

Insight

IN-DEPTH DISCUSSION

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Puerto Rico Treasury Issues New Guidance on Rules and Procedures for Qualification of Retirement Plans

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The Puerto Rico Department of the Treasury (the “PR Treasury”) issued Tax Policy Circular Letter No. 16-08 on December 23, 2016 (“CL 16-08”). CL 16-08 establishes new rules regarding the validity of retirement plan qualification letters and the procedures that employers and service providers must follow to request such qualification letters. It also repeals PR Treasury’s Circular Letter 11-10 dated December 16, 2011, and Letter 13-02 dated May 28, 2013, which established guidance in connection with procedures for plan qualification (the “Previous Guidance”), to the extent not adopted by reference in CL 16-08. The following is a summary of the changes made to the rules and procedures for qualification of retirement plans:

Validity of Qualification Letters

CL 16-08 provides that qualification letters issued under the Puerto Rico Internal Revenue Code of 2011, as amended (the “2011 PR Code”) will continue to be valid as long as the official plan document or trust agreement is not amended to add, modify, or remove (in whole or in part) any plan provision considered a “qualification amendment,” as defined in CL 16-08.

As with the Previous Guidance, qualification amendments may be adopted through a plan restatement or a separate plan amendment. However, CL 16-08 clarifies that only plan restatements and/or plan amendments that include amendments classified as “qualification amendments” have to be submitted for qualification. As a result, plan sponsors that have adopted a plan restatement and/or amendments that do not include any “qualification amendments” do not need to submit such restatement for qualification. This relieves plan sponsors from the obligation, under the Previous Guidance, to submit all plan restatements for qualification.

What is a Qualification Amendment?

CL 16-08 provides clear guidance on what is a “qualification amendment.” This new guidance keeps the qualification amendments of the Previous Guidance, but also adds additional types of amendments that will be considered qualification amendments. The additional qualification amendments are:

1. Changes in the form or method for the payment of benefits applicable to Puerto Rico participants;
2. Substitution of the plan administrator, the trustee or the insurer of the trust (as applicable), or the paying agent for Puerto Rico participants;
3. Changes in the official name of the plan;
4. Changes in the employer identification number (EIN) of the plan’s trust;
5. Substitution of the master or prototype plan sponsor adopted by the plan; and
6. Any other amendment to the official plan document, trust agreement or other plan documents that the Puerto Rico Treasury subsequently considers as a qualification amendment through regulations, circular letter or administrative determination.

CL 16-08 also provides that amendments not considered qualification amendments under the Previous Guidance will still be deemed not to be qualification amendments under CL-16, and specifically clarifies that (i) amendments to add, eliminate or change the rules regarding the payment of plan administrative plan costs by the employer or participants or (ii) changes in the name, organization or corporate structure that did not result in a change in its employer identification number (EIN), will not be considered qualification amendments.

Deadline to Request Qualification Letters

Pursuant to CL 16-08, plan sponsors of **existing plans** who have already obtained a qualification letter under Section 1081.01(a) of the 2011 PR Code (or have submitted a request but have not yet received a determination letter), and have adopted a restated plan or amended the plan to incorporate amendments considered qualification amendments, must submit such plan restatement and/or plan amendment for qualification no later than the last day the plan sponsors or participating employers with Puerto Rico participants have to file their income tax return, including extensions, for the tax year of the employer during which the restatement and/or amendment was formally adopted. **Note that CL 16-08 clarifies that the date that determines when the request for determination letter must be submitted is the date of the adoption of the qualification amendment, and not the effective date of the plan restatement or amendment.**

For **new plans** established after January 1, 2011, the request for qualification must be submitted no later than: (i) the last day that the plan sponsor or participating employer with Puerto Rico employees has to file its Puerto Rico income tax return, including any request for extension, for the tax year in which the plan was established or (ii) the year in which Puerto Rico employees began participating in the plan, whichever is later.

Documentation to be Included with the Request

CL 16-08 adds documentation and other information to what must be submitted with a request for plan qualification. The additional information documentation and information now required is:

- Email addresses of the plan sponsor and participating employers with Puerto Rico employees.
- Plans that have a cash or deferred arrangement must include the actual deferral percentage (ADP) test for the year immediately prior to the date in which the request is being submitted.

- To the extent there are no qualification amendments made to the trust agreement, a request for qualification does not have to include a copy of the trust agreement. If, however, the qualification amendments adopted only amend the trust agreement (such as changing the plan's trustee), a copy of the trust agreement, but not the plan document, must be included with the request.
- The qualification request must specify the number of active and inactive participants in the plan at the beginning of the plan year in which the plan is being filed for qualification (the Prior Guidance required only that the plan specify the number of participants). Because it was not clear whether "participants" included inactive participants, the general practice was not to include the number of inactive participants.
- As provided under the Previous Guidance, if the plan or trust is being audited, examined or investigated by the Internal Revenue Service, the United States Department of Labor and/or the PR Treasury, the qualification request must include a detailed explanation of the audit, examination or investigation. However, CL 16-08 now requires that the name, telephone number, email address, or any other reasonable information available to contact the agent in charge of the investigation or audit be included in the qualification request.

Filing Fees

Retroactive qualification. Retirement plans in effect as of January 1, 2011 (the effective date of the Code) that have not yet requested a determination letter under the 2011 PR Code will be considered non-qualified retirement plans. However, such plans can request a retroactive qualification, to the extent: (i) at the time of filing that request, the plan sponsor or participating employer with Puerto Rico employees is not subject to an audit, examination or investigation by the PR Treasury, the IRS or the U.S. Department of Labor related, directly or indirectly, to the qualification or operation of the retirement plan in Puerto Rico, and (ii) the plan sponsor includes the filing fees established in CL 13-02 (i.e., three times the administrative basic fee and the additional fee of \$150).

Regular qualification. In general, filing fees for retirement plan qualification requests with the PR Treasury remain the same, in accordance with the Regulation No. 8693, and as provided in CL 16-08. However, retirement plans that have already obtained a qualification letter under the 2011 PR Code (or that have submitted a request that is still pending) can submit the plan for qualification as a result of the adoption of one or various qualification amendments after the deadline mentioned above, and only pay an additional fee of \$350, instead of the penalties imposed under CL 13-02, which required three times the regular filing fees.

CL 16-08 became effective on December 23, 2016. Therefore, plan sponsors that are currently in the process of requesting a determination letter as to the qualified status of their plans must analyze, based on this new guidance, whether there is a need for plan qualification and, if so, ensure that the request complies with the new guidance provided in CL 16-08.