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TITLE: Timing of Plan Amendments

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Timing of Plan Amendments

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The IRS has changed the rules to which we have grown accustomed on when a plan amendment must be made with the issuance of Revenue Procedure 2005-66.

Interim Amendments

The IRS would like the plan document to contain the provisions by which the plan is currently being operated. Participants should be able to review the plan and determine the amount of their benefits.

Consistent with this goal, Revenue Procedure 2005-66 requires the adoption of interim amendments between the time plans are required to be restated and submitted for determination letters.

The deadline for an amendment's adoption varies on whether the amendment is discretionary or required due to a statutory or regulatory change.

Disqualifying Provisions

A plan provision is disqualifying if:

- the provision is in a new plan document or is missing from a new plan, Regulations section 1.401(b)-1(b)(1);
- it results in the failure of a plan to satisfy the qualification requirements on account of a change in the requirements, or is integral to a qualification requirement that has been changed; or
- the provision is a disqualifying provision designated under section 1.401(b)-1(b)(3).

Sections 5.01, 5.02 of Revenue Procedure 2005-66.

Plan changes that are required because they are disqualifying provisions must be adopted by the due date of the employer's tax return for the year the change is effective (including extensions), or the end of the plan year, which ever is later.

Sections 2.05, 5.05(1) and 5.05(2) of Revenue Procedure 2005-66.

If the plan is maintained by more than one employer, the deadline for amending the plan for the disqualifying provisions is the last day of the tenth month following the end of the plan year in which the amendment is effective.

Section 2.05 of Revenue Procedure 2005-66.

Discretionary Amendments

Any other amendment is discretionary.

Discretionary amendments, to the extent that they do not cut back benefits, must be adopted by the end of the plan year in which the provision is first effective.

Section 5.05(3) of Revenue Procedure 2005-66.

Exceptions

There are exceptions to these general rules:

1. A plan change that reduces a protected benefit under section 411(d)(6) must be made before the change is effective.
2. Often new tax laws often grant an extension; e.g., the Pension Protection Act grants an extension until the 2009 plan year.
3. Code section 412(c)(8) has a funding exception of 2 ½ months after the end of the plan year.
4. Regulations section 1.401(a)(4)-11(g) permits corrective amendments relating to coverage and (a)(4) discrimination testing be made within 9 ½ months after the end of the plan year.

Questions

1. **There's two Remedial Amendment Periods (RAP) under the procedure, which one applies?**

   Under Revenue Procedure 2005-66, there are two RAPs, one for the adoption of an amendment and one that ends on the submission date.

   - How does it work – is an employer required to amend within the plan year/tax return extension date and then have to wait to make a submission? Is this similar to EGTRRA's good faith amendment which permits a later amendment, to the extent necessary, at the time of submission?

- If the drafter missed something, does he get to go back and fix a change not related to EGTRRA?
- What does a new plan rely on if they don't submit until the EGTRRA submission date?
- When an employer makes a significant change to the plan (e.g., changing the benefit formula, converting to a cash balance plan), they'd like to get a determination letter right away.
- If an amendment was not made with respect to a disqualifying provision, what would be sufficient to demonstrate that the employer considered the amendment and decided that it wasn't required?
- Is the IRS considering providing any relief to employers that acquire plans as a result of a merger or acquisition and do not have the records of the prior plan sponsor or their benefits consultant about whether they considered adopting the amendment?

  For example, a profit sharing plan that provides distributions in the form of a lump sum only failed to make the technical amendments for the final 401(a)(9) regulations – it's not going to be clear whether that was a failure or an intentional decision that the rules did not apply. If the plan had already provided that 5% owners had to take a distribution at 70-1/2, and for other participants distributions had to be made no later than on termination of employment or by 65, if later, it's not clear that any changes were required.
- Revenue Procedure 2004-25 extends the remedial amendment period with respect to disqualifying provisions described in section 1.401(b)-1(b)(1) that are put into effect or adopted after December 31, 2001 to the end of the EGTRRA remedial amendment period. The effect of Revenue Procedure 2004-25 is to ensure that plan sponsors do not need to apply for more than one determination letter during the EGTRRA remedial amendment period simply because they have adopted voluntary plan amendments after December 31, 2001. There is a statement in the procedure that says: "*The revenue procedure does not extend any other existing plan amendment or determination letter submission deadlines, such as the deadline for the adoption of good faith*

amendments for EGTRRA..” What does this sentence mean with respect to submission deadlines?

2. Discretionary vs. Disqualifying – how does one decide?

- How do you determine if an amendment is discretionary or disqualifying?

  For example, is the change to 401(k) plans for GAP period income disqualifying? Employers can choose what method they want to use in determining GAP period income; isn't that discretionary?

- What about the automatic rollover amendments?

3. Is it possible to establish uniform, understandable rules?

- Most benefit professionals are not aware of whether the corporate tax return has been put on extension, and would not know if the corporate fiscal year was changed. This provision is based on section 401(b) and the regulations thereunder. Would the IRS consider in certain circumstances to extend that deadline under its discretionary authority to create a more uniform rule for plans that have the same plan year?
- The regulations give the IRS the power to create and often a new tax law provides for an extension beyond the dates required in Revenue Procedure 2005-66. Would the IRS consider granting a broad extension for any disqualifying provisions required within a short period of time of that due date in order to lessen the burdens on employers to adopt an amendment every year? Past practice has been to require amendments for several laws/changes to be made at one time – at the time the plan was being submitted for a determination letter.
- When an extension is granted beyond the RAP as outlined in Revenue Procedure 2005-66, would the IRS consider defining a specific date? Many practitioners were confused about the deadlines for the retroactive annuity starting date regulations and the Pension Funding Equity Act.
- Many tax exempt employers do not file tax returns, has the IRS considered defining an alternative RAP for them?
- The short deadline to adopt an interim amendment could be a burden for many government employers who do not meet

on a regular basis. Has the IRS considered adopting an alternative deadline for them?

- Considering the confusion caused by Revenue Procedure 2005-66, would the IRS consider granting a blanket extension for amendments due in 2005 and 2006 to a later date?

4. When do the exceptions apply?

- When does the 2 ½ month extension under section 412(c)(8) apply?

5. Disqualifying amendments

- Will interim amendments be required for every change in guidance or just limited to regulations?
- Will the IRS consider providing guidance on when interim amendments are required?
- Would the IRS consider adopting one deadline for guidance such as the final 401(k) regulations which contains both disqualifying and discretionary amendments?
- In mergers and acquisitions, many practioners are finding that interim amendments were not adopted by the target's plan, which causes a delay in merging the plan because an EPCRS filing must be made.

6. Discretionary Amendments

A. Change in Testing Method

- In establishing the end of the plan year deadline for discretionary amendments, did the IRS intend that the plan sponsor's ability to change the testing method, e.g., current or prior year or the top paid group, be made by the end of the plan year?
- Does IRS expect employers to run the discrimination tests before year end?
- If this is a definitely determinable issue, how will participants determine what group they are in (HCE or NHCE) and what the test results are – they don't have compensation and contribution data for the other participants?

- Would the IRS consider treating a change in the testing method similar to a corrective amendment under section 1.401(a) (4)-11(g)?

B. Increasing Benefits after the Plan Year

- Does the deadline for amending plans for discretionary amendments to the end of the plan year apply to amendments to increase benefits?
- For coverage and section 401(a)(4) problems, section 1.401(a)(4)-11(g) permits adding benefits after the end of the plan year if certain nondiscriminatory conditions are met. However, employers may want to add additional benefits even if there is no (a)(4) problem. For example, an employer may want to give credit to employees on military leave.
- Pension plans are permitted to increase benefits within the section 412(c)(8) period; is a similar period available to profit sharing plans and stock bonus plans?

7. Master and Prototype issues

- For the master & prototype plan universe (and volume submitter), the M&P sponsor can amend plans for its individual plan adopters. The value of this power is limited in situations where a choice is required (e.g., the automatic rollover provisions).
- The M&P sponsor loses the ability to adopt an amendment for a plan if some change is made to the plan that is not within the adoption agreement. See Revenue Procedure 2005-66, section 19.01 and 19.04. How will an M&P sponsor know whether they can adopt an amendment for each of their adopters? (Based on my experience, almost every employer makes a change from the adoption agreement, e.g., just to preserve prior plan provisions.)

Possible solutions

- Delay effective date of technical amendments until the next large restatement period.
- Require cotemporaneous amendments for changes that affect benefits.

- Delay amendment deadline for technical amendments such as 132(f), 401(a)(9), 415 interest rates, applicable mortality table.
- With respect to interim amendments establish clear, uniform deadlines.