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IRS Postpones Effective Date of Hybrid Plan Regulations and Extends PPA Amendment Adoption Deadline

On October 12, 2011, in Notice 2011-85, the IRS postpones the effective date for final hybrid plan regulations, extends the deadline set in PPA for adopting interim and discretionary hybrid plan amendments, and formalizes the 204(h) notice special timing rule in IRS Announcement 2009-82.

Background

The Pension Protection Act of 2006 (PPA) included provisions affecting the rules governing hybrid pension plans. PPA requires that the terms of a hybrid plan cannot provide for any interest credit for any plan year at a rate that exceeds a market rate of return. In October 2010, the Internal Revenue Service (IRS) issued proposed and final hybrid plan regulations that provide guidance on PPA's interest crediting and market rate of return requirements. The final regulations are generally effective for plan years beginning on or after January 1, 2011. However, the market-rate-of-return provisions in the final regulations are effective for plan years beginning on or after January 1, 2012, the same time the proposed regulations would have been effective if finalized.

In addition, PPA provides that, in general, plan sponsors do not have to amend their defined benefit plans to reflect the provisions of PPA or related regulations before the last day of the 2009 plan year. IRS Notice 2009-97 extended the amendment deadline for certain provisions until the end of the 2010 plan year. In Notice 2010-77, the IRS extended the Notice 2009-97 amendment deadline for an additional year. (See our December 8, 2010 [For Your Information](#).)

Notice 2011-85

On October 12, 2011, the IRS issued [Notice 2011-85](#), which postpones the effective date for the IRS' hybrid plan regulations dealing with interest crediting rates, extends the deadline for adopting hybrid plan amendments, and formalizes a special timing rule for 204(h) notices regarding changes to a hybrid plan's interest credit rate.

Hybrid Plan Regulations' Effective Dates Postponed

Notice 2011-85 postpones the effective date of the proposed and final hybrid plan regulations. Under the new guidance, the 2010 proposed hybrid plan regulations, when finalized, will apply to plan years that begin on or after a date specified in the regulations that is not earlier than January 1, 2013. In addition, the Notice provides that

the Department of the Treasury and IRS intend to amend the 2010 final regulations to provide that the effective date of those regulations will match the effective date of the proposed regulations. Until the final regulations are formally amended, plan sponsors may rely on Notice 2011-85 with respect to the postponement of the final regulations' effective date.

BUCK COMMENT. *The IRS does not give a reason for the delayed effective date or any indication as to when final regulations will be issued.*

Plan Amendment Adoption Deadline Extended

In Notice 2011-85, the IRS also extends the interim and discretionary amendment deadline set forth in Notice 2010-77. Specifically, plans now have until the last day of the first plan year before the plan year for which the 2010 proposed hybrid regulations, when finalized, apply to the plan. Plans taking advantage of this extension must continue to satisfy PPA Section 1107's operational compliance requirements.

BUCK COMMENT. *In further delaying the plan amendment adoption deadline, it appears that the IRS is still considering the definition of "market rate of return" for interest crediting rates. Note also that the extension of the deadline does not apply to changes pursuant to Internal Revenue Code (IRC) Section 411(a)(13)(A) which provides relief from the pre-PPA "whipsaw" requirements.*

As a result of the extended time to amend, with respect to determination letters submitted to the IRS between February 1, 2011 and January 31, 2012, the IRS will not consider the 2010 final hybrid plan regulations unless the plan has been amended to satisfy these regulations. In such case, the IRS will only consider provisions in the final regulations that are effective for plan years that begin on or after January 1, 2011.

Finally, Notice 2011-85 also provides that when the proposed regulations become final, the IRS will grant relief with respect to a plan amendment that eliminates or reduces a protected benefit if the amendment:

- Is adopted by the last day of the first plan year before the plan year for which the proposed plan regulations, once finalized, apply to the plan; and
- Eliminates or reduces the protected benefit only to the extent necessary to enable the plan to meet the requirements of IRC Section 411(b)(5).

204(h) Notice Timing Rule Formalized

Employee Retirement Income Security Act (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 before the effective date of the amendment. Section 204(h) requires plans to send a notice to all affected parties at least 45 days before an amendment's effective date. Under IRC Section 4980F, an excise tax will be imposed on employers who do not comply with this notice requirement.

In Announcement 2009-82, the IRS provided relief from the 204(h) notice timing requirements for hybrid plans with respect to certain amendments adopted to change the interest credit rate. In Notice 2011-85, the IRS formally adopts the 204(h) notice timing relief detailed in Announcement 2009-82. Specifically, under the special rule, plans can provide a Section 204(h) notice up to 30 days *after* the effective date of the plan change for amendments that:

- Change a hybrid plan's interest credit rate;
- Are adopted after November 10, 2009 and on or before the last day of the first plan year beginning on or after January 1, 2009; and
- Are effective no later than the first day of the first plan year beginning on or after January 1, 2010.

Conclusion

While not unexpected, Notice 2011-85 provides welcome relief for statutory hybrid plans. The earliest that the hybrid plan regulations regarding interest credits will apply to plans is January 1, 2013. As a consequence, plan sponsors may want to wait to amend their plans to conform to other PPA provisions for hybrid plans, such as accelerated vesting and safe harbors for age discrimination testing, and should expect further extensions of the plan amendment adoption deadline if the IRS needs additional time to define the market rate of return for interest crediting rates. Buck's consultants are available to help you understand how this latest guidance affects your plans.

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.