



Employee Benefits Law Information Memo

May 2008

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IRS CURRENTLY ACCEPTING DETERMINATION LETTER APPLICATIONS FOR "CYCLE C" FILERS

All Qualified Retirement Plan Sponsors Are Required To Timely Amend Plans To Comply With Interim Amendment Requirements

The Internal Revenue Service ("IRS") is currently accepting determination letter applications for individually-designed qualified retirement plans that are considered "Cycle C" filers under the determination letter application program maintained by the IRS. In general, an individually-designed plan is considered a Cycle C filer if the plan sponsor's federal employer identification number ends in a "3" or an "8" (although certain special rules apply for multiemployer plans, multiple employer plans, and plans maintained by multiple members of the same controlled group that may require or permit a different filing cycle). The deadline for submitting Cycle C plans to the IRS for a determination letter is not until January 31, 2009. However, affected plan sponsors should consider taking steps now to appropriately amend their individually-designed plans to reflect applicable legal requirements in preparation for the submission of their plans to the IRS for a determination letter. Additionally, all qualified retirement plan sponsors, regardless of their remedial amendment cycle, must continue to timely amend their plans to comply with IRS "interim" amendment requirements.

IRS Determination Letter Program

Under the determination letter program maintained by the IRS, a sponsor of a retirement plan intended to be qualified under Section 401(a) of the Internal Revenue Code ("Code") (e.g., a defined benefit plan, Code Section 401(k) plan, profit sharing plan, money purchase plan and employee stock ownership plan) may seek a determination from the IRS that the plan actually satisfies the applicable qualification requirements. In general, under the determination letter program, individually-designed plans are submitted to the IRS pursuant to a five year staggered "remedial amendment cycle," with the deadline for submitting a plan generally determined by the last number of the plan sponsor's federal employer identification number ("EIN"). (See the chart below illustrating the various remedial amendment cycles.) Although not legally required, it is generally recommended that the sponsor of an individually-designed plan seek a determination letter, as a favorable letter provides valuable assurance that the plan is a qualified plan (at least in form). In some circumstances, an employer that maintains a pre-approved retirement plan (i.e., a master, prototype or volume submitter plan offered by a financial institution or service provider) does not need to obtain a determination letter, but may rely on the IRS opinion or advisory letter received by the entity that offers the pre-approved plan.

If the EIN of the employer ends in ____	The plan's cycle is:	The last day of the initial remedial amendment period 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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The Cycle C filing period began on February 1, 2008 and ends on January 31, 2009. Individually-designed qualified retirement plans that are submitted during Cycle C must be amended and restated to reflect the applicable required provisions set forth in the 2007 Cumulative List issued by the IRS in Notice 2007-94. (Each year, the IRS issues a new Cumulative List identifying the legal requirements that must be adopted by plans that are subject to the subsequent remedial amendment cycle.) The 2007 Cumulative List includes changes required by the Economic Growth Tax Relief Reconciliation Act of 2001 (“EGTRRA”), as well as various other pieces of legislation and Treasury guidance that have been issued in recent years.

Interim Amendment Requirements

While only Cycle C plans are currently required to be amended, restated and submitted for a determination letter, all qualified retirement plans must be amended to reflect applicable “interim” amendments that are required in response to new legislation, regulations, or other applicable guidance affecting the qualified status of the plan. The interim amendment requirements can be a trap for the unwary, as under prior IRS procedures, the IRS permitted a plan to operate under “good-faith” compliance with applicable legal requirements, without the need to actually amend the plan until it was scheduled to be submitted to the IRS for a determination letter (a period which could often span a number of years). Under the interim amendment requirements, complying with a required legal change operationally is not sufficient, and a timely plan amendment needs to be adopted in accordance with the amendment deadlines explained below.

For a disqualifying provision or a provision that is integral to a disqualifying provision, an interim amendment is generally required to be adopted by the later of (i) the due date (including extensions) for filing the income tax return for the employer’s taxable year that includes the date on which the “remedial amendment period” begins, or (ii) the last day of the plan year that includes the date on which the “remedial amendment period” begins. The “remedial amendment period” begins on the date on which the change becomes effective with respect to a plan or, in the case of a provision that is integral to a qualification requirement that has been changed, the first day on which the plan is operated in accordance with the provision as amended. (Special amendment deadlines may apply for tax-exempt employers and government entities.)

It is important to note that while the interim amendment requirements generally apply to new legal requirements affecting the qualified status of retirement plans, special amendment deadlines may be issued in conjunction with specific legislation or regulations. For example, plan sponsors are generally not required to amend their plans to adopt applicable provisions of the Pension Protection Act of 2006 until the last day of the first plan year beginning on or after January 1, 2009 (January 1, 2011 in the case of governmental plans).

Amendment Deadline For “Discretionary” Amendments

A different amendment deadline applies for an amendment considered by the IRS to be a “discretionary” (rather than interim) plan amendment. Generally, discretionary amendments are amendments made to reflect optional changes in the law or to implement plan design changes desired by the plan sponsor. Discretionary amendments must be adopted by the end of the plan year in which the plan amendment is effective.

Recommended Action

Plan sponsors of individually-designed qualified retirement plans that are Cycle C filers should begin to amend their plans to reflect the applicable legal requirements set forth in the 2007 Cumulative List, to the extent such efforts have not already begun. Additionally, because the qualification requirements for retirement plans are frequently modified by the introduction of new legal requirements which may require interim amendments, all plan sponsors should be cognizant of the requirement to adopt timely interim plan amendments to ensure continued compliance with the Code’s qualification requirements.

If you have any questions about this memorandum, please contact John Godsoe (716-566-2850, jgodsoe@bsk.com) or any of the other members of our Employee Benefits Practice Group listed below.

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IRS Issues Timeline For the Adoption of Certain Pre-Approved Plans

The IRS recently issued opinion and advisory letters for most pre-approved defined contribution plans submitted to the IRS to comply with EGTRRA. In Announcement 2008-23, the IRS indicated that employers that have adopted these pre-approved plans to restate a plan for EGTRRA are required to adopt the EGTRRA-approved plan document by April 30, 2010. The IRS will begin to accept applications for individual determination letters for EGTRRA-approved pre-approved defined contribution plans starting May 1, 2008. The Announcement also provides certain new procedures for filing determination letter applications for such plans.