

## Benefits Advisory and Compliance

### Bulletin

December 2010

November was a busy month for legislative and regulatory developments. After much speculation, the Internal Revenue Service (IRS) extended the deadline to amend plans to incorporate benefit restrictions under IRC Section 436 of the Internal Revenue Code (IRC). The IRS also published appreciated guidance on in-plan Roth conversions, which clarifies many open issues. The Department of Labor (DOL) published proposed regulations on qualified default investment alternatives (QDIAs), target date fund disclosures and the annual funding notice required by defined benefit plans. Finally, this month's *Bulletin* reviews two recently published deficit reduction proposals that could affect employer health and retirement plans.

### Legislative Developments

#### Deadline for Adopting Certain PPA Amendments Extended to 2011

The IRS announced an extension until the end of the 2011 plan year (December 31, 2011, for calendar-year plans) to amend qualified defined benefit plans to incorporate the following Pension Protection Act (PPA) requirements:

- Funding-based limits on benefits and benefit accruals (for single-employer plans) under 436
- Three-year vesting rules applicable to hybrid plans and other PPA-related hybrid plan requirements (e.g., rules regarding interest rates, age discrimination and conversion protection), but not the deadline to eliminate plan terms that expressly required whipsaw calculations for a lump sum

The IRS Notice also provides related relief from anti-cutback restrictions for 436 amendments. The Notice also noted that anti-cutback relief for Section 411(b)(5) (market rate of interest) amendments is expected if they are adopted by the new deadline, and the change reduces benefits "only to the extent necessary" to satisfy those sections.

**Insight:** Although the amendment deadline was extended, continued operational compliance with these requirements is still necessary. Plan sponsors that file determination letters over the next two cycles should be aware that the IRS will not consider 436 in applications submitted before February 1, 2012. However, the IRS will consider Sections 411(a)(13) (i.e., related to whipsaw and three-year vesting) and 411(b)(5) (related to age discrimination rules), including the final regulations

under those sections, for applications submitted after January 31, 2011. The Notice warns that filing a determination letter for the cycle starting February 1, 2011, may accelerate the deadline for the above amendments. Thus, sponsors of plans scheduled to be filed in the next cycle should carefully review the implications of filing early. In addition, plan sponsors that are in the process of preparing (or have prepared) a 436 amendment may want to consider adopting it this year to avoid forgetting to do so next year. However, plan sponsors may decide to wait until next year to amend their plan, since the IRS has indicated informally that it may issue a model 436 amendment.

A copy of the Notice (2010-77) can be found [here](#).

## What If SSLIO Provisions Don't Pass?

The Job Creation and Tax Cuts Act, introduced by Senator Max Baucus [D-MT], would exempt Social Security Level Income Options (SSLIOs) from benefit restrictions through 2011. Similar relief was passed in June, requiring plans subject to benefit restrictions in 2009 or 2010 to allow participants to retroactively elect an SSLIO. The act would make optional the mandatory retroactive relief passed in June.

**Insight:** While this legislation remains under discussion among key lawmakers, Congress has limited time to reach an agreement and approval on this. Sponsors of plans subject to benefit restrictions and SSLIOs that may be impacted by the relief passed in June may want to consult their Towers Watson actuary for advice.

A copy of the Job Creation and Tax Cuts Act can be found [here](#).

## Regulatory Developments

### In-Plan Roth Rollover Guidance — IRS Notice 2010-84

The IRS has issued Notice 2010-84, which contains guidance for IRC Section 401(k) and 403(b) plans regarding in-plan Roth rollovers. As discussed in the [October Benefits and Advisory Compliance Bulletin](#) in-plan Roth rollovers permit plan participants to roll over eligible rollover distributions made after September 27, 2010, from a non-Roth account to a designated Roth account in the same plan.

The Notice:

- Provides extended deadlines for related plan amendments
- Confirms that plan sponsors may amend a plan to add an in-plan Roth direct rollover feature without expanding other in-service distribution opportunities available to participants
- Addresses required changes to the Section 402(f) notice

The Notice also discusses tax and withholding issues, special rules for 2010 in-plan Roth rollovers and the purposes for which in-plan Roth direct rollovers are not treated as distributions.

**Insight:** Although many vendors seem ready to implement in-plan conversions, it may be too late to implement them in 2010. The Notice answers many of the questions raised by vendors and plan sponsors when in-plan conversion legislation was passed.

A copy of the Notice can be found *here*. [here](#).

## **DOL Proposes New Disclosure Rules for QDIAs and Target Date Funds**

Proposed amendments to the DOL's QDIA and participant-level fee disclosure regulations would require defined contribution plan participants and beneficiaries to be given additional information about QDIAs, target date and life-cycle funds, and similar investments.

**Insight:** Given the growing use of target date and life-cycle funds, plan administrators need to ensure that specific disclosures required under the regulations, once finalized, are provided to participants and beneficiaries. In addition, plan fiduciaries will need to make sure that participant notices are updated to include the additional disclosures described in the finalized regulations. Due to a flurry of regulatory activity related to these types of disclosures, including recent vendor and participant fee disclosure regulations, plan fiduciaries should consider updating their governance procedure and fee policy statements (see the [August](#) and [October Benefits Advisory and Compliance Bulletin](#)). This may also be an opportune time for plan sponsors to provide ERISA fiduciaries with refresher training on their roles and responsibilities through Towers Watson's Professional Development Institute.

A copy of the proposed regulations can be found [here](#).

## **Annual Funding Notice Regulations**

The DOL published proposed regulations that incorporate much of an earlier Field Assistance Bulletin (FAB), which provided interim guidance on a defined benefit plan sponsor requirement to distribute an annual funding notice. The DOL's proposed regulations clarify requirements with respect to content, style and format, manner of furnishing and persons entitled to receive the notice. The regulations also provide guidance on events that may have a material impact on plan liabilities or assets for that year. These events include open-window programs, plan mergers or spinoffs, plant shutdowns that trigger benefits and COLAs for retirees.

**Insight:** The FAB remains in effect until the DOL adopts final regulations or other funding notice guidance. The proposed regulations also contain a new model notice that differs in a number of minor respects from the previous model notice. In a Fact Sheet describing the proposed regulations, the DOL indicated that use of either model notice is permissible.

A link to the proposed regulations can be found [here](#); the FAB (2009-1) can be found [here](#), and the Fact Sheet can be found [here](#).

## Publications

### Deficit Reduction Proposals Have Significant Health and Retirement Plan Implications

Deficit reduction and tax reform are expected to be top priorities for Congress in the next term. Two recent bipartisan deficit reduction reports contain specific recommendations for employer-provided health benefits and retirement savings plan contributions, among other things (e.g., increasing Pension Benefit Guaranty Corporation premiums, and reforming Social Security and Medicare). While these proposals are in the early stages of discussion, the potential for significant changes to employer health and retirement programs is on the discussion table. With respect to health plans, one proposal would cap employer-sponsored health care and eliminate cafeteria plans. For retirement plans, one proposal would eliminate all tax expenditures for employer-provided retirement benefits, while the other would cap combined employer and employee contributions to retirement savings programs at \$20,000 annually.

A copy of the proposals, one commissioned by President Obama, the other commissioned by an organization led by former Senate majority leaders, can be found [here](#) and [here](#).

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