



for your information®

Volume 34 | Issue 17 | February 16, 2011

IRS Opens Second Cycle for Individually Designed Pension Plans and Pre-Approved DC Pension Plans

On February 1, 2011, the IRS opened the second submission period for determination letters for Cycle A individually designed plans. Cycle A plan sponsors must submit letter requests by January 31, 2012 using the 2010 cumulative list of plan qualification requirements. IRS also opened the second submission period for pre-approved defined contribution plans.

Background

Individually-Designed Plans

The Internal Revenue Service (IRS) moved several years ago to a cycle system under which a sponsor of an individually designed pension plan could apply for a determination letter every five years. Generally, plans are assigned to a cycle (A-E) based on the last digit of the plan sponsor's Employer Identification Number (EIN). Special rules apply to multiple employer plans, multiemployer plans, governmental plans, some plans of employers in controlled groups, and plans for which there has been a spinoff, merger, or acquisition.

Until the plan's filing cycle, the sponsor must make, and operate the plan in accordance with, timely adopted interim and discretionary amendments. When the plan's filing cycle comes up, the sponsor must submit a restated plan that reflects all of the prior interim and discretionary amendments and satisfies the appropriate cumulative list of changes. (See [Revenue Procedure 2007-44](#) and our August 6, 2007 [For Your Information](#).) If the sponsor does so, the determination letter will provide retroactive relief.

Cycle A is available to plans of sponsors whose EIN ends in "1" or "6." The new Cycle A 12-month submission period started on February 1, 2011 and ends on January 31, 2012. This is the second cycle for most of these plans.

Pre-Approved Plans

The IRS also makes available several pre-approved plan programs. Under these programs, a pre-approved plan sponsor (i.e., the entity providing the plan document) applies to the IRS for an opinion letter on a basic plan document and associated adoption agreements (for master and prototype or "M&P" plans) or for an advisory letter on a specimen document (for volume submitter or "VS" plans). The IRS allows an M&P mass submitter or a VS mass submitter to apply for an opinion letter or advisory letter on behalf of a group of sponsors who, in turn,

will use the same plan document and adoption agreements or the same specimen document for each of their adopting employers. There is also a program for “national” sponsors.

The pre-approved plan program is opened every six years for all pre-approved plan sponsors. While there is no EIN distinction, there is a distinction between when the IRS opens the pre-approved plan program for defined contribution plans and for defined benefit plans. The first cycle for pre-approved defined contribution plans started one year before the individually designed plan program opened. Thus, February 1, 2011 also represents the start of a new six-year period for sponsors of pre-approved defined contribution plans.

Opening of Letter Programs

Individually Designed Plans

Sponsors of Cycle A plans may submit their determination letter requests as early as February 1, 2011 but no later than January 31, 2012 to receive full retroactive remedial amendment relief. Submissions must satisfy the requirements of the *2010 Cumulative List of Changes in Plan Qualification Requirements* (2010 Cumulative List), as specified in [Notice 2010-90](#). Although the cumulative list generally governs the law changes that a sponsor needs to include in a determination letter submission during a cycle, a special exception applies for terminating plans seeking a determination letter. A terminating plan must include all law changes in effect at the time of termination. See Section 8 of Revenue Procedure 2007-44.

Pre-Approved Plans

The second six-year cycle for sponsors of defined contribution M&P and VS plans also opened on February 1, 2011. The end date for the second pre-approved plan cycle differs depending on the type of pre-approved plan submission. The 12-month submission period for non-mass submitter sponsors and practitioners, word-for-word identical adopters, and M&P minor modifier placeholder applications ends January 31, 2012. The nine-month submission period for mass submitters and national sponsors ends October 31, 2011. See Revenue Procedure 2007-44 for definitions of the different categories.

Cumulative List

Generally, the IRS publishes a cumulative list of changes in plan qualification requirements each year. The list governs the issues that the IRS will consider for submissions under the individually designed plan cycle that opens the following February 1. (The 2010 Cumulative List also applies for purposes of the pre-approved defined contribution plan program.)

The IRS generally does not consider in the determination letter cycle any laws enacted or regulations issued after September 30th (with specified exceptions). The 2010 Cumulative List specified the following exceptions:

- Item 14 of [Notice 2010-84](#) dealing with in-plan Roth rollovers,

- [Final hybrid regulations](#) under Code Sections 411(a)(13) and 411(b)(5), and
- [Notice 2010-77](#) requires hybrid plans submitting in Cycle A to be amended for the hybrid provisions by the time of the submission (even if that is earlier than the end of the 2011 plan year).

BUCK COMMENT. *The fact that the IRS will not consider a law or regulation when issuing a determination letter does not in any way eliminate the requirement that the plan comply with currently effective laws and regulations, or the need to adopt timely amendments to the plan. As a result, the plan document for which a determination letter is issued will often be outdated by the time the determination letter is issued.*

The 2010 Cumulative List does not include items that the sponsor should have included in the plan in the first Cycle A filing five years ago. However, a plan first established after the prior Cycle A filing period will need to include those provisions even though they have been removed from the 2010 Cumulative List.

New Items

The following is a summary of items in the 2010 Cumulative List that were not on the 2009 Cumulative List:

Section 401(a)(9) – Minimum Required Distributions. [Notice 2009-82](#) provided guidance on suspensions of the minimum distribution requirements as permitted by Section 201 of the Worker, Retiree, and Employer Recovery Act of 2008 (WRERA). Some plans do not need to be retroactively amended for Section 201 of WRERA until after January 31, 2012. If the sponsor of such a plan chooses not to adopt the WRERA Section 201 amendment before filing a Cycle A determination letter application, the IRS will issue the letter without considering Section 201 of WRERA.

Section 401(a)(35) – Diversification of Employer Securities. The Pension Protection Act of 2006 (PPA) added a requirement that applicable defined contribution plans (exceptions include certain ESOPs) provide specified diversification rights with respect to employer securities. [Notice 2009-97](#) extended the date a sponsor had to make a plan amendment until the last day of the first plan year beginning on or after January 1, 2010. On May 19, 2010, IRS issued [final regulations](#) under Section 401(a)(35).

Section 402A – Roth 401(k) Plan Rollovers. The Small Business Jobs Act of 2010 (SBJA) added Code Section 402A(c)(4), which permits rollovers from a plan account other than a designated Roth account to the plan's designated Roth account. [Notice 2010-84](#) provides the relevant guidance.

Sections 401(a)(13) and 411(b)(5) – Hybrid Plans. The PPA rules for hybrid plans were generally effective on the first day of the 2008 plan year. On October 19, 2010, the IRS issued both [final](#) and [proposed](#) hybrid plan regulations. Most of the final regulations are effective for plan years beginning on or after January 1, 2011. The "market rate of return" portion of the final regulations is not effective until the first plan year beginning on or after January 1, 2012, as are the proposed regulations. Notice 2009-97 as amended by Notice 2010-77, extends the amendment date for making interim and discretionary amendments for the hybrid plan provisions to the last day of the 2011 plan year unless the plan is submitted for a determination letter sooner. The IRS review of determination letter submissions under Cycle A will take into account the provisions of the statute and the final

regulations. With respect to the statutory provisions addressed in the proposed regulations, the IRS determination letter review will be based on a standard of reasonable interpretation of the statute.

Section 414(x) – Eligible Combined Plans. The PPA included a new provision effective for plan years beginning on or after January 1, 2010 that allows certain small plans to combine a defined benefit plan with a qualified cash or deferred arrangement. Although the IRS will review individually designed plans with respect to these provisions, it will not, at this time, consider Section 414(x) in issuing opinion and advisory letters with respect to pre-approved plans.

Benefit Restrictions

Notice 2010-77 delays the need to adopt amendments to reflect the benefit restriction rules of Code Sections 401(a)(29) and 436 from, generally, the last day of the 2010 plan year to the last day of the 2011 plan year. The IRS will not take into account the requirements of Sections 401(a)(29) or 436 with respect to any plan submitted before February 1, 2012 (i.e., during Cycle A).

Proposed Regulations

Generally, the IRS review of a determination letter submission on matters addressed by proposed regulations is based on a reasonable interpretation of the statute, existing final regulations, or other published guidance. Notice 2010-90 says that the IRS will treat document compliance with certain proposed regulations as a reasonable interpretation for purposes of the determination, opinion, or advisory letter even though such a letter will not be able to be relied on with respect to whether the plan complies with the proposed regulations.

The applicable proposed regulations are those on Sections 401(k) and (m) on [cash and deferred plans](#); Sections 402(f), 411(a)(11), and 417 on [notice periods and content](#); Sections 411(a)(13) and 411(b)(5) on [hybrid plans](#); Section 411(b)(1) on potentially negative variable [interest crediting rates](#); and Section 432 on [multiemployer plan](#) endangered and critical status actions.

Conclusion

The IRS continues to review the cycle filing program and the need to adopt interim and discretionary amendments each year. The IRS's TE/GE Advisory Committee spent a year reviewing the program and has suggested changes focused on the timing of interim and discretionary amendments. Many practitioners have also suggested changes. While the IRS has had a task force looking at changes, as of now, there has been no change in procedure.

Buck's consultants are available to help you with your filings and with any questions you may have.

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.