

the reference “§ 1500.18(a)(19)” in its place.

Dated: December 11, 2003.

**Todd Stevenson,**

Secretary, Consumer Product Safety Commission.

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## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

#### 26 CFR Parts 1 and 602

[TD 9099]

RIN 1545–BA78

#### Disclosure of Relative Values of Optional Forms of Benefit

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Final regulations.

**SUMMARY:** This document contains final regulations that consolidate the content requirements applicable to explanations of qualified joint and survivor annuities and qualified preretirement survivor annuities payable under certain retirement plans, and specify requirements for disclosing the relative value of optional forms of benefit that are payable from certain retirement plans in lieu of a qualified joint and survivor annuity. These regulations affect plan sponsors and administrators, and participants in and beneficiaries of, certain retirement plans.

**DATES:** Effective Date: These final regulations are effective on December 17, 2003.

**Applicability Date:** These final regulations are applicable to QJSA explanations with respect to distributions with annuity starting dates on or after October 1, 2004, and to QPSA explanations provided on or after July 1, 2004.

**FOR FURTHER INFORMATION CONTACT:** John T. Ricotta at (202) 622–6060 (not a toll-free number).

#### SUPPLEMENTARY INFORMATION:

##### Paperwork Reduction Act

The collection of information (requirement to disclose information) contained in these final regulations has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under control number 1545–0928. Responses to this collection of information are mandatory.

An agency may not conduct or sponsor, and a person is not required to

respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

The estimated annual burden per respondent varies from .01 to .99 hours, depending on individual circumstances, with an estimated average of .5 hours.

Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be sent to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, SE:W:CAR:MP:T:SP, Washington, DC 20224, and to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503.

Books or records relating to a collection of information must be retained as long as their contents might become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

#### Background

This document contains amendments to 26 CFR part 1 under section 417(a)(3) of the Internal Revenue Code of 1986 (Code).

A qualified retirement plan to which section 401(a)(11) applies must pay a vested participant's retirement benefit under the plan in the form of a qualified joint and survivor annuity (QJSA), except as provided in section 417. Section 401(a)(11) applies to defined benefit plans, money purchase pension plans, and certain other defined contribution plans. A QJSA is defined in section 417(b) as an annuity for the life of the participant with a survivor annuity for the life of the spouse (if the participant is married) that is not less than 50 percent of (and is not greater than 100 percent of) the amount of the annuity that is payable during the joint lives of the participant and the spouse. Under section 417(b)(2), a QJSA for a married participant generally must be the actuarial equivalent of the single life annuity benefit payable for the life of the participant. However, a plan is permitted to subsidize the QJSA for a married participant. If the plan fully subsidizes the QJSA for a married participant so that failure to waive the QJSA would not result in reduced payments over the life of the participant compared to the single life annuity benefit, then the plan need not provide an election to waive the QJSA. See section 417(a)(5).

For a married participant, the QJSA must be at least as valuable as any other optional form of benefit payable under

the plan at the same time. See § 1.401(a)–20, Q&A–16. Further, the anti-forfeiture rules of section 411(a) prohibit a participant's benefit under a defined benefit plan from being satisfied through payment of a form of benefit that is actuarially less valuable than the value of the participant's accrued benefit expressed in the form of an annual benefit commencing at normal retirement age. These determinations must be made using reasonable actuarial assumptions. However, see § 1.417(e)–1(d) for actuarial assumptions required for use in certain present value calculations.

If a plan provides a subsidy for one optional form of benefit (*i.e.*, the payments under an optional form of benefit have an actuarial present value that is greater than the actuarial present value of the accrued benefit), there is no requirement to extend a similar subsidy (or any subsidy) to every other optional form of benefit. Thus, for example, a participant might be entitled to receive a single-sum distribution upon early retirement that does not reflect any early retirement subsidy in lieu of a QJSA that reflects a substantial early retirement subsidy. As a further example, a participant might be entitled to receive a single-sum distribution at normal retirement age in lieu of a QJSA that is subsidized as described in section 417(a)(5).

Section 417(a) provides rules under which a participant (with spousal consent) may waive payment of the participant's benefit in the form of a QJSA. Section 417(a)(3) provides that a plan must provide to each participant, within a reasonable period before the annuity starting date (and consistent with such regulations as the Secretary may prescribe), a written explanation of the terms and conditions of the QJSA, the participant's right to make, and the effect of, an election to waive the QJSA form of benefit, the rights of the participant's spouse, and the right to revoke (and the effect of the revocation of) an election to waive the QJSA form of benefit.

Section 205 of the Employee Retirement Income Security Act of 1974 (ERISA), Public Law 93–406 (88 Stat. 829) as subsequently amended, provides rules that are parallel to the rules of sections 401(a)(11) and 417 of the Internal Revenue Code. In particular, section 205(c)(3) of ERISA provides a rule parallel to the rule of section 417(a)(3) of the Code.

Under section 101 of Reorganization Plan No. 4 of 1978 (43 FR 47713), the Secretary of the Treasury has interpretative jurisdiction over the ERISA provisions that are parallel to the

Code provisions addressed in these regulations. Therefore, these regulations apply for purposes of section 205(c)(3) of ERISA, as well as for section 417(a)(3) of the Code.

Regulations governing the requirements for waiver of a QJSA were published in the **Federal Register** on August 19, 1988 (TD 8219; 53 FR 31837). Section 1.401(a)-20, Q&A-36, provides rules for the explanation that must be provided under section 417(a)(3) as a prerequisite to waiver of a QJSA. Section 1.401(a)-20, Q&A-36, requires that such a written explanation contain a general description of the eligibility conditions and other material features of the optional forms of benefit and sufficient additional information to explain the relative values of the optional forms of benefit available under the plan (*e.g.*, the extent to which optional forms are subsidized relative to the normal form of benefit or the interest rates used to calculate the optional forms). In addition, § 1.401(a)-20, Q&A-36, provides that the written explanation must comply with the requirements set forth in § 1.401(a)-11(c)(3). Section 1.401(a)-11(c)(3) was issued prior to the enactment of section 417, and provides rules relating to written explanations that were required prior to a participant's election of a preretirement survivor annuity or election to waive a joint and survivor annuity. Section 1.401(a)-11(c)(3)(i)(C) provides that such a written explanation must contain a general explanation of the relative financial effect of these elections on a participant's annuity.

In addition, under section 411 and § 1.411(a)-11(c), so long as a benefit is immediately distributable (within the meaning of § 1.411(a)-11(c)(4)), a participant must be informed of his or her right to defer that distribution. This requirement is independent of the section 417 requirements addressed in these regulations.

Concerns have been expressed that, in certain cases, the information provided to participants under section 417(a)(3) regarding the available distribution forms does not adequately enable them to compare those distribution forms without professional advice. In particular, participants who are eligible for both subsidized annuity distributions and unsubsidized single-sum distributions may be receiving notices that do not adequately explain the value of the subsidy that is foregone if the single-sum distribution is elected. In such a case, merely disclosing the amount of the single-sum distribution and the amount of annuity payments, or merely stating that the single sum distribution does not include the

subsidy that is included in the annuity payments, may not adequately enable those participants to make an informed comparison of the relative values of those distribution forms, even if the interest rate used to derive the single sum is disclosed. Furthermore, questions have been raised as to how the relative values of optional forms of benefit are required to be expressed under current regulations.

Accordingly, proposed regulations were published in the **Federal Register** on October 7, 2002 (67 FR 62417) that would consolidate the content requirements applicable to explanations of qualified joint and survivor annuities and qualified preretirement survivor annuities payable under certain retirement plans, and provide disclosure requirements that would enable participants to compare the relative values of the available distribution forms using more readily understandable information.

After consideration of the comments received concerning the proposed regulations, these final regulations adopt provisions of the proposed regulations with certain modifications, the most significant of which are highlighted below.

#### Explanation of Provisions

These regulations provide guidance regarding the required description of the relative values of optional forms of benefit compared to the value of the QJSA and the content of the required disclosure of relative values. Commentators generally approved of the increased disclosure that would result from the approach in the proposed regulations, and these final regulations are substantially similar to the proposed regulations.

As under the proposed regulations, the description of the relative value of an optional form of benefit compared to the value of the QJSA must be expressed in a manner that provides a meaningful comparison of the relative economic values of the two forms of benefit without the participant having to make calculations using interest or mortality assumptions. In order to provide this comparison, the benefit under one or both optional forms of benefit must be converted, taking into account the time value of money and life expectancies, so that both are expressed in the same form. While one commentator requested that the regulations only permit comparisons to be made on the basis of present value, the regulations do not take this approach. Instead, the final regulations retain the examples of techniques that may be used for this comparison that were included in the

proposed regulation: expressing the actuarial present value of the optional form of benefit as a percentage or factor of the actuarial present value of the QJSA; stating the amount of an annuity payable at the same time and under the same conditions as the QJSA that is the actuarial equivalent of the optional form of benefit; or stating the actuarial present value of both the QJSA and the optional form of benefit. However, a specific example has been added illustrating the use of the actuarial present value to express relative value.

The comparisons required under the proposed regulations depended on which form of benefit constitutes the QJSA for the participant. One commentator noted that this would result in a different comparison for married and unmarried participants, creating an unnecessary burden for plan sponsors in situations where the benefit options are identical for married and unmarried participants. Furthermore, if the plan sponsor did not know whether a participant is married, the plan would need to provide comparisons that covered both possibilities. In response to the comment, the final regulations permit a plan to use a uniform basis of comparison of relative value (*i.e.*, either the QJSA for married participants or the QJSA for unmarried participants) for both married and unmarried participants, if the benefit options are the same for married and unmarried participants. Thus, in a plan in which the applicable QJSA form for unmarried participants is a straight life annuity and the applicable QJSA form for married participants is a 50 percent joint and contingent annuity (and each of these forms of distribution are available to all participants on the same terms), the plan may choose to compare the relative value of the plan's optional forms of benefit to the value of the straight life annuity with respect to the required disclosure for all participants or the plan may choose to compare the relative value of the plan's optional forms of benefit to the value of the 50 percent joint and contingent annuity with respect to the required disclosure for all participants.

Since disclosing the relative value of every optional form of benefit regardless of the degree of subsidy may be too burdensome, and may provide participants with information that appears more precise than is warranted based on the inexact nature of the actuarial assumptions used, the final regulations follow the proposed regulation in providing for certain simplifications in the disclosure. Under one simplification, two or more optional forms of benefit that have approximately

the same value could be grouped for purposes of disclosing relative value. Under the proposed regulations, two or more optional forms of benefit were treated as having approximately the same value if those optional forms of benefit varied in relative value in comparison to the value of the QJSA by 5 percentage points or less when the relative value comparison is made by expressing the actuarial present value of each of those optional forms of benefit as a percentage of the actuarial present value of the QJSA.

Several commentators recommended changes in this 5 percentage point band. One commentator suggested that a band of 7.5 percentage points be used to simplify compliance and ease the administrative burden to plans. The commentator said that a band of 7.5 percentage points would allow a plan to treat unsubsidized optional forms of benefit for virtually all retiring participants as having approximately equal value. By contrast, another commentator favored a maximum band of 3 percentage points in order for participants to receive adequate disclosure about significant differences in value. The commentator said that a 5 percentage point difference in value was significant enough to be brought to the participant's attention.

These final regulations generally retain the 5 percentage point banding rule of the proposed regulations. This rule aims to minimize the compliance burdens for plans to the extent consistent with providing participants with information on differences in value that are material in light of the inexact nature of the actuarial assumptions used.

The proposed regulations also would have allowed a plan to treat all of its forms of benefit as approximately equal in value if the actuarial present value of all of those forms is not less than 95 percent of the actuarial present value of the QJSA. The final regulations permit a plan that is comparing the relative value of each optional form to the value of the QJSA for a married participant to treat each presently available optional form of benefit that has an actuarial present value of at least 95 percent of the actuarial present value of the QJSA as having approximately the same value as the QJSA. In addition, in the case of a plan that is comparing the relative value of each optional form to the value of the single life annuity, if all of the optional forms of benefit presently available have actuarial present values that are at least 95 percent, but not greater than 102.5 percent, of the actuarial present value of the presently available single life annuity, the plan is

permitted to treat all the presently available forms of distribution as approximately equal in value.

Some commentators recommended that participants have the right to know what actuarial assumptions were used in the plan's estimates of relative value. The final regulations require that this information be made available upon request if it is not provided in the notice.

Several commentators raised questions concerning whether the methods used in disclosing relative value of a plan's optional forms of benefit in accordance with these regulations affect the application of the requirement at § 1.401(a)-20, Q&A-16, that the QJSA for married participants be at least as valuable as any other optional form of benefit under the plan. While this issue is not addressed in these final regulations, there is no requirement, or implication, that the same actuarial assumptions used by a plan for purposes of disclosing relative value in accordance with these regulations must be applied for purposes of the requirement in § 1.401(a)-20, Q&A-16, that the QJSA for married participants be at least as valuable as any other optional form of benefit under the plan.

One commentator requested that these regulations address the use of electronic media to deliver the QJSA explanation or the QPSA explanation. The IRS and the Treasury Department are considering the extent to which the QJSA explanation and the QPSA explanation, as well as other notices under the various Internal Revenue Code requirements relating to qualified retirement plans, can be provided electronically, taking into account the effect of the Electronic Signatures in Global and National Commerce Act (ESIGN), Public Law 106-229, 114 Stat. 464 (2000). The IRS and the Treasury Department have invited comments on these issues, and anticipate issuing further guidance regarding electronic notices.

Commentators raised a number of other issues, including issues that relate to basic QJSA rules that are not addressed in these regulations and a request for the final regulations to include model language that can be included in a QJSA notice. These regulations do not include model language for several reasons, including the wide variety of distribution alternatives found in plans (including the variety of actuarial assumptions used to calculate optional forms of benefit), the variations in the average participant in the plan for purposes of understandability, as well as inclusion

in the regulations of several detailed examples showing how the information can be provided in order to disclose relative value.

#### **Effective Date**

These final regulations are applicable to QJSA explanations with respect to distributions with to annuity starting dates on or after October 1, 2004, and to QPSA explanations provided on or after July 1, 2004. In the case of a retroactive annuity starting date under section 417(a)(7), when required under § 1.417(e)-1(b)(3)(vi), the date of commencement of payments based on the retroactive annuity starting date is substituted for the annuity starting date for purposes of this effective date.

#### **Special Analyses**

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. It is hereby certified that the collection of information in these regulations will not have a significant economic impact on a substantial number of small entities. This certification is based upon the fact that qualified retirement plans of small businesses typically commence distribution of benefits to few, if any, plan participants in any given year and, similarly, only offer elections to waive a QPSA to few, if any, participants in any given year. Thus, the collection of information in these regulations will only have a minimal economic impact on most small entities. Therefore, an analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Code, the proposed regulations preceding these regulations were submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

#### **Drafting Information**

The principal authors of these regulations are Linda S.F. Marshall and John T. Ricotta of the Office of the Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the IRS and Treasury participated in their development.

#### **List of Subjects in 26 CFR Part 1**

Income taxes, Reporting and recordkeeping requirements.

## Adoption of Amendments to the Regulations

■ Accordingly, 26 CFR part 1 is amended as follows:

### PART 1—INCOME TAX; TAXABLE YEARS BEGINNING AFTER DECEMBER 31, 1986

■ **Paragraph 1.** The authority citation for part 1 continues to read in part as follows:

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

■ **Par. 2.** Paragraph (c)(3) of § 1.401(a)-11 is revised to read as follows:

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

\* \* \* \* \*

(c) \* \* \*

(3) *Information to be provided by plan.* For rules regarding the information required to be provided with respect to the election to waive a QJSA or a QPSA, see § 1.417(a)(3)-1.

\* \* \* \* \*

■ **Par. 3.** A-36 of § 1.401(a)-20 is revised to read as follows:

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

\* \* \* \* \*

A-36. For rules regarding the explanation of QPSAs and QJSAs required under section 417(a)(3), see § 1.417(a)(3)-1.

\* \* \* \* \*

■ **Par. 4.** Section 1.417(a)(3)-1 is added to read as follows:

#### § 1.417(a)(3)-1 Required explanation of qualified joint and survivor annuity and qualified preretirement survivor annuity.

(a) *Written explanation requirement—*

(1) *General rule.* A plan meets the survivor annuity requirements of section 401(a)(11) only if the plan meets the requirements of section 417(a)(3) and this section regarding the written explanation required to be provided a participant with respect to a QJSA or a QPSA. A written explanation required to be provided to a participant with respect to either a QJSA or a QPSA under section 417(a)(3) and this section is referred to in this section as a section 417(a)(3) explanation. See § 1.401(a)-20, Q&A-37, for exceptions to the written explanation requirement in the case of a fully subsidized QPSA or QJSA, and § 1.401(a)-20, Q&A-38, for the definition of a fully subsidized QPSA or QJSA.

(2) *Time for providing section 417(a)(3) explanation—*(i) *QJSA explanation.* See § 1.417(e)-1(b)(3)(ii) for rules governing the timing of the QJSA explanation.

(ii) *QPSA explanation.* See § 1.401(a)-20, Q&A-35, for rules governing the timing of the QPSA explanation.

(3) *Required method for providing section 417(a)(3) explanation.* A section 417(a)(3) explanation must be a written explanation. First class mail to the last known address of the participant is an acceptable delivery method for a section 417(a)(3) explanation. Likewise, hand delivery is acceptable. However, the posting of the explanation is not considered provision of the section 417(a)(3) explanation.

(4) *Understandability.* A section 417(a)(3) explanation must be written in a manner calculated to be understood by the average participant.

(b) *Required content of section 417(a)(3) explanation—*(1) *Content of QPSA explanation.* The QPSA explanation must contain a general description of the QPSA, the circumstances under which it will be paid if elected, the availability of the election of the QPSA, and, except as provided in paragraph (d)(3) of this section, a description of the financial effect of the election of the QPSA on the participant's benefits (*i.e.*, an estimate of the reduction to the participant's estimated normal retirement benefit that would result from an election of the QPSA).

(2) *Content of QJSA explanation.* The QJSA explanation must satisfy either paragraph (c) or paragraph (d) of this section. Under paragraph (c) of this section, the QJSA explanation must contain certain specific information relating to the benefits available under the plan to the particular participant. Alternatively, under paragraph (d) of this section, the QJSA explanation can contain generally applicable information in lieu of specific participant information, provided that the participant has the right to request additional information regarding the participant's benefits under the plan.

(c) *Participant-specific information required to be provided—*(1) *In general.* A QJSA explanation satisfies this paragraph (c) if it provides the following information with respect to each of the optional forms of benefit presently available to the participant (*i.e.*, optional forms of benefit with an annuity starting date for which the QJSA explanation applies)—

(i) A description of the optional form of benefit;

(ii) A description of the eligibility conditions for the optional form of benefit;

(iii) A description of the financial effect of electing the optional form of benefit (*i.e.*, the amount payable under the form of benefit to the participant

during the participant's lifetime and the amount payable after the death of the participant);

(iv) In the case of a defined benefit plan, a description of the relative value of the optional form of benefit compared to the value of the QJSA, in the manner described in paragraph (c)(2) of this section; and

(v) A description of any other material features of the optional form of benefit.

(2) *Requirement for numerical comparison of relative values—*(i) *In general.* The description of the relative value of an optional form of benefit compared to the value of the QJSA under paragraph (c)(1)(iv) of this section must be expressed to the participant in a manner that provides a meaningful comparison of the relative economic values of the two forms of benefit without the participant having to make calculations using interest or mortality assumptions. Thus, in performing the calculations necessary to make this comparison, the benefits under one or both optional forms of benefit must be converted, taking into account the time value of money and life expectancies, so that the values of both optional forms of benefit are expressed in the same form. For example, such a comparison may be expressed to the participant using any of the following techniques—

(A) Expressing the actuarial present value of the optional form of benefit as a percentage or factor of the actuarial present value of the QJSA;

(B) Stating the amount of the annuity that is the actuarial equivalent of the optional form of benefit and that is payable at the same time and under the same conditions as the QJSA; or

(C) Stating the actuarial present value of both the optional form of benefit and the QJSA.

(ii) *Use of one form for both married and unmarried individuals—*(A) *In general.* Under the rules of this paragraph (c)(2)(ii), in lieu of providing different QJSA explanations for married and unmarried individuals, the plan may provide a QJSA explanation to an individual that does not vary based on the participant's marital status. Except as specifically provided in paragraph (c)(3)(iii) of this section, any reference in this section to comparing the relative value of an optional form of benefit to the value of the QJSA may be satisfied using the substitution permitted under paragraph (c)(2)(ii)(B) or (C) of this section.

(B) *Substitution of single life annuity for married individual.* For a married participant, in lieu of comparing the value of each optional form of benefit presently available to the participant to the value of the QJSA, the plan can

compare the value of each optional form of benefit (including the QJSA) to the value of a QJSA for an unmarried participant (*i.e.*, a single life annuity), but only if that same single life annuity is available to that married participant.

(C) *Substitution of joint and survivor annuity for unmarried individual.* For an unmarried participant, in lieu of comparing the value of each optional form of benefit presently available to the participant to the value of the QJSA for that individual (which is a single life annuity), the plan can compare the value of each optional form of benefit (including the single life annuity) to the value of the joint and survivor annuity that is the QJSA for a married participant, but only if that same joint and survivor annuity is available to that unmarried participant.

(iii) *Simplified presentations permitted—(A) Grouping of certain optional forms.* Two or more optional forms of benefit that have approximately the same value may be grouped for purposes of a required numerical comparison described in this paragraph (c)(2). For this purpose, two or more optional forms of benefit have approximately the same value if none of those optional forms of benefit vary in relative value in comparison to the value of the QJSA by more than 5 percentage points when the relative value comparison is made by expressing the actuarial present value of each of those optional forms of benefit as a percentage of the actuarial present value of the QJSA. For such a group of optional forms of benefit, the requirement relating to disclosing the relative value of each optional form of benefit compared to the value of the QJSA can be satisfied by disclosing the relative value of any one of the optional forms in the group compared to the value of the QJSA, and disclosing that the other optional forms of benefit in the group are of approximately the same value. If a single-sum distribution is included in such a group of optional forms of benefit, the single-sum distribution must be the distribution form that is used for purposes of this comparison.

(B) *Representative relative value for grouped optional forms.* If, in accordance with paragraph (c)(2)(iii)(A) of this section, two or more optional forms of benefits are grouped, the relative values for all of the optional forms of benefit in the group can be stated using a representative relative value as the approximate relative value for the entire group. For this purpose, a representative relative value is any relative value that is not less than the relative value of the member of the

group of optional forms of benefit with the lowest relative value and is not greater than the relative value of the member of that group with the highest relative value when measured on a consistent basis. For example, if three grouped optional forms have relative values of 87.5 percent, 89 percent, and 91 percent of the value of the QJSA, all three optional forms can be treated as having a relative value of approximately 90 percent of the value of the QJSA. As required under paragraph (c)(2)(iii)(A) of this section, if a single-sum distribution is included in the group of optional forms of benefit, the 90 percent relative factor of the value of the QJSA must be disclosed as the approximate relative value of the single sum, and the other forms can be described as having the same approximate value as the single sum.

(C) *Special rules.* If the plan is comparing the value of each optional form to the value of the QJSA for a married participant, this paragraph (c)(2)(iii)(C) provides a grouping rule that is in addition to the grouping rules of paragraph (c)(2)(iii)(A) of this section. Under this special rule, the relative value of all optional forms of benefit that have an actuarial present value that is at least 95 percent of the actuarial present value of the QJSA for a married participant is permitted to be described by stating that those optional forms of benefit are approximately equal in value to the QJSA, or that all of those forms of benefit and the QJSA are approximately equal in value. In addition, if a plan is comparing the value of optional forms of benefit to the value of the single life annuity and all optional forms of benefit have actuarial present values that are at least 95 percent, but not greater than 102.5 percent, of the actuarial present value of the single life annuity, the plan is permitted to describe the relative value of all optional forms of benefit by stating that all the optional forms of benefit are approximately equal in value, or that all of those forms of benefit and the single life annuity are approximately equal in value.

(iv) *Actuarial assumptions used to determine relative values.* For the purpose of providing a numerical comparison of the value of an optional form of benefit to the value of the immediately commencing QJSA under this paragraph (c)(2), the following rules apply—

(A) If an optional form of benefit is subject to the requirements of section 417(e)(3) and § 1.417(e)–1(d), any comparison of the value of the optional form of benefit to the value of the QJSA must be made using the applicable

mortality table and the applicable interest rate as defined in § 1.417(e)–1(d)(2) and (3) (or, at the option of the plan, another reasonable interest rate and reasonable mortality table used under the plan to calculate the amount payable under the optional form of benefit); and

(B) All other optional forms of benefit payable to the participant must be compared with the QJSA using a single set of interest and mortality assumptions that are reasonable and that are applied uniformly with respect to all such optional forms payable to the participant (regardless of whether those assumptions are actually used under the plan for purposes of determining benefit payments).

(v) *Required disclosure of assumptions—(A) Explanation of concept of relative value.* The notice must provide an explanation of the concept of relative value, communicating that the relative value comparison is intended to allow the participant to compare the total value of distributions paid in different forms, that the relative value comparison is made by converting the value of the optional forms of benefit presently available to a common form (such as the QJSA or a single-sum distribution), and that this conversion uses interest and life expectancy assumptions. The explanation of relative value must include a general statement that all comparisons provided are based on average life expectancies, and that the relative value of payments ultimately made under an annuity optional form of benefit will depend on actual longevity.

(B) *Disclosure of assumptions.* A required numerical comparison of the value of the optional form of benefit to the value of the QJSA under this paragraph (c)(2) is required to include a disclosure of the interest rate that is used to develop the comparison. If all optional forms of benefit are permitted to be grouped under paragraph (c)(2)(iii)(A) of this section, then the requirement of this paragraph (c)(2)(v)(B) does not apply for any optional form of benefit not subject to the requirements of section 417(e)(3) and § 1.417(e)–1(d)(3).

(C) *Offer to provide actuarial assumptions.* If the plan does not disclose the actuarial assumptions used to calculate the numerical comparison required under paragraph (c)(2) of this section, then, the notice must be accompanied by a statement that includes an offer to provide, upon the participant's request, the actuarial assumptions used to calculate the relative value of optional forms of benefit under the plan.

(3) *Permitted estimates of financial effect and relative value*—(i) *General rule.* For purposes of providing a description of the financial effect of the distribution forms available to a participant as required under paragraph (c)(1)(iii) of this section, and for purposes of providing a description of the relative value of an optional form of benefit compared to the value of the QJSA for a participant as required under paragraph (c)(1)(iv) of this section, the plan is permitted to provide reasonable estimates (e.g., estimates based on data as of an earlier date than the annuity starting date, a reasonable assumption for the age of the participant's spouse, or, in the case of a defined contribution plan, reasonable estimates of amounts that would be payable under a purchased annuity contract), including reasonable estimates of the applicable interest rate under section 417(e)(3).

(ii) *Right to more precise calculation.* If a QJSA notice uses a reasonable estimate under paragraph (c)(3)(i) of this section, the QJSA explanation must identify the estimate and explain that the plan will, upon the request of the participant, provide a more precise calculation and the plan must provide the participant with a more precise calculation if so requested. Thus, for example, if a plan provides an estimate of the amount of the QJSA that is based on a reasonable assumption concerning the age of the participant's spouse, the participant can request a calculation that takes into account the actual age of the spouse, as provided by the participant.

(iii) *Revision of prior information.* If a more precise calculation described in paragraph (c)(3)(ii) of this section materially changes the relative value of an optional form compared to the value of the QJSA, the revised relative value of that optional form must be disclosed, regardless of whether the financial effect of selecting the optional form is affected by the more precise calculation. For example, if a participant provides a plan with the age of the participant's spouse and that information materially changes the relative value of an optional form of benefit (such as a single sum) compared to the value of the QJSA, then the revised relative value of the optional form of benefit and the value of the QJSA must be disclosed, regardless of whether the amount of the payment under that optional form of benefit is affected by the more precise calculation.

(4) *Special rules for disclosure of financial effect for defined contribution plans.* For a written explanation provided by a defined contribution plan, a description of financial effect required by paragraph (c)(1)(iii) of this

section with respect to an annuity form of benefit must include a statement that the annuity will be provided by purchasing an annuity contract from an insurance company with the participant's account balance under the plan. If the description of the financial effect of the optional form of benefit is provided using estimates rather than by assuring that an insurer is able to provide the amount disclosed to the participant, the written explanation must also disclose this fact.

(d) *Substitution of generally applicable information for participant information in the section 417(a)(3) explanation*—(1) *Forms of benefit available.* In lieu of providing the information required under paragraphs (c)(1)(i) through (v) of this section for each optional form of benefit presently available to the participant as described in paragraph (c) of this section, the QJSA explanation may contain the information required under paragraphs (c)(1)(i) through (v) of this section for the QJSA and each other optional form of benefit generally available under the plan, along with a reference to where a participant may readily obtain the information required under paragraphs (c)(1)(i) through (v) of this section for any other optional forms of benefit that are presently available to the participant.

(2) *Financial effect and comparison of relative values*—(i) *General rule.* In lieu of providing a statement of the financial effect of electing an optional form of benefit as required under paragraph (c)(1)(iii) of this section, or a comparison of relative values as required under paragraph (c)(1)(iv) of this section, based on the actual age and benefit of the participant, the QJSA explanation is permitted to include a chart (or other comparable device) showing the financial effect and relative value of optional forms of benefit in a series of examples specifying the amount of the optional form of benefit payable to a hypothetical participant at a representative range of ages and the comparison of relative values at those same representative ages. Each example in this chart must show the financial effect of electing the optional form of benefit pursuant to the rules of paragraph (c)(1)(iii) of this section, and a comparison of the relative value of the optional form of benefit to the value of the QJSA pursuant to the rules of paragraph (c)(2) of this section, using reasonable assumptions for the age of the hypothetical participant's spouse and any other variables that affect the financial effect, or relative value, of the optional form of benefit. The requirement to show the financial effect

of electing an optional form can be satisfied through the use of other methods (e.g., expressing the amount of the optional form as a percentage or a factor of the amount payable under the normal form of benefit), provided that the method provides sufficient information so that a participant can determine the amount of benefits payable in the optional form. The chart (or other comparable device) must be accompanied by the disclosures described in paragraph (c)(2)(v) of this section explaining the concept of relative value and disclosing certain interest assumptions. In addition, the chart (or other comparable device) must be accompanied by a general statement describing the effect of significant variations between the assumed ages or other variables on the financial effect of electing the optional form of benefit and the comparison of the relative value of the optional form of benefit to the value of the QJSA.

(ii) *Actual benefit must be disclosed.* The generalized notice described in this paragraph (d)(2) will satisfy the requirements of paragraph (b)(2) of this section only if the notice includes either the amount payable to the participant under the normal form of benefit or the amount payable to the participant under the normal form of benefit adjusted for immediate commencement. For this purpose, the normal form of benefit is the form under which payments due to the participant under the plan are expressed under the plan, prior to adjustments for form of benefit. For example, assuming that a plan's benefit accrual formula is expressed as a straight life annuity, the generalized notice must provide the amount of either the straight life annuity commencing at normal retirement age or the straight life annuity commencing immediately.

(iii) *Ability to request additional information.* The generalized notice described in this paragraph (d)(2) must be accompanied by a statement that includes an offer to provide, upon the participant's request, a statement of financial effect and a comparison of relative values that is specific to the participant for any presently available optional form of benefit, and a description of how a participant may obtain this additional information.

(3) *Financial effect of QPSA election.* In lieu of providing a specific description of the financial effect of the QPSA election, the QPSA explanation may provide a general description of the financial effect of the election. Thus, for example, the description can be in the form of a chart showing the reduction to a hypothetical participant's normal

retirement benefit at a representative range of participant ages as a result of the QPSA election (using a reasonable assumption for the age of the hypothetical participant's spouse relative to the age of the hypothetical participant). In addition, this chart must be accompanied by a statement that includes an offer to provide, upon the participant's request, an estimate of the reduction to the participant's estimated normal retirement benefit, and a description of how a participant may obtain this additional information.

(4) *Additional information required to be furnished at the participant's request*— The generalized notice described in paragraph (d)(2) of this section must be accompanied by a statement that includes an offer to provide, upon the participant's request, information described in this paragraph (d)(4)(i) and (ii), and a description of how a participant may obtain this additional information.

(i) *Explanation of QJSA*. If, as permitted under paragraphs (d)(1) and (2) of this section, the content of a QJSA explanation does not include all the items described in paragraph (c) of this section, then, upon a participant's request for any of the information required under paragraphs (c)(1)(i) through (v) of this section for one or more presently available optional forms (including a request for all optional forms presently available to the participant), the plan must furnish the information required under paragraphs (c)(1)(i) through (v) of this section with respect to those optional forms. Thus, with respect to those optional forms of benefit, the participant must receive a QJSA explanation specific to the participant that is based on the participant's actual age and benefit. In addition, the plan must comply with paragraph (c)(3)(iii) of this section. Further, if as permitted under paragraph (c)(2)(v)(B) of this section, the plan does not disclose the actuarial assumptions used to calculate the numerical comparison required under paragraph (c)(2) of this section, then, upon request, the plan must provide the actuarial assumptions used to calculate the relative value of optional forms of benefit under the plan.

(ii) *Explanation of QPSA*. If, as permitted under paragraph (d)(3) of this section, the content of a QPSA explanation does not include all the items described in paragraph (b)(1) of this section, then, upon a participant's request, the plan must furnish an estimate of the reduction to the participant's estimated normal retirement benefit that would result from a QPSA election.

(e) *Examples*. The following examples illustrate the application of this section. Solely for purposes of these examples, the applicable interest rate that applies to any distribution that is subject to the rules of section 417(e)(3) is assumed to be 52½ percent, and the applicable mortality table under section 417(e)(3) and § 1.417(e)–1(d)(2) is assumed to be the table that applies as of January 1, 2003. In addition, solely for purposes of these examples, assume that a plan which determines actuarial equivalence using 6 percent interest and the applicable mortality table under section 417(e)(3) and § 1.417(e)–1(d)(2) that applies as of January 1, 1995, is using reasonable actuarial assumptions. The examples are as follows:

*Example 1.* (i) Participant M participates in Plan A, a qualified defined benefit plan. Under Plan A, the QJSA is a joint and 100 percent survivor annuity, which is actuarially equivalent to the single life annuity determined using 6 percent interest and the section 417(e)(3) applicable mortality table that applies as of January 1, 1995. On October 1, 2004, M will terminate employment at age 55. When M terminates employment, M will be eligible to elect an unreduced early retirement benefit, payable as either a single life annuity or the QJSA. M will also be eligible to elect a single-sum distribution equal to the actuarial present value of the single life annuity payable at normal retirement age (age 65), determined using the applicable mortality table and the applicable interest rate under section 417(e)(3).

(ii) Consistent with paragraph (c) of this section, Participant M is provided with a QJSA explanation that describes the single life annuity, the QJSA, and single-sum distribution options under the plan, and any eligibility conditions associated with these options. Participant M is married when the explanation is provided. The explanation indicates that, if Participant M commenced benefits at age 55 and had a spouse age 55, the monthly benefit under an immediately commencing single life annuity is \$3,000, the monthly benefit under the QJSA is estimated to be 89.96 percent of the monthly benefit under the immediately commencing single life annuity or \$2,699, and the single sum is estimated to be 74.7645 times the monthly benefit under the immediately commencing single life annuity or \$224,293.

(iii) The QJSA explanation indicates that the single life annuity and the QJSA are of approximately the same value, but that the single-sum option is equivalent in value to a monthly benefit under the QJSA of \$1,215. (This amount is 45 percent of the value of the QJSA at age 55 (\$1,215 divided by 89.96 percent of \$3,000 equals 45 percent).) The explanation states that the relative value comparison converts the value of the single life annuity and the single-sum options to the value of each if paid in the form of the QJSA and that this conversion uses interest and life expectancy assumptions. The explanation specifies that the calculations relating to the single-sum distribution were prepared using

5.5 percent interest and average life expectancy, that the other calculations were prepared using a 6 percent interest rate and that the relative value of actual annuity payments for an individual and spouse live. The explanation notes that the calculation of the QJSA assumed that the spouse was age 55, that the amount of the QJSA will depend on the actual age of the spouse (for example, annuity payments will be significantly lower if the spouse is significantly younger than the participant), and that the amount of the single-sum payment will depend on the interest rates that apply when the participant actually takes a distribution. The explanation also includes an offer to provide a more precise calculation to the participant taking into account the spouse's actual age.

(iv) In accordance with paragraph (c)(3)(ii) of this section, Participant M requests a more precise calculation of the financial effect of choosing a QJSA taking into account that Participant M's spouse is 50 years of age. Using the actual age of Participant M's spouse, Plan A determines that the monthly payments under the QJSA are 87.62 percent of the monthly payments under the single life annuity, or \$2,628.60 per month, and provides this information to M. Plan A is not required to provide an updated calculation of the relative value of the single sum because the value of single sum continues to be 45 percent of the value of the QJSA.

*Example 2.* (i) The facts are the same as in *Example 1*, except that the comparison of the relative values of optional forms of benefit to the value of the QJSA is not expressed as a percentage of the actuarial present value of the QJSA, but instead is expressed by disclosing the actuarial present values of the optional forms and the QJSA. In addition, the Plan uses the applicable interest rate and the applicable mortality table under section 417(e)(3) for all comparison purposes.

(ii) Accordingly, the QJSA explanation indicates that the QJSA has an actuarial present value of \$498,089, while the single-sum payment has an actuarial present value of \$224,293 (*i.e.* the amount of the single sum is \$224,293) and that the single life annuity is approximately equal in value to the QJSA. The explanation states that the relative value comparison converts the value of single life annuity and the QJSA into an amount payable in the form of the single-sum option (even though a single-sum distribution in that amount is not available under the plan) and that this conversion uses interest and life expectancy assumptions. The explanation specifies that the calculations were prepared using 5.5 percent interest and average life expectancy, and that the relative value of actual annuity payments for an individual can vary depending on how long the individual and spouse live. The explanation notes that the calculation of the QJSA assumed that the spouse was age 55, that the amount of the QJSA will depend on the actual age of the spouse (for example, annuity payments will be significantly lower if the spouse is significantly younger than the participant), and that the amount of the single-sum payment will depend on the interest rates that apply when the participant

actually takes a distribution. The explanation also includes an offer to provide a more precise calculation to the participant taking into account the spouse's actual age.

*Example 3.* (i) The facts are the same as in *Example 1*, except that, in lieu of providing information specific to Participant M in the QJSA notice as set forth in paragraph (c) of this section, Plan A satisfies the QJSA explanation requirement in accordance with

paragraph (d)(2) of this section by providing M with a statement that M's monthly benefit under an immediately commencing single life annuity (which is the normal form of benefit under Plan A, adjusted for immediate commencement) is \$3,000, along with the following chart. The chart shows the financial effect of electing each optional form of benefit for a hypothetical participant with a \$1,000 benefit and a spouse who is the

same age as the participant. Instead of showing the relative value of these optional forms of benefit compared to the value of the QJSA, the chart shows the relative value of these optional forms of benefit compared to the value of the single life annuity. Separate charts are provided for ages 55, 60, and 65 as follows:

AGE 55 COMMENCEMENT

Optional form	Amount of distribution per \$1,000 of immediate single life annuity	Relative value
Life Annuity .....	\$1,000 per month .....	n/a.
QJSA (Joint and 100 percent survivor annuity)	\$900 per month (\$900 per month for survivor annuity).	Approximately the same value as the Life Annuity.
Lump sum .....	\$74,764 .....	Approximately 45 percent of the value of the Life Annuity.

AGE 60 COMMENCEMENT

Optional form	Amount of distribution per \$1,000 of immediate single life annuity	Relative value
Life Annuity .....	\$1,000 per month .....	n/a.
QJSA (Joint and 100 percent survivor annuity)	\$878 per month (\$878 per month for survivor annuity).	Approximately the same value as the Life Annuity.
Lump sum .....	\$99,792 .....	Approximately 66 percent of the value of the Life Annuity.

AGE 65 COMMENCEMENT

Optional form	Amount of distribution per \$1,000 of immediate single life annuity	Relative value
Life Annuity .....	\$1,000 per month .....	n/a.
QJSA (Joint and 100 percent survivor annuity)	\$852 per month (\$852 per month for survivor annuity).	Approximately the same value as the Life Annuity.
Lump sum .....	\$135,759 .....	Approximately the same value as the Life Annuity.

(ii) In accordance with paragraph (d)(4)(i) of this section, when Participant M requests specific information regarding the amounts payable under the QJSA, the joint and 100 percent survivor annuity, and the single-sum distribution and provides the age of M's spouse, Plan A determines that M's QJSA is \$2,628.60 per month and the single-sum distribution is \$224,293. The actuarial present value of the QJSA (determined using the 5.5 percent interest and the section 417(e)(3) applicable mortality table) is \$498,896 and the actuarial present value of the single life annuity is \$497,876. Accordingly, the specific information discloses that the single-sum distribution has a value that is 45 percent of the value of the single life annuity available to M on October 1, 2004. In accordance with paragraph (c)(2)(iii)(C) of this section, the QJSA notice

provides that the QJSA is of approximately the same value as the single life annuity.

*Example 4.* (i) The facts are the same as in *Example 1*, except that under Plan A, the single-sum distribution is determined as the actuarial present value of the immediately commencing single life annuity. In addition, Plan A provides a joint and 75 percent survivor annuity that is reduced from the single life annuity and that is the QJSA under Plan A. For purposes of determining the amount of the QJSA, if the participant is married the reduction is only half of the reduction that would normally apply under the actuarial assumptions specified in Plan A for determining actuarial equivalence of optional forms.

(ii) In lieu of providing information specific to Participant M in the QJSA notice as set forth in paragraph (c) of this section,

Plan A satisfies the QJSA explanation requirement in accordance with paragraph (d)(2) of this section by providing M with a statement that M's monthly benefit under an immediately commencing single life annuity (which is the normal form of benefit under Plan A, adjusted for immediate commencement) is \$3,000, along with the following chart showing the financial effect and the relative value of the optional forms of benefit compared to the QJSA for a hypothetical participant with a \$1,000 benefit and a spouse who is three years younger than the participant. For each optional form generally available under the plan, the chart shows the financial effect and the relative value, using the grouping rules of paragraph (c)(2)(ii) of this section. Separate charts are provided for ages 55, 60, and 65, as follows:

AGE 55 COMMENCEMENT

Optional form	Amount of distribution per \$1,000 of immediate single life annuity	Relative value
Life Annuity .....	\$1,000 per month .....	Approximately the same value as the QJSA.



AGE 55 COMMENCEMENT—Continued

Optional form	Amount of distribution per \$1,000 of immediate single life annuity	Relative value
QJSA (joint and 75 percent survivor annuity for a participant who is married).	\$956 per month (\$717 per month for survivor annuity).	n/a.
Joint and 100 percent survivor annuity .....	\$886 per month (\$886 per month for survivor annuity).	Approximately the same value as the QJSA.
Lump sum .....	\$165,959 .....	Approximately the same value as the QJSA.

AGE 60 COMMENCEMENT

Optional form	Amount of distribution per \$1,000 of immediate single life annuity	Relative value
Life Annuity .....	\$1,000 per month .....	Approximately 94 percent of the value of the QJSA.
QJSA (joint and 75 percent survivor annuity for a participant who is married).	\$945 per month (\$709 per month for survivor annuity).	n/a.
Joint and 100 percent survivor annuity .....	\$859 per month (\$859 per month for survivor annuity).	Approximately 94 percent of the value of the QJSA.
Lump sum .....	\$151,691 .....	Approximately the same value as the QJSA.

AGE 65 COMMENCEMENT

Optional form	Amount of distribution per \$1,000 of immediate single life annuity	Relative value
Life Annuity .....	\$1,000 per month .....	Approximately 93 percent of the value of the QJSA.
QJSA (joint and 75 percent survivor annuity for a participant who is married).	\$932 per month (\$699 per month for survivor annuity).	n/a.
Joint and 100 percent survivor annuity .....	\$828 per month (\$828 per month for survivor annuity).	Approximately 93 percent of the value of the QJSA.
Lump sum .....	\$135,759 .....	Approximately 93 percent of the value of the QJSA.

(iii) The chart disclosing the financial effect and relative value of the optional forms specifies that the calculations were prepared assuming that the spouse is three years younger than the participant, that the calculations relating to the single-sum distribution were prepared using 5.5 percent interest and average life expectancy, that the other calculations were prepared using a 6 percent interest rate, and that the relative value of actual payments for an individual can vary depending on how long the individual and spouse live. The explanation states that the relative value comparison converts the single life annuity, the joint and 100 percent survivor annuity, and the single-sum options to value of each if paid in the form of the QJSA and that this conversion uses interest and life expectancy assumptions. The explanation notes that the calculation of the QJSA depends on the actual age of the spouse (for example, annuity payments will be significantly lower if the spouse is significantly younger than the participant), and that the amount of the single-sum payment will depend on the interest rates that apply when the participant actually takes a distribution. The explanation also includes an offer to provide a calculation specific to the participant upon request, and an offer to provide mortality tables used in preparing calculations upon request.

(iv) In accordance with paragraph (d)(4)(i) of this section, Participant M requests specific information regarding the amounts

payable under the QJSA, the joint and 100 percent survivor annuity, and the single sum.

(v) Based on the information about the age of Participant M's spouse, Plan A determines that M's QJSA is \$2,856.30 per month, the joint and 100 percent survivor annuity is \$2,628.60 per month, and the single sum is \$497,876. The actuarial present value of the QJSA (determined using the 5.5 percent interest and the section 417(e)(3) applicable mortality table, the actuarial assumptions required under section 417) is \$525,091. Accordingly, the value of the single-sum distribution available to M on October 1, 2004, is 94.8 percent of the actuarial present value of the QJSA. In addition, the actuarial present value of the life annuity and the 100 percent joint and survivor annuity are 95.0 percent of the actuarial present value of the QJSA.

(vi) Plan A provides M with a QJSA explanation that incorporates these more precise calculations of the financial effect and relative value of the optional forms for which M requested information.

(f) *Effective date.* This section applies to QJSA explanations with respect to distributions with annuity starting dates on or after October 1, 2004, and to QPSA explanations provided on or after July 1, 2004. In the case of a retroactive annuity starting date under section 417(a)(7), when required under

§ 1.417(e)–1(b)(3)(vi), the date of commencement of the actual payments based on the retroactive annuity starting date is substituted for the annuity starting date for this purpose.

**§ 1.417(e)–1 [Amended]**  
 ■ **Par. 5.** In § 1.417(e)–1, paragraph (b)(2) is amended by removing the language “§ 1.401(a)–20 Q&A–36” and adding “§ 1.417(a)(3)–1” in its place.

**PART 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT**

■ **Par. 6.** The authority citation for part 602 continues to read as follows:  
**Authority:** 26 U.S.C. 7808.  
 ■ **Par. 7.** In § 602.101, paragraph (b) is amended by adding an entry for “§ 1.417(a)(3)–1” in numerical order to the table to read in part as follows:

**§ 602.101 OMB Control numbers.**

*	*	*	*	*
(b)	*	*	*	*

CFR part or section where identified and described	Current OMB control No.
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CFR part or section where identified and described	Current OMB control No.
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1.417(a)(3)-1 .....	1545-0928
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**Mark E. Matthews,**  
Deputy Commissioner for Services and Enforcement.

Approved: December 3, 2003.

**Gregory Jenner,**  
Deputy Assistant Secretary (Tax Policy).  
[FR Doc. 03-31033 Filed 12-16-03; 8:45 am]  
BILLING CODE 4830-01-P

**EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

**29 CFR Part 1626**

RIN 3046-AA54

**Procedures—Age Discrimination in Employment Act**

**AGENCY:** Equal Employment Opportunity Commission (EEOC).  
**ACTION:** Final rule.

**SUMMARY:** This rule revises the regulations on the processing of age discrimination charges to provide that the Commission will issue a notice, when it has dismissed or otherwise terminated the processing of an age discrimination charge, that the right to file a lawsuit on the charge under the Age Discrimination in Employment Act (ADEA) will expire in 90 days. These amendments also delete references to the previously applicable two- or three-year limitations period for filing a civil action. Finally, EEOC is deleting its list of ADEA referral states because the list is obsolete and unnecessary. These changes conform the Commission's regulations to the procedures adopted by the Commission to implement section 115 of the Civil Rights Act of 1991.

**EFFECTIVE DATE:** January 16, 2004.

**FOR FURTHER INFORMATION CONTACT:** Thomas J. Schlageter, Assistant Legal Counsel at (202) 663-4669 (voice) or (202) 663-7026 (TTY). This final rule is also available in the following formats: large print, braille, audiotape and electronic file on computer disk. Requests for this notice in an alternative format should be made to EEOC's Publication Center at 1-800-669-3362.

**SUPPLEMENTARY INFORMATION:** The Commission published a Notice of Proposed Rulemaking (NPRM) in the **Federal Register** on August 12, 2002 (67 FR 52431), proposing revisions to part

1626 of its regulations. These changes were proposed to (1) conform the Commission's regulations to the procedures it adopted for the processing of charges under the Age Discrimination in Employment Act (ADEA) following passage of section 115 of the Civil Rights Act of 1991 (CRA) and (2) delete an obsolete and unnecessary list of State Fair Employment Practices Agencies to which EEOC will send copies of ADEA charges.

The current § 1626.7(a) provides that charges will not be rejected as untimely provided that they are not barred by the statute of limitations contained in section 6 of the Portal to Portal Act. This provision recognized the Commission's authority to file suit within the Portal to Portal Act's limitation period even if the aggrieved party did not have a private right of action because the charge was filed more than 180 days (or 300 days in a referral jurisdictions) after the discriminatory event took place. Following passage of the CRA, the statute of limitations contained in the Portal to Portal Act is no longer applicable to ADEA lawsuits filed by either the aggrieved party or the Commission. We therefore proposed to delete the current § 1626.7(a). The Commission will dismiss ADEA charges filed more than 180 days (or 300 days in a referral jurisdiction) after the discriminatory act, absent waiver, estoppel or equitable tolling.

The current § 1626.9(b) and (c) contain a list of states to which the Commission refers charges under section 14(b) of the ADEA. These lists were created when there were relatively few such agencies. Since almost all states now have laws prohibiting age discrimination, we proposed to delete the lists because they are obsolete and unnecessary. The regulation continues to provide that the Commission will refer age charges to appropriate state agencies.

Section 7(d) of the ADEA requires that, upon receipt of a charge, the Commission shall promptly attempt to eliminate any alleged unlawful practice by informal methods of conciliation, conference and persuasion. Under current § 1626.12, EEOC issues a notice if this attempt at conciliation fails. To eliminate any possible confusion between this failure of conciliation notice and the new Notice of Dismissal or Termination (NDT), we proposed to add a sentence to § 1626.12 stating that notice under this section is not a Notice of Dismissal or Termination under § 1626.20.

The second sentence and last two sentences of the current § 1626.15(b) concern the tolling of the ADEA's

statute of limitations during EEOC conciliation. Because this tolling provision no longer applies, we proposed to delete these sentences. We also proposed an editorial change to the third sentence, eliminating a reference to the current second sentence that was being deleted.

The Commission proposed to add three new sections. Section 1626.17 was modeled on 29 CFR 1601.28 and provides for issuance of a Notice of Dismissal or Termination to an aggrieved person when EEOC dismisses or otherwise terminates its processing of an ADEA charge. Notification will be made by issuing a Notice of Dismissal or Termination to each aggrieved person. In the case of a charge concerning more than one aggrieved person, Notices of Dismissal or Termination will only be issued when the charge is dismissed or EEOC's proceedings are terminated as to all aggrieved persons.

Section 1626.18 concerns the institution of private civil actions. Paragraph (a) states that a civil action may be filed by an aggrieved person in either federal or state court under section 7 of the ADEA. Paragraph (b) makes clear that an aggrieved person need not wait for a Notice of Dismissal or Termination to be issued in order to file a civil action, but can file suit on a pending charge any time after 60 days have elapsed from the filing of the charge. Paragraph (c) provides that the right to file a private suit under the ADEA expires 90 days after receipt of a Notice of Dismissal or Termination. Paragraph (d) provides that when the Commission becomes aware that an aggrieved person has filed a private lawsuit under the ADEA against the respondent named in the charge, the Commission will terminate further processing of the charge or the portion of the charge affecting that person unless it is determined that further proceedings will effectuate the purposes of the ADEA.

Section 1626.19 clarifies that, unlike Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, and Title I of the Americans with Disabilities Act, 42 U.S.C. 12101 *et seq.*, the ADEA does not require the filing of a charge before the Commission has authority to investigate and litigate a possible violation of the ADEA. In addition, the termination of proceedings on an age discrimination charge and the issuance of a Notice of Dismissal or Termination does not prevent the Commission from investigating or litigating a matter that may have been the subject of or related to a charge on which a Notice of Dismissal or Termination was issued.