Report # 1006

NEW YORK STATE BAR ASSOCIATION TAX SECTION

REPORT WITH RESPECT TO

SECTION 411(d)(6) OF THE

INTERNAL REVENUE CODE

February 27, 2002

REPORT WITH RESPECT TO SECTION 411(d)(6) OF THE INTERNAL REVENUE CODE[1]

This report provides comments on Section 411(d)(6) of the Code and the regulations thereunder, which restrict the degree to which a sponsor of a qualified retirement plan may remove or limit the availability of forms of benefit payment under the plan.

Section 411(d)(6) is among the provisions of the Code establishing substantive requirements, generally protective of plan participants, upon "qualified retirement plans" under Section 401(a) as a condition to the favorable tax treatment afforded such plans.[2] In particular, Section 411(d)(6) provides that, once a benefit has been "accrued" by a participant under a qualified plan, the benefit may not be reduced by the employer.

The operation of Section 411(d)(6) may be illustrated by taking as an example a (typical) defined benefit pension plan design providing for an annual retirement benefit equal to 1% of an employee's final pay multiplied by the number of years of service for the employer. If an employee has worked, say, ten years, and has annual compensation of $50,000, he or she has an "accrued benefit" at that time of 10% x $50,000, or $5,000 per annum, which may not be subsequently reduced by the employer.[3]

Difficulties have arisen in identifying the precise reach of this rule, and in applying the rule to plans under particular factual circumstances. For example, while it is clear enough that an outright reduction in the amount of an employee's accrued pension would violate the "anti-cutback" rule of Section 411(d)(6), greater uncertainty attends more tangential aspects of plan benefits, such as, for example, the *manner of payment* of a pension. Regulations have taken a strict view of this issue, so that if, for example, a pension plan provides that benefits may be made in any of several forms (such as, for example, in a life annuity; over a ten-year fixed period; or in a lump sum), once a participant has accrued a benefit under the plan none of these options may ever be taken away to the extent of the benefit accrued. Thus, for instance, in the example

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[1] The principal drafters of this report were David Pratt and Andrew Stumpff. Helpful comments were also received from Samuel Dimon and Michael Schler.

[2] There are three principal tax advantages that accrue to qualified plans: First, the trusts in which plan assets are held are tax-exempt. IRC § 501(a). Second, participants are not taxed on the value of their interests in a qualified plan until benefits are distributed to them, despite the fact that such benefits are irrevocably secured by an interest in a nongrantor trust. IRC § 402. Third, employer contributions to a qualified plan are tax-deductible (within limits) despite the deferral of any participant inclusion with respect to such contributions. IRC § 404.

[3] The "accrual" of benefits is to be distinguished from the "vesting" of benefits. Once accrued, a benefit must remain accrued, but may, however, be subjected to a vesting schedule (of no more than a statutorily mandated time period). If a participant terminates employment before his or her accrued benefit has vested, the accrued benefit will be forfeited. The "accrued benefit" serves to define that which will eventually become vested if the participant remains employed.

set forth above, the participant's accrued $5,000 annual benefit would be required to be continually offered by the employer in all the forms available at the time the benefit was first accrued – regardless of whether the employer later decided to change the plan design with respect to future accruals.

This and similar problems have caused and continue to cause practical difficulties in plan administration. The following briefly describes several of our proposals to simplify and rationalize the rules under Section 411(d)(6). Further analysis and explanation of these proposals follow.

I. Summary of Recommendations

First, we suggest that the definition of a plan "amendment" (which implicates the anti-cutback rule) be more literally construed by the Service than is currently the case. As matters presently stand, the regulations treat as inherently violative of the anti-cutback rules any plan provision that allows the plan administrator or sponsor discretionary authority with respect to the payment of benefits. For example, a plan provision that provides for a default form of payment in the form of a life annuity, but permits the plan sponsor the discretion in individual cases to permit payment in lump-sum form, would inherently violate the regulations. We believe that this interpretation is ill-conceived and suggest that it be abandoned.

Second, it is currently unclear to what extent "contingent benefits" are protected under Section 411(d)(6). Contingent benefits are those benefits eligibility for which is dependent upon the occurrence of a contingency unrelated to the plan participant's termination of employment or attainment of a particular age or level of service. A common example of a contingent benefit is a so-called "plant shutdown" benefit, under which the employer's closing of a factory or other facility entitles the employees working there to special or accelerated retirement benefits. Recent guidance issued by the Service with respect to contingent benefits suggests that shutdown benefits are not protected under Section 411(d)(6) until an applicable "shutdown" actually occurs, and so may be eliminated without violation of Section 411(d)(6) if no shutdown has occurred at the time of elimination. However, there are a number of court cases also addressing this subject,[4] which suggest that such benefits may not be reduced even in advance of the specified contingency. We favor the approach chosen by the Service (although we recognize the existence of arguments to the contrary), and recommend that this view be more formally adopted by regulation in the hope of encouraging greater uniformity among the courts.

Third, we suggest that the Service has adopted an unduly restrictive view of the degree to which "optional" forms of benefit must be preserved in order to comply with

[4] Section 411(d)(6) is one of the Code provisions applicable to qualified retirement plans which is replicated in Title I of the Employee Retirement Security Act of 1974 ("ERISA") and, hence, enforceable by individual plan participants in federal court.

Section 411(d)(6). As noted above, existing regulations require that, with limited exceptions, most such optional forms be preserved. Although recent regulations have somewhat liberalized this requirement, we believe that pension policy and administrative practicality argue in favor of a substantial further loosening of the rules applicable to optional forms of benefit. In Part IV of this Report we propose several specific circumstances under which we believe it should be permissible to eliminate existing optional forms of benefit.

II. <u>Definition of "Plan Amendment"</u>

Section 411(d)(6) is by its terms violated only if an accrued benefit is reduced impermissibly by a "plan amendment". This term is not defined in the statute, but is clearly not meant to be limited to written instruments formally designated as "amendments." For instance, one court has held that "An erroneous interpretation of a plan provision that results in the improper denial of benefits to a plan participant may be construed as an "amendment" for the purposes of ERISA § 204(g)."[5] Under the regulations, the section 411(d)(6) prohibition also extends to plan mergers, spinoffs, transfers and other transactions having the effect of amending a plan to transfer benefits.[6]

To limit "plan amendments" covered by Section 411(d)(6) to documents formally designated as such would clearly allow plan sponsors undue latitude to circumvent the participant protections intended by Congress. In certain respects, however, the regulations issued under Section 411(d)(6) can be regarded as having effectively ignored the requirement of a plan amendment altogether. The most prominent source of this concern is the regulations' rule that a plan inherently violates Section 411(d)(6) if, by its terms, the plan permits the employer the *discretion* to provide, or not provide, a particular form or type of benefit.[7]

In our view this position is flawed from both a logical and policy perspective. If a plan provides from the outset that payment of a benefit in a particular form requires

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[5] *Hein v F.D.I.C.*, 88 F.3d 210 (3rd Cir., 1996), *cert. den.* 1997 U.S. LEXIS 72.

[6] Treas. Reg. Sec. 1.411(d)-4, Q & A 2(a)(3)(i).

[7] Treas. Reg. Sec. 1.411(d)-4, Q & A 4(a). For this purpose, the term "employer" includes any plan administrator, fiduciary, trustee, actuary, independent third party and other persons [Q & A 5]. In addition, a plan generally may not be amended to add employer discretion or other conditions (whether or not objective) restricting the availability of a Section 411(d)(6) protected benefit that has already accrued [Q & A 7; see also TAM 9735001]. See also the preamble to the 1988 final regulations, T.D. 8212, July 8, 1988 (stating that provisions for employer discretion "effectively enable an employer to eliminate or reduce a section 411(d)(6) protected benefit"); the preamble to the 1986 proposed regulations, 51 Fed. Reg. 3798, January 30, 1986; Prop. Reg. 1.411(d)-4, Q & A 2 (1986); and Notice 87-46, 1987-1 C.B. 502. However, objective conditions may be imposed to the extent permitted by the regulations [Q & A 2]. For additional exceptions to the general rule prohibiting employer discretion, see Q & A 4(b), 6.

the employer's consent, or may or may not be paid subject to the employer's discretion, then the availability and scope of that form of benefit arguably are (and always have been) limited by the provision for employer discretion. If the scope, or manner of exercise, of that discretion, as specified in the plan document, has not been modified, then the form of benefit has in our view not been reduced or eliminated by a plan "amendment." Indeed, notwithstanding the regulations, several courts have held that an exercise of employer discretion was not subject to Section 411(d)(6). In one case, the plan gave the plan administrator discretion to determine how benefits would be paid. The court held that "There is no indication that [the relevant section] of the Plan came about by plan amendment. Where there is no amendment altering the method of payment of benefits, the statute on its face does not apply."[8]

It seems likely that the Service's real concern is with the possibility of arbitrary or discriminatory awarding or withholding of benefits, rather than improper *reduction* of benefits. We agree that it is not advisable that employers be permitted to establish entirely discretionary benefits under a qualified plan. To the extent this concern is not already addressed through existing requirements such as the "definitely determinable benefits" rule[9] and rules requiring the nondiscriminatory availability of plan benefits, rights and features,[10] it should be dealt with more directly, if necessary through the adoption of legislation. In our view, it is improper for the Service to regulate the degree to which benefits may be discretionary through the device of an insupportably expansive interpretation of benefit "reduction."

A second way in which the regulations extend the reach of Section 411(d)(6) beyond the plausible scope of "plan amendments" involves the effect of changes to the statutory rules governing qualified plans. For example, Code section 401(a)(9) formerly required that qualified plan distributions begin upon a participant's attainment of age 70 1/2, a requirement that many plans incorporated by reference. (Thus, a plan might have required that plan distributions be made in accordance with Section 401(a)(9), which would have the effect of forcing commencement of benefits at age 70 1/2, regardless of a participant's expressed preference.) The age 70 1/2 distribution

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8 *Collignon v Reporting Services Co.*, 796 F. Supp. 1136 (C.D. Ill., 1992). 796 F. Supp. 1136 at 1142, *citing Dooley v. American Airlines, Inc.*, 797 F.2d 1447 (7th Cir. 1986), *cert. den.* 479 U.S. 1032 (1987) and *Oster v. Barco of California Employees' Retirement Plan*, 869 F.2d 1215 (9th Cir. 1988). *See also Sackett v Retirement Plan*, 1995 U.S. App. LEXIS 3814 (9th Cir., 1995).

9 One of the oldest rules applicable to qualified pension plans requires that benefits under such plans be "definitely determinable." Treas. Reg. Sec. 1.401-1(b)(1)(i). This rule, however, applies only to qualified plans that fall within the category of "pension" (*i.e.*, defined benefit or money purchase) plans.

10 Tax rules prohibit discrimination in favor of highly compensated employees in this respect. Treas. Reg. Sec. 1.401(a)(4)-4. In addition, of course, other existing law would prohibit an employer's discriminatory exercise of discretion on the basis of characteristics such as age, race or gender.

requirement has now been repealed by Congress (with certain limited exceptions). Despite this statutory repeal, the Section 411(d)(6) regulations treat distributions commencing at age 70½ as a protected "optional form of benefit" that cannot be reduced (except by meeting certain stringent conditions).[11] In cases where the plan incorporates section 401(a)(9) by reference, or provides that such distributions will be made only if and to the extent required by law, requiring the continued availability of distributions at age 70½, despite a change in the underlying law, again has the effect of extending section 411(d)(6) to situations where there is really no plan amendment.

We recommend that IRS clarify what constitutes an "amendment" for purposes of section 411(d)(6), to provide that an "amendment" includes

- The execution of any document, or
- The adoption of any policy or course of action, written or unwritten, or
- Any transaction (including a plan merger or spinoff, or the transfer of benefits from one plan to another)

that, individually or cumulatively, has the effect of impermissibly eliminating or reducing a benefit protected by section 411(d)(6). Moreover, where a plan includes, either explicitly or by cross-reference, a retirement form imposed by law (regardless of participant wishes), such as Section 401(a)(9), we recommend that if the obligation is removed by legislation, the employer's elimination of the form of benefit from a plan should not violate Section 411(d)(6).

We also recommend that merely awarding a plan administrator the discretion whether to provide an optional form of benefit (assuming participants did not previously have a right to such form of benefit) should not be considered as the removal of an optional form of benefit or give rise to such a removal when the plan administrator exercises that discretion.

III. <u>Contingent Benefits Protected by Section 411(d)(6)</u>

As noted above, so-called "shutdown benefits" arise when the employer's closing of a factory or other facility entitles the employees working there to special or accelerated retirement benefits. The IRS has taken the position[12] that shutdown benefits that are "retirement-type benefits" are protected benefits and may not be reduced or eliminated, but only if the shutdown contingency has already occurred:

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[11] Treas. Reg. Sec. 1.411(d)-4, Q & A 10.

[12] G.C.M. 39869, April 6, 1992.

> Shutdown benefits that are retirement-type benefits, and not ancillary benefits, become accrued benefits and therefore are protected benefits under 411(d)(6) upon the occurrence of the event that triggers the right to payment of benefits.

We agree with the Service's interpretation as described in the above-cited General Counsel Memorandum. A benefit that is contingent not on an employee's service or attainment of a particular age, but instead upon the occurrence of a future, unpredictable contingency, does not fall within the traditional notion of a pension "accrual." We suggest, however, that the Service's view be formalized through inclusion in the regulations, in order to improve the likelihood of that interpretation's adoption by courts. Thus far, the case law on this issue is inconsistent.[13] In the most recent case, *Bellas v CBS, Inc. and Westinghouse Pension Plan*,[14] the court rejected the IRS position that a contingent benefit is not protected until the contingent event occurs.[15] Such divergence among the courts is undesirable.

An argument against taking the Service's view is that if shut-down benefits are not protected under Section 411(d)(6), a participant might work until nearly the date of a shut-down only to have the employer eliminate the benefit just prior to the actual event. We note, however, that risk of this nature is present with all benefit accruals under a qualified retirement plan. For example, a typical profit-sharing plan provision would provide that the right to participate in the employer's plan contribution for a calendar year is contingent on a participant's being employed on December 31 of that year. Under these facts, assuming the employer had a profitable year, the employer could nonetheless revise or eliminate the contribution formula, or even terminate the plan, until the end of the day on December 30. There exists a need for some bright-line rule to determine when a benefit becomes "accrued;" once such a bright-line rule is established, situations can always be imagined in which a participant just misses attaining eligibility for the benefit in a way that seems unfair. We believe that long-

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[13] See *Ross v Pension Plan for Hourly Employees of SKF Industries, Inc.*, 847 F 2d 329 (6th Cir., 1988) (not protected); *Harms v Cavenham Forest Industries*, 984 F. 2d 686 (5th Cir., 1993) and *Wallace v Cavenham Forest Industries*, 707 F. Supp. 455 (D. Ore., 1989) (protected); *Davis v Burlington Industries, Inc.*, 966 F 2d 890 (4th Cir., 1992) (violation of 411(d)(6)); *Blank v Bethlehem Steel Corp.*, 926 F 2d 1090 (11th Cir., 1991) (not protected); *Richardson v Pension Plan of Bethlehem Steel Corporation*, 67 F. 3d 1462 (9th Cir., 1995) (protected); *withdrawn and rehearing granted* 112 F. 3d 982 (9th Cir., 1997) (holding no plan amendment); *Richardson Redux: The 9th Circuit Avoids Determining When a Plant Shutdown Benefit is a Protected Benefit Under Section 411(d)(6)*, 6 No. 3 ERISA Litig. Rep. 25 (August, 1997).

[14] 73 F. Supp.2d 500 (W.D. Pa., 1999), *affd.* 221 F.3d 517 (3rd Cir., 2000), *cert. den.* 121 S. Ct. 843 (2001).

[15] *Id.* at 508-509.

accepted usage and practice is inconsistent with considering a shut-down benefit to be "accrued" prior to occurrence of the shut-down.[16]

IV. Optional Forms of Benefit

As noted at the beginning of this report, the regulations protect not merely the absolute amount of an accrued benefit, but also most "optional forms of benefit"; that is, different forms in which the benefit may be paid. The regulations define the term "optional form of benefit" to mean

> (1) A distribution alternative (including the normal form of benefit) that is available under a plan with respect to the participant's accrued benefit, or
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> (2) A distribution alternative that is an early retirement benefit or retirement-type subsidy described in Code Section 411(d)(6)(B), including a qualified social security supplement.[17]

In general, subject to limited exceptions described in Treas. Reg. 1.401(a)(4)-4(e)(1)(ii), different optional forms of benefit exist if two distribution alternatives are not payable on substantially the same terms. Relevant terms include all plan provisions affecting the value of the optional form, such as the method of benefit calculation and the actuarial assumptions used to determine the amount distributed. Thus different optional forms of benefit may result from differences in terms relating to the payment schedule, timing, commencement, medium of distribution (*e.g.*, in cash or in kind), election rights, differences in eligibility requirements, or the portion of the benefit to which the distribution alternative applies.[18]

In our experience, the breadth of this definition causes enormous practical problems, and creates separate optional forms of benefit even if the differences between them are, by any reasonable criterion, trivial. We concur with the Tax Section of the American Bar Association, which has noted that

> When asked about optional forms, most employers think of the basic distribution forms- lump sums, installments, annuities. Few employers would further break down an optional form of benefit with respect to other features such as timing, medium of distribution and election rights with respect to optional forms.... Thus, many employers and plan administrators simply fail to

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[16] We also note that employers are neither required nor permitted to fund in advance for such contingencies.

[17] Treas. Reg. 1.401(a)(4)-4(e)(1).

[18] Treas. Reg. 1.401(a)(4)-4(e)(1)(i).

identify optional forms of benefit and therefore fail to preserve them.[19]

Elimination of an optional form of benefit is generally prohibited even if the plan continues to offer other optional forms of benefit which are actuarially equivalent to the eliminated optional form.[20] Thus, the present definition results in the preservation of numerous optional forms of benefit that differ only insignificantly from each other, many of which are never chosen by participants. The enactment of direct "rollover" rules in 1992 made it less important to preserve all prior optional forms of benefit. By receiving an eligible rollover distribution, and transferring it to an individual retirement account, a participant can, in effect, design a form of distribution, or combination of forms, that can be far more flexible than the alternatives available under any conceivable qualified plan, and that are tailor-made for his or her individual situation. The recently enacted Economic Growth and Tax Relief Reconciliation Act of 2001 has further liberalized the rollover rules so that, beginning in 2002, rollovers can include after-tax employee contributions and can be made between different types of plan. As a result, requiring that plans preserve optional forms of benefit will have even less practical benefit in the future.

The Retirement Equity Act of 1984 ("REA") granted the Treasury Secretary authority to provide by regulation that the Section 411(d)(6) prohibition would not apply to the elimination of an optional form of benefit, other than the elimination of a retirement-type subsidy or early retirement benefit. However, the REA legislative history states that

> The committee expects that the regulations will not permit the elimination of a "lump-sum distribution" option because, for a participant or beneficiary with substandard mortality, the elimination of that option could eliminate a valuable right even if a benefit of equal actuarial value (based on standard mortality) is available under the plan.[21]

In accordance with this grant of authority, the regulations currently provide that Section 411(d)(6) protected benefits may be eliminated or reduced in certain limited

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[19] American Bar Association, Section of Taxation, Employee Benefits Committee, *Comments Regarding the Internal Revenue Service and Treasury Department Proposal on Application of Section 411(d)(6) to Defined Contribution Plans* (1999), at 18.

[20] See S. Rep. 98-575, 98th Cong., 2nd Sess., 1984, at 27 (legislative history of the Retirement Equity Act of 1984).

[21] S. Rep. No. 98-575, *supra*, p. 30.

situations.[22] Nonetheless the requirement remains very restrictive – in our view, needlessly so, in view of the limited value the restrictions confer on plan participants.

First, many of the exceptions under the regulations are limited to defined contribution plans.[23] We believe that sponsors of defined benefit plans should have similar flexibility to eliminate forms of benefit that are no longer desirable, in order to simplify plan administration and participants' choices. For instance, while the regulations allow the elimination of some joint and survivor annuity options, they do not allow the elimination of term certain annuity options. Provided the plan offers a single sum distribution option, we suggest that plan sponsors should be free to eliminate all optional forms of benefit except (i) the single sum distribution and (ii) the annuity options required by statute.

Second, we suggest that special relief should be available in the following particular situations, in each of which, in our view, the benefits of participant protection (and the possibility of abuse) are small or are greatly outweighed by the administrative burdens imposed on plan sponsors. (We recognize that there may be some overlap in the relief available under these proposals, in the sense that adopting one or more of them might make adoption of others less necessary. Accordingly we would also support the adoption of any subset of the proposals.)

A number of the arguments we have advanced for permitting greater flexibility depend for their validity upon the relevant plan's continuing to offer, after elimination of a particular form of benefit, the option to receive benefits in the form of a lump sum. Accordingly, we would predicate availability of the first four exceptions described below upon the plan's offering payment of benefits in lump-sum form after the permitted elimination:

> **1. A plan merger, spin-off, direct transfer of assets or similar event following a corporate transaction described in Code section 410(b)(6)(C).**[24] In the case of a corporate transaction, the acquiror often finds itself as the successor sponsor of one or more qualified plans which have very different benefits features than those of the plans it previously maintained (and, therefore, those it is administratively prepared to deal with easily). Indeed, highly acquisitive companies may find that they have accumulated dozens of

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[22] Treas. Reg. Sec. 1.411(d)-4, Q & A 2(b)(2), 10.

[23] The preamble to the proposed regulations said that "While limited comments relating to defined benefit plans were received in response to Notice 98-29, the IRS and Treasury remain open to further comment in this area."

[24] We note that Treas. Reg. 1.401(a)(4)-4 requires, in the case of a plan merger, that any optional form of benefit available to some, but not all, of the participants in the merged plan, must be tested for nondiscriminatory availability.

plans, each with its own set of benefits options that must be indefinitely preserved. We have observed that in addition to the potential for progressive, exponential increase in ongoing administrative costs, the present state of the law can represent a source of at least some transactional "friction" in the case of some proposed economic combinations. We do not believe that offering relief for a change in benefits incidental to a corporate transaction would provide a significant opportunity for abuse by plan sponsors. (We recognize that limitations would be appropriate to ensure that any such transaction, to qualify for relief, should be bona fide and not intended merely to avoid the Section 411(d)(6) requirements. We would be pleased to work with the Service in crafting rules that would strike the appropriate balance in this regard.)

2. A change by the employer from one prototype or volume submitter plan to another. Prototypes and volume submitter plans allow small employers the opportunity to provide their employees with the benefits of a qualified plan without the disproportionate legal and other expense attendant to the design and maintenance of a "custom-designed" individually designed plan. A number of sponsors of such plans have arisen over the years, offering different packages of plan design, investment choices, and benefit administration. Given the frequency of changes in the law and investment climate, and also the frequency with which plans must be restated to remain in compliance with statutory changes, we believe small employers should be free to choose the prototype or volume submitter plan which best suits the needs of the employer and the participants at a given time and should not be shackled to a particular plan by the inability to eliminate unwanted optional forms of benefit. Also, as the ABA report notes

> Although prototypes usually contain boilerplate language that preserves the optional forms of benefit made available under the previous document, these optional forms may be lost in operation or in future restatements if they are not specifically stated in the employer's adoption agreement.[25]

To prevent abuse, we suggest that if this exception is adopted, it be limited so as not to apply if a principal purpose of a change in prototype or volume submitter plans is to deprive participants of a form of benefit that would otherwise be protected under Section 411(d)(6).

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[25] ABA Report, note 19 *supra*, p. 25.

3. An amendment that eliminates optional forms of benefit whose utilization is demonstrably very low. According to the ABA Report:

> Universally, the anecdotal information indicates that less than one percent of the participants in defined contribution plans with lump sum payments take annuity forms of payment. In some cases, clients can't remember a single participant who has taken an annuity in the last ten years. In defined benefit plans that offer lump sum payments, the number of participants who take annuities is also insignificant- again less than one percent.... Anecdotally, it is perceived that perhaps as many as one to three percent of the retirement age participants take an annuity form of payment- if that many.[26]

The argument against this approach is that, even if usage of the option is low, it may have real value to an individual participant and, thus, should not be eliminated. Against this concern must be balanced, however, the complexity of plan administration (which, if too great, can help deter employers from sponsoring plans). At some level, from a pension policy perspective, usage of an option is too low to justify the administrative burden even if it is of value to a particular participant.

4. An amendment that eliminates optional forms of benefit that apply to only a small portion of participants' benefits. In order to be of practical utility, such an approach would probably have to be applied on a plan basis, rather than an individual basis, at least for larger plans. So, for instance, if a particular optional form of benefit applied to less than 5% of the total accrued benefits under the plan, the option could be eliminated. As with the previous proposal, an objection could be made that even if a small proportion of overall benefits were involved, at least some participants may derive, individually, significant value from the form in question. The response to that objection stated above – that at some point pension policy, including the encouragement of pension plan sponsorship, overrides even a real value derived by a sufficiently small plan population – also applies with respect to this proposal.

We also suggest the following two exceptions from the prohibition on elimination of benefit forms. Unlike the preceding exemptions, we would not predicate these upon the plan's offering benefits in the form of a lump sum:

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[26] ABA Report, note 19 *supra*, p. 10.

5. An amendment that eliminates optional forms of benefit if the effective date of the amendment is deferred for some period of years. This approach has, for example, been supported by AARP.[27] We propose that the effective date must be deferred for five years, and that in any case the amendment will not be effective for a participant who has reached an age near retirement at the time of the amendment's adoption (for example, such amendments could be required not to apply to those participants age 55 and older). We believe it unlikely that a plan participant more than five years from retirement will have relied in any meaningful way on the fact that his or her retirement benefits can be paid in a particular form.

6. An amendment that eliminates one of several similar benefit forms. For example, it should be permissible to eliminate a "ten-year certain" form if the plan continued to provide five-year certain and fifteen-year certain forms. We would be pleased to work with the Service in defining those forms of benefit that are sufficiently similar that one or more may be eliminated.

[27] *AARP Suggests Ways to Develop Pension Plan Amendment Prohibition Exceptions*, Tax Notes Today, August 27, 1998, 98 TNT 166-30.