

(f) Evaluating the metric educational activities in meeting the project's objectives.

(20 U.S.C. 2952)

Subpart C—How Does One Apply for a Grant?

§ 161b.20 What rules must be followed?

The Commissioner only makes a grant to an eligible applicant that—

- (a) Submits an application; and
- (b) Complies with all procedural rules governing the submission of the application.

(20 U.S.C. 2953)

Subpart D—How Is a Grant Made?

§ 161b.30 How does the Commissioner select a metric education project?

(a) The Commissioner evaluates an application on the basis of the selection criteria used in 45 CFR Part 100a.202 through 100a.206 (EDGAR) and the criteria contained in these regulations. Applicants are advised to read the EDGAR criteria carefully.

(b) The selection criteria in EDGAR constitute 80 possible points and include the following:

- (1) *Plan of operation.* (15 points)
- (2) *Quality of staff.* (10 points)
- (3) *Budget and cost effectiveness.* (15 points)
- (4) *Evaluation plan.* (10 points)
- (5) *Adequacy of resources.* (10 points)
- (c) The criteria contained in the following paragraphs supplement the EDGAR criteria and constitute 40 possible points. The maximum possible point score for each criterion indicates the relative importance assigned to that criterion by the Commissioner, as follows:

- (1) *Needs.* (10 points) The extent to which the proposed project—
 - (i) Provides for an effective response to the assessed metric education needs of the learner population(s);
 - (ii) Focuses on enabling the learner population to acquire measurable skills for using the metric system of measurement; and
 - (iii) Provides for active participation of the learner population in planning project activities that contribute to their acquiring measurable skills in using the metric system.
- (2) *Staff and parent needs.* (8 points) The extent to which the proposed project—
 - (i) Responds to staff development needs in metric education; and
 - (ii) Provides for feasible, effective instruction of parents and other adults in the use of the metric system of measurement.

(3) *Outcomes.* (12 points) the extent to which the proposed project—

- (i) Contributes to the incorporation of metric educational activities and strategies into the regular educational program of the funded agency;
- (ii) Contributes to performance-oriented metric education approaches;
- (iii) Has a high project impact potential for contributing to the adaptation, expansion, and replication of project strategies and activities in the regular educational program of other agencies; and
- (iv) Includes a strategy for continuing support after Federal funding is ended.

(4) *Dissemination.* (10 points) the extent to which the project—

- (i) Provides a clear description of a plan for the dissemination of successful and promising metric education products, practices and strategies which are developed and implemented by the project staff;
- (ii) Provides a description of plans for non-participants to capitalize on the skills acquired by project participants; and
- (iii) Provides a description of the mechanism by which dissemination efforts will be accomplished.

Subpart E—What Conditions Must be Met by the Grantee?

§ 161b.40 Are there restrictions on the types of costs that may be supported?

(a) Funds may be used only for the following types of travel:

- (1) Travel by the project director or his or her designee to a metric education national conference; and
- (2) Travel by the project director or by the project instructional staff to visit or provide services at grantee's project training sites.

(b) Funds may be used for the following costs if the Commissioner determines they are necessary for carrying out a metric education project:

- (1) Purchase, replacement, and adaptation of metric measurement apparatus, and instructionally essential supplies and materials (limited to 20 percent of the direct costs of the award); and

(c) Funds may not be used for the provision of stipends, dependency allowances, substitute pay, or the purchase of textbooks that are not specifically for metric instruction.

(20 U.S.C. 2952)

§ 161b.41 Are there other restrictions?

(a) SEAs and LEAs must meet the requirements in sec. 302(b), Title III of the Elementary and Secondary Education Act of 1965 as amended, for

meeting the needs of students in nonprofit private elementary and secondary schools.

(20 U.S.C. 2942)

(b) LEAs must afford the public an opportunity to comment on the subject matter of their applications in accordance with sec. 1006 of the Elementary and Secondary Education Act of 1965, as amended.

(20 U.S.C. 3386)

[FR Doc. 79-18382 Filed 5-24-79; 8:45 am]

BILLING CODE 4110-02-M

Test Report Folder

Friday
May 25, 1979

Part IX

Department of Health, Education, and Welfare

Office of Human Development Services

Projects for Severely Disabled Individuals

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Office of Human Development Services

[Program Announcement No. 13626-792]

Special Projects for Severely Disabled Individuals

AGENCY: Office of Human Development Services, DHEW.

SUBJECT: Announcement of Availability of FY 1979 Grant Funds for Special Projects for Severely Disabled Individuals.

SUMMARY: The Rehabilitation Services Administration, Office of Human Development Services, announces the availability of grants for Special Projects for Severely Disabled Individuals authorized by Section 311(a)(1) of the Rehabilitation Act of 1973, as amended. Regulations governing Special Projects for Severely Disabled Individuals are published in the *Code of Federal Regulations* in 45 CFR Part 1362.

DATE: Applications for grants must be received in the Office of Human Development Services by July 13, 1979.

Program Purpose

The purpose of Special Projects for Severely Disabled Individuals is to establish programs for providing vocational rehabilitation services which hold promise of expanding or otherwise improving rehabilitation services to handicapped individuals (especially those with the most severe handicaps), including blind or deaf individuals, irrespective of age or vocational potential, who can benefit from comprehensive services.

Program Priorities: Goals and Objectives

The disability groups to be given priority in this grant program are determined on an annual basis by the Commissioner of Rehabilitation Services. Among the factors considered in such decisions are: (1) the disability groups identified in the authorizing legislation as examples of the populations these projects are intended to serve; (2) categories of severe disability identified as currently underserved by the public rehabilitation programs; and (3) other programmatic considerations, including expanding or improving services for persons handicapped by a specific disability recognized as offering problems of national scope in the field of rehabilitation.

Priority target populations for Special Projects for Severely Disabled Individuals in FY 1979 are persons severely handicapped by the following disabilities: blindness, deafness, mental illness, mental retardation and multiple sclerosis. It is planned to fund one (1) project for each of these disability groups. In the event that no application in a particular disability area is determined through the review procedure to merit Federal support, a second project may be approved for funding in one of the remaining priority disability areas. The decision in such circumstances will be a responsibility of the Commissioner of Rehabilitation Services.

It is important that applicants fully understand that Projects for Severely Disabled Individuals must focus their activities on individuals having one of the above impairments as their primary disability. This would not, of course, eliminate from the scope of the projects multiple-handicapped persons having other impairments in addition to their primary disability, e.g., an individual with the primary disability of deafness but who is also substantially handicapped by an emotional disorder.

Special Projects for Severely Disabled Individuals are intended to demonstrate effective methods for expanding or otherwise improving rehabilitation services for groups of persons severely handicapped by specific impairments. Examples of appropriate project objectives are listed below. It should be understood that these are examples only, and are not intended to restrict or limit applicants in developing objectives for project proposals in one of the priority disability areas.

1. Development of a cooperative program between a voluntary organization or a specialized treatment resource and a State rehabilitation agency to foster a coordinated approach to the provision of rehabilitation services leading to competitive employment or, where necessary because of the severity of the disability, to sheltered or home industry employment for the target population.

2. Establishment of a community-based program to provide the comprehensive services necessary for assisting the target population to obtain gainful employment, and thus eliminating or delaying substantially their need for institutional care.

3. Development of a coordinated, interagency approach aimed at facilitating the transition of a disability group from institution to community, and assisting these individuals to make a satisfactory vocational adjustment.

4. Establishment of cooperative arrangements between a public or voluntary agency and a mental health resource to demonstrate the effectiveness of joint programming in integrating treatment and vocational rehabilitation services for a priority disability group with the additional handicap of an emotional disorder.

5. Establishment of an outreach program, in either a rural or a metropolitan area, to identify low-functioning deaf, older blind or other multiple-handicapped individuals from one of the priority populations, followed by extensive evaluation and the provision of the services essential to their vocational rehabilitation.

Eligible Applicants

State or other public or nonprofit agencies or organizations are eligible to apply for these grants. If the applicant is other than the State rehabilitation agency, the approval of the appropriate State agency must be secured.

Available Funds

The total appropriation for the Special Projects for Severely Disabled Individuals program in FY 1979 is \$7,048,000. Of this amount, approximately \$2,060,000 will be used for non-competing Continuation grants to maintain support for projects initiated in prior years under this authority. An additional \$4,500,000 has been earmarked for projects to serve persons with spinal cord injuries, and such projects are not covered in this program announcement. Therefore, an estimated \$488,000 is available for new grants under this program announcement in FY 1979.

It is anticipated that a total of five (5) grants ranging from \$75,000-\$125,000 will be awarded with the average grant award expected to be \$97,600.

Under existing regulations, approved projects can be funded for a maximum of three (3) years. In the event of a change in the regulations, approved projects recommended for more than three (3) years may be adjusted appropriately.

In FY 1978, 22 applications were subjected to peer review in the area of mental illness, of which 2 were funded. Nine (9) projects in the area of blindness, deafness and multiple sclerosis were funded of the 24 applications reviewed.

Grantee Share of the Project

While the authorizing statute does not require that the grantee share in the cost of the project, it is generally expected that grantees will provide matching

funds. In previous years, the cost-sharing ratio has been approximately 90 percent Federal, 10 percent grantee.

Grantee contributions must be project-related and allowable under the Department's applicable cost principles specified in the appropriate appendix to Subpart Q of 45 CFR Part 74.

The portion of project costs not borne by the Federal government is matching or cost-sharing, and may consist of the following: (1) grantee cash outlays, including the outlay of funds contributed to the grantee by third parties; and (2) grantee non-cash contributions which consist of charges for the use of, or depreciation in, real or non-expendable personal property owned by the grantee—see 45 CFR, 1362.8(e).

The Application Process

Availability of Application Forms

Grant applications must be submitted on standard forms provided for this purpose. Application kits which include these forms and related instructions and information may be obtained by writing to: Director, Division of Innovative Programs and Demonstrations, Rehabilitation Services Administration, Room 3411, Mary E. Switzer Building, 330 C Street SW., Washington, D.C. 20201.

Application Submission

One (1) signed original and two (2) copies of the application with all attachments, including a written statement of approval from the appropriate State rehabilitation agency, are required. The completed applications should be submitted to the: Division of Grants and Contract Management, Office of Human Development Services, Room 1427, Mary E. Switzer Building, 330 C Street SW., Washington, D.C. 20201.

The application must be signed by an individual authorized to act for the applicant agency or organization, and to assume for the organization the obligations imposed by the terms and conditions of the grant award.

Circular A-95 Notification Process

In order to comply with Office of Management and Budget Circular No. A-95, Revised (interim procedures at 41 FR 3160, July 29, 1976), applicants for grant support must, prior to submitting an application, notify both the State and the Areawide A-95 Clearinghouses of their intent to apply for Federal Assistance. If the application is for a statewide project which does not affect areawide or local planning and programs, such notification need only be

sent to the State Clearinghouse. Some State and Area Clearinghouses provide their own forms on which this information is to be submitted. Applicants are advised to get in touch with the appropriate State Clearinghouse (listed at 42 FR 2210, January 10, 1977) for detailed information on meeting the A-95 requirements.

Application Considerations

It is recommended that applicants confer with their State rehabilitation agency in the initial stages of developing an application to ensure that requirements of these State agencies are met.

Applications which do not conform with the prescribed instructions, are incomplete, or are received after the deadline of July 13, 1979, will not be reviewed.

Unsuccessful applicants will be informed of this fact, and a brief statement of the reasons for this decision will be provided the applicant.

All final decisions on the approval of applications for funding are made by the Commissioner of Rehabilitation Services, who will make grant awards consistent with the purposes of the authorizing legislation, the relevant Federal regulations, and this program announcement, within the limits of available funds.

The official document notifying an applicant that a project application has been approved for funding is the Notice of Grant Awarded, which specifies to the grantee the amount of money awarded, the purpose of the grant, the terms and conditions of the grant award, the effective date of the award, the budget period for which support is being given, and the amount of funding contributed by the grantee to project cost. The initial Notice of Grant Awarded also specifies the total project for which Federal support is contemplated.

Special Consideration for Funding

In FY 1979, priority consideration will be given those applications in which vocational rehabilitation is the primary project objective.

Criteria for Review and Evaluation of Grant Applications

All new and competing continuation applications received on a timely basis and conforming with the guidelines in this announcement will be reviewed by qualified experts. Applications are rated in accordance with the following numerical scale of 0 to 4: Not

Acceptable—0, Poor—1, Acceptable—2, Above Average—3, and Outstanding—4.

The specific criteria against which applications will be evaluated are listed below:

1. Project objectives are identical with or are capable of achieving program objectives as defined in this announcement.

2. Project activities or tasks are capable of achieving project objectives.

3. Estimated cost to the Government is reasonable in relation to anticipated project results.

4. Budget items are appropriate in relation to project activities.

5. Adequate facilities are available to the applicant to carry out the project.

6. Project personnel, actual or proposed, are, or will be, well trained and qualified.

7. Staffing levels are adequate to carry out the project.

8. Project contains an adequate evaluation component.

9. Project provides for adequate liaison with the State rehabilitation agency and community groups to ensure client referrals, outreach and utilization of project results.

10. Project demonstrates the potential for the project to be continued after termination of Federal support.

11. Project demonstrates the potential for project results to be effectively utilized after termination of support.

Closing Date for Receipt of Applications

New and competing continuation applications must be received by July 13, 1979. Applications will be judged on time if:

a. The application was sent by mail not later than the date specified above as evidenced by the U.S. Postal Service postmark or the original receipt from the U.S. Postal Service, or

b. The application is hand-delivered to the office designated for the submission of the application. Hand-delivered applications will be accepted no later than the close of business on the date specified above.

(Catalog of Federal Domestic Assistance Number 13.626, Rehabilitation Services and Facilities Special Projects.

Dated: May 10, 1979.

Robert R. Humphreys,
Commissioner of Rehabilitation Services.

Approved: May 18, 1979.

Arabella Martinez,
Assistant Secretary for Human Development Services.

[FR Doc. 79-16383 Filed 5-24-79; 8:45 am]

BILLING CODE 4110-92-M

THE HISTORY OF THE
CITY OF BOSTON
FROM THE FIRST SETTLEMENT
TO THE PRESENT TIME
BY
JOSEPH NEASE, ESQ.
OF THE BARR

IN TWO VOLUMES.
THE FIRST VOLUME.
CONTAINING THE HISTORY
FROM THE FIRST SETTLEMENT
TO THE YEAR 1700.
AND THE SECOND VOLUME
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Test Report
Federal Register

Friday
May 25, 1979

Part X

**Department of
Health, Education,
and Welfare**

Office of the Secretary

**Protection of Human Subjects of
Biomedical and Behavioral Research**

**DEPARTMENT OF HEALTH,
EDUCATION, AND WELFARE**

Office of the Secretary

**Protection of Human Subjects of
Biomedical and Behavioral Research**

AGENCY: Department of Health,
Education, and Welfare.

ACTION: Notice of Report and
Recommendations for Public Comments.

SUMMARY: On July 12, 1974, the National Research Act (Pub. L. 93-348) was signed into law, thereby creating the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research. One of the charges to the Commission was to conduct a "special study" of the ethical, social and legal implications of advances in biomedical and behavioral research and technology. In discharging its duties under this mandate, the Commission: contracted for the conduct of an iterative policy study involving a national panel of consultants; contracted for a national opinion survey to serve as an adjunct to the policy study; and sponsored a four-day colloquium of 25 scientists and scholars. The Special Study addresses the implications of advances in biomedical and behavioral research and recommends the establishment of an advisory commission to anticipate the probable effects of research and technological advances for individuals and society, and to stimulate public participation in decisionmaking. The published copy of the report which includes the supporting documents assembled by the Commission is available as DHEW Publication No. (OS) 78-0015, for sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

DATES: The Secretary invites comment on the Special Study. The Comment period will close August 23, 1979.

ADDRESS: Please send comments or requests for additional information to: F. William Dommel, Jr., J.D., Assistant Director for Regulations, Office for Protection from Research Risks, National Institutes of Health, 5333 Westbard Avenue, Room 303, Bethesda, Maryland 20205, Telephone: (301) 496-7005, where all comments received will be available for inspection weekdays (Federal holidays excepted) between the hours of 9 a.m. and 4:30 p.m.

Dated: March 30, 1979.

Charles Miller,
Acting Assistant Secretary for Health.

Approved: May 17, 1979.

Hale Champion,
Acting Secretary.

**National Commission for the Protection of
Human Subjects of Biomedical and
Behavioral Research**

Members of the Commission

Kenneth John Ryan, M.D., Chairman, Chief of
Staff, Boston Hospital for Women.

Joseph V. Brady, Ph.D., professor of
behavioral biology, Johns Hopkins
University.

Robert E. Cooke, M.D., president, Medical
College of Pennsylvania.

Dorothy I. Height, president, National Council
of Negro Women, Inc.

Albert R. Jonsen, Ph.D., associate professor of
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Patricia King, J.D., associate professor of law,
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***David W. Louisell, J.D.,** professor of law,
University of California at Berkeley.

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Eliot Stellar, Ph.D., provost of the university
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University of Pennsylvania.

***Robert H. Turtle, LL.B.,** Attorney, VomBaur,
Coburn, Simmons & Turtle, Washington,
D.C.

**National Commission for the Protection of
Human Subjects of Biomedical and
Behavioral Research**

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Pender.

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Stephen Toulmin, Ph.D.

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- III. Findings With Implications for
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Special Study

*Implications of Advances in Biomedical
and Behavioral Research*

I. The Mandate

The National Commission for the
Protection of Human Subjects was

directed under section 203 of Public Law 93-348 to conduct a "special study" of the ethical, social and legal implications of advances in biomedical and behavioral research and technology. The issues reflected in the special study go back at least to 1945 (the year of Hiroshima) and have continued to develop in significant ways since Public Law 93-348 was enacted in July 1974. Since the last century, but most markedly from the time of World War II, advances in science and technology have been influencing the character of social and individual life. Such advances have created problems not only on account of their immediate consequences, but also because of their side effects. Questions have been raised regarding issues that range from "tampering with nature" to invasion of privacy. In addition, the complexity of scientific and technological issues has placed a strain on governmental machinery, most notably in democratic societies and nations where public participation and understanding have important roles to play in the formation of policy. In addressing section 203, accordingly, the immediate problems of biomedical and behavioral research and technology must be considered in relation to broader aspects of social change and public policy.

The recognition by then Senator Walter Mondale that the impact of biomedical and behavioral science and technology was more widespread and had given rise to more public disquiet than had been properly appreciated led him to sponsor S.J. Res. 145 in 1968 and S.J. Res. 75 in 1971, resolutions from which section 203 of Public Law 93-348 was derived. Similar considerations were responsible for a series of additional steps and inquiries in the government and elsewhere during the 1970's.

In the Congress, the Office of Technology Assessment, established in 1972, has conducted inquiries into the impact of certain innovations in medical technology and services. Related areas have been studied by other divisions of Congress, including the staffs of the relevant House and Senate subcommittees, the General Accounting Office, and the Congressional Clearinghouse on the Future in the Legislative Reference of the Library of Congress.

At the National Academy of Sciences, the Academy of Engineering and the Institute of Medicine have studied the medical and nonmedical impacts of some innovations. Within DHEW, an Office of Health Technology has recently been established to coordinate

analysis and testing by agencies of efficacy and safety, cost effectiveness, and standards of development for new and existing technologies, and to assist in determining which intervention mechanisms should be used to promote, inhibit or control the development and use of technologies. The National Institutes of Health has established an Office for the Medical Applications of Technology and has also been seeking to extend the roles of the National Advisory Councils to enlarge the contribution of public representatives to the development of research policies and priorities. The establishment of local Professional Standards Review Organizations and Health Systems Agencies provides new mechanisms for involving members of the professional community and lay public in monitoring the health care delivery system, including such new technologies as computerized tomography. The Bureau of Health Planning and Resources Development is sponsoring a study, mandated by Public Law 93-641, on technological advances in health and planning.

Similarly the reintroduction of science policy advisers into the Executive Office of the President, through the creation of the Office for Science and Technology Policy in 1976, could play a part in the development of public policies in the area of section 203.

Each of these assessment activities has its own goal, and none of them attends exclusively and explicitly to the ethical, social and legal implications of advances in technology. While the various mechanisms have been performing in their own spheres, there has been a demonstrable increase in interest in careful review of the implications of new technologies.

The most striking episode to take place in the area of the Special Study since the enactment of Public Law 93-348 has been controversy over recombinant DNA research. The broad concern over such research was almost totally unforeseen, even by the scientists most closely involved. This controversy demonstrated the range and depth of public disquiet and political feeling that can be aroused by the prospect of seemingly drastic new biomedical or behavioral influences on society originating in branches of science too technical for the public to understand. Whether or not, in fact, recombinant DNA research involves so grave a threat to the public health as some participants have maintained, the debate has made it clear that a better system of early warning and monitoring is required. Novel developments likely to result from

projected biomedical and behavioral research should be identified and assessed systemically before they arouse public alarm and political passions.

II. Activities Sponsored by the Commission

A request for proposals, which reiterated the language of section 203, was published in the *Commerce Business Daily* in February 1975. Proposals received were evaluated by a technical review panel which recommended that a contract be awarded jointly to Policy Research Incorporated and the New Jersey Institute of Technology (PRI/NJIT) to conduct an iterative policy study involving a national panel of consultants. Two other projects were implemented simultaneously. One was a national opinion survey to serve as an adjunct to the policy study. The other, recommended by the technical review panel as an alternative approach to the mandate, was a four-day colloquium of twenty-five scientists and scholars. A core group of the participants prepared a report of the colloquium.

The reports to the Commission that resulted from these different projects (reprinted in the Appendix of this statement) involved very different approaches to the special study. The PRI/NJIT policy study used a dynamic communication technique designed to analyze value-laden policy-related content. It consisted of a structured, iterative inquiry mailed to and completed by 121 consultant panelists between February and August 1976. Each successive inquiry instrument was based on responses to the preceding one. Panelists were thus provided feedback and were able to compare and contrast their own views with those of others. The study design relied heavily on a policy Delphi technique that sought to synthesize divergent positions advocated by respondents. Anonymity was protected, panelists had the opportunity to modify their positions, and different positions on issues were presented. Five subject areas were selected with the expectation that advances in those areas would generate a broad range of ethical, legal and social concerns during the next twenty years.

The national opinion survey was designed to elicit public attitudes toward advances in biomedical and behavioral research technology and alternative policies to deal with them. A structured questionnaire was administered to a random sample of 1,679 noninstitutionalized adults in the continental U.S. A parallel version of

the questionnaire was administered to the Delphi panelists, and the responses of the public and the panel were compared and contrasted.

The colloquium developed an historical and sociological perspective on recent advances in biomedical and behavioral research and services using a case study method. The social impact of advances was explored, as were existing legal and institutional constraints and incentives governing the introduction of new technologies into medical practice. In addition, current knowledge about the public's understanding of and attitudes toward advances and their implications was reviewed.

In general, these different approaches yielded similar results. The immediate consequences of the scientific and technological advances in biomedical and behavioral research and services since World War II are perceived, for the most part, as beneficial by professionals and the lay public. Neither group fears that the scale and character of the advances to be expected over the next few decades will change so drastically as to invalidate this optimistic assessment. Some of the anxieties expressed in the legislative hearings on the original Mondale resolution, and more recently in the recombinant DNA debate, appeared to both groups of the Commission's respondents to have been exaggerated. If immediate action is called for at the present time, both groups agreed, it will chiefly be to create new institutions to monitor the development and introduction of new technologies in the biomedical and behavioral fields, and to draw the attention of legislatures and the public to social problems arising from the use of these new technologies.

Some of these resulting social problems are already apparent, and the kinds of measures required to deal with them are discussed below. But it is probably worth underlining that, among all of the Commission's respondents, no significant body of opinion emerged that was opposed to continuation of the scientific and technological research that has led to so many innovations since 1945. Still less was there significant support for anything resembling a moratorium on biomedical and behavioral research. On the contrary, there was widespread consensus that, for the foreseeable future as for the past, the advantages flowing from such research will continue to outweigh the incidental problems resulting from them.

III. Findings with Implications for Public Policy

Several broad findings may be derived from the policy study, public opinion survey and the report of the colloquium sponsored by the Commission that are generally consistent with other literature addressing similar problem areas.

1. Today most Americans view scientific advances and technological innovations positively. However, there is growing recognition among the public, the scientific community and government officials that societal problems are increasingly complex and that the application of advances and innovations in biomedical and behavioral research and technology should take into account not only scientific and technological factors, but also their social context and the extent to which society can accommodate these advances.

2. Value conflicts are an inevitable consequence of the tensions in a pluralistic society between competing commitment to personal freedom and social responsibility, privacy and the public need for information, and the degree to which citizens should be protected by government. Behind these diverse concerns lie quite different views of the human image, of the nature of state authority, and of the form of the public welfare. The ethical concerns raised by advances in biomedical and behavioral technology reflect not only the novelty of these advances, but the deeper uncertainty and diversity of social values. Any public policy about these advances must respect the plurality of social values. Solutions which are reached in a democratic manner must genuinely protect the welfare of individuals and communities.

3. Situations in which the introduction of new technology could be of considerable benefit to some individuals, but only at the expense of others, create problems of equity. Often technological innovations are initially available only at high cost due to the expense of development and the apparatus involved. If public funds are used to make these new technologies available, decisions must be made regarding which individuals should benefit, and how to allocate benefits when resources are limited. There is a need to address the problem of equity of access to the benefits of innovations and the problems surrounding the allocation of limited resources.

4. The lack of understanding of the details of scientific developments and the feeling that decisions are made by

depersonalized government agencies lead to an erosion of trust by the public. Research activities, including funding mechanisms, should be accessible to the public to enhance general understanding of developing knowledge. Mechanisms should be developed both to educate the general public and to encourage its participation in making value decisions. Scientists should be sensitive to concerns of the general public.

5. There is a recognition that the introduction of new technologies may have unanticipated and unwanted side effects detrimental to the health of individuals, and the mechanisms need to be developed to protect against such hazards. There should be an early warning system in which there is an assessment of potential secondary impacts prior to the dissemination of new technologies. The results of such technological assessments should be widely available to the public to provide a knowledge base for decision-making and to enhance public participation in the development of policy.

IV. Recommendations

The Commission's findings that have implications for public policy cluster in two areas: one set of findings indicate a perceived need for a program to assess the social impact of technology. The second suggests a need to facilitate public information and public participation in research and technological innovations and the policy decisions that result. These findings suggest that a mechanism should be established to monitor and evaluate innovations and to provide an early warning system in which the probable effects of innovations in biomedical and behavioral research and technology can be assessed publicly, prior to development of widespread dissemination. The existing entities referred to previously serve narrower constituencies and goals, and the independence and broader mandate of a new body are needed.

The establishment of a mechanism to encourage public participation in policy formulation was of special concern to Mr. Mondale who, during legislative hearings on the resolution to establish a Commission on Health Science and Society in 1971, said that studies of advances and their implications should be incorporated into a public process by which society might express its right to say something about its own future: "The public's stake is too great. And the need for consensus as to how society should deal with these profound problems is too clear . . . I think we need something far more official and far

more public if we are to reach agreement on the ways in which society is to organize itself to handle these unprecedented problems."

The National Commission for the Protection of Human Subjects recommends, as have Mr. Mondale and Senator Kennedy, that an advisory commission be employed to anticipate the probable effects of research and technological advances for individuals and society, and to stimulate public participation in decision making. A commission with diverse membership, independent of control by any government agency or private institution, would be able to examine issues without the customary institutional and political constraints. The commission should not be dominated by health professionals, for its main purpose would be to facilitate widespread debate involving all segments of society in the ethical and policy issues that affect all people and about which diverse views should be heard. The commission would be able to clarify many issues and foster better understanding by the public and by those directly involved in decision making. It would not itself decide issues but rather help society to decide who should decide them and to explore the implications of various decisions that may ensue.

[FR Doc. 79-16493 Filed 5-24-79; 8:45 am]

BILLING CODE 4110-08-M

General Order

Friday
May 25, 1979

Part XI

Department of Labor

Wage and Hour Division

Employee Benefit Plans; Amendment to
Interpretative Bulletin

DEPARTMENT OF LABOR

Wage and Hour Division

29 CFR Part 860

Employee Benefit Plans; Amendment to Interpretative Bulletin

AGENCY: Wage and Hour Division, Labor.

ACTION: Amendment to Interpretative Bulletin.

SUMMARY: The Interpretative Bulletin on the Age Discrimination in Employment Act of 1967, as amended ("ADEA" or "Act"), sets forth various interpretations which indicate the construction of the ADEA that the Department of Labor believes to be correct and which will guide it in the performance of its administrative and enforcement duties under the Act. After enactment of the Age Discrimination in Employment Act Amendments of 1978, Pub. L. 95-256, 92 Stat. 189 (approved April 6, 1978), the Department of Labor published in the Federal Register of September 22, 1978, a proposed amendment to the Interpretative Bulletin with respect to employee benefit plans. After considering carefully numerous written comments as well as testimony at a hearing on the proposed amendment, the Department has revised the original proposal, which it now publishes in final form.

DATES: Effective date: May 25, 1979. Since this is an interpretative rule or statement of policy, the 30-day delay in effective date as prescribed in section 553(d) of title 5, U.S. Code, does not apply. The enforcement policy that will be followed by the Department of Labor and by the Equal Employment Opportunity Commission under this interpretative bulletin is explained in more detail below in part 9 of the preamble. The Equal Employment Opportunity Commission, which will take on administrative and enforcement responsibility for the ADEA effective July 1, 1979, concurs with this enforcement policy.

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SUPPLEMENTARY INFORMATION: The Department of Labor published its proposed amendment to § 860.120 of the Interpretative Bulletin on the ADEA on September 22, 1978 (see 43 FR 43264). This section of the Interpretative Bulletin deals with employee benefit plans under section 4(f)(2) of the Act, 29 U.S.C. 623(f)(2).

Prior to the 1978 amendments, when the Act protected individuals between the ages of 40 and 65, section 4(f)(2) provided:

(f) It shall not be unlawful for an employer, employment agency, or labor organization * * *

(2) to observe the terms of * * * any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual * * *.

In fashioning the section 4(f)(2) exception with respect to employee benefit plans, Congress explicitly recognized that the cost of providing certain benefits to older workers is greater than providing those same benefits to younger workers. To require that the same benefits be provided to all workers without regard to age, Congress feared, would discourage the employment of older workers or would unduly burden the employer and thereby jeopardize the continued maintenance and operation of such plans. As explained by Senator Javits during passage of the original bill in 1967, section 4(f)(2) is "particularly significant," "since, in its absence, employers might actually have been discouraged from hiring older workers because of the increased costs involved in providing certain types of benefits to them" (S. Rept. 723, 90th Cong., 1st Sess. (1967), p. 14; 113 Cong. Rec. 31254-31255). Senator Javits also stated: "The meaning of this provision is as follows: An employer will not be compelled under this section to afford to older workers exactly the same pension, retirement, or insurance benefits as he affords to younger workers" (113 Cong. Rec. 31255). In a similar vein, Representative Daniels pointed out that section 4(f)(2) was "designed to maximize employment possibilities without working an undue hardship on employers in providing special and costly benefits" (113 Cong. Rec. 34727). See also Hearings before the Senate Labor Subcommittee on S. 830 and S.

788, 90th Cong., 1st Sess., 1967, pp. 27-30, 53, 106-107.

The Department's original interpretation of section 4(f)(2), as published in the Federal Register on June 21, 1969 (34 FR 9709), and as republished in successive editions of the Code of Federal Regulations (CFR), reflected the congressional purpose underlying section 4(f)(2) in setting forth the general rule governing employee benefit plans falling within the exception:

* * * A retirement, pension, or insurance plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of pension or retirement benefits, or insurance coverage. * * *

[29 CFR 860.120(a)(1977).]

The 1978 amendments, in addition to increasing the maximum age of those individuals protected by the Act from 65 to 70 (and making other changes not relevant here), added a final clause to section 4(f)(2) so that it now reads:

(f) It shall not be unlawful for an employer, employment agency, or labor organization—

(2) to observe the terms of * * * any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such * * * employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 12(a) of this Act because of the age of such individual * * *.

The principal purpose of this amendment was to make clear that "the exception does not authorize an employer to require or permit involuntary retirement of an employee within the protected age group on account of age" (H. Rept. No. 95-950, 95th Cong., 2d Sess. (1978), p. 8 (ADEA Conference Report)).

In amending section 4(f)(2) Congress also made clear that the Department should issue more comprehensive guidance with respect to section 4(f)(2), particularly because of the increase in the maximum age level of those covered by the Act. See 124 Cong. Rec. H 2271 (daily ed. Mar. 21, 1978) (remarks of Rep. Hawkins); 124 Cong. Rec. S. 4451 (daily ed. Mar. 23, 1978) (remarks of Sens. Williams and Javits). The increase in the maximum age level of those covered has raised questions about many common benefit practices affecting employees at age 65. In the absence of comprehensive guidance, these questions would have to

be answered by the Department, and by the courts, on a potentially lengthy, costly and uncertain case-by-case basis.

The congressional requests for more comprehensive guidance from the Department were accompanied by a reiteration of the purposes of section 4(f)(2), reflecting the statements as described above which were made during the original enactment of the ADEA. Most significant was the following statement by Senator Javits, who was minority manager of the original ADEA and the 1978 amendments (124 Cong. Rec. S. 4450-S. 4451, daily ed., March 23, 1978):

The purpose of section 4(f)(2) is to take account of the increased cost of providing certain benefits to older workers as compared to younger workers.

Welfare benefit levels for older workers may be reduced only to the extent necessary to achieve approximate equivalency in contributions for older and younger workers. Thus a retirement, pension, or insurance plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of pension or retirement benefits, or insurance coverage. This is consistent with the following statement I made during the November 6, 1967 floor consideration of the original act:

The amendment relating to * * * employee benefit plans is particularly significant: Because of it an employer will not be compelled to afford older workers exactly the same pension, retirement, or insurance benefits as younger workers and thus employers will not, because of the often extremely high cost of providing certain types of benefits to older workers, actually be discouraged from hiring older workers. At the same time, it should be clear that this amendment only relates to the observance of bona fide plans. No such plan will help an employer if it is adopted merely as a subterfuge for discriminating against older workers.

The Department of Labor intends to promulgate comprehensive regulations in order to provide guidance in this regard for sponsors of employee benefit plans and the Secretary is urged to act as soon as possible.

Senator Williams, the majority manager, agreed that Senator Javits' statement "accurately reflects congressional intent in this regard." *Id.* at S. 4451.

Statements to the same effect were made during House floor debate by Congressman Hawkins (124 Cong. Rec. H. 2270-H. 2271, daily ed., March 21, 1978), Congressman Pepper (*id.* at H. 2275), Congressman Weiss (*id.* at H. 2276) and Congressman Waxman (*id.* at H. 2277). All of these statements indicate the congressional understanding of the language of section

4(f)(2), as originally enacted and as amended, which condemns any benefit practice which is "a subterfuge to evade the purposes of this Act." That understanding was succinctly stated by Congressman Waxman:

I am hopeful, however, that employers do not terminate capable and healthy older workers from benefit plans solely on the basis of age. In the absence of actuarial data, which clearly demonstrates that the costs of this service are uniquely burdensome to the employer, such a policy constitutes discrimination and a conscious effort to evade the purposes of the act. (*Id.* at 2277.)

The legislative history of the 1978 amendments establishes one exception to the otherwise uniform rule under section 4(f)(2) that age-based reductions in employee benefit plans must be justified by actuarially significant cost considerations. That exception is with respect to certain retirement plans—both defined contribution plans and defined benefit plans. The legislative history makes clear that

an employer will be permitted under the act, as amended, to maintain a defined contribution plan—other than a plan which is merely supplemental to a defined benefit or defined contribution plan maintained by the employer—which precludes employer and, if applicable, employee contributions to such a plan subsequent to an employee's attainment of the plan's normal retirement age. (124 Cong. Rec. S. 4450, daily ed., March 23, 1978, remarks of Sen. Javits.)

This statement by Senator Javits, with which Senator Williams concurred, is identical in all material respects to a statement by Congressman Dent with which Congressman Hawkins concurred (see 124 Cong. Rec. H. 2271, daily ed., March 21, 1978).

The legislative history also makes clear that under the ADEA, as amended, an employer maintaining a defined benefit retirement plan is not required (1) to credit, for purposes of benefit accrual, those years of service which occur after an employee has attained the normal retirement age under the plan; (2) to adjust actuarially the benefit accrued as of normal retirement age for an employee who continues to work beyond that age; (3) to commence benefits at normal retirement age when an employee's actual date of retirement is later; or (4) to provide for the accrual of benefits under such a plan during any years of service by an employee after normal retirement age. (See S. Rept. No. 95-493, 95th Cong., 1st Sess. 14-16 (1977); 123 Cong. Rec. H. 9977, daily ed., September 23, 1977.)

The Department of Labor's proposed interpretation, based on this legislative history, resulted in numerous comments

from the public. These comments have been detailed and useful. They have convinced the Department that its proposed interpretation is in need of certain modifications and clarifications. Accordingly, as is explained in more detail below, several changes have been made in the interpretation.

In the preamble to the proposed interpretation, the Department discussed seven general questions that had arisen with respect to employee benefit plans under the ADEA, and it then explained how it had proposed to resolve them. The discussion below of the various comments received by the Department is grouped under the same headings. In addition, two other important issues raised by the comments are discussed below under headings 8 and 9 in the preamble. The first of these issues is whether the failure of the ADEA to preempt State age discrimination laws insulates such laws, to the extent that they relate to employee benefit plans, from the preemption provisions in section 514 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1144.

The second issue not discussed originally, but which is discussed below, is the effective date of this amendment to the interpretative bulletin.

1. What Kinds of Employee Benefit Plans Fall Within Section 4(f)(2)?

The preamble and the proposed interpretation stated that section 4(f)(2) applies only to plans in which age is an actuarially significant factor in plan design, and used the example of group term life insurance to illustrate the kind of plan encompassed by this principle. The original proposal also stated that age is not an actuarially significant factor in the design of time off with pay plans, such as paid vacations and paid sick leave.

The comments on this aspect of the proposed interpretation were not numerous. Several commenters asserted that age is a significant actuarial cost factor in sick leave plans, particularly where such plans are separately insured. These same commenters questioned whether the Department, in formulating its position, had overlooked such plans or had intended to challenge the validity of the cost data with respect to such plans. The commenters requested clarification of the Department's position with respect to this issue.

The Department's original statement was intended to refer to those numerous paid sick leave plans which are not insured. Such plans do not fall within section 4(f)(2). An uninsured paid sick leave plan, like a paid vacation plan, is

simply not an "employee benefit plan such as a retirement, pension, or insurance plan" as described in section 4(f)(2). However, there may be certain insured sick leave plans whose design is such that age is an actuarially significant cost factor. In terms of their cost, these plans are frequently similar to short-term disability plans. Where such plans exist and where the employer can show clearly that the cost of providing older workers with the same benefits as younger workers is higher because of age, then the benefits for older workers can be correspondingly reduced, in accordance with the principles contained in this § 860.120. The final interpretation reflects this approach by describing as "uninsured" those paid sick leave plans which are outside the scope of section 4(f)(2).

Other comments requested that the Department define the term "employee benefit plan" in order to make clear what plans fall within section 4(f)(2) and what plans do not. Some commenters suggested using the same definition as in section 3(3) of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. 1002(3). In the Department's view, however, it would not be appropriate to use the ERISA definition, because it encompasses plans which are maintained to provide vacation benefits, prepaid legal services and certain other benefits whose cost does not increase with the age of the employee participant. The Department believes that it is sufficient to rest with its original statement, in view of the change in the reference to paid sick leave.

A major part of the comments received pointed out the absence of any discussion in the proposed interpretations of employee-pay-all plans which employers sometimes offer to their employees. It is clear that an employee-pay-all plan is subject to the provisions of section 4(a)(1) of the Act, since such a plan is one of the "terms, conditions, or privileges of employment" with respect to which discrimination on the basis of age is forbidden. Regardless of who pays for an employee benefit plan, it is available to employees of the employer and is therefore governed by the section 4(a)(1) prohibition against discrimination.

However, it does not follow that the level of benefits available to older workers under an employee-pay-all plan must be no less than those available to younger workers. Section 4(f)(2) of the ADEA permits a reduction in the level of benefits for older workers where the cost of supplying the same level of benefits to older workers as to younger

workers would be higher. There is no reason why a reduction in the level of benefits for older workers which would be permissible under a plan paid for in whole or in part by an employer should not also be permissible under an employee-pay-all plan. Accordingly, the interpretation takes the position that section 4(f)(2) applies to employee-pay-all plans. In such a plan, benefits for older workers may be reduced to the same extent and according to the same principles as apply to employee-paid plans.

The application of the ADEA to employee-pay-all plans raises not only the question of the level of benefits; it raises also the question of the costs paid by employees for those benefits. Regardless of whether benefits for older workers under an employee-pay-all plan are at the same level as or lower than benefits for younger workers, older workers cannot be required to pay more for the particular level of benefits they receive than the actual cost of those benefits. Requiring older workers to pay more than the actual cost of the benefits is plainly discrimination based on age, and no provision of the ADEA excuses such a practice.

These positions with respect to employee-pay-all plans are reflected in the interpretation below.

2. What Kinds of Cost Data May Be Relied on To Show That Age is an Actuarially Significant Factor in Plan Design?

The proposed interpretation took the position in § 860.120(d)(1) that an employer may rely on data which show the actual cost to him of providing the particular benefit in question. The proposal also stated, however, that where such data do not exist or where the universe of employees is too small to be statistically significant, reasonable actuarial data on benefit costs for similarly situated employees can be relied on.

This proposed interpretation, in requiring that employers rely on their own cost data in most instances, was intended to prevent employers from relying on other cost data which do not accurately reflect their own experience, even though such other data might be accurate with respect to other employers or groups of employers. In other words, the approach was designed to prevent potential abuses in the use of cost data.

Those who commented on this aspect of the proposed interpretation had several points to make. Some commenters noted that the Department's approach would prevent an employer from relying on cost data for a larger group of similarly situated employees

(except where an employer's own workforce is too small to be statistically significant). This approach was criticized as being unnecessarily restrictive, particularly since a larger group of similarly situated employees would be likely to be more representative of a particular employer's experience over the years. In this connection, some commenters observed that an employer forced to rely on its own cost experience might have to make adjustments in benefit levels each year, as a result of an unusually high or low number of deaths, illnesses or other events insured against in the previous year.

Another commenter requested that the Department state explicitly that where little or no reliable cost information is available—as may be the case with respect to some benefits after age 65—reasonable projections from cost data for younger ages be permitted.

After reviewing the comments and considering the original proposal afresh, the Department has decided to permit an employer to make adjustments in benefits on the basis of any reasonable data on benefit costs. In order to be considered reasonable, the data relied upon must reflect approximately the actual cost to the employer, over a representative period of years, of the benefits in question. Under this standard, an employer may rely on his own cost data for a representative period of years; this longer period will serve to reduce the cost impact of unusually high or low incidences of events insured against in a single year. An employer may also rely on cost data for a larger group of similarly situated employees. However, where an employer which is a self-insurer, or which is experience-rated by an insurance company, incurs costs which are significantly different from costs for similarly situated employees, the cost data for the similarly situated employees will not be considered reasonable as a basis for approximating the particular employer's benefit costs. This approach is adopted in § 860.120(d)(1) below.

The interpretation also makes clear that where reliable cost information is not yet available, reasonable projections may be made from existing cost data.

3. May comparisons of benefit costs at different age levels be made with respect to the benefit package as a whole, or must the cost comparison be made on a benefit-by-benefit basis?

The proposed interpretation required that all cost comparisons be made on a benefit-by-benefit basis, not on an overall "benefit package" basis. The

rejection of the "benefit package" approach was based on two major concerns: (1) that its application could deprive individual employees of benefits of particular value to them in a way unjustified by the age-related costs of those benefits, and (2) that it would be a less workable standard for compliance.

Comments in this area have sharply questioned the appropriateness of the Department's proposed rejection of the benefit package approach. These comments have also urged that if the Department persists in the benefit-by-benefit approach, it should clarify what it means by a "benefit."

In advocating a benefit package approach, commenters made several general points. First, several commenters stated that the legislative history does not explicitly rule out a benefit package approach; its only explicit requirement is that payments made or costs incurred by employers for employee benefit plans for older workers must be no less than for younger workers.

Second, numerous commenters contended that the more restrictive benefit-by-benefit approach would deprive not only employers, but also employees (including older employees), of the flexibility to design a package of fringe benefits responsive to their particular needs. Specifically, an employer who makes equal contributions at all age levels for each fringe benefit whose cost goes up with age may find that his employees want a package of benefits forbidden by the proposed interpretation.

Thirdly, commenters emphasized that group insurance plans of any type cannot be tailored to fit the individual needs of each employee. Generalities based on the needs of average or typical employees must be used in the design of such plans.

Finally, various commenters asserted that the purported convenience of being able to determine compliance with section 4(f)(2) by examining each employee benefit plan in isolation was an insufficient basis on which to forbid the use of a benefit package approach.

After a careful review of the legislative history in the light of these various comments, the Department has concluded that an exclusive adherence to the benefit-by-benefit approach is not warranted.

Although the legislative history does not compel a benefit-by-benefit approach exclusively, there is clear support for such an approach. Thus, Senator Javits described benefit plans one by one in indicating the compliance standard applicable to "a retirement,

pension or insurance plan * * *" (124 Cong. Rec. S 4450, daily ed., March 23, 1978, emphasis added). Also in 1978, Congressman Waxman, apparently referring to health insurance, condemned reductions for older workers "[i]n the absence of actuarial data which clearly demonstrates that the costs of this service are uniquely burdensome to the employer" (124 Cong. Rec. H 2277, daily ed., March 21, 1978, emphasis added). Moreover, the 1978 legislative history specifies a particular rule with respect to one type of benefit—retirement or pension benefits—without reference to other benefits or costs. All of these indications point to a benefit-by-benefit approach.

Nevertheless, this legislative history need not be read as rejecting a benefit package approach altogether, since it does not appear that Congress had the opportunity to consider the matter fully. Certainly there is no explicit rejection of a benefit package approach.

Moreover, the language and purposes of the act itself suggest that in some circumstances a benefit package approach should be permitted. The language of section 4(f)(2) condones a benefit arrangement which is "not a subterfuge to evade the purposes of [the] Act," and section 2(b) declares that one of those purposes is "to help employers and workers find ways of meeting problems arising from the impact of age on employment." One way of "meeting problems arising from the impact of age on employment" is to make sure that there is enough flexibility under section 4(f)(2) so that (1) older workers can continue to have the same level of certain fringe benefits which are particularly valuable to them as do younger workers, and (2) employers can avoid higher fringe benefit costs for older workers which would otherwise result by reducing the level of some other benefit or benefits more than the benefit-by-benefit approach would permit. This approach would meet the purposes of both section 2(b) and section 4(f)(2), provided that the costs of the benefits were no less for older workers than for younger workers, and provided that the benefits provided were not a subterfuge to evade the purposes of the ADEA.

Accordingly, the interpretation permits a benefit package approach, which is subject to certain restrictions which are described in detail under heading 7 of this preamble, as well as in § 860.120(f). These restrictions are designed to assure that the greater flexibility of the benefit package approach is used to provide older workers with a benefit package which

meets their needs at least as well as the benefit-by-benefit approach, if not better.

Benefit-by-Benefit Approach

In accepting the benefit package approach, the Department does not thereby reject the benefit-by-benefit approach. The benefit package approach, even with its restrictions, is designed to afford greater flexibility in the design of employee benefits than the benefit-by-benefit approach would have provided, but many employers may find that the benefit-by-benefit approach is a simpler means by which to assure compliance with the ADEA. For this reason, the precise application of the benefit-by-benefit approach must be defined.

Many comments indicated uncertainty or confusion as to the precise meaning of a "benefit" under the benefit-by-benefit approach. Some commenters seemed to believe that the Department intended a "plan-by-plan" approach. Many others suggested that the approach be understood to look at benefits on an "event-by-event" basis (that is, to take together all benefits available to an employee for a particular event—death, disablement, etc.). The Department acknowledges the ambiguity of the proposed interpretation. The Department also acknowledges that it anticipated a somewhat flexible definition of a "benefit" which would have permitted the substitution for older employees of similar benefits meeting the same basic need.

The Department now believes, however, that the desired flexibility—that is, flexibility that will better meet the needs of employees—may be and should be justified on a benefit package approach. The Department therefore now takes a strict view of a "benefit" under the benefit-by-benefit approach. The Department specifically rejects the suggestion that the benefit-by-benefit approach should be understood as an "event-by-event" approach which would ignore differences in the forms of benefits available for a particular event. Adjustments in benefits under the benefit-by-benefit approach are to be made in the amount of the benefit, not in its form. Where benefits are different in form or otherwise, they must stand up to a benefit package analysis. This is all explained more fully under heading 7 below and in § 860.120(f).

(4) *May the Level of a Benefit be Reduced on the Basis of the Average Cost of the Benefit for all Employees Within an Age Range (Such as 65 to 70 years Old), or Must the Cost of the*

Benefit be Calculated on a Year-by-Year Basis?

The proposed interpretation took the position in § 860.120(d)(3) that cost comparisons and adjustments must be made on a year-by-year basis. The purpose behind this approach was to avoid a large and sudden reduction in benefits for employees reaching a certain age which could not be justified by cost considerations with respect to that age.

The great majority of comments received took issue with this interpretation. Many comments noted that it has long been the practice in the insurance industry to price insurance on the basis of average costs in five-year age brackets, rather than on the basis of yearly costs. The same practice, it was pointed out, is reflected in section 79 of the Internal Revenue Code and Treasury Regulations thereunder. To change from the normal five-year average price approach to the Department's proposed approach, these commenters stated, would add to the administrative burden of maintaining such plans and of communicating changes in benefit levels to participants.

Several commenters also noted that under a five-year average cost approach, older employees within each age bracket would receive a *higher* level of benefits than under a year-by-year approach; conversely, younger employees within each age bracket would receive less. Accordingly, it was pointed out, the five-year bracketing approach, viewed in a broader perspective of an employee's total years of service with an employer, would be no more harmful to older employees than a year-by-year cost approach.

The Department has rejected an average cost approach based on periods of longer than five years. Some commenters suggested that a 10-year period be permitted, and others suggested that reductions in benefits at age 65 be based on the average cost of those benefits for a 25-year period (from ages 40 to 65). Such approaches, however, would lead to the drastic reductions in benefit levels at older age groups which the Department has sought to avoid.

Another comment requested that the interpretation make clear that cost-based reductions in benefit levels could start at any age—not just at age 65. (This comment may have been prompted by the example given in § 860.120(d)(3), which was of reductions starting at age 65.)

After reviewing the various comments and reassessing the original proposal, the Department has decided to permit

up to a five-year average cost approach, which is reflected in the interpretation below. Of course, a year-by-year approach or any other approach using age brackets of less than five years is also an acceptable form of compliance. The interpretation also states explicitly that reductions in benefit levels, if cost-justified, may begin at any age. Examples of this approach are given in the interpretative bulletin itself.

5. *Where the Government pays for certain benefits to employees on the basis of age—such as Medicare beginning at age 65—may an employer to that extent cease to provide those same benefits under his employee benefit plan, even though as a result the cost to the employer of providing medical benefits to older employees may be less than for younger employees?*

The interpretation permits such coordination of benefits, even though the availability of the Government-paid benefits may be based on age, provided that, when the Government-paid benefits are included, older employees still enjoy no less of a benefit than younger employees. It is in the nature of many employee benefit plans to respond to individual needs, and it would seem reasonable for such plans to take into account the extent to which individual needs are met by other benefits provided by the Government. This principle applies not only to Medicare, but also to Social Security disability and old-age and other such government-provided benefits.

Some comments in this area have validly pointed out that "Government-paid" benefits are ultimately paid for by employees and employers as a result of payroll deductions, taxes and similar devices. The Department did not intend to imply otherwise in using that shortened expression to describe such benefits.

The basic position expressed in the proposed interpretation has not been changed, except insofar as the interpretation seemed to disapprove any adjustment in health insurance coverage which did not simply offset (or "carve-out") Medicare benefits actually paid from regular health plan benefits. As indicated in the specific discussion of health insurance below, the Department is taking the position that plans which "supplement" rather than "carve-out" Medicare benefits are permissible where the total health benefit for employees over 65 is no less favorable than that for employees under 65.

6. (a) *May an employer require that an older employee make greater*

contributions into a benefit plan as a condition of employment?

The interpretation below, like the proposed interpretation, answers this question in the negative. The Department remains convinced that to impose such a requirement as a condition of employment would violate the special restrictions in section 4(f)(2). Such a requirement would force older workers, if they wanted to continue working, to accept less take-home pay as a result of higher contributions and in addition would impose an impermissible impediment to employment. Such a practice is illegal under the ADEA.

(b) *May an employer require that an older employee make greater contributions into a benefit plan as a condition of participation in the plan, in order for the employee to be able to receive the same level of benefits as a younger employee?*

The proposed interpretation answered this question in the negative, on the ground that the language and legislative history of section 4(f)(2) indicated that the provision contemplated adjustments in benefits, not adjustments in pay or in employee contributions which are a condition of participation in an employee benefit plan.

Upon reconsideration of this proposed position, and after reviewing comments, the Department of Labor has concluded that its original position is essentially correct. However, some refinements in that position are necessary, because in the Department's view there are very limited circumstances under which an older employee, in order to receive the same level of benefits as a younger worker, can be required, as a condition of continued participation, to contribute a greater amount than the younger worker.

In most situations, the Department continues to believe that a violation of the ADEA would occur if an older employee were required to contribute more than a younger employee for the same level of benefits. As indicated under heading 6(a) above, where participation in the employee benefit plan is *mandatory*, such a practice would violate the ADEA, because older workers, on the basis of age, would have no option but to receive less take-home pay than younger workers.

Where participation in the employee benefit plan is *voluntary*, somewhat different considerations apply. In such a situation, older workers are free to avoid reductions in take-home pay by declining to participate in the employee benefit plan. However, even where older workers voluntarily agree to participate in such a plan, the plan would not be

considered lawful where the cost of such participation to older workers is discriminatory on the basis of age. In order to avoid discriminatory costs, the proportion of the total premium borne by older workers cannot be more than that borne by younger workers.

The application of this principle can be illustrated with respect to the three different contribution arrangements for employee benefit plans in which participation is voluntary. The first such arrangement is one in which the employee-participant pays for the entire benefit in question. In such employee-pay-all plans, as noted under heading (1) above, it would not be unlawful to require older workers to contribute the full amount of the cost increase with age. In such a plan, older employees are treated no less favorably than younger employees, since all participants in the plan are required to pay the entire cost of the benefit, regardless of age. Employees are simply denied the advantage of continued membership in the plan if they are unwilling or unable to pay their own way like everyone else.

The second type of contribution arrangement in employee benefit plans in which participation is voluntary is the non-contributory (or "employer-pay-all") plan. In such plans, older employees cannot be required to contribute towards any of the age-related cost increase. If no employee-participants are required to make any contributions, there is obviously no age-based discrimination against older workers. However, if older workers are required to make contributions but younger workers are not, a violation of the ADEA would result. Such a requirement is discriminatory, even though the employer's contribution is no less for older than for younger workers, because in order to obtain any benefit from that contribution older workers must put in money of their own (that is, receive less take-home pay) whereas younger workers need not. (Of course, as explained elsewhere, an employer can reduce the level of benefits for older workers in order to avoid age-related increases in costs.)

The third type of contribution arrangement in employee benefit plans in which participation is voluntary is the contributory plan, in which the employer and the employee share the premium cost. In such a plan, in order to avoid discrimination based on age, the proportion of the total premium borne by older workers cannot be more than that borne by younger workers. This principle can perhaps best be illustrated by a concrete example.

Assume a contributory group insurance plan to which the employer and the employee each contribute 50 percent of the total premium of \$20 per month per employee, during a certain five-year age range. Further assume that in the next five-year age range the total premium increases to \$30 per month per employee. The employee contribution could be required to increase to as much as \$15 per month, since this amount is no more than 50 percent of the total premium cost, as is paid by the younger workers. The employer's contribution could not be less than \$15 per month. It could not be lower—such as \$10—since then the employee contribution would have to be greater than 50 percent of the total premium cost—in the example, \$20. This would be discriminatory because in order to obtain any benefit from the employer's contribution older employees would have to match it with \$2 of their own (out of their take-home pay) for every \$1 of the employer's contribution, whereas younger employees would only have to match it dollar-for-dollar. The only way the employer contribution could be held at \$10 would be by decreasing the level of benefits so that the total premium remained at \$20 and the employee contribution at \$10. (Alternatively, the employer could decrease coverage by a lesser amount—for example, so that the total premium increased to just \$24. The employee contribution could be required to increase in relation to the resulting total increase—in the example, to up to \$12.)

However, as the interpretation makes clear, older employees could be given the option, as individuals, to make the additional contribution necessary to prevent the reduction in benefits otherwise justified. Thus, the employee contribution could be permitted at employee option, but could not be required as a condition of participation in the plan, to increase to \$20 in order to fund, along with the \$10 employer contribution, the unreduced level of benefits whose total cost is \$30.

7. How Would Section 4(f)(2), As Amended, Apply to Various Employee Benefit Plans?

The application of section 4(f)(2) to various employee benefit plans depends on whether reductions in benefit levels are justified by means of the benefit-by-benefit approach or by the benefit package approach. Under the benefit-by-benefit approach, as outlined above, reductions in the level of one benefit—such as group term life insurance—must be justified by an increase in the cost of that particular benefit, regardless of any adjustment in the levels of other benefits. The discussion in part A below

describes the limits on reductions in benefit levels for four of the most common types of employee benefit plans—group term life insurance, group health insurance, long-term disability, and retirement plans—under the benefit-by-benefit approach. Employers who meet these standards (as set forth more precisely in § 860.120(f)) will be considered in compliance with section 4(f)(2). Although not specifically discussed herein, other plans within section 4(f)(2), such as short-term disability and accidental death and dismemberment, are subject to the same general principles.

Where reductions in any individual benefit are greater than those permitted under the benefit-by-benefit approach, such reductions must meet the standards of the benefit package approach. These standards are described in part B below.

A. Benefit-by-Benefit Approach.—(1) *Group term life insurance.* Where the level of group term life insurance benefits is reduced, on the basis of age, in direct correlation to the age-based increase in cost, no violation of the ADEA will result. The reduction may be made on the basis of average costs over a period of up to five years, but no longer. Where the level of group term life insurance benefits is based on the employee's wages or salary, such as two times base pay, increases in the cost of such coverage for older workers which are caused by increases in wages or salary cannot be taken into account. The reason for this is that such increases are not directly related to age. The interpretation sets forth examples of permissible adjustments in the level of group term life insurance benefits.

(2) *Health insurance.* It is still the Department's understanding that ordinarily health insurance coverage does not vary significantly with age up to age 65. Where employees are not now subject to mandatory retirement at that age, coverage after that age is almost invariably reduced to take account of Medicare. In view of the availability of Medicare starting at age 65, the interpretation takes the position that reductions in total health benefits (Medicare plus benefits from other sources) for employees age 65 to 70 will generally not be justified.

Comments and hearing testimony in this area have emphasized that there is more than one approach to the adjustment of health insurance coverage to take account of Medicare. The Department clearly intended to permit what is called a "carve-out" approach, under which regular health plan benefits are directly offset by benefits paid under

Medicare. Under this approach employees over 65 receive the same total health benefits as those under 65.

Other common approaches do not simply offset Medicare benefits actually paid but rather attempt to anticipate what will be paid under Medicare and supplement them with benefits which Medicare is not anticipated to pay. Under these approaches, which might be generally referred to as "supplement" approaches, employees over 65 might not receive the same total health benefits as those under 65: of some benefits (for example, professional service for which Medicare pays less than anticipated) they may receive less, and of some benefits (for example, prescription drugs not covered by either Medicare or the regular health plan but covered by the "supplement" plan) they may receive more.

Comments and hearing testimony have suggested that "supplement" approaches are used rather than the "carve-out" approach for administrative reasons, that they are not based on age stereotypes, and that they are not regarded as necessarily less favorable to employees. The Department takes the position that such Medicare "supplement" plans are a permissible alternative to a "carve-out" plan, provided that (1) their cost to the employer is no less than a "carve-out" plan would be, and (2) taken with Medicare benefits, they provide no less favorable benefits on an overall basis than a "carve-out" plan.

The specific question has been raised whether, in adjusting health insurance benefits to take account of Medicare, an employer may assume that eligible employees have taken advantage of available Medicare coverage. The Department takes the position that employers may not make such an assumption, unless they inform each eligible employee of the need to apply for Medicare coverage and provide any necessary assistance for making an application for benefits. Furthermore, where the employer's regular health plan requires no employee contribution or an employee contribution less than that required for Medicare "Part B" coverage, the employer must pay or contribute toward the "Part B" contribution so as to make the total benefits available to employees over 65 on the terms on which they are available to employees under 65. However, the employer's total contribution for Part B and the carve-out or supplemental plan would not have to be greater than the employer's highest contribution for health benefits for employees of any age under 65.

Some comments have suggested that some employers may be able to prove that despite the availability of Medicare their health insurance costs are higher for employees age 65 to 70 than for any younger employee group. Presumably any such employers would be ones with unusually comprehensive health insurance plans. In any case, the burden will be on any employer which reduces total health benefits for employees age 65 to 70 to produce sound and specific costs data to justify the reduction.

(3) *Long-term disability.* The proposed interpretation stated that age-based reductions in the level of benefits under long-term disability plans are permissible only where justifiable by age-related cost considerations. To supplement this position two alternatives were stated and comments were solicited with respect to the reasonableness of either or both. The first approach prohibited the cutting off of long-term disability benefits, on the basis of age, before age 70. The second alternative allowed benefit payments under long-term disability plans to cease at age 65 if the employee was disabled at age 60 or less, or to cease after five years (except that no payments need be made beyond age 70) with respect to disabilities occurring after age 60. A detailed explanation was offered for each of these alternatives in the supplementary information accompanying the proposed interpretation.

Almost every comment received by the Department offered views on the subject of long-term disability benefits. Most of these pointed out (as the Department was aware) that both alternative interpretations would have treated as unlawful the past practice under these plans of ceasing benefits at age 65 or at the age of eligibility for a full actuarially unreduced pension (if that age was other than age 65). Under this practice, workers who were disabled after age 65 or after normal retirement age would receive no long-term disability benefits at all. Thus, the employer would incur no long-term disability costs for such employees, whereas he would incur costs for younger employees. Section 4(f) (2) does not permit this treatment of older workers under the benefit-by-benefit approach, since workers can now continue working until age 70. The past practice would also adversely affect workers who are disabled just before age 65 or normal retirement age. Their benefits might cover only a few months, whereas workers who are disabled somewhat earlier would receive benefits for several years. Under a benefit-by-

benefit analysis, this difference in treatment cannot be justified under section 4(f) (2).

The Department has reassessed the two proposed alternatives thoroughly, and has concluded that although both are acceptable means of compliance, they are not the only options available.

The first alternative, in forbidding a cut-off in disability benefit payments until age 70, would have permitted an employer to avoid age-based benefit cost increase only by reducing the level of benefits. Another way of adhering to section 4(f) (2) cost justification principles is to reduce the duration of long-term disability payments. Under this approach, the minimum required duration of disability payments would depend upon the age at which an employee is disabled. For example, suppose an employee who is disabled at age 35 is entitled to long-term disability payments until age 65. In order to satisfy section 4(f) (2), the cost to the employer of insurance providing disability payments for an employee who is disabled at age 45, for example, must be no less than the cost to the employer of disability insurance for the 35-year-old. The same rule would apply to employees disabled at any other age.

The final interpretation set forth below, reflecting this approach, permits an employer to cut off disability payments at age 65 (or, for example, at normal retirement where that is not age 65) for workers who are disabled at relatively early ages. However, in order to assure equal costs in support of workers who are disabled at relatively later ages, the duration of their disability payments may have to extend beyond age 65. For any such older worker who is disabled before age 70, the employer must expend in support of his or her disability coverage an amount no less than the greatest amount expended in support of coverage for any younger worker. Where equal costs in support of disability coverage for older workers result in lesser benefits for such workers, the lesser benefits can be in the form of a shorter duration of benefits but at the same level as for younger workers.

A concrete example of this approach can be given. Suppose an employer, in line with a common practice in the past, cut off long-term disability coverage at age 65 for workers disabled at any age before age 65. It is likely that the greatest cost of such a plan, in terms of net annual claims costs, was for workers who were disabled at about age 61. (After age 61, the greater the age of the employee at the time of disablement, the less the cost of coverage until age 65,

because the duration of the disability payment declines more rapidly as a function of age than the probability of disablement increases.) In order to assure that workers who are disabled after age 61 have equal costs expended in support of their long-term disability coverage, their coverage must extend beyond age 65. The extent of the coverage depends on the age at which they are disabled and the rate of disablement at that age.

Statistics on the rate of disablement for employees over age 65 are scanty, but data are available for employees disabled just before age 65. Some information on this subject came from a comment prepared by the insurance company which provides group long-term disability insurance to more employers than any other insurer in the United States. Although the Department of Labor has not independently verified the accuracy of the insurance company's data or the assumptions on which they were computed, the data indicate how the duration of benefits could be reduced to avoid increases in costs. For any employer who cuts off long-term disability coverage at age 65 for workers who are disabled at age 61 or younger, the greatest cost expended for this benefit, if applied to workers disabled at later ages, would yield the following durations of benefits:

Age at disablement	Duration of benefits (in years)
61 or younger	To age 65
62	3½ years
63	3
64	2½
65	2
66	1½
67	1½
68	1½
69	1

If these statistics are based on reasonable actuarial data and reasonable extrapolations therefrom, then a long-term disability plan which provides at least this duration of benefits would be in compliance with section 4(f)(2) under a benefit-by-benefit analysis. Thus, the Department's proposed second alternative, although it was not originally suggested on the basis of cost data, would be in compliance with section 4(f)(2). There are clearly other possible forms of compliance which are likewise somewhat more generous than the data would minimally require. For example, a plan might provide for benefits to age 65 or for four years, whichever is later (except that no benefits would have to extend past age 70). Another plan might provide for benefits to age 67 or for

three years, whichever is later (except that no benefits would have to extend past age 70).

(4) *Retirement plans.* Comments and hearing testimony in this area have focused largely on the treatment of defined contribution plans. (The term "defined contribution plan" as used herein is synonymous with individual account plan.)

The proposed interpretation took the position that a defined contribution plan which was not "supplemental" could provide for the cessation of employer contributions after normal retirement age. Commenters have taken a variety of positions, including the following:

(1) That the distinction between "supplemental" and other defined contribution plans ought to be abandoned and all such plans treated alike, and

(2) That all "money purchase" plans ought to be deemed not to be "supplemental" and all other defined contribution plans (for example, profit-sharing plans) deemed "supplemental."

After reviewing these and other comments, the Department has concluded that, although in need of some clarification, the proposed interpretation was essentially correct.

The Department believes it should not ignore the clear legislative history which distinguishes between "supplemental" and other plans. In the absence of any indication that a specific technical meaning was intended, the Department has attempted to give the word "supplemental" its ordinary meaning. In response to specific comments and questions, the Department wishes to clarify its interpretation on one point, consistent with the ordinary meaning of the word "supplemental." The point concerns the situation where an employer has more than one retirement plan, but no one employee participates at one time in more than one plan. While the proposed interpretation might have been read to say otherwise, the Department would not in that situation deem any plan to be "supplemental," since as to any employee no plan "supplements" another. However, when any one employee participates at one time in more than one plan, as to that employee every plan but one is supplemental.

Another point raised by the comments relating to "supplemental" plans concerns what are sometimes called "floor" plans. A floor plan has a defined contribution component, but if the benefits available from that component are below a certain "floor" level, then extra benefits up to the "floor" level are provided. Some comments have

suggested that a "floor" plan is a single plan with no "supplemental" plan involved; other comments have suggested that it is two plans with the defined benefit plan being "supplemental." On the basis of information now available to the Department of Labor, it will not necessarily take the position that a floor plan constitutes more than one plan, nor is it in a position to state an appropriate rule on floor plans generally.

Several comments asserted that the proposed interpretation appeared to be inconsistent with ERISA because it would have permitted an employer maintaining a non-supplemental defined contribution plan to exclude from participation in such a plan, on the basis of age, any employee who was hired after reaching normal retirement age. In this connection, section 202(a)(2) of ERISA (29 U.S.C. 1052(a)(2)) provides, in pertinent part:

No pension plan may exclude from participation (on the basis of age) employees who have attained a specified age, unless—

(A) the plan is a—(i) defined benefit plan, or (ii) target benefit plan (as defined under regulations prescribed by the Secretary of the Treasury) * * *

(See also section 410(a)(2) of the Internal Revenue Code, 26 U.S.C. 410(a)(2).) To the extent that "participation" within the meaning of section 202(a)(2) of ERISA would entail employer contributions, adherence to the rule provided in the legislative history of the ADEA Amendments of 1978 could not justify non-compliance with this (or any other) provision of ERISA. The interpretation states merely that it is not a violation of the ADEA to follow the rules it sets forth. However, in order to avoid any confusion on this point, § 860.120(f)(4) has been revised to state simply that no contributions need be made to a non-supplemental defined contribution plan on behalf of an employee hired after normal retirement age. Any specific determination as to compliance with the provisions of ERISA dealing with "participation" in defined contribution plans or as to compliance with Section 410 of the Code must be made by the Internal Revenue Service.

Some comments have raised questions as to the treatment of investment gains and losses and employee termination forfeitures in defined contribution plans. Because the legislative history refers only to the cessation of contributions after normal retirement age, the Department takes the following positions with respect to defined contribution plans:

(1) Older employees, including those working past normal retirement age, should receive no less favorable treatment because of age with respect to investment gains and losses than younger employees.

(2) Where employee termination forfeitures are not used to reduce employer contributions, they should not be allocated less favorably because of age to older employees, including those working past normal retirement age, than to younger employees.

With respect to defined benefit plans, many comments have raised questions as to the treatment of salary increases and benefit improvements after normal retirement age. The 1978 legislative history indicates an understanding that no adjustment to an accrued benefit under a defined plan is required on account of employment after normal retirement age. Accordingly, the interpretation takes the position that employees working past normal retirement age need not receive the advantage from salary increases and benefit improvements that other active employees receive.

It would not follow, however, that employees working past normal retirement age could be denied the advantage of a benefit improvement for current retirees. While the ADEA does not require that an employee get a greater benefit by choosing to work rather than to retire after normal retirement age, it does not permit an employee to be given a lesser benefit because of that choice, although the benefit may be paid later (beginning at the later actual retirement age). (Similarly, the payment of benefits may be suspended during reemployment. See ERISA section 203(a)(3)(B). See also 43 FR 59098, December 19, 1978.) To provide a lesser (and not merely later) retirement benefit would obviously discourage employees from continuing their employment and would be deemed a subterfuge to evade the purposes of the Act.

Questions have also been raised about the integration of Social Security benefits with defined benefit plan benefits. The Department takes the position that such integration is permissible, consistent with the general principles on the coordination of benefits where Government-paid benefits are available, with one limitation. For employees who actually retire at normal retirement age, the general practice is not to decrease defined benefit plan benefits because of a subsequent increase in Social Security benefits. (See ERISA Section 206(b).) In light of the principle discussed in the

previous paragraph, the Department also takes the position that where an employee working past normal retirement age is denied because of age any upward adjustment in defined benefit plan benefits which is given younger active employees, that employee may not suffer any reduction in plan benefits because of an increase in Social Security benefits which current retirees would not suffer. Thus, where years of service in a benefit formula are "frozen" because of age at normal retirement age, the offset from plan benefits of Social Security benefits must generally also be "frozen" at that age. On the other hand, a plan need not "freeze" the Social Security offset at any age prior to actual retirement for employees who are given the full advantage of benefit adjustments (due to greater years of service, salary increases and benefit improvements) up to actual retirement age.

Finally, questions have been raised as to whether retirement benefits need to be paid to employees receiving long-term disability benefits who reach normal retirement age. Some comments have stated that an employee receiving both disability and retirement benefits might receive more than his or her full working salary. The legislative history makes clear that retirement benefits need not commence until actual retirement. The interpretation takes the position that an employee receiving long-term disability benefits as a salary replacement may be deemed not to have "actually retired" and therefore need not receive both benefits simultaneously.

B. Benefit Package Approach. A benefit package approach to compliance under section 4(f)(2) offers greater flexibility than a benefit-by-benefit approach. In essence it permits deviations from a benefit-by-benefit approach so long as the overall result is (1) no lesser cost to the employer and (2) no less favorable benefits for employees. As previously noted, part of the legal basis for a benefit package approach is the statutory purpose "to help employers and workers find ways of meeting problems arising from the impact of age on employment." In order to assure that such an approach is used for the benefit of older workers and not to their detriment, and is otherwise consistent with the legislative intent, it must necessarily be subject to limitations. These limitations are set forth in the interpretation and explained below:

(1) *A benefit package approach may apply only to employee benefit plans which fall within section 4(f)(2).* In other words, a benefit package approach does

not expand the intended scope of section 4(f)(2).

(2) *A benefit package approach may not apply to a retirement or pension plan.* Such plans are of course within the scope of section 4(f)(2). However, as previously noted, the 1978 legislative history sets forth specific and rather comprehensive rules governing such plans. Unlike the general principles with respect to other plans under section 4(f)(2), these rules are not tied to actuarially significant cost considerations but are intended to deal with the special funding arrangements of retirement or pension plans, which were of concern to Congress. See, e.g., S. Rept. 95-493, 95th Cong., 1st Sess. (1977), pp. 13-16. It would be a departure both from the general principles of section 4(f)(2) and from the specific legislative history to apply a benefit package approach, which is based on the general cost principles, to a retirement or pension plan, which is specifically governed by other rules.

The interpretation therefore takes the position that variations from the special rules are not justified by variations from the benefit-by-benefit approach in other benefit plans. Thus, for example, an employer who does not make an age-based reduction in group term life insurance which could be justified under a benefit-by-benefit approach may not justify on that (or any other) basis an age-based reduction in employees' annual accrual of pension benefits prior to normal retirement age. Similarly, the interpretation takes the position that variations from the special rules governing pension and retirement plans do not justify variations from the benefit-by-benefit approach in other benefit plans. For example, an employer who does not cease pension accrual at normal retirement age (as a benefit-by-benefit approach would permit) may not justify on that basis a reduction in group term life insurance benefits greater than would be justified under a benefit-by-benefit approach.

(3) *A benefit package approach may not be used to justify reductions in health benefits greater than would be justified under a benefit-by-benefit approach.* Such benefits would appear to be a particular importance to older workers in meeting "problems arising from the impact of age" and were clearly of particular concern to Congress. Congressman Waxman stated in the 1978 legislative history that "[w]hile the conference committee did not specifically address the status of health benefits to older workers protected under this act," reductions should not be made "[i]n the absence of

actuarial data which clearly demonstrates that the costs of this service are uniquely burdensome to the employer" (124 Cong. Rec. H 2277, daily ed., March 21, 1978, emphasis added).

On the basis of this legislative history and the comments received on the original proposal, the interpretation below takes the position that the "benefit package" approach may not be used to reduce health insurance benefits by more than is warranted by the increase in the cost to the employer of those benefits alone. This position is set forth in § 860.120(f)(2). Any greater reduction would be deemed "a subterfuge to evade the purposes of [the] Act."

(4) *A benefit reduction greater than would be justified under a benefit-by-benefit approach must be offset by another benefit available to the same employees.* Thus, for example, a benefit available to all employees may not be "traded off" for a benefit available to relatively few. Otherwise, some employees could suffer clear age discrimination in that they would be deprived because of age of one benefit without any offsetting benefit being made available to them.

(5) *Employers who wish to justify benefit reductions under a benefit package approach must be prepared to produce data to show that those reductions are fully justified.* Thus employers must be able to show that deviations from a benefit-by-benefit approach do not result in lesser cost to them or less favorable benefits to their employees. Obviously, the greater the deviation from a benefit-by-benefit approach, the greater will be the burden on the employer to show that older employees are being helped rather than hurt.

8. What is the relationship of the ADEA and ERISA to State age discrimination laws?

The ADEA does not preempt State age discrimination laws. See Section 14(a), 29 U.S.C. § 633(a). See also S. Rept. No. 95-493, 95th Cong., 1st Sess. (1977), p. 5-7. The question has arisen in the comments whether such State laws—to the extent that they relate to employee benefit plans—are nonetheless superseded under section 514 (a) of ERISA, 29 U.S.C. § 1144(a). This question was discussed by Senators Javits and Williams during floor consideration of the 1978 ADEA Amendments:

Mr. JAVITS. Finally, Mr. President, it is understood that just as these age discrimination amendments do not interfere with ERISA, State age discrimination in employment laws also are not to interfere

with ERISA. The ADEA itself, as pointed out in the Senate Report, does not preempt such State age discrimination laws. However, there should be no question that the preemption rules of section 514(a) of ERISA shall be determinative regarding the preemption of State age discrimination laws which directly or indirectly establish requirements relating to employee benefit plans.

ERISA's preemption of State age discrimination laws shall be determined without regard to section 514(d) of ERISA or the fact that the ADEA does not itself preempt State law.

Mr. WILLIAMS. I concur in my friend's observations as they accurately state the controlling principles of law in this regard. Federal law will preempt State age discrimination statutes only to the extent that those laws relate to an employee benefit plan described in section 4(a) of ERISA and are not exempt under section 4(b) of ERISA. [124 Cong. Rec. S4451, daily ed., March 23, 1978. The portion in brackets was inadvertently omitted from the March 23, 1978, statement, but it was corrected on April 4, 1978 (see 124 Cong. Rec. S4767).]

9. Effective Date and Enforcement.

This interpretation indicates the construction of the law which the Department of Labor believes to be correct and which will guide it in the performance of its administrative and enforcement duties under the Act unless and until it is otherwise directed by authoritative decisions of the Courts or concludes, upon reexamination of the interpretation, that it is incorrect. See 29 CFR 860.1.

This interpretation is effective immediately. It replaces as of this date the less specific interpretation in old § 860.120.

With respect to benefit practices prior to this date, no employer will be subject to back wage liability for failure to comply with the new interpretation if the employer can prove that the noncompliance was "in good faith in conformity with and in reliance on" the old interpretation or on an opinion letter of the Wage and Hour Administrator. See section 10 of the Portal-to-Portal Act of 1947, as amended, 29 U.S.C. 259, which applies to actions under the ADEA. ADEA section 7(e)(1), 29 U.S.C. 626(e)(1).

As noted above, the old interpretation provided in relevant part:

A retirement, pension, or insurance plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of a older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of pension or retirement benefits, or insurance coverage.

While the old interpretation was less specific than the new, the Department believes that some benefit practices could never be proved to have been in good faith in conformity with and in reliance on the old interpretation. One such practice would be a total cut-off on the basis of age of various benefits for employees between ages 40 and 65 or, since January 1, 1979, for employees between age 40 and 70.

With respect to benefit practices after the effective date of the new interpretation, appropriate enforcement policy will be determined on a case-by-case basis. Section 7(b) of the ADEA provides that before instituting any action, the Secretary of Labor shall attempt to eliminate any alleged unlawful practice and to effect voluntary compliance, through informal methods of conciliation, conference, and persuasion. 29 U.S.C. 626(b). Some comments have stated that it may be difficult to achieve prompt voluntary compliance with the new interpretation through any quick amendment of an employee benefit plan, particularly where such a plan is insured. These comments have emphasized the time involved in amending or creating insured employee benefit plans, particularly where changes cannot be made without the approval of a regulatory agency, such as a State insurance commission. This and other problems in achieving prompt compliance may appropriately be considered in the conciliation of individual cases. It will also be appropriate to consider whether prompt compliance could feasibly be achieved in spite of these problems through, for example, existing insurance products or partial self-insurance.

Finally, it should be noted that all the benefit practices specifically permitted under the proposed interpretation published September 22, 1978, would be in compliance with the final interpretation published now.

The Equal Employment Opportunity Commission, which will take on administrative and enforcement responsibility for the ADEA effective July 1, 1979, concurs with the interpretation and with this statement regarding enforcement.

This document was prepared under the direction and control of C. Lamar Johnson, Deputy Administrator, Wage and Hour Division. The principal authors were James B. Leonard, Counsel for Legal Advice, and Thomas J. Allen, Attorney, Office of the Solicitor, and Sandra K. Bollhoefer, Wage-Hour Analyst, Wage and Hour Division. They were assisted by staff from the Office of

the Solicitor and the Wage and Hour Division.

Accordingly, § 860.120 of Title 29, Code of Federal Regulations, is amended as follows:

§ 860.120 Costs and benefits under employee benefit plans.

(a) (1) *General.* Section 4(f)(2) of the Act provides that it is not unlawful for an employer, employment agency, or labor organization "to observe the terms of * * * any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such * * * employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 12(a) of this Act because of the age of such individuals." The legislative history of this provision indicates that its purpose is to permit age-based reductions in employee benefit plans where such reductions are justified by significant cost considerations. Accordingly, section 4(f)(2) does not apply, for example, to paid vacations and uninsured paid sick leave, since reductions in these benefits would not be justified by significant cost considerations. Where employee benefit plans do meet the criteria in section 4(f)(2), benefit levels for older workers may be reduced to the extent necessary to achieve approximate equivalency in cost for older and younger workers. A benefit plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of benefits or insurance coverage. Since section 4(f)(2) is an exception from the general non-discrimination provisions of the Act, the burden is on the one seeking to invoke the exception to show that every element has been clearly and unmistakably met. The exception must be narrowly construed. The following sections explain three key elements of the exception: (i) What a "bona fide employee benefit plan" is; (ii) what it means to "observe the terms" of such a plan; and (iii) what kind of plan, or plan provision, would be considered "a subterfuge to evade the purposes of [the] Act." There is also a discussion of the application of the general rules governing all plans with respect to specific kinds of employee benefit plans. For a discussion of the provisions in

section 4(f)(2) forbidding the failure to hire any individual or the involuntary retirement of any individual, see § 860.110 of this chapter.

(2) *Relation of section 4(f)(2) to sections 4(a), 4(b) and 4(c).* Sections 4(a), 4(b) and 4(c) prohibit specified acts of discrimination on the basis of age. Section 4(a) in particular makes it unlawful for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age * * *." Section 4(f)(2) is an exception to this general prohibition. Where an employer under an employee benefit plan provides the same level of benefits to older workers as to younger workers, there is no violation of section 4(a), and accordingly the practice does not have to be justified under section 4(f)(2).

(b) *"Bona fide employee benefit plan."* Section 4(f)(2) applies only to bona fide employee benefit plans. A plan is considered "bona fide" if its terms (including cessation of contributions or accruals in the case of retirement income plans) have been accurately described in writing to all employees and if it actually provides the benefits in accordance with the terms of the plan. Notifying employees promptly of the provisions and changes in an employee benefit plan is essential if they are to know how the plan affects them. For these purposes, it would be sufficient under the ADEA for employers to follow the disclosure requirements of ERISA and the regulations thereunder. The plan must actually provide the benefits its provisions describe, since otherwise the notification of the provisions to employees is misleading and inaccurate. An "employee benefit plan" is a plan, such as a retirement, pension, or insurance plan, which provides employees with what are frequently referred to as "fringe benefits." The term does not refer to wages or salary in cash; neither section 4(f)(2) nor any other section of the Act excuses the payment of lower wages or salary to older employees on account of age. Whether or not any particular employee benefit plan may lawfully provide lower benefits to older employees on account of age depends on whether all of the elements of the exception have been met. An "employee-pay-all" employee benefit plan is one of the "terms, conditions, or privileges of employment" with respect to which discrimination on the basis of age is forbidden under section 4(a)(1). In such a plan, benefits for older workers may be reduced only to the extent and according to the same

principles as apply to other plans under section 4(f)(2).

(c) *"To observe the terms" of a plan.* In order for a bona fide employee benefit plan which provides lower benefits to older employees on account of age to be within the section 4(f)(2) exception, the lower benefits must be provided in "observ[ance of] the terms of" the plan. As this statutory text makes clear, the section 4(f)(2) exception is limited to otherwise discriminatory actions which are actually prescribed by the terms of a bona fide employee benefit plan. Where the employer, employment agency, or labor organization is not required by the express provisions of the plan to provide lesser benefits to older workers, section 4(f)(2) does not apply. Important purposes are served by this requirement. Where a discriminatory policy is an express term of a benefit plan, employees presumably have some opportunity to know of the policy and to plan (or protest) accordingly. Moreover, the requirement that the discrimination actually be prescribed by a plan assures that the particular plan provision will be equally applied to all employees of the same age. Where a discriminatory provision is an optional term of the plan, it permits individual, discretionary acts of discrimination, which do not fall within the section 4(f)(2) exception.

(d) *"Subterfuge."* In order for a bona fide employee benefit plan which prescribes lower benefits for older employees on account of age to be within the section 4(f)(2) exception, it must not be "a subterfuge to evade the purposes of [the] Act." In general, a plan or plan provision which prescribes lower benefits for older employees on account of age is not a "subterfuge" within the meaning of section 4(f)(2), provided that the lower level of benefits is justified by age-related cost considerations. (The only exception to this general rule is with respect to certain retirement plans. See paragraph (f)(4) of this section.) There are certain other requirements that must be met in order for a plan not to be a subterfuge. These requirements are set forth below.

(1) *Cost data—General.* Cost data used in justification of a benefit plan which provides lower benefits to older employees on account of age must be valid and reasonable. This standard is met where an employer has cost data which show the actual cost to it of providing the particular benefit (or benefits) in question over a representative period of years. An employer may rely in cost data for its own employees over such a period, or on cost data for a larger group of

similarly situated employees. Sometimes, as a result of experience rating or other causes, an employer incurs costs that differ significantly from costs for a group of similarly situated employees. Such an employer may not rely on cost data for the similarly situated employees where such reliance would result in significantly lower benefits for its own older employees. Where reliable cost information is not available, reasonable projections made from existing cost data meeting the standards set forth above will be considered acceptable.

(2) *Cost data—Individual benefit basis and "benefit package" basis.* Cost comparisons and adjustments under section 4(f)(2) must be made on a benefit-by-benefit basis or on a "benefit package" basis, as described below.

(i) *Benefit-by-benefit basis.* Adjustments made on a benefit-by-benefit basis must be made in the amount or level of a specific form of benefit for a specific event or contingency. For example, higher group term life insurance costs for older workers would justify a corresponding reduction in the amount of group term life insurance coverage for older workers, on the basis of age. However, a benefit-by-benefit approach would not justify the substitution of one form of benefit for another, even though both forms of benefit are designed for the same contingency, such as death. See § 860.120(f)(1) of this section.

(ii) *"Benefit package" basis.* As an alternative to the benefit-by-benefit basis, cost comparisons and adjustments under section 4(f)(2) may be made on a limited "benefit package" basis. Under this approach, subject to the limitations described below, cost comparisons and adjustments can be made with respect to section 4(f)(2) plans in the aggregate. This alternative basis provides greater flexibility than a benefit-by-benefit basis in order to carry out the declared statutory purpose "to help employers and workers find ways of meeting problems arising from the impact of age on employment." A "benefit package" approach is an alternative approach consistent with this purpose and with the general purpose of section 4(f)(2) only if it is not used to reduce the cost to the employer or the favorability to the employees of overall employee benefits for older employees. A "benefit package" approach used for either of these purposes would be a subterfuge to evade the purposes of the Act. In order to assure that such a "benefit package" approach is not abused and is consistent with the legislative intent, it is subject to

the limitations described in § 860.120(f), which also includes a general example.

(3) *Cost data—Five year maximum basis.* Cost comparisons and adjustments under section 4(f)(2) may be made on the basis of age brackets of up to 5 years. Thus a particular benefit may be reduced for employees of any age within the protected age group by an amount no greater than that which could be justified by the additional cost to provide them with the same level of the benefit as younger employees within a specified five-year age group immediately preceding theirs. For example, where an employer chooses to provide unreduced group term life insurance benefits until age 60, benefits for employees who are between 60 and 65 years of age may be reduced only to the extent necessary to achieve approximate equivalency in costs with employees who are 55 to 60 years old. Similarly, any reductions in benefit levels for 65 to 70 year old employees cannot exceed an amount which is proportional to the additional costs for their coverage over 60 to 65 year old employees.

(4) *Employee contributions in support of employee benefit plans—*

(i) *As a condition of employment.* An older employee within the protected age group may not be required as a condition of employment to make greater contributions than a younger employee in support of an employee benefit plan. Such a requirement would be in effect a mandatory reduction in take-home pay, which is never authorized by section 4(f)(2), and would impose an impediment to employment in violation of the specific restrictions in section 4(f)(2).

(ii) *As a condition of participation in a voluntary employee benefit plan.* An older employee within the protected age group may be required as a condition of participation in a voluntary employee benefit plan to make a greater contribution than a younger employee only if the older employee is not thereby required to bear a greater proportion of the total premium cost (employer-paid and employee-paid) than the younger employee. Otherwise the requirement would discriminate against the older employee by making compensation in the form of an employer contribution available on less favorable terms than for the younger employee and denying that compensation altogether to an older employee unwilling or unable to meet the less favorable terms. Such discrimination is not authorized by section 4(f)(2). This principle applies to three different contribution arrangements as follows:

(A) *Employee-pay-all plans.* Older employees, like younger employees, may be required to contribute as a condition of participation up to the full premium cost for their age.

(B) *Non-contributory ("employer-pay-all") plans.* Where younger employees are not required to contribute any portion of the total premium cost, older employees may not be required to contribute any portion.

(C) *Contributory plans.* In these plans employers and participating employees share the premium cost. The required contributions of participants may increase with age so long as the proportion of the total premium required to be paid by the participants does not increase with age.

(iii) *As an option in order to receive an unreduced benefit.* An older employee may be given the option, as an individual, to make the additional contribution necessary to receive the same level of benefits as a younger employee (provided that the contemplated reduction in benefits is otherwise justified by section 4(f)(2)).

(5) *Forfeiture clauses.* Clauses in employee benefit plans which state that litigation or participation in any manner in a formal proceeding by an employee will result in the forfeiture of his rights are unlawful insofar as they may be applied to those who seek redress under the Act. This is by reason of section 4(d) which provides that it is unlawful for an employer, employment agency, or labor organization to discriminate against any individual because such individual "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this Act."

(6) *Refusal to hire clauses.* Any provision of an employee benefit plan which requires or permits the refusal to hire an individual specified in section 12(a) of the Act on the basis of age is a subterfuge to evade the purposes of the Act and cannot be excused under section 4(f)(2).

(7) *Involuntary retirement clauses.* Any provision of an employee benefit plan which requires or permits the involuntary retirement of any individual specified in section 12(a) of the Act on the basis of age is a subterfuge to evade the purpose of the Act and cannot be excused under section 4(f)(2).

(e) *Benefits provided by the Government.* An employer does not violate the Act by permitting certain benefits to be provided by the Government, even though the availability of such benefits may be based on age. For example, it is not necessary for an employer to provide

health benefits which are otherwise provided to certain employees by Medicare. However, the availability of benefits from the Government will not justify a reduction in employer-provided benefits if the result is that, taking the employer-provided and Government-provided benefits together, an older employee is entitled to a lesser benefit of any type (including coverage for family and/or dependents) than a similarly situated younger employee. For example, the availability of certain benefits to an older employee under Medicare will not justify denying an older employee a benefit which is provided to younger employees and is not provided to the older employee by Medicare.

(f) *Application of section 4(f)(2) to various employee benefit plans.*

(1) *Benefit-by-benefit approach.* This portion of the interpretation discusses how a benefit-by-benefit approach would apply to four of the most common types of employee benefit plans.

(i) *Life insurance.* It is not uncommon for life insurance coverage to remain constant until a specified age, frequently 65, and then be reduced. This practice will not violate the Act (even if reductions start before age 65), provided that the reduction for an employee of a particular age is no greater than is justified by the increased cost of coverage for that employee's specific age bracket encompassing no more than five years. It should be noted that a total denial of life insurance, on the basis of age, would not be justified under a benefit-by-benefit analysis. However, it is not unlawful for life insurance coverage to cease at age 70 or upon separation from service, whichever occurs first.

(ii) *Health insurance.* Ordinarily, health insurance coverage has not varied significantly with age up to age 65. The great variety of health insurance plans makes it difficult to offer a general guideline as to when, if ever, reductions in coverage might be justified by increased costs. Such reductions may not, however, be concentrated on certain items so as to make coverage less attractive to older workers.

(A) With respect to employees eligible for Medicare, it is not unlawful for an employer to "carve-out" from its own health insurance plan those benefits actually paid for by Medicare. Under such a "carve-out" approach, Medicare assumes primary responsibility for health care expenses under the employer's regular health insurance plan; the regular plan pays only for those expenses it insures against which are not actually paid for by Medicare. It

is also not unlawful for an employer to place employees eligible for Medicare in a separate health insurance plan which supplements Medicare, *provided* (1) that the cost to the employer for such a supplemental plan is not less than the cost which would be expended to include such individuals in the regular health plan (with a Medicare "carve-out") and (2) that the supplemental plan provides benefits which are no less favorable than an employee eligible for Medicare benefits would receive under the employer's regular health insurance plan.

(B) An employer may not assume that eligible employees have taken advantage of available Medicare coverage, unless the employer informs each eligible employee of the need to apply for Medicare coverage and provides any necessary assistance for making an application for benefits. Furthermore, where the employer's regular health plan requires no employee contribution or an employee contribution less than that required for Medicare "Part B" coverage, the employer must pay or contribute toward the "Part B" contribution so as to make the total benefits available on terms which are no less favorable for employees over 65 than for employees under 65. However, the employer's total contribution for "Part B" and the "carve-out" or supplemental plan would not have to be greater than the employer's highest contribution for health benefits for employees of any age under 65.

(C) As a result of the savings to employers when benefits are available through Medicare, reductions in total health benefits for employees age 65 to 70 will generally not be justified. The total denial on the basis of age of employer-provided health benefits for older employees not eligible for Medicare would never be justified. It is not unlawful, however, for health insurance coverage to cease at age 70 or upon separation from service, whichever occurs first.

(iii) *Long-term disability.* It has been common in the past to cut off long-term disability benefits for all disabled employees and long-term disability coverage for all active employees at age 65. Since the Act protects employees and their expectations of employment from discrimination up to age 70, this practice can no longer be justified under a benefit-by-benefit approach. Under such an approach, where employees who are disabled at younger ages are entitled to long-term disability benefits, there is no cost-based justification for denying such benefits altogether, on the basis of age, to employees who are

disabled at older ages. It is not unlawful to cut off long-term disability benefits and coverage on the basis of some non-age factor, such as recovery from disability. Nor is it unlawful to terminate benefits or coverage, on the basis of age, at age 70. Reductions on the basis of age before age 70 in the level or duration of benefits available for disability are justifiable only on the basis of age-related cost considerations as set forth elsewhere in this section. An employer which provides long-term disability coverage to all employees until the age of 70 may avoid any increases in the cost to it that such coverage for older employees would entail by reducing the level of benefits available to older employees. An employer may also avoid such cost increases by reducing the duration of benefits available to employees who become disabled at older ages, without reducing the level of benefits. In this connection, the Department would not assert a violation where the level of benefits is not reduced and the duration of benefits is reduced in the following manner:

(A) With respect to disabilities which occur at age 60 or less, benefits cease at age 65.

(B) With respect to disabilities which occur after age 60, benefits cease 5 years after disablement or at age 70, whichever occurs first. Cost data may be produced to support other patterns of reduction as well.

(iv) *Retirement plans.* (A) *Participation.* No employee hired prior to normal retirement age may be excluded from a defined contribution plan. With respect to defined benefit plans not subject to the Employee Retirement Income Security Act (ERISA), Pub. L. 93-406, 29 U.S.C. 1001, 1003 (a) and (b), an employee hired at an age more than 5 years prior to normal retirement age may not be excluded from such a plan unless the exclusion is justifiable on the basis of cost considerations as set forth elsewhere in this section. With respect to defined benefit plans subject to ERISA, such an exclusion would be unlawful in any case. An employee hired less than 5 years prior to normal retirement age may be excluded from a defined benefit plan, regardless of whether or not the plan is covered by ERISA. Similarly, any employee hired after normal retirement age may be excluded from a defined benefit plan.

(B) *Benefits.* In addition to the requirements as set forth elsewhere in this section, the following special rules apply to benefits provided under a retirement plan.

(1) A defined contribution plan may provide for the cessation of employer contributions after the normal retirement age of any participant in the plan. A defined contribution plan may also provide that no employer contributions shall be made on behalf of an employee who is hired after normal retirement age. However, these provisions apply only with respect to plans which are not "supplemental." Any defined contribution plan is deemed "supplemental" with respect to any employee who is a participant in it as well as in a defined benefit plan maintained by the employer. Where an employer has no defined benefit plan but two or more defined contribution plans, all but one of the defined contribution plans are "supplemental" with respect to those employees who are participants in them. The one defined contribution plan which is not "supplemental" could provide for the cessation of employer contributions after normal retirement age. The employer can designate which one of the defined contributions plans is not "supplemental."

(2) In a defined contribution plan, investment gains and losses and employee termination forfeitures are typically allocated to individual accounts instead of being used to reduce employer contributions. Where this is done, the allocations shall not be made less favorably on the basis of age to older employees (including those continuing to work past normal retirement age) than to younger employees. This rule shall apply regardless of whether or not the defined contribution plan is "supplemental."

(3) A defined benefit plan may fail to credit, for purposes of benefit accrual, service which occurs after an employee's normal retirement age.

(4) A defined benefit plan need not adjust actuarially the benefit accrued as of normal retirement age for an employee who continues to work beyond that age. (A defined contribution plan would have to pay the balance in the individual account.)

(5) A defined benefit plan need not provide for the accrual of benefits for an employee who continues to work after normal retirement age.

(6) A defined benefit plan may provide, and may be amended to provide, that retirement benefits will commence at the actual date of retirement rather than at normal retirement age for employees who choose to work beyond normal retirement age. Employees receiving long-term disability benefits as a salary replacement may be deemed not to have

"actually retired" and therefore need not be simultaneously provided with retirement benefits.

(7) A defined benefit plan need not take into account salary increases and benefit improvements under the plan which take place after an employee reaches the normal retirement age specified in the plan with respect to those employees continuing their employment beyond that age. However, benefit improvements for retirees may not be denied to such employees who do not receive the advantage of benefit accruals and increases given younger employees.

(8) A defined benefit plan which includes offsets for Social Security and which ceases benefit accruals or any other increases at the normal retirement age specified in the plan may not offset the benefit receivable by such employees at actual retirement with the amount of Social Security benefit receivable at that time if that amount is greater than it was at the cessation of accruals. The total retirement benefit must be calculated on the basis of a Social Security benefit no greater than that receivable at the time when benefit accruals ceased under the employer's plan.

(2) "Benefit Package" Approach

A "benefit package" approach to compliance under section 4(f)(2) offers greater flexibility than a benefit-by-benefit approach by permitting deviations from a benefit-by-benefit approach so long as the overall result is no lesser cost to the employer and no less favorable benefits for employees. As previously noted, in order to assure that such an approach is used for the benefit of older workers and not to their detriment, and is otherwise consistent with the legislative intent, it is subject to limitations as set forth below:

(i) A benefit package approach shall apply only to employee benefit plans which fall within section 4(f)(2).

(ii) A benefit package approach shall not apply to a retirement or pension plan. The 1978 legislative history sets forth specific and comprehensive rules governing such plans, which have been adopted above. These rules are not tied to actuarially significant cost considerations but are intended to deal with the special funding arrangements of retirement or pension plans. Variations from these special rules are therefore not justified by variations from the cost-based benefit-by-benefit approach in other benefit plans, nor may variations from the special rules governing pension and retirement plans justify variations from the benefit-by-benefit approach in other benefit plans.

(iii) A benefit package approach shall not be used to justify reductions in health benefits greater than would be justified under a benefit-by-benefit approach. Such benefits appear to be of particular importance to older workers in meeting "problems arising from the impact of age" and were of particular concern to Congress. Therefore, the "benefit package" approach may not be used to reduce health insurance benefits by more than is warranted by the increase in the cost to the employer of those benefits alone. Any greater reduction would be a subterfuge to evade the purpose of the Act.

(iv) A benefit reduction greater than would be justified under a benefit-by-benefit approach must be offset by another benefit available to the same employees. No employees may be deprived because of age of one benefit without an offsetting benefit being made available to them.

(v) Employers who wish to justify benefit reductions under a benefit package approach must be prepared to produce data to show that those reductions are fully justified. Thus employers must be able to show that deviations from a benefit-by-benefit approach do not result in lesser cost to them or less favorable benefits to their employees. A general example consistent with these limitations may be given. Assume two employee benefit plans, providing Benefit "A" and Benefit "B." Both plans fall within section 4(f)(2), and neither is a retirement or pension plan subject to special rules. Both benefits are available to all employees. Age-based cost increases would justify a 10% decrease in both benefits on a benefit-by-benefit basis. The affected employees would, however, find it more favorable—that is, more consistent with meeting their needs—for no reduction to be made in Benefit "A" and a greater reduction to be made in Benefit "B." This "trade-off" would not result in a reduction in health benefits. The "trade-off" may therefore be made. The details of the "trade-off" depend on data on the relative cost to the employer of the two benefits. If the data show that Benefit "A" and Benefit "B" cost the same, Benefit "B" may be reduced up to 20% if Benefit "A" is unreduced. If the data show that Benefit "A" costs only half as much as Benefit "B", however, Benefit "B" may be reduced up to only 15% if Benefit "A" is unreduced, since a greater reduction in Benefit "B" would result in an impermissible reduction in total benefit costs.

(g) Relation of ADEA to State laws. The ADEA does not preempt State age

discrimination in employment laws. However, the failure of the ADEA to preempt such laws does not affect the issue of whether section 514 of the Employee Retirement Income Security Act (ERISA) preempts State laws which related to employee benefit plans.

Signed at Washington, D.C. on this 22nd day of May 1979.

C. Lamar Johnson,

Deputy Administrator, Wage and Hour Division.

[FR Doc. 79-16550 Filed 5-23-79; 10:25 am]

BILLING CODE 4510-27-M]