

September 2010

Tax-Qualified Retirement Plans: Year End Action May Be Required

The following is a summary of year end action that may be required with respect to your company's tax-qualified retirement plans.

Plan Amendments

HEART Act

- The Heroes Earnings Assistance and Relief Tax Act of 2008 ("HEART Act") enacted new protections for military personnel and their families under tax-qualified retirement plans.
- These new protections include, for example, providing certain death benefits to the survivors of participants who die while performing qualified military service and treating "differential wage payments" as wages for income tax withholding purposes and compensation for certain purposes. For more detailed information on these amendments, [click here](#).
- Certain of the HEART Act amendments are mandatory while others are optional. The deadline for adopting mandatory HEART Act amendments is the last day of the first plan year beginning on or after January 1, 2010 (December 31, 2010 for calendar year plans).

Defined Benefit Plan Funding

- The Pension Protection Act of 2006 ("PPA") imposes certain funding restrictions and limits certain plan amendments under a tax-qualified defined benefit plan if the plan's funding levels fall below a certain threshold. Depending on the amount by which the defined benefit plan is underfunded, a plan may be required to restrict the availability of certain forms of distributions, eliminate certain unpredictable contingent event benefits, suspend the accrual of future benefits and/or limit plan amendments that increase benefits.
- These funding restrictions are effective for plan years beginning on or after December 31, 2007. The deadline for adopting amendments to reflect these funding

restrictions is the last day of the first plan year beginning on or after January 1, 2010 (December 31, 2010 for calendar year plans).

Cash Balance Plans

- The PPA imposes new discrimination and vesting rules and restrictions on interest credits that exceed a market rate of return under cash balance plans.
- The new rules for cash balance plans are effective for plan years beginning after 2007. The deadline for adopting amendments to reflect the new rules is the last day of the first plan year beginning on or after January 1, 2010 (December 31, 2010 for calendar year plans).

Plans With Employer Securities

- The PPA requires tax-qualified defined contribution plans that offer investment in publicly-traded employer securities to permit participants to diversify their investments.
- The PPA's diversification requirements are effective for plan years beginning after 2006. The deadline for adopting amendments to reflect the diversification requirements is the last day of the first plan year beginning on or after January 1, 2010 (December 31, 2010 for calendar year plans).
- In May of 2010, the IRS published additional guidance on diversification requirements for tax-qualified defined contribution plans that provide for investment in publicly-traded employer securities. The new guidance may require additional amendments to such plans by the end of 2011.

Non-Spouse Beneficiary Rollovers

- The PPA included an optional provision that permitted plans to allow non-spouse beneficiaries to roll over plan distributions into individual retirement accounts or Roth IRAs, if the non-spouse beneficiaries are eligible to receive rollover distributions.
- This optional provision was made **mandatory** by the Worker, Retiree and Employer Recovery Act of 2008 ("WRERA") for plan years beginning after December 31, 2009.
- Tax-qualified retirement plans that have not yet been amended to permit such non-spouse beneficiary rollovers must be amended to permit such rollovers by December 31, 2010.

Waiver of Required Minimum Distributions

- Generally, Internal Revenue Code ("Code") Section 401(a)(9) requires that participants in tax-qualified retirement plans begin receiving required minimum distributions

("RMDs") either by April 1st of the year following the year in which the participant reaches age 70½ or, if later, the year in which the participant retires from employment.

- WRERA waived the RMD requirements for defined contribution plans for the 2009 calendar year.
- Written plan amendments to reflect operational compliance with the waiver of RMDs are not required to be adopted until the end of the 2011 plan year. However, sponsors of tax-qualified retirement plans may wish to adopt the amendments sooner.

Other Optional/Discretionary Amendments

- Discretionary plan amendments that are not legally required (such as optional plan design changes) must generally be adopted by the last day of the plan year in which the amendments first become effective.
- However, certain amendments (such as eliminating certain benefits) may only be made effective prospectively.
- In addition, a discretionary amendment that would significantly reduce the rate of future benefit accruals under a defined benefit plan or money purchase plan generally cannot be made until an ERISA 204(h) notice has been provided to plan participants. The 204(h) notice must generally be provided at least 45 days before the effective date of the plan amendment.

Notices

401(k) Safe Harbor Notice

- An annual notice must generally be provided to each employee who is eligible to participate in a 401(k) safe harbor plan. A 401(k) safe harbor plan is a 401(k) plan that is not required to perform certain annual discrimination testing provided it meets certain requirements (such as making a minimum annual contribution).
- The annual safe harbor notice must be provided at least 30 days, but no more than 90 days, before the beginning of each plan year. A calendar year plan must provide the notice for the 2011 plan year by December 1, 2010.

401(k) Automatic Participant Enrollment Notice

- An annual notice must generally be provided to each employee who is eligible to participate in a 401(k) plan that provides for automatic participant enrollment.
- The annual automatic enrollment notice must be provided at least 30 days before the beginning of each plan year. A calendar year plan must provide the notice for the 2011 plan year by December 1, 2010.

- A model form of an automatic enrollment notice may be [found here](#).

Qualified Default Investment Alternatives Notice

- An annual notice must generally be provided to each participant or beneficiary on whose behalf an investment in a qualified default investment alternative ("QDIA") may be made.
- The annual QDIA notice must be provided at least 30 days before the beginning of each plan year.
- A calendar year plan must provide the notice for the 2011 plan year by December 1, 2010.

Updated Section 402(f) Notice

- A written explanation of rollover rights under Code Section 402(f) must be provided to each recipient of an eligible rollover distribution.
- The Section 402(f) notice generally must be provided at least 30 days, but no more than 180 days, before the date of distribution.
- The IRS has updated its model 402(f) notices to reflect recent changes in the law. The updated Section 402(f) notice may be [found here](#).

Special Pension Funding Rules Election Notice

- The recently enacted [Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010](#) ("PRA") provides special pension funding relief for single-employer and multi-employer tax-qualified defined benefit plans, including the use of an alternate extended amortization schedule (2-plus-7 year amortization or 15-year amortization).
- A plan sponsor that elects to use an alternative amortization schedule is required to give notice of the election to participants and beneficiaries of the plan and is also required to inform the PBGC of such election. Additional guidance regarding these notices is expected to be issued in the future, including guidance on when the notices must be furnished. See [IRS Notice 2010-55](#) and [IRS Notice 2010-56](#).

Summary Annual Reports

- Sponsors of tax-qualified defined contribution plans that are required to file a Form 5500 must generally provide a summary annual report to plan participants no later than nine months after the end of the plan year or two months after an extension of the Form 5500 filing date.
- For most calendar year plans, the deadline for furnishing SARs for 2009 Forms 5500 is December 15, 2010.

Determination Letter Applications

Cycle E Plans

- Sponsors of individually-designed tax-qualified plans may submit applications to the IRS for a determination as to continuing tax-qualified status once every five years, under a staggered system of five-year cycles.
- The year in which a plan sponsor is required to submit a determination letter application is determined by the last digit in its Employer Identification Number ("EIN").
- The current cycle is "Cycle E," which began on February 1, 2010 and ends on January 31, 2011.
- Plans in the current "Cycle E" are those sponsored by employers with EINs ending in the digits "0" or "5."

Cycle D Plans

- Plan sponsors of "Cycle D" plans whose first plan year beginning on or after January 1, 2009 ends on or after February 1, 2010 were permitted to defer submission of an application for determination letter until Cycle E. Such plans will be treated as Cycle E plans solely for this cycle, and all subsequent submissions will be made in Cycle D.

Controlled Groups and Affiliated Service Groups

- For plans maintained by members of a controlled group under Code Section 414(b) or (c) or an affiliated service group under Code Section 414(m), the plan's five-year cycle will generally be determined by the last digit of the EIN that is or will be used to report the plan on Form 5500.

**Our client alerts are for general informational purposes and should not be regarded as legal advice.
If you would like additional information or have any questions, please contact:**

Authors

Marjorie M. Glover
+1 (212) 408-1016
mglover@chadbourne.com

Rachel M. Kurth
+1 (212) 408-5185
rkurth@chadbourne.com

For More Information

David Gallai
+1 (212) 408-1033
dgallai@chadbourne.com

Rachel M. Kurth
+1 (212) 408-5185
rkurth@chadbourne.com

Marjorie M. Glover
+1 (212) 408-1016
mglover@chadbourne.com

Edward P. Smith
+1 (212) 408-5371
esmith@chadbourne.com

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