

Employee Plans CPE Technical Topics for 1999

SUMMARY OF PLAN REQUIREMENTS, SECTION 401(a)(9)

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PUBLISHED GUIDANCE

Notice 97-75

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Final regulations, Permitted Elimination of Preretirement Optional Forms of Benefit
Notice 96-67
Announcements 97-24, 97-70

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I. Introduction

For years beginning after December 31, 1996, section 401(a)(9) of the Code, as amended by the Small Business Job Protection Act ("SBJPA"), provides that, in the case of an employee who is not a 5 percent owner, the required beginning date ("RBD") for minimum distributions from a qualified plan is April 1 of the calendar year following the later of:

the calendar year in which the employee attains age 70 1/2 or

the calendar year in which the employee retires.

In the case of a defined benefit plan, an employee's accrued benefit must be actuarially increased to take into account the period after age 70 1/2 in which the employee was not receiving any benefits under the plan. This actuarial increase does not apply to defined benefit plans that choose to retain the old RBD (one of the options discussed below) see Notice 97-75 for details on the period and the amount of the actuarial increase.

In 1996 and 1997, the Internal Revenue Service issued five separate pieces of guidance on the SBJPA changes to section 401(a)(9). The most comprehensive guidance is contained in Notice 97-75, 1997-51 I.R.B. 18.

Although section 401(a)(9) was amended effective for years beginning after December 31, 1996, a plan amendment effective after such time that eliminates the right to receive distributions by April 1 after the year in which the employee reaches age 70 1/2 violates section 411(d)(6) of the Code with respect to benefits already accrued. Under the guidance issued by the Service, an employer has five options:

1. Retaining the old required beginning date, Notice 97-75, 1997-51 I.R.B. 18.
2. Adopting the new RBD, and permitting employees to affirmatively elect to defer distributions, or begin by the old RBD. Announcement 97-24, 1997-11 I.R.B. 24, Announcement 97-70, 1997-29 I.R.B. 14.
3. Adopting the new RBD, with no election to defer or commence (but old RBD may not be eliminated for employees reaching age 70 1/2 before 1999). Notice 97-75 and the final regulations.

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4. Adopting a new RBD for all employees, but only for future accruals.
5. Allowing employees to stop distributions, and recommence them later.

I. Retaining the old RBD

Notice 97-75 permits the employer to retain the old RBD definition for **all** employees under the plan. Notice 97-75 also provides the rules for how distributions are to be made under the old RBD in conjunction with the new RBD and the rules on how the excise taxes and rollover rules are affected if the plan uses the old RBD.

II. Option to defer distributions

A. General Rule

Employers may decide to adopt the new RBD and allow certain employees (other than a 5 percent owner) to make an affirmative election to defer distributions until a date no later than the new RBD. Such employees must have attained age 70 ½ after 1995 and have not retired by the end of that calendar year to delay commencement of benefit distributions.

Announcement 97-70, 1997-29 I.R.B. 14 provides transition relief and states that the option to defer for participants reaching age 70 ½ in 1996 is extended to December 31, 1997 (from April 1, 1997).

B. Plan must be amended to provide for option by the end of the remedial amendment period

The plan may give an employee the option to defer commencement of benefits until the new RBD even if the plan has not been amended to provide for this new RBD. However, **the employer must amend retroactively to conform the plan to its pre-amendment operation.** Under Rev. Proc. 97-41, 1997-33 I.R.B. 51, the retroactive amendment must be adopted by the end of the remedial amendment period, which for most plans is the last day of the first plan year beginning on or after January 1, 1999.

III. Adopting a new required beginning date

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A. Introduction

The right to receive a distribution by a certain time is an optional form of benefit, and eliminating that right for benefits already accrued is a violation of section 411(d)(6) of the Code. If a participant has not retired by the old RBD, the participant's right under the plan to receive pre-retirement distributions by the old RBD is an optional form of benefit that is protected by section 411(d)(6). Immediately amending the plan to delay the required beginning date to April 1 after the calendar year in which the participant actually retires violates section 411(d)(6) with respect to benefits already accrued.

The regulations under section 411(d)(6) were amended to allow a plan to adopt the new required beginning date for all benefits if the right to receive distributions by the old RBD is retained for certain older employees who may have had an expectation of receiving distributions in the near future and made plans in accordance with this expectation.

B. Final Regulations, issued and effective June 5, 1998

Q&A 10 of section 1.411(d)-4 adds the following rules concerning an amendment to eliminate the old RBD.

1. Amendment to change RBD is limited to employees reaching age 70 1/2 after 1998

Under the final regulations, an amendment to eliminate the 70 1/2 distribution option is permitted to apply to employees who attain age 70 1/2 in or after a calendar year specified in the amendment that begins after the later of:

December 31, 1998 or

the adoption date of the amendment.

2. Timing of plan amendment

The final regulations provide that the provisions apply to amendments adopted and effective after June 5, 1998. Thus, the amendment to eliminate the 70 1/2 option cannot be retroactive as other SBJPA amendments, but is effective on the date the amendment is made. In addition, an amendment to eliminate the 70 1/2 distribution option **must be adopted no later than the last day of the remedial amendment period.**

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3. Optional forms of benefit for participants retiring after age 70 1/2

A plan is prohibited from eliminating an optional form of benefit that would have been available in the calendar year in which the employee attained age 70 1/2. However, if a 411(d)(6) protected benefit can be eliminated in that subsequent year, it can be eliminated for the employee who takes the distribution in that year, regardless that the optional form of benefit was available in the 70 1/2 year.

Thus, to the extent a section 411(d)(6) protected benefit may otherwise be eliminated or reduced under section 1.411(d)-4, that protected benefit can be reduced or eliminated for all employees without violating section 411(d)(6), even if that benefit would have been available to an employee who retired in the calendar year in which the employee attained age 70 1/2. The final regulations clarified that this rule in section 401(a)(9) does not impose additional restrictions.

4. Circumstances under which no relief is required

The regulations include an example of a plan that does not need relief under section 411(d)(6). The profit sharing plan permits an employee to elect distribution at any time after age 59 1/2 in any amount. The example illustrates that this plan may be amended to implement the SBJPA change without violating section 411(d)(6) since the right to commence distribution at age 70 1/2 continues to be available under the plan even after the amendment.

5. Special rule for collectively bargained plans

A collectively bargained plan may not be able to be amended until the expiration of all applicable collectively bargained agreements. Thus, in the case of a collectively bargained plan maintained pursuant to one or more collectively bargained agreements, ratified prior to September 3, 1998, the amendment deadline is extended to the last day of the 12th month beginning after the date on which the last of such collective bargaining agreements terminate (determined without regard to any extensions on or after September 3, 1998) if later than the last day of the remedial amendment period.

IV Adopting a New RBD for future accruals

Section 411(d)(6) only applies to amendments that reduce benefits that are already accrued. Thus, the employer could amend the plan to eliminate the right

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to receive pre-retirement distributions with respect to future accruals. This choice is complicated to administer since the same employee may have two separate RBDs for past and future accruals.

V. Stopping and Recommencing Distributions

A. Introduction

This section discusses how employees who had begun to receive distributions under the old RBD could stop these distributions and wait until the new RBD to recommence distributions.

B. New RBD

The employees that are eligible to stop the required distributions are those employees who have a new RBD under SBJPA, which are employees:

who reach age 70 1/2 before 1997,

had not retired by January 1, 1997, and

had not received irrevocable distributions under an annuity as provided in section 1.401(a)(9)-1, B-5 of the proposed Income Tax Regulations.

Thus, the plan may provide that an employee receiving required distributions may elect to stop these distributions after January 1, 1997. Such distributions must recommence by the new RBD.

The terms of any applicable QDRO will control in determining whether an employee may stop distributions and recommence at a later date.

C. Spousal consent rules

Plans subject to sections 401(a)(11) and 417 must provide benefits in a certain form unless the participant waives this form and the spouse consents to the election of another form of benefit. Notice 97-75 sets forth two alternatives which depend on a choice of annuity starting dates which affects the required spousal consent.

1. Alternative 1, No New Annuity Starting Date

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One alternative is for the plan to provide that there is no annuity starting date under section 417 upon recommencement of benefits. Under this alternative, distributions recommence in the same form unless the employee elects a different form at the time of recommencement.

No spousal consent is required for an employee to elect to stop distributions. No spousal consent is required when payments recommence to the employee unless the employee elects a different form of benefit. For further information as to the required spousal consent, please see Notice 97-75.

2. Alternative 2, New Annuity Starting Date

A second alternative is designed to put the employee back in the position the employee would have been if distribution had never commenced. Thus, the plan provides that there is a new annuity starting date under section 417 upon recommencement of benefits and the plan must comply with all of the requirements of section 417 upon such recommencement. For further details, see Notice 97-75.

3. Required amendment of alternatives

The plan must operationally comply with the alternative chosen, **and must be amended to reflect this operational compliance within the SBJPA remedial amendment period**. In addition, the distributions must actually stop prior to the end of the remedial amendment period. Notice 97-75 does not address applicable rules for an employer to follow on stopping and recommencing distributions after the remedial amendment period.

VI SUMMARY

Employers have several choices in determining the RBD for distributions from a qualified plan, including retaining the old RBD, adopting a new RBD (with section 411(d)(6) protection for older employees), allowing employees to elect to defer and allowing employees to stop and recommence their distributions. Although this outline focuses on required amendments, Notice 97-75 also covers the treatment of distributions after SBJPA. For application of the rollover and excise tax rules, see Notice 97-75.

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Part III - Administrative, Procedural, and Miscellaneous

Minimum Distribution Requirements

Notice 97-75

I. PURPOSE

This notice provides guidance relating to the amendments to the minimum distribution requirements of ' 401(a)(9) of the Internal Revenue Code ("Code") made by ' 1404 of the Small Business Job Protection Act of 1996, Pub. L. 104-188 ("SBJPA"). Specifically, this notice:

! Answers questions regarding the actuarial increase that must be provided under a defined benefit plan for an employee who retires after age 70 1/2, and the interaction of this actuarial increase with ' 411.

! Coordinates the ' 401(a)(4) nondiscrimination requirements with the ' 401(a)(9) requirement that certain preretirement distribution options be available to an employee at age 70 1/2.

! Permits plans to allow participants who commenced distributions under pre-SBJPA ' 401(a)(9) to stop receiving those distributions, and provides guidance on the applicable notice and spousal consent requirements.

! Clarifies the extent to which distributions made after 1996 to an employee who has attained age 70 1/2 will be considered eligible rollover distributions under ' 402(c)(4)(B).

! Gives relief from the direct rollover requirements of ' 401(a)(31), the written explanation requirement under ' 402(f) and the mandatory 20-percent withholding requirement under ' 3405(c) for certain distributions made in 1997.

! Provides an optional rule under which an employee's required beginning date under pre-SBJPA ' 401(a)(9) may be retained.

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II. BACKGROUND

Section 401(a)(9) provides that, in order for a plan to be qualified under ' 401(a), distributions of each employee's interest in the plan must commence no later than the "required beginning date" for the employee. Prior to the amendments made by the SBJPA, ' 401(a)(9)(C) generally defined the required beginning date for an employee as the April 1 of the calendar year following the calendar year in which the employee attained age 70 1/2.

This meant that an employee who attained age 70 1/2 was required to commence receiving distributions from the plan during the following year, even if the employee had not retired from employment with the employer maintaining the plan.

Section 1404(a) of the SBJPA amended ' 401(a)(9) of the Code to provide that, in the case of an employee who is not a 5-percent owner, the required beginning date for minimum distributions from a qualified plan is April 1 of the calendar year following the later of:

the calendar year in which the employee attains age 70 1/2, or

the calendar year in which the employee retires.

In the case of an employee who is a 5-percent owner, the required beginning date continues to be the April 1 of the calendar year following the calendar year in which the employee attains age 70 1/2. An employee is treated as a 5-percent owner for purposes of ' 401(a)(9) as amended by the SBJPA if such employee is a 5-percent owner (as defined in ' 416) with respect to the plan year ending with or within the calendar year in which such owner attains age 70 1/2.

Once an employee is a 5-percent owner described in the preceding sentence, distributions must continue to such employee even if such employee ceases to own more than 5 percent of the employer in a subsequent year.

Section 1404(a) of the SBJPA also amended ' 401(a)(9) of the Code to provide that an employee's accrued benefit shall be actuarially increased to take into account the period after age 70 1/2 in which the employee was not receiving any benefits under the plan. The amendments to ' 401(a)(9) of the Code apply to years beginning after December 31, 1996.

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The amendments retain the existing rules relating to the determination of the required beginning date for distributions from an individual retirement account or individual retirement annuity under ' 408, and the determination of the required beginning date for church plans and government plans.

Notice 96-67, 1996-2 C.B. 235, provides guidance on the application of the amendments to ' 401(a)(9)(C) made by the SBJPA to employees who attained age 70 1/2 in 1996 but did not retire by the end of 1996.

Announcement 97-24, 1997-11 I.R.B. 24, provides that an employer may offer employees (other than 5-percent owners) who attain age 70 1/2 after 1995 and have not retired, an option to defer commencement of benefit distributions under a qualified plan rather than to begin receiving benefits from the plan by April 1, 1997, even if the plan has not yet been amended to provide for the option.

Announcement 97-70, 1997-29 I.R.B. 14, provides transition relief for a plan under which certain distributions required under the terms of the plan were not made to an employee (other than a 5-percent owner) who attained age 70 1/2 in 1996 and who did not retire from employment with the employer maintaining the plan by the end of 1996.

Section 1.411(d)-4, Q&A 10, of the proposed Income Tax Regulations, 62 F.R. 35752 (July 2, 1997), would provide relief from ' 411(d)(6) for certain plan amendments that eliminate preretirement distributions commencing at age 70 1/2.

Rev. Proc. 97-41, 1997-33 I.R.B. 51, provides guidance to sponsors of plans that are qualified under ' 401(a) with respect to the date by which they must adopt amendments to comply with changes in the law, including a remedial amendment period for amendments to reflect changes to the qualification requirements made by the SBJPA.

This notice provides guidance on additional issues relating to the amendments to ' 401(a)(9)(C) made by the SBJPA.

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III. QUESTIONS AND ANSWERS

(1) ACTUARIAL INCREASE FOR DEFINED BENEFIT PLANS

Q-1: If an employee retires in a calendar year after the calendar year in which the employee attains age 70 1/2, for what period must the employee's accrued benefit under a defined benefit plan be actuarially increased?

A-1: (a) Actuarial increase starting date. Under ' 401(a)(9)(C)(iii), in the case of an employee (other than a 5-percent owner) who retires in a calendar year after the calendar year in which the employee attains age 70 1/2, the employee's accrued benefit under a defined benefit plan must be actuarially increased in order to take into account the period after age 70 1/2 in which the employee is not receiving benefits under the plan. If an employee retires at age 70 1/2, then, in order to satisfy ' 401(a)(9), the distribution of the employee's benefits is required to begin no later than the April 1 following the calendar year in which the employee attains age 70 1/2. Thus, if an employee retires after the calendar year in which the employee attains age 70 1/2, the actuarial increase required to satisfy ' 401(a)(9) to reflect the delay in payment must be provided for the period starting on the April 1 following the calendar year in which the employee attains age 70 1/2. In the case of an employee who attained age 70 1/2 prior to 1996, the starting date for the period of actuarial increase is January 1, 1997.

(b) Actuarial increase ending date. The period for which the actuarial increase must be provided ends on the date on which benefits commence after retirement in an amount sufficient to satisfy ' 401(a)(9).

(c) Nonapplication to defined benefit plans using optional rule. If, pursuant to the optional rule of Q&A-10, minimum distributions under a plan to an employee commence no later than April 1 of the calendar year following the calendar year in which the employee attains age 70 1/2, in an amount sufficient to satisfy ' 401(a)(9) as in effect prior to amendment by the SBJPA, no actuarial increase is required under ' 401(a)(9)(C)(iii).

(d) Nonapplication to defined contribution plans. The actuarial increase required under this Q&A-1 does not apply to defined contribution plans.

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Q-2: What amount of actuarial increase is required under ' 401(a)(9)(C)(iii)?

A-2: In order to satisfy ' 401(a)(9)(C)(iii), the retirement benefits payable with respect to an employee as of the end of the period for actuarial increases (described in Q&A-1) must be no less than: the actuarial equivalent of the employee's retirement benefits that would have been payable as of the date the actuarial increase must commence under Q&A-1 (i.e., the later of the April 1 following the calendar year in which the employee attained 70 1/2 or January 1, 1997) if benefits had commenced on that date; plus the actuarial equivalent of any additional benefits accrued after that date; reduced by the actuarial equivalent of any distributions made with respect to the employee's retirement benefits after that date. Actuarial equivalence is determined using the plan's assumptions for determining actuarial equivalence for purposes of satisfying ' 411.

Q-3: How does the actuarial increase required under ' 401(a)(9)(C)(iii) relate to the actuarial increase required under ' 411?

A-3: As reflected in ' 1.411(c)-1(f)(2) of the proposed Income Tax Regulations, in order for an employee's accrued benefit to be nonforfeitable as required by ' 411, a defined benefit plan must make an actuarial adjustment to an accrued benefit the payment of which is deferred past normal retirement age. The only exception to this rule is that generally no actuarial adjustment is required to reflect the period during which a benefit is suspended as permitted under section 203(a)(3)(B) of the Employee Retirement Income Security Act of 1974 (ERISA). The actuarial increase required under ' 401(a)(9) of the Code for the period described in Q&A-1 is generally the same as, and not in addition to, the actuarial increase required for that same period under ' 411 to reflect any delay in the payment of retirement benefits after normal retirement age. However, unlike the actuarial increase required under ' 411, the actuarial increase required under ' 401(a)(9)(C) must be provided even during the period during which an employee is in section 203(a)(3)(B) service.

Q-4: To what extent may additional accruals required under ' 411(b)(1)(H) be reduced by actuarial increases required under ' 401(a)(9)(C)(iii)?

A-4: For purposes of ' 411(b)(1)(H)(iii)(II), the actuarial increase required under ' 401(a)(9)(C)(iii) will be treated as an adjustment attributable to the delay in distribution of benefits after the attainment of normal retirement age. Accordingly, to the extent permitted under ' 411(b)(1)(H), the actuarial increase required under ' 401(a)(9)(C)(iii) may reduce the benefit accrual otherwise required under ' 411(b)(1)(H)(i). However, the rule in the last sentence of ' 1.411(b)-2(b)(4)(iii)(B) of the proposed Income Tax Regulations regarding the actuarial adjustment in the case of a plan that suspends

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benefits in accordance with ' 203(a)(3)(B) of ERISA and the regulations thereunder is not applicable to the calculation of additional accruals for the period of time for which actuarial increases are required under ' 401(a)(9)(C)(iii).

(2) COORDINATION OF SECTION 401(a)(4) AND SECTION 401(a)(9) FOR CERTAIN PRERETIREMENT AGE 70 1/2 DISTRIBUTION OPTIONS

Q-5: Are there special rules that coordinate the implementation of the SBJPA changes to ' 401(a)(9) with the nondiscriminatory current and effective availability requirements of ' 1.401(a)(4)-4 of the Income Tax Regulations?

A-5: (a) Aggregation of optional forms of benefit. Solely for purposes of determining whether a plan satisfies the nondiscriminatory current and effective availability requirements of ' 1.401(a)(4)-4, a preretirement age 70 1/2 distribution option that is only available to required group members is permitted to be aggregated with another optional form of benefit that provides for commencement in the retirement period and the two optional forms of benefit may be treated as a single optional form of benefit. This aggregation treatment is permitted only if the other optional form of benefit is the same optional form of benefit as the preretirement age 70 1/2 distribution option except for the difference in the timing of the commencement of payments.

(b) Interim minimum distributions. In the case of a defined contribution plan, if a preretirement age 70 1/2 distribution option is available only to required group members and provides for payment of installment payments equal to the minimum amount (calculated in accordance with a method specified in the plan) necessary to satisfy ' 401(a)(9) (before or after amendment by the SBJPA) with payment commencing during the 70 1/2 period and ending by the end of the retirement period, and this form of payment does not apply to benefit payments after the end of the retirement period, this preretirement distribution option is treated as satisfying the requirements of ' 1.401(a)(4)-4.

(c) Definitions. The following definitions apply only for purposes of this Q&A-5:

(i) 70 1/2 period. The 70 1/2 period is the period beginning on January 1 of the year in which the employee attains age 70 1/2 and ending on the April 1 of the following year.

(ii) Retirement period. The retirement period is the period beginning on January 1 of the year in which the employee retires from employment with the employer maintaining the plan and ending on April 1 of the following year.

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(iii) Preretirement age 70 1/2 distribution option. A preretirement age 70 1/2 distribution option is an optional form of benefit under which benefits payable in a particular distribution form (including any modifications that may be elected after benefit commencement) commence during the 70 1/2 period prior to the employee's retirement from employment with the employer maintaining the plan.

(iv) Required group member. An employee who is a 5-percent owner for purposes of section 401(a)(9) is a required group member. If a plan is amended to eliminate a preretirement age 70 1/2 distribution option with respect to all employees (other than 5-percent owners) who attain age 70 1/2 after a specified calendar year, and the plan satisfied ' 1.401(a)(4)-4 with respect to availability of the preretirement age 70 1/2 distribution option immediately before the amendment, then employees who attained age 70 1/2 in or before the specified calendar year are also required group members with respect to the preretirement age 70 1/2 distribution option under the plan even if the employees are not 5-percent owners for purposes of section 401(a)(9).

(3) ISSUES RELATING TO EMPLOYEES WHO ATTAINED AGE 70 1/2 BEFORE JANUARY 1, 1997

Q-6: For purposes of ' 401(a)(9)(C) after amendment by the SBJPA, what is the required beginning date for an employee (other than a 5-percent owner) who attained age 70 1/2 before 1997, but did not retire from employment with the employer maintaining the plan before January 1, 1997?

A-6: For purposes of determining the amount of minimum distributions required after December 31, 1996, the required beginning date for an employee who did not retire from employment with the employer maintaining the plan before January 1, 1997 is determined under ' 401(a)(9)(C), as amended by the SBJPA.

Accordingly, as described in Q&A-2 of Notice 96-67, in the case of an employee (other than a 5-percent owner) who attained age 70 1/2 in 1996 and retired from employment with the employer maintaining the plan on or after January 1, 1997, the required beginning date is April 1 of the calendar year following the year in which the employee retires from employment with the employer maintaining the plan. Furthermore, an employee (other than a 5-percent owner) who attained age 70 1/2 prior to 1996, and retires from employment with the employer maintaining the plan on or after January 1, 1997, has a required beginning date for purposes of determining minimum distributions that are required on or after January 1, 1997 that is different from the required beginning date for the employee for purposes of determining minimum distributions that were required prior to January 1, 1997.

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Thus, for example, an employee (other than a 5-percent owner) who attained age 70 1/2 in 1995, and retired from employment with the employer maintaining the plan in 1997, has a required beginning date of April 1, 1998. See Q&A-10 of this notice for a special rule permitting an employee's required beginning date determined without regard to the SBJPA amendments to be treated as the required beginning date for purposes of determining the minimum distributions required after January 1, 1997.

Q-7: May a plan permit an employee who attained age 70 1/2 before 1997 but did not retire from employment with the employer maintaining the plan before January 1, 1997 to elect to stop current distributions?

A-7: (a) Election to stop permitted. An employee who attained age 70 1/2 before 1997, but did not retire from employment with the employer maintaining the plan before January 1, 1997 has a new required beginning date as described in Q&A-6.

Accordingly, distributions are not required to be made to that employee after December 31, 1996 and prior to the employee's new required beginning date in order to satisfy ' 401(a)(9). A plan may provide that such an employee may affirmatively elect to stop distributions at any time until the employee retires, subject to the terms of an applicable qualified domestic relations order (QDRO), within the meaning of ' 414(p).

(b) Compliance with sections 401(a)(11) and 417. An employee's election to stop and recommence distributions under paragraph (a) of this Q&A-7 is subject to the requirements of ' 401(a)(11) and 417, if the plan is otherwise subject to those rules. However, a plan that permits an employee to stop distributions in accordance with paragraph (a) of this Q&A-7 and that complies with either of the alternatives set forth in Q&A-8, will not violate ' 401(a)(11) and ' 417 on account of the employee's cessation and commencement of those distributions.

Q-8: What special alternatives are available for a plan that is subject to ' 401(a)(11) and ' 417 in order to satisfy those sections with respect to an employee who, pursuant to Q&A-7, elects to stop and recommence distributions?

A-8 (a): In general. A plan will not violate ' 401(a)(11) and ' 417 on account of an employee's cessation and commencement of distributions in accordance with Q&A-7(a) if the plan operationally complies with either paragraph (b) or (c) of this Q&A-8, the plan is amended within the remedial amendment period for the plan for SBJPA changes to reflect that operational compliance, and the distributions stop prior to the end of that remedial amendment period.

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(b) No new annuity starting date upon recommencement.

(i) Under this alternative, the plan provides that there is no new annuity starting date under ' 417 upon recommencement of benefits. In such case, no spousal consent is required for an employee to elect to stop distributions pursuant to Q&A-7(a). Moreover, no spousal consent is required when payments recommence to the employee if:

(A) payments recommence to the employee with the same beneficiary and in a form of benefit that is the same but for the cessation of distributions,

(B) the individual who was the employee's spouse on the annuity starting date executed a general consent within the meaning of ' 1.401(a)-20, A-31 of the Income Tax Regulations, or

(C) the individual who was the employee's spouse on the annuity starting date executed a specific consent to waive a QJSA within the meaning of ' 1.401(a)-20, A-31, and the employee is not married to that individual when benefits recommence.

(ii) However, in order to comply with this paragraph (b), consent of the individual who was the employee's spouse on the annuity starting date is required prior to recommencement if the employee chooses to recommence benefits either in a different form than the form in which they were being distributed prior to the cessation of distributions or with a different beneficiary and if:

(A) the original form was a qualified joint and survivor annuity (QJSA) within the meaning of ' 417(b), or

(B) the individual who was the employee's spouse on the annuity starting date originally executed a specific consent to waive a QJSA within the meaning of ' 1.401(a)-20, A-31, of the Income Tax Regulations, and the employee is still married to that individual when benefits recommence.

(c) New annuity starting date upon recommencement. Under this alternative, the plan provides that there is a new annuity starting date under ' 417 upon recommencement of benefits. In such case, no spousal consent is required for an employee to elect to stop distributions pursuant to Q&A-7(a), except where such distributions are being paid in the form of a qualified joint and survivor annuity (QJSA) within the meaning of ' 417(b). Where such distributions are being paid in the form of a QJSA, in order to comply with this paragraph (c), the person who was the employee's spouse on the original annuity starting date must consent to the election to stop

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distributions under Q&A-7(a) and the spouse's consent must acknowledge the effect of the election. Because there is a new annuity starting date upon recommencement of benefits, the plan, in order to satisfy this paragraph (c), must comply with all of the requirements of ' 417 upon such recommencement, including payment of a qualified preretirement survivor annuity (QPSA) if the employee dies before the new annuity starting date.

(4) ISSUES RELATING TO ELIGIBILITY FOR ROLLOVERS

Q-9: If distributions are made under a plan to an employee (other than a 5-percent owner) who did not retire before January 1, 1997 from employment with the employer maintaining the plan, is any portion of a distribution made after attainment of age 70 1/2 a required distribution under ' 401(a)(9) for purposes of ' 402(c)(4)(B)?

A-9: (a) General rule. Section 402(c)(4)(B) provides that a distribution is not an eligible rollover distribution to the extent that it is required under ' 401(a)(9). As noted in Q&A-6, for purposes of determining the amount of minimum distributions that are required after December 31, 1996, the required beginning date for an employee who did not retire before January 1, 1997 from employment with the employer maintaining the plan is redetermined under ' 401(a)(9)(C), as amended by the SBJPA.

Therefore, whether or not a plan allows an employee who attained age 70 1/2 before January 1, 1997, but did not retire from employment with the employer maintaining the plan before that date, to stop receiving distributions in accordance with Q&A-7, a distribution to such an employee prior to the year the employee retires is not a required distribution under ' 401(a)(9). Such a distribution is an eligible rollover distribution unless it is excepted for some other reason.

An exception is provided under ' 402(c)(4)(A) for a series of substantially equal periodic payments made for the life (or life expectancy) of the employee or the joint lives (or joint life expectancy) of the employee and the employee's designated beneficiary, or for a specified period of 10 years or more. If an employee's benefit is being distributed in a series of annual payments that would equal the required minimum distribution determined in accordance with Q&A F-1 of ' 1.401(a)(9)-1 of the proposed Income Tax Regulations, then the series of payments will be considered a series of substantially equal payments over the life (or life expectancy) of the employee or the joint lives (or joint life expectancy) of the employee and the employee's designated beneficiary, or for a specified period of 10 years or more, in accordance with Q&A-5 of ' 1.402(c)-2 of the Income Tax Regulations. Therefore, payments under such a series of payments are not eligible rollover distributions.

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(b) Treatment of 1996 distributions for employees who attained age 70 1/2 in 1996. As provided in Q&A-3 of Notice 96-67, if a distribution is made during 1996 to an employee who attained age 70 1/2 in 1996, whether that distribution is a required distribution under ' 401(a)(9) is determined by applying ' 401(a)(9) as in effect prior to amendment by the SBJPA.

(c) Transition rule for 1997 distributions. A plan will not fail to satisfy ' 401(a)(31) merely because the plan administrator or payor did not offer an employee (other than a 5-percent owner), who has attained age 70 1/2 but has not retired from employment with the employer maintaining the plan, a direct rollover option with respect to the eligible rollover distributions described in this paragraph (c). A distribution is described in this paragraph (c) if it is paid in calendar year 1997 and, under pre-SBJPA ' 401(a)(9), the distribution would not have been an eligible rollover distribution because it would have been a required minimum distribution. In addition, with respect to such a distribution, a plan will not be required to satisfy the written explanation requirement under ' 402(f) or the mandatory 20-percent withholding requirement under ' 3405(c).

(5) PLANS MAINTAINING PRE-SBJPA REQUIRED BEGINNING DATE

Q-10: Will a plan satisfy ' 401(a)(9) as amended by SBJPA if it provides for minimum required distributions for an employee commencing no later than an employee's required beginning date of April 1 of the calendar year following the calendar year the employee attained age 70 1/2, regardless of whether the employee is a 5-percent owner?

A-10: (a) A plan will not fail to satisfy ' 401(a)(9) as amended by SBJPA merely because it provides for minimum distributions commencing no later than an employee's pre-SBJPA required beginning date of April 1 of the calendar year following the calendar year the employee attained age 70 1/2, regardless of whether the employee is a 5-percent owner.

For example, a plan may provide, in the case of all employees who attained age 70 1/2 before 1999, that minimum required distributions will commence by the pre-SBJPA required beginning date of April 1 of the calendar year following the calendar year the employee attained age 70 1/2.

(b) If, pursuant to this Q&A-10, the plan provides for minimum distributions commencing no later than an employee's required beginning date of April 1 of the calendar year following the calendar year in which the employee attained age 70 1/2, both the employee's designated beneficiary and whether recalculation of life expectancy applies will be determined based on any elections in effect as of that date. Furthermore, an employee who dies after the required beginning date determined under the plan terms

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is treated as dying after the required beginning date within the meaning of ' 401(a)(9)(C). Thus, to determine the distributions after such a death, ' 401(a)(9)(B)(i) (and not ' 401(a)(9)(B)(ii)) applies, requiring the remaining portion of the employee's interest to be distributed at least as rapidly as under the method being used under ' 401(a)(9)(A)(ii) as of the employee's date of death. See Q&As B-4 and F-3A of ' 1.401(a)(9)-1 of the proposed Income Tax Regulations for guidance on satisfying the requirements of ' 401(a)(9)(B)(i).

(c) Regardless of whether, pursuant to this Q&A-10, the plan provides for minimum distributions commencing no later than an employee's required beginning date of April 1 of the calendar year following the calendar year the employee attained age 70 1/2, the employee's required beginning date for purposes of ' 4974 (excise tax on excess accumulations) and ' 402(c) (definition of eligible rollover distribution) is determined in accordance with ' 401(a)(9) as amended by the SBJPA.

Thus, in the case of an employee who is not a 5-percent owner, no excise tax under ' 4974 will apply prior to the calendar year in which the employee retires. However, beginning with that year, the amount that is required to be distributed each year to satisfy ' 401(a)(9), as amended by the SBJPA, for purposes of ' 4974 and ' 402(c), will be determined using the required beginning date under the plan.

IV. COMMENTS

The Treasury and the Service invite comments and suggestions regarding the matters discussed in this notice. Comments can be addressed to CC:DOM:CORP:R (Notice 97-75), room 5228, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. In the alternative, comments may be hand delivered between the hours of 8 a.m. and 5 p.m. to CC:DOM:CORP:R (Notice 97-75), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC. Alternatively, taxpayers may transmit comments electronically via the IRS Internet site at http://www.irs.ustreas.gov/prod/tax_regs/comments.html.

V. DRAFTING INFORMATION

The principal authors of this notice are Ingrid Grinde of the Employee Plans Division and Cheryl Press of the Office of the Associate Chief Counsel (Employee Benefits and Exempt Organizations). However, other personnel from the Service and Treasury contributed to its development. For further information regarding this notice, please contact the Employee Plans Division's taxpayer assistance telephone service at (202) 622-6074/6075 between the hours of 1:30 p.m. and 3:30 p.m. Eastern Time, Monday

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through Thursday. Alternatively, please call Thomas Foley at (202) 622-6050 or Ingrid Grinde at (202) 622-6214. These telephone numbers are not toll-free.

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FEDERAL REGISTER
Vol. 63, No. 108

Rules and Regulations

DEPARTMENT OF THE TREASURY
Internal Revenue Service (IRS)

26 CFR Parts 1 and 602

[TD 8769]
RIN 1545-AV26

Permitted Elimination of Preretirement Optional Forms of Benefit

63 FR 30621

DATE: Friday, June 5, 1998

ACTION: Final regulations.

SUMMARY: This document contains final regulations that permit an amendment to a qualified plan or other employee pension benefit plan that eliminates plan provisions for benefit distributions before retirement but after age 70 1/2. These regulations affect employers that maintain qualified plans and other employee pension benefit plans, plan administrators of these plans and participants in these plans.

EFFECTIVE DATE: These regulations are effective June 5, 1998.

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

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SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in these final regulations has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under the control number 1545-1545. The collection of information in these final regulations is in ' 1.411(d)-4. Responses to this collection of information are required in order to obtain a benefit. Specifically, this information is required for a taxpayer who wants to amend a qualified plan to eliminate certain preretirement optional forms of benefit. This information will be used to determine whether taxpayers have amended a qualified plan.

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

The estimated average burden per recordkeeper for master and prototype plan employers is 10 minutes. The estimated average burden per recordkeeper for master and prototype plan sponsors is 30 minutes. The estimated average burden per recordkeeper for employers with individually designed plans is 30 minutes.

Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be sent to the Internal Revenue Service, Attn: IRS Clearance Officer, T:FS:FP, Washington, D.C. 20224, and to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, D.C. 20503.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background

This document contains amendments to the Income Tax Regulations (26 CFR part1) under section 411(d) of the Internal Revenue Code of 1986. The final regulations permit taxpayers to amend qualified plans to eliminate plan provisions for benefit distributions before retirement but after age 70 1/2, if certain conditions are satisfied.

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

Section 401(a)(9) provides that, in order for a plan to be qualified under section 401(a), distributions from the plan must commence no later than the "required beginning date." Prior to 1997, section 401(a)(9)(C) generally provided that the required beginning date is April 1 following the calendar year in which the employee attains age 70 1/2. Consequently, in order to satisfy section 401(a)(9), qualified plans, other than certain church and governmental plans, have provided for distributions to commence no later than April 1 following the calendar year that an employee attains age 70 1/2. These distributions commence without regard to whether the employee has retired from employment with the employer maintaining the plan.

Section 1404 of the Small Business Job Protection Act of 1996, Public Law 104-188 (SBJPA), amended the definition of required beginning date that applies to an employee who is not a 5-percent owner. Section 401(a)(9)(C)(i), as amended, provides that, in the case of such an employee, the required beginning date is April 1 of the calendar year following the later of

the calendar year in which the employee attains age 70 1/2 or

the calendar year in which the employee retires.

Accordingly, except in the case of 5-percent owners, a plan is no longer required to provide for distributions that commence prior to retirement in order to satisfy section 401(a)(9).

The right to commence benefit distributions in any form at a particular time is an optional form of benefit within the meaning of section 411(d)(6)(B) and ' 1.411(d)-4, Q&A-1(b). In enacting section 1404 of the SBJPA, Congress did not alter the application of section 411(d)(6).

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Thus, except to the extent authorized by regulations, a plan amendment that eliminates the right to commence preretirement benefit distributions in a plan after age 70 1/2 (or restricts the right by adding an additional condition) violates section 411(d)(6) if the amendment applies to benefits accrued as of the later of the adoption or effective date of the amendment.

On July 2, 1997, a notice of proposed rulemaking under section 411(d)(6) was published in the Federal Register (62 FR 35752). The proposed regulations would allow amendment of qualified plans to eliminate the right to commence preretirement benefit distributions after age 70 1/2, as required under section 401(a)(9) before its amendment by the SBJPA.

On October 28, 1997, a public hearing was held on the proposed regulations. In general, most of the comments received with respect to the proposed regulations did not relate to the proposed amendments to the regulations under section 411(d)(6), but rather to the other issues related to the SBJPA amendment to section 401(a)(9). Many of those issues are addressed in Notice 97-75 (1997-51 I.R.B. 18). Those comments that addressed the amendments to the proposed regulations under section 411(d)(6) were generally favorable. Thus, after consideration of the comments received, the final regulations retain the structure and substance of the proposed regulations, with the changes or clarifications discussed below.

Overview

1. Permitted Elimination of Preretirement Distributions After Age 70 1/2.

The legislative history to section 1404 of the SBJPA indicates that the reason for amending the definition of required beginning date was that it is inappropriate to require all participants to commence distributions by age 70 1/2 without regard to whether the participant is still employed by the employer. Because section 1404 did not alter the application of section 411(d)(6) to plan provisions allowing or requiring preretirement distributions after age 70 1/2, an employer's choices for amending its plan to implement the SBJPA change to the definition of required beginning date would be limited if the IRS and Treasury did not grant relief from section 411(d)(6).

Under previously-issued administrative guidance, one approach that is available to employers is to give employees the option of commencing distributions at age 70 1/2 or deferring commencement until after retirement. See Announcement 97-24 (1997-11 I.R.B. 24) and Revenue Procedure 97-41 (1997-33 I.R.B. 51).

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Another alternative available to employers is to amend the plan to eliminate the right to preretirement distributions solely with respect to future accruals. However, under this second approach, each current participant would retain the right to receive preretirement distributions after age 70 1/2 with respect to a portion of his or her accrued benefit.

The IRS and Treasury recognize the potential complexity of administering plans (particularly defined benefit plans) that adopt either of these approaches. In addition, an employer may not have chosen voluntarily to offer preretirement distributions to employees who have attained age 70 1/2 but instead may have included these provisions in its plan solely to comply with section 401(a)(9) prior to its amendment by the SBJPA. Therefore, the proposed regulations set forth a proposal to provide relief from section 411(d)(6) for certain plan amendments that eliminate preretirement distributions commencing at age 70 1/2. After consideration of the comments received with respect to the proposed regulations, the final regulations provide this relief using the same approach.

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

a. Protection for Employees Who Are Near Age 70 1/2

Under the regulations, an amendment to eliminate a preretirement age 70 1/2 distribution option is permitted to apply only to benefits with respect to employees who attain age 70 1/2 in or after a calendar year, specified in the amendment, that begins after the later of

December 31, 1998, or

the adoption date of the amendment.

The relief from section 411(d)(6) is limited to distributions to employees who attain age 70 1/2 after calendar year 1998 because employees who were near age 70 1/2 at the time of enactment of the SBJPA may have had an expectation of receiving preretirement distributions in the near future and may have made plans that took into account these expected distributions.

b. Optional Forms of Benefit for Participants Retiring After Age 70 1/2

A plan using this relief generally may not preclude an employee who retires after the calendar year in which the employee attains age 70 1/2 from receiving an optional form of benefit that would have been available if the employee had

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retired in the calendar year in which the employee attained age 70 1/2. Two of the commentators on the proposed regulations requested clarification that this requirement does not impose special additional restrictions with respect to employees over age 70 1/2 that would require plan sponsors to retain all plan options in effect during the year any employee attained age 70 1/2.

In response to these comments, the final regulations clarify that no such special additional restrictions are being imposed. Thus, to the extent a section 411(d)(6) protected benefit may otherwise be eliminated or reduced under ' 1.411(d)-4, that protected benefit can be reduced or eliminated for all employees without violating section 411(d)(6), even if that benefit would have been available to an employee who retired in the calendar year in which the employee attained age 70 1/2.

c. Timing of Plan Amendment

An amendment to eliminate a preretirement age 70 1/2 distribution option must be adopted no later than the last day of the remedial amendment period that applies to the plan for changes under the SBJPA.

The relief provided is available only to employers that adopt the amendment within this specified time period because the relief is intended to simplify the implementation of section 401(a)(9), as amended by the SBJPA, for employers that do not voluntarily provide preretirement distributions for an extended period after the enactment of the SBJPA.

The IRS and Treasury have determined that it is appropriate to provide an extension of the period for collectively bargained plans to implement an amendment permitted by these regulations. This was suggested by a commentator who noted that it might not be possible to amend a collectively bargained plan until the expiration of all applicable collective bargaining agreements that are in effect when the final regulations are issued.

Accordingly, under the final regulations, ' 1.411(d)-4, Q&A-10(b)(3) has been amended so that, in the case of a plan maintained pursuant to one or more collective bargaining agreements between employee representatives and one or more employers ratified before September 3, 1998, the amendment deadline is extended to the last day of the twelfth month beginning after the date on which the last of such collective bargaining agreements terminates (determined without regard to any extensions on or after September 3, 1998), if later than the last day of the remedial amendment period for the plan for changes under the SBJPA.

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3. Circumstances Under Which No Relief Is Required

Many employers do not need relief under section 411(d)(6) in order to implement the SBJPA change in the definition of required beginning date in their plans. The regulations include an example of such a plan, a profit-sharing plan that permits an employee to elect distribution after age 59 1/2 at any time and in any amount.

The example illustrates that this plan may be amended to implement the SBJPA change in the definition of required beginning date without violating section 411(d)(6). In this example, the section 411(d)(6) relief in these regulations is not required because the optional forms of benefit in the plan that reflect the pre-SBJPA mandatory distribution requirements of section 401(a)(9) are encompassed by the optional forms of benefit provided under the general elective distribution provisions of the plan. The right to commence distributions at age 70 1/2 continues to be available under the plan even after the plan is amended to implement the SBJPA change in the required beginning date.

Effective Date

These regulations are effective June 5, 1998.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in EO 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. Further, it is hereby certified, pursuant to sections 603(a) and 605(b) of the Regulatory Flexibility Act, that the collection of information in these regulations does not have a significant economic impact on a substantial number of small entities. The burden imposed by the collection of information is the burden of amending a plan to modify the provisions reflecting section 401(a)(9). The cost of the amendment varies depending upon whether the small entity involved maintains an individually designed plan or uses a master or prototype plan. For an individually designed plan, the small entity maintaining the plan will be responsible for arranging to have the amendment made. Most small entities with individually designed plans will have the amendment done by a skilled outside service provider, such as a consulting firm or law firm. The time required to make such an amendment is estimated at 30 minutes, which is not a significant economic impact, even for a very small entity. Moreover, most very small entities that maintain a qualified plan use a master or prototype plan.

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For master and prototype plans, the plan sponsor drafts a single amendment for all of the employers participating in the plan. The average time required for the amendment per employer participating in a master or prototype plan is estimated to be 10 minutes, which certainly is not a substantial economic impact. Therefore, a regulatory flexibility analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking preceding these regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of these regulations is Cheryl Press, Office of the Associate Chief Counsel (Employee Benefits and Exempt Organizations), IRS. However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 602

Reporting and recordkeeping requirements.

Amendments to the Regulations

Accordingly, 26 CFR parts 1 and 602 are amended as follows:

PART 1--INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended by revising the entry for ' 1.411(d)-4 to read as follows:

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

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

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

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

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* * * * *

Q-10. If a plan provides for an age 70 1/2 distribution option that commences prior to retirement from employment with the employer maintaining the plan, to what extent may the plan be amended to eliminate this distribution option?

A-10. (a) In general.

The right to commence benefit distributions in a particular form and at a particular time prior to retirement from employment with the employer maintaining the plan is a separate optional form of benefit within the meaning of section 411(d)(6)(B) and Q&A-1 of this section, even if the plan provision creating this right was included in the plan solely to comply with section 401(a)(9), as in effect for years before January 1, 1997.

Therefore, except as otherwise provided in paragraph (b) of this Q&A-10 or any other Q&A in this section, a plan amendment violates section 411(d)(6) if it eliminates an age 70 1/2 distribution option (within the meaning of paragraph (c) of this Q&A-10) to the extent that it applies to benefits accrued as of the later of the adoption date or effective date of the amendment.

(b) Permitted elimination of age 70 1/2 distribution option.

An amendment of a plan will not violate the requirements of section 411(d)(6) merely because the amendment eliminates an age 70 1/2 distribution option to the extent that the option provides for distribution to an employee prior to retirement from employment with the employer maintaining the plan, provided that-

(1) The amendment eliminating this optional form of benefit applies only to benefits with respect to employees who attain age 70 1/2 in or after a calendar year, specified in the amendment, that begins after the later of-

(i) December 31, 1998; or

(ii) The adoption date of the amendment;

(2) The plan does not, except to the extent required by section 401(a)(9), preclude an employee who retires after the calendar year in which the employee attains age 70 1/2 from receiving benefits in any of the same

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optional forms of benefit (except for the difference in the timing of the commencement of payments) that would have been available had the employee retired in the calendar year in which the employee attained age 70 1/2; and

(3) The amendment is adopted no later than-

(i) The last day of the remedial amendment period that applies to the plan for changes under the Small Business Job Protection Act of 1996 (110 Stat. 1755); or

(ii) Solely in the case of a plan maintained pursuant to one or more collective bargaining agreements between employee representatives and one or more employers ratified before September 3, 1998, the last day of the twelfth month beginning after the date on which the last of such collective bargaining agreements terminates (determined without regard to any extension thereof on or after September 3, 1998), if later than the date described in paragraph (b)(3)(i) of this Q&A-10.

For purposes of this paragraph (b)(3)(ii), the rules of ' 1.410(b)-10(a)(2) apply for purposes of determining whether a plan is maintained pursuant to one or more collective bargaining agreements, except that September 3, 1998 is substituted for March 1, 1986, as the date before which the collective bargaining agreements must be ratified.

(c) Age 70 1/2 distribution option.

For purposes of this Q&A-10, an age 70 1/2 distribution option is an optional form of benefit under which benefits payable in a particular distribution form (including any modifications that may be elected after benefit commencement) commence at a time during the period that begins on or after January 1 of the calendar year in which an employee attains age 70 1/2 and ends April 1 of the immediately following calendar year.

(d) Examples. The provisions of this Q&A-10 are illustrated by the following examples:

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Example 1. Plan A, a defined benefit plan, provides each participant with a qualified joint and survivor annuity (QJSA) that is available at any time after the later of age 65 or retirement. However, in accordance with section 401(a)(9) as in effect prior to January 1, 1997, Plan A provides that if an employee does not retire by the end of the calendar year in which the employee attains age 70 1/2, then the QJSA commences on the following April 1.

On October 1, 1998, Plan A is amended to provide that, for an employee who is not a 5-percent owner and who attains age 70 1/2 after 1998, benefits may not commence before the employee retires but must commence no later than the April 1 following the later of the calendar year in which the employee retires or the calendar year in which the employee attains age 70 1/2. This amendment satisfies this Q&A-10 and does not violate section 411(d)(6).

Example 2. Plan B, a money purchase pension plan, provides each participant with a choice of a QJSA or a single sum distribution commencing at any time after the later of age 65 or retirement. In addition, in accordance with section 401(a)(9) as in effect prior to January 1, 1997, Plan B provides that benefits will commence in the form of a QJSA on April 1 following the calendar year in which the employee attains age 70 1/2, except that, with spousal consent, a participant may elect to receive annual installment payments equal to the minimum amount necessary to satisfy section 401(a)(9) (calculated in accordance with a method specified in the plan) until retirement, at which time a participant may choose between a QJSA and a single sum distribution (with spousal consent).

On June 30, 1998, Plan B is amended to provide that, for an employee who is not a 5-percent owner and who attains age 70 1/2 after 1998, benefits may not commence prior to retirement but benefits must commence no later than April 1 after the later of the calendar year in which the employee retires or the calendar year in which the employee attains age 70 1/2. The amendment further provides that the option described above to receive annual installment payments prior to retirement will not be available under the plan to an employee who is not a 5-percent owner and who attains age 70 1/2 after 1998. This amendment satisfies this Q&A-10 and does not violate section 411(d)(6).

Example 3. Plan C, a profit-sharing plan, contains two distribution provisions. Under the first provision, in any year after an employee attains age 59 1/2, the employee may elect a distribution of any specified amount not exceeding the balance of the employee's account. In addition, the plan provides a section 401(a)(9) override

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provision under which, if, during any year following the year that the employee attains age 70 1/2, the employee does not elect an amount at least equal to the minimum amount necessary to satisfy section 401(a)(9) (calculated in accordance with a method specified in the plan), Plan C will distribute the difference by December 31 of that year (or for the year the employee attains age 70 1/2, by April 1 of the following year).

On December 31, 1996, Plan C is amended to provide that, for an employee other than an employee who is a 5-percent owner in the year the employee attains age 70 1/2, in applying the section 401(a)(9) override provision, the later of the year of retirement or year of attainment of age 70 1/2, is substituted for the year of attainment of age 70 1/2. After the amendment, Plan C still permits each employee to elect to receive the same amount as was available before the amendment.

Because this amendment does not eliminate an optional form of benefit, the amendment does not violate section 411(d)(6). Accordingly, the amendment is not required to satisfy the conditions of paragraph (b) of this Q&A-10.

(e) Effective date. This Q&A-10 applies to amendments adopted and effective after June 5, 1998.

Michael P. Dolan,

Deputy Commissioner of Internal Revenue.

Approved: May 11, 1998.

Donald C. Lubick,

Assistant Secretary of the Treasury.

[FR Doc. 98-14875 Filed 6-4-98; 8:45 am]

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Notice 96-67

Application of Section 401(a)(9) to Employees who Attain Age 70 1/2 in 1996.

1996-2 C.B. 235; 1996 IRB LEXIS 374; 1996-53 I.R.B. 12

December 30, 1996

PURPOSE

This Notice addresses certain issues related to amendments, made by section 1404 of the Small Business Job Protection Act of 1996, Pub.L. 104-188 (SBJPA), to the minimum distribution requirements of section 401(a)(9) of the Internal Revenue Code. Specifically, the notice provides guidance on the application of section 401(a)(9), as amended by the SBJPA, to employees (other than 5-percent owners) who attain age 70 1/2 in 1996 but who have not retired by the end of 1996.

BACKGROUND

Section 401(a)(9) provides that, in order for a plan to be qualified under section 401(a), distributions from the plan must commence no later than the "required beginning date". Similar rules apply to an individual retirement account or annuity (IRA) and a section 403(b) contract (i.e., an annuity contract described in section 403(b), a custodial account described in section 403(b)(7) or a retirement income account described in section 403(b)(9)).

Prior to the amendments made by the SBJPA, section 401(a)(9)(C) generally defined required beginning date as April 1 of the calendar year following the calendar year in which an employee attained age 70 1/2.

This meant that an employee who attained age 70 1/2 was required to commence distributions from the plan, even if the employee had not retired from employment with the employer maintaining the plan.

Section 1404 of the SBJPA amended the definition of required beginning date that applies to an employee who is not a 5-percent owner. The amendment provides that, in the case of such an employee, the required beginning date is April 1 of the calendar year following the later of

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the calendar year in which the employee attains age 70 1/2 or

the calendar year in which the employee retires.

In the case of an employee who is a 5-percent owner, the required beginning date remains April 1 of the calendar year following the calendar year in which the 5-percent owner attains age 70 1/2. The amendments made by section 1404 of the SBJPA apply to years beginning after December 31, 1996.

The amendments do not apply to the required beginning date for distributions from an IRA, including an IRA established in conjunction with a Simplified Employee Pension (SEP) or a SIMPLE Plan. In addition, the amendments do not affect the determination of the required beginning date for church plans and government plans, since, under the pre-SBJPA version of section 401(a)(9), the required beginning date for these plans already was April 1 of the calendar year following the later of the calendar year in which the employee attains age 70 1/2 or the calendar year in which the employee retires.

Taxpayers have requested guidance on the application of the amendments to section 401(a)(9)(C) made by the SBJPA to employees who attain age 70 1/2 in 1996, but have not retired by the end of 1996. This Notice is issued in response to those requests.

QUESTIONS AND ANSWERS

Q-1: What is the effective date of the amendments to section 401(a)(9) made by section 1404 of the SBJPA?

A-1: Section 401(a)(9), as amended by section 1404 of the SBJPA, applies in determining the amount of any minimum distribution required to be made during any calendar year beginning on or after January 1, 1997 (that was not required to be made during an earlier calendar year).

Q-2: Is a minimum distribution required to be made by April 1, 1997 for an employee (other than a 5-percent owner) who attains age 70 1/2 in 1996, but has not retired from employment with the employer maintaining the plan by the end of 1996?

A-2: No. Such an employee's required beginning date is determined under section 401(a)(9), as amended by the SBJPA.

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Thus, the employee's required beginning date is not April 1, 1997. Instead, the employee's required beginning date is April 1 of the calendar year following the year in which the employee retires from employment with the employer maintaining the plan.

Q-3: If a plan distribution is made in 1996 to an employee (other than a 5-percent owner) who attains age 70 1/2 in that year, but has not retired by the end of 1996 from employment with the employer maintaining the plan, is any portion of the distribution a required distribution for purposes of section 402(c)(4)(B)?

A-3: Yes. Section 402(c)(4)(B) provides that a distribution is not an eligible rollover distribution to the extent that it is required under section 401(a)(9). If a distribution is made during 1996 (i.e., prior to the January 1, 1997 effective date of the SBJPA amendments to section 401(a)(9)), then, whether that distribution is a required distribution under section 401(a)(9) is determined by applying section 401(a)(9) as in effect prior to amendment by the SBJPA.

Under Q&A-7 of ' ' 1.402(c)-2 of the Income Tax Regulations, a distribution in the year an employee attains age 70 1/2 is treated as a required distribution under section 401(a)(9) to the extent that the total required minimum distribution under section 401(a)(9) for that year has not been satisfied. Therefore, although under Q&A-2 of this Notice, no distribution is required to be made by April 1, 1997 with respect to an employee (other than a 5-percent owner) who attains age 70 1/2 during 1996, but has not retired by the end of that year, if a distribution actually is made to such an employee in 1996, the distribution is treated as a required distribution to the extent that the total required minimum distribution under section 401(a)(9), as in effect prior to amendment by the SBJPA, has not been satisfied. Thus, to that extent, the distribution is not an eligible rollover distribution and is not subject to mandatory 20% withholding under section 3405(c). However, a distribution to such an employee in 1997 (i.e., after the effective date of the SBJPA amendments) is not a required distribution under section 401(a)(9).

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Q-4: How does the guidance provided in Q&A-2 and Q&A-3 of this Notice apply to the determination of the required minimum distribution from a section 403(b) contract?

A-4: In applying section 401(a)(9) to a section 403(b) contract to which contributions are made by an employer, an employee's required beginning date is determined under section 401(a)(9) in the same manner as it would be determined for a qualified plan maintained by that employer. Accordingly, the required beginning date with respect to a section 403(b) contract of an employee who attains age 70 1/2 in 1996 and who has not retired from employment by the end of 1996 is determined under Q&A-2 of this Notice. Similarly, whether a distribution in 1996 from a section 403(b) contract is a required minimum distribution (and thus not an eligible rollover distribution) is determined in accordance with the guidance in Q&A-3 of this notice.

REQUEST FOR COMMENTS CONCERNING RELAXATION OF SECTION 411(d)(6)

Except to the extent provided by regulations, section 411(d)(6)(B) precludes a plan amendment that eliminates an optional form of benefit as it applies to benefits accrued as of the later of the adoption date or the effective date of the amendment. The right to commence benefit distributions in any form at a particular time is an optional form of benefit within the meaning of section 411(d)(6)(B) and Q&A-1(b) of ' 1.411(d)-4 of the Income Tax Regulations.

When it enacted section 1404 of the SBJPA, Congress did not alter the application of section 411(d)(6). Accordingly, an amendment that eliminates the right to receive a distribution prior to retirement (an in-service distribution) after age 70 1/2 is precluded by section 411(d)(6) if the amendment applies to benefits accrued as of the later of the adoption date or the effective date of the amendment.

A plan that retains in-service distributions after age 70 1/2 (either as a mandatory or an optional form of distribution) will satisfy the requirements of section 401(a)(9) as amended, and will not be prohibited by section 411(d)(6). However, the Service and the Treasury recognize the potential complexity of administering these distribution options. Therefore, the Service and the Treasury are considering the extent to which it is appropriate to exercise the authority in section 411(d)(6)(B) to permit plan amendments to eliminate the option to receive in-service distributions after age 70 1/2. In making this determination, factors that the Treasury and the Service will take into account include the importance to plan participants of protecting the option to receive in-service distributions as well as the potential complexity to employers, plan administrators and participants of retaining the option.

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The Service and the Treasury request comments concerning the extent to which a relaxation of section 411(d)(6) protection is appropriate for amendments that eliminate in-service distributions after age 70 1/2 (e.g., by limiting section 411(d)(6) protection to employees above a certain age). Because the Service and the Treasury have received requests that this guidance be provided on an expedited basis, comments are requested to be submitted by January 31, 1997.

Comments can be addressed to CC:DOM:CORP:R (Notice 96-XX), room 5228, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. In the alternative, comments may be hand delivered between the hours of 8 a.m. and 5 p.m. to CC:DOM:CORP:R (Notice 96-XX), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC. Alternatively, taxpayers may transmit comments electronically via the IRS Internet site at <http://www.irs.ustreas.gov/prod/tax!@regs/comments.html>

DRAFTING INFORMATION

The principal author of this Notice is Cheryl Press of the Office of the Associate Chief Counsel (Employee Benefits and Exempt Organizations). For further information regarding this Notice, contact Thomas R. Foley at (202) 622-6050 (not a toll-free number).

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Announcement 97-24

Timing of Certain Plan Amendments Relating to Section 401(a)(9)

PURPOSE

This announcement provides that an employer is not precluded from offering, to employees (other than 5-percent owners) who attain age 70 1/2 after 1995 and have not retired, an option to defer commencement of benefit distributions under a qualified plan merely because the plan has not yet been amended to provide for the option.

BACKGROUND

Section 1404(a) of the Small Business Job Protection Act of 1996 (SBJPA) amended section 401(a)(9) of the Internal Revenue Code to provide that, in the case of an employee who is not a 5-percent owner, the required beginning date for minimum distributions from a qualified plan is April 1 of the calendar year following the later of the calendar year in which the employee attains age 70 1/2 or the calendar year in which the employee retires. The amendment to section 401(a)(9) applies to years beginning after December 31, 1996.

Notice 96-67, 1996-53 I.R.B. 12, Q&A-2, provides that, under section 401(a)(9) as amended by the SBJPA, an employee (other than a 5-percent owner) who attained age 70 1/2 in 1996, but who had not retired from employment with the employer maintaining the plan by the end of 1996, is not required to receive a minimum distribution by April 1, 1997.

Many qualified plans continue to contain provisions (consistent with section 401(a)(9) prior to its amendment by the SBJPA) requiring an employee who attains age 70 1/2 in a calendar year to begin receiving distributions by April 1 of the following calendar year.

Some employers wish to give employees (other than 5-percent owners) who have not retired the option to defer commencement of distributions beyond April 1 following the calendar year the employees attain age 70 1/2 and have requested guidance as to whether such an option may be offered before their plans are amended to provide for the option.

This announcement responds to these requests concerning the addition of an option to defer commencement of distributions before plan amendment. It does

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not address the elimination of the option to receive in-service distributions after age 70 1/2.

As noted in Notice 96-67, an amendment that eliminates the right to receive a distribution prior to retirement after age 70 1/2 is precluded by section 411(d)(6) if the amendment applies to benefits accrued as of the later of the adoption date or the effective date of the amendment. In Notice 96-67, the Service and Treasury requested comments concerning the extent to which a relaxation of section 411(d)(6) protection is appropriate for amendments that eliminate in-service distributions after age 70 1/2, and the Service and Treasury are currently considering the comments received.

TIMING OF PLAN AMENDMENTS

Under a qualified plan, an employer is permitted to offer an employee (other than a 5-percent owner)

who attains age 70 1/2 in a calendar year after 1995 and

has not retired by the end of that calendar year

the option to delay commencement of benefit distributions until no later than April 1 following the calendar year in which the employee retires from employment with the employer maintaining the plan.

A plan that continues to contain provisions requiring an employee to begin receiving distributions by April 1 following the calendar year in which the employee attains age 70 1/2 will not fail to satisfy section 401(a) merely because the employer offers the option described in the preceding sentence prior to amending the plan to include this option.

Thus, if employees (other than 5-percent owners) who attained age 70 1/2 in 1996 and did not retire from employment with the employer maintaining the plan by the end of 1996 are offered the opportunity to make an election to defer commencement of benefits rather than to begin receiving benefits from the plan by April 1, 1997, the plan will not fail to satisfy section 401(a) merely because the plan has not yet been amended to provide for this election.

Future guidance will provide that an employer that offers this option under a plan must amend the plan retroactively, no later than the date specified in that

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guidance, to provide for the option. The retroactive plan amendment will have to conform the plan to its pre-amendment operation regarding the option to defer commencement of benefits. The date by which a plan providing for this option must be retroactively amended will not be earlier than 90 days after the future guidance is published and in no event will be earlier than January 1, 1998.

This announcement also applies to an employer that has adopted a master or prototype or a regional prototype plan. Such an employer should note that if a conforming amendment is not an available option under the sponsor's prototype plan document, the required amendment may result in the loss of prototype status.

ELECTIONS TO STOP RECEIVING DISTRIBUTIONS

This announcement does not address the conditions under which employers may offer employees who have attained age 70 1/2 and have begun to receive distributions under a plan an election to stop receiving distributions until a date no later than April 1 of the calendar year following retirement. Employers are cautioned that, under certain circumstances, an election to stop receiving distributions may violate the qualification requirements under section 401(a), such as sections 401(a)(11) and 417 (relating to participant and spousal consent, joint and survivor annuity requirements, and related matters). Future guidance will address the conditions under which these types of elections may be made and the permitted timing of related plan amendments.

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Part IV.--Items of General Interest

Announcement 97-70

TRANSITION RELIEF FOR FAILURES TO MAKE PLAN DISTRIBUTIONS TO CERTAIN EMPLOYEES OR OFFER OPTIONS TO DEFER DISTRIBUTIONS BY APRIL 1, 1997

PURPOSE

This announcement provides transition relief for qualified plans that fail to make distributions required under the terms of the plan to an employee who attained age 70² in 1996 and who did not retire in 1996. This relief is conditioned upon the employer meeting specified requirements with respect to such an employee.

BACKGROUND

Section 401(a)(9) of the Internal Revenue Code ("Code") provides that, in order for a plan to be qualified under section 401(a), distributions from the plan must commence no later than the "required beginning date." Prior to 1997, section 401(a)(9)(C) generally provided that the required beginning date is April 1 following the calendar year in which the employee attains age 70².

Section 1404(a) of the Small Business Job Protection Act of 1996 ("SBJPA") amended section 401(a)(9) of the Code to provide that, in the case of an employee who is not a 5-percent owner, the required beginning date for minimum distributions from a qualified plan is April 1 of the calendar year following the later of

the calendar year in which the employee attains age 70² or

the calendar year in which the employee retires.

The amendment to section 401(a)(9) applies to years beginning after December 31, 1996.

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Notice 96-67, 1996-53 I.R.B. 12, December 30, 1996, Q&A-2, provides that, under section 401(a)(9) as amended by the SBJPA, an employee (other than a 5-percent owner) who attained age 70 $\frac{1}{2}$ in 1996, but who had not retired from employment with the employer maintaining the plan by the end of 1996, is not required to receive a minimum distribution by April 1, 1997.

Such an employee's required beginning date is determined under amended section 401(a)(9), which requires distributions to commence by April 1 of the calendar year following the calendar year in which the employee retires from employment with the employer maintaining the plan.

Many qualified plans continue to contain provisions (consistent with section 401(a)(9) prior to its amendment by the SBJPA) requiring an employee who attains age 70 $\frac{1}{2}$ in a calendar year to begin receiving distributions by April 1 of the following calendar year.

Announcement 97-24, 1997-11 I.R.B. 24, March 13, 1997, provides that, prior to amending its plan, an employer maintaining a plan is permitted to offer an employee (other than a 5-percent owner) who attains age 70 $\frac{1}{2}$ in a calendar year after 1995, e.g. 1996, and who does not retire by the end of that calendar year, the option to delay commencement of distributions until no later than April 1 following the calendar year in which the employee retires from employment with the employer.

Announcement 97-24 notes that future guidance will provide that an employer that offers this option under a plan must amend the plan retroactively to provide for the option. The retroactive plan amendment must conform the plan to its pre-amendment operation regarding this option to defer distributions until after retirement.

Announcement 97-24 states that it also applies to an employer that has adopted a master or prototype or a regional prototype plan. Announcement 97-24 notes that if a conforming amendment is not an available option under the sponsor's prototype plan document, the required amendment may result in the loss of prototype status.

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TRANSITION RELIEF

Under this announcement, if the requirements described below are satisfied, a plan will not be treated as failing to satisfy the requirements of section 401(a) of the Code merely because the plan fails to make certain distributions required under the terms of the plan to an employee (other than a 5-percent owner)

who attained age 702 in 1996 and

who did not retire from employment with the employer maintaining the plan by the end of 1996.

The relief in this announcement applies to a plan with respect to distributions required under the terms of the plan to be made to such an employee between August 20, 1996 (the date of enactment of the SBJPA) and December 31, 1997.

This relief is available only if:

- (1) the employee is offered an option to defer the distribution and elects to defer, or a make-up distribution is paid to such employee, and
- (2) the employee option or the make-up distribution meets the qualification requirements under section 401(a) of the Code (other than the requirement that a plan operate in accordance with its terms).

For example, the employee option or the make-up distribution must satisfy the requirements of sections 401(a)(11) and 417 (relating to joint and survivor annuities).

If the employer chooses to offer an election to defer, the election to defer must be made by the employee by December 31, 1997. If an employee chooses not to defer, the plan must pay a make-up distribution to the employee in a manner that satisfies the rules set out below.

Whether a make-up distribution from the plan is paid to all employees (other than 5-percent owners) who attained age 702 in 1996 and who did not retire from employment with the employer maintaining the plan by the end of 1996 or only to any such employee who is offered an election to defer but chooses not to defer, the make-up distribution must be made by December 31, 1997 and must

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include all of the employee's distributions required under the plan terms up to that date.

The make-up distribution must restore to the employee the benefits that the employee would have had if the plan terms had been followed. For example, in the case of a defined benefit plan, the make-up distribution for an employee must be increased to take into account the delayed payment consistent with the plan's actuarial adjustments.

Further, future guidance will provide that an employer who offers the option to defer described above under a plan must amend the plan retroactively, no later than the date specified in that guidance, to provide for the option.

The retroactive plan amendment must conform the plan to its preamendment operation regarding the option to defer commencement of benefits. However, a plan will not fail to satisfy this operational requirement merely because the amendment provides for an employee to have the option to either commence distribution by April 1, 1997 or to defer distribution beyond that date but, in operation, the plan provided for an election to defer or make up distributions in accordance with this announcement.

This announcement also applies to an employer that has adopted a master or prototype or a regional prototype plan. Such an employer should note that if a conforming amendment is not an available option under the sponsor's prototype plan document, the required amendment may result in the loss of prototype status.