

Part III - Administrative, Procedural, and Miscellaneous

Special Rules Governing Eligible Combined Plans.

Notice 2009-71

I. PURPOSE

The Treasury Department and the Internal Revenue Service plan to issue guidance relating to eligible combined plans under §414(x) of the Internal Revenue Code (Code). Section 414(x) was added by section 903(a) of the Pension Protection Act of 2006, Public Law 109-280, 120 Stat. 780 (PPA '06), effective for plan years beginning after December 31, 2009, and amended by section 109(c) of the Worker, Retiree, and Employer Recovery Act of 2008, Public Law 110-458, 122 Stat. 5092 (WRERA). An eligible combined plan provides a vehicle through which an employer can maintain both a defined contribution plan and a defined benefit plan on a combined basis, thus reducing the administrative burdens and costs of maintaining separate plans. This

notice requests comments on issues presented by § 414(x) of the Code with respect to eligible combined plans.

II. BACKGROUND

In general

Qualified retirement plans are subject to various requirements under the Code. Whether a particular requirement applies, or how a particular requirement applies, may depend on whether the plan is a defined contribution plan or a defined benefit plan. These requirements include nondiscrimination with respect to contributions or benefits under § 401(a)(4), vesting under § 401(a)(7) and 411, survivor annuity requirements under § 401(a)(11), limits on contributions and benefits under § 401(a)(16) and 415, and minimum funding standards under § 412.

Under § 414(i), a “defined contribution plan” is a plan that provides for an individual account for each participant and for benefits based solely on the amount contributed to the participant’s account, and any income, expenses, gains and losses, and any forfeitures allocated to the participant’s account. Under § 414(j), a “defined benefit plan” is any plan that is not a defined contribution plan. Under § 414(k), a defined benefit plan that provides a benefit derived from employer contributions based partly on the balance of a participant’s separate account is treated as a defined contribution plan for certain purposes and as a defined benefit plan for other purposes.

Certain defined contribution plans may include a qualified cash or deferred arrangement under § 401(k). A qualified cash or deferred arrangement is an arrangement: (1) under which an eligible employee may elect to have the employer make payments as contributions to the plan on behalf of the employee (referred to as

“elective contributions”) or to make payments directly to the employee in cash; and (2) which meets certain other requirements. See §401(k)(2) and §1.401(k)-1(a)(4)(i) of the Income Tax Regulations. In some cases, a qualified cash or deferred arrangement is structured so that an eligible employee is treated as having elected to have the employer make elective contributions in a specified amount unless the employee elects to receive the amount directly in cash or to have the employer make elective contributions in a different amount (referred to as an “automatic contribution arrangement”).

Section 701 of PPA '06 added new provisions to the Code relating to applicable defined benefit plans. Under §411(a)(13)(C) of the Code, an “applicable defined benefit plan” is: (1) a defined benefit plan under which the accrued benefit (or any portion thereof) is calculated as the balance of a hypothetical account maintained for the participant or as an accumulated percentage of the participant's final average compensation; or (2) to the extent provided under regulations, a defined benefit plan (or any portion of such a plan) that has a similar effect.

Section 6058 generally requires an employer maintaining a qualified retirement plan to file an annual return with respect to the plan. Section 6059 generally requires the plan administrator of a defined benefit plan to file an actuarial report with respect to the plan on a periodic basis. Form 5500, Annual Return/Report of Employee Benefit Plan, which consists of a primary form and various schedules, includes the information required to be filed under §6058 and 6059, as well as information required to be reported to the Department of Labor and the Pension Benefit Guaranty Corporation under the Employee Retirement Income Security Act of 1974, as amended, Public Law 93-406

(ERISA). The plan administrator generally satisfies annual reporting requirements with respect to each of the three agencies by filing the Form 5500.

Code § 414(x)

Section 414(x) of the Code, added by section 903(a) of PPA '06 and amended by section 109(c) of WRERA, provides special rules for eligible combined plans.¹

Definitions

Under §414(x)(2)(A) of the Code, an “eligible combined plan” is a plan: (1) that is maintained by an employer that is a small employer at the time the plan is established; (2) that consists of a defined benefit plan and an applicable defined contribution plan; (3) the assets of which are held in a single trust forming part of the plan and are clearly identified and allocated to the defined benefit plan and the applicable defined contribution plan to the extent necessary for the separate application of the Code; and (4) that meets the benefit, contribution, vesting, and nondiscrimination requirements under §414(x). Section 414(x)(2)(A) also provides that a “small employer” is generally an employer (taking into account the rules of §414(b), (c), (m), and (o)) that employed an average of at least 2 but not more than 500 employees on each business day during the preceding calendar year and who employs at least 2 employees on the first day of the plan year. In the case of an employer that was not in existence throughout the preceding calendar year, the determination of whether the employer is a small employer is based on the average number of employees it is reasonably expected the employer will employ on business days in the current calendar year. Section 414(x)(7) defines an

¹ Similarly, section 903(b) of PPA '06 amends ERISA to add new section 210(e), which provides special rules for eligible combined plans.

“applicable defined contribution plan” as a defined contribution plan that includes a qualified cash or deferred arrangement.

Application of qualified plan requirements to eligible combined plans

Section 414(x)(1) provides that, except as otherwise provided in §414(x), the requirements of the Code are applied to a defined benefit plan or applicable defined contribution plan that is part of an eligible combined plan in the same manner as if each such plan were not a part of the eligible combined plan. Further, in the case of the termination of both the defined benefit plan and the applicable defined contribution plan forming an eligible combined plan, the defined benefit plan and the applicable defined contribution plan must be terminated separately by the plan administrator. Under §414(x)(6)(A), the rules of §414(k), which determine the requirements applicable to defined benefit pension plans with separate participant accounts, do not apply to eligible combined plans.

Minimum benefits and vesting under defined benefit plan

Under §414(x)(2)(B), the defined benefit plan that forms part of the eligible combined plan must provide each participant with a minimum employer-provided accrued benefit. The minimum benefit must be an annual retirement benefit that is not less than the applicable percentage of the participant's final average pay. For this purpose, the applicable percentage is the lesser of: (1) 1 percent multiplied by the participant's years of service with the employer or (2) 20 percent. Final average pay is determined using the period of consecutive years (not exceeding five) during which the participant had the greatest aggregate compensation from the employer.

A special rule applies in the case of an applicable defined benefit plan that meets

certain interest credit requirements under § 411(b)(5)(B)(i). Such a plan is treated as meeting the minimum benefit requirement with respect to any plan year if, for the plan year, each participant receives a minimum pay credit to his or her hypothetical account. The minimum pay credit must be not less than the percentage of compensation applicable to the participant in accordance with the following table:

Participant's Age as of Beginning of Plan Year	Percentage
30 or less	2
Over 30 but less than 40	4
40 or over but less than 50	6
50 or over	8

For purposes of the minimum benefit rules, years of service are determined under the rules of § 411(a)(4), (5), and (6), except that the plan may not disregard any year of service merely because a participant makes, or fails to make, any elective contributions under the qualified cash or deferred arrangement that is included in the applicable defined contribution plan that forms part of the eligible combined plan.

Under § 414(x)(2)(D), a participant must be fully vested in his or her employer-provided accrued benefit under the defined benefit plan after completion of three years of service.

Minimum contributions and vesting under applicable defined contribution plan

Under § 414(x)(2)(C), the applicable defined contribution plan that forms part of the eligible combined plan must meet certain contribution requirements. In particular,

the qualified cash or deferred arrangement included in such plan must constitute an automatic contribution arrangement. In addition, the employer must be required to make matching contributions on behalf of each employee eligible to participate in the qualified cash or deferred arrangement. To satisfy the basic matching contribution requirement in § 414(x)(2)(C)(i)(II), matching contributions must be made in an amount equal to 50 percent of the elective contributions of the employee to the extent such elective contributions do not exceed 4 percent of compensation. Alternatively, the plan may provide for a different rate of matching contribution, provided that the rate of matching contribution does not increase as the participant's rate of elective contribution increases, and the aggregate amount of matching contributions at each rate of elective contribution is no less than the aggregate amount of matching contributions that would be provided under the basic matching contribution requirement. In no case may the rate of matching contribution for any elective contribution of a highly compensated employee at any rate of elective contribution be higher than the rate of matching contribution for a nonhighly compensated employee.

The applicable defined contribution plan can also provide for nonelective employer contributions, but nonelective contributions are not taken into account in determining whether the matching contribution requirements are met.

Under § 414(x)(2)(D), all participants must be fully vested in any matching contributions provided under the applicable defined contribution plan, including any matching contributions exceeding required matching contributions. In addition, a participant must be fully vested in any nonelective contributions under the applicable defined contribution plan after completion of three years of service.

Other benefit and contribution requirements

Under§414(x)(2)(E), all contributions and benefits under the defined benefit plan and applicable defined contribution plan forming part of the eligible combined plan, and all rights and features under each such plan, must be provided uniformly to all participants. Under§414(x)(2)(F), the minimum benefit and contribution requirements applicable to the defined benefit plan and applicable defined contribution plan must be met without application of the permitted disparity rules under§401(l). In addition, the defined benefit plan and applicable defined contribution plan must meet the nondiscrimination requirements under§401(a)(4) and the minimum coverage requirements under§410(b) without application of the permitted disparity rules and without being combined with any other plan.

Nondiscrimination and top-heavy requirements

Under§414(x)(3), a qualified cash or deferred arrangement that is included in the applicable defined contribution plan that forms part of an eligible combined plan and that meets the minimum contribution requirements described above is treated as meeting the actual deferral percentage test under§401(k) on a safe harbor basis. In addition, in applying the safe harbor contribution percentage test for matching contributions under §401(m)(11), the minimum contribution requirements described above and the notice requirements described below are substituted for the otherwise applicable minimum contribution and notice requirements.

Under§414(x)(4), a defined benefit plan and applicable defined contribution plan forming part of an eligible combined plan for any plan year are treated as meeting the top-heavy requirements under§416.

Automatic contribution and notice requirements

Under §414(x)(5), the qualified cash or deferred arrangement that is included in an eligible combined plan is treated as an automatic contribution arrangement if it meets certain notice and election requirements and provides that each employee eligible to participate in the arrangement is treated as having elected to make elective contributions in an amount equal to 4 percent of the employee's compensation unless the employee specifically elects not to have such contributions made or to have such contributions made at a different rate. Each employee eligible to participate in the qualified cash or deferred arrangement must receive a notice explaining the employee's right under the arrangement to elect not to have elective contributions made on the employee's behalf or to have the contributions made at a different rate. Each eligible employee must also have a reasonable period of time after receipt of the notice and before the first elective contribution is made to make an election. In addition, within a reasonable period before any year, each eligible employee must be given notice of the employee's rights and obligations under the arrangement. The notice must be sufficiently accurate and comprehensive to apprise the employee of the employee's rights and obligations and must be written in a manner calculated to be understood by the average eligible employee.

Reporting requirements

Section 414(x)(6)(B) provides that an eligible combined plan is treated as a single plan for purposes of §§6058 and 6059.

III. EFFECTIVE DATE

Section 414(x) is effective for plan years beginning after December 31, 2009. It is anticipated that the guidance under consideration in this notice would be prospective.

IV. COMMENTS REQUESTED

Written comments are requested regarding possible issues to be addressed in guidance under §414(x).

Written comments should be submitted by October 15, 2009. Send submissions to CC:PA:LPD:PR, (Notice 2009-xx), Room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, D.C. 20044. Comments may also be hand delivered Monday through Friday between the hours of 8 a.m. and 4:00 p.m. to: CC:PA:LPD:PR, (Notice 2009-xx), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, N.W., Washington DC. Alternatively, comments may be submitted via the Internet at notice.comments@irscounsel.treas.gov (Notice 2009-71). All comments will be available for public inspection.

DRAFTING INFORMATION

The principal author of this notice is Natalie Payne, formerly of the Office of the Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). For further information regarding this notice, contact Qualified Plans Branch 1 of the Office of the Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities) at (202) 622-6090 (not a toll-free number).