

# ASPPA *asap*

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## FAQs on the 415 Amendment: What if I Haven't Adopted it Yet?

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Numerous individuals have called SunGard recently stating that they, or the employers they served, have not yet adopted an amendment to comply with the final 415 regulations. These FAQs are designed as a resource to those individuals and their advisors.

### ▲ What is the final 415 amendment?

In April 2007, the Treasury adopted comprehensive final regulations interpreting the Code §415 limit on benefits and contributions. The new regulations change the computation of the limit, particularly for defined benefit plans. The regulations also change the definition of compensation counted in computing the limit, particularly compensation paid after severance of employment (post-severance compensation). The new rules also affect an employee's ability to defer out of post-severance compensation.

The "final 415 amendment" is an amendment designed in good faith to comply with the final regulations. Virtually all qualified plans are required to adopt a final 415 amendment.

### ▲ What is the effective date of the final 415 amendment?

The effective date is the first day of the first limitation year beginning after June 30, 2007. For most (but not all) plans, the limitation year is the same as the plan year. So the effective date is January 1, 2008, for a plan with a calendar plan and limitation year.

### ▲ Will the amendment affect plan allocations and accruals?

Potentially, yes. That effect can come in several ways:

1. The law forbids a defined contribution plan from allocating an amount in excess of the 415 limit. This could be a problem under several new rules in the final regulations.

2. The law forbids a 401(k) plan from accepting deferrals out of post-severance payments which are not compensation (for purposes of calculating the 415 limit) under the final regulations.

3. A defined benefit plan which is subject to the vesting rules of Code §411 cannot accrue a benefit for a participant which would exceed the 415 limit. This could be an issue for many defined benefit plans in specific situations.

4. Many plans use the concepts of Code §415 in other situations. For example, many plans use the definition of compensation from the regulations (directly or with modifications), as the basis for allocating employer contributions. Particularly in a plan with a discretionary profit sharing contribution or matching contribution, a change in the definition of post-severance compensation can affect the allocations to all participants.

Notice that items 1, 2, and 3 are all mandated by the Regulations. By contrast, item 4 comes because of an employer's choice in plan design.

### ▲ What is the deadline to adopt the final 415 amendment?

That depends on a variety of factors, including: (i) the plan's limitation year (which governs the effective date), (ii) the plan year (which is frequently the same as the limitation year); and (iii) the employer's tax year (which is frequently the same as the plan year).

There are two basic rules which tell us, with regard to any plan, the deadline for adopting the final 415 amendment, which is an "interim" (meaning "required") amendment under IRS guidance:

1. If the amendment is for a plan a single employer maintains, then the deadline is the later of (i) the last day of the plan year which includes the amendment's effective

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date, or (ii) the extended due date of the employer's tax return for the tax year which includes the effective date.

2. If the amendment is for a plan more than one employer maintains, then the deadline is the last day of the 10th month following the last day of the plan year which includes the amendment's effective date. Any plan of a controlled group or affiliated service group falls under this category, as does a multiple employer plan and a multi-employer plan.

The following table gives several examples of the way these rules operate. In each case, the table assumes that the employer is a corporation which has not extended its corporate income tax return (Form 1120).

Limitation year	Plan year	Tax year	More than 1 sponsor?	Effective date	Deadline to adopt
12/31	12/31	12/31	No	1/1/08	3/15/09
12/31	12/31	12/31	Yes	1/1/08	10/31/09
6/30	6/30	6/30	No	7/1/07	9/15/08
4/30	4/30	4/30	No	5/1/08	7/15/09
6/30	12/31	12/31	No	7/1/07	3/15/08
12/31	12/31	4/30	No	1/1/08	12/31/08

Notice that if the limitation year, the plan year, and the tax year are all the calendar year, there is now (during early March 2009) still time to timely adopt the final 415 amendment. In other words, if you haven't done it yet, there may not be a problem. However, in some situations, an employer, to avoid violating the anti-cutback rule, may need to adopt the final 415 amendment earlier than the deadline shown above. Even though adoption of the 415 amendment by the above date will satisfy the plan documentation requirement, the timing of the amendment adoption nonetheless may cause an anti-cutback violation which the employer will need to correct.

### ▲ How does the anti-cutback rule impact the deadline to adopt the final 415 amendment?

The anti-cutback rule forbids reducing a participant's accrued benefit after the participant has accrued the benefit under the terms of the plan. Some plans, such governmental plans, are exempt from the anti-cutback rule.

Whether the anti-cutback rule requires an employer to adopt the final 415 amendment prior to the deadline indicated above depends on the terms of the plan, the terms of the amendment, and the facts at hand. The following examples illustrate the effect of the anti-cutback rule. In each case, the plan has a calendar limitation and plan year.

*Example 1:* A 401(k) plan has always allowed employees to defer from their final paycheck and has counted that paycheck as compensation. The employer does not pay compensation after the final paycheck. The final 415 amendment will likely not change the plan's allocations and the anti-cutback rule is not an issue.

*Example 2:* A safe harbor 401(k) plan historically has counted, for allocation purposes, all W-2 payments to employees, without regard to the date of those payments. The

plan provides for a 3% nonelective contribution for all participants. Jack severed employment June 15, 2008 and received \$10,000 of severance pay on June 20, 2008, reported on Form W-2. The final 415 amendment provides that severance payments after employment termination are not compensation (both for determining the 415 limit and for allocation purposes). To avoid a cutback, the employer should have adopted the amendment prior to the award of the severance pay. Alternatively, the employer can adopt an amendment which provides that the amendment is effective for determining the 2008 415 limit, but does not affect 2008 allocations. That will solve both the 415 and anti-cutback problems, but may make nondiscrimination testing more complex, if the resulting allocation definition is not a "safe harbor" nondiscriminatory compensation definition.

*Example 3:* A profit sharing plan has never counted post-severance compensation. The plan has a discretionary profit sharing contribution allocated

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pro rata to all employees with 1,000 hours of service. In the final 415 amendment, the plan will count all “regular compensation” paid to a terminated participant so long as the employer pays the compensation within the limitation year of termination or within 2½ months after termination. Mary terminated employment September 14, 2008 and received a bonus payment October 15, 2008. The amendment would have the effect of increasing Mary’s compensation and hence her share of the allocation, while it would reduce the allocation of other participants. To avoid a cutback, the employer should have adopted the amendment before any participant whose allocation was reduced reached 1,000 hours of service. Alternatively, the employer can adopt a final 415 amendment which provides that the amendment does not affect the definition of compensation for 2008 allocation purposes. Again, that likely will make nondiscrimination testing more complex.

*Example 4:* Assume the same facts as Example 3 except the plan has a “last day” allocation condition. Mary does not share in the 2008 allocation. The timing of adoption of the 415 amendment will not violate the anti-cutback rule, because any participant who terminates during the plan year will not be entitled to an allocation, even if the participant does receive post-severance compensation.

As these examples show, some plans do not have an anti-cutback issue at all regarding the final 415 amendment. Others may be able to resolve the issue by narrowly drafting the amendment. A few defined benefit plans may find that it is impossible to comply at this date with both the anti-cutback rule and the requirement to adopt a final 415 amendment. Such a plan should correct the situation under the Voluntary Correction Program.

▲ **Can a document provider adopt a final 415 amendment on behalf of its clients?**

Yes if either: (1) the plan is a prototype plan; or (2) the plan is a volume submitter plan that gives the sponsor authority to adopt amendments on behalf of its adopting employers, and the employer has adopted an EGTRRA restatement. If the plan is an individually designed plan or a GUST volume submitter plan, the document provider lacks the authority to adopt the amendment.

▲ **What should an employer do if the deadline has passed and the employer has not adopted a final 415 amendment for its plan?**

The employer should file an application under VCP. Under EPCRS (Rev. Proc. 2008-50), the filing fee for such an application is \$375, regardless of the number of participants in the plan. There is also a streamlined VCP procedure with a simple application form.