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## IRS Again Postpones Plan Amendment Deadlines For Cash Balance and Other Hybrid Plans

Recent IRS Notice 2011-85 (Oct. 12, 2011) further extends the plan amendment deadlines for a handful of Pension Protection Act of 2006 ("PPA") provisions affecting cash balance and hybrid defined benefit plans until at least the end of 2012.

The deadline for plan amendments to comply with most of PPA's statutory changes for hybrid plans had been scheduled for the end of the first plan year beginning in 2011, as provided in IRS Notice 2010-77. However, Notice 2011-85 once again extends the amendment deadline. Cash balance and hybrid plans must now be amended by the last day of the plan year before the plan year that the 2010 proposed hybrid plan regulations are finalized and applicable to the plans. With this extension, the IRS has provided a helpful mechanism to automatically further extend the amendment deadline if the 2010 proposed hybrid plan regulations are not finalized in 2012. As with past extensions, the additional extension does not apply to amendments that would eliminate a plan's lump sum "whipsaw" provisions.

The further delay is necessary primarily because the IRS has not yet been able to develop final rules for the PPA's "market rate of return" limitations applicable to cash balance interest credits. The IRS has stated that the 2010 proposed hybrid plan regulations for the market rate of return rules will not be applied to plans earlier than January 1, 2013.

The IRS repeated in Notice 2011-85 that, when the 2010 proposed hybrid plan regulations are finalized, it is expected that additional guidance will provide and describe relief from the anti-cutback rules related to changing a non-compliant interest crediting rate to a rate that meets final guidance. The anti-cutback relief will apply to an amendment that eliminates or reduces a protected benefit "to the extent necessary" to meet the final regulations (provided the amendment is adopted by the applicable amendment deadline described above). Currently, it is not entirely clear how the "to the extent necessary" standard will apply to plans with an interest-crediting rate that will not meet the final rules, as there may be a variety of ways that a plan's above-market rate could be changed to comply with the final rules. We are hopeful that the IRS will provide more detail on the extent of this anti-cutback relief.

We expect that most plan sponsors will wait until final market rate of return rules are provided – we now hope in 2012 – to adopt any plan amendment that may be necessary to change a non-compliant interest crediting rate to a rate that meets final guidance. For determination letter filings submitted before February 1, 2012, the IRS will not consider the proposed hybrid plan regulations, and will only consider the final hybrid plan regulations issued in 2010 that are effective for plan years beginning on or after January 1, 2011 if the plan has been amended for such requirements.

We note that Notice 2011-85 does not address the deadline for single employer plans to be amended to reflect the complicated funding-based limits on benefits – including certain distributions and benefit accruals – for plans that do not meet certain minimum funding thresholds (Code Sec. 436). We are hopeful that the IRS will provide an extension of the end-of-2011 plan year amendment deadline and/or provide a model amendment very soon. We expect that future IRS guidance would spell out the parameters of the relief for potential cutback issues related to the required plan amendment.

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