JAMES KENNEY

# The 2009 Gray Book

READING A NEW GRAY BOOK is like choosing a new restaurant: you never quite know what you'll be eating. Will the chicken curry be too spicy? The prawns too garlicky? The lamb ragout heavenly? As always, Donald Segal and Ken Steiner, in their presentation at this year's Enrolled Actuaries Meeting, made wonderful guides to the perils and pleasures of the Gray Book. Segal is extremely forthright in his opinions, while Ken Steiner's wry one-liners can be very amusing. The Gray Book always has a number of things in it that grant a little bit here while taking away something else there, and the 2009 edition is no exception—containing some new approaches and inspiring ideas discussed at the session.

Question No. 33 of the Gray Book, for instance, deals with the interplay between plan amendments and the benefit restrictions of Internal Revenue Code Section 436. The answer parenthetically offers a wonderful drafting suggestion: "The proposed regulations do not specify what happens if the amendment cannot take effect, so it is recommended that the amendment itself state what happens in that case." Suppose a plan sponsor adopts an amendment effective in 2009 to raise benefits based on past service. This amendment cannot take effect in 2009 because the adjusted funding target attainment percentage (AFTAP) is below 80 percent and the sponsor doesn't make a special contribution to enable the amendment to take effect. What happens in 2010, when the AFTAP is above 80 percent? Does the amendment take effect then—or not? This is a frightening question, fraught with peril regardless of the answer. Suppose the answer is "yes" and someone retired during 2009 after the amendment's intended effective date. Should such a retiree's benefit be increased? Yet the former employee retired before the actual effective date of the amendment. On the other hand, the sponsor may face potential legal challenges if the benefit is *not* increased. Likewise, suppose the amendment never takes effect because on the effective date stated in the amendment, the Section 436 restrictions prevented it from taking effect, and the amendment was silent on the crucial question of what happens later. Accordingly, the government suggested adding language indicating which amendment would take precedence in the event that not all the amendments could take effect under Section 436.

It is probably fair to say that the rules regarding the Section 436 benefit restrictions and regarding reductions to the "credit balance" (I just can't get used to calling it a "carryover balance") dominate the confusion created by the Pension Protection Act of 2006 and exacerbated by the Worker, Retiree and Employer Recovery Act of 2008. Question No. 10 states that the proposed regulations require that an election to reduce the credit balance must include the "specific dollar amount" of the reduction and that an election containing a formula (such as "the amount necessary to achieve an AFTAP of 80 percent") is *not* a valid reduction election. An amusing discussion followed about whether "the entire amount" could be regarded as a specific dollar amount. Steiner's opinion was that such an election would be legitimate. Segal thought otherwise, adding: "Again, it just doesn't make sense, but it's part of the war on credit balances!"

Question No. 9 was an especially tasty appetizer: "Can the sponsor of a plan that has used the segment rates to determine minimum funding…elect to switch to the full yield curve without the consent of the secretary?" Amazingly enough, the answer is "yes"!

"Because that's what the law says!" Segal explained. Steiner felt this represented a backing off from the proposed regulations. Whatever the reason, since the yield curve approach often results in lower liabilities, it is good to know that clients can switch to it without a messy application to the IRS.

Question No. 23 discusses just what *does* a "change in accrued benefits" mean? Segal took the position that a change to an "accrued benefit" is defined as a change in the benefit payable at normal retirement, and Steiner countered with, "What if we're changing the early retirement factors? Is this an additional accrual? It increases the funding target." Segal admitted that he didn't know. The government's response to the actual amendments proposed in the question was that none of the changes would be considered as providing additional accruals under the plan.

Sometimes I have to wonder at the creativity of actuaries. Question No. 32 posited that a sponsor has two plans: one with an AFTAP of 70 percent and another of 90 percent. No lump sums could be paid under the first plan. Could the sponsor transfer people from the first plan to the second plan and then pay them lump sums? The answer was, "Transfers should not be used as an 'end-run' around the Section 436 restrictions." (I am not sure whether to be appalled at the cleverness of the ideas or marvel at the need for an answer, since the law itself appears to permit this.)

There are so many other Q-and-As worthy of attention. This is a particularly valuable Gray Book, and in many places it is obvious that the IRS is trying to make the PPA work while giving actuaries and plan sponsors a break. Unfortunately, the opacity of the PPA often makes this difficult. As a profession, we should be grateful to Don Segal and Ken Steiner for their long-standing role of Gray Book interpreters extraordinaire.

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