

EMPLOYEE PLANS - ISSUE FOCUS

TERMINATIONS

April 17, 2014

Rev. Proc. 2014-6 (as annually updated) provides that a terminating plan must be amended for all current law which is applicable to the plan even if the date by which the plan is required to be amended has not yet passed. See also Section 8 of Rev. Proc. 2007-44 regarding plan termination. Therefore, even though remedial amendment periods for the Pension Protection Act of 2006 (PPA '06), the U.S. Troop Readiness, Veterans' Care, Katrina Recovery and Iraq Accountability Appropriations Act of 2007, the Heroes Earnings Assistance and Relief Tax Act of 2008 (HEART) and Worker, Retiree, and Employer Recovery Act of 2008 (WRERA), the Small Business Jobs Act of 2010 (SBJA), the Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010 (PRA 2010), the Moving Ahead for Progress in the 21st Century Act (MAP-21) and the American Taxpayer Relief Act of 2012 (ATRA) may not be closed, a terminating plan is required to be properly amended to conform to these statutory provisions.

This report will update those previously provided Issue Foci with the "New" items listed on the 2013 Cumulative List identified below, as well as other provisions of the several Acts listed above which would be applicable to plans terminating in their 2014 plan year. Please note that this update is not an all inclusive list of required plan changes. Therefore, determination specialists should review terminating plans for compliance with all applicable law in effect at the date of termination.

Appendix

EXPLANATION OF THE “NEW” QUALIFICATION REQUIREMENTS FROM NOTICE 2013-84 (2013 CL)

401(a):

United States v. Windsor, 570 U.S. ____, 133 S. Ct. 2675 (2013). The Supreme Court found that Section 3 of the Defense of Marriage Act (DOMA), which provides that in determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife, is unconstitutional because it violates the principles of equal protection.

Change: The Court in *Windsor* held that DOMA’s stipulation that “marriage” and “spouse” apply to opposite-sex couples only, for Federal law interpretations, is unconstitutional. For qualified plan purposes, plan documents have been administered for many purposes (such as required minimum distributions) consistent with DOMA requirements. Consequently, the unconstitutionality of this section of the statute requires plans to afford the same treatment to same-sex married couples as to opposite-sex marriages. (Note that civil unions and other forms of domestic partnership which constitute a lesser unification than marriage under applicable state law would not be entitled to this same treatment.)

Effective Date: The decision was issued June 26, 2013, and was generally effective immediately. Therefore, plans must be operated in accordance with *Windsor* as of June 26, 2013. Notice 2014-19 extended required amendments for ongoing plans to no earlier than the later of (a) the remedial amendment date for purposes of adopting an interim amendment on account of the plan year which includes June 26, 2013, or (b) December 31, 2014, for ongoing calendar year plans. Governmental plans have until the close of the first regular legislative session of the legislative body with the authority to amend the plan that ends after December 31, 2014. (Terminating plans must be properly amended to conform to all law in effect at termination, such that the remedial amendment period conferred by this extension may be cut short.)

An amendment for this purpose must generally be made effective as of June 26, 2013, but may be made effective as of September 16, 2013, if the plan applied a “state of domicile rule” for same sex marriage determinations. Amendments can be made effective for periods beginning before June 26, 2013, to the extent that they do not result in discrimination under IRC § 401(a)(4) and do not create other adverse consequences (such as unforeseen attribution.)

Plan Language: Required to the extent plans need to conform by removing conflicting language, otherwise not required for plans that do not have terms in conflict with the decision.

Revenue Ruling 2013-17, 2013-38 I.R.B. 201, provides that for Federal tax purposes, the terms “spouse,” “husband and wife,” “husband,” and “wife” include an individual married to a person of the same sex if the individuals are lawfully married under state law, and the term “marriage” includes such a marriage between individuals of the same sex and the Service adopts a general rule recognizing a marriage of same-sex individuals that was validly entered into in a state whose laws authorize the marriage of two individuals of the same sex even if the married couple is domiciled in a state that does not recognize the validity of same-sex marriages.

Change: Providing administrative interpretation in order to implement the Windsor decision, the Ruling provides that for Federal tax purposes, the terms “spouse,” “husband and wife,” “husband,” and “wife” include an individual married to a person of the same sex if the individuals are lawfully married under state law. The term “marriage” includes a marriage between individuals of the same sex if the marriage was validly entered into in a state whose laws authorize the marriage of two individuals of the same sex, even if the married couple is domiciled in a state that does not recognize such a marriage. Finally, the terms “spouse,” “husband and wife,” “husband,” and “wife” do not include individuals (whether of the opposite sex or the same sex) who have entered into a registered domestic partnership, civil union, or other similar formal relationship recognized under state law that is not denominated as a marriage under the laws of that state, and the term “marriage” does not include such formal relationships.

Effective Date: The publication date – September 16, 2013 – is the effective date of the Ruling. Plans must be operated consistent with the issuance of the Windsor decision on June 26, 2013, but have an extended remedial amendment period to conform any necessary changes until the later of (a) the remedial amendment date for purposes of adopting an interim amendment on account of the plan year which includes June 26, 2013, or (b) December 31, 2014. Terminating plans may not be entitled to this extended period, as they must be amended as of the date of termination.

Plan Language: Required to the extent plans need to conform by removing conflicting language, otherwise not required for plans that do not have terms in conflict with the decision.

401(a)(35):

Notice 2013-17, 2013-20 I.R.B. 1082, provides relief from anti-cutback rules for an amendment to an ESOP to eliminate all in-service distribution options previously used to satisfy the diversification requirements of § 401(a)(28)(B)(i).

Change: The anti-cutback provisions of IRC § 411(d)(6) provide that an employer cannot amend-out certain benefits – including distribution rights – if they have already been accrued by participants. However, after enactment of PPA '06 and the addition of § 401(a)(35) to the Code, some ESOPs may have conflicting diversification and distribution provisions in their plans. In the case of an ESOP that satisfies the diversification requirements of § 401(a)(28)(B) by distributing a portion of the participant's account in accordance with § 401(a)(28)(B)(ii)(I) and then becomes subject to the requirements of § 401(a)(35), the plan must be amended to eliminate this distribution option, provided this amendment is adopted and made effective no earlier than the effective date of § 401(a)(35) with respect to the plan, and no later than the plan's PPA '06 § 1107 date.

Effective Date: Effective for any year beginning on or after January 1, 2013 in which the plan becomes subject to § 401(a)(35).

Plan Language: Required if the plan satisfies the diversification requirements of § 401(a)(28)(B) by distributing a portion of the participant's account and the plan subsequently becomes subject to § 401(a)(35). In which case an amendment is due by the later of (a) the plan's 2013 plan year, or (b) the due date of the income tax return of the plan sponsor for the year which includes the plan year for which the plan first became subject to § 401(a)(35).

401(k) & 401(m):

Final regulations provide guidance on permitted mid-year reductions or suspensions of safe harbor nonelective contributions in certain circumstances for amendments adopted after May 18, 2009 and revise the requirements for permitted mid-year reductions or suspensions of safe harbor matching contributions for plan years beginning on or after January 1, 2015 were published on November 15, 2013.

Change: Final regulations (published at T.D. 9641) permit sponsors of safe-harbor 401(k) arrangements to reduce or suspend 401(k) plan safe harbor nonelective and matching contributions midyear if appropriate conditions are met. For plan years beginning after 2014, these contributions may be suspended if the sponsor is either operating at an economic loss for the plan year or has previously given a reduction/suspension notice to participants. For plan years beginning before 2015, to reduce or suspend safe harbor matching contributions midyear, employers do not have to be operating an economic loss, and instead

only have to meet certain procedural requirements, including adoption of a plan amendment before the end of the plan year.

Effective Date: generally effective November 15, 2013, for plan years beginning after January 1, 2015.

Plan Language: Optional, to the extent that a plan sponsor wants to suspend / reduce safe harbor contributions mid-year, in which case an amendment to the plan would be due before the end of that applicable plan year, and effective no earlier than its adoption date or 30 days after giving notice to participants.

402A:

Notice 2013-74 provides guidance under new § 402A(c)(4)(E) relating to the expansion of rollovers from § 401(k) plans, § 403(b) plans, and governmental § 457(b) plans to designated Roth accounts in the same plan (“in-plan Roth rollovers”). Section 402A(c)(4)(E) provides for in-plan Roth rollovers of otherwise nondistributable amounts. This notice also provides guidance that applies to all in-plan Roth rollovers under § 402A(c)(4).

Change: The Notice provides guidance on rollovers within a retirement plan to designated Roth accounts in the same plan. These “in-plan Roth rollovers” are enabled under new § 402A(c)(4)(E) as added by § 902 of ATRA. Prior to amendment, IRC § 402A(c)(4)(E) permitted rollovers from other tax-deferred arrangements only to the extent the amounts were “distributable” under the terms of those prior arrangements. As amended by ATRA, § 402A(c)(4)(E) permits rollovers of even “non-distributable” amounts.

Effective Date: Generally effective for in-plan Roth rollovers made after December 31, 2012.

Plan Language: Optional. However a plan amendment providing for that option must be adopted no later than the later of the last day of the first plan year in which the amendment is effective, or December 31, 2014, provided the amendment is effective as of the date the plan first operates in accordance with the amendment.

411(d)(6):

Notice 2013-17 provides relief from anti-cutback rules for an amendment to an ESOP to eliminate all in-service distribution options previously used to satisfy the diversification requirements of § 401(a)(28)(B)(i).

Change: The anti-cutback provisions of IRC § 411(d)(6) provide that an employer cannot amend-out certain benefits – including distribution rights – if they have already been accrued by participants. However, after enactment of

PPA '06 and the addition of § 401(a)(35) to the Code, some ESOPs may have conflicting diversification and distribution provisions in their plans. In the case of an ESOP that satisfies the diversification requirements of § 401(a)(28)(B) by distributing a portion of the participant's account in accordance with § 401(a)(28)(B)(ii)(I) and then becomes subject to the requirements of § 401(a)(35), the plan may be amended to eliminate the distribution option, provided this amendment is adopted and made effective no earlier than the effective date of § 401(a)(35) with respect to the plan, and no later than the plan's PPA '06 § 1107 date.

Effective Date: Effective for any year beginning on or after January 1, 2013 in which the plan is subject to § 401(a)(35).

Plan Language: Required if the plan satisfies the diversification requirements of § 401(a)(28)(B) by distributing a portion of the participant's account and the plan subsequently becomes subject to § 401(a)(35). In which case an amendment is due by the later of (a) the plan's 2013 plan year, or (b) the due date of the income tax return of the plan sponsor for the year which includes the plan year for which the plan first became subject to § 401(a)(35).

436:

Notice 2013-11, 2013-11 I.R.B. 610, provides guidance on the 25-year average segment rates that are applied to adjust the otherwise applicable 24-month average segment rates that are used to compute the minimum contribution requirements for single-employer defined benefit plans under § 430 of the Code and § 303 of the Employee Retirement Income Security Act of 1974 (ERISA), as amended by MAP-21, for plan years beginning in 2013.

Change: Section 40211(a) of MAP-21 adds § 430(h)(2)(C)(iv), generally effective for plan years beginning on or after January 1, 2012. Section 430(h)(2)(C)(iv) provides that, for a plan year, each of the three segment rates described in § 430(h)(2)(C)(i), (ii), and (iii) is adjusted as necessary to fall within a specified range that is determined based on a percentage of the average of the corresponding segment rates for the 25-year period ending on September 30 preceding the calendar year that includes the first day of that plan year. Under § 430(h)(2)(C)(iv)(II), for plan years beginning in 2013, each segment rate is adjusted so that it is no less than 85% and no more than 115% of the corresponding 25-year average segment rate. For later plan years, this range is gradually expanded, so that the segment rates for plan years beginning after 2015 are no less than 70% and no more than 130% of the corresponding 25-year average segment rates. Section 430(h)(2)(C)(iv)(I) provides that the Secretary may prescribe equivalent rates for any years in the 25-year period for which segment rates are not available.

Effective Date: Effective for plan years beginning on or after January 1, 2013.

Plan Language: Not required, to the extent the plan either incorporates these rates by reference, or by its terms self-adjusts to comply with these requirements.