

2004 Cumulative List of Changes in Plan Qualification Requirements

Notice 2004-84

I. PURPOSE

This notice contains the 2004 Cumulative List of Changes in Plan Qualification Requirements (2004 Cumulative List) described in section 10 of the draft revenue procedure in Announcement 2004-71, 2004-40 I.R.B. 569. The Internal Revenue Service intends to annually publish a Cumulative List to identify statutory, regulatory and guidance changes that must be taken into account in plan sponsor's submissions to the Service for opinion, advisory and determination letters whose remedial amendment period is proposed to end on January 31 of the second calendar year following release of the list.

The 2004 Cumulative List is to be used primarily by plan sponsors and practitioners in drafting defined contribution pre-approved plans (that is, defined contribution plans that are master and prototype (M&P) or volume submitter (VS) plans) for their first submission under the proposed remedial amendment cycle. As a consequence, the 2004 Cumulative List only includes statutory changes and guidance that would apply to the types of defined contribution plans that may be used as pre-approved plans. The 2004 Cumulative List only contains statutory changes and guidance that have become effective after December 31, 2001, the date listed in section 7 of the draft revenue procedure attached to Announcement 2004-71. The 2004 Cumulative List informs plan sponsors and practitioners of issues the Service has specifically identified for review in determining whether a pre-approved plan has been properly updated to reflect statutory changes and guidance that have become effective after December 31, 2001, and thus were not previously considered by the Service in issuing opinion and advisory letters. In order to be qualified, a plan must comply with all relevant qualification requirements, not just those on the 2004 Cumulative List. The Service will not review plan language for guidance issued after December 14, 2004, unless it is on the 2004 Cumulative List. Thus, sponsors of pre-approved plans may not rely on opinion or advisory letters with respect to any guidance issued after December 14, 2004, unless that guidance is on the 2004 Cumulative List.

The 2004 Cumulative List in section IV does not extend the deadline by which a plan must be amended to comply with any statutory, regulatory, or guidance changes. However, section V of this notice provides a remedial amendment period under § 401(b) of the Internal Revenue Code (Code) for amendments with

respect to retroactive annuity starting dates described in § 417(a)(7)(A) of the Code.

II. BACKGROUND

In Announcement 2004-71, the Service published for comment a draft revenue procedure containing the proposed procedures for issuing determination letters on five-year cycles with respect to the qualified status under § 401(a) of the Code for individually designed plans (that is, plans that have not been pre-approved). It is intended that pre-approved plans would generally have a regular, six-year remedial amendment/approval cycle. The announcement also contains a discussion of the Cumulative List.

III. APPLICATION OF 2004 CUMULATIVE LIST

This notice is being issued in conjunction with the opening of the Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. 107-16 (EGTRRA) opinion and advisory letter program for defined contribution pre-approved plans. The Service proposes to open the program for defined contribution M&P and VS specimen plans on February 1, 2005. The 12-month submission period for M&P and VS specimen plans is intended to end January 31, 2006.

The 2004 Cumulative List reflects law changes under EGTRRA with technical corrections made by the Job Creation and Worker Assistance Act of 2002 (JCWAA), Pub. L. 104-147, as well as regulations and guidance published by the Service that are effective after December 31, 2001. The Service intends the 2004 Cumulative List to be used primarily by plan sponsors and practitioners in drafting defined contribution pre-approved plans for their first submission under the proposed remedial amendment cycle.

IV. 2004 CUMULATIVE LIST OF CHANGES IN PLAN QUALIFICATION REQUIREMENTS

The following list consists of statutory provisions and associated guidance which reflect changes to plan qualification requirements. Miscellaneous guidance is also provided. There are some items on the list that refer to guidance not yet published; nevertheless, it is expected that such guidance will be published in time to be incorporated into plan documents by pre-approved plan sponsors and practitioners early in 2005. These not-yet published guidance items have been included in the 2004 Cumulative List in order to allow this incorporation in the first submission in the proposed remedial amendment/approval cycle for pre-approved plans rather than having to wait until the next cycle.

The following guidance contains sample or model amendments: Notice 2001-57, 2001-1 C.B. 279 (miscellaneous EGTRRA amendments); Rev. Proc. 2002-29,

2002-2 C.B. 1176 (required minimum distribution amendments); and Rev. Proc. 2003-13, 2003-1 C.B. 317 (required language for deemed IRAs).

1. 72(p): Section 1.72(p)-1 of the Income Tax Regulations relating to plan loans was published on December 3, 2002 (67 Fed. Reg. 71821).
2. 401(a)(4): Amendments to § 1.401(a)(4)-8 of the Regulations relating to new comparability plans were published on June 29, 2001 (66 Fed. Reg. 34535).
 - Rev. Rul. 2001-30, 2001-2 C.B. 46.
3. 401(a)(9):
 - Sections 1.401(a)(9)-1 through -9 of the Regulations were published on April 17, 2002 and June 15, 2004 (67 Fed. Reg. 18834 and 69 Fed. Reg. 33288).
4. 401(a)(17): Section 401(a)(17) of the Code was amended by § 611(c) of EGTRRA to increase the compensation limit to \$200,000.
 - Notice 2001-56, 2001-2 C.B. 277.
5. 401(a)(31):
 - Section 401(a)(31) was amended by § 643(b) of EGTRRA to allow employees' after-tax contributions to be rolled over under certain circumstances.
 - Section 401(a)(31)(B) was amended by § 657(a) of EGTRRA (as amended by § 411(t) of JCWAA) to provide for the automatic rollover of certain mandatory distributions. The effective date is March 28, 2005. Guidance is expected to be published soon which will include a sample amendment.
 - Sections 641, 642 and 643 of EGTRRA (as amended by § 411(q) of JCWAA) amended the definition of eligible retirement plan in § 402 to include a § 403(b) annuity contract and eligible governmental § 457(b) plan.
 - Rev. Rul. 2004-12, 2004-7 I.R.B. 478.
 - Section 636(b) of EGTRRA modified the definition of eligible rollover distribution to exclude hardship distributions.
6. 401(k):
 - Section 401(k)(2) and § 401(k)(10) of the Code were amended by § 646(a)(1) of EGTRRA to permit distributions of elective deferrals from a § 401(k) plan upon severance from employment.
 - Notice 2002-4, 2002-1 C.B. 298.
 - Section 636(a) of EGTRRA directed the Secretary of the Treasury to revise the regulations relating to safe harbor hardship distributions of elective deferrals from § 401(k) plans so that the time the employee is

prohibited from making elective and employee contributions is reduced from one year to six months.

- Notice 2001-56.
 - Notice 2002-4.
- Section 401(k)(11) of the Code was amended by § 611(f) of EGTRRA to increase the maximum amount of qualified salary reduction contributions that can be made to SIMPLE 401(k) plans.
 - Section 402(g) of the Code was amended by § 611(d) of EGTRRA to increase the applicable dollar amount.
 - Guidance regarding the ability to make deferrals with respect to post severance compensation is expected to be issued soon.
 - Section 401(m)(9) of the Code was amended by § 666 of EGTRRA to eliminate the multiple use test.
 - Final regulations under § 401(k) and § 401(m) are expected to be published by the end of the 2004 calendar year.
7. 402A: Section 402A of the Code was added by § 617 of EGTRRA to offer optional treatment of elective deferrals as designated Roth contributions to defined contribution plans, effective for taxable years beginning after December 31, 2005.
 - Proposed amendments to § 401(k) regulations which reflect § 402A will be issued soon, and final regulations are expected to be published in mid-2005.
 - It is expected that plan amendments will be required to reflect the portions of the § 401(k) regulations which reflect § 402A, when they are finalized.
 8. 408(q): Section 408(q) of the Code was added by § 602 of EGTRRA (as amended by § 411(i) of JCWAA) to allow for deemed individual retirement accounts (IRAs) in an eligible retirement plan.
 - Section 1.408(q)-(e)(8)(T) of the Regulations was published on July 22, 2004 (69 Fed. Reg. 43735).
 9. 411(a): Section 411(a) of the Code was amended by § 633 of EGTRRA (as amended by § 411(o) of JCWAA) to provide for faster vesting of matching contributions.
 10. 411(a)(11): Section 411(a)(11)(D) of the Code was added by § 648(a) of EGTRRA (as amended by § 411(r) of JCWAA) to allow amounts attributable to rollover contributions to be disregarded in determining the value of an account balance for involuntary distributions.
 11. 414(v): Section 414(v) of the Code was added by § 631 of EGTRRA (as amended by § 411(o) of JCWAA) to allow for catch-up contributions for individuals age 50 or older.

- Regulations under § 1.414(v) were published on July 8, 2003 (68 Fed. Reg. 40510).
 - Notice 2002-4.
12. 415(c): Section 415(c) of the Code was amended by §§ 611(b) and 632 of EGTRRA (as amended by § 411(p) of JCWAA) to increase the maximum annual additions permitted to the lesser of \$40,000 or 100% of compensation.
 - Rev. Rul. 2001-51, 2001-2 C.B. 427.
 - Rev. Rul. 2002-27, 2002-1 C.B. 925 provided that “compensation” within the meaning of § 415(c) could in certain situations include “deemed § 125 compensation”.
 - Guidance regarding post-severance compensation issues is expected to be issued soon.
 13. 416: Section 416 of the Code was amended by § 613 of EGTRRA (as amended by § 411(k) of JCWAA) to make several changes to the top-heavy rules.
 - Section 416(g)(4)(H) of the Code was added by § 613(d) of EGTRRA to provide certain safe harbor § 401(k) plans and § 401(m) plans an exemption from the top-heavy rules.
 - Rev. Rul. 2004-13, 2004-7 I.R.B. 485.
 14. 4975: Section 4975 of the Code was amended by § 612 of EGTRRA to allow plan loans for Subchapter S shareholder-employees.
 15. Miscellaneous
 - Rev. Rul. 2002-42, 2002-1 C.B. 76, provides guidance with respect to a situation where a money purchase pension plan is merged or converted into a profit sharing plan.
 - Rev. Proc. 2002-21, 2002-1 C.B. 911, provides guidance with respect to defined contribution retirement plans maintained by professional employer organizations.
 - Rev. Proc. 2003-86, 2003-2 C.B. 1211, amplifies Rev. Proc. 2002-21 relating to relief provided for certain defined contribution plans maintained by professional employer organizations.
 - Rev. Rul. 2004-10, 2004-7 I.R.B. 484, provides guidance with respect to charging administrative expenses to former and current employees.

V. REMEDIAL AMENDMENT PERIOD FOR RETROACTIVE ANNUITY STARTING DATE AMENDMENT

Background

Section 401(b) provides a remedial amendment period during which an amendment to a disqualifying provision may be made retroactively effective,

under certain circumstances, to comply with the requirements of § 401(a). Section 1.401(b)-1(b)(1) provides that a disqualifying provision includes an amendment to an existing plan which causes the plan to fail to satisfy the requirements of the Code applicable to the qualification of the plan as of the date the plan or amendment is first made effective.

As provided in § 1.401(b)-1(d), the remedial amendment period for a disqualifying provision described in § 1.401(b)-1(b)(1) begins, in the case of an amendment to an existing plan, on the date the plan amendment is adopted or put into effect (whichever is earlier). Generally, the remedial amendment period for a disqualifying provision described in § 1.401(b)-1(b)(1) ends with the due date (including extensions) for filing the income tax return for the employer's tax year that includes, in the case of an amendment to an existing plan, the date the plan amendment is adopted or put into effect (whichever is later). Section 1.401(b)-1(f) grants the Commissioner the discretion to extend the remedial amendment period.

Section 1.401(b)-1(b)(3) provides that the Commissioner may also designate as a disqualifying provision under § 401(b) a plan provision that 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, or (2) is integral to a qualification requirement that has been changed.

Section 1.401(b)-1(c) provides that a disqualifying provision includes the absence from a plan of a provision required by, or, if applicable, integral to the applicable change to the qualification requirements of the Code, if the plan was in effect on the date the change became effective with respect to the plan.

Pursuant to § 417(a)(7)(A), § 1.417(e)-1 of the Regulations provide that the qualified joint and survivor annuity (QJSA) explanation may be furnished on or after the annuity starting date under certain circumstances (that is, retroactive annuity starting date). The retroactive annuity starting date may be used only if the plan provides for such provision and the participant affirmatively elects to use the retroactive annuity starting date. The effective date is plan years beginning on or after January 1, 2004.

Designation of Disqualifying Provision

Plan provisions relating to a retroactive annuity starting date are hereby designated as disqualifying provisions under § 1.401(b)-1(b)(3). This will allow plan sponsors to adopt retroactive annuity starting date amendments in the 2005 plan year.

Drafting Information

The principal author of this notice is Dana A. 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).