

corrected to read as follows: “**DATES:** The regulation published at 63 FR 25764 is effective February 2, 1999. Submit written comments by July 27, 1998. If no timely significant adverse comments are received, the agency will publish a document in the **Federal Register** no later than August 6, 1998, confirming the effective date of the direct final rule. If timely significant adverse comments are received, the agency will publish a document of significant adverse comment in the **Federal Register** withdrawing this direct final rule no later than August 6, 1998.”

Dated: May 28, 1998.

**William K. Hubbard,**

*Associate Commissioner for Policy Coordination.*

[FR Doc. 98-14718 Filed 6-4-98; 8:45 am]

BILLING CODE 4160-01-F

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

#### 26 CFR Parts 1 and 602

[TD 8769]

RIN 1545-AV26

#### Permitted Elimination of Preretirement Optional Forms of Benefit

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Final regulations.

**SUMMARY:** This document contains final regulations that permit an amendment to a qualified plan or other employee pension benefit plan that eliminates plan provisions for benefit distributions before retirement but after age 70½. These regulations affect employers that maintain qualified plans and other employee pension benefit plans, plan administrators of these plans and participants in these plans.

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

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

#### SUPPLEMENTARY INFORMATION:

##### Paperwork Reduction Act

The collection of information contained in these final regulations has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under the control number 1545-1545. The collection of information in these final regulations is

in § 1.411(d)-4. Responses to this collection of information are required in order to obtain a benefit. Specifically, this information is required for a taxpayer who wants to amend a qualified plan to eliminate certain preretirement optional forms of benefit. This information will be used to determine whether taxpayers have amended a qualified plan.

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

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

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

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

##### Background

This document contains amendments to the Income Tax Regulations (26 CFR part 1) under section 411(d) of the Internal Revenue Code of 1986. The final regulations permit taxpayers to amend qualified plans to eliminate plan provisions for benefit distributions before retirement but after age 70½, if certain conditions are satisfied.

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

to provide in regulations that this rule will not apply to an amendment that eliminates an optional form of benefit.

Section 401(a)(9) provides that, in order for a plan to be qualified under section 401(a), distributions from the plan must commence no later than the “required beginning date.” Prior to 1997, section 401(a)(9)(C) generally provided that the required beginning date is April 1 following the calendar year in which the employee attains age 70½. Consequently, in order to satisfy section 401(a)(9), qualified plans, other than certain church and governmental plans, have provided for distributions to commence no later than April 1 following the calendar year that an employee attains age 70½. These distributions commence without regard to whether the employee has retired from employment with the employer maintaining the plan.

Section 1404 of the Small Business Job Protection Act of 1996, Public Law 104-188 (SBJPA), amended the definition of required beginning date that applies to an employee who is not a 5-percent owner. Section 401(a)(9)(C)(i), as amended, provides that, in the case of such an employee, the required beginning date is April 1 of the calendar year following the later of the calendar year in which the employee attains age 70½ or the calendar year in which the employee retires. Accordingly, except in the case of 5-percent owners, a plan is no longer required to provide for distributions that commence prior to retirement in order to satisfy section 401(a)(9).

The right to commence benefit distributions in any form at a particular time is an optional form of benefit within the meaning of section 411(d)(6)(B) and § 1.411(d)-4, Q&A-1(b). In enacting section 1404 of the SBJPA, Congress did not alter the application of section 411(d)(6). Thus, except to the extent authorized by regulations, a plan amendment that eliminates the right to commence preretirement benefit distributions in a plan after age 70½ (or restricts the right by adding an additional condition) violates section 411(d)(6) if the amendment applies to benefits accrued as of the later of the adoption or effective date of the amendment.

On July 2, 1997, a notice of proposed rulemaking under section 411(d)(6) was published in the **Federal Register** (62 FR 35752). The proposed regulations would allow amendment of qualified plans to eliminate the right to commence preretirement benefit distributions after age 70½, as required under section 401(a)(9) before its amendment by the SBJPA. On October

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

## Overview

### 1. Permitted Elimination of Preretirement Distributions After Age 70½

The legislative history to section 1404 of the SBJPA indicates that the reason for amending the definition of required beginning date was that it is inappropriate to require all participants to commence distributions by age 70½ without regard to whether the participant is still employed by the employer. Because section 1404 did not alter the application of section 411(d)(6) to plan provisions allowing or requiring preretirement distributions after age 70½, an employer's choices for amending its plan to implement the SBJPA change to the definition of required beginning date would be limited if the IRS and Treasury did not grant relief from section 411(d)(6).

Under previously-issued administrative guidance, one approach that is available to employers is to give employees the option of commencing distributions at age 70½ or deferring commencement until after retirement. See Announcement 97-24 (1997-11 I.R.B. 24) and Revenue Procedure 97-41 (1997-33 I.R.B. 51). Another alternative available to employers is to amend the plan to eliminate the right to preretirement distributions solely with respect to future accruals. However, under this second approach, each current participant would retain the right to receive preretirement distributions after age 70½ with respect to a portion of his or her accrued benefit.

The IRS and Treasury recognize the potential complexity of administering plans (particularly defined benefit plans) that adopt either of these approaches. In addition, an employer may not have chosen voluntarily to offer preretirement distributions to

employees who have attained age 70½ but instead may have included these provisions in its plan solely to comply with section 401(a)(9) prior to its amendment by the SBJPA. Therefore, the proposed regulations set forth a proposal to provide relief from section 411(d)(6) for certain plan amendments that eliminate preretirement distributions commencing at age 70½. After consideration of the comments received with respect to the proposed regulations, the final regulations provide this relief using the same approach.

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

#### a. Protection for Employees Who Are Near Age 70½

Under the regulations, an amendment to eliminate a preretirement age 70½ distribution option is permitted to apply only to benefits with respect to employees who attain age 70½ in or after a calendar year, specified in the amendment, that begins after the later of December 31, 1998, or the adoption date of the amendment. The relief from section 411(d)(6) is limited to distributions to employees who attain age 70½ after calendar year 1998 because employees who were near age 70½ at the time of enactment of the SBJPA may have had an expectation of receiving preretirement distributions in the near future and may have made plans that took into account these expected distributions.

#### b. Optional Forms of Benefit for Participants Retiring After Age 70½

A plan using this relief generally may not preclude an employee who retires after the calendar year in which the employee attains age 70½ from receiving an optional form of benefit that would have been available if the employee had retired in the calendar year in which the employee attained age 70½. Two of the commentators on the proposed regulations requested clarification that this requirement does not impose special additional restrictions with respect to employees over age 70½ that would require plan sponsors to retain all plan options in effect during the year any employee attained age 70½. In response to these comments, the final regulations clarify that no such special additional restrictions are being imposed. Thus, to the extent a section 411(d)(6) protected benefit may otherwise be eliminated or reduced under § 1.411(d)-4, that protected benefit can be reduced or eliminated for all employees without violating section 411(d)(6), even if that

benefit would have been available to an employee who retired in the calendar year in which the employee attained age 70½.

#### c. Timing of Plan Amendment

An amendment to eliminate a preretirement age 70½ distribution option must be adopted no later than the last day of the remedial amendment period that applies to the plan for changes under the SBJPA. The relief provided is available only to employers that adopt the amendment within this specified time period because the relief is intended to simplify the implementation of section 401(a)(9), as amended by the SBJPA, for employers that do not voluntarily provide preretirement distributions for an extended period after the enactment of the SBJPA.

The IRS and Treasury have determined that it is appropriate to provide an extension of the period for collectively bargained plans to implement an amendment permitted by these regulations. This was suggested by a commentator who noted that it might not be possible to amend a collectively bargained plan until the expiration of all applicable collective bargaining agreements that are in effect when the final regulations are issued. Accordingly, under the final regulations, § 1.411(d)-4, Q&A-10(b)(3) has been amended so that, in the case of a plan maintained pursuant to one or more collective bargaining agreements between employee representatives and one or more employers ratified before September 3, 1998, the amendment deadline is extended to the last day of the twelfth month beginning after the date on which the last of such collective bargaining agreements terminates (determined without regard to any extensions on or after September 3, 1998), if later than the last day of the remedial amendment period for the plan for changes under the SBJPA.

### 3. Circumstances Under Which No Relief Is Required

Many employers do not need relief under section 411(d)(6) in order to implement the SBJPA change in the definition of required beginning date in their plans. The regulations include an example of such a plan, a profit-sharing plan that permits an employee to elect distribution after age 59½ at any time and in any amount. The example illustrates that this plan may be amended to implement the SBJPA change in the definition of required beginning date without violating section 411(d)(6). In this example, the section 411(d)(6) relief in these regulations is

not required because the optional forms of benefit in the plan that reflect the pre-SBJPA mandatory distribution requirements of section 401(a)(9) are encompassed by the optional forms of benefit provided under the general elective distribution provisions of the plan. The right to commence distributions at age 70½ continues to be available under the plan even after the plan is amended to implement the SBJPA change in the required beginning date.

#### Effective Date

These regulations are effective June 5, 1998.

#### Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in EO 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. Further, it is hereby certified, pursuant to sections 603(a) and 605(b) of the Regulatory Flexibility Act, that the collection of information in these regulations does not have a significant economic impact on a substantial number of small entities. The burden imposed by the collection of information is the burden of amending a plan to modify the provisions reflecting section 401(a)(9). The cost of the amendment varies depending upon whether the small entity involved maintains an individually designed plan or uses a master or prototype plan. For an individually designed plan, the small entity maintaining the plan will be responsible for arranging to have the amendment made. Most small entities with individually designed plans will have the amendment done by a skilled outside service provider, such as a consulting firm or law firm. The time required to make such an amendment is estimated at 30 minutes, which is not a significant economic impact, even for a very small entity. Moreover, most very small entities that maintain a qualified plan use a master or prototype plan. For master and prototype plans, the plan sponsor drafts a single amendment for all of the employers participating in the plan. The average time required for the amendment per employer participating in a master or prototype plan is estimated to be 10 minutes, which certainly is not a substantial economic impact. Therefore, a regulatory flexibility analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Internal Revenue Code, the notice

of proposed rulemaking preceding these regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

#### Drafting Information

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

#### List of Subjects

##### 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

##### 26 CFR Part 602

Reporting and recordkeeping requirements.

#### Amendments to the Regulations

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

#### PART 1—INCOME TAXES

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

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

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

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

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

\* \* \* \* \*

Q–10. If a plan provides for an age 70½ distribution option that commences prior to retirement from employment with the employer maintaining the plan, to what extent may the plan be amended to eliminate this distribution option?

A–10. (a) *In general.* The right to commence benefit distributions in a particular form and at a particular time prior to retirement from employment with the employer maintaining the plan is a separate optional form of benefit within the meaning of section 411(d)(6)(B) and Q&A–1 of this section, even if the plan provision creating this right was included in the plan solely to comply with section 401(a)(9), as in effect for years before January 1, 1997. Therefore, except as otherwise provided in paragraph (b) of this Q&A–10 or any other Q&A in this section, a plan amendment violates section 411(d)(6) if it eliminates an age 70½ distribution option (within the meaning of paragraph (c) of this Q&A–10) to the extent that it applies to benefits accrued as of the

later of the adoption date or effective date of the amendment.

(b) *Permitted elimination of age 70½ distribution option.* An amendment of a plan will not violate the requirements of section 411(d)(6) merely because the amendment eliminates an age 70½ distribution option to the extent that the option provides for distribution to an employee prior to retirement from employment with the employer maintaining the plan, provided that—

(1) The amendment eliminating this optional form of benefit applies only to benefits with respect to employees who attain age 70½ in or after a calendar year, specified in the amendment, that begins after the later of—

(i) December 31, 1998; or

(ii) The adoption date of the amendment;

(2) The plan does not, except to the extent required by section 401(a)(9), preclude an employee who retires after the calendar year in which the employee attains age 70½ from receiving benefits in any of the same optional forms of benefit (except for the difference in the timing of the commencement of payments) that would have been available had the employee retired in the calendar year in which the employee attained age 70½; and

(3) The amendment is adopted no later than—

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

(ii) Solely in the case of a plan maintained pursuant to one or more collective bargaining agreements between employee representatives and one or more employers ratified before September 3, 1998, the last day of the twelfth month beginning after the date on which the last of such collective bargaining agreements terminates (determined without regard to any extension thereof on or after September 3, 1998), if later than the date described in paragraph (b)(3)(i) of this Q&A–10. For purposes of this paragraph (b)(3)(ii), the rules of § 1.410(b)–10(a)(2) apply for purposes of determining whether a plan is maintained pursuant to one or more collective bargaining agreements, except that September 3, 1998 is substituted for March 1, 1986, as the date before which the collective bargaining agreements must be ratified.

(c) *Age 70½ distribution option.* For purposes of this Q&A–10, an age 70½ distribution option is an optional form of benefit under which benefits payable in a particular distribution form (including any modifications that may

be elected after benefit commencement commence at a time during the period that begins on or after January 1 of the calendar year in which an employee attains age 70½ and ends April 1 of the immediately following calendar year.

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

*Example 1.* Plan A, a defined benefit plan, provides each participant with a qualified joint and survivor annuity (QJSA) that is available at any time after the later of age 65 or retirement. However, in accordance with section 401(a)(9) as in effect prior to January 1, 1997, Plan A provides that if an employee does not retire by the end of the calendar year in which the employee attains age 70½, then the QJSA commences on the following April 1. On October 1, 1998, Plan A is amended to provide that, for an employee who is not a 5-percent owner and who attains age 70½ after 1998, benefits may not commence before the employee retires but must commence no later than the April 1 following the later of the calendar year in which the employee retires or the calendar year in which the employee attains age 70½. This amendment satisfies this Q&A-10 and does not violate section 411(d)(6).

*Example 2.* Plan B, a money purchase pension plan, provides each participant with a choice of a QJSA or a single sum distribution commencing at any time after the later of age 65 or retirement. In addition, in accordance with section 401(a)(9) as in effect prior to January 1, 1997, Plan B provides that benefits will commence in the form of a QJSA on April 1 following the calendar year in which the employee attains age 70½, except that, with spousal consent, a participant may elect to receive annual installment payments equal to the minimum amount necessary to satisfy section 401(a)(9) (calculated in accordance with a method specified in the plan) until retirement, at which time a participant may choose between a QJSA and a single sum distribution (with spousal consent). On June 30, 1998, Plan B is amended to provide that, for an employee who is not a 5-percent owner and who attains age 70½ after 1998, benefits may not commence prior to retirement but benefits must commence no later than April 1 after the later of the calendar year in which the employee retires or the calendar year in which the employee attains age 70½. The amendment further provides that the option described above to receive annual installment payments prior to retirement will not be available under the plan to an employee who is not a 5-percent owner and who attains age 70½ after 1998. This amendment satisfies this Q&A-10 and does not violate section 411(d)(6).

*Example 3.* Plan C, a profit-sharing plan, contains two distribution provisions. Under the first provision, in any year after an employee attains age 59½, the employee may elect a distribution of any specified amount not exceeding the balance of the employee's account. In addition, the plan provides a section 401(a)(9) override provision under which, if, during any year following the year that the employee attains age 70½, the

employee does not elect an amount at least equal to the minimum amount necessary to satisfy section 401(a)(9) (calculated in accordance with a method specified in the plan), Plan C will distribute the difference by December 31 of that year (or for the year the employee attains age 70½, by April 1 of the following year). On December 31, 1996, Plan C is amended to provide that, for an employee other than an employee who is a 5-percent owner in the year the employee attains age 70½, in applying the section 401(a)(9) override provision, the later of the year of retirement or year of attainment of age 70½, is substituted for the year of attainment of age 70½. After the amendment, Plan C still permits each employee to elect to receive the same amount as was available before the amendment. Because this amendment does not eliminate an optional form of benefit, the amendment does not violate section 411(d)(6). Accordingly, the amendment is not required to satisfy the conditions of paragraph (b) of this Q&A-10.

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

## PART 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

**Par. 3.** The authority citation for part 602 continues to read as follows:

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

**Par. 4.** In § 602.101, paragraph (c) is amended by adding an entry in numerical order to the table to read as follows:

### § 602.101 OMB control numbers.

* * * * *				
(c) * * *				
CFR part or section where identified and described				Current OMB control No.
* * * * *				*
1.411(d)-4	.....			1545-1545
* * * * *				*

**Michael P. Dolan,**

*Deputy Commissioner of Internal Revenue.*

Approved: May 11, 1998.

**Donald C. Lubick,**

*Assistant Secretary of the Treasury.*

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

BILLING CODE 4830-01-U

## EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

### 29 CFR Part 1625

### Waiver of Rights and Claims Under the Age Discrimination in Employment Act (ADEA)

**AGENCY:** Equal Employment Opportunity Commission.

**ACTION:** Final rule.

**SUMMARY:** EEOC is publishing this final regulation on agreements waiving rights and claims under the Age Discrimination in Employment Act, in order to set forth procedures for complying with the Older Workers Benefit Protection Act of 1990.

**DATES:** This final regulation will be effective on July 6, 1998.

### FOR FURTHER INFORMATION CONTACT:

Joseph N. Cleary, Assistant Legal Counsel, or Paul E. Boymel, Senior Attorney-Advisor, Office of Legal Counsel, 202-663-4692 (voice), 202-663-7026 (TDD).

### SUPPLEMENTARY INFORMATION:

#### A. History

Congress amended the ADEA by enacting the Older Workers Benefit Protection Act of 1990 (OWBPA), Pub. L. 101-433, 104 Stat. 983 (1990), to clarify the prohibitions against discrimination on the basis of age. In Title II of OWBPA, Congress addressed waivers of rights and claims under the ADEA, amending section 7 of the ADEA by adding a new subsection (f), 29 U.S.C. 626(f).

Section 7(f)(1) provides that "an individual may not waive any right or claim under the [ADEA] unless the waiver is knowing and voluntary." Section 7(f) sets out the minimum criteria for determining whether a waiver is knowing and voluntary.

In light of the OWBPA amendments, EEOC published an Advance Notice of Proposed Rulemaking (ANPRM) in the **Federal Register**, 57 FR 10626 (March 27, 1992), seeking information from the public on various issues under both titles of OWBPA. In response to the ANPRM, EEOC received approximately 40 comments, many of which presented detailed analyses of Title II issues, requesting EEOC to provide formal guidance on waivers of rights and claims under the ADEA. Since the publication of the ANPRM, EEOC also has received numerous written and telephone inquiries requesting information on how to comply with Title II.

On August 31, 1995, EEOC announced in the **Federal Register**, 60