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Notice and Disclosure Requirements for Single-Employer Plans Under the Pension Protection Act

The Pension Protection Act of 2006 (the "Act") contains many provisions imposing, modifying and deleting employee benefit plan notices and disclosures. The Act assesses significant penalties for failure to provide certain notices. This newsletter highlights, in order of effective date, the Act's major changes in the notice and disclosure requirements that apply to single-employer benefit plans.

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Effective August 17, 2006

Bankruptcy. (Defined Benefit Pension Plans or "DB Plans.") Contributing sponsors of single-employer PBGC insured pension plans are required to notify the plan administrator if a bankruptcy proceeding is initiated on or after September 16, 2007. The administrator must then notify participants of the bankruptcy and the limitations on benefit guarantees if the plan terminates while underfunded. The Department of Labor ("DOL") is to prescribe the form and manner of this notice.

Disclosure of Information on Distress Plan Terminations. (DB Plans) For both employer-initiated and involuntary distress terminations (*i.e.*, a PBGC-initiated termination of an underfunded pension plan), plan administrators must provide participants, beneficiaries, alternate payees and labor organizations representing participants with any information provided to the PBGC regarding the proposed termination within 15 days of a request for such information. The plan administrator must also provide to the requesting party any new information given to the PBGC. This provision is effective immediately for all plans required to send a notice of intent to terminate after August 17, 2006. Transitional relief applies to plans required to provide notice within 90 days of August 17, 2006.

Effective for 2007 Plan Years

Repeal of 4011 Notice for Plans Subject to PBGC Variable Rate Premiums. (DB Plans) The Act repeals the requirement that underfunded single-employer defined benefit plans subject to PBGC variable premium rates provide notice to participants regarding the plan's funding status and the limit on PBGC guaranteed benefits should the plan terminate. Transitional rules regarding the reporting of a plan's funded status may apply in 2007. This notice is replaced in 2008 by a new

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annual funding notice described in the section below on "Effective for 2008 Plan Years." (Note that PBGC has issued Technical Update 06-03 providing guidance on issuing a participant notice for 2006.)

Periodic Benefit Statements. (DB and Defined Contribution ("DC") Plans) Administrators of DB Plans must furnish benefit statements to actively employed participants with vested benefits at least once every three years. Alternatively, administrators may provide an annual notice of availability of pension benefit statements. Years during which a plan's accruals are frozen are not required to be taken into account in determining the three-year period for providing benefit statements.

Administrators of DC Plans with participant directed investments must furnish benefit statements to participants and beneficiaries each calendar quarter. Administrators of other individual account plans must furnish statements upon request and at least annually.

The DOL is required to publish model benefit statements by August 16, 2007. Benefit statements are required to indicate on the basis of latest available information (1) the total benefits accrued or account balances, (2) the vested accrued benefit or account balance or the earliest date on which the accrued benefit or account will become vested, (3) the value of each investment to which a participant's account has been allocated as of the plan's most recent valuation date, including the value of any employer securities, and (4) an explanation of any permitted disparity or floor-offset arrangement that may be applied in determining accrued benefits. If a plan provides participants the right to direct the investment of their account, the benefit statement must also explain any limitations or restrictions on that right, a statement on the importance of a well-balanced and diversified investment portfolio for long-term retirement security, and a statement of the risk of holding more than 20% of an account in securities of any one entity. Finally, the statement must direct participants to the DOL Website for information on individual investing.

The effective date of this provision is extended for collectively bargained plans. Statements may be delivered in written or electronic form (if reasonably accessible to participants). A $100/day penalty may be assessed for failure to provide a required benefit statement.

Notice and Consent Period for Distributions. (DB and DC Plans) Under pre-Act law, a plan generally must provide notice to participants of the right to consent to

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a distribution no less than 30 and no more than 90 days before a distribution. Also, a written explanation of a plan's qualified joint and survivor annuity ("QJSA") rights and the relative value of optional forms of payment must be provided not more than 90 days before the annuity starting date. A plan administrator must provide notice of the direct rollover rules, the mandatory income tax withholding on distributions not rolled over and the tax treatment of distributions not rolled over, no more than 90 days before a distribution. The Act doubles the amount of time for obtaining consent and providing joint and survivor and direct rollover notices from 90 days to 180 days. This provision gives plan administrators more time to validate and act on participant consents.

Notice of Right to Divest Employer Securities. (DC Plans) The Act creates new diversification rights for participants in plans that hold publicly traded employer securities. Plan administrators of defined contribution plans that invest in publicly traded employer securities must provide a new notice to individuals no later than 30 days before an individual is eligible to exercise a right to divest employer securities. The notice must explain the right of diversification and describe the importance of diversifying investments. Because elective and non-elective deferrals and matching contributions may be first eligible for diversification at different times, plan administrators may be required to send more than one notice. The Secretary of Treasury is to prescribe a model notice by February 13, 2007. The DOL may assess a civil penalty of up to $100/day from the date of failure to provide the notice, and each violation as to any participant is treated as a separate violation.

Notice of Default Investment Arrangements. (DC Plans) If a plan utilizes a qualified default investment arrangement ("QDIA"), notice of the participant's rights and obligations under the arrangement must be provided at least 30 days before assets are invested in the QDIA and at least 30 days before the beginning of each subsequent plan year. This notice can be provided in a summary plan description, as a summary of material modification or as a separate notice. The notice must include an explanation of the right to exercise control in investing the account, and explain how contributions will be invested in the absence of an investment election.

Notice of Investment Advice. (DC Plans) Under the Act, qualified fiduciary advisors can offer personally tailored professional investment advice to participants in self-directed plans without violating applicable prohibited transaction rules, provided certain conditions are satisfied. One of these conditions is that a "written" notice must be provided which, among other items,

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discloses applicable fees to be received by the financial advisor and the past performance and historical rates of return for each available investment option under the plan. The DOL is to issue a model form for the disclosure of fees.

Effective for 2008 Plan Years

Section 4010 Filings with the PBGC. (DB Plans) The Act changes the circumstances under which sponsors of single-employer DB Plans must report certain information to the PBGC. Under pre-Act law, certain plan sponsors must report to the PBGC if the aggregate unfunded vested benefit for all plans within a controlled group exceeded $50 million, the "4010 Gateway Test". Under the Act, 4010 filings are required if the funding target attainment percentage at the end of the preceding plan year for any one plan within a controlled group is less than 80%. The Act also expands the information required in the 4010 filing and provides that the PBGC may waive the requirement in appropriate circumstances, such as for small plans. PBGC may assess a penalty of up to $1,000/day for failure to provide the required information.

Defined Benefit Plan Annual Funding Notice. (DB Plans) Plan administrators of single-employer defined benefit plans must furnish an expanded version of the multiemployer annual funding notice required under the Pension Funding Equity Act. The notice is intended to provide participants with greater awareness of the security of their retirement benefits under the plan.

The funding notice must contain identifying information on the plan sponsor and administrator as well as a statement for the plan year and two preceding plan years: (1) as to whether the plan's funding target attainment percentage is at least 100% or, if not, the actual percentages; and (2) the value of plan assets and liabilities using certain assumptions and certain periods. In addition, the notice must (a) summarize the rules governing termination of single-employer plans; (b) if applicable, the information provided the PBGC 4010 filings as described above; (c) give the number of participants who are (i) retired or separated from service and receiving benefits or (ii) deferred vested participants and (iii) active participants; (d) state the plan's funding policy and asset allocations of investments; (e) explain any plan amendments or known events taking place in the current plan year which have a material effect on plan assets or liabilities; (f) generally describe plan benefits guaranteed by the PBGC; and (g) include a statement that copies of the plan's annual report are available upon request through the DOL Website or the plan sponsor's Intranet Website.

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The notice must be furnished to plan participants, beneficiaries, labor organizations representing participants, and the PBGC within 120 days after the end of the plan year (by April 30 for calendar year plans). Plans with 100 or fewer employees must furnish the notice by the due date for the plan's annual report, including extensions. The DOL is required to publish a model notice by August 17, 2007.

SAR Repealed for DB Plans. Plan administrators of DB Plans will no longer be required to provide a Summary Annual Report ("SAR"). Instead, some of the information on the SAR will be included in the new annual funding notice described above.

Additional Information Required on Form 5500 for Defined Benefit Plans. Plan administrators of defined benefit plans must provide the funded percentage of other plans in the annual report when the liabilities under the plan consist, in whole or in part, of liabilities under two or more plans as of immediately before the plan year.

Participant Notice of Limits on Distributions and Benefit Accruals. (DB Plans) Plan administrators must provide "written" notice to plan participants and beneficiaries within 30 days of a plan becoming subject to the Act's limits on unpredictable contingent event benefits (such as plant-shutdown benefits), and accelerated lump-sum benefit distributions. The notice generally must be provided within 30 days after the valuation date for a plan year in which the adjusted funding target attainment percentage is less than 50%. The "written" notice may be provided electronically.

Electronic Display of Annual Report. (DB and DC Plans) The Act requires plan administrators to file a plan's Form 5500 in an electronic format to accommodate Internet display in accordance with DOL Regulations. The DOL will display basic plan information and actuarial information on its Website within 90 days after annual reports are filed. Plan sponsors and administrators must also display the information on any Intranet Website maintained for communication with employees.

Written Explanation of QJSA. (DB and DC Plans) A DB Plan or individual account plan subject to the QJSA rules for distributions must also offer as an option a qualified joint and 75% survivor annuity. The plan's written explanation of the terms and conditions of optional forms of payment must include the terms and conditions of the new 75% QJSA option.

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Notice of Automatic Enrollment. (DC Plans) Prior to the beginning of each plan year, each employee subject to a qualified automatic enrollment arrangement (an arrangement exempt from nondiscrimination testing) must receive a notice of their rights under the arrangement explaining (1) the employee's right to elect not to have elective contributions made on the employee's behalf; and (2) how contributions will be invested in the absence of any investment election from the employee. Unless future guidance indicates otherwise, this notice apparently can be combined with the notice required for QDIAs described earlier. This notice is also required under plans that do not utilize the new automatic enrollment safe harbor but do provide for automatic enrollment and want to take advantage of permitting withdrawals of elective contributions within the first 90 days of participation and an extension to six months for correcting excess contributions due to nondiscrimination testing. A penalty of $1,100/day can be assessed if this notice requirement is not satisfied.

The 2006 Form 5500

Unrelated to the Act, the DOL made notable changes to the Form 5500 beginning with the 2008 plan year. One change is that Schedule P will no longer need to be filed to start the running of the statute of limitations on any tax that could be imposed on a plan's trust. The statute of limitations will now be set by reference to the date the Form 5500 is filed. Proposed DOL rules indicate that substantial disclosure and details on fees paid by a plan, and the allocation of assets and duration of debt instruments will be required under the revised Form 5500. Also notable is that the effective date for mandatory electronic filing of Form 5500 has been pushed back one year to plan years beginning on and after January 1, 2008. The Form 5500 instructions for annual reports due in 2009 will contain guidance on how to submit the required forms through a new processing system that replaces the current ERISA Filing Acceptance System ("EFAST").

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