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Employee Benefits Bulletin

A review and analysis of recent developments affecting employee benefits

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April 2000

NEW IRS GUIDANCE ON 401(k) SAFE HARBOR RULES PROVIDES FLEXIBILITY FOR PLAN SPONSORS

The Internal Revenue Service recently issued additional guidance on safe harbor requirements for 401(k) plans. Safe harbor contribution formulas became available for most 401(k) plans beginning with the 1999 plan year. By following the safe harbor rules, a plan sponsor does not have to perform the actual deferral percentage ("ADP") test for pre-tax contributions for a plan year. Other safe harbor contribution rules enable a plan sponsor to avoid performing the actual contribution percentage ("ACP") test for matching contributions for a plan year, although the ACP test still has to be performed for any after-tax employee contributions.

Many plan sponsors have considered adopting safe harbor plans because the ADP and ACP tests are complex and often limit contributions for highly compensated employees. However, the increased costs associated with safe harbor plans and the limited amount of flexibility initially provided by the IRS in 1998 deterred many plan sponsors. The revised guidance (IRS Notice 2000-3) provides plan sponsors with somewhat more flexibility in using safe harbor formulas. However, since the safe harbor contribution levels were enacted by Congress and not the IRS, they remain unchanged.

Overview of Safe Harbor Plans

Two alternative safe harbor contribution methods may be used to avoid the ADP test. For all eligible participants (or just all eligible nonhighly compensated participants), a plan sponsor may either: (1) make a contribution of 3% of compensation or (2) match pre-tax contributions at a rate of 100% of the first 3% of compensation and 50% of the next 2% of compensation. Within certain parameters, a plan sponsor can revise the matching formula, but matching contribution rates cannot be increased as the rate of pre-tax contributions increases. For example, a safe harbor matching contribution formula could be set at 100% of the first 4% of compensation or at 133-1/3% of the first 3% of compensation. ADP safe harbor contributions must be fully vested.

If the plan sponsor uses safe harbor matching contributions for the ADP test and does not make any additional matching contributions, then the ACP test does not have to be performed for those matching contributions. Also, a higher level of matching contributions can be provided under the ACP safe harbor rules for matching contributions. The ACP safe harbor is available if: (1) the plan sponsor uses one of the ADP safe harbor methods, (2) matching contributions do not exceed 6% of compensation, (3) the notice requirements for the ADP safe harbor rules (summarized below) are followed and (4) the rate of matching contributions does not increase as the rate of pre-tax contributions increases. Although ACP safe harbor matching contributions do not have to be fully vested, plan sponsors could find that it does not make sense to subject them to a vesting schedule if they are used in connection with ADP safe harbor matching contributions.

For both the ADP and ACP safe harbor formulas, the 1998 IRS guidance required that (1) the participants must be notified in writing of the contributions at least 30 days, and not more than 90 days, prior to the beginning of the plan year (but there was a transitional rule for the 1999 plan year), (2) the participants must be provided with a reasonable period to make or change a pre-tax contribution election, (3) participants must be provided with flexibility in setting their pre-tax contribution rates to obtain the maximum match or less than the maximum match, (4) the plan's procedures for changing the rate of pre-tax contributions had to be explained in the notice and (5) the plan sponsor could not change its mind and discontinue the safe harbor contributions during the year. In addition, the plan document had to provide for the safe harbor contribution formula being used before the beginning of the plan year, although this rule applies only after the current remedial amendment period expires (the last day of the plan year beginning in 2000).

Recent IRS Changes to Safe Harbor Rules

The following summarizes the highlights of the IRS's recent notice on safe harbor plans:

1. *Extended Date For Certain Plans Adopting the 3% ADP Safe Harbor Non-Elective Contribution Method.* Plan sponsors who want to utilize the flat 3% of compensation contribution for the ADP safe harbor may now have up to 30 days before the end of the plan year to make their decision. To be able to take advantage of this new rule, the plan must (1) use the current year testing method (as opposed to the prior year method), (2) provide notices to participants prior to the beginning of the plan year indicating that the plan *may* be amended to provide for the 3% safe harbor contribution and (3) provide another notice at least 30 days prior to the end of the plan year if the plan sponsor is going to make the 3% contribution. A plan sponsor who adopts such an amendment during a plan year is not required to continue making the 3% contribution for future plan years. Plan sponsors considering using this approach should also consider that some flexibility may be lost by foregoing the ability to use prior year testing. Although plan sponsors may always switch to the current year testing method, there are restrictions on switching to the prior year testing method.

2. *Transitional Relief For Plan Sponsors First Adopting Safe Harbor Contributions in 2000.* If the 2000 plan year is the first time that a plan sponsor utilizes safe harbor contributions, the sponsor has until May 1, 2000 to provide the required safe harbor notices to employees. Accordingly, for plan sponsors with plan years beginning prior to May 1, 2000, safe harbor formulas can still be implemented for the 2000 plan year.
3. *Method of Providing Notice.* The new guidance permits plan sponsors to provide the required safe harbor notices through an electronic medium, such as an intranet system. However, the electronic medium must be reasonably accessible to all employees and the employees must be informed that, upon request and at no charge, a written copy of the notice may be obtained. Certain aspects of the notice may now cross-reference the summary plan description.
4. *Timing of Making Matching Contributions.* Safe harbor matching contributions may be made at year-end for contributions made during the entire plan year, or separately with respect to each payroll period, month or quarter. If the payroll period, month or quarter method is used, the matching contributions must be made by the last day of the following quarter. The 1998 IRS guidance also permitted the payroll approach to be used, but required a "true-up" contribution in some cases at the end of the year if the participant's year-end contribution and compensation figures resulted in additional contributions. The new guidance no longer requires this.
5. *Eliminating Matching Contributions During the Plan Year.* The new guidance permits a plan sponsor to amend its plan prospectively to eliminate safe harbor matching contributions during a plan year. However, if it does so, the plan must pass applicable ADP and ACP tests for that year under the current year testing method. In addition, employees must be given at least 30 days' advance notice of this change and the opportunity to change their pre-tax contribution rates. Since all other safe harbor contribution rules apply until the effective date of the amendment, the safe harbor contributions

made before the amendment would continue to be subject to the safe harbor vesting rules.

6. *Excluding Certain Employees From Safe Harbor Contributions.* 401(k) plans may test separately employees who have not yet attained age 21 or completed one year of service. The new guidance provides that a plan may exclude this group of employees from receiving safe harbor contributions, but the group must separately pass the ADP and/or ACP tests using the current year testing method. Beginning with the 1999 plan year, plans also may exclude these employees entirely from testing if they are non-highly compensated. However, the new guidance does not address the availability of safe harbor contributions for these employees under a plan that excludes them from testing. Under a conservative approach, safe harbor contributions should be made available to them absent guidance to the contrary from the IRS.

Conclusion

The changes to safe harbor plan rules recently announced by the IRS provide increased flexibility for plan sponsors. Although some sponsors may still conclude that safe harbor formulas remain too expensive, other plan sponsors previously deterred by the lack of flexibility the IRS provided in 1998 may be encouraged to reconsider their position on safe harbor plans.

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STOCK OPTIONS AND OVERTIME CALCULATIONS

The number of U.S. workers receiving stock options has increased significantly as companies seek to compete for talent in a tight labor market. Once reserved almost exclusively for top executives, stock options are steadily being expanded down the corporate ladder. According to a recent survey, nearly 40 percent of major companies now have stock option plans covering over half their

employees.

The increasing popularity of broad-based stock option programs, however, may be hindered by a recently released Department of Labor opinion letter. In that letter, the Department of Labor stated that gains realized from the exercise of stock options must be included in overtime calculations for employees not exempt from the overtime requirements of the Fair Labor Standards Act ("FLSA").

Regular Rate

The FLSA requires employers to pay non-exempt employees overtime for each hour worked in excess of 40 in any workweek at the rate of one and one-half times an employee's "regular rate of pay." Non-exempt employees include both those paid on an hourly basis, as well as salaried employees who do not fall within one of the exempt classifications, the most common being executive, professional, and administrative.

An employee's "regular rate" is defined as "all remuneration for employment paid to, or on behalf of, the employee," except for certain specifically excluded types of payments. Excluded payments include discretionary bonuses, premium pay for weekend and holiday work, expense reimbursements, vacation and other paid time off, holiday and similar special occasion gifts, and irrevocable contributions made to a trust or third person pursuant to a plan for providing retirement or welfare benefits.

Department's Opinion

The Department of Labor's opinion letter was issued in response to an employer's request for a ruling. Under the plan, each full-time employee would receive options for 100 shares of stock. Employees would have the right to purchase the shares at the grant price upon the earlier of a specified date approximately two years after the grant or upon the company's shares being traded at or above a specified price. Eligible employees would have five years to exercise their options, but would have to be employed by the company at the time of exercise.

The Department of Labor's view was that the difference between the grant price and the price of the stock at the time the option is exercised (*i.e.*, the employee's profit) must be included in calculating an employee's regular rate

of pay for overtime pay purposes because it constitutes remuneration to the employee which is not specifically excluded from the definition of "regular rate of pay." According to the opinion letter, this profit must be allocated over the period of time in which it was earned, but in no event over a period of more than two years.

Example: Sally, a non-exempt employee earning \$10 an hour, exercises her stock option 26 weeks into the program and earns a profit of \$2,500. According to the opinion letter, that profit would be attributable to the previous 26 workweeks, ending with the workweek in which the option is exercised. The amount of overtime paid, if any, in each of those 26 weeks would then have to be recalculated and paid based upon a regular rate of \$12.40 (\$2,500 profit divided by 26 weeks divided by 40 hours per week equals \$2.40), rather than her \$10.00 base rate.

Controversy

The Department's opinion letter has created a firestorm of controversy since its release. However, the Department so far has refused to retract the letter, emphasizing that it was based exclusively on the facts and circumstances presented, and was not intended to suggest that all stock option programs would be treated in the same manner. Yet, the opinion letter appears to describe a fairly common nonstatutory stock option plan, and the Department has failed to identify anything unique about this plan that would distinguish it, for purposes of the Department's overtime pay analysis, from other broad-based employee stock option plans.

Congress has conducted hearings and legislation has been introduced which we are monitoring closely that would specifically exempt stock option programs from the FLSA's overtime pay requirements.

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CASH BALANCE PLANS

Cash balance plans have been around for many years, but their popularity has increased significantly in recent years. Since 1985, more than 15% of Fortune 500 companies have converted their traditional defined benefit plans to cash balance plans, and an estimated 30 to 40% currently are considering converting. Despite the controversy generated by some conversions, most conversions to cash balance plans from traditional final average pay plans have been implemented without litigation or public controversy.

What is a Cash Balance Plan?

A cash balance plan is, technically, a defined benefit plan because a participant's benefit is based on a formula and the employer is responsible for making the contributions needed to provide the promised benefit to the participant. However, a cash balance plan "feels" like a defined contribution plan because each participant has a hypothetical account balance in the plan. Although a participant's benefit will not be subject to market fluctuations as if it were invested in one or more mutual funds, the participant can track the benefit's growth by simply checking the hypothetical account balance.

A cash balance plan benefit is based upon two different types of credits the employer makes to each participant's hypothetical account. The first is an annual credit to the participant's account based on his or her pay. This credit is sometimes referred to as a "pay credit" and is usually calculated as a percentage of the participant's salary. For example, 2% of a participant's annual salary may be contributed to his or her hypothetical plan account each year. Although many plans use this flat rate for pay credits, some plans have a graduated level of credit, providing a higher percentage for older or longer service participants. These graduated credits address the possible perceived imbalance between benefits for older and younger employees discussed later in this article.

The second credit is an "interest credit" on the participant's accrued balance in the hypothetical account. Each participant earns interest on all pay credits (including those made in prior years) at a rate established by the plan, usually indexed to a readily ascertainable interest rate, such as a short-term Treasury bill rate. The interest credit

assumes that the employee will continue working until retirement age, ordinarily age 65, and the amount is based on the number of years the employee has until his or her normal retirement date.

The result of the cash balance structure is that benefits are accrued in a relatively uniform manner over the entire period of employment. In contrast, a significant portion of the benefit under a traditional final average pay plan with early retirement subsidy accrues during the final years of a long-term employee's career.

Conversion to a Cash Balance Plan

Many of the concerns being raised about cash balance plans involve conversions of existing defined benefit plans to cash balance plans, which some have argued may violate the Age Discrimination in Employment Act. Because employees have some idea of what benefit may be derived from the existing plan, an employer must address how employees may react to change. One possible reaction is that older employees may perceive that they are being discriminated against because their projected benefit is no longer based on their final average salary, but on a hypothetical account balance and future interest and pay credits. As noted above, older employees who have participated in a final average pay plan expect to accrue a substantial portion of their benefit in the years closest to retirement. Although the benefit is projected through the time the employee plans to retire, many employees view the projected amount as what they are entitled to under the plan without recognizing that their benefit may be substantially less if their employment terminates earlier.

Additionally, depending on the interest rate being used by the new plan, a participant may experience what is referred to as the "wearaway" effect. A participant experiences wearaway when the initial balance in his or her hypothetical account after the conversion from the final average pay plan is established at a level below his or her accrued benefit under the prior plan on the date of the conversion. This result is possible if the interest rate used by the cash balance plan is higher than the interest rate assumption used by the former final average pay plan. Accordingly, a smaller balance is required in the cash balance plan to achieve the same benefit at normal retirement age. Because ERISA prohibits any cutback in a participant's accrued benefit in a defined benefit plan, the

participant is entitled to receive the amount accrued under the former plan if he or she terminates employment during the wearaway period. However, this benefit amount will remain the same for a period of time until the pay and interest credits under the cash balance plan raise the hypothetical account balance to a level higher than the accrued benefit under the former plan.

Addressing Conversion Issues

There are several ways for plan sponsors to address the perceived inequities of a conversion from a final average pay plan to a cash balance plan. Some employers have offered participants the option to continue participating in the old final average pay plan or to convert their benefit to the new cash balance plan. IBM, which recently converted to a cash balance plan, eventually gave this option to all employees who were age 40 and over in an effort to appease complaints about the conversion. Because this option can be expensive due to the costs associated with running two retirement plans concurrently, participants sometimes are offered an incentive to convert their benefit to the new plan.

Alternatively, an employer may grandfather employees who would be adversely affected by the conversion. When an employee retires, the benefit which would have been derived under the old plan and the benefit which has accrued under the cash balance plan are calculated and the participant receives the larger of the two amounts. The advantage of grandfathering is that it enables the employer to avoid the cost associated with maintaining two plans. Ordinarily, benefits are grandfathered under the old plan only for a limited period of time, such as ten years. This is the route Ameritech took when recently converting to a cash balance plan.

Finally, an employer may choose to freeze the accrued benefit under the old plan and make the cash balance plan prospective only. Under this technique, a participant receives his or her retirement benefit in two pieces: the frozen benefit under the old plan and the accrued benefit under the cash balance plan. This particular method is effective for addressing the wearaway effect because a participant will always see an increase in his or her benefit over time. One disadvantage is the cost of maintaining two plans, the frozen plan and the new cash balance plan.

Conclusion

If a conversion is being contemplated, it is important to determine the actual impact of various design alternatives on the employees. This impact will vary from employer to employer based on the average age and years of service of employees. Next, consideration should be given to utilizing some strategy to protect the benefit accrual method used under the old plan. Finally, special attention needs to be given to proper employee communications.

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NEW SPECIAL TAX NOTICE FOR ROLLOVERS

Section 402(f) of the Internal Revenue Code requires plan administrators to provide a notice to qualified retirement plan participants who are about to receive an eligible rollover distribution that describes the possible federal income tax treatment of the distribution. Unfortunately, the rules governing the tax treatment of distributions from qualified plans are complex and keep changing. Furthermore, plan administrators are rightfully concerned about the level of detail required and potential liability for providing insufficient or misleading information.

In 1992, the IRS addressed these concerns by issuing a model notice that plan administrators could use to satisfy their Section 402(f) notice obligations. It was a good idea, but the model quickly became outdated due to changes in the law.

Now, after an eight-year hiatus, the IRS is back with an updated model notice. The new model notice, like the old, addresses direct rollovers and the income tax withholding requirements for failing to elect a direct rollover (*i.e.*, 20% mandatory federal income tax withholding). The updates in the new model notice include descriptions of the following legal changes since 1992:

- ⚡ Roth IRAs, SIMPLE-IRAs, and Education IRAs cannot receive a rollover from a qualified plan or Section 403(b) plan.

- ≈ Elimination of five-year income averaging beginning this year. However, for individuals born before 1936, ten-year averaging and capital gains treatment may still be available.
- ≈ Changes in the rollover treatment of hardship distributions.
- ≈ Tax treatment of defaulted participant loans as part of a distribution.

Plan administrators using the old model notice should begin using the updated notice. Plan administrators using their own individually designed notice should review that notice to ensure that it reflects the current rules governing qualified plan distributions.

Copies of the new model notice are available from any member of Vedder Price's Employee Benefits Group. The names and telephone numbers of group members are listed at the end of this Bulletin.

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NEW FORM 5500

The new and improved Form 5500 Annual Return/Report for Employee Benefit Plans makes its debut with the 1999 reporting year. Form 5500, Form 5500-C, and Form 5500-R have been replaced with a single Form 5500 to be used by all filers. The 1999 Form 5500 is a simple main form with basic identifying information, supplemented by 13 schedules.

This year also marks the start of the government's new computerized filing system, known as the ERISA Filing Acceptance System, or EFAS. Except for those filing electronically, use of computer scannable forms is mandatory for 1999 plan year reports, which generally are due in July 2000 for calendar year plans.

The computer scannable Form 5500 and schedules come in two varieties: (1) machine print format prepared using computer software, and (2) hand print format with special green ink that can be completed by hand or with a

typewriter. The IRS started its annual mailing of the Form 5500 package for 1999 in late February. The green ink hand print forms also may be obtained by calling 1-800-TAX-FORM (1-800-829-3676). The EFAS website at www.efas.dol.gov is expected to be updated later this month with additional information about the availability of the software for preparing machine print forms.

Also new this year is the Form 5500 filing location. For the first time, all filers will file their Form 5500s with the Department of Labor's Pension and Welfare Benefits Administration rather than with the IRS.

With all of these changes, those responsible for preparing and filing Form 5500s should plan on allocating additional time this year to familiarize themselves with the new format and reporting requirements.

About Vedder Price

Vedder, Price, Kaufman & Kammholz is a national, full-service law firm with approximately 180 attorneys in Chicago, New York City and Livingston, New Jersey.

The Employee Benefits Group

Vedder Price has one of the nation's largest employee benefits practices, with ongoing responsibility for the design, administration and legal compliance of pension, profit sharing and welfare benefit plans with aggregate assets of several billion dollars. Our employee benefits lawyers also have been involved in major litigation on behalf of benefit plans and their sponsors. Our clients include very large national corporations, smaller professional and business corporations, multi-employer trust funds, investment managers and other plan fiduciaries.

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IRS FINAL REGULATIONS ON ELECTRONIC COMMUNICATIONS

The Internal Revenue Service recently issued final regulations governing the use of electronic media in three areas of interest to plan sponsors and administrators. These final regulations address three principal topics: eligible rollover distribution tax notices, participant consents to distributions in excess of \$5,000, and tax withholding notices.

Special Tax Notice for Rollover Distributions

Section 402(f) of the Internal Revenue Code requires plan administrators to provide recipients of an eligible rollover distribution with an explanation of the direct rollover and mandatory 20% income tax withholding rules, and other relevant tax information. Regulations require that a Section 402(f) notice be provided to a participant no less than 30 and no more than 90 days before the date of the distribution, although the participant may waive the 30-

day period.

The new final regulations allow plan administrators to satisfy their Section 402(f) obligations by (a) supplying the notice in an electronic form, as long as the participant is informed that he or she can obtain a written copy upon request at no charge, or (b) complying with a three-step process.

Under the three-step process, a plan administrator must first provide a full, paper 402(f) notice to the participant, but this full notice need not be provided during the narrow 30/90-day time period. Second, the plan administrator must provide the participant with a summary of the 402(f) notice in electronic form or otherwise during the 30/90-day period prior to distribution. This summary must: (a) set forth the principle provisions of the full 402(f) notice; (b) refer the participant to the most recent version of the full 402(f) notice and, if the full notice was part of a larger document, such as a summary plan description, must identify that document and the page number or section where the notice may be found; and (c) advise the participant that he or she may request a paper copy of the full 402(f) notice, which will be provided without charge. Third, if the participant does request a paper copy of the full 402(f) notice, the plan administrator must supply the copy no less than 30 days before the date of the distribution, subject to the participant's ability to waive the 30-day notice period.

The practical effect of these changes is illustrated by the examples provided in the regulations. One example states that the Section 402(f) requirements will be satisfied if the full 402(f) notice is provided by e-mail or through a web site after a participant requests a distribution eligible for rollover via such electronic media. However, another example makes clear that the delivery of a full 402(f) notice over an automated telephone response system will not meet the requirements. The preamble accompanying the final regulations states that a full notice is too complicated to be provided over the telephone.

In addition, the examples illustrate the situation in which a full paper notice is supplied ahead of time, usually through an SPD, and an electronic summary is delivered to the participant during the 30/90-day time period. The summary may be supplied through e-mail, a web site, or read over a telephone system, so long as the other

benefits lawyers also have been involved in major litigation on behalf of benefit plans and their sponsors. Our clients include very large national corporations, smaller professional and business corporations, multi-employer trust funds, investment managers and other plan fiduciaries.

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requirements are met.

Participant Consent to Distribute Benefits

Code Section 411(a)(11) generally provides that if the value of a participant's accrued benefit exceeds \$5,000, the benefit may not be immediately distributed without the participant's consent. In addition, a consent is not valid unless the participant is given an explanation of the plan's distribution options and is advised of the right to defer the distribution, and such explanation is delivered between 30 days and 90 days prior to the date of the distribution.

The new final regulations allow for an electronic notice scheme similar to that described above. The Section 411(a)(11) notice requirement may be met by providing the full notice via e-mail, a web site, or a telephone system (in contrast to the 402(f) notice which may not be provided via a telephone system), as long as the participant may obtain a full paper copy upon request. In addition, a paper form of the notice may be provided ahead of time via an SPD or other document and a summary may be provided during the 30/90-day time period via e-mail, a web site, or a telephone system. The summary must still refer the participant to the previously supplied paper notice and inform the participant that a full paper copy of the notice will be supplied without charge upon request.

In addition, the regulations state that the participant may give consent to a distribution through an electronic medium, as long as (1) the electronic medium is reasonably accessible to the participant, (2) the system is reasonably designed to preclude anyone other than the participant from giving the consent, (3) the system gives the participant a reasonable opportunity to confirm, modify, or rescind the consent before the distribution becomes effective, (4) the system provides confirmation of the terms of the distribution, either in paper or electronic form, within a reasonable time after the consent is given, and (5) if the confirmation is provided in electronic form, the participant is informed that he or she may request a written copy of the confirmation which will be supplied without charge.

Withholding Notice

Code Section 3405(e)(10) requires the payor of a distribution to provide the payee a notice of the right not

to have income tax withheld from the payment. The final regulations state that this notice may be supplied through an electronic system that (1) is reasonably accessible to the payee, (2) is reasonably designed to provide the notice in a manner no less understandable to the payee than a written paper document, and (3) notifies the payee that the notice will be supplied without charge in paper form upon request. The examples provided in the final regulations illustrate that the 3405(e)(10) notice may be supplied via e-mail, a web site, or a telephone system.

Conclusion

The IRS' new final regulations, combined with earlier IRS and Department of Labor guidance, are expected to facilitate the current trend toward electronic retirement plan administration.

Kelly A. Starr

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"LOOK THROUGH" TRUSTS AS PLAN BENEFICIARIES

With the increasing amount of wealth accumulated in qualified retirement plans, plan sponsors increasingly are focusing on measures allowing participants to take full advantage of estate planning opportunities. One such opportunity is naming a trust as a designated beneficiary under a qualified plan.

Generally, a plan may provide that a trust can be named as a beneficiary of the plan. If the trust is a "look through" trust, the joint lives of the participant and a beneficiary of the trust may be used in determining minimum required distributions. If the trust does not satisfy the look through requirements, a participant is treated as not having a designated beneficiary and the minimum distributions will be made over the participant's life expectancy if the participant dies after his or her required beginning date, or over a five-year period if the participant dies before his or her required beginning date. In other words, the plan benefit may be distributed over a much shorter period of time, a result which the Internal Revenue Service may

welcome but which plan participants and their beneficiaries may wish to avoid.

Under proposed IRS regulations, a trust must satisfy four requirements in order to be eligible for look through treatment:

First, the trust must be valid under state law.

Second, the trust must be irrevocable or must, by its terms, become irrevocable upon the death of the participant. By allowing the trust to become irrevocable upon death, the proposed regulations eliminated the confusion which surrounded the issue of whether a grantor trust could satisfy the look through requirements. If the grantor of the trust and the participant are the same person, the trust will become irrevocable at the time of the participant-grantor's death and thus satisfy the requirement of irrevocability.

Third, the beneficiaries of the trust must be identifiable from the trust agreement. Beneficiaries may be members of a class, such as all of the participant's children.

Fourth, on or before the date when distributions are required from the plan, the participant must either (a) provide the plan administrator with a copy of the trust and all amendments; or (b) provide the plan administrator a list of all the beneficiaries under the trust, certify that the list is correct and complete and that the other requirements described above (items 1 through 3) are satisfied, and agree to provide corrected certifications as necessary. Alternative (b) replaces the former absolute requirement that the plan administrator have a copy of the trust.

For plan administrators, understanding the look through rules is essential in complying with the required minimum distribution rules when a trust is named as a beneficiary and in working with participants who want to utilize a look through trust as an estate planning tool.

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