

required minimum distribution rules is made without regard to whether a participant satisfies the required minimum distribution rules with respect to the deemed IRA.

Although section 408(a) provides that an individual retirement account is a trust, these regulations do not require that a separate trust be created for each deemed IRA that is an individual retirement account. Rather, the regulations provide that all such deemed IRAs may be held in a single trust as long as that trust is separate from the trust that holds the other assets of the plan. Where a single trust is created for the deemed IRAs, the regulations also provide that there must be separate accounting for each deemed IRA and each deemed IRA must satisfy all of the requirements of section 408(a) (except the prohibition of commingling under paragraph (a)(5) of that section). These proposed regulations also provide a comparable rule for deemed IRAs that are individual retirement annuities.

These regulations provide three exceptions to the general rule that the qualified employer plan and the deemed IRA are separate entities subject to their separate rules for purposes of the Code. First, the regulations state that the qualified employer plan document must contain the deemed IRA provisions. In general, the plan document must provide for a deemed IRA and a deemed IRA must be in effect at the time the deemed IRA contributions are accepted. However, plan sponsors who want to provide deemed IRAs for plan years beginning in 2003 are not required to have such provisions in their plan document before the end of such plan years. *See* Revenue Procedure 2003-13 (2003-4 I.R.B. 317).

Second, pursuant to section 408(q)(1), the prohibition of section 408(a)(5) on the commingling of IRA assets with other property except in a common trust fund or a common investment fund is not applicable to the assets of a deemed IRA. Thus, the assets of the deemed IRA may be commingled for investment purposes with the assets of the other portion of the plan. Where the assets are commingled, the regulations require that separate accounts be maintained and that gains and losses must be allocated to these separate accounts. For example, if a deemed IRA is established under a defined contribution plan that is qualified under section 401(a) and the assets of the plan and the deemed IRA are commingled for investment purposes, then any gains or losses from the investment of the commingled assets of an employee must be allocated to the separate accounts of the employee under the deemed IRA and the plan.

Third, these proposed regulations provide that the failure of any of the deemed IRAs maintained by the plan to satisfy the applicable requirements of section 408 or 408A will cause the plan as a whole to fail to satisfy the plan's qualification requirements. Section 408(q) states that if a qualified employer plan elects to allow voluntary employee contributions to a separate account or annuity and that separate account or annuity meets the applicable requirements of section 408 or section 408A, then the account or annuity will be treated as an individual retirement plan rather than as a qualified employer plan. Section 408(q) applies only if the deemed IRAs maintained by the plan meet the requirements of section 408 or section 408A. If any of the deemed IRAs do not meet the applicable requirements, then section 408(q) does not apply, and the qualified employer plan will fail to satisfy its qualification requirements.

These proposed regulations provide a different rule where the portion of the plan that is not a deemed IRA fails to satisfy the qualification requirements of section 401(a). In that case, the deemed IRA is not a deemed IRA because section 408(q) does not apply where the plan is not a qualified employer plan. The regulations provide, however, that although the account or annuity that was intended to be a deemed IRA is not a deemed IRA, it may still be treated as a traditional or a Roth IRA if it satisfies the applicable requirements of section 408 or 408A (including the prohibition of commingling under paragraph (a)(5) of section 408).

If, as discussed above, a qualified employer plan or a deemed IRA fails to satisfy the applicable qualification requirements, it may nevertheless be treated as satisfying those requirements if the Employee Plans Compliance Resolution System (EPCRS), Rev. Proc. 2002-47 (2002-29 I.R.B. 133), or other administrative practice is used to correct the qualification failures. In this regard, the IRS intends that when Rev. Proc. 2002-47 is updated, it will include provisions permitting submissions for deemed IRAs.

These regulations also provide that a deemed IRA may be either a traditional IRA under section 408 or a Roth IRA under section 408A. However, because contributions to deemed IRAs are limited to employee contributions, while SIMPLE IRAs under section 408(p) and SEPs under section 408(k) may only receive employer contributions, the regulations provide that SIMPLE IRAs and SEPs may not be used as deemed IRAs.

As noted above, these regulations provide a general principle that a qualified employer plan and the deemed IRA feature are generally treated as separate entities under the Code and each is subject to the rules applicable to that entity. This principle can be applied to address a variety of issues which might arise with respect to deemed IRAs and, as a result, the regulations do not contain specific provisions addressing these issues. For example, as noted in Announcement 99-2 (1999-1 C.B. 305), employers may permit employees to contribute to traditional or Roth IRAs by direct deposits through payroll deduction. In addition, employees making direct deposits to traditional IRAs of deductible contributions may be able to adjust their Federal income tax withholding to receive a more immediate tax benefit from their contributions. Because the IRA rules apply to deemed IRAs as they would to traditional and Roth IRAs, the provisions of Announcement 99-2 apply to deemed IRAs.

Similarly, these regulations expressly provide that the rules applicable to rollovers and transfers to and from IRAs also apply to rollovers and transfers to and from deemed IRAs, but the regulations do not address all of the aspects of such rollovers or transfers. For example, because section 408(c)(3) permits the surviving spouse of an IRA owner to treat the IRA as his or her own, the same rules apply to deemed IRAs although not expressly stated in these regulations. Thus, in accordance with section 408(c)(3), a qualified employer plan may permit a surviving spouse to treat a decedent's deemed IRA as his or her own. However, the surviving spouse, as a non-employee, may not make voluntary employee contributions to that deemed IRA.

Also, because the qualified employer plan and the deemed IRA are generally treated as separate entities, the early distribution rules of section 72(t) are applied separately to the two entities. Thus, a determination as to whether a distribution is a part of a series of substantially equal periodic payments under section 72(t)(2)(iv) will be determined separately for the qualified employer plan and for the deemed IRA.

Proposed Effective Date

The regulations are proposed to apply beginning on or after August 1, 2003. Taxpayers may rely upon these proposed regulations for guidance pending the issuance of final regulations. If, and to the extent, future guidance is more restrictive than the guidance in these proposed regulations,