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## IRS Memorandum Provides Informal Guidance on Vesting Requirements for Governmental Plans

A recently released memorandum from the Acting Director of EP Rulings and Agreements provides informal guidance on the vesting requirements for governmental 401(a) plans. Dated April 30, 2012, but only publicly released recently, the memorandum provides guidance to the reviewers of determination letter applications for governmental plans in the form of certain "safe harbor" vesting provisions that will permit a favorable determination letter to be issued to a governmental plan.

### Background

Governmental plans are not subject to the regular vesting rules under Code section 411, but the vesting requirements under the Code as in effect on September 1, 1974, prior to the enactment of ERISA. The question of what vesting provisions may satisfy those pre-ERISA rules for a governmental plan came to the forefront with the initial Cycle C filings for determination letters by governmental plans. The question is also tied to the concept of defining "normal retirement age" for plan purposes, because the pre-ERISA vesting rules require vesting at normal retirement age, whatever that is. IRS guidance in Notice 2012-29 indicated that the IRS was considering further guidance relating to the applicability of the 2007 normal retirement age regulations under Reg. § 1.401(a)-1(b)(1) to governmental plans and delayed the date those regulations would become effective for governmental plans.

### Vesting Safe Harbors

The new IRS memorandum of April 30 essentially provides three vesting provision safe harbors that will allow a governmental plan to be approved without further review:

1. Full vesting after 15 years of creditable service;
2. Full vesting based on a graded vesting schedule of 5 to 20 years of creditable service; or
3. For qualified public safety employees only (using the definition in 72(t)(10)(B), i.e., the special rule for an exception from the 72(t) excise tax for distributions upon separation from service by such employees) after 20 years of creditable service.

For these purposes, years of credit service can be based on years of employment, years of participation, or other creditable year definitions. More favorable vesting provisions are also deemed to satisfy the pre-ERISA vesting rules.

### **Normal Retirement Age**

Notably, a footnote in the memorandum indicates that the Office of Chief Counsel advised EP Rulings and Agreements that if a governmental plan's vesting provisions satisfy the pre-ERISA vesting rules without the use of attainment of a normal retirement age, then the plan would not need a definition of normal retirement age to satisfy those vesting requirements.

### **Plans Not Meeting a Vesting Safe Harbor**

Not meeting these safe harbors does not mean that the plan is not qualified, however, it means that the plan vesting provisions will be subject to further analysis and resolution by certain IRS staff.

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