

Deja Vu All Over Again: Remedial Amendment Cycles Recycle

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I enjoy the witticisms attributed to Yogi Berra. I've used this one before, but it is clearly apropos to this topic: "Déjà vu all over again." For more than six years, we've been telling you about the "new" remedial amendment period (RAP) submission cycles and advising that once we submit your plan under the new procedures, you won't have to do it again for at least five or six years. Well, guess what? The cycles are beginning again.

How It Used to Be

Historically, retirement plans were amended to comply with applicable law and guidance and submitted for IRS approval at irregular intervals. For example, the filing deadline for the GUST changes that began with 1994 legislation was extended to 2004. In many ways the process was beneficial because plan amendments reflected the final interpretation of the law. The downside was that plans were required to operate in good faith compliance for years, which was difficult to do, and from the standpoint of the IRS virtually all plans were submitted at one time, which strained resources.

The Staggered RAP Cycles

After white papers and discussions with practitioners, the IRS established a cyclical filing system in 2005. For this purpose plans were divided into two general categories, individually designed and preapproved. Individually designed plans are those that cannot or choose not to be preapproved plans. Preapproved plans generally fall into two categories, prototype and volume submitter. Prototype plans are required to have a basic plan document and an adoption agreement that enables the employer to choose among the plan design options that are offered. A volume submitter plan consists of plan language, including extensive optional language, that is submitted for IRS approval and then used to create employer plans.

Warner Norcross & Judd sponsors volume submitter plans. Use of our volume submitter documents results in a customized plan that is derived from thousands of flexible choices. In contrast, the separate adoption agreement for a prototype plan can practically offer only very limited choices. Moreover, in our view, prototype plans normally reflect the limitations of the recordkeeping system of the prototype sponsor and make it difficult to move to a new plan provider. For more comparison of the two types of plans read Heidi Lyon's Aug. 12, 2010, article, "You're Moving to a Prototype? Say It Isn't So," on our Web Site [here](#).

Maintaining a plan through volume submitter documentation is becoming relatively less costly. The IRS filing fee for individually designed plans was recently raised from \$1,000 to \$2,500 while the fee for volume submitter filings remains at \$300.

For individually designed plans, the IRS established five-year staggered RAP filing cycles based on the following schedule:

Last Digit of Sponsor EIN	Filing Cycle	Cycle Filing Deadline
1 or 6	Cycle A	January 31, 2007
2 or 7	Cycle B	January 31, 2008
3 or 8	Cycle C	January 31, 2009
4 or 9	Cycle D	January 31, 2010
5 or 0	Cycle E	January 31, 2011

We have been preparing and filing individually designed documents on the applicable cycles. Spreading the filing deadlines over a five-year period levels out the workload for the IRS.

For preapproved plans, the IRS established separate six-year submission cycles for defined contribution and defined benefit pension plans. For defined contribution plans, the deadline for the volume submitter document sponsor to submit plan language for approval was January 31, 2006. The IRS took two years to process all of those submissions and issued its advisory opinion letters simultaneously on March 31, 2008. A filing deadline of April 30, 2010, applied to all plans maintained through the use of that preapproved documentation. For defined benefit plans, the deadline for submitting plan language was January 31, 2008. Simultaneous approval letters were issued on March 31, 2010. Employers maintaining defined benefit plans through preapproved documents must file those documents for IRS approval not later than April 30, 2012.

Here We Go Again

If I wanted to talk like Yogi Berra, I would say "tempus fugit when it's flying." Although hard to believe, the remedial amendment cycles are starting all over once more. For individually designed plans required to be filed by the original Cycle A deadline of January 31, 2007, the next five-year filing deadline is January 31, 2012. For each subsequent cycle it is the next January 31. For preapproved plans the next deadlines for updated plan language are January 31, 2012, for defined contribution plans and January 31, 2014, for defined benefit plans. Although they could vary, presumably the deadlines for filing plans that utilize preapproved documentation will be April 30, 2016, for defined contribution plans and April 30, 2018, for defined benefit plans. The filing deadlines for those plans are still a long way off, but as you can see, the entire process begins all over again during 2011 with initial filing deadlines of January 31, 2012.

A Word About Cumulative Lists and Interim Amendments

Each year the IRS publishes a Cumulative List of required amendments. When plans are submitted for IRS approval, the IRS will only review amendments required by the applicable Cumulative List. The Cumulative List requirements also apply to preapproved document providers. Accordingly, both individually designed and preapproved plans submitted for IRS

review are not up-to-date with the latest legislation and guidance as of the time of filing and the gap is much longer and more significant for preapproved plans. This is an inherent flaw in the staggered filing cycles, particularly those for preapproved plans.

To address the lag, the IRS has been requiring so-called "interim" amendments to reflect new legislation and regulatory guidance. For required changes, the deadline is the tax return filing date for the taxable year related to the effective date of the amendment. For discretionary amendments, the deadline is the last day of that year. This distinction causes significant confusion. Furthermore, the duty to adopt interim amendments that update each plan to the most recent Cumulative List is an unwelcome burden. In some cases, such as the Pension Protection Act of 2006, Congress specified a delayed deadline for plan amendments. While this is helpful, the deadline eventually arrives. The result has been a steady stream of interim amendments rather than amendments geared to the next plan restatement under the filing cycles.

The requirement of interim amendments is a frustrating process for us and is considered a source of unnecessary cost by most plan sponsors. It has been severely criticized. The IRS states that it is seriously studying this problem and has indicated that at least it may eliminate the amendment deadline difference for required and discretionary amendments. We can only hope that there will be further and favorable developments with respect to interim amendments in the near future. Otherwise interim amendments will also continue to be déjà vu all over again.