

knew or reasonably should have known that a section 204(h) notice would be required. The commentator also suggested that the final regulations be revised to provide that only applicable individuals who were adversely affected by the egregious failure be entitled to the greater of the old or new benefit formulas.

Section 204(h)(6)(B) of ERISA generally defines an egregious failure as a failure within the control of the plan sponsor that is either an intentional failure or a failure to provide most of the individuals with most of the information they are entitled to receive. Further, section 204(h)(6)(A) of ERISA provides that, in the case of any egregious failure to meet any requirement of section 204(h) with respect to any plan amendment, the provisions are applied so that all applicable individuals are entitled to the greater of the benefits to which they would have been entitled without regard to the amendment, or the benefits under the plan with regard to the amendment. Accordingly, these suggestions were not adopted in the final regulations because they would conflict with the plain language of section 204(h) of ERISA.

J. Content of Section 204(h) Notice

Section 4980F of the Code and section 204(h) of ERISA require that section 204(h) notice be written in a manner calculated to be understood by the average plan participant and that it provide sufficient information to allow applicable individuals to understand the effect of the amendment. Q&A-11 of these final regulations sets forth the content requirements for section 204(h) notice. The final regulations retain the basic structure of Q&A-11 in the proposed regulations, but include a number of clarifications, including clarifying that the content must permit the applicable individual to determine the approximate magnitude of the reduction applicable to that individual. The regulations provide that this requirement is deemed to be satisfied if the notice includes illustrative examples satisfying certain conditions. At the request of a commentator, the final regulations clarify that individualized benefit statements may be used in lieu of illustrative examples if the statements include the same information as illustrative examples, such as showing the approximate range of the reductions for the individual if the reductions vary over time and identification of the assumptions used in the projections.

K. Benefit Changes Made by Collective Bargaining Agreements

A commentator suggested that the final regulations be revised to distinguish between a reduction in the rate of future benefit accrual by collective bargaining agreements and a reduction in the rate of future benefit accrual by plan amendments. Multiemployer plans often incorporate the provisions of related collective bargaining agreements by reference. The commentator argued that when the rate of future benefit accrual is being reduced by a change to a collective bargaining agreement, section 204(h) notice is not required because there is no plan amendment relating to the reduction. The commentator suggested that the final regulations include an example clarifying that in situations where there is an automatic benefit change that is linked to a collective bargaining agreement, section 204(h) notice is not required, or at a minimum that some relief be provided to allow the amendment to go into effect quickly. The IRS and Treasury believe that when a benefit formula in a plan document incorporates provisions of the collective bargaining agreement by reference, those provisions are part of the plan. Accordingly, the final regulations provide a rule in Q&A-7(a)(2) that if all or a part of a plan's rate of future benefit accrual, or an early retirement benefit or retirement-type subsidy provided under the plan, depends on provisions in another document that are referenced in the plan document, a change in the provisions of the other document is an amendment of the plan. An example illustrating this rule has been added to the final regulations.

The IRS and Treasury recognize that multiemployer plans may need additional time to comply with the requirements of Q&A-7(a)(2) of these final regulations, therefore the effective date of this rule has been delayed until January 1, 2004. In addition, because of the special characteristics of multiemployer plans (e.g., participating employers are often small businesses with fewer than 100 employees), the final regulations provide that, for a multiemployer plan, section 204(h) notice must be provided at least 15 days before the effective date of any section 204(h) amendment.

Effective Date

Except with respect to Q&A-7(a)(2), these regulations are applicable to amendments with an effective date that is on or after September 2, 2003.

The provisions of Q&A-7(a)(2) of these regulations are applicable to

amendments with an effective date that is on or after January 1, 2004.

Special Analyses

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

It is hereby certified that the collection of information in these final 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 thus they are required to provide section 204(h) notice to fewer individuals. Accordingly, the time required to 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 their 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, the notice of proposed rulemaking preceding these final regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of these regulations is Pamela R. Kinard, Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities), Internal Revenue Service. However, personnel from other offices of the Internal Revenue Service and Treasury Department participated in their development.

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.