Employee Benefits Corner

By Elizabeth Thomas Dold and David N. Levine

IRS Updates the Filing Process for Qualified Plans

The new year begins with a new round of IRS filing deadlines along with new procedures and guidance that must be followed in order for the IRS to make a determination that qualified plan documents comply, as to form, with the requirements of the Code. This article reviews a number of pieces of recent IRS guidance affecting the filing process for qualified plans. This guidance includes the following:

- Rev. Proc. 2011-49,1 which updates the rules for submitting pre-approved plans to the IRS
- The new Form 5300 determination letter application for individually designed plans[2]
- The new LRMs (Listing of Required Modifications) for defined contribution plans[3]
- EP Determinations Quality Assurance Bulletin 2012-1 addressing verification of prior plan documents[4]

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General Filing Overview–Cycle A and Other January 31, 2012, Deadlines

February 2011 marked the start of the second five-year determination letter cycle for individually designed tax-qualified plans. With the first five-year cycle complete, it is again time for Cycle A taxpayers to submit their qualified plans for a new determination letter as their existing favorable determination letters will expire on January 31, 2012.

Although the rules for determining who is a Cycle A filer have not changed significantly, with the January 31, 2012, deadline rapidly approaching, plan sponsors and fiduciaries should take this opportunity to

reevaluate whether they should be filing in Cycle A by the January 31, 2012, deadline. In general, the following plan sponsors are considered Cycle A filers:

- **EIN-Based.** Plan sponsors that have a 1 or 6 as the last digit of their EIN that maintain individually designed plans (for example, a plan that is not a pre-approved plan), other than a governmental plan, a multiple employer plan, or a multiemployer plan.
- **Controlled Group Election.** A controlled group or affiliated service group elects to file in Cycle A for all its plans and members pursuant to Rev. Proc. 2007-44[5] for individually designed plans. To elect Cycle A, all members sponsoring qualified plans within the controlled group must execute the election, which must list the names and EINs of all eligible members, before the January 31, 2012, filing deadline. The election must be included with the determination letter application.

In addition to the Cycle A filing deadlines, pre-approved defined contribution plan sponsors also currently face a January 31, 2012, deadline to submit requests for new opinion letters on their pre-approved plan documents. Accordingly, sponsors of pre-approved defined contribution plans should submit their master and prototype ("M&P") and volume submitter ("VS") plans to the IRS by January 31, 2012. The submission deadline for mass submitters was extended to January 31, 2012 as well, pursuant to Rev. Proc. 2011-49 as described below.

Rev. Proc. 2011-49

In Rev. Proc. 2011-49,[6] the IRS updated its procedures and requirements for obtaining opinion and advisory letters for pre-approved plans previously contained in Rev. Proc. 2005-16.[7] This update contains a number of technical changes to the opinion and advisory letter process. Some of the key changes include the following:

- **Extended Deadline.** As noted above, the filing deadline for all pre-approved defined contribution plans (including mass submitters and national sponsors) is now January 31, 2012. Even with this extension, a number of mass submitters and national sponsors have expressed concerned about the limited amount of time available for them to file in light of the timing of the release of new LRMs (as discussed below).
- **Covered Plans.** M&P plan documents can now be used as multiple employer plans (which have, themselves, received significant publicity in recent months). No longer must a multiple employer plan utilize a volume submitter plan document or be established as an individually designed plan. As anticipated, the revenue procedure also clarifies that pre-approved plans cannot include hybrids plans, Code Sec. 403(b) plans, Code Sec. 401(a) plans with Code Sec. 401(h) accounts, or Code Sec. 414(x) DB(k) plans. Moreover, governmental plans must be set forth in a separate specimen plan which is likely to affect pre-approved plan sponsors that have previously used a single pre-approved plan document for their clients.
- **Amendment Certification.** Although typically required by an IRS agent as part of the opinion letter application review process, the revenue procedure now expressly requires as part of the submission that the prototype sponsor certify, under penalty of perjury, that interim amendments were made timely and communicated timely to adopting employers. Moreover, the special one-year rule to amend a pre-approved plan following issue of IRS guidance has been removed.
- **Interim Amendments.** The revenue procedure clearly provides that the date on which each amendment is adopted must be provided with the amendment, which is effective prospectively beginning October 31, 2011. Therefore, careful attention should be placed on having signed and dated amendments, as this has been a universal area of concern for all plan sponsors—whether through the determination letter process or on examination—as the IRS is much less willing to accept an affidavit after the fact that the amendment was adopted timely.
- **Amendment Authority.** The revenue procedure, unfortunately, eliminates the amendment authority to correct "obvious and unambiguous typographical errors and/or cross references" within the document. This tightening of the authority is consistent with the IRS limited recognition of the concept of "scrivener's errors" in the context of employee benefit plans.
- **Standardized Plans.** Standardized plans can now only offer safe-harbor hardship distributions.
- **Nontransferability of Opinion/Advisory Letter.** The revenue procedure clarifies that a new opinion or advisory letter is required in the event of a change in sponsorship of the plan, including changing the employer identification number, sale or acquisition of the pre-approved plan sponsor. There is a special process and fee for obtaining a new opinion

or advisory letter that is described in the revenue procedure. With the significant amount of mergers and acquisitions activity in the service provider industry, entities involved in transactions should carefully review their transaction documents to determine who will be responsible for paying for and complying with the revenue procedure's change in sponsorship procedures.

Form 5300 Filing

The IRS recently replaced its long-standing Form 5300 determination letter application for individually designed plans that was last revised 10 years ago with a new version that is designed to be processed electronically. The new version of the Form 5300 largely tracks the old form, although the format may be viewed as less user-friendly (although more technology friendly), and includes a number of noteworthy new disclosures and requirements, including the following:

- **Controlled Group and Plan Data.** There are changes to lines 6b and 8a of the Form 5300 that require additional controlled group/plan data. For example, identifying foreign entities within the controlled group and the disclosing plan's vesting provisions is now required.
- **Other IRS Submissions.** The Form 5300 now includes a question regarding whether a voluntary compliance program filing (VCP) under Rev. Proc. 2008-50[8] or voluntary fiduciary compliance program (VFCP) filing with the Department of Labor is pending, and instructions to enclose with the application copies of all compliance statements and closing agreements for the Plan. As many of these filings are not subject to public disclosure, we anticipate that this information will be redacted if a copy of the filing is requested pursuant to a Freedom of Information Act disclosure requirement. We note that in recent months, some IRS agents have begun asking for these materials in connection with previously filed Form 5300 applications.
- **"On" or "Off" Cycle Filing.** The Form 5300 now includes a series of detailed questions to ascertain whether the submission is being made "on" or "off" cycle, as only certain factual situations are permitted to be filed "off" cycle (*e.g.*, plan termination). It is our experience and understanding that "off" cycle filings will only be processed out of order in very rare circumstances.
- **Multiple Employer Plans.** The Form 5300 now requires that all adopting employers of the multiple employer plan file for a determination letter. When more Form 5300s are filed for a multiple employer plan, there is a corresponding increase in the required IRS filing fee as set forth in Rev. Proc. 2011-8.[9]
- **Plan Mergers.** Although it was typical for the reviewing agent to ask for additional information regarding plans that were merged into the Plan under review, the process is now set forth on the Form 5300 itself. Failure to timely adopt interim amendments is a failure frequently discovered in IRS reviews of determination letters for plans that involve a number of plan mergers.
- **Signed and Dated Amendments.** The IRS has and continues to carefully review the plan amendments that are submitted as part of the determination letter filing. Consistent with this focus, the Form 5300 now contains separate lines for entering the date amendments are "signed" and "effective." Historically, all plan amendments that were adopted following the last determination letter were required to be submitted. Notably, the new instructions remove this language and appear to require the submission of all plan amendments (including good-faith EGTRRA (Economic Growth and Tax Relief Reconciliation Act of 2001[10]) even prior to the last determination letter, which would be extremely burdensome and inconsistent with the Rev. Proc. 2011-6,[11] which limits the amendments to be included to amendments since the last determination letter or otherwise needed to show that eligibility for the current remedial amendment period has been met.
- Therefore, prior to filing the Form 5300, it is important to review the content and timing of interim amendments, and make sure the amendments comply with the 2010 Cumulative List set forth in Notice 2010-90.[12] If there are any late or insufficient amendments, a streamlined VCP filing (which, as of November 2011, requires a $375 fee) should be considered to address this plan qualification concern. Importantly, if it is not addressed upfront with a VCP submission, the IRS may impose much higher fees in the determination letter process or on examination for a late or insufficient amendment.
- **Foreign Plan or Trust.** The Form 5300 now requires that the plan sponsor indicate whether the plan is a foreign plan or trust, which also includes Puerto Rico plans. This disclosure is consistent with the IRS's focus on international plan issues and compliance.
- **Other Additional Disclosures.** The Form 5300 now includes a number of questions regarding (1) whether the plan was previously a pre-approved

plan, (2) was there a change in the type of plan (*e.g.*, for a change between a money purchase plan to a profit sharing plan, a Code Sec. 204(h) notice is required), (3) whether the plan includes an offset arrangement, and (4) whether the plan includes leveraged ESOP language (regardless of whether or not the Plan is a leveraged ESOP).

The IRS will accept either the old or new form through the January 31, 2012, filing deadline. Moreover, although Rev. Proc. 2011-8 (as modified) increased the filing fees effective February 2011, the Form 8717 user fee application has not yet been updated to reflect these fees (and pending Rev. Proc. 2012-8 may again increase these fees for filings after January 2012). The change in fees for January 2011 versus January 2012 fees can be illustrated as illustrated in Table 1.

Table 1.

	Jan. 2011 Filing Fee	Jan. 2012 Filing Fee
Form 5300, no demonstrations	$1,000	$2,500
Form 5300, with demonstrations	$1,800	$4,500

New LRMs for Defined Contribution Plans

The IRS recently updated the LRMs for defined contribution plans (including 401(k) plans that are contained in a separate document). The LRMs represent sample plan language, which is issued for pre-approved plans, but is also helpful for drafters of individually designed plans in drafting similar provisions. The LRMs have been updated to reflect post-EGTRRA legal changes, including changes required by the Pension Protection Act of 2006, the Heroes Earnings Assistance and Relief Tax Act of 2008, and the Worker, Retiree, and Employer Recovery Act of 2008. Notably, the LRMs include language for Roth in-plan rollovers, the waiver of 2009 required minimum distributions, and diversification language under Code Sec. 401(a)(35). They also include provisions, as noted above, to allow a plan sponsor to use a M&P plan document, including a standardized plan document, for a multiple employer plan. Moreover, the LRMs also clarify the IRS's position that it is not permissible to distribute "gap period" earnings on excess contributions, excess deferrals and excess aggregate contributions.

EP Determinations Quality Assurance Bulletin

Lastly, the IRS recently issued EP Determinations Quality Assurance Bulletin 2012-1 (dated October 24, 2011), which addresses the verification of prior plan documents in the absence of a favorable determination letter. Specifically, it provides that as part of the determination letter process, the agent will verify the timely adoption of good-faith amendments and all interim and discretionary amendments required to be made since the plan's initial cycle filing. Moreover, if the plan does not have an EGTRRA determination letter, the agent will review all the applicable amendments that would have been covered in the initial EGTRRA cycle, but will not verify prior laws unless the facts of the case indicate additional verification is necessary and the agent has managerial approval. This Quality Assurance Bulletin should be reviewed closely when pre-approved and individually designed plans are being prepared for submission in the IRS's determination letter process to help evaluate whether a streamlined VCP application would be appropriate.

Endnotes

1 Rev. Proc. 2011-49, 2011-44, Oct. 5, 2011.
2 *www.irs.gov/pub/irs-pdf/f5300.pdf.*
3 *www.irs.gov/retirement/article/0,,id=97182,00.html.*
4 *www.irs.gov/pub/irs-tege/qab_102411.pdf.*
5 Rev. Proc. 2007-44, 2007-2 CB 54.
6 *www.irs.gov/pub/irs-drop/rp-11-49.pdf.*
7 Rev. Proc. 2005-16, IRB 2005-10, 64.
8 Rev. Proc. 2008-50, IRB 2008-35, 464.
9 Rev. Proc. 2011-8, IRB 2011-1, 237.
10 Economic Growth and Tax Relief Reconciliation Act of 2001 (P.L. 107-16).
11 Rev. Proc. 2011-6, IRB 2011-1, 195.
12 *www.irs.gov/pub/irs-drop/n-10-90.pdf.* Notice 2010-90, IRB 2010-52, 909.