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Required 2016 Tax-Qualified Amendments and Cycle A 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. It is important to meet these deadlines because IRS determination letter application reviewers and IRS examiners thoroughly review plan amendments to ensure they have been adopted timely, including for acquired company plans.

For 2016, 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, or (3) comply with other new regulatory or statutory requirements. The cumulative list contains the latest regulatory and statutory changes that must be reflected in plan documents. The current list is set forth in Notice 2015-84, which applies for Cycle A determination letter applications (to be submitted through January 31, 2017).

<https://www.irs.gov/pub/irs-drop/n-15-84.pdf>

Below we summarize amendments that may be needed for all plans in 2016 (both defined benefit ("DB") and defined contribution plans), review the document considerations for plans that are scheduled to apply for an IRS determination letter under Cycle A, and provide action steps for all plan sponsors.

2016 Amendments

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

- **2016 Plan Design Changes.** Plan design changes (including collective bargaining agreement changes) implemented during the 2016 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, subsidies, etc. – these amendments must be adopted before they become effective.
- **2017 Plan Design Changes.** Design changes contemplated for the 2017 plan year that would reduce future benefits (for example, reducing matching or profit sharing contributions) or are otherwise required to be adopted prospectively (such as changes to plans that use a 401(k) safe harbor formula or QACA safe harbor formula) may need to be adopted before the start of the 2017 plan year. Notice of pension plan amendments reducing future accruals, subsidies, etc., generally must

be given at least 45 days before the effective date. For example, a plan sponsor may elect to change the benefit formula (or definition of compensation) as a result of the new regulations under the Fair Labor Standards Act, which effective December 1, 2016, will likely result in overtime pay or other greater compensation for more workers.

- **PPA's Vesting, Accruals, and Market Rate of Return Rules for Cash Balance/Hybrid Plans (DB Plans)**. The IRS and Treasury released final regulations addressing the market rate of return limitations and other aspects of cash balance and other hybrid pension plans (80 Fed. Reg. 70680 (Nov. 16, 2015)). The final regulations provide transitional, anti-cutback relief for plans that must reduce the rate of interest in order to comply with the new limits. The new final rules are generally effective for plan years that begin on and after January 1, 2017. Amendments generally must be made before the end of the 2016 plan year.

A delayed effective date applies to “collectively bargained plans” where one or more employers ratified participation in the plan on or before November 13, 2015. In that case, the final regulations are effective for the collectively bargained plan by the later of: (a) January 1, 2017, or (b) the earlier of: (1) January 1, 2019, or (2) the latest date when one of the last collective bargaining agreements terminates.

If the change to the interest crediting rate under a plan to comply with the market rate of return limitations is considered a significant reduction in future benefit accruals, a 204(h) notice will be required to be sent to potentially impacted participants, generally 45 days in advance of the effective date of the change. As such, plan sponsors may need to provide a 204(h) notice to potentially impacted participants by November 16, 2016.

- **Distributions to Louisiana flood victims**. Under Announcement 2016-30, plan sponsors can elect to make special loan and hardship distributions to Louisiana flood victims and members of their families. Notably, a plan amendment is only needed – and may be adopted by the end of the next plan year – if the plan does not otherwise provide for loans or hardship distributions.
- **Mortality Table**. The IRS recently issued Notice 2016-50 that provides for updated static mortality tables for 2017 (including a modified unisex version of the mortality tables for determining minimum present value under Code section 417(e)(3)). Notably, the Notice indicates that the anticipated broader changes to be issued in proposed regulation format that will update the base mortality rates and projection factors in Treasury Regulation § 1.430(h)(3)-1 are still pending and are not expected to apply until 2018 – this confirmed one-year delay is welcomed news to plan sponsors. Most plans incorporate the new IRS mortality table by reference, so it is unlikely that a plan amendment will be required.
- **2015 Cumulative List Items (DB Plans only)**. The new items on the Cumulative List that the IRS may inquire as to whether an interim amendment has been made include:
 - **Closed Defined Benefit Pension Plans**. Notice 2015-28 provides temporary nondiscrimination relief for certain “closed” defined benefit plans for 2016, and recently issued Notice 2016-57 extends this relief for another year through 2017, pending the issuance of final regulations. However, unless the plan has detailed nondiscrimination provisions, it is unlikely that an amendment would be required to take advantage of the relief.
 - **Lump Sum Windows**. Notice 2015-49 generally prohibits lump sum windows for retirees in pay status after July 9, 2015, and, as part of the determination letter process, plan sponsors will be

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asked if they implemented such a window. If the plan implemented a lump sum window, the plan should have been amended to reflect the window.

- Normal Retirement Age. Special relief applies for defined benefit plans that on or before December 8, 2014 included a 30 years of service (or other numerical) component to the definition of normal retirement age. Plans that meet this requirement are unlikely to need a plan amendment, and those not meeting this relief should have already amended their plans to comply with the “normal retirement age” requirements.
- Code Section 420 Transfer. The ability to transfer excess pension assets to retiree health accounts was extended from 2021 until the end of 2025. In the rare event that the Plan included the 2021 expiration date, it could be amended to extend the date until 2025. A transfer may also be made to pay retiree life insurance benefits.
- Multiemployer Plans in Critical and Declining Status. Code section 432(e)(9) and the temporary regulations thereto permit the plan sponsor of a multiemployer plan to suspend participant benefits (without violating the anti-cutback provisions) if certain conditions are met, with IRS approval. If approved, a plan amendment would be required to reflect the terms of the suspension.
- Terminating Plans. Terminating plans must be amended to reflect all currently applicable rules prior to or at their date of termination.

It is possible, but unlikely, that the IRS will issue additional guidance during the remainder of 2016 that requires further amendments before the end of the year.

January 2017 IRS Submission Deadline: Cycle A Filers

In general, the following plan sponsors are part of the IRS's Cycle A determination letter filing period and should submit a determination letter application to the IRS by January 31, 2017:

- Plan sponsors that have a 1 or 6 as the last digit of their EIN and that maintain individually designed plans (for example, a plan that is not a pre-approved plan); and
- Controlled groups and affiliated service groups that maintain more than one plan that made a Cycle A election by January 31, 2012 (the last day of the previous Cycle A submission period) and any new member of the controlled group or affiliated service group that made a timely election to join the group.

As part of an IRS filing for an updated letter, the plan document should be updated to incorporate all required amendments, including the items listed in the 2015 Cumulative List (IRS Notice 2015-84) in a 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 will review the content and timing of interim amendments, and if 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 1 or 6. (The plan's EGTRRA determination letter should include a reference to the end of the reliance period for the prior letter, which is no longer effective but helpful in determining if you should file this year.)

Step 2: Prepare a restatement of the plan that incorporates all plan amendments to date, and update the plan as necessary to comply with the 2015 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. Sample amendment reference lists are available at <https://www.irs.gov/retirement-plans/reference-lists-of-changes-in-qualification-requirements-for-retirement-plans> to help in this process.

Step 4: Prepare and file the Form 5300 Determination Letter application, including the required filing fee, and consider filing a stream-lined VCP filing simultaneously for any late or inadequate interim amendments, by the January 31, 2017 deadline.

Upon IRS review of the submission (which may occur more quickly if the determination letter filing is made during 2016), 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.

Remember this is your last chance for a Cycle A determination letter, as the cycle system has been eliminated. Therefore, if you can file, we recommend you don't miss this final opportunity.