

Extension of Deadline to Adopt Certain Retirement Plan Amendments

Notice 2010-77

I. Purpose

This notice further extends the deadline for amending qualified defined benefit 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, and the Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010 (PRA 2010), Pub. L. 111-192. This is a further extension of the deadline for adopting certain defined benefit plan amendments as previously extended in Notice 2009-97, 2009-52 I.R.B. 972. The deadline is now extended to the last day of the first plan year that begins on or after January 1, 2011. 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; and
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.

The notice provides that the additional extension of time to amend also applies for the purpose of a plan's eligibility for the relief from the requirements of § 411(d)(6) described in Notice 2009-97.

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 FR 53004. The final regulations do not include rules interpreting the amendments with respect to § 436 made by section 101(c)(2) of WRERA, which are generally effective as if included in PPA '06, and section 203(a)(2) of PRA 2010, which are generally effective for plan years beginning on or after October 1, 2008.

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.

Final and proposed regulations under §§ 411(a)(13) and 411(b)(5) were published in the Federal Register on October 19, 2010 (75 FR 64123 and 75 FR 64197, respectively).

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. The filing of a determination letter application for a 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 the Plan Qualification Requirements in effect at the time the application is filed. (See sections 4 and 12.03 of Rev. Proc. 2007-44.) Thus, as noted in section 12.03 of Rev. Proc. 2007-44, a determination letter filing may accelerate to an earlier date one or more of the interim amendment deadlines that would otherwise apply to a plan.

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 generally requires plans to be amended for the changes in the plan qualification requirements made by PPA '06 by the last day of the first plan year that begins on or after January 1, 2009 ("the section 1107 date") and provides relief from the requirements of § 411(d)(6) for plan amendments adopted by that date pursuant to PPA '06 or regulations thereunder. Section 1107 of PPA '06 also generally requires that such an amendment be effective as of the effective date of the relevant provision of PPA '06 and that the plan be operated in accordance with the amendment as of the effective date of the amendment.

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.

Under the Commissioner's authority to extend remedial amendment periods under § 401(b), Notice 2009-97 extends the time to adopt interim and discretionary plan amendments for certain requirements of PPA '06, including §§ 401(a)(29), 436, 411(a)(13) (other than § 411(a)(13)(A)), and 411(b)(5), to the last day of the first plan year beginning on or after January 1, 2010.

Notice 2009-97 also grants relief from the requirements of § 411(d)(6) (pursuant to § 7805(b) and § 1.411(d)-4, A-2(b)(2)(i)) for an interim 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 §§ 401(a)(29) and 436. Further, Notice 2009-97 states that, 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).

The preamble to the proposed regulations under §§ 411(a)(13) and 411(b)(5) that were published in the Federal Register on October 19, 2010, 75 FR 64197, extends the duration of the expected relief and provides that the relief from the requirements of § 411(d)(6) is expected to apply if the amendment is adopted before regulations that finalize the proposed regulations apply to the plan. The regulations are proposed to be effective for plan years beginning on or after January 1, 2012, and the extensions provided by this notice are tailored to the expectation that this will be the effective date of the regulations when they are finalized. (See footnote six of the preamble to the proposed regulations.)

In order to give plan sponsors time to take the WRERA and PRA 2010 changes to § 436 into account, this notice provides a one-year extension of the time by which plans must be amended for §§ 401(a)(29) and 436, as well as the time by which such amendments must be adopted to be eligible for relief from the requirements of § 411(d)(6). In order to give plan sponsors time to take the final regulations under §§ 411(a)(13) and 411(b)(5) into account when adopting amendments to comply with §§ 411(a)(13) and 411(b)(5) (and consistent with the anticipated duration of the expected § 411(d)(6) relief that is discussed in the preamble to the proposed regulations), this notice also provides a one-year extension of the time by which plans must be amended for §§ 411(a)(13) (other than § 411(a)(13)(A)) and 411(b)(5). This notice does not extend the deadline for adopting any other plan amendments for PPA '06.

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

The deadline for adopting an interim or discretionary plan amendment under §§ 401(a)(29), 436, 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, 2011. 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.

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, 2011, 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)

When the regulations under §§ 411(a)(13) and 411(b)(5) that were proposed on October 19, 2010, are finalized, 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, 2011, and the elimination or reduction is made only to the extent necessary to enable the plan to meet the requirements of § 411(b)(5). Plan sponsors and their advisers are reminded that the preamble to the proposed regulations specifically requests comments regarding the amendments to a hybrid plan's interest crediting rate that should be considered "necessary to enable the plan to meet the requirements of § 411(b)(5)" for purposes of the expected relief from the requirements of § 411(d)(6).

V. Determination Letters

The Service's review of an application for a determination letter that is submitted before February 1, 2012, will not take into account the requirements of §§ 401(a)(29) and 436. Accordingly, a determination letter issued with respect to such an application cannot be relied upon with respect to the requirements of §§ 401(a)(29) and 436.

The Service's review of an application for a determination letter submitted after January 31, 2011, will take into account the requirements of §§ 411(a)(13) and 411(b)(5), including the final regulations under those sections that were published in the Federal Register on October 19, 2010, 75 FR 64123. The Service's review will not take into account the proposed regulations under §§ 411(a)(13) and 411(b)(5) but will be based on a standard of reasonable interpretation of the statute with respect to matters addressed in those regulations. As noted in section II of this notice, the filing of a determination letter application for a plan after January 31, 2011, may accelerate the time by which the plan's sponsor must adopt an interim plan amendment for §§ 411(a)(13) (other than § 411(a)(13)(A)) and 411(b)(5).

VI. Effect on Other Documents

Notice 2009-97 and section 5.07(2) of Rev. Proc. 2007-44 are modified.

Drafting Information

The principal author of this notice is James P. Flannery of the Employee Plans, Tax Exempt and Government Entities Division. Questions regarding this notice may be sent via e-mail to *retirementplanquestions@irs.gov*.