November 21, 2005
By E-Mail

CC: PA: LPD:PR(REG—156518--04)
Couriers Desk
Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, DC 20224

http://www.irs.gov/regs

Dear Sir or Madam:

These comments are filed by the National Coordinating Committee for Multiemployer plans (NCCMP) in response to the request for public comments on the Proposed Regulations concerning Section 411(d)(6) Protected Benefits in the Federal Register of August 12, 2005 (70 Fed. Reg. 47155).

The NCCMP is the only national organization devoted exclusively to protecting the interests of the approximately ten million workers, retirees, and their families who rely on multiemployer plans for retirement, health and other benefits. Our purposes is to assure an environment in which multiemployer plans can continue their vital role in providing benefits to working men and women. The NCCMP is a nonprofit organization, with members, plans and plan sponsors in every major segment of the multiemployer plan universe, including in the building and construction, retail food, trucking and service and entertainment industries.

**Amendments to Comply with Final Suspension of Benefits Regulations**

The proposed regulations provide in §1.411(d)-3(a)(3) that the protections of 411(d)(6) apply to a "plan amendment that decreases a participant's accrued benefits, or otherwise places greater restrictions or conditions on a participant's rights to section 411(d)(6) protected benefits, even if the amendment merely adds a restriction or condition that is otherwise permitted under the vesting rules in section 411(a)(3) through (a)(12)." One of the examples specifically addresses the facts of the decision in the *Heinz* case.

A troubling open issue is how far back a plan must look to determine whether it has adopted amendments that, in the light of *Heinz,* may now be considered to be prohibited cutbacks. In particular, questions have arisen whether the adoption of benefit-suspension

amendments in response to the 1981 Labor Department regulations under ERISA section 203(b)(3) could itself have been a violation. The NCCMP urges the IRS to clarify the application of 411(d)(6) to the unique circumstances at the time of the adoption by plans of amendments to comply with the Final DOL Regulations on Suspension of Benefits. Specifically, the NCCMP requests that the 411(d)(6) regulations clarify that if, prior to the amendment deadline for the final benefit-suspension regulations, a plan contained suspension of benefits rules that complied with the statutory requirements, a plan amendment to conform to the final regulations does not violate 411(d)(6).

The statutory requirements concerning suspension of benefits were and still are minimal. ERISA § 203(a)(3)(b) states as follows, for multiemployer plans:

> (B) A right to an accrued benefit derived from employer contributions shall not be 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—
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> …
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> (ii) in the case of a multiemployer plan, in the same industry, in the same trade or craft, and the same geographic area covered by the plan, as when such benefits commenced.
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> The Secretary shall prescribe such regulations as may be necessary to carry out the purposes of this subparagraph, including regulations with respect to the meaning of the term "employed".

IRS and DOL jointly issued Technical Information Release 1415 on November 5, 1975 announcing the Schedule of Publication Dates of ERISA Guidelines, which constituted a "compendium of authoritative rules" to govern the application of the qualification requirements of the Internal Revenue Code and the parallel provisions in parts 2 and 3 of Title I of ERISA. IRS And DOL emphasized in TIR 1415 that the ERISA Guidelines "constitute the entire set of interim rules of the Service and the Department for satisfying the new qualification requirements, and thus provide the authoritative guidance in respect of the new statutory requirements bearing on qualification. These rules are applicable to individually designed plans and to multiemployer (or other multiple employer) plans and may be relied upon until amended or supplemented by final regulations or other rules."

The ERISA Guidelines did not address suspension of benefits issues at all. Therefore, as plans were amended to comply with ERISA and were submitted to IRS for the initial ERISA determination letter, the only rules governing suspensions of benefits were those set out in the statutory language stated above. The Preamble to the Suspension of Benefits Regulations issued January 27, 1981, 46 FR 8894 states that suspension of benefits payments prior to the effective date of the regulation would be governed only by Section 203(a)(3)(B) of ERISA. Therefore, until the final regulations were effective a reasonable interpretation of ERISA §203(a)(3)(B) would satisfy the requirements of ERISA and the Internal Revenue Code.

The Final Regulations[1] interpreted the provisions of Section 203(a)(3)(B) and defined when a plan participant was "employed" in the same "industry", "trade or craft" or geographic area" covered by the plan as when the participant's benefits commenced. IRS Notice 82-23 provided that collectively bargained plans were required to be amended to comply with the Final Suspension Of Benefits Regulations by the earlier of: "(a) the end of the first plan year beginning after the expiration of the last of the bargaining agreements relating to the plan that were in effect on January 1, 1982; or (b) December 31, 1984.

In view of the circumstances prior to the Final Regulations on Suspension of Benefits, we urge the IRS to confirm in the 411(d)(6) regulation that, if a Plan had a suspension of benefits provision that complied with the statutory language in ERISA plan, then an amendment to conform the plan's rules to the Final Regulations on Suspension of Benefits is considered sufficiently equivalent to the prior plan provision to satisfy the requirements of §411(d)(6). In effect, any pre-existing plan provisions governing suspension of benefits would be presumed to have been more restrictive on participants than the rules that replaced them and that comply with the Final Regulations on Suspension of Benefits, even though the rules and restrictions may have had different formats (e.g., an annual earnings test rather than a monthly 40-hour test for prohibited employment).

**Change in Vesting Schedule**

The proposed regulation provides that a change in vesting schedule that could result in slower vesting for any participant violates §411(d)(6). The NCCMP believes that this is interpretation is incorrect. The provision in § 411(a)(10) for change in vesting schedule is a specific instance in which the statute authorizes the addition of a new condition to previously accrued benefits. Section 411(a)(10)(B) specifically provides that the new vesting schedule may be applied to participants with less than three years of service without their election. In other words, the statute itself authorizes a retroactive "cutback" here. The change proposed in the regulation would essentially write this provision out of the law.

It is clear from the Legislative History that this provision was intended to apply only when the change in vesting schedule would result in a reduction of the nonforfeitable percentage. Consistent with that intention, the existing regulations provide at §1.411(a)-8T(b)(1) that an election need not be given to any participant "whose nonforfeitable percentage under the plan, as amended, at any time cannot be less than such percentage determined without regard to such amendment". Therefore, if an election is not required if no participant's nonforfeitable percentage could be less under the amendment, and, when the amendment reduces the nonforfeitable percentage, an election is required only for participants with three or more years of service, it is clear that the statute specifically authorizes amendments that reduce the nonforfeitable percentage for participants with less than three years of service and for participants with three or more years of service, based on their election. The proposed regulation is inconsistent with the statutory provision and essentially writes §411(a)(10)(B) out of the statute. The proposed regulation should be revised to eliminate this inconsistency.

[1] Final Regulations were first issued January 27, 1981 (46 FR 8894) but were postponed pending amendments to the final regulations. Final amendments to that final regulation were issued December 4, 1981 (46 FR 59243). The entire regulation was effective January 1, 1982.

**Revenue Procedure 2005-23**

On a related point, we urge the IRS to update Revenue Procedure 2005-23, to give multiemployer plans additional time to complete the process of identifying and correcting benefit suspensions that, in light of the *Heinz* decision, turn out to have been erroneous. The Revenue Procedure, published in the May 5, 2005 IRB, calls for the adoption of a corrective amendment and completion of makeup payments by December 31, 2005. Given the complexity of the issues (some of which have still not been resolved, as illustrated by the first point in this comment) and the significant data-retrieval challenges involved, many multiemployer plans will not be able to complete the task by the current deadline. Accordingly, the NCCMP renews its request for the amendment and compliance dates to be re-set, ideally to the end of 2006 but, at a minimum, to June 30 of next year. This should not harm participants whose benefits were erroneously suspended, as the plans will be including interest in the makeup payments.

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The NCCMP respectfully requests the opportunity to testify at any hearing that is held on these proposed regulations. In addition, we will be happy to discuss this submission with you in any other convenient forum and to provide any other information or assistance that you may require.

Sincerely,

**Randy G. DeFrehn**

Randy G. DeFrehn
Executive Director