

[4830-01-p]

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG-107318-08]

Notice to Participants of Consequences of Failing to Defer Receipt of Qualified Retirement Plan Distributions; Expansion of Applicable Election Period and Period for Notices

RIN 1545-BH75

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of Proposed Rulemaking and notice of public hearing.

SUMMARY: This document contains proposed regulations under sections 402(f), 411(a)(11), and 417 of the Internal Revenue Code (Code). The proposed regulations would provide that the notice required under section 411(a)(11) to be provided to a participant of his or her right, if any, to defer receipt of an immediately distributable benefit must also describe the consequences of failing to defer receipt of the distribution. The proposed regulations would also provide that the applicable election period for waiving the qualified joint and survivor annuity form of benefit under section 417 is the 180-day period ending on the annuity starting date, and that a notice required to be provided under section 402(f), section 411(a)(11), or section 417 may be provided to a participant as much as 180 days before the annuity starting date (or, for a notice under section 402(f), the distribution date). These regulations would affect administrators of, employers maintaining, participants in, and beneficiaries of tax-favored retirement plans.

DATES: Written or electronic comments and requests to speak at the public hearing must be received by January 7, 2009.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG-107318-08), room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington D.C. 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-107318-08), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, N.W., Washington, D.C., or sent electronically via the Federal eRulemaking Portal at <http://www.regulations.gov> (IRS REG-107318-08).

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, Michael P. Brewer at (202) 622-6090; concerning submission of comments or to request to speak at the public hearing, Funmi Taylor at (202) 622-7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

**Paperwork Reduction Act**

The collection of information contained in this notice of proposed rulemaking has been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collection of information should be sent to the **Office of Management and Budget**, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the **Internal Revenue Service**, Attn: IRS Reports Clearance Officer, SE:W:CAR:MP:T:T:SP; Washington, DC 20224. Comments on the collection of information should be received by December 8, 2008. Comments are specifically requested concerning:

Whether the proposed collection of information is necessary for the proper performance of the functions of the Internal Revenue Service, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information;

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the proposed collections of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of service to provide information.

The collection of information in these proposed regulations is in §1.411(a)-11(c)(2) of the Income Tax Regulations. This collection of information is required to comply with the statutory notice requirements of section 411(a), and is expected to be included in the notices currently provided to employees that inform them of their rights and benefits under the plan. The likely recordkeepers are businesses or other for-profit institutions and nonprofit institutions and organizations.

Estimated total annual recordkeeping burden: 100,000 hours.

Estimated average annual burden hours per recordkeeper: 1 hour.

Estimated number of recordkeepers: 100,000.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

## **Background**

### **A. Notice of Consequences of Failing to Defer**

Section 411(a)(11)(A) provides that, if the present value of any nonforfeitable accrued benefit exceeds \$5,000, a qualified plan must provide that such benefit may not be immediately distributed without the consent of the participant. Similarly, section 203(e) of the Employee Retirement Income Security Act of 1974, as amended (ERISA), provides that if the present value of any nonforfeitable accrued benefit with respect to a participant in a plan exceeds \$5,000, the benefit may not be immediately distributed without the consent of the participant.

Section 1102(b)(1) of the Pension Protection Act of 2006 (PPA '06), 109 Public Law 280, 120 Stat. 780, instructs the Secretary of the Treasury to modify the regulations under section 411(a)(11) of the Code "to provide that the description of a participant's right, if any, to defer receipt of a distribution shall also describe the consequences of failing to defer such receipt." Section 1102(b)(2)(A) of PPA '06 provides that the modifications required by section 1102(b)(1) of PPA '06 shall apply to years beginning after December 31, 2006. Section 1102(b)(2)(B) of PPA '06, however, states that a plan shall not be treated as failing to meet the requirements of section 411(a)(11) with respect to any description of the consequences of failing to defer provided "within 90 days after the Secretary of the Treasury issues the modifications required by [section 1102(b)(1) of PPA '06] if the plan administrator makes a reasonable attempt to comply with such requirements."

Section 1.411(a)-11(c)(2)(i) states that, in order for a plan to obtain valid consent under section 411(a)(11), "so long as a benefit is immediately distributable, a participant must be informed of the right, if any, to defer receipt of the distribution."

Section 1.411(a)-11(c)(4) states that a distribution is immediately distributable prior to the later of the time a participant has attained normal retirement age or age 62.

Q&A-32 of Notice 2007-7, 2007-5 I.R.B. 395, provides that a plan administrator is required to revise the notice required under section 411 to reflect the modifications made by section 1102(b) of PPA '06 for notices provided in plan years beginning after December 31, 2006. Notice 2007-7 further provides that, pursuant to section 1102(b)(2)(B) of PPA '06, a plan will not be treated as failing to meet the new requirements of section 1102(b) of PPA '06 if the plan administrator makes a reasonable attempt to comply with the new requirements with respect to a notice that is provided prior to the 90th day after the issuance of regulations reflecting the modifications required by such section 1102(b) of PPA '06. See § 601.601 (b) (2) (ii) (b).

Q&A-33 of Notice 2007-7 includes a safe harbor that would be considered a reasonable attempt to comply with the requirement in section 1102(b)(1) of PPA '06 that a description of a participant's right to defer receipt of a distribution include a description of the consequences of failing to defer. In particular, Q&A-33 provides that a description that is written in a manner reasonably calculated to be understood by the average participant and that includes the following information is a reasonable attempt to comply with the requirements of section 1102(b)(2)(B) of PPA '06: (a) in the case of a defined benefit plan, a description of how much larger benefits will be if the commencement of distributions is deferred; (b) in the case of a defined contribution plan, a description indicating the investment options available under the plan (including fees) that will be available if distributions are deferred; and (c) the portion of the summary plan description that contains any special rules that might materially affect a participant's decision to defer. For purposes of clause (a), a plan

administrator can use a description that includes the financial effect of deferring distributions, as described in §1.417(a)(3)-1(d)(2)(i), based solely on the normal form of benefit.

Q&A-31 of Notice 2007-7 provides that the provisions of section 1102 apply to plan years that begin after December 31, 2006. Q&A-31 explains that this means that the new rules relating to the content of the notices apply only to notices issued in those plan years, without regard to the annuity starting date for the distributions.

**B. Expansion of Applicable Election Period**

Section 401(a)(11)(A)(i) provides that, except as provided in section 417, a plan that is qualified under section 401(a) must provide the accrued benefit payable to a vested participant who does not die before the annuity starting date in the form of a qualified joint and survivor annuity.

Section 417(a)(1)(A) provides that, in general, a plan satisfies section 401(a)(11) only if each participant may elect at any time during the “applicable election period” to waive the qualified joint and survivor annuity form of benefit (and to revoke the waiver), and certain other requirements are satisfied. Before PPA '06, section 417(a)(6)(A) provided that the “applicable election period” for a participant to waive the qualified joint and survivor annuity form of distribution was the 90-day period ending on the annuity starting date.

Section 1102(a)(1)(A) of PPA '06 amended section 417(a)(6)(A) by changing the 90-day “applicable election period” for electing a distribution subject to the qualified joint and survivor annuity (QJSA) rules of sections 401(a)(11) and 417 in a form other than a QJSA to a 180-day applicable election period. Section 1102(a)(2)(A) of PPA '06 made a parallel amendment to section 205(c)(7)(A) of ERISA by striking “90-day” and inserting “180-day”.

Sections 1102(a)(1)(B) and 1102(a)(2)(B) of PPA '06 provide that the Secretary of the Treasury shall modify the regulations relating to section 417 of the Code and section 205 of ERISA by substituting “180 days” for “90 days” each place it appears.

Section 1102(a)(3) of PPA '06 provides that the amendments to the applicable election period apply to years beginning after December 31, 2006.

#### C. Expansion of Period for Notices

Section 417(a)(3)(A) of the Code and section 205(c)(3)(A) of ERISA provide that a plan must provide to each participant, “within a reasonable period of time before the annuity starting date” and consistent with such regulations as the Secretary of the Treasury may prescribe, a written explanation that describes the terms and conditions of the qualified joint and survivor annuity and certain other information. Similarly, section 402(f)(1) provides that a plan administrator must, “within a reasonable period of time” before making an eligible rollover distribution, provide to recipients an explanation of certain tax consequences of the distribution.

Section 1102(a)(1)(B) of PPA '06 provides that the Secretary of the Treasury shall modify the regulations under sections 402(f), 411(a)(11), and 417 by substituting “180 days” for “90 days” each place it appears in §§1.402(f)-1, 1.411(a)-11(c), and 1.417(e)-1(b). Similarly, section 1102(a)(2)(B) of PPA '06 provides that the Secretary of the Treasury shall modify the regulations relating to sections 203(e) and 205 of ERISA by substituting “180 days” for “90 days” each place it appears.

Section 1102(a)(3) provides that the amendments to the notice periods apply to years beginning after December 31, 2006. Q&A-31 of Notice 2007-7 explains that the 180-day period for distributing notices applies to notices distributed in a plan year that begins after December 31, 2006.

#### D. Requirements under ERISA

ERISA section 203(e) is the parallel provision to section 411(a)(11) of the Code and ERISA section 205 is the ERISA parallel to section 417 of the Code. Pursuant to section 101 of Reorganization Plan No. 4 of 1978, 29 U.S.C. 1001nt (the Reorganization Plan), the Secretary of the Treasury generally has authority to issue regulations under parts 2 and 3 of subtitle B of title I of ERISA, including sections 203(e) and 205 of ERISA. Thus, the changes required by section 1102 of PPA '06 would apply as well for purposes of ERISA sections 203(e) and 205.

#### **Explanation of Provisions**

##### A. Notice of Consequences of Failing to Defer

These proposed regulations would provide that the notice required by section 411(a)(11) advising a participant of the right, if any, to defer receipt of a distribution must also inform the participant of the consequences of failing to defer such receipt. The proposed regulations would also provide guidance on the relevant information that must be provided to a participant in order to satisfy the requirement that the participant be notified of the consequences of failing to defer.

Specifically, these proposed regulations would require that the participant be provided a description of specified federal tax implications of failing to defer and, in the case of a defined benefit plan, a statement of the amount payable to the participant under the normal form of benefit both upon immediate commencement and when the benefit is no longer immediately distributable (that is, the later of age 62 or attainment of normal retirement age). Section 1.417(a)(3)-1(c)(2)(ii) permits a plan to provide participants with a QJSA explanation, which does not vary based on the participant's marital status, of the relative value of optional forms of benefit compared to the value of a QJSA. These proposed regulations would permit the statement of



the amount payable to not be based on the participant's marital status, to the extent the plan is permitted under §1.417(a)(3)-1(c)(2)(ii) to use a QJSA explanation that does not vary based on whether the participant is married or unmarried.

The proposed regulations would also require the information in the notice to include, in the case of a defined contribution plan, a statement that some currently available investment options in the plan may not be generally available on similar terms outside the plan and contact information for obtaining additional information on the general availability outside the plan of currently available investment options in the plan. In addition, the proposed regulations would require the notice to include, in the case of a defined contribution plan, a statement that fees and expenses (including administrative or investment-related fees) outside the plan may be different from fees and expenses that apply to the participant's account and contact information for obtaining information on such fees.

The proposed regulations also include an additional category of information that must be provided relating to any provisions of the plan (and provisions of any accident or health plan maintained by the employer) that could reasonably be expected to materially affect a participant's decision whether to defer receipt of the distribution. Thus, for example, the proposed regulations would require a description of the eligibility requirements for retiree health benefits if such benefits are limited to participants who have an undistributed benefit under the employer's retirement plan.

In general, the proposed regulations would also provide that the required information regarding the consequences of a participant's failing to defer receipt of a distribution must appear together. However, the proposed regulations would permit a cross-reference to where the required information may be found in notices or other information provided or made available to the participant, as long as the notice of

consequences of failing to defer includes a statement of how the referenced information may be obtained without charge and explains why the referenced information is relevant to a decision whether to defer.

**B. Expansion of Applicable Election Period and Period for Notices**

Consistent with sections 1102(a)(1)(A) and (1)(B) and 1102(a)(2)(A) and (2)(B) of PPA '06, the proposed regulations would both (1) expand the definition of applicable election period to up to 180 days, and (2) expand the time period for notices issued under sections 402(f), 411(a)(11), and 417 to allow the notices to be issued up to 180 days prior to the annuity starting date (or, in the case of a notice under section 402(f), the date of distribution). Specifically, the proposed regulations would substitute "180 days" for "90 days" and "180-day" for "90-day" each place those terms appear in §1.401(a)-13(g)(4)(ii), §1.401(a)-20, A-3(b)(1), A-4, A-10(a), A-16, and A-24(a)(1), §1.402(f)-1, §1.411(a)-11(c), and §1.417(e)-1(b).

Pursuant to section 101 of the Reorganization Plan, the Secretary of Treasury has the authority to issue regulations under ERISA sections 203(e) and 205. Thus, these proposed regulations that apply to sections 402(f), 411(a)(11), and 417 of the Code would apply as well for purposes of sections 203(e) and 205 of ERISA.

**Proposed Effective/Applicability Date**

These regulations are proposed to become effective for notices provided (and election periods beginning) on or after the first day of the first plan year beginning on or after January 1, 2010. However, in no event will the regulations become effective for notices provided (and election periods beginning) earlier than the first day of the first plan year beginning 90 days after publication of final regulations in the **Federal Register**.

With respect to the regulations relating to the notice of consequences of failing to defer the receipt of distributions, until these regulations become effective, a plan will be treated as complying if: (1) the plan complies either with these proposed regulations or with Q&A-32 and Q&A-33 in Notice 2007-7; or (2) if the plan administrator makes a reasonable attempt to comply with the requirement that the description of a participant's right, if any, to defer receipt of a distribution shall also describe the consequences of failing to defer such receipt.

With respect to the proposed regulations relating to the expanded applicable election period and the expanded period for notices, plans may rely on these proposed regulations for notices provided (and election periods beginning) during the period beginning on the first day of the first plan year beginning on or after January 1, 2007 and ending on the effective date of final regulations.

### **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.

It is hereby certified that the collection of information contained in this regulation will not have a significant economic impact on a substantial number of small entities. This certification is based on several factors, including that the regulation merely provides guidance to implement a statutorily-required notice, and that the incremental burden in the regulation would be minimal because it only requires including additional information in notices already provided by all of the affected entities. Accordingly, a Regulatory Flexibility Analysis under the Regulatory

Flexibility Act (5 U.S.C. chapter 6) is not required. 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 Public Hearing**

Before these proposed regulations are adopted as final regulations, consideration will be given to any written (one signed and eight (8) copies) or electronic comments that are submitted timely to the IRS. All comments will be available for public inspection and copying.

A public hearing has been scheduled for Friday, February 20, 2009, at 10 a.m. in the IRS Auditorium, Internal Revenue Building, 1111 Constitution Avenue, N.W., Washington, DC. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the FOR FURTHER INFORMATION CONTACT section of this preamble.

Persons who wish to present oral comments at the hearing must submit written or electronic comments by January 7, 2009, and submit an outline of the topics to be discussed and the amount of time to be devoted to each topic (a signed original and eight (8) copies) by January 16, 2009. A period of 10 minutes will be allotted to each person for making comments.

An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

### **Drafting Information**

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

### **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 continues to read as follows:

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

§1.401(a)-13; §1.401(a)-20; §1.402(f)-1; §1.411(a)-11; §1.417(e)-1 [Amended]

Par. 2. For each entry listed in the "Location" column, remove the language in the "Remove" column and add the language in the "Add" column in its place.

Location	Remove	Add
1.401(a)-13(g)(4)(ii), first sentence	90 days	180 days
1.401(a)-20, A-4, third sentence	90 days	180 days
1.401(a)-20, A-10(a), fifth and sixth sentences	90 days	180 days
1.401(a)-20, A-16, sixth sentence	90 days	180 days
1.401(a)-20, A-24(a)(1), fifth sentence	90 days	180 days
1.402(f)-1, A-2(a), first sentence	90 days	180 days
1.411(a)-11(c)(2)(ii)	90 days	180 days
1.411(a)-11(c)(2)(iii)(A), first sentence	90 days	180 days
1.417(e)-1(b)(3)(i)	90 days	180 days
1.417(e)-1(b)(3)(ii), first sentence	90 days	180 days
1.417(e)-1 (b)(3)(iii)	90 days	180 days
1.417(e)-1 (b)(3)(vi), second sentence	90 days	180 days
1.417(e)-1(b)(3)(vii)	90 days	180 days
1.417(e)-1(b)(3)(vii)	90-day	180-day

§1.411(a)-11 [Amended]

Par. 3. Section 1.411(a)-11 is amended as follows:

1. The second sentence of paragraph (c)(2)(i) is revised.
2. The second sentence of paragraph (c)(2)(iii)(B)(3) is revised.
3. Paragraphs (c)(2)(vi) and (h) are added.

The additions and revisions read as follows:

§1.411(a)-11 Restriction and valuation of distributions.

\* \* \* \* \*

(c) \* \* \*

(2) Consent--(i) \* \* \* In addition, so long as a benefit is immediately distributable, a participant must be informed of the right, if any, to defer receipt of the distribution and of the consequences of failing to defer such receipt. \* \* \*

\* \* \* \* \*

(iii) \* \* \*

(B) \* \* \*

(3) \* \* \* The summary described in paragraph (c)(2)(iii)(B)(2) of this section must advise the participant of the right, if any, to defer receipt of the distribution and of the consequences of failing to defer such receipt, must set forth a summary of the distribution options under the plan, must refer the participant to the most recent version of the notice (and, in the case of a notice provided in any document containing information in addition to the notice, must identify that document and must provide a reasonable indication of where the notice may be found in that document, such as by index reference or by section heading), and must advise the participant that, upon request, a copy of the notice will be provided without charge.

\* \* \* \* \*

(vi) Consequences of failing to defer--(A) A notice under this paragraph (c)(2) that is required to describe the consequences of failing to defer receipt of a distribution until it is no longer immediately distributable must, to the extent applicable under the plan and in a manner designed to be easily understood, provide the participant with the information set out in paragraphs (c)(2)(vi)(A)(1) through (5) of this section and explain why it is relevant to a decision whether to defer.

(1) A description of the following federal tax implications of failing to defer: differences in the timing of inclusion in taxable income of an immediately commencing distribution that is not rolled over (or not eligible to be rolled over) and a distribution that is deferred until it is no longer immediately distributable (including, as applicable, differences in the taxation of distributions of designated Roth contributions within the meaning of section 402A); application of the 10% additional tax on certain distributions before age 59½ under section 72(t); and, in the case of a defined contribution plan, loss of the opportunity upon immediate commencement for future tax-favored treatment of earnings if the distribution is not rolled over (or not eligible to be rolled over) to an eligible retirement plan described in section 402(c)(8)(B).

(2) In the case of a defined benefit plan, a statement of the amount payable to the participant under the normal form of benefit both upon immediate commencement and upon commencement when the benefit is no longer immediately distributable (assuming no future benefit accruals). The statement need not vary based on the participant's marital status if the plan is permitted, pursuant to §1.417(a)(3)-1(c)(2)(ii), to provide a QJSA explanation that does not vary based on the participant's marital status.

(3) In the case of a defined contribution plan, a statement that some currently available investment options in the plan may not be generally available on similar



terms outside the plan and contact information for obtaining additional information on the general availability outside the plan of currently available investment options in the plan.

(4) In the case of a defined contribution plan, a statement that fees and expenses (including administrative or investment-related fees) outside the plan may be different from fees and expenses that apply to the participant's account and contact information for obtaining additional information on the fees and expenses that apply to the participant's account.

(5) An explanation of any provisions of the plan (and provisions of an accident or health plan maintained by the employer) that could reasonably be expected to materially affect a participant's decision whether to defer receipt of the distribution. Such provisions would include, for example: plan terms under which a participant who fails to defer may lose eligibility for retiree health coverage or eligibility for early retirement subsidies or social security supplements; plan terms under which the benefit of a rehired participant who failed to defer may be adversely affected by the decision not to defer; and, in the case of a defined contribution plan, plan terms under which undistributed benefits that otherwise are nonforfeitable become forfeitable upon the participant's death.

(B) Location of information; incorporation by reference. In general, the information required to be provided in a notice under this paragraph (c)(2)(vi) must appear together (for example, in a list of consequences of failing to defer). However, the notice will not be treated as failing to satisfy the requirements of this paragraph (c)(2)(vi) merely because the notice includes a cross-reference to where the required information may be found in notices or other information provided or made available to the participant, as long as the notice of consequences of failing to defer includes a statement of how the referenced information may be obtained without charge and explains why the referenced information is relevant to a decision whether to defer.

\* \* \* \* \*

(h) Consequences of Failing to Defer Effective/Applicability Date. The provisions in paragraph (c) of this section that describe the requirement to notify participants of the consequences of failing to defer are effective for notices provided on or after the first day of the first plan year beginning on or after January 1, 2010.

/s/ Linda E. Stiff

Deputy Commissioner for Services and Enforcement