

Notice of Proposed Rulemaking

Revised Regulations Concerning Disclosure of Relative Values of Optional Forms of Benefit

REG-152914-04

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations that would revise final regulations that were issued on December 17, 2003, under section 417(a)(3) of the Internal Revenue Code concerning content requirements applicable to explanations of qualified joint and survivor annuities and qualified preretirement survivor annuities payable under certain retirement plans. These regulations affect plan sponsors and administrators, and participants in and beneficiaries of, certain retirement plans.

DATES: Written and electronic comments and requests for a public hearing must be received by April 28, 2005.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG-152914-04), room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to: CC:PA:LPD:PR (REG-152914-04), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC, or sent electronically, via the IRS Internet site at www.irs.gov/regs or via the Federal eRulemaking Portal at www.regulations.gov (indicate IRS and REG-152914-04).

FOR FURTHER INFORMATION

CONTACT: Concerning the regulations, Bruce Perlin at (202) 622-6090 (not a toll-free number); concerning submissions or hearing requests, LaNita Van Dyke, (202) 622-7180 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in this notice of proposed rulemaking has been previously 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.

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.

Books or records relating to a 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

Section 417(a) provides rules under which a participant (with spousal consent) may waive payment of the participant's benefit in the form of qualified joint and survivor annuity (QJSA). Specifically, section 417(a)(3) provides that a plan must provide to each participant, within a reasonable period before the annuity starting date, a written explanation that includes the following information:

(1) the terms and conditions of the QJSA; (2) the participant's right to make an election to waive the QJSA form of benefit; (3) the effect of such an election; (4) the rights of the participant's spouse; and (5) the right to revoke 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.

Section 1.401(a)-20, which provides rules governing the requirements for a waiver of the QJSA, was published in the **Federal Register** on August 19, 1988 (T.D. 8219, 1988-2 C.B. 48 [53 FR 31837]). Section 1.401(a)-20, Q&A-36, as published in 1988, set forth requirements for the explanation that must be provided under section 417(a)(3) as a prerequisite to waiver of a QJSA. Under those requirements, such a written explanation must 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, as published in 1988, provided 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.

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 section 417(e)(3) and §1.417(e)-1(d) for actuarial assumptions required for use in certain present value calculations.

Final regulations under section 417(a)(3) regarding disclosure of the relative value and financial effect of optional forms of benefit as part of QJSA explanations provided to participants receiving qualified retirement plan distributions were published in the **Federal Register** on December 17, 2003. See §1.417(a)(3)-1 (T.D. 9099, 2004-2 I.R.B. 255 [68 FR 70141]). The 2003 regulations are generally effective for QJSA explanations provided with respect to annuity starting dates beginning on or after October 1, 2004.

The 2003 regulations were issued in response to concerns that, in certain cases, the information provided to participants under section 417(a)(3) regarding available distribution forms pursuant to §1.401(a)-20, Q&A-36, does not adequately enable them to compare those distribution forms without professional advice. In particular, participants who are eligible for early retirement benefits in the form of both subsidized annuity distributions and unsubsidized single-sum distributions may be receiving explanations that do not adequately disclose 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 the annuity payments would not adequately enable a participant to make an informed comparison of the relative values of those distribution forms. The 2003 regulations address this problem, as well as the problem of disclosure in other cases where there are significant differences in value among optional forms, and also clarify the rules regarding the disclosure of the financial effect of benefit payments.

A number of commentators requested that the effective date of the 2003 regulations be postponed. Among the reasons

cited is the need in some plans for sponsors to complete an extensive review and analysis of optional forms of benefit in order to prepare proper comparisons of the relative values of those optional forms to the QJSA. They noted that recently proposed regulations under section 411(d)(6) would permit elimination of certain optional forms of benefit and that many plan sponsors can be expected to engage in a thorough review of all of the optional forms of benefit under their plans following publication of those regulations in final form. See §1.411(d)-3, 69 FR 13769 (March 24, 2004) (REG-128309-03, 2004-16 I.R.B. 800). These commentators argued that it would be inefficient for plans to be required to incur the costs of two such extensive analyses in succession, rather than a single analysis of optional forms that might serve to some extent for purposes of both the relative value regulations and the section 411(d)(6) regulations. After consideration of these comments, Treasury and the IRS issued Announcement 2004-58, 2004-29 I.R.B. 66, which postponed the effective date of the 2003 regulations under §1.417(a)(3)-1 for certain QJSA explanations.

Under section 101 of Reorganization Plan No. 4 of 1978 (43 FR 47713), the Secretary of the Treasury has interpretive jurisdiction over ERISA provisions that are parallel to the Code provisions addressed in these regulations. Therefore, these proposed regulations would apply for purposes of the parallel rules in section 205(c)(3) of ERISA, as well as for section 417(a)(3) of the Code.

Explanation of Provisions

Consistent with Announcement 2004-58, these proposed regulations would modify the 2003 regulations to provide that the 2003 regulations are generally effective for QJSA explanations provided with respect to annuity starting dates beginning on or after February 1, 2006. In the interim, plans that do not comply with §1.417(a)(3)-1 would be required to comply with the 1988 regulations regarding disclosure of relative value and financial effect.

However, the existing effective date under §1.417(a)(3)-1 of the 2003 regulations is retained for explanations with respect to any optional form of benefit that is subject

to the requirements of section 417(e)(3) (e.g., single sums, social security level income options, distributions in the form of partial single sums in combination with annuities, or installment payment options) if the actuarial present value of that optional form is less than the actuarial present value (as determined under section 417(e)(3)) of the QJSA. Thus, for example, a QJSA explanation provided with respect to an annuity starting date beginning on or after October 1, 2004, must comply with §1.417(a)(3)-1 to the extent that the plan provides for payment to that participant in the form of a single sum that does not reflect an early retirement subsidy available under the QJSA. Where the existing effective date is retained, the plan must disclose the relative value of the QJSA for the participant even if the plan provides a disclosure of relative values that is not tailored to the participant's marital status. Accordingly, if a plan provides a relative value disclosure based on the single life annuity (the QJSA for a single participant) to a married participant, the plan must also include a comparison of the value of the QJSA to the value of the single life annuity.

The proposed regulations include a special rule that would enable a plan to use the delayed effective date rule even if there are minor differences between the value of an optional form and the value of the QJSA for a married participant that are caused by the calculation of the amount of the optional form of benefit based on the life annuity rather than on the QJSA. Under this special rule, solely for purposes of the effective date provisions, the actuarial present value of an optional form is treated as not being less than the actuarial present value of the QJSA if the following two conditions are met. First, using the applicable interest rate and applicable mortality table under §§1.417(e)-1(d)(2) and (3), the actuarial present value of that optional form is not less than the actuarial present value of the QJSA for an unmarried participant. Second, using reasonable actuarial assumptions, the actuarial present value of the QJSA for an unmarried participant is not less than the actuarial present value of the QJSA for a married participant.

These proposed regulations would also modify the 2003 regulations in several other respects. First, for purposes of disclosing the normal form of benefit as

part of a disclosure made in the form of generally applicable information, reasonable estimates of the type permitted to be used to disclose participant-specific information may be used to determine the normal form of benefit, but only if the plan follows the requirements applicable to reasonable estimates used in disclosing participant-specific information (such as offering a more precise calculation upon request and revising previously offered information consistent with the more precise information). Second, a QJSA explanation does not fail to satisfy the requirements for QJSA explanations made in the form of disclosures of generally applicable information merely because the QJSA explanation contains an item of participant-specific information in place of the corresponding generally applicable information.

In addition, the proposed regulations would modify §1.401(a)–20, Q&A–16, to clarify the interaction of the rule prohibiting a plan from providing an option to a married individual that is worth more than the QJSA with the requirement that certain optional forms of benefit be calculated using specified actuarial assumptions. Under that clarification, a plan would not fail to satisfy the requirements of §1.401(a)–20, Q&A–16, merely because the amount payable under an optional form of benefit that is subject to the minimum present value requirement of section 417(e)(3) is calculated using the applicable interest rate (and, for periods when required, the applicable mortality table) under section 417(e)(3).

Dates of Applicability

The changes to §1.401(a)–20, A–36, and §1.417(a)(3)–1 are proposed to apply as if they had been included in T.D. 9099 (68 FR 70141). The change to §1.401(a)–20, Q&A–16, is proposed to apply as if it had been included in T.D. 8219 (53 FR 31837). Taxpayers may rely on these proposed regulations for guidance pending the issuance of final regulations.

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 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 regulation does 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 Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any electronic or written comments (preferably a signed original and eight (8) copies) that are submitted timely to the IRS. In addition to the other requests for comments set forth in this document, the IRS and Treasury also 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 will be scheduled if one is requested.

Drafting Information

The principal authors of these regulations are Bruce Perlin and Linda S.F. Marshall 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.

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Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be 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. Section 1.401(a)–20 is amended by:

1. Adding a sentence to the end of Q&A–16.

2. Adding a sentence to the end of Q&A–36.

The additions read as follows:

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

* * * * *

A–16 * * * A plan does not fail to satisfy the requirements of this Q&A–16 merely because the amount payable under an optional form of benefit that is subject to the minimum present value requirement of section 417(e)(3) is calculated using the applicable interest rate (and, for periods when required, the applicable mortality table) under section 417(e)(3).

* * * * *

A–36 * * * However, the rules of §1.401(a)–20, Q&A–36, as it appeared in 26 CFR Part 1 revised April 1, 2003, apply to the explanation of a QJSA under section 417(a)(3) for an annuity starting date prior to February 1, 2006.

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Par. 3. Section 1.417(a)(3)–1 is amended by:

1. Removing the language “paragraph (c)(3)(iii) of” from paragraph (c)(2)(ii)(A).

2. Adding a sentence to the end of paragraph (d)(2)(ii).

3. Adding paragraph (d)(5).

4. Revising paragraph (f).

The additions and revision read as follows:

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

* * * * *

(d) * * * * *

(2) * * * * *

(ii) *Actual benefit must be disclosed.* * * * Reasonable estimates of the type described in paragraph (c)(3)(i) may be used to determine the normal form of benefit for purposes of this paragraph (d)(2)(ii) if the requirements of paragraphs (c)(3)(ii) and (iii) of this section are satisfied with respect to those estimates.

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(5) *Use of participant-specific information in generalized notice.* A QJSA explanation does not fail to satisfy the requirements of this paragraph (d) merely because

it contains an item of participant-specific information in place of the corresponding generally applicable information.

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(f) *Effective date*—(1) *General effective date for QJSA explanations.* Except as provided in paragraph (f)(2) of this section, this section applies to a QJSA explanation with respect to any distribution with an annuity starting date that is on or after February 1, 2006.

(2) *Special effective date for certain QJSA explanations*—(i) *Application to QJSA explanations with respect to certain optional forms that are less valuable than the QJSA.* This section also applies to a QJSA explanation with respect to any distribution with an annuity starting date that is on or after October 1, 2004, and before February 1, 2006, if the actuarial present value of any optional form of benefit that is subject to the requirements of section 417(e)(3) (e.g., single sums, distributions in the form of partial single sums in combination with annuities, social security level income options, and installment payment options) is less than the actuarial present value (as determined under §1.417(e)–1(d)) of the QJSA. For purposes of this paragraph (f)(2)(i), the actuarial present value of an optional form is treated as not less than the actuarial present value of the QJSA if—

(A) Using the applicable interest rate and applicable mortality table under §§1.417(e)–1(d)(2) and (3), the actuarial present value of that optional form is not less than the actuarial present value of the QJSA for an unmarried participant; and

(B) Using reasonable actuarial assumptions, the actuarial present value of the QJSA for an unmarried participant is not less than the actuarial present value of the QJSA for a married participant.

(ii) *Requirement to disclose differences in value for certain optional forms.* A QJSA explanation with respect to any dis-

tribution with an annuity starting date that is on or after October 1, 2004, and before February 1, 2006, is only required to be provided under this section with respect to—

(A) An optional form of benefit that is subject to the requirements of section 417(e)(3) and that has an actuarial present value that is less than the actuarial present value of the QJSA (as described in paragraph (f)(2)(i) of this section); and

(B) The QJSA (determined without application of paragraph (c)(2)(ii) of this section).

(3) *Annuity starting date.* For purposes of paragraphs (f)(1) and (2) of this section, in the case of a retroactive annuity starting date under section 417(a)(7), as described in §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.

(4) *Effective date for QPSA explanations.* This section applies to any QPSA explanation provided on or after July 1, 2004.

Mark E. Matthews,
*Deputy Commissioner for
Services and Enforcement.*

(Filed by the Office of the Federal Register on January 27, 2005, 8:45 a.m., and published in the issue of the Federal Register for January 28, 2005, 70 F.R. 4058)