

[4830-01-u]

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 602

[TD 8796]

RIN 1545-AU05

Notice, Consent and Election Requirements of Sections 411(a)(11) and 417 for

Qualified Retirement Plans

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains regulations that provide guidance concerning the notice and consent requirements under section 411(a)(11) and the notice and election requirements under section 417 for qualified retirement plans. These regulations finalize proposed regulations published in the **Federal Register** on September 22, 1995. In order to avoid delay in the commencement of distributions, the regulations generally allow distributions to commence, with spousal consent if required, in less than 30 days after a participant receives a notice of distribution rights if the participant affirmatively so elects to have the distributions commence. The regulations affect employers that maintain qualified plans, and participants and beneficiaries in those plans.

DATES: These regulations are effective December 18, 1998.

FOR FURTHER INFORMATION CONTACT: Robert Walsh, (202) 622-6090 (not a toll-free number).

**SUPPLEMENTARY INFORMATION:****Paperwork Reduction Act**

The collection of 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 (44 U.S.C. 3507) under the control number 1545-1471. 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 the collection of information displays a valid control number.

The estimated burden per respondent is .011 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, OP:FS:FP, 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 this collection of information must be retained as long as their contents may 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 the Income Tax Regulations (26 CFR part 1) under section 411(a)(11) and section 417(e). These regulations finalize

proposed regulations that were published as a notice of proposed rulemaking (EE-24-93) (REG-209626-93) in the **Federal Register** (60 FR 49236) on September 22, 1995.

The notice of proposed rulemaking states that the text of the proposed regulations is the same as the text of temporary regulations which were published in the **Federal Register** (60 FR 49218) on the same day. A public hearing was held on the temporary regulations on April 24, 1996.

As indicated in Announcement 98-87 (1998-40 I.R.B. 11), the temporary regulations automatically expired in September, 1998, pursuant to section 7805(e). Announcement 98-87 provides, however, that plan sponsors may rely upon the identical proposed regulations until they are amended or finalized.

Prior to the issuance of the proposed regulations, §1.411(a)-11(c) provided that a participant's consent to a distribution under section 411(a)(11) was not valid unless the participant received a notice of his or her rights under the plan no more than 90 and no less than 30 days prior to the annuity starting date. Section 1.417(e)-1 set forth the same 90/30-day time period for providing the notice explaining the qualified joint and survivor annuity and waiver rights required under section 417(a)(3) (QJSA explanation).

Temporary regulations providing guidance on the amendment to section 402(f) made by the Unemployment Compensation Amendments of 1992 (UCA), published in October 1992, generally prescribed this 90/30-day time period for purposes of the notice requirement under that section. In the preamble to the UCA temporary regulations, the IRS and Treasury requested comments on the appropriateness of this

time period for section 411(a)(11), as well as for section 402(f).

In response to comments on the 90/30-day time period, the proposed regulations modified the 30-day time period for purposes of sections 411(a)(11) and 417. Under the proposed regulations, if, after having received the notice of distribution rights described in §1.411(a)-11, a participant affirmatively elects a distribution, a plan will not fail to satisfy the consent requirement of section 411(a)(11) merely because the distribution is made less than 30 days after the notice was provided to the participant.

The proposed regulations under section 417 made the same change to §1.417(e)-1 and also provided a more limited modification to the 30-day time period in §1.417(e)-1. The reception to this change to the 30-day period for purposes of section 417 was generally favorable.

Commentators expressed concern about the restatement in the proposed regulations of the statutory requirement that the QJSA explanation be provided before the annuity starting date because this requirement precluded retroactive annuity payments for any period before the explanation was provided. Subsequently, section 1451 of the Small Business Job Protection Act of 1996, Public Law 104-188, 110 Stat. 1755 (SBJPA) added section 417(a)(7) to the Internal Revenue Code effective for plan years beginning on or after January 1, 1997. Section 417(a)(7) permits the plan to provide the QJSA explanation after the annuity starting date.

After consideration of the comments, these final regulations generally adopt the provisions of the proposed regulations. However, the final regulations under section 417 have been modified to provide that, for plan years beginning after

December 31, 1996, the requirement that the QJSA explanation be provided before the annuity starting date does not apply to the extent provided under section 417(a)(7).

## **Explanation of Provisions**

### **1. Overview of Statutory Provisions**

Section 411(a)(11) provides that, if the value of a participant's accrued benefit exceeds \$5,000, a qualified plan generally may not distribute the benefit to the participant without the participant's consent.

Section 401(a)(11) requires that certain distributions be made in the form of a qualified joint and survivor annuity (QJSA) unless, in accordance with section 417, the participant waives the QJSA and elects a different form of benefit. Profit-sharing plans and stock bonus plans that meet the requirements of sections 401(a)(11)(B)(iii)(I) through (III) are not subject to the survivor annuity requirements of sections 401(a)(11) and 417.

Section 417 sets forth the requirements applicable to a waiver of the QJSA. Section 417(a) requires the participant to obtain the consent of the participant's spouse, if any, to any waiver of the QJSA and election of a form of benefit other than a QJSA. Any election made by the participant must be revocable during the 90-day period ending on the annuity starting date. Section 417(a)(3) requires that, within a reasonable period of time before the participant's annuity starting date, a plan provide the participant with a notice explaining the participant's right to the QJSA and the participant's right to waive the QJSA (QJSA explanation).

Section 417(a)(7)(B), added by SBJPA, codified the provision in the proposed

regulations which provides that a plan may permit a participant to elect (with applicable spousal consent) a distribution with an annuity starting date after the QJSA explanation was provided but before 30 days have elapsed, as long as the distribution commences more than seven days after the explanation was provided. As discussed above, section 417(a)(7)(A) further provides that a plan is permitted to provide the QJSA explanation after the annuity starting date if the distribution commences at least 30 days after such explanation was provided, subject to the same waiver of the 30-day minimum waiting period. This is intended to allow retroactive payments of benefits which are attributable to the period before the explanation.

## **2. Waiver of 30-day Period for QJSA Explanation**

The proposed regulations permit a plan administrator (where not inconsistent with the terms of the plan) to commence distributions before the end of the 30-day time period after the QJSA explanation is provided, if certain requirements are met. Specifically, after an affirmative distribution election, with any applicable spousal consent, the plan may permit the distribution to commence at any time more than seven days after the QJSA explanation was provided to the participant. Any distribution election must remain revocable until the later of the annuity starting date or the expiration of the seven-day period that begins the day after the QJSA explanation is provided. For example, if a married participant receives the explanation of the QJSA on November 28 and elects (with spousal consent) on December 2 to waive the QJSA and receive an immediate single life annuity, the annuity starting date is permitted to be December 1, provided that the first payment is made no earlier than December 6 and

the participant does not revoke the election before that date.

Most commentators expressed approval of this change to the 30-day waiting period. However, one commentator indicated that this change would create an incentive for participants to pressure their spouses to consent to any waiver of the QJSA as quickly as possible. Because it has been codified by section 417(a)(7)(B), the final regulations retain this waiver provision.

### 3. Provision of QJSA Explanation After Annuity Starting Date

The proposed regulations provide that the annuity starting date must be a date after the explanation of the QJSA is provided to the participant, but may precede the date the participant affirmatively elects a distribution or the date the distribution commences. Commentators indicated that this rule disadvantaged participants because it does not allow a retroactive annuity starting date to a date before the QJSA explanation was provided. However, prior to its amendment by SBJPA, the plain language of section 417 required the QJSA explanation to be provided before the annuity starting date.

As discussed above, section 1451 of the SBJPA added section 417(a)(7)(A) to the Code. That section provides that a plan may provide the QJSA explanation after the annuity starting date and that the applicable election period shall not end before the 30th day after the date on which the explanation is provided. Thus, section 417(a)(7)(A) allows retroactive payments of benefits which are attributable to the period before the QJSA explanation is provided. Accordingly, the final regulations provide that, for plan years beginning after December 31, 1996, the requirement that the QJSA explanation

be provided before the annuity starting date does not apply to the extent provided under section 417(a)(7).

Section 417(a)(7)(A) provides that the Secretary may by regulations limit its application except that such regulations may not limit the period of time by which the annuity starting date precedes the provision of the written explanation other than by providing that the annuity starting date may not be earlier than termination of employment.

#### **4. Use of Electronic Media for Notices and Consent**

Comments on the proposed regulations requested that the IRS and Treasury clarify the extent to which plans may use new technologies, including electronic media, for providing notices under sections 402(f), 411(a)(11) and 417, and for receiving participant and beneficiary consents and elections under sections 411(a)(11) and 417. Subsequently, section 1510 of the Taxpayer Relief Act of 1997 (TRA '97) provided generally for the Secretary of the Treasury to issue guidance concerning the use of new technologies in the administration of retirement plans. Announcement 98-62 (1998-29 I.R.B. 13) requested comments on the guidance described in section 1510.

After consideration of the comments on the proposed regulations and Announcement 98-62, the IRS and Treasury have decided to propose regulations regarding the use of electronic media to provide notices under sections 402(f), 411(a)(11), and section 3405(e)(10) and for receiving participant consent under section 411(a)(11). Those proposed regulations are set forth in a notice of proposed rulemaking published elsewhere in this issue of the **Federal Register**.

5. 90-day Time Period

Comments on the proposed regulations requested an expansion of the 90-day time period, and the IRS and the Treasury have decided to propose changes to the 90/30-day period for providing notices under sections 402(f) and 411(a)(11). These changes are included in the proposed regulations on the use of new technologies, which are set forth in a notice of proposed rulemaking published elsewhere in this issue of the **Federal Register**.

6. Effective Dates

The regulations apply to distributions on or after September 22, 1995. However, plan sponsors and plan administrators may rely on the regulations under section 411(a)(11) as though they were included in the final regulations under section 411(a)(11) published in 1988-2 C.B. 48.

**Special Analyses**

It has been determined that this Treasury decision is not a significant regulatory action as defined in EO 12866. Therefore, a regulatory assessment is not required. It also has 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 notice of proposed rulemaking was issued prior to March 29, 1996, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking preceding these regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

**Drafting Information**

The principal author of these regulations is Robert Walsh, Office of the Associate Chief Counsel (Employee Benefits and Exempt Organizations), IRS. However, other personnel from the IRS and Treasury Department participated in their development.

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

Income taxes, Reporting and recordkeeping requirements.

**26 CFR Part 602**

Reporting and recordkeeping requirements.

**Adoption of Amendments to the Regulations**

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

**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 1.411(a)-11 is amended as follows:

1. Paragraph (c)(2)(ii) is revised.
2. Paragraphs (c)(2)(iii), (c)(2)(iv), (c)(2)(v) and (c)(8) are added.

The revision and additions read as follows:

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

\* \* \* \* \*

(c) \* \* \*

(2) \* \* \*

(ii) Written consent of the participant to the distribution must not be made before the participant receives the notice of his or her rights specified in this paragraph (c)(2) and must not be made more than 90 days before the date the distribution commences.

(iii) A plan must provide participants with notice of their rights specified in this paragraph (c)(2) no less than 30 days and no more than 90 days before the date the distribution commences. However, if the participant, after having received this notice, affirmatively elects a distribution, a plan will not fail to satisfy the consent requirement of section 411(a)(11) merely because the distribution commences less than 30 days after the notice was provided to the participant, provided that the following requirement is met. The plan administrator must provide information to the participant clearly indicating that (in accordance with the first sentence of this paragraph (c)(2)(iii)) the participant has a right to at least 30 days to consider whether to consent to the distribution.

(iv) For purposes of satisfying the requirements of this paragraph (c)(2), the plan administrator may substitute the annuity starting date, within the meaning of §1.401(a)-20, Q&A-10, for the date the distribution commences.

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

\* \* \* \* \*

(8) Delegation to Commissioner. The Commissioner, in revenue rulings, notices,

and other guidance published in the Internal Revenue Bulletin, may modify, or provide additional guidance with respect to, the notice and consent requirements of this section. See §601.601(d)(2)(ii)(b) of this chapter.

\* \* \* \* \*

#### **§1.411(a)-11T [Removed]**

Par. 3. Section 1.411(a)-11T is removed.

Par. 4. Section 1.417(e)-1 is amended as follows:

1. Paragraph (b)(3) is revised.
2. Paragraph (b)(4) is added.

The revision and addition read as follows:

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

\* \* \* \* \*

(b) \* \* \*

(3) Time of consent. (i) Written consent of the participant and the participant's spouse to the distribution must be made not more than 90 days before the annuity starting date.

(ii) A plan must provide participants with the written explanation of the QJSA required by section 417(a)(3) no less than 30 days and no more than 90 days before the annuity starting date (except as otherwise provided by section 417(a)(7) for plan years beginning after December 31, 1996). However, if the participant, after having received the written explanation of the QJSA, affirmatively elects a form of distribution

and the spouse consents to that form of distribution (if necessary), a plan will not fail to satisfy the requirements of section 417(a) merely because the annuity starting date is less than 30 days after the written explanation was provided to the participant, provided that the following requirements are met:

(A) The plan administrator provides information to the participant clearly indicating that (in accordance with the first sentence of this paragraph (b)(3)(ii)) the participant has a right to at least 30 days to consider whether to waive the QJSA and consent to a form of distribution other than a QJSA.

(B) The participant is permitted to revoke an affirmative distribution election at least until the annuity starting date, or, if later, at any time prior to the expiration of the 7-day period that begins the day after the explanation of the QJSA is provided to the participant.

(C) The annuity starting date is after the date that the explanation of the QJSA is provided to the participant (except as otherwise provided by section 417(a)(7) for plan years beginning after December 31, 1996). However, the plan may permit the annuity starting date to be before the date that any affirmative distribution election is made by the participant and before the date that the distribution is permitted to commence under paragraph (b)(3)(ii)(D) of this section.

(D) Distribution in accordance with the affirmative election does not commence before the expiration of the 7-day period that begins the day after the explanation of the QJSA is provided to the participant.

(iii) The following example illustrates the provisions of this paragraph (b)(3):

Example. Employee E, a married participant in a defined benefit plan who has terminated employment, is provided with the explanation of the QJSA on November 28. Employee E elects (with spousal consent) on December 2 to waive the QJSA and receive an immediate distribution in the form of a single life annuity. The plan may permit Employee E to receive payments with an annuity starting date of December 1, provided that the first payment is made no earlier than December 6 and the participant does not revoke the election before that date. The plan can make the remaining monthly payments on the first day of each month thereafter in accordance with its regular payment schedule.

(iv) The additional rules of this paragraph (b)(3) concerning the notice and consent requirements of section 417 apply to distributions on or after September 22, 1995. For distributions before September 22, 1995, the additional rules concerning the notice and consent requirements of section 417 in §1.417(e)-1(b)(3) in effect prior to September 22, 1995 (see §1.417(e)-1 (b)(3) in 26 CFR Part 1 revised as of April 1, 1995) apply.

(4) Delegation to Commissioner. The Commissioner, in revenue rulings, notices, and other guidance published in the Internal Revenue Bulletin, may modify, or provide additional guidance with respect to, the notice and consent requirements of this section. See §601.601(d)(2)(ii)(b) of this chapter.

\* \* \* \* \*

#### **§1.417(e)-1T [Amended]**

Par. 5. In §1.417(e)-1T, paragraphs (b)(3) and (4) are removed.

#### **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. 7805.

Par. 7. In §602.101, the table in paragraph (c) is amended by removing the entry for

1.411(a)-11T and adding the following entries in numerical order to read as follows:

§602.101 OMB Control numbers.

\* \* \* \* \*

(c) \* \* \*

CFR part or section where identified and described Current OMB control No.

\* \* \* \*

1.411(a)-11..... 1545-1471

\* \* \* \*

1.417(e)-1..... 1545-1471

\* \* \* \*

/s/ John M. Dalrymple

## Acting Deputy Commissioner of Internal Revenue

Approved: December 2, 1998

/s/ Donald C. Lubick

## Assistant Secretary of the Treasury