GROOM LAW GROUP CHARTERED

BENEFITS BRIEF

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If you have any questions, please contact your regular Groom contact or any of the attorneys listed below:

Mark E. Carolan
mcarolan@groom.com
(202) 861-5424

Kimberly M. Dahm
kdahm@groom.com
(202) 861-2606

Kendall W. Daines
kdaines@groom.com
(202) 861-6611

Elizabeth T. Dold
edold@groom.com
(202) 861-5406

Jeffrey W. Kroh
jkroh@groom.com
(202) 861-5428

David N. Levine
dlevine@groom.com
(202) 861-5436

Mark L. Lofgren
mlofgren@groom.com
(202) 861-6614

Louis T. Mazawey
lmazawey@groom.com
(202) 861-6608

John F. McGuiness
jmcguiness@groom.com
(202) 861-6625

David W. Powell
dpowell@groom.com
(202) 861-6600

Brigen L. Winters
bwinters@groom.com
(202) 861-6618

Kara M. Soderstrom
ksoderstrom@groom.com
(202) 861-0177

Jeff Witt
jwitt@groom.com
(202) 861-6654

J. Rose Zaklad
rzaklad@groom.com

Required 2012 Tax-Qualified Plan Amendments and Cycle B Determination Letter Filings

Plan sponsors should review their tax-qualified plans annually to ensure that all necessary plan amendments are adopted on a timely basis. This can be challenging because the interaction between the rules for adopting plan amendments contained in new laws, and the administrative rules imposed by the Internal Revenue Service (IRS), sometimes result in complex amendment deadlines. However, it is important to meet these deadlines because IRS determination letter application reviewers thoroughly examine plan amendments to ensure they have been adopted timely, including for acquired company plans.

Each year, plan sponsors should consider whether plan amendments are needed to: (1) reflect desired design changes, (2) address items contained in the latest IRS cumulative list of plan amendments set forth in Notice 2011-97, or (3) comply with other new regulatory or statutory requirements. The cumulative list is updated annually and contains the latest regulatory and statutory changes that must be reflected in plan documents. The current list is the *2011 Cumulative List of Changes in Plan Qualification Requirements* (http://www.irs.gov/pub/irs-drop/n-11-97.pdf) applicable for Cycle B determination letter applications (to be submitted between February 1, 2012 and January 31, 2013).

Below we summarize amendments that may be needed for all plans in 2012, review the document considerations for plans that are scheduled to apply for an IRS determination letter under Cycle B, and provide action steps for all plan sponsors. We note that special delayed deadlines may apply to collectively bargained and governmental plans (for example, the governmental plan "normal retirement age" provision is not effective until 2015).

2012 Amendments

Plan sponsors should ensure that the following amendments are timely adopted.

- 2012 Plan Design Changes. Plan design changes (including collective bargaining agreement changes) implemented during the 2012 plan year should be adopted as plan amendments by the plan's year-end. Possible advance participant notice requirements and anti-cutback protections should be considered for amendments that may reduce future benefits. Notably, sponsors may want to review their plan's missing participant language for any reference to the IRS letter forwarding program, as this program is no longer available, as of August 31, 2012, for this purpose. One area where the need for plan design changes may arise affects plan sponsors who receive medical loss ratio (MLR) rebates. The plan document (and Code section 415) should be reviewed as cash payments to employees may be treated as eligible compensation, unless the plan is amended prospectively to exclude it. For example, a cash rebate of premiums paid with funds from a cafeteria plan (sec. 125) is

generally treated as taxable wages for employment tax purposes, which is typically picked-up in the Plan's general definition of compensation (subject to post-severance restrictions).

- 2013 Plan Design Changes. Design changes contemplated for the 2013 plan year that would reduce future benefits (for example, reducing matching or profit sharing contributions) or are required to be adopted prospectively (such as changes to plans that use a 401(k) safe harbor formula or QACA safe harbor formula) may also need to be adopted before the start of the 2013 plan year. Moreover, notice of pension plan amendments reducing future accruals, subsidies, etc., generally must be given 45 days before the effective date.

- Section 436 Amendment (Defined Benefit Plans). Defined benefit plans are required to be amended to reflect the funding-based limits on benefit accruals and distributions under Code section 436 (for example, restrictions on the use of certain forms of benefit payment when a pension plan is underfunded) generally by the end of the 2012 plan year. Sample plan language for the Code section 436 requirements is set forth in IRS Notice 2011-96 (http://www.irs.gov/pub/irs-drop/n-11-96.pdf).

- PPA's Vesting, Accruals, and Market Rate of Return Rules for Cash Balance/Hybrid Plans (Extension Provides Relief from 2012 Amendments). Recently, the IRS delayed the effective date of the yet-to-be-issued regulations for the market rate of return limitations for cash balance and other hybrid pension plans until (at least) January 1, 2014 (IRS Notice 2012-61, http://www.irs.gov/pub/irs-drop/n-12-61.pdf). This also generally extends the deadline by which plans must be amended to reflect most of the PPA's statutory changes for hybrid pension plans until at least the end of 2013, including:

    - provisions relating to three-year vesting;
    - special rules for comparing accruals to similarly situated younger participants; and
    - the market rate of return limits for cash balance plan interest credits.

  For most plans, the rules for vesting and accruals are fairly straight-forward and many plans have already been amended as necessary to comply with these rules. The IRS has indicated that it will provide anti-cutback relief for amendments that may be needed "to the extent necessary" to comply with the final market rate rules. Therefore, no PPA amendments in this area are required for 2012.

- Terminating Plans. Terminating plans must be amended to reflect all currently applicable rules prior to or at their date of termination.

- Puerto Rico Plans. Under the Puerto Rico Treasury Department ("PR Treasury") Circular Letter No. 11-10 ("CL 11-10"), on or before the end of the plan year beginning on or after January 1, 2012 (i.e., on or before December 31, 2012, for a plan with a calendar plan year), plans covering workers in Puerto Rico must be amended or restated to comply with the qualification provisions of the 2011 PR Code, including those which became effective January 1, 2011. CL 11-10 includes a list of the 2011 PR Code qualification provisions that must be included in the plan document (or appendix/supplement to the plan) in order to obtain a qualification letter under the 2011 PR Code. However, note that a plan must have been operated in compliance with all applicable 2011 PR Code provisions since January 1, 2011, even though the plan is not amended until sometime in 2012.

January 2013 IRS Submission Deadline: Cycle B Filers

In general, the following plan sponsors are part of the IRS's Cycle B determination letter filing period and should submit a determination letter application to the IRS by January 31, 2013:

- Plan sponsors that have a 2 or 7 as the last digit of their EIN that maintain individually designed plans (for example, a plan that is not a pre-approved plan), other than a governmental plan or multiemployer plan.
- All individually designed multiple employer plans.

As part of an IRS filing for an updated letter, the plan document should incorporate all required amendments, including the items listed in the 2011 Cumulative List (IRS Notice 2011-97) in either a working copy or plan restatement. Moreover, the timing of all recently required "interim" amendments (e.g., amendments required to be made to a plan as a result of changes to qualification requirements (and related integral amendments)) should be reviewed and if necessary, a stream-lined voluntary correction program ("VCP") filing (currently, for a $375 fee) should be considered for any late or insufficient amendments. Importantly, the IRS may be expected to review the content and timing of interim amendments. And, if errors are not addressed upfront with a VCP submission, the IRS may impose much higher fees (between $2,500-$40,000 depending on the number of plan participants) for a late or insufficient amendment discovered during the determination letter process.

Action Steps

Before year-end, each plan sponsor should:

- Review the plan document (and existing amendments) to ensure that the document has been updated for all required and optional plan changes (including legal and design changes that become effective during the year).
- Adopt any needed amendments.
- If an employer maintains an individually designed plan (either by adopting its own plan document or having lost "reliance" on a pre-approved plan based on the changes made from the approved document), it should do the following:

  Step 1: Determine if the EIN ends in 2 or 7, or is a multiple employer plan. (The plan's EGTRRA determination letter should include a reference to the end of the reliance period for the prior letter.)

  Step 2: Prepare a Plan Restatement or working copy of the Plan that incorporates all plan amendments to date, and otherwise complies with the 2011 Cumulative List.

  Step 3: Review all prior required interim amendments to determine if they complied with IRS requirements and were adopted no later than the applicable IRS deadline.

  Step 4: Prepare and file the Form 5300 Determination Letter application, and consider filing a stream-lined VCP filing simultaneously for any late or inadequate interim amendments, by the January 31, 2013 deadline.

Upon IRS review of the submission (which may occur more quickly if the determination letter filing is made during 2012), the IRS may ask for additional changes to comply with the plan qualification rules prior to issuing a favorable determination letter. The proposed changes should be carefully reviewed to determine if they are appropriate and

to assess the potential impact on the plan. Once the required changes are agreed upon by the IRS and the plan sponsor, these additional amendments will need to be adopted within 91 days of the date the favorable determination letter is issued.