

the future guidance will be applied without retroactive effect.

### Special Analyses

It has been determined that this notice of proposed rulemaking 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 regulations will not have a significant economic impact on a substantial number of small entities. The collection of information in the regulations is in § 1.408(q)–1(f)(2) and consists of the requirement that deemed IRAs must be held in trusts or annuity contracts separate from the trust or annuity contract of the qualified employer plan. This certification is based on the fact that the cost of maintaining these separate trusts and annuity contracts is small, particularly for small entities. 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.

### Drafting Information

The principal authors of these regulations are Robert M. Walsh and Linda C. Phillips, Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the IRS and Treasury participated in the development of these regulations.

### List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

### Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

## PART 1—INCOME TAXES

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

**Authority:** 26 U.S.C. 7805 \* \* \*  
§ 1.408(q)–1 also issued under 26 U.S.C. 408(q). \* \* \*

**Par. 2.** Section 1.408(q)–1 is added to read as follows:

### § 1.408(q)–1 Deemed IRAs in qualified employer plans.

(a) *In general.* Under section 408(q) a qualified employer plan may permit employees to make voluntary employee contributions to a separate account or annuity established under the plan. If the requirements of section 408(q) and this section are met, such account or annuity is treated in the same manner as an individual retirement plan under section 408 or section 408A (and contributions to such an account or annuity are treated as contributions to an individual retirement plan and not to the qualified employer plan). The account or annuity is referred to as a deemed IRA.

(b) *Types of IRAs.* If the account or annuity meets the requirements applicable to traditional IRAs under section 408, the account or annuity is deemed to be a traditional IRA, and if the account or annuity meets the requirements applicable to Roth IRAs under section 408A, the account or annuity is deemed to be a Roth IRA. Simplified employee pensions (SEPs) under section 408(k) and SIMPLE IRAs under section 408(p) may not be used as deemed IRAs.

(c) *Separate entities.* Except as provided in paragraph (d) and (g) of this section, the qualified employer plan and the deemed IRA are treated as separate entities under the Internal Revenue Code and are subject to the separate rules applicable to qualified employer plans and IRAs, respectively. Issues regarding eligibility, participation, disclosure, nondiscrimination, contributions, distributions, investments, and plan administration are generally to be resolved under the separate rules (if any) applicable to each entity under the Internal Revenue Code.

(d) *Exceptions.* The following exceptions to treatment of a deemed IRA and the qualified employer plan as separate entities apply:

(1) The plan document of the qualified employer plan must contain the deemed IRA provisions and a deemed IRA must be in effect at the time the deemed IRA contributions are accepted. Notwithstanding the preceding sentence, employers that want to provide for deemed IRAs for plan years beginning before January 1, 2004 (but after December 31, 2002), are not required to have such provisions in their plan documents before the end of such plan years.

(2) The requirements of section 408(a)(5) regarding commingling of assets do not apply to deemed IRAs. Accordingly, the assets of a deemed IRA may be commingled for investment purposes with those of the qualified

employer plan. However, the restrictions on the commingling of plan and IRA assets with non-plan assets apply to the assets of the qualified employer plan and the deemed IRA.

(e) *Application of distribution rules.*

(1) Rules applicable to distributions from qualified employer plans under the Internal Revenue Code and regulations do not apply to distributions from deemed IRAs. Instead, the rules applicable to distributions from IRAs apply to distributions from deemed IRAs. Also, any restrictions that a trustee, custodian or insurance company is permitted to impose on distributions from traditional and Roth IRAs may be imposed on distributions from deemed IRAs (for example, early withdrawal penalties on annuities).

(2) The required minimum distribution rules of section 401(a)(9) must be met separately with respect to the qualified employer plan and the deemed IRA. The determination of whether a qualified employer plan satisfies the required minimum distribution rules of section 401(a)(9) is made without regard to whether a participant satisfies the required minimum distribution requirements with respect to the deemed IRA that is established under such plan.

(f) *Additional rules.*—(1) *Trustee.* The trustee or custodian of an individual retirement account must be a bank, as required by section 408(a)(2), or, if the trustee is not a bank, as defined in section 408(n), the trustee must be an entity that receives approval from the Internal Revenue Service to serve as a nonbank trustee or nonbank custodian pursuant to § 1.408–2(e) of the regulations.

(2) *Separate trusts and annuity contracts.* (i) Deemed IRAs that are individual retirement accounts may be held in a single trust (rather than in separate, individual trusts), provided the trust would qualify as a single plan within the meaning of § 1.414(l)–1(b). See also § 1.410(b)–7(a) and (b). However, any trust holding deemed IRA assets must be separate from the trust holding the other assets of the qualified employer plan. A deemed IRA trust must be created or organized in the United States for the exclusive benefit of the participants. In addition, the written governing instrument creating the trust must satisfy the requirements of paragraphs (1), (2), (3), (4), and (6) of section 408(a), and there must be separate accounting for the interest of each participant.

(ii) Deemed IRAs that are individual retirement annuities may be held under a single annuity contract or under separate annuity contracts. However,