AMERICAN ACADEMY of ACTUARIES

February 05, 2013

Internal Revenue Service
ATTN: Ms. Diane Bloom
TE/GE: SE:T:EP:RA:T:G2
NCA-610-16
1111 Constitution Ave. NW
Washington DC 20224-0002

RE: IRS Notice 2012-46 - Notice requirements under section 101(j) of ERISA for funding-related benefit limitations in single-employer defined benefit pension plans

To Whom It May Concern:

The American Academy of Actuaries[1] Pension Committee respectfully requests your consideration of its comments regarding the notice requirements under section 101(j) of ERISA promulgated in Notice 2012-46. The Committee applauds Notice 2012-46's common-sense approach of only requiring participants who could be directly affected by a benefit restriction to be notified of that restriction. Such an approach greatly simplifies compliance in the relatively common situation where only a small group of participants could be affected by a restriction (e.g., an acquired group), and generally avoids confusing participants (e.g., current retirees) with information that has no effect on their rights under the plan.

We respond first to the IRS's specific request for comments on whether a section 101(j) notice should be required to be provided at additional dates or to additional participants. We also have several additional comments relating to unpredictable contingent event benefits (UCEBs), as well as clarifications we believe would be helpful.

***Should notices be required when a limitation ceases to apply?***

We do not believe there should be a notice required when restrictions cease to apply. We expect that many plan sponsors will of their own accord communicate the lifting of restrictions to participants. Notice 2012-46 does not require a notice when benefit restrictions are lifted unless restrictions on accelerated payment forms were in effect and the plan automatically provides the opportunity to make a new election to participants whose choices were restricted at their original annuity starting date (ASD). We believe this requirement strikes the proper balance between advising participants who have an immediate need to know of the change, but not being required to advise others who are not immediately affected and who will be made aware of the change at a point in the future when it is relevant to a decision they are making.

[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.

Specifically:

- If a restriction is being replaced with a different restriction (e.g., a plan that pays full lump sums moves from being at least 60% but less than 80% funded to being less than 60% funded, or vice versa) the participant will naturally be advised of the lifting of the old restriction in the notice explaining the new restriction.

- With respect to accrual restrictions, participants will be indirectly made aware of the lifting of restrictions when they receive their triennial benefit statement or when they request an accrued benefit statement. A statement could also be added to the Annual Funding Notice that accruals have resumed, along with the date they resumed.

- Participants are already told in the initial 101(j) notice that the benefit restriction is temporary (i.e., that it will only remain in effect until plan funding improves). In addition, contact information for a plan representative who can answer questions is provided in the original notice. Thus a participant interested in a restricted distribution knows who to ask whether the restriction is still in effect and a participant who requests a benefit election package will find out through that process whether any restrictions apply. Similarly, participants have a contact person who at any time can advise them as to whether accruals have resumed.

***Should periodic notices be required when benefit restrictions continue?***

We do not believe such a notice is needed to protect plan participants for reasons similar to those above (i.e., participants have already been advised that the restrictions will remain in place until the plan's funding improves, a contact person has been offered to answer questions, the continued operation of accrual restrictions will become known to participants through periodic benefit statements, and any participant seeking to begin benefits will be reminded again of the restrictions in effect, and their ability to defer benefit commencement, through the benefit election process).

If IRS and Treasury believe such periodic re-notification is important, we suggest it be done via a section in the Annual Funding Notice (similar to the section that advises participants that the plan is at risk).

***Should notices be required for new participants, beneficiaries or alternate payees?***

New participants will typically not be vested or eligible to begin benefits for a number of years. With respect to limitations on benefit accruals, they will be advised of the benefits they are actually accruing through triennial benefit statements (or benefit statements at the request of the participant) or through disclosure on the Annual Funding Notice. Should they become vested, terminate and seek benefit commencement, they will become aware of the options available and their right to defer commencement through the option election process, and the same will hold true for alternate payees under qualified domestic relations orders (QDROs). As a result, we do not believe there is a need to periodically send 101(j) notices to new participants, beneficiaries and alternate payees if disclosure is made on the Annual Funding Notice. If IRS and Treasury believe that direct notification of new participants is important, they could be notified via an insert to the summary plan description (SPD) they are provided.

***Earlier Notice Required for Certain Unpredictable Contingent Event Benefits (UCEBs)***

Notice 2012-46 imposes an earlier deadline for some notices related to unpredictable contingent event benefits (UCEBs) than the statutory deadline. We believe that the Notice should not accelerate the statutory deadline, and we also have specific concerns as to whether it is possible for plan sponsors to comply with the requirements of Notice 2012-46 in many cases.

The Notice first states (in Q&A 3) the general rule that, for a plan that was at least 60% funded based on the AFTAP or presumed AFTAP, a notice is required within 30 days after the date the unpredictable contingent event (UCE) occurs that gives rise to UCEBs that will cause the plan to drop below 60% funded. However, the Notice then goes on to provide (in Q&A 6) that a notice for a UCEB restriction if the plan was at least 60% funded pre-UCE is due no later than the latest of:

- The date a notice of a plant closing under the Worker Adjustment and Retraining Notification Act (WARN) must be provided;
- 60 days before the occurrence of the UCE;
- 30 days after the employer makes the decision that causes the UCE to occur.

This rule essentially renders the general rule in Q&A 3 meaningless, and accelerates the notice when a plan is at least 60% funded pre-UCE. In many cases this rule will cause the notice to be due before the UCE occurs, before it is administratively feasible to deliver notices, and even before it is reasonably possible to determine that the UCEBs will be restricted.

Consider a situation in which the employer knows of a UCE that would under the terms of the plan trigger UCEBs. To comply with these rules, the plan sponsor would need to know, possibly well in advance of the UCE, not only that the UCE precipitating the payment of UCEBs will occur, but also the participants who will be affected and whether or not the combination of benefit enhancements and gains and losses on underlying plan obligations caused by the event will cause the AFTAP or presumed AFTAP to drop below 60%. For many UCEs this may be very difficult or impossible. For example:

- An employer announces an upcoming reduction in force, which may be wholly involuntary, or which may be involuntary only to the extent needed to hit targets after volunteers under a severance program (with severance payments not related to the qualified plan) are taken into account. It may be some time after the employer announces this program that the plan sponsor would be able to determine whether the event will cause the plan’s AFTAP to drop below 60% and cause benefit restrictions.

- An employer announces that a facility is moving. Participants can either move to the new facility, or be treated as involuntarily terminated, triggering UCEBs under plan terms. Although the employer may know well in advance that the facility is moving, the employer may not know until after the facility closes the specific effect on the AFTAP.

- For plan sponsors who have funded their plans to 60% to avoid accrual restrictions with little or no cushion, even small numbers of events triggering UCEBs will drop the plan below 60% funded and prevent the UCEBs from taking effect. Such events may be the result of independent decisions made by managers and not known to senior management or the plan administrator until after the fact.

Examples are:

- A small number of layoffs in one location caused by fluctuating demand for the product produced at that location, in a plan which provides continued accruals for some period while on lay-off;
- An involuntary termination of an employee (e.g., for cause) in a plan that provides that service is "bridged" to early retirement eligibility upon involuntary termination close to early retirement eligibility.

In cases where WARN notices are given, it is more likely that the plan sponsor could determine whether UCEBs are likely to be restricted (as they presumably largely know which employees will be terminated when the WARN notice is given), although that may not be true in every case (e.g., if some participants may move to other facilities). If this rule is retained we suggest it be limited to cases in which a WARN notice is provided, and that the plan sponsor be allowed to state that UCEBs *may* be restricted if this cannot be determined with certainty when the notice is provided.

***Clarifications Needed***

Range Certifications - The Notice never mentions range certifications, but we believe that the general rule that a plan with a range certification in place is treated as though it has a certified AFTAP equal to the low end of the range applies, and that therefore any reference to an AFTAP certification in the Notice includes a range certification. It would be helpful to have that confirmed.

Effective Date - Notice 2012-46 was effective on November 1, 2012 (the first day of the first month that is 90 days after it is published in the Internal Revenue Bulletin). It is not clear what this means with respect to the new requirements for UCEBs. Does it apply to UCEBs if the UCE triggering the UCEB occurs on or after November 1, if the notice would otherwise be due on or after November 1, or some other approach? We recommend that it apply only to situations in which both (a) the UCE giving rise to the restricted UCEBs occurs on or after November 1; and (b) the notice (reflecting the new requirements in Notice 2012-46) would be due on or after November 1, 2012.

Deadline for Furnishing Notices - We request confirmation that the "mailbox rule" applies; that is, a notice will be treated as "furnished" or "provided" on a timely basis if it is postmarked no later than the due date (or delivered electronically no later than the due date).

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The Pension Committee appreciates the opportunity to provide input to the IRS on this important guidance. We would be happy to discuss any of these items with you at your convenience. Please contact David Goldfarb, the Academy's pension policy analyst (202-223-8196, goldfarb@actuary.org) if you have any questions or would like to discuss these items further.

Sincerely,

Michael Pollack, FSA, MAAA, EA, FCA
Chairperson, Pension Committee
American Academy of Actuaries