



For your information

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IRS adds time for IRC 436 retirement plan amendments and governmental plan determination letter submissions

The IRS issued guidance adding another year for sponsors of defined benefit retirement plans to adopt plan amendments to implement the Pension Protection Act of 2006 benefit restrictions contained in Internal Revenue Code (Code) Section 436. In addition, guidance was issued to again offer sponsors of governmental retirement plans the option of using Cycle E (January 31, 2016 deadline) instead of Cycle C (January 31, 2014 deadline) to submit plan documents for IRS review and approval.

Background

Code Section 436. As a general rule, qualified retirement plans must be amended to reflect changes in legal requirements by the end of the remedial amendment period. The normal remedial amendment period for single-employer plans affected by the Section 436 requirements was the deadline for filing the plan sponsor's tax return for the year containing the date the amendment had to be effective. For example, for a plan with a calendar year plan year whose plan sponsor has a calendar tax year, an amendment would have been needed by September 15, 2009 (assuming applicable extension) to reflect the 2008 effective date of the Section 436 requirements. Different deadlines would have applied for collectively bargained plans with delayed effective dates, multiple-employer plans, and certain other plans such as eligible charity plans. Ultimately, in Notice 2011-96, the IRS modified the normal deadline to extend the deadline for adopting an interim amendment to the latest of:

- the last day of the first plan year that begins on or after January 1, 2012,
- the last day of the plan year for which Section 436 is first effective for the plan, or
- the due date (including extensions) of the employer's tax return for the tax year that contains the first day of the plan year for which Section 436 is first effective for the plan.

An additional concern for a delayed plan amendment is the anticutback rule that prohibits reducing an accrued benefit below the amount specified by the terms of the existing plan. This protection applies to benefit accruals, optional forms of payment and certain early retirement benefits. In the case of the distribution restrictions of Section 436, the anticutback rule would prevent eliminating distribution options such as lump sum distributions were it not for specific language in PPA overriding the usual anticutback limits for timely amended plans.

Governmental plans. The IRS established specific cycles for processing determination letters for individually designed and preapproved plans (i.e., prototype and volume submitter plans). Preapproved plans use a six-year cycle—split between three years for defined benefit plans and three years for defined contribution plans. Individually designed plans operate on a five-year cycle generally based on the last number of the plan sponsor's EIN. Some special rules apply to certain types of individually designed plans such as governmental plans. Initially, governmental individually designed plans were assigned to Cycle C, but an option to use Cycle E was offered as an alternative in Revenue Procedure 2009-36. Plans opting to use Cycle E for the first round of determination letter processing were expected to revert to the Cycle C period in the second round of processing.

One more year for Section 436 amendments

In IRS [Notice 2012-70](#), the deadline for adopting an amendment to comply with the requirements of Section 436 was extended to no later than the last day of the first plan year that begins on or after January 1, 2013.

Buck comment. The IRS had previously announced that it would not consider Section 436 amendments when it reviews plans submitted during the Cycle B submission period (February 1, 2012 through January 31, 2013) even though it required the submitted restated plan to include the amendment. By extending the Section 436 deadline, plan sponsors are not obligated to include the amendment that IRS is not planning to review in any event.

Determination letter applications for individually designed plans filed on or after February 1, 2013 must include Section 436 amendments in their restated plans.

In addition to extending the date for adopting plan amendments, Notice 2012-70 extends the relief from the anticutback rule. Plans amended by the extended deadline can impose the statutorily required limitations without concern for violating the anticutback requirement.

Buck comment. Although IRS Notice 2012-70 extends the date for adopting an amendment to comply with the requirements of Section 436, the plan is operationally required to comply with Section 436 from the date it first became effective (i.e., the plan year beginning on or after January 1, 2008; later for certain collectively bargained plans).

Two more years for governmental plan letters

In [Revenue Procedure 2012-50](#), the IRS allows individually designed governmental plans to once again use Cycle E for determination letter requests. There is no requirement based on the option used for the first round of determination letter cycles, nor is there any guarantee that Cycle E will be available in the third round. Indeed, the procedure suggests that governmental plans will need to revert to Cycle C for round three. Governmental plan sponsors who choose to use the Cycle E option will need to address all documentation requirements applicable to other plans in Cycle E as reflected in the cumulative list of changes applicable for Cycle E.

In Closing

The additional time for plan amendments to implement the benefit restrictions of Section 436 and governmental plan determination letter requests will be useful to many plan sponsors, particularly those dealing with the fallout from Hurricane Sandy.

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.
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