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Many Tax-Qualified Plans Require 415 Amendments by September 15, 2009

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This is a brief reminder that tax-qualified plans, such as 401(k) plans, defined benefit pension plans and 403(b) plans must comply with final regulations issued in 2007 under section 415 of the Internal Revenue Code (the "Code"). The regulations apply to limitation years beginning on or after July 1, 2007, which for most plans will be the 2008 calendar year. In general, calendar-year plans must adopt these amendments by September 15, 2009,i.e., the employer's tax return due date (including extensions) for the 2008 calendar year.

Code Section 415 limits the amount of annual benefits that can be accrued for a participant under a defined benefit plan and the amount of annual contributions that can be allocated to a participant's account under a defined contribution plan. For defined benefit plans, Code Section 415 generally limits the amount of annual benefits that a participant can receive to the lesser of $160,000 (indexed to $195,000 for 2009) or 100% of the participant's high three-year average compensation. For defined contribution plans, Code Section 415 limits the amount of allowable allocations to a participant's account in any year to the lesser of $40,000 (indexed to $49,000 for 2009) or 100% of the participant's compensation.

Although the final regulations generally follow the proposed regulations issued by the IRS in 2005, there are some notable differences between the proposed regulations and the final regulations that employers will need to take into account and consider in deciding how to amend their plans:

- **Post-Termination Pay.** In general, under the proposed regulations, compensation received by a participant after termination of employment is not taken into account as compensation for purposes of applying the limitations under Code Section 415, unless it is regular compensation for services that would have been paid to the employee without regard to the termination of employment and was paid within 2 ½ months following termination of employment. Under the final regulations this rule is continued, but the time limit within which the compensation can be paid is extended until the *later* of 2 ½ months following termination, or the end of the limitation year in which the termination occurred.

  In addition, the final regulations provide that a plan *may* include payments made after termination of employment as compensation for purposes of Code Section 415, provided that

they are paid before the later of 2 ½ months following termination of employment, or the end of the limitation year in which the termination occurred, and such amounts represent (i) unused sick, vacation, or other leave that the employee would have been able to use if employment had continued, or (ii) amounts received under an unfunded deferred compensation plan if the employee would have received such amounts at the same time if no termination of employment had occurred.

Note: The final regulations continue to exclude severance, or deferred compensation paid as a result of severance, as compensation for purposes of Code Section 415.

Finally, a plan may provide that compensation for Code Section 415 purposes will include compensation paid to permanently and totally disabled participants to they extent they are not highly compensated or to the extent the plan provides for contributions on behalf of all participants who are permanently and totally disabled for a fixed or determinable period of time.

- **Compensation Within Code Section 401(a)(17) Limits.** The final regulations provide that no compensation in any year may be taken into account for purposes of the defined benefit plan limits under Code Section 415, to any extent such compensation exceeds the $200,000 limit in Code Section 401(a)(17) (indexed to $245,000 for 2009).

- **Aggregation of Plans for Determining Code Section 415 Limits.** The Code Section 415 regulations have always provided plan aggregation rules to prevent evasion of the limitations through the use of multiple plans. The final regulations, however, provide new rules regarding plans with overlapping limitation years and provide that an employer's plans must be aggregated with the plans of a predecessor employer, even if the successor does not assume the predecessor's plan. An employer who continues all or part of the trade or business of an entity is generally considered a successor employer to that entity.

- **Restorative Payments to Defined Contribution Plans.** The final regulations clarify that allocations made to a participant's account to restore plan losses resulting from a fiduciary breach are not considered annual additions that count against the allocations allowable to the participant under Code Section 415. This rule is similar to the position that the IRS has taken in private letter rulings over the years with respect to restorative payments.

The preceding examples are only a few of the many technical provisions contained in the final regulations under Code Section 415. For further information, please contact any member of the MoFo Employee Benefits and Executive Compensation Group.
