

2021 Required Amendments List for Individually Designed Qualified and Section 403(b) Plans

Notice 2021-64

I. PURPOSE

This notice sets forth the 2021 Required Amendments List (2021 RA List). The Required Amendments List (RA List) applies to both individually designed plans qualified under section 401(a) of the Internal Revenue Code (Code) (qualified individually designed plans) and individually designed plans that satisfy the requirements of section 403(b) (section 403(b) individually designed plans).

Section 5.05 of Rev. Proc. 2016-37, 2016-29 IRB 136,¹ provides generally that, except as otherwise provided by statute, or by regulations or other guidance published in the Internal Revenue Bulletin, in the case of a qualified individually designed plan that is not a governmental plan within the meaning of section 414(d), the remedial amendment period for a disqualifying provision arising as a result of a change in qualification requirements is extended to the end of the second calendar year that begins after the issuance of the RA List in which the change in qualification requirements appears. Similarly, section 5.03(1) of Rev. Proc. 2019-39, 2019-42 IRB 945,² provides generally that, except as otherwise provided by statute, or by regulations or other guidance published in the Internal Revenue Bulletin, with respect to a form defect in a section 403(b) individually designed plan that is not a governmental plan within the meaning of section 414(d), the remedial amendment period arising as a result of a change in section 403(b) requirements ends on the last day of the second calendar year that begins after the issuance of the RA List on which the change in section 403(b) requirements appears. Pursuant to these sections, and section 8.01 of Rev. Proc. 2016-37 and section 6.01 of Rev. Proc. 2019-39, December 31, 2023, generally is both the last day of the remedial amendment period and the plan amendment deadline with respect to (1) a disqualifying provision arising as a result of a change in qualification requirements that appears on the 2021 RA List, and (2) a form defect arising as a result of a change in section 403(b) requirements that appears on the 2021 RA List. Later dates may apply to a governmental plan within the meaning of section 414(d) pursuant to sections 5.06(3) and 8.01 of Rev. Proc. 2016-37 and sections 5.03(2)(c) and 6.01 of Rev. Proc. 2019-39. References to qualification requirements and to section 403(b)

¹ For purposes of this revenue procedure, references to Rev. Proc. 2016-37 are to Rev. Proc. 2016-37, as modified by Rev. Proc. 2017-41, 2017-29 IRB 92, Rev. Proc. 2019-20, 2019-20 IRB 1182, Rev. Proc. 2020-40, 2020-38 IRB 575, and Rev. Proc. 2021-38, 2021-38 IRB 425.

² For purposes of this revenue procedure, references to Rev. Proc. 2019-39 are to Rev. Proc. 2019-39, as modified by Notice 2020-35, 2020-25 IRB 948, Rev. Proc. 2020-40, and Rev. Proc. 2021-37, 2021-38 IRB 385.

requirements in Parts III and IV of this notice are referred to, separately and collectively, as “requirements.”³

II. BACKGROUND

Section 401(b) of the Code provides a remedial amendment period during which a plan may be amended retroactively to comply with the qualification requirements under section 401(a). Section 1.401(b)-1 describes the disqualifying provisions that may be amended retroactively and the remedial amendment period during which retroactive amendments may be adopted. That regulation also grants the Commissioner of Internal Revenue the discretion to designate in guidance published in the Internal Revenue Bulletin certain plan provisions as disqualifying provisions and to extend the remedial amendment period.

Sections 5.05 and 5.06 of Rev. Proc. 2016-37 extend the remedial amendment period for individually designed plans to correct disqualifying provisions that arise as a result of a change in qualification requirements. Sections 5.05 and 5.06 provide that, except as otherwise provided by statute, or by regulations or other guidance published in the Internal Revenue Bulletin, those sections set forth the extended remedial amendment period for disqualifying provisions. Under section 5.05(3), the remedial amendment period for a plan that is not a governmental plan within the meaning of section 414(d) is extended to the end of the second calendar year that begins after the issuance of the RA List on which the change in qualification requirements appears. Section 5.06(3) provides a special rule for governmental plans that may further extend the remedial amendment period in some cases.

Section 8.01 of Rev. Proc. 2016-37 provides that the plan amendment deadline with respect to a disqualifying provision described in section 5 of Rev. Proc. 2016-37 is the date on which the remedial amendment period ends with respect to that disqualifying provision.

Section 21.02 of Rev. Proc. 2013-22, 2013-18 IRB 985,⁴ establishes an initial remedial amendment period that permits an eligible employer to retroactively correct form defects in its written section 403(b) plan.

Rev. Proc. 2017-18, as modified by Notice 2020-35, 2020-25 IRB 948, provides that the initial remedial amendment period for a form defect in a section 403(b) plan ends on June 30, 2020.

³ In order to help plan sponsors achieve operational compliance with changes in requirements, the IRS provides the Operational Compliance List, which is a list of changes in both qualification requirements and section 403(b) requirements that are effective during a calendar year, on the IRS website at <https://www.irs.gov/retirement-plans/operational-compliance-list>. See section 10 of Rev. Proc. 2016-37 and section 9 of Rev. Proc. 2019-39.

⁴ Rev. Proc. 2013-22 was modified by Rev. Proc. 2014-28, 2014-16 I.R.B. 944, and Rev. Proc. 2015-22, 2015-11 I.R.B. 754, and clarified by Rev. Proc. 2017-18, 2017-5 I.R.B. 743.

Section 5.01 of Rev. Proc. 2019-39 establishes a system of recurring remedial amendment periods for section 403(b) individually designed plan form defects first occurring after the last day of the initial remedial amendment period.

Section 5.03(1) of Rev. Proc. 2019-39 provides that, except as otherwise provided by statute, or by regulations or other guidance published in the Internal Revenue Bulletin, with respect to a form defect relating to, or integral to, a change in section 403(b) requirements that occurs after the initial remedial period, the remedial amendment period for a section 403(b) individually designed plan that is not a governmental plan within the meaning of section 414(d) ends on the last day of the second calendar year that begins after the issuance of the RA List on which the change in requirements appears. Section 5.03(2)(c) provides a special rule for governmental plans that could further extend the remedial amendment period in some cases.

Section 6.01 of Rev. Proc. 2019-39 generally provides that the plan amendment deadline with respect to a form defect in a section 403(b) individually designed plan first occurring after the initial remedial amendment period is the date on which the remedial amendment period ends with respect to that form defect.

Section 7 of Rev. Proc. 2019-39 (as modified by Notice 2020-35), extends the initial remedial amendment period with respect to a section 403(b) individually designed plan form defect first occurring on or before June 30, 2020, to the later of (1) June 30, 2020, or (2) the end of the remedial amendment period provided under section 5 of Rev. Proc. 2019-39.

Section 9 of Rev. Proc. 2016-37 and section 8.01 of Rev. Proc. 2019-39 provide that the Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS) intend to publish an RA List annually. In general, a change in qualification requirements will not appear on an RA List until guidance with respect to that change (including, in certain cases, model amendments) has been provided in regulations or in other guidance published in the Internal Revenue Bulletin. However, in the discretion of the Treasury Department and the IRS, a change in qualification requirements may be included on an RA List in other circumstances, such as in cases in which a statutory change is enacted and the Treasury Department and the IRS anticipate that no guidance will be issued.

The remedial amendment period applicable to a disqualifying provision arising as a result of a change in qualification requirements may be extended beyond the date that normally would apply to an item included on an RA List, if, for example, a statute, regulation or other guidance published in the Internal Revenue Bulletin provides for a later deadline.

III. CONTENT AND ORGANIZATION OF RA LIST

In general, an RA List includes statutory and administrative changes in requirements that are first effective during the plan year in which the list is published.⁵ However, an RA List does not include:

- Guidance issued or legislation enacted after the list has been prepared;
- Statutory changes in requirements for which the Treasury Department and the IRS expect to issue guidance that would be included on an RA List issued in a future year;
- Changes in requirements that permit (but do not require) optional plan provisions, in contrast to changes in requirements that cause existing plan provisions (which may include optional plan provisions previously adopted) to become disqualifying provisions or section 403(b) form defects;⁶ or
- Changes in the tax laws affecting qualified individually designed plans or section 403(b) individually designed plans that do not change the requirements (such as changes to the tax treatment of plan distributions, or changes to the funding requirements for qualified individually designed plans).

The RA List is divided into two parts. Part A covers changes in requirements that generally would require an amendment to most plans or to most plans of the type affected by the change.

Part B includes changes in requirements that the Treasury Department and the IRS anticipate will not require amendments to most plans but might require an amendment because of an unusual plan provision in a particular plan. For example, if a change affects a particular requirement that most plans incorporate by reference, Part B would include that change because a particular plan might not incorporate the requirement by reference and, thus, might include language inconsistent with the change.

Annual, monthly, or other periodic changes to (1) the various dollar limits that are adjusted for cost of living increases as provided in section 415(d) or other Code provisions, (2) the spot segment rates used to determine the applicable interest rate under section 417(e)(3), and (3) the applicable mortality table under section 417(e)(3),

⁵ RA Lists also may include changes in requirements that were first effective in a prior year that were not included on a prior RA List under certain circumstances, such as changes in requirements that were issued or enacted after the prior year's RA List was prepared.

⁶ The remedial amendment period and plan amendment deadline for discretionary changes to the terms of a qualified individually designed plan are governed by sections 5.05(2), 5.06(2), and 8.02 of Rev. Proc. 2016-37. The remedial amendment period and plan amendment deadline for discretionary changes to the terms of a section 403(b) individually designed plan are governed by sections 5.03(1)(b), 5.03(2)(b), and 6.02 of Rev. Proc. 2019-39. These deadlines for discretionary changes are not affected by the inclusion of a change in requirements on an RA List.

are treated as included on the RA List for the year in which such changes are effective even though they are not directly referenced on that RA List. The Treasury Department and the IRS anticipate that few plans have language that will need to be amended on account of these changes.

The fact that a change in a requirement is included on the RA List does not necessarily mean that a plan must be amended as a result of that change. Each plan sponsor must determine whether a particular change in a requirement requires an amendment to its plan.

IV. 2021 REQUIRED AMENDMENTS LIST

Part A. Changes in requirements that generally would require an amendment to most plans or to most plans of the type affected by the change.

- *Special Financial Assistance Program for financially troubled multiemployer plans* (American Rescue Plan Act of 2021 section 9704). Section 9704 of the American Rescue Plan Act of 2021, Pub. L. 117-2, 135 Stat. 4, added section 4262 to the Employee Retirement Income Security Act of 1974, Pub. L. 93-406, 88 Stat. 829, as amended (ERISA) and section 432(k) to the Code. Under section 4262 of ERISA, the sponsor of an eligible multiemployer plan as defined in section 4262(b) of ERISA may apply to the Pension Benefit Guaranty Corporation (PBGC) to receive special financial assistance, provided certain conditions are satisfied. Section 432(k) of the Code provides rules relating to an eligible multiemployer plan that applies to PBGC for special financial assistance. Section 432(k)(2)(A)(i) provides that an eligible multiemployer plan receiving special financial assistance under section 4262 of ERISA must reinstate any benefits that were suspended under section 432(e)(9) of the Code or section 4245(a) of ERISA (which corresponds to section 418E(a) of the Code), effective as of the first month in which the effective date for the special financial assistance occurs, for participants and beneficiaries as of such month. Section 432(k)(2)(A)(ii) provides that an eligible multiemployer plan must also provide payments equal to the amount of benefits previously suspended to any participants or beneficiaries in pay status as of the effective date of the special financial assistance, payable as determined by the plan as a lump sum within three months of the effective date or in equal monthly installments over a period of five years, commencing within three months of the effective date, with no adjustment for interest.

Notice 2021-38, 2021-30 IRB 155 provides guidance under section 432(k). Among other things, Notice 2021-38 provides that, under section 432(k)(2)(A)(i), if an eligible multiemployer plan receiving special financial assistance was previously amended to suspend

benefits pursuant to section 432(e)(9) of the Code or section 4245(a) of ERISA, or had suspended benefits operationally under section 418E(a) of the Code without adopting a plan amendment, the plan must be amended to reinstate those suspended benefits, effective as of the month in which the special financial assistance is paid to the plan, for individuals who are participants or beneficiaries as of that month. Notice 2021-38 also provides that under section 432(k)(2)(A)(ii), an eligible multiemployer plan that receives special financial assistance must be amended to provide make-up payments to individuals who are participants or beneficiaries on, and who have commenced benefits by, the date the special financial assistance is paid to the plan. The make-up payments to a participant or a beneficiary must be paid, as determined by the plan sponsor, either as a lump sum within three months of the date the special financial assistance is paid to the plan or in equal monthly installments over a period of five years, commencing within three months of the date the special financial assistance is paid. The plan amendment providing for the make-up payments must also specify which distribution form (that is, a lump-sum payment or monthly installments) will apply for the make-up payments to a participant or beneficiary.

Part B. Other changes in requirements that may require an amendment.

- *None*

V. DRAFTING INFORMATION

The principal author of this notice is Angelique Carrington of the Office of Associate Chief Counsel (Employee Benefits, Exempt Organizations, and Employment Taxes). For further information regarding this notice, contact Ms. Carrington at (202) 317-4148 (not a toll-free number).