

participants in, qualified retirement plans.

**DATES:** Written or electronic comments must be received by November 10, 2005.

Requests to speak (with outlines of oral comments to be discussed) at the public hearing scheduled for December 6, 2005, at 10 a.m. must be received by November 15, 2005.

**ADDRESSES:** Send submissions to: CC:PA:LPD:PR (REG-156518-04), room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG-156518-04), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC. Alternatively, taxpayers may submit comments electronically, via the IRS Internet site at <http://www.irs.gov/regs>, or via the Federal eRulemaking Portal at <http://www.regulations.gov> (IRS-REG-156581-04). The public hearing will be held in the Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Concerning the proposed regulations, Pamela R. Kinard at (202) 622-6060; concerning submissions of comments, the hearing, and the requests to be placed on the building access list to attend the hearing, contact Treena Garrett, (202) 622-7180 (not toll-free numbers).

**SUPPLEMENTARY INFORMATION:**

**Background**

This document contains proposed amendments to 26 CFR part 1 under section 411(d)(6) of the Internal Revenue Code (Code). These proposed regulations, when finalized, would revise Treasury Regulations § 1.411(d)-3 to provide guidance on when a plan amendment may alter a benefit entitlement with respect to benefits accrued before the date of the amendment to add a condition that is permitted under section 411(a). These rules are intended to reflect the holding in *Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739 (June 7, 2004). The proposed regulations would also provide a new method—a utilization test—under which a plan amendment is permitted to eliminate or reduce an early retirement benefit, a retirement-type subsidy, or an optional form of benefit.

Section 411(a) generally provides that an employee's right to the accrued benefit derived from employer contributions must become nonforfeitable within a specified period

of service. Section 411(a)(3) provides circumstances under which an employee's benefit is permitted to be forfeited without violating section 411(a). Section 411(a)(3)(B) specifically provides that a right to an accrued benefit derived from employer contributions is not treated as forfeitable solely because the plan provides that the payment of benefits is suspended for such period as the employee is employed, subsequent to the commencement of payment of such benefits: (1) In the case of a plan other than a multiemployer plan, by the employer who maintains the plan under which such benefits were being paid; and (2) in the case of a multiemployer plan, in the same industry, the same trade or craft, and the same geographic area covered by the plan as when such benefits commenced.

The definition of employment for which benefit payments are permitted to be suspended is further described in 29 CFR 2530.203-3 of the Department of Labor Regulations, which interprets section 203(a)(3)(B) of the Employee Retirement Income Security Act of 1974 (ERISA), as amended, the counterpart to section 411(a)(3)(B) of the Code. Employment that satisfies the conditions described in section 203(a)(3)(B) of ERISA and the regulations thereunder is referred to as "section 203(a)(3)(B) service." See 29 CFR 2530.203-3(c).

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 ERISA. Section 411(d)(6)(B) 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).

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**DEPARTMENT OF THE TREASURY**

**Internal Revenue Service**

**26 CFR Part 1**

[REG-156518-04]

RIN 1545-BE10

**Section 411(d)(6) Protected Benefits**

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice of proposed rulemaking and notice of public hearing.

**SUMMARY:** This document contains proposed regulations providing guidance on certain issues relating to 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 proposed regulations would address the interaction between the anti-cutback rules of section 411(d)(6) and the nonforfeatability requirements of section 411(a), and would also provide a utilization test under which certain plan amendments would be permitted to eliminate or reduce certain early retirement benefits, retirement-type subsidies, or optional forms of benefit. These proposed regulations would generally affect sponsors of, and

Section 645(b)(1) of the Economic Growth and Tax Relief Reconciliation Act of 2001, Public Law 107-16 (115 Stat. 38) (EGTRRA) amended section 411(d)(6)(B) of the Code to direct the Secretary of the Treasury to issue regulations providing that section 411(d)(6)(B) 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.

Section 204(g) of ERISA contains parallel rules to section 411(d)(6) of the Code, including a similar directive to the Secretary of the Treasury to issue regulations providing that section 204(g) of ERISA 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 proposed regulations for purposes of ERISA, as well as the Code. Thus, these proposed Treasury regulations issued under section 411(d)(6) of the Code apply as well for purposes of section 204(g) of ERISA.

On July 11, 1988, final regulations (TD 8212) under section 411(d)(6) were published in the **Federal Register** (53 FR 26050). These regulations are contained in § 1.411(d)-4.

In conjunction with the publication of these proposed regulations, final regulations under sections 411(d)(6) and 4980F are being published elsewhere in the Rules and Regulations portion of this issue in the **Federal Register**. Those final regulations are contained in § 1.411(d)-3, which sets forth conditions under which a plan amendment is permitted to eliminate an optional form of benefit and to eliminate or reduce an early retirement benefit or a retirement-type subsidy that creates 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. However, those regulations reserve 2 topics for later guidance—the utilization test (currently reserved in § 1.411(d)-3(f)) and the interaction of the permitted forfeiture rules under section 411(a)

with the anti-cutback rules under section 411(d)(6) (currently reserved in § 1.411(d)-3(a)(3)). These proposed regulations would address these 2 topics as described below.

In *Central Laborers'*, the plaintiffs were 2 inactive participants in a multiemployer pension plan who commenced payment of their benefits in 1996 after qualifying for subsidized early retirement payments. The plan terms required that payments be suspended if a participant engaged in *disqualifying employment*. At the time of their commencement of benefits, the plan defined disqualifying employment to include only employment covered by the plan, but not work as a construction supervisor. Both participants were employed as construction supervisors after they commenced payment of benefits. Although the 2 participants' benefit payments were not suspended in 1996, the plan was amended in 1998 to expand its definition of disqualifying employment to include any employment in the same trade or craft, industry, and geographic area covered by the plan, and the plan stopped payments to the 2 participants on account of their disqualifying employment as construction supervisors. The 2 participants sued to recover the suspended payments, claiming that the amendment expanding the plan's suspension provisions violated section 204(g) of ERISA (the counterpart to section 411(d)(6) of the Code).

The Supreme Court, holding for the 2 participants, ruled that section 204(g) of ERISA prohibits a plan amendment expanding the categories of post-retirement employment that result in suspension of the payment of early retirement benefits already accrued. The Court found that, while ERISA permits certain conditions that are elements of the benefit itself (such as suspensions under section 411(a)(3)(B) of the Code or section 203(a)(3)(B) of ERISA), such a condition may not be imposed after a benefit has accrued, and that the right to receive benefit payments on a certain date may not be limited by a new condition narrowing that right. The Court agreed with the 7th Circuit that “[a] participant’s benefits cannot be understood without reference to the conditions imposed on receiving those benefits, and an amendment placing materially greater restrictions on the receipt of the benefit “reduces” the benefit just as surely as a decrease in the size of the monthly benefit.” *Central Laborers'* at 744, quoting *Heinz v. Central Laborers' Pension Fund*, 303 F.3d 802, 805 (7th Cir. 2002).

Rev. Proc. 2005-23 (2005-18 I.R.B. 991) limits the retroactive application of *Central Laborers'* for qualified plans under section 401(a) pursuant to the Commissioner's authority under section 7805(b)(8). The revenue procedure provides that the IRS will not disqualify a plan solely on account of a plan amendment adopted before June 7, 2004 that violated section 411(d)(6) by adding or expanding a suspension of benefit provision permitted under section 411(a)(3) if certain requirements are satisfied. These requirements include the adoption of a reforming amendment that provides for the payment of benefits retroactive to June 7, 2004, to affected plan participants. Rev. Proc. 2005-23 does not address participants' rights to recover benefits under Title I of ERISA.

Rev. Proc. 2005-23 states that Treasury and the IRS intend to propose regulations that reflect the holding in *Central Laborers'*. The revenue procedure provides that the proposed regulations will provide guidance on when an amendment may add a benefit entitlement condition that is permitted under the vesting rules with respect to benefits accrued before the date of the amendment. Those rules are contained in these proposed regulations.

#### Explanation of Provisions

##### *Interaction of the Permitted Forfeiture Rules Under Section 411(a) with the Anti-Cutback Rules Under Section 411(d)(6)*

The proposed regulations would address the interaction of the vesting rules in section 411(a) with the anti-cutback rules in section 411(d)(6), taking into account the decision in *Central Laborers'*. The regulations would provide that a plan amendment that decreases accrued benefits, or otherwise places greater restrictions on the rights to section 411(d)(6) protected benefits violates section 411(d)(6), even if the amendment merely adds a restriction or condition on receipt of section 411(d)(6) protected benefits that is otherwise permitted under the vesting rules in section 411(a)(3) through (11). The proposed regulations would further provide that such a plan amendment is permitted under section 411(d)(6) to the extent it applies with respect to benefits accruing after the applicable amendment date.

The proposed regulations include 3 examples illustrating this rule. One example includes facts similar to *Central Laborers'*. Another example illustrates the interaction of section 411(d)(6) with the rule of parity in section 411(a)(6)(D). The final example addresses how a plan amendment that

changes the plan's vesting schedule would violate section 411(d)(6) if the amendment were to place greater restrictions on the rights to section 411(d)(6) protected benefits. This example illustrates that the application of this section 411(d)(6) rule to a plan amendment changing a plan's vesting schedule is in addition to the requirements under section 411(a)(10)(A) (requiring that the nonforfeitable percentage of a participant's accrued benefit as of the applicable amendment date not be decreased by the plan amendment) and under section 411(a)(10)(B) (requiring that the plan permit each participant having not less than 3 years of service to elect to have his or her nonforfeitable percentage computed without regard to the plan amendment). Thus, if a plan amendment changes the plan's vesting schedule, the amendment must not place greater restrictions (including vesting restrictions) on a participant's rights to previously accrued benefits, and must also comply with section 411(a)(10). As indicated in the example, both of these requirements are satisfied for an amendment changing a plan's vesting schedule if each plan participant is entitled to benefits based on the greater of the new and old vesting schedules.

While the proposed regulations address the addition of conditions specifically described in section 411(a), these rules would also apply in other situations. For example, if a plan provides section 411(d)(6) protected benefits that are conditioned on the reemployment of the participant, then a plan amendment adding additional restrictions with respect to benefits already accrued on those benefits is required to satisfy section 411(d)(6). However, a plan amendment is permitted to add restrictions with respect to future accruals.

#### Utilization Test

The proposed regulations would provide that a plan is permitted to be amended to eliminate optional forms of benefit that comprise a generalized optional form<sup>1</sup> for a participant with respect to benefits accrued before the applicable amendment date if certain requirements relating to the use of the generalized optional form are satisfied. However, under the utilization test, a plan is not permitted to be amended to

<sup>1</sup> The term *generalized optional form* is defined in § 1.411(d)-3(g)(8) as 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.

eliminate core options (*i.e.*, 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). In order to eliminate a noncore optional form of benefit under the proposed utilization test, 2 conditions must be satisfied: (1) The generalized optional form is available to a substantial number of participants during the relevant look-back period and (2) no participant must have elected any optional form of benefit that is within its generalized optional form during such relevant look-back period.

If the utilization test is satisfied, the plan could be amended to eliminate all of the optional forms of benefit that comprise a generalized optional form without having to satisfy the burdensome and *de minimis* requirements of § 1.411(d)-3(e). Treasury and the IRS believe that the utilization test, by its nature, implicitly determines—by reference to participant's elections—which optional forms of benefit are considered valuable to plan participants. The fact that no participant in a substantial sample elected any optional form of benefit that is within a generalized optional form is a compelling indication that elimination of that the entire generalized optional form would not adversely affect the rights of any participant in a more than *de minimis* manner.

The utilization test would provide that the generalized optional form being eliminated must have been available to at least 100 participants who are taken into account during the look-back period. The look-back period under the utilization test in the proposed regulations is the 2 plan years immediately preceding the plan year in which the plan amendment eliminating the optional form of benefit is adopted. At least one of the plan years during the look-back period must be a 12-month plan year. If a plan does not have at least 100 participants who are taken into account during those 2 plan years, the look-back period is permitted to be expanded to be the 3, 4, or 5 plan years immediately preceding the plan year in which the plan amendment eliminating the optional form of benefit is adopted in order to have a look-back period that has at least 100 participants who are taken into account. If a plan does not have at least 100 participants who can be taken into account during the relevant 5-year period, the plan is not permitted to use the utilization test.

For purposes of the utilization test, a participant is generally taken into account only if during the look-back period the participant was eligible to

elect to commence payment of an optional form of benefit that is part of the generalized optional form being eliminated. However, a participant would not be taken into account if the participant: did not elect any optional form of benefit with an annuity commencement date that is within the look-back period; elected 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; elected an optional form of benefit that was only available during a limited period of time that contained a retirement-type subsidy that was not extended to the generalized optional form being eliminated; or elected an optional form of benefit with an annuity commencement date that is more than 10 years before normal retirement age.<sup>2</sup> Treasury and the IRS believe that, in light of these restrictions on participants who are permitted to be taken into account in applying the utilization test, the sample size of 100 participants who are eligible to elect the generalized optional form is sufficiently large to demonstrate that elimination of the generalized optional form would not adversely affect the rights of any plan participant in a more than *de minimis* manner.

Under the proposed regulations, a plan amendment eliminating a generalized optional form under the utilization rule cannot be 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 § 1.411(d)-3(g)(9)) after the date the amendment is adopted. This waiting period is the same as the waiting period for the elimination of an optional form of benefit under the redundancy rule in § 1.411(d)-3(c)(1)(ii).

#### Proposed Effective Date

The rules relating to section 411(a) nonforfeatability provisions are proposed to be effective June 7, 2004, the date of the *Central Laborers'* decision. The rules relating to the utilization test are proposed to be effective for amendments adopted after December 31, 2006. With respect to the rules relating to the utilization test, these proposed regulations cannot be relied upon until they are adopted in final form in the **Federal Register**.

<sup>2</sup> The term *annuity commencement date* is defined in § 1.411(d)-3(g)(3) as the annuity starting date, except that, in the case of a retroactive annuity starting date, *annuity commencement date* is 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).

Special Analyses

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

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. The Treasury Department and IRS specifically request comments on the clarity of the proposed rules and how they can be made easier to understand. All comments will be available for public inspection and copying.

A public hearing has been scheduled for December 6, 2005, beginning at 10 a.m. in the Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC. Due to building security procedures, visitors must enter at the main entrance, located at 1111 Constitution Avenue, NW. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the FOR FURTHER INFORMATION CONTACT portion of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments must submit written or electronic comments and an outline of the topics to be discussed and time to be devoted to each topic (a signed original and eight (8) copies) by November 15, 2005. A period of 10 minutes will be allotted to each person for making comments. An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving comments has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal author of these proposed regulations is Pamela R. Kinard, Office of 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 in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

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

Authority: 26 U.S.C. 7805 \* \* \* Section 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 amended by:

- 1. Revising paragraph (a)(3).
2. Adding Examples 3 and 4 to paragraph (a)(4).
3. Adding Example 3 to paragraph (b)(4).
4. Revising paragraph (f).
5. Adding Example 6 to paragraph (h).
6. Adding paragraphs (j)(3) and (j)(4).

The revisions and additions read as follows:

Section 411(d)(6) Protected Benefits.

(a) Application of section 411(a) nonforfeitable provisions with respect to section 411(d)(6) protected benefits. The rules of this paragraph (a) apply to a plan amendment that decreases a participant's accrued benefits, or otherwise places greater restrictions or conditions on a participant's rights to section 411(d)(6) protected benefits, even if the amendment merely adds a restriction or condition that is otherwise permitted under the vesting rules in section 411(a)(3) through (11). However, such an amendment does not violate section 411(d)(6) to the extent it applies with respect to benefits that accrue after the applicable amendment date.

- (4) Example 3.

Example 3. (i) Facts. Employer N maintains Plan C, a qualified defined benefit plan under which an employee participates upon completion of 1 year of service and is vested in 100% of the employer-derived accrued benefit upon completion of 5 years of service. Plan C provides that a former employee's years of service prior to a break in service will be reinstated upon completion of 1 year of service after being rehired. Plan C has participants who have fewer than 5 years of service and who are accordingly 0% vested in their employer-derived accrued benefits. On December 31, 2007, effective January 1, 2008, Plan C is amended, in accordance with section 411(a)(6)(D), to provide that any nonvested participant who has 5 consecutive 1-year breaks in service and whose number of consecutive 1-year breaks in service exceeds his or her number of years of service before the breaks will have his or her pre-break service disregarded in determining vesting under the plan.

(ii) Conclusion. Under paragraph (a)(3) of this section, the plan amendment does not satisfy the requirements of paragraph (a) of this section, and thus violates section 411(d)(6), because the amendment places greater restrictions or conditions on the rights to section 411(d)(6) protected benefits, as of January 1, 2008, for participants who have fewer than 5 years of service, by restricting the ability of those participants to receive further vesting protections on benefits accrued as of that date.

Example 4. (i) Facts—(A) Employer O sponsors Plan D, a qualified profit sharing plan under which each employee has a nonforfeitable right to a percentage of his or her employer-derived accrued benefit based on the following table:

Table with 2 columns: Completed years of service, Nonforfeitable percentage. Rows: Fewer than 3 (0), 3 (20), 4 (40), 5 (60), 6 (80), 7 (100).

(B) In January 2005, Employer O acquires Company X, which maintains Plan E, a qualified profit sharing plan under which each employee who has completed 5 years of service has a nonforfeitable right to 100% of the employer-derived accrued benefit. In 2006, Plan E is merged into Plan D. On the effective date for the merger, Plan D is amended to provide that the vesting schedule for participants of Plan E is the 7-year graded vesting schedule of Plan D. In accordance with section 411(a)(10)(A), the plan amendment provides that any participant of Plan E who had completed 5 years of service prior to the amendment is fully vested. In addition, as required under section 411(a)(10)(B), the amendment provides that any participant in Plan E who has at least 3 years of service prior to the amendment is permitted to make an irrevocable election to have the vesting of his or her nonforfeitable right to the employer-derived accrued benefit determined under either the 5-year cliff vesting schedule or the 7-year graded vesting

schedule. Participant G, who has an account balance of \$10,000 on the applicable amendment date, is a participant in Plan E with 2 years of service as of the applicable amendment date. As of the date of the merger, Participant G's nonforfeitable right to G's employer-derived accrued benefit is 0% under both the 7-year graded vesting schedule of Plan D and the 5-year cliff vesting schedule of Plan E.

(ii) *Conclusion.* Under paragraph (a)(3) of this section, the plan amendment does not satisfy the requirements of paragraph (a) of this section and violates section 411(d)(6), because the amendment places greater restrictions or conditions on the rights to section 411(d)(6) protected benefits with respect to G and any participant who has fewer than 7 years of service and who elected (or was made subject to) the new vesting schedule. A method of avoiding a section 411(d)(6) violation with respect to account balances attributable to benefits accrued as of the applicable amendment date and earnings thereon, would be for Plan D to provide for the vested percentage of G and each other participant in Plan E to be no less than the greater of the 2.

\* \* \* \* \*

(b) \* \* \*  
(4) \* \* \*

*Example 3.* (i) *Facts.* Plan C, a multiemployer defined benefit plan in a particular industry, provides that a participant may elect to commence distributions only if the participant is not currently employed by an employer maintaining the plan and provides that, if the participant has a specified number of years of service and attains a specified age, the distribution is without any actuarial reduction for commencement before normal retirement age. Since the plan's inception, Plan C has provided for suspension of pension benefits during periods of disqualifying employment (ERISA section 203(a)(3)(B) service). Before 2007, the plan defined disqualifying employment to include any job as an electrician in the particular industry and geographic location to which Plan C applies. This definition of disqualifying employment did not cover a job as an electrician supervisor. In 2005, Participant E, having rendered the specified number of years of service and attained the specified age to retire with a fully subsidized early retirement benefit, retires from E's job as an electrician with Employer Y and starts a position with Employer Z as an electrician supervisor. Employer Z is not a participating employer in Plan C but is an employer in the same industry and geographic location as Employer Y. When E left service with Employer Y, E's position as an electrician supervisor was not disqualifying employment for purposes of Plan C's suspension of pension benefit provision, and E elects to commence benefit payments in 2005. In 2006, effective January 1, 2007, Plan C, in accordance with section 411(a)(3)(B), is amended to expand the definition of disqualifying employment to include any job (including supervisory positions) as an electrician in the same industry and geographic location to which Plan C applies.

On January 1, 2007, E's pension benefits are suspended because of E's disqualifying employment as an electrician supervisor. (These facts are generally comparable to the facts in *Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739 (June 7, 2004).)

(ii) *Conclusion.* Under paragraphs (a)(3) and (b)(1) of this section, the 2007 plan amendment violates section 411(d)(6), because the amendment places greater restrictions or conditions on a participant's rights to section 411(d)(6) protected benefits to the extent it applies with respect to benefits that accrued before January 1, 2007. The result would be the same even if the amendment did not apply to former employees and instead applied only to participants who were actively employed at the time of the applicable amendment.

\* \* \* \* \*

(f) *Utilization test*—(1) *General rule.* A plan is permitted to be amended to eliminate all of the optional forms of benefit that comprise a generalized optional form (as defined in paragraph (g)(8) of this section) for a participant with respect to benefits accrued before the applicable amendment date if—

(i) None of the optional forms of benefit being eliminated is a core option, within the meaning of paragraph (g)(5) 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;

(iii) The generalized optional form has been available to at least 100 participants who are taken into account during the look-back period; and

(iv) No participant has elected any optional form of benefit that is part of the generalized optional form with an annuity commencement date that is within the look-back period.

(2) *Look-back period.* For purposes of this paragraph (f), the look-back period is the 2 plan years immediately preceding the plan year in which the plan amendment eliminating the generalized optional form is adopted. At least one of the plan years during the look-back period must be a 12-month plan year. However, if a plan does not have at least 100 participants who are taken into account under this paragraph (f) during those 2 plan years, the look-back period is permitted to be expanded to be the 3, 4, or 5 plan years immediately preceding the plan year in which the plan amendment eliminating the generalized optional form is adopted in order to have a look-back period that has at least 100 participants who are taken into account under this paragraph (f). If a plan does not have at least 100

participants who are taken into account under this paragraph (f) during the relevant 5-year period, the plan is not permitted to add more plan years to the look-back period and, accordingly, such a plan is not permitted to use the utilization test in this paragraph (f).

(3) *Participants taken into account.* Except as provided in this paragraph (f)(3), a participant is taken into account for purposes of this paragraph (f) only if the participant was eligible to elect to commence payment of an optional form of benefit that is part of the generalized optional form being eliminated with an annuity commencement date that is within the look-back period. However, a participant is not taken into account if the participant either—

(i) Did not elect any optional form of benefit with an annuity commencement date that was within the look-back period;

(ii) Elected an optional form of benefit that included a single-sum distribution that applied with respect to at least 25% of the participant's accrued benefit;

(iii) Elected an optional form of benefit that was only available during a limited period of time and that contained a retirement-type subsidy which at that annuity commencement date was not extended to the optional form of benefit with the same annuity commencement date that is part of the generalized optional form being eliminated; or

(iv) Elected an optional form of benefit with an annuity commencement date that was more than 10 years before normal retirement age.

(4) *Default elections.* For purposes of this paragraph (f), an election includes the payment of an optional form of benefit that applies in the absence of an affirmative election.

\* \* \* \* \*

(h) \* \* \*

*Example 6.* (i) *Facts involving elimination of noncore options using utilization test*—(A) *In general.* Plan G is a calendar year defined benefit plan under which participants may elect to commence distributions after termination of employment in the following actuarially equivalent forms, with spousal consent, if applicable: a straight life annuity; a 50%, 75%, or 100% joint and contingent annuity; or a 5-year, 10-year, or a 15-year term certain and life annuity. Participants whose benefits are under \$5,000 are permitted to elect a single-sum distribution. The annuities offered under the plan are generally 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 the ages of 62 and 67. Under Plan G, the normal retirement age is defined as age 65.

(B) *Utilization test.* In 2007, the plan sponsor of Plan G, after reviewing participants' benefit elections, determines that no participant in the 2 prior plan years (2005 and 2006) elected a 5-year term certain and life annuity with a social security leveling option. During the 2 prior plan years, Plan G has made the 5-year term certain and life annuity with a social security leveling option available to 142 participants who were at least age 55 and who elected an optional form of benefit with an annuity commencement date during that 2-year period. In addition, during 2005–06 plan years, 20 of the 142 participants elected a single-sum distribution and there was no retirement-type subsidy available for a limited period of time. Plan G, in accordance with paragraph (f)(1) of this section, is amended on September 1, 2007, effective as of January 1, 2008, to eliminate all 5-year term certain and life annuities with a social security leveling option for all annuity commencement dates on or after January 1, 2008.

(ii) *Conclusion.* The amendment satisfies the requirements of paragraph (f) of this section. First, the 5-year term certain and life annuity with a social security leveling option is not a core option as defined in paragraph (g)(5) of this section. Second, 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 after the date the amendment is adopted. Third, the 5-year term certain and life annuity with a social security leveling option has been available to at least 100 participants who are taken into account for purposes of paragraph (f)(4) of this section during the look-back period of 2005 and 2006. Fourth, during that period, no participant elected any optional form that is part of the generalized optional form being eliminated (*i.e.*, the 5-year term and life annuity with a social security leveling option).

\* \* \* \* \*

(j) \* \* \*

(3) *Effective date for rules relating to section 411(a) nonforfeitability provisions.* The rules provided in paragraph (a)(3) of this section are effective June 7, 2004.

(4) *Effective date for rules relating to utilization test.* The rules provided in paragraph (f) of this section are effective for amendments adopted after December 31, 2006.

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**Mark E. Matthews,**

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