Part III. Administrative, Procedural, and Miscellaneous

Miscellaneous Pension Protection Act Changes

Notice 2008-30

I. PURPOSE AND BACKGROUND

This notice provides guidance in the form of questions and answers with respect to certain distribution-related provisions of the Pension Protection Act of 2006, P.L. 109-280 ("PPA '06"), that are effective in 2008. This notice also provides, in Part V, guidance on amending plans to require that distribution of excess deferrals includes earnings from the end of the taxable year to the date of distribution ("gap-period" earnings).

The sections of PPA '06 addressed in this notice are § 824 (relating to rollovers from eligible retirement plans to Roth IRAs), § 1004 (relating to additional survivor annuity options), and § 302 (relating to interest rate assumptions for lump sum distributions). Notice 2007-7, 2007-5 I.R.B. 395, provides guidance with respect to certain provisions of PPA '06 that are primarily related to distributions and that were effective beginning in 2007 or earlier.

II. SECTION 824 OF PPA '06

Prior to amendment by PPA '06, § 408A of the Code provided that a Roth IRA could only accept a rollover contribution of amounts distributed from another Roth IRA, from a nonRoth IRA (i.e., a traditional or SIMPLE IRA) or from a designated Roth account described in § 402A. These rollover contributions to Roth IRAs are called "qualified rollover contributions." A qualified rollover contribution from a nonRoth IRA to a Roth IRA is called a "conversion." An individual who rolls over an amount from a nonRoth IRA to a Roth IRA must include in gross income any portion of the conversion amount that would be includible in gross income if the amount were distributed without being rolled over. For distributions before 2010, a conversion contribution is permitted only if the IRA owner's adjusted gross income does not exceed certain limits.

Section 824 of PPA '06 amended the definition of qualified rollover contribution in § 408A of the Code to include additional plans. Under this expansion, in addition to the rollovers described in the preceding paragraph, a Roth IRA can accept rollovers from other eligible retirement plans (as defined in § 402(c)(8)(B)). The amendments made by § 824 of PPA '06 are effective for distributions made after December 31, 2007.

Q-1. Can distributions from a qualified plan described in § 401(a) be rolled over to a Roth IRA?

A-1. Yes. The rollover can be made through a direct rollover from the plan to the Roth IRA or an amount can be distributed from the plan and contributed (rolled over) to the Roth IRA within 60 days. In either case, the amount rolled over must be an eligible rollover distribution (as defined in § 402(c)(4)) and, pursuant to § 408A(d)(3)(A), there is included in gross income any amount that would be includible if the distribution were not rolled over. In addition, for taxable years beginning before January 1, 2010, an individual can not make a qualified rollover contribution from an eligible retirement plan other than a Roth IRA if, for the year the eligible rollover distribution is made, he or she has modified adjusted gross income ("MAGI") exceeding $100,000 or is married and files a separate return.

Q-2. Can distributions from other types of retirement plans be rolled over to a Roth IRA?

A-2. Subject to the limitations described in the final sentence of A-1 of this notice, the new definition of qualified rollover contribution in § 408A(e) includes distributions from annuity plans described in § 403(a) and (b) and from eligible governmental plans under § 457(b).

Q-3. Does the additional tax under § 72(t) apply to a qualified rollover contribution from an eligible retirement plan other than a Roth IRA?

A-3. No. Pursuant to § 408A(d)(3)(A)(ii), the additional tax under § 72(t) does not apply to rollovers from an eligible retirement plan other than a Roth IRA. However, as with conversions, if a taxable amount rolled into a Roth IRA from an eligible retirement plan other than a Roth IRA is distributed within 5 years, § 72(t) applies to such distribution as if it were includible in gross income. See § 408A(d)(3)(F).

Q-4. Under § 401(a)(31)(A), must a plan permit a distributee of an eligible rollover distribution to elect a direct rollover to a Roth IRA?

A-4. Yes. Section 401(a)(31) requires that a plan follow a distributee's election to have an eligible rollover distribution paid in a direct rollover to an eligible retirement plan specified by the distributee. Section 1.401(a)(31)-1 of the Income Tax Regulations provides rules for direct rollovers, including exceptions for small amounts and multiple distributions.

Q-5. Is the plan administrator responsible for assuring the distributee is eligible to make a rollover to a Roth IRA?

A-5. No, the plan administrator is not responsible for assuring the distributee is eligible to make a rollover to a Roth IRA. However, a distributee that is ineligible to make a rollover to a Roth IRA may recharacterize the contribution pursuant to § 408A(d)(6).

Q-6. What are the withholding requirements for an eligible rollover distribution that is rolled over to a Roth IRA?

A-6. An eligible rollover distribution paid to an employee or the employee's spouse is subject to 20% mandatory withholding under § 3405(c). Pursuant to § 3405(c)(2), an eligible rollover distribution that a distributee elects, under § 401(a)(31)(A), to have paid directly to an eligible retirement plan (including a Roth IRA) is not subject to mandatory withholding, even if the distribution is includible in gross income. Also, a distribution that is directly rolled over to a Roth IRA by a nonspouse beneficiary pursuant to § 402(c)(11) (see Q&A-7 of this notice) is not subject to mandatory withholding. However, a distributee and a plan administrator or payor are permitted to enter into a voluntary withholding agreement with respect to an eligible rollover distribution that is directly rolled over from an eligible retirement plan to a Roth IRA. See section 3402(p) and the regulations thereunder for rules relating to voluntary withholding.

Q-7. Can beneficiaries make qualified rollover contributions to Roth IRAs?

A-7. Yes. In the case of a distribution from an eligible retirement plan other than a Roth IRA, the MAGI and filing status of the beneficiary are used to determine eligibility to make a qualified rollover contribution to a Roth IRA. Pursuant to § 402(c)(11), a plan may but is not required to permit rollovers by nonspouse beneficiaries and a rollover by a nonspouse beneficiary must be made by a direct trustee-to-trustee transfer. A nonspouse beneficiary that is ineligible to make a qualified rollover contribution to a Roth IRA may recharacterize the contribution pursuant to § 408A(d)(6). A surviving spouse who makes a rollover to a Roth IRA may elect either to treat the Roth IRA as his or her own or to establish the Roth IRA in the name of the decedent with the surviving spouse as the beneficiary. (See Notice 2007-7, Q&A-13, for a rule on how to title a beneficiary IRA.) A nonspouse beneficiary cannot elect to treat the Roth IRA as his or her own. (See Notice 2007-7, Part V.)

In the case of a rollover where the beneficiary does not treat the Roth IRA as his or her own, required minimum distributions from the Roth IRA are determined in accordance with Notice 2007-7, Q&As -17, -18 and -19.

III. SECTION 1004 OF PPA '06

Section 401(a)(11) of the Code applies to defined benefit plans and to certain defined contribution plans that are subject to the funding standards of § 412 or that do not satisfy certain other requirements to be exempt from § 401(a)(11). Plans that are subject to § 401(a)(11) must provide that accrued benefits are payable, in the case of a vested participant who does not die before the annuity starting date, in the form of a qualified joint and survivor annuity ("QJSA"). Section 417(b) defines a QJSA, for a married participant, as an annuity for the life of a participant with a survivor annuity for the life of the participant's spouse which is not less than 50% and not more than 100% of the amount of the annuity payable during the joint lives of the participant and the spouse. Section 417(a) generally provides that a plan that is subject to § 401(a)(11)

must permit a participant to waive the QJSA, with spousal consent, during an applicable election period, and must provide a written explanation to the participant of the terms and conditions of the QJSA.

Section 1004 of PPA ’06 amends § 417 to require a plan that is subject to § 401(a)(11) to offer to participants a specified optional form of benefit as an alternative to the QJSA. In particular, a plan that is subject to § 401(a)(11) must provide to a participant who waives the QJSA an opportunity to elect a qualified optional survivor annuity (“QOSA”) during the applicable election period, and must provide a written explanation to participants of the terms and conditions of the QOSA. Section 1004 of PPA ’06 defines a QOSA as an annuity for the life of a participant with a survivor annuity for the life of the participant’s spouse that is equal to a specified applicable percentage of the amount of the annuity that is payable during the joint lives of the participant and the spouse, and that is the actuarial equivalent of a single life annuity for the life of the participant. A QOSA also includes a distribution option in a form having the effect of such an annuity.

Section 1107 of PPA '06 permits a plan sponsor to delay adopting a plan amendment pursuant to statutory provisions under PPA '06 (or pursuant to any regulation issued under PPA '06) until the last day of the first plan year beginning on or after January 1, 2009 (January 1, 2011, in the case of governmental plans). This amendment deadline applies to both interim and discretionary amendments that are made pursuant to PPA '06 statutory provisions or any regulation issued under PPA '06. If § 1107 of PPA '06 applies to a plan amendment, the plan does not fail to satisfy the requirements of § 411(d)(6) by reason of the amendment except as provided by the Secretary of the Treasury. However, see Q&A-14 of this notice, which provides that § 411(d)(6) relief does not apply to a plan amendment adopted pursuant to § 1004 of PPA ’06.

Q-8. What level of spouse survivor annuity must be provided under a QOSA?

A-8. The level of spouse survivor annuity that must be provided under a QOSA depends upon the level of spouse survivor annuity provided under a plan’s QJSA (that is, the QJSA form of benefit that is provided to a married participant in the absence of a waiver of such form of benefit). If the QJSA for a married participant provides a survivor annuity for the life of the participant’s spouse that is less than 75 percent of the amount of the annuity that is payable during the joint lives of the participant and the participant’s spouse, the QOSA must provide a spouse survivor annuity percentage of 75 percent. If the QJSA for a married participant provides a survivor annuity for the life of the participant’s spouse that is greater than or equal to 75 percent of the amount of the annuity that is payable during the joint lives of the participant and the participant’s spouse, the QOSA must provide a spouse survivor annuity percentage of 50 percent.

Q-9. If, both before and after the effective date of § 1004 of PPA ’06, a plan that is subject to § 401(a)(11) offers, in addition to the QJSA, an optional joint and spouse survivor annuity that is at least actuarially equivalent to the plan’s single life annuity form of benefit payable at the same time as the optional joint and spouse survivor annuity and that provides a spouse survivor annuity percentage equal to the spouse survivor

annuity percentage required to be provided under a QOSA, must the plan be amended or the plan's administration be changed in order to implement § 1004 of PPA '06?

A-9. No. A plan that is subject to § 401(a)(11) must provide an optional joint and spouse survivor annuity that (i) is at least actuarially equivalent to the plan's single life annuity form of benefit payable at the same time as the optional joint and spouse survivor annuity, and (ii) provides a spouse survivor annuity percentage that is equal to the spouse survivor annuity percentage required to be provided under a QOSA. The plan need not be amended so that the optional joint and spouse survivor annuity is designated as a QOSA, and its administrative procedures need not be revised to designate the optional form of benefit as a QOSA. For example, a plan that, both before and after the effective date of § 1004 of PPA '06, provides a QJSA for a married participant that includes a spouse survivor annuity percentage of 50 percent, and also provides an optional joint and spouse survivor annuity that includes a spouse survivor annuity percentage of 75 percent and is at least actuarially equivalent to the plan's single life annuity form of benefit payable at the same time as the optional joint and spouse survivor annuity, complies with § 1004 of PPA '06 without the need for any amendment or other administrative change.

Q-10. If a plan that is subject to § 401(a)(11) provides a QJSA that is more valuable than the plan's single life annuity form of benefit, must the plan's QOSA be at least actuarially equivalent to the QJSA or need the plan's QOSA only be at least actuarially equivalent to the plan's single life annuity form of benefit payable at the same time as the QOSA?

A-10. A plan subject to § 401(a)(11) must provide a QOSA that is at least actuarially equivalent to the plan's form of benefit that is a single life annuity for the life of the participant payable at the same time as the QOSA. The QOSA need not be actuarially equivalent to the plan's QJSA.

Q-11. If a participant elects to receive a distribution in the form of a QOSA, must the participant's spouse consent to the participant's election?

A-11. In general, spousal consent is required for a participant to waive a plan's QJSA form of distribution and elect an alternative distribution form. However, § 1.401(a)-20, Q&A-16, provides that a participant may elect out of the QJSA, in favor of an actuarially equivalent alternative joint and survivor annuity that satisfies the conditions to be a QJSA, without spousal consent. Because a QOSA, by definition, satisfies the conditions to be a QJSA, no spousal consent is required if a plan participant elects a QOSA that is actuarially equivalent to the plan's QJSA. If the QOSA is not actuarially equivalent to the QJSA, spousal consent is required for the participant to waive the QJSA and elect the QOSA.

Q-12. How does a plan that is subject to § 401(a)(11) satisfy the requirement in § 417(a)(3)(i), as amended by §1004 of PPA '06, that the plan provide to a participant a written explanation of the terms and conditions of the QOSA available to the participant?

A-12. A plan that is subject to § 401(a)(11) can satisfy the requirement that it provide to a participant a written explanation of the terms and conditions of the QOSA available to the participant by satisfying the written explanation requirements of § 1.417(a)(3)-1. In satisfying these written explanation requirements, the plan must treat the QOSA as an optional form of benefit presently available to participants under the plan. The written explanation need not designate the optional form of benefit as the plan's QOSA.

Q-13. Must a plan that is subject to § 401(a)(11) offer to participants, as an alternative to a qualified preretirement survivor annuity described in § 417(c), a preretirement survivor annuity that is based on a QOSA?

A-13. No. A plan that is subject to § 401(a)(11) must offer participants a QOSA that is an alternative form of distribution to the QJSA. There is no requirement that the plan offer to participants, as an alternative to a qualified preretirement survivor annuity described in § 417(c), a preretirement survivor annuity that is based on a QOSA.

Q-14. How does § 1107 of PPA '06, which provides certain rules regarding amendments made pursuant to PPA '06, apply to plan amendments adopted pursuant to § 1004 of PPA?

A-14. If a plan that is subject to § 401(a)(11) is amended to implement a QOSA within the period established in § 1107(b)(2)(A) of PPA '06, and the plan is operated as if the amendment were in effect during the period from the effective date of the changes made to § 417 by § 1004 of PPA '06 until the date of the amendment, the plan is treated, pursuant to § 1107 of PPA '06, as being operated in accordance with its terms during such period, and the amendment is treated as being adopted on the effective date of such changes made to § 417. However, an amendment that implements a QOSA is not eligible for any relief, pursuant to § 1107 of PPA '06, from the requirements of § 411(d)(6). Thus, for example, a plan amendment that implements a QOSA may eliminate a distribution form or reduce or eliminate a subsidy with respect to a distribution form only to the extent such reduction or elimination is permitted under § 1.411(d)-3.

Q-15. What is the effective date of the changes made to § 417 by § 1004 of PPA '06?

A-15. In general, the changes to § 417 made by § 1004 of PPA '06 apply to distributions from a plan that is subject to § 401(a)(11) with annuity starting dates in plan years beginning after December 31, 2007. However, in the case of a plan that is subject to § 401(a)(11) and that is maintained pursuant to one or more collective bargaining agreements between employee representatives and one or more employers ratified on or before August 17, 2006 (the date of enactment of PPA '06), the changes to § 417 made by § 1004 of PPA '06 apply to distributions with annuity starting dates during plan years beginning on or after the earlier of (i) January 1, 2008 or, if later, the date on which the last collective bargaining agreement related to the plan terminates (determined without regard to any extensions to a collective bargaining agreement made after August 17, 2006), or (ii) January 1, 2009. In the event a participant elects a

distribution with a retroactive annuity starting date (pursuant to § 1.417(e)-1(b)(3)(iv)) that is before the effective date of § 1004 of PPA ’06, the date of the first actual payment of benefits based on the retroactive annuity starting date is substituted for the annuity starting date for purposes of applying the rules of this paragraph.

IV. SECTION 302 OF PPA ‘06

Section 417(e)(3) of the Code provides rules for the determination of the present value of plan benefits for purposes of § 417(e). Section 417(e)(3)(A) generally provides that, for purposes of § 417(e)(1) and (e)(2), the present value is not permitted to be less than the present value calculated by using the applicable mortality table and the applicable interest rate as defined in § 417(e)(3)(B) and (C).

For plan years beginning prior to January 1, 2008, § 417(e)(3)(A)(ii)(II) defines the term “applicable interest rate” as the annual rate of interest on 30-year Treasury securities for the month before the date of distribution or such other time as the Secretary may by regulations prescribe (the “pre-PPA ’06 applicable interest rate”). In addition, for the same plan years, § 417(e)(3)(A)(ii)(I) defines the term “applicable mortality table” as the mortality table prescribed by the Secretary and provides for such table to be based on the prevailing commissioners' standard table (described in § 807(d)(5)(A)) used to determine group reserves for group annuity contracts issued on the date as of which the present value is determined (the “pre-PPA ’06 applicable mortality table”).

For plan years beginning on or after January 1, 2008, § 302 of PPA ’06 changes the present value determination under § 417(e)(3). For such years, § 417(e)(3)(C) defines the term “applicable interest rate” as the adjusted first, second, and third segment rates applied under rules similar to the rules of § 430(h)(2)(C) for the month before the date of the distribution or such other time as the Secretary may by regulations prescribe (the “post-PPA ’06 applicable interest rate”). For this purpose, the adjusted first, second, and third segment rates are determined without regard to the 24-month averaging provided under § 430(h)(2)(D)(i), and § 417(e)(3)(D)(ii) provides a transition rule that phases in the use of the segment rates over 5 years. Also, for such years, § 417(e)(3)(B) defines the term “applicable mortality table” as a mortality table, modified as appropriate by the Secretary, based on the mortality table specified for the plan year under subparagraph (A) of § 430(h)(3) (without regard to subparagraph (C) or (D) of such section) (the “post-PPA ’06 applicable mortality table”).

Section 1.401(a)-20, Q&A-16, provides that, in the case of a married participant, the QJSA provided under a plan that is subject to § 401(a)(11) must be at least as valuable as any other optional form of benefit payable under the plan at the same time, and further provides that a plan does not fail to satisfy this requirement merely because the amount payable under an optional form of benefit that is subject to the minimum present value requirement of § 417(e)(3) is calculated using the applicable interest rate and applicable mortality table under § 417(e)(3).

As noted in Part III above, § 1107 of PPA '06 provides certain rules with respect to plan amendments adopted pursuant to statutory provisions under PPA '06.

Rev. Rul. 2007-67, 2007-48 I.R.B. 1047, provides guidance regarding the implementation of § 302 of PPA ’06, including guidance regarding the application of § 1107 of PPA ’06 to amendments adopted pursuant to § 302 of PPA ’06.

Q-16. If, after § 302 of PPA ’06 is effective, a plan is amended, during the period established in § 1107(b)(2)(A) of PPA ’06, to provide that the amount payable under an optional form of benefit that is subject to the minimum present value requirement of § 417(e)(3) is calculated as the more favorable to participants of (i) the amount calculated by using the pre-PPA ’06 applicable mortality table and pre-PPA ’06 applicable interest rate, or (ii) the amount calculated by using the post-PPA ’06 applicable mortality table and post-PPA ’06 applicable interest rate, will the plan fail to satisfy the requirement that the QJSA for a married participant be at least as valuable as any other form of benefit payable under the plan at the same time?

A-16. A plan does not fail to satisfy the requirement that the QJSA for a married participant be at least as valuable as any other form of benefit payable under the plan at the same time merely because the amount payable under an optional form of benefit that is subject to the minimum present value requirement of § 417(e)(3) is calculated as the more favorable to participants of (i) the amount calculated by using the pre-PPA ‘06 applicable mortality table and pre-PPA ‘06 applicable interest rate, or (ii) the amount calculated by using the post-PPA ’06 applicable mortality table and applicable interest rate. This special treatment for amounts calculated by using the pre-PPA ’06 applicable mortality table and pre-PPA ’06 applicable interest rate applies only through the end of the period described in § 1107(b)(2)(A) of PPA ’06. It is anticipated that § 1.401(a)-20, Q&A-16, will be amended to reflect this special treatment.

Q-17. If a plan is amended as described in Q&A-16 of this notice, but provides that benefits cease to be calculated by using the pre-PPA ’06 applicable mortality table and pre-PPA ’06 applicable interest rate after a specified period, does relief under § 1107 of PPA ’06, as described in Rev. Rul. 2007-67, apply to the amendment?

A-17. In general, relief under § 1107 of PPA ’06 applies to an amendment that provides the more favorable to participants of an amount calculated by using the pre-PPA ‘06 applicable mortality table and pre-PPA ‘06 applicable interest rate or an amount calculated by using the post-PPA ’06 applicable mortality table and post-PPA ’06 applicable interest rate, even if the pre-PPA ’06 applicable interest rate and/or pre-PPA ’06 applicable mortality table apply only for a specified period of time (as long as the amendment is adopted during the period established in § 1107(b)(2)(A) of PPA ’06). For example, if a plan is amended to provide that the amount payable under an optional form of benefit that is subject to the minimum present value requirements of § 417(e)(3) is calculated in the manner described in Q&A-16 of this notice (i.e., pursuant to a better-of calculation) for a specified period of time, and thereafter is calculated without reference to the pre-PPA ’06 applicable mortality table and pre-PPA ’06 applicable interest rate, the plan will not fail to satisfy the requirements of § 411(d)(6) by reason of the amendment.

However, with respect to a particular plan provision, relief under § 1107 of PPA ’06 applies only to the first plan amendment that implements the post-PPA ’06

applicable interest rate and/or post-PPA ’06 applicable mortality table with respect to the provision, and any subsequent amendment with respect to the provision will not be treated as adopted “pursuant to” statutory provisions under PPA ’06, as required for relief under § 1107 of PPA ’06. For purposes of determining whether an amendment that implements the post-PPA ’06 applicable interest rate and/or post-PPA ’06 applicable mortality table with respect to a particular plan provision is the first such amendment, amendments adopted on or before June 30, 2008, are disregarded. Thus, if a plan amendment is adopted that provides that the amount payable under an optional form of benefit that is subject to the minimum present value requirements of § 417(e)(3) is calculated in the manner described in Q&A-16 of this notice, and the plan is subsequently amended (during the period established in § 1107 of PPA ’06) so that the amount payable is calculated without reference to the pre-PPA ’06 applicable mortality table and pre-PPA ’06 applicable interest rate, the relief under § 1107 of PPA ’06 will apply with respect to the subsequent amendment only if the initial amendment was adopted on or before June 30, 2008.

Q-18. Does the relief under § 1107 of PPA ’06, as described in Rev. Rul. 2007-67 and this notice, apply to a plan amendment that replaces a plan reference to the pre-PPA ’06 applicable mortality table and/or pre-PPA ’06 applicable interest rate with a reference to the post-PPA ’06 applicable mortality table and/or post-PPA ’06 applicable interest rate, without regard to whether § 302 of PPA ’06 requires such amendment?

A-18. The relief under § 1107 of PPA ’06, as described in Rev. Rul. 2007-67 and this notice, applies to an amendment to a plan that is subject to § 401(a)(11) and that replaces a plan reference to the pre-PPA ’06 applicable mortality table and/or pre-PPA ’06 applicable interest rate with a reference to the post-PPA ’06 applicable mortality table and/or post-PPA ’06 applicable interest rate, without regard to whether § 302 of PPA ’06 requires such amendment. For example, if a plan calculates the amount of an optional form of benefit that is not subject to the minimum present value requirements of § 417(e)(3) by reference to the pre-PPA ’06 applicable mortality table and/or pre-PPA ’06 applicable interest rate and the plan is amended, pursuant to an amendment adopted during the period established in § 1107(b)(2)(A) of PPA ’06, so that it calculates the amount of the optional form of benefit by reference to the post-PPA ‘06 applicable mortality table and/or post-PPA ‘06 applicable interest rate, the plan will not fail to satisfy the requirements of § 411(d)(6) by reason of the amendment.

V. GAP-PERIOD EARNINGS

The final regulations under § 402(g), published in the Federal Register (72 FR 21103) on April 30, 2007, provide that the gap-period earnings must be included with the distribution of excess deferrals to the extent the employee is or would be credited with an allocable gain or loss on those excess deferrals for the gap period, if the total amount were to be distributed. This gap-period earnings rule applies to both pre-tax excess deferrals and excess deferrals that are designated Roth contributions. The effective date for the rule on gap-period earnings is taxable years beginning on or after January 1, 2007.

Section 5.04 of Rev. Proc. 2007-44, 2007-28 I.R.B. 54, generally requires an interim plan amendment to be adopted by the time described in section 5.05 of the revenue procedure when there is a statutory or regulatory change with respect to plan qualification requirements that will impact provisions of the written plan document.

Q-19. Is a plan restatement submitted to the Service in Cycle B (February 1, 2007, through January 31, 2008) or Cycle C (February 1, 2008, through January 31, 2009) required to provide for the inclusion of gap-period earnings in the distribution of excess deferrals?

A-19. Yes. As described in section 12.03 of Rev. Proc. 2007-44, a restated plan submitted to the Service in Cycle B or Cycle C is required to provide for the distribution of gap-period earnings. A plan sponsor of a plan submitted before March 24, 2008 that does not provide for the distribution of gap-period earnings will be asked to amend the plan to include the distribution of gap-period earnings in order to receive a determination letter.

Q-20. Is an interim plan amendment to provide for the inclusion of gap-period earnings in the distribution of excess deferrals required to be adopted by the time described in section 5.05 of Rev. Proc. 2007-44?

A-20. No. An interim plan amendment to provide for the inclusion of gap-period earnings in the distribution of excess deferrals will not be required to be adopted until the last day of the first plan year beginning on or after January 1, 2009.

Q-21. Are plans required to include gap-period earnings in the distribution of excess deferrals in accordance with the final regulations under § 402(g)?

A-21. Yes. Although the interim plan amendment requirement has been delayed until 2009, plans must include gap-period earnings in the distribution of excess deferrals, effective for excess deferrals attributable to taxable years beginning on or after January 1, 2007.

DRAFTING INFORMATION

The principal author of this notice is Angelique Carrington of the Employee Plans, Tax Exempt and Government Entities Division. For further information regarding this notice, please contact the Employee Plans taxpayer assistance answering service at 1-877-829-5500 (a toll free number) or e-mail Ms. Carrington at RetirementPlanQuestions@irs.gov.