

**EMPLOYEE PLANS - ISSUE FOCUS  
TERMINATIONS  
PLANS TERMINATING IN THE 2012 PLAN YEAR  
March 22, 2012**

Under Rev. Proc. 2012-6 (as annually updated), a terminating plan must be amended for all current law which is applicable to the plan even if the date by which the plan is required to be amended has not yet passed. Therefore, even though remedial amendment periods for the Pension Protection Act of 2006 (PPA '06), the Heroes Earnings Assistance and Relief Tax Act of 2008 (HEART) the Worker, Retiree, and Employer Recovery Act of 2008 (WRERA), the Small Business Jobs Act of 2010 (SBJA), and the Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010 (PRA 2010), may not be closed, or may have been extended by subsequent legislation or guidance, a terminating plan is required to be properly amended to conform to these statutory provisions.

This report will update those previously provided Issue Foci with the "New" items listed on the 2011 Cumulative List (Notice 2011-97) identified below.

**Please note that this update is not an all inclusive list of required plan language. Therefore, determination specialists should review terminating plans for compliance with all applicable law in effect at the date of termination.**

## Appendix

### EXPLANATION OF THE “NEW” QUALIFICATION REQUIREMENTS FROM NOTICE 2011-97 (2011 CL)

**Rev. Rul. 2011-1, 2011-2 I.R.B. 251, revises the generally applicable rules for group trusts and, if certain requirements are met, permits the participation in group trusts of custodial accounts under § 403(b)(7), retirement income accounts under § 403(b)(9), and governmental retiree benefit plans under § 401(a)(24). This revenue ruling also modifies the transition relief provided in Rev. Rul. 2008-40.**

Change: This revenue ruling modifies the rules for group trusts described in Rev. Rul. 81-100, as clarified and modified by Rev. Rul. 2004-67. The modifications revise the generally applicable rules for these group trusts and, if certain requirements are met, permit the participation in group trusts of custodial accounts under § 403(b)(7), retirement income accounts under § 403(b)(9), and governmental retiree benefit plans under § 401(a)(24). In addition, this revenue ruling provides related model language that may be used by group trusts to comply with these new provisions.

Effective Date: January 10, 2011

Plan Language: Model amendments included in the revenue ruling should be adopted by the group trust. The plans investing in such pooled trust does not require amendment.

**401(a)(22), 401(a)(28)(C), and 409: Notice 2011-19, 2011-11 I.R.B. 550, provides that the terms readily tradable on an established securities market and readily tradable on an established market mean employer securities that are readily tradable on an established securities market within the meaning of § 1.401(a)(35)-1(f)(5) for purposes of § 401(a)(28)(C). Notice 2011-19 is effective for plan years that begin on or after January 1, 2012, except for certain plans that have a delayed effective date.**

Change: Under this notice, the terms readily tradable on an established securities market and readily tradable on an established market, with respect to employer securities, each mean employer securities that are readily tradable on an established securities market within the meaning of § 1.401(a)(35)-1(f)(5) for purposes of the following provisions: (1) §401(a)(22); (2) §401(a)(28)(C); (3) §409(h)(1)(B); (4) §409(l); and (5) § 1042(c)(1)(A).

Under §1.401(a)(35)-1(f)(5), issued on May 18, 2010, a security is readily tradable on an established securities market if the security is traded on a national securities exchange that is registered under section 6 of the Securities Exchange Act of 1934. The regulations also treat a security as readily tradable on an established securities market if the security is traded on a foreign national securities exchange that is officially recognized, sanctioned, or supervised by a governmental authority and where the security is deemed by the Securities and Exchange Commission (SEC) as having a ready market under SEC Rule 15c3-1. Under the current SEC rules, a security that is included on the FTSE Group All-World Index is deemed to have a ready market. Section 1.401(a)(35)-1 is effective for plan years beginning on or after January 1, 2011.

Effective Date: This notice is effective for plan years beginning on or after January 1, 2012. However, this notice is not effective until plan years beginning on or after January 1, 2013 for any plan that is sponsored by an employer with respect to which, on March 14, 2011, neither the employer nor any member of its controlled group (within the meaning of § 409(l)) has any common stock that is readily tradable on an established securities market within the meaning of §1.401(a)(35)-(1)(f)(5)(A) (relating to securities that are traded on a national securities exchange that is registered under section 6 of the Securities Exchange Act of 1934), but the employer or a member of its controlled group has common stock that is readily tradable on an established securities market within the meaning of §1.401(a)(35)-(1)(f)(5)(B) (relating to securities that are traded on a foreign national securities exchange that is officially recognized, sanctioned, or supervised by a governmental authority and is deemed by the SEC as having a “ready market” under SEC Rule 15c3-1, within the meaning of §1.401(a)(35)-(1)(f)(5)(B)). Taxpayers (including any employer sponsoring a plan described in the preceding sentence) can rely on this notice for periods after March 14, 2011.

While the Notice provides an extended deadline, a terminating plan, to which the provision applies, must be amended even though that deadline might not have passed.

Plan Language: Required for DC plans with conflicting language.

**411(a)(13): Notice 2011-85, 2011-44 I.R.B. 605, extends the deadline for adopting an interim or discretionary amendment under § 411(a)(13) (other than § 411(a)(13)(A)).**

Change: Notice 2009-97 provided an extended deadline (extended to the last day of the first plan year that begins on or after January 1, 2010) for adopting an interim plan amendment to comply with the vesting requirements for cash balance (and similarly styled DB plans). Notice 2010-77 extended this deadline till the last day of the first plan year beginning on or after January 1, 2011. Notice 2011-85 further extends the deadline to the last day of the first plan year preceding the plan year for which the 2010 proposed hybrid plan regulations, once finalized, apply to the plan.

However, a terminating plan must be amended for all current law which is applicable to the plan even if the date by which the plan is required to be amended has not yet passed. Therefore, even though the remedial amendment period has been extended, a terminating plan is required to be properly amended to conform to these statutory provisions.

Effective Date: For plans that were in existence on June 29, 2005, the effective date applies to plan years beginning after December 31, 2007, unless the plan sponsor elects to apply the provision to plan years beginning on or after June 29, 2005 and before January 1, 2008. For plans not in existence on June 29, 2005, the effective date is plan years ending on or after June 29, 2005. However, the change does not apply to participants who fail to complete an hour of service on or after this effective date.

Plan Language: Required for cash balance plans and other hybrid plans.

**411(b)(5): Notice 2011-85, 2011-44 I.R.B. 605, announces that the Treasury Department and the Service intend to amend the 2010 final hybrid plan regulations to postpone the effective/applicability date of § 1.411(b)(5)-1(d)(1)(iii), (d)(1)(vi), and (d)(6)(i) to plan years that begin on or after a date to be specified in those regulations that is not earlier than January 1, 2013. This notice also extends the deadline for adopting an interim or discretionary amendment under § 411(b)(5).**

Change: The 2010 proposed hybrid plan regulations, when finalized, will apply for plan years that begin on or after a date to be specified in those regulations that is not earlier than January 1, 2013. In addition, the Treasury Department and the Service intend to amend the 2010 final hybrid plan regulations to postpone the effective/applicability date of § 1.411(b)(5)-1(d)(1)(iii), (d)(1)(vi), and (d)(6)(i) to match the applicability date that will apply to the proposed regulations when they are finalized. The provisions of § 1.411(b)(5)-1(f)(2)(iii) regarding reliance before the regulatory effective date will continue to apply until § 1.411(b)(5)-1(d)(1)(iii), (d)(1)(vi), and (d)(6)(i) become effective. Until the 2010 final hybrid plan regulations are amended, plan sponsors may rely on this notice with respect to the postponement of the effective/applicability date of § 1.411(b)(5)-1(d)(1)(iii), (d)(1)(vi), and (d)(6)(i).

Notice 2009-97 provided an extended deadline (extended to the last day of the first plan year that begins on or after January 1, 2010) for adopting an interim plan amendment to comply with the vesting requirements for cash balance (and similarly styled DB plans). Notice 2010-77 extended this deadline till the last day of the first plan year beginning on or after January 1, 2011. Notice 2011-85 further extends the deadline to the last day of the first plan year preceding the plan year for which the 2010 proposed hybrid plan regulations, once finalized, apply to the plan.

However, a terminating plan must be amended for all current law which is applicable to the plan even if the date by which the plan is required to be amended has not yet passed. Therefore, even though the remedial amendment period has been extended, a terminating plan is required to be properly amended to conform to these statutory provisions.

Effective Date: For plans that were in existence on June 29, 2005, the effective date applies to plan years beginning after December 31, 2007, unless the plan sponsor elects to apply the provision to plan years beginning on or after June 29, 2005 and before January 1, 2008. For plans not in existence on June 29, 2005, the effective date is plan years ending on or after June 29, 2005. However, the change does not apply to participants who fail to complete an hour of service on or after this effective date.

Plan Language: Required for cash balance plans and other hybrid plans.

**431(b)(8): PRA 2010 § 211(a)(2) added § 431(b)(8) to the Code, which provides two special funding rules available to multiemployer plans.**

- **Notice 2010-83, 2010-51 I.R.B. 862, provides guidance with respect to the special funding rules under § 431(b)(8).**

Change: The notice provides guidance in the form of questions and answers for sponsors of multiemployer defined benefit plans with respect to the special funding rules under § 431(b)(8), as added by section 211(a)(2) of the Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010 (PRA 2010).

IRC Section 431 sets forth the funding rules that apply specifically to multiemployer defined benefit plans. Section 431(b)(8) provides two special funding rules available to multiemployer plans, a special amortization rule in § 431(b)(8)(A) and a special asset valuation rule in § 431(b)(8)(B).

Under § 431(b)(8)(D), if either or both of the special funding rules apply for any plan year, a special restriction on benefit increases applies in addition to any other applicable restrictions on benefit increases. Under the special restriction, a plan amendment increasing benefits may not go into effect during either of the two plan years immediately following that plan year unless (1) the plan actuary certifies that the increase is paid for out of additional contributions not allocated to the plan immediately before the plan's application of the special amortization rule or the special asset valuation rule and that the plan's funded percentage and projected credit balances for those two plan years are reasonably expected to be at least as high as they would have been if the benefit increase had not been adopted, or (2) the amendment is required as a condition of qualification under the Code or to comply with other applicable law.

Effective Date: Under section 211(b)(2) of PRA 2010, the restriction on plan amendments increasing benefits is effective on June 25, 2010, the date of the enactment of PRA 2010. Thus, benefit increases that went into effect before June 25, 2010, are not subject to the restriction under § 431(b)(8)(D). Benefit increases that are effective on or after June 25, 2010, are subject to the restriction, even if adopted before that date.

Plan Language: None Required. However, if either or both of the special funding rules apply, prior amendments should be reviewed to ensure that there was no prohibited increase in benefits.