

(v) *Liabilities in excess of basis.* The facts are the same as in paragraph (i) of this *Example 1*, except that T's assets have a fair market value of \$170 (and \$60 basis) and are subject to \$70 of liabilities. Under paragraph (c) of this section, T's net asset basis is negative \$10 (\$60 minus \$70). See sections 351 and 358, and §§ 1.1502-19 and 1.1502-80(d). Thus, P has a \$10 excess loss account in S's stock. Under section 362, S has a \$60 basis in its assets (which are subject to \$70 of liabilities). (Under paragraph (a)(2) of this section, because the liabilities are taken into account in determining net asset basis under paragraph (c) of this section, the liabilities are not also taken into account as consideration not provided by P under paragraph (d)(1) of this section.)

(vi) *Consideration provided by S.* The facts are the same as in paragraph (i) of this *Example 1*, except that P forms S with a \$100 contribution at the beginning of Year 1, and during Year 6, pursuant to a plan, S purchases \$100 of P stock and T merges into S with the T shareholders receiving P stock in exchange for their T stock. Under paragraph (b)(1) of this section, P's \$100 basis in S's stock is increased by \$60 to reflect T's net asset basis. Under paragraph (d)(1) of this section, P's basis in S's stock is decreased by \$100 (the fair market value of the P stock) because the P stock purchased by S and used in the transaction is consideration not provided by P.

(vii) *Appreciated asset provided by S.* The facts are the same as in paragraph (i) of this *Example 1*, except that P has owned the stock of S for several years, and the shareholders of T receive \$60 of P stock and an asset of S with a \$30 adjusted basis and \$40 fair market value. S recognizes a \$10 gain from the asset under section 1001. Under paragraph (b)(1) of this section, P's basis in S's stock is increased by \$60 to reflect T's net asset basis. Under paragraph (d)(1) of this section, P's basis in S's stock is decreased by \$40 (the fair market value of the asset provided by S). In addition, P's basis in S's stock is increased under § 1.1502-32(b) by S's \$10 gain.

(viii) *Depreciated asset provided by S.* The facts are the same as in paragraph (i) of this *Example 1*, except that P has owned the stock of S for several years, and the shareholders of T receive \$60 of P stock and an asset of S with a \$50 adjusted basis and \$40 fair market value. S recognizes a \$10 loss from the asset under section 1001. Under paragraph (b)(1) of this section, P's basis in S's stock is increased by \$60 to reflect T's net asset basis. Under paragraph (d)(1) of this section, P's basis in S's stock is decreased by \$40 (the fair market value of the asset provided by S). In addition, S's \$10 loss is taken into account under § 1.1502-32(b) in determining P's basis adjustments under that section.

*Example 2. Stock acquisition.* (i) *Facts.* P is the common parent of one group and T is the common parent of another. T has assets with an aggregate basis of \$60 and fair market value of \$100 and no liabilities. T's shareholders have an aggregate basis of \$50 in T's stock. Pursuant to a plan, P forms S and S acquires all of T's stock in exchange for P stock in a transaction described in

section 368(a)(1)(B). The transaction is also a reverse acquisition under § 1.1502-75(d)(3). Thus, the transaction is a group structure change under § 1.1502-33(f)(1), and the earnings and profits of P and S are adjusted to reflect T's earnings and profits immediately before T ceases to be the common parent of the T group.

(ii) *Analysis.* Under paragraph (d)(4) of this section, although S is not the new common parent of the T group, adjustments must be made to S's basis in T's stock in accordance with the principles of this section. Although S's basis in T's stock would ordinarily be determined under section 362 by reference to the basis of T's shareholders in T's stock immediately before the group structure change, under the principles of paragraph (b)(2) of this section, S's basis in T's stock is determined by reference to T's net asset basis. Thus, S's basis in T's stock is \$60.

(iii) *Higher-tier adjustments.* Under paragraph (d)(4) of this section, P's basis in S's stock is increased by \$60 (to be consistent with the adjustment to S's basis in T's stock).

(iv) *Cross ownership.* The facts are the same as in paragraph (i) of this *Example 2*, except that several years ago S purchased 10% of T's stock from an unrelated person for cash and, pursuant to the plan, S acquires the remaining 90% of T's stock in exchange for P stock. S's basis in the initial 10% of T's stock is not redetermined under this section. However, S's basis in the additional 90% of T's stock is redetermined under this section. S's basis in that stock is adjusted to \$54 (90% of T's net asset basis).

(v) *Allocable share.* The facts are the same as in paragraph (i) of this *Example 2*, except that P owns only 90% of S's stock immediately after the group structure change. S's basis in T's stock is the same as in paragraph (ii) of this *Example 2*. Under paragraph (d)(2) of this section, P's basis in its S stock is increased by \$54 (90% of S's \$60 adjustment).

*Example 3. Taxable stock acquisition.* (i) *Facts.* P is the common parent of one group and T is the common parent of another. T has assets with an aggregate basis of \$60 and fair market value of \$100 and no liabilities. T's shareholders have an aggregate basis of \$50 in T's stock. Pursuant to a plan, P acquires all of T's stock in exchange for \$70 of P's stock and \$30 in a transaction that is a group structure change under § 1.1502-33(f)(1). P's basis in its acquired T stock is not determined in whole or in part by reference to the basis of the property exchanged for such stock. (Because of P's use of cash, the acquisition is not a transaction described in section 368(a)(1)(B).)

(ii) *Analysis.* The rules of this section do not apply to determine P's basis in T's stock. Therefore, P's basis in T's stock is \$100.

(h) *Effective dates—(1) General rule.* This section applies to group structure changes that occur after the date these regulations are published as temporary or final regulations in the **Federal Register**. However, after the date these regulations are published as temporary or final regulations in the **Federal Register**, a group may apply this section to group structure changes that occur on

or before the date these regulations are published as temporary or final regulations in the **Federal Register** and in consolidated return years beginning on or after January 1, 1995.

(2) *Prior law.* For group structure changes that occur on or before the date these regulations are published as temporary or final regulations in the **Federal Register** and in consolidated return years beginning on or after January 1, 1995, with respect to which the group does not elect to apply the provisions of this section, see § 1.1502-31 as contained in the 26 CFR part 1 edition revised as of April 1, 2003. For group structure changes that occur in consolidated return years beginning before January 1, 1995, see § 1.1502-31T as contained in the 26 CFR part 1 edition revised as of April 1, 1994.

**Robert E. Wenzel,**

*Deputy Commissioner for Services and Enforcement.*

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**BILLING CODE 4830-01-P**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

#### 26 CFR Part 1

[REG-112039-03]

RIN 1545-BC35

### Elimination of Forms of Distribution in Defined Contribution Plans

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

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** This document contains proposed regulations that would modify the circumstances under which certain forms of distribution previously available are permitted to be eliminated from qualified defined contribution plans. These proposed regulations affect qualified retirement plan sponsors, administrators, and participants. This document also provides notice of a public hearing on these proposed regulations.

**DATES:** Written and electronic comments and requests for a public hearing must be received by October 6, 2003.

**ADDRESSES:** Send submissions to: CC:PA:RU (REG-112039-03), room 5226, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 5 p.m. to: CC:PA:RU (REG-112039-03), Courier's Desk, Internal Revenue

Service, 1111 Constitution Avenue NW., Washington, DC. Alternatively, taxpayers may submit comments electronically directly to the IRS Internet site at: [www.irs.gov/regs](http://www.irs.gov/regs).

**FOR FURTHER INFORMATION CONTACT:**

Concerning the regulations, Vernon S. Carter, 202-622-6060 (not a toll-free number); concerning submissions or hearing requests, Guy Traynor, 202-622-7180 (not a toll-free number).

**SUPPLEMENTARY INFORMATION:**

**Explanation of Provisions**

This document contains proposed amendments to 26 CFR part 1 under section 411(d)(6) of the Internal Revenue Code of 1986 (Code) as amended by the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) (115 Stat. 117). Section 411(d)(6)(A) of the Code 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. Section 411(d)(6)(B) prior to amendment by EGTRRA provided that an amendment is treated as reducing an accrued benefit if, with respect to benefits accrued before the amendment is adopted, the amendment has the effect of either eliminating or reducing an early retirement benefit or a retirement-type subsidy, or, except as provided by regulations, eliminating an optional form of benefit.

The IRS published TD 8900 in the **Federal Register** on September 6, 2000 (65 FR 53901). TD 8900, which amended § 1.411(d)-4 of the Income Tax Regulations, added paragraph (e) of Q&A-2 to provide for additional circumstances under which a defined contribution plan can be amended to eliminate or restrict a participant's right to receive payment of accrued benefits under certain optional forms of benefit.

Section 1.411(d)-4, Q&A-2(e)(1) provides that a defined contribution plan may be amended to eliminate or restrict a participant's right to receive payment of accrued benefits under a particular optional form of benefit without violating the section 411(d)(6) anti-cutback rules if, once the plan amendment takes effect for a participant, the alternative forms of payment that remain available to the participant include payment in a single-sum distribution form that is "otherwise identical" to the eliminated or restricted optional form of benefit. The amendment cannot apply to a participant for any distribution with an annuity starting date before the earlier of the 90th day after the participant receives a summary that reflects the

plan amendment and that satisfies Department of Labor's requirements for a summary of material modifications under 29 CFR 2520.104b-3, or the first day of the second plan year following the plan year in which the amendment is adopted. Section § 1.411(d)-4, Q&A-2(e)(2) provides that a single-sum distribution form is "otherwise identical" to the optional form of benefit that is being eliminated or restricted only if it is identical in all respects (or would be identical except that it provides greater rights to the participant), except for the timing of payments after commencement. A single-sum distribution form is not "otherwise identical" to a specified installment form of benefit if the single-sum form:

- Is not available for distribution on any date on which the installment form could have commenced;
- is not available in the same medium as the installment form; or
- imposes any additional condition of eligibility.

Further, an otherwise identical distribution form need not retain any rights or features of the eliminated or restricted optional form of benefit to the extent those rights or features would not be protected from elimination under the anti-cutback rules. The single-sum distribution form would not, however, be disqualified from being an otherwise identical distribution form if the single-sum form provides greater rights to participants than did the eliminated or restricted optional form of benefits.

Section 645(a)(1) of EGTRRA revised section 411(d)(6) in a manner that is similar to § 1.411(d)-4, Q&A-2(e), but without the advance notice condition. Section 411(d)(6)(E) of the Code provides that, except to the extent provided in regulations, a defined contribution plan is not treated as reducing a participant's accrued benefit where a plan amendment eliminates a form of distribution previously available under the plan if a single-sum distribution is available to the participant at the same time as the form of distribution eliminated by the amendment, and the single-sum distribution is based on the same or greater portion of the participant's account as the form of distribution eliminated by the amendment.

To reflect the addition of section 411(d)(6)(E) by EGTRRA, these proposed regulations would amend § 1.411(d)-4, Q&A-2(e). Under these amendments, the regulations would retain the rules under which a defined contribution plan may be amended to eliminate or restrict a participant's right

to receive payment of accrued benefits under a particular optional form of benefit without violating the section 411(d)(6) anti-cutback rules if, once the plan amendment takes effect for a participant, the alternative forms of payment that remain available to the participant include payment in a single-sum distribution. However, these proposed regulations would remove the 90-day notice condition previously applicable to these plan amendments.<sup>1</sup>

Under section 101 of Reorganization Plan No. 4 of 1978 (43 FR 47713), the Secretary of the Treasury has interpretive jurisdiction over the subject matter addressed in these regulations for purposes of the Employee Retirement Income Security Act of 1974 (ERISA), as well as the Code. Section 204(g)(2) of ERISA, as amended by EGTRRA, provides a parallel rule to section 411(d)(6)(E) of the Code that applies under Title I of ERISA, and authorizes the Secretary of the Treasury to provide exception to this parallel ERISA requirement. Therefore, these regulations apply for purposes of the parallel requirements of sections 204(g)(2) of ERISA, as well as for section 411(d)(6)(E) of the Code.

**Effective Date and Applicability Date**

The proposed regulations are proposed to apply on the date of publication of final regulations in the **Federal Register**.

**Special Analyses**

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

<sup>1</sup> The Department of Labor has advised Treasury and the IRS that it should be noted that plans covered by Title I of ERISA will continue to be subject to the requirement under Title I that plan amendments be described in a timely summary of material modifications (SMM) or a revised summary plan description (SPD) to be distributed to plan participants and beneficiaries in accordance with applicable Department of Labor disclosure rules (see 29 CFR 2520.104b-3)."

## Drafting Information

The principal author of these regulations is Vernon S. Carter of the Office of the Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the IRS and Treasury participated in their development.

## List of Subjects in 26 CFR Parts 1

Income taxes, Reporting and recordkeeping requirements.

## Amendments to the Regulations

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

**Paragraph 1.** The authority citation for part 1 is amended to read in part as follows:

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

Section 1.411(d)-4, Q&A-2(e) also issued under 26 U.S.C. 411(d)(6)(E).  
\* \* \*

**Par. 2.** Section 1.411(d)-4, Q&A-2(e) is revised to read as follows:

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

\* \* \* \* \*

A-2: \* \* \*

(e) *Permitted plan amendments affecting alternative forms of payment under defined contribution plans—(1) General rule.* A defined contribution plan does not violate the requirements of section 411(d)(6) merely because the plan is amended to eliminate or restrict the ability of a participant to receive payment of accrued benefits under a particular optional form of benefit if, after the plan amendment is effective with respect to the participant, the alternative forms of payment available to the participant include payment in a single-sum distribution form that is otherwise identical to the optional form of benefit that is being eliminated or restricted.

(2) *Otherwise identical single-sum distribution.* For purposes of this paragraph (e), a single-sum distribution form is otherwise identical to an optional form of benefit that is eliminated or restricted pursuant to paragraph (e)(1) of this Q&A-2 only if the single-sum distribution form is identical in all respects to the eliminated or restricted optional form of benefit (or would be identical except that it provides greater rights to the participant) except with respect to the timing of payments after commencement. For example, a single-sum distribution form is not otherwise identical to a specified installment form of benefit if the single-sum distribution form is not available for distribution on the date on which the installment form

would have been available for commencement, is not available in the same medium of distribution as the installment form, or imposes any condition of eligibility that did not apply to the installment form. However, an otherwise identical distribution form need not retain rights or features of the optional form of benefit that is eliminated or restricted to the extent that those rights or features would not be protected from elimination or restriction under section 411(d)(6) or this section.

(3) *Example.* The following example illustrates the application of this paragraph (e):

*Example.* (i) P is a participant in Plan M, a qualified profit-sharing plan with a calendar plan year that is invested in mutual funds. The distribution forms available to P under Plan M include a distribution of P's vested account balance under Plan M in the form of distribution of various annuity contract forms (including a single life annuity and a joint and survivor annuity). The annuity payments under the annuity contract forms begin as of the first day of the month following P's severance from employment (or as of the first day of any subsequent month, subject to the requirements of section 401(a)(9)). P has not previously elected payment of benefits in the form of a life annuity, and Plan M is not a direct or indirect transferee of any plan that is a defined benefit plan or a defined contribution plan that is subject to section 412. Distributions on the death of a participant are made in accordance with plan provisions that comply with section 401(a)(11)(B)(iii)(I). On May 2, 2004, Plan M is amended so that, after the amendment is effective, P is no longer entitled to any distribution in the form of the distribution of an annuity contract. However, after the amendment is effective, P is entitled to receive a single-sum cash distribution of P's vested account balance under Plan M payable as of the first day of the month following P's severance from employment (or as of the first day of any subsequent month, subject to the requirements of section 401(a)(9)). The amendment does not apply to P if P elects to have annuity payments begin before July 1, 2004.

(ii) Plan M does not violate the requirements of section 411(d)(6) (or section 401(a)(11)) merely because, as of July 1, 2004, the plan amendment has eliminated P's option to receive a distribution in any of the various annuity contract forms previously available.

(4) *Effective date.* This paragraph (e) is applicable on the date of publication of final regulations in the **Federal Register**.

\* \* \* \* \*

**Robert E. Wenzel,**

*Deputy Commissioner for Services and Enforcement.*

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**BILLING CODE 4830-01-P**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

### 26 CFR Part 1

[REG-209377-89]

**RIN 1545-BA69**

### At-Risk Limitations; Interest Other Than That of a Creditor

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

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** This document contains proposed regulations relating to the treatment, for purposes of the at-risk limitations, of amounts borrowed from a person who has an interest in an activity other than that of a creditor or from a person related to a person (other than the borrower) with such an interest. Proposed regulations published in 1979 provide that amounts borrowed from a person who has an interest in an activity other than that of a creditor do not increase the amount at risk in certain enumerated activities. These proposed regulations extend this rule to all activities subject to the at-risk limitations. In addition, the rule is conformed to the current statutory language providing for its application to amounts borrowed from persons related to a person (other than the borrower) with an interest other than that of a creditor. These proposed regulations affect taxpayers subject to the at-risk limitations and provide them with guidance necessary to comply with the law.

**DATES:** Written or electronic comments and requests for a public hearing must be received no later than October 6, 2003.

**ADDRESSES:** Send submissions to: CC:PA:RU (REG-209377-89), room 5226, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may also be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to: CC:PA:RU (REG-209377-89), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC. Alternatively, taxpayers may submit electronic comments directly to the IRS Internet site at: <http://www.irs.gov/regs>.

**FOR FURTHER INFORMATION CONTACT:** Concerning the regulations, Tara P. Volungis or Christopher L. Trump, 202-622-3080; concerning submissions and requests for a public hearing, [INSERT NAME], 202-622-7180 (not toll-free numbers).