

## Remedial Amendment Periods and Determination Letter Applications: If Your Company's EIN Ends In 1 or 6, You're Up!

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by  
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In 2005, the IRS released important guidance relating to remedial amendment periods and the timeframes for filing determination letter applications for qualified retirement plans. In general, this guidance establishes a system of staggered remedial amendment periods for both individually-designed plans and pre-approved plans (pre-approved plans are those plans that are master and prototype plans or volume submitter plans). **Importantly, for some individually-designed plans, the guidance requires plan sponsors to update such plans and submit them for determination letters by January 31, 2007.**

The IRS guidance is found in Revenue Procedure 2005-66 ("Rev. Proc. 2005-66"), and this Newsletter briefly summarizes some of the important provisions of the guidance.

### A. Individually-Designed Plans

For individually-designed plans, Rev. Proc. 2005-66 establishes a staggered, five-year remedial amendment cycle for every plan. The five separate cycles are designated as Cycles A through E, and each individually-designed plan is assigned to a particular cycle. The particular cycle to which an individually-designed plan is assigned is generally based on the last digit of the plan sponsor's employer identification number ("EIN"). Each cycle begins on February 1<sup>st</sup> and ends on the following January 31<sup>st</sup>.

The following chart shows the five cycles and their respective remedial amendment periods:

<b>REMEDIAL AMENDMENT PERIOD CYCLES – INDIVIDUALLY-DESIGNED PLANS</b>			
<i><b>If the plan sponsor's EIN ends in...</b></i>	<i><b>Then the Plan's cycle is...</b></i>	<i><b>The last day of the initial remedial amendment cycle is. . .</b></i>	<i><b>The next five-year remedial amendment cycle ends on. . .</b></i>
1 or 6	Cycle A	January 31, 2007	January 31, 2012
2 or 7	Cycle B	January 31, 2008	January 31, 2013
3 or 8	Cycle C	January 31, 2009	January 31, 2014
4 or 9	Cycle D	January 31, 2010	January 31, 2015
5 or 0	Cycle E	January 31, 2011	January 31, 2016

*"In submitting the plan for a determination letter, the IRS . . . will generally require the plan document . . . to be submitted in restated format."*

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Thus, for example, for an individually-designed plan sponsored by an employer whose EIN ends in either 1 or 6, the plan is assigned to Cycle A (and, as a result, the end of the plan's initial remedial amendment cycle is January 31, 2007). Because the plan is assigned to Cycle A, the plan sponsor must generally (i) update the plan document for the plan to take into account the requirements of the applicable cumulative list of changes in plan qualification requirements (see Section D below for a discussion of the new cumulative list requirements), and (ii) submit the plan for a determination letter between the period beginning February 1, 2006, and ending January 31, 2007. In submitting the plan for a determination letter, the IRS has indicated that it will generally require the plan document for the plan to be submitted in restated format. For this purpose, the IRS has stated that submission of a working copy of the plan document in restated format will suffice.

There are a number of special rules that apply for purposes of determining the appropriate cycle to which certain individually-designed plans belong. **First**, the following special rules apply: (i) for a plan that is a multiple employer plan, the plan's cycle is automatically designated as Cycle B; (ii) for a plan that is a governmental plan, the plan's cycle is automatically designated as Cycle C; and (iii) for a plan that is a multiemployer plan, the plan's cycle is automatically designated as Cycle D. **Second**, for a plan that is maintained by multiple members of a single control group (as such term is defined in Sections 414(b), 414(c) and 414(m) of the Tax Code), the plan's cycle is determined by reference to the EIN of the entity under which the plan's Form 5500s are filed. **Third**, if members of a single control group maintain more than one plan, the members of the control group may jointly elect that the cycle for all such plans is Cycle A (or, alternatively, if the control group is a parent-subsidary control group, an election may be made for the appropriate cycle to be determined by reference to the parent organization's EIN).

There are also special rules that apply for purposes of determining the appropriate cycle in the case of mergers and acquisitions, changes in plan sponsorship, and plan spin-offs.

**B. Pre-Approved Plans**

For pre-approved plans, Rev. Proc. 2005-66 establishes a regular, six-year remedial amendment cycle. Pre-approved defined contribution plans have a different six-year cycle than pre-approved defined benefit plans. The following chart shows the two separate six-year cycles:

<b>REMEDIAL AMENDMENT PERIOD CYCLES – PRE-APPROVED PLANS</b>		
<b><i>If the Plan is . . .</i></b>	<b><i>The last day of the initial remedial amendment cycle is . . .</i></b>	<b><i>The next five-year remedial amendment cycle ends on . . .</i></b>
Defined Contribution	January 31, 2011	January 31, 2017
Defined Benefit	January 31, 2013	January 31, 2019

Pre-approved plan sponsors generally have until January 31<sup>st</sup> of the calendar year immediately following the opening of the six-year remedial amendment cycle to submit applications for new opinion and advisory letters. Thus, for pre-approved defined contribution plans, the sponsors of such pre-approved plans were required to file for new opinion and advisory letters for the initial remedial amendment cycle (which ends on January 31, 2011) by January 31, 2006.

*"Rev. Proc. 2005-66 extends the remedial amendment period for EGTRRA for both individually-designed plans and pre-approved plans."*

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When the review of a particular cycle has neared completion, the IRS will announce a separate uniform deadline by which all of the adopting employers of a pre-approved plan must adopt the updated documents for the plan. The IRS indicated in Rev. Proc. 2005-66 that it expects to give adopting employers approximately a two-year window under this uniform deadline for purposes of adopting their updated pre-approved plan documents.

### **C. EGTRRA Remedial Amendment Period**

Importantly, Rev. Proc. 2005-66 extends the remedial amendment period for the Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA") for both individually-designed plans and pre-approved plans. In particular, Rev. Proc. 2005-66 extends the EGTRRA remedial amendment period until the end of the applicable five-year or six-year remedial amendment cycle associated with a plan.

This extension is important because it aligns the end of the EGTRRA remedial amendment period with the new cycle system established under Rev. Proc. 2005-66. Thus, for example, the extension allows the plan sponsor of an individually-designed plan to avoid having to file two separate determination letter applications within a short period of time (i.e., one for the EGTRRA remedial amendment period and one at the end of the plan's initial remedial amendment cycle). Instead, the plan sponsor can simply wait to file its EGTRRA determination letter application until the twelve-month period (i.e., February 1<sup>st</sup> to January 31<sup>st</sup>) immediately preceding the end of the plan's initial five-year remedial amendment cycle.

### **D. Cumulative List of Changes**

In conjunction with establishing the new remedial amendment cycles, the IRS also intends to annually publish a cumulative list of changes in plan qualification requirements. These cumulative lists will identify, on a year-by-year basis, the changes in plan qualification requirements that are required to be taken into account in updated plan documents.

It is expected that the cumulative lists will be issued by the IRS near the end of each calendar year. Each annual cumulative list will identify those changes in the qualification requirements that are required to be taken into account by plans whose remedial amendment cycle begins on the following February 1<sup>st</sup>. So, for example, for a Cycle A individually-designed plan (whose initial remedial amendment cycle began on February 1, 2006, and ends on January 31, 2007), the IRS will review such plan based on the items contained in the cumulative list issued by the IRS late in 2005.

### **E. Interim and Discretionary Amendments**

In addition to setting forth the new remedial amendment cycles that will apply to qualified plans, Rev. Proc. 2005-66 also sets forth rules relating to the adoption of interim and discretionary plan amendments. In particular, although a qualified plan will only need to be submitted for a determination letter during its particular remedial amendment cycle, Rev. Proc. 2005-66 confirms that qualified plans must still be operated in accordance with their written plan documents. As a result, when there are statutory or regulatory changes in the plan qualification requirements, the adoption of interim and discretionary plan amendments will still be required.

"[I]f your company will need to file . . . by January 31, 2007, [an] interested party notification will need to be provided no later than early to mid January."

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An interim plan amendment is one which amends a plan's provisions in response to statutory or regulatory changes in the plan qualification requirements (or that amends a provision that is integral to a plan provision required to be amended in response to such a statutory or regulatory change). Such an interim amendment must generally be adopted by the later of (i) the end of the plan year which includes the date on which the change in plan qualification requirements becomes effective, or (ii) the due date (including extensions) for filing the income tax return for the employer's taxable year which includes the date on which the change becomes effective.

A discretionary amendment is one which either (i) implements new or changed rules prior to the time required by law, or (ii) implements optional plan provisions. Such a discretionary amendment must generally be adopted by the last day of the plan year in which the change is implemented.

#### **F. Conclusion**

If your company has not already done so, it should review the new rules contained in Rev. Proc. 2005-66 to determine which cycle applies to your company's plans. ***Importantly, if your company's EIN ends in 1 or 6 and your company sponsors any individually-designed plans, the end of the initial remedial amendment cycle for those plans (and the deadline for submitting the plans to the IRS for a determination letter) is likely January 31, 2007. In connection with this, remember that notice of a determination letter application must be sent to all "interested parties" not less than 10 days, nor more than 24 days, prior to the date on which the determination letter application is made. As a result, if your company will need to file for a determination letter with respect to a particular plan by January 31, 2007, the interested party notification will need to be provided no later than early to mid January.***

If you have questions about this Newsletter, or would like our assistance in determining the appropriate cycle to which your company's plans belong, please feel free to contact us.