

Model Amendments to Add Bifurcated Distribution Options to Defined Benefit Plans

Notice 2017-44

I. Purpose

This notice provides model amendments that a sponsor of a qualified defined benefit plan may use to amend its plan document to offer bifurcated benefit distribution options to participants in accordance with final regulations issued under § 417(e) of the Internal Revenue Code (see T.D. 9783, 2016-39 I.R.B. 396, published in the Federal Register on September 9, 2016 (81 FR 62359)). Stakeholders have indicated that providing model amendments would be helpful in light of the changes to the determination letter program that are set forth in Rev. Proc. 2016-37, 2016-29 I.R.B. 136.

Although a plan sponsor may use the model language in this notice to provide a bifurcated distribution option to participants in accordance with the final regulations, a plan that provides for a bifurcated distribution option is not required to include this specific model language. The sponsor of a plan that currently provides for bifurcated distributions under plan terms that comply with the provisions of § 1.417(e)-1(d)(7), relating to either implicit or explicit bifurcation, does not need to amend those plan

terms. In addition, use of the model language by an employer that has adopted a pre-approved plan will not cause the plan to fail to be identical to the pre-approved plan.

II. Background

Section 417 provides rules regarding survivor annuity forms of distribution that must be offered under qualified defined benefit plans. Section 417(e)(3) and § 1.417(e)-1(d)(2) and (3) specify the applicable mortality table and the applicable interest rate to be used to determine the minimum present value of a benefit distributed in the form of a lump sum. These minimum present value requirements apply for purposes of § 411(a)(11) and § 417(e)(1), which permit the distribution of a benefit under a plan to a participant in a lump sum without the consent of the participant or the participant's spouse if the present value of the benefit does not exceed \$5,000. The minimum present value requirements also apply when determining the dollar amount of a lump sum or other accelerated form of distribution elected by a participant.

Under § 1.417(e)-1(d)(6), an exception from the minimum present value requirements of § 417(e)(3) applies to a distribution paid in the form of an annuity that does not decrease during the life of the participant (other than specified permitted decreases). If an optional form of benefit is eligible for this exception, the requirement to use the § 417(e)(3) actuarial assumptions to determine the amount of the benefit payable in the optional form does not apply, and the actuarial assumptions that are used for this purpose must instead satisfy the requirements of § 411(a) that they not result in an impermissible forfeiture of the accrued benefit. See § 1.411(a)-4T(a).

To facilitate the payment of benefits partly in the form of an annuity and partly as a single sum (or other accelerated form), the Department of the Treasury and the Internal Revenue Service (IRS) amended the regulations under § 417(e) to permit plans to simplify the calculation of the amount of certain optional forms of benefit. The change was made to encourage sponsors of plans that include single sum distribution options to offer participants the additional option to bifurcate their benefits in order to receive a portion in an annuity form (providing financial protection against unexpected longevity) and the remainder in an accelerated form (providing increased liquidity during retirement).

Section 1.417(e)-1(d)(7) provides rules under which the participant's accrued benefit may be "bifurcated" (into two or more parts), so that the minimum present value requirements of § 417(e)(3) apply only to the portion of the participant's accrued benefit that is paid in the accelerated form. Section 1.417(e)-1(d)(7) applies to distributions with annuity starting dates in plan years beginning on or after January 1, 2017, or, if the taxpayer elects, to earlier periods.

Section 1.417(e)-1(d)(7)(ii)(A) and (B) provides two acceptable bifurcation methods that a plan sponsor may choose to include in plan terms. Under the explicit bifurcation method, a plan permits a participant to elect to divide his or her accrued benefit into two or more portions, and the minimum present value rules of § 417(e)(3) are applied separately to each portion of the accrued benefit as if it were the participant's entire benefit. Under the implicit bifurcation method, a plan permits a participant to elect the payment of a single-sum amount if the remaining portion of the participant's accrued

benefit is no less than the total accrued benefit reduced by the actuarial equivalent of the single sum (determined using the actuarial assumptions that apply under § 417(e)(3)). Section 1.417(e)-1(d)(7)(iii) sets forth rules of operation for these bifurcation methods, including rules describing certain circumstances under which the implicit bifurcation method is not available.

The appendix to this notice provides model language that may be used for each of these methods, as applicable to the plan. The model language provides for the payment of the minimum amounts required to be paid in order to comply with the rules of § 1.417(e)-1(d)(7). A plan may provide for amounts that exceed the minimum amounts required to be paid pursuant to § 1.417(e)-1(d)(7), but the treatment specified under section III.A of this notice does not apply to a plan amendment that differs from the model language in order to provide greater amounts.

Section 411(d)(6) prohibits a plan amendment that decreases a participant's accrued benefit. With respect to benefits attributable to service before an amendment, a plan amendment that effectively eliminates or reduces an early retirement benefit or retirement-type subsidy or that eliminates an optional form of benefit will be treated as reducing accrued benefits under § 411(d)(6). However, the last sentence of § 411(d)(6)(B) states that the Secretary may, by regulations, provide that § 411(d)(6)(B) does not apply to a plan amendment that eliminates an optional form of benefit (other than a plan amendment that has the effect of eliminating or reducing an early retirement benefit or a retirement-type subsidy). Section 1.417(e)-1(d)(7)(iv) exercises this authority with respect to certain amendments adopted to implement a bifurcated

distribution option pursuant to § 1.417(e)-1(d)(7). Pursuant to this authority, § 1.417(e)-1(d)(7)(iv) provides that § 411(d)(6) is not violated as a result of an amendment to a plan to implement a bifurcated distribution option if certain conditions are satisfied. This relief applies with respect to a plan amendment adopted on or before December 31, 2017, if, for plan years beginning before January 1, 2017, the § 417(e)(3) applicable interest rate and applicable mortality table were used to calculate the amount of a distribution that was made to settle a portion of the accrued benefit under the plan, and, pursuant to § 1.417(e)-1(d)(7), the requirements of § 417(e)(3) and § 1.417(e)-1(d) are not required to be applied to the distribution.

III. Model Amendments

A. Treatment of adoption of model amendments

The model amendments set forth in the Appendix may be used to implement either of the two methods set forth in § 1.417(e)-1(d)(7) for computing the amount to be paid to a participant who elects to receive his or her accrued benefit in an optional form of payment consisting partially of an annuity and partially of a more accelerated form of payment. Note that the Implicit Bifurcation Amendment may not be used with respect to distributions for which § 1.417(e)-1(d)(7)(iii)(C) prohibits the use of implicit bifurcation.

Pursuant to this notice:

1. Adoption of a plan amendment incorporating the language in either of the model amendments in accordance with this notice will not cause a plan to violate the requirements of § 417(e) and § 1.417(e)-1(d)(7);

2. Such a plan amendment that is adopted on or before December 31, 2017, is eligible for the limited relief from the application of the anti-cutback provisions of § 411(d)(6) provided under § 1.417(e)-1(d)(7)(iv); and
3. In the case of a pre-approved plan, if one of these model amendments is adopted by an adopting employer rather than by the sponsor/practitioner/provider, the adoption of the amendment will not cause the plan to fail to be identical to the pre-approved plan (see section 8.03(2) of Rev. Proc. 2017-41, 2017-29 I.R.B. 92, 108-109, or section 19.03(4)(c) of Rev. Proc. 2015-36, 2015-27 I.R.B. 20, 39, as applicable).

B. Applicable conditions

The treatment described in section III.A of this notice applies only if the following conditions are satisfied:

1. The terms of the model amendment are not modified, except as otherwise permitted in section III.C of this notice;
2. The plan is operated in accordance with the amendment from and after the effective date of the amendment; and
3. In accordance with § 1.417(e)-1(d)(7)(iii)(D), if a plan has an early retirement benefit, a retirement-type subsidy, an optional form of benefit, or an ancillary benefit that applies only to a portion of a participant's accrued benefit, and the plan provides for a distribution of some (but not all) of the participant's accrued benefit, the plan specifies the portion of the participant's total accrued benefit that is paid by that partial distribution.

C. Permitted modifications to the model amendments

A plan sponsor may modify the language of a model amendment without affecting the treatment described in section III.A to conform the language of the model amendment to the plan's terminology or organization or to satisfy the condition set forth in section III.B.3 of this notice, provided that the modifications do not alter the meaning of any of the provisions of the model amendment. In addition, in the case of a pre-approved plan, some portions of the model amendment may be included in the basic plan document, and others may be included in the adoption agreement, as appropriate.

D. Permitted plan designs using the model amendments

Plan sponsors may limit the extent to which bifurcation is available with respect to a participant's accrued benefit, specify the number of forms of distribution among which an accrued benefit may be bifurcated, or limit the combinations of forms that are available for this purpose. The following illustrates some of the ways in which plan terms may limit the bifurcation of a participant's accrued benefit:

-) A participant who elects to bifurcate his or her accrued benefit may divide the benefit between no more than two distribution forms.
-) Bifurcation may be available only for specified percentage divisions of the accrued benefit that are set forth in the plan. For example, a plan could provide that the only permitted bifurcations are a 50/50 or a 75/25 division.
-) Bifurcation may be available only between the portion of an accrued benefit earned before a specified date and the portion of an accrued benefit earned on and after that date.

-) A participant may elect to bifurcate his or her accrued benefit only into a lump sum distribution and an annuity (and the amount permitted to be paid as a lump sum may be capped at a specified dollar amount or a specified percentage of the participant's accrued benefit).

The second and third paragraphs of the model amendment for the explicit bifurcation method, and the third paragraph of the model amendment for the implicit bifurcation method, set out optional provisions that may be included in a plan amendment to implement these limitations.

Drafting Information

The principal authors of this notice are Diane S. Bloom and Linda S. F. Marshall of the Office of Associate Chief Counsel (Tax Exempt and Government Entities). Ms. Bloom and Ms. Marshall can be reached at (202) 317-6700 (not a toll-free number).

Appendix

Model Amendments for a Defined Benefit Plan that Satisfy § 417(e)(3) of the Internal Revenue Code with Respect to Bifurcated Distribution Options.

Instructions: *These model amendments set forth language that may be added to a plan in order for the plan to offer bifurcated optional forms of benefit determined under one of the two bifurcation methods described in § 1.417(e)-1(d)(7): (1) the explicit bifurcation method or (2) the implicit bifurcation method. Consistent with the requirements of § 1.417(e)-1(d)(7)(iii)(C), the model Implicit Bifurcation Method amendment may not be used in any case described in that paragraph.*

Explicit Bifurcation Method

Effective for annuity starting dates on or after _____ [insert date], if a participant so elects, the participant's accrued benefit will be divided and distributed as described below:

A participant may elect to divide his or her accrued benefit to the following extent:

[describe the permissible divisions of the accrued benefit].

A participant may elect a combination of distribution options for the divided portions of his or her accrued benefit to the following extent:

[describe available distribution options and designate any limit on the distribution options that may be combined for an accrued benefit that is bifurcated].

If a participant elects to divide his or her accrued benefit, the amount of the distribution payable with respect to each specified portion of the accrued benefit is determined in accordance with the method for calculating the amount of a distribution payable in the optional form elected for that portion as if that portion were the participant's entire accrued benefit.

Implicit Bifurcation Method

Effective for annuity starting dates on or after _____ *[insert date]*, if a participant so elects, the participant will receive a portion of his or her accrued benefit in the form of a single-sum payment as described below. For any participant who so elects, the remainder of the participant's accrued benefit not payable in the form of a single-sum payment, expressed in the form of _____ *[insert plan's normal form of benefit]* commencing when the participant attains normal retirement age (or at the current date, if later) will be equal to the excess of:

(1) The participant's total accrued benefit expressed in that form; over

(2) The annuity payable in that form that is actuarially equivalent to the single-sum payment, determined using the applicable interest rate under section 1.417(e)-1(d)(2) and the applicable mortality table under section 1.417(e)-1(d)(3).

A participant may elect to receive as a single-sum payment the following amount:

[describe (as a dollar figure or as a formula) the amount that may be distributed as a single-sum payment].

A participant who elects to receive a single-sum payment pursuant to this [section] may elect to receive the remainder of his or her accrued benefit in any of the following forms of payment: _____

[describe available distribution options and any limit on the distribution options under which the remainder of the participant's benefit may be paid].

If a participant elects to receive a portion of his or her accrued benefit in the form of a single-sum payment, then the amount of the distribution payable with respect to the remainder of the benefit is determined in accordance with the method for

calculating the amount of a distribution payable in the optional form elected for that remainder as if that remainder were the participant's entire accrued benefit.