

[4830-01-p]

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG-113738-12]

RIN 1545-BK94

Amendment of prohibited payment option under single-employer defined benefit plan of plan sponsor in bankruptcy

AGENCY: Internal Revenue Service (IRS), Treasury.

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

SUMMARY: This document contains proposed regulations that would provide guidance under the anti-cutback rules of section 411(d)(6) of the Internal Revenue Code, which generally prohibit plan amendments eliminating or reducing accrued benefits, early retirement benefits, retirement-type subsidies, and optional forms of benefit under qualified retirement plans. These proposed regulations would provide an additional limited exception to the anti-cutback rules to permit a plan sponsor that is a debtor in a bankruptcy proceeding to amend its single-employer defined benefit plan to eliminate a single-sum distribution option (or other optional form of benefit providing for accelerated payments) under the plan if certain specified conditions are satisfied. These proposed regulations would affect administrators, employers, participants, and beneficiaries of such a plan. This document also provides notice of a public hearing on these proposed regulations.

DATES: Written or electronic comments must be received by **INSERT DATE 60 DAYS**

**AFTER PUBLICATION OF THIS DOCUMENT IN THE FEDERAL REGISTER]**

Outlines of topics to be discussed at the public hearing scheduled for Friday, August 24, 2012, at 10 a.m. must also be received by August 16, 2012.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG-113738-12), 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-113738-12), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC, or sent electronically, via the Federal eRulemaking Portal at <http://www.regulations.gov> (IRS REG-113738-12). 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, Neil S. Sandhu 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, Oluwafunmilayo (Funmi) Taylor at (202) 622-7180 (not toll-free numbers).

**SUPPLEMENTARY INFORMATION:****Background**

This document contains proposed amendments to the Income Tax Regulations (26 CFR part 1) under section 411(d)(6) of the Internal Revenue Code (Code). These proposed regulations would amend §1.411(d)-4 of the Treasury regulations.

Section 401(a)(7) provides that a trust does not constitute a qualified trust unless its related plan satisfies the requirements of section 411 (relating to minimum vesting standards). Section 411(d)(6)(A) provides that a plan is treated as not satisfying the

requirements of section 411 if the accrued benefit of a participant is decreased by an amendment of the plan, other than an amendment described in section 412(d)(2) of the Code or section 4281 of the Employee Retirement Income Security Act of 1974, Public Law 93-406 (88 Stat. 829 (1974)), as amended (ERISA).

Section 411(d)(6)(B) provides that a plan amendment that has the effect of eliminating or reducing an early retirement benefit or a retirement-type subsidy, or eliminating an optional form of benefit, with respect to benefits attributable to service before the amendment is treated as impermissibly reducing accrued benefits. For a retirement-type subsidy, this protection applies only with respect to a participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy. The last sentence of section 411(d)(6)(B) provides that the Secretary may by regulations provide that section 411(d)(6)(B) does not apply to a plan amendment that eliminates an optional form of benefit (other than a plan amendment that has the effect of eliminating or reducing an early retirement benefit or a retirement-type subsidy).

Section 436(d)(2) provides that a defined benefit plan which is a single-employer plan must provide that, during any period in which the plan sponsor is a debtor in a case under title 11, United States Code, or similar Federal or State law (a “bankruptcy case”), the plan may not pay any “prohibited payment.” However, that limitation does not apply in a plan year on or after the date on which the enrolled actuary of the plan certifies that the adjusted funding target attainment percentage (as defined in section 436(j)(2)) of the plan for the plan year is not less than 100 percent.

Section 436(d)(5) sets forth a definition of the term “prohibited payment.” Under this definition, a “prohibited payment” is : (1) any payment, in excess of the monthly

amount paid under a single life annuity (plus any social security supplements described in the last sentence of section 411(a)(9)), to a participant or beneficiary whose annuity starting date (as defined in section 417(f)(2)) occurs during any period a limitation under section 436(d)(1) or section 436(d)(2) is in effect; (2) any payment for the purchase of an irrevocable commitment from an insurer to pay benefits; and (3) any other payment specified by the Secretary by regulations. The term “prohibited payment” does not include the payment of a benefit which under section 411(a)(11) may be immediately distributed without the consent of the participant.

Section 1.411(d)-4, Q&A-1(a) provides that the term “section 411(d)(6) protected benefit” includes: (1) benefits described in section 411(d)(6)(A); (2) early retirement benefits (as defined in §1.411(d)-3(g)(6)(i)) and retirement type subsidies (as defined in §1.411(d)-3(g)(6)(iv)); and (3) optional forms of benefit described in section 411(d)(6)(B)(ii).

Section 1.411(d)-4, Q&A-1(b)(1) provides that the term “optional form of benefit” for purposes of §1.411(d)-4 has the same meaning as in §1.411(d)-3(g)(6)(ii). Section 1.411(d)-3(g)(6)(ii)(A) defines the term “optional form of benefit” as “a distribution alternative (including the normal form of benefit) that is available under the plan with respect to an accrued benefit or a distribution alternative with respect to a retirement-type benefit. Different optional forms of benefit exist if a distribution alternative is not payable on substantially the same terms as another distribution alternative. The relevant terms include all terms affecting the value of the optional form, such as the method of benefit calculation and the actuarial factors or assumptions used to determine the amount distributed. Thus, for example, different optional forms of benefit

may result from differences in terms relating to the payment schedule, timing, commencement, medium of distribution (for example, in cash or in kind), election rights, differences in eligibility requirements, or the portion of the benefit to which the distribution alternative applies.”

Section 1.411(d)-4, Q&A-2(a)(1) provides that a plan is not permitted to be amended to eliminate or reduce a section 411(d)(6) protected benefit that has already accrued, except as provided in §1.411(d)-3 or §1.411(d)-4. Under §1.411(d)-4, Q&A-2(b)(1), the Commissioner is authorized to provide for the elimination or reduction of an optional form of benefit to the extent that plan participants do not lose either a valuable right or an employer-subsidized optional form of benefit when a similar optional form of benefit with a comparable subsidy is not provided.<sup>1</sup> In addition, §1.411(d)-4, Q&A-2(b)(2)(i) through (xi) sets forth specific situations under which the elimination or reduction of certain section 411(d)(6) protected benefits that have already accrued does not violate section 411(d)(6). These exceptions have been included in regulations pursuant to the Service’s authority under the last sentence of section 411(d)(6)(B) to permit a plan amendment that eliminates or reduces optional forms of benefit (other than a plan amendment that has the effect of eliminating or reducing an early retirement benefit or a retirement-type subsidy).

Section 1.436-1(d)(2) provides that a plan satisfies the requirements of section 436(d)(2) and §1.436-1(d)(2) only if the plan provides that a participant or beneficiary is not permitted to elect an optional form of benefit that includes a prohibited payment, and the plan will not pay any prohibited payment, with an annuity starting date that occurs

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<sup>1</sup> Such an amendment can be authorized only through the publication of revenue rulings, notices, and other documents of general applicability. See §601.601(d)(2)(ii)(b).

during any period in which the plan sponsor is a debtor in a case under title 11, United States Code, or similar Federal or State law, except for payments made with an annuity starting date that occurs on or after the date within the plan year on which the enrolled actuary of the plan certifies that the plan's adjusted funding target attainment percentage for the plan year is not less than 100 percent.

Title IV of ERISA provides for a pension plan termination insurance program that is administered by the Pension Benefit Guaranty Corporation (PBGC). PBGC guarantees nonforfeitable benefits, up to specified limits, for defined benefit pension plans that are covered under the program.<sup>2</sup> If a single-employer plan terminates in a distress termination under section 4041(c) of ERISA or an involuntary termination under section 4042 of ERISA, and the plan assets are not sufficient to provide all guaranteed benefits, PBGC pays benefits to participants and beneficiaries under the provisions of Title IV and PBGC's regulations.<sup>3</sup> PBGC allows a participant who is not in pay status at the time of the termination to elect among the various annuity forms described in 29 C.F.R. 4022.8. In addition, under 29 C.F.R. 4022.7, PBGC does not pay benefits in a single sum in excess of \$5,000 (except under certain limited circumstances).

Section 204(g) of ERISA contains rules that are parallel to Code section 411(d)(6). Under section 101 of Reorganization Plan No. 4 of 1978 (43 FR 47713) and section 204(g) of ERISA, the Secretary of the Treasury has interpretive jurisdiction over the subject matter addressed in these regulations for purposes of ERISA, as well as the Code. Thus, these regulations issued under section 411(d)(6) of the Code would apply as well for purposes of section 204(g) of ERISA.

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<sup>2</sup> See section 4021 of ERISA.

<sup>3</sup> See section 4022 of ERISA.

## Explanation of Provisions

These proposed regulations would provide a limited exception under section 411(d)(6)(B) to permit a plan sponsor that is a debtor in a bankruptcy proceeding to amend its single-employer defined benefit plan to eliminate a single-sum distribution option (or other optional form of benefit providing for accelerated payments) if certain conditions are satisfied.

In particular, the proposed regulations would permit a single-employer plan that is covered under section 4021 of ERISA to be amended, effective for a plan amendment that is both adopted and effective after August 31, 2012, to eliminate an optional form of benefit that includes a prohibited payment described in section 436(d)(5), provided that four conditions are satisfied on the later of the date the amendment is adopted or effective (the applicable amendment date, as defined in §1.411(d)-3(g)(4)). First, the enrolled actuary of the plan has certified that the plan's adjusted funding target attainment percentage (as defined in section 436(j)(2)) for the plan year that contains the applicable amendment date is less than 100 percent. Second, the plan is not permitted to pay any prohibited payment, due to application of the requirements of section 436(d)(2) of the Code and section 206(g)(3)(B) of ERISA, because the plan sponsor is a debtor in a bankruptcy case (that is, a case under title 11, United States Code, or under similar Federal or State law). Third, the court overseeing the bankruptcy case has issued an order, after notice to each affected party (within the meaning of section 4001(a)(21) of ERISA) and a hearing,<sup>4</sup> finding that the adoption of the amendment eliminating that optional form of benefit is necessary to avoid a distress termination of the plan pursuant to section 4041(c) of ERISA or an involuntary

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<sup>4</sup> See 11 U.S.C. 102(1).

termination of the plan pursuant to section 4042 of ERISA before the plan sponsor emerges from bankruptcy (or before the bankruptcy case is otherwise completed).

Fourth, PBGC has issued a determination that the adoption of the amendment eliminating that optional form of benefit is necessary to avoid a distress or involuntary termination of the plan before the plan sponsor emerges from bankruptcy (or before the bankruptcy case is otherwise completed) and that the plan is not sufficient for guaranteed benefits within the meaning of section 4041(d)(2) of ERISA.

These proposed regulations would exercise the Secretary's authority under the last sentence of section 411(d)(6)(B) in order to permit this type of amendment that eliminates an optional form of benefit in these limited circumstances. The legislative history of section 411(d)(6)(B), which was added by section 301(a) of the Retirement Equity Act of 1984, Public Law 98-397, states the intent that Treasury regulations could permit the elimination of an optional form of benefit if "(1) the elimination of the option does not eliminate a valuable right of a participant or beneficiary, and (2) the option is not subsidized or a similar benefit with a comparable subsidy is provided."<sup>5</sup> The legislative history further states that the committee "expects that the regulations will not permit the elimination of a 'lump-sum distribution option' because, for a participant or beneficiary with substandard mortality, the elimination of that option could eliminate a valuable right even if a benefit of equal actuarial value (based on standard mortality) is available under the plan."<sup>6</sup>

If the four conditions set forth in the regulations are satisfied, a single-sum distribution option or other optional form of benefit that includes a prohibited payment

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<sup>5</sup> S. Rep. No. 98-575, at 30 (1984).

<sup>6</sup> Id.

(generally a payment that is in excess of the monthly amounts payable under a single life annuity) would not currently be available and would not be available in the future. The plan would not currently be permitted to pay that optional form of benefit because section 436(d)(2) (which imposes restrictions on the payment of prohibited payments while the plan sponsor is in bankruptcy) bars the payment of such an optional form of benefit under these conditions. Furthermore, the bankruptcy court and the PBGC would each have issued a determination that the plan would be terminated in a distress or involuntary termination unless that optional form of benefit were eliminated. In addition, the PBGC would have determined that the plan is not sufficient for guaranteed benefits. In such a case, pursuant to §4022.7 and §4022.8 of the PBGC regulations, the optional form of benefit would not have been available after the plan termination. Accordingly, the elimination of the optional form of benefit would not result in the loss of a valuable right of a participant or beneficiary.

In addition, the plan amendment would not eliminate or reduce early retirement benefits or retirement-type subsidies, which would continue to be available under the plan. Because the plan would not be terminated in a distress or involuntary termination, participants would continue to be credited with additional service under the plan and could become eligible for early retirement benefits and retirement-type subsidies, regardless of whether participants received benefit accruals with respect to the additional service. Moreover, because the plan would not be terminated, the plan might have the opportunity to recover from its underfunded status.

Under these proposed regulations, a judicial determination must be made, after notice to each affected party (including each plan participant, each employee

organization representing plan participants, and the PBGC) and a hearing, that the amendment is necessary to avoid termination of the plan in a distress or involuntary termination before the plan sponsor emerges from bankruptcy. The primary purpose of this notice and hearing requirement is to afford plan participants who may be affected the opportunity to be heard on whether the amendment is necessary to avoid plan termination.

### **Effective/Applicability Dates**

These regulations are proposed to apply to plan amendments that are adopted and effective after August 31, 2012.

### **Special Analyses**

It has been determined that these proposed regulations are 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 regulation does 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 Treasury Department

and the IRS request comments on all aspects of the proposed rules, including specifically whether the regulations should impose additional conditions on the prospective elimination of the single-sum distribution option (or other optional form of benefit that includes a prohibited payment), such as a condition that, after the amendment, the plan must offer annuity distribution options that provide substantial survivor benefits, such as both (1) a life annuity with a term certain of 15 or more years and (2) a 100% joint and survivor annuity, in order to give participants who have substandard mortality the opportunity to protect their survivors.

All comments will be available at [www.regulations.gov](http://www.regulations.gov) or upon request. A public hearing has been scheduled for Friday, August 24, 2012, 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 60 DAYS AFTER PUBLICATION OF THIS DOCUMENT IN THE FEDERAL REGISTER** and submit 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 August 16, 2012.

. 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 Neil S. Sandhu 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(d)-4 is amended by adding a new paragraph A-2(b)(2)(xii) to read as follows:

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

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Q&A-2: \* \* \*

(b) \* \* \*

(2) \* \* \*

(xii) Prohibited payment option under single-employer defined benefit plan of plan

sponsor in bankruptcy. A single-employer plan that is covered under section 4021 of the Employee Retirement Income Security Act of 1974, Public Law 93-406 (88 Stat. 829 (1974)), as amended (ERISA), may be amended, effective for a plan amendment that is both adopted and effective after August 31, 2012, to eliminate an optional form of benefit that includes a prohibited payment described in section 436(d)(5), provided that the following conditions are satisfied on the applicable amendment date (as defined in §1.411(d)-3(g)(4)):

(A) The enrolled actuary of the plan has certified that the plan's adjusted funding target attainment percentage (as defined in section 436(j)(2)) for the plan year that contains the applicable amendment date is less than 100 percent;

(B) The plan is not permitted to pay any prohibited payment, due to application of the requirements of section 436(d)(2) of the Internal Revenue Code and section 206(g)(3)(B) of ERISA, because the plan sponsor is a debtor in a bankruptcy case (that is, a case under title 11, United States Code, or under similar Federal or State law);

(C) The court overseeing the bankruptcy case has issued an order, after notice to each affected party (within the meaning of section 4001(a)(21) of ERISA) and a hearing, finding that the adoption of the amendment eliminating that optional form of benefit is necessary to avoid a distress termination of the plan pursuant to section 4041(c) of ERISA or an involuntary termination of the plan pursuant to section 4042 of ERISA before the plan sponsor emerges from bankruptcy (or before the bankruptcy case is otherwise completed); and

(D) The Pension Benefit Guaranty Corporation has issued a determination that--

(1) The adoption of the amendment eliminating that optional form of benefit is necessary to avoid a distress or involuntary termination of the plan before the plan sponsor emerges from bankruptcy (or before the bankruptcy case is otherwise completed); and

(2) The plan is not sufficient for guaranteed benefits within the meaning of section 4041(d)(2) of ERISA.

\* \* \* \* \*

Steven T. Miller

Deputy Commissioner for Services and Enforcement.

**[FR Doc. 2012-15072 Filed 06/20/2012 at 8:45 am; Publication Date:  
06/21/2012]**