

Definition of Early Retirement Benefit and Retirement-Type Subsidy

Notice 2003-10

I. PURPOSE

The Internal Revenue Service and the Treasury Department intend to propose regulations that would provide guidance on benefits that are treated as early retirement benefits and retirement-type subsidies for purposes of 411(d)(6)(B) of the Internal Revenue Code. It is expected that the regulations would include guidance resolving conflicting court decisions that address the extent to which payments that are contingent on the occurrence of an unpredictable event, such as a plant shutdown, are protected under 411(d)(6)(B). The Service and Treasury invite comments on possible approaches before regulations are proposed.

II. BACKGROUND

Section 411(d)(6) generally provides that a plan is not treated as satisfying the requirements of 411 if the accrued benefit of a participant is decreased by a plan amendment. Under 411(d)(6)(B), a plan amendment that has the effect of eliminating or reducing a retirement-type subsidy, with respect to benefits attributable to service before the amendment, is treated as reducing accrued benefits for any employee who satisfies the pre-amendment conditions for the subsidy (either before or after the amendment). In addition, a plan amendment that has the effect of eliminating an early retirement benefit or, except as provided in regulations, an optional form of benefit is treated as reducing accrued benefits. Further, Treas. Reg. 1.411(d)-4, Q&A-1(d) specifies benefits that are ancillary and thus not protected from reduction or elimination under 411(d)(6)(B).

Section 645(b) of the Economic Growth and Tax Reform Reconciliation Act of 2001 (EGTRRA) amended 411(d)(6)(B) to provide for the Secretary of Treasury to issue regulations permitting the elimination of benefits or subsidies that create significant burdens or complexities for the plan and plan participants, and that affect the rights of any participant in no more than a de minimis manner. In Notice 2002-46, 2002-28 I.R.B. 1, the Service and Treasury requested comments in advance of developing regulations implementing the EGTRRA amendment.

Section 204(g) of the Employee Retirement Income Security Act of 1974 (ERISA), Public Law 93-406, 88 Stat. 829, as amended, provides parallel rules to the rules of 411(d)(6) of the Code. Pursuant to Reorganization Plan. No. 4 of 1978, 43 F.R. 47713, October 17, 1978, 1979-1 C.B. 480, Treasury regulations issued under 411(d)(6) apply as well for purposes of 204(g) of ERISA.

Section 411(d)(6)(B) was added to the Code by 301 of the Retirement Equity Act of 1984 (READ), Pub. L. No. 98-397, 98 Stat. 1426, 1450-51 (1984). With respect to retirement-type subsidies, the legislative history relating to 301 of REA states, in part:

The bill provides that an amendment of a qualified plan is to be treated as reducing accrued benefits if, with respect to benefits accrued before the amendment is adopted, the amendment has the effect of either (1) eliminating or reducing an early retirement benefit or a retirement-type subsidy, or (2) except as provided by Treasury regulations, eliminating an optional form of benefit.

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The bill provides that the term "retirement-type subsidy" is to be defined by Treasury regulations. The committee intends that under these regulations, a subsidy that continues after retirement is generally to be considered a retirement-type subsidy. The committee expects, however, that a qualified disability benefit, a medical benefit, a social security supplement, a death benefit (including life insurance), or a plant shutdown benefit (that does not continue after retirement age) will not be considered a retirement-type subsidy. The committee expects that Treasury regulations will prevent the recharacterization of retirement-type benefits as benefits that are not protected by the provision.

S. Rep. No. 98-575, at 28, 30 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2547, 2574, 2576.

Questions have arisen as to whether a benefit that is contingent on the occurrence of an unpredictable event, such as a plant shutdown or an involuntary separation, is a retirement-type subsidy and, thus, protected by 411(d)(6). Since the enactment of REA, three circuit courts have held that an unpredictable contingent event benefit is protected, while one has held that it is not. Compare *Bellas v. CBS, Inc.*, 221 F. 3d 517 (3rd Cir. 2000), cert. denied, 531 U.S. 1104 (2001) (separation benefit is both an early retirement benefit and a retirement-type subsidy to the extent it provides for the payment of normal retirement benefits that continue beyond normal retirement age); *Richardson v. Pension Plan of Bethlehem Steel Corp.*, 67 F. 3d 1462 (9th Cir. 1995), withdrawn, 91 F.3d 1312 (9th Cir. 1996), modified, 112 F.3d 982 (9th Cir. 1997) (shutdown benefit is a retirement-type subsidy protected under anticutback rule, opinion withdrawn and modified because court later found plan amendment not valid), and *Harms v. Cavenham Forest Industries, Inc.*, 984 F. 2d 686 (5th Cir.), cert. denied, 510 U.S. 944 (1993) (involuntary separation benefit is a retirement-type benefit protected under the anticutback rule), with *Ross v. Pension Plan for Hourly Employees of SKF Industries, Inc.*, 847 F. 2d 329 (6th Cir. 1988) (plant shutdown benefit is not a retirement-type subsidy).

III. UPCOMING PROPOSED REGULATIONS

The Service and Treasury anticipate that upcoming proposed regulations will provide general guidance concerning early retirement benefits and retirement-type subsidies under 411(d)(6)(B). The upcoming proposed regulations are expected to address whether benefits that are contingent on the occurrence of certain events, such as plant shutdown or involuntary separation, and that continue beyond normal retirement age, are retirement-type subsidies that are protected under 411(d)(6)(B) both before and after the occurrence of the contingency. In addition, the upcoming proposed regulations are expected to address the question of whether payment of the accrued benefit at an early commencement date on an unreduced or partially subsidized basis will be treated as providing a benefit that continues beyond normal retirement age and, hence, would be considered to be a retirement-type subsidy.

Section 411(d)(6) does not restrict the ability of an employer to amend a plan to eliminate accruals, subsidies, or other benefits (whether or not contingent), with respect to benefits not yet accrued. Thus, for example, the anticipated proposed regulations would not restrict an employer from amending a plan to compute the subsidized portion of the contingent benefit based solely on service completed before the date of the amendment, or to limit the benefit payable under the retirement-type subsidy to the amount payable as of the date of the amendment. In addition, because 411(d)(6) does not prevent an employer from amending a plan to eliminate ancillary benefits, the anticipated proposed regulations would not restrict a plan amendment to eliminate contingent benefits that are ancillary benefits. Thus, the anticipated proposed regulations would not restrict a plan amendment to eliminate an ancillary benefit described in Treas. Reg. 1.411(d)-4, Q&A-1(d) (e.g., a social security supplement that is not a qualified social security supplement under 1.401(a)(4)-12), regardless of whether the amendment occurs before or after the occurrence of any contingency on which the benefit is based.

IV. REGULATIONS WILL BE PROSPECTIVE

The regulations described above will be prospective. Regardless of the position taken in the final regulations, the Service will not treat a plan as failing to satisfy the requirements of 401 and 411 merely because of a plan amendment that eliminates or reduces an early retirement benefit or retirement-type subsidy that is conditioned on the occurrence of an unpredictable contingent event (within the meaning of section 412(l)) if the amendment is adopted and effective prior to the occurrence of the contingent event and prior to the publication of final regulations addressing this issue in the Federal Register. Note, however, that it is clear under current law that such a plan amendment is prohibited under 411(d)(6) and 411(a) (which provides vesting requirements for accrued benefits and prohibits forfeiture of a vested accrued benefit) if the amendment is adopted or effective after the occurrence of the contingent event.

V. COMMENTS REQUESTED

Comments regarding the anticipated proposed regulations described in this Notice are requested, including comments on the guidance that should be provided regarding early retirement benefits and retirement-type subsidies. In addition, comments are requested on the extent to which such proposed regulations should include relief for amendments that eliminate or reduce early retirement benefits or retirement-type subsidies that are contingent on unpredictable events, that create significant burdens or complexities for the plan and plan participants, and that affect the rights of any participant in no more than a de minimis manner. Comments should be submitted by May 5, 2003 to CC:ITA:RU (Notice 2003-10), Room 5226, Internal Revenue Service, POB 7604 Ben Franklin Station, Washington, D.C. 20044. Comments may be hand delivered between the hours of 8 a.m. and 5 p.m., Monday through Friday to CC:ITA:RU (Notice 2003-10), Courier's Desk, Internal Revenue Service, 1111 Constitution Ave. NW, Washington D.C. Alternatively, comments may be submitted via the Internet at Notice.Comments@irs.counsel.treas.gov. All comments will be available for public inspection.

VI. EFFECT ON OTHER DOCUMENTS

Notice 2002-46 is modified.

DRAFTING INFORMATION

The principal authors of this notice are Preston Rutledge of the Office of the Associate Chief Counsel (Tax Exempt and Government Entities) and Diane S. Bloom of the Employee Plans, Tax Exempt and Government Entities Division. For further information regarding this notice, contact the Employee Plans taxpayer assistance telephone service between the hours of 8:00 a.m. and 6:30 p.m. Eastern Time, Monday through Friday by calling 1-877-829-5500 (a toll-free number). Mr. Rutledge can be reached at (202) 622-6090 and Ms. Bloom can be reached at (202) 283-9888 (not toll-free numbers).