

December 16, 2009

Year-End IRS Guidance: Limited PPA Amendment Relief, § 403(b) Opinion/Determination Letters, 2009 Cumulative List and § 409A/TARP Relief

Last week, the Internal Revenue Service (IRS) issued guidance on a variety of qualified and nonqualified retirement plan matters. As discussed below in greater detail, the IRS has: (1) extended the deadline for adopting certain amendments required by the Pension Protection Act of 2006 (PPA); (2) announced its plans to move forward with issuing opinion and determination letters for § 403(b) plans; (3) issued the 2009 Cumulative List of Changes in Plan Qualification Requirements; and (4) issued guidance reconciling certain restrictions under Internal Revenue Code § 409A with the payment of deferred compensation by financial institutions receiving assistance under the Troubled Asset Relief Program (TARP).

Limited PPA Amendment Extension

In [Notice 2009-97](#), the IRS extended the deadline for adopting certain amendments required by the PPA, as modified by the Worker, Retiree, and Employer Recovery Act of 2008 (WRERA). The extended deadline to adopt certain plan amendments is the last day of the first plan year that begins on or after January 1, 2010. The IRS extended the deadline to give plan sponsors time to take into account recently issued final regulations and regulations that are expected to be issued in the near future. Plans must, of course, continue operational compliance with respect to the affected provisions.

The extension applies *only* to amendments related to:

- Limits on benefits and benefit accruals for single-employer defined benefit plans based on a plan's funding status. (§§ 401(a)(29) and 436)
- Vesting and other special rules, such as rules relating to the prohibition on ceasing or limiting accruals on account of an individual's age, applicable to cash balance and other applicable defined benefit plans. (§§ 411(a)(13) and 411(b)(5))
- Diversification requirements for certain defined contribution plans that include investments in employer securities. (§ 401(a)(35)(E))

The notice also includes rules allowing the reduction of plan benefits in certain circumstances to comply with the limits on benefits and benefit accruals and the rules applicable to cash balance plans.

Approval Procedures for § 403(b) Plans

In [Announcement 2009-89](#), the IRS stated that it plans to move forward with issuing opinion and determination letters for § 403(b) plans and will provide certain retroactive relief for plan document failures for plan sponsors.

According to the Announcement, the IRS will issue a future revenue procedure regarding pre-approved prototype plan opinion letters that responds to comments on its draft procedure contained in

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[Announcement 2009-34](#). The procedures for obtaining a favorable determination letter on an individually designed plan will follow the pre-approved plan guidance, in a second revenue procedure. The Announcement further provides that, if a sponsoring employer has satisfied the conditions of [Notice 2009-3](#) and either adopts a pre-approved § 403(b) plan or requests a determination letter for an individually designed § 403(b) plan, the employer will have both:

- A remedial amendment period in which to amend the plan document to correct any form defects retroactive to January 1, 2010, and
- Reliance, beginning January 1, 2010, that the form of its written plan satisfies § 403(b), provided that the pre-approved plan is adopted retroactive to January 1, 2010, or the plan is amended to correct any document failures retroactive to January 1, 2010.

Employers may continue to rely on the model plan language issued in [Revenue Procedure 2007-71](#) until further notice. The IRS notes, however, that employers should not request rulings or determination letters on the form of their § 403(b) plan documents until after the publication of the upcoming guidance.

2009 Cumulative List

Each year, the IRS publishes a cumulative list of changes in plan qualification requirements that must be reflected in plans submitted for determination letters. The [2009 Cumulative List](#) is intended to be used primarily by sponsors of individually designed plans that are in filing Cycle E, which are those plans with a submission period for determination letters from February 1, 2010, through January 31, 2011. The 2009 Cumulative List does not affect the deadline for operational compliance with any plan qualification requirements. Plan sponsors preparing determination letter requests in Cycle D, which ends on January 31, 2010, should refer to the 2008 Cumulative List, published in [Notice 2008-108](#).

In addition to guidance included in the 2008 Cumulative List, the 2009 Cumulative List includes several changes made by the PPA, WRERA, the Heroes Earnings Assistance and Relief Tax Act of 2008, and the Emergency Economic Stabilization Act of 2008. Key changes include:

- Permitting in-service distributions from a § 401(k) plan for reservists called to active duty after December 31, 2007.
- A suspension of the minimum distribution requirement for 2009 for defined contribution plans.
- Guidance for defined contribution plans containing qualified automatic contribution arrangements.
- Extending the period to provide notice under § 402(f) from 90 days to 180 days.
- Requiring direct rollovers to non-spouse beneficiaries.
- Eliminating the requirement that distributions of excess deferrals under a § 401(k) plan include “gap period” income.
- A temporary delay of the designation of multiemployer plans in endangered or critical status, and a temporary extension of the funding improvement or rehabilitation periods for multiemployer plans in endangered or critical status for 2008 and 2009.

409A Relief for Payments Under TARP Advisory Opinions

[Notice 2009-92](#) provides limited relief for certain financial institutions that receive assistance under TARP from certain restrictions under the § 409A deferred compensation rules. Section 409A limits the ability to make changes in the time or form of payments under covered nonqualified deferred compensation arrangements. The Notice generally provides that TARP recipients (and their employees and service providers) will not violate § 409A if changes to the time or form of payments under a nonqualified deferred compensation plan are made to comply with the requirements of certain advisory opinions issued by the Special Master for TARP Executive Compensation after September 30, 2009.

Among the requirements for relief under the Notice is that the Special Master's advisory opinion specifically address the relevant compensation arrangement, including changes to the time and form of payment or any payment condition imposed on the TARP recipient that is related to the receipt or repayment of TARP funds. In addition, the TARP recipient must enter into a written agreement adopting the advisory opinion within a certain time period. The IRS plans to issue regulations consistent with the relief provided in the Notice.



If you have any questions about this development, please feel free to contact any of the attorneys listed below or the Sutherland attorney with whom you regularly work.

Daniel M. Buchner	202.383.0869	daniel.buchner@sutherland.com
Adam B. Cohen	202.383.0167	adam.cohen@sutherland.com
Jamey A. Medlin	404.853.8198	jamey.medlin@sutherland.com
Alice Murtos	404.853.8410	alice.murtos@sutherland.com
Joanna G. Myers	202.383.0237	joanna.myers@sutherland.com
Robert J. Neis	404.853.8270	robert.neis@sutherland.com
Vanessa A. Scott	202.383.0215	vanessa.scott@sutherland.com
W. Mark Smith	202.383.0221	mark.smith@sutherland.com
William J. Walderman	202.383.0243	william.walderman@sutherland.com
Carol A. Weiser	202.383.0728	carol.weiser@sutherland.com