Workshop 11 – Section 436 – Going Beyond the Regulations
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Background

• Why?
• Reasons why (not!)

• Note – will assume calendar year plan year for presentation

PPA - 2006
Final § 436 regulations -10/2009
WRERA - 2008
Notice 2008-21
HATFA
Rev Proc 2017-56
PPA 2006

• Gave us § 436 – benefit restrictions based upon AFTAP (understanding assumed for today)
  • Effective 2008
  • Allowed valuation dates other then first day of plan year for small plans
  • Provided for presumed AFTAP before certification

WRERA 2008

• Workers, Retirees, and Employer Recovery Act of 2008
  • Added § 436(k)
    • Authority for Treasury/IRS to issue special rules for valuation dates other than first day of the plan year

Final § 436 Regulations 10/2009

• Effective 2010
• Issued with § 430 final regulations
• Fairly complete structure for plans with BOY valuation date
• Some important things left open
Final § 436 Regulations 10/2009

- Things not addressed
  - End of year valuation dates (or other than first day of year valuation dates)
  - Mergers
  - Spinoffs
  - Application to multiple amendments in certain situations
- Said future regulations and EOY valuation dates based upon Notice 2008-21

Notice 2008-21

- Delayed effective date of final regulations
- Gave transitional guidance for EOY valuation date
  - For 2008, prior year FTAP based upon 2006 valuation
  - Assets to include contribution for 2006
  - 2007 FTAP is Assets/Current Liability
  - Current Liability includes increase during 2006

Notice 2008-21 – Principles for EOY Val Dates

- Provides AFTAP for following plan year
- Assets include timely contribution for current plan year
- Funding target plus target normal cost for denominator of AFTAP fraction
- Based upon mortality table and segment rates for current plan year
- That is, 12/31/2019 valuation results used to get AFTAP for 2020 year
- No re-calculation based upon new mortality table or segment rates
HATFA

• Highway and Transportation Funding Act of 2014
• Provided that first segment rate applies to benefits determined to be payable during the 5-year period beginning on valuation date
• Periods for 2nd and 3rd segment rates follows
• Change required to be applied for plan years beginning on or after January 1, 2014
• Incorporated in final § 430 regulations issued in 2015

Rev Proc 2017-56

• Automatic approval for certain changes in funding method
• § 3.02(1) - Allows valuation date change to BOY if no change in previous 4 years
• Also, § 3.02(2) allows for change in val date to EDY if change in plan year and val date was EDY for previous 4 years. Not needed as addressed by § 430 regulations. Section 1.430(g)-1(b)(2)(iv) provides automatic approval for a required change in valuation date.

Rev Proc 2017-56

• § 4.01 allows change in funding method for takeover plans if certain conditions are met
  • Permitted change for takeover plans includes a change in the valuation date to EDY
  • Note no four year lookback
• § 5 provides approval for certain plan mergers provided certain conditions are met
Rev Proc 2017-56

• § 6.05(1) provides that approval does not apply to changes in connection with plan mergers if AFTAPs immediately before merger are not within the same range for all of the plans to be mergered.
  • Certified AFTAP for year of change used or, if no certified AFTAP, presumed AFTAP for year of change used
  • Ranges are (1) less than 60%, (2) at least 60% but less than 80%, (3) 80% or higher, or (4) 100% or higher, except that 80% or higher is treated as in the same range as 100% or higher.

Questions and Uncertainties

• Where are the “future regulations” that were mentioned?
• If valuation date is changed, how is presumed AFTAP determined?
  • Why is that an issue for concern?
  • Does it matter if change is from BOY to EOY or from EOY to BOY?
• What do I do for mergers that do not meet Rev. Proc. 2017-56?
• What about spin-offs?

Answers?

• Regulations – reportedly in the works?
  • It has been more than 10 years!!!
  • Some interruptions (i.e., funding relief guidance, MAP-21, HATFA), but not even a proposed regulation!
Answers?

• **Plan must operate using presumptions**
• In absence of regulations
  • Safest to take well grounded, reasonable positions when guidance not available.
  • Change in valuation date is a particular concern as need presumed AFTAP during transition.

Presumptive AFTAP Review – BOY Val Date

1/1/2020 to 3/31/2020
Certified AFTAP for 1/1/2019

4/1/2020 to 9/30/2020
Certified AFTAP for 4/1/2018 reduced by 10 percentage points if 80% - 90% or 60% - 70%.

10/1/2020 to EOY
Deemed less than 60%.

Presumptive AFTAP Review – EOY Val Date

1/1/2020 to 3/31/2020
Certified AFTAP for 12/31/2018

4/1/2020 to 9/30/2020
Certified AFTAP for 12/31/2018 reduced by 10 percentage points if 80% - 90% or 60% - 70%.

30/1/2020 to EOY
Deemed less than 60%.
Change from EOY to BOY Val Date

• First - decide year of change – 2019 or 2020?
• Year of Change 2019
  • 12/31/2018 valuation and associated AFTAP applies for 2019 until 1/1/2019
  valuation and new AFTAP certification
  • Allows time for 1/1/2019 valuation but need to be concerned if plan
  operation would change

Change from EOY to BOY Val Date

• Year of Change – 2020
  • 12/31/2018 valuation and associated AFTAP is certified AFTAP for 2019
  • Thus, become presumptive AFTAP for 2020
  • Possible reduction at 4/1/2020
  • Presumed less than 60% at 10/1/2020
  • Valuation as of 1/1/2020 becomes focus

Change from BOY to EOY Val Date

• Year of Change – 2020 for all practical purposes at this point
• Assume 1/1/2019 valuation done and AFTAP certified. Becomes
  presumed AFTAP for 2020.
• What happens at 10/1/2020?
• Remember – no official change in val date until SB signed and filed
Change from BOY to EOY Val Date

• First possibility – Do 12/31/2019 valuation and use for 2020 ATAP
  • Would not be on 2019 SB as 1/1/2019 val date figures shown
  • Would likely want an attachment to SB
• Second possibility – Do 1/1/2020 valuation for 2020 AFTAP and then
  12/31/2020 val for 2020 MRC
  • Would not be on 2020 SB as 12/31/2020 figures shown
  • Would likely want an attachment to SB
• Third possibility – Take 1/1/2019 valuation and update it to end of year
  • Include TNC with FT and increase at effective rate
  • Update assets to end of year at effective rate and add contributions for 2019
    adjusted to end of year
  • Alternatively, use end of year assets, plus discounted contributions for 2019
    made later
• Which is best?

Spin-Offs

• Issue – What to use for presumed AFTAP prior to certification of
  AFTAP for the plans after the spin-off?
  • Does it depend on type of spin-off?
• For today, assume spin-off takes place at last day of year or first day of
  year and no change in method, valuation date, plan year, etc.
Spin-Offs – De Minimis

• Treat small plan spun-off like a new plan?
  • Support in Rev. Rul. 83-212, however, see § 1.430(f)-1(d)(3)(ii), which addresses 2nd year of new plan and says not from merger or spin-off
  • Assets >= value of accrued benefits at spin-off so first AFTAP likely be 100% or better
  • Use AFTAP or presumed AFTAP of plan before spin-off until certification, depending on the timing of the spin-off (conservative approach)
  • Or treat as new plan for year of spin-off for AFTAP purposes
  • Remaining large plan, no change

Spin-Offs – Non-De Minimis

• Non-De Minimis
  • Use AFTAP or presumed AFTAP for plan before spinoff?
  • Example
    • PVAB = 2,000,000; MV assets = 1,000,000; AFTAP = 80%
    • Spin-off Plan 1 – FT=1,000,000; Assets=1,000,000
    • Spin-off Plan 2 – FT=1,000,000; Assets=600,000
  • Go back to re-create AFTAP for each spun-off piece?
    • Impractical, to say the least!!

Spin-Offs – Non-De Minimis

• Non-De Minimis
  • Answer seems to be to use AFTAP or presumed AFTAP for plan before spin-off
    • Approach was approved as part of a change in funding method where plan year also changed
    • Plan 75% funded; Spin-off Plan 1 – 90% funded, Spin-off Plan 2 – 70% funded
    • Language used in approval letter was that it is not unreasonable given guidance at this time
Mergers

• Impact of Rev Proc 2017-56
  • If the merger results in any change in funding method, make sure AFTAPs are in same range. Even for de minimis mergers.
  • Means valuation dates, look back months, etc. need to be the same for all plans being merged to avoid any method change.
  • Difficult if different valuation systems; planning needed
  • When regulations proposed, much to comment upon

Multiple Amendments

• Operational Rules of § 1.436-1(g) – how to apply AFTAP and presumed AFTAP to test whether amendments can go into effect
• During presumption period use Inclusive Presumed AFTAP
• If amendment cannot take effect during presumption, and no § 436 contribution, then need to be concerned with period after certification

Multiple Amendments

• § 1.436-1(a)(4)(iv) – treatment of plan amendments that do not take effect
  • If cannot take effect as of effective date because of limitations, but is permitted to take effect later in the plan year as a result of additional contributions under (f)(2) or pursuant to the actuary’s certification of the AFTAP that meets (g)(5)(i)(C), then must take effect automatically as of first day of plan year (or, if later, the original effective date).
  • If cannot take effect during the plan year, then must be treated as if never adopted, unless amendment provides otherwise.
Multiple Amendments

• § 1.436-1(g)(5)(ii)(C) – special rule for amendment that increases plan liabilities
  • If plan amendment does not take effect because of (g)(2)(iii)(D) or (g)(3)(ii)(A), the plan amendment must go into effect if it would be permitted under § 436 rules based upon certified AFTAP for year that takes into account the plan amendment, unless the amendment provides otherwise.

• § 1.436-1(g)(5)(iii)(D) – ordering rule for multiple amendments
  • Reserved

Multiple Amendments

• Example 1 – Two amendments covering different groups of participants. Signed on same day with same effective date.
  • Inclusive presumed AFTAP without plan amendment is 85% ($850,000/$1,000,000)
  • Amendment A increases inclusive presumed FT by $40,000
  • Amendment B increases inclusive presumed FT by $50,000
  • 850,000/1,050,000 = 80.95%
  • 850,000/1,090,000 = 77.98%
  • Now what?

Multiple Amendments

• Example 2 – Inclusive presumed AFTAP 85% as before
  • Amendment A adopted January 23, 2020, and would increase inclusive presumed FT by $65,000
  • Amendment B adopted March 1, 2020, and would increase inclusive presumed FT by $70,000
  • On September 1, 2020, AFTAP certified at 84.62% (1,100,000/1,300,000)
  • Either amendment can take effect but not both without § 436(f) contribution.
Multiple Amendments

- How to handle situations?
  - Plan language
  - Additional contributions
  - Maybe changing assumptions
- Additional considerations
- Bonus (for discussion) – increase in liabilities on account of merger
  - Formula of ongoing plan applies after merger

Questions and Additional Discussion