

IRS Grants Hybrid Pension Plan Relief on Timing of Amendments and Notices

November 12, 2009

On November 10, the IRS released Announcement 2009-82, which gives sponsors of cash balance and other hybrid pension plans additional time to bring their plans into compliance with the Pension Protection Act of 2006 (PPA) requirement that the plan's interest-crediting rate not exceed a "market rate of interest." The IRS indicated in the announcement that regulations outlining what constitutes a market rate of interest under PPA will be issued "in the near future." The announcement also grants 204(h) notice relief for plan sponsors that adopt amendments to adopt a market rate of interest by the end of the 2009 plan year.

Relief for Amendment Timing

The announcement indicates that plan sponsors have until the end of the 2010 plan year to amend their plans, as necessary, to adopt an interest-crediting rate that doesn't exceed a "market rate of interest" under PPA. Previously, amendments were required to be made by the end of the 2009 plan year. As part of this relief, the IRS has waived the anti-cutback rules that would otherwise prevent such a change, so long as plan sponsors adopt an amendment to comply with the regulations by the last day of the 2010 plan year (December 31, 2010 for calendar-year plans). Regulations defining what constitutes "a market rate of interest" are expected to be released soon.

Extended 204(h) Notice Relief

Notwithstanding the extension, plan sponsors that decide to amend their plans to change their interest-crediting rate this year (specifically, after November 10, 2009 and on or before the last day of the 2009 plan year) are permitted to provide 204(h) notices up to 30 days *after* the effective date of the amendment. Thus, for calendar-year plans, this relief would permit plan sponsors up to January 30, 2010 to provide a 204(h) notice for amendments that are effective as of January 1, 2010. If plan sponsors wait to amend their plans until after the 2009 plan year, the regular 204(h) notice rules apply, under which notice must be distributed at least 45 days *prior to* the effective date of the amendment.

Other Amendments Not Extended

The announcement provides relief only with respect to changes to the PPA interest-crediting rate. Other amendments that are required (or permitted) under PPA to be adopted by the end of the 2009 plan year

must still be adopted by that date, and for calendar-year plans, any required 204(h) notice would still be required to be issued by November 16, 2009.¹

For example, if a plan sponsor desires to amend a plan effective January 1, 2010 to eliminate whipsaw, the amendment is still required to be adopted by the end of the 2009 plan year.² Whipsaw is the requirement that applied to certain cash-balance or other hybrid plans that provide lump sum payments. A plan subject to whipsaw was required to provide a lump-sum payment equal to the greater of (i) the participant's account on the date of payment or (ii) the present value, using statutorily required rates, of the annuity derived from the participant's account projected with interest to normal retirement age using the plan's current interest crediting rate. The whipsaw requirement is eliminated under PPA at the election of the plan sponsor.

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1. It is not clear whether the date the notice is issued is deemed to be part of the 45-day advance notice period or whether the 45-day period begins on the day following the day that notice is given. Based on this uncertainty, we believe that a reasonable argument exists that the notice may be delivered on the first day of the 45-day period (which means that the notice would be timely if provided on November 17, 2009 for a change that is effective on January 1, 2010).

2. If a whipsaw calculation is eliminated, an ERISA Section 204(h) notice may be required. Conservatively, the notice should be provided at least 45 days prior to the effective date of the amendment. However, a reasonable argument exists, based on Notice 2007-6, that a 204(h) notice would be timely if provided at least 30 days prior to the effective date.

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