

the Freedom of Information Act (5 U.S.C. 552), § 1.4 of the Treasury Department Regulations (31 CFR 1.4), and § 103.11(b) of the Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9 a.m. and 4:30 p.m. at the Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service, Suite 3000, The Ronald Reagan Building, 1300 Pennsylvania Avenue, N.W., Washington, D.C.

Amendments to the Regulations

For the reasons stated above, the effective date of final rule document FR Doc. 97-18206, published in the **Federal Register** on July 11, 1997 is delayed until May 1, 1998.

The Regulatory Flexibility Act, and Executive Order 12866

Because this document is not subject to the notice and public procedure requirements of 5 U.S.C. 553, this document is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This amendment does not meet the criteria for a "significant regulatory action" as specified in Executive Order 12866.

Approved: October 9, 1997.

Samuel H. Banks,

Acting Commissioner of Customs.

John P. Simpson,

Deputy Assistant Secretary of the Treasury.

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 8738]

RIN 1545-AV43

Tax Treatment of Cafeteria Plans

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Temporary regulations.

SUMMARY: This document contains temporary regulations that clarify the circumstances under which an employer may permit a cafeteria plan participant to revoke an existing election and make a new election during a period of coverage. The text of these temporary regulations also serves as the text of the proposed regulations set forth in the notice of proposed rulemaking on this subject in the proposed rules section of this issue of the **Federal Register**.

DATES: These regulations are effective on December 31, 1998.

FOR FURTHER INFORMATION CONTACT: Sharon Cohen, (202) 622-6080 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document contains amendments to the Income Tax Regulations (26 CFR part 1) under section 125. These temporary regulations provide guidance relating to the circumstances under which a cafeteria plan participant may revoke an existing election and make a new election during a period of coverage.

Explanation of Provisions

A "cafeteria plan" under section 125 allows an employee to choose between cash and certain nontaxable benefits, such as accident or health coverage. Section 125 generally permits the employee to choose the nontaxable benefit (rather than the available cash) without the employee having to include the available cash in gross income. The temporary regulations:

- Permit a cafeteria plan to allow an employee, during a plan year, to change his or her health coverage election to conform with the new special enrollment rights provided under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), and
- Permit a cafeteria plan to allow a change in coverage election for a variety of other changes in status.

These regulations are designed to provide clear, administrable guidelines for determining when changes can be made in cafeteria plan elections during a plan year.

These regulations are effective for plan years beginning after December 31, 1998. However, taxpayers may rely on the guidance in the temporary regulations (or on the existing proposed regulations) for prior periods.

Summary

Section 125 generally provides that an employee in a cafeteria plan will not have an amount included in gross income solely because the employee may choose among two or more benefits consisting of cash and "qualified benefits." A qualified benefit generally is any benefit that is excludable from gross income because of an express provision of the Code, including coverage under an employer-provided accident or health plan under sections 105 and 106, group-term life insurance under section 79, elective contributions under a qualified cash or deferred

arrangement within the meaning of section 401(k), dependent care assistance under section 129, and adoption assistance under section 137.¹ Under §§ 1.125-1 and 1.125-2 of the existing proposed regulations,² an employee is permitted to make an election between cash and qualified benefits before the beginning of the period of coverage (which generally is the plan year of the cafeteria plan); changes in the election during the plan year are permitted only in limited circumstances.

The temporary regulations clarify the circumstances under which a cafeteria plan may permit an employee to change his or her cafeteria plan election with respect to accident or health coverage or group-term life insurance coverage during the plan year. Proposed regulations are also being published that cross-reference these temporary regulations, and that replace the change in family status provisions in Q&A-6 of proposed § 1.125-2 with respect to accident or health plans and group-term life insurance.

HIPAA Special Enrollment Rules

The temporary regulations conform the cafeteria plan rules to the new special enrollment rights provided under HIPAA (which generally require group health plans to permit individuals to be enrolled for coverage following the loss of other health coverage, or if a person becomes the spouse or dependent of an employee through birth, marriage, adoption, or placement for adoption).³ Under the regulations, if an employee has a right to enroll in an employer's group health plan or to add coverage for a family member under HIPAA, the employee can make a conforming election under the cafeteria plan. This allows required contributions for such health coverage to be paid on a pre-tax basis.

Changes in Status

The temporary regulations include rules for other events, called "changes in status," under which a cafeteria plan may allow an employee to change his or

¹ The following are not qualified benefits: products advertised, marketed, or offered as long-term care insurance; medical savings accounts under section 106(b); qualified scholarships under section 117; educational assistance programs under section 127; and fringe benefits under section 132.

² Published as proposed rules at 49 FR 19321 (May 7, 1984) and 54 FR 9460 (March 7, 1989), respectively.

³ See section 9801(f). Similar provisions are set forth in section 701(f) of the Employee Retirement Income Security Act of 1974 (ERISA), and section 2701(f) of the Public Health Service Act. Regulations under these provisions are set forth in Treas. Reg. § 54.9801-6T; 29 C.F.R. § 2590.701-6; and 45 C.F.R. § 146.117.

her election during the plan year. The events that constitute changes in status under the regulations are changes in legal marital status, number of dependents, employment status, work schedule, and residence or worksite, and cases where the dependent satisfies or ceases to satisfy the requirements for unmarried dependents.

The regulations permit a cafeteria plan to allow a change of election during the plan year if a change in status occurs that affects eligibility for coverage and the election change corresponds with the effect on eligibility. For example, if under the terms of an accident or health plan a child of an employee loses eligibility for coverage upon graduation from college, the cafeteria plan may allow the employee to cease payment for the child's coverage when the child graduates and coverage ceases.

Certain of these changes in status (marriage, birth, adoption, and placement for adoption) overlap with the special enrollment events under HIPAA. The regulations include examples that clarify the relationship between HIPAA's special enrollment rights and these change in status rules. In addition, if a change in status occurs that entitles an employee or family member to "COBRA" continuation coverage (or coverage under a similar State program) with respect to the employer's plan, the regulations permit payments for the continuation coverage to be made on a pre-tax basis under a cafeteria plan.

Other Events

The regulations allow a corresponding cafeteria plan change if a plan receives a court order, such as a qualified medical child support order under section 609 of ERISA. In addition, if an employee, spouse, or dependent becomes entitled to Medicare or Medicaid, a cafeteria plan can permit a corresponding election change.

Elective Contributions Under a Qualified Cash or Deferred Arrangement

The temporary regulations, in provisions similar to those of the existing proposed regulations (proposed § 1.125-2(f)), make clear that the rules of section 401(k) and (m), rather than the rules in these temporary regulations (which apply to other qualified benefits), govern changes in elections under a qualified cash or deferred arrangement (within the meaning of section 401(k)) or with respect to employee after-tax contributions subject to section 401(m).

Scope of Temporary Regulations and Reliance on Proposed Regulations

The temporary regulations do not address certain provisions concerning cafeteria plan election changes that are included in the existing proposed regulations. Guidance on these provisions is reserved at paragraphs (f)-(i) of the temporary regulations.

For example, future guidance under the significant cost change provision (reserved at paragraph (g) of the temporary regulations), rather than the change in status rules, would determine whether an employee who switches from full-time to part-time employment and who remains eligible under the employer's health plan could make an election change if the part-time employee is required to pay significantly higher amounts for the coverage. The temporary regulations also reserve guidance with respect to provisions set forth in the existing proposed regulations that permit an election change in the case of a significant change in coverage (which includes a significant change in the health coverage of the employee or spouse attributable to the spouse's employment).⁴ Other matters not addressed in the temporary regulations include the application of the cafeteria plan election change rules to qualified benefits other than accident or health coverage and group-term life insurance coverage (for example, dependent care assistance programs), and special rules concerning changes in elections by employees taking leave under the Family and Medical Leave Act of 1993 (Pub. L. 103-3).⁵ Pending further guidance, taxpayers can continue to rely on the existing proposed regulations⁶ concerning these and other matters not addressed in the temporary regulations.⁷

The temporary regulations are effective for plan years beginning after December 31, 1998. Prior to that date, however, taxpayers can rely on the guidance provided in the temporary regulations (as well as on the guidance provided in the existing proposed regulations that relates to matters addressed in the temporary regulations) in order to comply with the provisions of section 125.

⁴ See the second-to-last sentence in Q&A-6(c) of proposed § 1.125-2.

⁵ See § 1.125-3, published as a proposed rule at 60 FR 66229 (December 21, 1995).

⁶ See also § 1.125-2T, published at 51 FR 4312 (January 29, 1986), which describes benefits that may be offered under a cafeteria plan.

⁷ See the preambles to proposed §§ 1.125-1 and 1.125-2 and Q&A-8 of proposed § 1.125-3.

Special Analyses

It has been determined that this Treasury Decision is not a significant regulatory action as defined in EO 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, 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 Internal Revenue Code, these temporary regulations will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal authors of these regulations are Catherine Fuller and Sharon Cohen, Office of the Associate Chief Counsel (Employee Benefits and Exempt Organizations). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

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

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

Par. 2. § 1.125-4T is added to read as follows:

§ 1.125-4T Permitted election changes (temporary).

(a) *Election changes.* A cafeteria plan may permit an employee to revoke an election during a period of coverage and to make a new election only as provided in paragraphs (b) through (i) of this section. See paragraph (j) of this section for special provisions relating to qualified cash or deferred arrangements.

(b) *Special enrollment rights.* A cafeteria plan may permit an employee to revoke an election for accident or health coverage during a period of coverage and make a new election that corresponds with the special enrollment rights provided in section 9801(f), whether or not the change in election is permitted under paragraph (c) of this section.

(c) *Changes in status for accident or health coverage and group-term life.* (1) *In general.* A cafeteria plan may permit an employee to revoke an election for accident or health coverage or group-term life insurance coverage during a period of coverage and make a new election for the remaining portion of the period if, under the facts and circumstances —

(i) A change in status occurs; and
(ii) The election change satisfies the consistency requirement in paragraph (c)(3) of this section (consistency rule for accident or health coverage) or (c)(4) of this section (consistency rule for group-term life insurance coverage).

(2) *Change in status events.* The following events are changes in status for purposes of this paragraph (c):

(i) *Legal marital status.* Events that change an employee's legal marital status, including marriage, death of spouse, divorce, legal separation, or annulment;

(ii) *Number of dependents.* Events that change an employee's number of dependents (as defined in section 152), including birth, adoption, placement for adoption (as defined in regulations under section 9801), or death of a dependent;

(iii) *Employment status.* A termination or commencement of employment by the employee, spouse, or dependent;

(iv) *Work schedule.* A reduction or increase in hours of employment by the employee, spouse, or dependent, including a switch between part-time and full-time, a strike or lockout, or commencement or return from an unpaid leave of absence;

(v) *Dependent satisfies or ceases to satisfy the requirements for unmarried dependents.* An event that causes an employee's dependent to satisfy or cease to satisfy the requirements for coverage due to attainment of age, student status, or any similar circumstance as provided in the accident or health plan under which the employee receives coverage; and

(vi) *Residence or Worksite.* A change in the place of residence or work of the employee, spouse, or dependent.

(3) *Consistency rule for accident or health coverage.* (i) *General rule.* (A) An employee's revocation of a cafeteria plan election during a period of coverage and new election for the remaining portion of the period (referred to below as an "election change") is consistent with a change in status if, and only if—

(1) *The change in status results in the employee, spouse, or dependent gaining or losing eligibility for accident or health coverage under either the*

cafeteria plan or an accident or health plan of the spouse's or dependent's employer; and

(2) *The election change corresponds with that gain or loss of coverage.*

(B) A change in status results in an employee, spouse, or dependent gaining (or losing) eligibility for coverage under a plan only if the individual becomes eligible (or ineligible) to participate in the plan. A cafeteria plan may treat an individual as gaining (or losing) eligibility for coverage if the individual becomes eligible (or ineligible) for a particular benefit package option under a plan (e.g., a change in status results in an individual becoming eligible for a managed care option or an indemnity option). If, as a result of a change in status, the individual gains eligibility for elective coverage under a plan of the spouse's or dependent's employer, the consistency rule of this paragraph (c)(3)(i) is satisfied only if the individual elects the coverage under the spouse's or dependent's employer. See the *Examples* in paragraph (k) of this section for illustrations of the consistency rule.

(ii) *Exception for COBRA.* Notwithstanding paragraph (c)(3)(i) of this section, if the employee, spouse, or dependent becomes eligible for continuation coverage under the employer's group health plan as provided in section 4980B or any similar State law, the employee may elect to increase payments under the employer's cafeteria plan in order to pay for the continuation coverage.

(4) *Consistency rule for group-term life insurance coverage.* Except as provided in this paragraph (c)(4), the provisions of paragraph (c)(3)(i) of this section apply to group-term life insurance coverage. In the case of marriage, birth, adoption, or placement for adoption, a cafeteria plan can allow an election change to increase (but not to reduce) the amount of the employee's life insurance coverage. In the case of divorce, legal separation, annulment, or death of a spouse or dependent, a cafeteria plan may allow an election change to reduce (but not to increase) the amount of the employee's life insurance coverage.

(d) *Judgment, decree, or order.* This paragraph (d) applies to a judgment, decree, or order ("order") resulting from a divorce, legal separation, annulment, or change in legal custody (including a qualified medical child support order defined in section 609 of the Employee Retirement Income Security Act of 1974) that requires accident or health coverage for an employee's child. Notwithstanding the provisions of

paragraph (c) of this section, a cafeteria plan may—

(1) Change the employee's election to provide coverage for the child if the order requires coverage under the employee's plan; or

(2) Permit the employee to make an election change to cancel coverage for the child if the order requires the former spouse to provide coverage.

(e) *Entitlement to Medicare or Medicaid.* If an employee, spouse, or dependent who is enrolled in an accident or health plan of the employer becomes entitled to coverage (i.e., enrolled) under Part A or Part B of Title XVIII of the Social Security Act (Medicare) or Title XIX of the Social Security Act (Medicaid), other than coverage consisting solely of benefits under section 1928 of the Social Security Act (the program for distribution of pediatric vaccines), a cafeteria plan may permit the employee to make an election change to cancel coverage of that employee, spouse or dependent under the accident or health plan.

(f) *Changes in status for other qualified benefits.* [Reserved].

(g) *Significant coverage or cost changes.* [Reserved].

(1) *Employer's plan.* [Reserved].

(2) *Plan of spouse's or dependent's employer.* [Reserved].

(h) *Cessation of required contributions.* [Reserved].

(i) *Special requirements concerning the Family and Medical Leave Act.* [Reserved].

(j) *Elective contributions under a qualified cash or deferred arrangement.* The provisions of this section do not apply with respect to elective contributions under a qualified cash or deferred arrangement (within the meaning of section 401(k)) or employee contributions subject to section 401(m). Thus, a cafeteria plan may permit an employee to modify or revoke elections in accordance with sections 401(k) and 401(m) and the regulations thereunder.

(k) *Examples.* The following examples illustrate the rules of this section. In each case involving an accident or health plan, assume that the plan is subject to section 9801(f) (providing for special enrollment rights under certain group health plans).

Example 1. (i) Employer M provides health coverage for its employees under which employees may elect either employee-only coverage or family coverage. M also maintains a calendar year cafeteria plan under which qualified benefits, including health coverage, are funded through salary reduction. M's employee, A, elects employee-only health coverage before the beginning of the calendar year. During the year, A adopts

a child, C. Within 30 days thereafter, A wants to revoke A's election for employee-only health coverage and obtain family health coverage, as of the date of C's adoption. A satisfies the conditions for special enrollment of an employee with a new dependent under section 9801(f)(2), so that A may enroll in family coverage under M's accident or health plan in order to provide coverage for C, effective as of the date of C's adoption.

(ii) In this *Example 1*, M's cafeteria plan may permit A to change the employee's salary reduction election to family coverage for salary not yet currently available. The increased salary reduction could reflect the cost of family coverage from the date of adoption. (The adoption of C is also a change in status, and the election of family coverage is consistent with that change in status. Thus, under the change in status provisions of paragraph (c) of this section, M's cafeteria plan could permit A to elect family coverage prospectively in order to cover C for the remaining portion of the coverage period.)

Example 2. (i) The employer plans and permissible coverage are the same as in *Example 1*. Before the beginning of the calendar year, Employee A elects employee-only health coverage under M's cafeteria plan. A marries B during the plan year. B's employer, N, offers health coverage to N's employees, and, prior to the marriage, B had elected employee-only coverage. A wants to revoke the election for employee-only coverage, and is considering electing family health coverage under M's plan or obtaining family health coverage under N's plan.

(ii) In this *Example 2*, A's marriage to B is a change in status. Two possible election changes by A would be consistent with the change in status: to cover A and B by electing family health coverage under M's plan, or to cancel coverage under M's plan (with B electing family health coverage under N's plan in order to cover A and B). Thus, M's cafeteria plan may permit A to make either change in election. (M's cafeteria plan could also permit A to change A's salary reduction election to reflect the change to family coverage under M's group health plan in accordance with paragraph (b) of this section because the marriage would also create special enrollment rights under section 9801(f), pursuant to which an election of family coverage under M's plan would be required to be effective no later than the first day of the first calendar month beginning after the completed request for enrollment is received by the plan.)

Example 3. (i) Employee G, a single parent, elects family health coverage under a calendar year cafeteria plan maintained by Employer O. G and G's 21-year old child, H, are covered under O's health plan. During the year, H graduates from college. Under the terms of the health plan, dependents over the age of 19 must be full-time students to receive coverage. G wants to revoke G's election for family health coverage and obtain employee-only coverage under O's cafeteria plan.

(ii) In this *Example 3*, H's loss of eligibility for coverage under the terms of the health plan is a change in status. A revocation of G's election for family coverage and new election of employee-only coverage is consistent with

the change in status. Thus, O's cafeteria plan may permit G to elect employee-only coverage.

Example 4. (i) Employee J is married to K and they have one child, S. A calendar year cafeteria plan maintained by Employer P allows employees to elect no health coverage, employee-only coverage, employee-plus-one-dependent coverage, or family coverage. Under the plan, before the beginning of the calendar year, J elects family health coverage for J, K, and S. J and K divorce during the year and, under the terms of P's accident or health plan, K loses eligibility for P's health coverage. S does not lose eligibility for health coverage under P's plan upon the divorce. J now wants to revoke J's election under the cafeteria plan and elect no coverage.

(ii) In this *Example 4*, the divorce is a change in status. A change in the cafeteria plan election to cancel health coverage for K is consistent with that change in status. However, the divorce does not affect J's or S's eligibility for health coverage. Therefore, an election change to cancel J's or S's health coverage is not consistent with the change in status. The cafeteria plan, however, may permit J to elect employee-plus-one-dependent health coverage.

Example 5. (i) The facts are the same as *Example 4*, except that, before the beginning of the year, Employee J elected employee-only health coverage (rather than family coverage). Pursuant to J's divorce agreement with K, P's health plan receives a qualified medical child support order (as defined in section 609 of the Employee Retirement Income Security Act) during the plan year. The order requires P's health plan to cover S.

(ii) In this *Example 5*, P's cafeteria plan may change J's election from employee-only health coverage to employee-plus-one-dependent coverage in order to cover S.

Example 6. (i) Before the beginning of the coverage period, Employee L elects to participate in a cafeteria plan maintained by L's Employer, Q. However, in order to change the election during the coverage period so as to cancel coverage, and by prior understanding with Q, L terminates employment and resumes employment one week later.

(ii) In this *Example 6*, under the facts and circumstances, in which a principal purpose of the termination of employment was to alter the election and reinstatement of employment was understood at the time of termination, L does not have a change in status. However, L's termination of employment would constitute a change in status, permitting a cancellation of coverage during the period of unemployment, if L's original cafeteria plan election was reinstated upon resumption of employment (for example, because of a cafeteria plan provision requiring an employee who resumes employment within 30 days, without any other intervening event that would permit a change in election, to return to the election in effect prior to termination of employment).

Example 7. (i) Employer R maintains a calendar year cafeteria plan under which full-time employees may elect coverage under one of three benefit package options

provided under an accident or health plan: an indemnity option or either of two HMO options for employees that work in the respective service areas of the two HMOs. Employee T, who works in the service area of HMO #1, elects the HMO #1 option. During the year, T is transferred to another work location which is outside the HMO #1 service area and inside the HMO #2 service area.

(ii) In this *Example 7*, the transfer is a change in status and, under the consistency rule, the cafeteria plan may permit T to make an election change to either the indemnity option or HMO #2, or to cancel accident or health coverage.

Example 8. (i) A calendar year cafeteria plan maintained by Employer S allows employees to elect coverage under an accident or health plan providing indemnity coverage and under a flexible spending arrangement (FSA). Prior to the beginning of the calendar year, Employee U elects employee-only indemnity coverage, and coverage under the FSA for up to \$600 of reimbursements for the year to be funded by salary reduction contributions of \$600 during the year. U's spouse, V, has employee-only coverage under an accident or health plan maintained by V's employer. During the year, V terminates employment and loses coverage under that plan. U now wants to elect family coverage under S's accident or health plan and increase U's FSA election.

(ii) In this *Example 8*, V's termination of employment is a change in status. The cafeteria plan may permit U to elect family coverage under S's accident or health plan, and to increase U's FSA coverage.

Example 9. (i) Employer T provides group-term life insurance coverage as described under section 79. Under T's plan, an employee may elect life insurance coverage in an amount up to the lesser of his or her salary or \$50,000. T also maintains a calendar year cafeteria plan under which qualified benefits, including the group-term life insurance coverage, are funded through salary reduction. Before the beginning of the calendar year, Employee W elects \$10,000 of life insurance coverage, with W's spouse, X, as the beneficiary. During the year, a child is placed for adoption with W and X. W wants to increase W's election for life insurance coverage to \$50,000 (without changing the designation of X as the beneficiary).

(ii) In this *Example 9*, the placement of a child for adoption with W is a change in status. The increase in coverage is consistent with the change in status. Thus, W's cafeteria plan may permit W to increase W's life insurance coverage.

(1) *Effective Date.* This section is effective for plan years beginning after December 31, 1998.

Michael P. Dolan,
Acting Commissioner of Internal Revenue.

Dated: October 10, 1997.

Donald C. Lubick,
Acting Assistant Secretary of the Treasury.
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