ASC ALERT

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2015 Interim Amendments

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Practitioners who provide plan documents should review their clients' retirement plans to determine whether any plan amendment is necessary for 2015. This ASC Alert 2015-02 summarizes the responsibility practitioners have to ensure that their clients' plans remain up-to-date with legislative and regulatory requirements and the need to amend plans for 2015. In addition to addressing the amendment needs for pre-approved defined contribution plans and defined benefit plans, the Alert also discusses amendments for individually-designed cash balance plans, 403(b) plans and 457(b) plans.

Required Interim Amendments for ASCi Pre-Approved Plans for 2015

The Internal Revenue Service requires practitioners who are pre-approved (i.e., prototype and volume submitter) plan sponsors to make all necessary interim amendments to their plans and to timely communicate them to all adopting employers. This requirement is a condition for being a pre-approved plan sponsor. Failure to certify satisfaction of this requirement could jeopardize a practitioner's ability to sponsor pre-approved plans and require adopting employers to switch their plans to another pre-approved plan sponsor.

IRS procedures provide an extension of the remedial amendment period for a plan if an interim amendment is timely adopted in good faith with the intent of maintaining the qualified status of the plan ("good-faith amendment"). ASCi has determined that a 2015 interim good-faith amendment is necessary for the ASCi pre-approved defined contribution plans. No interim amendment will be necessary for the ASCi pre-approved defined benefit plans.

ASCi Pre-Approved Defined Contribution Plans – IRS regulations provide special minimum distribution rules under Code §401(a)(9) for "qualified longevity annuity contracts" (QLACs). (In general, a QLAC is an annuity contract that is purchased from an insurance company for the benefit of an employee under the plan in order to provide longevity protection. Under IRS regulations, a QLAC is not included in a participant's account balance in determining required minimum distributions.) While the use of QLACs has started slowly, more plans are using this distribution option for participants. For this reason, ASCi has determined that its pre-approved defined contribution plans should add the special minimum distribution provisions applicable when a plan uses a QLAC.

In addition to the QLAC-related interim amendment, ASCi has included two clarifying amendments to its 2015 Interim Amendment package. One clarifying amendment relates to same-sex marriage developments and the other relates to the determination of a valid rollover contribution. These clarifying amendments, although not considered required interim amendments, provide useful guidance for properly administering a plan.

ASCi Insight - ASCi will provide practitioners with 2015 Interim Amendment packages for its prototype and volume submitter defined contribution plans by the end of November. Practitioners who sponsor these types of plans should adopt the applicable interim amendments on behalf of their adopting employers by the end of 2015. Practitioners should then, within a reasonable period of time, provide the applicable interim amendment to adopting employers. Since the 2015 interim amendment does not contain any employer elections, adopting employers need not execute the interim amendment.

If an employer has not yet restated its pre-approved plan for PPA, the interim amendment may be included with the employer's PPA restatement.

REMINDER – Employers using pre-approved plans must restate their plans for PPA (i.e., the second defined contribution cycle) by April 30, 2016!! Because of issues relating to mid-year amendments, ASCi recommends restating safe harbor 401(k) plans by the end of the 2015 plan year.

ASCi Pre-Approved Defined Benefit Plans – ASCi has determined that no general interim amendment is required for its pre-approved defined benefit plan for 2015. (See the discussion below relating to interim amendments for individually-designed cash balance plans, which are not yet allowed under the current pre-approved defined benefit plan program.)

Individually-Designed Cash-Balance Plans

As ASCi was about to issue this ASC Alert, the IRS issued new regulations which provide for new transition rules for hybrid plans, including cash balance plans, to comply with the final "hybrid" plan regulations. The new transition rules allow cash balance plans to delay compliance with the final regulations until January 1, 2017. Therefore, ASCi has determined that no 2015 interim amendment is required for employers maintaining individually-designed cash balance plans.

ASCi Insight – ASCi will publish a separate ASC Alert analyzing the newly-released IRS regulations that provide for new transition rules for hybrid plans, including cash balance plans.

ASCi Insight – Cash balance plans currently must take an individually-designed format. Recent changes in IRS procedures will allow cash balance plans to use a pre-approved plan format in the future. Likely a pre-approved cash balance plan will not be available for adoption for several years. In the meantime, employers currently maintaining individually designed plans that intend to adopt pre-approved cash balance plans (when available) and do not wish to request an individually designed plan determination letter may complete Form 8905, Certification of Intent to Adopt a Pre-Approved Plan, before the end of their plan's current 5-year remedial amendment cycle.

Discretionary and Termination Amendments for 2015

Discretionary amendments are not required to maintain a plan's qualified status, but instead reflect an employer's desire to change its plan design. A failure to adopt such an amendment would not result in a plan's potential disqualification. However, a discretionary amendment will control the operation of the plan.

If an amendment is discretionary, the employer must adopt the amendment by the end of the plan year in which the plan amendment is effective. So, for a calendar plan year plan, the employer generally must adopt the amendment by December 31, 2015 to make the amendment effective for the 2015 plan year. Examples of discretionary amendments include changing the conditions for plan eligibility, amending the plan's vesting schedule, or modifying a plan's allocation method conditions or distribution options.

ASCi Insight – Although the deadline for adopting a discretionary amendment may be the end of the relevant year, employers may need to adopt an amendment earlier to avoid anti-cutback issues. IRS has stated that certain protected benefits cannot be reduced or eliminated. Once a participant's right to a benefit has accrued, an employer may only change such benefit provision prospectively.

Employers must amend a terminating plan for all laws and regulations in effect as of the date of termination. This rule applies even if the remedial amendment period that would apply to an on-going plan would allow a later amendment.

If an employer intends on terminating a plan by the end of 2015, it must amend the plan to reflect the required provisions, including all relevant required interim amendments. A Plan that has already been terminated during 2015 should not need to adopt this interim amendment.

ASCi Insight – ASCi provides termination amendments for its pre-approved defined contribution and defined benefit plans. ASCi generally recommends that the employer submit a terminating plan (including a pre-approved plan), as amended for termination, to the IRS for a determination letter using Form 5310.

Amendments for 403(b) Plans

No 2015 interim amendments are required for 403(b) plans. Under IRS procedures, 403(b) plans that were amended for the final 2007 Code §403(b) regulations by the end of 2010 have an extended remedial amendment period, which IRS will announce in the future. If the employer adopts a pre-approved 403(b) plan before the end of the remedial amendment period with its provisions retroactively effective to the first day of the remedial amendment period (generally January 1, 2010), the adopting employer is protected against adverse tax consequences with respect to defects in the form of the plan. Under the special remedial amendment period rules for 403(b) plans, IRS does not impose interim amendment requirements on such plans.

ASCi Insight – ASCi submitted several pre-approved 403(b) for approval under the new IRS program on April 30, 2015. We expect that the IRS will take about two years to review and approve the plans. If so, we estimate that the IRS will announce that the remedial amendment period for 403(b) plans will end sometime in 2019. Adoption of the ASCi pre-approved 403(b) plans will satisfy the IRS' retroactive amendment requirements.

Employers maintaining 403(b) plans must operationally conform to applicable regulatory rules, including the special minimum distribution rules relating to QLACs. An employer may need to make discretionary amendments if it wishes to change certain design features of the plan. An employer terminating a 403(b) plan will need to amend the plan for all laws and regulations in effect as of the date of termination.

Amendments for 457(b) Plans

Because there are no IRS rules for a remedial amendment for 457(b) plans, the concept of interim amendments does not apply to 457(b) plans. The consequence of not having a remedial amendment period means that an employer maintaining a 457(b) plan should amend the plan anytime that a law, regulation or other applicable guidance becomes effective. Although the interim amendment is merely a clarifying amendment, since the minimum distribution rules of Code §401(a)(9) apply to 457(b) plans, a 457(b) plan using QLACs (which we think is rare at this time) should amend the plan to reflect the revised minimum distribution regulations. A 457(b) plan may, but is not required to, adopt the additional provisions under the interim amendment.

ASCi Insight – Document providers using the ASCi 457(b) plans may request a "snap-on" amendment for plans using QLACs.

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