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Executive Compensation & Benefits
August 15, 2006

Client Alert

Pension Protection Act of 2006 Makes Sweeping Changes to Funding, Investment, Qualification and Other Employee Benefit Plan Rules

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The Pension Protection Act of 2006 (H.R. 4) (the "Act"), which was passed by the House of Representatives on July 28 and the Senate on August 3 and has been sent to the President for his signature, makes significant changes to a wide variety of rules that apply to employee benefit plans, including those dealing with minimum funding, plan investments, and tax qualification. Many provisions will require changes to plan documents and procedures, in some cases quite soon. This Client Alert summarizes some of the most significant changes made by the Act.

Changes Relating to Plan Funding

Funding Rules for Single-Employer and Multiple-Employer Plans

Effective in 2008, the Act replaces the existing minimum funding requirements of ERISA and the Internal Revenue Code for single-employer and multiple-employer plans with requirements that are based almost exclusively on the plan's current funding status. If assets equal or exceed 100% of the present value of all benefits accrued or earned as of the beginning of the plan year (the plan's "funding target"), generally the plan sponsor is required to contribute only an amount sufficient to fund any benefits expected to accrue or be earned during the year (including increases in benefits attributable to increases in compensation during the year). If the plan's funding level is less than 100%, an additional contribution sufficient to fund the shortfall over seven years is required. If the plan's funding level is less than 80%, the plan generally is considered "at risk," and further contributions are required. Plans with 500 or fewer participants are never considered "at risk." If certain requirements are satisfied, transition rules reduce the 100% threshold to 92%, 94%, and 96%, and the 80% threshold to 65%, 70%, and 75%, in 2008, 2009 and 2010, respectively. However, the

reductions apply solely for purposes of determining whether additional contributions are required, not for purposes of determining the amount of the contributions.

The Act preserves prefunding balances (creating by making contributions in excess of the minimum funding requirements) from prior years, and allows new ones to be created, but allows them to be used to reduce required contributions only if the plan's funding level is at least 80%. It continues to allow averaging to be used to value plan assets, but limits the averaging period to two years and requires the result to be between 90% and 100% of the asset's current value. It also requires plans with more than 100 participants to use the first day of the plan year as the valuation date. It extends the current interest rate rules (based on long-term corporate bond rates) through 2007. Beginning in 2008, it requires different interest rates (based on a corporate bond yield curve) to be used to determine the present value of benefits depending on when the benefits are expected to be paid.

Special funding rules are provided for plans maintained by commercial passenger airlines and companies that provide catering services to commercial passenger airlines.

The Act increases the existing deduction limits for 2006 and 2007 from 100% to 150% of the plan's unfunded current liability and, beginning in 2008, replaces them with new rules consistent with the new minimum funding requirements.

Restrictions to Improve Solvency

The Act also imposes various restrictions on underfunded plans and sponsors of underfunded plans. For example, it restricts the ability of many underfunded plans to pay accelerated (*e.g.*, lump sum) benefits or be amended in ways that could increase benefit liabilities, or even accrue additional benefits in some cases. Additionally, while a plan is "at risk" and at certain other times, it requires amounts that the plan sponsor sets aside in a rabbi trust to fund benefits for the chief executive officer and certain top executives to be subject to tax under section 409A. If the employer "grosses up" the benefits to cover the additional taxes, the Act prohibits the employer from deducting the gross-up amounts.

The Act also makes two changes designed to improve the solvency of all defined benefit plans. First, it changes the interest rate and mortality assumptions that defined benefit plans are required to use to convert a participant's projected annual benefit into an immediate lump sum to reduce the subsidy that tends to be created by the current rules. These changes are phased in gradually over the period 2008-2011. Second, it places lower limits on the interest rate that is used to convert a benefit that is not payable as a straight life annuity into a straight life annuity for purposes of the section 415 limit on benefits.

Funding Rules for Multiemployer Plans

The Act generally preserves the existing minimum funding requirements for multiemployer plans, but tightens them in various respects. Most importantly, it generally reduces the maximum amortization period for charges to the funding standard account (*e.g.*, for past service liabilities or experience gains and losses) to 15 years. It also imposes temporary new rules, effective through 2014, requiring significantly underfunded plans to adopt plans (the terms of which depend on their degree of underfunding) to improve their funding status over time.

Other Funding-Related Changes

The Act makes a variety of changes to the PBGC insurance program designed to improve the financial condition of the PBGC and address other issues. For example, it phases in the PBGC's guarantee of plant shutdown and other unpredictable contingent event benefits over five years after the event occurs, effective for events occurring after July 26, 2005, and eliminates the guarantee for benefits that accrue after an employer enters bankruptcy if the plan is terminated during bankruptcy, effective for bankruptcy proceedings beginning 30 days after the date of enactment.

The Act also enhances disclosures to participants in various respects. For example, beginning in 2009, it requires all plans insured by the PBGC to distribute annual notices to participants disclosing the plan's funding status, the allocation of its assets and other information. Similar notices are already required for multiemployer plans.

Changes Relating to Plan Investments

The Act makes a number of changes to the rules governing plan investments. Among the most significant are the following.

Prohibited Transaction Exemption for Provision of Investment Advice

The Act provides that, beginning in 2007, it is not a prohibited transaction under ERISA or the Internal Revenue Code for a fiduciary to provide investment advice to a participant in a plan with self-directed investments, and receive compensation for doing so, or for the participant to act on that advice, as long as the fees received by the fiduciary do not vary depending on the investment selected (which otherwise could bias the advice) or the advice is provided using a computer model that applies accepted investment theories and meets certain other basic requirements, and is certified by the Department of Labor. The fiduciary adviser must be a registered investment adviser, registered broker-dealer, bank, or insurance company, or be affiliated with such an entity. The arrangement must be authorized by another, unaffiliated, plan fiduciary. The Act provides that such an arrangement will not cause other plan fiduciaries to violate their fiduciary duties as long as, among other things, they prudently select and supervise the fiduciary adviser and require it to acknowledge that it is a plan fiduciary (similar to the existing rules for hiring an investment manager for a plan).

Prohibited Transaction Exemptions for Certain Financial Transactions

Block trades. The Act provides that, after the date of enactment, a purchase or sale of shares by a plan will not violate the prohibited transaction provisions of ERISA or the Internal Revenue Code even if it involves (*e.g.*, as the broker) a party-in-interest to the plan if it is part of a block trade, the party-in-interest is not a fiduciary of the plan (apparently even if the fiduciary has no control over the assets involved in the trade), and certain other requirements are satisfied. To be covered by the exemption, (1) the block trade must involve at least 10,000 shares or shares with a market value of at least $200,000, (2) the shares must be allocated across two or more unrelated client accounts, and (3) the plan's share of the trade must be less than 10%.

Transactions through alternative trading systems. Effective after the date of enactment, the Act creates an exemption from the prohibited transaction provisions of ERISA and the Internal Revenue Code for purchases and sales of securities, futures contracts, currency, and other property identified in regulations, by a plan that are executed through a regulated electronic communication network, alternative trading system

or similar system that meets certain requirements, even if a party-in-interest has an interest in the system or is on the other side of the transaction (apparently even if the party-in-interest is a fiduciary). The exemption is similar to the exemption for "blind" trades of securities through an exchange that is recognized in the legislative history of ERISA, but it applies even if the trades are not blind.

Transactions with service-providers. The Act provides that, after the date of enactment, a sale, exchange or lease of property, a loan or extension of credit, or a transfer or use of plan assets will not be a prohibited transaction under ERISA or the Internal Revenue Code solely because it involves a person that is a party-in-interest to the plan, if that person is a party-in-interest solely because the person provides services to the plan (and is not, for example, the plan sponsor or a fiduciary of the plan—at least with respect to the assets involved in the transaction), as long as the plan receives no less and pays no more than "adequate consideration." The exemption does not apply to transactions that involve the furnishing of goods, services, or facilities by or to a plan, but such transactions might be covered by other exemptions, such as the exemption for the provision of necessary services to a plan for no more than reasonable compensation.

Foreign exchange transactions. Effective after the date of enactment, the Act creates a new exemption from the prohibited transaction provisions of ERISA and the Internal Revenue Code for foreign exchange transactions between plans and banks or broker-dealers undertaken in connection with investments (such as purchases of securities). The exemption is significantly broader than the class exemptions for foreign exchange transactions that currently exist. However, like the existing exemptions, the bank or broker-dealer may not have any discretionary authority or control with respect to the investment of the plan assets involved in the transaction or render investment advice with respect to the transaction.

Cross-trades. Effective after the date of enactment, the Act creates an exemption from the prohibited transaction provisions of ERISA and the Internal Revenue Code for "cross-trades" of publicly-traded securities between a plan and an account managed by the same investment manager, if certain requirements are met. Among other things, no brokerage commission may be charged, and the cross-trading must be conducted in accordance with written policies and approved in advance by a plan fiduciary. The new exemption is significantly broader than the class exemption for "passive" cross-trading that currently exists.

Correction of certain securities transactions. Effective for errors discovered after the date of enactment, the Act provides that a prohibited transaction that involves the acquisition, holding or disposition of a security will not be treated as a prohibited transaction if it is reversed and any harm to the plan is undone within 14 days after the error is discovered (or should have been discovered). The exemption does not apply to transactions between a plan and the plan sponsor involving employer securities or employer real property.

Definition of Plan Assets

Effective after the date of enactment, the Act allows foreign plans, governmental plans, and church plans that have not elected to be covered by ERISA to be disregarded in determining whether an investment fund (such as a hedge fund) or other entity in which plans invest is treated as holding ERISA plan assets under the "25% test." Thus, after the change, only benefit plans that are actually subject to the prohibited transaction provisions of ERISA or the Internal Revenue Code must be taken into account as "benefit plan investors." The Act also requires an upstream entity that is treated as holding plan assets to be taken into account as a benefit plan investor only to the extent that it is owned by other benefit plan investors (rather than in its entirety as under current law). The changes will in many cases significantly reduce the chances that an entity will be treated as holding plan assets. (Another provision also treats plans maintained by Indian tribal governments as governmental plans for this and other purposes.)

Bonding Requirements

The Act exempts, after the date of enactment, a registered broker-dealer from the ERISA bonding requirements for persons handling plan assets, if the broker-dealer is subject to the fidelity bonding requirements of the Securities Exchange Act of 1934. For other persons subject to the ERISA bonding requirements, it raises the maximum bond amount from $500,000 to $1 million, effective in 2008.

Relief from Fiduciary Provisions for Certain Default Investments

Generally effective in 2008, the Act extends the relief from the fiduciary provisions of ERISA that plan fiduciaries enjoy when plan participants control how their accounts are invested to situations in which the investments are reallocated in connection with a change in investment options under the plan (sometimes called "mapping"), if the participants are notified of the change beforehand and given a chance to request a different reallocation. The Act also provides that the relief is not available during a blackout period unless the plan fiduciaries have satisfied the requirements of ERISA (such as the advance notice requirement) in connection with authorizing and implementing the blackout period. The Department of Labor is required to provide guidance (including safe harbors) within one year on how plan fiduciaries can satisfy their fiduciary obligations during a blackout period.

Effective in 2007, the Act extends the relief from the fiduciary provisions of ERISA that plan fiduciaries enjoy when plan participants control how their accounts are invested to situations in which the investments are selected by default when a participant does not provide affirmative investment directions (*e.g.*, when the participant is enrolled automatically in the plan). Participants must be notified of the default arrangement beforehand and given a chance to provide affirmative investment directions. The default arrangement must comply with Department of Labor regulations, which the Department is required to issue within six months.

Right to Diversify Out of Employer Securities

Generally beginning in 2007, the Act requires defined contribution plans that invest employee or employer contributions in employer securities to allow participants to select from among at least three other diversified investment options instead. The requirement does not apply to an ESOP unless the ESOP is part of a larger defined contribution plan (rather than a free-standing plan). It does not apply unless the employer securities are publicly traded, although the plan can be deemed to hold publicly traded securities if a plan sponsor or any member of its controlled group has issued publicly traded stock. In the case of employer contributions, diversification is required to be provided only to participants with at least three years of service. In the case of securities that are already held by a plan, the requirement is phased in over three years. Plan administrators are required to notify participants of their diversification rights and the importance of diversifying their retirement plan investments at least 30 days prior to the date that they first eligible to exercise such rights (*i.e.*, no later than December 1, 2006 for participants who become eligible to diversify on January 1, 2007). The Explanation of the Act by the Joint Committee on Taxation indicates that these are minimum requirements and that a plan may provide greater diversification rights without running afoul of the requirement for ESOPs to be primarily invested in employer securities.

Benefit Statements

Generally beginning in 2007, the Act revises the benefit statement requirements under ERISA. Defined contribution plans are required to provide participants and beneficiaries with their own accounts with statements describing not only their accrued and vested benefits but also the value of each investment held in their account. Plans that do not permit participants to select their own investments are required to provide the

statements at least annually. Plans that do are required to provide the statements at least quarterly and also provide information about the participant's right to select his or her investments and the importance of having a diversified portfolio. Defined benefit plans are required to provide, to every active participant with a vested benefit, either a benefit statement at least every three years or a notice of the availability of such a statement at least annually. Statements and notices may be delivered electronically if that form is reasonably accessible to the recipient. The Department of Labor is required to develop model statements that may be used to satisfy these requirements.

Changes Addressing Cash Balance Plan Issues

The Act favorably resolves, to a large extent, two legal issues that for years have clouded prospects for cash balance and other hybrid plans and been the subject of significant litigation. First, it rejects the view that, since hybrid plans are defined benefit plans, the age discrimination requirements must be applied to them on a benefits rather than a contributions basis, *i.e.*, on the basis of increases in projected annual benefits rather than credits to hypothetical accounts under the plan. It does, however, require hybrid plans to adopt a three-year cliff vesting schedule (or better) and prohibits interest credits from exceeding a market rate of return (interfering with plan designs that credit accounts with actual investment returns).

Second, the Act provides that a cash balance plan may limit the lump sum distribution that a participant can receive to the value of the participant's hypothetical cash balance account. A number of courts had concluded that distributing less than the present value of the participant's projected annual benefit (calculated using statutory interest rates that are often low and therefore produce a larger lump sum) would violate the accrual and vesting requirements of ERISA and the Internal Revenue Code.

The Act imposes restrictions on converting traditional defined benefit plans into hybrid plans that are designed to ensure that participants do not lose the value of early retirement subsidies to which they might have been entitled and are not subject to a "wearaway" period during which they do not accrue any benefits under the new plan formula until it exceeds the benefits they had accrued under the old plan formula. The Treasury Department is required to develop special rules dealing with conversions that occur in connection with corporate mergers and acquisitions.

The changes made by the Act are generally effective on or after June 29, 2005. However, the changes dealing with the value of lump sum distributions, vesting and interest credits generally are effective in 2008. The Act does not apply to prior periods, and therefore litigation over hybrid plans is likely to continue for some time. However, recent victories like the Seventh Circuit's decision last week rejecting an age discrimination claim against the IBM hybrid plan give plan sponsors some reason for optimism.

Changes Designed to Increase Savings

The Act makes a number of changes generally designed to increase savings, by increasing plan coverage, contributions and portability.

Repeal of EGTRRA Sunset

The Act repeals the general sunset provision of the Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA") that relate to retirement plans and IRAs. Under the sunset, a wide variety of changes made by EGTRRA, including various increases in the contribution and benefit limits on retirement plans IRAs and changes enhancing participants' ability to roll over plan distributions, were scheduled to expire after 2010.

The Act also makes permanent the $2,000 "savers credit" for low-income taxpayers that was added by EGTRRA, which was scheduled to expire after 2006. A separate provision indexes the income limit on eligibility for the credit.

Automatic Contribution Arrangements

The Act makes four changes designed to encourage employers to enroll employees automatically in their section 401(k) plans and other elective deferral arrangements. First, the Act provides that state wage payment and similar laws are preempted to the extent they would otherwise prohibit an automatic contribution arrangement, provided that certain basic requirements are satisfied, including a requirement that the investments in which contributions are placed satisfy the regulations on default investments noted above to be issued by the Department of Labor. (It is not clear whether this requirement means that the relief is limited to plans with self-directed investments.) Second, the Act makes it easier for new participants to get their automatic contributions back. Third, it gives a plan that includes an automatic contribution arrangement up to six months (rather than 2½ months under current law) after the end of the year to distribute excess contributions that would otherwise cause the plan to fail the ADP nondiscrimination test. Fourth, it creates a new safe method of satisfying the ADP and ACP nondiscrimination tests—in addition to the existing safe harbors—solely for plans that include automatic enrollment features. The safe harbor is very similar to the portions of the existing safe harbors that provide that the ADP and ACP tests are satisfied if the employer provides a minimum rate of matching contributions, except that (1) the minimum rate of matching contributions is somewhat lower, totaling 3.5% of compensation rather than 4%, and (2) matching contributions are required to vest over two years, rather than being fully vested. The Act generally requires automatic contributions to be at least 6% (less for employees with less than four years of service) but no more than 10% of compensation. The changes are generally effective in 2008, but the preemption of state law is effective on the date of enactment.

Rollover Rules

The Act allows after-tax contributions to be rolled over to a defined benefit plan or tax-deferred annuity beginning in 2007, allows direct rollovers from tax-qualified plans to Roth IRAs (subject to the same $100,000 income limitation as conversions of traditional IRAs to Roth IRAs) beginning in 2008, and allows non-spouse beneficiaries to roll over distributions to an IRA beginning in 2007.

Other Changes to Increase Savings

Among the other things, the Act also indexes the income limits on IRA contributions by individuals who are covered by an employer plan beginning in 2007, and makes available to smaller employers (generally those with not more than 500 employees) a new simplified retirement plan design that combines elements of a defined benefit plan and a section 401(k) plan beginning in 2010.

Other Changes Relating to Retirement Plans

The Act makes a number of other noteworthy changes affecting tax-qualified and other retirement plans.

Faster Vesting of Nonelective Employer Contributions

Perhaps most significantly, the Act extends the minimum vesting rules for employer matching contributions to a tax-qualified plan to nonelective employer contributions. Thus, nonelective employer contributions will be required to vest on a cliff basis after no more than three years of service or on a phased basis over six years

of service (rather than five years and seven years, respectively, under current law). The change applies to contributions made in 2007 or later for employees with an hour of service for the employer after the date of enactment.

Phased Retirement Relief and Other Changes to Distribution Rules

Some other changes are designed to make distributions easier to obtain in certain circumstances. Of particular importance is a change, effective in 2007, allowing pension plans to make in-service distributions to any participant age 62 or older. For such employees, this change makes moot the Treasury Department's complex and controversial proposed regulations on phased retirement, which would permit in-service distributions only if certain restrictive conditions were satisfied. The Act also allows penalty-free withdrawals for certain individuals who are called to active military duty retroactive to September 11, 2001, and certain distributions to public safety employees after the date of enactment, and requires the Treasury Department to modify the definitions of hardship and financial emergency used for hardship distributions within 180 days after the date of enactment to treat events that occur with respect to a beneficiary (such as incurring medical expenses) the same as events that occur with respect to the participant's spouse or dependents.

Changes Relating to Spousal Rights and Related Notices

Other changes relate to spousal rights and related notices. One change, generally effective in 2008, requires pension plans to offer a survivor annuity option with a 75% survivor annuity if they do not already provide a survivor annuity option of at least 75% already, and a 50% survivor annuity option if they already provide a survivor annuity option of at least 75%. Other changes require the Department of Labor to issue regulations dealing with multiple QDROs, and allow the notice that participants are generally required to receive of their distribution rights (including the right to defer distributions to age 65 and, if applicable, to receive the distribution in the form of a joint and survivor annuity) to be provided up to 180 days (rather than 90 days under current law) before the distribution begins.

Changes Primarily Affecting Governmental or Tax-Exempt Entities

Other changes relate primarily to plans sponsored by governmental or tax-exempt entities. For example, effective after the date of enactment, the Act extends to federal and other "governmental" plans (which include plans sponsored by entities such as the World Bank that are exempt from tax under the International Organization Immunities Act) the exemption from nondiscrimination rules that currently applies to state and local governmental plans. It also requires the Treasury Department to issue regulations allowing governmental plans to comply with the minimum required distribution rules of section 401(a)(9) on a reasonable good faith basis. It also clarifies that participants in state and local government plans may purchase "permissive service credit" for periods for which there is no performance of service. As noted above, it treats plans maintained by Indian tribal governments as governmental plans for this and other purposes. For church plans, the Act eliminates the 100% of compensation limit imposed by section 415 on benefits under a defined benefit plan in the case of benefits payable to nonhighly compensated employees, beginning in 2007, and exempts church retirement income accounts from unrelated business income tax on income from investments in debt-financed real property effective after the date of enactment. For schools, it creates a broad exemption from section 457, the pension plan rules in ERISA, and the Age Discrimination in Employment Act, for voluntary early retirement incentive and employment retention plans of public schools and education associations (*e.g.*, teachers' unions), also generally effective after the date of enactment.

Employee Plans Compliance Resolution System

The Act also places the Employee Plans Compliance Resolution System ("EPCRS") on a firmer legal footing by specifically authorizing the IRS to implement the program. It includes within this authorization the ability to waive income, excise, and other taxes "to ensure that any tax, penalty, or sanction is not excessive and bears a reasonable relationship to the nature, extent, and severity of the failure." This might encourage the IRS to expand the scope of the existing system, which generally does not apply to events for which the Code provides tax consequences other than plan disqualification, such as the imposition of an excise tax or additional income tax.

Timing of Plan Amendments Required by Act

Finally, as long as the plan complies with the change in operation before that date, the Act provides that plan amendments required by the Act or regulations issued as a result of the Act need not be adopted until the last day of the first plan year beginning on or after January 1, 2009 (or 2011 in the case of a governmental plan) and the anti-cutback rules generally will not be violated by adopting the amendments at such time. Thus, interim good faith amendments, such as those required by the IRS after EGTRRA, generally will not be required.

Other Changes Relating to Welfare Benefits

The Act also makes a number of changes relating to welfare benefits. It significantly expands the scope of section 420—which allows excess assets in a defined benefit plan to be transferred out of the plan and used to pay current retiree health liabilities if certain requirements are satisfied—by (1) reducing the amount of excess assets that the plan must have for the section to apply, (2) allowing assets to be transferred to cover future rather than just current liabilities, (3) providing more flexibility in complying with the requirement not to reduce retiree medical benefits after a transfer, and (4) extending the provision to multiemployer plans. These changes generally are effective after the date of enactment, except that the extension of the provision to multiemployer plans does not apply until 2007.

The Act also creates a new exception from the contribution limits in section 419A for certain small reserves under a self-insured health plan maintained by a "bona fide association." It also allows governmental retirement plans to make tax-free distributions to public safety employees to purchase health insurance. These changes generally are effective in 2007.

Finally, it denies tax-free treatment to death benefits in excess of premiums received by employers from company-owned life insurance policies ("COLI") unless the insured (1) was an employee within the last 12 months before his or her death, or is a director or highly compensated employee of the employer at the time contract is issued, or the death benefits are paid to insured's heirs, and (2) provides written consent to being insured under the contract for the benefit of the employer and permits the coverage to continue after he or she terminates employment. It also clarifies the tax rules that apply to long-term care insurance that is provided by a rider on or as part of an annuity or insurance contract. These changes generally apply to contracts issued after the date of enactment.

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