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## IRS Extends Amendment and Cutback Relief Dates for Benefit Restrictions and Certain Hybrid Plan Provisions

*IRS has issued Notice 2010-77 which extends from the last day of the 2010 plan year to the last day of the 2011 plan year the date by which plan sponsors must make retroactive amendments to defined benefit plans to reflect the regulations on benefit restrictions under Internal Revenue Code Section 436 and certain regulations affecting hybrid plans. Notice 2010-77 also provides anti-cutback relief to the extent an amendment is needed to keep the plan qualified. Last year, the IRS provided similar extensions (but from 2009 to 2010) in Notice 2009-97.*

### Background

The Pension Protection Act of 2006 (PPA) made numerous changes in the provisions of the Internal Revenue Code (Code) and the Employee Retirement Income Security Act of 1974 (ERISA) that affect retirement plans. Two of PPA's most significant changes were to the funding rules for defined benefit plans and the rules governing hybrid pension plans. Later laws have made further changes to some of these provisions. While the statutory rules have been effective for some time, IRS has not yet issued final regulations on all of the provisions.

Section 1107 of PPA provided that, in general, plan sponsors did not need to amend their defined benefit plans to reflect the provisions of PPA or related regulations before the last day of the 2009 plan year. Amendments made by that date also would have had relief from the anti-cutback provisions of Code Section 411(d)(6). IRS [Notice 2009-97](#) extended the amendment deadline for certain provisions until the end of the 2010 plan year. Notice 2009-97 also provided limited anti-cutback relief to the extent the amendments would be necessary for the plan to satisfy the law.

IRS issued additional final and proposed regulations during 2010, but they do not cover all of the outstanding issues related to benefit restrictions and hybrid plans. Accordingly, IRS has issued [Notice 2010-77](#), which essentially extends Notice 2009-97 for an additional year.

**BUCK COMMENT.** *As late as September, 2010, IRS staff was publicly stating that IRS would be extending the deadline for hybrid plan amendments but not for amendments on benefit restrictions. As a result, many plans have already amended or are far along in the process of amending the plan's benefit restriction language. Employers should consult with their advisors on how to proceed in light of the new extension notice.*

## Notice 2010-77

### Deadline for Adopting Amendments

[Notice 2010-77](#) extends the deadline for adopting interim and discretionary amendments to comply with Code requirements until the last day of the first plan year that begins in 2011. The extension applies only to the following Code provisions:

- Sections 401(a)(29) and 436 relating to benefit restrictions
- Section 411(a)(13)(B) relating 100% vesting in a hybrid plan (but not Section 411(a)(13)(A) relating to the ability of a plan to pay out the hypothetical account balance as the lump sum)
- Section 411(b)(5) relating to special age discrimination rules, including a safe harbor test and conversion requirements, for hybrid plans.

**BUCK COMMENT.** *These are the same provisions that were extended at the end of 2009. Neither the original extension nor this new extension applies to other portions of the funding rules or to elimination of “whipsaw” for hybrid plans (i.e., the ability to pay the hypothetical account balance).*

As with the prior relief, any amendment will need to be made retroactive to the effective date of the provision under PPA (unless the regulations provide for a later effective date) and the plan must have operated in accordance with the amendment.

### Anti-Cutback (Section 411(d)(6)) Relief for Benefit Restrictions

IRS recognizes that a plan sponsor may only be able to make an amendment required to satisfy the statute and regulations under Code Section 436 in a way that would violate the anti-cutback rules of Code Section 411(d)(6). Notice 2010-77 provides relief from the anti-cutback restrictions with respect to amendments on benefit restrictions, but only if:

- The sponsor amends the plan by the last day of the first plan year that begins in 2011, and
- The cutback is only to the extent necessary to satisfy the benefit restriction rules.

**BUCK COMMENT.** *The majority of the regulatory provisions governing benefit restrictions have already been issued and many sponsors have already amended their plans. However, the extension allows time for further amendments. In addition, there is still some thought that with the extension IRS will reconsider its decision not to issue model language.*

### Anti-Cutback (Section 411(d)(6)) Relief for Hybrid Plan Provisions

IRS has not yet provided similar anti-cutback relief for the provisions related to hybrid plans. However, IRS said in the proposed regulations on hybrid plans issued in October, 2010 that, when such regulations are issued in

final form, it expects to provide relief from the anti-cutback provisions but only to the extent that the amendment is adopted by the last day of the first plan year that begins on or after January 1, 2011 and only to the extent the amendment is needed to meet the requirements of the hybrid plan age discrimination provisions.

**BUCK COMMENT.** *This relief will primarily address what changes in the interest crediting rate can be made to comply with the market rate of return requirement. In its proposed hybrid plan regulations, IRS asked for comments on what changes should be allowed.*

## Determination Letters

Under its determination letter process, IRS specifies for each submission cycle what changes of law and regulations must be included in any determination letter request. It also specifies the changes in law and regulations on which it will not be ruling in that cycle. In the case of benefit restrictions, IRS will not take into account (and thus provide no reliance for) language implementing benefit restrictions if the submission is before February 1, 2012.

**BUCK COMMENT.** *Submissions under new Cycle A must be in by January 31, 2012. (January 31, 2011 is the cutoff for Cycle E submissions.) Thus, the first cycle in which IRS will consider the plan's language on benefit restrictions is new Cycle B (starting February 1, 2012).*

The rules are different with respect to consideration of the hybrid plan amendments. In the case of a determination letter request submitted after January 31, 2011 (i.e., after the end of Cycle E), IRS will take into consideration the statutory hybrid provisions and the provisions of the final regulations published in October 2010. With respect to the issues addressed in the proposed regulations issued in October 2010, the IRS will rely on a reasonable interpretation of the statutory provisions.

Sponsors may submit determination letters for new Cycle A starting February 1, 2011. Pursuant to the notice, IRS will require all of those submissions to include the interim plan amendments necessary to satisfy the statute's hybrid provisions and the October 2010 final hybrid regulations.

**BUCK COMMENT.** *Most sponsors wait until the latest possible time (January of the following year) to submit within a cycle. Because submitting early in new Cycle A will accelerate when employers must amend calendar year plans for the hybrid rules (i.e., before December 31, 2011), employers will have an additional reason to delay determination letter submissions.*

## Conclusion

Notice 2010-77 provides a one-year extension of the amendment relief provided for in Notice 2009-97. Buck's consultants are available to help you with any questions you may have.

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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.*