



Twelve Month Filing Period for Cycle D Plans Begins February 1, 2009

Under the IRS' staggered system for obtaining determination letters on qualified plans, individually designed plans have been assigned to one of five filing cycles, Cycle D, in which amendments related to the Pension Protection Act of 2006 will be addressed for the first time, begins on February 1, 2009 and ends on January 31, 2010.

Background

Under the staggered filing system, the IRS created 5-year cycles for sponsors of individually designed retirement plans to apply for determination letters confirming the qualified status of their plans. (See our September 28, 2005 [For Your Information](#).) Plan amendments that are required to be adopted during a plan's 5-year cycle need not be submitted to the IRS until the filing due date for that cycle. The remedial amendment period (i.e., the period allowed for retroactively curing any qualification defects) is preserved for all timely adopted and filed amendments.

Near the end of each calendar year, the IRS issues guidance on the qualification requirements that must be reflected in plans that will be submitted in the next cycle. This guidance is issued in the form of an IRS Notice containing the Cumulative List of Changes in Plan Qualification Requirements (Cumulative List) of statutory, regulatory and guidance changes that must be taken into account in subsequent submissions by plan sponsors. The annual Cumulative List includes changes based on statutes enacted or guidance issued since the prior Cumulative List, and identifies provisions that will not be covered by a determination letter issued under the cycle, even if they are included in the submitted plan.

In December 2008, the IRS issued [Notice 2008-108](#), containing the 2008 Cumulative List. The 12-month determination letter filing period for Cycle D opens on February 1, 2009.

Cycle D Filings

Filing cycles generally are determined by the last digit of the plan sponsor's Employer Identification Number (EIN). The IRS has also assigned certain types of plans to particular cycles regardless of the sponsor's EIN. Cycle D covers single-employer plans that are sponsored by employers with EINs ending in 4 or 9, and also covers all multiemployer plans.

Generally, applications for determination letters under Cycle D must be filed on or before January 31, 2010. However, the 2008 Cumulative List contains a special exception for certain non-calendar year plans. As an

alternative to filing under Cycle D, a plan sponsor of a Cycle D plan whose first plan year beginning on or after January 1, 2009 ends on or after February 1, 2010 may opt to file under Cycle E. To defer submission of its plan, the sponsor need only file for a determination letter on or before January 31, 2011, the Cycle E filing deadline. In such circumstances, the plan will be reviewed on the basis of the 2009 Cumulative List, which applies to all Cycle E filers, rather than the 2008 Cumulative List. Although the plan will be treated as a Cycle E plan for this initial cycle, it will revert to Cycle D for all subsequent submissions.

A special filing cycle election may still be available if two or more individually designed plans are maintained by members of a parent-subsidary controlled group. In such circumstances, the parent organization may elect to file all of the plans under the filing cycle that would normally apply to the parent's EIN as long as the filing cycle for none of those plans has already passed. For example, if one controlled group plan sponsor was a Cycle B filer and the parent and all other controlled group plan sponsors are Cycle D or Cycle E filers, the parent cannot make this election.

BUCK COMMENT. *If none of the plans in a parent-subsidary controlled group filed a determination letter application in Cycles A, B or C and the earliest filing cycle for any plan in the controlled group is Cycle D, the election to base the filing cycle on the parent company's EIN for all plans in the controlled group must be made by January 31, 2010 (the end of the period for filing Cycle D plans).*

Required Amendments

The 2008 Cumulative List contains the changes to the plan qualification requirements listed in the 2004 – 2007 Cumulative Lists as well as the additional 2008 requirements that must be taken into account by Cycle D filers. It includes rules prescribed in regulations, revenue rulings, revenue procedures and IRS notices issued on or before October 1, 2008. It also reflects law changes under various statutes, from the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) through the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act of 2007. Importantly, the 2008 Cumulative List includes for the first time changes made by the Pension Protection Act of 2006 (PPA), and special rules apply to plan amendments that include certain PPA provisions.

The 2008 Cumulative List does not include qualification requirements that take effect in or after 2010, or statutory provisions that first take effect in 2009 for which guidance has not yet been issued. Even though the IRS will not consider these in reviewing a determination letter application for Cycle D, a plan must still comply with all relevant qualification requirements (not just those on the 2008 Cumulative List) to secure its qualified status. This can be accomplished by including appropriate provisions in the Cycle D plan (even though the determination letter will not cover them). In some cases, compliance may require a good faith amendment in addition to operating the plan in accordance with the applicable requirements.

Plans submitted in Cycle D may include applicable provisions under the Heroes Earnings Assistance and Relief Tax Act of 2008 (HEART). However, the IRS will not consider the HEART Act provisions in Cycle D determination letters, and plan sponsors cannot rely on them with respect to HEART requirements.

BUCK COMMENT. *Plan sponsors should assure that appropriate amendments for EGTRRA and other law changes were adopted on a timely basis before their plans are submitted under Cycle D. If plan documentation is found to be inadequate, sponsors should consider including with their submissions a filing under the IRS Voluntary Correction Program (VCP) since the VCP generally offers lesser penalties. Once the application for a Cycle D determination letter is filed, the sponsor generally is ineligible for the VCP.*

Conclusion

With each new filing cycle, more guidance is issued and more plan changes are required. Compliance issues for Cycle D filers are greater than they were for the prior three cycles. While there is ample time to amend and file Cycle D plans by the January 31, 2010 deadline, plan sponsors should not delay the process too long. Required amendments need to be identified and their implications may still need to be determined. Plan documents need to be amended and restated. A Form 5300 package (Application for Determination Letter), and perhaps a VCP filing, must be completed and assembled. Sponsors must also decide whether to include HEART and other provisions effective in 2009 that are not required for Cycle D plans.

Buck's consultants are prepared to assist you in bringing the entire process to a successful and timely conclusion.

This FYI is intended to provide general information. It does not offer legal advice or purport to treat all the issues surrounding any one topic.