

News from our Compensation & Benefits Group

IRS Requires Certain 401(k) Plan Sponsors to Complete Compliance Questionnaire

The Internal Revenue Service (“IRS”) recently has begun sending out compliance check questionnaires to 1,200 randomly selected 401(k) plan sponsors. The questionnaire is intended to assist the IRS in identifying compliance areas where additional education, guidance and enforcement are needed.

The Internal Revenue Code (“Code”) contains a variety of requirements that retirement plans, like 401(k) plans, must follow in order to maintain their tax-qualified status. According to the IRS, 401(k) plans are the most common type of retirement plan that is not in full compliance with such requirements, and because they represent over 60% of all retirement plans and are the fastest growing segment of the retirement plan market, 401(k) plans have a significant impact on the health of the private retirement system. The IRS designed the 46-page questionnaire to identify particular areas of non-compliance and to develop strategies to address such non-compliance. Ultimately, the questionnaire project will result in a 2011 public report summarizing the findings from the questionnaire, but it is also possible that it could lead to additional IRS audit activity (as noted below).

About the questionnaire

The IRS is randomly selecting 401(k) plan sponsors that filed a Form 5500 for the 2007 plan year to complete the questionnaire. Such plan sponsors will receive a letter from the IRS with instructions on how to properly complete the online questionnaire by visiting a secure website and using a PIN

number provided in the letter. The questionnaire must be completed within 90 days from the date of the letter unless an extension is granted. The questionnaire covers various topics in the following categories:

- ▶ Plan demographics
- ▶ 401(k) plan participation
- ▶ Employer and employee contributions
- ▶ Top heavy and nondiscrimination rules
- ▶ Distributions and plan loans
- ▶ Other plan operational issues
- ▶ Automatic contribution arrangements
- ▶ Designated Roth features
- ▶ IRS voluntary compliance programs
- ▶ Plan administration

More information about this IRS project and the complete questionnaire can be found on the IRS website at www.irs.gov/retirement/article/0,,id=223440,00.html.

Potential effect of the questionnaire

The questionnaire is intended to be a review to determine a 401(k) plan’s adherence to the Code’s requirements and is not an audit or investigation. However, according to an IRS spokesperson, failure to respond to or provide complete information in the questionnaire may result in further action. It is also possible that answers on the questionnaire indicating noncompliance could result in an actual plan audit. In a similar situation, the IRS recently announced that it will be auditing 30 of the 400 colleges and universities selected in 2008 to complete a questionnaire intended

to identify compliance areas under Section 501(c)(3) of the Code.

What to do now

If your 401(k) plan has been selected for a questionnaire, it is important that the individuals who have the requisite knowledge relating to the plan carefully read and follow the IRS instructions and properly and timely complete the on-line questionnaire using the assigned personal identification number.

If your plan has not been selected for a questionnaire, it is still advisable to act

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now to identify and correct any Code compliance problems so as to avoid greater liability in the future. There are a variety of self-correction approaches sanctioned by the IRS that may be available depending on the individual circumstances of your 401(k) plan and the particular compliance issue that is discovered.

If you have questions about this *Alert* or would like additional information or assistance regarding the questionnaire or your 401(k) plan's compliance, please contact one of your Cooley team members or one of the attorneys listed above. ■