

INTERNAL REVENUE BULLETIN



HIGHLIGHTS OF THIS ISSUE

Bulletin No. 2016-7
February 16, 2016

These synopses are intended only as aids to the reader in identifying the subject matter covered. They may not be relied upon as authoritative interpretations.

EMPLOYEE PLANS

REG-125761-14, page 322.

The proposed regulations would modify the nondiscrimination requirements for qualified retirement plans under section 401(a)(4) and would include special rules for retirement plans that provide additional benefits to a grandfathered group of employees following certain changes in the coverage of a defined benefit plan or a defined benefit plan formula. The proposed regulations would also include additional modifications to the nondiscrimination regulations that are applicable to all plans.

REG-147310-12, page 336.

These proposed regulations would provide rules relating to the determination of whether the normal retirement age under a governmental plan (within the meaning of section 414(d) of the Code) that is a pension plan satisfies the requirements of section 401(a) and whether the payment of definitely determinable benefits that commence at the plan's normal retirement age satisfies these requirements. These regulations would affect sponsors and administrators of governmental pension plans, as well as participants in such plans.

Notice 2016-16, page 318.

Contributions to a § 401(k) or 401(m) retirement plan must not discriminate in favor of highly compensated employees. The nondiscrimination rules may be met through a safe harbor structure that includes limits on mid-year changes and a requirement to provide notice to plan participants. This guidance provides that certain types of mid-year changes do not violate these safe harbor rules. The guidance requires additional participant notice and election opportunities for some mid-year changes.

EXEMPT ORGANIZATIONS

Notice 2016-13, page 314.

This notice provides transition relief for section 529 qualified tuition programs that timely file a 2015 Form 1099-Q, Payments From Qualified Education Programs, that does not reflect the repeal of the aggregation requirement under section 529(c)(3)(D) of the Internal Revenue Code (Code) applicable to distributions from qualified tuition programs.

ADMINISTRATIVE

REG-134122-15, page 334.

The proposed regulation changes the user fee for the Enrolled Agent Special Enrollment Examination from \$11 per part to \$99 per part.

Notice 2016-14, page 315.

This notice provides guidance for fee year 2016 on how the definition of expatriate health plans under the Expatriate Health Coverage Clarification Act of 2014 applies for purposes of the fee imposed by § 9010 of the Affordable Care Act.

The IRS Mission

Provide America's taxpayers top-quality service by helping them understand and meet their tax responsibilities and enforce the law with integrity and fairness to all.

Introduction

The Internal Revenue Bulletin is the authoritative instrument of the Commissioner of Internal Revenue for announcing official rulings and procedures of the Internal Revenue Service and for publishing Treasury Decisions, Executive Orders, Tax Conventions, legislation, court decisions, and other items of general interest. It is published weekly.

It is the policy of the Service to publish in the Bulletin all substantive rulings necessary to promote a uniform application of the tax laws, including all rulings that supersede, revoke, modify, or amend any of those previously published in the Bulletin. All published rulings apply retroactively unless otherwise indicated. Procedures relating solely to matters of internal management are not published; however, statements of internal practices and procedures that affect the rights and duties of taxpayers are published.

Revenue rulings represent the conclusions of the Service on the application of the law to the pivotal facts stated in the revenue ruling. In those based on positions taken in rulings to taxpayers or technical advice to Service field offices, identifying details and information of a confidential nature are deleted to prevent unwarranted invasions of privacy and to comply with statutory requirements.

Rulings and procedures reported in the Bulletin do not have the force and effect of Treasury Department Regulations, but they may be used as precedents. Unpublished rulings will not be relied on, used, or cited as precedents by Service personnel in the disposition of other cases. In applying published rulings and procedures, the effect of subsequent legislation, regulations, court decisions, rulings, and procedures must be considered, and Service personnel and others concerned are cautioned

against reaching the same conclusions in other cases unless the facts and circumstances are substantially the same.

The Bulletin is divided into four parts as follows:

Part I.—1986 Code.

This part includes rulings and decisions based on provisions of the Internal Revenue Code of 1986.

Part II.—Treaties and Tax Legislation.

This part is divided into two subparts as follows: Subpart A, Tax Conventions and Other Related Items, and Subpart B, Legislation and Related Committee Reports.

Part III.—Administrative, Procedural, and Miscellaneous.

To the extent practicable, pertinent cross references to these subjects are contained in the other Parts and Subparts. Also included in this part are Bank Secrecy Act Administrative Rulings. Bank Secrecy Act Administrative Rulings are issued by the Department of the Treasury's Office of the Assistant Secretary (Enforcement).

Part IV.—Items of General Interest.

This part includes notices of proposed rulemakings, disbarment and suspension lists, and announcements.

The last Bulletin for each month includes a cumulative index for the matters published during the preceding months. These monthly indexes are cumulated on a semiannual basis, and are published in the last Bulletin of each semiannual period.

The contents of this publication are not copyrighted and may be reprinted freely. A citation of the Internal Revenue Bulletin as the source would be appropriate.

Part III. Administrative, Procedural, and Miscellaneous

Transition Relief for Certain Section 529 Qualified Tuition Programs Required to File Form 1099-Q, Payments From Qualified Education Programs (Under Sections 529 and 530)

Notice 2016-13

SECTION 1. PURPOSE

This notice provides transition relief for section 529 qualified tuition programs that timely file a 2015 Form 1099-Q, *Payments From Qualified Education Programs (Under Sections 529 and 530)*, that does not reflect the repeal of the aggregation requirement under section 529(c)(3)(D) of the Internal Revenue Code (Code) applicable to distributions from qualified tuition programs. Section 302(b) of the Protecting Americans from Tax Hikes Act of 2015 (the PATH Act), enacted on December 18, 2015, as part of the Consolidated Appropriations Act, 2016 (Pub. L. 114-113), repealed section 529(c)(3)(D) effective for distributions made after December 31, 2014.

In response to concerns expressed by section 529 qualified tuition programs about their inability to adjust their systems to retroactively accommodate the new method of calculating the earnings portion of a distribution before the due date of the 2015 Form 1099-Q, the Internal Revenue Service (IRS) will not impose penalties under section 6693 solely because of a reported earnings computation that does not reflect the repeal of section 529(c)(3)(D). This notice is limited to 2015 Forms 1099-Q required to be filed by February 29, 2016 (or March 31, 2016, if filed electronically). This notice does not provide penalty relief for any other failure that would cause a program to be subject to penalties under section 6693 or any other penalty under any provision of the Code.

This notice also provides information regarding the other changes made to section 529 by the PATH Act.

SECTION 2. BACKGROUND AND STATUTORY CHANGES

Under section 529, a State or its agency or instrumentality may establish or maintain a program that permits a person to prepay or contribute to an account for a designated beneficiary's qualified higher education expenses. In addition, an eligible educational institution may establish or maintain a program that permits a person to prepay a designated beneficiary's qualified higher education expenses. These programs are collectively referred to as "section 529 qualified tuition programs." If a distribution is used solely for qualified higher education expenses, the distribution (including any attributable earnings) is not subject to income tax. The PATH Act made three changes with regard to section 529 qualified tuition programs.

Expansion of definition of qualified higher education expenses. Under section 529(e)(3)(A), "qualified higher education expenses" include tuition, fees, books, supplies, and equipment required for the enrollment or attendance of a designated beneficiary at an eligible educational institution, and, in the case of a special needs beneficiary, expenses for special needs services that are incurred in connection with such enrollment or attendance. Qualified higher education expenses also include reasonable costs for room and board for students who are enrolled at least half-time. Effective beginning in 2015, the PATH Act amended section 529(e)(3)(A)(iii) to provide that qualified higher education expenses also include expenses for the purchase of computer or peripheral equipment (as defined in section 168(i)(2)(B)), computer software (as defined in section 197(e)(3)(B)), and Internet access and related services, if such equipment, software, or services are to be used primarily by the beneficiary during any of the years the beneficiary is enrolled at an eligible educational institution. Computer software designed for sports, games, or hobbies is qualified only when the software is predominantly educational in nature.

Computation of earnings. Under section 529(c)(3), to the extent distributions

from a section 529 qualified tuition program exceed a designated beneficiary's qualified higher education expenses, the earnings portion of the excess is includable in the gross income of the distributee in the manner provided under section 72. Prior to the repeal of section 529(c)(3)(D) by the PATH Act, section 529(c)(3)(D)(i) provided that, for purposes of applying section 72, all section 529 qualified tuition programs of which an individual is a designated beneficiary are treated as one program. Proposed regulations issued under section 529 provided that all accounts maintained by a section 529 qualified tuition program for the benefit of a designated beneficiary would be treated as a single account for purposes of calculating the earnings portion of any distribution. See Prop. Reg. section 1.529-3(d). In response to comments received regarding the proposed regulations, however, Notice 2001-81, 2001-2 C.B. 617, provided an interim rule that only accounts maintained within the same section 529 qualified tuition program and having the same account owner and the same designated beneficiary are aggregated for purposes of calculating the earnings portion of any distribution. The PATH Act repealed section 529(c)(3)(D) for distributions after December 31, 2014, eliminating the aggregation requirement.

Prior to their repeal, section 529(c)(3)(D)(ii) and (iii) provided that, for purposes of applying § 72, except as otherwise provided by the Secretary, all distributions during a taxable year are treated as one distribution and the value of the contract, earnings, and basis are computed as of the close of the calendar year in which the taxable year begins. Notice 2001-81 provided a modified rule that the earnings portion of each distribution is determined as of the date of distribution. This rule continues to apply.

Section 529(d) requires section 529 qualified tuition programs to make annual reports regarding contributions, distributions, and such other matters as the IRS may require. Notice 2001-81 instructs section 529 qualified tuition programs to use Form 1099-Q for reporting under section 529(d). These programs must report the amount of the gross distribution and

the portion of the gross distribution attributable to earnings on Form 1099-Q. These programs also must furnish a Form 1099-Q to distributees on or before January 31st of the year following the calendar year in which the distribution is made (February 1, 2016, in the case of 2015 Forms 1099-Q) and file the Form 1099-Q with the IRS on or before February 28 (February 29, 2016, in the case of 2015 Forms 1099-Q), or March 31 if filed electronically, of that same year. If a section 529 qualified tuition program required to file a Form 1099-Q fails to timely file the form, such program is subject to a \$50 penalty under section 6693 for each failure unless the failure is due to reasonable cause.

Recontribution of funds. The PATH Act also added new section 529(c)(3)(D) to address situations in which section 529 qualified tuition program funds are distributed for a beneficiary's qualified higher education expenses, but some portion of those expenses subsequently are refunded to the beneficiary. This could occur, for example, if the beneficiary dropped a class mid-semester. Section 529(c)(3)(D) now provides that the portion of a distribution refunded to the beneficiary of a section 529 qualified tuition program by an eligible educational institution is not subject to income tax to the extent that the refund is recontributed to a section 529 qualified tuition program of which the individual is a beneficiary not later than 60 days after the date of such refund. New section 529(c)(3)(D) applies to refunds received after December 31, 2014. The PATH Act included a transition rule, however, applicable to refunds received after 2014 but before the date of enactment. Specifically, those refunded distributions are exempt from income tax if they are recontributed to the beneficiary's section 529 qualified tuition program account not later than 60 days after the date of enactment of the PATH Act. Thus, amounts refunded in 2015 before December 18, 2015, must be recontributed no later than February 16, 2016.

SECTION 3. TRANSITION RELIEF

Due to concerns expressed by section 529 qualified tuition programs about their inability to adjust their systems to comply with the retroactive repeal of the aggrega-

tion requirement of section 529(c)(3)(D) and still timely satisfy their reporting requirement for the 2015 calendar year, the Treasury Department and the IRS are providing transition relief to enable these programs to timely file 2015 Forms 1099-Q and to furnish them to distributees without reflecting the repeal of section 529(c)(3)(D). Specifically, the IRS will not impose any penalty under section 6693 for Forms 1099-Q timely filed for the 2015 calendar year if, due solely to the aggregation rule change resulting from the repeal of section 529(c)(3)(D), the earnings are incorrectly reported in Box 2 or basis is incorrectly reported in Box 3 of a 2015 Form 1099-Q.

If a distributee with multiple accounts that were aggregated for purposes of calculating earnings for 2015 pursuant to this grant of transition relief for section 529 qualified tuition programs would prefer to have earnings computed for 2015 without aggregation, the distributee may request a corrected 2015 Form 1099-Q from the section 529 qualified tuition program that computes earnings for 2015 without aggregation. The program must furnish to the distributee, and file with the IRS, a corrected 2015 Form 1099-Q, if so requested, as soon as possible. See 2015 *General Instructions for Certain Information Returns (Forms 1097, 1098, 1099, 3921, 3922, 5498, and W-2G)*. For this purpose, the beneficiary's funds invested in different investment options under the program do not constitute separate "accounts".

A request for a corrected 2015 Form 1099-Q does not extend the due date for filing individual income tax returns for 2015. Taxpayers generally must file their income tax returns or request an extension by April 18, 2016 (April 19, 2016, for taxpayers living in Maine or Massachusetts).

SECTION 4. DRAFTING INFORMATION

The principal author of this notice is Peter A. Holiat of the Office of the Associate Chief Counsel (TEGE). For further information regarding this notice contact Mr. Holiat at 202-317-4541 (not a toll-free number).

Health Insurance Providers Fee; Procedural and Administrative Guidance Notice 2016-14

SECTION 1. PURPOSE

This notice provides guidance for fee year 2016 on how the definition of expatriate health plans under the Expatriate Health Coverage Clarification Act of 2014 applies for purposes of the fee imposed by § 9010 of the Affordable Care Act.

SECTION 2. BACKGROUND

Section 9010 of the Patient Protection and Affordable Care Act (PPACA), Public Law 111-148 (124 Stat. 119 (2010)), as amended by § 10905 of PPACA, and as further amended by § 1406 of the Health Care and Education Reconciliation Act of 2010, Public Law 111-152 (124 Stat. 1029 (2010)) (collectively, the Affordable Care Act or ACA), imposes an annual fee on covered entities engaged in the business of providing health insurance for United States health risks. The fee is a fixed amount allocated among all covered entities in proportion to their relative market share as determined by each entity's net premiums written for the data year, which is the year immediately preceding the year in which the fee is paid (the year in which the fee is paid is the fee year).

Section 9010(b)(3) requires the Secretary to calculate the amount of each covered entity's annual fee. For this purpose, § 9010(g)(1) requires each covered entity to report to the Secretary its net premiums written for health insurance for any United States health risk for the data year. Section 9010(d) defines United States health risk to mean a health risk of any individual who is: (1) a United States citizen; (2) a resident of the United States (within the meaning of § 7701(b)(1)(A)); or (3) located in the United States, during the period such individual is so located.

The Department of the Treasury (Treasury) and the Internal Revenue Service (IRS) published final Health Insurance Provider Fee regulations (T.D. 9643, 78 FR 71476) on November 26, 2013, to provide guidance regarding the § 9010 fee. The regulations require each covered entity to annually report its net premiums

written for health insurance of United States health risks by April 15th of the fee year on Form 8963, *Report of Health Insurance Provider Information*. Section 57.2(k) of the regulations defines “net premiums written” as “premiums written, including reinsurance premiums written, reduced by reinsurance ceded, and reduced by ceding commissions and medical loss ratio (MLR) rebates with respect to the data year.” For covered entities that file the Supplemental Health Care Exhibit (SHCE) with the National Association of Insurance Commissioners (NAIC), net premiums written for health insurance generally will equal the amount reported on the SHCE as direct premiums written minus MLR rebates with respect to the data year, subject to any applicable exclusions under § 9010.¹ Form 8963 accordingly requires reporting of direct premiums written for purposes of determining net premiums written. Section 57.4(b)(2) of the regulations provides that the entire amount reported as direct premiums written on the SHCE (including direct premiums written for expatriate health plans) will be considered to be for United States health risks unless the covered entity can demonstrate otherwise.

The Health Insurance Providers Fee regulations do not provide specific rules for expatriate health plans. The SHCE includes separate reporting for expatriate health plans, which are defined by reference to the definition of expatriate policies in the MLR final rule issued by the Department of Health and Human Services (MLR final rule definition). The MLR final rule definition defines expatriate policies as predominantly group health insurance policies that provide coverage to employees, substantially all of whom are: (1) working outside their country of citizenship; (2) working outside their country of citizenship and outside the employer’s country of domicile; or (3) non-U.S. citizens working in their home country. 45 CFR 158.120(d)(4).

On December 16, 2014, Congress enacted the Expatriate Health Coverage Clarification Act of 2014 (EHCCA) as

part of the Consolidated and Further Continuing Appropriations Act, 2015, Division M, Public Law 113–235 (128 Stat. 2130 (2014)). Section 3(a) of the EHCCA provides that the ACA generally does not apply to expatriate health plans. Section 3(c)(1) of the EHCCA specifically excludes expatriate health plans from the § 9010 fee by providing that, for calendar years after 2015, a qualified expatriate (and any spouse, dependent, or any other individual enrolled in the plan) enrolled in an expatriate health plan is not considered a United States health risk. These rules are generally effective for expatriate health plans issued or renewed on or after July 1, 2015, unless otherwise specified.

Section 3(c)(2) of the EHCCA provides a special rule that applied solely for purposes of determining the fee under § 9010 for fee years 2014 and 2015. The special rule did not affect the calculation of the fee generally for all covered entities. Instead, after the fees were calculated, the special rule proportionally reduced the fee of a covered entity with expatriate health plans to account for its net premiums written for those plans. Thus, for fee years 2014 and 2015, a covered entity with net premiums written for expatriate health plans paid a lower fee but this reduction had no impact on the fee for the remaining covered entities. By contrast, for fee years 2016 and beyond, the reduction for covered entities with net premiums written for expatriate health plans will affect the allocation of the fee among all covered entities.

Section 3(d)(2) of the EHCCA provides a definition of the term “expatriate health plan” that is more detailed than the MLR final rule definition of expatriate health policies. Treasury and the IRS determined that the MLR final rule definition of expatriate policies also used on the SHCE was sufficiently broad to cover potential expatriate health plans described in § 3(d)(2) of the EHCCA. Because guidance was needed to implement the special rule for fee years 2014 and 2015, on March 30, 2015, Treasury and the IRS issued Notice 2015–29, 2015–15 I.R.B.

873, to define expatriate health plan by reference to the MLR final rule definition solely for the limited purpose of the special rule for fee years 2014 and 2015.

On June 30, 2015, Treasury and the IRS, in consultation with the Department of Labor and the Department of Health and Human Services (referred to collectively as the Departments), issued Notice 2015–43, 2015–29 I.R.B. 73, to provide interim guidance, pending the publication of proposed regulations, on the application of certain ACA provisions to expatriate health insurance issuers, expatriate health plans, and employers in their capacity as plan sponsors of expatriate health plans, as defined in the EHCCA, including the definition of expatriate health plan in § 3(d)(2).

The interim guidance in Notice 2015–43 generally allows a taxpayer to apply the requirements of the EHCCA using a reasonable good faith interpretation of the EHCCA until further guidance is issued. However, that interim guidance does not apply to the § 9010 fee. Notice 2015–43 states that, for purposes of the § 9010 fee, Notice 2015–29 applies to the 2014 and 2015 fee years, and future guidance will address the 2016 and later fee years.

SECTION 3. GUIDANCE FOR FEE YEAR 2016

The Departments are developing proposed regulations under § 3(d)(2) of the EHCCA that will address the definition of an expatriate health plan. Because guidance is needed for the 2016 fee year on the definition of expatriate health plan in § 3(d)(2) of the EHCCA for purposes of § 3(c)(1) of the EHCCA, which excludes expatriate health plans from the § 9010 fee beginning in 2016, this notice provides that solely for this limited purpose the definition of expatriate health plan will be the same as provided in the MLR final rule definition. No inference is intended regarding the definition of expatriate health plan in § 3(d)(2) of the EHCCA for any other purpose, nor for purposes of the § 9010 fee for later years.

¹References to the SHCE are solely for the covered entity’s convenience in identifying the premium information required for Form 8963. If the entity does not file an SHCE with NAIC, the entity is still required to file Form 8963 and provide direct premiums written for health insurance of United States health risks on Form 8963 and any other information required by the form. Other sources of information for determining direct premiums written include the MLR Annual Reporting Form filed with the Center for Consumer Information and Insurance Oversight or any equivalent form required by the state of domicile of the entity or by federal law. If no single form contains all of the relevant data for determining all of the direct premiums written for health insurance for United States health risks of an entity, then direct premiums written must be determined using aggregated data from multiple sources.

SECTION 4. PROCEDURES FOR AMOUNTS REPORTED ON SHCE

.01 Filing Requirement.

If a covered entity (including controlled group members, if any) reported direct premiums written for expatriate health plans on its SHCE(s) for 2016, the covered entity must exclude those direct premiums written for expatriate health plans from the Direct Premiums Written column (f) on its 2016 Form 8963 and attach the reconciliation described in § 4.02 of this notice. For this limited purpose, an expatriate health plan means an expatriate policy under the MLR final rule definition described in § 2 of this notice.

.02 Reconciliation.

A covered entity described in § 4.01 of this notice must attach a statement to its 2016 Form 8963 certifying the following:

(1) The covered entity (or designated entity, in the case of a controlled group) filed the SHCE for 2016;

(2) The covered entity is filing the statement pursuant to Notice 2016–14;

(3) The aggregate dollar amount of direct premiums written for expatriate health plans reported on the SHCE(s) for 2016 for the covered entity (including the amounts for all members of the controlled group, if applicable) are excluded from direct premiums written reported in the Direct Premiums Written column (f) on the covered entity's 2016 Form 8963.

.03 Example.

The following example illustrates the application of this section 4:

Company X, the designated entity of a controlled group, and X's controlled group members (collectively, X Group) reported \$2 million in direct premiums written for expatriate health plans, in the aggregate, on their SHCEs and X Group excluded that amount from direct premiums written on its 2016 Form 8963. Company X attaches the following statement to its 2016 Form 8963:

Company X hereby certifies that:

(1) X Group filed SHCEs with the NAIC reporting direct premiums written for expatriate health plans in the 2016 fee year; (2) X Group is filing this statement pursuant to No-

tice 2016–14; (3) X Group is reporting an aggregate of \$2 million in direct premiums written for expatriate health plans on its 2016 SHCEs and has excluded that amount from direct premiums written in column (f) on the attached 2016 Form 8963.

The preceding example meets the requirements of § 4.02.

SECTION 5. PROCEDURES FOR AMOUNTS NOT REPORTED ON SHCE

.01 Filing Requirement.

If a covered entity (including controlled group members, if any) received direct premiums written for expatriate health plans in 2015 that were not reported on SHCEs for 2016, then the covered entity (including controlled group members, if any) must exclude direct premiums written for expatriate health plans from the Direct Premiums Written column (f) on its 2016 Form 8963 and attach the reconciliation described in § 5.02 of this notice. For this limited purpose, an expatriate health plan means an expatriate policy under the MLR final rule definition described in § 2 of this notice.

.02 Reconciliation.

A covered entity described in § 5.01 of this notice must attach a statement to its 2016 Form 8963 certifying the following:

(1) The covered entity is filing the statement pursuant to Notice 2016–14;

(2) The aggregate dollar amount of direct premiums written for expatriate health plans that met the MLR final rule definition that it excluded from the Direct Premiums Written column (f) on its 2016 Form 8963 (including the amounts for all members of the controlled group, if applicable); and

(3) The source of information that the covered entity has available on request for determining direct premiums written for expatriate health plans for 2016, such as the Accident and Health Policy Experience filed with the NAIC, the MLR Annual Reporting Form filed with the Center for Consumer Information and Insurance Oversight of the Department of Health and Human Services, or any similar statements filed with the NAIC, with any state government, or with the federal govern-

ment pursuant to applicable state or federal requirements.

.03 Example.

The following example illustrates the application of this section 4:

Company Y, the designated entity of a controlled group, and Y's controlled group members (collectively, Y Group) received \$20,000 in direct premiums written for expatriate health plans, in the aggregate, in 2015 and excluded this amount from its reporting of direct premiums written in column (f) on its 2016 Form 8963. Y Group did not file any SHCEs in 2016. Company Y attaches the following statement to its 2016 Form 8963.

Company Y hereby certifies that:

(1) Company Y is filing this statement pursuant to Notice 2016–14;

(2) Y Group excluded an aggregate of \$20,000 in direct premiums written for expatriate health plans that met the MLR final rule definition from its reporting of direct premiums written in column (f) on its 2016 Form 8963; and (3) Y Group expects to report for 2016 an aggregate of \$20,000 in direct premiums written for expatriate plans on Y Group's MLR Annual Reporting Form filed with the Center for Consumer Information and Insurance Oversight, which Y Group will supply upon request.

The preceding example meets the requirements of § 5.02.

SECTION 6. APPLICABILITY DATE

This notice applies to the 2016 fee year.

SECTION 7. PAPERWORK REDUCTION ACT

The collection of information contained in this notice has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1545-2249.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

The collection of information is in sections 4.02 and 5.02 of this notice. Collect-

ing the required information may provide covered entities with relief from a certain portion of the health insurance providers fee imposed by § 9010 of the ACA.

The estimated total annual reporting and/or recordkeeping burden is 4 hours.

The estimated annual burden per respondent and/or recordkeeper is .5 hours. The estimated total number of respondents and/or recordkeepers is 8.

The estimated frequency of collection of such information is annually.

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.

SECTION 8. DRAFTING INFORMATION

The principal author of this notice is Rachel S. Smith of the Office of Associate Chief Counsel (Passthroughs & Special Industries). For further information regarding this notice, please contact Ms. Smith at (202) 317-6855 (not a toll-free number).

Mid-Year Changes to Safe Harbor Plans and Safe Harbor Notices

Notice 2016-16

I. PURPOSE

This notice provides guidance on mid-year changes to a safe harbor plan under §§ 401(k) and 401(m) of the Internal Revenue Code. The notice provides that a mid-year change either to a safe harbor plan or to a plan's safe harbor notice does not violate the safe harbor rules merely because it is a mid-year change, provided that applicable notice and election opportunity conditions are satisfied and the mid-year change is not a prohibited mid-year change, as described in the notice. In addition, the notice requests comments on additional guidance that may be needed,

in particular with respect to mid-year changes to safe harbor plans in cases in which a plan sponsor is involved in a merger or acquisition.

II. BACKGROUND

A. Exemptions from ADP and ACP Testing for Safe Harbor Plans

Under general nondiscrimination rules, benefits under or contributions to a qualified plan must be nondiscriminatory in amount. Section 401(k) plans satisfy this requirement if elective contributions made on behalf of highly compensated employees ("HCEs") for a year satisfy the actual deferral percentage ("ADP") test. A similar actual contribution percentage ("ACP") test applies to matching contributions and employee contributions pursuant to § 401(m).

As an alternative to satisfying the annual ADP and ACP test, a plan may be structured to use a safe harbor plan design. For purposes of this notice, a "safe harbor plan" is a plan that includes a cash or deferred arrangement described in § 401(k)(12) (traditional § 401(k) safe harbor) or § 401(k)(13) (qualified automatic contribution arrangement ("QACA") 401(k) safe harbor), or a matching contribution described in § 401(m)(11) (traditional matching safe harbor) or § 401(m)(12) (QACA matching safe harbor).

For purposes of this notice, §§ 1.401(k)-3 and 1.401(m)-3 are referred to as the "safe harbor plan regulations." The safe harbor plan regulations set out requirements for a § 401(k) or 401(m) plan to be a safe harbor plan, including requirements regarding contributions, requirements that certain plan provisions remain in effect for a 12-month plan year (subject to certain exceptions), and requirements regarding the provision of safe harbor notices.

B. Safe Harbor Plan Provisions That Must Remain in Effect for Entire 12-Month Plan Year

Section 1.401(k)-3(e)(1) provides that a plan will fail to satisfy the requirements of §§ 401(k)(12) and 401(k)(13) and

§ 1.401(k)-3 unless plan provisions that satisfy the safe harbor plan rules of § 1.401(k)-3 are adopted before the first day of the plan year and remain in effect for an entire 12-month plan year. It also provides that a safe harbor plan that includes provisions that satisfy the safe harbor plan rules of § 1.401(k)-3 will not satisfy the nondiscrimination requirements for § 401(k) plans for a plan year if the safe harbor plan is amended to change those provisions during the plan year. Section 1.401(m)-3(f) includes similar provisions for matching safe harbor plans.

The safe harbor plan regulations set out several exceptions to the requirement that plan provisions satisfying the rules of §§ 1.401(k)-3 and 1.401(m)-3 be adopted before the first day of the plan year and continue for an entire 12-month plan year. These include exceptions for (i) a short first plan year, (ii) a change in the plan year, (iii) a short final plan year, (iv) a delayed adoption of safe harbor plan non-elective contributions (if notice of this possibility is provided before the beginning of the plan year), and (v) a mid-year reduction or suspension of safe harbor contributions (which results in loss of safe harbor plan status). See §§ 1.401(k)-3(e), (f), and (g) and 1.401(m)-3(f), (g), and (h).¹ In addition, exceptions to the prohibition against mid-year amendments may be provided in guidance of general applicability published in the Internal Revenue Bulletin. See §§ 1.401(k)-3(e) and 1.401(m)-3(f).

C. Safe Harbor Notice Requirements

The notice requirements applicable to traditional § 401(k) safe harbor plans are satisfied if each employee eligible to participate is given, within a reasonable period before any year, written notice of the employee's rights and obligations under the arrangement and the notice meets certain content and timing requirements. See § 401(k)(12)(D) and § 1.401(k)-3(d). Sections 401(k)(13)(E) and 401(m)(11)(A)(ii) impose similar notice requirements with respect to QACA and matching safe harbor plans. This notice refers to notices

¹Other guidance discussing mid-year changes to safe harbor plans includes: Ann. 2007-59, 2007-25 I.R.B. 1448 (certain hardship withdrawal changes and designated Roth contribution changes); Notices 2010-84, 2010-51 I.R.B. 872, and 2013-74, 2013-52 I.R.B. 819 (certain designated Roth contribution changes); and Notice 2014-37, 2014-24 I.R.B. 1100 (certain changes related to same sex spouses).

provided under these sections as “safe harbor notices.”

To meet the content requirements, a safe harbor notice must be sufficiently accurate and comprehensive to inform an employee of the employee’s rights and obligations under the plan, and written in a manner calculated to be understood by the average employee eligible to participate in the plan. Under the safe harbor plan regulations, a notice is not considered sufficiently accurate and comprehensive unless the notice accurately describes certain information specified in those regulations, including the plan’s safe harbor contributions, any other plan contributions, the type and amount of compensation that may be deferred under the plan, how to make cash or deferred elections (including any administrative requirements that apply to the elections), the plan’s withdrawal and vesting provisions, and specified contact information. See §§ 1.401(k)–3(d) and 1.401(m)–3(e). In addition to satisfying the general content requirements for a safe harbor notice, a safe harbor notice for a QACA must describe certain additional items, including the level of elective contributions that will be made on the employee’s behalf if the employee does not make an affirmative election and how contributions will be invested. See § 1.401(k)–3(k).

Requirements for providing safe harbor notices on a timely basis are set out in § 1.401(k)–3(d). A safe harbor notice generally must be provided within a reasonable period before the beginning of the plan year. Whether this timing requirement is met is based on all of the relevant facts and circumstances, but the timing requirement is deemed to be satisfied if a safe harbor notice is provided at least 30 days (and not more than 90 days) before the beginning of the plan year. Special timing rules apply for employees who become eligible during the plan year. These requirements for delivery of safe harbor notices also apply under § 1.401(m)–3(e). Section 1.401(k)–3(k) provides additional notice timing rules for QACAs.

D. Election Period after Receipt of Notice

The safe harbor plan regulations provide that a safe harbor plan generally may limit the frequency and duration of peri-

ods in which eligible employees may make or change cash or deferred elections under the plan, but require that an employee have a reasonable opportunity (including a reasonable period after receipt of a safe harbor notice) to make or change an election. For this purpose, a 30-day election period is deemed to be a reasonable period to make or change a cash or deferred election. See §§ 1.401(k)–3(c) and 1.401(m)–3(c).

III. GUIDANCE ON MID-YEAR CHANGES TO SAFE HARBOR PLANS AND NOTICES

A. Overview

Section III.B of this notice provides guidance on mid-year changes to a safe harbor plan or to a plan’s required safe harbor notice content that do not violate the safe harbor plan rules in §§ 1.401(k)–3 and 1.401(m)–3. For purposes of this notice, a “mid-year change” is (i) a change that is first effective during a plan year, but not effective as of the beginning of the plan year, or (ii) a change that is effective as of the beginning of the plan year, but adopted after the beginning of the plan year. Also, for purposes of this notice, “required safe harbor notice content” refers to the information that is required by the safe harbor plan regulations to be provided in a plan’s safe harbor notice.

Section III.C of this notice sets out special conditions that must be satisfied for a mid-year change that alters the plan’s required safe harbor notice content. Not every mid-year change to a safe harbor plan alters information required to be provided in a plan’s safe harbor notice (for example, information about a plan’s entry date is not required to be provided in a plan’s safe harbor notice). Similarly, information required to be included in a plan’s safe harbor notice can change mid-year even if no change is made to the safe harbor plan (for example, a change in contact information).

Section III.D of this notice lists prohibited mid-year changes, and section III.E of this notice provides examples illustrating certain aspects of the guidance provided under this notice.

B. Mid-Year Changes to Safe Harbor Plans and Notices

A change made to a safe harbor plan or to a plan’s required safe harbor notice content does not violate the requirements of §§ 1.401(k)–3 and 1.401(m)–3 merely because the change is a mid-year change, provided that (i) if it is a mid-year change to a plan’s required safe harbor notice content, the notice and election opportunity conditions in section III.C of this notice are satisfied, and (ii) the mid-year change is not described in the list of prohibited mid-year changes in section III.D of this notice.

The following mid-year changes are not subject to the provisions in the first paragraph of this section III.B, but instead would violate the requirements of §§ 1.401(k)–3 and 1.401(m)–3 unless the applicable regulatory conditions corresponding to each specified change are satisfied:

(i) Adoption of a short plan year or any change to the plan year (permitted only as described in §§ 1.401(k)–3(e)(2), (3), and (4) and 1.401(m)–3(f)(2), (3), and (4));

(ii) Adoption of safe harbor plan status on or after the beginning of the plan year (permitted only as described in §§ 1.401(k)–3(f) and 1.401(m)–3(g)); and

(iii) Reduction or suspension of safe harbor contributions or changes from safe harbor plan status to non-safe harbor plan status (permitted only as described in §§ 1.401(k)–3(g) and 1.401(m)–3(h)).

Other applicable law also may affect the permissibility of mid-year changes, including, for example, § 411(d)(6) (anti-cutback restrictions), § 401(a)(4) (nondiscrimination restrictions), and § 1.401(k)–1(b)(3) (anti-abuse provisions).

C. Conditions for Mid-Year Changes to a Plan’s Required Safe Harbor Notice Content

The notice and election opportunity conditions applicable to mid-year changes to a plan’s required safe harbor notice content (for purposes of applying the provisions in the first paragraph of section III.B of this notice) are described in paragraphs 1 and 2 of this section III.C. This notice does not require any additional notice or election opportunities for changes to information that is not required safe harbor

notice content, even if that information is provided in a plan's safe harbor notice. Also, this notice does not modify the rules governing information required to be included in a plan's safe harbor notice.

1. An updated safe harbor notice that describes the mid-year change and its effective date must be provided to each employee otherwise required to be provided a safe harbor notice under § 1.401(k)-3(d), 1.401(k)-3(k)(4), or 1.401(m)-3(e), as applicable, within a reasonable period before the effective date of the change. Whether this timing requirement is met is based on all of the relevant facts and circumstances, but this timing requirement is deemed to be satisfied if the updated safe harbor notice is provided at least 30 days (and not more than 90 days) before the effective date of the change. If it is not practicable for the updated safe harbor notice to be provided before the effective date of the change (for example, in the case of a mid-year change to increase matching contributions retroactively for the entire plan year, as described in section III.D.4 of this notice), the notice is treated as provided timely if it is provided as soon as practicable, but not later than 30 days after the date the change is adopted. For purposes of this section III.C, if the required information about the mid-year change and its effective date was provided with the pre-plan year annual safe harbor notice, an updated safe harbor notice is not required.

2. Each employee required to be provided an updated safe harbor notice under section III.C.1 of this notice must be given a reasonable opportunity (including a reasonable period after receipt of the updated notice) before the effective date of the mid-year change to change the employee's cash or deferred election (and/or any after-tax employee contribution election). For this purpose, a 30-day election period is deemed to be a reasonable period to make or change a cash or deferred election. If it is not practicable for the election opportunity to be provided before the effective date of the change (for example, in the case of a mid-year change to increase matching contributions retroactively for the entire plan year, as described in section III.D.4 of this notice), an employee is

treated as having a reasonable opportunity to make or change an election if the election opportunity begins as soon as practicable after the date the updated notice is provided to the employee, but not later than 30 days after the date the change is adopted.

D. Prohibited Mid-Year Changes

The mid-year changes described in this section III.D are prohibited mid-year changes (for purposes of the provisions in the first paragraph of section III.B of this notice). However, a mid-year change described in section III.D.1-4 is not a prohibited mid-year change under this section III.D if it is required by applicable law to be made mid-year, such as a change mandated by a statutory law change or court decision.

1. A mid-year change to increase the number of completed years of service required for an employee to have a nonforfeitable right to the employee's account balance attributable to safe harbor contributions under a QACA pursuant to the safe harbor rules under § 1.401(k)-3(k)(3) or 1.401(m)-3(a)(2).

2. A mid-year change to reduce the number or otherwise narrow the group of employees eligible to receive safe harbor contributions. This prohibition does not apply to an otherwise permissible change under eligibility service crediting rules or entry date rules made with respect to employees who are not already eligible (as of the date the change is either made effective or is adopted) to receive safe harbor contributions under the plan.

3. A mid-year change to the type of safe harbor plan, for example, a change from a traditional § 401(k) safe harbor plan to a QACA § 401(k) safe harbor plan.

4. A mid-year change (i) to modify (or add) a formula used to determine matching contributions (or the definition of compensation used to determine matching contributions) if the change increases the amount of matching contributions, or (ii) to permit discretionary matching contributions. However, this prohibition does not apply if, at least 3 months prior to the end of the plan year, the change is adopted and the updated safe harbor notice and election opportunity

are provided, and if the change is made retroactively effective for the entire plan year (which may require a plan that provides for periodic matching contributions as described in §§ 1.401(k)-3(c)(4) and (5)(ii) and/or 1.401(m)-3(d)(4) to be amended to provide for matching contributions based on the entire plan year).²

E. Examples

Example 1: The employer sponsoring Plan M, a traditional § 401(k) safe harbor plan, makes a mid-year plan amendment to increase future safe harbor nonelective contributions from 3% to 4% for all eligible employees. Employees otherwise required to be provided a safe harbor notice are provided both an updated notice that describes the increased contribution percentage and an additional election opportunity in accordance with section III.C of this notice. The mid-year change does not violate the provisions of §§ 1.401(k)-3 and 1.401(m)-3.

Example 2: The employer sponsoring Plan N, a traditional § 401(k) safe harbor plan, makes a mid-year plan amendment to decrease safe harbor nonelective contributions from 4% to 3% for all eligible employees. If the reduction meets the requirements of § 1.401(k)-3(g), the plan is no longer a safe harbor plan and is required to satisfy ADP testing or other nondiscrimination standards. If the reduction does not meet the requirements of § 1.401(k)-3(g), the plan as amended does not satisfy § 401(k)(3).

Example 3: The employer sponsoring Plan O, a traditional § 401(k) and traditional matching safe harbor plan with a calendar year plan year and match calculated on a payroll-period basis, makes a mid-year amendment on August 31 to increase the safe harbor matching contribution from 4% to 5% retroactive to January 1 and to amend the plan to change from a payroll-period match calculation to an entire-plan-year match calculation. Due to the retroactive effective date of the change, it is not practicable for the plan to provide an updated safe harbor notice and additional election opportunity to employees prior to the January 1 effective date. On September 3, the first date that an updated notice and additional election opportunity can practicably be provided, employees otherwise required to be provided a safe harbor notice are provided an updated notice that describes the increased contribution percentage and an additional 30-day election period starting September 3 in accordance with section III.C of this notice. The mid-year change does not violate the provisions of §§ 1.401(k)-3 and 1.401(m)-3.

Example 4: The employer sponsoring Plan P, a safe harbor plan, makes a mid-year amendment to add an age 59 ½ in-service withdrawal feature. Employees otherwise required to be provided a safe harbor notice are provided both an updated notice that describes the withdrawal feature and an additional election opportunity in accordance with section III.C of this notice. The mid-year change does

²As described in section III.B of this notice, adoption of safe harbor plan status on or after the beginning of the plan year is permitted only as described in §§ 1.401(k)-3(f) and 1.401(m)-3(g) and a mid-year change to reduce or suspend safe harbor contributions is permitted only as described in §§ 1.401(k)-3(g) and 1.401(m)-3(h).

not violate the provisions of §§ 1.401(k)-3 and 1.401(m)-3.

Example 5: The employer sponsoring Plan Q, a QACA safe harbor plan with multiple investment options, makes a mid-year change in the plan's default investment fund from Fund X to Fund Y. Employees otherwise required to be provided a safe harbor notice are provided both an updated notice that describes Fund Y as the default investment fund and an additional election opportunity in accordance with section III.C of this notice. The mid-year change does not violate the provisions of §§ 1.401(k)-3 and 1.401(m)-3.

Example 6: The employer sponsoring Plan R, a traditional § 401(k) safe harbor plan, makes a mid-year amendment to change the design to a QACA safe harbor plan. Section III.D.3 of this notice prohibits the change. The plan as amended does not satisfy § 401(k)(3). However, if the employer had made a mid-year amendment to add an automatic contribution feature (but not an amendment changing the design to a QACA safe harbor plan) and employees otherwise required to be provided a safe harbor notice had been provided both an updated notice that described the automatic contribution arrangement and an additional election opportunity in accordance with section III.C of this notice, then the mid-year change would not have violated the provisions of §§ 1.401(k)-3 and 1.401(m)-3.

Example 7: The employer sponsoring Plan S, a safe harbor plan, makes a mid-year amendment to change the entry date for commencement of participation of employees who meet the plan's minimum age and service eligibility requirements from monthly to quarterly. The amendment also changes plan rules regarding arbitration of disputes. The amendment is effective with respect to employees who are not already eligible to participate in the safe harbor plan. The safe harbor notice is not required to include the plan entry date or information on arbitration procedures; therefore, an updated notice and additional election opportunity are not required. The mid-year change does not violate the provisions of §§ 1.401(k)-3 and 1.401(m)-3.

IV. SECTION 403(b) PLANS

Section III of this notice applies on similar terms to § 403(b) plans that apply the § 401(m) safe harbor rules pursuant to § 403(b)(12).

V. COMMENTS

Comments are requested on additional guidance that may be needed with respect to mid-year changes to safe harbor plans. Specific comments are requested as to whether additional guidance is needed to address mid-year changes relating to plan sponsors involved in mergers and acquisitions or to plans that include an eligible automatic contribution arrangement under § 414(w).

Comments may be submitted in writing no later than April 28, 2016. Comments should be submitted to Internal Revenue Service, CC:PA:LPD:PR (Notice 2016-16), Room 5203, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044, or electronically to Notice.Comments@irs.counsel.treas.gov. Please include "Notice 2016-16" in the subject line of any electronic communications. Alternatively, comments may be hand delivered between the hours of 8:00 a.m. and 4:00 p.m. Monday to Friday to CC:PA:LPD:PR (Notice 2016-16), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW, Washington, D.C. All comments will be available for public inspection and copying.

VI. EFFECTIVE DATE

This notice is effective for mid-year changes made on and after January 29, 2016.

VII. EFFECT ON OTHER DOCUMENTS

Announcement 2007-59 is revoked.

VIII. PAPERWORK REDUCTION ACT

The collection of information contained in this notice has been reviewed

and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. § 3507) under control number 1545-2191.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

The collection of information in this notice is in section III of this notice. The collection of information relates to the updated notice requirements in the case of a mid-year change. The collection of information is mandatory for those plan sponsors making these elections.

The likely recordkeepers are businesses and other for-profit institutions and nonprofit institutions. Currently, it is estimated that any effect on burden, as previously reported to OMB, will not be significant. Any potential changes on burden will be reported through the renewal of the current OMB approval number. Estimates of the annualized cost to respondents are not relevant, because each collection of information in this notice is a one-time collection.

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 § 6103.

IX. DRAFTING INFORMATION

The principal author of this notice is Cynthia A. Van Bogaert of the Office of Associate Chief Counsel (Tax Exempt and Government Entities). For further information regarding this notice, contact Cynthia A. Van Bogaert at (202) 317-4102 (not a toll-free call).

Part IV. Items of General Interest

Notice of Proposed Rulemaking and Notice of Public Hearing

Nondiscrimination Relief for Closed Defined Benefit Pension Plans and Additional Changes to the Retirement Plan Nondiscrimination Requirements

REG-125761-14

AGENCY: Internal Revenue Service (IRS), Treasury.

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

SUMMARY: This document contains proposed regulations that modify the nondiscrimination requirements applicable to certain retirement plans that provide additional benefits to a grandfathered group of employees following certain changes in the coverage of a defined benefit plan or a defined benefit plan formula. The proposed regulations also make certain other changes to the nondiscrimination rules that are not limited to these plans. These regulations would affect participants in, beneficiaries of, employers maintaining, and administrators of tax-qualified retirement plans.

DATES: Written or electronic comments and must be received by April 29, 2016. Outlines of topics to be discussed at the public hearing scheduled for May 19, 2016 at 10 a.m., must be received by April 29, 2016.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG-125761-14), room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington D.C. 20044. Submissions may be hand-delivered Monday through Friday be-

tween the hours of 8 a.m. and 4 p.m. to: CC:PA:LPD:PR (REG-125761-14), 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-125761-14).

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, Kelly C. Scanlon and Linda S. F. Marshall at (202) 317-6700; concerning submissions of comments, the hearing, and/or being placed on the building access list to attend the hearing, Oluwafunmilayo (Funmi) Taylor at (202) 317-6901 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

Section 401(a)(4) provides generally that a plan is a qualified plan only if the contributions or benefits provided under the plan do not discriminate in favor of highly compensated employees. In 1991, the Treasury Department and the IRS issued comprehensive regulations under section 401(a)(4) (TD 8360, 56 FR 47524) setting forth several alternative methods for testing compliance with this statutory requirement. In 1993, the Treasury Department and the IRS made significant amendments to those regulations (TD 8485, 58 FR 46773).

Under the section 401(a)(4) regulations, a plan is permitted to demonstrate that either the contributions or the benefits provided under the plan are nondiscriminatory in amount, regardless of whether the plan is a defined benefit or defined contribution plan. See § 1.401(a)(4)-1(b)(2). In order to test a defined contribution plan on the basis of benefits, the amounts allocated to employees under the plan must be converted to equivalent benefits. This conversion is done using an interest rate between 7.5% and 8.5%.¹ In addition, for purposes of section 401(a)(4), a defined benefit plan and a

defined contribution plan are permitted to be aggregated and treated as a single plan pursuant to § 1.401(a)(4)-9, which refers to such an aggregated plan as a DB/DC plan.

After issuance of the final regulations, a new type of plan design developed. This type of plan is often referred to as a “new comparability” plan and is typically a defined contribution plan that provides higher allocation rates to an older and more highly compensated group of employees. This type of plan nonetheless satisfies the nondiscrimination requirements by testing the contributions on the basis of equivalent benefits because the conversion to equivalent benefits reflects assumed growth to normal retirement age and therefore results in relatively lower equivalent benefits for the highly compensated employees who are closer to normal retirement age. The Treasury Department and the IRS concluded that this type of plan was inconsistent with the intent behind the nondiscrimination regulations. Consequently, the Treasury Department and the IRS amended the section 401(a)(4) regulations in 2001 to require that a new comparability plan provide a higher minimum contribution to non-highly compensated employees² in order for the plan to be eligible to demonstrate compliance with the nondiscrimination requirements of section 401(a)(4) on the basis of equivalent benefits (TD 8954, 66 FR 34535) (the “2001 amendments”).

This higher minimum contribution requirement was directed at the new comparability plans. Other defined contribution plans that provide “broadly available allocation rates” or allocation rates that are “based on a gradual age or service schedule” are not subject to the higher minimum contribution requirement even if they demonstrate compliance with the nondiscrimination requirements of section 401(a)(4) on the basis of equivalent benefits.³ In addition, under the 2001 amendments, defined benefit replacement allocations (“DBRAs”) may be disregarded

¹See § 1.401(a)(4)-8(c)(2)(ii) and § 1.401(a)(4)-12 (definition of standard interest rate). This standard interest rate is used to determine assumed growth of a defined contribution plan account and to convert the projected account balance to an annuity at normal retirement age.

²This higher minimum contribution rate is required under § 1.401(a)(4)-8(b)(1)(i)(B)(3) and (b)(1)(vi).

³See § 1.401(a)(4)-8(b)(1)(i)(B)(I) and (2), (b)(1)(iii), and (b)(1)(iv).

when determining whether a defined contribution plan has broadly available allocation rates. The 2001 amendments also prescribe rules regarding DB/DC plans that provide for benefits in a manner similar to new comparability plans. Under these rules (contained in § 1.401(a)(4)–9(b)(2)(v)), in order for a DB/DC plan to be eligible to demonstrate compliance with the section 401(a)(4) nondiscrimination requirements on the basis of equivalent benefits, it must satisfy a minimum aggregate allocation gateway unless the DB/DC plan either fits within the definition of “primarily defined benefit in character” or consists of “broadly available separate plans.” This minimum aggregate allocation gateway requires a minimum allocation rate (or equivalent allocation rate) for each nonhighly compensated employee.

Since 2001, a number of employers have moved away from providing retirement benefits through traditional defined benefit plans. In many of these cases, employers have either significantly changed the type of benefit formula provided under the plan (such as in the case of a conversion to a cash balance plan), or have prohibited new employees from entering the plan entirely. The employers may then have allowed employees who had already begun participation in the defined benefit plan (or who are older or have been credited with longer service under the plan) to continue to earn pension benefits under the defined benefit plan while closing the plan or formula to all other employees. These defined benefit plans are sometimes referred to as “closed plans,” and the employees who continue to earn pension benefits under the closed plan are often known as a “grandfathered group of employees.” In situations in which new employees continue to earn benefits under the defined benefit plan, but are under a new formula, any formula that continues to apply to a grandfathered group of employees is sometimes referred to as a “closed formula.”

Closed plans are required to meet the coverage rules under section 410(b) and the nondiscrimination rules under section 401(a)(4) (including a nondiscrimination requirement regarding the availability of benefits, rights, and features). Many closed plans, however, may eventually find it difficult to meet these requirements because the proportion of the grandfathered group of employees who are highly compensated employees compared to the employer’s total workforce increases over time. This occurs because members of the grandfathered group of employees usually continue to receive pay raises (and so may become highly compensated employees), and new employees (who are generally nonhighly compensated employees) are not covered by the closed plan.

When a closed defined benefit plan can no longer meet the nondiscrimination requirements on a stand-alone basis because of the demographic changes previously described, it can demonstrate compliance with section 401(a)(4) by aggregating with the employer’s defined contribution plan. In general, it is easier to meet the nondiscrimination requirements if the resulting DB/DC plan demonstrates compliance with section 401(a)(4) based on the benefits or equivalent benefits provided to the employees (rather than based on contributions).

On January 6, 2014, the Treasury Department and the IRS published Notice 2014–5, 2014–2 I.R.B. 276. Notice 2014–5 provided temporary nondiscrimination relief for certain closed plans. Specifically, under Notice 2014–5, if certain criteria are satisfied,⁴ a plan sponsor is permitted to test a DB/DC plan that includes a closed plan that was closed before December 13, 2013, on a benefits basis for plan years beginning before January 1, 2016, without complying with the minimum aggregate allocation gateway, even if that would otherwise be required under the current regulations. Notice 2015–28, 2015–14 I.R.B. 848, extended that relief for an additional year by apply-

ing it to plan years beginning before 2017 provided that the conditions of Notice 2014–5 are satisfied.

Notice 2014–5 also requested comments on whether the section 401(a)(4) regulations should be amended to provide additional alternatives that would allow a DB/DC plan to satisfy the nondiscrimination in amount requirements on the basis of equivalent benefits, and whether certain other permanent changes should be made to the nondiscrimination regulations, such as modifications to the rules regarding nondiscriminatory benefits, rights, and features.⁵ The comments received in response to Notice 2014–5 generally supported these types of changes. In addition, all of the commenters requested permanent changes to the nondiscrimination requirements in order to make it easier for closed plans to continue to satisfy the nondiscrimination requirements.

The Treasury Department and the IRS agree that permanent changes to the nondiscrimination rules should be made in order to help employers and plan sponsors preserve the retirement expectations of certain grandfathered groups of employees. These changes are meant to apply to situations in which the proportion of the grandfathered group of employees who are highly compensated employees compared to the employer’s total workforce has increased due to ordinary demographic changes, as previously described in this preamble.

Explanation of Provisions

I. Overview

The proposed regulations modify a number of provisions in the existing regulations under section 401(a)(4) to address situations and plan designs, including closed plans and formulas, that were not contemplated in the development of the regulations and the 2001 amendments. While many of the changes in the proposed regulations provide nondiscrimina-

⁴Generally, in order to be eligible for the relief provided by Notice 2014–5, each defined benefit plan that is part of an aggregated DB/DC plan must have satisfied the requirements of section 401(a)(4) without using the minimum aggregate allocation gateway under § 1.401(a)(4)–9(b)(2)(v)(D). Thus, the defined benefit plan must have either been primarily defined benefit in character (within the meaning of § 1.401(a)(4)–9(b)(2)(v)(B)), consisted of broadly available separate plans (within the meaning of § 1.401(a)(4)–9(b)(2)(v)(C)), or satisfied the applicable nondiscrimination rules without being aggregated with a DC plan.

⁵Section 1.401(a)(4)–4 provides rules for determining whether the benefits, right, and features provided under a plan are made available in a nondiscriminatory manner. Under these rules, each benefit, right, or feature must satisfy the current availability requirement of § 1.401(a)(4)–4(b) (which requires testing of the group to which the benefit, right, or feature is currently available) and the effective availability requirement of § 1.401(a)(4)–4(c) (which requires that the group of employees to whom the benefit, right, or feature is effectively available must not substantially favor highly compensated employees).

tion relief for certain closed plans and formulas, the proposed regulations also include other changes that are not limited to closed plans and formulas.

II. Rules related to closed plans and similar arrangements

The proposed regulations set forth special rules that allow closed plans and similar arrangements to satisfy the nondiscrimination rules in additional situations. These special rules are based on the existing rules for DBRAs, as modified to respond to concerns raised by stakeholders with respect to those existing rules.

Under the proposed regulations, the eligibility conditions set forth in the modified DBRA rules (described in section II.A of this portion of the preamble) provide a framework for the eligibility conditions for the snapshot rule related to closed plans in a DB/DC plan (described in section II.B of this portion of the preamble). The modified DBRA rules are also used as a basis for the special testing rule for benefits, rights, and features provided to a grandfathered group of employees (described in section II.C of this portion of the preamble). For example, the special testing rule for a benefit, right, or feature provided to a grandfathered group of employees under a defined contribution plan establishes nondiscrimination relief for matching contributions provided to a grandfathered group of employees who formerly participated in a defined benefit plan that is intended to be consistent with the nondiscrimination relief provided by the modified DBRA rules for nonelective contributions provided to such a grandfathered group of employees.

A. Modifications to the DBRA rules under § 1.401(a)(4)–8

The proposed regulations modify the rules applicable to DBRAs under § 1.401(a)(4)–8, which allow certain defined contribution plan allocations to be disregarded when determining whether a defined contribution plan has broadly available allocation rates. The rules applicable to DBRAs allow employers to provide, in a nondiscriminatory manner, certain allocations to replace defined benefit plan retirement benefits without having to

satisfy the minimum aggregate allocation gateway. The modifications in the proposed regulations are intended to allow more allocations to fit within the DBRA rules. For example, under the existing regulations a DBRA must be reasonably designed to replace the benefits that would have been provided under the closed defined benefit plan. The proposed regulations provide greater flexibility in this respect and allow the allocations to be reasonably designed to replace some or all of the benefits that would have been provided under the closed plan, subject to a requirement that the allocations be provided in a consistent manner to all similarly situated employees.

The proposed regulations incorporate a modified version of the conditions for an allocation to be a DBRA that were reflected in Rev. Rul. 2001–30, 2001–2 C.B. 46. For example, under one of the conditions set forth in Rev. Rul. 2001–30, in order for an allocation to be a DBRA, the defined benefit plan’s benefit formula for the group of employees who formerly benefitted under that plan must have generated equivalent normal allocation rates that increased from year to year as employees attained higher ages. The proposed regulations ease this restriction on the types of defined benefit plans with respect to which a DBRA can be provided by allowing a DBRA also to replace the benefit provided under a defined benefit plan with a benefit formula that generated equivalent normal allocation rates that increased from year to year as employees were credited with additional years of service (rather than only as the employees attained higher ages).

The existing regulation also requires that the group of employees who receive a DBRA must be a nondiscriminatory group of employees, and Rev. Rul. 2001–30 interprets this rule as requiring that the group of employees satisfy the minimum coverage requirements of section 410(b) (determined without regard to the average benefit percentage test). The proposed regulations incorporate this interpretation, but limit its application so that the rule only applies for the first 5 years after the closure date. In addition, the proposed regulations incorporate the interpretation in Rev. Rul. 2001–30 regarding whether the defined benefit plan was an established

nondiscriminatory defined benefit plan by requiring that the closed plan be in effect for 5 years before the closure date (with one year substituted for 5 years, as provided by Rev. Rul. 2001–30, in the case of a defined benefit plan maintained by a former employer) with no substantial change to the closed plan during that time (except for certain permitted amendments allowed by the proposed regulations).

In addition, the proposed regulations expand the list of permitted amendments to a closed plan that do not prevent allocations under a plan from being DBRAs. For example, the proposed regulations permit an amendment to a closed plan during the 5-year period before it was closed, provided that the amendment does not increase the accrued benefit or future accruals for any employee, does not expand coverage, and does not reduce the ratio-percentage under any applicable nondiscrimination test. In addition, under the proposed regulations, an amendment during this period could extend coverage to an acquired group of employees provided that all similarly situated employees within that group are treated in a consistent manner.

As under the existing regulations, the proposed regulations contain a general restriction on plan amendments relating to a DBRA; however, the proposed regulations expand the list of plan amendments that are excepted from this rule. The proposed regulations retain the exception from this restriction on plan amendments for an amendment that makes *de minimis* changes in the calculation of a DBRA and for an amendment that adds or removes a “greater-of” plan provision (under which a participant receives the greater of the otherwise applicable allocation and the DBRA). In addition, the proposed regulations provide an exception from this restriction for any plan amendment modifying a DBRA that does not reduce the ratio percentage under any applicable nondiscrimination test.

B. Closed plan rule added to the plan aggregation and restructuring rules under § 1.401(a)(4)–9

The proposed regulations add a new exception to the requirement that a DB/DC plan must satisfy the minimum

aggregate allocation gateway once the other conditions under § 1.401(a)(4)–9 are not met (the “closed plan rule”). This closed plan rule, which applies to a DB/DC plan that includes a closed plan, provides an exception to the minimum aggregate allocation gateway that would otherwise apply, but only if the closed plan was in effect for 5 years before the closure date and no significant change was made to the closed plan during or since that time (except for certain permitted amendments).

The DB/DC plan may use this closed plan rule for a plan year that begins on or after the fifth anniversary of the closure date. To be eligible for the closed plan rule, during the 5-year period following the closure date, either the DB/DC plan must satisfy the nondiscrimination in amount requirement of section 401(a)(4) without using the minimum aggregate allocation gateway, or the closed plan must satisfy that requirement without aggregation with any defined contribution plan. This requirement is comparable to the requirement that the group of employees who receive DBRAs must be a group of employees who satisfy the minimum coverage requirements of section 410(b).

Under the proposed regulations, certain amendments to a closed defined benefit plan do not prevent the plan from using the closed plan rule. These plan amendments are intended to allow a plan sponsor of a closed plan to address changed circumstances. For example, under the proposed regulations, a plan amendment during the 5-year period ending on the closure date does not prevent the plan from later using the closed plan rule, provided that the plan amendment does not increase the accrued benefit or future accruals for any employee, does not expand coverage, and does not reduce the ratio percentage under any applicable nondiscrimination test. Similarly, an amendment to the closed plan is permitted after the closure date, provided that the amendment does not reduce the ratio percentage under any applicable nondiscrimination test. Thus, for example, under the proposed regulations, a plan sponsor may add non-highly compensated employees to a cov-

erage group after it is closed in order to satisfy the nondiscrimination rules. *De minimis* changes to the closed plan’s benefit formula are also permitted under the proposed regulations.

C. Special testing rule for the nondiscriminatory availability of a benefit, right, or feature provided to a grandfathered group of employees under § 1.401(a)(4)–4

The proposed regulations establish a special nondiscrimination testing rule under § 1.401(a)(4)–4 that applies if a benefit, right, or feature is made available only to a grandfathered group of employees with respect to a closed plan. This special rule provides relief in certain circumstances from certain nondiscrimination testing for a benefit, right, or feature provided under the closed plan, or for a rate of matching contributions provided to a grandfathered group under a defined contribution plan.

If the eligibility conditions are satisfied, the special testing rule treats a benefit, right, or feature that is provided only to a grandfathered group of employees as satisfying the current and effective availability tests of § 1.401(a)(4)–4(b) and (c). The special testing rule applies to plan years beginning on or after the fifth anniversary of the closure date and applies on a plan-year by plan-year basis. To be eligible for the special testing rule, the benefit, right or feature must be currently available to a group of employees that satisfies the minimum coverage requirements of section 410(b) for the plan years that begin within 5 years after the closure date. Once the special testing rule applies to a benefit, right, or feature, the special testing rule continues to apply for purposes of that benefit, right, or feature indefinitely (unless a later amendment changes the eligibility for the benefit, right, or feature). If a plan amendment changes the eligibility for the benefit, right, or feature after the closure date, then the special testing rule will cease to apply (subject to certain specified exceptions).

If the benefit, right, or feature that is available solely to a grandfathered group of employees is provided under a defined

benefit plan, then it must be provided under the closed plan (rather than a different defined benefit plan). This is because the purpose of the special rule is to accommodate a plan amendment under which the benefit formula has been changed, but the prior benefit formula has been preserved for a grandfathered group of employees and the benefit, right, or feature is made available only to the grandfathered group of employees who continue to accrue benefits under the prior benefit formula.⁶ Accordingly, the special testing rule is available only if the amendment restricting the availability of the benefit, right, or feature also resulted in a significant change in the type of the defined benefit plan’s formula. For example, a conversion to a cash balance plan would be a significant change in the type of benefit formula, so that the special testing rule would apply to facilitate preservation of any subsidized early retirement factors for the employees who continue to benefit under the prior benefit formula. By contrast, in the case of a benefit formula that determines benefits as a percentage of compensation, a change in that formula to reduce that percentage would not be considered a significant change in the type of benefit formula, even if the reduction is large.

The special testing rule for a benefit, right, or feature provided under the closed plan also requires that the benefit, right, or feature has been in effect without being amended for a 5-year period before the closure date (subject to a limited exception for acquired employees). This rule is designed to ensure that the special treatment is available only for a long-standing provision and cannot be used for a benefit, right, or feature that has not been provided long enough for participants to have established a reasonable expectation that it will continue. In addition, this rule prevents a plan sponsor from obtaining special treatment for a benefit, right, or feature added shortly before and in anticipation of the closure of the plan. The proposed regulations set forth a list of permitted plan amendments that do not result in the loss of this special testing rule that are generally comparable to the list of

⁶The existing regulations provide a special rule for current availability testing for a benefit, right, or feature that applies solely to benefits accrued before the amendment date. See § 1.401(a)(4)–4(d)(2).

permitted amendments for other closed plan arrangements.

The special testing rule also applies to a rate of matching contributions under a defined contribution plan that meets certain requirements. In order to be eligible for this testing rule, the rate of matching contributions must be reasonably designed so that the matching contributions will replace some or all of the value of the benefit accruals that each employee in the grandfathered group of employees would have been provided under the closed plan in the absence of a closure amendment. In addition, the rate of matching contributions for the grandfathered group of employees must be provided in a consistent manner to all similarly situated employees.

III. Modification of testing options under § 1.401(a)(4)–9 for DB/DC plans, including DB/DC plans that do not include a closed plan

In addition to providing a special rule for closed plans and similar arrangements, the proposed regulations generally ease the rules under which any DB/DC plan can satisfy the nondiscrimination in amount requirement on the basis of benefits. These changes are intended to facilitate the ongoing maintenance of a defined benefit plan that provides coverage to a group of employees that is determined using a reasonable business classification.

The proposed regulations expand the ability to use the average of the equivalent allocation rates under the defined benefit plan for purposes of satisfying the minimum aggregate allocation gateway by permitting the averaging of allocation rates for nonhighly compensated employees under the defined contribution plan for this purpose. This modification is intended to better accommodate plan sponsors that have a defined contribution plan with service- or age-based allocation formulas. The Treasury Department and the IRS have determined that it is appropriate, in this context, to allow shorter-service nonhighly compensated employees to be provided less than the minimum aggregate allocation gateway rate, as long as longer-

service nonhighly compensated employees are provided allocation rates that are sufficiently higher than the minimum aggregate allocation gateway rate. The Treasury Department and the IRS are considering whether any restrictions on this rule are appropriate so that the rule serves its intended purpose of facilitating formulas that provide higher allocation rates to longer-service nonhighly compensated employees, and invite comments on ways to permit appropriate flexibility while ensuring the provision is not used to circumvent the purpose of the nondiscrimination rules.

The proposed regulations also include a limitation on the averaging of rates that applies to both defined contribution and defined benefit plans in order to minimize the impact of outliers. In general, this special rule applies a cap under which any equivalent normal allocation rate or allocation rate in excess of 15% is treated as equal to 15%. However, this cap is raised to 25% for any allocation rate or equivalent normal allocation rate that results solely from a plan design providing allocation rates or generating equivalent normal allocation rates that are a function of age or service under which higher rates are provided to older or longer-service employees.

In addition, under the proposed regulations, the average of the matching contributions actually made for nonhighly compensated employees may be used to a limited extent (up to 3 percent of compensation) for purposes of determining whether each nonhighly compensated employee satisfies the minimum aggregate allocation gateway test. Thus, for example, if the minimum aggregate allocation gateway is 7% and the average of the matching contributions actually made for nonhighly compensated employees is 3%, then a non-elective contribution of 4% for each individual would be needed in order to satisfy the minimum aggregate allocation gateway under the proposed regulations. The regulations use the average matching contributions, rather than matching contributions allocated for each

employee, in order to avoid diluting the incentive effect of an employer match.

The proposed regulations also provide a new alternative to the minimum aggregate allocation gateway. Under this alternative, a DB/DC plan is not required to satisfy the minimum aggregate allocation gateway if it can satisfy the nondiscrimination in amount requirement on the basis of equivalent benefits using an interest rate of 6%, rather than the current standard interest rate of between 7.5% and 8.5%.

IV. Benefit formulas for individual employees or groups without a reasonable business purpose; modifications to the amounts testing rules under § 1.401(a)(4)–2 and § 1.401(a)(4)–3

The proposed regulations also include changes to address certain arrangements that take advantage of the flexibility in the existing nondiscrimination rules⁷ to provide a special benefit formula for selected employees without extending that formula to a classification of employees that is reasonable and is established under objective business criteria. A plan satisfies the minimum coverage requirements of section 410(b) if the plan's ratio percentage is 70% or higher or the plan satisfies the average benefit test. To satisfy the average benefit test, pursuant to § 1.410(b)–4, the group of employees must be determined using a classification that is reasonable and that is established under objective business criteria pursuant to § 1.410(b)–4(b) and must have a ratio percentage that is described in § 1.410(b)–4(c) (which includes safe harbor and unsafe harbor percentages). A classification of employees that is reasonable and is established under objective business criteria is referred to in this preamble as a "reasonable business classification." To the extent that a plan provides a special benefit formula and can still pass the nondiscrimination requirements, the plan sponsor can use a qualified retirement plan to provide benefits that would otherwise be provided under a nonqualified plan. These arrangements are sometimes referred to as

⁷Under the existing regulations, the nondiscrimination requirements of section 401(a)(4) and the coverage rules of section 410(b) are coordinated. The general test under the section 401(a)(4) regulations is applied by determining whether each rate group under the plan (that is, for each highly compensated employee, the group of employees with a benefit or contribution rate that is greater than or equal to the benefit or contribution rate for the highly compensated employee) satisfies section 410(b) as if it were a plan.

qualified supplemental executive retirement plans (or QSERPs).

Under the general test in the existing regulations, if a plan satisfies the minimum coverage requirements of section 410(b) using the average benefit percentage test, then the rate group for each highly compensated employee is treated as satisfying the minimum coverage requirements if the ratio percentage for the rate group is equal to the midpoint between the safe harbor and the unsafe harbor percentages (or the ratio percentage for the plan as a whole, if less). This rule recognizes that the composition of a rate group may be unpredictable and so the rate group should not be subject to a reasonable business classification standard. However, that same consideration is not relevant if the group of employees to whom the allocation formula under a defined contribution plan (or benefit formula under a defined benefit plan) applies is not a reasonable business classification.

Accordingly, the proposed regulations limit the existing rule under which a rate group with respect to a highly compensated employee is treated as satisfying the average benefit percentage test to those situations in which the allocation formula (or benefit formula) that applies to the highly compensated employee also applies to a reasonable business classification. For example, if a benefit formula applies solely to a highly compensated employee who is identified by name, it does not apply to a reasonable business classification. See § 1.410(b)-4(b). In such a case, the proposed regulations would require that the rate group with respect to that individual satisfy the ratio percentage test.

Proposed Applicability Date

Except as described below, these regulations are proposed to be applicable to plan years beginning on or after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**. Taxpayers are permitted to apply the provisions of these proposed regulations except for those described in section III of the Explanation of Provisions portion of the preamble for plan years beginning before this proposed applicability date, but not for plan years earlier than those beginning on or after

January 1, 2014. Accordingly, the ability to rely on a provision of these proposed regulations for periods prior to the proposed applicability date for these regulations applies to the disregard of certain defined benefit replacement allocations in cross-testing; the exception from the minimum aggregate allocation gateway with respect to certain closed plans; the special testing rule for benefits, rights, and features with respect to certain closed plans; and the rule applying the ratio percentage test to a rate group in the case of a benefit formula that does not apply to a reasonable business classification. Taxpayers may rely on these provisions (that is, the provisions that the proposed regulations would permit a taxpayer to apply before the proposed applicability date for these regulations) in order to satisfy the nondiscrimination requirements of section 401(a)(4) for plan years beginning on or after January 1, 2014, and until the corresponding final regulations become applicable.

Special Analyses

Certain IRS regulations, including this one, are exempt from the requirements of Executive Order 12866, as supplemented and reaffirmed by Executive Order 13563. Therefore, a regulatory impact 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, and because the regulation does not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Internal Revenue Code, these regulations have been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any comments that are submitted timely to the IRS as prescribed in this preamble under the “ADDRESSES” heading. Treasury and the IRS request comments on all aspects of the proposed rules, including the proposed

applicability date. Treasury and the IRS also request comments on the following issues:

- Whether guidance needs to be developed for a plan that has more than one closure or closure amendment?
- Whether the rules regarding transition allocations and successor employers are still needed in light of the modifications to the DBRA rules?

All comments will be available for public inspection and copying at www.regulations.gov or upon request.

A public hearing has been scheduled for May 19, 2016, beginning at 10 a.m. in the Auditorium, Internal Revenue Service, 1111 Constitution Avenue, N.W., Washington D.C. Because of building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Due to 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.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit written or electronic comments by April 28, 2016 and an outline of the topics to be discussed and the time to be devoted to each topic by April 28, 2016. A signed paper or electronic copy of the outline should be submitted as prescribed in this preamble under the “ADDRESSES” heading. 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.

Statement of Availability for IRS Documents

For copies of recently issued Revenue Procedures, Revenue Rulings, notices, and other guidance published in the Internal Revenue Bulletin, please visit the IRS website at <http://irs.gov>.

Drafting Information

The principal authors of these proposed regulations are Kelly C. Scanlon and Linda S. F. Marshall, IRS Office of Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the IRS and the Department of Treasury participated in the development of the proposed 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 in part as follows:

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

Par. 2. Section 1.401(a)(4)–0 is amended by:

- 1. Adding paragraph (c)(5) to the entry for § 1.401(a)(4)–2.
- 2. Adding paragraph (d)(8) to the entry for § 1.401(a)(4)–4.
- 3. Adding paragraph (a)(4) to the entry for § 1.401(a)(4)–13.

The additions read as follows:

§ 1.401(a)(4)–0 Table of contents.

* * * * *

§ 1.401(a)(4)–2 Nondiscrimination in amount of employer contributions under a defined contribution plan.

* * * * *

(c) * * *

(5) Effective/applicability date.

* * * * *

§ 1.401(a)(4)–4 Nondiscriminatory availability of benefits, rights, and features

* * * * *

(d) * * *

(8) Special testing rule for grandfathered group of employees.

* * * * *

§ 1.401(a)(4)–13 Effective dates and fresh-start rules.

(a) * * *

(4) Effective/applicability date.

* * * * *

Par. 3. Section 1.401(a)(4)–2 is amended by:

- 1. Revising paragraph (c)(3)(ii).
- 2. Revising *Examples 4* and *5* in paragraph (c)(4).
- 3. Adding *Examples 6* and *7* to paragraph (c)(4).
- 4. Adding paragraph (c)(5).

The revisions and additions read as follows:

§ 1.401(a)(4)–2 Nondiscrimination in amount of employer contributions under a defined contribution plan.

* * * * *

(c) * * *

(3) * * *

(ii) *Application of nondiscriminatory classification test.* A rate group satisfies the nondiscriminatory classification test of § 1.410(b)–4 if and only if—

(A) The formula that is used to determine the allocation for the HCE with respect to whom the rate group is established applies to a group of employees that satisfies the reasonable classification requirement of § 1.410(b)–4(b); and

(B) The ratio percentage of the rate group is greater than or equal to the midpoint between the safe and unsafe harbor percentages applicable to the plan (or the ratio percentage of the plan, if that percentage is less).

* * * * *

(4) * * *

Example 4. (a) The facts are the same as in *Example 3*, except that N4 has an allocation rate of 8.0 percent. In addition, the formula that is used to determine the allocation for H2 is the same formula that is used to determine the allocation for all other employees in Plan D.

(b) There are two rate groups in Plan D. Rate group 1 consists of H1 and all those employees who have an allocation rate greater than or equal to H1’s allocation rate (5.0 percent). Thus, rate group 1 consists of H1, H2 and N1 through N4. Rate group 2 consists of H2, and all those employees who have an allocation rate greater than or equal to H2’s allocation rate (7.5 percent). Thus, rate group 2 consists of H2 and N4.

(c) Rate group 1 satisfies the ratio percentage test under § 1.410(b)–2(b)(2) because the ratio percentage of the rate group is 100 percent—that is, 100 percent (the percentage of all nonhighly compen-

sated nonexcludable employees who are in the rate group) divided by 100 percent (the percentage of all highly compensated nonexcludable employees who are in the rate group).

(d) Rate group 2 does not satisfy the ratio percentage test of § 1.410(b)–2(b)(2) because the ratio percentage of the rate group is 50 percent—that is, 25 percent (the percentage of all nonhighly compensated nonexcludable employees who are in the rate group) divided by 50 percent (the percentage of all highly compensated nonexcludable employees who are in the rate group).

(e) However, under paragraph (c)(3)(ii) of this section rate group 2 satisfies the nondiscriminatory classification test of § 1.410(b)–4 because (i) the formula that is used to determine the allocation for H2 applies to a group of employees that satisfies the reasonable classification requirement of § 1.410(b)–4(b) (in this case, because it applies to all the employees) and (ii) the ratio percentage of the rate group (50 percent) is greater than the midpoint between the safe harbor and unsafe harbor percentages applicable to the plan under § 1.410(b)–4(c)(4) (40.5 percent).

(f) Under paragraph (c)(3)(iii) of this section, rate group 2 satisfies the average benefit percentage test if Plan D satisfies the average benefit percentage test. (The requirement that Plan D satisfy the average benefit percentage test applies even though Plan D satisfies the ratio percentage test and would ordinarily not need to run the average benefit percentage test.) If Plan D satisfies the average benefit percentage test, then rate group 2 satisfies section 410(b); thus, Plan D satisfies the general test in paragraph (c)(1) of this section because each rate group under the plan satisfies section 410(b).

Example 5. (a) Plan E satisfies section 410(b) by satisfying the nondiscriminatory classification test of § 1.410(b)–4 and the average benefit percentage test of § 1.410(b)–5 (without regard to § 1.410(b)–5(f)). See § 1.410(b)–2(b)(3). Plan E uses the facts-and-circumstances requirements of § 1.410(b)–4(c)(3) to satisfy the nondiscriminatory classification test of § 1.410(b)–4. The safe and unsafe harbor percentages applicable to the plan under § 1.410(b)–4(c)(4) are 29 and 20 percent, respectively. Plan E has a ratio percentage of 22 percent. Rate group 1 under Plan E has a ratio percentage of 23 percent. The formula that is used to determine the allocation for the HCE with respect to whom rate group 1 was formed applies to all other employees.

(b) Under paragraph (c)(3)(ii) of this section, rate group 1 satisfies the nondiscriminatory classification requirement of § 1.410(b)–4, because (i) the formula that is used to determine the allocation for the HCE with respect to whom the rate group was formed applies to a group of employees that satisfies the reasonable classification requirement of § 1.410(b)–4(b) (in this case, because it applies to all the employees) and (ii) the ratio percentage of the rate group (23 percent) is greater than the lesser of—

(1) The ratio percentage for the plan as a whole (22 percent); and

(2) The midpoint between the safe and unsafe harbor percentages (24.5 percent).

(c) Under paragraph (c)(3)(iii) of this section, the rate group satisfies section 410(b) because the plan

satisfies the average benefit percentage test of § 1.410(b)-5.

Example 6. (a) Employer Z maintains a defined contribution plan, Plan F. Employer Z has six non-excludable employees, all of whom benefit under Plan F. There is one HCE (H1) and five NHCEs (N1 through N5). There is one rate group under Plan F. The formula that is used to determine the allocation for H1 is the greater of \$20,000 or 10% of compensation for the year. The formula that applies to determine the allocation for N1 through N5 is 10% of compensation.

(b) Under paragraph (c)(3)(ii) of this section, the rate group with respect to H1 does not satisfy the nondiscriminatory classification test under § 1.410(b)-4 because the formula that is used to determine the allocation for H1 (with respect to whom the rate group is established) only applies to H1. Therefore, the rate group will satisfy paragraph (c)(3) of this section only if the ratio percentage of the rate group is greater than or equal to 70 percent. This ratio percentage test applies even if H1's compensation is greater than \$200,000. In such a case, the rate group will pass the ratio percentage test (and accordingly the plan will satisfy the general test of this paragraph (c)) because each employee receives an allocation of 10% of compensation and therefore the ratio percentage for the rate group is equal to 100%.

Example 7. The facts are the same as in *Example 6*, except that the classification of employees who are entitled to benefit under the formula that applies to H1 includes N1 and N2, who are identified by name. Under paragraph (c)(3)(ii) of this section, the rate group with respect to H1 does not satisfy the nondiscriminatory classification test under § 1.410(b)-4 because the classification of H1, N1 and N2 by name does not satisfy the reasonable classification requirement of § 1.410(b)-4(b). Therefore, the rate group with respect to H1 will satisfy paragraph (c)(3) of this section only if the ratio percentage of the rate group is greater than or equal to 70 percent.

(5) *Effective/applicability date.* See § 1.401(a)(4)-13(a)(4) for rules on the effective/applicability date of this paragraph (c).

Par. 4. In § 1.401(a)(4)-3, paragraph (c)(2) is revised to read as follows:

§ 1.401(a)(4)-3 Nondiscrimination in amount of employer-provided benefits under a defined benefit plan.

* * * * *
(c) * * *

(2) *Satisfaction of section 410(b) by a rate group.* For purposes of determining whether a rate group satisfies section 410(b), the rules of § 1.401(a)(4)-2(c)(3) apply except that § 1.401(a)(4)-2(c)(3)(ii)(A) is applied by substituting "benefit formula" for "formula that is used to determine the allocation." See paragraph (c)(4) of this section and

§ 1.401(a)(4)-2(c)(4), *Example 3* through *Example 6*, for examples of this rule. See § 1.401(a)(4)-13(a)(4) for rules on the effective/applicability date of this paragraph (c)(2).

* * * * *

Par. 5. In § 1.401(a)(4)-4, paragraph (d)(8) is added to read as follows:

§ 1.401(a)(4)-4 Nondiscriminatory availability of benefits, rights, and features.

* * * * *
(d) * * *

(8) *Special testing rule for grandfathered group of employees—(i) General rule.* For a plan year that begins on or after the fifth anniversary of the closure date with respect to a closed defined benefit plan, a benefit, right, or feature under a defined benefit or defined contribution plan that is available only to a grandfathered group of employees with respect to the closed defined benefit plan is treated as satisfying paragraphs (b) and (c) of this section for the plan year, provided that—

(A) No plan amendment that affects the availability of the benefit, right, or feature (other than the closure amendment) has an applicable amendment date (within the meaning of § 1.411(d)-3(g)(4)) that is within the period that begins on the closure date and ends on the last day of the plan year; and

(B) The additional requirements of paragraph (d)(8)(ii) or (iii) of this section, whichever is applicable, are satisfied.

(ii) *Additional requirements in the case of a benefit, right, or feature provided under a defined benefit plan.* If the benefit, right, or feature is provided under a defined benefit plan, then the following additional requirements apply—

(A) The defined benefit plan under which the benefit, right, or feature is provided is the closed defined benefit plan;

(B) No plan amendment that affects the availability of the benefit, right, or feature (other than the closure amendment) has an applicable amendment date that is within the 5-year period ending on the closure date; and

(C) The closure amendment that restricted the availability of the benefit, right, or feature, making it available only to the grandfathered group of employees,

must also have provided for a significant change in the type of benefit formula under the plan (such as a change from a benefit formula that is not a statutory hybrid benefit formula to a lump sum-based benefit formula).

(iii) *Additional requirements in the case of a benefit, right, or feature provided under a defined contribution plan.* If the benefit, right, or feature is provided under a defined contribution plan, then the following additional requirements apply—

(A) The benefit, right, or feature must be a right to a rate of matching contributions provided under the defined contribution plan;

(B) The rate of matching contributions must be reasonably designed so that the matching contributions will replace some or all of the value of the benefit accruals that each employee in the grandfathered group of employees would have been provided under the closed defined benefit plan in the absence of a closure amendment (based on the terms of that plan and the section 415(b)(1)(A) dollar limit in effect immediately prior to the closure date);

(C) The closed defined benefit plan must satisfy the conditions set forth in § 1.401(a)(4)-8(b)(1)(iii)(D)(3); and

(D) The rate of matching contributions must be provided in a consistent manner to all similarly situated employees.

(iv) *Certain amendments not taken into account.* For purposes of applying the rules under this paragraph (d)(8), the following plan amendments are not taken into account (and, in the case of an amendment described in paragraph (d)(8)(iv)(C) or (D) of this section, the rules of this paragraph (d)(8) are applied as if the benefit, right, or feature provided after the amendment were the benefit, right, or feature provided before the amendment):

(A) An amendment adopted during the 5-year period ending on the closure date that extends eligibility for the benefit, right, or feature to an acquired group of employees provided that all similarly situated employees within that group are treated in a consistent manner.

(B) An amendment adopted after the closure date that expands or restricts the eligibility for the benefit, right, or feature,

provided that, as of the applicable amendment date, the ratio percentage of the group of employees eligible for the benefit, right, or feature (taking into account the plan amendment) is not less than the ratio percentage of the group of employees eligible for the benefit, right, or feature provided before the amendment.

(C) An amendment adopted after the closure date that results in a replacement of the benefit, right, or feature with another benefit, right, or feature that is available to the same group of employees as the original benefit, right, or feature, provided that the original benefit, right, or feature is of inherently equal or greater value (within the meaning of paragraph (d)(4)(i)(A) of this section) than the benefit, right, or feature that replaces it.

(D) An amendment adopted after the closure date that results in a replacement of the benefit, right, or feature with another benefit, right, or feature that is available to the same group of employees as the original benefit, right, or feature, provided that there is only a *de minimis* difference between the amount payable under the original benefit, right, or feature and the amount payable under the benefit, right, or feature that replaces it.

(E) An amendment that is permitted by guidance published by the Commissioner in the Internal Revenue Bulletin.

(v) *Examples.* The following examples illustrate the rules in this paragraph (d)(8):

Example 1—(i) Pre-amendment defined benefit plan. Employer A maintains Plan P, a defined benefit plan that provides for an annual benefit equal to 2% of an employee's average annual compensation multiplied by the employee's years of service. Plan P also provides for a subsidized early retirement benefit available to employees who retire between the ages of 55 and 65 with 20 years of service. Plan P was established in 2003. The plan year is a calendar year. For the 2015 plan year, Plan P satisfied the nondiscrimination requirements under sections 410(b) and 401(a)(4) without regard to the special rules under section 410(b)(6)(C) and without aggregation with any other plan.

(ii) *Plan conversion amendment.* On November 1, 2015, Employer A amends Plan P to cease future accruals under its benefit formula effective as of the close of the plan year ending December 31, 2015 and to provide future benefit accruals under a cash balance formula. The cash balance formula provides for pay credits equal to 5% of compensation and annual interest credits at an interest crediting rate of 6%. Early retirement benefits payable with respect to benefits accrued under the cash balance formula are determined as the actuarial equivalent of the hypothetical account balance, determined using reason-

able actuarial assumptions that are specified in Plan P. Under the terms of the conversion amendment, an employee's benefit is equal to the employee's benefit under the prior benefit formula as of the close of the plan year ending December 31, 2015, plus the amount determined under the cash balance formula. However, any employee who had attained the age of 50 and had completed 15 years of service on or before December 31, 2015 is entitled to a plan benefit that is the greater of the benefit determined under the pre-amendment formula, or the benefit described in the prior sentence. Except for the closure amendment, there is no other plan amendment that affects the availability of Plan P's early retirement subsidy. No other significant change to Plan P's coverage or benefit formula is made with an applicable amendment date that is during the period beginning on January 1, 2011 and ending on December 31, 2015 (the 5-year period ending on the closure date).

(iii) *Applicability of special testing rule.* The plan conversion amendment is a closure amendment with a closure date of December 31, 2015. Plan P's subsidized early retirement benefit available solely to the grandfathered group of employees is a separate benefit, right, or feature that must be tested for current and effective availability under paragraphs (b) and (c) of this section. For a plan year that begins on or after January 1, 2021, Plan P's subsidized early retirement benefit is eligible for the relief provided by the special testing rule of this paragraph (d)(8) because all of the applicable requirements are satisfied. The requirement under paragraph (d)(8)(i)(A) of this section is satisfied because no other plan amendment that affects the availability of the subsidized early retirement benefit has an applicable amendment date that is on or after December 31, 2015. The additional requirements pertaining to a benefit, right, or feature provided under a defined benefit plan are also satisfied: the subsidized early retirement benefit is provided under a closed defined benefit plan as required by paragraph (d)(8)(ii)(A) of this section; no amendment that affected the availability of the subsidized early retirement benefit was made with an applicable amendment date during the 5-year period ending on the closure date as required by paragraph (d)(8)(ii)(B) of this section; and Plan P has undergone a significant change in benefit formula in connection with the closure amendment that resulted in a restriction on the availability of the subsidized early retirement benefit as required by paragraph (d)(8)(ii)(C) of this section.

Example 2—(i) Closure of defined benefit plan. The facts are the same as in *Example 1* of this paragraph (d)(8)(v), except that, instead of adopting a plan conversion amendment, Employer A amends Plan P to cease future accruals under the original benefit formula for all employees.

(ii) *Plan amendment to profit-sharing plan that provides enhanced rate of matching contributions.* Employer A has a profit-sharing plan that includes a qualified cash or deferred arrangement and matching contributions with respect to elective deferrals of up to 3% of compensation. On November 1, 2015, Employer A amends the plan to provide, effective January 1, 2016, for additional matching contributions of up to an additional 4% of compensation solely for employees who (1) were previously covered under the defined benefit plan, and (2) had

attained the age of 50 and had 15 years of service on or before December 31, 2015. This enhanced rate of matching contributions is reasonably designed so that the matching contributions will replace some or all of the value of the benefit accruals that would have otherwise been provided to this grandfathered group of employees under Plan P. Employer A makes no other change to this enhanced rate of matching contribution after the enhanced rate is established.

(iii) *Applicability of special testing rule.* The plan amendment is a closure amendment with a closure date of December 31, 2015. The enhanced rate of matching contribution that is available solely to the grandfathered group of employees is a separate benefit, right, or feature that must be tested for current and effective availability under paragraphs (b) and (c) of this section. For a plan year that begins on or after January 1, 2021, Plan P's enhanced rate of matching contribution is eligible for the relief provided by the special testing rule of this paragraph (d)(8) because all applicable requirements are satisfied. The requirement under paragraph (d)(8)(i)(A) of this section is satisfied because no change was made to the enhanced rate of match with an applicable amendment date that is on or after December 31, 2015. The following applicable additional requirements are also satisfied: the benefit, right, or feature provided under the defined contribution plan is a rate of matching contribution as required by paragraph (d)(8)(iii)(A) of this section; the enhanced rate of matching contribution is reasonably designed so that the matching contributions will replace some of the value of the benefit accruals that each employee in the grandfathered group of employees would have otherwise been provided under Plan P immediately prior to the closure date as required by paragraph (d)(8)(iii)(B) of this section; and the rate of matching contributions is provided in a consistent manner to all similarly situated employees as required by paragraph (d)(8)(iii)(D) of this section.

(iv) *Applicability of § 1.401(a)(4)–8(b)(1)(iii)(D)(3).* In addition to the requirements described in paragraph (iii) of this *Example 2*, Plan P meets the conditions for a closed defined benefit plan specified in § 1.401(a)(4)–8(b)(1)(iii)(D)(3) as required by paragraph (d)(8)(iii)(C) of this section because Plan P's prior benefit formula generated equivalent normal allocation rates that increased as employees attained higher ages; Plan P satisfied the minimum coverage and nondiscrimination requirements under sections 410(b) and 401(a)(4) without regard to the special rules under section 410(b)(6)(C) and without aggregating with any other plan for the plan year preceding the closure date; and Plan P was in effect for the five-year period ending on the closure date and neither the benefit formula nor the coverage of the plan was significantly changed during this period.

(vi) *Effective/applicability dates.* The rules of this paragraph (d)(8) apply to plan years beginning on or after the date of publication of the Treasury decision adopting these rules as final in the **Federal Register**. Taxpayers may apply the rules of this paragraph (d)(8) for plan

years beginning on or after January 1, 2014.

* * * * *

Par. 6. Section 1.401(a)(4)–8 is amended by:

1. Revising paragraphs (b)(1)(iii)(B) through (E).

2. Removing paragraph (b)(1)(iii)(F).

3. Adding paragraph (b)(1)(iv)(E).

The revisions and additions read as follows:

§ 1.401(a)(4)–8 *Cross-testing.*

* * * * *

(b) * * *

(1) * * *

(iii) * * *

(B) *Defined benefit replacement allocations disregarded.* In determining whether a plan has broadly available allocation rates for the plan year within the meaning of paragraph (b)(1)(iii)(A) of this section, the following rules in paragraphs (b)(1)(iii)(B)(1) and (2) of this section apply:

(1) If an employee receives a defined benefit replacement allocation (within the meaning of paragraph (b)(1)(iii)(D) of this section) for the plan year in addition to the employee's otherwise applicable allocation under the plan for the plan year, then the employee's allocation rate is determined without regard to the defined benefit replacement allocation.

(2) If an employee receives an allocation for the plan year that is the greater of the allocation for which the employee would otherwise be eligible and the defined benefit replacement allocation (within the meaning of paragraph (b)(1)(iii)(D) of this section), then the allocation for which the employee would otherwise be eligible is considered currently available to the employee, even if the employee's defined benefit replacement allocation is greater. See paragraph (b)(1)(iii)(C)(2) of this section for additional rules relating to "greater-of" plan provisions.

(C) *Plan provisions—(1) In general.* Plan provisions providing for defined benefit replacement allocations (within the meaning of paragraph (b)(1)(iii)(D) of this section) for the plan year must specify both the group of employees who are eligible for the defined benefit replacement

allocations and the amount of the defined benefit replacement allocations.

(2) *"Greater-of" plan provisions.* An allocation does not fail to be a defined benefit replacement allocation within the meaning of paragraph (b)(1)(iii)(D) of this section merely because the plan provides that each employee who is eligible for a defined benefit replacement allocation receives the greater of that allocation and the allocation for which the employee would otherwise be eligible under the plan.

(3) *Limited plan amendments.* Except as provided in paragraph (b)(1)(iii)(D)(5) of this section, an allocation is not a defined benefit replacement allocation within the meaning of paragraph (b)(1)(iii)(D) of this section for the plan year if the plan provisions relating to the allocation are amended after the date those plan provisions are both adopted and effective.

(D) *Defined benefit replacement allocation—(1) In general.* A defined benefit replacement allocation is an allocation under a defined contribution plan provided only to a grandfathered group of employees with respect to a closed defined benefit plan. An allocation is treated as a defined benefit replacement allocation if—

(i) The allocation satisfies the conditions to be a replacement allocation with respect to a closed defined benefit plan in paragraph (b)(1)(iii)(D)(2) of this section;

(ii) The closed defined benefit plan satisfies the conditions in paragraph (b)(1)(iii)(D)(3) of this section; and

(iii) For each plan year that begins before the fifth anniversary of the closure date of the closed defined benefit plan, the grandfathered group of employees is a nondiscriminatory group of employees within the meaning of paragraph (b)(1)(iii)(D)(4) of this section.

(2) *Replacement allocation.* An allocation is a replacement allocation with respect to a closed defined benefit plan under this paragraph (b)(1)(iii)(D)(2) if—

(i) The allocation is designed so that it is reasonably expected to replace some or all of the value of the benefit accruals that each employee in the grandfathered group of employees would have been provided under the closed defined benefit plan in the absence of a closure amendment (based on the terms of that plan and the

section 415(b)(1)(A) dollar limit in effect immediately prior to the closure date); and

(ii) The allocation is provided in a consistent manner to all similarly situated employees.

(3) *Closed defined benefit plan.* A closed defined benefit plan satisfies the conditions in this paragraph (b)(1)(iii)(D)(3) if—

(i) The closed defined benefit plan's benefit formula applicable to the grandfathered group of employees generated equivalent normal allocation rates that increased from year to year as employees attained higher ages or were credited with additional years of service;

(ii) The closed defined benefit plan satisfied the minimum coverage and nondiscrimination requirements under sections 410(b) and 401(a)(4) without regard to the special rules under section 410(b)(6)(C) and without aggregating with any other plan, for the plan year preceding the closure date; and

(iii) The closed defined benefit plan was in effect for the 5-year period ending on the closure date and neither the benefit formula nor the coverage of the plan was significantly changed by plan amendment with an effective date during this period.

(4) *Nondiscriminatory group of employees.* A group of employees is a nondiscriminatory group of employees for purposes of this paragraph (b)(1)(iii)(D)(4) if the group of employees satisfies section 410(b) for the plan year (without regard to § 1.410(b)–5).

(5) *Certain amendments not taken into account.* For purposes of determining whether the requirements of paragraphs (b)(1)(iii)(C)(3) and (b)(1)(iii)(D)(3) of this section are satisfied, the following plan amendments are not taken into account:

(i) An amendment to the closed defined benefit plan adopted during the 5-year period ending on the closure date, provided that the accrued benefit or future accruals for any employee are not increased, coverage is not expanded, and the amendment is not discriminatory within the meaning of paragraph (b)(1)(iii)(D)(6) of this section.

(ii) An amendment to the defined contribution plan under which the defined benefit replacement allocation is provided that makes *de minimis* changes in the cal-

ulation of that allocation (such as a change in the definition of compensation to include section 132(f) elective reductions).

(iii) An amendment to the defined contribution plan under which the defined benefit replacement allocation is provided that adds or removes a “greater-of” provision described under paragraph (b)(1)(iii)(C)(2) of this section.

(iv) An amendment to the defined contribution plan under which the defined benefit replacement allocation is provided that makes changes in the calculation of that allocation in a manner that is not discriminatory within the meaning of paragraph (b)(1)(iii)(D)(6) of this section.

(v) An amendment that guidance published by the Commissioner in the Internal Revenue Bulletin provides will not be taken into account.

(6) *Nondiscriminatory amendment—*

(i) *General rule.* An amendment to a plan is not discriminatory if the ratio percentage of the plan is not decreased as a result of the amendment and, in the case of a plan that demonstrates compliance with the nondiscrimination in amount requirement of § 1.401(a)(4)–1(b)(2) using a method other than a safe harbor test under § 1.401(a)(4)–2(b), § 1.401(a)(4)–3(b), or paragraph (b)(3) or (c)(3) of this section, the ratio percentage for the rate group with respect to any HCE is not decreased as a result of the amendment.

(ii) *Timing of nondiscrimination testing.* In determining whether the ratio percentage of the plan or the rate group is decreased as a result of an amendment, an amendment that is not in effect for an entire plan year is treated as if it were in effect for the entire plan year. In the case of an amendment that has separate portions with separate effective dates, each portion of the amendment is treated as a separate amendment that must satisfy the requirements of paragraph (b)(1)(iii)(D)(6)(i) of this section for the plan year in which it takes effect.

(7) *Special rules for former employers and acquired employees.* The following special rules apply in the case of former employers and acquired employees:

(i) If the closed defined benefit plan was sponsored by a former employer and not by the employer, then the rules in paragraph (b)(1)(iii)(D)(3)(ii) of this section

do not apply and one year is substituted for 5 years with respect to paragraph (b)(1)(iii)(D)(3)(iii) of this section;

(ii) An amendment adopted during the 5-year period ending on the closure date that extends the coverage or benefit formula of the closed defined benefit plan to an acquired group of employees may be applied (in addition to the amendments described in paragraph (b)(1)(iii)(D)(5) of this section) provided that all similarly situated employees within that group are treated in a consistent manner; and

(iii) If the employees of a former employer become the employees of the new employer as a result of a transaction that is a merger, acquisition, or similar event, then the transaction is treated as a closure amendment with respect to the former employer’s plan as of the effective date of the acquisition.

(E) *Effective/applicability date.* See § 1.401(a)(4)–13(a)(4) for rules on the effective/applicability date of this section.

(iv) * * *

(E) *Defined benefit replacement allocation may be disregarded.* In determining whether a plan has a gradual age or service schedule for the plan year within the meaning of paragraph (b)(1)(iv)(A) of this section, if an employee receives a defined benefit replacement allocation (within the meaning of paragraph (b)(1)(iii)(D) of this section) for the plan year, then the plan’s schedule is determined without regard to the defined benefit replacement allocation. For this purpose, the rules under paragraph (b)(1)(iii)(B) of this section apply. See § 1.401(a)(4)–13(a)(4) for rules on the effective/applicability date of this paragraph (b)(1)(iv)(E).

* * * * *

Par. 7. Section 1.401(a)(4)–9 is amended by:

1. Revising paragraphs (b)(2)(v)(A) and (b)(2)(v)(D)(3).
2. Adding paragraphs (b)(2)(v)(D)(4) and (5).
3. Redesignating paragraph (b)(2)(v)(F) as paragraph (b)(2)(v)(H).
4. Adding paragraphs (b)(2)(v)(F) and (b)(2)(v)(G).

The revisions and additions read as follows:

§ 1.401(a)(4)–9 *Plan aggregation and restructuring.*

* * * * *

(b) * * *

(2) * * *

(v) *Eligibility for testing on a benefits basis—(A) General rule—(1) In general.* Unless, for the plan year, a DB/DC plan is primarily defined benefit in character (within the meaning of paragraph (b)(2)(v)(B) of this section) or consists of broadly available separate plans (within the meaning of paragraph (b)(2)(v)(C) of this section), in order to be permitted to demonstrate satisfaction of the nondiscrimination in amount requirement of § 1.401(a)(4)–1(b)(2) on the basis of benefits, the DB/DC plan must satisfy the minimum aggregate allocation gateway (as described in paragraph (b)(2)(v)(D) of this section) except as provided in paragraph (b)(2)(v)(A)(2) of this section.

(2) *Additional testing options.* A DB/DC plan that is not eligible to demonstrate satisfaction of the nondiscrimination in amount requirement of § 1.401(a)(4)–1(b)(2) on the basis of benefits under paragraph (b)(2)(v)(A)(1) of this section is permitted to demonstrate satisfaction of that requirement on the basis of benefits if the DB/DC plan satisfies either the closed plan rule of paragraph (b)(2)(v)(F) of this section or the lower interest rate rule of paragraph (b)(2)(v)(G) of this section.

(3) *Effective/applicability date.* See § 1.401(a)(4)–13(a)(4) for rules on the effective/applicability date of this paragraph (b)(2)(v)(A).

* * * * *

(D) * * *

(3) *Averaging of rates for NHCEs—(i) Defined benefit plan.* For purposes of this paragraph (b)(2)(v)(D), a plan is permitted to treat each NHCE who benefits under a defined benefit plan that is part of the DB/DC plan as having an equivalent normal allocation rate equal to the average of the equivalent normal allocation rates under the defined benefit plan for all NHCEs benefitting under that plan.

(ii) *Defined contribution plan.* For purposes of this paragraph (b)(2)(v)(D), a plan is permitted to treat each NHCE who benefits under a defined contribution plan that is part of the DB/DC plan as having

an allocation rate equal to the average of the allocation rates under the defined contribution plan for all NHCEs benefitting under that plan.

(iii) *Limitations on the averaging of rates.* For purposes of applying paragraphs (b)(2)(v)(D)(3)(i) and (ii) of this section, any equivalent normal allocation rate or allocation rate in excess of 15% of plan year compensation is treated as being 15%. The preceding sentence is applied by substituting 25% for 15% each time it appears, but only if any allocation rate or equivalent normal allocation rate higher than 15% results solely from a plan design providing allocation rates or generating equivalent normal allocation rates that are a function of age or service under which higher rates are provided to older or longer-service employees.

(4) *Use of matching contributions.* For purposes of this paragraph (b)(2)(v)(D), if an NHCE is eligible for a matching contribution under a defined contribution plan that is part of the DB/DC plan, then the lesser of 3% and the average matching contribution percentage for the group of eligible NHCEs in that plan is permitted to be added to the allocation rate for that NHCE. For this purpose, the average matching contribution percentage for the group of eligible NHCEs in a plan is the actual contribution percentage (within the meaning of § 1.401(m)-5) for that group, determined without taking into account any employee contributions.

(5) *Effective/applicability date.* See § 1.401(a)(4)-13(a)(4) for rules on the effective/applicability date of this paragraph (b)(2)(v)(D).

* * * * *

(F) *Closed plan rule—(1) In general.* For a plan year that begins on or after the fifth anniversary of the closure date with respect to a closed defined benefit plan, a DB/DC plan that includes a closed defined benefit plan satisfies the closed plan rule of this paragraph (b)(2)(v)(F) for the plan year if—

(i) The closed defined benefit plan was in effect for the 5-year period ending on the closure date and neither the benefit formula nor the coverage of the plan was significantly changed by plan amendment (other than the closure amendment) with an effective date during the period that begins five years before the closure date

and ends on the last day of the plan year; and

(ii) For each plan year that begins on or after the closure date and before the fifth anniversary of the closure date, one of the requirements in paragraph (b)(2)(v)(F)(2) of this section is satisfied.

(2) *Testing for 5 years post-closure.* A DB/DC plan meets the requirements of this paragraph (b)(2)(v)(F)(2) if—

(i) Each defined benefit plan that is part of the DB/DC plan satisfies the nondiscrimination in amount requirement of § 1.401(a)(4)-1(b)(2) on the basis of benefits without aggregation with any defined contribution plan;

(ii) The DB/DC plan satisfies the nondiscrimination in amount requirement of § 1.401(a)(4)-1(b)(2) on the basis of contributions; or

(iii) The DB/DC plan satisfies the primarily defined benefit in character requirement of paragraph (b)(2)(v)(B) of this section, or the broadly available separate plans requirement of paragraph (b)(2)(v)(C) of this section.

(3) *Certain amendments not taken into account.* For purposes of this paragraph (b)(2)(v)(F), the following plan amendments are not taken into account:

(i) An amendment to the closed defined benefit plan adopted during the 5-year period ending on the closure date, provided that the accrued benefit or future accruals for any employee are not increased, coverage is not expanded, and the amendment is not discriminatory within the meaning of § 1.401(a)(4)-8(b)(1)(iii)(D)(6).

(ii) An amendment adopted during the 5-year period ending on the closure date that extends the benefit formula with respect to the closed defined benefit plan to an acquired group of employees provided that all similarly situated employees within that group are treated in a consistent manner.

(iii) An amendment to the closed defined benefit plan that is adopted after the closure date that is not discriminatory within the meaning of § 1.401(a)(4)-8(b)(1)(iii)(D)(6).

(iv) An amendment to the closed defined benefit plan that makes *de minimis* changes in the benefit formula.

(v) An amendment that guidance published by the Commissioner in the Internal

Revenue Bulletin provides will not be taken into account.

(G) *Lower interest rate rule.* A DB/DC plan satisfies the lower interest rate rule of this paragraph (b)(2)(v)(G) if the plan can demonstrate satisfaction of the nondiscrimination in amount requirement of § 1.401(a)(4)-1(b)(2) on the basis of benefits, provided that benefits are normalized using an interest rate of 6% rather than a standard interest rate.

* * * * *

Par. 8. In § 1.401(a)(4)-12, add definitions for *Closed defined benefit plan*, *Closure amendment*, *Closure date*, and *Grandfathered group of employees* in alphabetical order to read as follows:

§ 1.401(a)(4)-12 *Definitions.*

* * * * *

Closed defined benefit plan. Closed defined benefit plan means a defined benefit plan that has been amended to—

(1) Cease accruals under a benefit formula provided by the defined benefit plan for some or all employees whose benefits were previously determined under that benefit formula; or

(2) Limit participation in the defined benefit plan to a group of employees that consists of some or all of the plan participants who participated in the plan as of the closure date.

Closure amendment. A closure amendment is a plan amendment that results in a closed defined benefit plan.

Closure date. A closure date is the last day before accruals cease or participation is limited pursuant to the closure amendment.

* * * * *

Grandfathered group of employees. A grandfathered group of employees with respect to a closure amendment means the group of employees who, after the closure date, either continue accruals under the closed defined benefit plan's benefit formula or are entitled to an allocation formula under a defined contribution plan because those employees previously participated in the closed defined benefit plan.

* * * * *

Par. 9. In § 1.401(a)(4)-13, paragraph (a)(4) is added to read as follows:

§ 1.401(a)(4)-13 Effective dates and fresh-start rules.

(a) * * *

(4) *Effective/applicability date*—(i) *In general.* Except as otherwise provided in this paragraph (a)(4), the rules of § 1.401(a)(4)-2(c), § 1.401(a)(4)-3(c)(2), § 1.401(a)(4)-8(b), and § 1.401(a)(4)-9(b)(2)(v)(A) and (D) apply to plan years beginning on or after the date of publication of the Treasury decision adopting these rules as final in the **Federal Register**.

(ii) *Application for earlier plan years.* Except as provided in paragraph (a)(4)(iii) of this section, taxpayers may apply § 1.401(a)(4)-2(c), § 1.401(a)(4)-3(c)(2), § 1.401(a)(4)-8(b), or § 1.401(a)(4)-9(b)(2)(v)(A) and (D) for plan years beginning on or after January 1, 2014 and before the effective/applicability date specified under paragraph (a)(4)(i) of this section. Alternatively, for these plan years, taxpayers may apply § 1.401(a)(4)-2(c), § 1.401(a)(4)-3(c)(2), § 1.401(a)(4)-8(b), or § 1.401(a)(4)-9(b)(2)(v)(A) and (D) as contained in 26 CFR part 1 revised April 1, 2015.

(iii) *Certain rules not applicable until finalized.* The rules of § 1.401(a)(4)-9(b)(2)(v)(D)(3)(ii), (b)(2)(v)(D)(4), and (b)(2)(v)(G) are not permitted to be applied for plan years before the effective/applicability date specified in paragraph (a)(4)(i) of this section.

* * * * *

John Dalrymple,
*Deputy Commissioner
for Services and Enforcement.*

(Filed by the Office of the Federal Register on January 28, 2016, 8:45 a.m., and published in the issue of the Federal Register for January 29, 2016, 81 F.R. 4976)

Notice of Proposed Rulemaking and Notice of Public Hearing

Special Enrollment Examination User Fee for Enrolled Agents

REG-134122-15

AGENCY: Internal Revenue Service (IRS), Treasury.

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

SUMMARY: This document contains proposed amendments to the regulation relating to the user fee for the special enrollment examination to become an enrolled agent. The charging of user fees is authorized by the Independent Offices Appropriations Act (IOAA) of 1952. This document also contains a notice of public hearing on this proposed regulation.

The proposed regulation affects individuals taking the enrolled agent special enrollment examination.

DATES: Written or electronic comments must be received by February 24, 2016. Requests to speak and outlines of topics to be discussed at the public hearing scheduled for February 25, 2016, must be received by February 24, 2016.

ADDRESSES: Send submissions to: CC: PA:LDP:PR (REG-134122-15), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered between the hours of 8 a.m. and 4 p.m. to CC:PA:LDP:PR (REG-134122-15), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC, or sent via the Federal eRulemaking Portal at www.regulations.gov (IRS REG-134122-15). The public hearing will be held in the IRS Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC.

FOR FURTHER INFORMATION

CONTACT: Concerning this proposed regulation, Jonathan R. Black, (202) 317-6845; concerning submissions of comments and/or requests for a hearing, Regina Johnson (202) 317-6901 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background and Explanation of Provisions

Section 330 of title 31 of the United States Code authorizes the Secretary of the Treasury to regulate the practice of representatives before the Treasury Department. Pursuant to section 330 of title 31, the Secretary has published regula-

tions governing practice before the IRS in 31 CFR part 10 and reprinted the regulations as Treasury Department Circular No. 230 (Circular 230). Circular 230 is administered by the IRS Office of Professional Responsibility (OPR).

Section 10.4(a) of Circular 230 authorizes the IRS to grant status as enrolled agents to individuals who demonstrate special competence in tax matters by passing a written examination (Enrolled Agent Special Enrollment Examination (EA-SEE)) administered by, or under the oversight of, the IRS and who have not engaged in any conduct that would justify suspension or disbarment under Circular 230. Starting in 2006, the IRS engaged the services of a third-party contractor to develop and administer the EA-SEE.

After becoming enrolled, an enrolled agent must, as provided in § 10.6(d), renew enrollment every three years to maintain active enrollment and to be able to practice before the IRS. To qualify for renewal, an enrolled agent must certify the completion of the continuing education requirements set forth in § 10.6(e). There are currently approximately 55,600 enrolled agents.

The EA-SEE is comprised of three parts, which are offered in a testing period that begins each May 1 and ends the last day of the following February. The EA-SEE is not available in March and April, during which period it is updated to reflect changes in the relevant law. When it determined the current fee, the IRS estimated that individuals would take 34,000 parts of the EA-SEE each year. That number of parts has not been reached in any year. In the testing periods beginning in 2012, 2013, and 2014, the contractor administered approximately 18,900, 19,500, and 22,400 parts of the EA-SEE, respectively. During the testing period beginning May 2016, the IRS estimates that individuals taking the EA-SEE will take 20,000 parts. More information on the EA-SEE, including content, scoring, and how to register, can be found on the IRS Web site at www.irs.gov/Tax-Professionals/Enrolled-Agents/.

The Independent Offices Appropriations Act (IOAA) of 1952, which is codified at 31 U.S.C. 9701, authorizes agencies to prescribe regulations that establish charges for services they provide. These

charges include user fees. The charges must be fair and must be based on the costs to the government, the value of the service to the recipient, the public policy or interest served, and other relevant facts. The IOAA provides that regulations implementing user fees are subject to policies prescribed by the President, which are currently set forth in the Office of Management and Budget Circular A-25, 58 FR 38142 (July 15, 1993) (the OMB Circular). The OMB Circular encourages user fees for government-provided services that confer benefits on identifiable recipients over and above those benefits received by the general public. Under the OMB Circular, an agency that seeks to impose a user fee for government-provided services must calculate the full cost of providing those services. In general, a user fee should be set at an amount that allows the agency to recover the full cost of providing the special service, unless the Office of Management and Budget grants an exception.

As discussed above, Circular 230 § 10.4(a) provides that IRS will grant enrolled agent status to an applicant if the applicant, among other things, demonstrates special competence in tax matters by written examination. The EA-SEE is the written examination that tests special competence in tax matters for purposes of that provision, and an applicant must pass all parts of the EA-SEE to be granted enrolled agent status through written examination. The IRS confers a benefit on individuals who take the EA-SEE beyond those that accrue to the general public by providing them with an opportunity to demonstrate special competence in tax matters by passing a written examination and therefore satisfying one of the requirements for becoming an enrolled agent under Circular 230 § 10.4(a). Because the opportunity to take the EA-SEE is a special benefit, IRS charges a user fee to take the examination.

Pursuant to the guidelines in the OMB Circular, the IRS has calculated its cost of providing examination services under the enrolled agent program. The proposed user fee will be implemented under the authority of the IOAA and the OMB Circular and will recover the full cost of overseeing the program. The current user fee is \$11 to take each part of the EA-

SEE. The contractor who administers the EA-SEE also charges individuals taking the EA-SEE an additional fee for its services. For the May 2015 to February 2016 testing period, the contractor's fee is \$98 for each part of the EA-SEE.

Increased costs incurred by the IRS to implement the EA-SEE program require an increase in the EA-SEE user fee. These increased costs are primarily attributable to the following: (1) The cost for background checks required under Publication 4812, "Contractor Security Controls," for individuals working at the contractor's testing centers increased by \$270,000 per year; (2) the IRS estimates that the contractor will administer 14,000 fewer parts of the EA-SEE per year than the estimated number used to calculate the \$11 fee, and the total costs are therefore being recovered from fewer individuals; and (3) the IRS's costs of verifying the contractor's compliance with the information technology security requirements necessary to protect the personally identifiable information of individuals taking the EA-SEE have increased, because Publication 4812 has strengthened those requirements.

In addition, IRS original estimates of the cost to oversee the contract did not cover all the work the IRS now performs. The proposed fee more accurately accounts for the time and personnel necessary to oversee the development and administration of the EA-SEE and to ensure the contractor complies with the terms of its contract. IRS costs for oversight include costs associated with: (1) Review and approval of materials used by the contractor in developing the EA-SEE; (2) review of surveys of existing enrolled agents, which help to determine the topics to be covered in the EA-SEE; (3) composition of potential EA-SEE questions in coordination with the contractor's external tax law experts; (4) Office of Chief Counsel review and revision of the potential questions for legal accuracy; and (5) analysis of the answers and raw scores of a testing population to determine what should be a passing score.

Further, IRS personnel ensure the contractor's compliance with its contract by reviewing the work of the contractor using an annual Work Breakdown Structure—a project management tool—and reviewing and verifying that the contractor is in

compliance with its Quality Assurance Plan regarding customer satisfaction and accuracy. The IRS incurs additional costs associated with resolution of test-related issues such as cheating incidents, appeals regarding scores, refund requests, and customer service complaints that have not been resolved at the contractor level.

Taking into account the full amount of these costs, the user fee for the EA-SEE is proposed to be increased to \$99 per part.

Special Analyses

Certain IRS regulations, including this one, are exempt from the requirements of Executive Order 12866, as supplemented and reaffirmed by Executive Order 13563. 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 this proposed regulation.

Pursuant to the Regulatory Flexibility Act (5 U.S.C. chapter 6), it is hereby certified that this proposed regulation, if adopted, would not have a significant economic impact on a substantial number of small entities because it primarily affects individuals who take the enrolled agent examination and does not directly affect small entities. Accordingly, a regulatory flexibility analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, this notice of proposed rule-making has been 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 this proposed regulation is adopted as a final regulation, consideration will be given to any comments that are submitted timely to the IRS as prescribed in the preamble under the ADDRESSES section. The Treasury Department and the IRS request comments on all aspects of the proposed regulation. All comments submitted will be made available at www.regulations.gov or upon request.

A public hearing has been scheduled for February 25, 2016, beginning at 10:00 a.m. in the IRS Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC. Due to building security procedures, visitors must enter at

the Constitution Avenue entrance. 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.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit written or electronic comments and an outline of the topics to be discussed and the time to be devoted to each topic by February 24, 2016. A period of 10 minutes will be allocated 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 this regulation is Jonathan R. Black of the Office of the Associate Chief Counsel (Procedure and Administration).

* * * * *

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 300 is proposed to be amended as follows:

PART 300—USER FEES

Paragraph 1. The authority citation for part 300 continues to read as follows:

Authority: 31 U.S.C. 9701.

Par. 2. Section 300.4 is amended by revising paragraphs (b) and (d) to read as follows:

§ 300.4 Enrolled agent special enrollment examination fee.

* * * * *

(b) *Fee.* The fee for taking the enrolled agent special enrollment examination is \$99 per part, which is the cost to the government for overseeing the development and administration of the examina-

tion and does not include any fees charged by the administrator of the examination.

* * * * *

(d) *Effective/applicability date.* This section applies on and after the date of publication of a Treasury decision adopting this rule as a final regulation in the **Federal Register**.

Karen M. Schiller,

*Acting Deputy Commissioner
for Services and Enforcement.*

(Filed by the Office of the Federal Register on January 25, 2016, 8:45 a.m., and published in the issue of the Federal Register for January 26, 2016, 81 F.R. 4221)

Notice of Proposed Rulemaking Applicability of Normal Retirement Age Regulations to Governmental Pension Plans

REG-147310-12

AGENCY: Internal Revenue Service (IRS), Treasury

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations under section 401(a) of the Internal Revenue Code (Code). These regulations would provide rules relating to the determination of whether the normal retirement age under a governmental plan (within the meaning of section 414(d) of the Code) that is a pension plan satisfies the requirements of section 401(a) and whether the payment of definitely determinable benefits that commence at the plan's normal retirement age satisfies these requirements. These regulations would affect sponsors and administrators of governmental pension plans, as well as participants in such plans.

DATES: Comments and requests for a public hearing must be received by April 26, 2016.

ADDRESSES: Send submissions to CC: PA:LPD:PR (REG-147310-12), room 5205, Internal Revenue Service, PO Box

7604, Ben Franklin Station, Washington DC 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-147310-12), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC, 20224, or sent electronically via the Federal eRulemaking Portal at www.regulations.gov (IRS REG-147310-12).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Pamela Kinard at (202) 317-4148 or Robert Walsh at (202) 317-4102; concerning the submission of comments or to request a public hearing, Oluwafunmilayo (Funmi) Taylor, (202) 317-7180 or (202) 317-6901 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

I. Normal Retirement Age Generally

This document contains proposed regulations under section 401(a) of the Internal Revenue Code (Code). Section 401(a) sets forth the qualification requirements for a trust forming part of a stock bonus, pension, or profit-sharing plan of an employer. Several of these qualification requirements are based on a plan's normal retirement age, including the regulatory interpretation of the requirement that the plan provide for definitely determinable benefits (generally after retirement). Final regulations defining normal retirement age for the definitely determinable requirement were published in the **Federal Register** as TD 9325 on May 22, 2007 (72 FR 28604) (2007 NRA regulations).

Section 1.401(a)-1(b)(1) of the 2007 NRA regulations generally requires that a pension plan be established and maintained primarily to provide systematically for the payment of definitely determinable benefits over a period of years, usually for life, after retirement. The 2007 NRA regulations include two exceptions to the general rule that payments commence after retirement: (1) Payments can commence after attainment of normal retirement age; and (2) in accordance with section 401(a)(36), payments can commence after an employee reaches age 62.

Section 1.401(a)-1(b)(2)(i) of the 2007 NRA regulations provides that, as a gen-

eral rule, a normal retirement age under a pension plan must be an age that is not earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed (reasonably representative requirement). Section 1.401(a)–1(b)(2)(ii) of the 2007 NRA regulations provides that a normal retirement age of age 62 or later is deemed to satisfy the reasonably representative requirement. Under section 1.401(a)–1(b)(2)(iii) of the 2007 NRA regulations, whether a normal retirement age that is not earlier than age 55 but is below age 62 satisfies the reasonably representative requirement is based on a facts and circumstances analysis. Section 1.401(a)–1(b)(2)(iv) of the 2007 NRA regulations provides that a normal retirement age that is lower than age 55 is presumed not to satisfy the reasonably representative requirement unless the Commissioner determines otherwise on the basis of facts and circumstances. Under § 1.401(a)–1(b)(2)(v) of the 2007 NRA regulations, in the case of a pension plan in which substantially all of the participants are qualified public safety employees (within the meaning of section 72(t)(10)(B)), a normal retirement age of age 50 or later is deemed to satisfy the reasonably representative requirement.

As previously explained, normal retirement age is used by a pension plan in a variety of circumstances relating to plan qualification. Generally, in the case of a pension plan that is not a governmental plan under section 414(d) and is subject to the rules of section 411(a) through (d), normal retirement age is used in applying the rules under section 411(b) that are designed to preclude avoidance of the minimum vesting standards through the backloading of benefits (such as a benefit formula under which the rate of benefit

accrual is increased disproportionately for employees with longer service). Normal retirement age is also relevant for such a plan for other purposes, including the application of the rules relating to suspension of benefits under section 411(a)(3)(B), plan offset rules under section 411(b)(1)(H)(iii), and the minimum benefit rules applicable to non-key employee participants in the case of a top-heavy defined benefit plan under section 416. In addition, for such a plan, section 411(a)(8) defines the term *normal retirement age* as the earlier of (a) the time a participant attains normal retirement age under the plan or (b) the later of the time a plan participant attains age 65 or the 5th anniversary of the time a plan participant commenced participation in the plan.¹

II. Normal Retirement Age under a Governmental Plan

A. Application of section 411 to governmental plans

Section 414(d) of the Code provides that the term *governmental plan* generally means a plan established and maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing.² See sections 3(32) and 4021(b)(2) of ERISA for definitions of the term *governmental plan* for purposes of title I and title IV of ERISA, respectively.

Section 411(e)(1) of the Code provides that the provisions of section 411, other than section 411(e)(2), do not apply to a governmental plan. Under section 411(e)(2), a governmental plan is treated as meeting the requirements of section 411, for purposes of section 401(a), if the plan meets the vesting requirements resulting from the application of sections

401(a)(4) and 401(a)(7) as in effect on September 1, 1974 (pre-ERISA vesting rules). The only requirements under section 411 that apply to a governmental plan are the pre-ERISA vesting rules under section 411(e)(2). Thus, the definition of normal retirement age under section 411(a)(8) does not apply to a governmental plan. In addition, other rules of section 411, including section 411(a)(3)(B) (related to suspension of benefits), section 411(b)(1) (related to backloading of benefits in a defined benefit plan), and section 411(b)(1)(H)(iii) (related to offsets after normal retirement age) do not apply to a governmental plan. Therefore, except for specific circumstances in which in-service benefit payments are permitted under § 1.401(a)–1(b)(1), the definition of normal retirement age need not be used by a governmental plan for the same purposes that apply to a plan subject to section 411(a) through (d).³

B. Pre-ERISA vesting requirements for governmental plans

Under section 411(e)(2), a normal retirement age under a governmental plan must satisfy the pre-ERISA vesting rules. The pre-ERISA vesting rules applicable to governmental plans contain two basic components: (a) Rules relating to vesting and (b) rules relating to the right to commence benefits without reduction for early commencement. Rev. Rul. 66–11, 1966–1 C.B. 71, and Rev. Rul. 68–302, 1968–1 C.B. 163, illustrate the interplay between normal retirement age under the pre-ERISA vesting rules and section 401(a). As described in these rulings, to satisfy the requirements of section 401(a), a plan that is subject to the pre-ERISA vesting rules must provide for full vesting of the contributions made to or benefits

¹Section 411(f) provides a special normal retirement age rule that applies only to certain defined benefit plans that are subject to section 411(a) through (d). Section 411(f) was added to the Code on December 16, 2014 by Section 2 of Division P of the Consolidated and Further Continuing Appropriations Act, 2015, Public Law No. 113–235 (128 Stat. 2130 (2014)), which also made a corresponding change to section 204 of the Employee Retirement Income Security Act of 1974, Public Law 93–406 (88 Stat. 829 (1974)), as amended (ERISA). Under section 101 of Reorganization Plan No. 4 of 1978 (92 Stat. 3790), the Secretary of the Treasury has interpretive jurisdiction over the subject matter addressed in section 411(f) for purposes of ERISA, as well as the Code.

²The term *governmental plan* also includes a plan that is established and maintained by an Indian tribal government (as defined in section 7701(a)(40)), a subdivision of an Indian tribal government (determined in accordance with section 7871(d)), or an agency or instrumentality of either, and all the participants of which are employees of such entity substantially all of whose services as such an employee are in the performance of essential governmental functions but not in the performance of commercial activities (whether or not an essential government function). In addition, the term *governmental plan* includes any plan to which the Railroad Retirement Act of 1935 or 1937 (49 Stat. 967, as amended by 50 Stat. 307) applies and which is financed by contributions required under that Act and any plan of an international organization that is exempt from taxation by reason of the International Organizations Immunities Act, Public Law 79–291 (59 Stat. 669).

³Normal retirement age may also be relevant to participant eligibility for certain favorable tax treatment, including section 402(l) (providing an income exclusion of up to \$3,000 annually for certain distributions for health insurance and long-term care insurance premiums to eligible retired public safety officers who separate from service by reason of disability or attainment of normal retirement age) and the special catch-up provisions under § 1.457–4(c)(3)(v)(A).

payable under the plan for any employee who has attained normal retirement age under the plan and satisfied any reasonable and uniformly applicable requirements as to length of service or participation described in the plan. For more information about these rules, see Part 5(c) of Publication 778, *Guides for Qualification of Pension, Profit-Sharing, and Stock Bonus Plans* (Pub. 778).

Rev. Rul. 71-24, 1971-1 C.B. 114, illustrates the application of the pre-ERISA vesting rules to benefits provided under a pension plan for employees who continue employment after normal retirement age. Rev. Rul. 71-24 includes an example under which benefits are permitted to commence during employment after normal retirement age.

As described in Rev. Rul. 71-147,⁴ 1971-1 C.B. 116, the normal retirement age in a pension or annuity plan under the pre-ERISA vesting rules is generally the lowest age specified in the plan at which the employee has the right to retire without the consent of the employer and receive retirement benefits based on the amount of the employee's service to the date of retirement at the full rate set forth in the plan (that is, without actuarial or similar reduction because of retirement before some later specified age). Rev. Rul. 71-147 does not explicitly require a plan to include a provision defining normal retirement age. Instead, a plan's normal retirement age may be deduced from other plan provisions. As described in Rev. Rul. 71-147, although normal retirement age under a pension or annuity plan is ordinarily age 65, a plan may specify a lower age at which the employee has the right to retire without the consent of the employer and to receive retirement benefits based on the amount of the employee's service at the full rate set forth in the plan if this lower age would be an age at which employees customarily retire in the particular company or industry, and if the provision permitting receipt of unreduced benefits at this age is not a device to accelerate funding. For more information about these rules, see also Part 5(e) of Pub. 778.

III. Application of the 2007 NRA Regulations to Governmental Plans

Notice 2007-69, 2007-2 C.B. 468, asked for comments "on whether and how a pension plan with a normal retirement age conditioned on the completion of a stated number of years of service satisfies the requirement in § 1.401(a)-1(b)(1)(i) that a pension plan be maintained primarily to provide for the payment of definitely determinable benefits after retirement or attainment of normal retirement age and how such a plan satisfies the pre-ERISA vesting rules." Comments were received on a variety of issues, including comments that guidance should be issued to (1) clarify that governmental plans are not required to define normal retirement age, (2) provide safe harbor rules that would permit a governmental plan to define normal retirement age that includes a service component, and (3) provide that the age-50 safe harbor rule in § 1.401(a)-1(b)(2)(v) for qualified public safety employees can apply to these employees even if less than substantially all of a plan's participants are qualified public safety employees.

The 2007 NRA regulations provided that, in the case of governmental plans, the regulations would be effective for plan years beginning on or after January 1, 2009. Notices 2008-98, 2008-44 I.R.B. 1080, and 2009-86, 2009-6 I.R.B. 629, provided that the Department of the Treasury and the IRS intended to amend the 2007 NRA regulations to change the effective date of the 2007 NRA regulations for governmental plans to January 1, 2013.

Notice 2012-29, 2012-18 I.R.B. 872, announced that the Department of the Treasury and the IRS intend to modify provisions of the 2007 NRA regulations as applied to governmental plans in two ways. First, Notice 2012-29 announced the intent to modify the regulations to clarify that a governmental plan that is not subject to section 411(a) through (d) and does not provide for the payment of in-service distributions before age 62 will not fail to satisfy the requirement that the plan provide definitely determinable ben-

efits to employees after retirement or attainment of normal retirement age merely because the pension plan does not have a definition of normal retirement age or does not have a definition of normal retirement age that satisfies the requirements of the 2007 NRA regulations.

Second, Notice 2012-29 announced the intent to modify the 2007 NRA regulations to provide that the rule deeming age 50 or later to be a normal retirement age that satisfies the 2007 NRA regulations will apply to a group of employees substantially all of whom are qualified public safety employees, whether or not the group of qualified public safety employees are covered by a separate plan. Thus, under the intended modification, a governmental plan would be permitted to satisfy the reasonably representative requirement using a normal retirement age as low as 50 for a group substantially all of whom are qualified public safety employees and a later normal retirement age that otherwise satisfies the 2007 NRA requirements for all other participants.

Notice 2012-29 requested comments from governmental stakeholders on the guidance under consideration. Specific comments were requested on whether a new rule should be provided under which retirement after 20 to 30 years of service may be a normal retirement age that is reasonably representative of the typical retirement age for the industry in which qualified public safety employees are employed because these employees tend to have career spans that commence at a young age and continue over a limited number of years. Many commenters wrote that such a rule would be helpful and appropriate. Several commenters requested a rule that would permit a governmental plan to use the completion of 20 or more years of service as a normal retirement age for public safety employees.

Comments were also requested on whether there are other categories of governmental employees who have career spans similar to qualified public safety employees for whom a rule should be provided that is similar to the safe harbor for qualified public safety employees.

⁴Even though Rev. Rul. 71-147 was superseded by Rev. Rul. 80-276, 1980-1 C.B. 131, for plans subject to section 411(a)(8), Rev. Rul. 71-147 remains valid guidance for purposes of the pre-ERISA vesting rules.

Many commenters recommended a rule that would permit governmental plans to use the completion of a number of years of service as a normal retirement age for all employees, not just qualified public safety employees.

Notice 2012–29 also requested information on the overall retirement patterns of employees in government service to assist the Department of the Treasury and the IRS in determining the earliest age that is reasonably representative of the typical retirement ages for the industry in which these employees are employed. One commenter provided data on the retirement patterns and median normal retirement ages for participants in a state retirement system.

Notice 2012–29 also provided that the Department of the Treasury and the IRS intend to amend the 2007 NRA regulations to modify the effective date of the 2007 NRA regulations for governmental plans to annuity starting dates that occur in plan years beginning on or after the later of (1) January 1, 2015 or (2) the close of the first regular legislative session of the legislative body with the authority to amend the plan that begins on or after the date that is 3 months after the final regulations are published in the **Federal Register**.

Explanation of Provisions

I. Overview

These proposed regulations would provide guidance with respect to the applicability of the 2007 NRA regulations to governmental plans. These proposed regulations, when finalized, would provide guidance relating to the determination of whether the normal retirement age under a governmental plan satisfies the requirements of section 401(a) by amending the 2007 NRA regulations to provide additional rules for governmental plans. In addition, these proposed regulations would also include a minor change to the 2007 NRA regulations to reflect the addition of section 411(f), which provides a special rule for determining a permissible normal retirement age that applies only to certain defined benefit plans that are not governmental plans.

II. Use of Years of Service as a Component of the Pre-ERISA Vesting Rules

In response to Notice 2012–29, the Department of the Treasury and the IRS received a range of comments regarding the pre-ERISA vesting rules that apply to a governmental plan's normal retirement age. In particular, the Department of the Treasury and the IRS received many comments requesting rules that would permit governmental plans to define normal retirement age by reference to a period of service. Comments also focused on whether a governmental plan is required to include an explicit definition of normal retirement age.

As previously stated, a normal retirement age under a governmental plan must satisfy the pre-ERISA vesting rules. The Department of the Treasury and the IRS generally agree with those commenters who indicated that the pre-ERISA vesting rules applicable to normal retirement age may be read to permit a governmental plan to use a normal retirement age that reflects a period of service. Under pre-ERISA vesting rules, use of a period of service to determine normal retirement age under a governmental plan would be permissible if the period of service used is reasonable and uniformly applicable and the other pre-ERISA rules related to normal retirement age are satisfied. One of the pre-ERISA rules permits a governmental plan to specify a normal retirement age that is lower than age 65 if that age represents the age at which employees customarily retire in the industry.

Under the pre-ERISA rules related to normal retirement age, the terms of a governmental plan are not required to include an explicit definition of the term normal retirement age in order to satisfy section 401(a). However, in the absence of an explicit definition of normal retirement age, the terms of the plan must specify the earliest age at which a participant has the right to retire without the consent of the employer and to receive retirement benefits based upon the amount of the participant's service on the date of retirement at the full rate set forth in the plan (that is, without actuarial or similar reduction because of retirement before some later specified age). That age (the earliest age

described in the preceding sentence) will be considered the plan's normal retirement age for purposes of any statutory or regulatory requirements based on a normal retirement age.

Consistent with Notice 2012–29, the proposed regulations would provide that a governmental plan that does not provide for the payment of in-service distributions before age 62 would not fail to satisfy § 1.401(a)–1(b)(1) under these proposed regulations merely because the pension plan has a normal retirement age that is earlier than otherwise permitted under the requirements of § 1.401(a)–1(b)(2) of the 2007 NRA regulations (as proposed to be amended by these proposed regulations). Instead, because section 411(a) through (d) does not apply, the earlier normal retirement age under such a plan is treated as the age as of which an unreduced early retirement benefit is payable for purposes of these regulations.

III. Normal Retirement Age Must Satisfy the Reasonably Representative Requirement

A. In general

These proposed regulations would apply the reasonably representative requirement in the 2007 NRA regulations to governmental plans. Thus, the normal retirement age under a governmental plan must be an age that is not earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed.

B. General safe harbor

These proposed regulations would apply to governmental plans the safe harbor in the 2007 NRA regulations that a normal retirement age of at least age 62 is deemed to satisfy the reasonably representative requirement. Thus, a governmental plan satisfies this safe harbor if the normal retirement age under the plan is age 62 or if the normal retirement age is the later of age 62 or another specified date, such as the fifth anniversary of plan participation.

C. Safe harbors for governmental plans

To address comments regarding the need for additional safe harbors for governmental plans, including safe harbors that reflect permissible periods of service, these proposed regulations would provide several additional alternative safe harbors that a governmental plan could satisfy. The safe harbors included in these proposed regulations were developed based upon feedback provided in comments received in response to Notices 2007–69 and 2012–29.

1. Age 60 and 5 years of service

Under these proposed regulations, a normal retirement age under a governmental plan that is the later of age 60 or the age at which the participant has been credited with at least 5 years of service would be deemed to satisfy the reasonably representative requirement.

2. Age 55 and 10 years of service

Similarly, a normal retirement age under a governmental plan that is the later of 55 or the age at which the participant has been credited with at least 10 years of service would be deemed to satisfy the reasonably representative requirement. Thus, for example, a normal retirement age under a governmental plan that is the later of age 55 or the age at which the participant has been credited with 12 years of service would satisfy this safe harbor.

3. Combined age and years of service of 80 or more

A normal retirement age under a governmental plan that is the participant's age if the sum of the participant's age plus the number of years of service that have been credited to the participant under the plan equals 80 or more would also be deemed to satisfy the reasonably

representative requirement. For example, a participant in a governmental plan who is age 55 and who has been credited with 25 years of service under the plan would satisfy this safe harbor.

4. Any age with 25 years of service (in combination with a safe harbor that includes an age)

A governmental plan would also be permitted to combine any of the other safe harbors (except for the qualified public safety employee safe harbors) provided under the proposed regulations with 25 years of service, so that a participant's normal retirement age would be the participant's age when the number of years of service that have been credited to the participant under the plan equals 25 if that age is earlier than what the participant's normal retirement age would be under the other safe harbor(s). For example, a normal retirement age under a governmental plan would satisfy the reasonably representative requirement if the normal retirement age is the earlier of (1) the participant's age when the participant has been credited with 25 years of service under the plan and (2) the later of age 60 or the age when the participant has been credited with 5 years of service under the plan. Use of 25 years of service by a governmental plan for normal retirement age generally would not satisfy the pre-ERISA vesting requirement relating to normal retirement age, unless it is used in conjunction with an alternative normal retirement age that includes an age component and that otherwise satisfies the pre-ERISA rules. This is because the pre-ERISA vesting requirements allow for a service component only if that component does not unreasonably delay full vesting. For example, applying a 25 years of service requirement (without an alternative normal retirement age) to a newly-hired 63-year-old employee would not be reasonable because it would result

in a normal retirement age of 88. See generally, Rev. Rul. 66–11.

D. Qualified public safety employees

The proposed regulations include three safe harbors specifically for qualified public safety employees. The safe harbors were developed based upon feedback provided in comments received in response to Notices 2007–69 and 2012–29. Consistent with Notice 2012–29 and in response to comments, the proposed regulations would make clear that a governmental plan is permitted to use one or more of the safe harbors for qualified public safety employees to satisfy the reasonably representative requirement for those employees even if a different normal retirement age or ages is used under the plan for one or more other categories of participants who are not qualified public safety employees. The safe harbors for qualified public safety employees are not permitted to be used for these other categories of participants; a different normal retirement age (or ages) must be used for participants in a plan who are not qualified public safety employees.

As under the 2007 NRA regulations, the term *qualified public safety employee* would be defined by reference to section 72(t)(10)(B), under which a qualified public safety employee means any employee of a State or political subdivision of a State who provides police protection, firefighting services, or emergency medical services for any area within the jurisdiction of such State or political subdivision.⁵ Defining qualified public safety employee by reference to section 72(t)(10)(B) has been retained because it is closely aligned with the categories of employees described in the Age Discrimination in Employment Act that an employer may refrain from hiring after a certain age.⁶ Because qualified public safety employees typically commence plan participation at younger ages, the period of service re-

⁵Section 72(t)(10)(B) was amended by section 2(a) of Defending Public Safety Employees' Retirement Act, Public Law 114–26 (129 Stat. 319) (2015)) and section 308 of Protecting Americans From Tax Hikes Act of 2015 (PATH Act), enacted as part of the Consolidated Appropriations Act, 2016, Public Law 114–113 (129 Stat. 2422), to include federal public safety employees as qualified public safety employees for purposes of the rules under section 72(t)(10). Thus, for distributions made after December 31, 2015, the term *qualified public safety employee* means any employee of a State or political subdivision of a State who provides police protection, firefighting services, or emergency medical services for any area within the jurisdiction of such State or political subdivision, or any Federal law enforcement officer described in section 8331(20) or 8401(17) of title 5, United States Code, any Federal customs and border protection officer described in section 8331(31) or 8401(36) of such title, any Federal firefighter described in section 8331(21) or 8401(14) of such title, or any air traffic controller described in 8331(30) or 8401(35) of such title, any nuclear materials courier described in section 8331(27) or 8401(33) of such title, any member of the United States Capitol Police, any member of the Supreme Court Police, and any diplomatic security special agent of the Department of State.

⁶See section 4(j) of the Age Discrimination in Employment Act, 29 U.S.C. 623(j).

quired for full vesting at normal retirement age under each of the safe harbors for qualified public safety employees should be reasonable.

1. Age 50

The proposed regulations would modify the safe harbor for qualified public safety employees that was provided in the 2007 NRA regulations under which a normal retirement age of age 50 or later is deemed to satisfy the reasonably representative requirement and would expand on the guidance under consideration described in Notice 2012–29. The proposed regulations would make clear that a governmental plan is permitted to use the safe harbor (alone or together with one or both of the other safe harbors for qualified public safety employees described in this preamble) for one or more qualified public safety employees in a governmental plan without regard to any “substantially all” requirement (that is, without regard to whether substantially all of the participants in the plan or substantially all of the participants within a group of participants are qualified public safety employees).

2. Combined age and years of service of 70 or more

The proposed regulations would add a safe harbor under which a normal retirement age for qualified public safety employees under a governmental plan that is the participant’s age when the sum of the participant’s age plus the number of years of service that have been credited to the participant under the plan equals 70 or more would be deemed to satisfy the reasonably representative requirement.

3. Any age with 20 years of service

The proposed regulations would also add a safe harbor under which a normal retirement age for qualified public safety employees under a governmental plan that is the participant’s age when the number of years of service that have been credited to the participant under the plan equals 20 or more would be deemed to satisfy the

reasonably representative requirement. For example, a normal retirement age for qualified public safety employees under a plan that is 25 years of service would satisfy this safe harbor. The Department of the Treasury and the IRS agree with the comments received in response to Notice 2012–29 that indicated that a safe harbor based solely on a period of service would be appropriate for qualified public safety employees because these employees typically have career spans that commence at a young age and continue over a limited period of years.

E. Multiple normal retirement ages in a governmental plan

Commenters on Notice 2012–29 stated that it is a common practice for governmental plans to have a normal retirement age that is a combination of age and years of service. In light of these comments, some of the safe harbors proposed in these regulations contemplate a combination of age and years of service, such as, for example, the use of a normal retirement age that is the earlier of (1) the participant’s age when the participant has been credited with 30 years of service under the plan or (2) the later of age 60 or the age when the participant has been credited with 5 years of service under the plan. A normal retirement age under a governmental plan that is consistent with the safe harbors in these proposed regulations would not fail to satisfy the pre-ERISA requirements, including the requirement that any period of service required for vesting at normal retirement age be uniformly applicable to all employees in a plan, merely because the plan uses such a normal retirement age.

Commenters to Notice 2012–29 also stated that governmental plans typically provide multiple normal retirement ages, often based on different benefit structures or classifications of employees in a single plan. These comments expressed concern that certain language in Notice 2012–29⁷ could be read to indicate that a governmental plan could only have two normal retirement ages if one of the normal retirement ages covered qualified public safety employees and the other normal

retirement age covered all of the other participants in the plan.

Use of one normal retirement age for one classification of employees (such as qualified public safety employees) and one or more other normal retirement ages for one or more different classifications of employees would not be inconsistent with these proposed regulations and generally would not be inconsistent with the applicable pre-ERISA requirements, including the requirement that any period of service required for full vesting at normal retirement age be uniformly applicable. Similarly, the use of one normal retirement age under a governmental plan for employees hired before a certain date and another normal retirement age under the plan for employees hired on or after that date generally would not fail to satisfy the applicable pre-ERISA requirements.

F. Other normal retirement ages

The proposed regulations would provide that in the case of a normal retirement age under a governmental plan that fails to satisfy any of the governmental plan safe harbors, whether the normal retirement age satisfies the reasonably representative requirement would be based on all of the relevant facts and circumstances. Similar to the treatment of normal retirement ages between ages 55 and 62 under the 2007 NRA regulations, it is generally expected that a good faith determination of the typical retirement age for the industry in which the covered workforce is employed that is made by the employer will be given deference, assuming that the determination is reasonable under the facts and circumstances and that the normal retirement age is otherwise consistent with the pre-ERISA vesting requirements.

Proposed Effective Date

These regulations are proposed to be effective for employees hired during plan years beginning on or after the later of (1) January 1, 2017 or (2) the close of the first regular legislative session of the legislative body with the authority to amend the

⁷Notice 2012–29 provided that, under an anticipated amendment to the 2007 NRA regulations, a governmental plan would be permitted to satisfy the reasonably representative requirement using a normal retirement age as low as 50 for a group substantially all of whom are qualified public safety employees and a later normal retirement age that otherwise satisfies the 2007 NRA requirements for all other participants.

plan that begins on or after the date that is 3 months after the final regulations are published in the **Federal Register**. Governmental plan sponsors may rely on these proposed regulations for periods preceding the effective date, pending the issuance of final regulations. If and to the extent the final regulations are more restrictive than the rules in these proposed regulations, those provisions of the final regulations will be applied without retroactive effect.

Statement of Availability for IRS Documents

For copies of recently issued Revenue Procedures, Revenue Rulings, Notices, and other guidance published in the Internal Revenue Bulletin or Cumulative Bulletin, please visit the IRS Web site at <http://www.irs.gov> or the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

Special Analyses

Certain IRS regulations, including this one, are exempt from the requirements of Executive Order 12866, as supplemented and reaffirmed by Executive Order 13563. Therefore, a regulatory assessment is not required. It has also been determined that 5 U.S.C. 533(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. In addition, because no collection of information is imposed on small entities, the provisions of the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply and a Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, these regulations have been submitted to the Office of Chief Counsel for Advocacy of the Small Business Administration for comments on its impact on small business.

Comments and Requests for Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any comments that are submitted timely to the IRS as prescribed in this preamble under the "Addresses" heading. All comments are available at www.regulations.gov or upon request. A public hearing will be scheduled if re-

quested in writing by any person who timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place of the public hearing will be published in the **Federal Register**.

Drafting Information

The principal authors of these regulations are Sarah R. Bolen and Pamela R. Kinard, Office of Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the Department of the Treasury and the IRS 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 in part as follows:

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

Par. 2. Section 1.401(a)–1 is amended by:

1. Revising paragraph (b)(2)(v).
2. Adding paragraph (b)(2)(vi).
3. Revising the heading and the second sentence of paragraph (b)(4).

The revisions read as follows:

§ 1.401(a)–1 Post-ERISA qualified plans and qualified trusts; in general.

* * * * *

(b) * * *

(2) * * *

(v) *Rules of application for governmental plans*—(A) *In general.* In the case of a governmental plan (within the meaning of section 414(d)) that provides for distributions before retirement, the general rule described in paragraph (b)(2)(i) of this section may be satisfied in accordance with paragraph (b)(2)(ii) of this section or this paragraph (b)(2)(v). In the case of a governmental plan that does not provide for distributions before retirement, the plan's normal retirement age is not required to comply with the general rule described in paragraph (b)(2)(i) of this section or this paragraph (b)(2)(v).

(B) *Age 60 and 5 years of service safe harbor.* A normal retirement age under a governmental plan that is the later of age 60 or the age at which the participant has been credited with at least 5 years of service under the plan is deemed to be not earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed.

(C) *Age 55 and 10 years of service safe harbor.* A normal retirement age under a governmental plan that is the later of age 55 or the age at which the participant has been credited with at least 10 years of service under the plan is deemed to be not earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed.

(D) *Sum of 80 safe harbor.* A normal retirement age under a governmental plan that is the participant's age at which the sum of the participant's age plus the number of years of service that have been credited to the participant under the plan equals 80 or more is deemed to be not earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed. For example, a normal retirement age under a governmental plan that is age 55 for a participant who has been credited with 25 years of service would satisfy the rule described in this paragraph.

(E) *Service-based combination safe harbor.* A normal retirement age under a governmental plan that is the earlier of the participant's age at which the participant has been credited with at least 25 years of service under the plan and an age that satisfies any other safe harbor provided under paragraphs (b)(2)(v)(B) through (D) of this section is deemed to be not earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed. For example, a normal retirement age under a governmental plan that is the earlier of the participant's age at which the participant has been credited with 25 years of service under the plan and the later of age 60 or the age at which the participant has been credited with 5 years of service under the plan would satisfy this safe harbor.

(F) *Age 50 safe harbor for qualified public safety employees.* A normal retirement age under a governmental plan that is age 50 or later is deemed to be not earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed if the participants to which this normal retirement age applies are qualified public safety employees (within the meaning of section 72(t)(10)(B)).

(G) *Sum of 70 safe harbor for qualified public safety employees.* A normal retirement age under a governmental plan that is the participant's age at which the sum of the participant's age plus the number of years of service that have been credited to the participant under the plan equals 70 or more, is deemed to be not earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed if the participants to which this normal retirement age applies are qualified public safety employees (within the meaning of section 72(t)(10)(B)).

(H) *Service-based safe harbor for qualified public safety employees.* A normal retirement age under a governmental

plan that is the age at which the participant has been credited with at least 20 years of service under the plan is deemed to be not earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed if the participants to which this normal retirement age applies are qualified public safety employees (within the meaning of section 72(t)(10)(B)). For example, a normal retirement age that covers only qualified public safety employees and that is an employee's age when the employee has been credited with 25 years of service under a governmental plan would satisfy this safe harbor.

(I) *Reserved.*

(J) *Other normal retirement ages.* In the case of a normal retirement age under a governmental plan that fails to satisfy any safe harbor described in paragraph (b)(2)(ii) of this section or this paragraph (b)(2)(v), whether the age is not earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed is based on all of the relevant facts and circumstances.

(vi) *Special normal retirement age rule for certain plans.* See section 411(f), which provides a special rule for determining a permissible normal retirement age under certain defined benefit plans.

* * * * *

(4) *Effective/applicability date.* * * * In the case of a governmental plan (as defined in section 414(d)), the rules in paragraph (b)(2)(v) of this section are effective for employees hired during plan years beginning on or after the later of: January 1, 2017; or the close of the first regular legislative session of the legislative body with the authority to amend the plan that begins on or after the date that is 3 months after the final regulations are published in the **Federal Register**. However, a governmental plan sponsor may elect to apply the rules of paragraph (b)(2)(v) of this section to earlier periods. * * *

John M Dalrymple
*Deputy Commissioner for
Services and Enforcement.*

(Filed by the Office of the Federal Register on January 26, 2016, 8:45 a.m., and published in the issue of the Federal Register for January 27, 2016, 81 F.R. 4599)

Definition of Terms

Revenue rulings and revenue procedures (hereinafter referred to as “rulings”) that have an effect on previous rulings use the following defined terms to describe the effect:

Amplified describes a situation where no change is being made in a prior published position, but the prior position is being extended to apply to a variation of the fact situation set forth therein. Thus, if an earlier ruling held that a principle applied to A, and the new ruling holds that the same principle also applies to B, the earlier ruling is amplified. (Compare with modified, below).

Clarified is used in those instances where the language in a prior ruling is being made clear because the language has caused, or may cause, some confusion. It is not used where a position in a prior ruling is being changed.

Distinguished describes a situation where a ruling mentions a previously published ruling and points out an essential difference between them.

Modified is used where the substance of a previously published position is being changed. Thus, if a prior ruling held that a principle applied to A but not to B, and the new ruling holds that it applies to both A

and B, the prior ruling is modified because it corrects a published position. (Compare with amplified and *clarified*, above).

Obsoleted describes a previously published ruling that is not considered determinative with respect to future transactions. This term is most commonly used in a ruling that lists previously published rulings that are obsoleted because of changes in laws or regulations. A ruling may also be obsoleted because the substance has been included in regulations subsequently adopted.

Revoked describes situations where the position in the previously published ruling is not correct and the correct position is being stated in a new ruling.

Superseded describes a situation where the new ruling does nothing more than restate the substance and situation of a previously published ruling (or rulings). Thus, the term is used to republish under the 1986 Code and regulations the same position published under the 1939 Code and regulations. The term is also used when it is desired to republish in a single ruling a series of situations, names, etc., that were previously published over a period of time in separate rulings. If the new ruling does more than restate the sub-

stance of a prior ruling, a combination of terms is used. For example, modified and *superseded* describes a situation where the substance of a previously published ruling is being changed in part and is continued without change in part and it is desired to restate the valid portion of the previously published ruling in a new ruling that is self contained. In this case, the previously published ruling is first modified and then, as modified, is superseded.

Supplemented is used in situations in which a list, such as a list of the names of countries, is published in a ruling and that list is expanded by adding further names in subsequent rulings. After the original ruling has been supplemented several times, a new ruling may be published that includes the list in the original ruling and the additions, and supersedes all prior rulings in the series.

Suspended is used in rare situations to show that the previous published rulings will not be applied pending some future action such as the issuance of new or amended regulations, the outcome of cases in litigation, or the outcome of a Service study.

Abbreviations

The following abbreviations in current use and formerly used will appear in material published in the Bulletin.

A—Individual.
Acq.—Acquiescence.
B—Individual.
BE—Beneficiary.
BK—Bank.
B.T.A.—Board of Tax Appeals.
C—Individual.
C.B.—Cumulative Bulletin.
CFR—Code of Federal Regulations.
CI—City.
COOP—Cooperative.
Ct.D.—Court Decision.
CY—County.
D—Decedent.
DC—Dummy Corporation.
DE—Donee.
Del. Order—Delegation Order.
DISC—Domestic International Sales Corporation.
DR—Donor.
E—Estate.
EE—Employee.
E.O.—Executive Order.
ER—Employer.

ERISA—Employee Retirement Income Security Act.
EX—Executor.
F—Fiduciary.
FC—Foreign Country.
FICA—Federal Insurance Contributions Act.
FISC—Foreign International Sales Company.
FPH—Foreign Personal Holding Company.
F.R.—Federal Register.
FUTA—Federal Unemployment Tax Act.
FX—Foreign corporation.
G.C.M.—Chief Counsel’s Memorandum.
GE—Grantee.
GP—General Partner.
GR—Grantor.
IC—Insurance Company.
I.R.B.—Internal Revenue Bulletin.
LE—Lessee.
LP—Limited Partner.
LR—Lessor.
M—Minor.
Nonacq.—Nonacquiescence.
O—Organization.
P—Parent Corporation.
PHC—Personal Holding Company.
PO—Possession of the U.S.
PR—Partner.
PRS—Partnership.

PTE—Prohibited Transaction Exemption.
Pub. L.—Public Law.
REIT—Real Estate Investment Trust.
Rev. Proc.—Revenue Procedure.
Rev. Rul.—Revenue Ruling.
S—Subsidiary.
S.P.R.—Statement of Procedural Rules.
Stat.—Statutes at Large.
T—Target Corporation.
T.C.—Tax Court.
T.D.—Treasury Decision.
TFE—Transferee.
TFR—Transferor.
T.I.R.—Technical Information Release.
TP—Taxpayer.
TR—Trust.
TT—Trustee.
U.S.C.—United States Code.
X—Corporation.
Y—Corporation.
Z—Corporation.

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We Welcome Comments About the Internal Revenue Bulletin

If you have comments concerning the format or production of the Internal Revenue Bulletin or suggestions for improving it, we would be pleased to hear from you. You can email us your suggestions or comments through the IRS Internet Home Page (*www.irs.gov*) or write to the Internal Revenue Service, Publishing Division, IRB Publishing Program Desk, 1111 Constitution Ave. NW, IR-6230 Washington, DC 20224.