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# Employee Benefits Corner

## *IRS Determination Letters Are Back in Play for Certain Ongoing Plans*

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By Elizabeth Thomas Dold and David N. Levine

It has been several long years since budget restraints restricted the Internal Revenue Service's ("IRS") long standing determination letter program for 401(a)/401(k) qualified plans, which provided a process where plan sponsors could seek a determination from the IRS that the form of their individually designed plan document met the complex provisions of the Internal Revenue Code. Without this program, plan sponsors were left with some difficult decisions regarding how best to ensure that the plan remains tax-qualified, including whether a legal opinion should be sought or whether to consider moving to a pre-approved plan. So we are pleased to report that the IRS has re-opened the program for certain selected plans, providing an invaluable benefit to these plan sponsors who will now be able to obtain a Form 5300 determination letter on an on-going individual designed plan.

Specifically, in response to periodic requests to expand the determination letter program, the IRS has issued welcome guidance in Rev. Proc. 2019-20.<sup>1</sup> The guidance reopens the determination letter program for statutory hybrid plans (e.g., cash balance plans) and merged plans, and provides sanction relief from plan document failures identified and corrected as part of those determination letter applications. We briefly review the prior program and summarize the Revenue Procedure below.

### History Lesson

In June 2016, Rev. Proc. 2016-37 announced that the IRS was eliminating the long-standing five-year cycle determination letter program for individually designed tax-qualified retirement plans, and stopped issuing determination letters for ongoing plans with the final Cycle A submissions that were due on January 31, 2017. Plans that were not eligible for a "Cycle A" filing were not able to submit for a final determination letter. Rather, determination letters were generally limited to new plans (for initial qualification) or plan terminations (Form 5310). However, the IRS indicated that on a yearly basis it would reconsider opening the program for certain "special circumstances." Until now, the IRS declined to

issue such guidance. Although the IRS provided that prior determination letters would not expire, any plan design changes and new law requirements were not covered by the prior determination letter, which for some plans are now several years old.

## Plans Eligible for Filing for Determination Letters

Effective September 1, 2019, Rev. Proc. 2019-20 expands the determination letter program in two meaningful ways:

- Hybrid plans, and
- Plan mergers.

Therefore, these individual designed plans are eligible to submit a determination letter in accordance with this Revenue Procedure and Rev. Proc. 2019-4.

### 1. Hybrid Plans

First, sponsors of defined benefit plans that use a statutory hybrid formula—cash balance plans, pension equity plans, certain variable annuity plans, *etc.*—even if the plan is frozen or otherwise offers traditional benefit formulas as well (*e.g.*, benefits based on final average pay and credited years of service), are eligible to apply for a new determination letter during a one-year period beginning September 1, 2019, and ending August 31, 2020.

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The IRS explained that they opened the program up for this limited one-year window because depending on your prior “cycle,” not all plans were fully reviewed by the IRS for the hybrid plan regulations. However, the IRS expressly states that the anti-cutback relief that expired before the 2017 plan year for changes in interest credits has not been extended.

This means that existing plans and new hybrid plans can file for a determination letter for this one-year period, which, although a determination letter is optional, we generally recommend obtaining one whenever otherwise available. This is nothing better to show that the terms of your plan document comply with the Internal Revenue Code than an updated favorable IRS determination letter.

Therefore, any plan sponsor with a hybrid plan, or thinking of converting an existing plan to a hybrid plan, should restate their plan document next year and file for a determination letter by the August 31, 2020, filing deadline. This review will cover the entire document, so for any other design changes that have not been made (*e.g.*, waiting to move to market rate of return), now might be your time to make the change and seek a determination letter on the provision. The determination letter fee of Form 5300 filing is \$2,500 and this fee can be paid from plan assets.

### 2. Merged Plans

Second, sponsors of “merged plans” (which include all defined benefit and defined contribution plans) are eligible, beginning September 1, 2019, to apply for determination letters on an ongoing basis, provided that the following rules are met:

1. *M&A Transaction.* There is a corporate merger, acquisition, or similar business transaction among unrelated entities (*i.e.*, not within the same controlled group—generally less than 80% ownership);
2. *Plan Merger.* There is a plan merger of two or more formerly separate plans into a merged plan no later than the last day of the first plan year that begins after the plan year that includes the Date of Corporate Merger (*i.e.*, effective date of the transaction); and
3. *Form 5300 Filing Deadline.* The determination letter is filed within the period beginning on the Date of the Plan Merger (*i.e.*, effective date of the plan merger) and ending on the last day of the first plan year of the merged plan that begins after the Date of the Plan Merger.

For example, if a plan sponsor acquired an unrelated entity in a corporate transaction as of August 1, 2018, and then merged the acquired company’s plan thereafter into its plan no later than December 31, 2019, then the deadline for submitting a determination letter application would be December 31, 2020.

## Potential Sanctions

Historically, there has been very low risk of sanctions when filing for a determination letter—they were only raised when the reviewer flagged a provision that could not be corrected within the remedial amendment period—which included a fixed schedule for legal amendments that were not properly reflected in the plan document. When the determination program was restricted, these sanctions were replaced with a fee based on 150%–250% of the VCP filing fee (or higher facts and circumstances sanction if egregious nonamendment failure), depending on the timing of the document failure.<sup>2</sup> And to avoid these fees, we typically recommended that we review the plan prior to submission of the determination letter and anything that needed a retroactive plan amendment for compliance with these legally required amendments, we filed a VCP submission simultaneously to address any issues. This approach is still available. However, we have additional relief for plan document failures identified by the IRS.

First, the Rev. Proc. 2019-20 provides that the IRS will not impose any sanctions for plan document failures relating to (1) implementation of the final hybrid plan regulations for the hybrid plans or (2) plan document failures

that relate to a plan provision included to effectuate the plan merger for merged plans.

Second, for any other plan document failures, as long as the amendment that created the failure was adopted timely and in good faith with the intent of maintaining the plan's qualified status (or the plan sponsor reasonably and in good faith determined that no amendment was required in connection with a change in qualification requirements), a reduced sanction equal to 100% of the VCP fee will be imposed.

## Next Steps

Plan sponsors with M&A transactions or that maintain (or want to convert to) a hybrid plan should review the requirements for a determination letter, restate their plan documents, include any other plan design changes, and make the submission by the filing deadline.

Prior to making the submission, plan sponsors should also consider if they also want to make a separate VCP filing for plan document failures identified that are unrelated to the plan merger or hybrid regulations, to avoid a sanction (which is generally 150%–250% of the VCP fee—so likely not to exceed \$8,750, unless egregious plan document failures are identified), which is non-deductible and not payable from plan assets.

### ENDNOTES

<sup>1</sup> Rev. Proc. 2019-20 (May 1, 2019).

<sup>2</sup> Rev. Proc. 2019-19, IRB 2019-19.

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