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AEBP LEGISLATIVE UPDATE

QUALIFIED PLANS

December 5, 2011

1. Notice 2011-86 issued late October 2011. For qualified plan qualified status determination letter applications filed after January 1, 2011: IRS guidance relating to the eligibility for exemption from the user fees. Exemption applies if (a) the plan is maintained solely by one or more eligible employers, and (b) meets a timing requirement, which provides that the application is filed by the later of (i) the last day of the fifth plan year the plan is in existence, or (ii) the last day of any remedial amendment period with respect to the plan beginning within the first five plan years. The Notice expands on prior guidance and it explains how to determine if the application has been filed within a plan's remedial amendment period beginning within the plan's first five plan years.
2. The IRS released a revised Form 5300. Revisions include: (a) a requirement to specify whether the plan is filing on cycle or off-cycle and, if filing off-cycle, the priority category being claimed by the plan; (b) the effective date and the adoption date of each amendment adopted since the plan's last favorable determination letter; and (c) whether the plan is a foreign plan or the trust of a foreign trust including Puerto Rico. This revised Form was available in April 2011, but Cycle A filers may use the previous version of Form 5300 (Rev. 9-2001) for their current remedial amendment cycle submissions.
3. IRS has adopted internal procedures to ensure that a plan under determination letter review has been properly and timely amended to reflect prior legislation – in particular in instances where there is no prior determination letter. The approach described is interim guidance, pending the issuance of Internal Revenue Manual (IRM) section 7.11.1.16. (*EP Quality Assurance Bulletins 10/24/2011*).

4. Governmental Plans are treated differently than non-governmental plans for purposes of both ERISA and the Code. The IRS published two advance notices of proposed rulemaking (ANPRMs) on November 8, 2011, related to the definition of a governmental plan - Code Section 414(d). One ANPRM contains general rules that would apply to any plan that wanted to be considered a governmental plan, and the second ANPRM contains special rules for plans maintained by Indian Tribal governments. Each ANPRM includes a draft regulation. Comments are requested by February 6, 2012.
5. EBSA issued final regulations relating to the statutory prohibited transaction exemption that allows fiduciaries to provide investment advice to participants in participant self-directed individual account plans and IRAs. The final regulations implement the related PPA provisions and they will become effective on December 27, 2011. (*Labor Reg. 2550.408g-1; Labor Reg. 2550.408g-2*). The relief is available if the investment advice is provided by a fiduciary adviser under an “eligible investment advice arrangement” -- an arrangement that meets certain fee-leveling requirements or complies with certain computer modeling requirements. Also see *DOL Fact Sheet, October 2011*.
6. EBSA has also issued finalized amendments to the procedures under which applicants may request administrative exemptions from ERISA and Code prohibited transactions (*Labor Reg. 2570.30 through Labor Reg. 2570.52*)
7. The Securities and Exchange Commission (SEC), in response to a request from the DOL, has issued a no-action letter in which the SEC agrees to treat investment related information provided by a plan administrator to participants to comply with DOL participant-level disclosure regulations as though the information were a communication that satisfies the requirements of Rule 482 of the Securities Act of 1933. (*SEC No-Action: Dept. of Labor (10/26/2011)*). Rule 482 imposes standards and restrictions on the disclosure of investment performance information for certain funds that are registered under the Investment Company Act of 1940. Under the SEC no-action letter, the SEC has agreed that the investment-related information required to be disclosed to plan participants under the ERISA participant-level disclosure regulations “should not be viewed as inconsistent” with the timeliness and other requirements of Rule 482.
8. Related to underfunded single employer defined benefit pension plans, the PBGC announced that the maximum benefit that it will guarantee for age 65 retirees under plans that terminate in 2012 will increase to \$4,653.41 per month, or \$55,840.92 per year, up from the \$4,500 per month, or \$54,000 per year, in effect since 2009. The increase is not retroactive. (*PBGC News Release, 11/23/2011*).

9. PBGC, on October 28, 2011, proposed a new rule that would implement certain provisions of PPA and (a) conform PBGC regulations for determining allocation of assets and amount of benefits payable under ERISA Title IV to the PPA changes in the benefit determination rules for statutory hybrid plans (e.g., cash balance plans); (b) implement PPA change for determining the present value of accrued benefits under statutory hybrid plans; and (c) provide guidance on benefits payable under statutory hybrid plans that terminate in a standard termination. The rule will create greater certainty for hybrid plan participants about benefit amounts on termination. Comments are requested by December 30, 2011. (*Preamble to Proposed PBGC Regs, 76 Fed. Reg. 67105, 10/31/2011 ; Prop PBGC Reg 4022.120 et seq.; Prop PBGC Reg 4041.28(c)(3) ; Prop PBGC Reg 4044.52(e) ; Prop PBGC Reg 4044.76*).

10. Federal Register, Thursday, December 1. PBGC Final Rule: Amendment to PBGC regulation on allocation of assets in single-employer plans by substituting a new table for determining expected retirement ages for participants in pension plans undergoing distress or involuntary termination with valuation dates falling in 2012. This table is used to compute the value of early retirement benefits and, thus, the total value of benefits under a plan.

11. ASPPA is urging the EBSA to modify its VFC Program (voluntary fiduciary correction program) with respect to late deposits of elective deferrals and loan repayments, by adding a formal self-correction component.

12. The IRS's Employee Plans Compliance Unit (EPCU) has begun the "Form 5500 Non-Filer Project" to promote compliance with Form 5500 filing requirements. Under the program, the EPCU sends compliance check-up letters to plan sponsors for whom it has no record of a Form 5500 or 5500-SF filing with the DOL (or Form 5500-EZ with the IRS) within 6 to 9 months after the return's due date.

13. Form 5558 can only be used for up to three plans. The IRS will not process Forms 5558, *Application for Extension of Time To File Certain Employee Plan Returns*, requesting extensions for more than three plans. Forms 5558 for 5500s do not need to be signed. Forms 5558 do need to be signed for 5330 and 8955-SSA extensions.

14. Form 8955-SSA is to be used instead of Form SSA for 2009 Plan Year 2009 filings and thereafter. Under an interim transition rule, the due date for filing the 2009 and 2010 Forms 8955-SSA is the later of (a) January 17, 2012 or (b) the due date that generally applies for filing the Form 8955-SSA for the 2010 plan year. The January 17, 2012 due date may not be extended by filing Form 5558. (The 2010 Plan Year 8955-SSA Form has been issued. This does not change the transition rule where 2009 and 2010 can be filed together.)

Year-End Qualified Plan Amendment Items

- Notice 2011-85 The IRS postponed the effective date for the interest crediting/market rate of return regulations related to hybrid defined benefit pension plans, which includes cash balance plans; and extended the amendment deadline for associated hybrid plan amendments from 12/31/2011 (for calendar plan year plans) to the last day of the first plan year before the plan year the final regulations will be effective, which will not be earlier than January 1, 2013. The proposed regulations had been issued on October 19, 2010, with a proposed 2012 effective date, but these regulations have not yet been finalized, so the 2011 plan year end amendment adoption deadline is extended. The Notice also formalizes the related special ERISA 204(h) Notice timing rules contained in IRS Announcement 2009-82. (Note IRS Summary.)
- Notice 2011-96. IRS has extended (a) the deadline for single-employer defined benefit plans to adopt Code Section 436 Benefit Restriction interim amendments; these amendments relate to funding-based limits on the accrual of benefits and the payment of benefits that apply to plans that become underfunded; and (b) the period during which the amendments are eligible for relief from the Code Section 411(d)(6) anti-cutback requirements. This Notice also contains a sample amendment -- allows plan sponsors reliance with respect to the plan's qualification as to form. Extension until last day of plan year beginning on or after January 1, 2012.
- Worker, Retiree, and Employer Recovery Act of 2008 (WRERA Amendment) for defined contribution plans – relates to waiver of 2009 required minimum distributions. Amendment deadline is last day of the 2011 plan year, so December 31, 2011 for calendar year plans.
- In-Plan Roth Conversions. The SBJA of 2010 added Section 402A(c)(4) permitting rollovers from a plan account (other than a designated Roth account) to a designated Roth account under the plan. Information contained in IRS Notice 2010-84. A non-safe harbor 401(k) plan must adopt applicable conversion feature amendments by the later of the last day of the plan year in which the amendment is effective or December 31, 2011. A safe-harbor 401(k) plan must adopt applicable conversion feature amendments by the later of the first day of the plan year in which the amendment is effective or December 31, 2011. (Timing rules may be different for 403(b) Plans.)
- Cycle A – Individual Plan Filers – Deadline is January 31, 2012.

	2012	2011
RETIREMENT PLANS – e.g. 401(k), Profit Sharing, Pension		
Annual Maximum Compensation Limits - 401(a)(17)	250,000	245,000
Elective Deferrals 401(k)/403(b) - 402(g)(1)	17,000	16,500
Catch-up Contributions - 414(v)(2)(B)(i)	5,500	5,500
457 Elective Deferrals - 457(e)(15)	17,000	16,500
Defined Contribution 415 Contribution Limits - 415(c)(1)(A)	50,000	49,000
OTHER		
Highly Compensated Employee Threshold - 414(q)(1)(B)	115,000	110,000
Defined Benefit 415 Limits - 415(b)(1)(A)	200,000	195,000
Social Security Taxable Wage Base	110,100	106,800
IRAs		
IRA Contribution Limit - 219(b)(5)(A)	5,000	5,000
IRA Catch-Up Contributions - 219(b)(5)(B) (not subject to cost of living adjustments)	1,000	1,000
ROTH IRAs		
Adjusted Gross Income (AGI) for determining maximum Roth IRA contribution – married filing jointly or qualifying widow(er)	173,000	169,000
AGI for determining maximum Roth IRA contribution – Other filing status	110,000	107,000

Unless expressly stated otherwise above, nothing contained in this memo was intended or written to be used, or can be used by or relied upon by any taxpayer for the purpose of avoiding penalties that may be imposed on such taxpayer under the Internal Revenue Code of 1986, as amended. No one, without our express prior written permission, may use any part of this memo relating to any Federal tax matter to support the promotion or marketing of any Federal tax transaction(s) or matters or in promoting, marketing or recommending a partnership or other entity, investment plan or arrangement to one or more taxpayers. Any taxpayer should seek advice based upon the taxpayer's particular circumstances from an independent tax advisor with respect to any Federal tax transaction or matter contained in this memo.