



For your information

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## IRS Proposes Change to Anticutback Regulations for Plans Facing Distress Termination

Proposed IRS regulations would provide an exception from the anticutback rule for an amendment to permanently eliminate lump sums (or other prohibited payment forms) from a defined benefit plan if the plan sponsor is undergoing bankruptcy, the plan's AFTAP is less than 100%, and the bankruptcy court and PBGC issue orders saying the amendment is necessary to avoid a distress termination.

### Background

Plans that are subject to the vesting protections in the Internal Revenue Code (Code) and the Employee Retirement Income Security Act (ERISA) cannot be amended in a manner that reduces any accrued benefit (including optional forms of payment and certain early retirement and retirement-type benefits) unless an exception applies. Existing regulations dealing with this "anticutback" rule provide a list of situations and examples of permitted amendments.

### A New Addition to the List of Exceptions

Under the June 21, 2012 [proposed amendment](#) to the anticutback regulations, a plan sponsor in bankruptcy would be permitted to adopt an amendment that eliminates lump sum options (or other protected benefit that is a prohibited payment under the benefit restrictions of Code Section 436) if all of the following four conditions are met on the later of the amendment or effective date ("applicable amendment date"):

- The plan's enrolled actuary has certified that the plan's adjusted funding target attainment percentage (AFTAP) for the plan year that contains the applicable amendment date is less than 100%.
- The plan is not permitted to make any prohibited payment under the benefit restriction rules because the plan sponsor is a debtor in a bankruptcy case (that is, a case under Title 11, United States Code, or under similar federal or state law).
- The court overseeing the bankruptcy case has issued an order, after notice to each affected party and a hearing, finding that the adoption of the amendment eliminating that optional form of benefit

is necessary to avoid a distress or involuntary termination of the plan before the plan sponsor emerges from bankruptcy (or before the bankruptcy case is otherwise completed).

- The Pension Benefit Guaranty Corporation (PBGC) has issued a determination that the plan does not have sufficient funds to cover all guaranteed benefits and that the adoption of the amendment eliminating that optional form of benefit is necessary to avoid a distress or involuntary termination of the plan before the plan sponsor emerges from bankruptcy (or before the bankruptcy case is otherwise completed).

The rationale for the new exception is that participants already are barred from receiving lump sums (or other prohibited form of payment) because of the Code Section 436 restriction on payments and can't get lump sums if there is a distress termination because the PBGC doesn't honor lump sum distribution elections under distress terminations. As a result, the amendment doesn't eliminate any valuable right of a participant.

The IRS asked for comments on the proposed regulations, and in particular wants to know whether affected plans should be required to offer a term certain and life annuity or 100% joint and survivor annuity option coincident with the elimination of the lump sum so that participants with substandard mortality have the opportunity to protect their survivors.

## Effective Date

The proposed regulations are set for a public hearing on Friday, August 24, 2012 and would apply to amendments both adopted and effective after August 31, 2012.

### Buck Can Help

- Identify approaches to plan management during periods of financial distress
- Compose written comments on the proposed regulations