



## IRS Provides Guidance on 204(h) Notices After PPA

*On March 21, 2008, the IRS issued proposed regulations on the advance notice requirements for an amendment that would significantly reduce the future rate of benefit accrual in a qualified pension plan. The regulations basically clarify when notices are required in light of changes made by the Pension Protection Act of 2006 and the interaction with other notice requirements.*

### Background

ERISA Section 204(h) requires that advance notice of a plan amendment that would cause significant reductions in the rate of future benefit accrual be given to all affected participants within a reasonable time prior to the effective date of the amendment. In 2001, Section 4980F was added to the Internal Revenue Code (IRC) to provide parallel notice requirements and impose an excise tax for failure to comply. For both ERISA and IRC purposes, the notices are referred to as “204(h) notices.” The Pension Protection Act of 2006 (PPA) made several changes to ERISA Section 204(h) and IRC Section 4980F.

### IRS Proposed Regulations

The IRS has now issued [proposed regulations](#) to clarify how these notice requirements apply and incorporate changes made by PPA.

### No Notice for Lump Sum Distributions

PPA changed the required interest and mortality factors (Section 417(e) assumptions) to be used in determining the minimum present value of a participant’s benefit (e.g., lump sum), which could result in a reduced amount. The proposed regulations confirm prior IRS guidance that no 204(h) notice is required with respect to a reduction in a lump sum benefit due to a change from the pre-PPA Section 417(e) assumptions to the PPA 417(e) assumptions.

**BUCK COMMENT.** *The IRS ruled in Notice 2008-30 that there is no violation of the Section 411(d)(6) anti-cutback rules as a result of changing from the pre-PPA Section 417(e) assumptions to the PPA Section 417(e) assumptions, regardless of whether such a change is required by PPA (e.g., for a joint and survivor optional form of benefit). Although not covered by the proposed regulations, it would appear that no 204(h) notice would be required because the change would likely result in no more than a de minimis reduction in benefits.*

## General Timing With Respect to Retroactive Amendments

The proposed regulations clarify that notice in connection with an amendment that is permitted to be retroactively effective generally must be given 45 days (15 days for multiemployer plans) before the plan *begins to be operated* as if the amendment is in effect.

**Cash Balance Plan Amendments Eliminating Whipsaw.** PPA eliminated “whipsaw,” under which cash balance plans could be required to pay lump sums that exceed the current value of the employee’s hypothetical account balance. The whipsaw calculation, set forth in IRS Notice 96-8, involves projecting the account with interest to normal retirement age, converting the projected amount to an annuity, and discounting the annuity payments to a lump sum present value using Section 417(e) assumptions. Whipsaw in many cases results in lump sum payments greater than participants’ account balances, so the PPA provision could be viewed as a cutback in benefits necessitating a 204(h) notice. Notice 2007-6 provides that the Section 411(d)(6) anti-cutback relief provided under PPA is available for this change.

However, the proposed regulations reiterate the provision in Notice 2007-6 that if a 204(h) notice is required because the reduction in the rate of future benefit accrual is considered to be significant, the change cannot take effect until at least 30 days after the notices are provided to participants. Further, the proposed regulations limit the 30-day notice period to amendments effective no later than December 31, 2008. After 2008, the regular 45-day rule will apply.

**BUCK COMMENT.** *Because the elimination of whipsaw could be effective as early as August 17, 2006, a plan amendment implementing the change could be a retroactive reduction in benefits. Many employers have already eliminated whipsaw and have begun paying out account balances, which may be problematic if “timely” 204(h) notices were not issued.*

## Timing and Content of Other Notices

**Notice of Benefit Limitations Based on Funding.** PPA implemented new rules limiting the amount that may be paid to participants from plans that are not adequately funded. As a qualification requirement under Section 401(a)(29), plans will have to be amended to reflect these provisions by the end of 2009, although compliance is required for plan years beginning on or after January 1, 2008. ERISA Section 101(j) and IRC Section 436 require notice to participants 30 days after a benefit limitation based on a plan’s funded status is triggered. The proposed regulations provide that such a notice, if properly provided, will be deemed to satisfy the requirements for Section 204(h) notice as well, both as to timing and as to content.

**BUCK COMMENT.** *All plans, whether or not adequately funded, have to be amended to include the restrictions. These restrictions will also need to be included in an SMM or the plan’s SPD.*

**Other Notices.** The proposed regulations clarify that notices provided under other provisions of the IRC or ERISA dealing with benefit reductions also will be deemed to satisfy the Section 204(h) notice requirement, both as to content and as to timing, and no separate 204(h) notice will be required. These include –

- notices provided to participants to comply with IRC Section 412(d)(2) relating to retroactive plan amendments that reduce accrued benefits because of a business hardship

- notices provided under ERISA Section 4244A(b) when accrued benefits attributable to employer contributions are reduced or eliminated as a result of a multiemployer plan reorganization
- notices provided under ERISA Section 4245(e) to describe the effects of the insolvency of a multiemployer plan
- notices provided under ERISA Section 4281, when a terminated multiemployer plan is amended to reduce benefits when the value of the nonforfeitable benefits exceeds the value of the plan's assets
- notices provided under IRC Section 432, added by PPA, when there is a reduction of benefits payable from a multiemployer plan in critical status.

## Timing of Notices for Certain Commercial Airlines

PPA included special funding rules for plans maintained by certain commercial airlines or employers in certain related businesses, including restrictions on benefit accruals. For these plans, 204(h) notices may be given up to 15 days prior to the effective date of the amendment reducing benefits, instead of the usual 45 days.

## Notice to Contributing Employers

The proposed regulations include the PPA provision requiring all employers who have an obligation to contribute to a plan to be provided with 204(h) notices issued by the plan. This means that all employers contributing to a multiemployer plan must receive a 204(h) notice issued by the plan.

***BUCK COMMENT.*** *Some practitioners had interpreted PPA as requiring all participants in a multiple employer plan to receive a 204(h) notice. Fortunately, the proposed regulations define "obligation to contribute" by reference to ERISA Section 4212, thus clarifying that the intent is only with respect to multiemployer (union) plans and not generally to plans sponsored by more than one employer.*

## Conclusion

The proposed regulations provide some important guidance on 204(h) notices and how requirements to provide them may be satisfied through the issuance of other notices. Buck's consultants would be pleased to discuss this guidance with you and help you meet your notice requirements.

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*This FYI is intended to provide general information. It does not offer legal advice or purport to treat all the issues surrounding any one topic.*