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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 hundreds of plan sponsors nationwide who maintain a variety of different qualified retirement plans, each with their own unique considerations. Understanding the limited resources available to the IRS for determination letters, and the need of plan sponsors for assurance that their retirement plans satisfy the qualification requirements, we would recommend consideration of four situations/types of plans for expanding the determination letter program. We believe these recommendations would balance the needs of plan sponsors without overly taxing IRS resources. In this regard, we recognize that the Service may be able to accommodate these expansions over a period of years.

1. Cash Balance and Other Hybrid Plans

The final regulations addressing hybrid plans that determine benefits under a lump-sum based benefit formula (the "Final Cash Balance Regulations") were generally effective as of January 1, 2017, and plans were required to be updated for the same. Many plans needed to be amended for one or more items related to the Final Cash Balance Regulations, including amending their interest crediting rate to meet the market-based rate of return rules. It was not uncommon for these plans to use the transition relief provided in the Final Cash Balance Regulations to amend the interest crediting rate to be compliant. Consistent with the regulations, some of these changes may have reduced the prospective interest crediting rates on all accrued benefits.

The Final Cash Balance Regulations were a significant guidance project implementing the extensive rule changes for hybrid plans made by the Pension Protection Act of 2006. Most of the Final Cash Balance Regulations were not yet on the cumulative list by the time that the IRS discontinued the staggered filing system for determination letters. As a result, the outstanding determination letters for numerous plans do not cover the Final Cash Balance Regulations in their entirety.

We recommend that the IRS open the determination letter process to include plans that are subject to the Final Cash Balance Regulations. The determination letter process and review would provide plan sponsors with additional comfort that the changes they believed were required to be made were done properly, and that the plan sponsors can rely on the protections available under the Final Cash Balance Regulations (such as the anti-cutback relief when changing interest crediting rates in a manner prescribed by the final regulations or to be within a safe harbor deemed to satisfy the age discrimination rules under Internal Revenue Code ("Code") section 411(b)(1)(H)). Participants also would benefit from the plans being reviewed by the IRS, such as situations where certain amendments may need to be adjusted to meet the regulations and corrected timely, reducing the need for possible claims or litigation.

2. **Defined Benefit Plans with Variable Annuity Features**

Existing defined benefit plans with legacy features, and new plans attempting to address income replacement considerations and inflationary pressures, sometimes include a variable annuity feature. Such feature allows a participant to accrue a benefit expressed as units, and then convert some or all of those units into a variable rate benefit based on the return on plan assets or a sub-portfolio thereof. As a result, participants receive an accrued benefit where the annual value and retirement payment amount fluctuates, but is intended to help address inflation risk.

Past IRS guidance for variable annuity features relied upon by plan sponsors is very limited and dates back to the 1950's. The fluctuation in the unit values (and therefore benefits) makes it difficult for plan sponsors to determine how the variable annuity feature fits within the current defined benefit plan rules, such as anti-backloading requirements of Code section 411(b)(1) and calculating the present value of the accrued benefit for a lump sum payment under Code section 417(e).

Allowing pension plans with these features to be reviewed as part of a determination letter process would provide plan sponsors with additional comfort that these programs meet the tax-qualification requirements, and can be administered as provided in their respective plan documents.

3. Plans Implementing Significant Design Changes

Plan sponsors periodically update plan designs in order to meet business needs as well as to help participants save for retirement. In some cases, those changes can be significant in that they incorporate new or materially different benefit formulas, and some changes may simplify plan administration. We recommend that the IRS allow plans with a significant design change to submit the plan for a determination letter review.

We understand the difficulty of defining a "significant design change" in order to prevent such definition from being overly broad and allowing a flood of plans to overwhelm the limited IRS resources for determination letters. Nevertheless, a carefully drawn definition of "significant design change" could keep this risk in check while providing important assurance to plan sponsors and their participants.

In some cases, it may be possible, as part of the design change, to move to a pre-approved document to obtain certain qualification assurances. However, in many cases, the plan design changes may not be accommodated by a pre-approved document or other plan provisions required to be maintained may not be supported by the limited options pre-approved plan document.

We recommend that the IRS consider the following types of changes to be a "significant design change":

- Plans that convert to a cash balance-type formula would benefit from the IRS review as part of a determination letter application. These conversions can be complicated, and may require meaningful technical resources of the IRS to do an effective plan review. However, these types of changes are also the ones where plan sponsors and participants would benefit the most from a timely IRS review. A timely review can help identify any additional, necessary changes to preserve the tax-qualified status of the plan and also to provide participants confidence that their benefits have been properly preserved.

- Plans that incorporate changes that otherwise make certain compliance testing unnecessary would benefit from timely IRS review. For example, a 401(k) plan that adopts a safe harbor formula will no longer be required to perform ADP and ACP testing. Allowing a plan sponsor to have their plan timely reviewed by the IRS to ensure it meets the safe harbor requirements in form will provide comfort that the sponsor will not need to continue performing those tests. Such a timely review can also ensure that the sponsor would not need to go back and reperform the tests, including undertaking possible corrections, if the plan was not properly amended to include the safe harbor formula.

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- Plan changes accompanying significant workforce adjustments often raise issues on which certainty is highly desirable. For example,
    - workforce downsizing may include benefit enhancements such as subsidized early retirements, social security supplements or similar benefits intended to ease the transition to retirement.
    - corporate separations often feature special bridging or imputed service arrangements intended to preserve retirement benefits for participants who are relatively close to retirement.

We respectfully submit that the opportunity to obtain IRS comfort on these types of benefits changes will be very helpful – and avoid possible disincentives for being generous to workers.

4. Plans Filed under the Voluntary Correction Program Requiring a Plan Amendment

Plan sponsors frequently use the Employee Plans Compliance Resolution System (EPCRS) as described in Revenue Procedure 2016-51 to address operational and document failures. It is not uncommon for a plan sponsor to adopt an amendment as part of a Voluntary Correction Program (VCP) filing under EPCRS. Sometimes, the proposed amendments submitted as part of the correction are required to be revised based on comments from the reviewing IRS personnel. However, Section 6.05 of Revenue Procedure 2016-51 provides that a determination letter application to review the corrective amendment is not allowed. Further, the compliance statement issued under the VCP will not make a determination that the corrective amendment satisfies the qualification requirements in form.

In our view, the failure to address the qualification requirements for amendments performed as part of a correction being reviewed by the IRS creates unnecessary uncertainty for plan sponsors filing under VCP. Under the current program, a plan that adopts a corrective amendment as part of a VCP filing could receive a compliance statement related to the correction, yet still be subject to the risk of disqualification or additional penalties if the IRS later determined the corrective amendment did not satisfy the qualification requirements. One of the key objectives of plan sponsors for using the VCP is to obtain certainty that prior qualification errors are resolved. The failure of the IRS to cover corrective plan amendments either as part of the compliance statement or a determination letter application clearly frustrates that purpose. We note that Section 13.05 of EPCRS provides that the closing agreement issued by the IRS as part of Audit Cap is binding on all tax matters in such agreement. Similar protection should be provided to compliance statements issued under VCP related to corrective amendments.

We recommend that the IRS address corrective amendments submitted as part of a EPCRS submission either in the compliance statement, or allow the plan to be submitted as part

of a determination letter application to confirm that the plan, with the corrective amendment, meets the qualification requirements.

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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 the undersigned at (202) 861-6651.

Respectfully Submitted,

Jeff Witt