July 19, 2011

Mr. Mark Iwry
Senior Advisor to the Secretary and
Deputy Assistant Secretary (Retirement and Health Policy)
Department of the Treasury
1500 Pennsylvania Ave., NW
Washington, D.C. 20220

Re: Internal Revenue Code Section 412(d)(2) Amendments

Dear Mr. Iwry:

The American Society of Pension Professionals & Actuaries ("ASPPA") and the ASPPA College of Pension Actuaries ("ACOPA") are writing to draw your attention to a statement in the 2011 Gray Book that has caused significant concern for our membership due to its conflict with the clear intent of Internal Revenue Code ("IRC" or "Code") section 412(d)(2).

ASPPA is a national organization of more than 7,500 retirement plan professionals who provide consulting and administrative services for qualified retirement plans covering millions of American workers. ASPPA members are retirement professionals of all disciplines including consultants, administrators, actuaries, accountants, and attorneys. ASPPA is particularly focused on the issues faced by small- to medium-sized employers. ASPPA's membership is diverse but united by a common dedication to the employer-based retirement plan system. All credentialed actuarial members of ASPPA are members of ACOPA, which has primary responsibility for the content of comment letters that involve actuarial issues.

The Code clearly provides that amendments are deemed to be made as of the first day of the plan year as long as they are made within 2 ½ months after the end of the plan year and certain conditions are satisfied. IRC section 412(d)(2)[1] states:

> "[A]ny amendment applying to a plan year which—
>
> (A) is adopted after the close of such plan year but no later than 2 ½ months after the close of the plan year (or, in the case of a multiemployer plan, no later than 2 years after the close of such plan year),
>
> (B) does not reduce the accrued benefit of any participant determined as of the beginning of the first plan year to which the amendment applies, and

[1] Before enactment of the Pension Protection Act of 2006 (PPA), which included the current Code Section 412(d)(2), the Code included an identical section 412(c)(8).

> (C) does not reduce the accrued benefit of any participant determined as of the time of adoption except to the extent required by the circumstances,
>
> shall, at the election of the plan administrator, be deemed to have been made on the first day of such plan year."

For many years, this provision has been applied in the straight-forward manner in which it is written. The amendment in question increases benefits. The stated effective date of the amendment is the first day of the preceding plan year, the amendment is adopted within 2 ½ months after the end of the year, and the plan administrator makes an election to treat the amendment as if it had been made on the first day of the preceding year. Minimum required and maximum deductible contributions are then determined based on plan provisions as modified by the amendment.

However, the Internal Revenue Service ("IRS") has made a statement in the 2011 Gray Book that is in conflict with the clear intent of this provision of the law and runs counter to decades of interpretation and practice with regard to this provision. The attached Question 4 posed a question related to the final regulations under IRC Sections 430 and 436 regarding a discretionary amendment that increased the benefit formula and was made within 2 ½ months of the end of the plan year. The amendment appears to have satisfied all of the requirements of Code section 412(d)(2) and the response does not indicate otherwise.

The response stated that even if the plan administrator made an election pursuant to IRC section 412(d)(2) to include the amendment in the funding target and target normal cost for the immediately preceding plan year, the amendment could not be considered as effective for purposes of determining the funding target or target normal cost for the year because the amendment had not been adopted before the end of the year.

This position fails to consider the obvious – that pursuant to the IRC section 412(d)(2) election, the amendment is "deemed to have been made" on the first day of the preceding plan year. If the amendment had in fact been made on the first day of the preceding year, it would have been effective for that year for purposes of IRC section 430. The election to treat the amendment as if it had been made on the first day of the prior year is, therefore, an election to treat the amendment as if it had been effective for that prior year. Any other conclusion violates the clear meaning of the IRC section 412(d)(2). Stated another way, the 2011 Gray Book answer to Question 4 would effectively render meaningless the statutory language of IRC section 412(d)(2).

Our concern is not theoretical. Plan sponsors rely on the ability to amend a plan to increase benefits within 2 ½ months after the end of the year, make an election to treat the amendment as adopted on the first day of the prior year for purposes of funding calculation, and deduct contributions based on the resulting increased funding requirements. Although the Pension Protection Act of 2006 provided a substantial cushion for deductible contributions, "412(d)(2) amendments" still play an important role for small defined benefit plans. Examples of situations where the election plays a critical role include:

- A young defined benefit plan was frozen because of economic difficulties, but due to the market recovery, it is still well funded. The plan sponsor's business has recovered, and year-end accounting shows a substantial profit. The plan sponsor adopts an amendment within 2 ½ months after the end of the plan year to retroactively reinstate accruals, with the knowledge that the cost of these accruals will not be too burdensome. To assign the cost of contributions, and the associated deductibility, to the year in which benefits are accrued, the plan sponsor makes a 412(d)(2) election to reflect the reinstatement of accruals in the prior year's actuarial valuation.

- A defined benefit plan was established with a benefit formula providing less than the 415 maximum to allow the owner to contribute the maximum deductible amount in good years, but leave room for benefits to be increased to avoid overfunding in the event of plan termination. The plan is now funded to the extent of the cushion (or beyond if experience has exceeded expectations). The plan sponsor did not wait for the actuary's recommendation to contribute to the plan. He made a contribution during the plan year for that plan year and now it will not be deductible without an increase in the benefit formula. To allow deduction of that contribution for the year it was deposited, an amendment increasing benefits is adopted within 2 ½ months after the end of the plan year, and the plan sponsor makes a 412(d)(2) election with regard to that amendment.

- After the end of the year, the plan sponsor learns profits are greater than expected (and larger than the amount permitted by the cushion). The plan is amended to increase prior year accruals for key employees to the extent permitted under IRC section 401(a)(4), the plan sponsor makes a 412(d)(2) election with regard to that amendment, and additional deductible contributions are made for the preceding plan year.

Failure to recognize the validity of these elections would be inconsistent with the clear intent of the law, and would create significant problems for plan sponsors and practitioners.

These comments were prepared by ASPPA's Defined Benefit Subcommittee of the Government Affairs Committee and the ASPPA College of Pension Actuaries. Please contact Judy A. Miller, MSPA, Chief of Actuarial Issues at (703) 516-9300 if you have any comments or questions on the matters discussed above. We look forward to discussing this matter with you in person.

Thank you for your time and consideration.

Sincerely,

/s/
Brian H. Graff, Esq., APM
Executive Director/CEO

/s/
Judy A. Miller, MSPA
Chief of Actuarial Issues

/s/
Craig P. Hoffman, Esq., APM
General Counsel

/s/
Mark Dunbar, MSPA, Co-Chair
Gov't Affairs Committee

/s/
Ilene H. Ferenczy, Esq., APM, Co-Chair
Gov't Affairs Committee

/s/
James Paul, Esq., APM, Co-Chair
Gov't Affairs Committee

<u>**EXCERPT FROM 2011 GRAY BOOK**</u>

QUESTION 4

Funding: When to Reflect a Plan Amendment Adopted Within 2 ½ Months After Year End

The final §430 regulations provide that a plan amendment is reflected in FT and TNC if adopted no later than the valuation date for the plan year. In the case of an amendment adopted after the valuation date, the amendment is reflected in FT and TNC if the plan administrator makes the election in §412(d)(2).

However, in both cases, the amendment is taken into account only if it takes effect on or before the last day of the plan year. Assume a discretionary amendment (i.e., an amendment that is neither required for qualification nor integral to an amendment that is required for qualification) is adopted within the §412(d)(2) period of 2 ½ months after the end of the prior plan year to increase the benefit formula for prior service for all participants that worked at any time during the prior plan year. If the plan administrator makes the §412(d)(2) election, can the amendment be reflected in FT and TNC? Does the answer depend on whether a §436 contribution is required? On whether plan operations had actually reflected the amendment in the prior year? On whether the amendment is reflected for coverage and nondiscrimination purposes?

RESPONSE

In this situation the amendment is only reflected if it is adopted and takes effect by the end of the prior plan year. In general, if a discretionary amendment is adopted after the plan year that provides for increases in the prior year, there is no legal right to the increased benefits until adoption. Such an amendment takes effect when adopted (assuming §436 permits), and could be taken into account for the adoption year if a §412(d)(2) election is made for that year.

If a discretionary amendment is implemented operationally during a plan year (thus creating a legal right in the plan year) adoption is required by the end of that plan year [see Rev. Proc. 2007-44]. Any corrective amendment that meets the requirements of §1.401(a)(4)-11(g) that is adopted after the end of the plan year is treated as being effective in the year preceding the year the amendment is adopted for purposes of coverage and nondiscrimination, but that treatment will not apply for minimum funding (or deductions) as noted above.