

[4830-01-p]

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 54

[TD 9472]

RIN 1545- BG48

Notice Requirements for Certain Pension Plan Amendments Significantly Reducing the Rate of Future Benefit Accrual

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulation.

SUMMARY: This document contains final regulations providing guidance relating to the application of the section 204(h) notice requirements to a pension plan amendment that is permitted to reduce benefits accrued before the plan amendment's applicable amendment date. These regulations also reflect certain amendments made to the section 204(h) notice requirements by the Pension Protection Act of 2006. These final regulations generally affect sponsors, administrators, participants, and beneficiaries of pension plans.

DATES: Effective date: These regulations are effective on November 24, 2009.

Applicability date: For dates of applicability of these regulations, see Q&A-18, §54.4980F-1 of these regulations.

FOR FURTHER INFORMATION CONTACT: Pamela R. Kinard at (202) 622-6060 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

**Paperwork Reduction Act**

The collection of information contained in these final regulations were previously reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under control number 1545-1780, in conjunction with the Treasury decision (TD 9052), relating to Notice of Significant Reduction in the Rate of Future Benefit Accrual, published on April 9, 2003 in the **Federal Register** (68 FR 17277). There are no proposals for substantive changes to this collection of information.

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**

### Overview

This document contains amendments to 26 CFR parts 1 and 54 under sections 411(d)(6) and 4980F of the Internal Revenue Code (Code). This Treasury decision amends §54.4980F-1 of the Treasury regulations to reflect changes made to section 4980F by the Pension Protection Act of 2006, Public Law 109-280 (120 Stat. 780) (PPA '06). In addition, this Treasury decision amends §1.411(d)-3 to reflect changes to section 411(d)(6) made by section 1107 of PPA '06.

### Section 411(d)(6) Protected Benefits

Section 401(a)(7) of the Code provides that a trust does not constitute a qualified trust unless the plan under which the trust is established and maintained satisfies the requirements of section 411 (relating to minimum vesting standards). Section 411(d)(6)(A) and §1.411(d)-3(a)(1) provide that a plan is treated as not satisfying the requirements of section 411 if the accrued benefit of a participant is decreased by an amendment of the plan, other than an amendment described in section 412(d)(2) (formerly section 412(c)(8)), section 4281 of the Employee Retirement Income Security Act of 1974 (ERISA), as amended, or any other applicable law. Applicable law includes sections 418D and 418E of the Code and section 1541(a)(2) of the Taxpayer Relief Act of 1997, Public Law 105-34 (111 Stat. 788, 1085). Section 204(g) of ERISA contains parallel rules to section 411(d)(6) of the Code.

#### Notice Requirements for Significant Reduction in the Rate of Future Benefit Accruals

Section 4980F imposes an excise tax when a plan administrator fails to provide timely notice of a plan amendment that provides for a significant reduction in the rate of future benefit accrual. For this purpose, the elimination or reduction of an early retirement benefit or retirement-type subsidy is treated as having the effect of reducing the rate of future benefit accrual. Section 4980F(e)(3) provides that, except as provided in regulations, the notice must be provided within a “reasonable time” before the effective date of the plan amendment. Section 204(h) of ERISA contains parallel rules to section 4980F of the Code, and a notice required under section 4980F of the Code or section 204(h) of ERISA is generally referred to as a “section 204(h) notice.”

The Secretary of the Treasury has interpretive authority over sections 411(d)(6) and 4980F of the Code as well as sections 204(g) and 204(h) of ERISA, including the

subject matter addressed in these regulations. See section 101(a) of Reorganization Plan No. 4 of 1978, 29 U.S.C. 1001nt (under which the Secretary of the Treasury generally has the authority to issue regulations under parts 2 and 3 of subtitle B of title I of ERISA, including sections 204(g) and 204(h) of ERISA).<sup>1</sup> Thus, these Treasury regulations under sections 411(d)(6) and 4980F of the Code also apply for purposes of sections 204(g) and 204(h) of ERISA.

#### Provisions of the Pension Protection Act of 2006

Section 402 of PPA '06 provides special funding rules for plans maintained by an employer that is a commercial passenger airline or the principal business of which is providing catering services to a commercial passenger airline. Section 402(h)(4) of PPA '06 provides that, in the case of a plan amendment adopted in order to comply with the rules in section 402 of PPA '06, any notice required under section 4980F(e) of the Code (or section 204(h) of ERISA) must be provided within 15 days of the effective date of the plan amendment. Section 402 of PPA '06 generally applies to amendments made pursuant to section 402 of PPA '06 for plan years ending after the date of enactment of PPA '06 (August 17, 2006).

Section 502(c) of PPA '06 amended section 4980F(e)(1) of the Code (and section 204(h) of ERISA) to add a requirement that, if a section 204(h) notice is required with respect to an amendment, any employer with an obligation to contribute to the plan receive a section 204(h) notice. This new disclosure requirement is effective for plan years beginning after December 31, 2007.

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<sup>1</sup> In addition, sections 204(g) and 204(h) of ERISA include provisions authorizing the Secretary of the Treasury to issue guidance with respect to specific issues.

Section 1107 of PPA '06 provides that any plan amendment made pursuant to a PPA '06 change may be retroactively effective and, except as provided by the Secretary of the Treasury, does not violate the anti-cutback rules of section 411(d)(6) of the Code (or section 204(g) of ERISA) if, in addition to satisfying the conditions specified in section 1107(b)(2) of PPA '06, the amendment is made on or before the last day of the first plan year beginning on or after January 1, 2009 (January 1, 2011, with respect to governmental plans).

#### Notice Requirements Relating to Plan Amendments Affecting Previously Accrued Benefits

In addition to the section 204(h) notice requirement, both the Code and ERISA include a number of other requirements to provide information to certain parties (such as participants, beneficiaries, and contributing employers) regarding the potential effect of a plan amendment that is permitted to reduce or eliminate previously accrued benefits.

Section 412(d)(2) of the Code provides special rules relating to retroactive plan amendments. Rev. Proc. 94-42 (1994-1 CB 717), see §601.601(d)(2)(ii)(b), sets forth procedures under which a plan sponsor may file notice with and obtain approval from the Secretary of the Treasury for a retroactive amendment described in former section 412(c)(8) (now section 412(d)(2)) that reduces prior accrued benefits. Section 4 of Rev. Proc. 94-42 provides guidance relating to the written notice that must be provided to affected parties (employee organizations, participants, beneficiaries, and alternate payees) regarding the application for approval of a retroactive plan amendment to reduce accrued benefits under section 412(d)(2).

Section 113(a)(1)(B) of PPA '06 added Code section 436 which provides rules limiting benefits and benefit accruals for single-employer plans with certain funding shortfalls.<sup>2</sup> In general, these limits are based on a plan's adjusted funding target attainment percentage (AFTAP)<sup>3</sup> and include limits on unpredictable contingent event benefits<sup>4</sup> (where the plan's AFTAP is or would be below 60 percent), certain plan amendments which would increase liabilities of the plan by reason of an increase in benefits (where the plan's AFTAP is or would be below 80 percent), and prohibited payments (where the plan's AFTAP is below 60 percent or is at least 60 percent but below 80 percent, or during a period in which the plan sponsor is a debtor in a case under title 11 U.S.C. or similar federal or State law and the plan actuary has not certified that the plan's AFTAP is at least 100 percent for the plan year), and a cessation of benefit accruals (where the plan's AFTAP is below 60 percent).<sup>5</sup>

Section 101(j) of ERISA requires the plan administrator to provide a written notice to plan participants and beneficiaries, generally within 30 days after the plan becomes subject to the benefit limitations in section 206(g)(1), (3), or (4) of ERISA (which are parallel to the benefit limitations in Code section 436(b), (d), or (e)) relating to unpredictable contingent event benefits, prohibited payments, and cessation of benefit accruals. Section 101(c)(1)(A)(ii) of the Worker, Retiree, and Employer Recovery Act of 2008, Public Law 110-458 (122 Stat. 5092) (WRERA), amended section 101(j) of ERISA to authorize the Secretary of the Treasury, in consultation with the Secretary of

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<sup>2</sup> Section 103(a) of PPA '06 added section 206(g) of ERISA, the parallel provision to section 436 of the Code.

<sup>3</sup> For a definition of AFTAP, see section 436(j)(2).

<sup>4</sup> For a definition of unpredictable contingent event benefit, see section 436(b)(3).

<sup>5</sup> These provisions are reflected in sections 436(b)(1), (c)(1), (d)(1), (d)(2), and (d)(3), and (e)(1) (and the parallel provisions at sections 206(g)(1)(A), (g)(2)(A), (g)(3)(A), (g)(3)(B), and (g)(3)(C), and (g)(4)(A) of ERISA).

Labor, to prescribe rules applicable to the notice requirements under section 101(j) of ERISA.

Section 418D of the Code (and the parallel provision at section 4244A of ERISA) provides that a multiemployer plan in reorganization is permitted to adopt an amendment reducing or eliminating accrued benefits attributable to employer contributions under the plan. Under section 418D(b), an amendment is not permitted to reduce or eliminate benefits unless notice is given to plan participants, beneficiaries, and other affected persons at least 6 months before the first day of the plan year in which the amendment reducing benefits is adopted. The notice must include certain information, including an explanation of the rights and remedies of participants and beneficiaries under the plan and notification that, if contributions under the plan are not increased, accrued benefits under the plan for certain participants and beneficiaries will be reduced or an excise tax will be imposed on contributing employers.

Section 418E of the Code (and the parallel provision at section 4245 of ERISA) provides rules relating to suspension of benefits under an insolvent multiemployer plan. If payments of basic benefits under the plan exceed the resource benefit level or the level of basic benefits of the plan for the plan year, the payment of benefits must be suspended to the extent necessary to reduce such payments to the greater of the resource benefit level of the plan or the level of basic benefits. Section 418E of the Code provides that plans in reorganization that may become insolvent must provide notice to the Pension Benefit Guaranty Corporation (PBGC), contributing employers, employee organizations, plan participants, and beneficiaries that, certain non-basic benefit payments will be suspended if insolvency occurs.

Section 4281 of ERISA provides rules relating to the reduction of benefits or the suspension of benefit payments under certain terminated multiemployer plans. Section 4281(c) of ERISA provides that, if the value of nonforfeitable benefits under a terminated plan exceeds the value of a plan's assets, the plan must be amended to reduce benefits under the plan to the extent necessary to ensure that the plan's assets are sufficient to meet its obligations. The regulations at 29 CFR 4281.32 provide that a plan sponsor must notify the PBGC and plan participants and beneficiaries of a plan amendment reducing benefits pursuant to section 4281(c) of ERISA.

Section 212(a) of PPA '06 added section 432 of the Code (and section 202(a) of PPA '06 added the parallel provision at section 305 of ERISA), which provides rules relating to multiemployer plans that are in endangered or critical status. Under certain circumstances, a plan may adopt a plan amendment that reduces previously accrued benefits. Section 432(b)(3)(D) of the Code provides that, within 30 days after a certification by a plan actuary that a plan is in endangered or critical status, the plan sponsor must notify plan participants and beneficiaries, the bargaining parties, the PBGC, and the Secretary of Labor of the plan's endangered or critical status. If the plan is certified to be in critical status, the notice must provide an explanation of the possibility that (1) adjustable benefits may be reduced and (2) such reductions may apply to participants and beneficiaries whose benefit commencement date is on or after the date the notice is provided for the first plan year in which the plan is in critical status. Adjustable benefits, defined in section 432(e)(8)(A)(iv), include certain section 411(d)(6) protected benefits such as early retirement benefits and retirement-type subsidies.

Section 432(e)(8)(C) requires a plan to provide notice of a plan amendment reducing adjustable benefits to affected parties (including plan participants, beneficiaries, and contributing employers) at least 30 days before the general effective date of the reduction. The notice must include information that is sufficient for participants and beneficiaries to understand the effect of any reduction on their benefits, a description of the possible rights and remedies of plan participants and beneficiaries, and information on how to contact the Department of Labor and the PBGC. See sections 102(b)(1)(C), 102(b)(1)(E)(iv), 102(b)(2)(B), 102(b)(2)(D)(iv)(III), and 102(b)(2)(D)(iv)(IV) of WREERA for provisions authorizing the Secretary of the Treasury, in consultation with the Secretary of Labor, to issue guidance relating to the notice requirements in section 305(b)(3)(D) of ERISA (and the parallel provision at section 432(b)(3)(D) of the Code) and section 305(e)(8)(C)(iii) of ERISA (and the parallel provision at section 432(e)(8)(C) of the Code).

Section 432(f)(2) of the Code also restricts a plan from making certain accelerated benefit payments, effective on the date a notice of certification of a multiemployer plan's critical status is provided, which include single sum distributions. On March 18, 2008, proposed regulations (REG-151135-07) under section 432 of the Code (432 proposed regulations) were published in the **Federal Register** (73 FR 14417). Under §1.432(b)-1(e)(2) of the 432 proposed regulations, if a plan in critical status provides benefits that are restricted under section 432(f)(2), then the notice of critical status described in section 432(b)(3)(D) must include an explanation that the plan cannot pay such restricted benefits, to the extent the benefits exceed the monthly

amount paid under a single life annuity (plus social security supplements described in section 411(a)(9)).

On March 21, 2008, proposed regulations (REG-110136-07) under sections 411(d)(6) and 4980F of the Code (2008 proposed regulations) were published in the **Federal Register** (73 FR 15101). On July 10, 2008, the IRS held a public hearing on the 2008 proposed regulations. Written comments responding to the notice of proposed rulemaking were also received. After consideration of the comments, the proposed regulations are adopted, as amended by this Treasury decision. The revisions are discussed in this preamble.

## **Summary of Comments and Explanation of Revisions**

### **PPA '06 Revisions to Section 204(h) Notice Requirements**

This Treasury decision amends the regulations under section 4980F of the Code to reflect provisions in PPA '06. Section 502(c) of PPA '06 amended section 204(h) of ERISA and section 4980F of the Code to require that section 204(h) notice be provided to any employer that has an obligation to contribute to the plan. A contributing employer is defined in the regulations as an employer that has an obligation to contribute to a plan (within the meaning of section 4212(a) of ERISA). A commentator suggested that the final regulations clarify that the requirement that section 204(h) notice be given to contributing employers applies only to employers in a multiemployer plan, not to employers in a single employer plan. These regulations include this suggestion.

These final regulations retain from the proposed regulations a special timing rule to reflect section 402 of PPA '06. Section 402 of PPA '06 provides special funding rules for plans maintained by an employer that is a commercial passenger airline or the

principal business of which is providing catering services to a commercial passenger airline. Section 402(h)(4) of PPA '06 provides that, in the case of a plan amendment adopted in order to comply with the rules in section 402 of PPA '06, any notice required under section 4980F(e) of the Code (or section 204(h) of ERISA) must be provided within 15 days of the effective date of the plan amendment. The proposed regulations provided that, for certain plans maintained by an employer that is a commercial passenger airline or the principal business of which is providing catering services to a commercial passenger airline, section 204(h) notice must be provided at least 15 days before the effective date of the amendment. This is consistent with the Joint Committee on Taxation's Technical Explanation to section 402 of PPA '06 which states that the section 204(h) notice "allows the notice to be provided at least 15 days before the effective date of the plan amendment."<sup>6</sup> No comments were received on this proposed rule and the final regulations retain the rule from the proposed regulations.

#### Plan Amendments Reflecting a Change in Statutorily Mandated Minimum Present Value Rules

Section 417(e)(3) of the Code provides that, in distributing the present value of an accrued benefit to a plan participant, the present value of the benefit is not permitted to be less than the present value calculated using the applicable mortality table and the applicable interest rate under section 417(e)(3). Section 302(b) of PPA '06 amended section 417(e)(3) of the Code to provide new actuarial assumptions for calculating the minimum present value of a participant's accrued benefit. Plan sponsors have asked whether a plan amendment to reflect the change in these section 417(e)(3) actuarial

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<sup>6</sup> See Joint Committee on Taxation, Technical Explanation of H.R. 4, the "Pension Protection Act of 2006" (JCX-38-06), August 3, 2006, 109<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 87 (2006) at 87.

assumptions would trigger the requirement to provide a section 204(h) notice. Revenue Ruling 2007-67 (2007-2 CB 1047), see §601.601(d)(2)(ii)(b), which includes guidance on plan amendments regarding the new applicable mortality table and applicable interest rate under section 417(e)(3), states that certain amendments to reflect the new applicable mortality table and applicable interest rate for distributions with an annuity starting date in 2008 or later would not violate the anti-cutback rules of section 411(d)(6). The final regulations retain the rule in the 2008 proposed regulations that no section 204(h) notice is required if a defined benefit plan is amended to reflect changes to the applicable interest or mortality assumptions in section 417(e)(3) made by PPA '06. For example, a reduced single-sum distribution resulting from an amendment to a traditional defined benefit plan that timely substitutes the prescribed actuarial assumptions under section 417(e)(3), as amended by PPA '06, for the pre-PPA '06 actuarial assumptions under section 417(e)(3) does not require a section 204(h) notice.

Interaction of the Section 204(h) Notice Timing Rules with Plan Amendments that Have a Retroactive Effective Date

Section 1.411(d)-3(a)(1) of the current Treasury regulations generally provides that a plan is not a qualified plan if a plan amendment decreases the accrued benefit of any plan participant. These rules are generally based on the “applicable amendment date,” which is defined in §1.411(d)-3(g)(4) as the later of the effective date of the amendment or the date the amendment is adopted. While §1.411(d)-3(a)(1) generally prohibits a plan amendment that reduces benefits accrued before the applicable amendment date, a number of statutory exceptions apply. These exceptions include amendments permitted under sections 412(d)(2), 418D, and 418E of the Code, section 4281 of ERISA, and section 1107 of PPA '06. The prior regulations under section

411(d)(6) of the Code listed these exceptions, other than the exception under section 1107 of PPA '06. The final regulations provide a conforming amendment to §1.411(d)-3(a)(1) to include section 1107 of PPA '06 as a statutory exception to the general anti-cutback rule in section 411(d)(6) of the Code.

In the case of an amendment that is permitted to be adopted retroactively, the proposed regulations stated that the effective date of the amendment, for purposes of section 4980F, is the date the amendment is put into effect on an operational basis under the plan, so that a section 204(h) notice must generally be provided at least 45 days before the date the amendment is put into effect on an operational basis (15 days for multiemployer plans).

A commentator suggested that the final regulations clarify that there is no specific time limit on how far in advance of the effective date of a section 204(h) amendment<sup>7</sup> a section 204(h) notice may be provided. The commentator argued that while the notice requirements under section 4980F only restrict how late a notice can be provided, other notice requirements, such as the notice required under section 417(a)(6), provide a timeframe in which the notice must be provided. The commentator argued that notification far in advance of the effective date should be permitted on the grounds that notice any time in advance of the effective date would satisfy the statute, and would provide a practical solution to the administrative challenges of providing notice for a large plan with many contributing employers and with a variety of different amendment effective dates. No change has been made to the proposed regulations to reflect these comments.

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<sup>7</sup> A section 204(h) amendment is defined in Q&A-4(b) of §54.4980F-1 of the Treasury regulations as an amendment for which section 204(h) notice is required.

Another commentator requested clarification on whether section 204(h) notice is required in the case of a plan amendment that is permitted to reduce prior benefit accruals. The commentator cited to Q&A-7(b) of §54.4980F-1, which provides that any section 411(d)(6) protected benefit that may be eliminated or reduced as permitted under §1.411(d)-3 or §1.411(d)-4, Q&A-2(a) or (b), is not taken into account in determining whether an amendment is a section 204(h) amendment. This cross-reference to §1.411(d)-3 was added to the regulations in 2005 with the intent to address amendments that reduce or eliminate benefits or subsidies that create significant burdens or complexities for the plan and plan participants unless the amendment adversely affects the rights of any participant in more than a de minimis manner, not to address amendments implementing changes in applicable law. Similarly, the cross-reference to §1.411(d)-4, Q&A-2(a) or (b) was not intended to apply to amendments implementing future changes in applicable law. In order to reflect this intent, the final regulations revise the cross-references in Q&A-7(b) to provide that any plan amendment that is permitted to eliminate or reduce a section 411(d)(6) protected benefit under §1.411(d)-3(c), (d), or (f), or under §1.411(d)-4, Q&A-2(a)(2), (a)(3), (b)(1), or (b)(2)(ii) through (b)(2)(xi), is not an amendment for which section 204(h) notice is required.

The final regulations retain a special transitional rule which provides that, in the case of an amendment that is permitted to reduce benefit accruals and is made to a plan that is a statutory hybrid to which section 411(a)(13)(C) applies, a section 204(h) notice must be provided at least 30 days before the amendment is effective. No commentators objected to this rule in the proposed regulations. Accordingly, the final

regulations provide that for any section 204(h) notice that is required to be provided in connection with an amendment to a statutory hybrid plan under section 411(a)(13)(C) that is first effective before January 1, 2009, and that limits the amount of a distribution to the account balance as permitted under section 411(a)(13)(A), section 204(h) notice does not fail to be timely if the notice is provided at least 30 days before the date the amendment is first effective. This special timing rule reflects the 30-day timing rule described in Notice 2007-6 (2007-3 CB 272), see §601.601(d)(2)(ii)(b), which provides transitional guidance on the requirements of sections 411(a)(13) and 411(b)(5).<sup>8</sup> The final regulations, like the proposed regulations, permit the use of this transitional timing rule through the end of 2008. Thereafter, the general 45-day timing rule applies to such amendments.

#### Interaction of Section 204(h) Notice Requirements with Other Notice Requirements Relating to Plan Amendments

As stated in the background portion of this preamble, the Code and ERISA include a number of other notice requirements relating to plan amendments that are permitted to reduce or eliminate accrued benefits. To eliminate the need for a plan to provide multiple notices at different dates and with substantially the same function and information to affected persons, the proposed regulations stated that, with respect to an amendment that triggers a section 204(h) notice requirement as well as another statutory notice requirement, if a plan provides the latter notice in accordance with the applicable standards for such a notice, the plan is treated as having timely complied with the requirement to provide a section 204(h) notice with respect to the section

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<sup>8</sup> Section B.4 of Notice 2007-6 provides that, in the case of a plan amendment that is permitted to reduce benefit accruals, a section 204(h) notice must be provided at least 30 days before the amendment is effective. This rule would require the notice to be provided at least 30 days before the earliest date on which the plan is operated in accordance with the amendment.

204(h) amendment. Under the proposed regulations, this treatment would apply to the following notices:

- A notice required under Rev. Proc. 94-42 relating to retroactive plan amendments that reduce accrued benefits described in section 412(d)(2) of the Code;
- A notice required under section 101(j) of ERISA if an amendment is adopted to comply with the benefit limitation requirements of section 436 of the Code (section 206(g) of ERISA);
- A notice required under section 418D of the Code (section 4244A(b) of ERISA) for an amendment that reduces or eliminates accrued benefits attributable to employer contributions with respect to a multiemployer plan in reorganization;
- A notice required under section 418E of the Code (section 4245(e) of ERISA), relating to the effects of the insolvency status for a multiemployer plan; and
- A notice required under section 4281 of ERISA and 29 CFR 4281.32 for an amendment of a multiemployer plan reducing benefits pursuant to section 4281(c) of ERISA.

In general, commentators did not object to this treatment under the 2008 proposed regulations. However, some commentators argued that the regulations should not apply the excise tax under section 4980F of the Code if the plan were to fail to satisfy the requirements of the other applicable notice. For example, a commentator suggested that if the notice requirements under section 101(j) of ERISA are not satisfied for an amendment adopted to comply with section 436 of the Code (or section 206(g) of ERISA), the plan should still be treated as having provided section 204(h)

notice even though participants receive no notice of the amendment. However, there is no statutory basis for this suggestion, and the final regulations do not make this change. Thus, in any case in which notice is required to be given under section 101(j) of ERISA and, in addition, section 204(h) notice is required for the related plan amendment under section 4980F of the Code (and section 204(h) of ERISA), the plan sponsor either could provide two notices -- at the times and in the manner required under each such section -- or could provide a notice under section 101(j) of ERISA at the time and in the manner required under section 101(j). In this respect, providing section 101(j) notice constitutes a safe harbor for purposes of any requirement to provide section 204(h) notice. However, in general (and depending on the facts and circumstances), the failure to provide notice under both section 101(j) of ERISA and section 4980F of the Code (and section 204(h)) of ERISA, where required, would violate section 101(j) of ERISA and, separately, Code section 4980F (as well as section 204(h) of ERISA).

With respect to amendments made in order to comply with the benefit limitations provided by section 436 of the Code, some commentators asked that the rules in the final regulations be clarified to provide explicitly that a plan that is never required to provide a notice under ERISA section 101(j) (or is not required to do so for a long period of time) is not treated as failing to satisfy ERISA section 204(h) or Code section 4980F. Commentators asserted that this should be the case even though a section 204(h) notice was not sent when the plan adopted general conditional language authorizing the benefit restrictions to become effective if and when required. Under the standards set forth in the existing regulations at §54.4980F-1, A-5(a) and A-6, whether an amendment

to comply with section 436 requires section 204(h) notice depends on whether it is reasonably expected that the amendment will result in a reduction, taking into account facts and circumstances at the time of the amendment (in either the rate of future benefit accrual or early retirement benefits or retirement-type subsidies) and, if so, whether such reduction will be significant. A plan would still be required to provide notice under section 101(j) of ERISA when a benefit limitation is triggered under the rules of section 436 of the Code. The provision in these final regulations under which providing timely section 101(j) notice satisfies any section 204(h) notice requirement for a section 436 amendment has the effect of mooted questions such as when and whether an amendment to comply with section 436 requires section 204(h) notice. Accordingly, no special rules have been adopted to address these comments.

A conforming change was made to Q&A-8 of the regulation for plan amendments with retroactive effective dates. The final regulations provide that whether an amendment reducing the rate of future benefit accrual provides for a reduction that is significant is determined based on reasonable expectations taking into account the relevant facts and circumstances at the time the amendment is adopted, or earlier, at the time of the effective date of the amendment.

As stated earlier, a plan is treated as having timely complied with the requirements to provide a section 204(h) notice if the plan satisfies the requirements for providing one of the notices listed earlier in this section. Note that this special treatment does not apply if a plan is amended to implement benefit reductions independent of the reductions permitted under the relevant notice requirement. Thus, if a plan that is subject to the requirements of section 436 of the Code (section 206(g) of

ERISA) is amended to cease all benefit accruals independent of the amendment implementing the limitations required under section 436(e) (section 206(g)(4) of ERISA) (for example, an amendment implementing a permanent cessation of benefit accruals), the section 204(h) notice is required if the plan amendment provides for a significant reduction in the rate of future benefit accrual (treating elimination or reduction of an early retirement benefit or retirement-type subsidy as a reduction in the rate of future benefit accrual). A section 101(j) notice, however, is not required to be provided as a result of such an independent plan amendment.

#### Timing and Content Rules for Multiemployer Plans in Critical Status

Section 432 of the Code, relating to multiemployer plans that are in endangered or critical status (as defined in section 432(b)), permits a plan amendment to be adopted that reduces prior accruals under certain circumstances. With respect to any such amendment for a plan that is in critical status, section 432(e)(8)(C) requires that notice be provided to participants, beneficiaries, contributing employers, and certain employee organizations of any reduction in adjustable benefits. The 2008 proposed regulations included a rule under which the timing and content of a notice under 432(e)(8)(C) also satisfies the timing and content requirements for a section 204(h) notice. As a result, under the proposed regulations, any notice for a multiemployer plan in critical status that satisfies the timing and content requirements under section 432(e)(8)(C) would satisfy the timing and content requirements of a section 204(h) notice. Currently, the IRS and the Treasury Department are establishing requirements for a notice required under section 432(e)(8)(C), including the content requirements. The interaction of the section

432(e)(8)(C) notice with the requirements for a section 204(h) notice will be addressed as part of the section 432 regulation project.

The final regulations add the notice required under section 432(b)(3)(D) to the list of similarly-situated benefit reduction notices discussed in the preamble to these regulations under the heading, “Interaction of the Section 204(h) Notice Requirements with Other Notice Requirements Relating to Plan Amendments.” As mentioned in the background section of the preamble to these regulations, section 432(b)(3)(D) generally requires notice to plan participants and beneficiaries, within 30 days after a plan receives its annual certification, on whether the plan is in endangered or critical status. If the plan is in critical status, section 432(b)(3)(D) provides that the notice must provide certain information to participants and beneficiaries, including the possibility that adjustable benefits may be reduced and a description of who might be subject to the reductions. Section 432(f)(2)(A) generally states that, effective on the date that notice is provided that a plan is in critical status, the plan must not pay any payment in excess of the monthly amount paid under a single-life annuity (notwithstanding the anti-cutback rule in section 411(d)(6)). Thus, the payment of single-sum distributions would not be permitted under section 432(f)(2)(A) after a plan provides notification that the plan is in critical status. The final regulations provide that if a plan provides the notice under section 432(b)(3)(D) in accordance with the applicable timing and content standards for such a notice with respect to an amendment, the plan is treated as having complied with any requirement to provide a section 204(h) notice with respect to the amendment.

Delegation of Authority to the Commissioner

Like the 2008 proposed regulations, these final regulations delegate authority to the Commissioner of the Internal Revenue Service to publish revenue rulings, notices, or other guidance published in the Internal Revenue Bulletin (see §601.601(d)(2)(ii)(b) of this chapter) under section 4980F of the Code (which would also apply to section 204(h) of ERISA) that the Commissioner determines to be necessary or appropriate for a section 204(h) amendment that applies with respect to benefits accrued before the applicable amendment date but that does not violate section 411(d)(6) of the Code. This delegation of authority provides the Commissioner with greater flexibility to develop special rules to address special circumstances in the future, such as future statutory changes. This delegation of authority also extends to circumstances in which a section 204(h) amendment may require another notice in addition to a section 204(h) notice, as long as the amendment is permitted to reduce accrued benefits, regardless of whether that amendment actually reduces benefits accrued before the adoption date of the amendment. This delegation would permit the Commissioner to treat plans providing other notices with timing and content requirements similar to a section 204(h) notice as having complied with the requirement to provide a section 204(h) notice.

### **Effective/Applicability Dates**

These rules in these final regulations are generally applicable to section 204(h) amendments that are effective on or after January 1, 2008. With respect to the timing rules on providing a section 204(h) notice for a plan amendment that has a retroactive effective date and the clarification of the cross-references in Q&A-7(b), these special rules apply to section 204(h) amendments adopted in plan years beginning after July 1, 2008. With respect to any section 204(h) amendment to a lump sum-based benefit

formula (or any amendment adopted pursuant to section 701 of PPA '06), the special rules under the regulations relating to an amendment that applies with respect to benefits accrued before the applicable amendment date apply to amendments adopted after December 21, 2006. The special 30-day timing rule for providing a section 204(h) notice applies to such amendments effective on or after December 21, 2006, and no later than December 31, 2008. The Treasury Department and the IRS anticipate issuing guidance in the near future relating to the application of section 4980F to plan amendments that are adopted, in accordance with section 1107 of PPA '06, to comply with the requirements of section 411(b)(5)(B)(i), relating to market rates of return. As provided in Announcement 2009-82 (available on the IRS website at <http://www.irs.gov/pub/irs-drop/a-09-82.pdf>), this future guidance may provide a special timing rule for when section 204(h) notice must be provided.

The regulations also reflect special statutory effective dates for provisions in PPA '06. Section 402 of PPA '06 applies to section 204(h) amendments adopted in plan years ending after August 17, 2006. Section 4980F(e)(1) of the Code, as amended by section 502(c) of PPA '06, applies to section 204(h) amendments adopted in plan years beginning after December 31, 2007.

### **Special Analyses**

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to this regulation. Pursuant to the Regulatory Flexibility Act (5 U.S.C. chapter 6), it is hereby certified that the collection of

information in this regulation would not have a significant impact on a substantial number of small entities. This certification is based on the fact that this regulation only provides guidance on how to satisfy existing collection of information requirements. Accordingly, a Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding this regulation was submitted to the Small Business Administration for comment on its impact on small business.

### **Drafting Information**

The principal author of these regulations is Pamela R. Kinard of the Office of the Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities), Internal Revenue Service. However, personnel from other offices of the Internal Revenue Service and Treasury Department participated in their development.

### **List of Subjects**

#### **26 CFR Part 1**

Income taxes, Reporting and recordkeeping requirements.

#### **26 CFR Part 54**

Excise taxes, Pensions, Reporting and recordkeeping requirements.

### **Amendments to the Regulations**

Accordingly, 26 CFR parts 1 and 54 are amended as follows:

#### **PART 1--INCOME TAXES**

Paragraph 1. The authority citation for part 1 continues to read in part as follows:

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

Par. 2. Section 1.411(d)-3 is amended by revising the first sentence of paragraph (a)(1).

The revision reads as follows:

§1.411(d)-3 Section 411(d)(6) protected benefits.

(a) Protection of accrued benefits--(1) General rule. Under section 411(d)(6)(A), a plan is not a qualified plan (and a trust forming a part of such plan is not a qualified trust) if a plan amendment decreases the accrued benefit of any plan participant, except as provided in section 412(d)(2) (section 412(c)(8) for plan years beginning before January 1, 2008), section 4281 of the Employee Retirement Income Security Act of 1974 as amended (ERISA), or other applicable law (see, for example, sections 418D and 418E of the Internal Revenue Code, and section 1107 of the Pension Protection Act of 2006, Public Law 109-280 (120 Stat. 780, 1063)). \* \* \*

\* \* \* \* \*

PART 54--PENSION EXCISE TAXES

Par. 3. The authority citation for part 54 continues to read in part as follows:

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

Section 54.4980F-1 also issued under 26 U.S.C. 4980F. \* \* \*

Par. 4. Section 54.4980F-1 is amended by:

1. Revising the second sentence of paragraph A-1(a).
2. Revising paragraph A-7(b).
3. Revising paragraph A-8(a) and redesignating paragraph A-8(d) as A-8(e) and adding new paragraph A-8(d).

4. Revising the first sentence of paragraphs A-9(a), A-9(b), and A-9(c), and revising paragraph A-9(d)(1).

5. Adding paragraphs A-9(f) and A-9(g).

6. Revising the first sentence of paragraph A-10(a).

7. Revising paragraph A-11(a)(1).

8. Adding paragraphs A-18(a)(4) and A-18(a)(5).

9. Revising paragraph A-18(b)(1) and adding paragraphs A-18(b)(3)(i), A-18(b)(3)(ii), and A-18(b)(3)(iii).

The additions and revisions read as follows:

§54.4980F-1 Notice requirements for certain pension plan amendments significantly reducing the rate of future benefit accrual.

\* \* \* \* \*

A-1. (a) \* \* \* The notice is required to be provided to plan participants and alternate payees who are applicable individuals (as defined in Q&A-10 of this section), to certain employee organizations, and to contributing employers under a multiemployer plan (as described in Q&A-10(a) of this section). \* \* \*

\* \* \* \* \*

A-7. \* \* \*

(b) Plan provisions not taken into account--(1) In general. Plan provisions that do not affect the rate of future benefit accrual of participants or alternate payees are not taken into account in determining whether there has been a reduction in the rate of future benefit accrual.

(2) Interaction with section 411(d)(6). Any benefit that is not a section 411(d)(6) protected benefit as described in §§1.411(d)-3(g)(14) and 1.411(d)-4, Q&A-1(d) of this chapter, or that is a section 411(d)(6) protected benefit that may be eliminated or reduced as permitted under §1.411(d)-3(c), (d), or (f), or under §1.411(d)-4, Q&A-2(a)(2), (a)(3), (b)(1), or (b)(2)(ii) through (b)(2)(xi) of this chapter, is not taken into account in determining whether an amendment is a section 204(h) amendment. Thus, for example, provisions relating to the right to make after-tax deferrals are not taken into account.

\* \* \* \* \*

A-8. (a) General rule. Whether an amendment reducing the rate of future benefit accrual or eliminating or reducing an early retirement benefit or retirement-type subsidy provides for a reduction that is significant for purposes of section 4980F (and section 204(h) of ERISA) is determined based on reasonable expectations taking into account the relevant facts and circumstances at the time the amendment is adopted, or, if earlier, at the effective date of the amendment.

\* \* \* \* \*

(d) Plan amendments reflecting a change in statutorily mandated minimum present value rules. If a defined benefit plan offers a distribution to which the minimum present value rules of section 417(e)(3) apply (other than a payment to which section 411(a)(13)(A) applies) and the plan is amended to reflect the changes to the applicable interest rate and applicable mortality table in section 417(e)(3) made by the Pension Protection Act of 2006, Public Law 109-780 (120 Stat. 780) (PPA '06) (and no change is

made in the dates on which the payment will be made), no section 204(h) notice is required to be provided.

\* \* \* \* \*

A-9. (a) 45-day general rule. Except as otherwise provided in this Q&A-9, section 204(h) notice must be provided at least 45 days before the effective date of any section 204(h) amendment. \* \* \*

(b) 15-day rule for small plans. Except for amendments described in paragraphs (d)(2) and (g) of this Q&A-9, section 204(h) notice must be provided at least 15 days before the effective date of any section 204(h) amendment in the case of a small plan. \* \* \*

(c) 15-day rule for multiemployer plans. Except for amendments described in paragraphs (d)(2) and (g) of this Q&A-9, section 204(h) notice must be provided at least 15 days before the effective date of any section 204(h) amendment in the case of a multiemployer plan. \* \* \*

(d) Special timing rule for business transactions--(1) 15-day rule for section 204(h) amendment in connection with an acquisition or disposition. Except for amendments described in paragraphs (d)(2) and (g) of this Q&A-9, if a section 204(h) amendment is adopted in connection with an acquisition or disposition, section 204(h) notice must be provided at least 15 days before the effective date of the section 204(h) amendment.

\* \* \* \* \*

(f) Special timing rule for certain plans maintained by commercial airlines. See section 402 of PPA '06 for a special rule that applies to certain plans maintained by an

employer that is a commercial passenger airline or the principal business of which is providing catering services to a commercial passenger airline. Under this special rule, section 204(h) notice must be provided at least 15 days before the effective date of the amendment.

(g) Special timing rules relating to certain section 204(h) amendments that reduce section 411(d)(6) protected benefits--(1) Plan amendments permitted to reduce prior accruals. This paragraph (g) generally provides special rules with respect to a plan amendment that would not violate section 411(d)(6) even if the amendment were to reduce section 411(d)(6) protected benefits, which are limited to accrued benefits that are attributable to service before the applicable amendment date. For example, this paragraph (g) applies to amendments that are permitted to be effective retroactively under section 412(d)(2) of the Code (section 412(c)(8) for plan years beginning before January 1, 2008), section 418D of the Code, section 418E of the Code, section 4281 of ERISA, or section 1107 of PPA '06. See, generally, §1.411(d)-3(a)(1).

(2) General timing rule for amendments to which this paragraph (g) applies. For an amendment to which this paragraph (g) applies, the amendment is effective on the first date on which the plan is operated as if the amendment were in effect. Thus, except as otherwise provided in this paragraph (g), a section 204(h) notice for an amendment to which paragraph (a) of this section applies that is adopted after the effective date of the amendment must be provided, with respect to any applicable individual, at least 45 days before (or such other date as may apply under paragraph (b), (c), (d), or (f) of this Q&A-9) the date the amendment is put into operational effect.

(3) Special rules for section 204(h) notices provided in connection with other disclosure requirements--(i) In general. Notwithstanding the requirements in this Q&A-9 and Q&A-11 of this section, if a plan provides one of the notices in paragraph (g)(3)(ii) of this Q&A-9, in accordance with the applicable timing and content rules for such notice, the plan is treated as timely providing a section 204(h) notice with respect to a section 204(h) amendment.

(ii) Notice requirements. The notices in this paragraph (g)(3)(ii) are--

(A) A notice required under any revenue ruling, notice, or other guidance published under the authority of the Commissioner in the Internal Revenue Bulletin to affected parties in connection with a retroactive plan amendment described in section 412(d)(2) (section 412(c)(8) for plan years beginning before January 1, 2008);

(B) A notice required under section 101(j) of ERISA if an amendment is adopted to comply with the benefit limitation requirements of section 206(g) of ERISA (section 436 of the Code);

(C) A notice required under section 432(b)(3)(D) of the Code for an amendment adopted to comply with the benefit restrictions under section 432(f)(2);

(D) A notice required under section 418D, or section 4244A(b) of ERISA, for an amendment that reduces or eliminates accrued benefits attributable to employer contributions with respect to a multiemployer plan in reorganization;

(E) A notice required under section 418E, or section 4245(e) of ERISA, relating to the effects of the insolvency status for a multiemployer plan; and

(F) A notice required under section 4281 of ERISA for an amendment of a multiemployer plan reducing benefits pursuant to section 4281(c) of ERISA.

(4) Delegation of authority to Commissioner. The Commissioner may provide special rules under section 4980F, in revenue rulings, notices, or other guidance published in the Internal Revenue Bulletin (see §601.601(d)(2)(ii)(b) of this chapter), that the Commissioner determines to be necessary or appropriate with respect to a section 204(h) amendment--

(A) That applies to benefits accrued before the applicable amendment date but that does not violate section 411(d)(6); or

(B) For which there is a required notice relating to a reduction in benefits and such notice has timing and content requirements similar to a section 204(h) notice with respect to a significant reduction in the rate of future benefit accruals.

\* \* \* \* \*

A-10. (a) In general. Section 204(h) notice must be provided to each applicable individual, to each employee organization representing participants who are applicable individuals, and, for plan years beginning after December 31, 2007, to each employer that has an obligation to contribute (within the meaning of section 4212(a) of ERISA) to a multiemployer plan.\* \* \*

\* \* \* \* \*

A-11. (a) Explanation of notice requirement--(1) In general. Section 204(h) notice must include sufficient information to allow applicable individuals to understand the effect of the plan amendment. In order to satisfy this rule, a plan administrator providing section 204(h) notice must generally satisfy paragraphs (a)(2), (a)(3), (a)(4), (a)(5), and (a)(6) of this Q&A-11. See paragraph (g)(3) of Q&A-9 of this section for special rules relating to section 204(h) notices provided in connection with certain other

written notices. See also paragraph (g)(4) of Q&A-9 of this section for a delegation of authority to the Commissioner to provide special rules.

\* \* \* \* \*

A-18. (a) \* \* \*

(4) Special effective date for certain section 204(h) amendments made by plans of commercial airlines. Section 402 of PPA '06 applies to section 204(h) amendments adopted in plan years ending after August 17, 2006.

(5) Special effective date for rule relating to contributing employers. Section 502(c) of PPA '06, which amended section 4980F(e)(1) of the Internal Revenue Code, applies to section 204(h) amendments adopted in plan years beginning after December 31, 2007.

(b) Regulatory effective date--(1) General effective date. Except as otherwise provided in this paragraph (b) of this section, Q&A-1 through Q&A-18 of this section apply to amendments with an effective date that is on or after September 1, 2003.

\* \* \* \* \*

(3) Effective dates for Q&A-9(g)(1), (g)(3), and (g)(4)--(i) General effective date. Except as otherwise provided in Q&A-18(b)(3)(ii) or (b)(3)(iii) of this section, Q&A-9(g)(1), (g)(3), and (g)(4) of this section apply to amendments that are effective on or after January 1, 2008.

(ii) Effective dates for Q&A-9(g)(2) and Q&A-7(b). Except as otherwise provided in Q&A-18(b)(3)(iii) of this section, Q&A-9(g)(2) and Q&A-7(b) of this section apply to section 204(h) amendments adopted in plan years beginning after July 1, 2008.

(iii) Special rules for section 204(h) amendments to an applicable defined benefit plan. Except as otherwise provided in paragraph (b)(3)(i) or (b)(3)(ii) of this Q&A-18, with respect to any section 204(h) notice provided in connection with a section 204(h) amendment to an applicable defined benefit plan within the meaning of section 411(a)(13)(C)(i) to limit distributions as permitted under section 411(a)(13)(A) for distributions made after August 17, 2006, that is made pursuant to section 701 of PPA '06, paragraphs (g)(1) and (g)(2) of Q&A-9 of this section apply to amendments that are effective after December 21, 2006. For such an amendment that is effective not later

than December 31, 2008, section 204(h) notice does not fail to be timely if the notice is provided at least 30 days, rather than 45 days, before the date that the amendment is first effective.

Steve T. Miller

Deputy Commissioner for Services and Enforcement.

Approved: November 12, 2009

Michael Mundaca

Acting Assistant Secretary of the Treasury (Tax Policy).