

DEPARTMENT OF THE TREASURY**Internal Revenue Service****26 CFR Parts 1 and 54**

[TD 9219]

RIN 1545-BC26

Section 411(d)(6) Protected Benefits**AGENCY:** Internal Revenue Service (IRS), Treasury.**ACTION:** Final regulation.

SUMMARY: This document contains final regulations providing guidance regarding the anti-cutback rules of section 411(d)(6) of the Internal Revenue Code, which generally protect accrued benefits, early retirement benefits, retirement-type subsidies, and optional forms of benefit under qualified retirement plans. The regulations address the limited circumstances under which a qualified retirement plan is permitted to be amended to eliminate or reduce early retirement benefits, retirement-type subsidies, or optional forms of benefit.

The final regulations also provide related guidance concerning the notice requirements of section 4980F. These final regulations generally affect sponsors of, and participants in, qualified retirement plans.

DATES: *Effective date:* These regulations are effective on August 12, 2005.

Applicability date: For dates of applicability of these regulations, see § 1.411(d)-3(j) of these regulations.

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SUPPLEMENTARY INFORMATION:**Background**

This document contains amendments to 26 CFR parts 1 and 54 under sections 411(d)(6) and 4980F of the Internal Revenue Code (Code). This Treasury Decision amends § 1.411(d)3 of the Treasury regulations to reflect changes to section 411(d)(6) made by the Economic Growth and Tax Relief Reconciliation Act of 2001, Public Law 107-16 (155 Stat. 38) (EGTRRA). In addition, this Treasury Decision

includes rules relating to changes to section 411(d)(6) made by the Retirement Equity Act of 1984, Public Law 98-397 (98 Stat. 1426) (REA) and makes conforming amendments to § 1.411(d)-4. This Treasury Decision also amends § 54.4980F-1(b), relating to the notice requirement for certain plan amendments that eliminate or significantly reduce early retirement benefits or retirement-type subsidies.

Section 401(a)(7) provides that a trust does not constitute a qualified trust unless its related plan satisfies the requirements of section 411 (relating to minimum vesting standards). Section 411(d)(6)(A) provides that a plan is treated as not satisfying the requirements of section 411 if the accrued benefit of a participant is decreased by an amendment of the plan, other than an amendment described in section 412(c)(8) of the Code or section 4281 of the Employee Retirement Income Security Act of 1974 (ERISA), as amended.

Section 411(a)(7)(A) defines the term *accrued benefit*. For a defined contribution plan, a participant's accrued benefit is the balance of the participant's account. For a defined benefit plan, a participant's accrued benefit is the participant's benefit under the terms of the plan expressed in the form of an annual benefit commencing at normal retirement age. Under section 411(c)(3), if a participant's accrued benefit under a defined benefit plan is to be determined as an amount other than an annual benefit commencing at normal retirement age, the participant's accrued benefit is the actuarial equivalent of such benefit.

Section 301(a) of REA amended Code section 411(d)(6) to add subparagraph (B), which provides that a plan amendment that has the effect of eliminating or reducing an early retirement benefit or a retirement-type subsidy, or eliminating an optional form of benefit, with respect to benefits attributable to service before the amendment is treated as impermissibly reducing accrued benefits. For a retirement-type subsidy, this protection applies only with respect to an employee who satisfies the preamendment conditions for the subsidy (either before or after the amendment). Section 411(d)(6)(B) also authorizes the Secretary of the Treasury to provide, through regulations, that section 411(d)(6)(B) does not apply to any plan amendment that eliminates optional forms of benefit (other than a plan amendment that has the effect of eliminating or reducing an early retirement benefit or a retirement-type subsidy).

On July 11, 1988, final regulations (TD 8212) under section 411(d)(6) were published in the **Federal Register** (53 FR 26050) (the 1988 regulations). Under those regulations, section 411(d)(6) protects certain benefits, to the extent they have accrued, so that such benefits cannot be reduced or eliminated by plan amendment, except to the extent permitted by regulations (see § 1.411(d)-4, Q&A-1(a)). Section 1.411(d)-4 specifies circumstances under which a plan is permitted to be amended to reduce or eliminate an optional form of benefit.

Section 645(b)(1) of EGTRRA amended section 411(d)(6)(B) of the Code to direct the Secretary to issue regulations providing that the requirements of section 411(d)(6)(B) do not apply to any amendment that reduces or eliminates early retirement benefits or retirement-type subsidies that 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. As amended by EGTRRA, section 4980F of the Code and section 204(h) of ERISA each require that a plan administrator give notice of a plan amendment to affected plan participants and beneficiaries when the plan amendment provides for a significant reduction in the rate of future benefit accrual or the elimination or significant reduction of an early retirement benefit or a retirement-type subsidy.

Section 204(g) of ERISA contains parallel rules to Code section 411(d)(6), including a similar directive to the Secretary of the Treasury to issue regulations providing that section 204(g) does not apply to any amendment that reduces or eliminates early retirement benefits or retirement-type subsidies that 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. Under section 101 of Reorganization Plan No. 4 of 1978 (43 FR 47713) and section 204(g) of ERISA, the Secretary of the Treasury has interpretive jurisdiction over the subject matter addressed in these regulations for purposes of ERISA, as well as the Code. Thus, these final regulations issued under sections 411(d)(6) of the Code apply as well for purposes of section 204(g) of ERISA.

On March 24, 2004, proposed regulations (REG-128309-03) under sections 411(d)(6) and 4980F of the Code were published in the **Federal Register** (69 FR 13769). On June 24, 2004, the IRS held a public hearing on

the proposed regulations. Written comments responding to the notice of proposed rulemaking were also received. After consideration of all the comments, the proposed regulations are adopted, as amended by this Treasury Decision. The revisions are discussed below.

Explanation of Provisions

I. Overview

These regulations respond to the EGTRRA directive for purposes of both section 411(d)(6) of the Code and section 204(g) of ERISA by specifying the circumstances under which a plan may be amended to reduce or eliminate early retirement benefits, retirement-type subsidies, and optional forms of benefit (section 411(d)(6)(B) protected benefits). The circumstances specified in the regulations are designed to implement the statutory directive to permit reduction or elimination of section 411(d)(6)(B) protected benefits that create significant burdens or complexities for the plan and its participants, but only if the elimination does not adversely affect the rights of any participant in a more than *de minimis* manner. These provisions relating to the permissible elimination of benefits protected by section 411(d)(6)(B) are in addition to the rules permitting a plan to be amended to eliminate optional forms of benefit under § 1.411(d)-4.

These regulations provide 2 permitted methods for eliminating or reducing section 411(d)(6)(B) protected benefits under the EGTRRA directive: elimination of redundant optional forms of benefit and elimination of noncore optional forms of benefits where core options are offered. Either of these 2 alternative methods can be applied with respect to any optional form of benefit. A plan sponsor may determine that one method of elimination works for some plan participants or some optional forms of benefit, but not for the remaining plan participants or other optional forms of benefit. However, a plan must satisfy all of the requirements of the applicable method with respect to any optional form of benefit being eliminated.

These final regulations also include general guidance on section 411(d)(6), including the meaning of the terms used therein, the scope of the section 411(d)(6)(A) protection against plan amendments decreasing a participant's accrued benefit, and the scope of section 411(d)(6)(B) protection for early retirement benefits, retirement-type subsidies, and optional forms of benefit. This Treasury Decision also makes conforming amendments to § 1.411(d)-4, including amendments to the definition of optional form of benefit and the multiple amendment rule described in this preamble (under the heading *Multiple amendment rule*).

This Treasury Decision completely replaces the provisions in former § 1.411(d)-3. However, the rules in

former § 1.411(d)-3 generally have been carried over to this Treasury Decision, except to the extent needed to reflect statutory changes (such as the elimination of class-year vesting and the enactment of section 411(d)(6)(B)).

II. Scope of Section 411(d)(6) Protections

A. General Rules Under Section 411(d)(6)

These final regulations take into account and respond to judicial decisions interpreting section 411(d)(6) (or its parallel provision at section 204(g) of ERISA).¹ For example, the regulations provide that section 411(d)(6) protection applies to a participant's entire accrued benefit as of the applicable amendment date, without regard to whether the entire accrued benefit was accrued before a participant's severance from employment, or whether some portion of the accrued benefit was the result of an increase pursuant to a plan amendment adopted after the participant's severance from employment.²

The regulations generally retain the rules from former § 1.411(d)-3. Thus, for purposes of determining whether or not any participant's accrued benefit is decreased, all plan amendments affecting, directly or indirectly, the computation of accrued benefits are taken into account and, in determining whether a reduction has occurred, all plan amendments with the same applicable amendment date (the later of the adoption date or the effective date of the amendment) are treated as one amendment. The regulations also provide that these rules apply to section 411(d)(6)(B) protected benefits. Thus, for example, if there are 2 amendments with the same applicable amendment

date, one of which increases accrued benefits and the other of which decreases the early retirement factors that are used to determine the early retirement annuity, the 2 amendments are treated as one amendment and only violate section 411(d)(6) if, after the 2 amendments, the net dollar amount of any early retirement annuity, with respect to the accrued benefit of any participant as of the applicable amendment date, is lower on that applicable amendment date than it would have been without the 2 amendments.³

B. Definitions of Section 411(d)(6) Protected Benefits

The legislative history of REA provides that:

[T]he term "retirement-type subsidy" is to be defined by Treasury regulations. The committee intends that under these regulations, a subsidy that continues after retirement is generally to be considered a retirement-type subsidy. The committee expects, however, that a qualified disability benefit, a medical benefit, a social security supplement, a death benefit (including life insurance), or a plant shutdown benefit (that does not continue after retirement age) will not be considered a retirement-type subsidy. The committee expects that Treasury regulations will prevent the recharacterization of retirement-type benefits as benefits that are not protected [under section 411(d)(6)].⁴

These final regulations reflect the rules in the 1988 regulations (see § 1.411(d)-4, Q&A-1(d)) that ancillary benefits and other rights or features are not protected under section 411(d)(6). In addition, taking the REA legislative history into account, these regulations define the terms *early retirement benefit*, *retirement-type benefit*, and *retirement-type subsidy*. These definitions differ in several respects from the proposed regulations.

The definition of the term *ancillary benefit* in these regulations reflects changes from the proposed regulations regarding death benefits. Because the account balance is the accrued benefit in a defined contribution plan, the payment of the account balance upon the death of a participant is the payment of the accrued benefit rather than an ancillary benefit. Therefore, in contrast to the proposed regulations, the final regulations do not categorize a right to a death benefit under a defined contribution plan as an ancillary benefit, and this right is protected under section 411(d)(6). For a defined benefit plan, these regulations provide that a

death benefit that is not part of an optional form of benefit is an ancillary benefit and, therefore, is not protected under section 411(d)(6), even if paid after retirement. The regulations also clarify when a death benefit under a defined benefit plan is part of an optional form of benefit. The definition of *optional form of benefit* is defined in § 1.411(d)-3(g)(6)(ii) of these final regulations and in § 1.411(d)-4, Q&A-1(b)(1), which has been revised by this Treasury Decision to coordinate with the definition of *optional form of benefit* in these final regulations.

The regulations also include changes to the definitions of *ancillary benefit* and *retirement-type benefit*, relating to benefits that are not permitted to be in a qualified plan. These changes are relevant for purposes of applying section 204(g) of ERISA (the parallel rule to section 411(d)(6)), which applies to both qualified and nonqualified plans. The final regulations provide that, in addition to social security supplements, disability benefits, life insurance benefits, medical benefits under section 401(h), and certain death benefits, the only other ancillary benefits are plant shutdown benefits and other similar benefits that do not continue past retirement age, do not affect the payment of the accrued benefit, and are permitted to be in a qualified pension plan. These regulations also provide that a retirement-type benefit is either the payment of a distribution alternative with respect to an accrued benefit or the payment of any other benefit under a defined benefit plan (including a QSUPP as defined in § 1.401(a)(4)-12) that is permitted to be in a qualified pension plan, continues after retirement, and is not an ancillary benefit.

These regulations include a number of clarifications regarding section 411(d)(6)(B) protected benefits that were included in the proposed regulations with minor modifications. The regulations clarify that if, after a plan amendment, there is another optional form of benefit available to a participant under the plan that is of inherently equal or greater value, the plan amendment is not treated as eliminating an optional form of benefit, or eliminating or reducing an early retirement benefit or a retirement-type subsidy. For example, a change in the method of calculating a joint and survivor annuity from using a 90% adjustment factor on account of the survivorship payment at particular ages for a participant and a spouse to using a 91% adjustment factor at the same

¹ See *Bellas v. CBS, Inc.*, 221 F. 3d 517 (3rd Cir. 2000), cert. denied, 531 U.S. 1104 (2001) (holding early retirement benefit that is more valuable than actuarially reduced normal retirement benefit and that is payable on occurrence of unpredictable contingent event is retirement-type subsidy, and therefore is protected under section 204(g)), *Board of Trustees of the Sheet Metal Workers' National Pension Fund v. C.I.R.*, 318 F.3d 599 (4th Cir. 2003) (stating provision for automatic cost-of-living adjustments granted by plan amendment is not accrued benefit for participants who retired before effective date of amendment and, thus, holding subsequent plan amendment eliminating future adjustments did not violate anti-cutback rule of section 411(d)(6)), and *Michael v. Riverside Cement*, 266 F.3d 1023 (9th Cir. 2001) (holding plan amendment providing for actuarial offset of early retirement benefits previously received by retiree upon subsequent retirement violates ERISA section 204(g), even though net effect of amendment is increase in retirement benefit of participant).

² This is contrary to the analysis in *Board of Trustees of the Sheet Metal Workers' National Pension Fund v. C.I.R.*

³ This is contrary to the analysis in *Michael v. Riverside Cement*.

⁴ S. Rep. 98-575, at 30 (1984).

ages is treated as not eliminating an optional form of benefit.

C. Multiple Amendment Rule

Under the proposed regulations, a plan amendment would violate the requirements of section 411(d)(6) if it is one of a series of plan amendments made at different times that, when taken together, have the effect of reducing or eliminating a section 411(d)(6) protected benefit in a manner that would be prohibited under section 411(d)(6) if accomplished through a single amendment. The 1988 regulations contained a similar rule under which a plan amendment that modified an optional form of benefit with respect to benefits already accrued was evaluated in light of previous amendments (see § 1.411(d)-4, Q&A-2(c), as in effect prior to amendment by these regulations).

Commentators raised concerns about the multiple amendment rule in the proposed regulations, including its complexity and the uncertainty as to when the rule would apply. In response to these comments, this multiple amendment rule has been revised to add an objective rule that generally only combines plan amendments adopted within a 3-year period. The final regulations also retain an application of the multiple amendment rule from the proposed regulations relating to restrictions against creating burdens or complexities. Under this rule, if a plan is amended to add a retirement-type subsidy in order to eliminate another retirement-type subsidy within 3 years, the plan amendment eliminating the retirement-type subsidy will not be treated as reducing or eliminating burdens and complexities for the plan and its participants, even if the elimination of the subsidy would not adversely affect the rights of any plan participant in a more than *de minimis* manner.

These final regulations also make a conforming change to § 1.411(d)-4, Q&A-2(c), by replacing the serial amendment rule under those regulations with a revised version of the multiple amendment rule. These regulations do not modify the rule in § 1.411(d)-4, Q&A-1(c)(1), which provides 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, then those similar benefits will be treated as provided under the terms of the plan, without regard to the limited period of time, to the extent necessary to carry out the purposes of sections 411(d)(6) and, where applicable, the definitely

determinable requirement of section 401(a), including section 401(a)(25).

D. Application of Section 411(d)(6) to Certain Amendments Eliminating Impermissible Benefits

Commentators suggested that the final regulations clarify that a plan is permitted under section 411(d)(6) to eliminate an optional form of benefit that is inconsistent with the plan qualification requirements of section 401(a) (e.g., the requirements of section 401(a)(9)). In general, section 411(d)(6) does not permit the elimination or reduction of a section 411(d)(6) protected benefit solely because that benefit violates the plan qualification requirements. However, in the past, the IRS has exercised its authority to issue guidance that, in certain situations, permit certain plan amendments that eliminate or reduce certain optional forms of benefit that violate the plan qualification requirements. For example, § 1.401(a)(9)-8, Q&A-12, provides that a plan will not fail to satisfy section 411(d)(6) merely because the plan is amended to eliminate the availability of an optional form of benefit to the extent that the optional form does not satisfy section 401(a)(9).⁵

III. Elimination of Benefits of De Minimis Value Under EGTRRA

A. Elimination of Redundant Optional Forms of Benefit

These regulations generally retain the rule from the proposed regulations that a plan is permitted to be amended to eliminate an optional form of benefit for a participant with respect to benefits accrued before the applicable amendment date if the optional form of benefit is redundant with respect to a retained optional form of benefit and certain conditions are satisfied. An optional form of benefit is considered redundant with respect to a retained optional form of benefit if the retained optional form of benefit is in the same family of optional forms of benefit as the optional form of benefit being eliminated and the participant's rights with respect to the retained optional form of benefit are not subject to materially greater restrictions than those that applied to the optional form of benefit being eliminated.

These regulations also contain new terminology to facilitate the application of certain rules. Various rules in these final regulations use the term *annuity*

commencement date instead of the term *annuity starting date*, thereby accommodating the elimination of an optional form of benefit that includes a retroactive annuity starting date. The final regulations also define the term *generalized optional form*, which means a group of optional forms of benefit that are identical except for differences due to the actuarial factors that are used to determine the amount of the distributions under those optional forms of benefit and the annuity starting dates. The concept of a generalized optional form is used in several places in these regulations, including the redundancy rule and the rules concerning burdensome and *de minimis* benefits.

Under the proposed regulations, among the conditions for eliminating a section 411(d)(6)(B) protected benefit under the redundancy rule is that the plan amendment not apply to an optional form of benefit with an annuity starting date that is earlier than 90 days after the date the amendment is adopted. This 90-day waiting period is based on a rule relating to the timing for the written explanation of a qualified joint and survivor annuity under section 417(a)(3). Under that rule, the explanation cannot be provided more than 90 days before the annuity starting date. See § 1.417(e)-1(b)(3)(ii). A commentator suggested that the regulations be revised to increase the waiting period before the elimination of a redundant optional form of benefit from 90 days after the amendment is adopted to 180 days after the amendment is adopted. The commentator reasoned that this increase would give participants more time to adjust to the elimination of the optional form of benefit and, thus, participants would have more time to select from among the preamendment optional forms of benefit. The commentator also noted that proposed legislation had been introduced that would increase the number of days before the annuity starting date that a QJSA explanation can be provided (the maximum QJSA explanation period) from 90 days to 180 days.

In light of this comment, the final regulations explicitly link the waiting period before the elimination of a redundant optional form of benefit with the maximum QJSA explanation period, which is currently a 90-day period. Thus, these regulations provide that, for purposes of the redundancy rule, a plan amendment cannot be applicable with respect to an optional form of benefit with an annuity commencement date for which a written explanation relating to a QJSA would have satisfied the timing requirements of section 417(a)(3) had it

⁵ See also § 1.401(a)(9)-1, Q&A-3, providing that, notwithstanding any other plan provision, a plan is not permitted to distribute benefits under any optional form of benefit that does not satisfy section 401(a)(9).

been provided on or before the date that the amendment is adopted. This ensures that no participant will receive a QJSA explanation describing an optional form of benefit which could be eliminated before the election has been made. The waiting period before the elimination of a redundant optional form of benefit under these final regulations would change automatically if, at any future date, the maximum QJSA explanation period were to be altered.

B. Permissible Elimination of Noncore Optional Forms of Benefit Where Core Options Are Offered

The final regulations retain the rule from the proposed regulations under which a plan is permitted to be amended to eliminate an optional form of benefit for plan participants with respect to benefits accrued before the applicable amendment date if, after the amendment, the plan offers a designated set of core options to plan participants with respect to benefits accrued both before and after the amendment. The core options are defined as a straight life annuity, a 75% joint and contingent annuity, a 10-year term certain and life annuity, and the most valuable option for a participant with a short life expectancy. As under the proposed regulations, the final regulations do not permit a plan amendment to apply to optional forms of benefit with annuity commencement dates that are earlier than 4 years after the date the amendment is adopted. In addition, the final regulations retain the rule that a plan may not be amended to eliminate an optional form of benefit that includes a single-sum distribution that applies with respect to at least 25% of a participant's accrued benefit as of the date the optional form of benefit is eliminated.

Several commentators suggested that the 75% joint and contingent annuity core option be replaced with a 50% joint and contingent annuity core option. One commentator argued that if the 50% joint and contingent annuity option is not available to participants, the higher actuarial charge associated with the 75% joint and contingent annuity option might discourage participants from electing any joint and contingent annuity option. Other commentators pointed out that § 1.411(d)-4, Q&A-2(b)(2)(ii), allows a plan that provides a range of 3 or more actuarially equivalent joint and survivor annuity options to be amended to eliminate any of such options, other than the options with the largest and smallest optional survivor payment percentages (the bookends rule) and argued that the 75% joint and

contingent annuity core option rule would require plans to add back the 75% joint and contingent annuity option that was eliminated under the bookends rule. In light of these comments and to accommodate the bookends rule, the final regulations retain the 75% joint and contingent annuity as a core option, but provide a special rule that a plan is permitted to treat both the 50% and 100% joint and contingent annuity options as core options for purposes of the core options rule (in lieu of offering a 75% joint and contingent annuity) if the plan otherwise satisfies the requirements of the core options rule.

As stated above, these regulations retain in the list of core options the most valuable option for a participant with a short life expectancy. This core option is defined as the optional form of benefit that is reasonably expected to result in payments that have the largest actuarial present value in the case of a participant who dies shortly after the annuity starting date. Like the proposed regulations, these regulations provide a safe harbor method for determining which optional form of benefit under the plan is the most valuable option for a participant with a short life expectancy. Under this safe harbor method, a plan is permitted to treat a single-sum distribution option with an actuarial present value that is not less than the actuarial present value of any optional form of benefit being eliminated as the most valuable option for a participant with a short life expectancy. If a plan does not offer such a single-sum distribution option, the plan is permitted to treat a joint and contingent annuity as the most valuable option for a participant with a short life expectancy if the continuation percentage under the amendment is at least 75% and is at least as great as the highest continuation percentage available before the amendment. In the event a plan has neither a single-sum distribution option nor a joint and contingent annuity with a continuation percentage of at least 75%, the plan is permitted to treat a term certain and life annuity with a term certain period of at least 15 years as the most valuable option for a participant with a short life expectancy.

Similar rules were in the proposed regulations, and a commentator argued that the rules would overprotect single-sum distribution options by providing 2 levels of protection: first, by not treating an amendment as satisfying the core options rule if it eliminates an optional form of benefit that includes a single-sum distribution that applies with respect to at least 25% of the

participant's accrued benefit as of the date the optional form of benefit is eliminated; and, second, by providing that a plan is permitted to treat a single-sum distribution option with an actuarial present value that is not less than the actuarial present value of any optional form of benefit eliminated by the plan amendment as the most valuable option for a participant with a short life expectancy. This comment is based on the assumption that a single-sum distribution option will always be the most valuable option for a participant with a short life expectancy. However, as illustrated in an example in these regulations, a single-sum option is not always the most valuable option for a participant with a short life expectancy, e.g., where the single-sum distribution does not take into account an early retirement subsidy available in another optional form of benefit (see § 1.411(d)-3(h), *Example 4*). Accordingly, the final regulations retain the separate protection for single sum-distributions and the most valuable option for a participant with a short life expectancy. However, the final regulations clarify that the safe harbor hierarchy method for determining the most valuable option for a participant with a short life expectancy is available only if the single-sum distribution, joint and contingent annuity, or term certain and life annuity optional forms satisfy the conditions set forth in that rule at all relevant ages. Thus, when the safe harbor hierarchy rule applies, the most valuable option for a participant with a short life expectancy will be the generalized optional form for all participants.

These regulations also retain the requirement in the proposed regulations under which an amendment to eliminate an optional form of benefit under the core options rule cannot apply to an optional form of benefit with an annuity commencement date that is earlier than 4 years after the date the amendment is adopted. Several commentators argued that the waiting period before elimination of a noncore optional form of benefit be shortened, with one commentator suggesting 90 days, similar to the waiting period before the elimination of a redundant optional form of benefit. Other commentators argued that the waiting period before the elimination of a noncore optional form of benefit be increased to 5 years, similar to the 5-year cliff vesting rule. However, no commentator provided evidence that participants evaluate benefit choices over a shorter or longer period. The Treasury Department and the IRS

believe that the 4-year waiting period before elimination of a noncore optional form of benefit strikes the right balance between protecting participants' expectations about the various benefit choices in their plans in coordination with decisions relating to retirement planning, while reducing burdens on plans. Thus, the 4-year waiting period before the elimination of a noncore optional form of benefit has been retained in these regulations.

As stated earlier under the heading *Multiple amendment rule*, the final regulations provide that a plan amendment violates section 411(d)(6) if it is one of a series of plan amendments that, when taken together, have the effect of reducing or eliminating section 411(d)(6) protected benefits in a manner that would violate section 411(d)(6) if accomplished through a single amendment. These final regulations add a rule that, for purposes of the multiple amendment rule, only plan amendments made within a 3-year period are generally taken into account.

Notwithstanding this 3-year rule, the final regulations also add a rule that if a plan is amended to eliminate an optional form of benefit using the core option rule, the employer must wait 3 years after the first annuity commencement date for which the optional form of benefit is no longer available before reducing or eliminating any core options offered under the plan.

C. Elimination of Early Retirement Benefits and Retirement-Type Subsidies That Are of *de minimis* Value

The final regulations retain from the proposed regulations the additional requirements that a plan amendment must satisfy if the retained optional form of benefit or each core option offered under the plan does not have the same annuity starting date or has a lower actuarial present value than the optional form of benefit being eliminated. In such a case, the plan amendment is only permitted to reduce or eliminate a section 411(d)(6)(B) protected benefit that creates significant burdens or complexities for the plan and its participants, but only if elimination does not adversely affect the rights of any participant in more than a *de minimis* manner.

The regulations generally retain the rule in the proposed regulations which provides that a reduction in actuarial present value is of no more than a *de minimis* amount if the reduction does not exceed the greater of 2% of the present value of the retirement-type subsidy under the eliminated optional form of benefit (if any) prior to the amendment or 1% of the participant's

compensation for the prior plan year (as defined in section 415(c)(3)). Several commentators offered suggestions to change this *de minimis* value test. Some commentators suggested that the 2% threshold be increased in order to make the ability to eliminate the subsidy more meaningful. The commentators suggested an increase up to 5% of the retirement-type subsidy. In addition, other commentators argued that 2% threshold should be changed from a percentage of the retirement-type subsidy to a percentage of the eliminated optional form of benefit. Under this suggestion, the margin of difference would be permitted to be significantly greater. Other commentators argued that the 2% threshold should be lowered in order to reflect Congressional intent in the examples illustrating *de minimis* reductions in the EGTRRA conference report.⁶ These suggestions ranged from 1.5% to 1% of the retirement-type subsidy. These commentators also recommended that the 1% of compensation *de minimis* threshold be reduced. In addition, some commentators suggested that a plan amendment eliminating a retirement-type subsidy should be required to satisfy both tests, instead of the 2 tests being alternatives.

These final regulations do not adopt these suggestions. The examples in the EGTRRA conference report are explicitly expressed as examples, not rules. The percentage thresholds in the *de minimis* value test are rounded percentages based on the dollar amounts in the EGTRRA conference report, and, thus, they accurately reflect the intent of EGTRRA and the legislative history. Accordingly, the final regulations retain the percentage thresholds from the proposed regulations.

Several commentators also noted that the 1% of compensation test would have no application to terminated vested participants because terminated participants frequently have no current or prior year compensation from the employer. Other commentators argued that the 1% of compensation test does not accurately reflect all employment situations, such as those participants who may take a leave of absence or begin a reduced work schedule. In light of these comments, the regulations provide that the 1% of compensation test is applied using the greater of the participant's compensation (within the meaning of section 415(c)(3)) for the prior plan year or the participant's average compensation for his or her

high 3 years (within the meaning of section 415(b)(1)(B) and (b)(3)).

These regulations retain the rule in the proposed regulations under which a facts and circumstances analysis applies to determine whether a plan amendment eliminates section 411(d)(6)(B) protected benefits that create significant burdens and complexities for a plan and its participants. Under this rule, for a plan amendment eliminating a retirement-type subsidy or changing actuarial factors, the facts and circumstances to consider include the number of different retirement-type subsidies and other actuarial factors available under the plan, whether the terms and conditions applicable to the plan's retirement-type subsidies are difficult to summarize in a manner that is concise and readily understandable to the average plan participant, whether those different retirement-type subsidies and other actuarial factors were added to the plan as a result of mergers, acquisitions, or other business transactions, and whether the effect of the plan amendment is to reduce the number of categories of retirement-type subsidies or other actuarial factors.

Several commentators stated that this facts and circumstances standard is vague and subjective. The commentators suggested that the standard should be revised to provide for more objective criteria to determine the circumstances under which a plan amendment is permitted to eliminate a section 411(d)(6)(B) protected benefit that creates significant burdens or complexities for a plan and its participants. The commentators also suggested that the final regulations include examples of the standard.

In light of these comments, the final regulations add 2 new factors to the facts and circumstances analysis for retirement-type subsidies and actuarial factors. These new factors are whether the plan amendment eliminates one or more generalized optional forms and whether the plan amendment replaces a complex optional form of benefit with a simpler form. An example has been added to the final regulations to illustrate this facts and circumstances analysis.

Like the proposed regulations, the final regulations provide a rebuttable presumption for plan amendments that eliminate a set of actuarial factors under the plan that, considered in the aggregate, are burdensome or complex. If this is the case, then the elimination of any set of actuarial factors is presumed to eliminate section 411(d)(6)(B) protected benefits that create significant burdens or

⁶H.R. Conf. Rep. 107-84, at 254 (2001).

complexities for the plan and its participants. However, the regulations also provide that if the effect of a plan amendment with respect to an optional form of benefit is merely to substitute one set of actuarial factors for another set of actuarial factors, without any reduction in the number of different actuarial factors, the plan amendment would not be permitted. Commentators stated that this *no substitution* rule in the proposed regulations would offer no relief to plans that wish merely to update their plans with actuarial assumptions that reflect more recent experience. Another commentator similarly suggested that the regulations should permit a plan to update its mortality tables. In response to these comments, the final regulations provide an exception to the *no substitution* rule for situations in which a plan is changing actuarial factors for determining optional forms of benefit with new actuarial factors that are based on more accurate mortality experience or more appropriate interest rates (e.g., interest rates that reflect more recent rates of returns).

IV. Other Issues

A. Contingent Event Benefits

In Notice 2003–10 (2003–1 C.B. 369), the Treasury Department and the IRS announced that regulations would be proposed that would provide guidance on benefits that are treated as early retirement benefits and retirement-type subsidies for purposes of section 411(d)(6)(B). Notice 2003–10 also provided that the regulations will be prospective and the IRS will not treat a plan as failing to satisfy the requirements of section 401 merely because of a plan amendment that eliminates or reduces an early retirement benefit or a retirement-type subsidy that is conditioned on the occurrence of an unpredictable contingent event (within the meaning of section 412(l)) if the amendment is adopted and effective prior to the occurrence of the contingent event and prior to the publication of the final regulations in the **Federal Register**.

These final regulations generally retain the rule in the proposed regulations which provided that benefits that are contingent on the occurrence of certain events, such as a plant shutdown or involuntary separation, and that continue after retirement are retirement-type subsidies that are protected under section 411(d)(6)(B), both before and after the occurrence of the contingency.⁷

However, as noted above under the heading *Definitions of section 411(d)(6) protected benefits*, this rule is limited to benefits under a defined benefit plan that are permitted to be in a qualified plan. This rule applies to amendments adopted after December 31, 2005. For an amendment adopted before January 1, 2006, the IRS will not treat a plan as failing to be tax qualified under section 401(a) merely because the plan amendment eliminates or reduces an early retirement benefit or a retirement-type subsidy that is conditioned on the occurrence of an unpredictable contingent event (within the meaning of section 412(l)) if the amendment is adopted and effective prior to the occurrence of the contingent event.

B. Effect of Central Laborers' Decision

Since the issuance of the proposed regulations on March 24, 2004, the Supreme Court issued its opinion in *Central Laborers' Pension Fund v. Heinz*, 541 U.S. 749 (June 7, 2004). This case addressed an issue that was reserved in the proposed regulations, pending the final decision in *Central Laborers'*, namely the interaction of the vesting rules in section 411(a) with the anti-cutback rules in section 411(d)(6). This topic is reserved in these final regulations and addressed in proposed regulations (REG–156518–04) that are being published elsewhere in this issue of the **Federal Register**.

C. Utilization Test

Comments were made prior to the issuance of the proposed regulations requesting relief from section 411(d)(6) to enable plans to eliminate optional forms of benefit that participants rarely use. The preamble to the proposed regulations noted the difficulty in applying a utilization standard for plans where there are few retirements. However, comments on the proposed regulations asked the Treasury Department and the IRS to consider adding a utilization test to the regulations as an acceptable method of eliminating optional forms of benefit, early retirement benefits, and retirement-type subsidies that are rarely used. The commentators argued that rarely used optional forms create a burden both for plans and their participants and that utilization of an optional form of benefit is a good measure of a benefit's value to participants in a plan. In light of these comments, the Treasury Department and IRS are proposing a utilization standard, which is included in proposed regulations (REG–156518–04) being published elsewhere in this issue of the **Federal Register**. Accordingly, these

final regulations provide a reserved paragraph for such a utilization test.

Effective Dates

These final regulations apply to amendments adopted and effective after August 12, 2005. However, there is a special effective date for certain plan amendments as described above (under the heading *Contingent Event Benefits*). Plan amendments adopted before August 12, 2005 are to be evaluated in light of the applicable authorities without regard to these regulations. No implication is intended concerning whether or not a rule adopted prospectively in these regulations is applicable law before the effective date in these regulations.

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 has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. In addition, because no collection of information is imposed on small entities, the provisions of the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply, and therefore, a Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding these regulations was submitted to the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of these regulations is Pamela R. Kinard of the Office of the Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities), Internal Revenue Service. However, personnel from other offices of the Internal Revenue Service and Treasury Department participated in their development.

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 54

Excise taxes, Pensions, Reporting and recordkeeping requirements.

Amendments to the Regulations

■ Accordingly, 26 CFR parts 1 and 54 are amended as follows:

⁷ This rule follows the analysis in *Bellas v. CBS, Inc.*

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 is amended by adding an entry to read, in part, as follows:

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

§ 1.411(d)-3 also issued under 26 U.S.C. 411(d)(6) and section 645(b) of the Economic Growth and Tax Relief Reconciliation Act of 2001, Public Law 107-16 (115 Stat. 38). * * *

■ **Par. 2.** Section 1.411(d)-3 is revised to read as follows:

§ 1.411(d)-3 Section 411(d)(6) protected benefits.

(a) *Protection of accrued benefits—(1) General rule.* Under section 411(d)(6)(A), a plan is not a qualified plan (and a trust forming a part of such plan is not a qualified trust) if a plan amendment decreases the accrued benefit of any plan participant, except as provided in section 412(c)(8), section 4281 of the Employee Retirement Income Security Act of 1974 as amended (ERISA), or other applicable law (e.g., section 1541(a)(2) of the Taxpayer Relief Act of 1997, Public Law 105-34 (111 Stat. 788, 1085)). For purposes of this section, a plan amendment includes any changes to the terms of a plan, including changes resulting from a merger, consolidation, or transfer (as defined in section 414(l)) or a plan termination. The protection of section 411(d)(6) applies to a participant's entire accrued benefit under the plan as of the applicable amendment date, without regard to whether the entire accrued benefit was accrued before a participant's severance from employment or whether any portion was the result of an increase in the accrued benefit of the participant pursuant to a plan amendment adopted after the participant's severance from employment.

(2) *Plan provisions taken into account—(i) Direct or indirect reduction in accrued benefit.* For purposes of determining whether a participant's accrued benefit is decreased, all of the amendments to the provisions of a plan affecting, directly or indirectly, the computation of accrued benefits are taken into account. Plan provisions indirectly affecting the computation of accrued benefits include, for example, provisions relating to years of service and compensation.

(ii) *Amendments effective with the same applicable amendment date.* In determining whether a reduction in a participant's accrued benefit has occurred, all plan amendments with the same applicable amendment date are treated as one amendment. Thus, if two amendments have the same applicable amendment date and one amendment,

standing alone, increases participants' accrued benefits and the other amendment, standing alone, decreases participants' accrued benefits, the amendments are treated as one amendment and will only violate section 411(d)(6) if, for any participant, the net effect is to decrease participants' accrued benefit as of that applicable amendment date.

(iii) *Multiple amendments—(A) General rule.* A plan amendment violates the requirements of section 411(d)(6) if it is one of a series of plan amendments that, when taken together, have the effect of reducing or eliminating a section 411(d)(6) protected benefit in a manner that would be prohibited by section 411(d)(6) if accomplished through a single amendment.

(B) *Determination of the time period for combining plan amendments.* For purposes of applying the rule in paragraph (a)(2)(iii)(A) of this section, generally only plan amendments adopted within a 3-year period are taken into account.

(3) *Application of section 411(a) nonforfeiture provisions with respect to section 411(d)(6) protected benefits.* [Reserved].

(4) *Examples.* The following examples illustrate the application of this paragraph (a):

Example 1. (i) Facts. Plan A provides an annual benefit of 2% of career average pay times years of service commencing at normal retirement age (age 65). Plan A is amended on November 1, 2006, effective as of January 1, 2007, to provide for an annual benefit of 1.3% of final pay times years of service, with final pay computed as the average of a participant's highest 3 consecutive years of compensation. As of January 1, 2007, Participant M has 16 years of service, M's career average pay is \$37,500, and the average of M's highest 3 consecutive years of compensation is \$67,308. Thus, Participant M's accrued benefit as of the applicable amendment date is increased from \$12,000 per year at normal retirement age (2% times \$37,500 times 16 years of service) to \$14,000 per year at normal retirement age (1.3% times \$67,308 times 16 years of service). As of January 1, 2007, Participant N has 6 years of service, N's career average pay is \$50,000, and the average of N's highest 3 consecutive years of compensation is \$51,282. Participant N's accrued benefit as of the applicable amendment date is decreased from \$6,000 per year at normal retirement age (2% times \$50,000 times 6 years of service) to \$4,000 per year at normal retirement age (1.3% times \$51,282 times 6 years of service).

(ii) *Conclusion.* While the plan amendment increases the accrued benefit of Participant M, the plan amendment fails to satisfy the requirements of section 411(d)(6)(A) because the amendment decreases the accrued benefit of Participant N below the level of the

accrued benefit of Participant N immediately before the applicable amendment date.

Example 2 (i) Facts. The facts are the same as Example 1, except that Plan A includes a provision under which Participant N's accrued benefit cannot be less than what it was immediately before the applicable amendment date (so that Participant N's accrued benefit could not be less than \$6,000 per year at normal retirement age).

(ii) *Conclusion.* The amendment does not violate the requirements of section 411(d)(6)(A) with respect to Participant M (whose accrued benefit has been increased) or with respect to Participant N (although Participant N would not accrue any benefits until the point in time at which the new formula amount would exceed the amount payable under the minimum provision, approximately 3 years after the amendment becomes effective).

(b) *Protection of section 411(d)(6)(B) protected benefits—(1) General rule—(i) Prohibition against plan amendments eliminating or reducing section 411(d)(6)(B) protected benefits.* Except as provided in this section, a plan is treated as decreasing an accrued benefit if it is amended to eliminate or reduce a section 411(d)(6)(B) protected benefit as defined in paragraph (g)(15) of this section. This paragraph (b)(1) applies to participants who satisfy (either before or after the plan amendment) the preamendment conditions for a section 411(d)(6)(B) protected benefit.

(ii) *Contingent benefits.* The rules of paragraph (b)(1)(i) of this section apply to participants who satisfy (either before or after the plan amendment) the preamendment conditions for the section 411(d)(6)(B) protected benefit even if the condition on which the eligibility for the section 411(d)(6)(B) protected benefit depends is an unpredictable contingent event (e.g., a plant shutdown).

(iii) *Application of general rules in paragraph (a) of this section to section 411(d)(6)(B) protected benefits.* For purposes of determining whether a participant's section 411(d)(6)(B) protected benefit is eliminated or reduced, the rules of paragraph (a) of this section apply to section 411(d)(6)(B) protected benefits in the same manner as they apply to accrued benefits described in section 411(d)(6)(A). As an example of the application of paragraph (a)(2)(ii) of this section to section 411(d)(6)(B) protected benefits, if there are two amendments with the same applicable amendment date and one amendment increases accrued benefits and the other amendment decreases the early retirement factors that are used to determine the early retirement annuity, the amendments are treated as one amendment and only violate section 411(d)(6) if, after the two amendments,

the net dollar amount of any early retirement annuity with respect to the accrued benefit of any participant as of the applicable amendment date is lower than it would have been without the two amendments. As an example of the application of paragraph (a)(2)(iii) of this section to section 411(d)(6)(B) protected benefits, a series of amendments made within a 3-year period that, when taken together, have the effect of reducing or eliminating early retirement benefits or retirement-type subsidies in a manner that adversely affects the rights of any participant in a more than *de minimis* manner violates section 411(d)(6)(B) even if each amendment would be permissible pursuant to paragraphs (c), (d), or (f) of this section.

(2) *Permissible elimination of section 411(d)(6)(B) protected benefits—(i) In general.* A plan is permitted to be amended to eliminate a section 411(d)(6)(B) protected benefit if the elimination is in accordance with this section or § 1.411(d)–4.

(ii) *Increases in payment amounts do not eliminate an optional form of benefit.* An amendment is not treated as eliminating an optional form of benefit or eliminating or reducing an early retirement benefit or retirement-type subsidy under the plan, if, effective after the plan amendment, there is another optional form of benefit available to the participant under the plan that is of inherently equal or greater value (within the meaning of § 1.401(a)(4)–4(d)(4)(i)(A)). Thus, for example, a change in the method of calculating a joint and survivor annuity from using a 90% adjustment factor on account of the survivorship payment at particular ages for a participant and a spouse to using a 91% adjustment factor at the same ages is not treated as an elimination of an optional form of benefit. Similarly, a plan that offers a subsidized qualified joint and survivor annuity option for married participants under which the amount payable during the participant's lifetime is not less than the amount payable under the plan's straight life annuity is permitted to be amended to eliminate the straight life annuity option for married participants.

(3) *Permissible elimination of benefits that are not section 411(d)(6) protected benefits—(i) In general.* Section 411(d)(6) does not provide protection for benefits that are ancillary benefits, other rights and features, or any other benefits that are not described in section 411(d)(6). See § 1.411(d)–4, Q&A–1(d). However, a plan may not be amended to recharacterize a retirement-type benefit as an ancillary benefit. Thus, for example, a plan amendment to

recharacterize any portion of an early retirement subsidy as a social security supplement that is an ancillary benefit violates section 411(d)(6).

(ii) *No protection for future benefit accruals.* Section 411(d)(6) only protects benefits that accrue before the applicable amendment date. Thus, a plan is permitted to be amended to eliminate or reduce an early retirement benefit, a retirement-type subsidy, or an optional form of benefit with respect to benefits that accrue after the applicable amendment date without violating section 411(d)(6). However, section 4980F(e) of the Internal Revenue Code and section 204(h) of ERISA require notice of an amendment to an applicable pension plan that either provides for a significant reduction in the rate of future benefit accrual or that eliminates or significantly reduces an early retirement benefit or a retirement-type subsidy. See § 54.4980F–1 of this chapter generally, and see § 54.4980F–1, Q&A–7(b) and Q&A–8(c) of this chapter, with respect to the circumstances under which such notice is required for a reduction in an early retirement benefit or retirement-type subsidy.

(4) *Examples.* The following examples illustrate the application of this paragraph (b):

Example 1. (i) Facts involving amendments to an early retirement subsidy. Plan A provides an annual benefit of 2% of career average pay times years of service commencing at normal retirement age (age 65). Plan A is amended on November 1, 2006, effective as of January 1, 2007, to provide for an annual benefit of 1.3% of final pay times years of service, with final pay computed as the average of a participant's highest 3 consecutive years of compensation. Participant M is age 50, M has 16 years of service, M's career average pay is \$37,500, and the average of M's highest 3 consecutive years of compensation is \$67,308. Thus, M's accrued benefit as of the effective date of the amendment is increased from \$12,000 per year at normal retirement age (2% times \$37,500 times 16 years of service) to \$14,000 per year at normal retirement age (1.3% times \$67,308 times 16 years of service). (These facts are similar to the facts in *Example 1* in paragraph (a)(4) of this section.) Before the amendment, Plan A permitted a former employee to commence distribution of benefits as early as age 55 and, for a participant with at least 15 years of service, actuarially reduced the amount payable in the form of a straight life annuity commencing before normal retirement age by 3% per year from age 60 to age 65 and by 7% per year from age 55 through age 59. Thus, before the amendment, the amount of M's early retirement benefit that would be payable for commencement at age 55 was \$6,000 per year (\$12,000 per year minus 3% for 5 years and minus 7% for 5 more years). The amendment also alters the actuarial reduction factor so that, for a participant with

at least 15 years of service, the amount payable in a straight life annuity commencing before normal retirement age is reduced by 6% per year. As a result, the amount of M's early retirement benefit at age 55 becomes \$5,600 per year after the amendment (\$14,000 minus 6% for 10 years).

(ii) *Conclusion.* The straight life annuity payable under Plan A at age 55 is an optional form of benefit that includes an early retirement subsidy. The plan amendment fails to satisfy the requirements of section 411(d)(6)(B) because the amendment decreases the optional form of benefit payable to Participant M below the level that Participant M was entitled to receive immediately before the effective date of the amendment. If instead Plan A had included a provision under which M's straight life annuity payable at any age could be not be less than what it was immediately before the amendment (so that M's straight life annuity payable at age 55 could not be less than \$6,000 per year), then the amendment would not fail to satisfy the requirements of section 411(d)(6)(B) with respect to M's straight life annuity payable at age 55 (although the straight life annuity payable to M at age 55 would not increase until the point in time at which the new formula amount with the new actuarial reduction factors exceeds the amount payable under the minimum provision, approximately 14 months after the amendment becomes effective).

Example 2. (i) Facts involving plant shutdown benefits. Plan B permits participants who have a severance from employment before normal retirement age (age 65) to commence distributions at any time after age 55 with the amount payable to be actuarially reduced using reasonable actuarial assumptions regarding interest and mortality specified in the plan, but provides that the annual reduction for any participant who has at least 20 years of service and who has a severance from employment after age 55 is only 3% per year (which is a smaller reduction than would apply under reasonable actuarial reductions). Plan B also provides 2 plant shutdown benefits to participants who have a severance from employment as a result of a plant shutdown. First, the favorable 3% per year actuarial reduction applies for commencement of benefits after age 55 and before age 65 for any participant who has at least 10 years of service and who has a severance from employment as a result of a plant shutdown. Second, all participants who have at least 20 years of service and who have a severance from employment after age 55 (and before normal retirement age at age 65) as a result of a plant shutdown will receive supplemental payments. Under the supplemental payments, an additional amount equal to the participant's estimated old-age insurance benefit under the Social Security Act is payable until age 65. The supplemental payments are not a QSUPP, as defined in § 1.401(a)(4)–12, because the plan's terms do not state that the supplement is treated as an early retirement benefit that is protected under section 411(d)(6).

(ii) *Conclusion with respect to plant shutdown benefits.* The benefits payable with the 3% annual reduction are retirement-type

benefits. The excess of the actuarial present value of the early retirement benefit using the 3% annual reduction over the actuarial present value of the normal retirement benefit is a retirement-type subsidy and the right to receive payments of the benefit at age 55 is an early retirement benefit. These conclusions apply not only with respect to the rights that apply to participants who have at least 20 years of service, but also to participants with at least 10 years of service who have a severance from employment as a result of a plant shutdown. Thus, the right to receive benefits based on a 3% annual reduction for participants with at least 10 years of service at the time of a plant shutdown is an early retirement benefit that provides a retirement-type subsidy and is a section 411(d)(6)(B) protected benefit (even though no plant shutdown has occurred). Therefore, a plan amendment cannot eliminate this benefit with respect to benefits accrued before the applicable amendment date, even before the occurrence of the plant shutdown. Because the plan provides that the supplemental payments cannot exceed the OASDI benefit under the Social Security Act, the supplemental payments constitute a social security supplement (but not a QSUPP as defined in § 1.401(a)(4)-12), which is an ancillary benefit that is not a section 411(d)(6)(B) protected benefit and accordingly is not taken into account in determining whether a prohibited reduction has occurred.

(c) *Permissible elimination of optional forms of benefit that are redundant*—(1) *General rule.* Except as otherwise provided in paragraph (c)(5) of this section, a plan is permitted to be amended to eliminate an optional form of benefit for a participant with respect to benefits accrued before the applicable amendment date if—

(i) The optional form of benefit is redundant with respect to a retained optional form of benefit, within the meaning of paragraph (c)(2) of this section;

(ii) The plan amendment is not applicable with respect to an optional form of benefit with an annuity commencement date that is earlier than the number of days in the maximum QJSA explanation period (as defined in paragraph (g)(9) of this section) after the date the amendment is adopted; and

(iii) The requirements of paragraph (e) of this section are satisfied in any case in which either:

(A) The retained optional form of benefit for the participant does not commence on the same annuity commencement date as the optional form of benefit that is being eliminated; or

(B) As of the date the amendment is adopted, the actuarial present value of the retained optional form of benefit for the participant is less than the actuarial present value of the optional form of benefit that is being eliminated.

(2) *Similar types of optional forms of benefit are redundant*—(i) *General rule.* An optional form of benefit is redundant with respect to a retained optional form of benefit if, after the amendment becomes applicable—

(A) There is a retained optional form of benefit available to the participant that is in the same family of optional forms of benefit, within the meaning of paragraphs (c)(3) and (4) of this section, as the optional form of benefit being eliminated; and

(B) The participant's rights with respect to the retained optional form of benefit are not subject to materially greater restrictions (such as conditions relating to eligibility, restrictions on a participant's ability to designate the person who is entitled to benefits following the participant's death, or restrictions on a participant's right to receive an in-kind distribution) than applied to the optional form of benefit being eliminated.

(ii) *Special rule for core options.* An optional form of benefit that is a core option as defined in paragraph (g)(5) of this section may not be eliminated as a redundant benefit under the rules of this paragraph (c) unless the retained optional form of benefit and the eliminated core option are identical except for differences described in paragraph (c)(3)(ii) of this section. Thus, for example, a particular 10-year term certain and life annuity may not be eliminated by plan amendment unless the retained optional form of benefit is another 10-year term certain and life annuity.

(3) *Family of optional forms of benefit*—(i) *In general.* Paragraph (c)(4) of this section describes certain families of optional forms of benefits. Not every optional form of benefit that is offered under a plan necessarily fits within a family of optional forms of benefit as described in paragraph (c)(4) of this section. Each optional form of benefit that is not included in any particular family of optional forms of benefit listed in paragraph (c)(4) of this section is in a separate family of optional forms of benefit with other optional forms of benefit that would be identical to that optional form of benefit but for differences that are disregarded under paragraph (c)(3)(ii) of this section.

(ii) *Certain differences among optional forms of benefit*—(A) *Differences in actuarial factors and annuity starting dates.* The determination of whether two optional forms of benefit are within a family of optional forms of benefit is made without regard to actuarial factors or annuity starting dates. Thus, any optional forms of benefit that are part of

the same generalized optional form (within the meaning of paragraph (g)(8) of this section) are in the same family of optional forms of benefit. For example, if a plan has a single-sum distribution option for some participants that is calculated using a 5% interest rate and a specific mortality table (but no less than the minimum present value as determined under section 417(e)) and another single-sum distribution option for other participants that is calculated using the applicable interest rate as defined in section 417(e)(3)(A)(ii)(II) and the applicable mortality table as defined in section 417(e)(3)(A)(ii)(I), both single-sum distribution options are part of the same generalized optional form and thus in the same family of optional forms of benefit under the rules of paragraph (c)(3)(i) of this section. However, differences in actuarial factors and annuity starting dates are taken into account for purposes of the requirements in paragraph (e)(3) of this section.

(B) *Differences in pop-up provisions and cash refund features for joint and contingent options.* The determination of whether two optional forms of benefit are within a family of optional forms of benefit relating to joint and contingent families (as described in paragraph (c)(4)(i) and (ii) of this section) is made without regard to the following features—

(1) Pop-up provisions (under which payments increase upon the death of the beneficiary or another event that causes the beneficiary not to be entitled to a survivor annuity);

(2) Cash refund features (under which payment is provided upon the death of the last annuitant in an amount that is not greater than the excess of the present value of the annuity at the annuity starting date over the total of payments before the death of the last annuitant); or

(3) Term-certain provisions for optional forms of benefit within a joint and contingent family.

(C) *Differences in social security leveling features, refund of employee contributions features, and retroactive annuity starting date features.* The determination of whether 2 optional forms of benefit are within a family of optional forms of benefit is made without regard to social security leveling features, refund of employee contributions features, or retroactive annuity starting date features. But see paragraph (c)(5) of this section for special rules relating to social security leveling, refund of employee contributions, and retroactive annuity

starting date features in optional forms of benefit.

(4) *List of families.* The following are families of optional forms of benefit for purposes of this paragraph (c):

(i) *Joint and contingent options with continuation percentages of 50% to 100%.* An optional form of benefit is within the 50% or more joint and contingent family if it provides a life annuity to the participant and a survivor annuity to an individual that is at least 50% and no more than 100% of the annuity payable during the joint lives of the participant and the participant's survivor.

(ii) *Joint and contingent options with continuation percentages less than 50%.* An optional form of benefit is within the less than 50% joint and contingent family if it provides a life annuity to the participant and a survivor annuity to an individual that is less than 50% of the annuity payable during the joint lives of the participant and the participant's survivor.

(iii) *Term certain and life annuity options with a term of 10 years or less.* An optional form of benefit is within the 10 years or less term certain and life family if it is a life annuity with a guarantee that payments will continue to the participant's beneficiary for the remainder of a fixed period that is 10 years or less if the participant dies before the end of the fixed period.

(iv) *Term certain and life annuity options with a term longer than 10 years.* An optional form of benefit is within the longer than 10 years term certain and life family if it is a life annuity with a guarantee that payments will continue to the participant's beneficiary for the remainder of a fixed period that is in excess of 10 years if the participant dies before the end of the fixed period.

(v) *Level installment payment options over a period of 10 years or less.* An optional form of benefit is within the 10 years or less installment family if it provides for substantially level payments to the participant for a fixed period of at least 2 years and not in excess of 10 years with a guarantee that payments will continue to the participant's beneficiary for the remainder of the fixed period if the participant dies before the end of the fixed period.

(vi) *Level installment payment options over a period of more than 10 years.* An optional form of benefit is within the more than 10 years installment family if it provides for substantially level payments to the participant for a fixed period that is in excess of 10 years with a guarantee that payments will continue to the

participant's beneficiary for the remainder of the fixed period if the participant dies before the end of the fixed period.

(5) *Special rules for certain features included in optional forms of benefit.* For purposes of applying this paragraph (c), to the extent an optional form of benefit that is being eliminated includes either a social security leveling feature or a refund of employee contributions feature, the retained optional form of benefit must also include that feature, and, to the extent that the optional form of benefit that is being eliminated does not include a social security leveling feature or a refund of employee contributions feature, the retained optional form of benefit must not include that feature. For purposes of applying this paragraph (c), to the extent an optional form of benefit that is being eliminated does not include a retroactive annuity starting date feature, the retained optional form of benefit must not include the feature.

(d) *Permissible elimination of noncore optional forms of benefit where core options are offered—(1) General rule.* Except as otherwise provided in paragraph (d)(2) of this section, a plan is permitted to be amended to eliminate an optional form of benefit for a participant with respect to benefits accrued before the applicable amendment date if—

(i) After the amendment becomes applicable, each of the core options described in paragraph (g)(5) of this section is available to the participant with respect to benefits accrued before and after the amendment;

(ii) The plan amendment is not applicable with respect to an optional form of benefit with an annuity commencement date that is earlier than 4 years after the date the amendment is adopted; and

(iii) The requirements of paragraph (e) of this section are satisfied in any case in which either:

(A) One or more of the core options are not available commencing on the same annuity commencement date as the optional form of benefit that is being eliminated; or

(B) As of the date the amendment is adopted, the actuarial present value of the benefit payable under any core option with the same annuity commencement date is less than the actuarial present value of benefits payable under the optional form of benefit that is being eliminated.

(2) *Special rules—(i) Treatment of certain features included in optional forms of benefit.* For purposes of applying this paragraph (d), to the extent an optional form of benefit that

is being eliminated includes either a social security leveling feature or a refund of employee contributions feature, at least one of the core options must also be available with that feature, and, to the extent that the optional form of benefit that is being eliminated does not include a social security leveling feature or a refund of employee contributions feature, each of the core options must be available without that feature. For purposes of applying this paragraph (d), to the extent an optional form of benefit that is being eliminated does not include a retroactive annuity starting date feature, each of the core options must be available without that feature.

(ii) *Eliminating the most valuable option for a participant with a short life expectancy.* For purposes of applying this paragraph (d), if the most valuable option for a participant with a short life expectancy (as defined in paragraph (g)(5)(iii) of this section) is eliminated, then, after the plan amendment, an optional form of benefit that is identical, except for differences described in paragraph (c)(3)(ii) of this section, must be available to the participant. However, such a plan amendment cannot eliminate a refund of employee contributions feature from the most valuable option for a participant with a short life expectancy.

(iii) *Single-sum distributions.* A plan amendment is not treated as satisfying this paragraph (d) if it eliminates an optional form of benefit that includes a single-sum distribution that applies with respect to at least 25% of the participant's accrued benefit as of the date the optional form of benefit is eliminated. But see § 1.411(d)-4, Q&A-2(b)(2)(v), relating to involuntary single-sum distributions for benefits with a present value not in excess of the maximum dollar amount in section 411(a)(11).

(iv) *Application of multiple amendment rule to core option rule.* Notwithstanding paragraph (a)(2)(iii)(B) of this section, if a plan is amended to eliminate an optional form of benefit using the core options rule in this paragraph (d), then the employer must wait 3 years after the first annuity commencement date for which the optional form of benefit is no longer available before making any changes to the core options offered under the plan (other than a change that is not treated as an elimination under paragraph (b)(2)(ii) of this section). Thus, for example, if a plan amendment eliminates an optional form of benefit for a participant using the core options rule under this paragraph (d), with an adoption date of January 1, 2006 and an

effective date of January 1, 2010, the plan would not be permitted to be amended to make changes to the core options offered under the plan (and the core options would continue to apply with respect to the participant's accrued benefit) until January 1, 2013.

(v) *Special rule for joint and contingent annuity core option.* If a plan offers joint and contingent annuities under which a participant is entitled to a life annuity with a survivor annuity for the individual designated by the participant (including a non-spousal contingent annuitant) with continuation percentage options of both 50% and 100% (after adjustments permitted under paragraph (g)(5)(ii) of this section to comply with applicable law), the plan is permitted to treat both of these options as core options for purposes of this paragraph (d), in lieu of a 75% joint and contingent annuity. Thus, such a plan is permitted to use the rules of this paragraph (d) if the plan satisfies all of the requirements of this paragraph (d) (taking into account the modification rule in paragraph (g)(5)(ii) of this section) other than the requirement of offering a 75% joint and contingent annuity as described in paragraph (g)(5)(i)(B) of this section.

(e) *Permissible plan amendments under paragraphs (c) and (d) eliminating or reducing section 411(d)(6)(B) protected benefits that are burdensome and of de minimis value—*(1) *In general.* A plan amendment that, pursuant to paragraph (c)(1)(iii) or (d)(1)(iii) of this section, is required to satisfy this paragraph (e) satisfies this paragraph (e) if—

(i) The amendment eliminates section 411(d)(6)(B) protected benefits that create significant burdens or complexities for the plan and its participants as described in paragraph (e)(2) of this section; and

(ii) The amendment does not adversely affect the rights of any participant in a more than *de minimis* manner as described in paragraph (e)(3) of this section.

(2) *Plan amendments eliminating section 411(d)(6)(B) protected benefits that create significant burdens and complexities—*(i) *Facts and circumstances analysis—*(A) *In general.* The determination of whether a plan amendment eliminates section 411(d)(6)(B) protected benefits that create significant burdens or complexities for the plan and its participants is based on facts and circumstances.

(B) *Early retirement benefits.* In the case of an amendment that eliminates an early retirement benefit, relevant factors include whether the annuity

starting dates under the plan considered in the aggregate are burdensome or complex (e.g., the number of categories of early retirement benefits, whether the terms and conditions applicable to the plan's early retirement benefits are difficult to summarize in a manner that is concise and readily understandable to the average plan participant, and whether those different early retirement benefits were added to the plan as a result of a plan merger, transfer, or consolidation), and whether the effect of the plan amendment is to reduce the number of categories of early retirement benefits.

(C) *Retirement-type subsidies and actuarial factors.* In the case of a plan amendment eliminating a retirement-type subsidy or changing the actuarial factors used to determine optional forms of benefit, relevant factors include whether the actuarial factors used for determining optional forms of benefit available under the plan considered in the aggregate are burdensome or complex (e.g., the number of different retirement-type subsidies and other actuarial factors available under the plan, whether the terms and conditions applicable to the plan's retirement-type subsidies are difficult to summarize in a manner that is concise and readily understandable to the average plan participant, whether the plan is eliminating one or more generalized optional forms, whether the plan is replacing a complex optional form of benefit that contains a retirement-type subsidy with a simpler form, and whether the different retirement-type subsidies and other actuarial factors were added to the plan as a result of a plan merger, transfer, or consolidation), and whether the effect of the plan amendment is to reduce the number of categories of retirement-type subsidies or other actuarial factors.

(D) *Example.* The following example illustrates the application of this paragraph (e)(2)(i):

Example. (i) *Facts.* Plan A is a defined benefit plan under which employees may select a distribution in the form of a straight life annuity, a straight life annuity with cost-of-living increases, a 50% qualified joint and survivor annuity with a pop-up provision, or a 10-year term certain and life annuity. On January 15, 2007, Plan A is amended, effective June 1, 2007, to eliminate the 50% qualified joint and survivor annuity with a pop-up provision as described in paragraph (c)(3)(ii)(B)(1) of this section and replace it with a 50% qualified joint and survivor annuity without the pop-up provision (and using the same actuarial factor).

(ii) *Conclusion.* Plan A satisfies the requirements of paragraph (e)(2)(i)(B) of this section because, based on the relevant facts and circumstances (e.g., the amendment

replaces a complex optional form of benefit with a simpler form), the amendment eliminates section 411(d)(6)(B) protected benefits that create significant burdens and complexities. Accordingly, the plan amendment is permitted to eliminate the pop-up provision, provided that the plan amendment satisfies all the other applicable requirements in paragraph (c) or (d) of this section. For example, the plan amendment must not eliminate the most valuable option for a participant with a short life expectancy (as defined in paragraph (g)(5)(iii) of this section) and the plan amendment must not adversely affect the rights of any participant in a more than *de minimis* manner, taking into account the actuarial factors for the joint and survivor annuity with the pop-up provision and the joint and survivor annuity without the pop-up provision, as described in paragraph (e)(3) of this section.

(ii) *Presumptions for certain amendments—*(A) *Presumption for amendments eliminating certain annuity starting dates.* If the annuity starting dates under the plan considered in the aggregate are burdensome or complex, then elimination of any one of the annuity starting dates is presumed to eliminate section 411(d)(6)(B) protected benefits that create significant burdens or complexities for the plan and its participants. However, if the effect of a plan amendment with respect to a set of optional forms of benefit is merely to substitute one set of annuity starting dates for another set of annuity starting dates, without any reduction in the number of different annuity starting dates, then the plan amendment does not satisfy the requirements of this paragraph (e)(2).

(B) *Presumption for amendments changing certain actuarial factors.* If the actuarial factors used for determining benefit distributions available under a generalized optional form considered in the aggregate are burdensome or complex, then replacing some of the actuarial factors for the generalized optional form is presumed to eliminate section 411(d)(6)(B) protected benefits that create significant burdens or complexities for the plan and its participants. However, if the effect is merely to substitute one set of actuarial factors for another set of actuarial factors, without any reduction in the number of different actuarial factors or the complexity of those factors, then the plan amendment does not satisfy the requirements of this paragraph (e)(2) unless the change of actuarial factors is merely to replace one or more of the plan's actuarial factors for determining optional forms of benefit with new actuarial factors that are more accurate (e.g., reflecting more recent mortality experience or more recent market rates of interest).

(iii) *Restrictions against creating burdens or complexities.* See paragraphs (a)(2)(iii) and (b)(1)(iii) of this section for general rules applicable to multiple amendments. In accordance with these rules, a plan amendment does not eliminate a section 411(d)(6)(B) protected benefit that creates burdens and complexities for a plan and its participants if, less than 3 years earlier, a plan was previously amended to add another retirement-type subsidy in order to facilitate the elimination of the original retirement-type subsidy, even if the elimination of the other subsidy would not adversely affect the rights of any plan participant in a more than *de minimis* manner as provided in paragraph (e)(3) of this section.

(3) *Elimination of early retirement benefits or retirement-type subsidies that are de minimis*—(i) *Rules for retained optional forms of benefit under paragraph (c) of this section.* For purposes of paragraph (c) of this section, the elimination of an optional form of benefit does not adversely affect the rights of any participant in a more than *de minimis* manner if—

(A) The retained optional form of benefit described in paragraph (c) of this section has substantially the same annuity commencement date as the optional form of benefit that is being eliminated, as described in paragraph (e)(4) of this section; and

(B) Either the actuarial present value of the benefit payable in the optional form of benefit that is being eliminated does not exceed the actuarial present value of the benefit payable in the retained optional form of benefit by more than a *de minimis* amount, as described in paragraph (e)(5) of this section, or the amendment satisfies the requirements of paragraph (e)(6) of this section relating to a delayed effective date.

(ii) *Rules for core options under paragraph (d) of this section.* For purposes of paragraph (d) of this section, the elimination of an optional form of benefit does not adversely affect the rights of any participant in a more than *de minimis* manner if, with respect to each of the core options—

(A) The core option is available after the amendment with substantially the same annuity commencement date as the optional form of benefit that is being eliminated, as described in paragraph (e)(4) of this section; and

(B) Either the actuarial present value of the benefit payable in the optional form of benefit that is being eliminated does not exceed the actuarial present value of the benefit payable under the core option by more than a *de minimis* amount, as described in paragraph (e)(5)

of this section, or the amendment satisfies the requirements of paragraph (e)(6) of this section.

(4) *Definition of substantially the same annuity starting dates.* For purposes of applying paragraphs (e)(3)(i)(A) and (ii)(A) of this section, annuity starting dates are considered substantially the same if they are within 6 months of each other.

(5) *Definition of de minimis difference in actuarial present value.* For purposes of applying paragraph (e)(3)(i)(B) and (ii)(B) of this section, a difference in actuarial present value between the optional form of benefit being eliminated and the retained optional form of benefit or core option is not more than a *de minimis* amount if, as of the date the amendment is adopted, the difference between the actuarial present value of the eliminated optional form of benefit and the actuarial present value of the retained optional form of benefit or core option is not more than the greater of—

(i) 2% of the present value of the retirement-type subsidy (if any) under the eliminated optional form of benefit prior to the amendment; or

(ii) 1% of the greater of the participant's compensation (as defined in section 415(c)(3)) for the prior plan year or the participant's average compensation for his or her high 3 years (within the meaning of section 415(b)(1)(B) and (b)(3)).

(6) *Delayed effective date*—(i) *General rule.* For purposes of applying paragraph (e)(3)(i)(B) and (ii)(B) of this section, an amendment that eliminates an optional form of benefit satisfies the requirements of this paragraph (e)(6) if the elimination of the optional form of benefit is not applicable to any annuity commencement date before the end of the expected transition period for that optional form of benefit.

(ii) *Determination of expected transition period*—(A) *General rule.* The expected transition period for a plan amendment eliminating an optional form of benefit is the period that begins when the amendment is adopted and ends when it is reasonable to expect, with respect to a section 411(d)(6)(B) protected benefit (*i.e.*, not taking into account benefits that accrue in the future), that the form being eliminated would be subsumed by another optional form of benefit after taking into account expected future benefit accruals.

(B) *Determination of expected transition period using conservative actuarial assumptions.* The expected transition period for a plan amendment eliminating an optional form of benefit must be determined in accordance with actuarial assumptions that are

reasonable at the time of the amendment and that are conservative (*i.e.*, reasonable actuarial assumptions that are likely to result in the longest period of time until the eliminated optional form of benefit would be subsumed). For this purpose, actuarial assumptions are not treated as conservative unless they include assumptions that a participant's compensation will not increase and that future benefit accruals will not exceed accruals in recent periods.

(C) *Effect of subsequent amendments reducing future benefit accruals on the expected transition period.* If, during the expected transition period for a plan amendment eliminating an optional form of benefit, the plan is subsequently amended to reduce the rate of future benefit accrual (or otherwise to lengthen the expected transition period), thus that subsequent plan amendment must provide that the elimination of the optional form of benefit is void or must provide for the effective date for elimination of the optional form of benefit to be further extended to a new expected transition period that satisfies this paragraph (e)(6) taking into account the subsequent amendment.

(iii) *Applicability of the delayed effective date rule limited to employees who continue to accrue benefits through the end of expected transition period.*

An amendment eliminating an optional form of benefit under this paragraph (e)(6) must be limited to participants who continue to accrue benefits under the plan through the end of the expected transition period. Thus, for example, the plan amendment may not apply to any participant who has a severance from employment during the expected transition period.

(iv) *Special rule for section 204(h) notice.* See § 54.4980F-1(b), Q&A-8(c) of this chapter for a special rule relating to this paragraph (e)(6).

(f) *Utilization test.* [Reserved]

(g) *Definitions and use of terms.* The definitions in this paragraph (g) apply for purposes of this section.

(1) *Actuarial present value.* The term *actuarial present value* means actuarial present value (within the meaning of § 1.401(a)(4)-12) determined using reasonable actuarial assumptions.

(2) *Ancillary benefit.* The term *ancillary benefit* means—

(i) A social security supplement under a defined benefit plan (other than a QSUPP as defined in § 1.401(a)(4)-12);

(ii) A benefit payable under a defined benefit plan in the event of disability (to the extent that the benefit exceeds the benefit otherwise payable), but only if the total benefit payable in the event of disability does not exceed the maximum

qualified disability benefit, as defined in section 411(a)(9);

(iii) A life insurance benefit;

(iv) A medical benefit described in section 401(h);

(v) A death benefit under a defined benefit plan other than a death benefit which is a part of an optional form of benefit; or

(vi) A plant shutdown benefit or other similar benefit in a defined benefit plan that does not continue past retirement age and does not affect the payment of the accrued benefit, but only to the extent that such plant shutdown benefit, or other similar benefit (if any), is permitted in a qualified pension plan (see § 1.401-1(b)(1)(i)).

(3) *Annuity commencement date.* The term *annuity commencement date* generally means the annuity starting date, except that, in the case of a retroactive annuity starting date under section 417(a)(7), *annuity commencement date* means the date of the first payment of benefits pursuant to a participant election of a retroactive annuity starting date, as defined in § 1.417(e)-1(b)(3)(iv).

(4) *Applicable amendment date.* The term *applicable amendment date*, with respect to a plan amendment, means the later of the effective date of the amendment or the date the amendment is adopted.

(5) *Core options*—(i) *General rule.* With respect to a plan, the term *core options* means—

(A) A straight life annuity generalized optional form under which the participant is entitled to a level life annuity with no benefit payable after the participant's death;

(B) A 75% joint and contingent annuity generalized optional form under which the participant is entitled to a life annuity with a survivor annuity for any individual designated by the participant (including a non-spousal contingent annuitant) that is 75% of the amount payable during the participant's life (but see paragraph (d)(2)(v) of this section for a special rule relating to the joint and contingent annuity core option);

(C) A 10-year term certain and life annuity generalized optional form under which the participant is entitled to a life annuity with a guarantee that payments will continue to any person designated by the participant for the remainder of a fixed period of 10 years if the participant dies before the end of the 10-year period; and

(D) The most valuable option for a participant with a short life expectancy (as defined in paragraph (g)(5)(iii) of this section).

(ii) *Modification of core options to satisfy other requirements.* An annuity

does not fail to be a core option (e.g., a joint and contingent annuity described in paragraph (g)(5)(i)(B) of this section or a 10-year term certain and life annuity described in paragraph (g)(5)(i)(C) of this section) as a result of differences to comply with applicable law, such as limitations on death benefits to comply with the incidental benefit requirement of § 1.401-1(b)(1)(i) or on account of the spousal consent rules of section 417.

(iii) *Most valuable option for a participant with a short life expectancy*—(A) *General definition.* Except as provided in paragraph (g)(5)(iii)(B) of this section, *most valuable option for a participant with a short life expectancy* means, for an annuity starting date, the optional form of benefit that is reasonably expected to result in payments that have the largest actuarial present value in the case of a participant who dies shortly after the annuity starting date, taking into account both payments due to the participant prior to the participant's death and any payments due after the participant's death. For this purpose, a plan is permitted to assume that the spouse of the participant is the same age as the participant. In addition, a plan is permitted to assume that the optional form of benefit that is the most valuable option for a participant with a short life expectancy when the participant is age 70½ also is the most valuable option for a participant with a short life expectancy at all older ages, and that the most valuable option for a participant with a short life expectancy at age 55 is the most valuable option for a participant with a short life expectancy at all younger ages.

(B) *Safe harbor hierarchy*—(1) A plan is permitted to treat a single-sum distribution option with an actuarial present value that is not less than the actuarial present value of any optional form of benefit eliminated by the plan amendment as the most valuable option for a participant with a short life expectancy for all of a participant's annuity starting dates if such single-sum distribution option is available at all such dates, without regard to whether the option was available before the plan amendment.

(2) If the plan before the amendment does not offer a single-sum distribution option as described in paragraph (g)(5)(iii)(B)(1) of this section, a plan is permitted to treat a joint and contingent annuity with a continuation percentage that is at least 75% and that is at least as great as the highest continuation percentage available before the amendment as the most valuable option for a participant with a short life

expectancy for all of a participant's annuity starting dates if such joint and contingent annuity is available at all such dates, without regard to whether the option was available before the plan amendment.

(3) If the plan before the amendment offers neither a single-sum distribution option as described in paragraph (g)(5)(iii)(B)(1) of this section nor a joint and contingent annuity with a continuation percentage as described in paragraph (g)(5)(iii)(B)(2) of this section, a plan is permitted to treat a term certain and life annuity with a term certain period no less than 15 years as the most valuable option for a participant with a short life expectancy for each annuity starting date if such 15-year term certain and life annuity is available at all annuity starting dates, without regard to whether the option was available before the plan amendment.

(6) *Definitions of types of section 411(d)(6)(B) protected benefits*—(i) *Early retirement benefit.* The term *early retirement benefit* means the right, under the terms of a plan, to commence distribution of a retirement-type benefit at a particular date after severance from employment with the employer and before normal retirement age. Different early retirement benefits result from differences in terms relating to timing.

(ii) *Optional form of benefit*—(A) *In general.* The term *optional form of benefit* means a distribution alternative (including the normal form of benefit) that is available under the plan with respect to an accrued benefit or a distribution alternative with respect to a retirement-type benefit. Different optional forms of benefit exist if a distribution alternative is not payable on substantially the same terms as another distribution alternative. The relevant terms include all terms affecting the value of the optional form, such as the method of benefit calculation and the actuarial factors or assumptions used to determine the amount distributed. Thus, for example, different optional forms of benefit may result from differences in terms relating to the payment schedule, timing, commencement, medium of distribution (e.g., in cash or in kind), election rights, differences in eligibility requirements, or the portion of the benefit to which the distribution alternative applies. Likewise, differences in the normal retirement ages of employees or in the form in which the accrued benefit of employees is payable at normal retirement age under a plan are taken into account in determining whether a distribution alternative constitutes one or more optional forms of benefit.

(B) *Death benefits.* If a death benefit is payable after the annuity starting date for a specific optional form of benefit and the same death benefit would not be provided if another optional form of benefit were elected by a participant, then that death benefit is part of the specific optional form of benefit and is thus protected under section 411(d)(6). A death benefit is not treated as part of a specific optional form of benefit merely because the same benefit is not provided to a participant who has received his or her entire accrued benefit prior to death. For example, a \$5,000 death benefit that is payable to all participants except any participant who has received his or her accrued benefit in a single-sum distribution is not part of a specific optional form of benefit.

(iii) *Retirement-type benefit.* The term *retirement-type benefit* means—

(A) The payment of a distribution alternative with respect to an accrued benefit; or

(B) The payment of any other benefit under a defined benefit plan (including a QSUPP as defined in § 1.401(a)(4)–12) that is permitted to be in a qualified pension plan, continues after retirement, and is not an ancillary benefit.

(iv) *Retirement-type subsidy.* The term *retirement-type subsidy* means the excess, if any, of the actuarial present value of a retirement-type benefit over the actuarial present value of the accrued benefit commencing at normal retirement age or at actual commencement date, if later, with both such actuarial present values determined as of the date the retirement-type benefit commences. Examples of retirement-type subsidies include a subsidized early retirement benefit and a subsidized qualified joint and survivor annuity.

(v) *Subsidized early retirement benefit or early retirement subsidy.* The terms *subsidized early retirement benefit* or *early retirement subsidy* mean the right, under the terms of a plan, to commence distribution of a retirement-type benefit at a particular date after severance from employment with the employer and before normal retirement age where the actuarial present value of the optional forms of benefit available to the participant under the plan at that annuity starting date exceeds the actuarial present value of the accrued benefit commencing at normal retirement age (with such actuarial present values determined as of the annuity starting date). Thus, an early retirement subsidy is an early retirement benefit that provides a retirement-type subsidy.

(7) *Eliminate; elimination; reduce; reduction.* The terms *eliminate* or *elimination* when used in connection with a section 411(d)(6)(B) protected benefit mean to eliminate or the elimination of an optional form of benefit or an early retirement benefit and to reduce or a reduction in a retirement-type subsidy. The terms *reduce* or *reduction* when used in connection with a retirement-type subsidy mean to reduce or a reduction in the amount of the subsidy. For purposes of this section, an *elimination* includes a *reduction* and a *reduction* includes an *elimination*.

(8) *Generalized optional form.* The term *generalized optional form* means a group of optional forms of benefit that are identical except for differences due to the actuarial factors that are used to determine the amount of the distributions under those optional forms of benefit and the annuity starting dates.

(9) *Maximum QJSA explanation period.* The term *maximum QJSA explanation period* means the maximum number of days before an annuity starting date for a qualified joint and survivor annuity for which a written explanation relating to the qualified joint and survivor annuity would satisfy the timing requirements of section 417(a)(3) and § 1.417(e)–1(b)(3)(ii).

(10) *Other right and feature.* The term *other right or feature* has the meaning set forth at § 1.401(a)(4)–4(e)(3)(ii).

(11) *Refund of employee contributions feature.* The term *refund of employee contributions features* means a feature with respect to an optional form of benefit that provides for employee contributions and interest thereon to be paid in a single sum at the annuity starting date with the remainder to be paid in another form beginning on that date.

(12) *Retirement; retirement age.* For purposes of this section, the date of *retirement* means the annuity starting date. Thus, *retirement age* means a participant's age at the annuity starting date.

(13) *Retroactive annuity starting date feature.* The term *retroactive annuity starting date feature* means a feature with respect to an optional form of benefit under which the annuity starting date for the distribution occurs on or before the date the written explanation required by section 417(a)(3) is provided to the participant.

(14) *Section 411(d)(6) protected benefit.* The term *section 411(d)(6) protected benefit* means the accrued benefit of a participant as of the applicable amendment date described in section 411(d)(6)(A) and any section 411(d)(6)(B) protected benefit.

(15) *Section 411(d)(6)(B) protected benefit.* The term *section 411(d)(6)(B) protected benefit* means the portion of an early retirement benefit, a retirement-type subsidy, or an optional form of benefit attributable to benefits accrued before the applicable amendment date.

(16) *Social security leveling feature.* The term *social security leveling feature* means a feature with respect to an optional form of benefit commencing prior to a participant's expected commencement of social security benefits that provides for a temporary period of higher payments which is designed to result in an approximately level amount of income when the participant's estimated old age benefits from Social Security are taken into account.

(h) *Examples.* The following examples illustrate the application of paragraphs (c) through (g) of this section:

Example 1. (i) *Facts involving elimination of optional forms of benefit as redundant.* Plan C is a defined benefit plan under which employees may elect to commence distributions at any time after the later of termination of employment or attainment of age 55. At each potential annuity commencement date, Plan C permits employees to select, with spousal consent where required, a straight life annuity or any of a number of actuarially equivalent alternative forms of payment, including a straight life annuity with cost-of-living increases and a joint and contingent annuity with the participant having the right to select any beneficiary and any continuation percentage from 1% to 100%, subject to modification to the extent necessary to satisfy the requirements of the incidental benefit requirement of § 1.401–1(b)(1)(i). The amount of any alternative payment is determined as the actuarial equivalent of the straight life annuity payable at the same age using reasonable actuarial assumptions. On June 2, 2006, Plan C is amended to delete all continuation percentages for joint and contingent options other than 25%, 50%, 75%, or 100%, effective with respect to annuity commencement dates that are on or after January 1, 2007.

(ii) *Conclusion—(A) Categorization of family members under the redundancy rule.* The optional forms of benefit described in paragraph (i) of this *Example 1* are members of 4 families: a straight life annuity; a straight life annuity with cost-of-living increases; joint and contingent options with continuation percentages of less than 50%; and joint and contingent options with continuation percentages of 50% or more. The amendment does not affect either of the first 2 families, but affects the 2 families relating to joint and contingent options.

(B) *Conclusion for elimination of optional forms of benefit as redundant.* The amendment satisfies the requirements of paragraph (c) of this section. First, the eliminated optional forms of benefit are redundant with respect to the retained optional forms of benefit because each

eliminated joint and contingent annuity option with a continuation percentage of less than 50% is redundant with respect to the 25% continuation option and each eliminated joint and contingent annuity option with a continuation percentage of 50% or higher is redundant with respect to any one of the retained 50%, 75%, or 100% continuation options. In addition, to the extent that the optional form of benefit that is being eliminated does not include a social security leveling feature, return of employee contribution feature, or retroactive annuity starting date feature, the retained optional form of benefit does not include that feature. Second, the amendment is not effective with respect to annuity commencement dates before September 1, 2006, as required under paragraph (c)(1)(ii) of this section. Third, the plan amendment does not eliminate any available core option, including the most valuable option for a participant with a short life expectancy, treating a joint and contingent annuity with a 100% continuation percentage as this optional form of benefit pursuant to paragraph (g)(5)(iii)(B)(2) of this section. Finally, the amendment need not satisfy the requirements of paragraph (e) of this section because the retained optional forms of benefit are available on the same annuity commencement dates and have the same actuarial present value as the optional forms of benefit that are being eliminated.

Example 2. (i) Facts involving elimination of optional forms of benefit as redundant if additional restrictions are imposed. The facts are the same as *Example 1*, except that the plan amendment also restricts the class of beneficiaries that may be elected under the 4 retained joint and contingent annuities to the employee's spouse.

(ii) *Conclusion.* The amendment fails to satisfy the requirements of paragraph (c)(2)(i)(B) of this section because the retained joint and contingent annuities have materially greater restrictions on the beneficiary designation than did the eliminated joint and contingent annuities. Thus, the joint and contingent annuities being eliminated are not redundant with respect to the retained joint and contingent annuities. In addition, the amendment fails to satisfy the requirements of the core option rules in paragraph (d) of this section because the amendment fails to be limited to annuity commencement dates that are at least 4 years after the date the amendment is adopted, the amendment fails to include the core option in paragraph (g)(5)(i)(B) of this section because the participant does not have the right to designate any beneficiary, and the amendment fails to include the core option described in paragraph (g)(5)(i)(C) of this section because the plan does not provide a 10-year term certain and life annuity.

Example 3. (i) Facts involving elimination of a social security leveling feature and a period certain annuity as redundant. Plan D is a defined benefit plan under which participants may elect to commence distributions in the following actuarially equivalent forms, with spousal consent if applicable: a straight life annuity; a 50%, 75%, or 100% joint and contingent annuity; a 5-year, 10-year, or a 15-year term certain and life annuity; and an installment refund

annuity (*i.e.*, an optional form of benefit that provides a period certain, the duration of which is based on the participant's age), with the participant having the right to select any beneficiary. In addition, each annuity offered under the plan, if payable to a participant who is less than age 65, is available both with and without a social security leveling feature. The social security leveling feature provides for an assumed commencement of social security benefits at any age selected by the participant between age 62 and 65. Plan D is amended on June 2, 2006, effective as of January 1, 2007, to eliminate the installment refund form of benefit and to restrict the social security leveling feature to an assumed social security commencement age of 65.

(ii) *Conclusion.* The amendment satisfies the requirements of paragraph (c) of this section. First, the installment refund annuity option is redundant with respect to the 15-year certain and life annuity (except for advanced ages where, because of shorter life expectancies, the installment refund annuity option is redundant with respect to the 5-year certain and life annuity and also redundant with respect to the 10-year certain and life annuity). Second, with respect to restricting the social security leveling feature to an assumed social security commencement age of 65, under paragraph (c)(3)(ii)(C) of this section, straight life annuities with social security leveling features that have different social security commencement ages are treated as members of the same family as straight life annuities without social security leveling features. To the extent an optional form of benefit that is being eliminated includes a social security leveling feature, the retained optional form of benefit must also include that feature, but it is permitted to have a different assumed age for commencement of social security benefits. Third, to the extent that the optional form of benefit that is being eliminated does not include a social security leveling feature, a return of employee contribution feature, or retroactive annuity starting date feature, the retained optional form of benefit must not include that feature. Fourth, the plan amendment does not eliminate any available core option, including the most valuable option for a participant with a short life expectancy, treating a joint and contingent annuity with a 100% continuation percentage as this optional form of benefit pursuant to paragraph (g)(5)(iii)(B)(2) of this section. Fifth, the amendment is not effective with respect to annuity commencement dates before September 1, 2006, as required under paragraph (c)(1)(ii) of this section. The amendment need not satisfy the requirements of paragraph (e) of this section because the retained optional forms of benefit are available on the same annuity commencement dates and have the same actuarial present value as the optional forms of benefit that are being eliminated.

Example 4. (i) Facts involving elimination of noncore options. Employer N sponsors Plan E, a defined benefit plan that permits every participant to elect payment in the following actuarially equivalent optional forms of benefit (Plan E's uniformly available options), with spousal consent if applicable: a straight life annuity; a 50%, 75%, or 100%

joint and contingent annuity with no restrictions on designation of beneficiaries; and a 5-, 10-, or 15-year term certain and life annuity. In addition, each can be elected in conjunction with a social security leveling feature, with the participant permitted to select a social security commencement age from age 62 to age 67. None of Plan E's uniformly available options include a single-sum distribution. The plan has been in existence for over 30 years, during which time Employer N has acquired a large number of other businesses, including merging over 20 defined benefit plans of acquired entities into Plan E. Many of the merged plans offered optional forms of benefit that were not among Plan E's uniformly available options, including some plans funded through insurance products, often offering all of the insurance annuities that the insurance carrier offers, and with some of the merged plans offering single-sum distributions. In particular, under the XYZ acquisition that occurred in 1990, the XYZ acquired plan offered a single-sum distribution option that was frozen at the time of the acquisition. On April 1, 2006, each single-sum distribution option applies to less than 25% of the XYZ participants' accrued benefits. Employer N has generally, but not uniformly, followed the practice of limiting the optional forms of benefit for an acquired unit to an employee's service before the date of the merger, and has uniformly followed this practice with respect to each of the early retirement subsidies in the acquired unit's plan. As a result, as of April 1, 2007, Plan E includes a large number of generalized optional forms which are not members of families of optional forms of benefit identified in paragraph (c)(4) of this section, but there are no participants who are entitled to any early retirement subsidies because any subsidies have been subsumed by the actuarially reduced accrued benefit. Plan E is amended in April of 2007 to eliminate all of the optional forms of benefit that Plan E offers other than Plan E's uniformly available options, except that the amendment does not eliminate any single-sum distribution option except with respect to XYZ participants and permits any commencement date that was permitted under Plan E before the amendment. Plan E also eliminates the single-sum distribution option for XYZ participants. Further, each of Plan E's uniformly available options has an actuarial present value that is not less than the actuarial present value of any optional form of benefit offered before the amendment. The amendment is effective with respect to annuity commencement dates that are on or after May 1, 2011.

(ii) *Conclusion.* The amendment satisfies the requirements of paragraph (d) of this section. First, Plan E, as amended, does not eliminate any single-sum distribution option as provided in paragraph (d)(2)(iii) of this section except for single-sum distribution options that apply to less than 25% of a plan participant's accrued benefit as of the date the option is eliminated (May 1, 2011). Second, Plan E, as amended, includes each of the core options as defined in paragraph (g)(5) of this section, including offering the most valuable option for a participant with

a short life expectancy (treating the 100% joint and contingent annuity as this benefit, under paragraph (g)(5)(iii)(B)(2) of this section). The 100% joint and contingent annuity option (and not the grandfathered single-sum distribution option) is the most valuable option for a participant with a short life expectancy because the grandfathered single-sum distribution option is not available with respect to a participant's entire accrued benefit. In addition, as required under paragraph (d)(2) of this section, to the extent an optional form of benefit that is being eliminated includes either a social security leveling feature or a refund of employee contributions feature, at least one of the core options is available with that feature and, to the extent that the optional form of benefit that is being eliminated does not include a social security leveling feature or a refund of employee contributions feature, each of the core options is available without that feature. Third, the amendment is not effective with respect to annuity commencement dates that are less than 4 years after the date the amendment is adopted. Finally, the amendment need not satisfy the requirements of paragraph (e) of this section because the retained optional forms of benefit are available on the same annuity commencement date and have the same actuarial present value as the optional forms of benefit that are being eliminated. The conclusion that the amendment satisfies

the requirements of paragraph (d) of this section assumes that no amendments are made to change the core options before May 1, 2014.

Example 5. (i) Facts involving reductions in actuarial present value. (A) Plan F is a defined benefit plan providing an accrued benefit of 1% of the average of a participant's highest 3 consecutive years' pay times years of service, payable as a straight life annuity beginning at the normal retirement age at age 65. Plan F permits employees to elect to commence actuarially reduced distributions at any time after the later of termination of employment or attainment of age 55. At each potential annuity commencement date, Plan F permits employees to select, with spousal consent, either a straight life annuity, a joint and contingent annuity with the participant having the right to select any beneficiary and a continuation percentage of 50%, 66 2/3%, 75%, or 100%, or a 10-year certain and life annuity with the participant having the right to select any beneficiary, subject to modification to the extent necessary to satisfy the requirements of the incidental benefit requirement of § 1.401-1(b)(1)(i). The amount of any joint and contingent annuity and the 10-year certain and life annuity is determined as the actuarial equivalent of the straight life annuity payable at the same age using reasonable actuarial assumptions. The plan covers employees at 4 divisions, one of which, Division X, was acquired on January

1, 1999. The plan provides for distributions before normal retirement age to be actuarially reduced, but, if a participant retires after attainment of age 55 and completion of 10 years of service, the applicable early retirement reduction factor is 3% per year for the years between age 65 and 62 and 6% per year for the ages from 62 to 55 for all employees at any division, except for employees who were in Division X on January 1, 1999, for whom the early retirement reduction factor for retirement after age 55 and 10 years of service is 5% for each year before age 65. On June 2, 2006, effective January 1, 2007, Plan F is amended to change the early retirement reduction factors for all employees of Division X to be the same as for other employees, effective with respect to annuity commencement dates that are on or after January 1, 2008, but only with respect to participants who are employees on or after January 1, 2008 and only if Plan F continues accruals at the current rate through January 1, 2008 (or the effective date of the change in reduction factors is delayed to reflect the change in the accrual rate). For purposes of this *Example 5*, it is assumed that an actuarially equivalent early retirement factor would have a reduction shown in column 4 of the following table, which compares the reduction factors for Division X before and after the amendment:

Age	Old division X factor (as a %)	New factor (as a %)	Actuarially equivalent factor (as a %)	Column 3 minus column 2
1	2	3	4	5
65	NA	NA	NA	NA
64	95	97	91.1	+2
63	90	94	83.2	+4
62	85	91	76.1	+5
61	80	85	69.8	+5
60	75	79	64.1	+4
59	70	73	59.0	+3
58	65	67	54.3	+2
57	60	61	50.1	+1
56	55	55	46.3	0
55	50	49	42.8	-1

(B) On January 1, 2007, the employee with the largest number of years of service is Employee E, who is age 54 and has 20 years of service. For 2006, Employee E's compensation is \$80,000 and E's highest 3 consecutive years of pay on January 1, 2007 is \$75,000. Employee E's accrued benefit as of the January 1, 2007 effective date of the amendment is a life annuity of \$15,000 per year at normal retirement age (1% times \$75,000 times 20 years of service) and E's early retirement benefit commencing at age 55 has a present value of \$91,397 as of January 1, 2007. It is assumed for purposes of this example that the longest expected transition period for any active employee does not exceed 5 months (20 years and 5 months, times 1% times 49% exceeds 20 years times 1% times 50%). Finally, it is assumed for purposes of this example that the amendment reduces optional forms of benefit which are burdensome or complex.

(ii) *Conclusion concerning application of section 411(d)(6)(B).* The amendment reducing the early retirement factors has the effect of eliminating the existing optional forms of benefit (where the amount of the benefit is based on preamendment early retirement factors in any case where the new factors result in a smaller amount payable) and adding new optional forms of benefit (where the amount of benefit is based on the different early retirement factors). Accordingly, the elimination must satisfy the requirements of paragraph (c) or (d) of this section if the amount payable at any date is less than would have been payable under the plan before the amendment.

(iii) *Conclusion concerning application of redundancy rules.* The amendment satisfies the requirements of paragraph (c)(1)(i) and (ii) of this section (see paragraphs (iv) through (vi) of this *Example 5* below for the requirements of paragraph (c)(1)(iii) of this

section). First, with respect to each eliminated optional form of benefit (*i.e.*, with respect to each optional form of benefit with the Old Division X Factor), after the amendment there is a retained optional form of benefit that is in the same family of optional forms of benefit (*i.e.*, the optional form of benefit with the New Factor). Second, the amendment is not effective with respect to annuity commencement dates that are less than the time period required under paragraph (c)(1)(ii) of this section. Third, to the extent that the plan amendment eliminates the most valuable option for a participant with a short life expectancy, the retained optional form of benefit is identical except for differences in actuarial factors.

(iv) *Conclusion concerning application of the requirements under paragraph (e) of this section.* The plan amendment must satisfy the requirements of paragraph (e) of this section because, as of the December 2, 2006

adoption date, the actuarial present value of the early retirement subsidy is less than the actuarial present value of the early retirement subsidy being eliminated. The plan amendment satisfies the requirements under paragraph (e)(1)(i) and (2) of this section because the amendment eliminates optional forms of benefit that create significant burdens or complexities for the plan and its participants. See below for the *de minimis* requirement under paragraph (e)(1)(ii) and (3) of this section.

(v) *Conclusion concerning application of de minimis rules under paragraph (e)(5) of this section.* In order to satisfy the requirements under paragraph (e)(1)(ii) and (3) of this section, the amendment must satisfy the requirements of either paragraph (e)(5) or paragraph (e)(6) of this section. The amendment does not satisfy the requirements of paragraph (e)(5) of this section because the reduction in the actuarial present value is more than a *de minimis* amount under paragraph (e)(5) of this section. For example, for Employee E, the amount of the joint and contingent annuity payable at age 55 is reduced from \$7,500 (50% of \$15,000) to \$7,350 (49% of \$15,000) and the reduction in present value as a result of the amendment is \$1,828 (\$91,397—\$89,569). In this case, the retirement-type subsidy at age 55 is the excess of the present value of the 50% early retirement benefit over the present value of the deferred payment of the accrued benefit, or \$13,921 (\$97,269—\$83,348) and the present value at age 54 of the retirement-type subsidy is \$13,081. The reduction in present value is more than the greater of 2% of the present value of the retirement-type subsidy and 1% of E's compensation because the reduction in present value exceeds \$800 (the greater of \$262, which is 2% of the present value of the retirement-type subsidy for the benefit being eliminated, and \$800, which is 1% of E's compensation of \$80,000).

(vi) *Conclusion involving application of de minimis rules under paragraph (e)(6) of this section relating to expected transition period.* The amendment satisfies the requirements of paragraph (e)(6) of this section and, thus, satisfies the requirements of paragraph (c) of this section, including the requirement in paragraph (c)(1)(iii) of this section that paragraph (e) of this section be satisfied. First, as assumed under the facts above, the amendment reduces optional forms of benefit that are burdensome or complex. Second, the plan amendment is not effective for annuity commencement dates before January 1, 2008, and that date is not earlier than the longest expected transition period for any participant in Plan F on the date of the amendment. Third, the amendment does not apply to any participant who has a severance from employment during the transition period. If, however, a later plan amendment reduces accruals under Plan F, the initial plan amendment will no longer satisfy the requirements of paragraph (e)(6) of this section (and must be voided) unless, as part of the later amendment, the expected transition period is extended to reflect the reduction in accruals under Plan F.

(i) [RESERVED].

(j) *Effective dates—(1) General effective date.* Except as otherwise

provided in this paragraph (j), the rules of this section apply to amendments adopted on or after August 12, 2005.

(2) *Effective date for rules relating to contingent event benefits.* Paragraph (b)(1)(ii) of this section applies to amendments adopted after December 31, 2005.

§ 1.411(a)–4 [Amended]

■ **Par. 3.** Section 1.411(a)–4 is amended by removing paragraph (b)(4)(ii) and redesignating paragraph (b)(4)(iii) as paragraph (b)(4)(ii).

■ **Par. 4.** Section 1.411(d)–4 is amended by:

- 1. Revising paragraph (a)(2) of Q&A–1.
- 2. Revising paragraph (b)(1) of Q&A–1.
- 3. Amending paragraph (b)(2) of Q&A–1 to remove *Example 2* and redesignate *Example 3* through *11* as *Example 2* through *10*.
- 4. Revising the first sentence of paragraph (a)(1) of Q&A–2.
- 5. Revising paragraph (c) of Q&A–2.

The revisions read as follows:

§ 1.411(d)–4 Section 411(d)(6) protected benefits.

* * * * *

A–1. (a) * * *

(2) Early retirement benefits (as defined in § 1.411(d)–3(g)(6)(i)) and retirement-type subsidies (as defined in § 1.411(d)–3(g)(6)(iv)), and

* * * * *

(b) *Optional forms of benefit—(1) In general.* The term *optional form of benefit* has the same meaning as in § 1.411(d)–3(g)(6)(ii). Under this definition, different optional forms of benefit exist if a distribution alternative is not payable on substantially the same terms as another distribution alternative. Thus, for example, different optional forms of benefit may result from differences in terms relating to the payment schedule, timing, commencement, medium of distribution (e.g., in cash or in kind), election rights, differences in eligibility requirements, or the portion of the benefit to which the distribution alternative applies.

* * * * *

A–2 * * *

(a) *Reduction or elimination of section 411(d)(6) protected benefits—(1) In general.* A plan is not permitted to be amended to eliminate or reduce a section 411(d)(6) protected benefit that has already accrued, except as provided in § 1.411(d)–3 or this section. * * *

* * * * *

(c) *Multiple amendments—(1) General rule.* A plan amendment violates the requirements of section 411(d)(6) if it is one of a series of plan amendments that, when taken together, have the effect of

reducing or eliminating a section 411(d)(6) protected benefit in a manner that would be prohibited by section 411(d)(6) if accomplished through a single amendment.

(2) *Determination of time period for combining plan amendments.* For purposes of paragraph (c)(1) of this Q&A–2, generally only plan amendments adopted within a 3-year period are taken into account. But see Q&A–1(c)(1) of this section for rules relating to repeated plan amendments.

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PART 54—PENSION EXCISE TAXES

■ **Par. 5.** The authority citation for part 54 continues to read, in part, as follows:

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

■ **Par. 6.** Section 54.4980F–1 is amended by:

- 1. Revising paragraph (b) of Q&A–7.
- 2. Revising paragraph (c) of Q&A–8.
- 3. Revising paragraph (d) of Q&A–8.

The revisions and addition read as follows:

§ 54.4980F–1 Notice requirements for certain pension plan amendments significantly reducing the rate of future benefit accrual.

* * * * *

A–7. * * *

(b) *Plan provisions not taken into account.* Plan provisions that do not affect the rate of future benefit accrual of participants or alternate payees are not taken into account in determining whether there has been a reduction in the rate of future benefit accrual. Further, any benefit that is not a section 411(d)(6) protected benefit as described in §§ 1.411(d)–3(g)(14) and 1.411(d)–4, Q&A–1(d) of this chapter, or that is a section 411(d)(6) protected benefit that may be eliminated or reduced as permitted under § 1.411(d)–3 or § 1.411(d)–4, Q&A–2(a), or (b) of this chapter, is not taken into account in determining whether an amendment is a section 204(h) amendment. Thus, for example, provisions relating to the right to make after-tax deferrals are not taken into account.

* * * * *

A–8. * * *

(c) *Application to certain amendments reducing early retirement benefits or retirement-type subsidies.* Section 204(h) notice is not required for an amendment that reduces an early retirement benefit or retirement-type subsidy if the amendment is permitted under the third sentence of section 411(d)(6)(B) of the Internal Revenue Code and paragraphs (c), (d), and (f) of § 1.411(d)–3 of this chapter (relating to the elimination or reduction of benefits

or subsidies which create significant burdens or complexities for the plan and plan participants unless the amendment adversely affects the rights of any participant in a more than *de minimis* manner). However, in determining whether an amendment reducing a retirement-type subsidy constitutes a significant reduction because it reduces a retirement-type subsidy as permitted under § 1.411(d)-3(e)(6) of this chapter, the amendment is treated in the same manner as an amendment that limits the retirement-type subsidy to benefits that accrue before the applicable amendment date (as defined at § 1.411(d)-3(g)(4) of this chapter) with respect to each participant or alternate payee to whom the reduction is reasonably expected to apply.

(d) *Examples.* The following examples illustrate the rules in this Q&A-8:

Example 1. (i) *Facts.* Pension Plan A is a defined benefit plan that provides a rate of benefit accrual of 1% of highest-5 years pay multiplied by years of service, payable annually for life commencing at normal retirement age (or at actual retirement age, if later). An amendment to Plan A is adopted on August 1, 2009, effective January 1, 2010, to provide that any participant who separates from service after December 31, 2009, and before January 1, 2015, will have the same number of years of service he or she would have had if his or her service continued to December 31, 2014.

(ii) *Conclusion.* In this example, the effective date of the plan amendment is January 1, 2010. While the amendment will result in a reduction in the annual rate of future benefit accrual from 2011 through 2014 (because, under the amendment, benefits based upon an additional 5 years of service accrue on January 1, 2010, and no additional service is credited after January 1, 2010 until January 1, 2015), the amendment does not result in a reduction that is significant because the amount of the annual benefit commencing at normal retirement age (or at actual retirement age, if later) under the terms of the plan as amended is not under any conditions less than the amount of the annual benefit commencing at normal retirement age (or at actual retirement age, if later) to which any participant would have been entitled under the terms of the plan had the amendment not been made.

Example 2. (i) *Facts.* The facts are the same as in *Example 1*, except that the 2009 amendment does not alter the plan provisions relating to a participant's number of years of service, but instead amends the plan's provisions relating to early retirement benefits. Before the amendment, the plan provides for distributions before normal retirement age to be actuarially reduced, but, if a participant retires after attainment of age 55 and completion of 10 years of service, the applicable early retirement reduction factor is 3% per year for the years between the ages 65 and 62 and 6% per year for the ages from 62 to 55. The amendment changes these

provisions so that an actuarial reduction applies in all cases, but, in accordance with section 411(d)(6)(B), provides that no participant's early retirement benefit will be less than the amount provided under the plan as in effect on December 31, 2009 with respect to service before January 1, 2010. For participant X, the reduction is significant.

(ii) *Conclusion.* The amendment will result in a reduction in a retirement-type subsidy provided under Plan A (*i.e.*, Plan A's early retirement subsidy). Section 204(h) notice must be provided to participant X and any other participant for whom the reduction is significant and the notice must be provided at least 45 days before January 1, 2010 (or by such other date as may apply under Q&A-9 of this section).

Example 3. (i) *Facts.* The facts are the same as in *Example 2*, except that, for participant X, the change does not go into effect for any annuity commencement date before January 1, 2011. Participant X continues employment through January 1, 2011.

(ii) *Conclusion.* The conclusion is the same as in *Example 2*. Taking into account the rule in the second sentence of Q&A-8(c) of this section, the reduction that occurs for participant X on January 1, 2011, is treated as the same reduction that occurs under *Example 2*. Accordingly, assuming that the reduction is significant, section 204(h) notice must be provided to participant X at least 45 days before the January 1, 2010 effective date of the amendment (or by such other date as may apply under Q&A-9 of this section).

Mark E. Matthews,

Deputy Commissioner for Services and Enforcement.

Approved: August 1, 2005.

Eric Solomon,

Acting Deputy Assistant Secretary of the Treasury.

[FR Doc. 05-15958 Filed 8-11-05; 8:45 am]

BILLING CODE 4830-01-P
