

Morgan Lewis

webcast

Plan Sponsors: The (Year) End Is Near!

October 26, 2011

Presenters:

John G. Ferreira
Nguyen N. Trinh

www.morganlewis.com

Year-End Planning

- Annual Notices for Qualified Plans
- New Fee Disclosure Notices
- New IRS Form 8955-SSA
- Year-End Amendments
- IRS Determination Letter Filings
- New Plan Limits for 2012
- Puerto Rico Considerations
- Questions

Annual Notices

- Safe Harbor 401(k) Plan Notices
- Automatic Enrollment Notices (Including Safe Harbor Designs)
- Qualified Default Investment Alternative
- Defined Benefit Plan Annual Funding Notice
- Participant Benefit Statements
- Other Notices
- Participant Fee Disclosures

Safe Harbor 401(k) Notice

- Traditional Safe Harbor Notice
 - Notice describing the safe harbor contribution and other material plan features.
 - Notice must be provided no less than 30 and no more than 90 days prior to the beginning of the plan year.

Safe Harbor 401(k) Notice (cont'd)

- “Wait and See” Safe Harbor Notice
 - Available to plan sponsors that may want to provide a 3% nonelective safe harbor contribution to satisfy nondiscrimination testing. Allows decision to be made at a later time.
 - Notice explaining that a safe harbor contribution may be made must be provided to participants no less than 30 and no more than 90 days prior to the beginning of the plan year.

Safe Harbor 401(k) Notice (cont'd)

- “Wait and See” Approach (cont'd)
 - If a plan sponsor decides to make the safe harbor contribution, a subsequent notice is required before the end of the plan year informing participants of the contribution.
 - Plan amendment to provide for safe harbor contribution is also required before end of plan year.
 - Failure to provide the “Traditional” or “Wait and See” notices could result in the inability to use the safe harbor to satisfy nondiscrimination testing for a particular year.

Supplemental Notice for Midyear Suspension/ Reduction of Safe Harbor Contributions

- Midyear Suspension/Reduction of Safe Harbor Employer Contributions
 - IRS has proposed regulations (effective for amendments adopted on or after 5/18/09) to permit the suspension or reduction of safe harbor nonelective contributions for an employer that experiences a substantial business hardship
 - *No showing of substantial business hardship is required to suspend or reduce safe harbor matching contributions*
 - Supplemental notice must be given at least 30 days in advance and employees must be provided with an opportunity to adjust deferral elections

Automatic Enrollment Notice

- Automatic enrollment notices are required to be given both before a participant is initially auto enrolled and thereafter on an annual basis.
- The notice must describe the automatic enrollment process and may be combined with the QDIA notice.
- Notice must be provided at least 30 days prior to the beginning of each plan year.
 - For calendar year plans, December 1
- Failure to provide the notice could result in a penalty of up to \$1,000 per violation per day.

Qualified Default Investment Alternative Notice

- Qualified Default Investment Alternative (QDIA) Notice
 - Applies to savings plans that invest participant contributions in a QDIA
 - Must be provided to all participants who have been or may be defaulted into the QDIA
 - Must be separate from other notices, but may be combined with a safe harbor and/or automatic enrollment notice
 - Must be provided at least 30 days prior to the beginning of the plan year
 - *For calendar year plans, December 1*

Defined Benefit Annual Funding Notice

- Plan sponsors of single- and multiemployer defined benefit pension plans must provide an annual funding notice to participants, beneficiaries and labor organizations representing participants.
- The notice must contain certain information, including the plan's funding status for the previous two years and a statement of the plan's assets and liabilities, among other items.
- The notice must generally be provided within 120 days following the end of the plan year. Small plans (covering fewer than 100 participants) must provide the notice by the filing due date of the plan's IRS Form 5500.
 - For calendar year plans, April 30, 2012

Participant Benefit Statements

- *Defined Benefit Plans.* Plan sponsors of defined benefit plans must either (i) provide benefit statements every three years to participants who are active employees or (ii) provide an annual notice to participants describing how a benefit statement may be obtained.
- *Participant-Directed Defined Contribution Plans.* Participant-directed defined contribution plans are required to provide participant statements on a quarterly basis.
 - Plan sponsors are deemed to timely provide statements if they are provided within 45 days following the end of each calendar quarter.
- *Non-Participant-Directed Defined Contribution Plans.* Non-participant-directed defined contribution plans are required to provide participant statements annually.
 - Notice must be provided on or before the date the Form 5500 is filed.
 - *For calendar year plans, July 31 or October 15 (if extension is obtained)*

Notice of Consequences of Failure to Defer Benefits

- Participant consent is required to distribute benefits that have a present value exceeding \$5,000.
- Consent is only considered “valid” if participants are properly informed of their right to defer receipt of the distribution.
- Proposed regulations issued in 2008.
- Until issuance of final regulations, plan sponsors should comply in good faith.

Notice of Benefit Restrictions

- Funding-Based Benefit Restrictions
 - If a plan is $< 80\%$ but $\geq 60\%$ funded, the plan generally cannot pay more than 50% of the participant's accrued benefit in a lump sum and cannot be amended to increase benefits
 - If a plan is $< 60\%$ funded, no benefit accruals are allowed and tighter benefit restrictions apply (e.g., no lump-sum payments may be made)
 - *Effective for plan years beginning after December 31, 2007*
 - *Note: The Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010 (enacted June 25, 2010) provided funding relief for single-employer plans that included a two-year reprieve from funding restrictions for benefit accruals and Social Security level income options and more time to amortize recession-related losses*
- *Notice must be provided generally within 30 days after plan becomes subject to benefit restrictions*

Participant Fee Disclosures Background

- On October 14, the Department of Labor (DOL) released final regulations on new requirements for the disclosure of fee and investment information to participants and beneficiaries in participant-directed individual account plans (such as typical 401(k) plans)
 - Final regulations are effective for plan years beginning on or after November 1, 2011
- Plan sponsors should begin assembling information and coordinating with the plan's service and investment providers to ensure that compliant disclosure materials can be furnished to plan participants in a timely manner

Participant Fee Disclosures (cont'd)

Initial and Annual Disclosures

- Plan sponsors must provide each participant and beneficiary an initial disclosure on or before the date of plan eligibility and annually thereafter
 - Disclose general information about plan investments, planwide administrative expenses, and individual expenses and include a comparison chart detailing investment performance and expenses for designated plan investment funds and the benchmark index
 - Initial compliance deadline for this disclosure is May 31, 2012

Participant Fee Disclosures (cont'd)

Quarterly Disclosures

- Plan sponsors must also provide each participant and beneficiary with quarterly disclosures
 - Total dollar amount charged to each participant's account for administrative services and other individual charges
 - Initial compliance deadline for quarterly disclosures is August 14, 2012

New IRS Form 8955-SSA Background

- Starting with the 2009 plan year, plan sponsors are required to provide information on separated participants with deferred vested benefits on new IRS Form 8955-SSA.
 - IRS Form 8955-SSA replaces Schedule SSA of the Form 5500 annual report, which contained Social Security numbers and individual participant names
 - DOL removed Schedule SSA from the Form 5500 annual report to protect confidentiality of participant information when DOL required electronic filing of the Form 5500 annual report

New IRS Form 8955-SSA (cont'd)

Regular Deadline

- IRS Form 8955-SSA must be filed by the last day of the seventh calendar month after the plan year ends
 - For calendar year plans, July 31 of following calendar year
- The IRS will grant an extension to file the IRS Form 8955-SSA for up to 2-1/2 months
 - For calendar year plans, October 15 of the following calendar year

New IRS Form 8955-SSA (cont'd)

Extended Deadlines

- Extended filing deadlines for 2009 and 2010 due to delayed release of IRS Form 8955-SSA for 2009 and 2010
 - Later of (i) January 17, 2012 or (ii) due date that generally applies for filing IRS Form 8955-SSA for 2010 plan year
 - If plan year ends before April 1, 2011 (i.e., calendar year plans), the deadline for filing IRS Form 8955-SSA for both 2009 and 2010 is January 17, 2012
 - The January 17, 2012 deadline may not be extended except in limited circumstances for non–calendar year plans

New IRS Form 8955-SSA (cont'd)

Filings for 2009 and 2010

- IRS has released IRS Form 8955-SSA for 2009 and expects to release IRS Form 8955-SSA for 2010 shortly
 - Plan sponsors may file separate Forms 8955-SSA for the 2009 and 2010 plan years using the 2009 form
 - Plan sponsors may combine data for both plan years into a single 2009 Form 8955-SSA
- File IRS Form 8955-SSA with the IRS (not DOL)
 - Paper form
 - Electronically using third-party software or IRS's FIRE system

Plan Amendments Required by December 31, 2011

- Defined Contribution Plan Amendments
- Defined Benefit Plan Amendments
- Amendments Affecting Both Defined Contribution and Defined Benefit Plans
- Governmental Plan Amendments
- Discretionary Amendments

Defined Contribution Plans Required Minimum Distribution Waiver

- The Worker, Retiree, and Employer Recovery Act of 2008 waived 2009 required minimum distribution payments.
- Notice 2009-82 provided guidance (including sample amendments) to reflect the 2009 waiver.
- Amendments required by last day of 2011 plan year.

Defined Contribution Plans (cont'd)

In-Plan Roth Conversions

- The Small Business Jobs Act of 2010 permitted eligible participants to convert vested 401(k) or 403(b) plan accounts to Roth accounts without taking a distribution from the plan.
 - In-plan Roth conversion allows a participant to include the converted amounts in gross income for federal tax purposes in the year of the conversion (subject to special rule for 2010 conversions), rather than having to wait until the year of distribution.
 - Previously, a participant who wanted to convert his or her account to a Roth account would have had to take a distribution from the plan and then roll that distribution to another plan with a Roth feature in order to accelerate taxation and allow future earnings to accumulate tax free.

Defined Contribution Plans (cont'd)

In-Plan Roth Conversions

- Sponsors of 401(k) or 403(b) plans may offer in-plan Roth conversions anytime after September 27, 2010
- IRS delayed deadline to adopt plan amendments related to 2010 in-plan Roth conversions in order to give plan sponsors sufficient time to enable participants to make in-plan Roth conversions before the end of the 2010 plan year
 - Amendment deadline works differently for 401(k), 403(b) and safe harbor 401(k) plans

Defined Contribution Plans (cont'd)

In-Plan Roth Conversions

- Amendment deadline for 401(k) plans
 - Later of (i) last day of the plan year in which the in-plan Roth conversion feature was added or (ii) December 31, 2011
- Amendment deadline for safe harbor 401(k) plans
 - Later of (i) day before the first day of the plan year in which the in-plan Roth conversion feature was added or (ii) December 31, 2011

Defined Contribution Plans (cont'd)

In-Plan Roth Conversions

- Amendment deadline for 403(b) plans
 - Depends on whether the plan will be subject to an extended remedial amendment period
 - *If the 403(b) plan is subject to the extended remedial amendment period, the deadline is the later of (i) the end of the remedial amendment period or (ii) last day of the plan year in which the in-plan Roth conversion feature was added*
 - *If the remedial amendment period is not available to the 403(b) plan, the deadline is the last day of the plan year in which the in-plan Roth conversion feature was added*

Defined Benefit Plans Hybrid Plan Amendments

- Cash balance plans required to use a three-year cliff-vesting schedule for all participants who have an hour of service in a plan year beginning after December 31, 2007.
- The Pension Protection Act of 2006 (PPA) made several additional changes applicable to hybrid pension plans, including adopting a market rate of interest, among other items.
- Treasury released both final and proposed regulations on cash balance and hybrid plans on October 19, 2010.
- Treasury and IRS just announced intention to finalize proposed hybrid plan market-rate regulations, which are not expected to take effect earlier than January 1, 2013.

Defined Benefit Plans (cont'd)

Hybrid Plan Amendments

- Deadline to adopt amendments for hybrid plan changes has been extended several times
 - Last day of the first plan year beginning on or after January 1, 2010
 - Last day of the first plan year beginning on or after January 1, 2011
 - Last day of the first plan year before the plan year the proposed hybrid plan market-rate regulations take effect
 - *Proposed hybrid plan market-rate regulations are not expected to take effect earlier than January 1, 2013*

Defined Benefit Plans (cont'd)

Funding-Based Benefit Restrictions

- Rules regarding funding-based benefit restrictions were effective for plan years beginning after December 31, 2007
- Notice 2009-97 extended the deadline for adopting the funding-based restrictions to the last day of the first plan year beginning on or after January 1, 2010
- The Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010 (enacted June 25, 2010) provided funding relief for both single- and multiemployer pension plans

Defined Benefit Plans (cont'd)

Funding-Based Benefit Restrictions

- In order to give plan sponsors time to take the funding relief into account, the IRS extended the deadline to adopt amendments for the new funding rules to the last day of the first plan year beginning on or after January 1, 2011
 - For calendar year plans, December 31, 2011

Note: The IRS is expected to issue additional guidance on the funding-based benefit restriction rules and may provide an extension to adopt conforming amendments. Hence, amendments may not be needed by the end of the 2011 plan year.

Other Amendments

- Governmental Plans
 - PPA delayed the deadline for governmental plans to comply with PPA changes to the last day of the first plan year beginning on or after January 1, 2011
 - *For calendar year plans, December 31, 2011*
- Discretionary Amendments
 - Amendments to make discretionary changes (such as plan design changes) must be adopted by the end of the plan year in which they are implemented
 - Calendar year plans must be amended by December 31, 2011

IRS Determination Letter Program

- Second five-year remedial amendment cycle for individually designed plans began on February 1, 2011
- IRS began accepting determination letter applications for Cycle A on February 1, 2011
 - Cycle A is for plan sponsors with EINs that end in “1” or “6”
 - *Plans must be amended to include items on the IRS’s 2010 Cumulative List*
 - *The deadline to submit Cycle A determination letter applications to the IRS is January 31, 2012*
 - IRS just released new Form 5300 but not clear on when new Form 5300 is required to be used
 - New application fee not yet reflected in IRS Form 8717

New Plan Limits for 2012

- IRS announced increases for many qualified-plan dollar limits, which have not changed since 2009. Some limits remain unchanged.

Plan Limit	2012	2011	2010
Elective deferrals	\$17,000	\$16,500	\$16,500
Catch-up contributions	\$5,500	\$5,500	\$5,500
Annual compensation	\$250,000	\$245,000	\$245,000
Defined benefit plan limit	\$200,000	\$195,000	\$195,000
Defined contribution plan limit	\$50,000	\$49,000	\$49,000
Highly compensated employee	\$115,000	\$110,000	\$110,000
Key employee	\$165,000	\$160,000	\$160,000

New Puerto Rico Code Qualification Requirements

- On January 31, 2011, the Commonwealth of Puerto Rico adopted a new Internal Revenue Code (New PR Code), which substantially overhauled the tax requirements for retirement plans covering Puerto Rico residents
- The majority of the New PR Code plan qualification requirements were modeled after the relevant plan qualification requirements under the United States tax code
- With the exception of a handful of requirements, the New PR Code plan qualification requirements are generally effective January 1, 2011

New Puerto Rico Code (cont'd)

Amendments Deadline

- Both dual-qualified plans and Puerto Rico–only qualified plans, along with other plan-related documents and communications, will need to be amended to reflect the New PR Code requirements
 - Amendments due by December 31, 2011
- Technical amendments bill to be enacted into law relatively shortly
 - Plan sponsors should consult with local counsel for compliance with the New PR Code

New Puerto Rico Code (cont'd)

Determination Letter Filing with Hacienda

- Beginning on or after January 1, 2012, there is a new deadline to file a plan for qualification with the Puerto Rico Department of Treasury (Hacienda)
 - Due no later than the due date, including extensions, for filing the plan sponsor's Puerto Rico income tax return for the tax year in which the plan *first* began covering Puerto Rico participants
 - *2011 appears to be the last year for retroactive qualification under the regular determination letter process*
 - *Existing plans that have not filed for determination letters with Hacienda should file for determination letters no later than December 31, 2011*
- Hacienda is expected to issue additional guidance on the timing and process for filing determination letter applications with Hacienda

Transfers and Spinoffs to Puerto Rico Plans

- Transfers or spinoffs from a dual-qualified (United States and Puerto Rico) plan funded through a US trust to a Puerto Rico-only qualified plan are generally prohibited and such a transfer is generally taxable to participants and can affect the US tax-qualified status of the US plan.
- Revenue Rulings 2008-40 and 2011-2 provide a transition period, which expires on December 31, 2011, during which such transfers are permitted without any adverse tax consequences.

Transfers and Spinoffs to Puerto Rico Plans (cont'd)

- Reasons for transfer or spinoff
 - U.S. source income issues
 - Difficulty complying with divergent qualification requirements
 - Issues regarding whether a Puerto Rico plan can participate in a U.S. master trust
- Need to act soon to meet December 31, 2011 deadline, especially for defined contribution plans

Questions?

Contact Information

- John G. Ferreira
 - 412.560.3350, jferreira@morganlewis.com
- Nguyen N. Trinh
 - 215.963.5994, ntrinh@morganlewis.com

DISCLAIMER

- This communication is provided as a general informational service to clients and friends of Morgan, Lewis & Bockius LLP. It should not be construed as, and does not constitute, legal advice on any specific matter, nor does this message create an attorney-client relationship.