

Employee Benefits & Executive Compensation ADVISORY

November 2, 2009

Does Your Qualified Retirement Plan Need to Be Amended This Year?

This advisory is to remind plan sponsors of deadlines for amending qualified retirement plans. Some amendments must be completed by December 31, 2009 (for calendar year plans). Others must be completed by January 31, 2010 (for Cycle D plans). Still others must be completed by the deadline for filing the plan sponsor's 2009 tax return ("interim" amendments). This advisory identifies those plans that must be amended now or in the near future.

Amendments to comply with the Pension Protection Act of 2006 (PPA) are generally required to be adopted by December 31, 2009 (for calendar year plans). The PPA contains numerous changes impacting both defined benefit and defined contribution plans. Some of these changes include funding-based benefit restrictions and expanded rollover options.

Plan sponsors must adopt "discretionary" plan amendments no later than the last day of the plan year in which the amendment is effective. Discretionary amendments are amendments that are permitted to be adopted by the plan but are not required. For example, plan loans are permitted to be part of certain plans but are not required. An employer instituting a plan loan or other optional features in 2009 would need to amend the plan before December 31, 2009 (for calendar year plans).

"Cycle D" plans (defined below) may need to be amended to adopt certain required changes in the law no later than January 31, 2010. Note that if a Cycle D plan has discretionary amendments, those amendments still must be adopted by December 31, 2009. An example of a required amendment would be restating the plan to reflect the final Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) in lieu of good faith EGTRRA amendments previously adopted.

Finally, all qualified retirement plans must adopt interim amendments no later than the due date of the plan sponsor's 2009 tax return (with extensions). For example, a calendar year taxpayer with a calendar year retirement plan would have until March 15, 2010 (without extensions), or September 15, 2010 (with extensions), to adopt 2009 interim amendments. Different deadlines would apply to fiscal year taxpayers or non-calendar year retirement plans. Interim amendments are good faith amendments and reflect the IRS's view that a general reference to a required amendment must be added to a plan document between required filing cycles.

Each of these types of amendments is discussed below.

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Pension Protection Act of 2006 Amendments

The Pension Protection Act of 2006 was signed into law on August 17, 2006. PPA made numerous changes to rules regarding defined benefit and defined contribution plans. Although the changes took effect at various dates (and plans have been required to comply with each change as of the specified effective date), amendments reflecting these changes generally do not have to be adopted until the last day of the plan's 2009 plan year (December 31, 2009, for calendar year plans).

Some PPA amendments are mandatory and some are optional. Examples of mandatory amendments include:

- funding-based benefit restrictions for defined benefit plans;
- direct rollover from a qualified plan to a Roth IRA;
- qualified optional survivor annuity options; and
- elimination of the requirement to distribute "gap period" earnings on excess deferrals under a 401(k) plan.

Examples of optional PPA changes include:

- expansion of hardship withdrawal provisions;
- Qualified Reservist Distributions;
- rollovers by non spouse beneficiaries (optional for distributions after 2006; mandatory for plan years beginning after December 31, 2009); and
- expansion of the current 90-day notice and consent period for direct rollovers and qualified joint and survivor annuities/spousal consents to a period of up to 180 days.

Discretionary Amendments Potentially Due by December 31, 2009

Plan sponsors should be careful to consider any changes to a plan made in 2009 including operational or administrative changes that may require the adoption of a plan amendment. A discretionary amendment relates to a plan design change that is not mandated by a change in law. An employer has the option to make changes to the plan design or to the administration of the plan, but once made, those changes may require a plan amendment. Plan sponsors should review plans to determine whether there are discretionary amendments that should be adopted. Examples include (this is not an exhaustive list) the following:

- adding designated Roth contributions to a 401(k) plan;
- adding an automatic contribution arrangement (also known as a negative election feature); and
- adding or changing loan or hardship distribution provisions.

Cycle D Filings Due by January 31, 2010

Individually Designed Plans

The IRS has established staggered deadlines for employers to file their qualified retirement plans with the IRS for a determination letter. As a general rule, every individually designed qualified retirement plan is assigned a specific five-year cycle (Cycles A-E) based upon the last digit of the plan sponsor's employer identification number (EIN). If the plan sponsor's EIN ends in 4 or 9, the plan is a Cycle D plan.¹ Plan sponsors must submit Cycle D plans for a determination letter request no later than January 31, 2010 (plan sponsors should verify the EIN of their subsidiaries or other divisions maintaining their own separate plans). The effect of this system is that plan sponsors need to apply for new determination letters generally only once every five years. Prior to each cycle, the IRS issues guidance (in the form of a Notice entitled "Cumulative List of Changes in Plan Qualification Requirement") on the provisions that must be included in each plan that is being submitted for a determination letter. Plan sponsors should review the Cumulative List (see Notice 2008-108) issued in connection with Cycle D filings to make sure that all required amendments are included in the plan document.

For your information, the general filing cycle information is as follows:

Last digit of Plan Sponsor's EIN	Plan's Filing Cycle	Filing Due Date
1 or 6	A	January 31, 2007
2 or 7	B	January 31, 2008
3 or 8	C	January 31, 2009
4 or 9	D	January 31, 2010
5 or 10	E	January 31, 2011

Pre-Approved Plans

Master & Prototype (M&P) plans and volume submitter (VS) plans are generally reviewed on a six-year cycle. Plan sponsors using these pre-approved plan documents to restate a plan for EGTRRA will be required to adopt the EGTRRA-approved plan document by April 30, 2010 (the IRS has not announced the deadline for pre-approved defined benefit plans). Plan sponsors that adopt an EGTRRA-approved M&P or VS defined contribution plan by April 30, 2010, will have adopted the plan within the employer's six-year remedial amendment cycle.

Conclusion

Plan sponsors should review their qualified retirement plans now to ensure compliance with required amendment deadlines. Please do not hesitate to contact your Alston & Bird attorney if we can assist you in proper filing procedures for your qualified retirement plan and to discuss any plan amendments and applicable deadlines.

This advisory was written by Anne Tyler Hamby and Anna M. Grant.

¹ Some other plans may also be on Cycle D. For example, if the sponsor is part of a controlled group that has elected to have all plans on the same cycle, the cycle may be determined by the parent company's EIN. Also, for plan sponsors that have had a change in EIN, the cycle may continue to be determined under the prior EIN, or delayed for a year.

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