Client Advisory

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CHEIRON

ARTICLES IN THIS CLIENT ADVISORY:

BENEFIT SUSPENSIONS UNDER THE MULTIEMPLOYER REFORM ACT

Perhaps the most controversial aspect of the Multiemployer Pension Reform Act of 2014 (MPRA) is the suspension of benefit provisions allowing Trustees to suspend benefit payments[1] for retirees and beneficiaries in a plan projected to become insolvent. This update examines the conditions for making such suspensions and the procedure that Trustees must follow before putting them into effect. The process is lengthy and can take more than one year before any benefit reductions are actually made.

SUMMARY OF PROCEDURE FOR SUSPENDING BENEFITS

The process for implementing benefit suspensions takes place in several steps. Each of these steps contains additional requirements that must be satisfied before a plan may implement any suspension of benefits.

1. As part of its annual certification, the plan actuary certifies that the plan is in critical and declining status.
2. The Trustees determine that they have taken all reasonable measures to avoid insolvency, and design a program of proposed benefit suspensions.
3. If the plan has over 10,000 participants, the Trustees appoint a person in payment status to represent the interests of retirees, beneficiaries, and terminated vested participants at least 60 days prior to applying for approval to suspend benefits.

[1] *While the law uses the term "suspensions" (presumably because a reduction can be restored), a suspension is really a permanent or temporary reduction in benefits that will not be made up at a later point.*

4. The Trustees provide notice of their proposal to participants and beneficiaries, contributing employers, and unions and apply to the Secretary of the Treasury for approval of the benefit suspensions. The notice is provided concurrently with the application.
5. Within 30 days, the Secretary of the Treasury publishes a notice in the Federal Register soliciting comments on the Trustees' proposed suspensions from interested parties.
6. Within 225 days of receiving the application from the Trustees, the Secretary of the Treasury, in consultation with the Pension Benefit Guaranty Corporation (PBGC) and the Department of Labor (DOL), determines if the Trustees' plan is eligible to institute suspensions and if the proposed suspension satisfies the conditions and limitations of the law. Failure to reject the application within 225 days is deemed to be approval.
7. Within 30 days after approval of the application, the Secretary of the Treasury administers a vote by plan participants and beneficiaries on the suspension. If a majority of the votes reject the proposed suspension, it may not be put into effect, except as provided in the next step.
8. Within 14 days of a vote by participants and beneficiaries rejecting the proposed suspension of benefits, the Secretary of the Treasury determines if the plan is a systematically important plan, i.e., the present value of PBGC financial assistance to the plan as a result of its insolvency will equal or exceed $1 billion.
9. Within 90 days of a vote to reject the suspension, if the Secretary of the Treasury determines that the plan is systematically important, then it must either permit the Trustees' proposed benefit suspension to be put into effect or provide an alternative set of suspensions projected to maintain plan solvency.
10. Within 30 days after the Secretary of the Treasury's determination that the plan is systematically important, the PBGC's Participant and Plan Sponsor Advocate may submit recommendations to the Secretary of the Treasury with respect to the suspension or any revisions.
11. The Secretary of the Treasury issues a final order providing for suspension of benefits within 7 days after an approval vote, or, after a disapproval vote, at a time sufficient to allow implementation prior to the end of the 90-day period for systematically important plans.

Participants or beneficiaries aggrieved by a final decision suspending benefits may seek review of the decision in Court but may not bring an action for breach of fiduciary duty. A plan sponsor may also bring an action in court challenging denial of an application for suspension of benefits.

ACTUARIAL CERTIFICATION

The law creates a new zone status of "critical and declining," which is part of the annual certification by the plan actuary. The plan will be in critical and declining status if it meets any one of the four (4) tests for critical status and the plan is projected to become unable to pay benefits when due in the current plan year or any of the succeeding 14 plan years (19 plan years if the ratio of inactive participants to active participants is more than two to one, or if the funded ratio is less than 80%).

The determination of whether a plan is critical and declining will first be with the actuarial certification for 2015, which is due on March 31, 2015 for calendar year plans. Therefore, the proposal to suspend benefits can be made sometime in Spring 2015.

BENEFIT SUSPENSION

Benefits that are subject to suspension are all benefits under the plan, including benefits in pay status, except benefits for disabled participants and benefits payable to participants who have attained age 80. For participants who have attained age 75, but not age 80, the amount that can be suspended is reduced based on their age. The suspensions may be temporary or permanent. The conditions that must be satisfied before the Trustees can implement benefit suspensions are:

- All reasonable measures to avoid insolvency short of the proposed benefit suspension have been taken;
- The plan actuary certifies that the proposed benefit suspension will allow the pension plan to avoid insolvency;
- Absent the proposed suspensions, the pension plan is projected to become insolvent.

The all "reasonable measures" test is the same test under prior law for a plan in critical status that several plans have used. This allows the Trustees to stop proposing contribution increases as part of a revised rehabilitation plan even though the pension plan will become insolvent. This test assures that benefit suspensions will not be used to avoid insolvency unless all other avenues have been exhausted. The second and third tests are closely related. The second test requires the actuary to certify that the benefit suspensions proposed by the Trustees are sufficient to keep the plan going without the need for PBGC assistance, while the third test simply makes sure that the benefit suspensions are, in fact, needed to avoid insolvency.

In addition, the Trustees must create and maintain a written record that the plan is still projected to become insolvent unless benefits are suspended, although all reasonable measures to avoid insolvency have been taken (and continue to be taken during the period of the benefit suspensions).

Cheiron Observation: A condition of eligibility for benefit suspensions is that the plan has exhausted all reasonable measures short of suspensions to preserve insolvency. Therefore, early retirement subsidies and perhaps even the right to retire early, will probably have been eliminated from the plan, and accruals may well have been reduced significantly, leaving reductions of benefits in pay status as the primary or sole means to preserve plan solvency in most cases.

DESIGNING THE PROGRAM OF BENEFIT SUSPENSIONS

Although the law authorizes the Trustees to propose the schedule of benefit suspensions, it provides guidelines on what factors to consider and places limitations on the extent of the benefit reductions.

The plan is not permitted to suspend any portion of the benefits payable to disabled participants or to participants 80 or older. Benefit reductions are phased-out for participants between the ages of 75 and 80. In no event may benefit payments be reduced to a level below 110% of the PBGC guarantee amount. The table which follows shows the amount of pension that would remain to be paid by the plan, after the benefits are cut to 100% of the PBGC guarantee. The guarantee depends upon the amount of service and size of the monthly pension.

Amount of Pension After Cut to 110% of PBGC Guaranty

Monthly Pension Before Cut	5	10	15	20	25	30	35	40
$ 5,000	4%	8%	12%	16%	20%	24%	28%	31%
$ 4,500	4%	9%	13%	17%	22%	26%	31%	35%
$ 4,000	5%	10%	15%	20%	25%	29%	34%	39%
$ 3,500	6%	11%	17%	22%	28%	34%	39%	45%
$ 3,000	7%	13%	20%	26%	33%	39%	46%	52%
$ 2,500	8%	16%	24%	31%	39%	47%	55%	63%
$ 2,000	10%	20%	29%	39%	49%	59%	69%	79%
$ 1,500	13%	26%	39%	52%	66%	79%	90%	91%
$ 1,000	20%	39%	59%	79%	90%	92%	93%	95%
$ 500	39%	79%	92%	95%	98%	100%	100%	100%

Years of Service

Cheiron Observation: Some plans headed for insolvency have benefit levels that are already at or below the 110% threshold, so they will be unable to suspend benefits. These plans that do not qualify for suspensions may want to consider a partition instead. Also, a plan that can suspend benefits will need to have records to determine the PBGC guarantee amount for each participant. For participants who have been in pay status for many years, determining the 110% threshold may thus pose a challenge.

Benefit reductions must be equitably distributed among all participants and beneficiaries. The factors the Trustees may consider in devising the schedule of benefit suspensions are:

- Age and life expectancy
- Length of time in pay status
- Amount of benefit (has allocation requirements)
- Type of benefit (survivor, normal retiree, early retiree)
- Extent to which participants are receiving a subsidized benefit
- Extent to which participants have received post-retirement increases
- History of benefit increases and reductions

- Years to retirement for active employees
- Any discrepancies between active and retiree benefits
- Extent to which active participants are likely to withdraw support for the plan (accelerating employer withdrawals, which would increase need for additional reductions for other participants)
- Benefits earned by employers who did not pay their full withdrawal liability[2]

APPLICATION TO TREASURY AND NOTICE

Once the Trustees have devised a proposal for benefit suspensions, they must submit it for approval and concurrently provide notice to such plan participants and beneficiaries who may be contacted by reasonable efforts, contributing employers, and involved unions. The Department of the Treasury must post the suspension application on its website. The notice must be sufficient to allow participants and beneficiaries to understand the nature and effect of the suspensions, including individualized estimates of the effect on each participant or beneficiary. The notice must also state that:

- an application for approval has been filed with the Secretary of the Treasury;
- the application will be available on the Department of the Treasury website;
- comments will be accepted;
- information on how to contact the Secretary of the Treasury;
- participant rights and remedies; and,
- if a retiree representative has been appointed, the identity of the representative, whether he or she is a plan trustee, and how to contact him or her.

The notice must be in such form and manner as provided by the Secretary of the Treasury in guidance (in consultation with the PBGC and DOL). The law directs the Secretary of the Treasury, in consultation with PBGC and the DOL, to develop a model notice that can be used to satisfy the notice requirement.

REVIEW BY TREASURY

After receiving the application, publishing it on its website, and soliciting comments, the Secretary of the Treasury will review the proposed benefit suspensions, in consultation with PBGC and the DOL, to determine if the plan satisfies the conditions for eligibility for suspension and if the proposed suspensions satisfy the limitations and standards contained in the law. The Secretary of the Treasury must accept the Trustees' determinations unless it concludes, in consultation with PBGC and the DOL, that they were clearly erroneous. The Secretary of the Treasury has 225 days to reject the application. If it fails to act by the end of that period, the application is deemed approved. If the application is rejected, the Secretary of

[2]There is a special provision that applies only to benefits attributable to service with an employer that withdrew before the Act was passed, paid its withdrawal liability, and set up a single-employer plan that would make up any benefits lost due to plan insolvency, which seems to apply to only one plan and one employer.

the Treasury will provide a notice detailing the reasons for rejection. The Trustees may submit a new suspension application for approval.

REFERENDUM BY PARTICIPANTS AND BENEFICIARIES

The Secretary of the Treasury must administer a vote by participants and beneficiaries within 30 days after it approves an application for suspension of benefits. The ballots furnished to the voters must include statements:

- from the plan sponsor in support of the suspension;
- in opposition to the suspension compiled from comments received;
- that the suspension has been approved by the Secretary of the Treasury, in consultation with the PBGC and the DOL;
- that the plan sponsor has determined the plan will become insolvent unless the suspension takes effect;
- that insolvency of the plan could result in benefits lower than benefits paid under the suspension; and,
- that insolvency of the Pension Benefit Guaranty Corporation would result in benefits lower than benefits paid in the case of plan insolvency.

If a majority of the voters do not reject the suspension, the Treasury then issues a final authorization for the suspension within 7 days of the result of the vote. If the suspension proposal is rejected and the plan is a systematically important plan, additional procedures follow to either allow the proposed suspensions or replace it with another set of suspensions developed by the Secretary of the Treasury after consultation with PBGC and DOL. Not later than 30 days after the determination that the plan is systemically important, the PBGC's Participant and Plan Sponsor Advocate may submit recommendations to the Secretary of the Treasury with respect to the suspension or any revisions to the suspensions.

Cheiron Observation: The law is clear that it takes a majority of all participants and beneficiaries to vote to reject the suspension. Therefore, not voting would essentially be a vote in favor of the suspension.

REQUEST FOR COMMENTS BY TREASURY

On February 18, 2015, the Department of the Treasury published a formal request for information (RFI) with respect to the implementation of suspension of benefit provisions of MPRA. Comments were to be submitted by April 6, 2015. The RFI specifically asked for comments on a number of questions of practical concern about the entire process.[3] The comments will be taken into account in providing future guidance under the suspension of benefit provisions. The RFI clarified that a plan sponsor should not submit an application for a suspension of benefits until a date specified in the future guidance.

[3] *See the Cheiron Pension Alert dated February 19, 2015.*

SUMMARY

As outlined above, the steps involved in making a suspension of benefits under MPRA are many and may well depend on how the Secretary of the Treasury, PBGC, and DOL interpret the provisions. The law required that guidance be issued within 180 days of enactment. It is likely that the guidance will specify information that needs to be submitted to justify the suspension and to allow the government agencies to gauge the reasonableness of the information submitted.

Cheiron Observation: Plans considering a suspension of benefits under MPRA should wait for the guidance on how to make a submission. Otherwise, they risk further delay on procedural grounds if the government simply rejects the application as not consistent with procedures.

Cheiron pension consultants can assist you in evaluating whether a plan is a candidate for the suspension of benefits and other considerations under the law.

IRS CHANGES TO DETERMINATION LETTER PROCESSING

In Announcement 2015-01, the Internal Revenue Service (IRS) described changes that were being made to the processing of determination letter requests for pension, profit-sharing, or other plans of deferred compensation. Plan sponsors need to be aware of these changes when requesting a determination letter upon the initial or continued tax-favored status of plans.

BACKGROUND

In general, plan sponsors that adopt pension, profit-sharing, or other plans of deferred compensation want those plans to satisfy the IRS requirements to be considered "qualified plans" and thus receive favorable tax treatment. The favorable tax treatment includes deferral of income for plan participants until benefits are distributed, tax exemption of the plan trust so that investment income is not taxed, and deductions allowed for contributions made to the plan. Note that the income deferral for employees is important for all types of plans, but the tax deduction may not matter for government plans, or plans maintained by tax exempt entities.

In order to ensure that a plan satisfies the qualification rules, a plan sponsor may request a determination from the IRS that the plan is a qualified plan.

Aside from submitting the necessary documents and going to the expense of preparing the request, the application for a determination letter must be accompanied by a “user fee” to cover the cost to the IRS of reviewing the application.[1] Requesting a determination letter is voluntary, but the adverse tax consequences of not being a qualified plan are potentially much greater than the cost of obtaining a favorable letter, including immediate taxation of participants’ vested interests and denial of a tax deduction for employer contributions. Therefore, plan sponsors generally apply to the IRS for a determination that the plan meets the qualification requirements. Once a favorable determination letter is issued by the IRS, the plan sponsor may rely upon it for getting the favorable tax treatment accorded to a qualified plan.[2]

Under current procedural rules for individually designed plans,[3] a favorable determination letter generally expires at the end of five (5) years. Each 5-year period is regarded as a cycle, and there are five cycles (A to E). For an individually designed plan, the applicable cycle is generally based upon the last digit of the employer identification number of the plan sponsor. For example, if the last digit is 5 or 0, the plan is in Cycle E. However, special rules apply to certain types of plans regardless of the last digit of the employer identification number.

A governmental plan is generally in Cycle C, but was allowed to elect to be in Cycle E for the first set of cycles, and also can elect to be in Cycle E for the second set of cycles (which ends on January 31, 2016). A multiemployer plan is in Cycle B.

Because of frequent changes to the law and new regulations being issued, plans need to be monitored for changes that may be needed to keep the plan in compliance with the qualification rules. Each year, the IRS publishes a cumulative list of qualification requirements that will apply to applications submitted during the upcoming cycle. For example, in Notice 2014-77, the IRS published the cumulative list that will apply to ruling requests submitted during Cycle E, which runs from February 1, 2015, to January 31, 2016. Because of the timing of publication of the cumulative list, determination letter requests tend to be made towards the end of the cycle, which allows time to review the new cumulative list and draft any needed changes to a plan. The additions to the list since the last cycle are generally the focus of an IRS review with respect to determination letter requests made after the initial determination letter for a plan.

[1]*The user fees were mandated by law and much of the fees are part of general revenues. Any portion of the user fee kept by the IRS is taken into account when Congress approves the agency’s budget.*

[2]*If changes were needed, the IRS will review the draft changes before issuing the determination letter. The favorable determination letter may be issued contingent on the timely adoption of changes.*

[3]*As opposed to master and prototype plans.*

MODIFIED PROCEDURES

The IRS review of a determination letter request consists of two parts. The first part is a procedural review of the application to ascertain that all of the required information and documents have been provided. If an application is "complete," the IRS proceeds to the second review, which is a technical review of the plan provisions to determine if they satisfy the qualification requirements. The IRS has made changes to both parts of the process.

If the first review indicates that necessary information or documents (or the user fee) are missing, the IRS will contact the applicant in writing and allow 30 days for the deficient application to be supplemented. If the 30-day period expires without submission of the missing information, the case will be closed and the IRS will keep the user fee. A later re-submission will require another user fee and, although not explicitly stated, the IRS may not consider the plan to be a qualified plan in the interim if the re-submission is after the time period for submission for the cycle within which the plan falls. Similarly, if the missing information is submitted after the 30-day period (generally determined by the postmark date of the response), the IRS will also close the case.

During the course of the technical review, the IRS may also issue a written request for additional information. The written request will specify a time period for response. If a timely response is not provided or is not complete, the IRS will make a second written request for information and specify a period of time for submission. If there is not a timely and complete response to this second request, the IRS will close the case, retain the documents, and the user fee. The plan sponsor may re-submit the application with a new user fee, but if the re-submission is after the time period for submission for the cycle within which the plan falls, the IRS will apparently not accord favorable tax treatment to the plan.[4]

It appears that the new procedures will be effective for the Cycle E that commenced February 1, 2015. Announcement 2015-01 stated the IRS intends to develop a reference list that applicants may use to indicate the specific provisions in the plan document that reflect items in the Cycle E cumulative list. Use of the reference list will not be mandatory for the current Cycle E, but is encouraged. The IRS is considering making inclusion of a completed reference list mandatory for later cycles.

[4] *As a practical matter, the plan sponsor may need to make a filing under the Employee Plans Compliance Resolution Program to regain qualified status, which will likely entail the payment of some portion of the taxes that would apply with respect to the loss of plan qualification.*

IMPACT ON PLANS

The changes in the determination letter processing mean that plan sponsors and their advisers will need to carefully prepare an application for a determination letter. In addition, any requests for information will need to have a timely and complete response. Even if a case is closed and resubmitted in a timely manner, it appears the request will go to the back of the line. If issues arise during the course of the technical review, the IRS may allow only a short period of time to respond to a disagreement with respect to a complex area of the law. This underscores the need for careful review of plan documents before submission for a determination letter request. Professionals should carefully review the IRS revised procedures and make sure the application is complete and that they respond to IRS requests in a timely manner.

Note: As we went to press, IRS officials were talking about additional cutbacks in the determination letter program. This will be addressed in a future Cheiron Alert or Advisory as more details are obtained.

IRS TAKES ANOTHER STEP TOWARD REGULATIONS DEFINING "GOVERNMENTAL PLAN": PUBLIC CHARTER SCHOOL EMPLOYEES PROPOSAL

The IRS has taken another step towards issuing proposed regulations defining the term "governmental plan" under Internal Revenue Code section 414(d). The latest step is Notice 2015-7 on the coverage of employees of a chartered school. Notice 2015-7 describes specific rules that the IRS is considering proposing that relate to whether a State or local government plan may cover employees of a charter school. The notice also describes transition relief that may be provided and requests comments upon the proposal.

BACKGROUND

Section 414(d) of the Code provides that the term "governmental plan" generally means "a plan established and maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing." Sections 3(32) and 4021(b) of the Employee Retirement Income Security Act of 1974 (ERISA) define the term "governmental plan" for purposes of title I and title IV of ERISA, respectively.

Currently, there are no regulations interpreting section 414(d) of the Code. Revenue Ruling 89-49 lists several factors for determining whether an organization sponsoring a plan is an agency or instrumentality of a State or political subdivision. Revenue Ruling 89-49 provides that satisfaction of one or all of the factors is not necessarily determinative of whether an organization is a governmental entity. The factors in Revenue Ruling 89-49 are similar to the factors listed in Revenue Ruling 57-128, which listed factors for consideration in determining whether an organization is a governmental entity for employment tax purposes.

On November 8, 2011, the IRS published an Advance Notice of Proposed Rulemaking (ANPRM) relating to the definition of a governmental plan under section 414(d) of the Code.[1] The ANPRM described a draft proposed regulation (including factors to be considered) that would be used to determine whether a plan is a governmental plan. Comments were requested on the proposal and a hearing was held. Over 2,000 comments were submitted by members of the public charter school community. After review of the comments, the IRS has now released Notice 2015-7 to describe guidance under consideration with respect to charter school employees.

PUBLIC CHARTER SCHOOL PROPOSAL

The IRS is considering proposing regulations under section 414(d) of the Code specifying that a State or local retirement system that covers employees of a public charter school will not fail to be a governmental plan if certain requirements are satisfied by the entity. The requirements are:

I. The entity is a nonsectarian independent public school that serves a governmental purpose by providing tuition-free elementary or secondary education, or both.
II. The entity is established and operated in accordance with a specific State statute authorizing the granting of charters to create independent public schools or authorizing the establishment of independent public schools.
III. Participation in the State or local retirement system by the entity's employees is expressly required or permitted under applicable law.
IV. The entity satisfies either A or B below:
    A. The entity's governing board or body is controlled by a State, political subdivision of a State, or agency or instrumentality of a State or of a political subdivision of a State. For this purpose, either
        1. a State, political subdivision of a State, or an agency or instrumentality of a State or political subdivision of a State must have the power to nominate, appoint, remove, and replace a majority of the members of the entity's governing board or body, or

[1]*See the Cheiron Pension Alert dated November 10, 2011.*

    2. a majority of the members of the entity's governing board or body must be publicly nominated and elected.
  B. The entity satisfies the requirements in paragraphs 1 through 3 below:
    1. the primary source of the entity's funding is from a State, political subdivision of a State, or agency or instrumentality of a State or political subdivision of a State,
    2. the rights of the entity's employees to their accrued benefits under the State or local retirement system are not dependent on whether the entity continues to participate in the system and, in the event the entity ceases participation, a governmental entity has responsibility for the accrued benefits of the entity's employees, including the continued funding of the accrued benefits, to no lesser extent than a governmental entity has responsibility for the continued funding of the accrued benefits of the employees of any other participating employer in the system in the event that the other employer were to cease to be a participating employer, and
    3. the entity is part of a local educational agency, as defined in 20 U.S.C. 7801(26) (or is its own local educational agency), and is subject to the significant regulatory control and oversight by a State, political subdivision of a State, or agency or instrumentality of a State or political subdivision of a State, as described in (a) and (b) as follows:
      a) the entity is held accountable by an authorized public chartering agency as defined in 20 U.S.C. § 7221i(4), which has the power to approve, renew, and revoke the charter of the entity. For this purpose, the authorized public chartering agency must be authorized under State law to approve charters for the creation of independent public schools and to hold the entity accountable for results, and
      b) the entity is required to comply with health and safety standards, as well as academic and financial accountability standards, that are similar to those that are generally applicable to other public schools in the State.

V. All financial interests of ownership in the entity are held by a State, political subdivision of a State, or agency or instrumentality of a State or of a political subdivision of a State. A State, political subdivision of a State, or agency or instrumentality of a State or political subdivision of a State is not treated as holding all financial ownership interests in an entity unless, upon dissolution or final liquidation of the entity, the entity's governing documents require the entity's net assets to be distributed to another public school that meets the requirements in (I) through (V), or to a State, political subdivision of a State, or agency or instrumentality thereof.

Notice 2015-7 states that the IRS and Treasury Department consulted with the Department of Labor (DOL) and the Pension Benefit Guaranty Corporation (PBGC) (the "agencies") in developing the proposed charter school guidance. It appears that the agencies intend the regulations under section 414(d) will be used for purposes of ERISA as well as the Code. The IRS and Treasury Department also consulted with the Department of Education.

TRANSITION RELIEF

Notice 2015-7 makes it clear that any final regulations under section 414(d) would apply prospectively and will include a delayed effective date. The IRS anticipates final regulations will provide that a State or local retirement system that covers employees of a public charter school that meets the requirements under consideration (as set forth above) for periods on or after the effective date of the final rules will not fail to be a governmental plan if the public chartered school failed to meet the requirements before the effective date. Therefore, the IRS will allow a public charter school that does not satisfy the requirements prior to the effective date of eventual final rules to be brought into compliance with the requirements without the loss of governmental plan status for the plan.

The IRS also noted that many comments were submitted after the ANPRM requesting broader transition relief. Notice 2015-7 states that questions regarding broader transition relief will be addressed when proposed regulations are issued under section 414(d) of the Code.

COMMENTS REQUESTED ON CHARTER SCHOOL PROPOSAL

Notice 2015-7 requests comments on the proposed public charter school requirements by May 11, 2015. Comments can be submitted in writing to CC:PA:LPD:PR, (Notice 2015-07), Room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, D.C. 20044. Comments may also be submitted via the Internet at notice.comments@irscounsel.treas.gov (Notice 2015-07). All comments will be available for public inspection.

WHAT'S NEXT?

The IRS and the Treasury Department have moved cautiously in developing proposed regulations under section 414(d). First, the ANPRM was published and comments received. Second, in response to comments, Notice 2015-7 was published to garner comments on proposed rules for public charter schools. The next step is likely proposed regulations. While we expect time will be taken to evaluate the comments, we do not expect that another three-year period will elapse before proposed regulations are issued. Stay tuned.

DEPARTMENT OF LABOR FINAL REGULATION ON ANNUAL FUNDING NOTICE

The Department of Labor (DOL) has issued the final regulation on the annual funding notice requirement for defined benefit plans covered by the Pension Benefit Guaranty Corporation (PBGC). The final regulation follows the proposed regulation closely, but contains changes to the interim guidance (set out in Field Assistance Bulletin 2009-01) to reflect changes made by the Multiemployer Pension Reform Act of 2014 (MPRA). The final regulation applies to annual funding notices for plan years beginning in 2015, (i.e., notices given in 2016) but may be relied on for earlier filings. It contains new model notices, use of which constitutes compliance with the annual notice requirement. The model notices are found on the DOL website[1] and we recommend they be used whenever possible because they will be accepted as compliance with the annual notice requirement.

BACKGROUND

The requirement for defined benefit plans covered by the PBGC insurance program to provide an annual funding notice was added to the Employee Retirement Income Security Act of 1974 (ERISA) by the Pension Funding Equity Act of 2004, and originally applied only to defined benefit multiemployer plans. The Pension Protection Act of 2006 (PPA) extended the notice to single-employer plans and added additional disclosures. The DOL issued interim guidance implementing the notice requirement in Field Action Bulletin FAB 2009-01, which included separate model notices for single- and multi-employer plans. The DOL published a proposed regulation regarding the notice requirement in 2010.

The Moving Ahead for Progress in the 21st Century Act (MAP-21) in 2012, and the Highway and Transportation Funding Act of 2014 (HATFA) modified the requirements for single-employer plans, and these modifications were addressed by DOL FABs 2013-01 and 2015-01, respectively. MPRA has caused changes in the multiemployer reporting for the annual notice requirement. These changes are reflected in the final regulation just issued.

DISCLOSURES REQUIRED

Both the single- and multiemployer funding notices require that the notices contain identifying information about the plan, the plan demographics, disclosures about the funded percentage of the plan for the last completed plan year and the two prior plan years, assets and liabilities as of the last day of the notice year, funding and investment policy and specific asset allocation, PBGC guarantees, and material events that occur after the close of the plan year to which the notice relates.

[1]See http://www.dol.gov/ebsa/pensionreform.html and look under the heading "Annual Funding Notice for Defined Benefit Plans."

Because the funded percentage of a plan is computed differently under the single-employer and multiemployer funding rules, there are differences in how those percentages are obtained. In each case, however, the percentages are derived from the plan's actuarial schedule filed with its annual report. Also, most of the information required to be in the funding notice can be found in the annual report.

PERSONS ENTITLED TO THE NOTICE AND DUE DATE

The notice is to be furnished to:

- participants, beneficiaries receiving benefits, and alternative payees, as of the last day of the plan year for which the notice is required (notice year),
- labor organizations representing employees covered under the plan,
- for multiemployer plans, employers that are parties to the collective bargaining agreements pursuant to which the plan is maintained as of the last day of the notice year, or who would otherwise be subject to withdrawal liability, and
- the Pension Benefit Guaranty Corporation.

Except for small plans, notices are due no later than 120 days after the end of the notice year. For small plans the notice is due by the date, with extensions, for filing the annual report (Form 5500).

CHANGES FROM THE PROPOSED REGULATION

The final regulation contains only a few changes from the proposal. Multiemployer plans that have distributed all assets in accordance with section 4041A prior to the date the notice is due are not required to file the annual funding notice. Similarly, single-employer plans that have filed a notice of standard termination prior to the due date for the funding notice, provided that they distribute all assets in accordance with the PBGC requirements, are not required to file the annual funding notice. Also, for multiemployer plans in the new category of critical and declining status added by the MPRA, the notice must contain the projected date of insolvency, a clear statement that the insolvency may result in benefit reductions, and a description of any legally permitted actions the Trustees have taken to prevent insolvency (e.g., benefit reductions).

CONCLUSION

Plan administrators may continue to rely on the guidance and model notices in FABs 2009-1, 2013-1 and 2015-1 for the notices due by April 30, 2015 for the 2014 plan year, but should review the requirements contained in the final regulation and, unless not possible, use the new model notices to comply with the annual funding notice requirement.

Cheiron is a full-service actuarial consulting firm assisting Taft-Hartley, public sector and corporate plan sponsors with proactive management of benefit plans 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.