Joint and Survivor Annuities under ERISA -- The Gamble on Survival

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Background

Prior to the enactment of the Employee Retirement Income Security Act of 1974 (ERISA) the law required vesting of employee benefits only at normal retirement age and upon termination of the plan or complete discontinuance of contributions; it did not require a survivor benefit if a participant's death occurred prior to his normal retirement age, nor a survivor benefit if a participant died while his benefit was in pay status. Most prior Internal Revenue Service development concerned whether a distribution of benefits to a beneficiary was incidental to the required primary purpose of paying a benefit to the participant.

Defined contribution plans prior to ERISA commonly provided,

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2 I.R.C. § 401(a)(7), as amended by Pub. L. 87-792 § 2 (now I.R.C. §§ 401(a)(7) and 411(d)(3)).


5 The term "defined contribution plan" is defined in I.R.C. § 414(i) as "a plan which provides for an individual account for each participant and for benefits based solely on the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account." See also ERISA § 3(34) (assigning the same definition to "individual account plan").
although there was no explicit requirement to do so, that a participant's account was fully vested upon his death or disability prior to normal retirement age and in these two events his account was payable to his beneficiary. The probable source for this practice was Treasury Regulations Section 1.401-4(a)(1)(ii), which defines a profit-sharing plan as a plan providing for distributions of benefits "after a fixed number of years, the attainment of a stated age, or upon the prior occurrence of some event such as illness, disability, retirement, death, layoff, or

Defined contribution or individual account plans encompass primarily three types:

(1) Profit-sharing plans are defined in Reg. § 1.401-1(b)(1)(ii) as plans established and maintained by employers to provide for employee participation in the profits by establishing a definite predetermined formula for allocating the contributions made to the plan among the participants and for distributing the funds accumulated at a stated number of years, at the attainment of a stated age, or on the occurrence of some stated event, such as lay-off, illness, disability, retirement, death, severance of employment, hardship, or participation for a stated number of years (at least two).

(2) Money-purchase pension plans are distinguished in Reg. § 1.401-1(b)(1)(i) from defined benefit pension plans, discussed in note 7 infra, on the basis that the "definitely determinable benefits" prerequisite of a pension plan is satisfied in a money-purchase pension plan by the contributions merely being fixed without being geared to profits; whereas, in a defined benefit pension plan, contributions to the plan must be determined actuarially on the basis of definitely determinable benefits. In essence, a money-purchase pension plan is a separate account plan just as a profit-sharing plan, but

(a) the formula for making contributions cannot be varied from year to year (contributions are usually determined as a specified flat amount or a level percentage of each participant's compensation);
(b) contributions must be made regardless of whether there are profits;
(c) forfeitures must be used to reduce required employer contributions, whereas, in a profit-sharing plan, forfeitures may be added to the participants' accounts in addition to any employer contributions (see Lee, Slabaugh & Fogg, "Basics of Employee Benefit Plans," 27th Va. Conf. Fed. Tax. 72-73 (1975) (hereinafter cited as Lee, Slabaugh & Fogg)); and
(d) the deductible contribution under profit-sharing plans is limited (except for unused credit carryforwards) to 15 percent of compensation of the covered participants (I.R.C. § 404(a)(3)).

There is no deductible limitation as such on contributions to money-purchase pension plans, but the I.R.C. § 415 per-participant limitation of annual additions to the lesser of 25 percent of compensation or $25,000 (adjusted by a cost of living escalator) imposes an effective limitation of 25 percent of compensation as to deductions to a money-purchase pension plan. This mirrors prior administrative practice under which, as a rule of thumb for advance-determination letter purposes, the Service prior to ERISA had taken the position that a contribution not in excess of 25 percent of annual compensation on an overall basis would be generally acceptable under money-purchase pension plans. See Address by
severance of employment. . . .” The regulations also seem to have recognized the difference in practice between defined benefit and defined contribution plans. Defined contribution plans also frequently offered payment of a participant’s account balance in the plan at retirement under several options, usually including (1) a lump-sum distribution; or (2) the application of the account balance to the purchase of

Isadore Goodman, Q&A, 4 P-H Pension & Profit-Sharing Rep. ¶ 19,054.19, at 19,755 (1975) (Addresses by Isadore Goodman on Qualified Pension and Profit-Sharing Plans under the Internal Revenue Code Between Oct. 20, 1955 and Oct. 5, 1970.) Where a participant was sufficiently old so that a larger contribution would not yield a benefit actuarially determined in excess of 100 percent of compensation, larger contributions were allowed. The author is aware of a pre-ERISA qualified money-purchase pension plan, in which all of the participants were within ten years of normal retirement age and which provided for contributions equal to 100 percent of compensation. The advance-determination letter contained a caveat that benefits at normal retirement age could not exceed 100 percent of compensation.

(3) Stock bonus plans are defined in Reg. § 1.401-1(b)(iii) as plans that provide benefits similar to those of profit-sharing plans, except that (1) the contributions made by the employers are not necessarily dependent upon profits; and (2) the benefits must be distributed in the form of stock of the employer companies. For purposes of allocating and distributing the stock of the employers, such plans are subject to the same requirements as profit-sharing plans. See generally Lee, Slabaugh & Fogg at 76-77.

6 Compare Reg. § 1.401-7(a), with Reg. § 1.401-4(a)(1)(iii).

7 I.R.C. § 414(j) defines “defined benefit plan” as any plan that is not a defined contribution plan. See also ERISA § 3(35). Reg. § 1.401-1(b)(1)(i) defines a “pension plan” (which in this context is synonymous with a defined benefit pension plan) as a plan established and maintained by an employer primarily to systematically provide for the payment of “definitely determinable benefits” to employees over a period of years—usually for life—after retirement. Thus, a defined benefit pension plan cannot provide for a lump-sum cash distribution as the sole mode of payment. Pub. 778, Pt. 2(u) (Feb. 1972). On the other hand, it is probable that a defined benefit pension plan does not have to provide for payment of retirement benefits for life after retirement. Probably, such a plan could provide a term certain annuity as the sole method of payment. The definitely determinable benefit formula generally is based on such factors as years of service and compensation received by the employee. Determination of the amount of retirement benefits and the contributions actuarially determined as necessary to provide such benefits cannot be dependent upon profits. Furthermore, the IRS has long taken the position that benefits are not definitely determinable if forfeitures may be used to provide increased benefits for the remaining participants. See Reg. § 1.401-7(a). In summary, a plan designed to provide retirement benefits for employees to be paid upon retirement or over a period of years after retirement will be considered for Treasury purposes a “pension plan” (i.e., a defined benefit pension plan), if the employer contributions under the plan can be determined actuarially on the basis of definitely determinable benefits. There is a brief discussion of how contributions are actuarially determined in note 8 infra.
(a) a straight life annuity, (b) a term certain annuity, or (c) a joint and survivor annuity; or (3) a combination of the above options. In practical effect then, such plans did provide for survivor benefits prior to retirement, albeit usually not in an annuity form—the account balance. Since most defined contribution plan participants elected a lump-sum distribution at retirement, the effect in practice was that the plan provided no postretirement survivor benefit. Of course, the participant had received the full amount of retirement benefit or account regardless of life span after retirement so that there was no element of gambling on surviving in order to receive the full value of retirement benefits. However, from a social policy viewpoint of protecting the surviving spouse by dividing the participant's benefit with the spouse, this practice was not desirable.

In contrast, defined benefit plans, particularly of larger employers, frequently provided for a retirement benefit only if the participant survived to normal retirement age. Moreover, such retirement benefit generally was paid in the form of a straight life annuity, and, when the participant died, no survivor annuity was available for the surviving spouse. Frequently, larger defined benefit plans, in making the actuarial assumptions that went into establishing the amount necessary for the employer to contribute to the plan in order to fund the payment of its promised benefit, discounted in advance for the actuarial probabilities that some participants would die prior to attaining normal retirement age under the plan and also took into effect only the participants' life expectancies after retirement in computing the amount or cost of the final benefit. 8

In determining actuarially employer costs, the actuary always considers interest (i.e., earnings on the plan trust fund), postretirement mortality, and usually, in larger plans, preretirement mortality and turnover. The following factors in the past have been acceptable to the Commissioner of Internal Revenue Service as actuarial "assumptions": (1) mortality; (2) investment return or interest; (3) expenses of operation; (4) turnover of employees (i.e., separation from service prior to full vesting or prior to full accrual of the maximum benefit under the plan); (5) retirement ages; and (6) change in way of compensation. See Lee, Slabaugh & Fogg at 81. See also "Bulletin on Section 23(p)(1)(A) and (B) of I.R.C. (1939)," Pt. VII (1945), reprinted in 2 P-H Pension & Profit-Sharing Rep. ¶ 69,602 (1975).

The following illustration of simple actuarial assumptions contained in Lee, Slabaugh & Fogg at 81-82, is derived from P-H Pension & Profit-Sharing Rep. Explanation ¶ 2,143 (1975):

"Assume John Smith is 35 years of age and his employer wants to provide him upon retirement with a monthly life income of $100 a month. Assume further that the trustee will purchase annuities when the employee reaches normal retirement age (65) and that at that time such annuity would cost $15,000. The employer must accumulate this $15,000 over a period of 30
to live to normal retirement age to obtain any benefit, and it cut off at death. Where plans had made such actuarial assumptions, separate death benefits might be provided through insurance or self-insurance.9

Congress noted that the above (defined benefit) situation could result in a hardship where an individual primarily dependent upon his pension as a source of retirement income was unable to make adequate provision for his spouse's retirement years should he predecease her; and it provided the joint and survivor rules to correct this situation.10 Apart from such hardships, a failure to provide a pre-retirement survivor annuity is inconsistent with the premise that pension contributions previously made on behalf of an employee were made in lieu of additional compensation or some other benefit he would have received.11

Representative Elizabeth Holtzman (D-N.Y.) pointed out in the floor debate in the House on H.R. 2, the predecessor there to ERISA, that while many of her colleagues had the impression that under H.R. 2 once a worker's benefits were vested his wife would be provided for in the event that he predeceased her, in actuality the bill permitted pension plans to prevent a widow from receiving survivor's benefits unless her husband died after he had reached his (early) retirement age.12 She argued that this was

years (from age 35 to age 65), and $500 a year for 30 years would of course yield $15,000, but since interest will be paid upon the fund the annual contribution could be reduced to perhaps $300. If it is assumed that some employees will die before retirement and not receive any retirement benefits (no joint and survivor option being available), the trustee will never have to purchase annuities for such employees. The employer, therefore, may pay less than the $300 above since annuities for all participants need not be purchased—the exact sum to be deducted may be actuarially determined in advance by 'discounting for mortality.' Similarly, many employees will terminate employment before retirement and accordingly may not receive any or only reduced benefits. An allowance may similarly be computed for this factor which is called 'discounting for severance.' Thus, the employer under this example might ultimately have to contribute $200 per year on behalf of each 35-year old participant after interest, mortality, and severance assumptions have been taken into account."

12 The text of this provision of H.R. 2 as passed by the House of Representatives, and of its accompanying committee report, is contained in Appendix B.
a serious gap in the pending bill. It allows for a 20 to 25 year period after full vesting of an employee's benefits during which his wife is left unprotected in the event of his death. This is [unconscionable], particularly because it is not apparent from the language of either the bill or the report which is supposed to explain the bill. I am afraid that it will be misleading to employees who will be lulled into a false sense of security in the belief that once their pension rights are vested, their wife will be secure regardless of what happens to them.

If pension plans are to be more than a gamble on survival and a bet on coverage, and if we sincerely want to protect the rights of the surviving spouse, then my amendment [a plan must provide a qualified joint and survivor annuity as to a participant at "the earliest age at which he acquired any nonforfeitable rights"] should be adopted.\textsuperscript{13}

Representative John N. Erlenborn (R-Ill.) did not recall that such an amendment was discussed in committee, but in any event he doubted it:

because what this does, it converts the pension system into an insurance system that would be double, triple, quadruple the costs of operating a private pension plan. . . . If a company wants to offer an insurance option, that is fine, which many do; they know what the cost is. Usually if they do that, there is a combination with a contribution by the company and by the employee. This amendment would be so terribly expensive that it would completely destroy, in my opinion, the private pension systems.\textsuperscript{14}

Representative John H. Dent (D-Pa.) opposed the amendment as well on the basis that the discussion in committee had revolved around setting some kind of assurance that there would be a payment of survival benefits.

We established a base which set a date for survival before being made available at the earliest retirement age. Anything but that would give such an enormous cost that we could in many cases completely destroy the pension fund, because if one is to be given survivor benefits at any part of his vesting period, which is what the amendment does,

\textsuperscript{14} Id. (Rep. Erlenborn). Representative Erlenborn was the senior minority member on the General Subcommittee on Labor of the House Committee on Education and Labor, which conducted the hearings in the Ninety-Third Congress on H.R. 2 and H.R. 462, bills to revise the Welfare and Pension Plans Disclosure Act, and it was, in effect, responsible for shepherding through the House the House labor component of ERISA. Indeed, the final bill H.R. 2 was apparently so labeled in deference to the fact that the original House labor bill, H.R. 2, originated in the General Subcommittee on Labor of the House Committee on Education and Labor.
there is no way that one can accumulate funds in a retirement pension fund without having a definite number of years to be completed. So, when we compute the survivor benefits at the earliest retirement age, we know the [actuaries] have something to work with.\textsuperscript{15}

Representative Al Ullman (D-Ore.) also acknowledged the balancing approach the responsible committees had taken:

If we impose this kind of requirement, all we are going to do is put a lot of private pension programs out of business. . . . What we have tried to do is establish a balance, bring up the minimum pension requirements to the full extent possible without jeopardizing the existence of the private pension program and without discouraging the establishment of additional pension programs. If we impose the kind of high costs involved in this amendment of the private pension system, we will only discourage the development of further private pension programs and put a lot of existing ones out of business. Mr. Chairman, I commend the gentlewoman for her purpose, but this amendment cannot be accepted on this bill, in my judgement, (sic) without doing great disturbance to the Act.\textsuperscript{16}

In short, the concept that a pension benefit is accrued or earned in lieu of additional compensation to a participant, and, hence, it should be his and fully vested as earned, was outweighed by the additional costs that would be imposed upon plans by providing such “vesting”; and the exceptions to the joint and survivor annuity, that in effect swallow the general rule, should be viewed as a concession to the balancing approach between meaningful reform and keeping the costs within reasonable limits.\textsuperscript{17} A provision more in line than that of Representative Holtzman with the deferred vesting approach of ERISA,

\textsuperscript{15} Id. at H1286 (Rep. Dent). Representative Dent was the Chairman of the General Subcommittee on Labor, and was one of the prime movers in the pension reform movement that culminated in ERISA. For an excellent discussion of the legislative history of ERISA and prior federal regulation of employee benefit plans, see Chadwick & Foster, “Federal Regulation of Retirement Plans: The Quest for Parity,” 28 Vand. L. Rev. 642, 668-671 (1975).


which in itself constitutes a compromise with increased costs,18 would have been to have required in a defined benefit plan a survivor benefit equal to the present value of the vested accrued benefit.19 Such a rule would not have added an insurance feature to the plan, but only precluded an actuarial assumption that discounted for preretirement mortality.20 Under this approach, the surviving spouse would be entitled to precisely the benefit that the participant would have been entitled had he terminated employment rather than died.

General Rules

Introduction and Overview

The Senate Retirement Income Security for Employees bill (H.R. 4200 as passed by the Senate) simply provided that a qualified plan that provided for the payment of retirement benefits in the form of an annuity for the life of a participant, had to provide for such payment in the form of a joint and survivor annuity: that is, an annuity for the life of the participant (and of his spouse) after he retired, followed by a survivor annuity for the life of his surviving spouse after his postretirement death, unless the participant elected within two years of his normal retirement age or, if earlier, within two years of the annuity starting date, not to have the benefit paid in such form.21 Such election could be made only if the participant received a written explanation of the terms and conditions of such joint and survivor annuity and the effect of the election. The postretirement survivor annuity could not be less than one-half the amount of the annuity payable to the participant during the joint lives of the participant and his spouse. It is important to note that the Senate provision required only a postretirement survivor annuity. In other words, the joint and survivor annuity requirement was triggered only when payment of retirement benefits had commenced, and no survivor annuity was required if the participant died prior to retiring.

The House bill (H.R. 2) differed from the Senate bill in two major respects: (1) A mandatory preretirement survivor annuity had to

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19 The reserve is the actuarially determined amount required to provide the accrued benefit based upon the age and compensation of the participant at the time of the determination.
20 For discussion of the concept of discounting for preretirement and mortality, see note 8 supra.
be provided where the participant died after reaching his earliest retirement age under the plan, but before he retired (unless he elected not to have such a benefit); and (2) two antiadverse selection elements were added. First, payment of a postretirement and a pre-retirement survivor annuity was mandated (where the plan provided for the payment of benefits in the form of annuity) only if the participant and his spouse had been married throughout the five-year period ending on the annuity starting date in the former case, or ending on the date of the participant’s death in the latter case. Second, an election-out from the joint and survivor annuity (as to both the preretirement and postretirement survivor annuity) was provided, as in the Senate bill, but a plan could require that no such election would become effective if the participant died during a period (not in excess of two years) beginning on the date of election or revocation of an election.

The qualified joint and survivor annuity definition was the same for the preretirement and postretirement survivor annuity, namely, an annuity for the life of the participant, with a survivor annuity for the life of the spouse, that was not contingent upon survivorship of such spouse beyond the earliest retirement age of the participant and that was not less than one-half the amount of the annuity payable during the joint lives of the participant and his spouse. However, a preretirement survivor annuity is not a joint and survivor annuity. The participant never receives a joint lives annuity during his and his surviving spouse’s joint lives because he died prior to retirement; had he retired and then died, the benefit would be a joint lives annuity followed by a surviving spouse annuity unless he elected out. Instead, there is simply a survivor annuity.

The Conference Committee modeled the joint and survivor annuity provisions of ERISA more on the House bill than on the Senate bill. The major substantive changes were that the preretirement survivor annuity was changed from a mandatory provision with an election-out by the participant to an election-in, under which the participant had to be given a reasonable period before his earliest retirement age to elect to have a preretirement survivor annuity payable as to the period beginning on his earliest retirement age and ending on the date of his normal retirement age if he continued employment during that period. A different definition of the amount of the preretirement survivor annuity was also provided. The postretirement survivor annuity, in

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23 I.R.C. § 401(a)(11)(C); ERISA § 205(c)(1).
24 I.R.C. § 401(a)(11)(C); ERISA § 205(c)(2).
addition to the floor of 50 percent of the joint lives annuity, now had a ceiling imposed. It could not be greater than the amount of the annuity payable during the joint lives of the participant and his spouse. The five-year marriage rule was shortened to a one-year period and made optional with the plan; and the two-year period for giving affect to an election or revocation of an election was elaborated further. In summary, the major substantive difference between ERISA and the House bill lies in the preretirement survivor annuity. The House bill in essence did not distinguish between pre- and postretirement annuities; the statute as enacted distinguished between them, both as to who has the burden to choose the preretirement survivor annuity provision and the amount of the annuity.

Unfortunately, the progression from the relatively straightforward Senate provision of a mandatory postretirement joint and survivor annuity where the plan provided for the payment of benefits in the form of a life annuity to the extremely complicated and, as will be discussed, in places technically deficient final joint and survivor annuity provision, resulted in an unwieldy provision that most defined contribution plans will avoid by eliminating any life annuity option.

**Postretirement Joint and Survivor Annuity**

A "qualified joint and survivor annuity" is an annuity for the life of the participant after his retirement, with a survivor annuity after his death for the life of his spouse that is not less than one-half of, nor greater than, the amount of the annuity payable during the joint lives of the participant and his spouse, and that is the actuarial equivalent of a single life annuity for the life of the participant. The requirement that the postretirement survivor annuity not be greater than the amount of the annuity payable during the joint lives of the participant and his spouse (which will be referred to as the 100 percent joint lives ceiling) was not contained in the House bill but was added in Conference. On the surface, it seems that the drafters of Code Section 401(a)(11) imposed this limitation in Conference in order to backstop the application of new Section 415 to defined benefit plans. In essence, that section provides that no qualified benefit plan may provide for an annual benefit as to a participant that exceeds the lesser of $75,000 a year (adjusted under an escalator clause) or 100

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25 I.R.C. § 401(a)(11)(G)(iii); ERISA § 205(g)(3).  
26 I.R.C. § 401(a)(11)(D); ERISA § 205(d).  
27 I.R.C. § 401(a)(11)(F); ERISA § 205(f).  
28 I.R.C. § 401(a)(11)(G)(iii); ERISA § 205(g)(3); Prop. Reg. § 1.401(a)-11(b)(1).
percent of the participant’s average compensation for his high three years. The term “annual benefit” in turn is defined as excluding “that portion of any joint and survivor annuity which constitutes a qualified joint and survivor annuity. . . .” Obviously, if a defined benefit survivor annuity could exceed the joint lives annuity, the plan could avoid the Section 415 limitations through providing a very rich survivor annuity. The Conference Report acknowledges a tie-in between the 100 percent joint lives ceiling under the joint and survivor annuity and Section 415, in its discussion of the latter provision: “If a benefit were paid in the form of a joint and survivor annuity for the benefit of the participant and his spouse, the value of this feature would not be taken into account unless the survivor benefit were greater than the joint benefit.” The failure of Code Section 401(a)(11)(G)(3) in its definition of “qualified joint and survivor annuity” to distinguish between a defined benefit plan and a defined contribution plan, as the Section 415 limitation does, was to have serious effects upon defined

29 I.R.C. §§ 415(a)(1)(A) and 415(b)(1).

It happens that the provision that the survivor annuity cannot be greater than the amount of the annuity that is payable to the participant during the joint lives of the participant and his spouse, closely parallels the longstanding Treasury requirement that benefits payable to a beneficiary of an employee must be incidental to the primary purpose of distributing the accumulated funds to the employee. Reg. § 1.401-1(b)(1). The thrust of this requirement, according to the Service, was that the present value of the payments to be made to the participant generally must be more than 50 percent of the present value of the total payments to be made to the participant and his beneficiaries. See Rev. Rul. 72-241, 1972-1 C.B. 108. However, an exception was carved out to permit distribution of a participant’s interest over a period equal to his life and thereafter the life of his spouse, even though the participant’s beneficiary was someone other than his spouse. Id.

The “incidental benefits” concept continues to have vitality under ERISA. New I.R.C. § 401(a)(14) mandates that a qualified trust provide that, unless a participant otherwise elects, the payment of benefits under the plan to such participant will begin not later than the sixtieth day after the latest of the close of the plan year in which occurs the date on which the participant attains the earlier of age sixty-five or plan normal retirement age, the tenth anniversary of the year in which the participant commenced participation in the plan, or the date on which the participant terminated service with the employer. The proposed Treasury regulations under this provision provide for an election by a participant to receive payment of benefits at a date later than that provided above if the benefits payable under the plan with respect to the participant in the event of his death would be more than “incidental” within the meaning of Reg. § 1.401-1(b)(1)(i). See Prop. Reg. § 1.401(a)-14(b)(3).
contribution plans under the proposed Treasury regulations. It is possible, however, that the draftsmen imposed the joint lives ceiling in Code Section 401(a)(11) for another reason, applicable to both defined benefit and defined contribution plans. Without such a ceiling, it would have been possible, for example, to provide that the standard benefit was a joint lives annuity with a survivor annuity of five times the joint lives annuity. In such circumstances, due to the severe reduction in the joint lives annuity, most, if not all, participants would elect instead a straight life annuity. A joint lives ceiling on the post-retirement survivor annuity precludes such bias in favor of an election-out.

The "actuarial equivalent" of a single life annuity for the life of the participant requirement means that the joint and survivor annuities together must be "at least the actuarial equivalent of the normal form of benefit offered under the plan." 32

**Requirement of Postretirement Survivor Annuity**

Whether a qualified retirement plan must provide a postretirement survivor annuity turns on whether the participant may receive life annuity retirement payments and whether it can be said that such life annuity payments are provided by the plan. Once it is determined that a plan is required to provide the standard benefit in the form of a qualified joint and survivor annuity, the further question arises as to which plan benefits it must provide in such form.

**Provision of “Life” Annuity by Plan**

According to the proposed regulations, where a plan provides for the payment of benefits in any form of a life annuity, that is, "an annuity requiring survival of the participant or his spouse as a condition for payment," 33 its trust will not be qualified after the effective date of ERISA by virtue of the joint and survivor annuity provisions if the plan fails to provide for the payment of annuity benefits in a form having the effect of a qualified joint and survivor annuity. 34 The "life annuity" requirement of the proposed Treasury regulations is derived from House Committee Report Number 93-807. 35 With this rule, the proposed Treasury regulations laid to rest the fear, based upon

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32 Prop. Reg. § 1.401(a)-11(b)(1).
33 Prop. Reg. § 1.401(a)-11(a)(1).
34 I.R.C. § 401(a)(11)(A); compare ERISA § 205(a).
the definition of amounts received as an annuity under Code Section 72. 36 that the term “benefits in the form of an annuity” as used in Code Section 401(a)(11) encompassed determinable benefits payable at regular intervals over a period of more than one full year from the date on which they begin. Unfortunately, the proposed regulations perhaps less clearly define when a plan must provide for the payment of annuity benefits in the form having the effect of a qualified joint and survivor annuity.

It may be noted that the Senate bill expressly provided that the joint and survivor annuity requirement was triggered only where the plan provided “for the payment of benefits in the form of an annuity for the life of a participant.” 37 Accordingly, following traditional statutory construction, the subsequent House and Conference provisions, which mandated a joint and survivor annuity only where “the plan . . . provides for the payment of benefits in the form of an annuity,” 38 used a broader term than the Senate provision, which was not limited to life benefits. 39 Consequently, the “life annuity” approach of the regulations (necessary for sound plan administration) may expose a multitude of plans that seek to avoid the complexities of the joint and survivor annuity provisions through eliminating life annuity options, to litigation by surviving spouses demanding a survivor annuity.

Many defined contribution plans nevertheless may be expected to follow the road map contained in the Treasury regulations and discontinue life annuity payment options. Some question has been raised, however, whether this alternative is available to a money-purchase pension plan or a target benefit pension plan, both of which are defined contribution plans, but display some pension plan aspects. Pre-ERISA Treasury Regulations Section 1.401-1(B)(1)(i) defines the term “pension plan” as a plan established or maintained by an employer to provide for the payment of definitely determinable benefits “over a period of years, usually for life, after retirement.” It is the writer’s understanding that the current Internal Revenue Service position is that a defined contribution “pension” plan (i.e., a money-purchase

36 “[T]he provisions of section 72 distinguish between ‘amounts received as an annuity’ and ‘amounts not received as an annuity.’ In general, ‘amounts received as an annuity’ are amounts which are payable at regular intervals over a period of more than one full year from the date on which they are deemed to begin, provided the total of the amounts so payable or the period for which they are to be paid can be determined as of that date.” Reg. § 1.72-1(b).

37 H.R. 4200, as passed by the Senate, 93d Cong., 1st Sess. § 261(a)(2) (1973).

38 H.R. 2, as passed by the House, 93d Cong., 2d Sess. § 102(a)(1) (1974).

39 Note 37 supra.
pension plan and, perhaps, a target benefit plan) can meet the require-
ment of providing definitely determinable benefits over a period of years
by providing a nonlife annuity. Indeed, it should be possible to provide
an annuity for the life expectancy of the participant or for the joint life
expectancy of his surviving spouse without its constituting a life annuity.
In other words, the payments would continue for the life expectancy or
expectancies at the time of retirement and cease at that point whether
the participant and his surviving spouse lived longer or shorter than
their life expectancies. Apparently, the Service expects most defined
contribution plans will discontinue all life annuity options. Ironically,
the social goal of providing for a life annuity option in a defined con-
tribution plan and the equally desirable social goal of providing for
survivor benefits to surviving spouses ultimately have resulted in a
provision in ERISA that will cause most defined contribution plans,
at least, to abandon life annuity and joint and survivor annuity options
for payment of retirement benefits. Undoubtedly, the existing tendency
to pay out defined contribution plan benefits in the form of a lump-sum
distribution will be accelerated by the joint and survivor annuity pro-
visions of ERISA.

Some practitioners have suggested that a retiring participant can
obtain the joint and survivor annuity or straight life annuity advantages
or treatment even when he receives a lump-sum distribution by "rolling
over" such distribution within sixty days after it is received into an
Individual Retirement Annuity (IRA).\(^4\) While this would obtain the
income tax deferral aspects of a straight life or a joint and survivor
annuity option under the plan itself, since such annuity benefits would
be taxed only when received under Code Section 72, substantial estate
and gift tax advantages are lost under an IRA approach. Code Section
2039(c) provides that the value of an annuity or other payment re-
ceived by any beneficiary under an employees' trust or under a retire-
ment annuity contract purchased by an employees' trust forming the
part of a qualified plan, is excluded from the gross estate of the de-
ceased participant.\(^4\) Also, Code Section 2517 provides that the ex-
ercise or nonexercise by an employee of an election or option under
which an annuity or other payment is payable to any beneficiary at or

\(^4\) The payment of the balance to the credit of an employee from a § 401(a)
employees' trust is exempt from taxation if such payment constitutes a lump-sum
distribution (qualifying under I.R.C. § 402(e)(4)(A)) and the employee trans-
fers all the property he received in such distribution to an individual retirement
account (I.R.C. § 408(a)) or an Individual Retirement Annuity (I.R.C. §
408(b)) within sixty days after he received the property (I.R.C. § 402(e)(5)).

\(^4\) I.R.C. § 2039(c) expressly does not apply to sole proprietors or partners
under H.R. 10 plans.
after the employee's death, e.g., election of a joint and survivor annuity, is not considered a transfer in gift if the election is provided under an employees' trust or under a contract purchased by an employees' trust. Neither of these provisions refers to IRAs. Accordingly, undesirable estate or gift tax consequences would attach to rolling the lump-sum distribution into an IRA (with a survivor annuity provision).

In the past, defined contribution plans frequently, as indicated above, provided a participant with the option to choose between several forms of benefit payment, commonly including life annuity, term certain annuity, and lump-sum distribution alternatives. Against this background, some practitioners apparently assumed, for example, that a defined contribution plan with a similar provision had to provide under ERISA only that in the event the participant elected the life annuity option, then that option had to provide for the payment of benefits in a form having the effect of a qualified joint and survivor annuity.\(^42\) Yet, the entire tenor of the election-in and election-out discussed below would indicate that if a qualified plan wished to provide a life annuity retirement option, it must provide for the payment of benefits in the form of a joint and survivor annuity as the standard benefit under the plan, that participants could elect against and then take some other optional form of payment. It would seem, moreover, that the proposed regulations do mandate that if a defined contribution plan wishes to provide a life annuity option, it must state in effect "that the balance of a participant's individual account will be paid to him in a form having the effect of a qualified joint and survivor annuity unless a participant elects another form of benefit payment. . . ."\(^43\)

Practitioners also have suggested it might be possible in a defined contribution plan to avoid the joint and survivor requirements by, for example, providing that instead of the participant having the option, the plan administrator or perhaps the trustee has the sole discretion to choose the form in which benefits will be paid under the plan. While

\(^42\) Under this view, the plan would not have to provide the detailed financial impact information to the participant unless he elected the joint and survivor annuity benefit instead of some other form of benefit.

In general, where statements are made in this article as to interpretations by practitioners, the statement is based on written or oral questions proposed to the author at the ALI-ABA Course of Study: Pension, Profit-Sharing, and Other Deferred Compensated Plans held in Los Angeles on Oct. 9-11, 1975 in Washington, D.C. and on January 22-24, 1976. These questions were either submitted during the conferences or posed in subsequent oral or telephone conversations with registrants at the conferences. A précis of the written questions on the joint and survivor annuities submitted to the author at the above conferences is on file in the offices of the Law Journal.

\(^43\) Prop. Reg. § 1.401(a)-11(a)(2) Illustration.
placing such discretion in a party other than the participant historically has not disqualified the plan, there is no indication in the statute (although the proposed regulations are silent on this point) that the joint and survivor annuity provisions can be so easily passed by. Some practitioners find support for this technique in Proposed Treasury Regulations Section 1.401(a)-11(a)(2), which contains an illustration in which the pre-ERISA plan offered a retiring participant options of a lump-sum distribution, a life annuity, or five equal cash payments. The example concludes that the plan either must discontinue the life annuity option or be "amended to provide that the balance of a participant's individual account will be paid to him in a . . . joint and survivor annuity. . . ." They would add a third alternative: Take the options away from the participant and make them exercisable only by the plan administrator. It is submitted that where the life annuity is paid by the trust itself, the plan provides a life annuity regardless of who exercises the option as to the form of payment. The harder question is whether a defined contribution plan can be said to provide a life annuity where the participant's account balance is applied to the purchase of a life annuity from an insurance company (regardless of whether the option for such application lies in the participant, the trustee, or the plan administrator). Yet, if the answer is that such a plan does not provide a life annuity, defined benefit plans as well could easily avoid the requirements of a joint and survivor annuity by payment of benefits through purchases of annuities (including life annuities). Additionally, such a result could be viewed as a boon to the insurance industry.

The apparent thrust of the joint and survivor annuity provisions (as well as the necessity to limit the fiduciary liability of the plan administrator or trustee) is that the right to make retirement elections should (perhaps must) rest in the participant. However, some practitioners have expressed concern about moving the right to exercise the different optional forms of payment under the plan from the committee or trustee—a common design feature in pre-ERISA plans—to the participant on grounds of the doctrine of constructive receipt.


45 Even if this drafting technique were successful, it would expose the plan administrator to considerable fiduciary liability. Cf. Geidman v. Anheuser Busch, Inc., 299 F.2d 537 (2d Cir. 1962).

46 The doctrine of constructive receipt applies where a cash basis taxpayer is presently entitled to money that is immediately available to him without substantial limitations or restrictions, and where his failure to receive it in cash is entirely due
In the first place, the premise that lodging the right to make the election in the trustee or committee would avoid constructive receipt is probably fallacious in that historically such election was almost invariably made in accordance with the instructions of the participant himself. More significantly, however, Code Section 72(h) states that if an annuity contract provides for the payment of a lump sum in full discharge of an obligation under the contract, subject to an option to receive an annuity instead, and the annuity option is exercised within sixty days after the day on which such lump sum first becomes payable, then no part of the lump sum will be considered as includable in the gross income of the participant at the time it first became payable. In short, Section 72(h) carves out an exception to constructive receipt where the taxpayer has a choice between taking an annuity and a lump-sum distribution.

The Internal Revenue Service has applied Code Section 72(h) to qualified plans in Revenue Ruling 59-94.47 There the Service ruled under Section 72(h) that where a participant elects within sixty days after he separates from the service of the employer to have the trustee of an employees’ trust purchase for and transfer to him an annuity in lieu of a lump-sum distribution of the balance credited to his account, no part of such lump-sum distribution would be includable in his gross income at the time it first became payable. Possibly the same result would obtain where the annuity was provided by the trust itself rather than the trustee purchasing a contract.48

In this context, clearly an annuity is not limited to a life annuity, but instead constitutes a generic term covering amounts that are payable at regular intervals over a period of more than one full year from the date at which they are deemed to begin, provided that the total of amounts so payable or the period for which they are to be paid can be determined as of the annuity starting date. Thus, as long as the participant has a choice between an annuity and some other form of payment or payments, and he chooses the annuity option under a qualified plan, he will not be taxed under the doctrine of constructive receipt as if he had exercised, for example, the lump-sum distribution option. Where, however, he exercises some option other than either an annuity to his own volition: A taxpayer may not deliberately turn his back on income and avoid taxation. Reg. § 1.451-2(a); 2 Mertens, Federal Income Taxation § 10.01. In the area of taxation of participants or beneficiaries under plans qualified under Section 401(a), the question whether the amounts are “made available” (see I.R.C. § 402), but the rules and analysis are those of constructive receipt.47 1959-1 C.B. 25.

option or the lump-sum distribution option, it is possible that he would be taxed under the doctrine of constructive receipt.

For instance, under the example set forth in the proposed regulations where the life annuity option is deleted with the remaining options being a lump-sum cash distribution, an in-kind distribution of employer securities, and five equal annual cash payments, if the participant chose the lump-sum distribution of employer securities as his option, it is possible that under the doctrine of constructive receipt he would be immediately taxed, although he would not be taxed on the annual appreciation in the employer securities until disposed of. Of course, if he elected the five equal annual cash payments option, that apparently would come within Section 72(h) as an annuity option.

While many defined contribution plans will wish to eliminate life annuity payments to obviate the necessity of making a qualified joint and survivor annuity the standard plan benefit, for the administrative reasons discussed below, there may be inadvertent traps that escape the reviewer of the plan upon qualification, that in theory would disqualify the plan. For example, some defined contribution plans contain life insurance. While a life annuity option under such a life insurance contract payable at the death of the participant would not seem to trigger the joint and survivor annuity requirement of the Code since that benefit would not be payable to the participant but to his surviving spouse, retirement plan life insurance contracts also frequently provide that at maturity, i.e., normal retirement age, the cash surrender value of the policy can be paid in several options, including a life annuity option. If such a contract is held by a defined contribution plan and if it provides that at normal retirement age any insurance contracts may be distributed to the participant, then it is possible the joint and survivor annuity provisions are triggered as to the portion of the participant's account attributable to the cash surrender value, even though the plan itself does not provide for a life annuity payment. While this may seem a minor problem, one must bear in mind that the penalty imposed upon failure to provide for the payment of life annuity benefits in a form having the effect of a qualified joint and survivor annuity is disqualification of the trust.

Which Benefits Must Be Made in Life Annuity Form

In a stock bonus plan or employee stock ownership plan where the distribution is made solely in employer securities and traditionally in the form of a lump-sum distribution, there is no life annuity benefit that would trigger the qualified joint and survivor annuity requirement. On the other hand, it is not unusual for certain types of defined contribu-
tion plans, such as thrift plans, to provide that part of the contributions will be invested either in general investments or in government securities, etc. (usually the employee contribution), while the other portion of the contribution (usually the employer contribution) will be invested in employer securities. Such plans have sometimes provided that the general investments may be distributed under a life annuity option while the employer securities will be distributed in a lump-sum in-kind distribution. The question is whether, when part of the retirement, disability, or death benefit may be distributed in the form of a life annuity while another part is distributable only in a lump-sum distribution, the qualified joint and survivor annuity provisions apply to the entire benefit. If the entire retirement benefit does have to be distributed as an annuity, this will destroy some of the advantages to the plan inherent in distributions of employer securities.

Provided that the participant's spouse or beneficiary is entitled to the participant's entire employer security account upon his death, there is no policy reason to require that it be paid in the form of a survivor annuity. In addition, under the statute, only "annuity payments" must be paid in the form of a qualified joint and survivor annuity. If the only form of distribution of the employer security account is in a lump-sum distribution, then it is not a life annuity benefit and the qualified joint and survivor annuity provisions do not apply. Finally, the proposed regulations apparently apply the joint and survivor annuity

49 A thrift plan is a pension, profit-sharing, or stock bonus plan to which an employee savings feature (i.e., mandatory employee contributions) is added. Thrift plans usually start with employee contributions and then the employer's contribution is related to the amount or rate of employee contributions. Most thrift plans permit the employee to choose the amount of his savings within a specified range, and often the allowable amount of such employee contributions is expressed in terms of a percentage of pay, such as 2, 4, or 6 percent of base pay. See Lee, Slabaugh & Fogg at 79. The IRS tests for "discrimination" where plans require contributions of more than 6 percent of pay from employees. In so testing, integration, discussed in note 58 infra, is taken into account. Pub. 778, Pt. 4(g) (Feb. 1972).

50 The receipt of employer securities by a participant in a lump-sum distribution, as defined in I.R.C. § 402(e)(4)(A)—provided that the employee has participated in the plan for five years and elects a lump-sum distribution (I.R.C. §§ 402(e)(4)(H) and 402(e)(4)(B)—is income tax free to the extent that the stock or securities were acquired with the employee's own contribution and, more significantly, all unrealized appreciation of the employer stock is income tax free upon distribution (I.R.C. §§ 402(e)(4)(D)(ii) and 402(e)(4)(j)). Such unrealized appreciation is taxed upon a later sale, but is treated as a long-term capital gain regardless of how long the stock is held by the employee. (Reg. § 1,402(a)-1(b)(1) and (2).) See Rev. Rul. 75-125, 1975-1 C.B. 254. The balance of the fair market value of the stock distributed is taxed as any other lump-sum distribution is taxed.
requirements only to those benefits that are paid in the form of a life annuity.51

A closely related question is whether the postretirement joint and survivor annuity provisions apply where a plan provides that if a participant's defined contribution account balance does not exceed a certain minimum amount (for example, $1,750), payment of the benefits must be made in a lump-sum distribution rather than under a qualified joint survivor life annuity (with an election-out as to other options). It is arguable that such a plan does not provide for the payment of a benefit in the form of a life annuity, where the benefit is less than a stated account balance floor. Providing such an exception in the regulations at least as to defined contribution plans would seem advisable.

A similar question is whether a disability (retirement) benefit must be paid in the form of a joint and survivor annuity where the normal retirement benefit is paid in the form of a life annuity, but, upon disability, a participant's account balance is paid in a lump-sum distribution. The principal argument that the lump-sum death benefit would not have to be paid in the form of a qualified joint and survivor annuity, would be that the joint and survivor annuity requirement is triggered only as to benefits which the plan provides in the form of annuity benefits, and the lump-sum death benefit would not constitute an annuity benefit. This argument is supported by Proposed Treasury Regulations Section 1.401(a)-11(a)(1), which provides that a plan “providing for the payment of benefits in any form of a life annuity . . . [must provide] that these benefits must be paid in a form having the effect of a qualified joint and survivor annuity.” In other words, the joint and survivor annuity requirement is triggered only where the benefit is paid in any form of a life annuity, which a lump-sum disability distribution would not constitute. It is clear, however, that where a disability benefit is paid in the form of a life annuity, the joint and survivor annuity, i.e., the postretirement survivor annuity requirement, commences as soon as the participant reaches or would have reached the “earliest retirement age” under the plan.

Code Section 401(a)(11)(B) states that notwithstanding the requirement that a plan provide for the payment of benefits in annuity

51Prop. Reg. § 1.401(a)-11(a)(1) provides that a “trust, which is a part of a plan providing for the payment of benefits in any form of a life annuity . . . , shall not constitute a qualified trust . . . unless such a plan provides that these benefits must be paid in a form having the effect of a qualified joint and survivor annuity. Therefore, any benefits which may be paid in any form of a life annuity must be paid in a form having the effect of a qualified joint and survivor annuity unless the participant makes the election . . . not to receive benefits in this form.” (Emphasis added.)
payments in a joint and survivor annuity form, if a plan provides for payment of benefits before "normal retirement age," it is not required to pay them in the form of a joint and survivor annuity "during the period beginning on the date on which the employee enters into the plan . . . and ending on the later of (i) the date the employee reaches the earliest retirement age under the plan, or (ii) the first day of the 120th month beginning before the date on which the employee reaches normal retirement age." Yet, one early commentator argued that the joint and survivor annuity provisions did "not mandate payment in a joint and survivor option form upon the retirement before normal retirement age of an employee who has previously failed to make an election of that form of payment." 52 Thus, it was contended that an early retirement benefit did not have to be in the form of a joint and survivor annuity.\(^5\)

Yet, clearly, a plan must provide for payment of annuity benefits in a form having the effect of a joint and survivor annuity at times other than normal retirement age (with an election-out) where it provides annuity benefits at such other ages or upon the occurrence of other stated events. The statutory definition of annuity starting date, repeated in the proposed regulations ("the first day of the first period for which an amount is received as an annuity [whether by reason of retirement or by reason of disability]"),\(^5\) forces the conclusion that a joint and survivor annuity must be provided in the event of disability retirement (but only from the later of the date early retirement benefits would be available or the beginning of the period commencing ten years before normal retirement age)\(^5\) if such retirement benefit is paid optionally in the form of a life annuity.

On its face, an early retirement life annuity benefit constitutes a benefit payable in the form of a life annuity and, therefore, triggers the requirement that it be paid in the form of a qualified joint and survivor annuity (unless the election-out provisions apply, or the one-year waiting period rule, discussed below, should apply). Code Section 401(a)(11)(B) only determines the date that the postretirement survivor annuity provision becomes operative, or, to put it another way, the period "during" which a survivor annuity does not have to be paid if a par-

\(^{52}\) National Coordinating Committee for Multiemployer Plans, "Recommendations on Spouse Options Under the Employee Retirement Income Security Act" (March 25, 1975), reprinted in 3 CCH Pension Plan Guide § 25,003 (1975) (memorandum submitted to the Treasury Department and the Internal Revenue Service) (hereinafter referred to as and cited as "Recommendations on Spouse Options").

\(^{53}\) Id.

\(^{54}\) Prop. Reg. § 1.401(a)-11(b)(2).

\(^{55}\) See Prop. Reg. § 1.401(a)-11(d)(2)(iii).
participant retires and then dies. But after that period ends, a postretirement survivor annuity must be provided upon the death of the participant.

The Conference Committee Report does not distinguish between early retirement and normal retirement, and, indeed, at times clearly uses the term “retirement” in a generic sense: “In the case of an employee who retires, or who attains the normal retirement age, the joint and survivor provision is to apply unless the employee elected otherwise.” 56 The statute itself also uses the terms “retirement” or “retirement benefits” as generic terms, as may be seen in the definition of “earliest retirement age” as the earliest date under the plan on which the participant “could elect to receive retirement benefits.” 57 (There is no clear indication whether this term excludes early retirement where company consent is required.) 58 Finally, the most convincing reason that the standard form of an early retirement benefit in a plan providing a life annuity early retirement benefit must have the effect of a qualified joint

57 I.R.C. § 401(a)(11)(G)(iii); ERISA § 205(g)(2).
58 For example, a plan might provide that an employee could retire with the consent of the company at age fifty-five and without the consent of the company at age sixty. Presumably, in this circumstance age fifty-five would be the earliest possible date at which the participant could “elect” to receive retirement benefits. See note 91 infra and accompanying text. Furthermore, defined contribution plans commonly provided that any early retirement was with the consent of the company. It may be noted that under prior administrative practice where the employer’s consent was required for optional early retirement (the optional early retirement age had to be reasonable), the value of the early retirement benefit could not exceed the value of the employee’s vested benefits at that time. Pub. 778, P. 5(f) (Feb. 1972). Furthermore, if the optional early retirement age was earlier than sixty-five (sixty for women), and if the plan were integrated with OASDI or with benefits under the Railroad Retirement Act, the benefits that depend upon such integration had to be appropriately limited. Id.

The concept of integration has been explained as follows:

“If the benefits available under social security are explicitly recognized, the benefit structure of the pension plan will be set up in such a manner as to offset, at least partially (a) the exclusion of earnings above the taxable wage base [as to which OASDI or Federal Insurance Contribution Act taxes are imposed, in 1975, $14,100], (b) the heavier weighting assigned under the social security formula to the lower segments of the worker’s average monthly earnings, or (c) both. The general objective will be to provide combined benefits, those payable under social security and the plan, that will constitute approximately the same percentage of the employee’s compensation, irrespective of his position on the pay scale. In other words, the combined benefits of the higher paid employees will be about the same percentage of their earnings as that applicable to the lower paid employees. This approach to plan design not only serves the plan sponsor’s concept of equitable treat-
and survivor annuity is the congressional rationale for providing the election-in, discussed below, during the period between early retirement age and normal retirement age: If an employee could provide a survivor annuity to his spouse only if he had already retired, this would provide an unwarranted artificial incentive to exercise early retirement rights where available. Clearly, the premise here was that joint and survivor annuity benefits would automatically be available upon early retirement. It was to prevent an artificial incentive to elect early retirement that a participant was permitted at early retirement age, where he had not in fact retired, to elect into a joint and survivor annuity.

Notwithstanding that the statute and the proposed Treasury regulations clearly appear to require a joint and postretirement survivor annuity as the standard form of early retirement benefit where the plan provides an early retirement benefit, this may require a plan to subsidize in some instances the surviving spouse option or perhaps inequitably charge all participants with certain costs. Where an employee, who does not take early retirement, elects into the preretirement survivor annuity at earliest retirement age without retiring, there are additional costs from, in effect, the insurance protection provided during the period between earliest retirement age and normal retirement age to the surviving spouse. In theory, the plan sponsor could take care of this cost, as discussed below, where participants elect-in by charging the participants directly each year that they have the protection. Clearly, the plan can do so by reducing the benefits of all participants who elect-in and survive until normal retirement age. It has been suggested that under those circumstances an employee might refrain from electing into the preretirement survivor annuity in order to avoid such costs, but nevertheless count on having its protection through being able to retire prior to death, that is, a "death bed" election to retire early. This would represent an acute form of adverse election, which would not be subject to the two-year waiting rule discussed below. Furthermore, there is no requirement of an informed choice as to the election for early retirement as there would be to an election-out or an election-in.


60 Id.
61 See "Recommendations on Spouse Options" at 27,036.
62 Id.
Election-Out From Postretirement Survivor Annuity

To meet ERISA, a plan providing a life annuity must give each participant a reasonable period before the annuity starting date during which he may, in writing, elect-out of the joint and postretirement survivor annuity provision. He must be supplied with a written explanation of the joint and survivor provision, "explained in layman's language, as well as the practical (dollars and cents) effect on him (and his or her spouse)" of making such election-out. Congress believed that regulations should take cognizance of the practical difficulties that certain industries might have in contacting all of their participants—particularly those having multiemployer plans. The term "annuity starting date" is defined as the first day of the first period for which an amount is received as an annuity, whether by reason of retirement or by reason of disability.

The proposed regulations provide that the "reasonable period" for election-out generally must include at least the ninety days before the annuity starting date. But if the requisite written explanation is not provided within the applicable period, the election-out period must be extended at least ninety days following the date it is given. A plan has the option of providing that if a participant notifies the plan administrator less than ninety days prior to the annuity starting date of his intent to terminate employment, the election-out period will end on the later of the annuity starting date or the fourteenth day following such notice. This provision would cover the situation in which a plan permits an employee desiring to take early retirement to do so by notifying the plan administrator within one day of his proposed early retirement date of his intent to retire. In such circumstances, the commencement of pay-
ment of the early retirement benefit frequently would be less than ninety days after the participant's notice to take early retirement. This rule in such circumstances would permit the election-out period to be shortened to two weeks.

The ninety-day period for an election-out postretirement survivor annuity does not mesh very well in a defined contribution plan with the statutory requirement that, unless the participant otherwise elects, the payment of the benefits under the plan to the participant will begin no later than the sixtieth day after (in this context) the date on which the participant attains the earlier of age sixty-five or normal retirement age under the plan.70 In many defined contribution plans, the amount of the participant's account balance cannot be determined for some time following the end of the plan year as of which the trust fund is valued, since the computations of allocations to the participant's accounts of trust income or loss are based upon this valuation. An accounting may be delayed still further until the employer contribution for the plan year has been made.71 Frequently, the final results under these calculations are not available until, at the earliest, sixty to ninety days after the end of the plan year.72 In such circumstances, other proposed Treasury regulations would permit payments to begin within sixty days after allocations to the participants' accounts have been calculated, retroactive to the sixtieth day after the close of the plan year. In that event, the payments would need to begin within sixty days after such allocations, but it would not be possible ninety days prior to the beginning of the payments to give the participant the requisite information as to his account balance and the monthly annuities it would provide. It is this sort of administrative difficulty that will undoubtedly lead most defined contribution plan designers to delete any life annuity option under the plan. It may be noted that while the proposed regulations set forth the ninety-day rule and the seven-day rules discussed below, the temporary regulations state only that the participant will be given a reasonable time in which to make the election.

Within seven days after the first day of the election period, the plan administrator must furnish a written notification in nontechnical terms for the control, disposition, or management of the cash or property received by or contributed to the plan, irrespective of whether such control, disposition, or management is exercised directly by such person or persons or indirectly through an agent or trustee designated by such person or persons." Prop. Reg. § 1.414 (g)-1(b)(4).

70 I.R.C. § 401(a)(14); ERISA § 206(a).
71 By virtue of I.R.C. § 404(a)(7), a contribution can be delayed until the time for filing tax returns for the preceding taxable year (including extensions) and be deemed to have been made on the last day of such year.
72 Prop. Reg. § 1.401(a)-14.
to the participant of the availability of the election-out, of the terms and conditions of the joint and survivor annuity, and of the availability of information as to its financial effect.\textsuperscript{73} Upon subsequent written request, the administrator must furnish, again within seven days, a statement as to the financial effect of the election-out in terms of its effect upon the dollar amount of annuity payments.\textsuperscript{74} This two-step written explanation may help reduce the possibly excessive administrative costs of such explanation, but it seems to circumvent the intent of the statute by placing the burden upon the participant of seeking an explanation of the financial impact of an election. The Conference Committee Report arguably assumes a mandatory explanation of the dollars and cents effect.\textsuperscript{75}

An election must be revocable during the election period, and, after a revocation, new elections may be made during such period.\textsuperscript{76} Such multiple elections constitute the logical concomitant of the statutorily recognized right to revoke an election.\textsuperscript{77}

\textbf{Where No Election-Out Is Required}

Proposed Treasury Regulations Section 1.401(a)-11(c)(1) states that “if a plan provides that a qualified joint and survivor annuity is the only form of benefit payable under the plan, no election need be provided.” It had been argued that a mandatory right to elect out of a joint and postretirement survivor annuity, where a joint and survivor annuity is the normal form, would lead to further burdens on a plan that met the objective of protecting the surviving spouse through subsidization of the survivor annuity. Were such election-out permitted, the plan would be forced to pay a higher single life annuity to a married participant who chose not to protect his or her spouse, or the plan would incur administrative expense in offering participants a meaningless opportunity to

\textsuperscript{73} Prop. Reg. § 1.401(a)-11(c)(3)(i).
\textsuperscript{74} Prop. Reg. § 1.401(a)-11(c)(3)(ii).
\textsuperscript{75} “The employee is to be supplied with a written explanation of the joint and survivor provision, explained in layman’s language, as well as the practical (dollars and cents) effect on him (and his or her spouse) of making an election either to take or not to take the provision. At the same time, regulations in this area should take cognizance of the practical difficulties which certain industries (particularly those having multiemployer plans) may have in contacting all of their participants.” H.R. Rep. No. 93-1280, at 279-80.
\textsuperscript{76} Prop. Reg. §§ 1.401(a)-11(c)(4) and 1.401(a)-11(c)(5).
\textsuperscript{77} I.R.C. § 401(a)(11)(F) provides, as discussed below, that a plan will not be treated as failing to meet the joint and survivor provisions solely because under the plan “there is provision that any election . . . , and any revocation of any such election, does not become effective (or ceases to be effective) if the participant dies within a period . . . beginning on the date of such election or revocation, as the case may be.”
renounce no-cost protection (i.e., cost borne by the employer) where the participant's annuity during the joint life period would not be less than a straight annuity. It was argued that Code Section 401(a)(11)(E) and ERISA Section 205(e) do not require that other benefit options be made available under a plan that provides a joint and survivor annuity as the only form of option, based on the following statement in the Conference Report: "(Of course, a plan may provide that a joint and survivor annuity is to be the only form of benefit payable under the plan, and in this case, no election may be provided)." In fact, the quoted statement is referring to the election-in preretirement survivor annuity, discussed below, and not the election-out postretirement joint and survivor annuity.

The rationale for the exception in the proposed regulations where the qualified joint and survivor annuity is the only form of benefit may be that in such cases the employer bears the cost of the survivor annuity feature (this assumes that a straight life annuity for a single participant and accrued benefit of $10,000 is the actuarial equivalent under the plan of the joint lives annuity of the participant the same age at retirement with a surviving spouse and the same accrued benefit) and,

78 "Recommendations on Spouse Options" at 27,039.
80 "In the case of an employee who is eligible to retire prior to normal retirement age under the plan, and who does not retire, the joint and survivor provisions need not be applicable under the plan, unless the employee makes an affirmative election. . . . (Of course, the plan may provide that a joint and survivor annuity is to be the only form of benefit payable under the plan, and in this case, no election need be provided.)

These rules should help to avoid the situation where an employee who is not yet retired might have his own retirement benefit reduced as a result of inaction on his part and should help to prevent adverse election as against the plan." Id.

Clearly, this discussion only deals with the election-in, and there is no comparable discussion as to the election-out in the legislative history.

81 In other words, it is assumed that the regulation is valid where both a single participant and a married participant of the same age at retirement with the same accrued benefit would receive the same monthly annuity payments during their lives. In addition, after the death of the married participant, his surviving spouse would continue to receive a survivor annuity of, say, 50 percent of the annuity payable to him during their joint lives, or perhaps 50 percent of the annuity that would have been payable to him during their joint lives had his annuity been reduced for the survivor annuity, without any reduction of the joint lives annuity payable to the married participant.

If, however, the plan provides that a survivor annuity is the only form of benefit under the plan, but that the joint life annuity of a married participant will be reduced for the cost of such survivor annuity, then arguably the regulations are invalid. For example, assume that the straight life annuity is 100 and a 50
therefore, the apparent thrust of the legislative history—an employee might have "his own retirement benefit" reduced against his volition\textsuperscript{82)—is satisfied. At least Congress clearly did not want to provide a disincentive to employer subsidization of joint and survivor benefits.\textsuperscript{83} Providing an election-out in such circumstances would create just such a disincentive. However, the regulation seems invalid if it permits preclusion of an election-out where the joint lives annuity of a married participant is less than the straight life annuity of a single participant with the same accrued benefit and life expectancy.\textsuperscript{84} Even if the joint life annuity is not reduced (so that the regulation might be justified on a policy basis), it flies in the face of Code Section 401(a)(11)(E), which flatly states that a "plan shall not be treated as satisfying the [qualified joint and survivor annuity] requirements . . . unless, under the plan, each participant has a reasonable period . . . before the annuity starting date during which he may elect in writing . . . not to take such joint and survivor annuity." The implication is that a plan must provide an optional actuarial equivalent, such as a straight life annuity, to a qualified joint and survivor annuity.

Regardless of the merits of Treasury's policy, unfortunately, plan administrators (and perhaps plan sponsors)\textsuperscript{85} who operate a plan drafted percent survivor annuity would reduce the joint lives annuity to 80. Assume further that the plan provides that the joint life annuity would be 80 and a survivor annuity would be 40 where the participant's surviving spouse was, say, two years younger than he at normal retirement (sixty-five, under the plan). If, in such circumstances, the married participant would receive a joint life annuity of only 80 while a single participant with the same accrued benefit would receive a straight life annuity of 100, it is arguable that the married participant must be given an opportunity to elect-out. In summary, based on the legislative history, only where the joint lives annuity of a married participant, following the above hypothetical, is 100 and the employer subsidizes the survivor annuity of either 40 or 50, can providing an election-out be avoided. In such circumstances to allow an election-out would give a married participant an opportunity of receiving an annuity of, say, 105 or 110 during his life with no survivor annuity. This, Congress clearly did not contemplate.

\textsuperscript{82}H.R. Rep. No. 93-1280, at 279.
\textsuperscript{84}See note 81 supra.
\textsuperscript{85}The term "plan sponsor" is defined in ERISA § 3(16)(B) as (1) the employer in the case of a single employer plan, (2) the employee organization (i.e., union in the case of a plan established or maintained by an employee organization); or (3) in the case of a plan established or maintained by two or more employers or jointly by one or more employers and one or more employee organizations (i.e., a Taft-Hartley § 301 plan), the association, committee, joint board of trustees, or other similar group or representatives of the parties who establish or maintain the plan.
to follow the proposed regulations in this context, are certain to face litigation by married participants who wish a greater straight life annuity benefit.

**Period During Which Postretirement Survivor Annuity Not Required**

H.R. 4200, the Senate bill parent of ERISA, would have required merely that a participant could elect to receive any benefit, payable under the plan as an annuity, in the form of a joint and survivor annuity. Section 1021 (a) of H.R. 2, as passed by the House, revealed upon a very close reading that a joint and survivor annuity was required only where annuity payments to a participant had commenced or where the participant died after his earliest retirement age and before payments to him had commenced (i.e., his annuity starting date). This provision was the genesis of Representative Holtzman's proposed amendment, but the floor debate disclosed that such limitation was intentional in order to minimize increased costs to plans. Code Section 401(a)(11) and ERISA Section 205(b) explicitly provide that a "qualified joint and survivor annuity" (i.e., a postretirement survivor annuity) is not required during the period beginning on the date that the employee becomes a participant in the plan and ending on the later of the date that the employee reaches the earliest retirement age under the plan or ten years (the first day of the 120th month) prior to the date on which he would reach "normal retirement age," defined as the earliest of

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86 H.R. 4200 is set forth below in Appendix C.
87 Representative Holtzman's amendment would have made I.R.C. § 401(a) (11) read in pertinent parts as follows:

(11)(A) A trust shall not constitute a qualified trust under this section if the plan of which such trust is a part provides for the payment of benefits in the form of an annuity and if—

"(i) the participant and his spouse have been married throughout the 5-year period ending on the annuity starting date, or

"(ii) the participant dies after the earliest age at which he acquired nonforfeitable rights, and the participant and his spouse had been married throughout the 5-year period ending on the date of his death, . . .

"(D) for purposes of this paragraph— . . . (iii) the term 'qualified joint and survivor annuity' means an annuity for the life of the participant with a survivor annuity for the life of his spouse which is not contingent upon the survivorship of the participant beyond the earliest age at which he acquired any non-forfeitable rights under the plan and which is not less than one-half of the amount of the annuity payable during the joint lives of the participant and his spouse. . . ."

(1) The plan definition of normal retirement age, or
(2) The later of age sixty-five or the tenth anniversary of beginning participation. 89

Many, if not most, plans define normal retirement age as sixty-five and earliest retirement age as fifty-five. For convenience, the Section 401(a)(11)(B) period will be referred to as the “pre-earliest retirement age period,” and the period beginning thereafter and ending at normal retirement age will be referred to as the “earliest retirement age period.” The term “earliest retirement age” is defined as the earliest date on which, under the plan, the participant could elect to receive retirement benefits. 90

This definition, as well as earlier legislative history, dictates that the earliest retirement age applies on a person-by-person basis. “Thus, if a plan permits retirement as early as age 50 for 30 years of service, but otherwise retirement benefits are to be payable only upon attaining age 65, the earliest retirement age for an employee who began work at 25 would be age 55.” 91 Some plans provide, for example, for early retirement at age fifty and ten years of service with the consent of the company, or early retirement at age sixty and ten years of service without any requirement of company consent. The proposed regulations do not clearly speak to whether “election” by an employee means only an election by him that does not require company consent. Presumably, earliest retirement age is not so limited.

Possibly, employer consent for early retirement is no longer permitted under the Code. Code Section 401(a)(14) states that where a plan provides for the payment of an early retirement benefit, a participant, who has satisfied the service requirement of the early retirement benefit but separated from service (with any nonforfeitable right to an accrued benefit) before satisfying the age requirement for early retirement, must be permitted upon satisfaction of such age requirement to receive at least the normal retirement benefit to which he would have been entitled at normal retirement age, actuarially reduced in accordance with reasonable actuarial assumptions. A participant, who has satisfied any age and service requirements for early retirement (except for employer consent) but has not yet terminated employment, could obtain the same treatment by separating from service and then electing early retirement. A question that neither the Code nor the proposed or temporary regulations answer is whether this rule applies to a plan that does not state eligibility for early retirement benefits in terms of a service

requirement, but does in terms of an age requirement. Arguably, where there is no express service requirement (such as ten years of service) for early retirement, every participant upon entry automatically satisfies the service requirement of the plan. If this construction of the statute is accepted, then in most, if not all, circumstances, employer consent will have no effect on the determination of earliest retirement age.

The pre-earliest retirement age period exclusion from a joint and survivor annuity is backed up by Code Section 411(a)(3)(A) and ERISA Section 203(a)(3)(A), which provide that a right to an accrued benefit derived from employer contributions is not treated as forfeitable for purposes of the minimum vesting provisions solely because the plan provides that it is not payable (i.e., forfeited) to the extent it has not been paid or distributed to the participant prior to his death, unless the qualified joint and survivor annuity rules require payment of a survivor annuity.92 Because this provision constitutes, in effect, part of the definition of "nonforfeitable," it overrides the "nonforfeitable" or complete vesting rule upon termination or partial termination93; but operation of such a provision in a plan might not automatically pass the antidiscrimination requirements of Code Section 401(a)(4).94 Discrimination in operation could conceivably arise where most of the vested accrued benefits deferred until normal retirement age that are wiped out by death prior to normal retirement age are attributable to rank-and-file employees, while most of the prohibited group through longevity reach earliest retirement age and have an opportunity to elect into a pre-retirement joint and survivor annuity.

The proposed regulations patently do not require the payment of a postretirement survivor annuity during the pre-earliest retirement age period.95 As discussed below, they just as clearly require payment of a postretirement survivor annuity as soon as earliest retirement age occurs where the participant commenced receiving benefits prior to earliest retirement age, and as soon as the payment of benefits commences after the end of the pre-earliest retirement age period where the participant terminated employment prior thereto.96 They less obviously address the situation where a participant terminates employment prior to his earliest retirement age and dies prior to the annuity starting date of his deferred vested benefit,97 although clearly he cannot elect into a survivor annuity

95 Prop. Reg. § 1.401(a)-11(d)(1).
96 Prop. Reg. § 1.401(a)-11(d)(2).
after such termination.\footnote{H.R. Rep. No. 93-1280, at 279, provides in pertinent part as follows: 
"In the case of an employee who retires, or who attains normal retirement age, the joint and survivor provision is to apply unless the employee elected otherwise.

"In the case of an employee who is eligible to retire prior to the normal retirement age under the plan, and who does not retire, the joint and survivor provisions need not be applicable under the plan, unless the employee made an affirmative election. Moreover, the plan need not make this option available until the employee is within 10 years of normal retirement age."} The legislative history, however, manifests that a postretirement survivor annuity must be provided only where annuity payments to the participant have commenced (or he has reached normal retirement age and not elected-out) or where he has elected into a pre-retirement survivor annuity and dies prior to his annuity starting date.

**Period During Which a Postretirement Survivor Annuity Kicks In**

If a participant, who has terminated employment, begins to receive retirement benefits during the pre-earliest retirement age period, the proposed regulations provide that he and his spouse must receive after the termination of such period benefits having the effect of a qualified joint and survivor annuity.\footnote{Prop. Reg. § 1.401(a)-11(c)(2)(iii). The proposed regulation gives the example of a plan that provides for early retirement after completion of thirty years of service, commonly called a thirty-and-out plan. An employee commencing employment at age eighteen would be eligible for early retirement at age forty-eight; if the normal retirement age of the plan were age sixty-five, then it would be seven years before “earliest retirement age” under the plan—at which point the survivor annuity requirement attaches. The regulation explains that in such circumstances, unless the employee otherwise elects, the plan must provide a qualified joint and survivor annuity to the employee and his spouse after he reaches age fifty-five or after the date that he would have reached age fifty-five if he had survived. Prop. Reg. § 1.401(a)-11(d)(2)(iii). Another example would be disability retirement prior to age fifty-five.} Moreover, if such a participant dies prior to such period, his surviving spouse must receive a qualified survivor annuity after the date the participant’s pre-earliest retirement age period would have terminated if the participant had survived.\footnote{Prop. Reg. § 401(a)-11(d)(2)(i). These situations highlight the necessity of a plan's requiring as prerequisite to the payment of a survivor annuity that the surviving spouse have been married to the participant at the annuity starting date. Otherwise, such a participant during the potentially long period prior to the earliest retirement age period may marry or remarry and his surviving spouse be entitled to the surviving annuity. Conversely, the plan designer also may wish to require

These provisions of the regulations are bottomed on the fact that, under ERISA, every retirement life annuity, regardless of the annuity starting date, would have to be in the form of a qualified joint and survivor annuity (if the marriage at annuity starting date and other similar
Joint and Survivor Annuities Under ERISA

Preconditions were met and there was no election-out, but for the Section 401(a)(11)(B) pre-earliest retirement age period exception, which explicitly only exempts a plan from providing a qualified joint and survivor annuity during such pre-earliest retirement age period. Once that period is over, the general rule under Code Section 401(a)(11)(E) providing for an election-out nicely falls into place in this context. A participant commencing to receive a life annuity during the pre-earliest retirement age period (during which the plan does not have to provide a postretirement survivor annuity) must be given an opportunity prior to his annuity starting date to elect-out of a qualified joint and survivor annuity as to the period commencing upon the termination of his pre-earliest retirement age period. Thus, the election period would be computed with reference to the annuity starting date and not the later date that the "earliest retirement period" commenced. This is an exceedingly intricate provision, but required by the statute.

Also, where a participant terminates employment and begins to receive benefits after termination of his pre-earliest retirement age, he and his spouse must receive benefits having the effect of a qualified joint and survivor annuity unless he has elected-out. As discussed above, however, after termination of such period, but prior to the annuity starting date, a terminated or separated participant who had not begun to receive life annuity payments would not be able to elect into a qualified joint and survivor annuity. However, if such a terminated participant had satisfied the plan's service requirement for early retirement, he could elect early retirement at earliest retirement age under the plan and thus obtain a postretirement survivor annuity.

Preretirement (Election-In) Survivor Annuity

Congress reasoned that if an employee could obtain survivor annuity protection for his spouse only by retirement, including early

that the surviving spouse have been married to the participant at the time of his death, because otherwise a divorced spouse who was married at the annuity starting date might claim that he or she was entitled to a survivor annuity. The one potentiality concerning divorce, marriage, and remarriage that the regulations clearly preclude a plan from covering is that of cutting off the surviving spouse if he or she remarries after the participant's death. See Prop. Reg. § 1.401(a)-11(b)(1).

101 See I.R.C. § 411(a)(11)(E). This explains the otherwise puzzling impact of this provision upon an early retirement or disability more than ten years prior to normal retirement age or a disability retirement prior to such period. An election-out is provided even though at such time there is no survivor annuity; the survivor annuity attaches only after earliest retirement age.

retirement (as discussed above), and its attendant mandatory post-retirement joint and survivor annuity, there would be an "unwarranted artificial incentive" to exercise early retirement rights if available.\textsuperscript{103} Congress "concluded that it was preferable not to provide an artificial stimulus to exercise of these rights (or an added cost to the providing of these rights) of the sort that would result from requiring a survivor annuity to be paid only when the basic annuity was already in pay status." \textsuperscript{104} This was the genesis of the preretirement survivor annuity.

**Election-In Requirement**

Code Section 401(a)(11)(C) and ERISA Section 205(c)(1) literally mandate that any plan that provides for the payment of (life annuity) benefits before the normal retirement age also must provide a participant with a reasonable period during which he may elect into a survivor annuity to be payable on his death if it occurs during the period beginning with the date on which the pre-earliest retirement age period ends and ending on the date he reaches normal retirement age "if he continues his employment during that period." \textsuperscript{105} In short, the election-in survivor annuity may be viewed as a "boots on" survivor annuity—it applies where the participant dies before retirement ("with his boots on") after reaching his earliest retirement age under the plan. The joint and survivor or election-out annuity, in contrast, applies only where the participant has retired and then dies.

The election-in period is parallel to the election-out period. The election-in period must begin no later than ninety days before the end of the pre-earliest retirement age period.\textsuperscript{106} Where a plan uses the up-to-two-year waiting period limitation on elections, discussed below, the ninety-day election period is added to the end of the waiting period.\textsuperscript{107} The seven days and content requirements of the written explanation and furnishing of financial effect information by the plan administrator are identical to the election-out notification requirements.\textsuperscript{108}

\textsuperscript{103} H.R. Rep. No. 93-807, at 67.

\textsuperscript{104} Id.


\textsuperscript{106} Prop. Reg. § 1.401(a)-11(d)(3)(iii).

\textsuperscript{107} "For example, if a plan provides that an election made under this subparagraph does not become effective if the participant dies less than 2 years after the date of such election, the period for making an election under this paragraph must begin not later than 2 years and 90 days before the date on which the period described in subparagraph (1) of this paragraph ends." Prop. Reg. § 1.401(a)-11(d)(iii).

Continued Employment

Code Section 401(a)(11)(C) provides that a “plan described in subparagraph (B) [one that provides for payment of benefits before normal retirement age] does not meet the requirements of subparagraph (A) [benefits payable in the form of an annuity must be payable in a form having the effect of a qualified joint and survivor annuity] unless, under the plan, a participant has a reasonable period during which he may elect the qualified joint and survivor annuity form with respect to the period beginning on the date on which the period described in subparagraph (B) ends [the later of the date the employee reaches the earliest retirement age under the plan or the first day of the 120th month beginning before the date on which the employee reaches normal retirement age] and ending on the date on which he reaches normal retirement age . . . if he continues his employment during that period.” (Emphasis added.)

There are at least three possible constructions of the “continued employment” requirement in the context of an election-in. The first is that the continued employment requirement refers only to the period during which the election-in may be made. Under this construction, once a participant terminated his employment, he would not be permitted to make an election-in unless he was subsequently reemployed; but, presumably, if an election-in had already been made prior to termination, the election would continue in effect until normal retirement age or, if earlier, the date to which payment of the deferred vested benefit was postponed. The second construction is that the phrase “continues his employment during that period” modifies only normal retirement age. Under this reading, the phrase would apply primarily to situations in which normal retirement age requires both an age and a service requirement. The third construction is that survivor annuity payments under the qualified joint and survivor annuity would not be made if a participant had terminated his employment prior to his death.

The proposed regulations appear to adopt the first construction. In Proposed Treasury Regulations Section 1.401(a)-11(d)(3)(i)(A), the draftsmen of the regulations follow a paraphrase of the statute quoted above with the statement that “breaks in service during that period will neither invalidate a previous election or revocation nor prevent an election from being made or revoked during the election period.” The easiest, but not sole, reading of this provision is that if a participant who has elected-in subsequently terminates his employment and incurs a break in service, the previous election will continue to be valid. Thus, if he dies prior to his normal retirement age, his surviving spouse will receive a survivor annuity. A further indication that the proposed regulations adopt this interpretation is that the election period for an
election-in, as a general rule, is the period beginning not later than ninety
days before the date on which the pre-earliest retirement age period
ends “and ending on the date the participant terminates his employ-
ment.” 109 If an election-in had no effect once a participant terminated
his employment, there would be no need to cut off the right to so elect
with termination of service. In addition, the proposed regulations also
illustrate these provisions with an example in which the “plan must allow
a participant who continues his employment [after the earliest retirement
age under the plan] to elect a survivor annuity . . . to be payable on the
death of the participant if death occurs after . . . the earliest retirement
age . . . but before the date the participant reaches normal retirement
age (age 65).” 110 Again, continued employment seems only a prereq-
usite to electing.

The construction of continued employment as merely modifying
normal retirement age can only be reached by a strained reading. If
continued employment meant that normal retirement age (and, hence,
end of the election-in period) could be attained only by employees who
actually reached normal retirement age while satisfying any service
requirement, then the election-in period would never end as to employees
who terminated employment prior to attaining the service requirements
for a normal retirement age within both age and service requirements,
such as attainment of age sixty-five and completion of ten years of
service. If the phrase were intended as a constructive satisfaction of any
service requirement, then it more properly would have read “if he con-
tinued his employment during that period.” Thus, one may conclude
that the continued employment requirement does not have any relation-
ship to normal retirement age.

The construction of continued employment as a prerequisite for
payment of an election-in survivor annuity arises under a reading of the
statute in which the qualified joint and survivor annuity form is payable
with respect to the period beginning on the date which the pre-earliest
retirement age period ends and ending on the date that he reaches
normal retirement age only if the participant continues employment dur-
ing that period (until his death). This reading is not particularly strained
and, on a limited policy basis, could be justified as consistent with the
obvious goal of obtaining parity between a participant who had attained
earliest retirement age and did not retire and a participant who did retire
at such age. For, a terminated participant usually is not permitted to
take early retirement after attainment of the earliest retirement age if he
is no longer employed by the company (unless he has satisfied any
service requirement for early retirement). Moreover, the statute does

not require that a terminated employee with a deferred vested account who terminated employment prior to earliest retirement age and prior to the availability of an election-in be afforded an opportunity to elect-in to a qualified joint and survivor annuity. The proposed regulations could even be read as consistent with this construction if the provision that breaks in service during the earliest retirement age period do not invalidate a previous election were read as simply providing that, to use pre-ERISA terminology, there is no “continuous service” requirement, the participant only need be employed at his death during the election-in period; that is, prior breaks in service so long as followed by subsequent reemployment are of no consequence.

While the payment contingent on continued employment reading is a permissible reading, is supported or, perhaps better, not contradicted, by the purpose of the election-in provision (not to provide an unwarranted incentive to a participant employed after his earliest retirement age to elect early retirement), and both the Code provision and the provisions in the regulations are ambiguous to a degree, the draftsmen of the legislation properly chose the first construction, albeit ambiguously. Otherwise, a participant who has attained earliest retirement age and who has elected into a joint and survivor annuity benefit would be greatly surprised to find that his election-in would no longer be effective if he were discharged prior to normal retirement age. Consequently, the first construction of this provision is likely to prevail, although it is hoped that the final regulations will more clearly illustrate that this is the construction the draftsmen chose. This construction, of course, will result in greater costs to be borne by the plan sponsor if it subsidizes survivor annuities or by the remaining participants who elect-in and survive until normal retirement age.

Continued employment is only a requirement in the context of a preretirement survivor annuity. A participant who has reached earliest retirement age under the plan would be able (since by definition he would have satisfied any service and age requirement for early retirement) to terminate his employment and then elect early retirement as discussed above. Such early retirement would trigger a postretirement survivor annuity, unless the participant elected-out. However, many participants probably would not elect early retirement, even though they terminated their employment, in order to avoid the actuarial reduction for an early retirement benefit. In such circumstances, the question whether there is a continued employment at death requirement for a preretirement survivor annuity becomes critical.

111 Pre-ERISA plans frequently required as a condition for credited service for purposes of vesting or eligibility, for example, that the employee have continuous employment, unbroken by a break in service.
Amount of Preretirement Survivor Annuity

Floor on Election-In Survivor Annuity

By virtue of the last sentence of Code Section 401(a)(11)(C) and of ERISA Section 205(c)(2), the payments under the election-in preretirement survivor annuity can be no less than "the payments which would have been made under the joint annuity to which the participant' would have been entitled, if he had elected-in immediately prior to his retirement (which is deemed to have occurred on the day before his death and within the period within which an election can be made).

Three possible interpretations of this provision would be that the survivor annuity cannot be less than

1. "[T]he [survivor annuity] payments that would have been made under the joint [and survivor] annuity to which the participant [and his surviving spouse] would have been entitled . . . ," in which case the survivor annuity would be the actuarial equivalent of the survivor annuity only of the joint and survivor annuity;

2. "[T]he payments which would have been made under the joint [and survivor] annuity to which the participant [and his spouse] would have been entitled . . . ," in which case the survivor annuity could be no less than the actuarial equivalent of a single life annuity for the life of the participant; or

3. "[T]he payments which would have been made under the joint annuity to which the participant would have been entitled [during the joint lives of him and his surviving spouse]," in which case the survivor annuity could be no less than the actuarial equivalent of the joint lives annuity reduced for the survivor annuity.

These three alternatives may be illustrated by applying them to the following hypothetical taken from the proposed regulations: "A participant is entitled to a single life annuity of $100 per month or a reduced amount under a qualified joint and survivor annuity of $80 per month. . . ." 112 Under the first construction, the election-in preretirement survivor annuity could be no less than $40; under the second, no less than $100; and under the third, no less than $80.

Only the third alternative is consistent with the literal language of the statute. However, the proposed regulations have chosen the first alternative:

For example, if a participant is entitled to a single life annuity of $100 per month or a reduced amount under a qualified joint and survivor annuity of $80 per month, regardless of when he makes a valid election [-in] . . . his spouse is entitled to a payment of at least $40, but not more than $80 per month, under the survivor annuity.118

The strongest policy argument in favor of the proposed regulation's choice of a 50 percent survivor annuity floor is that upon retirement the survivor annuity may be as low as 50 percent of the joint (lives) annuity (with it being unclear whether the particular percentage must be a matter of participant choice or can be predetermined by plan design) and the preretirement surviving spouse should fare no better. Furthermore, under the House bill the survivor annuity upon either a pre- or postretirement death of the participant would have been the survivor annuity of a "qualified joint and survivor annuity" with a 50 percent floor.

An argument in favor of the second alternate of a floor which is the actuarial equivalent of a single life annuity for the life of the participant, is that a qualified joint and survivor annuity must constitute such equivalent; since there will be no joint lives annuity when the participant dies prior to retirement, the survivor annuity alone in such circumstances should constitute such equivalent. This argument on a policy basis has merit, for, under the "in lieu of other compensation" concept, a preretirement survivor annuity should constitute such equivalent—the surviving spouse should receive the vested accrued value that the participant would have received—and, in many defined contribution plans, the surviving spouse does receive the accrued benefit of the participant (his account balance) upon his death. However, such construction requires almost as many emendations of the received text as the first construction.

The third alternate of a floor of 100 percent of the joint lives annuity payable during the life of the participant (which is less than a straight life annuity since reduced for the survivor annuity), is the only natural reading of the statute. "[J]oint annuity to which the participant would have been entitled" clearly refers to "the annuity payable during the joint lives of the participant and his spouse" to which the participant would have been entitled had he elected-in, and then retired on the day before his death. Assuming no drafting error, it is probable that the statute limited the 100 percent floor to the joint lives annuity rather than the greater participant's single life annuity in order to achieve more parity with the same age participant who had elected early retirement; the 100 percent floor of the statute rather than 50 percent floor, on the other hand, probably reflects a desire to put the surviving spouse

118 Id.
more nearly in the shoes of the participant when he never retired and did not receive any of his annuity.

The proposed regulations probably chose an election-in 50 percent floor on the theory that the 100 percent joint lives floor in Section 401 (a) (11) (C) constituted a drafting error—the election-in and -out floors were intended to be identical. Regardless of whether that is the case, or whether the 50 percent floor is preferable as a policy matter, the regulation's choice places plan administrators and sponsors in an unfortunate position: if the plan adopts the 50 percent floor sanctioned by the regulations, a well-informed surviving spouse of a deceased participant who elected-in may well sue for a 100 percent floor survivor annuity under Title I, as required by the statute. The only safe answers are for plans to provide a 100 percent floor or for Congress to implement remedial legislation.

If a plan provides an employer-subsidized postretirement joint and survivor annuity, an interesting question arises as to whether the pre-retirement survivor annuity must be equal to the subsidized survivor annuity benefit. For example, following the above discussed hypothetical of the straight life annuity being 100 and the joint lives annuity being 80 where the survivor annuity is 40, assume that a plan provides that at retirement the joint lives annuity is 100 and the surviving spouse is given a subsidized annuity of, say, 50. The question is whether under the proposed regulations the election-in survivor annuity must be 50 or whether it can be 40. As a policy matter, the employer should be permitted to subsidize one survivor annuity and not another, since it is not required to subsidize either. However, the statute measures the election-in survivor annuity, according to the regulations, by reference to the survivor annuity that the surviving spouse would have had had the participant retired the day before his death. Presumably, were the plan to say nothing else, the participant would have had a joint lives benefit of 100 and his surviving spouse would have had a survivor annuity of 50 had he retired on the day before his death. Apparently, however, the plan can provide that for purposes of an election-in survivor annuity, the retirement benefit to which the participant would have been entitled immediately before his death (and the nonsubsidized survivor annuity to which his spouse would have been entitled) will differ from the unreduced joint lives retirement benefit and subsidized survivor annuity of an actual retirement. Hopefully, some less awkward drafting means of accomplishing the same objective would be permitted under the final regulations.

The probably more significant question whether the preretirement

114 See notes 149 and 150 infra and accompanying text.
survivor annuity can be actuarially reduced for the "cost of coverage" from earliest retirement age until the participant's death prior to normal retirement age is discussed below under "Actuarial Costs."

**Ceiling on Preretirement Survivor Annuity**

The proposed regulations may impose a 100 percent of the hypothetical joint lives annuity ceiling upon the preretirement survivor annuity parallel to the statutory ceiling on the postretirement survivor annuity.\(^{115}\) Code Section 401(a)(11)(C) does not speak explicitly to any ceiling. While such a ceiling is required as to the "standard benefit" (joint and postretirement survivor annuity), where it poses no problems, there is argument that it is not required as to an election-in preretirement survivor annuity. The reasoning is that the term "survivor annuity" is not defined in the statute, only the term "qualified joint and survivor annuity." In the case of an election-in, by definition there is no joint lives annuity since the participant does not receive payments during the joint lives of himself and his spouse. The "definition" of a preretirement survivor annuity is found in Code Section 401(a)(11)(C), which requires that "the payments under the survivor annuity are not less than the payments that would have been made under the joint annuity which the participant would have been entitled if he made an election . . . immediately prior to his retirement and if his retirement had occurred on a day before his death and within the period within which an election can be made." This language contains a floor on the preretirement survivor annuity, but not a ceiling.

In summary, arguably there is no 100 percent ceiling on the election-in survivor annuity. The proposed and temporary regulations appear confusing on this point. The main body of the regulations as to payments under the preretirement survivor annuity speaks only to a floor:

> [I]f an election is made, the payments under the survivor annuity must not be less than the payments that would have been made under the joint survivor to annuity to which the surviving spouse would have been entitled if the participant had made the election . . . immediately prior to his retirement. . . .\(^{116}\)

However, the example accompanying this statement in the regulations provides that "if a participant is entitled to a single life annuity of $100 per month or reduced annuity of $80 a month, . . . his spouse is entitled to a payment of at least $40 but not more than $80 per month,\(^{115}\) Prop. Reg. § 1.401(a)-11(d)(3)(v).

under the survivor annuity."  

If this is intended merely as an illustration of a particular plan and not as a limitation of a preretirement survivor annuity to a joint lives ceiling, the example is particularly unfortunate.

The counterargument, based on the statute, is that the election-in constitutes a right to "elect the qualified joint and survivor annuity form," and such form clearly contains a 100 percent ceiling. In any event, such a 100 percent of the joint lives annuity ceiling on the preretirement survivor annuity poses potential drafting and administrative problems for plans other than "uninsured" defined benefit plans, such as defined contributions plans or insurance contract defined benefit plans, that typically provide a survivor's death benefit equal to the participant's account or reserve. Such death benefit would be in excess of any 100 percent of the joint lives annuity ceiling, so that if such a ceiling were imposed, participants might have to be given a meaningless, but administratively costly (due to explanation requirements), election to give their spouse a greater death benefit over a lesser survivor annuity. The point is that defined contribution plans that seek to eliminate the costs of providing notice and explanations (since they already automatically provide a survivor benefit) may wish to always provide a "survivor annuity" in order to avoid giving notice of elections and, most importantly, to avoid the cost of actuarial studies of the dollars and cents effect upon a participant where the plan would not otherwise need the services of an actuary. An alternative may be available in that a surviving spouse may elect to have benefits paid in a form other than a qualified joint and survivor annuity, with no apparent requirement of a "written explanation" so that the plan may provide a preretirement survivor annuity equal to 100 percent of the joint lives annuity and give the surviving spouse an optional death benefit, i.e., the full account balance or reserve, as the case may be.

Where No Election-In Is Required

Proposed Treasury Regulations Section 1.401-(a)11(d)(3)(i)(B) provides that if a survivor annuity is the only form of benefit payable under the plan, no election-in need be provided. The Conference Report similarly states that a plan may provide that a joint and survivor annuity is the only form of benefit payable under the plan, in which case no election-in need be provided. Literally, however, Code Section 401

117 Id.
118 Prop. Reg. § 1.401(a)-11(a)(1).
(a)(11)(C) and ERISA Section 205(c) indicate that the election-in option must be provided as to any plan which provides for prenormal retirement age benefits (which is consistent with the rationale for the election-in—to avoid any artificial stimulus to take early retirement in order to obtain survivor annuity protection). On the other hand, it could be argued also that the reference in Code Section 401(a)(11)(C) to a “plan described in subparagraph (B)” means a plan that provides prenormal retirement age benefits but does not provide a survivor annuity as to the pre-earliest retirement age period (which Code Section 401(a)(11)(B) sanctions). Under this reading, the language of the statute would imply that an election-in must be provided unless the plan provides for a mandatory joint and survivor annuity as to the pre-earliest retirement age period as well as during the earliest retirement age period itself. This reading is supported by the statement in the Conference Report as to there being no need for an election-in; presumably, the plan must provide that a preretirement survivor annuity is always payable from participation (or earliest retirement age?), and, possibly, at actual retirement the only benefit must be a qualified joint and postretirement survivor annuity (with no election-out). The proposed and temporary regulations do not clarify these points.

While this approach has surface simplicity, other elements of the legislative history indicate that a plan might not be able to provide a mandatory joint and survivor annuity (with no election-out) during the period beginning with earliest retirement age and ending on normal retirement age. New Code Section 401(a)(11)(A)(ii), as set forth in Section 1021 of H.R. 2, as passed by the House, would have required a plan to provide for the payment of annuity benefits in a form having the effect of a qualified joint and survivor annuity if a participant died after his earliest retirement age and before the annuity starting date (provided that the participant and his spouse had been married throughout the five-year period ending on the date of his death). This provision obviously required a mandatory survivor annuity where the participant met the other qualifications, even if he had not retired on or after his earliest retirement age where he died before his annuity starting date. Under standard legislative construction, where this mandatory requirement was abandoned in final Code Section 401(a)(11)(B) and replaced by an optional election-in, a strong legislative history argument could be made that a mandatory survivor annuity during this period is certainly not required by statute and probably not permitted.

Moreover, the Conference Report seems to support in other places an argument that a plan may not require a mandatory survivor option since it states that “these [election-in] rules should help to avoid the situation where an employee who had not yet retired might have his
own retirement benefit reduced as a result of inaction on his part. . ." 120
This would seem to refer to the fact that Congress did not intend to require a plan to "subsidize a joint and survivor annuity." If a plan could charge, i.e., reduce the retirement benefit of, all participants who survive the period from earliest retirement age to normal retirement age and who retired at normal retirement age with a pro-rata portion of the costs as to a mandatory survivor annuity protection during this period, 121 the result would be that an employee who had not yet retired would have his own retirement benefit reduced without action on his part. This would not be the result, however, in a defined contribution or insurance contract plan, or in a defined benefit plan if the employer bears the cost; that is, the straight life annuity of a single participant and the joint life annuity of a married participant of an equal life expectancy and accrued benefit are actuarially equivalent. As a policy matter, such plans should be able to provide a mandatory survivor annuity, as the proposed regulations permit. Despite the contrary implications of the statute, this provision is likely to be upheld by reason of the passage in the Committee Report cited above, at least where the retirement benefit of the participant would not be reduced for the cost of his pre-retirement annuity benefit.

Preretirement Survivor Annuity and Terminated Participants

Under Code Section 401(a)(14) and ERISA Section 205(a), a plan must provide that, unless a participant otherwise elects, payment to him of benefits under the plan will begin not later than the sixtieth day after the close of the plan year in which (1) the participant attains the earlier of age sixty-five or plan normal retirement age; (2) the tenth anniversary of the year in which the participant commenced participation in the plan occurred; or (3) the participant terminated service with his employer. 122 Many plans provided under old law, and will continue to provide under this provision, that payment of a vested benefit of a participant who has separated from service will be deferred until his normal retirement age. By virtue of Code Section 401(a)(11)(B) and ERISA Section 205(b), the plan would not have to provide a survivor annuity as to such a withdrawn participant for the pre-earliest retirement age period. In addition, under Code Section 401(a)(11)(C) and ERISA Section 205(c), the plan would not have to provide him an election-in to a joint and survivor as to the period beginning with earliest retirement age and ending on normal retirement age, since he is not

120 Id.
121 "Recommendations on Spouse Options" at 27,023.
122 See Prop. Reg. § 1.401(a)-(14)(a).
continuing his employment during such period. As a consequence, no preretirement survivor annuity has to be provided as to a deferred vested accrued benefit of a withdrawn participant until the annuity starting date of such benefit. As discussed above, the death of such a terminated employee prior to the annuity starting date of his deferred vested benefit relieves a plan of any statutory obligation to provide a survivor annuity. Moreover, Code Section 411(a)(3)(A) and ERISA Section 203(a)(3)(A) do not require a different result by virtue of the minimum vesting standards. However, as discussed above, it is conceivable that in some circumstances the antidiscrimination requirements of Section 401(a)(4) might require a survivor annuity at least as to the present value of the accrued vested benefit in some circumstances and at least after attainment of early retirement age.

Preretirement Survivor Annuities and Defined Contribution Plans

As discussed in the Introduction, defined contribution plans under prior law commonly provided that a participant’s account was fully vested upon his death or disability prior to normal retirement age, and also frequently provided that, at retirement, a participant’s account balance could be applied under several alternative options, usually including a lump-sum distribution, the purchase of a straight life annuity, or combinations thereof.123 With this background, two questions arise: (1) May defined contribution plans take advantage of the broad exceptions to survivor annuities contained in ERISA; and (2) conversely, assuming that defined contribution plans retain full vesting of the participant’s account balance on death or disability, what effect do the joint and survivor affirmative rules have upon such plans?

Code Section 411(a)(3)(A) and ERISA Section 203(a)(3)(A), in providing that the right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because under the plan it is not payable if the participant dies (except in the case of a survivor annuity which is payable as provided in the qualified joint and survivor annuity provisions), do not distinguish between defined contribution and defined benefit plans. Therefore, for purposes of the minimum vesting provisions, a defined contribution plan need not provide that a participant’s account balance from employer contributions be fully vested upon his death or that a survivor annuity be available except where required by the qualified joint and survivor benefit rules, that is, an election-in at earliest retirement age and the standard joint and survivor annuity benefit after earliest retirement age (whether as

123 See notes 5 through 7 supra and accompanying text.
to disability or early retirement or normal retirement) for any annuity payment. In particular, a participant’s vested account balance, payment of which is deferred until normal retirement age, could be forfeited in a defined contribution plan under the above provisions if a participant died prior to normal retirement age. Had Congress thought about this, it surely would have distinguished between defined contribution and defined benefit plans, since the balancing aspect of making the plan into an insurance plan would not be applicable here, at least if a defined contribution plan were required to fully vest a participant in his account balance (in lieu of a survivor annuity). However, Congress failed to appreciate the distinction between the two types of plans, as is the general situation throughout ERISA. That being the case, there may well be plans currently providing that account balances are fully vested in the event of death or permanent disability, that inequitably may wish to provide that such account balances are forfeited except where the survivor annuity provisions apply; in which case, the account balance would be applied to the purchase of a survivor annuity (with the balance of the account balance being forfeited).

The first question is whether Code Section 411(a)(10) and ERISA Section 203(c)(1) would apply to a plan amendment deleting full vesting of account balances upon death or disability and substituting a survivor benefit only where required under joint and survivor annuity rules. Code Section 411(a)(10)(A) provides that a plan amendment changing any vesting schedule under the plan shall not be treated as satisfying the minimum vesting requirements of 411(a)(2) if the nonforfeitable percentage of the accrued benefit derived from employer contributions of any employee who is a participant under the plan is less than such nonforfeitable percentage computed under the plan without regard to such amendment. Code Section 411(a)(b) in turn provides that any participant with not less than five years of service must be permitted to elect to have his nonforfeitable percentage computed under the plan without regard to such amendment in order for the plan amendment changing any vesting schedule to be treated as satisfying the requirements of Code Section 411(a)(2). The catch is that since Code Section 411(a)(3)(A) provides that “a right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that it is not payable if the participant dies (except in the case of a survivor annuity payable as provided in Code Section 401(a)(11)),” in ERISA terms, there has not been a change in the “nonforfeitable percentage” of the accrued benefit by virtue of such an amendment, since an accrued benefit that is not payable by reason of death is not treated as being forfeitable. Thus, it is difficult to say that the nonforfeitable interest of the participant has decreased,
and, in any event, Code Section 411(a)(10) speaks to a change in the "nonforfeitable percentage" of the accrued benefit. Similar reasoning applies to the provisions of Title I. Whether this would also be the case where the plan changed from, say, a lump-sum death benefit to a survivor annuity is a harder question.

As discussed above, it is possible, however, that the nondiscrimination requirements of Code Section 401(a)(4) might apply to such an amendment. This may be the only resort of a participant who finds that he has been deprived of the right to a vested account balance payable upon death or disability through amendments adopting instead the minimum survivor annuity, since, by virtue of the preemption provisions of ERISA Section 514(a), only ERISA applies to the substantive issue.

Permitted Antiadverse Selection Rules: Marriage Requirements

The joint and survivor annuity provisions of H.R. 2, as passed by the House, provided that a plan was not required to provide a survivor annuity unless the employee had been married throughout the five-year period ending on the annuity starting date or, in the case of a participant who died after his earliest retirement age before the annuity starting date, the participant and his spouse had been married throughout the five-year period ending on the date of his death. This was done, according to the House Ways and Means Committee Report, so that plans could provide reasonable protection against adverse selection such as might occur, "for example, where a single person 'marries' immediately before retirement, retires, and then chooses to take heavily subsidized joint and survivor benefits in the form of a lump-sum distribution. Although your committee's bill does not require joint and survivor benefits to be subsidized (i.e., to be in excess of the actuarial value of a single-life annuity), neither does your committee wish to provide a disincentive to such subsidized benefits." 124

This five-year waiting period was criticized heavily by Representative Shirley Chisholm (D-N.Y.). She suggested that the election-out provision of the House bill should require approval of both spouses, and, in addition, she thought that the five-year marriage period ending on the annuity starting date, or on the date of the death of the participant who did not retire at early retirement age requirement, was unreasonable. In her opinion, the incidence of May-December marriages based upon statistics was not large at all. "It is an insulting restriction upon

our senior citizens and could work a real hardship on older ‘newly-weds.’”

She had been informed upon earlier inquiry that the requirement was included to protect a pension fund from being drained by survivors who marry participants much older than themselves. Allegedly, this had been a problem with survivors of black-lung patients.

“This may happen on occasion, but I do not believe that the incidence of May-December weddings is really any of our business. It is a bit of an insult to any older citizens to suggest that we have any business in placing restrictions upon whom and when they should marry.

“While it may be interesting to take this issue to court to see what kind of opinion Justice Douglas might write, I would suggest that the Section be deleted before it has to be taken to court.”

Code Section 401(a)(11)(D) and ERISA Section 205(d) have shortened the five-year marriage requirement to an optional one-year marriage requirement. Thus, a plan may, but is not required to, provide that the spouse of a participant is not entitled to receive a survivor annuity (whether or not the participant had elected-in as to the period between earliest retirement age and normal retirement age), unless the participant and his spouse have been married throughout the one-year period “ending on the date of such participant’s death.” In contrast, the Conference Report states that “when a plan provides for a retirement benefit in the form of an annuity, and the participant has been married for the one-year period ending on the annuity starting date, the plan must provide for a joint and survivor annuity.” The problem here is that sound administrative and proper plan drafting demand that a plan be able to require the surviving spouse to have been married to the participant at two points: the annuity starting date (in the case of the standard joint and survivor benefit at retirement, whether disability, early or normal), and the date of death (primarily for the election-in preretirement survivor annuity). Only with an annuity-starting-date marriage requirement can the plan handle the problems arising where a participant begins to receive his retirement annuity payments and then later either marries a second spouse, or marries for the first time a spouse as to whose life expectancy no reduction has been made in his now joint lives annuity. The one-year marriage requirement at death, in turn, is needed to forestall the adverse selection problems of election-in. Its use with a standard joint and survivor annuity benefit primarily would be to handle problems of divorce. The proposed regulations

126 Id.
acknowledge the necessity of permitting a marriage requirement at two points by providing that a “plan shall be treated as satisfying the require-
m ents of this section even though it requires the participant and his
spouse to have been married to each other on the annuity starting
date.”

The House bill also had taken such a bifurcated approach by turn-
ing the five-year waiting period on the annuity starting date where the
benefit was in pay status (whether by reason of retirement or by reason
of disability) and, in contrast, by measuring the five-year waiting period
with reference to the date of the participant’s death where he died after
his earliest retirement age but before the annuity starting date.

The above-cited passage in the Conference Report apparently refers
to the mandatory joint and survivor annuity where the joint lives annuity
is in pay status, and not to the preretirement survivor annuity. In con-
trast, the drafters of the statute, surely in an oversight, refer only to
the one-year period ending on the date of the participant’s death, that,
in proper legislative drafting, would have been limited to the election-in
situation. Undoubtedly, the error in drafting arose due to the imme-
diately preceding parenthetical that referred to the election-in joint and
survivor annuity. However, following the literal language of the statute,
and applying traditional rules of statutory construction to the facts that
the prior House bill distinguished between participants who had begun
to receive an annuity and those who died before the annuity starting
date but after the earliest retirement age (but the final version on its
surface does not so distinguish), one is led to the conclusion that the
literal language of the statute must be followed and the appropriate
reference for both situations is the date of the participant’s death. The
counterargument would be that the legislative history precludes only
using a one-year of marriage requirement before the annuity starting
date, but not a requirement solely of marriage on the annuity starting
date.

As indicated above, following the literal language of the statute,
however, as to the postretirement joint and survivor annuity benefit,
creates a host of apparently insoluble problems. For example, a plan
might have to provide a survivor annuity where a participant is single
at retirement (and, hence, commences benefits with an unreduced annu-
ity even if he did not elect against a joint and survivor, because it would
not be possible to actuarially reduce his annuity during the “joint lives”
period since there is no other life to take into consideration) and later
marries more than one year prior to death. The alternate of making

128 Prop. Reg. § 1.401(a)-11(e)(1).
a single participant elect with respect to a retirement or disability benefit against the joint and survivor annuity, assuming arguendo that a plan could require such an election or in the absence of an election could somehow reduce the straight-life annuity of the single participant, is not easy since the explanation of the effect of a joint and survivor annuity becomes almost impossible. Try to explain to a seventy-year-old late-retiring widower the reduction that would occur if he married a twenty-one-year-old bride anytime during, say, the next five years.

A different problem is that of a participant married at his annuity starting date to a wife, say, two years younger, who subsequently dies; and he remarries a substantially younger second wife. Following the literal words of the statute, if the second wife is married to him throughout the one-year period ending at the time of his death, she would be entitled to a survivor annuity, although in fact its value could be substantially greater than the survivor annuity to which the former wife would have been entitled (since the younger, second wife would have a longer life expectancy and would receive more annuity payments), and upon which the lesser reduction in the participant's joint life annuity was made. This problem would of course be avoided if there were a requirement that the spouse had been married one year at the annuity starting date, as was clearly the case in the House bill.

The proposed regulation obviates these problems by permitting as a prerequisite for a postretirement survivor annuity that the survivor have been married to the deceased participant on his annuity starting date. Note that the permitted marriage requirement is simply marriage on the annuity starting date and not a permitted requirement of marriage throughout the one-year period ending on the annuity starting date. The problems discussed above are readily soluble by permitting a requirement of marriage at an annuity starting date and are not really problems arising from a potential adverse election. Consequently, the draftsmen's choice was a wise one. However, surviving spouses who are married to a retired participant one year prior to his death are bound to sue the plan for a survivor annuity based upon the literal language of the statute and classical construction according to legislative history. Again, remedial legislation is the only sure solution.

Divorce and Remarriage

The Code and the proposed and temporary regulations do not expressly speak to joint and survivor annuities in the context of divorce. However, following the literal language of the Code and the regulations

129 Id.
a plan could provide that no postretirement annuity is available where the surviving spouse is not married to the participant throughout the one-year period prior to his death, and could thereby cut out a postretirement annuity for a divorced spouse if she were divorced one year or more prior to the participant's death. If the plan did this, an interesting question would arise as to the effect upon the participant's now single life annuity. One possibility would be to reinstate for such participant a single life annuity retroactively, perhaps with a lump-sum distribution attributable to increases to the past, and an increase in monthly payments for the remainder of the participant's life. While a strong case may be made that the husband's payments should be increased to a straight life annuity from the point of one year after the divorce on, some plans might discount in advance for divorces similar to separations from service prior to full vesting. If this were the case, then a lump-sum distribution attributable to the cost for the survivor annuity protection during the period prior to the divorce and one year thereafter would not be appropriate.

Two-Year Waiting Period

A plan is not required to, but may, provide that any election out of a joint and survivor annuity with reference to the annuity starting date or any election into a joint and survivor annuity after the end of the pre-earliest retirement age period, and any revocation of any such election will not become effective, or will cease to be effective, if the participant dies within a period (not in excess of two years) beginning on the date of such election or revocation as the case may be; provided, however, that such election or revocation must be given effect in the case of accidental death where the accident causing death occurs after the election or revocation and the failure to give effect to the election or revocation would deprive the participant's survivor of a survivor annuity. 130

The "deprivation of survivor annuity" requirement has a subtle, surely intentional effect. Where the plan uses the two-year rule and a participant elects-out of the joint and survivor annuity during the ninety-day period prior to an annuity starting date and dies within two years after such election-out, the election-out will never be given effect and the survivor will be entitled to a survivor annuity. If the death is not due to an accident, the primary rule takes effect; that is, death from nonaccidental causes within two years after an election renders it ineffective. Where the participant suffers an accidental death, failure

to give effect to the election-out would not deprive the participant's survivor of a survivor annuity; therefore, the accidental death exception does not apply. Conversely, where a participant elects into a joint and survivor annuity and dies from accidental causes due to an accident occurring thereafter, the election-in can be given effect under the accidental death exception.

In a defined contribution plan or in a defined benefit plan that does not discount for mortality, for example, an insurance contract plan with a reserve death benefit, there is no possibility of adverse selection. The death benefit will be paid to some beneficiary in any event. Accordingly, such plans will be well advised to forego the permitted antiadverse selection provisions in favor of greater administrative simplicity.

No Requirement of Subsidization of Joint and Survivor Annuity

Actuarial Costs

The last sentences of Code Section 401(a)(11)(G) and of ERISA Section 205(h) provide that the plan may take into account in any equitable fashion, as determined by Treasury regulations, any increased costs resulting from providing joint and survivor annuity benefits. However, the Title I provision limits this to any increased costs resulting from an election into a joint and survivor annuity during the period beginning with the end of the pre-earliest retirement benefit period and ending on the normal retirement age, while the Title II provision simply speaks to any increased costs resulting from providing joint and survivor annuity benefits. The Conference Report states that plans may make reasonable actuarial adjustments to take account of the possibility that total costs of the plan (without any apparent limitation to election-in survivor and annuity benefits) otherwise might be increased because of adverse selection and agreed with statements in the House Committee on Ways and Means Report to the effect that the reform legislation did not require that the plan "subsidize" the joint and survivor feature and these plans may make such reasonable actuarial adjustments. The Ways and Means Committee Report, in turn, stated that a joint and survivor annuity could be less in terms of dollars per annuity payment than the single life annuity. Senator Williams (D-N.J.) stated in his discussion of the Conference Report that such reason-
able actuarial adjustments could be made either on an individual case-by-case basis, or in the aggregate, based on the plan’s overall experience.\textsuperscript{134} The proposed regulations state that a “plan may take into account in any equitable manner consistent with generally accepted actuarial principles applied on a consistent basis any increased costs from providing joint and survivor annuity benefits.”\textsuperscript{135} More significantly, they also provide in the definition of the term “qualified joint and survivor annuity” that

A qualified joint and survivor annuity must be at least the actuarial equivalent of the normal form of benefit offered under the plan. Equivalence may be determined, on the basis of consistently applied reasonable actuarial factors, for each participant or for all participants or reasonable groupings of participants if such determination does not result in discrimination in favor of employees who are officers, shareholders, or highly compensated.\textsuperscript{136}

Provisions in the regulations that any increase in cost resulting from providing survivor annuity benefits may be taken into account in any “equitable manner consistent with generally accepted actuarial principles applied on a consistent basis” should be read in conjunction with Proposed Treasury Regulations Section 1.411(a)-4, which provides that any reduction in accrued benefits in excess of a true actuarial reduction constitutes a prohibited forfeiture. These two provisions set the stage for second-guessing by the participants and the Internal Revenue Service as to whether the actuarial principles used by the plan in taking account of the cost are generally accepted and applied on a consistent basis and for litigation by plan participants and beneficiaries on the ground that the interest and mortality assumptions used to compute the actuarially equivalent joint and survivor annuity are erroneous.\textsuperscript{137}

There are at least three distinct ways in which a survivor annuity may add to the costs of a plan:

(1) If the survivor annuity comes into effect at the annuity starting date, there may be more annuity payments made over the life of the participant and thereafter the life of his surviving spouse than would have been made over the life of the participant alone. The legislative history is clear that notwithstanding the wording of ERISA Section 205(h) the participant’s benefit in such circumstances may be reduced

\begin{itemize}
\item \textsuperscript{135} Prop. Reg. § 1.401(a)-11(g).
\item \textsuperscript{136} Prop. Reg. § 1.401(a)-11(b)(1).
\item \textsuperscript{137} See generally American Bar Association, Section of Taxation, Comments on Proposed Regulations Re: Qualified Joint and Survivor Annuities 14-15.
\end{itemize}
so that his benefit and that of his surviving spouse are the actuarial equivalent of a single life annuity for his life.\textsuperscript{138}

(2) A possible additional cost is that of the survivor annuity protection during the years of eligibility for early retirement. In the case of a participant who does not elect early retirement, but does elect into a joint and survivor annuity and dies prior to normal retirement age, there can be no adjustment to the amount of his benefit alone, since he will have none, that would compensate for the preretirement survivor annuity paid to his surviving spouse.\textsuperscript{139} Each year the participant enjoys this protection for his spouse may be conceptualized as enjoyment of a form of life insurance protection. As mentioned above, in theory this cost could be compensated for by directly charging the participant a premium for each year of such protection. It could also be compensated for by reducing the ultimate annuity of every participant who enjoys this protection and who lives to receive a retirement pension commencing at the annuity starting date. In short, just as in the payment of insurance premiums, all participants who elect in and survive until their annuity starting date will bear the cost of their preretirement survivor annuity protection (that cost in effect would consist largely of the cost of preretirement survivor annuity payments to the election-in surviving spouses of participants who elected-in and then died) by having the amount of their standard benefit reduced for that cost. The right to make adjustments for this purpose is clearly recognized by Section 205(h) of ERISA as well as the Title II provision.

Another means of charging participants for this survivor annuity protection would be to reduce the joint lives annuity (and, hence, survivor annuity as well) of any participant who had elected-in and then died prior to normal retirement age for the costs of the protection enjoyed up to the point that he died. A fundamental question raised by one commentator is whether the hypothetical joint life annuities (and, hence, the floor for the preretirement survivor annuity) can be reduced for the cost of the preretirement survivor annuity protection until a participant dies.\textsuperscript{140}

Code Section 401(a)(11)(C), in setting forth the amount of the election-in survivor annuity, measures it with respect to the joint annuity to which, in the words of the statute, the participant would have been entitled, or, in the words of the regulations, to which the surviving spouse would have been entitled; but, in either case, the entitlement is

\textsuperscript{138} H.R. Rep. No. 93-807, at 68.

\textsuperscript{139} "Recommendations on Spouse Options, at 27,022.

determined as if the participant had made an election-in immediately prior to his retirement and as if his retirement had occurred on the day before his death and within the period in which an election could be made. Following the Code and the proposed regulations literally, a participant who had not terminated service prior to his death could have his joint lives annuity reduced only to the extent that such benefit would be reduced for any participant who elected-in and survived until retirement, and not for his actual period of protection. This result appears supported by the proposed regulations that illustrate this provision by the above-quoted example in which the reduced amount under the qualified joint and survivor annuity (of $80 per month) is apparently the same “regardless of when he [the participant] makes a valid election-in.”

On the other hand, if a plan attempted to reduce the straight life annuity of each participant who elected-in and survived until retirement for the number of years that he enjoyed the preretirement survivor annuity protection, under this provision the deemed joint lives annuity of a participant who elected in and died prior to actual retirement would be reduced for only a day or so of deemed survivor annuity protection, when in fact the participant could have enjoyed almost ten years of preretirement survivor annuity protection.

In contrast, if a participant had elected-in to a survivor annuity, then terminated employment, and several years later but prior to normal retirement age died, the participant would not have been entitled to make an election-in on the day before his death, since he had not continued employment. This would lead to the result, carefully following the provisions of the proposed regulations and the statute, that the participant would have retired on the day before his death, and, hence, the survivor annuity of the postretirement joint and survivor annuity (not the election-in preretirement survivor annuity) would apply so that the surviving spouse would be entitled to a postretirement survivor annuity. Yet, since an election-in would not have been permitted after termination of employment, there would be no reduction in the joint lives annuity for the predeath survivor annuity protection. There would, however, be permitted a reduction in the joint lives annuity for the survivor annuity protection after the deemed retirement on the day before the participant’s death.

In addition, the proposed regulations do not explicitly recognize directly charging the participant, for example, through payroll deductions, although in some instances this may be cheaper to him than reduc-

142 Id.
ing his joint lives annuity. While directly charging the electing-in participant might be a cheaper way as to the participants of dealing with increased costs from election-in survivor annuities, and might in some circumstances be more equitable than reducing the standard benefit of all participants who elect-in and survive, a problem that the drafters of the regulations (who undoubtedly were aware of the desirability in some circumstances of directly charging participants) may have faced is that the statute only speaks to a plan taking into account any increased costs. It is difficult to force direct charging participants into this framework.

(3) The third cost is that of adverse selection, which is discussed above in the context of the two-year interval between the election and death and the permitted requirement that the spouse must have been married to the participant for at least a year prior to the participant's death (and married at the annuity starting date).

**Administrative Costs**

Due to the requirement of a written explanation of the financial effect of elections-in and -out, some commentators have been concerned with a number of potential administrative costs and problems, such as:

Do tables qualify as layman's language? The first is simply that if the plan uses tables that set forth, for example, a male employee's age in the left-hand margin and the wife's age across the top of the column (and possibly substantially identical tables would be required for female employees), the tables become quite complex. Moreover, such tabular adjustments may be difficult to communicate to rank-and-file employees. On the other hand, giving each individual participant the precise dollar amount of his own specific reduction if he takes a survivor annuity turning on his age and that of his spouse could be quite expensive.\(^{143}\)

Unisex calculations. Coupled with the problem of the complexity of the table itself is the question whether different adjustments should be applied to male and female participants, assuming that they are the same age and their wives and husbands are the same ages.\(^{144}\) Traditionally, separate mortality tables have generally been applied to men and women, with a male participant and his female spouse suffering a much sharper reduction than a female participant and her male spouse, on the theory that, in the aggregate, women live longer. The danger is that the legitimacy of such sex distinctions will be challenged.

As Representative Chisholm pointed out in the floor debate on

\(^{143}\) *Id.* at 27,026.

\(^{144}\) *Id.*
H.R. 2, while the female population lives longer than its male counterpart as a whole, there is evidence that working women are dying at younger ages, just as male workers do. Moreover, there are very few tables on mortality rates of working women. In a parallel development, the EEOC, according to Representative Chisholm, has ruled that the practice of using separate tables for working men and working women as the basis for separate computations is inherently discriminatory. "For example, the EEOC ruled against TIAA-CREF—Teachers Insurance Annuity Association-College Retirement Equities Fund. TIAA did indeed keep separate tables for working men and working women and found that the projected average lifetime for men was 82 years and for their women was 86 years. They then made separate projections of benefits on the basis of these figures. EEOC ruled against them, however, because they found that 75% of the women workers were dying before the age of 86, the average date of mortality. What was happening was that a few women were very long-lived and they were dragging the average lifetime expectancy rate of the group to a higher level than the majority of the group actually experienced." Similar developments recently have been occurring under state law. Some commentators have questioned, however, the EEOC premise that Title VII of the Civil Rights Act of 1964 demands provision of equal benefits in this area.

As a consequence, plans may wish to adopt "unisex" tables, particularly since a subsequent change from sex-based tables to a unisex table might be deemed to be a violation of the ERISA requirement that an accrued benefit of a participant in a plan not be decreased by an amendment, except under certain limited conditions. Such a unisex mortality table could be justified on the basis that in the aggregate the actuarial computations prevented any increase in costs.

148 I.R.C. § 411(b)(6); ERISA § 204(g). Compare In re Ayman, 193 N.Y.S.2d 2 (C.A. 1959) (change in actuarial tables used to convert accumulation of employer contributions into annuity violated rule in state constitution against any diminution in benefits).
Furthermore, on an aggregate basis, it may be desirable to devise tables lumping together several age groups of participants with spouses a stated number of years younger, with a composite average reduction. For example, if the reduction where the participant is fifty-five and his spouse is fifty-three is 88.5 percent, and 88.1 percent where the participant is fifty-seven and the spouse is two years younger, a plan might substitute 88 percent for each of these figures. An even simpler table might be to provide adjustment factors based on the age differential between the participant and his spouse, such as providing that if a male employee chooses a 50 percent survivor annuity, his benefit during their joint lives would be reduced by 15 percent if his wife is the same age, 16 percent if she is one year younger, 17 percent if two years younger, etc. Such groupings or overall rules should be easier to communicate and be understood by the average layman.

The proposed regulations in their approach to actuarial equivalence (and, hence, to the written explanation requirement) seem to accept the concept of using such groups which should help minimize the cost of communicating the financial effect of elections-in and -out to participants.

149 Examples taken from “Recommendations on Spouse Options” at 27,029-27,030.
150 Id.
151 The liberal approach to “equivalence” taken in the proposed regulations, which clearly contemplate utilization of reasonable groupings of participants—probably similar to that set forth in the text above—indicates that communication of the financial effect upon a participant's annuity may be made on the basis of a table with groupings in it. Presumably, the financial effect upon the participant's annuity in terms of dollars per annuity payment can be explained by including with the table monthly payments under the straight life annuity he would be entitled to. Then he could apply the reduction given in the table to determine the actual dollar reduction.

While this approach would solve many, if not most, of the communications problems of defined benefit plans, there are still serious problems with defined contribution plans. Those plans traditionally only set forth the dollar amount of the participant's account. Even if you can express the reduction on the basis of grouping payrolls, you still have to know what monthly annuity the dollar accumulations will buy. This would require a defined contribution plan to obtain either the services of an actuary or an insurance company to supply the cost. Hopefully, standard annuity cost tables will be available so that the plan administrator can readily calculate an approximate amount of the monthly annuity that the accumulations in a particular participant's account would purchase. An analog may be found in the annuity tables contained in Estate Tax Reg. § 20.2031-10(f). See also Rev. Rul. 72-438, 1972-2 C.B. 38. These tables do not contain commercial annuity rates, but could be used to present the approximate amount of benefits. From that, it would be simple to work back with standard tables to the reduction on the participant's life annuity if other features, such as the survivor annuity or a ten-year certain annuity, are used.
Consequences of Failure to Provide Joint and Survivor Annuity

Under Title II of ERISA, the failure of a plan to provide a qualified joint and survivor annuity in circumstances where such an annuity is theoretically required, results in disqualification of the trust, thereby affecting the deductibility of contributions to the plan,^{152} the taxation of income earned by the trust,^{153} and the taxation to participants of their accrued vested benefit.^{154} Under Title I of ERISA, the legislative mandate is that the plan must provide for an annuity benefit in a form having the effect of a qualified joint and survivor annuity where applicable. The consequence of a failure to do so under that title is that a participant, beneficiary, fiduciary, or the Secretary of Labor may bring an action to enjoin any act or practice, that is, failure to pay a survivor benefit that violates this provision of ERISA, or to obtain other appropriate equitable relief to redress such violation or to enforce this section of ERISA.^{155} For example, it might be possible for a proper party to bring an action to mandate an amendment of a plan to provide a qualified joint and survivor annuity where required. In all likelihood, such an action would be brought rather than the plan disqualified by the Secretary of Treasury, so that the cost of providing an unanticipated survivor annuity will constitute the true penalty and deterrent.

Application and Effective Date

ERISA Section 1021(a)(1) provides that Code Section 401(a)(11) is applicable to plan years beginning after December 31, 1975 as to plans in existence on January 1, 1974. The mandatory joint and survivor provisions apply as to a participant only if his annuity starting date occurs after such date, and they do not apply even then unless the participant was an “active participant” in the plan on or after the effective date. The proposed Treasury regulations define the term “active participant” as a participant for whom (1) benefits are being accrued under the plan; (2) his employer is obligated to contribute under the plan; or (3) the employer would have been obligated to contribute under the plan had any contributions been made under the plan.^{156} The import of the exclusion of participants who are not active is that the

^{152} I.R.C. § 404(a)(5).
^{153} I.R.C. § 501(a).
^{154} I.R.C. § 402(b).
^{156} Prop. Reg. § 1.401(a)-11(h).
standard joint and survivor benefit provision is not required as to a withdrawn participant with a deferred vested account upon the annuity starting date of his deferred vested benefit.

The joint and survivor annuity requirements apply only to plans to which the vesting requirements of ERISA are applicable. Thus, they do not apply to government plans or church plans (unless the latter elect into ERISA).

**Proposals for the Future**

Treasury regulations or, perhaps more likely, IRS rulings could ease the drafting and administrative problems of the joint and survivor annuity provisions as applied to defined contribution plans by stating that such plans can provide a death benefit (even in the form of a survivor annuity) in excess of the 100 percent of joint lives ceiling of the qualified joint and survivor annuity (subject, of course, to the traditional incidental benefits test), but that only the amount of the death benefit or survivor annuity not in excess of the 100 percent of joint lives annuity ceiling would be considered a qualified joint and survivor annuity. This would ease the drafting problems and, for that matter, the explanation of the survivor benefits in the summary plan description, where a defined contribution plan provides for payment of the account balance or account balance plus insurance proceeds as a vested death benefit, and the plan designer wishes to eliminate the necessity of an election-out.

The actuarial and administrative cost problems of defined contribution plans as well would be eased considerably if the Service were to publish a standard table providing the amount of a straight life annuity at a given age at normal or early retirement that an account balance would purchase or provide per $100 or $1,000. Here, the plan administrator probably should make the mathematical computations based upon the table necessary to determine the monthly straight life annuity that the account balance at a given age would provide or purchase. The explanation to the employee by the plan administrator could then provide the dollar amount of the participant’s account balance and his approximate monthly annuity (with a caveat perhaps that an actual annuity purchased from an insurance company might vary from that provided in the explanation). In addition, the Revenue Service should publish standard tables with groupings of lives (perhaps on a unisex basis) setting forth the percentage reduction of a joint lives or straight life annuity where the participant had attained a given age and his spouse is a stated number of years younger. The plan administrator should then be permitted to give this table to the participant for him to go down the table and find his age and that of his spouse, figure the percentage reduction
of his monthly annuity based upon such ages, and apply such percentage reduction to the monthly annuity provided in the explanation given to him by the plan administrator (based on the other government table for conversion of account balances to monthly annuities) to find out the dollars and cents effect on his joint lives annuity of a survivor annuity. Only with early steps by the IRS in publishing such tables or with early announcement that it will provide or at least accept such tables, can plan designers in uninsured defined contribution plans (at least in plans with a lesser number of participants) safely provide for a life annuity payout provision.

As to defined benefit plans that wish to provide a death benefit equal to the reserve, or the reserve plus insurance proceeds in some circumstances, essentially the same approach of splitting a preretirement survivor annuity into a qualified survivor annuity and excess survivor annuity could be taken. Recalling that the reason for the 100 percent of joint lives annuity ceiling in the definition of the survivor annuity component of a qualified joint and survivor annuity was ostensibly to backstop new Code Section 415 (as applied to defined benefit plans), it is important to note that Code Section 415(b)(2)(B) disregards only “that portion of any joint and survivor annuity which constitutes a qualified joint and survivor annuity. . . .” Accordingly, a defined benefit plan should be able to fund a preretirement survivor annuity to the maximum amount allowable under the traditional incidental benefit test, but only the qualified or 100 percent of joint lives ceiling portion would constitute a qualified joint and survivor annuity. The amount of the survivor annuity in excess then would be part of the “annual benefit” taken into account under the new Code Section 415 benefit limitation on defined benefit plans.\(^{157}\) A Service ruling or Treasury modification of the proposed regulations could, for instance, provide that “qualified joint and survivor annuity” means an annuity for the life of the par-

\(^{157}\) Rev. Rul. 75-481, 1975-44 I.R.B. 9, provides that in the case of a defined benefit plan that provides retirement benefits other than in the form of either a straight life annuity or qualified joint and survivor annuity, the annual benefit will be adjusted to the actuarial equivalent benefit in the form of a straight life annuity. The revenue ruling goes on to provide that in making such actuarial adjustments, any ancillary benefit “which is not directly related to retirement income benefits (such as preretirement death benefits) shall not be taken into account.” Under a narrow reading, a survivor annuity in excess of a qualified survivor annuity would be excluded from the ancillary benefits rule. What we may expect, however, is to see defined contribution plans, particularly insured plans, provide a survivor annuity equal to the 100 percent or perhaps 50 percent of joint lives annuity, with an optional preretirement death benefit of a substantially greater amount, such as insurance proceeds of 100 times the monthly benefit and the amount of the reserve, which the widow may elect instead.
participant and the portion of a survivor annuity for the life of his spouse which is neither (1) less than one-half of, nor (2) greater than, the amount of the annuity payable during the joint lives of the participant and his spouse.

In any statutory revision of the joint and survivor annuity provisions, as an alternative to the present provision which only awkwardly fits defined contribution plans, Congress should consider splitting the joint and survivor annuity provisions into two parts: one applicable to defined contribution plans, and the other to defined benefit plans. A defined contribution plan providing full vesting upon death and payment of the account balance to a beneficiary of the participant does not, as Congress apparently believed was the case with defined benefit plans, convert the plan into an insurance program. In a defined benefit plan, the retirement benefits are fixed or are definitely determinable by a plan formula. To require a benefit that was not previously in the plan would cause an increase in the funding each year necessary to provide the defined benefit under the plan. Conversely, in a defined contribution plan, contributions are determined without reference to the amount of the benefits that will be available on retirement, and the plan benefit is simply the account balance. Historically, such plans provided for immediate vesting upon the death of an active participant or a terminated participant. Thus, a forfeiture upon the death of either an active or terminated participant constitutes an unwarranted windfall to the other participants where forfeitures are added to their account balances, or to the employer if forfeitures reduce future employer contributions. Since there is no cost factor precluding payment of a death benefit equal to the account balance, it is inconsistent with the premise that contributions to the plan are in lieu of current compensation not to require a defined contribution plan to immediately vest a participant’s account balance upon his death and pay it to his beneficiary regardless of whether he has terminated service. Accordingly, Congress should amend the joint and survivor annuity provisions as applied to defined contribution plans to provide that the preretirement account balance in such plans must be fully vested upon the death of a participant (including a terminated participant with a deferred vested account) and payable to the participant’s surviving spouse through the purchase of a survivor annuity, unless she elects otherwise. Such a survivor annuity is administratively feasible if Congress also requires the Internal Revenue Service to promulgate standard tables for conversion of account balances into annuity amounts. Furthermore, the statute as amended could provide that a participant could elect—perhaps only with the consent of his surviving spouse—that someone other than his spouse be the beneficiary of his account. Such amendments would obviate an expensive preretirement election-in...
explanation and the 100 percent of joint lives annuity survivor annuity ceiling problems.

As to postretirement survivor annuities for defined contribution plans: The existing retirement joint and survivor annuity approach could be maintained without substantial administrative difficulties. At the same time, the apparent congressional desire to encourage annuity payouts at retirement could be met, so long as the statute also required the Revenue Service to promulgate tables (in addition to those from which the monthly annuity can be calculated) that would set forth groupings of ages for participants and surviving spouses from which the percentage deduction of a straight life annuity with a 50 percent, or perhaps 75 percent, of joint lives and survivor annuity could be calculated if the participant were a given age and the surviving spouse were several years younger. It might be advisable to mandate that these tables be compiled on a unisex basis. And, Congress should explicitly permit in the statute that an explanation of election-out effects could be satisfied through use of such tables, at least in defined contribution plans.

As to any revision of the application of the joint and survivor annuity provisions to defined benefits plans, a more radical question must be asked. Was Congress correct in viewing a survivor annuity as a form of insurance and, therefore, in order to lessen cost factors to the plan in provision of a survivor annuity, in limiting commencement of the election-in preretirement survivor annuity to the earliest retirement age of a participant?

In broad outline, ERISA was designed in this context to assure that participants in retirement plans not lose their benefits as a result of unduly restrictive forfeiture provisions or the failure of the plan to accumulate and retain sufficient funds to meet its obligations.\(^\text{158}\) Congress thought vesting necessary for participants to actually benefit from retirement plans.\(^\text{159}\) Additionally, funding or accumulating sufficient assets to pay benefits in the future to the participants in defined benefit plans is required under ERISA in accordance with a contribution schedule that Congress contemplated would produce sufficient funds to meet the obligations of defined benefit plans as they fall due.\(^\text{160}\) Such an adequate contribution or minimum funding schedule was viewed as necessary not only to protect the rights of participants under the plan, but also to provide a systematic method for employers to pay their plan costs.\(^\text{161}\) However, when such a minimum contribution schedule has not been in effect
for a sufficiently long period and the plan suffers adverse investment experience or, in some instances, benefit levels are increased, there still may not be sufficient assets in a defined benefit plan for payment of the plan's obligations when they fall due.\textsuperscript{162} Accordingly, Congress also created the mechanism of insuring a minimal level of benefits in certain defined benefit plans through the Pension Benefit Guaranty Corporation.\textsuperscript{163} Where any of these provisions might add to the cost of financing retirement plans, Congress sought to adopt provisions that struck a balance between providing meaningful reform and keeping costs within reasonable limits.\textsuperscript{164} At the same time, all of these reforms and others are meaningless to a participant or, perhaps better, to his surviving spouse, if he dies prior to retirement in circumstances in which a survivor annuity is not available.

The theme running throughout the floor debate, the committee reports, and other legislative history of ERISA, of striking a balance between providing meaningful reform and keeping costs within reasonable limits can be better understood when it is realized that as elements of the plan design (such as, degree of vesting, when accrual of benefits commences, when predeath benefits are to be provided, or how fast past service liabilities are to be amortized) are made more favorable to participants, the cost of funding a defined benefit plan increases.\textsuperscript{165} In the genesis of ERISA, some espoused the view that employee representatives and employers had already negotiated a trade-off between level of benefits and factors such as vesting, preretirement benefits, and entry age for accrual purposes.\textsuperscript{166} For Congress to then step in was to shift the balance that the parties had already struck.\textsuperscript{167} Indeed, it is probably a fact of life that in most negotiated bilateral defined benefit plans any increase in the cost of vesting or, say, preretirement benefits will not result in a decrease in benefit levels—only in an increase in employer costs.\textsuperscript{168}

\textsuperscript{163} ERISA §§ 4021 and 4022. See Pension Benefit Guaranty Corporation Reg. §§ 2605.3 through 2605.6, and 2609.3 through 2609.8.
\textsuperscript{165} See, e.g., Hearings on H.R. 2 and H.R. 462 before the General Subcomm. on Labor of the House Comm. on Education and Labor, 93d Cong., 1st Sess. 328 (1973) (Jacob Sheinkman, General Secretary-Treasurer, Amalgamated Clothing Workers) (hereinafter cited as H.R. 2 Hearings).
\textsuperscript{166} See, e.g., Hearings on H.R. 2 and H.R. 462 before the General Subcomm. on Labor of the House Comm. on Education and Labor, 93d Cong., 1st Sess. 328 (1973) (Jacob Sheinkman, General Secretary-Treasurer, Amalgamated Clothing Workers) (hereinafter cited as H.R. 2 Hearings).
\textsuperscript{168} See id. at 334-335, 337 (Sheinkman).
As to survivor annuity provisions, however, Congress decided to allow plans to pass on the costs of preretirement death benefits and post-retirement death benefits to the participants through adjusting their straight life benefits. On the other hand, if we view retirement benefits as being in lieu of compensation and earned by the individual participant and not by the group of participants as a whole, the only equitable approach to survivor benefits would be to provide a participant with a death benefit at least equivalent to his vested accrued benefit at the time of his death, unless he otherwise elects. Thus, a participant who died prior to normal retirement age should be in no worse position than a participant who quit and had a deferred vested benefit payable at normal retirement age (and survived until that time). The difficulty is that as the right to a survivor annuity attaches at a point earlier than earliest retirement age; in many instances, the number of employees who elect not to take a preretirement survivor annuity will not be sufficient to constitute a group of lives large enough to offset the increased costs for those participants who do die without an election-out prior to retirement age. On the surface, a simple answer would be to require a preretirement survivor annuity equal to the vested accrued benefit and permit plans to adjust all straight life benefits down without giving rise to a partial termination\(^{169}\) and creating a special exception to the retroactive decrease of benefits rule to permit such a modification of the benefit level.\(^{170}\) As a practical matter, however, it probably would be impossible for plan sponsors to reduce unilaterally the straight life annuity in the plan and certainly would not appear feasible in a multi-employer plan. An alternative would be to phase in any requirement that a defined benefit plan provide a survivor annuity equal to the reserve for the accrued benefit. With a phase-in, the increased costs arising from the preretirement death benefit could be offset by a plan not making the increases in benefits that would otherwise have been made in order to take account of inflation and other factors during the phase-in period. Then, after the end of the phase-in period, defined benefit plans would be precluded from discounting in advance of preretirement mortality in actuarial calculations. In effect, at that point, a preretirement death benefit would be subsidized by the employer, although in fact it might be borne by the employees through decreased benefit levels.

In a sense, this article advocates that Congress should police in this area those defined benefit plans that have promised more than they could actually deliver to all participants and then attempted to fulfill that promise by imposing such conditions that meaningful participation was

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\(^{169}\) Prop. Reg. § 1.411(d)-2(b).

\(^{170}\) I.R.C. § 412(c)(a); ERISA § 302(c)(8).
precluded. It is submitted that if there is only a limited amount of pension dollars, then it is more equitable for the plan’s defined benefit to be reduced and spread among more participants and their beneficiaries than to give a higher benefit to the gifted few who survive the vesting and the mortality risks to reach normal retirement or at least earliest retirement age while still employed by the company. Otherwise, a defined benefit pension all too frequently will be no more than a “gamble on survival.”

Conclusion

The story, possibly apocryphal, is told by one of the former committee staff members who participated in the drafting of ERISA (and who is now engaged in administration of that statute) that no one now

171 In the hearings on S. 4, S. 1179, and S. 1631, then Secretary of the Treasury Shultz articulated the position that in collective bargaining union and management had agreed upon how much money per payroll dollar (i.e., the pension dollar) that the employer was going to put into the plan. And then in plan design the parties agreed on what features, such as vesting vs. level of benefits, to allocate that money to.

“You say this as though either we or you can wave a magic wand over the American economy and make a change in these plans without affecting the costs. What I am trying to point out is that all around the country unions and managements have sat down with each other and they have constructed private plans and they have said that we are going to put 10 cents an hour into our pension plan. Now, that is part of their bargaining. Now and then they have said to each other, ‘how are we going to spend that 10 cents an hour? We could spend it all on vesting if we wanted to or we could say we want to raise the benefits so those who work here until they are on retirement will get, at least, some amount which we think added to social security is what is needed to get along, and so we will spend our dime that way.’

“And so different plans have made different compromises on that. What we are talking about here is, and whatever vesting requirement that is put in, is the imposition of a Federal governmental judgment overlaying all of this visualized judgment which has been made the right way? We think that no matter how you want to spend that dime that you have to spend a portion of it at least for this amount of vesting. Now, to go back and retroactively second-guess all of the decisions, I think that is taking quite a step.”

Senate Finance Hearings at 345.

The negotiation argument was criticized by some who said that the union negotiators had failed to adequately represent employee participants due to conflicts of interest; that is, the negotiators because of their long service were among the chief beneficiaries of a slow-vesting higher-benefit system and, in bargaining for high, but perhaps illusory, benefits, they could win more reelectations and could frighten dissidents with the argument that a change in bargaining representatives might mean a loss of their pensions. See H.R. 2 Hearings at 251 (Ralph Nader on behalf of Public Interest Research Group). See also Senate Finance Hearings at 341 (Senator Long).
acknowledges being in the room during the drafting session that gave birth to the Conference Committee joint and survivor annuity provisions.\textsuperscript{172} If true, these provisions well illustrate the limitations of parthenogenesis. For the statute contains an unacceptable number of technical omissions and errors as well as an astounding host of ambiguities and, in one instance, a conflict between Titles I and II. Ready examples of the former are the absence of a permitted requirement of marriage to the surviving spouse at the annuity starting date and the amount of the floor of the election-in survivor annuity (assuming that the proposed regulations embodied the congressional intent). Perhaps the category of errors also includes the statutory provision as to allowable adjustments to the election-in survivor annuity due to the deemed election-in on the day before death in the context of terminated participants. Ambiguities are illustrated by the continued employment requirement for an election-in survivor annuity and the ceiling, if any, on an election-in preretirement survivor annuity.

The proposed regulations, on the other hand, perform an admirable job on the whole in attempting to paper over the lacunae in the statute and particularly in endeavoring to ease plan administration of the joint and survivor annuity provisions, such as the two-step notice provisions and the relieving of plans from election-in and -out requirements where a survivor annuity is the only form of a benefit. Where the proposed regulations strong-arm the statute, hopefully they will be upheld, if for no other reason than to stem the tide of horribles that would otherwise inundate plan designers and administrators. But perhaps overshadowing both the strengths and the minor ambiguities of the proposed regulations, is the fact that they (due to the underlying statute) fail utterly to take into account the problems arising in the application of the joint and survivor provisions to defined contribution plans. Such failure must be remedied if life annuities are to be a part of defined contribution plans, and suggestions are offered in this article. In addition, when (hopefully, not \textit{if}) Congress returns to the joint and survivor annuity provisions, as it must to backstop the proposed regulations, it may be advisable for its members to rethink the premises of the joint and survivor annuity provisions as applied to defined benefit plans as well.

\textsuperscript{172} Still another former staff member claims he was in the room alone. All the other members were at a working lunch drafting the joint and survivor annuity provision. They crafted a perfect, workable provision, so the story goes, but the waiter dropped a plate of spaghetti on the draft and by error the spaghetti was enacted. The kernel of truth to both these tales, the writer is told, is that the final joint and survivor annuity provision was drafted by the conferees and not their staff.
Appendix A


SEC. 1021. ADDITIONAL PLAN REQUIREMENTS.
(a) JOINT AND SURVIVOR ANNUITY REQUIREMENT.—

(1) IN GENERAL.—Effective with respect to plan years beginning after December 31, 1975, section 401 (a) (relating to requirements for qualification) is amended by inserting after paragraph (10) the following new paragraph:

“(11) (A) A trust shall not constitute a qualified trust under this section if the plan of which such trust is a part provides for the payment of benefits in the form of an annuity unless such plan provides for the payment of annuity benefits in a form having the effect of a qualified joint and survivor annuity.

“(B) Notwithstanding the provisions of subparagraph (A), in the case of a plan which provides for the payment of benefits before the normal retirement age (as defined in section 411 (a) (8), the plan is not required to provide for the payment of annuity benefits in a form having the effect of a qualified joint and survivor annuity during the period beginning on the date on which the employee enters into the plan as a participant and ending on the later of—

“(i) the date the employee reaches the earliest retirement age under the plan, or

“(ii) the first day of the 120th month beginning before the date on which the employee reaches normal retirement age.

“(C) A plan described in subparagraph (B) does not meet the requirements of subparagraph (A) unless, under the plan, a participant has a reasonable period during which he may elect the qualified joint and survivor annuity form with respect to the period beginning on the date on which the period described in subparagraph (B) ends and ending on the date on which he reaches normal retirement age (as defined in section 411 (a) (8)) if he continues his employment during that period. A plan does not meet the requirements of this subparagraph unless, in the case of such an election, the payments under the survivor annuity are not less than the payments which would have been made under the joint annuity to which the participant would have been entitled if he made an election described in this subparagraph immediately prior to his retirement and if his retirement had occurred on the day before his death and within the period within which an election can be made.
"(D) A plan shall not be treated as not satisfying the requirements of this paragraph solely because the spouse of the participant is not entitled to receive a survivor annuity (whether or not an election described in subparagraph (C) has been made under subparagraph (C)) unless the participant and his spouse have been married throughout the 1-year period ending on the date of such participant’s death.

"(E) A plan shall not be treated as satisfying the requirements of this paragraph unless, under the plan, each participant has a reasonable period (as described by the Secretary or his delegate by regulations) before the annuity starting date during which he may elect in writing (after having received a written explanation of the terms and conditions of the joint and survivor annuity and the effect of an election under this subparagraph) not to take such joint and survivor annuity.

"(F) A plan shall not be treated as not satisfying the requirements of this paragraph solely because under the plan there is a provision that any election described in subparagraph (C) or (E), and any revocation of any such election, does not become effective (or ceases to be effective) if the participant dies within a period (not in excess of 2 years) beginning on the date of such election or revocation, as the case may be. The preceding sentence does not apply unless the plan provision described in the preceding sentence also provides that such an election or revocation will be given effect in any case in which—

"(i) the participant dies from accidental causes,

"(ii) a failure to give effect to the election or revocation would deprive the participant’s survivor of a survivor annuity, and

"(iii) Such election or revocation is made before such accident occurred.

"(G) For purposes of this paragraph—

"(i) the term ‘annuity starting date’ means the first day of the first period for which an amount is received as an annuity (whether by reason of retirement or by reason of disability),

"(ii) the term ‘earliest retirement age’ means the earliest date on which, under the plan, the participant could elect to receive retirement benefits, and

"(iii) the term ‘qualified joint and survivor annuity’ means an annuity for the life of the participant with a survivor annuity for the life of his spouse which is not less than one-half of, or greater than, the amount of the annuity payable during the joint lives of the participant and his spouse and which is the actuarial equivalent of a single life annuity for the life of the participant.

For purposes of this paragraph, a plan may take into account in any
equitable manner (as determined by the Secretary or his delegate) any increased costs resulting from providing joint and survivor annuity benefits.

"(II) This paragraph shall apply only if—
   "(i) the annuity starting date did not occur before the effective date of this paragraph, and
   "(ii) the participant was an active participant in the plan on or after such effective date."

Joint and survivor annuities

Under the conference substitute, when a plan provides for a retirement benefit in the form of an annuity, and the participant has been married for the one-year period ending on the annuity starting date, the plan must provide for a joint and survivor annuity. The survivor annuity must be not less than half of the annuity payable to the participant during the joint lives of the participant and his spouse.

In the case of an employee who retires, or who attains the normal retirement age, the joint and survivor provision is to apply unless the employee elected otherwise.

In the case of an employee who is eligible to retire prior to the normal retirement age under the plan, and who does not retire, the joint and survivor provisions need not be applicable under the plan, unless the employee made an affirmative election. Moreover, the plan need not make this option available until the employee is within 10 years of normal retirement age. (Of course, a plan may provide that a joint and survivor annuity is to be the only form of benefit payable under the plan, and in this case, no election need be provided.)

These rules should help to avoid the situation where an employee who had not yet retired might have his own retirement benefit reduced as a result of inaction on his part and should also help to prevent adverse selection as against the plan.

The employee is to be afforded a reasonable opportunity, in accordance with regulations, to exercise his election out of, (or, before normal retirement age, possibly into) the joint and survivor provision before the annuity starting date (or before he becomes eligible for early retirement). The employee is to be supplied with a written explanation of the joint and survivor provision, explained in layman's language, as well as the practical (dollar and cents) effect on him (and his or her spouse) of making an election either to take or not to take the provision. At the same time, regulations in this area should take cognizance of the practical difficulties which certain industries (particularly those having multiemployer plans) may have in contacting all of their participants.
To prevent adverse selection the plan may provide that any election, or revocation of an election, is not to become effective if the participant dies within some period of time (not in excess of two years) of the election or revocation (except in the case of accidental death where the accident which causes death occurs after the election).

Also, the conferees agree with the statements in the Ways and Means Committee report (No. 93-807) to the effect that the bill does not require the plan to “subsidize” the joint and survivor feature (although the plan is permitted to do so) and that plans may make reasonable actuarial adjustments to take account of the possibility that total costs of the plan otherwise might be increased because of adverse selection.

Appendix B


SEC. 1021. ADDITIONAL PLAN REQUIREMENTS.

(a) JOINT AND SURVIVOR ANNUITY REQUIREMENT.—

(1) IN GENERAL.—Section 401(a) (relating to requirements for qualification) is amended by inserting after paragraph (10) the following new paragraph:

“(11) (A) A trust shall not constitute a qualified trust under this section if the plan of which such trust is a part provides for the payment of benefits in the form of an annuity and if—

“(i) the participant and his spouse have been married throughout the 5-year period ending on the annuity starting date, or

“(ii) the participant dies after his earliest retirement age and before the annuity starting date, and the participant and his spouse have been married throughout the 5-year period ending on the date of his death,

unless such plan provides for the payment of annuity benefits in a form having the effect of a qualified joint and survivor annuity.

“(B) A plan shall be treated as satisfying the requirements of this paragraph if, under the plan, each participant has a reasonable period (as prescribed by the Secretary or his delegate by regulations) before the annuity starting date during which he may elect in writing (after having received a written explanation of the terms and conditions of the joint and survivor annuity and the effect of an election under this subparagraph) not to take such joint and survivor annuity.
“(C) A plan shall not be treated as not satisfying the requirements of this paragraph merely because, under the plan, any election under subparagraph (B), and any revocation of any such election, does not become effective (or ceases to be effective) if the participant dies within a period (not in excess of 2 years) beginning on the date of such election or revocation, as the case may be.

“(D) For purposes of this paragraph—

“(i) the term ‘annuity starting date’ means the first day of the first period for which an amount is received as an annuity (whether by reason of retirement or by reason of disability),

“(ii) the term ‘earliest retirement age’ means the earliest date on which, under the plan, the participant could elect to receive retirement benefits, and

“(iii) the term ‘qualified joint and survivor annuity’ means an annuity for the life of the participant with a survivor annuity for the life of his spouse which is not contingent upon survivorship of such spouse beyond the earliest age at which the participant could elect to receive retirement benefits under the plan and which is not less than one-half of the amount of the annuity payable during the joint lives of the participant and his spouse.

“(E) This paragraph shall apply only if—

“(i) the annuity starting date did not occur before the effective date of this paragraph, and

“(ii) the participant was an active participant in the plan on or after such effective date.”

(2) Certain additional requirements apply only to plans to which vesting requirements apply.—Section 401(a) (relating to requirements for qualification) is amended by adding at the end thereof the following new sentences: “Paragraphs (11), (12), (13), (14), (15), and (19) shall apply only in the case of a plan to which section 411 (relating to minimum vesting standards) applies. Any regulation prescribed by the Secretary or his delegate for purposes of paragraph (11), (12), (13), (14), (15), or (19) shall be effective for any plan year beginning after December 31, 1975, only if approved by the Secretary of Labor.”

(b) Requirements in case of mergers and consolidations of plans or transfers of plan assets.—Section 401(a) is amended by inserting after paragraph (11) the following new paragraph:

“(12) A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that—
“(A) in the case of any merger or consolidation with, or transfer of assets or liabilities to, any other plan after October 22, 1973, each participant in the plan would (if the plan then terminated) receive a benefit immediately after the merger, consolidation, or transfer which is equal to or greater than the benefit he would have been entitled to receive immediately before the merger, consolidation, or transfer (if the plan had then been terminated); and

“(B) no merger, consolidation, or transfer of assets or liabilities to another plan may be made after the date of the enactment of this paragraph unless the plan administrator has filed with the Secretary or his delegate, at least 30 days before such merger, consolidation, or transfer, an actuarial statement of valuation evidencing compliance with the requirements of subparagraph (A).”

(c) Retirement Benefits May Not Be Assigned or Alienated.—Section 401(a) is amended by inserting after paragraph (12) the following new paragraph:

“(13) A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that benefits provided under the plan may not be assigned or alienated. For purposes of the preceding sentence, there shall not be taken into account any voluntary and revocable assignment of not to exceed 10 percent of any benefit payment.”

(d) Requirement That Payment of Benefits Begin Not Later Than When the Participant Attains Age 65 or Has Completed 10 Years of Participation.—Section 401(a) is amended by inserting after paragraph (13) the following new paragraph:

“(14) A trust shall not constitute a qualified trust under this section unless the plan of which such trust is part provides that, unless the participant otherwise elects, the payment of benefits under the plan to the participant will begin not later than the 60th day after the latest of the close of the plan year in which—

“(A) the date on which the participant attains age 65.

“(B) occurs the 10th anniversary of the year in which the participant commenced participation in the plan, or

“(C) the participant terminates his service with the employer.”

(e) Requirement That Plan Benefits Are Not Decreased by Certain Social Security Increases.—Section 401(a) is amended by inserting after paragraph (14) the following new paragraph:
“(15) a trust shall not constitute a qualified trust under this section unless under the plan of which such trust is a part—

“(A) in the case of a participant or beneficiary who is receiving benefits under such plan, or

“(B) in the case of a participant who is separated from the service and who has nonforfeitable rights to benefits. . . .”

Joint and survivor annuities.—Under present law, there is no requirement that a qualified employee plan must provide for survivor annuities. This can result in a hardship where an individual primarily dependent on his pension as a source of retirement income is unable to make adequate provision for his spouse’s retirement years should he predecease her. To correct this situation, the committee’s bill requires that if a plan provides for a lifetime annuity then, where the participant has been married for the 5-year period ending on the annuity starting date, the plan must provide for a joint and survivor annuity (or an arrangement, such as supplementary benefits for the participant’s spouse, which has essentially the same effect) where the survivor annuity is at least half of the annuity payable to the participant during the joint lives of the participant and his spouse.

The plan is not required to provide this benefit unless the employee has been married throughout the 5-year period ending on the annuity starting date. This has been done so that plans can provide reasonable protection against adverse selection such as might occur, for example, where a single person “marries” immediately before retirement, retires, and then chooses to take heavily subsidized joint and survivor benefits in the form of a lump-sum distribution. Although your committee’s bill does not require joint and survivor benefits to be subsidized (i.e., to be in excess of the actuarial value of a single-life annuity), neither does your committee wish to provide a disincentive to such subsidized benefits.

In addition, concern was expressed that if an employee could provide such protection for his spouse only if he had already retired, then this would provide an unwarranted artificial incentive to exercise early retirement rights where available. Your committee concluded that it was preferable not to provide an artificial stimulus to exercise of these rights (or an added cost to the providing of these rights) of the sort that would result from requiring a survivor annuity to be paid only when the basic annuity was already in pay status. As a result, the bill requires the survivor annuity to be payable if the participant after reaching the earliest age at which retirement is permitted (whether or not retired), where the participant and his spouse have been married throughout the 5-year period ending on the date of the participant’s death. This is to be applied on a person-by-person basis. Thus, if a plan permits retirement as early
as age 50 with 30 years of service, but otherwise retirement benefits are to be payable only upon attaining age 65, the earliest retirement age for an employee who began work at 25 would be age 55.

The plan may provide that the participant has a reasonable period (as prescribed in regulations) before the annuity starting date during which he may elect in writing—after having received a written explanation of the terms and conditions of the joint and survivor annuity and the effect of such an election—not to take the joint and survivor annuity. The bill permits a plan to protect against adverse selection by providing that any election to take a single-life annuity (instead of a joint and survivor annuity) or any revocation of such an election would not become effective if the participant dies within some period of time (not in excess of 2 years) of such election or revocation. The plan would be permitted in such a case to disregard the election or revocation. This formulation of the bill’s requirements provides flexibility in that it does not require the plan to provide any such rule as to delayed effect if those in control of the plan choose not to do so. The bill does not require the plan to “subsidize” the joint and survivor annuity. Consequently, such a joint and survivor annuity could be less (in terms of dollars per annuity payment) than the single life annuity. Also, the bill does not forbid plans from making reasonable actuarial adjustments to take appropriate account of the possibility that otherwise total costs would be increased because of adverse selection.

The joint and survivor annuity requirements are to apply only to plans to which the new vesting requirements of this bill are applicable. In other words, the joint and survivor rules would not apply to government plans, they would not apply to church plans unless an election had been made to come under the new rules, and the effective date in the case of existing plans would be delayed to the same extent that the effective date is delayed generally with regard to the new vesting provisions. Of course, the plans not subject to these provisions (or to which the new provisions would not apply for some years into the future) may offer joint and survivor options if they wish to do so. The mandatory provisions of the bill will not apply unless that participant’s annuity starting date is on or after the effective date with regard to that plan and would not apply unless that participant was an active participant in the plan on or after that effective date.

Appendix C

(11) A trust shall not constitute a qualified trust under this section if the plan of which such trust is a part provides for the payment of benefits in the form of an annuity for the life of a participant unless such plan provides for the payment of such benefit in the form of a joint and survivor annuity (with a survivor annuity of not less than one half of the amount of the annuity payable to the participant and his spouse), unless the participant elects in writing, within 2 years of normal retirement age (or, if earlier, within 2 years of the first payment of regular retirement benefits), not to have the benefit paid in such form and that such election may be made only after such participant receives a written explanation of the terms and conditions of such joint and survivor annuity and the effect of such election.

1. Right to elect a survivor annuity (sec. 261 of the bill and sec. 401 of the Code).

Under present law, there is no requirement that a qualified retirement plan must offer the option of a survivor annuity. This can result in a hardship where an individual primarily dependent on his pension as a source of retirement income is unable to make adequate provision for his spouse's retirement years, should he predecease her. To correct this situation, the committee provision requires that a joint and survivor annuity be offered as an option with respect to any benefit under a qualified retirement plan which is payable as an annuity. If the option is exercised, and a survivor annuity is elected, the participant's own annuity may be reduced, so that the value of the joint and survivor annuity and the value of the annuity the participant would have been entitled to receive had the option not been exercised are actuarially equivalent.

This provision generally applies to plan years beginning after the date of enactment. However, in the case of a plan in existence on the date of enactment, the provision applies to plan years beginning after December 31, 1975.