

## **EMPLOYEE PLANS - ISSUE FOCUS TERMINATIONS**

**February 19, 2013**

On February 29, 2008, March 9, 2009, March 12, 2010, June 1, 2011 and March 22, 2012 we issued guidance regarding plans which terminated in the 2008 through 2012 plan years. This report will update those previously provided Issue Foci with the "New" items listed on the 2012 Cumulative List as indicated on the Appendix following.

Pursuant to Rev. Proc. 2013-6 (as annually updated), a plan must be amended for all current law applicable to the plan as of its date of termination, even if the date by which it is required to be amended has not yet passed. Therefore, even though remedial amendment periods for provisions of 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), the Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010 (PRA 2010), and the Moving Ahead for Progress in the 21st Century Act (MAP-21) 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 as in effect on the date of plan termination.

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.

**EXPLANATION OF THE “NEW” QUALIFICATION REQUIREMENTS FROM NOTICE  
2012-76 (2012 CL)**

**401(a)**

**Notice 2012-6, 2012-3 I.R.B. 293, extends and expands the transition relief provided under Rev. Rul. 2011-1 for certain group trusts, certain retirement trusts that qualify under the Puerto Rico Internal Revenue Code that participate in group trusts, and certain qualified retirement plans that benefit Puerto Rico residents. The notice also provides additional time for governmental retiree benefit plans described in § 401(a)(24) to be amended to satisfy the applicable requirements of Rev. Rul. 2011-1.**

Change(s):

**ERISA Section 1022(i)(1) Plans**

**1. Expansion of relief under Rev. Rul. 2011-1 relating to 81-100 group trust status of certain trusts containing § 1022(i)(1) plan investments.**

The relief provided in Rev. Rul. 2011-1 under the heading “Plans Described in Section 1022(i)(1) of ERISA” continues to apply. In addition, that relief is expanded to cover an 81-100 group trust with respect to an investment by a § 1022(i)(1) plan that is the recipient of a transfer of assets from a qualified retirement plan, pursuant to the transition relief under Rev. Rul. 2008-40 (as modified by Rev. Rul. 2011-1) and this notice, if assets of the transferor plan were held in the 81-100 group trust on January 10, 2011.

**2. Extension of transition relief under Rev. Rul. 2008-40 relating to tax consequences of certain transfers to section 1022(i)(1) plans:**

*(i) Extension of transfer deadline until further guidance for certain qualified plans invested in group trusts*

The relief provided in paragraphs 2, 3, and 4(b) under the Transition Relief heading in Rev. Rul. 2008-40 is extended for transfers to a § 1022(i)(1) transferee plan from a qualified retirement plan that participated in an 81-100 group trust on January 10, 2011, until a deadline to be set forth in future published guidance. It is expected that, when further guidance relating to participation of § 1022(i)(1) plans in group trusts is published, that guidance will set a future deadline for transfers covered by this extension.

*(ii) One-year general extension of transfer deadline*

The Service recognizes that a sponsor of a qualified retirement plan that benefits Puerto Rico residents may need additional time to evaluate whether to spin-off the portion of the plan benefiting Puerto Rico residents to a § 1022(i)(1) plan in order to consider the effect of the changes to the Puerto Rico Code enacted earlier this year. Accordingly, Rev. Rul. 2008-40 is hereby further modified to extend the relief provided in paragraphs 2, 3, and 4(b) under the Transition Relief heading in Rev. Rul. 2008-40 for transfers to a section 1022(i)(1) transferee plan from any qualified retirement plan until December 31, 2012, regardless of whether the qualified retirement plan participates in a group trust.

### **Governmental Retiree Benefit Plans**

In the case of a § 401(a)(24) plan for which the authority to amend the plan is held by a legislative body that meets in legislative session, the plan will not fail to satisfy the requirements of Rev. Rul. 2011-1 if the governing document is modified to satisfy the applicable requirements of Rev. Rul. 2011-1 by the earlier of:

1. The close of the first regular legislative session of the legislative body with the authority to amend the plan that begins on or after January 1, 2012; or
2. January 1, 2015.

Effective Date: Expansion of relief originally conveyed as of January 10, 2011

Plan Language: Model amendments included in Rev. Rul. 2011-1 should be adopted by the group trust. The plans investing in such pooled trust does not require amendment. While the Notice provides extended deadlines, a terminating plan, to which the provision applies, must be amended even though that deadline might not have passed.

**Notice 2012-29, 2012-18 I.R.B. 872, provides that the Service and Treasury intend to modify the normal retirement age regulations to clarify that governmental plans that do not provide for in-service distributions before age 62 do not need to have a definition of normal retirement age and to modify the age-50 safe harbor rule for qualified public safety employees. The notice also provides that the Service and Treasury intend to amend the normal retirement age regulations to extend the effective date for governmental plans to annuity starting dates that occur in plan years beginning on or after the later of (1) January 1, 2015 or (2) the close of the first regular legislative session of the legislative body with the authority to amend the plan that begins on or after the date that is 3 months after the final regulations are published in the Federal Register.**

Change: The regulations are to be modified to clarify that a governmental plan that is not subject to § 411(a) through (d) and does not provide for the payment of in-service distributions before age 62 will not fail to satisfy the requirement that the plan provide definitely determinable benefits to employees after retirement or attainment of normal retirement age, merely because the pension plan does not have a definition of normal retirement age or does not have a definition of normal retirement age that satisfies the requirements of the 2007 NRA regulations.

The 2007 NRA regulations are to be changed with respect to the age-50 safe harbor rule for qualified public safety employees. Under the 2007 NRA regulations, in the case of a plan in which substantially all of the participants are qualified public safety employees, a normal retirement age of 50 or later is deemed to satisfy the requirement that a pension plan's normal retirement age be an age that is not earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed. The requirement that qualified public safety employees be in a separate plan, rather than a separate group within a larger plan containing other employees with higher NRAs, may impose inappropriate administrative burdens on state and local governments. Accordingly, the 2007 NRA regulations will be revised to provide that the rule deeming age

50 or later to be a normal retirement age that satisfies those regulations will apply to a group of employees substantially all of whom are qualified public safety employees, whether or not the group of qualified public safety employees are covered by a separate plan. Thus, a governmental pension plan could satisfy the normal retirement age requirement using a normal retirement age as low as 50 for a group substantially all of whom are qualified public safety employees and a later normal retirement age that otherwise satisfies the 2007 NRA requirements for other participants. Governmental plan sponsors may rely on this notice with respect to the extension until such time as the 2007 NRA regulations are so amended.

Effective Date: The 2007 NRA regulations are to be modified to change the effective date for governmental plans to annuity starting dates that occur in plan years beginning on or after the later of (1) January 1, 2015 or (2) the close of the first regular legislative session of the legislative body with the authority to amend the plan that begins on or after the date that is 3 months after the final regulations are published in the Federal Register.

Plan Language: None Required.

**411(a): Rev. Rul. 2012-4, 2012-8 I.R.B. 386, describes whether a qualified defined benefit pension plan that accepts a direct rollover of an eligible rollover distribution from a qualified defined contribution plan maintained by the same employer satisfies §§ 411 and 415 in a case in which the defined benefit plan provides an annuity resulting from the direct rollover.**

Change: A qualified defined benefit plan that accepts a direct rollover of an employee's or former employee's benefit from a qualified defined contribution plan maintained by the same employer does not violate § 411 or 415 if the defined benefit plan provides an annuity resulting from the direct rollover that is determined by converting the amount directly rolled over into an actuarially equivalent immediate annuity using the applicable interest rate and applicable mortality table under § 417(e).

If a defined benefit plan were to provide an annuity resulting from the rollover amount that is determined using a less favorable actuarial basis than required under the rules of § 411(c) (so that the annuity is smaller than required under the rules of § 411(c)), then the plan would not satisfy the requirements of § 411(a)(1).

If a defined benefit plan were to provide an annuity resulting from the rollover amount that is determined using a more favorable actuarial basis than required under the rules of § 411(c) (so that the annuity is larger than required under the rules of § 411(c)), then the portion of the benefit resulting from the amount directly rolled over that exceeds the benefit derived from that rolled over amount under the rules of § 411(c)(2)(B) would be subject to the non-forfeiture rules applicable to benefits derived from employer contributions and would be included in the annual benefit for purposes of § 415(b).

Effective Date: Rollovers made on or after January 1, 2013.

Plan Language: None required. However, plan(s) may need to be amended to accept rollovers if they do not already provide such language (i.e. Optional).

**411(a)(13) & 411(b)(5): Notice 2012-61, 2012-42 I.R.B. 479, provides that certain provisions in the 2010 final hybrid plan regulations will not be effective for plan years beginning before January 1, 2014.**

Change: Section 1.411(b)(5)-1(d)(1)(iii) provides that an interest crediting rate is not in excess of a market rate of return only if it is described in § 1.411(b)(5)-1(d)(3), (d)(4), or (d)(5). Section 1.411(b)(5)-1(f)(2)(i)(B) provides that § 1.411(b)(5)-1(d)(1)(iii) is effective for plan years beginning on or after January 1, 2012. However, Notice 2011-85, 2011-44 I.R.B. 605, indicates that the Treasury Department and the Service intend to amend the regulations to postpone the effective/applicability date of § 1.411(b)(5)-1(d)(1)(iii) to match the applicability date that will apply to regulations finalizing other rules regarding the market rate of return requirement. Those final regulations will not be effective for plan years beginning before January 1, 2014.

Whether any of the MAP-21 segment rates will be specified in the regulations described in Notice 2011-85 as interest crediting rates that do not exceed a market rate of return has not yet been determined, and this determination will be made when those regulations are finalized. If those regulations do not permit a statutory hybrid plan to use an interest crediting rate by reference to the MAP-21 segment rates, a plan that is crediting interest by reference to such rates will be required to change the interest crediting rate in accordance with the applicable transition rules that will apply to other plans that have an interest crediting rate in excess of a market rate of return. As noted above, those regulations will not be effective for plan years beginning before January 1, 2014.

Effective Date: Plan years beginning on or after January 1, 2013.

Plan Language: None required until final regulations issued.

**411(d)(6): Final Regulations under § 411(d)(6), which provide an additional limited exception to the anti-cutback rules to a plan sponsor who is a debtor in a bankruptcy proceeding, were published on October 8, 2012 (77 Fed Reg. 66915).**

Change: These final regulations provide a limited exception under § 411(d)(6)(B) to permit a plan sponsor that is a debtor in a bankruptcy proceeding to amend its single-employer defined benefit plan to eliminate a single-sum distribution option (or other optional form of benefit providing for accelerated payments) if certain conditions are satisfied.

In particular, the regulations permit a single-employer plan that is covered under § 4021 of ERISA to be amended, effective for a plan amendment that is both adopted and effective after November 8, 2012, to eliminate an optional form of benefit that includes a prohibited payment

described in § 436(d)(5), provided that four conditions are satisfied on the later of the date the amendment is adopted or effective.

First, the enrolled actuary of the plan has certified that the plan's adjusted funding target attainment percentage (as defined in § 436(j)(2)) for the plan year that contains the applicable amendment date is less than 100 percent.

Second, the plan is not permitted to pay any prohibited payment, due to application of the requirements of § 436(d)(2) of the Code and § 206(g)(3)(B) of ERISA, because the plan sponsor is a debtor in a bankruptcy case (that is, a case under Title 11 of the United States Code, or under similar Federal or State law).

Third, the court overseeing the bankruptcy case has issued an order, after notice to the affected parties and a hearing, finding that the adoption of the amendment eliminating that optional form of benefit is necessary to avoid a distress termination of the plan pursuant to § 4041(c) of ERISA or an involuntary termination of the plan pursuant to § 4042 of ERISA before the plan sponsor emerges from bankruptcy (or before the bankruptcy case is otherwise completed).

Fourth, PBGC has issued a determination that the adoption of the amendment eliminating that optional form of benefit is necessary to avoid a distress or involuntary termination of the plan before the plan sponsor emerges from bankruptcy (or before the bankruptcy case is otherwise completed) and that the plan is not sufficient for guaranteed benefits within the meaning of § 4041(d)(2) of ERISA

Effective Date: The Regulation is effective for plan amendments that are both adopted and effective after November 8, 2012.

Plan Language: None required. If the plan satisfies the above four conditions, the plan may be amended to eliminate other optional forms of benefit or or after the effective date.

**415: Rev. Rul. 2012-4, 2012-8 I.R.B. 386, describes whether a qualified defined benefit pension plan that accepts a direct rollover of an eligible rollover distribution from a qualified defined contribution plan maintained by the same employer satisfies §§ 411 and 415 in a case in which the defined benefit plan provides an annuity resulting from the direct rollover.**

Change: A qualified defined benefit plan that accepts a direct rollover of an employee's or former employee's benefit from a qualified defined contribution plan maintained by the same employer does not violate § 411 or 415 if the defined benefit plan provides an annuity resulting from the direct rollover that is determined by converting the amount directly rolled over into an actuarially equivalent immediate annuity using the applicable interest rate and applicable mortality table under § 417(e).

If a defined benefit plan were to provide an annuity resulting from the rollover amount that is determined using a less favorable actuarial basis than required under the rules of § 411(c) (so that the annuity is smaller than required under the rules of § 411(c)), then the plan would not satisfy the requirements of § 411(a)(1).

If a defined benefit plan were to provide an annuity resulting from the rollover amount that is determined using a more favorable actuarial basis than required under the rules of § 411(c) (so that the annuity is larger than required under the rules of § 411(c)), then the portion of the benefit resulting from the amount directly rolled over that exceeds the benefit derived from that rolled over amount under the rules of § 411(c)(2)(B) would be subject to the non-forfeiture rules applicable to benefits derived from employer contributions and would be included in the annual benefit for purposes of § 415(b).

Effective Date: Rollovers made on or after January 1, 2013.

Plan Language: None required. However, plan(s) may need to be amended to accept rollovers if they do not already provide such language (i.e. Optional).

**417: Rev. Rul. 2012-3, 2012-6 I.R.B. 383, describes how the qualified joint and survivor annuity (“QJSA”) and the qualified preretirement survivor annuity (“QPSA”) rules, described in §§ 401(a)(11) and 417, apply when a deferred annuity contract is purchased under a profit sharing plan.**

Change: The Revenue Ruling provides various situations that might require a plan normally exempt from the requirements of § 417 (i.e. profit sharing plan) to provide the required language for QJSA and QPSA.

Situation 1 allowed for the investment of accounts in a deferred annuity contract. Amounts invested in the annuity contract can be transferred to another type of investment at any time prior to the annuity starting date. In addition, the participant may elect any other type of distribution option including a lump sum payment method. The entire account balance is payable as a death benefit to the surviving spouse (or designated beneficiary) upon the participant's death. The plan was not a transferee from another plan subject to § 417.

Ordinarily,, the plan would not generally not subject to the QJSA or QPSA requirements. However, since the normal form of benefit under the annuity contract is for a life annuity, once the participant has attained his annuity starting date, the amount invested in such annuity contract(s) only will be subject to the requirements of § 417.

In Situation 2, the facts are essentially the same as Situation 1, except that the participant may not transfer amounts to another type of investment or elect a lump sum payment option with respect to amounts invested in the annuity contract(s). The plan is subject to the QJSA and QPSA requirements at the time that the investment is made in the annuity contract. However, since the plan fully subsidizes the costs of the QPSA and a participant may not waive the QPSA or select a non-spouse beneficiary, the Plan is not required to provide the written QPSA explanation or obtain spousal consent with respect to a QPSA.

In Situation 3, the participant is allowed to waive part of the benefit when determining a pre-retirement death benefit. Therefore, the plan would be subject to the QJSA and QPSA requirements including the written QPSA and spousal consent requirements of § 417(a).

Effective Date: As of the date that the plan first becomes subject to § 417 when no longer exempt under § 401(a)(11)(B)(iii).

Plan Language: Required for DC plans which do not satisfy all of the exemptions of IRC § 401(a)(11)(B)(iii).

**420: Sections 40241 and 40242 of MAP-21 amend § 420 to extend the provisions relating to transfers of excess pension assets to retiree health accounts and to expand those provisions to allow transfers to retiree group term life insurance accounts.**

Change: Qualified plans which satisfy the requirements of IRC § 420 may use the excess to fund retiree medical benefits. This option was set to expire as of December 31, 2013. MAP-21 extends the availability of these options through December 31, 2021.

MAP-21 also adds the option of using transfers to fund retiree group-term life insurance.

Effective Date: July 6, 2012.

Plan Language: None. However, plans which want to permit the transfer of excess assets to retiree health accounts would need to add enabling language. (i.e. Optional)

**436:**

**§1.436-1 provides guidance on the application of § 436, which provides a series of limitations on the accrual and payment of benefits under underfunded single employer defined benefit plans.**

Change: Regulations with regard to IRC § 436 were issued on October 15, 2009.

Effective Date: The regulations apply to plan years beginning on or after January 1, 2010.

Plan Language: Required for single employer DB plans (including multiple employer plans). See Notice 2011-96 for sample plan language.

**Notice 2011-3, 2011-2 I.R.B. 263, provides guidance on the special rules relating to the relaxation of § 436 rules that were included in the funding relief for single employer defined benefit pension plans under PRA 2010.**

Change: The Notice provides a series of Q&A's with regard to alternative amortization schedules for funding purposes.

Effective Date: In general, plan years ending on or after October 10, 2009, and beginning before January 1, 2012 are eligible for this relief.

Plan Language: N/A

**Notice 2011-96, 2011-52 I.R.B. 915, provides a sample plan amendment that plan**



**sponsors may adopt to satisfy § 436 regarding limitations on the accrual and payment of benefits. The notice also extends both the deadline to amend a plan to satisfy § 436 and the period during which such an amendment is eligible for relief from the anti-cutback requirements of § 411(d)(6).**

Change: The deadline for adopting an interim amendment with respect to § 436 is extended to the latest of:

- (1) the last day of the first plan year that begins on or after January 1, 2012,
- (2) the last day of the plan year for which § 436 is first effective for the plan, or
- (3) the due date (including extensions) of the employer's tax return for the tax year that contains the first day of the plan year for which § 436 is first effective for the plan.

However, see Notice 2012-70 below for an additional extension.

Effective Date: Plan years beginning after December 31, 2007.

Plan Language: Required for single employer DB plans (including multiple employer plans).

**Notice 2012-70, 2012-51 I.R.B. This notice extends the deadline, as set forth in Notice 2011-96, 2011-52 I.R.B. 915, to amend a defined benefit plan to satisfy the requirements of § 436 and provides associated relief from the requirements of § 411(d)(6).**

Change: The deadline to adopt an interim amendment for § 436 is extended to the latest of:  
(a) the last day of the first plan year that begins on or after January 1, 2013,  
(b) the last day of the plan year for which § 436 is first effective for the plan, or  
(c) the due date (including extensions) of the employer's tax return for the tax year that contains the first day of the plan year for which § 436 is first effective for the plan.

However, if an application for a determination letter for an individually designed plan is filed on or after February 1, 2013 (or, in the case of a plan described in §§ 104 or 105 of PPA '06, as amended, by the first day of the plan year for which § 436 is first effective for the plan, if later), the restated plan submitted with the application must incorporate an amendment with respect to § 436.

In addition, pursuant to § 7805(b) and § 1.411(d)-4, A-2(b)(2)(i), the Notice also provides that a plan amendment adopted with respect to § 436 that eliminates or reduces a § 411(d)(6) protected benefit does not cause the plan to fail to meet the anti-cutback requirements of § 411(d)(6) if the amendment is adopted by the deadline described above and the elimination or reduction is made only to the extent necessary to enable the plan to meet the requirements of § 436.

Effective Date: Plan years beginning after December 31, 2007.

Plan Language: Required for single- and multiple employer DB plans .