SOCIETY OF ACTUARIES

Intersector Group report to the Society of Actuaries'[1] Pension Section Council

Meeting with the Internal Revenue Service/Treasury September 11, 2013

[1] The Society of Actuaries is an educational, research and professional organization dedicated to serving the public and Society members. The SOA's vision is for actuaries to be the leading professionals in the measurement and management of risk.

Notes from Intersector Meeting with IRS/Treasury
September 11, 2013

The Intersector Group is composed of two delegates from each of the following actuarial organizations: American Academy of Actuaries, Society of Actuaries, Conference of Consulting Actuaries, and ASPPA College of Pension Actuaries. Twice a year the Intersector Group meets with representatives of the U.S. Department of Treasury (Treasury Department) and the Internal Revenue Service (IRS) to dialogue with them on regulatory and other issues affecting pension practice. Attending from the Intersector Group: Don Fuerst, Judy Miller, John Moore, Heidi Rackley, Maria Sarli, Don Segal, and Larry Sher. David Goldfarb, Academy staff member supporting the Intersector Group, also attended.

These meeting notes are not official statements of the Treasury Department or the IRS and have not been reviewed by its representatives who attended the meetings. The notes merely reflect the Intersector Group's understanding of Treasury Department/IRS representatives' views expressed at the meeting, and are not to be construed in any way as establishing official positions of the Treasury Department, the IRS, or any other government agency. The notes cannot be relied upon by any person for any purpose. Moreover, the Treasury Department and the IRS have not in any way approved these notes or reviewed them to determine whether the statements herein are accurate or complete.

Discussion items:

1. **Update from IRS**

Priority Guidance Plan - In August, IRS published their priority guidance plan for the 7/1/2013 - 6/30/2014 guidance year. A number of defined benefit items are on the list:

- Closed plans
- Finalizing IRC 430 regulations proposed in 2008
- Finalizing PRA 2010 regulations
- New proposed IRC 436/430 regulations
- New project on changes in funding methods (for both multiemployer and single employer plans)

The numerical order listed in the guidance plan is not the order of priority – it is by IRC Code section number. Many projects are running concurrently.
IRC 436 amendment deadline – Government representatives don't think that there is any reason to wait to amend plans for IRC 436. Any changes in final regulations will be fine- tuning. IRS has already issued a model amendment. There will be no extension on the amendment deadline and no reason to wait.
DOMA/Windsor Decision - Government representatives indicated that DOMA issues (They use the phrase "post Windsor", not DOMA) were on the guidance plan, but in the General Tax section. The revenue ruling they released deferred the question of the effective date for qualified plans. They wanted to get the basic calls out the door as quickly as possible, and then go to work on other issues.

Government representatives could not answer any questions on timing, retroactivity (mandatory or voluntary), effective date (Supreme Court ruling date?), other than to say that IRS is working through the retroactivity issues, and that it is a high priority. They said they are interested in input but they need it quickly.

We asked that they provide guidance on what valuation date must first reflect the Windsor decision (for example, for non CY plans). We also asked that if an amendment might be needed to implement any required retroactive changes, that IRS consider providing an exemption from IRC 436 testing for the effect (similar to the exemption from testing for some required changes in vesting).

Government representatives said that within a plan you need to be consistent on whether marriage certificates are required for same sex and opposite sex spouses. In different plans you could have different approaches (e.g., health care vs. pension).

2. Late Retirement Issues

We discussed whether reviewers in VCP are being consistent in what they require for suspension of benefits failures and how late retirement actuarial increases are calculated (year-by-year as in 1988 proposed regulations, or merely increasing the accrued benefit at NRD to the late retirement date, without providing increases on any accruals after NRD)– the practitioner experience is that they often are not. The government representatives indicated that in VCP there can be some flexibility (i.e., VCP reviewers should have some latitude to look at unspecified other things), but their intention is to have a consistent approach, so if there are inconsistencies that are not explainable by the purpose of the VCP request they want to hear about it. The government representatives suggested that maybe they should add something in the EPCRS regulation to specifically cover suspension failures and spell out how the actuarial increase should be calculated.

Government representatives said they are considering updating some of those “antique” vesting/forfeiture regulations for participants who cannot be found. They said it is turning into a “colossal” project since IRC 411 touches on everything. They are not trying to fundamentally change the rules; they are just trying to update and clarify.

While primarily a DOL issue, we suggested IRS work with DOL to revise the regulations on suspension of benefits to directly address participants who continue to work beyond NRD without starting benefits. The current DOL regulations only address participants who return to work after they have begun receiving pension benefits. IRS Rev. Rul. 81-140 explains how the DOL regulations apply to participants who remain in service after NRD and requires a suspension of benefits notice (SOBN) to be provided in the month the employee reaches NRD. This gives rise to a lot of failures – it is hard to police and hard to get the timing right. Notification in the first month of suspension is much less of a problem when someone retired, started payments, is subsequently rehired, and the employer must take action to stop benefit payments. Under current rules there is no ability to cover suspension of benefits in the SPD and dispense with the SOBNs for active participants who continue to work past NRD.

The 2002 regulations regarding post-NRD benefit adjustments that were withdrawn took a different approach than the 1988 regulations that weren’t withdrawn (and on which employers can rely). The 2002 regulations looked at accruals year by year, and added the greater of the formula accrual and the actuarial increase each year. Government representatives indicated that the 2002 regulations are consistent with what IRS thinks the rules should be. We indicated that the basic problem is that people – including EPCRS staff, plan sponsors, administrators and other practitioners – don't understand what the rules are and how they fit together. IRS Phone Forums or other educational sessions in this area might be beneficial.

3. Merger/Spin-off Guidance

Government representatives indicated that IRC 436 questions surrounding mergers/spin-offs – including mid-year – are included in the proposed regulation project on IRC 436. Separately, the IRC 430 effect of mergers and spin-offs will be dealt with in updated Revenue Procedures on changes in funding methods – both automatic approvals and requests for approval – which will replace Rev. Procs. 2000-40 and 2000-41.

4. Participant/coverage and nondiscrimination for closed plans

Government representatives said they are trying to get their hands around the issues. The typical plan situation is this – you close the DB plan, at some point it is no longer a good IRC 410(b) group on its own, the solution is to aggregate with the DC plan for new entrants. But then you need to get through the cross testing gateways, since you can only pass the General Test if you do benefits based testing. Plan sponsors are not meeting the gateways, because you eventually fail the primarily DB in character gateway, so only the minimum aggregate allocation gateway is available, and that usually cannot be satisfied.

In the government representatives view, the key point is that the high paid are in the DB plan and the low paid young are in the DC plan. In 2002 when they put in gateways, they didn't care how you got into that situation (e.g., whether it was a deliberate "new comparability" design vs. a closed plan that becomes discriminatory over time). IRS just tried to get more dollars to the NHCEs via the gateway.

With regard to a solution that says "if you pass when you close, you pass forever", government representatives indicated that they "are not necessarily going there." Counting the match in either the gateway or the General Test would be a big shift, a very heavy lift per Government representatives. Reducing the 7.5%-8.5% standard interest rate range as a trade-off for easing the gateway was discussed. Government representatives said it is an intriguing idea, but how do you evaluate the trade-offs?

They would need data to help them understand what is going on. Is it is an issue of not enough money being provided to the NHCEs, or money not provided in the "right way". Government representatives said they understand that 7.5% to every NHCE (often needed to get through the minimum aggregate allocation gateway) is a heavy lift for employers. They said maybe 5% is enough if it is a uniform formula – are the NHCEs typically getting 5%?

They also indicated that they don't want to leave the impression that anything is off the table, and they are evaluating everything. Does IRS think this can be addressed through regulation or do they think legislation is needed? Government representatives said if they had the statutory authority to write the gateways, they have the statutory authority to change them.

5. 404(o) deduction issues (ASPPA / ACOPA letter, Aug. 19, 2013)

We discussed that because there is no guidance, people are taking different positions about what rules apply. We discussed the ASPPA/ACOPA letter. Government representatives said they are evaluating different scopes (e.g., IRC 414(o)?, IRC 404(a)(7)?) for a guidance project. Is it better to have less guidance sooner, or more comprehensive guidance later? We said that comprehensiveness is important, and some people would not like partial guidance, especially if the bad news comes out first. We indicated that the cushion amount, and being able to take salary increases into account, are big questions with respect to career average pay and cash balance plans.

Plan sponsors don't understand why they can't deduct the amount needed to get assets to the sum of the account balances for cash balance plans. There are unresolved questions regarding at-risk calculations. Also, simplifications are needed to keep things practical – practitioners see cases where the plan sponsor says they will contribute on Friday and we give them the amount and they contribute it on Wednesday instead, and then they have gone over the limit.

6. Automatic Approval of Change in Plan Year

We discussed whether a change in plan year to delay the PBGC premium increase could be automatically approved. Specifically, how does the provision in Revenue Ruling 87-27 that "the change will not delay the time when the plan would otherwise have been required to conform to the requirements of any statute, regulation, or published position of the Service" apply to this type of change?

Government representatives expressed concern that the change in plan year would likely not be eligible for automatic approval under Rev. Rul. 87-27. They said the prohibition on delay applies to any statutory effective date, including statutes related to PBGC premiums – it is not only statutes that affect areas under IRS jurisdiction. Re MAP-21 corridor changes, while the MAP-21 effective data already passed, IRS believes the phase-in date is the effective date of each change in corridor.

Government representatives said in deciding whether to approve a change in plan year they look at why you want to change, and would want to see a long term reason (e.g., to align plan year and fiscal year, plans with different plan years in the controlled group, etc.)

Plan sponsors who assumed they had automatic approval would only find out they didn't on audit; short plan years are easy to identify from electronic Form 5500 filings.

[Following the meeting, IRS issued an Employee Plans News article on this topic.]

7. Cash balance plans – projection of variable interest credits for nondiscrimination testing

Government representatives indicated that they have difficulty understanding how the accrued benefit you test for nondiscrimination testing can be different than the accrued benefit you test for accrual rule testing. Government representatives said the regulations for accrual rule testing are clear – all relevant factors are held constant in the 133-1/3% test, including the current cash balance interest crediting rate (even if based on investment-based returns, though proposed regulations would allow use of 0% return when the actual return is negative), and that therefore dictates the same answer for nondiscrimination testing. No resolution of whether the answer would be different for cash balance plans that use a fractional-rule failsafe to satisfy the accrual rules.