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Cash or Benefits - Take Your Choice - §125 Is Not The "Exclusive" Means for Avoiding Tax

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In this article, Gary Quintiere and Nicholas Wamsley* describe a significant provision known as the "exclusivity rule" in the U.S. Department of the Treasury's proposed 2007 cafeteria plan regulations, and conclude that Treasury overstepped its "gap filler" role when it determined that individuals should bear an immediate tax when offered certain benefit choices. The "exclusivity rule" is found in Treasury's affirmative response to the following question: should providing an employee with a choice between a taxable and a nontaxable benefit outside the bounds of a cafeteria plan, in all cases, cause the employee who chooses the nontaxable benefit to recognize gross income in the amount of the taxable benefit? Quintiere and Wamsley write that the exclusivity rule is in conflict with the wording of Section 125 and with Congress's clearly expressed intent, as recorded in the legislative history.

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