EMPLOYEE PLANS - ISSUE FOCUS

TERMINATIONS

January 28, 2015

Rev. Proc. 2015-6 (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), the American Taxpayer Relief Act of 2012 (ATRA), the Highway and Transportation Funding Act of 2014 (HATFA), and the Cooperative and Small Employer Charity Pension Flexibility Act (CSEC Act) 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 2014 Cumulative List identified below, as well as other provisions of the several Acts listed above which would be applicable to plans terminating in their 2015 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 2014-77 (201 CL)

401(a):
Rev. Rul. 2014-9, 2014-17 I.R.B. 975, provides procedures a plan administrator may use in order to reasonably conclude that an amount is a valid rollover contribution.

Change: Plan administrators could – but are not required to – accept inbound rollovers from other tax deferred accounts, such as retirement plans or individual retirement accounts (IRAs). However, they do so at potential risk for later finding out that the account was not tax-qualified. Prior to this guidance, many administrators would not accept rollovers; those that did so were concerned about the level of proof required to prove the tax-qualified status of the distributing account. This guidance provides procedures for "due diligence" steps which plan administrators can take in order to accept rollovers, and actions that must be taken if they are found later to have come from accounts that were not tax-qualified. In brief, it provides that administrators can rely on Form 5500 information in accepting a rollover from another retirement plan, and on available evidence (such as check stub, information) in accepting a rollover from an IRA.

Effective Date: The ruling was issued April 3, 2014, and was generally effective immediately.

Plan Language: None required, however plans accepting rollovers must have enabling plan language in place in advance of the transfer.

Notice 2014-19, 2014-17 I.R.B. 979, provides guidance on the application (including the retroactive application) of the decision in United States v. Windsor, and the holdings of Rev. Rul. 2013-17, to retirement plans qualified under § 401(a).

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.

Rev. Rul. 2014-24, 2014-37 I.R.B. 529, modifies the list of group trust retiree benefit plans eligible to participate in group trusts described in Rev. Rul. 81-100, as modified by Rev. Rul. 2011-1 and Notice 2012-6, to include trusts of certain retirement plans qualified only under the Puerto Rico Code, clarifies that assets held by certain separate accounts maintained by insurance companies may be invested in those group trusts, and provides limited transition relief.

Change: The Ruling modifies the rules regarding 81-100 group trusts by stating that certain retirement plans qualified under the Puerto Rico Code may invest in 81-100 group trusts even if such a plan is not also "dual-qualified" under the Internal Revenue Code, clarifying that assets held by insurance company separate accounts may be invested in 81-100 group trusts under some circumstances, and affording transition relief for certain dual-qualified plans to allow sponsors of those plans an additional year to spin off the assets and liabilities of their Puerto Rico employees into Puerto Rico-only qualified plans satisfying ERISA §1022(i)(1). If plan assets are invested through an insurance company's separate account in an 81-100 group trust as of December 8, 2014, the trustee of the group trust and the insurance company must enter into a written arrangement meeting the requirements of Rev. Rul. 2014-24 before January 1, 2016. Otherwise, the group trust trustee and the insurance company must enter into a written arrangement no later than the time of the investment.

Effective Date: Expansion and clarification of relief originally conveyed as of January 10, 2011.

Plan Language: Model amendments included in Rev. Rul. 2011-1 should be adopted by the group trust. While the Notice provides extended deadlines, a terminating group trust, to which the provision applies, must be amended even though that deadline might not have passed. . Plans investing in group trusts do not require amendment.

401(a)(4):
Notice 2014-5, 2014-2 I.R.B. 276, provides temporary nondiscrimination relief for certain "closed" defined benefit pension plans.

Change: Permits certain sponsors of a DB/DC combo plan, consisting of a closed DB plan and an ongoing DC plan, to demonstrate that the aggregated plans satisfy § 401(a)(4) nondiscrimination requirements on the basis of aggregated, equivalent benefits, even if the aggregated plans do not otherwise satisfy the current conditions for testing on that basis.

Effective Date: Generally effective immediately, on an interim basis until final rules can be provided.

Plan Language: None required.

Notice 2014-66, 2014-46 I.R.B. 820, provides a special nondiscrimination rule for a qualified defined contribution plan that provides lifetime income by offering, as investment options, a series of target date funds (TDFs) that include deferred annuities among their assets, even if some of the TDFs within the series are available only to older participants.

Change: Provides a special testing exception to the benefits, rights and features (BRF) requirement of Reg. § 1.401(a)(4)-4, enabling qualified DC plans to provide lifetime income by offering, as investment options, a series of target date funds (TDFs) that include deferred annuities among their assets, even if some of the TDFs within the series are available only to older participants. If certain conditions are satisfied, a series of TDFs in a DC plan is treated as a single BRF for nondiscrimination testing, thus enabling the TDFs to satisfy BRF testing even if one or more of the TDFs considered on its own would not satisfy those requirements.

Effective Date: Generally effective immediately.

Plan Language: None required.

401(a)(9):
Final regulations that provide a limited modification of the required minimum distribution rules for tax-qualified defined contribution plans holding qualifying longevity annuity contracts were published on July 2, 2014 (79 Fed. Reg. 37633).

Change: Final regulations enable participants in defined contribution plans to use qualified longevity annuity contracts (QLACs) as a “hedge” against prematurely exhausting retirement savings (triggered by required minimum distributions over life expectancy). Under these regulations, retiring participants can “carve out” QLACs from otherwise required minimum distribution amounts computed to satisfy IRC § 401(a)(9) requirements. To satisfy QLAC requirements, contracts have to meet a number of limitations and thresholds, including limits on premiums paid relative to account balances, commencement of distributions, etc.

Effective Date: Effective for qualified longevity annuity contracts purchased on or after July 2, 2014.

Plan Language: Optional, and applicable only to DC plans (and IRAs). Amendments to the plan’s described investment section would be required for a DC plan that wants to permit the purchase of QLACs as investments.

401(k):
Notice 2014-37, 2014-24 I.R.B. 1100, provides guidance on a mid-year amendment to a § 401(k) safe harbor plan or § 401(m) safe harbor plan to reflect the outcome of United States v. Windsor, pursuant to Notice 2014-19.

Change: As noted above, *Windsor* held that DOMA’s stipulation that “marriage” and “spouse” apply to opposite-sex couples only, for Federal law interpretations, is unconstitutional. 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.

This guidance provides that any such amendment may be made to a plan containing § 401(k)/(m) safe harbor provisions to the extent necessary to comply, without violating the prohibition on making otherwise impermissible mid-year amendments to these arrangements.

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.

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: *Windsor*-conforming language is required to the extent plans need to remove conflicting provisions; otherwise it is not required for plans that do not have terms in conflict with the decision. This guidance enables such language changes even if otherwise precluded by application of the prohibitions against mid-year safe harbor plan amendments contained at Reg. § 1.401(k)-3(e)(1) and/or §1.401(m)-3(f)(1).

402(a):
Final regulations clarifying the rules regarding the tax treatment of payments by qualified retirement plans for accident or health insurance were published on May 12, 2014 (79 Fed. Reg. 26838).

Change: Final regulations clarify that amounts held in a qualified retirement plan used to pay accident or health insurance premiums are taxable distributions, unless otherwise subject to a specific exception which would otherwise exempt them. The taxable amount reportable for these distributions generally would equal the amount of the premium charged against the participant's accrued benefits or account balance in the plan. The rules also supply an additional exception (to those already extant in the Code) for payment of disability insurance premiums meeting certain criteria (contract terms require payment to plan trust, paid on account of employee's inability to continue working, does not exceed reasonable expectation of expected annual contribution / accrued benefit increase.)

Effective Date: Generally applicable to distributions made on or after May 12, 2014, and apply for taxable years that begin on or after January 1, 2015, but taxpayers may elect to apply the rules to earlier taxable years.

Plan Language: No amendments are required to address these specific rules. However, plans wishing to pay accident / health insurance benefits from participant accounts would need enabling language.

402(c)(2):
Notice 2014-54, 2014-41 I.R.B. 670, provides rules for allocating pretax and after-tax amounts among disbursements that are made to multiple destinations from a qualified plan described in § 401(a).

Change: The Notice provides rules for allocating pretax and after-tax amounts among disbursements that are made to multiple destinations from a qualified plan (or from a § 403(b) arrangement or a § 457(b) plan maintained by a governmental employer). Disbursements of benefits from the plan to the recipient that are scheduled to be made at the same time (disregarding differences due to reasonable delays to facilitate plan administration) are treated as a single distribution without regard to whether the recipient has directed that the disbursements be made to a single destination or multiple destinations. Accordingly, a participant may direct the portion of a single distribution that consists of pre-tax funds to one destination (such as a traditional IRA) and the portion that consists of after-tax funds to a separate destination (such as a Roth IRA).

Effective Date: Generally applicable to distributions made on or after January 1, 2015. However, taxpayers are permitted to apply the proposed regulations to distributions made on or after September 18, 2014.

Plan Language: None required.

402A:
Notice 2014-54, 2014-41 I.R.B. 670, provides rules for allocating pretax and after-tax amounts among disbursements that are made to multiple destinations from a qualified plan described in § 401(a).

Change: The Notice provides rules for allocating pretax and after-tax amounts among disbursements that are made to multiple destinations from a qualified plan (or from a § 403(b) arrangement or a § 457(b) plan maintained by a governmental employer). Disbursements of benefits from the plan to the recipient that are scheduled to be made at the same time (disregarding differences due to reasonable delays to facilitate plan administration) are treated as a single distribution without regard to whether the recipient has directed that the disbursements be made to a single destination or multiple destinations. Accordingly, a participant may direct the portion of a single distribution that consists of pre-tax funds to one destination (such as a traditional IRA) and the portion that consists of after-tax funds to a separate destination (such as a Roth IRA).

Effective Date: Generally applicable to distributions made on or after January 1, 2015. However, taxpayers are permitted to apply the proposed regulations to distributions made on or after September 18, 2014, as long as they make a reasonable interpretation of the statutory allocation requirements.

Plan Language: None required.

Proposed regulations under § 402A were published on September 19, 2014 (79 Fed. Reg. 56310) with respect to the tax treatment of distributions from designated Roth accounts under tax-favored retirement plans.

Change: As explained in the above Notice, rules for allocating pretax and after-tax amounts among disbursements that are made to multiple destinations from a qualified plan (or from § 403(b) arrangement or § 457(b) plan maintained by a governmental employer) were changed to allow distributions to be split between pre-tax and after-tax recipient accounts. Treas. Reg. § 1.402A–1, Q&A–5(a) was modified to eliminate the separate distribution requirement, originally providing that any amount paid in a direct rollover is treated as a separate distribution from any amount paid directly to the employee. Under the proposed regulations, upon which taxpayers may rely until final regulations are published, disbursements of benefits from the plan to the recipient that are scheduled to be made at the same time (disregarding differences due to reasonable delays to facilitate plan administration) are treated as a single distribution without regard to whether the recipient has directed that the disbursements be made to a single destination or multiple destinations. Accordingly, a participant may direct the portion of a single distribution that consists of pre-tax funds to one destination (such as a traditional IRA) and the portion that consists of after-tax funds to a separate destination (such as a Roth IRA).

Effective Date: Generally applicable to distributions made on or after January 1, 2015. However, taxpayers are permitted to apply the proposed regulations to distributions made on or after September 18, 2014, as long as they make a reasonable interpretation of the statutory allocation requirements.

Plan Language: None required.

411(a)(13):
Amendments to the final regulations under § 411(a)(13) (which were included in the 2010 C. L.) were published on September 19, 2014 (79 Fed. Reg. 56442).

Change: IRC § 411(a)(13)(A), provides that, for vesting and accrual purposes, a hybrid plan may treat a participant's accrued benefit as the present value of the benefit accrued according to the plan's formula Regulations originally finalized in 2010 provided that certain rules otherwise applicable to benefits under a defined benefit plan are not violated solely because certain benefits determined under a lump sum-based benefit formula are based on the current lump sum amount under that formula. Those 2010 final regulations define a lump sum-based benefit formula as a benefit formula used to determine all or any part of a participant's accumulated benefit under which the accumulated benefit provided under the formula is expressed as the current balance of a hypothetical account maintained for the participant ("cash balance" formula) or as the current value of an accumulated percentage of the participant's final average compensation ("pension equity plan" or "PEP" formula).

These 2014 regulations clarify that hybrid plans, like other defined benefit plans, must either properly suspend benefits for post-normal retirement age service or provide an actuarial increase in benefits. The regulations also expand the definition of PEP formulas to include a benefit formula that is expressed as a current single-sum dollar amount equal to a percentage of the participant's highest average compensation (with a permitted lookback period for determining highest average compensation, such as highest 5 out of the last 10 years). Finally, these regulations provide that a benefit formula does not constitute a lump sum-based benefit formula unless a distribution of the benefits under that formula in the form of a single-sum payment equals the accumulated benefit under that formula (except to the extent the single-sum payment is greater to satisfy the requirements of § 411(d)(6)).

Effective Date: Regulations are effective on September 19, 2014, and generally apply to plan years that begin on or after January 1, 2016. However, for plans terminating prior to the effective date of these final regulations, the plan must be amended to comply with the requirements of sections 411(a)(13) and 411(b)(5). A plan may accomplish this by use of the 2010 final or proposed regulations, 2007 proposed regulations, Notice 2007-6 or an earlier use of these 2014 final regulations.

Plan Language: Required for hybrid plans.

411(b)(1):
Final regulations under § 411(b)(1) with respect to a variable interest crediting rate that potentially can be negative in any given year were published on September 19, 2014 (79 Fed. Reg. 56442).

Change: Proposed regulations under § 411(b)(1) were published on October 19, 2010 (75 Fed. Reg. 64197) and can be relied upon until the 2014 final hybrid plan regulations become effective. Those 2010 proposed regulations contained a special rule regarding the application of the 133⅓ percent rule of § 411(b)(1)(B)[3] to a statutory hybrid plan that adjusts benefits using a variable interest crediting rate that can potentially be negative in any given year. Under this rule, for plan years that begin on or after January 1, 2012, a plan that determines any portion of the participant's accrued benefit pursuant to a statutory hybrid benefit formula (as defined in § 1.411(a)(13)–1(d)(4)) with a variable interest crediting rate that was negative for the prior plan year would not be treated as failing to satisfy the requirements of the 133⅓ percent rule for the current plan year merely because the § 411(b)(1)(B) backloading calculation is performed assuming that the variable rate is zero for the current plan year and all future plan years.

These 2014 final regulations provide that if the annual benefit payable before normal retirement age is greater for a participant than the annual benefit under the corresponding form of benefit for any similarly situated, older individual who is or could be a participant and who is currently at or before normal retirement age, then that excess is not part of the subsidized portion of an early retirement benefit and, accordingly, is not disregarded for age discrimination purposes. Thus, if more than a subsidized portion of an early retirement benefit is provided to a participant, that additional benefit is not disregarded for purposes of the § 411(b)(5) age discrimination safe harbor (and, as a result, the safe harbor typically would not be satisfied). For purposes of determining whether the annual benefit payable before normal retirement age is greater for a participant than the annual benefit under the corresponding form of benefit for any similarly situated, older individual who is or could be a participant, social security leveling options and social security supplements are disregarded. In addition, a plan is not treated as providing a greater annual benefit to a participant than to a similarly situated, older individual who is or could be a participant merely because the reduction (based on actuarial equivalence, using reasonable actuarial assumptions) in the amount of an annuity to reflect a survivor benefit is smaller for the participant than for a similarly situated, older individual who is or could be a participant.

Effective Date: Regulations are effective on September 19, 2014, and generally apply to plan years that begin on or after January 1, 2016. However, for plans terminating prior to the effective date of these final regulations, the plan must be amended to comply with the requirements of sections 411(a)(13) and 411(b)(5). A plan may accomplish this by use of the 2010 final or proposed regulations, 2007 proposed regulations, Notice 2007-6 or an earlier use of these 2014 final regulations.

Plan Language: Required for hybrid plans.

411(b)(5):
Amendments to the final regulations under § 411(b)(5) (which were included in the 2010 C. L.) were published on September 19, 2014 (79 Fed. Reg. 56442).

Change: Proposed regulations under § 411(b)(5) were published on October 19, 2010 (75 Fed. Reg. 64197) and can be relied upon until the 2014 final hybrid plan regulations become effective. Those 2010 proposed regulations provided that a plan is not treated as failing to meet the age discrimination requirements of IRC § 411(b)(1)(H)(i) with respect to an individual who is or could be a participant if, as of any date, the accumulated benefit of the individual would not be less than the accumulated benefit of any similarly situated, younger individual who is or could be a participant. In general, this safe harbor is available only if the accumulated benefits being compared are expressed under only one type of formula (that is, cash balance formulas, PEP formulas, or annuities payable at normal retirement age.)

These 2014 final regulations clarify that the age discrimination safe harbor for cash balance formulas and PEP formulas under IRC § 411(b)(5) applies only for lump sum-based benefit formulas. Because the definition of lump sum-based benefit formula requires the benefit to be expressed under the terms of the plan as a cash balance formula or PEP formula, the existing language in these safe harbors that the benefit be expressed under the terms of the plan as a cash balance formula or PEP formula was eliminated as redundant.

Effective Date: Regulations are effective on September 19, 2014, and generally apply to plan years that begin on or after January 1, 2016. However, for plans terminating prior to the effective date of these final regulations, the plan must be amended to comply with the requirements of sections 411(a)(13) and 411(b)(5). A plan may accomplish this by use of the 2010 final or proposed regulations, 2007 proposed regulations, Notice 2007-6 or an earlier use of these 2014 final regulations.

Plan Language: Required for hybrid plans.

415:
Proposed regulations under § 415 were published on November 15, 2013 (78 Fed. Reg. 68780) with respect to amounts paid to an Indian tribe member as remuneration for services performed in a fishing rights-related activity.

Change: Proposed regulations clarify that compensation received by Indian tribal members for services rendered in performed certain fishing rights-related activities may be treated as compensation for purposes of applying § 415 limitations. Various Federal statutes, treaties, executive orders regulate Indian tribal rights the right to conduct fishing activities, both on and off reservations, and income derived from these activities is exempt from income and employment taxes. These regulations clarify that exemption notwithstanding, fishing rights-related income is included in § 415 compensation, and may be contributed to a qualified retirement plan.

Effective Date: Effective for taxable years ending on or after November 15, 2013.

Plan Language: Required for plans sponsored by Indian tribal governments, or plans covering Indian tribal members who receive remuneration for services performed in a fishing rights-related activity.

436:
CSEC Act § 202 exempted certain cooperative and small employer charity pension plans from the limitations of §§ 436 and 401(a)(33), and provided new funding rules for these plans.

Change: In 2014, Congress passed the Cooperative and Small Employer Charity Pension Flexibility Act. Act § 202 amended the Code to exempt certain cooperative and small employer charity pension plans from the limitations of §§ 436 and 401(a)(33), and provided substitute funding rules. Briefly, the Act: (1) defines such plans as employee benefit pension plans that are defined benefit plans maintained as of June 25, 2010, by multiple employers, all of whom are tax-exempt charitable organizations; (2) exempts these plans from existing funding standards and allows such plans to establish minimum funding standards and special rules with respect to the valuation of plan assets, required contributions, and liquidity requirements; (3) allows pension plan sponsors to elect out of treatment of their plans as a CSEC plan in plan years beginning after December 31, 2013; and (4) requires notices to pension plan participants to include statements that different rules apply to these plans than apply to single-employer plans, that contributions to a plan may have changed due to amendments made by this Act, and that a CSEC Plan is in funding restoration status for the plan year

Effective Date: Effective for plan years beginning after December 31, 2013.

Plan Language: Required for pension plans sponsored by cooperatives or by a small employer charity, unless they make an election to "opt out" of the rules (which are relief-oriented) provided by the Act. Plans which opt out (and thus elect not to be covered by the Act) would be subject to existing required funding language. Contrarily, a qualifying cooperative or by a small employer charity that does not opt out would require changes to their definitions of accumulated funding deficiency and a modification to the plan's § 436 provisions