COMMENTS CONCERNING PROPOSED REGULATIONS UNDER SECTION 4980F OF THE CODE

The following comments (the “Comments”) are the individual views of the members of the Section of Taxation who prepared them and do not represent the position of the American Bar Association or the Section of Taxation.

These Comments were prepared by individual members of the Committee on Employee Benefits of the Section of Taxation of the American Bar Association (the “Section”). Principal responsibility was exercised by Pam Scott, and W. Andrew Douglass, Robert Miller, Marc Sandberg, Richard Sanderson, and Robert B. Stevenson made substantial drafting contributions. Other substantive contributions were made by Ellen A. Hennessy, Thomas Jorgensen, James Raborn, and John Wendeln. The Comments were reviewed by Diane Fuchs and Thomas Hoecker, Kyle N. Brown of the Section’s Committee on Government Submissions and Stuart Lewis, Council Director.

Although members of the Section who participated in preparing these Comments have clients who would be affected by the federal tax principles addressed by these comments or have advised clients on the application of such principles, no such member (or the firm or organization to which such member belongs) has been engaged by a client to make a government submission with respect to, or otherwise influence the development or outcome of, the specific subject matter of these Comments.

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I. Executive Summary

Section 659 of the Economic Growth and Tax Reform Reconciliation Act of 2001 ("EGTRRA") amended section 204(h) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA") and added new section 4980F of the Internal Revenue Code of 1986, as amended (the "Code"). Subject to some specific transition rules, these statutory provisions have a general effective date of June 7, 2001. In anticipation of proposed regulations interpreting these statutes, on February 4, 2002 individual members of the American Bar Association submitted comments on the applicable statutes. The proposed regulations were issued under section 4980F of the Code on April 23, 2002, in question and answer format, and the references below to “Q&As” refer to the Q&As in Prop. Treas. Reg. § 54.4980F-1. Set forth below are our comments on those proposed regulations.

In general, we believe that the proposed regulations are consistent with the statutory requirements and, in that context, reasonably balance participants’ interest in receiving detailed information and burdens on employers who are to provide such information. In other words, in our view, the proposed regulations require the provision of neither too much nor too little information.

Our recommendations regarding the proposed regulations are as follows:

1. Final regulations should define the scope of the terms “early retirement benefits” and “retirement-type subsidies,” both for purposes of section 204(h) of ERISA and section 411(d)(6) of the Code. A separate regulations project may be necessary to achieve this.

2. Given the administrative burdens and potential penalties associated with noncompliance with section 204(h), a safe harbor for non-significant reductions in future benefits should be provided. For this purpose, a reduction of less than a specified percentage should be considered non-significant.

3. Final regulations should affirmatively state that section 204(h) notice requirements do not apply to plan amendments adding minimum benefits, even if such amendments may result in “wear-aways” for some participants who benefit from the new minimum benefit.

4. The relationship between amendments that permissibly eliminate benefits under section 411(d)(6) and amendments that trigger the section 204(h) notice requirement should be clarified.

5. Final regulations should not require any advance notice period in excess of 30 days.

6. Additional guidance regarding the relationship between an explanation of the “effect of the amendment” and one of “the magnitude of the reduction” would be
helpful; it is not clear if the use of the word “magnitude” implies a special type of
disclosure.

7. Where a plan provides for a primary benefit formula that is changing and other
formulas for limited groups of participants, the notice should be required to
describe only the plan’s primary benefit formula prior to a change. A reference to
the plan’s summary plan description for alternate formulas or special provisions
applicable to limited groups of participants might be required.

8. Proposed regulations should expressly provide that plan sponsors may show
examples illustrating the reduction in a participant’s total benefit (not just the
benefits accruing after the change).

9. The final regulations should make it clear that the current interest rates do not
have to be used in the preparation of examples, especially where current interest
rates are unusually low or high.

10. Treasury should reconsider the statutory basis for the portion of the proposed
regulations requiring additional information when choice is offered, as the statute
appears to authorize only those regulations that permit the provision of less
information.

11. Final regulations should retain the provisions of the proposed regulations
authorizing the issuance of section 204(h) notices through new technologies.

12. The proposed regulations should be clarified to indicate that in the case of
nongregious violations, the plan amendment shall become effective as to all
affected individuals.

II. Background

Under section 204(h) of ERISA and section 4980F of the Code, if a pension plan sponsor
adopts a plan amendment that has the effect of significantly reducing the rate of future
benefit accrual for one or more participants, the sponsor must distribute a written notice
to each affected individual and any employee organization representing such affected
individuals. In addition, a plan amendment which eliminates or significantly reduces an
early retirement benefit or retirement-type subsidy (as described section 411(d)(6) of the
Code) is treated as having the effect of significantly reducing the rate of future benefit
accrual.

The notice must provide “sufficient information” to allow affected individuals to
understand the effect of the amendment, and must be written in a manner calculated to be
understood by the average plan participant. The statute allows regulations to provide that
any such notice may be delivered by new technologies, and the proposed regulations
provide standards for the use of new technologies.
In general, the notice must be provided within a reasonable time before the effective date of the amendment. The proposed regulations establish a general rule of 45 days advance notice of the effective date. The notice may be distributed to participants before the adoption of the amendment if no material modification of the amendment as described in the section occurs once the amendment is adopted.

Affected individuals who must receive the notice are participants in the plan and alternate payees under a QDRO whose rate of future benefit accrual or whose early retirement subsidy or retirement-type subsidy may reasonably be expected to be significantly reduced by the plan amendment.

The notice requirements apply to defined benefit plans and money purchase pension plans, except for governmental plans not covered by ERISA, and church plans that have not elected to be covered by ERISA. In a technical correction, the Job Creation and Worker Assistance Act of 2002, enacted on March 9, 2002, clarified that the provisions of section 4980F applied only to qualified plans (so that section 204(h) of ERISA and section 4980F of the Code apply in the same manner).

Complex penalties may be imposed for noncompliance. Under ERISA, in addition to possible liability to participants under section 502 of ERISA, in the case of any egregious failure to meet any of the requirements of section 204(h), all individuals who are entitled to a notice are entitled to receive the greater of the benefits under the plan prior to the amendment, or after the amendment. An egregious failure is one where such failure is within the control of the plan sponsor and is (a) intentional or (b) a failure to provide most of the individuals with most of the information that they are entitled to under section 204(h). An intentional failure includes any failure to promptly provide the required notice or information after the plan sponsor discovers an unintentional failure.

Penalties for noncompliance differ under the Code. Section 4980F of the Code imposes an excise tax of $100 per day per participant for each day that an affected individual fails to receive the section 204(h) notice, unless an exception applies. For plan sponsors who exercise reasonable diligence in attempting to comply, the maximum tax penalty in any taxable year is $500,000.

III. Comments

A. Need for regulations defining early retirement benefits and retirement-type subsidies

1. Issue

Section 4980F(f)(3) of the Code and section 204(h)(9) of ERISA provide that a plan amendment which eliminates or significantly reduces any early retirement benefit or retirement-type subsidy shall be treated as having the effect of significantly reducing the rate of future benefit accrual. In such an event, a section 204(h) notice is required. Q&A-5(b) defines “early retirement benefit” and “retirement-type subsidy” by reference to section
411(d)(6)(B)(i) of the Code. No regulations have been issued under section 411(d)(6) defining these terms.

2. Comment

Section 411(d)(6)(B)(i) of the Code was added to the Code as part of the Retirement Equity Act of 1984. Since the statute was enacted, there has been some litigation over the meaning of those terms, especially the definition of “retirement-type subsidy.” See, e.g., Bellas v. CBS, Inc., 221 F.3d 517 (3d Cir. 2000), cert. denied 531 U.S. 1107 (2001). Although some of the case law has been instructive, uncertainty remains. In the context of section 204(h) notices, this uncertainty is problematic. Because the penalties for non-compliance with these new rules may be severe, additional guidance is needed.

3. Recommendation

A notice inviting public comment on the definition of “early retirement benefit” and “retirement-type subsidy” should be issued, and regulations should be developed in connection with that project. It is possible that the current regulations project addressing de minimis changes in optional forms of benefit, described in Notice 2002-46, could address this concern.

In the interim, a good faith determination by a plan sponsor that a notice is not required should insulate against any penalty imposition, but will not offer protection from section 502 of ERISA.

B. Need for a safe harbor with respect to “significant reductions”

1. Issue

A section 204(h) notice is required only if the reduction in the rate of future benefit accrual or an early retirement benefit or retirement-type subsidy is “significant.” Q&A-5 and Q&A-8 do not provide a definitive standard for determining whether a reduction in the rate of future benefit accrual or an early retirement benefit or retirement-type subsidy is “significant” for purposes of section 204(h) of ERISA. Instead, under the proposed regulations, the determination is to be made on the basis of all the facts and circumstances.

2. Comment

The use of the term “significant” in the statute evinces Congressional intent that a section 204(h) notice is not always required when a plan sponsor adopts an amendment that reduces the rate of future benefit accrual (or an early retirement benefit or retirement-type subsidy). However, the proposed regulations do not provide much guidance for determining which reductions are “significant.” In this regard, Q&A-8(a)
of the proposed regulations indicates that whether a reduction is significant will be “determined based on reasonable expectations taking into account the relevant facts and circumstances at the time the amendment is adopted.”

In light of the potential penalties for noncompliance, which were dramatically increased by the adoption of Code section 4980F, it is crucial for there to be more certainty regarding which situations require notice and which do not. However, we recognize that attempting to define a single, bright-line, “one-size-fits-all” standard to cover all cases would be difficult and could be counter-productive. Consequently, a reasonable approach would be to establish a safe harbor level for reductions, so that smaller reductions would not be subject to the requirements and penalties of sections 204(h) and 4980F.

In this regard, we recommend that the Treasury consider adopting a safe harbor approach such that any reductions of less than a specified percentage in the projected benefit of a participant would be deemed to be not significant, and other reductions would then remain covered by the general facts and circumstances test. This safe-harbor standard is consistent with Congressional intent and would provide much-needed clarity to plan sponsors in this area. We understand that some relief was provided for good-faith judgments of nonsignificance (see Q&A-14), but it is not clear that plan sponsors would be willing to use even that limited relief without further guidance from Treasury. If Treasury is willing to consider the adoption of a safe harbor, we may provide further comments on alternative approaches.

3. Recommendation

Final regulations should provide for a safe harbor for reductions in the rate of future benefit accrual or early retirement benefits such that a “significant” reduction is deemed to not occur for a participant if there is a reduction of less than a specified percentage in the projected normal, early or subsidized benefit of the participant versus the amount such projected benefit would be without the change. The general facts-and-circumstances standard in the proposed regulations would continue to apply to cases which fell outside the safe harbor.

C. Clarification of need for notice with plan amendments that provide minimum benefits

1. Issue

Q&A-6(b) provides that an amendment to a defined benefit plan reduces the rate of future benefit accrual only if it is reasonably expected to reduce the amount of future benefit accrual commencing at normal retirement age
for benefits accruing “for a year.” It is not clear what the phrase “for a year,” means in this context, but some have raised the possibility that plan amendments adding minimum benefits could be subject to the notice requirements, because there may be years in which participants will accrue no benefits other than the minimum benefit.

2. Comment

The EGTRRA amendments to section 204(h) were in large part inspired by the controversy over cash balance plans. An element of the debate in Congress centered on conversions that created wear-aways, and the failure of participants in some cases to understand that they would not accrue benefits for a period of time after the conversion. The amendments to section 204(h) require, for the first time, that participants be given sufficient information to understand the effect of an amendment with wear-away benefits.

Wear-away can occur in settings that have nothing to do with potential “take-aways” from employees. For example, plan sponsors may amend a qualified defined benefit plan to add a minimum benefit. For any employee affected by the plan amendment, such an improvement might mean that he or she accrues no additional minimum benefit during the years that the minimum applies, but, in all cases, that employee’s accrued benefit is at least as large as it would have been under the prior plan provisions.

Applying the section 204(h) notice rules in this context would indeed be counterintuitive, as all participants in these plans will be better off (or no worse off) in every year under the new plan design. In this regard, the proposed regulations seem contradictory. Q&A-6(b)(1) indicates that notice is required when the amendment “is reasonably expected to reduce the amount of future annual benefit commencing at normal retirement age for benefits accruing for a year.” (Emphasis added.) On the other hand, Q&A-8(b) indicates that such determination is made by “comparing the amount of the annual benefit commencing at normal retirement age as determined under Q&A-6(b)(1) of this section under the terms of the plan as amended with the amount of annual benefit commencing at normal retirement age as determined under Q&A-6(b)(1) of this section, under the terms of the plan prior to the amendment.” It is not clear how these two sections of the proposed regulations can be reconciled, as Q&A-8(b) would suggest that no year-by-year comparison is required or allowed.

3. Recommendation
Final regulations should clearly state that the section 204(h) notice requirements do not apply to plan amendments adding minimum benefits.

D. Clarification of relationship between section 411(d)(6) and section 204(h)

1. Issue

Under Q&A-7(b), plan amendments that permissibly reduce a 411(d)(6)-protected benefit apparently do not create a requirement to issue a section 204(h) notice, but this result is not completely clear from the proposed regulations.

2. Comment

Q&A-7(b) describes plan provisions that are not taken into account in determining whether there has been a reduction in the rate of future benefit accrual. That Q&A provides in part,

“Further, any benefit that is not a section 411(d)(6) protected benefit as described in §1.411(d)-4, Q&A-1(d) of this chapter, or that is a section 411(d)(6) protected benefit that may be eliminated or reduced as permitted under §1.411(d)-4, Q&A-2(a) or (b) of this chapter, is not taken into account in determining whether an amendment is a section 204(h) amendment. Thus, for example, provisions relating to vesting schedules or the right to make after-tax contributions or elective deferrals are not taken into account.”

These sentences appear to mean that if a plan amendment reduces an ancillary benefit that is not protected by section 411(d)(6) (for either past or future accruals or both), there is no need to issue a section 204(h) notice, and examples to that effect are provided. The sentences also appear to mean that if a plan amendment reduces a benefit that may be eliminated or reduced in accordance with Treas. Reg. § 1.411(d)-4, Q&A-2(a) or (b), then there is no need to issue a section 204(h) notice, but no examples to that effect are provided.

3. Recommendation

Final regulations should make it clear that if an amendment permissibly eliminates a benefit in accordance with the regulations under section 411(d)(6) or IRS pronouncements issued thereunder, there is a section 204(h) notice requirement.

E. Timing of the issuance of the notice

1. Issue
Section 204(h)(3) of ERISA and section 4980F(e)(3) of the Code require that sponsors of applicable plans provide a notice to affected individuals within a “reasonable time” prior to the effective date of a plan amendment regulated by those provisions. Q&A-9 sets forth the timing requirements for the issuance of the notice. The general standard, set forth in the proposed regulations, of 45 days advance notice is somewhat longer than the 30-day standard proposed in our previous set of comments.

2. Analysis

Section 204(h) requires “reasonable notice” of a significant reduction in the rate of benefit accruals. Prior to EGTRRA, section 204(h) had specified a notice period of at least 15 days. Under the proposed regulations, the section 204(h) notice must generally be provided 45 days in advance of the date the plan amendment is effective. The proposed regulations also provide for several exceptions to this general rule in situations where compliance with the 45-day rule might not be practical. First, for small plans with less than 100 participants, the prior 15-day rule will apply. In addition, the 15-day rule will also apply with respect to amendments that relate to mergers and acquisitions. Finally, if a reduction in the rate of benefit accruals relates only to early retirement or retirement-type subsidies, and is in connection with a merger or acquisition, then notice may be provided as late as 30 days after the effective date of the amendment.

Treasury is commended for recognizing that compliance by smaller employers is likely to be more difficult than for larger employers and also for providing relief in merger and acquisition situations. The special timing rules contained in Q&A-9 are appropriate for those situations.

However, there are concerns about the use of a 45-day general rule for the advance notice period. Under EGTRRA, the notice appears to be intended to give the participant sufficient time to understand the effect of the amendment and discuss the notice with another person (perhaps a financial advisor). Discussions of the amendment with others are clearly contemplated by EGTRRA; section 204(h)(4) of ERISA allows a sponsor to send the notice to a person designated in writing by the affected individual. Moreover, depending on the nature of the amendment and the participant’s circumstances, a participant may want to take action on the basis of the information contained in the notice. He or she may decide to accept another offer of employment, ask additional questions of the employer, discuss the effects of the amendment with other employees, or ask management for a change in the amendment.

Implicit in the requirements of this provision of EGTRRA is the notion that the notice period must take into account the plan sponsor’s obligations to deliver sufficient information to the participant, and to use language that is clear. The more time a sponsor has to work on the details of the amendment and the details
of the communication, the more likely the sponsor is to deliver the best possible notice. Accordingly, the notice period should balance the needs of the sponsor to draft compliant notices with the possible need of the participants to take actions before the effective date of the amendment.

In light of the foregoing, a 30-day advance notice period should be a sufficient period of time for participants to review the notice and consult with advisors in all cases. It may be that responses of participants to information in the notice will not be complete within the 30-day period. However, sponsors are typically able to adjust amendments in response to participant concerns – if they view such adjustments as appropriate – well after the effective date of an amendment.

Moreover, 30 days is viewed as a sufficient period for other important notice provisions of the Code. For example, plan sponsors must give participants at least 30 days notice of a 401(k) plan’s safe harbor status. See section 401(k)(12)(D) of the Code; IRS Notice 98-52, 1998-46 I.R.B. 16; IRS Notice 2000-3, 2000-4 I.R.B. 1. Also, under section 402(f) of the Code, a 30-day notice of the tax consequences of rollover-eligible distributions is considered to be a “reasonable” notice period. See Treas. Reg. § 1.402(f)-1, Q&A-2(a). Finally, the minimum period for spousal consent to distributions and providing the related written explanation is 30 days. See section 417(a)(7) of the Code.

The 45-day standard appeared in certain earlier versions of Section 659 of EGTRRA, but did not appear in the final version. This failure may well be indicative of Congressional intent to not have a notice period of this length. Although there might be circumstances in which a 45-day period would be appropriate, a notice period of such duration would be unnecessarily long in many circumstances. Moreover, no other pension provision of the Code or ERISA uses 45 days as the standard for measuring time, so using this period would not serve the goal of streamlining compliance rules. Thus, that time period should not be adopted as a standard.

3. Recommendation

Thirty days should be considered a reasonable general notice period for amendments covered by section 204(h)(3) of ERISA and section 4980F(e)(3) of the Code.

F. Content of the section 204(h) notice

1. Issue

The section 204(h) notice content is the key to meeting the requirements that participants receive “sufficient information to understand the effect of the amendment.” Q&A-11(a) requires that participants receive sufficient information so that they will understand the “magnitude” of the reduction. It is not clear whether this language imposes additional requirements, or is
synonymous with the statutory requirement that participants receive sufficient information to understand the effect of the amendment.

2. Comment

The proposed regulations already require the use of examples where the consequences of an amendment vary, and, in some circumstances, suggest using examples that “book end” the range of change for participants. There seems to be no need for additional requirements for showing the magnitude of the changes made by an amendment, as the “effect” of the amendment is illustrated by the examples. In addition, Q&A-11(a)(3)(i) and (ii) require that changes in future benefits be further explained and illustrated where it is not “reasonable” to expect that the “magnitude” of the reduction will be “reasonably apparent” (presumably to the average plan participant) from the stated written description. What is “reasonable” for a plan administrator to think is “reasonably apparent” to an average participant in a particular plan does not provide much assistance to a plan administrator in determining whether examples must be provided.

3. Recommendation

Wherever applicable in Q&A-11, reference should be to the “effect of amendment” rather than the “magnitude of the reduction” to avoid redundancy and provide clarity. If additional information other than those required by the statute should be delivered to illustrate the “magnitude,” the proposed regulations should provide more detail on the meaning of that concept.

G. Content of the section 204(h) notice

1. Issue

Q&A-11(a)(2)(i) requires that the old plan provision be described in the notice (in an SPD like fashion) as well as the new provision. Although this requirement appears to be simple, it may be an obstacle to effective communications with participants.

2. Comment

This requirement could result in a notice that becomes unwieldy, especially for plans with existing alternate formulas or special provisions affecting limited groups of employees such as those pertaining to participants from another plan that was merged into the current plan.

3. Recommendation

To address this concern, the notice should be required to describe the plan’s primary benefit formula prior to a change and refer to the plan’s
summary plan description for alternate formulas or special provisions applicable to limited groups of participants.

H. Content of the section 204(h) notice

1. Issue

Q&A-11(a)(3)(iii) requires that changes that vary in their effect be described with illustrative examples that approximately cover the range of reductions. The illustrative examples in the proposed regulations appear to suggest that only the change in the benefit taking place immediately after the amendment be disclosed, when disclosure of the change in the aggregate benefit might be more helpful to participants.

2. Comment

The use of an example showing the effect of the amendment on the entire accrued benefit is much easier for a participant to understand, and shows the effect of the expected reduction. The experience of plan sponsors suggests both that participants are interested in understanding the change in their total projected benefit expressed in dollars, and that providing the total benefit provides a more complete picture for the participant. For example, a sponsor might want to provide an example showing that the lump sum value of the final average pay benefit at normal retirement for a participant age 45 with 20 years of service would be $600,000 had the plan not converted to cash balance, but would be only $350,000 after the conversion. The percentage of that benefit accrued to date is not likely to be important to a participant in this context – he or she justifiably will focus on the significant reduction. Moreover, the information – the reduction is expected to be $250,000 – will be the same regardless of whether post-amendment benefits only or total benefits are shown.

3. Recommendation

The final regulation should make it clear that a sponsor may elect to show the participant’s estimated whole benefit under the changed plan (including benefits earned prior to the change) in comparison to the benefits that are estimated had the change not been made, as an alternative to showing the change in the benefit immediately before and after the plan amendment.

I. Assumptions used in the examples in the section 204(h) notice

1. Issue

Q&A-11(a)(3)(iii)(C) describes actuarial assumptions to be used in the examples. While the proposed regulation says that reasonable assumptions should be used to construct the examples in the section
204(h) notice, the examples in the proposed regulations suggest that, in the case of a discussion of a cash balance plan, the interest rates used should be based on the current interest rates under section 417(e) or other applicable current interest rate.

2. Comment

In the situation where examples are specifically required (cash balance conversions, for example), the regulation should not specifically require that the current interest rate be used in all future years. While the current rate is appropriate for showing a conversion of benefits from a traditional final pay formula to an opening cash balance “account”, ongoing interest credits will be made at various rates, so using the point-in-time rate has the potential for seriously under-estimating or over-estimating future benefits. An average of historical rates, or a reasonable projection of future rates, should also be permitted. (Using a range of future rates in this situation also mirrors the regulation’s requirement that a salary scale be used illustrating the benefit change.)

3. Recommendation

The final regulations should make it clear that the current interest rate does not have to be used in the preparation of examples, especially where the current interest rate is unusually low or high.

J. Choice in benefit formulas

1. Issue

Section 4980F(e)(2) of the Code and section 204(h)(2)(B) of ERISA authorize the Secretary of the Treasury to provide for a simplified form of notice for, or exempt from any notice requirement, a plan that offers the participants the option to choose between the new benefit formula and the old benefit formula. Q&A-12 requires additional information, rather than simplification or exemptions.

2. Comment

The last sentence of Q&A-12 indicates that the “information sufficient to enable the individual to make an informed choice” must be provided within a period that is “reasonably contemporaneous with the date by which the individual is required to make his or her choice and that allows sufficient advance notice to enable the individual to understand and consider the additional information before making that choice.”

The proposed regulations recognize that information relating to a choice between an old and new benefit formula are not required to be provided in the same timeframe as the basic information required by section 204(h).
The additional obligations for situations involving choice articulate fairly vague standards. Reasonable persons could surely differ on how long “sufficient advance notice” should be. Since failure to meet the standard will trigger the section 4980F excise tax, it is important for the regulations to set forth more guidance regarding the period for furnishing the additional information. This might best be done via a safe harbor. To this end, the minimum time for giving any additional required information should be no greater than 30 days, since that is the timeframe already used for other important participant benefit election choices.

Another concern with Q&A-12 is more fundamental. Section 4980F of the Code and section 204(h) of ERISA grant authority to the Department of the Treasury to reduce or eliminate any notice which section 204(h) would otherwise require in situations in which a plan offers participants the option to choose between old and new benefit formulas. Any additional notice requirements over and above those generally required under section 204(h) should be governed by the general disclosure and fiduciary duty requirements imposed by ERISA, and not come within the purview either of the Department of Treasury or the section 4980F and section 204(h) regulations. ERISA’s fiduciary rules are well articulated, are amplified by decades of judicial interpretation, and are time-tested. They should admirably direct and constrain a plan administrator in describing the choice of benefit formulas offered to a participant. As stated in the Department of Labor’s September 14, 2000 Request For Information regarding this issue:

“Recent court decisions have found that plan fiduciaries have a duty to disclose information not expressly required to be disclosed under Part 1 of Title I [of ERISA]. These cases have involved the fiduciary duty to act solely in the interest of plan participants and beneficiaries and the issue of the extent to which this fiduciary duty encompasses a collateral duty to provide participants and beneficiaries with information they need to exercise their rights under the plan, to protect their right under ERISA, or otherwise make informed decisions about their future.”

There should be no need to reinvent this wheel in the context of section 204(h) of ERISA.

Plan sponsors that offer all or a group of participants the right to choose between the new benefit formula and the old benefit formula are subject to fiduciary standards in communicating with participants regarding that choice. In fact, the Joint Committee Explanation to EGTRRA provides:

“The House bill also authorizes the Secretary to provide a simplified notice requirement or an exemption from the
notice requirement if participants are given the option to choose between benefits under the new plan formula and the old plan formula. In such cases, the House bill will have no effect on the fiduciary rules applicable to pension plans that may require appropriate disclosure to participants, even if no disclosure is required under the House bill.”

See Joint Committee Explanation to EGTRRA, p. 170.

3. Recommendation

The final regulations should not require additional information for choice situations. Thus, the section 204(h) and section 4980F requirements should be eliminated in all cases in which participants are given a choice between old and new benefit formulas. Providing such a choice indicates that the plan is not actually being amended to reduce the rate of benefit accruals, so that the section 204(h) requirements and section 4980F excise taxes would not apply.

Alternatively, Q&A-12 should be replaced with a provision excluding the additional information from the purview of section 204(h) or section 4980F.

If the requirement of providing additional information in the choice section remains in the final regulations, Q&A-12 should be clarified to indicate that the minimum period for giving choice-related materials will never exceed the time which would otherwise apply under Q&A-9.

K. Electronic notices

1. Issue

Q&A-13 authorizes the issuance of section 204(h) notices through new technologies. The proposed regulation represents a departure from Treasury’s past position on this matter.

2. Comment

Before these proposed regulations, Treasury had not authorized the issuance of a section 204(h) notice in electronic form. EGTRRA expressly authorized regulations permitting electronic section 204(h) notices, and the proposed regulations generally provide standards for such notices that will be administrable for employers and provide participants with the information they need to understand the effect of the plan amendment.

3. Recommendation
Final regulations should retain the provisions of the proposed regulations authorizing the issuance of section 204(h) notices through new technologies.

L. Consequences of a failure to provide the section 204(h) notice

1. Issue

EGTRRA’s amendments to section 204(h) of ERISA changed the manner in which employers may be penalized for failing to comply with the requirements of section 204(h), and EGTRRA created section 4980F of the Code to provide for additional penalties if a plan sponsor fails to issue the required notice. Because of the potential for conflict, the proposed regulations coordinate the penalty rules.

2. Comment

Under Q&A-14 of the proposed regulations, in the event of an egregious violation, participants would receive benefits calculated as the better of the benefits with, or without, the amendment. For less than egregious violations, Q&A-14(b) provides that the amendment may become effective with respect to all applicable individuals, whether or not they received the notice. This standard is arguably not definitive and leaves sponsors open to challenge as to whether an amendment in fact becomes effective.

3. Recommendation

Q&A-14(b) should be clarified to indicate that in the case of nonegregious violations, the plan amendment shall become effective as to all affected individuals.