[4830-01-u]

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG-116495-99]

RIN 1545-AX68

Loans From a Qualified Employer Plan to Plan Participants or Beneficiaries

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed Income Tax Regulations relating to loans made from a qualified employer plan to plan participants or beneficiaries. These regulations affect administrators of, participants in, and beneficiaries of qualified employer plans that permit participants or beneficiaries to receive loans from the plan, including loans from section 403(b) contracts and other contracts issued under qualified employer plans.

DATES: Written and electronic comments and requests for a public hearing must be received by October 31, 2000.

ADDRESSES: Send submissions to: CC:MSP:RU (REG-116495-99), room 5226, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 5 p.m. to: CC:MSP:RU (REG-116495-99), Courier’s Desk, Internal Revenue

Service, 1111 Constitution Avenue, NW., Washington, DC. Alternatively, taxpayers may submit comments electronically via the Internet by selecting the "Tax Regs" option on the IRS Home Page, or by submitting comments directly to the IRS Internet site at http://www.irs.gov/tax_regs/regslist.html.

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, Vernon S. Carter, (202) 622-6070; concerning submissions Sonya Cruse (202) 622-7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

This document contains proposed amendments to the Income Tax Regulations (26 CFR Part 1) under section 72 of the Internal Revenue Code of 1986 (Code).

Explanation of Provisions

Section 72(p)(1)(A) provides that a loan from a qualified employer plan (including a contract purchased under a qualified employer plan) by a participant or beneficiary is treated as received as a distribution from the plan for purposes of section 72 (a deemed distribution). Section 72(p)(1)(B) provides that an assignment or pledge of (or an agreement to assign or pledge) any portion of a participant’s or beneficiary’s interest in a qualified employer plan is treated as a loan from the plan.

Section 72(p)(2) provides that section 72(p)(1) does not apply to the extent certain conditions are satisfied. Specifically, under section 72(p)(2), a loan from a qualified employer plan to a participant or beneficiary is not treated as a distribution from the plan if the loan satisfies requirements relating to the term of the loan and the repayment schedule, and to the extent the loan satisfies certain limitations on the amount loaned.

Section 1704(n) of the Small Business Job Protection Act of 1996, Public Law 104-188 (110 Stat. 1755), added section 414(u) of the Code. Section 414(u)(4) provides that if a plan suspends the obligation to repay a loan made to an employee from the plan for any part of a period during which the employee is performing service in the uniformed services, that suspension is not to be taken into account for purposes of section 72(p).[1] The proposed regulations provide a rule clarifying that, under section 414(u)(4), if a plan provides for the suspension of a participant's obligation to repay a loan for any part of any leave of absence for a period of military service (as defined in chapter 43 of title 38, United States Code), the suspension will not cause the loan to be deemed distributed, even if the leave exceeds one year, as long as loan repayments resume upon the completion of the military service, the amount then remaining due on the loan is repaid in substantially level installments thereafter, and the loan is fully repaid by the end of the period equal to the original term of the loan plus the period of the military service.

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[1]Rev. Proc. 96-49 (1996-2 C.B. 369), includes a model amendment that may be used to reflect section 414(u)(4).

Regulations were proposed in 1995[2] with respect to many of the issues arising under section 72(p)(2). The preamble to the 1995 proposed regulations requested comments on whether further guidance should be provided on issues that were not addressed and how the issues should be resolved, including (1) the effect of a deemed distribution on the tax treatment of subsequent distributions from a plan (such as whether a participant has basis), (2) the application of the $50,000 limitation to multiple loan arrangements, and (3) the application of section 72(p)(2) to a refinancing and to multiple loan arrangements. Following publication of the 1995 proposed regulations, various comments were received and a public hearing was held on June 28, 1996. After reviewing the written comments and comments made at the public hearing, proposed regulations generally addressing the first issue were published in the **Federal Register** (63 FR 42) on January 2, 1998 (REG-209476-82).

Final regulations for the issues addressed in the 1995 and 1998 proposed regulations are being published elsewhere in this issue of the **Federal Register**. These proposed regulations address the remaining issues on which comments were requested in the preamble to the 1995 proposed regulations, namely, situations in which a loan is refinanced or more than one loan is made.

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[2]Proposed §1.72(p)-1 was published in the **Federal Register** (60 FR 66233) on

These proposed regulations provide that if a loan is deemed distributed to a

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December 21, 1995.

participant or beneficiary and has not been repaid, then no payment made thereafter to the participant or beneficiary will be treated as a loan for purposes of section 72(p)(2), unless certain conditions are satisfied. Specifically, there must be an arrangement among the plan, the participant or beneficiary, and the employer, enforceable under applicable law, under which repayments will be made by payroll withholding or the plan must receive adequate security for the additional loan (in addition to the participant's accrued benefit under the plan).[3]

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[3]The Department of Labor (DOL) has advised the IRS that, with respect to plans covered by Title I of the Employee Retirement Income Security Act of 1974 (88 Stat. 829) (ERISA), the administration of a participant loan program involves the management of plan assets. Therefore, fiduciary conduct undertaken in the administration of such a loan program must conform to the rules that govern

transactions involving plan assets. In particular, a loan program must be administered in a prudent manner, solely in the interest of the participants and beneficiaries, and for the exclusive purpose of providing benefits to participants and beneficiaries. See, generally, ERISA sections 403, 404, and 406. In the view of DOL, it is questionable whether a participant loan program of a plan covered by Title I of ERISA that does not provide for timely repayment of loans (through payroll withholding or otherwise), regular

The proposed regulations also provide that while a loan can be refinanced and additional amounts may be borrowed, the refinancing and multiple loan arrangements must satisfy the requirements in section 72(p)(2)(B) and (C) that each loan be repaid in

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and effective collection efforts following a default, and adequate security for the plan in the event of default would be in compliance with the rules applicable under Title I of ERISA to transactions involving plan assets. In the view of DOL, it is also questionable whether such a program would qualify for the relief provided under section 408(b)(1) of ERISA. See Preamble to 29 CFR 2550.408b-1, (54 FR 30520, 30521) (July 20, 1989). Further, a plan may make a second loan to a defaulting participant whose prior loan remains unpaid only if such a loan would be in accordance with the applicable standards of Title I. A fiduciary must take steps to ensure, inter alia, that such a loan is bona fide and not a mere transfer of plan assets, that the loan is adequately secured, and that the plan's assets will be preserved in the event of default. See Preamble to 29 CFR 2550.408b-1, (54 FR at 30521).

level installments, not less often than quarterly, over five years (or longer for certain home loans). Under the proposed regulations, a refinancing is, in effect, treated as a new loan that is then applied to repay a prior loan if the new loan both replaces a prior loan and has a later repayment date. Thus, the transaction will result in a deemed distribution if the amount of the new loan plus the prior outstanding loan exceeds the amount limitations of section 72(p)(2)(A). This rule does not apply to a refinancing loan under which the amount of the prior loan is to be repaid by the original repayment date of the prior loan. These standards are illustrated in examples.[4]

In addition, a participant may borrow more than once from the plan under section 72(p)(2), but, in order to ensure that additional loans are not used to circumvent the requirements of section 72(p), a deemed distribution of a loan will occur if two loans have previously been made from the plan to the participant or beneficiary during the year.

Electronic Signatures Act

The Electronic Signatures in Global and National Commerce Act (114 Stat. 464) (the Electronic Signatures Act) was signed on June 30, 2000. Title I of the Electronic Signatures Act, which is generally effective October 1, 2000, applies to certain electronic records and signatures in commerce. Comments are requested on the impact of the Electronic Signatures Act on the final regulations under section 72(p) that appear in this issue of the Federal Register and on any future guidance that may be

[4]The examples in the new proposed regulations are based on the same assumptions described in §1.72(p)-1 introductory text of the final regulations.

needed on the application of the Electronic Signatures Act to plan loan transactions.

Proposed Effective Date

The regulations are proposed to be effective with respect to loans made on or after the first January 1 that is at least six months after publication as final regulations. However, Q&A-19(b)(2) of the proposed regulations would not apply to loans, whenever made, under an insurance contract that is in effect before a date that is 12 months after publication as final regulations if the insurance carrier is required under the insurance contract to offer loans to contractholders that are not secured (other than being secured by the participant's or beneficiary's benefit under the contract).

Special Analyses

It has been determined that this notice of proposed rulemaking 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, and, because the regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Requests for a Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and (8) copies) or electronic comments that are submitted timely to the IRS. The IRS and Treasury Department specifically request comments on the clarity of the proposed rule and how it may be made easier to understand. All comments will be available for public inspection and copying. A public hearing may be scheduled if requested in writing by a person that timely submits written comments. If a public hearing is scheduled, notice of the date, time and place for the hearing will be published in the **Federal Register**.

Drafting Information

The principal author of these regulations is Vernon S. Carter, Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1--INCOME TAXES

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

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

Par. 2. Section 1.72(p)-1 is amended as follows:

1. Q&A-9(b) and (c), Q&A-19 and Q&A-20 are revised.

2. Q&A-22 is amended by adding new paragraph (d).

The revisions and addition read as follows:

§1.72(p)-1 Loans treated as distributions.

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A-9: * * *

(b) Military service. In accordance with section 414(u)(4), if a plan suspends the obligation to repay a loan made to an employee from the plan for any part of a period during which the employee is performing service in the uniformed services (as defined in chapter 43 of title 38, United States Code), whether or not qualified military service, such suspension shall not be taken into account for purposes of section 72(p) or this section. Thus, if a plan suspends loan repayments for any part of a period during which the employee is performing military service described in the preceding sentence, such suspension shall not cause the loan to be deemed distributed even if the suspension exceeds one year and even if the term of the loan is extended. However, the loan will not satisfy the repayment term requirement of section 72(p)(2)(B) and the level amortization requirement of section 72(p)(2)(C) unless loan repayments resume upon the completion of such period of military service, the frequency of the periodic installments due during the period beginning when the military service ends and ending when the loan is repaid in full, and the amount of each periodic installment, is not less than the frequency and amount of the periodic installments required under the terms of the original loan, and the loan is repaid in full (including interest that accrues during the period of military service) by the end of the period equal to the original term of the loan plus the period of such military service.

(c) Examples. The following examples illustrate the rules of paragraph (a) and (b) of this Q&A-9 and are based upon the assumptions described in the introductory text of this section:

Example 1. (i) On July 1, 2001, a participant with a nonforfeitable account balance of $80,000 borrows $40,000 to be repaid in level monthly installments of $825 each over 5 years. The loan is not a principal residence plan loan. The participant makes 9 monthly payments and commences an unpaid leave of absence that lasts for 12 months. The participant was not performing military service during this period. Thereafter, the participant resumes active employment and resumes making repayments on the loan until the loan is repaid. The amount of each monthly installment is increased to $1,130 in order to repay the loan by June 30, 2006.

(ii) Because the loan satisfies the requirements of section 72(p)(2), the participant does not have a deemed distribution. Alternatively, section 72(p)(2) would be satisfied if the participant continued the monthly installments of $825 after resuming active employment and on June 30, 2006 repaid the full balance remaining due.

Example 2. (i) The facts are the same as in Example 1, except the participant was on leave of absence performing service in the uniformed services (as defined in chapter 43 of title 38, United States Code) for two years. After the military service ends on April 2, 2004, the participant resumes active employment on April 19, 2004, continues the monthly installments of $825 thereafter, and on June 30, 2008 repays the full balance remaining due ($10,527).

(ii) Because the loan satisfies the requirements of section 72(p)(2) and paragraph (b) of this Q&A-9, the participant does not have a deemed distribution. Alternatively, section 72(p)(2) would also be satisfied if the amount of each monthly installment after April 19, 2004, is increased to $983 in order to repay the loan by June 30, 2008 (without any balance remaining due then).

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Q-19: If there is a deemed distribution under section 72(p), is the interest that accrues thereafter on the amount of the deemed distribution an indirect loan for income tax purposes and what effect does the deemed distribution have on subsequent loans?

A-19: (a) General rule. Except as provided in paragraph (b) of this Q&A-19, a deemed distribution of a loan is treated as a distribution for purposes of section 72. Therefore, a loan that is deemed to be distributed under section 72(p) ceases to be an outstanding loan for purposes of section 72, and the interest that accrues thereafter under the plan on the amount deemed distributed is disregarded for purposes of applying section 72 to the participant or the beneficiary. Even though interest continues to accrue on the outstanding loan (and is taken into account for purposes of determining the tax treatment of any subsequent loan in accordance with paragraph (b) of this Q&A-19), this additional interest is not treated as an additional loan (and, thus, does not result in an additional deemed distribution) for purposes of section 72(p). However, a loan that is deemed distributed under section 72(p) is not considered distributed for all purposes of the Internal Revenue Code. See Q&A-16 of this section.

(b) Effect on subsequent loans--(1) Application of section 72(p)(2)(A). A loan that is deemed distributed under section 72(p) (including interest accruing thereafter) and that has not been repaid (such as by a plan loan offset) is considered outstanding for purposes of applying section 72(p)(2)(A) to determine the maximum amount of any subsequent loan to the participant or beneficiary.

(2) Additional security for subsequent loans. If a loan is deemed distributed to a participant or beneficiary under section 72(p) and has not been repaid (such as by a plan loan offset), then no payment made thereafter to the participant or beneficiary shall be treated as a loan for purposes of section 72(p)(2) unless the loan otherwise satisfies section 72(p)(2) and this section and either of the following conditions is satisfied:

(i) There is an arrangement among the plan, the participant or beneficiary, and the employer, enforceable under applicable law, under which repayments will be made by payroll withholding. For this purpose, an arrangement will not fail to be enforceable merely because a party has the right to revoke the arrangement prospectively.

(ii) The plan receives adequate security from the participant or beneficiary that is in addition to the participant's or beneficiary's accrued benefit under the plan.

(3) Condition no longer satisfied. If, following a deemed distribution that has not been repaid, a payment is made to a participant or beneficiary that satisfies the conditions in paragraph (b)(2) of this Q&A-19 for treatment as a plan loan and, subsequently, before repayment of the second loan, the conditions in paragraph (b)(2) of this Q&A-19 are no longer satisfied with respect to the second loan (for example, if the loan recipient revokes consent to payroll withholding), the amount then outstanding on the second loan is treated as a deemed distribution under section 72(p).

Q-20: May a participant refinance an outstanding loan or have more than one loan outstanding from a plan?

A-20: (a) Refinancings and multiple loans--(1) General rule. A participant who has an outstanding loan that satisfies section 72(p)(2) and this section may refinance that loan or borrow additional amounts, if, under the facts and circumstances, the loans collectively satisfy the amount limitations of section 72(p)(2)(A) and the prior loan and the additional loan each satisfy the requirements of section 72(p)(2)(B) and (C) and this section. For this purpose, a refinancing includes any situation in which one loan replaces another loan.

(2) Loans that repay a prior loan and have a later repayment date. For purposes of section 72(p)(2) and this section (including paragraph (a)(3) of this Q&A-20 and the amount limitations of section 72(p)(2)(A)), if a loan that satisfies section 72(p)(2) is replaced by a loan (a replacement loan) and the term of the replacement loan ends after the term of the loan it replaces (the replaced loan), the replacement loan and the replaced loan are both treated as outstanding on the date of the transaction. For purposes of the preceding sentence, the term of the replaced loan is determined under the terms of that loan as in effect immediately prior to the making of the replacement loan. Thus, for example, the replacement loan results in a deemed distribution if the sum of the amount of the replacement loan plus the outstanding balance of all other loans on the date of the transaction, including the replaced loan, fails to satisfy the amount limitations of section 72(p)(2)(A). This paragraph (a)(2) of this Q&A-20 does not apply to a replacement loan if the terms of the replacement loan would satisfy section 72(p)(2) and this section determined as if the replacement loan consisted of two separate loans, the replaced loan (amortized in substantially level payments over a period ending not later than the last day of the term of the replaced loan) and a new loan based on the difference between the amount of the replacement loan and the amount of the replaced loan.

(3) Multiple loans. For purposes of section 72(p)(2) and this section, a loan to a participant or beneficiary shall be treated as a deemed distribution if two or more loans have previously been made from the plan to the participant or beneficiary during the year. This limitation applies on the basis of a calendar year unless the plan applies

this limit on the basis of the plan year or another consistent 12-month period.

(b) Examples. The following examples illustrate the rules in paragraph (a) of this Q&A-20 and are based on the assumptions described in the introductory text of this section:

Example 1. (i) A participant with a vested account balance that exceeds $100,000 borrows $40,000 from a plan on January 1, 2003, to be repaid in 20 quarterly installments of $2,491 each. Thus, the term of the loan ends on December 31, 2007. On January 1, 2004, when the outstanding balance on the loan is $33,322, the loan is refinanced and is replaced by a new $40,000 loan from the plan to be repaid in 20 quarterly installments. Under the terms of the refinanced loan, the loan is to be repaid in level quarterly installments (of $2,491 each) over the next 20 quarters. Thus, the term of the new loan ends on December 31, 2008.

(ii) Under section 72(p)(2)(A), the amount of the new loan, when added to the outstanding balance of all other loans from the plan, must not exceed $50,000 reduced by the excess of the highest outstanding balance of loans from the plan during the 1-year period ending on December 31, 2003 over the outstanding balance of loans from the plan on January 1, 2004, with such outstanding balance to be determined immediately prior to the new $40,000 loan. Because the term of the new loan ends later than the term of the loan it replaces, both the new loan and the loan it replaces must be taken into account for purposes of applying section 72(p)(2), including the amount limitations in section 72(p)(2)(A). The amount of the new loan is $40,000, the outstanding balance on January 1, 2004 of the loan it replaces is $33,322 and the highest outstanding balance of loans from the plan during 2003 was $40,000. Accordingly, under section 72(p)(2)(A), the sum of the new loan and the outstanding balance on January 1, 2004 of the loan it replaces must not exceed $50,000 reduced by $6,678 (the excess of the $40,000 maximum outstanding loan balance during 2003 over the $33,322 outstanding balance on January 1, 2004, determined immediately prior to the new loan) and thus, must not exceed $43,322. The sum of the new loan ($40,000) and the outstanding balance on January 1, 2004 of the loan it replaces ($33,322) is $73,322. Since $73,322 exceeds the $43,322 limit under section 72(p)(2)(A) by $30,000, there is a deemed distribution of $30,000 on January 1, 2004.

(iii) However, no deemed distribution would occur if, under the terms of the refinanced loan, the amount of the first 16 installments on the refinanced loan were equal to $2,907, which is the sum of the $2,491 originally scheduled quarterly installment payment amount under the first loan, plus $416 (which is the amount required to repay, in level quarterly installments over five years beginning on January 1, 2004, the excess of the refinanced loan over the January 1, 2004 balance of the first loan ($40,000 minus $33,322 equals $6,678)), and the amount of the 4 remaining installments were equal to $416. The refinancing would not be subject to paragraph (a)(2) of this Q&A-20 because the terms of the new loan would satisfy section 72(p)(2) and this section (including the substantially level amortization requirements of section 72(p)(2)(B) and (C)) determined as if the new loan consisted of two loans, one of which is in the amount of the first loan ($33,322) and is amortized in substantially level payments over a period ending December 31, 2007 (the last day of the term of the first loan) and the other of which is in the additional amount ($6,678) borrowed under the new loan. Similarly, the transaction also would not result in a deemed distribution (and would not be subject to paragraph (a)(2) of this Q&A-20) if the terms of the refinanced loan provided for repayments to be made in level quarterly installments (of $2,990 each) over the next 16 quarters.

Example 2. (i) The facts are the same as in Example 1, except that the applicable interest rate used by the plan when the loan is refinanced is significantly lower due to a reduction in market rates of interest and, under the terms of the refinanced loan, the amount of the first 16 installments on the refinanced loan is equal to $2,848 and the amount of the next 4 installments on the refinanced loan is equal to $406. The $2,848 amount is the sum of $2,442 to repay the first loan by December 31, 2007 (the term of the first loan), plus $406 (which is the amount to repay, in level quarterly installments over five years beginning on January 1, 2004, the $6,678 excess of the refinanced loan over the January 1, 2004 balance of the first loan).

(ii) The transaction does not result in a deemed distribution (and is not subject to paragraph (a)(2) of this Q&A-20) because the terms of the new loan would satisfy section 72(p)(2) and this section (including the substantially level amortization requirements of section 72(p)(2)(B) and (C)) determined as if the new loan consisted of two loans, one of which is in the amount of the first loan ($33,322) and is amortized in substantially level payments over a period ending December 31, 2007 (the last day of the term of the first loan) and the other of which is in the additional amount ($6,678) borrowed under the new loan. The transaction would also not result in a deemed distribution (and not be subject to paragraph (a)(2) of this Q&A-20) if the terms of the new loan provided for repayments to be made in level quarterly installments (of $2,931 each) over the next 16 quarters.

Example 3. (i) A participant with a vested account balance that exceeds $100,000 borrows $20,000 from a plan on January 1, 2005 to be repaid in 20 quarterly installments of $1,245 each. On March 31, 2005, when the first installment is due, the participant receives a second loan equal to $1,245, with that March loan to be repaid in 20 quarterly installments of $78 each. On June 30, 2005, when the second installment is due on the January loan and the first installment is due on the March loan, the participant receives a third loan equal to $1,323 (which is the sum of the $1,245 installment and the $78 installment then due), with that June loan to be repaid in 20 quarterly installments of $82 each. On September 30, 2005, when the third installment is due on the January loan, the second installment is due on the March loan, and the first installment is due on the June loan, the participant receives a fourth loan equal to $1,405 (which is the sum of the $1,245 installment, the $78 installment and the $82 installment then due), with that September loan to be repaid in 20 quarterly installments of $88 each. On December 31, 2005, when the fourth installment is due on the January loan, the third installment is due on the March loan, the second installment is due on the June loan, and the first installment is due on the September loan, the participant receives a fifth loan equal to $1,493 (which is the sum of the $1,245 installment, the $78 installment, the $82 installment, and the $88 installment then due), with that December loan to be repaid in 20 quarterly installments of $93 each.

(ii) Under paragraph (a)(3) of this Q&A-20, the participant has deemed distributions on June 30, 2005 equal to $1,323 (which is the amount of the June loan), on September 30, 2005 equal to $1,405 (which is the amount of the September loan), and on December 31, 2005 equal to $1,493 (which is the amount of the December loan) because on each of these dates the participant had previously received two loans from the plan during the year.

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A-22: * * *

(d) <u>Effective date for Q&A-19(b)(2) and Q&A-20</u>. Paragraph (b)(2) of Q&A-19 and Q&A-20 of this section apply to loans made on or after the first January 1 that is at least 6 months after publication of final regulations in the **Federal Register**, except that paragraph (b)(2) of Q&A-19 of this section does not apply to loans, whenever made, under an insurance contract that is in effect before the date that is 12 months after publication of final regulations in the **Federal Register** under which the insurance carrier is required to offer loans to contractholders that are not secured (other than being secured by the participant's or beneficiary's benefit under the contract).

Robert E. Wenzel

Deputy Commissioner of Internal Revenue