



For your information

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IRS Extends Deadline for Code Section 436 Amendments and Provides Sample Amendment

On November 29, 2011, the IRS issued Notice 2011-96. In the Notice, the IRS extends the deadline for adopting an interim amendment under Code Section 436 and extends related anti-cutback relief. In addition, the IRS provides a sample Code Section 436 amendment.

Background

The Pension Protection Act of 2006 (PPA) made numerous changes to the Internal Revenue Code (Code) and the Employee Retirement Income Security Act of 1974 (ERISA) that affect retirement plans. Among the changes was the addition of Code Section 436, which sets forth limitations on the accrual and payment of benefits from underfunded single-employer defined benefit plans. (See our October 24, 2006 [For Your Information](#).)

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). Internal Revenue Service (IRS) Notice 2009-97 extended the amendment deadline for certain provisions, including Code Section 436 amendments, 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 comply with the law. (See our December 11, 2009 [For Your Information](#).) Last year, the IRS issued Notice 2010-77, which extended the deadline for adopting certain interim and discretionary amendments to comply with PPA's requirements, including Code Section 436 amendments, until the last day of the first plan year that begins in 2011. Notice 2010-77 also provided limited relief from the anti-cutback restrictions. (See our December 8, 2010 [For Your Information](#).)

Notice 2011-96

On November 29, 2011, the IRS issued [Notice 2011-96](#). In the Notice, the IRS again extends the deadline for adopting an interim amendment under Code Section 436 and the related anti-cutback relief. In addition, the IRS provides a sample Code Section 436 amendment.

Extension of Amendment Deadline and Anti-Cutback Relief

In Notice 2011-96, the IRS further extends the deadline for adopting an interim amendment with respect to Code Section 436 to the latest of:

- The last day of the first plan year that begins on or after January 1, 2012;
- The last day of the plan year for which Code Section 436 is first effective for the plan; or
- 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 Code Section 436 is first effective for the plan.

However, if a plan files a determination letter application for an individually designed plan, one or more of the interim amendment deadlines that would otherwise apply to the plan may be accelerated. For example, the IRS also noted that if an individually designed plan is submitted for a favorable determination letter on or after February 1, 2012, then it must generally incorporate an interim amendment with respect to Code Section 436.

Further, the extension in Notice 2011-96 only applies if the amendment is effective as of the effective date of Code Section 436, and the plan had operated in accordance with Code Section 436 from the effective date.

In addition, a Code Section 436 plan amendment that eliminates or reduces a protected benefit will not cause the plan to fail to meet the anti-cutback requirements of Code Section 411(d)(6) if the amendment is adopted by the deadline detailed above and the elimination or reduction of the protected benefit is made only to the extent necessary to enable the plan to meet the requirements of Code Section 436.

COMPLIANCE ALERT: Plan sponsors that have not already adopted Code Section 436 amendments will need to determine the deadline by which they must adopt these amendments. For most plans this will be the last day of the first plan year that begins in 2012; only the relatively few plans for which Code Section 436 first takes effect in 2012 or afterward could have a later deadline.

Sample Code Section 436 Amendment

In Notice 2011-96, the IRS provides a sample Code Section 436 amendment. The IRS states that because the sample amendment complies with the requirements of Code Section 436, if a plan is amended by adoption of the sample amendment, the plan will satisfy Code Section 436.

The sample amendment has three parts. The first part contains provisions applicable to all plans. The second part only applies to multiple employer plans, and it has two alternative provisions. The

third part contains four optional provisions that may be used to modify the first part of the sample amendment. The third part relates to the future limited restoration of benefit accruals, distribution options, and the timing and forms of payment.

Under the Notice, if a plan sponsor amends the plan using the sample amendment, the plan will satisfy the Code Section 436 requirements, and the amendment will not cause the plan to fail to meet the Code Section 411(d)(6) anti-cutback requirements if:

- The sample amendment is adopted by the deadline detailed above;
- Generally, the terms of the sample amendment are not modified; and
- The plan operates in accordance with the amendment from and after the effective date of the amendment, or was operated in accordance with the earlier Notices or the proposed regulations.

A plan sponsor may still rely on the modified sample amendment if changes are made to conform to the plan's terminology or organization, and the changes do not materially modify the provisions of the sample amendment. In addition, a plan sponsor may modify the sample amendment to specify effective dates for any of the optional provisions in the third part of the sample amendment that are later than the general effective date of the sample amendment, as long as the plan operates in accordance with the modified effective dates.

COMPLIANCE ALERT: Plan sponsors that already adopted Code Section 436 amendments will want to review the Notice's sample amendment to determine if the language in their amendments is consistent with the language in the sample amendment.

Eligible Charity Plans

Sponsors of eligible charity plans and other plans affected by the amendments to Code Section 436 and PPA that were made by the Pension Relief Act of 2010 (PRA 2010) may have operated their plans in a manner that would satisfy Code Section 436 as in effect prior to the enactment of PRA 2010 but that does not satisfy the law when the amendments made by PRA 2010 are taken into account. The IRS plans to issue guidance that will allow these plan sponsors to correct their plans to take into account the PRA 2010 amendments. These sponsors are not precluded from adopting or relying on the sample amendment for periods during which Code Section 436 applies to their plans.

Conclusion

The extension of time to adopt Code Section 436 amendments is welcome news for plan sponsors. Buck's consultants can help you draft Code Section 436 amendments and determine if amendments already adopted are consistent with language in the sample amendment provided in Notice 2011-96.

Buck Can Help

- Determine whether your plan has and continues to comply with Code Section 436
- Determine the deadline by which your plan must be amended under Code Section 436
- Review already adopted Code Section 436 amendments to determine if they are consistent with the language in the sample Code Section 436 amendment
- Draft Code Section 436 amendments or modify already adopted Code Section 436 amendments if necessary