

Employee Plans Technical Guidance Phone Forum

Presented by:

Adrien LaBombarde and Tonya B. Manning, Actuaries
Employee Plans Rulings & Agreement - Technical

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Funding Relief Under PRA 2010

(Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010)

- Single Employer:
 - Review of Provisions
 - Guidance under Notice 2011-3
 - Upcoming guidance
- Multiemployer
 - Guidance under Notice 2010-83
 - Upcoming Guidance

Key Provisions of PRA 2010 for Single Employer Plans

3

- Alternative Amortizations: plan sponsor can elect to extend amortization period for funding shortfall, thus decreasing Minimum Required Contribution (MRC)
- Suspension of Benefit Restrictions: when determining if certain benefit restrictions apply, must substitute 'lookback' funded ratio for current funded ratio if lookback ratio is higher
- Relief of Credit Balance Restrictions: charitable organizations can substitute prior year's funded ratio with 'lookback' funded ratio to be eligible to apply credit balance
- Delayed PPA Effective Date for Eligible Charity Plans: certain plans maintained by eligible charities have delayed effective date for the application of §430 and §436 as added by the Pension Protection Act (PPA)

Guidance Included in IRS Notice 2011-3

- How to make an election to extend an amortization and how to notify plan participants, beneficiaries and the PBGC of the election
- Calculating shortfall amortization installments under alternative amortization schedules
- Merger and acquisition situations
- Schedule SB reporting requirements
- Transition rules

Alternative Amortization Schedules: General Rules

- Ability to elect alternative amortization schedule
 - Permitted for up to 2 years from 2008-2011
 - The 2 years chosen need not be consecutive
- Alternative Amortization Methods:
 - 15 years
 - 2+7, with interest only for 2 years
- Same method must be used if relief is elected for 2 years
- Plans with Delayed Effective Dates
 - Also have ability to elect alternative amortization schedule
 - Rules based on “pre-PPA” funding rules and 412(l) current liability calculations
 - Future guidance to be issued on how these calculations work
 - *Note:* defense contractors can elect only one year of “pre-PPA” relief for 2008-2010; can elect “post-PPA” relief in 2011

Alternative Amortization Schedules: IRS Notice 2011-3

- “2+7” Amortization Schedule
 - First two shortfall amortization installments (SAIs) = shortfall amortization base (SAB) x effective interest rate (EIR) for election year
 - Remaining seven SAIs calculated using funding interest rates for election year such that present value of all SAIs = SAB
- 15-year Amortization Schedule
 - SAIs are determined similar to remaining seven SAIs above and using funding interest rates for election year
- Funding waivers
 - Requests are reviewed based on facts and circumstances
 - An election for alternative amortization schedule will be considered in conditions for approval

Installment Acceleration Amounts: General Rules

- If elect alternative amortization, the MRC may be increased by Installment Acceleration Amounts (IAAs)
- IAAs = “excess compensation” paid or “extraordinary dividends or redemptions” occurring during restriction period (*more in later slides*)
- Limited to remaining amount of the base and to the cumulative amortization without relief
 - Excess amounts carried forward for 4 or 7 years, depending on type of amortization extension elected
- Ignored when calculating quarterlies; only affect residual contributions
 - Cannot be added to PFB, but can be satisfied with credit balances

Installment Acceleration Amounts: IRS Notice 2011-3

- Shortfall Amortization Installments (SAIs) are accelerated by IAAs
 - To offset acceleration, later SAIs are reduced, in reverse order, so that present value of current and future installments remains unchanged
- Multiple Plans
 - If a plan sponsor elects funding relief for a single year for multiple plans, the IAA for a plan year is allocated among the plans in a restriction period during that plan year
 - Allocate in proportion to first year reductions in SAIs for plans electing relief
 - If plan years differ, determine IAAs on calendar year basis and allocate among plans based on plan years beginning in the calendar year

Installment Acceleration Amounts: IRS Notice 2011-3

- If there are two plan years with an election for an alternative amortization:
 - SAls for both plan years are increased by IAA if occurs during restriction period for both elections
- What this means:
 - Excess employee compensation and shareholder payments of \$1 during restriction period of both elections can increase MRC by \$2

Installment Acceleration Amounts: Definitions

- “Excess compensation” - any employee’s taxable compensation over \$1 million, indexed after 2010
 - Includes amounts set aside for nonqualified deferred compensation (NQDC)
 - Excludes commissions based on individual performance
 - Excludes amounts attributable to services before 3/1/10
- “Extraordinary dividends/redemptions” - excess dividends paid or repurchased company stock
 - Excess of dividends and share purchases (with some exclusions) over EBITDA
 - Exception for continuation of dividends determined in the same manner for past 5 years
- Both are determined for controlled group
 - Difficult with complex groups or foreign operations

Excess Compensation:

IRS Notice 2011-3

- Aggregate amount includible in income under chapter 1 of the IRC
- Includes - amounts payable to former employees
- Excludes - amounts paid to nonresident aliens for services outside the US
- Amounts set aside or reserved to fund NQDC is included at fair market value when set aside
- Qualified plan payments?
 - Not specifically addressed
 - Taxable compensation
 - But, not compensation from the employer

Excess Compensation: IRS Notice 2011-3

- Excludes compensation attributable to services performed before 3/1/2010:
 - Guidance under Q&A 23 of Notice 2009-8 applies
 - Any compensation not directly attributable to specific months of 2010 (e.g., a bonus for services during all of 2010) is attributed pro-rata
- In order to exclude NQDC, restricted stock, or stock options, or stock appreciation rights payable or granted under written binding contract in effect on 3/1/2010:
 - Employee must have legally binding right to compensation under rules of §1.409A-1(b)(1)
 - Portion of contract dealing with a type of compensation must not be materially modified

Excess Shareholder Payment Amounts: IRS Notice 2011-3

- Includes all members of plan sponsor's controlled group
- Based on
 - Dividends declared during year, regardless of when paid, and
 - Stock redeemed during year, regardless of when announced
- EBITDA determined for fiscal year ending with or during prior plan year, but not less than zero
- Dividend exception is only available if dividends were declared using same formula for 60-month period preceding plan year

Excess Shareholder Payment Amounts: IRS Notice 2011-3

- Excludes:
 - Dividends declared and stock redemptions paid for before 3/1/2010
 - Dividends paid by one member of controlled group to another
 - Redemptions of stock made pursuant to an employee plan
 - Certain preferred stock dividends
 - Distributions of stock are not generally considered dividends, but distributions described in §305(b)(1) through (5) are treated as dividends if paid out of earnings and profits as described in §316(a)

IRS Notice 2011-3:

Mergers and Acquisitions

- Example: Company A and Company B were in different controlled groups, but then became part of the same controlled group due to a merger
- If Company A had elected relief prior to the merger but Company B had not, IAAs following merger exclude any excess employee compensation and shareholder payments paid by Company B prior to merger
- If Company A and Company B had both elected relief, IAAs must be combined as though companies were in same controlled group before and after merger
 - Ignore plans not in restriction period during year of merger in determining whether both companies had elected relief

IRS Notice 2011-3:

Key To-dos

- Relief elections for 2009 or 2010 were due by 1/31/2011
- PBGC notification was due later of 30 days after date of election or 1/31/2011
- Participant notification is due by 5/2/2011
- Do not need to file amended 2009 Schedule SB
 - Can reflect 2009 relief election on 2010 SB and explain changes in 2009 MRC, excess contributions, UMRC, and funding balances in attachments

IRS Notice 2011-3:

Alternative Amortization Elections

- Elections
 - Must be in writing, signed and dated
 - Provide to both the Enrolled Actuary and the Plan Administrator
 - Notice provides list of required content
- Once made, may only be revoked with consent of Secretary of Treasury, after consultation with PBGC
- Election rules are applied separately to each employer in a multiple employer plan if §413(c)(4)(A) applies
- Due the latest of:
 - Last day of plan year for which election is being made,
 - 30 days after valuation date for plan year for which election is being made, or
 - 1/31/2011

IRS Notice 2011-3:

Notifying Plan Participants of Election

- Deadline is later of:
 - 120 days after end of plan year for which election is made
 - 5/2/2011
- Notice must be provided to all participants and beneficiaries *except*:
 - Individuals who first become participants or beneficiaries after last day of last plan year ending before notice is due
 - Individuals who cease to be participants or beneficiaries before notice is provided
- Paper or electronic form, if reasonably accessible
- Can provide at same time as another notice (e.g., DB funding notice under ERISA §101(f)), but must be separate
- Notice lists required content and provides samples

IRS Notice 2011-3:

Notifying the PBGC of an Election

- Deadline is later of:
 - 30 days after election is made, or
 - 1/31/2011
- Copy of plan sponsor's election to EA & plan administrator must be e-mailed to PBGC at:
single-employer.funding.relief.election@pbgc.gov
- Email subject line must contain plan sponsor's EIN, plan number, and name of plan

IRS Notice 2011-3:

Schedule SB Reporting Requirements

- If a plan sponsor elects extended amortization for 2008 or 2009, but Schedule SB either did not reflect the election or reflected it but not per IRS Notice 2011-3, can file amended Schedule SB (*not required*)
- If do not file amended Schedule SB:
 - Schedule SB for subsequent plan year (but no later than 2010) must accurately reflect election
 - Differences resulting from election must be explained in attachments
- Form 5330 Required?
 - No, if Schedule SB for year of election showed an unfunded MRC that will be eliminated due to relief election
 - Yes, if expect to have an unfunded MRC when correct amortization schedule is reflected (any excise tax due under §4971(a) should be paid as soon as possible)

IRS Notice 2011-3: Transition Rules

- If a plan sponsor elected an alternative amortization schedule prior to Notice 2011-3, but the election did not meet the requirements of Notice 2011-3:
 - Election is still valid and may not be revoked without IRS approval
 - Plan sponsor must notify participants and PBGC by deadlines discussed earlier
 - PBGC notification should include all information required by Notice 2011-3, even if not included in original election

IRS Notice 2011-3:

Transition Rules *(continued)*

- If standing election to add maximum amount to credit balances is in place, additional excess contributions resulting from relief election are automatically added
 - Plan sponsor can elect to temporarily suspend standing election to avoid increasing the credit balance by full amount
- If standing election is not in place or was temporarily suspended, plan sponsor can elect to add some or all of additional excess contributions
- Due date for elections described above is later of:
 - Due date that would normally apply under §1.430(f)-1(f)
 - March 31, 2011

IRS Notice 2011-3:

Transition Rules *(continued)*

- If standing election to apply credit balance to MRC is in place, reduction in MRC resulting from alternative amortization election will automatically reduce amount of credit balance applied
 - Plan sponsor can elect to temporarily suspend standing election to avoid increase
 - If standing election is not in place, plan sponsor can revoke specific election, but only to the extent that amount applied exceeded entire MRC
- Due date for elections described above is later of:
 - Due date that would normally apply under §1.430(f)-1(f)
 - March 31, 2011

IRS Notice 2011-3:

Caution with Transition Rules

- Determine impact on AFTAP before electing to add to prefunding balance or revoking elections to apply credit balance to MRC
- Under final §436 regulations, change in AFTAP due to election to add to prefunding balance is not a deemed immaterial change
 - Could result in qualification problem if AFTAP was at least 80% and election would reduce AFTAP to below 80%
- Change in AFTAP due to revocation of election to apply funding balances to MRC would likely also not be a deemed immaterial change
 - Notice 2011-3 does not explicitly state this, but effect would be similar to election to add to credit balance

Delayed PPA Effective Date for Eligible Charity Plans

- An eligible charity plan (ECP) is a plan maintained by more than one employer, where each employer is a §501(c)(3) charitable organization
 - Employers do not have to be in the same controlled group
- If an ECP, §430 and §436 do not apply until the earlier of:
 - First plan year the plan ceases to be an eligible charity plan
 - First plan year beginning in 2017

Delayed PPA Effective Date for Eligible Charity Plans *(continued)*

- Delayed effective dates only apply if plan was
 - In existence on 6/26/2005, and
 - An ECP for the plan year that includes that date
- Delayed effective dates are
 - MANDATORY
 - RETROACTIVE to 2008 (*can elect to apply beginning in 2009*)

Eligible Charity Plans: Future Guidance

- Clarity needed r.e. Congressional intent; hope of technical corrections
- Any relief for plans that have an Accumulated Funding Deficiency for 2008 or 2009 under pre-PPA rules?
- Will Schedule SB need to be re-filed:
 - To reflect pre-PPA rules?
 - To reflect differences between “reasonable interpretation” and final rules?
- Many questions related to plans that elect to apply PPA rules for 2008
- §436 restrictions
 - In what situations and in what way are restricted distributions corrected?
 - What flexibility / relief is permitted for period before guidance is issued?

Suspension of Benefit Restrictions

- Applies for
 - Restrictions on benefit accruals and Social Security Leveling Options (SSLOs)
 - Plan years beginning between 10/1/08 and 9/30/10
- If greater, replace current year Adjusted Funding Target Attainment Percentage (AFTAP) with 'lookback' AFTAP
 - Lookback AFTAP is the AFTAP for the plan year beginning between 10/1/07 and 9/30/08
- Rule is **REQUIRED**, not optional
 - Independent of election to extend amortization

Suspension of Benefit Restrictions: Future Guidance

- Undoing SSLO restrictions
 - In what situations and in what way are restricted distributions corrected?
 - What flexibility / relief is permitted for period before guidance is issued?
- Restoring accruals
- Impact on 2011 presumed AFTAP
- Transition issues

Relief of Credit Balance Restrictions

- ONLY available to §501(c)(3) organizations
- Rule w/o Relief: Must have prior year AFTAP of at least 80% in order to use credit balance for current plan year
- Rule w/ Relief: For plan years beginning 9/1/09 through 8/31/11, rule is based on the greater of:
 - Prior year AFTAP
 - AFTAP for 'lookback' plan year
- 'Lookback' plan year is plan year beginning 9/1/07 through 8/31/08

Multiemployer Pension Plans - Pension Relief Act of 2010 (PRA)

- Temporary freeze of 432 status - Worker, Retiree and Employer Recovery Act (WRERA)
- Elective relief of 412 funding - Pension Protection Act of 2006 (PPA)
- Recent IRS Guidance

Multiemployer Pension Plans – Recent IRS Guidance

- Notice 2010-83 - Substantive guidance on PRA
- Notice 2010-56 - PRA relief available even if Form 5500 filed
- Proposed regulations

Multiemployer Pension Plans – Pension Relief Act of 2010 (PRA)

- Election of either or both relief provisions –
 - Extended amortization of net investment losses for either or both of 2008 and 2009 plan years
 - Relaxed asset valuation rules –
 - Extended smoothing period for either or both of 2008 and 2009 plan years
 - Expanded market value corridor for either or both of 2008 and 2009 plan years

Multiemployer Pension Plans – Pension Relief Act of 2010 (PRA)

- Solvency test - Initial condition for election of relief
- Restrictions on benefit increases
- Notification requirements

Notice 2010-83 – Extended Amortization Period

- Eligible Net Investment Loss
 - Relief may be elected for either or both of first two plan years ending after August 31, 2008
 - Generally equal to the difference between actual market value and the expected market value as of end of year

Note: ENIL exists with an asset gain if the gain was less than expected

Notice 2010-83 – Extended Amortization Period

- Eligible Net Investment Loss – Exceptions
 - Asset valuation methods based on difference between actual and expected market returns
 - Valuation date other than first or last day of the plan year
 - Criminally fraudulent losses

Notice 2010-83 – Extended Amortization Period

- Attribution of Eligible Net Investment Loss
 - Prospective method – Based on future expected asset return
 - Retrospective method – Based on past actual asset return
- Amortization periods –
 - 29 years for initial year recognition
 - Declining by 1 year for each subsequent year

Notice 2010-83 – Extended Amortization Period

- Methodology is part of funding method
- Coordination of PRA bases with other experience bases - Remaining gain/loss amortized over 15 years
- Plans with spread gain method must change to an immediate gain method to elect amortization relief

Notice 2010-83 – Asset Valuation Relief

- For either or both of the eligible loss years
 - Eligible net investment losses may be recognized over period of up to 10 years
 - Actuarial value may be as much as 130 percent of market value
- Approval of funding method changes –
 - Smoothing - IRS approval required if current method does not use a fixed smoothing period
 - Corridor - Automatic approval

Notice 2010-83 – Solvency Test

- Solvency test must be met for the initial year of election of PRA relief
- Applicable period for solvency test –
 - 10 years if only asset valuation relief is elected
 - 30 years if extended amortization relief is elected

Notice 2010-83 – Solvency Test

- Timing of solvency certification
 - Before formal election of relief
 - Retroactively deemed solvent if solvent when relief decision is made
- Actuarial basis - Same basis used for zone certification under IRC 432

Notice 2010-83 – Benefit Restrictions

- Triggering event - establishment of a PRA amortization base
- General rule - plan amendment to increase benefits prohibited for next two plan years
- Exceptions
 - Benefit increases required by law
 - Increase funded through additional contributions

Notice 2010-83 – Election of Relief

- Election - Plan's regular formal decision process
- Election deadline –
 - Earliest of status certification for 2011 plan year, or 6/30/2011
 - Exception for trustee deadlock
- Plan may opt out of subsequent PRA relief
 - Previously established bases unaffected
 - Plan may not re-elect PRA relief

Notice 2010-83 – Notification Requirements

- Participant notice - due 30 days after election deadline
- PBGC notice –
 - 30 days after election of relief
 - Must include copy of participant notice

Notice 2010-83 – IRC 432 Implications

- PRA elections must be taken into account in subsequent IRC 432 status certifications and in funding improvement plans or rehabilitation plans
- Plans may redetermine status certifications to recognize relief elections
- Plans may modify previously adopted funding improvement plans or rehabilitation plans to reflect elections

Notice 2010-83 – Form 5500 Implications

- Not necessary to amend Form 5500
- If previously filed Form 5500 is not amended, reconciliation must be attached to next filing

IRC 432 Timeline – Calendar Year Plans - 2011

- Actuarial certification - 90 days - 3/31/2011
- Notice to interested parties - 30 days after actuarial certification - 4/30/2011
- Imposition of surcharges - 30 days after notice of surcharge sent to employers
- Adoption of funding improvement plan or rehabilitation plan - 240 days after required date of actuarial certification - 11/26/2011

IRC 432 Timeline – Calendar Year Plans - 2011

- Schedules to bargaining parties - 30 days after adoption of funding improvement plan or rehabilitation plan - 12/26/2011
- Commencement of funding improvement plan or rehabilitation plan - Not later than beginning of plan year following second anniversary of plan adoption - 1/1/2014

Select IRC 432 Issues

- Actuarial certification of status - endangered or critical
 - Effect of WREERA election
 - Failure to file is treated as failure to file annual report
- Reduction of adjustable benefits for multiemployer plan in critical status

Select IRC 432 Issues

- Adoption of funding improvement plan or rehabilitation plan
 - Default schedules
 - Annual updates required
 - Schedules of contributions remain in effect for duration of collective bargaining agreement
- Certification of scheduled progress
- Excise taxes for failures under IRC 432