

## MEMORANDUM TO CLIENTS

May 25, 2010

**RE: Reminder – Required 2010 Tax-Qualified Plan Amendments and January 2011 IRS Determination Letter Filing Deadline**

Plan sponsors should review their tax-qualified plans annually to ensure that all necessary amendments are adopted on a timely basis. This can be challenging because the timing rules for plan amendments have become quite complex due to the interplay between the rules sometimes contained in new laws and the rules imposed by the Internal Revenue Service. It is important to meet these rules as IRS determination letter reviewers thoroughly review plan amendments to ensure they have been adopted timely, including for acquired company plans.

Each year, plan sponsors should consider whether amendments are needed to reflect any intended design changes or to address any items contained in the latest "cumulative list" of plan amendments issued by the IRS. The IRS updates the "cumulative list" annually to include the latest regulatory and statutory changes that must be reflected in plan documents. The current list is available at [http://www.irs.gov/irb/2009-52\\_IRB/ar20.html](http://www.irs.gov/irb/2009-52_IRB/ar20.html). Below we summarize the amendments possibly needed in 2010 for all plans, as well as the plan document considerations for plans that are scheduled to be filed for a determination letter by January 31, 2011 under IRS "Cycle E."

**A. 2010 Amendments**

The following amendments are generally required to be adopted during the 2010 plan year, subject to possible exceptions for collectively bargained or governmental plans.

- **2010 Design Changes:** Any plan design changes (including collective bargaining agreement changes) that were implemented in 2010 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 benefits.
- **2011 Design Changes:** Any design changes contemplated for the 2011 plan year that would result in a reduction of benefits (e.g., reduction in matching or profit sharing contribution) also may need to be adopted before the start of such year. Notice of pension plan amendments reducing accruals, subsidies, etc., generally must be given 45 days before the effective date.
- **PPA Amendments (non-calendar year plans):** Non-calendar year plans have until the end of the year that begins in 2009 to reflect most changes related to the Pension Protection Act of 2006 ("PPA"), whether the changes are new mandatory requirements or optional provisions. Calendar year plans were required to be amended by December 31, 2009.

- **Special PPA Deadlines for Defined Benefit Plans:** Defined benefit plans must reflect certain PPA changes no earlier than the end of the 2010 plan year, including: (i) funding-based limits on benefit accruals and distributions, and (ii) for cash balance and other hybrid pension plans, 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. Further IRS guidance on these issues is expected later this year.
- **Right to Diversify Employer Stock:** Defined contribution plans with investments in employer stock must be amended by the end of the 2010 plan year to provide participants with certain diversification opportunities. Final IRS regulations in this area were just issued.
- **Normal Retirement Age:** For pension plans with a normal retirement age (NRA) between age 55 and 62 that are changing the NRA to comply with Notice 2007-69, the amendment to NRA must be made by the end of the first plan year beginning after June 30, 2008, or, if later, the tax return deadline (plus extensions) for the sponsor's return that includes the first day of the first plan year beginning after June 30, 2008. The IRS has extended this to the first plan year beginning on or after January 1, 2013 in the case of governmental plans.
- **HEART Act:** Plan amendments related to the Heroes Earnings and Assistance Relief Tax Act of 2008 ("HEART Act") are generally effective as of January 1, 2007, and must be adopted by the end of the 2010 plan year. Certain amendments are mandatory (e.g., providing a beneficiary of a participant who died in qualifying military service with the same benefits as if the participant returned to employment and then died), while others are optional (e.g., providing for accruals while in qualifying military service for participants who die while in qualifying military service). Optional provisions should be adopted by the end of the 2010 plan year if they are to have retroactive effect.
- **Rollovers by Non-Spousal Beneficiaries:** Plans must be amended to allow rollover of benefits by non-spousal beneficiaries by the end of the plan year beginning after December 31, 2009 or, if later, the tax return deadline (plus extensions) for the sponsor's return that includes the first day of the such plan year. Most plans made this change as part of the PPA amendments.
- **Hurricane/Flood Relief:** The Emergency Economic Stabilization Act of 2008 ("EESA") provides for optional flood-related distributions, recontributions of withdrawals for home purchases, and special loan rules. EESA-related amendments must generally be adopted by the end of the 2010 plan year.
- **MRD Amendment:** Defined benefit plans that are filing for a Cycle E determination letter must be amended by January 31, 2011 to reflect the final minimum required distribution regulations.

Please note that terminating plans must reflect all currently applicable rules prior to or at their termination.

**B. January 2011 IRS Submission Deadline – Cycle E Filers**

In general, all plan sponsors: (i) with a "0" or "5" as the last digit of their EIN that maintain an individually designed plan (e.g., not a pre-approved plan), (ii) that are a Cycle D filer whose first plan year begins after January 1, 2009 and ends on or after February 1, 2010 that made an election to defer submission until this cycle, and (iii) that maintain a single-employer governmental plan and made a one-time election to file in Cycle E, are part of the IRS's Cycle E determination letter filing period and should submit a determination letter application by January 31, 2011. However, plan sponsors that made one-time elections to file in this Cycle E will revert back to their normal determination cycle (e.g., Cycle D for a filer with "4" or "9" as the last digit of their EIN, and Cycle C for governmental plans) for their next filing.

As part of the filing, the plan document should be updated to incorporate all required amendments, including the items listed in the 2009 Cumulative List and contained in IRS Notice 2009-98 in either a working copy or plan restatement. Note that the Cycle E determination letter review will not consider amendments regarding the HEART Act and funding-based limits on benefit accruals and distributions.

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Please call one of the following, or the Groom attorney you regularly contact, if you have any questions about these matters or would like assistance with 2010 amendments or upcoming IRS determination letter filings.

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