

December 2005

IRS Extends Deadlines for Amending Qualified Retirement Plans

As an early holiday gift, the IRS has extended the deadlines for plan sponsors to amend their qualified retirement plans to comply with certain changes in the law and regulations. Generally, the deadline for adopting these amendments is the later of (i) the due date (including extensions) for filing the income tax return for the employer's taxable year in which the amendment is effective, or (ii) the last day of the plan year in which the amendment is effective. In Notice 2005-95 (the "Notice"), the IRS provides considerable relief from this general rule. The Notice allows additional time for plan sponsors to adopt amendments relating to a number of required changes, including the retroactive annuity starting date requirements, the new automatic rollover rules, and the final regulations issued under Code Sections 401(k) and (m). In addition, the Notice clarifies the application of other rules provided under previous IRS guidance.

This Management Alert discusses how the Notice modifies the rules for **individually-designed plans**. Please note that different deadlines and transition rules apply to multiple-employer plans, multi-employer plans, and master & prototype plans (including volume submitter and other pre-approved plans). Plan sponsors who maintain these other types of plans should consult their employee benefits counsel to determine how the Notice applies to them.

Below are the highlights of the IRS guidance provided under the Notice:

- ♦ **Retroactive Annuity Starting Dates.** The deadline to adopt an interim amendment to comply with final regulations governing retroactive annuity starting dates ("RASD") is the later of (i) the due date (including extensions) for filing the income tax return for the employer's taxable year that contains January 1, 2004, or (ii) December 31, 2005. However, if a plan does not already provide for RASD and the employer subsequently wishes to amend the plan to provide for RASD, the deadline for adopting such a plan amendment remains the end of the plan year in which the amendment is effective.
- ♦ **Automatic Rollover Rules.** Previously, the IRS required amendments to reflect the new automatic rollover rules by the end of the first plan year ending on or after March 28, 2005 (for calendar year plans, this deadline was December 31, 2005). Under the Notice, however, the IRS has extended the deadline to adopt such an amendment to the latest of (i) the due date (including extensions) for filing the income tax return for the employer's taxable year which includes March 28, 2005, (ii) the last day of the plan year that includes March 28, 2005, or (iii) December 31, 2005. For calendar year employers (who sponsor calendar year plans), this deadline is March 15, 2006 (or later if the employer extends the due date for filing its income tax return).
- ♦ **Final Regulations under Code Sections 401(k) and 401(m).** The final IRS regulations under Code Sections 401(k) and 401(m) are effective for plan years beginning on or after January 1, 2006. In general, employers must amend their plans by no later than the end of the first plan year beginning on or after January 1, 2006 (for calendar year plans, this deadline is December 31, 2006). However, employers are permitted to amend their plans to *accelerate* the application of these regulations for the 2005 plan year. In this case, the Notice provides that the plan amendment deadline is the later of (i) December 31, 2005, or (ii) the end of the 2005 plan year. For calendar year plans, this deadline is December 31, 2005.
- ♦ **Safe Harbor 401(k) Plans.** For plan years beginning before January 1, 2007, the Notice provides that a safe harbor 401(k) plan may continue to cross-reference the plan's summary plan description in the annual safe harbor notice provided to eligible employees.
- ♦ **Required Minimum Distribution Rules for Defined Benefit Plans.** The deadline for defined benefit plans to adopt amendments to comply with the final regulations for required minimum distributions under Code Section 401(a)(9) is the end of the five-year EGTRRA remedial amendment cycle, as described in prior IRS guidance (please note that the earliest EGTRRA remedial amendment cycle will not end until January 31, 2007). Plan sponsors should consult their employee benefits counsel to determine which remedial amendment cycle applies to their plans.

- ◆ **Roth 401(k) Contributions.** An employer may amend its 401(k) plan to add a Roth 401(k) contribution feature beginning January 1, 2006. Previous IRS guidance required that such an amendment be adopted prior to the date that any Roth 401(k) contributions commenced under the plan. However, under the Notice, an employer will have until the end of the plan year in which the Roth 401(k) contribution feature becomes effective to adopt such an amendment. For calendar year plans that permit Roth 401(k) contributions beginning in 2006, this deadline is December 31, 2006.
- ◆ **Interest Rate Used for Non-Annuity Benefits under Defined Benefit Plans.** The Notice provides that the deadline for employers that sponsor defined benefit plans to adopt a plan amendment for the new interest rate used for non-annuity benefits (as required under the Pension Funding Equity Act of 2004, which amended Code Section 415(b)) is the last day of the first plan year beginning on or after January 1, 2006. For calendar year plans, this deadline is December 31, 2006.
- ◆ **Hurricane Katrina Relief.** Under the Katrina Emergency Tax Relief Act of 2005, plans may make certain emergency distributions and loans to employees affected by the recent hurricanes. To the extent these features are not already provided for under the plan, an employer wishing to provide for these distributions must adopt a plan amendment by no later than the end of the first plan year beginning after December 31, 2005. For calendar year plans, this deadline is December 31, 2006.
- ◆ **Corrective Amendments after the Heinz Decision.** In the *Central Laborers' Pension Fund v. Heinz* decision, issued in 2004, the U.S. Supreme Court ruled that an amendment expanding the categories of post-retirement employment which results in the suspension of the payment of benefits already accrued violates the "anti-cutback" rules under ERISA. Because this was a common change to many plans, the IRS issued guidance giving employers until the end of their EGTRRA remedial amendment period to adopt plan amendments correcting any such disqualifying provisions. The Notice clarifies that this extension is until the end of the revised EGTRRA remedial amendment cycle applicable to each employer, as described under prior IRS guidance (see "Required Minimum Distribution Rules for Defined Benefit Plans" above).
- ◆ **Discretionary Amendments.** The Notice confirms that a "discretionary" amendment (*i.e.*, any amendment not required by changes in the law or regulations) must be adopted by the end of the plan year in which the amendment is effective.

If you have any questions or wish to discuss the application of these extensions to your plan(s), please contact the Seyfarth Shaw LLP employee benefits group attorney with whom you regularly work or any employee benefits group attorney on the website at www.seyfarth.com.

This newsletter is a periodical publication of Seyfarth Shaw LLP and should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have. For further information about these contents, please contact the firm's Employee Benefits Practice Group.

ATLANTA

One Peachtree Pointe
1545 Peachtree Street, N.E., Suite 700
Atlanta, Georgia 30309-2401
404-885-1500
404-892-7056 fax

BOSTON

Two Seaport Lane, Suite 300
Boston, Massachusetts 02210-2028
617-946-4800
617-946-4801 fax

CHICAGO

55 East Monroe Street, Suite 4200
Chicago, Illinois 60603-5803
312-346-8000
312-269-8869 fax

HOUSTON

700 Louisiana Street, Suite 3700
Houston, Texas 77002-2797
713-225-2300
713-225-2340 fax

LOS ANGELES

One Century Plaza
2029 Century Park East, Suite 3300
Los Angeles, California 90067-3063
310-277-7200
310-201-5219 fax

NEW YORK

1270 Avenue of the Americas, Suite 2500
New York, New York 10020-1801
212-218-5500
212-218-5526 fax

SACRAMENTO

400 Capitol Mall, Suite 2350
Sacramento, California 95814-4428
916-448-0159
916-558-4839 fax

SAN FRANCISCO

560 Mission Street, Suite 3100
San Francisco, California 94105
415-397-2823
415-397-8549 fax

WASHINGTON, D.C.

815 Connecticut Avenue, N.W., Suite 500
Washington, D.C. 20006-4004
202-463-2400
202-828-5393 fax

BRUSSELS

Boulevard du Souverain 280
1160 Brussels, Belgium
(32)(2)647.60.25
(32)(2)640.70.71 fax