

Year-End Checklist for Tax-Qualified Retirement Plans

November 3, 2008

As the end of the year is fast approaching, it is important to stop and review whether any qualified plan action items must be addressed prior to year-end. The following checklist describes potential year-end amendments and notices that may be necessary for tax-qualified retirement and savings plans. This list is not exhaustive, but is intended to provide a reminder of the general issues that may need to be reviewed and considered.

Annual Notice Requirements

Depending on the type of qualified plan and the plan's features, one or more annual notices may be required. Please carefully review the list of annual notices below to confirm if any are required to be issued for your plan.

Annual Safe-Harbor 401(k) Plan Notices

- *Traditional Safe-Harbor Plan Notice.* Safe-harbor 401(k) plans must provide an annual safe-harbor notice to all plan participants describing the safe-harbor contribution and other material plan features.
- *“Wait and See” Safe-Harbor Notice.* Sponsors of safe-harbor 401(k) plans that intend to satisfy the safe-harbor requirements through a 3% nonelective contribution may wish to follow the “wait and see” approach. Plan sponsors that follow this approach must provide a notice prior to the beginning of the plan year notifying eligible employees that the safe harbor may be adopted. Additionally, plan sponsors that previously provided a “wait and see” notice prior to the beginning of the ongoing plan year and that decide to implement a safe-harbor arrangement prior to the end of the plan year (by making the 3% nonelective contribution) must provide a supplemental notice to eligible employees informing them that the safe-harbor arrangement will be adopted.

The traditional safe-harbor notice and the contingent and supplemental notices must be provided at least 30 days and no more than 90 days prior to the beginning of the plan year. Thus, calendar year plans will need to provide the applicable notice by December 1, 2008.

Note: If you previously provided a “wait and see” safe-harbor notice and have decided to implement the 3% nonelective safe-harbor contribution for this plan year, as well as providing the notice described above you will need to amend your plan to provide for the safe-harbor contribution prior to the end of the plan year.

Qualified Default Investment Alternative Notices

Participant-directed 401(k) plans that invest participant contributions for which no affirmative investment election has been made into a qualified default investment alternative (QDIA) must provide an annual notice. The notice must be distributed to all participants that have been defaulted into a QDIA. The notice must be provided at least 30 days before the beginning of each plan year. For calendar year plans, notice must be provided by December 1, 2008.

A QDIA is an investment alternative (for example, a balanced fund or target-date fund) in a participant-directed 401(k) or profit sharing plan into which participant contributions are “defaulted” if the participant has not made an affirmative investment election. If a plan fiduciary properly selects a QDIA and follows the specific QDIA requirements, which include providing an initial and an annual notice, the plan fiduciary will generally receive fiduciary protection for those defaulted investments under Section 404(c) of the Employee Retirement Income Security Act of 1974, as amended (ERISA) because participants will be “deemed” to have elected to invest their contributions into the QDIA.

Note: One of the many QDIA notice requirements is that the notice be “separate” from any other notices that are provided. However, the QDIA notice is permitted (but not required) to be combined with the safe-harbor notice described above and the automatic enrollment notices described below.

401(k) Plan Annual Automatic Enrollment Notices

Sponsors of 401(k) plans that automatically enroll participants must provide an annual notice to all eligible employees describing the circumstances under which contributions may be automatically contributed to the plan. This notice may be combined with the QDIA notice described above. This notice must be distributed at least 30 days prior to the beginning of each plan year. For calendar year plans, the notice must be provided by December 1, 2008.

Note: There are a number of different automatic enrollment arrangements (for example, one arrangement simply provides for the automatic enrollment of participants and another arrangement is linked to satisfying 401(k) plan discrimination tests), but all of them require a notice.

Defined Benefit Pension Plan Annual Funding Notice

Plan sponsors of single- and multiemployer defined benefit pension plans must provide an annual funding notice to participants, beneficiaries, and labor organizations representing participants. The notice must contain certain information about the plan, including, among other items, the plan’s funding status for the previous two years, and a statement of the plan’s assets and liabilities. The notice must generally be provided within 120 days following the end of the plan year. Small plans (covering fewer than 100 participants) must provide the notice by the filing due date of the plan’s IRS

Form 5500. Additional notice requirements apply if the plan is subject to benefit restrictions due to failure to meet certain funding targets.

For calendar year plans, the first notice is due on April 30, 2009. This notice will take the place of the summary annual report for a defined benefit plan.

Participant Benefit Statements

Depending upon the type of qualified plan, specific participant benefit statement requirements apply, as described below.

- *Defined Benefit Pension Plans.* Plan sponsors of defined benefit pension plans must either provide participant benefit statements every three years to vested participants who are active employees or provide an annual notice to participants describing how a benefit statement may be obtained. If a plan sponsor decides to provide an annual notice instead of providing a benefit statement every three years, the notice must be provided by December 31, 2008.
- *Participant-Directed Defined Contribution Plans.* Participant-directed defined contribution plans are required to provide participant statements on a quarterly basis. Plan sponsors are deemed to timely provide statements if they are provided within 45 days following the end of the calendar quarter.
- *Non-Participant-Directed Defined Contribution Plans.* Plans that do not permit participants to individually direct their account balances are required to provide statements at least once each calendar year. Plan sponsors are deemed to timely provide statements if they are provided within 45 days following the end of the calendar year.

Plan Amendments

While amendments to comply with the Pension Protection Act of 2006 are generally not required to be adopted until 2009 (or later in some instances), certain plan amendments relating to discretionary or other compliance changes may be required to be adopted by December 31, 2008. Please review the list below to confirm if any of the plan amendments may apply to your plan.

Discretionary Changes

Plan amendments for discretionary changes (i.e., changes not required by law, such as plan design changes) must be adopted by the end of the plan year in which the amendment is effective. Thus, plans with calendar year plan years must be amended by December 31, 2008 in order to timely adopt any discretionary changes.

Code Section 415 Amendments

Qualified plans (including both defined contribution and defined benefit pension plans) must be amended to comply with the final regulations under Section 415 of the Internal Revenue Code of 1986, as amended (415 amendments). The final regulations are effective for limitation years beginning on or after July 1, 2007 (e.g., January 1, 2008 for plans with a calendar year limitation year). The regulations

include both “mandatory” and “discretionary” changes. “Mandatory” changes must generally be adopted by the later of (i) the last day of the plan year during which a plan amendment is effective, and (ii) the due date for filing the employer’s tax return (plus extension) for the fiscal year during which the provision became effective. “Discretionary” changes are changes that a plan sponsor can choose whether or not to adopt and must be adopted by the end of the plan year in which they became effective.

- *Deadline—Mandatory Changes.* Mandatory 415 amendments for plans that have a calendar year limitation year and a calendar year fiscal year must be adopted by the due date plus extensions for the employer’s tax year ending December 31, 2008.
- *Deadline—Discretionary Changes.* Discretionary 415 amendments for plans that have a calendar year limitation year and a calendar year fiscal year must be adopted by December 31, 2008.

Pension Funding Equity Act Amendments for Defined Benefit Plans

The Pension Funding Equity Act (PFEA) generally changed the actuarial assumptions used for determining the Code Section 415 limits for lump sum distributions made in 2004 and 2005. Amendments to adopt PFEA changes must be made by the end of the 2008 plan year. Thus, calendar year plans must be amended by December 31, 2008 to reflect PFEA changes.

IRS Determination Letter Program

As you probably are aware, under the IRS’s determination letter program, individually designed plans have staggered, five-year remedial amendment cycles. While not a year-end deadline, the period for submitting individually designed plans in the third remedial amendment cycle (Cycle C for employers with employer identification numbers that end in 3 or 8 and most governmental plans) began February 1, 2008 and ends January 31, 2009. Thus, plan sponsors with individually designed plans in Cycle C should begin (if they haven’t already) to amend (and possibly restate) their plans and to gather the other information required for the filing in order to ensure timely submission to the IRS.

Written Plan Document Deadline for Code Section 403(b) Plans

Final regulations under Code Section 403(b) were issued last year and, among other things, require that Code Section 403(b) arrangements be maintained pursuant to a written plan document. Sponsors of Code Section 403(b) plans will need to update existing plan documents or adopt new plan documents by December 31, 2008 to comply with these final regulations.

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