By the Commission.

John Wheeler,

Secretary.

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 602

[T.D. 8035]

Investment Credit for Commuter Highway Vehicles

AGENCY: Internal Revenue Service, Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations relating to special rules for computing the investment credit for commuter highway vehicles. The Energy Tax Act of 1978 (Pub. L. 95-618, 92 Stat. 3193) enacted special rules for determining the amount of that credit and for the recapture of that credit. The regulations provide the public and Internal Revenue Service personnel with the guidance needed to comply with and administer the law.

DATES: The amendments are effective for commuter highway vehicles placed in service on or after November 9, 1978 and before January 1, 1986.

FOR FURTHER INFORMATION CONTACT: Patricia Wendlandt of the Legislation and Regulations Division, Office of Chief Counsel, Internal Revenue Service, 1111 Constitution Avenue, N.W., Washington, D.C. 20224, Attention: CC:LR:T [202-566-3458, not a toll-free call].

SUPPLEMENTARY INFORMATION:

Background

This document contains final amendments to the Income Tax Regulations (26 CFR Part 1) under sections 46(c)(6) and 47(a)(4) of the Internal Revenue Code of 1954, relating to the investment credit for commuter highway vehicles. These regulations were published in proposed form in the **Federal Register** on October 5, 1984 (49 FR 39344). One comment was received suggesting changes to the proposed amendments to the regulations. There were no requests for a public hearing and none was held. With only minor revisions, the proposed regulations are adopted by this Treasury decision.

Commuter Use Requirement

The proposed regulations define the 80 percent commuter use requirement. To qualify for the investment credit for commuter highway vehicles, section 46(c)(6)(B)(ii) and the regulations provide that at least 80 percent of the vehicle's mileage must be for purposes of transporting the taxpayer's employees between their residences and their places of employment. The comment suggested that personal incentive mileage and mileage for maintenance and refueling be included as qualified commuter uses. Such usage is not considered to be for the purpose of transporting the taxpayer's employees between their residences and places of employment and is not properly considered a qualified commuter use of the vehicle. Although personal incentive mileage and mileage for maintenance and refueling are not includible as qualified commuter uses, such mileage will not disqualify a commuter highway vehicle provided it does not exceed 20 percent of the vehicle's total mileage. Accordingly, the final regulations adopt the proposed definition of the commuter use requirement without change.

Executive Order 12291 and Regulatory Flexibility Act

The Commissioner of Internal Revenue has determined that this final rule is not a major rule as defined in Executive Order 12291 and that a Regulatory Impact Analysis is therefore not required. Although a notice of proposed rulemaking that solicited public comment was issued, the Internal Revenue Service concluded when the notice was issued that the regulations are interpretative and that the notice and public procedure requirements of 5 U.S.C. 553 did not apply. Accordingly, the final regulations do not constitute regulations subject to the Regulatory Flexibility Act (5 U.S.C. Chapter 6).

Paperwork Reduction Act

The collection of information requirements contained in these regulations have been submitted to the Office of Management and Budget (OMB) in accordance with the requirements of the Paperwork Reduction Act of 1980. These requirements have been approved by OMB.

Drafting Information

The principal author of these final regulations is Patricia Wendlandt of the Legislation and Regulations Division of the Office of Chief Counsel, Internal Revenue Service. However, personnel from other offices of the Internal Revenue Service and Treasury Department participated in developing the regulations, both on matters of substance and style.

List of Subjects in 26 CFR Part 1.0-1 through 1.58-8

Income taxes, Tax liabilty, Tax rates, Credits.

26 CFR Part 602

OMB Control Numbers, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

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

PART 1—INCOME TAX; TAXABLE YEARS BEGINNING AFTER DECEMBER 31, 1953

Paragraph 1. The Authority citation for Part 1 is amended by adding the following citation:

Authority: 26 U.S.C. 7805 * * * § 1.47-1 also issued under 26 U.S.C. 47(a).

Par. 2. A new § 1.46-10 is added and reserved in the appropriate place.

§ 1.46-10 [Reserved].

Par. 3. A new § 1.46-11 is added in the appropriate place. As added, the new section reads as follows:

§ 1.46-11 Commuter highway vehicles.

(a) *In general.* Section 46(c)(6) provides that the applicable percentage to determine qualified investment under section 46(c)(1) for a qualifying commuter highway vehicle is 100 percent. A qualifying commuter highway vehicle is a vehicle (defined in paragraph (b) of this section)—

(1) Which is acquired by the taxpayer on or after November 9, 1978,

(2) Which is placed in service by the taxpayer before January 1, 1986, and

(3) With respect to which the taxpayer makes an election under paragraph (g) of this section.

(b) *Definition of commuter highway vehicle.* A commuter highway vehicle is a highway vehicle that meets the following requirements:

(1) The vehicle is section 38 property in the hands of the taxpayer. The rule of section 48(d), allowing a lessor to elect to treat the lessee of new section 38 property as having acquired the property, applies to commuter highway vehicles. If the vehicle is leased and that election is made, the lessee is treated as the taxpayer under this section. However, if that election is not made, the lessor, and not the lessee, is treated as the taxpayer under this section.

(2) The vehicle must meet the seating capacity requirement of paragraph (c) of this section; and

(3) The taxpayer reasonably expects to meet the commuter use requirement

of paragraph (d) of this section for at least the first 36 months after the vehicle is placed in service.

(c) *Seating capacity.* A commuter highway vehicle must have a seating capacity of a least 8 adults in addition to the driver's seat.

(d) *Commuter use requirement.* A vehicle meets the commuter use requirement only if at least 80 percent of the miles the vehicle is driven are for trips to transport the taxpayer's employees between their residences and their places of employment. A trip for this purpose includes driving the vehicle before or after employees are in the vehicle, so long as the mileage driven is necessary either to pick up or drop off passengers or to park the vehicle in its regular parking space. A trip does not include miles driven solely for maintenance or to refuel the vehicle. A trip is not considered to transport the taxpayer's employees between their residences and their places of employment unless at least one-half the seating capacity (defined in paragraph (c) of this section) is used to seat employees of the taxpayer. In no event is the driver counted as an employee of the taxpayer.

(e) *Definition of employee.* An employee in this section is the same as in section 3121 (d) (definition of employee for withholding purposes).

(f) *Transportation between employee's residence and place of employment.* An employee is transported between that employee's residence and place of employment even if that place of employment is not the same as any of the other employees transported, and even if picked up or dropped off at some central point between that residence and place of employment. An employee is not transported between that employee's residence and place of employment if the transportation is of the type for which a deduction would be allowed under § 1.162–2 were the employee providing it, such as the transportation from one work site to another after beginning work for the day.

(g) *Election.* A taxpayer must elect to have the vehicle treated as a qualifying commuter highway vehicle on the return for the taxable year in which the vehicle is placed in service. The election may be made only if the vehicle actually meets the commuter use requirement under paragraph (d) of this section for that taxable year. It must be made on or before the due date (including extensions) of that return. The election is effective as of that due date.

Par. 4. Section 1.47–1 is amended by:

1. Inserting in the first sentence of paragraph (a)(1)(i) of that section, "or is a qualifying commuter highway vehicle (as defined in paragraph (a) of § 1.46–11) which undergoes a change in use (as defined in paragraph (m)(2) of this section)" immediately following "(as defined in paragraph (g) of § 1.46–3)", and

2. Adding and reserving paragraphs (i), (j), (k), and (l) and by adding a new paragraph (m) to read as follows:

§ 1.47–1 Recomputation of credit allowed by section 38.

* * * * *

(i) [Reserved].

(j) [Reserved].

(k) [Reserved].

(l) [Reserved].

(m) *Commuter highway vehicles*—(1) *Recomputed qualified investment.* (i) If a qualifying commuter highway vehicle (as defined in § 1.46–11(a) undergoes a change in use but does not cease to be section 38 property, qualified investment for that vehicle is recomputed as if the vehicle was section 38 property which is not a qualifying commuter highway vehicle for its entire useful life.

(ii) The following example illustrates this paragraph (m)(1).

Example. X Corporation, a calendar year taxpayer, acquired and placed in service on January 1, 1982, a qualifying commuter highway vehicle with a basis of $10,000 and which qualified as three year recovery property under section 168(c)(2)(A)(i). The amount of qualified investment for the vehicle under section 46(c) (1) and (6) is $10,000. For the taxable year 1982, X Corporation's credit earned was $1,000 (10 percent of $10,000) and X Corporation was allowed under section 38 a $1,000 credit against its 1982 tax liability. During the taxable year 1984, the vehicle undergoes a change in use but does not cease to be section 38 property. The vehicle is treated as section 38 property which is not a qualifying commuter highway vehicle for its entire useful life. The recomputed qualified investment for the vehicle is $6,000 (60 percent of $10,000) and X Corporation's recomputed credit earned is $600 (10 percent of $6,000). The income tax imposed by chapter 1 of the Code on X Corporation for 1984 is increased by the $400 decrease in its credit earned for 1982 ($1,000 – $600).

(2) *Change in use*—(i) A qualifying commuter highway vehicle undergoes a change in use if the vehicle does not meet the commuter use requirement (as defined in § 1.46–11(d)) for each computation period.

(ii) Each of the following is a computation period:

(A) The period beginning on the date the vehicle was placed in service and ending on the last day of the taxpayer's taxable year in which the vehicle was placed in service;

(B) Each of the taxpayer's taxable years beginning after the date the vehicle was placed in service and ending before the end of the first 36 months after the vehicle was placed in service; and

(C) The period ending at the end of the first 36 months after the vehicle was placed in service and beginning on the first day of the taxpayer's taxable year in which the end of those first 36 months falls.

(iii) The following example illustrates this paragraph (m)(2).

Example. (*a*) Z Corporation, a calendar year taxpayer, acquired and placed in service a qualifying commuter highway vehicle on January 15, 1979. Z Corporation used the vehicle as set forth in the following table:

Taxable year ending	Total miles	Commuter miles	Ratio
1979	10,000	9,000	.90
1980	10,000	8,000	.80
1981	10,000	8,000	.80
1982 (1–14)	1,000	100	.10

(*b*) The first computation period begins on the date the vehicle is placed in service, in this example 1–15–79, and ends 12–31–79. In that computation period, the ratio of commuter miles to total miles is .90 (9,000 miles ÷ 10,000 miles). Therefore, the vehicle meets the commuter use requirement for that period and has not undergone a change in use. Similar calculations for the computation periods 1–1–80 to 12–31–80 and 1–1–81 to 12–31–81 produce the same result.

(*c*) As of the computation period beginning 1–1–82 and ending 1–14–82, the ratio of commuter use to total mileage is .10 (100 miles ÷ 1,000 miles). Since that ratio is less than .80, the vehicle does not meet the commuter use requirement for the period and the vehicle has undergone a change in use.

PART 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

Par. 5. The authority citation for Part 602 continues to read as follows:

Authority: 26 U.S.C. 7805.

§ 602.101 [Amended]

Par. 6. Section 602.101(c) is amended by inserting in the appropriate place in the table "§ 1.46–11(g) . . . 1545–0155".

Roscoe L. Egger, Jr.,

Commissioner of Internal Revenue.

Approved: June 17, 1985.

Ronald A. Pearlman,

Assistant Secretary of the Treasury.

[FR Doc. 85–17269 Filed 7–18–85; 8:45 am]

BILLING CODE 4830–01–M

26 CFR Part 1

[T.D. 8038]

Income Tax, Taxable Years Beginning After December 31, 1953; Effective Dates, Transitional Rules, Restrictions on Plan Distributions, and Other Issues Arising Under the Retirement Equity Act of 1984

AGENCY: Internal Revenue Service, Treasury.

ACTION: Temporary regulations.

SUMMARY: This document contains temporary regulations relating to the effective dates, transitional rules, restrictions on distributions from employee plans, and other issues arising under the Retirement Equity Act of 1984. The regulations will generally affect sponsors of, and participants in, pension, profit-sharing, and stock bonus plans, and they provide plan sponsors with guidance necessary to comply with the law.

In addition, the text of the temporary regulations set forth in this document also serves as the text of the notice of proposed rulemaking that appears in the Proposed Rules section of this issue of the **Federal Register**.

DATES: The regulations are effective July 19, 1985, and generally apply for plan years beginning after December 31, 1984, except as otherwise specified in the Retirement Equity Act of 1984.

FOR FURTHER INFORMATION CONTACT: Charles M. Watkins of the Employee Plans and Exempt Organizations Division, Office of the Chief Counsel, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, D.C. 20224 (Attention CC:LR:T) (202-566-3903, not a toll-free call).

SUPPLEMENTARY INFORMATION:

Background

This document contains temporary regulations relating to the requirements for payment of survivor annuities, to restrictions on payments under qualified employee plans, and other rules, as enacted by Titles II and III of the Retirement Equity Act of 1984 ("REA '84") (Pub. L. 98-397, 98 Stat. 1436 *et seq.*).

Taxpayers may rely on these temporary regulations for guidance pending the issuance of final regulations. These temporary regulations do not, however, address comprehensively the issues raised by Titles II and III of REA '84, and no inferences should be drawn by reason of the fact that an issue is not addressed in this Treasury decision.

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

New Requirements

Sections 411(a)(11) and 417(e) of the Internal Revenue Code restrict a plan's ability to distribute benefits to participants and, when applicable, spouses. Section 411(a)(11) treats as forfeitable, for purposes of section 411(a), any accrued benefit that may be distributed to a participant without the participant's consent when the present value of the participant's nonforfeitable accrued benefit in the plan exceeds $3,500. Section 417(e) prohibits any plan subject to section 401(a)(11) from distributing any portion of a qualified joint and survivor annuity (QJSA), or a qualified preretirement survivor annuity (QPSA), if the present value of such an annuity is greater than $3,500, without the consent of the participant and the participant's spouse. Under sections 411(a)(11) and 417(e), the present value of a participant's annuity benefit in a defined benefit plan is to be determined by reference to an interest rate that is not greater than the interest rate used by the Pension Benefit Guaranty Corporation (PBGC) in valuing immediate annuities on plan termination. Plans are required to use this PBGC interest rate for both determining whether the $3,500 floor is reached and valuing the accrued benefit.

Defined contribution plans, such as money purchase, profit-sharing, and stock bonus plans, whether or not subject to section 401(a)(11), are not required to use interest rates that are not greater than the PBGC rates to calculate the amount to be distributed, even if such plans use an account balance to purchase an annuity.

The regulations provide that, for purposes of sections 401(a)(11), 411(a)(11), and 417, a participant's accrued benefit includes benefits attributable to both employer and employee contributions under the plan, excluding deductible employee contributions described in section 72(o).

The regulations also provide two rules governing when a reduction in an accrued benefit to satisfy a participant's loan obligation to the plan is treated as a distribution from the plan. Such a reduction is generally subject to the applicable consent requirements of sections 411(a)(11) and 417(e). Alternatively, a plan may obtain the consent of the participant and the participant's spouse to a subsequent reduction in accrued benefits within the 90 day period before the making of a loan secured by an accrued benefit.

The Department of Labor has jurisdiction over the prohibited transaction rules of section 4975. It has indicated that a loan secured by an accrued benefit subject to REA '84 may not be adequately secured under section 4975(d)(1) if consent to a reduction in the accrued benefit is not obtained before such a loan is made, and, therefore, may be a prohibited transaction.

Plan Amendments

Plan amendments required by the Retirement Equity Act of 1984 must, in general, be adopted not later than the end of the first plan year to which the statutory provisions generally apply.

Nonapplicability of Executive Order 12291

The Treasury Department has determined that this regulation is not subject to review under Executive Order 12291. Accordingly, a Regulatory Impact Analysis is not required.

Regulatory Flexibility Act

No general notice of proposed rulemaking is required by 5 U.S.C. 553(b) for temporary regulations. Accordingly, this regulation does not constitute a regulation subject to the Regulatory Flexibility Act (5 U.S.C. chapter 6).

Drafting Information

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

List of Subjects in 26 CFR 1.401-0—1.425-1

Income taxes, Employee benefit plans, Pensions.

Adoption of Amendments to the Regulations

PART 1—[AMENDED]

Accordingly, 26 CFR Part 1 is amended as follows:

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

Authority: 26 U.S.C. 7805 * * *.

Par. 2. A new § 1.401(a)–11T is added immediately after § 1.401(a)–11 to read as follows:

§ 1.401(a)–11T Requirement of qualified joint and survivor annuity and qualified preretirement survivor annuity (temporary).

Q–1: Are there new survivor annuity requirements added to the Code by the Retirement Equity Act of 1984 (REA '84) to protect spouses?

A–1: Yes. REA '84 replaced section 401(a)(11) with a new section 491(a)(11) and added a new section 417. Plans subject to new section 401(a)(11) must comply with the requirements of section 401(a)(11) and section 417 in order to remain qualified under section 401(a) or 403(a). In general, these plans must now provide both a qualified joint and survivor annuity (QJSA) and a qualified preretirement survivor annuity (QPSA) to remain qualified. These new survivor annuity requirements are applicable to any benefit payable under a plan, including benefits payable to a participant under a contract purchased by the plan and paid by a third party. Thus, an annuity contract purchased by a plan and distributed to or owned by the participant must comply with the new survivor annuity requirements as they would apply to the plan if the benefits were paid directly by the plan.

Q–2: What plans are subject to sections 401(a)(11) and 417?

A–2: Sections 401(a)(11) and 417 apply to any defined benefit plan and to any defined contribution plan that is subject to the minimum funding standards of section 412. These sections also apply to any participant under any other defined contribution plan unless—

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

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

(c) With respect to the participant, the plan is not a transferee plan (see Q&As–7 and 8).

Section 401(a)(11)(C) provides that, for purposes of determining whether benefits under an employee stock ownership plan are subject to sections 401(a)(11) and 417, that portion of a participant's accrued benefit that is subject to section 409(h) is to be treated as though such benefit were provided under a defined contribution plan not subject to section 412.

Q–3: May a defined contribution plan not subject to section 412 that provides that a participant's nonforfeitable accrued benefit is payable in full to a surviving spouse use the rules set forth in section 417(d) for determining whether or not the participant is married at the time of death?

A–3: Yes.

Q–4: How do the survivor annuity requirements added by REA '84 apply to married participants?

A–4: Section 401(a)(11)(A) requires that upon the death of a married participant with vested benefits attributable to employer contributions, plan benefits with respect to such participant, except plan benefits the payment of which had commenced prior to the participant's death, must be paid in the form of a QPSA. A QPSA must be provided regardless of whether the participant separated from service before the date of death. Section 401(a)(11)(A) also requires that the plan benefits of a married participant who survives until commencement of payment of such benefits be provided in the form of a QJSA. The QPSA and the QJSA may be waived if the applicable notice, election, and spousal consent requirements of section 417 are satisfied. Thus, for example, in order for a money purchase pension plan to distribute any portion of a married participant's benefit to such participant—even if the distribution is merely an ad hoc distribution after the participant has attained the normal retirement age under the plan but has not yet separated from service—the plan must distribute such portion in the form of a QJSA (unless the plan satisfies the applicable requirements of section 417(a) with respect to such portion of the participant's benefit). The plan still must satisfy the QPSA requirements with respect to any portion of the participant's benefits that has not been distributed, except any benefits the payment of which has commenced. However, if, prior to the commencement of a distribution of any benefits, the present value of such married participant's nonforefeitable accrued benefit is not more than $3,500, the requirements of section 417(a) need not be satisfied with respect to the payment of such participant's benefits. See § 1.417(e)–1T.

Q–5: Must a plan subject to sections 401(a)(11) and 417 provide an annuity to participants who are not married?

A–5: Yes. Plans subject to the requirements of sections 401(a)(11)(and 417 must satisfy those requirements with respect to participants who are not married. A QJSA for a participant who is not married is an annuity for the life of the participant, and thus, an unmarried participant must be provided such an annuity unless he elects another form of benefit.

Q–6: Must plans subject to new section 401(a)(11) meet other requirements?

A–6: Yes. Plans subject to new section 401(a)(11) must satisfy the requirements of section 417 (relating to minimum survivor annuity requirements).

Q–7: How do sections 401(a)(11) and 417 apply to transferee plans (certain defined contribution plans that are not subject to section 412)?

A–7: Although profit-sharing, stock bonus, and other defined contribution plans not subject to section 412 are generally not subject to sections 401(a)(11) and 417 with respect to their participants, these plans are subject to sections 401(a)(11) and 417 with respect to any participant if the plan is a transferee plan with respect to that participant. A defined contribution plan is a transferee plan with respect to a participant if the plan is a direct or indirect transferee, with respect to that participant, of benefits that were held, on or after January 1, 1985, by:

(a) A defined benefit plan;

(b) A defined contribution plan subject to section 412; or

(c) A defined contribution plan that is subject to sections 401(a)(11) and 417 with respect to that participant.

A transfer made before January 1, 1985, and any rollover contribution made at any time, is not a transfer that subjects a plan to the new survivor annuity rules with respect to a participant. If a plan is a transferee plan with respect to a participant, the section 417 requirements do not apply with respect to other plan participants solely because of the transfer. However, in order to prevent discrimination under section 401(a)(4), it may be necessary for the plan to provide QJSAs or QPSAs with respect to other participants.

Q–8: What benefits in a transferee plan are subject to the new survivor annuity requirements?

A–8: All accrued benefits held for a participant with respect to whom the plan is a transferee plan are subject to the new survivor annuity requirements

unless there is an acceptable separate accounting between the transferred benefits and any other benefits under the plan. A separate accounting is not acceptable unless gains, losses, withdrawals, contributions, forfeitures, and other credits or charges are allocated between the accrued benefits subject to the new survivor annuity requirements and other benefits on a reasonable and consistent basis. If there is an acceptable separate accounting between transferred benefits and any other benefits under the plan, only the transferred benefits are subject to the new survivor annuity requirements.

Q–9: Must annuity contracts purchased and distributed to a participant or spouse by a plan subject to sections 401(a)(11) and 417 satisfy the requirements of those sections?

A–9: Yes. No rights to accrued benefits, optional forms of payments, consents, or other privileges provided for by section 401(a)(11) or 417 may be eliminated or reduced because the plan uses annuity contracts to provide benefits or because such a contract is held by a participant or spouse instead of a plan trustee. Similarly, the protection provided by section 411(d)(6) may not be eliminated or reduced by the use of annuity contracts.

Q–10: If a plan would otherwise be subject to the survivor annuity requirements of new sections 401(a)(11) and 417, does the fact that it is frozen or terminated make a difference?

A–10: In general, benefits provided under a plan that is subject to the new survivor annuity requirements of sections 401(a)(11) and 417 must be provided in accordance with those requirements even if the plan is terminated or frozen. However, any plan that has a termination date prior to September 17, 1985, and that distributes all remaining assets as soon as administratively feasible after the termination date is not subject to the new survivor annuity requirements. The date of termination is determined under section 411(d)(3) and § 1.411(d)–2(c).

Q–11: If a plan would otherwise be subject to the survivor annuity requirements of new sections 401(a)(11) and 417, does it make a difference that the Pension Benefit Guaranty Corporation (PBGC) is administering the plan?

A–11: No. Participants and spouses are entitled to the same protection irrespective of whether an employer or the PBGC is administering a plan.

Q–12: Do the new survivor annuity requirements apply to benefits derived from employer and employee contributions?

A–12: Yes. The new survivor annuity benefit requirements apply to benefits derived from both employer and employee contributions.

Q–13: To what benefits do the new survivor annuity requirements apply?

A–13: (a) *Defined benefit plans.* Sections 401(a)(11) and 417 apply only to benefits in which a participant was vested immediately prior to death. They do not apply to benefits in which a participant becomes vested by reason of death or to the proceeds of a life insurance contract maintained by the plan for a participant to the extent such proceeds exceed the present value of the participant's nonforfeitable accrued benefits existing immediately prior to death.

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

Q–14: What preretirement survivor annuity benefits must a defined contribution plan provide?

A–14: A defined contribution plan that is subject to sections 401(a)(11) and 417 must provide an annuity whose actuarial equivalent is not less than 50 percent of the nonforfeitable account balance of the participant as of the date of the participant's death. For this purpose, the nonforfeitable account balance of the participant includes amounts attributable to nonforfeitable employer contributions and amounts attributable to employee contributions.

Q–15: In determining whether amounts attributable to employer contributions to a defind contribution plan are nonforfeitable under sections 401(a)(11) and 417, does the rule of section 411(a)(3)(A) (permitting forfeitures on account of death) apply?

A–15: No. Therefore, sections 401(a)(11) and 417 apply to benefits that were nonforfeitable immediately prior to death (determined without regard to section 411(a)(3)(A)), as well as to benefits that become nonforfeitable at death.

Q–16: Do sections 401(a)(11) and 417 apply to accumulated deductible employee contributions, as defined in section 72(o)?

A–16: No. Accumulated deductible employee contributions are not subject to the new survivor annuity rules even though such contributions are made to a defined benefit or defined contribution plan that is subject to sections 401(a)(11) and 417.

Q–17: When do the new survivor annuity requirements apply to plans?

A–17: New sections 401(a)(11) and 417 generally apply to plan years beginning after December 31, 1984. Sections 302 and 303 of REA '84 provide specific effective dates and transitional rules under which the QJSA or QPSA (or pre-REA '84 section 401(a)(11)) requirements may be applicable to particular plans or with respect to benefits provided to particular participants. In general, the new section 401(a)(11) survivor annuity requirements do not apply with respect to a participant who does not have at least one hour of service or one hour of paid leave under the plan after August 22, 1984.

Q–18: Are there special effective dates for plans maintained pursuant to collective bargaining agreements?

A–18: Yes. Section 302(b) of REA '84 provides a special deferred effective date for such plans. Whether or not a plan is described in section 302(b) will be determined under the principles applied under section 1017(c) of the Employee Retirement Income Security Act of 1974. In addition, a plan will not be treated as maintained under a collective bargaining agreement unless the employee representative satisfies section 7701(a)(46) of the Internal Revenue Code after March 31, 1984. Nothing in section 302(b) shall deny a participant or spouse the rights set forth in sections 303(c)(2), 303(c)(3), 303(e)(1), and 303(e)(2) of REA '84.

Q–19: What is one hour of service or paid leave under the plan for purposes of the transition rules in section 303 of REA '84?

A–19: One hour of service or paid leave under the plan is one hour of service or paid leave recognized or required to be recognized under the plan for any purpose, *e.g.*, participation, vesting percentage, or benefit accrual purposes. For plans that do not compute hours of service, one hour of service or paid leave means any service or paid leave recognized or required to be recognized under the plan for any purpose.

Q–20: Must a plan be amended to provide for the QPSA required by section 303(c)(2) of REA '84, or for the survivor annuities required by section 303(e) of REA '84?

A–20: A plan will not fail to satisfy the qualification requirements of section 401(a) or 403(a) merely because it is not amended to provide the QPSA required by section 303(c)(2) or the survivor annuities required by section 303(e). The plan must, however, satisfy those requirements in operation. In addition, the plan must be amended to satisfy sections 401(a)(11) and 417 not later than the last day of the first plan year to which sections 401(a)(11) and 417 apply.

Q-21: Is a participant's election, or a spouse's consent to an election, with respect to a QPSA, made before August 23, 1984, valid?

A-21: No.

Q-22: Is spousal consent required for certain survivor annuity elections made by the participant after December 31, 1984, and before the first plan year to which new sections 401(a)(11) and 417 apply?

A-22: Yes. Section 303(c)(3) of REA '84 provides that any election by a participant, made after December 31, 1984, and before the date sections 401(a)(11) and 417 apply to the plan, not to take a QJSA is not effective unless the spousal consent requirements of section 417 are met with respect to such election. Unless the participant's annuity starting date occurred before January 1, 1985, the spousal consent required by section 417(a)(2) and (e) must be obtained even though the participant elected the benefit prior to January 1, 1985. By the end of the first plan year to which new sections 401(a)(11) and 417 apply, the plan must be amended to comply with the QJSA requirements.

Par. 3. A new § 1.401(a)-13T is added immediately after § 1.401(a)-13 to read as follows:

§ 1.401(a)-13T Assignment or alienation of benefits; special rules for qualified domestic relations orders (temporary).

(a) *Definition.* The term qualified domestic relations order (QDRO) has the meaning set forth in section 414(p). For purposes of the Internal Revenue Code, a QDRO also includes any domestic relations order described in section 303(d) of the Retirement Equity Act of 1984, as provided in that section.

(b) *Plan amendments.* A plan will not fail to satisfy the qualification requirements of section 401(a) or 403(a) merely because it is not amended to require the plan to comply with a QDRO.

Par. 4. A new § 1.410(a)-5T is added immediately after § 1.410(a)-5 to read as follows:

§ 1.410(a)-5T Five consecutive 1-year breaks in service, transitional rules under the Retirement Equity Act of 1984 (temporary).

Sections 410(a)(5)(D) and 411(a)(6)(D), as amended by the Retirement Equity Act of 1984 (REA '84), permit a plan to disregard years of service that were disregarded under plan provisions satisfying those sections (as in effect on August 22, 1984), as of the day before the amendments apply to the plan. Under section 302(a) of REA '84, the new break in service rules generally apply to plan years beginning after December 31, 1984. Thus, for example, assume a plan has a calendar plan year and disregarded years of service as permitted by sections 410(a)(5)(D) and 411(a)(6)(D) as in effect on August 22, 1984. An employee completed two years of service in 1981 and 1982, and then incurred two consecutive 1-year breaks in service in 1983 and 1984. The plan may disregard the prior years of service, even though the employee did not incur five consecutive 1-year breaks in service. On the other hand, assume the employee completed three consecutive years of service beginning in 1980, and incurred two 1-year breaks in service in 1983 and 1984. Because, as of December 31, 1984, the years of service credited before 1983 could not be disregarded, whether the plan may subsequently disregard those years of service would be governed by the rules enacted by REA '84.

§ 1.411(a)-7 [Amended]

Par. 5. Section 1.411(a)-7(d)(4)(iv)(B) is amended by adding at the end thereof the following sentence:

* * * * *

(d) * * *

(4) * * *

(iv) * * *

(B) * * * Notwithstanding the above sentence, no defined benefit plan or defined contribution plan may require that repayments be made earlier than the end of a period of 5 consecutive one-year breaks in service.

* * * * *

Par. 6. A new § 1.410(a)-7T is added immediately after § 1.410(a)-7 to read as follows:

§ 1.410(a)-7T Elapsed time method; maternity and paternity absence (temporary).

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

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

Assume an individual works until June 30, 1986; is first absent from employment on July 1, 1986, on account of maternity or paternity absence; and on July 1, 1989, performs an hour of service. The period of service must include the period from employment commencement date until June 30, 1987 (one year after the date of separation for any reason other than a quit, discharge, retirement, or death). The period from July 1, 1987, to June 30, 1988, is neither a period of service nor a period of severance. The period of severance would be from July 1, 1988 to June 30, 1989.

Par. 7. A new § 1.411(a)(11)-1T is added after § 1.411(a)-9 to read as follows:

§ 1.411(a)(11)-1T. Restrictions and valuations of distributions (temporary).

(a) *Scope.* Section 411(a)(11) restricts the ability of a plan subject to section 411 to distribute any portion of a participant's accrued benefits without the participant's consent. Section 411(a)(11) applies in determining whether a plan satisfies the nonforfeitability requirements of section 411(a).

(b) *General rules*—(1) *New requirements.* If a plan does not satisfy the participant consent requirement with respect to the immediate distribution of any participant's nonforfeitable accrued benefit with a present value in excess of $3,500, the entire accrued benefit is forfeitable for purposes of determining whether section 411(a) is satisfied.

(2) *Additional requirements.* The requirements of section 411(a)(11) and this section are in addition to the requirements of sections 401(a)(9) (relating to required distributions), 401(a)(14) (relating to benefit commencement), and 417 (relating to survivor benefits). Notwithstanding any provision to the contrary in section 401(a)(14) or § 1.401(a)-14, the failure of a participant to consent to a distribution while a benefit is immediately distributable is deemed to be an election to defer commencement of payment of any benefit sufficient to satisfy section 401(a)(14) and § 1.401(a)-14.

(c) *Consent, etc. requirements*—(1) *General rule.* Section 411(a)(11) permits plans subject to that section to provide for the distribution of any portion of a participant's nonforfeitable accrued benefits only if either the applicable consent requirements are satisfied or such distribution is not immediately distributable.

(2) *Consent.* Written consent of the participant is required before the commencement of the distribution of any part of an accrued benefit if the

present value of the nonforfeitable portion of such benefit is greater than $3,500.

(3) *Accrued benefit.* The term "accrued benefit" has the same meaning as such term has under section 417(e) and the regulations thereunder.

(4) *Immediately distributable.* An accrued benefit is immediately distributable for purposes of section 411(a)(11) and this section if any part of the benefit may be distributed to the participant before the later of the normal retirement age (as defined in section 411(a)(8)) or age 62.

(5) *Death of participant.* Section 411(a)(11) does not apply after the death of the participant.

§ 1.411(d)(3) [Amended]

Par. 8. Section 1.411(d)-3 is amended by removing the second sentence of paragraph (a)(1).

Par. 9. A new § 1.411(d)-3T is added immediately after § 1.411(d)-3, to read as follows:

§ 1.411(d)-3T Class year plans; plan years beginning after 1984 (temporary).

In the case of a class year plan, the rights of an employee who separates from service prior to the time such rights become nonforfeitable may be forfeited only if there is a 5-year break-in-service. A 5-year break-in-service is a period of five consecutive plan years, beginning with the plan year in which the employee separates from service, during which the employee is not employed on the last day of each plan year. For purposes of the preceding sentence, any plan year in which an individual is absent from work on the last day of the plan year by reason of an absence described in section 411(a)(6)(E)(i) shall be disregarded.

Par. 10. A new § 1.417(e)-1T is added after § 1.416-1 to read as follows:

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

(a) *Scope*—(1) *New requirements.* Section 417(e) restricts the ability of certain qualified plans to distribute any portion of a participant's accrued benefits without the consent of the participant and the participant's spouse. It also requires the present value of accrued benefits to be calculated using specified interest rates. Section 417(e) applies in determining whether certain plans satisfy the survivor annuity requirements of sections 401(a)(11) and 417. These requirements must be satisfied by pension plans with respect to all participants, and by profit-sharing and stock bonus plans with respect to participants to whom section 401(a)(11)(B) applies. Special rules are provided in section 401(a)(11)(C) for certain ESOP benefits. A plan does not satisfy the requirements of sections 401(a)(11) and 417 unless it satisfies the consent requirements, the determination of present value requirements and the other requirements set forth in this section. This section does not apply to payments to an alternate payee, defined in section 414(p)(8), except as provided in a qualified domestic relations order pursuant to section 414(p)(5).

(2) *Additional requirements.* The requirements of section 417(e) and this section are in addition to the requirements of sections 401(a)(9) (relating to required distributions), 401(a)(14) (relating to benefit commencement), and 411(a)(11) (relating to distributions). Notwithstanding any provision to the contrary in section 401(a)(14) or § 1.401(a)-14, the failure of a participant or spouse to consent to a distribution while a benefit is immediately distributable is deemed to be an election to defer commencement of payment of any benefit sufficient to satisfy section 401(a)(14) and § 1.401(a)-14.

(3) *Accrued benefit.* For purposes of this section, accrued benefit has the same meaning as specified in section 411(a)(7). The present value of an accrued benefit or annuity includes benefits attributable to both employee and employer contributions. Because section 401(a)(11) is not applicable to accumulated deductible employee contributions described in section 72(o), such accumulated contributions are not part of the accrued benefit. The value of an accrued benefit does not include any plan subsidy included in the present value of the qualified joint and survivor annuity (QJSA) or in the present value of the qualified preretirement survivor annuity (QPSA).

(b) *Consent, etc. requirements*—(1) *General rule.* Section 417(e) prohibits plans subject to that section from permitting the commencement of any distribution of any portion of a participant's accrued benefits unless—

(i) The applicable consent requirements are satisfied; or

(ii) (A) Such distribution is provided in the form of a qualified joint and survivor annuity (QJSA) or a qualified preretirement survivor annuity (QPSA); and

(B) Such benefit is not immediately distributable as described in paragraph (b)(3) of this section.

The consent requirement is applicable to accrued benefits that are immediately distributable.

(2) *Consent.* (i) Written consent of the participant and, if the participant is married at the time of the commencement of the distribution of benefits, the participant's spouse (or, if either the participant or the spouse has died, the survivor) is required before the commencement of the distribution of any part of an accrued benefit if the present value of the nonforfeitable accrued benefit is greater than $3,500. Such present value will be treated as greater than $3,500 at all times after the commencement of a distribution of benefits that was subject to this consent requirement. No consent is required before the commencement of the distribution of benefits if the present value of the nonforfeitable accrued benefit is not more than $3,500.

(ii) In determining the present value of the nonforfeitable accrued benefit, a defined benefit plan must use an interest rate not greater than the rate used by the Pension Benefit Guaranty Corporation (PBGC) to value immediate annuities for plans terminating as of either (A) the proposed distribution (or benefit commencement) date or (B) the first day of the plan year that contains the proposed distribution (or benefit commencement) date (the PBGC rate.).

(3) *Immediately distributable.* An accrued benefit is immediately distributable if any part of the benefit could be distributed to the participant or beneficiary before that participant attains (or would have attained if not dead) the later of normal retirement age (as defined in section 411(a)(8)) or age 62.

(4) *Time of consent.* Written consent of the participant and the participant's spouse to the distribution must be obtained not more than 90 days before the commencement of the distribution of any part of an accrued benefit. See paragraph (d) of this section for a special rule for loans.

(5) *Other rules.* Except as provided in paragraphs (b)(2) and (d) of this section, the commencement of any distribution (including loans) permitted under section 417(e) and this section is subject to the election, spousal consent, and written explanation requirements of section 417(a).

(c) *Permitted distributions*—(1) *In general.* A plan may not require that a participant or surviving spouse begin to receive benefits without satisfying paragraph (b) of this section while such benefits are immediately distributable, as defined in paragraph (b)(3) of this section. Once benefits are no longer immediately distributable, all benefits must be provided in the form of a QJSA and QPSA unless the applicable written explanation, election, and consent

requirements of section 417(a) are satisfied.

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

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

(3) *Unmarried participant.* In the case of a participant who is not married, the term "QJSA" means an annuity for the life of a participant.

(d) *Loans*—(1) *General rule.* (i) A loan from a plan to a participant shall not be treated as a distribution for purposes of this section. However, the reduction of an account balance or the present value of an accrued benefit to satisfy an obligation of a participant arising in connection with a loan from a plan to a participant is a distribution to the participant requiring the consent of the participant and spouse (if any) at the time of the reduction. The preceding sentence also applies to loans described in section 72(p)(4).

(ii) For purposes of satisfying the consent requirement with respect to a loan that is secured by a married participant's accrued benefit, a plan may require the participant and spouse to consent to the loan and the possible reduction in the accrued benefit within the 90-day period before the making of the loan. Thus, if spousal consent is obtained at the time of making a plan loan to a married participant, spousal consent is not required at the time of any setoff of the loan against the accrued benefit resulting from nonpayment, even though the participant is married to a different spouse at the time of the setoff. Similarly, in the case of an unmarried participant, the consent requirement may be satisfied by requiring the participant's consent to the loan and the possible reduction in the accrued benefit within the 90-day period before the making of the loan, even if the participant is married at the time of any setoff of the loan against the accrued benefit.

(iii) If the plan does not obtain consent of a current spouse at the time of a loan secured by some portion of the participant's accrued benefit, the plan will not be certain that it will be able to execute on the security by reducing the participant's accrued benefit without violating section 417(e). Thus the plan (depending upon whether there is other security for the loan) may have made a loan that is not adequately secured. See sections 401(a)(13) and 4975.

(2) *Renegotiation, etc.* For purposes of this paragraph (d), any renegotiation, extension, renewal, or other revision of a loan shall be treated as a new loan made on the date of the renegotiation, extension, renewal, or other revision.

(3) *Effective date.* This paragraph does not apply to loans made prior to August 19, 1985.

(e) *Present value requirement*—(1) *Interest rate.* For purposes of determining the present value of any accrued benefit and for purposes of determining the amount (subject to section 415) of any distribution, a defined benefit plan must use an interest rate not greater than the PBGC rate determined in the same manner and time as set forth in paragraph (b)(2)(ii). The same rate must be used for both purposes.

(2) *Other rules.* (i) In the case of a defined benefit plan that assumes a rate other than the PBGC rate, the rate producing the greater benefit (subject to section 415) must be used.

(ii) Any change in a rate described in subparagraph (1) is subject to section 411(d)(6).

(3) *Exceptions.* (i) Subparagraphs (1) and (2)(i) do not apply to a distribution under a non-decreasing annuity payable for a period not less than the life of the participant or, in the case of a QPSA, the life of the surviving spouse. A non-decreasing annuity includes an annuity that decreases merely because of the cessation or reduction of Social Security supplements or qualified disability payments (as defined in section 411(a)(9)).

(ii) Subparagraphs (1) and (2)(i) do not apply to any payment under a QJSA or QPSA.

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

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

(2) *Effective date.* This paragraph does not apply to contracts distributed to or owned by a participant prior to September 17, 1985, unless additional contributions are made under the plan by the employer with respect to such contracts.

There is a need for immediate guidance with respect to the provisions contained in this Treasury decision. For this reason, it is found impractical to issue this Treasury decision with notice and public procedure under subsection (b) of section 553 of Title 5 of the United States Code or subject to the effective date limitation of subsection (d) of that section.

James I. Owens,

Acting Commissioner of Internal Revenue.

Approved: July 3, 1985.

Ronald A. Pearlman,

Assistant Secretary of the Treasury.

[FR Doc. 85-17238 Filed 7-18-85; 8:45 am]

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26 CFR Parts 1 and 602

[T.D. 8037]

Income Tax—Taxable Years Beginning After December 31, 1953 and OMB Control Numbers Under the Paperwork Reduction Act; Notice, Election, and Consent Rules Under the Retirement Equity Act of 1984

AGENCY: Internal Revenue Service, Treasury.

ACTION: Temporary regulations.

SUMMARY: This document provides temporary regulations relating to the notice, election and consent rules enacted by the Retirement Equity Act of 1984. The regulations will generally affect sponsors of, and participants in, pension, profit-sharing, and stock bonus plans, and they provide plan sponsors with guidance necessary to comply with the law.

In addition, the text of the temporary regulations set forth in this document also serves as the text of the notice of proposed rulemaking that appears in the Proposed Rules Section of this issue of the **Federal Register.**

DATES: The regulations are effective July 19, 1985, and generally apply for plan years beginning after December 31, 1984, except as otherwise specified in the Retirement Equity Act of 1984.

FOR FURTHER INFORMATION CONTACT: Charles M. Watkins of the Employee Plans and Exempt Organizations Division, Office of the Chief Counsel, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, D.C. 20224 (Attention CC:LR:T) (202-566-3903, not a toll-free call).