

## CRG Retirement Plan Update – DB and DC Plans

### Summary of Guidance Issued in 2009

- **December 28 (DB):** In Announcement 2010-3, the IRS provides guidance that two specific changes in funding methods will receive automatic approval from the agency: (1) a change in the actuarial valuation software used to determine plan liabilities (in many cases, due to changes in calculations required by the Pension Protection Act), and (2) a change in the enrolled actuary and the business organization providing actuarial services to a plan (i.e., an event sometimes called a “takeover plan”).
- **December 28 (DB/DC):** The Employee Benefits Security Administration of the Department of Labor announced on its website in a Fact Sheet that it plans to publish a proposed regulation in June 2010 which would “amend the current regulatory definition of ‘fiduciary’ to include more persons, such as pension consultants [and other plan advisers], as fiduciaries.”
- **December 11 (DB/DC):** The IRS released Notice 2009-97 which provides an extension of time – to “the last day of the first plan year that begins on or after January 1, 2010” – for certain plan amendments required by the Pension Protection Act of 2006 (PPA 2006) and the Worker, Retiree, and Employer Recovery Act of 2008 (WRERA 2008). In general, this extension applies to (1) amendments required by IRC §436 related to funding-based limits on benefits and benefit accruals for pension plans, (2) amendments required by IRC §411(a)(13) and IRC §411(b)(5) related to vesting and other special rules for cash balance pension plans, and (3) amendments required by IRC §401(a)(35) related to diversification requirements for certain defined contribution plans.
- **November 24 (DB):** The IRS/Treasury issued final regulations pertaining to various amendments that might trigger so-called “section 204(h) notices” (e.g., a notice of a plan amendment that provides for a significant reduction in the rate of future benefit accrual, as required under ERISA §204(h)). These regulations finalize the March 2008 proposed rules, and generally provide guidance on timing, situations involving plan amendments with retroactive effective dates, and interactions between section 204(h) notices and other notice requirements. Among other items, the final rules specify that, in general, a plan amendment made to reflect the new applicable mortality table and interest rates for distributions subject to IRC §417(e)(3) would not require a section 204(h) notice.
- **November 23 (DB):** The PBGC issued a request for public comments in conjunction with forthcoming guidance related to the purchases of irrevocable commitments to provide plan benefits prior to initiating a standard plan termination. While the PBGC understands that “plans sometimes consider [the] purchase of irrevocable commitments ... to take advantage of favorable interest rates, or to gradually prepare for a termination,” the PBGC states two “substantial

concerns” with these purchases: (1) concern “that the purchase circumvents the statutory and regulatory protections afforded under the standard termination process” and (2) concern “that [after the purchase] plan assets could be insufficient for plan benefits at the time of any distribution upon termination.” Comments are requested by January 22, 2010.

- **November 23 (DB):** The PBGC released a proposed rule related to the “reportable events” regulation under ERISA §4043. The key elements contained in the proposed rule include: (1) elimination of most automatic waivers and extensions related to advance and post-event notices, (2) reduction in the frequency of reporting in situations involving multiple participant reductions over the course of a year, (3) a new reportable event if a plan’s Adjusted Funding Target Attainment Percentage (AFTAP) drops below 60%, and (4) a new reportable event for plan asset transfers to a retiree health account. Comments on the proposed rule are due by January 22, 2010.
- **November 19 (DC):** The Department of Labor issued a press release announcing that it has withdrawn its controversial rule on the provision of investment advice. This rule had been originally issued on January 21, 2009 and had been postponed several times prior to this announcement. The DOL indicated that it intends to publish another proposed rule related to investment advice, but no time table was provided.
- **November 10 (DB):** The IRS/Treasury released Announcement 2009-82 which provides relief for statutory hybrid plans (e.g., cash balance plans) and guidance on the timing of plan amendments addressing interest crediting rates not being in excess of “permissible market rates of return.” The Announcement states that proposed and final regulations related to hybrid plans are expected in the “near future” and, once issued, a plan amendment that brings the interest crediting rates into compliance will not result in a impermissible cutback under §411(d)(6). In addition, the Announcement indicates that final regulations regarding permissible market rates of return will not be effective before “the first plan year that begins on or after January 1, 2011.”
- **October 27 (DB):** The PBGC announced the maximum insurance benefit for participants in an underfunded pension plan which terminated in 2010: \$54,000 per year for those participants retiring at age 65. This amount is unchanged from the 2009 level.
- **October 27 (DB):** U.S. House Representatives Earl Pomeroy (D-North Dakota) and Pat Tiberi (R-Ohio) introduced a pension funding relief bill titled the “Preserve Benefits and Jobs Act of 2009”. Key provisions for single employer plans include: (1) extension of amortization periods for recent losses (including so-called “maintenance of effort” provisions), (2) widening of the asset averaging corridor around market value from 10% to 20%, (3) permission to lookback to the funded status for the 2008 plan year for the determination of benefit accrual freezes for the 2009 and 2010 plan years, (4) permission to lookback to the

funded status for the 2008 plan year for the determination of whether funding balances may be used to offset minimum contribution requirements for the 2009 and 2010 plan years, (5) clarification that investment-related expenses are excluded from “plan-related expenses” in a plan’s target normal cost, and (6) modified reporting rules under ERISA §4010. The bill contains other provisions, as well as relief targeted for multiemployer plans. While the preservation of jobs is cited as the impetus for such funding relief, the bill will need to be reconciled with any forthcoming Senate version, which may add other provisions, and the timetable for ultimate passage is unknown at this time.

- **September 14 (DC):** The Department of Labor officially stopped a regulation concerning the provision of investment advice to participants and beneficiaries of participant-directed individual account plans (such as 401(k) plans). The original effective date of the regulation was March 23, 2009, which was postponed to May 22, 2009 and then again to November 18, 2009, but then it was cancelled on September 14, 2009. The DOL announced that it will undertake a fresh start and issue a new regulation in the future.
- **September 8 (DC):** The IRS/Treasury released Notice 2009-75 which provides guidance on the federal income tax consequences of rolling over an eligible rollover distribution from a qualified retirement plan (including §401(a), §403(a), §403(b), and §457 plans) to a Roth IRA.
- **September 8 (DC):** The Department of Labor issued Field Assistance Bulletin 2009-03 which outlines how a plan fiduciary of a participant-directed individual account plan (such as a 401(k) plan) may distribute a mutual fund’s “summary prospectus” to satisfy the prospectus-delivery requirements set forth in the ERISA §404(c) regulations.
- **September 5 (DC):** President Obama announced several initiatives to encourage savings for retirement, which was followed by the IRS and Treasury releasing four notices and three revenue rulings:
  - Notice 2009-65: Facilitates automatic enrollment by providing a sample plan amendment for adding a basic automatic contribution arrangement to a §401(k) plan and a second sample plan amendment for adding an eligible automatic contribution arrangement to a §401(k) plan.
  - Notice 2009-66: Provides guidance to facilitate automatic enrollment in SIMPLE IRA plans.
  - Notice 2009-67: Provides a sample plan amendment that a prototype sponsor of a SIMPLE IRA plan may use to add an automatic contribution arrangement to such a plan.
  - Notice 2009-68: Contains two safe harbor explanations (updating those previously published in Notice 2002-3) that may be provided to recipients of eligible rollover distributions from an employer plan in order to satisfy IRC §402(f).

- Revenue Ruling 2009-30: Provides guidance on how a §401(k) plan may allow automatic increases in an eligible employee's default contribution percentage as the employee's base pay increases in the future.
  - Revenue Ruling 2009-31: Indicates that a qualified profit-sharing plan may be amended to permit an annual contribution to the plan in an amount equal to the dollar equivalent of a participant's unused paid time-off, in certain circumstances.
  - Revenue Ruling 2009-32: Indicates that a qualified profit-sharing plan may be amended to permit a contribution to the plan in an amount equal to the dollar equivalent of a participant's unused paid time-off upon termination of employment, in certain circumstances.
- **July 20 (DC)**: The Department of Labor issued Field Assistance Bulletin No. 2009-02 which provides transitional relief related to the Form 5500 filing requirement, beginning with the 2009 plan year, for 403(b) plans. Specifically, a sponsor does not need to classify annuity contracts and custodial accounts issued prior to January 1, 2009 as plan assets on the Form 5500 (subject to audit requirements) if certain conditions are met. ASPPA recently reported that this relief apparently applies to 2009 and all future years.
  - **July 1 (DB/DC)**: In an effort to organize and simplify authoritative (nongovernmental) U.S. generally accepted accounting principles and related literature, the FASB Accounting Standards Codification™ was launched. While the Codification does not change U.S. GAAP, it will change (with the goal of improving) the way accounting issues are released, researched, and communicated. As an example, SFAS No. 87 will no longer be authoritative in its current form, but its content will be "reallocated" to one or more sections of the Codification structure.
  - **May 22 (DC)**: The Department of Labor postponed (again) the effective date of the final regulation on the provision of investment advice to participants and beneficiaries of participant-directed individual account plans from May 22, 2009 to November 18, 2009. The delay is intended to give the DOL additional time to evaluate the regulation (please refer to our January 16/20, 2009 and March 20, 2009 postings).
  - **May 18 (DC)**: The IRS/Treasury issued a proposed rule that would allow sponsors affected by a "substantial business hardship" to reduce or suspend 401(k) or 403(b) safe harbor nonelective contributions during a plan year (i.e., mid-year) in a comparable fashion to provisions allowing comparable reductions or suspensions of safe harbor matching contributions. The proposed regulation would apply to amendments adopted after May 18, 2009 and is intended to "provide an employer an alternative to the option of terminating" a safe harbor plan, provided certain timing and notification requirements are satisfied. Comments on the proposed rule are due by August 19, 2009.

- **April 30 (DB):** The PBGC issued Technical Update 09-3, which grants relief from the reportable event notification requirement for small plans in the event that a 2009 required quarterly contribution is not made on time and the failure to make the contribution “is not motivated by financial inability.” The notification requirement is (1) waived for plans with fewer than 25 participants in the prior plan year and (2) simplified for plans with between 25 and 100 participants in the prior plan year.
- **April 14 (DC):** The IRS released Announcement 2009-34 which (1) outlines its intent (in the form of a draft revenue procedure) to establish a procedure for approving 403(b) prototype plans and (2) announces the posting of sample plan language on its website that can be used in drafting these prototype plans. Comments on the draft revenue procedure are due by June 1, 2009.
- **March 31 (DB):** The IRS/Treasury announced in its “Employee Plans News” publication that a “reasonable interpretation” of proposed regulations is acceptable when electing to use a yield curve for funding valuations. Quoting the newsletter, “for a calendar year plan with a January 1, 2009 valuation date, the IRS will not challenge the use of the monthly yield curve for January 2009, or any one of the four months immediately preceding January 2009.” Therefore, it appears that plan sponsors have a “free pass” to elect one of five available yield curves for plan year 2009 funding valuations, which is welcome news for many plan sponsors. It is anticipated that final regulations, when issued, will provide additional guidance for future plan years.
- **March 20 (DC):** The Department of Labor postponed the effective date of the final regulation on the provision of investment advice to participants and beneficiaries of participant-directed individual account plans from March 23, 2009 to May 22, 2009. The delay is intended to give the DOL additional time to evaluate the regulation (please refer to our January 16/20, 2009 posting).
- **March 17 (DB):** The IRS/Treasury released Notice 2009-22 which provides rules for “asset smoothing” for single employer defined benefit plans pursuant to a technical correction (to the Pension Protection Act of 2006) issued under the Worker, Retiree, and Employer Recovery Act of 2008. While it does not change the “90% to 100% corridor around market value” for permissible smoothed asset values, the Notice allows for automatic approval for plan sponsors to change the asset valuation method as of January 1, 2009, so long as the method follows the rules outlined in this Notice.
- **March 16 (DB):** The U.S. Government Accountability Office (GAO) issued a report to Congress titled “Defined Benefit Plans: Proposed Plan Buyouts by Financial Firms Pose Potential Risks and Benefits.” This report is a follow-up to Revenue Ruling 2008-45 (issued August 6, 2008) which concluded that the transfer of sponsorship of a qualified retirement plan from an employer to an unrelated taxpayer (when the transfer is not connected with a transfer of assets, operations, or employees, sometimes referred to as a “pension buyout” or “risk

transfer”) violates the “exclusive benefit rule” of IRC §401(a). While the GAO’s 34-page report states that participants in some underfunded DB plans might benefit from these transfers/buyouts and that the PBGC would stand to collect ongoing premiums from bought-out plans, such financial transactions could “pose some key risks that might be difficult to anticipate and mitigate.” Such risks include misaligned incentives (e.g., would the new sponsor have an incentive to manage the bought-out plan in the interests of participants) and concentration of risk (e.g., if a single financial firm takes over a large number of plans and subsequently faces financial difficulty).

- **March 16 (DB):** The PBGC issued a final rule on “annual financial and actuarial information reporting” under ERISA Section 4010 (commonly referred to as “4010 filings”), as called for by the Pension Protection Act of 2006. In high-level terms, a controlled group (an organization and its member entities) is subject to a 4010 filing if a pension plan maintained by a member is certified to be below 80% for a plan year and if the aggregate under-funded amount among all pension plans within that controlled group is \$15 million or more. The final rule keeps the due date for the filing at 105 days after the information year (in most cases, the plan year); therefore, the filing is generally due on April 15, 2009 for 2008 calendar year plan years.
- **February 24 (DC):** The IRS released a final regulation pertaining to automatic contribution arrangements. This regulation reflects provisions of the Pension Protection Act of 2006 and generally adopts the proposed rules issued in November 2007, with certain modifications. The final rules pertaining to qualified automatic contribution arrangements (QACAs) apply to plan years beginning on or after January 1, 2008, and the final rules pertaining to eligible automatic contribution arrangements apply to plan years beginning on or after January 1, 2010.
- **February 20 (DB):** The PBGC announced on its website that it will not grant automatic waivers for 2009 for the requirement under ERISA §4043 to notify the agency of missed quarterly contributions. For 2008 and prior years, the PBGC had provided automatic waivers of this reporting requirement for certain small and/or well-funded plans.
- **February 10 (DB):** The DOL issued Field Assistance Bulletin No. 2009-01 which provides model annual funding notices to participants for single-employer and multiemployer DB plans, along with related guidance. The bulletin confirmed that the funding notice for plan year 2008 is due by April 30, 2009 (for calendar year plans).
- **January 16 & 20 (DC):** On January 16, the Department of Labor (DOL) issued what was to be a final regulation on the provision of investment advice by a fiduciary adviser to participants and beneficiaries in participant-directed individual account plans (such as 401(k) plans). This final rule was to be published in the Federal Register on January 21, with an effective date of March

23, 2009. However, on January 20 (Inauguration Day), a White House order froze this regulation (and all other pending regulations) so that new and pending regulations that had not yet been published in the Federal Register could be reviewed and approved by the new administration. It is likely that the effective date of the final regulation, when published, will be extended beyond March 23.

- **January 9 (DC):** The IRS issued Notice 2009-9 providing guidance on reporting required minimum distributions for 2009 based on provisions contained in the Worker, Retiree, and Employer Recovery Act (WRERA) of 2008, passed on December 23, 2008.
- **January 9 (DB):** The PBGC issued Technical Update 09-1 which provides guidance on the calculation of asset values and unfunded vested benefits for plan years beginning in 2009 for satisfying the advance reporting requirements contained in the reportable events regulations contained in ERISA §4043.
- **January 2 (DB/DC):** The DOL issued a final regulation which establishes procedures for assessing civil penalties on plan administrators under ERISA as mandated by the Pension Protection Act of 2006 (PPA) for failure to provide certain required notices and documents to plan participants. Rules related to the notices and documents are contained in ERISA §§ 101(j), 101(k), 101(l), and 514(e)(3), and the DOL's regulation carries a retroactive effective date of March 3, 2008.