

## **Extension of Deadline to Adopt Certain Retirement Plan Amendments**

### **Notice 2009-97**

#### **I. Purpose**

This notice extends the deadline for amending qualified retirement plans to meet certain requirements of the Internal Revenue Code that were added by the Pension Protection Act of 2006 (PPA '06), Pub. L. 109-280, and subsequently modified by the Worker, Retiree, and Employer Recovery Act of 2008 (WRERA), Pub. L. 110-458. The deadline is extended to the last day of the first plan year that begins on or after January 1, 2010. This extension applies to:

1. The deadline for amending single-employer defined benefit plans to meet the requirements of §§ 401(a)(29) and 436, relating to funding-based limits on benefits and benefit accruals under single-employer plans;
2. The deadline for amending cash balance and other applicable defined benefit plans, within the meaning of § 411(a)(13)(C), to meet the requirements of § 411(a)(13) (other than § 411(a)(13)(A)) and § 411(b)(5), relating to vesting and other special rules applicable to these plans; and
3. The deadline for amending applicable defined contribution plans, within the meaning of § 401(a)(35)(E), to meet the requirements of § 401(a)(35), relating to diversification requirements for certain defined contribution plans.

This notice also provides limited relief from the anti-cutback requirements of § 411(d)(6) for amendments that are adopted by the extended deadline for amending a plan to meet the requirements of §§ 401(a)(29) and 436. In addition, this notice provides that limited § 411(d)(6) relief is expected to be granted for amendments that are adopted by the extended deadline for amending a plan to meet the requirements of § 411(b)(5) once final regulations under §§ 411(a)(13) and 411(b)(5) are issued.

#### **II. Background**

Section 401(a)(29) requires single-employer defined benefit plans that are subject to the minimum funding requirements of § 412 to meet the requirements of § 436. Section 436, which was added by section 113(a)(1) of PPA '06, imposes funding-based limits on benefits and benefit accruals under single-employer plans. The requirements of § 436 generally apply to plan years that begin after December 31, 2007. Final regulations under § 436 were published in the Federal Register on October 15, 2009, 74 F.R. 53004.

Section 411(a)(13), which was added by section 701(b)(2) of PPA '06, contains special rules for cash balance and other applicable defined benefit plans. Section 411(a)(13)(A) provides, in general, that an applicable defined benefit plan will not fail to satisfy the requirements of § 411(a)(2), 411(c), or 417(e) solely because the present value of the participant's accrued benefit under the plan equals the balance in the participant's hypothetical account or the accumulated percentage of the participant's final average compensation. Section 411(a)(13)(B) requires an applicable defined benefit plan to provide 100 percent vesting for employer-derived benefits on completion of three years of service. Section 411(a)(13) is generally effective for years that begin after December 31, 2007, and for distributions made after August 17, 2006.

Section 411(b)(5), which was added by section 701(b)(1) of PPA'06 and is generally effective for years that begin after December 31, 2007, contains special rules for applicable defined benefit plans with regard to the requirements of § 411(b)(1)(H), which prohibits a defined benefit plan from ceasing an employee's benefit accruals or reducing an employee's rate of benefit accrual because of the attainment of any age.

Notice 2007-6, 2007-1 C.B. 273, provides transitional guidance regarding the requirements of §§ 411(a)(13) and 411(b)(5). Proposed regulations under §§ 411(a)(13) and 411(b)(5) were published in the Federal Register on December 28, 2007, 72 F.R. 73690. Announcement 2009-82, 2009-48 I.R.B. 720, announced certain relief with respect to the requirements of § 411(b)(5)(B)(i), relating to the interest crediting rate in applicable defined benefit plans. Final and additional proposed regulations under §§ 411(a)(13) and 411(b)(5) are expected to be published in the near future.

Section 401(a)(35), which was added by section 901(a)(1) of PPA '06, requires certain defined contribution plans to meet certain diversification requirements with respect to investments in employer securities. The requirements of § 401(a)(35) generally apply to plan years that begin after December 31, 2007. Notice 2006-107, 2006-2 C.B. 1114, provides transitional guidance regarding § 401(a)(35). Proposed regulations under § 401(a)(35) were published in the Federal Register on January 3, 2008, 73 F.R. 421. Final regulations under § 401(a)(35) are expected to be published in the near future.

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 of the Treasury regulations 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.

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 which 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 three 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.

Section 1107 of PPA '06 provides, in general, that, except as provided by the Secretary of the Treasury, a plan will not fail to satisfy the anti-cutback requirements of § 411(d)(6) as a result of a plan amendment made pursuant to a provision of PPA '06 or regulations thereunder, provided that:

- (1) the plan amendment is adopted no later than the section 1107 date, which is the last day of the first plan year that begins on or after January 1, 2009 (or 2011, in the case of a governmental plan as defined in § 414(d));
- (2) if the plan amendment is required to enable the plan to continue to satisfy § 401(a), the amendment applies retroactively to the effective date of the provision of PPA '06 or regulation; and
- (3) the plan is operated as if the plan amendment were in effect during the period beginning on the effective date of the amendment and ending on the section 1107 date or, if earlier, the date the amendment is adopted.

Section 1107 of PPA '06 also provides that a plan will not be treated as failing to be operated in accordance with its terms during the period described in (3), provided that the conditions in (1) through (3) are met.

Section 5.07(2) of Rev. Proc. 2007-44 provides an exception from the general deadline for adopting interim amendments. This section provides that the deadline for adopting an interim amendment pursuant to a provision of PPA '06 or regulations thereunder is the section 1107 date. This is also the deadline for adopting a discretionary

amendment (within the meaning of section 5.05(2) of Rev. Proc. 2007-44) pursuant to a provision of PPA '06 or regulations thereunder.

The extension of time to adopt plan amendments that is provided by section 1107 of PPA '06 applies to any plan amendment that is adopted pursuant to a provision of PPA '06 or regulations thereunder. For example, section 1107 of PPA '06 extends the otherwise applicable deadline for adopting plan amendments to meet the requirements, if applicable, of §§ 401(a)(29) and 436, 401(a)(35), 401(a)(36), 401(k)(13) and 414(w), 411(a)(2), 411(a)(13), 411(b)(5), 417(a), 417(e), and 432 to the section 1107 date. In addition to extending the time by which an amendment pursuant to a provision of PPA '06 or regulations thereunder would otherwise have to be adopted, section 1107 of PPA '06 also generally provides relief from the requirements of § 411(d)(6) that would otherwise apply to the amendment.

Under the Commissioner's authority to extend remedial amendment periods under § 401(b), Part III of this notice grants a further extension of time, beyond the section 1107 date, to adopt certain plan amendments. However, except as described in Part IV of this notice regarding amendments for §§ 401(a)(29) and 436 and § 411(b)(5), this notice does not grant relief from the requirements of § 411(d)(6) for amendments adopted after the section 1107 date. For example, an amendment of an applicable defined benefit plan to eliminate, with respect to a post-August 17, 2006 distribution, the excess of a single-sum distribution over a participant's hypothetical account balance must comply with the generally applicable requirements of § 411(d)(6) if the amendment is adopted after the section 1107 date.

### **III. Extension of Deadline for Adopting Amendments Under §§ 401(a)(29) and 436, 401(a)(35), 411(a)(13) (other than § 411(a)(13)(A)), and 411(b)(5)**

In order to give plan sponsors time to adopt plan amendments that take into account recently issued final regulations and those that are expected to be issued in the near future, the deadline for adopting an interim or discretionary plan amendment under §§ 401(a)(29) and 436, 401(a)(35), 411(a)(13) (other than § 411(a)(13)(A)), and 411(b)(5) is extended to the last day of the first plan year that begins on or after January 1, 2010. A plan must continue to satisfy the operational compliance requirements of section 1107 of PPA'06 as a condition of the extension of the deadline for adopting plan amendments provided by this notice.

This extension does not restrict rights with respect to the timing of plan amendments set out in Rev. Proc. 2007-44. For example, under section 5.03(2) of Rev. Proc 2007-44, the extension of the remedial amendment period to the end of the applicable remedial amendment cycle for a disqualifying provision continues to apply to a disqualifying provision where the employer reasonably and in good faith determines during the period when an interim amendment to reflect a qualification change would otherwise be

required that no amendment is required because the qualification change does not impact provisions of the written plan document.

#### **IV. Section 411(d)(6) Relief for Certain Amendments**

##### **A. Relief for Amendments Under §§ 401(a)(29) and 436**

Pursuant to § 7805(b) and § 1.411(d)-4, A-2(b)((2)(i), an interim plan amendment that eliminates or reduces a § 411(d)(6) protected benefit will not cause a plan to fail to meet the requirements of § 411(d)(6) if the amendment is adopted by the last day of the first plan year that begins on or after January 1, 2010, and the elimination or reduction is made only to the extent necessary to enable the plan to meet the requirements of §§ 401(a)(29) and 436.

##### **B. Relief for Amendments Under § 411(b)(5)**

As provided in Announcement 2009-82, it is expected that once final regulations under § 411(b)(5)(B)(i) are issued, relief from the requirements of § 411(d)(6) will be granted to permit plan amendments that are adopted prior to the effective date of those final regulations to reduce the interest crediting rate on participants' accounts to the extent necessary to constitute a permissible rate under those final regulations. More broadly, pursuant to this notice, once final regulations under §§ 411(a)(13) and 411(b)(5) are issued, it is expected that relief from the requirements of § 411(d)(6) will be granted for a plan amendment that eliminates or reduces a § 411(d)(6) protected benefit, provided that the amendment is adopted by the last day of the first plan year that begins on or after January 1, 2010, and the elimination or reduction is made only to the extent necessary to enable the plan to meet the requirements of § 411(b)(5).

#### **V. Determination Letters**

The Service's review of an application for a determination letter that is submitted before February 1, 2011, will not take into account the requirements of §§ 401(a)(29) and 436. The Service's review of an application for a determination letter submitted after January 31, 2009, and before February 1, 2011, will take into account the requirements of §§ 401(a)(35), 411(a)(13) (including § 411(a)(13)(A)), or 411(b)(5), only if the plan has been amended to meet those requirements.

#### **VI. Effect on Other Documents**

Section 5.07(2) of Rev. Proc. 2007-44 is modified.

Notice 2008-108, 2008-2 C.B. 1275, which contains the 2008 Cumulative List of Changes in Plan Qualification Requirements, is modified to provide that the Service's review of an application for a determination letter submitted during the submission

period beginning on February 1, 2009, will take into account the requirements of §§ 401(a)(35), 411(a)(13) (including § 411(a)(13)(A)), or 411(b)(5), only if the plan has been amended to meet those requirements.

**Drafting Information**

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