

CITY OF MILWAUKEE

Form CA-43

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June 3, 2003

Ms. Anne M. Bahr, Executive Director
Employees' Retirement System
City Hall, Room 603

Re: EGTRRA Deadline

Dear Ms. Bahr:

By correspondence dated December 3, 2002, you requested our advice with respect to amendment of Chapter 36 as it relates to the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA). You asked if any amendments were necessary in order to comply with EGTRRA.

In Notice 2001-42, 2001-30 I.R.B. 70, the Internal Revenue Service designated plan provisions that must be amended to satisfy the qualification requirements of the Code because of changes made by EGTRAA, and also designated certain plan provisions that are integral to the qualification requirements changed by EGTRAA. The effect of this designation was to provide for a remedial amendment period in which any needed retroactive remedial EGTRRA plan amendments may be adopted. This remedial amendment period ends on December 31, 2005.

The Internal Revenue Service provided detailed advice about EGTRRA amendments, including sample plan amendments, in IRS Notice 2001-57.

In Notice 2001-57, the IRS noted that the availability of the EGTRRA remedial amendment period is conditioned on the adoption of required good faith EGTRRA plan amendments. There are two circumstances in which a good faith amendment is required: First, a plan is required to have an amendment in effect for a year if the plan is required to implement a provision of EGTRAA for the year, and the plan language prior to the amendment is not consistent with the provision of EGTRRA. Second, a plan is required to have good faith EGTRRA plan amendment in effect for a year if the plan sponsor elects to implement a provision of EGTRRA for the year and the plan language, prior to the amendment is not consistent with the operation of the plan in a manner consistent with EGTRRA.

I. Mortality Tables

EGTRAA requires amendments with respect to the mortality tables used by qualified plans beginning in the 2002 plan year for purposes of applying sections 415(b) and 417(e). These new mortality tables were announced in Rev. Rul. 2001-62, 2001-2 C.B. 632, published December 31, 2001. If the existing plan provision is inconsistent with EGTRRA, it must be amended prior to December 31, 2002.

Governmental plans are not subject to the provisions of section 417(e). See Rev. Rul. 98-1, 1998-1 C.B. 249, 1998-2 I.R.B. 5.

However, both Rev. Rul. 95-29 and Rev. Rul. 98-1 provide that plans which are not subject to section 417(e)(3) (such as governmental plans and certain church plans), although exempt from the interest rate requirement under section 415(b)(2)(E)(ii), are subject to the mortality table requirement under section 415(b)(2)(E)(v) of the Code. See *Internal Revenue Manual* 4.72.6.3.4.3.4 - *Transition Rules After SBJPA/Rev. Rul. 98-1* (12-01-2002).

Amendment would be required if the applicable plan provision is not consistent with EGTRRA. The pertinent provision of Chapter 36 relating to mortality tables, however, is not on its face inconsistent with EGTRRA. The applicable provision, section 36-14, is sufficiently broad to permit implementation of new mortality tables without amendment. It provides:

14. PERIODIC VALUATIONS; TABLES AND RATES THEREON. At least once in each 5-year period the actuary shall make an actuarial investigation into the mortality, service and compensation experience of the members and beneficiaries of the retirement system, and shall make a valuation of the assets and liabilities of the funds of the system, and taking into account the results of such investigation and valuation, the board shall adopt for the retirement system such mortality, service and other tables as shall be deemed necessary.

Because this provision is not inconsistent with EGTRRA requirements, no plan amendment is required.

II. Rollover Distributions

EGTRRA also made changes to the rollover provisions applicable to qualified plans, and permits rollovers to an annuity contract described in section 403(b) of the Code and an eligible deferred compensation plan under section 457(b) of the Code.

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ERS rollover distributions are addressed in sections 36-10-2 and 36-10-3 of the Milwaukee City Charter, which provide as follows:

2. Notwithstanding sub. 1., [which prohibits beneficiaries from making assignments of benefits and allowances] a beneficiary who was a member may elect to have a taxable distribution except: annuities paid over life or life expectancy; installments for a period spanning 10 years or more; and minimum distributions under s. 401(a)(9) of the Internal Revenue Code; paid directly to an individual retirement account or bona fide defined contribution account that accepts contributions (Internal Revenue Code s. 401(a) and (31) and Internal Revenue Code s. 404(a)(2)) or a tax sheltered annuity that accepts rollovers (Internal Revenue Code s. 403(b)(10)).
3. Notwithstanding sub. 1., a beneficiary who is the surviving spouse of a member or beneficiary who was a member may elect to have a taxable distribution except: annuities paid over life or life expectancy; installments for a period spanning 10 years or more; and required minimum distributions under s. 401(a)(9) of the Internal Revenue Code; paid directly to an individual retirement account.

The foregoing provisions already permit rollovers to a section 403(b) tax-sheltered annuity plan and to a "bona fide defined contribution account," and we understand that ERS has been implementing requested rollovers to section 457 deferred compensation plans based on the authorization in section 36-10 for rollovers to a "bona fide defined contribution account." To clarify and harmonize this provision with the precise language of EGTRRA rollover provisions, we recommend an amendment to section 36-10 in the form attached to this opinion.

Very truly yours,


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City Attorney


ELLEN H. TANGEN
Assistant City Attorney

Enclosure

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1054-2002-3760:63742

Proposed Amendments to Section 36-10-2 and 36-10-3:

2. Notwithstanding sub. 1., a beneficiary who was a member may elect to have a taxable distribution except: annuities paid over life or life expectancy; installments for a period spanning 10 years or more; and minimum distributions under s. 401(a)(9) of the Internal Revenue Code; paid directly to an individual retirement account or bona fide defined contribution account that accepts contributions (Internal Revenue Code s. 401(a) and (31) and Internal Revenue Code s. 404(a)(2))>>, including an eligible plan under Section 457(b) of the Code which is maintained by a state, political subdivision of a state, or any agency or instrumentality of a state or political subdivision of a state and which agrees to separately account for amounts transferred into such plan,<< or a tax sheltered annuity that accepts rollovers (Internal Revenue Code s. 403(b)(10)).

3. Notwithstanding sub. 1., a beneficiary who is the surviving spouse of a member or beneficiary who was a member may elect to have a taxable distribution except: annuities paid over life or life expectancy; installments for a period spanning 10 years or more; and required minimum distributions under s. 401(a)(9) of the Internal Revenue Code; paid directly to an individual retirement account))>> or a bona fide defined contribution account that accepts contributions (Internal Revenue Code s. 401(a) and (31) and Internal Revenue Code s. 404(a)(2), including an eligible plan under Section 457(b) of the Code which is maintained by a state, political subdivision of a state, or any agency or instrumentality of a state or political subdivision of a state and which agrees to separately account for amounts transferred into such plan, or a tax sheltered annuity that accepts rollovers (Internal Revenue Code s. 403(b)(10))<<.