

future benefit accrual for purposes of section 4980F of the Code and section 204(h) of ERISA.

#### *C. Rate of Future Benefit Accrual Determined Annually*

A commentator questioned the provisions of the proposed regulations under which the determination of whether there is a reduction in the rate of future benefit accrual would be based on the whether the amendment is reasonably expected to reduce "the benefits accruing for a year." The commentator objected on the grounds that this could require section 204(h) notice for an amendment that increases benefits in one year and then reduces them in the next, even though the aggregate benefit over the two years might not be reduced or might even be increased in the aggregate. The final regulations retain this rule, but clarify in an example that where a reduction occurs at the same time as an immediate increase in accrued benefits such that the participant's aggregate benefit can never be less than what it would have been had the amendment not been adopted, the reduction is not significant.

#### *D. Reduction in the Rate of Future Benefit Accrual for Individual Account Plans*

A commentator suggested that the regulations be revised to clarify that only contributions or forfeitures that are allocated to a participant's account be considered in determining whether a plan amendment to an individual account plan reduces the rate of future benefit accrual. The commentator recommended this revision to clarify that an amendment reducing a contribution formula is not considered insignificant solely because expected future investment returns might offset a portion of the reduction in the contribution formula. A clarification that reflects this suggestion has been adopted in the final regulations.

#### *E. Determination of Applicable Individuals*

A commentator suggested that the regulations be revised to clarify the date as of which applicable individuals should be identified. The commentator argued that the lack of a clear determination date would make it difficult, from an administrative standpoint, for plans to identify applicable individuals due to turnover among participants. The final regulations provide that whether a plan participant or an alternate payee is an applicable individual is determined on a typical business day that is reasonably proximate to the time the section 204(h)

notice is provided (or at the latest date for providing section 204(h) notice, if earlier), based on all relevant facts and circumstances. An example to this effect has been added to the final regulations.

#### *F. Definition of Early Retirement Benefits and Retirement-Type Subsidies*

A commentator stated that Treasury and IRS should issue regulations defining the terms *early retirement benefits* and *retirement-type subsidies*. The commentator noted that there are numerous references to the terms *early retirement benefit* or *retirement-type subsidy* in both the Code (section 4980F(f)(3) and section 411(d)(6)(B)(i)), ERISA (sections 204(g)(2)(A) and 204(h)(9)) and the regulations (§ 1.411(d)-4 and Proposed § 54.4980F-1), but the terms are not defined. The commentator expressed concern that adverse consequences might result from an egregious failure to identify a significant reduction in early retirement benefit or a retirement-type subsidy and guidance has not been issued to clarify the meaning of those terms. The definitions of *Early retirement benefits* and *retirement-type subsidies* affect more than determining whether an amendment requires a section 204(h) notice and, therefore, are beyond the scope of these final regulations. Treasury and IRS anticipate issuing proposed regulations under section 411(d)(6), including general guidance concerning early retirement benefits and retirement-type subsidies. Comments regarding the anticipated proposed regulations were requested, including comments on the guidance that should be provided regarding early retirement benefits and retirement-type subsidies, in Notice 2002-46 (2002-28 I.R.B. 96) and Notice 2003-10 (2003-5 I.R.B. 369).

#### *G. Timing of Notice*

A number of comments addressed what constitutes a reasonable period for providing a section 204(h) notice. The proposed regulations included a generally applicable 45-day advance notice rule with exceptions for amendments in connection with certain business transactions and small plans. Some comments recommended that notice generally be required to be provided more than 45 days in advance of the effective date of the section 204(h) amendment and others recommended that notice generally be allowed to be provided less than 45 days in advance of the effective date of the section 204(h) amendment. The approach in the proposed regulations was designed to strike a balance between providing participants with sufficient time to understand and consider the

information in the notice and allowing employers to effect changes in their plans for business reasons within a reasonable time, and has been retained in the final regulations.

A commentator requested clarification that section 204(h) notice may be provided before the adoption date of the amendment. The commentator noted that neither section 4980F of the Code nor section 204(h) of ERISA prevents a plan administrator from providing section 204(h) notice before the adoption date of the amendment. The regulations have not been revised to reflect this suggestion because the statute is already sufficiently clear that section 204(h) notice may be provided before the adoption of the amendment.

#### *H. Certification of Accuracy by Senior Officer*

A commentator suggested that the regulations be revised to require that a senior officer of the plan sponsor or the plan administrator certify to employees of the plan sponsor and the IRS that the disclosures in the section 204(h) notice accurately describe the effects of the amendment and that the notice is presented in a manner that is understandable to the average applicable individual. The commentator also suggested that the senior officer should certify that the section 204(h) notice provided to applicable individuals does not contain any false or misleading information. The commentator argued that this certification would not be burdensome to plan sponsors if they have exercised due diligence concerning the content of the section 204(h) notice. Because of concerns about the usefulness of such a rule as well as whether there is statutory authority for such a rule, this suggestion has not been adopted.

#### *I. Determination and Effects of Egregious Failures*

A commentator suggested that the regulations revise the definition of an egregious violation to distinguish between intentional and negligent acts of failure. The commentator stated that it is possible that a trustee or plan sponsor may make a decision not to provide section 204(h) notice that the trustee or plan sponsor thought was prudent at the time but later determined was a mistake. The commentator argued that these types of decisions, which may be negligent but not intentional, should not be considered egregious failures. The commentator suggested that the final regulations be revised to provide that an egregious failure is an action resulting from a deliberate choice by the plan sponsor, in which the plan sponsor