Working Group
Meeting Agenda: September 25, 2024

I. Call to Order
Chair Auditor Blaha.

II. Review and Approval of Working Group Meeting Minutes
Exhibit A. Draft September 5, 2024, Meeting Minutes

III. Discussion of Audit Frequency
Exhibit B.

IV. Discussion of Minimum Retirement Age (Payments before 50)

V. Discussion of Special Fund Member Contributions
Exhibit C.

VI. Review of Position Statement on Length of Service Incentives
Exhibit D.

VII. Other Business

VIII. Next Meeting
Tuesday, October 1, 2024
2:00 p.m. to 3:30 p.m.
In-Person/Virtual Hybrid Format

IX. Adjournment

Individuals who need a reasonable accommodation to participate in this event, please contact Rose Hennessy Allen at (651) 296-5985 or (800) 627-3529 (TTY) by September 24, 2024.

Exhibit A
9-5-24 Approved Minutes

Office of the State Auditor

Members Present
Julie Blaha, State Auditor
Tim Bush, Minnesota State Fire Chiefs Association Representative (defined contribution plans)
Roger Carlson, Minnesota State Fire Department Association Representative (defined benefit monthly/lump sum plans)
Jon Dahlke, Glencoe Fire Relief Association Treasurer (defined benefit monthly/lump sum plans)
Sue Iverson, Municipal Finance Representative
Dan Johnson, Mendota Heights Fire Relief Association Trustee (defined contribution plans)
Aaron Johnston, Coon Rapids Fire Relief Association Treasurer (defined contribution plans)
Mikal Knotek, St. Michael Fire Relief Association Secretary (defined benefit lump sum plans)
Karl Mork, Bemidji Fire Relief Association Treasurer (defined benefit lump sum plans)
Kevin Wall, Lower Saint Croix Valley Fire Relief Association President (defined benefit lump sum plans)
Michael Walstien, Plymouth Fire Relief Association Member (defined contribution plans)
Thomas Wilson, Eden Prairie Fire Relief Association Secretary (defined benefit monthly/lump sum plans)

Members Excused
Steve Donney, City of Harmony Mayor
Darrell Pettis, St. Peter Fire Relief Association Treasurer (defined benefit lump sum plans)

Office of the State Auditor Representatives Present
Ramona Advani, Deputy State Auditor and General Counsel
Rose Hennessy Allen, Office of the State Auditor Pension Director

Legislative Support Present
Susan Lenczewski, Legislative Commission on Pensions and Retirement Executive Director

I. Call to Order

Auditor Blaha called the meeting to order. She explained that the meeting was being conducted in a hybrid format and being recorded and streamed to the Office of the State Auditor (OSA) YouTube channel. The meeting agenda was accepted with no objections.

II. Review and Approval of Working Group Meeting Minutes

Members reviewed the August 21, 2024, meeting minutes that had been provided in advance. The meeting minutes were accepted with no objections.

III. Public Input on Minimum Retirement Age Topic

During the August meeting Working Group members began discussing the topic of whether relief associations should have authority to pay retirement benefits to members who are not yet 50. Executive Director Lenczewski is pulling together some information on this topic that will be shared during the September 25 meeting. However, because it was mentioned in the fire relief association monthly newsletter and during last month's meeting that the topic would be discussed today, space was provided for any members of the public who wanted to share their thoughts on early distributions. Hennessy Allen shared that she received two email responses to the newsletter from defined benefit relief associations that were supportive of permitting distributions before age 50. There were no other comments from members of the public.

Executive Director Lenczewski shared that qualified plans do not have the discretion to only offer members the option of rolling over their benefits to an eligible retirement plan. Working Group members reiterated concerns that money may not be used for retirement purposes if direct distributions were permitted before age 50, and that members may incur early withdrawal tax penalties that they were not expecting. While having these concerns, Working Group were still interested in considering further whether relief associations should have the option of allowing early distributions. The group looked forward to discussing this further during the September 25 meeting.

IV. Position Statement on Minimum Service Requirements

Working Group members reviewed the draft position statement recommending that no changes to current law be recommended at this time with respect to a relief association's role in establishing minimum service requirements or determining whether individual firefighters have met those requirements. Wall made a motion to adopt the position statement. The motion was seconded by Johnston and then adopted unanimously.

V. Discussion of Length of Service Incentives

Hennessy Allen explained that some relief associations are interested in having flexibility to provide a monetary incentive to members who continue active service after becoming fully vested, as a way to retain experienced firefighters and reward and recognize them for their service. Working Group members discussed how experienced firefighters are valuable to the department, but that relief associations don't receive additional funding if they have longer-serving members and benefit formulas already result in higher benefits to members with longer lengths of service. While Working Group members acknowledged that being able to pay a one-time bonus to members would help reduce surpluses without incurring the additional ongoing liabilities of a benefit level increase, it was agreed that no changes should be pursued at this time. Concerns with a legislative change to permit length of service incentives included tax issues if distributions were made to members who had not yet separated from service, administrative difficulties in calculating liabilities and benefit amounts, and that the employer already has the ability to increase compensation to retain and reward firefighters. It was agreed that a position statement documenting the Working Group's decision to not pursue a change at this time would be drafted for review at the next meeting.

VI. Review of Technical Change

Working Group members reviewed draft language that would remove a calculation table from statute that is no longer needed. Hennessy Allen explained that the table was used to calculate active member accrued liability amounts on Schedule Forms for years before 2022. These forms have all been filed with the Office of the State Auditor, so the table is no longer needed. The liability calculation was changed beginning with the 2021 Schedule Form to be more precise if a relief association elected to offer full vesting after fewer than 20 years of service. The change was made to address concerns that the previous methodology could understate plan liabilities for members who are hired at older ages in relief associations with shorter vesting requirements. Working Group members had no concerns and voted unanimously to adopt the technical change.

VII. Discussion of Supplemental Benefits for Alternate Payees

Working Group members discussed whether the definition of "qualified recipient" for purposes of supplemental benefits should be amended to include alternate payees. This would permit a direct supplemental benefit distribution to an alternate payee who receives some or all of a relief association member's retirement benefit pursuant to a qualified domestic relations order. Working Group members had concerns about relief associations being responsible for tracking eligibility of these additional benefit payments, especially if the total amount paid to both the alternate payee and member were limited to the current $1,000 cap as the payments could occur years apart. Johnston made a motion to not change the definition of "qualified recipient" to include alternate payees. Knotek seconded the motion that was then adopted unanimously.

VIII. Other Business

There was no other business.

IX. Next Meeting

Wednesday, September 25, 2024
10:00 a.m. to 11:30 a.m.
In-Person/Virtual Hybrid Format

X. Adjournment

The meeting was adjourned at 3:21 p.m.

Minnesota Local Government

2023 Auditing and Reporting Requirements

Thresholds					Attributes					
Entity Type	*Sub Type or Population Size*	*Sub Type or Revenue*	*Clerk -Treasurer Structure*	*Revenue*	*Accounting Basis*	*Reporting*	*Frequency*	*Deadline*	*Fiscal Year End*	*Minnesota Statute*
County (87)					GAAP	Financial Audit	Annual	November 1	Varies	§ 375.17, § 6.481, § 6.74
Special District (615)	**Stand Alone** Unit (615*)	**Not** a watershed district, soil and water conservation district, or management org (448)		Revenues **under** $274,000 (137)	Cash	Unaudited financial statements, AUP	Statements: annually AUP: every 5 years	180 days from fiscal year end	Varies	§ 6.756
				Revenues **over** $274,000 (246)	Cash	Financial Audit	Annual	180 days from fiscal year end	Varies	§ 6.756
		Soil and Water Conservation District (97)			Cash	Financial Audit	Annual	October 31	Varies	§ 103C.325, MOU between OSA & BWSR
		Watershed District (45)			Cash	Financial Audit	Annual	120 days from fiscal year end	Varies	§ 103D.355, § 6.756, R. 8410.0150
		Watershed Management Org (25)			Cash	Financial Audit	Annual	120 days from fiscal year end	Varies	§ 103B.227, § 6.756, R. 8410.0150
	Component Unit (57)				Based on reporting unit	Based on reporting unit	Based on reporting unit	Based on reporting unit	Based on Reporting Unit	Based on reporting unit
City (854)	Population **under** 2500 (617)		**Separate** Clerk and Treasurer (231)		Cash	Unaudited financial statements	Annual	March 31	Dec	§ 6.74, § 471.698
			Combined Clerk and Treasurer (386)	Revenues **under** $274,000 (70)	Cash	Unaudited financial statements, AUP	Statements: annually AUP: every 5 years	Statements: March 31 AUP: June 30th	Dec	§ 6.74, § 471.698, § 412.02, § 412.591
				Revenues **over** $274,000 (316)	Cash	Financial Audit	Annual	March 31	Dec	§ 6.74, § 412.02, § 412.591
	Population **over** 2500 (236)				GAAP	Financial Audit	Annual	June 30	Dec	§ 471.697
Town (1779)	Population **under** 2500 (1736)		**Separate** Clerk and Treasurer (1595)		Cash	OSA Reporting Form	Annual	March 31	Dec	§ 6.74
			Combined Clerk and Treasurer (141)	Revenues **under** $274,000 (90)	Cash	Unaudited financial statements, Financial Audit	Statements: annually Audit: every 5 years	Statements: March 31 Audit: June 30th	Dec	§ 6.74, § 367.36
				Revenues **over** $274,000 (28)	Cash	Financial Audit	Annual	March 31	Dec	§ 6.74, § 367.36
	Population **over** 2500 (43)	Revenues **under** $1,223,000 (19)	**Separate** Clerk and Treasurer (18)		Cash	OSA Reporting Form	Annual	March 31	Dec	§ 6.74
			Combined Clerk and Treasurer (1)	Revenues **under** $274,000	Cash	Unaudited financial statements, Financial Audit	Statements: annually Audit: every 5 years	Statements: March 31 Audit: June 30th	Dec	§ 6.74, § 367.36
				Revenues **over** $274,000 (1)	Cash	Financial Audit	Annual	March 31	Dec	§ 6.74, § 367.36
		Revenues **over** $1,223,000 (24)			GAAP	Financial Audit	Annual	June 30	Dec	§ 471.697
Schools (576)	**School Districts** and **Charter** Schools (510)				GAAP	Unaudited data Audited Data Financial Audit	Annual	Unaudited: Sept 15 Audited Data: Nov 30 Audit: December 31	June	§ 123B.77, § 124E.16
	Other Districts (66)									

Notes:

- These are minimum reporting requirements. A local government might be required to do more based on other agreements.
- Cities, counties, special districts, and towns required to have an audit are also required to report data to the OSA.
- These may include, but are not limited to, single audit requirements, grant agreements, bond covenants, and joint powers agreements. Audited financial statements should be submitted when available.
- Local governments that have a minimum reporting requirement of cash basis but choose to report on a GAAP basis must meet all the requirements of a GAAP entity.
- Quantities in red are the number of entitites in each category based on 2022 counts
- * Items are estimates

Updated:
9/19/2024

From: Susan Lenczewski
To: Rose Hennessy-Allen
Cc: Lisa Diesslin
Subject: More for tomorrow"s meeting
Date: Tuesday, September 24, 2024 3:55:22 PM
Attachments: 353G excerpt from 2024 bill.docx
0025_001.pdf

Topic 2:

Distributions before age 50: Members of the firefighter work group have expressed an interest in amending the statutes to permit distributions to firefighters after leaving firefighting service, but before age 50. This issue has come up, in part, because the statutes that govern the PERA Statewide Volunteer Firefighter Plan were amended in the 2024 omnibus pension bill to add a defined contribution plan option and permit distributions from this type of plan to firefighters who leave service and request a distribution before reaching age 50. Please see the attached excerpt from the pension bill, which shows the amendments made to Section 353G.10. Subdivision 1 provides the distribution rules for (1) the defined contribution plan, (2) the lump sum defined benefit plan, and (3) the monthly defined benefit plan. Only paragraph (1) provides for distribution as soon as practicable after separating from active firefighting service, upon request of the firefighter.

This is a two-part analysis. The first is whether a defined benefit plan is permitted to distribute benefits prior to retirement age. Treasury regulation 1.401-1 has been around forever (since 1960) and states the following as the definition of a “pension plan”:

> (2) A qualified pension, profit-sharing, or stock bonus plan is a definite written program and arrangement which is communicated to the employees and which is established and maintained by an employer—
>
> (i) In the case of a pension plan, to provide for the livelihood of the employees or their beneficiaries after the retirement of such employees through the payment of benefits determined without regard to profits (see paragraph (b)(1)(i) of this section);...

“Pension plan” means the same as “defined benefit plan,” which is a term that became commonly used after these regulations were published.

Paragraph (b)(1)(i) states:

> (b) General rules. (1)(i) A pension plan within the meaning of section 401(a)

> is a plan established and maintained by an employer primarily to provide systematically for the payment of definitely determinable benefits to his employees over a period of years, usually for life, after retirement. Retirement benefits generally are measured by, and based on, such factors as years of service and compensation received by the employees. The determination of the amount of retirement benefits and the contributions to provide such benefits are not dependent upon profits....A plan designed to provide benefits for employees or their beneficiaries to be paid upon retirement or over a period of years after retirement will, for the purposes of section 401(a), be considered a pension plan if the employer contributions under the plan can be determined actuarially on the basis of definitely determinable benefits.... A pension plan may provide for the payment of a pension due to disability and may also provide for the payment of incidental death benefits through insurance or otherwise. However, a plan is not a pension plan if it provides for the payment of benefits not customarily included in a pension plan such as layoff benefits or benefits for sickness, accident, hospitalization, or medical expenses (except medical benefits described in section 401(h) as defined in paragraph (a) of § 1.401-14).

After ERISA became law in 1974, the IRS provided guidance on what constitutes "normal retirement age." Treasury regulation 1.401(a)-1 states:

> § 1.401(a)-1 Post-ERISA qualified plans and qualified trusts; in general.
>
> (a) Introduction—(1) In general. This section and the following regulation sections under section 401 reflect the provisions of section 401 after amendment by the Employee Retirement Income Security Act of 1974 (Pub. L. 93-406) ("ERISA").
>
> (b) Requirements for pension plans—(1) Definitely determinable benefits.
>
> (i) In order for a pension plan to be a qualified plan under section 401(a), the plan must be established and maintained by an employer primarily to provide systematically for the payment of definitely determinable benefits to its employees over a period of years, usually for life, after retirement or attainment of normal retirement age (subject to paragraph (b)(2) of this section). A plan does not fail to satisfy this paragraph (b)(1)(i) merely because the plan provides, in accordance with section 401(a)(36), that a

distribution may be made from the plan to an employee who has attained age 62 and who is not separated from employment at the time of such distribution.

(2) Normal retirement age—(i) General rule. The normal retirement age under a plan must be an age that is not earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed.

(ii) Age 62 safe harbor. A normal retirement age under a plan that is age 62 or later is deemed to be not earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed.

(iii) Age 55 to age 62. In the case of a normal retirement age that is not earlier than age 55 and is earlier than age 62, whether the age is not earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed is based on all of the relevant facts and circumstances.

(iv) Under age 55. A normal retirement age that is lower than age 55 is presumed to be earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed, unless the Commissioner determines that under the facts and circumstances the normal retirement age is not earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed.

(v) Age 50 safe harbor for qualified public safety employees. A normal retirement age under a plan that is age 50 or later is deemed to be not earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed if substantially all of the participants in the plan are qualified public safety employees (within the meaning of section 72(t)(10)(B)).

(3) Benefit distribution prior to retirement. For purposes of paragraph (b)(1)(i) of this section, retirement does not include a mere reduction in the number of hours that an employee works. Accordingly, benefits may not

> be distributed prior to normal retirement age solely due to a reduction in the number of hours that an employee works.

Section 72(t)(10)(B) defines "qualified public safety employees" as follows:

> (B)Qualified public safety employee.
> For purposes of this paragraph, the term "qualified public safety employee" means—
> (i) any employee of a State or political subdivision of a State who provides police protection, firefighting services, emergency medical services, or services as a corrections officer or as a forensic security employee providing for the care, custody, and control of forensic patients for any area within the jurisdiction of such State or political subdivision, ...

For the sake of completeness, I'll note that, more recently, the IRS issued proposed regulations on this topic, attached. I've highlighted parts that I believe are relevant to this issue. These are proposed regulations, but a plan may rely on them until final regs are issued.

There are no such restrictions on distributions from defined contribution plans, which may distribute retirement benefits after separation from service and even before separation from service if the contributions have been in the plan at least two years or the participant has had at least 5 years of participation (and the contributions are not 401(k) salary deferral contributions).

Based on the above analysis, my conclusion is that defined benefit plans cannot distribute retirement benefits before early or normal retirement age, the earliest of which can be age 50, while defined contribution plans are not subject to such restrictions.

Having concluded that, we look to the second part of the analysis, which is whether a firefighter will incur a 10% excise tax when the firefighter takes a distribution of the firefighter's benefit before normal retirement age. Internal Revenue Code section 72(t) governs this topic:

> (t) 10-percent additional tax on early distributions from qualified retirement plans
>
> 1. Imposition of additional tax. If any taxpayer receives any amount from a qualified retirement plan (as defined in section 4974(c)), the taxpayer's

tax under this chapter for the taxable year in which such amount is received shall be increased by an amount equal to 10 percent of the portion of such amount which is includible in gross income.

2. Subsection not to apply to certain distributions. Except as provided in paragraphs (3) and (4), paragraph (1) shall not apply to any of the following distributions:

A. In general. Distributions which are—

(i) made on or after the date on which the employee attains age 59½,

(ii) made to a beneficiary (or to the estate of the employee) on or after the death of the employee,

(iii) attributable to the employee's being disabled within the meaning of subsection (m)(7),

(iv) part of a series of substantially equal periodic payments (not less frequently than annually) made for the life (or life expectancy) of the employee or the joint lives (or joint life expectancies) of such employee and his designated beneficiary,

(v) made to an employee after separation from service after attainment of age 55,

(vi) – (ix) [not relevant].

Later on in Section 72(t), paragraph (10) states:

(10) Distributions to qualified public safety employees and private sector firefighters

(A) In general. In the case of a distribution to a qualified public safety employee from a governmental plan (within the meaning of section 414(d)) or a distribution from a plan described in clause (iii), (iv), or (vi) of section 402(c)(8)(B) to an employee who provides firefighting services, paragraph (2)(A)(v) shall be applied by substituting "age 50 or 25 years of service under the plan, whichever is earlier" for "age 55".

B. Qualified public safety employee. For purposes of this paragraph, the term “qualified public safety employee” means—

(i) any employee of a State or political subdivision of a State who provides police protection, firefighting services, emergency medical services, or services as a corrections officer or as a forensic security employee providing for the care, custody, and control of forensic patients for any area within the jurisdiction of such State or political subdivision,....

Based on the foregoing, since a defined benefit plan will not distribute a retirement benefit until after the firefighter leaves firefighting service and reaches age 50 (or a later normal retirement age, as defined by the plan), the firefighter will not be liable for the 10% excise tax. if a defined contribution plan, however, distributes a retirement benefit after the firefighter leaves firefighting service, but before the earlier of age 50 or 25 years of service, the firefighter will be liable for the 10% excise tax on the amount of the distribution, unless the firefighter rolls the distribution into another retirement plan or an IRA.

Susan

Legislative Commission on Pensions and Retirement
Susan Lenczewski, Executive Director
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the inclusion in the comment file of any such materials will be made available on the SEC's Web site. To ensure direct electronic receipt of such notifications, sign up through the "Stay Connected" option at *www.sec.gov* to receive notifications by email.

FOR FURTHER INFORMATION CONTACT: Shehzad K. Niazi, Special Counsel; Office of Rulemaking, Division of Corporation Finance, at (202) 551–3430; or Elliot Staffin, Special Counsel; Office of International Corporate Finance, Division of Corporation Finance, at (202) 551–3450, U.S. Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549.

SUPPLEMENTARY INFORMATION: The Commission has requested comment on a release proposing new Rule 13q–1 and an amendment to Form SD to implement Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act. Section 1504 added Section 13(q) to the Securities Exchange Act of 1934, which directs the Commission to issue rules requiring resource extraction issuers to include in an annual report information relating to any payment made by the issuer, a subsidiary of the issuer, or an entity under the control of the issuer, to a foreign government or the Federal Government for the purpose of the commercial development of oil, natural gas, or minerals. Section 13(q) requires a resource extraction issuer to provide information about the type and total amount of payments made for each project related to the commercial development of oil, natural gas, or minerals, and the type and total amount of payments made to each government. In addition, Section 13(q) requires a resource extraction issuer to provide certain information regarding those payments in an interactive data format, as specified by the Commission.

The Commission originally requested that initial comments on the release be received by January 25, 2016 and that reply comments, which may respond only to issues raised in the initial comment period, be received by February 16, 2016. The Commission has received a request for an extension of time for public comment on the proposal to, among other things, allow for the collection of information and to improve the quality of responses.[1] The Commission believes that providing the public additional time to consider thoroughly the matters addressed by the release and to submit comprehensive responses to the release would benefit the Commission in its consideration of final rules. Therefore, the Commission is extending the comment period for Release No. 34–76620 "Disclosure of Payments by Resource Extraction Issuers" until February 16, 2016 for initial comments and until March 8, 2016 for reply comments.

By the Commission.

Dated: January 21, 2016.

Brent J. Fields,

Secretary.

[FR Doc. 2016–01545 Filed 1–26–16; 8:45 am]

BILLING CODE 8011–01–P

[1] Letter from American Petroleum Institute (Jan. 7, 2016). Comments are available on the Commission's Web site at *http://www.sec.gov/comments/s7-25-15/s72515.shtml.*

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–147310–12]

RIN–1545–BM22

Applicability of Normal Retirement Age Regulations to Governmental Pension Plans

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations under section 401(a) of the Internal Revenue Code (Code). These regulations would provide rules relating to the determination of whether the normal retirement age under a governmental plan (within the meaning of section 414(d) of the Code) that is a pension plan satisfies the requirements of section 401(a) and whether the payment of definitely determinable benefits that commence at the plan's normal retirement age satisfies these requirements. These regulations would affect sponsors and administrators of governmental pension plans, as well as participants in such plans.

DATES: Comments and requests for a public hearing must be received by April 26, 2016.

ADDRESSES: Send submissions to CC:PA:LPD:PR (REG–147310–12), Room 5205, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–147310–12), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC 20224, or sent electronically via the Federal eRulemaking Portal at *www.regulations.gov* (IRS REG–147310–12).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Pamela Kinard at (202) 317–4148 or Robert Walsh at (202) 317–4102; concerning the submission of comments or to request a public hearing, Oluwafunmilayo (Funmi) Taylor, (202) 317–7180 or (202) 317–6901 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

I. Normal Retirement Age Generally

This document contains proposed regulations under section 401(a) of the Internal Revenue Code (Code). Section 401(a) sets forth the qualification requirements for a trust forming part of a stock bonus, pension, or profit-sharing plan of an employer. Several of these qualification requirements are based on a plan's normal retirement age, including the regulatory interpretation of the requirement that the plan provide for definitely determinable benefits (generally after retirement). Final regulations defining normal retirement age for the definitely determinable requirement were published in the **Federal Register** as TD 9325 on May 22, 2007 (72 FR 28604) (2007 NRA regulations).

Section 1.401(a)–1(b)(1) of the 2007 NRA regulations generally requires that a pension plan be established and maintained primarily to provide systematically for the payment of definitely determinable benefits over a period of years, usually for life, after retirement. The 2007 NRA regulations include two exceptions to the general rule that payments commence after retirement: (1) Payments can commence after attainment of normal retirement age; and (2) in accordance with section 401(a)(36), payments can commence after an employee reaches age 62.

Section 1.401(a)–1(b)(2)(i) of the 2007 NRA regulations provides that, as a general rule, a normal retirement age under a pension plan must be an age that is not earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed (reasonably representative requirement). Section 1.401(a)–1(b)(2)(ii) of the 2007 NRA regulations provides that a normal retirement age of age 62 or later is deemed to satisfy the reasonably representative requirement. Under section 1.401(a)–1(b)(2)(iii) of the 2007 NRA regulations, whether a normal retirement age that is not earlier than age 55 but is below age 62 satisfies the reasonably representative

requirement is based on a facts and circumstances analysis. Section 1.401(a)–1(b)(2)(iv) of the 2007 NRA regulations provides that a normal retirement age that is lower than age 55 is presumed not to satisfy the reasonably representative requirement unless the Commissioner determines otherwise on the basis of facts and circumstances. Under § 1.401(a)–1(b)(2)(v) of the 2007 NRA regulations, in the case of a pension plan in which substantially all of the participants are qualified public safety employees (within the meaning of section 72(t)(10)(B)), a normal retirement age of age 50 or later is deemed to satisfy the reasonably representative requirement.

As previously explained, normal retirement age is used by a pension plan in a variety of circumstances relating to plan qualification. Generally, in the case of a pension plan that is not a governmental plan under section 414(d) and is subject to the rules of section 411(a) through (d), normal retirement age is used in applying the rules under section 411(b) that are designed to preclude avoidance of the minimum vesting standards through the backloading of benefits (such as a benefit formula under which the rate of benefit accrual is increased disproportionately for employees with longer service). Normal retirement age is also relevant for such a plan for other purposes, including the application of the rules relating to suspension of benefits under section 411(a)(3)(B), plan offset rules under section 411(b)(1)(H)(iii), and the minimum benefit rules applicable to non-key employee participants in the case of a top-heavy defined benefit plan under section 416. In addition, for such a plan, section 411(a)(8) defines the term *normal retirement age* as the earlier of (a) the time a participant attains normal retirement age under the plan or (b) the later of the time a plan participant attains age 65 or the 5th anniversary of the time a plan participant commenced participation in the plan.[1]

[1] Section 411(f) provides a special normal retirement age rule that applies only to certain defined benefit plans that are subject to section 411(a) through (d). Section 411(f) was added to the Code on December 16, 2014 by Section 2 of Division P of the Consolidated and Further Continuing Appropriations Act, 2015, Public Law 113–235 (128 Stat. 2130 (2014)), which also made a corresponding change to section 204 of the Employee Retirement Income Security Act of 1974, Public Law 93–406 (88 Stat. 829 (1974)), as amended (ERISA). Under section 101 of Reorganization Plan No. 4 of 1978 (92 Stat. 3790), the Secretary of the Treasury has interpretive jurisdiction over the subject matter addressed in section 411(f) for purposes of ERISA, as well as the Code.

II. Normal Retirement Age Under a Governmental Plan

A. Application of Section 411 to Governmental Plans

Section 414(d) of the Code provides that the term *governmental plan* generally means a plan established and maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing.[2] See sections 3(32) and 4021(b)(2) of ERISA for definitions of the term *governmental plan* for purposes of title I and title IV of ERISA, respectively.

Section 411(e)(1) of the Code provides that the provisions of section 411, other than section 411(e)(2), do not apply to a governmental plan. Under section 411(e)(2), a governmental plan is treated as meeting the requirements of section 411, for purposes of section 401(a), if the plan meets the vesting requirements resulting from the application of sections 401(a)(4) and 401(a)(7) as in effect on September 1, 1974 (pre-ERISA vesting rules). The only requirements under section 411 that apply to a governmental plan are the pre-ERISA vesting rules under section 411(e)(2). Thus, the definition of normal retirement age under section 411(a)(8) does not apply to a governmental plan. In addition, other rules of section 411, including section 411(a)(3)(B) (related to suspension of benefits), section 411(b)(1) (related to backloading of benefits in a defined benefit plan), and section 411(b)(1)(H)(iii) (related to offsets after normal retirement age) do not apply to a governmental plan. Therefore, except for specific circumstances in which in-service benefit payments are permitted under § 1.401(a)–1(b)(1), the definition of normal retirement age need not be used by a governmental plan for the same purposes that apply to a plan subject to section 411(a) through (d).[3]

[2] The term *governmental plan* also includes a plan that is established and maintained by an Indian tribal government (as defined in section 7701(a)(40)), a subdivision of an Indian tribal government (determined in accordance with section 7871(d)), or an agency or instrumentality of either, and all the participants of which are employees of such entity substantially all of whose services as such an employee are in the performance of essential governmental functions but not in the performance of commercial activities (whether or not an essential government function). In addition, the term *governmental plan* includes any plan to which the Railroad Retirement Act of 1935 or 1937 (49 Stat. 967, as amended by 50 Stat. 307) applies and which is financed by contributions required under that Act and any plan of an international organization that is exempt from taxation by reason of the International Organizations Immunities Act, Public Law 79–291 (59 Stat. 669).

B. Pre-ERISA Vesting Requirements for Governmental Plans

Under section 411(e)(2), a normal retirement age under a governmental plan must satisfy the pre-ERISA vesting rules. The pre-ERISA vesting rules applicable to governmental plans contain two basic components: (a) Rules relating to vesting and (b) rules relating to the right to commence benefits without reduction for early commencement. Rev. Rul. 66–11, 1966–1 C.B. 71, and Rev. Rul. 68–302, 1968–1 C.B. 163, illustrate the interplay between normal retirement age under the pre-ERISA vesting rules and section 401(a). As described in these rulings, to satisfy the requirements of section 401(a), a plan that is subject to the pre-ERISA vesting rules must provide for full vesting of the contributions made to or benefits payable under the plan for any employee who has attained normal retirement age under the plan and satisfied any reasonable and uniformly applicable requirements as to length of service or participation described in the plan. For more information about these rules, see Part 5(c) of Publication 778, *Guides for Qualification of Pension, Profit-Sharing, and Stock Bonus Plans (Pub. 778).*

Rev. Rul. 71–24, 1971–1 C.B. 114, illustrates the application of the pre-ERISA vesting rules to benefits provided under a pension plan for employees who continue employment after normal retirement age. Rev. Rul. 71–24 includes an example under which benefits are permitted to commence during employment after normal retirement age.

As described in Rev. Rul. 71–147,[4] 1971–1 C.B. 116, the normal retirement age in a pension or annuity plan under the pre-ERISA vesting rules is generally the lowest age specified in the plan at which the employee has the right to retire without the consent of the employer and receive retirement benefits based on the amount of the employee's service to the date of retirement at the full rate set forth in the

[3] Normal retirement age may also be relevant to participant eligibility for certain favorable tax treatment, including section 402(l) (providing an income exclusion of up to $3,000 annually for certain distributions for health insurance and long-term care insurance premiums to eligible retired public safety officers who separate from service by reason of disability or attainment of normal retirement age) and the special catch-up provisions under § 1.457–4(c)(3)(v)(A).

[4] Even though Rev. Rul. 71–147 was superseded by Rev. Rul. 80–276, 1980–1 C.B. 131, for plans subject to section 411(a)(8), Rev. Rul. 71–147 remains valid guidance for purposes of the pre-ERISA vesting rules.

plan (that is, without actuarial or similar reduction because of retirement before some later specified age). Rev. Rul. 71–147 does not explicitly require a plan to include a provision defining normal retirement age. Instead, a plan's normal retirement age may be deduced from other plan provisions. As described in Rev. Rul. 71–147, although normal retirement age under a pension or annuity plan is ordinarily age 65, a plan may specify a lower age at which the employee has the right to retire without the consent of the employer and to receive retirement benefits based on the amount of the employee's service at the full rate set forth in the plan if this lower age would be an age at which employees customarily retire in the particular company or industry, and if the provision permitting receipt of unreduced benefits at this age is not a device to accelerate funding. For more information about these rules, see also Part 5(e) of Pub. 778.

III. Application of the 2007 NRA Regulations to Governmental Plans

Notice 2007–69, 2007–2 C.B. 468, asked for comments "on whether and how a pension plan with a normal retirement age conditioned on the completion of a stated number of years of service satisfies the requirement in § 1.401(a)–1(b)(1)(i) that a pension plan be maintained primarily to provide for the payment of definitely determinable benefits after retirement or attainment of normal retirement age and how such a plan satisfies the pre-ERISA vesting rules." Comments were received on a variety of issues, including comments that guidance should be issued to (1) clarify that governmental plans are not required to define normal retirement age, (2) provide safe harbor rules that would permit a governmental plan to define normal retirement age that includes a service component, and (3) provide that the age-50 safe harbor rule in § 1.401(a)–1(b)(2)(v) for qualified public safety employees can apply to these employees even if less than substantially all of a plan's participants are qualified public safety employees.

The 2007 NRA regulations provided that, in the case of governmental plans, the regulations would be effective for plan years beginning on or after January 1, 2009. Notices 2008–98, 2008–44 I.R.B. 1080, and 2009–86, 2009–6 I.R.B. 629, provided that the Department of the Treasury and the IRS intended to amend the 2007 NRA regulations to change the effective date of the 2007 NRA regulations for governmental plans to January 1, 2013.

Notice 2012–29, 2012–18 I.R.B. 872, announced that the Department of the Treasury and the IRS intend to modify provisions of the 2007 NRA regulations as applied to governmental plans in two ways. First, Notice 2012–29 announced the intent to modify the regulations to clarify that a governmental plan that is not subject to section 411(a) through (d) and does not provide for the payment of in-service distributions before age 62 will not fail to satisfy the requirement that the plan provide definitely determinable benefits to employees after retirement or attainment of normal retirement age merely because the pension plan does not have a definition of normal retirement age or does not have a definition of normal retirement age that satisfies the requirements of the 2007 NRA regulations.

Second, Notice 2012–29 announced the intent to modify the 2007 NRA regulations to provide that the rule deeming age 50 or later to be a normal retirement age that satisfies the 2007 NRA regulations will apply to a group of employees substantially all of whom are qualified public safety employees, whether or not the group of qualified public safety employees are covered by a separate plan. Thus, under the intended modification, a governmental plan would be permitted to satisfy the reasonably representative requirement using a normal retirement age as low as 50 for a group substantially all of whom are qualified public safety employees and a later normal retirement age that otherwise satisfies the 2007 NRA requirements for all other participants.

Notice 2012–29 requested comments from governmental stakeholders on the guidance under consideration. Specific comments were requested on whether a new rule should be provided under which retirement after 20 to 30 years of service may be a normal retirement age that is reasonably representative of the typical retirement age for the industry in which qualified public safety employees are employed because these employees tend to have career spans that commence at a young age and continue over a limited number of years. Many commenters wrote that such a rule would be helpful and appropriate. Several commenters requested a rule that would permit a governmental plan to use the completion of 20 or more years of service as a normal retirement age for public safety employees.

Comments were also requested on whether there are other categories of governmental employees who have career spans similar to qualified public safety employees for whom a rule should be provided that is similar to the safe harbor for qualified public safety employees. Many commenters recommended a rule that would permit governmental plans to use the completion of a number of years of service as a normal retirement age for all employees, not just qualified public safety employees.

Notice 2012–29 also requested information on the overall retirement patterns of employees in government service to assist the Department of the Treasury and the IRS in determining the earliest age that is reasonably representative of the typical retirement ages for the industry in which these employees are employed. One commenter provided data on the retirement patterns and median normal retirement ages for participants in a state retirement system.

Notice 2012–29 also provided that the Department of the Treasury and the IRS intend to amend the 2007 NRA regulations to modify the effective date of the 2007 NRA regulations for governmental plans to annuity starting dates that occur in plan years beginning on or after the later of (1) January 1, 2015 or (2) the close of the first regular legislative session of the legislative body with the authority to amend the plan that begins on or after the date that is 3 months after the final regulations are published in the **Federal Register**.

Explanation of Provisions

I. Overview

These proposed regulations would provide guidance with respect to the applicability of the 2007 NRA regulations to governmental plans. These proposed regulations, when finalized, would provide guidance relating to the determination of whether the normal retirement age under a governmental plan satisfies the requirements of section 401(a) by amending the 2007 NRA regulations to provide additional rules for governmental plans. In addition, these proposed regulations would also include a minor change to the 2007 NRA regulations to reflect the addition of section 411(f), which provides a special rule for determining a permissible normal retirement age that applies only to certain defined benefit plans that are not governmental plans.

II. Use of Years of Service as a Component of the Pre-ERISA Vesting Rules

In response to Notice 2012–29, the Department of the Treasury and the IRS received a range of comments regarding the pre-ERISA vesting rules that apply to a governmental plan's normal retirement age. In particular, the Department of the Treasury and the IRS received many comments requesting

rules that would permit governmental plans to define normal retirement age by reference to a period of service. Comments also focused on whether a governmental plan is required to include an explicit definition of normal retirement age.

As previously stated, a normal retirement age under a governmental plan must satisfy the pre-ERISA vesting rules. The Department of the Treasury and the IRS generally agree with those commenters who indicated that the pre-ERISA vesting rules applicable to normal retirement age may be read to permit a governmental plan to use a normal retirement age that reflects a period of service. Under pre-ERISA vesting rules, use of a period of service to determine normal retirement age under a governmental plan would be permissible if the period of service used is reasonable and uniformly applicable and the other pre-ERISA rules related to normal retirement age are satisfied. One of the pre-ERISA rules permits a governmental plan to specify a normal retirement age that is lower than age 65 if that age represents the age at which employees customarily retire in the industry.

Under the pre-ERISA rules related to normal retirement age, the terms of a governmental plan are not required to include an explicit definition of the term normal retirement age in order to satisfy section 401(a). However, in the absence of an explicit definition of normal retirement age, the terms of the plan must specify the earliest age at which a participant has the right to retire without the consent of the employer and to receive retirement benefits based upon the amount of the participant's service on the date of retirement at the full rate set forth in the plan (that is, without actuarial or similar reduction because of retirement before some later specified age). That age (the earliest age described in the preceding sentence) will be considered the plan's normal retirement age for purposes of any statutory or regulatory requirements based on a normal retirement age.

Consistent with Notice 2012–29, the proposed regulations would provide that a governmental plan that does not provide for the payment of in-service distributions before age 62 would not fail to satisfy § 1.401(a)–1(b)(1) under these proposed regulations merely because the pension plan has a normal retirement age that is earlier than otherwise permitted under the requirements of § 1.401(a)–1(b)(2) of the 2007 NRA regulations (as proposed to be amended by these proposed regulations). Instead, because section 411(a) through (d) does not apply, the earlier normal retirement age under such a plan is treated as the age as of which an unreduced early retirement benefit is payable for purposes of these regulations.

III. Normal Retirement Age Must Satisfy the Reasonably Representative Requirement

A. In General

These proposed regulations would apply the reasonably representative requirement in the 2007 NRA regulations to governmental plans. Thus, the normal retirement age under a governmental plan must be an age that is not earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed.

B. General Safe Harbor

These proposed regulations would apply to governmental plans the safe harbor in the 2007 NRA regulations that a normal retirement age of at least age 62 is deemed to satisfy the reasonably representative requirement. Thus, a governmental plan satisfies this safe harbor if the normal retirement age under the plan is age 62 or if the normal retirement age is the later of age 62 or another specified date, such as the fifth anniversary of plan participation.

C. Safe Harbors for Governmental Plans

To address comments regarding the need for additional safe harbors for governmental plans, including safe harbors that reflect permissible periods of service, these proposed regulations would provide several additional alternative safe harbors that a governmental plan could satisfy. The safe harbors included in these proposed regulations were developed based upon feedback provided in comments received in response to Notices 2007–69 and 2012–29.

1. Age 60 and 5 Years of Service

Under these proposed regulations, a normal retirement age under a governmental plan that is the later of age 60 or the age at which the participant has been credited with at least 5 years of service would be deemed to satisfy the reasonably representative requirement.

2. Age 55 and 10 Years of Service

Similarly, a normal retirement age under a governmental plan that is the later of 55 or the age at which the participant has been credited with at least 10 years of service would be deemed to satisfy the reasonably representative requirement. Thus, for example, a normal retirement age under a governmental plan that is the later of age 55 or the age at which the participant has been credited with 12 years of service would satisfy this safe harbor.

3. Combined Age and Years of Service of 80 or More

A normal retirement age under a governmental plan that is the participant's age if the sum of the participant's age plus the number of years of service that have been credited to the participant under the plan equals 80 or more would also be deemed to satisfy the reasonably representative requirement. For example, a participant in a governmental plan who is age 55 and who has been credited with 25 years of service under the plan would satisfy this safe harbor.

4. Any Age With 25 years of Service (in Combination With a Safe Harbor That Includes an Age)

A governmental plan would also be permitted to combine any of the other safe harbors (except for the qualified public safety employee safe harbors) provided under the proposed regulations with 25 years of service, so that a participant's normal retirement age would be the participant's age when the number of years of service that have been credited to the participant under the plan equals 25 if that age is earlier than what the participant's normal retirement age would be under the other safe harbor(s). For example, a normal retirement age under a governmental plan would satisfy the reasonably representative requirement if the normal retirement age is the earlier of (1) the participant's age when the participant has been credited with 25 years of service under the plan and (2) the later of age 60 or the age when the participant has been credited with 5 years of service under the plan. Use of 25 years of service by a governmental plan for normal retirement age generally would not satisfy the pre-ERISA vesting requirement relating to normal retirement age, unless it is used in conjunction with an alternative normal retirement age that includes an age component and that otherwise satisfies the pre-ERISA rules. This is because the pre-ERISA vesting requirements allow for a service component only if that component does not unreasonably delay full vesting. For example, applying a 25 years of service requirement (without an alternative normal retirement age) to a newly-hired 63-year-old employee would not be reasonable because it would result in a normal retirement age of 88. See generally, Rev. Rul. 66–11.

D. Qualified Public Safety Employees

The proposed regulations include three safe harbors specifically for qualified public safety employees. The safe harbors were developed based upon feedback provided in comments received in response to Notices 2007–69 and 2012–29. Consistent with Notice 2012–29 and in response to comments, the proposed regulations would make clear that a governmental plan is permitted to use one or more of the safe harbors for qualified public safety employees to satisfy the reasonably representative requirement for those employees even if a different normal retirement age or ages is used under the plan for one or more other categories of participants who are not qualified public safety employees. The safe harbors for qualified public safety employees are not permitted to be used for these other categories of participants; a different normal retirement age (or ages) must be used for participants in a plan who are not qualified public safety employees.

As under the 2007 NRA regulations, the term *qualified public safety employee* would be defined by reference to section 72(t)(10)(B), under which a qualified public safety employee means any employee of a State or political subdivision of a State who provides police protection, firefighting services, or emergency medical services for any area within the jurisdiction of such State or political subdivision.[5] Defining qualified public safety employee by reference to section 72(t)(10)(B) has been retained because it is closely aligned with the categories of employees described in the Age Discrimination in Employment Act that an employer may refrain from hiring after a certain age.[6] Because qualified public safety employees typically commence plan participation at younger ages, the period of service required for full vesting at normal retirement age under each of the safe harbors for qualified public safety employees should be reasonable.

1. Age 50

The proposed regulations would modify the safe harbor for qualified public safety employees that was provided in the 2007 NRA regulations under which a normal retirement age of age 50 or later is deemed to satisfy the reasonably representative requirement and would expand on the guidance under consideration described in Notice 2012–29. The proposed regulations would make clear that a governmental plan is permitted to use the safe harbor (alone or together with one or both of the other safe harbors for qualified public safety employees described in this preamble) for one or more qualified public safety employees in a governmental plan without regard to any "substantially all" requirement (that is, without regard to whether substantially all of the participants in the plan or substantially all of the participants within a group of participants are qualified public safety employees).

2. Combined Age and Years of Service of 70 or More

The proposed regulations would add a safe harbor under which a normal retirement age for qualified public safety employees under a governmental plan that is the participant's age when the sum of the participant's age plus the number of years of service that have been credited to the participant under the plan equals 70 or more would be deemed to satisfy the reasonably representative requirement.

3. Any Age With 20 Years of Service

The proposed regulations would also add a safe harbor under which a normal retirement age for qualified public safety employees under a governmental plan that is the participant's age when the number of years of service that have been credited to the participant under the plan equals 20 or more would be deemed to satisfy the reasonably representative requirement. For example, a normal retirement age for qualified public safety employees under a plan that is 25 years of service would satisfy this safe harbor. The Department of the Treasury and the IRS agree with the comments received in response to Notice 2012–29 that indicated that a safe harbor based solely on a period of service would be appropriate for qualified public safety employees because these employees typically have career spans that commence at a young age and continue over a limited period of years.

E. Multiple Normal Retirement Ages in a Governmental Plan

Commenters on Notice 2012–29 stated that it is a common practice for governmental plans to have a normal retirement age that is a combination of age and years of service. In light of these comments, some of the safe harbors proposed in these regulations contemplate a combination of age and years of service, such as, for example, the use of a normal retirement age that is the earlier of (1) the participant's age when the participant has been credited with 30 years of service under the plan or (2) the later of age 60 or the age when the participant has been credited with 5 years of service under the plan. A normal retirement age under a governmental plan that is consistent with the safe harbors in these proposed regulations would not fail to satisfy the pre-ERISA requirements, including the requirement that any period of service required for vesting at normal retirement age be uniformly applicable to all employees in a plan, merely because the plan uses such a normal retirement age.

Commenters to Notice 2012–29 also stated that governmental plans typically provide multiple normal retirement ages, often based on different benefit structures or classifications of employees in a single plan. These comments expressed concern that certain language in Notice 2012–29[7] could be read to indicate that a governmental plan could only have two normal retirement ages if one of the normal retirement ages covered qualified public safety employees and the other normal retirement age covered all of the other participants in the plan.

Use of one normal retirement age for one classification of employees (such as qualified public safety employees) and one or more other normal retirement ages for one or more different classifications of employees would not

[5] Section 72(t)(10)(B) was amended by section 2(a) of Defending Public Safety Employees' Retirement Act, Public Law 114–26 (129 Stat. 319) (2015)) and section 308 of Protecting Americans From Tax Hikes Act of 2015 (PATH Act), enacted as part of the Consolidated Appropriations Act, 2016, Public Law 114–113 (129 Stat. 2422), to include federal public safety employees as qualified public safety employees for purposes of the rules under section 72(t)(10). Thus, for distributions made after December 31, 2015, the term *qualified public safety employee* means any employee of a State or political subdivision of a State who provides police protection, firefighting services, or emergency medical services for any area within the jurisdiction of such State or political subdivision, or any Federal law enforcement officer described in section 8331(20) or 8401(17) of title 5, United States Code, any Federal customs and border protection officer described in section 8331(31) or 8401(36) of such title, any Federal firefighter described in section 8331(21) or 8401(14) of such title, or any air traffic controller described in 8331(30) or 8401(35) of such title, any nuclear materials courier described in section 8331(27) or 8401(33) of such title, any member of the United States Capitol Police, any member of the Supreme Court Police, and any diplomatic security special agent of the Department of State.

[6] See section 4(j) of the Age Discrimination in Employment Act, 29 U.S.C. 623(j).

[7] Notice 2012–29 provided that, under an anticipated amendment to the 2007 NRA regulations, a governmental plan would be permitted to satisfy the reasonably representative requirement using a normal retirement age as low as 50 for a group substantially all of whom are qualified public safety employees and a later normal retirement age that otherwise satisfies the 2007 NRA requirements for all other participants.

be inconsistent with these proposed regulations and generally would not be inconsistent with the applicable pre-ERISA requirements, including the requirement that any period of service required for full vesting at normal retirement age be uniformly applicable. Similarly, the use of one normal retirement age under a governmental plan for employees hired before a certain date and another normal retirement age under the plan for employees hired on or after that date generally would not fail to satisfy the applicable pre-ERISA requirements.

F. Other Normal Retirement Ages

The proposed regulations would provide that in the case of a normal retirement age under a governmental plan that fails to satisfy any of the governmental plan safe harbors, whether the normal retirement age satisfies the reasonably representative requirement would be based on all of the relevant facts and circumstances. Similar to the treatment of normal retirement ages between ages 55 and 62 under the 2007 NRA regulations, it is generally expected that a good faith determination of the typical retirement age for the industry in which the covered workforce is employed that is made by the employer will be given deference, assuming that the determination is reasonable under the facts and circumstances and that the normal retirement age is otherwise consistent with the pre-ERISA vesting requirements.

Proposed Effective Date

These regulations are proposed to be effective for employees hired during plan years beginning on or after the later of (1) January 1, 2017 or (2) the close of the first regular legislative session of the legislative body with the authority to amend the plan that begins on or after the date that is 3 months after the final regulations are published in the **Federal Register**. Governmental plan sponsors may rely on these proposed regulations for periods preceding the effective date, pending the issuance of final regulations. If and to the extent the final regulations are more restrictive than the rules in these proposed regulations, those provisions of the final regulations will be applied without retroactive effect.

Statement of Availability for IRS Documents

For copies of recently issued Revenue Procedures, Revenue Rulings, Notices, and other guidance published in the Internal Revenue Bulletin or Cumulative Bulletin, please visit the IRS Web site at *http://www.irs.gov* or the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402.

Special Analyses

Certain IRS regulations, including this one, are exempt from the requirements of Executive Order 12866, as supplemented and reaffirmed by Executive Order 13563. Therefore, a regulatory assessment is not required. It has also been determined that 5 U.S.C. 533(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. In addition, because no collection of information is imposed on small entities, the provisions of the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply and a Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, these regulations have been submitted to the Office of Chief Counsel for Advocacy of the Small Business Administration for comments on its impact on small business.

Comments and Requests for Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any comments that are submitted timely to the IRS as prescribed in this preamble under the **ADDRESSES** heading. All comments are available at *www.regulations.gov* or upon request. A public hearing will be scheduled if requested in writing by any person who timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place of the public hearing will be published in the **Federal Register**.

Drafting Information

The principal authors of these regulations are Sarah R. Bolen and Pamela R. Kinard, Office of Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the Department of the Treasury and the IRS participated in the development of these regulations.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

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

PART 1—INCOME TAXES

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

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

■ **Par. 2.** Section 1.401(a)–1 is amended by:

■ 1. Revising paragraph (b)(2)(v).

■ 2. Adding paragraph (b)(2)(vi).

■ 3. Revising the heading and the second sentence of paragraph (b)(4).

The revisions read as follows:

§ 1.401(a)–1 Post-ERISA qualified plans and qualified trusts; in general.

* * * * *

(b) * * *

(2) * * *

(v) *Rules of application for governmental plans*—(A) *In general.* In the case of a governmental plan (within the meaning of section 414(d)) that provides for distributions before retirement, the general rule described in paragraph (b)(2)(i) of this section may be satisfied in accordance with paragraph (b)(2)(ii) of this section or this paragraph (b)(2)(v). In the case of a governmental plan that does not provide for distributions before retirement, the plan's normal retirement age is not required to comply with the general rule described in paragraph (b)(2)(i) of this section or this paragraph (b)(2)(v).

(B) *Age 60 and 5 years of service safe harbor.* A normal retirement age under a governmental plan that is the later of age 60 or the age at which the participant has been credited with at least 5 years of service under the plan is deemed to be not earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed.

(C) *Age 55 and 10 years of service safe harbor.* A normal retirement age under a governmental plan that is the later of age 55 or the age at which the participant has been credited with at least 10 years of service under the plan is deemed to be not earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed.

(D) *Sum of 80 safe harbor.* A normal retirement age under a governmental plan that is the participant's age at which the sum of the participant's age plus the number of years of service that have been credited to the participant under the plan equals 80 or more is deemed to be not earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the

covered workforce is employed. For example, a normal retirement age under a governmental plan that is age 55 for a participant who has been credited with 25 years of service would satisfy the rule described in this paragraph.

(E) *Service-based combination safe harbor.* A normal retirement age under a governmental plan that is the earlier of the participant's age at which the participant has been credited with at least 25 years of service under the plan and an age that satisfies any other safe harbor provided under paragraphs (b)(2)(v)(B) through (D) of this section is deemed to be not earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed. For example, a normal retirement age under a governmental plan that is the earlier of the participant's age at which the participant has been credited with 25 years of service under the plan and the later of age 60 or the age at which the participant has been credited with 5 years of service under the plan would satisfy this safe harbor.

(F) *Age 50 safe harbor for qualified public safety employees.* A normal retirement age under a governmental plan that is age 50 or later is deemed to be not earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed if the participants to which this normal retirement age applies are qualified public safety employees (within the meaning of section 72(t)(10)(B)).

(G) *Sum of 70 safe harbor for qualified public safety employees.* A normal retirement age under a governmental plan that is the participant's age at which the sum of the participant's age plus the number of years of service that have been credited to the participant under the plan equals 70 or more, is deemed to be not earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed if the participants to which this normal retirement age applies are qualified public safety employees (within the meaning of section 72(t)(10)(B)).

(H) *Service-based safe harbor for qualified public safety employees.* A normal retirement age under a governmental plan that is the age at which the participant has been credited with at least 20 years of service under the plan is deemed to be not earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed if the participants to which this normal retirement age applies are qualified public safety employees (within the meaning of section 72(t)(10)(B)). For example, a normal retirement age that covers only qualified public safety employees and that is an employee's age when the employee has been credited with 25 years of service under a governmental plan would satisfy this safe harbor.

(I) *Reserved.*

(J) *Other normal retirement ages.* In the case of a normal retirement age under a governmental plan that fails to satisfy any safe harbor described in paragraph (b)(2)(ii) of this section or this paragraph (b)(2)(v), whether the age is not earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed is based on all of the relevant facts and circumstances.

(vi) *Special normal retirement age rule for certain plans.* See section 411(f), which provides a special rule for determining a permissible normal retirement age under certain defined benefit plans.

* * * * *

(4) *Effective/applicability date.* * * * In the case of a governmental plan (as defined in section 414(d)), the rules in paragraph (b)(2)(v) of this section are effective for employees hired during plan years beginning on or after the later of: January 1, 2017; or the close of the first regular legislative session of the legislative body with the authority to amend the plan that begins on or after the date that is 3 months after the final regulations are published in the **Federal Register**. However, a governmental plan sponsor may elect to apply the rules of paragraph (b)(2)(v) of this section to earlier periods. * * *

John M. Dalrymple,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2016–01639 Filed 1–26–16; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–115452–14]

RIN 1545–BM12

Disguised Payments for Services; Hearing

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of a public hearing on notice of proposed rulemaking.

SUMMARY: This document provides a notice of public hearing on proposed regulations relating to disguised payments for services under section 707(a)(2)(A) of the Internal Revenue Code.

DATES: The public hearing is being held on Friday, February 26, 2016, at 10:00 a.m. The IRS must receive outlines of the topics to be discussed at the public hearing by Monday, February 8, 2016.

ADDRESSES: The public hearing is being held in the IRS Auditorium, Internal Revenue Service Building, 1111 Constitution Avenue NW., Washington, DC 20224. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building.

Send Submissions to CC:PA:LPD:PR (REG–115452–14), Room 5205, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday to CC:PA:LPD:PR (REG–115452–14), Couriers Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC 20224 or sent electronically via the Federal eRulemaking Portal at *www.regulations.gov* (IRS REG–115452–14).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Wendy Kribell at (202) 317–6850; concerning submissions of comments, the hearing and/or to be placed on the building access list to attend the hearing Oluwafunmilayo Taylor at (202) 317–6901 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

The subject of the public hearing is the notice of proposed rulemaking (REG–115452–14) that was published in the **Federal Register** on Thursday, July 23, 2015 (80 FR 43652).

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing that submitted written comments by November 16, 2015, must submit an outline of the topics to be addressed and the amount of time to be denoted to each topic by Monday, February 8, 2016.

A period of 10 minutes is allotted to each person for presenting oral comments. After the deadline for receiving outlines has passed, the IRS will prepare an agenda containing the schedule of speakers. Copies of the agenda will be made available, free of charge, at the hearing or in the Freedom

353G.10 ~~DEFERRED~~ LEAVING FIREFIGHTING SERVICE ~~PENSION AMOUNT~~ BEFORE REACHING NORMAL RETIREMENT AGE.

Subdivision 1. **Entitlement to a retirement benefit, to the extent vested.**

~~A person who was an active member of a fire department covered by either the lump-sum division or the monthly benefit division of the plan who has separated~~ If a volunteer firefighter separates from active firefighting service ~~for at least~~ before reaching normal retirement age, the volunteer firefighter is entitled to a distribution of the volunteer firefighter's retirement benefit under section 353G.09, subdivision 1a, as follows:

(1) if the volunteer firefighter is covered by the defined contribution plan, the volunteer firefighter is entitled to a distribution of the retirement benefit as soon as practicable after the volunteer firefighter submits an application for a distribution;

(2) if the volunteer firefighter is covered by the lump-sum division of the defined benefit plan, the volunteer firefighter is entitled to a distribution of the volunteer firefighter's retirement benefit after the volunteer firefighter has reached age 50 and as soon as practicable after the volunteer firefighter submits an application for a distribution; and

(3) if the volunteer firefighter is covered by the monthly benefit division of the defined benefit plan, the volunteer firefighter is entitled to begin a distribution of the volunteer firefighter's retirement benefit after the volunteer firefighter has reached age 50 and as soon as practicable after the volunteer firefighter submits an application for a distribution.

Subd. 2. **Application.**

No earlier than 30 days ~~and who has completed at least five years of service credit, but has not attained the age of 50 years, is entitled to a deferred service pension on or after attaining the age of 50 years and applying~~ after leaving active firefighting service, a volunteer firefighter entitled to a distribution under subdivision 1 must submit an application to the executive director in a manner specified by the executive director ~~for the service pension. The service pension payable is the nonforfeitable percentage of the service pension under section 353G.09, subdivision 2, and is payable~~.

Subd. 3. **Retirement benefit during period of deferral.**

(a) A volunteer firefighter's account in the defined contribution plan must continue to be invested with the rest of the assets of the individual accounts in the volunteer firefighter's fire department account and, until the account is distributed, credited with investment earnings or reduced by investment losses under section 353G.082, subdivision 4, and a deduction taken for an equal share of the administrative expenses under section 353G.082, subdivision 3, paragraph (b), until the volunteer firefighter's account is distributed.

(b) A volunteer firefighter's retirement benefit in the defined benefit plan must be retained in the defined benefit plan without any interest on or increase in the service pension ~~over~~ during the period of deferral.

Subd. 4. **Forfeiture of accounts of volunteer firefighters who end service.**

(a) The portion of an account or pension benefit that is not vested is forfeited as of the earliest of:

(1) the last day of the calendar year that includes the fifth anniversary of the date on which the volunteer firefighter ended service;

(2) immediately upon receiving a lump-sum payment of the entire vested portion of the account or pension benefit; or

(3) immediately upon receiving the final payment consisting of the entire amount remaining in the account or pension benefit that is vested.

(b) A volunteer firefighter with a zero percent vested interest in the account or pension benefit is deemed to have received a distribution on the last day of service, and the account or pension benefit must immediately be forfeited.

(c) Amounts forfeited remain forfeited and must not be reinstated upon the resumption of service with the fire department or any other fire department covered by the retirement plan.

EFFECTIVE DATE.

This section is effective January 1, 2025.

Exhibit C
Special Fund Member Contributions: Applicable State Statutes

Office of the State Auditor

424A.06 RELIEF ASSOCIATION GENERAL FUND.

Subd. 2. **General fund assets and revenues.** (a) The general fund, if established, must be credited with the following:

(1) all money received from dues other than dues payable as contributions under the bylaws of the relief association to the special fund;

(2) all money received from fines;

(3) all money received from initiation fees;

(4) all money received as entertainment revenues; and

(5) any money or property donated, given, granted or devised by any person, either for the support of the general fund of the relief association or for unspecified purposes.

(b) The treasurer of the relief association is the custodian of the assets of the general fund and must be the recipient on behalf of the general fund of all revenues payable to the general fund. The treasurer shall maintain adequate records documenting any transaction involving the assets or the revenues of the general fund. These records must be open for inspection by any member of the relief association at reasonable times and places.

424A.092 RELIEF ASSOCIATIONS PAYING LUMP-SUM SERVICE PENSIONS.

Subd. 3. **Financial requirements of relief association; minimum obligation of municipality.**

(d) The minimum obligation of the municipality with respect to the special fund is the financial requirements of the special fund reduced by the amount of any fire state aid and police and firefighter retirement supplemental state aid payable under chapter 477B and section 423A.022 reasonably anticipated to be received by the municipality for transmittal to the special fund during the following calendar year, an amount of interest on the assets of the special fund projected to the beginning of the following calendar year calculated at the rate of five percent per annum, and the amount of any contributions to the special fund required by the relief association bylaws from the active members of the relief association reasonably anticipated to be received during the following calendar year. A reasonable amount of anticipated fire state aid is an amount that does not exceed the fire state aid actually received in the prior year multiplied by the factor 1.035.

424A.093 RELIEF ASSOCIATIONS PAYING MONTHLY SERVICE PENSIONS.

Subd. 5. **Minimum municipal obligation.**

(b) The minimum obligation of the municipality with respect to the special fund is an amount equal to the financial requirements of the special fund of the relief association determined under subdivision 4, reduced by the estimated amount of any fire state aid and police and firefighter retirement supplemental state aid

payable under chapter 477B and section 423A.022 reasonably anticipated to be received by the municipality for transmittal to the special fund of the relief association during the following year and the amount of any anticipated contributions to the special fund required by the relief association bylaws from the active members of the relief association reasonably anticipated to be received during the following calendar year. A reasonable amount of anticipated fire state aid is an amount that does not exceed the fire state aid actually received in the prior year multiplied by the factor 1.035.

From:	Susan Lenczewski
To:	Rose Hennessy-Allen
Cc:	Lisa Diesslin
Subject:	Materials for tomorrow"s meeting
Date:	Tuesday, September 24, 2024 2:14:38 PM
Attachments:	Ice Miller on the topic of CODAs and pick-ups 1.8.2019.pdf 356.62 as amended 2024 pension bill.docx

Rose, I'm addressing the first of two topics for tomorrow's meeting, below, and have attached materials. I'll get the second of two topics out as soon as possible later this afternoon.

Topic 1:

Special Fund Member Contributions. My understanding is that some relief associations require the payment of dues by members, which are transmitted as contributions to the special fund. The statutes don't explicitly allow for these contributions, but OSA and relief associations have been interpreting Section 424A.06, subdivision 2, 424A.092, and 424A.093 as permitting them. I'm not aware of any restrictions or concerns with paying dues into the general fund, so the following concerns relate only to the contribution of dues to the special fund.

The overriding concern is that Section 356.631 does not permit dues to be contributed to a public pension or retirement plan, including a relief association plan. Section 356.631:

> **356.631 ADDITIONAL SOURCES OF FUNDING.**
>
> Notwithstanding any other provision of law to the contrary, in addition to all sources of funding described in Minnesota Statutes, section 356.63, any public retirement plan described in Minnesota Statutes, section 356.63, paragraph (b), is authorized to accept, at its discretion, for deposit in its fund the following:
>
> (1) gifts;
>
> (2) donations;
>
> (3) bequests; and
>
> (4) life insurance death benefits.

The reference to Section 356.63, paragraph (b) includes relief association plans.

Setting aside the foregoing concern to address contributions of dues, my understanding is that payment of dues is done in either of two ways:

1. A firefighter pays dues periodically to the relief association, which transmits the dues to the special fund. The firefighter's dues are paid with after-tax dollars.

2. A firefighter authorizes dues to be deducted from per call compensation the firefighter receives from the fire department. The fire department deducts the dues from compensation and forwards it to the relief association, which deposits it in the special fund. Section 181.06, subdivision 2, permits a firefighter to authorize payroll deductions:

> A written contract may be entered into between an employer and an employee wherein the employee authorizes the employer to make payroll deductions for the purpose of… membership dues of a relief association governed by sections 424A.091 to 424A.096 or Laws 2013, chapter 111, article 5, sections 31 to 42….

Member contributions, whether they are characterized as "dues" or something else, to the special fund are not permitted under federal law unless they are (1) after-tax contributions or (2) handled like the mandatory contributions MN public employees make to the pension plans and the law or bylaws contain required language about "pick-up contributions." The relief association plans, including the dc plans, are not and cannot be 401(k) plans, so discretionary member contributions are not permitted.

Under option 1, the firefighter makes after-tax contributions to the special fund. This should be okay under federal law, but the problem is that the relief association should be separately tracking the after-tax contributions so that when the firefighter receives a distribution of the firefighter's benefit, the firefighter will not be required to pay income tax again on the already taxed portion of the retirement benefit being received. For instance, if the firefighter makes after-tax contributions over 10 years of $2,000 and receives a lump sum retirement benefit of $10,000, the 1099-R provided to the firefighter should indicate that $2,000 of the distribution is not taxable and cannot be rolled over to another plan or an IRA.

For option 2, please see the attached advice on the topic of CODAs (cash or deferred arrangements; i.e., 401(k)s). Section 356.62, as amended by the 2024 omnibus pension bill, provides the special language needed to consider payroll deduction contributions as pre-tax employee contributions. Please see the attached. In addition to the pick-up provision, the other requirements noted in the legal advice from Ice Miller is that the payroll deduction contribution must be entered into during the first 30 days or so of firefighting service and must be irrevocable. In addition, Section 356.62, subdivision 2(c), requires the fire department or the city, as employer, to provide an "information return."

One note on dues: a firefighter's retirement benefit, to the extent vested, cannot be

forfeited because the firefighter failed to pay dues once the firefighter reaches normal retirement age (age 50 in relief association plans). This is a requirement under applicable law, which is pre-ERISA Section 401(a)(7). There is probably some litigation risk anyway in requiring the forfeiture of a retirement benefit due to the nonpayment of dues. The extent to which a retirement benefit is “vested” and cannot be forfeited due to non-payment of dues has not been litigated in MN.

Susan

Legislative Commission on Pensions and Retirement
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Legal advice on the topic of CODAs and pick-up contributions in governmental pension plans

Email from Robert Gauss, Ice Miller, January 8, 2019

Susan: The following is the information I mentioned to you during our call. I hope it is helpful. Rob

Treas. Reg. § 1.401(k)-1(a)(3) defines a "cash or deferred election" and provides for an exception for one-time, irrevocable elections. As a matter of federal law, a qualified, governmental plan may allow a one-time, irrevocable election for pre-tax employee contributions by members, **but that election must be made upon first becoming eligible under the plan or any plan of the employer** (often, this is at the commencement of employment but could be after the expiration of a waiting period). After that one-time irrevocable election (or after the first eligibility under the plan has passed), the employee is not permitted to modify the pick-up election or have a new election opportunity. **Importantly, the 401(k) regulations, effective in 2006, changed the wording with respect to one-time irrevocable elections from elections made at various times during a career (e.g., when eligible for a different plan) to elections made upon first eligibility for any retirement plan (as noted above)**.

The most critical shift in "formal" guidance on picked-up contributions is found in Rev. Rul. 2006-43, which sets forth the current requirements for a valid pick-up, and the IRS' current ruling position. Under Rev. Rul. 2006-43, mandatory employee contributions to a governmental retirement plan can be picked-up and treated as pre-tax contributions only if:

(1) the employer takes formal action to provide for the pick-up (or if state or local law or the plan requires the pick-up), **and**

(2) the employee has no election with respect to the amount or duration of the contribution after the employee's initial employment.

Rev. Rul. 2006-43 allows one exception – an election with respect to picked-up contributions **if** that election is made when the employee **is first eligible under any plan of the employer**.

Thus, the IRS and U.S. Department of Treasury ("Treasury") still agree that a one-time irrevocable election at the time the employee is first eligible under any retirement plan of the employer is permissible. Consequently, their change in policy involves elections by existing employees/former employees with respect to pre-tax contributions. **Please note that the IRS and Treasury have not raised concerns with regard to elections involving post-tax employee contributions by any employees, whether new or existing**.

IRS Announcement 94-101 discussed the one-time irrevocable election exception under Treas. Reg. 1.401(k)-1(a)(3)(v) as follows:

> Although any choice between cash and a deferral is technically a CODA, the regulations, at Section 1.401(k)-1(a)(3)(v), provide an exception. **A one-time irrevocable election by the employee, when first hired or first eligible for any plan of the employer, is deemed not to be a choice between cash and a deferral. Once such an election is made, it cannot be changed**. Thus, if an employer terminated a money purchase pension plan and replaced it with a different money purchase pension plan, an employee who elected to receive a 5% contribution under the old plan may only receive a 5% contribution from the new plan. In addition, a change in status, such as from associate to partner or union

employee to supervisor does NOT give rise to another one-time irrevocable election. **Once an employee has participated in ANY plan of the employer, the one-time election is unavailable**.

(Emphasis added).

Additionally, the current regulations under Code § 402(g)(3) state that an employer contribution is not an elective deferral if the contribution is made pursuant to a one-time irrevocable election made at the initial eligiblity to participate in any retirement plan of the employer. The regulations under Code § 402(g)(3) define elective deferral to have the same meaning as under the § 401(k) regulations. Treas. Reg. § 1.401(k)-1(a)(3)(iv) provides that a one-time irrevocable election is not an elective deferral if it was made no later than the employee's first becoming eligible under **the plan or any other 401(a) or 403(b) plan of the employer**. "Employer" for this purpose means the employer and all related employers under Code §§ 414(b), (c) or (m). Thus, participants who have irrevocably elected to (or not to) participate in one retirement plan offered by the employer cannot at a later time elect to participate instead in another plan sponsored by the employer or a related employer without violating the previous one-time irrevocable election exemption. Moreover, participants must make their one-time irrevocable election at the time they first become eligible under *any retirement plan* sponsored by that employer. **Note: this section assumes the plans would have different employee contribution deferrals. As noted above, if the employee contributions were always the same (both in amount and in tax status (pre or post tax)), regardless of the plan selected, the election would not compromise the pick-up character of these contributions.**

MOST RECENT IRS RULINGS

In late 2014 and 2015, the IRS began clearing out a number of pending PLRs. These new rulings give practical examples of the IRS and Treasury views of employee choice, and application of the above-described statutes and regulations. PLRs are binding only on the entities they were issued to, but can be very helpful in seeing the IRS's application of the regulations:

- PLR 201540014 outlines appropriate pick-up mechanics in a situation where there is no employee choice, but which would also apply if a choice exists.

- PLR 201532036 describes an employee choice process with different amounts of employee contributions depending on the employee's election. The conclusion is that to offer employees who are already participating in one plan an election to stay in that plan or go to another plan would be an impermissible cash or deferred arrangement. This ruling may speak precisely to the current choice.

- PLR 201529009 demonstrates one acceptable way to structure an election – make pre-tax employee contributions the same regardless of what plan is elected. **If the employee pre-tax contributions are always the same regardless of what coverage the employee selects, there is no election problem**.

- PLR 201443035 reviews irrevocable elections and what constitutes an acceptable one-time irrevocable election in terms of timing. The IRS views this very narrowly – **the election must occur only before the employee is covered in any retirement type plan of the employer**.

- The rulings also stress that these limitations only apply if the employee contributions are **pre-tax**. **If the employee contributions are always post-tax, there is no election problem.**

- PLR 201720009 more recently confirmed the rulings in PLR 201529009 that an election for a current employee between 2 plans in which the employee's rate of contribution is the same regardless of which plan the employee selects will not constitute a cash or deferred election (this PLR is worth discussing because it includes a design where the employer would have to increase its contribution rate in order to keep the employee contribution level).

In summary, at this point the IRS provides very limited exceptions for an employee election that would not constitute a CODA. The allowable employee contribution change exceptions are as follows:

- ***Employer Mandate*** – the employer mandates a contribution rate change across all members under a plan (e.g., all employees are mandatorily moved to a new tier or new plan with a different contribution rate, with no employee choice).

- ***Level Contribution*** – the employee contribution rate is the same across all applicable plans subject to the choice.

- ***Post-Tax Contribution*** – the lowest pre-tax employee contribution rate in a set of plans subject to an election is treated as picked-up (pre-tax), and any incremental rate among that set of plans is treated as post-tax employee contributions.

As mentioned during our call, and as I think you said Tony Roda will address, there has been some recent activity in Congress to ask the IRS to reconsider Rev. Rul. 2006-43 and/or to allow current employees the opportunity for a new election, but nothing has yet made its way into current legislation or the current tax bill.

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356.62 PAYMENT OF EMPLOYEE CONTRIBUTION.

Subdivision 1. **Definitions**

(a) For purposes of this section, the following terms have the meanings given.

(b) "Employee" means any person covered by a public pension or retirement plan.

(c) "Employee contributions" means any sums deducted from the employee's salary or wages or otherwise paid in lieu thereof, regardless of whether they are denominated contributions by the public pension or retirement plan.

(d) "Public pension or retirement plan" means a covered retirement plan listed in section 356.611, subdivision 6, or any other public retirement plan to which section 414(h)(2) of the Internal Revenue Code applies.

Subd. 2. **Pick up of employee contributions.**

(a) For purposes of any public pension or retirement plan, ~~as defined in section 356.63, paragraph (b),~~ each employer shall pick up the employee contributions required under law or under the pension plan document for all salaries. ~~If the United States Treasury Department rules that under section 414(h) of the Internal Revenue Code of 1986, as amended through December 31, 1992, that these picked up contributions are not includable in the employee's adjusted gross income until they are distributed or made available, then these picked up contributions must be treated as employer contributions in determining tax treatment under the Internal Revenue Code of 1986 and the employer shall discontinue withholding federal income taxes on the amount of these contributions. The employer shall pay these picked up contributions from the same source of funds as is used to pay the salary of the employee.~~ The employer shall pick up these employee contributions by a reduction in the cash salary of the employee.

(b) Employee contributions that are picked up must be treated for all purposes of the public pension or retirement plan in the same manner and to the same extent as employee contributions that were made before the date on which the employee contributions pick up began. The amount of the employee contributions that are picked up must be included in the salary upon which retirement coverage is credited and upon which retirement and survivor's benefits are determined. ~~For purposes of this section, "employee" means any person covered by a public pension plan. For purposes of this section, "employee contributions" include any sums deducted from the employee's salary or wages or otherwise paid in lieu thereof, regardless of whether they are denominated contributions by the public pension plan.~~

(c) The employing unit shall supply each employee and the commissioner of revenue with an information return indicating the amount of the employer's picked-up contributions for the calendar year that were not subject to withholding. This return must be provided to the employee not later than January 31 of the succeeding calendar year. The commissioner of revenue shall prescribe the form of the return and the provisions of section 289A.12 must apply to the extent not inconsistent with the provisions of this section.

EFFECTIVE DATE. This section is effective the day following final enactment.

Exhibit D

Position on Length of Service Incentives

For the reasons identified below, the Fire Relief Association Working Group recommends that no changes be pursued to provide authority for relief associations to pay monetary length of service incentives to members.

Benefit calculations already reward length of service – Retirement benefits for relief association members in a defined benefit plan are based on years of service, an annual benefit level, and vested percentage that increases each year until the member becomes fully vested. Members who serve longer therefore receive higher benefits through the additional year of service credit and increased vested percentage. In defined contribution plans, members who serve longer receive higher benefits through the additional annual contribution allocations and increased vested percentage.

Employer has ability to increase compensation – Municipalities have the ability, and some flexibility, in how they structure compensation for their firefighters. A municipality could, for example, increase per-call pay or other types of compensation for senior firefighters.

Restrictions on midstream distributions – Because relief associations operate as qualified plans, they may run into tax issues if they make distributions to members who have not yet separated from service.

Administrative difficulties with benefit portability and calculating liabilities – It is unclear how benefits would be calculated for members who return to active service after a break in service or accrue combined service with more than one fire department, if different periods of service are credited using different benefit levels. Likewise, the actuarial calculations for active member liabilities are quite complex when members accrue service for different periods at different benefit levels. This administrative complexity could increase the potential for payment calculation errors and increase the time and cost of performing the calculations.