

December 16, 1975

Dear :

This is in response to your letter raising questions concerning the joint and survivor annuity provisions of the Employee Retirement Income Security Act of 1974 (ERISA).

You ask first if a joint and survivor annuity is required under a defined contribution plan which provides for a lump-sum distribution of cash to participants but which permits the employee to direct the value of his account be used to purchase an annuity contract from an insurance company.

The requirements of section 205 of ERISA regarding joint and survivor benefits for pension plans providing for the payment of benefits in the form of an annuity is applicable to the situation you describe; the applicability of those requirements cannot be made to hinge on the plan's designation of which is its ordinary form of benefit where no direction is made, otherwise the joint and survivor provisions could be nullified. Moreover, section 205(a) requires provision for joint and survivor annuities in any pension plan providing for the payment of benefits in the form of an annuity; there is no basis for the distinction you suggest between defined contribution and defined benefit plans in this regard. Thus, in the plan you describe, where the designation is made by the employee that an annuity be provided, the joint and survivor provisions apply.

You ask also whether a plan must provide for a joint and survivor annuity, regardless of the wishes of a surviving spouse, if the employee dies before retirement but after attaining early retirement age. Where a pension plan provides for the payment of benefits in the form of an annuity, during the period beginning on the later of the date the employee reaches the earliest retirement age and the first day of the 120th month beginning before the date on which he reaches normal retirement age and ending with the date on which he reaches normal retirement age the participant must be accorded a right to elect a joint and survivor annuity (section 205(c)(1)). The wishes of the surviving spouse cannot be made relevant since at that

P/OPINION 75-71

point in time preceding death the identity of the surviving spouse is unknown.

As to your concern that the surviving spouse might prefer an alternative benefit instead of an annuity, the temporary regulations on joint and survivor annuities issued by the Internal Revenue Service on October 3, 1975, provide that a plan will not fail to meet the requirements for tax qualifications under section 401(a)(11) of the Internal Revenue Code (which contains joint and survivor annuity requirements similar to those in section 205, ERISA), merely because the plan "provides that the spouse of a deceased participant may elect to have benefits paid in a form other than a qualified joint and survivor annuity" (section 11.401(a)-11, 40 Fed. Reg. 45810).

Sincerely,