

Cumulative List of Changes in Plan Qualification Requirements for Pre-Approved Defined Contribution Plans for 2017

Notice 2017-37

I. PURPOSE

This notice contains the Cumulative List of Changes in Plan Qualification Requirements for Pre-Approved Defined Contribution Plans for 2017 (2017 Cumulative List). As described in section 17 of Rev. Proc. 2016-37, 2016-29 I.R.B. 136, 146, Cumulative Lists identify changes in the qualification requirements of the Internal Revenue Code that are required to be taken into account in a pre-approved plan document submitted under the pre-approved plan program administered by the Internal Revenue Service (IRS) and that will be considered by the IRS for purposes of issuing opinion letters.

The 2017 Cumulative List is to be used to submit opinion letter applications for pre-approved defined contribution plans during the third six-year remedial amendment cycle, which began February 1, 2017, and ends January 31, 2023 (“third-cycle opinion letter applications”). Defined contribution plans may be submitted for approval during the on-cycle submission period, which begins October 2, 2017, and ends October 1, 2018.

The list of changes in section IV of this notice does not extend the deadline by which a plan must be amended to comply with any statutory, regulatory, or guidance changes. The general deadline for timely adoption of an interim or discretionary amendment is provided in section 15 of Rev. Proc. 2016-37.

II. BACKGROUND

Rev. Proc. 2016-37 sets forth procedures for issuing opinion letters and describes the six-year remedial amendment cycle for pre-approved plans. Pre-approved defined contribution plans and pre-approved defined benefit plans each have separate six-year cycles. In section 17 of Rev. Proc. 2016-37, the IRS announced its intention to publish Cumulative Lists to identify changes in the qualification requirements that will be considered by the IRS in its review of pre-approved plan documents for purposes of issuing opinion letters. A change in the qualification requirements includes a statutory change or a change in the requirements provided in regulations or other guidance published in the Internal Revenue Bulletin.

Rev. Proc. 2016-37 also modifies the IRS determination letter program for qualified plans by eliminating, as of January 1, 2017, the five-year remedial amendment cycle system for individually designed plans that was set forth in Rev. Proc. 2007-44, 2007-2 C.B. 54. Prior to Rev. Proc. 2016-37, Cumulative Lists were used by the IRS in reviewing both individually designed plan documents and pre-approved plan documents. Pursuant to sections 12 and 17 of Rev. Proc. 2016-37, beginning in 2017, the IRS will use Cumulative Lists to review pre-approved plan documents submitted for opinion letters and will use Required Amendments Lists, described in section 9 of

Rev. Proc. 2016-37, to review individually designed plan documents submitted for determination letters. For the Required Amendments List for 2016, see Notice 2016-80, 2016-52 I.R.B. 918.

To assist plan sponsors in achieving operational compliance, the IRS intends to provide an Operational Compliance List periodically to identify changes in qualification requirements that are effective during a calendar year. For the current Operational Compliance List, see <https://www.irs.gov/retirement-plans/operational-compliance-list>.

III. APPLICATION OF THE 2017 CUMULATIVE LIST

This notice relates to the opinion letter program for pre-approved defined contribution plans. The third six-year remedial amendment cycle for pre-approved defined contribution plans began February 1, 2017, and ends January 31, 2023. Pursuant to section 16.02 of Rev. Proc. 2016-37, as modified by section 9.02 of Rev. Proc. 2017-41, 2017-29 I.R.B. ____, ____ (July 17, 2017), the on-cycle submission period for the third six-year remedial amendment cycle begins October 2, 2017, and ends October 1, 2018.

The 2017 Cumulative List set forth in section IV of this notice lists specific matters the IRS has identified for review in determining whether a defined contribution plan document that has been filed for an opinion letter has been properly updated.

Except as provided in section IV of this notice, the IRS will not consider any of the following items in its review of any opinion letter application for the six-year remedial amendment cycle that began February 1, 2017:

1. Guidance issued after February 1, 2017.
2. Statutes enacted after February 1, 2017.

3. Qualification requirements first effective in 2018 or later.

4. Statutory provisions that are first effective in 2017 for which there is no guidance identified in this notice.

In order to be qualified, a plan must comply with all relevant qualification requirements, not only those on the 2017 Cumulative List.

IV. CUMULATIVE LIST OF CHANGES IN PLAN QUALIFICATION REQUIREMENTS FOR PRE-APPROVED DEFINED CONTRIBUTION PLANS FOR 2017

The 2017 Cumulative List contains items that relate to pre-approved defined contribution plans that were included on the 2011-2015 Cumulative Lists¹ or were issued after October 1, 2015.² However, if a plan has not been previously reviewed for items on earlier Cumulative Lists that relate to pre-approved defined contribution plans, those items must also be taken into account. The items on earlier Cumulative Lists that are referred to in the preceding sentence can be found in the 2010 Cumulative List, Notice 2010-90, 2010-52 I.R.B. 909, and in the 2004 Cumulative List, Notice 2004-84, 2004-2 C.B. 1030.

The 2017 Cumulative List sets forth changes in the qualification requirements. At the end of each item, a parenthetical note indicates the year the item first appeared on a Cumulative List or identifies the item as new.

¹ For recent previous Cumulative Lists, see Notice 2015-84, 2015-52 I.R.B. 880; Notice 2014-77, 2014-52 I.R.B. 974; Notice 2013-84, 2013-52 I.R.B. 822; Notice 2012-76, 2012-52 I.R.B. 775; and Notice 2011-97, 2011-52 I.R.B. 923.

² Previous Cumulative Lists included certain items that the IRS does not intend to review in connection with third-cycle opinion letter applications, including items that affected only defined benefit retirement plans or that affected the operations of a plan but did not require a change in the plan document. Those items have been removed from this 2017 Cumulative List. See the Operational Compliance List, at <https://www.irs.gov/retirement-plans/operational-compliance-list>, for the current list of changes in qualification requirements that affect operational compliance.

1. Section 401(a):

- Notice 2012-29, 2012-18 I.R.B. 872, provides that the IRS and the Department of the Treasury (Treasury Department) intend to modify the normal retirement age regulations to clarify that governmental plans that do not provide for in-service distributions before age 62 do not need to have a definition of normal retirement age and to modify the age-50 safe harbor rule for qualified public safety employees. The notice also provides that the IRS and Treasury Department intend to amend the normal retirement age regulations to extend the effective date for governmental plans to annuity starting dates that occur in plan years beginning on or after the later of (1) January 1, 2015, or (2) the close of the first regular legislative session of the legislative body with the authority to amend the plan that begins on or after the date that is 3 months after the final regulations are published in the Federal Register. See also the description, later in this 2017 Cumulative List, of proposed regulations under § 401(a) published on January 27, 2016, relating to normal retirement ages under § 414(d) governmental pension plans. (2012 C. L.)
- *United States v. Windsor*, 570 U.S. ___, 133 S. Ct. 2675 (2013). The Supreme Court found that Section 3 of the Defense of Marriage Act (DOMA), which provides that, in determining the meaning of any Act of Congress or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to

a person of the opposite sex who is a husband or a wife, is unconstitutional because it violates the principles of equal protection. (2013 C. L.)

- Rev. Rul. 2013-17, 2013-38 I.R.B. 201, provides that for Federal tax purposes, the terms “spouse,” “husband and wife,” “husband,” and “wife” include an individual married to a person of the same sex if the individuals are lawfully married under state law, and the term “marriage” includes such a marriage between individuals of the same sex, and the IRS adopts a general rule recognizing a marriage of same-sex individuals that was validly entered into in a state whose laws authorize the marriage of two individuals of the same sex even if the married couple is domiciled in a state that does not recognize the validity of same-sex marriages. (2013 C. L.)
- 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). (2014 C. L.)
- Notice 2015-86, 2015-52 I.R.B. 887, provides that qualified retirement plans are not required to make additional changes as a result of the decision in *Obergefell v. Hodges*, 576 U.S.____, 135 S. Ct. 2584 (2015). However, a plan sponsor may decide to amend its plan following *Obergefell* to make certain discretionary amendments (also described in Notice 2015-86). (New)
- Proposed regulations under § 401(a) were published on January 27, 2016 (81 Fed. Reg. 4599), and provide safe harbors and other rules regarding normal

retirement age under a § 414(d) governmental pension plan. These regulations are proposed to be effective for employees hired during plan years beginning on or after the later of (1) January 1, 2017, or (2) the close of the first regular legislative session of the legislative body with the authority to amend the plan that begins on or after the date that is three months after the final regulations are published in the Federal Register. However, employers may choose to rely on these proposed regulations currently and for prior periods. (New)

2. Section 401(a)(4):

- 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. (2014 C. L.)

3. Section 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). (2014 C. L.)

4. Section 401(a)(22):

- Notice 2011-19, 2011-11 I.R.B. 550, provides that the terms “readily tradable on an established securities market” and “readily tradable on an established market” mean employer securities that are readily tradable on an established securities

market within the meaning of § 1.401(a)(35)-1(f)(5) for purposes of § 401(a)(22). Notice 2011-19 is effective for plan years that begin on or after January 1, 2012, except for certain plans that have a delayed effective date. (2011 C. L.)

5. Section 401(a)(28)(C):

- Notice 2011-19 provides that the terms “readily tradable on an established securities market” and “readily tradable on an established market” mean employer securities that are readily tradable on an established securities market within the meaning of § 1.401(a)(35)-1(f)(5) for purposes of § 401(a)(28)(C). Notice 2011-19 is effective for plan years that begin on or after January 1, 2012, except for certain plans that have a delayed effective date. (2011 C. L.)

6. Section 401(a)(35):

- Notice 2013-17, 2013-20 I.R.B. 1082, provides relief from anti-cutback rules for an amendment to an employee stock ownership plan (ESOP) that becomes subject to the diversification requirements of § 401(a)(35) to eliminate all in-service distribution options previously used to satisfy the diversification requirements of § 401(a)(28)(B)(i). (2013 C. L.)

7. Section 401(k), 401(m):

- Final regulations that provide guidance on permitted mid-year reductions or suspensions of safe harbor nonelective contributions in certain circumstances for amendments adopted after May 18, 2009, and revise the requirements for permitted mid-year reductions or suspensions of safe harbor matching

contributions for plan years beginning on or after January 1, 2015, were published on November 15, 2013 (78 Fed. Reg. 68735). (2013 C. L.)

- Notice 2016-16, 2016-7 I.R.B. 318, permits mid-year changes to safe harbor 401(k) plans under certain circumstances. (New)
- Proposed regulations under §§ 401(k) and 401(m) were published on January 18, 2017 (82 Fed. Reg. 5477), and provide that qualified matching contributions (QMACs) and qualified nonelective contributions (QNECs) must satisfy applicable nonforfeitability and distribution requirements at the time they are allocated to participants' accounts, but need not meet these requirements when they are contributed to the plan. These proposed regulations apply only to taxable years beginning on or after the publication of final regulations, but taxpayers may choose to rely on these proposed regulations currently and for prior periods. (New)

8. Section 402(c):

- Protecting Americans from Tax Hikes Act of 2015 § 306 amended § 408(p)(1)(B) to permit rollovers from a qualified plan to a SIMPLE IRA. (New)

9. Section 402A:

- American Taxpayer Relief Act of 2012 § 902 added § 402A(c)(4)(E), which provides that rollovers from a plan account to the plan's designated Roth account can include a rollover of an otherwise nondistributable amount. (2013 C. L.)

- Notice 2013-74 provides guidance regarding § 402A(c)(4)(E) and also provides guidance that applies to all in-plan Roth rollovers under § 402A(c)(4).
(2013 C. L.)

10. Section 409:

- Notice 2011-19 provides that the terms “readily tradable on an established securities market” and “readily tradable on an established market” mean employer securities that are readily tradable on an established securities market within the meaning of § 1.401(a)(35)-1(f)(5) for purposes of § 409(h)(1)(B) and § 409(l). Notice 2011-19 is effective for plan years that begin on or after January 1, 2012, except for certain plans that have a delayed effective date. (2011 C. L.)

11. Section 411(d)(6):

- Notice 2013-17 provides relief from anti-cutback rules for an amendment to an ESOP to eliminate all in-service distribution options previously used to satisfy the diversification requirements of § 401(a)(28)(B)(i). (2013 C. L.)

12. Section 415:

- Proposed regulations under § 415 were published on November 15, 2013 (78 Fed. Reg. 68780), and provide that amounts paid to an Indian tribe member as remuneration for services performed in a fishing rights-related activity may be treated as compensation for purposes of applying the limits on qualified plan benefits and contributions. Taxpayers may rely on the proposed regulations for periods preceding the effective date of the final regulations. (2014 C. L.)

13. Section 417:

- Rev. Rul. 2012-3, 2012-6 I.R.B. 383, describes how the qualified joint and survivor annuity (QJSA) and the qualified preretirement survivor annuity (QPSA) rules, described in §§ 401(a)(11) and 417, apply when a deferred annuity contract is purchased under a profit sharing plan. (2012 C. L.)

DRAFTING INFORMATION

The principal author of this notice is Patrick Gutierrez of the Office of Associate Chief Counsel (Tax Exempt and Government Entities). For further information regarding this notice, contact Patrick Gutierrez at (202) 317-4148 (not a toll-free number).