requirements set forth in §§ 1309.71–1309.73 of this part and the recordkeeping and reporting requirements set forth under parts 1310 and 1313 of this chapter.

PART 1310—[AMENDED]

1. The authority citation for part 1310 continues to read as follows:

Authority: 21 U.S.C. 802, 830, 871(b).

2. Section 1310.02 is amended by adding new paragraphs (a)(25) through (27) to read as follows:

§ 1310.02 Substances covered.

* * * * *

(a) * * *

(25) Red phosphorus	6795
(26) White phosphorus (Other names: Yellow Phosphorus)	6796
(27) Hypophosphorous acid and its salts (Including ammonium hypophosphite, calcium hypophosphite, iron hypophosphite, potassium hypophosphite, manganese hypophosphite, magnesium hypophosphite and sodium hypophosphite)	6797

* * * * *

3. Section 1310.04 is amended by adding new paragraphs (g)(1)(ii) through (g)(1)(iv) to read as follows:

§ 1310.04 Maintenance of records.

* * * * *

(g) * * *

(1) * *

(ii) Red phosphorus

(iii) White phosphorus (Other names: Yellow Phosphorus)

(iv) Hypophosphorous acid and its salts

4. Section 1310.08 is amended by adding a new paragraph (j) to read as follows:

§ 1310.08 Excluded transactions.

* * * * *

(j) Domestic return shipments of reusable containers from customer to producer containing residual red phosphorus or white phosphorus in isotainers and rail cars with capacities greater than or equal to 2500 gallons (in a single container).

5. Section 1310.09 is amended by adding a new paragraph (d) to read as follows:

§ 1310.09 Temporary exemption from registration.

* * * * *

(d) Each person required by section 302 of the Act (21 U.S.C. 822) to obtain a registration to distribute, import, or export the List I chemicals red phosphorus, white phosphorus, and hypophosphorous acid (and its salts), is temporarily exempted from the registration requirement, provided that the person submits a proper application for registration on or before December 17, 2001. The exemption will remain in effect for each person who has made such application until the Administration has approved or denied that application. This exemption applies only to registration; all other chemical control requirements set forth in parts 1309, 1310, and 1313 of this chapter remain in full force and effect.

Dated: October 5, 2001.

Asa Hutchinson,

Administrator.

[FR Doc. 01–26013 Filed 10–16–01; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 599

[Docket No. FR–4663–C–05]

RIN 2506–AC09

Designation of Forty Renewal Communities; Technical Correction

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Interim rule; technical correction.

SUMMARY: On July 9, 2001, HUD published an interim rule to govern the designation of Renewal Communities nominated by States and local governments. This document corrects an error in the interim rule by removing arson from the list of offenses counted in determining the Crime Index and the Local Crime Index.

DATES: *Effective Date:* August 8, 2001.

FOR FURTHER INFORMATION CONTACT: John Haines, Renewal Community Initiative, Office of Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 7130, Washington, DC 20410, (202) 708–6339. Persons with hearing or speech disabilities may call (800) 877–8339 (the Federal Information Relay Service-TTY).

SUPPLEMENTARY INFORMATION:

On July 9, 2001 (66 FR 35850), HUD published an interim rule for the designation of Renewal Communities (RCs) and Round III urban Empowerment Zones (EZs). The preamble, at 66 FR 35853, cited the Crime Index (CI) of the FBI's Uniform Crime Reporting (UCR) as including the offense of arson. The rule, in § 599.107(a)(3) at 66 FR 35858, includes arson in the list of offenses that must be included when determining the Local Crime Index (LCI) in a nominated area for purposes of comparing the LCI to the CI.

Although the offense of arson is included as part of the UCR, it is not included in the CI determination because the reporting for arson is not as consistent as for other offenses. The references to arson in the interim rule are, therefore, being removed. In addition, a correction to make conforming changes to the August 7, 2001 (66 FR 41432) Notice Inviting Applications for Designation of Forty Renewal Communities is published elsewhere in this issue of the **Federal Register**.

Accordingly, FR Doc. 01–17011, Designation of Round III Urban Empowerment Zones and Renewal Communities, (FR–4663–I–01), published in the **Federal Register** on July 9, 2001 (66 FR 35850), is corrected as follows:

1. On page 35853, second column, the second complete sentence is revised to read as follows: ''The offenses included are the violent crimes of murder and nonnegligent manslaughter, forcible rape, robbery, and aggravated assault, and the property crimes of burglary, larceny-theft, and motor vehicle theft.''

PART 599—RENEWAL COMMUNITIES

§ 599.107 [Corrected]

2. On page 35858, second column, the last complete sentence of § 599.107(a)(3) is revised to read as follows: ''The offenses used in determining the LCI are the violent crimes of murder and nonnegligent manslaughter, forcible rape, robbery, and aggravated assault, and the property crimes of burglary, larceny-theft, and motor vehicle theft.''

Dated: October 10, 2001.

Roy A. Bernardi,

Assistant Secretary for Community Planning and Development.

[FR Doc. 01–26023 Filed 10–16–01; 8:45 am]

BILLING CODE 4210–29–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 8966]

RIN 1545–AT47

Effect of the Family and Medical Leave Act on the Operation of Cafeteria Plans

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations relating to cafeteria plans that reflect changes made by the Family and Medical Leave Act of 1993 (Act). The final regulations provide the public with guidance needed to comply with the Act and affect employees who participate in cafeteria plans.

DATES: *Effective Date:* These regulations are effective October 17, 2001.

Applicability Date: These regulations are applicable for cafeteria plan years beginning on or after January 1, 2002.

FOR FURTHER INFORMATION CONTACT: Shoshanna Chaiton at (202) 622–6080 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document contains additions to the Income Tax Regulations (26 CFR part 1) under section 125 of the Internal Revenue Code of 1986 (Code). These additions conform the cafeteria plan regulations to the Family and Medical Leave Act of 1993 (FMLA), Public Law 103–3, 29 U.S.C. 2601 *et seq.* FMLA imposes certain requirements on employers regarding coverage, including family coverage, under group health plans for employees taking FMLA leave and regarding the restoration of benefits to employees who return from FMLA leave. Proposed regulations, EE–20–95, published in the **Federal Register** on December 21, 1995 (60 FR 66229), addressed a number of the principal questions that were raised about how these FMLA requirements affect the operation of cafeteria plans (including flexible spending arrangements) maintained under section 125. These final regulations are based on the 1995 proposed regulations, and include clarifications and other changes resulting from comments received on the proposed regulations.

Summary of Changes

A number of comments that were made in response to the 1995 proposed regulations relate to FMLA. The requirements pertaining to FMLA leave, including the employer's obligation to maintain coverage under a group health plan during FMLA leave and to restore benefits upon return from FMLA leave, are established by FMLA, not the Code. The U.S. Department of Labor, in 29 CFR part 825, has published rules interpreting the requirements of FMLA, and the Department of Labor has jurisdiction relating to those rights or obligations. These final regulations do not interpret FMLA or the rules published by the Department of Labor. Rather, they provide guidance on the cafeteria plan rules that apply to an employee in circumstances to which FMLA and the Labor Regulations thereunder also apply. Accordingly, these final regulations include a number of changes intended to clarify which particular conditions must be satisfied to comply with FMLA and with the cafeteria plan rules.

The Department of the Treasury, including the Internal Revenue Service (IRS), discussed these final regulations with the Department of Labor to ensure that they do not conflict with, and are not inconsistent with, the provisions of FMLA or the Labor regulations thereunder, at 29 CFR part 825. In response to those discussions and comments made by the public, these cafeteria plan regulations have been changed to clarify the circumstances under which an employer is required to maintain coverage and an employee is required to continue paying premiums. These changes are described below.

As a general matter, under FMLA, an employer has the obligation to offer coverage under any group health plan for the duration of FMLA leave, whether paid or unpaid, and under the same conditions as coverage would have been provided if the employee had been continuously working during the entire leave period. The employee has the right to keep this coverage by continuing to pay the premium. During the period of FMLA leave, the employer is required to continue payment of its share of the costs of group health insurance coverage, but may condition such continued payments on the employee paying his or her share of the costs under one of the methods set forth at 29 CFR 825.210. See also the notice requirements at 29 CFR 825.301(b)(1)(iv).

Furthermore, the employer must either allow the employee to revoke coverage while on unpaid FMLA leave, or continue coverage but allow the employee to discontinue his or her share of the premium payments while the employee is on unpaid leave. Although ordinarily health plan coverage would cease if an employee does not make his or her share of the premium payments, FMLA does not give the employee a right to require that the employer terminate coverage. The FMLA permits an employer to continue health plan coverage while the employee is on unpaid FMLA leave by paying both the employer's and the employee's share of group health plan contributions. In this event, the employer may recover the employee's share of the contributions when the employee returns from leave or, if the employee fails to return from leave, the employer may recover the employee's share of contributions and may also recover its own share as well under the circumstances set forth in 29 CFR 825.213(a). However, under the FMLA, an employee who chooses to discontinue premium payments may not be required to make contributions until the unpaid FMLA leave ends.

Upon return from leave, FMLA requires that the employee have the right to be reinstated under the same terms as if the employee had worked during the entire leave period without any break in coverage. An employee who has revoked coverage or has failed to make required payments therefore has the right to be reinstated in the group health plan upon return from leave. If the employee does not elect to be reinstated in the group health plan upon return from FMLA leave, the employer may nevertheless require the employee to resume participation if the employer also requires employees who return from unpaid non-FMLA leave to resume participation upon return from leave. This reflects a change in position from the 1995 proposed regulations, which specifically prohibited an employer from requiring an employee whose coverage has terminated while on FMLA leave to reinstate coverage under a health FSA upon return from FMLA leave. Several commentators disagreed with this position, and suggested that the FMLA regulations do not require this rule. In response to these comments, the rule has been modified as described above.

One commentator questioned whether an employee on paid FMLA leave may change or revoke an election. Whether an employer is required to permit an employee on paid FMLA leave to revoke an election is governed by the FMLA and the Labor Regulations thereunder, rather than these regulations. As described above, the FMLA permits an employer to require that the employee continue coverage during an FMLA leave if the employer is continuing the employee's pay during the FMLA leave and does not treat employees on paid FMLA leave differently from other employees on paid leave. If these two conditions are satisfied, as described in Q&A–4, an employer may require that an employee who goes on paid FMLA leave continue to pay premiums by the method normally used during any paid leave.

In response to comments, the rule in the 1995 regulations concerning the catch-up payment option was modified. Under the 1995 regulations, an employee who elected to use the catch-up payment option before going on FMLA leave was required to enter into

an advance agreement with the employer specifying that the employee wanted to continue health coverage while on unpaid FMLA leave, that the employer would pay the premiums during the FMLA leave, and that the employee would repay these amounts upon return. Commentators noted that this rule did not provide enough flexibility for employers attempting to recoup payments in situations where employees originally elected the pay-as-you-go method but then were not able to make those required payments. Accordingly, the rule under the final regulations eliminates the requirement that an employee who elects the catch-up payment option enter into an advance agreement with the employer. The new rule adds flexibility and permits continued coverage because, although employees may still use either the catch-up payment option or the after-tax pay-as-you-go method from the outset, now employers may continue coverage and, under the catch-up payment option, recoup any amounts paid on an employee's behalf if the employee cannot make all the payments under the pay-as-you-go method.

The 1995 proposed regulations included a special proration rule for cases in which health coverage under a flexible spending arrangement (FSA) did not continue during an FMLA leave because the employee revoked coverage or failed to make required payments, and then the employee elects to resume the coverage when the leave ends during the same year. The proposed regulation permitted the employee's coverage to be reduced after the employee resumes work if the employee did not have coverage during the FMLA leave. Based on information provided by the Department of Labor concerning FMLA, the final regulations require that, where an employee does not have coverage under the FSA during FMLA leave because the employee chooses to revoke coverage or does not pay required premiums for any reason during FMLA leave, the employer must provide the employee upon return from FMLA leave a choice between: (1) Resuming coverage at the original level and making up the unpaid premium payments or (2) resuming coverage at a level that is reduced under the proration rule and resuming premium payments at the original level. Where the employee selects the prorated method and the plan has already made disbursements to the employee that exceed the premiums that will be paid for the year, the employer may not require the employee to pay any more than the remaining premiums due. If health FSA coverage does continue during the leave (whether due to an FMLA coverage continuation election by the employee or because the employer's plan requires health FSA coverage to be continued during a leave), there would of course be no proration.

Commentators requested clarification regarding whether employers are required to obtain elections from employees who are on FMLA leave when an open enrollment period occurs. In response to this comment, the final regulations clarify that employees on FMLA leave have the same rights during the leave period as employees participating in a cafeteria plan who are not on FMLA leave. Accordingly, employers are required to give employees on FMLA leave the right to enroll in a plan or change their election while they are on leave in the same manner as for active employees, rather than waiting for the employees on FMLA leave to return to work.

These final regulations supplement the regulations that were issued at § 1.125–4 (TD 8878 issued in March of 2000 (65 FR 15548) and TD 8921 (issued in January of 2001 (66 FR 1837)) setting forth the conditions under which a cafeteria plan can permit an employee to make an election change during the year. Thus, as provided at § 1.125–4(g), if an employee goes on an FMLA leave, section 125 allows a cafeteria plan to permit the employee to make an election change if the conditions in either these final regulations or the regulations at § 1.125–4 are satisfied. Further, as described above, FMLA requires that an employee who goes on an FMLA leave have the same election rights under a group health plan as an employee who is not on FMLA leave. Thus, a cafeteria plan that is subject to FMLA must allow an employee who goes on an FMLA leave to be able to make the same election changes as an employee who is not on an FMLA leave.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) and the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply to these regulations, and, therefore, a Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Code, these regulations will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of these regulations is Christine Keller, Division Counsel/Associate Chief Counsel (Office of Tax Exempt and Government Entities). However, other personnel from the IRS and Department of the Treasury participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 1.125–3 is added to read as follows:

§ 1.125–3 Effect of the Family and Medical Leave Act (FMLA) on the operation of cafeteria plans.

The following questions and answers provide guidance on the effect of the Family and Medical Leave Act (FMLA) on the operation of cafeteria plans:

Q–1: May an employee revoke coverage or cease payment of his or her share of group health plan premiums when taking unpaid Family and Medical Leave Act (FMLA), 29 U.S.C. 2601 et seq., leave?

A–1: Yes. An employer must either allow an employee on unpaid FMLA leave to revoke coverage, or continue coverage but allow the employee to discontinue payment of his or her share of the premium for group health plan coverage (including a health flexible spending arrangement (FSA)) under a cafeteria plan for the period of the FMLA leave. See 29 CFR 825.209(e). FMLA does not require that an employer allow an employee to revoke coverage if the employer pays the employee's share of premiums. As discussed in Q&A–3, if the employer continues coverage during an FMLA leave, the employer may recover the employee's share of the premiums when the employee returns to work. FMLA also provides the employee a right to be reinstated in the group health plan coverage (including a health FSA) provided under a cafeteria plan upon returning from FMLA leave if the employee's group health plan coverage terminated while on FMLA leave (either

by revocation or due to nonpayment of premiums). Such an employee is entitled, to the extent required under FMLA, to be reinstated on the same terms as prior to taking FMLA leave (including family or dependent coverage), subject to any changes in benefit levels that may have taken place during the period of FMLA leave as provided in 29 CFR 825.215(d)(1). See 29 CFR 825.209(e) and 825.215(d). In addition, such an employee has the right to revoke or change elections under § 1.125–4 (e.g., because of changes in status or cost or coverage changes as provided under § 1.125–4) under the same terms and conditions as are available to employees participating in the cafeteria plan who are working and not on FMLA leave.

Q–2: Who is responsible for making premium payments under a cafeteria plan when an employee on FMLA leave continues group health plan coverage?

A–2: FMLA provides that an employee is entitled to continue group health plan coverage during FMLA leave whether or not that coverage is provided under a health FSA or other component of a cafeteria plan. See 29 CFR 825.209(b). FMLA permits an employer to require an employee who chooses to continue group health plan coverage while on FMLA leave to be responsible for the share of group health premiums that would be allocable to the employee if the employee were working, and, for this purpose, treats amounts paid pursuant to a pre-tax salary reduction agreement as amounts allocable to the employee. However, FMLA requires the employer to continue to contribute the share of the cost of the employee's coverage that the employer was paying before the employee commenced FMLA leave. See 29 CFR 825.100(b) and 825.210(a).

Q–3: What payment options are required or permitted to be offered under a cafeteria plan to an employee who continues group health plan coverage while on unpaid FMLA leave, and what is the tax treatment of these payments?

A–3: (a) *In general.* Subject to the limitations described in paragraph (b) of this Q&A–3, a cafeteria plan may offer one or more of the following payment options, or a combination of these options, to an employee who continues group health plan coverage (including a health FSA) while on unpaid FMLA leave; provided that the payment options for employees on FMLA leave are offered on terms at least as favorable as those offered to employees not on FMLA leave. These options are referred to in this section as pre-pay, pay-as-you-go, and catch-up. See also the FMLA notice requirements at 29 CFR 825.301(b)(1)(iv).

(1) *Pre-pay.* (i) Under the pre-pay option, a cafeteria plan may permit an employee to pay, prior to commencement of the FMLA leave period, the amounts due for the FMLA leave period. However, FMLA provides that the employer may not mandate that an employee pre-pay the amounts due for the leave period. See 29 CFR 825.210(c)(3) and (4).

(ii) Contributions under the pre-pay option may be made on a pre-tax salary reduction basis from any taxable compensation (including from unused sick days or vacation days). However, see Q&A–5 of this section regarding additional restrictions on pre-tax salary reduction contributions when an employee's FMLA leave spans two cafeteria plan years.

(iii) Contributions under the pre-pay option may also be made on an after-tax basis.

(2) *Pay-as-you-go.* (i) Under the pay-as-you-go option, employees may pay their share of the premium payments on the same schedule as payments would have been made if the employee were not on leave or under any other payment schedule permitted by the Labor Regulations at 29 CFR 825.210(c) (e.g., on the same schedule as payments are made under section 4980B (relating to coverage under the Consolidated Omnibus Budget Reconciliation Act (COBRA), 26 U.S.C. 4980B), under the employer's existing rules for payment by employees on leave without pay, or under any other system voluntarily agreed to between the employer and the employee that is not inconsistent with this section or with 29 CFR 825.210(c)).

(ii) Contributions under the pay-as-you-go option are generally made by the employee on an after-tax basis. However, contributions may be made on a pre-tax basis to the extent that the contributions are made from taxable compensation (e.g., from unused sick days or vacation days) that is due the employee during the leave period.

(iii) An employer is not required to continue the group health coverage of an employee who fails to make required premium payments while on FMLA leave, provided that the employer follows the notice procedures required under FMLA. See 29 CFR 825.212. However, if the employer chooses to continue the health coverage of an employee who fails to pay his or her share of the premium payments while on FMLA leave, FMLA permits the employer to recoup the premiums (to the extent of the employee's share). See 29 CFR 825.212(b). Such recoupment may be made as set forth in paragraphs (a)(3)(i) and (ii) of this Q&A–3. See also Q&A–6 of this section regarding coverage under a health FSA when an employee fails to make the required premium payments while on FMLA leave.

(3) *Catch-up.* (i) Under the catch-up option, the employer and the employee may agree in advance that the group coverage will continue during the period of unpaid FMLA leave, and that the employee will not pay premiums until the employee returns from the FMLA leave. Where an employee is electing to use the catch-up option, the employer and the employee must agree in advance of the coverage period that: the employee elects to continue health coverage while on unpaid FMLA leave; the employer assumes responsibility for advancing payment of the premiums on the employee's behalf during the FMLA leave; and these advance amounts are to be paid by the employee when the employee returns from FMLA leave.

(ii) When an employee fails to make required premium payments while on FMLA leave, an employer is permitted to utilize the catch-up option to recoup the employee's share of premium payments when the employee returns from FMLA leave. See, e.g., 29 CFR 825.212(b). If the employer chooses to continue group coverage under these circumstances, the prior agreement of the employee, as set forth in paragraph (a)(3)(i) of this Q&A–3, is not required.

(iii) Contributions under the catch-up option may be made on a pre-tax salary reduction basis from any available taxable compensation (including from unused sick days and vacation days) after the employee returns from FMLA leave. The cafeteria plan may provide for the catch-up option to apply on a pre-tax salary reduction basis if premiums have not been paid on any other basis (i.e., have not been paid under the pre-pay or pay-as-you-go options or on a catch-up after-tax basis).

(iv) Contributions under the catch-up option may also be made on an after-tax basis.

(b) *Exceptions.* Whatever payment options are offered to employees on non-FMLA leave must be offered to employees on FMLA leave. In accordance with 29 CFR 825.210(c), cafeteria plans may offer one or more of the payment options described in paragraph (a) of this Q&A–3, with the following exceptions:

(1) FMLA does not permit the pre-pay option to be the sole option offered to employees on FMLA leave. However, the cafeteria plan may include pre-payment as an option for employees on FMLA leave, even if such option is not

offered to employees on non-FMLA leave-without-pay.

(2) FMLA allows the catch-up option to be the sole option offered to employees on FMLA leave if and only if the catch-up option is the sole option offered to employees on non-FMLA leave-without-pay.

(3) If the pay-as-you-go option is offered to employees on non-FMLA leave-without-pay, the option must also be offered to employees on FMLA leave. The employer may also offer employees on FMLA leave the pre-pay option and/or the catch-up option.

(c) *Voluntary waiver of employee payments.* In addition to the foregoing payment options, an employer may voluntarily waive, on a nondiscriminatory basis, the requirement that employees who elect to continue group health coverage while on FMLA leave pay the amounts the employees would otherwise be required to pay for the leave period.

(d) *Example.* The following example illustrates this Q&A–3:

Example. (i) Employer Y allows employees to pay premiums for group health coverage during an FMLA leave on an after-tax basis while the employee is on unpaid FMLA leave. Under the terms of Y's cafeteria plan, if an employee elects to continue health coverage during an unpaid FMLA leave and fails to pay one or more of the after-tax premium payments due for that coverage, the employee's salary after the employee returns from FMLA leave is reduced to cover unpaid premiums (i.e. the premiums that were to be paid by the employee on an after-tax basis during the FMLA leave, but were paid by the employer instead).

(ii) In this *Example,* Y's cafeteria plan satisfies the conditions in this Q&A–3. Y's cafeteria plan would also satisfy the conditions in this Q&A–3 if the plan provided for coverage to cease in the event the employee fails to make a premium payment when due during an unpaid FMLA leave.

Q–4: Do the special FMLA requirements concerning payment of premiums by an employee who continues group health plan coverage under a cafeteria plan apply if the employee is on paid FMLA leave?

A–4: No. The Labor Regulations provide that, if an employee's FMLA leave is paid leave as described at 29 CFR 825.207 and the employer mandates that the employee continue group health plan coverage while on FMLA leave, the employee's share of the premiums must be paid by the method normally used during any paid leave (e.g., by pre-tax salary reduction if the employee's share of premiums were paid by pre-tax salary reduction before the FMLA leave began). See 29 CFR 825.210(b).

Q–5: What restrictions apply to contributions when an employee's FMLA leave spans two cafeteria plan years?

A–5: (a) No amount will be included in an employee's gross income due to participation in a cafeteria plan during FMLA leave, provided that the plan complies with other generally applicable cafeteria plan requirements. Among other requirements, a plan may not operate in a manner that enables employees on FMLA leave to defer compensation from one cafeteria plan year to a subsequent cafeteria plan year. See section 125(d)(2).

(b) The following example illustrates this Q&A–5:

Example. (i) Employee A elects group health coverage under a calendar year cafeteria plan maintained by Employer X. Employee A's premium for health coverage is $100 per month throughout the 12-month period of coverage. Employee A takes FMLA leave for 12 weeks beginning on October 31 after making 10 months of premium payments totaling $1,000 (10 months × $100 = $1,000). Employee A elects to continue health coverage while on FMLA leave and utilizes the pre-pay option by applying his or her unused sick days in order to make the required premium payments due while he or she is on FMLA leave.

(ii) Because A cannot defer compensation from one plan year to a subsequent plan year, A may pre-pay the premiums due in November and December (i.e., $100 per month) on a pre-tax basis, but A cannot pre-pay the premium payment due in January on a pre-tax basis. If A participates in the cafeteria plan in the subsequent plan year, A must either pre-pay for January on an after-tax basis or use another option (e.g., pay-as-you-go, catch-up, reduction in unused sick days, etc.) to make the premium payment due in January.

Q–6: Are there special rules concerning employees taking FMLA leave who participate in health FSAs offered under a cafeteria plan?

A–6: (a) *In general.* (1) A group health plan that is a flexible spending arrangement (FSA) offered under a cafeteria plan must conform to the generally applicable rules in this section concerning employees who take FMLA leave. Thus, to the extent required by FMLA (see 29 CFR 825.209(b)), an employer must—

(i) Permit an employee taking FMLA leave to continue coverage under a health FSA while on FMLA leave; and

(ii) If an employee is on unpaid FMLA leave, either—

(A) Allow the employee to revoke coverage; or

(B) Continue coverage, but allow the employee to discontinue payment of his or her share of the premium for the health FSA under the cafeteria plan during the unpaid FMLA leave period.

(2) Under FMLA, the plan must permit the employee to be reinstated in health coverage upon return from FMLA leave on the same terms as if the employee had been working throughout the leave period, without a break in coverage. See 29 CFR 825.214(a) and 825.215(d)(1) and paragraph (b)(2) of this Q&A–6. In addition, under FMLA, a plan may require an employee to be reinstated in health coverage upon return from a period of unpaid FMLA leave, provided that employees who return from a period of unpaid leave not covered by the FMLA are also required to resume participation upon return from leave.

(b) *Coverage.* (1) Regardless of the payment option selected under Q&A–3 of this section, for so long as the employee continues health FSA coverage (or for so long as the employer continues the health FSA coverage of an employee who fails to make the required contributions as described in Q&A–3(a)(2)(iii) of this section), the full amount of the elected health FSA coverage, less any prior reimbursements, must be available to the employee at all times, including the FMLA leave period.

(2) (i) If an employee's coverage under the health FSA terminates while the employee is on FMLA leave, the employee is not entitled to receive reimbursements for claims incurred during the period when the coverage is terminated. If an employee subsequently elects or the employer requires the employee to be reinstated in the health FSA upon return from FMLA leave for the remainder of the plan year, the employee may not retroactively elect health FSA coverage for claims incurred during the period when the coverage was terminated. Upon reinstatement into a health FSA upon return from FMLA leave (either because the employee elects reinstatement or because the employer requires reinstatement), the employee has the right under FMLA: to resume coverage at the level in effect before the FMLA leave and make up the unpaid premium payments, or to resume coverage at a level that is reduced and resume premium payments at the level in effect before the FMLA leave. If an employee chooses to resume health FSA coverage at a level that is reduced, the coverage is prorated for the period during the FMLA leave for which no premiums were paid. In both cases, the coverage level is reduced by prior reimbursements.

(ii) FMLA requires that an employee on FMLA leave have the right to revoke or change elections (because of events described in § 1.125–4) under the same

terms and conditions that apply to employees participating in the cafeteria plan who are not on FMLA leave. Thus, for example, if a group health plan offers an annual open enrollment period to active employees, then, under FMLA, an employee on FMLA leave when the open enrollment is offered must be offered the right to make election changes on the same basis as other employees. Similarly, if a group health plan decides to offer a new benefit package option and allows active employees to elect the new option, then, under FMLA, an employee on FMLA leave must be allowed to elect the new option on the same basis as other employees.

(3) The following examples illustrate the rules in this Q&A–6:

Example 1. (i) Employee B elects $1,200 worth of coverage under a calendar year health FSA provided under a cafeteria plan, with an annual premium of $1,200. Employee B is permitted to pay the $1,200 through pre-tax salary reduction amounts of $100 per month throughout the 12-month period of coverage. Employee B incurs no medical expenses prior to April 1. On April 1, B takes FMLA leave after making three months of contributions totaling $300 (3 months × $100 = $300). Employee B's coverage ceases during the FMLA leave. Consequently, B makes no premium payments for the months of April, May, and June, and B is not entitled to submit claims or receive reimbursements for expenses incurred during this period. Employee B returns from FMLA leave and elects to be reinstated in the health FSA on July 1.

(ii) Employee B must be given a choice of resuming coverage at the level in effect before the FMLA leave (i.e., $1,200) and making up the unpaid premium payments ($300), or resuming health FSA coverage at a level that is reduced on a prorata basis for the period during the FMLA leave for which no premiums were paid (i.e., reduced for 3 months or 1/4 of the plan year) less prior reimbursements (i.e., $0) with premium payments due in the same monthly amount payable before the leave (i.e., $100 per month). Consequently, if B chooses to resume coverage at the level in effect before the FMLA leave, B's coverage for the remainder of the plan year would equal $1,200 and B's monthly premiums would be increased to $150 per month for the remainder of the plan year, to make up the $300 in premiums missed ($100 per month plus $50 per month ($300 divided by the remaining 6 months)). If B chooses prorated coverage, B's coverage for the remainder of the plan year would equal $900, and B would resume making premium payments of $100 per month for the remainder of the plan year.

Example 2. (i) Assume the same facts as *Example 1* except that B incurred medical expenses totaling $200 in February and obtained reimbursement of these expenses.

(ii) The results are the same as in *Example 1*, except that if B chooses to resume coverage at the level in effect before the FMLA leave, B's coverage for the remainder of the year would equal $1,000 ($1,200 reduced by $200) and the monthly payments for the remainder of the year would still equal $150. If instead B chooses prorated coverage, B's coverage for the remainder of the plan year would equal $700 ($1,200 prorated for 3 months, and then reduced by $200) and the monthly payments for the remainder of the year would still equal $100.

Example 3. (i) Assume the same facts as *Example 1* except that, prior to taking FMLA leave, B elects to continue health FSA coverage during the FMLA leave. The plan permits B (and B elects) to use the catch-up payment option described in Q&A–3 of this section, and as further permitted under the plan, B chooses to repay the $300 in missed payments on a ratable basis over the remaining 6-month period of coverage (i.e., $50 per month).

(ii) Thus, B's monthly premium payments for the remainder of the plan year will be $150 ($100 + $50).

Q–7: Are employees entitled to non-health benefits while taking FMLA leave?

A–7: FMLA does not require an employer to maintain an employee's non-health benefits (e.g., life insurance) during FMLA leave. An employee's entitlement to benefits other than group health benefits under a cafeteria plan during a period of FMLA leave is to be determined by the employer's established policy for providing such benefits when the employee is on non-FMLA leave (paid or unpaid). See 29 CFR 825.209(h). Therefore, an employee who takes FMLA leave is entitled to revoke an election of non-health benefits under a cafeteria plan to the same extent as employees taking non-FMLA leave are permitted to revoke elections of non-health benefits under a cafeteria plan. For example, election changes are permitted due to changes of status or upon enrollment for a new plan year. See § 1.125–4. However, FMLA provides that, in certain cases, an employer may continue an employee's non-health benefits under the employer's cafeteria plan while the employee is on FMLA leave in order to ensure that the employer can meet its responsibility to provide equivalent benefits to the employee upon return from unpaid FMLA. If the employer continues an employee's non-health benefits during FMLA leave, the employer is entitled to recoup the costs incurred for paying the employee's share of the premiums during the FMLA leave period. See 29 CFR 825.213(b). Such recoupment may be on a pre-tax basis. A cafeteria plan must, as required by FMLA, permit an employee whose coverage terminated while on FMLA leave (either by revocation or nonpayment of premiums) to be reinstated in the cafeteria plan on return from FMLA leave. See 29 CFR 825.214(a) and 825.215(d).

Q–8: What is the applicability date of the regulations in this section?

A–8: This section is applicable for cafeteria plan years beginning on or after January 1, 2002.

Par. 3. Section 1.125–4 is amended by adding a sentence at the end of paragraph (g) to read as follows:

§ 1.125–4 Permitted election changes.

* * * * *

(g) *Special requirements relating to the Family and Medical Leave Act.* * * * See § 1.125–3 for additional rules.

* * * * *

David A. Mader,

Acting Deputy Commissioner of Internal Revenue.

Approved: October 9, 2001.

Mark Weinberger,

Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 01–25909 Filed 10–16–01; 8:45 am]

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DEPARTMENT OF DEFENSE

National Imagery and Mapping Agency

32 CFR Part 320

[NIMA Instruction 5500.7R1]

Privacy Act; Implementation

AGENCY: National Imagery and Mapping Agency, DoD.

ACTION: Final rule.

SUMMARY: The National Imagery and Mapping Agency (NIMA) is revising its existing Privacy Act procedural and exemption rule. This rule is being adopted as final.

EFFECTIVE DATE: October 9, 2001.

FOR FURTHER INFORMATION CONTACT: Mr. Tom Willess, Associate General Counsel, at (301) 227–2953.

SUPPLEMENTARY INFORMATION: The proposed rule was previously published on August 9, 2001 at 66 FR 41811. No comments were received.

Executive Order 12866, ''Regulatory Planning and Review''.The Director of Administration and Management, Office of the Secretary of Defense, hereby determines that Privacy Act rules for the Department of Defense are not significant rules. The rules do not (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy; a sector of the economy; productivity; competition; jobs; the environment;