

## Notice of Proposed Rulemaking and Notice of Public Hearing

### Permitted Elimination of Preretirement Optional Forms of Benefit

REG-107644-97

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed regulations that would permit an amendment to a qualified plan that eliminates certain preretirement optional forms of benefit. These regulations affect employers that maintain qualified plans, plan administrators of qualified plans and participants in qualified plans. This document provides notice of a public hearing on these proposed regulations.

DATES: Written comments and outlines of the topics to be discussed at the public hearing must be received by September 30, 1997. A public hearing is scheduled for October 28, 1997.

ADDRESSES: Send submissions to CC:DOM:CORP:R (REG-107644-97), Room 5228, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered between the hours of 8 a.m. and 5 p.m. to CC:DOM:CORP:R (REG-107644-97), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC. Alternatively, taxpayers may submit comments electronically via the Internet by selecting the "Tax Regs" option on the IRS Home Page, or by submitting comments directly to the IRS Internet site at [http://www.irs.ustreas.gov/prod/tax\\_regs/comments.html](http://www.irs.ustreas.gov/prod/tax_regs/comments.html). A public hearing is scheduled to be held in the Auditorium, Internal Revenue Building, 111 Constitution Avenue, NW, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Thomas Foley, (202) 622-6050 (not a toll-free number).

## 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, T:FP, Washington, DC 20224. Comments on the collection of information should be received by September 2, 1997. 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 (see below);

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

How the burden of complying with the proposed collection 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 this proposed regulation is in §1.411(d)-4. This information is required for a taxpayer who wants to amend a qualified plan to eliminate certain preretirement optional forms of benefit. This information will be used to determine whether taxpayers have amended a qualified plan. The collection of information is voluntary to obtain a benefit. The likely recordkeepers are businesses or other for-profit organizations and non-profit institutions.

Estimated total recordkeeping burden: 48,800 hours.

Estimated average burden per recordkeeper: For Master and Prototype Plan Employers: 10 minutes. For Master and Prototype Plan Sponsors: 30 minutes. For Employers with Individually Designed Plans: 30 minutes.

Estimated number of recordkeepers: 135,000.

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*

This notice contains proposed amendments to the income tax regulations (26 CFR Part 1) under section 411(d) of the Internal Revenue Code of 1986.

Section 411(d)(6) generally provides that a plan will not be treated as satisfying the requirements of section 411 if the accrued benefit of a participant is decreased by a plan amendment. Under section 411(d)(6)(B), a plan amendment that eliminates an optional form of benefit will be treated as reducing accrued benefits to the extent that the amendment applies to benefits accrued as of the later of the adoption date or the effective date of the amendment. However, section 411(d)(6)(B) also permits the Secretary to provide in regulations that this rule will not apply to an amendment that eliminates an optional form of benefit.

Section 401(a)(9) provides that, in order for a plan to be qualified under section 401(a), distributions from the plan must commence no later than the "required beginning date." Prior to 1997, section 401(a)(9)(C) generally provided that the required beginning date is April 1 following the calendar year in which the employee attains age 70½. Consequently, in order to satisfy section 401(a)(9), qualified plans, other than certain church and governmental plans, have provided for distributions to commence no later than April 1 following the calendar year that

an employee attains age 70½. These distributions commence without regard to whether the employee has retired from employment with the employer maintaining the plan.

Section 1404 of the Small Business Job Protection Act of 1996, Public Law 104-188 (SBJPA), amended the definition of required beginning date that applies to an employee who is not a 5-percent owner. Section 401(a)(9)(C)(i), as amended, provides that, in the case of such an employee, the required beginning date is April 1 of the calendar year following the later of the calendar year in which the employee attains age 70½ or the calendar year in which the employee retires. Accordingly, except for 5-percent owners, a plan is no longer required to provide for distributions that commence prior to retirement in order to satisfy section 401(a)(9).

The right to commence benefit distributions in any form at a particular time is an optional form of benefit within the meaning of section 411(d)(6)(B) and §1.411(d)-4 Q&A-1(b). In enacting section 1404 of the SBJPA, Congress did not alter the application of section 411(d)(6). Thus, except to the extent authorized by regulations, a plan amendment that eliminates the right to commence preretirement benefit distributions in a plan after age 70½ (or restricts the right by adding an additional condition) violates section 411(d)(6) if the amendment applies to benefits accrued as of the later of the adoption or effective date of the amendment.

Notice 96-67 (1996-53 I.R.B. 12) provided questions and answers addressing certain issues relating to the amendment of section 401(a)(9)(C) by the SBJPA and requested comments concerning the extent to which relief from section 411(d)(6) would be appropriate for plan amendments that eliminate preretirement distributions after age 70½ (e.g., by limiting section 411(d)(6) protection to employees above a certain age).

#### Overview

#### 1. Permitted Elimination of Preretirement Distributions After Age 70½

The legislative history to section 1404 of the SBJPA indicates that the reason for

amending the definition of required beginning date was that it is inappropriate to require all participants to commence distributions by age 70½ without regard to whether the participant is still employed by the employer. Because section 1404 did not alter the application of section 411(d)(6) to plan provisions allowing or requiring preretirement distributions after age 70½, an employer's choices for amending its plan to implement the SBJPA change to the definition of required beginning date are limited unless the IRS and Treasury grant relief from section 411(d)(6).

As one choice, in accordance with the guidance in Announcement 97-24 (1997-11 I.R.B. 24) March 13, 1997, the employer may give employees the option of commencing distributions at age 70½ or deferring commencement until after retirement. As a second alternative, the employer may amend the plan to eliminate the right to preretirement distributions solely with respect to future accruals. However, under this second approach, each current participant would retain the right to receive preretirement distributions after age 70½ with respect to a portion of his or her accrued benefit.

The IRS and Treasury recognize the potential complexity of administering plans (particularly defined benefit plans) that adopt either of these choices. In addition, an employer may not have voluntarily chosen to offer preretirement distributions to employees who have attained age 70½ but instead may have included these provisions in its plan solely to comply with section 401(a)(9) prior to its amendment by the SBJPA. Therefore, after consideration of the comments received in response to Notice 96-67 and subject to the conditions described below, the proposed regulations would provide relief from section 411(d)(6) for certain plan amendments that eliminate preretirement distributions commencing at age 70½.

#### 2. Conditions on the Relief From Section 411(d)(6)

##### a. Protection for Employees Who Are Near Age 70½

Under the proposed regulation, an amendment to eliminate a preretirement age 70½ distribution option may apply only to benefits with respect to employees

who attain age 70½ in or after a calendar year, specified in the amendment, that begins after the later of December 31, 1998, or the adoption date of the amendment. The relief from section 411(d)(6) is limited to distributions to employees who attain age 70½ after calendar year 1998 because employees who were near age 70½ at the time of enactment of the SBJPA may have had an expectation of receiving preretirement distributions in the near future and may have made plans that took into account these expected distributions.

##### b. Optional Forms of Benefit for Participants Retiring After Age 70½

A plan using this relief generally may not preclude an employee who retires after the calendar year in which the employee attains age 70½ from receiving an optional form of benefit that would have been available if the employee had retired in the calendar year in which the employee attained age 70½.

##### c. Timing of Plan Amendment

An amendment to eliminate a preretirement age 70½ distribution option may be adopted no later than the last day of any remedial amendment period that applies to the plan for changes under the SBJPA. However, in no event will the deadline for adopting such a plan amendment be before December 31, 1998. The relief provided is available only to employers that adopt the amendment within this specified time period because the relief is being provided to simplify the implementation of section 401(a)(9), as amended by the SBJPA, for employers that do not voluntarily provide preretirement distributions for an extended period after the enactment of the SBJPA.

#### 3. Circumstances Under Which No Relief Is Required

Many employers do not need relief under section 411(d)(6) in order to implement the SBJPA change in the definition of required beginning date in their plans. The regulation includes an example of such a plan, a profit-sharing plan that permits an employee to elect distribution after age 59½ at any time and in any amount. The example illustrates that this plan may be amended to implement the SBJPA change in the definition of re-

quired beginning date without violating section 411(d)(6). In this example, the section 411(d)(6) relief proposed in this regulation is not required because the optional forms of benefit in the plan that reflect the pre-SBJPA mandatory distribution requirements of section 401(a)(9) are encompassed by the optional forms of benefit provided under the general elective distribution provisions. The right to commence distributions at age 70½ continues to be available under the plan even after the plan is amended to implement the SBJPA change in the required beginning date.

#### *Effective Date*

The guidance in these proposed regulations will only be effective after the date that final regulations are adopted and will only apply to amendments adopted and effective after that date. In order to provide employers with ample time to craft the appropriate plan amendment to implement the relief from section 411(d)(6) that would be provided when these regulations are finalized, the IRS and the Treasury intend to finalize these regulations on an expedited schedule after consideration of the comments received.

#### *Special Analyses*

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in EO 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. Further, it is hereby certified, pursuant to sections 603(a) and 605(b) of the Regulatory Flexibility Act, that the collection of information in these regulations will not have a significant economic impact on a substantial number of small entities. The burden imposed by the collection of information is the burden of amending a plan to modify the provisions reflecting section 401(a)(9). The cost of the amendment varies depending upon whether the small entity involved maintains an individually designed plan or uses a master or prototype plan. For an individually designed plan, the small entity maintaining the plan will be responsible for arranging to have the amendment made. Most small entities with individu-

ally designed plans will have the amendment done by a skilled outside service provider, such as a consulting firm or law firm. The time required to make such an amendment is estimated at 30 minutes, which is not a significant economic impact, even for a very small entity. Moreover, most very small entities that maintain a qualified plan use a master or prototype plan. For master and prototype plans, the plan sponsor drafts a single amendment for all of the employers participating in the plan. The average time required for the amendment per employer participating in a master or prototype plan is estimated to be 10 minutes, which certainly is not a substantial economic impact. Therefore, 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 Internal Revenue 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 Requests for a Public Hearing*

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

A public hearing has been scheduled for October 28, 1997, at 10 a.m. in the Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC. Because of access restrictions, visitors will not be admitted beyond the building lobby more than 15 minutes before the hearing starts.

The rules of 26 CFR 601.601(a)(3) apply to the hearing.

Persons that wish to present oral arguments at the hearing must submit written comments and an outline of the topics to be discussed at the time devoted to each topic by September 30, 1997.

A period of 10 minutes will be allotted to each person for making comments.

An agenda showing the scheduling of speakers will be prepared after 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 Cheryl Press, Office of the Associate Chief Counsel (Employee Benefits and Exempt Organizations), IRS. However, other personnel from the IRS and Treasury Department participated in their development.

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#### *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 is amended by revising the entry for §1.411(d)-4 to read as follows:

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

§1.411(d)-4 also issued under 26 U.S.C. 411(d)(6). \* \* \*

Par. 2. Section 1.411(d)-4 is amended by adding Q&A-10 to read as follows:

*§1.411(d)-4 Section 411(d)(6) protected benefits.*

\* \* \* \* \*

Q-10. If a plan provides for an age 70½ distribution option that commences prior to retirement from employment with the employer maintaining the plan, to what extent may the plan be amended to eliminate this distribution provision?

A-10. (a) *In general.* The right to commence benefit distributions in a particular form and at a particular time prior to retirement from employment with the employer maintaining the plan is a separate optional form of benefit within the meaning of section 411(d)(6)(B) and Q&A-1 of this section, even if the plan provision creating this right was included in the plan solely to comply with section 401(a)(9), as in effect for years before January 1, 1997. Therefore, except as otherwise provided in paragraph (b) of this A-10, a plan amendment violates section 411(d)(6) if it eliminates an age 70½ distribution option (within the meaning of paragraph (c) of this A-10) to the extent that it applies to benefits accrued as of the later of the adoption date or effective date of the amendment.

(b) *Permitted elimination of optional form.* An amendment of a plan will not violate the requirements of section 411(d)(6)

merely because the amendment eliminates an age 70½ distribution option to the extent that the option provides for distribution to an employee prior to retirement from employment with the employer maintaining the plan, provided that—

(1) The amendment eliminating this optional form of benefit applies only to benefits with respect to employees who attain age 70½ in or after a calendar year, specified in the amendment, that begins after the later of—

(i) December 31, 1998; or

(ii) The adoption date of the amendment;

(2) The plan does not, except to the extent required by section 401(a)(9), preclude an employee who retires after the calendar year in which the employee attains age 70½ from receiving benefits in any of the same optional forms of benefit (except for the difference in the timing of the commencement of payments) that would have been available had the employee retired in the calendar year in which the employee attained age 70½; and

(3) The amendment is adopted no later than the last day of any remedial amendment period that applies to the plan for changes under the Small Business Job Protection Act of 1996 (110 Stat. 1755) (but in no event will the adoption of the amendment be required before December 31, 1998).

(c) *Age 70½ distribution option.* For purposes of this Q&A-10, an age 70½ distribution option is an optional form of benefit under which benefits payable in a particular distribution form (including

any modifications that may be elected after benefit commencement) commence at a time during the period that begins on or after January 1 of the calendar year in which an employee attains age 70½ and ends April 1 of the immediately following calendar year.

(d) *Examples.* The provisions of this section are illustrated by the following examples:

*Example 1.* Plan A, a defined benefit plan, provides each participant with a qualified joint and survivor annuity (QJSA) that is available at any time after the later of age 65 or retirement. However, in accordance with section 401(a)(9) as in effect prior to January 1, 1997, Plan A provides that if an employee does not retire by the end of the calendar year in which the employee attains age 70½, then the QJSA commences on the following April 1. On October 1, 1998, Plan A is amended to provide that, for an employee who is not a 5-percent owner and who attains age 70½ after 1998, benefits may not commence before the employee retires but must commence no later than the April 1 following the later of the calendar year in which the employee retires or the calendar year in which the employee attains age 70½. This amendment satisfies this Q&A-10 and does not violate section 411(d)(6).

*Example 2.* Plan B, a money purchase pension plan, provides each participant with a choice of a QJSA or a single sum distribution commencing at any time after the later of age 65 or retirement. In addition, in accordance with section 401(a)(9) as in effect prior to January 1, 1997, Plan B provides that benefits will commence in the form of a QJSA on April 1 following the calendar year in which the employee attains age 70½, except that, with spousal consent, a participant may elect to receive annual installment payments equal to the minimum amount necessary to satisfy section 401(a)(9) (calculated in accordance with a method specified in the plan) until retirement, at which time a participant may choose between a QJSA and a single sum distribution (with spousal consent). On June 30, 1998, Plan B is amended to provide that, for an employee who is not a 5-percent owner and who attains age 70½ after 1998, benefits may not commence prior to retirement but benefits must commence no later than April 1 after the later of the calendar year in which the employee retires or the calendar year in which

the employee attains age 70½. The amendment further provides that the option described above to receive annual installment payments prior to retirement will not be available under the plan to an employee who is not a 5-percent owner and who attains age 70½ after 1998. This amendment satisfies this Q&A-10 and does not violate section 411(d)(6).

*Example 3.* Plan C, a profit-sharing plan, contains two distribution provisions. Under the first provision, in any year after an employee attains age 59½, the employee may elect a distribution of any specified amount not exceeding the balance of the employee's account. In addition, the plan provides a section 401(a)(9) override provision under which, if, during any year following the year that the employee attains age 70½, the employee does not elect an amount at least equal to the minimum amount necessary to satisfy section 401(a)(9) (calculated in accordance with a method specified in the plan), Plan C will distribute the difference by December 31 of that year (or for the year the employee attains age 70½, by April 1 of the following year). On December 31, 1996, Plan C is amended to provide that, for an employee other than an employee who is a 5-percent owner in the year that the employee attains age 70½, in applying the section 401(a)(9) override provision, the later of the year of retirement, or year of attainment of age 70½, is substituted for the year that the employee attains age 70½. After the amendment, Plan C still permits each employee to elect to receive the same amount as was available before the amendment. Because this amendment does not eliminate an optional form of benefit, the amendment does not violate section 411(d)(6). Accordingly, the amendment is not required to satisfy the conditions of paragraph (b) of this A-10.

(e) This Q&A-10 applies to amendments adopted and effective after the publication of final regulations in the **Federal Register**.

Michael P. Dolan,  
*Acting Commissioner of  
Internal Revenue.*

(Filed by the Office of the Federal Register on July 1, 1997, 8:45 a.m., and published in the issue of the Federal Register for July 2, 1997, 62 F.R. 35752)