

Employee Benefits & Executive Compensation ADVISORY

November 7, 2011

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, 2011 (for calendar year plans). Others must be completed by January 31, 2012 (for Cycle A plans). Still others must be completed by the deadline for filing the plan sponsor's 2011 tax return ("interim" amendments). This advisory identifies those plans that must be amended now or in the near future.

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 2011 would need to amend the plan before December 31, 2011 (for calendar year plans).

"Cycle A" plans (defined below) will need to be amended to adopt certain required changes in the law no later than January 31, 2012. Note that if a Cycle A plan has discretionary amendments, those amendments still must be adopted by December 31, 2011 (for calendar year plans).

Finally, all qualified retirement plans must adopt interim amendments no later than the due date of the plan sponsor's 2011 tax return (with extensions). Not every year has interim amendments that must be adopted, and 2011 appears to be a year when interim amendments are not required. Please consult with your Alston & Bird lawyer if you have any questions on interim amendments for your plan.

I. The Worker, Retiree, and Employer Recovery Act of 2008

The Worker, Retiree, and Employer Recovery Act of 2008 (WRERA) enacted several changes in the law. Perhaps the best-known provision of WRERA was applicable to the 2009 calendar year: for 2009, defined contribution plans could choose to avoid making required minimum distributions (RMDs) to participants at the later of age 70½ or termination of employment (age 70½ for 5% or more owners).

Many plans chose not to make RMDs during 2009 unless a participant requested a distribution. However, different options were also available, including continuing to make RMDs as usual during 2009. Plans must be amended by December 31, 2011, to reflect the method used by the plan, if it was a change from prior plan provisions. Regardless of what choice was made, the IRS will ask for a WRERA amendment when the plan is filed for a determination letter. Therefore, it may be a "best practice" to include a WRERA amendment specifying how the plan was administered, even if the amendment is not technically required.

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II. Certain Delayed Amendments for Governmental Plans

Governmental plans have later deadlines to adopt amendments for some law changes. The key amendment deadlines for governmental plans are:

- PPA – must be amended by December 31, 2011;
- HEART – must be amended by December 31, 2012; and
- WRERA – must be amended by December 31, 2012.

III. Rolling Deadlines to Adopt Certain Pension Protection Act (PPA) Changes

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

- Diversification of employer stock held in defined contribution plans (Code Section 401(a)(35)(E)) – This must be adopted by December 31, 2011.
- Distribution and benefit accrual restrictions based on funding of defined benefit pension plans (Code Section 436) – Currently, this must be adopted by December 31, 2011. However, last year, the IRS promised to issue a model amendment. To date, the model amendment has not yet been provided. As a result, there is a possibility the IRS may again extend the deadline to make this amendment for one additional year. If this amendment deadline applies to your plan, please contact your Alston & Bird attorney or pay special attention to IRS updates over the upcoming weeks.
- Special rules applicable to cash balance and similar defined benefit plans (Code Section 411(a)(13)(C)) – These deadlines have been extended until December 31, 2012.

IV. Discretionary Amendments Potentially Due by December 31, 2011

Plan sponsors should be careful to consider any changes to a plan made in 2011, 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 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.

Plan sponsors should also be careful about amendments that decrease eligibility or the amount of benefits provided under a plan. In many cases, this type of amendment cannot be adopted retroactively, but can only be adopted prospectively. For example, an amendment to reduce a match should be done prospectively.

In addition, the addition of a cash or deferred (401(k)) contribution to a plan can only be added prospectively (not at the end of the year).

V. Cycle A Filings Due by January 31, 2012

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 1 or 6, the plan is a Cycle A plan. Plan sponsors must submit Cycle A plans for a determination letter request no later than January 31, 2012 (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 2010-90) issued in connection with Cycle A filings to make sure that all required amendments are included in the plan document.

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
2 or 7	B	January 31, 2013
3 or 8	C	January 31, 2014
4 or 9	D	January 31, 2015
5 or 10	E	January 31, 2016

Pre-Approved Plans

Master & Prototype (M&P) plans and volume submitter (VS) plans are generally reviewed on a six-year cycle. 2011 is not a cycle year, and therefore no filings are required to be submitted to the IRS in 2011.

VI. Miscellaneous Amendments

Very few plans elected to allow a so-called "in-plan Roth rollover" during 2010. If your plan was one of the few that allowed in-plan Roth rollovers during 2010, the deadline to amend your plan is generally December 31, 2011. An in-plan Roth rollover is a transfer of previously contributed amounts held in a defined contribution plan to an after-tax Roth rollover account.

VII. 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 lawyer if we can assist you with employing proper filing procedures for your qualified retirement plan and to discuss any plan amendments and applicable deadlines.

This advisory was written by [John R. Anderson](#).

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

Members of Alston & Bird's Employee Benefits & Executive Compensation Group

John R. Anderson
202.239.3816
john.anderson@alston.com

David C. Kaleda
202.239.3329
david.kaleda@alston.com

John B. Shannon
404.881.7466
john.shannon@alston.com

Robert A. Bauman
202.239.3366
bob.bauman@alston.com

Johann Lee
202.239.3574
johann.lee@alston.com

Richard S. Siegel
202.239.3696
richard.siegel@alston.com

Saul Ben-Meyer
212.210.9545
saul.ben-meyer@alston.com

Brandon Long
202.239.3721
brandon.long@alston.com

Carolyn E. Smith
202.239.3566
carolyn.smith@alston.com

Emily Seymour Costin
202.239.3695
emily.costin@alston.com

Douglas J. McClintock
212.210.9474
douglas.mcclintock@alston.com

Michael L. Stevens
404.881.7970
mike.stevens@alston.com

Patrick C. DiCarlo
404.881.4512
pat.dicarlo@alston.com

Blake Calvin MacKay
404.881.4982
blake.mackay@alston.com

Jahnisa P. Tate
404.881.7582
jahnisa.tate@alston.com

Ashley Gillihan
404.881.7390
ashley.gillihan@alston.com

Emily W. Mao
202.239.3374
emily.mao@alston.com

Daniel G. Taylor
404.881.7567
dan.taylor@alston.com

David R. Godofsky
202.239.3392
david.godofsky@alston.com

Earl Pomeroy
202.239.3835
earl.pomeroy@alston.com

Laura G. Thatcher
404.881.7546
laura.thatcher@alston.com

John R. Hickman
404.881.7885
john.hickman@alston.com

Craig R. Pett
404.881.7469
craig.pett@alston.com

Elizabeth Vaughan
404.881.4965
beth.vaughan@alston.com

H. Douglas Hinson
404.881.7590
doug.hinson@alston.com

Jonathan G. Rose
202.239.3693
jonathan.rose@alston.com

Kerry T. Wenzel
404.881.4983
kerry.wenzel@alston.com

Emily C. Hootkins
404.881.4601
emily.hootkins@alston.com

Thomas G. Schendt
202.239.3330
thomas.schendt@alston.com

Kyle R. Woods
404.881.7525
kyle.woods@alston.com

James S. Hutchinson
212.210.9552
jamie.hutchinson@alston.com

ATLANTA
One Atlantic Center
1201 West Peachtree Street
Atlanta, GA 30309-3424
404.881.7000

BRUSSELS
Level 20 Bastion Tower
Place du Champ de Mars
B-1050 Brussels, BE
Phone: +32 2 550 3700

CHARLOTTE
Bank of America Plaza
Suite 4000
101 South Tryon Street
Charlotte, NC 28280-4000
704.444.1000

DALLAS
2828 N. Harwood St.
Suite 1800
Dallas, TX 75201
214.922.3400

LOS ANGELES
333 South Hope Street
16th Floor
Los Angeles, CA 90071-3004
213.576.1000

NEW YORK
90 Park Avenue
New York, NY 10016-1387
212.210.9400

RESEARCH TRIANGLE
4721 Emperor Boulevard
Suite 400
Durham, NC 27703-8580
919.862.2200

SILICON VALLEY
275 Middlefield Road
Suite 150
Menlo Park, CA 94025-4004
650.838.2000

VENTURA COUNTY
Suite 215
2801 Townsgate Road
Westlake Village, CA 91361
805.497.9474

WASHINGTON, D.C.
The Atlantic Building
950 F Street, NW
Washington, DC 20004-1404
202.239.3300

www.alston.com

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