

10/11/11

Part III - Administrative, Procedural and Miscellaneous

Postponement of Effective/Applicability Date of § 1.411(b)(5)-1(d)(1)(iii), (d)(1)(vi), and (d)(6)(i) of the Income Tax Regulations Relating to Interest Crediting Rates in Hybrid Pension Plans; Extension of Plan Amendment Deadline for §§ 411(a)(13) (other than § 411(a)(13)(A)) and 411(b)(5); Special Timing Rule for Providing Section 204(h) Notice of Certain Amendments Changing the Interest Crediting Rate in Hybrid Pension Plans

Notice 2011-85

I. Purpose

This notice announces that the Treasury Department and the Internal Revenue Service intend to amend the final regulations under § 411(b)(5) of the Internal Revenue Code (Code), which sets forth special rules for statutory hybrid plans (as defined in § 1.411(a)(13)-1(d) of the Income Tax Regulations), to postpone the effective/applicability date of those provisions of § 1.411(b)(5)-1(d) that apply to plan years beginning on or after January 1, 2012. Section 1.411(b)(5)-1(d) sets forth rules under § 411(b)(5)(B)(i) relating to interest crediting rates under a cash balance or other statutory hybrid plan.

This notice also extends the deadline for adopting an interim or discretionary plan amendment under § 411(a)(13) (other than § 411(a)(13)(A)) and § 411(b)(5). In addition, this notice provides that the previously announced limited relief from the requirements of § 411(d)(6) for certain amendments made to comply with § 411(b)(5) is expected to apply to amendments made before the postponed effective date. The Service's review of an application for a determination letter submitted to the Service between February 1, 2011, and January 31, 2012, will not consider the final regulations under § 411(a)(13) (other than with respect to § 411(a)(13)(A)) and § 411(b)(5) unless the plan has been amended to satisfy those regulations.

Finally, in Announcement 2009-82, 2009-48 I.R.B. 720, the Treasury Department and the Service announced their intent to provide a special timing rule for providing section 204(h) notice (as defined in § 54.4980F-1, A-4(a) of the Excise Tax Regulations) for certain amendments to change the interest crediting rate under a statutory hybrid plan. The special timing rule only applies to amendments that were adopted after November 10, 2009, and on or before the last day of the first plan year that begins on or after January 1, 2009. This notice formally provides the special timing rule described in Announcement 2009-82.

II. Background

A. Sections 411(b)(5)(B)(i) and 411(d)(6)

Section 411(b)(5)(B)(i) provides that a statutory hybrid plan is treated as failing to satisfy the requirements of § 411(b)(1)(H), relating to continued accrual beyond normal

retirement age, if the terms of the plan provide any interest credit (or an equivalent amount) for any plan year at a rate that is in excess of a market rate of return. Section 411(b)(5)(B)(i), which was added by section 701(b)(1) of the Pension Protection Act of 2006 (PPA '06), Pub. L. 109-280, is generally effective for plan years beginning after December 31, 2007.

Section 411(d)(6) provides generally that a plan does not satisfy § 401(a) if an amendment to the plan decreases a participant's accrued benefit. For this purpose, a plan amendment that has the effect of eliminating or reducing an early retirement benefit or a retirement-type subsidy or eliminating an optional form of benefit with respect to benefits attributable to service before the amendment is treated as reducing accrued benefits.

Section 1.411(d)-4, A-2(b)(2)(i), of the Income Tax Regulations provides that a plan may be amended to eliminate or reduce a section 411(d)(6) protected benefit, within the meaning of § 1.411(d)-4, A-1, if the following three requirements are met: the amendment constitutes timely compliance with a change in law affecting plan qualification; there is an exercise of § 7805(b) relief by the Commissioner; and the elimination or reduction of the section 411(d)(6) protected benefit is made only to the extent necessary to enable the plan to continue to satisfy the requirements for qualified plans.

Final and proposed regulations (2010 final and proposed hybrid plan regulations) under § 411(a)(13) and § 411(b)(5) were published in the Federal Register on October 19, 2010 (75 F.R. 64123 and 75 F.R. 64197). The 2010 final and proposed hybrid plan regulations provide guidance as to the market rate of return requirement under § 411(b)(5)(B)(i). Furthermore, section IV.C of the preamble to the 2010 proposed hybrid plan regulations provides that, after the 2010 proposed hybrid plan regulations are issued as final regulations, it is expected that the relief from the requirements of § 411(d)(6) will be granted pursuant to § 1.411(d)-4, A-2(b)(2)(i), for a plan amendment that eliminates or reduces a section 411(d)(6) protected benefit, provided that the amendment is adopted before those final regulations apply to the plan, and the elimination or reduction is made only to the extent necessary to enable the plan to meet the requirements of § 411(b)(5).

The 2010 final hybrid plan regulations generally apply to plan years beginning on or after January 1, 2011. However, § 1.411(b)(5)-1(d)(1)(iii), (d)(1)(vi), and (d)(6)(i) of those regulations apply to plan years beginning on or after January 1, 2012, which is also when the 2010 proposed hybrid plan regulations are proposed to be effective. Section 1.411(b)(5)-1(d)(1)(iii), (d)(1)(vi), and (d)(6)(i) provide that the regulations set forth the exclusive list of interest crediting rates and combinations of rates that satisfy the requirements of § 411(b)(5)(B)(i). The 2010 proposed hybrid plan regulations would amend § 1.411(b)(5)-1(d), in part by describing additional interest crediting rates that satisfy the requirements of § 411(b)(5)(B)(i).

B. Section 1107 of PPA '06

Section 1107 of PPA '06 provides that a plan amendment made pursuant to PPA '06 or regulations thereunder does not have to be adopted until a specified date (the "section 1107 date") that is the last day of the first plan year that begins on or after January 1, 2009 (or January 1, 2011, in the case of a governmental plan as defined in § 414(d)), provided that certain conditions are satisfied. Section 1107 of PPA '06 also provides that, except as provided by the Secretary, a plan will not fail to satisfy the anti-cutback requirements of § 411(d)(6) as a result of amendments made pursuant to PPA '06 or regulations thereunder that are adopted by the plan's section 1107 date, provided that the same conditions are satisfied. Generally, the conditions under section 1107 are satisfied if:

- (1) the plan amendment is pursuant to a provision of PPA '06 or regulations thereunder;
- (2) the plan amendment is adopted no later than the plan's section 1107 date; and
- (3) the plan is operated as if the plan amendment were in effect during the period beginning on the effective date of the amendment and ending on the plan's section 1107 date or, if earlier, the date the amendment is adopted.

A plan is not treated as failing to be operated in accordance with its terms during the period described in (3), provided that the conditions in (1) through (3) are met.

C. Section 401(b)

Section 401(b) provides a period during which a plan may be amended retroactively to comply with the Code's qualification requirements. Section 1.401(b)-1 and Rev. Proc. 2007-44, 2007-2 C.B. 54, describe disqualifying provisions that may be amended retroactively and the remedial amendment period during which retroactive amendments may be adopted. Section 1.401(b)-1(f) gives the Commissioner the discretion to extend the remedial amendment period. Section 401(b) does not relieve a plan from the requirement to satisfy § 411(d)(6) with respect to an amendment.

Section 5.05 of Rev. Proc. 2007-44 provides that, when there are statutory or regulatory changes to the plan qualification requirements that will impact provisions of the written plan document, the adoption of an interim amendment will generally be required by the later of the end of the plan year in which the change is first effective or the due date of the employer's tax return for the tax year that includes the date the change is first effective. Section 5.07(2) of Rev. Proc. 2007-44 provides an exception from the general deadline for adopting interim amendments. This section provides that the deadline for adopting an interim amendment pursuant to a provision of PPA '06 or regulations thereunder is the plan's section 1107 date. This is also the deadline for adopting a

discretionary amendment (within the meaning of section 5.05(2) of Rev. Proc. 2007-44) pursuant to a provision of PPA '06 or regulations thereunder.

Notice 2009-97, 2009-2 C.B. 972, extends the deadline for adopting an interim or discretionary plan amendment under certain sections of the Code that were added or amended by PPA '06, including § 411(a)(13) (other than § 411(a)(13)(A)) and § 411(b)(5) to the last day of the first plan year that begins on or after January 1, 2010.

Notice 2010-77, 2010-2 C.B. 851, further extends the deadline for adopting an interim or discretionary plan amendment under § 411(a)(13) (other than § 411(a)(13)(A)) and § 411(b)(5) to the last day of the first plan year that begins on or after January 1, 2011. Notice 2010-77 also provides that, when the 2010 proposed hybrid plan regulations are finalized, it is expected that relief from the requirements of § 411(d)(6) will be granted for a plan amendment that eliminates or reduces a section 411(d)(6) protected benefit, provided that the amendment is adopted by the last day of the first plan year that begins on or after January 1, 2011, and the elimination or reduction is made only to the extent necessary to enable the plan to meet the requirements of § 411(b)(5).

Notice 2010-90, 2010-2 C.B. 909, which contains the 2010 Cumulative List of Changes in Plan Qualification Requirements (2010 Cumulative List) described in section 4 of Rev. Proc. 2007-44, provides that the Service will consider the 2010 final hybrid plan regulations in issuing a determination letter in the case of a statutory hybrid plan that is submitted to the Service between February 1, 2011, and January 31, 2012.

D. Section 4980F

Section 4980F imposes an excise tax when a plan administrator fails to provide timely notice of a plan amendment that provides for a significant reduction in the rate of future benefit accrual (a "section 204(h) amendment"). Section 204(h) of the Employee Retirement Income Security Act (ERISA) contains parallel rules to § 4980F of the Code. Section 204(h) notice is notice that complies with § 4980F(e) of the Code and section 204(h)(1) of ERISA.

Final regulations under § 4980F of the Code were published in the Federal Register on November 24, 2009, 74 F.R. 61270. The regulations under § 4980F also apply for purposes of section 204(h) of ERISA, pursuant to section 101(a) of Reorganization Plan No. 4 of 1978, 29 U.S.C. 1001nt. Section 54.4980F-1, A-9(a), provides that section 204(h) notice must generally be provided at least 45 days before the effective date of the section 204(h) amendment. Under § 54.4980F-1, A-9(g), a section 204(h) amendment that is permitted to reduce section 411(d)(6) protected benefits, including an amendment that is permitted to be retroactively effective under section 1107 of PPA '06, is effective on the first date on which the plan is operated as if the amendment were in effect. Section 54.4980F-1, A-9(g)(4), authorizes the Commissioner to provide special timing rules under § 4980F, in revenue rulings, notices, or other guidance

published in the Internal Revenue Bulletin, that the Commissioner determines to be necessary or appropriate regarding section 204(h) notice required for a section 204(h) amendment that applies to benefits accrued before the applicable amendment date but that does not violate § 411(d)(6).

III. Postponement of Effective/Applicability Date of § 1.411(b)(5)-1(d)(1)(iii), (d)(1)(vi), and (d)(6)(i)

The 2010 proposed hybrid plan regulations, when finalized, will apply for plan years that begin on or after a date to be specified in those regulations that is not earlier than January 1, 2013. In addition, the Treasury Department and the Service intend to amend the 2010 final hybrid plan regulations to postpone the effective/applicability date of § 1.411(b)(5)-1(d)(1)(iii), (d)(1)(vi), and (d)(6)(i) to match the applicability date that will apply to the proposed regulations when they are finalized. The provisions of § 1.411(b)(5)-1(f)(2)(iii) regarding reliance before the regulatory effective date will continue to apply until § 1.411(b)(5)-1(d)(1)(iii), (d)(1)(vi), and (d)(6)(i) become effective. Until the 2010 final hybrid plan regulations are amended, plan sponsors may rely on this notice with respect to the postponement of the effective/applicability date of § 1.411(b)(5)-1(d)(1)(iii), (d)(1)(vi), and (d)(6)(i).

IV. Extension of Deadline for Adopting Amendments Under § 411(a)(13) (other than § 411(a)(13)(A)) and § 411(b)(5)

The anticipated § 411(d)(6) relief discussed in section IV.C of the preamble to the 2010 proposed hybrid plan regulations is expected to apply to eligible plan amendments adopted before those regulations, once finalized, apply to a plan. Consistent with the expected duration of § 411(d)(6) relief, the deadline for adopting an interim or discretionary plan amendment under § 411(a)(13) (other than § 411(a)(13)(A)) and § 411(b)(5) is extended to the last day of the first plan year preceding the plan year for which the 2010 proposed hybrid plan regulations, once finalized, apply to the plan. A plan must continue to satisfy the operational compliance requirements of section 1107 of PPA '06 as a condition of the extension of the deadline for adopting plan amendments provided by this notice.

As a result of the extension of time to amend for § 411(a)(13) (other than § 411(a)(13)(A)) and § 411(b)(5), the Service's review of an application for a determination letter submitted to the Service between February 1, 2011 and January 31, 2012, will not consider the 2010 final hybrid plan regulations (other than with respect to § 411(a)(13)(A)) unless the plan has been amended to satisfy those regulations. For this purpose, the Service will only consider those provisions of the regulations that are effective for plan years that begin on or after January 1, 2011.

V. Section 411(d)(6) Relief for Amendments Under § 411(b)(5)

When the 2010 proposed hybrid plan regulations are finalized, it is expected that relief from the requirements of § 411(d)(6) will be granted for a plan amendment that eliminates or reduces a section 411(d)(6) protected benefit, provided that the amendment is adopted by the last day of the first plan year preceding the plan year for which the 2010 proposed hybrid plan regulations, once finalized, apply to the plan, and the elimination or reduction is made only to the extent necessary to enable the plan to meet the requirements of § 411(b)(5).

VI. Special Timing Rule

This section VI provides a special timing rule for providing section 204(h) notice of a plan amendment that (1) changes an interest crediting rate under a statutory hybrid plan, (2) was adopted after November 10, 2009 (the date of issuance of Announcement 2009-82), and on or before the plan's section 1107 date, and (3) became effective not later than the first day of the first plan year that began on or after January 1, 2010. Pursuant to § 54.4980F-1, A-9(g)(4), section 204(h) notice with respect to such an amendment was permitted to be provided as late as 30 days after the date the amendment was effective. For this purpose, a plan amendment that changes an interest crediting rate under a statutory hybrid plan is effective on the first date on which the plan operationally implements the change or, if earlier, on the stated effective date of the amendment. This rule applies not only to the portion of the amendment that changes the plan's interest crediting rate, but also to any other change made by the amendment that may be necessary or appropriate in light of the change in the plan's interest crediting rate (such as any reduction in future principal credits under the plan).

Under this special rule, while the adoption date must have been after November 10, 2009, and on or before the last day of the first plan year beginning on or after January 1, 2009, the date by which section 204(h) notice was required to be provided relates to the date the amendment was effective. Thus, for example, if an amendment changing the interest crediting rate with respect to future interest credits under a plan with a plan year beginning on October 1, 2009, and ending on September 30, 2010 (the plan's section 1107 date), was adopted on September 5, 2010, and became effective on September 30, 2010 (the plan's section 1107 date), section 204(h) notice of the amendment was permitted to be provided as late as October 30, 2010. However, if the plan had operationally implemented the change in interest crediting rate on a date earlier than September 30, 2010, then the special rule in this section VI would only apply to permit section 204(h) notice to have been provided as late as 30 days after that earlier date.

Because the special rule in this section VI only applies to an amendment that was adopted on or before the last day of the first plan year beginning on or after January 1, 2009, the special rule does not apply in the case of a plan amendment described in section IV that is adopted within the plan's remedial amendment period but after the plan's section 1107 date.

VII. Effect on Other Documents

Notices 2010-77 and 2010-90 are modified.

Drafting Information

The principal author of this notice is James P. Flannery of the Employee Plans, Tax Exempt and Government Entities Division. Questions regarding this notice may be sent via e-mail to *retirementplanquestions@irs.gov*.