A **Planning** Guide
for Plan Sponsors

Mergers and Acquisitions Planning Guide

Defined Benefit Plans

MassMutual
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We'll help you get there.®

Contents

Introduction and Overview

An organizational merger or acquisition can bring many changes. Some of these changes may involve your retirement plans, which is why we have created this ***Mergers and Acquisitions Planning Guide ("Guide")***.

A multitude of regulations govern your retirement plan with both legal and financial implications. It's critical to understand what those regulations require prior to either a merger or acquisition. This ***Guide*** provides detail on topics such as compliance testing, government reporting, and funding implications.

The legal documents governing the purchase and sale also may well affect the retirement plan options that are available. These documents might stipulate what retirement benefits must be provided to certain groups of employees for a specified period after a merger or acquisition. These provisions may dictate your course of action, at least in the short term. Keep in mind, of course, that the stipulated provisions will have to meet the regulatory requirements imposed by the Internal Revenue Service ("IRS") and Department of Labor ("DOL").

While it's important to understand your options after a merger or acquisition, it's as important to plan early to avoid unanticipated consequences (not enough time to implement the preferred option). The due diligence that is a necessity when contemplating an organizational merger or acquisition should be extended to a due diligence review that addresses retirement plans as well. This ***Guide*** is intended to help you get through that process by discussing specific areas of focus for your due diligence efforts.

How MassMutual Helps

MassMutual is available to help from start to finish. Serving the retirement plan needs of over 36,000 plan sponsors, we have the experience and knowledge to assist you at any stage of the process. We can provide more assistance when we are part of the process early. Be assured that the information you share with us will be kept confidential and will be used only to help you plan your actions. To involve us, just contact any member of your MassMutual service team.

Eight Steps to Successful Mergers and Acquisitions

Step 1: Involve Counsel

Company mergers and acquisitions are extremely complex matters. In the midst of such activities, considerations of retirement plan design and structure can naturally give way to issues of corporate management and direction. Involving your legal counsel and actuary at the earliest possible stage of the process will help ensure that all issues and considerations are handled at the right time and in the proper manner.

You should also notify your MassMutual associate as early as possible so we may lend assistance and orchestrate a service strategy throughout the process as we provide a smooth transition for you and your plan's participants.

The checklist in this ***Guide*** is helpful in gathering the necessary information about an acquisition target's plan. Provide counsel with the checklist prior to meeting with an acquisition target to discuss the plan merger, spin-off or consolidation.

Step 2: Due Diligence

By using the checklist in this ***Guide*** throughout the due diligence process, you will obtain valuable information to aid you in determining:

- the identity of all of an acquisition target's plans;
- the compatibility of an acquisition target's plan benefit structure with your current plan benefit structure;
- the transaction's impact on nondiscrimination requirements;
- potential costs associated with various alternatives;
- whether any plans involved are overfunded or underfunded;
- whether an acquisition target's plan is a single employer, multiple employer or multiemployer plan; and
- corporate structure issues (controlled group, governmental employer, etc.).

Your MassMutual team is available to assist you in gathering the data needed to make an informed decision and affect a smooth transition.

Step 3: Choose the Appropriate Option

Once you gather the data, you must analyze it and choose the appropriate course of action for your situation. This ***Guide*** is designed to alert you to many of the issues that will need to be addressed throughout the process and help identify available options. It does not recommend any particular option, as MassMutual cannot provide you with legal advice. Once again, you are encouraged to involve your counsel and actuary in this process as early as possible.

Step 4: Administrative Coordination

Plan mergers, spin-offs and consolidations require extensive administrative coordination. Filings with governmental agencies, actuarial and accounting analysis, plan amendments and participant communications are just some of the areas requiring attention.

MassMutual will work with you, your counsel , your actuary and advisors throughout the entire process. We can assist with regulatory filings, conduct actuarial analysis, prepare communication materials and work with the prior recordkeeper to ensure a smooth and accurate transfer of participant records.

Step 5: Plan and Contract Documents

We provide amendments for your MassMutual contract and MassMutual-drafted plan document as necessary. Plan amendments should be reviewed with your counsel and actuary. MassMutual may need corporate transaction documents prior to completing an amendment. Additionally, MassMutual will provide consulting services and prepare other documents as necessary to suit the needs of your particular situation.

Step 6: Participant Engagement

Plan mergers, spin-offs and consolidations all require timely delivered participant communications to help participants understand the options available to them under the new plan and any changes that might have occurred. Such changes may include changes in vesting, the way service is credited or changes to contribution formulas. Participants in your plan and an acquisition target's plan will have many questions and concerns about the status of their benefits. By addressing these issues promptly, you will avoid confusion, alleviate concerns and maintain a higher level of comfort and productivity among all employees.

MassMutual can assist you in designing, publicizing and delivering your participant communications. Your MassMutual team is available to help enhance participant awareness and understanding of your plan.

Direct participant contact, through on-site meetings or electronic means, can help participants understand how the resulting plan works and what changes might have occurred as a result of the merger, spin-off or consolidation. MassMutual can assist you in designing, publicizing and delivering these sessions. Your MassMutual team can deploy our experienced and knowledgeable communication specialists to help you maximize understanding and appreciation of the plan and answer participants' questions.

Step 7: Transfer of Assets

The acquisition target's plan assets are transferred to MassMutual after all contract and plan documents are completed and signed and any required government filings are timely completed. MassMutual can assist you in completing any Form 5310-A (Notice of Plan Merger or Consolidation, Spin-off, or Transfer of Plan Assets or Liabilities) that you may be required to file with the IRS along with a user fee within the required timeframe. We can also assist with completion of any Pension Benefit Guaranty Corporation ("PBGC") required Form 10 (Post-Event Notice of Reportable Events) or Form 10-Advance (Advance Notice of Reportable Events).

Step 8: Wrap-Up

Once you have completed steps 1 through 7, it is important to wrap-up the process. This involves a review of the steps already taken and an evaluation of any remaining tasks to be completed (including time frames) such as Form 5500 filings and testing considerations. Your MassMutual team will be there every step of the way to answer your questions and to help guide you through this complex process.

To learn more about how we can help orchestrate your plan transition, call your MassMutual team.

Frequently Asked Questions

General Questions

G- 1. If my company sponsors a qualified plan and we acquire another company that also sponsors a qualified plan, what options do we have regarding those plans?

You may:

- merge the two plans into one new plan;
- maintain the two plans separately and make continued contributions, as necessary, to both plans on an ongoing basis;
- freeze one of the plans and add the participants of the frozen plan to the other plan on a future basis; or
- terminate one of the plans and add the participants of that plan to the other plan on a future basis. *Note: Termination of the plan can occur before or after the corporate acquisition.*

G-2. How do I know which option to choose?

First, you should consider at what point you are in the process (e.g., has the acquisition occurred or are you still in the negotiation phase). Then, analyze your plan(s) and the acquisition target's plan(s) for compatibility, similarities, differences and tax qualification issues. Next, consider whether there are any business reasons for maintaining multiple plans (e.g., different types of businesses, or businesses located in different areas requiring different benefit structures). Finally, decide what provisions will be required/desired in the final plan.

Note: If this is a stock acquisition or merger, the acquiring company (or resulting corporation) is deemed to automatically step into the shoes of the target company. This means the acquiring company will automatically acquire the target company's plan assets and liabilities unless arrangements are made for the acquisition target to terminate its plan prior to the acquisition or merger.

If this is an asset acquisition, the acquiring company does not acquire the acquisition target's plan assets and liabilities unless there is agreement by the parties.

Also, you should consider the impact of any action on employee relations and morale. After dealing with anti-cutback issues and protected benefits, there are still the concerns and expectations of participants in both plans to consider.

These options are discussed in more detail in additional sections of this ***Guide***.

G-3. Can a governmental plan or a tax-exempt plan be involved in a plan merger?

Yes, plans of governmental employers and tax-exempt employers can be involved in a plan merger.

G-4. Can multiemployer plans be involved in a plan merger or spin-off?

Yes, but only if specific rules concerning multiemployer plan mergers and spin-offs found under the Employee Retirement Income Security Act of 1974 ("ERISA") §4231 are satisfied. Under these rules, a multiemployer plan sponsor can only effect a plan merger or a spin-off if:

- the plan sponsor notifies the PBGC of a merger or transfer of plan assets or liabilities at least 120 days before the effective date of the merger or transfer;
- accrued benefits are not reduced immediately after the effective date;
- a special actuarial valuation is performed; and
- the benefits of participants are not reasonably expected to be suspended due to plan insolvency.

*Note: This **Guide** is not designed to address governmental plans or multiemployer plans. Governmental plans are not subject to Internal Revenue Code ("Code") §411, so* *requirements related to vesting service and §204(h) notices do not apply to governmental plans.*

G-5. Is controlled group status a factor in a merger, spinoff or consolidation?

Yes. In a controlled group of corporations (or affiliated service group), each member of that entire controlled group is jointly and severally liable for PBGC premium payments, unpaid minimum funding contributions and any potential termination liabilities of defined benefit plans sponsored by any other member of the controlled group. In a stock sale, the acquiring company takes on the liabilities as well as the assets of the acquisition target. For this reason, in a stock purchase, the acquiring company will usually ask for confirmation and/or representations that the acquisition target has timely paid all PBGC premiums and timely made all contributions for its defined benefit plan(s) and that all premiums have been paid and all contributions made for any other defined benefit plans maintained by other controlled group members. In addition, the acquiring company should confirm that any defined benefit plan terminations are standard terminations.

Certain corporate transactions at a controlled group level may trigger a reportable event that requires notifying the PBGC under the ERISA §4043 rules.

G-6. What exactly is a plan merger?

A plan merger is the combining of two or more plans into a new plan or into an existing plan of the ongoing company. If the assets of each plan are not combined, but are instead kept separate for purposes of determining benefits, the plans are not considered to have merged.

Mergers are typically the most common option chosen by plan sponsors. Thus, this ***Guide*** deals more with issues surrounding mergers than alternative options.

G-7. What is the difference between merging plans and converting a plan?

Mergers involve combining two or more plans into one. Conversion involves one plan changing into another type of plan (e.g., traditional defined benefit into a cash balance plan).

G-8. What if I am only buying a part of a company? Would I be responsible for prior service and benefits?

In the sale of a piece of Company A to Company B, Company A has two basic choices:

- keep the liabilities of the accrued benefits and corresponding assets in Company A's plan; or
- transfer both assets and liabilities to Company B that includes a spin-off calculation.

To the extent the assets are less than the liabilities, an adjustment to the sales price will often occur. It is advisable that both companies have their own actuary involved in the valuation process.

G-9. Does the other plan have to be the same type as my company's plan?

No. Many different types of qualified plans can be merged together. In merging two plans, you must decide what type of plan the successor plan will be (e.g., traditional defined benefit or cash balance) and amend the plans accordingly.

Frequently Asked Questions (continued)

G-10. Can a defined contribution plan be merged with a defined benefit plan?

Generally, yes. However, one of the plans should be converted to the other type of plan (e.g., a defined contribution plan can be converted to a defined benefit plan) and then when the two plans are the same type (e.g., both defined benefit plans) they can be merged. After conversion, the merger follows the rules governing the surviving plan type.

Note: Merging a defined benefit plan into a defined contribution plan (or, vice versa) can result in significant complexities with respect to plan provisions and plan administration. Most plan sponsors find it much less complicated to simply freeze or terminate the defined benefit plan and allow future benefits to accrue under the defined contribution plan.

G-11. Is the merger effective date important?

Establishing the merger effective date is much more complicated than it may first appear to be. Aside from attempting to determine the date upon which two plans being merged become a "single plan" under the law, the regulations state that the actual date of a merger or spin-off shall be determined on the basis of that situation's facts and circumstances. For purposes of this determination, the following factors (none of which is necessarily controlling) are relevant:

- date on which affected employees stop accruing benefits under one plan and begin coverage and benefit accruals under another plan;
- date the amount of assets to be eventually transferred is calculated; and
- if the merger or spin-off agreement provides that interest is to accrue from a certain date to the date of actual transfer, the date from which such interest shall accrue.

G-12. What is a special schedule of benefits and how does it affect a merger?

Code §414(l) calls for a comparison of the benefits of all plans involved in a merger on a termination basis before and after the merger. If the plan assets after the merger date are not sufficient to provide for benefits should the plans subsequently terminate, a special schedule of benefits must be maintained for not less than five years to ensure that participants do not receive a lower benefit on a plan termination basis due to the plan merger than they would have received if the plans had not merged. Alternatively, data sufficient to create such a schedule may be maintained for the five-year period. When the plan assets after the merger date are more than sufficient to provide for benefits if the plans were to subsequently terminate, a special schedule of benefits is not required.

G-13. What is a spin-off?

A spin-off occurs when one plan is split into two or more plans. A spin-off may be relevant in the acquisition context when an acquiring company is only purchasing a portion of the selling company (e.g., a subsidiary or division). In that situation, the selling company can spin-off a portion of the plan it sponsors covering only those employees in the subsidiary or division being sold. This new plan can then be adopted and maintained by the acquiring company or merged into the acquiring company's plan.

G-14. What requirements must be satisfied when a defined benefit plan spin-off occurs?

A defined benefit plan spin-off occurs if the following Code §414(l) requirements are met:

- All of the accrued benefits of each participant are allocated to only one of the spun-off plans; and
- The value of the assets allocated to each of the spun-off plans is not less than the sum of the present value of the benefits on a termination basis in the plan before the spin-off for all participants in that spun-off plan.

A spin-off will be deemed to satisfy these requirements even if plan assets allocated to the spun-off plans are less than the present value of benefits on a termination basis under a special de minimis rule which permits transfer of assets equal to the present value of the accrued benefits spun-off if less than three percent of the plan assets of the original plan are involved.

G-15. Will I need to amend my company's plan?

Yes. The particular circumstances of each spin-off, conversion or merger will determine the level and complexity of the amendments required.

A complete review of each plan is necessary to determine the extent of the amendment. Although only a partial list, it is necessary to consider the impact of the transaction on the following plan provisions:

- **Eligibility** – Will the eligibility requirements be more restrictive under the merged plan than under the pre-merger plans?
- **Vesting** – Will the merged plan have a different vesting schedule than one of the pre-merger plans?
- **Optional Forms of Benefits and Accrued Benefits** – The merged plan generally cannot eliminate optional forms of benefits with respect to benefits that have accrued at the time of the merger under the pre-merger plans. Optional forms of benefits may be eliminated, however, with respect to benefits that accrue after the merger.
- **Annuity Distribution Options (e.g., installment payments)** – There are some annuity options that must be protected with respect to accrued benefits but they may be eliminated from the merged plan for benefits accrued after the merger and may be eliminated entirely from a non-pension defined contribution plan. However, Code §411(d)(6) final regulations permit the elimination of other annuity options without protecting accrued benefits when certain conditions are met for the previous plan and the successor plan.
  - Cost of Living Adjustments (COLAs) for future benefit accruals (but not for benefits already accrued) may be eliminated.
  - early retirement benefit or retirement-type subsidy – The merged plan cannot generally eliminate these. For example, if a plan permits participants to receive benefits at early retirement age, the right to begin this benefit at an early retirement date is a Code §411(d)(6) protected benefit.
  - ancillary benefits are not protected benefits and may be eliminated.

G-16. What if the assets in the original plan are insufficient to cover all the liabilities on a plan termination basis?

A plan must allocate assets based on the categories described in ERISA §4044. For example, the "highest" category of liability is assigned to employee contributions to the plan. Assets must be allocated to each group sufficient to cover all the liabilities in this Category 1. Assuming there are assets remaining to be allocated (and there usually are), the assets are then allocated to Category 2, then to Category 3 and so on until all plan assets are allocated. The final Category (non-vested accrued benefits) often has very little remaining assets.

G-17. Should the final plan specifically address the prior plan's transferred assets?

Yes, the final plan in a merger or spin-off must contain specific language to prevent cutbacks of accrued benefits from the prior plan. The final plan must also contain language to preserve the original defined benefit plan's protected benefits.

G-18. What vesting issues should plan sponsors be aware of?

In a merger or spin-off, Code §411 vesting provisions require the following:

- A participant's vested accrued benefit after the amendment/merger must not be less than the participant's vested accrued benefit prior to the amendment/merger.
- If a participant has at least three years of service, and the new vesting schedule would provide a lesser vesting percentage at any time in the future, the participant must be given a 60-day election period to choose between the old vesting schedule and the new vesting schedule. The schedule each participant chooses would depend on each participant's personal situation and future increases in vesting are determined under the applicable schedule chosen by each participant.
- All hybrid plans (such as cash balance plans or pension equity plans) generally must provide that each participant who has completed three years of service is 100% vested in his or her accrued benefit derived from employer contributions.

G-19. Are all participant benefits protected from reduction in a merger, conversion or spin-off?

No. Code §411(d)(6) anti-cutback rules only prohibit the reduction or elimination by amendment of a participant's accrued benefit, including optional forms of benefits and early retirement benefits or subsidies. (As noted in Q&A 15, the final §411(d)(6) regulations permit the elimination of certain optional forms of benefit when various requirements are met.) These are called §411(d)(6) protected benefits. For this purpose, a merger, conversion or spin-off is considered a plan amendment. A plan may be amended to eliminate or reduce benefits to the extent that those benefits have not yet accrued as of the later of the amendment's adoption date or effective date. Also, there are exceptions to the anti-cutback rule. The following are examples of items that are not §411(d)(6) protected benefits:

- ancillary life insurance protection;
- the right to make after-tax employee contributions;

- administrative procedures for distributing benefits, such as provisions relating to the particular dates on which notices are given and by which elections must be made; and
- rights that derive from administrative and operational provisions.

Exceptions allow certain protected benefits to be eliminated prospectively including a plan sponsor's ability to involuntarily cash-out accrued benefits of $5,000 or less (if the plan so provides) without violating the anti-cutback rule.

G-20. Is there a way to avoid the §411(d)(6) protected benefit rule requirements?

You may elect to have the acquisition target terminate its plan prior to the transaction effective date and then permit voluntary rollover of the participants' benefits into your plan as rollover contributions. If the acquisition target's plan is terminated, the affected participants' accrued benefits become 100% vested. If the plan permits single sum payments at plan termination, then each participant must be given an opportunity to receive his or her benefit as a distribution or to roll all or a portion of the benefit into your plan as a rollover contribution. Rollover contributions lose their prior plan characteristics coincident with the prior plan's termination and are not subject to prior plan restrictions or protected benefit rules.

Former participants in the terminated plan, however, may choose to roll over their distributions to IRAs or keep the cash, which would result in fewer assets in the merged plan.

G-21. How do I credit service for participants from an acquisition target?

In determining whether you are required to credit service, you must consider whether the acquisition is the result of an asset or a stock sale. As a general rule, if the acquisition results from a stock sale, then the acquiring company is required to credit a participant's service with the acquired company after the acquisition. You should check with your ERISA counsel, however, if you are acquiring stock of a subsidiary company since an exception to the general rule may apply. If the acquisition results from an asset sale, as a general rule, the acquiring company is treated as a new employer and is not required to credit a participant's service with the acquired company after the acquisition. However, as a practical matter, the acquiring employer generally will recognize service for purposes of eligibility and vesting.

An exception to this general rule may apply if the buyer assumes sponsorship of the seller's plan or a portion thereof, and if the buyer accepts a direct transfer of assets and liabilities (other than by direct rollover) from the seller's plan into a plan maintained by the buyer.

If you continue to maintain the plan of the acquisition target or merge it with your existing plan, you must credit a participant's service with the acquisition target company as service for your company for purposes of vesting and eligibility (crediting service for benefit accrual purposes is a discretionary decision). If the acquisition target's plan is terminated prior to the transaction effective date, the decision to credit service with the acquisition target company for all purposes (vesting, eligibility and benefit accrual) is discretionary. You may also choose to credit service with an acquisition target company, even if that company did not maintain a qualified retirement plan.

Frequently Asked Questions (continued)

G-22. How are distributions to employees from a pension plan impacted in a merger or acquisition situation?

General Counsel Memorandum 39824 provides IRS guidance on the limited circumstances when a defined benefit plan may make distributions of accrued benefits in a merger or acquisition scenario. The key to permitting a distribution is that there be a "severance of employment" of the affected employee(s) from the employer sponsoring the distributing plan. Generally, distributions are permitted if:

- the buyer is an unrelated employer of the seller (i.e., not a member of the same controlled group or affiliated service group);
- the buyer's plan does not accept a transfer of plan benefits from the seller's plan; and
- the buyer does not take over the seller's plan as its own plan. This is easier to control in an asset acquisition.

G-23. What is the "Same Desk Rule" and how does it impact a merger, spin-off or termination?

Under the "Same Desk Rule," the IRS applies a different definition to the term "separation from service" than it does to "severance from employment." The employee does not incur a separation from service when he or she continues in the same or similar job capacity with a different employer as a result of an acquisition of the stock or assets of the former employer or a similar transaction. This means that, even though the participant has terminated employment with the former employer, a participant subject to the Same Desk Rule has not separated from service for purposes of receiving a plan distribution from the former employer's pension plan if the new employer is unrelated to the seller, has accepted a transfer of plan benefits from the prior employer's plan and has taken over all or part of the prior employer's plan. Therefore, the participant would not be entitled to a benefit from the plan until he or she has a severance from employment with the new employer and/or meets the criteria for a benefit payment under the plan

Review your specific circumstances with your tax or legal counsel to determine where your plan fits and what amendments (if any) are necessary.

G-24. What determines if there has been a partial plan termination in a spin-off or merger?

Generally, a spin-off will not result in a partial termination if the spun-off plan remains in existence where the participants in the spun-off plan will continue to receive service credit for vesting and eligibility purposes. This is also the case when the spun-off plan is to be sponsored by an acquiring company since the acquiring company is obligated to credit service with the prior employer.

A partial termination may arise if two plans covering a substantially similar group of employees merge and the final plan eliminates benefit accruals provided by one of the premerger plans.

G-25. What happens if there has been a partial plan termination?

When a partial plan termination occurs, all affected participants become fully vested in their accrued benefits as of the date of the partial plan termination. Affected participants are those who have been eliminated from participation and/or ongoing benefit accrual. Other participants who are not affected would continue to be subject to the plan's vesting schedule.

G-26. What are the testing implications of a plan merger or spin-off?

Nondiscrimination and coverage tests are impacted by plan mergers and spin-offs involving plans of unrelated companies. The addition (or deletion) of participants in the highly and/or non-highly compensated groups will affect the nondiscrimination and minimum coverage ratio percentages.

Note: If a company acquires a plan as part of a corporate level transaction, then the plan can be maintained and tested separately for minimum coverage purposes for the plan year in which the transaction occurs and the following plan year. If the two plans remain separate, they can be tested separately for nondiscrimination purposes during the transition period. This permits the ongoing plan sponsor to evaluate the plans to determine whether to amend, merge or terminate the plan without bearing the burden of failed testing issues while doing so. This transaction period also applies to the minimum participation rules.

Defined benefit plans must first satisfy the minimum participation requirements, then minimum coverage and then the general nondiscrimination in amounts of benefits. If a sponsor is a member of a controlled group of corporations or an affiliated service group, then all the related employers are treated as a single employer for testing purposes.

It is important that you know exactly when the transition period begins and ends as this defines the window and will allow you to avoid consequential mistakes.

A defined benefit plan must satisfy minimum participation before it can perform the more complex tests. A plan may either satisfy minimum participation automatically or by applying the numerical test (the lesser of 50 employees or 40% of the employees of the employer).

Plans that do not meet minimum coverage "automatically," will have to perform either the ratio percentage test or, if that fails, the more complex (two-part) average benefit test. When researching an acquisition target's prior test results, we recommend that you ask for the most current plan year's test results.

Plans that satisfy Code §401(a)(4) safe harbor nondiscrimination plan design rules are not required to perform the §401(a)(4) general test. If the acquisition target plan is not a "safe harbor plan," ask for the most recent general test results as well as the testing methodology.

Finally, if a plan's benefit formula includes a definition of compensation (or monthly earnings) that does not automatically satisfy Code §414(s) compensation rules, you will need to ask for the most recent §414(s) compensation test.

G-27. Are any IRS or other government filings required if we merge, consolidate or spin-off a plan?

You may need to file IRS Form 5310-A (Notice of Plan Merger or Consolidation, Spin-off, or Transfer of Plan Assets or Liabilities).

You will not need to file IRS Form 5310-A if you maintain a qualified defined benefit plan and merge it with another qualified defined benefit plan, assuming all of the following conditions are met:

- The total liabilities (present value of benefits whether or not vested) that are merged into the larger plan involved in the merger are less than 3% of the assets of the larger plan (on at least one day of the larger plan's plan year during which the merger occurs); and
- The provisions of the larger plan that allocate assets at the time of termination must provide that, in the event of a spin-off or termination of the plan within five years following the merger, plan assets will be allocated first for the benefit of the participant in the other plan(s) to the extent of their benefits on a termination basis just prior to the merger.

Frequently Asked Questions (continued)

You will not need to file IRS Form 5310-A if you maintain a qualified defined benefit plan and spin-off the plan into two or more qualified defined benefit plans, assuming all of the following conditions are met:

- For each plan that results from the spin-off, other than the spun-off plan with the greatest value after the spin-off, the value of the assets spun-off is not less than the present value of the benefits spun-off (whether or not vested); and
- The value of the assets spun-off to all the resulting spun-off plans (other than the spun-off plan with the greatest value of plan assets after the spin-off) plus other assets previously spun-off during the plan year in which the spin-off occurs is less than 3% of the assets of the plan before the spin-off as of at least one day in that plan's plan year.

Other exceptions apply to mergers of defined contribution plans and plan spin-offs. Refer to the "Filings" section of the Mergers & Acquisitions Planning ***Guide*** Summary at the end of this ***Guide*** for further details on filings pertaining to your particular circumstance.

G-28. Must I contact the PBGC in a merger, spin-off or consolidation?

The PBGC generally requires that single-employer pension plans file Form 10 or Form 10-Advance to report the occurrence of certain transactions, thus permitting PBGC intervention to protect benefits due to participants and beneficiaries where necessary. There are a number of reportable events, including changes in contributing sponsor or controlled group and transfers of 3% or more of a plan's benefit liabilities. While most events must be disclosed within 30 days after the event, under certain circumstances 30 days advance notice is required. A number of waivers and/or extensions are available for each reportable event. Review the PBGC reportable events requirements under ERISA §4043 with your counsel and actuary well in advance of any transaction to determine if a waiver or extension is available in your situation.

G-29. What is a §204(h) notice?

Section 204(h) of ERISA generally requires that participants in defined benefit plans be notified of any amendment that significantly reduces the rate of future benefit accruals ("§204(h) notice"), including amendments that terminate and/or freeze benefits under the plan. A plan amendment that eliminates or significantly reduces any early retirement benefit or retirement-type subsidy shall also be treated as having the effect of significantly reducing the rate of future benefit accrual. An amendment affects the rate of future benefit accrual if it can reasonably be expected to change the amount allocated in the future to the participants' retirement benefits.

A §204(h) notice must be written in a manner calculated to be understood by the average plan participant and should provide sufficient information (determined by the IRS) to allow applicable individuals to understand the effect of the plan amendment. The IRS may also allow an exemption or simplified form of notice for plans with fewer than 100 participants.

The regulations provide general standards for content of §204(h) notices rather than specific language requirements:

- If the required narrative description will not reasonably convey the approximate magnitude of the reduction in benefit accruals, additional narrative or one or more illustrative examples are required to be included in the notice.
- If an amendment affects different classes of participants differently, separate §204(h) notices must be provided to each class of participants. When an amendment may result in reductions that vary in impact, the notice, with certain exceptions, must show the approximate range of reductions.
- IRS regulations on hybrid plans contain special rules for ensuring that a conversion from a traditional defined benefit plan to a hybrid plan (such as a cash balance plan) will not result in a "wear-away" situation with respect to the participant's pre-conversion accrued benefits and any early retirement subsidy to which the participant is entitled based on the pre-conversion benefits. These regulations also provide guidance on what constitutes a conversion amendment (significantly reducing the rate of future benefit accruals).
- If an amendment reduces an early retirement benefit or retirement-type subsidy merely as a result of reducing the rate of future benefit accrual, notice need not contain a separate description of the reduction in the early retirement benefit or retirement-type subsidy.
- A cessation of accruals simply requires a description of the old formula, a statement that no future benefits accrue, and the effective date of the amendment.

G-30. Who should receive a §204(h) notice?

The §204(h) notice must be provided to:

- each participant that is affected by the amendment as well as any beneficiary so affected;
- each alternate payee designated by a Qualified Domestic Relations Order (QDRO), under the plan that is affected by the amendment;
- any employee organization representing participants entitled to the notice; and
- each employer who has an obligation to contribute under a multiemployer plan.

G-31. When and how must a §204(h) notice be given?

- IRS regulations require that a §204(h) notice generally must be provided at least 45 days before the effective date of the plan amendment:
  a. The period is reduced to 15 days before the effective date of an amendment adopted in connection with a business merger or acquisition, regardless of the size of the plan, and with respect to amendments of small plans;
  b. Business merger or acquisition amendments involving a plan-to-plan transfer or merger and affecting only an early retirement benefit or retirement-type subsidy (but not reducing the rate of future benefit accrual) are provided an additional special timing rule requiring notice be provided no later than 30 days after the effective date of the amendment.
- Notice may be delivered using electronic means, including e-mail, Internet, DVD or CD as long as the method used results in actual receipt or the plan administrator takes appropriate and necessary measures to ensure actual receipt.
- Special rules apply to plan termination situations.
- The DOL has advised the IRS that the §204(h) notice will generally satisfy ERISA's requirement for summaries of material modifications.

- Generally, an excise tax of $100 per day per failure may be imposed. There is a cap available on the excise tax of $500,000 for failure to comply with these rules, if reasonable diligence was exercised to meet the notice requirements. Additionally, there is excise tax relief available for certain failures corrected within 30 days.

G-32. Should I review my investment policy and asset allocation strategy in light of a merger or spin-off?

The plan sponsor should periodically review its investment policy and asset allocation strategy. Any time you significantly change the makeup of your plan, it is prudent to review your investment policy and asset allocation strategy to assure it meets the plan's current needs. Adding or losing employees and large shifts in plan assets due to merger or acquisition activity can affect your plan's assets and liabilities and present significant new challenges to your plan's funding status and the investment policy and asset allocation strategy currently employed to meet those needs.

Actuarial Questions

A-1. When should I involve my actuary in this process?

As soon as possible! In addition to reviewing the acquisition target plan's most recent valuation report, an actuary can determine whether any previously adopted amendments have been reported in the valuation (e.g., an early retirement window benefit which could negatively impact plan assets). An actuary can also determine if scheduled benefit increases under collective bargaining agreements have been included in the valuation report. (A benefit increase is not required to be included in a valuation report until the year following the year during which the increase was adopted or became effective, whichever is later.) Finally, the actuary can advise his client about the fairness of the assets versus liabilities that are being spun-off and whether the acquiring employer might want to consider negotiating an adjustment to the original sale price.

A-2. What is "funding status" and how does it impact a merger, spin-off or consolidation?

Defined benefit plans provide benefits based upon a formula described in the plan document. A plan's funding status is a measure of a plan's ability to pay the benefits owed when they come due. It compares the current value of the plan's assets to the actuarial value of projected and accrued benefits under the plan (the plan's "liabilities"). Accordingly, a plan may be overfunded (surplus assets) or underfunded (liabilities exceed plan assets). To protect participants against a plan having insufficient assets to pay benefits owed, qualified plans are subject to minimum funding requirements under Code §430 and a parallel provision under ERISA §303. The funding method is a mechanism to allocate the costs of the plan to various plan years.

A proper review of an acquisition target plan's funded status will require knowing what actuarial assumptions were used to determine the plan's liabilities. Once the liabilities are established based on these assumptions, they can then be compared to the value of assets as of the same date to determine the plan's funded status.

A-3. What factors affect a plan's funding status?

The plan's funding status will also be impacted by the actuarial assumptions the plan's actuary has adopted for determining the plan's liabilities. Pertinent assumptions include: mortality (life expectancy); rate of return (the rate at which plan monies will grow); salary scale (rate of future salary growth); and turnover (frequency with which employees terminate employment). Conservative assumptions generally result in higher liability figures, whereas more liberal assumptions will tend to lower liability figures.

Because certain unpredictable contingent events might not be considered in advance (e.g., job elimination or plant shutdown benefits), plans are not funded for these situations. An offer of an early retirement window benefit to a select group of employees is another factor that could impact a plan's funded status.

Other types of benefit increases may also impact a plan's funded status and may not have been taken into consideration since an actuary does not have to include benefit increases until the year following the year during which the amendment was effective or adopted, whichever is later.

A-4. What is the difference between actuarial liabilities and termination liability?

Actuarial liabilities (funding assumptions):

- are used to determine how much money to contribute to the plan to enable the payment of benefits assuming the plan has an indefinite duration;
- inform various federal agencies of the plan's funded status; and
- give participants an indication of the plan's fiscal security.

Termination liability (determined according to rules set by the PBGC) is the amount of money needed to cover the cost of all accrued benefits at the time a plan terminates.

A-5. Can early retirement window benefits impact a plan's funding status?

Many companies offer early retirement window benefits. If elected by eligible participants, the payment of these benefits from the plan could significantly reduce plan assets. Additionally, early retirement window benefits must satisfy requirements found under Code §401(a)(4) regulations. If you determine that an early retirement window benefit has been offered, you should request the analyses demonstrating compliance with these rules. Depending upon the timing of the amendment, the benefit may not be described in the plan's most recent valuation report.

A-6. What requirements apply when an over-funded defined benefit plan is involved in a spin-off?

When an overfunded defined benefit plan (determined on a termination basis) is involved in a spin-off transaction, the excess assets must be allocated to one or more of the plans involved in the spin-off after each post-spin-off plan receives enough assets to be able to pay for all accrued benefits if the plan were to terminate immediately after the spin-off transaction is complete. Code §414(l)(2) sets forth specific allocation rules for the excess assets as well as exempting certain specified plans from the mandatory allocation requirements. Under these rules, the amount of excess assets to be allocated to the exempt plans must be determined first, with the remainder allocated to the plans subject to mandatory allocation requirements. The types of spin-off plans exempt from the mandatory allocation requirements include plans transferred outside of a related group (e.g., controlled groups of corporations), plans transferred out of certain multiple employer plans and

Frequently Asked Questions (continued)

terminating plans. The amount allocated to each nonexempt spin-off plan is the applicable percentage of the combined excess assets to be allocated to all such plans, which is determined as follows:

$$\frac{\text{full funding limit for the plan minus present value of accrued benefits (on termination basis)}}{\text{sum of numerators for all plans included in the allocation}}$$

A-7. Are there any other factors I should be aware of during this process?

The Code imposes an excise tax on plans that do not satisfy the minimum funding standards. If a buyer of a company becomes the sponsor of the acquired company's plan, the plan's unfunded liabilities and any resulting excise taxes could become the buyer's responsibility. If any required funding has not been made by the acquired company, the buyer may not want to sponsor the acquired company's plan unless the required contributions are made or the buyer obtains financial concessions from the acquired company.

Your actuary should determine if the acquisition target's plan(s) are overfunded or underfunded. This requires identifying the assumptions used and their purpose (i.e., funding, plan termination liability, financial accounting).

If the plan is subject to collective bargaining, then review the collective bargaining agreements (or plan documents) to determine if any future benefits are guaranteed that might impact a plan's funded status. Plan design issues (e.g., compensation as part of the benefit formula or subsidized early retirement benefits under the target plan not available under your plan) will also require analysis. Consult the due diligence checklist on the following pages for further details on factors to consider.

A-8. Should a plan sponsor merge an existing defined benefit plan with a defined benefit plan of a newly acquired company?

The answer depends on a number of factors and you should consult your actuary to determine what course to take. The actuary's analysis considers such things as contribution levels and potential or existing benefit restrictions imposed by the Pension Protection Act of 2006 on each individual plan or on a merged basis. For example, if one plan is well funded and the other is not, the merger could result in a single well funded plan which would be a good reason to merge the two plans. However, if the underfunded plan pulls the previously well funded plan into a poorly funded status, it might not be a good idea to merge the plans.

Due Diligence Checklist

1. Identify type of defined benefit plan (select each box that applies):

❑ traditional defined benefit plan

❑ cash balance plan

❑ multiemployer plan

❑ other (specify: ___________________)

If you are considering merging an acquisition target's plan(s) into or with your plan, there are many issues to consider involving the plan type. For example, a cash balance plan generally offers a cash option while a traditional defined benefit plan does not. Cash balance plans are designed to look like defined contribution plans and are fundamentally different in plan design and benefit formula from traditional defined benefit plans. It may be necessary to convert one of the plans to the form of the other prior to merging. Thus, this would be a consideration in reviewing the compatibility of the plans before deciding on a course of action. A merger or spin-off, or the conversion of the form of a plan, cannot have the effect of eliminating protected benefits. Your MassMutual team has experience reviewing plans for protected benefits issues in plan mergers.

2. Identify form of plan document:

❑ volume submitter

❑ individually designed

❑ prototype/non-standardized

❑ prototype/standardized

The form of the acquisition target's plan document has an impact on plan design options currently available and may impact available plan design features going forward. MassMutual can restate the existing plan to a MassMutual provided and supported defined benefit plan document in a flexible format that has been updated for the latest legislative and regulatory requirements.

3. Identify form of plan sponsor (select each box that applies):

❑ Corporation

❑ Professional Service Corporation

❑ S Corporation

❑ Partnership, including LLP

❑ Limited Liability Company taxed as

– a Partnership or Sole Proprietorship

– a Corporation

– an S Corporation

An acquisition target's organizational form can have a significant impact on the acquisition process. The form of the plan sponsor also impacts the form of the plan and the form of the specific plan impacts how a plan satisfies nondiscrimination requirements.

In a stock purchase acquisition, you are purchasing the form of the entity and thus, its form may impact the plan. Since the acquired entity will continue to have a corporate identity, a subsidiary-type situation will be created, raising controlled group issues. As the purchasing company, you will become the sponsor of any plan(s) maintained by the acquisition target and responsible for any current or future liabilities of such plan(s).

In an asset acquisition, the plan remains with the acquisition target (selling) company unless specifically included as one of the purchased assets. Since you purchase only the assets of the other entity, and not its form, the form of an acquisition target may not matter in an asset acquisition

Due Diligence Checklist (continued)

so long as the plans are compatible for the planned action (merger, consolidation or termination). Other reasons to identify an acquisition target's organizational form include SEC registration issues and the simplest reason of all – to know from whom you're purchasing the plan.

4. Obtain the following documentation for each defined benefit plan:

Each piece of documentation requested holds valuable information necessary for determining whether to have the acquisition target's plan terminated before the acquisition, maintained as a separate plan or merged into your company's plan after the acquisition. As the ongoing plan sponsor, you need to know that an acquisition target has been operating its plan as it is legally required to do. Much of this documentation will assist you in verifying that an acquisition target's plan is in compliance with ERISA and Code requirements. An acquisition target's plan administrator will have the bulk of the information needed. As the acquisition process progresses, additional information will be required from an acquisition target's plan recordkeeper. This will involve more administrative detail, such as participant records, account balances, etc. While some of this material is also obtainable through other sources (e.g., Form 5500 information), the availability of such information from the acquisition target's plan administrator and recordkeeper can be a helpful indicator of how carefully they have previously maintained the plan.

- ❑ plan documents
- ❑ trust document, (if applicable)
- ❑ group annuity contract or other funding vehicle
- ❑ all amendments to such documents
- ❑ collective bargaining agreement (if applicable)

These documents are necessary to determine the compatibility of an acquisition target's current plan provisions with your company's plan and to uncover existing contractual obligations, if any, impacting the transfer of an acquisition target's plan assets to MassMutual. It is important to obtain the most recent copies that are signed and dated. Determine whether the documents have been restated or amended within the required regulatory timeframes and confirm that restatements were submitted to the IRS within the required filing periods, if applicable. These documents detail the benefit structure of the acquisition target's plan and help to address any concerns you, as the plan sponsor, may have regarding qualification issues of an acquisition target. Your MassMutual team will review these documents for such things as protected benefit issues in plan merger situations.

Group annuity contracts have many design variables and/or restrictions that should be identified and analyzed (e.g., surrender charges or retiree annuity purchases that may be guaranteed by plan assets).

❑ Most recent determination letter (or prototype plan opinion letter or volume submitter advisory letter)

Helps to ensure an acquisition target's plan is qualified and has been timely amended or restated, thus avoiding the potential consequences of mixing nonqualified assets with your plan's qualified plan assets. See Section 5 below.

❑ Most recent Summary Plan Description (SPD) and any applicable Summary of Material Modification (SMM)

Verifies what information has been communicated to an acquisition target's plan participants with regard to such things as benefits and plan administration. Where a plan document and SPD are in conflict, there is also a risk that a court will treat the SPD as the governing document because it contains the information that has been communicated to participants.

❑ **Most recent valuation report and accounting statements**

The plan's valuation report provides information on the plan's funded status, actuarial assumptions used to determine funded status, participant information and a summary of plan provisions. Note: As a result of timing, the most recent amendments (e.g., change in benefit formula) may not have been considered in the valuation report when determining the plan's funded status.

❑ **Compare assets to liabilities under the plan.**

Confirm that the interest rate used in determining assets was reasonable and actuarial assumptions are appropriate.

❑ **Confirm the Adjusted Funding Target Attainment Percentage (AFTAP) for the plan.**

The AFTAP is used to determine whether, based on its funding level, a plan is subject to any benefit restrictions. Specifically, if a plan is determined to be between 60% and 80% funded, lump sum distributions are limited to the lesser of 50% of the total lump sum or the present value of the participant's minimum PBGC guaranteed benefit. If the AFTAP is below 60%, the plan becomes frozen (e.g., all future benefit accruals must cease) and no lump sums may be distributed until the AFTAP exceeds 60%. There are certain exceptions to this rule for small annuities and plans frozen as of September 1, 2005.

❑ **Review financial/disclosure requirements.**

Review these requirements to determine pension liability as disclosed in the acquisition target's financial statements.

❑ **Form 5500 annual return/reports for the three most recent plan years, including accompanying schedules and audited financial statements (if required)**

Provides you with asset information about an acquisition target's plan and the number of participants that will be added to your plan. MassMutual utilizes this information to prepare for the addition of those participant's accrued benefits to your plan and/or contract. Forms 5500 from the three most recent plan years can be useful indicators of plan growth. Small plans can claim a waiver of the audited financial statements if certain conditions are met. To determine whether a small plan's Form 5500 should include audited financial statements, review Schedule I, indicating if a waiver was taken for a given plan year.

❑ **Evidence that annual funding notices were timely distributed**

Another check for ERISA compliance on the part of an acquisition target. Request copies of the actual notice which discloses information for the current and preceding plan years including such information as the value of the plan's assets and liabilities, funding status, funding policy, allocation of investments, summary of rules governing plan termination, and a description of benefits guaranteed by the PBGC.

❑ **Latest PBGC Premium Filing**

E-filing of the plan's premium payment to the PBGC.

Due Diligence Checklist (continued)

❑ **Notices of PBGC Reportable Events (if any required)**
The PBGC requires pension plans to report the occurrence of certain transactions, so that, in appropriate cases, the PBGC may take any necessary steps to protect benefits due participants and beneficiaries.

❑ **Collective Bargaining Agreement (where applicable)**
Additional benefit increases and/or restrictions that are not yet effective may be outlined in a collective bargaining agreement. Benefit increases could, for example, impact a plan's funded status and the amount of future plan contributions.

❑ **Nondiscrimination Test Results – minimum participation, minimum coverage, compensation and general nondiscrimination**
Ask for the most current plan year's test results. If the plan did not satisfy the ratio percentage test, ask for the minimum coverage average benefit test or the basis for which the plan automatically satisfies the test. If the plan is not a design-based safe harbor plan, ask for the most recent §401(a)(4) general test. Also, if the plan's definition of monthly earnings (compensation) does not automatically satisfy §414(s), ask for the most recent compensation test.

❑ **Notices of Waivers of Funding Deficiencies**
Copies of the following notices if provided to participants and beneficiaries:

- Notice of Funding Waiver Request – provided when plan applies for waiver of minimum funding standards;
- Notice of Funding Failure – provided when plan sponsor has missed a payment or installment required to meet minimum funding standards; and
- Notice of Funded Status – provided when plan becomes subject to a variable rate PBGC premium. Plan sponsor is not required to distribute a "Notice of Funding Failure" if such a request is pending at the time the payment or installment is due. However, if the request is denied, the notice must be provided within 60 days after the denial.

❑ **Other participant communications that describe a material term of the plan not contained in plan documents, SPD or SMMs**
This catch-all category covers anything else that may have been delivered to participants. As with SPDs and SMMs, this may be important if it contains information inconsistent with the plan document. This does not mean that you must uncover every participant communication ever sent to an acquisition target's participants. (Note that the request is typically limited to a very narrow category of communications that describe a material term of the plan that is not otherwise found in the plan document, the SPD or SMM.)

❑ **Participant ERISA §101(j) Notices**
If the plan's actuary, upon certification of the AFTAP, determines that partial or total benefit restrictions apply, the plan sponsor must provide a notice required by §101(j) of ERISA to plan participants and beneficiaries within 30 days of the determination date.

❑ **Related Board of Directors Resolutions**
Requires only those resolutions affecting the defined benefit plan such as delegation of authority to the plan administrator to amend the plan. See section 6 below.

- ❑ **Communications received from or filed with any governmental entity or authority**

This will reveal information such as whether the plan has engaged in any prohibited transactions, is or has been under IRS audit or, if the plan has employee contributions, has been questioned by the DOL on the timing of employee after-tax contributions.

- ❑ **A description of any outstanding (or threatened) litigation involving the plan**

Standard due diligence requirement. The potential impact on the plan sponsor and/or the plan assets must be assessed as part of your fiduciary responsibilities to your current plan's participants.

5. Determination Letter Due Diligence:

- ❑ **Request the most recent determination letter that the plan received. If the plan is a volume submitter plan or prototype plan, confirm that there is a volume submitter advisory letter or prototype plan opinion letter. Note that the IRS has announced that it is generally eliminating determination letters for individually designed plans of employers, with limited exceptions, such as for new plans and terminating plans.**

To ease the burden on defined benefit plan sponsors seeking a plan document provider, MassMutual has contracted with an outside law firm that sponsors and drafts defined benefit volume submitter plan documents and individually designed plan documents.

6. Plan Document Due Diligence:

Confirm that the terms of the plan documents properly reflect the plan's administrative practice. ERISA requires that all plan documents and amendments be formally adopted by authorizing board resolutions or by some entity (e.g., the plan administrator) designated to exercise such authority on behalf of the board. In the latter case, you should collect a certified copy of the board authorization delegating amendment authority to that entity. The plan and all amendments must be fully and timely executed (signed, dated and witnessed by all necessary parties) to have full and proper legal effect. Plan document due diligence ensures an acquisition target has complied with these requirements.

- ❑ **Confirm that the plan document and all amendments are fully executed.**
- ❑ **If an amendment reduced future benefit accruals, obtain a copy of the §204(h) notice.**

To satisfy ERISA §204(h), the timing of the notice can be critical. If the notice which reduces the rate of future benefit accruals (or other Code §411(d)(6) protected benefit) is not adopted within the required timeframe, significant penalties may be assessed. Additionally, recent amendments concerning benefits may not be included in the most recent valuation reports.

- ❑ **Confirm that the entity executing the plan document and all amendments was properly authorized by a board of directors resolutions.**
- ❑ **Confirm that the plan document or most recent amendment complies with requirements of legislative changes.**

This check will reveal whether the plan is in conformance with recent changes in the law. In a merger situation, the plan(s) being terminated must be amended for recent regulatory changes prior to termination.

Due Diligence Checklist (continued)

7. Form 5500 Due Diligence:

❑ **Confirm the use of the appropriate Form 5500 based on plan size.**

Qualified retirement plans with 100 or more participants at the beginning of the plan year generally need to file a full Form 5500 along with audited financial statements prepared by an independent qualified public accountant. Small plans (less than 100 participants) are permitted to file Form 5500 with a simplified financial schedule or a Form 5500-SF, and generally without an independent qualified public accountant's opinion.

A small plan may claim a waiver of the Form 5500 annual audited financial statement examination requirement if certain conditions are met, including that at least 95% of plan assets are considered "qualifying" (e.g, held by certain regulated financial institutions, including insurance companies) or, any person who handles "non-qualifying" plan assets is bonded in accordance with fidelity bond rules.

❑ **Confirm that Form 5500 was timely filed.**

"Timely Filed" means filed by the last day of the 7th month after the plan year ends (assuming no extensions). By filing Form 5558, plan sponsors can obtain an automatic 2 ½ month extension on the 5500 filing deadline. If the fiscal year is the same as the plan year and the employer has filed for an extension for its corporate tax return, then the 5500 has an automatic extension up to this date.

❑ **Review Schedule SB actuarial information.**

This should be reviewed in connection with the applicable valuation report.

❑ **Review Form 5500 (and plan audit report) for disclosure of any noncompliance.**

Form 5500 contains a series of "Yes/No" questions concerning various transactions made during the plan year. "Yes" answers indicate failure to comply with regulations or involvement with prohibited transactions that may have resulted in additional penalties and/or payment of excise taxes.

8. Confirm the target plan's compliance with the following:

(Virtually all of this information should be available from an acquisition target's plan administrator.)

❑ **Code §401(a)(26) – Minimum Participation**

Defined benefit plans must annually satisfy minimum participation. A plan must automatically satisfy minimum participation on an exception basis or through the numerical test.

❑ **Code §410(b) – Minimum Coverage**

A plan may satisfy minimum coverage "automatically" (e.g., plan only benefiting non-highly compensated employees). If the plan does not automatically satisfy minimum coverage, it must satisfy minimum coverage through the ratio percentage test or the average benefit test. Verify satisfaction of the minimum coverage test by obtaining the most recent test results.

❑ **Code §401(a)(4) – Nondiscriminatory Amount of Benefits (and other §401(a)(4) regulation**s)

Is the plan a design-based safe harbor plan that does not require the §401(a)(4) general test? If the answer is no, obtain the most recent (within the past three plan years) §401(a)(4) test results. Review the plan for uniformity of benefits availability. If not uniformly available, obtain documentation of the current and effective availability (§410(b) test).

❑ **Code §414(s) – Nondiscriminatory Definition of Compensation**

Does the plan's benefit formula include compensation? If the answer is yes, does the definition automatically satisfy §414(s) or is the compensation test required? If not a safe harbor definition, obtain the most recent plan year test results.

❑ Code §401(a)(9) – Required Minimum Distributions at Age 70 ½

Required minimum distributions must commence by April 1 of the calendar year following the calendar year in which the participant attains age 70 ½ for a 5% owner. For a participant who is not a 5% owner, the plan may require that minimum distributions commence by the later of: a) April 1 of the calendar year following the calendar year in which the participant attains age 70 ½;, or b) the participant's retirement date. Obtain a list of plan participant ages and confirm that distributions have been made in accordance with statutory and plan requirements in effect at time of distribution.

❑ Code §401(a)(17) – Maximum Compensation Limit (as indexed)

Look for this limit to be expressed in the plan document (perhaps by incorporating Code §401(a)(17) by reference).

❑ Code §404 – Deduction Limit

This limit will be expressed in the plan. Assure deductions have not been made above the appropriate limit.

❑ Code §415 – Annual Benefit Limit

Verify through obtaining copies of test results, including any terminated or retired participants whose benefits may have been limited by §415.

❑ Code §416 – Top-Heavy Requirements

Confirm provisions in the acquisition target's plan for top-heavy minimum benefit and vesting rules. Further, confirm (if the plan is/was top-heavy) that the plan is/was operated in accordance with top-heavy provisions by copies of test results, if available.

❑ Code §417 – Joint and Survivor Annuity Requirements

Verify that you have information concerning survivor annuitants, including dates of birth.

❑ Code §414(p) – (QDRO)

Verify that you have information providing all alternative payees pursuant to QDROs received pertaining to the plan(s) as well as any pending orders that are still open.

❑ Pension Protection Act of 2006 §113 – Restricted Benefits

Confirm whether benefit restrictions apply based on the plan's AFTAP and whether any required ERISA §101(j) notices have been sent to participants within the required time period.

9. Litigation Review:

❑ Request copies of all relevant documents with respect to any outstanding litigation (or threats of such litigation) other than routine claims for benefits.

Any litigation (or threat of litigation) other than routine claims for benefits should be thoroughly researched in your litigation review. Copies of any documents relevant to the litigation should be obtained and reviewed for impact (or potential impact) on the plan, plan assets and/or the plan participants. An example of such litigation is litigation related to any early retirement window benefit offerings.

If you assume the plan or engage in a stock acquisition, you will assume the liabilities of that plan unless you negotiate this point with the prior plan sponsor before the acquisition.

Merging Plans

PLAN DESIGN

Merging plans may create uniformity of benefits for current and acquired participants. However, a merged plan could maintain the different benefit structures for each group that applied immediately prior to the merger.

If plan provisions will be revised for acquired participants under the merged plan, consider Code §411(d)(6) protected benefit issues (i.e., COLAs, accrued benefits, early retirement benefits, and optional forms of benefits, to the extent accrued).

Combined recordkeeping and reporting can ease administration while potentially lowering expenses over maintaining two (or more) plans.

Amend final plan to:

- address any protected benefit issues;
- add new company as associated employer; and/or
- address years of service issues for eligibility and vesting of acquired participants.

Identify safe harbor status of all plans prior to merger:

- Is Compensation definition (if applicable) safe harbor? Any reason to change?
- If the plan is a §401(a)(4) safe harbor plan, is there any reason to change status? (See Testing below.)

ADMIN/COMPLIANCE

Protected Benefits Issues: separate accounting for different participant groups, money (employer v. employee contributions) or benefit options.

Vesting: Employees of acquisition target with three years of service have option to remain under prior plan schedule or move to new plan schedule. Vesting can never be reduced for a participant's accrued benefit. NOTE: Employer contributions to a cash balance plan must vest under a schedule that is no longer than a three year cliff vesting schedule.

Asset/Liability Management: Investment manager takes plan liabilities into account when analyzing investment mix. MassMutual assumes responsibility for ensuring plan stays in compliance with policy.

Testing: Changes in number of employees covered under plan or in classes of employees included/excluded from plan will affect test results for meeting nondiscrimination requirements. For controlled group situations, if each plan meets minimum participation, minimum coverage prior to transaction, merged plan is, generally, deemed to satisfy these rules for plan year in which merger occurs and following plan year.

Controlled Groups: Merging plans which cover all employees results in one plan – thus, no issue for final plan. If certain employee groups or divisions are excluded, nondiscrimination analysis should be made prior to final plan design decisions. Coverage testing and joint and several liability for defined benefit liabilities for contributions are also impacted if either plan was part of a controlled group before merger.

Permissive Aggregation: Plans of related groups that are aggregated for coverage testing must be aggregated for all purposes under Code §410(b) coverage rules and §401(a)(4) general nondiscrimination rules. Plans may not be aggregated unless they have same plan year.

Funded Status (for all plans before merger):

- Determine actuarial assumptions used;
- Review Schedule SB/most recent valuation report(s);
- Confirm that all amendments are included;
- Confirm whether there are any delinquent contributions.

Mergers & Acquisitions Planning Guide Summary (continued)

	Maintain Separate Plans	Freezing a Plan	Terminating a Plan
PLAN DESIGN	Maintaining separate plans may be required as part of the purchase/sale of an acquisition target. You may want to amend plan(s) to create uniformity of benefits if required to maintain separate plans. Identify safe harbor status of all plans: • Is compensation definition (if applicable) safe harbor? Any reason to change? • Are benefit formulas compatible? • If any plan is a §401(a)(4) safe harbor plan, is there any reason to change status? (See Testing below.)	Acquired company's plan would have to be amended to freeze participation and benefit accruals ("hard freeze"). Plan may also be amended to freeze participation only ("soft freeze"). Acquiring company's plan may need to be amended to permit acquisition target's employees to participate in the acquiring company's plan on a prospective basis.	Acquired company's plan may need to be amended to terminate it. There are standard and distress plan terminations under the PBGC. Actuarial consultation and analysis should be sought for a determination of the proper procedure to follow.
ADMIN/COMPLIANCE	Controlled Groups: If acquisition target is part of a controlled group, the acquisition may require maintaining separate plans for separate benefit structures or plan-to-plan transfer of assets/liabilities directly to acquiring company's plan. Coverage testing and joint and several liability for defined benefit liabilities for contributions are also impacted if either plan was part of a controlled group before event. Testing: For controlled group situations, if each plan separately meets minimum participation, minimum coverage requirements prior to transaction, both plans are, generally, deemed to satisfy these rules for plan year in which acquisition occurs and following plan year. Future minimum participation, coverage and general nondiscrimination testing issues may arise, since participants in one plan must be counted as eligible but not participating employees in the other plan(s). Funded Status (for all plans): • Determine actuarial assumptions used; • Review Schedule SB; • Review most recent valuation report(s); • Confirm that all amendments are included; • Confirm whether there are any delinquent contributions.	A frozen plan is still an active plan and may need future amendments to comply with regulatory requirements. Funded Status: Depending on plan's funded status, ongoing employer contributions to the frozen plan may be required. Testing: A plan with a soft freeze is still subject to testing requirements. However, once a plan with frozen benefit accruals is frozen for an entire plan year, it will automatically satisfy coverage and general nondiscrimination requirements. A frozen plan with no benefit accruals is deemed to pass the minimum participation test so long as it passes the prior benefit structure test on the basis of accrued benefits.	Termination of a defined benefit plan is comprised of complex steps, usually involving the IRS and PBGC. Funded Status: • Plan must, generally, be fully funded; • Actuarial determinations are required regarding plan's funding sufficiency; • Determine actuarial assumptions used; • Review Schedule SB; • Review most recent valuation report(s); • Confirm that all amendments are included; • Confirm whether there are any delinquent contributions. Board of Directors Resolution terminating the plan must be adopted.

Merging Plans

FILINGS /NOTICES/COMMUNICATIONS

Form 5310-A: Both the acquisition target's plan and your plan may be required to file Notice of Plan Merger or Consolidation, Spin-off, or Transfer of Plan Assets or Liabilities. (Actuarial statement showing Code §414(l) compliance included.)

Form 5500: Each plan is required to timely file annually until assets of both plans are merged. Once assets are merged, a final Form 5500 should be filed for acquired plan. Contact current recordkeeper of acquired plan on this matter.

ERISA §204(h) Notice: Generally must be sent to employees at least 45 days (15 days for small plans or for acquisitions or dispositions) before effective date of any amendment eliminating or significantly reducing the rate of future benefit accruals from what was originally provided in the plan.

PBGC Reportable Events: Employer may be required to notify PBGC of certain changes. Many exemptions apply – advance analysis required.

SPD: Provide participants with a revised SPD or an SMM informing them of changes to the plan. NOTE: §204(h) Notice serves as an SMM.

ERISA §101(j) Notice: If the merged plan's Adjusted Funding Target Attainment Percentage (AFTAP) is less than 80%.

EXPENSES

A merged single plan is generally less expensive to maintain than two separate plans.

One Time Costs:
- Administrative setup fees;
- Legal/actuarial/consulting fees;
- Form 5310-A user fee;

Plan/Contract amendments fees; Costs associated with communicating plan merger to participants;

	Maintaining Separate Plans	Freezing a Plan	Terminating a Plan
FILINGS /NOTICES/COMMUNICATIONS	Each plan is required to make all standard government filings each year it is maintained as a separate plan (e.g., Form 5500, PBGC premium filing, Form 1099-R, etc.).	Frozen plan is required to continue making all standard government filings annually while assets remain in plan (Form 5500, PBGC premium filings, Form 1099-R, etc.). ERISA §204(h) Notice: Generally must be sent to active participants at least 45 days (15 days for small plans or for acquisitions or dispositions) before effective date of any amendment eliminating or significantly reducing the rate of future benefit accruals from what was originally provided in the plan. A §204(h) notice serves as an SMM.	Form 1099-R: Distribute to participants and file with IRS. Form 5310: Application for Determination Upon Termination. (Filing is strongly recommended but not required.) Form 5500: Terminating plan is required to timely file a Form 5500 annually until all plan assets are distributed. Once all assets are distributed, a final Form 5500 should be filed for the terminated plan. ERISA §204(h) Notice: Generally must be sent to participants at least 45 days prior to the effective date of amendment terminating the plan. PBGC Plan Termination Filings – Process (with time constraints) includes distribution of certain notices and completion of PBGC-related forms. In addition, various notices must be timely distributed, including the Notice of Intent to Terminate. Note: If acquisition target terminates the plan prior to the acquisition effective date, the plan assets may be distributed to the plan's participants as terminated plan assets and rolled over to IRAs or the acquiring company's plan, if allowed. (This may require amending ongoing plan to accept rollover contributions. Plan sponsors may also wish to amend the ongoing plan to address years of service for eligibility and vesting of acquired participants.)
EXPENSES	The ongoing administrative expense of maintaining separate plans is generally higher than maintaining one merged plan. One Time Costs: • Cost for amending the acquired plan; • Legal/actuarial/consulting fees; • Administrative setup fees for newly acquired plan; • Costs associated with communicating any changes to participants.	The ongoing administrative expense of maintaining a separate frozen plan is generally higher than maintaining one merged plan. One Time Costs: • Cost for amending the plan and drafting a §204(h) notice; • Legal/actuarial/consulting fees; • Administrative setup fees for newly acquired plan; • Costs associated with communicating any changes to participants.	One Time Costs: • Plan termination administrative cost for terminating acquisition target plan following completion of acquisition; • Plan/Contract amendments may be needed; • Legal/actuarial/consulting fees; • Costs associated with communications to participants regarding the plan termination; • Cost of filing for determination letter.

Guidelines for Plan v. Settlor Expenses

Type of Plan Activity	Employer Pays (for settlor actions)	Plan Pays[1] (for actions that relate to plan administration and maintenance)
Plan Establishment	• Determining the type of plan to establish • Cost analysis, design proposals • Drafting initial plan document (which may include trust) • Drafting corporate resolutions • Legal fees • Consulting fees regarding plan design	• Drafting trust document (if separate from plan document)
Plan Design	• Legal Fees: plan design studies, projected cost studies • Legal Fees: benefit formula/allocation changes • Financial impact analysis of proposed changes • Plan benefit studies for potential amendments • Actuarial analyses for proposed plan design studies • Consulting fees: analysis for plan amendments and restatements • Plan design proposals (e.g., spin-off, conversion to cash balance) • Amending plan benefit formula • Amending plan to provide for spin-off • Amending plan to include an early retirement window benefit • Any discretionary amendment • Union negotiations	• Determination letter requests for plan amendments to maintain qualified status due to changes in tax law • Determining plan benefits after implementation of amendments • Amending for changes in fiduciary responsibilities • Amending due to ERISA Title I compliance • Amending for regulatory-mandated changes (e.g., PPA restatements)
Plan Administration	• Early retirement window benefit calculations made before proposed amendment is adopted • Establishing a participant loan program • Overhead Costs: office space • Recordkeeping Fees: systems changes due to plan design change; computing annual deduction limits • Disclosure Documents: SPDs or SMMs revised for plan design changes • If applicable, summary information in a booklet that relates to non-pension plan matters (e.g., vacation policy, holiday schedule)	• Early retirement window benefit calculations made after amendment is adopted • Operating an established participant loan program • Overhead Costs: supplies and equipment utilized to provide services to the plan (telephone voice response system, retirement planning software) • Recordkeeping Fees: routine expenses and systems changes due to changes in the law. • Disclosure Documents: initial SPD, successive SPDs, SMMs, SPDs and SMMs revised for law changes, and other plan-related communications (i.e., enrollment, RMDs, retirement, participant educational seminars, etc.) • Produce and distribute summary information about the pension plan • On-going benefit calculations (Note: Benefit calculations for different distribution options may be borne by the participant, rather than plan.) • Service provider fees (trustee, accounting, custodial, investment management, participant-level investment advice, legal fees relating to plan administrative issues [non-settlor issues] and reporting fees) • Start-up fees associated with administrative outsourcing • Determining DRO qualified status (Note: Fees may be charged to individual participants, at plan fiduciary's discretion.)

Guidelines for Plan v. Settlor Expenses – continued

Type of Plan Activity	Employer Pays (for settlor actions)	Plan Pays[1] (for actions that relate to plan administration and maintenance)
Plan Maintenance	• FASB Accounting Standards Codification Topics 712 and 715 • Non-routine nondiscrimination testing done in advance of a plan change (e.g., coverage or general tests done with proposed early retirement window benefit amendment to DB plan)	• Fidelity bond • Routine nondiscrimination testing • Transaction fees (hardships, installments, checks, loans) (Note: Expenses for hardships and processing distributions may be borne by the participant receiving the distribution.) • Retirement and disability annual maintenance charges • ERISA-required communications (e.g., SPDs, SARs and individual benefit statements for individual requests) • Fiduciary insurance • Periodic valuation (daily, annual, etc.) • Actuarial Fees: costs associated with changing actuaries • Plan-to-plan transfer computations • Fees incurred in locating "lost" individuals for benefit payments (Note: Such expenses may be charged to the missing participant.) • Form 5500 series preparation and audited financials prepared by certified public accountant • Periodic compliance auditing
Government-Imposed Fees	• Plan-related penalties and fines • Compliance programs, including IRS's EPCRS costs, DOL's 5500 late filing program • EPCRS (Audit CAP sanction, VCP compliance fee) • DOL Corrections Programs: Voluntary Fiduciary Correction Program and Delinquent Filer Voluntary Compliance Program	• Determining plan spin-off benefits (amount) • Determination letter requests for proposed or adopted plan design amendments • PBGC premiums (PBGC Advisory Letter 74-10)
Plan Termination	• Study incurred before decision to terminate the plan • Analysis of recoverable expenses after plan termination • Successor plan analysis and consulting fees • Legal fees incurred in determining to terminate the plan	• Determination letter request for terminating plan • PBGC termination fees • Contract termination charges • Service provider termination charges • Implementing plan termination (auditing the plan, preparing/filing annual reports, preparing benefit statements, calculating benefits, notifying participants of benefits under the plan)

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[1] Plan administrators must determine, as plan fiduciaries, whether an expense is payable from the plan. However, the plan sponsor may elect to pay for such expenses. Plan documents should be reviewed to determine if any provisions govern payment of plan administrative expenses. Each analysis is dependent on the particular facts and circumstances, and should be made prudently and in the interest of plan participants and beneficiaries. If it is determined that an expense is payable from plan assets, the fiduciary determines whether the expense is a *reasonable* expense. **This Plan v. Expenses Chart is not intended for use by multiemployer plans.**

Please note that this list is not intended to be a comprehensive list. Rather, as expenses are incurred, a factual analysis should be made as to the nature of the services (e.g., proposed plan changes, statutory requirements). This document is intended to provide an overview of plan expenses versus settlor expenses. It is the plan administrator's ongoing fiduciary responsibility to determine whether a particular expense is properly characterized as a plan administrative expense or settlor expense. In reviewing expenses, the plan administrator may determine that an expense represents both "settlor" (plan sponsor) fees and expenses that may be paid from plan assets. In such a situation, the expense may require further breakdown.

This **Plan v. Settlor Expenses Chart** is distributed with the understanding that MassMutual is not engaged in rendering legal or tax advice or in providing accounting service. If legal or tax advice or accounting service is needed, the assistance of an attorney or an accountant should be sought by the plan administrator.

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