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Client Alert

Notice, Reporting and Disclosure Requirements Under the Pension Protection Act

The Pension Protection Act of 2006 (PPA), which was enacted into law on August 17, makes significant changes to, among other things, the notice, reporting and disclosure rules that apply to retirement plans. For example, under the PPA, benefit statements containing specified information will have to be provided regularly to participants in all pension plans (not only on request as under current law). Also, with respect to the reporting rules for defined benefit plans, additional information will be required, but the summary annual report requirements that previously existed will be repealed. Rules applicable to multiemployer plans also will be revised to require that a new summary report be provided to employers, unions and the PBGC, and that notices of certain plan information be provided to certain parties upon their written request. Changes to the timing and content of distribution and QJSA election notices, and the corresponding consent and election periods, for certain distributions from qualified retirement plans also are included.

Some of these changes are effective now or will go into effect quite soon, and in many cases even the changes that have more delayed effective dates will require plan administrators to begin making programing changes in the near future.

Below, we have summarized details of these and other changes to the notice, reporting and disclosure requirements and the effective dates of such changes. Note that many aspects of these changes are still unclear. However, additional guidance is expected (and in some cases required to be provided by the PPA) from the Secretary of the Treasury and the Secretary of Labor on compliance with various aspects of the new rules.

Effective Now

Notice to Participants or Beneficiaries of Blackout Periods [PPA §509]

The definition of “one-participant retirement plans”, which are exempt from the current blackout period notice requirement, is expanded to be consistent with Department of Labor (DOL) regulations under which business owners or partners and their spouses are not treated as employees. The new definition is retroactively effective as if included in section 306 of P.L. 107-204, the Sarbanes-Oxley Act of 2002, which generally was effective January 27, 2003.

Disclosure of Termination Information to Plan Participants [PPA § 506]

The PPA requires information provided to the Pension Benefit Guaranty Corporation (PBGC) in connection with a proposed distress termination or an involuntary termination to be provided to an affected party (generally including participants, beneficiaries, alternate payees, representative employer organizations and the PBGC) within 15 days of a written request by the affected party. With respect to a proposed distress termination, any additional information provided to the PBGC relating to the previous request also must be provided to the affected party within 15 days of its provision to the PBGC.

This provision applies only to plan terminations with respect to which a notice of intent to terminate (or in the case of a termination by the PBGC, a notice of determination) is provided after August 17, 2006. If notice otherwise would be required to be provided before November 15, 2006, a transition rule provides a grace period so that the notice will not have to be provided until November 15, 2006.

Plan administrators and plan sponsors are not allowed to provide the information required by the provision to an affected party in a form that may directly or indirectly be associated with or identify an individual participant or beneficiary, and disclosure of confidential information may be limited by a court to authorized representatives. Notice may be delivered in written, electronic or other appropriate form as is reasonably accessible to the participant or beneficiary.

Effective For Plan Years Beginning After 2006

Notice of Right to Diversify Out of Employer Securities [PPA §507]

No later than 30 days before the first date an individual is eligible (pursuant to Section 901 of the PPA) to direct the proceeds of a divestment of employer securities with respect to any kind of contribution, the PPA requires the administrator to provide a notice to the individual describing the right and describing the importance of diversifying the investment of retirement account assets. The notice must be written so as to be understood by the average plan participant and may be delivered in written, electronic or other appropriate form as is reasonably accessible to the recipient. Failure to provide the notice may result in a penalty of up to \$100 a day from the date of the failure or refusal to do so. The Secretary of the Treasury will provide a model notice by February 13, 2007.

If a calendar year plan first provides a diversification right on March 31, 2007, apparently the first notice for that plan will be required by March 1, 2007. If notice otherwise would be required to be provided before November 15, 2006, a transition rule provides a grace period so that the notice will not have to be provided until November 15, 2006. As explained below, the PPA will require similar information regarding the impor-

tance of diversification to be provided in benefit statements to participants and beneficiaries with self-directed investment rights, and it is not clear how these requirements will be coordinated.

Periodic Pension Benefit Statements [PPA §§ 508]

The PPA imposes new requirements for the provision of benefit statements to qualified plan participants and beneficiaries and the information such statements must contain, which generally will be effective for plan years beginning on or after January 1, 2007.¹

Benefit statements will have to be provided to participants and beneficiaries of all qualified retirement plans, other than certain “one-participant plans” that cover only business owners or partners and their spouses. The benefit statements must indicate: (a) total benefits accrued; (b) vested benefits accrued or the earliest date on which vesting will occur; and (c) an explanation of any permitted disparity or floor-offset arrangement that may be applied in determining such benefits. The requirement under (b) will be met if, at least annually and in conformance with DOL requirements, the plan either updates the vested benefits information provided in the benefit statement or separately provides such information as is necessary to enable a participant or beneficiary to determine their accrued vested benefit. Provision of benefit statements to participants and beneficiaries with their own accounts is mandatory as detailed below. Other beneficiaries not described below will be entitled to receive one benefit statement during any 12-month period, upon written request.

Defined contribution plans – Benefit statements will have to be provided at least quarterly to participants and beneficiaries with self-directed investment rights and at least annually to participants and beneficiaries without self-directed investment rights. In addition to the required basic information described above, the benefit statement for defined contribution plans must include the value of each investment in an individual account, as determined as of the plan’s most recent valuation date. This includes the value of any assets held in the form of employer securities, regardless of whether the employer securities were contributed by the plan sponsor or otherwise. Additionally, the benefit statement for participants or beneficiaries with self-directed investment rights must include: (1) an explanation of any limitations or restrictions on these rights; (2) an explanation of the importance of a well-balanced and diversified investment portfolio for long-term retirement security, including a statement of the risk that holding more than 20% of assets in the security of one entity may not be adequate diversification, and (3) a notice directing the participant or beneficiary to the DOL’s website for more information on individual investing and diversification.

Defined benefit plans – Benefit statements will have to be provided at least every three years to participants with vested accrued benefits who are employed with the plan sponsor at the time the statement is distributed. The DOL may provide that years during which no employee or former employee benefits under the plan do not need to be taken into account in determining this three-year period. Information provided may be based on reasonable estimates as provided under regulations prescribed by the DOL, in consultation with the PBGC. Alternatively, the requirement will be met if participants are provided at least annually with notice of the availability of the benefit statement and how to obtain it.

In all cases, benefit statements must be written so as to be understood by the average plan participant and may be delivered in written, electronic or other appropriate form as is reasonably accessible to the partici



¹ For plans maintained pursuant to one or more collective bargaining agreements, the requirements are effective for plan years beginning after the earlier of (1) the later of December 31, 2007 or the date on which the last of such collective bargaining agreements terminates (determined without regard to any extension thereof after the date of enactment), or (2) December 31, 2008.

part or beneficiary. The DOL is required to release a model benefit statement that plan sponsors may use to comply with these new requirements by August 17, 2007, and also may issue any interim final rules it determines appropriate. The penalty for failure to provide benefit statements as described above is a fee of \$110 per day, imposed on the plan administrator.

Practical Note: To comply with this requirement, plan administrators will have to keep running records of the vested status of plan participants; this will be a major change for administrators with a current practice of waiting until a participant terminates employment to determine vesting service and vested status.

Notice and Consent Period Regarding Distributions [PPA 1102]

The PPA revises the timing rule for delivery of certain notices required to be received by participants before they consent to certain actions, effective for plan years beginning on and after January 1, 2007. Present rules require qualified plan participants to consent to benefit distributions before they reach normal retirement age and, if they are married, to waive with their spouse's consent the qualified joint and survivor annuity (QJSA) form of benefit, if they have a vested accrued benefit in excess of \$5,000, and also to be notified of their right to delay the distribution and waive the QJSA. The applicable notice must be delivered during the period no less than 30 days and no more than 90 days before the date of distribution or the annuity starting date, as the case may be. Also, present law requires that the consent to waive the QJSA form must be provided by the non-participant spouse in the 90-day period ending on the annuity starting date.

The PPA revises this timing rule so that such notices will have to be provided no less than 30 and no more than 180 days before the distribution/annuity starting date, and the election to waive the QJSA form will have to be made during the 180-day period ending on the annuity starting date.

The PPA also requires the Secretary of the Treasury to modify the applicable regulations to require that participants who have a right to defer receipt of a plan distribution (*i.e.*, where the value of a participant's vested accrued benefit exceeds \$5,000) until normal retirement age be informed of the consequences of failing to do so. This change apparently will be effective only after the regulations are modified, and a notice issued within 90 days after that date will not be treated as failing to meet the new requirement if it reflects a reasonable attempt by the plan administrator to comply with the regulations. Because of the difficulty crafting such a notice, some employers have already asked the Treasury Department to provide a model notice.

Reporting Simplification [PPA §§ 1103]

The PPA provides that retirement plans may file a simplified version of Form 5500 for plan years in which they had fewer than 25 participants on the first day of the plan year. Additionally, one-participant plans with assets of \$250,000 or less will no longer need to file a Form 5500. Currently, the non-filing asset threshold for one-participant plans is \$100,000. These changes will apply for plan years beginning on or after January 1, 2007.

Effective For Plan Years After 2007

Defined Benefit Plan Annual Funding Notices [PPA §501]

Annual funding notices for all defined benefit plans (not only multiemployer plans as under current law) will have to be provided to (1) participants and beneficiaries; (2) each labor organization representing the participants and beneficiaries; (3) the PBGC; and (4) for multiemployer plans, each contributing employer, effective

for plan years beginning on and after January 1, 2008. The current notice requirement for single-employer plans subject to PBGC variable-rate premiums will be repealed effective for plan years beginning on and after January 1, 2007 (i.e., one year earlier), since it would require submitting the same information. A transition rule provides that requirements to report the funding target attainment percentage or funded percentage of a plan for plan years beginning before January 1, 2008, will be met if the plan reports the funded current liability percentage in the case of a plan year beginning in 2006 and the funding target attainment percentage or estimated funded percentage in the case of a plan year beginning in 2007.

Access to Multiemployer Pension Plan Information [PPA 502]

The PPA sets out the following new disclosure rules for multiemployer plans, effective for plan years beginning on and after January 1, 2008.

Disclosure of actuarial and financial reports – Within 30 days of receiving a written request from any plan participant or beneficiary, employee representative or any contributing employer, administrators of multiemployer plans will have to provide the requesting party a copy of (1) any periodic actuarial report which has been in the plan's possession for at least 30 days; (2) any quarterly, semi-annual or annual financial report prepared for the plan by any plan investment manager or advisor or other fiduciary that has been in the plan's possession for at least 30 days; and (3) any application filed with the Secretary of the Treasury requesting an extension under minimum funding standards rules.

Such information may not include individually identifiable information regarding any plan participant, beneficiary, employee, fiduciary or contributing employer or any proprietary information regarding the plan, any contributing employer or entity providing services to the plan. The requested information need be provided only once in any 12-month period and may be provided in written, electronic or other appropriate form.

Disclosure of withdrawal liability – Within 180 days (or longer, if regulations issued by the Secretary of the Treasury provide for a longer period) of receiving a written request from any contributing employer, administrators of multiemployer plans will have to provide the requesting employer a copy of (1) the estimated amount of withdrawal liability that would attach to the requesting contributing employer if such employer withdrew on the last day of the prior plan year; and (2) an explanation of how such estimated liability was determined, including actuarial assumptions and methods, data, any the application of any relevant limitations.

The requested information need be provided only once in any 12-month period, and may be provided in written, electronic or other appropriate form.

Disclosure of reduction in future benefit accrual – Currently, a notice of a significant reduction in future benefit accrual is required to be provided to each applicable individual and to each employee organization representing the individuals. The PPA will require that the notice also be provided to each employer that has an obligation to contribute to the plan.

Additional Annual Reporting Requirements [PPA 503]

Additional information required under the PPA to be included in annual reporting, effective for plan years beginning on and after January 1, 2008, includes the following:

Defined benefit plans – In cases where liabilities to participants or beneficiaries at the end of a plan year in whole or in part consist of liabilities that existed under two or more pension plans immediately before that plan year, the annual report will have to include the funded percentage of each of those plans as of the last day of that plan year and the funded percentage of the plan with respect to which the annual report is filed as of the last day of the plan year.

Multiemployer plans – The annual report will have to include (1) the number of employers obligated to contribute to the plan; (2) a list of employers who contributed more than 5% of the total contributions to the plan during the plan year; (3) the number of participants on whose behalf no contributions were made by an employer who was the employer of the participant for that plan year and the two preceding plan years; (4) the ratios of the respective numbers of participants under the plan on whose behalf no employer had an obligation to make an employer contribution during the plan year and during the two preceding plan years; (5) whether an amortization extension or shortfall funding method applies under the minimum funding standards or the rules for multiemployer plans in endangered or critical status, the amount of the difference between the minimum required contribution for the year and the minimum required contribution which would have been required without regard to any extension or use of the shortfall funding method that applies, and the period of such extension or use of the shortfall funding method; (6) whether the plan was in critical or endangered status for such plan year and, if so, a summary of any plan, adopted during the plan year, for funding improvement or rehabilitation, including any modification to such plan, and the funded percentage of the plan; (7) the number of employers that withdrew from the plan during the preceding plan year and the aggregate actual or estimated withdrawal liability assessed against such withdrawn employers; (8) if a plan merger or transfer of assets and liabilities has occurred, the actuarial valuation of the assets and liabilities of each affected plan during the year preceding the effective date of the merger or transfer. The Secretary of Labor will issue guidance within one year of the enactment of the PPA that describes how plan participants for whom there is no employer with an obligation to make an employer contribution under the plan can be identified and enumerated. Such annual report is only required to be provided to participants and beneficiaries under current law, but the new law requires the plan administrator to also provide such report to each employee organization and contributing employers.

Also with respect to multiemployer plans, a report containing summary plan information will have to be provided to employers and employee representatives of multiemployer plans. The report must contain the information listed in the above paragraph, except for (4), (5) and (6), but additionally must include a description of the plan's contribution schedules and benefit formulas used during the plan year and any modifications thereto; whether the plan was in critical or endangered status for the plan year and, if so, a list of actions taken by the plan to improve its funding status and a statement describing how to obtain a copy of an improvement or rehabilitation plan; whether the plan sought or received an amortization extension under the minimum funding standards or used the shortfall funding method under the rules for multiemployer plans in endangered or critical status; and notification of the right to receive, upon written request and only once in any 12-month period, a copy of the plan's annual report filed with the Secretary of the Labor, summary plan description and summary of any material modification of the plan.

Annual actuarial statements containing retirement plan projections – A statement must be included explaining the actuarial assumptions and methods used in projecting future retirement and forms of benefit distribution.

Electronic Display of Annual Report Information [PPA 504]

Effective for plan years beginning on and after January 1, 2008, identification and basic plan information and actuarial information provided in the annual report for any plan year will have to be filed with the Secretary of Labor in an electronic format. The DOL will display this information on the internet within 90 days after receiving it. This information also will have to be displayed on any internal non-public website maintained by or on behalf of a plan sponsor for the purpose of communicating with employees, in accordance with regulations which will be issued by the Secretary of Labor.

ERISA Section 4010 Filings with the PBGC [PPA 505]

Under current law, certain large, underfunded single-employer defined benefit plans and controlled group members must file annual financial and actuarial information with the PBGC (known as “section 4010 reporting”) if the aggregate unfunded vested benefits of the contributing sponsor and controlled group members exceed \$50 million for the plan year. For plan years beginning after 2007, the PPA will eliminate the \$50 million unfunded vested benefit threshold and establish a new filing criterion, under which filing will be required if the “funding target attainment percentage”² at the end of the previous plan year is less than 80%. Filers will be required to submit additional information with their filing, including (1) the amount of benefit liabilities under the plan determined using the assumptions used by the corporation in determining liabilities; (2) the “funding target”³ of the plan determined as if the plan has been in “at-risk status”⁴ for at least five plan years; and (3) the funding target attainment percentage of the plan.

² The funding target attainment percentage is the ratio, expressed as a percentage, that the value of plan assets for the plan year bears to the funding target of the plan for the plan year.

³ The funding target for a plan year is the present value of the benefits earned or accrued under the plan as of the beginning of the plan year.

⁴ A plan is in at-risk status for a plan year if the plan’s funding target attainment percentage for the preceding year was less than 80%, determined without using specified at-risk actuarial assumptions, and was less than 70%, determined using specified at-risk actuarial assumptions.

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