

of any grant, scholarship, fellowship, or gift that you use or set aside to pay the cost of tuition, fees, or other necessary educational expenses at any educational institution, including vocational or technical institutions. The 9 months begin the month after the month you receive the educational assistance.

(b)(1) We will count as a resource any portion of a grant, scholarship, fellowship, or gift you (or your spouse, if any) did not use or set aside to pay tuition, fees, or other necessary educational expenses. We will count such portion of a grant, scholarship, fellowship or gift as a resource in the month following the month of receipt.

(2) If you use any of the funds that were set aside for tuition, fees, or other necessary educational expenses for another purpose within the 9-month exclusion period, we will count such portion of the funds used for another purpose as income in the month you use them.

(3) If any portion of the funds are no longer set aside for paying tuition, fees, or other necessary educational expenses within the 9-month exclusion period, we will count the portion of the funds no longer set aside as income in the month when they are no longer set aside for paying tuition, fees, or other necessary educational expenses. We will consider any remaining funds that are no longer set aside or used to pay tuition, fees, or other educational expenses as a resource in the month following the month we count them as income.

(4) We will count any portion of grants, scholarships, fellowships, or gifts remaining unspent after the 9-month exclusion period as a resource beginning with the 10th month after you received the educational assistance.

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## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

#### 26 CFR Part 1

[TD 9280]

RIN 1545-BE10

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

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

**ACTION:** Final regulations.

**SUMMARY:** This document contains final regulations providing guidance on certain issues under section 411(d)(6) of the Internal Revenue Code (Code),

including the interaction between the anti-cutback rules of section 411(d)(6) and the nonforfeitable requirements of section 411(a). These regulations also provide a utilization test under which certain plan amendments are permitted to eliminate or reduce certain early retirement benefits, retirement-type subsidies, or optional forms of benefit. These regulations generally affect sponsors of, and participants and beneficiaries in, qualified retirement plans.

**DATES: Effective Date:** These regulations are effective August 9, 2006.

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

**FOR FURTHER INFORMATION CONTACT:**

Pamela R. Kinard at (202) 622-6060 (not a toll-free number).

**SUPPLEMENTARY INFORMATION:**

**Background**

This document contains amendments to 26 CFR part 1 under section 411(d)(6) of the Code. These regulations revise § 1.411(d)-3 to provide guidance on the application of section 411(d)(6) to a plan amendment that 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 permitted under the vesting rules of section 411(a)(3) through (11). These rules are intended to reflect *Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739 (2004). These regulations also set forth standards for the utilization test, which is a permitted method of eliminating optional forms of benefit that are burdensome to the plan and of de minimis value to plan participants.

Section 401(a)(7) provides that a trust does not constitute a qualified trust unless its related plan satisfies the requirements of section 411. 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) 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, either (1) by the employer who maintains the plan under which such

benefits were being paid, in the case of a plan other than a multiemployer plan, or (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 set forth 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 are referred to as "section 203(a)(3)(B) service." See 29 CFR 2530.203-3(c).

Under section 411(a)(10), a plan amendment changing the plan's vesting schedule must satisfy certain requirements. Section 411(a)(10)(A) provides that a plan amendment changing any vesting schedule under the plan does not satisfy the minimum vesting standards of section 411(a)(2) if the nonforfeitable percentage of the accrued benefit derived from employer contributions (determined as of the applicable amendment date)<sup>1</sup> of any employee who is a participant in the plan is less than the nonforfeitable percentage computed under the plan without regard to the amendment. Section 411(a)(10)(B) provides that a plan amendment changing any vesting schedule under the plan does not satisfy the minimum vesting standards of section 411(a)(2) unless each participant with at least 3 years of service is permitted to elect to have his or her nonforfeitable percentage computed under the plan without regard to the plan amendment.

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. This protection applies with

<sup>1</sup> The term *applicable amendment date* means the later of the effective date of the amendment or the date that the amendment is adopted. See § 1.411(d)-3(g)(4).

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 an optional form of benefit (other than a plan amendment that has the effect of eliminating or reducing an early retirement benefit or a retirement-type subsidy).

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 regulations for purposes of ERISA, as well as the Code. Thus, these final regulations issued under section 411(d)(6) of the Code also apply for purposes of section 204(g) of ERISA.

In *Central Laborers'*, the plaintiffs were two 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. After the two participants' benefit payments had commenced 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 two participants on account of their disqualifying employment as construction supervisors. The two participants sued to recover the suspended payments, claiming that the amendment expanding the plan's suspension provisions violated section 204(g) of ERISA.

The Supreme Court, holding for the two 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 held 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 and section 203(a)(3)(B) of ERISA), such a condition may not be imposed on a benefit after the 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'*, 547 U.S. at 744, quoting *Heinz v. Central Laborers' Pension Fund*, 303 F.3d 802, 805 (7th Cir. 2002).

On July 11, 1988, final regulations (TD 8212) under section 411(d)(6) were published in the **Federal Register** (53 FR 26050). Those regulations are contained in § 1.411(d)-4 (the 1988 regulations). On August 12, 2005, final regulations (TD 9219) under section 411(d)(6) were published in the **Federal Register** (70 FR 47109) (the 2005 final regulations). Those 2005 final regulations, which are largely contained in § 1.411(d)-3, set 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 reserved two topics for later

guidance—a utilization test and the interaction of the permitted forfeiture rules under section 411(a) with the anti-cutback rules under section 411(d)(6) after taking into account the decision in *Central Laborers'*.

In connection with the 2005 final regulations, a notice of public rulemaking (REG-156518-04) under section 411(d)(6) of the Code was published in the **Federal Register** (70 FR 47155) (the 2005 proposed regulations) to address the two reserved topics discussed in this preamble. On December 6, 2005, the IRS held a public hearing on the 2005 proposed regulations. Written comments responding to the notice of public rulemaking were also received. After consideration of all the comments, the 2005 proposed regulations are adopted, as amended by this Treasury Decision. The revisions are discussed in this preamble.

### Explanation of Provisions

#### *Application of Section 411(d)(6) to Plan Amendments Affecting Vesting*

In applying the holding in *Central Laborers'*, these regulations retain the rule in the 2005 proposed regulations that provides that a plan amendment that places greater restrictions or conditions on a participant's rights to section 411(d)(6) protected benefits by adding or modifying a plan provision relating to suspension of benefit payments during a period of employment or reemployment violates section 411(d)(6). This rule applies for periods beginning on or after June 7, 2004, the date of the decision in *Central Laborers'*. For relief limiting the retroactive application of *Central Laborers'*, see the discussion under the heading "Effective Dates" in this preamble.

These regulations also address a broader question of the interaction of the vesting rules in section 411(a) with the requirements of section 411(d)(6), applying the reasoning in *Central Laborers'* to other situations. These regulations generally retain the rule in the 2005 proposed regulations that 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, violates section 411(d)(6), 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).<sup>2</sup> These

<sup>2</sup> However, note that section 411(d)(6) does not prohibit a plan amendment that reduces or suspends benefits under a multiemployer plan as

regulations also provide examples of the application of this rule, including an example illustrating, for changes in a plan's vesting schedule, the protection of a participant's right to have post-amendment vesting of the participant's pre-amendment accrued benefit determined under the old vesting schedule. Of course, these regulations also retain the rule that such a plan amendment is permitted under section 411(d)(6) to the extent it applies to benefits accruing after the applicable amendment date.

Some commentators agreed with the rule in the 2005 proposed regulations that adopts the holding and rationale of *Central Laborers'*, but other commentators raised concerns about the scope of the rule. Several commentators argued that *Central Laborers'* only addresses the interaction of section 411(d)(6) with the suspension of benefit rules under section 411(a)(3)(B), and does not require the extension of its holding to plan amendments relating to the other vesting provisions under section 411(a). Those commentators recommended that the regulations be revised to narrow the scope of the rule in the 2005 proposed regulations to the fact pattern in *Central Laborers'*. Other commentators recommended that the final regulations provide that, for a plan amendment changing the plan's vesting schedule, the rule in the 2005 proposed regulations does not apply, so that section 411(a)(10) would provide the exclusive requirements for vesting schedule changes. Some of these commentators supported this request by stating that the rule in the 2005 proposed regulations had the effect of rendering section 411(a)(10) moot.

After consideration of the comments relating to the rule in the 2005 proposed regulations, the Treasury Department and the IRS believe that the holding and rationale in the *Central Laborers'* decision control and, thus, the rule in the 2005 proposed regulations should be retained, subject to a certain modifications. In this regard, the Treasury Department and the IRS note that the protection provided by section 411(a)(10) applies with respect to future accruals, whereas the protection extended by these regulations to changes in a vesting schedule applies only with respect to benefits accrued before the applicable amendment date. However, in light of the comments, these final regulations provide a limited exception from the requirement in the

permitted under section 411(a)(3)(F) (e.g., a plan amendment to reduce benefits as permitted under section 418D or to suspend benefit payments as permitted under section 418E).

2005 proposed regulations for a plan changing its vesting computation period. Under this exception, a plan amendment that satisfies the rules for changing a plan's vesting computation period, as set forth in applicable Department of Labor Regulations,<sup>3</sup> does not fail to satisfy the requirements under section 411(d)(6) merely because the plan changes the plan's vesting computation period.

#### Utilization Test

These regulations generally retain the rule in the 2005 proposed regulations that a plan is permitted to be amended to eliminate optional forms of benefit that comprise a generalized optional form<sup>4</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. Under the utilization test, a plan is not permitted to eliminate any core option<sup>5</sup> offered under the plan and the plan amendment eliminating the generalized optional form cannot apply 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 (for example, a 90-day period) after the date the amendment is adopted. The utilization test, along with the redundancy method and the core options method, are three permitted methods for eliminating or reducing section 411(d)(6)(B) protected benefits. See § 1.411(d)-3(c), (d), and (e) of the 2005 final regulations for rules relating to the redundancy and core options methods.

These regulations provide that, in order to eliminate a noncore optional form of benefit under the utilization test, the plan must satisfy two conditions. First, the generalized optional form must have been available to at least a minimum number of participants who are taken into account during the relevant look-back period. Second, no participant must have elected the optional form of benefit that is part of the generalized optional form with an annuity commencement date that is within the look-back period.

<sup>3</sup> See 29 CFR 2530.203-2(c) for rules relating to changing a plan's vesting computation period. See also §§ 1.411(a)-8(b)(3) and 1.411(a)-8T(b)(3).

<sup>4</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.

<sup>5</sup> The term *core option* is defined in § 1.411(d)-3(g)(5) 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.

Under the 2005 proposed regulations, the look-back period was generally the 2 plan years immediately preceding the date on which the plan amendment eliminating the general optional form is adopted. These regulations modify the look-back period from the 2005 proposed regulations to include the portion of the plan year in which the plan amendment is adopted that precedes the date of adoption (the pre-adoption period). Adding the pre-adoption period to the look-back period ensures that participants who elected the generalized optional form with an annuity commencement date within the year of adoption are taken into account. However, in order to reduce burdens for plans, the regulations permit a plan to exclude from the lookback period the calendar month in which the amendment is adopted and the 1 or 2 preceding calendar months (to the extent those preceding months are within the pre-adoption period). These regulations also retain the rule under the 2005 proposed regulations permitting a plan to extend the look-back period to include an additional 1, 2, or 3 plan years.

Under the utilization test in the 2005 proposed regulations, 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. A participant is generally taken into account only if, during the look-back period, the participant was eligible to commence payment of an optional form of benefit that is part of the generalized optional form being eliminated. However, the 2005 proposed regulations provided that a participant is not 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.

Commentators recommended that the regulations be revised to provide an alternative for smaller plans that cannot meet the 100-participant requirement, even with the 5-year look-back rule. Commentators also recommended that the utilization test be revised to permit a plan to use the utilization test to

eliminate a general optional form even if a small percentage of participants elected the generalized optional form. The percentages proposed by the commentators ranged from 1% to 5% of the participants. Commentators further recommended that the regulations be revised to permit participants who elected single-sum distributions to be taken into account in determining the applicable number of participants.

In light of these comments, these regulations include a number of revisions. In applying the utilization test, the generalized optional form must be available to at least the applicable number of participants who are taken into account. These regulations define the term *applicable number of participants* as 50 participants. These regulations also set forth a special rule that permits a plan to take into account any participant who elects a single-sum distribution that applied with respect to at least 25% of the participant's accrued benefit, provided the applicable number of participants is increased to 1,000 participants.

The Treasury Department and the IRS continue to believe that the utilization test, by its nature, determines which optional forms are considered valuable to participants. This determination is made by reference to participants' elections. The fact that, during a 2-year period, no participant in a substantial number of participant elections elected any optional form of benefit that is within a generalized optional form is a compelling indication that elimination of that generalized optional form would not adversely affect the rights of any participant in a more than *de minimis* manner. Conversely, if at least one participant in the sample elected the generalized optional form, that election would provide significant evidence that the elimination of the generalized optional form could adversely affect the rights of some other participant in a more than *de minimis* manner. In addition, a plan that satisfies the requirements of the utilization test is permitted to be amended to eliminate all of the optional forms of benefit that comprise a generalized optional form without having to satisfy separately the requirements of § 1.411(d)-3(e). Thus, these regulations retain the requirement from the 2005 proposed regulations that no participant must have elected any optional form that is part of the generalized optional form that is being eliminated.

#### *Other Issues*

These regulations also include a few modifications to the 2005 final regulations. Specifically, the regulations

include specific reference to amendments permitted under sections 418D and 418E (relating to, respectively, to multiemployer plans in reorganization and accrued benefits attributable to employer contributions that are not eligible for the Pension Benefit Guaranty Corporation's guarantee) as not being subject to the requirements of section 411(d)(6). See section 411(a)(3)(F), which permits the reduction and suspension of accrued benefits by a multiemployer plan pursuant to sections 418D and 418E, as well as section 4281 of ERISA.

These regulations also revise the method for determining whether an optional form of benefit is within a family of optional forms of benefit for purposes of eliminating redundant optional forms of benefit in situations in which a plan permits a participant to make different distribution elections with respect to two or more separate portions of the participant's accrued benefit. Comments were received recommending that the regulations be revised to permit a plan that provides different elections with respect to separate portions of a participant's benefit (for example, plans with one set of generally applicable distribution options and a second set of distribution options that apply only to a participant's benefit earned while employed by a former employer) to be permitted to apply the redundancy rules separately to each set of distribution options.

In light of this comment, these regulations permit a plan to apply the redundancy rules separately to each portion of the participant's benefit to which separate distribution elections apply as if that portion were the participant's entire benefit. This change is similar to the bifurcation rule in § 1.417(a)(3)-1(c)(5)(iii), which permits a plan that permits a participant to make separate distribution elections with respect to two or more portions of the participant's benefit to describe the financial effect and relative value of combined optional forms of benefit separately for each such portion of the benefit, rather than for each optional form of benefit (for example, each combination of possible elections).

#### **Effective Dates**

##### *Applicability Dates for Amendments Relating to Vesting*

With respect to a plan amendment that places greater restrictions or conditions on a participant's rights to section 411(d)(6) protected benefits by adding or modifying a plan provision relating to suspension of benefit

payments, the rules in these regulations apply for periods beginning on or after June 7, 2004. However, for a plan amendment that places greater restrictions or conditions on a participant's rights to section 411(d)(6) protected benefits with respect to vesting, other than a plan amendment relating to a suspension of benefit payments, the rules in these regulations apply to plan amendments adopted after August 9, 2006.

##### *Applicability Date for Change to Redundancy Rule Regarding Bifurcation of Benefits*

The change to the regulations permitting a plan to apply the redundancy rules separately to each portion of a participant's benefit to which separate distribution elections apply is applicable for amendments adopted after August 9, 2006.

##### *Applicability Date for Utilization Test*

The rules provided in the utilization test are applicable for amendments adopted after December 31, 2006.

##### *Relief Limiting the Retroactive Application of Central Laborers'*

Rev. Proc. 2005-23 (2005-18 I.R.B. 991), as modified by Rev. Proc. 2005-76 (2005-50 I.R.B. 1139), 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). Rev. Proc. 2005-23 provides that a qualified plan will not be treated as having failed to satisfy the requirements of section 401(a) merely because a plan amendment that was adopted before June 7, 2004, violated section 411(d)(6) by adding or expanding a provision under which a suspension of benefit provision occurs. To receive this treatment, a plan must adopt a reforming plan amendment, comply operationally with the reforming amendment, and provide to affected participants notice of the right to elect retroactively to commence payment of benefits. All of these actions must be completed on or before January 1, 2007.

In response to the 2005 proposed regulations, some commentators expressed concern on how section 411(d)(6) would apply to plan amendments adopted many years in the past when both the rules for interpreting the suspension of benefit provisions under section 411(a)(3)(B) and the rules for satisfying section 411(d)(6) were still being developed. Commentators specifically raised the issue of whether the adoption of a benefit suspension amendment in response to the final

suspension of benefit regulations issued by the Department of Labor would violate section 411(d)(6).<sup>6</sup>

In light of these comments and taking into account the Supreme Court's suggestion for relief in *Central Laborers*,<sup>7</sup> the Treasury Department and IRS believe that it is appropriate not to require that a plan correct under Rev. Proc. 2005-23 in order to qualify for relief from disqualification under section 401(a) for a plan amendment that added or expanded a suspension of benefit provision if the amendment was adopted before the effective date of the 1988 regulations under section 411(d)(6). Providing this section 7805(b) treatment for any such amendment is appropriate because it would be difficult to determine whether a plan amendment adding or expanding a suspension of benefit payment that was adopted at that time violated section 411(d)(6). In addition, any correction made for any affected plan participant would likely be insignificant (especially in light of subsequent accruals), while creating significant administrative burdens for the plan.

Accordingly, pursuant to the Commissioner's authority under section 7805(b)(8), a plan will not fail to satisfy section 401(a) merely because the plan was amended to add or expand a suspension of benefit provision, provided that the amendment was adopted before January 1, 1989. In the case of collectively bargained plans, this relief applies to plan amendments adopted before January 1, 1991. These dates are based on the effective dates of the 1988 regulations under § 1.411(d)-4 for plans generally existing as of August 1, 1986.

### Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a

<sup>6</sup> See 29 CFR 2530.203-3, providing rules that permit a plan to withhold permanently a plan participant's benefit payments on account of a continuation of employment or reemployment after the payments commenced. See also Notice 82-23 (1982-2 C.B. 752) (providing guidance on the need to amend and the timing for a plan to be amended to comply with the final suspension of benefit regulations).

<sup>7</sup> The Court stated in *Central Laborers*:

Nothing we hold today requires the IRS to revisit the tax-exempt status in past years of plans that were amended in reliance on the agency's representations in its manual by expanding the categories of work that would trigger suspension of benefit payments as to already-accrued benefits. The Internal Revenue Code gives the Commissioner discretion to decline to apply decisions of this Court retroactively \* \* \*. This would doubtless be an appropriate occasion for exercise of that discretion.

*Central Laborers*, 541 U.S. at 748, n.4.

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(b) 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 in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

### Adoption of Amendments to the Regulations

■ Accordingly, 26 CFR part 1 is amended as follows:

#### PART 1—INCOME TAXES

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

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

■ **Par. 2.** Section 1.411(a)-8 is amended by adding paragraph (c)(3) to read as follows:

#### § 1.411(a)-8 Changes in vesting schedule.

\* \* \* \* \*

(c) \* \* \*

(3) *Relationship with section 411(d)(6).* For additional requirements relating to section 411(d)(6), see § 1.411(d)-3(a)(3).

\* \* \* \* \*

■ **Par. 3.** Section 1.411(d)-3 is amended by:

- 1. Revising the first sentence of paragraph (a)(1).
- 2. Revising paragraphs (a)(3) and (f).
- 3. Adding *Examples 3* and *4* to paragraph (a)(4), *Example 3* to paragraph (b)(4), and *Example 6* to paragraph (h).
- 4. Adding paragraphs (c)(6), (j)(3), (j)(4), and (j)(5).

The revisions and additions 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 (see, for example, sections 418D and 418E of the Internal Revenue Code, and section 1541(a)(2) of the Taxpayer Relief Act of 1997, Public Law 105-34 (111 Stat. 788, 1085)). \* \* \*

\* \* \* \* \*

(3) *Application of section 411(a) nonforfeiture provisions with respect to section 411(d)(6) protected benefits*—

(i) *In general.* 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 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 accrued prior to the applicable amendment date. See section 411(a)(10) and § 1.411(a)-8 for additional rules relating to changes in a plan's vesting schedule.

(ii) *Exception for changes in a plan's vesting computation period.*

Notwithstanding paragraph (a)(3)(i) of this section, a plan amendment that satisfies the applicable requirements under 29 CFR 2530.203-2(c) (rules relating to vesting computation periods) does not fail to satisfy the requirements of section 411(d)(6) merely because the plan amendment changes the plan's vesting computation period.

(4) \* \* \*

*Example 3. (i) Facts.* Employer N maintains Plan C, a qualified defined benefit plan under which an employee becomes a participant 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 at least 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 this paragraph (a), 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:

Completed years of service	Nonforfeitable percentage
Fewer than 3 .....	0
3 .....	20
4 .....	40
5 .....	60
6 .....	80
7 .....	100

(B) In January 2006, 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 2007, 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 this paragraph (a) 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 5 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 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 vesting percentages under the two vesting schedules (for example, for G and each other participant in Plan E to be 20% vested upon completion of 3 years of service, 40% vested upon completion of 4 years of service, and fully vested upon completion of 5 years of service) for those account balances and earnings.

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

*Example 3.* (i) *Facts.* Plan C, a multiemployer defined benefit plan in which participation is limited to electricians in the construction industry, provides that a participant may elect to commence distributions only if the participant is not currently employed by a participating employer 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 elected to commence benefit payments in 2005. In 2006, effective January 1, 2007, Plan C 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. The plan's definition of disqualifying employment satisfies the requirements of section 411(a)(3)(B). On January 1, 2007, E's pension benefits are suspended because of E's disqualifying employment as an electrician supervisor.

(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.

\* \* \* \* \*  
(c) \* \* \*

(6) *Separate application of redundancy rules for bifurcated benefits.* If a plan permits the participant to make different distribution elections with respect to two or more separate portions of the participant's benefit, the rules of this paragraph (c) are permitted to be applied separately to each such portion of the participant's benefit as if that portion were the participant's entire benefit. Thus, for example, if one set of distribution elections applies to a portion of the participant's accrued benefit and another set of distribution elections applies to the other portion of the participant's accrued benefit, then with respect to one portion of the participant's benefit, the determination of whether any optional form of benefit is within a family of optional forms of benefit is permitted to be made disregarding elections that apply to the other portion of the participant's benefit. Similarly, if a participant can elect to receive any portion of the accrued benefit in a single sum and the remainder pursuant to a set of distribution elections, the rules of this paragraph (c) are permitted to be applied separately to the set of distribution elections that apply to the portion of the participant's accrued benefit that is not payable in a single sum (for example, for the portion of a participant's benefit that is not paid in a single sum, the determination of whether any optional form of benefit is within a family of optional forms of benefit is permitted to be made disregarding the fact that the other portion of the participant's benefit is paid in a single sum).

\* \* \* \* \*

(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

Qualified Joint and Survivor Annuity explanation period (as defined in paragraph (g)(9) of this section) after the date the amendment is adopted;

(iii) During the look-back period—

(A) The generalized optional form has been available to at least the applicable number of participants who are taken into account under paragraph (f)(3) and (4) of this section; and

(B) 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*—(i) *In general*. For purposes of this paragraph (f), the look-back period is the period that includes—

(A) The portion of the plan year in which such plan amendment is adopted that precedes the date of adoption (the pre-adoption period); and

(B) The 2 plan years immediately preceding the pre-adoption period.

(ii) *Special look-back period rules*—(A) *12-month plan year*. In the look-back period, at least 1 of the plan years must be a 12-month plan year.

(B) *Permitted 3-month exclusion in the pre-adoption period*. A plan is permitted to exclude from the look-back period the calendar month in which the amendment is adopted and the preceding 1 or 2 calendar months to the extent those preceding months are contained within the pre-adoption period.

(C) *Permission to extend the look-back period*. In order to have a look-back period that satisfies the minimum applicable number of participants requirement in paragraph (f)(1)(iii)(A) of this section, the look-back period described in paragraph (f)(2)(i)(B) of this section is permitted to be expanded, so as to include the 3, 4, or 5 plan years immediately preceding the plan year in which the amendment is adopted. Thus, in determining the look-back period, a plan is permitted to substitute the 3, 4, or 5 plan years immediately preceding the pre-adoption period for the 2 plan years described in paragraph (f)(2)(i)(B) of this section. However, if a plan does not satisfy the minimum applicable number of participants requirement of paragraph (f)(1)(iii)(A) of this section using the pre-adoption period and the immediately preceding 5 plan years, the plan is not permitted to be amended in accordance with the utilization test in this paragraph (f).

(3) *Participants taken into account*. 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—

(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 where the subsidy that is part of the generalized optional form being eliminated was not extended to any optional form of benefit with the same annuity commencement date; or

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

(4) *Determining the applicable number of participants*. For purposes of applying the rules in this paragraph (f), the applicable number of participants is 50 participants. However, notwithstanding paragraph (f)(3)(ii) of this section, a plan is permitted to take into account any participant who 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, but only if the applicable number of participants is increased to 1,000 participants.

(5) *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. A participant is permitted to elect a single-sum distribution if the present value of the participant's nonforfeitable accrued benefit is not greater than \$5,000. 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, during the period from January 1, 2005, through June 30, 2007, no participant has elected a 5-year term certain and life annuity with a social security leveling option. During that period, 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 optional forms of benefit with an annuity commencement dates during that period. In addition, during that period, 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 15, 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 50 participants who are taken into account for purposes of paragraph (f) of this section during the look-back period. Fourth, during the look-back period, no participant elected any optional form that is part of the generalized optional form being eliminated (for example, the 5-year term and life annuity with a social security leveling option).

\* \* \* \* \*

(j) \* \* \*

(3) *Effective dates for rules relating to section 411(a) nonforfeitability provisions*—(i) *Application of suspension of benefit rules to section 411(d)(6) protected benefits*. With respect to a plan amendment that places greater restrictions or conditions on a participant's rights to section 411(d)(6) protected benefits by adding or modifying a plan provision relating to suspension of benefit payments during a period of employment or reemployment, the rules provided in paragraph (a)(3) of this section apply to periods beginning on or after June 7, 2004.

(ii) *Application of section 411(a) nonforfeitability provisions to section 411(d)(6) protected benefits*. With respect to a plan amendment that places greater restrictions or conditions on a participant's rights to section 411(d)(6) protected benefits other than a plan amendment described in paragraph (j)(3)(i) of this section, the rules

provided in paragraph (a)(3) of this section apply to plan amendments adopted after August 9, 2006.

(4) *Effective date for change to redundancy rule regarding bifurcation of benefits.* The rules provided in paragraph (c)(6) of this section are applicable for amendments adopted after August 9, 2006.

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

\* \* \* \* \*

**Mark E. Matthews,**

*Deputy Commissioner for Services and Enforcement.*

Approved: July 31, 2006.

**Eric Solomon,**

*Acting Deputy Assistant Secretary of the Treasury (Tax Policy).*

[FR Doc. E6-12885 Filed 8-8-06; 8:45 am]

**BILLING CODE 4830-01-P**

**DEPARTMENT OF HOMELAND SECURITY**

**Coast Guard**

**33 CFR Part 117**

[CGD01-06-105]

**Drawbridge Operation Regulations; Jamaica Bay and Connecting Waterways, Queens, NY**

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of temporary deviation from regulations.

**SUMMARY:** The Commander, First Coast Guard District, has issued a temporary deviation from the regulation governing the operation of the Marine Parkway Bridge across Jamaica Bay at mile 3.0, at Queens, New York. Under this temporary deviation, the Marine Parkway Bridge need not open for the passage of vessel traffic between 7 a.m. and 3 p.m. on August 28, 2006 and August 29, 2006. This deviation is necessary to facilitate scheduled bridge maintenance.

**DATES:** This deviation is effective from August 28, 2006 through August 29, 2006.

**ADDRESSES:** Materials referred to in this document are available for inspection or copying at the First Coast Guard District, Bridge Branch Office, One South Street, New York, New York, 10004, between 7 a.m. and 4 p.m., Monday through Friday, except Federal holidays. The telephone number is (212) 668-7165. The First Coast Guard

District Bridge Branch Office maintains the public docket for this temporary deviation.

**FOR FURTHER INFORMATION CONTACT:** Judy Leung-Yee, Project Officer, First Coast Guard District, at (212) 668-7195.

**SUPPLEMENTARY INFORMATION:** The Marine Parkway Bridge, across Jamaica Bay at mile 3.0, at Queens, New York, has a vertical clearance in the closed position of 55 feet at mean high water and 59 feet at mean low water. The existing drawbridge operation regulations are listed at 33 CFR 117.795(a).

The owner of the bridge, MTA Bridges and Tunnels, requested a temporary deviation to facilitate bridge inspection operations. The bridge will not be able to open while the bridge inspection operation is underway.

Under this temporary deviation, the Marine Parkway Bridge across Jamaica Bay at mile 3.0 need not open for the passage of vessel traffic between 7 a.m. and 3 p.m. on August 28, 2006 and August 29, 2006.

In accordance with 33 CFR 117.35(c), this work will be performed with all due speed in order to return the bridge to normal operation as soon as possible.

Should the bridge maintenance authorized by this temporary deviation be completed before the end of the effective period published in this notice, the Coast Guard will rescind the remainder of this temporary deviation, and the bridge shall be returned to its normal operating schedule. Notice of the above action shall be provided to the public in the Local Notice to Mariners and the **Federal Register**, where practicable.

This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: August 1, 2006.

**Gary Kassof,**

*Bridge Program Manager, First Coast Guard District.*

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**BILLING CODE 4910-15-P**

**DEPARTMENT OF HOMELAND SECURITY**

**Coast Guard**

**33 CFR Part 117**

[CGD01-06-099]

**Drawbridge Operation Regulations; Long Island, New York Inland Waterway From East Rockaway Inlet to Shinnecock Canal, Jones Beach, NY**

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of temporary deviation from regulations.

**SUMMARY:** The Commander, First Coast Guard District, has issued a temporary deviation from the regulation governing the operation of the Loop Parkway Bridge across Long Creek at mile 0.7, at Jones Beach, New York. Under this temporary deviation, the Loop Parkway Bridge need not open for the passage of vessel traffic from 8:30 a.m. through 11:30 a.m. and 1:30 p.m. through 4:30 p.m., daily, from September 6, 2006 through October 26, 2006. A single bridge opening for all inbound commercial fishing vessels shall be provided, if a request to open the bridge is given, during the 1:30 p.m. to 4:30 p.m. bridge closure period. This deviation is necessary to facilitate scheduled bridge maintenance.

**DATES:** This deviation is effective from September 6, 2006 through October 26, 2006.

**ADDRESSES:** Materials referred to in this document are available for inspection or copying at the First Coast Guard District, Bridge Branch Office, One South Street, New York, New York 10004, between 7 a.m. and 4 p.m., Monday through Friday, except Federal holidays. The telephone number is (212) 668-7165. The First Coast Guard District Bridge Branch Office maintains the public docket for this temporary deviation.

**FOR FURTHER INFORMATION CONTACT:** Judy Leung-Yee, Project Officer, First Coast Guard District, at (212) 668-7195.

**SUPPLEMENTARY INFORMATION:** The Loop Parkway Bridge, across Long Creek at mile 0.7, at Jones Beach, New York, has a vertical clearance in the closed position of 21 feet at mean high water and 25 feet at mean low water. The existing drawbridge operation regulations are listed at 33 CFR 117.799(f).

The owner of the bridge, New York State Department of Transportation, requested a temporary deviation to facilitate bridge painting operations. The bridge will not be able to open while the bridge painting operation is underway.

Under this temporary deviation, the Loop Parkway Bridge across Long Creek at mile 0.7, need not open for the passage of vessel traffic from 8:30 a.m. through 11:30 a.m. and from 1:30 p.m. through 4:30 p.m., daily, from September 6, 2006 through October 26, 2006. All inbound commercial fishing vessels shall be provided a single bridge opening during the 1:30 p.m. through 4:30 p.m. bridge closure period each day provided a bridge opening request is