

## Part III – Administrative, Procedural and Miscellaneous

### **Transitional Relief Provided for Certain Plan Amendment Deadlines**

#### Notice 2005-95

##### I. Purpose

This notice clarifies the interaction of the amendment timing deadlines for plans qualified under § 401(a) as set forth in Rev. Proc. 2005-66, 2005-37 I.R.B. 509 with the deadlines set forth in various other published guidance. This notice also provides transitional relief from certain of those deadlines, thus giving sponsors, practitioners, and employers additional time to adopt required amendments. Pursuant to this relief, sponsors, practitioners, and employers maintaining plans qualified under § 401(a) will have an extension of the otherwise applicable deadline for adopting certain plan amendments reflecting the final retroactive annuity starting date regulations, the automatic rollover requirements under § 401(a)(31)(B) of the Internal Revenue Code, and the final §§ 401(k) and 401(m) regulations.

This notice also provides relief with respect to the satisfaction of the safe harbor notice requirement of § 401(k)(12) for plan years beginning before 2007. In addition, this notice provides relief, under the heading “Required Minimum Distributions for Defined Benefit Plans,” to sponsors of prototype individual retirement arrangements.

##### II. Overview

The Service has received inquiries with respect to the impact, if any, that Rev. Proc. 2005-66 has on the deadline for plan sponsors maintaining qualified plans to adopt plan amendments reflecting certain published guidance. Section 5.05 of Rev. Proc. 2005-66 provides a general rule for the deadline for the timely adoption of an interim or discretionary amendment. When there are statutory or regulatory changes with respect to plan qualification requirements that will impact provisions of the written plan document, the adoption of an interim amendment will generally be required by the deadline under Rev. Proc. 2005-66, as described below.

Under Rev. Proc. 2005-66, the deadline is different for a discretionary amendment than for amendment with respect to a disqualifying provision. For a disqualifying provision<sup>1</sup> or a provision that is integral to a disqualifying provision, an

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<sup>1</sup> A plan provision under an existing plan is designated as a disqualifying provision under § 1.401(b)-1(b)(3) if the provision either (1) results in the failure of the plan to satisfy the qualification requirements of the Code by reason of a change in those requirements that is effective after December 31, 2001; or (2) is

interim amendment must be adopted by the later of (1) the due date (including extensions) for filing the income tax return for the employer's taxable year that includes the date on which the remedial amendment period begins<sup>2</sup> or (2) the last day of the plan year that includes the date on which the remedial amendment period begins. A plan maintained by more than one employer need not be amended for a disqualifying provision until the last day of the tenth month following the last day of the plan year in which the remedial amendment period begins. A discretionary amendment must be adopted by the end of the plan year in which the plan amendment is effective.

The deadlines set forth by Rev. Proc. 2005-66 have generated concern among the practitioner community as to when plan amendments must be adopted to reflect changes in various qualification requirements. This notice re-affirms the applicability of the timing rules under Rev. Proc. 2005-66, while giving transitional relief to plan sponsors and employers that will, in some cases, provide additional time to adopt plan amendments related to the final retroactive annuity starting date regulations, automatic rollover guidance under Notice 2005-5, and final §§ 401(k) and 401(m) regulations as set forth in section IV and summarized in the Appendix to this notice.

### III. General Timing Rules for Plan Amendments

In general, the deadlines set forth under section 5.05 of Rev. Proc. 2005-66 apply except in the following circumstances:

(1) A statutory provision or guidance issued by the Service sets forth an earlier deadline to timely adopt an amendment. For example, an amendment generally cannot be adopted retroactively when to do so would violate the anti-cutback rules of § 411(d)(6). Also, an amendment to add a qualified cash or deferred arrangement to a profit sharing plan or to change a § 401(k) plan to become a safe harbor plan cannot be adopted retroactively.

(2) A statutory provision or guidance issued by the Service sets forth a specific deadline for the adoption of an amendment that is earlier or later than the deadlines set forth under section 5.05 of Rev. Proc. 2005-66. See section V for a list of those deadlines.

### IV. Amendment Timing Issues for Provisions Modified in this Notice

#### Retroactive Annuity Starting Date

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integral to a qualification requirement of the Code that has been changed effective after December 31, 2001, but only if the provision is integral to a plan provision that is a disqualifying provision under (1) above with respect to the plan. A disqualifying provision under § 1.401(b)-1(b)(1) is a provision of, or absence of a provision from, a new plan and the plan was intended, in good faith, to be qualified.

<sup>2</sup> The remedial amendment period begins on the date on which the change becomes effective with respect to the plan or, in the case of a provision that is integral to a qualification requirement that has been changed, the first day on which the plan is operated in accordance with the provisions as amended.

Final regulations for plans providing a retroactive annuity starting date (RASD) under § 1.417(e)-1 were issued on July 16, 2003. The final regulations apply to plan years beginning on or after January 1, 2004. In Notice 2004-84, 2004-2 C.B. 1030, the Service provided that a defined benefit plan with a provision that does not satisfy the RASD regulations has a disqualifying provision.

Section 5.05 of Rev. Proc. 2005-66 stated that the deadline to adopt an interim amendment depends on whether or not the plan amendment is required or discretionary. For example, a plan sponsor who maintains a single employer defined benefit plan with a calendar plan year that already provides for RASD but which did not comply with the final regulations has a disqualifying provision and under Rev. Proc. 2005-66 must adopt an interim amendment by the due date (including extensions) for filing the income tax return for the employer's taxable year that contains January 1, 2004 or if later, December 31, 2004. By contrast, where a single employer defined benefit plan does not provide for RASD and the employer wishes to provide for RASD, under Rev. Proc. 2005-66 a discretionary amendment providing for RASD must be adopted by the end of the plan year in which the plan amendment is effective.

Pursuant to this notice, the deadline to adopt an interim amendment to comply with the final RASD regulations will be the later of the deadline under Rev. Proc. 2005-66 that would otherwise apply to the plan sponsor or employer or December 31, 2005.

### Automatic Rollover

Section 657 of the Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. 107-16 (EGTRRA) amended § 401(a)(31)(B) of the Code and directed the Department of Labor (DOL) to issue regulations for the direct rollover of certain mandatory distributions. DOL issued final regulations on September 28, 2004 (29 CFR § 2550.404a-2) which were effective for any rollover of mandatory distributions made on or after March 28, 2005.

Notice 2001-42, 2001-2 C.B. 70 set forth amendment timing rules for all amendments adopted pursuant to EGTRRA and provided that if a plan sponsor implements an EGTRRA provision for a plan year, then the plan sponsor must adopt the good faith amendment by the end of the plan year. Notice 2001-42 provided that the EGTRRA remedial amendment period would end no earlier than the last day of the first plan year beginning on or after January 1, 2005. With respect to the automatic rollover requirements of § 401(a)(31)(B) of the Code, Notice 2005-5, 2005-3 I.R.B. 337, provided guidance effective for mandatory distributions made on or after March 28, 2005. In accordance with the effective date of the automatic rollover rules and Notice 2001-42, Notice 2005-5 required qualified plans (other than governmental and non-electing church plans) to be amended to comply with the automatic rollover rules by the end of the first plan year ending on or after March 28, 2005.

If the amendment timing rules under Rev. Proc. 2005-66 were applied to an

amendment to comply with the mandatory rollover requirements, a plan sponsor would be required to correct the disqualifying provision by adopting an interim amendment by the later of (1) the due date (including extensions) for filing the income tax return for the employer's taxable year that includes March 28, 2005 or (2) the last day of the plan year that includes March 28, 2005. Pursuant to this notice, the Service is clarifying that the deadline under Rev. Proc. 2005-66 applies to the amendments to reflect the automatic rollover requirements under Notice 2005-5, and under the transitional relief provided, the deadline will be the later of the deadline under Rev. Proc. 2005-66 or December 31, 2005.

### Final §§ 401(k) and 401(m) Regulations

Final Regulations under §§ 401(k) and 401(m) were published on December 29, 2004 (Final § 401(k) regulations). The Final § 401(k) regulations generally apply to plan years beginning on or after January 1, 2006. In the case of a plan maintained pursuant to one or more collectively bargained agreements between employee representatives and one or more employers in effect on January 1, 2006, the Final § 401(k) regulations apply to the later of the first plan year beginning after the termination of the last such agreement or the first plan year beginning on or after January 1, 2006.

Plan sponsors are permitted to apply the Final § 401(k) regulations to any plan year that ends after December 29, 2004. An amendment that implements the Final § 401(k) regulations for a plan year before the effective date with respect to that plan is a discretionary amendment. Under Rev. Proc. 2005-66, the deadline to adopt a discretionary amendment is the end of the plan year in which the plan amendment is effective.

Pursuant to this notice, the deadline to adopt a discretionary amendment for the Final § 401(k) regulations prior to the effective date is extended to the later of December 31, 2005 or the otherwise applicable deadline (i.e., the end of the plan year in which the regulations are implemented). However, this transitional relief does not otherwise override other existing rules regarding the deadline to adopt a plan amendment prior to the beginning of the plan year (e.g., adding a qualified cash or deferred arrangement to a profit sharing plan or adding a safe harbor feature to a § 401(k) plan).

In addition, for plan years beginning before 2007, a safe harbor § 401(k) plan described in § 401(k)(12) will not fail to satisfy the notice requirement of § 401(k)(12)(D) merely because the notice cross-references the plan's summary plan description in accordance with Q&A-8 in Notice 2000-3, 2000-1 C.B. 413.

### V. Other Delays in Amendment Timing Issues

In the situations set forth in this section V, the deadlines for plan amendments described below apply in lieu of the deadlines set forth in Rev. Proc. 2005-66.

## Required Minimum Distributions for Defined Benefit Plans

Rev. Proc. 2002-29, 2002-1 C.B. 1176 provided, in part, that defined benefit plans must be amended by the end of the first plan year beginning on or after January 1, 2003, to the extent necessary to comply with the Final and Temporary regulations under § 401(a)(9), relating to required minimum distributions. However, Rev. Proc. 2003-10, 2003-1 C.B. 259 postponed the time by which defined benefit plans must be amended to comply with the requirements set forth in the Final and Temporary Regulations under § 401(a)(9) to the end of the EGTRRA remedial amendment period as set forth in Notice 2001-42. Notice 2001-42 provided that the EGTRRA remedial amendment period would end no earlier than the last day of the first plan year beginning on or after January 1, 2005.

Sections 12 and 18 of Rev. Proc. 2005-66 modified Notice 2001-42 by extending the EGTRRA remedial amendment period for individually designed plans to the end of the initial five-year remedial amendment cycle and for pre-approved plans to the end of the initial six-year remedial amendment cycle. Thus, defined benefit plans must be amended for the final regulations under § 401(a)(9) by the end of the initial five or six-year remedial amendment cycle described in Rev. Proc. 2005-66, whichever is applicable.

Sponsors of prototype individual retirement arrangements (IRAs), including Roth IRAs and SIMPLE IRAs, that reference the temporary regulations under § 401(a)(9) are not required to amend their documents merely to reference the final regulations under § 401(a)(9) or to make other conforming changes that are expected to have no effect on plan operation. However, if an IRA sponsor does make such changes, no application to the Service is required for continued reliance on an Opinion Letter.

## Suspension of Benefits Plan Amendments

*Heinz v. Central Laborers' Pension Fund* was decided on June 7, 2004. The Supreme Court held that § 204(g) of the Employee Retirement Income Security Act of 1974 (ERISA) prohibits a plan amendment from expanding the categories of post-retirement employment that results in suspension of the payment of early retirement benefits already accrued. The Service subsequently published Rev. Proc. 2005-23, 2005-18 I.R.B. 991 on April 18, 2005. Rev. Proc. 2005-23 gave § 7805(b)(8) relief for plans that adopted an amendment before June 7, 2004 which violated § 411(d)(6) of the Code (the counterpart to § 204(g) of ERISA). Under Rev. Proc. 2005-23, a plan sponsor has until the last day of EGTRRA remedial amendment period to adopt an amendment correcting the disqualifying provision. As noted above, Rev. Proc. 2005-66 extended the EGTRRA remedial amendment period for individually designed plans to the end of the initial five-year remedial amendment cycle and for pre-approved plans to the end of the initial six-year remedial amendment cycle.

Rev. Proc. 2005-76, 2005-50 I.R.B. (Dec. 12, 2005), provides extensions to the

time periods for taking corrective action to be eligible for § 7805(b) relief.

### Professional Employer Organizations

In Rev. Proc. 2002-21, 2002-1 C.B. 911, the Service provided transitional relief for certain defined contribution plans maintained by professional employer organizations (PEO). In order to remain qualified under § 401(a), the plan sponsor had the option to either terminate the PEO plan or convert the PEO plan into a multiple employer plan by the 120th day after the first day of the first plan year beginning on or after January 1, 2003. For a calendar year plan, the deadline was May 2, 2003. The Service published Rev. Proc. 2003-86, 2003-2 C.B. 1211 to provide additional guidance relating to PEOs. Rev. Proc. 2003-86 provided that plan sponsors have until the end of the EGTRRA remedial amendment period as set forth in Notice 2001-42 to adopt transitional amendments for technical corrections. As noted above, Rev. Proc. 2005-66 extended the EGTRRA remedial amendment period for individually designed plans to the end of the initial five-year remedial amendment cycle and for pre-approved plans to the end of the initial six-year remedial amendment cycle.

### Pension Funding Equity Act of 2004

The Pension Funding Equity Act of 2004, Pub. L. 108-218 (PFEA) was enacted on April 10, 2004. PFEA amended § 415(b)(2)(E)(ii) applicable for the plan years beginning in 2004 and 2005. Under § 101(c) of PFEA, the deadline to amend plans to comply with the changes to § 415(b)(2)(E)(ii) is the last day of the first plan year beginning on or after January 1, 2006.

### Hurricane Katrina Relief

The Katrina Emergency Tax Relief Act of 2005, P.L. 109-73 (KETRA) was enacted on September 23, 2005 to provide that qualified individuals receive favorable tax treatment with respect to distributions from eligible retirement plans that are qualified Hurricane Katrina distributions. Under § 104 of KETRA, for an employer plan other than a governmental plan, the date by which any plan amendment to reflect KETRA is required to be made will not be earlier than the last day of the first plan year beginning on or after January 1, 2007. For a governmental plan described in § 414(d) of the Code, the date by which any plan amendment to reflect KETRA is required to be made will not be earlier than the last day of the first plan year beginning on or after January 1, 2009.

Announcement 2005-70, 2005-40 I.R.B. 682, provides relief for taxpayers adversely affected by Hurricane Katrina for hardship distribution and loans. A plan that does not provide for loans or hardship distributions as described in Announcement 2005-70 must be amended to provide for loans or such emergency distributions no later than the end of the first plan year beginning after December 31, 2005.

## VI. Other Amendment Issues

### Designated Roth Contributions

Section 402A of the Code was added by EGTRRA to allow the optional treatment of elective deferrals as designated Roth elective deferrals to defined contribution plans. Proposed amendments to the Final § 401(k) Regulations related to designated Roth contributions were published on March 2, 2005. The regulatory effective date is proposed to be the same as the effective date for the Final § 401(k) Regulations described above. The statutory effective date for designated Roth contributions is for taxable years beginning after December 31, 2005.

An employer can implement designated Roth contributions beginning with the statutory effective date, even if it is prior to the regulatory effect date of the Final § 401(k) Regulations. As a discretionary amendment, the deadline to adopt an amendment implementing designated Roth contributions under Rev. Proc. 2005-66 is the end of the plan year in which the plan amendment is effective. For example, for a plan where the plan year ends March 31st, designated Roth contributions can be implemented as early as January 1, 2006 but in such cases, the plan sponsor must amend the plan by March 31, 2006.

In order to facilitate the timely adoption of the discretionary amendment, the Service intends to issue a sample amendment for designated Roth contributions after publication of the final § 401(k) regulations as amended for designated Roth contributions.

### Good Faith Amendments

Notice 2005-5 includes a sample amendment that can be used to implement the automatic rollover rules. However, the Service does not currently intend to issue a model or sample amendment for the final RASD regulations, final § 401(k) regulations, final § 401(a)(9) regulations for the required minimum distribution for defined benefit plans, the suspension of benefits under *Heinz v. Central Laborers' Pension Fund*, the Pension Funding Equity Act of 2004, and certain defined contribution plans maintained by professional employer organizations. Therefore, plan sponsors must adopt good faith plan amendments reflecting these qualification changes. The Service will consider whether to issue a sample amendment related to Hurricane Katrina Relief.

### Maintaining the Pre-approved Status of a Pre-approved Plan

The Service will not treat the adoption of good faith plan amendments that reflect the qualification changes listed in sections 4 and 5 of this notice as affecting the pre-approved status of a master and prototype (M&P) or volume submitter plan. That is, M&P plans may be amended by the M&P sponsor (and, if applicable, the adopting employer) without causing the plans to fail to be M&P plans. Similarly, volume

submitter plans may be amended by the sponsoring employer or the practitioner, if authorized under the terms of the plans, without causing the plans to fail to be volume submitter plans. In either case, the amendment will not result in the loss of reliance on a favorable opinion, advisory, or determination letter, if the amendment causes the plan to fail to satisfy § 401(a) and a retroactive remedial amendment is adopted within the applicable five or six-year remedial amendment cycle.

#### Effect on other Documents

Notice 2004-84 and Notice 2005-5 are modified.

#### DRAFTING INFORMATION

The principal author of this notice is Dana Barry of the Employee Plans, Tax Exempt and Government Entities Division. For further information regarding this notice, please contact the Employee Plans' taxpayer assistance telephone service at 1-877-829-5500 (a toll-free number) between the hours of 8:00 a.m. and 6:30 p.m. Eastern Time, Monday through Friday (a toll free call). Ms. Barry may be reached at (202) 283-9888 (not a toll-free call).

## Appendix

Guidance	Date of Publication	Effective Date of Published Guidance	Deadline to Adopt Plan Amendment under Rev. Proc. 2005-66 (or Notice 2005-5)	Deadline to Adopt Plan Amendment under this Notice
Retroactive Annuity Starting Date § 1.417(e)-1	July 17, 2003	Plan years beginning on or after January 1, 2004.	If discretionary -- end of the plan year in which plan amendment is put into effect.  If required – later of the end of the employer’s tax filing date for the taxable year that contains January 1, 2004 or the last day of the first plan year beginning on or after January 1, 2004.	Later of (1) the deadline under Rev. Proc. 2005-66 or (2) December 31, 2005.
Automatic Rollover § 401(a)(31)(B)	December 28, 2004	Mandatory distributions made on or after March 28, 2005.	Notice 2001-42 and Notice 2005-5 required the amendment to be adopted by the end of the plan year ending on or after March 28, 2005.	Latest of (1) December 31, 2005, (2) the end of the plan year that contains March 28, 2005, or (3) the tax filing deadline for the employer’s tax year containing March 28, 2005.
Final §§ 401(k) and 401(m) Regulations §§ 1.401(k)-1 through -6 and 1.401(m)-1 through -5	December 29, 2004	Generally, plan years beginning on or after January 1, 2006. Plan sponsors are permitted to apply final regulations to any plan year that ends after December 29, 2004.	If discretionary -- end of plan year in which plan amendment is put into effect.  (Amendment is discretionary if it is adopted prior to the effective date.)	Later of (1) December 31, 2005 or (2) the end of the plan year in which the §§ 401(k) and 401(m) regulations are implemented.