



Employee Benefits & Executive Compensation ADVISORY ■

NOVEMBER 14, 2013

Qualified Retirement Plan Amendments and IRS Filings – Do You Need to Amend or File in 2013?

This advisory reminds plan sponsors of deadlines for amending qualified retirement plans and for submitting certain plans to the IRS for a determination letter.

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, participant loans are permitted to be part of certain qualified retirement plans, but are not required. An employer instituting a participant loan program or other optional features in 2013 would need to amend the plan before December 31, 2013 (for calendar year plans).

“Cycle C” plans (defined below) will generally need to be amended and restated no later than January 31, 2014. Note: if a Cycle C plan has discretionary amendments, those amendments still must be adopted by December 31, 2013 (for calendar year plans).

Normally, all qualified retirement plans must adopt interim amendments no later than the due date of the plan sponsor’s 2013 tax return (with extensions). However, not every year has interim amendments that must be adopted. It appears that for most plans, no interim amendments are required in 2013. However, it is possible that your plan may require certain amendments under the Pension Protection Act of 2006 (please see Section III below).

I. Discretionary Amendments Potentially Due by December 31, 2013

Plan sponsors should carefully consider any changes to a plan that were made or that became effective in 2013, including operational or administrative changes that may require the adoption of a plan amendment. A plan sponsor has the option to make changes to the plan design or 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. Though not an exhaustive list, examples include the following:

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

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Plan sponsors should also be careful about changes to a plan that decrease eligibility or decrease the amount of benefits provided under a plan. In many cases, this type of plan amendment cannot be adopted retroactively, but can only be adopted prospectively. For example, eliminating or reducing an employer matching contribution should only be done prospectively. Similarly, some provisions that increase benefits can only be added prospectively. For example, the addition of a cash or deferred (401(k)) contribution feature to a plan can only be applied prospectively.

II. Cycle C Filings Due by January 31, 2013

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 3 or 8, the plan will generally be a Cycle C plan.¹

Most governmental plans are Cycle C plans, regardless of the plan sponsor's EIN. However, in this filing cycle, the IRS permits government plans to file under either Cycle C or Cycle E (February 1, 2015, to January 31, 2016) instead. No formal election is needed.

Plan sponsors who desire to obtain an IRS determination letter must submit Cycle C plans for a determination letter request no later than January 31, 2014. 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 generally need to apply for new determination letters 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 Requirements") 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 issued in connection with Cycle C filings (see Notice 2012-76) 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, 2012 (Next filing due in 2017) |
| 2 or 7 Also all Multiple Employer Plans, regardless of EIN | B | January 31, 2013 (Next filing due in 2018) |
| 3 or 8 Also most Governmental Plans, regardless of EIN | C | January 31, 2014 |
| 4 or 9 Also all Multi-Employer Plans, regardless of EIN | D | January 31, 2015 |
| 5 or 0 Optional delayed filing period for Governmental Plans | E | January 31, 2016 |

¹ An exception applies if the parent company in a controlled group sponsors a Cycle C plan. In this situation, the parent can elect that all plans sponsored by members of its controlled group also file under Cycle C.

Pre-Approved Plans

The IRS determination letter program is generally not available to master & prototype (M&P) plans and volume submitter (VS) plans. However, in some very limited situations, M&P and VS plans may still file for a determination letter.

III. Deadlines to Adopt Certain Pension Protection Act Changes

With few exceptions, the deadline for calendar year plans to adopt amendments required by the Pension Protection Act of 2006 (PPA) was December 31, 2009. However, because the IRS did not release critical guidance on several aspects of the PPA, the IRS extended the deadline to adopt certain amendments. The following amendments have approaching deadlines:

- Distribution and benefit accrual restrictions based on funding of defined benefit pension plans (Code Section 436). This provision must be adopted by December 31, 2013. Most plans have already incorporated these changes, but if your defined benefit plan has not, you should prepare to make this amendment before the end of this year.
- Special rules applicable to cash balance and similar defined benefit plans (Code Section 411(a)(13)(C)). We are still anticipating guidance on these rules. When this guidance is issued, amendments may be required.

IV. Impact of Same-Sex Marriage on Retirement Benefits

Earlier this year, the U.S. Supreme Court and the IRS issued guidance² specifying that same-sex couples validly married under state law are considered "married" for federal tax purposes (including employee benefits). This means that qualified retirement plans should begin treating same-sex married couples as "spouses" for retirement benefit purposes. The IRS has promised to issue further guidance on how this rule will apply retroactively. Until this guidance is issued, it is probable that no specific plan amendments are required for your plan.

V. Conclusion

Plan sponsors should review their qualified retirement plans now to ensure compliance with required amendment and filing 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.

² The IRS guidance is found in Revenue Ruling 2013-17 and became effective September 16, 2013. The Department of Labor has also issued similar guidance (see Technical Release No. 2013-04).

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If you have any questions or would like additional information, please contact your Alston & Bird attorney or any of the following:

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