

## Appendix "A"

### EXCERPT FROM 2011 GRAY BOOK

#### 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.

# Appendix B



Department of the Treasury  
Internal Revenue Service

Date: 2/24/14

[Redacted]

TUCSON, AZ 85718

Name of Plan:

[Redacted]

DEFINED BENEFIT PLAN

Plan Number:

002

Employer Identification Number:

[Redacted]

Person to Contact:

Cassandra Burns #1000906122

Telephone Number:

(513) 263-4631

Fax: (855) 212-0914

Response Due Date: 3/10/14

Dear Sir or Madam:

We are considering your request for a determination on the above plan. However, we need more information before we can continue processing your request. The enclosed checksheet(s) show the information we need and, if applicable, amendments to be submitted.

Please reply by the response date and attach this letter to your reply. If we do not hear from you within that time, we may process your application on the basis of the information you have already supplied us. This could result in a determination that your plan is not qualified for favorable tax treatment.

If you have questions or concerns regarding this matter, you can reach me at the number shown above or you can contact my manager, Cathy Waite at (513) 263-3412. **Please include the Application Identification Sheet** with your response if mailing your response – you do not need it if sending via fax at 855-212-0914.

Sincerely,

*Cassandra Burns*  
Employee Plans Specialist

Enclosure:  
Checksheet

[Redacted]

Internal Revenue Service  
P.O. Box 12192  
Covington, KY 41012-0192

Letter 1196

CHECKSHEET

Sponsor's Name: [REDACTED]  
 EIN: [REDACTED]

**Information Needed**

1. The amendments dated 4/11/12 and effective 1/1/11, 2/25/11 effective 1/1/10, and 3/10/10 effective 1/1/09, appear to be discretionary amendments and were not adopted by the end of the plan year first effective. See IRC 401(b) and Rev Proc 2007-44 section 5.05(2). Because satisfaction of IRC 412 is not needed to qualify under IRC 401(a) this is not an exception to the rules of see IRC 401(b) and Rev Proc 2007-44 section 5.05, and therefore IRC 412 does not give plans an exemption to amend the plan after the end of the plan year for a discretionary benefit change. See also the 2011 Gray Book answer to this question which can be found online.

If the amendments were made to satisfy Treas. Reg. 1.401(a)(4)-11(g) then provide what the failure was, if the employees receiving the additional contribution were fully vested in that contribution, and if they were NHCEs at the time. Please also provide an explanation as to whether the test which was failed was passed after the amendment was made taking into consideration the new terms of this amendment in question.

## Appendix "C"

This is a late discretionary amendment. A closing agreement should be considered in order to prevent a proposed adverse closing.

For purposes of satisfying 401(a), the funding recognition election provisions of 412(c)(8) (currently 412(d)(2)) are inapplicable. Compliance with 401(a) is not contingent upon satisfaction of 412. A failure to satisfy IRC 412 is not a disqualifying defect but creates an excise tax. The form of a plan document does not have to satisfy 412 in order to satisfy 401(a), although the linkage is a little tighter with the addition of 401(a)(29). IRC 412(d)(2) does not override, impact or supersede any authoritative guidance with respect to timely adoption of discretionary amendments.

The article at the link provided in the email below provides the language of 412(d)(2) and then states- "In other words, §412(d)(2) allows a defined benefit plan sponsor to amend its plan within 2½ months of the end of a plan year to increase benefits." This interpretation is not accurate. IRC 412(d)(2) is very clearly and very directly limited in its impact by the first phrase - "For purposes of this section"; the 'section' is merely regarding satisfaction of the minimum funding standards. IRC 412(d)(2) allows an administrator to recognize - for purposes of calculating the minimum funding standard and only for purposes of calculating the minimum funding standard - retroactively the impact of a plan amendment on the funded status of the plan.

IRC 412(d)(2) does not permit a retroactive discretionary plan amendment. IRC 412(d)(2) merely allows an administrator to retroactively determine the impact of an amendment on the funding standards and funded status. IRC 412(d)(2) does not operate to make or allow a retroactive amendment such that the benefit accrual is also retroactive. IRC 412(d)(2) is limited to funding recognition, not benefit accrual or amendment date.

At no time, including before the issuance of the Grey Book in question, was this type of retroactive amendment permitted. The 1954 Regulations made it clear that a plan had to operate in accordance with its terms and IRC 401(b) and Rev Ruls made it clear that discretionary amendments had to be in place by the end of a plan year. Rev Procs 2005-66 and 2007-44 made it very clear that a discretionary amendment was required to be in place by the end of a plan year. See sections 5.04 and 5.05 of each.

The position provided in the IRS response in the Grey Book is the historic position and is not a change of position as indicated by the article.

Andy Fedders