53 FR 31837

DEPARTMENT OF THE TREASURY

Internal Revenue Service

AGENCY: Internal Revenue Service, Treasury.

26 CFR Parts 1 and 602

Income Tax: Taxable Years Beginning After December 31, 1953; OMB Control Number Under The Paperwork Reduction Act; Survivor Benefits, Distribution Restriction and Various Other Issues Under the Retirement Equity Act of 1984

[T.D. 8219]

53 FR 31837

August 22, 1988

ACTION: Final regulations.

SUMMARY: This document provides final regulations relating to qualified joint and survivor annuities required to be provided under certain retirement plans under section 401(a)(11) prior to its amendment by the Retirement Equity Act of 1984 (REA 1984). The pre-REA 1984 regulations are changed to conform them to *BBS Associates, Inc. v. Commissioner of Internal Revenue.*

This document also provides final regulations relating to the qualified joint and survivor and qualified preretirement survivor annuity requirements and the notice, election and consent rules enacted by REA 1984 and relating to the effective dates, transitional rules, restrictions on distributions from employee plans, and other issues arising under REA 1984. The final regulations also reflect certain provisions in the Tax Reform Act of 1986 (1986 Act) that affect the REA 1984 provisions. The regulations will generally affect sponsors of, and participants in, pension, profit-sharing and stock bonus plans, and provide plan sponsors with guidance to comply with the law.

DATES: The regulations are effective August 22, 1988. The pre-REA 1984 regulations are applicable for plan years beginning after December 31, 1974. The REA 1984 regulations are generally applicable for plan years beginning after December 31, 1984 except as otherwise specified in REA 1984, or in the 1986 Act.

FOR FURTHER INFORMATION CONTACT: William D. Gibbs of the Employee Benefits and Exempt Organizations Division, Office of the Chief Counsel, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC 20224 (Attention CC:LR:T) (202-377-9372) not a toll-free number).

TEXT:
Background -- Pre-REA 1984 Regulations

On October 27, 1982, the Federal Register published proposed amendments to the Income Tax Regulations (26 CFR Part 1) under section 401(a)(11) of the Internal Revenue Code of 1954. The amendments were proposed to conform the regulations to *BBS Associates, Inc. v. Commissioner of Internal Revenue*, 74 T.C. 1118 (1980), *aff'd mem.*, 661 F.2d 913 (1981).

No hearing was requested on these pre-REA regulations and none was held.

Explanation of Provisions

Section 401(a)(11), prior to REA 1984, provided that if a trust provides for the payment of benefits in the form of an annunity, such trust must provide for the payment of annuity benefits in a form having the effect of qualified joint and survivor annuity in order for the trust to be qualified under section 401.

Regulations under section 401(a)(11) published prior to REA 1984 interpret this provision to mean that a plan offering a life annuity as a benefit option must provide that the automatic form of benefit payment is a qualified joint and survivor annuity.

The Tax Court and the Court of Appeals for the Third Circuit rejected the interpretation of section 401(a)(11) expressed in the regulations in *BBS Associates, Inc. v. Commissioner of Internal Revenue*, 74 T.C. 1118 (1980), *aff'd mem.*, 661 F.2d 913 (1981). The Court held that sections 401(a)(11)(A) and 401(a)(11)(E) (prior to REA 1984) do not require that the automatic form of benefit distribution be a qualified joint and survivor annunity merely because a plan offers a life annuity as an optional form of benefit. The Court held that *Example (1)* of § 1.401 (a)-11 (a)(3), was invalid.

In Notice 82-4, 1982-1 C.B. 356, the Internal Revenue Service stated that it would not file a petition for a writ of certiorari in the *BBS* case and that the invalidated regulations would be amended.

The pre-REA 1984 regulations, § 1.401(a)-11, are amended to conform to the *BBS* decision. The regulations provide that in order for a plan offering benefits payable as a life annuity to qualify under section 401(a), such life annuity benefits must be paid in the form of a qualified joint and survivor annuity unless the participant elects otherwise.

Actions Taken

Proposed Treas. Reg. § 1.401(a)-11(c)(2)(i)(C)(3) allowed defined benefit plans to satisfy the requirement for the early survivor annuity election by providing a survivor benefit at least equal in value to the present value of the vested portion of the participant's accrued benefit (determined immediately prior to death). Under the proposed regulations, present value must be "determined in accordance with actuarial assumptions or factors specified in the plan".

As suggested by commentators, the requirement with respect to specification of actuarial factors or assumptions for determining present value is conformed to the requirements of Rev. Rul. 79-90, 1979-1 C.B. 155. Thus, certain defined benefit plans must state either assumptions or factors or a variable standard independent of employer discretion determining the present value of a participant's accrued benefit.

The pre-REA 1984 regulations are also amended to reflect the amendment to section 401(a)(11) by REA 1984. However, the rules in the pre-REA regulations, to the extent not inconsistent with the statute and the new regulations, continue to apply to plan years governed by the REA 1984 amendment to section 401(a)(11).

Background -- REA 1984 Regulations

On July 19, 1985, the Federal Register published proposed and temporary amendments to the Income Tax Regulations (26 CFR Part 1) under sections 401(a)(11) and (13), 402(f), 410(a)(5), 411(a)(6), (7) and (11), 411(d)(3), 414(p), and 417. The text of the temporary regulations served as the text for the proposed regulations. The amendments were proposed to conform the regulations to the Internal Revenue Code provisions of Titles II and III of REA 1984. Amendments under the Paperwork Reduction Act were also proposed. (26 CFR Part 602). A public hearing was held on these REA 1984 proposed regulations on December 9, 1985.

On October 22, 1986, the Tax Reform Act of 1986 (1986 Act) (Pub. L. 99-514, 100 Stat. 2085) was enacted. Sections 1139, 1145 and 1898 of the 1986 Act amended certain Internal Revenue Code provisions affected by REA 1984. The final regulations which are the subject matter of this Treasury decision reflect those provisions. Further, certain provisions of REA 1984 that were not reflected in the proposed regulations are reflected in the final regulations.

After consideration of all written comments and the comments made at the REA 1984 hearing regarding the proposed amendments, the proposed regulations under the applicable Code sections are adopted as revised by this Treasury decision.

Explanation of Provisions

For an explanation of the proposed regulations, see the following preambles to the proposed and temporary REA 1984 regulations in the July 19, 1985 Federal Register: (1) EE-3-85 (*see* the cross-referenced temporary regulations, T.D. 8037) 50 FR 29436; (2) EE-35-85 (*see* the cross-referenced temporary regulations, T.D. 8038), 50 FR 29436; (3) T.D. 8037 (OMB Control Numbers under the Paperwork Reduction Act; Notice, Election, and Consent Rules under REA 1984), 50 FR 29376; and (4) T.D. 8038 (Effective Dates, Transitional Rules, Restrictions on Plan Distributions, and Other Issues Arising Under REA 1984), 50 FR 29371.

Matters Relating to Reporting (T.D. 8037)

The principal reporting change in the final regulations, § 1.402(f)-1, relates to the safe harbor notice that may be given recipients of certain plan distributions to satisfy the reporting requirement of section 402(f). The safe harbor notice provided by § 1.402(f)-1T(b) (the temporary regulations superseded by this Treasury decision) is obsolete because of the changes to the distribution rules since its publication.

The final regulations provide the Commissioner with authority to provide new safe harbor notices. The Service intends to publish a notice that reflects the various changes to the taxation of distributions under sections 402 and 403 made by sections 1122 and 1124 of the 1986 Act. Any such notice would cease to be effective upon any change in the applicable law effect by a statute, regulation, revenue ruling or other general guidance that is inconsistent with such notice.

Title I of ERISA

Under section 101 of Reorganization Plan No. 4 of 1978 (43 FR 47713), the Secretary of the Treasury has jurisdiction over the subject matter addressed in the REA 1984 regulations. Therefore, under section 104 of the Reorganization Plan, these regulations apply when the Secretary of Labor exercises authority under Title I of the Employee Retirement Income Security Act of 1974 (as amended, including the amendments made by Title I of REA and the subsequent amendments by the 1986 Act) ("ERISA"). Thus, the requirements also apply to employee plans subject to Title I of ERISA.

No Spousal Consent Needed for Commencement of Qualified Joint and Survivor Annuity

The proposed and temporary regulations required that the spouse of a participant consent to the distribution of a qualified joint and survivor annuity (QJSA) before the participant attains the later of age 62 or normal retirement age. Section 1.417(e)-1(b) of the final regulations removes this requirement and permits plans subject to section 417 to provide that a married participant who retires may elect, without the consent of the participant's spouse, to begin receiving a QJSA before attaining the later of age 62 or normal retirement age. The Service announced this position on October 2, 1985 (see News

Release 85-99, also published in 1985-43 I.R.B. 29 (October 28, 1985)).

Section 417(b) defines a QJSA. In general, a QJSA is an immediate annuity for the life of the participant, with a survivor annuity for the life of the participant's spouse. A plan may have more than one joint and survivor annuity satisfying the QJSA requirements. If so, the plan must designate which one is the QJSA and therefore the automatic form of payment. The QJSA for a married participant must be at least equal to the most valuable optional form of benefit payable to the participant at the time of the election. The amount of the survivor annuity may not be less than 50 percent, and not more than 100 percent, of the amount of the annuity payable during the time when the participant and spouse are both alive. (*See also* pre-REA 1984 section 401(a)(11) and § 1.401(a)-11(b)(2) for the pre-REA 1984 definition of a QJSA which is still generally applicable.)

Plan Amendments

Under the proposed and temporary regulations, plan amendments reequired by REA 1984 were generally required to be adopted not later than the end of the first plan year to which the statutory provisions apply (generally the first plan year beginning in 1985).

Since the publication of the regulations, technical corrections to REA 1984 (technical corrections) were enacted in Title XVIII of the 1986 Act. In Notice 87-28, published in 1987 -- 14 I.R.B. 46 (April 6, 1987), the Service generally extended the date by which plans must be amended to satisfy the proposed and temporary REA regulations and the technical corrections. Under the Notice, plan amendments generally are not required until the time section 1140 of the 1986 Act would require other plan amendments, generally the 1989 plan year, as long as there is compliance in operation with the proposed and temporary regulations and the technical corrections.

The time for making plan amendments to comply with REA would also be extended to the time permitted by section 401(b) for plans to be amended to comply with the 1986 Act. In general, plans can continue to follow Notice 87-28 until that time, except that the plan must satisfy the retroactive compliance requirements of section 401(b). Thus, in general, most plans must satisfy these final regulations as of the first day of the first plan year beginning after December 31, 1988.

Use of PBGC Interest Rate

The proposed and temporary regulations required that plans subject to the survivor annuity requirements of sections 411(a)(11) and 417(e) satisfy two basic rules. First, for purposes of determining whether a distribution may be made without obtaining the applicable consents (the "threshold rule"), a participant's benefit must be valued by using an interest rate no greater than the Pension Benefit Guaranty Corporation's (PBGC) immediate interest rate for trusteed single-employer plans. Second, the actual single sum that the participant (or beneficiary) receives under the plan must be calculated using an

interest rate no greater than the immediate PBGC rate (the "amount rule") for trusteed single-employer plans. The same interest rate must be used for both the threshold and amount rules. Many commentators objected to the amount rule.

Section 1139 of the 1986 Act ratified the threshold and amount rules set forth in the proposed and temporary regulations and sections 411(a)(11) and 417 with certain changes. The final regulations adopt these rules to reflect section 1139 of the 1986 Act. The Service issued guidance on these rules in Notice 87-20, 1987-6 I.R.B. 17 (February 9, 1987). The rules in Notice 87-20 are adopted in these final REA 1984 regulations, except as otherwise indicated. For plans that did not satisfy the interest rate restrictions of the proposed and temporary regulations, Notice 87-20 requires retroactive adjustments using the interest rates set forth in the Notice. Increased distributions resulting from these adjustments were required to be made by August 9, 1987. The time to distribute required increases due to recalculation of benefits using the appropriate interest rate is extended until the end of the first plan year beginning after December 31, 1988.

Some of the principal changes in the final regulations resulting from the 1986 Act are discussed below. First, plan provisions must use the PBGC applicable interest rate rather than the PBGC immediate interest rate for both the threshold rule and the amount rule. The PBGC immediate interest rate is a single interest rate used to value an immediate annuity that is determined at the date of plan termination of an insufficient trusteed single-employer plan. The PBGC applicable interest rate (referred to in the final REA 1984 regulations as the "section 417 interest rate") is the immediate interest rate where an immediate annuity is being valued and is a set of interest rates computed for varying time periods where a deferred annuity is being valued. *See also,* final PBGC regulations under section 29 CFR Part 2619 (Appendix B) which are discussed in more detail in Notice 87-20.

Second, the final regulations reflect the amendments to the threshold and amount rule in sections 411(a)(11)(B) and 417(e)(3) made by section 1139 of the 1986 Act. There is a two-tier test for valuing single sum distributions using $25,000 (unindexed) as the breakpoint. The section 417(e) interest rate for vested accrued benefits equal to or less than $25,000 is the PBGC applicable interest rate and for vested accrued benefits greater than $25,000 is 120 percent of such PBGC rate. If a participant or beneficiary would receive a single sum distribution of less than $25,000 if the interest rate used to calculate the distribution were 120 percent of the PBGC applicable interest rate then 100 percent of such PBGC rate must be used to calculate the amount of the benefit. This two-tier test is set forth in §§ 1.411(a)-11(d) and 1.417(e)-1(d)(2).

Finally, in order to retain its qualification under section 401(a) or 403(a), a plan must contain provisions reflecting the section 417(e) interest rate limitations used in the threshold and amount rules, even if the provisions that are currently in the plan currently result in greater single sum distributions than the distributions that would result from use of the section 417(e) interest rate. This provision is required because, in the future, use of the section 417(e) rate rather than the plan rate may result in larger distributions due to the variable nature of PBGC rates. These rules are discussed in more detail in Notice 87-

20.

The proposed and temporary regulations were unclear as to how the interest rate limitations applied to benefits under plans in situations in which plan benefits in the form of single sum distributions include subsidies. The final regulations apply the interest rate limitations to value all benefits, including subsidies such as early retirement and survivor subsidies, effective for distributions commencing on or after the first day of the first plan year beginning after December 31, 1988. Prior to such date, a plan will be considered to satisfy the interest rate limitation rules with respect to subsidies if under the plan a reasonable interpretation of the temporary regulations was applied on a consistent basis.

Loan Rules

The proposed and temporary REA 1984 regulations provided rules governing the reduction of an accrued benefit to satisfy a participant's loan obligation to the plan. Because such a reduction is treated as a distribution from the plan, it is generally subject to the applicable consent requirements of sections 411(a)(11) and 417(e). Nevertheless, the proposed and temporary regulations provided that a plan may obtain the consent of the participant and the participant's spouse within the 90-day period before a loan is secured by the accrued benefit.

The loan rules of sections 401(a)(11)(B)(iii) and 417 (a)(4) and (c)(3) were revised by the 1986 Act. Section 1.401(a)-20, Q&A 24, reflects these amendments, which closely approximate the rules in the proposed and temporary regulations.

The Department of Labor has interpretive authority over the prohibited transaction rules of section 4975. It has indicated that a loan secured by an accrued benefit subject to REA 1984 may not be adequately secured under section 4975(d)(1) if consent to a reduction in the accrued benefit is not obtained before a loan is so secured, and, therefore, may be a prohibited transaction.

DEC Benefits and Employee Contributions

The final regulations, § 1.401(a)-20, Q&As 14(b) and 39(c), contain rules applying the consent requirements to plans holding Qualified Voluntary Employee Contributions (Accumulated DECs). Accumulated DECs are plan benefits attributable to employee contributions deductible under section 219. Because the consent requirements were not applied to Accumulated DECs under the proposed and temporary regulations, these rules will not apply to distributions made before the first day of the first plan year beginning after December 31, 1988.

Further, a transitional rule is provided for plans that paid benefits attributable to employee contributions to employees who were not vested in employer contributions. Under this transitional rule, distribution of these employee contributions prior to October

22, 1986, will generally not be treated as violating sections 401(a)(11) and 417.

Annuity Starting Date

The final regulations clarify the meaning of annuity starting date. In the case of payment of a benefit as an annuity, the annuity starting date is the first day of the first period for which an annuity is paid. For example, if an annuity is paid retroactive to January 1, the annuity stating date is January 1 even though the actual payment is not made until a later date. Similarly, in the case of a payment not in an annuity form, the annuity starting date is the first day of the first period for which the benefit form is paid.

The annuity starting date is important for purposes of determining when QPSA coverage ends and, therefore, when a QJSA must be provided and when participant and spousal consent must be provided. Further, the annuity starting date is the distribution date under sections 411(a)(11) and 417(e) for purposes of determining the applicable PBGC interest rate.

Participant and spousal consent must be obtained within 90 days prior to the annuity starting date. For example, if the plan offers a deferred annuity option starting five years hence, in order for the plan to pay the deferred annuity option, participant and spousal consent to waive the QJSA and take the annuity must be obtained 90 days before the start of the period five years hence. Thus, the plan may only receive consent with respect to benefits that commence within 90 days (*i.e.*, annuity starting date is within 90 days). Any delayed payment form alternative to the QJSA requires consents at the time of commencement of the delayed payments.

Accrued Benefit, Cash-Out Rules

A plan may have more than one optional form of benefit under which benefits may be paid. There is no requirement that each form of benefit be the actuarial equivalent of all other benefit forms. Thus, a plan could have a QJSA benefit form that has a larger actuarial value than a benefit payable as a single life annuity and the amount of a single sum optional form could be determined based on the single life annuity. Similarly, a plan may provide for a retirement subsidy or an early retirement benefit that applies to the payment of a specific optional form. Whether these subsidies must be valued when calculating the amount of the single sum distribution depends on the plan provisions. The present value required by sections 411(a)(11) and 417(e) and § 1.417(e)-1(a) applies to the particular optional form of benefit as determined under the plan. The definitely determinable requirement and the requirements of section 411(c)(3) also apply in determining the amount of any optional form of benefit. Thus, a plan may satisfy such requirements even though it has a subsidized joint and survivor annuity and determines a single sum distribution based on an unsubsidized single life annuity.

The final regulations, § 1.411(a)-7(d)(2)(ii) (C) and (D) and (d)(4) (i) and (iv), change the

existing cash-out rules under section 411(a)(7) to reflect REA 1984. Generally, a plan must permit a participant to repay any plan distribution that is less than the present value of the participant's accrued benefit. The determination of the present value of the accrued benefit is based on the form of benefit distributed to the participant. A plan distributing a participant's entire accrued benefit is not required to take into account benefit subsidies described in section 411(d)(6)(B)(i) to which the participant is not currently entitled but to which the participant could subsequently be entitled. For example, if a participant receives a distribution of his entire accrued benefit at a time when he has not yet satisfied the conditions for a subsidized benefit, the plan is not required to permit the participant to repay the distribution of his benefit. If the plan does not distribute the entire accrued benefit, however, and the participant both repays the distribution and later satisfies the conditions for the subsidy, the participant must be entitled to the subsidy in order for the plan to satisfy section 411.

Executive Order 12291 and Regulatory Flexibility Act

The Treasury Department has determined that this final rule is not a major rule as defined in Executive Order 12291 and that, therefore, a regulatory impact analysis is not required.

Although a notice of proposed rulemaking that solicited public comment was issued, the Internal Revenue Service concluded that the regulations are interpretative and that the notice and public procedure requirements of 5 U.S.C. 553 did not apply. Accordingly, the final regulations do not constitute regulations subject to the Regulatory Flexibility Act (5 U.S.C. Chapter 6).

Paperwork Reduction Act

The collections of information contained in this final regulation have been reviewed and approved by the Office of Management and Budget in accordance with the requirements of the Paperwork Reduction Act (44 U.S.C. 3504(h)) under control number 1545-0928. The estimated average burden associated with the collection of information in this final rule is 35 minutes per respondent or recordkeeper. Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be directed to the Internal Revenue Service, Washington, DC 20224, *Attention:* IRS Reports Clearance Office, TR:FP and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503, Attention Desk Officer for Internal Revenue Service.

Temporary Regulations Superseded

The following table indicates sections in the temporary regulations that are superceded, the sections of the corresponding final regulation that replaces the temporary regulation and the subject matter for the regulation section:

Temporary regulation section	Final regulation section	Subject matter
Section 1.401(a)-11T	Section 1.401(a)-20	Requirements of qualified joint and survivor annuity and qualified preretirement survivor annuity.
Section 1.401(a)-13T	Section 1.401(a)-13	Assignment of alienation of benefits; special rules for qualified domestic relations orders.
Section 1.402(f)-1T	Section 1.402(f)-1	Required explanation of rollovers, capital gains, and special averaging.
Section 1.410(a)-5T	Section 1.410(a)-8	Five consecutive 1-year breaks in service, transitional rules under the Retirement Equity Act of 1984.
Section 1.410(a)-7T	Section 1.410(a)-9	Elapsed time method; maternity and paternity absence.
Section 1.411(a) (11)-1T	Section 1.411(a)-11	Restrictions and valuations of distributions.
Section 1.411(d)-3T	Section 1.411(d)-3	Class year plan -- pre-1986 year.
	Section 1.411(d)-4	Class year plans -- post-1986 year.
Section 1.417(e)-1T	Section 1.417(e)-1	Restrictions and valuations of distributions from plans subject to sections 401(a)(11) and 417.

Drafting Information

The principal authors of these final regulations are William D. Gibbs and Richard J. Wickersham, of the Employee Benefit and Exempt Organizations Division of the Office of the Chief Counsel, Internal Revenue Service. Personnel from other offices of the Internal Revenue Service and Treasury Department also participated in developing the regulations, on matters of both substance and style.

List of Subjects

26 CFR 1.401-0 -- 1.425-1

Income taxes, Employee benefit plans, Pensions.

26 CFR Part 602

Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR Parts 1 and 602 are amended as follows:

Income Tax Regulation

PART 1 -- [AMENDED]

Paragraph 1. The authority citation for Part 1 continues to read in part:

Authority: 26 U.S.C. 7805.

Par. 2. Section 1.401(a)-(11) is amended by --

1. Striking out in paragraphs (a)(1) (i), (ii) and (iii) "such benefits" and adding in lieu thereof "life annuity benefits".

2. Revising paragraph (a) (3) *Example* (1).

3. Revising paragraph (c)(2) (i)(C).

4. Revising the first two sentences of paragraph (c)(3) (ii).

5. Revising paragraph (d)(1) and adding a new paragraph (d)(5).

6. Adding a new paragraph (g).

These revised and added provisions read as follows:

§ 1.401 (a)-11 Qualified joint and survivor annuities.

(a) *General rule* -- * * *

(3) *Illustration* * * *

Example (1). The X Corporation Defined Contribution Plan was established in 1960. As in effect on January 1, 1974, the plan provided that, upon the participant's retirement, the participant may elect to receive the balance of his account in the form of (1) a single-sum cash payment, (2) a single-sum distribution consisting of X Corporation stock, (3) five equal annual cash payments, (4) a life annuity, or (5) a combination of options (1) through (4). The plan also provided that, if a participant did not elect another form of distribution, the balance of his account would be distributed to him in the form of a single-sum cash payment upon his retirement. Assume that section 401(a)(11) and this section became applicable to the plan as of its plan year beginning January 1, 1976, with respect to persons who were active participants in the plan as of such date (see paragraph (f) of this section). If X Corporation Defined Contribution Plan continues to allow the life annuity payment option after December 31, 1975, it must be amended to provide that if a participant elects a life annuity option the life annuity benefit will be paid in a form having the effect of a qualified joint and survivor annuity, except to the extent that the participant elects another form of benefit payment. However, the plan can continue to provide that, if no election is made, the balance will be paid as a single-sum cash payment. If the trust is not so amended, it will fail to qualify under section 401(a).

* * * * *

(c) *Election.* * * *

(2) *Election of early survivor annuity* -- (i) *In general.* * * *

(C) A plan is not required to provide an election under this subparagraph if --

(*1*) The plan provides that an early survivor annuity is the only form of benefit payable under the plan with respect to a married participant who dies while employed by an employer maintaining the plan,

(*2*) In the case of a defined contribution plan, the plan provides a survivor benefit at least equal in value to the vested portion of the participant's account balance, if the participant dies while in active service with an employer maintaining the plan, or

(*3*) In the case of a defined benefit plan, the plan provides a survivor benefit at least equal in value to the present value of the vested portion of the participant's normal form of the accrued benefit payable at normal retirement age (determined immediately prior to death), if the participant dies while in active service with an employer maintaining the plan. Any present values must be determined in accordance with either the actuarial assumptions or factors specified in the plan, or a variable standard independent of employer discretion for converting optional benefits specified in the plan.

* * * * *

(3) *Information to be provided by plan administrator.*

* * * * *

(ii) The method or methods used to provide the information described in subdivision (i) of this subparagraph may vary. Posting which meets the requirements of § 1.7476-2(c)(1) may be used; see § 1.7476-2(c)(1) for examples of other methods which may be used. * * *

(d) *Permissible additional plan provisions* -- (1) *In general.* A plan will not fail to meet the requirements of section 401(a)(11) and this section merely because it contains one or more of the provisions described in paragraphs (d)(2) through (5) of this section.

* * * * *

(5) *Benefit option approval by third party.* (i) A plan may provide that an optional form of benefit elected by a participant is subject to the approval of an administrative committee or similar third party. However, the administrative committee cannot deny a participant any of the benefits required by section 401(a)(11). For example, if a plan offers a life annuity option, the committee may deny the participant a qualified joint and survivor annuity only by denying the participant access to all life annuity options without knowledge of whether the participant wishes to receive a qualified joint and survivor annuity. Alternatively, if the committee knows which form of life annuity the participant has chosen before the committee makes its decision, the committee cannot withhold its consent for payment of a qualified joint and survivor annuity event though it denies all other life annuity options. This subparagraph (5) only applies before the effective date of the amendment made to section 411(d)(6) by section 301 of the Retirement Equity Act of 1984. See section 411(d)(6) and the regulations thereunder for rules limiting employer discretion.

(ii) The provisions of this subparagraph may be illustrated by the following example:

Example. In 1980 plan M provides that the automatic form of benefit is a single sum distribution. The plan also permits, subject to approval by the administrative committee, the election of several optional forms of life annuity. On the election form that is reviewed by the administrative committee the participant indicates whether any life annuity option is preferred, without indicating the particular life annuity chosen. Thus, the committee approves or disapproves the election without knowledge of whether a qualified joint and survivor annuity will be elected. The administrative committee approval provision in Plan M does not cause the plan to fail to satisfy this section. On the other hand, if the form indicates which form of life annuity is preferred, committee disapproval of any election of the qualified joint and survivor annuity would cause the

plan to fail to satisfy this section.

* * * * *

(g) *Effect of REA 1984* -- (1) *In general.* The Retirement Equity Act of 1984 (REA 1984) significantly changed the qualified joint and survivor annuity rules generally effective for plan years beginning after December 31, 1984. The new survivor annuity rules are primarily in sections 401(a)(11) and 417 as revised by REA 1984 and §§ 1.401(a)-20 and 417(e)-1.

(2) *Regulations after REA 1984.* (i) REA and the regulations thereunder to the extent inconsistent with pre-REA 1984 section 401(a)(11) and this section are controlling for years to which REA 1984 applies. See *e.g.,* paragraphs (a)(1) and (2) of this section, relating to required provisions and certain cash-outs, respectively and (e), relating to costs of providing annuities, for rules that are inconsistent with REA 1984 and, therefore, are not applicable to REA 1984 years.

(ii) To the extent that the pre-REA 1984 law either is the same as or consistent with REA 1984 and the new regulations hereunder, the rules in this section shall continue to apply for years to which REA 1984 applies. (See, *e.g.,* paragraph (c) (relating to how information is furnished participants and spouses) and paragraph (b) (defining a life annuity) for some of the rules that apply to REA 1984 years.) The rules in this section shall not apply for such year to the extent that they are inconsistent with REA 1984 and the regulations thereunder.

(iii) The Commissioner may provide additional guidance as to the continuing effect of the various rules in this section for years to which REA applies.

§ 1.401(a)-11T [Removed]

Par. 3. Section 1.401(a)-11T is removed. New § 1.401(a)-20 is added in its place immediately after § 1.401(a)-19 to read as follows:

§ 1.401(a)-20 Requirements of qualified joint and survivor annuity and qualified preretirement survivor annuity.

Q-1: What are the survivor annuity requirements added to the Code by the Retirement Equity Act of 1984 (REA 1984)?

A-1: REA 1984 replaced section 401(a)(11) with a new section 401(a)(11) and added section 417. Plans to which new section 401(a)(11) applies must comply with the requirements of sections 401(a)(11) and 417 in order to remain qualified under sections 401(a) or 403(a). In general, these plans must provide both a qualified joint and survivor annuity (QJSA) and a qualified preretirement survivor annuity (QPSA) to remain qualified. These survivor annuity requirements are applicable to any benefit payable

under a plan, including a benefit payable to a participant under a contract purchased by the plan and paid by a third party.

Q-2: Must annuity contracts purchased and distributed to a participant or spouse by a plan subject to the survivor annuity requirements of sections 401(a)(11) and 417 satisfy the requirements of those sections?

A-2: Yes. Rights and benefits under section 401(a)(11) or 417 may not be eliminated or reduced because the plan uses annuity contracts to provide benefits merely because (a) such a contract is held by a participant or spouse instead of a plan trustee, or (b) such contracts are distributed upon plan termination. Thus, the requirements of sections 401(a)(11) and 417 apply to payments under the annuity contracts, not to the distributions of the contracts.

Q-3: What plans are subject to the survivor annuity requirements of section 401(a)(11)?

A-3: (a) Section 401(a)(11) applies to any defined benefit plan and to any defined contribution plan that is subject to the minimum funding standards of section 412. This section also applies to any participant under any other defined contribution plan unless all of the following conditions are satisfied --

(1) The plan provides that the participant's nonforfeitable accrued benefit is payable in full, upon the participant's death, to the participant's surviving spouse (unless the participant elects, with spousal consent that satisfies the requirements of section 417(a)(2), that such benefit be provided instead to a designated beneficiary);

(2) The participant does not elect the payment of benefits in the form of a life annuity; and

(3) With respect to the participant, the plan is not a transferee or an offset plan. (See Q&A 5 of this section.)

(b) A defined contribution plan not subject to the minimum funding standards of section 412 will not be treated as satisfying the requirement of paragraph (a)(1) unless both of the following conditions are satisfied --

(1) The benefit is available to the surviving spouse within a reasonable time after the participant's death. For this purpose, availability within the 90-day period following the date of death is deemed to be reasonable and the reasonableness of longer periods shall be determined based on the particular facts and circumstances. A time period longer than 90 days, however, is deemed unreasonable if it is less favorable to the surviving spouse than any time period under the plan that is applicable to other distributions. Thus, for example, the availability of a benefit to the surviving spouse would be unreasonable if the distribution was required to be made by the close of the plan year including the participant's death while distributions to employees who separate from service were required to be made within 90 days of separation.

(2) The benefit payable to the surviving spouse is adjusted for gains or losses occurring after the participant's death in accordance with plan rules governing the adjustment of account balances for other plan distributions. Thus, for example, the plan may not provide for distributions of an account balance to a surviving spouse determined as of the last day of the quarter in which the participant's death occurred with no adjustments of an account balance for gains or losses after death if the plan provides for such adjustments for a participant who separates from service within a quarter.

(c) For purposes of determining the extent to which section 401(a)(11) applies to benefits under an employee stock ownership plan (as defined in section 4975(e)(7)), the portion of a participant's accrued benefit that is subject to section 409(h) is to be treated as though such benefit were provided under a defined contribution plan not subject to section 412.

(d) The requirements set forth in section 401(a)(11) apply to other employee benefit plans that are covered by applicable provisions under Title I of the Employee Retirement Income Security Act of 1974. For purposes of applying the regulations under sections 401(a)(11) and 417, plans subject to ERISA section 205 are treated as if they were described in section 401(a). For example, to the extent that section 205 covers section 403(b) contracts and custodial accounts they are treated as section 401(a) plans. Individual retirement plans (IRAs), including IRAs to which contributions are made under simplified employee pensions described in section 408(k) and IRAs that are treated as plans subject to Title I, are not subject to these requirements.

Q-4: What rules apply to a participant who elects a life annuity option under a defined contribution plan not subject to section 412?

A-4: If a participant elects at any time (irrespective of the applicable election period defined in section 417(a)(6)) a life annuity option under a defined contribution plan not subject to section 412, the survivor annuity requirements of sections 401(a)(11) and 417 will always thereafter apply to all of the participant's benefits under such plan unless there is a separate accounting of the account balance subject to the election. A plan may allow a participant to elect an annuity option prior to the applicable election period described in section 417(a)(6). If a participant elects an annuity option, the plan must satisfy the applicable written explanation, consent, election, and withdrawal rules of section 417, including waiver of the QJSA within 90 days of the annuity starting date. If a participant selecting such an option dies, the surviving spouse must be able to receive the QPSA benefit described in section 417(c)(2) which is a life annuity, the actuarial equivalent of which is not less than 50 percent of the nonforfeitable account balance (adjusted for loans as described in Q&A 24(d) of this section). The remaining account balance may be paid to a designated nonspouse beneficiary.

Q-5: How do sections 401(a)(11) and 417 apply to transferee plans which are defined contribution plans not subject to section 412?

A-5: (a) *Transferee plans.* Although the survivor annuity requirements of sections 401(a)

(11) and 417 generally do not apply to defined contribution plans not subject to section 412, such plans are subject to the survivor annuity requirements to the extent that they are transferee plans with respect to any participant. A defined contribution plan is a transferee plan with respect to any participant if the plan is a direct or indirect transferee of such participant's benefits held on or after January 1, 1985, by:

(1) A defined benefit plan,

(2) A defined contribution plan subject to section 412

or

(3) A defined contribution plan that is subject to the survivor annuity requirements of sections 401(a)(11) and 417 with respect to that participant.

If through a merger, spinoff, or other transaction having the effect of a transfer, benefits subject to the survivor annuity requirements of sections 401(a)(11) and 417 are held under a plan that is not otherwise subject to such requirements, such benefits will be subject to the survivor annuity requirements even though they are held under such plan. Even if a plan satisfies the survivor annuity requirements, other rules apply to these transactions. See, *e.g.*, section 411(d)(6) and the regulations thereunder. A transfer made before January 1, 1985, and any rollover contribution made at any time, are not transactions that subject to the transferee plan to the survivor annuity requirements with respect to a participant. If a plan is a transferee plan with respect to a participant, the survivor annuity requirements do not apply with respect to other plan participants solely because of the transfer. Any plan that would not otherwise be subject to the survivor annuity requirements of sections 401(a)(11) and 417 whose benefits are used to offset benefits in a plan subject to such requirements is subject to the survivor annuity requirements with respect to those participants whose benefits are offset. Thus, if a stock bonus or profit-sharing plan offsets benefits under a defined benefit plan, such a plan is subject to the survivor annuity requirements.

(b) *Benefits covered.* The survivor annuity requirements apply to all accrued benefits held for a participant with respect to whom the plan is a transferee plan unless there is an acceptable separate accounting between the transferred benefits and all other benefits under the plan. A separate accounting is not acceptable unless gains, losses, withdrawals, contributions, forfeitures, and other credits or charges are allocated on a reasonable and consistent basis between the accrued benefits subject to the survivor annuity requirements and other benefits. If there is an acceptable separate accounting between transferred benefits and any other benefits under the plan, only the transferred benefits are subject to the survivor annuity requirements.

Q-6: Is a frozen or terminated plan required to satisfy the survivor annuity requirements of sections 401(a)(11) and 417?

A-6: In general, benefits provided under a plan that is subject to the survivor annuity requirements of sections 401(a)(11) and 417 must be provided in accordance with those requirements even if the plan is frozen or terminated. However, any plan that has a termination date prior to September 17, 1985, and that distributed all remaining assets as soon as administratively feasible after the termination date, is not subject to the survivor annuity requirements. The date of termination is determined under section 411(d)(3) and § 1.411(d)-2(c).

Q-7: If the Pension Benefit Guaranty Corporation (PBGC) is administering a plan are benefits payable in the form of a OPSA or QJSA

A-7: Yes, the PBGC will pay benefits in such forms.

Q-8: How do the survivor annuity requirements of sections 401(a)(11) and 417 apply to participants?

A-8: (a) If a participant dies before the annuity starting date with vested benefits attributable to employer or employee contributions (or both), benefits must be paid to the surviving spouse in the form of a QPSA. If a participant survives until the annuity starting date with vested benefits attributable to employer or employee contributions (or both), benefits must be provided to the participant in the form of a QJSA.

(b) A participant may waive the QPSA or the QJSA (or both) if the applicable notice, election, and spousal consent requirements of section 417 are satisfied.

(c) Benefits are not required to be paid in the form of a QPSA or QJSA if at the time of death or distribution the participant was vested only in employee contributions and such death occurred, or distribution commenced, before October 22, 1986.

(d) *Certain mandatory distributions.* A distribution may occur without satisfying the spousal consent requirements of section 417 (a) and (e) if the present value of the nonforfeitable benefit does not exceed $3,500. See § 1.417(e)-1.

Q-9: May separate portions of a participant's accrued benefit be subject to QPSA and QJSA requirements at any particular point in time?

A-9: (a) *Dual QPSA and QJSA rights.* One portion of a participant's benefit may be subject to the QPSA and another portion to the QJSA requirements at the same time. For example, in order for a money purchase pension plan to distribute any portion of a married participant's benefit to the participant, the plan must distribute such portion in the form of a QJSA (unless the plan satisfies the applicable consent requirements of section 417 (a) and (e) with respect to such portion of the participant's benefit). This rule applies even if the distribution is merely an in-service distribution attributable to voluntary employee contributions and regardless of whether the participant has attained the normal retirement age under the plan. The QJSA requirements apply to such a distribution because the annuity starting date has occurred with respect to this portion of the

participant's benefit. In the event of a participant's death following the commencement of a distribution in the form of a QJSA, the remaining payments must be made to the surviving spouse under the QJSA. In addition, the plan must satisfy the QPSA requirements with respect to any portion of the participant's benefits for which the annuity starting date had not yet occurred.

(b) *Example.* Assume that participant A has a $100,000 account balance in a money purchase pension plan. A makes an in-service withdrawal of $20,000 attributable to voluntary employee contributions. The QJSA requirements apply to A's withdrawal of the $20,000. Accordingly, unless the QJSA form is properly waived such amount must be distributed in the form of a QJSA. A's remaining account balance ($80,000) remains subject to the QPSA requirements because the annuity starting date has not occurred with respect to the $80,000. (If A survives until the annuity starting date, the $80,000 would be subject to the QJSA requirements.) If A died on the day following the annuity starting date for the withdrawal, A's spouse would be entitled to a QPSA with a value equal to at least $40,000 with respect to the $80,000 account balance, in addition to any survivor benefit without respect to the $20,000. If the $20,000 payment to A had been the first payment of an annuity purchased with the entire $100,000 account balance rather than an in-service distribution, then the QJSA requirements would apply to the entire account balance at the time of the annuity starting date. In such event, the plan would have no obligation to provide A's spouse with a QPSA benefit upon A's death. Of course, A's spouse would receive the QJSA benefit (if the QJSA had not been waived) based on the full $100,000.

Q-10: What is the relevance of the annuity starting date with respect to the survivor benefit requirements?

A-10: (a) *Relevance.* The annuity starting date is relevant to whether benefits are payable as either a QJSA or QPSA, or other selected optional form of benefit. If a participant is alive on the annuity starting date, the benefits must be payable as a QJSA. If the participant is not alive on the annuity starting date, the surviving spouse must receive a QPSA. The annuity starting date is also used to determine when a spouse may consent to and a participant may waive a QJSA. A waiver is only effective if it is made 90 days before the annuity starting date. Thus, a deferred annuity cannot be selected and a QJSA waived until 90 days before payments commence under the deferred annuity. In some cases, the annuity starting date will have occurred with respect to a portion of the participant's accrued benefit and will not have occurred with respect to the remaining portion. (See Q&A-9.)

(b) *Annuity starting date* -- (1) *General rule.* For purposes of sections 401(a)(11), 411(a)(11) and 417, the annuity starting date is the first day of the first period for which an amount is paid as an annuity or any other form.

(2) *Annuity payments.* The annuity starting date is the first date for which an amount is paid, not the actual date of payment. Thus, if participant A is to receive annuity payments as of the first day of the first month after retirement but does not receive any payments

until three months later, the annuity starting date is the first day of the first month. For example, if an annuity is to commence on January 1, January 1 is the annuity starting date even though the payment for January is not actually made until a later date. In the case of a deferred annuity, the annuity starting date is the date for which the annuity payments are to commence, not the date that the deferred annuity is elected or the date the deferred annuity contract is distributed.

(3) *Administrative delay.* A payment shall not be considered to occur after the annuity starting date merely because actual payment is reasonably delayed for calculation of the benefit amount if all payments are actually made.

(4) *Forfeitures on death.* Prior to the annuity starting date, section 411(a)(3)(A) allows a plan to provide for a forfeiture of a participant's benefit, except in the case of a QPSA or a spousal benefit described in section 401(a)(11)(B)(iii)(I). Once the annuity starting date has occurred, even if actual payment has not yet been made, a plan must pay the benefit in the distribution form elected.

(5) *Surviving spouses, alternate payees, etc.* The definition of "annuity starting date" for surviving spouses, other beneficiaries and alternate payees under section 414(p) is the same as it is for participants.

(c) *Disability auxiliary benefit* -- (1) *General rule.* The annuity starting date for a disability benefit is the first day of the first period for which the benefit becomes payable unless the disability benefit is an auxiliary benefit. The payment of any auxiliary disability benefits is disregarded in determining the annuity starting date. A disability benefit is an auxiliary benefit if upon attainment of early or normal retirement age, a participant receives a benefit that satisfies the accrual and vesting rules of section 411 without taking into account the disability benefit payments up to that date.

(2) *Example.* (i) Assume that participant A at age 45 is entitled to a vested accrued benefit of $100 per month commencing at age 65 in the form of a joint and survivor annuity under Plan X. If prior to age 65 A receives a disability benefit under Plan X and the payment of such benefit does not reduce the amount of A's retirement benefit of $100 per month commencing at age 65, any disability benefit payments made to A between ages 45 and 65 are auxiliary benefits. Thus, A's annuity starting date does not occur until A attains age 65. A's surviving spouse B would be entitled to receive a QPSA if A died before age 65. B would be entitled to receive the survivor portion of a QJSA (unless waived) if A died after age 65. The QPSA payable to B upon A's death prior to age 65 would be computed by reference to the QJSA that would have been payable to A and B had A survived to age 65.

(ii) If in the above example A's benefit payable at age 65 is reduced to $99 per month because a disability benefit is provided to A prior to age 65, the disability benefit would not be an auxiliary benefit. The benefit of $99 per month payable to A at age 65 would not, without taking into account the disability benefit payments to A prior to age 65, satisfy the minimum vesting and accrual rules of section 411. Accordingly, the first day

of the first period for which the disability payments are to be made to A would constitute A's annuity starting date, and any benefit paid to A would be required to be paid in the form of a QJSA (unless waived by A with the consent of B).

(d) *Other rules* -- (1) *Suspension of benefits.* If benefit payments are suspended after the annuity starting date pursuant to a suspension of benefits described in section 411(a)(3)(B) after an employee separates from service, the recommencement of benefit payments after the suspension is not treated as a new annuity starting date unless the plan provides otherwise. In such case, the plan administrator is not required to provide new notices nor to obtain new waivers for the recommenced distributions if the form of distribution is the same as the form that was appropriately selected prior to the suspension. If benefits are suspended for an employee who continues in service without a separation and who never receives payments, the commencement of payments after the period of suspension is treated as the annuity starting date unless the plan provides otherwise.

(2) *Additional accruals.* In the case of an annuity starting date that occurs on or after normal retirement age, such date applies to any additional accruals after the annuity starting date, unless the plan provides otherwise. For example, if a participant who continues to accrue benefits elects to have benefits paid in an optional form at normal retirement age, the additional accruals must be paid in the optional form selected unless the plan provides otherwise. In the case of an annuity starting date that occurs prior to normal retirement age, such date does not apply to any additional accruals after such date.

Q-11: Do the survivor annuity requirements apply to benefits derived from both employer and employee contributions?

A-11: Yes. The survivor annuity benefit requirements apply to benefits derived from both employer and employee contributions. Benefits are not required to be paid in the form of a QPSA or QJSA if the participant was vested only in employee contributions at the time of death or distribution and such death or distribution occurred before October 22, 1986. All benefits provided under a plan, including benefits attributable to rollover contributions, are subject to the survivor annuity requirements.

Q-12: To what benefits do the survivor annuity requirements of sections 401(a)(11) and 417 apply?

A-12: (a) *Defined benefit plans.* Under a defined benefit plan, sections 401(a)(11) and 417 apply only to benefits in which a participant was vested immediately prior to death. They do not apply to benefits to which a participant's beneficiary becomes entitled by reason of death or to the proceeds of a life insurance contract to the extent such proceeds exceed the present value of the participant's nonforfeitable benefits that existed immediately prior to death.

(b) *Defined contribution plans.* Sections 401(a)(11) and 417 apply to all nonforfeitable benefits which are payable under a defined contribution plan, whether nonforfeitable before or upon death, including the proceeds of insurance contracts.

Q-13: Does the rule of section 411(a)(3)(A) which permits forfeitures on account of death apply to a QPSA or the spousal benefit described in section 401(a)(11)(B)(iii)?

A-13: No. Section 411(a)(3)(A) permits forfeiture on account of death prior to the time all the events fixing payment occur. However, this provision does not operate to deprive a surviving spouse of a QPSA or the spousal benefit described in section 401(a)(11)(B)(iii). Therefore, sections 401(a)(11) and 417 apply to benefits that were nonforfeitable immediately prior to death (determined without regard to section 411(a)(3)(A)). Thus, in the case of the death of a married participant in a defined contribution plan not subject to section 412 which provides that, upon a participant's death, the entire nonforfeitable accrued benefit is payable to the participant's spouse, the nonforfeitable benefit is determined without regard to the provisions of section 411(a)(3)(A).

Q-14: Do sections 411(a)(11), 401(a)(11) and 417 apply to accumulated deductible employee contributions, as defined in section 72(o)(5)(B) (Accumulated DECs)?

A-14: (a) *Employee consent, section 411.* The requirements of section 411(a)(11) apply to Accumulated DECs. Thus, Accumulated DECs may not be distributed without participant consent unless the applicable exemptions apply.

(b) *Survior requirements.* Accumulated DECs are treated as though held under a separate defined contribution plan that is not subject to section 412. Thus, section 401(a)(11) applies to Accumulated DECs only as provided in section 401(a)(11)(B)(iii). All Accumulated DECs are treated in this manner, including Accumulated DECs that are the only benefit held under a plan and Accumulated DECs that are part of a defined benefit or a defined contribution plan.

(c) *Effective date.* Sections 401(a)(11) and 411(a)(11) shall not apply to distributions of accumulated DECs until the first plan year beginning after December 31, 1988.

Q-15: How do the survivor annuity requirements of sections 401(a)(11) and 417 apply to a defined benefit plan that includes an accrued benefit based upon a contribution to a separate account or mandatory employee contributions?

A-15: (a) *414(k) plans.* In the case of a section 414(k) plan that includes both a defined benefit plan and a separate account, the rules of sections 401(a)(11) and 417 apply separately to the defined benefit portion and the separate account portion of the plan. The separate account portion is subject to the survivor annuity requirements of sections 401(a)(11) and 417 and the special QPSA rules in section 417(c)(2).

(b) *Employee contributions* -- (1) *Voluntary.* In the case of voluntary employee contributions to a defined benefit plan, the plan must maintain a separate account with respect to the voluntary employee contributions. This separate account is subject to the survivor annuity requirements of sections 401(a)(11) and 417 and the special QPSA rules in section 417(c)(2).

(2) *Mandatory.* In the case of a defined benefit plan providing for mandatory employee contributions, the entire accrued benefit is subject to the survivor annuity requirements of sections 401(a)(11) and 417 as a defined benefit plan.

(c) *Accumulated DECs.* See Q&A 14 of this section for the rule applicable to accumulated deductible employee contributions.

Q-16: Can a plan provide a benefit form more valuable than the QJSA and if a plan offers more than one annuity option satisfying the requirements of a QJSA, is spousal consent required when the participant chooses among the various forms?

A-16: In the case of an unmarried participant, the QJSA may be less valuable than other optional forms of benefit payable under the plan. In the case of married participant, the QJSA must be at least as valuable as any other optional form of benefit payable under the plan at the same time. Thus, if a plan has two joint and survivor annuities that would satisfy the requirements for a QJSA, but one has a greater actuarial value than the other, the more valuable joint and survivor annuity is the QJSA. If there are two or more actuarially equivalent joint and survivor annuities that satisfy the requirements for a QJSA, the plan must designate which one is the QJSA and, therefore, the automatic form of benefit payment. A plan, however, may allow a participant to elect out of such a QJSA, without spousal consent, in favor of another actuarially equivalent joint and survivor annuity that satisfies the QJSA conditions. Such an election is not subject to the requirement that it be made within the 90-day period before the annuity starting date. For example, if a plan designates a joint and 100% survivor annuity as the QJSA and also offers an actuarially equivalent joint and 50% survivor annuity that would satisfy the requirements of a QJSA, the participant may elect the joint and 50% survivor annuity without spousal consent. The participant, however, does need spousal consent to elect a joint and survivor annuity that was not actuarially equivalent to the automatic QJSA.

Q-17: When must distributions to a participant under a QJSA commence?

A-17: (a) *QJSA benefits upon earliest retirement.* A plan must permit a participant to receive a distribution in the form of a QJSA when the participant attains the earliest retirement age under the plan. Written consent of the participant is required. However, the consent of the participant's spouse is not required. Any payment not in the form of a QJSA is subject to spousal consent. For example, if the participant separates from service under a plan that allows for distributions on separation from service or if a plan allows for in-service distributions, the participant may receive a QJSA without spousal consent in such events. Payments in any other form, including a single sum, would require waiver of the QJSA by the participant's spouse.

(b) *Earliest retirement age.* (1) This paragraph (b) defines the term "earliest retirement age" for purposes of sections 401(a)(11), 411(a)(11) and 417.

(2) In the case of a plan that provides for voluntary distributions that commence upon the

participant's separation from service, earliest retirement age is the earliest age at which a participant could separate from service and receive a distribution. Death of a participant is treated as a separation from service.

(3) In the case of a plan that provides for in-service distributions, earliest retirement age is the earliest age at which such distributions may be made.

(4) In the case of a plan not described in subparagraph (2) or (3) of this paragraph, the rule below applies. Earliest retirement age is the early retirement age determined under the plan, or if no early retirement age, the normal retirement age determined under the plan. If the participant dies or separates from service before such age, then only the participant's actual years of service at the time of the participant's separation from service or death are taken into account. Thus, in the case of a plan under which benefits are not payable until the attainment of age 65, or upon attainment of age 55 and completion of 10 years of service, the earliest retirement age of a participant who died or separated from service with 8 years of service is when the participant whould have attained age 65 (if the participant had survived). On the other hand, if a participant died or separated from service after 10 years of service, the earliest retirement age is when the participant would have attained age 55 (if the participant had survived).

Q-18: What is a qualified preretirement survivor annuity (QPSA) in a defined benefit plan?

A-18: A QPSA is an immediate annuity for the life of the surviving spouse of a participant. Each payment under a QPSA under a defined benefit plan is not to be less than the payment that would have been made to the survivor under the QJSA payable under the plan if (a) in the case of a participant who dies after attaining the earliest retirement age under the plan, the participant had retired with a QJSA on the day before the participant's death, and (b) in the case of a participant who dies on or before the participant's earliest retirement age under the plan, the participant had separated from service at the earlier of the actual time of separation or death, survived until the earliest retirement age, retired at that time with a QJSA, and died on the day thereafter. If the participant elects before the annuity starting date a form of joint and survivor annuity that satisfies the requirements for a QJSA and dies before the annuity starting date, the elected form is treated as the QJAS and the QPSA must be based on such form.

Q-19: What rules apply in determining the amount and forfeitability of a QPSA?

A-19: The QPSA is calculated as of the earliest retirement age if the participant dies before such time, or at death if the participant dies after the earliest retirement age. The plan must make reasonable actuarial adjustments to reflect a payment earlier or later than the earliest retirement age. A defined benefit plan may provide that the QPSA is forfeited if the spouse does not survive until the date prescribed under the plan for commencement of the QPSA (*i.e.,* the earliest retirement age). Similarly, if the spouse survives past the participant's earliest retirement age (or other earlier QPSA distribution date under the plan) and elects after the death of the participant to defer the commencement of the

QPSA to a later date, a defined benefit plan may provide for a forfeiture of the QPSA benefit if the spouse does not survive until the deferred commencement date. The account balance in a defined contribution plan may not be forfeited even though the spouse does not survive until the time the account balance is used to purchase the QPSA. See Q&A-17 of this section for the meaning of earliest retirement age.

Q-20: What preretirement survivor annuity benefits must a defined contibution plan subject to the survivor annuity requirements of sections 401(a)(11) and 417 provide?

A-20: A defined contribution plan that is subject to the survivor annuity requirements of sections 401(a)(11) and 417 must provide a preretirement survivor annuity with a value which is not less than 50 percent of the nonforfeitable account balance of the participant as of the date of the participant's death. If a contributory defined contribution plan has a forfeiture provision permitted by section 411(a)(3)(A), not more than a proportional percent of the account balance attributable to contributions that may not be forfeited at death (for example, employee and section 401(k) contributions) may be used to satisfy the QPSA benefit. Thus, for example, if the QPSA benefit is to be provided from 50 percent of the account balance, not more than 50 percent of the nonforfeitable contributions may be used for the QPSA.

Q-21: May a defined benefit plan charge the participant for the cost of the QPSA benefit?

A-21: Prior to the later of the time the plan allows the participant to waive the QPSA or provides notice of the ability to waive the QPSA, a defined benefit plan may not charge the participant for the cost of the QPSA by reducing the participant's plan benefits or by any other method. The preceding sentence does not apply to any charges prior to the first plan year beginning after December 31, 1988. Once the participant is given the opportunity to waive the QPSA or the notice of the QPSA is later, the plan may charge the participant for the cost of the QPSA. A charge for the QPSA that reasonably reflects the cost of providing the QPSA will not fail to satisfy section 411 even if it reduces the accrued benefit.

Q-22: When must distributions to a surviving spouse under a QPSA commence?

A-22: (a) In the case of a defined benefit plan, the plan must permit the surviving spouse to direct the commencement of payments under QPSA no later than the month in which the participant would have attained the earliest retirement age. However, a plan may permit the commencement of payments at an earlier date.

(b) In the case of a defined contribution plan, the plan must permit the surviving spouse to direct the commencement of payments under the QPSA within a reasonable time after the participant's death.

Q-23: Must a defined benefit plan obtain the consent of a participant and the participant's spouse to commence payments in the form of a QJSA in order to avoid violating section 415 or 411(b)?

A-23: No. A defined benefit plan may commence distributions in the form of a QJSA without the consent of the participant and spouse, even if consent would otherwise be required (see § 1.417(e)-1(b)), to the extent necessary to avoid a violation of section 415 or 411(b). For example, assume a plan has a normal retirement age of 55. A is a married participant, age 55, and has accrued a $75,000 joint and 100 percent survivor annuity that satisfies section 415. If an actuarial increase would be required under section 411 because of deferred commencement and the increase would cause the benefit to exceed the applicable limit under section 415, the plan may commence payment of a QJSA at age 55 without the participant's election or consent and without the spouse's concent.

Q-24: What are the rules under sections 401(a)(11) and 417 applicable to plan loans?

A-24: (a) *Consent rules.* (1) A plan does not satisfy the survivor annuity requirements of sections 401(a)(11) and 417 unless the plan provides that, at the time the participant's accrued benefit is used as security for a loan, spousal consent to such use is obtained. Consent is required even if the accrued benefit is not the primary security for the loan. No spousal consent is necessary if, at the time the loan is secured, no consent would be required for a distribution under section 417(a)(2)(B). Spousal consent is not required if the plan or the participant is not subject to section 401(a)(11) at the time the accrued benefit is used as security, or if the total accrued benefit subject to the security is not in excess of $3,500. The spousal consent must be obtained no earlier than the beginning of the 90-day period that ends on the date on which the loan is to be so secured. The consent is subject to the requirements of section 417(a)(2). Therefore, the consent must be in writing, must acknowledge the effect of the loan and must be witnessed by a plan representative or a notary public.

(2) Participant consent is deemed obtained at the time the participant agrees to use his accrued benefit as security for a loan for purposes of satisfying the requirements for participant consent under sections 401(a)(11), 411(a)(11) and 417.

(b) *Change in status.* If spousal consent is obtained or is not required under paragraph (a) of this Q&A 24 at the time the benefits are used as security, spousal consent is not required at the time of any setoff of the loan against the accrued benefit resulting from a default, even if the participant is married to a different spouse at the time of the setoff. Similarly, in the case of a participant who secured a loan while unmarried, no consent is required at the time of a setoff of the loan against the accrued benefit even if the participant is married at the time of the setoff.

(c) *Renegotiation.* For the purposes of obtaining any required spousal consent, any renegotiation, extension, renewal, or other revision of a loan shall be treated as a new loan made on the date of the renegotiation, extension, renewal, or other revision.

(d) *Effect on benefits.* For purposes of determining the amount of a QPSA or QJSA, the accrued benefit of a participant shall be reduced by any security interest held by the plan by reason of a loan outstanding to the participant at the time of death or payment, if the

security interest is treated as payment in satisfaction of the loan under the plan. A plan may offset any loan outstanding at the participant's death which is secured by the participant's account balance against the spousal benefit required to be paid under section 401(a)(11)(B)(iii).

(e) *Effective date.* Loans made prior to August 19, 1985, are deemed to satisfy the consent requirements of paragraph (a) of this Q&A 24.

Q-25: How do the survivor annuity requirements of sections 401(a)(11) and 417 apply with respect to participants who are not married or to surviving spouses and participants who have a change in marital status?

A-25: (a) *Unmarried participant rule.* Plans subject to the survivor annuity requirements of sections 401(a)(11) and 417 must satisfy those requirements applicable to QJSAs with respect to participants who are not married. A QJSA for a participant who is not married is an annuity for the life of the participant. Thus, an unmarried participant must be provided the written explanation described in section 417(a)(3)(A) and a single life annuity unless another form of benefit is elected by the participant. An unmarried participant is deemed to have waived the QPSA requirements. This deemed waiver is null and void if the participant later marries.

(b) *Marital status change.* -- (1) *Remarriage.* If a participant is married on the date of death, payments to a surviving spouse under a QPSA or QJSA must continue even if the surviving spouse remarries.

(2) *One-year rule.* (i) A plan is not required to treat a participant as married unless the participant and the participant's spouse have been married throughout the one-year period ending on the earlier of (A) the participant's annuity starting date or (B) the date of the participant's death. Nevertheless, for purposes of the preceding sentence, a participant and the participant's spouse must be treated as married throughout the one-year period ending on the participant's annuity starting date even though they are married to each other for less than one year before the annuity starting date if they remain married to each other for at least one year. See section 417(d)(2). If a plan adopts the one-year rule provided in section 417(d), the plan must treat the participant and spouse who are married on the annuity starting date as married and must provide benefits which are to commence on the annuity starting date in the form of a QJSA unless the participant (with spousal consent) elects another form of benefit. The plan is not required to provide the participant with a new or retroactive election or the spouse with a new consent when the one-year period is satisfied. If the participant and the spouse do not remain married for at least one year, the plan may treat the participant as having not been married on the annuity starting date. In such event, the plan may provide that the spouse loses any survivor benefit right; further, no retroactive correction of the amount paid the participant is required.

(ii) *Example.* Plan X provides that participants who are married on the annuity starting date for less than one year are treated as unmarried participants. Plan X provides benefits in the form of a QJSA or an optional single sum distribution. Participant A was married 6

months prior to the annuity starting date. Plan X must treat A as married and must commence payments to A in the form of a QJSA unless another form of benefit is elected by A with spousal consent. If a QJSA is paid and A is divorced from his spouse S, within the first year of the marriage, S will no longer have any survivor rights under the annuity (unless a QDRO provides otherwise). If A continues to be married to S, and A dies within the one-year period, Plan X may treat A as unmarried and forfeit the OJSA benefit payable to S.

(3) *Divorce.* If a participant divorces his spouse prior to the annuity starting date, any elections made while the participant was married to his former spouse remain valid, unless otherwise provided in a QDRO, or unless the participant changes them or is remarried. If a participant dies after the annuity starting date, the spouse to whom the participant was married on the annuity starting date is entitled to the QJSA protection under the plan. The spouse is entitled to this protection (unless waived and consented to by such spouse) even if the participant and spouse are not married on the date of the participant's death, except as provided in a QDRO.

Q-26: In the case of a defined contribution plan not subject to section 412, does the requirement that a participant's nonforfeitable accrued benefit be payable in full to a surviving spouse apply to a spouse who has been married to the participant for less than one year?

A-26: A plan may provide that a spouse who has not been married to a participant throughout the one-year period ending on the earlier of (a) the participant's annuity starting date or (b) the date of the participant's death is not treated as a surviving spouse and is not required to receive the participant's account balance. The special exception described in section 417(d)(2) and Q&A 25 of this section does not apply.

Q-27: Are there circumstances when spousal consent to a participant's election to waive the QJSA or the QPSA is not required?

A-27: Yes. If it is established to the satisfaction of a plan representative that there is no spouse or that the spouse cannot be located, spousal consent to waive the QJSA or the QPSA is not required. If the spouse is legally incompetnent to give consent, the spouse's legal guardian, even if the guardian is the participant, may give consent. Also, if the participant is legally separated or the participant has been abandoned (within the meaning of local law) and the participant has a court order to such effect, spousal consent is not required unless a QDRO provides otherwise. Similar rules apply to a plan subject to the requirements of section 401(a)(11)(B)(iii)(I).

Q-28: Does consent contained in an antenuptial agreement or similar contract entered into prior to marriage satisfy the consent requirements of sections 401(a)(11) and 417?

A-28: No. An agreement entered into prior to marriage does not satisfy the applicable consent requirements, even if the agreement is executed within the applicable election period.

Q-29: If a participant's spouse consents under section 417(a)(2)(A) to the participant's waiver of a survivor annuity form of benefit, is a subsequent spouse of the same participant bound by the consent?

A-29: No. A consent under section 417(a)(2)(A) by one spouse is binding only with respect to the consenting spouse. See Q&A-24 of this section for an exception in the case of plan benefits securing plan loans.

Q-30: Does the spousal consent requirement of section 417(a)(2)(A) require that a spouse's consent be revocable?

A-30: No. A plan may preclude a spouse from revoking consent once it has been given. Alternatively, a plan may also permit a spouse to revoke a consent after it has been given, and thereby to render ineffective the participant's prior election not to receive a QPSA or QJSA. A participant must always be allowed to change his election during the applicable election period. Spousal consent is required in such cases to the extent provided in Q&A 31, except that spousal consent is never required for a QJSA or QPSA.

Q-31: What rules govern a participant's waiver of a QPSA or QJSA under section 417(a)(2)?

A-31: (a) *Specific beneficiary.* Both the participant's waivers of a QPSA and QJSA and the spouse's consents thereto must state the specific nonspouse beneficiary (including any class of beneficiaries or any contingent beneficiaries) who will receive the benefit. Thus, for example, if spouse B consents to participant A's election to waive a QPSA, and to have any benefits payable upon A's death before the annuity starting date paid to A's children, A may not subsequently change beneficiaries without the consent of B (except if the change is back to a QPSA). If the designated beneficiary is a trust, A's spouse need only consent to the designation of the trust and need not consent to the designation of trust beneficiaries or any changes of trust beneficiaries.

(b) *Optional form of benefit* -- (1) *QJSA.* Both the participant's waiver of a QJSA (and any required spouse's consent thereto) must specify the particular optional form of benefit. The participant who has waived a QJSA with the spouse's consent in favor of another form of benefit may not subsequently change the optional form of benefit without obtaining the spouse's consent (except back to a QJSA). Of course, the participant may change the form of benefit if the plan so provides after the spouse's death or a divorce (other than as provided in a QDRO). A participant's waiver of a QJSA (and any required spouse's consent thereto) made prior to the first plan year beginning after December 31, 1986, is not required to specify the optional form of benefit.

(2) *QPSA.* A participant's waiver of a QPSA and the spouse's consent thereto are not required to specify the optional form of any preretirement benefit. Thus, a participant who waives the QPSA with spousal consent may subsequently change the form of the preretirement benefit, but not the nonspouse beneficiary, without obtaining the spouse's

consent.

(3) *Change in form*. After the participant's death, a beneficiary may change the optional form of survivor benefit as permitted by the plan.

(c) *General consent*. In lieu of satisfying paragraphs (a) and (b) of this Q&A 31, a plan may permit a spouse to execute a general consent that satisfies the requirements of this paragraph (c). A general consent permits the participant to waive QPSA or QJSA, and change the designated beneficary or the optional form of benefit payment without any requirement of further consent by such spouse. No general consent is valid unless the general consent acknowledges that the spouse has the right to limit consent to a specific beneficiary and a specific optional form of benefit, where applicable, and that the spouse voluntarily elects to relinquish both of such rights. Notwithstanding the previous sentence, a spouse may execute a general consent that is limited to certain beneficiaries or forms of benefit payment. In such case, paragraphs (a) and (b) of this Q&A 31 shall apply to the extent that the limited general consent is not applicable and this paragraph (c) shall apply to the extent that the limited general consent is applicable. A general consent, including a limited general consent, is not effective unless it is made during the applicable election period. A general consent executed prior to October 22, 1986 does not have to satisfy the specificity requirements of this Q&A 31.

Q-32: What rules govern a participant's waiver of the spousal benefit under section 401(a)(11)(B)?

A-32: (a) *Application*. In the case of a defined contribution plan that is not subject to the survivor annuity requirements of sections 401(a)(11) and 417, a participant may waive the spousal benefit of section 401(a)(11)(B)(iii) if the conditions of paragraph (b) are satisfied. In general, a spousal benefit is the nonforfeitable account balance on the participant's date of death.

(b) *Conditions*. In general, the same conditions, other than the age 35 requirement, that apply to the participant's waiver of a QPSA and the spouse's consent thereto apply to the participant's waiver of the spousal benefit and the spouse's consent thereto. See Q&A-31. Thus, the participant's waiver of the spousal benefit must state the specific nonspouse beneficiary who will receive such benefit. The waiver is not required to specify the optional form of benefit. The participant may change the optional form of benefit, but not the nonspouse beneficiary, without obtaining the spouse's consent.

Q-33: When and in what manner, may a participant waive a spousal benefit or a QPSA?

A-33: (a) *Plans not subject to section 401(a)(11)*. A participant in a plan that is not subject to the survivor annuity requirements of section 401(a)(11) (because of subparagraph (B)(iii) thereof) may waive the spousal benefit at any time, provided that no such waiver shall be effective unless the spouse has consented to the waiver. The spouse may consent to a waiver of the spousal benefit at any time, even prior to the participant attaining age 35. No spousal consent is required for a payment to the participant or the

use of the accrued benefit as security for a plan loan to the participant.

(b) *Plans subject to section 401(a)(11)*. A participant in a plan subject to the survivor annuity requirements of section 401(a)(11) generally may waive the QPSA benefit (with spousal consent) only on or after the first day of the plan year in which the participant attains age 35. However, a plan may provide for an earlier waiver (with spousal consent), provided that a written explanation of the QPSA is given to the participant and such waiver becomes invalid upon the beginning of the plan year in which the participant's 35th birthday occurs. If there is no new waiver after such date, the participant's spouse must receive the QPSA benefit upon the participant's death.

Q-34: Must the written explanations required by section 417(a)(3) be provided to nonvested participants?

A-34: Such written explantions must be provided to nonvested participants who are employed by an employer maintaining the plan. Thus, they are not required to be provided to those nonvested participants who are no longer employed by such an employer.

Q-35: When must a plan provide the written explanation, required by section 417(a)(3)(B), of the QPSA to a participant?

A-35: (a) *General rule*. A plan must provide the written explanation of the QPSA to a participant within the applicable period. Except as provided in paragraph (b), the applicable period means, with respect to a participant, whichever of the following periods ends last:

(1) The period beginning with the first day of the plan year in which the participant attains age 32 and ending with the close of the plan year preceding the plan year in which the participant attains age 35.

(2) A reasonable period ending after the individual becomes a participant.

(3) A reasonable period ending after the QPSA is no longer fully subsidized.

(4) A reasonable period ending after section 401(a)(11) first applies to the participant. Section 401(a)(11) would first apply when a benefit is transferred from a plan not subject to the survivor annuity requirements of section 401(a)(11) to a plan subject to such section or at the time of a election of an annuity under a defined contribution plan described in section 401(a)(11)(B)(iii).

(b) *Pre-35 separations*. In the case of a participant who separates from service before attaining age 35, the applicable period means the period beginning one year before the separation from service and ending one year after such separation. If such a participant returns to service, the plan must also comply with pragraph (a).

(c) *Reasonable period*. For purposes of applying paragraph (a), a reasonable period ending after the enumerated events described in paragraphs (a) (2), (3) and (4) is the end of the one-year period beginning with the date the applicable event occurs. The applicable period for such events begins one year prior to the occurrence of the enumerated events.

(d) *Transition rule*. In the case of an individual who was a participant in the plan on August 23, 1984, and, as of that date had attained age 34, the plan will satisfy the requriement of section 417(a)(3)(B) if it provided the explanation not later than December 31, 1985.

Q-36: How do plans satisfy the requirements of providing participants explanations of QPSAs and QJSAs?

A-36: Section 417(a)(3) sets forth the requirements for providing plan participants written explanations of QPSAs and QJSAs. The requirement that the terms and conditions of the QJSA or QPSA, as the case may be, be furnished to participants is not satisfied unless the written explanation complies with the requirements set forth in § 1.401(a)-11(c)(3). Also, for plan years beginning after December 31, 1988, participants must be furnished a general description of the eligibility conditions and other material features of the optional forms of benefit and sufficient additional information to explain the relative values of the optional forms of benefit available under the plan (*e.g.*, the extent to which optional forms are subsidized relative to the normal form of benefit or the interest rates used to calculate the optional forms).

Q-37: What are the consequences of fully subsidizing the cost of either a QJSA or a QPSA in accordance with section 417(a)(5)?

A-37: If a plan fully subsidizes a QJSA or QPSA in accordance with section 417(a)(5) and does not allow a participant to waive such QJSA or QPSA or to select a nonspouse beneficiary, the plan is not required to provide the written explanation required by section 417(a)(3). However, if the plan offers an election to waive the benefit or designate a beneficiary, it must satisfy the election, consent, and notice requirements of section 417(a) (1), (2), and (3), with respect to such subsidized QJSA or QPSA, in accordance with section 417(a)(5).

Q-38: What is a fully subsidized benefit?

A-38: (a) *QJSA* -- (1) *General rule*. A fully subsidized QJSA is one under which no increase in cost to, or decrease in actual amounts received by, the participant may result from the participant's failure to elect another form of benefit.

(2) *Examples*.

11*Example (1)*. If a plan provides a joint and survivor annuity and a single sum option, the plan does not fully subsidize the joint and survivor annuity, regardless of the actuarial

value of the joint and survivor annuity because, in the event of the participant's early death, the participant would have received less under the annuity than he would have received under the single sum option.

Example (2). If a plan provides for a life annuity of $100 per month and a joint and 100% survivor benefit of $99 per month, the plan does not fully subsidize the joint and survivor benefit.

(b) *QPSA*. A QPSA is fully subsidized if the amount of the participant's benefit is not reduced because of the QPSA coverage and if no charge to the participant under the plan is made for the coverage. Thus, a QPSA is fully subsidized in a defined contribution plan.

Q-39: When do the survivor annuity requirements of sections 401(a)(11) and 417 apply to plans?

A-39: Sections 401(a)(11) and 417 generally apply to plan years beginning after December 31, 1984. Sections 302 and 303 of REA 1984 provide specific effective dates and transitional rules under which the QJSA or QPSA (or pre-REA 1984 section 401(a)(11)) requirements may be applicable to particular plans or with respect to benefits provided to (as amended by REA 1984) particular participants. In general, the section 401(a)(11) (as amended by REA 1984) survivor annuity requirements do not apply with respect to a participant who does not have at least one hour of service or one hour of paid leave under the plan after August 22, 1984.

Q-40: Are there special effective dates for plans maintained pursuant to collective bargaining agreements?

A-40: Yes. Section 302(b) of REA 1984 as amended by section 1898(g) of the Tax Reform Act of 1986 provides a special deferred effective date for such plans. Whether a plan is described in section 302(b) of REA 1984 is determined under the principles applied under section 1017(c) of the Employee Retirement Income Security Act of 1974. See H.R. Rep. No. 1280, 93d Cong., 2d Sess. 266 (1974). In addition, a plan will not be treated as maintained under a collective bargaining agreement unless the employee representatives satisfy section 7701(a)(46) of the Internal Revenue Code after March 31, 1984. See § 301.7701-17T for other requirements for a plan to be considered to be collectively bargained. Nothing in section 302(b) of REA 1984 denies a participant or spouse the rights set forth in sections 303(c)(2), 303(c)(3), 303(e)(1), and 303(e)(2) of REA 1984.

Q-41: What is one hour of service or paid leave under the plan for purposes of the transition rules in section 303 of REA 1984?

A-41: One hour of service or paid leave under the plan is one hour of service or paid leave recognized or required to be recognized under the plan for any purpose, *e.g.*, participation, vesting percentage, or benefit accrual purposes. For plans that do not compute hours of service, one hour of service or paid leave means any service or paid

leave recognized or required to be recognized under the plan for any purpose.

Q-42: Must a plan be amended to provide for the QPSA required by section 303(c)(2) of REA 1984, or for the survivor annuities required by section 303(e) of REA 1984?

A-42: A plan will not fail to satisfy the qualification requirements of section 401(a) or 403(a) merely because it is not amended to provide the QPSA required by section 303(c)(2) or the survivor annuities required by section 303(e). The plan must, however, satisfy those requirements in operation.

Q-43: Is a participant's election, or a spouse's consent to an election, with respect to a QPSA, made before August 23, 1984, valid?

A-43: No.

Q-44: Is spousal consent required for certain survivor annuity elections made by the participant after December 31, 1984, and before the first plan year to which new sections 401(a)(11) and 417 apply?

A-44: Yes. Section 303(c)(3) of REA 1984 provides that any election not to take a QJSA made after December 31, 1984, and before the date sections 401(a)(11) and 417 apply to the plan by a participant who has 1 hour of service or leave under the plan after August 23, 1984, is not effective unless the spousal consent requirements of section 417 are met with respect to such election. Unless the participant's annuity starting date occurred before January 1, 1985, the spousal consent required by section 417 (a)(2) and (e) must be obtained even though the participant elected the benefit prior to January 1, 1985. The plan is not required to be amended to comply with section 303(c)(3) of REA 1984, but the plan must satisfy this requirement in operation.

Q-45: Are there special rules for certain participants who separated from service prior to August 23, 1984?

A-45: Yes. Section 303(e) of REA 1984 provides special rules for certain participants who separated from service before August 23, 1984. Section 303(e)(1), which applies only to plans subject to section 401(a)(11) of the Code (as in effect on August 22, 1984), provides that participants whose annuity starting date did not occur before August 24, 1984, and who had one hour of service on or after September 2, 1974, but not in a plan year beginning after December 31, 1975, may elect to receive the benefits required to be provided under section 401(a)(11) of the Code (as in effect on August 22, 1984). Section 303(e)(2) provides that certain participants who had one hour of service in a plan year beginning on or after January 1, 1976, but not after August 22, 1984, may elect QPSA coverage under new sections 401(a)(11) and 417 in plans subject to these provisions. Section 303(e)(4)(A) requires plans or plan administrators to notify those participants of the provisions of section 303(e).

Q-46: When must a plan provide the notice required by section 303(e)(4)(A) of REA

1984?

A-46: The notice required by section 303(e)(4)(A) must be provided no later than the earlier of:

(a) The date the first summary annual report provided after September 17, 1985, is distributed to participants; or

(b) September 30, 1985.

A plan will not fail to satisfy the preceding sentence if the plan provides a fully subsidized QPSA with respect to any participant described in section 303(e) who dies on or after July 19, 1985, and before the notice is received. If the plan ceases to fully subsidize the QPSA, the cessation must not be effective until the notice is given. For this purpose, an annuity payable to a nonspouse beneficiary elected by the participant, in lieu of a spouse, shall satisfy the QPSA requirement, so long as the survivor benefit is fully subsidized. The notice required by this paragraph must be in writing and sent to the participant's last known address.

Q-47: Is there another time when plans must provide notice of the right, described in section 303(e)(1) of REA '84, to elect a pre-REA 1984 qualified joint and survivor annuity?

A-47: Yes. Notice of this right must also be provided to a participant at the time the participant applies for benefit payments.

§ 1.401(a)-13T [Removed]

Par. 4. Section 1.401(a)-13T is removed. Section 1.401(a)-13 is amended by adding a new paragraph (g) to read as follows:

§ 1.401(a)-13 Assignment or alienation of benefits.

* * * * *

(g) *Special rules for qualified domestic relations orders* -- (1) *Definition.* The term "qualified domestic relations order" (QDRO) has the meaning set forth in section 414(p). For purposes of the Internal Revenue Code, a QDRO also includes any domestic relations order described in section 303(d) of the Retirement Equity Act of 1984.

(2) *Plan amendments.* A plan will not fail to satisfy the qualification requirements of section 401(a) or 403(a) merely because it does not include provisions with regard to a QDRO.

(3) *Waiver of distribution requirements.* A plan shall not be treated as failing to satisfy the requirements of sections 401 (a) and (k) and 409(d) solely because of a payment to an alternate payee pursuant to a QDRO. This is the case even if the plan provides for payments pursuant to a QDRO to an alternate payee prior to the time it may make payments to a participant. Thus, for example, a pension plan may pay an alternate payee even though the participant may not receive a distribution because he continues to be employed by the employer.

(4) *Coordination with section 417* -- (i) *Former spouse.* (A) *In general.* Under section 414(p)(5), a QDRO may provide that a former spouse shall be treated as the current spouse of a participant for all or some purposes under sections 401(a)(11) and 417.

(B) *Consent.* (*1*) To the extent a former spouse is treated as the current spouse of the participant by reason of a QDRO, any current spouse shall not be treated as the current spouse. For example, assume H is divorced from W, but a QDRO provides that H shall be treated as W's current spouse with respect to all of W's benefits under a plan. H will be treated as the surviving spouse under the QPSA and QJSA unless W obtains H's consent to waive the QPSA or QJSA or both. The fact that W married S after W's divorce from H is disregarded. If, however, the QDRO had provided that H shall be treated as W's current spouse only with respect to benefits that accrued prior to the divorce, then H's consent would be needed by W to waive the QPSA or QJSA with respect to benefits accrued before the divorce. S's consent would be required with respect to the remainder of the benefits.

(*2*) In the preceding examples, if the QDRO ordered that a portion of W's benefit (either through separate accounts or a percentage of the benefit) must be distributed to H rather than ordering that H be treated as W's spouse, the survivor annuity requirements of sections 401(a)(11) and 417 would not apply to the part of W's benefit awarded H. Instead, the terms of the QDRO would determine how H's portion of W's accrued benefit is paid. W is required to obtain S's consent if W elects to waive either the QJSA or QPSA with respect to the remaining portion of W's benefit.

(C) *Amount of the QPSA or QJSA.* (*1*) Where, because of a QDRO, more than one individual is to be treated as the surviving spouse, a plan may provide that the total amount to be paid in the form of a QPSA or survivor portion of a QJSA may not exceed the amount that would be paid if there were only one surviving spouse. The QPSA or survivor portion of the QJSA, as the case may be, payable to each surviving spouse must be paid as an annuity based on the life of each such spouse.

(*2*) Where the QDRO splits the participant's accrued benefit between the participant and a former spouse (either through separate accounts or percentage of the benefit), the surviving spouse of the participant is entitled to a QPSA or QJSA based on the participant's accrued benefit as of the date of death or the annuity starting date, less the separate account or percentage that is payable to the former spouse. The calculation is made as if the separate account or percentage had been distributed to the participant prior to the relevant date.

(ii) *Current spouse.* Under section 414(p)(5), even if the applicable election periods (*i.e.*, the first day of the year in which the participant attains age 35 and 90 days before the annuity starting date) have not begun, a QDRO may provide that a current spouse shall not be treated as the current spouse of the participant for all or some purposes under sections 401(a)(11) and 417. A QDRO may provide that the current spouse waives all future rights to a QPSA or QJSA.

(iii) *Effects on benefits.* (A) A plan is not required to provide additional vesting or benefits because of a QDRO.

(B) If an alternative payee is treated pursuant to a QDRO as having an interest in the plan benefit, including a separate account or percentage of the participant's account, then the QDRO cannot provide the alternate payee with a greater right to designate a beneficiary for the alternate payee's benefit amount than the participant's right. The QJSA or QPSA provisions of section 417 do not apply to the spouse of an alternate payee.

(C) If the former spouse who is treated as a current spouse dies prior to the participant's annuity starting date, then any actual current spouse of the participant is treated as the current spouse, except as otherwise provided in a QDRO.

(iv) *Section 415 requirements.* Even though a participant's benefits are awarded to an alternate payee pursuant to a QDRO, the benefits are benefits of the participant for purposes of applying the limitations of section 415 to the participant's benefits.

§ 1.402(f)-1T [Removed]

Par. 5A. Section 1.402(f)-1T is removed. New § 1.402(f)-1 is added in its place immediately after § 1.402(e)-1 to read as follows:

§ 1.402(f)-1 Required explanation of rollovers, capital gains, and the separate tax on lump sum distributions.

(a) *General rules.* Section 402(f) requires plan administrators to give recipients of certain distributions a written explanation of the rules relating to the taxation of certain amounts as capital gains under section 402(a)(2), the separate tax on the ordinary income portion of lump sum distributions under section 402(e), and the exclusion from gross income under section 402(a)(5) for amounts rolled over into eligible retirement plans. This notice must be provided to the recipient of any qualified total distribution or any partial distribution satisfying section 402(a)(5)(D)(i) that is made after December 31, 1984, not later than two weeks after the distribution is made.

(b) *Future safe-harbor notices.* The Commissioner may publish safe-harbor notices to aid plan administrators in complying with the section 402(f) requirements.

§ 1.410(a)-5T [Removed]

Par. 6. Section 1.410(a)-5T is removed. New § 1.410(a)-8 is inserted in its place immediately after § 1.410(a)-7 to read as follows:

§ 1.410(a)-8 Five consecutive 1-year breaks in service, transitional rules under the Retirement Equity Act of 1984.

Sections 410(a)(5)(D) and 411(a)(6)(D), as amended by the Retirement Equity Act of 1984 (REA 1984), permit a plan to disregard years of service that were disregarded under the plan provisions satisfying those sections (as in effect on August 22, 1984) as of the day before the REA amendments apply to the plan. Under section 302(a) of REA 1984, the new break-in-service rules generally apply to plan years beginning after December 31, 1984. Thus, for example, assume a plan has a calendar plan year and disregarded years of service as permitted by sections 410(a)(5)(D) and 411(a)(6)(D) as in effect on August 22, 1984. An employee completed two years of service in 1981 and 1982, and then incurred two consecutive 1-year breaks in service in 1983 and 1984. The plans may disregard the prior years of service even though the employee did not incur five consecutive 1-year breaks in service. On the other hand, assume the employeer completed three consecutive years of service beginning in 1980, and incurred two 1-year breaks in service in 1983 and 1984. Because, as of December 31, 1984, the years of service credited before 1983 could not be disregarded, whether the plan may subsequently disregard those years of service would be governed by the rules enacted by REA 1984.

§ 1.410(a)-7T [Removed]

Par. 7. Section 1.410(a)-7T is removed. New § 1.410(a)-9 is added in its place immediately after § 1.410(a)-8 to read as follows:

§ 1.410(a)-9 Maternity and paternity absence.

(a) *Elapsed time* -- (1) *Rule.* For purposes of applying the rules of § 1.410(a)-7 (relating to the elapsed time method of crediting service) to absences described in sections 410(a)(5)(E) and 411(a)(6)(E) (relating to maternity or paternity absence), the severance from service date of an employee who is absent from service beyond the first anniversary of the first day of absence by reason of a maternity or paternity absence described in section 410(a)(5)(i)(E) or 411(a)(6)(i)(E) is the second anniversary of the first day of such absence. The period between the first and second anniversaries of the first day of absence from work is neither a period of service nor a period of severance. This rule applies to maternity and paternity absences beginning on or after the first day of the first plan year in which the plan is required to credit service under sections 410(a)(5)(E) and 411(a)(6)(E).

(2) *Example.* The rules of this section are illustrated by the following example:

Assume an individual works until June 30, 1986; is first absent from employment on July 1, 1986, on account of maternity or paternity absence; and on July 1, 1989, performs an

hour of service. The period of service must include the period from employment commencement date until June 30, 1987 (one year after the date of separation for any reason other than a quit, discharge, retirement, or death). The period from July 1, 1987, to June 30, 1988, is neither a period of service nor a period of severance. The period of severance would be from July 1, 1988, to June 30, 1989.

(b) *Other methods.* This paragraph provides a safe harbor for plans that compute years of service under the hours of service methods or permitted equivalencies. Such a plan will be treated as satisfying the requirements of sections 410(a)(5)(E) and 411(a)(6)(E) if the plan increases the minimum period of consecutive 1-year breaks required to disregard any service (or deprive any employee of any right) by one. Thus, a plan will satisfy sections 410(a)(5)(E) and 411(a)(6)(E) without having to compute service for maternity or paternity and sections 410(a)(5)(D) and 411 (a)(4)(D) and (a)(6)(C), by increasing the period of consecutive breaks in service from 5 to 6.

Par. 8. Section 1.411(a)-7 is amended by revising paragraph (d)(2)(ii) (C), (D) and (E) and paragraph (d)(4) (i)(B) and (iv) to read as follows:

§ 1.411(a)-7 Definitions and special rules.

* * * * *

(d) * * *

(2) * * *

(ii) * * *

(C) In the case of both defined benefit plans and defined contribution plans, the plan repayment provision described in this subparagraph may provide that the employee must repay the full amount of the distribution in order to have the forfeited benefit restored. The plan provision may not require that such repayment be made sooner than the time described in paragraph (d)(2)(ii)(D) of this section.

(D)(*1*) If a distribution is on account of separation from service, the time for repayment may not end before the earlier of --

(*i*) 5 years after the first day the employee is subsequently employed, or

(*ii*) The close of the first period of consecutive 1-year breaks in service commencing after the distribution.

If the distribution occurs for any other reason, the time for repayment may not end earlier than 5 years after the date of distribution. Nevertheless, a plan provision may provide for

a longer period in which the employee may repay. For example, a plan could allow repayments to be made at any time before normal retirement age.

(*2*) In the case of a plan utilizing the elapsed time method, described in § 1.410(a)-7, the minimum time for repayment shall be determined as in paragraph (d)(2)(ii)(D)(*1*) of this section except as provided in this subdivision. The 5 consecutive 1-year break periods shall be determined by substituting the term "1-year period of severance" for the term "1-year break in service". Also, the repayment period both commences and closes in a manner determined by the Commissioner that is consistent with the rules in § 1.410(a)-7 and the substitution in section 411(a)(6) (C) and (D) of a 5-year break in service rule for the former 1-year break in service rule.

(E) A defined benefit plan using the break in service rule described in section 410(a)(5)(D) or a defined contribution plan using the break in service rule described in section 411(a)(6)(C) for determining employees' accrued benefits is not required to provide for repayment by an employee whose accrued benefit is disregarded by reason of a plan provision using these rules.

* * * * *

(4) * * *

(i) * * *

(B) The requirements of section 411(a)(11) are satisfied at the time of the distribution. See § 1.411(a)(11)-1.

* * * * *

(iv) *Plan repayment provision.* (A) A plan repayment provision satisfies the requirements of this subdivision if, under the provision, the accrued benefit of an employee that is disregarded by a plan under this subparagraph is restored upon repayment to the plan by the employee of the full amount of the distribution. An accrued benefit is not restored unless all of the optional forms of benefit and subsidies relating to such benefit are also restored. A plan is not required to provide for repayment of an accrued benefit unless the employee --

(*1*) Received a distribution that is in a plan year to which section 411 applies (see § 1.411(a)-2), which distribution is less than the amount of his accrued benefit determined under the same optional form of benefit as the distribution was made, and

(*2*) Resumes employment covered under the plan.

(B) *Example.* Plan A provides a single sum distribution equal to the present value of the

normal form of the accrued benefit payable at normal retirement age which is a single life annuity. Plan A also provides a subsidized joint and survivor annuity and a subsidized early retirement annuity benefit. A participant who is fully vested and receives a single sum distribution equal to the present value of the single life annuity normal retirement benefit is not required to be provided the right under the plan to repay the distribution upon subsequent reemployment even though the participant received a distribution that did not reflect the value of the subsidy in the joint and survivor annuity or the value of the early retirement annuity subsidy. This is true whether or not the participant had satisfied at the time of the distribution all of the conditions necessary to receive the subsidies. However, if a participant does not receive his total accrued benefit in the optional form of benefit under which his benefit was distributed, the plan must provide for repayment. If the employee repays the distribution in accordance with section 411(a)(7), the plan must restore the employee's accrued benefit which would include the right to receive the subsidized joint and survivor annuity and the subsidized early retirement annuity benefit.

(C) A plan may impose the same conditions on repayments for the restoration of employer-derived accrued benefits that are allowed as conditions for restoration of employer-derived accrued benefits upon repayment of mandatory contributions under paragraphs (d)(2)(ii) (B), (C), (D) and (E) of this section.

* * * * *

§ 1.411(a)(11)-1T [Removed]

Par. 9. Section 1.411(a)(11)-1T is removed. New § 1.411(a)-11 is added in its place after § 1.411(a)-9 to read as follows:

§ 1.411(a)-11 Restriction and valuation of distributions.

(a) *Scope* -- (1) *In general.* Section 411(a)(11) restricts the ability of a plan to distribute any portion of a participant's accrued benefit without the participant's consent. Section 411(a)(11) also restricts the ability of defined benefit plans to distribute any portion of a participant's accrued benefit in optional forms of benefit without complying with specified valuation rules for determining the amount of the distribution. If the consent requirements or the valuation rules of this section are not satisfied, the plan fails to satisfy the requirements of section 411(a).

(2) *Accrued benefit.* For purposes of this section, an accrued benefit is valued taking into consideration the particular optional form in which the benefit is to be distributed. The value of an accrued benefit is the present value of the benefit in the distribution form determined under the plan. For example, a plan that provides a subsidized early retirement annuity benefit may specify that the optional single sum distribution form of benefit available at early retirement age is the present value of the subsidized early retirement annuity benefit. In this case, the subsidized early retirement annuity benefit must be used to apply the valuation requirements of this section and the resulting amount

of the single sum distribution. However, if a plan that provides a subsidized early retirement annuity benefit specifies that the single sum distribution benefit available at early retirement age is the present value of the normal retirement annuity benefit, then the normal retirement annuity benefit is used to apply the valuation requirements of this section and the resulting amount of the single sum distribution available at early retirement age.

(b) *General consent rules.* A plan must satisfy the participant consent requirement with respect to the distribution of a participant's nonforfeitable accrued benefit with a present value in excess of $3,500. See paragraphs (c) (3) and (4) for situations where no consent is required.

(c) *Consent, etc. requirements* -- (1) *General rule.* If an accrued benefit is immediately distributable, section 411(a)(11) permits plans to provide for the distribution of any portion of a participant's nonforfeitable accrued benefits only if the applicable consent requirements are satisfied.

(2) *Consent.* (i) No consent is valid unless the participant has received a general description of the material features, and an explanation of the relative values of, the optional forms of benefit available under the plan in a manner that would satisfy the notice requirements of section 417(a)(3). *See* § 1.401(a)-20 Q&A-36. In addition, so long as a benefit is immediately distributable, a participant must be informed of his right, if any, to defer receipt of the distribution. Furthermore, consent is not valid if a significant detriment is imposed under the plan on any participant who does not consent to a distribution. Whether or not a significant detriment is imposed shall be determined by the Commissioner by examining the particular facts and circumstances.

(ii) A plan must provide participants with notice of their rights specified in this subparagraph no less than 30 days and no more than 90 days before the annuity starting date. Written consent of the participant to the distribution must not be made before the participant receives the notice and must not be made more than 90 days before the annuity starting date. See § 1.401(a)-20 Q&A-10 for the definition of annuity starting date.

(iii) See § 1.401(a)-20 Q&A-24 for a special rule applicable to consents to plan loans.

(3) *$3,500.* Written consent of the participant is required before the commencement of the distribution of any portion of an accrued benefit if the present value of the nonforfeitable total accrued benefit is greater than $3,500. The consent requirements are deemed satisfied if such value does not exceed $3,500 and the plan may distribute such portion to the participant as a single sum. Present value for this purpose must be determined in the same manner as under section 417(e); see § 1.417(e)-1(d). If the present value determined at the time of a distribution to the participant exceeds $3,500, then the present value at any subsequent time shall be deemed to exceed $3,500.

(4) *Immediately distributable.* Participant consent is required for any distribution while it

is immediately distributable, *i.e.*, prior to the later of the time a participant has attained normal retirement age (as defined in section 411(a)(8)) or age 62. Once a distribution is no longer immediately distributable, a plan may distribute the benefit in the form of a QJSA in the case of a benefit subject to section 417 or in the normal form in other cases without consent.

(5) *Death of participant.* The consent requirements of section 411(a)(11) do not apply after the death of the participant.

(6) *QDROs.* The consent requirements of section 411(a)(11) do not apply to payments to an alternate payee, defined in section 414(p)(8), except as provided in a qualified domestic relations order pursuant to section 414(p).

(7) *Section 401(a)(9), etc.* The consent requirements of section 411(a)(11) do not apply to the extent that a distribution is required to satisfy the requirements of section 401(a)(9) or 415. See section 401(a)(9) and the regulations thereunder and § 1.401(a)-20 Q&A 23 for guidance on these requirements. Notwithstanding any provision to the contrary in section 401(a)(14) or § 1.401(a)-14, a plan may not distribute a participant's nonforfeitable accrued benefit with a present value in excess of $3,500 while the benefit is immediately distributable unless the participant consents to such distribution. The failure of a participant to consent is deemed to be an election to defer commencement of payment of the benefit for purposes of section 401(a)(14) and § 1.401(a)-14.

(d) *Distribution valuation requirements.* In determining the present value of any distribution of any accrued benefit from a defined benefit plan, the plan must take into account specified valuation rules. For this purpose, the valuation rules are the same valuation rules for valuing distributions as set forth in section 417(e); see § 1.417(e)-1(d). This paragraph (d) applies both before and after the participant's death regardless of whether the accrued benefit is immediately distributable. This paragraph also applies whether or not the participant's consent is required under paragraphs (b) and (c) of this section.

(e) *Special rules* -- (1) *Plan termination.* The requirements of this section apply before, on and after a plan termination. If a defined contribution plan terminates and the plan does not offer an annuity option (purchased from a commercial provider), then the plan may distribute a participant's accrued benefit without the participant's consent. The preceding sentence does not apply if the employer or any entity within the same controlled group as the employer maintains another defined contribution plan, other than an employee stock ownership plan (as defined in section 4975(e)(7)). In such a case, the participant's accrued benefit may be transferred without the participant's consent to the other plan if the participant does not consent to an immediate distribution from the terminating plan. See section 411(d)(6) and the regulations thereunder for other rules applicable to transferee plans and plan terminations.

(2) *ESOP dividends.* The requirements of this section do not apply to any distribution of dividends to which section 404(k) applies.

(3) *Other rules.* See § 1.401(a)-20 Q&As 14, 17 and 24 for other rules that apply to the section 411(a)(11) requirements.

§ 1.411(d)-3 [Amended]

Par. 10. Section 1.411(d)-3 is amended by adding the following new sentence at the end of paragraph (a)(1): "See § 1.411(d)-4A for rules that apply to class year plans for contributions made for plan years beginning after October 22, 1986."

§ 1.411(d)-3T [Removed]

Par. 11. Section 1.411(d)-3T is removed. New § 1.411(d)-4 is added in its place immediately after § 1.411(d)-3 to read as follows:

§ 1.411(d)-4 Class year plans; plan years beginning after October 22, 1986.

(a) *Plan years beginning prior to 1989.* (1) The requirements of section 411(a)(2) shall be treated as satisfied in the case of a class-year plan if such plan provides that 100 percent of each employee's right to or derived from the contributions of the employer on the employee's behalf with respect to any plan year is nonforfeitable not later than when such participant was performing services for the employer as of the close of each of 5 plan years (whether or not consecutive) after the plan year for which the contributions were made.

(2) For purposes of paragraph (a)(1) of this section if --

(i) Any contributions are made on behalf of a participant with respect to any plan year, and

(ii) Before such participant meets the requirements of paragraph (a)(1) of this section, such participant was not performing services for the employer as of the close of each of any 5 consecutive plan years after such plan year, then the plan may provide that the participant forfeits any right to or derived from the contributions made with respect to such plan year.

(3) This paragraph (a) applies to contributions made for plan years beginning after October 22, 1986.

(b) *Plan years beginning after 1988.* (1) The special class year vesting rule in section 411(d)(4) was repealed by section 1113(b) of the Tax Reform Act of 1986 (1986 Act). The repeal is generally effective for plan years beginning after December 31, 1988. See section 1111(e) of the 1986 Act for a special effective date rule applicable to certain plans maintained pursuant to collectively bargaining agreements.

(2)(i) This subparagraph (2) provides a special rule for class year plans that were in

compliance with section 411(d)(4) immediately before the first plan year beginning after section 411(d)(4) is repealed. These plans are not required to retroactively compute years of service under the general section 411(a)(2) rules. Instead, a participant must receive a year of service for each such prior plan year if the employee was performing services on the last day of such year. Similarly, if the participant was not performing services on the last day of such years, the participant will be treated as if a one-year break in service occurred for such plan year. This subdivision (i) applies to plan years to which this section applies.

(ii) In the case of a plan year to which § 1.411(d)-3 applied, a class year plan must compute years of service and breaks in service in a manner consistent with the rules in this paragraph (b)(2)(i), giving appropriate regard to the statutory changes made to section 411(d)(4).

§ 1.417(e)-1T [Removed]

Par. 12. Section 1.417(e)-1T is removed. New § 1.417(e)-1 is added in its place after § 1.416-1 to read as follows:

§ 1.417(e)-1 Restrictions and valuations of distributions from plans subject to sections 401(a)(11) and 417.

(a) *Scope* -- (1) *In general.* A plan does not satisfy the requirements of sections 401(a)(11) and 417 unless it satisfies the consent requirements, the determination of present value requirements and the other requirements set forth in this section. See section 401(a)(11) and § 1.401(a)-11A for other rules regarding the survivor annuity requirements.

(2) *Additional requirements.* See § 1.411(a)(11)-1(c)(6) for other rules applicable to the consent requirements.

(3) *Accrued benefit.* The definition of "accrued benefit" in § 1.411(a)(11)-1 applies when that term is used in this section.

(b) *Consent, etc. requirements* -- (1) *General rule.* Generally plans may not commence the distribution of any portion of a participant's accrued benefit in any form unless the applicable consent requirements are satisfied. No consent of the participant or spouse is needed for distribution of a QJSA or QPSA after the benefit is no longer immediately distributable (after the participant attains (or would have attained if not dead) the later of normal retirement age (as defined in section 411(a)(8)) or age 62). No consent of the spouse is needed for distribution of a QJSA at any time. After the participant's death, a benefit may be paid to a nonspouse beneficiary without the beneficiary's consent. A distribution cannot be made at any time in a form other than a QJSA unless such QJSA has been waived by the participant and such waiver has been consented to by the spouse. A QJSA is an annuity that commences immediately. Thus, for example, a plan may not offer a participant separating from service at age 45 a choice only between a single sum distribution at separation of service and a joint and survivor annuity that satisfies all the

requirements of a QJSA except that it commences at normal retirement age rather than immediately. To satisfy this section, the plan must also offer a QJSA (*i.e.*, an annuity that satisfies all the requirements for a QJSA including the requirement that it commences immediately).

(2) *Consent.* (i) Written consent of the participant and, if the participant is married at the annuity starting date and the benefit is to be paid in a form other than a QJSA, the participant's spouse (or, if either the participant or the spouse has died, the survivor) is required before the commencement of the distribution of any part of an accrued benefit if the present value of the nonforfeitable benefit is greater than $3,500. No consent is valid unless the participant has received a general description of the material features, and an explanation of the relative values of, the optional forms of benefit available under the plan in a manner which would satisfy the notice requirements of section 417(a)(3). *See* § 1.401(a)-20 Q&A 36. No consent is required before the annuity starting date if the present value of the nonforfeitable benefit is not more than $3,500. If the present value of the accrued benefit at the time of any distribution exceeds $3,500, the present value of the accrued benefit at any subsequent time will be deemed to exceed $3,500.

(ii) In determining the present value of any nonforfeitable accrued benefit, a defined benefit plan is limited by the interest rate restriction as set forth in paragraph (d) of this section.

(3) *Time of consent.* A plan must provide participants with the written explanation of the QJSA required by section 417(a)(3) no less than 30 days and no more than 90 days before the annuity starting date. Written consent of the participant and the participant's spouse to the distribution must be made not more than 90 days before the annuity starting date.

(c) *Permitted distributions.* A plan may not require that a participant or surviving spouse begin to receive benefits without satisfying paragraph (b) of this section while such benefits are immediately distributable (see paragraph (b)(1) of this section). Once benefits are no longer immediately distributable, all benefits that the plan requires to begin must be provided in the form of a QJSA and QPSA unless the applicable written explanation, election and consent requirement of section 417 are satisfied.

(d) *Present value requirement* -- (1) *Requirements.* For purpose of determining the present value of any accrued benefit and for purposes of determining the amount (subject to sections 411(c)(3) and 415) of any distribution including a single sum, a defined benefit plan is subject to the interest rate limitations described in subparagraph (2) of this paragraph (d) at the time set forth in subparagraph (3) of this paragraph (d). A plan amendment that changes the rate described in this paragraph (d) is subject to section 411(d)(6). The present value of any optional form of benefit cannot be less than the present value of the normal retirement benefit determined in accordance with this paragraph.

(2) *Section 417 interest rate.* The section 417 interest rate is (i) the rate or rates that would be used by the Pension Benefit Guaranty Corporation (PBGC) for a trusteed

single-employer plan to value the participant's (or beneficiary's) vested benefit ("applicable interest rate") if the present value of such benefit does not exceed $25,000 and (ii) 120 percent of the applicable interest rate, as determined in accordance with (i) above, if such present value exceeds $25,000. In no event shall the present value determined by use of 120 percent of the applicable interest rate result in a present value less than $25,000. The applicable interest rate may be a series of interest rates for any given date. For example, the applicable rate could be X percent for the first 5 years over which the benefits are valued, Y percent for the next succeeding 10 years and Z percent for the following years. In such case, 1.20 percent of the applicable interest rate would be 1.20 times X percent, 1.20 times Y percent and 1.20 times Z percent over the years described above. The applicable interest rates are the interest rates that would be used (as of the date of the distribution) by the PBGC for purposes of determining the present value of that benefit upon termination of an insufficient trusteed single-employer plan. Except as otherwise provided by the Commissioner, the applicable interest rates are determined by PBGC regulations. See 29 CFR Part 2619 for the applicable PBGC rates.

(3) *Time for determining interest rate.* (i) Except as provided in subdivision (ii), the section 417 interest rate limitations are determined on either the annuity starting date or the first day of the plan year that contains the annuity starting date. The plan must provide which date is applicable.

(ii) The plan may provide for the use of any other time for determining the interest rate provided that such time is not more than 120 days before the annuity starting date if such time is determined in a consistent manner and is applied uniformly to all participants.

(iii) The Commissioner may in revenue rulings, notices or other documents of general applicability prescribe other times for determining the section 417 interest rate limitations.

(iv) If a plan amendment changes the time for determining the section 417 interest rate, the amendment will not be treated as reducing an accrued benefit if the conditions of this subdivision (iv) are satisfied. Any distribution in the one-year period commencing at the time the plan amendment is effective (if the amendment is effective on or after the adoption date) must use the rate determined under the plan, either before or after the amendment, that results in the larger accrued benefit. If the plan amendment is adopted retroactively (that is, the amendment is effective prior to the adoption date), the plan must use the rate resulting in the larger accrued benefit for the period beginning with the effective date and ending one year after the adoption date.

(4) *Determination of interest rates.* (i) In the case of a defined benefit plan that uses a rate or rates in addition to the section 417 interest rate, the rate producing the greatest benefit must be used.

(ii) The same interest rate that is required to be used by the plan under this paragraph (d) to determine the amount of benefit must also be used to compute the present value of the benefit for purposes of determining whether consent for a distribution is required under

paragraph (b) of this section.

(iii) *Example.* A qualified defined benefit plan provides that single sum distributions received on or before normal retirement age are to be determined using the lower of the rate(s) of interest guaranteed under a particular annuity contract of an unrelated insurance company or the applicable section 417 rates. The rates of interest guaranteed under the annuity contract are 10% for the first 5 years, 7.5% for the next 10 and 5% thereafter while the applicable section 417 interest rates would be 8% and 120% of such rate would be 9.6%. Because in some years over which a benefit is valued the interest rate under the PBGC rates would be the lower rate while in other years it would be the higher rate, the rate that must be used is the one that results in the greater plan benefit.

(5) *Exceptions.* This paragraph (d) (other than the reference to section 411(d)(6) requirements) does not apply to the amount of a distribution under a nondecreasing annuity payable for a period not less than the life of the participant or, in the case of a QPSA, the life of the surviving spouse. A nondecreasing annuity includes a QJSA, QPSA and an annuity that decreases merely because of the cessation or reduction of Social Security supplements or qualified disability payments (as defined in section 411(a)(9)).

(6) *Defined contribution plans.* Because the accrued benefit in a defined contribution plan equals the account balance, such plans are not subject to the interest rate requirements of this paragraph (d), even though they are subject to section 401(a)(11).

(e) *Special rules for annuity contracts* -- (1) *General rule.* Any annuity contract purchased by a plan subject to section 401(a)(11) and distributed to or owned by a participant must provide that benefits under the contract are provided in accordance with the applicable consent, present value, and other requirements of sections 401(a)(11) and 417 applicable to the plan.

(f) *Effective dates* -- (1) *Annuity contracts.* (i) Paragraph (e) of this section does not apply to contracts distributed to or owned by a participant prior to September 17, 1985, unless additional contributions are made under the plan by the employer with respect to such contracts.

(ii) In the case of a contract owned by the employer or distributed to or owned by a participant prior to the first plan year beginning after December 31, 1988, paragraph (e) of this section shall be satisfied if the annuity contracts described therein satisfy the requirements in §§ 1.401(a)-11T and 1.417(e)-1T. The preceding sentence shall not apply if additional contributions are made under the plan by the employer with respect to such contracts on or after the beginning of the first plan year beginning after December 31, 1988.

(2) *Interest rates.* (i) A plan that uses the PBGC immediate interest rate as required by § 1.417(e)-1T(e) for distributions commencing in plan years beginning before January 1, 1987, shall be deemed to satisfy paragraph (d) of this section for such years.

(ii) For a special exception to the requirements of section 411(d)(6) for certain plan amendments that incorporate applicable interest rates, see section 1139(d)(2) of the Tax Reform Act of 1986.

(3) *Other effective dates and transitional rules.* (i) Except as otherwise provided, a plan will be treated as satisfying sections 401(a)(11) and 417 for plan years beginning before the first plan year that the requirements of section 410(b) as amended by TRA 86 apply to such plan, if the plan satisfied the requirements in §§ 1.401(a)-11T and 1.417(e)-1T.

(ii) See § 1.401(a)-20 for other effective dates and transitional rules that apply to plans subject to sections 401(a)(11) and 417.

OMB Control Numbers Under the Paperwork Reduction Act

PART 602 -- [AMENDED]

Par. 13. The authority citation for Part 602 continues to read as follows:

Authority: 26 U.S.C. 7805.

§ 602.101 [Amended]

Par. 14. Section 602.101(c) is amended by inserting the appropriate places in the table "§ 1.401(a)-20 * * * 1545-0928" and § 1.402(f)-1 * * * 1545-0928.

Lawrence B. Gibbs,

Commissioner of Internal Revenue.

Approved: May 12, 1988.

O. Donaldson Chapoton,

Assistant Secretary of Tax Policy.
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