

Notice 2012-70

## **I. Purpose**

This notice extends the deadline, as set forth in Notice 2011-96, 2011-52 I.R.B. 915, to amend a defined benefit plan to satisfy the requirements of § 436 of the Internal Revenue Code and provides associated relief from the requirements of § 411(d)(6).

## **II. Background**

Section 401(b) provides a period during which a plan may be amended retroactively to comply with the Code's qualification requirements. Section 1.401(b)-1 and Rev. Proc. 2007-44, 2007-2 C.B. 54, describe the disqualifying provisions that may be amended retroactively and the remedial amendment period during which retroactive amendments may be adopted. The regulations also grant the Commissioner the discretion to extend the remedial amendment period.

Section 5.05 of Rev. Proc. 2007-44 provides that when there are statutory or regulatory changes to the plan qualification requirements that will impact provisions of the written plan document, the adoption of an interim amendment will generally be required by the later of the end of the plan year in which the change is first effective or the due date of the employer's tax return for the tax year that includes the date the change is first effective. Pursuant to section 5.02 of Rev. Proc. 2007-44, an interim amendment is an amendment with respect to a plan provision that is a disqualifying provision because the provision (1) causes the plan to fail to satisfy the qualification requirements of the Code by reason of a change in those requirements, or (2) is integral to a changed qualification requirement, but only if the provision is also integral to a plan provision that is a disqualifying provision under (1). A change in a qualification requirement includes a statutory change or a change in the requirements provided in regulations or other guidance published in the Internal Revenue Bulletin. A disqualifying provision includes the absence from a plan of a provision required by or, if applicable, integral to the applicable change in the qualification requirements of the Code.

The filing of a determination letter application for an individually designed plan generally requires the plan to be restated to take into account changes in qualification requirements and guidance that are listed in the Cumulative List of Changes in Plan Qualification Requirements in effect at the time the application is filed. (See sections 4 and 12.03 of Rev. Proc. 2007-44.)

Section 411(d)(6) provides, generally, that a plan will not satisfy § 401(a) if an amendment to the plan decreases a participant's accrued benefit. For this purpose, a plan amendment that has the effect of eliminating or reducing an early retirement benefit or a retirement-type subsidy or eliminating an optional form of benefit with respect to benefits attributable to service before the amendment is treated as reducing accrued benefits. Section 401(b) does not relieve a plan of the requirement to satisfy § 411(d)(6) with respect to any amendment.

Section 1.411(d)-4, A-2(b)(2)(i), provides that a plan may be amended to eliminate or reduce a § 411(d)(6) protected benefit, within the meaning of § 1.411(d)-4, A-1, if the following requirements are met: the amendment constitutes timely compliance with a change in law affecting plan qualification; there is an exercise of § 7805(b) relief by the Commissioner; and the elimination or reduction is made only to the extent necessary to enable the plan to continue to satisfy the requirements for qualified plans.

Notice 2011-96 provides a sample plan amendment that a sponsor of a single employer defined benefit plan may adopt to amend the terms of the plan to satisfy the requirements of § 436, relating to benefit restrictions that apply to underfunded plans. Notice 2011-96 also provides that the deadline to adopt an interim amendment for § 436 is the latest of:

- (1) the last day of the first plan year that begins on or after January 1, 2012,
- (2) the last day of the plan year for which § 436 is first effective for the plan, or
- (3) the due date (including extensions) of the employer's tax return for the tax year (determined in accordance with section 5.06(2) of Rev. Proc. 2007-44, in the case of a tax-exempt employer) that contains the first day of the plan year for which § 436 is first effective for the plan.

However, if an application for a determination letter for an individually designed plan is filed on or after February 1, 2012 (or, in the case of an eligible cooperative, charity, or PBGC settlement plan described in section 104 or 105 of the Pension Protection Act of 2006 (PPA '06), Pub. L. 109-280, as amended, the first day of the plan year for which § 436 is first effective for the plan, if later), Notice 2011-96 requires the restated plan submitted with the application to incorporate an interim amendment with respect to § 436.

Pursuant to § 7805(b) and § 1.411(d)-4, A-2(b)(2)(i), Notice 2011-96 also provides that a plan amendment adopted with respect to § 436 that eliminates or reduces a § 411(d)(6) protected benefit does not cause a plan to fail to meet the anti-cutback requirements of § 411(d)(6) if the amendment is adopted by the deadline described above and the elimination or reduction is made only to the extent necessary to enable the plan to meet the requirements of § 436.

Notice 2011-97, 2011-52 I.R.B. 923, contains the Cumulative List of Changes in Plan Qualification Requirements, as described in section 4 of Rev. Proc. 2007-44, for 2011 (the "2011 Cumulative List"). The 2011 Cumulative List is to be used by plan sponsors and practitioners submitting determination letter applications for plans during the period beginning February 1, 2012, and ending January 31, 2013. The Service's review of plans submitted during this period will take into account the changes in law and guidance on the 2011 Cumulative List. Footnote 2 of Notice 2011-97 provides that the Service will not consider the requirements of § 436 in its review of any determination

letter application submitted during the period beginning February 1, 2012, and ending January 31, 2013.

### **III. Extension of Amendment Deadline and Associated Relief under § 411(d)(6)**

As noted in section II of this notice, pursuant to Notice 2011-96, an interim amendment to satisfy the requirements of § 436 would generally be required to be adopted by the last day of the first plan year beginning on or after January 1, 2012. If an application for a determination letter for the plan were filed on or after February 1, 2012, an amendment for § 436 generally would need to be incorporated in the restated plan that is submitted with the application. However, an application for a determination letter that is filed during the 12-month submission period beginning on February 1, 2012, would not be reviewed with respect to the requirements of § 436.

To ensure that a plan amendment for § 436 is not required to be included in a plan that is filed for a determination letter with the Service when the Service will not consider such an amendment in its review of the determination letter application, Notice 2011-96 is modified. In particular, the deadline to adopt an interim amendment for § 436 is extended to the latest of:

- (a) the last day of the first plan year that begins on or after January 1, 2013,
- (b) the last day of the plan year for which § 436 is first effective for the plan, or
- (c) the due date (including extensions) of the employer's tax return for the tax year (determined in accordance with section 5.06(2) of Rev. Proc. 2007-44, in the case of a tax-exempt employer) that contains the first day of the plan year for which § 436 is first effective for the plan.

However, if an application for a determination letter for an individually designed plan is filed on or after February 1, 2013 (or, in the case of a plan described in section 104 or 105 of PPA '06, as amended, the first day of the plan year for which § 436 is first effective for the plan, if later), the restated plan submitted with the application must incorporate an amendment with respect to § 436. As noted in section 12.03 of Rev. Proc. 2007-44, the filing of a determination letter application may accelerate the time by which the plan must be amended to satisfy the requirements of § 436.

In addition, pursuant to § 7805(b) and § 1.411(d)-4, A-2(b)(2)(i), this notice also provides that a plan amendment adopted with respect to § 436 that eliminates or reduces a § 411(d)(6) protected benefit does not cause the plan to fail to meet the anti-cutback requirements of § 411(d)(6) if the amendment is adopted by the deadline described above and the elimination or reduction is made only to the extent necessary to enable the plan to meet the requirements of § 436.

#### **IV. Effect on Other Documents**

Notice 2011-96 is modified.

#### **Drafting Information**

The principal author of this notice is Angelique Carrington of the Employee Plans, Tax Exempt and Government Entities Division. Questions regarding this revenue procedure may be sent via e-mail to [retirementplanquestions@irs.gov](mailto:retirementplanquestions@irs.gov).