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NEBRASKA RETIREMENT SYSTEMS COMMITTEE OF THE LEGISLATURE

Report of Compliance Audit

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INTRODUCTION AND SUMMARY OF FINDINGS

Ice Miller LLP ("Ice Miller") was retained by the Omaha School Employees' Retirement System ("OSERS") to conduct a federal tax law compliance audit of the School Employees' Retirement System of Douglas County School District 00001 a/k/a Omaha School Employees' Retirement System (the "Plan"). Please allow this to provide an introduction of our law firms, an introduction of the assignment and a summary of the findings.

I. Introduction of Ice Miller

Ice Miller is a full-service law firm, with locations in Indianapolis, Indiana; Chicago, Illinois; DuPage County, Illinois; New York, New York; Columbus, Ohio; Philadelphia, Pennsylvania; and Washington, D.C. Ice Miller prides itself on our commitment to providing exceptional, personal service and valued counsel to our clients. Our historic and recognized focus areas have included employee benefits and government entity representation. Ice Miller has offered federal tax services since 1920, and we have served public plans as legal counsel for their tax, benefits, fiduciary, and investment needs for more than 30 years.

Ice Miller's Employee Benefits Group is one of the most experienced benefits groups in the country. One of our group's main focuses is working with defined benefit retirement systems, defined compensation and deferred compensation plans at the state and local levels in 40 states.

Ice Miller regularly performs compliance audits for public pension plans. We have been involved in section-by-section analysis of the pension laws of states and municipalities in order to demonstrate to the Internal Revenue Service ("IRS") how these laws meet the Internal Revenue Code ("IRC"), Treasury Regulations, and IRS requirements for tax qualification/compliance. Our analysis ordinarily includes review and consideration of constitutional provisions, statutes, ordinances, Board rules and plan documents or procedures.

We wish to recognize Ms. Cecelia M. Carter, OSERS' Executive Director, and the OSERS staff and outside counsel for their cooperation and responsiveness to our requests for information and records. We conducted multiple interviews and meetings with OSERS' staff and counsel, we reviewed OSERS' forms and form letters and we considered OSERS' current actuarial reports and financial statements.

II. Introduction of Assignment

We conducted our compliance audit based upon the federal tax law requirements for qualified, governmental defined benefit plan, as well as considering the Class V Retirement Act, Legislative Bill ("LB") 147 which was passed over the Governor's veto on May 26, 2021 and the Rules and Regulations of the Douglas County School District 00001 Board of Education on the Operation Management of the Omaha School Employees' Retirement System (adopted July 12, 2021) (the "Board Rules and Regulations"). Our focus has been to conduct an independent, compliance audit in accordance with Section 42 of LB 147. In this regard, our work has been to ensure the Plan's written terms comply with the requirements for a qualified, governmental defined benefit plan in accordance with IRC §§ 401(a) and 414(d). This part of our work also focused on whether Nebraska State law, which comprises the greatest portion of the Plan's written terms,

complies with the applicable federal law requirements for OSERS. Separately, our compliance audit also considered whether the Plan, in operation, complies with federal and state law requirements.

In accordance with Section 42 of LB 147, our compliance audit was charged with considering and evaluating the following:

* * * *

(3) The compliance audit shall include an examination of records, files, and any other documents or resources of the retirement system and an evaluation of all policies and procedures of the retirement system, the school district, the board of education, and the board of trustees related to the administration and operation of the retirement system to determine compliance with all state and federal laws. The compliance audit shall also include, but not be limited to, an examination and evaluation of:

(a) Eligibility and enrollment to ensure eligible individuals are properly and timely enrolled in the plan;

(b) Contributions, compensation, service hours, and other records to ensure that members are making the correct contributions, that only eligible compensation and eligible service hours are reported at the time and in the manner specified in plan documents, and that only the authorized interest is being recorded;

(c) Termination of employment to ensure that only terminated members are taking distributions from the plan at the time and in the manner specified in the plan documents;

(d) Reemployment after retirement to ensure that retirees and members who have terminated employment who reemploy have complied with plan documents;

(e) Benefit calculations and benefit payments to ensure that the correct benefits are calculated for members and paid on a timely basis; and

(f) Disability retirements to ensure:

(i) The determination of the member's disability status and any accrual of additional disability benefits due to deferred distribution of such benefits are conducted in accordance with the act; and

(ii) The amount of the disability retirement benefits is correctly calculated for members and paid on a timely basis.

(4) The examination of each of the issues listed in subsection (3) of this section shall also include, but not be limited to, a review of:

(a) The plan documents and training that the retirement system has provided to the staff of the retirement system and employees who provide services to the retirement system to ensure proper compliance with the procedures and processes;

(b) Oversight practices or processes used by the board of trustees and administrator of the retirement system to identify whether the employer properly followed the plan documents; and

(c) Practices and processes used by the board of trustees and administrator of the retirement system to correct any errors made.

(5) The board of trustees, the board of education, the school district, and the retirement system shall provide:

(a) The compliance auditors with the documents identified in this section and access to personnel who perform or have knowledge of duties related to the practices, procedures, operations, and administration of the retirement system to facilitate timely completion of the compliance audit; and

(b) The Auditor of Public Accounts with documents and access to personnel as requested by the auditor to facilitate timely completion of the audit required by subsection (1)(b) of section 79-987.

* * * *

III. Summary of Findings

By way of summary, our audit has concluded that the Plan substantially is in compliance with the requirements under Code §§ 401(a) and 414(d). During the course of our audit, we identified certain amendments which we recommended be adopted by the Board in order to better align the Plan's terms and the Board Rules and Regulations with federal tax law requirements. Separately, as we completed our audit, we identified one additional amendment that we recommend be adopted for compliance with IRC § 401(a)(31). Our proposed amendment was provided to OSERS.

Additionally, we noted certain federal law amendments that were not adopted by the Plan in a timely manner. In order to correct these late amendments, we recommend that the Plan file a voluntary correction with the IRS through its Employee Plans Compliance Resolution System ("EPCRS"), Revenue Procedure 2021-30.

Separately, because the Plan has never received a favorable determination letter from the IRS, in order to provide protections to the Plan and to all of its members that the Plan is a qualified plan, we recommend that the Plan be filed with the IRS for purposes of receiving a favorable determination letter. We believe this recommendation also aligns with the expectations under LB 147 for the transition and transfer of management of the Plan effective September 1, 2024. Considering that duties and responsibilities for the Plan will transition to the retirement board as established in Section 6 of LB 147 effective September 1, 2024, and that the Director of the

Nebraska Public Employees Retirement Systems shall have the duty and authority for the management, operation and general administration of the Plan on and after September 1, 2024, we believe it is in the best interests of all involved to receive the assurances reflected by a favorable determination letter from the IRS. In this regard, our audit of the Plan document was based upon the requirements for qualified, governmental defined benefit plans and would bring the Plan current from a federal law compliance perspective through the IRS' Operational Compliance List for 2021, as well as the Coronavirus Aid Relief and Economic Security Act of 2020 (the "CARES Act"). The results of the tax compliance review portion of the audit are reflected in Attachment A to this Report.

Separately, based upon our conversations with OSERS' staff, and review of the Plan's records, we also are providing our Report on Selected Operational Compliance Issues which addresses common areas of noncompliance under the IRC ("Operational Compliance Report"). The Operational Compliance Report is attached as Attachment B. Within the Operational Compliance Report, we made certain recommendations to OSERS in addition to recommending updates to the Board's Rules and Regulations. Additionally, we offered to review select 1099-R data for compliance on OSERS' reporting of benefits. During the course of our audit, we were apprised that the 1099-R reporting is included in the audit of OSERS' financial statement as performed by its local audit firm, Seim Johnson. While we remain willing to conduct additional review of 1099-R data, based upon our discussions with staff regarding the processes and programming for 1099-R reporting, we were satisfied that the Plan was properly reporting benefits in accordance with the IRS' requirements for Form 1099-R, including with regard to basis recovery in accordance with IRC § 72.

Also, we addressed with OSERS' staff the various requirements for certain limitations on compensation under IRC § 401(a)(17), limitations on benefits under IRC § 415(b) and the limitations on contributions under IRC § 415(c). We were satisfied that OSERS is monitoring for these limits and that it is working with its outside actuarial firm, Cavanaugh Macdonald Consulting, LLC to confirm compliance with these limits. To the extent that there is a specific requirement under Section 42 or LB 147 which is not directly reflected in this Report, it is because the requirement is addressed by OSERS' financial audit, the audit conducted by the Auditor of Public Accounts and/or OSERS' actuarial review.

Finally, cybersecurity is an increasing concern for all retirement systems. Because OSERS is dependent on data from the Class V school district (the "District") for its information, and because OSERS' computer systems draw information from the District's computer systems, the cybersecurity risks are magnified. Accordingly, we recommend OSERS and the Board continue to monitor for developments in this ever-changing area and to operate the necessary firewalls between the computer systems. In addition, OSERS could consider a data security audit to ensure the necessary protections are in place.

Attachment A

TAX COMPLIANCE REVIEW CHECKLIST
FOR
Omaha School Employees' Retirement System

**A Governmental Defined Benefit Plan
Plan Year: September 1 – August 31**

*** Indicates that a provision was timely adopted but the date of adoption may have been earlier than indicated in this Report because the Nebraska Legislature website only includes bills back to 1999.**

Federal Law	Plan Document Requirement	Due Date for Adoption	Plan Section	Date Adopted	Status/Issues
401(a) – Valid Rollover Contribution:	<ul style="list-style-type: none"> Rev. Rul. 2014-9 provides procedures a plan administrator may use in order to reasonably conclude that an amount is a valid rollover contribution. (2014 CL). The IRS provided illustrations of when a receiving plan's administrator can "reasonably conclude" a rollover contribution is valid, rather than providing fixed requirements for all contexts. The 				<p>No amendment needed. However, the Retirement Board should consider the processes by which it reasonably concludes a rollover is valid within the meaning of Treas. Reg. § 1.401(a)(31)-1.</p> <p>Neb. Rev. Stat., section 79-998</p> <p>Neb. Rev. Stat., section 79-998(5)</p> <p>See also Rules and Regulations, Chapter 11 (purchase of service credit) section 006, section 003.03 section 003.04(a).</p>

Federal Law	Plan Document Requirement	Due Date for Adoption	Plan Section	Date Adopted	Status/Issues
	<p>administrator of a plan that receives a rollover contribution must have some basis for "reasonably concluding" that the rollover contribution is valid, but the administrator need not have proof that the rollover contribution is valid.</p>				
<p>401(a)(9) – Longevity Annuity Contracts</p>	<ul style="list-style-type: none"> Final regulations were published on July 2, 2014 (79 Fed. Reg. 37633) that provide a limited modification of the required minimum distribution rules for tax-qualified defined contribution plans holding qualifying longevity annuity contracts ("QLAC"). This provision applies to defined contribution plans 				<p>This Plan is a governmental defined benefit plan; therefore, this provision does not apply.</p>

Federal Law	Plan Document Requirement	Due Date for Adoption	Plan Section	Date Adopted	Status/Issues
	only. (2014 CL).				
402(a) – Medical, Accident Benefits Paid from a Qualified Profit Sharing Plan	<ul style="list-style-type: none"> Final regulations clarifying the rules regarding the tax treatment of payments by qualified retirement plans for accident or health insurance were published on May 12, 2014 (79 Fed. Reg. 26838). (2014 CL). 				No amendment is needed because the Plan does not provide for the purchase of accident or health insurance.
402(c)(2) – Allocating Pre-Tax and After-Tax Amounts Among Disbursements that are Made to Multiple Destinations	<ul style="list-style-type: none"> Notice 2014-54 provides rules for allocating pre-tax and after-tax amounts among disbursements that are made to multiple destinations from a qualified plan described in Code § 401(a). (2014 CL). 				No amendment is needed for this provision, but the Plan's Special Tax Notice should be reviewed and updated as necessary to reflect this allocation. Most recently, the IRS provided model language for special tax notices with Notice 2020-62.
<u>402A - Roth:</u>	<ul style="list-style-type: none"> Code §402A(c)(4)(E) was added by ATRA § 				The Plan does not include a qualified Roth contribution program. No amendment is

Federal Law	Plan Document Requirement	Due Date for Adoption	Plan Section	Date Adopted	Status/Issues
	<p>902 to provide that rollovers from a plan account to the plan's designated Roth account may include a rollover of an otherwise nondistributable amount. Notice 2013-74 provides guidance regarding in-plan Roth rollovers under Code § 402A(c)(4). These provisions apply to defined contribution plans.</p>				<p>needed.</p>
<p><u>402A - Roth:</u></p>	<ul style="list-style-type: none"> Proposed regulations under Code § 402A were published on September 19, 2014 (79 Fed. Reg. 56310) with respect to the tax treatment of distributions from designated Roth accounts under tax-favored retirement plans. This 				<p>The Plan does not include a qualified Roth contribution program. No amendment is needed.</p>

Federal Law	Plan Document Requirement	Due Date for Adoption	Plan Section	Date Adopted	Status/Issues
	provision applies to defined contribution plans.				
<i>Windsor</i> Decision	<ul style="list-style-type: none"> Spouse includes a spouse in a same-sex marriage validly entered into in an authorizing state (effective 9/16/13) <p><u>Note:</u> If a plan's terms are not inconsistent with <i>Windsor</i>, an amendment generally would not be required.</p>	<p>Deadline for adoption under Notice 2014-19, Q&A-8, is the latest of the 401(b) deadline, December 31, 2014, or the close of the first regular legislative session ending after December 31, 2014.</p> <p>Example deadline: Later of 12/31/2014 or last day of legislative session.</p>			<p>No amendment needed</p> <p>Neb. Rev. Stat., sections 79-978</p> <p>Neb. Rev. Stat., sections 79-9,119</p> <p>Rules and Regulations, Chapter 5, section 004</p>
Group Trusts under Rev. Rul. 2011-1 and Notice 2012-6	<ul style="list-style-type: none"> Exclusive benefit provisions 	<p>Earlier of (i) close of the first regular legislative session that begins on or after January 1, 2012, or (ii) January 1, 2015.</p>	<p>Neb. Rev. Stat., section 79-9,107.</p> <p>Neb. Rev. Stat., section 79-9,108.</p>		<p>The Funds are not currently held in a group trust. We recommend adoption of a group trust amendment by the Board and by the Nebraska Investment Council to provide greater flexibility/protections to the Plan's investment</p>

Federal Law	Plan Document Requirement	Due Date for Adoption	Plan Section	Date Adopted	Status/Issues
					structure and trust assets.
<p>Leave Conversions under Rev. Ruls. 2009-31 and 2009-32</p>	<ul style="list-style-type: none"> • Conversion must be automatic (without right to request cash payment) • Only permitted for unused leave under a policy qualifying as a bona fide sick and/or vacation leave plan 	<p>Optional Provision— Adopt by end of plan year in which implemented</p>			<p>The plan does not permit leave conversions. Therefore, no amendment is needed.</p>
<p>Workers, Retirees, and Employer Recovery Act of 2008 ("WRERA")</p>	<ul style="list-style-type: none"> • Rollovers by non-spouse beneficiaries to inherited IRA (clarified mandatory for plan years beginning after 12/31/09) • Mortality table for Code § 415 limitations (clarified PPA) 	<p>Under WRERA, the amendments take effect as if included in the provisions of PPA. Deadline for adoption under PPA § 1107 and Section 5.07(2) of Rev. Proc. 2007-44 is the last day of the first plan year beginning on or after January 1, 2011.</p>	<p><u>Rollovers Non-Spouse Beneficiaries</u></p> <p>Neb. Rev. Stat., section 79-998(7) <u>Date Adopted:</u> Laws 2012, LB 916, Section 25; Approved by Governor: <u>April 6, 2012</u>; Effective: April 6, 2012</p> <p>Neb. Rev. Stat., section 79-998(6), (8) <u>Date Adopted:</u> Laws 2012, LB 916, Section 25; Approved by Governor: <u>April 6, 2012</u>; Effective: April 6, 2012.</p>		<p><u>Rollovers Non-Spouse Beneficiaries</u></p> <p>Timely Adopted</p> <p><u>Mortality Tables</u></p> <p>Late Amendment</p> <p><u>Interest Rate</u></p> <p>Not Applicable.</p>

Federal Law	Plan Document Requirement	Due Date for Adoption	Plan Section	Date Adopted	Status/Issues
	<ul style="list-style-type: none"> Exception for interest rate used for lump sum conversion for 415 purposes for small "eligible employer" 	<p>— 12/31/2011 deadline for calendar year plans.</p> <p>— 06/30/12 deadline for July 1 plans.</p>		<p>Neb. Rev. Stat., section 79-980 <u>Date Adopted:</u> Laws 2012, LB 916, Section 24; Approved by Governor: <u>April 6, 2012</u>; Effective: April 6, 2012</p> <p>Neb. Rev. Stat., section 79-998(1), (6), (7), (8) and (9). Neb. Rev. Stat., section 79-998(1); <u>Date Adopted:</u> Laws 2002, LB 407, Section 5; Approved by Governor: <u>April 17, 2002</u>; Effective: April 17, 2002</p> <p>Neb. Rev. Stat., section 79-978(20) <u>Date Adopted:</u> Laws 2000, LB 155, Section 1; Approved by Governor: <u>March 21, 2000</u>; Effective: March 21, 2000.</p> <p>Neb. Rev. Stat., section 79-978(3) <u>Date Adopted:</u> Laws 2018, LB 1005, Section; Approved by Governor: <u>April 23, 2018</u>; Effective: April 23, 2018.</p> <p>Neb. Rev. Stat., section 79-978(21) <u>Date Adopted:</u> Laws 2000, LB 155, Section 1; Approved by</p>	

Federal Law	Plan Document Requirement	Due Date for Adoption	Plan Section	Date Adopted	Status/Issues
			<p>Governor: <u>March 21, 2000</u>; Effective: March 21, 2000.</p> <p>Neb. Rev. Stat., section 79-978(25) <u>Date Adopted</u>: Laws 2016, LB 447, Section 14; Approved by Governor: <u>March 30, 2016</u>; Effective: March 30, 2016.</p> <p>Neb. Rev. Stat., section 79-978(14) <u>Date Adopted</u>: Laws 2000, LB 155, Section 1; Approved by Governor: <u>March 21, 2000</u>; Effective: March 21, 2000.</p> <p>Neb. Rev. Stat., section 79-978(18) <u>Date Adopted</u>: Laws 2016, LB 447, Section 14; Approved by Governor: <u>March 30, 2016</u>; Effective: March 30, 2016.</p> <p>Neb. Rev. Stat., section 79-9,102 <u>Date Adopted</u>: Laws 2013, LB 263, Section 27; Approved by Governor: <u>April 24, 2013</u>; Effective: April 24, 2013.</p> <p>Neb. Rev. Stat., section 79-9,102 <u>Date Adopted</u>: Laws 2013, LB 263, Section 27; Approved by Governor: <u>April 24, 2013</u>; Effective: April 24, 2013.</p>		

Federal Law	Plan Document Requirement	Due Date for Adoption	Plan Section	Date Adopted	Status/Issues
			<p>Neb. Rev. Stat., section 79-984* <u>Date Adopted:</u> Laws 2001, LB 711, Section 8; Approved by Governor: <u>May 1, 2001</u>; Effective: May 1, 2001.</p> <p>Rules and Regulations, Chapter 1, section 007.02(b). Adopted July 12, 2021.</p> <p>Rules and Regulations, Chapter 13, section 003.01(a). Adopted July 12, 2021.</p> <p>Rules and Regulations, Chapter 13, section 003.01(b). Adopted July 12, 2021.</p> <p><u>Interest Rate</u></p> <p>Not Applicable.</p>		
<p>Heroes Earnings Assistance and Relief Tax Act of 2008 ("HEART")</p>	<ul style="list-style-type: none"> • Death benefits for members who die while performing military service • Differential pay included in compensation for Code §415(c) 	<p>Deadline for adoption under HEART and Section V. of Notice 2010-15 is last day of the first plan year beginning on or after January 1, 2012.</p>	<p><u>Death benefits for members who die while performing military service</u></p> <p>Neb. Rev. Stat., section 79-9,106(4) <u>Date Adopted:</u> Laws 2012, LB 916, Section 27; Approved by Governor: <u>April 6, 2012</u>; Effective: April 6, 2012</p>		<p><u>Death benefits for members who die while performing military service</u></p> <p>Timely Adopted</p> <p><u>Differential pay included in compensation for Code §415(c)</u></p>

Federal Law	Plan Document Requirement	Due Date for Adoption	Plan Section	Date Adopted	Status/Issues
	<p>purposes (clarified by Notice 2010-15)</p> <ul style="list-style-type: none"> Benefit accruals for death and/or disability during military service (optional) 	<p>— 12/31/2012 deadline for calendar year plans.</p> <p>— 06/30/2013 deadline for July 1 plans.</p>	<p><u>Differential pay included in compensation for Code §415(c) purposes</u></p>	<p>Neb. Rev. Stat., section 79-9,102 <u>Date Adopted:</u> Laws 2013, LB 263, Section 27; Approved by Governor: <u>April 24, 2013</u>; Effective: April 24, 2013.</p>	<p><u>purposes</u></p> <p>Timely Adopted</p>
<p>Pension Protection Act of 2006 ("PPA")</p>	<ul style="list-style-type: none"> In-service withdrawals at age 62 Direct rollovers of after-tax amounts to DB or DC plan or 403(b) plan if account for separately Direct rollovers to Roth IRAs Rollovers by non-spouse beneficiaries to inherited IRA (clarified by WRERA) Interest rate assumption for 	<p>Deadline for adoption under PPA § 1107 and Section 5.07(2) of Rev. Proc. 2007-44 is the last day of the first plan year beginning on or after January 1, 2011.</p> <p>— 12/31/2011 deadline for calendar year plans.</p> <p>— 06/30/2012 deadline for July 1 plans.</p> <p>Notice 2012-29 extends effective date of normal retirement age</p>	<p><u>In-Service Withdrawals at age 62</u></p> <p>No in-service withdrawals.</p> <p><u>Rollovers of After-Tax Amounts</u></p> <p>[No specific provision found in Neb. Rev. Stat., sections 79-978 through 79-9,123.]</p> <p><u>Direct Rollovers to Roth IRAs</u></p> <p>[No specific provision found in Neb. Rev. Stat., sections 79-978 through 79-9,123.]</p> <p><u>Rollovers Non-Spouse Beneficiaries</u></p> <p>Neb. Rev. Stat., section 79-998(8)</p>		<p><u>In-Service Withdrawals at age 62</u></p> <p>No in-service withdrawals.</p> <p><u>Rollovers of After-Tax Amounts</u></p> <p>Late Amendment</p> <p>See attached draft amendment, for clarifying language.</p> <p><u>Direct Rollovers to Roth IRAs</u></p> <p>Late Amendment</p> <p>We proposed an amendment to the Board's Rules and Regulations.</p> <p><u>Rollovers Non-Spouse</u></p>

Federal Law	Plan Document Requirement	Due Date for Adoption	Plan Section	Date Adopted	Status/Issues
	<p>Code § 415 limitations</p> <ul style="list-style-type: none"> • Mortality table for Code § 415 limitations (amended by WRERA) • Expanded special rules in Code §§ 415(b)(2)(H) and 415(b)(10) to Indian tribal governments • Governmental plan treated as having complied with Code § 401(a)(9) if it complies with a reasonable good faith interpretation 	<p>regulations to annuity starting dates occurring on or after first day of 2015 plan year (or close of legislative session beginning 3 months after amendment of final regulations, if later)</p>	<p>(see above). <u>Date Adopted:</u> Laws 2012, LB 916, Section 25; Approved by Governor: <u>April 6, 2012</u>; Effective: April 6, 2012</p> <p><u>Interest Rate Assumption</u></p> <p>Neb. Rev. Stat., section 79-9,102. <u>Date Adopted:</u> Laws 2013, LB 263, Section 27; Approved by Governor: <u>April 24, 2013</u>; Effective: April 24, 2013.</p> <p>Neb. Rev. Stat., section 79-9,102 <u>Date Adopted:</u> Laws 2013, LB 263, Section 27; Approved by Governor: <u>April 24, 2013</u>; Effective: April 24, 2013.</p> <p>Rules and Regulations, Chapter 13, section 003.01(a). Adopted July 12, 2021.</p> <p>Rules and Regulations, Chapter 13, section 003.01(b). Adopted July 12, 2021.</p> <p><u>Mortality Table</u></p> <p>Neb. Rev. Stat., section 79-9,102. <u>Date Adopted:</u> Laws 2013, LB 263, Section 27; Approved by</p>		<p><u>Beneficiaries</u></p> <p>Timely Adopted</p> <p><u>Interest Rate Assumption</u></p> <p>Late Amendment</p> <p><u>Mortality Table</u></p> <p>Late Amendment</p> <p><u>Expanded Special Rules to Indian Tribal Governments</u></p> <p>Not Applicable.</p> <p><u>IRC 401(a)(9)</u></p> <p>Timely Adopted</p>

Federal Law	Plan Document Requirement	Due Date for Adoption	Plan Section	Date Adopted	Status/Issues
			<p>Governor: <u>April 24, 2013</u>; Effective: April 24, 2013.</p> <p>Neb. Rev. Stat., section 79-9,102 <u>Date Adopted*</u>: Laws 2013, LB 263, Section 27; Approved by Governor: <u>April 24, 2013</u>; Effective: April 24, 2013.</p> <p>Rules and Regulations, Chapter 13, section 003.01(a). Adopted July 12, 2021.</p> <p>Rules and Regulations, Chapter 13, section 003.01(b). Adopted July 12, 2021.</p> <p><u>Expanded Special Rules to Indian Tribal Governments</u></p> <p>Not Applicable.</p> <p><u>IRC 401(a)(9)</u></p> <p>Neb. Rev. Stat., section 79-980. <u>Date Adopted</u>: Laws 2012, LB 916, Section 24; Approved by Governor: <u>April 6, 2012</u>; Effective: April 6, 2012.</p> <p>Rules and Regulations, Chapter 1, section 007.02(d). Adopted July</p>		

Federal Law	Plan Document Requirement	Due Date for Adoption	Plan Section	Date Adopted	Status/Issues
			<p>12, 2021.</p> <p>Neb. Rev. Stat., section 79-980. <u>Date Adopted*</u>: Laws 2001, LB 711, Section 5; Approved by Governor: <u>May 1, 2001</u>; Effective: May 1, 2001.</p> <p>Neb. Rev. Stat., section 79-9,105(2). <u>Date Adopted</u>: Laws 2000, LB 155, Section 4; Approved by Governor: <u>March 21, 2000</u>; Effective: March 21, 2000. Neb. Rev. Stat., section 79-9,105(2). <u>Date Adopted</u>: Laws 2001, LB 711, Section 15; Approved by Governor: <u>May 1, 2001</u>; Effective: May 1, 2001.</p> <p>Rules and Regulations, Chapter 4 (Refund and Termination Benefit Procedures). Adopted July 12, 2021.</p> <p>Rules and Regulations, Chapter 6, section 001.02. Adopted July 12, 2021.</p> <p>Rules and Regulations, Chapter 17, section 004. Adopted July 12, 2021.</p>		

Federal Law	Plan Document Requirement	Due Date for Adoption	Plan Section	Date Adopted	Status/Issues
<p>Final Regulations under Code Section 415</p>	<ul style="list-style-type: none"> • Post-severance compensation counted for 415(c) (both required and optional types) (only applicable if after-tax contributions—not service purchases) • 415(c) compensation limited by 401(a)(17) • Interest Assumptions • COLA Adjustments (optional) • 415(n) limits on service purchases 	<p>Deadline for adoption under Treas. Regs. 1.401(b)-1 (and Notice 89-8) is last day of the 7th month after end of plan year (i.e., limitation year for 415 purposes) in which the 415 regs. apply. The required provisions of the 415 regs. apply to limitation years beg. on or after 7/1/2007 (e.g., for a calendar limitation year, 1/1/2008), or if legislature amends the plan, the limitation year that begins more than 90 days after the close of the regular session that begins on or after 7/1/2007 (e.g., for a calendar limitation year, 1/1/2009).</p>	<p><u>Post-severance compensation counted for 415(c)</u></p> <p>[No specific provision found in Neb. Rev. Stat., sections 79-978 through 79-9,123.]</p> <p>Neb. Rev. Stat., section 79-9,102. <u>Date Adopted:</u> Laws 2013, LB 263, Section 27; Approved by Governor: <u>April 24, 2013</u>; Effective: April 24, 2013.</p> <p>Rules and Regulations, Chapter 11 (purchase of service credit), section 002.11. Adopted July 12, 2021.</p> <p>Rules and Regulations, Chapter 11 (purchase of service credit) (006 payment methods). Adopted July 12, 2021.</p> <p><u>415(c) compensation limited by 401(a)(17)</u></p> <p>Neb. Rev. Stat., section 79-978(9)(c) <u>Date Adopted:</u> Laws 2015, LB 446, Section 4; Approved by Governor: <u>March 12, 2015</u></p>	<p></p>	<p>Staff has confirmed that post-severance compensation is counted for 415(c) purposes.</p> <p>We proposed an amendment to the Board's Rules and Regulations.</p>

Federal Law	Plan Document Requirement	Due Date for Adoption	Plan Section	Date Adopted	Status/Issues
			<p>Neb. Rev. Stat., section 79-978(11) <u>Date Adopted:</u> Laws 2000, LB 155, Section 2; Approved by Governor: <u>March 21, 2000</u>; Effective: March 21, 2000.</p>		
			<p>Neb. Rev. Stat., section 79-9,102 <u>Date Adopted:</u> Laws 2013, LB 263, Section 27; Approved by Governor: <u>April 24, 2013</u>; Effective: April 24, 2013.</p>		
			<p>Rules and Regulations, Chapter 9, section 004. Adopted July 12, 2021.</p>		<p><u>415(c) compensation limited by 401(a)(17)</u></p>
			<p>Rules and Regulations, Chapter 13, section 003.05. Adopted July 12, 2021.</p>		<p>Timely Adopted</p>
			<p>Rules and Regulations, Chapter 13, section 003. Adopted July 12, 2021.</p>		<p>Incorporates by Reference</p>
			<p>Chapter 13, section 003.07. Adopted July 12, 2021.</p>		<p><u>Interest Assumptions</u></p>
			<p><u>Interest Assumptions</u></p>		<p>Timely Adopted</p>
			<p>Rules and Regulations, Chapter 13, section 003.01(a). Adopted</p>		<p><u>COLA Adjustments (optional)</u></p>
					<p>Timely Adopted</p>
					<p><u>415(n) limits on service</u></p>

Federal Law	Plan Document Requirement	Due Date for Adoption	Plan Section	Date Adopted	Status/Issues
			<p>July 12, 2021.</p> <p>Rules and Regulations, Chapter 13, section 003.01(b). Adopted July 12, 2021.</p> <p><u>COLA Adjustments (optional)</u></p> <p>Neb. Rev. Stat., section 79-9,102. <u>Date Adopted:</u> Laws 2013, LB 263, Section 27; Approved by Governor: <u>April 24, 2013</u>; Effective: April 24, 2013.</p> <p><u>415(n) limits on service purchases</u></p> <p>Neb. Rev. Stat., section 79-998(2) <u>Date Adopted:</u> Laws 2002, LB 407, Section 47; Approved by Governor: <u>April 17, 2002</u>; Effective: April 17, 2002.</p> <p>Neb. Rev. Stat., section 79-9,102(2) <u>Date Adopted*</u>: Laws 2013, LB 263, Section 27; Approved by Governor: <u>April 24, 2013</u>; Effective: April 24, 2013. Neb. Rev. Stat., section 79-9,102(2) was amended to add September 1, 2024 language. <u>Date Adopted:</u> Laws 2021, LB</p>		<p><u>purchases</u></p> <p>Timely Adopted</p>

Federal Law	Plan Document Requirement	Due Date for Adoption	Plan Section	Date Adopted	Status/Issues
			<p>147, Section 30; Approved by Governor: <u>May 26, 2021</u>; Effective: May 26, 2021.</p> <p>Neb. Rev. Stat., section 79-9,102. <u>Date Adopted</u>: Laws 2013, LB 263, Section 27; Approved by Governor: <u>April 24, 2013</u>; Effective: April 24, 2013.</p> <p>Neb. Rev. Stat., section 79-9,102. <u>Date Adopted*</u>: Laws 2013, LB 263, Section 27; Approved by Governor: <u>April 24, 2013</u>; Effective: April 24, 2013.</p> <p>Rules and Regulations, Chapter 11 sections 002.11, 004.07, 006.01, 006.03; Chapter 13, section 003.01; and Chapter 14, section 003.01.</p>		
<p>Automatic Rollover Rules for Mandatory Distributions— Code Section 401(a)(31)(B)</p>	<p>Mandatory Distributions in excess of \$1,000 must comply with automatic rollover rules under Code § 401(a)(31)(B)</p>	<p>Deadline for adoption under Notice 2005-5 is the end of the first regular legislative session of governing body with authority to amend that begins on or after 01/01/2006.</p>	<p>No Mandatory Distributions in excess of \$1,000</p> <p>See Neb. Rev. Stat., section 79-992(3).</p>		<p>No Mandatory Distributions in excess of \$1,000. Thus, no amendment is needed.</p>

Federal Law	Plan Document Requirement	Due Date for Adoption	Plan Section	Date Adopted	Status/Issues
<p>Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA)</p>	<ul style="list-style-type: none"> • Increased 415 Limits • Increased Compensation Limits under Code § 401(a)(17) • Expanded Direct Rollover Rules under Code § 401(a)(31) 	<p>Deadline for adoption of good faith amendment under Notice 2001-42 is the later of (1) the end of the plan year in which EGTRRA change is required or, if optional, put into effect, or (2) the end of the plan's GUST RAP.</p> <p>— 12/31/2002 deadline for calendar year individually designed plans.</p> <p>— 06/30/2003 deadline for July 1 individually designed plans.</p> <p>— 09/30/2003 deadline for prototype and volume submitter plans.</p>	<p><u>IRC 415</u></p> <p>Neb. Rev. Stat., section 79-9,102. <u>Date Adopted:</u> Laws 2013, LB 263, Section 27; Approved by Governor: <u>April 24, 2013</u>; Effective: April 24, 2013.</p> <p>Neb. Rev. Stat., section 79-9,102. <u>Date Adopted*:</u> Laws 2013, LB 263, Section 27; Approved by Governor: <u>April 24, 2013</u>; Effective: April 24, 2013.</p> <p>Rules and Regulations, Chapter 13 – Administration of Internal Revenue Service Code Section 415 and Maximum Compensation Limits. Adopted July 12, 2021.</p> <p>Rules and Regulations, Chapter 13, section 003.01. Adopted July 12, 2021.</p> <p>Rules and Regulations, Chapter 13, section 003.03. Adopted July 12, 2021.</p> <p>See Rules and Regulations, Chapter 13, section 003.04. Adopted July 12, 2021.</p>		<p><u>IRC 415</u></p> <p>Timely Adopted</p> <p><u>IRC 401(a)(17)</u></p> <p>Timely Adopted</p> <p><u>IRC 401(a)(31)</u></p> <p>Timely Adopted</p>

Federal Law	Plan Document Requirement	Due Date for Adoption	Plan Section	Date Adopted	Status/Issues
			<p><u>IRC 401(a)(17)</u> Neb. Rev. Stat., section 79-978(9)(c). <u>Date Adopted:</u> Laws 2015, LB 446, Section 4; Approved by Governor: <u>March 12, 2015</u></p> <p>Neb. Rev. Stat., section 79-978(11). <u>Date Adopted*:</u> Laws 2000, LB 155, Section 2; Approved by Governor: <u>March 21, 2000</u>; Effective: March 21, 2000.</p> <p>Rules and Regulations, Chapter 9, section 004. Adopted July 12, 2021.</p> <p>See Rules and Regulations, Chapter 13, section 003.05. Adopted July 12, 2021.</p> <p>See Rules and Regulations, Chapter 13, section 003.06. Adopted July 12, 2021.</p> <p>See Chapter 13, section 003.07. Adopted July 12, 2021.</p> <p><u>IRC 401(a)(31)</u> Neb. Rev. Stat., section 79-980 (see above). <u>Date Adopted:</u> Laws 2012, LB 916, Section 24;</p>		

Federal Law	Plan Document Requirement	Due Date for Adoption	Plan Section	Date Adopted	Status/Issues
			<p>Approved by Governor: <u>April 6, 2012</u>; Effective: April 6, 2012</p> <p>Neb. Rev. Stat., section 79-998(1), (6), (7), (8) and (9). <u>Date Adopted</u>: Laws 2002, LB 407, Section 5; Approved by Governor: <u>April 17, 2002</u>; Effective: April 17, 2002</p> <p>Neb. Rev. Stat., section 79-998(6) (see above). <u>Date Adopted</u>: Laws 2001, LB 711, Section 12; Approved by Governor: <u>May 1, 2001</u>; Effective: May 1, 2001</p> <p>Neb. Rev. Stat., section 79-9,106(3) (see above). <u>Date Adopted</u>: Laws 2012, LB 916, Section 27; Approved by Governor: <u>April 6, 2012</u>; Effective: April 6, 2012</p>		
<p>Community Renewal Tax Relief Act of 2000—</p>	<p>Law required Including Transportation Fringe Benefits in Compensation under Code § 414(s)(2)</p>	<p>Deadline for adoption was extended under Rev. Proc. 2002-73 to the latest of (1) the end of the 2002 plan year, (2) the end of the GUST RAP, or (3) 06/30/03</p>	<p>Neb. Rev. Stat., section 79-978(9)(a).</p> <p>See also Rules and Regulations, Chapter 9, section 003. Adopted July 12, 2021.</p> <p>Neb. Rev. Stat., section 79-978(9)(a). <u>Date Adopted</u>: Laws 2015, LB 446, Section 4; Approved</p>		<p>Late Amendment</p>

Federal Law	Plan Document Requirement	Due Date for Adoption	Plan Section	Date Adopted	Status/Issues
		<p>— 06/30/2003 deadline for individually designed plans.</p> <p>— 09/30/2003 deadline for prototype and volume submitter plans.</p>		<p>by Governor: <u>March 12, 2015</u>. See also Rules and Regulations, Chapter 9, section 003. Adopted July 12, 2021.</p> <p>Neb. Rev. Stat., section 79-978(11). <u>Date Adopted</u>: Laws 2005, LB 364, Section 11; Approved by Governor: <u>May 31, 2005</u>; Effective: May 31, 2005.</p>	
'94 GAR Mortality Table— Revenue Ruling 2001-62	Updated Mortality Table for Calculating Maximum Allowable Benefit under Code § 415(b).	<p>Deadline for adoption under Rev. Rul. 2001-62 was the end of the plan year that included the '94 GAR effective date</p> <p>— 12/31/2002 deadline for calendar year plans.</p> <p>— 06/30/2003 deadline for July 1 plans.</p>		<p>Neb. Rev. Stat., section 79-978(20). <u>Date Adopted</u>: Laws 2000, LB 155, Section 1; Approved by Governor: <u>March 21, 2000</u>; Effective: March 21, 2000.</p> <p>Neb. Rev. Stat., section 79-9,102 <u>Date Adopted*</u>: Laws 2013, LB 263, Section 27; Approved by Governor: <u>April 24, 2013</u>; Effective: April 24, 2013.</p> <p>Rules and Regulations, Chapter 13, section 003.01(a). Adopted July 12, 2021.</p> <p>Rules and Regulations, Chapter 13, section 003.01(b) defines the actuarially equivalent straight life annuity benefit for a benefit paid in a form to which section 417(e)(3)</p>	Timely Adopted.

Federal Law	Plan Document Requirement	Due Date for Adoption	Plan Section	Date Adopted	Status/Issues
			of the Code applies (lump sum). Adopted July 12, 2021.		
<p>"GUST"— (GATT, USERRA, SBJPA, TRA '97, and RRA '98)</p>	<ul style="list-style-type: none"> • Provide for Required Beginning Date and Required Actuarial Adjustment under 401(a)(9) for all benefits paid from plan • Repeal of Family Aggregation Rules under Code §§ 401(a)(17) & 414(q)(4) • Repeal of DB/DC Plan Limitations under Code § 415(e) • Leased Employee Primary Direction and Control Test under Code § 414(n) • Veteran's Reemployment Rights under USERRA and Code § 414(u) effective 	<p>Deadline for adoption for individually designed plans was extended under Rev. Proc. 2001-55 to the <u>latest</u> of: (1) 02/28/2002, (2) the last day of the 2001 plan year, or (3) the last day of the first plan year beg. on or after the "2000 legislative date"</p> <p>— 02/28/2002 deadline for calendar year plans.</p> <p>— 06/30/2002 deadline for July 1 plans.</p> <p>Deadline for adoption for prototype and volume submitter plans was extended under Rev. Proc.</p>	<p><u>IRC 401(a)(9)</u></p> <p>Neb. Rev. Stat., section 79-980 <u>Date Adopted</u>: Laws 2012, LB 916, Section 24; Approved by Governor: <u>April 6, 2012</u>; Effective: April 6, 2012.</p> <p>Rules and Regulations, Chapter 1, section 007.02(d). Adopted July 12, 2021.</p> <p>Neb. Rev. Stat., section 79-980. <u>Date Adopted*</u>: Laws 2001, LB 711, Section 5; Approved by Governor: <u>May 1, 2001</u>; Effective: May 1, 2001.</p> <p>Neb. Rev. Stat., section 79-9,105(2). <u>Date Adopted</u>: Laws 2000, LB 155, Section 4; Approved by Governor: <u>March 21, 2000</u>; Effective: March 21, 2000.</p> <p>Neb. Rev. Stat., section 79-9,105(2). <u>Date Adopted</u>: Laws 2001, LB 711, Section 15; Approved by Governor: <u>May 1, 2001</u>; Effective: May 1, 2001.</p>		<p><u>IRC 401(a)(9)</u></p> <p>Timely Adopted</p> <p><u>Repeal Family Aggregation Rule</u></p> <p>Incorporated by Reference.</p> <p><u>Repeal IRC 415(e)</u></p> <p>Incorporated by Reference.</p> <p><u>Leased Employees</u></p> <p>No Leased Employees.</p> <p><u>USERRA</u></p> <p>Incorporated by Reference.</p> <p><u>IRC 415(b)(2)</u></p>

Federal Law	Plan Document Requirement	Due Date for Adoption	Plan Section	Date Adopted	Status/Issues
	<p>12/12/1994</p> <ul style="list-style-type: none"> 415 Requirement for Actuarial Adjustments and Exemption for Survivor and Disability Benefits under Code § 415(b)(2) and compliance with Rev. Rul. 98-1 	<p>2000-20 and Rev. Proc. 2002-73 to the later of: (1) 09/30/2003, or (2) the end of the 12-month period after the date of the IRS opinion or advisory letter.</p> <p>— 09/30/2003 deadline.</p>	<p>Rules and Regulations, Chapter 4 (Refund and Termination Benefit Procedures). Adopted July 12, 2021.</p> <p>Rules and Regulations, Chapter 6, section 001.02. Adopted July 12, 2021.</p> <p>Rules and Regulations, Chapter 17, section 004. Adopted July 12, 2021.</p> <p><u>Repeal Family Aggregation Rule</u></p> <p>Neb. Rev. Stat., section 79-978(11) <u>Date Adopted*</u>: Laws 2000, LB 155, Section 2; Approved by Governor: <u>March 21, 2000</u>; Effective: March 21, 2000.</p> <p><u>Repeal IRC 415(e)</u></p> <p>Neb. Rev. Stat., section 79-9,102. <u>Date Adopted*</u>: Laws 2013, LB 263, Section 27; Approved by Governor: <u>April 24, 2013</u>; Effective: April 24, 2013.</p> <p><u>Leased Employees</u></p>		<p>Timely Adopted</p>

Federal Law	Plan Document Requirement	Due Date for Adoption	Plan Section	Date Adopted	Status/Issues
			<p>No Leased Employees.</p> <p><u>USERRA</u></p> <p>Neb. Rev. Stat., section 79-978(21) <u>Date Adopted:</u> Laws 2000, LB 155, Section 1; Approved by Governor: <u>March 21, 2000</u>; Effective: March 21, 2000. <u>Date Adopted:</u> Laws 2010, LB 950, Section 17; Approved by Governor: <u>April 13, 2010</u>; Effective: April 13, 2010.</p> <p>Neb. Rev. Stat., section 79-990(1). <u>Date Adopted:</u> Laws 2002, LB 722, Section 7; Approved by Governor: <u>April 19, 2002</u>. Amended. <u>Date Adopted:</u> Laws 2010, LB 950, Section 18; Approved by Governor: <u>April 13, 2010</u>; Effective: April 13, 2010.</p> <p>Neb. Rev. Stat., section 79-990(1) <u>Date Adopted:</u> Laws 2002, LB 722, Section 7; Approved by Governor: <u>April 19, 2002</u>. Amended. <u>Date Adopted:</u> Laws 2010, LB 950, Section 18; Approved by Governor: <u>April 13, 2010</u>; Effective: April 13, 2010.</p>		

Federal Law	Plan Document Requirement	Due Date for Adoption	Plan Section	Date Adopted	Status/Issues
			<p>Neb. Rev. Stat., section 79-990(1) <u>Date Adopted:</u> Laws 2001, LB 711, Section 10; Approved by Governor: <u>May 1, 2001</u>; Effective: May 1, 2001</p> <p>Neb. Rev. Stat., section 55-161(1) <u>Date Adopted:</u> Laws 2002, LB 722, Section 4; Approved by Governor: <u>April 19, 2002</u>. Amended Laws 2016, LB 753, Section 1; Approved by Governor: March 9, 2016.</p> <p>Neb. Rev. Stat., section 55-160. <u>Date Adopted</u>, Approved by Governor: <u>April 19, 2002</u>. Amended [<u>Date Adopted:</u> Laws 2018, LB 1003, Section 1; Approved by Governor: <u>April 17, 2018</u>.</p> <p>Rules and Regulations, Chapter 12 - Military Service Credit and Reemployment. Adopted July 12, 2021.</p> <p><u>IRC 415(b)(2)</u></p> <p>Neb. Rev. Stat., section 79-9,102. <u>Date Adopted:</u> Laws 2013, LB</p>		

Federal Law	Plan Document Requirement	Due Date for Adoption	Plan Section	Date Adopted	Status/Issues
			<p>263, Section 27; Approved by Governor: <u>April 24, 2013</u>; Effective: April 24, 2013.</p> <p>Neb. Rev. Stat., section 79-9,102. <u>Date Adopted*</u>: Laws 2013, LB 263, Section 27; Approved by Governor: <u>April 24, 2013</u>; Effective: April 24, 2013.</p> <p>Neb. Rev. Stat., section 79-9,102(1) <u>Date Adopted*</u>: Laws 2013, LB 263, Section 27; Approved by Governor: <u>April 24, 2013</u>; Effective: April 24, 2013.</p> <p>Neb. Rev. Stat., section 79-9,102(2) <u>Date Adopted*</u>: Laws 2013, LB 263, Section 27; Approved by Governor: <u>April 24, 2013</u>; Effective: April 24, 2013.</p> <p>Neb. Rev. Stat., section 79-9,102(3) <u>Date Adopted*</u>: Laws 2013, LB 263, Section 27; Approved by Governor: <u>April 24, 2013</u>; Effective: April 24, 2013.</p> <p>Neb. Rev. Stat., section 79-9,102(5) <u>Date Adopted*</u>: Laws 2013, LB 263, Section 27; Approved by Governor: <u>April 24,</u></p>		

Federal Law	Plan Document Requirement	Due Date for Adoption	Plan Section	Date Adopted	Status/Issues
			<p><u>2013</u>; Effective: April 24, 2013.</p> <p>Neb. Rev. Stat., section 79-978(20) <u>Date Adopted</u>: Laws 2000, LB 155, Section 1; Approved by Governor: <u>March 21, 2000</u>; Effective: March 21, 2000.</p> <p>Neb. Rev. Stat., section 79-978(21) <u>Date Adopted</u>: Laws 2000, LB 155, Section 1; Approved by Governor: <u>March 21, 2000</u>; Effective: March 21, 2000.</p> <p>Neb. Rev. Stat., section 79-984 <u>Date Adopted*</u>: Laws 2001, LB 711, Section 8; Approved by Governor: <u>May 1, 2001</u>; Effective: May 1, 2001.</p>		
<p>OBRA '93— Code Section 401(a)(17)</p>	<p>Lowered Annual Compensation Limit to \$150,000 under Code § 401(a)(17)</p>	<p>Notice 96-64 extended the deadline to amend for TRA '86, UCA '92, and OBRA '93; Rev. Proc. 99-23 extended the TRA '86 RAP (including UCA '92 and OBRA '93) to the end of GUST RAP; Rev. Proc. 2001-55</p>	<p>Neb. Rev. Stat., section 79-978(9)(c) <u>Date Adopted</u>: Laws 2015, LB 446, Section 4; Approved by Governor: <u>March 12, 2015</u>.</p> <p>Neb. Rev. Stat., section 79-978(11) <u>Date Adopted*</u>: Laws 2000, LB 155, Section 2; Approved by Governor: <u>March 21, 2000</u>; Effective: March 21, 2000.</p> <p>Rules and Regulations, Chapter 9,</p>		<p>Timely Adopted Incorporated by Reference.</p>

Federal Law	Plan Document Requirement	Due Date for Adoption	Plan Section	Date Adopted	Status/Issues
		<p>extended the deadline for individually designed plans to the latest of: (1) 02/28/2002, (2) the last day of the 2001 plan year, or (3) the last day of the first plan year beg. on or after the "2000 legislative date"</p> <p>— 02/28/2002 deadline for calendar year plans.</p> <p>— 06/30/2002 deadline for July 1 plans.</p> <p>Deadline for adoption for prototype and volume submitter plans was extended under Rev. Proc. 2000-20 and Rev. Proc. 2002-73 to the later of: (1) 09/30/2003, or (2) the end of the 12-month period after</p>	<p>section 004. Adopted July 12, 2021.</p> <p>See Rules and Regulations, Chapter 13, section 003. Adopted July 12, 2021.</p> <p>See Rules and Regulations, Chapter 13, section 003.06. Adopted July 12, 2021.</p> <p>See Chapter 13, section 003.07. Adopted July 12, 2021.</p>		

Federal Law	Plan Document Requirement	Due Date for Adoption	Plan Section	Date Adopted	Status/Issues
		<p>the date of the IRS opinion or advisory letter.</p> <p>— 09/30/2003 deadline.</p>			
UCA '92—Code Section 401(a)(31)	Direct Rollover of Eligible Distributions effective for distributions made after 12/31/1992 under Code § 401(a)(31).	Deadline for adoption under Rev. Proc. 93-12 was 12/31/1994; Notice 96-64 extended the deadline to amend for TRA '86, UCA '92, and OBRA '93; Rev. Proc. 99-23 extended the TRA '86 RAP (including UCA '92 and OBRA '93) to the end of GUST RAP; Rev. Proc. 2001-55 extended the deadline for individually designed plans to the latest of: (1) 02/28/2002, (2) the last day of the 2001 plan year, or (3) the last day of the first plan year beg. on or	Neb. Rev. Stat., section 79-998(1), (6), (7), (8) and (9). Neb. Rev. Stat., section 79-998(1); <u>Date Adopted</u> : Laws 2002, LB 407, Section 5; Approved by Governor: <u>April 17, 2002</u> ; Effective: April 17, 2002.	Neb. Rev. Stat., section 79-998(6). <u>Date Adopted*</u> : Laws 2001, LB 711, Section 12; Approved by Governor: <u>May 1, 2001</u> ; Effective: May 1, 2001. Neb. Rev. Stat., section 79-998(6) incorporates IRC 401(a)(31) by reference, effective January 1, 1993.	Timely Adopted

Federal Law	Plan Document Requirement	Due Date for Adoption	Plan Section	Date Adopted	Status/Issues
		<p>after the "2000 legislative date"</p> <p>— 02/28/2002 deadline for calendar year plans.</p> <p>— 06/30/2002 deadline for July 1 plans.</p> <p>Deadline for adoption for prototype and volume submitter plans was extended under Rev. Proc. 2000-20 and Rev. Proc. 2002-73 to the later of: (1) 09/30/2003, or (2) the end of the 12-month period after the date of the IRS opinion or advisory letter.</p> <p>— 09/30/2003 deadline.</p>			
<p>Technical and Miscellaneous Revenue Act of</p>	<ul style="list-style-type: none"> Election not to apply Code § 415 limit to 	<p>Deadline for adoption for individually</p>	<p>Neb. Rev. Stat., section 79-9,102 <u>Date Adopted:</u> Laws 2013, LB 263, Section 27; Approved by</p>		<p>TAMRA Election not adopted.</p>

Federal Law	Plan Document Requirement	Due Date for Adoption	Plan Section	Date Adopted	Status/Issues
1988 ("TAMRA")	accrued benefits (benefits determined without regard to amendments after October 14, 1987 if first became a participant before January 1, 1990)	<p>designed plans was extended under Rev. Proc. 2001-55 to the <u>latest</u> of:</p> <p>(1) 02/28/2002, (2) the last day of the 2001 plan year, or (3) the last day of the first plan year beg. on or after the "2000 legislative date"</p> <p>— 02/28/2002 deadline for calendar year plans.</p> <p>— 06/30/2002 deadline for July 1 plans.</p> <p>Deadline for adoption for prototype and volume submitter plans was extended under Rev. Proc. 2000-20 and Rev. Proc. 2002-73 to the later of: (1) 09/30/2003, or (2) the end of the 12-month period after</p>	Governor: <u>April 24, 2013</u> ; Effective: April 24, 2013.	Neb. Rev. Stat., section 79-9,102. <u>Date Adopted*</u> : Laws 2013, LB 263, Section 27; Approved by Governor: <u>April 24, 2013</u> ; Effective: April 24, 2013.	

Federal Law	Plan Document Requirement	Due Date for Adoption	Plan Section	Date Adopted	Status/Issues
		<p>the date of the IRS opinion or advisory letter.</p> <p>— 09/30/2003 deadline.</p>			
<p>Tax Reform Act of 1986 (TRA '86)</p>	<ul style="list-style-type: none"> • Minimum Required Distributions at Age 70-1/2 under Code § 401(a)(9) • Define Code as IRC of 1986 • Define Employee to Include Leased Employees • Remove any Age Requirement for Late Retirement • Limit Compensation to \$200,000 (increased by cost of living adjustments) • Phase in of Dollar Limit, Maximum Dollar Amount before SSRA under Code § 415(b) 	<p>Deadline for adoption for individually designed plans was extended under Rev. Proc. 2001-55 to the <u>latest</u> of:</p> <p>(1) 02/28/2002, (2) the last day of the 2001 plan year, or (3) the last day of the first plan year beg. on or after the "2000 legislative date"</p> <p>— 02/28/2002 deadline for calendar year plans.</p> <p>— 06/30/2002 deadline for July 1 plans.</p> <p>Deadline for adoption for</p>	<p><u>IRC 401(a)(9)</u></p> <p>Neb. Rev. Stat., section 79-980. <u>Date Adopted:</u> Laws 2012, LB 916, Section 24; Approved by Governor: <u>April 6, 2012</u>; Effective: April 6, 2012.</p> <p>Rules and Regulations, Chapter 1, section 007.02(d). Adopted July 12, 2021.</p> <p>Rules and Regulations, Chapter 4 (Refund and Termination Benefit Procedures), section 004. Adopted July 12, 2021.</p> <p>Rules and Regulations, Chapter 6, section 001.02. Adopted July 12, 2021.</p> <p>Rules and Regulations, Chapter 17, section 004. Adopted July 12, 2021.</p>		<p><u>IRC 401(a)(9)</u></p> <p>Late Amendment</p> <p><u>Define Code as IRC of 1986</u></p> <p>Timely Adopted</p> <p><u>Leased Employees</u></p> <p>No Leased Employees.</p> <p><u>Remove Age Requirement</u></p> <p>No age requirement for late retirement.</p> <p><u>Limit Compensation to \$200,000</u></p> <p>Incorporated by Reference.</p>

Federal Law	Plan Document Requirement	Due Date for Adoption	Plan Section	Date Adopted	Status/Issues
	<ul style="list-style-type: none"> DRO Restrictions under Code § 414(p) 	<p>prototype and volume submitter plans was extended under Rev. Proc. 2000-20 and Rev. Proc. 2002-73 to the later of: (1) 09/30/2003, or (2) the end of the 12-month period after the date of the IRS opinion or advisory letter.</p> <p>— 09/30/2003 deadline.</p>	<p><u>Define Code as IRC of 1986</u></p> <p>Neb. Rev. Stat., section 79-980 defines "Internal Revenue Code" by reference to Neb. Rev. Stat., section 49-801.01. <u>Date Adopted:</u> Laws 2001, LB 711, Section 5; Approved by Governor: <u>May 1, 2001</u>; Effective: May 1, 2001.</p> <p>Neb. Rev. Stat., section 79-9,105(2) defines "Internal Revenue Code" by reference to Neb. Rev. Stat., section 49-801.01. <u>Date Adopted:</u> Laws 2001, LB 711, Section 15; Approved by Governor: <u>May 1, 2001</u>; Effective: May 1, 2001.</p> <p>Neb. Rev. Stat., section 49-801.01 <u>Date Adopted:</u> Laws 2018, LB 1091, Section 1; Approved by Governor: <u>April 11, 2018</u>; Effective: April 11, 2018.</p> <p>Neb. Rev. Stat., section 49-801.01. <u>Date Adopted:</u> Laws 2001, LB 122, Section 1; Approved by Governor: <u>February 6, 2001</u>; Effective: February 7, 2001.</p>		<p><u>Phase in of Dollar Limit IRC 415(b)</u></p> <p>Timely Adopted.</p> <p><u>DRO Restrictions</u></p> <p>Timely Adopted.</p>

Federal Law	Plan Document Requirement	Due Date for Adoption	Plan Section	Date Adopted	Status/Issues
			<p>Rules and Regulations, Chapter 9, section 002.04. Adopted July 12, 2021.</p> <p><u>Leased Employees</u></p> <p>No Leased Employees.</p> <p><u>Remove Age Requirement</u></p> <p>No age requirement for late retirement.</p> <p><u>Limit Compensation to \$200,000</u></p> <p>Neb. Rev. Stat., section 79-978(9)(c). <u>Date Adopted</u>: Laws 2015, LB 446, Section 4; Approved by Governor: <u>March 12, 2015</u>.</p> <p>Neb. Rev. Stat., section 79-978(11) <u>Date Adopted*</u>: Laws 2000, LB 155, Section 2; Approved by Governor: <u>March 21, 2000</u>; Effective: March 21, 2000.</p> <p>Rules and Regulations, Chapter 9, section 004. Adopted July 12, 2021.</p> <p>See Rules and Regulations,</p>		

Federal Law	Plan Document Requirement	Due Date for Adoption	Plan Section	Date Adopted	Status/Issues
			<p>Chapter 13, section 003.05. Adopted July 12, 2021.</p> <p>See Rules and Regulations, Chapter 13, section 003.06. Adopted July 12, 2021.</p> <p>See Chapter 13, section 003.07. Adopted July 12, 2021.</p> <p><u>Phase in of Dollar Limit IRC 415(b)</u></p> <p>Neb. Rev. Stat., section 79-9,102 <u>Date Adopted*</u>: Laws 2013, LB 263, Section 27; Approved by Governor: <u>April 24, 2013</u>; Effective: April 24, 2013.</p> <p>Neb. Rev. Stat., section 79- 9,102(1) <u>Date Adopted*</u>: Laws 2013, LB 263, Section 27; Approved by Governor: <u>April 24, 2013</u>; Effective: April 24, 2013.</p> <p>Neb. Rev. Stat., section 79- 9,102(2) <u>Date Adopted*</u>: Laws 2013, LB 263, Section 27; Approved by Governor: <u>April 24, 2013</u>; Effective: April 24, 2013.</p> <p>Neb. Rev. Stat., section 79- 9,102(3). <u>Date Adopted*</u>: Laws</p>		

Federal Law	Plan Document Requirement	Due Date for Adoption	Plan Section	Date Adopted	Status/Issues
			<p>2013, LB 263, Section 27; Approved by Governor: <u>April 24, 2013</u>; Effective: April 24, 2013.</p> <p>Neb. Rev. Stat., section 79-9,102(5) <u>Date Adopted*</u>: Laws 2013, LB 263, Section 27; Approved by Governor: <u>April 24, 2013</u>; Effective: April 24, 2013.</p> <p><u>DRO Restrictions</u></p> <p>Neb. Rev. Stat., section 79-9,104. <u>Date Adopted*</u>: Laws 2000, LB 155, Section 3; Approved by Governor: <u>March 21, 2000</u>; Effective: March 21, 2000.</p> <p>See Rules and Regulations, Chapter 16 regarding "Qualified Domestic Relations Orders." Adopted July 12, 2021.</p>		

**OSERS
Additional Plan Qualification Requirements**

Prior Compliance	Code Requirement	Plan Section Reference and Compliance Date
	The following list consists of statutory provisions and associated guidance which reflect additional plan qualification requirements.	
	<p><u>DEFINITION OF INTERNAL REVENUE CODE</u></p> <p>The Internal Revenue Code should be defined in the Plan as the "Internal Revenue Code of 1986" as set forth in the Tax Reform Act of 1986.</p>	See Tax Compliance Review Checklist
	<p><u>CODE SECTION 401(a)(1)</u></p> <p><u>Formal Plan Required.</u> A qualified plan that allows contributions to a trust for the sole purpose of distributing benefits to employees and beneficiaries with favorable tax treatment must be <u>written</u>. Contributions may be made only by (i) the employer, (ii) the employees, or (iii) both the employer and the employees.</p> <p>Policies of the Board of Trustees for the Omaha School Employees' Retirement System (May 6, 2021).</p> <p><u>"Pension Plan"</u>: a pension plan is a plan established and maintained by an employer primarily to provide systematically for the payment of definitely determinable benefits to employees over a period of years, usually for life, after retirement. Treas. Reg. § 1.401-1(b)(1)(i).</p> <p><u>Definitely Determinable Benefit:</u> for a defined benefit plan, requirement is satisfied where the benefit (including disability, death and early retirement) for each participant can be computed in accordance with an express formula contained in the plan. Rev. Rul. 74-385; Treas. Reg. § 1.401-1(b)(1)(i). <u>See also</u> Code § 401(a)(25) (if benefit is determined on the basis of actuarial assumptions, such assumptions must be specified in plan so as to preclude employer discretion).</p> <p><u>Mortality Tables.</u> In recent discussions, the IRS has been requiring specific provisions setting forth the</p>	<p>Neb. Rev. Stat., sections 79-978 through 79-9,123</p> <p>Rules and Regulations Adopted July 12, 2021.</p> <p>Provisions currently in Plan Document:</p> <p>Neb. Rev. Stat., section 79-999 – Normal Retirement Neb. Rev. Stat., section 79-9,100 – Normal Retirement Neb. Rev. Stat., section 79-9,100.01 – Early Retirement Neb. Rev. Stat., section 79-9,105 – Disability Retirement Neb. Rev. Stat., section 79-9,106 Survivor Benefit</p> <p>Neb. Rev. Stat., section 79-978(2) defines "Actuarial equivalent) and (3)</p>

**OSERS
Additional Plan Qualification Requirements**

Prior Compliance	Code Requirement	Plan Section Reference and Compliance Date
	<p>actuarial assumptions to be used in determining actuarial equivalence.</p> <p><u>Incidental Benefit rules</u> (non-retirement benefits, e.g., disability and death benefits). Treas. Reg. § 1.401-1(b)(1).</p>	<p>defines "Actuarial tables."</p> <p>We proposed amendments to the Board's Rules and Regulations.</p>
	<p><u>CODE SECTION 401(a)(2)</u></p> <p><u>Exclusive Benefit to Employees.</u> Plan must provide that all qualified plan assets must be used exclusively for the benefit of employees or their beneficiaries. This rule involves a review of both form and operation. In order to comply with this "exclusive benefit" rule, it must also be shown that not only are payments made solely to members and their beneficiaries, but also that payments made to beneficiaries are <u>incidental</u> to those payments made to the member.</p> <p><u>Nondiversion of Trust Funds:</u> Plan must prohibit reversion of trust funds or return of employer contribution for purposes other than exclusive benefit of employees or beneficiaries. Treas. Reg. § 1.401-2(a)(2).</p>	<p>Neb. Rev. Stat., section 79-979(1).</p> <p>Neb. Rev. Stat., section 79-982.01(2).</p> <p>Neb. Rev. Stat., section 79-982.02.</p> <p>Neb. Rev. Stat., section 79-986.</p> <p>Neb. Rev. Stat., section 79-9,115.</p> <p>Neb. Rev. Stat., section 79-9,117.</p> <p>Neb. Rev. Stat., section 79-9,121(3).</p> <p>Neb. Rev. Stat., section 79-9,122.</p> <p>Neb. Rev. Stat., section 79-9,123.</p>
	<p><u>CODE SECTION 401(a)(7)</u></p> <p><u>Vesting Requirements.</u> Pre-ERISA minimum vesting standards, requiring 100% vesting upon retirement and upon plan termination or discontinuance of employer contributions, must be met.</p>	<p>.</p> <p>Neb. Rev. Stat.,</p>

**OSERS
Additional Plan Qualification Requirements**

Prior Compliance	Code Requirement	Plan Section Reference and Compliance Date
	<ul style="list-style-type: none"> • <u>Rev. Rul. 66-11</u>: Requires full vesting (nonforfeitability) at normal retirement age and completion of required years of service. • <u>IRS Memo</u>: April 30, 2012 directive regarding vesting requirements for governmental plans. 	<p>section 79-978(22).</p> <p><u>For employees who become members prior to July 1, 2016</u>: Neb. Rev. Stat., section 79-9,100(5).</p> <p><u>For employees who become members on or after July 1, 2016, and prior to July 1, 2018</u>: 79-9,100.01(1).</p> <p><u>For an employee who becomes a member prior to July 1, 2018</u>: Neb. Rev. Stat., section 79-9,100.01(2)(a)</p> <p><u>For a member hired or rehired on or after July 1, 2018</u>: Neb. Rev. Stat., section 79-9,100.01(2)(b).</p>
	<p><u>CODE SECTION 401(a)(8)</u></p> <p><u>Forfeitures</u>. Forfeitures may not be used to increase plan benefits in a defined benefit plan.</p>	<p>There are no provisions in Neb. Rev. Stat., sections 79-978 through 79-9,123 that address forfeitures.</p> <p>See Rules and Regulations, Chapter 6, section 007 regarding distributing unclaimed benefits. Adopted July 12, 2021. Providing funds to unclaimed</p>

**OSERS
Additional Plan Qualification Requirements**

Prior Compliance	Code Requirement	Plan Section Reference and Compliance Date
		<p>property could create qualification concerns. Per our Operational Compliance Review, we recommended that unclaimed benefits be forfeited within the Plan.</p>
	<p><u>CODE SECTION 401(a)(9)</u></p> <p><u>Required Distributions.</u> Governmental plans must make distributions to an employee no later than April 1 of the calendar year in which he or she attains age 70 ½ or in which he or she retires, if later. The basic rule is that such distributions must be over the life of the employee or over the lives of the 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. If an employee dies before his/her entire interest is distributed, the remaining portion must be distributed at least as rapidly as under the method of distribution being used at the date of death. If an employee dies before distribution of his/her interest has begun, the entire interest must be distributed over the beneficiaries lifetime or within 5 years after the employee's death. There are limited exceptions to the 5-year rule, and special rules if the surviving spouse is the designated beneficiary.</p>	<p>See Tax Compliance Review Checklist</p>
	<p><u>CODE SECTION 401(a)(16)</u></p> <p>Benefits or contributions may not exceed 415 limits. <u>See</u> discussion below.</p>	<p><u>See</u> discussion below and See Tax Compliance Review Checklist.</p> <p>Neb. Rev. Stat., section 79-980. <u>Date Adopted:</u> Laws 2012, LB 916, Section 24; Approved by</p>

**OSERS
Additional Plan Qualification Requirements**

Prior Compliance	Code Requirement	Plan Section Reference and Compliance Date
		<p>Governor: <u>April 6, 2012</u>; Effective: April 6, 2012.</p> <p>Rules and Regulations, Chapter 1, section 007.02(d). Adopted July 12, 2021.</p>
	<p><u>CODE SECTION 401(a)(17)</u></p> <p><u>Maximum Compensation.</u> For years beginning after December 31, 2001, the compensation limit will be increased to \$200,000 and indexed thereafter in \$5,000 increments. Certain governmental employees who qualify as eligible participants are grandfathered to limit in effect under plan on 7/1/93.</p>	<p>See Tax Compliance Review Checklist</p>
	<p><u>CODE SECTION 401(a)(24)</u></p> <p><u>Participation in Group Trusts.</u> A group trust can remain tax-exempt while accepting funds from a governmental plan or government maintained 457 plan or accepting funds intended to satisfy governmental obligations with respect to such plans.</p>	<p>See Tax Compliance Review Checklist</p>
	<p><u>CODE SECTION 401(a)(25)</u></p> <p><u>Stated Actuarial Assumptions.</u> Whenever the amount of any benefit is determined on the basis of actuarial assumptions, a defined benefit plan must specify actuarial assumptions in a manner that precludes employer discretion in order to provide definitely determinable benefits.</p>	<p><u>See</u> discussion below and See Tax Compliance Review Checklist.</p> <p>Neb. Rev. Stat., section 79-984.</p> <p>Neb. Rev. Stat., section 79-992.</p> <p>Neb. Rev. Stat., section 79-9,100(7)(b) and 79-9,100.01(5).</p>

**OSERS
Additional Plan Qualification Requirements**

Prior Compliance	Code Requirement	Plan Section Reference and Compliance Date
		<p>Neb. Rev. Stat., section 79-9,101.</p> <p>Chapter 1, section 007.02(b). Adopted July 12, 2021.</p>
	<p><u>CODE SECTION 401(a)(31)</u></p> <p>(Note that Code Section 402(c) provides total and partial rollover and distribution rules, and general tax rules.)</p> <p><u>Eligible Rollover Distribution.</u> This section requires a plan to permit distributees to elect to have an eligible rollover distribution paid directly to an eligible retirement plan specified by the distributee in a direct rollover. For distributions made after December 31, 2001, plans may permit participants to rollover account balances among 401(a) plans, 403(b) tax-sheltered annuities, and 457 governmental deferred compensation plans. In addition, rollovers may be allowed from IRAs to these employer retirement plans. After-tax contributions in qualified plans may be rolled over to defined contributions plans that will account for them separately or to IRAs. Surviving spouses may be permitted to rollover distributions to a qualified plan, 403(b) plan, or 457 plan. Also, the law provides a hardship exception to the requirement that rollovers be made within 60 days of distribution, permitting the IRS to waive the 60 day requirement if the failure to do so would be against equity or good conscience.</p>	<p>See Tax Compliance Review Checklist</p>
<p>N/A – no in-service distributions</p>	<p><u>CODE SECTION 401(a)(36)</u></p> <p><u>Distributions During Working Retirement.</u> Added by PPA '06 § 905(b). This section allows a distribution from a qualified trust to an employee who has attained age 62 and who has not separated from employment at the time of such distribution.</p>	<p>Plan does not currently allow in-service distributions.</p>

**OSERS
Additional Plan Qualification Requirements**

Prior Compliance	Code Requirement	Plan Section Reference and Compliance Date
	<p><u>CODE SECTION 401(h)</u></p> <p><u>Retiree Medical Benefits.</u> Pension or annuity plan may provide limited sickness, accident, hospitalization and medical benefits for retirees, their spouses and their dependents.</p>	No Retiree Medical Benefits.
Not a 401(k) plan	<p><u>CODE SECTION 401(k)</u></p> <p><u>Cash or Deferred Arrangements.</u> Governmental organizations generally cannot maintain a qualified cash or deferred arrangement.</p>	
	<p><u>CODE SECTION 414(d)</u></p> <p><u>Governmental Plan.</u> Defined as "a plan established and maintained by its employees by ... the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing." The inclusion of non-governmental or quasi-governmental employers/ employees can cause loss of governmental plan status.</p> <p>Include statement that plan intends to satisfy Code Section 401(a) by meeting the requirements of Code Section 414(d).</p>	Neb. Rev. Stat., section 79-979.
	<p><u>CODE SECTION 414(h)</u></p> <p><u>Government "Pick-ups."</u> Allows a government entity to treat certain employee contributions as employer contributions. Revenue rulings have established the following requirements for an effective pick-up:</p> <ul style="list-style-type: none"> ➤ The employer must take formal action, evidenced by a contemporaneous written document, specifying that the contributions, although designated as employee contributions, are being paid by the employer in lieu of contributions by the employee. A person duly authorized to take such action with respect to the employer must do so. The action must apply prospectively only. ➤ The employee must not be given the option, from and after the date of the pick-up, to have a cash or deferred election right (within the meaning of § 1.401(k)-1(a)(3)) with respect to 	<p>Neb. Rev. Stat., section 79-978(9) Adopted July 12, 2021.</p> <p>Neb. Rev. Stat., section 79-9,113(2).</p>

**OSERS
Additional Plan Qualification Requirements**

Prior Compliance	Code Requirement	Plan Section Reference and Compliance Date
	<p>the designated employee contributions. Thus, the employees must not be able to opt out of the pick-up or be able to receive the contributed amounts directly instead of having them paid by the employer to the pension plan.</p> <p>Rev. Rul. 2006-43; <u>see also</u> Rev. Rul. 81-35; Rev. Rul. 81-36; and Rev. Rul. 87-10.</p>	
✓	<p><u>CODE SECTION 414(j)</u></p> <p><u>Definition of Defined Benefit Plan.</u> A defined benefit plan means any plan that is not a defined contribution plan, <u>i.e.</u>, "a plan that provides for an individual account for each participant and for benefits based solely on the amount contributed to the participant's account, and any income, expenses, gains and losses, and forfeitures of accounts of other participants which may be allocated to such participant's account." Code § 414(i).</p>	[No language required.]
No leased employees covered	<p><u>CODE SECTION 414(n)</u></p> <p><u>Leased Employees.</u> Definitions for leased employees.</p>	See Tax Compliance Review Checklist
	<p><u>CODE SECTION 414(p)</u></p> <p><u>Definition of Qualified Domestic Relations Order.</u> A distribution from a governmental plan, which is not subject to Code § 401(a)(13), made pursuant to a domestic relations order will be treated as a QDRO if that order creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan. Code § 414(p)(1)(A)(i) and (ii).</p> <p>Note: Governmental plans are not required to accept QDROs. However, if plan does make distributions under DROs that meet these definitions, the appropriate tax consequences are determined by federal law.</p>	See Tax Compliance Review Checklist.

**OSERS
Additional Plan Qualification Requirements**

Prior Compliance	Code Requirement	Plan Section Reference and Compliance Date
	<p><u>CODE SECTION 414(u) (USERRA)</u></p> <p><u>Reemployed Veterans.</u> The Uniformed Services Employment and Reemployment Rights Act of 1994 expanded veterans rights and included various retirement plan provisions in the Internal Revenue Code. Generally, make-up employee contributions required under DB plan not subject to 415 limits for year make-up contributions made, but subject to applicable limits for year to which the contributions relate.</p>	<p>See Tax Compliance Review Checklist</p>
	<p><u>CODE SECTION 415(b)</u></p> <p><u>Limitations on Benefits.</u> Effective for years ending after December 31, 2001, the benefit limit will increase to \$160,000, with future indexing in \$5,000 increments. Special rules regarding benefit reductions apply to governmental plans and particularly plans maintained for certain police and fire plans. Governmental plans are not subject to the benefit limitation based upon 100% of salary.</p>	<p>See Tax Compliance Review Checklist</p>
	<p><u>CODE SECTION 415(c)</u></p> <p><u>Limitations on Contributions.</u> For years beginning after December 31, 2001, the annual additions limit is increased to the lesser of \$40,000 or 100% of compensation, with future indexing of the dollar limit in \$1,000 increments. The 415(c) limit is not applicable to picked-up contributions or the receipt of roll-over distributions. Note: 1997 legislation also establishes a transitional rule for eligible participants to grandfather purchases of service allowable as of 8/5/97.</p>	<p>See Tax Compliance Review Checklist</p>
	<p><u>CODE SECTION 415(k)(3)</u></p> <p><u>Repayments.</u> In case of repayment (including interest) to plan with respect to an amount previously refunded upon a forfeiture of service credit under the plan or under another governmental plan maintained by a State or local government employer within the</p>	<p>See Tax Compliance Review Checklist</p>

OSERS
Additional Plan Qualification Requirements

Prior Compliance	Code Requirement	Plan Section Reference and Compliance Date
	<p>same State, any such repayment shall not be taken into account for purposes of Code § 415. After December 31, 2001, a governmental defined benefit plan may permit a trustee-to-trustee transfer from a 403(b) plan or a 457 plan to purchase permissive service credit (see Code § 415(n)) or to repay previously refunded contributions.</p>	
	<p><u>CODE SECTION 415(m)</u></p> <p><u>Excess Benefits.</u> The 1996 federal legislation authorizes the establishment of Qualified Excess Benefit Arrangements to deal with benefits and contributions in excess of 415 limits.</p>	<p>The Plan does not have an Excess Benefit Arrangement.</p>
	<p><u>CODE SECTION 415(n)</u></p> <p><u>Service Purchases.</u> Effective for 1998, there are modified 415(c) and 415(b) limits that apply to voluntary employee contributions for purchases of permissive service credit. After December 31, 2001, a governmental defined benefit plan may permit a trustee-to-trustee transfer from a 403(b) plan or a 457 plan to purchase permissive service credit or to repay contributions previously refunded under forfeiture of service credit (see Code § 415(k)(3)).</p>	<p>See Tax Compliance Review Checklist.</p>
	<p><u>CODE SECTION 503(b)</u></p> <p><u>Prohibited Transactions.</u> While governmental plan is not subject to excise tax of Code § 4975, engaging in prohibited transaction could result in loss of plan's tax-exempt status.</p>	<p>An amendment is not required but the Plan should ensure operational compliance.</p>

REQUIRED AMENDMENTS LIST

Background

The first Required Amendments List ("RA List") issued by the IRS is for calendar year 2016, as provided in Revenue Procedure 2016-37, §§ 3.01(2), 9. The RA List is an annual list of statutory and administrative changes in retirement plan qualification requirements.¹ A change generally will not be included on the RA List until guidance with respect to that change has been provided in regulations or other IRS guidance. However, a change in qualification may be included on the RA List if the Treasury Department or IRS does not anticipate that any guidance will be issued with respect to that change.

The RA List also establishes an amendment deadline for individually designed plans. For changes on the 2016 RA List, this deadline is generally December 31, 2018. Rev. Proc. 2016-37, § 5.05(3). For changes on the 2017 RA List, this deadline is generally December 31, 2019. IRS Notice 2017-72 (**Note:** the 2018 RA List does not have a similar deadline, as that list did not include any entries listing changes in qualification requirements. See IRS Notice 2018-91.) For changes on the 2019 RA List, this deadline is generally December 31, 2021. IRS Notice 2019-64. For changes on the 2020 RA List, this deadline is generally December 31, 2022. IRS Notice 2020-83. However, the "remedial amendment period applicable to a disqualifying provision arising as a result of change in qualification requirements may be extended beyond the date that normally would apply to an item included on the 2020 RA List" under the SECURE Act as provided in Notice 2020-68. In addition, if later, the amendment date for governmental plan sponsors is extended to 90 days after the close of the third regular legislative session of the legislative body with authority to amend the plan that begins on or after the date of issuance of the RA List.²

Review and Conclusions

The 2016 RA List is divided into Part A and Part B.

Part A – Covers the qualification requirement changes generally requiring an amendment to most plans or to most plans of the type affected by the change.

- *No changes were listed by the IRS for 2016 under Part A.*

Part B – Covers other qualification requirement changes for which an amendment may be required. Under Part B, the IRS listed one change for 2016.

- *Collectively-bargained defined benefit plans: Restrictions on accelerated distributions from underfunded single-employer plans in employer bankruptcy*

¹ The RA List does not include the following: (1) statutory qualification requirements changes with respect to which the Treasury Department and IRS expect to issue guidance (these will be included on a future RA List); (2) qualification requirement changes which permit optional plan provisions; or (3) tax law changes which affect qualified plans that do not change the Code § 401(a) qualification requirements (for example, changes to the tax treatment of plan distributions or, for ERISA plans, changes to the funding requirements).

² Rev. Proc. 2016-37, §§ 5.06(3)

under Code § 436 based upon the Highway and Transportation Funding Act of 2014, P.L. 113-159, § 2003.

CONCLUSION: No amendments are required to the Plan under the 2016 RA List.

The 2017 RA List is divided into Part A and Part B.

Part A – Covers the qualification requirement changes generally requiring an amendment to most plans or to most plans of the type affected by the change.

- *Final regulations regarding cash balance/hybrid plans. Cash balance/hybrid plans must be amended to the extent necessary to comply with those portions of the regulations regarding market rate of return and other requirements that first become applicable to the plan for the plan year beginning in 2017.*
- *Benefit restrictions for certain DB plans that are eligible cooperative plans or eligible charity plans under § 104 of the Pension Protection Act of 2006 ("PPA"). An eligible cooperative plan or eligible charity plan that was not subject to the benefit restrictions of Code § 436 for the 2016 plan year under § 104 of PPA ordinarily becomes subject to those restrictions for plan years beginning on or after Jan. 1, 2017. However, a plan that fits within the definition of a CSEC plan continues not to be subject to those rules unless the plan sponsor has made an election for the plan not to be treated as a CSEC plan.*

Part B – Covers other qualification requirement changes for which an amendment may be required. Under Part B, the IRS listed one change for 2017.

- *Final regulations regarding partial annuity distribution options for defined benefit pension plans (81 Fed. Reg. 62359). Defined benefit plans that permit benefits to be paid partly in the form of an annuity and partly as a single sum (or other accelerated form) must do so in a manner that complies with the Code § 417(e) and regulations. Section 1.417(e)-1(d)(7) provides rules under which the minimum present value rules of Code § 417(e)(3) apply to the distribution of only a portion of a participant's accrued benefit.*

CONCLUSION: These provisions do not apply to the Plan, which is a governmental defined benefit plan. As such, no amendments are required to the Plan under the 2017 RA List.

The 2018 RA List, unlike previous lists, was not divided into two parts.

- *Section IV provided that there are no entries listing changes in qualification requirements on the 2018 RA List.*

CONCLUSION: No amendments are required to the Plan under the 2018 RA List.

The 2019 RA List is divided into Part A and Part B.

Part A - *Changes in requirements that generally would require an amendment to most plans or to most plans of the type affected by the change.*

- Final regulations relating to hardship distributions. Plans that (1) provide for a suspension of an employee's elective deferrals or employee contributions as a condition for obtaining a hardship distribution of elective deferrals or (2) do not require a representation from an employee who requests a hardship distribution that he or she has insufficient cash or other liquid assets reasonably available to satisfy the need, must be amended as necessary to eliminate the suspension and provide for the representation, for hardship distributions made on or after January 1, 2020.
- Final regulations regarding cash balance/hybrid defined benefit plans. Collectively bargained cash balance/hybrid defined benefit plans maintained pursuant to one or more collective bargaining agreements ratified on or before November 13, 2015, and which constitute collectively bargained plans under § 1.436-1(a)(5)(ii)(B), must be amended to the extent necessary to comply with those portions of the regulations regarding market rate of return and other requirements.

Part B - *Other changes in requirements that may require an amendment.*

- *No changes in requirements that may require an amendment.*

CONCLUSION: These provisions do not apply to the Plan, which is a governmental defined benefit plan. As such, no amendments to the Plan are required under the 2019 RA List.

The 2020 RA List is divided into Part A and Part B.

Part A – Changes in requirements that generally would require an amendment to most plans or to most plans of the type affected by the change.

- No changes to requirements that would require an amendment.

Part B – Other changes in requirements that may require an amendment.

- Difficulty of care payments treated as compensation for retirement contribution limitations. SECURE Act § 116(b) adds § 415(c)(8) to the Code to increase the annual additions limit for retirement plans to take into account difficulty of care payments, which are defined in Code § 131(c). Code § 415(c)(8)(A) provides that a participant's compensation for purposes of Code § 415(c)(1) is increased by the amount of difficulty of care payments. Plans that are maintained by employers that have provided difficulty of care payments during plan years beginning after December 31, 2015, and before January 1, 2021, must be amended by December 31, 2022 or, if later, the SECURE Act § 601 date applicable to the plan, as set forth in section G of Notice 2020-68. If an employer begins to make difficulty of care payments to its employees in future years, the plan must be amended to include difficulty of care payments in the definition of Code § 415(c)(1) compensation by the end of the second calendar year following the calendar year in which the employer begins to make difficulty of care payments.

- Application of cooperative and small employer charity pension plan rules to certain charitable employers. CARES Act § 3609 adds Code § 414(y)(1)(D). Code § 414(y)(1)(D) provides that a cooperative and small employer charity pension plan (CSEC plan) is defined to include a defined benefit plan that, as of January 1, 2000, was maintained by a tax-exempt employer that met specific characteristics.

CONCLUSION: We assume that the OSERS (and/or the District) does not make "difficulty of care payments" to employees (these are qualified foster care payments that may be excluded from gross income under Code § 131), and thus this provision would not apply to the Plan. If this is not the case, we should discuss this provision. The second provision does not apply to the Plan, because the Plan is a governmental defined benefit plan. As such, no amendments are required to the Plan under the 2020 RA List.

The RA Lists described above state that the following annual, monthly, or other periodic changes, even though not directly referenced on the RA List, are treated as incorporated under the RA List for the year that such change is effective:

1. Dollar limits adjusted for cost-of-living increases provided under Code Section 415(d), etc.;
2. Spot segment rates used in determining the applicable interest rate under Code Section 417(e); and
3. Applicable mortality tables under Code Section 417(e).

See www.irs.gov/retirement-plans/recent-ep-published-guidance.

Accordingly, we reviewed the applicable provisions of the Plan to confirm that the Plan's terms do not need to be amended to reflect these additional changes.

1. The language in the Plan document provides that the 401(a)(17) and 415 dollar limits are adjusted each calendar year. *Neb. Rev. Stat., section 79-978(9)(c) under definition of "Compensation" incorporates IRC 401(a)(17) by reference. Neb. Rev. Stat., section 79-9,102 incorporates IRC 415 by reference, including incorporating by reference the annual adjustments to the limitations of 415 that are made pursuant to 415(d).*
2. The language in the Plan document provides that the Plan will follow the IRS requirements, which include Code Section 417(e). *Neb. Rev. Stat., section 79-9,102 incorporates IRC 415 by reference. Neb. Rev. Stat., section 79-978(3) defines "Actuarial tables."* For purposes of ensuring compliance with the 415(b) limits, it should be confirmed that the interest rate assumptions under Code Section 415(b)(2)(E) and the applicable mortality table under Code Section 417(e) are being followed when converting any annuity payable in a form other than a straight life annuity in order to calculate the actuarially equivalent straight life benefit.

CONCLUSION: No amendments are needed to the Plan to address any of the additional changes incorporated under the RA Lists.

IRS OPERATIONAL COMPLIANCE LIST

Background

The IRS announced in Revenue Procedure 2016-37 that it intends to publish an annual Operational Compliance List to identify changes in qualification requirements effective during a calendar year in order to help plan sponsors achieve operational compliance. Rev. Proc. 2016-37, §§ 3.04, 10. The Operational Compliance List identifies matters that may involve either mandatory or discretionary plan amendments or that may contain other significant guidance which affects daily plan operations. The Operational Compliance List is not intended to be an exhaustive list of all IRS legislation or guidance issued for a year. To be qualified, however, a plan must comply operationally with each relevant qualification requirement, even if the most recently issued Operational Compliance List does not include the requirement.

The IRS has published an Operational Compliance List for 2016 through 2022. See www.irs.gov/retirement-plans/operational-compliance-list (last reviewed or updated on June 3, 2021). The Operational Compliance List includes the following developments for operational compliance that were effective in 2016, 2017, 2018, 2019, 2020, 2021, and 2022.

Review and Conclusions

Effective in 2016

Relief for plans that made loans and hardship distributions to victims of Hurricane Matthew. In accordance with Announcement 2016-39, the IRS provided certain relief from Code requirements if a qualified employer plan made a loan or hardship distribution for need arising from damage caused by Hurricane Matthew to employees or former employees whose principal residence was in Florida on October 3 and 4, 2016 and was located in a federally declared disaster area.

CONCLUSION: This item is not applicable to the Plan because the Plan does not provide for plan loans. To the extent that the Board of Trustees is interested in allowing plan loans for federally declared disaster relief, please let us know as we would be glad to assist you in this regard.

Relief for plans that made loans and hardship distributions to victims of the Louisiana storms similar to the relief regarding Hurricane Matthew. In particular, Announcement 2016-30 provided certain relief to qualified employer plans which made loans or hardship distributions for need arising from Louisiana flooding to employees or former employees whose principal residence on August 11, 2016 was located in a federally declared disaster area.

CONCLUSION: This item is not applicable to the Plan because the Plan does not provide for plan loans. To the extent that the Board of Trustees is interested in allowing plan loans for federally declared disaster relief, please let us know as we would be glad to assist you in this regard.

Mid-year changes to safe harbor 401(k) plans.

CONCLUSION: Because this change applies to safe harbor 401(k) plans only, this item does not apply to the Plan.

Proposed regulations regarding non-discrimination testing under Code § 401(a)(4). The proposed regulations would provide relief from the non-discrimination requirements for certain qualified retirement plans that provide additional benefits to a grandfathered group of employees following certain changes in the coverage of a defined benefit plan or a defined benefit plan formula.

CONCLUSION: Because Code § 401(a)(4) is not applicable to governmental plans, this item is not applicable to the Plan. Code § 401(a)(5)(G).

Proposed regulations regarding normal retirement age for governmental pension plans. The proposed regulations provide guidance to governmental plans regarding the normal retirement age to begin paying retirement benefits to participants who reach that age, even if the employee continued to work for the employer that sponsors the plan.

CONCLUSION: The proposed regulations for governmental plans have not been finalized. Currently, the proposed regulations provide safe harbors at which a normal retirement age will be considered to satisfy IRS requirements. For general employees in a governmental plan, safe harbors apply if normal retirement age is:

- i. Age 60 and five years of service;**
- ii. Age 55 and 10 years of Service;**
- iii. Combined age and years of service of 80 or more; or**
- iv. Any age with 25 years of service.**

We note that the Plan's current normal retirement age is the end of the month during which the member attains age 65 and has completed at least 5 years of membership service. Neb. Rev. Stat., section 79-978(22). Thus, there is no concern with the normal retirement age.

The Board should continue to monitor developments related to the normal retirement age regulations.

For employees who become members prior to July 1, 2016: (i) no reduction if annuity begins prior to member's 62 birthday and member has completed at least 35 years of membership service; (ii) for retirements on or after June 7, 1995, any retirement annuity which begins prior to the sixty-second birthday of the member shall be reduced by twenty-five hundredths percent for each month or partial month between the date the annuity begins and the member's sixty-second birthday; and (iii) no reduction if annuity begins at a time when the sum of the member's attained age and creditable service is at least 85. Neb. Rev. Stat., section 79-9,100(5).

For employees who become members on or after July 1, 2016, and prior to July 1, 2018: (i) no reduction if annuity begins at a time when the sum of the member's attained age and creditable service totals 85 and the member is at least age 55; (ii) no reduction for employees who become members on or after July 1, 2018, if the annuity begins at a time when the sum of the member's attained age and creditable service totals 85 and the member is at least age 60. Neb. Rev. Stat., section 79-9,100.01(1).

For an employee who becomes a member prior to July 1, 2018: Reduction for each month or partial month between the date the annuity begins and the member's 65th birthday, if the annuity begins on or after member's 60th birthday and member has completed at least at total of 5 years of creditable service. Neb. Rev. Stat., section 79-9,100.01(2)(a)

For a member hired or rehired on or after July 1, 2018: Reduction for each month or partial month between the date the annuity begins and the member's 65th birthday, if the annuity begins on or after the sixtieth birthday and the member has completed at least a total of five years of creditable service including eligibility and vesting credit but has not qualified for an unreduced annuity as specified in this section. Neb. Rev. Stat., section 79-9,100.01(2)(b).

Extension of temporary non-discrimination relief for closed defined benefit plans.

CONCLUSION: This item is not applicable to governmental plans, and therefore no further action is necessary.

Restrictions on distributions in bankruptcy for collectively bargained single-employer defined benefit plans.

CONCLUSION: This item is not applicable to the Plan since the Plan is not a collectively bargained plan.

Effective in 2017

Relief for 2016 disaster areas. Plans may offer qualified disaster distributions to participants who were affected by 2016 disasters. These distributions are subject to special tax treatment and recontribution options. Qualified 2016 disaster distributions must have been made on or after January 1, 2016 and before January 1, 2018.

CONCLUSION: This item is not applicable to the Plan because the Plan does not provide for plan loans or qualified disaster distributions. To the extent that the Board of Trustees is interested in providing for plan loans or qualified disaster distributions for federally declared disaster relief, please let us know as we would be glad to assist you.

Relief for plans that make loans and hardship distributions to victims of Hurricanes Harvey, Irma, and Maria, as well as the California wildfires. Announcements 2017-11, 2017-13, and 2017-15 provide relief from certain requirements for loans and hardship distributions to victims of Hurricanes Harvey, Irma, and Maria, and to the victims of the California wildfires.

CONCLUSION: This item is not applicable to the Plan because the Plan does not provide for plan loans or qualified disaster distributions. To the extent that the Retirement Board is interested in providing for plan loans or qualified disaster distributions for federally declared disaster relief, please let us know as we would be glad to assist you.

New "qualified hurricane distributions" and increased plan loan limits permitted for victims of Hurricanes Harvey, Irma, and Maria. Plans may offer participants affected by these hurricanes new "qualified hurricane distributions" that are subject to special tax treatment and

recontribution options, as well as plan loans of up to \$100,000 that are subject to special repayment rules.

CONCLUSION: This item is not applicable to the Plan because the Plan does not provide for plan loans or qualified disaster distributions. To the extent that the Board of Trustees is interested in providing for plan loans or qualified disaster distributions for federally declared disaster relief, please let us know as we would be glad to assist you.

Proposed regulations regarding qualified non-elective contributions ("QNECs") and qualified matching contributions ("QMACs") in certain qualified retirement plans which contain cash or deferred arrangements under Code § 401(k). The proposed regulations establish that QNECs and QMACs must satisfy applicable non-forfeitability and distribution requirements at the time they are allocated to participants' accounts. The proposed regulations will only apply to taxable years beginning after the publication of final regulations.

CONCLUSION: This item is not applicable to the Plan because it applies to plans which contain cash or deferred arrangements under Code § 401(k) only.

The extension of temporary non-discrimination relief for closed defined benefit pension plans.

CONCLUSION: However, the regulations are specific to non-discrimination relief, they are not applicable to governmental defined benefit plans. Therefore, no further action is necessary.

Final regulations changing the regulations regarding the minimum present value requirements for defined benefit plan distributions to permit plans to simplify the treatment of certain optional forms of benefit that are paid partly in the form of an annuity and partly in a more accelerated form.

CONCLUSION: While the Plan provides several optional forms of allowances, the regulations are in regards to Code §§ 411 and 417. Governmental plans are exempt from these two Code provisions. Therefore, no amendments are necessary.

Final regulations regarding cash balance/hybrid plans.

CONCLUSION: Because these regulations apply to cash balance/hybrid plans only and are under Code § 411, this item is not applicable to the Plan. See Code § 401(e)(1)(A).

Application of benefit restrictions for certain defined benefit plans (eligible cooperative plans or eligible charity plans described in Section 104 of the Pension Protection Act of 2006, as amended ("PPA")).

CONCLUSION: This item is not applicable to the Plan because it applies to cooperative plans or eligible charity plans only.

Effective in 2018

Final regulations regarding qualified non-elective contributions ("QNECs") and qualified matching contributions ("QMACs"). These regulations provide that employer contributions to a 401(k) plan can be qualified nonelective contributions or qualified matching contributions, provided they satisfy the applicable nonforfeitability requirements and distribution limitations when they are allocated to participant accounts.

CONCLUSION: This item is not applicable to the Plan because it applies to Code § 401(k) plans only.

Relief for California Wildfires (Bipartisan Budget Act of 2018, Section 20102). A plan may offer participants affected by the California wildfires (a) new distribution options for "qualified wildfire distributions," which are provided special tax treatment and recontribution options, and (b) plan loans of up to \$100,000, subject to special repayment rules. To take advantage of the options provided under this legislation, the loans or distributions must be made within a specified time frame ending December 31, 2018. If the plan makes such loans or distributions, any necessary retroactive amendments implementing the special rules must be adopted on or before the last day of the first plan year beginning on or after January 1, 2019 (or for IRC Section 414(d) governmental plans, the last day of the first plan year beginning on or after January 1, 2021). See, Pub. 976 for more information.

CONCLUSION: This item is not applicable to the Plan because the Plan does not provide for plan loans or qualified disaster distributions. To the extent that the Board of Trustees is interested in providing for plan loans or qualified disaster distributions for federally declared disaster relief, please let us know as we would be glad to assist you.

The extension of temporary non-discrimination relief for closed defined benefit pension plans.

CONCLUSION: This item is not applicable to the Plan because the Plan is not a closed defined benefit plan.

Extended rollover periods for certain amounts. New rules allow an extended rollover deadline for qualified plan loan offset amounts and refunds of improper tax levies.

CONCLUSION: This item is not applicable to the Plan because the Plan does not provide for plan loans or refunds of tax levies.

Modification of deduction for personal casualty losses. Under Code § 165(h)(5), for taxable years 2018-2025, the deduction for a personal casualty loss is generally available only to the extent the loss is attributable to a federally declared disaster. Proposed Treas. Reg. 1.401(k)-1(d)(3)(ii)(B)(6) provides that expenses for the repair of damage to an employee's principal residence that would qualify for the Code § 165 casualty deduction is determined without regard to Code § 165(h).

CONCLUSION: This item is not applicable to the Plan because it applies to Code § 401(k) plans only.

Effective in 2019

Qualified employer plans prohibited from making loans through credit cards and other similar arrangements (SECURE Act, Section 108). This section of the SECURE Act modifies IRC

Section 72(p) by prohibiting loans through credit cards and other similar arrangements. The amendments made by Section 108 apply to loans made after December 20, 2019 (the date of enactment of the Act). (Added May 2020) *Note:* In order to avoid a plan operational failure, It is recommended that plan sponsors remove, by the deadline under SECURE Act Section 601, plan language that provides for making loans through credit cards or any other similar arrangement. (Added March 2021).

CONCLUSION: This item is not applicable to the Plan because the Plan does not provide for loans.

Automatic extension of filing deadlines in case of certain taxpayers affected by federally declared disasters (Taxpayer Certainty and Disaster Tax Relief Act of 2019, Section 205). This section of the Taxpayer Certainty and Disaster Tax Relief Act of 2019 amends IRC Section 7508A to provide certain taxpayers affected by a federally declared disaster with a 60-day extension for performing certain acts. For retirement plans, the extension applies to the time for making deductible contributions and for completing rollovers. The amendment made by Section 205 applies to federally declared disasters declared after December 20, 2019 (the date of enactment of the Act). (Added May 2020)

CONCLUSION: No amendment is necessary.

Bipartisan Budget Act of 2018. Sections 41113 and 41114 provide that a distribution will not fail to be treated as made on account of hardship merely because the employee does not take any available loan from the plan. Further, they expand the types of contributions and earnings a plan may make available for hardship distributions. This legislation also directs the IRS and Treasury to eliminate the safe harbor requirement to suspend participant contributions for six months in order for the distribution to be deemed necessary to satisfy an immediate and heavy financial need.

CONCLUSION: This item is not applicable to the Plan because the Plan does not provide for hardship distributions.

Proposed regulations regarding hardship withdrawals. These proposed regulations would revise the 401(k) regulations to reflect legislation regarding hardship distributions.

CONCLUSION: This item is not applicable to the Plan because it applies to Code § 401(k) plans and hardship distributions.

Relief for victims of Hurricanes Florence and Michael. The IRS and Treasury extended the retirement plan relief provided under Announcement 2017-15 to include similarly situated victims of Hurricanes Florence and Michael, except that: (1) the "Incident Dates" are as provided by FEMA; (2) relief is provided through March 15, 2019; and (3) any necessary amendments must be made no later than the deadline for amending a disqualifying provision, as set forth in Rev. Proc. 2016-37.

CONCLUSION: This item is not applicable to the Plan because the Plan does not provide for plan loans or qualified disaster distributions. To the extent that the Board of Trustees is interested in providing for plan loans or qualified disaster distributions for federally declared disaster relief, please let us know as we would be glad to assist you.

The extension of temporary non-discrimination relief for closed defined benefit pension plans.

Additional temporary nondiscrimination relief for closed defined benefit pension plans (Notice 2019-60). This notice provides additional temporary relief from the requirements of Treasury Regs. Section 1.401(a)(4)-4 relating to benefits, rights, and features to a closed defined benefit plan that generally meets the eligibility conditions for the temporary relief under Notice 2014-5, as extended under Notice 2015-28, Notice 2016-57, Notice 2017-45, Notice 2018-69, and Notice 2019-49. (Added May 2020)

CONCLUSION: This item is not applicable to the Plan because the Plan is not a closed defined benefit plan.

Effective in 2020

Final regulations relating to hardship distributions (84 Fed. Reg. 49651). These regulations amended the rules relating to hardship distributions from IRC Section 401(k) plans to reflect statutory changes affecting those plans, including changes made by the Bipartisan Budget Act of 2018, Pub. L. 115-123 (BBA 2018), and the Tax Cuts and Jobs Act, Pub. L. 115-97 (TCJA).

CONCLUSION: This item is not applicable to the Plan because the Plan does not provide for hardship distributions.

The extension of temporary non-discrimination relief for closed defined benefit pension plans.

CONCLUSION: This item is not applicable to the Plan because the Plan is not a closed defined benefit plan.

Increase in 10 percent cap for automatic enrollment safe harbor after first plan year (SECURE Act, Section 102).

CONCLUSION: This item is not applicable to the Plan because the Plan is not a 401(k) plan.

Rules relating to election of safe harbor 401(k) status (SECURE Act, Section 103). This section of the SECURE Act removes the requirement to provide an annual safe harbor notice for nonelective safe harbor IRC Section 401(k) plans.

CONCLUSION: This item is not applicable to the Plan because the Plan is not a 401(k) plan.

Portability of lifetime income options (SECURE Act, Section 109). This section of the SECURE Act provides that qualified defined contribution plans under IRC Section 401(k) and IRC Section 403(b) plans may permit certain transfers and distributions of lifetime income investment options.

CONCLUSION: This item is not applicable to the Plan because the Plan is not a 401(k) or 403(b) plan.

Penalty-free withdrawals from retirement plans for individuals in case of birth or adoption (SECURE Act, Section 113). This section of the SECURE Act amends IRC Section 72(t) to provide that the 10 percent additional tax on early distributions from certain retirement plans does not apply to qualified birth or adoption distributions.

CONCLUSION: This item generally is not applicable to the Plan because the Plan is a defined benefit plan, and therefore generally cannot permit in-service withdrawals. However, a member who is otherwise entitled to a distribution from the Plan may be able to claim the exemption from the 10% early distribution penalty if he or she meets the applicable requirements under Code § 72(t).

Increase in age for required beginning date for mandatory distributions (SECURE Act, Section 114). This section of the SECURE Act modifies IRC Section 401(a)(9) to increase the age on which the determination of required minimum distributions is based from age 70½ to age 72.

CONCLUSION: This item applies to the Plan. See SECURE Act discussion below for further detail. See Rules and Regulations Chapter 4.

Difficulty of care payments treated as compensation for retirement contribution limitations (SECURE Act, Section 116). This section of the SECURE Act amends IRC Section 415(c) to provide that, with respect to an individual who, under IRC Section 131, excludes from gross income a qualified foster care payment that is a difficulty of care payment, compensation under IRC Section 415(c)(1)(B) is increased by the amount so excluded.

CONCLUSION: Assuming that the OSERS (and/or the District) does not make "difficulty of care payments" to employees (these are qualified foster care payments that may be excluded from gross income under Code § 131), and thus this provision would not apply to the Plan. If this is not the case, we should discuss this provision.

Modification of nondiscrimination rules to protect older, longer service participants (SECURE Act, Section 205). This section of the SECURE Act changes the nondiscrimination testing requirements (generally relating to testing contributions or benefits and compliance with the minimum participation rules) for a grandfathered group of employees with respect to a closed defined benefit plan.

CONCLUSION: This item is not applicable to the Plan because the Plan is not a closed defined benefit plan.

Modification of required distribution rules for designated beneficiaries (SECURE Act, Section 401). This section of the SECURE Act changes the after-death required minimum distribution rules applicable to defined contribution plans. For governmental plans, these rules are effective for distributions from defined contribution plans with respect to individuals who die after December 31, 2021.

CONCLUSION: This item is not applicable to the Plan because the Plan is not a defined contribution plan.

Provisions relating to plan amendments (SECURE Act, Section 601). This section of the SECURE Act provides relief from the anti-cutback rules of IRC Section 411(d)(6) for amendments to any retirement plan or annuity contract pursuant to any amendment made by the SECURE Act or pursuant to any Treasury or Department of Labor regulation under this Act.

CONCLUSION: This item is not applicable to the Plan because the Plan is a governmental plan and is not subject to Code § 411.

Reduction to minimum age for allowable in-service distributions (Bipartisan American Miners Act of 2019, Section 104). The minimum age for allowable in-service distributions under IRC Section 401(a)(36) is lowered from 62 to 59½. The amendments made by this provision apply to plan years beginning after December 31, 2019.

CONCLUSION: This item is an optional provision, but the Plan does not currently allow in-service distributions. Implementation of a change would require a Plan amendment. See discussion of Miners Act below for further detail.

Relief for certain major disasters (Taxpayer Certainty and Disaster Tax Relief Act of 2019, Section 202). A plan may offer participants affected by major disasters declared during the period beginning on January 1, 2018, and ending on February 18, 2020, (a) new distribution options for "qualified disaster distributions," which are provided special tax treatment and recontribution options, and (b) plan loans of up to \$100,000, subject to special repayment rules.

CONCLUSION: This item is not applicable to the Plan because the Plan does not provide for plan loans or qualified disaster distributions. To the extent that the Board of Trustees is interested in providing for plan loans or qualified disaster distributions for federally declared disaster relief, please let us know as we would be glad to assist you.

Special rules for coronavirus related distributions (CARES Act, Section 2202 and COVID-related Tax Relief Act of 2020, Section 280). Provides that, for certain individuals affected by the coronavirus, a plan may provide for: (a) "coronavirus-related distributions" during the period January 1, 2020 through December 30, 2020, which are provided favorable tax treatment and recontribution options; (b) plan loans of up to \$100,000, for loans made during the period March 27, 2020 through September 22, 2020; and (c) a suspension of repayments on existing plan loans due during the period March 27, 2020 through December 31, 2020. Notice 2020-50 provides guidance.

CONCLUSION: This item is not applicable to the Plan because the Plan does not provide for plan loans or qualified disaster distributions. To the extent that the Board of Trustees is interested in providing for plan loans or qualified disaster distributions for federally declared disaster relief, please let us know as we would be glad to assist you.

Temporary waiver of required minimum distribution rules for certain retirement plans and accounts (CARES Act, Section 2203). Provides that (a) a defined contribution plan under IRC Section 401(a), 403(a), or 403(b) may waive the required minimum distribution rules of IRC Section 401(a)(9) for 2020; (b) any amount distributed during 2020 that is an eligible rollover distribution under IRC Section 402(c)(4), but would not have been an eligible rollover distribution had IRC Section 401(a)(9) applied during 2020, is not treated as an eligible rollover distribution for purposes of IRC Sections 401(a)(31), 402(f), and 3405(c); and (c) retroactive amendments implementing Section 2203 must be adopted on or before the last day of the first plan year beginning on or after January 1, 2024, and, for an amendment with a retroactive effective date, the plan must be operated as if the amendment were in effect. Notice 2020-51 provides guidance.

CONCLUSION: This item is not applicable to the Plan because the Plan is not a defined contribution plan.

Temporary relief from the physical presence requirement for spousal consents under qualified retirement plans (Notice 2020-42). Provides that, in the case of a participant election witnessed by a notary public or plan representative, for the period January 1, 2020 through December 31, 2020, the physical presence requirement in Treasury Regs. Section 1.401(a)-21(d)(6) is deemed satisfied for an electronic system that satisfies the requirements. Notice 2021-03 extends, from January 1, 2021, through June 30, 2021, the temporary relief.

CONCLUSION: This item is not applicable to the Plan because the Plan is a governmental plan and is not subject to the qualified joint and survivor (QJSA) requirements of § 417.

COVID-19 relief and other guidance on mid-year reductions or suspensions of contributions to safe harbor IRC Section 401(k) and IRC Section 401(m) plans (Notice 2020-52).

CONCLUSION: This item is not applicable to the Plan because the Plan is not a safe harbor IRC Section 401(k) plan or IRC Section 401(m) plan.

Temporary rule preventing partial plan termination (Taxpayer Certainty and Disaster Tax Relief Act of 2020, Section 209). Provides that a plan will not be treated as having a partial termination (within the meaning of IRC Section 411(d)(3)) during any plan year that includes the period beginning March 13, 2020, and ending March 31, 2021, if the number of active participants covered by the plan on March 31, 2021, is at least 80 percent of the number of active participants covered by the plan on March 13, 2020.

CONCLUSION: This item is not applicable to the Plan because the Plan is a governmental plan and is not subject to Code § 411. While not directly applicable to governmental plans, this provision may be useful by analogy in the event a governmental plan with a significant loss of active participants seeks to avoid a partial plan termination.

Special disaster-related rules for use of retirement funds (Taxpayer Certainty and Disaster Tax Relief Act of 2020, Section 302). Provides that a plan may offer participants affected by major disasters declared during the period beginning January 1, 2020, and ending February 25, 2021, (a) new distribution options for "qualified disaster distributions," which are provided special tax treatment and recontribution options; (b) suspensions of plan loan repayments; and (c) new loans with higher maximum dollar limits. To take advantage of the options provided under this legislation, the distributions must be made within the period beginning the first day of an incident period for a qualified disaster and ending June 24, 2021, and the new loans must be made within the period beginning December 27, 2020, and ending June 24, 2021. Plans may also allow repayment of withdrawals made for the purchase or construction of a principal home that was not purchased or constructed because of a disaster. These options do not apply to disasters declared only by reason of COVID-19.

CONCLUSION: This item is not applicable to the Plan because the Plan does not provide for plan loans or qualified disaster distributions. To the extent that the Board of Trustees is interested in providing for plan loans or qualified disaster distributions for federally declared disaster relief, please let us know as we would be glad to assist you.

Effective in 2021

Qualified cash or deferred arrangements (CODAs) must allow long-term employees working at least 500 but less than 1,000 hours per year to participate (Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act), Section 112).

CONCLUSION: This item is not applicable to the Plan because it applies to plans which contain cash or deferred arrangements under Code § 401(k) only.

Extension of Temporary Relief from the Physical Presence Requirement for Spousal Consents Under Qualified Retirement Plans (Notice 2021-03). Extends, from January 1, 2021, through June 30, 2021, the temporary relief provided in Notice 2020-42 from the physical presence requirement.

CONCLUSION: This item is not applicable to the Plan because the Plan is a governmental plan and is not subject to the qualified joint and survivor (QJSA) requirements of § 417.

Effective in 2022

Final Regulations relating to updated life expectancy and distribution period tables used for purposes of determining minimum required distributions (85 Fed. Reg. 72472). Provide guidance relating to the life expectancy and distribution period tables that are used to calculate required minimum distributions from qualified retirement plans and IRC Section 403(b) plans. The final regulations apply to distribution calendar years (as defined in Treasury Regs. Section 1.401(a)(9)-5, Q&A-1(b)), beginning on or after January 1, 2022.

CONCLUSION: The Plan will not need to be amended to implement this change, but the Plan will need to update the tables it uses for benefits and for calculating RMDs.

CONCLUSION: The only amendment to the Plan that will be required in order to comply with the 2016-2022 Operational List as applicable to governmental defined benefit plans is to comply with the SECURE Act modification of Code § 401(a)(9) to increase the age on which the determination of required minimum distributions is based from age 70½ to age 72. See SECURE Act discussion below. Based on the updated Rules and Regulations, the Plan has been updated.

Protecting Americans from Tax Hikes Act of 2015 ("PATH Act")

Prior to the PATH Act, a SIMPLE IRA was not eligible to receive rollover contributions. Following the passage of the PATH Act, after a two-year waiting period is over, a SIMPLE IRA can now receive rollover eligible funds from other types of retirement plans, including 401(a) governmental plans. The two-year period begins on the first day on which the employer deposits contributions in the SIMPLE IRA. The IRS has not issued any guidance on this issue and it has not appeared in the Required Amendments Lists.

CONCLUSION: A plan amendment is not required at this time but we proposed a change to the Rules and Regulations to include SIMPLE IRAs. Even without an amendment, the Board of Trustees should allow participants to directly rollover an eligible rollover distribution to a SIMPLE IRA if the SIMPLE IRA has been established for two years. The Board of Trustees should consider this for purposes of updating its special tax notice and may want to amend its rollover forms to include SIMPLE IRAs and an acknowledgement, from the member, that the SIMPLE IRA has been established for two years.

Setting Every Community Up for Retirement Enhancement ("SECURE" Act)

On December 20, 2019, the Setting Every Community Up for Retirement Enhancement ("SECURE") Act became law as part of the Further Consolidated Appropriations Act, 2020 ("Appropriations Act"). The SECURE Act provides for a remedial plan amendment period until the last day of the first plan year beginning on or after January 1, 2022 (January 1, 2024 for governmental plans and certain collectively bargained plans) any plan amendment required under the SECURE Act.

- **Required Beginning Date.** Previously, the required beginning date ("RBD") for commencing required minimum distributions ("RMDs") was April 1 of the calendar year following the calendar year in which the individual attains age 70½ (or, if later, retired). The SECURE Act increases an individual's RBD age from age 70½ to age 72. As a result, **for distributions required to be made after December 31, 2019 with respect to individuals who attain age 70½ after such date,** the RBD age for mandatory distributions is increased to age 72. This provision does not change the RBD or RMDs for individuals who attain age 70½ before January 1, 2020. This change also applies when determining the date that a surviving spouse must commence benefits. (Note: The SECURE Act also made changes to the required period for designated beneficiaries to take RMDs, but those changes only apply to defined contribution plans.)

CONCLUSION: The Rules and Regulations have been updated for this change.

Bipartisan American Miners Act of 2019 ("MINERS Act")

Previously, in-service distributions from a 401(a) defined benefit or money purchase pension plan generally were not permitted until age 62 (unless the normal retirement age exception applied). Code § 401(a)(36). Under the Miners Act, the age under Code § 401(a)(36)

for in-service distributions was lowered from 62 to 59½ for qualified 401(a) plans. This change is optional, and it is applicable to plan years beginning after December 31, 2019.

CONCLUSION: Because the Plan currently does not permit in-service distributions, we have not prepared a Plan amendment to implement this optional change.

Coronavirus Aid, Relief and Economic Security Act of 2020 ("CARES Act")

The CARES Act was enacted on March 27, 2020. For retirement plans, the CARES Act included the following provisions:

- **Coronavirus-related distributions ("CRDs")**. A new category of distribution is created for an amount (up to \$100,000) distributed between January 1, 2020 - December 31, 2020 to a "qualified individual" from an "eligible retirement plan." The CARES Act includes specific definitions for these terms. CARES Act § 2202. This provision does not create a new in-service distribution right for defined benefit plans and money purchase pension plans that are otherwise prohibited from making in-service distributions to members before age 59 ½. However, regardless of whether a plan offers CRDs as a separate distribution provision, distributions that are otherwise permitted from the plan that meet the criteria of a CRD will receive the favorable tax treatment. In addition to being exempt from the 10% early distribution penalty, an individual receiving a CRD may spread the taxation of the distribution over three years.

Loan Relief. The CARES Act permits plans that offer loans to have increased loan limits and to delay repayments of plan loans for "qualified individuals." CARES Act § 2202.

- **Suspension of RMDs paid in 2020**. The CARES Act provides a waiver for RMDs for calendar year 2020 for defined contribution plans and IRAs.

CONCLUSION: Because the Plan is a defined benefit plan that does not provide for loans, the Plan is not required to be amended for any of the CARES Act provisions. However, a member who is otherwise entitled to a distribution from the Plan that meets the requirements for a CRD still would be able to claim the favorable tax treatment for CRDs described above on his/her individual federal tax return.

Final Regulations Updating Life Expectancy Tables for Calculating RMDs

On November 6, 2020, the IRS announced final regulations updating the life expectancy and distribution period tables that are used to calculate required minimum distributions from qualified plans. These new tables will apply for distribution calendar years beginning on or after January 1, 2022.

CONCLUSION: The Plan will not need to be amended to implement this change, but the Plan will need to update the tables it uses for calculating RMDs.

Attachment B

IceMiller
LEGAL COUNSEL

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Report on Selected Operational
Compliance Issues

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I. COMPLIANCE REVIEW

The Omaha School Employees' Retirement System ("OSERS") has retained Ice Miller LLP to perform a compliance audit of the retirement plan. The purpose of this report is to identify common areas of noncompliance under the Internal Revenue Code ("Code"). These areas covered under this audit as follows:

- Required Minimum Distributions - Code Section 401(a)(9)
- Limitation on Compensation - Code Section 401(a)(17)
- Limitations on Contributions and Benefits - Code Section 415
- Rollovers - Code Section 401(a)(31)
- Return to work/In-Service Distributions - Code Section 401(a)(36)
- HEART Act - Code Section 401(a)(37)
- Definition of Compensation

The purpose of this report is to provide an overview of the federal law on each topic and then provide an analysis of OSERS compliance, including selected reviews of member and retiree populations to determine substantial compliance.

II. DEFINITIONS

As used in this Report, the following terms have the indicated meaning:

CARES Act	Coronavirus Aid, Relief, and Economic Security Act
Code or IRC	Internal Revenue Code of 1986, as amended, or if applicable 1954
EGTRRA	Economic Growth and Tax Relief Reconciliation Act of 2001
ERISA	Employee Retirement Income Security Act of 1974
HEART Act	Heroes Earnings Assistance and Relief Tax Act of 2008
IRS	Internal Revenue Service
PPA	Pension Protection Act of 2006
SECURE Act	Setting Every Community Up for Retirement Enhancement Act of 2019
USERRA	Uniformed Services Employment and Reemployment Rights Act

III. REQUIRED MINIMUM DISTRIBUTIONS - CODE SECTION 401(a)(9)

A. HISTORY OF CODE SECTION 401(a)(9) AND IRS GUIDANCE

All qualified retirement plans, including governmental plans, must comply with Code Section 401(a)(9) in order to maintain qualified status. Code Section 401(a)(9) and the applicable regulations contain complex rules regarding both the timing of distributions and the form of distributions from qualified plans. In addition, Code Section 401(a)(9) prescribes both document compliance requirements and operational compliance requirements. The key provisions of Code Section 401(a)(9) are summarized as follows:

- Section 401(a)(9) requires a qualified plan to provide for compliance with the required minimum distribution rules.
- Section 401(a)(9) provides rules for distributions during the life of the employee in section 401(a)(9)(A) and rules for distributions after the death of the employee in section 401(a)(9)(B). Section 401(a)(9)(A)(ii) provides that the entire interest of an employee in a qualified plan must be distributed, beginning not later than the employee's required beginning date, in accordance with regulations, over the life of the employee or over the lives of the employee and a designated beneficiary (or over a period not extending beyond the life expectancy of the employee and a designated beneficiary).
- Section 401(a)(9)(C) defines the required beginning date ("RBD") for employees (other than 5-percent owners and IRA owners) as April 1 of the calendar year following the later of the calendar year in which the employee attains age 72 (if the member was born on or after July 1, 1949 or age 70½ if the member was born on or before June 30, 1949) or the calendar year in which the employee retires.
- Section 401(a)(9)(D) provides that (except in the case of a life annuity) the life expectancy of an employee and the employee's spouse that is used to determine the period over which payments must be made may be redetermined, but not more frequently than annually.
- Section 401(a)(9)(E) provides that the term designated beneficiary means any individual designated as a beneficiary by the employee.
- Section 401(a)(9)(G) provides that any distribution required to satisfy the incidental death benefit requirement of section 401(a) is a required minimum distribution.
- Section 401(a)(9)(B)(i) provides that, if the employee dies after distributions have begun, the employee's interest must be distributed at least as rapidly as under the distribution method used by the employee.

- Section 401(a)(9)(B)(ii) and (iii) provides that, if the employee dies before required minimum distributions have begun, the employee's interest must be either: distributed (in accordance with regulations) over the life or life expectancy of the designated beneficiary with the distributions beginning no later than one year after the date of the employee's death, or distributed within five years after the death of the employee. However, under section 401(a)(9)(B)(iv), a surviving spouse may wait until the date the employee would have attained age 72 (or age 70½ if born on or before June 30, 1948) to begin taking required minimum distributions.

Proposed regulations were first published on June 27, 1987 ("1987 Proposed Regulations") and the IRS permitted taxpayers to rely on these proposed regulations until final regulations were issued. The 1987 Proposed Regulations were amended in 1997, with respect to the situation where a trust is named as a beneficiary.

The IRS subsequently issued new proposed regulations for Code Section 401(a)(9) on January 19, 2001 ("2001 Proposed Regulations"), which provided the same permissible reliance. The 2001 Proposed Regulations presented a number of problems for governmental systems, particularly with respect to COLA provisions.

On April 17, 2002, the IRS published new final and temporary regulations relating to required minimum distributions from qualified plans, individual retirement plans, deferred compensation plans under section 457, and section 403(b) annuity contracts, custodial accounts, and retirement income accounts under Code Section 401(a)(9) ("2002 Final Regulations"). These final rules incorporated (with several modifications) the provisions of the 2001 Proposed Regulations. The 2002 Final Regulations went into effect January 1, 2003, with respect to all plans – defined contribution and defined benefit. However, Treas. Reg. § 1.401(a)(9)-6T ("2002 Temporary Regulations"), which addressed benefits paid by defined benefit plans and annuities, was issued in temporary form.

Final regulations were issued June 14, 2004 regarding minimum distributions for defined benefit plans and annuity contracts, at 26 CFR § 1.401(a)(9)-6 ("2004 Final Regulations"). These regulations also went into effect January 1, 2003, with a transitional period that extended until 2006. However, in addition to addressing most of the issues raised in comments to the IRS, the 2004 Final Regulations offer a transitional period and grandfathered treatment for certain benefit options.

Section 823 of the PPA required the Department of Treasury to issue regulations that would permit governmental plans to comply with a reasonable good faith interpretation of Code Section 401(a)(9) for all years. Those proposed regulations were published July 10, 2008 ("PPA Proposed Regulations"). Under these PPA Proposed Regulations, a governmental plan would be permitted (but not required) to comply with final regulations.

Further, in 2019, the SECURE Act increased the RBD age from age 70 ½ to age 72 for those members born on or after July 1, 1949.

B. OVERVIEW OF THE 2002 FINAL REGULATIONS – DEFINED CONTRIBUTION AND DEFINED BENEFIT PLANS

1. Coverage

The 2002 Final Regulations – Treas. Reg. § 1.401(a)(9)-0 through § 1.401(a)(9)-9 apply to all qualified plans – both defined benefit and defined contribution. The 2002 Final Regulations apply to all account balances and benefits in existence on and after January 1, 1985, and apply to distributions to participants and to beneficiaries on and after January 1, 2003. Treas. Reg. § 1.401(a)(9)-1, Q&A-1, -2. Plan documents must contain certain specified provisions and may contain certain optional provisions. Treas. Reg. § 1.401(a)(9)-1, Q&A-3.

2. Beginning Distributions to Plan Members

a. Required Distribution Date; Payments to Members.

In order to constitute a qualified trust, one of the requirements imposed by Code Section 401(a)(9) is that a participant's interest in the trust must, at the very least, begin to be distributed "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)." Code Section 401(a)(9)(A)(ii). For purposes of governmental plans, this means that the distribution must begin by the later of (i) April 1 of the calendar year following the calendar year that the employee attains age 72 (if the member was born on or after July 1, 1949 or age 70½ if the member was born on or before June 30, 1949) or (ii) April 1 of calendar year after the calendar year in which the participant retires. Code Section 401(a)(9)(C). See Treas. Reg. § 1.401(a)(9)-2, Q&A-2, -3.

b. Pre-Required Distribution Date Payments.

Distributions made prior to a participant's required distribution date (discussed below) do not have to comply with Code Section 401(a)(9) unless the terms of the form of distribution selected will violate the minimum requirements for the year including and after the required beginning date. Treas. Reg. § 1.401(a)(9)-2, Q&A-4. A distribution method must be adjusted to comply with Code Section 401(a)(9) by the required distribution date or the method will be deemed to violate Code Section 401(a)(9), as of the date the distributions originally commenced. Id.

3. Definition of a Designated Beneficiary

Having a designated beneficiary has significance throughout Code Section 401(a)(9). In order to have a designated beneficiary, there is no requirement that the participant make an affirmative election as long as the terms of the plan designate a beneficiary. Treas. Reg. § 1.401(a)(9)-4 Q&A-1. In fact, the beneficiary need not be specified by name as long as such beneficiary is identifiable as of the required beginning

date. Id. However, non-individuals may not be "designated beneficiaries;" and, if a non-individual is named as a beneficiary, the participant will be deemed to have no "designated beneficiary" even if the participant also has an individual named as a beneficiary. Treas. Reg. § 1.401(a)(9)-4 Q&A-3 and Q&A-5 (certain qualifying individual trusts and contingent beneficiaries are not treated as non-individuals for this purpose).

To be a designated beneficiary, an individual must be a beneficiary as of the date of the participant's death. In addition, the individual must remain a designated beneficiary as of September 30 of the year following the calendar year of the employee's death. Treas. Reg. § 1.401(a)(9)-4 Q&A-4. Thus, any beneficiary eliminated by distribution of the beneficiary's benefit or because of disclaimer is disregarded in determining a designated beneficiary for purposes of calculating required minimum distributions.

When there is a "designated beneficiary," the distribution of the participant's interest may be made over the life (or not to exceed the life expectancy) of a non-spouse designated beneficiary and requires the payments to begin no later than December 31 of the calendar year subsequent to the calendar year in which the participant died. Code Section 401(a)(9)(B)(iii); Treas. Reg. § 1.401(a)(9)-3 Q&A-1. If the surviving spouse is the designated beneficiary, the benefits must be paid to the surviving spouse beginning the later of (i) December 31 of the calendar year after the calendar year of the participant's death, or (ii) December 31 of the year the participant would have attained age 72 (if the member was born on or after July 1, 1949 or age 70½ if the member was born on or before June 30, 1949). Code Section 401(a)(9)(B)(iv)(I); Treas. Reg. § 1.401(a)(9)-3 Q&A-3. However, if the surviving spouse, as designated beneficiary, dies before distributions begin, the required beginning date of distributions will be determined as if the surviving spouse were the participant. Code Section 401(a)(9)(B)(iv)(II).

4. Beginning Distributions to Beneficiaries for Defined Benefit Plans

a. Payments to Beneficiaries Prior to Required Beginning Date.

If there is a designated beneficiary and the participant dies before the required beginning date, the default rule under the 2002 Final Regulations is that the participant's remaining benefit generally must be distributed over the designated beneficiary's lifetime or a period not to exceed his/her life expectancy ("the Lifetime Rule"), or the plan may provide for distributions in accordance with the five-year rule ("5-Year Rule"). Under the Lifetime Rule, the employee's interest must be distributed over the life or not to exceed the life expectancy of the designated beneficiary with the distributions beginning no later than one year after the date of the employee's death.

If the participant does not have a designated beneficiary or the designated beneficiary is not an individual, the participant's remaining benefit must be distributed in accordance with the five-year rule. Code Section 401(a)(9)(B)(ii) and Treas. Reg. § 1.401(a)(9)-3, Q&A-4. To satisfy this "five-year rule," the participant's remaining interest generally must be fully distributed by the December 31 of the calendar year containing the fifth anniversary of the participant's death. Using the life expectancy provision as the

default unless the plan provides otherwise, rather than the five-year provision, is a change from the 1987 Proposed Regulations. Treas. Reg. § 1.401(a)(9)-3, Q&A-2.

b. Payments to Beneficiaries After Required Distributions Have Commenced.

If distributions have already begun (in a manner that complies with Code Section 401(a)(9)) and the participant dies prior to full distribution of his or her benefits, then the participant's remaining interest must be distributed at least as rapidly as it would have been distributed had the employee lived long enough to have the entire interest distributed. Code Section 401(a)(9)(B)(i); Treas. Reg. § 1.401(a)(9)-2, Q&A-5.

c. Application of Beneficiary Payment Rules; Determining Which Rule Applies.

Determining which of the two rules described above applies is generally based on whether the employee has reached his or her required beginning date for which mandated minimum distributions have already started, not whether distributions may have started before a required beginning date. See Treas. Reg. § 1.401(a)(9)-2 Q&A-5 and Treas. Reg. § 1.401(a)(9)-3, Q&A-4. However, a special rule applies to annuity payments, which is discussed below under C.6.

5. Form of Distribution

a. Required Distribution Period.

In addition to the requirement that the distributions begin in a timely fashion, there are requirements dictating the period over which the participant's interest must be distributed. The Code provides that meeting one of the following four time periods satisfies this distribution requirement: (i) the life of the participant; (ii) the life of the participant and a designated beneficiary; (iii) a period not extending beyond the life expectancy of the participant; or (iv) a period not extending beyond the life expectancy of the participant and a designated beneficiary. Code Section 401(a)(9)(A)(ii) under C.6.

b. Timing and Amount of Minimum Distribution Payments.

The regulations also require that a minimum distribution be made during each applicable calendar year. Treas. Reg. § 1.401(a)(9)-2 Q&A -1 As indicated above, the first calendar year in which the minimum distribution must be paid to a participant is the later of (i) the calendar year in which the participant attains the age 72 (if the member was born on or after July 1, 1949 or age 70½ if the member was born on or before June 30, 1949), or (ii) the calendar year the participant retires, even though the required distribution dates for these minimum distributions is not until the April 1 of the following calendar year. All other minimum distribution payments must be made by December 31 of the calendar year in which the payment is due. Thus, for a defined contribution plan or the single sum distribution from a defined benefit plan (Treas. Reg. § 1.401(a)(9)-6, Q&A-1(d)), two minimum distribution payments are required in the year containing the required beginning

date – one by April 1 for the prior calendar year and the other by December 31 for the present calendar year. For an annuity from a defined benefit plan, the first annuity payment must be made on or before the required beginning date. Treas. Reg. § 1.401(a)(9)-6, Q&A-1(c). If more than the minimum distribution is made during a calendar year, no credit will be given for a subsequent year for purposes of meeting the minimum distribution in that subsequent calendar year.

c. Required Minimum Distributions from Defined Contribution Plans or Lump Sum Distributions from a Defined Benefit Plan

The 2002 Final Regulations provide simplified minimum distribution rules for separate account plans, including the calculation of the required minimum distribution during the individual's lifetime using a uniform table. Treas. Reg. § 1.401(a)(9)-5, Q&A-1. See Treas. Reg. § 1.401(a)(9)-9, Q&A-1 for the Uniform Table. The basic calculation for the individual accounts provides that the required minimum distribution is determined by dividing the account balance by the distribution period. Treas. Reg. § 1.401(a)(9)-5, Q&A-1. The distribution period is generally based upon the employee's life expectancy and the life expectancy of the employee's beneficiaries as determined under the Uniform Table. Treas. Reg. § 1.401(a)(9)-5, Q&A-4. The Uniform Table is based on the joint life and last survivor expectancy of an individual and a hypothetical beneficiary 10 years younger. However, if the employee's sole beneficiary is the employee's spouse and the spouse is more than 10 years younger than the employee, a longer distribution period measured by the joint life and last survivor life expectancy of the employee and spouse is permitted to be used. Treas. Reg. § 1.401(a)(9)-9, Q&A-2. For years after the year of the employee's death, the distribution period is generally the remaining life expectancy of the designated beneficiary. If the employee's spouse is the sole beneficiary, the distribution period during the spouse's life is the spouse's single life expectancy. Separate accounts may be established for multiple beneficiaries and separate required minimum distribution amounts may be established for these beneficiaries. Treas. Reg. § 1.401(a)(9)-8, Q&A-2.

6. Rollovers

A qualified plan must not treat a required minimum distribution as an eligible rollover distribution. Treas. Reg. § 1.401(a)(9)-7 (with respect to lump sum payments).

7. Special Rules

If an employee is a participant in more than one plan, the plans in which the employee participates are not aggregated for purposes of testing whether Code Section 401(a)(9) is met – each plan must separately meet these requirements. Treas. Reg. § 1.401(a)(9)-8, Q&A-1.

With regard to a defined contribution plan, if an employee has multiple accounts under a plan, those accounts must be aggregated for purposes of Code Section 401(a)(9). Treas. Reg. § 1.401(a)(9)-8, Q&A-2. However, if an employee's account is used in part for the purchase of an annuity, the annuity must separately satisfy the

requirements of Treas. Reg. § 1.401(a)(9)-6. Separate accounts for beneficiaries may be treated separately for compliance purposes. Treas. Reg. § 1.401(a)(9)-8, Q&A-2(a)(2); see also Treas. Reg. § 1.401(a)(9)-8, Q&A-3.

If a defined benefit plan has benefit structures that are separately identifiable and separately distributed, they can be treated as separate plans for compliance purpose. Treas. Reg. § 1.401(a)(9)-8, Q&A-2(b).

The 2002 Final Regulations also contain special rules regarding the definition of spouse, surviving spouse, and alternate payee for purposes of Code Section 401(a)(9) compliance. Treas. Reg. § 1.401(a)(9)-8, Q&A-5, -6.

C. OVERVIEW OF THE 2004 FINAL REGULATIONS—DEFINED BENEFIT PLANS

The requirements in the 2004 Final Regulations are substantially improved from the perspective of governmental defined benefit plans over the 2002 Temporary Regulations and even the 1987 Proposed Regulations. The following section highlights the terms of the 2004 Final Regulations and also points out those areas of improvement.

1. Non-Increasing Annuities

Under Code Section 401(a)(9), annuities must generally be non-increasing. The 2002 Temporary Regulations had permitted increases based upon increases in the cost of living, as determined under a CPI, increases due to plan amendments, pop-ups, and the return of employee contributions upon the employee's death. The plan amendment exception was a very important aspect of the temporary regulations because of its impact on ad hoc COLAs. The 2004 Final Regulations retained the exceptions provided in the 2002 Temporary Regulations and expanded the exceptions for increasing annuities by permitting cumulative COLAs, COLAs with an annual cap and a periodic catch-up, COLAs based on a modified CPI, increases based on the salary of an active employee, as well as fixed rate or variable rate increases that are unrelated to cost-of-living or salary increases. Treas. Reg. § 1.401(a)(9)-6, Q&A-14. This expanded list of COLAs and other increases was an important result of comments submitted by governmental plans.

2. Plan Amendments

The exception for increases due to plan amendments is very critical. The 2002 Temporary Regulations included such an exception, which was carried forward to the 2004 Final Regulations as follows:

Except as otherwise provided in this section, all annuity payments (whether paid over an employee's life, joint lives, or a period certain) must be nonincreasing or increase only in accordance with the following –

(4) to pay increased benefits that result from a plan amendment;

Treas. Reg. § 1.401(a)(9)-6, Q&A-14(a). We believe that the IRS interprets this provision to permit plan sponsors to increase benefits on a permanent or ad hoc basis without that increase alone creating a violation of the non-increasing rule.

3. Ancillary Death Benefits

The rule against increasing annuities does not apply to an ancillary death benefit. Such a death benefit is also not considered as part of the employee's entire interest. A death benefit is considered ancillary if it is not paid as part of the employee's accrued benefit or under any optional form of the employee's benefit and if the death benefit meets the incidental benefit requirement of Treas. Reg. § 1.401-1(b)(1)(i). Treas. Reg. § 1.401(a)(9)-6, Q&A-1(e).

4. Joint and Survivor Benefits

Under Code Section 401(a)(9), annuities must primarily benefit the participant as opposed to the participant's beneficiaries – this is called the minimum distribution incidental benefit ("MDIB") rule. All joint and survivor benefit to a spouse were treated by the temporary regulations as satisfying MDIB rules. But joint and survivor benefits to a non-spouse were subject to limitations based upon the age difference of the participant and the beneficiary. For example, a 100% joint and survivor benefit could not be provided, under the temporary regulations, to a nonspouse beneficiary if the beneficiary was more than 10 years younger than the employee. The 2004 Final Regulations continue the same treatment of the surviving spouse and permit more flexibility with respect to a non-spouse beneficiary if a participant retires before age 70. In that case, the number of years between the age at retirement and age 70 is subtracted from the age difference between the participant and his beneficiary to determine whether an option is permissible. Treas. Reg. § 1.401(a)(9)-6, Q&A-2(c).

The 2004 Final Regulations included a provision sought by governmental plans, often called a pop-up to a surviving spouse. In this situation, if a participant names his/her children as beneficiaries and if the payments cease after the child reaches the age of majority recovers from a disabling illness, dies, or completes a specified course of education, then the benefits may be payable to the surviving spouse. Treas. Reg. § 1.401(a)(9)-6, Q&A-15.

5. Changes in the Form of Distribution

Additional flexibility was provided by the 2004 Final Regulations with regard to changing the form of annuities by both the employee and the survivor. Treas. Reg. § 1.401(a)(9)-6, Q&A-13. If the distribution is in the form of a period certain only annuity (no life contingency), an individual may change the form prospectively at any time. Upon marriage, an employee may change his/her form of benefit to a qualified joint and survivor annuity. At the time of retirement or plan termination, an employee or beneficiary may change the form of benefit, regardless of the form of benefit, before the employee's actual

retirement or plan termination. One of the changes sought by governmental plans was included in the final regulations – a survivor may convert the survivor annuity into a lump sum upon the death of the employee.

6. Definition of Required Beginning Date for Annuities

The general rule under Code Section 401(a)(9)(C) is that distributions must begin by the later of (i) April 1 of the calendar year following the calendar year the member attains age 72 (if the member was born on or after July 1, 1949 or age 70½ if the member was born on or before June 30, 1949) or (ii) April 1 of the calendar year after the calendar year the member terminates employment. However, the 2004 Final Regulations have the effect of providing that as soon as a member begins to receive a OSERS annuity, the member is treated as having attained the member's RBD for certain purposes:

Treasury Regulations § 1.401(a)(9)-6, Q&A-10(a), states as follows:

(a) General rule. If distributions commence to an employee on a date before the employee's required beginning date over a period permitted under section 401(a)(9)(A)(ii) and the distribution form is an annuity under which distributions are made in accordance with the provisions of A-1 of this section, the annuity starting date will be treated as the required beginning date for purposes of applying the rules of this section and § 1.401(a)(9)-2. Thus, for example, the designated beneficiary distributions will be determined as of the annuity starting date. Similarly, if the employee dies after the annuity starting date but before the required beginning date determined under A-2 of § 1.401(a)(9)-2, after the employee's death, the remaining portion of the employee's interest must continue to be distributed in accordance with this section over the remaining period over which distributions commenced. The rules in § 1.401(a)(9)-3 and section 401(a)(9)(B)(ii) or (iii) and (iv) [5 year rule, distribution over life of beneficiary, and surviving spouse rule] do not apply.

Thus, the 2004 Final Regulations provide that, in the case of an individual who has commenced an annuity benefit prior to age 72 (or age 70 ½, if applicable) the annuity commencement date becomes the RBD for purposes of determining the distribution of the remaining portion of the employee's interest after the member's death. Accordingly, if annuity payments begin before death, any benefit remaining after the participant's death must continue to be distributed at least as rapidly as under the method of distribution in effect at the time of the participant's death. Id. This rule applies when the distribution irrevocably commences in an annuity form that meets all these rules. Therefore, in the case of an annuity, the remaining portion of the individual's interest must continue to be distributed at least as rapidly as under the method of distribution in effect as of the individual's date of death. For example, if a member has an annuity starting date of age 55, the member, in the IRS' opinion, has attained his or her RBD. For some systems, this approach raises issues for the timing of death benefit claims and rollover rights under lump sum death benefits.

D. EFFECTIVE DATE – TRANSITIONAL RULE – DEFINED BENEFIT PLANS

The 2004 Final Regulations are effective as of June 15, 2004 and apply to distributions in calendar years beginning on and after January 1, 2003. Transitional relief is provided to all defined benefit plans such that they may follow a reasonable and good faith interpretation of Code Section 401(a)(9). Treas. Reg. § 1.401(a)(9)-1, Q&A-2(d). For governmental plans, a good faith interpretation would include reliance on the 1987 Proposed Regulations, the 2001 Proposed Regulations, the 2002 Regulations, or the 2004 Final Regulations. Preamble, 69 FR 33292.

E. SPECIAL GRANDFATHER PROVISIONS FOR GOVERNMENTAL DEFINED BENEFIT PLANS

In addition to the transitional provisions available to all defined benefit plans, the 2004 Final Regulations grandfather certain governmental defined benefit plan provisions in effect on April 17, 2002. Governmental plan distribution options in effect on April 17, 2002, "will not fail to satisfy section 401(a)(9) merely because the annuity payments do not satisfy the requirements of A-1 through A-15 of [1.401(a)(9)-6]." However, the grandfathered options "must satisfy the statutory requirements of Code Section 401(a)(9), based on a reasonable and good faith interpretation" of that section. Treas. Reg. § 1.401(a)(9)-6, Q&A-16.

The grandfather provisions of the 2004 Final Regulations only apply so long as the benefit option remains unamended. Any amendment to a grandfathered benefit option or any new benefit option must be in compliance with the 2004 Final Regulations subject to the transitional period. Preamble, 69 FR 33292.

The PPA Proposed Regulations remove this grandfather provision and add a general statement that covers all of the regulations to the effect that a governmental plan

is treated as having complied with section 401(a)(9) for all years to which section 401(a)(9) applies to the plan if the plan complies with a reasonable and good faith interpretation of section 401(a)(9).

73 FR 39632.

F. DOCUMENT COMPLIANCE

We first want to note the requirement in Treas. Reg. § 1.401(a)(9)-1, Q&A-3 that a qualified plan include the following provisions:

First, the plan must generally set forth the statutory rules of section 401(a)(9), including the incidental death benefit requirement in section 401(a)(9)(G). Second, the plan must provide that distributions will be made in accordance with this section and §§ 1.401(a)(9)-2 through 1.401(a)(9)-9. The plan document must also provide that the provisions reflecting section 401(a)(9) override any distribution options in the plan inconsistent with section 401(a)(9). The plan must include any other provision reflecting

section 401(a)(9) that are prescribed by the Commissioner in revenue rulings, notices and other guidance published in the Internal Revenue Bulletin.

- **OSERS Compliance:** Currently, Neb. Rev. Stat., section 79-980 provides that the board of trustees and the administrator shall administer the retirement system in compliance with the tax-qualification requirements applicable to government retirement plans under IRC section 401(a), including IRC section 401(a)(9) the incidental death benefit distribution requirement of IRC section 401(a)(9)(G). This provision was adopted and effective on April 6, 2012. However, as set forth in the Tax Compliance Review Chart, this amendment was not timely adopted. Thus, we recommend that OSERS request a VCP from the IRS for the late adoption.

Required Beginning Date – Document Compliance

<u>Code Section 401(a)(9) and Final Regulations</u>	<u>Analysis – OSERS</u>
<p>Required Beginning Date ("RBD")</p> <p>The SECURE Act increased the RBD for those members who were born on or after July 1, 1949 from age 70 ½ to age 72. Thus, Section 401(a)(9)(C) defines the required beginning date for members as April 1 of the calendar year following the later of the calendar year in which the member attains age 72 (or 70½ for the members born on or before June 30, 1948) or the calendar year in which the member retires. <u>See</u> §§ 1.401(a)(9)-2, Q&A-2; 1.401(a)(9)-6, Q&A-10(a) (discussed below).</p>	<p>The Final Rules and Regulations Section Chapter 4.004.01 states:</p> <p>"Distribution of a member's benefit must begin by the required beginning date, which is the later of the April 1 following the calendar year in which the member attains age 72 (if the member was born after June 30, 1949) or age 70 1/2 if the member was born before July 1, 1949 or April 1 of the year following the calendar year in which the member terminates."</p>

Designated Beneficiary

Section 401(a)(9)(E) provides that the term designated beneficiary means any individual designated as a beneficiary by the employee. However, a designated beneficiary may also be determined by the terms of the plan. Only an individual may be a designated beneficiary. If a person other than an individual is designated as a beneficiary of an employee's benefit, the employee will be treated as having no designated beneficiary unless special rules applicable to trusts are met.

Treas. Reg. § 1.401(a)(9)-4 provides that an individual may be designated as a beneficiary under the plan either by the terms of the plan or, if the plan so provides, by an affirmative election by the employee. A beneficiary designated as such under the plan is an individual who is entitled to a portion of the member's benefit, contingent on the member's death or another specified event. A designated beneficiary need not be specified by name in the plan or by the employee in order to be a designated beneficiary, provided the individual is identifiable under the plan. The members of a class of beneficiaries which may expand or contract are treated as identifiable if it is possible to identify the class member with the shortest life expectancy. The fact that an employee's interest in the plan passes to an individual under a will or state intestacy laws does not make that individual a designated beneficiary unless the individual is designated under the plan.

Neb. Rev. Stat. § 79-9,119 Beneficiary designation; order of priority

(1) Except as provided in section 79-9,104, in the event of a member's death, the death benefit shall be paid to the following, in order of priority:

(a) To the member's surviving designated beneficiary as designated in writing on forms provided by the system;

(b) To the spouse married to the member on the member's date of death if there is no surviving designated beneficiary as designated in writing on forms provided by the system; or

(c) To the member's estate if the member is not married on the member's date of death and there is no surviving designated beneficiary as designated in writing on forms provided by the system.

(2) The priority designations described in subsection (1) of this section shall not apply if the member has retired under a joint and survivor benefit option.

<p>Required Distribution Period</p> <p>Section 401(a)(9)(A)(ii) provides that the entire interest of an employee in a qualified plan must be distributed, beginning not later than the employee's required beginning date, in accordance with regulations, over the life of the employee or over the lives of the employee and a designated beneficiary (or over a period not extending beyond the life expectancy of the employee and a designated beneficiary).</p>	<p>The Final Rules and Regulations Section Chapter 4.004.02 states:</p> <p>The member's entire interest must be distributed over the member's life or the lives of the member and a designated beneficiary, or over a period not extending beyond the life expectancy of the member or of the member and a designated beneficiary.</p>
<p>Post-Retirement Survivor Benefits</p> <p>Section 401(a)(9)(B)(i) provides that, if the employee dies after distributions have begun, the employee's interest must be distributed at least as rapidly as under the distribution method used by the employee.</p>	<p>The Final Rules and Regulations Section Chapter 4.004.04 states:</p> <p>If a member dies after the required distribution of benefits has begun, the remaining portion of the member's interest must be distributed at least as rapidly as under the method of distribution before the member's death.</p>

Pre-RBD Survivor Benefits

Section 401(a)(9)(B)(ii) and (iii) provides that, if the employee dies before required minimum distributions have begun, the employee's interest must be either: distributed (in accordance with regulations) over the life or life expectancy of the designated beneficiary with the distributions beginning no later than one year after the date of the employee's death, or distributed within five years after the death of the employee. However, under section 401(a)(9)(B)(iv), a surviving spouse may wait until the date the employee would have attained his/her RBD to begin taking required minimum distributions.

The Final Rules and Regulations Section Chapter 4.004.05 states:

If a member dies before required distribution of the member's benefits has begun, the member's entire interest must be distributed within five (5) years of his death, unless it is to be distributed in accordance with the following rules:

(a) If the member's surviving spouse is the sole designated beneficiary, the member's remaining interest in the plan is distributed or begins to be distributed by December 31 of the calendar year immediately following the calendar year in which the member died or, if later, by December 31 of the calendar year in which the member would have attained age 72 (if the member was born after June 30, 1949) or age 70 1/2 if the member was born before July 1, 1949), and if the surviving spouse dies before the distribution to the surviving spouse begins, this section shall be applied as if the surviving spouse were the plan member; or

(b) If the member's surviving spouse is not the sole designated beneficiary, the member's remaining interest is to be distributed over the life of the designated beneficiary or over a period not extending beyond the life expectancy of the designated beneficiary; and such distribution begins no later than December 31 of the calendar year immediately following the calendar year of the member's death.

<p>Re-determination of Life Expectancy</p> <p>Section 401(a)(9)(D) provides that (except in the case of a life annuity) the life expectancy of an employee and the employee's spouse that is used to determine the period over which payments must be made may be re-determined, but not more frequently than annually.</p>	<p>No re-determination except in the case of a pop-up or a Domestic Relations Order based on the terms of the Domestic Relations Order with some basis recovery apportioned to the Alternate Payee.</p>
<p>Incidental Death Benefit Requirement</p> <p>Section 401(a)(9)(G) provides that any distribution required to satisfy the incidental death benefit requirement of section 401(a) is a required minimum distribution.</p>	<p>The Final Rules and Regulations Sections Chapter 4.004.06 and 4.004.07 states:</p> <p>The amount of an annuity paid to a member's beneficiary may not exceed the maximum determined under the incidental death benefit requirement of section 401(a)(9)(G) of the Internal Revenue Code, and the minimum distribution incidental benefit rule under Treasury Regulation Section 1.401(a)(9)-6, Q&A-2.</p> <p>The death and disability benefits provided by the retirement system are limited by the incidental benefit rule set forth in section 401(a)(9)(G) of the Internal Revenue Code and Treasury Regulation Section 1.401-1(b)(1)(i) or any successor regulation thereto. As a result, the total death or disability benefits payable may not exceed 25% of the cost for all of the members' benefits received from the retirement system.</p>

G. OPERATIONAL COMPLIANCE ANALYSIS

1. Required Beginning Date

a. *Member Annuities*

The latest age to defer an annuity distribution for individuals not working is age 65. OSERS practice has been to send the retirement information to those individuals regarding commencement of the individual's benefits. In addition, upon termination, all vested members receive information regarding commencing a benefit. If OSERS is unable to contact the individual, OSERS will continue to monitor and try to contact the individual. As the individual approaches age 70, OSERS will continue to attempt to reach the individual. If OSERS receives a return address, then OSERS will look for any beneficiary address, property tax records, general internet searching, and death reports.

b. *"Dormant" Accounts*

In the past, OSERS has not undertaken the same level of searching for those members with dormant accounts as it has for those members entitled to an annuity. However, as of the date of this report, OSERS is not aware of anyone who is past the Mandatory Required Beginning Date.

In general, OSERS process is to send a letter to the individual approximately 35 days after separation. The letter informs the individual that the individual is not vested and requesting directions regarding a rollover or distribution.

- **OSERS Compliance:** We recommend that OSERS continue to monitor all dormant accounts for compliance with the Required Beginning Date. As an account approaches the Required Beginning Date, OSERS should take the same steps it takes to contact annuity members to inform the member regarding the need to initiate a distribution.

2. Survivor Benefits

There are rules governing both the timing of distributions to a survivor and the form of such distributions. The form and length of such distributions is discussed in more detail above. This discussion will include some repetition of those requirements but will also emphasize the required beginning date of survivor distributions and this section is specific to defined benefit plans, such as OSERS. The Code and various Regulations basically are consistent as to the commencement date of benefits to a survivor after a member's death:¹

¹This is in regard to death benefits that are not considered "ancillary benefits" (ancillary benefits are benefits which are not paid as part of the member's accrued benefit or under any optional form of the member's benefit, and which, together with any other payments with respect to a member's benefit provided to a survivor, satisfy the incidental benefit requirement of Treas. Reg. § 1.401-1(b)(1)(i)). Thus, the benefit commencement rules described here are generally applicable to post-retirement survivor benefits derived from the member's benefit.

- If the member died before the RBD and before commencement of benefits, the member's entire interest (lump sum) must be distributed by December 31 of the calendar year containing the 5th anniversary of the member's death. In the case of annuity payments, for a non-spouse beneficiary the annuity must commence by December 31 of the calendar year following the year of the member's death. If the spouse is the sole beneficiary, the annuity need not start until the end of the calendar year in which the member would have reached his/her RBD. We generally recommend an active approach in tracking down beneficiaries to ensure these distributions.
- If the member died after the RBD, the method of distribution must be at least as rapid as the method used by the member. Therefore, survivor benefits should begin immediately upon the member's death. So long as the annuity payment was permissible for the member, the ongoing payments to the survivor also should be permissible. The Final Regulations also permit certain changes to the benefit options under limited circumstances.

NOTE: We want to be sure that you are aware that the Final Regulations provide that, if monthly annuity benefits commence to a member on a date before the member's required beginning date, the annuity starting date will be treated as the required beginning date for purposes of applying the rules under Treas. Reg. § 1.401(a)(9)-2 (rules when distributions commence during an employee's lifetime) and § 1.401(a)(9)-6. Treas. Reg. § 1.401(a)(9)-6, Q&A-10(a). Thus, for example, the designated beneficiary distributions will be determined as of the annuity starting date. Also, if the member dies after the annuity starting date but before the RBD, after the member's death, the remaining portion of the member's interest must continue to be distributed at least as rapidly as under the method of distribution being used at the member's death. Therefore, the rules in Code Section 401(a)(9)(B)(ii) or (iii) and (iv) and Treas. Reg. § 1.401(a)(9)-3 (which permit delayed distributions to spouses, distributions over the lives of designated beneficiaries, etc.) do not apply.

If distributions already have begun, distributions will be continued as soon as the survivor has been identified and will continue at least as rapidly as distributions would have been made had the Member remained alive. If there is any delay in identifying and/or locating the survivor after the death of a Member, the initial payment made by OSERS to the survivor will include an amount representing any missed payments during the delay period. If distributions have not already begun, and if the survivor is a non-spouse, the entire amount owed to the survivor will be distributed no later than December 31 of the calendar year containing the fifth anniversary of the Member's death.

Where distributions have not already begun and the survivor is a spouse, distributions must commence no later than the end of the calendar year in which the member would have reached his/her RBD. In order to ensure that the required beginning date is satisfied, survivors are monitored on an ongoing basis through the screening process described above with respect to compliance with the required beginning date.

3. Missing Participant Protocols

We realize much of what is discussed above and in the regulations assumes that the member or beneficiary can be located. The situation becomes much more difficult in the case of individuals for whom contact information is questionable or is actually known to be inaccurate (i.e., the "missing" participants and survivors).

OSERS Final Rules and Regulations under Chapter 6 meet the IRS guidance for lost and missing participants. Specifically, the IRS' Employee Plans Compliance Resolution System ("EPCRS") (Revenue Procedure ("Rev. Proc.") 2021-30) provides that reasonable actions must be taken to find all current and former participants and beneficiaries to whom additional benefits are due, but who have not been located after a mailing to the last known address. EPCRS provides in pertinent part as follows:

(d) Locating lost participants.

(i) Reasonable actions must be taken to find all current and former participants and beneficiaries to whom additional benefits are due, but who have not been located after a mailing to the last known address. In general, such actions include, but are not limited to, a mailing to the individual's last known address using certified mail, and, if that is unsuccessful, an additional search method, such as the use of a commercial locator service, a credit reporting agency, or internet search tools. Depending on the facts and circumstances, the use of more than one of these additional search methods may be appropriate. A plan will not be considered to have failed to correct a failure due to the inability to locate an individual if reasonable actions to locate the individual have been undertaken in accordance with this paragraph; provided that, if the individual is later located, the additional benefits are provided to the individual at that time.

Rev. Proc. 2021-30, Section 6.02(5)(d).

Additionally, an October 19, 2017 IRS EP Examinations Memorandum provided the following guidance for Employee Plans ("EP") examiners:

This memorandum directs EP examiners not to challenge a qualified plan as failing to satisfy the required minimum distribution (RMD) standards under Internal Revenue Code (IRC) § 401(a)(9) in the circumstances set forth below. . . .

In certain cases, plans have been unable to commence or make a distribution to a terminated participant due to the plan's inability to locate the participant.

EP examiners shall not challenge a qualified plan for violation of the RMD standards for the failure to commence or make a distribution to a participant or beneficiary to whom a payment is due, if the plan has taken the following steps:

- searched plan and related plan, sponsor, and publicly-available records or directories for alternative contact information;
- used any of the search methods below:
 - a commercial locator service;
 - a credit reporting agency; or
 - a proprietary internet search tool for locating individuals; and
- attempted contact via United States Postal Service (USPS) certified mail to the last known mailing address and through appropriate means for any address or contact information (including email addresses and telephone number).

When OSERS exhausts its internal and external procedures, the remaining accounts may be internally forfeited in the Plan, but the benefits must be restored if the Member or beneficiary(ies) eventually claim their benefits.

- **OSERS Compliance:** We note that the Rules and Regulations that provide the accounts will be turned over to Unclaimed Property. OSERS has informed us that it has not turned over any accounts to the State's Unclaimed Property Fund. We caution that providing the funds to the State's Unclaimed Property Fund could raise plan qualification concerns and raise questions regarding whether the Board is properly fulfilling its fiduciary duties. Namely, under federal law, providing funds to the State's Unclaimed Property could raise concerns regarding the Exclusive Benefit Rule and potential violations of the Prohibited Transactions Rule.

4. Automatic Rollover Issues

An additional issue for consideration is the automatic rollover provisions enacted under § 657(c)(2)(A) of the Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA"), which added a number of requirements to Code Section 401(a)(31) with respect to automatic rollovers of certain mandatory distributions (small benefit cash-outs) to IRAs that have been selected by the retirement plan for each distributee. These provisions would have to be taken into account in designing any automatic payment scheme, particularly with regard to amounts over the immediate minimum distribution required. Of course, the required minimum distribution amounts themselves would not be eligible rollover amounts. Thus, OSERS would have to consider any proposed forced distribution process in light of these rules.

If an account has less than \$200, then the account will be automatically distributed at the time of separation from service. Although this has been OSERS practice, this is not part of the Plan document or the Rules and Regulations.

- **OSERS Compliance:** Thus, we recommend that either this practice be eliminated or an amendment adopted to conform the Plan terms with this operational practice.

IV. LIMITS ON COMPENSATION – CODE SECTION 401(a)(17)

A. OVERVIEW OF LAW

Code Section limits must be followed to protect the tax qualified status of a retirement plan under Code Section 401(a). Code Section 401(a)(17) provides that "the annual compensation of each employee taken into account under the plan for any year does not exceed \$200,000." Code Section 401(a)(17)(A). Annually, that amount is increased based upon the cost-of-living adjustments determined by the Internal Revenue Service ("IRS"). Code Section 401(a)(17)(B). The indexed limit was \$235,840 in 1993. For 2021, the limit is \$290,000.

B. PLAN DOCUMENT COMPLIANCE – INCORPORATION BY REFERENCE

A qualified plan may incorporate by reference the mandatory requirements of Code Section 401(a)(17) by reference.

- **OSERS Compliance** – OSERS has incorporated the 401(a)(17) limits in Neb. Rev. Stat. § 79-978(9)(c) with respect to the definition of compensation.

C. EFFECTIVE DATE FOR GOVERNMENTAL PLANS

In the case of governmental plans described in Code Section 414(d), Code Section 401(a)(17) is considered satisfied for plan years beginning before the later of January 1, 1996, or 90 days after the opening of the first legislative session beginning on or after January 1, 1996, of the governing body with authority to amend the plan, if that body does not meet continuously. Treasury Regulations § 1.401(a)(17)-1(d)(4)(i).

D. GRANDFATHER RULE FOR GOVERNMENTAL PLANS

In the case of an "eligible participant" in a governmental plan (within the meaning of Code Section 414(d)), the annual compensation limit under Code Section 401(a)(17) does not apply to the extent that the application of the limitation would reduce the amount of compensation that is allowed to be taken into account under the plan below the amount that was allowed to be taken into account under the plan as in effect on July 1, 1993. Thus, for example, if a plan as in effect on July 1, 1993, determined benefits without any reference to a limit on compensation, then the annual compensation limit in effect under this section will not apply to any "eligible participant" in any future year.

An "eligible participant" is an individual who *first* became a participant in the plan prior to the first day of the first plan year beginning after the earlier of –

- (1) The last day of the plan year by which a plan amendment to reflect the amendments made by section 13212 of OBRA '93 is both adopted and effective; or
- (2) December 31, 1995.

Treasury Regulations § 1.401(a)(17)-1(d)(4)(ii).

- **OSERS Compliance: OSERS does not have a grandfathered Code Section 401(a)(17) limit.**

E. CODE SECTION 401(a)(17) REGULATIONS AND EXAMPLES

The regulations under Code Section 401(a)(17) provide that the limit applies in two ways. First, a defined benefit plan may not base benefit accruals on compensation in excess of the limit. Second, a defined contribution plan may not base allocations on compensation in excess of the limit. Treasury Regulations §1.401(a)(17)-1(a)(1).

1. DB Rule

The regulations provide that the limit in effect for a plan year applies only to the compensation for that year taken into account for that year. Compensation for any prior plan year taken into account for benefit accruals for a current plan year is subject to the applicable compensation limit in effect for the prior year. Illustrations of the application to a defined benefit plan are found in the following examples:

Example 1. Plan X is a defined benefit plan with a calendar year plan year and bases benefits on the average of an employee's high 3 consecutive years' compensation. The OBRA '93 effective date for Plan X is January 1, 1994. Employee A's high 3 consecutive years' compensation prior to the application of the annual compensation limits is \$160,000 (1994), \$155,000 (1993), and \$135,000 (1992). To satisfy the Treasury Regulations, Plan X cannot base plan benefits for Employee A in 1994 on compensation in excess of \$145,000 (the average of \$150,000 (A's 1994 compensation capped by the annual compensation limit), \$150,000 (A's 1993 compensation capped by the \$150,000 annual compensation limit applicable to all years before 1994), and \$135,000 (A's 1992 compensation capped by the \$150,000 annual compensation limit applicable to all years before 1994)). For purposes of determining the 1994 accrual, each year (1994, 1993, and 1992), not the average of the 3 years, is subject to the 1994 annual compensation limit of \$150,000.

Example 2. Assume the same facts as Example 1, except that Employee A's high 3 consecutive years' compensation prior to the application of the limits is \$185,000 (1997), \$175,000 (1996), and \$165,000 (1995). Assume that the annual compensation limit is first adjusted to \$160,000 for plan years beginning on or after January 1, 1997. Plan X cannot base plan benefits for Employee A in 1997 on compensation in excess of \$153,333, the average of \$160,000 (A's 1997 compensation capped by the 1997 limit), \$150,000 (A's 1996 compensation capped by the 1996 limit), and \$150,000 (A's 1995 compensation capped by the 1995 limit)).

Treasury Regulations § 1.401(a)(17)-1(b)(6).

2. DC Rule

The 401(a)(17) limits apply in the calculation of employee contributions based upon compensation during a plan year. In the case of a defined benefit plan, the 401(a)(17) limits apply in calculating the employee's contribution to the defined benefit plan.

F. CALENDAR YEAR VS PLAN YEAR

The compensation limits under Code Section 401(a)(17) are established on a calendar year basis. However, the limitation for any calendar year applies for all plan years beginning during that calendar year. For example, when the \$290,000 limit was established on January 1, 2021, it was effective on the first day of the plan year beginning in 2021.

G. EMPLOYEE VS EMPLOYER CONTRIBUTIONS

The Code Section 401(a)(17) limitations apply only to contributions and accruals which directly benefit a particular employee. Therefore, OSERS must apply the limitation to employee contributions (including pre-tax contributions). However, if employer contributions go into a general pool and do not benefit a specific employee, OSERS does not need to apply the limitation to employer contributions. Note, however, that in the case of the employer contributions that are used in directly calculating a benefit, the limitation must be applied to both types of contributions.

H. METHOD OF APPLYING LIMITATIONS

OSERS applies the 401(a)(17) limit based on a "cliff method" on a calendar year basis. Thus, when a member reaches the 401(a)(17) limit in a calendar year, then contributions cease for that member. OSERS has informed us that it has not had anyone who has made excess contributions in at least the past three years.

V. LIMITATIONS ON BENEFITS AND CONTRIBUTIONS – CODE SECTION 415

A. CODE SECTION 415 LIMITS

Code Section 415 benefit and contribution limits must be followed to protect the tax qualified status of a retirement plan under Code Section 401(a). These limits must be met by all plan members. If even one member is paid an annual benefit greater than Code Section 415 allows, or contributes more than Code Section 415 allows, theoretically, the entire plan will be disqualified. However, the EPCRS program found in Revenue Procedure 2021-30 provides approved procedures for correction to avoid this result.

B. FINAL REGULATIONS

Final Regulations under Code Section 415 were issued by the IRS on April 5, 2007. The Final Regulations are effective for governmental plans for all limitation years that begin more than 90 days after the close of the first regular legislative session of the legislative body with authority to amend the plan that begins on or after July 1, 2007. However, a governmental plan may apply the provisions of the Final Regulations as early as the limitation year beginning on or after July 1, 2007.

C. PLAN DOCUMENT COMPLIANCE – INCORPORATION BY REFERENCE

The Final Regulations provide that a qualified plan may incorporate by reference the mandatory requirements of Code Section 415 by reference. However, there are important exceptions to this rule that limit the "wholesale" adoption of 415 limits by reference.

- **OSERS Compliance:** Neb. Rev. Stat. § 79-9,102 incorporates Code Section 415 by reference. The Final Rules and Regulations adopt specific provisions regarding Code Section 415. OSERS and the Plan's actuary have confirmed that there is one member who approaches the 415 limit. The actuary performs a 415 calculation for anyone who is approaching the limit.

1. Optional Provisions

Where there are optional provisions of Code Section 415, the plan must specify how those provisions will be applied. In the situation where there is an optional provision where the Code or Final Regulations provide a default, then the default will apply if the plan does not otherwise specify.

2. Limitation Year

The annual benefit is tested in a "limitation year." Unless an election is made by the employer, the limitation year is the calendar year. Treas. Reg. § 1.415(j)-1. An employer that maintains more than one qualified plan may elect to use different limitation years for each such plan. Treas. Reg. § 1.415(j)-1(c).

A plan may use the calendar year as its limitation year or it may use a fiscal year, that is any 12 month period. (The default if not provided otherwise is the calendar year.)

- **OSERS Compliance:** A calendar year limitation year is utilized.

D. OVERVIEW OF 415(b) LIMITS ON BENEFITS

1. Basic Current Benefit Limits

EGTRRA provides that the basic requirement of Code Section 415(b) is that the annual benefit in the form of a single life annuity provided to a member who is between the ages of 62 and 65 may not exceed the lesser of: (1) \$160,000 as adjusted for inflation in \$5,000 increments (the "Dollar Limit"), \$230,000 for 2021, or (2) 100% of average compensation (the "Salary Limit"). Code Section 415(b)(1). The Salary Limit does not apply to governmental plans such as OSERS. Therefore, the following discussion and our methodology do not include the Salary Limit. This limitation is applied to the gross benefit amounts, not net of withholding and deductions.

- **OSERS Compliance:** The Final Rules and Regulations Chapter 13.003.03 and Neb. Rev. Stat. § 79-9,102 adopt the 415(b) limit.

2. TAMRA Election

Section 415(b)(10) of the Code was added by the Technical and Miscellaneous Revenue Act of 1988 (sometimes called TAMRA) to offer state and local government plans a means of complying with the Section 415 limits without violating state anti-cutback laws. Under this Section, the defined benefit limit for an employee who became a participant in the plan before January 1, 1990, would not be less than his or her accrued benefit determined without regard to any plan amendment adopted after October 14, 1987. However, for a state or local government to take advantage of Section 415(b)(10), each employer maintaining the plan was required to elect, before the close of the plan year beginning in 1990, to apply the defined benefit limits applicable to private plans to employees who first became participants after 1990. However, there were also special provisions for state-wide statutory changes. For plans that made a TAMRA election, the qualified participants would still have their TAMRA protection. Revocation of a TAMRA election is permitted pursuant to Code Section 415(b)(10)(C)(ii), effective for all plan years to which the election applied and to all subsequent plan years, provided the revocation is accomplished by the last day of the third plan year beginning after August 20, 1996.

- **OSERS Compliance:** OSERS did not make the TAMRA election.

3. Amounts Excluded from Testing

For purposes of Code Section 415(b), the annual benefit means the benefit payable annually in the form of a straight life annuity (with no ancillary benefits), without considering payments made from a qualified excess benefit arrangement, after-tax employee contributions, and any rollover contributions. Code Section 415(b)(2).

a. Ancillary Benefits

"Ancillary benefits" do not count toward the benefits subject to Code Section 415. As a result, any benefit that is an ancillary benefit can exceed the 415 limits without the plan being disqualified. Generally, "ancillary benefits" are benefits not directly related to retirement income benefits. Ancillary benefits include "pre-retirement disability benefits and death benefits (such as in-service death benefits)." Code Section 415(b)(2)(B); Treas. Reg. § 1.415(b)-1(c)(4). However, if a disability benefit or death benefit is no different from the retirement benefit, then the disability benefit or death benefit is tested as a retirement benefit.

(1) Disability Benefits

All disability retirement benefits must be taken into account for purposes of complying with the Code Section 415 limitations, subject to the special rule under Code Section 415(b)(2)(I).

(2) Pre-Retirement Death Benefits

Pre-retirement death benefits provided under a governmental plan are also exempt from the Code Section 415 limits. Treas. Reg. § 1.415(b)-1(c)(4)(i)(B). The Final Regulations make it very clear that pre-retirement death benefits must meet the incidental benefit requirements of Code Section 401 and the regulations thereto in order to be excluded from 415(b) testing. Generally speaking, death benefits are incidental where the plan provides a pre-retirement death benefit that is no greater than 100 times the monthly annuity benefit provided under the plan, or the cost of the death benefit does not exceed 25% of the total cost of all benefits for that participant. (This latter test would be one that would be analyzed by an actuary.) Revenue Ruling 74-307, 1974-2 C.B. 126.

b. Pre-1995 Payments

Effective for years after December 31, 1994, state and local government employers may maintain "qualified governmental excess benefit plans" ("QEBA") under Code Section 415(m). Excess Plans are plans that provide benefits that cannot be provided under a qualified plan due to the limits on contributions and benefits. The following provisions that accompanied the enactment of Code Section 415(m):

Nothing in the amendments made by this section shall be construed to imply that a governmental plan (as defined in section 414(d) of the Internal Revenue Code of 1986) fails to satisfy the requirements of section 415 of such Code for any taxable year beginning before January 1, 1995.

P.L. 104-188, § 1444(c)(2).

➤ **OSERS Compliance:** OSERS has not adopted a QEBA.

4. Allocation of Benefits to After-Tax Employee Contributions

Treasury Regulation § 1.415(b)-1(b)(1)(ii) provides that the benefit attributable to "Employee Contributions" is not included in the benefit which is tested against the 415(b) limitation. In general, this is because these contributions are deemed to be annual additions and subject to Code Section 415(c) limits (discussed below in more detail). Therefore, because the benefits have already been tested under Code Section 415(c), any portion of a defined benefit attributable to those after-tax contributions may be subtracted from the annual benefit before it is tested under Code Section 415(b). However, it is important to note that benefits that would be attributable to excess 415(c) contributions would not be "subtracted" from the annual benefit for 415(b) testing purposes.

a. *Definition of Employee Contributions*

Only certain employee contributions are treated as Employee Contributions for purposes of 415(b) testing. In particular, the following items are not treated as Employee Contributions and therefore the benefit attributable to these items is included for purposes of 415(b) testing:

- Contributions picked up by the employer pursuant to Code Section 414(h).
- Any repayment of a loan from the plan to the participant.
- Certain repayments amounts previously distributed upon the participant's termination of participation in the plan.
- Certain repayments of a withdrawal of employee contributions.

b. *Mandatory Employee Contributions*

Treasury Regulation § 1.415(b)-1(b)(2)(iii) provides that the annual benefit attributable to mandatory contributions is determined by using the factors described in Code Section 411(c)(2)(B) "regardless of whether the requirements of sections 411 and 417 apply to that plan." Treasury Regulation § 1.411(c)-1(c) establishes the required method for allocating a portion of the defined benefit to the after-tax employee contributions for purposes of excluding this amount from the final annual benefit to be tested. The method requires calculation of the after-tax (not picked up) employee contributions (both mandatory employee contributions and any voluntary after-tax payments for service purchases unless tested under Code Section 415(n)), plus interest, at rates specified by the regulations. See Treas. Reg. § 1.411(c)-1(c). Generally, interest is computed at the rate provided by the plan until the last plan year before Code Section 411(a)(2) does not apply. Id. Thereafter, a plan should use a 5% interest rate factor.

In general, Code Section 411(a)(2) does not apply to a governmental plan, such as OSERS. However, the Final Regulations provide that Code Section 411 should be treated as applicable to this calculation even if the section is not applicable to the plan. The Explanation of Provisions in the Final Regulations states that a plan not subject to

Code Section 411(a)(2), such as a governmental plan, should determine what the effective date of Code Section 411(a)(2) would have been if 411 applied to the plan and then apply the specific interest rates appropriately. Therefore, only the benefit attributable to employer contributions using 411 factors can be excluded from 415(b) testing.

Treasury Regulation § 1.415(b)-1(b)(2)(iii) clearly indicates that the Code Section 411 factors should be applied to a governmental plan for purposes of determining the benefit attributable to employee contributions for purposes of Code Section 415(b) testing. The calculation is done in a two-step process. First interest is accumulated on the contributions using the applicable interest rates specified in Code Section 411(c). The 411 interest rates are the following:

- For contributions prior to 1976, use the interest rate in the plan document, if any;
- For contributions between 1976-1987, use 5%;
- For contributions from 1988 through the date the benefit commences or the annuity starting date (the determination date), use 120% of the mid-term applicable federal rate; and
- For contributions from the determination date to the normal retirement date (the date at which unreduced benefits are paid), use the applicable 417(e) interest rate.
- For plan years beginning before January 1, 2008, the applicable 417(e) rate is the annual rate on 30-year Treasury securities for the month before the distribution.
- For plan years beginning on and after January 1, 2008, the applicable 417(e) rate is the adjusted first, second and third segment rates for the month before the distribution. The segment rates are based on the corporate bond yield curve based on varying maturities. The IRS announces all rates monthly.

The second step is for the accumulated value of the contributions with interest to be converted to an annuity value using the applicable 417(e) interest rate and the applicable 417(e) mortality table.

c. Voluntary After-Tax Contributions

Where a plan permits voluntary after-tax employee contributions, the portion of the plan to which such contributions are made is treated as a defined contribution plan. Therefore, voluntary after-tax contributions are subject to the 415(c) contribution limits and not the 415(b) benefit limits. Treas. Reg. § 1.415(b)-1(b)(2)(iv). The benefit attributable to voluntary after-tax contributions is not subject to 415(b) testing. However, the calculation to remove the attributable benefit is done using 411 factors as above.

5. Employee After-Tax Contributions for Permissive Service Credit

Code Section 415(n) applies to purchases of "permissive service credit" made in years beginning after December 31, 1997. Code Section 415(n) establishes two alternatives for testing voluntary after-tax employee contributions, instead of relying on the existing Code Section 415(c) defined contribution limitations. For purposes of Code Section 415(n), a qualified plan may accept voluntary after-tax employee contributions under either a modified 415(b) test or a modified 415(c) test:

a. Modified 415(b) Limit

The defined benefit limit in Code Section 415(b) may be met by treating the accrued benefit derived from all permissive service credit as part of the member's annual benefit. Code Section 415(n)(2)(A) provides that, where the dollar limit under 415(b) is reduced for retirement before age 62, "the plan shall not fail to meet the reduced dollar limit under Subsection (b)(2)(C) [the age-reduced dollar limit] solely by reason of this subsection."

b. Modified 415(c) Limit

For purposes of Code Section 415(n), only the Dollar Limit under Code Section 415(c) applies, as adjusted for inflation, (currently \$58,000 for 2021) by treating all permissive service contributions as an annual addition under that limit. In other words, the 100% of compensation limit is not applied.

The testing rules that are applicable at the time of service purchase are governed by Code Section 415(n) and the transition rule (also referred to as the "Grandfather Provision" discussed below). However, at the annuity starting date, the 415(b) testing rules apply. The benefit attributable to service purchases that met the Modified DC Limits can be excluded from testing. However, the determination of the benefit attributable is not controlled by the amount of service purchases, but rather upon the principles contained in Treasury Regulations. If after-tax contributions were made under the Modified DB Limit, those after-tax contributions cannot be excluded from testing at the annuity starting date.

c. Definition of Permissive Service Credit

The special testing rules apply only if the service being purchased qualifies as permissive service credit. Code Section 415(n)(3) defines "permissive service credit" as follows:

- (3) PERMISSIVE SERVICE CREDIT.—For purposes of this subsection—
- (A) IN GENERAL.—The term "permissive service credit" means service credit—
- (i) recognized by the governmental plan for purposes of calculating a participant's benefit under the plan,

- (ii) which such participant has not received under such governmental plan, and
- (iii) which such participant may receive only by making a voluntary additional contribution, in an amount determined under such governmental plan, which does not exceed the amount necessary to fund the benefit attributable to such service credit.

Such term may include service credit for periods for which there is no performance of service, and, notwithstanding clause (ii), may include service credited in order to provide an increased benefit for service credit which a participant is receiving under the plan.

Code Section 415(n)(3)(A). Benefit enhancement purchases (buying a higher multiplier on service a member already has in a plan) and airtime purchases (buying service credit for a period for which there is no performance of service) both qualify as permissive service credit.

d. Nonqualified and Qualified Permissive Service

Permissive service credit can be categorized into two types. First, the Code defines "non-qualified service credit" as all permissive service credit that does not fall within one of the itemized types listed in Code Section 415(n)(3)(C). Although the Code does not use this term, we have termed the types of service included in this list as "qualified permissive service."

Code Section 415(n)(3)(C) defines "nonqualified service" as all permissive service except for the following types of service (which we have designated "qualified permissive service"):

- Service (including parental, medical, sabbatical, and similar leave) for the US government, any state or political subdivision thereof, or any agency or instrumentality of any of the foregoing.
- Service (including parental, medical, sabbatical, and similar leave) for an educational organization which is a public, private, or sectarian school which provides elementary or secondary education (through grade 12) as determined under state laws.
- Service for an association of employees of the U.S., state or political subdivision thereof, or an agency or instrumentality of the foregoing.
- Military service (non-USERRA covered) recognized by the governmental plan.

However, service under the first 3 points above will be nonqualified service if recognition of the service would cause the member to receive a retirement benefit for the same service under more than one plan. Code Section 415(n) does not permit a plan to

take more than 5 years of nonqualified service into account, or to give members credit for any nonqualified service before the member has at least 5 years of participation in the plan. Code Section 415(n)(3)(B). The PPA clarified that these limits do not apply to trustee-to-trustee transfers from a 457(b) plan or a 403(b) plan for the purchase of permissive service credit.

It is important to note that "nonqualified service" is still one type of permissive service that is described in Code Section 415(n)(3)(A). Therefore, nonqualified service is available for purchase and may be tested under Code Section 415(n) special testing provisions.

e. Grandfather Provision – After-tax Contributions for Permissive Service Credit

The service purchase testing provisions for permissive service credit under Code Section 415(n) are subject to a transition rule. The transition rule provides that the defined contribution limits of Code Section 415(c) will not be used to reduce the amount of permissive service credit an "eligible participant" can purchase below what they were allowed to purchase under the terms of the plan as in effect on the enactment date, August 5, 1997. An "eligible participant" is an individual who first becomes a participant in the plan before the first plan year beginning after the last day of the calendar year in which the next regular session (following the date of enactment) of the governing body with authority to amend the plan ends.

This provision was also considered in PLR 200805026. Under this PLR, we believe the IRS interprets this provision as only applying to after-tax employee contributions. A grandfathered purchase would be treated in the same way as a permissive service credit purchase under Code Section 415(n) (even if the purchase occurred prior to 1998). As noted above, such an after-tax employee contribution would be treated as passing the Modified DC Limit and thus the benefit attributable to the after-tax purchase would be excluded from testing at the annuity starting date. This could permit permissive service purchases that exceed 415(c) and (b) limits but would not extend to the purchase of service that did not meet the definition of permissive service credit.

OSERS Compliance: OSERS has several service purchase options:

- Outside Service – "Buy-in" - Up to ten years of previous creditable experience in another public school system may be purchased at the time of initial employment by the Omaha Public Schools
 - If purchased with after-tax employee contributions, 415(n) limits apply. Therefore, purchase will be tested under modified 415(b) limits.
 - If purchased with rollover funds, 415(c) limits do not apply. 415(b) limits apply at distribution.

- Purchase of Service – "All-Purpose Buy-In" - A full-time vested member of the retirement system may purchase up to five years of service credit at any time prior to retirement. If purchased with after-tax employee contributions, 415(n) limits apply. Therefore, purchase will be tested under modified 415(b) limits.
 - Purchase of Military Service – "Buy-In" - In the case of USERRA contributions, if the member is making USERRA contributions with post-tax dollars, the applicable 415(c) limits are the limits in place in the years of the covered service – not necessarily the year of payment.
 - Purchase of Leave of Absence Time – "Buy-In" - If purchased with after-tax employee contributions, 415(n) limits apply. Therefore, purchase will be tested under modified 415(b) limits.
- **OSERS Compliance:** OSERS applies the 415(c) limit to all service purchases.

6. **Picked-Up Contributions**

It is important to note that pre-tax contributions ("picked-up contributions"), whether mandatory or voluntary, are not treated as post-tax contributions. The benefit attributable to picked-up contributions is subject to 415(b) testing. Treas. Reg. § 1.415(b)-1(b)(2)(ii)(A).

7. **Amounts Attributable to Rollovers**

Rollovers contributions to a defined benefit plan are treated similarly to employee contributions for purposes of 415(b) testing:

If the benefit under the plan is payable in any form other than the form described in subparagraph (A), or if the employees contribute to the plan or make rollover contributions (as defined in sections 402(c), 403(a)(4), 403(b)(8), 408(d)(3), and 457(e)(16), the determinations as to whether the limitation described in paragraph (1) has been satisfied shall be made, in accordance with regulations prescribed by the Secretary, by adjusting such benefit so that it is equivalent to the benefit described in subparagraph (A).

Code Section 415(b)(2)(B). The Final Regulations treat rollovers in a manner similar to after-tax contributions, so that the benefit attributable to the rollover must be converted in accordance with prescribed 411 factors. This is true only to the extent the plan provides for a benefit based upon the rollover contributions. That is, if the benefit attributable to the rollover contributions is based upon a separate account, in which the rollover contributions are credited with actual earnings and losses, then the separate account is treated as a defined contribution plan. Treas. Reg. § 1.415(b)-1(b)(2)(v).

8. Amounts Attributable to Transfers between Qualified Plans

Under the Final Regulations, the treatment of transferred benefits for purposes of the 415(b) limits depends upon the types of plans involved and whether there is any relationship between them. Where the transfer is from one defined benefit plan to another defined benefit plan, the receiving plan must include the transferred benefits for purposes of applying the 415(b) limitations. Treas. Reg. § 1.415(b)-1(b)(3)(i)(C).

Where the transfer occurs between two plans which must be aggregated, the transferred benefits must be included by the receiving plan for 415(b) testing purposes. Where the transfer occurs between two plans which are not aggregated, the transferor plan is required to include the transferred benefits by treating the benefits as if provided as an annuity from a separate plan which must be aggregated with the transferor plan. Treas. Reg. § 1.415(b)-1(b)(3)(i)(A), (B).

9. Plan-to-Plan Transfers from a 457(b) or 403(b) Plan

Amounts accepted in a plan to plan transfer from a 457(b) or 403(b) plan should be treated in the same manner as a rollover, as discussed above.

10. Restoration of Contributions

Code Section 415(k)(3) provides that any repayment of contributions (including interest) will not be taken into account for Code Section 415 purposes if the repayment is to a governmental plan with respect to an amount previously refunded on a forfeiture of service credit under that plan or any other governmental plan maintained by the state or any local governmental employer within the same state. Thus, so long as the amount repaid does not exceed the amount refunded, plus interest, Code Section 415 should not apply. However, the Final Regulations do provide that the restored benefit is to be treated for testing purposes as the original benefit would have been treated.

E. AGE-BASED ADJUSTMENT TO LIMITS

1. Benefits Before Age 62

When the benefit begins before the participant reaches age 62, the Dollar Limit benefit limit generally must be actuarially adjusted so that the limit (as reduced) equals an annual benefit that is payable when the retirement benefit begins, and which is the equivalent of the Dollar Limit beginning at age 62. Code Section 415(b)(2)(C). The actuarial adjustments must be made in accordance with Code Section 415(b)(2)(E). Treas. Reg. § 1.415(b)-1(d).

There is an exception for disability and death benefits. The actuarial reduction for benefits beginning before age 62 does not apply to disability benefits or survivor benefits payable in the event of the disability or death of the member provided under a governmental plan. Code Section 415(b)(2)(I). The benefit must be paid "on account of the participant's becoming disabled by reason of personal injuries or sickness, or as a result of the death of the participant." Treas. Reg. § 1.415(b)-1(d)(4). This provision will

mitigate the IRS position that post-retirement disability benefits must be tested under 415(b).

2. Benefits After Age 65

For all members, if the retirement benefit under the plan begins after age 65 and is actuarially increased due to the delayed starting date, the Dollar Limit is increased so that it is the actuarial equivalent of an annual benefit beginning at age 65. Code Section 415(b)(2)(D). The actuarial assumptions used to make this conversion are set forth in Code Section 415(b)(2)(E). However, under the Final Regulations, this adjustment in the Dollar Limit is only available where the benefit is also increased post age 65

F. ADDITIONAL SPECIAL RULES

Code Section 415(b) has a number of additional special rules that may impact OSERS.

1. Small Benefits

Code Section 415(b)(4) provides that defined benefit limits will not be applied to reduce a participant's benefits when total annual distributions are \$10,000 or less. However, this limitation only applies "if the employer has not at any time maintained a defined contribution plan in which the employee has participated." Code Section 415(b)(4)(B); Treas. Reg. § 1.415(b)-1(f). The \$10,000 test is measured against actual distributions – not the actuarial equivalent of a straight life annuity.

2. Less than 10 Years of Participation

When an employee has less than ten years of participation in a defined benefit plan, the basic Code Section 415(b) Dollar Limit (or the minimum \$10,000 exemption from testing) is reduced by 10% for each year less than ten in which the employee participated in the defined benefit plan (but not below 1/10th of the Dollar Limit). Code Section 415(b)(5) and Treas. Reg. § 1.415(b)-1(g).

3. Optional Forms of Benefits – Benefits Other Than a Straight Life Annuity

The benefit that is subject to testing is a straight life annuity, and any other benefit under a plan which is payable in a form other than a straight life annuity (other than a qualified joint and survivor annuity) must be converted to a straight life annuity in order to pass 415(b) testing. In essence, even if a benefit actually being paid is not a straight life annuity, it still should have been converted to a straight life annuity and tested under Code Section 415(b). For example, annuity benefit forms including a post-retirement death benefit or an annuity providing for a guaranteed number of payments must be adjusted for purposes of applying the Code Section 415(b) limit. See Treas. Reg. § 1.415(b)-1(c).

a. 417(e)(3) Benefits and Non-417(e)(3) Benefits

Code Section 415(b)(2)(E)(i) provides that "for purposes of adjusting any limit under subparagraph (C) [adjustment to dollar limit before age 62] and ... for purposes of adjusting any benefit under subparagraph (B) [adjustment for other forms of benefits], the interest rate assumption shall not be less than the greater of 5% or the rate specified in the plan." With respect to adjusting a different form of benefit (under Code Section 415(b)(2)(B)), different interest rate assumptions are used in the case of a form of benefit subject to Code Section 417(e)(3). Code Section 415(b)(2)(E)(ii). However, prior to the Final Regulations, because a governmental plan is not subject to Code Section 417(e)(3), these different interest rate assumptions were not considered to be applicable to governmental plans. Rev. Rul. 98-1, Q&A-3, concluded that plans that are not subject to Code Section 417(e)(3), such as governmental plans, were not subject to the interest rate requirement under Section 415(b)(2)(E)(ii).

However, with the Final Regulations this position has been changed for governmental plans on and after the effective date. The Explanation of Provisions to the Final Regulations states that because Code Section 415(b)(2)(E) applies based on the form of the benefit rather than the status of the plan, the rules set forth in Treasury Regulations § 1.415(b)-1(b)(c) that dictate the manner of adjusting forms of benefit to which 415(e)(3) does or does not apply must be used regardless of whether Code Section 417(e)(3) otherwise applies to the plan. Thus, a governmental plan must follow these rules, presumably as if 417(e)(3) applied.

Code Section 417(e)(3) generally applies to full and partial lump sum distributions and period certain annuities. In a governmental plan, this may include DROP distributions and level income options which do not qualify as Social Security options. Treasury Regulation § 1.415(b)-1(c)(2) provides that, if 417(e)(3) does apply to the form of benefit, then the actuarially equivalent straight life benefit is the greatest of:

- The annual amount of a straight life annuity beginning on the same date as the form of benefit actually being paid and which has the same actuarial present value as the benefit being paid, computed using the interest rate and mortality table (or tabular factor) specified by the plan;
- The annual amount of a straight life annuity beginning on the same date as the form of benefit actually being paid and which has the same actuarial present value as the benefit being paid, computed using a 5.5% interest rate and the appropriate mortality table from Treasury Regulation § 1.417(e)-1(d)(2) for that starting date; or
- The annual amount of a straight life annuity beginning on the same date as the form of benefit actually being paid and which has the same actuarial present value as the benefit being paid, computed using the interest rate specified in Treasury Regulation § 1.417(e)-1(d)(3) and the appropriate mortality table from Treasury Regulation § 1.417(e)-1(d)(2), divided by 1.05.

Code Section 417(e)(3) does not apply to straight-life annuities or qualified joint and survivor annuities. If 417(e)(3) does not apply to the form of benefit, then the actuarially equivalent straight life benefit is the greater of:

- The annual amount of the straight life annuity payable under the plan, if any, starting on the same date as the form of benefit actually being paid; or
- The annual amount of a straight life annuity beginning on the same date as the form of benefit actually being paid and which has the same actuarial present value as the benefit being paid, computed using a 5% interest rate and the appropriate mortality table from Treasury Regulation § 1.417(e)-1(d)(2) for that starting date.

b. QJSA Benefits

No adjustment is required for the actuarial value of a qualified joint and survivor annuity ("QJSA") (a 50%-100% joint and survivor annuity with the spouse as designated beneficiary) that is fully or partially subsidized. See Treas. Reg. § 1.415(b)-1(c)(4).

c. Cost-of-Living Adjustment of Code Section 415(b) Limits

Automatic benefit increases (e.g., cost of living adjustments) to a member's benefits are permitted under Code Section 415(d). However, unless the cost of living adjustment meets the requirements of Treasury Regulation § 1.415(b)-1(c)(5), the value of the future cost of living adjustments must be included in converting the value of the total benefit to a single life annuity. That is, the value of all future cost of living increases must be annuitized over the recipient's life expectancy for 415(b) purposes. This method is more likely to result in violations of the limit than the method provided for COLAs which meet the requirements of Treasury Regulation § 1.415(b)-1(c)(5). That method essentially permits annual testing of the benefit, as increased by the COLA that year, against the 415(b) limit, as increased by 415(d) for that year.

Cost of living adjustments to which no adjustment is required for purposes of 415(b) testing are described as automatic, periodic adjustments applied in the following situations:

- A benefit paid in a form to which 417(e)(3) does not apply (that is, an annuity form of benefit is covered by these new rules);
- A benefit that satisfies 415(b) without regard to the COLA; and
- The plan provides that the benefit payable in any year will not exceed the 415(b) limit applicable at the annuity starting date, as increased annually pursuant to Code Section 415(d).

If the cost of living (or other post-retirement adjustment) is not automatic but rather is ad hoc, then the above is not available and benefits must be retested. Under the Final Regulations, automatic, periodic increases include annual increases according to a

"specified percentage or objective index" or automatic increases to "share favorable investment returns on plan assets." Treas. Reg. § 1.415(b)-1(c)(5)(ii).

4. Consideration of an Alternate Payee's Benefits For Testing Purposes

Benefits payable to an alternate payee under a qualified domestic relations order are treated as part of the member's benefit for purposes of applying the benefit limits under Code Section 415. IRS Notice 87-21, Q&A-20; see also Announcement 95-99, Q&A-17.

5. Aggregation of Total OSERS Benefits for Testing Purposes

Under a multiple employer plan, 2 or more employers that are not part of a related group participate in the same plan. In applying the Code Section 415 limits to such multiple employer plans, Treas. Reg. § 1.415(a)-1(e) provides that for a participant in a multiple employer plan, benefits or contributions under the plan attributable to such participant from all of the employers maintaining the plan and compensation from all the participating employers must be taken into account. Generally, if the employers had maintained separate plans this rule would not apply, and the Code Section 415 limits would be separately determined for each employer because they are not part of a related group.

- **OSERS Compliance:** We are informed that the Plan's actuary monitors the Code Section 415(b) limit for compliance.

G. OVERVIEW OF THE LAW WITH RESPECT TO DEFINED CONTRIBUTION LIMITS

Annual additions made or deemed to be made to a defined contribution plan are subject to the limits under Code Section 415(c). "Annual additions" include all employer contributions (including picked-up contributions), employee contributions (voluntary and mandatory, pre-tax and post-tax), and forfeitures. Code § 415(c)(2). This test is applied on an annual basis and it is applicable to those governmental defined benefit plans that provide for after-tax employee contributions or certain purchases of service. Thus, after-tax employee contributions and after-tax payments for purchases of service are tested under the Code Section 415(c) limits, in the same manner as contributions to a separate defined contribution plan. Treas. Reg. § 1.415(c)-1(a)(2)(ii).

1. Current Limits

The 415(c) limit for each member is the lesser of a Dollar Limit and a 100% of compensation limit ("Percentage Limit"). The Dollar Limit for defined contribution is a \$40,000 limit subject to indexing, with annual cost of living adjustments in \$1,000 increments. The Percentage Limit means the 415(c) limit is in effect zero in any limitation year in which the member has no compensation.

2. Definition of Compensation

a. **General Rule.**

Code § 415(c)(3)(A) defines "participant's compensation" as "the compensation of the participant from the employer for the year." Code § 415(c)(3)(D) includes as compensation elective deferrals under Code § 402(g)(3) and amounts contributed by the employer at the election of the employee which are excluded from income under Code §§ 125, 132(f)(4), or 457.

NOTE: picked-up contributions are not included in Code § 415(c) compensation.

Treasury Regulation § 1.415(c)-2(b) provides the following definition of compensation:

For purposes of applying the limitations of § 415, except as otherwise provided in this section, the term "compensation" means remuneration for services of the following types:

- (1) The employee's wages, salaries, fees for professional services, and other amounts received (without regard to whether or not an amount is paid in cash) for personal services actually rendered in the course of employment with the employer maintaining the plan to the extent that the amounts are includible in gross income (or to the extent amounts would have been received and includible in gross income but for an election under section 125(a), 132(f)(4), 402(e)(3), 402(h)(1)(B), 402(k), or 457(b)).

* * *

- (3) Amounts described in sections 104(a)(3), 105(a), and 105(h), but only to the extent that these amounts are includible in the gross income of the employee.
- (4) Amounts paid or reimbursed by the employer for moving expenses incurred by an employee, but only to the extent that at the time of the payment it is reasonable to believe that these amounts are not deductible by the employee under section 217.

* * *

- (7) Amounts that are includible in the gross income of an employee under the rules of section 409A or section

457(f)(1)(A) or because the amounts are constructively received by the employee.

Certain compensation may be included if the plan so provides - compensation paid within 2½ months of severance from employment or the end of the calendar year. Treas. Reg. § 1.415(c)-2(d)(3).

b. Safe Harbor Definitions. There are at least three safe harbor options available to a plan for purposes of defining compensation for Code § 415(c):

- (1) Calculate and define compensation on a person by person basis, including all taxable income and certain items not included on IRS Form W-2, imputed income items, etc. This approach has the advantage of producing the highest possible compensation amount for each individual but is not administrable for a plan of any size.
- (2) Define compensation based on the number reported by the employer as gross income in Box 1 of each employee's IRS Form W-2. This approach may result in a lower number than method 1 but is much easier to administer.
- (3) Define compensation based on amounts subject to federal income tax withholding, as well as certain amounts that would be includible except for an election under a cafeteria plan, a qualified transportation fringe benefit, a 401(k) plan, a 403(b) plan, a simplified employee pension, a simple retirement account, or a 457(b) plan. This approach also results in a lower number than method 1 but is generally easily available from the employer or payroll service provider and is therefore much easier to administer than an individualized approach.

➤ **OSERS Compliance:** The Plan applies the statutory definition of "compensation" for 415(c) purposes.

3. The Limitation Year

The limitation year for 415(c) testing purposes will be determined in the same fashion as for 415(b) testing purposes.

4. Code Section 415(k)(3): Repayment of Cash-Outs

Section 415(k)(3) provides that any repayment of contributions (including interest) will not be taken into account for Code Section 415 purposes if the repayment is to a governmental plan with respect to an amount previously refunded on a forfeiture of

service credit under that plan or any other governmental plan maintained by the state or any local governmental employer within the same state.

5. Testing of USERRA Service Purchases

Special Code Section 415 testing rules apply to the payment of contributions covered by the USERRA. Pursuant to Code Section 414(u)(1)(A) and (B), payments made in the applicable USERRA "make-up" period shall not be included in the Code Section 415(c) test for the limitation year in which the payment is made and shall instead be allocated to the limitation year for which it relates. This rule exists to address a situation in which make up contributions permitted by USERRA for multiple years, in addition to the regular on-going contributions, were all made at once upon the return of a plan member on USERRA-approved leave. If the Code Section 415(c) limits were applied to the sum of these contributions, then a member might exceed the applicable limit.

6. Code Section 414(v)

Code Section 414(v) provides that an "applicable employer plan" may permit an eligible participant to make additional elective deferrals in any plan year subject to certain limits. An "applicable employer plan" includes a 401(a) plan, a 403(b) plan, a SEP or a SIMPLE IRA, and a 457(b) plan. An eligible participant means a participant in the plan who will attain age 50 in the plan year and who would otherwise be "capped" out by other Code limitations. These additional elective deferrals may not exceed the lesser of the "applicable dollar amount" (for 2006 and thereafter this amount is \$5,000) or the difference between the participant's compensation minus all other elective deferrals. For purposes of applying this limit, all 401(a) plans, 403(b) plans, SEPS and Simple IRAs of a single employer must be aggregated. Multiple 457(b) plans of a single employer must be aggregated but are not aggregated with the other types of employer plans.

An additional elective deferral under Code Section 414(v) will not be subject to the otherwise applicable limitation under Code Section 401(a)(30), 402(h), 403(b), 408, 415(c), and 457(b) (determined without regard to 457(b)(3)).

Therefore, in determining whether an OSERS member who makes an after-tax employee contribution is violating the 415(c) limits, the member's 415(c) limit is determined without regard to any additional elective deferral made under Code Section 414(v).

7. Treatment of Worker's Compensation

Plans often question how to treat worker's compensation payments for purposes of the Code Section 415(c) definition of compensation. Generally, worker's compensation payments are excluded from gross income, provided they are paid under a worker's compensation statute, and therefore would not be includible as compensation under Code Section 415(c)(3). We believe this is true regardless of whether the employer is funding the payments directly or has paid for worker's compensation insurance, as in either case

the amounts paid would (presumably) be paid pursuant to a worker's compensation statute.

There is a special rule under Code Section 415(c)(3)(C) which provides as follows:

- (C) SPECIAL RULES FOR PERMANENT AND TOTAL DISABILITY. In the case of a participant in any defined contribution plan—
 - (i) who is permanently and totally disabled (as defined in section 22(e)(3)),
 - (ii) who is not a highly compensated employee (within the meaning of section 414(q)), and
 - (iii) with respect to whom the employer elects, at such time and in such manner as the Secretary may prescribed, to have this subparagraph apply,

the term "participant's compensation" means the compensation the participant would have received for the year if the participant was paid at the rate of compensation paid immediately before becoming permanently and totally disabled. This subparagraph shall apply only if contributions made with respect to amounts treated as compensation under this subparagraph are nonforfeitable when made. If a defined contribution plan provides for the continuation of contributions on behalf of all participants described in clause (i) for a fixed or determinable period, this subparagraph shall be applied without regard to clauses (ii) and (iii).

Code § 22(e)(3) provides that an individual is totally and permanently disabled if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.

Treasury Regulation § 1.415(b)-1(b)(2)(iv) and Treasury Regulation § 1.415(c)-1(a)(2)(ii)(B) provide that the voluntary and mandatory employee contributions (but not picked up contributions) under a defined benefit plan are treated as a separate defined contribution plan maintained by the employer, subject to the limitations on contributions of Code Section 415(c) and Treasury Regulation § 1.415(c)-1. Thus, while Code Section 415(c)(3)(C) specifies its applicability to defined contribution plans, these provisions would be applicable to that portion of a defined benefit plan that is to be treated as a defined contribution plan.

Treasury Regulation § 1.415(c)-2(g)(4) provides that, if certain conditions are satisfied, then "compensation" for a defined contribution plan participant who is permanently and totally disabled means "the compensation the participant would have received for the year if the participant was paid at the rate of compensation paid

immediately before becoming permanently and totally disabled, if such compensation is greater than the participant's compensation determined without regard to this paragraph." For this rule to apply, the following conditions must be satisfied:

- (1) Either the participant is not a highly compensated employee (as defined in section 414(q)) immediately before becoming disabled, or the plan provides for the continuation of contributions on behalf of all participants who are permanently and totally disabled for a fixed or determinable period;
- (2) The plan provides that the rule of this paragraph (g)(4) (treating certain amounts as compensation for a disabled participant) applies with respect to the participant; and
- (3) Contributions made with respect to amounts treated as compensation under this paragraph (g)(4) are nonforfeitable when made.

Treas. Reg. § 1.415(c)-2(g)(4)(ii).

This special rule provides that in the case of an individual with a total and permanent disability, Code Section 415(c) compensation would be deemed to be compensation at the rate the employee was being paid prior to the disability. This then leads to the question of how this provision is applied. Based on the Final Regulations, it appears that Code Section 415(c)(3)(C) is definitional for 415 compensation purposes, thereby creating a base for applying the 415(c) limit. As such, the employee contributions must be made on an after-tax basis.

➤ **OSERS Compliance:**

- Neb. Rev. Stat. § 79-998 allows for eligible rollover contributions into the Plan, with pre-tax funds for service purchase. OSERS does permit after-tax contributions with a check for service purchases.
- The OSERS definition of disability under Neb. Rev. Stat. § 79-951 meets this definition.

8. Analysis of All Employer Plans

Code Section 415(g) requires the aggregation of all plans of an employer for 415 testing purposes. Therefore, our other primary area of concern for 415 testing occurs with respect to the other 401(a) defined contribution or defined benefit plans that are (or could be) maintained by the employer. Note: a 457(b) deferred compensation plan or a 403(b) plan is not aggregated with OSERS.

- **OSERS Compliance:** OSERS members do not participate in any other employer sponsored 401(a) defined contribution or 401(a) defined benefit plans.

9. Service Purchases

A voluntary employee after-tax contribution is subject to 415(c) testing unless the more advantageous provisions of Code Section 415(n) apply. However, the PPA has made 415(n) much broader. As noted in an earlier section of the report, if an employee makes a voluntary contribution for a service purchase, the voluntary contribution may be tested under more generous 415(c) limits or 415(b) limits. The 415(c) limits under 415(n) are as follows:

For purposes of Code Section 415(n) service purchases, only the dollar limit under Code Section 415(c) applies as adjusted for inflation, (currently \$58,000 for 2021) by treating all permissive service contributions as an annual addition under that limit.

- **OSERS Compliance:** As noted above, post-tax service purchases are limited by Code Section 415(c).

VI. ROLLOVERS – CODE SECTION 401(a)(31)

A. OVERVIEW

Code Section 401(a)(31) requires a plan to permit an individual receiving a distribution to elect to have the eligible rollover distribution paid in the form of a direct rollover to an "eligible retirement plan," as specified by the distributee. The terms "eligible rollover distribution" and "eligible retirement plan" are defined in Code Sections 402(f)(2)(A) and 402(c)(8)(B), respectively. Code Section 402(c) provides that any "eligible rollover distribution" paid directly to the individual from a qualified trust described in Code Section 401(a) may be rolled over to an "eligible retirement plan" within 60 days. Code Section 402(c)(3). The amount of any such distribution that is actually rolled over to an eligible retirement plan is not included in the recipient's taxable income. Code Section 402(c)(1).

B. DEFINITION OF ELIGIBLE ROLLOVER DISTRIBUTIONS

Code Section 401(a)(31) requires qualified plans to permit an individual receiving an "eligible rollover distribution" from such a plan to elect to have the distribution paid in the form of a direct rollover to an "eligible retirement plan," as specified by the distributee. The terms "eligible rollover distribution" and "eligible retirement plan" are defined in Code §§ 402(f)(2)(A) and 402(c)(8)(B), respectively.

An "eligible rollover distribution" means any distribution from a qualified plan to a distributee (an employee, a surviving spouse, or a designated non-spouse beneficiary of an employee) of all or any portion of the balance to the credit of the employee in a qualified plan, except for the following:

- Any distribution that is one of a series of substantially equal periodic payments made (not less frequently than annually) over any one of the following periods: (i) the life of the employee (or the joint lives of the employee and the employee's designated beneficiary), (ii) the life expectancy of the employee (or the joint life and last survivor expectancy of the employee and the employee's designated beneficiary), or (iii) a specified period of 10 years or more;
- Any distribution to the extent the distribution is required by the minimum distribution requirements of Code Section 401(a)(9). For the purpose of determining the amount of the required minimum distribution necessary to satisfy Code Section 401(a)(9)(A) for any calendar year, OSERS may assume that there is no designated beneficiary;
- Any distribution which is made upon hardship of the employee (Note: Not applicable to OSERS);
- Elective deferrals, as defined in Code Section 402(g)(3), that, pursuant to Treas. Reg. §1.415-6(b)(6)(iv), are returned as a result of the application of

the Code § 415 limitations, together with the income allocable to these corrective distributions (Note: Not applicable to OSERS);

- Corrective distributions of excess deferrals as described Treas. Reg. §1.402(g)-1(e)(3), together with the income allocable to these corrective distributions;
- The portion of any distribution that is not includible in gross income (i.e., the employee's tax basis), unless the amount is directly rolled over to an IRA or, if the plan agrees to separately account for the after-tax dollars (and earnings thereon), a qualified defined contribution plan, a defined benefit plan or 403(b) plan; and
- Additional items designated by the IRS Commissioner in revenue rulings, notices, and other guidance of general applicability. Example of those items that already have been designated include dividends on employer securities, plan loans that are treated as deemed distributions, taxable cost of life insurance coverage (P.S. 58 costs) and corrective distributions for 401(k) plans (Note: None of these items are applicable to OSERS).

Code Sections 402(c)(4), 402(f)(2) and 403(b)(8)(B); Treas. Reg. §§ 1.402(c)-2 Q&A-3 and Q&A-4; Treas. Reg. § 1.402(c)-2, Q&A-3(a); and Treas. Reg. § 1.403(b).

C. ELIGIBLE RETIREMENT PLAN

Code Section 402(c) allows a member and a member's designated beneficiaries to execute a rollover to an "eligible retirement plan." The definition of the term "eligible retirement plan" varies depending on the facts and circumstances of the rollover.

1. Regular (Indirect) Rollovers

A regular, indirect, rollover occurs when a recipient of an eligible rollover distribution elects to personally receive the distribution (rather than have the distribution paid directly to an eligible retirement plan) and subsequently transfers all or part of the distributed amount to an eligible retirement plan within 60 days after receiving the distribution. Code Section 402(c)(3).

Prior to the United States Supreme Court's *Windsor* decision on June 26, 2013, under DOMA, a spouse for federal law purposes only included an opposite-sex spouse. However, effective as of June 26, 2013, after the *Windsor* decision, it is critical to treat equally both opposite-sex and same-sex spouses for purposes of rollover rights. IRS Notice 2014-19; Rev. Rul. 2013-17.

Generally, the 60-day rollover deadline cannot be extended. However, the IRS has authority to waive the deadline if a "failure to waive . . . would be against equity or good conscience" because of, for example, "casualty, disaster, or other events beyond the reasonable control of the [distributee]." Code Section 402(c)(3)(B). The IRS has also provided a "self-certification" procedure under which a taxpayer missing the 60-day

deadline, but believing to be eligible for a waiver, can certify to the administrator of the plan into which the rolled-over distribution is to be deposited or a trustee, custodian, or issuer of an IRA that they qualify for a waiver. Revenue Procedure 2020-46 has model language for such certifications. Otherwise, to apply for a waiver from the IRS, the distributee must file a private letter ruling request with the IRS.

2. Direct Rollovers – Pre-Tax Dollars

A direct rollover occurs whenever a distributee elects to have an eligible rollover distribution paid directly to an eligible retirement plan. Code Section 401(a)(31); Treas. Reg. § 1.402(c)-2 Q&A-12(a). An eligible retirement plan for this purpose includes, with respect to pre-tax dollars, all of the following (for the member or the member's spouse):

- An IRA described in Code Section 408(a).
- An individual retirement annuity (other than endowment contract) described in Code Section 408(b).
- Qualified plans described in Code Section 401(a).
- Qualified annuity plans described in Code Section 403(a).
- A tax-sheltered annuity arrangement described in Code Section 403(b).
- A governmental deferred compensation plan described in Code Section 457(b).
- A Roth IRA described in Code Section 408A.
- A SIMPLE IRA that meets the 2-year requirement in Code Section 408(p).

For a non-spouse designated beneficiary (as defined in Code Section 401(a)(9)(E)), an eligible retirement plan is an IRA established for the purpose of receiving the distribution and which is treated as an "inherited" IRA under the Code. Code Section 402(c)(11); IRS Notice 2007-7.

3. Direct Rollovers - After-Tax Dollars

After-tax dollars can be directly rolled over from OSERS to either an IRA or a qualified defined contribution plan that agrees to separately account for the after-tax dollars (including the interest thereon). Rollovers of after-tax dollars to qualified defined contribution plans may only be made in the form of a direct rollover. Further, the portion of an eligible rollover distribution that represents employee after-tax contributions that are not includible in gross income may also be rolled over in a direct rollover distribution to a qualified defined benefit plan or a Code Section 403(b) annuity contract. This is particularly important when addressing basis recovery. See Code Sections 72(e), (o), and 401(a)(31)(C).

After-tax contributions (including non-deductible contributions to an IRA) are not permitted to be rolled over from an IRA into a qualified plan, a tax-sheltered annuity, or a 457 plan.

The Code permits eligible rollover distributions of pre-tax and after-tax amounts from a qualified retirement plan, a 403(b) plan, or a governmental 457(b) plan to be split and allocated to different destinations on a tax-favored basis. Specifically, IRS Notice 2014-54 provides guidance on how to allocate distributions of pre-tax and after-tax amounts that are made to multiple destinations.

Under the rules set forth in IRS Notice 2014-54, all eligible rollover distributions from a qualified retirement plan, a 403(b) plan, or a governmental 457(b) plan that are made to a recipient at the same time will be treated as a single distribution, regardless of whether the recipient has directed the payments be made to a single destination or multiple destinations. In addition, if the pre-tax amount of the distribution is less than the amount of the distribution that is directly rolled over to one or more eligible retirement plans, the entire pre-tax amount is allocated to the direct rollover. In situations where payments are directly rolled over to two or more eligible retirement plans, the participant can select how the pre-tax amount is allocated among the plans, as long as he or she notifies the plan administrator of the allocation before the payments are directly rolled over.

The guidance applies only to eligible rollover distributions and does not change the requirement for allocation of the investment in the contract between a lump sum and an annuity when a participant is receiving both.

D. OVERVIEW OF IRS GUIDANCE ON ROLLOVERS

The IRS has issued guidance in the form of a final regulation on the qualification requirement imposed by Code Section 401(a)(31), pertaining to the direct rollover option for eligible rollover distributions from pension, profit-sharing, and stock bonus plans. Treas. Reg. § 1.401(a)(31)-1. For purposes of applying the plan qualification requirements of Code Section 401(a), a direct rollover is a distribution and rollover of the eligible rollover distribution and not a transfer of plan assets and liabilities. Treas. Reg. § 1.401(a)(31)-1 Q&A-15.

1. Option for Direct Rollover Required

A qualified plan such as OSERS must give the distributee the option of having any eligible rollover distribution paid in a direct rollover to an eligible retirement plan specified by the distributee. A direct rollover that satisfies Code Section 401(a)(31) is an eligible rollover distribution that is paid directly to an eligible retirement plan for the benefit of the distributee. A direct rollover may be accomplished by any reasonable means of direct payment to an eligible retirement plan, including, for example, a wire transfer or the mailing of a check to the eligible retirement plan. Treas. Reg. § 1.401(a)(31)-1 Q&A-3. If payment is made by check, the check must be negotiable only by the trustee of the eligible retirement plan. If the payment is made by wire transfer, the wire transfer must be

directed only to the trustee of the eligible retirement plan. The qualified plan may also accomplish a direct rollover by providing the distributee with a check and instructing the distributee to deliver the check to the eligible retirement plan provided that the check is made payable to the trustee of the eligible retirement plan for the benefit of the distributee. For example, "ABC Bank as trustee of Individual Retirement Account of John Q. Smith," or "Trustee of City of _____ Retirement Plan for the benefit of Jane Doe." Treas. Reg. § 1.401(a)(31)-1 Q&A-4.

2. Reasonable Procedures Permitted

OSERS may prescribe any procedure for distributees to elect a direct rollover under Code Section 401(a)(31), provided that the procedure is reasonable. Treas. Reg. § 1.401(a)(31)-1 Q&A-6(a). The procedure may include any reasonable requirement for information or documentation from the distributee. For example, it would be reasonable for OSERS to require that the distributee provide a statement from the designated recipient plan that the plan will accept the direct rollover for the benefit of the distributee and that the recipient plan is, or is intended to be, an eligible retirement plan. However, OSERS may not prescribe any unreasonable procedure, or require information or documentation, that effectively eliminates or substantially impairs the distributee's ability to elect a direct rollover. Treas. Reg. § 1.401(a)(31)-1 Q&A-6(b). For example, it would effectively eliminate or substantially impair the member's ability to elect a direct rollover if OSERS (i) required the member to obtain an opinion of counsel stating that the eligible retirement plan receiving the rollover is a qualified plan, (ii) required the recipient plan to automatically return any direct rollover amount that the distributing plan advises the recipient plan was paid incorrectly, or (iii) required the recipient plan to indemnify OSERS for any liability arising from the distribution.

3. Mandatory Withholding

If a distributee does not elect to have the eligible rollover distribution paid directly from OSERS to an eligible retirement plan, the eligible rollover distribution is subject to a 20% income tax withholding under Code Section 3405(c). Treas. Reg. § 1.401(a)(31)-1 Q&A-5.

E. OPTIONS FOR PLAN DESIGN REGARDING ROLLOVERS

1. Deadlines

OSERS may establish a reasonable deadline after which a distributee may not revoke an election to do a rollover. However, that deadline or time period with respect to revocation of a direct rollover election may not be more restrictive than a deadline under the plan applicable to revocations of the form of distribution elected by the member. Treas. Reg. § 1.401(a)(31)-1 Q&A-8.

2. Partial Rollovers (Rollover to an Eligible Retirement Plan and Payment to Distributee)

OSERS must permit a distributee to elect to have a portion of an eligible rollover distribution paid to an eligible retirement plan in a direct rollover and to have the remainder paid to the distributee. Treas. Reg. § 1.401(a)(31)-1 Q&A-9. However, OSERS could require that a direct rollover be equal to at least a specified minimum amount, which may not be more than \$500.

3. Minimum Rollover Amounts

For a direct rollover distribution, a minimum amount not to exceed \$200 may be set. Treas. Reg. § 1.401(a)(31)-1 Q&A-11. Under Treas. Reg. § 31.3405(c)-1 Q&A-14, OSERS is not required to withhold from a distribution that is less than \$200. However, all eligible rollover distributions received within one taxable year of the distributee under the same plan must be aggregated for purposes of determining whether the \$200 threshold is reached.

4. Divided Rollovers (Rollovers to more than one Eligible Retirement Plan)

OSERS is permitted, but not required, to allow a distributee to divide an eligible rollover distribution into separate distributions to be paid to two or more eligible retirement plans in the form of direct rollovers. Treas. Reg. § 1.401(a)(31)-1 Q&A-10. Therefore, OSERS could require that the distributee select a single eligible retirement plan for the direct rollover.

5. Series of Payments

A qualified plan may treat a distributee's election to do a direct rollover of one in a series of periodic payments as applying to all subsequent payments in the series, so long as the distributee is permitted at any time to change the election and the 402(f) notice explains this provision. Treas. Reg. § 1.401(a)(31)-1 Q&A-12. Only one notice needs to be given prior to the beginning of the payments, assuming such a notice was timely provided, but a copy of the notice must be provided at least annually thereafter. Treas. Reg. § 1.402(f)-1, Q&A-3.

6. Acceptance or Refusal of Rollovers

OSERS may refuse to accept rollovers. Treas. Reg. § 1.401(a)(31)-1 Q&A-13. Alternatively, OSERS may limit the circumstances under which it will accept rollovers. OSERS accepts rollovers for service purchases only.

If a plan accepts an invalid rollover contribution, the contribution will be treated, for purposes of applying the Code's qualification requirements to the receiving plan, as if it were a valid rollover contribution if two conditions are met:

- The plan administrator acted reasonably in concluding initially that the rollover was valid; and
- When the plan administrator later determines that the rollover is invalid, the rollover is distributed to the distributee (plus earnings) within a reasonable time.

Treas. Reg. § 1.401(a)(31)-1, Q&A-14.

Rev. Rul. 2014-9 provides "simplified safe harbor due diligence procedures" OSERS may use to reasonably conclude that certain rollover contributions are valid under the income tax regulations. In addition, Rev. Rul. 2014-9 provides two new "streamline safe harbor due diligence procedures" that, without evidence to the contrary, will cause one to assume that the administrator of the receiving plan reasonably concluded that a rollover was valid. In the first procedure, the plan administrator for the former employer's plan effectively made a representation that the plan was intended to be a plan qualified under Code §§ 401, 403 or 408. In the second, (i) the trustee for an IRA treated the distribution as a rollover contribution being paid to the new employer's plan; (ii) the plan administrator for the new plan reasonably concluded that the source of the funds was a traditional, non-inherited IRA; and (iii) the employee certified that the distribution included no after-tax amounts and that he or she will not attain age 70½ by the end of the year of the transfer. Based upon the facts under both procedures, the IRS determined that the plan administrator of the new plan may reasonably conclude that the rollover contribution is a valid rollover contribution. In either situation, the IRS notes that if it is later determined the amount rolled over is an invalid rollover contribution, the invalid amount, plus earnings, must be distributed to the employee.

➤ **OSERS Compliance:**

- OSERS is authorized to accept rollover contributions to the Plan. Neb. Rev. Stat. § 79-998. See also Rules and Regulations, Chapter 11 regarding payment methods for service purchase.
- OSERS should consider the processes by which it reasonably concludes a rollover is valid, despite the indemnification provisions of Neb. Rev. Stat. § 79-998(5). Under 006.02(b) of the Rules and Regulations, "a rollover or transfers from a qualifying tax-deferred account will not be accepted by OSERS without the member certifying that the originating rollover/transfer account has maintained its proper tax qualification conditions under the applicable sections of the Internal Revenue Code."
 - OSERS has noted that the rollovers are, generally, received from other retirement systems with a breakdown of pre/post-tax. If coming from an IRA, then the check will be identified as such. They receive account number information and may request additional information if needed.

- Neb. Rev. Stat. § 79-998(7) and (8) comply with the non-spouse beneficiary rollover requirements.
- The statutes and rules do not include a specific provision regarding rollovers of after-tax amounts or direct rollovers to Roth IRAs.

F. ROLLOVER NOTICE REQUIREMENTS

OSERS is required to furnish members, spouses, and designated non-spouse beneficiaries with a written explanation of the general rollover rules. Code Section 402(f) outlines the contents of the written explanation that must be provided to recipients of distributions eligible for rollover treatment. Treas. Reg. § 1.402(f)-1, Q&A-1.

1. General Requirements and Timing Rules

Plan administrators are required to give a written notice meeting certain requirements to a member within a reasonable period of time before making an eligible rollover distribution. Code § 402(f)(1); Treas. Reg. § 1.402(f)-1, Q&A-2. Generally speaking, the "rollover notice" must be given no less than 30 days and no more than 180 days before the distribution starting date. The Treasury Regulations specifically refer to a maximum period of 90 days. Treas. Reg. § 1.402(f)-1, Q&A-2(a). However, the PPA extended that period to 180 days. The Treasury Regulations also provide that distributees may, after receiving the required notice, waive the application of the 30 day time period by affirmatively electing to make or not make a direct rollover. Treas. Reg. § 1.402(f)-1, Q&A-2. Qualified plans should closely monitor the 30 to 180 day period for providing the notice to ensure compliance. For example, a plan might add a "date sent" line to its distribution forms in order to keep track of this time period.

2. Contents of Notice

The Treasury Regulations require that the "rollover notice" must be easily understood and must explain the following:

- The direct rollover rules;
- The rules that require mandatory 20% tax withholding on the distribution, if it is not paid via a direct rollover;
- The regular rollover rules that enable the distributee of an eligible rollover distribution to roll the distribution over into an eligible retirement plan within 60 days after receipt;
- The provisions under which distributions from the plan receiving the distribution may be subject to restrictions and tax consequences which are different from those applicable to distributions from OSERS; and
- Any other special tax rules that may apply.

The IRS has published Notice 2020-62 which provides a model notice OSERS may use to satisfy this requirement. The model notice constitutes a safe harbor notice.

3. Implementation of the 30-180 Day Window

The Treasury Regulations provide detailed instructions as to timing, waivers of the 30-day period, the required contents, and acceptable distribution methods of the "rollover notice." Treas. Reg. § 1.402(f)-1. Under Treas. Reg. § 1.401(a)-21, the notice may also be provided electronically if certain requirements are met, including: (i) the electronic medium must be reasonably accessible to the distributee; (ii) the system must be reasonably designed to provide the notice in a manner no less understandable than a written paper document; and (iii) the distributee must be advised that, upon request, they may request and receive a paper notice at no charge.

- **OSERS Compliance:** We have provided a draft Special Tax Notice for OSERS to use for all eligible rollover distributions.

G. AUTOMATIC ROLLOVERS

1. Notice 2005-5

Notice 2005-5 provides guidance relating to the automatic rollover provisions contained in Code Section 401(a)(31)(B). The automatic rollover provisions apply to all mandatory distributions from 401(a) plans, 457(b) governmental plans, and 403(b) plans, provided that the mandatory distributions are also eligible rollover distributions. As explained in Notice 2005-5, the automatic rollover rules require a plan to automatically roll over such mandatory distributions over \$1,000 into an IRA on behalf of any member who does not elect a method of distribution. A mandatory distribution is a distribution that is made without the member's consent (e.g., lump sums of small benefits that do not exceed \$5,000) before the member attains the later of age 62 or the plan's normal retirement age. A distribution to a surviving spouse or alternate payee is not a mandatory distribution for purposes of these requirements. There are also other exceptions, such as for plan loan offsets.

In order to satisfy the automatic rollover requirement, OSERS must provide that, when making a mandatory distribution that is also an eligible rollover distribution in excess of \$1,000:

- a.** OSERS must notify the member of the automatic rollover requirements, including the identity of the IRA trustee or issuer, and
- b.** If, after receipt of the notice, a member does not elect to receive a mandatory distribution directly or have it paid in a direct rollover to an eligible retirement, the distribution must be paid in the form of a

direct rollover to an IRA, in accordance with Code § 401(a)(31)(B). OSERS may choose the IRA provider for these purposes.

To set up IRAs for members who do not affirmatively elect to opt out of the automatic rollover provisions (including members who cannot be located after a diligent search), OSERS may execute all necessary documents to establish an IRA with the chosen provider on the member's behalf. For purposes of providing the notice and setting up the IRA, the member's most recent mailing address in the records of the employer and plan administrator may be used.

- **OSERS Compliance:** OSERS does provide for automatic rollovers or mandatory distributions. The OSERS handbook states that "[i]f you are not Vested, you must respond to the Retirement Office letter within 60 days selecting either a Refund or a Rollover. If the Retirement Office does not receive a reply, after 60 days the Retirement Office will transfer your contributions and interest into a non-interest bearing account."² We note that we do not find provisions regarding this process in either the Nebraska Code or the Rules and Regulations. OSERS has confirmed that this process is not done. Thus, we recommend that OSERS updated the handbook to accurately reflect the process.

H. REQUIREMENTS

1. Separation from Service Requirement

To retain its status as qualified defined benefit pension plan under Code Section 401(a), OSERS must satisfy certain restrictions and limitations, including restrictions on distributions. For example, qualified defined benefit plans generally are not allowed to distribute employer contributions prior to the date a participant retires under the plan unless: (i) the employee separates from service or becomes disabled; or (ii) the plan is terminated. See Rev. Rul. 56-693. The provisions affecting distributions from tax qualified pension plans and tax sheltered annuities do not affect these qualification requirements.

2. Exception for Direct Transfers for Service Purchases

A transfer from a 403(b) plan or a governmental 457(b) plan for the purchase of permissive service may occur in-service. Treas. Reg. § 1.457-10(b)(4).

3. Plan-to-Plan Transfers

In general, transfers between comparable qualified plans are allowed. Rev. Rul. 67-213. However, as a prerequisite, the plans at issue must permit the transfer according to their plan terms. Treas. Reg. § 1.401-6(b)(1) provides that: "A plan is not terminated, for example, merely because an employer consolidates or replaces that plan with a

² <https://osers.org/AboutOSERS/Handbook.aspx#BacktoTop> (last visited September 7, 2021).

comparable plan." The Regulation refers to Treas. Reg. § 1.381(c)(11)-(1)(d)(4) for the definition of a comparable plan, as well as any additional guidance. Treas. Reg. § 1.381(c)(11)-(1)(d)(4) generally provides that pension and annuity plans are comparable, stock bonus and profit-sharing plans are comparable, but profit-sharing and pension plans are not comparable. See also GCM 36048.

I. WITHHOLDING AND REPORTING REQUIREMENTS

The federal income tax withholding and reporting requirements for rollovers are set forth in Code Section 3405(c) and Treas. Reg. § 31.3405(c)-1. Code Section 3405(c) provides that any designated distribution that is an eligible rollover distribution is subject to income tax withholding.

1. Mandatory Withholding

Any designated distribution that is an eligible rollover distribution, as defined in Code Section 402(f)(2)(A), is subject to income tax withholding at the rate of 20%, unless the distributee of the eligible rollover distribution elects to have the distribution paid directly to an eligible retirement plan in a direct rollover. Treas. Reg. § 31.3405(c)-1, Q&A-1. If the amount of the distribution is less than \$200, and OSERS does not know at the time of such distribution whether any additional eligible rollover distributions will be made during the year that would be required to be aggregated for withholding purposes, OSERS need not withhold from the first distribution.

2. Distributee's Options

A distributee may not elect out of the mandatory withholding. Treas. Reg. § 31.3405(c)-1, Q&A-2. However, the distributee may elect to have more than 20% withheld from the eligible rollover distribution. Such an agreement must conform to the requirements of Code § 3402(p) regarding voluntary withholding agreements. Treas. Reg. § 31.3405(c)-1, Q&A-3.

3. Withholding on Partial Rollovers

If a distributee elects a partial rollover, the 20% mandatory withholding applies to the portion of the eligible rollover distribution that the distributee receives and not to the portion that is paid in a direct rollover. Treas. Reg. § 31.3405(c)-1, Q&A-6.

4. OSERS's Reliance on Erroneous Information

If OSERS reasonably relied on adequate information provided by the distributee, OSERS generally will not be subject to liability for taxes, interest, or penalties for failure to withhold income tax from an eligible rollover distribution, solely because the distribution is paid to an account or plan that is not, in fact, an eligible retirement plan.

For these purposes, it is not reasonable for OSERS to rely on information that is clearly erroneous on its face. Treas. Reg. § 31.3405(c)-1, Q&A-7(a). "Adequate information" in this context means that the distributee has provided the name of the

eligible retirement plan, a representation that the recipient plan is an eligible retirement plan, and any other information required in order to do the direct rollover, such as the name and address of the trustee of an IRA. Treas. Reg. § 31.3405(c)-1, Q&A-7(b).

5. Required Recordkeeping and Reports

Generally, OSERS is responsible for maintaining the records and filing the required reports and returns with respect to eligible rollover distributions from qualified plans. However, if the OSERS fails to keep the required records or file the required reports, the employer maintaining the plan is responsible. Treas. Reg. § 31.3405(c)-1, Q&A-15.

6. Form 1099-Rs

Each eligible rollover distribution, including each eligible rollover distribution that is paid directly to an eligible retirement plan in a direct rollover, must be reported on Form 1099-R in accordance with the instructions for Form 1099-R. Distributions that are not eligible rollover distributions are subject to the reporting requirements of Treas. Reg. § 35.3405-1. Treas. Reg. § 31.3405(c)-1, Q&A-16. The receiving plan is not required to report the receipt of a rollover contribution. Treas. Reg. § 31.3405(c)-1, Q&A-17(b).

- **OSERS Compliance:** OSERS has informed us that the 1099-Rs are reviewed as part of the audit process and it feels comfortable with the auditor's review at this point.

VII. RETURN TO WORK – CODE SECTION 401(a)(36)

A. DEFINITION OF NORMAL RETIREMENT AGE

1. Internal Revenue Code Requirements

All governmental defined benefit plans must meet the definition of a pension plan as set forth in Treas. Reg. § 1.401-1(b)(1)(i). A pension plan is defined as "a plan established and maintained by an employer primarily to provide systematically for the payment of definitely determinable benefits to his employees over a period of years, usually for life, after retirement." Treas. Reg. § 1.401(a)-1(b)(1)(i). Under this definition, the IRS has developed certain limitations on in-service withdrawals of members' funds prior to retirement, arising from Treas. Reg. § 1.401-1(a)(2)(i). In general, a member may not withdraw contributions made by the employer, or earnings on such contributions, before normal retirement, termination of employment, or termination of the plan. Rev. Rul. 74-254.

2. In-Service Distributions at Age 59½³ or Normal Retirement Age

Congress has provided an exception to the no-in-service distribution rule – Code Section 401(a)(36) provides that a qualified pension plan may be designed to make an "in-service" distribution at age 59½, even if that is before normal retirement age under the plan. This means that a qualified plan may provide for payment of a pension benefit if a member reaches age 59½ (but this applies only if the plan permits an in-service distribution at 59½ or older). Treas. Reg. §1.401(a)-1(b)(1)(i) (the regulations on normal retirement age) provide that, in order for a pension plan to be a qualified plan under § 401(a), the plan must be established and maintained by an employer primarily to provide systematically for the payment of definitely determinable benefits to its employees over a period of years, usually for life, after retirement or attainment of normal retirement age. A plan does not fail to satisfy the requirements of the regulation merely because the plan provides, in accordance with Code Section 401(a)(36), that a distribution may be made from the plan to an employee who has attained age 59½ and who is not separated from employment at the time of such distribution. These Treasury Regulations are not yet applicable to governmental plans. See IRS Notice 2012-29.

3. Payment of Benefits Without Actual Termination of Employment

The IRS has considered the payment of retirement benefits without a termination of employment and its potential effect on the qualified status of a plan. See PLR 201147038. The IRS concluded that employees who "retire" for purposes of beginning retirement benefits, but do not truly "retire" in their separation from employment, are not legitimately retired and cannot receive retirement benefits unless they have attained

³ A provision in the Further Consolidated Appropriations Act, 2020 ("Appropriations Act"), which also contained the SECURE Act, reduced the Code Section 401(a)(36) minimum age for permissive in-service distributions from qualified retirement plans from age 62 to age 59½. This change is applicable to plan years beginning after December 31, 2019. Under prior law, a qualified 401(a) plan could allow in-service distributions at the plan's normal retirement age or age 62. This change is optional for those plans seeking to reduce the age for in-service distributions.

normal retirement age under the plan or age 62 (if earlier). Therefore, payments upon such "retirements" violate Code § 401(a) and result in disqualification of the plan if the payments are made prior to normal retirement age or age 59½.⁴

- a.** Reemployment of retirees raise qualification concerns for governmental plans under Code §§ 401(a) and 414(d), as well as premature distribution tax concerns for the retiree under Code § 72(t).
- b.** With regard to the plan's qualification, the IRS specifically has provided guidance that a pre-arranged agreement for reemployment **with the same employer** will not be treated by the IRS as a termination from employment. Further, the IRS takes the position that the employment relationship must not continue post-retirement, even if there is a substantial modification of the hours worked or the classification of the position. It is also important to realize that the IRS may not consider the employment relationship to have been severed if the member becomes a leased employee or independent contractor of the same employer. Finally, the IRS has stated repeatedly that the determination of whether there is or is not a severance from employment needs to be determined using a facts and circumstances test. In this regard, the IRS has not established a "safe harbor" period of time for severance from employment. However, based upon the regulations under Code §§ 410 and 457, which are cited in PLR 201147038, it appears that a 12 month period without performing service may qualify as a reasonable period of time. Depending on the facts and circumstances of a particular plan and its population, a lesser period (such as 6 months) may also be considered reasonable.

B. IN-SERVICE DISTRIBUTIONS – TAXATION

1. Taxation Issues

Code Section 72(t) imposes an additional 10% premature distribution tax on certain distributions that are paid to members from qualified plans. This tax is in addition to the ordinary or, other applicable income tax that applies to the distributed amount. The recipient of the premature distribution (*i.e.* the member), not the qualified plan, is liable for this tax. The member reports the early distribution tax on IRS Form 5329, which is then filed in conjunction with the member's regular income tax return. See IRS Form

⁴ A provision in the Further Consolidated Appropriations Act, 2020 ("Appropriations Act"), which also contained the SECURE Act, reduced the Code Section 401(a)(36) minimum age for permissive in-service distributions from qualified retirement plans from age 62 to age 59½. This change is applicable to plan years beginning after December 31, 2019. Under prior law, a qualified 401(a) plan could allow in-service distributions at the plan's normal retirement age or age 62. This change is optional for those plans seeking to reduce the age for in-service distributions.

5329 and the instructions thereto. However, a qualified plan must properly code premature distributions when preparing IRS Form 1099-R.

The premature distribution tax does not apply to:

- distributions made after the date the member attains 59½;
- distributions made after the member's death;
- distributions attributable to the member's disability;⁵
- substantially equal periodic payments commencing after the member separates from service and payable over the life (or life expectancy) of the member or the joint lives (or joint life expectancy) of the member and member's designated beneficiary;
- distributions made to a member who separates from service after attainment of age 55 (for a public safety employee in a governmental plan, age 50);
- distributions made to the member to pay significant medical expenses (not to exceed allowable amount of deduction under Code Section 213), determined without regard to whether the employee itemizes deductions for such taxable year;
- distributions to an alternate payee pursuant to a QDRO;
- distributions made on account of an IRS levy under Code Section 6331 on the qualified retirement plan.

Two of these exceptions – the substantially equal periodic payment exception and the age 55 exception – require a separation from service.

2. No Exception for Normal Retirement Age

Unlike the qualification requirements, there is no exception from the separation from service requirements based on normal retirement age. Taxation under Code Section 72(t) must be analyzed based on the specified ages and on the requirements of that section. Therefore, if an OSERS member begins drawing benefits before age 59½, an

⁵ Under the disability exclusion of Code § 72(t)(2)(A)(iii), a disability is defined by reference to Code § 72(m)(7). See also Form 1099-R Instructions (2014), references Code § 72(m)(7) for use of Code 3 in Box 7. The definition of disability under Code § 72(m)(7) requires that the person be "unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or to be of long-continued and indefinite duration." Some systems use a disability determination by Social Security as a basis for using Code 3 in Box 7, while other systems make their own determinations on using a Code 3. If a disability does not meet the Code definition, a monthly benefit may still be Coded 2 (or 7) in Box 7 under the substantially equal periodic payment exceptions, provided there has been a separation from service.

exception under Code Section 72(t) must be identified in order for that member to avoid the 10% penalty.

3. **Definition of a Bona Fide Separation from Service**

In the situation where distributions commence upon separation from service with the employer maintaining the plan and continue upon reemployment with the same employer (and the employee has not reached normal retirement age), the focus will be upon whether there has been a bona fide separation from service. Neither the Code nor the regulations define "separation from service." Most guidance in this area has occurred in the context of taxation of distributions.

Ridenour v. U.S., 52 AFTR 2d 83-5584 (Cl. Ct. 1983). The Claims Court held that promotion from status of common law employee to partner at the same firm was not a separation from service. The court drew a distinction between one who continues to provide services and one who discontinues providing services, rather than upon the particular status of the person rendering the service. The Claims Court concluded that one who continues to provide services has not separated from the service within the meaning of Code Section 402(e)(4)(A)(iii).

Pre-Arranged Agreement – Reemployment. The IRS specifically has provided guidance that a pre-arranged agreement for reemployment **with the same employer** will not be treated by the IRS as a termination from employment. Further, the IRS takes the position that the employment relationship must not continue post-retirement even if there is a substantial modification of the hours worked or the classification of the position. It is also important to realize that the IRS may not consider the employment relationship to have been severed if the member becomes a leased employee or independent contractor of the same employer. Finally, the IRS has stated repeatedly that the determination of whether there is or is not a severance from employment needs to be determined using a facts and circumstances test. In this regard, the IRS has not established a "safe harbor" period of time for severance from employment. However, based upon the regulations under Code §§ 410 and 457, which are cited in PLR 201147038, it appears that a 12 month period without performing service may qualify as a reasonable period of time. Depending on the facts and circumstances of a particular plan and its population, a lesser period (such as six months) may also be considered reasonable. Therefore, returning to work for the same employer without a bona fide severance from employment, especially if the period of severance is less than a reasonable period of time, will not qualify as "retirement."

- **OSERS Compliance:** OSERS does not provide for in-service distributions. OSERS properly requires a bona fide separation from service prior to receiving a benefit under Neb. Rev. Stat. § 79-921(2)(a)(iii) and Rules and Regulations, Chapter 4 (Refund and Termination Benefit Procedures). OSERS actively monitors for compliance.
- OSERS members who return to employment continue receiving retirement benefits and are treated as a new employee. A new member account is

created, the member makes contributions to the new account, and receives service credit only for future service commencing from the date of reemployment. Neb. Rev. Stat. § 79-922. There are also provisions for service buy-backs.

VIII. HEART ACT – CODE SECTION 401(a)(37)

HEART Act § 104(a) added Code Section 401(a)(37) to require that a qualified plan provide that, in the case of a participant who dies while performing qualified USERRA service, the survivors of the participant are entitled to any additional benefits (other than benefit accruals) provided under the plan had the participant resumed and then terminated employment on account of death.

A. HEART ACT SECTION 104: SURVIVOR AND DISABILITY PAYMENTS WITH RESPECT TO QUALIFIED MILITARY SERVICE

HEART Act § 104 provides mandatory and optional provisions affecting qualified plans.

1. Death Benefits under USERRA-Qualified Active Military Service.

If a plan participant dies while performing USERRA-qualified military service, a qualified plan (401(a) plan), a 403(b) plan, and a 457(b) plan must treat that plan participant as having died during covered employment with the pension plan. The effect of this provision is that it entitles the survivors of the participant to any additional benefits (other than benefit accruals relating to the period of qualified military service) that would have been provided under the plan had the participant resumed employment and then terminated employment on account of death. The types of benefits subject to Code Section 401(a)(37) include accelerated vesting, ancillary life insurance benefits and other survivor benefits provided under a plan that are contingent on a participant's termination of employment on account of death.

2. Benefit Accruals in the Case of Death or Disability Resulting from Active Military Service Under USERRA.

A retirement plan may treat an individual who dies or becomes disabled (under the terms of the plan) while performing qualified military service as if the individual has resumed employment in accordance with USERRA on the day preceding the death or disability and then terminated employment on the actual date of death or disability. In order for a plan to provide these benefits, the plan must provide service and benefits on reasonably equivalent terms to all individuals performing USERRA service. See IRC Section 414(u)(9), which also prescribes the amount of employee contributions and elective deferrals that may be made.

B. HEART ACT SECTION 105: TREATMENT OF DIFFERENTIAL MILITARY PAY AS WAGES

1. Income Tax Withholding on Differential Wage Payments.

In certain cases, some employers paid employees who were called to active duty, some or all of the compensation that the service member would have received from the employer during the service member's period of active duty had the employee not been called to active duty and, instead, remained active with the employer. Prior to the HEART

Act, these payments, also referred to as "differential wage payments," were not treated as wages for purposes of Federal employment taxes. With the HEART Act, an individual receiving a "differential wage payment" (as defined under Code § 3401(h)) is (i) treated as an employee of the employer making the payment; (ii) the differential wage is treated as compensation; and (iii) the plan is not treated as failing to meet the requirements of Code § 414(u)(1)(C) by reason of any contribution or benefit which is based on the differential wage payment; this includes any nondiscrimination provisions of Code § 414(u)(1)(C). Under Code § 3401(h), a "differential wage payment" is any payment which:

- a.** Is made by an employer to an individual with respect to any period during which the individual is performing service in the uniformed services while on active duty for a period of more than 30 days, and
- b.** Represents all or a portion of the wages the individual would have received from the employer if the individual were performing service for the employer.

2. Treatment of Differential Wage Payments for Retirement Plan Purposes.

The IRS clarified, that although differential wage payments are not required to be treated as compensation for purposes of determining contributions and benefits under the plan, they must be treated as compensation for purposes of Code § 415(c)(3) and Treas. Reg. § 1.415(c)-2. IRS Notice 2010-15.

3. Special Rule for Distributions.

Notwithstanding the rule that a person receiving differential pay is to be considered an employee, for purposes of 401(k), 403(b), and 457(b) plans, an individual shall be treated as having severed employment while in USERRA covered service. Therefore, the individual may take a distribution from the plan. In such a circumstance, the individual may not make an elective deferral or employee contribution during the 6-month period beginning on the date of the distribution.

- **OSERS Compliance:** The Board must administer OSERS in compliance with the tax-qualification requirements applicable to governmental retirement plans under Code § 401(a). Neb. Rev. Stat. § 79-980; see *also* Rules and Regulations, Chapter 1 § 007.02(d). Code § 415 is incorporated by reference, including incorporating by reference the annual adjustments to the limitations of 415 that are made pursuant to 415(d). Neb. Rev. Stat. § 79-9,102.