



New Final Regulations Offer More Flexibility in Defining Compensation

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Clarifications include no reduction in accrued benefits, a facts-and-circumstances test for former employees, and a PIA safe harbor.

Final Regulations (the 1993 Regulations) issued 9/1/93 deal with permitted disparity (TD 8486), coverage (TD 8487), and compensation (TD 8488), under Sections 401(1) , 410(b) , and 414(s) , respectively. These Regulations, when read together with the final Regulations issued by the IRS in late August 1993¹ relating to nondiscrimination in contributions and benefits under Section 401(a)(4) , provide the Service's response to the hail of criticism that greeted the issuance of the five-TD package of nondiscrimination final Regulations in September 1991.²

This iteration of the qualified plan Regulations contains the safe harbor rules for primary insurance amount (PIA) offset plans announced in Notice 92-32, 1992-2 CB 362 , and the imputed compensation rules described in Notices 92-31, 1992-2 CB 359 , and 92-37, 1992-2 CB 367. There are many other changes, which are explained in detail below.



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DEFINITION OF COMPENSATION

In general, the 1993 Regulations allow defined benefit plans to credit compensation with another employer (for the periods both before and after employment with the employer maintaining the plan) or compensation during a leave of absence, as long as certain basic facts-and-circumstances standards are met:

- (1.) All similarly situated employees must be treated in the same manner.
- (2.) There must be a legitimate business purpose for crediting the compensation.
- (3.) Crediting the compensation must not discriminate significantly in favor of highly compensated employees (HCEs).

Under the 1993 Regulations, the rules for determining the compensation that may be credited are more flexible and are consistent with the proposals in Notices 92-31 and 92-37.

HCEs. Under the 1991 Regulations, the safe harbor status for the definition of compensation was not lost merely because of exclusions of additional amounts or items of compensation for HCEs. Any such exclusions, however, had to be uniform as to all HCEs. The 1993 Regulations relax this uniformity requirement, permitting the exclusion of any portion of the compensation of some or all HCEs (Reg. 1.414(s)-1(c)(5)).

Rate of pay. The 1993 Regulations retain the basic requirements for rate-of-pay definitions of compensation, but certain modifications make the rules more flexible. Reg. 1.414(s)-1(e)(1) clarifies that a definition of compensation may include a combination of actual compensation (e.g., overtime or bonuses) and compensation determined using each employee's rate of pay. In addition, a definition of compensation will not fail to satisfy Section 414(s) merely because it defines compensation for each employee as the greater of (1) the employee's actual compensation (a definition that qualifies as a safe harbor), or (2) the employee's basic or regular compensation, which is determined using the employee's basic or regular rate of compensation.

As under the 1991 Regulations, a rate-of-pay definition may be used in nondiscrimination testing only if it is also used to determine contributions or benefits under the plan (Reg. 1.414(s)-1(e)(3)).³ Thus, if even a small group of employees covered by the plan does not have benefits determined using rate of pay, the rate-of-pay definition may not be used at all in testing for satisfaction of the Section 401(a)(4) requirements. For example, if a defined benefit plan covers two separate groups of employees where the benefit formulas are quite distinct, and rate-of-pay is used in calculating benefits for only one of the groups, the 1993 Regulations prohibit using the rate-of-pay definition in testing the plan for nondiscrimination. This type of inconsistency is not prohibited in applying the average benefit percentage test where the two groups are covered by separate defined benefit plans (Reg. 1.410(b)-5(e)(2)(iii)(A)).



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Each employee's basic or regular compensation for the determination period must be determined using the employee's basic or regular rate of compensation as of a designated date during the determination period. Different dates within a period may be used to determine employees' rates of pay for the period, to allow, for example, for the inclusion of annual increases provided on different dates to different groups of employees. The date or dates selected, however, by themselves, must not cause the portion of total compensation included to vary significantly among employees (Reg. 1.414(s)-1(e)(3)(iii)).

Imputed and prior-employer compensation. In determining whether a defined benefit plan (but not a defined contribution plan) satisfies Section 401(a)(4) or 410(b) , a compensation definition that includes prior-employer compensation or imputed compensation is a reasonable alternative definition of compensation under Section 414(s) if it satisfies certain prescribed requirements (Reg. 1.414(s)-1(f)).

Prior-employer compensation is compensation from an employer other than the one maintaining the plan (determined when the compensation is paid) that is credited for periods prior to the employee's employment with the employer maintaining the plan and during which the employee performed services for the other employer.

Imputed compensation is compensation credited for periods after an employee has commenced or recommenced participation in a plan while the employee is either not compensated or compensated at a reduced rate by the employer maintaining the plan because the employee (1) is not performing services as an employee for the employer (including a period in which the employee performs services for another employer, e.g., a joint venture) or (2) has a reduced work schedule.

The prescribed requirements for including prior-employer compensation and imputed compensation are as follows:

- (1.) The definition must otherwise be permissible under the general rules and must comply with the applicable compensation nondiscrimination requirements. If, for instance, rate of pay was being imputed for a period not worked, the amount so imputed must be consistent with the rate-of-pay rules in the Regulations.
- (2.) As with rate of compensation, a definition of compensation that credits prior-employer compensation or imputed compensation must be used to calculate the benefits under the plan. This requirement is limited, however, to similarly situated employees.
- (3.) A provision in a plan's definition of compensation crediting prior-employer compensation or imputed compensation must apply on the same terms to all similarly situated employees in the plan. The criteria for determining whether employees are similarly situated for this purpose are the same as those for determining whether a plan provision crediting pre-participation or imputed service satisfies the requirements of Reg.



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1.401(a)(4)-11(d)(3)(iii)(A).

(4.) There must be a legitimate business purpose for crediting prior-employer compensation or imputed compensation to an employee for the particular period. The standard here is the same as that for determining whether crediting pre-participation service under a plan satisfies Reg. 1.401(a)(4)-11(d)(3)(iii)(B) , and whether crediting imputed service satisfies both that rule and Reg. 1.401(a)(4)-11(d)(3)(iv)(A) . If, however, the purpose for crediting imputed compensation (1) relates to services the employee is performing for another employer, and (2) satisfies Reg. 1.401(a)(4)-11(d)(3)(iii)(B) , the additional requirements of Reg. 1.401(a)(4)-11(d)(3)(iv)(A) are deemed satisfied. For example, crediting imputed compensation to an employee while that employee performs services for another employer as a result of a merger, acquisition, or similar transaction with the other employer, satisfies the requirements of Reg. 1.401(a)(4)-11(d)(3)(iii)(B) . Accordingly, crediting the imputed compensation to the employee is deemed to satisfy the additional requirements of Reg. 1.401(a)(4)-11(d)(3)(iv)(A) , even if the employee is not performing those services under an arrangement that provides an ongoing business benefit to the employer maintaining the plan.

(5.) Crediting prior-employer compensation or imputed compensation must not-by design or in operation-discriminate significantly in favor of HCEs. The standard here is the same as that used for determining whether crediting pre-participation service satisfies the requirement found in Reg. 1.401(a)(4)-11(d)(3)(iii)(C) , and whether crediting imputed service satisfies that rule and the additional requirement found in Reg.

1.401(a)(4)-11(d)(3)(iv)(B).

(6.) Prior-employer compensation credited to an employee for a period when the employee is performing services for another employer must be compensation for the employee from the other employer (or must be based on the employee's basic or regular rate of compensation from the other employer) for that period. In addition, prior-employer compensation credited to an employee may not exceed the compensation from the other employer that would have been included under the definition in effect for that period for compensation from the employer maintaining the plan.

(7.) The imputed compensation credited to an employee during any period, when combined with the actual compensation included, may not exceed an amount that, based on all the relevant facts and circumstances, is reasonably representative of the compensation the employee would have received, and that would have been included under the definition of compensation in effect for the period, had the employee continued to perform services for the employer during that period at the same level as before the employee ceased performing services or changed to a reduced work schedule.



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Nondiscrimination rules. An alternative definition of compensation (i.e., not a safe harbor definition) must, in addition to other requirements, satisfy the nondiscrimination rule of Reg. 1.414(s)-1(d)(3). An alternative definition is nondiscriminatory for a determination period if the average percentage of total compensation included under the definition for an employer's HCEs as a group for the period does not exceed by more than a de minimis amount the average percentage of total compensation included under the definition for the employer's non-HCEs as a group. Here, "total compensation" must be determined using a safe harbor definition of compensation. Thus, total compensation does not include prior-employer compensation or imputed compensation (Reg. 1.414(s)-1(d)(3)). In addition, if an item of compensation is excluded for some HCEs under the alternative definition, the total compensation of any HCE subject to the exclusion must be reduced by such item. If the exclusion applies consistently in defining the compensation of all HCEs, however, this adjustment to total compensation is not required (Reg. 1.414(s)-1(d)(3)(ii)(B)).

In testing an alternative definition that uses rate of compensation or includes prior-employer or imputed compensation, each employee's compensation for a determination period that is taken into account in determining the average percentages in the nondiscrimination requirement (i.e., the numerator) may not exceed the employee's total compensation for that period (Reg. 1.414(s)-1(d)(3)(vi)). In this situation, total compensation must include all the types of elective contributions and deferred compensation described in Reg. 1.414(s)-1(c)(4). The limit on compensation taken into account in determining the average percentages applies even if the compensation credited to the employee for the determination period under the definition, and thus used as compensation within the meaning of Section 414(s), exceeds the employee's total compensation for the period. If the employee's total compensation for the determination period is zero, however, the employee is disregarded in determining whether the nondiscrimination requirement of Reg. 1.414(s)-1(d)(3) is satisfied for that period. An employee who, for example, is on an unpaid leave of absence and therefore does not receive any actual compensation during a determination period, but who is credited with imputed compensation, is disregarded in determining whether the Section 414(s) nondiscrimination requirement is satisfied for that period.

These individualized and complex computational exercises will be quite expensive and time consuming, and in certain circumstances will have little or no consequences. In the spirit of reducing "taxpayer burden," as embodied in Ann. 92-81, 1992-22 IRB 56 (dealing with substantiation guidelines for nondiscrimination testing), and subsequent Notices, the Service should have permitted plan sponsors to use averages of the HCE and non-HCE groups, unless such averages discriminate significantly in favor of HCEs.



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MINIMUM COVERAGE

The 1993 Regulations change the coverage rules for former employees, plan aggregations, employees who benefit under the plan, excludable employees, and the average benefit test.

Former employees. Benefit increases for former employees are still tested separately, but the prior numerical rules for testing coverage of former employees are replaced with a facts-and-circumstances test. A plan satisfies the minimum coverage rules with respect to former employees if, under all the relevant facts and circumstances (including consideration of those former employees who do not benefit), the group of former employees benefitting under the plan does not significantly discriminate in favor of highly compensated former employees (Reg. 1.410(b)-2(c)(2)). Former employees receiving additional benefits who were collectively bargained employees apparently must be tested under this provision; they do not seem to have the automatic pass that applies to collectively bargained active employees (Reg. 1.410(b)-6(d)(2)(i) ; see generally Regs. 1.410(b)-2(b)(7) and 1.401(a)(4)-1(c)(5)).

The 1993 Regulations provide that an individual who receives ongoing service or compensation credits under the plan is an employee, rather than a former employee (Reg. 1.410(b)-9). Because "employee" does not include "former employee," the Regulation does not appear to treat a former employee as a collectively bargained employee, even where benefits (e.g., a post-retirement benefit increase) are provided to former employees pursuant to a collective bargaining agreement. (See the Reg. 1.410(b)-9 definitions of "employee" and "former employee.")

Plan aggregation. An employer that disaggregates a plan into those employees who meet the maximum possible eligibility requirements (entry date after attaining age 21 and completing one year of service), and "otherwise excludable employees" who are participants but who have not attained the maximum possible eligibility requirements, does not aggregate the two groups for purposes of the average benefit percentage test (Reg. 1.410(b)-7(e)(1)). This reverses the rule under the 1991 Regulations.

Employees who benefit under the plan. The 1993 Regulations generally provide that an employee is treated as benefitting under a defined benefit plan for a plan year only if there is an increase in the employee's accrued benefit. In certain cases, an employee is treated as benefitting even though there is no additional accrual for the year. For instance, where an employee's accrued benefit would have increased if a previously accrued benefit were disregarded, such as where the plan uses a "wear-away" formula, the employee is treated as benefitting under the plan (Reg. 1.410(b)-3(a)(2)(iii)(C)). The Proposed Regulations contained additional examples of such a situation, such as an increase in covered compensation or a decrease in the employee's compensation for the plan year. No inference regarding the Service's interpretation of Section 411(d)(6) or 411(b)(1)(G) is to be drawn from the elimination of those examples from the final Regulations. This issue is discussed in more detail below.



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The Regulations do not change the existing rule whereby plan provisions that implement the Section 415 limits are disregarded in determining whether an employee benefits under the plan (and thus has to be taken into account in the numerator for purposes of coverage testing). Under the Regulations, however, any plan provision that calls for increases in an employee's accrued benefit under the plan due solely to (1) adjustments under Section 415(d)(1) , (2) additional years of participation or service under Section 415(b)(5) , or (3) changes in the defined contribution fraction under Section 415(e) is also disregarded, but only if such provision applies uniformly to all employees in the plan (Reg. 1.410(b)-3(a) (2)(ii)).

Thus, if a defined benefit plan provides nonuniform (but not uniform) increases in benefits for these purposes (e.g., retired participants only receive automatic increases), any participant receiving the increase is treated as benefitting under the plan for that plan year, necessitating testing the additional accruals of such participants for the year. If the participants receiving the nonuniform increase are predominantly former HCEs, there may be a discrimination problem (Reg. 1.401(a)(4)-10).

If a defined benefit plan does not provide for automatic benefit increases resulting from Section 415(d)(1) adjustments, plan provisions implementing the Section 415 limits must be taken into account in determining accrual rates under the Section 401(a)(4) general test (Reg. 1.410(b)-3(a)(2)(ii)(B)). For instance, if a defined benefit plan is amended to provide for increases to participants because of the Section 415(d)(1) adjustment, the increases would be deemed an increase in accrued benefits subject to Section 401(a)(4) general testing (Reg. 1.401(a)(4)-3(d)(2)(ii)(B)).

The new rules also provide that in determining whether a participant benefits, a defined contribution plan may either take the Section 415 limits into account or not, as long as employees are treated consistently (Reg. 1.410(b)-3(a)(2)(ii)).

Excludable employees. The 1993 Regulations clarify that different ways of calculating service (such as hours of service versus elapsed time) do not result in multiple age and service conditions (Reg. 1.410(b)-6(b)(2)). The new rules also clarify that an employee is a collectively bargained employee with respect to the hours of service performed as such, and a noncollectively bargained employee with respect to the hours of service performed in that capacity, where the employee performs services in both capacities during a plan year (Reg. 1.410(b)-6(d)(2)(i)).

If an employee in a multiemployer plan leaves the bargaining unit and still maintains coverage under the plan (for example, because the employee works for the union), separate nondiscrimination testing is not required, provided that not more than 5% of those covered by the plan are noncollectively bargained employees (Reg. 1.410(b)-6(d)(2)(ii)).



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Average benefit percentage test. The 1993 Regulations coordinate the determination of employee benefit percentages with the determination of accrual rates under the new Section 401(a)(4) Regulations, and thus replace entirely the detailed rules of the 1991 Regulations in this area. Employee benefit percentages generally would be the applicable accrual or allocation rates as determined under the Section 401(a)(4) Regulations if all plans in the testing group for the average benefit percentage test were one aggregated plan for purposes of Sections 410(b) and 401(a)(4). Thus, in general, the methods and options for determining employee benefit percentages would be the same as those available for an aggregated plan under the Section 401(a)(4) Regulations (which depend on the types of plans being tested and on whether the aggregated plan is tested on a contributions, benefits, or cross-tested basis). For example, if the testing group includes both defined benefit and defined contribution plans and employee benefit percentages are determined on a benefits basis, the methods and options available are the same as those for a defined benefit/defined contribution plan tested on a benefits basis under Reg. 1.401(a)(4)-9.

The rules permitting separate average benefit percentage testing for defined benefit and defined contribution plans have been retained. The 1993 Regulations have a greater tolerance than the 1991 Regulations for inconsistencies between plans in determining employee benefit percentages where the percentages are the sum of separately determined rates for each plan, as long as significantly higher percentages are not the result (Reg. 1.410(b)-5(e)(2)(iii)).

The rules concerning alternative compensation definitions that may be used to determine percentages have been liberalized. In particular, an alternative definition that is not a Section 414(s) safe harbor need not satisfy the special compensation ratio test of Reg. 1.414(s)-1(d)(3), although it still must pass the "reasonable definition" test of Reg. 1.414(s)-1(d)(2) (Reg. 1.410(b)-5(e)(6)).

PERMITTED DISPARITY

Most of the revisions dealing with Section 401(1) relate to defined benefit plans.

PIA offset safe harbor. In perhaps the most significant change, the 1993 Regulations provide a safe harbor under which a defined benefit plan that offsets an employee's benefit by a percentage of the employee's PIA under Social Security will satisfy Section 401(1), and thus satisfy the nondiscriminatory amount requirement under Section 401(a)(4). Under the new rules, an offset does not fail to meet the uniformity requirements merely because the plan applies an offset of the lesser of a specified percentage of the employee's PIA and an offset that otherwise satisfies Section 401(1) (the "Section 401(1) overlay") (Reg. 1.401(1)-3(c)(2)(ix)). The Section 401(1) overlay, however, may require changes in plan communications and operations that could make it less desirable to employers. Consequently, most employers with PIA offset plans will probably test them for nondiscrimination under the general rule.



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A definition of "PIA" has been added that refers to the Social Security benefit payable at a single age, not less than 62 or greater than 65. When the offset is calculated, level future compensation until reaching the particular single age may be assumed, but not any increases in pay, the consumer price index, the taxable wage base, or Social Security formula breakpoints. PIA must be determined consistently for all employees, in accordance with IRS guidance (Reg. 1.401(1)-1(c)(26)). Thus, Rev. Rul. 84-45, 1984-1 CB 115, applies in determining the compensation history on which an employee's PIA is based.

Section 417(e) . The provision that no adjustment to permitted disparity is necessary for plans that provide minimum lump sums under Section 417(e) has been clarified, making this protection available even if the plan does not use 120% of Pension Benefit Guaranty Corporation rates for lump sums over \$25,000 (Reg. 1.401(1)-3(b)(4)(iii)(E)).⁵ The Regulations also clarify that if a plan provides a subsidized benefit using an interest rate lower than the rate required under Section 417(e), the disparity maximum must be reduced to reflect the entire subsidy, not merely the difference between the rate required under Section 417(e) and the plan's rate.

Additional option for nonstandard integration level. A fourth alternative was added to the nondiscrimination portion of the demographic test for using a non-standard integration level. An offset plan may base offset levels on each individual's final average compensation, provided the plan imposes individual adjustments to the maximum permitted disparity (Reg. 1.401(1)-3(d)(8)(iii)(D)).

Disability benefits. The provisions allowing certain disability payments to be made without affecting permitted disparity were streamlined. Where previously the Section 401(1) Regulations contained language concerning what disability benefits came under that provision (including a mandate that the Social Security definition of disability be met), now there is only a cross-reference to the Section 411(a)(9) concept of a "qualified disability benefit" (which does not require that the plan use the Social Security definition of disability).

Cumulative disparity and two formulas. The cumulative disparity rule was clarified for certain plans. If benefits are based on the greater of two formulas, each can satisfy the cumulative disparity rule as if it were the only formula, provided the employee was never in another integrated plan sponsored by the employer (single-plan requirement). A plan in which benefits are offset by employer-provided benefits under another plan must satisfy the cumulative disparity rule without taking the offset into account (Reg. 1.401(1)-5(c)(4)). Apparently, the single-plan requirement was designed to prevent the special rule for greater-of formulas from applying to an employee who concurrently benefits under two or more integrated plans. In addition, the single-plan requirement is not failed merely because an employee benefits under another defined benefit plan, as long as neither plan provides service credit for the period credited under the other plan and special requirements regarding cumulative disparity are met (Reg. 1.401(1)-5(c)(4)(i)(C)).



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Consequently, where employees transfer from one plan that uses permitted disparity to satisfy the nondiscrimination requirements of the Code to another, the single-plan requirement will not prevent the employee from qualifying for the special rule where the plans use a method other than an offset to determine a transferred employee's pension benefit (e.g., where benefits under the plans are added together—often referred to as the "sum-of" method).

No reduction in accrued benefit. Finally, the 1993 Regulations clarify that the permitted disparity rules provide no exception to any other requirement under Section 401(a) (Reg. 1.401(1)-1(b)). The 1991 Regulations and the Proposed Regulations had a parenthetical reference to the effect that a plan may not take into account increases in an employee's covered compensation that cause reductions in the employee's accrued benefit under the plan. Under either a PIA offset plan or an excess plan, increases in an employee's covered compensation could not result in a net reduction of the employee's age 65 normal retirement benefit payable from the plan. While the parenthetical reference was removed from the 1993 Regulations, it seems clear that, contrary to the rule under pre-TRA '86 law, IRS apparently believes that no such reduction is allowable under either Section 411(d)(6) (the anti-cutback rule) or 411(b)(1)(G) (which prohibits reductions in accrued benefits because of increasing age or service).⁶

Under this interpretation of Section 411, a defined benefit plan may not provide an accrued benefit that is less than the highest such benefit ever earned by an employee. That is, decreases in the accrued benefit of an active participant by reason of the operation of the plan's benefit formula (whether due to increases in the participant's covered compensation, Social Security benefits, or the taxable wage base, or decreases in the participant's compensation) are prohibited. (See also Reg. 1.410(b)-3(a)(2)(iii)(C) .) Thus, plan administrators must accumulate the data needed to perform and retain the annual or more frequent calculations necessary to assure that this requirement is met.

The validity of this requirement as applied to a plan that takes permitted disparity into account has been questioned on the theory that Section 401(a)(15) would not have been necessary if this were already the rule. Section 401(a)(15) , however, does not by its terms permit the reduction in accrued benefits argued for. ⁷ Literally, any future decrease in accrued benefits, however caused, can be said to result from increasing age or service (i.e., but for the additional time worked and covered by the plan, the accrued benefits would have been as previously earned), which is prohibited by Section 411(b)(1)(G). Moreover, the TRA '86 change to integration rules characterized purely as permitted disparity rules implies that an otherwise impermissible reduction in accrued benefits is not sanctioned by Section 401(1) . Finally, the Service's interpretation applies to all plans (see Reg. 1.410(b)-3(a)(2)(iii)(C)) whether or not permitted disparity is taken into account and, particularly in view of the 1986 changes to Section 401(1), it would be anomalous to except integrated plans from its reach.



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CONCLUSION

The latest Regulations concerning permitted disparity, minimum coverage, and definitions of compensation implement the safe harbors announced by the Service in several 1992 Notices, and provide flexibility and simplification in some situations. In other instances, however, they add complexity to the already intricate rules concerning the nondiscrimination requirements for employee plans.

1

TD 8485 , 8/30/93. See "Final Regulations Issued for Qualified Plan Nondiscrimination Rules," .

2

See, for example, Quintiere and Swift, Jr., "Final Nondiscrimination Rules Pose Formidable Compliance Challenges," .

3

Rate-of-pay compensation may not be used for actual deferral percentage (ADP) or actual contribution percentage (ACP) testing purposes. Reg. 1.414(s)-1(e)(2) .

4

A determination period is an interval during which compensation is measured for purposes of determining whether the requirements of an applicable provision are satisfied. If no such interval is provided under the applicable provision, the determination period is the period for which the applicable provision must be satisfied. Reg. 1.414(s)-1(h)(2) .

5

The 1991 Regulations generally provided that an optional form of benefit that is not payable as a level annuity over the life of the employee must satisfy the disparity maximum on a normalized basis. Thus, for example, a plan that provided a subsidized single-sum benefit had to reduce the disparity maximum as a result of the subsidy. The 1991 Regulations also provided an exception whereby a plan did not fail to satisfy the disparity maximum merely because it complied with the interest rate restrictions under Sections 401(a)(11) and 417(e) .

6

The Preamble to the final Section 411 Regulations stated that for "a plan integrated with Social Security, plan benefits may decrease prior to an employee's retirement or separation because of increasing Social Security benefits. The rules have been changed to make it clear that this is not a prohibited forfeiture." See TD 7501 , 8/22/77. See also Reg. 1.411(a)-7(c)(6), Example (4) .

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7

This provision may well be deadwood.

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