

ADVISORY COMMITTEE ON ADMINISTRATION

Internal Revenue Service Updates Rules Regarding Timing of Determination Letter Filings

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On July 9, 2007, the Internal Revenue Service ("IRS") published Revenue Procedure 2007-44, which clarifies, modifies and supersedes Revenue Procedure 2005-66, in which the IRS substantially changed the deadlines for submitting tax-qualified retirement plans to the IRS for review of their tax-qualified status. To ensure that their plans continue to comply with all relevant tax qualification rules, employers that sponsor individually designed plans must submit determination letter applications every five years, and sponsors of master, prototype and volume submitter plans ("pre-approved plans") must submit applications for opinion letters every six years.

BACKGROUND

The terms of all tax-qualified retirement plans are required to comply in form with the tax qualification requirements of Section 401(a) of the Internal Revenue Code. Employers that sponsor individually designed plans can obtain assurance from the IRS that the terms of their plans comply with Section 401(a) by applying for and obtaining a favorable determination letter from the IRS. Employers that adopt pre-approved plans generally can obtain that assurance by relying on an opinion letter issued by the IRS to the organization that sponsors the pre-approved plan. The sponsor of the pre-approved plan must periodically apply for and obtain an opinion letter, but the employer that adopts a pre-approved plan generally does not need to apply for its own determination letter.

Under Section 401(b) of the Internal Revenue Code, the deadline for submitting an application for a determination or opinion letter generally is the due date (including extensions) of the employer's tax return for the taxable year in which the change or amendment is adopted or effective, whichever is later. This deadline is referred to as the last day of the plan's remedial amendment period.

The IRS has discretion under Section 401(b) to extend the remedial amendment period deadline. So that plans would not require annual submission, the IRS historically exercised this discretion by imposing a single deadline for all filers with respect to legislative and regulatory changes that became effective over a period of several years. (The most recent example of this type of deadline was the "GUST" remedial amendment deadline.) The new revenue procedure makes the timing of required determination or opinion letter filings more predictable for everyone by establishing a schedule for all filings.

INDIVIDUALLY DESIGNED PLANS

Five-Year Cycles

Employers that sponsor individually designed plans must apply for a new determination letter by January 31 of every fifth year, with the five-year cycles staggered so that roughly 20% of all employers will be required to submit new determination letter applications every year. The five year cycle applicable to an employer is determined by reference to the last digit of the employer's federal taxpayer identification number ("EIN") as listed below:

Five-Year Remedial Amendment Cycles for Individually Designed Plans

If the last digit of the plan sponsor's EIN is —	The plan's cycle is —	The last day of the EGTRRA remedial amendment period (i.e., the first cycle) is —	The next five-year remedial amendment cycle ends on —
1 or 6	Cycle A	January 31, 2007	January 31, 2012
2 or 7	Cycle B	January 31, 2008	January 31, 2013
3 or 8	Cycle C	January 31, 2009	January 31, 2014
4 or 9	Cycle D	January 31, 2010	January 31, 2015
5 or 0	Cycle E	January 31, 2011	January 31, 2016

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For example, under the new rules, an employer whose EIN ends in 2 or 7 will be in the group required to file for a new determination letter by January 31, 2008, January 31, 2013 and every fifth year thereafter.

Revenue Procedure 2007-44 provides that if an employer determined, based on a reasonable and good faith interpretation of Revenue Procedure 2005-66, that a plan was not a Cycle A plan, and under Revenue Procedure 2007-44 the plan is a Cycle A plan, then the employer has until January 9, 2008 to submit the plan to the IRS and the submission will be considered timely.

Determination Letter Coverage

In mid-November of each year, the IRS will publish an annual Cumulative List of Changes in Plan Qualification Requirements (“Cumulative List”). The list will specify the changes in plan qualification requirements that the IRS will consider in its review of plans submitted for determination letters on and after January 31 of the second calendar year following publication of the list. For example, the IRS published the 2006 Cumulative List in November 2006. Cycle B employers will submit determination letter applications between February 1, 2007 and January 31, 2008 and the determination letters they receive will cover all of the changes included in the 2006 Cumulative List. Similarly, Cycle C employers will submit determination letter applications between February 1, 2008 and January 31, 2009, and the determination letters they receive will cover all of the changes included in the 2007 Cumulative List.

As listed in the Cumulative List, the initial determination letter filing for each cycle will take into account the requirements of the Economic Growth and Tax Relief Reconciliation Act of 2001 (“EGTRRA”). The new revenue procedure clarifies that the IRS will not consider the Pension Protection Act of 2006 (“PPA”) in reviewing determination letter applications using the 2006 or 2007 Cumulative List. Also, the IRS will not consider in its review of any application any qualification change that becomes effective, any guidance that is published, or any statutes that are enacted after the October 1 preceding the date the applicable Cumulative List is issued.

Effective July 9, 2007, Form 6406, Short Form Application for Determination for Minor Amendment of Employee Benefit Plan, no longer may be used to apply for a determination letter. In addition, individually designed plans must be restated when they are submitted for determination letters. For this purpose, submission of a working copy or a restated plan in proposed form will suffice if timely executed plan amendments also are submitted.

Off-Cycle Filing

Employers are discouraged from filing “off-cycle.” First, off-cycle employers will be given secondary priority to “on-cycle” employers — i.e., their applications will be reviewed only after all of the applications of on-cycle employers have been reviewed and processed. Second, if an employer files during a premature February 1 to January 31 period, the employer still will be required to file during its next regularly scheduled cycle to ensure that it has a letter covering all of the changes reflected in the Cumulative List that applies to its cycle.

The new revenue procedure clarifies that the following types of plans will be given the same priority as on-cycle applications: (1) a new individually designed plan whose next regular on-cycle submission period ends at least two years after the end of the off-cycle submission period during which the plan sponsor submits its application; and (2) an off-cycle application submitted in accordance with published IRS guidance specifying that a determination letter must be submitted in connection with a particular event. In addition, the IRS will grant urgent business needs requests in limited cases, but only if exceptional circumstances exist.

Plan Terminations

Terminated plans fall out of the five-year remedial amendment period cycle because the termination of a plan ends the plan’s remedial amendment period. A determination letter application for a terminated plan will be considered timely only if it is filed no later than the later of (i) one year after the effective date of the termination, or (ii) one year after the date on which the termination is authorized, but no later than 12 months after the date of distribution of substantially all of the plan’s assets.

Multiemployer and Multiple Employer Plans; Governmental Plans

A plan that is a multiemployer plan will be subject to the five-year remedial amendment Cycle D. A multiple employer plan will be subject to the five-year remedial amendment Cycle B. A governmental plan, including a governmental plan that is a multiple employer plan, will be subject to the five-year remedial amendment Cycle C.

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Controlled Groups and Affiliated Service Groups

A plan maintained by multiple members of a controlled group under Code Section 414(b) or (c) or an affiliated service group under Code Section 414(m) will be subject to the five-year remedial amendment period applicable to the EIN used to report the plan on Form 5500, Annual Return/Report of Employee Benefit Plan. Instead of the rule above, if more than one plan is maintained by the members of the controlled group or affiliated service group, the members may elect to have all plans (other than multiemployer or multiple employer plans) of all members of the group be subject to the five-year Cycle A remedial amendment period. The election must be made jointly by all members of the group and must list all members of the group, each member's EIN, and all plans (other than multiemployer or multiple employer plans) that are maintained by each member of the group. If more than one plan is maintained by a parent-subsidary group, the parent may elect to have all plans subject to the remedial amendment cycle determined by reference to the parent's EIN.

The election must be made (i.e., signed and dated) and filed with the first determination letter application submitted in accordance with Revenue Procedure 2007-44 for any plan maintained by any member of the group. For example, if one member uses Cycle B and one member uses Cycle C, the election must be made by the due date for Cycle B applications. The election also must be filed with the determination letter application filed for each plan maintained by any member of the group. Once made, the election may not be modified or revoked unless there is a change in the controlled group or affiliated service group status.

Corporate Transactions and Changes in Plan Status

If there is a change in the employer that maintains a plan (due to a merger, acquisition, spinoff or change in plan sponsorship), the plan's remedial amendment cycle following the change will be determined based on the EIN of the employer that maintains the plan following the change. If a plan changes its status by becoming or ceasing to be a multiemployer plan or a multiple employer plan, the five-year remedial amendment cycle of the plan post-change will be determined based on the post-change status. If one of these changes in the amendment cycle would create a post-change remedial amendment cycle shorter than twelve months, the post-change cycle will be extended for twelve months and the next five-year cycle will be shortened accordingly. This extension does not apply to any other plans of the employer that are not similarly affected. A cover letter or attachment to the determination letter application must explain the change in the plan's filing cycle.

PRE-APPROVED PLANS

Six-Year Cycles

Sponsors of pre-approved plans will be required to apply for new opinion letters every six years. For pre-approved defined contribution plan sponsors, this period began on February 1, 2005 and ended on January 31, 2006. The IRS review period for pre-approved plans will last approximately two years from the end of this 12-month filing period, after which the IRS will publish an announcement notifying adopting employers of the date by which they must adopt the pre-approved plans. The deadline will give virtually all adopting employers a two-year period within which to adopt the updated pre-approved plan. If the employer adopts the pre-approved plan by the announced deadline date, the employer will have adopted the plan within the employer's six-year remedial amendment period. For example, it is expected that the IRS will issue opinion letters by January 31, 2008 to pre-approved defined contribution plan sponsors that submitted their applications for opinion letters by January 31, 2006 (two years after the end of the application period). Employers then will have until approximately January 31, 2010 to adopt the pre-approved plan.

An adopting employer will be treated as having adopted a pre-approved plan if, prior to the end of the five-year cycle that would otherwise apply to the employer if it maintained an individually designed plan, the employer either (i) adopts a sponsor's approved (or interim) pre-approved plan or (ii) together with a pre-approved sponsor, executes IRS Form 8905, Certification of Intent to Adopt Pre-approved Plan, and then, prior to the end of the two-year adoption period announced by the IRS, the employer adopts any pre-approved plan. (Form 8905 is available at www.irs.gov/ep.) These rules apply regardless of whether the employer is adopting a new plan or restating an existing individually designed plan in the form of a pre-approved plan.

If a pre-approved plan is modified so it becomes an individually designed plan, the plan may be required to switch from

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the six-year pre-approved plan cycle to the five-year individually designed plan cycle, depending on the nature of the modification.

TIMING OF PLAN AMENDMENTS

Notably, the new rules contained in Revenue Procedure 2007-44 only change the deadlines for submitting determination letter applications (thereby permitting retroactive changes to previously adopted amendments). They do not directly change the dates by which plans must be amended to reflect changes in applicable law. Although the IRS may extend amendment deadlines from time to time, the general deadline for amending plans to comply with changes in applicable law remains the due date of the plan sponsor's income tax return (including extensions) for the year in which the change becomes effective or operative. Thus, although the new rules will permit plan sponsors to avoid frequent opinion and determination letter application filings, they will not necessarily permit plan sponsors to avoid periodic plan amendments to reflect changes in the law from time to time between such applications.

The author of this article is a member of The ESOP Association's Advisory Committee on Administration. The author consulted with Committee Chair, Rebecca L. Hoffman, of the Principal Financial Group, Charlottesville, VA.

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