

**Towers Watson
Monthly Regulatory Round-Up**

January 2010

- - Retirement - -

The Monthly Regulatory Round-Up is a high-level summary of legal and regulatory developments that occurred during January 2010 that may be relevant to large employers. Developments are sorted according to

- federal legislative developments,
- federal regulatory guidance
- other developments (e.g., significant litigation, studies, select state law developments).

The Monthly Regulatory Round-Up is prepared by Towers Watson's Technical Services staff, located in Valhalla, NY. This material is not a substitute for legal, accounting, actuarial or other professional advice.

LEGISLATIVE

1. ***Obama Administration's FY 2011 budget proposal.*** In connection with its FY 2011 budget proposal, the Administration has proposed some initiatives concerning retirement plans. First, it has proposed a requirement for all but small employers to establish automatic IRAs where they do not otherwise offer a retirement plan. Direct deposit contributions would be made as a default, unless an employee opts out. Second, it has proposed simplification and expansion of the tax credit known as the Saver's Credit so as to match 50% of the first \$1,000 of retirement contributions by families earning up to \$65,000 (with a phased reduction up to \$85,000) and make the credit refundable. Finally, the Administration has proposed a number of initiatives focused on defined contribution plans to:
 - enhance 401(k) fee disclosure,
 - encourage employers to make unbiased investment advice available,
 - promote the availability of annuities, and
 - provide clear disclosures with respect to target date funds.

REGULATORY

1. ***Determination letter procedures and user fee schedule.*** The IRS reissued its annual revenue procedures involving requests for determination letters for qualified plans (IRS Rev. Proc. 2010-6) and user fees associated with these and certain other requests for rulings from the IRS (IRS Rev. Proc. 2010-8). Only a few minor changes were made to the determination letter procedures. Among these, if an off-cycle submission is not reviewed by the end of the cycle, it will be returned to the sponsor.
2. ***DOL safe harbor for remitting employee contributions to small plans.*** The DOL published a final rule that provides a safe harbor for employers to remit employee contributions to small pension and welfare benefit plans (i.e., those with fewer than 100 participants). The safe harbor period is seven business days following receipt or withholding by employers. The DOL also considered a safe harbor for large plans, but decided against it at this time. As a result, large plans must remit participant contributions in accordance with the general "plan asset" rule. Under the general rule, employers must remit employee contributions to pension plans as soon as they can reasonably be segregated from the general assets of the employer, but no later than the 15th business day of the month following the month in which contributions are received or withheld by the employer. The latest date for forwarding participant contributions to health plans is 90 days from the date on which such amounts are received or withheld by the employer.
3. ***IRS issues HEART Act guidance.*** The IRS issued Notice 2010-15 that provides guidance, in question and answer format, on various provisions of the Heroes Earnings Assistance and Relief Tax Act (HEART Act). The HEART Act made a number of changes affecting the retirement benefits provided to military personnel. Among other things, the Notice clarifies the timing for plan amendments for discretionary and mandatory HEART changes. The Notice also notes that the IRS is considering additional guidance on these provisions and requests that any comments be submitted by April 9, 2010.
4. ***IRC provisions that may be incorporated by reference.*** The IRS published a Quality Assurance Bulletin (QAB) describing which provisions of the Internal Revenue Code can be

incorporated by reference into a plan. Notably, the QAB does not include IRC § 436 (the benefit restriction rules) in the list of Code sections that can be incorporated by reference.

5. **IRS correction program for 409A NQDC plan document failures.** The IRS issued Notice 2010-6, which permits taxpayers to correct certain failures of a nonqualified deferred compensation plan to comply with the plan document requirements of IRC § 409A. The types of relief provided for document failures include the following:
 - Transition relief allows document failures identified in the Notice to be corrected by December 31, 2010 (if certain conditions are met), generally without any income inclusion or application of the 20% tax under IRC § 409A for those covered under the arrangement.
 - Plan terms identified in the Notice may be corrected at any time without income inclusion or the 20% tax, if the provision being modified does not affect actual operation of the plan for a period of one year following the correction. If this condition is not fulfilled, relief is still available to limit the amount that must be included in income and the additional taxes.
 - The Notice clarifies that certain ambiguous, but relatively common phrases found in plan documents will not be treated as causing the plan to violate IRC § 409A. Examples are phrases like "as soon as practicable" and "termination of employment," but only if there is no pattern or practice of interpreting the phrase in a manner that is inconsistent with the requirements of IRC § 409A.
 - Correction of document failures can be made without any income inclusion or application of the 20% tax during a limited period after the adoption of a new plan, provided the plan is the first one of that type ever maintained by the employer (applying the nine plan "types" set forth in the 409A regulations for this purpose), disregarding grandfathered arrangements and plans under which all amounts have been paid or forfeited.

The relief in Notice 2010-6 is not available to stock options or stock appreciation rights and is available to certain linked plans only on a transition basis through 2011. The Notice also clarifies certain aspects of Notice 2008-113, which addresses failures of nonqualified deferred compensation plans to comply with IRC § 409A in operation.
6. **RFI on encouraging annuity options in retirement plans.** The DOL and IRS issued a request for information (RFI) to help them determine whether, and, if so, how, they could enhance, by regulation or otherwise, the retirement security of participants in employer-sponsored retirement plans and in individual retirement arrangements (IRAs) by facilitating access to, and use of, lifetime income or other arrangements designed to provide a lifetime stream of income after retirement. The RFI sets forth over three dozen questions concerning lifetime income options. In general, the questions seek information on current plan practices and employee behavior, and seek feedback on whether lifetime income payments could be fostered through new kinds of participant education and disclosure, product changes, or rule changes concerning qualified joint and survivor annuities, spousal consent, minimum distributions, purchases of lifetime income from defined benefit plans, annuity provider selection, ERISA section 404(c), and qualified default investment alternatives.
7. **2010 Premium Filings.** The PBGC announced on their website that both estimated flat-rate filings and comprehensive filings for plan years beginning in 2010 may now be electronically submitted via My Plan Administration Account (My PAA). Information about how to e-file via My PAA (e.g., FAQs and Demos) is on the online premium filing (My PAA) page.
8. **New determination letter filing address.** The IRS announced that the filing address for determination letter applications has changed. The Instructions for Applications for Determination Letters contain an old post office box number that should no longer be used.

Applications for individual determination letters should be sent to: Internal Revenue Service, P.O. Box 12192, Covington, KY 41012-0192.

9. **Cycle D determination letter submission period extended by one day.** In a Special Edition of the Employee Plans News, the IRS extended the Cycle D submission period by one day. Generally, an individually designed plan is in Cycle D if it is a multiemployer plan under IRC § 414(f) or if the plan is a single employer plan and the last digit of the plan sponsor's employer identification number is 4 or 9. The 12-month submission period for determination letters for Cycle D plans is February 1, 2009 - January 31, 2010. However, because January 31, 2010 is a Sunday, the IRS extended the submission period until February 1, 2010. Since the 2008 Cumulative list allows some non-calendar year Cycle D plans to file in Cycle E, and Cycle E begins on February 1st, the newsletter instructs a Cycle D plan electing to file under Cycle E on February 1 to note this on the application.
10. **DOL launches Form 5500 EFAST2 electronic filing system.** The DOL all-electronic system for filing Form 5500 annual reports, EFAST2, "went live" on the DOL's website. The EFAST2 system is intended to facilitate the DOL regulatory requirement that all Form 5500s for plan years beginning on or after January 1, 2009 must be filed electronically. The DOL also issued guidance on how to file delinquent or amended Form 5500s for plan years prior to 2009, in light of the new electronic system that must be used.
11. **2009 and 2010 Form 5500.** The DOL posted informational copies of the 2009 and 2010 Form 5500 and instructions to their website. Schedule SB instructions have been omitted from the 2010 version. A note indicates that "the 2010 Schedule SB will be available for filing after the issuance of additional regulatory guidance related to PPA. Do not file the 2010 Form 5500 for a defined benefit plan until the 2010 Schedule SB and instructions are available to use for filing."

OTHER

1. **Supreme Court declines to review case involving 401(k) fees.** The U.S. Supreme Court declined to review an important appeals court decision in favor of a plan sponsor involving 401(k) plan fees (*Hecker v. Deere & Co.*). This leaves standing a Seventh Circuit decision that held, among other things, that there is no duty under ERISA to disclose a revenue sharing arrangement.