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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

TD 9275

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Exclusion of Employees of 501(c)(3) Organizations in 401(k) and 401(m) Plans

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations under section 410(b) of the Internal Revenue Code. The final regulations permit, in certain circumstances, employees of a tax-exempt organization described in section 501(c)(3) to be excluded for the purpose of testing whether a section 401(k) plan (or a section 401(m) plan that is provided under the same general arrangement as the section 401(k) plan of the employer) meets the requirements for minimum coverage specified in section 410(b). These regulations affect tax-exempt employers described in section 501(c)(3), retirement plans sponsored by these employers, and participants in these plans.

DATES: EFFECTIVE DATE: July 21, 2006.

APPLICABILITY DATE: These regulations apply to plan years beginning after December 31, 1996.

FOR FURTHER INFORMATION CONTACT: Linda L. Conway, 202-622-6060, or Michael P. Brewer, 202-622-6090 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

This document contains final amendments to the Income Tax Regulations (26 CFR Part 1) under section 410(b) of the Internal Revenue Code of 1986 (Code). On March 16, 2004, a notice of proposed rulemaking (REG-149752-03) was published in the **Federal Register** (69 FR 12291) under section 410(b). The regulations implement a directive by Congress, contained in section 664 of the Economic Growth and Tax Relief Reconciliation Act of 2001 (Public Law 107-16, 115 Stat. 38) (EGTRRA), to amend §1.410(b)-6(g) of the regulations.

Prior to the enactment of the Small Business Job Protection Act of 1996 (Public Law 104-188, 110 Stat. 1755) (SBJPA), both governmental and tax-exempt entities generally were subject to the section 410(b) coverage requirements and precluded from maintaining section 401(k) plans pursuant to section 401(k)(4)(B). To prevent the section 401(k)(4)(B) prohibition from causing a plan to fail section 410(b), the existing regulations provide that employees of either governmental or tax-exempt entities who are precluded from being eligible employees under a section 401(k) plan by reason of section 401(k)(4)(B) may be treated as excludable in applying the minimum coverage rules to a section 401(k) plan or a section 401(m) plan that is provided under the same general arrangement as the section 401(k) plan, if more than 95 percent of the employees of the employer who are not precluded from being eligible employees by section 401(k)(4)(B) benefit under the plan for the plan year. Although tax-exempt organizations described in section 501(c)(3) were precluded by

section 401(k)(4)(B) from maintaining a section 401(k) plan, they were permitted to allow their employees to make salary reduction contributions to a plan or contract that satisfies section 403(b) (a section 403(b) plan).

Section 1426(a) of SBJPA amended section 401(k)(4)(B), effective for plan years beginning after December 31, 1996, to allow nongovernmental tax-exempt organizations (including organizations exempt under section 501(c)(3)) to maintain section 401(k) plans. Thus, a section 501(c)(3) tax-exempt organization can now maintain a section 401(k) plan, a section 403(b) plan, or both. Prior to the enactment of SBJPA, many eligible tax-exempt organizations maintained section 403(b) plans. In light of this provision of SBJPA, section 664 of EGTRRA directed the Secretary of the Treasury to modify the regulations under section 410(b) to provide that employees of an organization described in section 403(b)(1)(A)(i) (a section 501(c)(3) organization) who are eligible to make contributions under section 403(b) pursuant to a salary reduction agreement may be treated as excludable with respect to a plan under section 401(k) or a plan under section 401(m) that is provided under the same general arrangement as a plan under section 401(k), if (1) no employee of an organization described in section 403(b)(1)(A)(i) is eligible to participate in such section 401(k) plan or section 401(m) plan and (2) 95 percent of the employees who are not employees of an organization described in section 403(b)(1)(A)(i) are eligible to participate in such plan under such section 401(k) or (m).

The amendment to §1.410(b)-6(g) of the regulations pursuant to section 664 of EGTRRA allows the continued maintenance of section 403(b) plans by these organizations

without requiring the same employees to be covered under a section 401(k) plan and the section 403(b) plan. In certain circumstances, the amendments will help an employer that maintains both a section 401(k) plan and a section 403(b) plan that provides for contributions under a salary reduction agreement (within the meaning of section 402(g)) to satisfy the section 410(b) coverage requirements with respect to the section 401(k) plan without the employer having to provide dual coverage for employees.

Only a few comments were received on the proposed regulations. No public hearing was requested or held. After consideration of the comments received, the final regulations adopt the provisions of the proposed regulations with certain modifications described below.

Explanation of Provisions

These final regulations retain the rule that provides that employees of governmental entities who are precluded from being eligible employees under a section 401(k) plan by reason of section 401(k)(4)(B)(ii) may be treated as excludable employees if more than 95 percent of the employees of the employer who are not precluded from being eligible employees by reason of section 401(k)(4)(B)(ii) benefit under the plan for the year.

As directed by section 664 of EGTRRA, these final regulations also provide that employees of a section 501(c)(3) organization who are eligible to make contributions under section 403(b) pursuant to a salary reduction agreement (within the meaning of section 402(g)) may be treated as excludable with respect to a section 401(k) plan, or a section 401(m) plan that is provided under the same general arrangement as a section 401(k) plan, if (1) no employee of a section 501(c)(3) organization is eligible to participate in such section

401(k) plan or section 401(m) plan; and (2) at least 95 percent of the employees who are neither employees of a section 501(c)(3) organization nor employees of a governmental entity who are precluded from being eligible employees under a section 401(k) plan by reason of section 401(k)(4)(B)(ii) are eligible to participate in such section 401(k) plan or section 401(m) plan.

The proposed regulations, in an attempt to simplify the language in section 664 of EGTRRA, would have provided that, for purposes of testing either a section 401(k) plan, or a section 401(m) plan that is provided under the same general arrangement, employees of a section 501(c)(3) organization who are eligible to make salary reduction contributions (within the meaning of section 402(g)) under a section 403(b) plan may be treated as excludible employees if no employee of the organization (rather than no employee of any organization described in section 403(b)(1)(A)(ii) (as in the language in section 664 of EGTRRA)) is eligible to participate in the section 401(k) plan or 401(m) plan, and 95% of the employees of the employer who are not employees of the organization (rather than an organization described in section 403(b)(1)(A)(ii) (as in the language in section 664 of EGTRRA)) are eligible to participate in the section 401(k) plan or section 401(m) plan. After further consideration, the IRS and Treasury Department have concluded that this simplification of the statutory language might not in all cases result in the same employees being excludible as would be excludible by applying the statutory language, which was not the intent. Thus, the final regulations more closely track the language in section 664 of EGTRRA than the proposed regulations.

The few comments received on the proposed regulations generally did not ask for changes to the basic rule but rather asked for further explanation as to the proper interpretation of the rule, including the scope of the exclusion and the interaction of the rule with other rules in the regulations under section 410(b). As explained further below, the IRS and Treasury Department believe that the answers to the questions raised in the comments is reasonably clear under the existing language, and have decided not to expand guidance in the regulation beyond the specific direction of Congress.

Commentators requested clarification as to when a section 401(m) plan is provided under the same general arrangement as a section 401(k) plan for purposes of these regulations. Generally, a section 401(m) plan is provided under the same general arrangement as a section 401(k) plan only to the extent that the matching contributions are contingent upon elective deferrals in the section 401(k) plan.

Commentators asked for clarification of the relationship between the proposed regulations and §1.410(b)-7(f) and whether matching contributions made under a 401(a) tax-qualified plan may be taken into account when applying the coverage requirements of section 410(b) to matching contributions provided as part of a section 403(b) plan. Treasury regulation §1.410(b)-7(f) permits a plan subject to section 403(b)(12)(A)(i), which requires the universal availability of the right to defer, to satisfy section 410(b) by taking into account plans that are not subject to section 403(b)(12)(A)(i). Accordingly, a section 403(b) plan is permitted to satisfy the section 410(b) coverage requirements for matching contributions by taking into account matching contributions that are provided under a plan that is not subject

to section 403(b)(12)(A)(i) (e.g., a section 401(a) tax-qualified plan). However, because Treasury regulation §1.410(b)-7(f) does not permit a section 401(a) tax-qualified plan to satisfy the requirements of section 410(b) by taking into account a plan subject to section 403(b)(12)(A)(i), a section 401(a) tax-qualified plan must satisfy the section 410(b) coverage requirements by disregarding coverage under a section 403(b) plan. These regulations provide the rules for disregarding employees of a governmental or tax-exempt entity for purposes of applying the coverage requirements of section 410(b) to a section 401(k) plan or a section 401(m) plan that is provided under the same general arrangement as the section 401(k) plan.

Commentators asked whether employees of a tax-exempt organization described in section 501(c)(3) who would be eligible to make salary reduction contributions under a section 403(b) plan but for the exclusions permitted under section 403(b)(12), such as nonresident aliens and employees who normally work less than 20 hours per week, are taken into account as employees who are eligible to make salary reduction contributions for purposes of these regulations. These regulations provide that such employees are not taken into account unless they are actually eligible to make salary reduction contributions to the section 403(b) plan.

Effective Date

As directed by Congress in section 664 of EGTRRA, these final regulations apply to plan years beginning after December 31, 1996. However, the preamble to the proposed regulations provided that taxpayers were permitted to rely on the proposed regulations, and

if and to the extent that the final regulations were more restrictive, the final regulations would be prospective. As described above, the final regulations make certain modifications to the proposed regulations. These may be more restrictive than the proposed regulations under certain limited circumstances. Consequently, for plan years beginning after December 31, 1996, but before January 1, 2007, an employer is permitted to determine the excludible employees under a section 401(k) plan or section 401(m) plan using either §1.410(b)-6(g) in the proposed regulations or these final regulations.

Special Analyses

It has been determined that this is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and, because these regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply.

Drafting Information

The principal authors of these regulations are Linda L. Conway and Michael P. Brewer of the Office of the Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the IRS and Treasury participated in the development of these regulations.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1--INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended by removing the entry for §§1.410(b)-2 through 1.410(b)-10 and adding entries in numerical order to read, in part, as follows:

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

§1.410(b)-2 also issued under 26 U.S.C. 410(b)(6).
§1.410(b)-3 also issued under 26 U.S.C. 410(b)(6).
§1.410(b)-4 also issued under 26 U.S.C. 410(b)(6).
§1.410(b)-5 also issued under 26 U.S.C. 410(b)(6).
§1.410(b)-6 also issued under 26 U.S.C. 410(b)(6) and section 664 of the Economic Growth and Tax Relief Reconciliation Act of 2001 (Public Law 107-16, 115 Stat. 38).
§1.410(b)-7 also issued under 26 U.S.C. 410(b)(6).
§1.410(b)-8 also issued under 26 U.S.C. 410(b)(6).
§1.410(b)-9 also issued under 26 U.S.C. 410(b)(6).
§1.410(b)-10 also issued under 26 U.S.C. 410(b)(6).* * *

Par. 2. Section 1.410(b)-0, table of contents, the entry for 1.410(b)-6 is amended by:

1. Revising the entry for 1.410(b)-6(g).

2. Adding entries for 1.410(b)-6(g)(1), (g)(2), and (g)(3).

The revision and additions read as follows:

§1.410(b)-0 Table of contents.

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§1.410(b)-6 Excludable employees.

* * * * *
(g) Employees of certain governmental or tax-exempt entities.
(1) Plans covered.
(2) Employees of governmental entities.

(3) Employees of tax-exempt entities.

* * * * *

Par. 3. In §1.410(b)-6, paragraph (g) is revised to read as follows:

§1.410(b)-6 Excludable employees.

* * * * *

(g) Employees of certain governmental or tax-exempt entities--(1) Plans covered. For purposes of testing either a section 401(k) plan, or a section 401(m) plan that is provided under the same general arrangement as a section 401(k) plan, an employer may treat as excludable those employees described in paragraphs (g)(2) and (3) of this section.

(2) Employees of governmental entities. Employees of governmental entities who are precluded from being eligible employees under a section 401(k) plan by reason of section 401(k)(4)(B)(ii) may be treated as excludable employees if more than 95 percent of the employees of the employer who are not precluded from being eligible employees by reason of section 401(k)(4)(B)(ii) benefit under the plan for the year.

(3) Employees of tax-exempt entities. Employees of an organization described in section 403(b)(1)(A)(i) who are eligible to make salary reduction contributions under section 403(b) may be treated as excludable with respect to a section 401(k) plan, or a section 401(m) plan that is provided under the same general arrangement as a section 401(k) plan, if--

(i) No employee of an organization described in section 403(b)(1)(A)(i) is eligible to participate in such section 401(k) plan or section 401(m) plan; and

(ii) At least 95 percent of the employees who are neither employees of an organization described in section 403(b)(1)(A)(i) nor employees of a governmental entity who are precluded from being eligible employees under a section 401(k) plan by reason of section 401(k)(4)(B)(ii) are eligible to participate in such section 401(k) plan or section 401(m) plan.

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Par. 4. In §1.410(b)-10, paragraph (e) is added to read as follows:

§1.410(b)-10 Effective dates and transition rules.

* * * * *

(e) Effective date for provisions relating to exclusion of employees of certain tax-exempt entities. The provisions in §1.410(b)-6(g) apply to plan years beginning after December 31, 1996. For plan years to which §1.410(b)-6 applies that begin before January 1, 1997, §1.410(b)-6(g) (as it appeared in the April 1, 2005 edition of 26 CFR part 1) applies.

Mark E. Matthews,
Deputy Commissioner for Services and Enforcement.

Approved: June 30, 2006.

Eric Solomon,
Acting Deputy Assistant Secretary of the Treasury (Tax Policy).