

November 2005

## IRS Establishes Cyclical Determination Letter Filing Periods

The Internal Revenue Service recently issued guidance which officially opens the determination letter program **beginning February 1, 2006** for changes under the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA). It also establishes fixed determination letter filing cycles for individually designed and pre-approved tax-qualified plans, and extends the EGTRRA remedial amendment period (for plans that adopted timely good faith amendments). The cycles are staggered and spread over a five year period for individually designed plans and a six year period for pre-approved plans.

### Individually Designed Plans

Plan sponsors of individually designed plans now may submit their plans for a determination letter only once every five years. In general, the last digit of the plan sponsor's EIN is used to determine the plan's five year cycle. The guidance also opens the EGTRRA remedial amendment period on **February 1, 2006** and extends it to the end of the plan's initial five year cycle, as shown in the following table:

Last Digit of EIN	Plan's Cycle	Last Day of Initial Cycle and of EGTRRA Remedial Amendment Period	Last Day of the Next 5-Year Cycle
1 or 6	A	January 31, 2007	January 31, 2012
2 or 7 and multiple employer plans	B	January 31, 2008	January 31, 2013
3 or 8 and governmental plans	C	January 31, 2009	January 31, 2014
4 or 9 and multiemployer plans	D	January 31, 2010	January 31, 2015
5 or 0	E	January 31, 2011	January 31, 2016

For a plan maintained by multiple members of a controlled group or an affiliated service group, the plan's five-year cycle is determined by reference to the last digit of the EIN that is or will be used to report the plan on Form 5500. If the members of a controlled group or affiliated service group maintain more than one plan, the employers may elect that the five-year cycle for all plans in the group (other than multiemployer and multiple employer plans) will be Cycle A. This election must be made jointly by all members of the group, unless it is a parent-sub-subsidiary controlled group, in which case the parent may elect to apply the cycle based on the last digit of the parent's EIN. This election is due no later than the end of the earliest cycle that would have applied to any member

of the group and cannot be amended or revoked, except in certain cases such as merger or plan spin-off. Revenue Procedure 2005-66 provides additional rules to determine the applicable cycle following a plan merger or spin-off, corporate acquisition, change in EIN or similar change to the plan sponsor.

The first opportunity to submit a plan for a letter based on the changes required under EGTRRA will be February 1, 2006. The Service now requires that individually designed plans be restated when submitted. Determination letters issued under this new structure cannot be relied on beyond the expiration date identified in the letter, which will generally be the end of the plan's first cycle that ends more than twelve months after the application was received. Thus, to avoid filing more than one application in any five year period, plan sponsors should file applications only during the last twelve months of a cycle. For example, a plan subject to Cycle B would file for a letter between February 1, 2007 and January 31, 2008. Such a plan may be filed earlier (this is referred to as filing "off cycle") but the resulting letter would expire on January 31, 2008 and another filing would be needed in order to obtain a determination letter that would be effective after January 31, 2008.

As part of the determination letter process, the Service will consider in its review only those qualification changes identified on the Service's published Cumulative List and any other change based on guidance issued before the publication of the Cumulative List. The List is expected to be published each November. Thus, for example, the Service will review an application for a plan subject to Cycle A (beginning February 1, 2006) based on the 2005 Cumulative List published in November of 2005 and any guidance preceding that date (whether or not identified on the List).

## Pre-Approved Plans

Sponsors of pre-approved plans (i.e., master, prototype and volume submitter plans) will be subject to a six year cycle in which to submit applications for opinion and advisory letters. The cycle is determined based on whether the plan is a defined contribution or a defined benefit plan. The initial cycle opened in February of 2005 and defined contribution plans have until January 31, 2006 to amend for EGTRRA and submit an initial application for an opinion or advisory letter on the specimen plan. Defined benefit plans have until January 31, 2008, except mass submitter plans and national sponsors which are subject to a deadline of October 31, 2007.

The Service will issue a notice within the two year period following the applicable submission deadline. This notice will advise adopting employers of the deadline for adoption of the approved specimen plan. Generally, employers will have approximately two years from the date of this notice in which to adopt the particular pre-approved plan.

If an employer makes amendments to its plan, the employer's ability to stay within the six year cycle may be affected. Generally, if an employer has adopted a pre-approved plan and amends such plan in a way that makes the plan ineligible for an opinion or advisory letter, or if the employer makes changes that are not based on an underlying pre-approved document, the cycle in which the employer makes these impermissible amendments remains the six year cycle until that cycle expires. The subsequent cycle is the five-year cycle.

## Interim Plan Amendments and Extension of EGTRRA Remedial Amendment Period

The five and six year cycles apply with respect to the timing and frequency of a determination letter application. However, plan sponsors must continue to amend their plans in accordance with the applicable remedial amendment periods. A remedial amendment period is the period during which a plan may be amended retroactively to comply with the qualification requirements under the Internal Revenue Code. Regulations and other guidance identify the disqualifying provisions that are eligible for such retroactive amendment and the period during which remedial amendments may be adopted. The Service has the discretion to extend this period and historically has done so where significant legislation requires numerous changes to be made to plans. If there is a failure to adopt timely amendments, or operate the plan in accordance with an amended plan provision, plan sponsors should consider whether the failure may be corrected through the Service's correction program known as the Employee Plans Compliance Resolution System.

With respect to the EGTRRA remedial amendment period, the extension includes the plan changes specifically required under EGTRRA, as well as certain other disqualifying provisions. As noted, in order to be eligible for the extension, interim good faith plan amendments must have been made by the applicable deadlines. However, the guidance expressly does not provide relief where the disqualifying plan provision violates the Code's "anti-cut-back" rule under section 411(d)(6).

## Next Steps

Plan sponsors should begin to prepare for the opening of the application process in February 2006 by first confirming the correct EIN for their plan(s). Then, plan sponsors should determine the cycle applicable to their plans(s) and, if an election to modify the cycle is available, whether the plan sponsor wishes to make such an election. Finally, plans also should be reviewed to identify any needed amendments.

*For further details and guidance regarding the determination letter process and applicable plan amendment requirements, please do not hesitate to contact your Seyfarth Shaw LLP attorney or contact any Employee Benefits attorney on the website at [www.seyfarth.com](http://www.seyfarth.com)*

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