



Treasury Department's Proposed Final Normal Retirement Age Regulations for Governmental Plans

These rules will generally apply to **employees** hired on or after January 1, 2017

Plans Impacted

Defined contribution and defined benefit governmental plans (within the meaning of Internal Revenue Code ("Code") §414(d))¹ intending to satisfy Code §401(a) will need to satisfy these proposed final Normal Retirement Age ("NRA") regulations. These proposed final regulations do not apply to Code §§ 403(b) or 457 governmental plans.

Effective Date: The proposed final rules 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.

Governmental plan sponsors may elect to apply these rules earlier.

¹ The term "governmental plan" under Code §414(d) 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 the foregoing. The term "governmental plan" also includes any plan to which the Railroad Retirement Act of 1935 or 1937 applies. The term includes a plan which is established and maintained by an Indian tribal government, a subdivision, or an agency or instrumentality of either, and all of 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).

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Background

Governmental plans are subject to the pre-ERISA vesting rules (not the Code §411 rules that apply to other 401(a) qualified plans). These pre-ERISA rules have two basic components: 1) full vesting of benefits/contributions at NRA; and 2) NRA generally being the lowest age specified in the plan in which the employee has the right to retire without the consent of the employer. While Revenue Ruling 71-147 noted that NRA is ordinarily described as age 65, it went on to state that a plan could specify a lower age if it is an age at which employees customarily retire in the particular company or industry. A governmental plan does not need to explicitly define NRA within its plans, since this may be deduced from other plan provisions.

2007 final NRA regulations applied many provisions from the current Code §411 which doesn't apply to governmental plans (pre-ERISA Code §411 rule do apply). With these 2007 regulations, the Treasury requested comments regarding the application of the pre-ERISA vesting rules and other qualification rules. Additionally, Notices 2007-69, 2008-98 and 2012-29 either

modified, were requested or delayed the effective date of the 2007 regulations.

2016 Proposed Final Regulations

The proposed final 2016 regulations provide guidance with respect to the applicability of the 2007 NRA regulations to governmental plans.

NRA definition is not required as long as the terms of the plan specify the earliest age at which a participant has the right to retire without the consent of the employer and to receive benefits based upon the amount of the participant's service on the date of retirement at the full rate set forth in the plan without actuarial or similar reduction because of retirement before some later specified age. This will be considered the plan's NRA.

Reasonably Representative requirement from the 2007 regulations apply; that is, the NRA 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.

The *general safe harbor* from the 2007 regulations where a NRA of at least age 62 (or the later of age 62 or another specified date such as the fifth

anniversary of participation) is deemed to satisfy the reasonably representative requirement.

Additional Safe Harbors: The proposed final regulations include several additional alternative safe harbors that a governmental plan may use, including:

- Age 60 and 5 years of service
- Age 55 and 10 years of service
- Combined age and years of service of 80 or more
- Any age with 25 years of service that is combined with another Safe Harbor that includes an age². For example, the earlier of the participant's age when credited with (1) 25 years of service and (2) the later of age 60 or the age when the participant has been credited with 5 years of service under the plan.

² Except for the qualified public safety employee safe harbors described below.

*Qualified public safety employees*³ These proposed final regulations expand the age-50 safe harbor rule found in the 2007 regulations, which applies only for plans in which substantially all of the participants are qualified public safety employees. With the proposed final regulations, a governmental plan could satisfy the NRA

requirement by using one of the three safe harbors (see below) for qualified public safety employees and a later NRA that otherwise satisfies the requirements in these proposed final regulations for other participants. These safe harbors, if adopted, are deemed to meet the *reasonably representative requirement*-without regard to the *substantially all requirement*:

- Age 50
- Combined age and years of service of 70 or more
- Any age with 20 years of service. Treasury and the IRS agree with comments that a safe harbor based solely on a period of service for qualified public safety employees is appropriate since these employees typically have career spans that commence at a younger age and continue over a limited period.

If a government plan covers both *qualified public safety employees* and other categories of

³The term *qualified public safety employee* under Code §72(t)(10)(B) 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, Federal customs and border protection officer, any Federal firefighter, any air traffic controller, any nuclear materials courier, 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.

employees, the three safe harbors noted above cannot be used for the other categories.

As a reminder, eligible retired public safety officers, who have separated from service due to disability or reaching the plan's normal retirement age, are allowed to exclude from gross income up to \$3,000 per year for distributions from their eligible governmental plan to pay for qualified health insurance or long-term care insurance premiums. If the plan permits this type of distribution it must be paid directly from the plan to a health or long-term care insurance company (for defined benefit plans, the plan sponsor should check with the annuity service provider before offering this option). For purposes of applying this \$3,000 limitation, distributions from all eligible government plans are aggregated.

Multiple NRAs in a governmental plan are permitted for different classification of employees. Similarly, the use of one NRA for employees hired before a certain date and another NRA under the plan for employees hired on or after that certain

date would not fail to satisfy the applicable pre-ERISA requirements.

NRA is not one of these safe harbors? If a NRA fails to satisfy one of the safe harbors described within this white paper, the plan still may satisfy the *reasonably representative requirement* based on all the relevant facts and circumstances. A “good faith” determination of the typical retirement age for the industry in which the covered workforce is employed will be given deference, as long as the determination is reasonable and the NRA would otherwise be consistent with other pre-ERISA vesting requirements. This type of NRA would need to be reviewed on an ongoing basis, to ensure that the facts and circumstances continue to be considered reasonable over time.

Next Steps

We recommend you review your Plan's definition of NRA to confirm whether the definition falls into one of the Safe Harbor definitions described in this white paper. If it doesn't, now is the time to consider adopting a Safe Harbor definition which would apply to employees hired on or after the proposed effective date. These proposed final regulations are 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.

Since the proposed final regulations apply to employees hired on or after the effective date of the regulations, sponsors can continue to apply the NRA definition in effect prior to the final regulations for employees hired before the effective date of the final regulations. The proposed regulations are silent with respect to the NRA definition that would apply to employees rehired on or after the effective date.

MassMutual Regulatory Advisory Services

If you have questions about the information in this white paper or wondering what your “next steps” might be with respect to **Treasury’s Proposed Final NRA Regulations**, please contact your MassMutual representative.

This document is for informational purposes only and should not be construed as legal and/or tax advice. Please consult with your own legal counsel and other experienced advisors regarding the application of the matters described herein to your specific circumstances.