

## **2009 Cumulative List of Changes in Plan Qualification Requirements**

Notice 2009-98

### **I. PURPOSE**

This notice contains the 2009 Cumulative List of Changes in Plan Qualification Requirements (2009 Cumulative List) described in section 4 of Rev. Proc. 2007-44, 2007-2 C.B. 54. The 2009 Cumulative List is to be used primarily by plan sponsors of individually designed plans that are in Cycle E. An individually designed plan is in Cycle E if it is a single employer plan where the last digit of the employer identification number of the plan sponsor is 5 or 0, or it is a § 414(d) governmental plan for which an election has been made by the plan sponsor to treat Cycle E as the initial EGTRRA remedial amendment cycle for the plan.

The list of changes in section VI of this notice does not extend the deadline by which a plan must be amended to comply with any statutory, regulatory, or guidance changes. The general deadline for timely adoption of an interim or discretionary amendment can be found in section 5.05 of Rev. Proc. 2007-44.

### **II. BACKGROUND**

Rev. Proc. 2007-44 sets forth procedures for issuing opinion, advisory, and determination letters and describes the five-year remedial amendment cycle for individually designed plans and the six-year remedial amendment cycle for pre-approved plans. In addition, section 5.05 of Rev. Proc. 2007-44 provides the deadline for timely adoption of an interim amendment or discretionary amendment.

Under section 4 of Rev. Proc. 2007-44, the Internal Revenue Service intends to annually publish a Cumulative List to identify statutory, regulatory, and guidance changes that must be taken into account in submissions by plan sponsors to the Service for opinion, advisory, and determination letters whose submission period begins on February 1st following issuance of the Cumulative List.

In Notice 2008-108, 2008-2 C.B. 1275, the Service published the 2008 Cumulative List of Changes in Plan Qualification Requirements (2008 Cumulative List).<sup>1</sup>

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<sup>1</sup> See Notice 2007-94, 2007-2 C.B. 1179; Notice 2007-3, 2007-1 C.B. 255; Notice 2005-101, 2005-2 C.B. 1219; and Notice 2004-84, 2004-2 C.B. 1030, for the 2007, 2006, 2005, and 2004 Cumulative Lists, respectively.

Under section 1107 of the Pension Protection Act of 2006 (PPA '06), a plan amendment made pursuant to any amendment made by PPA '06 generally may be retroactively effective, if, in addition to meeting the other applicable requirements, the amendment is made on or before the last day of the first plan year beginning on or after January 1, 2009 (January 1, 2011 in the case of a governmental plan).

Pursuant to Notice 2008-108, as an alternative to submitting a plan in Cycle D (February 1, 2009 – January 31, 2010), a plan sponsor of a Cycle D plan whose first plan year beginning after January 1, 2009 ends on or after February 1, 2010, may defer submission of its plan until Cycle E (February 1, 2010 – January 31, 2011). In order to defer submission of such a plan until Cycle E, an application for a determination letter must be timely filed in Cycle E. In such a case, the plan will be treated as having been filed within the plan's EGTRRA remedial amendment period and will be reviewed on the basis of the 2009 Cumulative List. However, such a plan will be treated as a Cycle E plan solely for this initial cycle, and all subsequent submissions will be made in Cycle D.

Rev. Proc. 2009-36, 2009-35 I.R.B. 304, provides, in part, that the sponsor of an individually designed governmental plan may make a one-time election to be in Cycle E (instead of Cycle C), as the initial EGTRRA remedial amendment cycle for the plan.

### III. APPLICATION OF 2009 CUMULATIVE LIST

This notice is being issued for purposes of the determination letter program for plans submitted for determination letters during the Cycle E submission period. In Rev. Proc. 2005-66, 2005-2 C.B. 509, the Service announced the opening of the initial five-year remedial amendment cycle. In accordance with Rev. Proc. 2007-44, the Service will start accepting determination letter applications for Cycle E plans beginning on February 1, 2010. The 12-month submission period for Cycle E plans will end January 31, 2011.

The 2009 Cumulative List, set forth in section VI of this notice, informs plan sponsors of issues the Service has specifically identified for review in determining whether a plan filing in Cycle E has been properly updated. Specifically, the 2009 Cumulative List reflects law changes under the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), Pub. L. 107-16 (with technical corrections made by the Job Creation and Worker Assistance Act of 2002 (JCWAA)), Pub. L. 104-147, the Pension Funding Equity Act of 2004 (PFEA), Pub. L. 108-218, the American Jobs Creation Act of 2004 (AJCA), Pub. L. 108-357, the Katrina Emergency Tax Relief Act of 2005 (KETRA), Pub. L. 109-73, the Gulf Opportunity Zone Act of 2005 (GOZA), Pub. L. 109-135, the Pension Protection Act of 2006 (PPA '06), Pub. L. 109-280, the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007, Pub. L. 110-28, the Heroes Earnings Assistance and Relief Tax Act of

2008 (HEART Act), Pub. L. 110-245, the Emergency Economic Stabilization Act of 2008 (EESA), Pub. L. 110-343, and the Worker, Retiree, and Employer Recovery Act of 2008 (WRERA), P.L. 110-458.

The Service will not consider in its review of any determination letter application, for the submission period that begins February 1, 2010, any:

- (1) guidance issued after October 1, 2009;
- (2) statutes enacted after October 1, 2009;
- (3) qualification requirements first effective in 2011 or later; or
- (4) statutory provisions that are first effective in 2010, for which there is no guidance identified in this notice.<sup>2</sup>

The 2009 Cumulative List does not include any items described in (1) through (4) above. However, in order to be qualified, a plan must comply with all relevant qualification requirements, not just those on the 2009 Cumulative List.

The Service will not consider the proposed regulations identified in the footnotes of section VI of this notice in issuing determination letters, and such letters cannot be relied on with respect to the proposed regulations.

Terminating plans must include all law changes in effect at the time of termination. See section 8 of Rev. Proc. 2007-44 regarding plan termination.

#### IV. SPECIAL RULES FOR THE HEROES EARNINGS ASSISTANCE AND RELIEF TAX ACT OF 2008

Under sections 104(d)(2) and 105(c) of the Heroes Earnings Assistance and Relief Tax Act of 2008 (HEART Act), Pub. L. 110-245, a plan amendment made pursuant to sections 104(a) or 105(b)(1) of the HEART Act generally may be retroactively effective, if, in addition to meeting the other applicable requirements, the amendment is made on or before the last day of the first plan year beginning on or after January 1, 2010 (January 1, 2012 in the case of a governmental plan).

Plans submitted in Cycle E must meet the amendment deadline for the HEART Act, if applicable. However, the Service will not consider the HEART Act in issuing determination letters because no guidance has been issued with respect to the HEART Act, and such letters cannot be relied on with respect to the HEART Act. The HEART Act provisions are listed in section VII of this notice.

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<sup>2</sup> The Service will also not consider the requirements of § 436 in its review of any Cycle E determination letter application. The Service will consider the requirements of §§ 401(a)(35), 411(a)(13), and 411(b)(5) in its review of a Cycle E determination letter application only if the plan has been amended to meet those requirements.

Section 107(a) of the HEART Act extends the applicability of the qualified reservist distribution to individuals ordered or called to duty after December 31, 2007. The Service is treating an amendment made pursuant to section 107 of the HEART Act as if it was included in the amendments described in section 1107 of PPA '06. See section VI of this notice, # 11, with respect to § 401(k)(2)(B)(i)(V) qualified reservist distributions.

#### V. SPECIAL RULES FOR THE WORKER, RETIREE, AND EMPLOYER RECOVERY ACT OF 2008

Section 201 of WREERA added section 401(a)(9)(H) to the Code. This provision provides, in part, a suspension of the minimum distribution requirement for 2009 applicable to defined contribution plans.

Under section 201(c)(2) of WREERA, a plan amendment made pursuant to WREERA section 201 generally may be retroactively effective, if, in addition to meeting the other applicable requirements, the amendment is made on or before the last day of the first plan year beginning on or after January 1, 2011 (January 1, 2012 in the case of a governmental plan).

Plans submitted in Cycle E can be amended, at the option of plan sponsors to include WREERA section 201. However, the Service will not consider WREERA section 201 in issuing determination letters for Cycle E plans, and such letters cannot be relied on with respect to the requirements of WREERA section 201.

A plan restatement submitted in Cycle E must include the applicable WREERA provisions identified in section VI of this notice.

#### VI. 2009 CUMULATIVE LIST OF CHANGES IN PLAN QUALIFICATION REQUIREMENTS

The following list consists of statutory provisions and associated guidance which reflect changes to plan qualification requirements. Miscellaneous guidance is also provided. The Service has identified below plan qualification requirements which were not on the 2008 or earlier Cumulative Lists as “(New)”. Thus, the 2009 Cumulative List contains those plan qualification requirements listed in the 2004, 2005, 2006, 2007, and 2008 Cumulative Lists as well as additional 2009 plan qualification requirements.

1. 72(p): Section 1.72(p)-1 of the Income Tax Regulations relating to plan loans was published on December 3, 2002 (67 Fed. Reg. 71821). (2004 C. L.).
2. 401(a):

- Final Regulations under § 401(a) of the Code regarding permissible normal retirement ages were published on May 22, 2007 (72 Fed. Reg. 28604). (2006 C. L.).
    - Notice 2007-69, 2007-2 C.B. 468, provides temporary relief, for certain pension plans under which the definition of normal retirement age may be required to be changed to comply with the regulations, but only until the first day of the first plan year that begins after June 30, 2008. (2007 C. L.).
    - Notice 2008-98, 2008-2 C.B. 1080, provides that the Service and Treasury intend to amend the normal retirement age regulations to change the effective date for governmental plans to plan years beginning on or after January 1, 2011.<sup>3</sup> (New).
  - Rev. Rul. 2008-40, 2008-2 C.B. 166, provides that the transfer of amounts from a trust under a plan qualified under § 401(a) to a nonqualified foreign trust is treated as a distribution from the transferor plan and that transfer of assets and liabilities from a qualified plan to a plan that satisfies § 1165 of the Puerto Rico Code is also treated as a distribution from the transferor plan. (2008 C. L.).
  - Rev. Rul. 2008-45, 2008-2 C.B. 403, provides that the exclusive benefit rule of § 401(a) is violated if the sponsorship of a qualified retirement plan is transferred from an employer to an unrelated taxpayer and the transfer is not in connection with a transfer of business assets or operations from the employer to the unrelated taxpayer. (2008 C. L.).
3. 401(a)(4):
- Amendments to § 1.401(a)(4)-8 of the Regulations relating to new comparability plans were published on June 29, 2001 (66 Fed. Reg. 34535). (2004 C. L.).
  - Rev. Rul. 2001-30, 2001-2 C.B. 46. (2004 C. L.).
  - Amendments to § 1.401(a)(4)-9 of the Regulations relating to new comparability plans were published on June 29, 2001 (66 Fed. Reg. 34535). (2005 C. L.).
  - Rev. Rul. 2004-21, 2004-1 C.B. 544. (2005 C. L.).
4. 401(a)(5): Section 401(a)(5)(G) of the Code was amended by PPA '06 § 861(a)(1) with respect to governmental plans. (2008 C. L.).

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<sup>3</sup> Notice 2009-86, 2009-46 I.R.B. 629, provides that the Service and Treasury intend to amend the normal retirement age regulations to change the effective date for governmental plans to plan years beginning on or after January 1, 2013.

5. 401(a)(9):
  - Sections 1.401(a)(9)-1 through –9 of the Regulations were published on April 17, 2002 and June 15, 2004 (67 Fed. Reg. 18988 and 69 Fed. Reg. 33288). (2004 C. L.).
  - Final regulations under § 401(a)(9) were published on September 8, 2009 (74 Fed. Reg. 45993), which permit a governmental plan to comply with the required minimum distribution rules of § 401(a)(9) by using a reasonable and good faith interpretation of the statute. (New).
  
6. 401(a)(17): Section 401(a)(17) of the Code was amended by § 611(c) of EGTRRA to increase the compensation limit to \$200,000. (2004 C. L.).
  - Notice 2001-56, 2001-2 C.B. 277. (2004 C. L.).
  
7. 401(a)(26): Section 401(a)(26)(G) of the Code was amended by PPA '06 § 861(a)(1) with respect to governmental plans. (2008 C. L.).
  
8. 401(a)(31):
  - Section 401(a)(31) was amended by § 643(b) of EGTRRA to allow employees' after-tax contributions to be rolled over under certain circumstances. (2004 C. L.).
  - Section 401(a)(31)(B) was amended by § 657(a) of EGTRRA (as amended by § 411(t) of JCWAA) to provide for the automatic rollover of certain mandatory distributions. The effective date is March 28, 2005. (2004 C. L.).
    - Notice 2005-5, 2005-1 C.B. 337. (2004 C. L.).
  - Sections 641, 642 and 643 of EGTRRA (as amended by § 411(q) of JCWAA) amended the definition of eligible retirement plan in § 402 of the Code to include a § 403(b) annuity contract and eligible governmental § 457(b) plan. (2004 C. L.).
  - Section 636(b) of EGTRRA modified the definition of eligible rollover distribution to exclude hardship distributions. (2004 C. L.).
  
9. 401(a)(35): PPA '06 § 901(a)(1) added § 401(a)(35) requiring that defined contribution plans provide employees with the freedom to divest publicly traded securities.<sup>4</sup> (2008 C. L.).
  - Notice 2006-107, 2006-2 C.B. 1114. (2008 C. L.).
  - Notice 2008-7, 2008-1 C.B. 276, extends certain transitional guidance and transitional relief provided to certain defined contribution plans holding publicly traded employer securities under Notice 2006-107. (2008 C. L.).

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<sup>4</sup> Proposed regulations under § 401(a)(35) were published on January 3, 2008 (73 Fed. Reg. 421) and may be relied upon until final regulations are issued. The Service will consider the requirements of § 401(a)(35) in its review of a Cycle E determination letter application only if the plan has been amended to meet those requirements.

- WRERA § 109(a) amended the definition of one-participant retirement plan under § 401(a)(35)(E)(iv). (New).
10. 401(a)(36): PPA '06 § 905(b) added § 401(a)(36) regarding distributions to a participant who has attained age 62 and who has not separated from employment at the time of the distribution. (2008 C. L.).
11. 401(k) & 401(m):
- Section 401(k)(2) and § 401(k)(10) of the Code were amended by § 646(a)(1) of EGTRRA to permit distributions of elective deferrals from a § 401(k) plan upon severance from employment. (2004 C. L.).
    - Notice 2002-4, 2002-1 C.B. 298. (2004 C. L.).
  - Section 636(a) of EGTRRA directed the Secretary of the Treasury to revise the regulations relating to safe harbor hardship distributions of elective deferrals from § 401(k) plans so that the time the employee is prohibited from making elective and employee contributions is reduced from one year to six months after a hardship distribution. (2004 C. L.).
    - Notice 2001-56. (2004 C. L.).
    - Notice 2002-4. (2004 C. L.).
  - Section 401(k)(11) of the Code was amended by § 611(f) of EGTRRA to increase the maximum amount of qualified salary reduction contributions that can be made to SIMPLE 401(k) plans. (2004 C. L.).
  - Section 402(g) of the Code was amended by § 611(d) of EGTRRA to increase the applicable dollar amount. (2004 C. L.).
  - Section 401(m)(9) of the Code was amended by § 666 of EGTRRA to eliminate the multiple use test. (2004 C. L.).
  - Final Regulations under § 401(k) and § 401(m) of the Code were published on December 29, 2004 (69 Fed. Reg. 78144).<sup>5</sup> (2004 C. L.).
  - Announcement 2007-59, 2007-1 C.B. 1448, provides that a plan will not fail to satisfy the requirements of a § 401(k) safe harbor plan because of a mid-year change to implement a designated Roth contribution program. (2007 C. L.).
  - PPA '06 § 826 modified the rules relating to distributions from a § 401(k) plan on account of a participant's hardship to permit the plan to treat a participant's beneficiary under the plan the same as the participant's spouse or dependent. (2008 C. L.).
    - Notice 2007-7, 2007-1 C.B. 395, provides guidance regarding PPA '06 § 826. (2008 C. L.).

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<sup>5</sup> Proposed amendments to the regulations under § 401(k) and § 401(m) were published on May 18, 2009 (74 Fed. Reg. 23134) and may be relied upon until final regulations are issued.

- Announcement 2007-59, 2007-1 C.B. 1448, provides that a plan will not fail to satisfy the requirements of a § 401(k) safe harbor plan because of a mid-year change to implement the PPA '06 § 826 hardship withdrawals. (2008 C. L.).
  - PPA '06 § 827 added § 401(k)(2)(B)(i)(V) which permits reservists called to active duty after September 11, 2001 and before 2008 to take in-service distributions from a § 401(k) plan. (2008 C. L.).
    - Section 107(a) of the HEART Act extends the applicability of the qualified reservist distribution to individuals ordered or called to active duty after December 31, 2007. (New).
  - PPA '06 § 861(a)(2) amended § 401(k)(3)(G) with respect to governmental plans. (2008 C. L.).
  - PPA '06 § 902(e)(3) eliminates the gap period income rule for excess contributions in § 401(k)(8)(A)(i). (2008 C. L.).
  - PPA '06 § 902 added § 401(k)(13) with respect to qualified automatic contribution arrangements. (2008 C. L.).
    - Final regulations under § 401(k) with respect to qualified automatic contribution arrangements were published on February 24, 2009 (74 Fed. Reg. 8200). (New).
    - Rev. Rul. 2009-30, 2009-39 I.R.B. 391, provides information with respect to automatic contribution increases under automatic contribution arrangements. (New).
    - Notice 2009-65, 2009-39 I.R.B. 413, provides sample amendments that plan sponsors can use to add automatic contribution features to their plans. (New).
  - PPA '06 § 902(e)(3) eliminates the gap period income rule for excess aggregate contributions in § 401(m)(6)(A). (2008 C. L.).
  - PPA '06 § 902 added § 401(m)(12) with respect to qualified automatic contribution arrangements. (2008 C. L.).
    - Final regulations under § 401(m) with respect to qualified automatic contribution arrangements were published on February 24, 2009 (74 Fed. Reg. 8200). (New).
12. 402(c)(2)(A): PPA '06 § 822(a) amended § 402(c)(2)(A) to permit nontaxable distributions from a qualified plan to be directly rolled over tax-free to either another qualified plan or a § 403(b) plan if the separate accounting requirements are met. (2008 C. L.).
13. 402(c)(11): PPA '06 § 829(a)(1) added § 402(c)(11) to allow nonspouse beneficiaries to directly roll over distributions from a qualified plan to an individual retirement plan. (2008 C. L.).
- Notice 2007-7, 2007-1 C.B. 395, provides guidance regarding § 402(c)(11). (2008 C. L.).
  - WRERA § 108(f) requires that plans provide for nonspouse beneficiary rollovers under § 402(c)(11), effective for plan years beginning after December 31, 2009. (New).

14. 402(f): PPA '06 § 1102(a) provides that notice required to be provided under § 402(f) may be provided as much as 180 days before the annuity starting date.<sup>6</sup> (2008 C. L.).
- Notice 2007-7, 2007-1 C.B. 395, provides guidance regarding PPA '06 § 1102. (2008 C. L.).
  - Notice 2009-68, 2009-39 I.R.B. 423, provides two safe harbor explanations that may be provided to recipients of eligible rollover distributions from an employer to satisfy § 402(f). (New).
  - WRERA § 108(f)(2) amended § 402(f)(2)(A) with respect to the definition of eligible rollover distribution. (New).
15. 402(g)(2): WRERA § 109(b)(3) amended § 402(g)(2)(A)(ii) to eliminate the distribution of gap period earnings with excess deferrals. (New).
16. 402A: Section 402A of the Code was added by § 617 of EGTRRA to offer optional treatment of elective deferrals as designated Roth contributions to defined contribution plans, effective for taxable years beginning after December 31, 2005. (2004 C. L.).
- Final Regulations under § 401(k) and § 401(m) of the Code relating to designated Roth contributions were published on January 3, 2006 (71 Fed. Reg. 6). (2005 C. L.).
    - Notice 2006-44, 2006-1 C.B. 889, provides a sample amendment for Roth § 401(k) plans. (2006 C. L.).
  - Final Regulations under § 402A of the Code were published on April 30, 2007 (72 Fed. Reg. 21103). (2006 C. L.).
17. 404:
- Section 404(k)(2)(A) of the Code was amended by § 662(a) of EGTRRA (as amended by § 411(w) of JCWAA) to allow ESOP dividends to be reinvested without the loss of dividend deductions. (2005 C. L.).
    - Notice 2002-2, 2002-1 C.B. 285, provides guidance with respect to the changes made to § 404(k) of the Code and on the effective date of § 409(p) of the Code. (2005 C. L.).
18. 408(q): Section 408(q) of the Code was added by § 602 of EGTRRA (as amended by § 411(i) of JCWAA) to allow for deemed individual retirement accounts (IRAs) in an eligible retirement plan. (2004 C. L.).
- Section 1.408(q)-1 of the Regulations was published on July 22, 2004 (69 Fed. Reg. 43735). (2004 C. L.).

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<sup>6</sup> Proposed regulations under § 402(f) were published on October 9, 2008 (73 Fed. Reg. 59575) and may be relied upon until final regulations are issued.

19. 408A(e): PPA '06 § 824 added § 408A(e) which permits rollovers to Roth IRAs from accounts that are not designated Roth accounts that are part of qualified plans, § 403(b) plans, and § 457 plans. (2008 C. L.).
- Notice 2008-30, 2008-1 C.B. 638, provides guidance regarding PPA '06 § 824. (2008 C. L.).
20. 409: Section 409(p) of the Code was added by § 656 of EGTRRA relating to restrictions on the allocation of employer securities in an ESOP maintained by an S corporation. (2005 C. L.).
- Section 1.409(p)-1T of the Regulations was published on July 21, 2003 (68 Fed. Reg. 42970). (2005 C. L.).
  - Section 1.409(p)-1T of the Regulations was published on December 17, 2004 (69 Fed. Reg. 75455). (2005 C. L.).
  - Rev. Proc. 2003-23, 2003-1 C.B. 599, as modified and superseded by Rev. Proc. 2004-14, 2004-1 C.B. 489, allows a direct rollover from an ESOP maintained by an S corporation to an individual retirement plan (IRA). (2005 C. L.).
  - Rev. Rul. 2003-6, 2003-1 C.B. 286, provides guidance with respect to whether an ESOP maintained by an S corporation is eligible for the delayed effective date of § 409(p) under § 656(d)(2) of EGTRRA. (2005 C. L.).
  - Rev. Rul. 2004-4, 2004-1 C.B. 414, provides guidance relating to synthetic equity owned by a disqualified person in a nonallocation year of an ESOP maintained by an S corporation. (2005 C. L.).
  - Final Regulations were published on December 20, 2006 (71 Fed. Reg. 76134) that provide guidance concerning requirements under § 409(p) for ESOPs holding stock of S corporations. (2006 C. L.).
21. 410(b): Final Regulations were published on July 21, 2006 (71 Fed. Reg. 41357) permitting some employees of tax-exempt organizations to be excluded when determining whether a § 401(k) plan meets the § 410(b) minimum coverage requirements. (2006 C. L.).
22. 411(a):
- Section 411(a) of the Code was amended by § 633 of EGTRRA (as amended by § 411(o) of JCWAA) to provide for faster vesting of matching contributions. (2004 C. L.).
  - Rev. Rul. 2003-65, 2003-1 C.B. 1035. (2005 C. L.).
  - Amendments to § 1.411(d)-3 of the Final Regulations were published on August 9, 2006 (71 Fed. Reg. 45379) with respect to the interaction between the anti-cutback rules of § 411(d)(6) and the nonforfeitability requirements of § 411(a). (2006 C. L.).
  - Section 411(a) of the Code was amended by § 904 of PPA '06 to provide for faster vesting of employer nonelective contributions. (2008 C. L.).

- Notice 2007-7, 2007-1 C.B. 395, provides guidance regarding § 411(a), as amended by § 904 of PPA '06. (2008 C. L.).
23. 411(a)(11): Section 411(a)(11)(D) of the Code was added by § 648(a) of EGTRRA (as amended by § 411(r) of JCWAA) to allow amounts attributable to rollover contributions to be disregarded in determining the value of an account balance for involuntary distributions. (2004 C. L.).
- PPA '06 § 1102(a) provides that notice required to be provided under § 411(a)(11) may be provided as much as 180 days before the annuity starting date. Section 1102(b) of PPA '06 requires that the notice under § 411(a)(11) also include a description of the consequences of failing to defer receipt of a distribution.<sup>7</sup> (2008 C. L.).
  - Notice 2007-7, 2007-1 C.B. 395, provides guidance regarding PPA '06 § 1102. (2008 C. L.).
24. 411(a)(13): PPA '06 § 701(b)(2) added § 411(a)(13) with respect to special vesting rules for applicable defined benefit plans, such as cash balance plans.<sup>8</sup> (2008 C. L.).
- Notice 2007-6, 2007-1 C.B. 272, provides guidance regarding cash balance plans and other hybrid defined benefit plans. (2008 C. L.).
  - WRERA § 107(b)(2) amended § 411(a)(13)(A). (New).
25. 411(b)(1):
- Rev. Rul. 2008-7, 2008-7 I.R.B. 419, addresses (1) the application of the backloading provisions of § 411(b)(1)(A), (B), and (C) to defined benefit cash balance plans and (2) the use of a "greater of" formula in the instance of a conversion of a defined benefit pension plan to a cash balance plan, including limited § 7805(b) relief. (2008 C. L.).
26. 411(b)(5): PPA '06 § 701(b)(1) added § 411(b)(5) with respect to applicable defined benefit plans, such as cash balance plans, and special rules relating to age.<sup>9</sup> (2008 C. L.).

<sup>7</sup> Proposed regulations under § 411(a)(11) were published on October 9, 2008 (73 Fed. Reg. 59575). Until final regulations are issued, a plan will be treated as complying with § 411(a)(11) if (1) the plan complies with either the proposed regulations or Q&A-32 and Q&A-33 in Notice 2007-7; or (2) if the plan administrator makes a reasonable attempt to comply with § 411(a)(11).

<sup>8</sup> Proposed regulations under § 411(a)(13) were published on December 28, 2007 (72 Fed. Reg. 73680) and may be relied upon until final regulations are issued. The Service will consider the requirements of § 411(a)(13) in its review of a Cycle E determination letter application only if the plan has been amended to meet those requirements.

<sup>9</sup> Proposed regulations under § 411(b)(5) were published on December 28, 2007 (72 Fed. Reg. 73680) and may be relied upon until final regulations are issued. Announcement 2009-82, 2009-48 I.R.B. November 30, 2009, announces relief for sponsors of statutory hybrid plans that must amend the interest crediting rate in those plans. Plan sponsors may rely on Ann. 2009-82 pending publication of the anticipated additional guidance described in the announcement. The

- Notice 2007-6, 2007-1 C.B. 272, provides guidance regarding cash balance plans and other hybrid defined benefit plans. (2008 C. L.).
  - WRERA § 107(b)(1) amended § 411(b)(5). (New).
27. 411(d)(3):
- Rev. Rul. 2007-43, 2007-2 C.B. 45, provides guidance regarding the partial termination of a defined contribution plan. (2007 C. L.).
28. 411(d)(6):
- *Central Laborers' Pension Fund v. Heinz*, 124 S.Ct. 2230 (2004). (2005 C. L.).
    - Rev. Proc. 2005-23, 2005-1 C.B. 991, as modified by Rev. Proc. 2005-76, 2005-2 C.B. 1139. (2005 C. L.).
    - Amendments to § 1.411(d)-3 of the Final Regulations were published on August 9, 2006 (71 Fed. Reg. 45379) with respect to the interaction between the anti-cutback rules of § 411(d)(6) and the nonforfeitability requirements of § 411(a). (2006 C. L.).
  - Section 645(b)(3) of EGTRRA directed the Secretary of the Treasury to issue regulations under § 411(d)(6)(B). (2005 C. L.).
    - Section 1.411(d)-3 of the Regulations was published on August 12, 2005 (70 Fed. Reg. 47109). (2005 C. L.).
    - Amendments to § 1.411(d)-3 of the Final Regulations were published on August 9, 2006 (71 Fed. Reg. 45379) with respect to a utilization test. (2006 C. L.).
  - Section 411(d)(6)(D) and § 411(d)(6)(E) of the Code were added by § 645 of EGTRRA to permit the elimination of certain optional forms of benefit under certain conditions. (2005 C. L.).
    - Section 1.411(d)-4, Q&A-2(e) of the Regulations was published on January 25, 2005 (70 Fed. Reg. 3475) to implement § 411(d)(6)(E). (2005 C. L.).
29. 412:
- Rev. Rul. 2004-20, 2004-1 C.B. 546, provides guidance with respect to whether a qualified pension plan can be a § 412(i) plan if the plan holds life insurance contracts and annuity contracts for benefits at normal retirement age in excess of a participant's benefits at normal retirement age under the plan. (2005 C. L.).
  - Notice 2004-59, 2004-2 C.B. 447, provides guidance with respect to restrictions placed on plan amendments following an employer's election of an alternative deficit reduction contribution. (2005 C. L.).

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Service will consider the requirements of § 411(b)(5) in its review of a Cycle E determination letter application only if the plan has been amended to meet those requirements.

30. 414(d): PPA '06 § 906(a)(1) added language to the definition of governmental plan in § 414(d) with respect to Indian tribal governments. (2008 C. L.).
- Notice 2006-89, 2006-2 C.B. 772, provides transition relief for plans subject to PPA '06 § 906. (2008 C. L.).
  - Notice 2007-67, 2007-2 C.B. 467, extends the transition relief provided in Notice 2006-89. (2008 C. L.).
31. 414(f)(6): PPA '06 § 1106(b) added § 414(f)(6) with respect to a multiemployer status election. Section 6611(a)(2) and (b)(2) of the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007 amends § 414(f)(6). (2008 C. L.).
32. 414(v): Section 414(v) of the Code was added by § 631 of EGTRRA (as amended by § 411(o) of JCWAA) to allow for catch-up contributions for individuals age 50 or older. (2004 C. L.).
- Regulations under § 414(v) were published on July 8, 2003 (68 Fed. Reg. 40510). (2004 C. L.).
    - Notice 2002-4. (2004 C. L.).
33. 414(w): PPA '06 § 902(d)(1) added § 414(w) with respect to eligible automatic contribution arrangements. (2008 C. L.).
- WRERA § 109(b)(4), (5), and (6) amended § 414(w)(3), (5), and (6) respectively. (New).
  - Final regulations under § 414(w) with respect to eligible automatic contribution arrangements were published on February 24, 2009 (74 Fed. Reg. 8200). (New).
  - Rev. Rul. 2009-30, 2009-39 I.R.B. 391, provides information with respect to automatic contribution increases under automatic contribution arrangements. (New).
  - Notice 2009-65, 2009-39 I.R.B. 413, provides sample amendments that plan sponsors can use to add automatic contribution features to their plans. (New).
34. 415:
- Section 415(c) of the Code was amended by §§ 611(b) and 632 of EGTRRA (as amended by § 411(p) of JCWAA) to increase the maximum annual additions permitted to the lesser of \$40,000 or 100% of compensation. (2004 C. L.).
    - Rev. Rul. 2001-51, 2001-2 C.B. 427. (2004 C. L.).
    - Rev. Rul. 2002-27, 2002-1 C.B. 925, provided that "compensation" within the meaning of § 415(c) could in certain situations include "deemed § 125 compensation". (2004 C. L.).

- Section 415(b) of the Code was amended by § 611 of EGTRRA to increase the dollar limit and change the age when the limit is reduced or increased. (2005 C. L.).
  - Rev. Rul. 2001-51, 2001-2 C.B. 427. (2004 C. L.).
- Section 415(b)(2)(E)(ii) of the Code was amended by § 101(b)(4) of PFEA to fix the percentage at 5.5%. (2005 C. L.).
  - Notice 2004-78, 2004-2 C.B. 879, provides the actuarial assumptions that must be used for distributions with annuity starting dates occurring during the plan years beginning in 2004 and 2005. (2005 C. L.).
  - WRERA § 103(a) changed the deadline to adopt PFEA amendments from the end of the 2008 plan year to the end of the 2009 plan year. (New).
- Section 415(b)(2)(E)(ii) of the Code was amended by § 303 of PPA '06 regarding the interest rate assumption for applying benefit limitations to lump sum distributions. (2008 C. L.).
- PPA '06 § 832(a) amended § 415(b)(3) to eliminate the active participant restriction from the “average compensation for high 3 years” definition. (2008 C. L.).
- PPA '06 § 906(b)(1)(A) & (B) modified §§ 415(b)(2)(H) and 415(b)(10), respectively, regarding Indian tribal governments. (2008 C. L.).
- PPA '06 § 867(a) amended § 415(b)(11) to remove the 100% of compensation limitation for a church plan participant if the participant has never been a highly compensated employee of the church. (2008 C. L.).
- Final Regulations under § 415 were published on April 5, 2007 (72 Fed. Reg. 16878). (2006 C. L.).
- WRERA § 103(b)(2)(B)(i) amended § 415(b)(2)(E)(v). (New).

35. 416:

- Section 416 of the Code was amended by § 613 of EGTRRA (as amended by § 411(k) of JCWAA) to make several changes to the top-heavy rules. (2004 C. L.).
- Section 416(g)(4)(H) of the Code was added by § 613(d) of EGTRRA to provide certain safe harbor § 401(k) plans and § 401(m) plans an exemption from the top-heavy rules. (2004 C. L.).
  - Rev. Rul. 2004-13, 2004-1 C.B. 485. (2004 C. L.).
- Section 416(c)(1)(C) of the Code was amended by § 613(e) of EGTRRA (as amended by § 411(k)(1) of JCWAA) to provide when a frozen defined benefit plan is exempt from the minimum benefit requirements. (2005 C. L.).
- PPA '06 § 902(c)(1) amended § 416(g)(4)(H)(i) by inserting § 401(k)(13) of the Code . (2008 C. L.).

- PPA '06 § 902(c)(2) amended § 416(g)(4)(H)(ii) by inserting § 401(m)(12) of the Code. (2008 C. L.).

36. 417:

- Section 1.417(e)-1 of the Regulations was published on July 16, 2003 (68 Fed. Reg. 41906) relating to retroactive annuity starting dates. (2005 C. L.).
- Final Regulations under § 417(a)(3) were published on March 24, 2006 (71 Fed. Reg. 14798) regarding the disclosure of the relative value of optional forms of benefit. (2006 C. L.).
- PPA '06 § 1102(a) provides that notice required to be provided under § 417 may be provided as much as 180 days before the annuity starting date.<sup>10</sup> (2008 C. L.).
  - Notice 2007-7, 2007-1 C.B. 395, provides guidance regarding PPA '06 § 1102. (2008 C. L.).
- PPA '06 § 302(b) amended the applicable interest rate and mortality table to be used for determining the present value of lump sum distributions in § 417(e)(3). (2008 C. L.).
  - Rev. Rul. 2007-67, 2007-2 C.B. 1047, addresses the mortality tables required by § 417(e)(3). (2008 C. L.).
  - Notice 2008-30, 2008-1 C.B. 638, provides guidance regarding PPA '06 § 302. (2008 C. L.).
  - WRERA § 103(b)(2)(A) amended § 417(e)(3)(D)(i). (New).
- PPA '06 § 1004(a) added the qualified optional survivor annuity benefit to § 417. (2008 C. L.).
  - Notice 2008-30, 2008-1 C.B. 638, provides guidance regarding PPA '06 § 1004. (2008 C. L.).

37. 420:

- Section 6613 of the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007, amends § 420(c)(3)(A) regarding minimum cost requirements for transfers of excess pension assets to retiree health accounts. (2007 C. L.).
- PPA '06 § 114(d)(1) modified the definition of the term "excess pension assets" in § 420(e)(2). Section 6612(b) of the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007, amends § 420(e)(2)(B). (2007 C. L.).

38. 432: PPA '06 § 212(a) added § 432 which requires that a funding improvement plan or a rehabilitation plan be adopted for multiemployer

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<sup>10</sup> Proposed regulations under § 417 were published on October 9, 2008 (73 Fed. Reg. 59575) and may be relied upon until final regulations are issued.

plans in endangered or critical status and provides for certain benefit reductions.<sup>11</sup> (2008 C. L.).

- WREERA § 204 provides a temporary delay of designation of multiemployer plans in endangered or critical status. (New).
  - Notice 2009-31, 2009-16 I.R.B. 856, as modified by Notice 2009-42, 2009-20 I.R.B. 1011, provides election and notice procedures for multiemployer plans under WREERA § 204. (New).
  - Rev. Proc. 2009-43, 2009-40 I.R.B. 460, provides procedures with respect to the revocation of elections by multiemployer plans to freeze funded status under WREERA § 204. (New).
- WREERA § 205 provides a temporary extension of the funding improvement or rehabilitation periods for multiemployer plans in endangered or critical status for 2008 or 2009. (New).
  - Notice 2009-31, 2009-16 I.R.B. 856, as modified by Notice 2009-42, 2009-20 I.R.B. 1011, provides election and notice procedures for multiemployer plans under WREERA § 205. (New).

39. 4975:

- Section 4975 of the Code was amended by § 612 of EGTRRA to allow plan loans for Subchapter S shareholder-employees. (2004 C. L.).
- Section 4975(f) of the Code was amended by § 240 of AJCA to allow an S corporation distribution on allocated shares to pay off an exempt loan as long as equal amounts are allocated to participant accounts. (2005 C. L.).

40. Hurricane Relief:

- Katrina Emergency Tax Relief Act of 2005, Pub. L. 109-73. (2005 C. L.).
  - Notice 2005-92, 2005-2 C.B. 1165. (2005 C. L.).
- Announcement 2005-70, 2005-2 C.B. 682. (2005 C. L.).
- Gulf Opportunity Zone Act of 2005, Pub. L. 109-135, added § 1400M and § 1400Q to the Code to provide certain tax benefits to those areas affected by Hurricanes Katrina, Wilma, and Rita. (2006 C. L.).
- Notice 2008-87, 2008-42 I.R.B. 930, provides relief in connection with certain employee benefit plans because of damage caused by Hurricane Ike. (New).
- Emergency Economic Stabilization Act of 2008, Pub. L. 110-343, provides temporary tax relief for areas damaged by 2008 Midwestern severe storms, tornados, and flooding by applying § 1400Q and KETRA to any Midwestern disaster area. (New).

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<sup>11</sup> Proposed regulations under § 432 were published on March 18, 2008 (73 Fed. Reg. 14417) and may be relied upon until final regulations are issued.

41. Miscellaneous:

- Rev. Rul. 2002-42, 2002-1 C.B. 76, provides guidance with respect to a situation where a money purchase pension plan is merged or converted into a profit sharing plan. (2004 C. L.).
- Rev. Proc. 2002-21, 2002-1 C.B. 911, provides guidance with respect to defined contribution retirement plans maintained by professional employer organizations. (2004 C. L.).
- Rev. Proc. 2003-86, 2003-2 C.B. 1211, amplifies Rev. Proc. 2002-21 relating to relief provided for certain defined contribution plans maintained by professional employer organizations. (2004 C. L.).
- Rev. Rul. 2004-10, 2004-1 C.B. 484, provides guidance with respect to charging administrative expenses to former and current employees. (2004 C. L.).
- Rev. Rul. 2004-12, 2004-1 C.B. 478, provides guidance with respect to the distribution restrictions applicable to rollover contributions. (2004 C. L.).
- Rev. Rul. 2001-62, 2001-2 C.B. 632, provides guidance with respect to the mortality table under § 415(b)(2)(E)(v) of the Code and the applicable mortality table under § 417(e)(3)(A)(ii)(I) of the Code. (2005 C. L.).
- Rev. Rul. 2003-11, 2003-1 C.B. 285, provides guidance with respect to satisfying the nondiscrimination rules under § 401(a)(4) of the Code and the minimum coverage requirements under § 410(b) of the Code when applying the increased compensation limit to former employees. (2005 C. L.).
- Rev. Rul. 2005-55, 2005-2 C.B. 284, provides guidance with respect to medical reimbursement accounts under a profit sharing plan. (2005 C. L.).
- Section 1.401(a)-21 of the Final Regulations was published on October 20, 2006 (71 Fed. Reg. 61877) setting forth standards for the use of an electronic medium to provide applicable notices to recipients or to make participant elections. (2006 C. L.).
- Notice 2008-21, 2008-1 C.B. 431, provides transitional guidance for 2008 under § 436 for small plans with end-of-year valuation dates. (2008 C. L.).
- Notice 2008-73, 2008-2 C.B. 717, expands transition relief of Notice 2008-21. (2008 C. L.).
- Rev. Rul. 2009-31, 2009-39 I.R.B. 395, provides guidance with respect to annual paid time off contributions. (New).
- Rev. Rul. 2009-32, 2009-39 I.R.B. 398, provides guidance with respect to paid time off contributions at termination of employment. (New).

The following guidance contains sample or model amendments: Notice 2001-57, 2001-1 C.B. 279 (miscellaneous EGTRRA amendments); Rev. Rul. 2001-62, 2001-2 C.B. 632 (applicable mortality table); Rev. Proc. 2002-29, 2002-2 C.B. 1176 (required minimum distribution amendments); Rev. Proc. 2003-13, 2003-1 C.B. 317 (required language for deemed IRAs); Notice 2005-5 (automatic rollover); Notice 2006-44, 2006-1 C.B. 889 (Roth § 401(k) plans); and Notice 2009-65, 2009-39 I.R.B. 413 (automatic contribution features).

## VII. HEROES EARNINGS ASSISTANCE AND RELIEF TAX ACT OF 2008 PROVISIONS

As provided in section IV of this notice, a plan amendment made pursuant to section 104(a) or 105(b)(1) of the HEART Act generally may be retroactively effective, if, in addition to meeting the other applicable requirements, the amendment is made on or before the last day of the first plan year beginning on or after January 1, 2010 (January 1, 2012 in the case of a governmental plan). While plans submitting in Cycle E must meet the amendment deadline for the HEART Act, if applicable, the Service will not consider the HEART Act in issuing determination letters because no guidance has been issued with respect to the HEART Act. The HEART Act provisions are listed below.

1. 401(a)(37): Section 104(a) of the HEART Act added Code § 401(a)(37) with respect to benefits payable on the death of a plan participant while performing qualified military service. (2008 C. L.).
2. 414(u)(9): Section 104(b) of the HEART Act amended § 414(u) of the Code by adding a paragraph regarding how a plan may provide benefit accruals for a person who dies or becomes disabled while performing qualified military service. (2008 C. L.).
3. 414(u)(12): Section 105(b)(1) of the HEART Act added § 414(u)(12) with respect to the treatment of differential wage payments during the period a person, while on active duty, is performing service in the uniformed services. (2008 C. L.).

## VIII. WORKER, RETIREE, AND EMPLOYER RECOVERY ACT OF 2009 PROVISION

As provided in section V of this notice, a plan amendment made pursuant to WRERA section 201 generally may be retroactively effective, if, in addition to meeting the other applicable requirements, the amendment is made on or before the last day of the first plan year beginning on or after January 1, 2011 (January 1, 2012 in the case of a governmental plan). The WRERA provision is listed below.

1. 401(a)(9)(H): Section 201(a) of WREERA added § 401(a)(9)(H) which provides a suspension of the minimum distribution requirement for 2009 applicable to defined contribution plans. (New).
  - Notice 2009-82, 2009-41 I.R.B. 491, provides guidance relating to the suspension of the minimum distribution requirement for 2009 applicable to defined contribution plans. (New).

#### DRAFTING INFORMATION

The principal author of this notice is Angelique Carrington of the Employee Plans, Tax Exempt and Government Entities Division. For further information regarding this notice, please contact the Employee Plans taxpayer assistance answering service at 1-877-829-5500 (a toll free number) or e-mail Ms. Carrington at [RetirementPlanQuestions@irs.gov](mailto:RetirementPlanQuestions@irs.gov).