

# Client Alert

A report  
for clients  
and friends  
of the Firm      November 2007

## Pension Protection Act Provisions (and Other Changes) that Become Effective in 2008

As the end of 2007 approaches, we would like to take this opportunity to remind sponsors of tax-qualified pension plans of various matters that may affect such plans in the 2008 plan year. Some of these matters have been addressed in prior Client Alerts (see attached links). Most of the changes described below are a result of the Pension Protection Act of 2006 (the "PPA"). While many of the changes imposed by the PPA are effective as of the plan year beginning on or after January 1, 2008, conforming plan amendments are generally not required to be adopted prior to the plan year beginning on or after January 1, 2009. Accordingly, where applicable, plans should be operated in compliance with the requirements described below as of the first day of the plan year beginning on or after January 1, 2008.

### 1. Changes in Actuarial Assumptions – 204(h) Notice Requirement for Certain Cash Balance Plans

For Plan Years beginning on or after January 1, 2008, the PPA requires defined benefit plans to use different actuarial factors in calculating the lump sum present value of an annuity benefit. These new factors could result in a reduction in the value of lump sum payments. The IRS issued a "News Flash" on November 6th stating that "traditional defined benefit plans" are not required to issue a notice of reduction in future benefit accruals, known as a "204(h) Notice," with respect to these changes. The IRS specifically did not address whether non-traditional defined plans, such as cash balance plans, are required to issue 204(h) Notices with respect to the PPA-imposed change in actuarial assumptions.

Accordingly, sponsors of cash balance plans should consider whether the PPA mandated changes will have a significant impact on the value of lump sum distributions

under their plans to determine whether a 204(h) Notice will be required. We recommend that plan sponsors of cash balance plans consult with their actuaries in making this assessment. A 204(h) Notice must generally be issued 45 days (for multi-employer plans and plans with fewer than 100 participants, 15 days) prior to the effective date of an amendment that reduces future benefit accruals. For calendar year plans, the 204(h) Notices should be issued no later than November 16, 2007 (for multi-employer plans and small plans, December 16, 2007).

### 2. Underfunded Defined Benefit Plans Not Required to Issue Additional 204(h) Notice

The PPA imposes certain benefit limitations on defined benefit plans that are less than 80% funded. Section 101(j) of ERISA requires sponsors of such plans to issue notices to participants regarding these benefit limitations. In the November 6th "News Flash," the IRS stated that such notices are deemed to satisfy the content and timing requirements of 204(h) Notices. Accordingly, sponsors of such plans do not have to issue a separate 204(h) Notice regarding the limitations on future benefits.

### 3. Qualified Optional Survivor Annuities

For plan years beginning on or after January 1, 2008, plans that are currently required to offer qualified joint and survivor annuities must offer an additional form of spousal survivor annuity. If the plan's current normal form of benefit for married participants is a spousal joint and survivor annuity providing less than a 75% survivor annuity, the plan must also offer a qualified optional 75% survivor annuity. If the normal form of benefit is a spousal joint and 75% (or greater) survivor annuity, the qualified optional survivor annuity must be a joint and 50% survivor annuity.

### 4. Nonspousal Rollover Distributions

Pursuant to the PPA, plan sponsors have the option of amending their plans to permit rollovers to nonspousal beneficiaries. While the PPA indicated that this provision was optional, the IRS has recently indicated that plans will be required to provide for nonspousal rollover distributions as early as the 2008 plan year. Accordingly, plan sponsors may wish to include appropriate provisions for nonspousal rollovers when amending their plans.

## 5. Final Regulations Under Section 415 of the Internal Revenue Code

The Treasury Department recently issued final regulations under Section 415 of the Internal Revenue Code. Some of the provisions of these regulations may require plan amendments.

For example, plan sponsors have the option of including within 415 compensation certain amounts (e.g., salary or bonus for past services, cashed out vacation or sick days) that are paid to a participant within 2 ½ months after his severance from employment. Plan sponsors who would like to adopt this provision for the 2008 limitation year must amend their plans by the due date of their 2008 tax return, including extensions.

[http://www.proskauer.com/news\\_publications/client\\_alerts/content/2007\\_08\\_03/](http://www.proskauer.com/news_publications/client_alerts/content/2007_08_03/)

## 6. Increase in Maximum Fidelity Bond Coverage

For plan years beginning on or after January 1, 2008, the maximum amount of fidelity bond coverage for fiduciaries of plans that invest in employer securities will increase from \$500,000 to \$1,000,000.

## 7. Participant Statements

For many plans, 2007 is the first year for which the plan was obligated to issue participant benefit statements. Defined benefit plans must either issue statements once in a three year cycle, or issue an annual notice regarding participants' ability to receive benefit statements upon request. Plan sponsors planning to issue the annual notice should do so no later than December 31, 2007. For individual account plans that are not participant directed, the deadline for issuing an annual benefit statement for 2007 is the date of filing of the plan's Form 5500 for the 2007 plan year.

[http://www.proskauer.com/news\\_publications/client\\_alerts/content/2007\\_03\\_23](http://www.proskauer.com/news_publications/client_alerts/content/2007_03_23)

## 8. Distribution Consent Forms

For plan years beginning on or after January 1, 2007, plan sponsors were obligated to make a good faith effort to update their plan distribution consent forms to reflect the effects of a participant's failing to defer a distribution. Plan sponsors that have not yet updated their distribution consent forms should do so immediately.

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## 9. Discretionary Amendments

There are several discretionary PPA provisions that plan sponsors may adopt, including:

- allowing participants to take hardship distributions to satisfy the medical, educational, or funeral expenses of their designated beneficiary, even if their designated beneficiary is not considered their dependent for tax purposes;
- extending the period during which the explanation of the qualified joint and survivor annuity can be issued from between 30 and 90 days before the annuity starting date to between 30 and 180 days before the annuity starting date; and
- permitting distributions of after-tax dollars to be rolled over to another qualified plan or 403(b) plan, if that plan can separately account for after-tax contributions.

If you wish to adopt any of the foregoing discretionary provisions during the 2008 plan year, your plan must be amended no later than the last day of the plan year beginning on or after January 1, 2009.

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### Client Alert

Proskauer's Employee Benefits and Executive Compensation Law Practice Group includes over 50 attorneys with significant and diverse tax, executive compensation and employee benefits law experience. The following individuals serve as contact persons with respect to this Client Alert and would welcome any questions you might have:

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