Employee Benefits Corner

IRS Issues the Latest Installment on the Determination Letter Program

By Elizabeth Thomas Dold and David N. Levine

For over a year now, the IRS has promised dramatic changes to its longstanding determination letter program for tax-qualified plans, and the recently issued Rev. Proc. 2016-37[1] delivers on that promise. To the chagrin of some practitioners who have advocated for more flexibility in this guidance, it mainly follows the path previously laid out by the IRS in prior guidance and public communications. Below we briefly summarize the existing guidance and then highlight the changes made to the determination (and opinion/advisory) letter programs. This round of guidance largely focuses on the determination letter program, but we anticipate additional changes to the Employee Plans Compliance Resolution System (EPCRS) and pre-approved plans down the road.

ELIZABETH THOMAS DOLD is a Principal at Groom Law Group, Chartered in Washington, D.C.

DAVID N. LEVINE is a Principal at Groom Law Group, Chartered in Washington, D.C.

Background

Beginning with Ann. 2015-19,[2] the IRS announced dramatic changes in its longstanding determination letter program for tax-qualified plans. Effective January 1, 2017, the IRS said it was eliminating the staggered five-year determination letter remedial amendment cycles for individually designed plans, and effective July 21, 2015, no longer accepted off-cycle determination letters. The new program is limited to (1) new plans—initial plan qualification for a plan that has not received a Form 5300 (or Form 5307) determination letter in the past (regardless of the date of adoption of the plan), (2) terminated plans that elect to file a Form 5310 and (3) certain other limited circumstances as determined from time to time by the IRS and Treasury in published guidance.

The IRS indicated that it was also making corresponding changes to the remedial amendment period (RAP) for disqualifying provisions and extending the RAP to at least December 31, 2017, which is the large focus of this new Revenue Procedure, which replaces Rev. Proc. 2007-44[3] in its entirety.

Earlier this year, Notice 2016-3 and Rev. Proc. 2016-6[4] announced that expiration dates on determination letters issued before January 4, 2016, are no longer operative, which was a step in the right direction, and new determination letters no longer have them. IRS also stated that future guidance will clarify the extent of reliance on these "evergreen" letters when the law changes

or the plan is amended, which again is provided in the new guidance described below. Lastly, to encourage individual designed plans to move to pre-approved plans, the Notice provided a one-year extension—from April 30, 2016, to April 30, 2017—for an employer *not* using a pre-approved defined contribution (DC) plan to adopt one on or after January 1, 2016 (and apply for a determination letter on Form 5307, if permitted for a volume submitter plan).

For over a year now, the IRS has promised dramatic changes to its longstanding determination letter program for tax-qualified plans, and the recently issued Rev. Proc. 2016-37 delivers on that promise.

New Guidance

On June 29, the IRS released Rev. Proc. 2016-37, which officially replaced the five-year RAP cycles for individually designed plans that were first implemented in 2007, and made a number of other important changes in this area, primarily impacting individually designed plans.

Individually Designed Plans

- *Form 5300 Filings*. The IRS reiterated that effective January 1, 2017 (except for Cycle A filings due January 31, 2017), Form 5300 filings are only available for initial plan qualification for plans that have never been issued a favorable determination letter under Forms 5300 or 5307, without any further clarification of the scope of this provision. Also, it explained that consideration will be given annually as to whether determination letter applications will be accepted in specified circumstances, including factors such as significant law changes, new approaches to plan design and the inability of certain types of plans to convert to pre-approved documents, with the IRS's current case load and resources available being a significant factor in this decision. Additional situations will be announced in published guidance (and the IRS will periodically seek comments on appropriate additional situations to permit), but for 2017 the IRS has determined that no filings for existing plans will be permitted (other than final Cycle A filings).
- *RAP and Required Amendments List (Coming Soon)*. The IRS replaced the existing five-year RAP cycle and interim good faith amendments with the following RAP, which is the deadline for adopting amendments to address disqualifying provisions:
  a. New plans—later of 15th day of the 10th calendar month after the end of the plan's initial plan year, or the tax filing deadline (plus extensions) of the employer's tax return for the tax year in which falls the later of the date that the plan is adopted or effective. Special rule apply for tax-exempt plans to determine the tax filing deadline.
  b. Existing plans—if not reflected on the Required Amendments List, the end of the second calendar year following the calendar year in which the amendment is adopted or effective, whichever is later; otherwise, the end of the second calendar year that begins after the issuance of the Required Amendments List in which the change in qualification requirements appears. The IRS indicated that it will annually issue this new Required Amendments List that will apply to changes in plan qualification that become effective after 2015 (and which will also dictate the IRS review in a Form 5300 filing) and explained that items will generally not appear on the list until the IRS issues guidance on such item (such as a model amendment).

     Governmental plans have special rules that extend these periods. Also notable is that there is still no anti-cutback relief for these retroactive amendments, but the RAP does not expire prior to December 31, 2017. Lastly, disqualifying provisions in terminating plans must be adopted in connection with the plan termination (without regard to whether the item is on the Required Amendments List).
- *Amendment Deadline for Discretionary Amendments*. For discretionary amendments—that is plan design amendments that are not made to address disqualifying provisions (*i.e.*, not made to address a qualification requirement or integral thereto)—the IRS largely retained the existing rule of adoption by the end of the plan year in which the provision is effective. Specifically, the new rule provides that except as otherwise provided by IRS guidance, the amendment deadline is the end of the plan year in which the plan amendment is operationally "put into effect"—which means when the provision is administered in a manner consistent with the intended plan amendment (rather than existing plan terms). Governmental plans have

an extended period until 90 days after the close of the second regular legislative session of the legislative body with amendment authority that begins on or after the date the plan amendment is operationally put into effect.

- *New Operational Compliance List (Coming Soon)*. The IRS will issue annually a new Operational Compliance List that is intended to reflect changes in qualification requirements that are effective during a calendar year. This is intended to help plan sponsor be in operational compliance with any required amendments as of the effective date of the change, which is required, even though plan sponsors will generally have the two-year RAP described above to actually adopt the plan amendment. This list will help sponsors know what rules they should be following before the required amendment must be (and is) adopted, which is needed as the Cumulative List will no longer be published annually.
- *Reliance on Last Determination Letter*. The IRS has clarified that a plan sponsor can continue to rely on its last favorable determination letter with respect to plan provisions that are not amended or affected by a change in law. (Longstanding IRS guidelines for such reliance, *e.g.*, that all material facts were disclosed in the earlier review, would continue to apply.) Thus, for the vast majority of previously-reviewed provisions in an existing plan, employers can continue to rely on existing letters if they do not change the plan provisions, unless Congress changes it or the IRS comes out with new guidance.

Pre-Approved Plans

- *Six-Year Cycles and Interim Amendments*. There is no change to the six-year RAP for pre-approved plans, the good-faith interim amendment process or the general plan year-end requirement for adopting discretionary amendments, except that governmental plans have a slight longer period to adopt amendments (*e.g.*, 90 days after the close of the third (second for discretionary amendments) regular legislative session of the legislative body with authority to amend the plan that begins on or after the amendment's effective date). Therefore, plan sponsors that adopt pre-approved plans, and stay within the confines of the plan document, can rely on the IRS opinion or advisory letter that is issued for the plan, and the plan restatements every six-years can be cleaned-up in the IRS review process without triggering sanctions for plan sponsors that adopt the pre-approved documents, provided that annual good-faith interim amendments are adopted. In addition, it appears that even if the plan amendment impacts reliance on the opinion/advisory letter, the plan sponsor may generally be able to take advantage of the six-year RAP (except if within a year the plan sponsor amends the document to a type of plan not otherwise permitted on a pre-approved plan), largely consistent with prior guidance (and since we no longer have the ability to move to a five-year RAP this is important).

Acceptance is the first step to change, and this guidance is the first step in clarifying the new landscape for plan sponsors and the benefits community to help maintain the tax-qualified status of retirement plans.

- The Cumulative List will continue to be issued for this process, but as the pre-approved filing are not done annually, the Cumulative List will not be issued until around December of the year prior to the applicable filing year. The Operational Compliance List (as described above) will assist with interim amendments and operational compliance. Unfortunately, the two-year period that individually designed plans will have to adopt legally required amendments does not extend to pre-approved plans, so it may be important for timely amendments to determine if the plan is individually designed or not.
- *Form 5307 Filings*. There is no change in the availability of a determination letter for a pre-approved plan, so only certain plan sponsors of volume submitter plans can file within the designated two-year window, and there is no special Form 5300 filing available if the plan is actually an individually designed plan. But as mentioned in Notice 2016-3, individually designed plans that convert to pre-approved DC plans after 2015 still have through April 30, 2017, to adopt a PPA restatement (and file a Form 5307, if eligible).
- *Pre-Approved Sponsor Filing Deadline for DC Plans*. The guidance includes a six-month extension for filing for new opinion/advisory letters for pre-approved DC plans (submission period currently reflected as August 1, 2017—July 31, 2018, which may be subject to further change.

Observations

Acceptance is the first step to change, and this guidance is the first step in clarifying the new landscape for plan sponsors and the benefits community to help maintain the tax-qualified status of retirement plans. The guidance references a number of important tools that will be forth coming to help make the new program work, including the Required Amendments List, Operational Compliance List and model amendments. Moreover, we anticipate the next round of guidance to modify EPCRS to reflect the major contraction of the program and provide needed relief for foot-faults that are inevitability going to arise without periodic IRS review of the plan documents. Stay tuned and if you are a Cycle A filer, do not bypass your opportunity for one last evergreen determination letter.

ENDNOTES

1 Rev. Proc. 2016-37, IRB 2016-29.
2 Ann. 2015-19, IRB 2015-32, 157.
3 Rev. Proc. 2007-44, 2007-2 CB 54.
4 Notice 2016-3, IRB 2016-3, 278, and Rev. Proc. 2016-6, IRB 2016-1, 200.