Official Discusses Proposed Regs for Cash Balance Plans, Automatic Retirement Plan Enrollment

by Sam Young

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Rhonda Migdail, a senior technical adviser in the Employee Plans Division at the IRS, gave her audience at the September 21 Benefits Conference of the South in Atlanta several hints about the contents of two sets of proposed regs that she said are in the "final stages of clearance." The first set of proposed regs would replace the transition guidance contained in Notice 2007-6, 2007-3 IRB 272 (*Doc 2006-25485* [**PDF**] or *2006 TNT 246-9*), for cash balance pension plans under sections 411(a)(13) and 411(b)(5). The second set would instruct employers on how to add an automatic enrollment feature to their section 401(k) plans.

Among the items addressed in the proposed cash balance plan regs will be the definition of the market rate of return, although not every different kind of rate will be addressed, Migdail said.

The proposed cash balance plan regs will also deal with conversions from defined benefit plans to cash balance plans, she said.

The proposed automatic enrollment regs "will be published rather shortly," Migdail said.

"We are working on putting together a sample notice to be used by plan sponsors for the automatic enrollment," she said, and "we are hoping to get that out at the same time" as the proposed regs.

Those proposed regs will address how to handle a loss on an employee's investment during the 90-day postnotification period, how and when increases in automatic enrollment contributions can be applied, and the effects of starting all employees at the maximum 10 percent automatic contribution, Migdail said. The proposed regs also "will expressly address what is an election," for example, to clarify the effects of lost paperwork, she added.

In additional comments, Migdail provided some hints about what the proposed regs' approach would be. In discussing the effects of losses on automatic

contributions, she emphasized the language in the Pension Protection Act of 2006 that specifies gains and losses, impliedly saying that losses would reduce the amount returned to an employee who opted out during the 90-day "do-over" window. And the Service is "cognizant of the administrative difficulties in dealing with individual employees," she said, implying that increased enrollment contributions will be permitted for employees as a group rather than being required to track perfectly with each employee's qualification date.

Migdail also suggested that a model automatic enrollment amendment would not be forthcoming from the Service. The IRS "generally has found that when they put [model plans] out, they are not used by many people," making model plans a poor use of agency resources, she said.

Adam C. Prozek, vice president of consulting services for Sentinel Benefits Group and Migdail's copanelist, said that he expects the popularity of automatic enrollment to depend on what the proposed regs look like. By some estimates, automatic enrollment could add $2 trillion to section 401(k) plans over the next 15 years, he said.

Supplemental guidance will have to be released later, Migdail said, to deal with particularly difficult cash balance plan issues. As Andrew E. Zuckerman, director of IRS Employee Plans Rulings and Agreements, explained, many of the plans previously submitted but subjected to the "cash balance jail" moratorium on determination letters may violate the rule against backloading, and their variety makes a single, simple solution impossible to achieve.