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Tax-Qualified Retirement Plans:
Amendments and Other Year-End Action Items

November 17, 2011

The end of the year marks the deadline for many tax and other qualification requirements for qualified retirement and savings plans. It is important that plan sponsors review whether any qualified plan action items must be addressed prior to year-end. This LawFlash describes potential year-end notices and plan amendments that may be required for tax-qualified retirement and savings plans. This list is not exhaustive, but it is intended to serve as a reminder of items that plan sponsors should review and consider before the end of the year.

PLAN AMENDMENTS

The deadlines to adopt amendments to comply with certain provisions of the Pension Protection Act of 2006 (PPA) relating to benefit restrictions and hybrid plans and the provision of the Worker, Retiree, and Employer Recovery Act of 2008 (WRERA) relating to the waiver of required minimum distributions were extended to the last day of the first plan year beginning on or after January 1, 2011. Thus, calendar year plans must adopt these amendments by December 31, 2011. The deadline for governmental plans to adopt amendments to comply with PPA provisions is also the end of the 2011 plan year for calendar year plans. Collectively bargained or multiemployer plans may have later effective dates and/or amendment dates. If your plan is not a collectively bargained or multiemployer plan, the list below will help you determine if any amendments are required for your plan by the end of the 2011 plan year.

Required Amendments. Below is a list of amendments relating to changes in the law that may need to be adopted by the end of the 2011 plan year.

Defined Contribution Plan Amendments

Amendment	Explanation
Required Minimum Distribution Waiver in 2009	WRERA modified the required minimum distribution (RMD) rules for 2009 by waiving any 2009 RMDs for defined contribution plans. The method by which a plan treated RMD waivers in 2009 depended upon whether the plan complied with the RMD requirements by forcing the commencement of distributions at age 70½ or by only paying the required minimum amount each year. In IRS Notice 2009-82, the IRS provided guidance (including sample amendments)

Amendment	Explanation
	to reflect the waiver of 2009 RMDs, and extended the deadline for adopting the required RMD waiver changes to the last day of the first plan year beginning on or after January 1, 2011 (the 2012 plan year for governmental plans).
In-Plan Roth Conversions	The Small Business Jobs Act of 2010 permitted eligible participants to convert their vested 401(k) or 403(b) plan accounts to Roth accounts without taking a distribution from the plan. This in-plan conversion allows participants to include the converted amounts in gross income for federal tax purposes in the year of the conversion (subject to a special rule for 2010 conversions), rather than having to wait until the year in which the amounts are actually distributed from the plan. Previously, a participant who wanted to convert his or her account to a Roth account would have had to take a distribution from the plan and then roll the distribution over to another plan with a Roth feature, such as a Roth IRA, in order to accelerate taxation and allow future earnings to accumulate tax-free. Sponsors of 401(k) or 403(b) plans may offer in-plan Roth conversions anytime after September 27, 2010. In an effort to give plan sponsors sufficient time to enable plan participants to make in-plan Roth conversions before the end of the 2010 plan year, the IRS delayed the deadline for adopting plan amendments related to 2010 in-plan Roth conversions. The amendment deadline works differently for 401(k), 403(b), and safe-harbor plans. Amendments to add an in-plan Roth conversion feature to a 401(k) plan are due by the later of (i) the last day of the plan year in which the conversion feature was added or (ii) December 31, 2011. A safe-harbor plan must generally be amended by the later of (i) the day before the first day of the plan year in which the conversion feature was added or (ii) December 31, 2011. The amendment deadline for 403(b) plans depends on whether the plan will be subject to an extended remedial amendment period. If the 403(b) plan is subject to the extended remedial amendment period, the amendment deadline is the later of (i) the end of the remedial amendment period or (ii) the last day of the plan year in which the conversion feature was added. If the remedial amendment period is not available to the 403(b) plan, the amendment must be adopted by the last day of the plan year in which the conversion feature is added. For additional information on in-plan Roth conversions, please see our December 20, 2010 LawFlash, "In-Plan Roth Conversion Rules Fleshed Out by Recent IRS Guidance," available at http://www.morganlewis.com/pubs/EB_LF_In-PlanRothConversionRulesIRSGuidance_20dec10.pdf.

Defined Benefit Plan Amendments

Amendment	Explanation
Three-Year Cliff Vesting for Cash Balance Plans	Benefits under a cash balance (or hybrid) plan in existence on June 29, 2005 must use a three-year cliff vesting schedule for all participants who have an hour of service in a plan year beginning after December 31, 2007. While this is a PPA change, IRS Notice 2009-97 extended the deadline for adopting this required change to the last day of the first plan year beginning on or after January 1, 2010. However, on October 19, 2010, the Department of the Treasury (Treasury) issued final and proposed regulations regarding this change for cash balance (or hybrid) plans. In order to give plan sponsors time to take the final regulations into account, IRS Notice 2010-77 further extended the deadline to adopt amendments for this change to the last day of the first plan year beginning on or after January 1, 2011 (December 31, 2011 for calendar year plans).
Funding-Based Benefit Restrictions	Under the new pension funding rules, benefit restrictions apply to certain underfunded defined benefit pension plans. For plans that are less than 80% but at least 60% funded, the plan generally cannot pay more than 50% of the participant's accrued benefit in a lump sum, and it cannot be amended to increase benefits. For plans that are less than 60% funded, no benefit accruals are allowed (mandated plan freeze) and tighter benefit restrictions apply (no lump-sum payments may be made). These rules are effective for plan years beginning after December 31, 2007, but IRS Notice 2009-97 delayed the deadline for adopting funding-based restriction amendments to the last day of the first plan year beginning on or after January 1, 2010. On June 25, 2010, the Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010 (the Act) was enacted. This law gave single-employer defined benefit plans a two-year reprieve from the funding restrictions enacted by PPA for benefit accruals and Social Security level income options and provided an opportunity to elect funding relief for certain eligible plan years. Depending upon the circumstances, the funding relief election and related notices may be due by the end of 2011. The Act also provided funding relief for multiemployer pension plans and plans sponsored by 501(c)(3) charities. In order to give plan sponsors time to take the funding relief provided by the Act into account, IRS Notice 2010-77 further extended the deadline to adopt amendments for the new funding rules to the last day of the first plan year beginning on or after January 1, 2011 (December 31, 2011 for calendar year plans). Note: *The IRS is expected to issue additional guidance on these changes and may provide an extension to adopt conforming amendments. Hence, amendments for these changes may not be needed by the end of the 2011 plan year.*
Hybrid Plan Changes	The PPA made several changes that are applicable to hybrid pension plans, including cash balance plans. IRS Notice 2009-97 extended the deadline for

Amendment	Explanation
	adopting such amendments (other than the elimination of the lump-sum whipsaw) until the last day of the first plan year beginning on or after January 1, 2010. However, on October 19, 2010, Treasury issued final and proposed regulations regarding PPA changes applicable to hybrid pension plans. In order to give plan sponsors time to take the final regulations into account, IRS Notice 2010-77 further extended the deadline to adopt amendments for PPA changes applicable to hybrid pension plans (other than the elimination of the lump-sum whipsaw) to the last day of the first plan year beginning on or after January 1, 2011. IRS Notice 2010-77 also suggests that anti-cutback relief will be provided in the final regulations to the extent protected benefits are reduced to comply with the PPA changes. IRS Notice 2011-85 announced that the IRS and Treasury intend to finalize the proposed hybrid plan market-rate regulations. The finalized hybrid plan market-rate regulations are not expected to take effect earlier than January 1, 2013. Plan amendments must be adopted by the last day of the plan year preceding the first plan year the final regulations are effective. So, if the regulations are effective January 1, 2013, calendar year plans will have to be amended by December 31, 2012. In that case, if 204(h) notices are necessary, they will have to be distributed by November 16, 2012. IRS Notice 2011-85 also provides anti-cutback relief to the extent protected benefits are reduced to comply with the PPA changes.

Governmental Plan PPA Amendments

PPA delayed the deadline for governmental plans to adopt amendments to comply with PPA changes until the last day of the first plan year beginning on or after January 1, 2011. Thus, for calendar year governmental plans, amendments to adopt PPA changes must be made by December 31, 2011. For a summary of the PPA amendments that may apply to your governmental plan, please see our September 18, 2009 LawFlash, "Tax-Qualified Retirement Plans: Year-End Action Items and the HEART Act," available at http://www.morganlewis.com/pubs/EB_TaxQualifiedRetirementPlans_LF_18sept09.pdf, and our October 29, 2010 LawFlash, "Tax-Qualified Retirement Plans: Amendments and Other Year-End Action Items," available at http://www.morganlewis.com/pubs/EB-LF_TaxQualifiedRetirementPlans-YearEndActions_29oct10.pdf.

Discretionary Amendments. Plan amendments for discretionary changes (i.e., changes not required by law, such as plan design changes) must be adopted by the end of the plan year in which the amendment is effective (unless earlier adoption is necessary to avoid a benefit cutback). Thus, calendar year plans must be amended by December 31, 2011 for optional changes that took effect in 2011.

SECOND EGTRRA REMEDIAL AMENDMENT CYCLE

Under the IRS determination letter program, individually designed plans have staggered five-year remedial amendment cycles. The initial five-year remedial amendment cycle for individually designed plans ended on January 31, 2011, and the second five-year remedial amendment cycle for individually designed plans began on February 1, 2011.

The IRS began accepting determination letter applications for Cycle A on February 1, 2011. Cycle A applies to employers with employer tax identification numbers that end in 1 or 6. Plan sponsors that are required to file in Cycle A must submit their plans to the IRS by January 31, 2012.

The IRS released the 2010 Cumulative List, which describes all of the required provisions that must be included in each plan that is submitted for a determination letter during the Cycle A submission period. Plan sponsors should review the 2010 Cumulative List prior to submitting a plan for a determination letter to ensure that any additional amendments that are outlined on the 2010 Cumulative List are included in the plan document.

Note: The IRS recently updated the IRS Form 5300 application for determination letter to reflect the staggered five-year remedial amendment cycles and other various plan design features. However, the IRS did not specify whether the new IRS Form 5300 is required to be used by Cycle A plans. The IRS is expected to provide guidance on this matter.

Note: Plan sponsors submitting determination letter applications must also include IRS Form 8717 and pay a user fee. In Rev. Proc. 2011-8, the IRS announced increased user fees for determination letter applications submitted on or after February 1, 2011. However, the IRS has yet to update IRS Form 8717 to reflect the increased fees. Plan sponsors submitting determination letter applications on or after February 1, 2011 must use the old IRS Form 8717 and submit the increased fees until the new Form 8717 is available.

NEW PLAN LIMITATIONS FOR 2012

On October 20, 2011, the IRS announced increases for many of the qualified retirement plan dollar limits, which have remained constant since 2009. Many of the new dollar limitations will change for 2012 because the increase in the cost-of-living index met the statutory thresholds that trigger their adjustment. However, some dollar limits will remain unchanged. The chart below highlights some of the qualified retirement plan dollar limits for 2012 and the past two years:

Code Section Limit	2012	2011	2010
Elective deferral (contribution) limit under Code section 402(g)	$17,000	$16,500	$16,500
Catch-up contribution limit under Code section 414(v)(2)(B)(i)	$5,500	$5,500	$5,500
Annual compensation limit under Code section 401(a)(17)	$250,000	$245,000	$245,000
Maximum defined benefit annuity limit under Code section 415(b)(1)(A)	$200,000	$195,000	$195,000
Maximum defined contribution annual additions limit under Code section 415(c)(1)(A)	$50,000	$49,000	$49,000
Highly compensated employee threshold under Code section 414(q)(1)(B)	$115,000	$110,000	$110,000
Key employee threshold under Code section 416(i)(1)(A)(i)	$165,000	$160,000	$160,000

ANNUAL NOTICE REQUIREMENTS

Depending on the type of qualified plan and the plan's features, one or more annual notices may be required. Please carefully review the following notices to determine whether any are required to be issued for your plan.

<table>
<tr><th>Notice</th><th>Explanation</th></tr>
<tr><td>Annual Safe-Harbor 401(k) Plan Notices</td><td><u>Traditional Safe-Harbor Plan Notice</u>. Safe-harbor 401(k) plans must provide an annual safe-harbor notice to all plan participants describing the safe-harbor contribution and other material plan features.

<u>"Wait and See" Safe-Harbor Notice</u>. Sponsors of safe-harbor 401(k) plans that intend to satisfy the safe-harbor requirements through a 3% nonelective contribution may wish to follow the "wait and see" approach. Plan sponsors that follow this approach must provide a notice prior to the beginning of the plan year notifying eligible employees that the safe harbor may be adopted. Additionally, plan sponsors that previously provided a "wait and see" notice prior to the beginning of the ongoing plan year and that decide to implement a safe-harbor arrangement prior to the end of the plan year (by making the 3% nonelective contribution) must provide a supplemental notice to eligible employees informing them that the safe-harbor arrangement will be adopted.

The traditional safe-harbor notice and the contingent notice must be provided at least 30 days and no more than 90 days prior to the beginning of the plan year. The supplemental notice must be provided at least 30 days before the last day of the plan year. Thus, calendar year plans will need to provide the applicable notice by December 1, 2011.

<u>Note</u>: If you previously provided a "wait and see" safe-harbor notice and have decided to implement the 3% nonelective safe-harbor contribution for this plan year, in addition to providing the notice described above, you will also need to amend your plan to provide for the safe-harbor contribution prior to the end of the plan year.</td></tr>
<tr><td>Qualified Default Investment Alternative Notices</td><td>Participant-directed 401(k) plans that invest participant contributions for which no affirmative investment election has been made into a qualified default investment alternative (QDIA) must provide an annual notice. The notice must be distributed to all participants who have been or may be defaulted into a QDIA.

The notice must be provided at least 30 days before the beginning of each plan year. For calendar year plans, notice must be provided by December 1, 2011.

A QDIA is an investment alternative (for example, a balanced fund or target-date fund) in a participant-directed 401(k) or profit-sharing plan into which participant contributions are "defaulted" if the participant has not made an affirmative investment election. If a plan fiduciary properly selects a QDIA and follows the specific QDIA requirements, which include providing an initial and an annual notice, the plan fiduciary will generally receive fiduciary protection for those defaulted investments under Section 404(c) of the Employee Retirement Income Security Act of 1974, as amended (ERISA), because participants will be "deemed" to have elected to invest their contributions in the</td></tr>
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Notice	Explanation
	QDIA. *<u>Note</u>: One of the many QDIA notice requirements is that the notice be "separate" from any other notices that are provided. However, the QDIA notice is permitted (but not required) to be combined with the safe-harbor notice (described above) and the automatic enrollment notices (described below).*
401(k) Plan Annual Automatic Enrollment Notice	Sponsors of 401(k) plans that automatically enroll participants must provide an annual notice to all eligible employees describing the circumstances under which contributions may be automatically contributed to the plan. This notice may be combined with the QDIA notice (described above). This notice must be distributed at least 30 days, but no more than 90 days, prior to the beginning of each plan year. For calendar year plans, the notice must be provided by December 1, 2011. *<u>Note</u>: There are a number of different automatic enrollment arrangements (for example, one arrangement simply provides for the automatic enrollment of participants, while another is linked to satisfying 401(k) plan discrimination tests), but each requires a notice.*
Defined Benefit Plan Annual Funding Notice	Plan sponsors of single- and multiemployer defined benefit pension plans must provide an annual funding notice to participants, beneficiaries, and labor organizations representing participants. The notice must contain certain information about the plan, including the plan's funding status for the previous two years, and a statement of the plan's assets and liabilities, among other items. The notice generally must be provided within 120 days following the end of the plan year. Small plans (covering fewer than 100 participants) must provide the notice by the filing due date of the plan's IRS Form 5500. Additional notice requirements apply if the plan is subject to benefit restrictions due to failure to meet certain funding targets. For calendar year plans, the notice is due by April 30, 2012.
Notice of Consequences of the Failure to Defer Benefits	Under section 411(a) of the Internal Revenue Code, a plan is required to obtain participant consent in order to distribute defined contribution or defined benefit plan benefits that have a present value exceeding $5,000. The regulations under section 411(a) indicate that the consent is only valid if the participant is properly informed of the right to defer receipt of distribution. The PPA added the requirement that participants must also be informed of the consequences of failing to defer their distributions until normal retirement age. While the notice requirement is in effect for plan years beginning after December 31, 2006, the PPA included a "reasonable attempt to comply" standard until 90 days after the issuance of final regulations. IRS Notice 2007-7 contained a safe harbor describing what would be considered a "reasonable attempt" to comply with the notice requirement. In October 2008, the IRS issued proposed regulations. Until the issuance of final regulations occurs, plan sponsors should continue to take good-faith reasonable steps to comply with the notice requirements. We will issue a LawFlash when the final regulations are released.

Notice	Explanation
Participant Benefit Statements	Depending upon the type of qualified plan, specific participant benefit statement requirements apply, as described below. Defined Benefit Pension Plans. Plan sponsors of defined benefit pension plans must either provide participant benefit statements every three years to vested participants who are active employees or provide an annual notice to participants describing how a benefit statement may be obtained. Participant-Directed Defined Contribution Plans. Participant-directed defined contribution plans are required to provide participant statements on a quarterly basis. Plan sponsors are deemed to timely provide statements if they are provided within 45 days following the end of the calendar quarter. Non-Participant-Directed Defined Contribution Plans. Plans that do not permit participants to individually direct their account balances are required to provide statements at least once each calendar year. Plan sponsors are deemed to timely provide statements if they are provided on or before the date on which the Form 5500 annual report is filed by the plan (including extensions).
Participant Fee Disclosures	For plan years beginning on or after November 1, 2011 (for calendar year plans, January 1, 2012), sponsors of participant-directed defined contribution plans must provide participants and beneficiaries with disclosure on general information about plan investments, planwide administrative expenses, and individual expenses, and a comparison table detailing investment performance and expenses for designated plan investment funds and benchmark indexes. This disclosure is due on or before the date of plan eligibility and annually thereafter. The initial compliance deadline for this fee disclosure is May 31, 2012. Sponsors of such plans must also provide each participant and beneficiary with quarterly disclosures of the total dollar amount charged to each participant's account for administrative services and other individual charges. The initial compliance deadline for the quarterly disclosure is August 14, 2012. Even though the initial compliance deadlines for the fee disclosures are not until the spring and summer of 2012 for calendar year plans, plan sponsors should begin assembling information and coordinating with the plan's service providers and investment providers prior to the effective date to ensure that compliant disclosure materials can be furnished to plan participants in a timely manner. See our October 26, 2010 LawFlash on this issue, "DOL Releases Final Disclosure Regulations for Participant-Directed Individual Account Plans," available at http://www.morganlewis.com/pubs/EB_LF_FinalDisclosureIndividualAccountPlans_26oct10.pdf.

NEW IRS FORM FOR REPORTING SEPARATED PARTICIPANTS' DEFERRED VESTED BENEFITS

Starting with the 2009 plan year, plan sponsors are required to provide information on separated participants with deferred vested benefits on new IRS Form 8955-SSA. New IRS Form 8955-SSA replaces Schedule SSA of the Form 5500 annual report, which contained Social Security numbers and individual participant names. The Department of Labor (DOL) removed Schedule SSA from the Form 5500 annual report in order to protect the confidentiality of participant information when the DOL required electronic filing of the Form 5500 annual report.

Except for the 2009 and 2010 plan years, Form 8955-SSA must generally be filed by the last day of the seventh calendar month after the plan year ends. The general deadline for filing Form 8955-SSA may be extended for up to 2½ months by filing IRS Form 5558 by the general Form 8955-SSA deadline. For calendar year plans, the general Form 8955-SSA deadline is July 31 of the following calendar year. Filing Form 5558 by July 31 will extend the general deadline to October 15.

Due to the delayed release of the new Form 8955-SSA for 2009 and 2010, the IRS extended the general Form 8955-SSA deadline for the 2009 and 2010 plan years until the later of (i) January 17, 2012 or (ii) the due date that generally applies for filing Form 8955-SSA for the 2010 plan year. Thus, if the 2010 plan year ends before April 1, 2011 (which is the case for calendar year plans), the deadline for filing Form 8955-SSA for both 2009 and 2010 is January 17, 2012. The January 17, 2012 deadline may not be extended, except in limited circumstances for non-calendar year plans.

The IRS has released Form 8955-SSA for 2009 and expects to release Form 8955-SSA for 2010 in the near future. Plan sponsors may file separate Forms 8955-SSA for the 2009 and 2010 plan years using the 2009 form, or combine data for both plan years into a single 2009 Form 8955-SSA. Form 8955-SSA may be filed with the IRS by paper or electronically using third-party software or the IRS's Filing Information Returns Electronically (FIRE) system.

NEW PUERTO RICO INTERNAL REVENUE CODE

On January 31, 2011, the Commonwealth of Puerto Rico adopted a new Internal Revenue Code (the 2011 PR Code), which substantially overhauled the tax requirements for retirement plans covering Puerto Rico residents. The majority of the 2011 PR Code plan qualification requirements were modeled after the relevant plan qualification requirements under the United States tax code.

With the exception of a handful of requirements, the 2011 PR Code plan qualification requirements are generally effective January 1, 2011. Both dual-qualified (United States and Puerto Rico) plans and Puerto Rico–only qualified plans, along with other plan-related documents and communications, will need to be amended by December 31, 2011 to reflect the 2011 PR Code requirements.

Beginning on or after January 1, 2012, retirement plans intended to be qualified under the 2011 PR Code must file and obtain a determination letter from the Puerto Rico Department of Treasury (Hacienda) by the due date, including extensions, for filing the plan sponsor's Puerto Rico income tax return for the tax year in which the plan first began covering Puerto Rico participants. Because the availability of retroactive qualification through the regular determination letter process after December 31, 2011 is unclear, existing plans that have not filed for a determination letter with Hacienda or existing plans that have received determination letters from Hacienda but have made subsequent amendments that are not intended to comply with the 2011 PR Code requirements should file for a determination letter no later

than December 31, 2011. Hacienda is expected to issue additional guidance on the timing and process for submitting determination letter applications with Hacienda.

Note: At the time of publication of this LawFlash, Puerto Rico's legislature is considering a 120-page technical amendments bill that would clarify and amend certain articles of the 2011 PR Code relating to retirement plan qualification requirements. The technical amendments bill is expected to be enacted into law relatively shortly. Plan sponsors are urged to consult with Puerto Rico counsel for compliance with the 2011 PR Code.

TRANSFERS AND SPIN-OFFS TO PUERTO RICO QUALIFIED PLANS BY DECEMBER 31, 2011

In Revenue Ruling 2008-40, the IRS clarified that the transfer or spin-off of assets from a dual-qualified (United States and Puerto Rico) plan funded through a U.S. trust to a Puerto Rico–only qualified plan funded through a Puerto Rico trust is generally prohibited and that such a transfer is taxable to affected participants and may jeopardize the U.S. tax-qualified status of the U.S. plan. However, Revenue Rulings 2008-40 and 2011-2 provided a relief period, expiring on December 31, 2011, during which such transfer will be allowed without any adverse tax consequences.

Plan sponsors contemplating such a transfer or spin-off should act quickly in order to accomplish and complete the transfer or spin-off by the December 31, 2011 deadline. Any such transfer after that date will generally be taxable to the Puerto Rico residents participating in the plan and could jeopardize the tax-qualified status of the U.S. plan unless the Puerto Rico transferee plan makes an election to comply with U.S. qualification requirements under ERISA Section 1022(i)(2).

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