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Sent by U.S. Mail and by Email to notice.comments@irscounsel.treas.gov.

Internal Revenue Service
CC:PA:LPD:PR (Notice 2018-24)
Room 5203
P.O. Box 7604, Ben Franklin Station
Washington, D.C. 20044

Re: Notice 2018-24

Dear Sir or Madam:

This letter responds to the request by the Internal Revenue Service ("IRS") in Notice 2018-24 for comments on specific types of plans for which the Treasury Department and the IRS should consider accepting determination letter applications during calendar year 2019 in circumstances other than for initial qualification and qualification upon plan termination.

Our firm, Groom Law Group, Chartered, represents a large number of state and local governmental retirement plans. We would suggest that the IRS would be justified in expanding the types of plans on which determination letter applications should be accepted for 2019 and future years to include a governmental plan within the meaning of Internal Revenue Code ("Code") section 414(d) where there has been a significant change in the state or local law governing such plan.

Among the circumstances described in section 4.03(3) of Rev. Proc. 2016-37 which established the new procedures to file for a determination letter are significant law changes, new approaches to plan design, and the inability of certain types of plans to convert to pre-approved plan documents. Although the reference to significant changes in the law may have been written in the context of significant changes in federal law, we believe it should also apply to significant changes in the state and local laws that govern a public plan. Such state and local law changes can result in numerous plan changes that make it very difficult to be certain the plan remains qualified in form. Under such circumstances, we believe that a review by the IRS of the plan as amended would be warranted.

In particular, a significant change in state or local law will often include a change in plan design. It is common for state legislatures in particular to make changes to benefit formulas, sometimes adding defined contribution or hybrid elements, early or normal retirement dates, or other benefits, rights or features, which may include deferred retirement options, benefit elections, new Code section 414(h)(2) pick-up contribution rates, or special service crediting rules. Sometimes these will only affect new hires, and may be referred to as "tiers," to distinguish the terms of the plan applicable to different participants based on their dates of hire.

These changes are not only significant in terms of their impact on the benefits provided under and the changes to the plan document – typically, for state retirement systems, the statute, together with regulations or policies, are the plan document – but often in terms of the number of participants who would be impacted. Though some state plans may be relatively small – solely for legislators or judges, for example – others can run into the tens or hundreds of thousands of participants and beneficiaries. It is important that the retirement plans for so many participants and beneficiaries be clearly tax-qualified in form.

Moreover, because of the many different rules under the Code for governmental plans, and the tendency of such plans, at least when they serve as the main retirement plan for the governmental entity, to be statutory and unique to that governmental entity, there are very few instances where the main retirement plan of a governmental entity will be able to "fit" into a pre-approved plan document.

For all of these reasons – that there will have been a significant change in the law, there will often be new plan designs, and the common inability of governmental plans to convert to pre-approved plan documents – we would urge the IRS to consider allowing a determination letter filing for a governmental plan when there has been a significant change in the state or local law governing the plan.

This would also suggest consideration of a standard for when a change in the state or local law is "significant" for this purpose. Not every change in state law will be as comprehensive as a new "tier" for new hires, for example. Nor, as with federal law changes, will the IRS be in a position to independently monitor and determine significant state or local law changes. We would suggest that, if an objective standard of when a change in state or local law is "significant" would be useful, consideration be given to setting a minimum number of affected participants and beneficiaries, such as 1000, as a prerequisite to the making of a determination letter filing on account of a change in state or local law. Such an approach would be analogous to the IRS continuing to grant opinion letters on pre-approved plans on the grounds that the large number of participants covered by such plans justifies the cost of the review.

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We thank you for considering these comments, and would be happy to discuss these ideas further or have a meeting to provide more information if you think it would be helpful. If you have any questions, please contact David W. Powell at (202) 861-6600.

Respectfully submitted,

David W. Powell