

example provided above, if the participant elected a QJSA with a retroactive annuity starting date and a 66⅔% survivor annuity, the QJSA would provide \$840 monthly to the participant with a survivor annuity of \$560 to the participant's spouse and a make-up payment of \$18,666. Spousal consent is not required in such a case because the \$560 survivor annuity exceeds the minimum permissible under a currently commencing QJSA.

The proposed regulations impose an additional condition on the availability of a retroactive annuity starting date, regarding the permissible amount of the distribution under sections 417(e)(3) (if applicable) and 415. To satisfy this condition, the distribution must be adjusted, if necessary, to satisfy the requirements of sections 417(e)(3) (if applicable) and 415 where the date the distribution commences is substituted for the annuity starting date.

Several comments raised concerns regarding the requirement that sections 415 and 417(e)(3) be satisfied as of the date of distribution as well as the retroactive annuity starting date. Some commentators suggested that testing whether the distributions satisfy section 415 as of the date of distribution could be particularly restrictive for multiemployer plans. The commentators noted, for example, that for a participant who left covered service under a multiemployer plan at age 60 and retires at age 68 under a plan with an age-62 normal retirement age, the amount payable in the year of benefit commencement, as calculated for purposes of section 415, could well be higher than 100% of that participant's average compensation for his high three years and thus would violate section 415.<sup>2</sup>

The IRS and Treasury Department believe this second test is generally needed to stop participants from using the retroactive annuity starting date as a means of receiving benefits in excess of the section 415 limits. However, the IRS and Treasury Department have weighed the importance of compliance with this requirement against the associated burdens and have concluded that testing for section 415 compliance as of the date distributions commence may not be needed in every case. Thus, the final regulations do not apply the requirement that satisfaction of the benefit limitations of section 415 be demonstrated as of the date

distributions commence in the case of a distribution that commences no more than twelve months after the retroactive annuity starting date, unless the form of benefit (as of the retroactive annuity starting date) is a form of benefit subject to the valuation rules of section 417(e)(3). For example, in the case of a life annuity distribution, compliance with section 415 need not be demonstrated as of the date of distribution where that date is no more than twelve months after the retroactive annuity starting date. However, if the distribution were a single sum distribution, compliance with section 415 would need to be tested as of the actual commencement date.

Some commentators also objected to the rule in the proposed regulation that required the plan to comply with the valuation rules of section 417(e)(3) as of the date of distribution. The IRS and Treasury Department continue to believe that a participant should not be receiving a smaller lump sum through the election of a retroactive annuity starting date than would be available for a current annuity starting date.

Accordingly, these regulations adopt the rules of the proposed regulations regarding the requirements of section 417(e)(3) with a clarification relating to the application of section 417(e)(3). Under this clarification, in the case of a form of benefit that would have been subject to section 417(e)(3) if distributions had commenced as of the retroactive annuity starting date, the distribution pursuant to a retroactive annuity starting date election must be no less than the distribution produced by applying the applicable interest rate and the applicable mortality table determined as of the date the distribution commences to the annuity form that corresponds to the annuity form that was used to determine the benefit amount as of the retroactive annuity starting date. Thus, for example, if a distribution paid pursuant to an election of a retroactive annuity starting date is a single-sum distribution that is based on the present value of the straight life annuity payable at normal retirement age, then the amount of the distribution must be no less than the present value of the annuity payable at normal retirement age, determined as of the distribution date using the applicable mortality table and applicable interest rate that apply as of the distribution date. Likewise, if a distribution paid pursuant to an election of a retroactive annuity starting date is a single-sum distribution that is based on the present value of the early retirement annuity payable as of the

retroactive annuity starting date, then the amount of the distribution must be no less than the present value of the early retirement annuity payable as of the distribution date, determined as of the distribution date using the applicable mortality table and applicable interest rate that apply as of the distribution date.

The final regulations retain the rule of the proposed regulations that the determination of whether the valuation rules of section 417(e)(3) apply is based upon the benefit form as of the retroactive annuity starting date. Accordingly, a distribution option that is a non-decreasing benefit under § 1.417(e)-1(d)(6) does not become subject to the valuation rules of section 417(e)(3) merely because of the make-up payments for the period between the retroactive annuity starting date and the date distributions actually commence.

Similarly, the final regulations provide that annuity payments that otherwise satisfy the requirements for a QJSA under section 417(b) will not fail to be treated as a QJSA for purposes of section 415(b)(2)(B) because a retroactive annuity starting date is elected and a make-up payment is made. Further, to address concerns raised by commentators, these regulations provide that plan distributions may be considered to be a series of substantially equal periodic payments for purposes of section 72(t)(2)(A)(iv) even though the plan distributes a make-up payment to a participant who has elected a retroactive annuity starting date.

One commentator suggested that make-up payments made pursuant to a retroactive annuity starting date should be considered to be part of a series of substantially equal periodic payments for purposes of the eligible rollover distribution definition of section 402(c)(4)(A). However, these regulations do not address this issue. Section 1.402(c)-2, Q&A-6 provides that an adjustment in a payment that is part of a series of substantially equal periodic payments will be treated as part of the series of substantially equal periodic payments for purposes of section 402(c)(4)(A) where the adjustment was due solely to reasonable administrative error or delay. To ensure that any rule applicable to make-up payments under this regulation is consistent with the rules generally applicable to independent payments under Q&A-6, the IRS and Treasury Department anticipate reviewing these rules and issuing guidance.

Two commentators suggested that defined contribution plans should be allowed to adopt provisions for

<sup>2</sup> After the comments relating to multiemployer plans were received, section 415(b)(11) was amended by the Economic Growth and Tax Relief Reconciliation Act of 2001, Public Law No. 107-16, to provide that the 100% test of section 415(b)(1)(B) no longer applies to multiemployer plans.