CHEIRON CLIENT ADVISORY

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Deadline Nears for Multiemployer Plans to Submit Determination Letter Applications

The deadline is approaching for calendar year multiemployer plans to file applications for a determination letter to assure compliance with plan qualification requirements. It may be advantageous for many plans to seek a determination letter because it provides assurance that the plan document satisfies the requirements for tax-exempt status.

In 2007 the IRS modified its determination letter program by dividing the universe of qualified pension plans into five parts and assigning each of the parts to one year in a five-year cycle in which it could request a determination letter. Multiemployer plans generally are assigned to "Cycle D" – the period from February 1, 2009 to January 31, 2010 – with the exception that for this cycle only, if a plan year ends after February 1, 2010, the plan may elect to file in "Cycle E" instead of "Cycle D."

Calendar year multiemployer plans must file their applications by January 31, 2010. Only if a plan files within its assigned Cycle will it be within the EGTRRA remedial amendment period. Otherwise, any problems will need to be resolved through the IRS compliance resolution process.

The application cannot be filed until the plan complies with the requirements for providing notice to interested parties. The accompanying sidebar on the next page highlights those requirements as set forth in Rev. Procedure 2009-6.

***Determination Letter**, continued on page 2*

Normal Retirement Age Regs Effective for Cycle D Plans

In 2007, IRS published a regulation allowing a pension plan to begin distributions after a participant reached normal retirement age even though he or she was still working. The regulation also prohibited a plan from defining normal retirement age as an "age that is earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed." The regulation set age 62 as a safe harbor and provides that IRS will give deference to a good faith determination by plan trustees that the typical retirement age for the industry in which the covered workforce is employed is 55 or older. Normal retirement ages earlier than 55 are presumed invalid.

Although for multiemployer plans, the regulation's effective date may be after the 2009 plan year, IRS has announced that it will examine plans

***Retirement Age Regs**, continued on page 4*

In This Client Advisory

Notice requirements for determination letter applications

Following are key notice requirements for determination letter applications:

(1) A brief description identifying the class or classes of interested parties to whom the notice is addressed (*e.g.*, all present employees of the employer, all present employees eligible to participate);

(2) The name of the plan, the plan identification number, and the name of the plan administrator;

(3) The name and taxpayer identification number of the applicant for a determination;

(4) That an application for a determination as to the qualified status of the plan is to be made to the Service at the address in section 6.17*, and stating whether the application relates to an initial qualification, a plan amendment, termination, or a partial termination;

(5) A description of the class of employees eligible to participate under the plan;

(6) Whether or not the Service has issued a previous determination as to the qualified status of the plan;

(7) A statement that any person to whom the notice is addressed is entitled to submit, or request the Department of Labor to submit, to Employee Plans ("EP") Determinations, a comment on the question of whether the plan meets the requirements of §401 or 403(a); that two or more such persons may join in a single comment or request; and that if such persons request the Department of Labor to submit a comment and the Department of Labor declines to do so with respect to one or more matters raised in the request, the persons may still submit a comment to EP Determinations with respect to the matters on which the Department declines to comment. The Pension Benefit Guaranty Corporation (PBGC) may also submit comments. In every instance where there is either a final adverse termination or a distress termination, the Service formally notifies the PBGC for comments;

(8) The specific dates by which a comment to EP Determinations or a request to the Department of Labor must be received in order to preserve the right of comment (see section 17* above);

(9) The number of interested parties needed in order for the Department of Labor to comment; and

(10) Except to the extent that the additional informational material required to be made available by sections 18.05 through 18.09* are included in the notice, a description of a reasonable procedure whereby such additional informational material will be available to interested parties (see section 18.04*). (Examples of notices setting forth the above information, in a case in which the additional information required by sections 18.05 through 18.09* will be made available at places accessible to the interested parties, are set forth in the Exhibit attached to this revenue procedure.) ■

**References to sections in the list are references to sections in Rev. Proc. 2009-6.*

***Determination Letter**, continued from page 1*

The application must include a restated plan document (or restated working plan document) and copies of all interim amendments. The service will review the plan for compliance with the EGTRRA requirements and those Pension Protection Act provisions for which the IRS has issued guidance. Notice 2008-108 contains a list of all provisions that must be included in the plan. A link to Notice 2008-108 on the IRS website can be found on Cheiron's website under "determination letters."

Because of the many interim changes that plans were required to implement prior to this determination letter cycle, fund counsel should review all amendments since 2001 to make sure they comply with applicable guidance. Plans should be aware that the required amendments cover not only changes in the statute but also changes as a result of the Supreme Court's ruling in the *Heinz* case that a change in the suspension of benefit rules was subject to the anti-cutback requirements. IRS issued guidance on how

***Determination Letter**, continued on page 3*

Trustees May Wish to Defer Funding Improvement or Rehabilitation Plan Changes in Current Environment

PPA requires that the Trustees update their Funding Improvement Plan ("FIP") or Rehabilitation Plan ("RP") each year. This requirement applies in the 2009 plan year for plans that were endangered or critical in their 2008 plan year and did not elect to freeze their status under the Worker, Retiree, and Employer Recovery Act of 2008. Because of the drop in the value of assets, revisions could be justified.

However, it seems likely that Congress will act to provide some relief to plans this year, and, any increases in contribution rates would not be imposed on employers who signed collective bargaining agreements that complied with 2008 FIPs and RPs until the expiration of those agreements. For these reasons, and the likelihood that the financial markets and other factors affecting the financial condition of the plan will change, Trustees may well want to consider not making any changes in the FIP or RP for 2009. ■

***Determination Letter**, continued from page 2*

plans could comply with that ruling. Also, IRS issued several pieces of guidance in 2006 and 2007 related to PPA requirements that were effective in or before the 2009 plan year.

Of particular importance are the final regulations published on benefit limits. These regulations make it clear that only the dollar limit applies to multiemployer plans (not the 100% of compensation limit). However, benefits of a participant from a multiemployer plan are combined with the benefits from any other defined benefit plan maintained by an employer that also contributes to the multiemployer plan. The result is that multiemployer plan participants that moved into supervisory or management positions should be considered carefully. The law allows multiemployer plans to adopt a provision that only those benefits accrued while working for a specific employer will be combined with benefits from that employer's non-multiemployer defined benefit plan. This may be important to individuals who began their careers as bargaining unit employees and then moved into union positions where they became covered by the union single-employer plan, moved into a management position at another participating company, or became owners of their own participating company.

The IRS will consider any PPA provisions for which it has issued guidance before October 1, 2008, except if the effective date of those provisions is 2010 or later. In addition, for plans submitted in the current cycle, the Service will not require amendments under the HEROs act or amendments for provisions that go into effect in 2010 or later.

Plans applying for a determination letter must submit a Form 5300, a cover letter describing any amendments made since the last determination letter and their effect on the plan, significant amounts of data, a restated plan or working copy of a restated plan and copies of any amendments adopted since the last determination letter. Because of the laborious nature of the process of assembling the necessary materials to apply for a determination letter, plan administrators should familiarize themselves with the data and documents required and allow sufficient time to provide this material to whoever is going to make the application on behalf of the plan. ■

Trustee-to-Trustee Transfers for Non-Spouse Beneficiaries may be Advisable Prior to WRERA-Mandated Deadline

PPA provided that a plan may allow a non-spouse beneficiary to elect a transfer of the deceased participant's interest to an eligible retirement plan. This avoids the need for the plan to withhold taxes on the payment and for the non-spouse beneficiary to decide to either front the taxes withheld if he or she decides to roll over the entire distribution amount, or include the withheld amounts in income in their tax return. But the Worker, Retiree, and Employer Recovery Act of 2008 ("WRERA") went one step further and *required* plans to allow such rollovers.

WRERA's effective date is plan years beginning in 2010, so IRS will not examine the plan for compliance with the WRERA provision as part of the determination process. Nevertheless, it might be more efficient to include the non-spousal rollover provision in the restatement submitted to IRS to avoid the need to go through another amendment process during the 2010 plan year. ■

***Retirement Age Regs**, continued from page 1*

for compliance with the regulation as part of the determination letter process. In a follow-up piece granting transitional relief, the IRS observed that a normal retirement age defined by reference to a stated number of years of service would violate the law. Thus, a plan that provides that the normal retirement age is the lesser of 30 years of service or 65 and five years of service would need to be amended.

At this point it is unclear whether defining the normal retirement age as the later of 30 years of service and a specified age typical of retirement in the industry or age 65 and five years of service would be acceptable. In any event, plans that have definitions of normal retirement age based solely on years of service will need to be amended in order to get a favorable determination letter. The IRS regulation provides relief from the anti-cutback rules for raising the normal retirement age, but requires that the plan still provide an unreduced early retirement benefit to participants who satisfy the service requirement. Thus, the only effect of the amendment is to prevent in-service distributions to such participants, and apparently to require plans to stop such distributions for employees who are still working in covered service.

In addition to plans that define normal retirement age on the basis of years of service, other plans may define normal retirement age as an age less than 62. Trustees for such plans will need to determine if such age is a typical retirement age for the industry in which the covered participants work. This could provide a challenge if a plan covers participants in more than one industry. It is too early to determine how the IRS will enforce the standard that the Trustees make a good faith determination. Thus, Trustees, in consultation with fund counsel, will need to decide what course of action to pursue and whether to change the plan's normal retirement age to age 62 before submitting an application for a determination letter. ■

Cheiron is a full-service actuarial consulting firm assisting Taft-Hartley, public sector and corporate plan sponsors manage their benefit plans proactively to achieve strategic objectives and satisfy the interests of plan participants and beneficiaries. To discuss how Cheiron can help you meet your technical and strategic needs, please contact your Cheiron consultant, or request to speak to one by emailing your request to info@cheiron.us.

The issues presented in this Advisory do not constitute legal advice. Please consult with your own tax and legal counsel when evaluating their impact on your situation.