

Qualified retirement plans in 2017 and beyond: first Operational Compliance List issued

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Introduction

In Revenue Procedure 2016-37, the Internal Revenue Service (IRS) formally announced the elimination – effective January 1 2017 – of the five-year remedial amendment cycle system for individually designed qualified retirement plans.⁽¹⁾ The IRS further announced that it would publish each year a Required Amendments List and provide an Operational Compliance List in place of the cumulative list of amendments that previously provided guidance to these plans. The first Required Amendments List was published in early December 2016 and the first Operational Compliance List was provided on the IRS website at the end of February 2017. Both lists present an opportunity to develop procedures for maintaining qualified status in 2017 and beyond.

This update discusses some resources and considerations that can help to inform employers in such actions as plan sponsor and replaces the earlier update "[Qualified retirement plans in 2017 and beyond: resources and considerations for employers](#)".

Required Amendments List is not exhaustive

The Required Amendments List published in IRS Notice 2016-80 includes a single amendment that is potentially applicable only to certain defined benefit plans. This brevity highlights both the scope and limitations of the Required Amendments List.

The IRS has stated that the Required Amendments List is intended to include statutory and administrative changes in qualification requirements that are first effective during the calendar year in which the list is published.⁽²⁾ In general, plans must be amended for such requirements within the remedial amendment period – this is no later than the end of the second calendar year which begins after the issuance of the Required Amendments List in which the change in qualification requirements appears (ie, with respect to the recently published Required Amendments List, December 31 2018).

The Required Amendments List is not intended to include the following:

- statutory changes in qualification requirements for which the Treasury Department and the IRS expect to issue guidance (which could be included on the Required Amendments List in the future);
- changes in qualification requirements that permit (but do not require) optional plan provisions; or
- changes in the tax laws affecting qualified plans that do not change the qualification requirements *per se*, such as changes to funding requirements.

This suggests that, while the Required Amendments List can serve as the starting point for

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determining whether any plan amendments are required, it should not be treated as definitive. Rather, employers will need to undertake a more extensive review of a given plan's terms in the context of existing legal rules. However, not all amendments listed on the Required Amendments List will be appropriate for every plan. The responsibility for determining whether and when an amendment is required will continue to rest with the plan sponsor.

Operational Compliance List may be required before plan amendment

The Operational Compliance List provided on the IRS website identifies changes in qualification requirements that are effective during a calendar year. These may involve either mandatory or discretionary plan amendments, as well as other significant guidance that affects plan operations. At present, the Operational Compliance List addresses both 2016 and 2017.

For 2016, items include:

- permitted mid-year changes to safe harbour 401(k) plans; and
- proposed regulations regarding normal retirement age for governmental plans.

For 2017, items include:

- guidance applicable to specific types of defined benefit plan (eg, closed plans and cash balance or hybrid plans); and
- proposed regulations regarding qualified non-elective contributions and qualified matching contributions in defined contribution plans.

The Operational Compliance List will be updated on the IRS website, but will not be formally published. Therefore, employers should consult it periodically to remain apprised of the latest updates.

While the Operational Compliance List may assist employers in achieving operational compliance with the enumerated changes, the IRS website notes that a plan must continue to comply operationally with respect to each relevant qualification requirement, even if the requirement is not included on the Operational Compliance List. Further, operational changes may be required immediately (ie, before the end of the remedial amendment period) for any corresponding plan amendment which permits retroactive adoption. The resulting period between required operational and required documentary compliance can extend to a year or more, so employers should develop strategies for ensuring consistency between plan operations and the required terms of the amendments that memorialise them.

Limited reliance on existing determination letters

Determination letters issued before January 4 2016 included automatic expiration dates which are no longer operative. Instead, the IRS has stated that plan sponsors that maintain a qualified plan for which a favourable determination letter has been issued and that are otherwise entitled to rely on the determination letter may not continue to rely on the determination letter with respect to a plan provision that is subsequently amended or subsequently affected by a change in law. However, a plan sponsor may continue to rely on a determination letter with respect to plan provisions that are not amended or affected by a change in law.

Although the ability to rely on an existing determination letter is therefore limited, it is nonetheless significant. In order to maximise the available reliance, employers may wish to:

- preserve the version of the plan document for which the most recent determination letter was issued, so that any subsequent amendments can be clearly identified;
- weigh stylistic revisions to the plan document (whether via amendment or restatement) against their potential impact on reliance; and
- consider the desired reliance on the existing plan document when drafting future amendments – for example, in assessing which sections to amend and how best to do so.

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Endnotes

(1) Individually designed plans in Cycle A (those with plan sponsors whose employer identification numbers end in 1 or 6) had a final opportunity to submit a request for an advance determination letter in the Cycle A submission period ending on January 31 2017.

(2) See Rev Proc 2016-37.

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