

Part III - Administrative, Procedural, and Miscellaneous

**In-Service Benefits Permitted to be Provided at Age 62 by a Pension Plan**

Notice 2007-8

I. PURPOSE

The Treasury Department and the Internal Revenue Service are considering proposing guidance under § 401(a)(36) of the Internal Revenue Code, as added by section 905 of the Pension Protection Act of 2006, Public Law 109-280, 120 Stat. 780 (PPA '06). This notice requests comments on issues presented by § 401(a)(36) of the Code with respect to defined benefit plans.

II. BACKGROUND

In-service distributions from a pension plan

Section 401(a) provides rules for qualified pension plans, profit-sharing plans, and stock bonus plans. Section 1.401-1(a)(2) of the Income Tax Regulations provides that a qualified pension plan (i.e., a qualified defined benefit plan or money purchase pension plan) is a definite written program and arrangement that is communicated to employees and that is established and maintained by an employer to provide for the livelihood of the employees or their beneficiaries after the retirement of such

employees through the payment of benefits. Under § 1.401-1(b)(1)(i), a qualified pension plan must be established and maintained by an employer primarily to provide systematically for the payment of definitely determinable benefits for employees over a period of years, usually for life, after retirement. Following the enactment of the Employee Retirement Income Security Act of 1974 (ERISA), Public Law 93-406 (88 Stat. 829), the regulations under § 401(a) were modified to provide that § 1.401-1(b)(1)(i) continues to apply, except as otherwise provided. See § 1.401(a)-1(b)(1)(i). Accordingly, a qualified pension plan is generally not permitted to pay benefits before retirement. See also Rev. Rul. 56-693, 1956-2 C.B. 282, as modified by Rev. Rul. 60-323, 1960-2 C.B. 148.

A notice of proposed rulemaking (REG-114726-04) under §401(a) was published in the **Federal Register** (69 FR 65108) (the proposed regulations) on November 10, 2004. The proposed regulations would permit a qualified pension plan to make in-service distributions to a participant before normal retirement age under a bona fide phased retirement program. In addition, the proposed regulations would modify § 1.401(a)-1(b)(1) by permitting a qualified pension plan to make in-service distributions to a participant upon the participant's attainment of normal retirement age and by clarifying that a plan's normal retirement age cannot be set so low as to be a subterfuge for avoiding the requirements of § 401(a). On March 14, 2005, the IRS held a public hearing on the proposed regulations. Written comments responding to the proposed rulemaking were also received.

Section 401(a)(36), as added by section 905(b) of PPA '06, provides that, for plan years beginning after December 31, 2006, a pension plan does not fail to qualify under § 401(a) solely because the plan provides that a distribution may be made to an employee who has attained age 62 and who has not separated from employment at the time of the distribution.

Application of § 411(a) and (b) to defined benefit plans

Section 401(a)(7) provides that a plan must satisfy the requirements of §411.<sup>1</sup> Section 411(a) provides that a qualified plan must provide that an employee's right to his or her normal retirement benefit is nonforfeitable upon the attainment of normal retirement age, and also provides vesting requirements with respect to an employee's accrued benefit. For purposes of a defined benefit plan, § 411(a)(7) generally defines the term "accrued benefit" as an employee's accrued benefit determined under the plan and expressed in the form of an annual benefit commencing at normal retirement age. Under § 411(a)(9), the term "normal retirement benefit" is defined as the greater of the early retirement benefit under the plan or the benefit under the plan commencing at normal retirement age.

Under § 411(a), a defined benefit plan must satisfy one of the three anti-backloading rules described §§ 411(b)(1)(A), 411(b)(1)(B), and 411(b)(1)(C). These anti-backloading rules govern the minimum rate at which a participant's accrued benefit

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<sup>1</sup> Under §411(e), certain plans are treated as meeting the requirements of §411 if such plans meet the vesting requirements resulting from the application of §§401(a)(4) and 401(a)(7) as in effect on September 1, 1974.

accrues. These rules are designed to ensure that the minimum vesting rules of § 411(a) are not circumvented through a plan formula under which accruals are inappropriately deferred. In addition, under § 411(b)(1)(G), a defined benefit plan is not permitted to reduce a participant's accrued benefit on account of any increase in the participant's age or service, and under § 411(b)(1)(H), a defined benefit plan is not permitted to cease a participant's benefit accrual, or reduce the rate of an employee's benefit accrual, because of the attainment of any age.

#### Section 411(d)(6) protections

Most of the § 411 requirements outlined above protect a participant's accrued benefit. Section 411(d)(6)(A) generally provides that a plan is treated as not satisfying the requirements of § 411 if the accrued benefit of a participant is decreased by a plan amendment. In addition, § 411(d)(6)(B) provides that a plan amendment that has the effect of eliminating or reducing an early retirement benefit or a retirement-type subsidy, or eliminating an optional form of benefit, with respect to benefits attributable to service before the amendment is treated as impermissibly reducing accrued benefits.

Sections 1.411(d)-3 and 1.411(d)-4 provide rules relating to § 411(d)(6) protected benefits. Section 1.411(d)-3(g) distinguishes among the types of benefits protected under §411(d)(6). A § 411(d)(6) protected early retirement benefit is defined as the right to commence distribution of a retirement-type benefit at a particular date after severance from employment with the employer and before normal retirement age.

Generally, under these regulations, a § 411(d)(6) protected retirement-type subsidy, such as a subsidized early retirement benefit and a subsidized qualified joint and survivor annuity, is the excess of the actuarial present value of a retirement-type benefit over the actuarial present value of the accrued benefit commencing at normal retirement age or at the actual commencement date. A plan provision that permits a participant to receive an in-service distribution is an optional form of benefit that is protected under § 411(d)(6), but is not an early retirement benefit. See §§ 1.411(d)-3(g)(6) and 1.411(d)-4, Q&A-1(a)(3), Q&A-1(b)(1), and Q&A-2(a)(1).

### III. COMMENTS REQUESTED

The Treasury Department and the Internal Revenue Service are considering issuing guidance with respect to § 401(a)(36). Comments are requested on the guidance that should be issued. In particular, comments on the following specific issues related to § 401(a)(36) and defined benefit plans are requested:

- Should in-service distribution of a benefit to a participant who has attained age 62 but who has not attained normal retirement age be limited to no greater than the benefit to which the participant would be entitled at normal retirement age, reduced in accordance with reasonable actuarial assumptions (e.g., should only unsubsidized benefits be permitted pursuant to § 401(a)(36))?
- If subsidized benefits are permitted to be distributed to a participant who has attained age 62 but is still in-service and has not yet attained normal retirement age, how should the subsidized benefits be characterized for purposes of § 411?

- For example, should the subsidized benefits be treated as a subsidized early retirement benefit despite the fact that the participant has not yet separated from employment?
- If the subsidized benefits are not treated as a subsidized early retirement benefit, should the subsidized benefits be treated as a part of the participant's accrued benefit, or is there some other characterization of the subsidized benefits for purposes of § 411?
- Whether final regulations permitting in-service distributions under a bona fide phased retirement program should be issued, in light of the ability of plans to permit in-service distributions after age 62 pursuant to § 401(a)(36)?

Written comments should be submitted by April 16, 2007. Send submissions to CC:PA:LPD:DRU (Notice 2007-8), Room 5203, Internal Revenue Service, POB 7604 Ben Franklin Station, Washington, D.C. 20044. Comments may be hand delivered between the hours of 8 a.m. and 5 p.m., Monday through Friday, to Courier's Desk, Internal Revenue Service, Attn: CC:PA:LPD:DRU (Notice 2007-8), 1111 Constitution Avenue, NW, Washington D.C. Alternatively, comments may be submitted via the Internet at [notice.comments@irs.counsel.treas.gov](mailto:notice.comments@irs.counsel.treas.gov) (Notice 2007-8). All comments will be available for public inspection.

DRAFTING INFORMATION

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The principal drafter of this notice is Kathleen Herrmann of the Employee Plans, Tax Exempt and Government Entities Division. For further information regarding this notice, please contact the Employee Plans' taxpayer assistance telephone service at 1-877-829-5500 (a toll-free number) between the hours of 8:30 a.m. and 4:30 p.m. Eastern Time, Monday through Friday. Ms. Herrmann may be reached at (202) 283-9888 (not toll-free number).