Qualification Changes - Exam Break-out

Cumulative List

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INTERNAL REVENUE SERVICE
TAX EXEMPT AND GOVERNMENT ENTITIES

Overview

Introduction

This chapter summarizes certain requirements on the 2009 Cumulative List. Some topics were chosen because they were not covered in prior CPEs, even though these topics were listed on older Cumulative Lists. Other topics were chosen if they were recent changes, such as being listed on the 2008 or 2009 Cumulative List.

Order of the Chapter

Note that the topics are listed in the order that they appear on the 2009 Cumulative List. For example, Item 2 is the Normal Retirement Age section, which is the first item covered in this chapter.

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Normal Retirement Age

Final Regulations for Normal Retirement Age (NRA)

Final regulations were published on May 22, 2007, and apply to pension plans. An amendment is not required if the plan is already in compliance. If required, the compliance date is the due date of the tax returns, plus extensions. If the amendment is discretionary, and the due date is end of the plan year in which the provision is used.

Introduction

Normal retirement age is generally the lowest age specified in the pension plan at which the employee has the right to receive retirement benefits based on the amount of the employee's service on the date of retirement at the full rate set forth in the plan.

Final Regulations

Treas. Reg. Section 1.401(a)-1(b)(1)(i) provides that in order for a pension plan to be qualified, the plan must be established and maintained by an employer primarily to provide systematically for the payment of benefits to its employees over a period of years, usually for life, after retirement or attainment of normal retirement age.

The normal retirement age under a 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. Treas. Reg. Section 1.401(a)-1(b)(2).

Age 62 Safe Harbor

A normal retirement age of 62 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. Thus a plan may provide for a normal retirement age of age 62 or later without worrying about whether that age is reasonably representative in the industry.

Ages 55 to 62

For a normal retirement age between ages 55 through 61, there is a facts and circumstances test. Thus, whether the age is reasonably representative in the industry is based on all the relevant facts and circumstances.

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Normal Retirement Age, Continued

Age under 55

For a normal retirement age that is lower than age 55, the age is presumed to be earlier than the earliest age that is reasonably representative in the industry. However, the Commissioner can determine that under the facts and circumstances, the normal retirement age is reasonably representative in the industry.

Public Safety Employees

A normal retirement age that is age 50 or later is deemed to be reasonably representative of the typical age in the industry if substantially all of the participants in the plan are qualified public safety employees (within the meaning of section 72(t)(10)(B).

Reduction in Hours

Retirement does not include a reduction in the number of hours that an employee works. Thus, benefits may not be distributed prior to normal retirement age solely due to a reduction in the number of hours.

Notice 2007 – 69

Certain pension plans may be required to change their normal retirement age definition to comply with the final regulations. Notice 2007-69 provides temporary relief until the first day of the first plan year that begins after June 30, 2008.

Transfer of Plan Assets to Unrelated Third Party- Revenue Rulings 2008-40 and 2008-45

Plans Affected and Effective Dates

Revenue Rulings 2008-40 and 2008-45 apply to all plans. These revenue rulings are on the 2008 cumulative list. Compliance dates for RR 2008-40 vary-Octobers 1, 2008 or January 1, 2011. For RR 2008-45, the compliance date is August 28, 2008.

RR 2008-40

This ruling provides that the transfer of amounts from a trust under a qualified plan to a non-qualified foreign trust is treated as a distribution from the qualified plan. The ruling also provides that a transfer of assets and liabilities from a trust under a qualified plan to a plan that satisfies section 1165 of the Puerto Rico code is also a distribution from the qualified plan.

Transfer of Assets and Liabilities

A transfer of assets and liabilities from one plan to another constitutes a continuation of the transferor plan with respect to these assets and liabilities. This transfer is not a distribution of benefits. However, a nonqualified plan cannot be a continuation from a qualified plan.

Thus a transfer of assets from a qualified plan to a nonqualified plan results in a distribution and the disqualification of the qualified plan if the distribution failed to satisfied the applicable qualification requirements. For example, the plan would be disqualified if any participant was not eligible for a distribution or if the transfer eliminated rights under section 411(d)(6).

Section 402(c)(8) lists the types of arrangements that constitute eligible retirement plans for purposes of excluding eligible rollover distributions from income under § 402(c), which does not include nonqualified foreign trusts.

Section 402(d) provides that a nonqualified foreign trust is nonetheless treated as qualified under § 501(a) for purposes of § 402(c)(8) if it satisfies all of the qualification requirements of § 401(a) other than having a U.S. trust. Accordingly, a distribution to a nonqualified foreign trust is excluded from income under § 402(c) only if it is rolled over to a trust described in § 402(d).

RR 2008-45

This ruling provides that the exclusive benefit rule is violated if the sponsorship of a qualified plan is transferred from an employer to an unrelated taxpayer and the transfer is not in connection with the transfer of business assets or operations from the employer to the unrelated taxpayer.

Section 401(a)(31)-Distribution Rules

Introduction

The following section provides some background and the changes to section 401(a)(31).

Section 401(a)(31)-Background

In order to be qualified, the plan must provide that if a participant receiving an eligible rollover distribution and:

- Elects to have the distribution paid directly to an eligible retirement plan and
- Specifies the plan to which the distribution is to be made,

- the distribution shall be made in the form of a direct trustee to trustee transfer to the specified eligible retirement plan.

The following sections provide the changes that were made to section 401(a)(31).

After-Tax Contributions

Section 643(b) of EGTRRA allows after-tax contributions to be rolled over under certain circumstances. This is required for all plans providing after-tax contributions. This rule also applies to distributions made on or after January 1, 2002.

The compliance date is the end of the EGTRRA good faith remedial amendment period, which is the later of:

- End of the plan year in which the amendments are required to be or are optionally put into effect, or
- The end of the GUST remedial amendment period (or 91 days from the date on the favorable determination letter, if later.

A good faith or interim amendment is required.

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Section 401(a)(31)-Distribution Rules, Continued

After-Tax Contributions-Background

Section 401(a)(31)(C) provides that subparagraph (A) (general rule of section 401(a)(31)) and (B) (mandatory distributions) only applies to the extent that the eligible rollover distribution would be includable in gross income if the distribution was not transferred.

However, after-tax contributions can be transferred if the contributions are transferred to a DC qualified plan, and such plan agrees to separately account for the after-tax contributions.

After-tax contributions can also be transferred to an IRA or IRA annuity as defined in section 402(c)(8)(B)(i) and (ii).

Mandatory Distributions-Effective date

There was also a change requiring mandatory distributions of more than $1000 from a qualified plan to be paid in a direct rollover to an IRA. This is required for all plans and is effective for distributions made after March 28, 2005.
The compliance date is the latest of:

- December 31, 2005,
- The end of the plan year that contains March 28, 2005, or
- The tax filing deadline, including extensions, for the taxable year containing March 28, 2005.

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Section 401(a)(31)-Distribution Rules, Continued

Section 401(a)(31)(B)-Mandatory Distributions-Background

Section 401(a)(31)(B) provides that a qualified eligible plan must provide that if:

- A mandatory distribution exceeding $1,000 is made, and
- The person receiving the distribution does not make an election to pay the distribution to a eligible retirement plan and does not elect to receive the distribution directly,
- The plan administrator shall make such transfer to an individual retirement plan and shall notify the distributee in writing that the distribution may be transferred to another individual retirement plan.

In other words, if the participant does not elect to receive the mandatory distribution or to pay the distribution to another plan, the plan administrator will pay the distribution to an IRA. This is an automatic rollover of mandatory distributions.

Eligible Plan for Certain Mandatory Distributions

An eligible plan with respect to automatic rollovers is a plan that provides for mandatory distributions of any nonforfeitable accrued benefit for which the present value does not exceed $5,000. The effective date is March 28, 2005.

Required Provision

All plans that have mandatory distributions must be amended to comply with section 401(a)(31)(B). The plan could be amended to comply with this requirement by lowering the distribution limit to $1,000. As a result, the plan administrator would not have to transfer any funds to an individual retirement account.

The plan could also keep the limit at $5,000, but any distribution amount in between $1,000 and $5,000 must be rolled over into an IRA.

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Section 401(a)(31)-Distribution Rules, Continued

Eligible Retirement Plan

The definition of eligible retirement plan under section 402(c)(8) was changed to include a 403(b) annuity contract and eligible governmental plan. This change is required for all plans, effective for distributions made on or after January 1, 2002.

The compliance date is the end of the EGTRRA good faith remedial amendment period, which is the later of:

- End of the plan year in which the amendments are required to be or are optionally put into effect, or
- The end of the GUST remedial amendment period (or 91 days from the date on the favorable determination letter, if later.

Note that section 401(a)(31)(D) provides that an eligible retirement plan is a plan described under section 402(c)(8)(B), except that the plan must be a DC that accepts rollover distributions.

Hardship Distributions

Finally, the definition of eligible rollover distributions was changed to exclude hardship distributions. This is required for all plans, effective for distributions made on or after January 1, 2002. The compliance date is the end of the EGTRRA good faith remedial amendment period, which is the later of:

- End of the plan year in which the amendments are required to be or are optionally put into effect, or
- The end of the GUST remedial amendment period (or 91 days from the date on the favorable determination letter, if later.

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Eligible Rollover Distribution-Background

EGTRRA modified the definition of an eligible rollover distribution to exclude hardship distributions. An eligible rollover distribution is defined by IRC section 402(f)(2)(A), which refers to an eligible rollover distribution as defined in section 402(c).

Section 402(c)(4) defines the term eligible rollover distribution as any distribution of all or a portion of the balance to the credit of the employee in a qualified trust, except that such distribution does not include:

- A distribution that is one of a series of substantially equal periodic payments,
- A required distribution under section 401(a)(9), and
- Any distribution which is made upon hardship of the employee.

Section 401(a)(35)--Divesting Publicly Traded Securities

Amendments and Applicability

The amendment required by section 401(a)(35) applies to all DC plans. The compliance date was extended by notice 2009 –97 to the last day of the first plan year beginning on or after January 1, 2010.

An EGTRRA good faith or interim amendment is not required.

Section 401(a)(35) was also amended to change the definition of a one participant retirement plan. This change was made under section 401(a)(35)(E)(iv). This is required for all DC plans with conflicting language.

The effective date was for plan years beginning after December 31, 2006. The compliance date was extended by notice 2009-97 to the last day of the first plan year beginning on or after 2010. A good faith EGTRRA or interim amendment is not required.

Notice 2008-7

This notice extends the transitional guidance and transitional relief provided to certain DC plans holding publicly traded employer securities under notice 2006-107. This extension is until the issued regulations under section 401(a)(35) become effective. These regulations, when finalized, will not be effective before plan years beginning on or after January 1, 2009. Except as otherwise provided in proposed or final regulations, plans must continue to apply Notice 2006-107 until the regulations become effective.

Background

A qualified plan must meet the diversification requirements of section 401(a)(35)(B), (C) and (D). These diversification requirements apply to DC plans that hold publicly traded employer securities.

Section 401(a)(35)(B)

Section 401(a)(35)(B) provides that for elective deferrals and employee contributions invested in employer securities, a plan must allow an individual to elect to direct the plan to divest any such securities and reinvest an equivalent amount in other investment options meeting the requirements of section 401(a)(35)(D).

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Section 401(a)(35)--Divesting Publicly Traded Securities,
Continued

Diversification Right

This diversification right only applies when publicly traded employer securities are held under the plan and allocated the participant's or beneficiary's account. See notice 2006 – 107

Restrictions on Divestiture Rights

A plan can limit the time for divestment and reinvestment to periodic, reasonable opportunities occurring no less frequently than quarterly. Also, a plan is prohibited from imposing restrictions or conditions with respect to the investment of employer securities that are not imposed on the investment of other assets of the plan. Notice 2006 – 107.

Section 401(a)(35)(C)

For employer contributions invested in employer securities, a plan meets the requirements of section 401(a)(35)(C) if each applicable individual who is a participant with at least three years of service, or is the beneficiary of a participant, may elect to direct the plan to:

- divest any employer securities, and
- reinvest an equivalent amount in other investment options meeting the requirements of section 401(a)(35)(D).

Section 401(a)(35)(D)-Investment Options

The plan must offer at least three investment options, other than employer securities, to which an applicable individual may direct the proceeds from the divestment of employer securities. Each investment option must be diversified and have materially different risk and return characteristics.

Investment Options

Investment options that satisfy the requirements of section 2550.404-1(b)(3) of the Department of Labor regulations are treated as being diversified and having materially different risk and return characteristics. Notice 2006 – 107.

Applicable Individual

An "applicable individual" means a participant or a beneficiary who has an account under the plan in which the beneficiary is entitled to exercise the rights of the participant.

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Section 401(a)(35)--Divesting Publicly Traded Securities,
Continued

Notice 2006 – 107

This notice provides transitional guidelines for section 401(a)(35). Publicly traded employer securities mean employer securities which are readily tradable on an established securities market. Although employer securities may not be publicly traded, they are treated as publicly traded if any employer corporation or any member of a controlled group that includes the employer corporation has issued a class of stock that is a publicly traded employer security.

Conditions for an ESOP

Section 401(a)(35) does not apply to an ESOP if:

- There are no contributions held in the plan which are elective deferrals, after-tax contribution or matching contributions that are subject to section 401(k) or (m), and
- The plan is, for purposes of section 414(l) a separate plan from any other plan maintained by the employer.

Thus, an ESOP is subject to section 401(a)(35) if either the ESOP holds any contributions to which section 401(k) or (m) applies or the ESOP is a portion of the plan that holds any amounts that are not part of the ESOP.

Applicable DC Plan

Applicable DC plan means any DC plan which holds any publicly traded employer securities. An applicable DC plan does not include a one participant retirement plan.

A one participant retirement plan means a retirement plan that on the first day of the plan year:

- Covered only one individual, (or the individual and the individual's spouse) and the individual (or the individual and the individual's spouse) owned 100% of the plan sponsor, or
- Covered only one or more partners (or partners and their spouses) in the plan sponsor.

Section 401(a)(36)

Optional Amendment

Section 401(a)(36) allows for in-service distributions for participants that have attained at least age 62. This provision applies to pension plans. The amendment is optional.

The effective date of the provision is for plan years beginning after December 31, 2006. The compliance date is for distributions made for plan years that begin after December 31, 2006.

Section 401(k) Changes

Introduction for Severance from Employment

Distributions of elective deferrals are permitted upon severance from employment. This is an optional plan amendment and is effective for distributions made on or after January 1, 2002, regardless of when the severance occurs.

The compliance date is the end of the EGTRRA good faith remedial amendment period, which is the later of:

- End of the plan year in which the amendments are required or are optionally put into effect, or
- The end of the GUST remedial amendment period (or 91 days from the date of the latest favorable determination letter, if later).

Severance from Employment

Section 401(k)(2) and (k)(10) were amended by section 646(a)(1) of EGTRRA to permit distributions of elective deferrals from a 401(k) plan upon the severance of employment, rather than separation from service.

GCM 39824 provides that a determination as to whether a severance from employment has occurred depends on whether or not the employee continues to be employed by the employer maintaining the plan. This is distinguished from whether the employee continues to work on the same job for a different employer, or consolidation etc. Thus, if the employee of the employer changes from the employer maintaining the plan to another employer of the same controlled group, there is no severance from employment.

Hardship Distributions

After a hardship distribution, employees are prohibited from making elective contributions and employee contributions for a certain period of time. This time period is reduced from one year to six months. See section 1.401(k)-1(d)(3)(iv)(E)(2). This is required for safe harbor hardship distributions.

Section 826 of PPA ’06 directs the Secretary of the Treasury to modify the rules relating to distributions from § 401(k), § 403(b), § 409A, and § 457(b) plans on account of a participant’s hardship or unforeseeable financial emergency. Such plans are permitted to treat a participant’s beneficiary under the plan the same as the participant’s spouse or dependent in determining whether the participant has incurred a hardship or unforeseeable financial emergency.

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Section 401(k) Changes, Continued

Other Expenses Allowed for Hardship Distributions

A § 401(k) plan that permits hardship distributions of elective contributions to a participant only for expenses described in § 1.401(k)-1(d)(3)(iii)(B) may, beginning August 17, 2006, permit distributions for expenses described in §1.401(k)-1(d)(3)(iii)(B)(*1*), (*3*), or (*5*) (relating to medical, tuition, and funeral expenses, respectively) for a primary beneficiary under the plan.

Primary Beneficiary

A "primary beneficiary under the plan" is an individual who is named as a beneficiary under the plan and has an unconditional right to all or a portion of the participant's account balance under the plan upon the death of the participant.

Plan must satisfy All Other Hardship Distribution Requirements

A plan that adopts these expanded hardship provisions must still satisfy all the other requirements applicable to hardship distributions, such as the requirement that the distribution be necessary to satisfy the financial need. These rules also apply to § 403(b) plans.

Announcement 2007 – 59

A plan will not fail to satisfy the requirements to be a 401(k) safe harbor plan merely because of midyear changes to implement the hardship withdrawals described in part III of notice 2007-7 (beneficiaries treated as a spouse or dependent).

Other 401(k) changes

Reservists taking an In-Service Distribution

Section 401(k)(2)(B)(i)(V) permits reservists called to active duty to take in-service distributions from a 401(k) plan. Section 107(a) of the HEART Act extends the applicability of the qualified reservist distribution to individuals ordered or called to active duty after December 31, 2007.

Gap Period Income

Section 902(e)(3) of PPA '06 eliminated the gap period income rules excess contributions. Thus, when excess contributions are distributed, income on the excess contributions is calculated only with respect to the year in which the excess contributions arose.

PPA ' 06 also eliminated the gap period income rules excess aggregate contributions in section 401(m)(6)(A). 2008 cumulative list.

Qualified Automatic Contribution Arrangements (QACAs)

Section 401(k)(13), Section 401(m)(12)

Section 902 of PPA '06 added section 401(k)(13) with respect to qualified automatic contribution arrangements. (2008 CL). A qualified automatic contribution arrangement (QACA) is a safe harbor automatic contribution arrangement (ACA) that is deemed to satisfy the ADP/ACP tests.

Section 902 also added section 401(m)(12) with respect to qualified automatic contribution arrangements.

QACA-Regulations

On February 24, 2009, final regulations were published with respect to QACAs for both 401(k) and (m) plans. This is new for the 2009 cumulative list.

For plan years beginning on or after January 1, 2008, a cash or deferred arrangement satisfies the ADP safe harbor provision of section 401(k)(13) for a plan year if the arrangement:

- Is described in paragraph (j), and
- Satisfies:
  - the safe harbor contribution requirement of paragraph (k), and
  - the notice requirement of paragraph (d).

The plan must satisfy other requirements in the regulations. Treas. Reg. Section 1.401(k)-3(a)(2).

Automatic Contribution Arrangement

An automatic contribution arrangement is cash or deferred arrangement that provides that, in the absence of an employee's affirmative election, a default election applies where the employee is treated as having made an election to have a specified contribution made to the plan on his or her behalf. The default election ceases to apply for periods when the employee has an affirmative election to have elective contributions made in a different amount or not to have elective contributions. Treas. Reg. Section 1.401(k)-3(j)(1)(ii).

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Qualified Automatic Contribution Arrangements (QACAs), Continued

Automatic Contribution Requirement

A cash or deferred arrangement is described in section 1.401(k)-3 (j) if it is an automatic contribution arrangement under 1.401(k)-3(j)(1)(ii) with a default election. The default election under that arrangement must be a contribution equal to the qualified percentage under (j)(2). This qualified percentage is multiplied by the employee's compensation to determine the elective contributions. Treas. Reg. Section 1.401(k)-3(j)(1)(i).

Qualified Percentage

Under Treas. Reg. section 1.401(k)-3(j)(2), a percentage is a qualified percentage only if it:

- Is uniform for all employees (with exceptions under 1.401(k)-3(j)(2)(iii).
- Does not exceed 10%, and
- Satisfies the minimum percentage requirements of 1.401(k)-3(j)(2)(ii).

Exception for Current Employees

An automatic contribution arrangement will still be a qualified automatic contribution arrangement even though the default election is not applied to an employee who:

- Was an eligible employee immediately prior to the effective date of the QACA and
- Had, on that effective date, an affirmative election in effect (that remains in effect) to:
  - have elective contributions made on his or her behalf (in a specified percentage), or
  - not to have any elective contributions made on his or her behalf.

Treas. Reg. Section 1.401(k)-3(j)(1)(iii).

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Qualified Automatic Contribution Arrangements (QACAs), Continued

Reference to CPE Chapter

Chapter 1 of CPE 2009 covered automatic contribution arrangements, including qualified automatic contribution arrangements under section 401(k)(13).

Revenue Ruling 2009-30

A default contribution to a profit-sharing plan will still be considered elective contributions even though these contributions are made pursuant to an automatic contribution arrangement which provides the following:

> An eligible employee's default contribution percentage automatically increases in plan years after the first plan year of the employee's participation in the arrangement based in part on increases in the employee's compensation.

The default percentage can increase for all eligible employees on a date other than the first day of the plan year. Thus, with such an increase, the automatic contribution arrangement will still satisfy the qualified percentage requirement, including uniformity and minimum percentage requirements. 2009 cumulative list.

Notice 2009-65

This notice provides to sample plan amendments for sponsors, practitioners, and employers who want to add certain automatic contribution features to their 401(k) plans.

The first sample plan amendment can be used to add an automatic contribution arrangement to a 401(k) plan.

The second sample plan amendment can be used to add eligible automatic contribution arrangement under section 414(w).

Effective Date

Section 1107 of PPA '06 provided generally that any plan amendment made pursuant to PPA '06 can be made as late as the last day of the first plan year beginning on or after January 1, 2009.

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Qualified Automatic Contribution Arrangements (QACAs), Continued

Notice 2009 - 65-Time and Manner of Adoption

Plan sponsors who want to add one of the sample amendments to their 401(k) plan must adopt the chosen amendment by the later of:

- The end of the plan year in which the amendment is effective. This is the deadline to adopt a discretionary amendment under section 5.05(2) of Revenue Procedure 2007-44.
- If applicable, the deadline under PPA '06 for adopting an amendment pursuant to PPA ' 06

Effect on Reliance

The adoption of either sample plan amendment, as modified if necessary to conform to the plan's terms and administrative procedures, will not result in the loss of reliance on a favorable opinion, advisory, or determination letter.

Section 402 Changes

Section 402(c)(2)(A)

Section 402(c)(2)(A), amended by section 822 of PPA '06, allows **nontaxable** distributions from a qualified plan to be directly rolled over tax-free to either:

- Another qualified plan, or
- A section 403(b) annuity.

The plan receiving the contributions must satisfy separate accounting requirements. Thus, the plan has to provide separate accounting for the distribution portion that is includable in gross income and the distribution portion that is not includable in gross income.

The direct rollover has to be a direct trustee to trustee transfer.

See 2008 cumulative list

Section 402(c)(11)

Section 402(c)(11) allows a non-spouse beneficiary to directly rollover distributions from a qualified retirement plan to an individual retirement plan. The direct rollover must be a trustee to trustee transfer from an eligible retirement plan of a deceased employee to an IRA established for the individual who is a designated non-spouse beneficiary.

The transfer is treated as an eligible rollover distribution. Under section 402(c), an eligible rollover distribution is excluded from income. Thus, if a non-spouse beneficiary elects a trustee to trustee transfer, such transfer is not includable in gross income in the year of distribution.

Plan Required to Provide for Direct Rollover

Under notice 2007-7, a plan is not required to offer a direct rollover to a non-spouse beneficiary. However, this rule was changed by WRERA.

Section 108(f) of WRERA requires that plans provide for non-spouse beneficiary rollovers under section 402(c)(11), effective for plan years beginning after December 31, 2009.

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Section 402 Changes, Continued

Background-Section 401(a)(31)(A)

To fully understand how WRERA requires plans to provide for non-spouse beneficiary rollovers, we must first review the general rule under section 401(a)(31).

The general rule under section 401(a)(31)(A) requires that a plan provide that if the distributee of any eligible rollover distribution:

- Elects to have such distribution paid directly to an eligible retirement plan, and
- Specifies the eligible retirement plan to which the distribution is to be paid,

- such distribution shall be made in the form of a direct trustee to trustee transfer to the eligible retirement plan.

Eligible Rollover Distribution

An eligible rollover distribution under section 401(a)(31)(D) refers to section 402(f)(2)(A). Section 402(f)(2)(A) defines an eligible rollover distribution to include any distribution to a designated beneficiary which would be treated as an eligible rollover distribution by reason of section 402(c)(11). Section 402(c)(11) provides that a trustee to trustee transfer is treated as an eligible rollover distribution if the transfer is to an IRA owned by a designated beneficiary who is not the surviving spouse.

Conclusion – Section 401(a)(31) and Section 402(c)(11)

Section 402(f)(2)(A) now includes distributions under section 402(c)(11) as an eligible rollover distribution. Since section 401(a)(31)(D) refers to the definition of eligible rollover distributions under section 402(f)(2)(A), section 402(c)(11) distributions are brought in under the requirements of section 401(a)(31). Since these distributions are now under the requirements of section 401(a)(31), the plan is required to provide for trustee to trustee transfers for non-spouse beneficiaries.

See 2009 cumulative list.

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Section 402 Changes, Continued

Section 402(f)

PPA '06 provides that notice required to be provided under section 402(f) may be provided as much as 180 days before the annuity starting date, or the date on which the distribution is made.

The general rule under section 402(f) is that a plan administrator of any plan shall, within a reasonable period of time before making an eligible rollover distribution, provide a written explanation to the recipient of various provisions with respect to direct rollovers. 2008 cumulative list.

Notice 2007-7 provides guidance with respect to section 1102 of PPA '06. The 180 day period for distributing notices applies to notices distributed in a plan year that begins after December 31, 2006.

Notice 2009-68 provides two safe harbor explanations that may be provided to recipients of eligible rollover distributions from an employee to satisfy section 402(f). The first safe harbor explanation does not include information relevant to distributions from a designated Roth account. Thus, this explanation should only be used for a distribution that is not from a designated Roth account. 2009 cumulative list.

Section 402(g)(2)

WRERA section 109(b)(3) amended section 402(g)(2)(A)(ii) to eliminate the distribution of gap period earnings with excess deferrals. Thus, earnings with respect to excess deferrals are only calculated through the end of the taxable year in which the excess deferrals arose.

Section 402A-Treating Elective Deferrals as Roth Contributions

Optional Treatment of Elective Deferrals

Section 402A was added by EGTRRA to offer optional treatment of elective deferrals as designated Roth contributions to DC plans. However, such contributions shall not be excludable from gross income. Thus, elective deferrals would be included in gross income if such deferrals are contributed to a Roth account.

Qualified Roth Contribution Program

A "qualified Roth contribution program" means a program under which an employee may elect to make designated Roth contributions in lieu of all or a portion of elective deferrals employees otherwise eligible to make under the applicable retirement plan.

Note there is a separate accounting requirement.

Designated Roth Contribution

The term designated Roth contribution means any elective deferral which:

- Is excludable from gross income of an employee without regard to section 402A, and
- The employee designates the elective deferrals as not being so excludable.

Distributions from a Designated Roth account

Any qualified distribution from a designated Roth account shall not be includable in gross income. A qualified distribution has the same meaning as section 408A(d)(2)(A). Thus, a qualified distribution means any payment or distribution:

- Made on or after the date on which the individual attains 59 1/2,
- Made to a beneficiary (or to the estate of the individual) on or after the death of the individual,
- Attributable to the individual's being disabled,
- Which is a qualified special-purpose distribution.

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Section 402A-Treating Elective Deferrals as Roth Contributions, Continued

Final Regulations

Final regulations under section 401(k) and (m) relating to designated Roth contributions were published on January 3, 2006.

Final regulations under section 402A were published on April 30, 2007.

Section 408 Changes

Section 408(q) Section 408(q) was added to allow for deemed individual retirement accounts in an eligible retirement plan. If:

- A qualified employer plan allows employees to make voluntary employee contributions to a separate account, and
- Under the terms of the qualified employer plan, such account meets the applicable requirements of this section (408) or section 408A,

then such account shall be treated as an individual retirement plan and not as a qualified employer plan. 2004 cumulative list.

Section 408A(e) PPA '06 added section 408A(e) which permits rollovers to Roth IRAs from accounts that are not designated Roth accounts that are part of qualified plans. Such qualified plans must be eligible retirement plans. Also, the rollover contributions must meet the requirements of section 402(c).

An eligible retirement plan is defined in section 402(c)(8)(B), which includes:

- An individual retirement account described in section 408(a),
- A qualified trust,
- An annuity plan described in section 403(a), and
- An annuity contract described in section 403(b).

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Section 408 Changes, Continued

Section 408A-Background

Section 408A provides for Roth IRA accounts. A Roth IRA is an IRA that is designated as a Roth IRA. A Roth IRA is treated in the same manner as an IRA.

Section 408A(c) provides the rules as to how to treat contributions. There is no deduction allowed under section 219 for a contribution to a Roth IRA. There is a contribution limit under section 408A(c)(2), which is the excess of:

- The maximum amount allowable as a deduction under section 219, computed without regard to:
  - section 219(d)(1)(denies deduction for individuals over age 70 1/2) or
  - section 219(g)(limitation of deduction for active participants in certain pension plans)

  over
- The aggregate amount of contributions to all other IRAs maintained for the benefit of the individual.

Distributions for a Roth IRA

The distribution rules are under section 408A(d). The general rule is that any qualified distribution from a Roth IRA is not included in gross income.

Under section 408A(d)(2), a qualified distribution means any payment or distribution:

- Made on or after the date on which the individual attains age 59 1/2,
- Made to a beneficiary (or to the estate of the individual) on or after the death of the individual,
- Attributable to the individual's being disabled, or
- Which is a qualified special-purpose distribution.

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Section 408 Changes, Continued

Distributions for a Roth IRA (continued)

A qualified special-purpose distribution is a distribution under section 72(t)((2)(F). This distribution is from certain plans for first home purchases.

Note that there are other distribution rules with respect to Roth IRAs under section 408A(d).

Section 411 Changes-Vesting

Faster Vesting under Section 411(a)(2)

This vesting change applies to all DC plans, and is required for plan years beginning after December 31, 2006.

Section 904 of PPA '06 amended the minimum vesting requirements to require faster vesting for employer nonelective contributions to a DC plan. Section 411(a)(2)(B), as amended by PPA '06, provides that a DC plan satisfies the minimum vesting requirements for employer contributions if it has a three-year cliff vesting schedule or a 2 to 6 year graded vesting schedule. Also see notice 2007-7.

Section 411(a)(10) – Background

Note that a plan amendment that changes a vesting schedule must satisfy section 411(a)(10). Section 411(a)(10)(B) requires the plan to permit the participant with at least three years of service to elect to have the vested percentage of his accrued benefit determined without regard to the amendment. Under Notice 2007-7, Q&A 28, the plan must ensure that any such election satisfies the new vesting requirements. Thus, such a participant must be provided at all times of vesting percentage that is no less than the minimum under the new vesting rules and the vesting percentage determined under the old vesting rules.

Under Temporary Regulation 1.411(a)-8T, no election needs to be provided for any participant whose nonforfeitable percentage under the plan, as amended, at any time cannot be less than the percentage determined without regard to the amendment.

Separate Vesting Schedules

A plan can have separate vesting schedules for employer nonelective contributions that are and are not subject to faster vesting under section 411(a)(2)(B) as amended by PPA '06. Thus for nonelective contributions for plan years beginning after December 31, 2006, the new vesting schedule is applied. However, the plan must separately account for the contributions made under the prior vesting schedule and the new vesting schedule.

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Section 411 Changes-Vesting, Continued

Contributions that are Subject to the Old Vesting Schedule

A contribution is subject to the old vesting schedule for a plan year that begins before January 1, 2007, if the contribution:

- Is allocated under the terms of the plan as of a date in that plan year and
- Is not subject to any conditions that have not been satisfied by the end of the plan year.

This applies even if the contribution is not made until the next plan year.

Example – When a Contribution is considered to be made

For example, a plan with a calendar year makes a contribution as of December 31, 2006, based on service and compensation in 2006. The contribution is not contingent on the occurrence of an event after 2006. This contribution is treated as made for the 2006 plan year and is not subject to the new vesting schedule even if the amount is not contributed until 2007.

PPA '06-Changes to Notices under Section 411

PPA '06 Changes Notices

Changes made by PPA '06 for required notices apply to all plans and are optional. This change applies to plan years beginning after 12/31/2006.

The new rules relating to the content of the notices apply only to notices issued in those plan years, without regard to the annuity starting date for the distributions. See Notice 2007-7.

Notice required under section 411(a)(11) may be provided as much as 180 days before the annuity starting date. PPA section 1102(a). This PPA section also requires that the notice under section 411(a)(11) include a description of the consequences of failing to defer receipt of a distribution.

The Secretary is directed to modify the regulations under section 411(a)(11) to make the above changes. See 2008 cumulative list.

Q&A 32, Notice 2007-7

A plan administrator is required to revise the notice under section 411 to reflect the modifications made by PPA for notices provided in plan years beginning after December 31, 2006. However, a plan will not fail to meet the new requirements if the plan administrator makes a reasonable attempt to comply with the new requirements for a notice that is provided prior to the 90th day after the issuance of regulations reflecting the PPA '06 modifications.

Q&A 33-Notice 2007-7

There is a safe harbor available to a plan administrator that would be considered a reasonable attempt to comply with the PPA '06 requirement that a description of the participant's right to defer a distribution includes a description of the consequences of failing to defer such a distribution.

Section 411(a)(11)-Rollover is not Part of Involuntary Contribution

Section 411(a)(11)-Background

If the present value of any nonforfeitable accrued benefit exceeds $5,000, the plan must provide that such benefit may not be immediately distributed without the participant's consent. Section 411(a)(11).

Rollover Distributions not part of Account Balance for Involuntary Distributions

Section 411(a)(11)(D) was added to allow amounts attributable to rollover contributions to be disregarded in determining the value of an account balance for involuntary distributions. The term rollover contributions means any rollover contributions under section 402(c), 403(a)(4), 403(b)(8), 408(d)(3)(A)(ii) and 457(e)(16). 2004 Cumulative List.

Eligible Rollover Distributions

Section 402(c)(4) defines the term eligible rollover distributions as any distribution of all or any portion of the balance of the credit of the employee in a qualified trust, except:

- Any distributions which is one of a series of substantially equal periodic payments made:
  - For the life or life expectancy of the employee or joint lives or joint life expectancies of the employee and the employee's designated beneficiary
  - for a specified period of 10 years or more
- Any minimum required distribution under section 401(a)(9), and
- Any hardship distribution.

Section 411-Cash Balance Plans

Section 411(a)(13) – Cash Balance Plans

Special vesting rules were added for applicable DB plans, such as cash balance plans. This is required for DB plans. The compliance date, which is different than general compliance date for PPA '06, is extended to the last day of the first plan year that begins on or after January 1, 2011. This deadline is for interim and discretionary amendments under section 411(a)(13) and 411(b)(5), except for section 411(a)(13)(A).

A plan must continue to satisfy the operational requirements under section 1107 of PPA'06 as a condition of the extension of the deadline for adopting plan amendments provided in Notice 2010 – 77.

Section 411(a)(13)(A) – Background

Section 411(a)(13)(A) was also amended by WRERA, section 107(b)(2) (2009 cumulative list).

An applicable DB plan, which is defined as a cash balance plan or a PEP plan, is subject to a three-year cliff vesting requirement under section 411(a)(13)(B). In addition, the applicable DB plan (a cash balance plan) shall not fail to meet section 411(a)(11), 411(c) or 417(e) solely because the present value of the accrued benefit (or any portion) is, under the terms of the plan, equal to the amount of the hypothetical account balance.

For more information on section 411(a)(13), please refer to the hybrid plan chapter of CPE 2013. In addition, Notice 2007-6 provides guidance regarding cash balance plans and other hybrid DB plans.

Section 411(b)(1) – Revenue Ruling 2008-7

This ruling is required for cash balance or other hybrid plans which do not otherwise satisfied the accrual rules. The relief is effective for plan years beginning before January 1, 2009. The compliance date follows PPA "06. A good faith or interim requirement is not required.

This revenue ruling applies the backloaded provisions to DB cash balance plans and addresses the use of a "greater of" formula when a DB plan is converted to a cash balance plan. For explanation of the back loading, please refer to the hybrid plan chapter of CPE 2013. See 2008 cumulative list.

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411(b)(5) – Required and Compliance Date

Section 411(b)(5) was added by PPA'06. The effective date of the PPA '06 provision is for periods beginning on or after June 29, 2005. However, this provision is extended under notice 2010-77 to the last day of the first plan year beginning after January 1, 2011.

Section 411(b)(5) – Background

A plan will not fail the age discrimination requirements of section 411(b)(1)(H)(i) if a participant's accrued benefit, as determined as of any date under the terms of the plan, would be equal or greater than that of any similarly situated, younger individual who is or could be a participant.

A participant is similarly situated to any other individual if such participant is identical to the other individual in every respect except for age. Thus, the participant must be identical with respect to period of service, compensation, position, date of hire, work history, and any other respect.

The accrued benefit, may, under the terms of the plan, be expressed as an annuity payable at normal retirement age, the balance of a hypothetical account, or the current value of the accumulated percentage of the employee's final average compensation.

For further information on section 411(b)(5), please refer to the hybrid plan chapter in CPE 2013.

Partial Termination-Revenue Ruling 2007-43

Introduction

This revenue ruling applies to DC plans. Under this revenue ruling, a plant shutdown caused a partial termination, requiring full vesting of the affected participants.

Revenue Ruling 2007-43-Background

An employer maintains a DC plan that is qualified under section 401(a). The plan year is the calendar year. The plan participants include both current and former employees. The plan provides for each participant to have a fully vested and nonforfeitable right to his or her account balance upon the plan's termination or partial termination that affects the participants.

The employer ceases operations at one of its four business locations. As a result, 23% of the plan's participants who are employees ceased active participation in the plan due to a severance from employment. Some of these participants are fully vested due to having completed three years of service or having attained age 65.

The revenue ruling cited regulations and cases and held that there is a presumption that a partial termination has occurred because the turnover rate is 20% or more. The facts and circumstances support the finding of a partial termination because the severance from employment occurred as a result of the shutdown of one of the employer's business locations. Therefore, a partial termination has occurred.

Catch-Up Contributions under Section 414(v)

Introduction

Catch-up contributions under section 414(v) were added by EGTRRA. An applicable employer plan is permitted to allow an eligible participant to make additional elective deferrals in any plan year. The amount of the additional elective deferrals cannot exceed the lesser of:

- The applicable dollar amount or
- The excess, if any, of:
  - the participants compensation under section 415, over
  - any other elective deferrals which are made without regard to section 414(v).

Applicable Dollar Amount

The applicable dollar amount for 2009 and 2010 is $5,500. This dollar amount applies to an applicable employer plan other than a plan described in sections 401(k)(11), a SIMPLE plan, or 408(p), A SIMPLE retirement account.

Eligible Participant

An eligible participant means a plan participant:

- Who would attain age 50 by the end of the taxable year,
- With respect to whom no other elective deferrals may be made to the plan due to any limitation or restriction described in 414(v)(3).

These limitations include the limits under section 402(g), and the limits with respect to the ADP test under section 401(k)(3).

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Catch-Up Contributions under Section 414(v), Continued

Catch-Up Contributions

Under section 414(v)(3), a catch-up contribution shall not be subject to any otherwise applicable limitation, including the limitation under section 401(a)(30) (the 402(g) limitations). In addition, the plan shall not be treated as failing to meet the nondiscrimination requirements under section 401(a)(4), or the ADP test under section 401(k)(3).

Thus, catch-up contributions are elective deferrals made by a catch up eligible participant that exceed any of the applicable limits under section 1.414(v)-1(b). However, the catch-up contributions cannot exceed the catch-up contribution limit under section 1.414(v)-1(c), which provides the applicable dollar limit as defined above.

Applicable Limits

An applicable limit for purposes of determining catch-up contributions for a catch up eligible participant is any of the following:

- Statutory limits – a statutory limit is a limit on elective deferrals or annual additions permitted to be made with respect to an employee for a year provided in section 401(a)(30), 402(h), 403(b), 408, 415(c) or 457(b)(2).
- An employer provided limit – an employer provided limit is any limit on the elective deferrals under the terms of the plan, but which is not required under the Internal Revenue Code. Thus, for example, if a plan provides for an elective deferral limit of 10% for HCEs, this limit is an employer provided limit that is an applicable limit for HCEs.
- ADP limit-the ADP limit is the highest amount of elective deferrals that can be retained in the plan by any HCE under the rules of section 401(k)(8)(C), which provides for the distribution of excess contributions.

Applicable Employer Plan, Section 414(v)(6)

An applicable employer plan means a qualified plan under section 401(a), an annuity contract described in section 403(b), an eligible deferred compensation plan under section 457 of an eligible employer, and an arrangement meeting the requirements of section 408(k) or (p).

Section 414(w)-Eligible Automatic Contributions

Effective Dates

The effective date for section 414(w) is for plan years after December 31, 2007. Section 414(w) was amended by WRERA also for plan years beginning after December 31, 2007.

Since section 414(w) was added by PPA '06, section 1107 generally requires plans to be amended for changes in plan qualification requirements by the last day of the first plan year that begins on or after January 1, 2009. Section 1107 also requires that such an amendment be effective as of the effective date of the relevant provision, and that the plan be operated in accordance with the amendment as of the effective date of the amendment.

Any individually designed plans that are submitted under Cycle D (2/1/09-1/21/2010) or later must be amended to include the applicable PPA '06 provisions.

Final regulations were issued on February 24, 2009. The regulations apply to plan years beginning on or after January 1, 2010. The plan must operate in accordance with a good faith interpretation of the section 414(w) provisions for the 2008 and 2009 plan years. The regulations are new on the 2009 cumulative list

Rev. Rul. 2009-30 and Notice 2009-65

The Rev. Rul. provides 2 situations in which increases in the default elective contributions does not change their status as elective contributions.

Notice 2009-65 provides for sample amendments that plan sponsors can use to add automatic contribution features to their plans.

Both the revenue ruling and notice are new on the 2009 cumulative list.

Purpose of Statute

Section 414(w) provides rules under which certain employees are permitted to elect to make a withdrawal of default elective contributions from an eligible automatic contribution arrangement.

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Section 414(w)-Eligible Automatic Contributions, Continued

Section 414(w)-Special Rules for Withdrawals

If an eligible automatic contribution arrangement allows an employee to elect to make permissible withdrawals:

- The amount of the withdrawal shall be included in gross income for the taxable year in which the distribution is made,
- Section 72(t) tax shall not apply to the distribution, and
- The arrangement shall not be treated as violating any restrictions for distributions under this title solely by reason of allowing the withdrawal.

For any distribution under this paragraph 414(w)(1), employer matching contribution shall be forfeited or subject to other treatment as the Secretary may prescribe.

Permissible Withdrawal

A permissible withdrawal means any withdrawal from an eligible automatic contribution arrangement which:

- Is made pursuant to an election by an employee, and
- Consists of elective contributions described in section 414(w)(3)(B) with earnings.

Amount of the Distribution-Section 414(w)(2)(C)

The amount of the distribution due to the election must be equal to the amount of the elective contributions made for the first payroll period to which the eligible automatic contribution arrangement applies through any succeeding payroll period beginning before the effective date of the election plus earnings.

Time for Making the Election-414(w)(2)(B)

The employee must make the election to withdraw by 90 days after the date of the first automatic elective contribution for the employee under the arrangement.

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Section 414(w)-Eligible Automatic Contributions, Continued

Eligible Automatic Contribution Arrangement-414(w)(3)

Eligible contribution automatic arrangement means an arrangement under an applicable employer plan:

- Under which a participant may elect to have the employer make contributions to the plan or to the participant directly in cash,
- Under which the participant is treated as having elected to make such contributions in an amount equal to a uniform percentage of compensation provided under the plan until the participant specifically elects not to have such contributions made (or elects a different amount)
- Which meets the notice requirements under section 414(w)(4).

In other words, the elective contributions are automatic contributions under the plan until the participant elects otherwise, either by electing to have no contributions or electing to have a different percentage made to the plan. The participant can then receive a distribution of the automatic elective contributions.

Applicable Employer Plan-Section 414(w)(5)

An applicable employer plan means:

- A qualified plan under section 401(a),
- A 403(b) annuity contract,
- An eligible deferred compensation plan under 457(b) maintained by an eligible employer under section 457(e)(1)(A),
- A simplified employee pension plan with a salary reduction arrangement under section 408(k)(6), and
- A simple retirement account as defined in section 408(p).

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Section 414(w)-Eligible Automatic Contributions, Continued

Organization of Regulation

The regulations under section 414(w) are organized as follows:

- Section 1.414(w)-1(b) defines an eligible automatic contribution arrangement.
- Section 1.414(w)-1(c) describes a permissible withdrawal and addresses which employees are eligible to elect a withdrawal, the timing of the withdrawal election and the amount of the withdrawal.
- Section 1.414(w)-1(d) describes the tax and other consequences of the withdrawal.
- Section 1.414(w)-1(e) includes definitions applicable to this section 1.414(w)-1.

Eligible Automatic Contribution Arrangement

An eligible automatic contribution arrangement is an automatic contribution arrangement that is intended to be an eligible automatic contribution arrangement. This arrangement must satisfy the uniformity requirement and the notice requirement. An eligible automatic contribution arrangement does not have to cover all employees who are eligible to elect to have contributions made on their behalf. See Treas. Reg. 1.414(w)-1(b)(1).

Uniformity Requirement

An eligible automatic contribution arrangement must provide that the default elective contribution is a uniform percentage of compensation. Note there is an exception to the uniform percentage requirement under section 1.414(w)-1(b)(2)(ii).

Notice Requirement

The notice requirement is satisfied for plan year if each covered employee is given notice of the employee's rights and obligations under the arrangement. The notice must be sufficiently accurate and comprehensive to apprise the employee of such rights and obligations. The notice must be written in a manner calculated to be understood by the average employee to whom the arrangement applies. Section 1.414(w)-1(b)(3)(i).

There is also a content and timing requirement in order for the arrangement to satisfy the notice requirements. See section 1.414(w)-1(b)(3)(ii)-(iii).

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Section 414(w)-Eligible Automatic Contributions, Continued

Permissible Withdrawal

If the plan so provides, an employee who has default elective contributions made under the eligible automatic contribution arrangement may elect to make a withdrawal of such contributions and earnings. Section 1.414(w)-1(c)(1).

An applicable employer plan that includes an eligible automatic contribution arrangement will not fail to satisfy the prohibition on in-service withdrawals merely because the plan permits withdrawals that satisfy the timing requirement and the amount requirement. Section 1.414(w)-1(c)(2) and (3).

Timing Requirement-Section-1.414(w)-1(c)(2)

An election to withdraw default elective contributions **must be made** no later than 90 days after the date of the first elective contribution under the eligible automatic contribution arrangement. The election **must be effective** no later than:

- The pay date for the second payroll period that begins after the date the election is made, and
- The first pay date that occurs at least 30 days after the election is made.

Amount and Timing of Distributions-Section 1.414(w)-1(c)(3)

The distribution must be equal to the amount of default elective contributions made under the eligible automatic contribution arrangement through the effective date of the election under 1.414(w)-1(c)(2). This amount is adjusted for earnings and loss to the date of distribution.

If default elective contributions are separately accounted for in the participant's account, the amount of the distribution will be the total amount in that account. However, if the elective contributions are not separately accounted for, the amount of allocable gains and losses will be determined under rules similar to those provided for the distribution of excess contributions.

The distribution must be made in accordance with the plan's ordinary timing procedures for processing distributions and making distributions.

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Section 414(w)-Eligible Automatic Contributions, Continued

Consequences of Withdrawal – 1.414(w)-1(d)

The amount of the withdrawal is included in the eligible employee's gross income for the taxable year in which the distribution is made. However, any portion of the distribution consisting of designated Roth contributions is not included in an employee's gross income a second time.

- The withdrawal is not subject to the additional tax under section 72(t).
- The amount of the withdrawal is not taken into account in determining the 402(g) limits.
- For withdrawals, employer matching contributions with respect to the amount withdrawn that have been allocated the participant's account must be forfeited.
- A withdrawal may be made without regard to any notice or consent otherwise required under sections 401(a)(11) or 417.

Definitions – Section1.414(w)-1(e)-Applicable Employer Plan

An applicable employer plan means a plan that is:

1. Qualified under section 401(a),
2. Satisfies the requirements of section 403(b),
3. Is a section 457(b) eligible governmental plan described in section 1.457-2(f),
4. Is a simplified employee pension plan providing for a salary reduction arrangement under section 408(k)(6),
5. Is a SIMPLE described in section 408(p).

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Section 414(w)-Eligible Automatic Contributions, Continued

Automatic Contribution Arrangement

An automatic contribution arrangement means an arrangement that provides for a cash or deferred election. The arrangement specifies that, in the absence of an affirmative election, a default election applies under which the employee is treated as having elected to have default elective contributions made to the plan.

The default election begins to apply with respect to an eligible employee no earlier than a reasonable period of time after receipt of the notice describing the automatic contribution arrangement.

The default election ceases to apply with respect to an eligible employee for periods of time to which the employee has made an affirmative election currently in effect not to have any default elective contributions made or changing the amount of the elective contributions.

Covered Employee

A covered employee means an employee who is covered under the automatic contribution arrangement, determined under the terms of the plan. A plan must provide whether an employee who makes an affirmative election remains a covered employee. If the employee remains a covered employee, the employee must continue to receive notice. In addition, the plan may be eligible for the excise tax relief with respect to excess amounts distributed within six months after the end of the plan year under section 4979(f)(1).

Rev. Rul. 2009-30-Situation 1

This revenue ruling holds that because the default contribution percentage can be increased or otherwise changed over time pursuant to a plan's specified schedule, default contributions do not stop being elective contributions just because the default contributions increases over time and are, in part, determined by reference to increases in base pay. This is situation 1.

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Section 414(w)-Eligible Automatic Contributions, Continued

Situation 2

In addition, the default contribution percentage is automatically increased beginning with the first pay period that begins on or after April 1 does not cause the plan to fail the uniformity requirement.

The increases are eligible for an exception to the uniformity requirement because they apply in the same manner to all eligible employees from the same number of years or portions of years have elapsed since default contributions were first made for them under the automatic contribution arrangement. This is situation 2.

Thus default contributions under an automatic contribution arrangement will not fail to satisfy the qualified percentage requirement merely because default contributions made pursuant to an arrangement under which the default contribution percentage for all employees increases on a day other than the first day of the plan year.

Notice 2009-65

This notice facilitates automatic enrollment by providing two sample plan amendments for sponsors, practitioners, and employers who want to add certain automatic contribution features to their § 401(k) plans.

Sample Amendment 1 can be used to add an automatic contribution arrangement to a § 401(k) plan.

Sample Amendment 2 can be used to add an eligible automatic contribution arrangement described in § 414(w) of the Internal Revenue Code (permitting 90-day withdrawals) to a § 401(k) plan.

Section 416

Effective Date

The effective date is for plan years beginning after December 31, 2007. The compliance date is the PPA '06 date-the last day of the first plan year that begins on or after January 1, 2009.

PPA '06 also generally requires that such amendment be effective as the effective date of the relevant PPA provision and that the plan be operated in accordance with the amendment as of the effective date of the amendment.

PPA '06 Added Plans that are not considered Top-Heavy

Section 416(g)(4)(H)(i) and (ii) was amended to provide that a plan is not considered to be top heavy if it consists solely of an automatic contribution arrangement with the applicable matching contribution limited under section 401(m)(11)(B). Thus, the term top heavy plan shall not include a plan which consists solely of:

- A cash or deferred arrangement which meets the requirements of §401(k)(12) or 401(k)(13), and
- Matching contributions with respect to which the requirements of section 401(m)(11) or (m)(12) are met.