

## **Cash Balance and Other Hybrid Defined Benefit Pension Plans**

Notice 2007-6

### **I. PURPOSE**

This notice announces that the Service is beginning to process determination letter and examination cases in which an application for a determination letter or a plan under examination involves an amendment to change a traditional defined benefit plan into a cash balance plan and provides related guidance. This notice also provides transitional guidance on the requirements of §§411(a)(13) and 411(b)(5) of the Internal Revenue Code (Code), as added by section 701(b) of the Pension Protection Act of 2006, Public Law 109-280 (PPA '06), which was enacted on August 17, 2006. This guidance generally relates to cash balance plans and other hybrid defined benefit pension plans and to amendments that convert defined benefit pension plans to hybrid defined benefit pension plans. This notice also requests comments on certain issues raised by §§411(a)(13) and 411(b)(5).

### **II. BACKGROUND**

A defined benefit pension plan generally must satisfy the minimum vesting standards of §411(a) and the accrual requirements of §411(b) in order to be qualified under §401(a). Both sections have been modified by section 701(b) of PPA '06, which added §§411(a)(13) and 411(b)(5) to the Code.

Section 411(a)(13)(A) provides that a plan described in §411(a)(13)(C) is not treated as failing to meet either (i) the requirements of §411(a)(2) (subject to a special vesting rule in §411(a)(13)(B) with respect to benefits derived from employer contributions), or (ii) the requirements of §411(c) or §417(e) with respect to benefits derived from employer contributions, solely because the present value of the accrued benefit (or any portion thereof) of any participant is, under the terms of the plan, equal to the amount expressed as the balance in a hypothetical account or as an accumulated percentage of the participant's final average compensation.

A plan is described in §411(a)(13)(C)(i) if the plan is a defined benefit plan under which the accrued benefit (or any portion thereof) of a participant is calculated as the balance of a hypothetical account maintained for the participant or as an accumulated percentage of the participant's final average compensation. Under §411(a)(13)(C)(ii), the Secretary is to issue regulations that treat any defined benefit plan (or any portion of such a plan) that has an effect similar to a plan described in §411(a)(13)(C)(i) as if it were described in §411(a)(13)(C)(i). For purposes of this notice, a plan described either in §411(a)(13)(C)(i) or in regulations or other guidance issued pursuant to §411(a)(13)(C)(ii) is referred to as a statutory hybrid plan.

Section 411(b)(1)(H)(i) provides that a defined benefit plan fails to comply with §411(b) if, under the plan, an employee's benefit accrual is ceased, or the employee's rate of benefit accrual is reduced, because of the attainment of any age. Section 411(b)(5)(A), as added by section 701(b)(1) of PPA '06, generally provides that a plan will not be treated as failing to meet the requirements of §411(b)(1)(H)(i) if a participant's benefit accrued to date, as determined as of any date under the terms of

the plan, would be equal to or greater than that of any similarly situated, younger individual who is or could be a participant. For purposes of this notice, a participant's benefit accrued to date is referred to as the participant's accumulated benefit. Under §411(b)(5)(A)(iv), for purposes of the safe harbor standard of §411(b)(5)(A), a participant's accumulated benefit may, under the terms of the plan, be expressed as an annuity payable at normal retirement age, the balance of a hypothetical account, or the current value of the accumulated percentage of the employee's final average compensation.

Section 411(b)(5)(B) imposes several requirements on a statutory hybrid plan as a condition of satisfying §411(b)(1)(H). First, §411(b)(5)(B)(i) provides that a statutory hybrid plan is treated as failing to meet the requirements of §411(b)(1)(H) if the terms of the plan provide for an interest credit (or an equivalent amount) for any plan year at a rate that is greater than a market rate of return. Second, §411(b)(5)(B)(ii) and (iii) contain minimum benefit rules that apply if, after June 29, 2005, an amendment is adopted that converts a defined benefit plan to a statutory hybrid plan. For purposes of this notice, such an amendment is referred to as a conversion amendment. Third, §411(b)(5)(B)(vi) provides a special rule for projecting variable interest crediting rates in the case of a terminating statutory hybrid plan. In addition, §411(a)(13)(B) requires a statutory hybrid plan to provide that an employee who has completed at least 3 years of service has a nonforfeitable right to 100 percent of the employee's accrued benefit derived from employer contributions.

Section 411(b)(5)(E) provides that a plan is not treated as failing to meet the requirements of §411(b)(1)(H) solely because the plan provides for indexing of accrued

benefits under the plan. Under §411(b)(5)(E)(iii), indexing means, in connection with an accrued benefit, the periodic adjustment of the accrued benefit by means of the application of a recognized investment index or methodology.

Section 701(a) of PPA '06 added provisions to the Employee Retirement Income Security Act of 1974, Public Law 93-406 (ERISA) that are parallel to the above described sections of the Code that were added by section 701(b) of PPA '06. The guidance provided in this notice with respect to the Code also applies for purposes of the parallel amendments to ERISA made by PPA '06.<sup>1</sup>

Section 701(c) of PPA '06 added provisions to the Age Discrimination in Employment Act of 1967, Public Law 90-202 (ADEA), that are parallel to §411(b)(5) of the Code. Executive Order 12067 requires all Federal departments and agencies to advise and offer to consult with the Equal Employment Opportunity Commission (EEOC) during the development of any proposed rules, regulations, policies, procedures or orders concerning equal employment opportunity. Treasury and the Service have consulted with the EEOC prior to the issuance of this notice.

The amendments made by section 701 of PPA '06 are generally effective for periods beginning on or after June 29, 2005. There are a number of special effective date rules, some of which are described in this notice. Section 701(d) of PPA '06 provides that nothing in the amendments made by section 701 should be construed to create an inference concerning the treatment of statutory hybrid plans or conversions of plans into such plans under §411(b)(1)(H), or concerning the determination of whether a statutory hybrid plan fails to meet the requirements of §411(a)(2), 411(c), or 417(e) as in

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<sup>1</sup> Under section 101 of Reorganization Plan No. 4 of 1978 (43 F.R. 47713), the Secretary has interpretive jurisdiction over the subject matter addressed by this notice for purposes of ERISA.

effect before such amendments solely because the present value of the accrued benefit (or any portion thereof) of any participant is equal to the amount expressed as the balance in a hypothetical account or as an accumulated percentage of the participant's final average compensation.

Section 702 of PPA '06 requires the Secretary to prescribe regulations for the application of the provisions of section 701 of PPA '06 in cases where the conversion of a plan to a statutory hybrid plan is made with respect to a group of employees who become employees by reason of a merger, acquisition, or similar transaction.

Proposed regulations (EE-184-86) under §§411(b)(1)(H) and 411(b)(2) were published by Treasury and the Service in the Federal Register on April 11, 1988 (53 F.R. 11876), as part of a package of regulations that also included proposed regulations under §§410(a), 411(a)(2), 411(a)(8), and 411(c) (relating to the maximum age for participation, vesting, normal retirement age, and actuarial adjustments after normal retirement age, respectively).<sup>2</sup>

Notice 96-8, 1996-1 C.B. 359, described the application of §§411 and 417(e), prior to the enactment of PPA '06, to a single-sum distribution under a cash balance plan where interest credits under the plan are frontloaded (i.e., where future interest credits to an employee's hypothetical account balance are not conditioned upon future service and thus accrue at the same time that the benefits attributable to a hypothetical allocation to the account accrue). Under the analysis set forth in Notice 96-8, in order to

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<sup>2</sup> On December 11, 2002, Treasury and the Service issued proposed regulations regarding the age discrimination requirements of §411(b)(1)(H) that specifically addressed cash balance plans as part of a package of regulations that also addressed §401(a)(4) nondiscrimination cross-testing rules applicable to cash balance plans (67 F.R. 76123). The 2002 proposal was intended to replace the 1988 proposal. In Announcement 2003-22, 2003-1 C.B. 847, Treasury and the Service announced the withdrawal of the 2002 proposed regulations under §401(a)(4), and in Announcement 2004-57, 2004-2 C.B. 15, Treasury and the Service announced the withdrawal of the 2002 proposed regulations relating to age discrimination.

comply with §§411(a) and 417(e) in calculating the amount of a single-sum distribution under a cash balance plan, the balance of an employee's hypothetical account must be projected to normal retirement age and converted to an annuity under the terms of the plan, and then the employee must be paid at least the present value of the projected annuity, determined in accordance with §417(e). Under that analysis, where a cash balance plan provides frontloaded interest credits using an interest rate that is higher than the §417(e) applicable interest rate, payment of a single-sum distribution equal to the current hypothetical account balance as a complete distribution of the employee's accrued benefit may result in a violation of §417(e) or a forfeiture in violation of §411(a). In addition, Notice 96-8 proposed a safe harbor that provided that, if frontloaded interest credits are provided under a plan at a rate no greater than the sum of identified standard indices and associated margins, no violation of §411(a) or 417(e) would result if the employee's entire accrued benefit is distributed in the form of a single-sum distribution equal to the employee's hypothetical account balance, provided the plan uses appropriate annuity conversion factors.

On September 15, 1999, the Service's Director, Employee Plans, issued a field directive requiring that open determination letter applications and examination cases that involved the conversion of a defined benefit plan formula into a benefit formula commonly known as a cash balance formula be submitted for technical advice with respect to the conversion's effect on the qualified status of the plan (referred to in this notice as the 1999 Field Directive). The 1999 Field Directive identified as a cash balance formula a benefit formula in a defined benefit plan by whatever name (e.g., personal account plan, pension equity plan, life cycle plan, cash account plan, etc.) that,

rather than expressing the accrued benefit as a life annuity commencing at normal retirement age, defines benefits for each employee by reference to a single-sum distribution amount. In Announcement 2003-1, 2003-1 C.B. 281, the Service announced that the cases that were the subject of the 1999 Field Directive would not be processed pending issuance of regulations addressing age discrimination.

### III. TRANSITIONAL GUIDANCE

This part III provides transitional guidance with respect to rules in §§411(a)(13) and 411(b)(5) that relate to statutory hybrid plans and the conversion of a defined benefit plan into a statutory hybrid plan. The transitional guidance provided in this part III applies pending the issuance of further guidance.

#### A. Section 411(a)(13)(C): Definition of statutory hybrid plan.

1. In general. A statutory hybrid plan described in §411(a)(13)(C)(i) and (ii) is a plan that is either a lump sum based plan or a plan that has a similar effect to a lump sum based plan. For purposes of this notice, the term lump sum based plan means a defined benefit plan under the terms of which the accumulated benefit of a participant is expressed as the balance of a hypothetical account maintained for the participant or as the current value of the accumulated percentage of the participant's final average compensation, and includes a plan under which the accrued benefit under the terms of the plan is calculated as the actuarial equivalent of such a hypothetical account balance or accumulated percentage. Whether a plan is a lump sum based plan is determined based on how the accumulated benefit of a participant is expressed under the terms of the plan, and does not depend on whether the plan provides for an optional form of benefit in the form of a lump sum payment.

2. Similar effect to a lump sum based plan.

(i) Treated as having a similar effect. Except as provided below in part IIIA(2)(ii) of this notice, a plan that is not a lump sum based plan is treated as having a similar effect to a lump sum based plan if the plan provides that a participant's accrued benefit (payable at normal retirement age) is expressed as a benefit that includes automatic periodic increases through normal retirement age that results in the payment of a larger amount at normal retirement age to a similarly situated participant who is younger. This includes a plan that provides for indexing of accrued benefits within the meaning of §411(b)(5)(E)(iii), such as a plan that expresses the accrued benefit as an indexed annuity.

(ii) Not treated as having a similar effect.

(I) Plan with post-retirement adjustment. A plan described in §411(b)(5)(E) that solely provides for post-retirement adjustment of the amounts payable to a participant is not treated as having a similar effect to a lump sum based plan.

(II) Variable annuity plan. A variable annuity plan is not treated as having a similar effect to a lump sum based plan if it has an assumed interest rate used for purposes of adjustment of amounts payable to a participant that is at least five percent. For this purpose, a variable annuity plan includes any plan which provides that the amount payable is periodically adjusted by reference to the difference between the rate of return of plan assets (or specified market indices) and the assumed interest rate.

B. Section 411(a)(13): Special rules for the application of §§411(a)(2), 411(c), and 417(e).

1. In general. Section 411(a)(13)(A) provides special rules with respect to §§411(a)(2), 411(c), and 417(e) for benefits expressed as the balance of a hypothetical account maintained for a participant or as the current value of the accumulated percentage of a participant's final average compensation under a lump sum based plan. Specifically, with respect to such benefits, a lump sum based plan is not treated as failing to meet the requirements of §411(a)(2), or the requirements of §§411(c) and 417(e) with respect to such benefits derived from employer contributions, solely because the present value of such benefits of any participant is, under the terms of the plan, equal to the amount expressed as the balance in the hypothetical account or as the accumulated percentage of the participant's final average compensation. Section 411(a)(13)(A) does not apply to benefits under a statutory hybrid plan that are expressed neither as the balance of a hypothetical account maintained for a participant nor as the current value of the accumulated percentage of a participant's final average compensation.

2. Effective date. Section 411(a)(13)(A) is effective for distributions made after August 17, 2006. The Service expects to issue regulations shortly interpreting the effective date of §411(a)(13)(A).

3. Section 411(d)(6) relief. In the case of a lump sum based plan that provides for a single-sum distribution to a participant that exceeds the participant's hypothetical account balance or accumulated percentage of final average compensation, the plan may be amended to eliminate the excess for distributions made after August 17, 2006, under the rules of section 1107 of PPA '06. Because such an amendment is made pursuant to section 701 of PPA '06, section 1107 of PPA '06 applies to the amendment

if the amendment satisfies the requirements specified in section 1107. Thus, if the amendment is adopted on or before the last day of the first plan year beginning on or after January 1, 2009 (January 1, 2011, for a governmental plan), and the plan is operated as if such amendment were in effect as of the first date the amendment is effective, then the amendment does not violate section 411(d)(6) with respect to distributions made after the later of August 17, 2006, or the effective date of the amendment.

4. Section 4980F. Pursuant to this notice, in the case of an amendment described in section B(3) of this part III, a notice required under §4980F (and the parallel provision at section 204(h) of ERISA) must be provided at least 30 days before the date the amendment is first effective. Thus, if an amendment described in section B(3) of this part III that significantly reduces the rate of future benefit accrual for purposes of §4980F is adopted retroactively (i.e., is adopted after the effective date of the amendment) as an amendment under the rules of section 1107 of PPA '06, then the notice required under §4980F must be provided at least 30 days before the earliest date on which the plan is operated in accordance with the amendment.

5. Vesting. See §411(a)(13)(B) for a special 3-year vesting schedule for statutory hybrid plans.

C. Section 411(b)(5)(A)(iv): Scope of rule. In applying the age discrimination test set forth in §411(b)(5)(A)(i), a lump sum based plan may under §411(b)(5)(A)(iv) determine the accumulated benefit of a participant as the balance of a hypothetical account or the current value of the accumulated percentage of the employee's final

average compensation even if the plan defines the participant's accrued benefit as an annuity at normal retirement age that is actuarially equivalent to such balance or value.

D. Section 411(b)(5)(B)(i): Market rate of return.

1. Future guidance on market rate of return. During 2007, Treasury and the Service expect to issue guidance that addresses the market rate of return rules at §411(b)(5)(B)(i), including the special rule regarding preservation of capital under §411(b)(5)(B)(i)(II) and the minimum rate of return rules in the second sentence of §411(b)(5)(B)(i)(I). The guidance is also expected to address the extent to which §411(d)(6) relief provided under section 1107 of PPA '06 applies to an amendment to a statutory hybrid plan that changes the plan's interest crediting rate where such amendment is adopted after August 17, 2006.

2. Safe harbor. Pending further guidance, a market rate of return for purposes of §411(b)(5)(B)(i) includes the rate of interest on long-term investment grade corporate bonds (as described in §412(b)(5)(B)(ii)(II) prior to amendment by PPA '06 for plan years beginning prior to January 1, 2008, and the third segment rate described in §430(h)(2)(C)(iii) for subsequent plan years) or the rate of interest on 30-year Treasury securities (as described in §417(e)(3) prior to amendment by PPA '06). In addition, a market rate of return for purposes of §411(b)(5)(B)(i) includes the sum of any of the standard indices and the associated margin for that index as described in part IV of Notice 96-8.

3. Certain plan termination requirements. See §411(b)(5)(B)(vi) for required plan terms related to termination of a statutory hybrid plan.

E. Section 411(b)(5)(B)(ii) - (iv): Special rules for conversion amendments.

1. In general. Section 411(b)(5)(B)(ii) provides that if a conversion amendment is adopted with respect to a plan after June 29, 2005, the plan is treated as failing to meet the requirements of §411(b)(1)(H) unless the requirements of §411(b)(5)(B)(iii) are met with respect to each individual who was a participant in the plan immediately before the adoption of the conversion amendment.

2. Requirements of §411(b)(5)(B)(iii). Subject to §411(b)(5)(B)(iv), §411(b)(5)(B)(iii) is satisfied with respect to any participant if the accrued benefit of the participant under the terms of the plan as in effect after the conversion amendment is not less than the sum of--

(i) the participant's accrued benefit for years of service before the effective date of the conversion amendment, determined under the terms of the plan as in effect before the amendment, and

(ii) the participant's accrued benefit for years of service after the effective date of the amendment, determined under the terms of the plan as in effect after the amendment.

3. Requirements of §411(b)(5)(B)(iv). Under §411(b)(5)(B)(iv), a plan must credit the accumulation account or similar account for purposes of the accrued benefit described in part III E(2)(ii) of this notice with the amount of any early retirement benefit or retirement-type subsidy for the plan year in which the participant retires if, as of such time, the participant has met the age, years of service, and other requirements under the plan for entitlement to such benefit or subsidy. For this purpose, the date on which a participant retires means the annuity starting date for the participant's benefit.

4. Effective date. Section 411(b)(5)(B)(ii) applies to a conversion amendment that is adopted after, and takes effect after, June 29, 2005. See section 701(e)(5) of PPA '06 for a special election with respect to §411(b)(5)(B)(ii).

F. Safe harbor for conversions related to mergers and acquisitions.

1. Future guidance on conversions related to mergers and acquisitions. In accordance with section 702 of PPA '06, the Service expects to issue regulations not later than August 17, 2007, regarding an amendment to convert a defined benefit plan into a hybrid defined benefit plan with respect to a group of employees who become employees by reason of a merger, acquisition, or similar transaction.

2. Safe harbor. Pending further guidance, a plan amendment described in part III E that is also described in part III F(1) of this notice is not treated as failing to meet the requirements of §411(b)(1)(H) if the benefit of each participant under the plan as amended is not less than the sum of:

(A) the participant's section 411(d)(6) protected benefit (as defined in §1.411(d)-3(g)(14)) with respect to service before the effective date of the conversion amendment, determined under the terms of the plan as in effect before the amendment, and

(B) the participant's section 411(d)(6) protected benefit with respect to service on and after the effective date of the conversion amendment, determined under the terms of the plan as in effect after the amendment.

For purposes of this paragraph F(2), the benefits under clause (A) and the benefits under clause (B) of this paragraph F(2) must each be determined in the same manner as if they were provided under separate plans that are independent of each other (e.g., without any benefit offsets).

#### IV. DETERMINATION LETTERS

In light of the enactment of section 701 of PPA '06, the Service is no longer applying the 1999 Field Directive and Announcement 2003-1 and is beginning to process the determination letters and examination cases that were the subject of such field directive and announcement (referred to as moratorium plans in this notice). This part IV describes certain rules that will be applied for purposes of processing moratorium plans. Qualification requirements that are not described in this part IV (e.g., the backloading rules of §411(b)(1)(A), (B), and (C)) continue to apply.

##### A. Age discrimination.

1. In general. Except as provided in part IVA(2) of this notice, a moratorium plan will be reviewed as to whether accruals under the plan that relate to service performed by the participant after the conversion violate §411(b)(1)(H). For this purpose, a moratorium plan will not be treated as failing to satisfy the requirements of §411(b)(1)(H) merely because a moratorium plan that is frontloaded provides that interest credits through normal retirement age are accrued in the year of the related hypothetical allocation.

2. Pre-6/30/05 conversions. For purposes of processing a determination letter application for a moratorium plan, the plan will not be reviewed as to whether the conversion of the plan satisfies the requirements of §411(b)(1)(H) if the amendment that results in the conversion was adopted prior to June 30, 2005. Therefore, determination letters issued to moratorium plans will not consider, and may not be relied on with respect to, whether such a conversion satisfies the requirements of §411(b)(1)(H), as in

effect prior to the addition of §411(b)(5) by PPA '06, including the effect of any wearaway.

3. Post-6/29/05 conversions. In the case of a moratorium plan that involves a conversion of the plan to a statutory hybrid plan pursuant to an amendment that is adopted after June 29, 2005, the conversion must satisfy the requirements of §411(b)(5)(B)(ii) (described in part III E of this notice).

B. Distributions before August 18, 2006. The Service expects to issue regulations interpreting the effective date of §411(a)(13)(A) (described in part III B(2) of this notice). Until this guidance is issued, the Service will not process a moratorium plan that does not satisfy the requirements of Notice 96-8 with respect to distributions made before August 18, 2006.

C. Terminating plans. Under Title IV of ERISA, a standard termination may only occur if, when the final distribution of assets occurs, the plan is sufficient for benefit liabilities determined as of the termination date. See §4041(b)(1)(D) of ERISA; 29 C.F.R. §4041.8(a). The Pension Benefit Guaranty Corporation (PBGC) has informed the Service that, for purposes of Title IV of ERISA, a terminating plan with a termination date that is prior to August 18, 2006, cannot apply §411(a)(13)(A) in determining its benefit liabilities with respect to any distributions made by the terminating plan.

## V. COMMENTS REQUESTED AND FUTURE REGULATIONS

Treasury and the Service expect to issue regulations with respect to the transitional guidance provided in this notice and the issues described in part III B(2) of this notice. These initial regulations may address some additional issues, but will not address all of the outstanding issues relating to §§411(a)(13) and 411(b)(5).

Comments are requested on the following additional issues. These comments will be considered in conjunction with the comments received in response to the initial regulations in developing additional guidance.

- Identification of when two or more amendments, or the coordination of two or more defined benefit plans, have the effect of a conversion into a statutory hybrid plan.
- The definition of market rate of return for purposes of §411(b)(5)(B)(i), including the following related issues:
  - The impact of the minimum rate of return rules in the second sentence of §411(b)(5)(B)(i)(I) on the definition of market rate of return.
  - The impact of the preservation of capital rule in §411(b)(5)(B)(i)(II) on the definition of market rate of return.
  - The application of §411(d)(6) to an amendment to the interest crediting rate specified in a statutory hybrid plan, and the circumstances under which the § 411(d)(6) relief provided under section 1107 of PPA '06 should apply to such an amendment.
- Application of the special rules for hybrid plans in the case of a plan in which only certain participants' accrued benefits, or only a portion of a participant's accrued benefit, is determined by reference to a hypothetical account balance or an accumulated percentage of final average compensation, including plans in which the benefit payable under one plan is offset by the benefit provided under another plan.
- The application of qualification requirements other than §§411(b)(1)(H) and 417(e) to a defined benefit plan under which the accrued benefit is calculated as an accumulated percentage of the participant's final average compensation (commonly

referred to as a pension equity plan or PEP), including the treatment of interest credited with respect to terminated vested participants.

- The definition of a recognized index or methodology for purposes of §411(b)(5)(E) and whether there are any types of indexed plans that should not be treated as statutory hybrid plans other than those described in part IIIA(2)(i) above.

Written comments should be submitted by April 16, 2007. Send submissions to CC:PA:LPD:DRU (Notice 2007-6), Room 5203, Internal Revenue Service, POB 7604 Ben Franklin Station, Washington, D.C. 20044. Comments may be hand delivered to CC:PA:LPD:DRU (Notice 2007-6), Room 5203, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC. Alternatively, comments may be submitted via the Internet at [notice.comments@irs.counsel.treas.gov](mailto:notice.comments@irs.counsel.treas.gov) (Notice 2007-6). All comments will be available for public inspection.

## VI. DRAFTING INFORMATION

The principal authors of this notice are Kathleen J. Herrmann of the Employee Plans, Tax Exempt and Government Entities Division and Christopher A. Crouch, Lauson C. Green, and Linda S. F. Marshall of the Office of the Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). For further information regarding this notice, contact Ms. Herrmann at (202) 283-9888 and Mr. Crouch, Mr. Green, and Ms. Marshall at (202) 622-6090 (not toll-free numbers).