[4830-01-p]

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG-100464-08]

RIN 1545-BH50

Accrual rules for defined benefit plans

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed regulations providing guidance on the application of the accrual rule for defined benefit plans under section 411(b)(1)(B) of the Internal Revenue Code (Code) in cases where plan benefits are determined on the basis of the greatest of two or more separate formulas. These regulations would affect sponsors, administrators, participants, and beneficiaries of defined benefit plans. This document also provides a notice of a public hearing on these proposed regulations.

DATES: Written or electronic comments must be received by **[INSERT DATE 90 DAYS AFTER PUBLICATION OF THIS DOCUMENT IN THE FEDERAL REGISTER]**. Outlines of topics to be discussed at the public hearing scheduled for October 15, 2008, at 10 a.m. must be received by September 24, 2008.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG 100464-08), room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the

hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG 100464-08), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC., or sent electronically via the Federal eRulemaking Portal at www.regulations.gov (IRS REG-100464-08). The public hearing will be held in the IRS Auditorium, Internal Revenue Building, 1111 Constitution Avenue NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, Lauson C. Green or Linda S. F. Marshall at (202) 622-6090; concerning submissions of comments, the hearing, and/or being placed on the building access list to attend the hearing, Richard A. Hurst at Richard.A.Hurst@irscounsel.treas.gov or at (202) 622-7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

This document contains proposed Income Tax Regulations (26 CFR part 1) under section 411(b) of the Code.[1]

Section 401(a)(7) provides that a trust is not a qualified trust under section 401 unless the plan of which such trust is a part satisfies the requirements of section 411 (relating to minimum vesting standards).

Section 411(a) requires a qualified plan to provide that an employee's right to the normal retirement benefit is nonforfeitable upon attainment of normal retirement age and that an employee's right to his or her accrued benefit is nonforfeitable upon

[1] Section 204(b) of the Employee Retirement Income Security Act of 1974, Public Law 93-406 (88 Stat. 829), as amended (ERISA), sets forth rules that are parallel to those in section 411(b) of the Code. Under section 101 of Reorganization Plan No. 4 of 1978 (43 FR 47713), the Secretary of the Treasury has interpretive jurisdiction over the subject matter addressed in these proposed regulations for purposes of ERISA, as well as the Code. Thus, these proposed Treasury regulations issued under section 411(b)(1)(B) of the Code would apply as well for purposes of section 204(b)(1)(B) of ERISA.

completion of the specified number of years of service under one of the vesting schedules set forth in section 411(a)(2). Section 411(a)(7)(A)(i) defines a participant's accrued benefit under a defined benefit plan as the employee's accrued benefit determined under the plan, expressed in the form of an annual benefit commencing at normal retirement age, subject to an exception in section 411(c)(3) under which the accrued benefit is the actuarial equivalent of the annual benefit commencing at normal retirement age in the case of a plan that does not express the accrued benefit as an annual benefit commencing at normal retirement age.

Section 411(a) also requires that a defined benefit plan satisfy the requirements of section 411(b)(1). Section 411(b)(1) provides that a defined benefit plan must satisfy one of the three accrual rules of section 411(b)(1)(A), (B), and (C) with respect to benefits accruing under the plan. The three accrual rules are the 3 percent method of section 411(b)(1)(A), the 133 ⅓ percent rule of section 411(b)(1)(B), and the fractional rule of section 411(b)(1)(C).

Section 411(b)(1)(A) provides that a defined benefit plan satisfies the requirements of the 3 percent method if, under the plan, the accrued benefit payable upon the participant's separation from service is not less than (A) 3 percent of the normal retirement benefit to which the participant would be entitled if the participant commenced participation at the earliest possible entry age under the plan and served continuously until the earlier of age 65 or the normal retirement age under the plan, multiplied by (B) the number of years (not in excess of 33 ⅓ years) of his or her participation in the plan. Section 411(b)(1)(A) provides that, in the case of a plan providing retirement benefits based on compensation during any period, the normal

retirement benefit to which a participant would be entitled is determined as if the participant continued to earn annually the average rate of compensation during consecutive years of service, not in excess of 10, for which his or her compensation was highest. Section 411(b)(1)(A) also provides that Social Security benefits and all other relevant factors used to compute benefits are treated as remaining constant as of the current plan year for all years after the current year.

Section 411(b)(1)(B) provides that a defined benefit plan satisfies the requirements of the 133 ⅓ percent rule for a particular plan year if, under the plan, the accrued benefit payable at the normal retirement age is equal to the normal retirement benefit, and the annual rate at which any individual who is or could be a participant can accrue the retirement benefits payable at normal retirement age under the plan for any later plan year is not more than 133 ⅓ percent of the annual rate at which the individual can accrue benefits for any plan year beginning on or after such particular plan year and before such later plan year.

For purposes of applying the 133 ⅓ percent rule, section 411(b)(1)(B)(i) provides that any amendment to the plan which is in effect for the current year is treated as in effect for all other plan years. Section 411(b)(1)(B)(ii) provides that any change in an accrual rate which does not apply to any individual who is or could be a participant in the current plan year is disregarded. Section 411(b)(1)(B)(iii) provides that the fact that benefits under the plan may be payable to certain participants before normal retirement age is disregarded. Section 411(b)(1)(B)(iv) provides that Social Security benefits and all other relevant factors used to compute benefits are treated as remaining constant as of the current plan year for all years after the current year.

Section 411(b)(1)(C) provides that a defined benefit plan satisfies the fractional rule if the accrued benefit to which any participant is entitled upon his or her separation from service is not less than a fraction of the annual benefit commencing at normal retirement age to which the participant would be entitled under the plan as in effect on the date of separation if the participant continued to earn annually until normal retirement age the same rate of compensation upon which the normal retirement benefit would be computed under the plan, determined as if the participant had attained normal retirement age on the date on which any such determination is made (but taking into account no more than 10 years of service immediately preceding separation from service). This fraction, which cannot exceed 1, has a numerator that is the total number of the participant's years of participation in the plan (as of the date of separation from service) and a denominator that is the total number of years the participant would have participated in the plan if the participant separated from service at normal retirement age. Section 411(b)(1)(C) also provides that Social Security benefits and all other relevant factors used to compute benefits are treated as remaining constant as of the current plan year for all years after the current year.

Section 1.411(a)-7(a)(1) of the Income Tax Regulations provides that, for purposes of section 411 and the regulations under section 411, the accrued benefit of a participant under a defined benefit plan is either (A) the accrued benefit determined under the plan if the plan provides for an accrued benefit in the form of an annual benefit commencing at normal retirement age, or (B) an annual benefit commencing at normal retirement age which is the actuarial equivalent (determined under section 411(c)(3) and §1.411(c)-1)) of the accrued benefit under the plan if the plan does not

provide for an accrued benefit in the form of an annual benefit commencing at normal retirement age.

Section 1.411(b)-1(a)(1) provides that a defined benefit plan is not a qualified plan unless the method provided by the plan for determining accrued benefits satisfies at least one of the alternative methods in §1.411(b)-1(b) for determining accrued benefits with respect to all active participants under the plan. The three alternative methods are the 3 percent method, the 133 ⅓ percent rule, and the fractional rule. A defined benefit plan may provide that accrued benefits for participants are determined under more than one plan formula. Section 1.411(b)-1(a)(1) provides that, in such a case, the accrued benefits under all such formulas must be aggregated in order to determine whether or not the accrued benefits under the plan for participants satisfy one of these methods. Under §1.411(b)-1(a)(1), a plan may satisfy different methods with respect to different classifications of employees, or separately satisfy one method with respect to the accrued benefits for each such classification, provided that such classifications are not so structured as to evade the accrued benefit requirements of section 411(b) and §1.411(b)-1.

Section 1.411(b)-1(b)(2)(i) provides that a defined benefit plan satisfies the 133 ⅓ percent rule for a particular plan year if (A) under the plan the accrued benefit payable at the normal retirement age (determined under the plan) is equal to the normal retirement benefit (determined under the plan), and (B) the annual rate at which any individual who is or could be a participant can accrue the retirement benefits payable at normal retirement age under the plan for any later plan year cannot be more than 133 ⅓ percent of the annual rate at which the participant can

accrue benefits for any plan year beginning on or after such particular plan year and before such later plan year.

Section 1.411(b)-1(b)(2)(ii)(A) through (D) sets forth a series of rules that correspond to the rules of section 411(b)(1)(B)(i) through (iv). For example, §1.411(b)-1(b)(2)(ii)(A) sets forth a special plan amendment rule for purposes of satisfying the 133 ⅓ percent rule that corresponds to section 411(b)(1)(B)(i). Under that rule, any amendment to a plan that is in effect for the current year is treated as if it were in effect for all other plan years.

Section 1.411(b)-1(b)(2)(ii)(E) provides that a plan is not treated as failing to satisfy the requirements of §1.411(b)-1(b)(2) for a plan year merely because no benefits under the plan accrue to a participant who continues service with the employer after the participant has attained normal retirement age.[2] Section 1.411(b)-1(b)(2)(ii)(F) provides that a plan does not satisfy the requirements of §1.411(b)-1(b)(2) if the base for the computation of retirement benefits changes solely by reason of an increase in the number of years of participation.

Rev. Rul. 2008-7 (2008-7 IRB 419), see §601.601(d)(2)(ii)(b), describes the application of the accrual rules of section 411(b)(1)(A) through (C) and the regulations under section 411(b)(1)(A) through (C) to a defined benefit plan that was amended to change the plan's benefit formula from a traditional formula based on highest average compensation to a new lump sum-based benefit formula. Under the terms of the plan described in the revenue ruling, for an employee who was employed on the day before the change, a hypothetical account was established equal to the actuarial present

[2] However, section 411(b)(1)(H), which was added to the Code after the issuance of §1.411(b)-1, generally requires the continued accrual of benefits after attainment of normal retirement age.

value of the employee's accrued benefit as of that date, and that account was also to be credited with subsequent pay credits and interest credits. Under transition rules set forth in the plan, the accrued benefit of certain participants is the greater of the accrued benefit provided by the hypothetical account balance at the age 65 normal retirement age and the accrued benefit determined under the traditional formula as in effect on the day before the change, but taking into account post-amendment compensation and service for a limited number of years.

Revenue Ruling 2008-7 describes how the accrued benefits of different participant groups satisfy, or fail to satisfy, the accrual rules under section 411(b)(1)(A) through (C), taking into account the requirement in §1.411(b)-1(a)(1) that a plan that determines a participant's accrued benefits under more than one formula must aggregate the accrued benefits under all of those formulas in order to determine whether or not the accrued benefits under the plan satisfy one of the alternative methods under section 411(b)(1)(A) through (C). However, Revenue Ruling 2008-7 explains that, in the case of a plan amendment that replaces the benefit formula under the plan for all periods after the amendment, pursuant to section 411(b)(1)(B)(i) and §1.411(b)-1(b)(2)(ii)(A), the rule that would otherwise require aggregation of the multiple formulas does not apply. Under section 411(b)(1)(B)(i) and §1.411(b)-1(b)(2)(ii)(A), any amendment to the plan which is in effect for the current plan year is treated as if it were in effect for all other plan years (including past and future plan years).

Revenue Ruling 2008-7 illustrates the application of this rule with respect to participants who only accrue benefits under the new formula (who in the ruling are

referred to as participants who are not "grandfathered"). For these participants, the plan amendment completely ceases accruals under a traditional pension benefit formula that provides an annuity at normal retirement age based on service and average pay and, for all periods after the amendment, provides for the greater of the section 411(d)(6) protected benefit under the pre-amendment formula and the benefit under a new post-amendment lump sum-based benefit formula. In such a case, as stated in Revenue Ruling 2008-7, the section 411(d)(6) protected benefit under the pre-amendment formula is not aggregated with the post-amendment formula, but rather is entirely disregarded, for purposes of applying the 133 ⅓ percent rule because the new formula is treated under section 411(b)(1)(B)(i) and §1.411(b)-1(b)(2)(ii)(A) as having been in effect for all plan years. This analysis was reflected in Register v. PNC Fin. Servs. Group, Inc., 477 F.3d 56 (3d Cir. 2007).

In addition to satisfying the requirements of section 411(b)(1)(B), a defined benefit plan must also satisfy the age discrimination rules of section 411(b)(1)(H), taking into account section 411(b)(5), as added to the Code by the Pension Protection Act of 2006, Public Law 109-280 (120 Stat. 780) (PPA '06). In the case of a conversion of a plan to a statutory hybrid plan pursuant to an amendment that is adopted after June 29, 2005 (a "post-PPA conversion plan"), the conversion amendment must satisfy the rule of section 411(b)(5)(B)(iii) that prohibits wearaway of benefits upon conversion. In the case of a plan converted to a statutory hybrid plan pursuant to an amendment that is adopted on or before June 29, 2005 (a "pre-PPA conversion plan"), as provided in Notice 2007-6, the IRS will not consider and will not issue determination letters with respect to whether such a pre-PPA conversion plan

satisfies the requirements of section 411(b)(1)(H) (as in effect prior to the addition of section 411(b)(5) by PPA '06), including the effect of any wearaway. Thus, although wearaway upon conversion is expressly prohibited with respect to post-PPA conversion plans pursuant to section 411(b)(5), the IRS will not address and will not issue determination letters with respect to whether a conversion that results in wearaway with respect to a pre-PPA conversion plan violates the age discrimination rules of section 411(b)(1)(H). See §601.601(d)(2)(ii)(b).

Revenue Ruling 2008-7 provides a different analysis as to whether a plan with wearaway fails to satisfy the accrual rules of section 411(b)(1)(B) when the pre-amendment formula continues in place after the amendment for a group of participants. In such a case, where an amendment has gone into effect but continues the prior formula for some period of time with respect to one or more participants, the application of the rule in section 411(b)(1)(B)(i) and §1.411(b)-1(b)(2)(ii)(A) does not result in a disregard of the prior plan formula (which remains in effect after the amendment). Instead, the 133 ⅓ percent rule must be applied with respect to those participants based on the combined effect of the two ongoing formulas.[3]

Revenue Ruling 2008-7 provides relief from disqualification under the Internal Revenue Code (under the authority of section 7805(b)) for a limited class of plans under which a group of employees specified under the plan receives a benefit equal to the greatest of the benefits provided under two or more formulas (an applicable "greater-of" benefit), provided that each such formula standing alone would satisfy an

[3] Two federal courts have taken a position contrary to this interpretation of section 411(b)(1)(B)(i) and §1.411(b)-1(b)(2)(ii)(A) as set forth in Revenue Ruling 2008-7. See Tomlinson v. El Paso Corp., 2008 WL 762456 (D. Colo. Mar. 19, 2008); Wheeler v. Pension Value Plan for Employees of Boeing Corp., 2007 WL 2608875 (S.D. Ill. Sept. 6, 2007).

accrual rule of section 411(b)(1)(A), (B), or (C) for the years involved. Under the relief set forth in Rev. Rul. 2008-7, for plan years beginning before January 1, 2009, the IRS will not treat a plan eligible for the relief as failing to satisfy the accrual rules of section 411(b)(1)(A), (B), and (C) solely because the plan provides an applicable "greater-of" benefit, where the separate formulas, standing alone, would satisfy an accrual rule of section 411(b)(1)(A), (B), and (C).

Explanation of Provisions

The fact pattern described in Revenue Ruling 2008-7 has occurred in a number of situations over the past few years. Employers sponsoring these plans have suggested that their plans should satisfy the accrual rules of section 411(b)(1)(A), (B), and (C), contending that any technical violation of the accrual rules is directly because the participant has higher frontloaded accruals under one formula when compared to the other formula that will ultimately provide the larger benefit under the plan. While the relief under section 7805(b) that is provided under Revenue Ruling 2008-7 addresses the situation for past years, the relief does not apply for the parallel accrual rules of section 204(b)(1)(A), (B) and (C) of ERISA and only applies to plan years beginning before January 1, 2009.

The proposed regulations would provide a limited exception to the existing requirement under §1.411(b)-1(a)(1) to aggregate the accrued benefits under all formulas in order to determine whether or not the accrued benefits under the plan for participants satisfy one of the alternative methods under section 411(b)(1)(A) through (C). Under this limited exception, certain plans that determine a participant's benefits as the greatest of the benefits determined under two or more separate formulas would

be permitted to demonstrate satisfaction of the 133 ⅓ percent rule of section 411(b)(1)(B) by demonstrating that each separate formula satisfies the 133 ⅓ percent rule of section 411(b)(1)(B).[4]

A plan would be eligible for this exception only if each of the separate formulas uses a different basis for determining benefits. For example, a plan would be eligible for this special rule if it provides a benefit equal to the greater of the benefits under two formulas, one of which determines benefits on the basis of highest average compensation and the other of which determines benefits on the basis of career average compensation. As another example, a traditional defined benefit plan which determined benefits based on highest average compensation that is amended to add a cash balance formula (as in the facts of Rev. Rul. 2008-7) would be eligible for this exception where, in order to provide a better transition for longer service active participants, the plan provides that a group of participants is entitled to the greater of the benefit provided by the hypothetical account balance and the benefit determined under the continuing traditional formula. In each of the above two examples, each separate formula under the plan uses a different basis for determining benefits and, therefore, both of those plans would be eligible to utilize this exception. Accordingly, both plans would be permitted to demonstrate satisfaction of the 133 ⅓ percent rule of section 411(b)(1)(B) by demonstrating that each separate formula under the plan satisfies the 133 ⅓ percent rule of section 411(b)(1)(B).

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[4] These proposed regulations would only apply for purposes of the 133 ⅓ percent rule of section 411(b)(1)(B) (and the parallel rule of section 204(b)(1)(B) of ERISA). Neither Rev. Rul. 2008-7 nor these proposed regulations are relevant to (and thus they do not affect) the application of the age discrimination rules of section 411(b)(1)(H) (or the parallel age discrimination rules of section 204(b)(1)(H) of ERISA).

The utility of this exception can be seen from the following example of a plan that provides a benefit equal to the greater of two formulas. One formula provides a benefit of 1 percent of average compensation for the 3 consecutive years of service with the highest such average multiplied by the number of years of service at normal retirement age (not in excess of 25 years of service), and the other formula provides a benefit that is the accumulation of 1.5 percent of compensation for each year of service. Under the existing final regulations, the 133 ⅓ percent rule of section 411(b)(1)(B) is applied by reference to the annual rate of accrual for each year from the year of the test through normal retirement age. If the participant's accrued benefit currently is determined using the 1 percent formula (because the high-3 average compensation is significantly higher than the effective career average compensation that is used under the 1.5 percent formula), but the participant's normal retirement benefit will ultimately be determined using the 1.5 percent formula if service continues to normal retirement age (because the 25-year service cap will apply to the 1 percent formula, but not the 1.5 percent formula), then the annual rate of accrual will have to be determined for testing purposes on a consistent basis for each year, either using each year's compensation or high-3 average compensation. Thus, in order to test the plan under the 133 ⅓ percent rule, the existing final regulations would require that either the accruals under the 1 percent formula be expressed in terms of a single year's pay or the accruals under the 1.5 percent formula be expressed in terms of high-3 average compensation. In either case, the annual rates of accrual would differ from the stated rates under the plan formulas. In addition, the annual rates of accrual for the accumulation formula when those rates are expressed in terms of high-3

average compensation could be negative in some cases. In contrast, using the exception set forth in the proposed regulation would enable the plan to be tested using the annual rates of accrual expressed in the plan formulas.

The proposed regulations would also provide an extension of this exception in the case of a plan that provides benefits based on the greatest of three or more benefit formulas. In such a case, the plan would be eligible for a modified version of the formula-by-formula testing under the proposed regulations. Under this modification, the accrued benefits determined under all benefit formulas that have the same basis are first aggregated and then those aggregated formulas are treated as a single formula for purposes of applying the separate testing rule under the proposed regulations.

Eligibility for separate testing under the proposed regulations would be constrained by an anti-abuse rule. The proposed regulations would provide that a plan is not eligible for separate testing if the Commissioner determines that the plan's use of separate formulas with different bases is structured to evade the general requirement to aggregate formulas under §1.411(b)-1(a)(1) (for example, if the differences between the bases of the separate formulas are minor).

Proposed Effective/Applicability Date

These regulations are proposed to be effective for plan years beginning on or after January 1, 2009.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 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, and because the regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, this regulation has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. The IRS and the Treasury Department specifically request comments on the clarity of the proposed regulations and how they may be made easier to understand. All comments will be available for public inspection and copying.

Under these proposed regulations, a plan eligible for the separate testing option would not violate the accrual rules merely because the plan provides higher frontloaded accruals under one formula when compared to the other formula that will ultimately provide the larger benefit under the plan. Some commentators have suggested a broader rule that would modify the regulations to provide that a plan does not violate the accrual rules where the plan provides a pattern of accruals that affords higher benefits in earlier years (that is, benefit accruals are frontloaded) relative to a pattern of accruals that satisfies the accrual rules. The 3 percent method of section 411(b)(1)(A) and the fractional rule of section 411(b)(1)(C) automatically achieve this

result because they are cumulative tests that test on the basis of the total accrued benefit compared to the projected normal retirement benefit. By contrast, the 133 ⅓ percent rule is based on a comparison of the "annual rate at which any individual who is or could be a participant can accrue the retirement benefits payable at normal retirement age" for a later plan year with the annual rate for an earlier plan year. The existing final regulations include an example (§1.411(b)-1(b)(2)(iii), Example (3)) that demonstrates how a plan fails the 133 ⅓ percent rule where it provides accruals in earlier years that are frontloaded relative to accruals that apply in later years. The proposed regulations do not include a provision under the 133 ⅓ percent rule that recognizes prior frontloading of benefits. However, commentators who would suggest such a provision under the 133 ⅓ percent rule should describe how that provision would fit within the statutory language of section 411(b)(1)(B), including the application of section 411(b)(1)(B)(i) (which requires that an amendment to the plan that is in effect for the current year be treated as in effect for all other plan years).

A public hearing has been scheduled for October 15, 2008, beginning at 10 a.m. in the Auditorium, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit written or electronic comments by **[INSERT DATE 90 DAYS AFTER PUBLICATION OF THIS DOCUMENT IN THE FEDERAL REGISTER]**, and an outline of topics to be discussed and the amount of time to be devoted to each topic (a signed original and eight (8) copies) by September 24, 2008. A period of 10 minutes will be allotted to each person for making comments. An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal authors of these regulations are Lauson C. Green and Linda S. F. Marshall, Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the IRS and the Treasury Department participated in the development of these regulations.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1--INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read in part as follows:

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

Par. 2. Section 1.411(b)-1 is amended by adding new paragraph (b)(2)(ii)(G) to read as follows:

§1.411(b)-1 Accrued benefit requirements.

* * * * *

(b) * * *

(2) * * *

(ii) * * *

(G) Special rule for multiple formulas--(1) In general. Notwithstanding paragraph (a)(1) of this section, a plan that determines a participant's accrued benefit as the greatest of the benefits determined under two or more separate formulas is permitted, to the extent provided under this paragraph (b)(2)(ii)(G), to demonstrate satisfaction of section 411(b)(1)(B) and this paragraph (b) by demonstrating that each separate formula satisfies the requirements of section 411(b)(1)(B) and this paragraph (b).

(2) Separate bases requirement. A plan is eligible for separate testing under

this paragraph (b)(2)(ii)(G) if each of the separate formulas uses a different basis for determining benefits. For example, a plan is eligible for this special rule if it provides an accrued benefit equal to the greater of the benefits under two formulas, one of which determines accrued benefits on the basis of highest average compensation and the other of which determines accrued benefits on the basis of career average compensation. As another example, a defined benefit plan that bases benefits on highest average compensation and that is amended to add a statutory hybrid benefit formula (as defined in §1.411(a)(13)-1(d)(3)) that provides for pay credits to be made based on each year's compensation is eligible for this separate testing exception if the plan provides that one or more participants are entitled to the greater of the benefit determined under the statutory hybrid benefit formula and the benefit determined under the original formula.

(3) Plans with three or more formulas. If a plan determines a participant's benefits as the greatest of the benefits determined under three or more separate formulas, but two or more of the formulas use the same basis for determining benefits, then the plan may nonetheless apply paragraphs (b)(2)(ii)(G)(1) and (2) of this section by aggregating all benefit formulas that have the same basis and treating those aggregated formulas as a single formula for purposes of paragraphs (b)(2)(ii)(G)(1) and (2) of this section.

(4) Anti-abuse rule. A plan is not eligible for separate testing under this paragraph (b)(2)(ii)(G) if the Commissioner determines that the plan's use of separate formulas with different bases is structured to evade the requirement to aggregate

formulas under paragraph (a)(1) of this section (for example, if the differences between the bases of the separate formulas are minor).

(5) Effective/applicability date. This paragraph (b)(2)(ii)(G) is applicable for plan years beginning on or after January 1, 2009.

Steven T. Miller

Acting Deputy Commissioner for Services and Enforcement

[FR Doc. 2008-13788 Filed 06/17/2008 at 8:45 am; Publication Date: 06/18/2008]