Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9J, *Airspace Designations and Reporting Points*, dated September 1, 2001, and effective September 16, 2001, is to be amended as follows:

* * * * *

Paragraph 6005 Class E airspace extending upward from 700 feet or more above the surface of the earth.

* * * * *

AAL AK E5 Buckland, AK [Revised]

Buckland Airport, AK
(Lat. 65°58′56″N, long. 161°09′07″W)

That airspace extending upward from 700 feet above the surface within a 6.5 mile radius of the Buckland Airport; and that airspace extending upward from 1,200 feet above the surface from 65°28′30″N, 159°00′00″W to 65°57′45″N, 162°11′00″W to 66°16′00″N, 162°15′00″W to 66°40′00″N, 160°03′00″W to 66°35°00″N, 160°27′00″W to 66°11′00″N, 159°00′00″W to point of beginning.

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Issued in Anchorage, AK, on April 10, 2002.

Stephen P. Creamer,

Assistant Manager, Air Traffic Division, Alaskan Region.

[FR Doc. 02–9848 Filed 4–22–02; 8:45 am]

BILLING CODE 4910–13–P

NATIONAL INDIAN GAMING COMMISSION

25 CFR Part 542

RIN 3141–AA24

Minimum Internal Control Standards

AGENCY: National Indian Gaming Commission.

ACTION: Notice of certification of no significant impact under the Regulatory Flexibility Act; request for comments.

SUMMARY: The National Indian Gaming Commission (Commission) is reopening the comment period on our proposed revisions to the Minimum Internal Control Standards, 66 Fed. Reg. 66500 (December 26, 2001) for the limited purpose of giving small entities an opportunity to comment on the Commission's certification that the proposed revisions will not have a significant economic impact on them.

DATES: Comments must be received on or before May 23, 2002.

ADDRESSES: Mail comments to: Comments on Regulatory Flexibility Act on MICS, National Indian Gaming Commission, 1441 L St., NW, Suite 9100, Washington, D.C. 20005, Attn.: Michele F. Mitchell. Comments and requests may also be sent by facsimile to 202–632–7066.

FOR FURTHER INFORMATION CONTACT: Michele F. Mitchell, at 202/632–7003 or, by fax, at 202/632–7066 (these are not toll-free numbers).

SUPPLEMENTARY INFORMATION: The Commission published proposed revisions to its existing Minimum Internal Control Standards on December 26, 2001. 66 FR 66500. The Commission received numerous comments on the proposed rule. As a result of one of the comments received, the Commission determined that certain Indian gaming operations, if they meet specific definitional criteria, may qualify as ''small entities,'' under the Regulatory Flexibility Act (RFA). 5 U.S.C. 601(3).

Section 603 of the RFA, requires agencies to prepare an analysis describing the impact of proposed rules on small entities. In the alternative, if an agency determines that its rule will not have a significant impact on a substantial number of small entities, it may certify to this determination and an analysis is not required. (5 U.S.C. 605(b)).

There are approximately 315 Indian gaming operations across the country. We estimate that approximately 100 of the operations have gross revenues of less than $5 million. Of these, approximately 50 operations have gross revenues of under $1 million. Since the proposed revisions will not apply to gaming operations with gross revenues under $1 million, only 50 small operations may be affected.

The proposed rule will not have a significant economic affect on these operations because gaming operations must have internal controls to protect their assets. The costs involved in implementing these controls are part of the regular business costs incurred by such an operation.

The Commission's regulations require tribes to adopt minimum standards, below which, the assets of the gaming operation would be placed at an unacceptable risk of loss. We believe that many Indian gaming operations have already implemented internal control standards which are more stringent than those contained in these regulations.

Under the proposed revisions, small gaming operations grossing under $1 million are exempted from MICS compliance. Tier A facilities (those with gross revenues between $1 and $5 million) are subject to the yearly requirement that independent certified public accountant testing occur. The purpose of this testing is to measure the gaming operation's compliance with the tribe's minimum internal control standards. The cost of compliance with this requirement for a small gaming operation is estimated at between $3,000 and $5,000. The cost of this report is minimal and does not create a significant economic effect on gaming operations. What little impact exists is further offset because other regulations require a yearly independent financial audit that can be conducted at the same time. The results of the MICS audit are used by Commission and the tribes to measure compliance with the standards. For these reasons, the Commission has concluded that the proposed rule will not have a significant economic impact on those small entities subject to the rule.

If your gaming operation qualifies as a small entity and you would like to comment on the Commission's conclusions, please submit a comment explaining how and to what degree these proposed revisions affect you and the extent of the economic impact on your business. The Commission will consider any comments received prior to issuing a final rule. Comments addressing the substantive provisions of the proposed revisions to 25 CFR part 542 will not be considered at this time.

The Commission will provide this certification to the Chief Counsel for Advocacy of the Small Business Administration as required by 5 U.S.C. 605(b).

Dated: April 17, 2002.

Montie R. Deer,

Chairman.

Elizabeth L. Homer,

Vice Chair.

Teresa E. Poust,

Commissioner.

[FR Doc. 02–9861 Filed 4–22–02; 8:45 am]

BILLING CODE 7565–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1, 54 and 602

[REG–136193–01]

RIN 1545–BA08

Notice of Significant Reduction in the Rate of Future Benefit Accrual

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed regulations relating to the requirements of section 4980F of the Internal Revenue Code (Code) and section 204(h) of the Employee Retirement Income Security Act of 1974 (ERISA), as amended, which apply to defined benefit plans and to individual account plans that are subject to the funding standards of section 412 of the Code and section 302 of ERISA. These regulations provide guidance on the requirements for plan administrators to give notice of plan amendments to adversely affected plan participants and other parties when those amendments provide for a significant reduction in the rate of future benefit accrual or the elimination or significant reduction in an early retirement benefit or retirement-type subsidy. These regulations will affect retirement plan sponsors and administrators, participants in and beneficiaries of retirement plans, and employee organizations representing retirement plan participants. This document also provides a notice of public hearing on these proposed regulations.

DATES: Written or electronic comments must be received by July 22, 2002.

Requests to speak (with outlines of oral comments to be discussed) at the public hearing scheduled for August 15, 2002, at 10 a.m., must be received by July 22, 2002.

ADDRESSES: Send submissions to: CC:ITA:RU (REG–136193–01), room 5226, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 5 p.m. to: CC:ITA:RU (REG–136193–01), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC. Alternatively, taxpayers may submit comments electronically directly to the IRS Internet site at *www.irs.gov/regs*. The public hearing will be held in the IRS Auditorium, Seventh Floor, Internal Revenue Service, 1111 Constitution Ave., NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, Janet A. Laufer at (202) 622–6090 or Diane S. Bloom at (202) 283–9888; concerning submissions, Donna Poindexter at (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collections of information contained in this notice of proposed rulemaking have been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collections of information should be sent to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, W:CAR:MP:FP:S Washington, DC 20224. Comments on the collection of Information should be received by June 24, 2002. Comments are specifically requested concerning:

Whether the proposed collections of information are necessary for the proper performance of the functions of the Internal Revenue Service, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information (see below);

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the proposed collections of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of service to provide information.

The collections of information in this proposed regulation are in § 54.4980F–1. Responses to this collection of information are required in order to obtain a benefit. Specifically, this information is required for a taxpayer who wants to amend a plan that is subject to the requirements of section 204(h) or section 4980F to significantly reduce the rate of future benefit accrual or significantly reduce an early retirement benefit or retirement-type subsidy. This information will be used to notify participants, alternate payees, and employee organizations of the amendment.

Estimated total annual reporting burden: 40,000 hours.

The estimated annual burden per respondent varies from one hour to 80 hours, depending on individual circumstances, with an estimated average of 10 hours.

Estimated number of respondents: 4,000.

Estimated annual frequency of responses: Once.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background

Section 204(h) was added to ERISA by section 11006(a) of the Single-Employer Pension Plan Amendments Act of 1986, Title XI of Public Law 99–272 (100 Stat. 237) and was amended by section 1879(u)(1) of the Tax Reform Act of 1986, Public Law 99–514 (100 Stat. 2913) (TRA '86). As amended by TRA '86, section 204(h) of ERISA (section 204(h)) required a plan administrator to provide notice to participants and other interested persons after the date of adoption and at least 15 days before the effective date of a plan amendment providing for a significant reduction in the rate of future benefit accrual.

Pursuant to section 101(a) of Reorganization Plan No. 4 of 1978, 29 U.S.C. 1001nt, the Secretary of the Treasury generally has authority to issue regulations under parts 2 and 3 of subtitle B of title I of ERISA, including section 204 of ERISA. Under section 104 of Reorganization Plan No. 4, the Secretary of Labor retains enforcement authority with respect to parts 2 and 3 of subtitle B of title I of ERISA, but, in exercising such authority, is bound by the regulations issued by the Secretary of the Treasury. On December 15, 1995, temporary regulations (TD 8631), under section 411 of the Internal Revenue Code (Code), 26 U.S.C. 411, were published in the **Federal Register** (60 FR 64320), along with a notice of proposed rulemaking cross-referencing the temporary regulations (60 FR 64401). Those temporary regulations addressed the notice requirements of section 204(h). On December 14, 1998, final regulations (TD 8795) addressing the notice requirements of section 204(h) were published in the **Federal Register**. See § 1.411(d)–6.

Section 659 of the Economic Growth and Tax Relief Reconciliation Act of 2001, Public Law 107–16 (115 Stat. 38) (EGTRRA) added section 4980F of the Code, which imposes an excise tax when a plan administrator fails to provide timely notice of plan amendments that provide for a significant reduction in the rate of future benefit accrual, and, for this purpose, treats the elimination or

reduction of an early retirement benefit or retirement-type subsidy as a reduction in the rate of future benefit accrual. EGTRRA also amended section 204(h) to treat the elimination or reduction of an early retirement benefit or retirement-type subsidy as a reduction in the rate of future benefit accrual. The requirement in section 204(h)(1) that notice be given after the date of adoption and at least 15 days in advance of the amendment's effective date was replaced by a requirement contained in both section 4980F(e)(3) and section 204(h)(3) that, except as provided in regulations, the notice be provided within a ''reasonable time'' before the effective date of the amendment. The notice requirements in section 4980F of the Code are essentially identical to the notice requirements in section 204(h), as amended by EGTRRA. In addition, section 204(h) has been amended by EGTRRA to provide that, in the case of an egregious failure to meet the notice requirements, the provisions of the plan are applied as if the amendment entitled applicable individuals to the greater of the benefits to which they would have been entitled without regard to the amendment or the benefits under the plan as amended.

The Job Creation and Worker Assistance Act of 2002, Public Law 107–147 (116 Stat. 21) included certain technical corrections to section 659 of EGTRRA.

These proposed regulations, when finalized, would replace the Treasury regulations currently at § 1.411(d)–6 to reflect the EGTRRA changes outlined above. Since the notice requirements of section 204(h) are now also required under section 4980F of the Code, these proposed regulations are issued under section 4980F, but apply for purposes of section 204(h), as well as for purposes of section 4980F.

Explanation of Provisions

Statutory Requirements After EGTRRA

Section 4980F(e) of the Code and section 204(h) of ERISA require notice to be provided when a defined benefit plan or a money purchase pension or other individual account plan that is subject to the funding standards of section 412 of the Code is amended to significantly reduce the rate of future benefit accrual. This notice must be provided to participants and alternate payees for whom the amendment is reasonably expected to significantly reduce the rate of future benefit accrual, and to employee organizations representing such participants. For purposes of these rules, an amendment that eliminates or reduces an early retirement benefit or retirement-type subsidy is treated as an amendment that reduces the rate of future benefit accrual. The notice must contain sufficient information (as determined in accordance with regulations) to enable such individuals to understand the effect of the amendment and, except to the extent provided in regulations, must be provided within a reasonable time before the effective date of the amendment. Additionally, section 4980F(e)(2) of the Code and section 204(h)(2) of ERISA authorize the Secretary to provide special rules for plans covering fewer than 100 participants and for plans that offer participants the option to choose between the new benefit formula and the old benefit formula.

A plan amendment that is subject to the notice requirements of section 4980F of the Code and section 204(h) of ERISA (section 204(h) amendment) may be subject to additional reporting and disclosure requirements under title I of ERISA, such as the requirement to provide a summary of material modifications (SMM) describing the amendment. Notice under section 4980F of the Code and section 204(h) of ERISA (referred to in the proposed regulations as section 204(h) notice) must be provided in accordance with the provisions of these regulations even though sections 102(a) and 104(b) of ERISA also may require that an SMM describing the plan amendment be furnished to participants covered under the plan and beneficiaries receiving benefits under the plan. The Department of Labor has advised the IRS that, at least until the effective date of final regulations under section 4980F of the Code, a plan administrator that provides a section 204(h) notice to applicable individuals in accordance with these proposed regulations will be treated as having furnished those individuals with an SMM regarding the section 204(h) amendment. The plan administrator is required to satisfy any other requirements regarding the furnishing of SMMs or updated summary plan descriptions, including, for example, satisfaction of the requirement to furnish an SMM to any other participants covered under the plan, and to beneficiaries receiving benefits under the plan, who are entitled to an SMM regarding the amendment.

Time for Providing Section 204(h) Notice Under Proposed Regulations

The proposed regulations aim to strike a balance between giving participants and other affected parties section 204(h) notice long enough in advance to enable them to understand and consider the information before the amendment goes into effect, and allowing employers the ability to effect changes to their plans for business reasons (such as to facilitate business reorganizations or to permit small businesses the flexibility to reduce costs promptly) within a reasonable time. The Treasury Department and IRS have concluded, based on the history of the legislation, that the reason why the 15-day advance notice required under section 204(h) as it existed prior to EGTRRA was replaced by the ''reasonable time'' standard is because the 15-day standard was perceived as often being insufficient. Accordingly, these proposed regulations would provide that a reasonable time generally means at least 45 days before the effective date of the plan amendment.

However, the proposed regulations include certain special timing rules, including rules that would allow section 204(h) notice to be provided as late as 15 days before the effective date of the amendment in two types of cases. First, the proposed regulations would generally permit section 204(h) notice to be provided 15 days in advance for amendments adopted in connection with business mergers and acquisitions. Second, the proposed regulations include a 15-day advance notice requirement with respect to amendments of small plans. Thus, the 15-day standard that was in section 204(h) before EGTRRA would generally continue to apply for small plans and for amendments adopted in connection with business mergers and acquisitions for which notice would have been required under section 204(h) as in effect before EGTRRA. The proposed regulations provide an additional special timing rule that applies in the case of an amendment that is adopted in connection with a business merger or acquisition involving a plan-to-plan transfer or merger and that affects only an early retirement benefit or retirement-type subsidy (but does not reduce the rate of future benefit accrual). In the case of such an amendment, the notice must be provided no later than 30 days after the effective date of the amendment.

In the case of a plan amendment which offers participants the option to choose between the new benefit formula and the old benefit formula, the general timing rules would apply, except that the proposed regulations would allow certain additional information to be provided at a later date, as described in *Content of Section 204(h) Notice* of this preamble.

Content of Section 204(h) Notice

Section 4980F(e)(2) of the Code and section 204(h)(2) of ERISA require section 204(h) notice to be written in a manner calculated to be understood by the average plan participant and to provide sufficient information (as determined in accordance with regulations) to allow applicable individuals to understand ''the effect of'' the amendment.

The Conference report for EGTRRA states that the changes to the section 204(h) of ERISA notice requirements were expected to ''provide for alternative disclosures rather than a single disclosure methodology that may not fit all situations,'' and also notes ''the need to consider the complex actuarial calculations and assumptions involved in providing necessary disclosures.'' H.R. Rep. 107–84, at 266. In addition, particular concern was expressed about the effects of conversion of traditional defined benefit plans to cash balance or hybrid formula plans and the effects of ''wear-away'' provisions under which participants earn no additional benefits for a period of time after conversion. H.R. Rep. 107–84, at 266.

The content requirements in these proposed regulations take into account this background and generally seek to ensure that adversely affected participants receive sufficient information to enable them to understand the impact and magnitude of the changes being made to their pension plan, without imposing unduly burdensome requirements on employers and while permitting latitude to employers in diverse businesses with varying employee demographics to determine how to communicate plan changes in an appropriately effective manner. Accordingly, the proposed regulations provide general standards for the content of a section 204(h) notice, rather than containing specific requirements for each type of notice.

The proposed regulations require a section 204(h) notice to include sufficient information to allow applicable individuals to understand the effect of the plan amendment, including the approximate magnitude of the expected reduction. The type and amount of information necessary to satisfy this standard varies depending on the nature of the change resulting from the amendment. The information must be written in a manner calculated to be understood by the average plan participant. The notice must describe the affected provisions prior to plan amendment, describe these provisions as amended, and state the effective date of the amendment. This description of plan provisions might be similar to the description of a plan's benefit accrual formula in a summary plan description that satisfies the requirements under § 2520.102–3 of the Department of Labor regulations. If the amendment applies by its terms differently to various classes of employees (such as where the amendment applies differently depending on what division an employee is in), the explanation must include sufficient information to allow an affected participant to understand the general class or classes of participants to whom the reduction applies. Also, these proposed regulations clarify that, in cases in which a plan amendment affects different classes of applicable individuals differently, the plan administrator may provide different section 204(h) notices. A section 204(h) notice cannot include materially false or misleading information (or omit information so as to cause the information provided to be misleading).

If a section 204(h) amendment reduces an early retirement benefit or retirement-type subsidy merely as a result of reducing the rate of future benefit accrual, the section 204(h) notice need not contain a separate description of that reduction in the early retirement benefit or retirement-type subsidy.

Additional information may be necessary to make the approximate magnitude of the reduction apparent. In cases in which it is not reasonable to expect that the approximate magnitude of the reduction will be reasonably apparent from a narrative description, one or more illustrative examples are required to be included in the notice. Thus, for example, illustrative examples would be required for a change from a traditional defined benefit formula to a cash balance formula or a change that results in a period of time during which there are no accruals with regard to normal retirement benefits or an early retirement subsidy (a wear-away period). However, examples are not required to illustrate circumstances under which a participant's benefit may increase as a result of the section 204(h) amendment.

Where an amendment may result in reductions that vary in their impact on applicable individuals, the examples must show the approximate range of the reductions. However, the range of reductions need not include reductions that are likely to occur in only a de minimis number of cases if a narrative statement is included to that effect (for example, such a narrative might state that larger or smaller reductions may occur in some other cases) and examples are provided that show the approximate range of the reductions in cases other than this de minimis number. For amendments for which the maximum reduction occurs under identifiable circumstances with proportionately smaller reductions in other cases, the range of reductions can be illustrated by one example illustrating the maximum reduction, with a statement that smaller reductions also occur. Further, assuming that the reduction varies from small to large depending on service or other factors, as might occur for an amendment that results in a wear-away, two illustrative examples may be provided showing the smallest likely reduction and the largest likely reduction.

Examples are not required to be based on any particular form of payment (such as a life annuity or a single sum), but may be based on whatever form appropriately illustrates the reduction. The examples may be based on any reasonable assumptions, such as assumptions relating to age, service, and compensation (and salary scale assumptions for amendments that alter the compensation taken into account under the plan, such as a change from a final pay plan to a career average pay plan), but the section 204(h) notice must identify those assumptions. The proposed regulations include special rules for determining whether an amendment is reasonably expected to result in a wear-away period.

The proposed regulations include special rules for any case in which an applicable individual can choose between the new formula and the old formula. Under these rules, the individual must be provided sufficient information to enable the individual to make an informed choice between the new and old benefit formulas. The information to enable the individual to make an informed choice is not required to be provided at the same time as section 204(h) notice is otherwise required to be provided, as long as it is provided within a period that is reasonably contemporaneous with the individual's choice and that allows sufficient advance notice to enable the individual to understand and consider the additional information before making the choice.

A section 204(h) notice may include more information than is required, but cannot include any false or misleading information and cannot include so much additional information that the required information fails to be provided in a manner calculated to come to the attention of applicable individuals. While a notice for an amendment converting a traditional

final pay plan to a cash balance plan must include an estimate of the future normal retirement benefit of the participant in the illustration even if that requires an estimate of future wage increases, a section 204(h) notice could also include alternative estimates. For example, an alternative estimate could be based on an assumption that there are no future wage increases.

The proposed regulations include several examples, including examples that are intended to show the illustrations that are required for a cash balance conversion amendment that is a based on a very simplified form of conversion. For more complex conversion amendments, it is expected that more illustrations may be appropriate. However, these regulations do not require section 204(h) notice to include different illustrative examples to address the amount of the reduction for every demographic variation (e.g., differences in compensation or years of service).

Excise Tax Under Internal Revenue Code Section 4980F(c)(1)

Section 4980F(c)(1) of the Code provides that no excise tax is imposed on a failure for any period during which it is established to the satisfaction of the Secretary that the employer (or other person responsible for the tax) did not know that the failure existed and exercised reasonable diligence to meet the notice requirements. The proposed regulations provide that the requirements of section 4980F(c)(1) of the Code are satisfied if and only if the person that would be responsible for the tax exercised reasonable diligence in attempting to deliver timely section 204(h) notice to applicable individuals (by the latest date permitted under the regulations) and believed that section 204(h) notice was actually and timely delivered to each applicable individual. An example of this illustrates that section 4980F(c)(1) of the Code would apply to a situation in which a plan administrator relies on an overnight delivery service to send materials to the persons who are expected to hand deliver section 204(h) notice to participants, and the overnight delivery service is late in making that delivery.

ERISA Provisions Regarding Egregious Failures

Section 204(h)(6)(A) of ERISA, as amended by EGTRRA, provides that in the case of an egregious failure to meet the notice requirements, the provisions of the plan are applied as if the plan amendment entitled applicable individuals to the greater of the benefits to which they would have been entitled without regard to the amendment or the benefits under the plan as amended. Section 204(h)(6)(B) of ERISA provides that, for this purpose, there is an egregious failure to meet the section 204(h) notice requirements if such failure is within the control of the plan sponsor and is an intentional failure (including any failure to promptly provide the required notice or information after the plan administrator discovers an unintentional failure to meet notice requirements) or a failure to provide most of the individuals with most of the information they are entitled to receive. The proposed regulations provide that a failure is not egregious if the plan administrator reasonably determines, taking into account the statute, administrative guidance, and relevant facts and circumstances, that the reduction is not significant. The proposed regulations clarify that, in the case of a failure that is not egregious, the failure will not preclude the amendment from becoming effective. However, where there is a failure, whether or not egregious, recourse may be available under ERISA section 502 to, among other things, recover benefits due under the plan, enforce rights under the terms of the plan, clarify rights to future benefits under the plan, obtain equitable relief, or otherwise redress such violation. This might occur, for example, if a participant receives and thus uses materially inadequate or misleading information in making a choice between the new and the old benefit formula.

Method of Delivery of Section 204(h) Notice

As a general standard, the section 204(h) notice either must be provided through a method that results in actual receipt of the notice or the plan administrator must take appropriate and necessary measures reasonably calculated to ensure that the method for providing the notice results in actual receipt. Therefore, section 204(h) notice may not be provided by ''posting.''

Section 4980F(g) of the Code and section 204(h)(7) of ERISA, as amended by EGTRRA, state that the Secretary of the Treasury may by regulation allow 204(h) notice to be provided using new technologies. Because those provisions specifically relate to electronic delivery and were enacted after enactment of the Electronic Signatures in Global and National Commerce Act (114 Stat. 464) (2000) (E-SIGN Act), the authority conferred by those provisions on the Secretary to decide whether to permit, and under what conditions to permit, electronic delivery of section 204(h) notice is not constrained by the provisions of the E–SIGN Act.

Section 4980F(g) of the Code and section 204(h)(7) of ERISA give the Secretary of the Treasury authority to impose appropriate criteria for the provision of section 204(h) notice through electronic methods to ensure that applicable individuals will receive section 204(h) notice electronically and are able to access it timely. As noted above, section 204(h) notice either must be provided through a method that results in actual receipt of the notice or the plan administrator must take appropriate and necessary measures reasonably calculated to ensure that the method for providing the notice results in actual receipt. These proposed regulations would apply the same standard to the electronic delivery of section 204(h) notice by requiring that the method used result in actual receipt or that the plan administrator take appropriate and necessary measures to ensure that any provision of the notice in electronic format results in actual receipt of the transmitted information. Additionally, the plan administrator must offer to provide each applicable individual a paper version of the notice free of charge. Of course, the requirements of these regulations must otherwise be satisfied when section 204(h) notice is provided in electronic format. The proposed regulations include a number of examples illustrating the rules applicable to the electronic provision of a section 204(h) notice and also include a safe harbor, which has conditions similar to the consumer protection provisions of section 101(c) of the E–SIGN Act.

Under the proposed regulations, permitted electronic means for furnishing section 204(h) notice would include e-mail, a site on the Internet, or other electronic communications site, and a DVD or CD that could generally be accessed using a computer at an employee's worksite. However, section 204(h) notice information is not considered provided merely because it is available through a computer kiosk, even when the kiosk is at the individual's workplace and the individual is otherwise provided notice of the availability of information at the kiosk, because, like posting, providing such information through a kiosk places a burden on participants to seek out the information. Nevertheless, information made available through a kiosk is considered provided to those applicable individuals who actually access the information through the kiosk.

Proposed Effective Date

These proposed regulations would apply to amendments that go into effect on or after the date that is 120 days after publication of final regulations in the **Federal Register**. The proposed regulations also restate the general statutory effective date and special effective date rules that are in section 659(c) of EGTRRA. Thus, the proposed regulations include the transition rule of section 659(c)(2) of EGTRRA that provides that, for amendments taking effect on or after the date of enactment of EGTRRA (June 7, 2001) and prior to the effective date of the final regulations, the notice requirements of section 4980F(e)(2) and (3) of the Code, and of section 204(h) of ERISA as amended by EGTRRA, are treated as satisfied if the plan administrator makes a reasonable, good faith effort to comply with those requirements.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations.

It is hereby certified that the collection of information in these proposed regulations will not have a significant economic impact on a substantial number of small entities. This certification is based upon the fact that small entities generally do not have very complex benefit structures in their plans, or many different classes of participants who will be differently affected by an amendment reducing the rate of future benefit accrual. Small entities also have fewer employees, and so those small entities that are required to provide section 204(h) notice need to provide it to fewer individuals. Accordingly, the time required for them to prepare and provide section 204(h) notice will usually be modest. Furthermore, because most small entities will only be affected when they amend the retirement plans they sponsor to reduce or eliminate benefits, and most small entities will not so amend the retirement plans frequently, it is generally expected that most small entities would be required to provide section 204(h) notice only once over the course of several years. Therefore, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and (8) copies) or electronic comments that are submitted timely to the IRS. The Treasury Department and IRS specifically request comments on the clarity of the proposed rules and how they may be made easier to understand. All comments will be available for public inspection and copying.

A public hearing has been scheduled for August 15, 2002, beginning at 10 a.m., in the IRS Auditorium, Seventh Floor, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC. Due to building security procedures, visitors must enter at the main entrance, located at 1111 Constitution Avenue, NW. All visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 15 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the **FOR FURTHER INFORMATION CONTACT** portion of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments must submit written or electronic comments and an outline of the topics to be discussed and time to be devoted to each topic (preferably a signed original and eight (8) copies) by June 18, 2002. A period of 10 minutes will be allotted to each person for making comments. An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal author of these regulations is Janet A. Laufer, 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

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 54

Excise taxes, Pensions, Reporting and recordkeeping requirements.

26 CFR Part 602

Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR parts 1, 54 and 602 are 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 * * *

§ 1.411(d)(6) [Removed]

Par. 2. Section 1.411(d)–6 is removed

PART 54—PENSION EXCISE TAXES

Par. 3. The authority citation for part 54 is amended by adding the following citation in numerical order to read as follows:

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

§ 54.4980F–1 is also issued under 26 U.S.C. 4980. * * *

Par.4. Section 54.4980F–1 is added to read as follows:

§ 54.4980F–1 Notice requirements for certain pension plan amendments significantly reducing benefit accruals.

(a) *Table of contents.* This paragraph contains a list of the questions in § 54.4980F–1(b).

Q–1. What are the notice requirements of section 4980F(e) of the Internal Revenue Code and section 204(h) of ERISA?

Q–2. What are the differences between section 4980F and section 204(h)?

Q–3. What is an ''applicable pension plan'' to which section 4980F of the Internal Revenue Code and section 204(h) apply?

Q–4. What is ''section 204(h) notice'' and what is a ''section 204(h) amendment''?

Q–5. For which amendments is section 204(h) notice required?

Q–6. What is an amendment that reduces the rate of future benefit accrual or reduces an early retirement benefit or retirement-type subsidy for purposes of determining whether section 204(h) notice is required?

Q–7. What plan provisions are taken into account in determining whether an amendment is a section 204(h) amendment?

Q–8. What is the basic principle used in determining whether a reduction in the rate of future benefit accrual or an early retirement benefit or retirement-type subsidy is significant for purposes of section 204(h)?

Q–9. When must section 204(h) notice be provided?

Q–10. To whom must section 204(h) notice be provided?

Q–11. What information is required to be provided in a section 204(h) notice?

(b) *Questions and answers.* The questions and answers are as follows:

Q–1. What are the notice requirements of section 4980F(e) of the Internal Revenue Code and section 204(h) of ERISA?

A–1. (a) *Requirements of Internal Revenue Code section 4980F(e) and ERISA section 204(h).* Section 4980F of the Internal Revenue Code (section 4980F) and section 204(h) of the Employee Retirement Income Security Act of 1974, as amended (ERISA), 29 U.S.C. 1054(h) (section 204(h)) each generally requires notice of an amendment to an applicable pension plan that either provides for a significant reduction in the rate of future benefit accrual or that eliminates or significantly reduces an early retirement benefit or retirement-type subsidy. The notice is required to be provided to plan participants or alternate payees who are applicable individuals (as defined in Q&A–10 of this section) and to certain employee organizations. The plan administrator must generally provide the notice before the effective date of the plan amendment. Q&A–9 of this section sets forth the time frames for providing notice, Q&A–11 of this section sets forth the content requirements for the notice, and Q&A–12 of this section contains special rules for cases in which participants can choose between the old and new benefit formulas.

(b) *Other notice requirements.* Other provisions of law may require that certain parties be notified of a plan amendment. See, for example, sections 102 and 104 of ERISA, and the regulations thereunder, for requirements relating to summary plan descriptions and summaries of material modifications.

Q–2. What are the differences between section 4980F and section 204(h)?

A–2. Section 4980F was added to the Internal Revenue Code by the Economic Growth and Tax Relief Reconciliation Act of 2001, Public Law 107–16 (115 Stat. 38) (2001) (EGTRRA). EGTRRA also amended section 204(h) to, among other things, extend the notice requirement to a plan amendment that eliminates or significantly reduces an early retirement benefit or retirement-type subsidy, even if it does not significantly reduce the rate of future benefit accrual. The notice requirements of section 4980F generally are parallel to the notice requirements of section 204(h), as amended by EGTRRA. However, the consequences of the two provisions differ: section 4980F imposes an excise tax on a failure to satisfy the notice requirements, while section 204(h)(6), as amended by EGTRRA, contains a special rule with respect to egregious failures. See Q&A–14 and Q&A–15 of this section. Except to the extent specifically indicated, these regulations apply both to section 4980F and to section 204(h).

Q–3. What is an ''applicable pension plan'' to which section 4980F and section 204(h) apply?

A–3. (a) *In general.* Section 4980F and section 204(h) apply to an applicable pension plan. For purposes of section 4980F, an *applicable pension plan* means a defined benefit plan qualifying under section 401(a) or 403(a) of the Internal Revenue Code, or an individual account plan that is subject to the funding standards of section 412 of the Internal Revenue Code. For purposes of section 204(h), an *applicable pension plan* means a defined benefit plan that is subject to part 2 of subtitle B of title I of ERISA, or an individual account plan that is subject to such part 2 and to the funding standards of section 412 of the Internal Revenue Code. Accordingly, individual account plans that are not subject to the funding standards of section 412 of the Internal Revenue Code, such as profit-sharing and stock bonus plans, are not applicable pension plans to which section 4980F or section 204(h) apply. Similarly, a defined benefit plan that neither qualifies under section 401(a) or 403(a) of the Internal Revenue Code nor is subject to part 2 of subtitle B of title I of ERISA is not an applicable pension plan. Further, neither a governmental plan (within the meaning of section 414(d) of the Internal Revenue Code), nor a church plan (within the meaning of section 414(e) of the Internal Revenue Code) with respect to which no election has been made under section 410(d) of the Internal Revenue Code is an applicable pension plan.

(b) *Section 204(h) notice not required for small plans covering no employees.* Section 204(h) notice is not required for a plan under which no employees are participants covered under the plan, as described in § 2510.3–3(b) of the Department of Labor regulations, and which has fewer than 100 participants.

Q–4. What is ''section 204(h) notice'' and what is a ''section 204(h) amendment''?

A–4. *Section 204(h) notice* is notice that complies with section 4980F(e), section 204(h)(1), and this section. A *section 204(h) amendment* is an amendment for which section 204(h) notice is required under this section.

Q–5. For which amendments is section 204(h) notice required?

A–5. (a) *Significant reduction in the rate of future benefit accrual.* Section 204(h) notice is required for an amendment to an applicable pension plan that provides for a significant reduction in the rate of future benefit accrual, including a cessation of benefit accrual.

(b) *Early retirement benefits and retirement-type subsidies.* Section 204(h) notice is required for an amendment to an applicable pension plan that provides for the significant reduction of an early retirement benefit or retirement-type subsidy. For purposes of this section, *early retirement benefit* and *retirement-type subsidy* mean early retirement benefits and retirement-type subsidies within the meaning of section 411(d)(6)(B)(i).

(c) *Elimination or cessation of benefits.* For purposes of this section, the terms *reduce* or *reduction* include *eliminate* or *cease* or *elimination* or *cessation.*

(d) *Delegation of authority to Commissioner.* The Commissioner may provide in revenue rulings, notices, or other guidance published in the Internal Revenue Bulletin (see § 601.601(d)(2) of this chapter) that section 204(h) notice need not be provided for plan amendments otherwise described in paragraph (a) or (b) of this Q&A–5 that the Commissioner determines to be necessary or appropriate, as a result of changes in the law, to maintain compliance with the requirements of the Internal Revenue Code (including requirements for tax qualification), ERISA, or other applicable federal law.

Q–6. What is an amendment that reduces the rate of future benefit accrual or reduces an early retirement benefit or retirement-type subsidy for purposes of determining whether section 204(h) notice is required?

A–6. (a) *In general.* For purposes of determining whether section 204(h) notice is required, an amendment reduces the rate of future benefit accrual or reduces an early retirement benefit or retirement-type subsidy only as

provided in paragraph (b) or (c) of this Q&A–6.

(b) *Reduction in rate of future benefit accrual*—(1) *Defined benefit plans.* For purposes of section 4980F and section 204(h), an amendment to a defined benefit plan reduces the rate of future benefit accrual only if it is reasonably expected to reduce the amount of the future annual benefit commencing at normal retirement age for benefits accruing for a year. For this purpose, the annual benefit commencing at normal retirement age is the benefit payable in the form in which the terms of the plan express the accrued benefit (or, in the case of a plan in which the accrued benefit is not expressed in the form of an annual benefit commencing at normal retirement age, the benefit payable in the form of a single life annuity commencing at normal retirement age that is the actuarial equivalent of the accrued benefit expressed under the terms of the plan, as determined in accordance with section 411(c)(3) of the Internal Revenue Code).

(2) *Individual account plans.* For purposes of section 4980F and section 204(h), an amendment to an individual account plan reduces the rate of future benefit accrual only if it is reasonably expected to reduce the amounts allocated in the future to participants' accounts for a year. Changes in the investments or investment options under an individual account plan are not taken into account for this purpose.

(3) *Determination of rate of future benefit accrual.* The rate of future benefit accrual for purposes of this paragraph (b) is determined without regard to optional forms of benefit within the meaning of § 1.411(d)–4, Q&A–1(b) of this chapter (other than the annual benefit described in paragraph (b)(1) of this Q&A–6). The rate of future benefit accrual is also determined without regard to ancillary benefits and other rights or features as defined in § 1.401(a)(4)–4(e) of this chapter.

(c) *Reduction of early retirement benefits or retirement-type subsidies.* For purposes of section 4980F and section 204(h), an amendment reduces an early retirement benefit or retirement-type subsidy only if it is reasonably expected to eliminate or reduce an early retirement benefit or retirement-type subsidy.

Q–7. What plan provisions are taken into account in determining whether an amendment is a section 204(h) amendment?

A–7. (a) *Plan provisions taken into account.* All plan provisions that may affect the rate of future benefit accrual, early retirement benefits, or retirement-type subsidies of participants or alternate payees must be taken into account in determining whether an amendment is a section 204(h) amendment. For example, plan provisions that may affect the rate of future benefit accrual include the dollar amount or percentage of compensation on which benefit accruals are based; the definition of service or compensation taken into account in determining an employee's benefit accrual; the method of determining average compensation for calculating benefit accruals; the definition of normal retirement age in a defined benefit plan; the exclusion of current participants from future participation; benefit offset provisions; minimum benefit provisions; the formula for determining the amount of contributions and forfeitures allocated to participants' accounts in an individual account plan; in the case of a plan using permitted disparity under section 401(l) of the Internal Revenue Code, the amount of disparity between the excess benefit percentage or excess contribution percentage and the base benefit percentage or base contribution percentage (all as defined in section 401(l) of the Internal Revenue Code); and the actuarial assumptions used to determine contributions under a target benefit plan (as defined in § 1.401(a)(4)–8(b)(3)(i) of this chapter). Plan provisions that may affect early retirement benefits or retirement-type subsidies include the right to receive payment of benefits after severance from employment and before normal retirement age and actuarial factors used in determining optional forms for distribution of retirement benefits.

(b) *Plan provisions not taken into account.* Plan provisions that do not affect the rate of future benefit accrual of participants or alternate payees are not taken into account in determining whether there has been a reduction in the rate of future benefit accrual. Further, any benefit that is not a section 411(d)(6) protected benefit as described in § 1.411(d)–4, Q&A–1(d) of this chapter, or that is a section 411(d)(6) protected benefit that may be eliminated or reduced as permitted under § 1.411(d)–4, Q&A–2(a) or (b) of this chapter, is not taken into account in determining whether an amendment is a section 204(h) amendment. Thus, for example, provisions relating to vesting schedules or the right to make after-tax contributions or elective deferrals are not taken into account.

(c) *Example.* The following example illustrates the rules in this Q&A–7:

Example. (i) *Facts.* A defined benefit plan provides a normal retirement benefit equal to 50% of final average compensation times a fraction (not in excess of one), the numerator of which equals the number of years of participation in the plan and the denominator of which is 20. A plan amendment is adopted that changes the numerator or denominator of that fraction.

(ii) *Conclusion.* The plan amendment must be taken into account in determining whether there has been a reduction in the rate of future benefit accrual.

Q–8. What is the basic principle used in determining whether a reduction in the rate of future benefit accrual or a reduction in an early retirement benefit or retirement-type subsidy is significant for purposes of section 204(h)?

A–8. (a) *General rule.* Whether an amendment reducing the rate of future benefit accrual or reducing an early retirement benefit or retirement-type subsidy provides for a reduction that is significant for purposes of section 204(h) is determined based on reasonable expectations taking into account the relevant facts and circumstances at the time the amendment is adopted.

(b) *Application for determining significant reduction in the rate of future benefit accrual.* For a defined benefit plan, the determination of whether an amendment provides for a significant reduction in the rate of future benefit accrual is made by comparing the amount of the annual benefit commencing at normal retirement age, as determined under Q&A–6(b)(1) of this section, under the terms of the plan as amended with the amount of the annual benefit commencing at normal retirement age, as determined under Q&A–6(b)(1) of this section, under the terms of the plan prior to amendment. For an individual account plan, the determination of whether an amendment provides for a significant reduction in the rate of future benefit accrual is made in accordance with Q&A–6(b)(2) of this section by comparing the amounts to be allocated in the future to participants' accounts under the terms of the plan as amended with the amounts to be allocated in the future to participants' accounts under the terms of the plan prior to amendment.

(c) *Application to certain amendments reducing early retirement benefits or retirement-type subsidies.* Because section 204(h) notice is required only for reductions that are significant, section 204(h) notice is not required for an amendment that reduces an early retirement benefit or retirement-type subsidy if the amendment is permitted under the third sentence of section 411(d)(6)(B) of the Internal Revenue Code and regulations thereunder (relating to the elimination

or reduction of benefits or subsidies which create significant burdens or complexities for the plan and plan participants unless the amendment adversely affects the rights of any participant in a more than de minimis manner).

Q–9. When must section 204(h) notice be provided?

A–9. (a) *45-day general rule.* Except as described in paragraphs (b) and (c) of this Q&A–9, section 204(h) notice must be provided at least 45 days before the effective date of any section 204(h) amendment. See paragraph (d) of this Q&A–9 for special rules for amendments permitting participant choice.

(b) *15-day rule for small plans.* Except for amendments described in paragraph (c)(2) of this Q&A–9, in the case of a small plan, section 204(h) notice must be at least 15 days before the effective date of any section 204(h) amendment. For purposes of this section, a small plan is a plan that the plan administrator reasonably expects to have, on the effective date of the section 204(h) amendment, fewer than 100 participants who have an accrued benefit under the plan.

(c) *Special timing rule for business transactions*—(1) *15-day rule for section 204(h) amendment in connection with an acquisition or disposition.* Except for amendments described in paragraph (c)(2) of this Q&A–9, if a section 204(h) amendment is adopted in connection with an acquisition or disposition, section 204(h) notice must be provided at least 15 days before the effective date of the section 204(h) amendment.

(2) *Later notice permitted for section 204(h) amendment significantly reducing early retirement benefit or retirement-type subsidies in connection with certain plan transfers, mergers, or consolidations.* If a section 204(h) amendment is adopted with respect to liabilities that are transferred to another plan in connection with a transfer, merger, or consolidation of assets or liabilities as described in section 414(l) of the Internal Revenue Code and § 1.414(l)–1 of this chapter, the amendment is adopted in connection with an acquisition or disposition, and the amendment significantly reduces an early retirement benefit or retirement-type subsidy, but does not significantly reduce the rate of future benefit accrual, then section 204(h) notice must be provided no later than 30 days after the effective date of the section 204(h) amendment.

(3) *Definition of acquisition or disposition.* For purposes of this paragraph (c), see § 1.410(b)–2(f) of this chapter for the definition of acquisition or disposition.

(d) *Timing rule for amendments permitting participant choice.* In general, section 204(h) notice of a section 204(h) amendment that provides applicable individuals with a choice between the old and the new benefit formulas (as described in Q&A–12 of this section) must be provided in accordance with the time period applicable under paragraphs (a) through (c) of this Q&A–9. See Q&A–12 of this section for additional guidance regarding section 204(h) notice in connection with participant choice.

Q–10. To whom must section 204(h) notice be provided?

A–10. (a) *In general.* Section 204(h) notice must be provided to each applicable individual and to each employee organization representing participants who are applicable individuals. A special rule is provided in paragraph (d) of this Q&A–10.

(b) *Applicable individual.* Applicable individual means each participant in the plan, and any alternate payee, whose rate of future benefit accrual under the plan is reasonably be expected to be significantly reduced, or for whom an early retirement benefit or retirement-type subsidy under the plan may reasonably be expected to be significantly reduced, by the section 204(h) amendment.

(c) *Alternate payee.* Alternate payee means a beneficiary who is an alternate payee (within the meaning of section 414(p)(8) of the Internal Revenue Code) under an applicable qualified domestic relations order (within the meaning of section 414(p)(1)(A) of the Internal Revenue Code).

(d) *Designees.* Section 204(h) notice may be provided to a person designated in writing by an applicable individual or by an employee organization representing participants who are applicable individuals, instead of being provided to that applicable individual or employee organization. Any designation of a representative made through an electronic method that satisfies standards similar to those of Q&A–13(c)(1) of this section satisfies the requirement that a designation be in writing.

(e) *Facts and circumstances test.* Whether a participant or alternate payee is an applicable individual is determined based on all relevant facts and circumstances at the time the section 204(h) notice must be provided (or is provided, if earlier).

(f) *Examples.* The following examples illustrate the rules in this Q&A–10:

Example 1. (i) *Facts.* A defined benefit plan requires an individual to complete 1 year of service to become a participant who can accrue benefits, and participants cease to accrue benefits under the plan at severance from employment with the employer. There are no alternate payees and employees are not represented by an employee organization. The plan is amended effective as of January 1, 2005 to significantly reduce the rate of future benefit accrual.

(ii) *Conclusion.* Section 204(h) notice is only required to be provided to individuals who, on January 1, 2005, have completed at least 1 year of service and are employed by the employer.

Example 2. (i) *Facts.* The facts are the same as in *Example 1,* except that the sole effect of the plan amendment is to alter the pre-amendment plan provisions under which benefits payable to an employee who retires after 20 or more years of service are unreduced for commencement before normal retirement age. The amendment requires 30 or more years of service in order for benefits commencing before normal retirement age to be unreduced, but the amendment only applies for future benefit accruals.

(ii) *Conclusion.* Section 204(h) notice is only required to be provided to individuals who, on January 1, 2005, have completed at least 1 year of service but less than 30 years of service, are employed by the employer, have not attained normal retirement age, and will have completed 20 or more years of service before normal retirement age if their employment continues to normal retirement age.

Example 3. (i) *Facts.* A plan is amended to reduce significantly the rate of future benefit accrual for all current employees who are participants. Based on the facts and circumstances, it is reasonable to expect that the amendment will not reduce the rate of future benefit accrual of former employees who are currently receiving benefits or of former employees who are entitled to deferred vested benefits.

(ii) *Conclusion.* The plan administrator is not required to provide section 204(h) notice to any former employees.

Example 4. (i) *Facts.* The facts are the same as in *Example 3,* except that the plan covers two groups of alternate payees. The alternate payees in the first group are entitled to a certain percentage or portion of the former spouse's accrued benefit and, for this purpose, the accrued benefit is determined at the time the former spouse begins receiving retirement benefits under the plan. The alternate payees in the second group are entitled to a certain percentage or portion of the former spouse's accrued benefit and, for this purpose, the accrued benefit was determined at the time the qualified domestic relations order was issued by the court.

(ii) *Conclusion.* It is reasonable to expect that the benefits to be received by the second group of alternate payees will not be affected by any reduction in a former spouse's rate of future benefit accrual. Accordingly, the plan administrator is not required to provide section 204(h) notice to the alternate payees in the second group.

Example 5. (i) *Facts.* A plan covers hourly employees and salaried employees. The plan provides the same rate of benefit accrual for both groups. The employer amends the plan to reduce significantly the rate of future

benefit accrual of the salaried employees only. At that time, it is reasonable to expect that only a small percentage of hourly employees will become salaried in the future.

(ii) *Conclusion.* The plan administrator is not required to provide section 204(h) notice to the participants who are currently hourly employees.

Example 6. (i) *Facts.* A plan covers employees in Division M and employees in Division N. The plan provides the same rate of benefit accrual for both groups. The employer amends the plan to reduce significantly the rate of future benefit accrual of employees in Division M. At that time, it is reasonable to expect that in the future only a small percentage of employees in Division N will be transferred to Division M.

(ii) *Conclusion.* The plan administrator is not required to provide section 204(h) notice to the participants who are employees in Division N.

Example 7. (i) *Facts.* The facts are the same facts as in *Example 6,* except that at the time the amendment is adopted, it is expected that thereafter Division N will be merged into Division M in connection with a corporate reorganization (and the employees in Division N will become subject to the plan's amended benefit formula applicable to the employees in Division M).

(ii) *Conclusion.* In this case, the plan administrator must provide section 204(h) notice to the participants who are employees in Division M and to the participants who are employees in Division N.

Q–11. What information is required to be provided in section 204(h) notice?

A–11. (a) *Explanation of amendment*—(1) *In general.* Section 204(h) notice must include sufficient information to allow applicable individuals to understand the effect of the plan amendment, including the approximate magnitude of the expected reduction. To the extent any expected reduction is not uniformly applicable to all participants, the notice must either identify the general classes of participants to whom the reduction is expected to apply, or by some other method include sufficient information to allow each applicable individual receiving the notice to determine which reductions are expected to apply to that individual. The information must be written in a manner calculated to be understood by the average plan participant and to apprise the applicable individual of the significance of the notice. The type and amount of information necessary to satisfy these standards will vary depending on the nature of the change resulting from the amendment, as described further in paragraphs (a)(2) and (3) of this Q&A–11.

(2) *Required narrative*—(i) *Reduction in rate of future benefit accrual.* In the case of an amendment reducing the rate of future benefit accrual, the notice must include a description of the benefit or allocation formula prior to the amendment, a description of the benefit or allocation formula under the plan as amended, and the effective date of the amendment.

(ii) *Reduction in early retirement benefit or retirement-type subsidy.* In the case of an amendment that reduces an early retirement benefit or retirement-type subsidy (other than as a result of an amendment reducing the rate of future benefit accrual), the notice must describe how the early retirement benefit or retirement-type subsidy is calculated from the accrued benefit before the amendment, how the early retirement benefit or retirement-type subsidy is calculated from the accrued benefit after the amendment, and the effective date of the amendment. For example, if, for a plan with a normal retirement age of 65, the change is from an unreduced normal retirement benefit at age 55 to an unreduced normal retirement benefit at age 60 for benefits accrued in the future, with an actuarial reduction to apply for benefits accrued in the future to the extent that the early retirement benefit begins before age 60, the notice must state that and specify the factors that apply in calculating the actuarial reduction (e.g., a 5% per year reduction applies for early retirement before age 60).

(3) *Additional required information*—(i) *Standard for additional information.* In cases in which it is not reasonable to expect that the approximate magnitude of the reduction will be reasonably apparent from the description provided in accordance with in paragraph (a)(2) of this Q&A–11, further information is required. This requirement can be satisfied by furnishing additional narrative information, as described in paragraph (a)(3)(ii) of this Q&A–11; by furnishing illustrative examples, as described in paragraph (a)(3)(iii) of this Q&A–11; or through a combination of these.

(ii) *Additional narrative information.* Further narrative explanation of the effect of the difference between the old and new formulas or benefit calculation may be provided to make the approximate magnitude of the reduction apparent.

(iii) *Illustrative examples*—(A) *Requirement generally.* In cases in which it is not reasonable to expect that the approximate magnitude of the reduction will be reasonably apparent from the description provided in accordance with in paragraph (a)(2) of this Q&A–11 (plus any additional narrative information provided in accordance with paragraph (a)(3)(ii) of this Q&A–11), the notice must include one or more illustrative examples showing the approximate magnitude of the reduction in the example. Thus, illustrative examples are required for a change from a traditional defined benefit formula to a cash balance formula or a change that results in a period of time during which there are no accruals (or minimal accruals) with regard to normal retirement benefits or an early retirement subsidy (a wear-away period).

(B) *Examples must bound the range of reductions.* Where an amendment results in reductions that vary (as would occur for an amendment converting a traditional defined benefit formula to a cash balance formula or an amendment that results in a wear-away period) , the illustrative example(s) provided in accordance with this paragraph (a)(3)(iii) must show the approximate range of the reductions. However, any reductions that are likely to occur in only a de minimis number of cases are not required to be taken into account in determining the range of the reductions if a narrative statement is included to that effect and examples are provided that show the approximate range of the reductions in other cases. Amendments for which the maximum reduction occurs under identifiable circumstances, with proportionately smaller reductions in other cases, may be illustrated by one example illustrating the maximum reduction, with a statement that smaller reductions also occur. Further, assuming that the reduction varies from small to large depending on service or other factors, two illustrative examples may be provided showing the smallest likely reduction and the largest likely reduction.

(C) *Assumptions used in examples.* The examples required under this paragraph (a)(3)(iii) are not required to be based on any particular form of payment (such as a life annuity or a single sum), but may be based on whatever form appropriately illustrates the reduction. The examples generally may be based on any reasonable assumptions (e.g., assumptions relating to the representative participant's age, years of service, and compensation, along with any interest rate and mortality table used in the illustrations, as well as salary scale assumptions used in the illustrations for amendments that alter the compensation taken into account under the plan), but the section 204(h) notice must identify those assumptions. However, if a plan's benefit provisions include a factor that varies over time (such as a variable interest rate), the determination of whether an amendment is reasonably expected to result in a wear-away period

must be based on the value of the factor applicable under the plan at a time that is reasonably close to the date section 204(h) notice is provided, and any wear-away period that is solely a result of a future change in the variable factor may be disregarded. For example, to determine whether a wear-away occurs as a result of a section 204(h) amendment that converts a defined benefit plan to a cash balance pension plan that will credit interest based on a variable interest factor specified in the plan, the future interest credits must be projected based on the interest rate applicable under the variable factor at the time section 204(h) notice is provided.

(4) *No false or misleading information.* A notice that includes materially false or misleading information (or omits information so as to cause the information provided to be misleading) does not constitute section 204(h) notice.

(b) *Additional information when reduction not uniform*— (1) *In general.* If an amendment by its terms affects different classes of participants differently (e.g., one new benefit formula will apply to Division A and another to Division B), then the requirements of paragraph (a) of this Q&A–11 apply separately with respect to each such general class of participants. In addition, the notice must include sufficient information to enable an applicable individual who is a participant to understand which class he or she is a member of.

(2) *Option for different section 204(h) notices.* If a section 204(h) amendment affects different classes of applicable individuals differently, the plan administrator may provide to differently affected classes of applicable individuals a section 204(h) notice appropriate to those individuals. Such section 204(h) notice may omit information that does not apply to the applicable individuals to whom it is furnished, but must identify the class or classes of applicable individuals to whom it is provided.

(c) *Examples.* The following examples illustrate the requirements of paragraph (a) of this Q&A–11. In each example it is assumed that the notice is written in a manner calculated to be understood by the average plan participant and to apprise the applicable individual of the significance of the notice.

Example 1. (i) *Facts.* Plan A provides that a participant is entitled to a normal retirement benefit of 2% of the participant's average pay over the 3 consecutive years for which the average is the highest (highest average pay) multiplied by years of service. Plan A is amended to provide that, effective January 1, 2004, the normal retirement benefit will be 2% of the participant's highest average pay multiplied by years of service before the effective date, plus 1% of the participant's highest average pay multiplied by years of service after the effective date. The plan administrator provides notice that states: ''Under the Plan's current benefit formula, a participant's normal retirement benefit is 2% of the participant's average pay over the 3 consecutive years for which the average is the highest multiplied by the participant's years of service. This formula is being changed by a plan amendment. Under the Plan as amended, a participant's normal retirement benefit will be the sum of 2% of the participant's average pay over the 3 consecutive years for which the average is the highest multiplied by years of service before the effective date, plus 1% of the participant's average pay over the 3 consecutive years for which the average is the highest multiplied by the participant's years of service after the effective date. This change is effective on January 1, 2004.'' The notice does not contain any additional information.

(ii) *Conclusion.* The notice satisfies the requirements of paragraph (a) of this Q&A–11.

Example 2. (i) *Facts.* Plan B provides that a participant is entitled to a normal retirement benefit at age 64 of 2.2% of the participant's career average pay times years of service. Plan B is amended to cease all accruals, effective January 1, 2004. The plan administrator provides notice that includes a description of the old benefit formula, a statement that after December 31, 2003, no participant will earn any further accruals, and the effective date of the amendment.

(ii) *Conclusion.* The notice satisfies the requirements of paragraph (a) of this Q&A–11.

Example 3. (i) *Facts.* Plan C provides that a participant is entitled to a normal retirement benefit at age 65 of 2% of career average compensation times years of service. Plan C is amended to provide that the normal retirement benefit will be 1% of average pay over the 3 consecutive years for which the average is the highest times years of service. The amendment only applies to accruals for years of service after the amendment, so that each employee's accrued benefit is equal to the sum of the benefit accrued as of the effective date of the amendment plus the accrued benefit equal to the new formula applied to years of service beginning on or after the effective fate. The plan administrator provides notice that describes the old and new benefit formulas and also explains that for an individual whose compensation increases over the individual's career such that the individual's highest 3-year average exceeds the individual's career average, the reduction will be less or there may be no reduction.

(ii) *Conclusion.* The notice satisfies the requirements of paragraph (a) of this Q&A–11.

Example 4. (i) *Facts.* (A) Plan D is a defined benefit pension plan under which each participant accrues a normal retirement benefit, as a life annuity beginning at the normal retirement age of 65, equal to the participant's number of years of service times 1.5 percent times the participant's average pay over the 3 consecutive years for which the average is the highest. Plan D provides early retirement benefits for former employees beginning at or after age 55 in the form of an early retirement annuity that is actuarially equivalent to the normal retirement benefit, with the reduction for early commencement based on reasonable actuarial assumptions that are specified in Plan D. Plan D provides for the suspension of benefits of participants who continue in employment beyond normal retirement age, in accordance with section 203(a)(3)(B) of ERISA and regulations thereunder issued by the Department of Labor. The pension of a participant who retires after age 65 is calculated under the same normal retirement benefit formula, but is based on the participant's service credit and highest 3-year pay at the time of late retirement with any appropriate actuarial increases.

(B) Plan D is amended, effective July 1, 2005, to change the formula for all future accruals to a cash balance formula under which the opening account balance for each participant on July 1, 2005 is zero, hypothetical pay credits equal to 5 percent of pay are credited to the account thereafter, and hypothetical interest is credited monthly based on the applicable interest rate under section 417(e)(3) of the Internal Revenue Code at the beginning of the quarter. Any participant who terminates employment with vested benefits can receive an actuarially equivalent annuity (based on the same reasonable actuarial assumptions that are specified in Plan D) commencing at any time after termination of employment and before the plan's normal retirement age of 65. The benefit resulting from the hypothetical account balance is in addition to the benefit accrued on June 30, 2005 (taking into account only service and highest 3-year pay before July 30, 2005), so that it is reasonably expected that no wear-away period will result from the amendment. The plan administrator expects that, as a general rule, depending on future pay increases and future interest rates, the rate of future benefit accrual after the conversion is higher for participants who accrue benefits before approximately age 50 and after approximately age 70, but is lower for participants who accrue benefits between approximately age 50 and age 70.

(C) The plan administrator of Plan D announces the conversion to a cash balance formula on May 16, 2005. The announcement is delivered to all participants and includes a written notice that describes the old formula, the new formula, and the effective date.

(D) In addition, the notice states that the Plan D formula before the conversion provided a normal retirement benefit equal to the product of a participant's number of years of service times 1.5 percent times the participant's average pay over the 3 years for which the average is the highest (highest 3-year pay). The notice includes an example showing the normal retirement benefit that will be accrued after June 30, 2005 for a participant who is age 49 with 10 years of service at the time of the conversion. The

plan administrator believes that such a participant is representative of the participants whose rate of future benefit accrual will be reduced as a result of the amendment. The example estimates that, if the participant continues employment to age 65, the participant's normal retirement benefit for service from age 49 to age 65 will be $657 per month for life. The example assumes that the participant's pay is $50,000 at age 49. The example states that the estimated $657 monthly pension accrues over the 16-year period from age 49 to age 65 and that, based on assumed future pay increases, this amount annually would be 9.1 percent of the participant's highest 3-year pay at age 65, which over the 16 years from age 49 to age 65 averages 0.57 percent per year times the participant's highest 3-year pay. The example also states that the sum of the monthly annuity accrued before the conversion in the 10-year period from age 39 to age 49 plus the $657 monthly annuity estimated to be accrued over the 16-year period from age 49 to age 65 is $1,235 and that, based on assumed future increases in pay, this would be 17.1 percent of the participant's highest 3-year pay at age 65, which over the employee's career from age 39 to age 65 averages 0.66 percent per year times the participant's highest 3-year pay. The notice also includes two other examples with similar information, one of which is intended to show the circumstances in which a small reduction may occur and the other of which shows the largest reduction that the plan administrator thinks is likely to occur. The notice states that the estimates are based on the assumption that pay increases annually after June 30, 2005 at a 4 percent rate. The notice also specifies that the applicable interest rate under section 417(e) for hypothetical interest credits after June 30, 2005 is assumed to be 6 percent, which is the section 417(e) of the Internal Revenue Code applicable interest rate under the plan for 2005.

(ii) *Conclusion.* The information in the notice, as described in paragraph (i)(C) of this *Example 4*, satisfies the requirements of paragraph (a)(2) of this Q&A–11 with respect to applicable individuals who are participants. The additional requirements of paragraph (a)(3) of this Q&A–11 are satisfied because, as noted in paragraph (i)(D) of this *Example 4,* the notice describes the old formula and describes the estimated future accruals under the new formula in terms that can be readily compared to the old formula, i.e., the notice states that the estimated $657 monthly pension accrued over the 16-year period from age 49 to age 65 averages 0.57 percent of the participant's highest 3-year pay at age 65. The requirement that the examples include sufficient information to be able to determine the approximate magnitude of the reduction would also be satisfied if the notice instead directly stated the amount of the monthly pension that would have accrued over the 16-year period from age 49 to age 65 under the old formula.

Example 5. (i) *Facts.* The facts are the same as in *Example 4*, except that, under the plan as in effect before the amendment, the early retirement pension for a participant who terminates employment after age 55 with at least 20 years of service is equal to the normal retirement benefit without reduction from age 65 to age 62 and reduced by only 5 percent per year for each year before age 62. As a result, early retirement benefits for such a participant constitute a retirement-type subsidy. The plan as in effect after the amendment provides an early retirement benefit equal to the sum of the early retirement benefit payable under the plan as in effect before the amendment taking into account only service and highest 3-year pay before July 1, 2005, plus an early retirement annuity that is actuarially equivalent to the account balance for service after June 30, 2005. The notice provided by the plan administrator describes the old early retirement annuity, the new early retirement annuity, and the effective date. The notice includes an estimate of the early retirement annuity payable to the illustrated participant for service after the conversion if the participant were to retire at age 59 (which the plan administrator believes is a typical early retirement age) and elect to begin receiving an immediate early retirement annuity. The example states that the normal retirement benefit expected to be payable at age 65 as a result of service from age 49 to age 59 is $434 per month for life beginning at age 65 and that the early retirement annuity expected to be payable as a result of service from age 49 to age 59 is $270 per month for life beginning at age 59. The example states that the monthly early retirement annuity of $270 is 38 percent less than the monthly normal retirement benefit of $434, whereas a 15 percent reduction would have applied under the plan as in effect before the amendment. The notice also includes similar information for examples that show the smallest and largest reduction that the plan administrator thinks is likely to occur in the early retirement benefit. The notice also specifies the applicable interest rate, mortality table, and salary scale used in the example to calculate the early retirement reductions.

(ii) *Conclusion.* The information in the notice, as described in paragraphs (i)(C) and (i)(D) of *Example 4* and paragraph (i) of this *Example 5*, satisfies the requirements of paragraph (a) of this Q&A–11 with respect to applicable individuals who are participants. The requirements of paragraph (a)(3) of this Q&A–11 are satisfied because, as noted in paragraph (i) of this *Example 5*, the notice describes the early retirement subsidy under the old formula and describes the estimated early retirement pension under the new formula in terms that can be readily compared to the old formula, i.e., the notice states that the monthly early retirement pension of $270 is 38 percent less than the monthly normal retirement benefit of $434, whereas a 15 percent reduction would have applied under the plan as in effect before the amendment. The requirements of paragraph (a)(1) of this Q&A–11 would also be satisfied if the notice instead directly stated the amount of the monthly early retirement pension that would be payable at age 59 under the old formula.

Q–12. What special rules apply if participants can choose between the old and new benefit formulas?

A–12. In any case in which an applicable individual can choose between the benefit formula (including any early retirement benefit or retirement-type subsidy) in effect before the section 204(h) amendment (old formula) or the benefit formula in effect after the section 204(h) amendment (new formula), section 204(h) notice has not been provided unless the applicable individual has been provided the information required under Q&A–11 of this section, and has also been provided sufficient information to enable the individual to make an informed choice between the old and new benefit formulas. The information required under Q&A–11 of this section must be provided by the date otherwise required under Q&A–9 of this section. The information sufficient to enable the individual to make an informed choice must be provided within a period that is reasonably contemporaneous with the date by which the individual is required to make his or her choice and that allows sufficient advance notice to enable the individual to understand and consider the additional information before making that choice.

Q–13. How may section 204(h) notice be provided?

A–13. (a) A plan administrator (including a person acting on behalf of the plan administrator, such as the employer or plan trustee) must provide section 204(h) notice through a method that results in actual receipt of the notice or the plan administrator must take appropriate and necessary measures reasonably calculated to ensure that the method for providing section 204(h) notice results in actual receipt of the notice. Section 204(h) notice must be provided either in the form of a paper document or in an electronic form that satisfies the requirements of paragraph (c) of this Q&A–13. First class mail to the last known address of the party is an acceptable delivery method. Likewise, hand delivery is acceptable. However, the posting of notice is not considered provision of section 204(h) notice. Section 204(h) notice may be enclosed with or combined with other notice provided by the employer or plan administrator (for example, a notice of intent to terminate under title IV of ERISA). Except as provided in paragraph (c) of this Q&A–13, a section 204(h) notice is deemed to have been provided on a date if it has been provided by the end of that day. When notice is delivered by first class mail, the notice is considered provided as of the date of the United States postmark stamped on the cover in which the document is mailed.

(b) *Example.* The following example illustrates the provisions of paragraph (a) of this Q&A–13:

Example. (i) *Facts.* Plan A is amended to reduce significantly the rate of future benefit accrual effective January 1, 2005. Under Q&A–9 of this section, section 204(h) notice is required to be provided at least 45 days before the effective date of the amendment. The plan administrator causes section 204(h) notice to be mailed to all affected participants. The mailing is postmarked November 16, 2004.

(ii) *Conclusion.* Because section 204(h) notice is given 45 days before the effective date of the plan amendment, it satisfies the timing requirement of Q&A–9 of this section.

(c) *New technologies*—(1)*General rule.* A section 204(h) notice may be provided to an applicable individual through an electronic method (other than an oral communication or a recording of an oral communication), provided that all of the following requirements are satisfied:

(i) Either the notice is actually received by the applicable individual or the plan administrator takes appropriate and necessary measures reasonably calculated to ensure that the method for providing section 204(h) notice results in actual receipt of the notice by the applicable individual.

(ii) The plan administrator provides the applicable individual with a clear and conspicuous statement, in electronic or non-electronic form, that the applicable individual has a right to request and obtain a paper version of the section 204(h) notice without charge and, if such request is made, the applicable individual is furnished with the paper version without charge.

(iii) The requirements of this section must otherwise be satisfied. Thus, for example, a section 204(h) notice provided through an electronic method must be delivered on or before the date required under Q&A–9 of this section and must satisfy the requirements set forth in Q&A–11 of this section, including the content requirements and the requirements that it be written in a manner calculated to be understood by the average plan participant and to apprise the applicable individual of the significance of the notice. Accordingly, when it is not otherwise reasonably evident, the recipient should be apprised (either in electronic or non-electronic form), at the time the notice is furnished electronically, of the significance of the notice.

(2) *Examples.* The following examples illustrate the requirement in paragraph (c)(1)(i) of this Q&A–13. In these examples, it is assumed that the notice satisfies the requirements in paragraph (c)(1)(ii) and (iii) of this section. The examples are as follows:

Example 1. (i) *Facts.* On July 1, 2003, M, a plan administrator of Company N's plan, sends notice intended to satisfy section 204(h) of ERISA to A, an employee of Company N and a participant in the plan. The notice is sent through e-mail to A's e-mail address on Company N's electronic information system. Accessing Company N's electronic information system is not an integral part of A's duties. M sends the e-mail with a request for a computer-generated notification that the message was received and opened. M receives notification indicating that the e-mail was received and opened by A on July 9, 2003.

(ii) *Conclusion.* With respect to A, although M has failed to take appropriate and necessary measures reasonably calculated to ensure that the method for providing section 204(h) notice results in actual receipt of the notice, M satisfies the requirement of paragraph (c)(1)(i) of this Q&A–13 on July 9, 2003, which is when A actually receives the notice.

Example 2. (i) *Facts.* On August 1, 2003, O, a plan administrator of Company P's plan, sends a notice intended to satisfy section 204(h) of ERISA to B, who is an employee of Company P and a participant in Company P's plan. The notice is sent through e-mail to B's e-mail address on Company P's electronic information system. B has the ability to effectively access electronic documents from B's e-mail address on Company P's electronic information system and accessing the system is an integral part of B's duties.

(ii) *Conclusion.* Because access to the system is an integral part of B's duties, O has taken appropriate and necessary measures reasonably calculated to ensure that the method for providing section 204(h) notice results in actual receipt of the notice. Thus, regardless of whether B actually accesses B's email on that date, O satisfies the requirement of paragraph (c)(1)(i) of this Q&A–13 on August 1, 2003, with respect to B.

(3) *Safe harbor in case of consent.* The requirement of paragraph (c)(1)(i) of this Q&A–13 is deemed to be satisfied with respect to an applicable individual if the section 204(h) notice is provided electronically to an applicable individual, and—

(i) The applicable individual has affirmatively consented electronically, or confirmed consent electronically, in a manner that reasonably demonstrates the applicable individual's ability to access the information in the electronic form in which the notice will be provided, to receiving section 204(h) notice electronically and has not withdrawn such consent;

(ii) The applicable individual has provided, if applicable, in electronic or non-electronic form, an address for the receipt of electronically furnished documents;

(iii) Prior to consenting, the applicable individual has been provided, in electronic or non-electronic form, a clear and conspicuous statement indicating—

(A) That the consent can be withdrawn at any time without charge;

(B) The procedures for withdrawing consent and for updating the address or other information needed to contact the applicable individual;

(C) Any hardware and software requirements for accessing and retaining the documents; and

(D) The information required by paragraph (c)(1)(ii) of this Q&A–13; and

(iv) After consenting, if a change in hardware or software requirements needed to access or retain electronic records creates a material risk that the applicable individual will be unable to access or retain the section 204(h) notice—

(A) The applicable individual is provided with a statement of the revised hardware and software requirements for access to and retention of the section 204(h) notice and is given the right to withdraw consent without the imposition of any fees for such withdrawal and without the imposition of any condition or consequence that was not disclosed at the time of the initial consent; and

(B) The requirement of paragraph (c)(3)(i) of this Q&A–13 is again complied with.

Q–14. What are the consequences if a plan administrator fails to provide section 204(h) notice?

A–14. (a) *Egregious failures*— (1) *Effect of egregious failure to provide section 204(h) notice.* Section 204(h)(6)(A) of ERISA provides that, in the case of any egregious failure to meet the notice requirements with respect to any plan amendment, the plan provisions are applied so that all applicable individuals are entitled to the greater of the benefit to which they would have been entitled without regard to the amendment, or the benefit under the plan with regard to the amendment. For a special rule applicable in the case of a plan termination, see Q&A–17(b) of this section.

(2) *Definition of egregious failure.* For purposes of section 204(h) of ERISA and this Q&A–14, there is an egregious failure to meet the notice requirements if a failure to provide required notice is within the control of the plan sponsor and is either an intentional failure or a failure, whether or not intentional, to provide most of the individuals with most of the information they are entitled to receive. For this purpose, an intentional failure includes any failure to promptly provide the required notice or information after the plan administrator discovers an

unintentional failure to meet the requirements. A failure to give section 204(h) notice is deemed not to be egregious if the plan administrator reasonably determines, taking into account section 204(h) of ERISA, section 4980F of the Internal Revenue Code, these regulations, other administrative pronouncements, and relevant facts and circumstances, that the reduction in the rate of future benefit accrual resulting from an amendment is not significant (as described in Q&A–8 of this section), or that an amendment does not significantly reduce an early retirement benefit or retirement-type subsidy.

(3) *Example.* The following example illustrates the provisions of this paragraph (a):

Example. (i) *Facts.* Plan A is amended to reduce significantly the rate of future benefit accrual effective January 1, 2003. Section 204(h) notice is required to be provided 45 days before January 1, 2003. Timely section 204(h) notice is provided to all applicable individuals (and to each employee organization representing participants who are applicable individuals), except that the employer intentionally fails to provide section 204(h) notice to certain participants until May 16, 2003.

(ii) *Conclusion.* The failure to provide section 204(h) notice is egregious. Accordingly, for the period from January 1, 2003 through June 30, 2003 (which is the date that is 45 days after May 16, 2003), all participants and alternate payees are entitled to the greater of the benefit to which they would have been entitled under Plan A as in effect before the amendment or the benefit under the plan as amended.

(b) *Effect of non-egregious failure to provide section 204(h) notice.* If an egregious failure has not occurred, the amendment with respect to which section 204(h) notice is required may become effective with respect to all applicable individuals. However, see section 502 of ERISA for civil enforcement remedies. Thus, where there is a failure, whether or not egregious, to provide section 204(h) notice in accordance with this section, individuals may have recourse under section 502 of ERISA.

(c) *Excise taxes.* See section 4980F of the Internal Revenue Code and Q&A–15 of this section for excise taxes that may apply to a failure to notify applicable individuals of a pension plan amendment that provides for a significant reduction in the rate of future benefit accrual or eliminates or significantly reduces an early retirement benefit or retirement-type subsidy, regardless of whether or not the failure is egregious.

Q–15. What are some of the rules that apply with respect to the excise tax under section 4980F?

A–15. (a) *Person responsible for excise tax.* In the case of a plan other than a multiemployer plan, the employer is responsible for reporting and paying the excise tax. In the case of a multiemployer plan, the plan is responsible for reporting and paying the excise tax.

(b) *Excise tax inapplicable in certain cases.* Under section 4980F(c)(1) of the Internal Revenue Code, no excise tax is imposed on a failure for any period during which it is established to the satisfaction of the Commissioner that the employer (or other person responsible for the tax) exercised reasonable diligence, but did not know that the failure existed. Under section 4980F(c)(2) of the Internal Revenue Code, no excise tax applies to a failure to provide section 204(h) notice if the employer (or other person responsible for the tax) exercised reasonable diligence and corrects the failure within 30 days after the employer (or other person responsible for the tax) first knew, or exercising reasonable diligence would have known, that such failure existed. For purposes of section 4980F(c)(1) of the Internal Revenue Code, a person has exercised reasonable diligence, but did not know that the failure existed if and only if—

(1) The person exercised reasonable diligence in attempting to deliver section 204(h) notice to applicable individuals by the latest date permitted under this section; and

(2) At the latest date permitted for delivery of section 204(h) notice, the person reasonably believes that section 204(h) notice was actually delivered to each applicable individual by that date.

(c) *Example.* The following example illustrates the provisions of paragraph (b) of this Q&A–15:

Example. (i) *Facts.* Plan A is amended to reduce significantly the rate of future benefit accrual. The employer sends out a section 204(h) notice to all affected participants and other applicable individuals and to any employee organization representing applicable individuals, including actual delivery by hand to employees at worksites. However, although the employer exercises reasonable diligence in seeking to deliver the notice, the notice is not delivered to any participants at one worksite due to a failure of an overnight delivery service to provide the notice to appropriate personnel at that site for them to timely hand deliver the notice to affected employees. The error is discovered when the employer subsequently calls to confirm delivery. Appropriate section 204(h) notice is then promptly delivered to all affected participants at the worksite.

(ii) *Conclusion.* Because the employer exercised reasonable diligence, but did not know that a failure existed, no excise tax applies, assuming that participants at the worksite receive section 204(h) notice within 30 days after the employer first knew, or exercising reasonable diligence would have known, that the failure occurred.

Q–16. How do section 4980F and section 204(h) apply when a business is sold?

A–16. (a) *Generally.* Whether section 204(h) notice is required in connection with the sale of a business depends on whether a plan amendment is adopted that significantly reduces the rate of future benefit accrual or significantly reduces an early retirement benefit or retirement-type subsidy.

(b) *Examples.* The following examples illustrate the rules of this Q&A–16:

Example 1. (i) *Facts.* Corporation Q maintains Plan A, a defined benefit plan that covers all employees of Corporation Q, including employees in its Division M. Plan A provides that participating employees cease to accrue benefits when they cease to be employees of Corporation Q. On January 1, 2006, Corporation Q sells all of the assets of Division M to Corporation R. Corporation R maintains Plan B, which covers all of the employees of Corporation R. Under the sale agreement, employees of Division M become employees of Corporation R on the date of the sale (and cease to be employees of Corporation Q), Corporation Q continues to maintain Plan A following the sale, and the employees of Division M become participants in Plan B.

(ii) *Conclusion.* No section 204(h) notice is required because no plan amendment was adopted that reduced the rate of future benefit accrual. The employees of Division M who become employees of Corporation R ceased to accrue benefits under Plan A because their employment with Corporation Q terminated.

Example 2. (i) *Facts.* Subsidiary Y is a wholly owned subsidiary of Corporation S. Subsidiary Y maintains Plan C, a defined benefit plan that covers employees of Subsidiary Y. Corporation S sells all of the stock of Subsidiary Y to Corporation T. At the effective date of the sale of the stock of Subsidiary Y, in accordance with the sale agreement between Corporation S and Corporation T, Subsidiary Y amends Plan C so that all benefit accruals cease.

(ii) *Conclusion.* Section 204(h) notice is required to be provided because Subsidiary Y adopted a plan amendment that significantly reduced the rate of future benefit accrual in Plan C.

Example 3. (i) *Facts.* As a result of an acquisition, Corporation U maintains two plans: Plan D covers employees of Division N and Plan E covers the rest of the employees of Corporation U. Plan E provides a significantly lower rate of future benefit accrual than Plan D. Plan D is merged with Plan E, and all of the employees of Corporation U will accrue benefits under the merged plan in accordance with the benefit formula of former Plan E.

(ii) *Conclusion.* Section 204(h) notice is required.

Example 4. (i) *Facts.* The facts are the same as in *Example 3,* except that the rate of future

benefit accrual in Plan E is not significantly lower. In addition, Plan D has a retirement-type subsidy that Plan E does not have and the Plan D employees' rights to the subsidy under the merged plan are limited to benefits accrued before the merger.

(ii) *Conclusion.* Section 204(h) notice is required for any participants or beneficiaries for whom the reduction in the retirement-type subsidy is significant (and for any employee organization representing such participants).

Example 5. (i) *Facts.* Corporation V maintains several plans, including Plan F, which covers employees of Division P. Plan F provides that participating employees cease to accrue further benefits under the plan when they cease to be employees of Corporation V. Corporation V sells all of the assets of Division P to Corporation W, which maintains Plan G for its employees. Plan G provides a significantly lower rate of future benefit accrual than Plan F. Plan F is merged with Plan G as part of the sale, and employees of Division P who become employees of Corporation W will accrue benefits under the merged plan in accordance with the benefit formula of former Plan G.

(ii) *Conclusion.* No section 204(h) notice is required because no plan amendment was adopted that reduces the rate of future benefit accrual or eliminates or significantly reduces an early retirement benefit or retirement-type subsidy. Under the terms of Plan F as in effect prior to the merger, employees of Division P cease to accrue any further benefits (including benefits with respect to early retirement benefits and any retirement-type subsidy) under Plan F after the date of the sale because their employment with Corporation V terminated.

Q–17. How are amendments to cease accruals and terminate a plan treated under section 4980F of the Internal Revenue Code and section 204(h) of ERISA?

A–17. (a) *General rule*—(1) *Rule.* An amendment providing for the cessation of benefit accruals on a specified future date and for the termination of a plan is subject to section 4980F of the Internal Revenue Code and section 204(h) of ERISA.

(2) *Example.* The following example illustrates the rule of paragraph (a)(1) of this Q&A–17:

Example. (i) *Facts.* An employer adopts an amendment that provides for the cessation of benefit accruals under a defined benefit plan on December 31, 2003, and for the termination of the plan pursuant to title IV of ERISA as of a proposed termination date that is also December 31, 2003. As part of the notice of intent to terminate required under title IV in order to terminate the plan, the plan administrator gives section 204(h) notice of the amendment ceasing accruals, which states that benefit accruals will cease ''on December 31, 2003.'' However, because all the requirements of title IV for a plan termination are not satisfied, the plan cannot be terminated until a date that is later than December 31, 2003.

(ii) *Conclusion.* Nonetheless, because section 204(h) notice was given stating that the plan was amended to cease accruals on December 31, 2003, section 204(h) does not prevent the amendment to cease accruals from being effective on December 31, 2003. The result would be the same had the section 204(h) notice informed the participants that the plan was amended to provide for a proposed termination date of December 31, 2003 and to provide that ''benefit accruals will cease on the proposed termination date whether or not the plan is terminated on that date.'' However, neither section 4980F of the Internal Revenue Code nor section 204(h) of ERISA would be satisfied with respect to the December 31, 2003 effective date if the section 204(h) notice had merely stated that benefit accruals would cease ''on the termination date'' or ''on the proposed termination date.''

(3) *Additional requirements under title IV of ERISA.* See 29 CFR 4041.23(b)(4) and 4041.43(b)(5) for special rules applicable to plans terminating under title IV of ERISA.

(b) *Terminations in accordance with title IV of ERISA.* A plan that is terminated in accordance with title IV of ERISA is deemed to have satisfied section 4980F of the Internal Revenue Code and section 204(h) of ERISA not later than the termination date (or date of termination, as applicable) established under section 4048 of ERISA. Accordingly, neither section 4980F of the Internal Revenue Code nor section 204(h) of ERISA would in any event require that any additional benefits accrue after the effective date of the termination.

(c) *Amendment effective before termination date of a plan subject to title IV of ERISA.* To the extent that an amendment providing for a significant reduction in the rate of future benefit accrual or a significant reduction in an early retirement benefit or retirement-type subsidy has an effective date that is earlier than the termination date (or date of termination, as applicable) established under section 4048 of ERISA, that amendment is subject to section 4980F of the Internal Revenue Code and section 204(h) of ERISA. Accordingly, the plan administrator must provide section 204(h) notice (either separately, with, or as part of the notice of intent to terminate) with respect to such an amendment.

Q–18. What is the effective date of section 4980F of the Internal Revenue Code, section 204(h) of ERISA, as amended by EGTRRA, and these regulations?

A–18. (a) *Statutory effective date*—(1) *General rule.* Section 4980F of the Internal Revenue Code and section 204(h) of ERISA, as amended by EGTRRA, apply to plan amendments taking effect on or after June 7, 2001 (statutory effective date), which is the date of enactment of EGTRRA.

(2) *Transition rule.* For amendments applying after the statutory effective date in paragraph (a)(1) of this Q&A–18 and prior to the regulatory effective date in paragraph (c) of this Q&A–18, the requirements of section 4980F(e)(2) and (3) of the Internal Revenue Code and section 204(h) of ERISA, as amended by EGTRRA, are treated as satisfied if the plan administrator makes a reasonable, good faith effort to comply with those requirements.

(3) *Special notice rule*—(i) *In general.* Notwithstanding Q&A–9 of this section, section 204(h) notice is not required by section 4980F(e) of the Internal Revenue Code or section 204(h) of ERISA, as amended by EGTRRA, to be provided prior to September 7, 2001 (the date that is three months after the date of enactment of EGTRRA).

(ii) *Reasonable notice.* The requirements of section 4980F of the Internal Revenue Code and section 204(h) of ERISA, as amended by EGTRRA, do not apply to any plan amendment that takes effect on or after June 7, 2001 if, before April 25, 2001, notice was provided to participants and beneficiaries adversely affected by the plan amendment (and their representatives) which was reasonably expected to notify them of the nature and effective date of the plan amendment. For purposes of this paragraph (a)(3)(ii), notice that complies with § 1.411(d)–6 of this chapter, as it appeared in the April 1, 2001 edition of 26 CFR part 1, is deemed to be notice which was reasonably expected to notify participants and beneficiaries adversely affected by the plan amendment (and their representatives) of the nature and effective date of the plan amendment.

(b) *Amendments taking effect prior to June 7, 2001.* For rules applicable to amendments taking effect prior to June 7, 2001, see § 1.411(d)–6 of this chapter, as it appeared in the April 1, 2001 edition of 26 CFR part 1.

(c) *Regulatory effective date.* Q&A–1 through Q&A–18 of this section apply to amendments taking effect on or after the date that is 120 days after publication of final regulations under this section (regulatory effective date).

Robert E. Wenzel,

Deputy Commissioner of Internal Revenue.

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