testing years. See §1414(r)–1(c)(3) and (d)(6). Paragraph (b) of this section explains how the requirements of section 401(a)(26) are applied separately with respect to the employees of a qualified separate line of business for purposes of testing a plan. Paragraph (c) of this section provides certain supplementary rules necessary for the application of this section.

(b) *Requirements applicable to a plan.* If the requirements of section 401(a)(26) are applied separately with respect to the employees of a qualified separate line of business for a testing year, a plan (other than a plan that is tested under the special rule for employer-wide plans in §1.414(r)–1(c)(3)(ii) for a plan year) satisfies section 401(a)(26) only if it satisfies the requirements of §§1.401(a)(26)–1 through 1.401(a)(26)–9 on a qualified-separate-line-of-business basis. For this purpose, the nonexcludable employees of the employer taken into account in testing the plan under section 401(a)(26) are determined under §1.401(a)(26)–6(b), taking into account the exclusion in §1.401(a)(26)–6(b)(8) for employees of other qualified separate lines of business of the employer. Thus, in testing a plan separately with respect to the employees of one qualified separate line of business under this paragraph (b), all employees of the employer's other qualified separate lines of business are treated as excludable employees.

(c) *Supplementary rules*—(1) *In general.* This paragraph (c) provides certain supplementary rules necessary for the application of this section.

(2) *Definition of plan.* For purposes of this section, the term *plan* mean a plan within the meaning of §1.401(a)(26)–2(c) and (d), including the mandatory disaggregation rule of §1.401(a)(26)–2(d)(6) for portions of a plan that benefit employees of different qualified separate lines of business. Thus, for purposes of this section, the portion of a plan that benefits employees of one qualified separate line of business is treated as a separate plan from the other portions of the same plan that benefit employees of other qualified separate lines of business of the employer, unless the plan is tested under the special rule for employer-wide plans in §1.414(r)–1(c)(3)(ii) for the plan year.

(3) *Employees of a qualified separate line of business.* For purposes of applying paragraph (b)(2) of this section with respect to a section 401(a)(26) testing day, the employees of each qualified separate line of business of the employer are determined by applying §1.414(r)–7 to the employees of the employer otherwise taken into account under section 401(a)(26) for the section 401(a)(26) testing day. For the definition of *section 401(a)(26) testing day*, see §1.414(r)–11(b)(8).

(4) *Consequences of failure.* If a plan fails to satisfy paragraph (b)(2) of this section, the plan (and any plan of which it constitutes a portion) fails to satisfy section 401(a). However, this failure alone would not cause the employer to fail to be treated as operating qualified separate lines of business in accordance with §1.414(r)–1(b), unless the employer is relying on benefits provided under the plan to satisfy the minimum benefit portion of the safe harbor in §1.414(r)–5(g)(2) with respect to at least one of its qualified separate lines of business.

[T.D. 8376, 56 FR 63459, Dec. 4, 1991]

§1.414(r)–10 Separate application of section 129(d)(8). [Reserved]

§1.414(r)–11 Definitions and special rules.

(a) *In general.* This section contains certain definitions and special rules applicable under these regulations. Paragraph (b) of this section provides certain definitions that apply for purposes of these regulations. Paragraph (c) of this section provides averaging rules under which certain provisions of these regulations may be applied on the basis of a two-year or a three-year average.

(b) *Definitions*—(1) *In general.* In applying the provisions of this section and of §§1.414(r)–1 through 1.414(r)–10, unless otherwise provided, the definitions in this paragraph (b) govern in addition to the definitions in §1.410(b)–9.

(2) *Substantial-service employee.* An employee is a substantial-service employee with respect to a line of business for a testing year if at least 75 percent of the employee's services are provided to that line of business for that testing year within the meaning of §1.414(r)–3(c)(5). In addition, if an employee provides at least 50% and less than 75% of the employee's services to a line of business for the testing year within the meaning of §1.414(r)–3(c)(5), the employer may treat that employee as a substantial-service employee with respect to that line of business provided the employee is so treated for all purposes of these regulations. The employer may choose such treatment separately with respect to each employee.

(3) *Top-paid employee.* Generally, an employee is a top-paid employee with respect to a line of business for a testing year if the employee is among the top 10 percent by compensation of those employees who provide services to that line of business for that testing year within the meaning of §1.414(r)–3(c)(5) and who are not substantial-service employees within the meaning of paragraph (b)(2) of this section with respect to any other line of business. In addition, in determining the group of top-paid employees, the employer may choose to disregard all employees who provide less than 25 percent of their services to the line of business. For purposes of this paragraph (b)(3), an employee's compensation is the compensation used to determine the employee's status as a highly or nonhighly compensated employee under section 414(q) for purposes of applying section 410(b) with respect to the first testing day. For this purpose, only compensation received during the determination year (within the meaning of §1.414(q)–1T, Q&A–13) is taken into account. See §1.414(r)–3(c)(7) for examples of the determination of top-paid employee.

(4) *Residual shared employee.* An employee is a residual shared employee for a testing year if the employee is not a substantial-service employee with respect to any line of business for the testing year.

(5) *Testing year.* The term *testing year* means the calendar year.

(6) *Testing day.* The term *testing day* means any day on which §1.410(b)–8(a)(1) requires any plan (within the meaning of §1.414(r)–8(d)(2)) of the employer actually to satisfy section 410(b) with respect to plan year that begins in the testing year. Thus, if a plan is required to satisfy section 410(b) on one day within each quarter of the plan year under the quarterly testing option of §1.410(b)–8(a)(3), each of those four days is a testing day. Similarly, if a plan is required to satisfy section 410(b) on every day of the plan year under the daily testing option of §1.410(b)–8(a)(2), every day of the plan year is a testing day.

(7) *First testing day.* The term *first testing day* means the testing day that occurs earliest in time of all the testing days under all plans of the employer with respect to the testing year. If a plan is tested under the annual testing option of §1.410(b)–8(a)(4) (other than for purposes of the average benefit percentage test of §1.410(b)–5) for a plan year that begins in a testing year, then, solely for purposes of determining the first testing day in a testing year, the employer may treat any day in the plan year as a testing day, provided that the coverage of each plan of the employer on the day selected is reasonably representative of the coverage of the plan over the entire plan year. The first testing day with respect to a testing year must fall within that testing year.

(8) *Section 401(a)(26) testing day.* The term *section 401(a)(26) testing day* means any day on which §1.401(a)(26)–7(a) or (b) requires any plan of the employer actually to satisfy section 401(a)(26) with respect to a plan year that begins in the testing year. In no event may a section 401(a)(26) testing day with respect to a testing year fall before the first testing day for that testing year. For purposes of this paragraph (b)(8), the term *plan* has the same meaning as in §1.414(r–9(c)(2).

(c) *Averaging rules*—(1) *In general.* The provisions specified in this paragraph (c) are permitted to be applied based on the average of the percentages for the current testing year and the consecutive testing years (not to exceed four consecutive testing years) immediately preceding the current testing year.

(2) *Specified provisions.* The provisions specified in this paragraph (c) are—

(i) The 90-percent separate employee workforce requirement of §1.414(r)–3(b)(4);

(ii) The 80-percent separate management requirement of §1.414(r)–3(b)(5);

(iii) The 25-percent provision-to-customers requirement of §1.414(r)–3(d)(2)(iii);

(iv) The minimum and maximum highly compensated employee percentage ratios under the statutory safe harbor of §1.414(r)–5(b)(1)(i) and (ii) (50 percent and 200 percent, respectively), but not the 10-percent exception in §1.414(r)–5(b)(4);

(v) The employee assignment percentage applied for purposes of the dominant line of business method of allocating residual shared employees under §1.414(r)–7(c)(2) and the pro-rata method for allocating residual shared employees under §1.414(r)–7(c)(3).

(3) *Averaging of large fluctuations not permitted.* A provision is not permitted to be applied based on an average determined under this paragraph (c) if the percentage for any testing year taken into account in calculating the average falls below a mimimum percentage, or exceeds a maximum percentage, by more than 10 percent (not 10 percentage points) of the respective minimum or maximum percentage. Thus, for example, the statutory safe harbor of §1.414(r)–5(b) is not permitted to be applied based on an average determined under this paragraph (c) if the percentage for any testing year taken into account in calculating the average falls below 45 percent (which is 10 percent below the 50-percent minimum) or exceeds 220 percent (which is 10 percent above the 200-percent maximum).

(4) *Consistency requirements.* A provision is permitted to be applied on an averaging basis under this paragraph (c) regardless of how any other provision is applied, except in the case of the separate employee workforce and separate management requirements of §1.414(r)–3(b)(4) and (5), which each must be applied on the same basis as the other. A provision is also permitted to be applied on an averaging basis under this paragraph (c) for a testing year, regardless of how the provision is applied for any other testing year. However, once a provision is applied on an averaging basis under this paragraph (c) for a testing year, it must be applied on the same basis to all the employer's lines of business to which the provision is applied for the testing year. The percentage for a preceding testing year may be taken into account under this paragraph (c) only if—

(i) The employer calculates the percentage for the preceding testing year in the same manner as the employer calculates the percentage for the current testing year;

(ii) The employer is treated as operating qualified separate lines of business in accordance with §1.414(r)–1(b) for the preceding testing year; and

(iii) The employer designated the same lines of business in the preceding testing year as in the current testing year.

[T.D. 8376, 56 FR 63460, Dec. 4, 1991, as amended by T.D. 8548, 59 FR 32922, June 27, 1994]

§1.414(s)–1 Definition of compensation.

(a) *Introduction*—(1) *In general.* Section 414(s) and this section provide rules for defining compensation for purposes of applying any provision that specifically refers to section 414(s) or this section. For example, section 414(s) is referred to in many of the nondiscrimination provisions applicable to pension, profit-sharing, and stock bonus plans qualified under section 401(a). In accordance with section 414(s)(1), this section defines compensation as compensation within the meaning of section 415(c)(3). It also implements the election provided in section 414(s)(2) to treat certain deferrals as compensation and exercises the authority granted to the Secretary in section 414(s)(3) to prescribe alternative nondiscriminatory definitions of compensation.

(2) *Limitations on scope of section 414(s).* Section 414(s) and this section do not apply unless a provision specifically refers to section 414(s) or this section. For example, even though a definition of compensation permitted under section 414(s) must be used in determining whether the contributions or