

2016 ASPPA ANNUAL CONFERENCE



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OCTOBER 23-26, 2016

GAYLORD NATIONAL, NATIONAL HARBOR MD

**The Anti-Cutback Rules of
IRC §411(d)(6)
Protections and Exceptions**

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ASPPA
Making Retirement Plans Work

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- (6) Accrued benefit not to be decreased by amendment.
- (A) In general. A plan shall be treated as not satisfying the requirements of this section if the accrued benefit of a participant is decreased by an amendment of the plan, other than an amendment described in section 412(d)(2), or section 4281 of the Employee Retirement Income Security Act of 1974.
- (B) Treatment of certain plan amendments. For purposes of subparagraph (A), a plan amendment which has the effect of-
- (i) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or
 - (ii) eliminating an optional form of benefit,
- with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy. The Secretary shall by regulations provide that this subparagraph shall not apply to any plan amendment which reduces or eliminates benefits or subsidies which create significant burdens or complexities for the plan and plan participants, unless such amendment adversely affects the rights of any participant in a more than de minimis manner. The Secretary may by regulations provide that this subparagraph shall not apply to a plan amendment described in clause (ii) (other than a plan amendment having an effect described in clause (i)).
- (C) Special rule for ESOPs. For purposes of this paragraph, any-
- (i) tax credit employee stock ownership plan (as defined in section 409(a)), or
 - (ii) employee stock ownership plan (as defined in section 4975(e)(7)),
- shall not be treated as failing to meet the requirements of this paragraph merely because it modifies distribution options in a nondiscriminatory manner.
- (D) Plan transfers.
- (i) In general. A defined contribution plan (in this subparagraph referred to as the "transferee plan") shall not be treated as failing to meet the requirements of this subsection merely because the transferee plan does not provide some or all of the forms of distribution previously available under another defined contribution plan (in this subparagraph referred to as the "transferor plan") to the extent that-
- (I) the forms of distribution previously available under the transferor plan applied to the account of a participant or beneficiary under the transferor plan that was transferred from the transferor plan to the transferee plan pursuant to a direct transfer rather than pursuant to a distribution from the transferor plan,
 - (II) the terms of both the transferor plan and the transferee plan authorize the transfer described in subclause (I),
 - (III) the transfer described in subclause (I) was made pursuant to a voluntary election by the participant or beneficiary whose account was transferred to the transferee plan,
 - (IV) the election described in subclause (III) was made after the participant or beneficiary received a notice describing the consequences of making the election, and
 - (V) the transferee plan allows the participant or beneficiary described in subclause (III) to receive any distribution to which the participant or beneficiary is entitled under the transferee plan in the form of a single sum distribution.
- (ii) Special rule for mergers, etc. Clause (i) shall apply to plan mergers and other transactions having the effect of a direct transfer, including consolidations of benefits attributable to different employers within a multiple employer plan.
- (E) Elimination of form of distribution. Except to the extent provided in regulations, a defined contribution plan shall not be treated as failing to meet requirements of this section merely because of the elimination of a form of distribution previously available thereunder. This subparagraph shall not apply to the elimination of a form of distribution with respect to any participant unless-
- (i) a single sum payment is available to such participant at the same time or times as the form of distribution being eliminated, and
 - (ii) such single sum payment is based on the same or greater portion of the participant's account as the form of distribution being eliminated.



Anti-Cutback Rules Prohibit:

1. Decreasing an accrued benefit; or

2. Eliminating an optional form of benefit

- **Typically find anti-cutback issues during amendments and mergers or acquisitions**



Reducing Benefits

- **401(k) safe harbor plan**
- **Company having a tough time**
- **Get rid of safe harbor status for upcoming plan year?**



Reducing Benefits

- **Anti-cutback rules only protect benefits accrued as of amendment date**
- **Allowed to change future accruals or even terminate the plan**

Treas. Reg. § 1.411(d)-3(b)(3)



Allocation Formula

- **Profit sharing contributions**
 - **Pro rata**
 - **Permitted Disparity**
 - **Cross tested**
- **Matching contributions**
 - **Fixed**
 - **Discretionary**



Allocation Formula

- **IRS position: right to allocation formula protected once allocation conditions are satisfied**
- **Considered “protected allocable share”**
- **Need to review allocation conditions**

TAM 9735001



Allocation Formula

- **Last day requirement?**
- **No protected allocable share until last day of plan year**
- **Allocation formula can be amended any time before last day**



Allocation Formula

- **1,000 hour requirement?**
- **No protected allocable share until hour requirement satisfied**
- **Full time employee will work 1,040 in six months**
- **If both last day & 1,000 hour?**
- **No protected allocable share until last day of plan year**



Allocation Formula

- **No allocation conditions?**
- **Protected allocable share as soon as participant works one hour**
- **For discretionary contributions, sponsor has ability to not contribute at all – so isn't protected allocable share really nothing?**



Allocation Conditions

- **Executive leaves mid-year**
- **Front loaded her salary deferrals**
- **Discretionary matching contribution**
- **Add a last day allocation condition?**



Allocation Conditions

- **Existing conditions – last day or 1,000 hour?**
- **Conditions for receiving allocation protected once satisfied**
- **If no existing allocation conditions, back to protected allocable share resulting in anti-cutback protection**

Treas. Reg. § 1.411(d)-4, Q&A 1(d)(8)



Distribution Timing

- **Employee leaves & may be starting a competing business**
- **Completed distribution form & plan doc states paid as soon as possible**
- **Can you change to paid after the last day of the plan year in which termination occurs?**



Distribution Timing

- **Optional form of benefit = distribution alternative available with respect to accrued benefits**
- **Includes timing of distribution**
- **Only delay distribution timing for future accruals**
- **Too late for terminated employee**

Treas. Reg. § 1.411(d)-3(g)(6)(ii)(A)



DC Distribution Options

- **Picking up an existing 401(k) plan**
- **Provides QJSA and other annuity options**
- **No MPPP or DB assets**
- **Do you have to deal with notice & consent requirements?**



DC Distribution Options

- **Exception to anti-cutback rules!**
- **DC may eliminate annuity options for accrued benefits**
 IRC § 411(d)(6)(E);
 Treas. Reg. § 1.411(d)-4, Q&A 2(e)
- **No need to provide notice to participants before effective date**
 ERISA § 204(h)(1);
 Treas. Reg. § 54.4980F-1, Q&A 3(a)



ESOP Distribution Options

- **Enrollment meeting**
- **Employee wants to roll money into plan from ESOP**
- **She received a notice from ESOP sponsor that lump sum distributions no longer permitted**
- **She is upset and wants to know if this is allowed?**



ESOP Distribution Options

- **Exception to anti-cutback rules!**
- **Applies when ESOP subject to put option requirement**
- **ESOP may modify distribution options for accrued benefits**
- **Also may modify distribution timing**

**IRC § 411(d)(6)(C);
Treas. Reg. § 1.411(d)-4, Q&A 2(d)**



In-Service Distributions

- **Client buys another company & wants to combine plans**
- **Acquired allows PS account to be distributed after 5 yrs participation or contribution in plan at least 2 yrs**
- **Client only allows in-service upon normal retirement age (65)**



In-Service Distributions

- **Protected under anti-cutback rules**
- **Optional form of benefit includes distribution alternatives for accrued benefits**
- **PS assets acquired must still be permitted in-service after 5 yrs part or 2 yrs after contrib**
- **Future PS contributions to client plan for acquired employees may only permit in-service upon NRA**
Treas. Reg. § 1.411(d)-3(g)(6)(ii)



Protected Earnings?

- **Are earnings also entitled to protection under anti-cutback rules?**
- **Protection of eliminated in-service dist option may be limited to actual account balance as of merger**
- **Depends on R/K system**



Hardship Withdrawals

- **Client buys another company & wants to combine plans**
- **Acquired plan permits hardship distributions**
- **Client plan does not and does not want to start**



Hardship Withdrawals

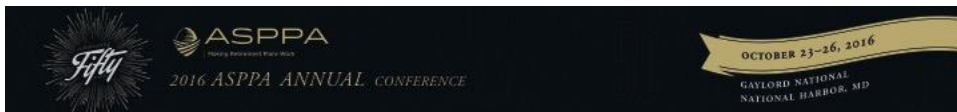
- **Exception to anti-cutback rules!**
- **May eliminate hardship distribution option**
- **Different than inability to eliminate other in-service distributions**
- **Sponsor can also limit hardship availability**

Treas. Reg. § 1.411(d)-4, Q&A 2(b)(2)(x)



Mandatory Cash-Outs

- **Plan doc requires cash-outs if less than \$1,000**
- **To reduce plan costs, sponsor wants to raise to \$5,000 with rollover to IRA**



Mandatory Cash-Outs

- **Exception to anti-cutback rules!**
- **Cash-out threshold permissible under statutory law**
- **Sponsor may increase cash-out from \$1,000 to \$5,000 without violating anti-cutback rules**

Treas. Reg. § 1.411(d)-4, Q&A 2(b)(2)(v)



Normal Retirement Age

- **DC plan wants to change NRA from 62 to 65**
- **Full vesting upon NRA**
- **In-service withdrawal permitted at NRA**
- **No one has attained age 62 yet**



Normal Retirement Age

- **Conditions on right to protected benefits need not be satisfied at time of potential amendment**
- **Vesting and in-service allowed for accrued benefits**
- **May change NRA for future benefits**

Treas. Reg. § 1.411(d)-3(b)(1)(ii)



Ancillary Benefits

- **ancillary life insurance protection**
- **accident or health insurance benefits**
- **most social security supplements**
- **availability of loans**
- **right to make after-tax employee contributions or elective deferrals**

Treas. Reg. § 1.411(d)-4, Q&A 1(d)



Ancillary Benefits

- **right to direct investments**
- **right to a particular form of investment**
- **allocation dates or time for contributions and valuation dates for account balances**
- **admin procedures for distributions**
- **rights that derive from administrative and operational provisions (allocating earnings in DC account)**

Treas. Reg. § 1.411(d)-4, Q&A 1(d)



Ancillary Benefits

- **Not protected by anti-cutback rules**
Treas. Reg. § 1.411(d)-3(b)(3)(i)
- **May be eliminated from the plan**
 - **Participant loan features**
 - **Self-directed brokerage accounts**
 - **Ability to purchase life insurance**
 - **Force liquidation of existing insurance contracts unless participants agree to purchase outside of plan** **DOL PTE 92-6**



Summary

- 1. Decreasing an accrued benefit**
 - **Allocation formula**
 - **Allocation conditions**
 - **Normal Retirement Age**
- **May reduce future benefits**
- **Ancillary benefits not protected**



Summary

2. Eliminating an optional form of benefit

- **Distribution timing**
- **Distribution options**
 - **Except DC annuity options**
 - **Except ESOP distribution options**
 - **Except hardships**
 - **Except mandatory cash-outs**



Questions?

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