AMERICAN ACADEMY of ACTUARIES

Aug. 20, 2012

CC:PA:LPD:PR (Reg-113738-12)
Room 5203
Internal Revenue Service
PO Box 7604
Ben Franklin Station
Washington DC 20044

RE: Prohibited Payment Option Under Single-Employer Defined Benefit Plan of Plan Sponsor in Bankruptcy

To Whom It May Concern:

The American Academy of Actuaries'[1] Pension Committee requests your consideration of its comments and recommendations on proposed regulations concerning prohibited payment options[2] under single-employer defined benefit plans when the plan sponsor is in bankruptcy (REG-113738-12).

The committee commends the Department of the Treasury and the Internal Revenue Service (IRS) for proposing regulation to help preserve defined benefit plans that otherwise would be likely to undergo a distress or involuntary termination. The committee agrees that plan participants will be unable to realize the benefit of a single-sum option if maintaining the option leads to a distress or involuntary termination. Furthermore, such termination will subject participants to losses that potentially are far greater than the loss of the single-sum option. Nevertheless, the committee suggests certain participant rights could be protected better by modifying the regulation.

Additional Optional Forms

If a distress or involuntary termination is inevitable as a result of the single-sum option, participants with substandard mortality expectations will be unable to capture its economic benefit. The purpose of the regulation appears to be to avoid such terminations and to preserve plan benefits that do not force terminations. It seems reasonable to the committee, therefore, that the special value of the single-sum payment option for participants with substandard mortality expectations could be preserved in part by requiring the plan to provide an actuarially equivalent life annuity with a 15-year

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[1] The American Academy of Actuaries is a 17,000-member professional association whose mission is to serve the public and the U.S. actuarial profession. The Academy assists public policymakers on all levels by providing leadership, objective expertise, and actuarial advice on risk and financial security issues. The Academy also sets qualification, practice, and professionalism standards for actuaries in the United States

[2] Prohibited payment options under Internal Revenue Code (IRC) Sec.436(d)(5) include a full single-sum distribution as well as certain other optional payment forms, such as a partial lump sum payment with a residual annuity, installment payments, and Social Security level income annuities. Although our comments focus specifically on the full single-sum distribution option, they also generally would apply to the other prohibited payment forms under IRC Sec.436(d)(5).

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term certain or a 100 percent joint and survivor annuity. These additional optional forms would provide substantial survivor benefits without materially accelerating the plan's cash flow requirements.

Point-in-Time Certifications

The committee notes that bankruptcy proceedings are of uncertain length. Some well-planned proceedings may take as little as a few months, but large reorganizations often take several years. Some of the four conditions specified in the proposed regulation could change over time. In particular:

- As the regulation is currently drafted, it appears that an amendment could be adopted early in a bankruptcy proceeding when the adjusted funding target attainment percentage (AFTAP) is less than 100 percent. The enrolled actuary certifies a plan's AFTAP annually. If the bankruptcy is not resolved before the next annual certification, the AFTAP may have improved and could be 100 percent or greater.
- If the subsequent AFTAP indicates a fully funded plan on that basis (100 percent or greater) while bankruptcy proceedings continue, IRC Sec.436(d)(2) would no longer prohibit a single-sum payment.
- The plan's financial position may improve enough that the plan would be sufficient for guaranteed benefits within the meaning of Sec.4041(d)(2) of ERISA.

If these changes in the plan's financial status take place while the sponsor is still in bankruptcy there is no longer any justification for the removal of the single-sum optional form.

These point-in-time issues could be resolved by requiring that if the AFTAP equals or exceeds 100 percent **and** the plan becomes sufficient for guaranteed benefits before the sponsor's exit from bankruptcy, then the amendment would be rescinded, retroactive for annuity starting dates on or after the later of those two certifications.

Partial Lump Sum Payments

In cases in which plans are substantially underfunded, an amendment as proposed under this regulation providing for the total elimination of a single-sum option is likely to be the only way to avoid a distress or involuntary termination. The committee envisions that some situations may not fit this mold. Marginal situations might develop in which the single-sum payment could be modified to a partial lump sum payment (e.g., 25 percent) with the balance of the benefit paid as an immediate or deferred lifetime annuity under one of the other options available under the plan. This would be far less disruptive for those with plans to retire in the near future.

Provided that the court and the PBGC believe partial lump sums could be provided to participants without triggering a distress or involuntary termination, the committee suggests that the regulation be amended to permit partial lump sums to the extent not already available under the terms of the plan.

Participant Advocacy

The third condition listed in the proposed regulation requires the court to hold a hearing, and provide notice to each affected party. The notice and hearing would provide participants the opportunity to provide relevant evidence and reasoning for objecting to the elimination of the optional form.

The fourth condition provides that the PBGC has determined that the plan is insufficient for guaranteed benefits, and that elimination of the optional form is necessary to avoid a distress or involuntary termination. We observe that if the plan is insufficient, it is often beneficial to the PBGC to avoid a distress or involuntary termination (unless efforts to delay termination fail and the plan is ultimately in worse financial condition). In many cases, it may be quite clear that elimination of the optional form is necessary. Yet, cases may develop where the need is marginal.

In these marginal cases, we are concerned that the rights of participants should be protected. We urge you to address this issue and enhance the protection of these benefits in cases in which the need is considered marginal. One possibility is to expand the role of the Participant and Plan Sponsor Advocate (created by the Moving Ahead for Progress in the 21st Century Act) to encompass plans that are not yet terminated and are considering an amendment under this regulation.

Conclusion

The proposed regulation is a significant step forward in preserving certain pension plans and avoiding distress or involuntary terminations. We appreciate the Treasury Department and the IRS giving consideration to these comments. Please contact David Goldfarb, the Academy's pension policy analyst (202-785-7868, goldfarb@actuary.org) if you have any questions or comments.

Respectfully submitted,

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