

## **Notice 2012-46**

### **Notice requirements under section 101(j) of ERISA for funding-related benefit limitations in single-employer defined benefit pension plans**

#### **I. Purpose**

This notice provides guidance in the form of questions and answers with respect to the notice requirements of section 101(j) of the Employee Retirement Income Security Act of 1974 (ERISA), which requires that notice be provided to participants and beneficiaries relating to certain limitations on benefits in pension plans imposed under section 206(g) of ERISA, Section 436 of the Internal Revenue Code (Code) has provisions that are parallel to the provisions in section 206(g) of ERISA and which are identified in this notice in parentheses following the parallel ERISA provision. Section 401(a)(29) of the Code provides that, in the case of a defined benefit plan (other than a multiemployer plan) to which the minimum funding requirements of § 412 apply, the plan is not a qualified plan unless the plan meets the requirements of § 436. as added by the Pension Protection Act of 2006 (PPA '06), P.L. 109-280, 120 Stat. 780.

#### **II. Background**

Section 101(j) of ERISA requires the plan administrator of a single-employer defined benefit plan to provide a written notice to plan participants and beneficiaries, generally within 30 days after the plan becomes subject to the benefit limitations of section 206(g)(1) or (3) of ERISA (relating to unpredictable contingent event benefits and prohibited payments). In addition, in the case of a plan that becomes subject to the benefit limitations of section 206(g)(4) of ERISA (relating to the cessation of benefit accruals), the section 101(j) notice must be provided within 30 days after the earlier of the valuation date for the plan year for which the plan's adjusted funding target attainment percentage (AFTAP) is less than 60% or the date such percentage is presumed to be less than 60% under the rules of section 206(g)(7) of ERISA. Section 502(c)(4) of ERISA provides that the Secretary of Labor may assess a civil penalty of not more than \$1,000 a day for each violation by any person of the notice requirement under section 101(j) of ERISA.

Section 101(c)(1)(A)(ii) of the Worker, Retiree, and Employer Recovery Act of 2008, Public Law 110-458 (122 Stat. 5092) (WRERA), amended section 101(j) of ERISA to authorize the Secretary of the Treasury, in consultation with the Secretary of Labor, to prescribe rules applicable to the notice requirements under section 101(j) of ERISA.

Section 206 of ERISA (§ 436 of the Code) provides benefit limitations that depend on a plan's funding level, which is measured by the plan's AFTAP, as determined under section 206(g)(9)(B) of ERISA (§ 436(j)(2) of the Code). In general, a plan's AFTAP is based on the plan's funding target attainment percentage (FTAP) under section 303(d)(2) of ERISA (§ 430(d)(2) of the Code) for the plan year. Generally, the plan's

FTAP for a plan year is a fraction (expressed as a percentage), the numerator of which is the value of plan assets for the plan year (after subtraction of the plan's funding balances), and the denominator of which is the funding target of the plan for the plan year. The plan's AFTAP for a plan year is determined by adding the aggregate amount of purchases of annuities for employees (other than highly compensated employees, within the meaning of Code § 414(q)) made by the plan during the two preceding plan years to the numerator and the denominator of the fraction used to determine the FTAP.

Under section 206(g)(1) of ERISA (§ 436(b) of the Code), a plan is required to provide that, if a participant is entitled to an unpredictable contingent event benefit payable with respect to any event occurring during a plan year, such benefit may not be paid if the plan's AFTAP for the plan year is less than 60% or would be less than 60% taking into account the occurrence of the unpredictable contingent event benefit. Section 206(g)(1)(C) of ERISA (§ 436(b)(3) of the Code) defines an unpredictable contingent event benefit as any benefit payable solely by reason of a plant shutdown (or similar event, as determined by the Secretary of the Treasury) or an event other than the attainment of any age, performance of any service, receipt or derivation of any compensation, or occurrence of death or disability.

Under section 206(g)(2) of ERISA (§ 436(c) of the Code), a plan amendment increasing the liabilities of the plan by reason of an increase in benefits, establishment of new benefits, changing the rate of benefit accrual, or changing the rate at which a benefit accrual becomes nonforfeitable generally cannot take effect in a plan year if the plan's AFTAP for the plan year is less than 80% or would be less than 80% taking into account such amendment. The notice requirements of section 101(j) of ERISA do not apply as a result of an amendment that causes the plan to become subject to the benefit limitations in section 206(g)(2).

Section 206(g)(3) of ERISA (§ 436(d) of the Code) restricts a plan's ability to make "prohibited payments" if the plan's AFTAP is below 80% or the plan sponsor is a debtor in bankruptcy. Section 206(g)(3)(B) of ERISA (§ 436(d)(5) of the Code) provides that a "prohibited payment" is generally:

- (1) any payment in excess of the monthly amount paid under a single life annuity (plus any social security supplements described in the last sentence of section 204(b)(1)(G) of ERISA (§ 411(a)(9) of the Code)) to a participant or beneficiary whose annuity starting date occurs during any period that a limitation under section 206(g)(1)(A) or (B) of ERISA (or §436(d)(1) or (2) of the Code) is in effect;
- (2) any payment for the purchase of an irrevocable commitment from an insurer to pay benefits; and
- (3) any other payment specified by the Secretary of the Treasury by regulations.

However, a prohibited payment does not include a payment of a benefit which under section 203(e) of ERISA (§ 411(a)(11) of the Code) (relating to benefits with a present value that does not exceed \$5,000) may be immediately distributed without the consent of the participant.

Under section 206(g)(3)(A) of ERISA (§ 436(d)(1) of the Code), a plan is required to provide that the plan is not permitted to make any prohibited payment for a plan year after the valuation date for the year if the plan's AFTAP for the plan year is less than 60%. Under section 206(g)(3)(C) of ERISA (§ 436(d)(3) of the Code), if a plan's AFTAP is at least 60% but less than 80%, the plan must provide that the plan is not permitted to pay any prohibited payment that is in excess of 50% of the amount of the payment that could be made but for the benefit limitation (or, if less, the present value of the maximum guarantee with respect to the participant under section 4022 of ERISA) (partially prohibited payments).

Under section 206(g)(3)(B) of ERISA (§ 436(d)(2) of the Code), a plan is required to provide that, if the plan sponsor is a debtor in a case under title 11 of the United States Code (or similar Federal or State law), the plan is not permitted to pay any prohibited payment until the plan's enrolled actuary certifies that the plan's AFTAP for the plan year is not less than 100%.

The limitations on prohibited payments under section 206(g)(3) of ERISA (§ 436(d) of the Code) do not apply to a plan for any plan year if the terms of the plan, as in effect for the period beginning on September 1, 2005, and ending with such plan year, provide for no benefit accruals with respect to any participant during that period.

Under section 206(g)(4) of ERISA (§ 436(e) of the Code), a plan is required to provide that, if the plan's AFTAP is below 60% for a plan year, all benefit accruals cease as of the valuation date for the plan year.

Sections 206(g)(1)(B), 206(g)(4)(B), and 206(g)(5) of ERISA (§§ 436(b)(2), 436(e)(2), and 436(f) of the Code) set forth rules relating to special contributions that are permitted to be made in order to avoid benefit limitations (section 436 contributions). Under § 1.436-1(f)(2)(ii)(B) of the Income Tax Regulations, a section 436 contribution must be designated as such at the time it is contributed to the plan. Under section 206(g)(5)(B) of ERISA (§ 436(f)(2) of the Code), a section 436 contribution is an actual contribution that is treated as separate from a minimum required contribution under § 430 and is disregarded in determining the maximum addition to a prefunding balance under § 430(f)(6). See § 1.436-1(f)(2) generally for rules relating to section 436 contributions. See also section 206(g)(5)(C) of ERISA (§ 436(f)(3) of the Code), which describes situations in which an employer is deemed to have made an election under section 303(f) of ERISA (§ 430(f)(5) of the Code) to reduce the plan's funding standard carryover balance or prefunding balance.

Under section 206(g)(7) of ERISA (§ 436(h) of the Code), special presumptions apply in certain situations for purposes of applying the benefit limitations under section 206(g) of

ERISA (§ 436 of the Code). Under section 206(g)(7)(A) of ERISA (§ 436(h)(1) of the Code), if a benefit limitation has been applied in the preceding plan year, then the AFTAP for the current plan year is generally presumed to be equal to the prior year's AFTAP until the plan's enrolled actuary certifies the actual AFTAP for the current plan year. Further, under section 206(g)(7)(B) of ERISA (§ 436(h)(2) of the Code), if no certification is made before the first day of the 10<sup>th</sup> month of the current plan year, then, for purposes of applying these benefit limitations, that day is deemed to be the valuation date of the plan and the plan's AFTAP is conclusively presumed to be less than 60% as of that date. Under section 206(g)(7)(C) of ERISA (§ 436(h)(3) of the Code), if a benefit limitation did not apply to a plan in the prior plan year but the plan's AFTAP for the prior plan year was not more than 10 percentage points greater than an AFTAP that would have caused the plan to be subject to that benefit limitation, and if the plan's enrolled actuary has not certified the plan's actual AFTAP for the current plan year before the first day of the 4<sup>th</sup> month of the current plan year, then, until the actuary so certifies, that day is deemed to be the valuation date for the current plan year and the plan's AFTAP is presumed to be equal to a percentage that is 10 percentage points less than the plan's AFTAP for the preceding plan year.

Final regulations under § 436 were published on October 15, 2009 in the **Federal Register** at 74 FR 53004. These regulations also apply for purposes of the parallel rules in section 206(g) of ERISA. The regulations use the term section 436 measurement date (defined in § 1.436-1(j)(8)) to identify the dates on which a benefit limitation under § 436 of the Code (section 206(g) of ERISA) may apply or cease to apply. A section 436 measurement date might occur due to a certification of the plan's AFTAP issued by the enrolled actuary for the plan or due to the application of a presumption. See § 1.436-1(a)(4)(ii)(B), (c)(3), (d)(3)(ii)(A)(1), (d)(3)(ii)(C), and (d)(6) for certain optional plan provisions that are permitted with respect to § 436 (and the parallel rules in section 206(g) of ERISA).

### III. Questions and Answers

Q-1. What are the general timing requirements for providing a section 101(j) notice?

A-1. Section 101(j) of ERISA provides that notice to participants is required to be provided at the following times:

- (a) Within 30 days after the date on which the plan has become subject to a limitation on unpredictable contingent event benefits under section 206(g)(1) of ERISA (§ 436(b) of the Code).
  
- (b) Within 30 days after the date on which the plan has become subject to a limitation on prohibited payments under section 206(g)(3)(A), (B), or (C) of ERISA (§ 436(d)(1), (2), or (3) of the Code).
  
- (c) Within 30 days after the date benefit accruals under the plan are required to have ceased under section 206(g)(4) of ERISA (§ 436(e) of the Code).

(d) At such other time as may be determined by the Secretary of the Treasury.

Q&A-2 through Q&A-6 of this notice provide further guidance on these timing requirements.

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Q-2. For purposes of A-1(a) of this notice, when does a plan with an AFTAP of less than 60% become subject to a limitation on unpredictable contingent event benefits under section 206(g)(1) of ERISA (§ 436(b) of the Code)?

A-2. For purposes of A-1(a) of this notice, a plan becomes subject to a limitation on unpredictable contingent event benefits under section 206(g)(1) of ERISA (§ 436(b) of the Code) on the first section 436 measurement date on which the plan's AFTAP is certified or presumed to be less than 60% (if the plan provides for unpredictable contingent event benefits that it would not be permitted to pay). The section 101(j) notice must be provided within 30 days after that section 436 measurement date. The following example illustrates this rule:

Example. Plan X, a calendar year plan, provides for an unpredictable contingent event benefit upon shutdown of a plant at a specified location. Plan X's AFTAP has always been at least 60%. On March 18, 2013, Plan X's AFTAP is certified to be less than 60% for the 2013 plan year. The section 101(j) notice must be provided, with respect to the plan's plant shutdown benefit, by April 17, 2013, which is the 30<sup>th</sup> day following the March 18, 2013, section 436 measurement date, even if the plant has not shut down and is not expected to be shut down.

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Q-3. For purposes of A-1(a) of this notice, when does a plan with an AFTAP of 60% or more become subject to a limitation on unpredictable contingent event benefits under section 206(g)(1) of ERISA (§ 436(b) of the Code)?

A-3. For purposes of A-1(a) of this notice, unless a plan's AFTAP is already certified or presumed to be less than 60%, the plan becomes subject to a limitation on unpredictable contingent event benefits on the date of the occurrence of an unpredictable contingent event that would make the AFTAP less than 60% (aggregating benefits applicable to similarly situated participants). In this case, a section 101(j) notice must be provided, with respect to any unpredictable contingent event benefit, within 30 days after the occurrence of the unpredictable contingent event (unless Q&A-6(a) of this notice requires earlier notice with respect to that unpredictable contingent event).

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Q-4. For purposes of A-1(b) of this notice, when does a plan become subject to a limitation on prohibited payments under section 206(g)(3) of ERISA (§ 436(d) of the Code)?

A-4. (a) General requirements relating to limitations on prohibited payments. For purposes of A-1(b) of this notice, the date on which a plan becomes subject to a limitation on prohibited payments under section 206(g)(3)(A), (B), or (C) of ERISA (§ 436(d)(1), (2), or (3) of the Code) is the first day on which the plan is required to operate in accordance with the benefit limitation. This date is determined without regard to whether any participant or beneficiary is eligible to elect or has actually elected to receive payment in the form of a prohibited payment. Thus, for example, if a plan's AFTAP is certified or presumed to be less than 80% (but not less than 60%) on a section 436 measurement date, so that the plan becomes subject to a limitation on prohibited payments under section 206(g)(3)(C) of ERISA (§ 436(d)(3) of the Code) on that date, then a section 101(j) notice must be provided within 30 days after that section 436 measurement date. If the plan's AFTAP is later certified or presumed to be less than 60% on a section 436 measurement date, so that the plan becomes subject to a limitation on prohibited payments under section 206(g)(3)(A) of ERISA (§ 436(d)(1) of the Code) on that date, then a section 101(j) notice must also be provided within 30 days after that later section 436 measurement date.

(b) Rules of application. (1) A-4(a) of this notice applies separately to the benefit limitations imposed by each of the following provisions:

- Section 206(g)(3)(A) of ERISA (§ 436(d)(1) of the Code) (relating to a plan with an AFTAP that is less than 60%);
- Section 206(g)(3)(B) of ERISA (§ 436(d)(2) of the Code) (relating to the plan sponsor being a debtor in a case under title 11 of the United States Code or similar Federal or State law); and
- Section 206(g)(3)(C) of ERISA (§ 436(d)(3) of the Code) (relating to limited payments for a plan with an AFTAP of less than 80% but not less than 60%).

Thus, for example, if a plan's AFTAP was below 60% in a prior period and is subsequently certified to be at least 60% but less than 80% on a section 436 measurement date (so that the plan is no longer subject to the limitation on prohibited payments under section 206(g)(3)(A) of ERISA (§ 436(d)(1) of the Code) but becomes subject to the limitation on prohibited payments under section 206(g)(3)(C) of ERISA (§ 436(d)(3) of the Code), then a section 101(j) notice describing the benefit limitation under section 206(g)(3)(C) of ERISA (§ 436(d)(3) of the Code) must be provided within 30 days after that later section 436 measurement date.

(2) Notwithstanding A-4(b)(1) of this notice, if a section 101(j) notice was required as a result of the plan becoming subject to a limitation on prohibited payments under one of either (i) section 206(g)(3)(A) of ERISA (§ 436(d)(1) of the Code) or (ii) section 206(g)(3)(B) of ERISA (§ 436(d)(2) of the Code), and the plan also becomes subject to the other such limitation, then no section 101(j) notice is required to be provided describing that other limitation. In addition, if the plan subsequently ceases to be subject to one of the limitations but remains subject to the other limitation, then no additional

section 101(j) notice is required to be provided describing either limitation.

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Q-5. For purposes of A-1(c) of this notice, when does a plan become subject to a limitation on benefit accruals under section 206(g)(4) of ERISA (§ 436(e) of the Code)?

A-5. For purposes of A-1(c) of this notice, the date on which a plan becomes subject to a limitation on benefit accruals under section 206(g)(4) is the first section 436 measurement date on which the AFTAP is less than 60% and, thus, the date on which benefit accruals under the plan are required to have ceased pursuant to section 206(g)(4) of ERISA (§ 436(e) of the Code). The date on which a section 101(j) notice must be provided is 30 days after the first section 436 measurement date on which benefit accruals under the plan are required to have ceased pursuant to section 206(g)(4) of ERISA (§ 436(e) of the Code).

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Q-6. Has the Secretary of the Treasury (or his delegate) determined, pursuant to section 101(j)(3) of ERISA, that a section 101(j) notice is required to be provided at any times other than those described in Q&A-2 through Q&A-5 of this notice?

A-6. (a) Special rule for the date on which a limitation on unpredictable contingent event benefits applies for plans with an AFTAP of 60% or more. Yes. In the case of a plan with an AFTAP of 60% or more, A-3 of this notice generally provides that a section 101(j) notice with respect to an unpredictable contingent event benefit must be provided within 30 days after the occurrence of the unpredictable contingent event. The Commissioner has determined that a section 101(j) notice must also be provided with respect to the unpredictable contingent event benefit on or before the latest of the following dates: (1) if the employer is covered by the Worker Adjustment and Retraining Notification Act (WARN Act) (P.L. 100-379) and the related unpredictable contingent event is an event for which a WARN Act notice must be provided, the date on which the WARN Act notice is provided; (2) 60 days before the actual occurrence of the related unpredictable contingent event; and (3) 30 days after the date the employer makes a decision to cause the related unpredictable contingent event to occur (for example, a decision to shut down a plant). No additional section 101(j) notice is required with respect to the unpredictable contingent event benefit under A-3 of this notice if this A-6(a) requires a section 101(j) notice with respect to that unpredictable contingent event benefit earlier than the date that a section 101(j) notice would be required under A-3 of this notice.

(b) Special rule requiring a section 101(j) notice for plans that permit new annuity starting dates. In addition, if (i) a plan becomes subject to a limitation on prohibited payments under section 206(g)(3)(A), 206(g)(3)(B), or 206(g)(3)(C) of ERISA (§ 436(d)(1), 436(d)(2), or 436(d)(3) of the Code), (ii) that limitation subsequently ceases to apply, and (iii) the plan permits those participants or beneficiaries whose benefits commenced during the period the limitation applied to elect (after the limitation ceases to apply) to receive their remaining benefits in the form of a prohibited payment (see §

1.436-1(a)(4)(ii)), then a section 101(j) notice is required to be provided within 30 days after the date on which the limitation ceases to apply. For rules addressing the content requirements for a section 101(j) notice relating to new annuity starting dates, see A-9(b) of this notice.

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Q-7. How do the notice requirements under section 204(h) of ERISA (section 4980F of the Code) interact with the notice requirements under section 101(j) of ERISA?

A-7. If a plan that is subject to the requirements of section 206(g) of ERISA (§ 436 of the Code) is amended to cease all benefit accruals independent of the benefit limitations imposed under section 206(g)(4) of ERISA (§ 436(e) of the Code), a section 101(j) notice is not required to be provided to participants and beneficiaries as a result of that amendment (because no participants or beneficiaries would be affected by the benefit limitation under section 206(g)(4) of ERISA (§ 436(e) of the Code)). However, a notice is required under section 204(h) of ERISA (§ 4980F of the Code) as a result of that amendment. Further, even though accruals have ceased, a section 101(j) notice is nevertheless required under A-2 of this notice if the plan is unable to pay unpredictable contingent event benefits under section 206(g)(1) of ERISA (§ 436(b) of the Code) and is required under A-4(a) of this notice if the plan is unable to pay prohibited payments under section 206(g)(3)(A) or (B) of ERISA (§ 436(d)(2) or (3) of the Code). Similarly, if a plan that ceases accruals pursuant to section 206(g)(4) of ERISA (§ 436(e) of the Code) is later amended to implement a permanent freeze on accruals or otherwise significantly reduce the rate of future benefit accruals (so that the cessation would remain in effect even if the benefit limitation under section 206(g)(4) of ERISA (§ 436(e) of the Code) no longer were to apply, the plan would be required to provide a notice of the amendment under section 204(h) of ERISA (§ 4980F of the Code). See § 54.4980F-1, A-9(g)(3)(i) and (g)(3)(ii)(B) for special rules that apply for purposes of section 204(h) of ERISA and § 4980F of the Code with respect to a plan amendment reflecting section 206(g)(4) of ERISA (§ 436(e) of the Code). See also A-8(c) of this notice for a related rule.

The following example illustrates the rules in this A-7:

Example. For the 2013 calendar plan year, Plan X's AFTAP is certified on May 15, 2013, to be less than 60%. In accordance with section 206(g)(4) of ERISA (§ 436(e) of the Code), the plan is required to cease all benefit accruals as of May 15, 2013. Plan X provides a section 101(j) notice to plan participants on May 30, 2013 (within 30 days after the section 436 measurement date). On October 1, 2013, Plan X is amended to freeze the plan permanently as of January 1, 2014. With respect to the plan amendment, a section 101(j) notice is not required. However, a section 204(h) notice is required to be provided to affected individuals within the period required under § 54.4980F-1, Q&A-9.

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Q-8. Which persons must be provided with a section 101(j) notice?



A-8. (a) General rule. A section 101(j) notice is generally required to be provided to each participant covered under the plan and to each beneficiary entitled to benefits under the plan on the first date that the plan becomes subject to the applicable benefit limitation or limitations. However, a notice is not required to be provided to any participant or beneficiary with respect to whom it is reasonably anticipated that the relevant limitation could not apply on or after the date on which the limitation becomes applicable. The notice is only required to be provided to participants and beneficiaries to whom the relevant limitation applies or could apply. A limitation applies or could apply to a participant or beneficiary only if the participant or beneficiary is or could be adversely affected by the limitation, as described further in this A-8(a).

(1) Limit on unpredictable contingent event benefits. In the case of the limitation on unpredictable contingent event benefits under section 206(g)(1) of ERISA (§ 436(b) of the Code), the limitation applies to any participant or beneficiary who on the date the limitation becomes applicable could be entitled to those benefits, currently or at a future date, in the event the contingency on which the benefits are based were to occur.

The following example illustrates this rule:

Example. Plan X provides for an unpredictable contingent event benefit in the form of an early retirement subsidy for participants whose employment ends after age 55 but before normal retirement age due to involuntary termination in connection with a plant shutdown. For the 2013 calendar plan year, Plan X's AFTAP is certified on February 1, 2013, to be less than 60%. In accordance with section 206(g)(1) of ERISA (§ 436(b) of the Code), the plan is required to provide that unpredictable contingent event benefits may not be paid. A section 101(j) notice must be provided to each participant who is employed at that plant, other than employees who have attained normal retirement age (and who thus could never become eligible for the early retirement subsidy).

(2) Limit on prohibited payments. In the case of a limitation on prohibited payments imposed under section 206(g)(3) of ERISA (§ 436(d) of the Code), the limitation applies to an individual who is a participant or beneficiary on the date the limitation becomes applicable and who could be eligible to elect to receive a prohibited payment under the plan (at any time on or after the date the limitation becomes applicable) if the limitation did not apply. Thus, for example, a participant who is receiving pension payments and who would not be eligible to elect a prohibited payment even if the plan were not subject to the limitation is not adversely affected by the limitation on prohibited payments. Therefore, a section 101(j) notice is not required to be provided to such a participant as a result of a limitation on prohibited payments under section 206(g)(3) of ERISA (§ 436(d) of the Code). As another example, if a plan does not offer payment in any form of prohibited payment, then no section 101(j) notice is required to be provided to any participant or beneficiary as a result of a limitation on prohibited payments under section 206(g)(3) of ERISA (§ 436(d) of the Code). Thus, if a plan only offers single-sum payments when a participant's or beneficiary's benefit has a present value of less than the dollar amount for which consent is required under section 203(e) of ERISA (§

411(a)(11) of the Code) (and if participants and beneficiaries do not have the right to elect distribution in any other form of prohibited payment), then no section 101(j) notice is required as a result of section 206(g)(3) of ERISA (§ 436(d) of the Code) applying to the plan. However, a limitation under section 206(g)(3) of ERISA (§ 436(d) of the Code) applies to any participant or beneficiary who could be eligible to elect a prohibited payment at any date on or after the limitation applies to the plan (if he or she were to separate from service after attaining any age or service condition for eligibility to elect that form of payment). Therefore, a section 101(j) notice is required to be provided to such participant or beneficiary.

(3) Limitation on benefit accruals. With respect to the limitation under section 206(g)(4) of ERISA (§ 436(e) of the Code) requiring accruals to cease, the limitation applies to any participant who would otherwise be benefiting under the plan, within the meaning of § 1.410(b)-3(a), on the date on which the limitation first applies to the plan. Therefore, a section 101(j) notice must be provided to each such participant, but would not be required to be provided to former employees or beneficiaries (assuming that they would not otherwise be eligible to accrue benefits under the plan).

(b) Special rule for plans that permit new annuity starting dates. A section 101(j) notice must be provided to each participant or beneficiary described in A-6(b) of this notice to whom an election to receive a prohibited payment becomes available as a result of the applicable limitation ceasing to apply.

(c) Application to frozen plans. In the case of a plan that provides for no benefit accruals with respect to any participant, whether or not section 206(g)(4) of ERISA (§ 436(e) of the Code) applies to the plan, a section 101(j) notice must nevertheless be provided if the plan provides for any unpredictable contingent event benefits or any prohibited payments and the plan becomes subject to a limitation under section 206(g)(1) or (3) of ERISA (§ 436(b) or (d) of the Code). If a frozen plan that does not provide for any unpredictable contingent event benefits or prohibited payments is certified or presumed to have an AFTAP that is less than 60%, no section 101(j) notice is required to be provided because there would be no participant who would otherwise be benefiting under the plan (as described in paragraph (a)(3) of this A-8) and no participant who is or could be affected by a limitation on unpredictable contingent event benefits or prohibited payments. However, if such a frozen plan is subsequently amended to resume benefit accruals and, at a later date, benefit accruals are not permitted under the plan because of section 206(g)(4) of ERISA (§ 436(e) of the Code), then a section 101(j) notice would be required to be provided within 30 days after the first date benefit accruals under the plan are required to cease as a result of section 206(g)(4) of ERISA (§ 436(e) of the Code).

(d) Special rule where limitation ceases to apply before the latest date for providing a section 101(j) notice. If a plan becomes subject to a benefit limitation and then ceases to be subject to the benefit limitation before the latest date for providing a section 101(j) notice, the plan is required to provide a section 101(j) notice only to those participants and beneficiaries who were affected by the benefit limitation during the period after the

plan becomes subject to the benefit limitation and before the plan then ceases to be subject to the benefit limitation. Thus, no section 101(j) notice is required to be provided if there is no participant or beneficiary who was affected by the benefit limitation during that period. For purposes of this A-8, the circumstances under which a participant or beneficiary might not be affected by a benefit limitation during a period include: (1) the employer makes a section 436 contribution before the section 101(j) notice is required to be provided; (2) in the case of a limitation on prohibited payments under section 206(g)(3)(C) of ERISA (§ 436(d)(3) of the Code) relating to partially prohibited payments, either no participant or beneficiary commences benefits during that period or the plan permits any participant or beneficiary whose benefits commenced during that period to elect to receive his or her remaining benefits in the form of a prohibited payment promptly after the limitation ceases to apply; and (3) benefits that would have accrued during a cessation of accruals under section 206(g)(4) of ERISA (§ 436(e) of the Code) are restored (as described in § 1.436-1(c)(2) or (3)) before the section 101(j) notice is required to be provided.

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Q-9. What information is required to be in a section 101(j) notice?

A-9. (a) General rule. In the case of a section 101(j) notice required to be provided because the plan has become subject to a limitation described in section 206(g)(1), 206(g)(3), or 206(g)(4) of ERISA (§ 436(b), 436(d), or 436(e) of the Code), the following information is required to be in the notice:

(1) The name of the plan, the plan's employer identification number (EIN) assigned by the Internal Revenue Service, and the plan number assigned by the plan sponsor.

(2) A general description of the limitation, such as (i) in the case of a limitation on unpredictable contingent event benefits or prohibited payments under sections 206(g)(1) and 206(g)(3) of ERISA (§§ 436(b) and 436(d) of the Code), a description of the benefits that are not permitted to be paid, and (ii) in the case of the limitation under section 206(g)(4) of ERISA (§ 436(e) of the Code), a statement that benefit accruals have stopped.

(3) In the case of a limitation on unpredictable contingent event benefits under section 206(g)(1) of ERISA (§ 436(b) of the Code), a prohibited payment limitation under section 206(g)(3)(A) or (C) of ERISA (§ 436(d)(1) or (3) of the Code), or benefit accruals having ceased under section 206(g)(4) of ERISA (§ 436(e) of the Code), a statement that the limitation applies because of the level of the plan's AFTAP, which may be described as the plan's "funded percentage," including identification of the specific percentage that constitutes the plan's AFTAP. The notice must state whether the AFTAP that applies at the time a benefit limitation becomes applicable is a result of a certification issued by the plan's enrolled actuary or is the result of application of a presumption under section 206(g)(7) of ERISA (§ 436(h) of the Code).

(4) In the case of a limitation imposed under section 206(g)(3)(B) of ERISA (§ 436(d)(2)

of the Code) relating to bankruptcy, a statement that the limitation applies because of the relevant legal process (under which the plan sponsor is a debtor in a case under title 11, United States Code, or similar Federal or State law) and because the plan's AFTAP has not been certified to be at least 100%.

(5) In the case of a limitation on unpredictable contingent event benefits under section 206(g)(1) of ERISA (§ 436(b) of the Code), a description of the unpredictable contingent event benefits written in sufficient detail so that the notice is calculated to make evident the difference between the plan's benefits that would be payable if the limitation had not applied and those that are payable after application of the limitation.

(6) In the case of a limitation on prohibited payments under section 206(g)(3) of ERISA (§ 436(d) of the Code), a description of the prohibited payments written in sufficient detail so that the notice describes the difference between the plan's benefits that would be payable if the limitation did not apply and those that are payable after application of the limitation. If a limitation on prohibited payments under section 206(g)(3) of ERISA (§ 436(d) of the Code) applies with respect to forms of payment that may be payable for the participant's lifetime (such as a social security leveling option), the description is not required to provide more detail than a statement that benefits under any such form of payment may be limited, depending on relevant factors. For example, in the case of a social security leveling option, the information provided must include an explanation that a restriction is more likely to apply in certain cases in which the present value of the increased benefits is more than half of the present value of the total benefits payable.

(7) A description of the conditions under which the limitation will cease to apply to the plan (such as "when the plan's funded percentage is at least 80%") and a description of plan provisions that are applicable after the limitation ceases to apply, such as a provision on how benefits under the plan are restored after a benefit limitation no longer applies. For plans that provide new annuity starting dates as described in A-6(b) of this notice, the notice must state that any participant or beneficiary to whom an election to receive a prohibited payment becomes available as a result of the limitation ceasing to apply will receive notice within 30 days after the date that the limitation ceases to apply.

(8) The effective date of the limitation.

(9) The class of participants or beneficiaries affected.

(10) The name, address, and telephone number of the plan administrator, trustee, or other contact person from whom more information may be obtained.

(b) Special rule for plans that permit new annuity starting dates. In the case of a section 101(j) notice required under paragraph A-6(b) of this notice, the following information is required to be in the notice:

(1) The name of the plan, the plan's employer identification number (EIN) assigned by the Internal Revenue Service, and the plan number assigned by the plan sponsor.

(2) A statement that the limitation that had been imposed on the form of distribution that constituted a prohibited payment no longer applies.

(3) A statement that the participant or beneficiary is eligible to elect the applicable form of distribution that constituted a prohibited payment, including any deadlines and application procedures that apply for that purpose.

(4) The name, address, and telephone number of the plan administrator, trustee, or other contact person to obtain more information.

(c) Style and format. A section 101(j) notice must be written in a manner calculated to be understood by the average plan participant. In addition, a section 101(j) notice must be written in such a manner that the participant or beneficiary will understand the significance of the required information in the notice relating to the benefit limitation. While a section 101(j) notice may include any additional information that is necessary or helpful for recipients to understand the required information in the notice, the notice should not have the effect of misleading or misinforming recipients or of distracting recipients from the required information in the notice. A single combined notice can be provided if a plan is subject to more than one limitation (for example, if the plan's AFTAP is certified to be below 60% or is presumed to be below 60%, so that the plan is subject to the limitations in sections 206(g)(1), 206(g)(3)(A), and 206(g)(4) of ERISA (§§ 436(b), 436(d)(1), and 436(e) of the Code)).

(d) Illustrative example. The following example illustrates information that satisfies the requirements of paragraph (a) of this A-9 with respect to a pension plan (Pension Plan A) with a valuation date at the beginning of the plan year for which the AFTAP for the 2013 calendar plan year is certified, on July 6, 2013, to be 75%. Pension Plan A is a single-employer defined benefit plan to which section 206(g)(1) of ERISA (§ 436(b) of the Code) applies and the terms of the plan, as in effect since September 1, 2005, have provided for benefit accruals with respect to one or more participants. Pension Plan A allows commencement of benefits at any time between termination of employment and normal retirement age (65). The plan generally permits payment of a participant's entire benefit in various life annuities that do not constitute prohibited payments, plus a single-sum payment form and a social security leveling form. However, Pension Plan A requires payment to be made in an immediate single-sum distribution if the present value of the benefit does not exceed \$5,000. Pension Plan A provides that, if a limitation under section 206(g)(3)(C) of ERISA (§ 436(d)(3) of the Code) applies to the plan, participants and beneficiaries who elect a single-sum payment or a social security leveling form of payment for the maximum amount permitted and who commence the remainder of their benefits in a form of payment that is not a prohibited payment can elect to convert that form of payment to a single-sum payment or full social security leveling form of payment within a specified period after the limitation ceases to apply. The notice is provided, by August 5, 2013, to all participants and beneficiaries who have not commenced benefits before July 6, 2013.

*Notice Regarding [Insert Name of the Plan]*

*[Insert name of the plan, the plan's employer identification number (EIN) assigned by the Internal Revenue Service, and the plan number assigned by the plan sponsor.]*

*Federal law requires a change in the way your benefits may be paid from your pension plan. Beginning on July 6, 2013, the plan is no longer permitted to offer full payment in a lump-sum payment form for a participant or beneficiary whose benefit is worth more than \$5,000. However, the plan is permitted to pay up to half of the pension in the form of a lump-sum payment. (A special limit may apply to lump-sum payments that exceed a dollar amount which is published by the government at <http://www.pbqc.gov/practitioners/miscellaneous-tables/pvmg.html>.)*

*Beginning on July 6, 2013, the plan may also be required to limit the amount paid in the social security leveling form in certain specific cases (where the value of the extra amount payable before your presumed social security retirement age under the plan is more than half of the value of the total benefits payable under the plan).*

*This limit on lump-sum payments and on payments in the social security leveling form is imposed under federal law because the plan's funded percentage for the current plan year (at January 1, 2013) is 75%, as determined by the plan's actuary. The limit will cease to apply when it has been determined that the plan's funding status has improved so that the funded percentage is at least 80%.*

*This limit only applies if your total benefit is worth more than \$5,000 and does not place any restriction on payment in the form of a life annuity, so that each optional form of payment offered under the plan other than the lump-sum or social security leveling forms continues to be available. If you retire or otherwise terminate employment and are eligible to commence benefits, you may choose among the following:*

*Elect payment of your entire benefit in a non-accelerated form of payment. You can elect to receive 100% of your pension in any life annuity or other optional form of payment offered under the plan other than a lump-sum payment or social security leveling form.*

*Elect payment of half your benefit in a lump-sum payment, with the remainder in a non-accelerated form. You can elect to receive up to 50% of your pension in the form of a lump-sum payment, with the remaining 50% paid in any other form of payment available under the plan. Later, if the plan's funding status has improved so that the plan is permitted to offer full lump-sum payments, you will be notified of the change in status at that time and then can elect to receive a lump-sum payment for the remaining portion of your benefit.*

*Elect payment of half your benefit in a social security leveling form, with the remainder in a non-accelerated form. You can elect to receive up to 50% of your pension in installments until your*

*presumed social security retirement date under the plan, with the remaining 50% paid in an immediate life annuity or any other non-accelerated form of payment available under the plan. If you choose this payment option, you can elect to receive the remaining portion of your benefit in the social security leveling form if the plan is again permitted to offer such payments in full. If you choose this half social security leveling form, you will be notified if the plan's funding status has improved enough so that full payments in the form of social security leveling are permitted.*

*Elect to receive your benefit later. You can defer receipt of your entire pension to any later date (but not later than age 65), when the limit might not apply.*

*If you are married, you cannot elect payment in any form other than a joint and survivor annuity with your spouse as the survivor, with at least a 50% surviving spouse's annuity, unless your spouse consents.*

*If you have any questions, contact [insert name, address, and telephone number for contact information].*

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Q-10. What are the acceptable methods of providing a section 101(j) notice?

A-10. A section 101(j) notice must be in writing and may be furnished in any paper or electronic form to the extent such form is reasonably accessible to persons to whom the notice is required to be provided. Permissible electronic methods include those permitted under regulations of the Department of Labor at 29 C.F.R. § 2520.104b-1(c) and those described at § 54.4980F-1, Q&A-13(c).

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#### **IV. Applicability Date**

This notice is effective on **[INSERT DATE THAT IS THE FIRST DAY OF THE FIRST CALENDAR MONTH FOLLOWING 90 DAYS AFTER PUBLICATION OF THIS DOCUMENT IN THE INTERNAL REVENUE BULLETIN]**. However, the plan administrator may rely on the provisions in this notice before that date. The plan administrator may also apply a reasonable interpretation of section 101(j) of ERISA before that date.

#### **V. Request for Comments**

Comments are requested on whether a section 101(j) notice should be required to be

provided at additional dates, such as whenever a limitation ceases to apply. Similarly, comments are requested on whether a section 101(j) notice should be provided to individuals who become participants or beneficiaries after the first date the limitation applies or to participants and beneficiaries at later dates if the limitation continues to apply to the plan, such as on an annual or tri-annual basis.

## **DRAFTING INFORMATION**

The principal author of this notice is Diane Bloom of Employee Plans, Tax Exempt and Government Entities Division, with the participation of personnel from other offices within the Service and Treasury. For further information regarding this notice, please call the Employee Plans customer assistance service Monday through Friday between 8:30 a.m. and 4:30 p.m. Eastern time at (877) 829-5500 (a toll-free number) or e-mail [RetirementPlanQuestions@irs.gov](mailto:RetirementPlanQuestions@irs.gov).