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IRS Publishes Rules for Single-Employer Pension Plan Funding Relief

IRS Notice 2011-3 provides guidance as to how a sponsor of a single-employer defined benefit pension plan may elect one of the two alternative funding schedules allowed by PRA 2010 for one or two of the eligible plan years (generally, 2009, 2010, and 2011). A sponsor of a calendar year plan must make the election by January 31, 2011 with respect to plan years 2009 and/or 2010, and by December 31, 2011 with respect to plan year 2011.

Background

The Pension Protection Act of 2006 (PPA 2006) rewrote the funding rules governing single-employer defined benefit pension plans, generally effective for 2008 plan years. PPA 2006 requires a plan to amortize changes in unfunded liability (the "shortfall amortization base") over seven years, to value liabilities based on either a twenty-four month average yield curve or a spot yield curve, and, for plans with over 100 participants, to use the first day of the plan year as the valuation date.

The strong economic downturn that occurred shortly after the new funding rules became effective resulted in increased funding requirements for many plan sponsors at the same time they had cash flow difficulties. The Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010 (PRA 2010) provides funding relief by allowing sponsors to stretch out funding of their plans' shortfall amortization bases over a longer period. (See our June 28, 2010 *For Your Information*.)

PRA 2010 allows a plan sponsor to elect to amortize the shortfall amortization base for an "eligible plan year" using one of two schedules: (a) a 2-plus-7-year schedule (meaning two years of interest only and then seven-year amortization), or (b) a 15-year amortization schedule. An eligible plan year is 2009, 2010, or 2011, with 2008 being an eligible plan year only for plans whose 2008 plan year ends on or after October 10, 2009. PRA 2010 reduces or eliminates the relief if the sponsor or a member of its controlled group pays compensation or dividends over specified amounts.

A sponsor must provide notice of the election to participants and beneficiaries and to the Pension Benefit Guaranty Corporation (PBGC). PRA 2010 includes special funding relief rules for plans with delayed effective dates under PPA 2006 (e.g., plans of certain cooperatives) and includes a special rule treating plans of certain charities as if they were a cooperative with a delayed PPA effective date. PRA 2010 also includes special rules delaying the requirements for poorly-funded plans to freeze plan accruals and not pay a benefit in the form of a Social Security leveling option.

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BUCK COMMENT. *PRA 2010 followed a unusual legislative path. As a result, the version of PRA 2010 that was enacted did not include a number of technical "fixes" to the provisions that passed. This was especially true with respect to a provision affecting the funding rules for plans of certain charitable organizations but also applies to other provisions. The Notice addresses some of these issues to the extent they are just matters of interpretation, but other issues must wait for further legislation. Just before Congress adjourned for 2010, the Senate passed limited corrections – including a correction with respect to the funding rules for certain charitable organizations – but the House did not pass these corrections.*

The IRS has now issued Notice 2011-3 providing guidance on the PRA 2010 funding relief.

Notice 2011-3

Notice 2011-3 consists of questions and answers on ten topics.

Elections to Use an Alternative Amortization Schedule

The Notice provides that a sponsor must make an election of an alternative amortization schedule by the latest of (a) the last day of the plan year for which the election is made, (b) 30 days after the valuation date for the plan year (i.e., 30 days after the first day of the plan year for all plans with more than 100 participants), or (c) January 31, 2011. Only in the case of a plan with 100 or fewer participants and a valuation date in the last month of the plan year will "30 days after the valuation date" be later than the last day of the plan year.

Therefore, sponsors of calendar year plans electing the relief with respect to either 2009 or 2010, or both, must make the election by January 31, 2011. Sponsors of calendar year plans electing relief with respect to 2011 must make that election by December 31, 2011.

BUCK COMMENT. *Notice 2011-3, in combination with the sponsor's ability under the October 2009 final funding regulations to "reset" many funding elections for the 2010 plan year, allows plan sponsors significant opportunities to design optimal cash flow patterns for several year' contributions. Most sponsors interested in funding relief will want to make an election for 2009. However, determining whether a second election is better made for 2010 or for 2011, demands creative analysis of all the funding options.*

A plan sponsor makes the election by providing a written notification, which must be signed and dated, to both the plan's enrolled actuary and the plan's administrator. There is no specific election form but the Notice provides that the election notification must include the following: (a) name of plan and sponsor, (b) plan number and sponsor's EIN, (c) sponsor's mailing address, (d) the alternative chosen and the plan year or years chosen, (e) whether there was a prior election and, if so, a statement that this election is for the same alternative, and (f) a statement that the plan sponsor will notify the plan's participants and beneficiaries and the PBGC.

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Notification to Participants, Beneficiaries, and the PBGC

A plan sponsor that elects funding relief must provide participants and beneficiaries a "pension funding relief notice" within 120 days after the end of the plan year for which the election is made or, if later, May 2, 2011.

> ***BUCK COMMENT.*** *A plan sponsor that elects relief for the 2009 calendar plan year or the 2010 calendar plan year, or both, must make the election by January 31, 2011 and provide the notice by May 2, 2011. The sponsor can address both years in one notice.*

The plan sponsor must provide the notice to all participants and beneficiaries, with the exception of those who became a participant or beneficiary after the end of the last plan year before the notice is due. The sponsor may also exclude those who cease to be participants or beneficiaries prior to the date the notice is provided.

Notice 2011-3 provides two sample pension funding relief notices, one for a one-year election and one for a two-year election. Sponsors are not required to use the samples. The notice must be written in a manner calculated to be understood by the average plan participant or beneficiary, including language that allows them to understand the significance of the election. The sponsor may include additional information to help understanding, as long as it is not misleading or distracting. The notice must be a separate document but it can be mailed with other notices (such as the annual funding notice). The notice may be provided electronically.

> ***BUCK COMMENT.*** *Buck recommends using the sample pension funding relief notices provided by the IRS, at least as a starting point, to avoid the risk of later challenges.*

The sponsor must notify the PBGC earlier than it has to notify the participants and beneficiaries. The PBGC notice is due by the later of 30 days after the date the election is made or January 31, 2011. Notification consists of an e-mail to the PBGC with a copy of the election notice. (The subject line of the e-mail must contain the sponsor's EIN, the plan number, and the name of the plan.) If an election was made before January 1, 2011 but was not completed in accordance with the requirements of this Notice 2011-3, special actions are required.

General Rules

A sponsor may elect an alternative amortization schedule for one or two plan years ("election years"). The eligible election years generally are 2009, 2010, and 2011; however, the sponsor of a plan with a 2008 plan year ending on or after October 10, 2009 may elect 2008. There are two possible alternative funding schedules: (a) a 2-plus-7-year amortization schedule and (b) a 15-year amortization schedule. A sponsor may elect either schedule but if the sponsor elects relief for two years, the sponsor must use the same schedule for both years.

> ***BUCK COMMENT.*** *The rules allow a sponsor of two defined benefit plans to elect 2-plus-7-year amortization for one plan and 15-year amortization for the other.*

The 2-plus-7-year amortization schedule requires the sponsor to contribute an installment of only interest for the first two years (i.e., the election year and the following year) and then amortize the shortfall amortization base so

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that the present value of the nine installments as of the valuation date for the election year equals the amount of the shortfall amortization base established for the election year. The "interest-only" installments are, for the first two years, determined by multiplying the amount of the shortfall amortization base established for the election year by the effective interest rate for the plan for the election year. The present value of the nine installments is determined by using the segment rates or the rates from the full yield curve, whichever was used to determine the plan's target normal cost for the election year (or to determine the funding target if the target normal cost is zero).

> ***BUCK COMMENT.*** *Until issuance of this Notice, the methodology for calculating the annual installments under the 2-plus-7-year amortization schedule has been unclear due to ambiguity between the PRA 2010 statutory language and the legislative description.*

The installment calculation for the 15-year amortization schedule is straight forward. The shortfall amortization base for the election year is amortized on a level basis over the 15-year period beginning with the election year using the segment rates or rates from the full yield curve, whichever was used to determine the target normal cost (or to determine the funding target if there is no target normal cost) for the election year.

In the case of a small plan that uses a valuation date other than the first day of the plan year, the same principles apply. For example, the interest installment would be the product of the shortfall amortization base and the plan's effective interest rate for the election year, without any further adjustment for interest.

The rule for a multiple employer plan depends on whether the plan is funded on an employer-by-employer basis or funding is on a plan-wide basis. In the first case, the election and all of the rules apply separately for each employer and that employer's participants. If, instead, the funding rules apply plan-wide, there is one plan-wide election and all employers and participants are impacted by that election.

If the sponsor of a plan that is using one of the alternative amortization schedules applies for a funding waiver, the IRS will take all the facts and circumstances into consideration. The Notice indicates that one important factor is whether the combination of the alternative amortization schedule and the funding waiver will reduce the minimum required contribution to a point where the granting of the waiver will be adverse to the interests of plan participants in the aggregate. The Notice also states that the IRS may impose additional requirements relating to the amortization schedule when granting a waiver.

Installment Acceleration Amounts

A plan sponsor that elects to apply one of the special amortization schedules will have to increase payments by an "accelerated installment amount" if the sponsor or any member of its controlled group of companies (a) pays an individual compensation in excess of $1 million (in the aggregate, the "excess compensation amount") or (b) pays dividends or redeems stock over certain limits (in the aggregate, the "excess shareholder payment amount") during the "restriction period." The installment acceleration amount for any year is the sum of the excess compensation amount and the excess shareholder payment amount. The restriction period is the three-plan-year

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period (for plans electing the 2-plus-7-year amortization schedule) and the five-plan-year period (for plans electing the 15-year amortization schedule) beginning with the later of the election year or the first plan year beginning after December 31, 2009.

> ***BUCK COMMENT.*** *If the sponsor of a calendar year plan elects the 2009 or 2010 plan year as the election year, the restriction years, in both cases, start with 2010. This is because, while the sponsor may elect funding relief for 2009, the restriction years cannot start until 2010.*

In determining the quarterly contribution necessary to satisfy either of the quarterly contribution safe harbors, the actuary ignores any acceleration amounts.

The acceleration amount cannot exceed (a) the sum (without interest) of the amount that the shortfall amortization installment for the plan year and all preceding plan years in the amortization period would have been in the absence of the election over (b) the same sum based on the election and any acceleration amount (other than any accelerations for the current year).

If there is an acceleration amount for a year, subsequent installments are reduced beginning with the last payment due so that the present value of the adjusted amortization schedule is equal to the present value of the remaining unamortized shortfall amortization base. These present values are determine using the segment rates or the full yield curve, whichever was used to determine the target normal cost (or funding target if the target normal cost is zero) for the year in which the acceleration amount is added.

If the limit on the acceleration amount for a year applies, the unused portion is carried over to the next year if that next year is in the restricted or carryover period. For the 2-plus-7-year amortization schedule, the restricted period is three years and the carryover period is one additional year. For the 15-year amortization schedule, the restricted period is five years and the carryover period is two additional years. If all of the acceleration amounts have not been used by the end of the carryover period, any remaining amount is ignored.

If the sponsor elects to use the special amortization rules for two years, the same acceleration amount is applied to each of the special amortization schedules. Thus, an acceleration amount can result in an increase in contributions of twice the acceleration amount. For example, if the sponsor elects the 2-plus-7-year amortization schedule for both 2010 and 2011, and there is an acceleration amount of $500,000 in 2011, the 2011 amortization of both the 2010 and 2011 bases would be increased by $500,000, resulting in a total increase of $1 million.

> ***BUCK COMMENT.*** *This is double counting (or use) of the same acceleration amount. However, that is how in the Notice the IRS interprets the statutory language.*

Acceleration amounts are determined on a controlled group basis, without regard to whether employees who exceed the $1 million threshold on compensation are plan participants. If an entity in the controlled group sponsors more than one defined benefit plan or several different entities sponsor defined benefit plans, all plans for which a special amortization schedule was elected would receive an allocated portion of the controlled group's acceleration amount. Thus, as distinct from the case where an election is made for two separate years, election

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by more than one plan for the same year results in the acceleration amount being used only once. The Notice contains rules governing allocation and rules governing plans with different plan years.

> ***BUCK COMMENT***. *A member of a controlled group needs to consider the compensation and dividend policies of other members of the controlled group before electing a special amortization schedule. Once an election has been made, members of the sponsor's controlled group need to be aware of the accelerated funding obligation created by the timing of compensation, dividends, and stock repurchases.*

Excess Compensation Amounts

One of the principles underlying the passage of the funding relief was that if an employer could afford to pay high compensation, it could afford to fund its defined benefit plan. PRA 2010 creates a new measure of "excess" compensation for this purpose. Compensation is tested on an employee-by-employee basis and is "excess" to the extent an employee's compensation exceeds $1 million (indexed). In measuring compensation, the employer must include any amounts set aside or reserved, directly or indirectly, in a trust or other arrangement for purposes of paying deferred compensation, as defined under Code Section 409A. The amount set aside is counted as compensation, for this purpose, in the year set aside, and once counted is not counted again in the year when actually paid.

> ***BUCK COMMENT.*** *The "excess" measure here is very different than the deductible limit of $1 million on the compensation of a few executive officers under Code Section 162(m). The PRA 2010 rule, in theory, applies to all employees, has no exception for performance-based compensation, and applies to deferred compensation. Most significantly, it is not a deduction limit but rather a funding increase.*

The excess compensation amount is the sum of the excess for each of the employees in the controlled group of the plan sponsor. The term "employee" includes former employees. In the case of a non-resident alien, amounts paid by a foreign corporation to a foreign trust are not considered for purposes of the excess-compensation test except to the extent the amount is subject to U.S. tax in the same manner as if they had been paid to the non-resident alien in cash (i.e., to the extent the income is effectively connected with the conduct of a trade or business within the U.S.).

Compensation for a plan year is measured by remuneration to the employee for work for the plan sponsor during the calendar year in which the plan year begins. It also includes remuneration paid in the current year for work in prior years. Amounts set aside or reserved are measured by their fair market value at the time set aside or reserved. The concept is the same as under Code Section 409A(b), which among other things limits setting aside or restricting amounts for deferred compensation if a defined benefit plan sponsored by a member of the controlled group is "at-risk" under Code Section 430(i). An amount set aside or reserved is only counted once, so it is not again treated as remuneration in the year paid-out.

> ***BUCK COMMENT.*** *The IRS has not yet issued guidance under Code Section 409A(b).*

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There are some exceptions to what is considered compensation for purposes of the $1 million test. The most significant exception is the exclusion from compensation for work performed before March 1, 2010. However, this exception does not apply to what is considered set aside in a trust or reserved for purposes of paying deferred compensation. If compensation such as a bonus for 2010 is not attributable to a specific month in 2010, then the payment is allocated pro rata for the year and the part allocated to January and February 2010 is ignored.

Also excluded is any amount included in compensation with respect to the granting after February 28, 2010 of employer stock (using the definition of service-recipient stock under Code Section 409A) that is subject to a substantial risk of forfeiture (within the meaning of Code Section 83) for at least five years. Whether there is a five-year substantial risk of forfeiture is determined as of the date of the grant. For example, if a plan provides for vesting upon death (i.e., the substantial risk of forfeiture would lapse upon death) and death occurs within the five years, the possibility or actuality of death and the lapse of the substantial risk of forfeiture during the first five years would not change the status on the date of grant.

Compensation subject to the limit excludes commissions. The Notice makes clear that whether a payment is a commission is determined on an individual basis. A payment is a commission only if it is the result of a direct sale of a product or service. The commission exclusion does not include amounts paid on a broader performance standard such as performance of a business unit. For this purpose, compensation also does not include nonqualified deferred compensation, restricted stock, stock options, or stock appreciation rights payable or granted under a written binding contract that was in effect on March 1, 2010 and that was not modified in any material respect before the compensation is paid and included in income. Whether a contract is legally binding and whether the modification is material are both determined in accordance with Code Section 409A guidance. Nonqualified deferred compensation does not include amounts deferred for less than 2½ months after the employee's taxable year in which the work is performed (i.e., generally, by March 15th of the following year).

BUCK COMMENT. *The excess compensation rules for defined benefit plan funding relief borrow heavily from the concepts under Code Sections 83 and 409.*

Excess Shareholder Payment Amounts

In addition to excess compensation, a sponsor that elects relief may have to accelerate funding because of dividends and redemption of stock by the sponsor or a member of the sponsor's controlled group. Dividends are governed by the plan year in which the dividend is declared. Repurchases are governed by the plan year in which the stock is redeemed. Intra-group dividends (i.e., dividends paid to another member of the controlled group) are excluded.

To determine if the dividends and repurchase amounts are excess, the total of dividends declared and the stock redeemed in a plan year is compared to the greater of two amounts: (a) the adjusted net income of the plan sponsor for the preceding plan year, determined without any reduction for interest, taxes, depreciation, or

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amortization (i.e., EBITDA) and (b) in the case of a plan sponsor that determined and declared dividends in the same manner for at least the five consecutive preceding plan years, the amount of such dividends determined in the same manner.

Dividends are considered as being determined in the same manner if the dividends are determined using the same formula. The same specified dollar amount is the same formula either on a per share or aggregate basis. If the determination is on a per share basis, there must be an adjustment to reflect stock splits and other changes in capitalization. The same formula also includes dividends increased by the same fixed amount or percentage each year and dividends that are a fixed percentage of income, earnings, or other consistently applied measures of profitability. There is no five-year exception if the sponsor existed for fewer than 60 months before the first day of the plan year or there was no dividend in one of the relevant periods.

Generally, distributions of stock by a corporation may be ignored; however, distributions that affect the proportionate interests of stockholders in the earnings and profits may have to be considered. Also ignored are stock redemptions made pursuant to a plan with respect to employees. The plan can be qualified or non-qualified. An agreement with a single employee is not considered an exempt non-qualified plan; however, an agreement with a category of employees may be exempt.

The Notice also excludes certain redemptions from an employee or stockholder made on account of death, disability, or termination of employment. The exclusion only applies if the sponsor or a member of the controlled group is required to redeem the stock (even if the stockholder is not required to tender) or the stockholder is required to tender (even if the sponsor or a member of the controlled group is not required to redeem).

Finally, the Notice excludes certain dividends with respect to and redemptions of applicable preferred stock. The relevant dividends and redemptions are those that accrue at a specified rate in all events without regard to income and the interest on such dividends if unpaid. However, applicable preferred stock is limited to stock originally issued before March 1, 2010 (and, if reissued after that date, having the same terms). Applicable preferred stock also includes preferred stock held by an ERISA-covered plan.

In determining EBITDA for the preceding plan year, the Code looks to the definition of adjusted net income for purposes of the PBGC reportable event rules and applies it with respect to the fiscal year ending in or with the plan year. The PBGC reportable event definition relies on generally accepted accounting principles (GAAP) so, according to the Notice, adjusted net income is the EBITDA determined in accordance with GAAP principles. For this purpose, net income may never be less than zero. The Notice provides a pro rata rule when either the plan year or fiscal year is fewer than 12 months.

If more than one plan in the controlled group makes the election for funding relief and the plans have different plan years, the Notice requires the calculation to be made on a calendar-year-basis and looks at all plan years that begin in the applicable calendar year. The Notice includes special rules for the transition situation when the calculation moves from a plan-year to a calendar-year-basis.

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Mergers and Acquisitions

PRA 2010 left the rules for mergers and acquisitions to IRS guidance. The Notice provides that in calculating excess compensation and excess shareholder payments after an acquisition or merger of an entity in one controlled group with an entity in another controlled group, the rules depend on whether only one or both controlled groups had entities that previously elected the relief. If only one of the controlled groups had an entity that made the election, then any compensation earned, dividends declared, or redemptions made in the controlled group that did not have a relief election before the acquisition is ignored. If, however, both controlled groups had entities that elected the relief, all of the amounts are combined as if they had been in one controlled group and there is an allocation in accordance with the allocation rules for when there is more than one plan in the controlled group electing relief for a plan year.

An election to use the relief that is made in the year of the acquisition is treated as an election made before the date of the acquisition. If the restriction period has passed with respect to an election, the election is ignored. Any amount used to purchase stock pursuant to a merger or acquisition is ignored.

> ***BUCK COMMENT.*** *These calculations may become complicated for a large company with multiple acquisitions, mergers, and sales in a year.*

Reporting Requirements

Plans had to file their Form 5500 and associated Schedules SB for 2008 and, in most cases, 2009 before the IRS issued Notice 2011-3. In Notice 2010-55, the IRS allows an employer to use an alternative amortization schedule without regard to the information on the Schedule SB. Thus, some plans electing funding relief have filed Schedules SB that do not show the alternative amortization schedule at all and some have filed Schedules SB that show an election but with the wrong calculations.

Notice 2011-3 allows plan sponsors to file amended Schedules SB but does not require it. Instead the Notice establishes a procedure whereby the corrections for any prior year are reflected in the subsequent plan year's Form 5500 filing (no later than the 2010 plan year filing). The subsequent plan year Schedule SB should reflect the effect of any election to use an alternative amortization schedule for the 2008 or 2009 plan year on the calculation of the minimum required contribution. To the extent the amounts are different than shown on the earlier Schedule SB, the difference should be explained in the attachments to the Schedule SB for the subsequent plan year. The Notice provides detailed instructions in question-and-answer R-1 for the plan's actuary to follow. Question and answer R-2 addresses the detailed rules for differences in the minimum required contribution.

> ***BUCK COMMENT.*** *A sponsor that has already filed a Schedule SB for a plan year using a different minimum required contribution than elected should discuss with its actuary the alternatives available.*

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If an unpaid minimum required contribution was reported on any form already filed and that unpaid contribution would be eliminated by the election, the sponsor should not file a Form 5330 to pay the excise tax. Instead, when the IRS contacts the plan, the plan sponsor should respond by telling the IRS that the unpaid amount will be eliminated by an election and provide supporting evidence. If the plan will still have an unpaid required minimum contribution even after the election and has not filed a Form 5330, the sponsor should file the Form 5330 as soon as possible to cut off interest and penalties.

> ***BUCK COMMENT.*** *If a sponsor is not clear on what the plan actuary did and plans to do with respect to the Schedule SB, elections, and any remaining shortfalls, the sponsor should discuss the issue with the actuary as soon as possible.*

Once the election is in place, subsequent Schedules SB must reflect the election in the amount of the shortfall amortization installment reported on Line 32a (and the related attachment). Small plans that file the Form 5500-EZ or –SF don't file a Schedule SB. However, if the sponsor of one of these plans makes an election, a Schedule SB must be prepared and provided to the plan administrator who must keep it with the plan records.

Transition Rules

If a plan sponsor made an election prior to January 1, 2011, but did not include all of the required information, the election remains valid. The pension funding relief notice provided to participants and beneficiaries and the notification of the PBGC must include all of the required information and be issued timely under the rules of this Notice.

If the minimum required contribution for a year is less than before because of the retroactive election, some of the contributions treated as mandatory minimum contributions really are excess contributions that the employer could treat either as prefunding balance or additional assets. Similarly, plans may have used more existing funding standard carryover and prefunding balances than necessary to meet minimum contribution requirements. The Notice provides flexibility.

If the plan sponsor had a standing election to add the maximum amount to the prefunding balance, any excess contributions would automatically correct and become part of the prefunding balance. If the plan sponsor does not want that result, the Notice allows the sponsor to make a written election to suspend the standing election retroactively, so there is no change in the amount used. If there were no standing election or the standing election was suspended retroactively, the sponsor may make an election to increase the prefunding balance by an amount no greater than the excess contributions resulting from the election of the alternative amortization schedule.

A similar issue arises when the plan has a standing election to use the funding standard carryover balance or the prefunding balance to satisfy annual minimum required contribution requirements (standing elections are not allowed for quarterly requirements). Here again, the Notice allows for a retroactive election if necessary. The

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Notice also allows an election to reverse the use of the funding balances to the extent of the excess even if the normal period for making such elections (the end of the plan year for plans with more than 100 participants) has passed. The special elections must be made no later than the later of the normal due date for such elections or March 30, 2011.

The relief above does not apply to the benefit restrictions of Code Section 436. Thus, if increasing the amount of the prefunding balance would decrease the AFTAP so that a restriction should have been in place but was not, the plan would violate Section 436 by changing the amount of the prefunding balance.

> ***BUCK COMMENT.*** *Employers should be very careful when making retroactive changes because of the complicated rules on benefit restrictions both for the initial year and the presumptions for the following year. Changing a contribution from an asset to a prefunding balance may reduce the plan's AFTAP. A sponsor may have to retroactively suspend a standing election to avoid Section 436 problems.*

Eligible Charity Plans

PRA 2010 includes a special rule for plans of certain charities This special rule would require certain charities to revert to the pre-PPA funding rules for their plans until 2017 and create other problems. Legislation to correct the provision passed the Senate but not the House before Congress adjourned for 2010. As a result, the provision remains in the law in an unintended form. The Notice simply states the rule as it exists in PRA 2010.

> ***BUCK COMMENT.*** *There is a general consensus that this provision will be corrected at some point but no one is sure when that will happen. In the meantime, it is creating great confusion. For some charities, the use of the pre-PPA funding rules substantially reduces minimum contributions but for others (generally, those that would be subject to the Deficit Reduction Contribution under the pre-PPA rules), it substantially increases contributions. Adding to the confusion, the provision is required not optional for some earlier years, so plans may have retroactive funding problems.*

Conclusion

The IRS has set out very formal requirements for election, participant notice, notification to the PBGC, and Schedule SB. It also has provided an opportunity to change the treatment of prefunding balances but with no relief for benefit restrictions. Retroactive changes are always complicated and have unintended consequences. Deadlines are short with the election decision having to be made for many plans by January 31, 2011.

Buck's consultants are available to help you analyze your options and prepare the necessary documents.

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.

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