No. _______

IN THE

Supreme Court of the United States

COLGATE-PALMOLIVE COMPANY, *ET AL.*,

Petitioners,

v.

REBECCA MCCUTCHEON, *ET AL.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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June 12, 2023

QUESTIONS PRESENTED

This Court has repeatedly held that when an ERISA plan expressly confers upon the plan administrator discretion to interpret its terms, that interpretation should stand unless arbitrary and capricious. *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989); *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105 (2008); *Conkright v. Frommert*, 559 U.S. 506 (2010). In declining to defer to the reasonableness of the Colgate plan administrator's interpretation of key plan provisions, the Second Circuit departed from this line of cases and deepened two separate circuit splits. The questions presented are:

1. Whether the Second Circuit erred in holding, contrary to decisions of the Seventh Circuit, that it must disregard all objective extrinsic evidence of the reasonableness of an ERISA plan administrator's interpretation of plan terms if the court views the plan terms as unambiguous within the four corners of the plan.

2. Whether the Second Circuit erred in holding, contrary to decisions of the Ninth and Tenth Circuits, that an ERISA plan administrator's reasonable interpretation of plan terms receives no deference if the plan terms at issue involve actuarial assumptions used to determine a plan participant's benefits.

PARTIES TO THE PROCEEDING

Petitioners here and defendants-appellants below are Colgate-Palmolive Company, Colgate-Palmolive Company Employees' Retirement Income Plan and the Employee Relations Committee of Colgate-Palmolive Company (collectively, "Colgate"). Colgate employees Laura Flavin and Daniel Marsili were also defendants below, but the claims against them were dismissed.

Respondents here and plaintiffs-appellees below, Rebecca McCutcheon and Paul Caufield, are named plaintiffs who brought suit on behalf of a class of former employees of Colgate, each of whom (1) was a Colgate employee in July 1989, (2) received a lump sum payment from Colgate's Employees' Retirement Income Plan (the "Plan"); and (3) is entitled to a "greater benefit than his or her Accrued Benefit" under certain provisions of the Plan, certified by Order entered July 27, 2017 in *Rebecca McCutcheon, et al. v. Colgate-Palmolive Co., et al.,* Dkt. No. 75, 1:16-cv-04170-LGS (S.D.N.Y.).

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioners certify that Colgate-Palmolive Company is a publicly held corporation. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of this Court's Rule 14.1(b)(iii): *In re Colgate-Palmolive Co. ERISA Litig.*, No. 07-cv-9515 (S.D.N.Y. July 17, 2014); *McCutcheon v. Colgate-Palmolive Co.*, No. 16-cv-4170 (S.D.N.Y. Aug. 24, 2020); *McCutcheon v. Colgate-Palmolive Co.*, No. 20-3225 (2d Cir. Mar. 13, 2023).

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Colgate-Palmolive Company, Colgate-Palmolive Company Employees' Retirement Income Plan and the Employee Relations Committee of Colgate-Palmolive Company respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Second Circuit Court of Appeals (App. A) is reported at 62 F.4th 674 (2d Cir. 2023). The district court's opinion (App. B) is reported at 481 F. Supp. 3d 252 (S.D.N.Y. 2020).

JURISDICTION

The judgment of the Second Circuit was entered on March 13, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant provisions of ERISA, 29 U.S.C. § 1001 *et seq.*, and Internal Revenue Code §§ 401(a)(25) and 417(e) are set forth in the appendix to this petition (App. E).

INTRODUCTION

The deference to which ERISA plan administrators are entitled under an "arbitrary and capricious" standard of review means nothing if a court can carve out unwarranted exceptions. The court below erected two obstacles to deference that warrant this Court's review.

Petitioners are a pension plan, the Employees' Retirement Income Plan (the "Plan"); the plan sponsor, Colgate-Palmolive Company; and the Employee Relations Committee (the "Committee"), which was appointed as the plan administrator, with broad discretion to interpret the plan at issue (collectively, "Colgate"). Respondents are Plan participants who challenged Colgate's calculation of pension benefits. The crux of the disagreement turned on the interpretation of Plan provisions concerning a Plan amendment and its actuarial calculations. Colgate sought to demonstrate the meaning of those provisions using the text of the Plan as well as objective extrinsic evidence, such as contemporaneous documentation and course of conduct, that was drawn from outside the Plan's four corners. Under longstanding ERISA precedent, so long as the Colgate plan administrator's decisions were not arbitrary and capricious, the courts below were obligated to accept them.

The courts below repeatedly refused to defer to the Colgate plan administrator. The Second Circuit justified this approach in two extraordinary ways. *First*, it refused to consider the "substantial extrinsic evidence" of a Plan amendment's meaning because, in the court's view, the Plan language was unambiguous within the four corners of the Plan, thereby precluding examination of anything other than Plan text itself. The court took this position despite acknowledging the likelihood that its decision was contrary to the intended effect of the provision—as demonstrated by contemporaneous documentation. This decision conflicts with those from the Seventh Circuit, such as *Mathews v. Sears Pension Plan*, 144 F.3d 461, 466-67 (7th Cir. 1998), where the court held that the doctrine of "extrinsic ambiguity" applies to the interpretation of ERISA plan terms and permits consideration of "objective" evidence to show what someone "who understood the context of [the plan's] creation would understand" the language to mean.

Second, the court below refused to defer to Colgate's plan administrator to interpret a Plan term that necessarily involves an actuarial assumption, namely the interest rate used to project certain benefits to age 65, where the Plan does not state expressly what interest rate to use. Instead, the court carved out an exception to the well-established deference given plan administrators and concluded that deference would impermissibly conflict with the requirement in I.R.C. § 401(a)(25) that, for an ERISA plan to be tax-qualified, accrued benefits must be "definitely determinable". That statute, however, is a tax code provision that Congress omitted from ERISA. Accordingly, other circuits have recognized that the standards of I.R.C. § 401(a)(25) are inapplicable to ERISA cases. *See McDaniel v. Chevron Corp.*, 203 F.3d 1099, 1118 (9th Cir. 2000); *Stamper v. Total Petroleum, Inc. Ret. Plan*, 188 F.3d 1233, 1238-39 (10th Cir. 1999). By creating the false choice between a purportedly unlawful Plan provision and the court's preferred reading, the court below proceeded to substitute its own judgment for the plan administrator's.

The court below undermined the deference owed plan administrators with discretion to interpret plan terms by placing obstacles in the way of considering the reasonableness of Colgate's interpretations. In the process, the court reached a result in direct conflict with the contemporaneous documentary evidence of the meaning of the provision at issue, as well as Colgate's consistent course of conduct since enacting the amendment. The court also mandated the use of inconsistent interest rates to project two items that were then compared to each other—a result the plan administrator would not have adopted in the exercise of the discretion to which it was entitled under the Plan and governing ERISA law.

STATEMENT

A. Colgate's "Old" vs. "New" Formula

Prior to 1989, Colgate's Plan was a final average pay plan, which provided participants with a benefit expressed as a monthly annuity beginning at normal retirement age (the "Grandfathered Formula benefit"). A1269. The Grandfathered Formula benefit was based on a participant's years of service, final average earnings and estimated Social Security benefit. A537. In 1989, the Plan was converted to a cash balance plan, which provided Plan participants with a benefit expressed as a balance in a personal retirement account ("PRA") that was credited with interest and pay credits over time. A1269. The "new" Plan formula defined the PRA benefit as the participant's "Accrued Benefit". *See, e.g.*, A405, § 1.2.[1]

Unlike the "old" Grandfathered Formula, the "new" cash balance approach allowed participants to elect to receive their PRA benefit as either a lump sum (the "PRA lump sum") or a lifetime monthly annuity (the "PRA annuity"). The PRA lump sum and the PRA annuity are two forms of the same benefit. The Plan document describes both options identically, as the "Actuarial Equivalent of the Member's Accrued Benefit". A434-435; A585-586.

Upon retirement, Grandfathered Participants could elect to receive their benefit as a lump sum payment, consisting of the "new" PRA benefit plus any contributions they made to continue the "old" Grandfathered Formula. For Participants who had continued making contributions to maintain their Grandfathered Formula benefit, like named plaintiff McCutcheon, this lump sum option is set out in Appendix C § 2(a). A480; A638.

If, on the other hand, a Grandfathered Participant elected to receive his or her benefit in the form of an annuity, the Grandfathered Participant automatically received the greater of (i) the annuity to which they were entitled under the "old" Grandfathered Formula or (ii) the "new" PRA annuity to which they were entitled under the "new" formula, plus any contributions they made to maintain their benefit under the Plan (the "2(b)(ii)

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[1] The 1994 Plan document was effective as of July 1, 1989, and sets forth the relevant terms of the Plan following the 1989 conversion. App. 55a.

Annuity"). For employees who continued making contributions under the Grandfathered Plan, this annuity option is set out in Appendix C § 2(b). A480-481; A638-639.

The Plan did not provide for any similar "greater of" comparison of the "old" Grandfathered Formula benefit and the "new" PRA benefit for Participants who elected to receive their "new" PRA benefit as a lump sum payment—the individuals who make up the current class.

B. The Residual Annuity Amendment

In 2004, Colgate identified a potential forfeiture issue for certain Grandfathered Participants who elected to receive a lump sum. The "new" PRA lump sum these participants received was potentially lower than the value of the annuity that was otherwise payable under the "old" Grandfathered Formula. As noted above, for Grandfathered Participants who elected to receive their benefit in the form of an annuity, the Plan makes a "greater of" comparison between the "old" Grandfathered Formula benefit and the "new" PRA benefit to ensure such Grandfathered Participants will not forfeit any benefit to which they were entitled under the "old" Grandfathered Formula. However, the Plan did not make any such "greater of" comparison for Participants who elected the "new" PRA lump sum.

To address this gap, Colgate's pension consultants advised Colgate to consider an amendment to the Plan providing that "if the PRA lump sum is selected, an incremental, unsubsidized 'residual' annuity may also need to be provided *to* *make the total benefit equivalent to the grandfathered formula benefit*". A1000 (emphasis added). To that end, Colgate subsequently adopted the Residual Annuity Amendment ("RAA") in 2005.

The relevant text reads:

> Effective as of July 1, 1989, a Member who, under any of Appendices B, C or D, is entitled to a greater benefit than his Accrued Benefit (as defined in Section 1.2), and who chooses to receive his benefit under this Lump Sum Payment Option, which is the Actuarial Equivalent of his Accrued Benefit (as defined in Section 1.2), shall receive in addition to such lump sum payment an additional benefit, commencing at the same time and payable in the standard form applicable to such Member under Sections 6.2 or 6.3. A Member may not elect any other form of payment option with respect to this additional benefit.
>
> Such additional benefit shall be computed by subtracting the age 65 single life annuity Actuarial Equivalent amount of the Member's lump sum payment from the age 65 single life annuity benefit otherwise payable to the Member under Appendices B, C or D, as applicable, and applying to such remainder early retirement reductions applicable to the Member's benefit based on the Member's age at benefit commencement.

A366.

Notably, under the RAA, Colgate must first convert the "new" PRA lump sum a Participant received into an annuitized amount, or the "age 65 single life annuity Actuarial Equivalent amount of the Member's lump sum payment" (the "Age 65 AE of LS paid"). *Id.* That is done to perform an "apples to apples" comparison between the two benefits expressed as annuities. The RAA specifies that, once calculated, the Age 65 AE of LS paid would only be compared to the benefit "otherwise payable" and only "as applicable", which Colgate interpreted to mean the "old" Grandfathered Formula benefit, as the "new" PRA benefit had already been paid in the form of a lump sum, and therefore could not be the "otherwise payable" benefit.

Colgate thus adopted the RAA to ensure that Grandfathered Participants did not forfeit a portion of their "old" Grandfathered Formula benefit by electing a "new" lump sum. Colgate proceeded to provide residual annuities to affected Participants with a value equal to the difference between the "old" Grandfathered Formula annuity benefit otherwise payable under the Appendices, on the one hand, and the "new" PRA lump sum they had actually received, converted to the Age 65 AE of LS paid, on the other hand. A921; *see also* A537-538.

C. The *Colgate I* Litigation

In 2007, class counsel filed an ERISA action that identified a separate forfeiture issue concerning the "new" PRA formula. *See In re Colgate-Palmolive Co. ERISA Litig.*, Master File No. 07-cv-9515 (S.D.N.Y.)

("*Colgate I*"). The plaintiffs in *Colgate I* were former Colgate employees (including employees who joined Colgate after the Plan's conversion in 1989 to the PRA formula) who had elected to receive their benefit under the "new" PRA formula as a lump sum. A1573. The plaintiffs in that action alleged that the value of the "new" PRA lump sums they received was less than the value of the "new" PRA annuity they would have been entitled to receive, in violation of the present value requirements under I.R.C. § 417(e). To be clear, this claim involved a comparison of "new" lump sum and "new" annuity benefits, *not* "new" lump sum and "old" annuity benefits. During the class period, the Plan merely paid out the balance in a participant's PRA as a lump sum instead of projecting the PRA balance forward to age 65 at the interest rate prescribed by the Plan (to calculate the PRA annuity), and then discounting the resulting amount back to the present using a different, lower, interest rate prescribed by § 417(e). A1580. This is called a "whipsaw calculation". *Id.* According to the plaintiffs in *Colgate I*, failure to perform the "whipsaw calculation" for the *Colgate I* class members resulted in the underpayment of the plaintiffs' "new" PRA lump sum, as compared to the "new" PRA annuity. Notably, the need for the "whipsaw calculation" was eliminated when Colgate amended the Plan in 2003 (before the adoption of the RAA) so that going forward, the projection rate used to convert the PRA balance to age 65 was the same as the discount rate prescribed by § 417(e). A560 § 1.5; A585 § 6.4(a)(i).

The parties reached an agreement to settle *Colgate I*, which was approved by the District Court in 2014. *In re Colgate-Palmolive Co. ERISA Litig.,* 36 F. Supp. 3d 344 (S.D.N.Y. 2014). The settlement included a broad release of pension claims relating to the calculation of the "new" PRA lump sum and "new" PRA annuity, and the Plan paid over $45 million to the class as part of the settlement. A291; A296; A299. Excluded from the release were any claims that are "based upon, or arise under" the RAA, but such claims are offset by the settlement benefit. A304-305.

D. Plaintiff McCutcheon's Administrative Claim and Complaint

On July 30, 2014, Rebecca McCutcheon, a former employee who worked at Colgate from 1979 to 1994 and who had been a plaintiff in the *Colgate I* litigation and participated in the settlement, filed an administrative claim alleging that she was additionally entitled to a residual annuity under the RAA. A393-394. The Committee denied Ms. McCutcheon's claim, explaining that the annuitized form of Ms. McCutcheon's "new" PRA lump sum (plus the *Colgate I* settlement proceeds she had already received) was greater than the "old" Grandfathered Formula benefit that was otherwise payable to her, and, as a result, she was not entitled to any additional RAA benefit. A372-375.

Following the denial of her claim and administrative appeal, Ms. McCutcheon, along with Ms. McCutcheon's beneficiary, Mr. Caufield, filed this putative class action complaint against Colgate, the Plan, the Committee and Colgate employees Marsili and Flavin for violations under ERISA.

A143-158. The action was brought as a continuation of *Colgate I*.

Plaintiffs in the follow-on case assert that the RAA actually serves a purpose entirely different from the purpose described in documents contemporaneous with its adoption and inconsistent with how the Plan has been administered. Specifically, Plaintiffs argue that the RAA is intended to provide a residual annuity to address any shortfall in the "new" PRA lump sum due to the failure to calculate the "new" PRA lump sum using the "whipsaw calculation" described above. Under this view, even though the RAA is available *only* to Grandfathered Participants, the RAA requires Colgate to make a comparison between the "new" PRA lump sum, expressed as the Age 65 AE of LS paid, on the one hand, and the *greater* of the "old" Grandfathered benefit or the "new" 2(b)(ii) Annuity, on the other hand. A69-72. Accordingly, Plaintiffs allege that they were improperly denied benefits because Colgate failed to pay a residual annuity that took into account any difference between the "new" Age 65 AE of LS paid and the "new" PRA annuity. *Id.* Colgate contends that the RAA was not intended to compare two different forms of the same "new" benefit, and rather applies only to a comparison of the "old" Grandfathered Formula benefit and the "new" PRA lump sum. Plaintiffs also allege that Colgate improperly used a pre-retirement mortality discount in determining the Age 65 AE of LS paid when calculating residual annuities. A73. Plaintiffs assert damages of approximately $300 million arising from these alleged "errors". App. 16a.

E. Proceedings Below

Following two years of discovery, Colgate filed a motion for summary judgment on September 4, 2019. A869-870. Colgate argued that the plain terms of the Plan, as well as substantial extrinsic evidence, make clear that the RAA requires only a comparison between a Participant's "new" PRA lump sum, expressed as the Age 65 AE of LS paid, and the "old" Grandfathered Benefit, but not the "new" 2(b)(ii) Annuity. This is because the "new" 2(b)(ii) Annuity is the same "new" PRA benefit that the Participant already received as a lump sum and, therefore, cannot be the "otherwise payable" benefit described in the language of the RAA. A892-902. Plaintiffs did not move for summary judgment on any issue at that time.

On July 10, 2020, the District Court denied Colgate summary judgment. App. 90a-132a. The District Court not only disagreed with the Committee's interpretation of the RAA, but found the Plan terms "clear[ly] and unambiguous[ly]" require a comparison between (a) the "new" Age 65 AE of LS paid and (b) the greater of the "old" Grandfathered benefit or the "new" 2(b)(ii) Annuity as described in the Appendices. App. 118a-121a. The basis of the District Court's holding was the perception that the "new" 2(b)(ii) Annuity is not the same benefit as the "new" Age 65 AE of LS paid. App. 119a-121a. Therefore, the District Court held, Colgate must consider any difference between the "new" Age 65 AE of LS paid and the "new" 2(b)(ii) Annuity and award Participants a residual annuity to reflect that amount. *Id.*

Following this decision, Plaintiffs filed a request for leave to file a motion that would grant Plaintiffs summary judgment, consistent with the July 10 Order. A1461-1464.

Plaintiffs filed their motion for summary judgment on August 4, 2020. A1469-1482. In addition to their 10-page motion, Plaintiffs submitted a 30-page redline of the District Court's July 10 Order denying Colgate's summary judgment motion, which included textual edits, the addition of citations and detailed residual annuity calculations based on Plaintiffs' expert report. A1516-1549. Colgate opposed Plaintiffs' motion, arguing that before summary judgment was entered for Plaintiffs, the Committee should first be given an opportunity to interpret the Plan in light of the Court's July 10 Order and determine which portions of the Appendices are "applicable" as well as the appropriate interest rates to use when comparing the "new" Age 65 AE of LS paid and the "new" 2(b)(ii) Annuity. A1550-1563.

The District Court issued an order on August 24, 2020, granting Plaintiffs summary judgment. App. 52a-86a. The decision mirrored the July 10 Order and accepted most of Plaintiffs' proposed changes. Notably, while the District Court's July 10 Order described Plaintiffs as only having "the better argument" in interpreting the RAA, App. 116a, the August 24 Order accepted Plaintiffs' edit of that same sentence to state that Plaintiffs "are correct" in their interpretation and granted summary judgment, with no changes to the earlier order's substantive reasoning. App. 68a.

The Second Circuit affirmed. Although it acknowledged that the Plan authorizes its administrator to interpret the Plan, the court refused to consider extrinsic evidence of the Plan's meaning, which directly supported the reasonableness of the Colgate plan administrator's interpretation. Instead, importing into its analysis rigid principles of contract law to the exclusion of the trust law principles on which ERISA is based, the Second Circuit concluded that certain plan language was unambiguous in Respondents' favor, and so declined to defer to the plan administrator's interpretation or even to consider the contemporaneous objective evidence undergirding it. App. 31a-38a.

The Second Circuit also refused to defer to the plan administrator's reasonable interpretation of an actuarial calculation (involving the interest rate used for projections), concluding that any ambiguity would impermissibly conflict with the requirement in I.R.C. § 401(a)(25) that accrued benefits be "definitely determinable". Instead, the court substituted its own judgment for that of the plan administrator and approved Plaintiffs' proposed actuarial calculation. App. 39a-46a. This petition followed.

REASONS FOR GRANTING THE PETITION

This petition presents two questions related to purported exceptions to the underlying principles of deference to plan administrator discretion under this Court's *Firestone* line of cases.

I. Review Is Warranted Because There Is a Conflict Among the Federal Courts Regarding the Consideration of Extrinsic Evidence in Support of a Plan Administrator's Reasonable Interpretation of Plan Terms.

The Second Circuit's decision warrants this Court's review because it deepens confusion in the circuits concerning the discretion that ERISA plan administrators may exercise. If not corrected by the Court, the Second Circuit's decision will sow additional confusion and further entrench an incorrect canon of judicial review of ERISA plan interpretation—in direct contravention of Congress's intent when it enacted ERISA.

A. This Court Has Held That ERISA Requires Deference to Plan Administrator Judgments.

Congress struck a delicate balance when it enacted ERISA. As this Court has recognized, "Congress enacted ERISA to ensure that employees would receive the benefits they had earned, but Congress did not require employers to establish benefit plans in the first place." *Conkright v. Frommert*, 559 U.S. 506, 516 (2010). For this reason, ERISA represents a "careful balancing between [1] ensuring fair and prompt enforcement of rights under a plan and [2] the encouragement of the creation of such plans". *Id.* at 517 (quotation omitted). The interpretive deference afforded to ERISA plan administrators, articulated by this Court in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989), and affirmed repeatedly ever since, "preserves the 'careful balancing' on which ERISA is based". *Conkright*, 559 U.S. at 517.

1. In *Firestone*, this Court held that the arbitrary and capricious standard of review applies where "the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan". 489 U.S. at 115. This Court has adhered to this deferential standard of review without exception. In *Metropolitan Life Insurance Co. v. Glenn*, this Court declined to "create special burden-of-proof rules, or other special procedural or evidentiary rules", and held that a deferential standard of review continues to apply even when the plan administrator has a conflict of interest. 554 U.S. 105, 116-17 (2008). And in *Conkright*, this Court held that the plan administrator remains entitled to deference even where it had previously issued an interpretation of the same plan terms that a federal court found to be unreasonable. 559 U.S. at 522. The Court emphasized that the administrator's interpretation of plan terms was "not [to] be disturbed if reasonable". *Id.* at 521 (quoting *Firestone*, 489 U.S. at 111).

These principles are drawn from trust, not contract law. *See Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559, 570 (1985) ("Thus, rather than explicitly enumerating *all* of the powers and duties of [ERISA] trustees and other fiduciaries, Congress invoked the common law of trusts to define the general scope of their authority and responsibility."); 29 U.S.C. § 1103(a) ("assets of an employee benefit plan shall be held in trust"). When applying the principles of trust law in the ERISA context, the court "analogize[s] a plan administrator to the trustee of a common-law trust". *Glenn*, 554 U.S. at 111 (citing *Firestone*, 489 U.S. at 111).

2. Application of these trust law principles, as articulated in *Firestone* and its progeny, is vital to preserving the "careful balanc[e]" Congress crafted when enacting ERISA. *Conkright*, 559 U.S. at 517. ERISA is predicated on uniformity of decision and predictability of liabilities. *See id.* ("ERISA induc[es] employers to offer benefits by assuring a predictable set of liabilities, under uniform standards of primary conduct and a uniform regime of ultimate remedial orders and awards when a violation has occurred." (quotation omitted)). By "permitting an employer to grant primary interpretive authority over an ERISA plan to the plan administrator", *id.*, *Firestone* deference promotes these interests in uniformity and predictability.

B. The Second Circuit's Refusal to Consider Extrinsic Evidence Conflicts with Decisions of Other Circuits.

In contravention of this Court's *Firestone* line of cases and Congress's purpose in enacting ERISA, the Second Circuit refused to defer to a plan administrator's reasonable interpretation by deliberately disregarding substantial extrinsic evidence supporting the Colgate plan administrator's view.

1. The Colgate Plan could not be clearer in affording deference to the plan administrator, including specifically in interpreting plan terms. The

Plan expressly grants the plan administrator "[t]he exclusive right to construe and interpret [] the terms or provisions of the Plan . . . ; to exercise discretion where necessary or appropriate in the interpretation and administration of the Plan; and to decide any and all matters arising thereunder". A445, § 8.4(a). Under this Court's *Firestone* line of cases, that language should trigger arbitrary and capricious review, under which the plan administrator's interpretation is upheld if reasonable. Nevertheless, the Second Circuit erected an artificial barrier to preclude itself from considering evidence demonstrating the Colgate plan administrator's reasonableness, and decided this case *de novo* because it concluded that the provision of the RAA at issue unambiguously supported Plaintiffs' position. App. 24a-30a.[2]

Critically, the Second Circuit applied its plain meaning interpretation of the Plan even while acknowledging that "[i]t may be true that Colgate's intent when adopting the RAA was different from the actual effect of the text's unambiguous language". App. 33a. Despite the presence of "substantial extrinsic evidence" supporting the Colgate plan administrator's decision, the court below refused even to consider that evidence, as though it were deciding a contract interpretation

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[2] Colgate notes it disagrees with the Second Circuit's conclusion that the provision at issue, RAA § 5 (amending Plan § 6.4(a)(1)) (A366), unambiguously means what the Second Circuit held it means. In particular, the terms "otherwise payable" and "as applicable" (A366) are reasonably interpreted to limit the residual annuity comparison to the old Grandfathered Formula benefit.

case outside the ERISA fiduciary context. *Id.* The court did so because it perceived the appeal as presenting "what seems to be a simple question of contract interpretation", App. 2a, rather than a question of deference under ERISA to the plan administrator, drawing on trust law principles.

The Second Circuit believed its own precedent required this result because "as we read our case law, we have no choice but to adopt what we see as the unambiguous reading". App. 38a. The court cited Second Circuit precedent limiting review to the "four corners of the contract". App. 33a (citing *Feifer v. Prudential Ins. Co. of Am.*, 306 F.3d 1202, 1210 (2d Cir. 2002)).

In expressly approaching the issue at hand as "a simple question of contract interpretation", App. 2a, the decision below is contrary to this Court's direction that in determining standards of review in ERISA cases, "we are guided by principles of trust law", not contract law. *Firestone*, 489 U.S. at 111 (citing *Cent. States, Se. & Sw. Areas Pension Fund*, 472 U.S. at 570). Trust law is more permissive than contract law in looking to evidence of settlor intent. *See* Restatement (Third) of Trusts § 4 (2003) ("The phrase 'terms of the trust' means the manifestation of intention of the settlor with respect to the trust provisions expressed in a manner that admits of its proof in judicial proceedings."); Unif. Trust Code § 415 cmt. (2000), 7C U.L.A. 515 (2006) ("In determining the settlor's original intent, the court may consider evidence relevant to the settlor's intention even though it contradicts an apparent plain meaning of the text.").

2. The decision below furthers the confusion in ERISA jurisprudence between those circuits (notably the Seventh, but also others) that allow parties to present extrinsic evidence to show that an ERISA plan's language is susceptible of more than one meaning, and those circuits (such as the Second and Sixth) that do not.

To be sure, ERISA requires a "written instrument" for every employee benefit plan, 29 U.S.C. § 1102(a)(1), and accordingly "is built around reliance on the face of written plan documents". *US Airways, Inc. v. McCutchen*, 569 U.S. 88, 100-01 (2013) (quotation omitted). This Court has held that equitable defenses may not "overrid[e] plain contract terms". *Id.* at 101. Accordingly, "[e]xtrinsic evidence should not be used where the contract is unambiguous", and "if fiduciaries or administrators of an ERISA plan controvert the plain meaning of a plan, their actions are arbitrary and capricious". *Swaback v. Am. Info. Techs. Corp.*, 103 F.3d 535, 540-41 (7th Cir. 1996) (citations omitted).

The circuit split arises, however, where there is an ambiguity not evident within the four corners of the plan, and extrinsic evidence can demonstrate the latent ambiguity. The Seventh Circuit has long permitted recourse to extrinsic evidence to understand the meaning of plan terms. In *Mathews v. Sears Pension Plan*, 144 F.3d 461, 466 (7th Cir. 1998) (Posner, J.), the court applied the exception to the parol evidence rule by which "parties are allowed to present extrinsic evidence to demonstrate that although the [plan document] looks clear, anyone who understood the context of its creation would understand that it doesn't mean what it seems to mean". *Mathews* was a case in which "[t]he language of the Sears plan" was "unambiguous in favor of the class". *Id.* The plan provided that the discount rate would be the PBGC rate in effect "as of the date of distribution". *Id.* at 464. Yet the court nevertheless held—following review of the objective extrinsic evidence supporting the view that "as of the date of distribution" meant as of January 1 of the year in which the distribution was made—that "Sears' interpretation is correct". *Id.* at 469. Similarly, in *Bock v. Computer Associates International, Inc.*, 257 F.3d 700, 706-11 (7th Cir. 2001), the court found that the term "incentive compensation" was unambiguous and covered sales commissions when considered within the four corners of the plan, but nevertheless concluded after consulting the characterization in a contemporaneous one-page summary of the plan that the term was ambiguous.

The Third Circuit likewise permits analysis of objective extrinsic evidence, such as the parties' course of conduct, to demonstrate an ambiguity in ERISA plan language. In *Baldwin v. University of Pittsburgh Medical Center*, 636 F.3d 69 (3d Cir. 2011), which concerned whether the term "children" included biological children adopted by another parent, the court held that "[a]mbiguous terms that appear clear and unambiguous on their face, but whose meaning is made uncertain due to facts beyond the four corners of the contract, suffer from latent ambiguity". *Id.* at 76; *see also Smith v. Hartford Ins. Grp.*, 6 F.3d 131, 139 (3d Cir. 1993) (holding that "[e]vidence of the parties' performance can also demonstrate a latent ambiguity in the contract”).[3]

Opposing this view, the Sixth Circuit follows a rule similar to the “four corners of the contract” rule articulated in the Second Circuit decision below. App. 33a. As the Sixth Circuit expressed the rule, “before a district court can consider extrinsic evidence of the parties’ intent, it must find an ambiguity *on the face of the contract*”. *Schachner v. Blue Cross & Blue Shield of Ohio*, 77 F.3d 889, 893 (6th Cir. 1996) (emphasis added). In *Schachner*, the district court had granted summary judgment in the plan’s favor because the plan term at issue was ambiguous “based on [the plan’s] extrinsic evidence”. *Id.* at 894. The Sixth Circuit reversed and held that the plan “must make its showing of ambiguity *without* resorting to extrinsic evidence”. *Id.*

The conflict between the two approaches to extrinsic evidence is often outcome-determinative. In *Mathews*, the court would have reached a different outcome if it had applied the “four corners” rule, as the language “as of the date of distribution” was unambiguous on its face. *See Mathews*, 144 F.3d at 466. And in this case, the term at issue—“the age 65 single life annuity benefit ***otherwise payable*** to the Member under Appendices B, C or D, ***as applicable***” (A366) (emphasis added)—is plausibly

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[3] The First and Ninth Circuits have also recognized the appropriate use of extrinsic evidence in determining whether ERISA plans are ambiguous. *See Coffin v. Bowater*, 501 F.3d 80, 97-98 (1st Cir. 2007); *Bolton v. Construction Laborers’ Pension Tr. for S. Cal.*, 56 F.3d 1055, 1059 n.2 (9th Cir. 1995).

interpreted, by someone who understands the context of the Plan's terms, to mean the "old" Grandfathered Formula benefit, since the "new" PRA benefit had already been paid in the form of a "new" lump sum and therefore was neither "otherwise payable" nor "applicable" to the residual annuity calculation. For ERISA plan terms like these, where context matters, deference to the plan administrator is critical.

This conflict leaves companies like Colgate—which operate in multiple states and have tens of thousands of retirees—without certainty in their ability to administer benefit plans in a uniform manner. It is therefore crucial for the Court to settle this issue.

3. Permitting extrinsic evidence to clarify a superficially unambiguous plan document harmonizes with the law of trusts. Plan administrators, like other trustees, are familiar with the goals of the trust and the context in which it was created; they are "knowledgeable of the details of a trust fund (both its purpose and its operation), and thus they are in a position to make prudent judgments concerning participant eligibility". *Ponce v. Constr. Laborers Pension Tr. for S. Cal.*, 628 F.2d 537, 542 (9th Cir. 1980). These reasons for deference to plan administrator judgment apply with even greater force where the terms at issue involve complex plan amendments and nuanced actuarial calculations, as is the case here. *See Roark v. Lewis*, 401 F.2d 425, 429 (D.C. Cir. 1968) ("[T]he size of the pie is fixed and variations can be achieved only by changing the size or the number of the slices. . . . It is for the trustees, not judges, to choose between various reasonable alternatives."). Review is necessary here to ensure that complex ERISA plan provisions are interpreted by plan administrators, who are best suited to perform that task.

C. This Case Is an Ideal Vehicle To Resolve This Circuit Split.

This case presents an ideal fact pattern to resolve the circuit split over whether, under ERISA's arbitrary and capricious standard of review, courts can refuse to consider objective evidence of a pension plan's meaning on the ground that the court believes the plan terms are unambiguous on the face of the contract. That is because the Second Circuit acknowledged that its "four corners" interpretation of the plan terms may be inconsistent with Colgate's purpose of adopting the RAA. Even though "[i]t may be true that Colgate's intent when adopting the RAA was different from the actual effect of the text's unambiguous language", the court nevertheless relied on contract law (not trust law) cases to hold that Colgate's contrary intent "does not control our analysis". App. 33a.

The extrinsic evidence of the meaning of the Plan amendment is compelling. Contemporaneous documentation makes clear that the purpose of the RAA was to compare the old grandfathered annuity to the new PRA lump sum, not (as the Second Circuit held) to compare the new PRA annuity to the new PRA lump sum. The Plan's consultant, Mellon, recommended in 2004 that the Committee amend the Plan to "reflect[] the incremental value of the grandfather benefit over the PRA lump sum". A969. Similarly, the Committee minutes from December

2004, where Mellon presented its recommendation and the plan administrator first discussed adoption of the RAA, state that the residual annuity will be provided "to make the total benefit equivalent to the *grandfathered formula benefit*". A999-1000 (emphasis added); *see also* A913-923; A1295-1298 (summarizing contemporaneous documentation). This extrinsic evidence demonstrates that the Plan term "otherwise payable" does *not* unambiguously refer to "the larger of [a participant's] grandfathered annuity or her PRA annuity", as the Second Circuit found based on its reading of "the clear text of the Plan, without more". App. 27a. Rather, it was reasonable for the Plan administrator to conclude that "otherwise payable" referred to the grandfathered benefit alone.

The parties' course of conduct is consistent with this contemporaneous documentation. Following the adoption of the RAA, Colgate consistently administered the plan to provide an additional annuity *only* if a Participant's "old" Grandfathered Formula benefit exceeded the Age 65 AE of LS paid. *See* Dkt. No. 237 ¶¶ 61-71.[4]

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[4] Over the years, the Committee consistently expressed this understanding of the RAA's purpose. The Second Circuit ignored the portion of the February 2014 minutes (A855) that supported the Committee's interpretation of the term "otherwise payable", App. 39a-42a & n.20, even as the court embraced as determinative, because the Committee was acting in its settlor capacity, the portion of the exact same minutes that the court believed supported its view on which interest rates to use, 40a-41a. This asymmetric use of the same contemporaneous documentation further demonstrates the

The Second Circuit recognized that its decision had "some peculiar, though not inexplicable, effects". App. 38a. The court persisted with this result because it wrongly believed that it "ha[d] no choice but to adopt what we see as the unambiguous reading". *Id.* Thus, the decision below makes clear on its face that, under the correct legal standard, the result likely would be different.

II. Review Is Warranted To Resolve a Conflict Over Whether Courts Should Defer to Plan Administrator Interpretations Involving Actuarial Assumptions.

This case presents a second, related question that warrants the Court's review. Despite this Court's repeated holdings that courts should defer to the plan administrator's reasonable interpretations of the terms of an ERISA plan, the Second Circuit held that no deference is due if the interpretive issue involves an actuarial assumption (such as an interest rate) used to determine a plan participant's benefit. App. 44a-45a. The Second Circuit's decision widens a circuit conflict on this issue, and, if correct, would mean that this Court reached the wrong result in *Conkright*.

A. The Circuits Are Divided Over Whether Deference Is Due to a Plan Administrator's Interpretation Involving Actuarial Assumptions.

The Second Circuit held that the usual deference accorded to plan administrators under

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need for this Court to establish guiding principles for the interpretation of ERISA plans.

ERISA is inapplicable to interpretations involving an actuarial assumption. Having erroneously held that the RAA requires a projection of the two forms of the "new" PRA benefit (the account balance and the prior lump sum) to age 65, *see supra* Point I, the court should have *then* allowed the Plan administrator to choose the relevant projection rate to apply (a question that arose only because of the court's novel interpretation, and so had never been considered by the Plan administrator). Instead, the court below compounded its first error by requiring Colgate to use inconsistent interest rates for the two sides of that comparison. Specifically, the court held that in projecting the PRA balance to age 65, Colgate was required to use a "20+1%" rate (the 20-year Treasury bill rate plus 1%), App. 42a-46a, but, in projecting the lump sum distribution of the PRA benefit to age 65, Colgate was required to use the lower PBGC rate, *id.* at 39a-42a. The result was to impose a substantial and unexpected liability on the Plan, driven largely by the artificial difference created by requiring the use of inconsistent interest rates.

The Second Circuit based its refusal to defer to the plan administrator on a provision Congress added to the Internal Revenue Code ("IRC") (but omitted from ERISA itself) stating that one of the requirements for tax-qualification under the Code is that a participant's accrued benefit must be "definitely determinable", *i.e.*, that actuarial assumptions must be specified "in the plan in a way which precludes employer discretion". App. 44a-45a (citing IRC § 401(a)(25)). Courts of appeals are squarely divided on this precise issue.

1. In *McDaniel v. Chevron Corp.*, 203 F.3d 1099 (9th Cir. 2000), the Ninth Circuit deferred to a plan administrator's reasonable adjustment to the actuarial assumptions incorporated in a pension plan.

To determine when a lump sum distribution is the "actuarial equivalent" of an ordinary single-life annuity, 29 U.S.C. § 1054(c)(3), the plan administrator must rely on assumptions about how long any given plan participant is likely to continue receiving benefits. In *McDaniel*, Chevron determined its own liabilities to the pension plan using separate mortality tables for men and women to account for the overrepresentation of men among its plan participants and women's significantly greater life expectancy. 203 F.3d at 1105. Because federal law requires plans to use a single table to calculate actuarially equivalent benefits for both men and women, however, the company used a single, all-population mortality table but tweaked the table to account for the significant overrepresentation of men among plan participants. *Id.*

A plan participant sued, alleging that this adjustment violated the plan's requirement that benefits be "based on" and "in accordance with" the specified mortality table. The Ninth Circuit viewed the plaintiff's argument as reasonable, but nevertheless rejected it. Chevron's interpretation was also reasonable: the mortality table specified in the plan was the starting point or foundation of its actuarial analysis, but that did not foreclose reasonable adjustments to the table. Because the plan gave the plan administrator discretion to construe plan terms and determine benefit eligibility, the company's reading was controlling. *Id.* at 1107-14.

The Ninth Circuit, in direct conflict with the Second Circuit's approach in this case, rejected the plaintiff's argument that Chevron's interpretation was unreasonable because it meant that the plan's assumptions were not "definitely determinable", as required for tax qualification under I.R.C. section 401(a)(25). *McDaniel*, 203 F.3d at 1114-20. The court found no indication that Congress intended to incorporate this preclusion of "employer discretion" into ERISA's "actuarial equivalent" requirement, and "no basis for concluding that an ambiguous description of a mortality assumption in a pension plan violates [ERISA's actuarial equivalence requirement in] § 204(c)(3)". *Id.* at 1118; *see also Stamper v. Total Petroleum, Inc. Ret. Plan*, 188 F.3d 1233, 1238-39 (10th Cir. 1999) (refusing to find that a pension plan was unlawful based on the Tax Code's "definitely determinable" requirement because "it would be improper to read into ERISA a requirement Congress elected to apply only to the Tax Code").

2. On the other side of the split, the Seventh Circuit agrees with the Second Circuit. In *Thompson v. Retirement Plan for Employees of S.C. Johnson & Son, Inc.*, 651 F.3d 600 (7th Cir. 2011), the court determined that the plan used impermissible interest rates to calculate benefits, and rejected the administrator's argument that it should have discretion to determine the replacement rates. The Seventh Circuit held that *Firestone* deference does not apply with respect to actuarial assumptions because supplying assumptions "is not interpretation" and because of the requirement that, to be tax-qualified, a pension plan must specify actuarial assumptions. *Id.* at 608-10. Noting that "[s]omeone, however, must choose a method for making the inherently uncertain estimate" using actuarial assumptions, the court held that the district court, rather than the plan administrator, should make such a determination. *Id.* at 610.

3. Other courts repeatedly have deferred to plan administrators' interpretations involving actuarial calculations. *See, e.g.*, *Fallin v. Comm. Indus. Cash Balance Plan*, 695 F.3d 512, 516 (6th Cir. 2012); *de Nobel v. Vitro Corp.*, 885 F.2d 1180, 1188-91 (4th Cir. 1989).

Indeed, this Court did exactly that in *Conkright*. The underlying issue in *Conkright* was how to account for past distributions to plan participants when calculating current benefits. 559 U.S. at 510. The plan was ambiguous on how to account for the time value of money, a key actuarial calculation. The plan administrator initially chose to use what was called the "phantom account" method, by which past distributions were assumed to have grown as if invested in the plan's investment funds. *Id.* After the Second Circuit rejected that approach as violating ERISA, the plan administrator on remand chose to adjust past distributions based on an "interest rate that was fixed at the time of distribution". *Id.* at 511. On a second appeal, the Second Circuit declined to defer to the plan administrator's modified decision on a "one strike and you're out" principle because the administrator's initial determination had been set aside as unreasonable. *Id.* at 512-13. This Court reversed on the ground that a prior mistake "does not strip a plan administrator of deference". *Id.* at 513.

Conkright, like the Second Circuit's decision in this case, involved actuarial assumptions used to calculate plan benefits. If the Second Circuit is correct that plan administrators receive no deference in this situation, then the Court reached the wrong result in *Conkright*. The conflict between the decision below and *Conkright* provides an additional reason to grant the petition.

B. The Second Circuit's Decision Is Deeply Flawed.

The decisions of this Court and other courts deferring to plan administrator interpretations involving actuarial assumptions are correct.

1. Congress "incorporated a number of requirements into both the Tax Code and ERISA", but it incorporated the "'actuarial assumptions' requirement only into the Tax Code and not into ERISA". *Stamper*, 188 F.3d at 1238. As the court in *Stamper* explained: "In light of the Supreme Court's observation that 'ERISA is a comprehensive and reticulated statute, which Congress adopted after careful study of private retirement pension plans,' we believe it would be improper to read into ERISA a requirement Congress elected to apply only to the Tax Code." *Id.* at 1238-39 (quotation omitted).

Other courts of appeals have reached similar conclusions. For example, the Third Circuit noted that '[t]he mere fact that ERISA sets forth requirements for qualification of plans does not lead one to conclude that the failure of a plan to meet these requirements is a 'violation' of ERISA." *Trenton v. Scott Paper Co.*, 832 F.2d 806, 810 (3d Cir. 1987). And the D.C. Circuit rejected a claim that a plan violated a tax-qualification provision because "[the plaintiff] doesn't seek to disqualify the plan; she seeks relief under ERISA". *Clark v. Feder, Semo & Bard, P.C.*, 739 F.3d 28, 29 (D.C. Cir. 2014). The Sixth Circuit explained: "[T]he favorable tax consequences of ERISA plans are not mandatory and cannot be guaranteed by judicial intervention." *Crawford v. Roane*, 53 F.3d 750, 756 (6th Cir. 1995); *see also Abraham v. Exxon Corp.*, 85 F.3d 1126, 1131 (5th Cir. 1996) ("Failure to meet the [tax qualification] requirements of those regulations results in the loss of a beneficial tax status; it does not permit a court to rewrite the plan . . . .").

2. The argument for *Firestone* deference is especially strong when the ambiguities and gaps in an ERISA plan involve the actuarial assumptions underpinning a plan. ERISA is an "enormously complex and detailed" statute. *Mertens v. Hewitt Associates*, 508 U.S. 248, 262 (1993). So are ERISA plans, which are often lengthy and complicated. *See, e.g.*, *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11 (1987). As this case illustrates, determining what benefits an ERISA plan participant should receive often requires multiple actuarial assumptions used at multiple steps of a complex calculation process. This complexity creates the possibility for ambiguities. "The words of a plan may speak clearly, but they may also leave gaps." *US Airways, Inc. v. McCutchen*, 569 U.S. 88, 102 (2013).

The Second Circuit's decision creates a sweeping exception to *Firestone* deference, multiplying the number of decisions by plan administrators that will be subject to second-guessing via litigation and *de novo* judicial review. That expansion of judicial review would undermine the efficiency and predictability of plan administration.

If the plan administrator's decisions about actuarial assumptions are not entitled to deference, decisions about which rates to use will fall to courts. *See, e.g.*, *Thompson*, 651 F.3d at 610. Where, as here, the plan assigns to the plan administrator responsibility for making those determinations, judicial assumption of this responsibility subverts the intent of the plan. Moreover, courts are ill-suited to make decisions about the actuarially appropriate interest rates. Those decisions should be left to plan administrators, as the plan here contemplated.

C. This Case Is an Excellent Vehicle for Deciding the Question.

The question on which the courts are divided is clearly presented in this case. The Colgate Plan expressly grants the plan administrator discretion to interpret the plan's provisions. A444-445 § 8.4. Colgate proffered, as a reasonable interpretation, that the plan's interest crediting rate should be used to project the PRA balance to age 65 because that is the rate used to project a cash balance to retirement age under Second Circuit precedent, and requested that the plan administrator be given an opportunity to provide its interpretation. A1560-61 (citing *Esden v. Bank of Boston*, 229 F.3d 154, 163-65 (2d Cir. 2000)). Nevertheless, the Second Circuit applied *de* *novo* review and refused to defer to the plan administrator if the administrator would exercise discretion to resolve an ambiguity concerning actuarial assumptions. App. 44a-45a.

The Plan here does not specify the interest rate the administrator should use to project the PRA balance to age 65. The Second Circuit reasoned that a "recitation of the relevant plan mechanics reveals … the appropriate rate for calculating a participant's lump sum annuity". App. 42a. The court's unusual choice of words is significant. The court did not rely solely on the language of the plan, but instead on its understanding of "plan mechanics". Nor did the court say that a particular interest rate is "specified" or "required" by the plan language, but only that the Court's chosen rate is "appropriate". The Second Circuit acknowledged that Section 1.3 of the Plan prescribes the interest rate used in the calculation that converts a cash balance at age 65 into an annuity, but does not expressly address the interest rate to be used when a participant chooses to receive his or her benefit prior to age 65, such that the participant's cash balance must be projected forward to age 65 before being converted into an annuity. Although the court asserted that the "plain text" of Section 1.3 "applies to the whole process of converting a member's account into an age 65 annuity", App. 44a, it went beyond the "plain text" by conflating the distinct steps of "projection" and "conversion."[5]

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[5] By conflating the terms "projection" and "conversion", the court of appeals disregarded the ordinary meaning of these terms of art. As with *Mathews*, 144 F.3d at 466, "anyone who

The Second Circuit's decision creates a substantial liability for the Plan by dictating the use of inconsistent interest rates to project the two sides of the comparison. The Second Circuit believed that, for the 2(b)(ii) Annuity, this result followed from the Plan requirement to use the 20+1% rate "[f]or purposes of converting a Member's Account". A405 § 1.3. But the calculation of the hypothetical annuity involves two separate steps: the *projection* of the account balance from an earlier age to age 65, followed by the *conversion* of the projected account balance to an annuity. IRS and congressional guidance reject the court's equivalence of projection and conversion and make clear that *projecting* a cash-balance account balance to normal retirement age is distinct from *converting* the projected account balance to an annuity, and may be subject to a different interest rate.[6] The interest rate for the projection to age 65 is not addressed in Section 1.3 of the Plan.

To fill these gaps, the Second Circuit should have afforded the Plan administrator an opportunity

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understood the context" in which those terms were employed within the Plan—*i.e.*, professionals knowledgeable about ERISA—would have known that they addressed different functions and should not have been treated as synonyms. (*See supra* Point I.) Deference to the Colgate plan administrator to interpret these terms was therefore particularly necessary.

[6] *See, e.g.*, IRS Notice 96-8, 1996-1 C.B. 359 (recognizing that projection rates may differ from annuity conversion rates); Joint Committee on Taxation Report JCX-38-06, at 153 (2006) (explaining that "generally" projection is based on the cash balance interest crediting rate, while conversion is based on interest and mortality assumptions specified in the plan).

to address this issue in the first instance.[7] The Second Circuit refused to grant the required deference to the Plan administrator, and instead relied on an interpretation that is not required by the Plan language. Accordingly, the court's ruling requiring use of the 20+1% rate rests on its conclusion that plan administrators' discretion to interpret plan provisions does not extend to provisions concerning actuarial assumptions.[8]

The Second Circuit's approach is particularly troubling because it resulted in a substantial liability for the Plan, caused almost entirely by the artificial difference between the Age 65 AE of LS paid and the 2(b)(ii) Annuity created by requiring Colgate to project the two items to age 65 at different interest rates. The court found, contrary to Colgate's position, that a 2014 resolution requires use of the PBGC rate to project the Age 65 of LS paid. App. 39a-42a. But

[7] Colgate proposed to use the Plan's interest crediting rate to project the 2(b)(ii) Annuity to age 65. The court rejected that interpretation out of hand because it believed it to depart from past practice in other contexts. App. 45a & n.22. But those other contexts did not involve adding liabilities to the Plan as a result of the use of inconsistent interest rates.

[8] The Second Circuit also found Colgate's proffered interpretation "difficult to credit" because it supposedly departed from Colgate's past practice. App. 46a. But Colgate's plan administrator had never before calculated a "projected Appendix C § 2(b) winning annuity" because, prior to the court's decision, the plan administrator believed that such a calculation was not required at all. The Second Circuit thus discounted Colgate's proffered interpretation on the ground that the plan administrator failed to anticipate the court's resolution of a separate interpretive issue (*see supra* Point I). In so doing, the Second Circuit repeated the error this Court expressly disapproved in *Conkright*, 559 U.S. at 512-13.

the court declined to give the plan administrator an opportunity to consider how the court's resolution of this actuarial assumption affects other, closely related actuarial assumptions, such as the use of the 20+1% rate to project the other side of the comparison (the "new" PRA annuity). That is inconsistent with *Conkright*, which made clear that, if the plan administrator's initial interpretation is not accepted by the court, the plan administrator must still be given another opportunity to interpret the plan. 559 U.S. at 513 ("We reject this 'one-strike-and-you're-out' approach.").

The Second Circuit's application of IRC § 401(a)(25) to override plan administrator discretion had an inequitable result. The Colgate plan administrator was deprived of the opportunity to consider the alternatives for the appropriate interest rate to use in projecting the 2(b)(ii) Annuity.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

June 12, 2023

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED MARCH 13, 2023

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2021

(Argued: December 6, 2021 Decided: March 13, 2023)

Docket No. 20-3225

REBECCA MCCUTCHEON, ON BEHALF OF THEMSELVES AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PAUL CAUFIELD, ON BEHALF OF THEMSELVES AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellees,

v.

COLGATE-PALMOLIVE CO., COLGATE-PALMOLIVE CO. EMPLOYEE'S RET. INCOME PLAN, LAURA FLAVIN, DANIEL MARSILI, EMPLOYEE RELATIONS COMMITTEE OF COLGATE-PALMOLIVE CO.,

Defendants-Appellants.[*]

Before: LIVINGSTON, *Chief Judge*, SACK, *Circuit Judge*, and COGAN, *District Judge.*[**]

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* The Clerk of the Court is respectfully instructed to amend the caption to conform with the above.

** Judge Brian M. Cogan, United States District Court for the Eastern District of New York, sitting by designation.

Plaintiffs-appellees brought this class action under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq. , arguing, inter alia, that defendant-appellant Colgate-Palmolive Co. miscalculated residual annuities based on an erroneous interpretation of its retirement income plan and improperly used a pre-retirement mortality discount to calculate residual annuities, thereby working an impermissible forfeiture of benefits under ERISA. The district court granted summary judgment to plaintiffs-appellees on these claims. For the reasons set forth below, we agree. We therefore AFFIRM the district court's order and final judgment.

Sack, *Circuit Judge*:

At its core, this appeal presents what seems to be a simple question of contract interpretation, obscured by the argot of federal law governing employee retirement income plans. On one hand, the plaintiffs-appellees—a class of former employees of Colgate-Palmolive Co. ("Colgate")—assert that certain provisions of Colgate's retirement plan have a single, unambiguous meaning that entitles them to greater benefits. On the other, the defendants-appellants—Colgate and some of its affiliated entities and officers—argue that those provisions are ambiguous, and that we must therefore defer to their preferred interpretation, which would result in lesser cumulative benefit payments to the plaintiff class.

After extensive litigation in which summary judgment was granted to the defendants on several counts,[1] the

1. The initial grant of summary judgment with respect to those claims is not before us on appeal.

United States District Court for the Southern District of New York (Schofield, *J.*) granted summary judgment to the plaintiff class on a subset of its claims. In particular, the district court entered summary judgment for the plaintiffs on Count II, Errors 1 and 3, reasoning that Colgate had denied benefits based on two discrete errors in administering a 2005 amendment to the plan that provided for residual annuity benefits to certain plan participants. Colgate now appeals that order and final judgment of the district court. We conclude that the plaintiffs-appellees' interpretation of Colgate's retirement plan is the unambiguously correct reading of the plan's text, and therefore AFFIRM the district court's order and final judgment granting summary judgment to the plaintiffs-appellees on Count II, Errors 1 and 3.

BACKGROUND

A. Factual Background

Defendant-appellant Colgate is a global consumer products company that sponsored the Colgate-Palmolive Co.'s Employees' Retirement Income Plan (the "Plan"), an employee pension benefit plan.

1. The Plan's conversion to a cash balance plan

The issues in this appeal stem from the Plan's conversion from a final-average-pay plan to a cash-balance plan in 1989.[2] Prior to 1989, the Plan operated as a final-

2. To be precise, the Plan was amended in 1994, with retroactive effect as of July 1, 1989. This amendment is therefore applicable to

average-pay plan, meaning that a member's "accrued benefit" was calculated based on her final average earnings, along with her years of service and estimated Social Security benefits. Under this earlier iteration of the Plan, each member (also referred to as a participant) could receive a retirement benefit *only* in the form of a monthly annuity beginning at the normal retirement age of 65 (hereinafter referred to as the "grandfathered" annuity, for reasons that should soon become clear).

In 1989, Colgate converted the Plan to a cash-balance plan which provided participants with an accrued benefit expressed as a hypothetical cash balance in a Personal Retirement Account, or PRA (the "PRA benefit"). Over time, Colgate credited each member's PRA with a fixed percentage of her annual pay plus interest. Unlike the pre-1989 version of the Plan (in which members could receive grandfathered benefits only as an annuity), the cash-balance plan offered participants a choice to receive their PRA benefit as *either* a lump sum *or* a lifetime monthly annuity.

After the Plan shifted from final-average-pay to cash-balance, Colgate needed to account for those participants who had already accrued benefits under the pre-1989 plan but remained employed after the conversion. To do so, Colgate grandfathered participants who had already accrued benefits under the prior final-average-pay plan

all class members paid between July 1, 1989, and the effective date of the new 2003 Plan. For the purpose of simplifying the complex timeline of relevant events, we refer to the Plan's conversion to a cash-balance model as occurring in 1989.

and offered them the option to purchase the continuing accrual of grandfathered benefits while *also* accruing PRA benefits under the new Plan formula. These participants' rights are contained in Plan Appendices A, B, C, and D. *See* App'x 464-87.[3] As relevant here, those grandfathered participants could elect to receive their ultimate benefit as either a lump sum payment or an annuity. According to Appendix C § 2(b), if a grandfathered participant chose to receive an annuity, she was "eligible" to receive the "larger of" the two different annuities that were accruing: (i) her grandfathered annuity, or (ii) her PRA annuity adjusted to include her contributions toward maintaining the grandfathered annuity.[4] *Id.* at 480-81. If, on the other hand, a grandfathered participant chose to receive a lump sum, Appendix C § 2(a) provides that the lump sum would reflect the value of her accrued PRA benefit plus the value of any contributions she made to continue her prior grandfathered benefits. *See id.* at 480.[5]

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3. Generally, Appendix A defines various terms used in calculating grandfathered benefits, Appendix B specifies how to calculate grandfathered benefits, and Appendices C and D describe the benefits available to certain participants who remained employed after the Plan's 1989 conversion.

4. We refer to the larger of these two annuities hereinafter as a participant's "winning" annuity.

5. Because of the way in which Appendix C is drafted, there are multiple provisions that could be identified as "Appendix C § 2(a)" or "Appendix C § 2(b)." In this opinion, we use those terms to refer to the corresponding provisions found in the record at App'x 480-81, which "shall be applicable" "[i]f a Member elects to make Contributions to Maintain Prior Plan Benefits starting July 1, 1989 and continues to do so until h[er] separation from service." App'x 480.

2. Colgate's calculation of benefits leads to two distinct forfeitures

To resolve the issues raised on appeal, we must first review some of the legal requirements that govern the Plan and how Colgate's failure to comply with those requirements led to two distinct forfeitures of benefits.

The parties agree that at all relevant times the Plan was a "defined benefit plan" under the Employee Retirement Income Security Act of 1975 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, because the plan guarantees a defined level of benefits, known as accrued benefits. For defined benefit plans, ERISA defines the term "accrued benefit" to mean "the individual's accrued benefit determined under the plan and . . . expressed in the form of an annual benefit commencing at normal retirement age." ERISA § 3(23)(A), 29 U.S.C. § 1002(23)(A). In other words, "the accrued benefit under a defined benefit plan must be valued in terms of the annuity that it will yield at normal retirement age," which here is 65. *Esden v. Bank of Bos.*, 229 F.3d 154, 163 (2d Cir. 2000).[6]

6. Federal law defines an "accrued benefit" as an "annual benefit," i.e., an annuity. ERISA § 3(23)(A), 29 U.S.C. § 1002(23)(A). Somewhat oxymoronically, the Plan offers a "monthly annuity." *See, e.g.*, App'x 405, 434-35. For the sake of simplicity, because the Plan's monthly benefit is effectively a traditional annuity paid out in more frequent installments, we treat the "monthly annuity" to which a member is entitled under the Plan as the legally defined "accrued benefit" against which any optional form of the benefit should be compared.

The value of the age-65 annuity to which a participant is entitled under the Plan terms serves as the baseline against which a participant's actual benefits are measured. That said, ERISA does not restrict an employer to providing a benefit only in the form of an annuity; it can also offer an employee the option to receive benefits in a lump sum instead. But the "present value" requirements of § 417(e) of the Internal Revenue Code ("I.R.C.") and § 205(g) of ERISA require that, under a defined benefit plan, any lump sum distribution be the actuarial equivalent of a member's normal retirement benefit. *See* I.R.C. § 417(e); ERISA § 205(g), 29 U.S.C. § 1055(g); *see also Esden*, 229 F.3d at 163-64. In other words, any lump sum's value must be equal to the value of the age 65 single life annuity to which the member is otherwise entitled, accounting for, among other things, the time value of money and the life expectancy of the recipient. This actuarial-equivalence requirement is designed to protect employees from employers who might entice them "to sell their pension entitlement back to the company cheap" by offering a lump sum option that is less valuable than the delayed annuity they would receive upon reaching retirement age. *Berger v. Xerox Corp. Ret. Income Guarantee Plan*, 338 F.3d 755, 762 (7th Cir. 2003).

The first forfeiture caused by Colgate's implementation of the Plan involves a so-called "whipsaw violation," which relates to the inequivalence of the two optional forms of the PRA benefit: the PRA lump sum and the PRA annuity. To ensure that a lump sum is actuarially equivalent to the retirement-age annuity guaranteed by a cash-balance plan, the plan administrator (here, Colgate) must perform what is known as a whipsaw calculation. *See Laurent v. Pricewaterhouse Coopers LLP*, 794 F.3d 272, 275 (2d Cir. 2015) (explaining that a whipsaw calculation is used to determine the "difference between the hypothetical value of a cash balance plan account at any given time and the value of the account as an annuity payable at normal retirement age"). Generally speaking, to perform the whipsaw calculation, a plan administrator typically projects a participant's hypothetical cash balance forward to normal retirement age using a certain interest rate (the "projection rate") and then discounts that amount back to present value with a certain interest rate (the "discount rate"). Projection rates may be set by a plan, but the discount rate is statutorily capped. *See Esden*, 229 F.3d at 159. In the context of the Plan, to properly compute a participant's lump sum benefit, Colgate had to increase the participant's hypothetical cash balance to age 65 using the plan-prescribed "projection rate," convert that amount into the age 65 annuity (i.e., the PRA annuity), convert that age 65 annuity to a lump sum, and finally discount the lump sum back to present value using the statutorily-prescribed "discount rate."[7]

As relevant to the class members before us, § 1.3 of the Plan selected as a projection rate the 20-year Treasury

7. Colgate amended the Plan in 2003 so that the projection rate used to convert a member's cash balance to age 65 was the same as the discount rate prescribed by I.R.C. § 417(e). The whipsaw violation was therefore resolved on a prospective basis as of the date of this amendment, but it remained an issue retrospectively for participants who had been underpaid while the higher projection rate was in effect.

bill interest rate plus 1% (the "20+1% rate"). *See* App'x 405-06 (requiring that the 20+1% rate must be used "[f]or purposes of converting a Member's Account into a single life annuity payable for the life of the Member starting at Normal Retirement Date"). In the whipsaw calculation, that rate was used to project the hypothetical PRA account balance forward to the age of 65 and to convert that projected balance into the PRA annuity. The discount rate used to bring the age 65 projected lump sum back to present value is set by I.R.C. § 417(e). From 1989 to 2002, federal law mandated that the discount rate could not be higher than the Pension Benefit Guaranty Corporation rate (the "PBGC rate"). *See McCutcheon v. Colgate-Palmolive Co.* (*Colgate II*), 481 F. Supp. 3d 252, 257 (S.D.N.Y. 2020) (citing I.R.C. § 417(e)(3)(C); I.R.S. Notice 87-20, 1987-1 C.B. 456 (Feb. 9, 1987)).

For the relevant period, however, Colgate used the 20+1% rate as *both* the projection rate *and* the discount rate, despite the 20+1% rate being considerably higher than the PBGC rate during that time. *See* App'x 1367. As a result of using the same rate to project and discount, a member who elected to receive her benefits as a lump sum received a payment that was necessarily equal to her hypothetical PRA account value. Insofar as this undervalued lump sum was not actuarially equivalent to a member's accrued benefit, these participants suffered a forfeiture.

The second forfeiture at issue is a "grandfathered benefit forfeiture," which relates to the Plan's failure to compare the PRA lump sum to the grandfathered annuity for certain members who continued to make contributions to maintain their grandfathered benefits. As previously noted, these grandfathered participants effectively had two benefits accruing at the same time, and the Plan gave them the option to choose to receive either an annuity or a lump sum—the values of which were required to be actuarially equivalent. For the purposes of present-value requirements under federal law, a grandfathered member's "accrued benefit"—i.e., the baseline annuity to which her lump sum payment must be actuarially equivalent—was the age 65 single life annuity to which she was entitled under the Plan. *See* I.R.C. § 411(a)(7) (defining "accrued benefit"); *accord* ERISA § 3(23)(A). Under Appendix C § 2(b), that "accrued benefit" would be her "winning" annuity, i.e., whichever of the PRA annuity or grandfathered annuity was more valuable. But because there was no lump-sum form of the grandfathered benefit, under Appendix C § 2(a), a participant who elected to receive a lump sum would obtain a payment that (at least in theory) reflected only the value of her PRA annuity, even if her winning annuity—and, thus, her legally defined accrued benefit—was her grandfathered annuity.[8] As a result, some members whose larger grandfathered annuities were their "winning" annuities received lump sum payments that (if properly calculated) would only be actuarially equivalent to their smaller PRA annuities.

Thus, a member with a winning grandfathered annuity who elected a lump sum payment suffered two

8. We say "in theory" because, as noted above, a member's PRA lump sum was *not* the actuarial equivalent of her accrued PRA benefit due to the separate whipsaw violation.

nested forfeitures: first, her PRA lump sum was not actuarially equivalent to her PRA annuity because of Colgate's whipsaw violation, and second, even if the two forms of the PRA benefit had been actuarially equivalent, her properly calculated PRA lump sum still would have been worth less than the present value of her winning grandfathered annuity.

3. The Residual Annuity Amendment

In 2005, Colgate amended the Plan through a Residual Annuity Amendment (the "RAA"). The RAA applied retroactively "[e]ffective as of July 1, 1989," and granted a residual annuity benefit to any participant who (i) elected a lump sum payment and (ii) was "entitled to a greater benefit than h[er] Accrued Benefit" as defined under the Plan. App'x 366.[9]

The core of the issues on appeal concern Colgate's interpretation and implementation of the RAA. In pertinent part, the RAA provides that a qualifying member's residual annuity "shall be computed by subtracting the age 65 single life annuity Actuarial Equivalent amount of the Member's lump sum payment from the age 65 single life annuity benefit otherwise payable to the Member under Appendices B, C, or D, as applicable." App'x 366. Parsing

9. Section 1.2 of the Plan defines "Accrued Benefit" as "a monthly annuity for the life of the Member . . . commencing at Normal Retirement Age or any later date, which is the Actuarial Equivalent of the Member's Account[.]" App'x 405. In other words, this aspect of the Plan's definition of "Accrued Benefit" refers to a participant's PRA annuity.

this clause, the amount of a qualifying member's residual annuity under the RAA equals the difference between two values. The first value is "the age 65 single life annuity Actuarial Equivalent amount of the Member's lump sum payment." *Id.* In less technical terms, this figure reflects the value of the lump sum payment that the member actually received, converted into an annuity payable at the age of 65 for the purpose of comparison. The first value is therefore a hypothetical annuity that is the actuarial equivalent of the lump sum payment that Colgate paid to a member (the "AE of LS").

The second value (from which the AE of LS is subtracted to calculate the residual annuity) is the "age 65 single life annuity benefit otherwise payable to the Member under Appendices B, C or D, as applicable." *Id.* As the precise meaning of this clause is critical to this appeal, it is discussed at some length below. According to the defendants-appellants, in 2004, Colgate discovered the grandfathered benefit forfeiture described above and adopted the RAA to address *only* that forfeiture. *See* Appellants' Br. 14. Thus, Colgate contends that the "age 65 single life annuity benefit otherwise payable to the Member under Appendices B, C or D, as applicable," refers only to the grandfathered annuity (and not to the PRA annuity, even if it is a member's winning annuity). *Id.* at 14-15 (quoting App'x 366). The plaintiffs-appellees, on the other hand, contend that this language unambiguously refers to a member's winning annuity under Appendix C § 2(b) and argue that whatever the RAA's purpose, its plain language operates to remedy both the grandfathered benefit forfeiture and the whipsaw forfeiture for covered participants. *See* Appellees' Br. 11.

Although the RAA was technically effective as of July 1, 1989, Colgate initially implemented the RAA only prospectively, granting residual annuities to qualifying employees who retired after its adoption in 2005. Thus, at first, there was no retroactive application of the RAA to participants who retired between July 1989 and February 2005.

4. The *Colgate I* settlement and retroactive RAA application

In 2007, an ERISA class action was initiated against Colgate on behalf of thousands of Plan participants who alleged that Colgate had miscalculated their pension benefits as a result of the whipsaw violation. *See In re Colgate-Palmolive Co. ERISA Litig.* (*Colgate I*), 36 F. Supp. 3d 344, 347 (S.D.N.Y. 2014). The class was comprised of former Colgate employees—including both those whose employment started before and after the 1989 plan conversion—who had elected to receive their PRA benefit as a lump sum, but who received lump sums worth less than the actuarial equivalent of the PRA annuity benefit to which they were entitled, in violation of § 417(e)'s present-value requirements.

In May 2010, the parties in *Colgate I* reached a preliminary agreement to settle the plaintiffs' claims. At the time of this preliminary agreement, plaintiffs' counsel was unaware of the existence of the RAA. Upon learning of the RAA in July 2011, the plaintiffs continued their efforts to settle *Colgate I*, which eventually culminated in a settlement agreement that excluded from its scope "any and all past, present and future" claims "that are based upon, or arise under the Residual Annuity Amendment." App'x 304. In July 2014, the United States District Court for the Southern District of New York (Schofield, *J.*) approved this $45 million settlement. *See Colgate I*, 36 F. Supp. 3d 344, 2014 WL 7929831 (S.D.N.Y. 2014) (final order and judgment); *see also Colgate I*, 36 F. Supp. 3d at 346.

After disclosure of the RAA during the *Colgate I* settlement proceedings, Colgate began to implement the RAA retroactively, granting millions of dollars of additional annuity benefits to several hundred former participants who had opted to receive lump sum payments between 1989 and 2005. Based on Colgate's reading of the RAA, it calculated those members' residual annuities by subtracting the AE of LS from the grandfathered annuity exclusively, even when a member's PRA annuity—rather than the grandfathered annuity—was her "winning" annuity under the Plan.

5. McCutcheon's administrative claim and appeal

Plaintiff-appellee Rebecca McCutcheon was a Colgate employee from 1979 to 1994. McCutcheon made contributions to continue her eligibility for grandfathered benefits after the Plan's 1989 conversion and elected to receive her pension benefit as a lump sum at the time of her resignation. She also received a settlement payment as part of the *Colgate I* litigation.

On July 30, 2014, McCutcheon filed an administrative claim alleging that she was entitled to a residual annuity under the RAA.[10] By letter dated November 4, 2014, the Employee Relations Committee of Colgate-Palmolive Co. (the "Committee") denied her claim, determining that she was not entitled to any additional benefit under the RAA because the age 65 actuarial equivalent of her lump sum plus her *Colgate I* settlement proceeds was greater than her grandfathered annuity. On April 6, 2015, McCutcheon appealed the Committee's denial, identifying four errors that the Committee allegedly committed when calculating her residual annuity. On June 4, 2015, the Committee denied her appeal.

B. District Court Proceedings

After her administrative appeal was denied, McCutcheon filed this action in the United States District Court for the Southern District of New York on behalf of a putative class against Colgate, the Plan, the Committee, and two Colgate Vice Presidents who served on the Committee, Laura Flavin and Daniel Marsili.[11]

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10. Colgate calculated McCutcheon's grandfathered annuity as $731.31 per month and her PRA annuity as $1,125.38 per month. *See* App'x 790 ¶ 211. Therefore, her winning annuity under Appendix C § 2(b) was her PRA annuity. She elected to receive a lump sum of $22,425.64, and she received a *Colgate I* settlement of $11,226.03 before expenses and fees. *See* App'x 373. Based on the value of her lump sum and settlement, Colgate calculated her AE of LS as $752.84. *See* App'x 374. Therefore, based on Colgate's calculations, her lump sum payment was worth more than her grandfathered annuity, but less than her winning PRA annuity.

11. The complaint originally asserted five causes of action, but the magistrate judge overseeing the pre-trial proceedings bifurcated the case and ordered only Counts I and II to proceed.

Count I, which is not a class claim and is not before us on appeal, alleged that the defendants violated 29 C.F.R. § 2560.503-1 by failing to produce all relevant documents and information during McCutcheon's claim and appeal. Count II, which is before us, alleged that the class plaintiffs were wrongly denied residual annuities under the RAA based on four distinct errors Colgate made when interpreting and calculating such benefits. The district court granted the motion for class certification as to Count II and appointed McCutcheon as the class representative. *Caufield v. Colgate-Palmolive Co.*, No. 16-cv-4170, 2017 U.S. Dist. LEXIS 118022, 2017 WL 3206339, at *6, *8 (S.D.N.Y. July 27, 2017). As explained by the district court, "each Class Member (1) was a Colgate employee in July 1989, (2) received a lump sum payment from the Plan and (3) is entitled to a greater benefit under any of Appendices B, C or D than his or her Accrued Benefit as defined in Plan § 1.2." *Colgate II*, 481 F. Supp. 3d at 260. The plaintiffs estimate that the class contains approximately 1,200 people with claims totaling some $300 million.

After two years of discovery, Colgate moved for summary judgment. The district court granted the motion in part, dismissing (i) Count I; (ii) Count II, Error 2; and (iii) Count II, Error 4 as to the Class but not as to McCutcheon herself. *See McCutcheon v. Colgate-Palmolive Co.*, No. 16-cv-4170, 2020 U.S. Dist. LEXIS 121798, 2020 WL 3893303, at *16 (S.D.N.Y. July 10, 2020).[12] The district court denied summary judgment to

12. In Error 2, the plaintiffs argued that Colgate used the wrong Plan provision to determine the Estimated Social Security Primary Insurance Amount when calculating benefits under the

Colgate on Count II, Errors 1 and 3. *See id.* The plaintiffs subsequently moved for summary judgment on Count II, Errors 1 and 3, and sought entry of a final judgment in their favor. On August 24, 2020, the district court issued an order granting the plaintiffs' motion for summary judgment. *Colgate II*, 481 F. Supp. 3d at 256.

In Error 1, the plaintiffs claimed that Colgate miscalculated residual annuities, leading to a forfeiture. *Id.* at 261. The district court determined that Colgate's reading of the RAA—that both eligibility and the amount of the residual annuity is determined by comparing the lump sum paid with only the grandfathered annuity—was erroneous as a matter of law. *Id.* As to eligibility, the district court agreed with the plaintiffs that "if either the Grandfathered benefit exceeds the Accrued Benefit as defined in Plan § 1.2 [i.e., the PRA annuity] or the participant elected to make Employee Contributions, then

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grandfathered formula. *See* App'x 193. In Error 4, the plaintiffs argued that, while the *Colgate I* settlement agreement required future residual annuities to be offset by any settlement proceeds, the Plan itself was not amended prior to applying the offsets to the payments, and retroactively amending the plan after applying the offsets would result in an impermissible cutback in benefits under ERISA and the I.R.C. *See* App'x 195. The district court denied summary judgment on Error 4 as to McCutcheon because it found a more generous standard of review applied to her claim specifically than the class's Error 4 claim. *McCutcheon*, 2020 U.S. Dist. LEXIS 121798, 2020 WL 3893303, at *15-16. McCutcheon subsequently waived her right to de novo review of her claim based on this Error, which effectively merged her individual claim with the class's claim that the district court dismissed. *See Colgate II*, 481 F. Supp. 3d at 270. Neither of these alleged Errors is before us on appeal.

the participant will be entitled to a Residual Annuity." *Id.* at 262. The court then concluded that "[b]ased on a plain reading of the RAA," "the amount of the Residual Annuity is determined by comparing the Age 65 AE of LS . . . with the *greater of* the Grandfathered Benefit *or* the Member's Accrued Benefit as defined in Plan § 1.2 [i.e., the PRA annuity] plus Employee Contributions." *Id.* (emphasis in original).

In Error 3, the plaintiffs asserted that Colgate violated ERISA when it used a pre-retirement mortality discount ("PRMD") to determine actuarial equivalence when calculating residual annuities. *See id.* at 266-67. Generally speaking, when calculating the present value of a retirement benefit, a mortality discount can be used to account for the possibility that a participant may die before reaching the eligibility age for that benefit. Here, pursuant to the Plan's terms, Colgate incorporated a PRMD when calculating a participant's AE of LS and age 65 annuity benefit, thereby diminishing the value of the residual annuities under the RAA. The district court granted summary judgment to the plaintiffs on Error 3 on the ground that the defendants failed to respond to the plaintiffs' arguments in their opposition brief. *Id.* at 267. Nevertheless discussing the merits, the court explained that, under the Plan, a member's benefit "must be paid in all events and does not decrease if the Participant dies prior to reaching age sixty-five." *Id.* at 268. That is, if a member were to die prior to retirement age, a benefit of substantially similar value is nonetheless paid to that member's beneficiary. The district court adopted reasoning from cases in our sister circuits that "applying a pre-retirement mortality discount to a retirement benefit that does not decrease if the participant dies would result in a lump sum that was less than the actuarial equivalent of the annuity it [was] supposed to replace," and would "result in a forfeiture prohibited by ERISA." *Id.* at 267 (alteration in original) (citation omitted).

Finally, the district court ordered Colgate to recalculate all class members' RAA annuities using the 20+1% rate as the projection rate to convert a below-retirement-age participant's cash balance into an age 65 annuity and the PBGC rate as the discount rate to determine the Age 65 AE of LS. *Id.* at 269.

The defendants-appellants now appeal the district court's grant of summary judgment to the plaintiffs-appellees on Count II, Errors 1 and 3, and the district court's determination that Colgate must use the above-mentioned rates to recalculate participants' residual annuities.

DISCUSSION

I. Standard of Review

"We review a district court's decision to grant summary judgment *de novo*, construing the evidence in the light most favorable to the party against which summary judgment was granted and drawing all reasonable inferences in its favor." *Halo v. Yale Health Plan, Dir. of Benefits & Recs. Yale Univ.*, 819 F.3d 42, 47 (2d Cir. 2016) (citation omitted). Summary judgment is appropriate if the record establishes that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A genuine issue of material fact exists if 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Nick's Garage, Inc. v. Progressive Cas. Ins. Co.*, 875 F.3d 107, 113 (2d Cir. 2017) (citation omitted). In ERISA cases where a pension plan participant moves for summary judgment against a plan administrator, summary judgment is appropriate when the plan language "unambiguously" supports the participant's interpretation. *See O'Neil v. Ret. Plan for Salaried Emps. of RKO Gen., Inc.*, 37 F.3d 55, 58-59 (2d Cir. 1994).

II. Error 1

With respect to Error 1, the plaintiffs claimed that Colgate had miscalculated class members' residual annuities, resulting in an impermissible forfeiture of benefits. Based on its interpretation of the RAA's text, Colgate had calculated residual annuities by comparing the AE of LS only with a member's grandfathered annuity. The district court granted summary judgment to the class, concluding that the unambiguous language of the Plan required Colgate to calculate residual annuities by comparing the AE of LS with the greater of (i) the grandfathered annuity or (ii) the PRA annuity plus employee contributions made to maintain eligibility for grandfathered benefits. *See Colgate II*, 481 F. Supp. 3d at 262. Under the district court's interpretation, an eligible member would receive a residual annuity if either of those annuities is greater than the value of the lump sum they were paid.

We agree with the district court that the text of the RAA is unambiguous and requires Colgate to calculate a member's residual annuity by subtracting the AE of LS from that member's winning annuity under Appendix C § 2(b).

A. Relevant Plan Provisions

Central to this appeal is the language of the RAA and the related language of Plan Appendix C § 2(b), which the parties agree is the relevant appendix provision for purposes of the analysis.

The RAA states, in relevant part:

> Effective as of July 1, 1989, a Member who, under any of Appendices B, C or D, is entitled to a greater benefit than his Accrued Benefit . . . , and who chooses to receive his benefit under this Lump Sum Payment Option, which is the Actuarial Equivalent of his Accrued Benefit . . . , shall receive in addition to such lump sum payment an additional benefit, commencing at the same time and payable in the standard form applicable to such Member . . . . A Member may not elect any other form of payment option with respect to this additional benefit.
>
> Such additional benefit shall be computed by subtracting the age 65 single life annuity

> Actuarial Equivalent amount of the Member's lump sum payment [i.e., the AE of LS] from *the age 65 single life annuity benefit otherwise payable* to the Member under Appendices B, C or D, *as applicable*, and applying to such remainder early retirement reductions applicable to the Member's benefit based on the Member's age at benefit commencement.

App'x 366 (emphases added).

Appendix C § 2(b) states, in relevant part:

> If [a member] elects to receive an annuity settlement instead of a single lump sum payment, he *shall be eligible* for an annuity pursuant to Section 6.2 . . ., Section 6.3 . . . or Section 6.4(a)(ii) . . . of the Plan that provides for him to receive *the larger of*:
>
> (i) the benefit that he would have received had he continued under the Plan as in effect prior to July 1, 1989, pursuant to Appendix B . . . [i.e., his grandfathered annuity]; or
>
> (ii) the benefit payable pursuant to Section 6.2 . . . , Section 6.3 . . . or Section 6.4(a)(ii) . . . of the Plan [i.e., his PRA annuity], which is the Actuarial Equivalent of the Member's Accrued Benefit . . . plus his Contributions to Maintain Prior Plan Benefits with interest . . . at his Benefit Commencement Date.

App'x 480-81 (emphases added).

B. Principles for Construction of Plans

"ERISA plans are construed according to federal common law," *Fay v. Oxford Health Plan*, 287 F.3d 96, 104 (2d Cir. 2002), and general principles of contract law apply to their interpretation, *Burke v. PriceWaterHouseCoopers LLP Long Term Disability Plan*, 572 F.3d 76, 81 (2d Cir. 2009) (per curiam). The first step in interpreting a plan is to determine whether the plan's terms are ambiguous. *See Strom v. Siegel Fenchel & Peddy P.C. Profit Sharing Plan*, 497 F.3d 234, 244 n.6 (2d Cir. 2007); *O'Neil*, 37 F.3d at 58-59. "Whether ERISA plan language 'is ambiguous is a question of law that is resolved by reference to the contract alone.'" *Strom*, 497 F.3d at 244 n.6 (quoting *O'Neil*, 37 F.3d at 59). "Language is ambiguous when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement." *O'Neil*, 37 F.3d at 59 (ellipsis, internal quotation marks, and citation omitted).

If a plan's terms are unambiguous, they must be enforced according to those terms without regard for how the plan administrator has otherwise interpreted the language "because unambiguous language leaves no room for the exercise of discretion." *Id.* Thus, "[w]here the language is plain and unambiguous, a court may construe the [plan] and grant summary judgment." *Brass v. Am. Film Techs., Inc.*, 987 F.2d 142, 148 (2d Cir. 1993). Conversely, if a plan's language is ambiguous and the "plan[] invest[s] the administrator with broad discretionary authority to determine eligibility," it will be "reviewed under the arbitrary and capricious standard."

Celardo v. GNY Auto. Dealers Health & Welfare Tr., 318 F.3d 142, 145 (2d Cir. 2003); *accord O'Neil*, 37 F.3d at 59. When a plan's language is ambiguous and "both the [administrator] of [the plan] and a rejected applicant offer rational, though conflicting, interpretations of plan provisions, the [administrator's] interpretation must be allowed to control." *Novella v. Westchester Cnty.*, 661 F.3d 128, 140 (2d Cir. 2011) (citation omitted).

Therefore, whether the language of the plan is ambiguous effectively determines the outcome of our analysis. That is, if the RAA unambiguously requires the plaintiffs-appellees' interpretation, we must affirm the district court's grant of summary judgment. But if the RAA is ambiguous and Colgate's preferred reading is reasonable, we would almost surely defer to that reasonable interpretation.

C. Ambiguity Analysis

We conclude that the text of the RAA unambiguously requires comparing the AE of LS to a participant's Appendix C § 2(b) winning annuity. We are unpersuaded by Colgate's attempt to discredit the district court's assertedly unambiguous reading as "illogical." *See* Appellants' Br. 29. We also reject Colgate's proposed alternative interpretation of the RAA, which is not, we think, a reasonable reading of the RAA's text, but rather an impermissible effort to introduce ambiguity by reference to extrinsic evidence of the RAA's alleged purpose. Accordingly, we affirm the district court's grant of summary judgment to the class members on Error 1.

1. The Plan unambiguously requires residual annuities to be calculated by comparing the AE of LS to the Appendix C § 2(b) winning annuity

The ambiguity dispute in this case focuses primarily on one sentence in the RAA, which states that the amount of the residual annuity "shall be computed by subtracting the age 65 single life annuity Actuarial Equivalent amount of the Member's lump sum payment [i.e., the AE of LS] from *the age 65 single life annuity benefit otherwise payable to the Member under Appendices B, C or D, as applicable*." App'x 366 (emphasis added). We begin our analysis of whether this language is ambiguous, as we must, "by reference to the contract alone." *Strom*, 497 F.3d at 244 n.6 (citation omitted).

Under the RAA, a residual annuity is computed by calculating the difference between (1) the AE of LS—which represents the "amount of the Member's lump sum payment" expressed as an annuity for comparison's sake—and (2) the "annuity benefit" that is "*otherwise payable* to the Member under Appendices B, C or D, *as applicable*." App'x 366 (emphases added). Thus, to determine that second value, the plan administrator must first find the Appendix provision that is "applicable" and then identify which "annuity benefit" is "otherwise payable to the Member under" that Appendix provision.

In McCutcheon's case, there is no doubt which Appendix provision is referenced by the words "as applicable" in the RAA: the first portion of Appendix C § 2 states that "[i]f a Member elects to make Contributions to Maintain Prior Plan Benefits [i.e., grandfathered benefits] starting July l, 1989 and continues to do so until h[er] separation from service"—as McCutcheon did—"the following provisions *shall be applicable*." *Id.* at 480 (emphasis added).[13]

Having identified the "applicable" appendix provisions, we must then determine which "annuity benefit" is "otherwise payable" to the member under that portion of Appendix C § 2. The applicable language in Appendix C § 2 is structured as a binary between lump sums, in § 2(a), and annuities, in § 2(b). *See id.* at 480-81. Subsection 2(a) states that members "shall be entitled to receive a single lump sum payment," as McCutcheon chose to do. *Id.* at 480; *see also id.* at 542. Subsection 2(b) identifies which annuity benefit a member like McCutcheon would have received had she "elect[ed] to receive an annuity settlement instead of a single lump sum payment." *Id.* at 480. In that circumstance, a member "shall be eligible for . . . the larger of" (i) the grandfathered annuity or (ii) the

13. While these provisions of Appendix C § 2 are applicable here, there are numerous other provisions that could be "applicable" depending on a member's particular circumstances. To provide a few examples, Appendix B includes "Special Rules Applicable to Certain Employees" specified therein, App'x 469; Appendix C § 2 includes many other provisions, including some that "shall be applicable" to any member who "rescind[s] h[er] decision to make Contributions to Maintain [grandfathered benefits]" "[a]t any point before termination of employment," *see* App'x 481-82; Appendix C § 3 includes provisions that "shall be applicable" when "a Member elects not to make Contributions to Maintain [grandfathered] Benefits," *see* App'x 482; and Appendix D § 2 includes provisions that "shall be applicable" to certain "Older Employees," *see* App'x 485.

PRA annuity plus employee contributions. *Id.* at 480-81. To summarize, under the "applicable" appendix provision, if a lump sum recipient had instead elected to receive an annuity, the "annuity benefit" that she "otherwise" would have been paid is her Appendix C § 2(b) winning annuity, i.e., the larger of her grandfathered annuity or her PRA annuity.[14]

The clear text of the Plan, without more, thus settles the question of ambiguity: the RAA is not ambiguous. The text plainly requires a comparison between the AE of LS and, in this case, a member's winning annuity under Appendix C § 2(b).

Before engaging with Colgate's preferred alternative reading, first we address Colgate's primary textual counterargument that the interpretation outlined above is, in fact, a wholly unreasonable construction of the RAA's text. For some members (like McCutcheon), our interpretation of the RAA requires a comparison between the values of the PRA lump sum and the PRA annuity. Colgate warns that "[a] comparison of the 'new' PRA lump sum and the 'new' PRA-based annuity is illogical because . . . the [PRA] Annuity is expressly defined in the Plan to be the *same benefit* the Participant already received as a lump sum," and therefore cannot be the "otherwise payable" benefit specified in the RAA. Appellants' Br. 29

14. Further, for a member like McCutcheon (whose PRA annuity plus employee contributions is larger than her grandfathered annuity), the grandfathered annuity is decidedly *not* "otherwise payable" because, per Appendix C § 2(b), she is only "eligible for" the "larger" PRA annuity.

(emphasis in original). Colgate asserts that "[t]he District Court side-stepped the question of whether, as a matter of plan interpretation, the 'new' PRA lump sum and the 'new' [PRA] Annuity are the *same benefit*." *Id.* at 32 (emphasis in original). But, for the reasons explained below, Colgate's question is a red herring.

First, Colgate asserts that once a member has been paid a PRA lump sum, the PRA annuity "cannot be the 'otherwise payable' *benefit* specified in the RAA because that *benefit* was already paid" to the member in a different form. *Id.* at 29 (emphases in original). But Colgate omits a significant word from the text of the Plan: the RAA does not direct the Plan administrator to identify the "*benefit* otherwise payable" to a member (as Colgate insists); rather, it refers to the "*annuity benefit* otherwise payable." *See* App'x 366 (emphases added). Even if the PRA lump sum and the PRA annuity are different forms of the same benefit, the lump sum is not an "annuity benefit." Therefore, the fact that a lump sum version of the PRA benefit had already been paid does not have an impact on whether the PRA annuity could be an "otherwise payable" "annuity benefit."[15] To the contrary, the annuity

15. To the extent that Colgate argues that the PRA annuity is not otherwise payable because a member is not entitled to receive the same benefit twice in different forms, this argument would render the RAA a nullity. This argument is premised on the unavailability of a PRA annuity once the lump sum option has already been elected. But under that premise, neither the PRA annuity nor the grandfathered annuity would be "otherwise payable" because a member would not be "eligible for [either] annuity" once she elected the lump sum option. App'x 480.

benefit McCutcheon would otherwise have been paid is her PRA annuity had she not elected to receive a lump sum payment.

Second, Colgate is too quick to dismiss the significance of the RAA's invocation of the AE of LS, a computational construct representing the hypothetical annuitized value of the lump sum payment actually paid to a member for the sake of comparison. *See* Appellants' Br. 34 (referring to the district court's focus on the distinction between the PRA annuity and the AE of LS as "an attack on a straw man"). It would be undeniably odd—perhaps even "illogical"—if the RAA required comparison of a benefit to itself, such that the two values would always be perfectly actuarially equivalent and the resulting residual annuity would always equal zero. But that is not what the RAA does.

As an initial matter—and as emphasized by the district court—from a mathematical perspective, the two values are not equivalent because they are based on different interest rate assumptions. For reasons discussed in more detail *infra* Section III, we agree that the AE of LS is calculated using the PBGC rate, while the PRA annuity is projected using the higher 20+1% rate. *See Colgate II*, 481 F. Supp. 3d at 264-65. Further, the RAA compares the undervalued lump sum that a member actually received—represented in the AE of LS—with the full annuity benefit to which they were legally entitled. The RAA, which was adopted in 2005, was intended to apply retroactively to 1989, thereby covering the entire whipsaw violation period.[16] During that period, a member's lump sum payment was not actuarially equivalent to her PRA annuity, even though it should have been under federal law. This discrepancy—between the legally mandated equivalence of the two forms of the PRA benefit and their real-world inequivalence—makes it wholly reasonable for the RAA to compare the undervalued lump sum that a member received to the PRA annuity to which she would have otherwise been entitled.[17]

Thus, Colgate's "same-benefit" argument does not disturb our conclusion that the RAA's language is unambiguous. We find nothing inherently "illogical" or ambiguous about the RAA's comparison of the AE of LS to a winning annuity, and that comparison does not become any more ambiguous if the lump sum is technically an alternate form of the PRA annuity. Because "unambiguous language in an ERISA plan must be interpreted and enforced in accordance with its plain meaning," *Strom*, 497 F.3d at 244 n.6 (citation omitted), we affirm the district court's grant of summary judgment to the class plaintiffs as to Error 1.

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16. The RAA also applied prospectively, but for reasons we address *infra* Section II.C.3, we conclude that the RAA's prospective application—despite the Plan's amendment to eliminate the whipsaw issue in 2003—has no bearing on whether the RAA can also remedy past whipsaw violations.

17. Colgate argues that the whipsaw forfeiture was entirely resolved by the *Colgate I* settlement. *See* Appellants' Br. 40-41; 51-52. We address the relationship between the RAA and the *Colgate I* settlement in detail *infra* Section II.C.3. For now, we simply note that the RAA was drafted prior to the initiation of the *Colgate I* lawsuit, so its settlement has no impact on our analysis of textual ambiguity.

2. Colgate's preferred reading of the RAA is not a reasonable interpretation of the text

When Colgate first moved for summary judgment, it unsuccessfully argued that the text unambiguously required its preferred reading; now, it adopts the position that the RAA is "susceptible to more than one reasonable interpretation." Appellants' Br. 27. However, we do not think that Colgate's alternative interpretation of the RAA is a reasonable construction of the Plan's text.

Colgate argues that the "annuity benefit otherwise payable to the Member" refers only to the grandfathered annuity, not the larger of the grandfathered annuity or PRA annuity. According to the defendants-appellants:

> Colgate interprets the term "otherwise payable" in the text of the RAA to direct the Committee only to those portions of the Appendices that relate to the "old" Grandfathered Formula benefit that would otherwise have been payable to Participants *had the plan conversion not occurred*, and not the "new" PRA annuity benefit referenced elsewhere in the Appendices (*i.e.*, the "new" 2(b)(ii) Annuity). The reason for this is straightforward: the RAA ensures that a Grandfathered Participant receives the full value of the "old" benefit that the Participant would have received if there were no "new" PRA benefit. The phrase "otherwise payable" means the benefit that would otherwise be paid if there were no "new" benefit.

Id. at 28-29 (emphasis added). That is, Colgate argues that it is reasonable to interpret the phrase "otherwise payable" as drawing a distinction between pre-and post-Plan conversion benefits. The "straightforward" reason Colgate gives for its pre-/post-conversion interpretation is that it would fulfill the alleged purpose of the RAA, which Colgate claims is to remedy a forfeiture of grandfathered benefits. Colgate also argues that the words "as applicable"—used in reference to the Plan's appendices—is similarly ambiguous and could reasonably be read to refer to "only those sections of the Appendices that apply to the 'old' Grandfathered Formula benefit." *Id.* at 35. Again, Colgate's only support for this interpretation of "as applicable" appears to be that it comports with that RAA's alleged purpose "to ensure that the value of the 'old' Grandfathered Formula benefit is not forfeited, to the extent it is not fully paid by the 'new' PRA lump sum." *Id.*

We find nothing in the text of the Plan that suggests that the phrases "otherwise payable" and "as applicable" refer specifically to the annuity that Colgate would have paid had the Plan not been converted to a cash-balance plan in 1989. Indeed, this reading requires inserting into the RAA an additional qualification, namely, that "benefit otherwise payable" actually means "benefit otherwise payable *had the plan conversion not occurred* in 1989." Nevertheless, Colgate's proffered interpretation begins with the proposition that the RAA is simply not concerned with the whipsaw forfeiture, and Colgate urges us to find this interpretation reasonable because it would align with that alleged purpose. But Colgate does not divine that purpose from the text of the Plan; instead, it draws on "substantial extrinsic evidence demonstrating that the purpose of the RAA was to ensure that Grandfathered Participants received the full value of their 'old' Grandfathered Formula benefit even if they elected to receive their benefit under the 'new' PRA formula as a lump sum." *Id.* at 39. Colgate thus asks us to put the extrinsic evidence cart before the textual horse. The law does not permit us to do so.

We repeat: "It is axiomatic that where the language of a [plan] is unambiguous, the parties' intent is determined within the four corners of the contract, without reference to external evidence." *Feifer v. Prudential Ins. Co. of Am.*, 306 F.3d 1202, 1210 (2d Cir. 2002). And "[w]hether ERISA plan language 'is ambiguous is a question of law that is resolved *by reference to the contract alone*.'" *Strom*, 497 F.3d at 244 n.6 (emphasis added) (quoting *O'Neil*, 37 F.3d at 59). Therefore, we will not invoke extrinsic evidence of a Plan's purpose to inject ambiguity into otherwise unambiguous language. It may be true that Colgate's intent when adopting the RAA was different from the actual effect of the text's unambiguous language, but that does not control our analysis. *See, e.g.*, *AEP Energy Servs. Gas Holding Co. v. Bank of Am., N.A.*, 626 F.3d 699, 729 (2d Cir. 2010) ("The 'primary concern when interpreting a contract is to ascertain and give effect to the intent of the parties as that intent is expressed in the contract.'" (citation omitted)).

3. The language of the RAA is not rendered ambiguous by its effects

For largely the same reasons, we also conclude that any allegedly unusual effects flowing from the RAA's plain meaning do not change our ambiguity analysis. That said, we also note that certain effects of our interpretation, which may seem odd at first, may not be so confounding upon closer review.

First, the RAA was adopted in 2005 and was intended to apply both retroactively (to 1989) and prospectively. Colgate notes, however, that by 2005 "the Plan had already been amended to eliminate the whipsaw issue for the 'new' PRA benefit on a going-forward basis, meaning that there was no prospective § 417(e) issue for the RAA to address." Appellants' Br. 50 (internal citation omitted). In our view, the fact that the RAA also applied prospectively does not refute the conclusion that, as drafted, it also remedies prior whipsaw violations. Rather, the RAA's combined prospective and retrospective application comports with an interpretation of the RAA that addresses both of the Plan's forfeiture problems—one limited to the past and one continuing—for a large subset of members at once.

That "two-birds-one-stone" approach to resolving the Plan's overlapping forfeiture issues also helps to answer a second question related to the RAA's effect. Under the RAA, a residual annuity is available only to a lump sum recipient who is "entitled to a greater benefit than h[er] Accrued Benefit," App'x 366—i.e., any participant whose grandfathered annuity exceeds her PRA annuity or who elected to make employee contributions. Yet there are some participants, such as those who joined after the Plan's conversion in 1989, who are not eligible for a residual annuity but who still suffered a whipsaw forfeiture. Colgate insists that "it would have been illogical for [it] to attempt to remedy the [whipsaw] forfeiture issue through residual annuities available only to Grandfathered Participants, as opposed to remedying the issue for *all* Plan participants who elected to receive their 'new' PRA benefit as a lump sum rather than an annuity." Appellants' Br. 50-51 (emphasis in original).

We think it makes perfectly good sense to conclude that while Colgate was in the process of fixing an issue related to forfeiture of grandfathered benefits, it would use the same mechanism to partially remedy a contemporaneous whipsaw violation, inflicted upon those same grandfathered participants. While the Committee was already considering the unique plights of grandfathered participants, it would have been convenient for it to adopt a single amendment that remedied all forfeitures that those members had suffered. Thus, we see nothing inherently illogical about the RAA's scope, as conceived on our construction of its terms.

Third, Colgate raises concerns about the relationship between the RAA and the *Colgate I* settlement. Colgate asserts that under the plaintiffs-appellees' reading the class would receive an unwarranted windfall because members were already "compensated for the alleged underpayment of their PRA lump sum in *Colgate I*," and "the current class is claiming again the difference between their *Colgate I* settlement award and their PRA annuity." Reply Br. 17. In Colgate's view, when *Colgate I* was settled, the unlawfulness of the whipsaw violation was resolved, even though class members received a settlement award that was less than the full gap between the PRA annuity and the lump sum that they had received. The reason for the incomplete remedy, Colgate explains, is that the settlement award "was discounted to reflect the plaintiffs' likelihood of success (as most settlements are)." *Id.* at 16. That "settled" difference is also the amount that the instant class is attempting to recoup via their RAA claims, which Colgate describes as "a second bite at the apple." *Id.* On our read, the class plaintiffs do not stand to earn any undue windfall from a favorable judgment in this case.

Colgate's complaint is premised on the notion that *Colgate I* settled all claims alleging an impermissible gap between the value of the PRA lump sum and the value of the PRA annuity. However, that settlement agreement explicitly excluded any claims that were "based upon, or ar[o]se under" the RAA. App'x 304. Colgate does not dispute that the *Colgate I* settlement exempted all future RAA claims; instead, Colgate again relies on extrinsic evidence of the RAA's purpose in an effort to avoid this aspect of the settlement. Colgate begins with the assumption that the instant class members' claims could not possibly arise under the RAA because "the RAA . . . was never intended to address them." Appellants' Br. 52. According to Colgate, "the RAA is about reconciling 'new' with 'old'" (i.e., the PRA lump sum with the grandfathered annuity) and "*not* comparing 'new' and 'new'" (i.e., the PRA lump sum and PRA annuity). *Id.* at 51-52 (emphasis in original). But this is a circular argument, essentially claiming that Colgate's current interpretation of the RAA must be correct because, otherwise, Colgate's interpretation of the RAA (when it settled *Colgate I*) was incorrect.

We conclude otherwise. The plaintiffs are not "attempting to relitigate the settled claims in *Colgate I*," *id.* at 52, by asserting their claims under the unambiguous language of the RAA. When Colgate agreed to carve out all future RAA claims from the *Colgate I* settlement, it presumed that its reading of the RAA was correct. Now, when faced with a determination that its interpretation is erroneous, it seeks to rewrite the settlement. But the settlement clearly excludes any claims under the RAA, whatever they may be. App'x 304; *see also id.* at 303 (listing all "Released Claims" and noting "[f]or avoidance of doubt, the foregoing does not include *any claims* arising under the Residual Annuity Amendment" (emphasis added)). These plaintiffs, having demonstrated that the plain text of the RAA guarantees them an annuity that covers the gap between their lump sum and their winning PRA annuity,[18] are now entitled to recover that full difference.

Thus, we decline to read ambiguity into the otherwise unambiguous text of the RAA based on these effects-based arguments.[19]

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18. The *Colgate I* settlement clarifies that "any claims under the Residual Annuity Amendment are subject to [an] offset" in "an amount based upon the individual net settlement benefit" a participant received. App'x 305. This prevents a member from collecting more than the full gap between the AE of LS and her PRA annuity.

19. These arguments about odd effects of the unambiguous text of the RAA might presume that Colgate drafted the Plan clearly

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We are faced with a choice between (1) the unambiguous meaning of the Plan's text that may have some peculiar, though not inexplicable, effects, and (2) an interpretation that appears to us to be unreasonable, but that—when viewed in light of extrinsic evidence of purpose—results in outcomes that seem more in line with the defendants-appellants' preferences. Under these circumstances, as we read our case law, we have no choice but to adopt what we see as the unambiguous reading. We therefore affirm the district court's grant of summary judgment to the plaintiff class on Error 1.

III. Required Projection Rates

Colgate argues that irrespective of our decision to affirm the district court's grant of summary judgment on Error 1, we should reject the court's conclusion that Colgate must use specific rates when calculating the AE of LS and PRA annuity for the purpose of determining

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and administered it rationally. Of course, the history of the Plan is one of flawed design and implementation. From not performing whipsaw calculations and failing to achieve equivalence between lump sums and grandfathered annuities, to neglecting to retroactively apply amendments to correct those original errors, Colgate's cornucopia of missteps has led to a patchwork resolution and years of assorted litigation, including this case. Given these past events, it is unsurprising that the Commission enacted an RAA that only partially resolves the whipsaw forfeiture, or that Colgate would reach a legal settlement that does not preclude quite as many future claims as it might have hoped. Ultimately, our duty is to interpret the text of the RAA faithfully, not to imagine another version that might seem more rational or practical.

residual annuities. Colgate insists that, instead, the Committee should be entitled to retroactively determine which interest rates to use for those calculations. We disagree, and, instead, affirm the district court's conclusion that Colgate must use the PBGC rate to calculate the AE of LS and the 20+1% rate to calculate the PRA annuity.

A. PBGC Rate for AE of LS Calculations

The district court held that Colgate must use the PBGC rate when calculating the AE of LS largely because that was the rate required by I.R.C. § 417(e) during the period at issue for present valuing benefits. *See Colgate II*, 481 F. Supp. 3d at 264-65, 269. We agree with the district court's conclusion, but for a simpler reason: The Plan itself requires the use of the PBGC rate.

According to minutes of a meeting held on February 6, 2014, the Committee met to discuss the calculation of residual annuities. *See* App'x 854-56. Liza LeAndre, the Chief Benefits Counsel, "provided the Committee . . . with an overview of the [RAA]" that aligned with the interpretation Colgate unsuccessfully advanced in this litigation. *Id.* at 855. The minutes then explain:

> Ms. LeAndre indicated that to calculate the residual annuity, determining the age 65 Actuarial Equivalent amount of the PRA benefit [i.e., the AE of LS] is required. Ms. LeAndre explained that the interest rate to be used for this calculation for benefits paid between 1989 and 2002 needed to be determined. Ms. LeAndre recommended that the applicable

> interest rate statutory basis of PBGC rates be used to calculate residual annuities for such pre-2002 calculations. The Committee, acting in its settlor capacity, approved this recommendation.

Id. Put simply, the Committee adopted a resolution related to "determining the [AE of LS]" for the purpose of "calculat[ing] residual annuities." *Id.* That resolution specified that "the interest rate to be used for this calculation for benefits paid between 1989 and 2002" is the PBGC rate. *Id.* Because these documents were adopted by the Committee "in its settlor capacity," *id.*, the terms of the resolution are part of the Plan itself. *See Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 444, 119 S. Ct. 755, 142 L. Ed. 2d 881 (1999) (noting that a "settlor" has the power to amend a Plan and to determine "who is entitled to receive Plan benefits and in what amounts, or how such benefits are calculated").

Colgate does not dispute that this resolution is a binding part of the Plan. Rather, it emphasizes that LeAndre's pre-resolution summary of the RAA maintained (incorrectly) that "the [RAA] provided for residual annuities to be paid to eligible employees who elected a lump sum equal to the excess value of the *grandfathered formula* benefit over the personal retirement (PRA) benefit." App'x 855 (emphasis added). Colgate then argues that the selection of the PBGC rate was limited to "this calculation of [*sic*] benefits." Reply Br. 26-27 (emphasis omitted).[20]

20. Colgate's reply brief incorrectly quotes the Committee minutes. The minutes did not say "the interest rate to be used *for this calculation of benefits* paid between 1989 and 2002 needed to

We disagree. The "calculation" to which the resolution applies is set forth in the immediately preceding sentence of the minutes, which instructs that "to calculate the residual annuity, determining the [AE of LS] is required." App'x 855. And the selection of the PBGC rate was made "for this calculation for benefits paid between 1989 and 2002." *Id.* The plaintiffs' benefits were paid during this time, and the resolution clearly establishes that the PBGC rate shall be used to "determin[e] the [AE of LS]" in order "to calculate residual annuities" for such members. It matters not that Colgate maintained a more limited, atextual interpretation of the RAA at the time of the resolution. The Committee adopted an unqualified resolution that "the applicable interest rate statutory basis of PBGC rates be used to calculate residual annuities for such pre-2002 calculations." *Id.*

More broadly, we think it would be arbitrary to construe the text of the Plan to allow for distinct calculations of the AE of LS depending on the annuity to which it is compared. A comparison of the AE of LS to the PRA annuity is not a "new calculation." *See* Reply Br. 27. It is part of a longstanding calculation that, in the past, Colgate incorrectly interpreted. The RAA has always called for only a single calculation using two variables: (1) the AE of LS and (2) a member's winning annuity under Appendix C § 2(b). It would be unreasonable for Colgate to calculate the first variable—the AE of LS—differently depending on a characteristic of the distinct second

be determined," Reply Br. 26 (emphasis added); rather, it stated that "the interest rate to be used *for this calculation for benefits* paid between 1989 and 2002 needed to be determined," App'x 855 (emphasis added).

variable in the RAA's formula. Having already resolved to calculate the AE of LS for some participants with the PBGC rates (and having consistently used that rate in such calculations thus far, *see* Appellants' Br. 56 n.10), we would decline to let Colgate change those rates for other participants simply because their winning annuity is different.

Because we conclude that the Plan itself requires the use of the PBGC rate when calculating the AE of LS, we need not address the district court's alternative reasons for reaching the same determination.

B. 20+1% Rate for Appendix C § 2(b) PRA Annuity Calculations

We also agree with the district court that for the purpose of calculating the Appendix C § 2(b)(ii) PRA annuity, Colgate must use the 20+1% rate to project a participant's cash balance account forward and convert it into an age 65 annuity. *Colgate II*, 481 F. Supp. 3d at 264, 269. Section 1.3 of the Plan states that the 20+1% rate must be used "[f]or purposes of converting a Member's Account into a single life annuity payable for the life of the Member starting at Normal Retirement Date." App'x 405-06. A brief recitation of the relevant plan mechanics reveals that this is the appropriate rate for calculating a participant's PRA annuity.

As explained *supra* Section II.C.1, the RAA requires determining a member's winning annuity under Appendix C § 2(b), which is the greater of the grandfathered annuity (described in Appendix C § 2(b)(i)) and the PRA annuity (described in Appendix C § 2(b)(ii)). *See* App'x 366, 480-81. Where a member's winning annuity is the PRA annuity, it is that member's "Accrued Benefit,"[21] which the Plan defines as "a monthly annuity for the life of the Member . . . commencing at Normal Retirement Age." *See id.* at 405. This definition matches the specifications of § 1.3, which applies "[f]or purposes of converting a Member's Account into a single life annuity payable for the life of the Member starting at Normal Retirement Date." App'x 405-06. As such, when calculating a member's PRA annuity, § 1.3 of the Plan requires Colgate to use the 20+1% projection rate.

Colgate takes issue with this reading, asserting that § 1.3 prescribes the 20+1% rate only for the "calculation done at age 65 for a Participant who elects the annuity form of the [PRA] benefit." Appellants' Br. 56-57. Colgate insists that "Section 1.3 says nothing about how to project a cash balance account to age 65 when a participant chooses to receive his or her benefit *prior* to normal retirement age." *Id.* at 57 (emphasis in original). That is, Colgate breaks the conversion of a member's PRA account into two steps, each permitting different interest rates: (1) projection of the account to age 65 and (2) conversion of the age 65 projected account into an annuity. Colgate argues

21. This is so because Appendix C § 2(b)(ii) defines the PRA annuity through cross-references to the "benefit payable pursuant to Section 6.2 . . . , Section 6.3 . . . or Section 6.4(a)(ii)," App'x 481, each of which describes "the benefit payable to such Member" as "h[er] Accrued Benefit" or some optional form of benefit that is the actuarial equivalent thereof, App'x 433-34.

that § 1.3 only requires using the 20+1% rate in step 2 to convert an age 65 PRA account into an annuity, but not in step 1 to project the account of a younger member forward to the age of 65 prior to conversion. Therefore, Colgate argues that it should be able to decide anew which rate to use when projecting PRA accounts to age 65 for residual annuity determinations.

We are not convinced. First, under the plain text of the Plan, § 1.3's rate selection applies to the whole process of "converting" a member's account into an age 65 annuity, without distinguishing between the steps of that conversion calculation. The Plan selects the 20+1% rate "[f]or purposes of converting a Member's Account" without reference to the age of that account. App'x 405. If a member is not yet 65, the process of "converting [that] Member's Account" into an age 65 single life annuity requires projection. Therefore, for a pre-retirement-age member, § 1.3 contemplates that the 20+1% rate will be used to project her PRA account to the age of 65 and to convert that projected PRA balance into an annuity.

Second, even if we were to determine that § 1.3 is ambiguous, we would not defer to Colgate's interpretation because it would render the plan unlawful. "[C]ontracts should not be interpreted to render them illegal and unenforceable where the wording lends itself to a logically acceptable construction that renders them legal and enforceable . . . ." *Walsh v. Schlecht*, 429 U.S. 401, 408, 97 S. Ct. 679, 50 L. Ed. 2d 641 (1977). Colgate notes that the Plan "says nothing about how to project a cash balance account to age 65" and that "the applicable interest rate for projection remains an open question" that Colgate should have the discretion to resolve. Appellants' Br. 57; *see also* App'x 1560 ("Neither Section 1.3 nor any other section of the Plan explains how to project a cash balance account forward to age 65 when a participant has *not* reached normal retirement." (emphasis in original)). But if we were to adopt this interpretation, we would, in effect, be concluding that the Plan contains no instructions for calculating the accrued benefit for anyone under the age of 65. This omission would render the Plan unlawful because I.R.C. § 401(a)(25) requires that a participant's accrued benefit be "definitely determinable," i.e., calculated under a formula with no employer discretion. *See* I.R.C. § 401(a)(25) ("A defined benefit plan shall not be treated as providing definitely determinable benefits unless, whenever the amount of any benefit is to be determined on the basis of actuarial assumptions, such assumptions are specified in the plan in a way which precludes employer discretion."); Treas. Reg. § 1.401-1(b)(1) (as amended in 2007) (requiring "definitively determinable benefits").[22]

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22. Colgate seeks to avoid this issue by noting that "there is no private right of action to enforce a tax-qualification provision" like the "definitely determinable" requirement. Reply Br. 29. But this is irrelevant. The plaintiffs-appellees do not bring any claim based on that requirement but merely urge us to consider it when evaluating Colgate's own interpretation. Colgate additionally argues that it would be reasonable for it to select the lower "interest crediting rate" as an alternative. *See* Appellants' Br. 57; Reply Br. 29. In offering this rate, Colgate appears to make conflicting arguments: on one hand it claims that the Plan does not offer any explanation for how to project an account forward, while on the other, it suggests a reasonable interpretation of the text would lead to applying the Plan's interest crediting rate. We see nothing in the text that would suggest the

Third, and finally, we find it difficult to credit Colgate's proposed approach because the company's past practice undercuts its interpretation of the Plan. In this litigation, Colgate argues that the Plan does not set a projection rate, but in practice Colgate consistently used the 20+1% rate as a projection rate to calculate the PRA annuity for members who departed during the relevant period. Consistent with the text of the Plan, Colgate informed these members that their PRA annuities were worth a certain amount based on a 20+1% projection rate when they left the company. Colgate cannot arbitrarily adopt a lower projection rate to retroactively change those prior valuations.

For these reasons, we affirm the district court's conclusion that Colgate is required to use of the 20+1% projection rate when calculating the Appendix C § 2(b)(ii) PRA annuity for the purpose of determining a member's residual annuity.

IV. Error 3

A mortality discount accounts for the possibility that the participant might die before reaching retirement

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Plan selected the interest crediting rate as a projection rate when converting accounts into age 65 annuities. The interest crediting rate is defined as the rate at which a member's PRA account actually accrues interest, without any reference to projecting hypothetical, future account growth. *See* App'x 423. Although the Plan cannot select a projection rate that is "less than the interest credits provided under the plan," *Esden*, 229 F.3d at 166, it does not follow that the Plan could neglect to select a projection rate and simply afford the plan administrator the discretion to either select a higher rate or default to the interest crediting rate.

age when calculating the present value of a benefit. The Plan clearly calls for the application of a PRMD, but the plaintiffs argued to the district court that Colgate's use of a PRMD to calculate residual annuities violated I.R.C. § 417(e)'s and ERISA § 203(a)(2)'s actuarial equivalence rules. The district court granted summary judgment to the class plaintiffs on this error. *See Colgate II*, 481 F. Supp. 3d at 266-69. We affirm.[23]

In theory, under a plan with no survivorship—i.e., a plan in which a member's right to collect her accrued benefit does not pass to her surviving beneficiary in the event of her premature death—the promise of an age 65 annuity may be less valuable to a pre-retirement-age member than an upfront lump sum payment: the member is guaranteed to get paid now if she elects a lump sum, but if she waits for an annuity, she may forfeit her accrued benefit if she dies before the age of 65. Colgate claims that its use of a PRMD in calculating the AE of LS accurately reflects this risk of early death. However, if a member's pre-retirement death would have little or no effect on the value of the benefit that she or her beneficiary receives, there is no risk that she will forfeit her benefit. Therefore, if a plan guarantees survivor benefits that are substantially similar in value to a member's accrued benefit, it is improper to use a PRMD to discount the present value of a future annuity.

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23. The district court noted that, "[a]s a threshold matter, Defendants d[id] not oppose Plaintiffs' arguments regarding Error 3 in their opposition brief," and thus concluded that "[s]ummary judgment [was] granted on this ground alone." *Colgate II*, 481 F. Supp. 3d at 267. On appeal, Colgate makes no effort to contest the district court's determination regarding its failure to respond.

This issue appears to be a matter of first impression in this Circuit, but we are persuaded—as the district court was—by the careful reasoning of our sister circuits finding ERISA and I.R.C. violations in similar circumstances.[24]

For example, in *West v. AK Steel Corp.*, 484 F.3d 395 (6th Cir. 2007), the Sixth Circuit held that an impermissible forfeiture occurred when a plan administrator applied a PRMD to reduce the present value of a lump sum distribution when the death benefit was equal to a participant's accrued benefit, *id.* at 411. Under the plan in *West*, "[i]f a Plan participant die[d] before reaching the age of 65, the Plan's terms provide[d] that the surviving spouse or other beneficiary receive[d] a death benefit 'equal to the participant's pension benefit.'" *Id.* The death benefit was defined as "the actuarial equivalent of the participant's accrued benefit." *Id.* On those facts, the court determined that "[b]ecause the beneficiary receives a death benefit equal to the participant's accrued benefit, he or she 'steps into [the participant's] shoes and is entitled to his entire pension benefit.'" *Id.* (second alteration in original) (quoting *Berger*, 338 F.3d at 764). "Even if the participant were to die before the age of 65, his or her beneficiary is still entitled to the entire accrued benefit," and the "[u]se of a mortality discount for the period before

24. *See, e.g.*, *West v. AK Steel Corp.*, 484 F.3d 395, 411 (6th Cir. 2007); *Berger*, 338 F.3d at 764; *see also Ruppert v. Alliant Energy Cash Balance Pension Plan*, No. 08-cv-127-bbc, 2010 U.S. Dist. LEXIS 137743, 2010 WL 5464196, at *2, *16-18 (W.D. Wis. Dec. 29, 2010); *Crosby v. Bowater Inc. Ret. Plan For Salaried Emps. of Great N. Paper, Inc.*, 212 F.R.D. 350, 360-62 (W.D. Mich. 2002), *vacated on other grounds*, 382 F.3d 587 (6th Cir. 2004).

age 65 would, accordingly, result in a partial forfeiture of benefits in violation of the ERISA vesting rules (i.e., the anti-forfeiture rules).” *Id.* (citation omitted).

We find this logic persuasive here, inasmuch as the Plan also defines the death benefit as “the Actuarial Equivalent of the Accrued Benefit.” App’x 429. As a result, in the event of a member’s death, her beneficiary would receive a benefit that is effectively equal to the accrued benefit such that the beneficiary “steps into the participant’s shoes and is entitled to [her] entire pension benefit.” *West*, 484 F.3d at 411 (internal alteration and citation omitted). The RAA functions to remedy the underpayment of lump sums with an additional residual annuity such that the lump sum and residual annuity together ensure compliance with the I.R.C.’s and ERISA’s present value requirements. *See* ERISA § 203(a)(2); I.R.C. § 417(e); *see also* 26 C.F.R. § 1.417(e)-1(d)(1)(i) (“The present value of any optional form of benefit cannot be less than the present value of the normal retirement benefit . . . .”). Because the value of the benefit paid if a member dies before 65 is the same as the Plan’s normal retirement benefit, we conclude that Colgate’s use of a PRMD to determine the present value of the lump sum when calculating a make-whole residual annuity results in an optional form of benefit that is less than the corresponding normal retirement benefit.

Colgate’s primary response is to argue that the Plan’s “death benefit . . . is an incidental benefit and not the *accrued retirement benefit*,” so that when a participant dies, she forfeits her entire accrued benefit and her beneficiary becomes entitled to a distinct benefit of essentially equal value. Appellants' Br. 59 (emphasis in original). But as reflected in this case law, a Plan administrator cannot undervalue a member's accrued benefit simply because a death benefit is defined as the "actuarial equivalent of the accrued benefit" rather than being the "accrued benefit" itself. To hold otherwise would defeat the purpose of ERISA's and the I.R.C.'s present value requirements.

Additionally, Colgate relies on a proposed 2016 IRS regulation which it claims explicitly rejects our approach regarding the unlawful use of a PRMD in this context. *See* Update to Minimum Present Value Requirements for Defined Benefit Plan Distributions, 81 Fed. Reg. 85,190 (proposed Nov. 25, 2016). Regardless of whether the document was intended to reflect the IRS's view of "current law" as Colgate suggests, *see* Appellants' Br. 60, the proposed regulation has no legal effect. *See LeCroy Rsch. Sys. Corp. v. Comm'r of Internal Revenue*, 751 F.2d 123, 127 (2d Cir. 1984) ("Proposed regulations are suggestions made for comment; they modify nothing."). Nor is it clear that the proposed regulation—if adopted—would support Colgate's argument.[25] In any event, an unadopted IRS regulation does not disturb our reasoning.

We therefore affirm the grant of summary judgment to the plaintiffs on Error 3.

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25. As the district court noted, "the proposed regulation appears to forbid the application of a PRMD to determine the present value of the entire accrued benefit if any portion of the accrued benefit is derived from contributions made by the employee, as is the case here." *Colgate II*, 481 F. Supp. 3d at 269.

CONCLUSION

We have considered the defendants-appellants' remaining arguments on appeal and conclude that they are without merit. For the foregoing reasons, we AFFIRM the order and final judgment of the district court.

APPENDIX B — OPINION, ORDER AND FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED AUGUST 24, 2020

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

16 Civ. 4170 (LGS)

REBECCA MCCUTCHEON, *et al.*,

Plaintiffs,

-against-

COLGATE-PALMOLIVE CO., *et al.*,

Defendants.

August 24, 2020, Decided
August 24, 2020, Filed

OPINION, ORDER AND FINAL JUDGMENT

LORNA G. SCHOFIELD, District Judge:

Plaintiff and class representative Rebecca McCutcheon[1] brings this action, on behalf of herself and others similarly situated, under the Employee Retirement Income Security

1. The Plaintiffs are McCutcheon and her former husband, Paul Caufield. Only McCutcheon is a class representative. She brings claims under Counts I and II. Caufield seeks relief on Count II, but not Count I.

Act of 1974, 29 U.S.C. § 1001 et seq. ("ERISA"), against Defendants Colgate-Palmolive Co. ("Colgate"), Colgate-Palmolive Co. Employees' Retirement Income Plan (the "Plan"), Laura Flavin, Daniel Marsili and the Employee Relations Committee of Colgate-Palmolive Co. (the "Committee").

In its Opinion and Order of July 10, 2020 (Dkt. No. 265), the Court granted Defendants' summary judgment on Count I, Count II, Error 2 and Count II, Error 4 as to the Class but not as to Plaintiff McCutcheon. *McCutcheon v. Colgate-Palmolive Co.*, No. 16 Civ. 4170, 2020 U.S. Dist. LEXIS 121798, 2020 WL 3893303, at *16 (S.D.N.Y. July 10, 2020). At the same time, the Court denied Defendants' summary judgment on Count II, Error 1 and Error 3. *Id.; see also* 7/29/20 Order (Dkt. No. 274) (supplementing *McCutcheon*, 2020 U.S. Dist. LEXIS 121798, 2020 WL 3893303 with inadvertently omitted additional reasons for denying Defendants summary judgment on Error 1). Plaintiffs now move for summary judgment on Count II, Errors 1 and 3 and for entry of final judgment under Rule 54(b). This Opinion largely mirrors the language of the decision on Defendants' motion for summary judgment on the same issues, with the addition of citations and with minor modifications or clarifications, many of which were proposed by Plaintiffs in their proposed order, which the Court requested. For the following reasons, Plaintiffs' motion is granted.

I. BACKGROUND

The facts below are drawn from the record and are undisputed or there is no genuine issue as to any of the following material facts.

A. History of the Plan

a. Colgate-Palmolive Company and the Committee

Defendant Colgate is a global consumer products company and is the sponsor of the Plan. Ans. (Dkt. No. 49) ("Ans.") ¶ 36; Defs. Rule 56.1 Stmt of Facts (Dkt. No. 237) ("Defs. SOF") ¶¶ 8-9. At all relevant times, Defendant Plan was an "employee pension benefit plan" and a defined benefit plan within the meaning of ERISA; Defendant Committee was the "plan administrator," and, along with non-party the Pension Fund Committee, was a "named fiduciar[y]" of the Plan. Ans. ¶¶ 35, 40, 111; Defs. SOF ¶¶ 10-11. Defendants Daniel Marsili (Senior Vice President of Global Human Resources) and Laura Flavin (Vice President for Global Employee Compensation and Benefits) were members of the Committee. Ans. ¶¶ 46-47.

b. Conversion to Cash Balance Plan as of 1989

The Plan originally operated as a traditional defined benefit plan, which guaranteed that each member (or "Participant") receive an "accrued benefit" expressed as an annuity upon reaching "normal retirement age," here, age sixty-five. Ans. ¶¶ 35, 55; Defs. SOF ¶¶ 9, 11. Prior to July 1, 1989, the Plan determined the level of benefits using a final average pay formula (the "Grandfathered Formula"), based on a Participant's final average earnings and years of credited service. Participants received their Plan benefits only in the form of an annuity. Defs. SOF ¶ 12-13.

The Plan was amended in 1994, effective as of July 1, 1989, and reflected the terms of the Plan in effect and applicable to all Class Members paid between July 1, 1989, and the effective date of the 2003 Plan, including Plaintiff. 30(b)(6) Deposition Transcript ("30(b)(6) Tr."), Ex. 1C (Dkt. No. 242-1) 78:23-81:15, 85:23-87:20, 232:16-20; Ans. ¶ 59; Defs. SOF ¶ 34; Pls. SJ Opp (Dkt. No. 241) ("Pls. Opp.") at 3. Effective July 1, 1989, the Plan was converted to a cash balance plan. Ans. ¶ 59; Defs. SOF ¶ 11. As a cash balance plan, each Participant had a "cash balance" account called the Personal Retirement Account balance, which reflected a set percentage of yearly pay plus interest (the "PRA Formula"). Defs. SOF ¶ 16. Unlike the prior version of the Plan using the Grandfathered Formula, the cash balance plan allowed Participants to elect to receive their benefits either as a lump sum or an annuity beginning on the "benefit commencement date" (i.e., the first date of the first period when a Participant is paid). *Id.*

Because the Plan is considered a defined benefit plan under applicable law, Internal Revenue Code ("IRC") § 417(e) and ERISA § 205(g) require any lump sum payment to be no less than the actuarial equivalent of the Participant's accrued benefit expressed as a single life annuity payable at normal retirement age. I.R.C. § 417(e); ERISA § 205(g), 29 U.S.C. § 1055(g); *accord Esden v. Bank of Bos.*, 229 F.3d 154, 164 (2d Cir. 2000); Ans. ¶ 57; Defs. SJ Br. (Dkt. No. 236) at 25; Defs. SOF ¶ 18; 9/4/19 Collins Decl. (Dkt. No. 238) ¶ 42); 6/17/19 Expert Report of Jeff Leonard (Dkt. No. 259) (Leonard Rep.) ¶¶ 42, 46-47. If a benefit is paid even partially as a lump sum, IRC § 417(e) applies, with the result that the total value of the benefit paid cannot be less than the value of the accrued benefit determined using IRC § 417(e). *See* Rev. Rul. 89-60; Treas. Reg. § 1.417(e)-1(d); Defs. 6/4/15 Ltr. (Dkt. No. 21-6) at 13-14; Ans. ¶ 57. To determine actuarial equivalence, a plan administrator projects the cash balance forward to normal retirement age, converts that cash balance to an age sixty-five annuity and then converts that age sixty-five annuity to a lump sum and discounts back the lump sum to present value. Defs. SOF ¶ 18; Leonard Rep. ¶ 46. A plan can select a different rate to project the cash balance forward into an age sixty-five single-life annuity, but the discount rate to determine the present value of the accrued benefit (annuity) is prescribed by IRC § 417(e). *See* I.R.C. § 417(e); *Esden*, 229 F.3d at 164; *accord* Defs. SOF ¶ 19; Leonard Rep. ¶ 47.

For Class Members who, like McCutcheon, received their benefit between 1989 and 2002, the Plan document used a projection rate of the 20-year Treasury bill interest rate plus 1% ("20+1% rate"). 1994 Plan (Dkt. No. 21-9) § 1.3; 2003 Plan § 1.3 (as in effect through February 28, 2002) (Dkt. No. 21-48); 5/16/19 Expert Report of Lawrence Deutsch (Dkt. No. 261) ("Deutsch Rep.") at 4. This projection rate, used to convert the cash balance into an age sixty-five annuity (for Participants younger than sixty-five), was dictated by § 1.3 of the Plan, which defined "Actuarial Equivalent" and in its first paragraph states that "for purposes of converting a Member's Account into a single life annuity payable for the life of the Member starting at Normal Retirement Date" (i.e. age 65) the 20+1% rate is applied. 1994 Plan § 1.3; 2003 Plan § 1.3 (as in effect through February 28, 2002). The discount rate to determine the present value of the accrued benefit (annuity) as prescribed by IRC § 417(e) at the time of the adoption of the Plan in 1989 until February 28, 2002 (i.e. the day before the effective date of the 2003 Plan), was a blend of interest rates equal to the Pension Benefit Guaranty Corporation ("PBGC") rate. I.R.C. § 417(e)(3)(A)(ii)(II) (current version at I.R.C. § 417(e)(3)(C)); I.R.S. Notice 87-20, 1987-1 C.B. 456 (Feb. 9, 1987); Deutsch Rep. ¶ 24. The 20+1% rate from 1989 through February 28, 2002 was consistently and substantially higher than the PBGC rate. Morgan Tr., Ex. 1A (Dkt. No. 242-1) 550:19-23; Deutsch Rep. ¶¶ 37(2)-(3), 45.

c. Plan Appendices -- Preservation of Benefits Under Grandfathered Formula

When the cash balance plan and PRA Formula were adopted as of 1989, employees who were then still employed by Colgate were given the option to continue benefits under the Grandfathered Formula as set forth in Appendices A through D of the Plan. 1994 Plan, Appendix C § 2; Defs. SOF ¶ 20; Defs. SJ Br. at 1; Pls. Opp. at 7. The Appendices offered protection to Participants, like McCutcheon, who worked at Colgate prior to 1989, remained employed after the conversion to the cash balance plan but had accrued benefits under the previous Grandfathered Formula. *Id.* Under Appendix C, these Participants could elect to make contributions to continue to accrue benefits under the Grandfathered Formula. 1994 Plan, Appendix C § 2; Defs. SOF ¶ 24; Defs. SJ Br. at 18; Leonard Rep. ¶ 14 ("employee contributions allowed [those] individuals to continue to accrue benefits under the Grandfathered Formula"). If a Participant elected to make these contributions, and did so until her separation from service, she would be entitled to a benefit no less than her accrued benefit under the PRA Formula plus her employee contributions to maintain the Grandfathered Formula, in the form of either a lump sum or an annuity. 1994 Plan, Appendix C § 2; Defs. 3/24/17 Ltr. (Dkt. No. 47) at 2-3; Defs. 6/4/15 Ltr. at 7, 13; Ans. ¶¶ 211, 214; Defs. SJ Br. at 18; Defs. SOF ¶¶ 26, 28-29.

d. The Residual Annuity Amendment and 2005 Implementation

In 2004, it came to Colgate's attention that the lump sum payments that the Plan had been paying to Participants -- who continued making contributions to maintain Grandfathered Formula benefits -- were less than the Participants would have otherwise received had they elected to receive an annuity. Defs. 6/4/15 Ltr. at 11; Ans. ¶¶ 68-69, 107; Defs. SJ Br. at 6-7, 20-22, 27; Leonard Rep. ¶¶ 102-03, 105, 108, 164-65; Defs. SOF ¶¶ 48-51, 54, 57, 59; 5/11/14 Mellon Presentation (Dkt. No. 238-1) at 12-16, 21; *see also* April 2002 Risk Assessment (Dkt. No. 242-2) at COL_STALEY000024984. On March 30, 2005, the Committee adopted the RAA to address the potential unlawful forfeiture of benefits. Defs. 6/4/15 Ltr. at 11; Defs. 5/22/17 Ltr. (Dkt. 57) at 3; Ans. ¶¶ 69, 74, 107, 180.

The RAA amended the Plan and granted a residual annuity (the "RAA Annuity") to any Participant who elected a lump sum payment upon separation, who met a threshold eligibility requirement (discussed further below) and whose age sixty-five single life annuity benefit otherwise payable to the Member under Appendices B, C or D, as applicable, was greater than the age sixty-five single life annuity actuarial equivalent of a Participant's lump sum payment (the "Age 65 AE of LS paid"). Residual Annuity Amendment (Dkt. No. 21-3) ("RAA") ¶ 5. The amount of the RAA Annuity was the delta between the two amounts. After the Committee adopted the RAA in 2005, it was implemented only for prospective retirees, i.e., those Participants who retired after March 2005, even though the RAA was effective as of July 1, 1989. Defs. 8/29/16 MTD (Dkt. No. 26) at 2; Defs. SJ Br. at 2-3, 18; Ans. ¶¶ 9, 18; Defs. SOF ¶¶ 62, 75, 78; Leonard Rep. at 62 n.18. Retroactive implementation of the RAA did not occur at that time for Participants who had retired between July 1989 and February 2005, such as McCutcheon. *Id.*

e. *Colgate I* Settlement and Retroactive Implementation of the RAA

In 2007, a class action was commenced on behalf of several thousand Participants against Colgate, alleging that their pension benefits had been miscalculated. *See In re Colgate-Palmolive Co. ERISA Litig. ("Colgate I")*, 36 F. Supp. 3d 344 (S.D.N.Y. 2014). In May 2010, the parties in

Colgate I reached an agreement in principle to settle that case. Ans. ¶ 128. Up to that point, counsel for the plaintiffs in *Colgate I* had not been aware of the RAA. *See* Ans. ¶ 131; 2/24/17 Order (Dkt. No. 35) at 4. Once plaintiffs' counsel received a copy of the RAA in July 2011, all RAA-related claims were carved out of the settlement agreement. Ans. ¶ 132; 2/24/17 Order at 4. The Court approved the final settlement agreement on July 8, 2014. Ans. ¶¶ 144-148.

After the *Colgate I* settlement, Defendants retroactively applied the RAA, granting millions of dollars of additional annuity benefits to a few hundred Participants who had taken a lump sum payment between 1989 and 2005, *see* Defs. SOF ¶ 86, the vast majority of whom had elected to make contributions to maintain the Grandfathered Formula. Deutsch Rep. at 64 ¶¶ 202, 205. Defendants contend that all Participants entitled to an RAA Annuity received one at that time. Ans. ¶ 3; Defs. SJ Br. at 7. Plaintiffs dispute this.

B. McCutcheon's Administrative Claim and Appeal

McCutcheon was employed by Colgate from 1979 to 1994, and participated in the Plan during that time. Ans. ¶ 32; Defs. SOF ¶ 5. After the Plan converted in 1989, she made contributions to continue the Grandfathered Formula until she resigned from the company at the age of thirty-seven in 1994. Ans. ¶ 86; Defs. SOF ¶ 5; Defs. 11/4/14 Ltr. (Dkt. No. 21-5). She elected to receive her pension benefit as a lump sum distribution of $22,425.64. 1994 Worksheets (Dkt. No. 21-32) at 1-2. She did not receive any benefit under the RAA when it was enacted in 2005. Defs. SJ Br. at 2-4; 2/24/17 Order at 4. On July 30, 2014, she submitted a claim letter to the Committee, stating that she was entitled to an RAA Annuity, in addition to the lump sum payment she had received in 1994. McCutcheon 7/30/14 Ltr. (Dkt. No. 21-8). She requested that Defendants begin paying her an RAA Annuity, and provide an explanation of how it was calculated. *Id.*

Defendant Flavin responded on behalf of the Committee and denied McCutcheon's claim, by letter dated November 4, 2014. Defs. 11/4/14 Ltr. Because her Grandfathered Benefit (calculated as $699.58) was less than her Age 65 AE of LS paid (calculated as $752.84), the Committee concluded that McCutcheon was not entitled an RAA Annuity. *Id.* at 3. On January 6, 2015, McCutcheon sent a letter to the Committee, requesting, among other things, certain documents, information and responses to questions described in the letter. McCutcheon 1/6/15 Ltr. (Dkt. No. 21-28). On March 5, 2015, Defendant Flavin responded to McCutcheon on behalf of the Committee, attaching some, but not all, of the documents McCutcheon had requested. Defs. 3/5/15 Ltr. (Dkt. No. 21-11).

McCutcheon formally appealed the Committee's benefit denial decision in a letter dated April 6, 2015, identifying four errors ("Errors") that the Committee allegedly committed in the course of calculating her RAA Annuity. McCutcheon 4/6/15 Ltr. (Dkt. No. 21-4). The four Errors are the basis for the denial of benefits claim in Count II. Two of these Errors -- Errors 1 and 3 -- and are discussed in detail below. On June 4, 2015, in a sixteen-page letter signed by Defendant Marsili, the Committee denied McCutcheon's appeal. Defs. 6/4/15 Ltr.

C. Relevant Procedural History

McCutcheon commenced this action on June 3, 2016, asserting five causes of action. The Magistrate Judge overseeing pre-trial proceedings bifurcated the case and ordered only Counts I and II to proceed. Count I is not a class claim. Count I alleges that Defendants violated 29 C.F.R. § 2560.503-1 by failing to produce all relevant documents and information during McCutcheon's claim and appeal. Count II alleges that Plaintiffs were wrongfully denied residual annuity benefits under the Residual Annuity Amendment (the "RAA") and incorporated Plan provisions.

On July 27, 2017, the Court granted Plaintiffs' motion for class certification as to Count II and appointed McCutcheon as class representative of a class consisting of:

> any person who, under any of Appendices B, C or D of the Plan, is entitled to a greater benefit than his or her Accrued Benefit as defined in Plan § 1.2, provided such person received a lump sum payment from the Plan, and the beneficiaries and estates of any such person.

Caufield v. Colgate-Palmolive Co., No. 16 Civ. 4170, 2017 U.S. Dist. LEXIS 118022, 2017 WL 3206339, at *8 (S.D.N.Y. July 27, 2017). Given this class definition, each

Class Member (1) was a Colgate employee in July 1989, (2) received a lump sum payment from the Plan and (3) is entitled to a greater benefit under any of Appendices B, C or D than his or her Accrued Benefit as defined in Plan § 1.2, which defines Accrued Benefit in part as the "Actuarial Equivalent of the Member's Account." Plaintiffs estimate that the Class consists of approximately 1,200 individuals, 2017 U.S. Dist. LEXIS 118022, [WL] at *4, with claims totaling approximately $300,000,000. Deutsch Rep. at 69 ¶ 230.

As noted above, the Court granted in part and denied in part Defendants' motion for summary judgment. Plaintiffs then filed a letter motion seeking leave to file a motion that would (1) allow Plaintiffs to voluntarily dismiss with prejudice Counts III-V of the Complaint, (2) grant summary judgment as to the remaining surviving claims and (3) ask the Court to enter final judgment under Federal Rule of Civil Procedure 54(b). (Dkt. No. 267). The Court granted Plaintiffs' requests, dismissed Counts III-V with prejudice, and set a briefing schedule for this motion. (Dkt. No. 275). Plaintiffs now seek summary judgment on Count II, Errors 1 and 3.

II. LEGAL STANDARD

Summary judgment is appropriate if the record establishes that there is no "genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A genuine issue of material fact exists if 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Nick's Garage, Inc. v. Progressive Cas. Ins. Co.*, 875 F.3d 107, 113 (2d Cir. 2017) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)). The moving party "bears the burden of 'demonstrat[ing] the absence of a genuine issue of material fact.'" *Id.* at 114 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)) (alteration in original). The evidence is construed in the light most favorable to, and all reasonable inferences are drawn in favor of, the nonmoving party. *Id.* at 113. "Summary judgment should be denied where there are genuine issues of material fact 'that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.'" *Davis-Garett v. Urban Outfitters, Inc.*, 921 F.3d 30, 45 (2d Cir. 2019) (quoting *Anderson*, 477 U.S. at 250).

III. DISCUSSION

Plaintiffs' denial of benefits claim in Count II is based on four alleged Errors Defendants made when interpreting and calculating benefits under the RAA. Plaintiffs seek summary judgment on Errors 1 and 3. As explained below, summary judgment is granted to Plaintiffs on these two aspects of Count II.

A. Error 1

As Error 1, Plaintiffs assert that Defendants miscalculated the RAA benefit, causing an impermissible forfeiture of benefits by Class Members. For the following reasons, summary judgment is granted to Plaintiffs on

Error 1, because, regardless of the standard of review, based on the unambiguous terms of the Plan, Defendants' interpretation is erroneous as a matter of law.

1. Legal Principles for Construing a Plan

When a plan is construed in ERISA cases involving claims under § 1132(a)(1)(B), courts interpret the plan according to "federal common law," which is "largely informed by state law principles." *Lifson v. INA Life Ins. Co. of New York*, 333 F.3d 349, 352-53 (2d Cir. 2003); *accord Stets v. Securian Life Ins. Co.*, No. 17 Civ. 09366, 2020 U.S. Dist. LEXIS 53985, 2020 WL 1467395, at *5 (S.D.N.Y. Mar. 25, 2020). Courts first look to determine if the Plan's terms are ambiguous. *See O'Neil*, 37 F.3d at 58-59; *accord Verdier v. Thalle Constr. Co., Inc.*, No. 14 Civ. 4436, 2017 U.S. Dist. LEXIS 2178, 2017 WL 78512, at *4 (S.D.N.Y. Jan. 5, 2017), *aff'd*, 771 F. App'x 20 (2d Cir. 2019). "Whether ERISA plan language 'is ambiguous is a question of law that is resolved by reference to the contract alone.'" *Strom v. Siegel Fenchel & Peddy P.C. Profit Sharing Plan*, 497 F.3d 234, 244 n.6 (2d Cir. 2007) (quoting *O'Neil*, 37 F.3d at 59); *accord Verdier*, 2017 U.S. Dist. LEXIS 2178, 2017 WL 78512, at *4. "Language is ambiguous when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement." *Strom*, 497 F.3d at 244 n.6 (internal quotation marks omitted); *accord Verdier*, 2017 U.S. Dist. LEXIS 2178, 2017 WL 78512, at *4.

If the terms of the Plan are unambiguous, they are enforced according to their terms. "Where . . . plan language categorically states that certain benefits will be provided, *de novo* review is appropriate because unambiguous language leaves no room for the exercise of discretion." *O'Neil*, 37 F.3d at 59; *accord Strom*, 497 F.3d at 244 n.6 ("[U]nambiguous language in an ERISA plan must be interpreted and enforced in accordance with its plain meaning."). The court is to "review the Plan as a whole, giving terms their plain meanings." *Fay v. Oxford Health Plan*, 287 F.3d 96, 104 (2d Cir. 2002); *accord Jarosz v. Am. Axle & Mfg., Inc.*, 372 F. Supp. 3d 163, 178 (W.D.N.Y. 2019); *see Brass v. Am. Film Techs., Inc.*, 987 F.2d 142, 148 (2d Cir. 1993) ("Where the [contract] language is plain and unambiguous, a court may construe the contract and grant summary judgment.").

If the terms of the Plan are ambiguous, the denial of benefits is considered under the arbitrary and capricious standard where the party making the interpretation has discretion to interpret the terms. *O'Neil*, 37 F.3d at 59; *accord Jarosz*, 372 F. Supp. 3d at 175. A denial of benefits is "arbitrary and capricious only if the decision is without reason, unsupported by substantial evidence or erroneous as a matter of law." *Fay*, 287 F.3d at 104 (internal quotation marks omitted); *accord Jarosz*, 372 F. Supp. 3d at 175. "'[W]here the trustees of a plan . . . interpret the plan in a manner inconsistent with its plain words, or by their interpretation render some provisions of the plan superfluous, their actions may well be found to be arbitrary and capricious.'" *DeCesare v. Aetna Life Ins. Co.*, 95 F. Supp. 3d 458, 481 (S.D.N.Y. 2015) (quoting *O'Shea v. First Manhattan Co. Thrift Plan & Tr.*, 55 F.3d 109, 112 (2d Cir. 1995)). But where both the interpretation proffered by the administrator and the interpretation proffered by the claimant are reasonable, the administrator's interpretation will not be disturbed. *Novella v. Westchester Cty.*, 661 F.3d 128, 140 (2d Cir. 2011); *accord Jarosz*, 372 F. Supp. 3d at 175.

"It is axiomatic that where the language of a contract [at issue in a § 1132(a)(1)(B) claim] is unambiguous, the parties' intent is determined within the four corners of the contract, without reference to external evidence." *Feifer v. Prudential Ins. Co. of Am.*, 306 F.3d 1202, 1210 (2d Cir. 2002); *accord Halpern v. Blue Cross/Blue Shield of W. New York*, No. 12 Civ. 407, 2014 U.S. Dist. LEXIS 124388, 2014 WL 4385759, at *10 (W.D.N.Y. Sept. 4, 2014); *Brooks v. Macy's, Inc.*, No. 10 Civ. 5304, 2011 U.S. Dist. LEXIS 48788, 2011 WL 1793345, at *2 (S.D.N.Y. May 6, 2011). By contrast, when a plan's terms are ambiguous, "an employer is entitled to summary judgment if it presents extrinsic evidence sufficient to remove the ambiguity and that evidence is not contradicted by opposing evidence." *Gilbert v. Related Mgmt. Co., L.P.*, No. 95 Civ. 9610, 1998 U.S. Dist. LEXIS 2382, 1998 WL 99801, at *4 (S.D.N.Y. Mar. 4, 1998), *aff'd sub nom.*, 162 F.3d 1147 (2d Cir. 1998) (collecting cases).

2. Construing the RAA

In broad terms, Error 1 involves how to determine who is entitled to an RAA Annuity benefit, and the amount of any such benefit. Plaintiffs seek summary judgment, arguing that eligibility is determined by comparing the Appendix benefit (which is the greater of the Grandfathered benefit or the sum of the Accrued Benefit as defined in Plan § 1.2 and any Employee Contributions) to the Accrued Benefit as defined in Plan § 1.2 (with the outcome that if either the Grandfathered benefit exceeds the Accrued Benefit as defined in Plan § 1.2 or the participant elected to make Employee Contributions, then the participant will be entitled to a Residual Annuity). Plaintiffs further argue that the amount of the Residual Annuity is determined by comparing the Age 65 AE of LS paid (defined above as the "Age 65 actuarial equivalent of the lump sum paid") with the greater of the Grandfathered Benefit or the Member's Accrued Benefit as defined in Plan § 1.2 plus Employee Contributions (which is then adjusted for payment prior to age 65 and potential conversion to a Joint and Survivor benefit form). Defendants argue that both eligibility and the amount of the residual annuity is determined by comparing the Age 65 AE of LS paid with only the Grandfathered Benefit. All agree that if the Age 65 AE of LS paid is smaller than the second amount, then the difference is the RAA Annuity benefit. Based on a plain reading of the RAA, Plaintiffs are correct.

The RAA states, regarding eligibility to receive the RAA Annuity, that

> [e]ffective as of July 1, 1989, a Member who, under any of Appendices B, C or D, is entitled to a greater benefit than [her] Accrued Benefit . . . and who chooses to receive [her] benefit under this Lump Sum Payment Option, which

> is the Actuarial Equivalent of [her] Accrued Benefit . . . shall receive in addition to such lump sum payment an additional benefit, commencing at the same time and payable in the standard form applicable to such Member . . . . A Member may not elect any other form of payment option with respect to this additional benefit.

(Dkt. No. 21-3 at 4/8). But the following provision of the RAA directs how to compute the RAA Annuity:

> Such additional benefit shall be computed by subtracting the age 65 single life annuity Actuarial Equivalent amount of the Member's lump sum payment [i.e., the Age 65 AE of LS paid] from *the age 65 single life annuity benefit otherwise payable to the Member under Appendices B, C or D, as applicable* . . . .

(Dkt. No. 21-3 at 4/8) (emphasis added).

The parties agree that Appendix C § 2(b) is the Appendix applicable to McCutcheon. It states:

> If [she] elects to receive an annuity settlement instead of a single lump sum payment, [she] shall be eligible for an annuity pursuant to Section 6.2 . . ., Section 6.3 . . . or Section 6.4(a)(ii) . . . of the Plan that provides for [her] to receive *the larger of*:

(i) the benefit that [she] would have received had [she] continued under the Plan as in effect prior to July 1, 1989, pursuant to Appendix B . . . or

(ii) the benefit payable pursuant to Section 6.2 . . . Section 6.3 . . . or Section 6.4(a)(ii) . . . of the Plan, which is the Actuarial Equivalent of the Member's Accrued Benefit . . . plus [her] Contributions to Maintain Prior Plan Benefits with interest . . . at [her] Benefit Commencement Date.

(Dkt. No. 21-10 at 18-19/71). Defendants argue that only § 2(b)(i) (which is the Grandfathered Benefit) should be compared to the Age 65 AE of LS paid. Plaintiffs argue that the *greater* of § 2(b)(i) (the Grandfathered Benefit) *or* § 2(b)(ii) above should be compared to the Age 65 AE of LS paid.

The Plan plainly states that Participants are entitled "to receive the larger of" the two amounts, paragraph (i) the Grandfathered Benefit, and paragraph (ii) another amount discussed below. The Plan unambiguously directs that both amounts must be considered, as Plaintiffs assert. Defendants' interpretation to the contrary is erroneous as a matter of law.[2]

2. Defendants' additional arguments regarding the meaning of the "as applicable" language in the RAA are rejected. (Dkt. No. 281 at 7-9/14). The "as applicable" language in the RAA is an unambiguous direction to the Plan Administrator to determine and identify which part of the Appendix applies to a given Participant before calculating her RAA Annuity.

Defendants agree that the language governing determination of the RAA Annuity payments is clear and unambiguous, but argue that the RAA dictates a comparison between the PRA lump sum payment (expressed as an annuity) and the Grandfathered Formula annuity only. Defendants assert that "the age 65 single life annuity benefit *otherwise payable* to the Member under Appendices B, C or D, as applicable" refers only to the Grandfathered Benefit. The other benefit, in Appendix C § 2(b)(ii), they argue is not "otherwise payable" because it is the same as the PRA lump sum payment, which was already paid.

This argument is unpersuasive because the PRA lump sum is not the same as the Appendix C § 2(b)(ii) benefit. The PRA lump sum is more precisely "the age 65 single life annuity Actuarial Equivalent amount of the Member's lump sum payment" (i.e., the Age 65 AE of LS paid) from the RAA. That amount is different from "the benefit payable pursuant to Section 6.2 . . . Section 6.3 . . . or Section 6.4(a)(ii) . . . of the Plan, which is the Actuarial Equivalent of the Member's Accrued Benefit . . . plus [her] Contributions to Maintain Prior Plan Benefits with interest" from Appendix C § 2(b)(ii).

First, on the most basic level, the words are different, suggesting that the drafters of the Plan meant to indicate two different things. Second, the Age 65 AE of LS paid is a computational construct created solely to facilitate the computation under the RAA. It is not a Plan benefit; there is no such benefit in the Plan. In contrast, Appendix C § 2(b)(ii) creates by its terms an actual Plan benefit, established when the Plan was converted from a defined benefit plan to a PRA cash balance plan.

Third, a critical difference that flows from this distinction, and the reason the amounts are not the same, is that they are based on different interest rate assumptions. The Age 65 AE of LS paid is based on a PBGC interest rate, while the Appendix C § 2(b)(ii) benefit uses the higher 20+1% rate. The Age 65 AE of LS paid is based on a PBGC interest rate because, at the time of the adoption of the Plan in 1989, until February 28, 2002, the interest rates that IRC § 417(e) required the Plan to use in present valuing benefits were a blend of interest rates equal to the PBGC rate for immediate or deferred annuities. I.R.C. § 417(e)(3)(A)(ii)(II) (current version at I.R.C. § 417(e)(3)(C)); I.R.S. Notice 87-20, 1987-1 C.B. 456 (Feb. 9, 1987). Defendants admit in their reply memorandum that the Committee "uses the PBGC rates to convert the PRA Formula lump sum into an annuity for purposes of comparison with the Grandfathered Formula annuity." Defs. SJ Reply (Dkt. No. 249) ("Defs. SJ Reply") at 10 n.5.

In contrast, the Appendix C § 2(b)(ii) benefit, which is an actual benefit, is based on the higher 20+1% rate because that is the interest rate assumption in the Plan that Defendants actually used (for Participants paid before March 1, 2002) to project to an age sixty-five account value and then convert it to an age sixty-five annuity. As reflected in the 2003 Plan document, the Plan required the use of 20+1% rate to convert a Participant's Account into a single life annuity in § 1.3, before the year 2000 (and, indeed, through February 28, 2002, as explained above). Throughout the relevant period, this rate was always greater -- i.e., not the same as -- the PBGC rates.

Defendants' argument in response falls short. They assert that the Age 65 AE of LS paid and Appendix C § 2(b)(ii) benefit are one and the same. Defs. SJ Reply at 10-11; Defs. SOF ¶¶ 29-30 and 32. They do not explain how this can be, given that the two amounts are based on different interest rates, nor do they appear to challenge that they use the PBGC rate for the former, while the Plan throughout the relevant period dictates use of the 20+1% rate for the latter. Defendants also cite evidence to show that the RAA's purpose and intent was to ensure that Participants were "made whole" by comparing their Age 65 AE of LS paid just to the Appendix C § 2(b)(i) Annuity Benefit (to preserve the Grandfathered Formula benefit). They similarly argue that the Committee's past practice is consistent with their interpretation. But the unambiguous language of the RAA and Appendix C forecloses consideration of extrinsic evidence such as intent and purpose or past practice. *See Aeronautical Indus. Dist. Lodge 91 of Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO v. United Techs. Corp., Pratt & Whitney*, 230 F.3d 569, 576 (2d Cir. 2000) ("Only when provisions are ambiguous may courts look to extrinsic factors . . . such as bargaining history, past practices, and other provisions . . . to interpret the language in question."); *DeVito v. Hempstead China Shop, Inc.*, 38 F.3d 651, 654 (2d Cir. 1994) (noting that "[t]o the extent that [an] *ambiguity exists*, a textual analysis of the Agreement may be supplemented by an exploration of extrinsic evidence concerning the parties' intent" (emphasis added)).

Even if not foreclosed by the Plan's unambiguous language, Defendants cannot support their argument regarding consistent prior practice, *see* Defs. SJ Reply at 9-10, since they admitted that there was no practice regarding the determination of the Residual Annuity for participants who were paid prior to the effective date of the 2003 Plan when the actuarial basis for determining the Account plus Employee Contributions benefit differed from the actuarial basis for determining the Age 65 AE of LS paid (i.e. when the Plan § 1.3 actuarial equivalence 20+1% interest rate exceeded the applicable IRC § 417(e) rate). *See* Leonard Rep. ¶ 191 & n.18, and the sole evidence that Defendants cite in their reply to support their argument is a set of calculations that predate the RAA by almost a year and hence are not actual RAA benefit calculations.

Defendants also argue that different interest rates (in this case the PBGC rate on the one hand and the 20+1% rate on the other) cannot be used in the same benefit calculation. Defs. SJ Br. at 24-25. But Defendants have admitted that it is standard practice in a cash balance plan to use a different rate for projecting the account to age 65 than is used for calculations that are subject to IRC § 417(e). Defs. SJ Br. at 25-26; Defs. SOF ¶¶ 18-19; Leonard Rep. ¶¶ 47, 49.

Defendants' expert argues that IRC § 417(e) does not apply here because IRC § 417(e) does not apply at all when the benefit is partially paid as a lump sum and partially paid as an annuity. Leonard Rep. ¶¶ 22, 178-79. This argument is unpersuasive because he relies on an IRS notice that was issued after the calculations in question were performed. *See* I.R.S. Notice 2017-44. Also, the IRS notice by its terms (and as explained by Plaintiffs' expert) does not appear to apply to the benefit here. *See* 6/24/19 Reply Report of Lawrence Deutsch (Dkt. No. 262) ("Deutsch Reply Rep.") at 15 (explaining that the notice also would have required that the Plan be timely amended, to apply to benefits that commenced prior to 2017, which the Plan was not). Plaintiffs' expert further pointed out that application of the IRS Notice would actually serve to increase, rather than decrease, the amount of the Residual Annuity. *Id.* at 17.

Defendants raised reformation as a defense in their Answer (*see* Dkt. No. 49 at 123/125) and in their summary judgment motion (*see* Dkt. No. 236 at 33/42), arguing that the Plan should be reformed to produce the desired result. Defendants' reformation defense is rejected as a matter of law. Defendants seek to reform the Plan to "reflect the drafters' intent" that the Residual Annuity be based only upon the Grandfather benefit and say what they argued in their summary judgment motion, which the Court rejected as contrary to the plain meaning of the Plan: if the value of a Participant's Appendix C § 2(b)(i) annuity benefit (which is the Grandfathered Benefit) was greater than the value of the annuitized form of her PRA lump sum payment, the Participant would receive an RAA Annuity in the amount of the difference (*see* Dkt. No. 236 at 33-34/42). This argument is rejected because, so reformed, the Plan would be in violation of IRC § 417(e), which requires any lump sum payment to be no less than the actuarial equivalent of the Participant's accrued benefit expressed as a single life annuity payable at normal retirement age. I.R.C. § 417(e); *accord Esden*, 229 F.3d at 164. As explained above, the discount rate to determine the present value of the accrued benefit (annuity) is prescribed by IRC § 417(e), which at the relevant time was the PBGC rate. *See* Dkt. No. 265 at 22/32. If reformed as Defendants request, this discount rate would be the 20+1% rate, which at the relevant time was higher than the PBGC rate and therefore, if applied, would be in violation of IRC § 417(e). The Court declines to reform a plan provision that conforms to controlling law into a plan provision that would violate the law. In no case that Defendants cited were the relevant plan terms after reformation contrary to law.

Reformation is unavailable to Defendants for the additional reason that reformation is not a defense but rather an affirmative claim that Defendants failed raise as a counterclaim. *See* 29 U.S.C. § 1132(a)(3) ("A *civil action* may be brought . . . by a . . . fiduciary . . . to obtain other appropriate equitable relief." (emphasis added)); *In re DeRogatis*, 904 F.3d 174, 199 (2d Cir. 2018) (noting that "plaintiffs *asserting a claim* under [ERISA] section 502(a)(3) may seek remedies such as . . . equitable reformation of plan terms" (emphasis added)); *Scarangella v. Grp. Health, Inc.*, 731 F.3d 146, 149 (2d Cir. 2013) (discussing the three *counterclaims*, brought by defendant in response to plaintiff's complaint, "seeking rescission and/or reformation" of the plan (emphasis added)); *see also Powermat Techs., Ltd. v. Belkin Int'l Inc.*, No. 19 Civ. 878, 2020 U.S. Dist. LEXIS 98912, 2020 WL 2892385, at *7 (S.D.N.Y. Apr. 2, 2020) (addressing whether, under New York law, defendant had adequately pleaded reformation as a *counterclaim* and the corresponding *defense* of mutual mistake). Defendants have not identified any Second Circuit case that supports asserting reformation only as a defense, nor have they identified any persuasive out-of-Circuit case where a court has allowed a defendant to reform an ERISA plan in this context in the manner they suggest.

Second, while Defendants suggest reformation is an absolute plan sponsor right under ERISA, *see, e.g.*, Defs. 7/27/20 Ltr. at 1 (Dkt. No. 273), reformation is appropriate only in extreme cases, and in substantiating an intent contrary to the clear and unambiguous plan's terms, the defendant must meet the high bar of clear and convincing evidence relying only on objective, written evidence that is "not dependent 'on the credibility . . . of an interested party.'" *Young v. Verizon's Bell Atlantic Cash Balance Plan*, 615 F.3d 808, 820 (7th Cir. 2010). Defendants fail to explain how the situation here is an extreme case: Defendants claim "windfall," Dkt. No. 273 at 2, but it is no windfall for participants to receive a make-whole payment following a forfeiture of their legally indefeasible benefits. Moreover, Defendants point to no objective, written extrinsic evidence showing that, when Colgate adopted the RAA in March 2005, the intention was to cure the IRC § 417(e) violations visited upon a specific group of Appendix benefit participants (those with greater Grandfathered formula benefits) but to repeat the IRC § 417(e) violations inflicted on the other Appendix benefit participants (those with greater Appendix C § 2(b)(ii) benefits). The evidence to which Defendants point includes the December 2004 Committee minutes, which indicate that Colgate's intent included compliance with the regulation, which would require basing the Residual Annuity upon the entire benefit, not just the Grandfather benefit. Thus, Defendants have not identified admissible evidence that creates a genuine issue of material fact establishing that Colgate had, as of the March 2005 adoption date, an affirmative intention to repeat its prior Appendix Account-based underpayments.

Accordingly, Plaintiffs are entitled to summary judgment on Error 1.

B. Error 3

In Error 3, Plaintiffs argue that Defendants improperly used a pre-retirement mortality discount ("PRMD") to determine a Class Member's RAA Annuity in the calculation of the age sixty-five actuarial equivalence for the period prior to age sixty-five (normal retirement age). Unlike Error 1, which applies only to Class members paid prior to the effective date of the 2003 Plan, Error 3 applies to all calculations under the RAA, including participants who were paid a Residual Annuity prior to 2014. Plaintiffs do not dispute that the PRMD is called for by the Plan. Instead they argue that Defendants' use of PRMD violates the law -- ERISA § 203(a)(2) and IRC § 417(e)'s actuarial equivalence rules. As a question of law, the Court reviews Error 3 de novo. *See Wilkins v. Mason Tenders Dist. Council Pension Fund*, 445 F.3d 572, 581

(2d Cir. 2006) ("The interpretation of ERISA, a federal statute, is a question of law subject to *de novo* review."); *accord Munnelly v. Fordham Univ. Faculty*, 316 F. Supp. 3d 714, 727 (S.D.N.Y. 2018). For the following reasons, summary judgment is granted to Plaintiffs on Error 3.

As a threshold matter, Defendants do not oppose Plaintiffs' arguments regarding Error 3 in their opposition brief. (*See* Dkt. No. 281). Summary judgment is granted on this ground alone. *See Vermont Teddy Bear Co. v. 1-800 Beargram Co.*, 373 F.3d 241, 244 (2d Cir. 2004) ("[I]f a non-moving party fails to oppose a summary judgment motion, then summary judgment, *if appropriate*, shall be entered against him." (internal quotation marks omitted)).

A mortality discount factors into the present value of a benefit -- here an age sixty-five single life annuity -- the possibility that the participant might die before the projected end date of the benefit, here age sixty-five. For example, a plan could determine the present value of a benefit by projecting the cash balance account forward to age sixty-five and then discounting the account back to the participant's current age, and then applying a further mortality discount. The amount of the discount is taken from the plan's applicable mortality table.[3]

Plaintiffs argue that a mortality discount should not be used to determine the present value of a normal

3. This example is merely illustrative and focuses on an individual who, like McCutcheon, received benefits prior to 2006 and the enactment of the Pension Protection Act.

retirement annuity when, as prescribed by the Plan, the ultimate benefit paid does not significantly decrease if the participant dies before normal retirement age (i.e., the benefit payable to the beneficiary upon death is not significantly less than what would have been paid to the participant upon survival), as is the case here. Plaintiffs cite multiple out-of-Circuit cases, which have found an IRC § 417(e) violation in similar circumstances. *See West v. AK Steel Corp.*, 484 F.3d 395, 411 (6th Cir. 2007) (agreeing with the district court that applying a mortality discount to reduce the present value of a pre-retirement lump-sum distribution where the death benefit is equal to the participant's pension benefit would create an impermissible forfeiture under ERISA); *Berger v. Xerox Corp. Ret. Income Guarantee Plan*, 338 F.3d 755, 764 (7th Cir. 2003) (affirming and observing that the use of a pre-retirement mortality discount was "unfathomable" because the participant's death would not reduce his benefits); *Ruppert v. Alliant Energy Cash Balance Pension Plan*, No. 08 Civ. 127, 2010 U.S. Dist. LEXIS 137743, 2010 WL 5464196, at *2, 16-18 (W.D. Wis. Dec. 29, 2010); *Crosby v. Bowater Inc. Ret. Plan For Salaried Emps. of Great N. Paper, Inc.*, 212 F.R.D. 350, 360-62 (W.D. Mich. 2002), *vacated on other grounds*, 382 F.3d 587 (6th Cir. 2004). The rationale is that "applying a pre-retirement mortality discount to a retirement benefit that does not decrease if the participant dies would result in a lump sum that was less than the actuarial equivalent of the annuity it [was] supposed to replace" and therefore would "result in a forfeiture prohibited by ERISA." *West v. AK Steel Corp. Ret. Accumulation Pension Plan*, No. 02 Civ. 0001, 2005 U.S. Dist. LEXIS 37863, 2005 WL 3465637, at *5 (S.D. Ohio Dec. 19, 2005) (internal quotation marks omitted), *aff'd sub nom.*, *West*, 484 F.3d 395.

This reasoning is persuasive. As applied to this case, no PRMD should be used to determine a Class Member's RAA Annuity in the calculation of the age sixty-five actuarial equivalence for the period prior to age sixty-five because the death benefit is defined as "the Actuarial Equivalent of the Accrued Benefit" in § 5.1(a) of the Plan. Under 26 C.F.R. § 1.417(e)-1, "[t]he present value of any optional form of benefit cannot be less than the present value of the normal retirement benefit determined in accordance with the preceding sentence." 26 C.F.R. § 1.417(e)-1. Here, a PRMD is used to determine the present value of the Age 65 AE of LS paid -- a benefit that must be paid in all events and does not decrease if the Participant dies prior to reaching age sixty-five. This results in a present value that is less than the corresponding normal retirement benefit and therefore violates 26 C.F.R. § 1.417(e)-1. *See West*, 484 F.3d at 411 ; *Berger*, 338 F.3d at 764. Therefore, a PRMD should not be applied.

Defendants argue that a proposed 2016 IRS regulation explicitly rejects Plaintiffs' argument regarding the unlawful use of a PRMD in this context, with citation to the same cases upon which Plaintiffs rely. *See* Update to Minimum Present Value Requirements for Defined Benefit Plan Distributions, 81 Fed. Reg. 85,190 (proposed Nov. 25, 2016) (to be codified at 26 C.F.R. pt. 1). Defendants also argue that the IRS approved the Plan's use of PRMD in 2003, when it qualified the Plan, that this interpretation should be entitled to deference, and that the Second

Circuit has separately held that IRS interpretations are entitled to deference.

While Defendants are correct that proposed regulations may provide guidance, they are not binding.[4] *See LeCroy Research Sys. Corp. v. Comm'r*, 751 F.2d 123, 127 (2d Cir. 1984) ("Proposed regulations are suggestions made for comment; they modify nothing."); *accord Sweet v. Sheahan*, 235 F.3d 80, 87 (2d Cir. 2000) ("Implicit in our argument is the established point of law that proposed regulations . . . have no legal effect."). The Second Circuit case on which Defendants rely for the proposition that IRS interpretations are entitled to deference involves an IRS regulation that was adopted, rather than merely proposed. *See Hurwitz v. Sher*, 982 F.2d 778, 782 (2d Cir. 1992) (addressing 26 C.F.R. § 1.401(a)-20, effective March 24, 2006).

Further, the proposed regulations cited by Defendants appear to support Plaintiffs' position. They would update existing regulations for minimum present value requirements for defined benefit plan distributions, including the treatment of preretirement mortality discounts in determining the minimum present value of accrued benefits. *See* Update to Minimum Present Value

4. The proposed regulations were published on November 25, 2016, and have not become final since. *See* Update to Minimum Present Value Requirements for Defined Benefit Plan Distributions, 81 Fed. Reg. 85,190 (proposed Nov. 25, 2016) (to be codified at 26 C.F.R. pt. 1). Written and electronic comments were submitted by February 23, 2017, and discussed at a public hearing on March 7, 2017. *Id.*

Requirements for Defined Benefit Plan Distributions, 81 Fed. Reg. at 85,192. As relevant here, according to the proposed regulations, the probability of death (under the applicable mortality table) during an assumed deferral period, if any, would not be taken into account for purposes of determining the present value under IRC § 417(e)(3) of an accrued benefit derived from contributions made by an employee. *Id.* This is because, according to the proposed regulations, an employee's rights in the accrued benefits from the employee's own contributions are non-forfeitable under IRC § 411(a)(3)(A), and the exception for death under IRC § 411(a)(3)(A) to the non-forfeitability of accrued benefits does not apply to the accrued benefit derived from employee contributions. *Id.* In other words, the proposed regulation appears to forbid the application of a PRMD to determine the present value of the entire accrued benefit if any portion of the accrued benefit is derived from contributions made by the employee, as is the case here.

For these reasons, summary judgment is granted to Plaintiffs on Error 3.

IV. ORDER DIRECTING RECALCULATION OF BENEFITS

Having found Plaintiffs entitled to summary judgment on Errors 1 and 3, but Defendants entitled to judgment on Errors 2 and 4, the Court directs Defendants to calculate or recalculate, in a manner consistent with this Opinion, all Residual Annuities for each member of the Class and pay the corrected Residual Annuity. For avoidance of doubt, Defendants' arguments objecting to the use of the 20+1% interest rates to determine the Projection rate, and the use of the PBGC rates to determine the Age 65 AE of LS paid, are rejected for the reasons discussed above. Accordingly,

- The Projection Rate (used to convert the cash balance into an age sixty-five annuity for Participants younger than sixty-five) is the 20+1% rate if the Original Payment Date is prior to March 1, 2002.

- The IRC § 417(e) Rates shall be used in calculating the Age 65 AE of LS paid ("the age 65 single life annuity Actuarial Equivalent amount of the Member's lump sum payment" per the RAA) and are the PBGC interest rates in effect on the Original Payment Date if the Original Payment Date is prior to March 1, 2002.[5]

5. Defendants assert that the PBGC rates should cease to apply as of January 1, 2000, based on an effective date of a cited change to IRC § 417(e). This argument is rejected. The change, effective January 1, 2000, did not prohibit the use of the PBGC rates past that date, but rather allowed the Plan to be amended as of that date to replace the PBGC rates; and if the Plan failed to be amended by January 1, 2000, then the Plan was required to provide the better of the PBGC rate and the 30-year Treasury rate. *See* Pub. L. 103-465 § 767(a)(2); Deutsch Rep. ¶¶ 25-26. Since the Plan was not amended until 2002, the Plan was required to pay no less than the better of the benefit determined using PBGC rates and the 30-year Treasury Rate.

V. ENTRY OF JUDGMENT UNDER RULE 54(b)

As with Error 3, Defendants do not oppose Plaintiffs' entry of judgment under Rule 54(b) of the Federal Rules of Civil Procedure and therefore summary judgment is granted on this ground alone. *See Vermont Teddy Bear Co.*, 373 F.3d at 244. In the alternative, summary judgment is also granted to Plaintiffs on the merits of the argument.

Rule 54(b) permits entry of a final judgment as to fewer than all claims or parties if the court finds that "there is no just reason for delay." Fed. R. Civ. P. 54(b). That is the case here because while there is one technically unadjudicated claim -- Plaintiff McCutcheon's individual Count II, Error 4 anti-cutback claim, to be reviewed de novo, *see McCutcheon*, 2020 U.S. Dist. LEXIS 121798, 2020 WL 3893303, at *16 (noting that the Court has not decided "which party has the better argument" on her individual claim, reviewed de novo) -- that too has effectively been resolved with the Court's grant to Defendants of summary judgment on the Class's Error 4 claim (reviewed deferentially) because, as discussed in Plaintiffs' July 21 letter to the Court (Dkt. No. 267), Plaintiff waives any right to de novo review of her Error 4 claim based on Defendants' mishandling of her administrative claim and appeal, and, like the Class, limits her contention to that which the Class would make on appeal, namely, that her/their entitlement to de novo review of her/their Error 4 cutback claim is because it centers on a question of law rather than an interpretation of the Plan. In other words, by her agreement, Plaintiff's individual Error 4 claim merges in its entirety into the Class's claim in all respects including for purposes of appeal, leaving nothing more to be decided here.

This case is thus suitable for certification under Rule 54(b) because this case is, in every practical sense, at an end and ready in its entirety for appellate review, there is no need for the Court to reach the merits of Error 4 reviewed de novo and there is no chance of piecemeal appeals. This makes certification under Rule 54(b) in the "interest[s] of sound judicial administration and efficiency." *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 8, 100 S. Ct. 1460, 64 L. Ed. 2d 1 (1980); *accord Harriscom Svenska AB v. Harris Corp.*, 947 F.2d 627, 629 (2d Cir. 1991).

VI. CONCLUSION

For the foregoing reasons, Plaintiffs' motion is GRANTED. The relief provided in this Opinion, Order and Final Judgment is stayed to allow the parties to pursue an appeal. Defendants' request for oral argument (Dkt. No. 283) is DENIED as moot.

The Clerk of Court is respectfully directed to close the motion at Docket No. 278.

Dated: August 24, 2020
New York, New York

/s/ Lorna G. Schofield
Lorna G. Schofield
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED JULY 29, 2020

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

16 Civ. 4170 (LGS)

REBECCA MCCUTCHEON, *et al.*,

Plaintiffs,

-against-

COLGATE-PALMOLIVE CO., *et al.*,

Defendants.

ORDER

LORNA G. SCHOFIELD, District Judge:

WHEREAS, on July 10, 2020, the Court issued an Opinion and Order (the "Opinion") granting in part and denying in part Defendants' motion for summary judgment (Dkt. No. 265). All capitalized terms in this Order are defined in the Opinion.

WHEREAS, on July 16, 2020, the Court issued an order stating that this action was trial ready and requesting a letter from the parties regarding their preference for settlement referral (Dkt. No. 266).

WHEREAS, on July 21, 2020, Plaintiffs filed a letter motion, requesting a pre-motion conference and seeking leave to file a motion that, in part, would obviate the need for a trial (Dkt. No. 267).

WHEREAS, on July 27, 2020, Defendants filed a response which, in part, notes that Defendants raised reformation as a defense in their Answer (*see* Dkt. No. 49 at 123/125) and in their summary judgment motion (*see* Dkt. No. 236 at 33/42) and that the Court did not rule on this defense in the Opinion (Dkt. No. 273).

WHEREAS both parties addressed the issue of reformation in submissions on Defendants' motion for summary judgment.

WHEREAS the omission of discussion of reformation in the Opinion was inadvertent, and it is hereby

ORDERED that Defendants' reformation defense is rejected as a matter of law. Defendants seek to reform the Plan to "reflect the drafters' intent" and say what they argued in their summary judgment motion, which the Court rejected as contrary to the plain meaning of the Plan: if the value of a Participant's Appendix C § 2(b)(i) annuity benefit (which is the Grandfathered Benefit) was greater than the value of the annuitized form of her PRA lump sum payment, the Participant would receive an RAA Annuity in the amount of the difference (*see* Dkt. No. 236 at 33-34/42). This argument is rejected because, so reformed, the Plan would be in violation of IRC § 417(e), which requires any lump sum payment to be no less than the actuarial equivalent of the Participant's accrued benefit expressed as a single life annuity payable at normal retirement age. I.R.C. § 417(e); *accord Esden v. Bank of Bos.*, 229 F.3d 154, 164 (2d Cir. 2000). As explained in the Opinion, the discount rate to determine the present value of the accrued benefit (annuity) is prescribed by IRC § 417(e), which at the relevant time was the PBGC rate. *See* Dkt. No. 265 at 22/32. If reformed as Defendants request, this discount rate would be the 20+1% rate, which at the relevant time was higher than the PBGC rate and therefore, if applied, would be in violation of IRC § 417(e).

Defendants' expert argues that § 417(e) does not apply. This argument is unpersuasive because he relies on an IRS notice that was issued after the calculations in question were performed. *See* I.R.S. Notice 2017-44. Also, the IRS notice by its terms (and as explained by Plaintiffs' expert) does not appear to apply to the benefit here. *See* Dkt. No. 262 at 17/38.

Dated: July 29, 2020
New York, NY

/s/ Lorna G. Schofield
Lorna G. Schofield
United States District Judge

APPENDIX D — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, DATED JULY 10, 2020

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

16 Civ. 4170 (LGS)

REBECCA MCCUTCHEON, *et al.*,

Plaintiffs,

v.

COLGATE-PALMOLIVE CO., *et al.*,

Defendants.

July 10, 2020, Decided;
July 10, 2020, Filed

OPINION AND ORDER

LORNA G. SCHOFIELD, District Judge:

Plaintiff and class representative Rebecca McCutcheon[1] brings this action, on behalf of herself and others similarly situated, under the Employee Retirement Income Security

1. The Plaintiffs are McCutcheon and her former husband, Paul Caufield. Only McCutcheon is a class representative. She brings claims under Counts I and II. Caufield seeks relief on Count II, but not Count I.

Act of 1974, 29 U.S.C. § 1001 et seq. ("ERISA"), against Defendants Colgate-Palmolive Co. ("Colgate"), Colgate-Palmolive Co. Employees' Retirement Income Plan (the "Plan"), Laura Flavin, Daniel Marsili and the Employee Relations Committee of Colgate-Palmolive Co. (the "Committee"). Defendants move for summary judgment on Counts I and II of the Complaint, which allege, respectively, that Defendants failed to comply with ERISA and accompanying regulations during the administrative phase of the case, and that Plaintiffs were wrongfully denied residual annuity benefits under the Residual Annuity Amendment (the "RAA") and incorporated Plan provisions. Count I is not a class claim. For the following reasons, summary judgment is granted in part and denied in part to Defendants.

I. BACKGROUND

Unless otherwise noted, the facts below are drawn from the record and, in general terms unless otherwise noted, are undisputed.[2]

2. Defendants argue that the Court should strike Plaintiffs Rule 56.1 Opposition because it violates the Court's Individual Rules and the Local Rules for the Southern District of New York. The Court declines to strike the Rule 56.1 Opposition in its entirety, but disregards any portion that is repetitive or contains argument, rather than "a separate, short and concise statement of additional material facts as to which it is contended that there exists a genuine issue to be tried." S.D.N.Y. Local Civ. R. 56.1(b).

A. History of the Plan

a. Colgate-Palmolive Company and the Committee

Defendant Colgate is a global consumer products company and is the sponsor of the Plan. At all relevant times, Defendant Plan was an "employee pension benefit plan" and a defined benefit plan within the meaning of ERISA; Defendant Committee was the "plan administrator," and, along with non-party the Pension Fund Committee, was a "named fiduciar[y]" of the Plan. Defendants Daniel Marsili (Senior Vice President of Global Human Resources) and Laura Flavin (Vice President for Global Employee Compensation and Benefits) were members of the Committee.

b. Conversion to Cash Balance Plan as of 1989

The Plan originally operated as a traditional defined benefit plan, which guaranteed that each member (or "Participant") receive an "accrued benefit" expressed as an annuity upon reaching "normal retirement age," here, age sixty-five. Prior to July 1, 1989, the Plan determined the level of benefits using a final average pay formula (the "Grandfathered Formula"), based on a Participant's final average earnings and years of credited service. Participants received their Plan benefits *only* in the form of an annuity.

The Plan was amended in 1994, effective as of July 1, 1989, and reflected the terms of the Plan in effect and applicable to all Class Members paid between July 1, 1989, and the effective date of the 2003 Plan, including Plaintiff. Effective July 1, 1989, the Plan was converted to a cash balance plan. As a cash balance plan, each Participant had a "cash balance" account called the Personal Retirement Account balance, which reflected a set percentage of yearly pay plus interest (the "PRA Formula"). Unlike the prior version of the Plan using the Grandfathered Formula, the cash balance plan allowed Participants to elect to receive their benefits either as a lump sum or an annuity beginning on the "benefit commencement date" (i.e., the first date of the first period when a Participant is paid).

Because the Plan is considered a defined benefit plan under applicable law, Internal Revenue Code ("IRC") § 417(e) and ERISA § 205(g) require any lump sum payment to be no less than the actuarial equivalent of the Participant's accrued benefit expressed as a single life annuity payable at normal retirement age. I.R.C. § 417(e); ERISA § 205(g), 29 U.S.C. § 1055(g); *accord Esden v. Bank of Bos.*, 229 F.3d 154, 164 (2d Cir. 2000). To determine actuarial equivalence, a plan administrator projects the cash balance forward to normal retirement age, converts that cash balance to an age sixty-five annuity and then converts that age sixty-five annuity to a lump sum and discounts back the lump sum to present value. A plan can select a different rate to project the cash balance forward into an age sixty-five single-life annuity, but the discount rate to determine the present value of the accrued benefit (annuity) is prescribed by IRC § 417(e). *See* I.R.C. § 417(e); *Esden*, 229 F.3d at 164.

For Class Members who, like McCutcheon, separated from service between 1989 and 2000, the Plan used a projection rate of the 20-year Treasury bill interest rate plus 1% ("20+1% rate"). This projection rate, used to convert the cash balance into an age sixty-five annuity (for Participants younger than sixty-five), was dictated by § 1.3 of the Plan, which defined "Actuarial Equivalent." The discount rate to determine the present value of the accrued benefit (annuity) as prescribed by IRC § 417(e) at the time of the adoption of the Plan in 1989 until February 28, 2002, was a blend of interest rates equal to the Pension Benefit Guaranty Corporation ("PBGC") rate. I.R.C. § 417(e)(3)(A)(ii)(II) (current version at I.R.C. § 417(e)(3)(C)); I.R.S. Notice 87-20, 1987-1 C.B. 456 (Feb. 9, 1987). The 20+1% rate used by Defendants between 1989 and 2000 was consistently and substantially higher than the PBGC rate.

c. Plan Appendices -- Preservation of Benefits Under Grandfathered Formula

When the cash balance plan and PRA Formula were adopted as of 1989, employees who were then still employed by Colgate were given the option to continue benefits under the Grandfathered Formula as set forth in Appendices A through D of the Plan. The Appendices offered protection to Participants, like McCutcheon, who worked at Colgate prior to 1989, remained employed after the conversion to the cash balance plan but had accrued benefits under the previous Grandfathered Formula. Under Appendix C, these Participants could elect to make contributions to maintain benefits accrued under the Grandfathered Formula. If a Participant elected to continue making these contributions, and did so until her separation from service, she would be entitled to her accrued benefit under the PRA Formula plus her contributions under the Grandfathered Formula, in the form of either a lump sum or an annuity.

d. The Residual Annuity Amendment and 2005 Implementation

In 2004, it came to Colgate's attention that the lump sum payments that the Plan had been paying to Participants -- who continued making contributions to maintain Grandfathered Formula benefits -- were less than the Participants would have otherwise received had they elected to receive an annuity. On March 30, 2005, the Committee adopted the RAA to address the potential unlawful forfeiture of benefits.

The RAA amended the Plan and granted a residual annuity (the "RAA Annuity") to any Participant who elected a lump sum payment upon separation, and whose age sixty-five single life annuity benefit otherwise payable to the Member under Appendices B, C or D, as applicable, (the "Grandfathered Benefit") was greater than the age sixty-five single life annuity actuarial equivalent of a Participant's lump sum payment (the "Age 65 AE of LS paid"). The amount of the RAA Annuity was the delta between the two amounts. After the Committee adopted the RAA in 2005, it was implemented only for prospective retirees, i.e., those Participants who retired after March 2005, even though the RAA was effective as of July 1, 1989.

Retroactive implementation of the RAA did not occur at that time for Participants who had retired between July 1989 and February 2005, such as McCutcheon.

e. *Colgate I* Settlement and Retroactive Implementation of the RAA

In 2007, a class action was commenced on behalf of several thousand Participants against Colgate, alleging that their pension benefits had been miscalculated. *See In re Colgate-Palmolive Co. ERISA Litig.* ("*Colgate I*"), 36 F. Supp. 3d 344 (S.D.N.Y. 2014). In May 2010, the parties in *Colgate I* reached an agreement in principle to settle that case. Up to that point, counsel for the plaintiffs in *Colgate I* had not been aware of the RAA. Once plaintiffs' counsel received a copy of the RAA in July 2011, all RAA-related claims were carved out of the settlement agreement. The Court approved the final settlement agreement on July 8, 2014.

After the *Colgate I* settlement, Defendants retroactively applied the RAA, granting millions of dollars of additional annuity benefits to a few hundred Participants who had taken a lump sum payment between 1989 and 2005 and who had continued to make contributions under the Grandfathered Formula. Defendants contend that all Participants entitled to an RAA Annuity received one at that time. Plaintiffs dispute this.

B. McCutcheon's Administrative Claim and Appeal

McCutcheon was employed by Colgate from 1979 to 1994, and participated in the Plan during that time. After the Plan converted in 1989, she continued to make contributions under the Grandfathered Formula until she resigned from the company at the age of thirty-seven in 1994. She elected to receive her pension benefit as a lump sum distribution of $22,425.64. She did not receive any benefit under the RAA when it was enacted in 2005. On July 30, 2014, she submitted a claim letter to the Committee, stating that she was entitled to an RAA Annuity, in addition to the lump sum payment she had received in 1994. She requested that Defendants begin paying her an RAA Annuity, and provide an explanation of how it was calculated.

Defendant Flavin responded on behalf of the Committee and denied McCutcheon's claim, by letter dated November 4, 2014. Because her Grandfathered Benefit (calculated as $699.58) was less than her Age 65 AE of LS paid (calculated as $752.84), the Committee concluded that McCutcheon was not entitled an RAA Annuity. On January 6, 2015, McCutcheon sent a letter to the Committee, requesting, among other things, certain documents, information and responses to questions described in the letter. On March 5, 2015, Defendant Flavin responded to McCutcheon on behalf of the Committee, attaching some, but not all, of the documents McCutcheon had requested.

McCutcheon formally appealed the Committee's benefit denial decision in a letter dated April 6, 2015, identifying four errors ("Errors") that the Committee allegedly committed in the course of calculating her RAA Annuity. The four Errors are the basis for the denial of benefits claim in Count II and are discussed in detail below. The April 6, 2015, letter also noted that Defendants had not adequately responded to the "39 specific requests for documents, records and/or information" made in McCutcheon's January 6, 2015, letter, and again requested that Defendants "respond to those contentions, answer those questions, and fully comply with those requests . . . so as to prevent further prejudice to [McCutcheon]."

On June 4, 2015, in a sixteen-page letter signed by Defendant Marsili, the Committee denied McCutcheon's appeal. In a March 14, 2016, letter from McCutcheon to the Committee, she again raised the Committee's failure to respond adequately to her prior request for documents. On April 25, 2016, the Committee provided four additional documents.

C. Relevant Procedural History

McCutcheon commenced this action on June 3, 2016, asserting five causes of action. The Magistrate Judge overseeing pre-trial proceedings bifurcated the case and ordered only Counts I and II to proceed. On July 27, 2017, the Court granted Plaintiffs' motion for class certification as to Count II and appointed McCutcheon as class representative of a class consisting of:

> any person who, under any of Appendices B, C or D of the Plan, is entitled to a greater benefit than his or her Accrued Benefit as defined in Plan § 1.2, provided such person received a lump sum payment from the Plan, and the beneficiaries and estates of any such person.

Caufield v. Colgate-Palmolive Co., No. 16 Civ. 4170, 2017 U.S. Dist. LEXIS 118022, 2017 WL 3206339, at *8 (S.D.N.Y. July 27, 2017). Given this class definition, each Class Member (1) was a Colgate employee in July 1989 who elected to continue making contributions under the Grandfathered Formula as set forth in Appendices A through D of the Plan until separating from the company, (2) received a lump sum payment from the Plan in the amount of his or her accrued benefit plus contributions under the Grandfathered Formula upon separation and (3) is entitled to a greater benefit than his or her Accrued Benefit as defined in Plan § 1.2, which defines Accrued Benefit in part as the "Actuarial Equivalent of the Member's Account." Plaintiffs estimate that the Class consists of approximately 1,200 individuals, 2017 U.S. Dist. LEXIS 118022, [WL] at *4, with claims totaling approximately $300,000,000. Defendants now seek summary judgment on Counts I and II.[3]

3. After the current motion was fully briefed, on October 24, 2019, Plaintiffs filed a letter motion seeking a pre-motion conference and permission for leave to file a surreply. The Court denied Plaintiffs' request to file a surreply, and stated that it would consider whether to accept the letter motion as a surreply when the motion was adjudicated. The surreply was considered in connection with this decision and nothing in the surreply affected the outcome.

II. LEGAL STANDARD

Summary judgment is appropriate if the record establishes that there is no "genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A genuine issue of material fact exists if 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Nick's Garage, Inc. v. Progressive Cas. Ins. Co.*, 875 F.3d 107, 113 (2d Cir. 2017) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)). The moving party "bears the burden of 'demonstrat[ing] the absence of a genuine issue of material fact.'" *Id.* at 114 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)) (alteration in original). The evidence is construed in the light most favorable to, and all reasonable inferences are drawn in favor of, the nonmoving party. *Id.* at 113. "Summary judgment should be denied where there are genuine issues of material fact 'that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.'" *Davis-Garett v. Urban Outfitters, Inc.*, 921 F.3d 30, 45 (2d Cir. 2019) (quoting *Anderson*, 477 U.S. at 250).

III. DISCUSSION

A. Alleged Failure to Produce Documents and Information -- Count I and Standard of Review on Count II

1. The Administrative Procedure Claim (Count I)

Count I alleges that Defendants[4] violated 29 U.S.C. § 1133(a)(2) by violating portions of the ERISA Procedures Regulation, 29 C.F.R. § 2560.503-1, by failing to produce all relevant documents and information during McCutcheon's claim and appeal. Count I seeks relief in the form of an order "to permit Plaintiffs to review all relevant documents, records and other information

4. Defendants argue that the Committee is the only proper defendant for Counts I and II because it was appointed as the plan administrator, granted discretionary authority to determine benefits, provided documents and made final, binding decisions on appeals. This argument is unpersuasive. ERISA authorizes claims under 29 U.S.C. § 1132(a)(1)(B) against the plan, administrators and fiduciaries. *See Paneccasio v. Unisource Worldwide, Inc.*, 532 F.3d 101, 108 n.2 (2d Cir. 2008) ("A claim for recovery of benefits under ERISA . . . can be brought only against a covered plan, its administrators or its trustees."); *accord Romero v. Teamsters Union Local 272*, No. 15 Civ. 7583, 2019 U.S. Dist. LEXIS 165549, 2019 WL 4688642, at *7 (S.D.N.Y. Sept. 25, 2019). Defendants Flavin and Marsili are each members of the Committee, which is itself a named fiduciary and defined according to the positions by which it is composed, and Colgate is the sponsor of the Plan. Accordingly, all Defendants are appropriately named in Counts I and Count II. *See* ERISA § 402(a)(2), 29 U.S.C. § 1102(a)(2); ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A).

forthwith." Summary judgment is granted to Defendants on Count I on the ground of mootness because the material at issue was produced during the course of the litigation. *See Martin-Trigona v. Shiff*, 702 F.2d 380, 386 (2d Cir. 1983) ("The hallmark of a moot case or controversy is that the relief sought can no longer be given or is no longer needed."); *accord Krull v. Oey*, 805 F. App'x 73, 74 (2d Cir. 2020) (summary order).

2. The Standard of Review on the Denial of Benefits Claim (Count II)

Plaintiffs relatedly argue that the de novo standard of review applies to the denial of benefits claim (Count II) because Defendants violated the ERISA Procedures Regulation, by failing to produce relevant documents and information, as well as by failing to explain the specific reasons and specific plan provisions upon which the denial of her claim was based. For the following reasons, the Court agrees that Defendants failed to produce documents and information, and finds that McCutcheon's claim in Count II is subject to a de novo standard of review but that the same claim on behalf of Class Members is subject to the more deferential "arbitrary and capricious" standard. This is more of a theoretical than an actual difference as Errors 1 and 2 are resolved based on the unambiguous language of the Plan, *see O'Neil v. Ret. Plan for Salaried Employees of RKO Gen., Inc.*, 37 F.3d 55, 59 (2d Cir. 1994); Error 3 centers on a question of law, as to which the de novo standard applies, *see Wilkins v. Mason Tenders Dist. Council Pension Fund*, 445 F.3d 572, 581 (2d Cir. 2006); and only Error 4 is subject to the arbitrary and capricious standard as regards the Class.

a. Applicable Law to Determine Standard of Review for Denial of Benefits Claim

Although "ERISA does not set out the appropriate standard of review for actions under § 1132(a)(1)(B) challenging benefit eligibility determinations," in *Firestone*, the Supreme Court held that "a denial of benefits challenged under § 1132(a)(1)(B) is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan," in which case an arbitrary and capricious standard applies. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 109, 115, 109 S. Ct. 948, 103 L. Ed. 2d 80 (1989); *accord Halo v. Yale Health Plan, Dir. of Benefits & Records Yale Univ.*, 819 F.3d 42, 51 (2d Cir. 2016). An administrator's decision will be overturned as "arbitrary and capricious" only when the decision is "without reason, unsupported by substantial evidence or erroneous as a matter of law." *Roganti v. Metro. Life Ins. Co.*, 786 F.3d 201, 211 (2d Cir. 2015); *accord Cohen v. Liberty Mut. Grp. Inc.*, 380 F. Supp. 3d 363, 384 (S.D.N.Y. 2019). However, even when a plan confers discretionary authority to the plan administrator, de novo review applies when a plan "fail[s] to comply with the claims-procedure regulation in the processing of a participant claim [unless the failure] was inadvertent *and* harmless." *Halo*, 819 F.3d at 58; *accord Cohen*, 380 F. Supp. 3d at 376-77. The plan "bears the burden of proof on this issue since the party claiming deferential review should prove the predicate that justifies it." *Halo*, 819 F.3d at 58; *accord Cohen*, 380 F. Supp. 3d at 379.

2. Application of Law Dictates Different Standards of Review for McCutcheon and the Class, Except as to Questions of Law

The express terms of Section 8.4(a) confer discretionary authority to the Committee to determine benefits eligibility and construe the terms of the Plan.

> [The Committee] shall have such duties and powers as may be necessary to discharge its duties hereunder, including, but not by way of limitation . . . [t]he exclusive right to construe and interpret (i) the terms or provisions of the Plan . . . or (ii) the applicability of any of the terms or provisions of the foregoing in a particular situation, or (iii) all questions of eligibility and determine the amount, manner and time of payment of any benefits hereunder; to exercise discretion where necessary or appropriate in the interpretation and administration of the Plan; and to decide any and all matters arising thereunder.

See, e.g., Tocker v. Philip Morris Cos., Inc., 470 F.3d 481, 487 (2d Cir. 2006) (concluding the same where plan language stated that the committee "shall have all powers reasonably necessary to administer the Plan and is authorized, in accordance with its provisions, to determine eligibility, to compute and determine benefits, and to determine individual rights and privileges under the Plan"). But de novo review nevertheless applies, at least with respect to McCutcheon, because Defendants did not comply with the ERISA Procedures Regulation.

Under 29 C.F.R. § 2560.503-1(h)(2)(iii), claimants must be "provided, upon request and free of charge, reasonable access to, and copies of, *all* documents, records, and other information relevant to the claimant's claim for benefits," subject to the definition of relevance in 29 C.F.R. § 2560.503-1(m)(8). 29 C.F.R. § 2560.503-1(h)(2)(iii) (emphasis added). 29 C.F.R. § 2560.503-1(m)(8) states that a document, record or other information shall be considered "relevant" to an administrative claim if it was either:

> (i) . . . relied upon in making the benefit determination; (ii) . . . submitted, considered, or generated in the course of making the benefit determination, without regard to whether such document, record, or other information was relied upon in making the benefit determination; (iii) [or] [d]emonstrates compliance with the administrative processes and safeguards required pursuant to paragraph (b)(5) of this section in making the benefit determination.

29 C.F.R. § 2560.503-1(m)(8).

29 C.F.R. § 2560.503-1(b)(5) states that a plan's claim procedures are reasonable only if they "contain administrative processes and safeguards designed to ensure and to verify that benefit claim determinations are made in accordance with governing plan documents and that, where appropriate, the plan provisions have been applied consistently with respect to similarly situated claimants." 29 C.F.R. § 2560.503-1(b)(5).

In addition to failing to respond fully to the thirty-nine specific requests contained in the January 6, 2015, letter during the course of McCutcheon's claim and appeal, Plaintiffs argue that Defendants withheld the following relevant documents -- generated, considered and/or relied upon by Defendants in denying her claim and appeal -- and that Plaintiffs were able to learn of and obtain these documents only in the course of discovery: (1) documents relating to the Committee's February 2014 action adopting the PBGC rate for purposes of converting a Participant's PRA lump sum payment into the Age 65 AE of the LS paid; (2) documents relating to Defendants' actual calculations of McCutcheon's RAA eligibility, contained within an Excel spreadsheet created as part of the 2014 retroactive implementation of the RAA, which Defendants referenced in the letter denying McCutcheon's appeal; (3) a 2014 RAA manual outlining relevant calculation methodology and procedures, which Defendants identified as a guide on how to identify Participants entitled to the RAA and how to calculate RAA Annuities, and which Defendants contend shows that the Plan calculated McCutcheon's eligibility for the RAA in the same way as other Participants; (4) spreadsheets and related benefit files of Participants similarly situated to McCutcheon; (5) an initial internal memorandum analyzing McCutcheon's April 2015 appeal; and (6) an internal draft response to the January 6, 2015, letter, discussing and directly addressing many of McCutcheon's document and information requests even though those responses were never shared with her during the claims process.[5]

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5. These documents were finally produced during the course of discovery, in response to RFP No. 6, which sought "all documents

These documents are "relevant" under the definition in 29 C.F.R. § 2560.503-1(m)(8), as documents (1) relied upon by Defendants in denying McCutcheon's claim, (2) submitted, considered or generated in the course of making her benefit determination or (3) demonstrating compliance with the administrative processes and safeguards stated in 29 C.F.R. § 2560.503-1(b)(5), such as showing that the relevant Plan provisions have been applied consistently with respect to similarly situated Participants. *See, e.g., Thoma v. Fox Long Term Disability Plan*, No. 17 Civ. 4389, 2018 U.S. Dist. LEXIS 209077, 2018 WL 6514757, at *26 (S.D.N.Y. Dec. 11, 2018) (identifying documents relating to defendant's internal policies as relevant under 29 C.F.R. § 2560.503-1(h)(2)(iii), as showing whether the claims procedure was applied consistently); *Mohamed v. Sanofi-Aventis Pharm.*, No. 06 Civ. 1504, 2009 U.S. Dist. LEXIS 119871, 2009 WL 4975260, at *12 (S.D.N.Y. Dec. 22, 2009) (identifying as relevant under 29 C.F.R. § 2560.503-1(h)(2)(iii) copies of policies plaintiff was alleged to have violated, performance evaluations, documents relating to the at-issue unauthorized purchase orders and emails between plaintiff and other employees).

Because the documents identified above are relevant and were provided to McCutcheon for the first time during this litigation, this is sufficient to show a violation of 29 C.F.R. § 2560.503-1(h)(2)(iii).[6] *See Thoma*, 2018 U.S. Dist.

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constituting the 'robust administrative record, which shows how thoroughly the Plan analyzed [McCutcheon's] claim.'"

6. Defendants argue that the documents identified by McCutcheon were already in her possession before the current case

LEXIS 209077, 2018 WL 6514757, at *26 (concluding the same where certain documents requested by plaintiff -- and relevant to a consideration of whether the claims procedure was applied consistently -- were not provided until discovery); *Mohamed*, 2009 U.S. Dist. LEXIS 119871, 2009 WL 4975260, at *12 (same).

Defendants dispute the relevance of the documents Plaintiffs identify, to the extent that Plaintiffs have not shown that the documents were provided to, relied upon or generated by the Committee, and argue that they complied with the ERISA Procedures Regulation by providing 1,200 pages of documents during the course of McCutcheon's claim and appeal. Defendants misread what 29 C.F.R. § 2560.503-1(h)(2)(iii) requires, as the definition of relevance is broad, and the regulation does not require Plaintiffs to show explicitly the documents were relied upon by the Committee.[7] *Compare Salisbury v. Prudential*

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was filed, citing a footnote in Plaintiffs' memorandum in response to Defendants' objections to an October 19, 2017, discovery order. However, the footnote compels the opposite conclusion, as Plaintiffs state that "Defendants' repeated suggestion . . . that they have already produced documents pursuant to . . . Plaintiffs' RFP Nos. 2-6 is incorrect and misleading," noting that "the vast majority of [documents produced by Defendants] . . . comprise *multiple* copies of claim and appeal correspondence and attachments . . . which Plaintiffs *explicitly excluded* from their requests." (emphasis added). Nowhere in the footnote do Plaintiffs -- as Defendants suggest -- admit they were provided the *specific* documents identified above.

7. Defendants cite *Glista v. Unum Life Ins. Co. of Am.*, 378 F.3d 113 (1st Cir. 2004) for the proposition the documents identified by Plaintiffs are not relevant because they were not "generated or adopted by the plan administrator" nor "were [the documents] known

Ins. Co. of Am., 238 F. Supp. 3d 444, 449 (S.D.N.Y. 2017) ("[I]f the plan administrator does not *strictly* comply with the Department of Labor's regulations" then de novo review applies. (emphasis added)), *with Russo v. Cont'l Cas. Co.*, No. 05 Civ. 5700, 2006 U.S. Dist. LEXIS 17963, 2006 WL 931683, at *5 (S.D.N.Y. Apr. 11, 2006), *aff'd*, 214 F. App'x 7 (2d Cir. 2007) (finding no violation of 29 C.F.R. § 2560.503-1(h)(2)(iii) where, upon request, plaintiff was sent "a *complete* copy of the administrative record." (emphasis added)).

Additionally, Defendants separately violated 29 C.F.R. § 2560.503-1(g)(1)(i) and (ii) by failing to set forth in McCutcheon's claim denial letter -- "in a manner calculated to be understood by the claimant" -- "[t]he specific reason or reasons for the adverse determination" and "[r]eference to the specific plan provisions on which the determination is based." 29 C.F.R. § 2560.503-1(g)(1)(i)-(ii). While the claim denial letter identifies some information related to the RAA and includes a basic explanation of

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or should have been known by those who made the decision to deny the claim." *Id.* at 123. Defendants both misread and misuse *Glista*, as the court there concluded the documents identified by plaintiff *were relevant* to the interpretation of other plan documents, and noted that "[t]he fact that [the plan appeals consultant] does not remember if she actually relied on [the documents identified by plaintiff as relevant] in evaluating [plaintiff's] claim does not undercut [the documents'] relevance." *Id.* at 124-25. Defendants also overlook this Court's motion to dismiss decision, stating that similar materials would be relevant under 29 C.F.R. § 2560.503-1(m)(8), "even if they ultimately were not relied upon." *See Caufield v. Colgate-Palmolive Co.*, No. 16 Civ. 4170, 2017 U.S. Dist. LEXIS 26287, 2017 WL 744600, *8 (S.D.N.Y. Feb. 24, 2017).

the relevant RAA calculations, the letter provides no reference to the specific Plan provisions -- apart from the RAA, Appendix C and Appendix F mortality rates -- upon which denial was based; fails to explain why the Grandfathered Benefit used to calculate the RAA was $699.58, when the same benefit was calculated as $1,125.38 when McCutcheon separated from service in 1994; and fails to identify which Plan provision defined the "PBGC interest rates," among other omissions. *See Montefiore Med. Ctr. v. Local 272 Welfare Fund*, No. 09 Civ. 3096, 2019 U.S. Dist. LEXIS 13385, 2019 WL 571455, at *3 (S.D.N.Y. Jan. 25, 2019), *report and recommendation adopted*, No. 09 Civ. 3096, 2019 U.S. Dist. LEXIS 22743, 2019 WL 569805 (S.D.N.Y. Feb. 12, 2019) (finding a violation of 29 C.F.R. § 2560.503-1(g)(1), in part, where none of the explanation of benefits forms referenced a specific plan provision); *Babino v. Gesualdi*, 278 F. Supp. 3d 562, 584 (E.D.N.Y. 2017), *aff'd*, 744 F. App'x 30 (2d Cir. 2018) (finding a violation of 29 C.F.R. § 2560.503-1(g)(1) where the claim denial failed to reference the specific plan provision upon which defendants relied in calculating plaintiff's pension benefits). Further, Plaintiffs have cited evidence, including Defendant Flavin's testimony, that McCutcheon's claim was denied based on the 2010 Plan document, rather than the operative 1994 Plan, and that Defendant Flavin signed the claim denial letter without "hav[ing] in mind . . . [the] obligation to provide all the reasons for the denial in the letter."

Defendants argue, in the alternative, that even if they did violate the ERISA Procedures Regulation, Plaintiffs have failed to identify any actual prejudice caused by a violation. "[In *Halo*] the Second Circuit was careful to circumscribe [this] exception to 'prevent the exception from swallowing the rule,' and it directed that deviations from the ERISA Procedures Regulation 'should not be tolerated lightly[,]' and that a noncompliant plan 'bears the burden of proof on [showing a failure to comply with the ERISA Procedures Regulation was inadvertent and harmless].'" *Cohen*, 380 F. Supp. 3d at 379 (quoting *Halo*, 819 F.3d at 57-58) (third alteration in original).

Here, the ERISA Procedures Regulation violations are not analogous to the exceptions envisioned in *Halo*, "such as responding one hour or one day late, where such delays do not harm the claimant in a[ny] material way." *Id.* (concluding the same where defendant's denial of benefits letter provided only vague reasons for the denial and did not identify the relevant provisions of the plan). And contrary to Defendants' assertion that *Plaintiffs* have failed to identify prejudice, it is Defendants' burden to show that a violation of the ERISA Procedures Regulation was inadvertent and harmless. *See Halo*, 819 F.3d at 58; *Aitken v. Aetna Life Ins. Co.*, No. 16 Civ. 4606, 2018 U.S. Dist. LEXIS 164008, 2018 WL 4608217, at *14 (S.D.N.Y. Sept. 25, 2018) (concluding that the *Halo* exception did not apply because defendant did not show that the violation was inadvertent). Here Defendants have failed to show both. Accordingly, McCutcheon's claim in Count II is subject to a de novo standard of review (except as qualified below).

Defendants' violation of the ERISA Procedures Regulation affects the standard of review only for

McCutcheon's denial of benefits claim, since Count I is solely an individual claim and is not asserted on behalf of the putative Class. Because the Plan confers discretionary authority to the Committee to determine benefits eligibility and construe the terms of the Plan, a claim asserted by any other Participant is afforded a deferential standard of review (again except as qualified below) because no other participant has established a violation of the ERISA Procedure Regulation.

B. Denial of Benefits Claim (Count II)

Plaintiffs' denial of benefits claim in Count II is based on four alleged Errors Defendants made when interpreting and calculating benefits under the RAA. For the following reasons, summary judgment is granted in part and denied in part to Defendants on Errors 1 through 4.

a. Error 1

As Error 1, Plaintiffs assert that Defendants miscalculated the RAA benefit, causing an impermissible forfeiture of benefits by Class Members. For the following reasons, summary judgment is denied to Defendants on Error 1 under both a de novo standard and arbitrary and capricious standard, because Defendants' interpretation is erroneous as a matter of law.

1. Legal Principles for Construing a Plan

When a plan is construed in ERISA cases involving claims under § 1132(a)(1)(B), courts interpret the plan according to "federal common law," which is "largely informed by state law principles." *Lifson v. INA Life Ins. Co. of New York*, 333 F.3d 349, 352-53 (2d Cir. 2003); *accord Stets v. Securian Life Ins. Co.*, No. 17 Civ. 09366, 2020 U.S. Dist. LEXIS 53985, 2020 WL 1467395, at *5 (S.D.N.Y. Mar. 25, 2020). Courts first look to determine if the Plan's terms are ambiguous. *See O'Neil*, 37 F.3d at 58-59; *accord Verdier v. Thalle Constr. Co., Inc.*, No. 14 Civ. 4436, 2017 U.S. Dist. LEXIS 2178, 2017 WL 78512, at *4 (S.D.N.Y. Jan. 5, 2017), *aff'd*, 771 F. App'x 20 (2d Cir. 2019). "Whether ERISA plan language 'is ambiguous is a question of law that is resolved by reference to the contract alone.'" *Strom v. Siegel Fenchel & Peddy P.C. Profit Sharing Plan*, 497 F.3d 234, 244 n.6 (2d Cir. 2007) (quoting *O'Neil*, 37 F.3d at 59); *accord Verdier*, 2017 U.S. Dist. LEXIS 2178, 2017 WL 78512, at *4. "Language is ambiguous when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement." *Strom*, 497 F.3d at 244 n.6 (internal quotation marks omitted); *accord Verdier*, 2017 U.S. Dist. LEXIS 2178, 2017 WL 78512, at *4.

If the terms of the Plan are unambiguous, they are enforced according to their terms. "Where . . . plan language categorically states that certain benefits will be provided, *de novo* review is appropriate because unambiguous language leaves no room for the exercise of discretion." *O'Neil*, 37 F.3d at 59; *accord Strom*, 497 F.3d at 244 n.6 ("[U]nambiguous language in an ERISA plan must be interpreted and enforced in accordance with its plain meaning."). The court is to "review the Plan as a whole, giving terms their plain meanings." *Fay v. Oxford Health Plan*, 287 F.3d 96, 104 (2d Cir. 2002); *accord Jarosz v. Am. Axle & Mfg., Inc.*, 372 F. Supp. 3d 163, 178 (W.D.N.Y. 2019); *see Brass v. Am. Film Techs., Inc.*, 987 F.2d 142, 148 (2d Cir. 1993) ("Where the [contract] language is plain and unambiguous, a court may construe the contract and grant summary judgment.").

If the terms of the Plan are ambiguous, the denial of benefits is considered under the arbitrary and capricious standard where the party making the interpretation has discretion to interpret the terms. *O'Neil*, 37 F.3d at 59; *accord Jarosz*, 372 F. Supp. 3d at 175. A denial of benefits is "arbitrary and capricious only if the decision is without reason, unsupported by substantial evidence or erroneous as a matter of law." *Fay*, 287 F.3d at 104 (internal quotation marks omitted); *accord Jarosz*, 372 F. Supp. 3d at 175. "'[W]here the trustees of a plan . . . interpret the plan in a manner inconsistent with its plain words, or by their interpretation render some provisions of the plan superfluous, their actions may well be found to be arbitrary and capricious.'" *DeCesare v. Aetna Life Ins. Co.*, 95 F. Supp. 3d 458, 481 (S.D.N.Y. 2015) (quoting *O'Shea v. First Manhattan Co. Thrift Plan & Tr.*, 55 F.3d 109, 112 (2d Cir. 1995)). But where both the interpretation proffered by the administrator and the interpretation proffered by the claimant are reasonable, the administrator's interpretation will not be disturbed. *Novella v. Westchester Cty.*, 661 F.3d 128, 140 (2d Cir. 2011); *accord Jarosz*, 372 F. Supp. 3d at 175.

"It is axiomatic that where the language of a contract [at issue in a § 1132(a)(1)(B) claim] is unambiguous, the parties' intent is determined within the four corners of the contract, without reference to external evidence." *Feifer v. Prudential Ins. Co. of Am.*, 306 F.3d 1202, 1210 (2d Cir. 2002); *accord Halpern v. Blue Cross/Blue Shield of W. New York*, No. 12 Civ. 407, 2014 U.S. Dist. LEXIS 124388, 2014 WL 4385759, at *10 (W.D.N.Y. Sept. 4, 2014); *Brooks v. Macy's, Inc.*, No. 10 Civ. 5304, 2011 U.S. Dist. LEXIS 48788, 2011 WL 1793345, at *2 (S.D.N.Y. May 6, 2011). By contrast, when a plan's terms are ambiguous, "an employer is entitled to summary judgment if it presents extrinsic evidence sufficient to remove the ambiguity and that evidence is not contradicted by opposing evidence." *Gilbert v. Related Mgmt. Co., L.P.*, No. 95 Civ. 9610, 1998 U.S. Dist. LEXIS 2382, 1998 WL 99801, at *4 (S.D.N.Y. Mar. 4, 1998), *aff'd sub nom.*, 162 F.3d 1147 (2d Cir. 1998) (collecting cases).

2. Construing the RAA

In broad terms, Error 1 involves how to determine who is entitled to an RAA Annuity benefit, and the amount of any such benefit. Defendants seek summary judgment, arguing that eligibility and the amount are determined by comparing the PRA lump sum payment Age 65 AE of LS paid (defined above as the "Age 65 actuarial equivalent of the lump sum paid") with the Grandfathered Benefit. Plaintiffs oppose, arguing that the determination is made by comparing the Age 65 AE of LS paid with the *greater of* the Grandfathered Benefit or the Actuarial Equivalent of the Member's Accrued Benefit plus Contributions. All agree that if the Age 65 AE of LS paid is smaller than the second amount, then the difference is the RAA Annuity benefit. Based on a plain reading of the RAA, Plaintiffs have the better argument.

The RAA states, regarding eligibility to receive the RAA Annuity, that

> [e]ffective as of July 1, 1989, a Member who, under any of Appendices B, C or D, is entitled to a greater benefit than [her] Accrued Benefit . . . and who chooses to receive [her] benefit under this Lump Sum Payment Option, which is the Actuarial Equivalent of [her] Accrued Benefit . . . shall receive in addition to such lump sum payment an additional benefit, commencing at the same time and payable in the standard form applicable to such Member . . . . A Member may not elect any other form of payment option with respect to this additional benefit.

(Dkt. No. 21-3 at 4/8). But the following provision of the RAA directs how to compute the RAA Annuity:

> Such additional benefit shall be computed by subtracting the age 65 single life annuity Actuarial Equivalent amount of the Member's lump sum payment [i.e., the Age 65 AE of LS paid] from *the age 65 single life annuity benefit otherwise payable to the Member under Appendices B, C or D, as applicable* . . . .

(Dkt. No. 21-3 at 4/8) (emphasis added).

Appendix D

The parties agree that Appendix C § 2(b) is the Appendix applicable to McCutcheon. It states:

> If [she] elects to receive an annuity settlement instead of a single lump sum payment, [she] shall be eligible for an annuity pursuant to Section 6.2 . . . , Section 6.3 . . . or Section 6.4(a)(ii) . . . of the Plan that provides for [her] to receive *the larger of*:
>
> (i) the benefit that [she] would have received had [she] continued under the Plan as in effect prior to July 1, 1989, pursuant to Appendix B . . . or
>
> (ii) the benefit payable pursuant to Section 6.2 . . . Section 6.3 . . . or Section 6.4(a)(ii) . . . of the Plan, which is the Actuarial Equivalent of the Member's Accrued Benefit . . . plus [her] Contributions to Maintain Prior Plan Benefits with interest . . . at [her] Benefit Commencement Date.

(Dkt. No. 21-10 at 18-19/71). Defendants argue that only § 2(b)(i) (which is the Grandfathered Benefit) should be compared to the Age 65 AE of LS paid. Plaintiffs argue that the *greater* of § 2(b)(i) (the Grandfathered Benefit) *or* § 2(b)(ii) above should be compared to the Age 65 AE of LS paid.

The Plan plainly states that Participants are entitled "to receive the larger of" the two amounts, paragraph (i) the Grandfathered Benefit, and paragraph (ii) another amount discussed below. The Plan unambiguously directs that both amounts must be considered, as Plaintiffs assert. Defendants' interpretation to the contrary is erroneous as a matter of law.

Defendants agree that the language governing determination of the RAA Annuity payments is clear and unambiguous, but argue that the RAA dictates a comparison between the PRA lump sum payment (expressed as an annuity) and the Grandfathered Formula annuity only. Defendants assert that "the age 65 single life annuity benefit *otherwise payable* to the Member under Appendices B, C or D, as applicable" refers only to the Grandfathered Benefit. The other benefit, in Appendix C § 2(b)(ii), they argue is not "otherwise payable" because it is the same as the PRA lump sum payment, which was already paid.

This argument is unpersuasive because the PRA lump sum is not the same as the Appendix C § 2(b)(ii) benefit. The PRA lump sum is more precisely "the age 65 single life annuity Actuarial Equivalent amount of the Member's lump sum payment" (i.e., the Age 65 AE of LS paid) from the RAA. That amount is different from "the benefit payable pursuant to Section 6.2 . . . Section 6.3 . . . or Section 6.4(a)(ii) . . . of the Plan, which is the Actuarial Equivalent of the Member's Accrued Benefit . . . plus [her] Contributions to Maintain Prior Plan Benefits with interest" from Appendix C § 2(b)(ii).

First, on the most basic level, the words are different, suggesting that the drafters of the Plan meant to indicate two different things. Second, the Age 65 AE of the LS paid is a computational construct created to facilitate the computation under the RAA. It is not a Plan benefit; there is no such benefit in the Plan. In contrast, Appendix C § 2(b)(ii) creates by its terms an actual Plan benefit, established when the Plan was converted from a defined benefit plan to a PRA cash balance plan.

Third, a critical difference that flows from this distinction, and the reason the amounts are not the same, is that they are based on different interest rate assumptions. The Age 65 AE of the LS paid is based on a PBGC interest rate, while the Appendix C § 2(b)(ii) benefit is based on the higher 20+1% rate. The Age 65 AE of the LS paid is based on a PBGC interest rate because, at the time of the adoption of the Plan in 1989, until February 28, 2002, the interest rates that IRC § 417(e) required plans to use in present valuing benefits were a blend of interest rates equal to the PBGC rate for immediate or deferred annuities. I.R.C. § 417(e)(3)(A)(ii)(II) (current version at I.R.C. § 417(e)(3)(C)); I.R.S. Notice 87-20, 1987-1 C.B. 456 (Feb. 9, 1987). Defendants admit in their reply memorandum that the Committee "uses the PBGC rates to convert the PRA Formula lump sum into an annuity for purposes of comparison with the Grandfathered Formula annuity."

In contrast, the Appendix C § 2(b)(ii) benefit, which is an actual benefit, is based on the higher 20+1% rate because that is the interest rate assumption that Defendants actually used (for Participants paid before January 1, 2000) to project to an age sixty-five account value and then convert it to an age sixty-five annuity. As reflected in the 2003 Plan document, the Plan required the use of 20+1% rate to convert a Participant's Account into a single life annuity in § 1.3, before the year 2000. Throughout the relevant period, this rate was always greater -- i.e., not the same as -- the PBGC rates.

Defendants' argument in response falls short. They assert that the Age 65 AE of LS paid and Appendix C § 2(b)(ii) benefit are one and the same. They do not explain how this can be, given that the two amounts are based on different interest rates, nor do they appear to challenge that they use the PBGC rate for the former, and the 20+1% rate for the latter. Defendants also cite evidence to show that the RAA's purpose and intent was to ensure that Participants were "made whole" by comparing their Age 65 AE of LS paid *just* to the Appendix C § 2(b)(i) Annuity Benefit (to preserve the Grandfathered Formula benefit). They similarly argue that the Committee's past practice is consistent with their interpretation. But the unambiguous language of the RAA and Appendix C forecloses consideration of extrinsic evidence such as intent and purpose or past practice. *See Aeronautical Indus. Dist. Lodge 91 of Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO v. United Techs. Corp., Pratt & Whitney*, 230 F.3d 569, 576 (2d Cir. 2000) ("Only when provisions are ambiguous may courts look to extrinsic factors . . . such as bargaining history, past practices, and other provisions . . . to interpret the language in question."); *DeVito v. Hempstead China Shop, Inc.*, 38 F.3d 651, 654 (2d Cir. 1994) (noting that "[t]o the extent that [an] *ambiguity exists*, a textual analysis of the Agreement may be supplemented by an exploration of extrinsic evidence concerning the parties' intent" (emphasis added)). Accordingly, Defendants are denied summary judgment on Error 1.

b. Error 2

In Error 2, Plaintiffs argue that Defendants used the wrong Plan provision to determine the Estimated Primary Insurance Amount ("PIA") when calculating benefits under the Grandfathered Formula. Summary judgment is granted to Defendants with respect to Error 2.

The Appendix C § 2(b)(i) Annuity Benefit (i.e., the Grandfathered Benefit) references Appendix B. Appendix B § 2(a) states that Participants shall be entitled to receive a monthly retirement income "commencing on [her] Normal Retirement Date" equal to: "1.8% of [her] Average Recognized Monthly Earnings multiplied by [her] years of Benefit Accrual Service (with adjustment for completed months)" minus

> 1.25% of [her] monthly Estimated [PIA] under the Federal Social Security Act in effect at the time of the Member's retirement multiplied by [her] years of Benefit Accrual Service (with adjustment for completed months) after the attainment of age 25, but not in excess of 40 such years.

"Estimated Primary Insurance Amount" is defined in Appendix A § 7 as "the amount that is estimated to be paid to a [Participant] under the Federal Insurance Contribution Act . . . in effect upon the date of termination of employment." Section 7 requires calculation of this amount "using an administrative procedure established by [Colgate]" using either of two alternate sets of "principles" depending on where the Participant is working when she retires. Section 7(a) governs Participants "who elect[] to retire directly from the employment of [Colgate]." Section 7(b) governs Participants "who [are] not in the active employment of [Colgate] . . . immediately prior to [her] Benefit Commencement Date."

As expressed in Appendix B § 2(a), the PIA creates an offset in the target level of retirement income that reflects the estimated income a person will receive from Social Security. Section 7(a), for Participants who retire directly from Colgate, carries the assumption that no compensation is earned after termination until retirement age for Social Security (age sixty-two). Section 7(b), for Participants who are not employed by Colgate immediately prior to the Benefit Commencement Date, carries the assumption that all future earnings remain level until the year prior to age sixty-two. Based on these assumptions, the PIA offset calculated under § 7(a) is generally lower than under § 7(b), resulting in a higher Appendix C § 2(b)(i) Annuity Benefit, therefore affecting RAA eligibility and level of any benefits. Plaintiffs allege that Defendants should have applied § 7(a) to Participants like McCutcheon. Defendants assert that they properly applied § 7(b) to such Participants. Defendants are correct.

Based on a plain reading of § 7, Defendants are correct that the PIA for Participants like McCutcheon is governed by § 7(b) rather than § 7(a). The language is not ambiguous because "it is capable of [only] . . . one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement." *Strom*, 497 F.3d at 244 n.6.

Here, the Plan makes clear that the PIA is an estimate of the amount a Participant will receive from Social Security, to be used as an offset to the target level of retirement income a Participant will receive. To calculate the PIA requires an assumption about the terminating employee's earnings after separating from Colgate. The Plan offers only two choices: an assumption of no future earnings for Participants who retire directly from Colgate, or an assumption of future earnings that will continue until the year prior to age sixty-two for others.

Participants like McCutcheon do not fit neatly in the definition of either group. When McCutcheon terminated employment at age thirty-seven, she did not "retire" -- in the usual sense of the word -- directly from the employment at Colgate (so not within the terms of § 7(a)), but she *was* in active employment at Colgate immediately prior to her Benefit Commencement Date (and therefore not within the express terms of § 7(b)), since the Plan provided for an immediate lump sum payment upon termination. Nevertheless, § 7 offers only two choices, so that McCutcheon and others like her who left the company's employ before age sixty-two must fall under either § 7(a) or § 7(b). In the context of the entire integrated agreement, the only reasonable interpretation of § 7 is that she is in the second group, which carries the assumption that she continued to work after leaving Colgate until she reached age sixty-two. The other assumption, that she had no further earnings after her Colgate employment, is not a reasonable assumption or interpretation given the two choices in § 7, when viewed by a reasonably intelligent person in the context of the entire Plan. This interpretation -- which is aimed at applying a reasonable estimate of future social security earnings -- is reinforced by the provision in § 7 following the disputed language that permits a Participant to submit her actual Social Security earnings history, which will instead be the basis for calculating the Participant's benefits.

To support the argument that § 7(b) does not apply, Plaintiffs dispute Defendants' argument about the Committee's prior practice under the Grandfathered Plan before the cash balance conversion in 1989 and before the Appendices at issue existed. This argument relies on evidence extrinsic to the Plan and Appendices, and therefore is not properly considered in light of the finding that Appendix § 7 is unambiguous in its inclusion of McCutcheon in § 7(b). Similarly, the parties' dispute about which version of an administrative manual might shed light on the issue relies on extrinsic evidence that is not properly considered. Accordingly, summary judgment is granted to Defendants with respect to Error 2.

c. Error 3

In Error 3, Plaintiffs argue that Defendants improperly used a pre-retirement mortality discount ("PRMD") to determine a Class Member's RAA Annuity in the calculation of the age sixty-five actuarial equivalence for the period prior to age sixty-five (normal retirement age). Plaintiffs do not dispute that the PRMD is called for by the Plan. Instead they argue that Defendants' use of PRMD violates the law -- ERISA § 203(a)(2) and IRC § 417(e)'s actuarial equivalence rules. As a question of law, the Court reviews Error 3 de novo. *See Wilkins*, 445 F.3d at 581 ("The interpretation of ERISA, a federal statute, is a question of law subject to *de novo* review."); *accord Munnelly v. Fordham Univ. Faculty*, 316 F. Supp. 3d 714, 727 (S.D.N.Y. 2018). For the following reasons, summary judgment is denied to Defendants on Error 3.

A mortality discount factors into the present value of a benefit -- here an age sixty-five single life annuity -- the possibility that the participant might die before the projected end date of the benefit, here age sixty-five. For example, a plan could determine the present value of a benefit by projecting the cash balance account forward to age sixty-five and then discounting the account back to the participant's current age, and then applying a further mortality discount. The amount of the discount is taken from the plan's applicable mortality table.[8]

Plaintiffs argue that a mortality discount should not be used to determine the present value of a normal retirement annuity when, as prescribed by the Plan, the ultimate benefit paid does not significantly decrease if the participant dies before normal retirement age (i.e.,

8. This example is merely illustrative and focuses on an individual who, like McCutcheon, received benefits prior to 2006 and the enactment of the Pension Protection Act.

the benefit payable to the beneficiary upon death is not significantly less than what would have been paid to the participant upon survival), as is the case here. Plaintiffs cite multiple out-of-Circuit cases, which have found an IRC § 417(e) violation in similar circumstances. *See West v. AK Steel Corp.*, 484 F.3d 395, 411 (6th Cir. 2007) (agreeing with the district court that applying a mortality discount to reduce the present value of a pre-retirement lump-sum distribution where the death benefit is equal to the participant's pension benefit would create an impermissible forfeiture under ERISA); *Berger v. Xerox Corp. Ret. Income Guarantee Plan*, 338 F.3d 755, 764 (7th Cir. 2003) (affirming and observing that the use of a pre-retirement mortality discount was "unfathomable" because the participant's death would not reduce his benefits); *Ruppert v. Alliant Energy Cash Balance Pension Plan*, No. 08 Civ. 127, 2010 U.S. Dist. LEXIS 137743, 2010 WL 5464196, at *2, 16-18 (W.D. Wis. Dec. 29, 2010); *Crosby v. Bowater Inc. Ret. Plan For Salaried Emps. of Great N. Paper, Inc.*, 212 F.R.D. 350, 360-62 (W.D. Mich. 2002), *vacated on other grounds*, 382 F.3d 587 (6th Cir. 2004). The rationale is that "applying a pre-retirement mortality discount to a retirement benefit that does not decrease if the participant dies would result in a lump sum that was less than the actuarial equivalent of the annuity it [was] supposed to replace" and therefore would "result in a forfeiture prohibited by ERISA." *West v. AK Steel Corp. Ret. Accumulation Pension Plan*, No. 02 Civ. 0001, 2005 U.S. Dist. LEXIS 37863, 2005 WL 3465637, at *5 (S.D. Ohio Dec. 19, 2005) (internal quotation marks omitted), *aff'd sub nom.*, *West*, 484 F.3d 395.

This reasoning is persuasive. As applied to this case, no PRMD should be used to determine a Class Member's RAA Annuity in the calculation of the age sixty-five actuarial equivalence for the period prior to age sixty-five because the death benefit is defined as "the Actuarial Equivalent of the Accrued Benefit" in § 5.1(a) of the Plan. Under 26 C.F.R. § 1.417(e)-1, "[t]he present value of any optional form of benefit cannot be less than the present value of the normal retirement benefit determined in accordance with the preceding sentence." 26 C.F.R. § 1.417(e)-1. Here, a PRMD is used to determine the present value of the Age 65 AE of the LS paid -- a benefit that must be paid in all events and does not decrease if the Participant dies prior to reaching age sixty-five. This results in a present value that is less than the corresponding normal retirement benefit and therefore violates 26 C.F.R. § 1.417(e)-1. *See West*, 484 F.3d at 411; *Berger*, 338 F.3d at 764. Therefore, a PRMD should not be applied.

Defendants argue that a proposed 2016 IRS regulation explicitly rejects Plaintiffs' argument regarding the unlawful use of a PRMD in this context, with citation to the same cases upon which Plaintiffs rely. *See* Update to Minimum Present Value Requirements for Defined Benefit Plan Distributions, 81 Fed. Reg. 85,190 (proposed Nov. 25, 2016) (to be codified at 26 C.F.R. pt. 1). Defendants also argue that the IRS approved the Plan's use of PRMD in 2003, when it qualified the Plan, that this interpretation should be entitled to deference, and that the Second Circuit has separately held that IRS interpretations are entitled to deference.

While Plaintiffs are correct that proposed regulations may provide guidance, they are not binding.[9] *See LeCroy Research Sys. Corp. v. Comm'r*, 751 F.2d 123, 127 (2d Cir. 1984) ("Proposed regulations are suggestions made for comment; they modify nothing."); *accord Sweet v. Sheahan*, 235 F.3d 80, 87 (2d Cir. 2000) ("Implicit in our argument is the established point of law that proposed regulations . . . have no legal effect."). The Second Circuit case on which Defendants rely for the proposition that IRS interpretations are entitled to deference involves an IRS regulation that was adopted, rather than merely proposed. *See Hurwitz v. Sher*, 982 F.2d 778, 782 (2d Cir. 1992) (addressing 26 C.F.R. § 1.401(a)-20, effective March 24, 2006).

Further, the proposed regulations cited by Defendants appear to support Plaintiffs' position. They would update existing regulations for minimum present value requirements for defined benefit plan distributions, including the treatment of preretirement mortality discounts in determining the minimum present value of accrued benefits. *See* Update to Minimum Present Value Requirements for Defined Benefit Plan Distributions, 81 Fed. Reg. at 85,192. As relevant here, according to the proposed regulations, the probability of death (under the

9. The proposed regulations were published on November 25, 2016, and have not become final since. *See* Update to Minimum Present Value Requirements for Defined Benefit Plan Distributions, 81 Fed. Reg. 85,190 (proposed Nov. 25, 2016) (to be codified at 26 C.F.R. pt. 1). Written and electronic comments were submitted by February 23, 2017, and discussed at a public hearing on March 7, 2017. *Id.*

applicable mortality table) during an assumed deferral period, if any, would not be taken into account for purposes of determining the present value under IRC § 417(e)(3) of an accrued benefit derived from contributions made by an employee. *Id.* This is because, according to the proposed regulations, an employee's rights in the accrued benefits from the employee's own contributions are non-forfeitable under IRC § 411(a)(3)(A), and the exception for death under IRC § 411(a)(3)(A) to the non-forfeitability of accrued benefits does not apply to the accrued benefit derived from employee contributions. *Id.* In other words, the proposed regulation appears to forbid the application of a PRMD to determine the present value of an accrued benefit derived from contributions made by the employee, as is the case here.

For these reasons, summary judgment is denied to Defendants on Error 3.

d. Error 4

In Error 4, the Complaint alleges that, while the *Colgate I* settlement agreement required future RAA Annuities to be offset by *Colgate I* settlement proceeds, the Plan itself was not amended prior to applying the offsets to the payments; and if the Plan were retroactively amended now, that would result in an impermissible cutback in benefits under ERISA § 204(g) and IRC § 411(d)(6). *See* ERISA § 204(g), 29 U.S.C. § 1054(g); I.R.C. § 411(d)(6). For the following reasons, summary judgment is granted to Defendants on Error 4 as to the Class, and denied to Defendants as to McCutcheon alone.

"ERISA was enacted 'to ensure that employees will not be left empty-handed once employers have guaranteed them certain benefits.'" *Morrone v. Pension Fund of Local No. One, I.A.T.S.E.*, 867 F.3d 326, 332 (2d Cir. 2017) (quoting *Lockheed Corp. v. Spink*, 517 U.S. 882, 887, 116 S. Ct. 1783, 135 L. Ed. 2d 153 (1996)). Part of this purpose is ensuring that once "'a worker has been promised a defined pension benefit upon retirement . . . and if [she] has fulfilled whatever conditions are required to obtain a vested benefit . . . [she] actually will receive it.'" *Id.* (quoting *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 375, 100 S. Ct. 1723, 64 L. Ed. 2d 354 (1980)). "The . . . 'anti-cutback rule' is 'crucial' to this purpose." *Id.* (quoting *Cent. Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 744, 124 S. Ct. 2230, 159 L. Ed. 2d 46 (2004)). The anti-cutback rule is found in ERISA § 204(g)(1), which directs that "[t]he accrued benefit of a participant under a plan may not be decreased by an amendment of the plan." ERISA § 204(g)(1), 29 U.S.C. § 1054(g)(1); *accord Morrone*, 867 F.3d at 332.

There is no dispute that under the terms of the *Colgate I* settlement agreement, the parties agreed that the Plan would apply the settlement funds as an offset against any RAA Annuities later determined to be payable. The Court approved the settlement and ordered the Plan, among others, "to undertake the necessary steps to effectuate forthwith the Settlement according to its terms." The Committee complied with the order on December 5, 2014, and "acting in its settlor capacity," resolved that "the administration and payment of benefits" under the Plan be "in accordance with the terms of the Settlement Agreement."

Plaintiffs in substance argue that the offset for settlement funds was contrary to the terms of the Plan because Defendants failed to amend the Plan prior to applying the offset to the RAA Annuities. This argument is unpersuasive. The Committee's decision to comply with the Court's order despite the absence of amendment is subject to the arbitrary and capricious standard with respect to the Class. Plaintiffs have not shown that this decision was "without reason, unsupported by substantial evidence or erroneous as a matter of law." *Roganti*, 786 F.3d at 211. To the contrary, if the Committee had failed to abide by the terms of the settlement agreement, and had failed to apply the setoff, that likely would have been a breach of fiduciary duty. *See In re DeRogatis*, 904 F.3d 174, 190 (2d Cir. 2018). And to reverse the setoff now, only with respect to the subset of *Colgate I* class members who are Class Members in this action, would be unfair and discriminatory to the remaining *Colgate I* class members.

Accordingly, summary judgment is granted to Defendants on Error 4 as to the Class. Summary judgment is denied to Defendants on Error 4 as to McCutcheon alone, because the legal arguments are not sufficiently developed to determine which party has the better argument applying the de novo standard of review applicable to McCutcheon's claim.

IV. CONCLUSION

For the foregoing reasons, Defendants' motion for summary judgement is GRANTED in part, and DENIED in part as follows:

- Count I — granted
- Count II:
  - o Error 1 - denied
  - o Error 2 - granted
  - o Error 3 - denied
  - o Error 4 - granted as to the Class, denied as to McCutcheon

Defendants' request for oral argument is DENIED as moot, as is Plaintiffs' request for a pre-motion conference on the application to file a surreply.

The Clerk of Court is respectfully directed to close the motion at Docket No. 235.

Dated: July 10, 2020
New York, New York

/s/ Lorna G. Schofield
LORNA G. SCHOFIELD
UNITED STATES DISTRICT JUDGE

APPENDIX E — RELEVANT STATUTORY PROVISIONS

26 U.S.C.A. § 401, I.R.C. § 401

§ 401. Qualified pension, profit-sharing, and stock bonus plans

(a) Requirements for qualification.--A trust created or organized in the United States and forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall constitute a qualified trust under this section--

(1) if contributions are made to the trust by such employer, or employees, or both, or by another employer who is entitled to deduct his contributions under section 404(a)(3)(B) (relating to deduction for contributions to profit-sharing and stock bonus plans), or by a charitable remainder trust pursuant to a qualified gratuitous transfer (as defined in section 664(g)(1)), for the purpose of distributing to such employees or their beneficiaries the corpus and income of the fund accumulated by the trust in accordance with such plan;

(2) if under the trust instrument it is impossible, at any time prior to the satisfaction of all liabilities with respect to employees and their beneficiaries under the trust, for any part of the corpus or income to be (within the taxable year or thereafter) used for, or diverted to, purposes other than for the exclusive benefit of his employees or their beneficiaries (but this paragraph shall not be construed, in the case of a multiemployer plan, to prohibit the return of a contribution within 6 months after the plan administrator determines that the contribution was made by a mistake of fact or law (other than a mistake relating to whether the plan is described in section 401(a) or the trust which is part of such plan is exempt from taxation under section 501(a), or the return of any withdrawal liability payment determined to be an overpayment within 6 months of such determination));

(3) if the plan of which such trust is a part satisfies the requirements of section 410 (relating to minimum participation standards); and

(4) if the contributions or benefits provided under the plan do not discriminate in favor of highly compensated employees (within the meaning of section 414(q)). For purposes of this paragraph, there shall be excluded from consideration employees described in section 410(b)(3)(A) and (C).

(5) Special rules relating to nondiscrimination requirements.--

(A) Salaried or clerical employees.--A classification shall not be considered discriminatory within the meaning of paragraph (4) or section 410(b)(2)(A)(i) merely because it is limited to salaried or clerical employees.

(B) Contributions and benefits may bear uniform relationship to compensation.--A plan shall not be considered discriminatory within the meaning of paragraph (4) merely because the contributions or benefits of, or on behalf of, the employees under the plan bear a uniform relationship to the compensation (within the meaning of section 414(s)) of such employees.

(C) Certain disparity permitted.--A plan shall not be considered discriminatory within the meaning of paragraph (4) merely because the contributions or benefits of, or on behalf of, the employees under the plan favor highly compensated employees (as defined in section 414(q)) in the manner permitted under subsection (l).

(D) Integrated defined benefit plan.--

(i) In general.--A defined benefit plan shall not be considered discriminatory within the meaning of paragraph (4) merely because the plan provides that the employer-derived accrued retirement benefit for any participant under the plan may not exceed the excess (if any) of--

(I) the participant's final pay with the employer, over

(II) the employer-derived retirement benefit created under Federal law attributable to service by the participant with the employer.

For purposes of this clause, the employer-derived retirement benefit created under Federal law shall be treated as accruing ratably over 35 years.

(ii) Final pay.--For purposes of this subparagraph, the participant's final pay is the compensation (as defined in section 414(q)(4)) paid to the participant by the employer for any year--

(I) which ends during the 5-year period ending with the year in which the participant separated from service for the employer, and

(II) for which the participant's total compensation from the employer was highest.

(E) 2 or more plans treated as single plan.--For purposes of determining whether 2 or more plans of an employer satisfy the requirements of paragraph (4) when considered as a single plan--

(i) Contributions.--If the amount of contributions on behalf of the employees allowed as a deduction under section 404 for the taxable year with respect to such plans, taken together, bears a uniform relationship to the compensation (within the meaning of section 414(s)) of such employees, the plans shall not be considered discriminatory merely because the rights of employees to, or derived from, the employer contributions under the separate plans do not become nonforfeitable at the same rate.

(ii) Benefits.--If the employees' rights to benefits under the separate plans do not become nonforfeitable at the same rate, but the levels of benefits provided by the separate plans satisfy the requirements of regulations prescribed by the Secretary to take account of the differences in such rates, the plans shall not be considered discriminatory merely because of the difference in such rates.

(F) Social security retirement age.--For purposes of testing for discrimination under paragraph (4)--

(i) the social security retirement age (as defined in section 415(b)(8)) shall be treated as a uniform retirement age, and

(ii) subsidized early retirement benefits and joint and survivor annuities shall not be treated as being unavailable to employees on the same terms merely because such benefits or annuities are based in whole or in part on an employee's social security retirement age (as so defined).

(G) Governmental plans.--Paragraphs (3) and (4) shall not apply to a governmental plan (within the meaning of section 414(d)).

(6) A plan shall be considered as meeting the requirements of paragraph (3) during the whole of any taxable year of the plan if on one day in each quarter it satisfied such requirements.

(7) A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part satisfies the requirements of section 411 (relating to minimum vesting standards).

(8) A trust forming part of a defined benefit plan shall not constitute a qualified trust under this section unless the plan provides that forfeitures must not be applied to increase the benefits any employee would otherwise receive under the plan.

(9) Required distributions.--

(A) In general.--A trust shall not constitute a qualified trust under this subsection unless the plan provides that the entire interest of each employee--

(i) will be distributed to such employee not later than the required beginning date, or

(ii) will be distributed, beginning not later than the required beginning date, in accordance with regulations, over the life of such employee or over the lives of such employee and a designated beneficiary (or over a period not extending beyond the life expectancy of such employee or the life expectancy of such employee and a designated beneficiary).

(B) Required distribution where employee dies before entire interest is distributed.--

(i) Where distributions have begun under subparagraph (A)(ii).--A trust shall not constitute a qualified trust under this section unless the plan provides that if--

(I) the distribution of the employee's interest has begun in accordance with subparagraph (A)(ii), and

(II) the employee dies before his entire interest has been distributed to him,

the remaining portion of such interest will be distributed at least as rapidly as under the method of distributions being used under subparagraph (A)(ii) as of the date of his death.

(ii) 5-year rule for other cases.--A trust shall not constitute a qualified trust under this section unless the plan provides that, if an employee dies before the distribution of the employee's interest has begun in accordance with subparagraph (A)(ii), the entire interest of the employee will be distributed within 5 years after the death of such employee.

(iii) Exception to 5-year rule for certain amounts payable over life of beneficiary.--If--

(I) any portion of the employee's interest is payable to (or for the benefit of) a designated beneficiary,

(II) such portion will be distributed (in accordance with regulations) over the life of such designated beneficiary (or over a period not extending beyond the life expectancy of such beneficiary), and

(III) such distributions begin not later than 1 year after the date of the employee's death or such later date as the Secretary may by regulations prescribe,

for purposes of clause (ii), the portion referred to in subclause (I) shall be treated as distributed on the date on which such distributions begin.

(iv) Special rule for surviving spouse of employee.--If the designated beneficiary referred to in clause (iii)(I) is the surviving spouse of the employee and the surviving spouse elects the treatment in this clause--

(I) the regulations referred to in clause (iii)(II) shall treat the surviving spouse as if the surviving spouse were the employee,

(II) the date on which the distributions are required to begin under clause (iii)(III) shall not be earlier than the date on which the employee would have attained the applicable age, and

(III) if the surviving spouse dies before the distributions to such spouse begin, this subparagraph shall be applied as if the surviving spouse is the employee.

An election described in this clause shall be made at such time and in such manner as prescribed by the Secretary, shall include a timely notice to the plan administrator, and once made may not be revoked except with the consent of the Secretary.

(C) Required beginning date.--For purposes of this paragraph--

(i) In general.--The term “required beginning date” means April 1 of the calendar year following the later of--

(I) the calendar year in which the employee attains the applicable age, or

(II) the calendar year in which the employee retires.

(ii) Exception.--Subclause (II) of clause (i) shall not apply--

(I) except as provided in section 409(d), in the case of an employee who is a 5-percent owner (as defined in section 416) with respect to the plan year ending in the calendar year in which the employee attains the applicable age, or

(II) for purposes of section 408(a)(6) or (b)(3).

(iii) Actuarial adjustment.--In the case of an employee to whom clause (i)(II) applies who retires in a calendar year after the calendar year in which the employee attains age 70 ½, the employee's accrued benefit shall be actuarially increased to take into account the period after age 70 ½ in which the employee was not receiving any benefits under the plan.

(iv) Exception for governmental and church plans.--Clauses (ii) and (iii) shall not apply in the case of a governmental plan or church plan. For purposes of this clause, the term "church plan" means a plan maintained by a church for church employees, and the term "church" means any church (as defined in section 3121(w)(3)(A)) or qualified church- controlled organization (as defined in section 3121(w)(3)(B)).

(v) Applicable age.--

(I) In the case of an individual who attains age 72 after December 31, 2022, and age 73 before January 1, 2033, the applicable age is 73.

(II) In the case of an individual who attains age 74 after December 31, 2032, the applicable age is 75.

(D) Life expectancy.--For purposes of this paragraph, the life expectancy of an employee and the employee's spouse (other than in the case of a life annuity) may be redetermined but not more frequently than annually.

(E) Definitions and rules relating to designated beneficiaries.--For purposes of this paragraph--

(i) Designated beneficiary.--The term "designated beneficiary" means any individual designated as a beneficiary by the employee.

(ii) Eligible designated beneficiary.--The term "eligible designated beneficiary" means, with respect to any employee, any designated beneficiary who is--

(I) the surviving spouse of the employee,

(II) subject to clause (iii), a child of the employee who has not reached majority (within the meaning of subparagraph (F)),

(III) disabled (within the meaning of section 72(m)(7)),

(IV) a chronically ill individual (within the meaning of section 7702B(c)(2), except that the requirements of subparagraph (A)(i) thereof shall only be treated as met if there is a certification that, as of such date, the period of inability described in such subparagraph with respect to the individual is an indefinite one which is reasonably expected to be lengthy in nature), or

(V) an individual not described in any of the preceding subclauses who is not more than 10 years younger than the employee.

The determination of whether a designated beneficiary is an eligible designated beneficiary shall be made as of the date of death of the employee.

(iii) Special rule for children.--Subject to subparagraph (F), an individual described in clause (ii)(II) shall cease to be an eligible designated beneficiary as of the date the individual reaches majority and any remainder of the portion of the individual's interest to which subparagraph (H)(ii) applies shall be distributed within 10 years after such date.

(F) Treatment of payments to children.--Under regulations prescribed by the Secretary, for purposes of this paragraph, any amount paid to a child shall be treated as if it had been paid to the surviving spouse if such amount will become payable to the surviving spouse upon such child reaching majority (or other designated event permitted under regulations).

(G) Treatment of incidental death benefit distributions.--For purposes of this title, any distribution required under the incidental death benefit requirements of this subsection shall be treated as a distribution required under this paragraph.

(H) Special rules for certain defined contribution plans.--In the case of a defined contribution plan, if an employee dies before the distribution of the employee's entire interest--

(i) In general.--Except in the case of a beneficiary who is not a designated beneficiary, subparagraph (B)(ii)--

(I) shall be applied by substituting "10 years" for "5 years", and

(II) shall apply whether or not distributions of the employee's interests have begun in accordance with subparagraph (A).

(ii) Exception for eligible designated beneficiaries.--Subparagraph (B)(iii) shall apply only in the case of an eligible designated beneficiary.

(iii) Rules upon death of eligible designated beneficiary.--If an eligible designated beneficiary dies before the portion of the employee's interest to which this subparagraph applies is entirely distributed, the exception under clause (ii) shall not apply to any beneficiary of such eligible designated beneficiary and the remainder of such portion shall be distributed within 10 years after the death of such eligible designated beneficiary.

(iv) Special rule in case of certain trusts for disabled or chronically ill beneficiaries.--In the case of an applicable multi-beneficiary trust, if under the terms of the trust--

(I) it is to be divided immediately upon the death of the employee into separate trusts for each beneficiary, or

(II) no beneficiary (other than a[1] eligible designated beneficiary described in subclause (III) or (IV) of subparagraph (E)(ii)) has any right to the employee's interest in the plan until the death of all such eligible designated beneficiaries with respect to the trust,

for purposes of a trust described in subclause (I), clause (ii) shall be applied separately with

1. So in original. Probably should be "an".

respect to the portion of the employee's interest that is payable to any eligible designated beneficiary described in subclause (III) or (IV) of subparagraph (E)(ii); and, for purposes of a trust described in subclause (II), subparagraph (B)(iii) shall apply to the distribution of the employee's interest and any beneficiary who is not such an eligible designated beneficiary shall be treated as a beneficiary of the eligible designated beneficiary upon the death of such eligible designated beneficiary.

(v) Applicable multi-beneficiary trust.--For purposes of this subparagraph, the term "applicable multi-beneficiary trust" means a trust--

(I) which has more than one beneficiary,

(II) all of the beneficiaries of which are treated as designated beneficiaries for purposes of determining the distribution period pursuant to this paragraph, and

(III) at least one of the beneficiaries of which is an eligible designated beneficiary described in subclause (III) or (IV) of subparagraph (E)(ii).

For purposes of the preceding sentence, in the case of a trust the terms of which are described in clause (iv)(II), any beneficiary which is an organization described in section 408(d)(8)(B)(i) shall be treated as a designated beneficiary described in subclause (II).

(vi) Application to certain eligible retirement plans.--For purposes of applying the provisions of this subparagraph in determining amounts required to be distributed pursuant to this paragraph, all eligible retirement plans (as defined in section 402(c)(8)(B), other than a defined benefit plan described in clause (iv) or (v) thereof or a qualified trust which is a part of a defined benefit plan) shall be treated as a defined contribution plan.

(I) Temporary waiver of minimum required distribution.--

(i) In general.--The requirements of this paragraph shall not apply for calendar year 2020 to--

(I) a defined contribution plan which is described in this subsection or in section 403(a) or 403(b),

(II) a defined contribution plan which is an eligible deferred compensation plan described in section 457(b) but only if such plan is maintained by an employer described in section 457(e)(1)(A), or

(III) an individual retirement plan.

(ii) Special rule for required beginning dates in 2020.--Clause (i) shall apply to any distribution which is required to be made in calendar year 2020 by reason of--

(I) a required beginning date occurring in such calendar year, and

(II) such distribution not having been made before January 1, 2020.

(iii) Special rules regarding waiver period.--For purposes of this paragraph--

(I) the required beginning date with respect to any individual shall be determined without regard to this subparagraph for purposes of applying this paragraph for calendar years after 2020, and

(II) if clause (ii) of subparagraph (B) applies, the 5-year period described in such clause shall be determined without regard to calendar year 2020.

(J) Certain increases in payments under a commercial annuity.--Nothing in this section shall prohibit a commercial annuity (within the meaning of section 3405(e)(6)) that is issued in connection with any eligible retirement plan (within the meaning of section 402(c)(8)(B), other than a defined benefit plan) from providing one or more of the following types of payments on or after the annuity starting date:

(i) annuity payments that increase by a constant percentage, applied not less frequently than annually, at a rate that is less than 5 percent per year,

(ii) a lump sum payment that--

(I) results in a shortening of the payment period with respect to an annuity or a full or partial commutation of the future annuity payments, provided that such lump sum is determined using reasonable actuarial methods and assumptions, as determined in good faith by the issuer of the contract, or

(II) accelerates the receipt of annuity payments that are scheduled to be received within the ensuing 12 months, regardless of whether such acceleration shortens the payment period with respect to the annuity, reduces the dollar amount of benefits to be paid under the contract, or results in a suspension of annuity payments during the period being accelerated,

(iii) an amount which is in the nature of a dividend or similar distribution, provided that the issuer of the contract determines such amount using reasonable actuarial methods and assumptions, as determined in good faith by the issuer of the contract, when calculating the initial annuity payments and the issuer's experience with respect to those factors, or

(iv) a final payment upon death that does not exceed the excess of the total amount of the consideration paid for the annuity payments, less the aggregate amount of prior distributions or payments from or under the contract.

(10) Other requirements.--

(A) Plans benefiting owner-employees.--In the case of any plan which provides contributions or benefits for employees some or all of whom are owner-employees (as defined in subsection (c)(3)), a trust forming part of such plan shall constitute a qualified trust under this section only if the requirements of subsection (d) are also met.

(B) Top-heavy plans.--

(i) In general.--In the case of any top-heavy plan, a trust forming part of such plan shall constitute a qualified trust under this section only if the requirements of section 416 are met.

(ii) Plans which may become top-heavy.--Except to the extent provided in regulations, a trust forming part of a plan (whether or not a top-heavy plan) shall constitute a qualified trust under this section only if such plan contains provisions--

(I) which will take effect if such plan becomes a top-heavy plan, and

(II) which meet the requirements of section 416.

(iii) Exemption for governmental plans.--This subparagraph shall not apply to any governmental plan.

(11) Requirement of joint and survivor annuity and preretirement survivor annuity.--

(A) In general.--In the case of any plan to which this paragraph applies, except as provided in section 417, a trust forming part of such plan shall not constitute a qualified trust under this section unless--

(i) in the case of a vested participant who does not die before the annuity starting date, the accrued benefit payable to such participant is provided in the form of a qualified joint and survivor annuity, and

(ii) in the case of a vested participant who dies before the annuity starting date and who has a surviving spouse, a qualified preretirement survivor annuity is provided to the surviving spouse of such participant.

(B) Plans to which paragraph applies.--This paragraph shall apply to--

(i) any defined benefit plan,

(ii) any defined contribution plan which is subject to the funding standards of section 412, and

(iii) any participant under any other defined contribution plan unless--

(I) such plan provides that the participant's nonforfeitable accrued benefit (reduced by any security interest held by the plan by reason of a loan outstanding to such participant) is payable in full, on the death of the participant, to the participant's surviving spouse (or, if there is no surviving spouse or the surviving spouse consents in the manner required under section 417(a)(2), to a designated beneficiary),

(II) such participant does not elect a payment of benefits in the form of a life annuity, and

(III) with respect to such participant, such plan is not a direct or indirect transferee (in a transfer after December 31, 1984) of a plan which is described in clause (i) or (ii) or to which this clause applied with respect to the participant.

Clause (iii)(III) shall apply only with respect to the transferred assets (and income therefrom) if the plan separately accounts for such assets and any income therefrom.

(C) Exception for certain ESOP benefits.--

(i) In general.--In the case of--

(I) a tax credit employee stock ownership plan (as defined in section 409(a)), or

(II) an employee stock ownership plan (as defined in section 4975(e)(7)),

subparagraph (A) shall not apply to that portion of the employee's accrued benefit to which the requirements of section 409(h) apply.

(ii) Nonforfeitable benefit must be paid in full, etc.--In the case of any participant, clause (i) shall apply only if the requirements of subclauses (I), (II), and (III) of subparagraph (B)(iii) are met with respect to such participant.

(D) Special rule where participant and spouse married less than 1 year.--A plan shall not be treated as failing to meet the requirements of subparagraphs (B)(iii) or (C) merely because the plan provides that benefits will not be payable to the surviving spouse of the participant unless the participant and such spouse had been married throughout the 1-year period ending on the earlier of the participant's annuity starting date or the date of the participant's death.

(E) Exception for plans described in section 404(c).--This paragraph shall not apply to a plan which the Secretary has determined is a plan described in section 404(c) (or a continuation thereof) in which participation is substantially limited to individuals who, before January 1, 1976, ceased employment covered by the plan.

(F) Cross reference.--For--

(i) provisions under which participants may elect to waive the requirements of this paragraph, and

(ii) other definitions and special rules for purposes of this paragraph, see section 417.

(12) A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that in the case of any merger or consolidation with, or transfer of assets or liabilities to, any other plan after September 2, 1974, 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 terminated). The preceding sentence does not apply to any multiemployer plan with respect to any transaction to the extent that participants either before or after the transaction are covered under a multiemployer plan to which title IV of the Employee Retirement Income Security Act of 1974 applies.

(13) Assignment and alienation.--

(A) In general.--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 made by any participant who is receiving benefits under the plan unless the assignment or alienation is made for purposes of defraying plan administration costs. For purposes of this paragraph a loan made to a participant or beneficiary shall not be treated as an assignment or alienation if such loan is secured by the participant's accrued nonforfeitable benefit and is exempt from the tax imposed by section 4975 (relating to tax on prohibited transactions) by reason of section 4975(d)

(1). This paragraph shall take effect on January 1, 1976 and shall not apply to assignments which were irrevocable on September 2, 1974.

(B) Special rules for domestic relations orders.--Subparagraph (A) shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order, except that subparagraph (A) shall not apply if the order is determined to be a qualified domestic relations order.

(C) Special rule for certain judgments and settlements.--Subparagraph (A) shall not apply to any offset of a participant's benefits provided under a plan against an amount that the participant is ordered or required to pay to the plan if--

(i) the order or requirement to pay arises--

(I) under a judgment of conviction for a crime involving such plan,

(II) under a civil judgment (including a consent order or decree) entered by a court in an action brought in connection with a violation (or alleged violation) of part 4 of subtitle B of title I of the Employee Retirement Income Security Act of 1974, or

(III) pursuant to a settlement agreement between the Secretary of Labor and the participant, or a settlement agreement between the Pension Benefit Guaranty Corporation and the participant, in connection with a violation (or alleged violation) of part 4 of such subtitle by a fiduciary or any other person,

(ii) the judgment, order, decree, or settlement agreement expressly provides for the offset of all or part of the amount ordered or required to be paid to the plan against the participant's benefits provided under the plan, and

(iii) in a case in which the survivor annuity requirements of section 401(a)(11) apply with respect to distributions from the plan to the participant, if the participant has a spouse at the time at which the offset is to be made--

(I) either such spouse has consented in writing to such offset and such consent is witnessed by a notary public or representative of the plan (or it is established to the satisfaction of a plan representative that such consent may not be obtained by reason of circumstances described in section 417(a)(2)(B)), or an election to waive the right of the spouse to either a qualified joint and survivor annuity or a qualified preretirement survivor annuity is in effect in accordance with the requirements of section 417(a),

(II) such spouse is ordered or required in such judgment, order, decree, or settlement to pay an amount to the plan in connection with a violation of part 4 of such subtitle, or

(III) in such judgment, order, decree, or settlement, such spouse retains the right to receive the survivor annuity under a qualified joint and survivor annuity provided pursuant to section 401(a)(11)(A)(i) and under a qualified preretirement survivor annuity provided pursuant to section 401(a)(11)(A)(ii), determined in accordance with subparagraph (D).

A plan shall not be treated as failing to meet the requirements of this subsection, subsection (k), section 403(b), or section 409(d) solely by reason of an offset described in this subparagraph.

(D) Survivor annuity.--

(i) In general.--The survivor annuity described in subparagraph (C)(iii)(III) shall be determined as if--

(I) the participant terminated employment on the date of the offset,

(II) there was no offset,

(III) the plan permitted commencement of benefits only on or after normal retirement age,

(IV) the plan provided only the minimum-required qualified joint and survivor annuity, and

(V) the amount of the qualified preretirement survivor annuity under the plan is equal to the amount of the survivor annuity payable under the minimum-required qualified joint and survivor annuity.

(ii) Definition.--For purposes of this subparagraph, the term "minimum-required qualified joint and survivor annuity" means the qualified joint and survivor annuity which is the actuarial equivalent of the participant's accrued benefit (within the meaning of section 411(a)(7)) and under which the survivor annuity is 50 percent of the amount of the annuity which is payable during the joint lives of the participant and the spouse.

(14) A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a 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 the earlier of age 65 or the normal retirement age specified under the plan,

(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.

In the case of a plan which provides for the payment of an early retirement benefit, a trust forming a part of such plan shall not constitute a qualified trust under this section unless a participant who satisfied the service requirements for such early retirement benefit, but separated from the service (with any nonforfeitable right to an accrued benefit) before satisfying the age requirement for such early retirement benefit, is entitled upon satisfaction of such age requirement to receive a benefit not less than the benefit to which he would be entitled at the normal retirement age, actuarially, reduced under regulations prescribed by the Secretary.

(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,

such benefits are not decreased by reason of any increase in the benefit levels payable under title II of the Social Security Act or any increase in the wage base under such title II, if such increase takes place after September 2, 1974, or (if later) the earlier of the date of first receipt of such benefits or the date of such separation, as the case may be.

(16) A trust shall not constitute a qualified trust under this section if the plan of which such trust is a part provides for benefits or contributions which exceed the limitations of section 415.

(17) Compensation limit.--

(A) In general.-- A trust shall not constitute a qualified trust under this section unless, under the plan of which such trust is a part, the annual compensation of each employee taken into account under the plan for any year does not exceed $200,000.

(B) Cost-of-living adjustment.--The Secretary shall adjust annually the $200,000 amount in subparagraph (A) for increases in the cost-of-living at the same time and in the same manner as adjustments under section 415(d); except that the base period shall be the calendar quarter beginning July 1, 2001, and any increase which is not a multiple of $5,000 shall be rounded to the next lowest multiple of $5,000.

[(18) **Repealed.** Pub.L. 97-248, Title II, § 237(b), Sept. 3, 1982, 96 Stat. 511]

(19) A trust shall not constitute a qualified trust under this section if under the plan of which such trust is a part any part of a participant's accrued benefit derived from employer contributions (whether or not otherwise nonforfeitable), is forfeitable solely because of withdrawal by such participant of any amount attributable to the benefit derived from contributions made by such participant. The preceding sentence shall not apply to the accrued benefit of any participant unless, at the time of such withdrawal, such participant has a nonforfeitable right to at least 50 percent of such accrued benefit (as determined under section 411). The first sentence of this paragraph shall not apply to the extent that an accrued benefit is permitted to be forfeited in accordance with section 411(a)(3)(D)(iii) (relating to proportional forfeitures of benefits accrued before September 2, 1974, in the event of withdrawal of certain mandatory contributions).

(20) A trust forming part of a pension plan shall not be treated as failing to constitute a qualified trust under this section merely because the pension plan of which such trust is a part makes 1 or more distributions within 1 taxable year to a distributee on account of a termination of the plan of which the trust is a part, or in the case of a profit-sharing or stock bonus plan, a complete discontinuance of contributions under such plan. This paragraph shall not apply to a defined benefit plan unless the employer maintaining such plan files a notice with the Pension Benefit Guaranty Corporation (at the time and in the manner prescribed by the Pension Benefit Guaranty Corporation) notifying the Corporation of such payment or distribution and the Corporation has approved such payment or distribution or, within 90 days after the date on which such notice was filed, has failed to disapprove such payment or distribution. For purposes of this paragraph, rules similar to the rules of section 402(a) (6)(B) (as in effect before its repeal by section 521 of the Unemployment Compensation Amendments of 1992) shall apply.

[**(21) Repealed.** Pub.L. 99-514, Title XI, § 1171(b)(5), Oct. 22, 1986, 100 Stat. 2513]

(22) If a defined contribution plan (other than a profit-sharing plan)--

> **(A)** is established by an employer whose stock is not readily tradable on an established market, and
>
> **(B)** after acquiring securities of the employer, more than 10 percent of the total assets of the plan are securities of the employer,

any trust forming part of such plan shall not constitute a qualified trust under this section unless the plan meets the requirements of subsection (e) of section

409. The requirements of subsection (e) of section 409 shall not apply to any employees of an employer who are participants in any defined contribution plan established and maintained by such employer if the stock of such employer is not readily tradable on an established market and the trade or business of such employer consists of publishing on a regular basis a newspaper for general circulation. For purposes of the preceding sentence, subsections (b), (c), (m), and (o) of section 414 shall not apply except for determining whether stock of the employer is not readily tradable on an established market.

(23) A stock bonus plan shall not be treated as meeting the requirements of this section unless such plan meets the requirements of subsections (h) and (o) of section 409, except that in applying section 409(h) for purposes of this paragraph, the term "employer securities" shall include any securities of the employer held by the plan.

(24) Any group trust which otherwise meets the requirements of this section shall not be treated as not meeting such requirements on account of the participation or inclusion in such trust of the moneys of any plan or governmental unit described in section 818(a)(6).

(25) Requirement that actuarial assumptions be specified.--A defined benefit plan shall not be treated as providing definitely determinable benefits unless, whenever the amount of any benefit is to be determined on the basis of actuarial assumptions, such assumptions are specified in the plan in a way which precludes employer discretion.

(26) Additional participation requirements.--

(A) In general.--In the case of a trust which is a part of a defined benefit plan, such trust shall not constitute a qualified trust under this subsection unless on each day of the plan year such trust benefits at least the lesser of--

(i) 50 employees of the employer, or

(ii) the greater of--

(I) 40 percent of all employees of the employer, or

(II) 2 employees (or if there is only 1 employee, such employee).

(B) Treatment of excludable employees.--

(i) In general.--A plan may exclude from consideration under this paragraph employees described in paragraphs (3) and (4)(A) of section 410(b).

(ii) Separate application for certain excludable employees.--If employees described in section 410(b)(4)(B) are covered under a plan which meets the requirements of subparagraph (A) separately with respect to such employees, such employees may be excluded from consideration in determining whether any plan of the employer meets such requirements if--

(I) the benefits for such employees are provided under the same plan as benefits for other employees,

(II) the benefits provided to such employees are not greater than comparable benefits provided to other employees under the plan, and

(III) no highly compensated employee (within the meaning of section 414(q)) is included in the group of such employees for more than 1 year.

(C) Special rule for collective bargaining units.--Except to the extent provided in regulations, a plan covering only employees described in section 410(b)(3)(A) may exclude from consideration any employees who are not included in the unit or units in which the covered employees are included.

(D) Paragraph not to apply to multiemployer plans.--Except to the extent provided in regulations, this paragraph shall not apply to employees in a multiemployer plan (within the meaning of section 414(f)) who are covered by collective bargaining agreements.

(E) Special rule for certain dispositions or acquisitions.--Rules similar to the rules of section 410(b)(6)(C) shall apply for purposes of this paragraph.

(F) Separate lines of business.--At the election of the employer and with the consent of the Secretary, this paragraph may be applied separately with respect to each separate line of business of the employer. For purposes of this paragraph, the term "separate line of business" has the meaning given such term by section 414(r) (without regard to paragraph (2) (A) or (7) thereof).

(G) Exception for governmental plans.--This paragraph shall not apply to a governmental plan (within the meaning of section 414(d)).

(H) Regulations.--The Secretary may by regulation provide that any separate benefit structure, any separate trust, or any other separate arrangement is to be treated as a separate plan for purposes of applying this paragraph.

(I) Protected participants.--

(i) In general.--A plan shall be deemed to satisfy the requirements of subparagraph (A) if--

(I) the plan is amended--

(aa) to cease all benefit accruals, or

(bb) to provide future benefit accruals only to a closed class of participants,

(II) the plan satisfies subparagraph (A) (without regard to this subparagraph) as of the effective date of the amendment, and

(III) the amendment was adopted before April 5, 2017, or the plan is described in clause (ii).

(ii) Plans described.--A plan is described in this clause if the plan would be described in subsection (o)(1)(C), as applied for purposes of subsection (o)(1)(B)(iii)(IV) and by treating the effective date of the amendment as the date the class was closed for purposes of subsection (o)(1)(C).

(iii) Special rules.--For purposes of clause (i)(II), in applying section 410(b)(6)(C), the amendments described in clause (i) shall not be treated as a significant change in coverage under section 410(b)(6)(C)(i)(II).

(iv) Spun-off plans.--For purposes of this subparagraph, if a portion of a plan described in clause (i) is spun off to another employer, the treatment under clause (i) of the spun-off plan shall continue with respect to the other employer.

(27) Determinations as to profit-sharing plans.--

(A) Contributions need not be based on profits.--The determination of whether the plan under which any contributions are made is a profit-sharing plan shall be made without regard to current or accumulated profits of the employer and without regard to whether the employer is a tax-exempt organization.

(B) Plan must designate type.--In the case of a plan which is intended to be a money purchase pension plan or a profit- sharing plan, a trust forming part of such plan shall not constitute a qualified trust under this subsection unless the plan designates such intent at such time and in such manner as the Secretary may prescribe.

(28) Additional requirements relating to employee stock ownership plans.--

(A) In general.--In the case of a trust which is part of an employee stock ownership plan (within the meaning of section 4975(e)(7)) or a plan which meets the requirements of section 409(a), such trust shall not constitute a qualified trust under this section unless such plan meets the requirements of subparagraphs (B) and (C).

(B) Diversification of investments.--

(i) In general.--A plan meets the requirements of this subparagraph if each qualified participant in the plan may elect within 90 days after the close of each plan year in the qualified election period to direct the plan as to the investment of at least 25 percent of the participant's account in the plan (to the extent such portion exceeds the amount to which a prior election under this subparagraph applies). In the case of the election year in which the participant can make his last election, the preceding sentence shall be applied by substituting "50 percent" for "25 percent".

(ii) Method of meeting requirements.--A plan shall be treated as meeting the requirements of clause (i) if--

(I) the portion of the participant's account covered by the election under clause (i) is distributed within 90 days after the period during which the election may be made, or

(II) the plan offers at least 3 investment options (not inconsistent with regulations prescribed by the Secretary) to each participant making an election under clause (i) and within 90 days after the period during which the election may be made, the plan invests the portion of the participant's account covered by the election in accordance with such election.

(iii) Qualified participant.--For purposes of this subparagraph, the term "qualified participant" means any employee who has completed at least 10 years of participation under the plan and has attained age 55.

(iv) Qualified election period.--For purposes of this subparagraph, the term "qualified election period" means the 6- plan-year period beginning with the later of--

(I) the 1st plan year in which the individual first became a qualified participant, or

(II) the 1st plan year beginning after December 31, 1986.

For purposes of the preceding sentence, an employer may elect to treat an individual first becoming a qualified participant in the 1st plan year beginning in 1987 as having become a participant in the 1st plan year beginning in 1988.

(v) Exception.--This subparagraph shall not apply to an applicable defined contribution plan (as defined in paragraph (35)(E)).

(C) Use of independent appraiser.--A plan meets the requirements of this subparagraph if all valuations of employer securities which are not readily tradable on an established securities market with respect to activities carried on by the plan are by an independent appraiser. For purposes of the preceding sentence, the term "independent appraiser" means any appraiser meeting requirements similar to the requirements of the regulations prescribed under section 170(a)(1).

(29) Benefit limitations.--In the case of a defined benefit plan (other than a multiemployer plan or a CSEC plan) to which the requirements of section 412 apply, the trust of which the plan is a part shall not constitute a qualified trust under this subsection unless the plan meets the requirements of section 436.

(30) Limitations on elective deferrals.--In the case of a trust which is part of a plan under which elective deferrals (within the meaning of section 402(g)(3)) may be made with respect to any individual during a calendar year, such trust shall not constitute a qualified trust under this subsection unless the plan provides that the amount of such deferrals under such plan and all other plans, contracts, or arrangements of an employer maintaining such plan may not exceed the amount of the limitation in effect under section 402(g)(1)(A) for taxable years beginning in such calendar year.

(31) Direct transfer of eligible rollover distributions.--

(A) In general.--A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that if the distributee of any eligible rollover distribution--

(i) elects to have such distribution paid directly to an eligible retirement plan, and

(ii) specifies the eligible retirement plan to which such distribution is to be paid (in such form and at such time as the plan administrator may prescribe),

such distribution shall be made in the form of a direct trustee-to-trustee transfer to the eligible retirement plan so specified.

(B) Certain mandatory distributions.--

(i) In general.--In case of a trust which is part of an eligible plan, such trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that if--

(I) a distribution described in clause (ii) in excess of $1,000 is made, and

(II) the distributee does not make an election under subparagraph (A) and does not elect to receive the distribution directly,

the plan administrator shall make such transfer to an individual retirement plan of a designated trustee or issuer and shall notify the distributee in writing (either separately or as part of the notice under section 402(f)) that the distribution may be transferred to another individual retirement plan.

(ii) Eligible plan.--For purposes of clause (i), the term "eligible plan" means a plan which provides that any nonforfeitable accrued benefit for which the present value (as determined under section 411(a)(11)) does not exceed $7,000 shall be immediately distributed to the participant.

(C) Limitation.--Subparagraphs (A) and (B) shall apply only to the extent that the eligible rollover distribution would be includible in gross income if not transferred as provided in subparagraph (A) (determined without regard to sections 402(c), 403(a)(4), 403(b)(8), and 457(e)(16)). The preceding sentence shall not apply to such distribution if the plan to which such distribution is transferred--

(i) is a qualified trust which is part of a plan which is a defined contribution plan and agrees to separately account for amounts so transferred, including separately accounting for the portion of such distribution which is includible in gross income and the portion of such distribution which is not so includible, or

(ii) is an eligible retirement plan described in clause (i) or (ii) of section 402(c)(8)(B).

(D) Eligible rollover distribution.--For purposes of this paragraph, the term "eligible rollover distribution" has the meaning given such term by section 402(f)(2)(A).

(E) Eligible retirement plan.--For purposes of this paragraph, the term "eligible retirement plan" has the meaning given such term by section 402(c)(8)(B), except that a qualified trust shall be considered an eligible retirement plan only if it is a defined contribution plan, the terms of which permit the acceptance of rollover distributions.

(32) Treatment of failure to make certain payments if plan has liquidity shortfall.--

(A) In general.--A trust forming part of a pension plan to which section 430(j)(4) or 433(f)(5) applies shall not be treated as failing to constitute a qualified trust under this section merely because such plan ceases to make any payment described in subparagraph (B) during any period that such plan has a liquidity shortfall (as defined in section 430(j)(4) or 433(f)(5)).

(B) Payments described.--A payment is described in this subparagraph if such payment is--

(i) any payment, in excess of the monthly amount paid under a single life annuity (plus any social security supplements described in the last sentence of section 411(a)(9)), to a participant or beneficiary whose annuity starting date (as defined in section 417(f)(2)) occurs during the period referred to in subparagraph (A),

(ii) any payment for the purchase of an irrevocable commitment from an insurer to pay benefits, and

(iii) any other payment specified by the Secretary by regulations.

(C) Period of shortfall.--For purposes of this paragraph, a plan has a liquidity shortfall during the period that there is an underpayment of an installment under section 430(j)(3) or 433(f) by reason of section 430(j)(4)(A) or 433(f)(5), respectively.

(33) Prohibition on benefit increases while sponsor is in bankruptcy.--

(A) In general.--A trust which is part of a plan to which this paragraph applies shall not constitute a qualified trust under this section if an amendment to such plan is adopted while the employer is a debtor in a case under title 11, United States Code, or similar Federal or State law, if such amendment increases liabilities of the plan by reason of--

(i) any increase in benefits,

(ii) any change in the accrual of benefits, or

(iii) any change in the rate at which benefits become nonforfeitable under the plan,

with respect to employees of the debtor, and such amendment is effective prior to the effective date of such employer's plan of reorganization.

(B) Exceptions.--This paragraph shall not apply to any plan amendment if--

(i) the plan, were such amendment to take effect, would have a funding target attainment percentage (as defined in section 430(d)(2)) of 100 percent or more,

(ii) the Secretary determines that such amendment is reasonable and provides for only de minimis increases in the liabilities of the plan with respect to employees of the debtor,

(iii) such amendment only repeals an amendment described in section 412(d)(2), or

(iv) such amendment is required as a condition of qualification under this part.

(C) Plans to which this paragraph applies.--This paragraph shall apply only to plans (other than multiemployer plans or CSEC plans) covered under section 4021 of the Employee Retirement Income Security Act of 1974.

(D) Employer.--For purposes of this paragraph, the term "employer" means the employer referred to in section 412(b) (1), without regard to section 412(b)(2).

(34) Benefits of missing participants on plan termination.--In the case of a plan covered by title IV of the Employee Retirement Income Security Act of 1974, a trust forming part of such plan shall not be treated as failing to constitute a qualified trust under this section merely because the pension plan of which such trust is a part, upon its termination, transfers benefits of missing participants to the Pension Benefit Guaranty Corporation in accordance with section 4050 of such Act.

(35) Diversification requirements for certain defined contribution plans.--

(A) In general.--A trust which is part of an applicable defined contribution plan shall not be treated as a qualified trust unless the plan meets the diversification requirements of subparagraphs (B), (C), and (D).

(B) Employee contributions and elective deferrals invested in employer securities.--In the case of the portion of an applicable individual's account attributable to employee contributions and elective deferrals which is invested in employer securities, a plan meets the requirements of this subparagraph if the applicable individual may elect to direct the plan to divest any such securities and to reinvest an equivalent amount in other investment options meeting the requirements of subparagraph (D).

(C) Employer contributions invested in employer securities.--In the case of the portion of the account attributable to employer contributions other than elective deferrals which is invested in employer securities, a plan meets the requirements of this subparagraph if each applicable individual who--

(i) is a participant who has completed at least 3 years of service, or

(ii) is a beneficiary of a participant described in clause (i) or of a deceased participant,

may elect to direct the plan to divest any such securities and to reinvest an equivalent amount in other investment options meeting the requirements of subparagraph (D).

(D) Investment options.--

(i) In general.--The requirements of this subparagraph are met if the plan offers not less than 3 investment options, other than employer securities, to which an applicable individual may direct the proceeds from the divestment of employer securities pursuant to this paragraph, each of which is diversified and has materially different risk and return characteristics.

(ii) Treatment of certain restrictions and conditions.--

(I) Time for making investment choices.--A plan shall not be treated as failing to meet the requirements of this subparagraph merely because the plan limits the time for divestment and reinvestment to periodic, reasonable opportunities occurring no less frequently than quarterly.

(II) Certain restrictions and conditions not allowed.--Except as provided in regulations, a plan shall not meet the requirements of this subparagraph if the plan imposes restrictions or conditions with respect to the investment of employer securities which are not imposed on the investment of other assets of the plan. This subclause shall not apply to any restrictions or conditions imposed by reason of the application of securities laws.

(E) Applicable defined contribution plan.--For purposes of this paragraph--

(i) In general.--The term "applicable defined contribution plan" means any defined contribution plan which holds any publicly traded employer securities.

(ii) Exception for certain ESOPs.--Such term does not include an employee stock ownership plan if--

(I) there are no contributions to such plan (or earnings thereunder) which are held within such plan and are subject to subsection (k) or (m), and

(II) such plan is a separate plan for purposes of section 414(l) with respect to any other defined benefit plan or defined contribution plan maintained by the same employer or employers.

(iii) Exception for one participant plans.--Such term does not include a one-participant retirement plan.

(iv) One-participant retirement plan.--For purposes of clause (iii), the term "one-participant retirement plan" means a retirement plan that on the first day of the plan year--

(I) covered only one individual (or the individual and the individual's spouse) and the individual (or the individual and the individual's spouse) owned 100 percent of the plan sponsor (whether or not incorporated), or

(II) covered only one or more partners (or partners and their spouses) in the plan sponsor.

(F) Certain plans treated as holding publicly traded employer securities.--

(i) In general.--Except as provided in regulations or in clause (ii), a plan holding employer securities which are not publicly traded employer securities shall be treated as holding publicly traded employer securities if any employer corporation, or any member of a controlled group of corporations which includes such employer corporation, has issued a class of stock which is a publicly traded employer security.

(ii) Exception for certain controlled groups with publicly traded securities.--Clause (i) shall not apply to a plan if--

(I) no employer corporation, or parent corporation of an employer corporation, has issued any publicly traded employer security, and

(II) no employer corporation, or parent corporation of an employer corporation, has issued any special class of stock which grants particular rights to, or bears particular risks for, the holder or issuer with respect to any corporation described in clause (i) which has issued any publicly traded employer security.

(iii) Definitions.--For purposes of this subparagraph, the term--

(I) "controlled group of corporations" has the meaning given such term by section 1563(a), except that "50 percent" shall be substituted for "80 percent" each place it appears,

(II) "employer corporation" means a corporation which is an employer maintaining the plan, and

(III) "parent corporation" has the meaning given such term by section 424(e).

(G) Other definitions.--For purposes of this paragraph--

(i) Applicable individual.--The term "applicable individual" means--

(I) any participant in the plan, and

(II) any beneficiary who has an account under the plan with respect to which the beneficiary is entitled to exercise the rights of a participant.

(ii) Elective deferral.--The term "elective deferral" means an employer contribution described in section 402(g)(3)(A).

(iii) Employer security.--The term "employer security" has the meaning given such term by section 407(d)(1) of the Employee Retirement Income Security Act of 1974.

(iv) Employee stock ownership plan.--The term "employee stock ownership plan" has the meaning given such term by section 4975(e)(7).

(v) Publicly traded employer securities.--The term "publicly traded employer securities" means employer securities which are readily tradable on an established securities market.

(vi) Year of service.--The term "year of service" has the meaning given such term by section 411(a)(5).

(H) Transition rule for securities attributable to employer contributions.--

(i) Rules phased in over 3 years.--

(I) In general.--In the case of the portion of an account to which subparagraph (C) applies and which consists of employer securities acquired in a plan year beginning before January 1, 2007, subparagraph (C) shall only apply to the applicable percentage of such securities. This subparagraph shall be applied separately with respect to each class of securities.

(II) Exception for certain participants aged 55 or over.--Subclause (I) shall not apply to an applicable individual who is a participant who has attained age 55 and completed at least 3 years of service before the first plan year beginning after December 31, 2005.

(ii) Applicable percentage.--For purposes of clause (i), the applicable percentage shall be determined as follows:

Plan year to which subparagraph (C) applies:	The applicable percentage is:
1st	33
2d	66
3d and following	100.

(I) ESOP rules relating to publicly traded securities.--In the case of an applicable defined contribution plan which is an employee stock ownership plan, an employer security shall be treated as described in subparagraph (G)(v) if--

(i) the security is the subject of priced quotations by at least 4 dealers, published and made continuously available on an interdealer quotation system (as such term is used in section 13 of the Securities Exchange Act of 1934) which has made the request described in section 6(j) of such Act to be treated as an alternative trading system,

(ii) the security is not a penny stock (as defined by section 3(a)(51) of such Act),

(iii) the security is issued by a corporation which is not a shell company (as such term is used in section 4(d)(6) of the Securities Act of 1933), a blank check company (as defined in section 7(b)(3) of such Act), or subject to bankruptcy proceedings,

(iv) the security has a public float (as such term is used in section 240.12b-2 of title 17, Code of Federal Regulations) which has a fair market value of at least $1,000,000 and constitutes at least 10 percent of the total shares issued and outstanding.

(v) in the case of a security issued by a domestic corporation, the issuer publishes, not less frequently than annually, financial statements audited by an independent auditor registered with the Public Company Accounting Oversight Board established under the Sarbanes-Oxley Act of 2002, and

(vi) in the case of a security issued by a foreign corporation, the security is represented by a depositary share (as defined under section 240.12b-2 of title 17, Code of Federal Regulations), or is issued by a foreign corporation incorporated in Canada and readily tradeable on an established securities market in Canada, and the issuer--

(I) is subject to, and in compliance with, the reporting requirements of section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78m or 78*o*(d)),

(II) is subject to, and in compliance with, the reporting requirements of section 230.257 of title 17, Code of Federal Regulations, or

(III) is exempt from such requirements under section 240.12g3-2(b) of title 17, Code of Federal Regulations.

(36) Distributions during working retirement.--

(A) In general.--A trust forming part of a pension plan shall not be treated as failing to constitute a qualified trust under this section solely because the plan provides that a distribution may be made from such trust to an employee who has attained age 59 ½ and who is not separated from employment at the time of such distribution.

(B) Certain employees in the building and construction industry.--Subparagraph (A) shall be applied by substituting “age 55” for “age 59 ½” in the case of a multiemployer plan described in section 4203(b)(1)(B)(i) of the Employee Retirement Income Security Act of 1974, with respect to individuals who were participants in such plan on or before April 30, 2013, if--

(i) the trust to which subparagraph (A) applies was in existence before January 1, 1970, and

(ii) before December 31, 2011, at a time when the plan provided that distributions may be made to an employee who has attained age 55 and who is not separated from employment at the time of such distribution, the plan received at least 1 written determination from the Internal Revenue Service that the trust to which subparagraph (A) applies constituted a qualified trust under this section.

(37) Death benefits under USERRA-qualified active military service.--A trust shall not constitute a qualified trust unless the plan provides that, in the case of a participant who dies while performing qualified military service (as defined in section 414(u)), the survivors of the participant are entitled to any additional benefits (other than benefit accruals relating to the period of qualified military service) provided under the plan had the participant resumed and then terminated employment on account of death.

(38) Portability of lifetime income.--

(A) In general.--Except as may be otherwise provided by regulations, a trust forming part of a defined contribution plan shall not be treated as failing to constitute a qualified trust under this section solely by reason of allowing--

(i) qualified distributions of a lifetime income investment, or

(ii) distributions of a lifetime income investment in the form of a qualified plan distribution annuity contract,

on or after the date that is 90 days prior to the date on which such lifetime income investment is no longer authorized to be held as an investment option under the plan.

(B) Definitions.--For purposes of this subsection--

(i) the term "qualified distribution" means a direct trustee-to-trustee transfer described in paragraph (31)(A) to an eligible retirement plan (as defined in section 402(c)(8)(B)),

(ii) the term "lifetime income investment" means an investment option which is designed to provide an employee with election rights--

(I) which are not uniformly available with respect to other investment options under the plan, and

(II) which are to a lifetime income feature available through a contract or other arrangement offered under the plan (or under another eligible retirement plan (as so defined), if paid by means of a direct trustee-to-trustee transfer described in paragraph (31)(A) to such other eligible retirement plan),

(iii) the term "lifetime income feature" means--

(I) a feature which guarantees a minimum level of income annually (or more frequently) for at least the remainder of the life of the employee or the joint lives of the employee and the employee's designated beneficiary, or

(II) an annuity payable on behalf of the employee under which payments are made in substantially equal periodic payments (not less frequently than annually) over the life of the employee or the joint lives of the employee and the employee's designated beneficiary, and

(iv) the term "qualified plan distribution annuity contract" means an annuity contract purchased for a participant and distributed to the participant by a plan or contract described in subparagraph (B) of section 402(c)(8) (without regard to clauses (i) and (ii) thereof).

(39) Qualified long-term care distributions.--

(A) In general.--A trust forming part of a defined contribution plan shall not be treated as failing to constitute a qualified trust under this section solely by reason of allowing qualified long-term care distributions.

(B) Qualified long-term care distribution.--For purposes of this paragraph--

(i) In general.--The term "qualified long-term care distribution" means so much of the distributions made during the taxable year as does not exceed, in the aggregate, the least of the following:

(I) The amount paid by or assessed to the employee during the taxable year for or with respect to certified long-term care insurance for the employee or the employee's spouse (or other family member of the employee as provided by the Secretary by regulation).

(II) An amount equal to 10 percent of the present value of the nonforfeitable accrued benefit of the employee under the plan.

(III) $2,500.

(ii) Adjustment for inflation.--In the case of taxable years beginning after December 31, 2024, the $2,500 amount in clause (i)(II) shall be increased by an amount equal to--

(I) such dollar amount, multiplied by

(II) the cost-of-living adjustment determined under section 1(f)(3) for the calendar year in which the taxable year begins, determined by substituting 'calendar year 2023' for 'calendar year 2016' in subparagraph (A)(ii) thereof.

If any increase under the preceding sentence is not a multiple of $100, such amount shall be rounded to the nearest multiple of $100.

(C) Certified long-term care insurance.--The term "certified long-term care insurance" means--

(i) a qualified long-term care insurance contract (as defined in section 7702B(b)) covering qualified long-term care services (as defined in section 7702B(c)),

(ii) coverage of the risk that an insured individual would become a chronically ill individual (within the meaning of section 101(g)(4)(B)) under a rider or other provision of a life insurance contract which satisfies the requirements of section 101(g)(3) (determined without regard to subparagraph (D) thereof), or

(iii) coverage of qualified long-term care services (as so defined) under a rider or other provision of an insurance or annuity contract which is treated as a separate contract under section 7702B(e) and satisfies the requirements of section 7702B(g),

if such coverage provides meaningful financial assistance in the event the insured needs home-based or nursing home care. For purposes of the preceding sentence, coverage shall not be deemed to provide meaningful financial assistance unless benefits are adjusted for inflation and consumer protections are provided, including protection in the event the coverage is terminated.

(D) Distributions must otherwise be includible.--Rules similar to the rules of section 402(l)(3) shall apply for purposes of this paragraph.

(E) Long-term care premium statement.--

(i) In general.--No distribution shall be treated as a qualified long-term care distribution unless a long-term care premium statement with respect to the employee has been filed with the plan.

(ii) Long-term care premium statement.--For purposes of this paragraph, a long-term care premium statement is a statement provided by the issuer of long-term care coverage, upon request by the owner of such coverage, which includes--

(I) the name and taxpayer identification number of such issuer,

(II) a statement that the coverage is certified long-term care insurance,

(III) identification of the employee as the owner of such coverage,

(IV) identification of the individual covered and such individual's relationship to the employee,

(V) the premiums owed for the coverage for the calendar year, and

(VI) such other information as the Secretary may require.

(iii) Filing with Secretary.--A long-term care premium statement will be accepted only if the issuer has completed a disclosure to the Secretary for the specific coverage product to which the statement relates. Such disclosure shall identify the issuer, type of coverage, and such other information as the Secretary may require which is included in the filing of the product with the applicable State authority.

Paragraphs (11), (12), (13), (14), (15), (19), and (20) shall apply only in the case of a plan to which section 411 (relating to minimum vesting standards) applies without regard to subsection (e)(2) of such section.

(b) Plan amendments.--

(1) Certain retroactive changes in plan.--A stock bonus, pension, profit-sharing, or annuity plan shall be considered as satisfying the requirements of subsection (a) for the period beginning with the date on which it was put into effect, or for the period beginning with the earlier of the date on which there was adopted or put into effect any amendment which caused the plan to fail to satisfy such requirements, and ending with the time prescribed by law for filing the return of the employer for his taxable year in which such plan or amendment was adopted (including extensions thereof) or such later time as the Secretary may designate, if all provisions of the plan which are necessary to satisfy such requirements are in effect by the end of such period and have been made effective for all purposes for the whole of such period.

(2) Adoption of plan.--If an employer adopts a stock bonus, pension, profit-sharing, or annuity plan after the close of a taxable year but before the time prescribed by law for filing the return of the employer for the taxable year (including extensions thereof), the employer may elect to treat the plan as having been adopted as of the last day of the taxable year. In the case of an individual who owns the entire interest in an unincorporated trade or business, and who is the only employee of such trade or business, any elective deferrals (as defined in section 402(g)(3)) under a qualified cash or deferred arrangement to which the preceding sentence applies, which are made by such individual before the time for filing the return of such individual for the taxable year (determined without regard to any extensions) ending after or with the end of the plan's first plan year, shall be treated as having been made before the end of such first plan year.

(3) Retroactive plan amendments that increase benefit accruals.--If--

(A) an employer amends a stock bonus, pension, profit-sharing, or annuity plan to increase benefits accrued under the plan effective as of any date during the immediately preceding plan year (other than increasing the amount of matching contributions (as defined in subsection (m)(4)(A))),

(B) such amendment would not otherwise cause the plan to fail to meet any of the requirements of this subchapter, and

(C) such amendment is adopted before the time prescribed by law for filing the return of the employer for the taxable year (including extensions thereof) which includes the date described in subparagraph (A),

the employer may elect to treat such amendment as having been adopted as of the last day of the plan year in which the amendment is effective.

(c) Definitions and rules relating to self-employed individuals and owner-employees.--For purposes of this section--

(1) Self-employed individual treated as employee.--

(A) In general.--The term "employee" includes, for any taxable year, an individual who is a self-employed individual for such taxable year.

(B) Self-employed individual.--The term "self-employed individual" means, with respect to any taxable year, an individual who has earned income (as defined in paragraph (2)) for such taxable year. To the extent provided in regulations prescribed by the Secretary, such term also includes, for any taxable year--

(i) an individual who would be a self-employed individual within the meaning of the preceding sentence but for the fact that the trade or business carried on by such individual did not have net profits for the taxable year, and

(ii) an individual who has been a self-employed individual within the meaning of the preceding sentence for any prior taxable year.

(2) Earned income.--

(A) In general.--The term "earned income" means the net earnings from self-employment (as defined in section 1402(a)), but such net earnings shall be determined--

(i) only with respect to a trade or business in which personal services of the taxpayer are a material income-producing factor,

(ii) without regard to paragraphs (4) and (5) of section 1402(c),

(iii) in the case of any individual who is treated as an employee under subparagraph (A), (C), or (D) of section 3121(d) (3), without regard to section 1402(c)(2),

(iv) without regard to items which are not included in gross income for purposes of this chapter, and the deductions properly allocable to or chargeable against such items,

(v) with regard to the deductions allowed by section 404 to the taxpayer, and

(vi) with regard to the deduction allowed to the taxpayer by section 164(f).

For purposes of this subparagraph, section 1402, as in effect for a taxable year ending on December 31, 1962, shall be treated as having been in effect for all taxable years ending before such date. For purposes of this part only (other than sections 419 and 419A), this subparagraph shall be applied as if the term "trade or business" for purposes of section 1402 included service described in section 1402(c)(6).

[**(B) Repealed.** Pub.L. 89-809, Title II, § 204(c), Nov. 13 1966, 80 Stat. 1577]

(C) Income from disposition of certain property.--For purposes of this section, the term "earned income" includes gains (other than any gain which is treated under any provision of this chapter as gain from the sale or exchange of a capital asset) and net earnings derived from the sale or other disposition of, the transfer of any interest in, or the licensing of the use of property (other than good will) by an individual whose personal efforts created such property.

(3) Owner-employee.--The term "owner-employee" means an employee who--

(A) owns the entire interest in an unincorporated trade or business, or

(B) in the case of a partnership, is a partner who owns more than 10 percent of either the capital interest or the profits interest in such partnership.

To the extent provided in regulations prescribed by the Secretary, such term also means an individual who has been an owner-employee within the meaning of the preceding sentence.

(4) Employer.--An individual who owns the entire interest in an unincorporated trade or business shall be treated as his own employer. A partnership shall be treated as the employer of each partner who is an employee within the meaning of paragraph (1).

(5) Contributions on behalf of owner-employees.--The term "contribution on behalf of an owner-employee" includes, except as the context otherwise requires, a contribution under a plan--

(A) by the employer for an owner-employee, and

(B) by an owner-employee as an employee.

(6) Special rule for certain fishermen.--For purposes of this subsection, the term "self-employed individual" includes an individual described in section 3121(b)(20) (relating to certain fishermen).

(d) Contribution limit on owner-employees.--A trust forming part of a pension or profit-sharing plan which provides contributions or benefits for employees some or all of whom are owner-employees shall constitute a qualified trust under this section only if, in addition to meeting the requirements of subsection (a), the plan provides that contributions on behalf of any owner-employee may be made only with respect to the earned income of such owner-employee which is derived from the trade or business with respect to which such plan is established.

[**(e) Repealed.** Pub.L. 98-369, Div. A, Title VII, § 713(d)(3), July 18, 1984, 98 Stat. 958]

(f) Certain custodial accounts and contracts.--For purposes of this title, a custodial account, an annuity contract, or a contract (other than a life, health or accident, property, casualty, or liability insurance contract) issued by an insurance company qualified to do business in a State shall be treated as a qualified trust under this section if--

(1) the custodial account or contract would, except for the fact that it is not a trust, constitute a qualified trust under this section, and

(2) in the case of a custodial account the assets thereof are held by a bank (as defined in section 408(n)) or another person who demonstrates, to the satisfaction of the Secretary, that the manner in which he will hold the assets will be consistent with the requirements of this section.

For purposes of this title, in the case of a custodial account or contract treated as a qualified trust under this section by reason of this subsection, the person holding the assets of such account or holding such contract shall be treated as the trustee thereof.

(g) Annuity defined.--For purposes of this section and sections 402, 403, and 404, the term "annuity" includes a face-amount certificate, as defined in section 2(a)(15) of the Investment Company Act of 1940 (15 U.S.C., sec. 80a-2); but does not include any contract or certificate issued after December 31, 1962, which is transferable, if any person other than the trustee of a trust described in section 401(a) which is exempt from tax under section 501(a) is the owner of such contract or certificate.

(h) Medical, etc., benefits for retired employees and their spouses and dependents.--Under regulations prescribed by the Secretary, and subject to the provisions of section 420, a pension or annuity plan may provide for the payment of benefits for sickness, accident, hospitalization, and medical expenses of retired employees, their spouses and their dependents, but only if--

(1) such benefits are subordinate to the retirement benefits provided by the plan,

(2) a separate account is established and maintained for such benefits,

(3) the employer's contributions to such separate account are reasonable and ascertainable,

(4) it is impossible, at any time prior to the satisfaction of all liabilities under the plan to provide such benefits, for any part of the corpus or income of such separate account to be (within the taxable year or thereafter) used for, or diverted to, any purpose other than the providing of such benefits,

(5) notwithstanding the provisions of subsection (a)(2), upon the satisfaction of all liabilities under the plan to provide such benefits, any amount remaining in such separate account must, under the terms of the plan, be returned to the employer, and

(6) in the case of an employee who is a key employee, a separate account is established and maintained for such benefits payable to such employee (and his spouse and dependents) and such benefits (to the extent attributable to plan years beginning after March 31, 1984, for which the employee is a key employee) are only payable to such employee (and his spouse and dependents) from such separate account.

For purposes of paragraph (6), the term "key employee" means any employee, who at any time during the plan year or any preceding plan year during which contributions were made on behalf of such employee, is or was a key employee as defined in section 416(i). In no event shall the requirements of paragraph (1) be treated as met if the aggregate actual contributions for medical benefits, when added to actual contributions for life insurance protection under the plan, exceed 25 percent of the total actual contributions to the plan (other than contributions to fund past service credits) after the date on which the account is established. For purposes of this subsection, the term "dependent" shall include any individual who is a child (as defined in section 152(f)(1)) of a retired employee who as of the end of the calendar year has not attained age 27.

(i) Certain union-negotiated pension plans.--In the case of a trust forming part of a pension plan which has been determined by the Secretary to constitute a qualified trust under subsection (a) and to be exempt from taxation under section 501(a) for a period beginning after contributions were first made to or for such trust, if it is shown to the satisfaction of the Secretary that--

(1) such trust was created pursuant to a collective bargaining agreement between employee representatives and one or more employers,

(2) any disbursements of contributions, made to or for such trust before the time as of which the Secretary determined that the trust constituted a qualified trust, substantially complied with the terms of the trust, and the plan of which the trust is a part, as subsequently qualified, and

(3) before the time as of which the Secretary determined that the trust constitutes a qualified trust, the contributions to or for such trust were not used in a manner which would jeopardize the interests of its beneficiaries, then such trust shall be considered as having constituted a qualified trust under subsection (a) and as having been exempt from taxation under section 501(a) for the period beginning on the date on which contributions were first made to or for such trust and ending on the date such trust first constituted (without regard to this subsection) a qualified trust under subsection (a).

[**(j) Repealed.** Pub.L. 97-248, Title II, § 238(b), Sept. 3, 1982, 96 Stat. 512]

(k) Cash or deferred arrangements.--

(1) General rule.--A profit-sharing or stock bonus plan, a pre-ERISA money purchase plan, or a rural cooperative plan shall not be considered as not satisfying the requirements of subsection (a) merely because the plan includes a qualified cash or deferred arrangement.

(2) Qualified cash or deferred arrangement.--A qualified cash or deferred arrangement is any arrangement which is part of a profit-sharing or stock bonus plan, a pre-ERISA money purchase plan, or a rural cooperative plan which meets the requirements of subsection (a)--

(A) under which a covered employee may elect to have the employer make payments as contributions to a trust under the plan on behalf of the employee, or to the employee directly in cash;

(B) under which amounts held by the trust which are attributable to employer contributions made pursuant to the employee's election--

(i) may not be distributable to participants or other beneficiaries earlier than--

(I) severance from employment, death, or disability,

(II) an event described in paragraph (10),

(III) in the case of a profit-sharing or stock bonus plan, the attainment of age 59 ½,

(IV) subject to the provisions of paragraph (14), upon hardship of the employee,

(V) in the case of a qualified reservist distribution (as defined in section 72(t)(2)(G)(iii)), the date on which a period referred to in subclause (III) of such section begins,

(VI) except as may be otherwise provided by regulations, with respect to amounts invested in a lifetime income investment (as defined in subsection (a)(38)(B)(ii)), the date that is 90 days prior to the date that such lifetime income investment may no longer be held as an investment option under the arrangement, or

(VII) as provided in section 401(a)(39),

(ii) will not be distributable merely by reason of the completion of a stated period of participation or the lapse of a fixed number of years, and

(iii) except as may be otherwise provided by regulations, in the case of amounts described in clause (i)(VI), will be distributed only in the form of a qualified distribution (as defined in subsection (a)(38)(B)(i)) or a qualified plan distribution annuity contract (as defined in subsection (a)(38)(B)(iv)),

(C) which provides that an employee's right to his accrued benefit derived from employer contributions made to the trust pursuant to his election is nonforfeitable, and

(D) which does not require, as a condition of participation in the arrangement, that an employee complete a period of service with the employer (or employers) maintaining the plan extending beyond the close of the earlier of--

(i) the period permitted under section 410(a)(1) (determined without regard to subparagraph (B)(i) thereof), or

(ii) subject to the provisions of paragraph (15), the first period of 2 consecutive 12-month periods during each of which the employee has at least 500 hours of service.

(3) Application of participation and discrimination standards.--

(A) A cash or deferred arrangement shall not be treated as a qualified cash or deferred arrangement unless--

(i) those employees eligible to benefit under the arrangement satisfy the provisions of section 410(b)(1), and

(ii) the actual deferral percentage for eligible highly compensated employees (as defined in paragraph (5)) for the plan year bears a relationship to the actual deferral percentage for all other eligible employees for the preceding plan year which meets either of the following tests:

(I) The actual deferral percentage for the group of eligible highly compensated employees is not more than the actual deferral percentage of all other eligible employees multiplied by 1.25.

(II) The excess of the actual deferral percentage for the group of eligible highly compensated employees over that of all other eligible employees is not more than 2 percentage points, and the actual deferral percentage for the group of eligible highly compensated employees is not more than the actual deferral percentage of all other eligible employees multiplied by 2.

If 2 or more plans which include cash or deferred arrangements are considered as 1 plan for purposes of section 401(a)(4) or 410(b), the cash or deferred arrangements included in such plans shall be treated as 1 arrangement for purposes of this subparagraph.

If any highly compensated employee is a participant under 2 or more cash or deferred arrangements of the employer, for purposes of determining the deferral percentage with respect to such employee, all such cash or deferred arrangements shall be treated as 1 cash or deferred arrangement. An arrangement may apply clause (ii) by using the plan year rather than the preceding plan year if the employer so elects, except that if such an election is made, it may not be changed except as provided by the Secretary.

(B) For purposes of subparagraph (A), the actual deferral percentage for a specified group of employees for a plan year shall be the average of the ratios (calculated separately for each employee in such group) of--

(i) the amount of employer contributions actually paid over to the trust on behalf of each such employee for such plan year, to

(ii) the employee's compensation for such plan year.

(C) A cash or deferred arrangement shall be treated as meeting the requirements of subsection (a)(4) with respect to contributions if the requirements of subparagraph (A)(ii) are met.

(D) For purposes of subparagraph (B), the employer contributions on behalf of any employee--

(i) shall include any employer contributions made pursuant to the employee's election under paragraph (2), and

(ii) under such rules as the Secretary may prescribe, may, at the election of the employer, include--

(I) matching contributions (as defined in 401(m)(4)(A)) which meet the requirements of paragraph (2)(B) and (C), and

(II) qualified nonelective contributions (within the meaning of section 401(m)(4)(C)).

(E) For purposes of this paragraph, in the case of the first plan year of any plan (other than a successor plan), the amount taken into account as the actual deferral percentage of nonhighly compensated employees for the preceding plan year shall be--

(i) 3 percent, or

(ii) if the employer makes an election under this subclause, the actual deferral percentage of nonhighly compensated employees determined for such first plan year.

(F) Special rule for early participation.--If an employer elects to apply section 410(b)(4)(B) in determining whether a cash or deferred arrangement meets the requirements of subparagraph (A)(i), the employer may, in determining whether the arrangement meets the requirements of subparagraph (A)(ii), exclude from consideration all eligible employees (other than highly compensated employees) who have not met the minimum age and service requirements of section 410(a)(1)(A).

(G) Governmental plan.--A governmental plan (within the meaning of section 414(d)) shall be treated as meeting the requirements of this paragraph.

(4) Other requirements.--

(A) Benefits (other than matching contributions) must not be contingent on election to defer.--A cash or deferred arrangement of any employer shall not be treated as a qualified cash or deferred arrangement if any other benefit (other than a de minimis financial incentive (not paid for with plan assets) provided to employees who elect to have the employer make contributions under the arrangement in lieu of receiving cash) is conditioned (directly or indirectly) on the employee electing to have the employer make or not make contributions under the arrangement in lieu of receiving cash. The preceding sentence shall not apply to any matching contribution (as defined in section 401(m)) made by reason of such an election.

(B) Eligibility of State and local governments and tax-exempt organizations.--

(i) Tax-exempts eligible.--Except as provided in clause (ii), any organization exempt from tax under this subtitle may include a qualified cash or deferred arrangement as part of a plan maintained by it.

(ii) Governments ineligible.--A cash or deferred arrangement shall not be treated as a qualified cash or deferred arrangement if it is part of a plan maintained by a State or local government or political subdivision thereof, or any agency or instrumentality thereof. This clause shall not apply to a rural cooperative plan or to a plan of an employer described in clause (iii).

(iii) Treatment of Indian tribal governments.-- An employer which is an Indian tribal government (as defined in section 7701(a)(40)), a subdivision of an Indian tribal government (determined in accordance with section 7871(d)), an agency or instrumentality of an Indian tribal government or subdivision thereof, or a corporation chartered under Federal, State, or tribal law which is owned in whole or in part by any of the foregoing may include a qualified cash or deferred arrangement as part of a plan maintained by the employer.

(C) Coordination with other plans.--Except as provided in section 401(m), any employer contribution made pursuant to an employee's election under a qualified cash or deferred arrangement shall not be taken into account for purposes of determining whether any other plan meets the requirements of section 401(a) or 410(b). This subparagraph shall not apply for purposes of determining whether a plan meets the average benefit requirement of section 410(b)(2)(A)(ii).

(5) Highly compensated employee.--For purposes of this subsection, the term "highly compensated employee" has the meaning given such term by section 414(q).

(6) Pre-ERISA money purchase plan.--For purposes of this subsection, the term "pre-ERISA money purchase plan" means a pension plan--

(A) which is a defined contribution plan (as defined in section 414(i)),

(B) which was in existence on June 27, 1974, and which, on such date, included a salary reduction arrangement, and

(C) under which neither the employee contributions nor the employer contributions may exceed the levels provided for by the contribution formula in effect under the plan on such date.

(7) Rural cooperative plan.--For purposes of this subsection--

(A) In general.--The term "rural cooperative plan" means any pension plan--

(i) which is a defined contribution plan (as defined in section 414(i)), and

(ii) which is established and maintained by a rural cooperative.

(B) Rural cooperative defined.--For purposes of subparagraph (A), the term "rural cooperative" means--

(i) any organization which--

(I) is engaged primarily in providing electric service on a mutual or cooperative basis, or

(II) is engaged primarily in providing electric service to the public in its area of service and which is exempt from tax under this subtitle or which is a State or local government (or an agency or instrumentality thereof), other than a municipality (or an agency or instrumentality thereof),

(ii) any organization described in paragraph (4) or (6) of section 501(c) and at least 80 percent of the members of which are organizations described in clause (i),

(iii) a cooperative telephone company described in section 501(c)(12),

(iv) any organization which--

(I) is a mutual irrigation or ditch company described in section 501(c)(12) (without regard to the 85 percent requirement thereof), or

(II) is a district organized under the laws of a State as a municipal corporation for the purpose of irrigation, water conservation, or drainage, and

(v) an organization which is a national association of organizations described in clause (i), (ii),,[2] (iii), or (iv).

(C) Special rule for certain distributions.--A rural cooperative plan which includes a qualified

2. So in original.

cash or deferred arrangement shall not be treated as violating the requirements of section 401(a) or of paragraph (2) merely by reason of a hardship distribution or a distribution to a participant after attainment of age 59 ½. For purposes of this section, the term "hardship distribution" means a distribution described in paragraph (2)(B)(i)(IV) (without regard to the limitation of its application to profit-sharing or stock bonus plans).

(8) Arrangement not disqualified if excess contributions distributed.--

(A) In general.--A cash or deferred arrangement shall not be treated as failing to meet the requirements of clause (ii) of paragraph (3)(A) for any plan year if, before the close of the following plan year--

(i) the amount of the excess contributions for such plan year (and any income allocable to such contributions through the end of such year) is distributed, or

(ii) to the extent provided in regulations, the employee elects to treat the amount of the excess contributions as an amount distributed to the employee and then contributed by the employee to the plan.

Any distribution of excess contributions (and income) may be made without regard to any other provision of law.

(B) Excess contributions.--For purposes of subparagraph (A), the term "excess contributions" means, with respect to any plan year, the excess of--

(i) the aggregate amount of employer contributions actually paid over to the trust on behalf of highly compensated employees for such plan year, over

(ii) the maximum amount of such contributions permitted under the limitations of clause (ii) of paragraph (3)(A) (determined by reducing contributions made on behalf of highly compensated employees in order of the actual deferral percentages beginning with the highest of such percentages).

(C) Method of distributing excess contributions.--Any distribution of the excess contributions for any plan year shall be made to highly compensated employees on the basis of the amount of contributions by, or on behalf of, each of such employees.

(D) Additional tax under section 72(t) not to apply.--No tax shall be imposed under section 72(t) on any amount required to be distributed under this paragraph.

(E) Treatment of matching contributions forfeited by reason of excess deferral or contribution or permissible withdrawal.--For purposes of paragraph (2)(C), a matching contribution (within the meaning of subsection (m)) shall not be treated as forfeitable merely because such contribution is forfeitable if the contribution to which the matching contribution relates is treated as an excess contribution under subparagraph (B), an excess deferral under section 402(g) (2)(A), a permissible withdrawal under section 414(w), or an excess aggregate contribution under section 401(m)(6)(B).

(F) Cross reference.--

For excise tax on certain excess contributions, see section 4979.

(9) Compensation.--For purposes of this subsection, the term "compensation" has the meaning given such term by section 414(s).

(10) Distributions upon termination of plan.--

(A) In general.--An event described in this subparagraph is the termination of the plan without establishment or maintenance of another defined contribution plan (other than an employee stock ownership plan as defined in section 4975(e)(7)).

(B) Distributions must be lump sum distributions.--

(i) In general.--A termination shall not be treated as described in subparagraph (A) with respect to any employee unless the employee receives a lump sum distribution by reason of the termination.

(ii) Lump-sum distribution.--For purposes of this subparagraph, the term "lump-sum distribution" has the meaning given such term by section 402(e)(4)(D) (without regard to subclauses (I), (II), (III), and (IV) of clause (i) thereof). Such term includes a distribution of an annuity contract from--

(I) a trust which forms a part of a plan described in section 401(a) and which is exempt from tax under section 501(a), or

(II) an annuity plan described in section 403(a).

(11) Adoption of simple plan to meet nondiscrimination tests.--

(A) In general.--A cash or deferred arrangement maintained by an eligible employer shall be treated as meeting the requirements of paragraph (3)(A)(ii) if such arrangement meets--

(i) the contribution requirements of subparagraph (B),

(ii) the exclusive plan requirements of subparagraph (C), and

(iii) the vesting requirements of section 408(p)(3).

(B) Contribution requirements.--

(i) In general.--The requirements of this subparagraph are met if, under the arrangement--

(I) an employee may elect to have the employer make elective contributions for the year on behalf of the employee to a trust under the plan in an amount which is expressed as a percentage of compensation of the employee but which in no event exceeds the amount in effect under section 408(p)(2)(A)(ii) (after the application of any election under section 408(p)(2)(E)(i)(II)),

(II) the employer is required to make a matching contribution to the trust for the year in an amount equal to so much of the amount the employee elects under subclause (I) as does not exceed 3 percent of compensation for the year,

(III) the employer may make nonelective contributions of a uniform percentage (up to 10 percent) of compensation, but not to exceed the amount in effect under section 408(p)(2)(A)(iv) in any year, for each employee who is eligible to participate in the arrangement and who has at least $5,000 of compensation from the employer for the year, and

(IV) no other contributions may be made other than contributions described in subclause (I), (II), or (III).

(ii) Employer may elect 2-percent nonelective contribution.--An employer shall be treated as meeting the requirements of clause (i)(II) for any year if, in lieu of the contributions described in such clause, the employer elects (pursuant to the terms of the arrangement) to make nonelective contributions of 2 percent of compensation for each employee who is eligible to participate in the arrangement and who has at least $5,000 of compensation from the employer for the year. If an employer makes an election under this subparagraph for any year, the employer shall notify employees of such election within a reasonable period of time before the 60th day before the beginning of such year.

(iii) Administrative requirements.--

(I) In general.--Rules similar to the rules of subparagraphs (B) and (C) of section 408(p)(5) shall apply for purposes of this subparagraph.

(II) Notice of election period.--The requirements of this subparagraph shall not be treated as met with respect to any year unless the employer notifies each employee eligible to participate, within a reasonable period of time before the 60th day before the beginning of such year (and, for the first year the employee is so eligible, the 60th day before the first day such employee is so eligible), of the rules similar to the rules of section 408(p)(5)(C) which apply by reason of subclause (I).

(C) Exclusive plan requirement.--The requirements of this subparagraph are met for any year to which this paragraph applies if no contributions were made, or benefits were accrued, for services during such year under any qualified plan of the employer on behalf of any employee eligible to participate in the cash or deferred arrangement, other than contributions described in subparagraph (B).

(D) Definitions and special rule.--

(i) Definitions.--For purposes of this paragraph, any term used in this paragraph which is also used in section 408(p) shall have the meaning given such term by such section.

(ii) Coordination with top-heavy rules.--A plan meeting the requirements of this paragraph for any year shall not be treated as a top-heavy plan under section 416 for such year if such plan allows only contributions required under this paragraph.

(E) Employers electing increased contributions.--In the case of an employer which applies an election under section 408(p)(2)(E)(i)(II) for purposes of the contribution requirements of this paragraph under subparagraph (B)(i)(I), rules similar to the rules of subparagraphs (B)(iii), (C)(ii)(IV), and (G) of section 408(p)(2) shall apply for purposes of subparagraphs (B)(i)(II) and (B)(ii) of this paragraph.

(12) Alternative methods of meeting nondiscrimination requirements.--

(A) In general.--A cash or deferred arrangement shall be treated as meeting the requirements of paragraph (3)(A)(ii) if such arrangement--

(i) meets the contribution requirements of subparagraph (B) and the notice requirements of subparagraph (D), or

(ii) meets the contribution requirements of subparagraph (C).

(B) Matching contributions.--

(i) In general.--The requirements of this subparagraph are met if, under the arrangement, the employer makes matching contributions on behalf of each employee who is not a highly compensated employee in an amount equal to--

(I) 100 percent of the elective contributions of the employee to the extent such elective contributions do not exceed 3 percent of the employee's compensation, and

(II) 50 percent of the elective contributions of the employee to the extent that such elective contributions exceed 3 percent but do not exceed 5 percent of the employee's compensation.

(ii) Rate for highly compensated employees.--The requirements of this subparagraph are not met if, under the arrangement, the rate of matching contribution with respect to any elective contribution of a highly compensated employee at any rate of elective contribution is greater than that with respect to an employee who is not a highly compensated employee.

(iii) Alternative plan designs.--If the rate of any matching contribution with respect to any rate of elective contribution is not equal to the percentage required under clause (i), an arrangement shall not be treated as failing to meet the requirements of clause (i) if--

(I) the rate of an employer's matching contribution does not increase as an employee's rate of elective contributions increase, and

(II) the aggregate amount of matching contributions at such rate of elective contribution is at least equal to the aggregate amount of matching contributions which would be made if matching contributions were made on the basis of the percentages described in clause (i).

(C) Nonelective contributions.--The requirements of this subparagraph are met if, under the arrangement, the employer is required, without regard to whether the employee makes an elective contribution or employee contribution, to make a contribution to a defined contribution plan on behalf of each employee who is not a highly compensated employee and who is eligible to participate in the arrangement in an amount equal to at least 3 percent of the employee's compensation.

(D) Notice requirement.--An arrangement meets the requirements of this paragraph if, under the arrangement, each employee eligible to participate is, within a reasonable period before any year, given written notice of the employee's rights and obligations under the arrangement which--

(i) is sufficiently accurate and comprehensive to apprise the employee of such rights and obligations, and

(ii) is written in a manner calculated to be understood by the average employee eligible to participate.

(E) Other requirements.--

(i) Withdrawal and vesting restrictions.--An arrangement shall not be treated as meeting the requirements of subparagraph (B) or (C) of this paragraph unless the requirements of subparagraphs (B) and (C) of paragraph (2) are met with respect to all employer contributions (including matching contributions) taken into account in determining whether the requirements of subparagraphs (B) and (C) of this paragraph are met.

(ii) Social security and similar contributions not taken into account.--An arrangement shall not be treated as meeting the requirements of subparagraph (B) or (C) unless such requirements are met without regard to subsection (l), and, for purposes of subsection (l), employer contributions under subparagraph (B) or (C) shall not be taken into account.

(F) Timing of plan amendment for employer making nonelective contributions.--

(i) In general.--Except as provided in clause (ii), a plan may be amended after the beginning of a plan year to provide that the requirements of subparagraph (C) shall apply to the arrangement for the plan year, but only if the amendment is adopted--

(I) at any time before the 30th day before the close of the plan year, or

(II) at any time before the last day under paragraph (8)(A) for distributing excess contributions for the plan year.

(ii) Exception where plan provided for matching contributions.--Clause (i) shall not apply to any plan year if the plan provided at any time during the plan year that the requirements of subparagraph (B) or paragraph (13)(D)(i)(I) applied to the plan year.

(iii) 4-percent contribution requirement.--Clause (i)(II) shall not apply to an arrangement unless the amount of the contributions described in subparagraph (C) which the employer is required to make under the arrangement for the plan year with respect to any employee is an amount equal to at least 4 percent of the employee's compensation.

(G) Other plans.--An arrangement shall be treated as meeting the contribution requirements under subparagraph (B) or (C) if any other plan maintained by the employer meets such requirements with respect to employees eligible under the arrangement.

Appendix E

(13) Alternative method for automatic contribution arrangements to meet nondiscrimination requirements.--

(A) In general.--A qualified automatic contribution arrangement shall be treated as meeting the requirements of paragraph (3)(A)(ii).

(B) Qualified automatic contribution arrangement.--For purposes of this paragraph, the term "qualified automatic contribution arrangement" means a cash or deferred arrangement--

(i) which is described in subparagraph (D)(i)(I) and meets the applicable requirements of subparagraphs (C) through (E), or

(ii) which is described in subparagraph (D)(i)(II) and meets the applicable requirements of subparagraphs (C) and (D).

(C) Automatic deferral.--

(i) In general.--The requirements of this subparagraph are met if, under the arrangement, each employee eligible to participate in the arrangement is treated as having elected to have the employer make elective contributions in an amount equal to a qualified percentage of compensation.

(ii) Election out.--The election treated as having been made under clause (i) shall cease to apply with respect to any employee if such employee makes an affirmative election--

(I) to not have such contributions made, or

(II) to make elective contributions at a level specified in such affirmative election.

(iii) Qualified percentage.--For purposes of this subparagraph, the term "qualified percentage" means, with respect to any employee, any percentage determined under the arrangement if such percentage is applied uniformly, does not exceed 15 percent (10 percent during the period described in subclause (I)), and is at least--

(I) 3 percent during the period ending on the last day of the first plan year which begins after the date on which the first elective contribution described in clause (i) is made with respect to such employee,

(II) 4 percent during the first plan year following the plan year described in subclause (I),

(III) 5 percent during the second plan year following the plan year described in subclause (I), and

(IV) 6 percent during any subsequent plan year.

(iv) Automatic deferral for current employees not required.--Clause (i) may be applied without taking into account any employee who--

(I) was eligible to participate in the arrangement (or a predecessor arrangement) immediately before the date on which such arrangement becomes a qualified automatic contribution arrangement (determined after application of this clause), and

(II) had an election in effect on such date either to participate in the arrangement or to not participate in the arrangement.

(D) Matching or nonelective contributions.--

(i) In general.--The requirements of this subparagraph are met if, under the arrangement, the employer--

(I) makes matching contributions on behalf of each employee who is not a highly compensated employee in an amount equal to the sum of 100 percent of the elective contributions of the employee to the extent that such contributions do not exceed 1 percent of compensation plus 50 percent of so much of such contributions as exceed

1 percent but do not exceed 6 percent of compensation, or

(II) is required, without regard to whether the employee makes an elective contribution or employee contribution, to make a contribution to a defined contribution plan on behalf of each employee who is not a highly compensated employee and who is eligible to participate in the arrangement in an amount equal to at least 3 percent of the employee's compensation.

(ii) Application of rules for matching contributions.--The rules of clauses (ii) and (iii) of paragraph (12)(B) shall apply for purposes of clause (i)(I).

(iii) Withdrawal and vesting restrictions.--An arrangement shall not be treated as meeting the requirements of clause (i) unless, with respect to employer contributions (including matching contributions) taken into account in determining whether the requirements of clause (i) are met--

(I) any employee who has completed at least 2 years of service (within the meaning of section 411(a)) has a nonforfeitable right to 100 percent of the employee's accrued benefit derived from such employer contributions, and

(II) the requirements of subparagraph (B) of paragraph (2) are met with respect to all such employer contributions.

(iv) Application of certain other rules.--The rules of subparagraphs (E)(ii) and (G) of paragraph (12) shall apply for purposes of subclauses (I) and (II) of clause (i).

(E) Notice requirements.--

(i) In general.--The requirements of this subparagraph are met if, within a reasonable period before each plan year, each employee eligible to participate in the arrangement for such year receives written notice of the employee's rights and obligations under the arrangement which--

(I) is sufficiently accurate and comprehensive to apprise the employee of such rights and obligations, and

(II) is written in a manner calculated to be understood by the average employee to whom the arrangement applies.

(ii) Timing and content requirements.--A notice shall not be treated as meeting the requirements of clause (i) with respect to an employee unless--

(I) the notice explains the employee's right under the arrangement to elect not to have elective contributions made on the employee's behalf (or to elect to have such contributions made at a different percentage),

(II) in the case of an arrangement under which the employee may elect among 2 or more investment options, the notice explains how contributions made under the arrangement will be invested in the absence of any investment election by the employee, and

(III) the employee has a reasonable period of time after receipt of the notice described in subclauses (I) and (II) and before the first elective contribution is made to make either such election.

(F) Timing of plan amendment for employer making nonelective contributions.--

(i) In general.--Except as provided in clause (ii), a plan may be amended after the beginning of a plan year to provide that the requirements of subparagraph (D)(i)(II) shall apply to the arrangement for the plan year, but only if the amendment is adopted--

(I) at any time before the 30th day before the close of the plan year, or

(II) at any time before the last day under paragraph (8)(A) for distributing excess contributions for the plan year.

(ii) Exception where plan provided for matching contributions.--Clause (i) shall not apply to any plan year if the plan provided at any time during the plan year that the requirements of subparagraph (D)(i)(I) or paragraph (12)(B) applied to the plan year.

(iii) 4-percent contribution requirement.--Clause (i)(II) shall not apply to an arrangement unless the amount of the contributions described in subparagraph (D)(i)(II) which the employer is required to make under the arrangement for the plan year with respect to any employee is an amount equal to at least 4 percent of the employee's compensation.

(14) Special rules relating to hardship withdrawals.--For purposes of paragraph (2)(B)(i)(IV)--

(A) Amounts which may be withdrawn.--The following amounts may be distributed upon hardship of the employee:

(i) Contributions to a profit-sharing or stock bonus plan to which section 402(e)(3) applies.

(ii) Qualified nonelective contributions (as defined in subsection (m)(4)(C)).

(iii) Qualified matching contributions described in paragraph (3)(D)(ii)(I).

(iv) Earnings on any contributions described in clause (i), (ii), or (iii).

(B) No requirement to take available loan.--A distribution shall not be treated as failing to be made upon the hardship of an employee solely because the employee does not take any available loan under the plan.

(C) Employee certification.--In determining whether a distribution is upon the hardship of an employee, the administrator of the plan may rely on a written certification by the employee that the distribution is--

(i) on account of a financial need of a type which is deemed in regulations prescribed by the Secretary to be an immediate and heavy financial need, and

(ii) not in excess of the amount required to satisfy such financial need, and

that the employee has no alternative means reasonably available to satisfy such financial need. The Secretary may provide by regulations for exceptions to the rule of the preceding sentence in cases where the plan administrator has actual knowledge to the contrary of the employee's certification, and for procedures for addressing cases of employee misrepresentation.

(15) Special rules for participation requirement for long-term, part-time workers.--For purposes of paragraph (2)(D) (ii)--

(A) Age requirement must be met.--Paragraph (2)(D)(ii) shall not apply to an employee unless the employee has met the requirement of section 410(a)(1)(A)(i) by the close of the last of the 12-month periods described in such paragraph.

(B) Nondiscrimination and top-heavy rules not to apply.--

(i) Nondiscrimination rules.--In the case of employees who are eligible to participate in the arrangement solely by reason of paragraph (2)(D)(ii), or by reason of such paragraph and section 202(c)(1)(B) of the Employee Retirement Income Security Act of 1974--

(I) notwithstanding subsection (a)(4), an employer shall not be required to make nonelective or matching contributions on behalf of such employees even if such contributions are made on behalf of other employees eligible to participate in the arrangement, and

(II) an employer may elect to exclude such employees from the application of subsection (a)(4), paragraphs (3), (12), and (13), paragraphs (2), (11), and (12) of subsection (m), and section 410(b).

(ii) Top-heavy rules.--An employer may elect to exclude all employees who are eligible to participate in a plan maintained by the employer solely by reason of paragraph (2)(D)(ii) from the application of the vesting and benefit requirements under subsections (b) and (c) of section 416.

(iii) Vesting.--For purposes of determining whether an employee described in clause (i) has a nonforfeitable right to employer contributions (other than contributions described in paragraph (3)(D)(i)) under the plan, each 12-month period for which the employee has at least 500 hours of service shall be treated as a year of service, and section 411(a)(6) shall be applied by substituting "at least 500 hours of service" for "more than 500 hours of service" in subparagraph (A) thereof.

(iv) Employees who become full-time employees.--This subparagraph (other than clause (iii)) shall cease to apply to any employee as of the first plan year beginning after the plan year in which the employee meets the requirements of paragraph (2)(D) without regard to paragraph (2)(D)(ii).

(C) Exception for employees under collectively bargained plans, etc.--Paragraph (2)(D)(ii) shall not apply to employees described in section 410(b)(3).

(D) Special rules.--

(i) Time of participation.--The rules of section 410(a)(4) shall apply to an employee eligible to participate in an arrangement solely by reason of paragraph (2)(D)(ii).

(ii) 12-month periods.--12-month periods shall be determined in the same manner as under the last sentence of section 410(a)(3)(A).

(16) Starter 401(k) deferral-only plans for employers with no retirement plan.--

(A) In general.--A starter 401(k) deferral-only arrangement maintained by an eligible employer shall be treated as meeting the requirements of paragraph (3)(A)(ii).

(B) Starter 401(k) deferral-only arrangement.--For purposes of this paragraph, the term "starter 401(k) deferral-only arrangement" means any cash or deferred arrangement which meets--

(i) the automatic deferral requirements of subparagraph (C),

(ii) the contribution limitations of subparagraph (D), and

(iii) the requirements of subparagraph (E) of paragraph (13).

(C) Automatic deferral.--

(i) In general.--The requirements of this subparagraph are met if, under the arrangement, each eligible employee is treated as having elected to have the employer make elective contributions in an amount equal to a qualified percentage of compensation.

(ii) Election out.--The election treated as having been made under clause (i) shall cease to apply with respect to any employee if such employee makes an affirmative election--

(I) to not have such contributions made, or

(II) to make elective contributions at a level specified in such affirmative election.

(iii) Qualified percentage.--For purposes of this subparagraph, the term "qualified percentage" means, with respect to any employee, any percentage determined under the arrangement if such percentage is applied uniformly and is not less than 3 or more than 15 percent.

(D) Contribution limitations.--

(i) In general.--The requirements of this subparagraph are met if, under the arrangement--

(I) the only contributions which may be made are elective contributions of employees described in subparagraph (C), and

(II) the aggregate amount of such elective contributions which may be made with respect to any employee for any calendar year shall not exceed $6,000.

(ii) Cost-of-living adjustment.--In the case of any calendar year beginning after December 31, 2024, the $6,000 amount under clause (i) shall be adjusted in the same manner as under section 402(g)(4), except that "2023" shall be substituted for "2005".

(iii) Catch-up contributions for individuals age 50 or over.--In the case of an individual who has attained the age of 50 before the close of the taxable year, the limitation under clause (i)(II) shall be increased by the applicable amount determined under section 219(b)(5)(B)(ii) (after the application of section 219(b)(5)(C)(iii)).

(E) Eligible employer.--For purposes of this paragraph--

(i) In general.--The term “eligible employer” means any employer if the employer does not maintain a qualified plan with respect to which contributions are made, or benefits are accrued, for service in the year for which the determination is being made. If only individuals other than employees described in subparagraph (A) of section 410(b)(3) are eligible to participate in such arrangement, then the preceding sentence shall be applied without regard to any qualified plan in which only employees described in such subparagraph are eligible to participate.

(ii) Relief for acquisitions, etc.--Rules similar to the rules of section 408(p)(10) shall apply for purposes of clause (i).

(iii) Qualified plan.--The term “qualified plan” means a plan, contract, pension, account, or trust described in subparagraph (A) or (B) of paragraph (5) of section 219(g) (determined without regard to the last sentence of such paragraph (5)).

(F) Eligible employee.--For purposes of this paragraph--

(i) In general.--The term “eligible employee” means any employee of the employer who meets the minimum age and service conditions described in section 410(a)(1).

(ii) Exclusions.--The employer may elect to exclude from such definition any employee described in paragraph (3) or(4) of section 410(b).

(l) Permitted disparity in plan contributions or benefits.--

(1) In general.--The requirements of this subsection are met with respect to a plan if--

(A) in the case of a defined contribution plan, the requirements of paragraph (2) are met, and

(B) in the case of a defined benefit plan, the requirements of paragraph (3) are met.

(2) Defined contribution plan.--

(A) In general.--A defined contribution plan meets the requirements of this paragraph if the excess contribution percentage does not exceed the base contribution percentage by more than the lesser of--

(i) the base contribution percentage, or

(ii) the greater of--

(I) 5.7 percentage points, or

(II) the percentage equal to the portion of the rate of tax under section 3111(a) (in effect as of the beginning of the year) which is attributable to old-age insurance.

(B) Contribution percentages.--For purposes of this paragraph--

(i) Excess contribution percentage.--The term "excess contribution percentage" means the percentage of compensation which is contributed by the employer under the plan with respect to that portion of each participant's compensation in excess of the integration level.

(ii) Base contribution percentage.--The term "base contribution percentage" means the percentage of compensation contributed by the employer under the plan with respect to that portion of each participant's compensation not in excess of the integration level.

(3) Defined benefit plan.--A defined benefit plan meets the requirements of this paragraph if--

(A) Excess plans.--

(i) In general.--In the case of a plan other than an offset plan--

(I) the excess benefit percentage does not exceed the base benefit percentage by more than the maximum excess allowance,

(II) any optional form of benefit, preretirement benefit, actuarial factor, or other benefit or feature provided with respect to compensation in excess of the integration level is provided with respect to compensation not in excess of such level, and

(III) benefits are based on average annual compensation.

(ii) Benefit percentages.--For purposes of this subparagraph, the excess and base benefit percentages shall be computed in the same manner as the excess and base contribution percentages under paragraph (2)(B), except that such determination shall be made on the basis of benefits attributable to employer contributions rather than contributions.

(B) Offset plans.--In the case of an offset plan, the plan provides that--

(i) a participant's accrued benefit attributable to employer contributions (within the meaning of section 411(c)(1)) may not be reduced (by reason of the offset) by more than the maximum offset allowance, and

(ii) benefits are based on average annual compensation.

(4) Definitions relating to paragraph (3).--For purposes of paragraph (3)--

(A) Maximum excess allowance.--The maximum excess allowance is equal to--

(i) in the case of benefits attributable to any year of service with the employer taken into account under the plan, ¾ of a percentage point, and

(ii) in the case of total benefits, ¾ of a percentage point, multiplied by the participant's years of service (not in excess of 35) with the employer taken into account under the plan.

In no event shall the maximum excess allowance exceed the base benefit percentage.

(B) Maximum offset allowance.--The maximum offset allowance is equal to--

(i) in the case of benefits attributable to any year of service with the employer taken into account under the plan, ¾ percent of the participant's final average compensation, and

(ii) in the case of total benefits, ¾ percent of the participant's final average compensation, multiplied by the participant's years of service (not in excess of 35) with the employer taken into account under the plan.

In no event shall the maximum offset allowance exceed 50 percent of the benefit which would have accrued without regard to the offset reduction.

(C) Reductions.--

(i) In general.--The Secretary shall prescribe regulations requiring the reduction of the ¾ percentage factor under subparagraph (A) or (B)--

(I) in the case of a plan other than an offset plan which has an integration level in excess of covered compensation, or

(II) with respect to any participant in an offset plan who has final average compensation in excess of covered compensation.

(ii) Basis of reductions.--Any reductions under clause (i) shall be based on the percentages of compensation replaced by the employer-derived portions of primary insurance amounts under the Social Security Act for participants with compensation in excess of covered compensation.

(D) Offset plan.--The term "offset plan" means any plan with respect to which the benefit attributable to employer contributions for each participant is reduced by an amount specified in the plan.

(5) Other definitions and special rules.--For purposes of this subsection--

(A) Integration level.--

(i) In general.--The term "integration level" means the amount of compensation specified under the plan (by dollar amount or formula) at or below which the rate at which contributions or benefits are provided (expressed as a percentage) is less than such rate above such amount.

(ii) Limitation.--The integration level for any year may not exceed the contribution and benefit base in effect under section 230 of the Social Security Act for such year.

(iii) Level to apply to all participants.--A plan's integration level shall apply with respect to all participants in the plan.

(iv) Multiple integration levels.--Under rules prescribed by the Secretary, a defined benefit plan may specify multiple integration levels.

(B) Compensation.--The term "compensation" has the meaning given such term by section 414(s).

(C) Average annual compensation.--The term "average annual compensation" means the participant's highest average annual compensation for--

(i) any period of at least 3 consecutive years, or

(ii) if shorter, the participant's full period of service.

(D) Final average compensation.--

(i) In general.--The term "final average compensation" means the participant's average annual compensation for--

(I) the 3-consecutive year period ending with the current year, or

(II) if shorter, the participant's full period of service.

(ii) Limitation.--A participant's final average compensation shall be determined by not taking into account in any year compensation in excess of the contribution and benefit base in effect under section 230 of the Social Security Act for such year.

(E) Covered compensation.--

(i) In general.--The term "covered compensation" means, with respect to an employee, the average of the contribution and benefit bases in effect under section 230 of the Social Security Act for each year in the 35-year period ending with the year in which the employee attains the social security retirement age.

(ii) Computation for any year.--For purposes of clause (i), the determination for any year preceding the year in which the employee attains the social security retirement age shall be made by assuming that there is no increase in the bases described in clause (i) after the determination year and before the employee attains the social security retirement age.

(iii) Social security retirement age.--For purposes of this subparagraph, the term "social security retirement age" has the meaning given such term by section 415(b)(8).

(F) Regulations.--The Secretary shall prescribe such regulations as are necessary or appropriate to carry out the purposes of this subsection, including--

(i) in the case of a defined benefit plan which provides for unreduced benefits commencing before the social security retirement age (as defined in section 415(b)(8)), rules providing for the reduction of the maximum excess allowance and the maximum offset allowance, and

(ii) in the case of an employee covered by 2 or more plans of the employer which fail to meet the requirements of subsection (a)(4) (without regard to this subsection), rules preventing the multiple use of the disparity permitted under this subsection with respect to any employee.

For purposes of clause (i), unreduced benefits shall not include benefits for disability (within the meaning of section 223(d) of the Social Security Act).

(6) Special rule for plan maintained by railroads.--In determining whether a plan which includes employees of a railroad employer who are entitled to benefits under the Railroad Retirement Act of 1974 meets the requirements of this subsection, rules similar to the rules set forth in this subsection shall apply. Such rules shall take into account the employer-derived portion of the employees' tier 2 railroad retirement benefits and any supplemental annuity under the Railroad Retirement Act of 1974.

(m) Nondiscrimination test for matching contributions and employee contributions.--

(1) In general.--A defined contribution plan shall be treated as meeting the requirements of subsection (a)(4) with respect to the amount of any matching contribution or employee contribution for any plan year only if the contribution percentage requirement of paragraph (2) of this subsection is met for such plan year.

(2) Requirements.--

(A) Contribution percentage requirement.--A plan meets the contribution percentage requirement of this paragraph for any plan year only if the contribution percentage for eligible highly compensated employees for such plan year does not exceed the greater of--

> **(i)** 125 percent of such percentage for all other eligible employees for the preceding plan year, or
>
> **(ii)** the lesser of 200 percent of such percentage for all other eligible employees for the preceding plan year, or such percentage for all other eligible employees for the preceding plan year plus 2 percentage points.

This subparagraph may be applied by using the plan year rather than the preceding plan year if the employer so elects, except that if such an election is made, it may not be changed except as provided by the Secretary.

(B) Multiple plans treated as a single plan.--If two or more plans of an employer to which matching contributions, employee contributions, or elective deferrals are made are treated as one plan for purposes of section 410(b), such plans shall be treated as one plan for purposes of this subsection. If a highly compensated employee participates in two or more plans of an employer to which contributions to which this subsection applies are made, all such contributions shall be aggregated for purposes of this subsection.

(3) Contribution percentage.--For purposes of paragraph (2), the contribution percentage for a specified group of employees for a plan year shall be the average of the ratios (calculated separately for each employee in such group) of--

(A) the sum of the matching contributions and employee contributions paid under the plan on behalf of each such employee for such plan year, to

(B) the employee's compensation (within the meaning of section 414(s)) for such plan year.

Under regulations, an employer may elect to take into account (in computing the contribution percentage) elective deferrals and qualified nonelective contributions under the plan or any other plan of the employer. If matching contributions are taken into account for purposes of subsection (k)(3)(A)(ii) for any plan year, such contributions shall not be taken into account under subparagraph (A) for such year. Rules similar to the rules of subsection (k)(3)(E) shall apply for purposes of this subsection.

(4) Definitions.--For purposes of this subsection--

(A) Matching contribution.--The term "matching contribution" means--

(i) any employer contribution made to a defined contribution plan on behalf of an employee on account of an employee contribution made by such employee,

(ii) any employer contribution made to a defined contribution plan on behalf of an employee on account of an employee's elective deferral, and

(iii) subject to the requirements of paragraph (14), any employer contribution made to a defined contribution plan on behalf of an employee on account of a qualified student loan payment.

(B) Elective deferral.--The term "elective deferral" means any employer contribution described in section 402(g)(3).

(C) Qualified nonelective contributions.--The term "qualified nonelective contribution" means any employer contribution (other than a matching contribution) with respect to which--

(i) the employee may not elect to have the contribution paid to the employee in cash instead of being contributed to the plan, and

(ii) the requirements of subparagraphs (B) and (C) of subsection (k)(2) are met.

(D) Qualified student loan payment.--The term "qualified student loan payment" means a payment made by an employee in repayment of a qualified education loan (as defined in section 221(d)(1)) incurred by the employee to pay qualified higher education expenses, but only--

(i) to the extent such payments in the aggregate for the year do not exceed an amount equal to--

(I) the limitation applicable under section 402(g) for the year (or, if lesser, the employee's compensation (as defined in section 415(c)(3)) for the year), reduced by

(II) the elective deferrals made by the employee for such year, and

(ii) if the employee certifies annually to the employer making the matching contribution under this paragraph that such payment has been made on such loan.

For purposes of this subparagraph, the term "qualified higher education expenses" means the cost of attendance (as defined in section 472 of the Higher Education Act of 1965, as in effect on the day before the date of the enactment of the Taxpayer Relief Act of 1997) at an eligible educational institution (as defined in section 221(d)(2)).

(5) Employees taken into consideration.--

(A) In general.--Any employee who is eligible to make an employee contribution (or, if the employer takes elective contributions into account, elective contributions) or to receive a matching contribution under the plan being tested under paragraph (1) shall be considered an eligible employee for purposes of this subsection.

(B) Certain nonparticipants.--If an employee contribution is required as a condition of participation in the plan, any employee who would be a participant in the plan if such employee made such a contribution shall be treated as an eligible employee on behalf of whom no employer contributions are made.

(C) Special rule for early participation.--If an employer elects to apply section 410(b)(4)(B) in determining whether a plan meets the requirements of section 410(b), the employer may, in determining whether the plan meets the requirements of paragraph (2), exclude from consideration all eligible employees (other than highly compensated employees) who have not met the minimum age and service requirements of section 410(a)(1)(A).

(6) Plan not disqualified if excess aggregate contributions distributed before end of following plan year.--

(A) In general.--A plan shall not be treated as failing to meet the requirements of paragraph (1) for any plan year if, before the close of the following plan year, the amount of the excess aggregate contributions for such plan year (and any income allocable to such contributions through the end of such year) is distributed (or, if forfeitable, is forfeited). Such contributions (and such income) may be distributed without regard to any other provision of law.

(B) Excess aggregate contributions.--For purposes of subparagraph (A), the term "excess aggregate contributions" means, with respect to any plan year, the excess of--

(i) the aggregate amount of the matching contributions and employee contributions (and any qualified nonelective contribution or elective contribution taken into account in computing the contribution percentage) actually made on behalf of highly compensated employees for such plan year, over

(ii) the maximum amount of such contributions permitted under the limitations of paragraph (2)(A) (determined by reducing contributions made on behalf of highly compensated employees in order of their contribution percentages beginning with the highest of such percentages).

(C) Method of distributing excess aggregate contributions.--Any distribution of the excess aggregate contributions for any plan year shall be made to highly compensated employees on the basis of the amount of contributions on behalf of, or by, each such employee. Forfeitures of excess aggregate contributions may not be allocated to participants whose contributions are reduced under this paragraph.

(D) Coordination with subsection (k) and 402(g).--The determination of the amount of excess aggregate contributions with respect to a plan shall be made after--

(i) first determining the excess deferrals (within the meaning of section 402(g)), and

(ii) then determining the excess contributions under subsection (k).

(7) Treatment of distributions.--

(A) Additional tax of section 72(t) not applicable.--No tax shall be imposed under section 72(t) on any amount required to be distributed under paragraph (6).

(B) Exclusion of employee contributions.--Any distribution attributable to employee contributions shall not be included in gross income except to the extent attributable to income on such contributions.

(8) Highly compensated employee.--For purposes of this subsection, the term "highly compensated employee" has the meaning given to such term by section 414(q).

(9) Regulations.--The Secretary shall prescribe such regulations as may be necessary to carry out the purposes of this subsection and subsection (k), including regulations permitting appropriate aggregation of plans and contributions.

(10) Alternative method of satisfying tests.--A defined contribution plan shall be treated as meeting the requirements of paragraph (2) with respect to matching contributions if the plan--

(A) meets the contribution requirements of subparagraph (B) of subsection (k)(11),

(B) meets the exclusive plan requirements of subsection (k)(11)(C), and

(C) meets the vesting requirements of section 408(p)(3).

(11) Additional alternative method of satisfying tests.--

(A) In general.--A defined contribution plan shall be treated as meeting the requirements of paragraph (2) with respect to matching contributions if the plan--

(i) meets the contribution requirements of subparagraph (B) or (C) of subsection (k)(12),

(ii) meets the notice requirements of subsection (k)(12)(D), and

(iii) meets the requirements of subparagraph (B).

(B) Limitation on matching contributions.--The requirements of this subparagraph are met if--

(i) matching contributions on behalf of any employee may not be made with respect to an employee's contributions or elective deferrals in excess of 6 percent of the employee's compensation,

(ii) the rate of an employer's matching contribution does not increase as the rate of an employee's contributions or elective deferrals increase, and

(iii) the matching contribution with respect to any highly compensated employee at any rate of an employee contribution or rate of elective deferral is not greater than that with respect to an employee who is not a highly compensated employee.

(12) Alternative method for automatic contribution arrangements.--A defined contribution plan shall be treated as meeting the requirements of paragraph (2) with respect to matching contributions if the plan--

(A) is a qualified automatic contribution arrangement (as defined in subsection (k)(13)),

(B) meets the notice requirements of subsection (k)(13)(E), and

(C) meets the requirements of paragraph (11)(B).

(13) Matching contributions for qualified student loan payments.--

(A) In general.--For purposes of paragraph (4)(A)(iii), an employer contribution made to a defined contribution plan on account of a qualified student loan payment shall be treated as a matching contribution for purposes of this title if--

(i) the plan provides matching contributions on account of elective deferrals at the same rate as contributions on account of qualified student loan payments,

(ii) the plan provides matching contributions on account of qualified student loan payments only on behalf of employees otherwise eligible to receive matching contributions on account of elective deferrals,

(iii) under the plan, all employees eligible to receive matching contributions on account of elective deferrals are eligible to receive matching contributions on account of qualified student loan payments, and

(iv) the plan provides that matching contributions on account of qualified student loan payments vest in the same manner as matching contributions on account of elective deferrals.

(B) Treatment for purposes of nondiscrimination rules, etc.--

(i) Nondiscrimination rules.--For purposes of subparagraph (A)(iii), subsection (a)(4), and section 410(b), matching contributions described in paragraph (4)(A)(iii) shall not fail to be treated as available to an employee solely because such employee does not have debt incurred under a qualified education loan (as defined in section 221(d)(1)).

(ii) Student loan payments not treated as plan contribution.--Except as provided in clause (iii), a qualified student loan payment shall not be treated as a contribution to a plan under this title.

(iii) Matching contribution rules.--Solely for purposes of meeting the requirements of paragraph (11)(B), (12), or (13) of this subsection, or paragraph (11)(B)(i)(II), (12)(B), (13)(D), or (16)(D) of subsection (k), a plan may treat a qualified student loan payment as an elective deferral or an elective contribution, whichever is applicable.

(iv) Actual deferral percentage testing.--In determining whether a plan meets the requirements of subsection (k)(3) (A)(ii) for a plan year, the plan may apply the requirements of such subsection separately with respect to all employees who receive matching contributions described in paragraph (4)(A)(iii) for the plan year.

(C) Employer may rely on employee certification.--The employer may rely on an employee certification of payment under paragraph (4)(D)(ii).

(14) Cross reference.--

For excise tax on certain excess contributions, see section 4979.

(n) Coordination with qualified domestic relations orders.--The Secretary shall prescribe such rules or regulations as may be necessary to coordinate the requirements of subsection (a)(13)(B) and section 414(p) (and the regulations issued by the Secretary of Labor thereunder) with the other provisions of this chapter.

(o) Special rules for applying nondiscrimination rules to protect older, longer service and grandfathered participants.--

(1) Testing of defined benefit plans with closed classes of participants.--

(A) Benefits, rights, or features provided to closed classes.--A defined benefit plan which provides benefits, rights, or features to a closed class of participants shall not fail to satisfy the requirements of subsection (a)(4) by reason of the composition of such closed class or the benefits, rights, or features provided to such closed class, if--

(i) for the plan year as of which the class closes and the 2 succeeding plan years, such benefits, rights, and features satisfy the requirements of subsection (a)(4) (without regard to this subparagraph but taking into account the rules of subparagraph (I)),

(ii) after the date as of which the class was closed, any plan amendment which modifies the closed class or the benefits, rights, and features provided to such closed class does not discriminate significantly in favor of highly compensated employees, and

(iii) the class was closed before April 5, 2017, or the plan is described in subparagraph (C).

(B) Aggregate testing with defined contribution plans permitted on a benefits basis.--

(i) In general.--For purposes of determining compliance with subsection (a)(4) and section 410(b), a defined benefit plan described in clause (iii) may be aggregated and tested on a benefits basis with 1 or more defined contribution plans, including with the portion of 1 or more defined contribution plans which--

(I) provides matching contributions (as defined in subsection (m)(4)(A)),

(II) provides annuity contracts described in section 403(b) which are purchased with matching contributions or nonelective contributions, or

(III) consists of an employee stock ownership plan (within the meaning of section 4975(e)(7)) or a tax credit employee stock ownership plan (within the meaning of section 409(a)).

(ii) Special rules for matching contributions.-- For purposes of clause (i), if a defined benefit plan is aggregated with a portion of a defined contribution plan providing matching contributions--

(I) such defined benefit plan must also be aggregated with any portion of such defined contribution plan which provides elective deferrals described in subparagraph (A) or (C) of section 402(g)(3), and

(II) such matching contributions shall be treated in the same manner as nonelective contributions, including for purposes of applying the rules of subsection (l).

(iii) Plans described.--A defined benefit plan is described in this clause if--

(I) the plan provides benefits to a closed class of participants,

(II) for the plan year as of which the class closes and the 2 succeeding plan years, the plan satisfies the requirements of section 410(b) and subsection (a)(4) (without regard to this subparagraph but taking into account the rules of subparagraph (I)),

(III) after the date as of which the class was closed, any plan amendment which modifies the closed class or the benefits provided to such closed class does not discriminate significantly in favor of highly compensated employees, and

(IV) the class was closed before April 5, 2017, or the plan is described in subparagraph (C).

(C) Plans described.--A plan is described in this subparagraph if, taking into account any predecessor plan--

(i) such plan has been in effect for at least 5 years as of the date the class is closed, and

(ii) during the 5-year period preceding the date the class is closed, there has not been a substantial increase in the coverage or value of the benefits, rights, or features described in subparagraph (A) or in the coverage or benefits under the plan described in subparagraph (B)(iii) (whichever is applicable).

(D) Determination of substantial increase for benefits, rights, and features.--In applying subparagraph (C)(ii) for purposes of subparagraph (A)(iii), a plan shall be treated as having had a substantial increase in coverage or value of the benefits, rights, or features described in subparagraph (A) during the applicable 5-year period only if, during such period--

(i) the number of participants covered by such benefits, rights, or features on the date such period ends is more than 50 percent greater than the number of such participants on the first day of the plan year in which such period began, or

(ii) such benefits, rights, and features have been modified by 1 or more plan amendments in such a way that, as of the date the class is closed, the value of such benefits, rights, and features to the closed class as a whole is substantially greater than the value as of the first day of such 5-year period, solely as a result of such amendments.

(E) Determination of substantial increase for aggregate testing on benefits basis.--In applying subparagraph (C)(ii) for purposes of subparagraph (B)(iii)(IV), a plan shall be treated as having had a substantial increase in coverage or benefits during the applicable 5-year period only if, during such period--

(i) the number of participants benefitting under the plan on the date such period ends is more than 50 percent greater than the number of such participants on the first day of the plan year in which such period began, or

(ii) the average benefit provided to such participants on the date such period ends is more than 50 percent greater than the average benefit provided on the first day of the plan year in which such period began.

(F) Certain employees disregarded.--For purposes of subparagraphs (D) and (E), any increase in coverage or value or in coverage or benefits, whichever is applicable, which is attributable to such coverage and value or coverage and benefits provided to employees--

(i) who became participants as a result of a merger, acquisition, or similar event which occurred during the 7-year period preceding the date the class is closed, or

(ii) who became participants by reason of a merger of the plan with another plan which had been in effect for at least 5 years as of the date of the merger,

shall be disregarded, except that clause (ii) shall apply for purposes of subparagraph (D) only if, under the merger, the benefits, rights, or features under 1 plan are conformed to the benefits, rights, or features of the other plan prospectively.

(G) Rules relating to average benefit.--For purposes of subparagraph (E)--

(i) the average benefit provided to participants under the plan will be treated as having remained the same between the 2 dates described in subparagraph (E)(ii) if the benefit formula applicable to such participants has not changed between such dates, and

(ii) if the benefit formula applicable to 1 or more participants under the plan has changed between such 2 dates, then the average benefit under the plan shall be considered to have increased by more than 50 percent only if--

(I) the total amount determined under section 430(b)(1)(A)(i) for all participants benefitting under the plan for the plan year in which the 5-year period described in subparagraph (E) ends, exceeds

(II) the total amount determined under section 430(b)(1)(A)(i) for all such participants for such plan year, by using the benefit formula in effect for each such participant for the first plan year in such 5-year period,

by more than 50 percent. In the case of a CSEC plan (as defined in section 414(y)), the normal cost of the plan (as determined under section 433(j)(1)(B)) shall be used in lieu of the amount determined under section 430(b) (1)(A)(i).

(H) Treatment as single plan.--For purposes of subparagraphs (E) and (G), a plan described in section 413(c) shall be treated as a single plan rather than as separate plans maintained by each employer in the plan.

(I) Special rules.--For purposes of subparagraphs (A)(i) and (B)(iii)(II), the following rules shall apply:

(i) In applying section 410(b)(6)(C), the closing of the class of participants shall not be treated as a significant change in coverage under section 410(b)(6)(C)(i)(II).

(ii) 2 or more plans shall not fail to be eligible to be aggregated and treated as a single plan solely by reason of having different plan years.

(iii) Changes in the employee population shall be disregarded to the extent attributable to individuals who become employees or cease to be employees, after the date the class is closed, by reason of a merger, acquisition, divestiture, or similar event.

(iv) Aggregation and all other testing methodologies otherwise applicable under subsection (a)(4) and section 410(b) may be taken into account.

The rule of clause (ii) shall also apply for purposes of determining whether plans to which subparagraph (B)(i) applies may be aggregated and treated as 1 plan for purposes of determining whether such plans meet the requirements of subsection (a)(4) and section 410(b).

(J) Spun-off plans.--For purposes of this paragraph, if a portion of a defined benefit plan described in subparagraph (A) or (B)(iii) is spun off to another employer and the spun-off plan continues to satisfy the requirements of--

(i) subparagraph (A)(i) or (B)(iii)(II), whichever is applicable, if the original plan was still within the 3-year period described in such subparagraph at the time of the spin off, and

(ii) subparagraph (A)(ii) or (B)(iii)(III), whichever is applicable, the treatment under subparagraph (A) or (B) of the spun-off plan shall continue with respect to such other employer.

(2) Testing of defined contribution plans.--

(A) Testing on a benefits basis.--A defined contribution plan shall be permitted to be tested on a benefits basis if--

(i) such defined contribution plan provides make-whole contributions to a closed class of participants whose accruals under a defined benefit plan have been reduced or eliminated,

(ii) for the plan year of the defined contribution plan as of which the class eligible to receive such make-whole contributions closes and the 2 succeeding plan years, such closed class of participants satisfies the requirements of section 410(b)(2)(A)(i) (determined by applying the rules of paragraph (1)(I)),

(iii) after the date as of which the class was closed, any plan amendment to the defined contribution plan which modifies the closed class or the allocations, benefits, rights, and features provided to such closed class does not discriminate significantly in favor of highly compensated employees, and

(iv) the class was closed before April 5, 2017, or the defined benefit plan under clause (i) is described in paragraph (1) (C) (as applied for purposes of paragraph (1)(B)(iii)(IV)).

(B) Aggregation with plans including matching contributions.--

(i) In general.--With respect to 1 or more defined contribution plans described in subparagraph (A), for purposes of determining compliance with subsection (a)(4) and section 410(b), the portion of such plans which provides make-whole contributions or other nonelective contributions may be aggregated and tested on a benefits basis with the portion of 1 or more other defined contribution plans which--

(I) provides matching contributions (as defined in subsection (m)(4)(A)),

(II) provides annuity contracts described in section 403(b) which are purchased with matching contributions or nonelective contributions, or

(III) consists of an employee stock ownership plan (within the meaning of section 4975(e)(7)) or a tax credit employee stock ownership plan (within the meaning of section 409(a)).

(ii) Special rules for matching contributions.--Rules similar to the rules of paragraph (1)(B)(ii) shall apply for purposes of clause (i).

(C) Special rules for testing defined contribution plan features providing matching contributions to certain older, longer service participants.--In the case of a defined contribution plan which provides benefits, rights, or features to a closed class of participants whose accruals under a defined benefit plan have been reduced or eliminated, the plan shall notfail to satisfy the requirements of subsection (a)(4) solely by reason of the composition of the closed class or the benefits, rights, or features provided to such closed class if the defined contribution plan and defined benefit plan otherwise meet the requirements of subparagraph (A) but for the fact that the make-whole contributions under the defined contribution plan are made in whole or in part through matching contributions.

(D) Spun-off plans.--For purposes of this paragraph, if a portion of a defined contribution plan described in subparagraph (A) or (C) is spun off to another employer, the treatment under subparagraph (A) or (C) of the spun-off plan shall continue with respect to the other employer if such plan continues to comply with the requirements of clauses (ii) (if the original plan was still within the 3-year period described in such clause at the time of the spin off) and (iii) of subparagraph (A), as determined for purposes of subparagraph (A) or (C), whichever is applicable.

(3) Definitions and special rule.--For purposes of this subsection--

(A) Make-whole contributions.--Except as otherwise provided in paragraph (2)(C), the term "make-whole contributions" means nonelective allocations for each employee in the class which are reasonably calculated, in a consistent manner, to replace some or all of the retirement benefits which the employee would have received under the defined benefit plan and any other plan or qualified cash or deferred arrangement under subsection (k)(2) if no change had been made to such defined benefit plan and such other plan or arrangement. For purposes of the preceding sentence, consistency shall not be required with respect to employees who were subject to different benefit formulas under the defined benefit plan.

(B) References to closed class of participants.--References to a closed class of participants and similar references to a closed class shall include arrangements under which 1 or more classes of participants are closed, except that 1 or more classes of participants closed on different dates shall not be aggregated for purposes of determining the date any such class was closed.

(C) Highly compensated employee.--The term "highly compensated employee" has the meaning given such term in section 414(q).

(p) Cross reference.--

For exemption from tax of a trust qualified under this section, see section 501(a).

Appendix E

26 U.S.C.A. § 417, I.R.C. § 417

§ 417. Definitions and special rules for purposes of minimum survivor annuity requirements

(a) Election to waive qualified joint and survivor annuity or qualified preretirement survivor annuity.--

(1) In general.--A plan meets the requirements of section 401(a)(11) only if--

(A) under the plan, each participant--

(i) may elect at any time during the applicable election period to waive the qualified joint and survivor annuity form of benefit or the qualified preretirement survivor annuity form of benefit (or both),

(ii) if the participant elects a waiver under clause (i), may elect the qualified optional survivor annuity at any time during the applicable election period, and

(iii) may revoke any such election at any time during the applicable election period, and

(B) the plan meets the requirements of paragraphs (2), (3), and (4) of this subsection.

(2) Spouse must consent to election.--Each plan shall provide that an election under paragraph (1)(A)(i) shall not take effect unless--

(A) (i) the spouse of the participant consents in writing to such election, (ii) such election designates a beneficiary (or a form of benefits) which may not be changed without spousal consent (or the consent of the spouse expressly permits designations by the participant without any requirement of further consent by the spouse), and (iii) the spouse's consent acknowledges the effect of such election and is witnessed by a plan representative or a notary public, or

(B) it is established to the satisfaction of a plan representative that the consent required under subparagraph (A) may not be obtained because there is no spouse, because the spouse cannot be located, or because of such other circumstances as the Secretary may by regulations prescribe.

Any consent by a spouse (or establishment that the consent of a spouse may not be obtained) under the preceding sentence shall be effective only with respect to such spouse.

(3) Plan to provide written explanations.--

(A) Explanation of joint and survivor annuity.-- Each plan shall provide to each participant, within a reasonable period of time before the annuity starting date (and consistent with such regulations as the Secretary may prescribe), a written explanation of--

(i) the terms and conditions of the qualified joint and survivor annuity and of the qualified optional survivor annuity,

(ii) the participant's right to make, and the effect of, an election under paragraph (1) to waive the joint and survivor annuity form of benefit,

(iii) the rights of the participant's spouse under paragraph (2), and

(iv) the right to make, and the effect of, a revocation of an election under paragraph (1).

(B) Explanation of qualified preretirement survivor annuity.--

(i) In general.--Each plan shall provide to each participant, within the applicable period with respect to such participant (and consistent with such regulations as the Secretary may prescribe), a written explanation with respect to the qualified preretirement survivor annuity comparable to that required under subparagraph (A).

(ii) Applicable period.--For purposes of clause (i), the term "applicable period" means, with respect to a participant, whichever of the following periods ends last:

(I) The period beginning with the first day of the plan year in which the participant attains age 32 and ending with the close of the plan year preceding the plan year in which the participant attains age 35.

(II) A reasonable period after the individual becomes a participant.

(III) A reasonable period ending after paragraph (5) ceases to apply to the participant.

(IV) A reasonable period ending after section 401(a)(11) applies to the participant.

In the case of a participant who separates from service before attaining age 35, the applicable period shall be a reasonable period after separation.

(4) Requirement of spousal consent for using plan assets as security for loans.--Each plan shall provide that, if section 401(a)(11) applies to a participant when part or all of the participant's accrued benefit is to be used as security for a loan, no portion of the participant's accrued benefit may be used as security for such loan unless--

(A) the spouse of the participant (if any) consents in writing to such use during the 90-day period ending on the date on which the loan is to be so secured, and

(B) requirements comparable to the requirements of paragraph (2) are met with respect to such consent.

(5) Special rules where plan fully subsidizes costs.--

(A) In general.--The requirements of this subsection shall not apply with respect to the qualified joint and survivor annuity form of benefit or the qualified preretirement survivor annuity form of benefit, as the case may be, if such benefit may not be waived (or another beneficiary selected) and if the plan fully subsidizes the costs of such benefit.

(B) Definition.--For purposes of subparagraph (A), a plan fully subsidizes the costs of a benefit if under the plan the failure to waive such benefit by a participant would not result in a decrease in any plan benefits with respect to such participant and would not result in increased contributions from such participant.

(6) Applicable election period defined.--For purposes of this subsection, the term "applicable election period" means--

(A) in the case of an election to waive the qualified joint and survivor annuity form of benefit, the 180-day period ending on the annuity starting date, or

(B) in the case of an election to waive the qualified preretirement survivor annuity, the period which begins on the first day of the plan year in which the participant attains age 35 and ends on the date of the participant's death.

In the case of a participant who is separated from service, the applicable election period under subparagraph (B) with respect to benefits accrued before the date of such separation from service shall not begin later than such date.

(7) Special rules relating to time for written explanation.--Notwithstanding any other provision of this subsection--

(A) Explanation may be provided after annuity starting date.--

(i) In general.--A plan may provide the written explanation described in paragraph (3)(A) after the annuity starting date. In any case to which this subparagraph applies, the applicable election period under paragraph (6) shall not end before the 30th day after the date on which such explanation is provided.

(ii) Regulatory authority.--The Secretary may by regulations limit the application of clause (i), except that such regulations may not limit the period of time by which the annuity starting date precedes the provision of the written explanation other than by providing that the annuity starting date may not be earlier than termination of employment.

(B) Waiver of 30-day period.--A plan may permit a participant to elect (with any applicable spousal consent) to waive any requirement that the written explanation be provided at least 30 days before the annuity starting date (or to waive the 30-day requirement under subparagraph (A)) if the distribution commences more than 7 days after such explanation is provided.

(b) Definition of qualified joint and survivor annuity.--For purposes of this section and section 401(a)(11), the term "qualified joint and survivor annuity" means an annuity--

(1) for the life of the participant with a survivor annuity for the life of the spouse which is not less than 50 percent of (and is not greater than 100 percent of) the amount of the annuity which is payable during the joint lives of the participant and the spouse, and

(2) which is the actuarial equivalent of a single annuity for the life of the participant.

Such term also includes any annuity in a form having the effect of an annuity described in the preceding sentence.

(c) Definition of qualified preretirement survivor annuity.--For purposes of this section and section 401(a)(11)--

(1) In general.--Except as provided in paragraph (2), the term "qualified preretirement survivor annuity" means a survivor annuity for the life of the surviving spouse of the participant if--

(A) the payments to the surviving spouse under such annuity are not less than the amounts which would be payable as a survivor annuity under the qualified joint and survivor annuity under the plan (or the actuarial equivalent thereof) if--

(i) in the case of a participant who dies after the date on which the participant attained the earliest retirement age, such participant had retired with an immediate qualified joint and survivor annuity on the day before the participant's date of death, or

(ii) in the case of a participant who dies on or before the date on which the participant would have attained the earliest retirement age, such participant had--

(I) separated from service on the date of death,

(II) survived to the earliest retirement age,

(III) retired with an immediate qualified joint and survivor annuity at the earliest retirement age, and

(IV) died on the day after the day on which such participant would have attained the earliest retirement age, and

(B) under the plan, the earliest period for which the surviving spouse may receive a payment under such annuity is not later than the month in which the participant would have attained the earliest retirement age under the plan.

In the case of an individual who separated from service before the date of such individual's death, subparagraph (A)(ii) (I) shall not apply.

(2) Special rule for defined contribution plans.--In the case of any defined contribution plan or participant described in clause (ii) or (iii) of section 401(a)(11)(B), the term "qualified preretirement survivor annuity" means an annuity for the life of the surviving spouse the actuarial equivalent of which is not less than 50 percent of the portion of the account balance of the participant (as of the date of death) to which the participant had a nonforfeitable right (within the meaning of section 411(a)).

(3) Security interests taken into account.--For purposes of paragraphs (1) and (2), any security interest held by the plan by reason of a loan outstanding to the participant shall be taken into account in determining the amount of the qualified preretirement survivor annuity.

(d) Survivor annuities need not be provided if participant and spouse married less than 1 year.--

(1) In general.--Except as provided in paragraph (2), a plan shall not be treated as failing to meet the requirements of section 401(a)(11) merely because the plan provides that a qualified joint and survivor annuity (or a qualified preretirement survivor annuity) will not be provided unless the participant and spouse had been married throughout the 1-year period ending on the earlier of--

(A) the participant's annuity starting date, or

(B) the date of the participant's death.

(2) Treatment of certain marriages within 1 year of annuity starting date for purposes of qualified joint and survivor annuities.--For purposes of paragraph (1), if--

(A) a participant marries within 1 year before the annuity starting date, and

(B) the participant and the participant's spouse in such marriage have been married for at least a 1-year period ending on or before the date of the participant's death,

such participant and such spouse shall be treated as having been married throughout the 1-year period ending on the participant's annuity starting date.

(e) Restrictions on cash-outs.--

(1) Plan may require distribution if present value not in excess of dollar limit.--A plan may provide that the present value of a qualified joint and survivor annuity or a qualified preretirement survivor annuity will be immediately distributed if such value does not exceed the amount that can be distributed without the participant's consent under section 411(a)(11). No distribution may be made under the preceding sentence after the annuity starting date unless the participant and the spouse of the participant (or where the participant has died, the surviving spouse) consents in writing to such distribution.

(2) Plan may distribute benefit in excess of dollar limit only with consent.--If--

(A) the present value of the qualified joint and survivor annuity or the qualified preretirement survivor annuity exceeds the amount that can be distributed without the participant's consent under section 411(a)(11), and

(B) the participant and the spouse of the participant (or where the participant has died, the surviving spouse) consent in writing to the distribution,

the plan may immediately distribute the present value of such annuity.

(3) Determination of present value.--

(A) In general.--For purposes of paragraphs (1) and (2), the present value shall not be less than the present value calculated by using the applicable mortality table and the applicable interest rate.

(B) Applicable mortality table.--For purposes of subparagraph (A), the term "applicable mortality table" means a mortality table, modified as appropriate by the Secretary, based on the mortality table specified for the plan year under subparagraph (A) of section 430(h)(3) (without regard to subparagraph (C) or (D) of such section).

(C) Applicable interest rate.--For purposes of subparagraph (A), the term "applicable interest rate" means the adjusted first, second, and third segment rates applied under rules similar to the rules of section 430(h)(2)(C) (determined by not taking into account any adjustment under clause (iv) thereof) for the month before the date of the distribution or such other time as the Secretary may by regulations prescribe.

(D) Applicable segment rates.--For purposes of subparagraph (C), the adjusted first, second, and third segment rates are the first, second, and third segment rates which would be determined under section 430(h)(2)(C) (determined by not taking into account any adjustment under clause (iv) thereof) if section 430(h)(2)(D) were applied by substituting the average yields for the month described in subparagraph (C) for the average yields for the 24-month period described in such section.

(f) Other definitions and special rules.--For purposes of this section and section 401(a)(11)--

(1) Vested participant.--The term "vested participant" means any participant who has a nonforfeitable right (within the meaning of section 411(a)) to any portion of such participant's accrued benefit.

(2) Annuity starting date.--

(A) In general.--The term "annuity starting date" means--

(i) the first day of the first period for which an amount is payable as an annuity, or

(ii) in the case of a benefit not payable in the form of an annuity, the first day on which all events have occurred which entitle the participant to such benefit.

(B) Special rule for disability benefits.--For purposes of subparagraph (A), the first day of the first period for which a benefit is to be received by reason of disability shall be treated as the annuity starting date only if such benefit is not an auxiliary benefit.

(3) Earliest retirement age.--The term "earliest retirement age" means the earliest date on which, under the plan, the participant could elect to receive retirement benefits.

(4) Plan may take into account increased costs.--A plan may take into account in any equitable manner (as determined by the Secretary) any increased costs resulting from providing a qualified joint or survivor annuity or a qualified preretirement survivor annuity.

(5) Distributions by reason of security interests.--If the use of any participant's accrued benefit (or any portion thereof) as security for a loan meets the requirements of subsection (a)(4), nothing in this section or section 411(a)(11) shall prevent any distribution required by reason of a failure to comply with the terms of such loan.

(6) Requirements for certain spousal consents.--No consent of a spouse shall be effective for purposes of subsection (e)(1) or (e)(2) (as the case may be) unless requirements comparable to the requirements for spousal consent to an election under subsection (a)(1)(A) are met.

(7) Consultation with the Secretary of Labor.--In prescribing regulations under this section and section 401(a)(11), the Secretary shall consult with the Secretary of Labor.

(g) Definition of qualified optional survivor annuity.--

(1) In general.--For purposes of this section, the term "qualified optional survivor annuity" means an annuity--

(A) for the life of the participant with a survivor annuity for the life of the spouse which is equal to the applicable percentage of the amount of the annuity which is payable during the joint lives of the participant and the spouse, and

(B) which is the actuarial equivalent of a single annuity for the life of the participant.

Such term also includes any annuity in a form having the effect of an annuity described in the preceding sentence.

(2) Applicable percentage.--

(A) In general.--For purposes of paragraph (1), if the survivor annuity percentage--

(i) is less than 75 percent, the applicable percentage is 75 percent, and

(ii) is greater than or equal to 75 percent, the applicable percentage is 50 percent.

(B) Survivor annuity percentage.--For purposes of subparagraph (A), the term "survivor annuity percentage" means the percentage which the survivor annuity under the plan's qualified joint and survivor annuity bears to the annuity payable during the joint lives of the participant and the spouse.

Appendix E

29 U.S.C.A. § 1054

§ 1054. Benefit accrual requirements

(a) Satisfaction of requirements by pension plans

Each pension plan shall satisfy the requirements of subsection (b)(3), and--

(1) in the case of a defined benefit plan, shall satisfy the requirements of subsection (b)(1); and

(2) in the case of a defined contribution plan, shall satisfy the requirements of subsection (b)(2).

(b) Enumeration of plan requirements

(1)(A) A defined benefit plan satisfies the requirements of this paragraph if the accrued benefit to which each participant is entitled upon his separation from the service is not less than--

(i) 3 percent of the normal retirement benefit to which he would be entitled at the normal retirement age if he commenced participation at the earliest possible entry age under the plan and served continuously until the earlier of age 65 or the normal retirement age specified under the plan, multiplied by

(ii) the number of years (not in excess of 33 $^1/_3$) of his participation in the plan.

In the case of a plan providing retirement benefits based on compensation during any period, the normal retirement benefit to which a participant would be entitled shall be determined as if he continued to earn annually the average rate of compensation which he earned during consecutive years of service, not in excess of 10, for which his compensation was the highest. For purposes of this subparagraph, social security benefits and all other relevant factors used to compute benefits shall be treated as remaining constant as of the current year for all years after such current year.

(B) A defined benefit plan satisfies the requirements of this paragraph of a particular plan year if under the plan the accrued benefit payable at the normal retirement age is equal to the normal retirement benefit and the annual rate at which any individual who is or could be a participant can accrue the retirement benefits payable at normal retirement age under the plan for any later plan year is not more than 133 $^{1}/_{3}$ percent of the annual rate at which he can accrue benefits for any plan year beginning on or after such particular plan year and before such later plan year. For purposes of this subparagraph--

> **(i)** any amendment to the plan which is in effect for the current year shall be treated as in effect for all other plan years;
>
> **(ii)** any change in an accrual rate which does not apply to any individual who is or could be a participant in the current year shall be disregarded;

(iii) the fact that benefits under the plan may be payable to certain employees before normal retirement age shall be disregarded; and

(iv) social security benefits and all other relevant factors used to compute benefits shall be treated as remaining constant as of the current year for all years after the current year.

(C) A defined benefit plan satisfies the requirements of this paragraph if the accrued benefit to which any participant is entitled upon his separation from the service is not less than a fraction of the annual benefit commencing at normal retirement age to which he would be entitled under the plan as in effect on the date of his separation if he continued to earn annually until normal retirement age the same rate of compensation upon which his normal retirement benefit would be computed under the plan, determined as if he had attained normal retirement age on the date any such determination is made (but taking into account no more than the 10 years of service immediately preceding his separation from service). Such fraction shall be a fraction, not exceeding 1, the numerator of which is the total number of his years of participation in the plan (as of the date of his separation from the service) and the denominator of which is the total number of years he would have participated in the plan if he separated from the service at the normal retirement age. For purposes of this subparagraph, social security benefits and all other relevant factors used to compute benefits shall be treated as remaining constant as of the current year for all years after such current year.

(D) Subparagraphs (A), (B), and (C) shall not apply with respect to years of participation before the first plan year to which this section applies but a defined benefit plan satisfies the requirements of this subparagraph with respect to such years of participation only if the accrued benefit of any participant with respect to such years of participation is not less than the greater of--

> **(i)** his accrued benefit determined under the plan, as in effect from time to time prior to September 2, 1974, or
>
> **(ii)** an accrued benefit which is not less than one-half of the accrued benefit to which such participant would have been entitled if subparagraph (A), (B), or (C) applied with respect to such years of participation.

(E) Notwithstanding subparagraphs (A), (B), and (C) of this paragraph, a plan shall not be treated as not satisfying the requirements of this paragraph solely because the accrual of benefits under the plan does not become effective until the employee has two continuous years of service. For purposes of this subparagraph, the term "year of service" has the meaning provided by section 1052(a)(3)(A) of this title.

(F) Notwithstanding subparagraphs (A), (B), and (C), a defined benefit plan satisfies the requirements of this paragraph if such plan--

(i) is funded exclusively by the purchase of insurance contracts, and

(ii) satisfies the requirements of paragraphs (2) and (3) of section 1081(b) of this title (relating to certain insurance contract plans),

but only if an employee's accrued benefit as of any applicable date is not less than the cash surrender value his insurance contracts would have on such applicable date if the requirements of paragraphs (4), (5), and (6) of section 1081(b) of this title were satisfied.

(G) Notwithstanding the preceding subparagraphs, a defined benefit plan shall be treated as not satisfying the requirements of this paragraph if the participant's accrued benefit is reduced on account of any increase in his age or service. The preceding sentence shall not apply to benefits under the plan commencing before benefits payable under title II of the Social Security Act which benefits under the plan--

(i) do not exceed social security benefits, and

(ii) terminate when such social security benefits commence.

(H)(i) Notwithstanding the preceding subparagraphs, a defined benefit plan shall be treated as not satisfying the requirements of this paragraph if, under the plan, an employee's benefit accrual is ceased, or the rate of an employee's benefit accrual is reduced, because of the attainment of any age.

(ii) A plan shall not be treated as failing to meet the requirements of this subparagraph solely because the plan imposes (without regard to age) a limitation on the amount of benefits that the plan provides or a limitation on the number of years of service or years of participation which are taken into account for purposes of determining benefit accrual under the plan.

(iii) In the case of any employee who, as of the end of any plan year under a defined benefit plan, has attained normal retirement age under such plan--

(I) if distribution of benefits under such plan with respect to such employee has commenced as of the end of such plan year, then any requirement of this subparagraph for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of the actuarial equivalent of in-service distribution of benefits, and

(II) if distribution of benefits under such plan with respect to such employee has not commenced as of the end of such year in accordance with section 1056(a)(3) of this title, and the payment of benefits under such plan with respect to such employee is not suspended during such plan year pursuant to section 1053(a)(3)(B) of this title, then any requirement of this subparagraph for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of any adjustment in the benefit payable under the plan during such plan year attributable to the delay in the distribution of benefits after the attainment of normal retirement age.

The preceding provisions of this clause shall apply in accordance with regulations of the Secretary of the Treasury. Such regulations may provide for the application of the preceding provisions of this clause, in the case of any such employee, with respect to any period of time within a plan year.

(iv) Clause (i) shall not apply with respect to any employee who is a highly compensated employee (within the meaning of section 414(q) of Title 26) to the extent provided in regulations prescribed by the Secretary of the Treasury for purposes of precluding discrimination in favor of highly compensated employees within the meaning of subchapter D of chapter 1 of Title 26.

(v) A plan shall not be treated as failing to meet the requirements of clause (i) solely because the subsidized portion of any early retirement benefit is disregarded in determining benefit accruals.

(vi) Any regulations prescribed by the Secretary of the Treasury pursuant to clause (v) of section 411(b)(1)(H) of Title 26 shall apply with respect to the requirements of this subparagraph in the same manner and to the same extent as such regulations apply with respect to the requirements of such section 411(b)(1)(H).

(2)(A) A defined contribution plan satisfies the requirements of this paragraph if, under the plan, allocations to the employee's account are not ceased, and the rate at which amounts are allocated to the employee's account is not reduced, because of the attainment of any age.

(B) A plan shall not be treated as failing to meet the requirements of subparagraph (A) solely because the subsidized portion of any early retirement benefit is disregarded in determining benefit accruals.

(C) Any regulations prescribed by the Secretary of the Treasury pursuant to subparagraphs (B) and (C) of section 411(b)(2) of Title 26 shall apply with respect to the requirements of this paragraph in the same manner and to the same extent as such regulations apply with respect to the requirements of such section 411(b)(2).

(3) A plan satisfies the requirements of this paragraph if--

> **(A)** in the case of a defined benefit plan, the plan requires separate accounting for the portion of each employee's accrued benefit derived from any voluntary employee contributions permitted under the plan; and
>
> **(B)** in the case of any plan which is not a defined benefit plan, the plan requires separate accounting for each employee's accrued benefit.

(4)(A) For purposes of determining an employee's accrued benefit, the term "year of participation" means a period of service (beginning at the earliest date on which the employee is a participant in the plan and which is included in a period of service required to be taken into account under section 1052(b) of this title, determined without regard to section 1052(b)(5) of this title) as determined under regulations prescribed by the Secretary which provide for the calculation of such period on any reasonable and consistent basis.

(B) For purposes of this paragraph, except as provided in subparagraph (C), in the case of any employee whose customary employment is less than full time, the calculation of such employee's service on any basis which provides less than a ratable portion of the accrued benefit to which he would be entitled under the plan if his customary employment were full time shall not be treated as made on a reasonable and consistent basis.

(C) For purposes of this paragraph, in the case of any employee whose service is less than 1,000 hours during any calendar year, plan year or other 12-consecutive-month period designated by the plan (and not prohibited under regulations prescribed by the Secretary) the calculation of his period of service shall not be treated as not made on a reasonable and consistent basis merely because such service is not taken into account.

(D) In the case of any seasonal industry where the customary period of employment is less than 1,000 hours during a calendar year, the term "year of participation" shall be such period as determined under regulations prescribed by the Secretary.

(E) For purposes of this subsection in the case of any maritime industry, 125 days of service shall be treated as a year of participation. The Secretary may prescribe regulations to carry out the purposes of this subparagraph.

(5) Special rules relating to age

(A) Comparison to similarly situated younger individual

(i) In general

A plan shall not be treated as failing to meet the requirements of paragraph (1)(H)(i) if a participant's accrued benefit, as determined as of any date under the terms of the plan, would be equal to or greater than that of any similarly situated, younger individual who is or could be a participant.

(ii) Similarly situated

For purposes of this subparagraph, a participant is similarly situated to any other individual if such participant is identical to such other individual in every respect (including period of service, compensation, position, date of hire, work history, and any other respect) except for age.

(iii) Disregard of subsidized early retirement benefits

In determining the accrued benefit as of any date for purposes of this subparagraph, the subsidized portion of any early retirement benefit or retirement-type subsidy shall be disregarded.

(iv) Accrued benefit

For purposes of this subparagraph, the accrued benefit may, under the terms of the plan, be expressed as an annuity payable at normal retirement age, the balance of a hypothetical account, or the current value of the accumulated percentage of the employee's final average compensation.

(B) Applicable defined benefit plans

(i) Interest credits

(I) In general

An applicable defined benefit plan shall be treated as failing to meet the requirements of paragraph (1)(H) unless the terms of the plan provide that any interest credit (or an equivalent amount) for any plan year shall be at a rate which is not greater than a market rate of return. A plan shall not be treated as failing to meet the requirements of this subclause merely because the plan provides for a reasonable minimum guaranteed rate of return or for a rate of return that is equal to the greater of a fixed or variable rate of return.

(II) Preservation of capital

An applicable defined benefit plan shall be treated as failing to meet the requirements of paragraph (1)(H) unless the plan provides that an interest credit (or equivalent amount) of less than zero shall in no event result in the account balance or similar amount being less than the aggregate amount of contributions credited to the account.

(III) Market rate of return

The Secretary of the Treasury may provide by regulation for rules governing the calculation of a market rate of return for purposes of subclause (I) and for permissible methods of crediting interest to the account (including fixed or variable interest rates) resulting in effective rates of return meeting the requirements of subclause (I).

(ii) Special rule for plan conversions

If, after June 29, 2005, an applicable plan amendment is adopted, the plan shall be treated as failing to meet the requirements of paragraph (1)(H) unless the requirements of clause (iii) are met with respect to each individual who was a participant in the plan immediately before the adoption of the amendment.

(iii) Rate of benefit accrual

Subject to clause (iv), the requirements of this clause are met with respect to any participant if the accrued benefit of the participant under the terms of the plan as in effect after the amendment is not less than the sum of--

(I) the participant's accrued benefit for years of service before the effective date of the amendment, determined under the terms of the plan as in effect before the amendment, plus

(II) the participant's accrued benefit for years of service after the effective date of the amendment, determined under the terms of the plan as in effect after the amendment.

(iv) Special rules for early retirement subsidies

For purposes of clause (iii)(I), the plan shall credit the accumulation account or similar amount[1] with the amount of any early retirement benefit or retirement-type subsidy for the plan year in which the participant retires if, as of such time, the participant has met the age, years of service, and other requirements under the plan for entitlement to such benefit or subsidy.

1. So in original. Probably should be "similar account".

(v) Applicable plan amendment

For purposes of this subparagraph--

(I) In general

The term "applicable plan amendment" means an amendment to a defined benefit plan which has the effect of converting the plan to an applicable defined benefit plan.

(II) Special rule for coordinated benefits

If the benefits of 2 or more defined benefit plans established or maintained by an employer are coordinated in such a manner as to have the effect of the adoption of an amendment described in subclause (I), the sponsor of the defined benefit plan or plans providing for such coordination shall be treated as having adopted such a plan amendment as of the date such coordination begins.

(III) Multiple amendments

The Secretary of the Treasury shall issue regulations to prevent the avoidance of the purposes of this subparagraph through the use of 2 or more plan amendments rather than a single amendment.

(IV) Applicable defined benefit plan

For purposes of this subparagraph, the term "applicable defined benefit plan" has the meaning given such term by section 1053(f)(3) of this title.

(vi) Termination requirements

An applicable defined benefit plan shall not be treated as meeting the requirements of clause (i) unless the plan provides that, upon the termination of the plan--

(I) if the interest credit rate (or an equivalent amount) under the plan is a variable rate, the rate of interest used to determine accrued benefits under the plan shall be equal to the average of the rates of interest used under the plan during the 5-year period ending on the termination date, and

(II) the interest rate and mortality table used to determine the amount of any benefit under the plan payable in the form of an annuity payable at normal retirement age shall be the rate and table specified under the plan for such purpose as of the termination date, except that if such interest rate is a variable rate, the interest rate shall be determined under the rules of subclause (I).

(C) Certain offsets permitted

A plan shall not be treated as failing to meet the requirements of paragraph (1)(H)(i) solely because the plan provides offsets against benefits under the plan to the extent such offsets are otherwise allowable in applying the requirements of section 401(a) of Title 26.

(D) Permitted disparities in plan contributions or benefits

A plan shall not be treated as failing to meet the requirements of paragraph (1)(H) solely because the plan provides a disparity in contributions or benefits with respect to which the requirements of section 401(l) of Title 26 are met.

(E) Indexing permitted

(i) In general

A plan shall not be treated as failing to meet the requirements of paragraph (1)(H) solely because the plan provides for indexing of accrued benefits under the plan.

(ii) Protection against loss

Except in the case of any benefit provided in the form of a variable annuity, clause (i) shall not apply with respect to any indexing which results in an accrued benefit less than the accrued benefit determined without regard to such indexing.

(iii) Indexing

For purposes of this subparagraph, the term "indexing" means, in connection with an accrued benefit, the periodic adjustment of the accrued benefit by means of the application of a recognized investment index or methodology.

(F) Early retirement benefit or retirement-type subsidy

For purposes of this paragraph, the terms "early retirement benefit" and "retirement-type subsidy" have the meaning given such terms in subsection (g)(2)(A).

(G) Benefit accrued to date

For purposes of this paragraph, any reference to the accrued benefit shall be a reference to such benefit accrued to date.

(6) Projected interest crediting rate

For purposes of subparagraphs (A), (B), and (C) of paragraph (1), in the case of an applicable defined benefit plan (within the meaning of section 1053(f)(3) of this title) which provides variable interest crediting rates, the interest crediting rate which is treated as in effect and as the projected interest crediting rate shall be a reasonable projection of such variable interest crediting rate, not to exceed 6 percent.

(c) Employee's accrued benefits derived from employer and employee contributions

(1) For purposes of this section and section 1053 of this title an employee's accrued benefit derived from employer contributions as of any applicable date is the excess (if any) of the accrued benefit for such employee as of such applicable date over the accrued benefit derived from contributions made by such employee as of such date.

(2)(A) In the case of a plan other than a defined benefit plan, the accrued benefit derived from contributions made by an employee as of any applicable date is--

> **(i)** except as provided in clause (ii), the balance of the employee's separate account consisting only of his contributions and the income, expenses, gains, and losses attributable thereto, or
>
> **(ii)** if a separate account is not maintained with respect to an employee's contributions under such a plan, the amount which bears the same ratio to his total accrued benefit as the total amount of the employee's contributions (less withdrawals) bears to the sum of such contributions and the contributions made on his behalf by the employer (less withdrawals).

(B) Defined benefit plans

In the case of a defined benefit plan, the accrued benefit derived from contributions made by an employee as of any applicable date is the amount equal to the employee's accumulated contributions expressed as an annual benefit commencing at normal retirement age, using an interest rate which would be used under the plan under section 1055(g)(3) of this title (as of the determination date).

(C) For purposes of this subsection, the term "accumulated contributions" means the total of--

(i) all mandatory contributions made by the employee,

(ii) interest (if any) under the plan to the end of the last plan year to which section 1053(a)(2) of this title does not apply (by reason of the applicable effective date), and

(iii) interest on the sum of the amounts determined under clauses (i) and (ii) compounded annually--

(I) at the rate of 120 percent of the Federal midterm rate (as in effect under section 1274 of Title 26 for the 1st month of a plan year for the period beginning with the 1st plan year to which subsection (a)(2) applies by reason of the applicable effective date) and ending with the date on which the determination is being made, and

(II) at the interest rate which would be used under the plan under section 1055(g)(3) of this title (as of the determination date) for the period beginning with the determination date and ending on the date on which the employee attains normal retirement age.

For purposes of this subparagraph, the term "mandatory contributions" means amounts contributed to the plan by the employee which are required as a condition of employment, as a condition of participation in such plan, or as a condition of obtaining benefits under the plan attributable to employer contributions.

(D) The Secretary of the Treasury is authorized to adjust by regulation the conversion factor described in subparagraph (B) from time to time as he may deem necessary. No such adjustment shall be effective for a plan year beginning before the expiration of 1 year after such adjustment is determined and published.

(3) For purposes of this section, in the case of any defined benefit plan, if an employee's accrued benefit is to be determined as an amount other than an annual benefit commencing at normal retirement age, or if the accrued benefit derived from contributions made by an employee is to be determined with respect to a benefit other than an annual benefit in the form of a single life annuity (without ancillary benefits) commencing at normal retirement age, the employee's accrued benefit, or the accrued benefits derived from contributions made by an employee, as the case may be, shall be the actuarial equivalent of such benefit or amount determined under paragraph (1) or (2).

(4) In the case of a defined benefit plan which permits voluntary employee contributions, the portion of an employee's accrued benefit derived from such contributions shall be treated as an accrued benefit derived from employee contributions under a plan other than a defined benefit plan.

(d) Employee service which may be disregarded in determining employee's accrued benefits under plan

Notwithstanding section 1053(b)(1) of this title, for purposes of determining the employee's accrued benefit under the plan, the plan may disregard service performed by the employee with respect to which he has received--

(1) a distribution of the present value of his entire nonforfeitable benefit if such distribution was in an amount (not more than the dollar limit under section 1053(e)(1) of this title) permitted under regulations prescribed by the Secretary of the Treasury, or

(2) a distribution of the present value of his nonforfeitable benefit attributable to such service which he elected to receive.

Paragraph (1) shall apply only if such distribution was made on termination of the employee's participation in the plan. Paragraph (2) shall apply only if such distribution was made on termination of the employee's participation in the plan or under such other circumstances as may be provided under regulations prescribed by the Secretary of the Treasury.

(e) Opportunity to repay full amount of distributions which have been reduced through disregarded employee service

For purposes of determining the employee's accrued benefit, the plan shall not disregard service as provided in subsection (d) unless the plan provides an opportunity for the participant to repay the full amount of a distribution described in subsection (d) with, in the case of a defined benefit plan, interest at the rate determined for purposes of subsection (c)(2)(C) and provides that upon such repayment the employee's accrued benefit shall be recomputed by taking into account service so disregarded. This subsection shall apply only in the case of a participant who--

(1) received such a distribution in any plan year to which this section applies, which distribution was less than the present value of his accrued benefit,

(2) resumes employment covered under the plan, and

(3) repays the full amount of such distribution with, in the case of a defined benefit plan, interest at the rate determined for purposes of subsection (c)(2)(C).

The plan provision required under this subsection may provide that such repayment must be made (A) in the case of a withdrawal on account of separation from service, before the earlier of 5 years after the first date on which the participant is subsequently re-employed by the employer, or the close of the first period of 5 consecutive 1-year breaks in service commencing after the withdrawal; or (B) in the case of any other withdrawal, 5 years after the date of the withdrawal.

(f) Employer treated as maintaining a plan

For the purposes of this part, an employer shall be treated as maintaining a plan if any employee of such employer accrues benefits under such plan by reason of service with such employer.

(g) Decrease of accrued benefits through amendment of plan

(1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 1082(d)(2) or 1441 of this title.

(2) For purposes of paragraph (1), a plan amendment which has the effect of--

> **(A)** eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or
>
> **(B)** eliminating an optional form of benefit,

with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy. The Secretary of the Treasury shall by regulations provide that this paragraph shall not apply to any plan amendment which reduces or eliminates benefits or subsidies which create significant burdens or complexities for the plan and plan participants, unless such amendment adversely affects the rights of any participant in a more than de minimis manner. The Secretary of the Treasury may by regulations provide that this subparagraph shall not apply to a plan amendment described in subparagraph (B) (other than a plan amendment having an effect described in subparagraph (A)).

(3) For purposes of this subsection, any--

> **(A)** tax credit employee stock ownership plan (as defined in section 409(a) of Title 26), or
>
> **(B)** employee stock ownership plan (as defined in section 4975(e)(7) of Title 26),

shall not be treated as failing to meet the requirements of this subsection merely because it modifies distribution options in a nondiscriminatory manner.

(4)(A) A defined contribution plan (in this subparagraph referred to as the "transferee plan") shall not be treated as failing to meet the requirements of this subsection merely because the transferee plan does not provide some or all of the forms of distribution previously available under another defined contribution plan (in this subparagraph referred to as the "transferor plan") to the extent that--

> **(i)** the forms of distribution previously available under the transferor plan applied to the account of a participant or beneficiary under the transferor plan

that was transferred from the transferor plan to the transferee plan pursuant to a direct transfer rather than pursuant to a distribution from the transferor plan;

(ii) the terms of both the transferor plan and the transferee plan authorize the transfer described in clause (i);

(iii) the transfer described in clause (i) was made pursuant to a voluntary election by the participant or beneficiary whose account was transferred to the transferee plan;

(iv) the election described in clause (iii) was made after the participant or beneficiary received a notice describing the consequences of making the election; and

(v) the transferee plan allows the participant or beneficiary described in clause (iii) to receive any distribution to which the participant or beneficiary is entitled under the transferee plan in the form of a single sum distribution.

(B) Subparagraph (A) shall apply to plan mergers and other transactions having the effect of a direct transfer, including consolidations of benefits attributable to different employers within a multiple employer plan.

(5) Except to the extent provided in regulations promulgated by the Secretary of the Treasury, a defined contribution plan shall not be treated as failing to meet the requirements of this subsection merely because of the elimination of a form of distribution previously available thereunder. This paragraph shall not apply to the elimination of a form of distribution with respect to any participant unless--

(A) a single sum payment is available to such participant at the same time or times as the form of distribution being eliminated; and

(B) such single sum payment is based on the same or greater portion of the participant's account as the form of distribution being eliminated.

(h) Notice of significant reduction in benefit accruals

(1) An applicable pension plan may not be amended so as to provide for a significant reduction in the rate of future benefit accrual unless the plan administrator provides the notice described in paragraph (2) to each applicable individual (and to each employee organization representing applicable individuals) and to each employer who has an obligation to contribute to the plan.

(2) The notice required by paragraph (1) shall be written in a manner calculated to be understood by the average plan participant and shall provide sufficient information (as determined in accordance with regulations prescribed by the Secretary of the Treasury) to allow applicable individuals to understand the effect of the plan amendment. The Secretary of the Treasury may provide a simplified form of notice for, or exempt from any notice requirement, a plan--

(A) which has fewer than 100 participants who have accrued a benefit under the plan, or

(B) which offers participants the option to choose between the new benefit formula and the old benefit formula.

(3) Except as provided in regulations prescribed by the Secretary of the Treasury, the notice required by paragraph (1) shall be provided within a reasonable time before the effective date of the plan amendment.

(4) Any notice under paragraph (1) may be provided to a person designated, in writing, by the person to which it would otherwise be provided.

(5) A plan shall not be treated as failing to meet the requirements of paragraph (1) merely because notice is provided before the adoption of the plan amendment if no material modification of the amendment occurs before the amendment is adopted.

(6)(A) In the case of any egregious failure to meet any requirement of this subsection with respect to any plan amendment, the provisions of the applicable pension plan shall be applied as if such plan amendment entitled all applicable individuals to the greater of--

(i) the benefits to which they would have been entitled without regard to such amendment, or

(ii) the benefits under the plan with regard to such amendment.

(B) For purposes of subparagraph (A), there is an egregious failure to meet the requirements of this subsection if such failure is within the control of the plan sponsor and is--

(i) an intentional failure (including any failure to promptly provide the required notice or information after the plan administrator discovers an unintentional failure to meet the requirements of this subsection),

(ii) a failure to provide most of the individuals with most of the information they are entitled to receive under this subsection, or

(iii) a failure which is determined to be egregious under regulations prescribed by the Secretary of the Treasury.

(7) The Secretary of the Treasury may by regulations allow any notice under this subsection to be provided by using new technologies.

(8) For purposes of this subsection--

(A) The term "applicable individual" means, with respect to any plan amendment--

(i) each participant in the plan; and

(ii) any beneficiary who is an alternate payee (within the meaning of section 1056(d)(3)(K) of this title) under an applicable qualified domestic relations order (within the meaning of section 1056(d)(3)(B)(i) of this title),

whose rate of future benefit accrual under the plan may reasonably be expected to be significantly reduced by such plan amendment.

(B) The term "applicable pension plan" means--

(i) any defined benefit plan; or

(ii) an individual account plan which is subject to the funding standards of section 412 of Title 26.

(9) For purposes of this subsection, a plan amendment which eliminates or reduces any early retirement benefit or retirement- type subsidy (within the meaning of subsection (g)(2)(A)) shall be treated as having the effect of reducing the rate of future benefit accrual.

(i) Prohibition on benefit increases where plan sponsor is in bankruptcy

(1) In the case of a plan described in paragraph (3) which is maintained by an employer that is a debtor in a case under Title 11 or similar Federal or State law, no amendment of the plan which increases the liabilities of the plan by reason of--

(A) any increase in benefits,

(B) any change in the accrual of benefits, or

(C) any change in the rate at which benefits become nonforfeitable under the plan,

with respect to employees of the debtor, shall be effective prior to the effective date of such employer's plan of reorganization.

(2) Paragraph (1) shall not apply to any plan amendment that--

(A) the Secretary of the Treasury determines to be reasonable and that provides for only de minimis increases in the liabilities of the plan with respect to employees of the debtor,

(B) only repeals an amendment described in section 1082(d)(2) of this title,

(C) is required as a condition of qualification under part I of subchapter D of chapter 1 of Title 26, or

(D) was adopted prior to, or pursuant to a collective bargaining agreement entered into prior to, the date on which the employer became a debtor in a case under Title 11 or similar Federal or State law.

(3) This subsection shall apply only to plans (other than multiemployer plans or CSEC plans) covered under section 1321 of this title for which the funding target attainment percentage (as defined in section 1083(d)(2) of this title) is less than 100 percent after taking into account the effect of the amendment.

(4) For purposes of this subsection, the term “employer” has the meaning set forth in section 1082(b)(1) of this title, without regard to section 1082(b)(2) of this title.

(j) Diversification requirements for certain individual account plans

(1) In general

An applicable individual account plan shall meet the diversification requirements of paragraphs (2), (3), and (4).

(2) Employee contributions and elective deferrals invested in employer securities

In the case of the portion of an applicable individual’s account attributable to employee contributions and elective deferrals which is invested in employer securities, a plan meets the requirements of this paragraph if the applicable individual may elect to direct the plan to divest any such securities and to reinvest an equivalent amount in other investment options meeting the requirements of paragraph (4).

(3) Employer contributions invested in employer securities

In the case of the portion of the account attributable to employer contributions other than elective deferrals which is invested in employer securities, a plan meets the requirements of this paragraph if each applicable individual who--

(A) is a participant who has completed at least 3 years of service, or

(B) is a beneficiary of a participant described in subparagraph (A) or of a deceased participant,

may elect to direct the plan to divest any such securities and to reinvest an equivalent amount in other investment options meeting the requirements of paragraph (4).

(4) Investment options

(A) In general

The requirements of this paragraph are met if the plan offers not less than 3 investment options, other than employer securities, to which an applicable individual may direct the proceeds from the divestment of employer securities pursuant to this subsection, each of which is diversified and has materially different risk and return characteristics.

(B) Treatment of certain restrictions and conditions

(i) Time for making investment choices

A plan shall not be treated as failing to meet the requirements of this paragraph merely because the plan limits the time for divestment and reinvestment to periodic, reasonable opportunities occurring no less frequently than quarterly.

(ii) Certain restrictions and conditions not allowed

Except as provided in regulations, a plan shall not meet the requirements of this paragraph if the plan imposes restrictions or conditions with respect to the investment of employer securities which are not imposed on the investment of other assets of the plan. This subparagraph shall not apply to any restrictions or conditions imposed by reason of the application of securities laws.

(5) Applicable individual account plan

For purposes of this subsection--

(A) In general

The term "applicable individual account plan" means any individual account plan (as defined in section 1002(34) of this title) which holds any publicly traded employer securities.

(B) Exception for certain ESOPs

Such term does not include an employee stock ownership plan if--

(i) there are no contributions to such plan (or earnings thereunder) which are held within such plan and are subject to subsection (k) or (m) of section 401 of Title 26, and

(ii) such plan is a separate plan (for purposes of section 414(l) of Title 26) with respect to any other defined benefit plan or individual account plan maintained by the same employer or employers.

(C) Exception for one participant plans

Such term shall not include a one-participant retirement plan (as defined in section 1021(i)(8)(B) of this title).

(D) Certain plans treated as holding publicly traded employer securities

(i) In general

Except as provided in regulations or in clause (ii), a plan holding employer securities which are not publicly traded employer securities shall be treated as holding publicly traded employer securities if any employer corporation, or any member of a controlled group of corporations which includes such employer corporation, has issued a class of stock which is a publicly traded employer security.

(ii) Exception for certain controlled groups with publicly traded securities

Clause (i) shall not apply to a plan if--

(I) no employer corporation, or parent corporation of an employer corporation, has issued any publicly traded employer security, and

(II) no employer corporation, or parent corporation of an employer corporation, has issued any special class of stock which grants particular rights to, or bears particular risks for, the holder or issuer with respect to any corporation described in clause (i) which has issued any publicly traded employer security.

(iii) Definitions

For purposes of this subparagraph, the term--

(I) "controlled group of corporations" has the meaning given such term by section 1563(a) of Title 26, except that "50 percent" shall be substituted for "80 percent" each place it appears,

(II) "employer corporation" means a corporation which is an employer maintaining the plan, and

(III) "parent corporation" has the meaning given such term by section 424(e) of Title 26.

(6) Other definitions

For purposes of this paragraph--

(A) Applicable individual

The term "applicable individual" means--

(i) any participant in the plan, and

(ii) any beneficiary who has an account under the plan with respect to which the beneficiary is entitled to exercise the rights of a participant.

(B) Elective deferral

The term "elective deferral" means an employer contribution described in section 402(g)(3)(A) of Title 26.

(C) Employer security

The term "employer security" has the meaning given such term by section 1107(d)(1) of this title.

(D) Employee stock ownership plan

The term "employee stock ownership plan" has the meaning given such term by section 4975(e)(7) of Title 26.

(E) Publicly traded employer securities

The term “publicly traded employer securities” means employer securities which are readily tradable on an established securities market.

(F) Year of service

The term “year of service” has the meaning given such term by section 1053(b)(2) of this title.

(7) Transition rule for securities attributable to employer contributions

(A) Rules phased in over 3 years

(i) In general

In the case of the portion of an account to which paragraph (3) applies and which consists of employer securities acquired in a plan year beginning before January 1, 2007, paragraph (3) shall only apply to the applicable percentage of such securities. This subparagraph shall be applied separately with respect to each class of securities.

(ii) Exception for certain participants aged 55 or over

Clause (i) shall not apply to an applicable individual who is a participant who has attained age 55 and completed at least 3 years of service before the first plan year beginning after December 31, 2005.

(B) Applicable percentage

For purposes of subparagraph (A), the applicable percentage shall be determined as follows:

Plan year to which paragraph (3) applies:	**The applicable percentage is:**
1st	33
2d	66
3d and following	100.

(k) Special rule for determining normal retirement age for certain existing defined benefit plans

(1) In general

Notwithstanding section 1002(24) of this title, an applicable plan shall not be treated as failing to meet any requirement of this subchapter, or as failing to have a uniform normal retirement age for purposes of this subchapter, solely because the plan provides for a normal retirement age described in paragraph (2).

(2) Applicable plan

For purposes of this subsection--

(A) In general

The term “applicable plan” means a defined benefit plan the terms of which, on or before December 8, 2014, provided for a normal retirement age which is the earlier of--

(i) an age otherwise permitted under section 1002(24) of this title, or

(ii) the age at which a participant completes the number of years (not less than 30 years) of benefit accrual service specified by the plan.

A plan shall not fail to be treated as an applicable plan solely because the normal retirement age described in the preceding sentence only applied to certain participants or only applied to employees of certain employers in the case of a plan maintained by more than 1 employer.

(B) Expanded application

Subject to subparagraph (C), if, after December 8, 2014, an applicable plan is amended to expand the application of the normal retirement age described in subparagraph (A) to additional participants or to employees of additional employers maintaining the plan, such plan shall also be treated as an applicable plan with respect to such participants or employees.

(C) Limitation on expanded application

A defined benefit plan shall be an applicable plan only with respect to an individual who--

(i) is a participant in the plan on or before January 1, 2017, or

(ii) is an employee at any time on or before January 1, 2017, of any employer maintaining the plan, and who becomes a participant in such plan after such date.

(l) Cross reference

For special rules relating to plan provisions adopted to preclude discrimination, see section 1053(c)(2) of this title.

Appendix E

29 U.S.C.A. § 1102

§ 1102. Establishment of plan

(a) Named fiduciaries

(1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

(2) For purposes of this subchapter, the term "named fiduciary" means a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly.

(b) Requisite features of plan

Every employee benefit plan shall--

(1) provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan and the requirements of this subchapter,

(2) describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan (including any procedure described in section 1105(c)(1) of this title),

(3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan, and

(4) specify the basis on which payments are made to and from the plan.

(c) Optional features of plan

Any employee benefit plan may provide--

(1) that any person or group of persons may serve in more than one fiduciary capacity with respect to the plan (including service both as trustee and administrator);

(2) that a named fiduciary, or a fiduciary designated by a named fiduciary pursuant to a plan procedure described in section 1105(c)(1) of this title, may employ one or more persons to render advice with regard to any responsibility such fiduciary has under the plan; or

(3) that a person who is a named fiduciary with respect to control or management of the assets of the plan may appoint an investment manager or managers to manage (including the power to acquire and dispose of) any assets of a plan.

Appendix E

29 U.S.C.A. § 1103

§ 1103. Establishment of trust

(a) Benefit plan assets to be held in trust; authority of trustees

Except as provided in subsection (b), all assets of an employee benefit plan shall be held in trust by one or more trustees. Such trustee or trustees shall be either named in the trust instrument or in the plan instrument described in section 1102(a) of this title or appointed by a person who is a named fiduciary, and upon acceptance of being named or appointed, the trustee or trustees shall have exclusive authority and discretion to manage and control the assets of the plan, except to the extent that--

(1) the plan expressly provides that the trustee or trustees are subject to the direction of a named fiduciary who is not a trustee, in which case the trustees shall be subject to proper directions of such fiduciary which are made in accordance with the terms of the plan and which are not contrary to this chapter, or

(2) authority to manage, acquire, or dispose of assets of the plan is delegated to one or more investment managers pursuant to section 1102(c)(3) of this title.

(b) Exceptions

The requirements of subsection (a) of this section shall not apply--

(1) to any assets of a plan which consist of insurance contracts or policies issued by an insurance company qualified to do business in a State;

(2) to any assets of such an insurance company or any assets of a plan which are held by such an insurance company;

(3) to a plan--

(A) some or all of the participants of which are employees described in section 401(c)(1) of Title 26; or

(B) which consists of one or more individual retirement accounts described in section 408 of Title 26;

to the extent that such plan's assets are held in one or more custodial accounts which qualify under section 401(f) or 408(h) of Title 26, whichever is applicable.

(4) to a plan which the Secretary exempts from the requirement of subsection (a) and which is not subject to any of the following provisions of this chapter--

(A) part 2 of this subtitle,

(B) part 3 of this subtitle, or

(C) subchapter III of this chapter; or

(5) to a contract established and maintained under section 403(b) of Title 26 to the extent that the assets of the contract are held in one or more custodial accounts pursuant to section 403(b)(7) of Title 26.

(6) Any plan, fund or program under which an employer, all of whose stock is directly or indirectly owned by employees, former employees or their beneficiaries, proposes through an unfunded arrangement to compensate retired employees for benefits which were forfeited by such employees under a pension plan maintained by a former employer prior to the date such pension plan became subject to this chapter.

(c) Assets of plan not to inure to benefit of employer; allowable purposes of holding plan assets

(1) Except as provided in paragraph (2), (3), or (4) or subsection (d), or under sections 1342 and 1344 of this title (relating to termination of insured plans), or under section 420 of Title 26 (as in effect on December 29, 2022), the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

(2)(A) In the case of a contribution, or a payment of withdrawal liability under part 1 of subtitle E of subchapter III--

(i) if such contribution or payment is made by an employer to a plan (other than a multiemployer plan) by a mistake of fact, paragraph (1) shall not prohibit the return of such contribution to the employer within one year after the payment of the contribution, and

(ii) if such contribution or payment is made by an employer to a multiemployer plan by a mistake of fact or law (other than a mistake relating to whether the plan is described in section 401(a) of Title 26 or the trust which is part of such plan is exempt from taxation under section 501(a) of Title 26), paragraph (1) shall not prohibit the return of such contribution or payment to the employer within 6 months after the plan administrator determines that the contribution was made by such a mistake.

(B) If a contribution is conditioned on initial qualification of the plan under section 401 or 403(a) of Title 26, and if the plan receives an adverse determination with respect to its initial qualification, then paragraph (1) shall not prohibit the return of such contribution to the employer within one year after such determination, but only if the application for the determination is made by the time prescribed by law for filing the employer's return for the taxable year in which such plan was adopted, or such later date as the Secretary of the Treasury may prescribe.

(C) If a contribution is conditioned upon the deductibility of the contribution under section 404 of Title 26, then, to the extent the deduction is disallowed, paragraph (1) shall not prohibit the return to the employer of such contribution (to the extent disallowed) within one year after the disallowance of the deduction.

(3) In the case of a withdrawal liability payment which has been determined to be an overpayment, paragraph (1) shall not prohibit the return of such payment to the employer within 6 months after the date of such determination.

(d) Termination of plan

(1) Upon termination of a pension plan to which section 1321 of this title does not apply at the time of termination and to which this part applies (other than a plan to which no employer contributions have been made) the assets of the plan shall be allocated in accordance with the provisions of section 1344 of this title, except as otherwise provided in regulations of the Secretary.

(2) The assets of a welfare plan which terminates shall be distributed in accordance with the terms of the plan, except as otherwise provided in regulations of the Secretary.