

MEMORANDUM TO CLIENTS

August 12, 2009

RE: IRS Modifies Determination Letter Process for Governmental Plans to Extend Remedial Amendment Period and to Permit Filings in Cycle E

In recent years, the IRS has shown increasing interest in governmental tax-qualified plans, ranging from its 2008 governmental plans roundtable to its governmental plans survey (which our firm commented on in May 2009 (<http://www.groom.com/resources-366.html>)). One aspect of this increased interest has been to formally require individually-designed governmental plans that wish to obtain IRS determination letters to request updated letters every five years. The filing deadline for governmental plans during the first five year cycle was January 31, 2009 (*i.e.*, the end of "Cycle C" under Revenue Procedure 2007-44). However, on November 5, 2008, in an announcement posted on its website, the IRS modified its position and allowed plans to file by either the end of Cycle C or by January 31, 2011 (Cycle E) for the first five year cycle.

In Revenue Procedure 2009-36, I.R.B. 2009-35 (Aug. 31, 2009), the IRS further modified the determination letter process by (1) extending the timeline by which a governmental tax-qualified plan must adopt amendments required as a condition of a favorable determination letter after the favorable letter is issued and (2) formally revising the determination process rules in Revenue Procedure 2007-44 to permit governmental plans to file during Cycle E by January 31, 2011 as provided in the prior guidance published on the IRS website

A. Extension of Remedial Amendment Period

Under Revenue Procedure 2007-44 and the Treasury Regulations issued under Internal Revenue Code section 401(b), tax-qualified retirement plans must generally adopt amendments required to be adopted by the Internal Revenue Service as part of the tax-qualified plan determination letter process by 91st day after the date of a plan's favorable IRS determination letter. This period is often referred to as a plan's "remedial amendment period." For many non-governmental plan sponsors this 91 day period is sufficient time during which an authorized individual or body can adopt amendments required by the IRS as part of the determination letter process. However, governmental plans, due to their varying administrative structures have been concerned that they might not be able to adopt a required amendment within this 91 day period. Failure to comply with this requirement could lead to future audit sanctions unless a governmental plan files to correct this failure under the Employee Plans Compliance Resolution System.

In an apparent response to comments from the governmental plans community, the Revenue Procedure extends the period for adopting amendments required in connection with an IRS determination letter application from 91 days after the date of the favorable determination letter to 91 days after the last day of the first regular legislative session beginning more than 120 days after the date of the favorable determination letter in which the governing body with authority to amend the plan can consider a plan amendment under the laws and procedures

applicable to its deliberations. Notably, this relief also extends to situations where a declaratory judgment is sought from the U.S. Tax Court regarding the tax-qualified status of a plan. This end-of-legislative session approach adopted by the Revenue Procedure is similar to that adopted by the IRS in other contexts with respect to governmental plans, such as the extended deadlines for governmental plans to adopt amendments that were required to reflect changes to the Code section 415 maximum benefit regulations issued in 2007.

B. Clarification of Determination Letter Cycle for Governmental Plans

On November 5, 2008, in response to significant concerns about governmental plans' ability and willingness to submit determination letter applications by the January 31, 2009, Cycle C deadline, the IRS posted guidance on its website (<http://www.irs.gov/pub/irs-tege/se1108.pdf>) allowing, for one-time only, governmental plans to file an IRS determination letter application in Cycle C (ending January 31, 2009) or Cycle E (ending January 31, 2011) instead of just in Cycle C. In future five year cycles, governmental plans that choose to file should return to Cycle C, regardless of whether they file in Cycle C or Cycle E in the current five year cycle which ends in January 2011.

The Revenue Procedure incorporates the IRS' previously published website guidance that allowed governmental plans to file in Cycle E by January 31, 2011, instead of in Cycle C. In addition, the Revenue Procedure permits a Cycle C governmental plan filer to withdraw its previously filed Cycle C determination letter application. If an application was filed on or before November 7, 2008, and a refund request was filed with the IRS on or before January 31, 2009, it was also eligible to have its user fee refunded. Withdrawal requests after are not be eligible for a user fee refund if they were filed after that date.

Any governmental plan that files in Cycle E in lieu of Cycle C will need to comply with the IRS "cumulative list" of amendments that is published for Cycle E that will likely be issued in October or November 2010.

C. Additional Considerations

The Revenue Procedure is helpful in that it provides significant relief for governmental plans that have been hesitant to file determination letter applications. However, there are a number of open issues that governmental plan sponsors should continue to take into account when evaluating whether to file a determination letter application:

- The remedial amendment period relief provided by the Revenue Procedure is applicable only to governmental plans described in Code section 414(d). We understand that additional IRS guidance on the definition of "governmental plan" is likely to be issued in the current IRS guidance year ending June 30, 2010.
- It is not clear if or how the extension to a governmental plan's remedial amendment period would apply to a governmental plan that is governed by a committee or board that does not have a "regular legislative session."

- As currently provided in IRS guidance, governmental plans that choose to file in Cycle E would be subject to review for compliance with amendments required by the Pension Protection Act of 2006. Because governmental plans generally have until the end of the first plan year beginning on or after January 1, 2011 to adopt amendments made pursuant to the Pension Protection Act of 2006, we would anticipate that the IRS would provide relief in Cycle E with respect to this compliance requirement as was done with respect to certain Cycle D filers, but, as of this date, the IRS has not provided any formal or informal guidance with respect to this potential issue.
- Governmental plans should still be sure to carefully consider their compliance status with respect to legally-required amendments prior to filing a determination letter application to avoid facing potentially significant "Audit CAP" penalties for failures discovered during the determination letter process. If failures to timely adopt legally-required amendments are discovered, governmental plan sponsors should consider filing under the Employee Plans Compliance Resolution System to correct these failures instead of simply filing a stand-alone determination letter application.

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

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