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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 8948]

RIN 1545-AY43

Minimum Cost Requirement Permitting the Transfer of Excess Assets of a Defined Benefit Pension Plan to a Retiree Health Account

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final Income Tax Regulations relating to the minimum cost requirement under section 420, which permits the transfer of excess assets of a defined benefit pension plan to a retiree health account. Pursuant to section 420(c)(3)(E), these regulations provide that an employer who significantly reduces retiree health coverage during the cost maintenance period does not satisfy the minimum cost requirement of section 420(c)(3). In addition, these regulations clarify the circumstances under which an employer is considered to have significantly reduced retiree health coverage during the cost maintenance period.

DATES: Effective Date: These regulations are effective June 19, 2001.

Applicability Date: These regulations are applicable to transfers of excess pension assets occurring on or after December 18, 1999. See the Effective Date portion of this preamble.

FOR FURTHER INFORMATION CONTACT: Janet A. Laufer or Vernon S. Carter, (202) 622-6060 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document contains final regulations (26 CFR Part 1) under section 420 of the Internal Revenue Code of 1986 (Code). These regulations provide guidance concerning the minimum cost requirement under section 420. The Revenue Reconciliation Act of 1990 (Public Law 101-508) (104 Stat. 1388), section 12011, added section 420 of the Code, a temporary provision permitting certain qualified transfers of excess pension assets from a non-multiemployer defined benefit pension plan to a health benefits account. A health benefit account is defined as an account established and maintained under section 401(h) of the Code (401(h) account) that is part of the plan.[1] One of the conditions of a qualified section 420 transfer was that the employer satisfy a maintenance of effort requirement in the form of a "minimum cost requirement" under which the employer was required to maintain employer-provided retiree health expenditures for covered retirees, their spouses, and dependents at a minimum dollar level for a 5-year cost maintenance period, beginning with the taxable year in which the

[1] Section 420(a)(1) and (2) provide that the trust that is part of the plan is not treated as failing to satisfy the qualification requirements of section 401(a) or (h) of the Code, and no amount is includible in the gross income of the employer maintaining the plan, solely by reason of such transfer. Also, section 420(a)(3) provides that a qualified transfer is not treated as either an employer reversion for purposes of section 4980 or a prohibited transaction for purposes of section 4975.

In addition, Title I of the Employee Retirement Income Security Act of 1974 (88 Stat. 829), as amended (ERISA), provides that a qualified transfer pursuant to section 420 is not a prohibited transaction under ERISA (ERISA section 408(b)(13)) or a prohibited reversion of assets to the employer (ERISA section 403(c)(1)). ERISA also provides certain notification requirements with respect to such qualified transfers.

qualified transfer occurs.

The Uruguay Round Agreements Act (Public Law 103-465) (108 Stat. 4809) (December 8, 1994), extended the availability of section 420 through December 31, 2000. In conjunction with the extension, Congress modified the maintenance of effort rules for plans transferring assets for retiree health benefits so that employers could take into account cost savings realized in their health benefit plans. As a result, the focus of the maintenance of effort requirement was shifted from health costs to health benefits. Under this "benefit maintenance requirement," which applied to qualified transfers made after December 8, 1994, an employer had to maintain substantially the same level of employer-provided retiree health coverage for the taxable year of the transfer and the following 4 years. The level of coverage required to be maintained was based on the coverage provided in the taxable year immediately preceding the taxable year of the transfer.

The Tax Relief Extension Act of 1999 (title V of H.R. 1180, the Ticket to Work and Work Incentives Improvement Act of 1999) (Public Law 106-170,113 Stat. 1860) (TREA-99) extended section 420 through December 31, 2005. In conjunction with this extension, the minimum cost requirement was reinstated as the applicable "maintenance of effort" provision (in lieu of requiring the maintenance of the level of coverage) for qualified transfers made after December 17, 1999. Because the minimum cost requirement relates to per capita cost, an employer could satisfy the minimum cost requirement by maintaining the average cost even though the employer defeats the purpose of the maintenance of effort requirement by reducing the number of people covered by the health plan. In response to concerns regarding this possibility, TREA-99 also added section 420(c)(3)(E), which requires the Secretary of the Treasury to prescribe such regulations as may be necessary to prevent an employer who significantly reduces retiree health coverage during the cost maintenance period from being treated as satisfying the minimum cost requirement of section 420(c)(3). If the minimum cost requirement of section 420(c)(3) is not satisfied, the transfer of assets from the pension plan to the 401(h) account is not a “qualified transfer” to which the provisions of section 420(a) apply.

On January 5, 2001, a notice of proposed rulemaking (REG-116468-00) was published in the **Federal Register** (66 FR 1066). Written comments were received on the proposed regulations. A public hearing scheduled for March 15, 2001 was canceled because no one had requested to speak (66 FR 13864). After consideration of all the comments received on the proposed regulations, the regulations are adopted as modified by this Treasury decision.

Explanation of Provisions

General Framework

Following the approach taken in the proposed regulations, these regulations provide that the minimum cost requirement of section 420(c)(3) is not met if an employer significantly reduces retiree health coverage during the cost maintenance period. Whether an employer has significantly reduced retiree health coverage is determined by looking at the number of individuals (retirees, their spouses, and dependents) who lose coverage during the cost maintenance period as a result of employer actions, measured on both an annual basis and a cumulative basis.

In determining whether an employer has significantly reduced retiree health coverage, the regulations provide that the employer does not satisfy the minimum cost requirement if the percentage decrease in the number of individuals provided with applicable health benefits that is attributable to employer action exceeds 10 percent in any year, or if the sum of the annual percentage decreases during the cost maintenance period exceeds 20 percent.

Employer Action

The regulations retain the broad definition of employer action contained in the proposed regulations. Thus, employer action includes not only plan amendments but also situations in which other employer actions, such as the sale of all or part of the employer's business, operate in conjunction with the existing plan terms to have the indirect effect of ending an individual's coverage.

The proposed regulations contained no exceptions from the rule that treats individuals as losing health coverage by reason of employer action if those individuals' coverage ends by reason of a sale of all or part of the employer's business, even if the buyer provides coverage for such individuals (on the implicit assumption that a buyer of less than an entire corporation rarely undertakes to provide such coverage to retirees in these transactions). The preamble to the proposed regulations specifically requested comments as to (1) the circumstances, if any, in which buyers commonly provide the seller's retirees, and their spouses and dependents, with health coverage following a corporate transaction, and (2) in such cases, criteria that should apply to the replacement coverage in determining whether to treat those individuals as not having lost coverage.

Commentators disagreed with the assumption stated in the preamble to the proposed regulations that a buyer acquiring a portion of a seller's business rarely undertakes to provide retiree health coverage to retirees in these transactions and expressed concern about the approach taken in the proposed regulations concerning individuals who lose retiree health coverage in such situations. One commentator stated that in the case of business combinations involving organizations that contract with the United States Government, the relevant procurement regulations encourage buyers to assume a seller's obligations for retirees' pension and retiree medical benefits. Other commentators expressed a desire to retain flexibility in structuring future business dispositions so that a buyer or transferee of a business could undertake to provide retiree health coverage for the seller's employees.

Generally, commentators requested that the regulations allow an employer who sells or transfers a business to take into account health coverage that a buyer or transferee provides to retired employees of the employer. Various approaches were suggested, most of them centering around allowing an employer to take credit for retiree health benefits provided by a buyer or transferee that are substantially similar to the benefits provided by the employer.

In cases in which a buyer acquires the entire employer sponsoring the pension plan that is the subject of the maintenance of effort requirement under section 420(c)(3)(E), no special rule is required, because the buyer as the successor employer maintaining the plan is responsible for continuing to satisfy the minimum cost requirements of section 420(c)(3) with respect to that transfer. However, based upon comments received, these final regulations include a special rule that allows the employer responsible for satisfying the maintenance of effort requirement of section 420(c)(3)(E) to take credit for a buyer's or transferee's provision of retiree health benefits in certain other situations.

Under the final regulations, an employer may, but is not required to, treat retiree health coverage as not having ended for individuals whose coverage is provided by a buyer. In such a case, for the year of the sale and future taxable years of the cost maintenance period, the employer must apply the minimum cost requirement contained in section 420(c)(3) by treating the individuals whose coverage is provided by the buyer as individuals to whom coverage for applicable health benefits is provided during the year (i.e., including all such individuals in the denominator in the determination of applicable employer cost) and treating amounts the buyer spends on health benefits for those individuals as qualified current retiree health liabilities. After the buyer commences providing the retiree health benefits, action of the buyer is attributed to the employer for purposes of determining whether an individual's coverage ends by reason of employer action. Accordingly, if a buyer initially provides retiree health benefits to individuals affected by the sale, but later amends its plan to stop providing benefits to those individuals, the employer must treat those individuals as having lost coverage by reason of employer action.

These final regulations also add a definition of "sale" to clarify that the rule for sales applies as well to other transfers of a business. In the case of a transfer, the transferee is treated as the buyer. Thus, for example, the rule applies in a situation in which an employer spins off all or part of its business, and also applies when a contractor that operates a government-owned facility is replaced by another contractor and the replacement contractor hires the employees of the prior contractor to operate the facility.

Effective Date

The proposed regulations provided that the 10 percent annual limit would not apply to a taxable year beginning before February 5, 2001 (30 days after publication of the proposed regulations in the **Federal Register**). However, under the proposed regulations, the 20 percent cumulative limit applied with respect to cost maintenance periods pertaining to any transfers made on or after December 18, 1999. Thus, if an employer reduced coverage by more than 20 percent prior to issuance of the proposed regulations, the employer would have failed the cumulative test.

Several commentators expressed concern about the proposed effective date of transfers occurring on or after December 18, 1999. None of the comments indicated that any employers had in fact reduced coverage by more than 20 percent prior to issuance of the proposed regulations, and one of the commentators stated that as a practical matter, the issue of retroactivity is moot. However, a number of the commentators expressed concern over retroactive effective dates in Treasury regulations as a matter of principle.

These final regulations, like the proposed regulations, provide that the 20 percent cumulative test will apply with respect to transfers of excess pension assets occurring on or after December 18, 1999. In order to address concerns raised by commentators, however, the final regulations take into account any reinstatement of coverage that occurs during the portion of a cost maintenance period that precedes the first day of the first taxable year beginning on or after January 1, 2002 (the initial period). Thus, for purposes of the cumulative test, if an employer reduced retiree health coverage by more than 20 percent, the employer can, before the end of the initial period, resume providing coverage for individuals who lost coverage and treat those individuals as not having lost coverage. However, if an employer reduces retiree health coverage by more than 20 percent during the initial period and does not "correct" by again providing coverage for individuals who lost coverage, the employer would fail the cumulative test. Also, the annual test of significant reduction applies only to taxable years beginning on or after January 1, 2002, which reflects a further delay from the date in the proposed regulation.

Additional changes

The proposed regulations contained a special rule that addresses situations in which an employer adopts plan terms that establish eligibility for health coverage for some individuals, but provide that those same individuals lose health coverage upon the occurrence of a particular event or after a stated period of time. In those cases, an individual is not counted as having lost health coverage by reason of employer action merely because that individual's coverage ends upon the occurrence of the event or after a certain period of time, such as when health benefits are provided to employees retiring as a result of a plant closing only for the period during which they receive severance pay (see example 2 of the regulations). As a result of the changes discussed above that address “corrections” through restoration of coverage during the initial period and sale transactions, these final regulations contain two modifications of the special rule for contemporaneously-adopted plan terms. First, the special rule is not available with respect to an amendment that restores coverage before the end of the initial period. Second, in the context of an amendment of a buyer’s health plan to provide retiree health coverage for a seller’s employees, the special rule is available only to the extent that any terms that have the effect of ending an individual’s coverage are the same as the terms of the plan maintained by the seller, and only if the terms of the seller’s plan that terminate coverage were adopted contemporaneously with the provision under which the individual became eligible for retiree health coverage under the seller’s plan.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and, because the regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding these regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal authors of these regulations are Janet A. Laufer and Vernon S.

Carter, Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1 – INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended by adding a new entry in numerical order to read in part as follows:

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

§1.420-1 also issued under 26 U.S.C. 420(c)(3)(E).

Par. 2 Section 1.420-1 is added under the undesignated center heading "Pension, Profit-Sharing, Stock Bonus Plans, etc." to read as follows:

<u>§1.420-1 Significant reduction in retiree health coverage during the cost maintenance period</u>.

(a) <u>In general</u>. Notwithstanding section 420(c)(3)(A), the minimum cost requirements of section 420(c)(3) are not met if the employer significantly reduces retiree health coverage during the cost maintenance period.

(b) <u>Significant reduction</u>--(1) <u>In general</u>. An employer significantly reduces retiree health coverage during the cost maintenance period if, for any taxable year beginning on or after January 1, 2002, that is included in the cost maintenance period, either --

(i) The employer-initiated reduction percentage for that taxable year exceeds 10 percent; or

(ii) The sum of the employer-initiated reduction percentages for that taxable year and all prior taxable years during the cost maintenance period exceeds 20 percent.

(2) Employer-initiated reduction percentage. The employer-initiated reduction percentage for any taxable year is the fraction B/A, expressed as a percentage, where:

A = The total number of individuals (retired employees plus their spouses plus their dependents) receiving coverage for applicable health benefits as of the day before the first day of the taxable year.

B = The total number of individuals included in A whose coverage for applicable health benefits ended during the taxable year by reason of employer action.

(3) Special rules for taxable years beginning before January 1, 2002. The following rules apply for purposes of computing the amount in paragraph (b)(1)(ii) of this section if any portion of the cost maintenance period precedes the first day of the first taxable year beginning on or after January 1, 2002--

(i) Aggregation of taxable years. The portion of the cost maintenance period that precedes the first day of the first taxable year beginning on or after January 1, 2002 (the initial period) is treated as a single taxable year and the employer-initiated reduction percentage for the initial period is computed as set forth in paragraph (b)(2) of this section, except that the words “initial period” apply instead of “taxable year.”

(ii) Loss of coverage. If coverage for applicable health benefits for an individual ends by reason of employer action at any time during the initial period, an employer may treat that coverage as not having ended if the employer restores coverage for applicable health benefits to that individual by the end of the initial period.

(4) Employer action--(i) General rule. For purposes of paragraph (b)(2) of this section, an individual's coverage for applicable health benefits ends during a taxable year by reason of employer action, if on any day within the taxable year, the individual's eligibility for applicable health benefits ends as a result of a plan amendment or any other action of the employer (e.g., the sale of all or part of the employer's business) that, in conjunction with the plan terms, has the effect of ending the individual's eligibility. An employer action is taken into account for this purpose regardless of when the employer action actually occurs (e.g., the date the plan amendment is executed), except that employer actions occurring before the later of December 18, 1999, and the date that is 5 years before the start of the cost maintenance period are disregarded.

(ii) Special rule. Notwithstanding paragraph (b)(4)(i) of this section, coverage for an individual will not be treated as having ended by reason of employer action merely because such coverage ends under the terms of the plan if those terms were adopted contemporaneously with the provision under which the individual became eligible for retiree health coverage. This paragraph (b)(4)(ii) does not apply with respect to plan terms adopted contemporaneously with a plan amendment that restores coverage for applicable health benefits before the end of the initial period in accordance with paragraph (b)(3)(ii) of this section.

(iii) Sale transactions. If a purchaser provides coverage for retiree health benefits to one or more individuals whose coverage ends by reason of a sale of all or part of the employer's business, the employer may treat the coverage of those individuals as not having ended by reason of employer action. In such a case, for the remainder of the year of the sale and future taxable years of the cost maintenance period --

(A) For purposes of computing the applicable employer cost under section 420(c)(3), those individuals are treated as individuals to whom coverage for applicable health benefits was provided (for as long as the purchaser provides retiree health coverage to them), and any amounts expended by the purchaser of the business to provide for health benefits for those individuals are treated as paid by the employer;

(B) For purposes of determining whether a subsequent termination of coverage is by reason of employer action under this paragraph (b)(4), the purchaser is treated as the employer. However, the special rule in paragraph (b)(4)(ii) of this section applies only to the extent that any terms of the plan maintained by the purchaser that have the effect of ending retiree health coverage for an individual are the same as terms of the plan maintained by the employer that were adopted contemporaneously with the provision under which the individual became eligible for retiree health coverage under the plan maintained by the employer.

(c) Definitions. The following definitions apply for purposes of this section:

(1) Applicable health benefits. Applicable health benefits means applicable health benefits as defined in section 420(e)(1)(C).

(2) Cost maintenance period. Cost maintenance period means the cost maintenance period as defined in section 420(c)(3)(D).

(3) Sale. A sale of all or part of an employer's business means a sale or other transfer in connection with which the employees of a trade or business of the employer

become employees of another person. In the case of such a transfer, the term <u>purchaser</u> means a transferee of the trade or business.

(d) <u>Examples</u>. The following examples illustrate the application of this section:

<u>Example 1</u>. (i) Employer W maintains a defined benefit pension plan that includes a 401(h) account and permits qualified transfers that satisfy section 420. The number of individuals receiving coverage for applicable health benefits as of the day before the first day of Year 1 is 100. In Year 1, Employer W makes a qualified transfer under section 420. There is no change in the number of individuals receiving health benefits during Year 1. As of the last day of Year 2, applicable health benefits are provided to 99 individuals, because 2 individuals became eligible for coverage due to retirement and 3 individuals died in Year 2. During Year 3, Employer W amends its health plan to eliminate coverage for 5 individuals, 1 new retiree becomes eligible for coverage and an additional 3 individuals are no longer covered due to their own decision to drop coverage. Thus, as of the last day of Year 3, applicable health benefits are provided to 92 individuals. During Year 4, Employer W amends its health plan to eliminate coverage under its health plan for 8 more individuals, so that as of the last day of Year 4, applicable health benefits are provided to 84 individuals. During Year 5, Employer W amends its health plan to eliminate coverage for 8 more individuals.

(ii) There is no significant reduction in retiree health coverage in either Year 1 or Year 2, because there is no reduction in health coverage as a result of employer action in those years.

(iii) There is no significant reduction in Year 3. The number of individuals whose health coverage ended during Year 3 by reason of employer action (amendment of the plan) is 5. Since the number of individuals receiving coverage for applicable health benefits as of the last day of Year 2 is 99, the employer-initiated reduction percentage for Year 3 is 5.05 percent (5/99), which is less than the 10 percent annual limit.

(iv) There is no significant reduction in Year 4. The number of individuals whose health coverage ended during Year 4 by reason of employer action is 8. Since the number of individuals receiving coverage for applicable health benefits as of the last day of Year 3 is 92, the employer-initiated reduction percentage for Year 4 is 8.70 percent (8/92), which is less than the 10 percent annual limit. The sum of the employer-initiated reduction percentages for Year 3 and Year 4 is 13.75 percent, which is less than the 20 percent cumulative limit.

(v) In Year 5, there is a significant reduction under paragraph (b)(1)(ii) of this section. The number of individuals whose health coverage ended during Year 5 by reason of employer action (amendment of the plan) is 8. Since the number of individuals receiving coverage for applicable health benefits as of the last day of Year 4 is 84, the employer-initiated reduction percentage for Year 5 is 9.52 percent (8/84), which is less than the 10 percent annual limit. However, the sum of the employer-initiated reduction percentages for Year 3, Year 4, and Year 5 is 5.05 percent + 8.70 percent + 9.52 percent = 23.27 percent, which exceeds the 20 percent cumulative limit.

Example 2. (i) Employer X, a calendar year taxpayer, maintains a defined benefit pension plan that includes a 401(h) account and permits qualified transfers that satisfy section 420. X also provides lifetime health benefits to employees who retire from Division A as a result of a plant shutdown, no health benefits to employees who retire from Division B, and lifetime health benefits to all employees who retire from Division C. In 2000, X amends its health plan to provide coverage for employees who retire from Division B as a result of a plant shutdown, but only for the 2-year period coinciding with their severance pay. Also in 2000, X amends the health plan to provide that employees who retire from Division A as a result of a plant shutdown receive health coverage only for the 2-year period coinciding with their severance pay. A plant shutdown that affects Division A and Division B employees occurs in 2000. The number of individuals receiving coverage for applicable health benefits as of the last day of 2001 is 200. In 2002, Employer X makes a qualified transfer under section 420. As of the last day of 2002, applicable health benefits are provided to 170 individuals, because the 2-year period of benefits ends for 10 employees who retired from Division A and 20 employees who retired from Division B as a result of the plant shutdown that occurred in 2000.

(ii) There is no significant reduction in retiree health coverage in 2002. Coverage for the 10 retirees from Division A who lose coverage as a result of the end of the 2-year period is treated as having ended by reason of employer action, because coverage for those Division A retirees ended by reason of a plan amendment made after December 17, 1999. However, the terms of the health plan that limit coverage for employees who retired from Division B as a result of the 2000 plant shutdown (to the 2-year period) were adopted contemporaneously with the provision under which those employees became eligible for retiree coverage under the health plan. Accordingly, under the rule provided in paragraph (b)(4)(ii) of this section, coverage for those 20 retirees from Division B is not treated as having ended by reason of employer action. Thus, the number of individuals whose health benefits ended by reason of employer action in 2002 is 10. Since the number of individuals receiving coverage for applicable health benefits as of the last day of 2001 is 200, the employer-initiated reduction percentage for 2002 is 5 percent (10/200), which is less than the 10 percent annual limit.

(e) Regulatory effective date. This section is applicable to transfers of excess pension assets occurring on or after December 18, 1999.

David A. Mader
Acting Deputy Commissioner of Internal Revenue

Approved: June 12, 2001

Mark A. Weinberger
Assistant Secretary of the Treasury (Tax Policy)