

(c) *Additional rules.* The Commissioner may, in revenue rulings, notices, and other guidance of general applicability, provide any additional rules that may be necessary or appropriate in applying the minimum participation requirements of section 401(a)(26).

[T.D. 8375, 56 FR 63413, Dec. 4, 1991, as amended by T.D. 8487, 58 FR 46838, Sept. 3, 1993]

§ 1.401(a)(26)-2 Minimum participation rule.

(a) *General rule.* A plan satisfies this paragraph (a) for a plan year only if the plan benefits at least the lesser of—

(1) 50 employees of the employer, or

(2) 40 percent of the employees of the employer.

(b) *Frozen plans.* A plan under which no employee or former employee benefits (within the meaning of § 1.401(a)(26)-5 (a) or (b)), is a frozen plan for purposes of this section and satisfies paragraph (a) of this section automatically. Thus, a frozen defined contribution plan satisfies section 401(a)(26) automatically and a frozen defined benefit plan satisfies section 401(a)(26) for a plan year by satisfying the prior benefit structure requirements in § 1.401(a)(26)-3. For purposes of the rule in this paragraph (b), a defined benefit plan that provides only the minimum benefits for non-key employees required by section 416 is a frozen defined benefit plan.

(c) *Plan.* “Plan” means a plan within the meaning of § 1.401(b)-7 (a) and (b), after the application of the mandatory disaggregation rules of paragraph (d)(1) of this section and, if applicable, the permissive disaggregation rules of paragraph (d)(2) of this section.

(d) *Disaggregation of certain plans—(1) Mandatory disaggregation—(i) ESOPs and non-ESOPs.* The portion of a plan that is an ESOP and the portion of the plan that is not an ESOP are treated as separate plans for purposes of section 401(a)(26), except as otherwise permitted under § 54.4975-11(e) of this Chapter.

(ii) *Plans maintained by more than one employer—(A) Multiple employer plans.* If a plan benefits employees of more than one employer and those employees are not included in a unit of employees covered by one or more collective bargaining agreements, the plan is a mul-

multiple employer plan. A multiple employer plan is treated as separate plans, each of which is maintained by a separate employer and must separately satisfy section 401(a)(26) by reference only to that employer’s employees.

(B) *Multiemployer plans.* The portion of a multiemployer plan that benefits employees who are included in one or more units of employees covered by one or more collective bargaining agreements and the portion of that plan that benefits employees who are not included in a unit of employees covered pursuant to any collective bargaining agreement are treated as separate plans. The portion of a multiemployer plan that benefits employees who are not included in a unit of employees covered by a collective bargaining agreement is a multiple employer plan as described in paragraph (d)(1)(ii)(A) of this section. This paragraph (d)(1)(ii)(B) does not apply to the extent that the special testing rule in § 1.401(a)(26)-1(b)(2)(ii) applies. Also, this paragraph (d)(1)(B)(2) does not apply for purposes of prior benefit structure testing under § 1.401 (a)(26)-3.

(iii) *Defined benefit plans with other arrangements—(A) In general.* A defined benefit plan is treated as comprising separate plans if, under the facts and circumstances, there is an arrangement (either under or outside the plan) that has the effect of providing any employee with a greater interest in a portion of the assets of a plan in a way that has the effect of creating separate accounts. Separate plans are not created, however, merely because a partnership agreement provides for allocation among partners, in proportion to their partnership interests, of either the cost of funding the plan or surplus assets upon plan termination.

(B) *Examples.* The following examples illustrate certain situations in which other arrangements relating to a defined benefit plan are or are not treated as creating separate plans:

Example 1. Employer A maintains a defined benefit plan under which each highly compensated employee can direct the investment of the portion of the plan’s assets that represents the accumulated contributions with respect to that employee’s plan benefits. In addition, by agreement outside the plan, if the product of the employee’s investment direction exceeds the value needed to fund that

employee's benefits, Employer A agrees to make a special payment to the participant. In this case, each separate portion of the pool of assets over which an employee has investment authority is a separate plan for the employee.

Example 2. Employer B is a partnership that maintains a defined benefit plan. The partnership agreement provides that, upon termination of the plan, a special allocation of any excess plan assets after reversion is made to the partnership on the basis of partnership share. This arrangement does not create separate plans with respect to the partners.

(iv) *Plans benefiting employees of qualified separate lines of business.* If an employer is treated as operating qualified separate lines of business for purposes of section 401(a)(26) in accordance with § 1.414(r)-1(b), the portion of a plan that benefits employees of one qualified separate line of business is treated as a separate plan from the portions of the same plan that benefit employees of the other qualified separate lines of business of the employer. See §§ 1.414(r)-1(c)(3) and 1.414(r)-9 (separate application of section 401(a)(26) to the employees of a qualified separate line of business). The rule in this paragraph (d)(6) does not apply to a plan that is tested under the special rule for employer-wide plans in § 1.414(r)-1(c)(3)(ii) for a plan year.

(2) *Permissive disaggregation*—(i) *Plans benefiting collectively bargained employees.* For purposes of section 401(a)(26), an employer may treat the portion of a plan that benefits employees who are included in a unit of employees covered by a collective bargaining agreement as a plan separate from the portion of a plan that benefits employees who are not included in such a collective bargaining unit. This paragraph (d)(2)(i) applies separately to each collective bargaining agreement. Thus, for example, the portion of a plan that benefits employees included in a unit of employees covered by one collective bargaining agreement may be treated as a plan that is separate from the portion of the plan that benefits employees included in a unit of employees covered by another collective bargaining agreement.

(ii) *Plans benefiting otherwise excludable employees.* If an employer applies section 401(a)(26) separately to the por-

tion of a plan that benefits only employees who satisfy age and service conditions under the plan that are lower than the greatest minimum age and service conditions permissible under section 410(a), the plan is treated as comprising separate plans, one benefiting the employees who have not satisfied the lower minimum age and service but not the greatest minimum age and service conditions permitted under section 410(a) and one benefiting employees who have satisfied the greatest minimum age and service conditions permitted under section 410(a). See § 1.401(a)(26)-6(b)(1)(ii) for rules concerning testing of otherwise excludable employees.

[T.D. 8375, 56 FR 63414, Dec. 4, 1991]

§ 1.401(a)(26)-3 Rules applicable to a defined benefit plan's prior benefit structure.

(a) *General rule.* A defined benefit plan that does not meet one of the exceptions in § 1.401(a)(26)-1(b) must satisfy paragraph (c) of this section with respect to its prior benefit structure. Defined contribution plans are not subject to this section.

(b) *Prior benefit structure.* Each defined benefit plan has only one prior benefit structure, and all accrued benefits under the plan as of the beginning of a plan year (including benefits rolled over or transferred to the plan) are included in the prior benefit structure for the year.

(c) *Testing a prior benefit structure*—(1) *General rule.* A plan's prior benefit structure satisfies this paragraph if the plan provides meaningful benefits to a group of employees that includes the lesser of 50 employees or 40 percent of the employer's employees. Thus, a plan satisfies the requirements of this paragraph (c) if at least 50 employees or 40 percent of the employer's employees currently accrue meaningful benefits under the plan. Alternatively, a plan satisfies this paragraph if at least 50 employees and former employees or 40 percent of the employer's employees and former employees have meaningful accrued benefits under the plan.

(2) *Meaningful benefits.* Whether a plan is providing meaningful benefits,