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[4830-01-p]

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG-147310-12]

RIN-1545-BM22

Applicability of Normal Retirement Age Regulations to Governmental Pension Plans

AGENCY: Internal Revenue Service (IRS), Treasury

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations under section 401(a) of the Internal Revenue Code (Code). These regulations would provide rules relating to the determination of whether the normal retirement age under a governmental plan (within the meaning of section 414(d) of the Code) that is a pension plan satisfies the requirements of section 401(a) and whether the payment of definitely determinable benefits that commence at the plan's normal retirement age satisfies these requirements. These regulations would affect sponsors and administrators of governmental pension plans, as well as participants in such plans.

DATES: Comments and requests for a public hearing must be received by

[INSERT DATE 90 DAYS AFTER PUBLICATION OF THIS DOCUMENT IN THE FEDERAL REGISTER].

ADDRESSES: Send submissions to CC:PA:LPD:PR (REG-147310-12), room 5205, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington D.C. 20044. Submissions may be hand-delivered Monday through Friday

between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG-147310-12), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, N.W., Washington, DC, 20224, or sent electronically via the Federal eRulemaking Portal at www.regulations.gov (IRS REG-147310-12).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Pamela Kinard at (202) 317-4148 or Robert Walsh at (202) 317-4102; concerning the submission of comments or to request a public hearing, Oluwafunmilayo (Funmi) Taylor, (202) 317-7180 or (202) 317-6901 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

I. Normal Retirement Age Generally

This document contains proposed regulations under section 401(a) of the Internal Revenue Code (Code). Section 401(a) sets forth the qualification requirements for a trust forming part of a stock bonus, pension, or profit-sharing plan of an employer. Several of these qualification requirements are based on a plan's normal retirement age, including the regulatory interpretation of the requirement that the plan provide for definitely determinable benefits (generally after retirement). Final regulations defining normal retirement age for the definitely determinable requirement were published in the **Federal Register** as TD 9325 on May 22, 2007 (72 FR 28604) (2007 NRA regulations).

Section 1.401(a)-1(b)(1) of the 2007 NRA regulations generally requires that a pension plan be established and maintained primarily to provide

systematically for the payment of definitely determinable benefits over a period of years, usually for life, after retirement. The 2007 NRA regulations include two exceptions to the general rule that payments commence after retirement: (1) payments can commence after attainment of normal retirement age; and (2) in accordance with section 401(a)(36), payments can commence after an employee reaches age 62.

Section 1.401(a)-1(b)(2)(i) of the 2007 NRA regulations provides that, as a general rule, a normal retirement age under a pension plan must be an age that is not earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed (reasonably representative requirement). Section 1.401(a)-1(b)(2)(ii) of the 2007 NRA regulations provides that a normal retirement age of age 62 or later is deemed to satisfy the reasonably representative requirement. Under section 1.401(a)-1(b)(2)(iii) of the 2007 NRA regulations, whether a normal retirement age that is not earlier than age 55 but is below age 62 satisfies the reasonably representative requirement is based on a facts and circumstances analysis. Section 1.401(a)-1(b)(2)(iv) of the 2007 NRA regulations provides that a normal retirement age that is lower than age 55 is presumed not to satisfy the reasonably representative requirement unless the Commissioner determines otherwise on the basis of facts and circumstances. Under §1.401(a)-1(b)(2)(v) of the 2007 NRA regulations, in the case of a pension plan in which substantially all of the participants are qualified public safety employees (within the meaning of

section 72(t)(10)(B)), a normal retirement age of age 50 or later is deemed to satisfy the reasonably representative requirement.

As previously explained, normal retirement age is used by a pension plan in a variety of circumstances relating to plan qualification. Generally, in the case of a pension plan that is not a governmental plan under section 414(d) and is subject to the rules of section 411(a) through (d), normal retirement age is used in applying the rules under section 411(b) that are designed to preclude avoidance of the minimum vesting standards through the backloading of benefits (such as a benefit formula under which the rate of benefit accrual is increased disproportionately for employees with longer service). Normal retirement age is also relevant for such a plan for other purposes, including the application of the rules relating to suspension of benefits under section 411(a)(3)(B), plan offset rules under section 411(b)(1)(H)(iii), and the minimum benefit rules applicable to non-key employee participants in the case of a top-heavy defined benefit plan under section 416. In addition, for such a plan, section 411(a)(8) defines the term normal retirement age as the earlier of (a) the time a participant attains normal retirement age under the plan or (b) the later of the time a plan participant attains age 65 or the 5th anniversary of the time a plan participant commenced participation in the plan.¹

¹Section 411(f) provides a special normal retirement age rule that applies only to certain defined benefit plans that are subject to section 411(a) through (d). Section 411(f) was added to the Code on December 16, 2014 by Section 2 of Division P of the Consolidated and Further Continuing Appropriations Act, 2015, Public Law No. 113-235 (128 Stat. 2130 (2014)), which also made a corresponding change to section 204 of the Employee Retirement Income Security Act of 1974, Public Law 93-406 (88 Stat. 829 (1974)), as amended (ERISA). Under section 101 of Reorganization Plan No. 4 of 1978 (92 Stat. 3790), the Secretary of the Treasury has interpretive

II. Normal Retirement Age under a Governmental Plan

A. Application of section 411 to governmental plans

Section 414(d) of the Code provides that the term governmental plan generally means a plan established and maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing.² See sections 3(32) and 4021(b)(2) of ERISA for definitions of the term governmental plan for purposes of title I and title IV of ERISA, respectively.

Section 411(e)(1) of the Code provides that the provisions of section 411, other than section 411(e)(2), do not apply to a governmental plan. Under section 411(e)(2), a governmental plan is treated as meeting the requirements of section 411, for purposes of section 401(a), if the plan meets the vesting requirements resulting from the application of sections 401(a)(4) and 401(a)(7) as in effect on September 1, 1974 (pre-ERISA vesting rules). The only requirements under section 411 that apply to a governmental plan are the pre-ERISA vesting rules under section 411(e)(2). Thus, the definition of normal retirement age under section 411(a)(8) does not apply to a governmental plan. In addition, other rules

jurisdiction over the subject matter addressed in section 411(f) for purposes of ERISA, as well as the Code.

² The term governmental plan also includes a plan that is established and maintained by an Indian tribal government (as defined in section 7701(a)(40)), a subdivision of an Indian tribal government (determined in accordance with section 7871(d)), or an agency or instrumentality of either, and all the participants of which are employees of such entity substantially all of whose services as such an employee are in the performance of essential governmental functions but not in the performance of commercial activities (whether or not an essential government function). In addition, the term governmental plan includes any plan to which the Railroad Retirement Act of 1935 or 1937 (49 Stat. 967, as amended by 50 Stat. 307) applies and which is financed by contributions required under that Act and any plan of an international organization that is exempt from taxation by reason of the International Organizations Immunities Act, Public Law 79-291 (59 Stat. 669).

of section 411, including section 411(a)(3)(B) (related to suspension of benefits), section 411(b)(1) (related to backloading of benefits in a defined benefit plan), and section 411(b)(1)(H)(iii) (related to offsets after normal retirement age) do not apply to a governmental plan. Therefore, except for specific circumstances in which in-service benefit payments are permitted under §1.401(a)-1(b)(1), the definition of normal retirement age need not be used by a governmental plan for the same purposes that apply to a plan subject to section 411(a) through (d).³

B. Pre-ERISA vesting requirements for governmental plans

Under section 411(e)(2), a normal retirement age under a governmental plan must satisfy the pre-ERISA vesting rules. The pre-ERISA vesting rules applicable to governmental plans contain two basic components: (a) rules relating to vesting and (b) rules relating to the right to commence benefits without reduction for early commencement. Rev. Rul. 66-11, 1966-1 C.B. 71, and Rev. Rul. 68-302, 1968-1 C.B. 163, illustrate the interplay between normal retirement age under the pre-ERISA vesting rules and section 401(a). As described in these rulings, to satisfy the requirements of section 401(a), a plan that is subject to the pre-ERISA vesting rules must provide for full vesting of the contributions made to or benefits payable under the plan for any employee who has attained normal retirement age under the plan and satisfied any reasonable and uniformly applicable requirements as to length of service or participation described in the

³ Normal retirement age may also be relevant to participant eligibility for certain favorable tax treatment, including section 402(l) (providing an income exclusion of up to \$3,000 annually for certain distributions for health insurance and long-term care insurance premiums to eligible retired public safety officers who separate from service by reason of disability or attainment of normal retirement age) and the special catch-up provisions under §1.457-4(c)(3)(v)(A).

plan. For more information about these rules, see Part 5(c) of Publication 778, Guides for Qualification of Pension, Profit-Sharing, and Stock Bonus Plans (Pub. 778).

Rev. Rul. 71-24, 1971-1 C.B. 114, illustrates the application of the pre-ERISA vesting rules to benefits provided under a pension plan for employees who continue employment after normal retirement age. Rev. Rul. 71-24 includes an example under which benefits are permitted to commence during employment after normal retirement age.

As described in Rev. Rul. 71-147,⁴ 1971-1 C.B. 116, the normal retirement age in a pension or annuity plan under the pre-ERISA vesting rules is generally the lowest age specified in the plan at which the employee has the right to retire without the consent of the employer and receive retirement benefits based on the amount of the employee's service to the date of retirement at the full rate set forth in the plan (that is, without actuarial or similar reduction because of retirement before some later specified age). Rev. Rul. 71-147 does not explicitly require a plan to include a provision defining normal retirement age. Instead, a plan's normal retirement age may be deduced from other plan provisions. As described in Rev. Rul. 71-147, although normal retirement age under a pension or annuity plan is ordinarily age 65, a plan may specify a lower age at which the employee has the right to retire without the consent of the employer and to receive retirement benefits based on the amount of the employee's service at the

⁴ Even though Rev. Rul. 71-147 was superseded by Rev. Rul. 80-276, 1980-1 C.B. 131, for plans subject to section 411(a)(8), Rev. Rul. 71-147 remains valid guidance for purposes of the pre-ERISA vesting rules.

full rate set forth in the plan if this lower age would be an age at which employees customarily retire in the particular company or industry, and if the provision permitting receipt of unreduced benefits at this age is not a device to accelerate funding. For more information about these rules, see also Part 5(e) of Pub. 778.

III. Application of the 2007 NRA Regulations to Governmental Plans

Notice 2007-69, 2007-2 C.B. 468, asked for comments “on whether and how a pension plan with a normal retirement age conditioned on the completion of a stated number of years of service satisfies the requirement in §1.401(a)-1(b)(1)(i) that a pension plan be maintained primarily to provide for the payment of definitely determinable benefits after retirement or attainment of normal retirement age and how such a plan satisfies the pre-ERISA vesting rules.”

Comments were received on a variety of issues, including comments that guidance should be issued to (1) clarify that governmental plans are not required to define normal retirement age, (2) provide safe harbor rules that would permit a governmental plan to define normal retirement age that includes a service component, and (3) provide that the age-50 safe harbor rule in §1.401(a)-1(b)(2)(v) for qualified public safety employees can apply to these employees even if less than substantially all of a plan's participants are qualified public safety employees.

The 2007 NRA regulations provided that, in the case of governmental plans, the regulations would be effective for plan years beginning on or after January 1, 2009. Notices 2008-98, 2008-44 I.R.B 1080, and 2009-86, 2009-6 I.R.B. 629, provided that the Department of the Treasury and the IRS intended to

amend the 2007 NRA regulations to change the effective date of the 2007 NRA regulations for governmental plans to January 1, 2013.

Notice 2012-29, 2012-18 I.R.B. 872, announced that the Department of the Treasury and the IRS intend to modify provisions of the 2007 NRA regulations as applied to governmental plans in two ways. First, Notice 2012-29 announced the intent to modify the regulations to clarify that a governmental plan that is not subject to section 411(a) through (d) and does not provide for the payment of in-service distributions before age 62 will not fail to satisfy the requirement that the plan provide definitely determinable benefits to employees after retirement or attainment of normal retirement age merely because the pension plan does not have a definition of normal retirement age or does not have a definition of normal retirement age that satisfies the requirements of the 2007 NRA regulations.

Second, Notice 2012-29 announced the intent to modify the 2007 NRA regulations to provide that the rule deeming age 50 or later to be a normal retirement age that satisfies the 2007 NRA regulations will apply to a group of employees substantially all of whom are qualified public safety employees, whether or not the group of qualified public safety employees are covered by a separate plan. Thus, under the intended modification, a governmental plan would be permitted to satisfy the reasonably representative requirement using a normal retirement age as low as 50 for a group substantially all of whom are qualified public safety employees and a later normal retirement age that otherwise satisfies the 2007 NRA requirements for all other participants.

Notice 2012-29 requested comments from governmental stakeholders on the guidance under consideration. Specific comments were requested on whether a new rule should be provided under which retirement after 20 to 30 years of service may be a normal retirement age that is reasonably representative of the typical retirement age for the industry in which qualified public safety employees are employed because these employees tend to have career spans that commence at a young age and continue over a limited number of years. Many commenters wrote that such a rule would be helpful and appropriate. Several commenters requested a rule that would permit a governmental plan to use the completion of 20 or more years of service as a normal retirement age for public safety employees.

Comments were also requested on whether there are other categories of governmental employees who have career spans similar to qualified public safety employees for whom a rule should be provided that is similar to the safe harbor for qualified public safety employees. Many commenters recommended a rule that would permit governmental plans to use the completion of a number of years of service as a normal retirement age for all employees, not just qualified public safety employees.

Notice 2012-29 also requested information on the overall retirement patterns of employees in government service to assist the Department of the Treasury and the IRS in determining the earliest age that is reasonably representative of the typical retirement ages for the industry in which these employees are employed. One commenter provided data on the retirement

patterns and median normal retirement ages for participants in a state retirement system.

Notice 2012-29 also provided that the Department of the Treasury and the IRS intend to amend the 2007 NRA regulations to modify the effective date of the 2007 NRA regulations for governmental plans to annuity starting dates that occur in plan years beginning on or after the later of (1) January 1, 2015 or (2) the close of the first regular legislative session of the legislative body with the authority to amend the plan that begins on or after the date that is 3 months after the final regulations are published in the **Federal Register**.

Explanation of Provisions

I. Overview

These proposed regulations would provide guidance with respect to the applicability of the 2007 NRA regulations to governmental plans. These proposed regulations, when finalized, would provide guidance relating to the determination of whether the normal retirement age under a governmental plan satisfies the requirements of section 401(a) by amending the 2007 NRA regulations to provide additional rules for governmental plans. In addition, these proposed regulations would also include a minor change to the 2007 NRA regulations to reflect the addition of section 411(f), which provides a special rule for determining a permissible normal retirement age that applies only to certain defined benefit plans that are not governmental plans.

II. Use of Years of Service as a Component of the Pre-ERISA Vesting Rules

In response to Notice 2012-29, the Department of the Treasury and the IRS received a range of comments regarding the pre-ERISA vesting rules that apply to a governmental plan's normal retirement age. In particular, the Department of the Treasury and the IRS received many comments requesting rules that would permit governmental plans to define normal retirement age by reference to a period of service. Comments also focused on whether a governmental plan is required to include an explicit definition of normal retirement age.

As previously stated, a normal retirement age under a governmental plan must satisfy the pre-ERISA vesting rules. The Department of the Treasury and the IRS generally agree with those commenters who indicated that the pre-ERISA vesting rules applicable to normal retirement age may be read to permit a governmental plan to use a normal retirement age that reflects a period of service. Under pre-ERISA vesting rules, use of a period of service to determine normal retirement age under a governmental plan would be permissible if the period of service used is reasonable and uniformly applicable and the other pre-ERISA rules related to normal retirement age are satisfied. One of the pre-ERISA rules permits a governmental plan to specify a normal retirement age that is lower than age 65 if that age represents the age at which employees customarily retire in the industry.

Under the pre-ERISA rules related to normal retirement age, the terms of a governmental plan are not required to include an explicit definition of the term normal retirement age in order to satisfy section 401(a). However, in the

absence of an explicit definition of normal retirement age, the terms of the plan must specify the earliest age at which a participant has the right to retire without the consent of the employer and to receive retirement benefits based upon the amount of the participant's service on the date of retirement at the full rate set forth in the plan (that is, without actuarial or similar reduction because of retirement before some later specified age). That age (the earliest age described in the preceding sentence) will be considered the plan's normal retirement age for purposes of any statutory or regulatory requirements based on a normal retirement age.

Consistent with Notice 2012-29, the proposed regulations would provide that a governmental plan that does not provide for the payment of in-service distributions before age 62 would not fail to satisfy §1.401(a)-1(b)(1) under these proposed regulations merely because the pension plan has a normal retirement age that is earlier than otherwise permitted under the requirements of §1.401(a)-1(b)(2) of the 2007 NRA regulations (as proposed to be amended by these proposed regulations). Instead, because section 411(a) through (d) does not apply, the earlier normal retirement age under such a plan is treated as the age as of which an unreduced early retirement benefit is payable for purposes of these regulations.

III. Normal Retirement Age Must Satisfy the Reasonably Representative Requirement

A. In general

These proposed regulations would apply the reasonably representative requirement in the 2007 NRA regulations to governmental plans. Thus, the normal retirement age under a governmental plan must be an age that is not earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed.

B. General safe harbor

These proposed regulations would apply to governmental plans the safe harbor in the 2007 NRA regulations that a normal retirement age of at least age 62 is deemed to satisfy the reasonably representative requirement. Thus, a governmental plan satisfies this safe harbor if the normal retirement age under the plan is age 62 or if the normal retirement age is the later of age 62 or another specified date, such as the fifth anniversary of plan participation.

C. Safe harbors for governmental plans

To address comments regarding the need for additional safe harbors for governmental plans, including safe harbors that reflect permissible periods of service, these proposed regulations would provide several additional alternative safe harbors that a governmental plan could satisfy. The safe harbors included in these proposed regulations were developed based upon feedback provided in comments received in response to Notices 2007-69 and 2012-29.

1. Age 60 and 5 years of service

Under these proposed regulations, a normal retirement age under a governmental plan that is the later of age 60 or the age at which the participant

has been credited with at least 5 years of service would be deemed to satisfy the reasonably representative requirement.

2. Age 55 and 10 years of service

Similarly, a normal retirement age under a governmental plan that is the later of 55 or the age at which the participant has been credited with at least 10 years of service would be deemed to satisfy the reasonably representative requirement. Thus, for example, a normal retirement age under a governmental plan that is the later of age 55 or the age at which the participant has been credited with 12 years of service would satisfy this safe harbor.

3. Combined age and years of service of 80 or more

A normal retirement age under a governmental plan that is the participant's age if the sum of the participant's age plus the number of years of service that have been credited to the participant under the plan equals 80 or more would also be deemed to satisfy the reasonably representative requirement. For example, a participant in a governmental plan who is age 55 and who has been credited with 25 years of service under the plan would satisfy this safe harbor.

4. Any age with 25 years of service (in combination with a safe harbor that includes an age)

A governmental plan would also be permitted to combine any of the other safe harbors (except for the qualified public safety employee safe harbors) provided under the proposed regulations with 25 years of service, so that a participant's normal retirement age would be the participant's age when the

number of years of service that have been credited to the participant under the plan equals 25 if that age is earlier than what the participant's normal retirement age would be under the other safe harbor(s). For example, a normal retirement age under a governmental plan would satisfy the reasonably representative requirement if the normal retirement age is the earlier of (1) the participant's age when the participant has been credited with 25 years of service under the plan and (2) the later of age 60 or the age when the participant has been credited with 5 years of service under the plan. Use of 25 years of service by a governmental plan for normal retirement age generally would not satisfy the pre-ERISA vesting requirement relating to normal retirement age, unless it is used in conjunction with an alternative normal retirement age that includes an age component and that otherwise satisfies the pre-ERISA rules. This is because the pre-ERISA vesting requirements allow for a service component only if that component does not unreasonably delay full vesting. For example, applying a 25 years of service requirement (without an alternative normal retirement age) to a newly-hired 63-year-old employee would not be reasonable because it would result in a normal retirement age of 88. See generally, Rev. Rul. 66-11.

D. Qualified public safety employees

The proposed regulations include three safe harbors specifically for qualified public safety employees. The safe harbors were developed based upon feedback provided in comments received in response to Notices 2007-69 and 2012-29. Consistent with Notice 2012-29 and in response to comments, the proposed regulations would make clear that a governmental plan is permitted to

use one or more of the safe harbors for qualified public safety employees to satisfy the reasonably representative requirement for those employees even if a different normal retirement age or ages is used under the plan for one or more other categories of participants who are not qualified public safety employees. The safe harbors for qualified public safety employees are not permitted to be used for these other categories of participants; a different normal retirement age (or ages) must be used for participants in a plan who are not qualified public safety employees.

As under the 2007 NRA regulations, the term qualified public safety employee would be defined by reference to section 72(t)(10)(B), under which a qualified public safety employee means any employee of a State or political subdivision of a State who provides police protection, firefighting services, or emergency medical services for any area within the jurisdiction of such State or political subdivision.⁵ Defining qualified public safety employee by reference to section 72(t)(10)(B) has been retained because it is closely aligned with the categories of employees described in the Age Discrimination in Employment Act

⁵ Section 72(t)(10)(B) was amended by section 2(a) of Defending Public Safety Employees' Retirement Act, Public Law 114-26 (129 Stat. 319) (2015)) and section 308 of Protecting Americans From Tax Hikes Act of 2015 (PATH Act), enacted as part of the Consolidated Appropriations Act, 2016, Public Law 114-113 (129 Stat. 2422), to include federal public safety employees as qualified public safety employees for purposes of the rules under section 72(t)(10). Thus, for distributions made after December 31, 2015, the term qualified public safety employee means any employee of a State or political subdivision of a State who provides police protection, firefighting services, or emergency medical services for any area within the jurisdiction of such State or political subdivision, or any Federal law enforcement officer described in section 8331(20) or 8401(17) of title 5, United States Code, any Federal customs and border protection officer described in section 8331(31) or 8401(36) of such title, any Federal firefighter described in section 8331(21) or 8401(14) of such title, or any air traffic controller described in 8331(30) or 8401(35) of such title, any nuclear materials courier described in section 8331(27) or 8401(33) of such title, any member of the United States Capitol Police, any member of the Supreme Court Police, and any diplomatic security special agent of the Department of State.

that an employer may refrain from hiring after a certain age.⁶ Because qualified public safety employees typically commence plan participation at younger ages, the period of service required for full vesting at normal retirement age under each of the safe harbors for qualified public safety employees should be reasonable.

1. Age 50

The proposed regulations would modify the safe harbor for qualified public safety employees that was provided in the 2007 NRA regulations under which a normal retirement age of age 50 or later is deemed to satisfy the reasonably representative requirement and would expand on the guidance under consideration described in Notice 2012-29. The proposed regulations would make clear that a governmental plan is permitted to use the safe harbor (alone or together with one or both of the other safe harbors for qualified public safety employees described in this preamble) for one or more qualified public safety employees in a governmental plan without regard to any “substantially all” requirement (that is, without regard to whether substantially all of the participants in the plan or substantially all of the participants within a group of participants are qualified public safety employees).

2. Combined age and years of service of 70 or more

The proposed regulations would add a safe harbor under which a normal retirement age for qualified public safety employees under a governmental plan that is the participant’s age when the sum of the participant’s age plus the number of years of service that have been credited to the participant under the

⁶ See section 4(j) of the Age Discrimination in Employment Act, 29 U.S.C. 623(j).

plan equals 70 or more would be deemed to satisfy the reasonably representative requirement.

3. Any age with 20 years of service

The proposed regulations would also add a safe harbor under which a normal retirement age for qualified public safety employees under a governmental plan that is the participant's age when the number of years of service that have been credited to the participant under the plan equals 20 or more would be deemed to satisfy the reasonably representative requirement. For example, a normal retirement age for qualified public safety employees under a plan that is 25 years of service would satisfy this safe harbor. The Department of the Treasury and the IRS agree with the comments received in response to Notice 2012-29 that indicated that a safe harbor based solely on a period of service would be appropriate for qualified public safety employees because these employees typically have career spans that commence at a young age and continue over a limited period of years.

E. Multiple normal retirement ages in a governmental plan

Commenters on Notice 2012-29 stated that it is a common practice for governmental plans to have a normal retirement age that is a combination of age and years of service. In light of these comments, some of the safe harbors proposed in these regulations contemplate a combination of age and years of service, such as, for example, the use of a normal retirement age that is the earlier of (1) the participant's age when the participant has been credited with 30 years of service under the plan or (2) the later of age 60 or the age when the

participant has been credited with 5 years of service under the plan. A normal retirement age under a governmental plan that is consistent with the safe harbors in these proposed regulations would not fail to satisfy the pre-ERISA requirements, including the requirement that any period of service required for vesting at normal retirement age be uniformly applicable to all employees in a plan, merely because the plan uses such a normal retirement age.

Commenters to Notice 2012-29 also stated that governmental plans typically provide multiple normal retirement ages, often based on different benefit structures or classifications of employees in a single plan. These comments expressed concern that certain language in Notice 2012-29⁷ could be read to indicate that a governmental plan could only have two normal retirement ages if one of the normal retirement ages covered qualified public safety employees and the other normal retirement age covered all of the other participants in the plan.

Use of one normal retirement age for one classification of employees (such as qualified public safety employees) and one or more other normal retirement ages for one or more different classifications of employees would not be inconsistent with these proposed regulations and generally would not be inconsistent with the applicable pre-ERISA requirements, including the requirement that any period of service required for full vesting at normal retirement age be uniformly applicable. Similarly, the use of one normal

⁷ Notice 2012-29 provided that, under an anticipated amendment to the 2007 NRA regulations, a governmental plan would be permitted to satisfy the reasonably representative requirement using a normal retirement age as low as 50 for a group substantially all of whom are qualified public safety employees and a later normal retirement age that otherwise satisfies the 2007 NRA requirements for all other participants.

retirement age under a governmental plan for employees hired before a certain date and another normal retirement age under the plan for employees hired on or after that date generally would not fail to satisfy the applicable pre-ERISA requirements.

F. Other normal retirement ages

The proposed regulations would provide that in the case of a normal retirement age under a governmental plan that fails to satisfy any of the governmental plan safe harbors, whether the normal retirement age satisfies the reasonably representative requirement would be based on all of the relevant facts and circumstances. Similar to the treatment of normal retirement ages between ages 55 and 62 under the 2007 NRA regulations, it is generally expected that a good faith determination of the typical retirement age for the industry in which the covered workforce is employed that is made by the employer will be given deference, assuming that the determination is reasonable under the facts and circumstances and that the normal retirement age is otherwise consistent with the pre-ERISA vesting requirements.

Proposed Effective Date

These regulations are proposed to be effective for employees hired during plan years beginning on or after the later of (1) January 1, 2017 or (2) the close of the first regular legislative session of the legislative body with the authority to amend the plan that begins on or after the date that is 3 months after the final regulations are published in the **Federal Register**. Governmental plan sponsors may rely on these proposed regulations for periods preceding the effective date,

pending the issuance of final regulations. If and to the extent the final regulations are more restrictive than the rules in these proposed regulations, those provisions of the final regulations will be applied without retroactive effect.

Statement of Availability for IRS Documents

For copies of recently issued Revenue Procedures, Revenue Rulings, Notices, and other guidance published in the Internal Revenue Bulletin or Cumulative Bulletin, please visit the IRS Web site at <http://www.irs.gov> or the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

Special Analyses

Certain IRS regulations, including this one, are exempt from the requirements of Executive Order 12866, as supplemented and reaffirmed by Executive Order 13563. Therefore, a regulatory assessment is not required. It has also been determined that 5 U.S.C. 533(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. In addition, because no collection of information is imposed on small entities, the provisions of the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply and a Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, these regulations have been submitted to the Office of Chief Counsel for Advocacy of the Small Business Administration for comments on its impact on small business.

Comments and Requests for Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any comments that are submitted timely to the IRS as prescribed in this preamble under the “Addresses” heading. All comments are available at www.regulations.gov or upon request. A public hearing will be scheduled if requested in writing by any person who timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place of the public hearing will be published in the **Federal Register**.

Drafting Information

The principal authors of these regulations are Sarah R. Bolen and Pamela R. Kinard, Office of Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the Department of the Treasury and the IRS 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 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 1.401(a)-1 is amended by:

1. Revising paragraph (b)(2)(v).
2. Adding paragraph (b)(2)(vi).

3. Revising the heading and the second sentence of paragraph (b)(4).

The revisions read as follows:

§1.401(a)-1 Post-ERISA qualified plans and qualified trusts; in general.

* * * * *

(b) * * *

(2) * * *

(v) Rules of application for governmental plans--(A) In general. In the case of a governmental plan (within the meaning of section 414(d)) that provides for distributions before retirement, the general rule described in paragraph (b)(2)(i) of this section may be satisfied in accordance with paragraph (b)(2)(ii) of this section or this paragraph (b)(2)(v). In the case of a governmental plan that does not provide for distributions before retirement, the plan's normal retirement age is not required to comply with the general rule described in paragraph (b)(2)(i) of this section or this paragraph (b)(2)(v).

(B) Age 60 and 5 years of service safe harbor. A normal retirement age under a governmental plan that is the later of age 60 or the age at which the participant has been credited with at least 5 years of service under the plan is deemed to be not earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed.

(C) Age 55 and 10 years of service safe harbor. A normal retirement age under a governmental plan that is the later of age 55 or the age at which the participant has been credited with at least 10 years of service under the plan is

deemed to be not earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed.

(D) Sum of 80 safe harbor. A normal retirement age under a governmental plan that is the participant's age at which the sum of the participant's age plus the number of years of service that have been credited to the participant under the plan equals 80 or more is deemed to be not earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed. For example, a normal retirement age under a governmental plan that is age 55 for a participant who has been credited with 25 years of service would satisfy the rule described in this paragraph.

(E) Service-based combination safe harbor. A normal retirement age under a governmental plan that is the earlier of the participant's age at which the participant has been credited with at least 25 years of service under the plan and an age that satisfies any other safe harbor provided under paragraphs (b)(2)(v)(B) through (D) of this section is deemed to be not earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed. For example, a normal retirement age under a governmental plan that is the earlier of the participant's age at which the participant has been credited with 25 years of service under the plan and the later of age 60 or the age at which the participant has been credited with 5 years of service under the plan would satisfy this safe harbor.

(F) Age 50 safe harbor for qualified public safety employees. A normal retirement age under a governmental plan that is age 50 or later is deemed to be not earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed if the participants to which this normal retirement age applies are qualified public safety employees (within the meaning of section 72(t)(10)(B)).

(G) Sum of 70 safe harbor for qualified public safety employees. A normal retirement age under a governmental plan that is the participant's age at which the sum of the participant's age plus the number of years of service that have been credited to the participant under the plan equals 70 or more, is deemed to be not earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed if the participants to which this normal retirement age applies are qualified public safety employees (within the meaning of section 72(t)(10)(B)).

(H) Service-based safe harbor for qualified public safety employees. A normal retirement age under a governmental plan that is the age at which the participant has been credited with at least 20 years of service under the plan is deemed to be not earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed if the participants to which this normal retirement age applies are qualified public safety employees (within the meaning of section 72(t)(10)(B)). For example, a normal retirement age that covers only qualified public safety employees and that is an employee's age when the employee has been credited

with 25 years of service under a governmental plan would satisfy this safe harbor.

(I) Reserved.

(J) Other normal retirement ages. In the case of a normal retirement age under a governmental plan that fails to satisfy any safe harbor described in paragraph (b)(2)(ii) of this section or this paragraph (b)(2)(v), whether the age is not earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed is based on all of the relevant facts and circumstances.

(vi) Special normal retirement age rule for certain plans. See section 411(f), which provides a special rule for determining a permissible normal retirement age under certain defined benefit plans.

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(4) Effective/applicability date. * * * In the case of a governmental plan (as defined in section 414(d)), the rules in paragraph (b)(2)(v) of this section are effective for employees hired during plan years beginning on or after the later of: January 1, 2017; or the close of the first regular legislative session of the legislative body with the authority to amend the plan that begins on or after the

date that is 3 months after the final regulations are published in the **Federal Register**. However, a governmental plan sponsor may elect to apply the rules of paragraph (b)(2)(v) of this section to earlier periods. * * *

John M Dalrymple

Deputy Commissioner for Services and Enforcement.

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