THE ERISA INDUSTRY COMMITTEE

1400 L Street NW, Suite 350, Washington DC 20005 (202) 789-1400 fax: (202) 789-1120 www.eric.org
Advocating the Benefit and Compensation Interests of America's Major Employers

COMMENTS OF THE ERISA INDUSTRY COMMITTEE

THE PROPOSED REGULATIONS ON § 411(d)(6) PROTECTED BENEFITS

June 22, 2004

The ERISA Industry Committee ("ERIC")[1] is pleased to submit the following comments on the proposed regulations under Internal Revenue Code § 411(d)(6). In general, § 411(d)(6) prohibits an amendment to a tax-qualified plan from reducing a participant's accrued benefit.

The proposed regulations were published in the March 24, 2004, issue of the Federal Register. 69 Fed. Reg. 13,769. The preamble to the proposed regulations states that comments on the proposed regulations must be submitted by June 22, 2004.

I. Summary of Comments

1. The proposed regulations are dense, complex, and restrictive. They are a far cry from what Congress intended when it directed the Treasury to provide relief from "significant burdens and complexities." In order to implement Congressional intent, the Treasury should clarify, simplify, and liberalize the regulations. We will be pleased to work with the Treasury and the Service to achieve this objective.

2. The Treasury should amend the regulations to permit a defined benefit plan to be amended to eliminate a lump-sum distribution option following a business acquisition and the expiration of a reasonable transition period that protects the rights of plan participants. The Treasury should revise the regulations to permit a plan to be amended to

[1] ERIC is a nonprofit association committed to the advancement of the employee retirement, health, incentive, and welfare benefit plans of America's largest employers. ERIC's members provide comprehensive retirement, health care coverage, incentive, and other economic security benefits directly to some 25 million active and retired workers and their families. ERIC has a strong interest in proposals affecting its members' ability to deliver those benefits, their costs and effectiveness, and the role of those benefits in the American economy.

eliminate an optional form of distribution that violates any law or qualification requirement, such as the regulations under IRC § 401(a)(9).

3. The proposed regulations reaffirm the simultaneous amendment rule of current law, which provides that in determining whether a participant's accrued benefit has decreased, all amendments with the same applicable amendment date (the later of the adoption date or the effective date) are treated as one amendment. Under current law, the simultaneous amendment rule applies both to the accrued benefit payable at normal retirement age and to benefits protected by § 411(b)(6)(B), such as early retirement benefits, retirement-type subsidies, and optional forms of distribution. Because the simultaneous amendment rule is part of current law, and because countless plan amendments have been adopted in reliance on the simultaneous amendment rule, the Treasury should revise the regulations to make clear that the simultaneous amendment rule applies to amendments adopted before publication of the final regulations as well as to amendments adopted thereafter.

4. The Treasury should make clear that -

    1. a qualified defined benefit plan may provide benefits that are contingent on involuntary termination of employment if the normal form of distribution for the benefit is a permitted form of distribution (such as a social security supplement or a life annuity); and

    2. if the plan gives an eligible participant the right to elect to receive the actuarial equivalent of a contingent-event life annuity benefit as a lump sum (rather than as a normal retirement age annuity or an immediate annuity), the lump-sum option is an optional form of distribution, and neither the availability of the lump-sum option nor a participant's election to receive the benefit in a lump sum prevents the benefit from being part of the participant's accrued benefit.

5. The Treasury should make clear that repeated plan amendments that provide for ad hoc increases in retirees' pension benefits do not cause automatic benefit increases to become part of each retiree's accrued benefit in the future.

II. Comments

1. <u>The proposed regulations are dense, complex, and restrictive. They are a far cry from what Congress intended when it directed the Treasury to provide relief from "significant burdens and complexities." In order to implement Congressional intent, the Treasury should clarify, simplify, and liberalize the regulations. We will be pleased to work with the Treasury and the Service to achieve this objective</u>.

Section 645(b)(1) of the Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA") amended Code § 411(d)(6)(B) to direct the Treasury to issue regulations providing that § 411(d)(6)(B) does not apply to an amendment that reduces or eliminates benefits or subsidies that create significant burdens or complexities for the plan and plan participants except where the amendment adversely affects participants in more than a de minimis manner.

Although the proposed regulations seek to comply with Congress's directive, they fail to provide the relief envisioned by Congress. Far from providing relief from the "significant burdens and complexities" that concerned Congress, the proposed regulations are dense, complex, and restrictive. They are thus a far cry from what Congress intended when it directed the Treasury to provide relief from "significant burdens and complexities." In order to implement Congressional intent, the Treasury should clarify, simplify, and liberalize the regulations. We recognize that this is easier said than done, and we will be pleased to work with the Treasury and the Service to achieve this objective.

The following examples illustrate the complexity, restrictiveness, and ambiguity of the proposed regulations. We emphasize that the examples are illustrative rather than comprehensive.

- **Updating assumptions:** The proposed regulations provide no relief to employers that wish to maintain their plans' optional forms of benefit, but wish to update the interest and mortality assumptions used to determine the amounts payable under the optional forms. The proposed regulations should be modified to provide relief for amendments that update plan assumptions.

- **2% of subsidy restriction:** The first prong of the proposed regulations' test for a de minimis difference in actuarial present value is satisfied if the present value of the eliminated form of benefit does not exceed the present value of the retained form by more than 2% *of the retirement-type subsidy* under the eliminated optional form. The 2% of subsidy restriction is so severe that it is virtually impossible to eliminate optional forms for terminated vested participants. An amendment should be treated as de minimis if the difference does not exceed 2% of the present value *of the eliminated optional form*.

- **1% of compensation restriction:** The second prong of the proposed regulations' test for a de minimis difference in actuarial present value is satisfied if the present value of the eliminated form of benefit does not exceed the present value of the retained form by more than 1% of the participant's *prior year compensation* (as determined under IRC § 415(c)(3)). This restriction fails to take into account the situations of terminated vested participants, participants on leaves of absence or reduced hours, and participants who are being credited with imputed service. The regulations should be modified to address these situations (*e.g.*, by allowing the use of alternative definitions of compensation).

- **Social security leveling features:** The proposed regulations fail to provide relief for amendments that eliminate social security leveling features. The regulations should be modified to provide such relief.[2]

[2] At the very least, relief should be provided if the plan offers a lump-sum distribution alternative.

- **Joint and contingent options with less than 50% continuation percentages:** The proposed regulations protect joint and contingent options with continuation percentages of less than 50%. The regulations should be modified to allow amendments that eliminate such options as long as the plan offers a comparable option with a continuation percentage of at least 50%.

- **Benefit formula variations as separate optional forms:** Proposed § 1.411(d)-3(f)(4)(ii) provides that different optional forms of benefit exist if a distribution alternative is not payable on substantially the same terms as another distribution alternative and that the relevant terms include all terms affecting the value of the optional form, "such as the method of benefit calculation." By contrast, existing regulations § 1.411(d)-4, A-1(b)(1), in defining optional form of benefit, refers (generally, for post-1994 years) to § 1.401(a)(4)-4(e)(1), which provides that a distribution alternative under a defined benefit plan does not fail to be a single optional form of benefit merely because of differences in the benefit formulas, accrual methods, or other factors underlying the accrued benefit. It is not clear why the standards under the -3 and -4 regulations should differ or whether a difference was intended. The discrepancy should be resolved in favor of the provision in § 1.411(d)-4.

- **De minimis changes in timing:** Proposed § 1.411(d)-3(e)(4) provides that annuity starting dates are substantially the same if they are within six months of each other. By contrast, existing regulations § 1.411(d)-4, A-2(b)(2)(ix), establishes a two-month rule (for post-termination distributions) and a six-month rule (for in-service distributions). Again, it is not clear why there should be different standards under the -3 and -4 regulations or whether a difference was intended.

- **Elimination of joint and survivor annuity forms:** The proposed regulations would place joint and survivor annuity in two families: the 50% or more joint and contingent family and the below 50**%** joint and contingent family. Under the proposed regulations, with 90 days advance notice, a plan may eliminate all but one joint and survivor annuity from each family. By contrast, existing regulations § 1.411(d)-4, A-2(b)(2)(ii), provides that all but the smallest and largest joint and survivor annuities may be eliminated and does not specify an advance notice requirement. The proposed regulations fail to make clear the relationship between these two related, but somewhat different, rules.

- **Unavailability of actuarial equivalency factors:** Proposed § 1.411(d)-3(e)(2)(ii) provides that if a plan amendment merely substitutes one set of actuarial factors for another, without any reduction in the number of different actuarial factors, the amendment does not satisfy the requirement that the amendment eliminates protected benefits that create significant burdens or complexities for the plan. The proposed regulations fail to take into account situations where the actuarial factors are no longer available (such as where the factors are determined by reference to an external standard -- for example,

an index or insurance contract -- that no longer exists). A plan should be permitted to substitute alternative factors in such situations.

- **Timing of § 204(h) notice for an amendment with a delayed effective date:** The proposed regulations do not clearly identify the "effective date," for purposes of the § 204(h) notice requirement, in the case of an amendment with a delayed effective date. Proposed § 54.4980F-1, A-8(c), provides that in determining whether an amendment provides for a significant reduction with respect to an amendment that reduces a retirement-type subsidy as permitted by § 1.411(d)-3(e)(6), the amendment is treated in the same way as an amendment that limits the retirement-type subsidy to benefits that accrue before the applicable amendment date -- which is defined by proposed § 1.411(d)-3(f)(2) as the later of the adoption date or the effective date of the amendment. However, the proposed regulations do not make clear what the "effective date" is where an amendment becomes applicable as of one date, but applies to benefits accruing after an earlier date. *Example 3* indicates that the latter date was intended, but the regulations should make this point more explicitly.

2. <u>The Treasury should amend the regulations to permit a defined benefit plan to be amended to eliminate a lump-sum distribution option following a business acquisition and the expiration of a reasonable transition period that protects the rights of plan participants</u>.

Major employers commonly engage in mergers and acquisitions. In many cases, the plans of the acquired company reflect a benefits policy that is inconsistent with the acquiring company's benefits policy. The anti-cutback rule often prevents the acquiring company from conforming the acquired company's defined benefit plans to the acquiring company's benefits policy.

This is a particularly acute problem where the acquiring company believes it is inappropriate for a defined benefit plan to pay lump sums (other than mandatory lump-sum cash outs of small benefit amounts). Under current law, if the acquired company's defined benefit plan offers a lump-sum option, the acquirer's only alternatives are to continue to allow lump-sum distributions under the acquired company's plan -- contrary to the acquirer's benefits policy -- or to freeze the portion of the participants' accrued benefit that can be paid in a lump sum. The former option creates two classes of employees and undermines the acquirer's benefits policy. The latter option is difficult to communicate and administer, and decades will pass before the lump-sum option is fully phased out of the acquired company's plan.

We ask the Treasury to consider two alternative solutions to this problem. The first is to allow the acquirer to freeze the accrued benefit that can be paid in a lump sum and, after an appropriate transition period expires, to eliminate the lump-sum option entirely. The second alternative is to allow the acquirer to amend the plan to provide that, effective at the end of an appropriate transition period, the lump-sum option will no longer be available (although it

will continue to be available -- even with respect to newly accrued benefits -- throughout the transition period). The object is to give ample opportunity for participants at or near to retirement age to take lump sums, but to avoid putting the plan in a position in which it must retain the lump-sum option for an inordinate period of time.[3]

3. The Treasury should revise the regulations to permit a plan to be amended to eliminate an optional form of distribution that violates any law or qualification requirement, such as the regulations under IRC § 401(a)(9).

A change in the law, or in administrative interpretation or application of the law, might cause some of a plan's optional forms of distribution to be regarded as unlawful or inconsistent with the plan's tax qualification.[4] The Treasury should revise the regulations to make clear that an amendment that eliminates an optional form that is inconsistent with the law or the Code's qualification requirements does not violate the anti-cutback rule. The legislative history of the anti-cutback rule makes it clear that this is what Congress intended:

> "Under the bill, to the extent provided by Treasury regulations, a benefit option may be eliminated with respect to benefits accrued before the date the amendment is adopted. The committee expects that, for example, the elimination of an option with respect to previously accrued benefits is not to be prohibited by a plan amendment to the extent the elimination of the option is required as a condition of meeting the standards for qualified status of the plan." S. Rep. No. 575, 98th Cong., 2d Sess. 30 (1984).

4. The proposed regulations reaffirm the simultaneous amendment rule of current law, which provides that in determining whether a participant's accrued benefit has decreased, all amendments with the same applicable amendment date (the later of the adoption date or the effective date) are treated as one amendment. Under current law, the simultaneous amendment rule applies both to the accrued benefit payable at normal retirement age and to benefits protected by § 411(b)(6)(B), such as early retirement benefits, retirement-type subsidies, and other optional forms of benefit. Because the simultaneous amendment rule is part of current law,

---

[3] If necessary, these proposals could be modified to protect the interests of deferred vested participants (who might not be eligible to receive lump sums during the transition period) and the interests of retirees (who might be eligible to elect lump sums during the transition period, but who might wish to defer taking their lump sums until a later date permitted by the plan). In addition, if the Treasury and the Service consider it necessary to protect the interests of participant who are concerned about the possibility of premature death, the proposal could apply only where the plan offers a suitable alternative distribution option (*e.g.,* a life annuity or a joint and survivor annuity with a term certain guarantee feature).

[4] *See, e.g.,* Treas. Reg. § 1.401(a)(9)-6, A-14 (permitting increases in annuity payments only in very limited circumstances).

and because countless plan amendments have been adopted in reliance on the simultaneous amendment rule, the Treasury should revise the regulations to make clear that the simultaneous amendment rule applies to amendments adopted before publication of the final regulations as well as to amendments adopted thereafter.

As proposed, all of the changes to Treas. Reg. § 1.411(d)-3 apply only to plan amendments adopted on or after the date the final regulations are published in the Federal Register.

While prospective application is appropriate for the provisions of the regulations that create new exceptions to the anti-cutback rule, prospective application is inappropriate for the provisions that merely restate existing law.

The final two sentences of IRC § 411(d)(6)(B) direct the Secretary to issue regulations exempting certain plan amendments from the anti-cutback rule. Specifically, the Secretary (a) is required to issue regulations under which the anti-cutback rule will not apply to "any plan amendment which reduces or eliminates benefits or subsidies which create significant burdens or complexities for the plan and plan participants, unless such amendment adversely affects the rights of any participant in a more than de minimis manner," and (b) is permitted to issue regulations that exempt from the anti-cutback rule an amendment that eliminates any optional form of benefit if the amendment does not also have the effect of eliminating or reducing an early retirement benefit or a retirement-type subsidy.

When the Secretary acts on this authority to create exceptions to the anti-cutback rule, a new rule is created, and it is appropriate to apply the new rule prospectively. When, however, the Secretary merely restates existing law, no new rule is created, and it is inappropriate to limit application of the restatement to amendments adopted after the proposed regulations are finalized.

The proposed regulations' application of Treas. Reg. § 1.411(d)-3(b) to early retirement benefits, retirement-type subsidies, and optional forms of benefit is merely a restatement of the existing law and should apply retroactively as well as prospectively. The proposed regulations are based on the current provisions of Treas. Reg. § 1.411(d)-3(b) and Code § 411(d)(1)(B). Treas. Reg. § 1.411(d)-3(b) currently states that the cumulative effect of all "provisions of a plan affecting directly or indirectly the computation of accrued benefits which are amended with the same adoption and effective dates" must be considered as a single amendment when applying the anti-cutback rule and specifically includes "actuarial factors for determining optional or early retirement benefits" as an example:

> "For purposes of determining whether or not any participant's accrued benefit is decreased, all of the provisions of the plan affecting directly or indirectly the computation of accrued benefits which are amended with the same adoption and effective dates shall be treated as one plan amendment. Plan provisions indirectly affecting accrued benefits include, for example, provisions relating to years of service and breaks in service for determining benefit accrual, and to **actuarial factors for determining optional or early retirement benefits**" (emphasis added).

The Service emphasized this point in Revenue Ruling 81-12:

> "Section 1.411(d)-3(b) of the regulations states that for purposes of determining whether or not any participant's accrued benefit is decreased, all the provisions of a plan affecting directly or indirectly the computation of the accrued benefit which are amended with the same adoption and effective dates shall be treated as one plan amendment. That section further states that plan provisions indirectly affecting a participant's accrued benefit include **actuarial factors for determining optional or early retirement benefits**." 1981-1 C.B. 128, 229 (emphasis added).

In 1984, Code § 411(d)(6)(B) was enacted as part of the Retirement Equity Act of 1984 to provide that early retirement benefits, retirement-type subsidies, and optional forms of benefit were part of the accrued benefit for purposes of the anti-cutback rule. Surely after the enactment of § 411(d)(6)(B), there should have been no doubt that provisions relating to early retirement benefits, retirement-type subsidies, and optional forms of benefit were covered by the simultaneous amendment rule.[5]

For over two decades, employers have justifiably relied on the simultaneous amendment rule in designing a wide array of plan amendments affecting participants' early retirement benefits, retirement-type subsidies, and optional forms of benefit. In many cases, one provision of an amendment that, in isolation, reduced a participant's benefit has been completely offset, or more than offset, by other provisions of a simultaneous amendment that **increased** the participant's benefit. In these circumstances, employers have reasonably concluded, based on the simultaneous amendment rule, that because the net effect of the amendments was to increase (or not to reduce) any participant's accrued benefit, the amendments did not violate the anti-cutback rule.[6]

To even suggest that the simultaneous amendment rule does not already apply to early retirement benefits, retirement-type subsidies, and other optional forms of benefit would unjustifiably put employers in jeopardy by subjecting them to potential ERISA liability and their plans to potential disqualification. The Treasury should not pull the rug out from under employers by issuing regulations suggesting that the simultaneous amendment rule did not apply in the past to early retirement benefits, retirement-type subsidies, and optional forms of benefit.

---

[5] *See Central Laborers' Pension Fund v. Heinz*, 541 U.S. ___ (June 7, 2004), slip op. at p. 4 ("After some initial questions about whether the provision addressed early retirement benefits, . . . a 1984 amendment made it clear that it does. Retirement Equity Act of 1984, § 301(a)(2), 98 Stat. 1451.").

[6] Cf. id. at pp. 4 - 5 ("Hence the question here: did the 1998 amendment to the Plan have the effect of 'eliminating or reducing an early retirement benefit' that was earned by service before the amendment was passed? . . . We simply do not see how, in any practical sense, this change of terms could not be viewed as shrinking the value of Heinz's pension rights and reducing his promised benefits.").

As the Treasury recognized in the preamble to the proposed regulations, the proposed regulations' application of the anti-cutback rule is contrary to the analysis adopted by the court in *Michael v. Riverside Cement Co. Pension Plan*, 266 F.3d 1023, 1027-29 (9th Cir. 2001), which declined to apply the simultaneous amendment rule. *See* 69 Fed. Reg. 13,770 n.3. In the preamble to the final regulations, the Treasury should make clear that it disagrees with the way the court applied the anti-cutback rule in that case.

5. The Treasury should make clear that -

    1. a qualified defined benefit plan may provide benefits that are contingent on involuntary termination of employment if the normal form of distribution for the benefit is a permitted form of distribution (such as a social security supplement or a life annuity); and

    2. if the plan gives an eligible participant the right to elect to receive the actuarial equivalent of a contingent-event life annuity benefit as a lump sum (rather than as a normal retirement age annuity or an immediate annuity), the lump-sum option is an optional form of distribution, and neither the availability of the lump-sum option nor a participant's election to receive the benefit in a lump sum prevents the benefit from being part of the participant's accrued benefit.

In the preamble to the proposed regulations, the Treasury asked for comments on a series of issues, including the following:

> "• How to determine whether a benefit, including a contingent-event benefit, continues after retirement (or retirement age);
>
> "• The extent to which plant-shutdown benefits that do not continue after retirement age are permitted to be provided in a qualified plan (*e.g.*, whether such benefits are limited to payments payable before the plan's earliest retirement age or are the benefits limited to amounts that are less than the expected social security benefit or, alternatively, the normal retirement benefit); and
>
> "• What other benefits (*e.g.*, involuntary termination benefits) that do not continue after retirement age and which are similar to the benefits listed as ancillary in the legislative history should be considered ancillary and should be permitted to be provided in a qualified plan."

Treas. Reg. § 1.401-1(b)(1)(i) provides that a qualified pension plan may not provide for the payment of benefits not customarily included in a qualified pension plan, such as layoff benefits or benefits for sickness, accident, hospitalization, or medical expenses, except as described in § 401(h). The Service has explained that this rule is based on the requirement that a pension plan may generally not distribute employer-provided benefits until the participant has terminated employment:

> "Contingencies such as layoff, sickness, and accident generally do not involve a termination of employment, and payments for such contingencies from a qualified pension plan are prohibited by section 1.401-1(b)(1)(i) of the regulations."[7]

By contrast, numerous authorities make clear that a qualified pension plan may provide either ancillary benefits[8] or enhanced pension benefits[9] in connection with plant closings and voluntary and involuntary exit programs involving termination of employment.[10] Based on these authorities, it is clear under current law that a qualified pension plan may provide benefits that are contingent on voluntary or involuntary termination of employment if the normal form of distribution for the benefit is a permitted form of distribution, such as a social security supplement or a life annuity.

---

[7] Rev. Rul. 74-254, 1974-1 C.B. 91; GCM 35635 (Jan. 25, 1974) ("Contingencies such as layoff, sickness, and accident do not involve a termination of employment, and the benefit payments from a pension plan for such contingencies are proscribed by Treas. Reg. § 1.401-1(b)(1)(i). We believe a plan that provides for payment of an annuity or lump sum distribution from employer contributions or increments thereon when an employee ceases his plan participation, but continues his same employment, is analogous to a plan that provides payments for contingencies such as those proscribed by the regulations, and, therefore does not qualify under Code § 401(a)."); *see also* Treas. Reg. § 1.410(a)-7(b)(2) (severance from service date occurs on earlier of (i) date employee quits, retires, is discharged, or dies or (ii) first anniversary of absence for any other reason, such as layoff); Rev. Rul. 78-198, 1978-1 C.B. 117 ("temporary periods of layoff"). By contrast, the regulations permit qualified profit-sharing plans to make distributions in the event of "layoff" **or** "severance of employment," indicating that a "layoff" differs from a "severance of employment." *See* Treas. Reg. § 1.401-1(b)(1)(ii); GCM 35635, *supra*.

[8] *See, e.g.,* Code § 411(a)(9) (social security supplements); Treas. Reg. § 1.401(a)(4)-4(e)(2) (ancillary benefits include social security supplements), § 1.411(a)-7(c)(4) (social security supplements); S. Rep. No. 575, *supra*, at 30 (social security supplement); GCM 39896 (April 6, 1992) (social security supplements) .

[9] *See, e.g.*, Treas. Reg. § 1.401(a)(4)-3(f)(4) (amounts testing for early retirement window programs); Rev. Rul. 92-66, 1992-2 C.B. 92 (repeated plan amendments offering early retirement window benefits); GCM 39896, *supra* (retirement-type benefits).

[10] *See, e.g.,* Code § 412(*l*)(7)(B)(ii) (funding requirements for unpredictable contingent event benefits); ADEA § 4(*l*)(2)(A)(ii), 29 U.S.C. § 623(*l*)(2)(A)(ii) (permitting a deduction from severance pay for the value of any additional pension benefits made available solely because of a contingent event unrelated to age); Treas. Reg. § 1.401(a)(4)-3(f)(5) (amounts testing for unpredictable contingent event benefits), § 1.401(a)(4)-4(d)(7) (benefits, rights, and features that are contingent on the occurrence of an unpredictable contingent event); S. Rep. No. 63, 100th Cong., 1st Sess. 171-72 (1987) (unpredictable contingent event benefits include events like facility shutdowns or reductions or contractions in the workforce); H.R. Rep. No. 391, 100th Cong., 1st Sess. 987 (1987) (same); S. Rep. No. 575, *supra,* at 30 (shutdown benefits that continue after retirement age are retirement-type subsidies); GCM 39896, *supra* (shutdown benefits may be provided by a qualified pension plan if they are provided as an ancillary benefit or as a retirement-type benefit); *cf.* GCM 35635, *supra* (no distinction should be drawn between voluntary and involuntary programs).

For example, Treas. Reg. § 1.401(a)(4)-3(f)(4) prescribes special nondiscrimination testing rules for early retirement window programs that award additional retirement-type benefits to employees who terminate during a window period. Likewise, GCM 39869 makes clear that a qualified pension plan may provide shutdown benefits in the form of a retirement-type benefit or in the form of an ancillary benefit such as a social security supplement.

Many pension plans, including both money purchase pension plans and defined benefit pension plans, have routinely distributed lump-sum benefits to participants who have terminated employment for a great many years. Many of these lump-sum benefits have included benefits attributable to voluntary and involuntary window programs.

It is clear that a qualified pension plan may allow a participant to elect to receive a contingent-event life annuity as a lump sum rather than as an immediate or deferred life annuity. In these circumstances, the lump sum is an optional form of distribution, and neither the availability of the lump sum nor a participant's election to receive the benefit in a lump sum prevents the benefit from being part of the participant's accrued benefit. Indeed, § 411(d)(6) makes clear that a lump-sum distribution option is a part of a participant's accrued benefit for purposes of the anti-cutback rule.

Sections 411(a)(11) and 417(e) expressly permit a plan to allow participants to elect to receive their benefits in a lump sum, as long as the plan meets specified election and valuation requirements. Section 411(d)(6)(B) explicitly recognizes that a plan may provide *both* an early retirement benefit *and* optional forms of benefit. Section 402 deliberately encourages the payment of lump sums by allowing lump sums (but not annuity payments) to be rolled over tax-free.[11] None of these provisions contains the slightest suggestion that a plan could jeopardize its tax qualification by offering a lump-sum option as an alternative to the plan's normal form of payment.

The Treasury should not issue any regulation or other guidance that casts doubt on the ability of a qualified defined benefit plan to pay the actuarial equivalent of a contingent life-annuity benefit in a lump sum.

6. <u>The Treasury should make clear that repeated plan amendments that provide for ad hoc increases in retirees' pension benefits do not cause automatic benefit increases to become part of each retiree's accrued benefit in the future</u>.

The current regulations under § 411(d)(6) provide that -

> "if an employer establishes a pattern of repeated plan amendments providing for similar benefits in similar situations for substantially consecutive, limited periods of time, such benefits will be treated as provided under the terms of the plan, without regard to the limited periods of time, to the extent necessary to carry out the purposes of section 411(d)(6) and, where applicable, the definitely determinable requirement

[11] Congress has also prescribed, from time to time, favorable income tax rules for lump-sum distributions, including capital gain treatment and income averaging.

> of section 401(a), including section 401(a)(25). A pattern of repeated plan amendments providing that a particular optional form of benefit is available to certain named employees for a limited period of time is within the scope of this rule and may result in such optional form of benefit being treated as provided under the terms of the plan to all employees covered under the plan without regard to the limited period of time and the limited group of named employees." Treas. Reg. § 1.411(d)-4, Q&A-1(c)(1).

The Treasury should make clear that the repeated plan amendment rule does not apply to occasional ad hoc increases in retirees' pension benefits. We are concerned that even a remote possibility that the repeated plan amendment rule might apply is discouraging some employers from amending their plans to provide for ad hoc pension increases and is encouraging others to delay ad hoc increases -- to the detriment of retirees and their families.

Occasional plan amendments providing for ad hoc benefit increases are not the kind of amendment described by the regulation: they are not available for "limited periods of time," and they are provided occasionally (for example, once every three or four years or so), but not for "substantially consecutive" periods of time. Moreover, unlike the optional forms of benefit referred to in the regulations (or the early retirement incentive benefits referred to in Rev. Rul. 92-66, *supra*), ad hoc benefit increases are not made available only to those who elect to take advantage of them: each ad hoc increase permanently increases the benefits of every retiree to whom the increase applies. Finally, Rev. Rul. 92-66, *supra*, indicates that the repeated plan amendment rule applies only if the plan amendments give rise to a reasonable expectation that the benefit is "an ongoing feature of the plan." We are not aware of any instance in which a history of plan amendments providing for ad hoc benefit increases would have created any such reasonable expectation.

We appreciate the opportunity to submit these comments. We reserve the right to supplement these comments as our members accumulate greater experience in working with the proposed regulations.

If the Treasury or the Service has any questions about our comments, or if we can otherwise be of assistance, please let us know.

THE ERISA INDUSTRY COMMITTEE