

401(a)(17) for plan years beginning on or after the OBRA '93 effective date) and that for section 401(a)(17) employees, each employee's accrued benefit will be determined under § 1.401(a)(4)-13(c)(4)(i) (formula without wear-away) using December 31, 1993 as the OBRA '93 fresh-start date.

(b) Assume that for each of the years 1996-98 Employee A's annual compensation under the plan compensation definition, disregarding the amendment to comply with section 401(a)(17), is \$400,000. Assume that the annual compensation limit is first adjusted to \$160,000 for plan years beginning on or after January 1, 1997, and is not adjusted for the plan year beginning on or after January 1, 1998. The compensation that may be taken into account for the 1998 plan year cannot exceed \$156,667 (the average of \$150,000 for 1996, \$160,000 for 1997, and \$160,000 for 1998).

(c) Therefore, at the end of December 31, 1998, Employee A's accrued benefit is \$63,564, which is equal to \$47,897 (Employee A's OBRA '93 frozen accrued benefit) plus \$15,667 (\$156,667 multiplied by (2 percent multiplied by 5 years of service)).

Example 6. (a) Assume the same facts as in *Example 5*, except that, for the fresh-start group (in this case the section 401(a)(17) employees), the amendments to Plan Y provide for adjustments to the section 401(a)(17) frozen accrued benefit and the OBRA '93 frozen accrued benefit in accordance with § 1.401(a)(4)-13(d) using the fraction described in § 1.401(a)(4)-13(d)(8)(i).

(b) Employee A's frozen accrued benefit as of December 31, 1993, is adjusted as of December 31, 1998, as follows:

(1) Employee A's frozen accrued benefit as of December 31, 1993, is the sum of Employee A's section 401(a)(17) frozen accrued benefit (\$25,000) and Employee A's frozen accruals for the years 1989-93 (\$22,897).

(2) The numerator of Employee A's adjustment fraction is \$156,667 (the average of \$150,000, \$160,000, and \$160,000). The denominator of Employee A's adjustment fraction with respect to Employee A's section 401(a)(17) frozen accrued benefit is \$250,000, and the denominator of Employee A's adjustment fraction with respect to the rest of Employee A's frozen accrued benefit is \$228,973 (the average of Employee A's annual compensation for 1991, 1992, and 1993, as limited by the respective annual limit for each of those years).

(3) Employee A's section 401(a)(17) frozen accrued benefit as adjusted through December 31, 1998, remains \$25,000. The compensation adjustment fraction determined in accordance with paragraph (e)(4)(iii) of this section is less than one (\$156,667 divided by \$250,000).

(4) Employee A's frozen accruals for the years 1989-93, as adjusted through December 31, 1998, remain \$22,897 because the adjust-

ment fraction is less than one (\$156,667 divided by \$228,973).

(5) Employee A's adjusted accrued benefit as of December 31, 1998, equals \$47,897 (the sum of the \$25,000 and \$22,897 amounts from paragraphs (b)(3) and (b)(4), respectively, of this *Example*).

(c) Employee A's section 401(a)(17) frozen accrued benefit will not be adjusted for compensation increases until the numerator of the fraction used to adjust that frozen accrued benefit exceeds the denominator of \$250,000 used in determining those accruals.

Similarly, the portion of Employee A's OBRA '93 frozen accrued benefit attributable to the frozen accruals for the years 1989-1993 will not be adjusted for compensation increases until the numerator of the fraction used to adjust those frozen accruals exceeds the denominator of \$228,973 used in determining those accruals.

[T.D. 8547, 59 FR 32905, June 27, 1994]

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[T.D. 8375, 56 FR 63413, Dec. 4, 1991]

§ 1.401(a)(26)-1 Minimum participation requirements.

(a) *General rule.* A plan is a qualified plan for a plan year only if the plan satisfies section 401(a)(26) for the plan year. A plan that satisfies any of the exceptions described in paragraph (b) of this section passes section 401(a)(26) automatically for the plan year. A plan that does not satisfy one of the exceptions in paragraph (b) of this section must satisfy § 1.401(a)(26)-2(a). In addition, a defined benefit plan must satisfy § 1.401(a)(26)-3 with respect to its prior benefit structure. Finally, a defined benefit plan that benefits former employees (for example, a defined benefit plan that is amended to provide an ad hoc cost-of-living adjustment to former employees) must separately satisfy § 1.401(a)(26)-4 with respect to its former employees.

(b) *Exceptions to section 401(a)(26)*—(1) *Plans that do not benefit any highly compensated employees.* A plan, other than a frozen defined benefit plan as defined in § 1.401(a)(26)-2(b), satisfies section 401(a)(26) for a plan year if the plan is not a top-heavy plan under section 416 and the plan meets the following requirements:

(i) The plan benefits no highly compensated employee or highly compensated former employee of the employer; and

(ii) The plan is not aggregated with any other plan of the employer to enable the other plan to satisfy section 401(a)(4) or 410(b). The plan may, however, be aggregated with the employer's other plans for purposes of the average benefit percentage test in section 410(b)(2)(A)(ii).

(2) *Multiemployer plans*—(i) *In general.* The portion of a multiemployer plan that benefits only employees included in a unit of employees covered by a collective bargaining agreement may be treated as a separate plan that satisfies section 401(a)(26) for a plan year.

(ii) *Multiemployer plans covering non-collectively bargained employees*—(A) *In general.* The rule provided in paragraph (b)(2)(i) does not apply to the portion of a multiemployer plan that benefits em-

ployees who are not included in any collective bargaining unit covered by a collective bargaining agreement. Thus, the portion of the plan benefiting these employees must separately satisfy section 401(a)(26).

(B) *Special testing rule.* A multiemployer plan that benefits employees who are not included in any collective bargaining unit covered by a collective bargaining agreement satisfies section 401(a)(26) if the plan benefits 50 employees. For purposes of this special testing rule, employees who are included in a unit of employees covered by a collective bargaining agreement may be included in determining whether the plan benefits 50 employees.

(3) *Certain underfunded defined benefit plans*—(i) *In general.* A defined benefit plan is deemed to satisfy section 401(a)(26) for a plan year if all of the conditions of paragraphs (b)(3)(ii) through (b)(3)(iv) of this section are satisfied with respect to the plan for the plan year.

(ii) *Eligible plans.* This condition is satisfied for a plan year only if the plan is subject to Title IV of the Employee Retirement Income Security Act of 1974 (ERISA) for the plan year or, if the plan is not a Title IV plan under ERISA, it is not a top-heavy plan within the meaning of section 416. This condition does not apply for plan years beginning before January 1, 1992.

(iii) *Actuarial certification.* This condition is satisfied for a plan year only if the employer's timely filed actuarial report, as required by section 6059, evidences that the plan does not have sufficient assets to satisfy all liabilities under the plan (determined in accordance with section 401(a)(2)).

(iv) *Cessation of all benefit accruals.* This condition is satisfied for a plan year only if, for the plan year, no employee or former employee is benefiting within the meaning of § 1.401(a)(26)-5(a) or (b). For this purpose, an employee is not treated as benefiting solely by reason of being a non-key employee receiving minimum benefit accruals required by section 416.

(4) *Section 401(k) plan maintained by employers that include certain governmental or tax-exempt entities.* Section 401(k)(4)(B) prevents certain State and