GROOM LAW GROUP

October 1, 2015

Internal Revenue Service
CC:PA:LPD:PR (Announcement 2015-19)
P.O. Box 7604, Room 5203
Ben Franklin Station
Washington, DC 20044

Re: Recommendations Concerning The Determination Letter Program

Dear Sirs and Madams:

We are writing on behalf of numerous clients who are extremely concerned with the dramatic cuts to the longstanding Internal Revenue Service ("IRS") Determination Letter ("DL") Program in Announcement 2005-19 (July 21, 2015). For several decades, our firm has regularly assisted clients to maintain their qualified plan documents and apply for IRS DLs. Our clients include many major US companies and government entities that sponsor individually designed plans covering millions of US workers, retirees and surviving spouses. In view of this focus, the IRS' dramatic curtailment of the DL Program is of major concern to us.

An Overview of Our Concerns

The elimination of the existing DL Program for individually designed retirement plans undermines the current retirement system by negatively impacting plan participants and unduly burdening employers and plan administrators. Since DLs were first issued some 70 years ago, an entire framework has been established that relies on the IRS determination letter as prima facie evidence of a plan's qualified status. Many thousands of transactions that effectively rely on a plan's determination letter occur every single day, whether as:

- purchases and sales of companies that sponsor plans,
- participant rollover contributions (where the recipient plan must confirm the rollover contribution comes from a qualified plan),
- plan investments, including lower cost vehicles like collective trusts or insurance company separate accounts, whose legal status as a group trust or unregistered investment depends on the plan's qualified status,
- participant bankruptcies and other efforts to reach benefits protected by the anti-assignment rule.

As further explained below, these are just a few examples from a system that has evolved into one that places heavy reliance on the determination letter. Undermining this system by eliminating the periodic determination letters for individually designed plans will harm participants, whose rollover contributions can no longer be processed as efficiently (or perhaps

would not be accepted at all by individually designed plans), impeding the transition to lower cost funds, and effectively preventing participants from protecting their retirement savings from creditors and other third-party claims.

Employers forced onto prototype or volume submitter documents will lose the flexibility to customize their retirement plans to reflect the unique needs of their employee populations or adequately reflect their fiduciary structure and control their fiduciary responsibilities. This inflexibility, coupled with the challenge of identifying new ways to demonstrate qualified plan status for what were routine daily transactions, will generate uncertainty and confusion – and may even encourage some employers to terminate their retirement plans. This dramatic change runs counter to decades of policymakers' efforts to encourage participation in employer-sponsored retirement plans.

We are sympathetic to the challenges the IRS faces as it struggles to cope with reduced budgets and staffs. We respectfully submit, however, that the DL Program is simply too important to put on the "chopping block" in such a drastic fashion as we hope the following discussion will make clear. Indeed, only the IRS is in a position to determine that the form of a plan in fact meets all of the applicable plan qualification requirements. Accordingly, the IRS and the pension community should work together to maintain the integrity of a comprehensive DL Program while relieving undue burdens on the IRS.

The detailed comments below are divided as follows:

Parts I-IV – Review the history and importance of DLs and why these planned reductions are contrary to the interest of the many stakeholders in the public and private plan communities – including participants, employers, plan administrators, investment advisors and other service providers, and

Part V – If, notwithstanding these adverse impacts, the IRS chooses to proceed, we describe the changes it should make to the "remedial amendment period" and what additional opportunities for DL filings should be provided.

I. Part I: The Longstanding DL Program Achieves Critical Tax and Retirement Policy Goals and Should be Preserved

A. Origins of the Program and Growth of Retirement Plans

The current DL Program has its genesis at least as far back as the early 1940's – over 70 years ago. See Deputy Commissioner Cann, *How the Commissioner Handles Pension Plans, Taxes* (Oct. 1945), pp. 918-24 (noting that, by 1945, over 7,500 plans had been submitted for advance rulings). At that time, the predecessor to Code section 401(a) contained only six paragraphs – essentially, just the "exclusive benefit" and written plan document rules, and requiring nondiscriminatory coverage and benefits.

As the law has grown in complexity – certainly in the 40 or so years since ERISA's enactment – the need for a scheme where IRS reviews a plan document to confirm that it satisfies applicable law – has grown exponentially. Indeed, in ERISA, the tax-writing committees recognized the importance of this system:

> to assist employers in their development of plans or plan amendments, the Internal Revenue Service issues determination letters indicating whether or not proposed plans or amendments qualify for the special tax treatment. As a practical matter, since taxpayers generally want assurance in advance that their plans or amendments will qualify, in most cases they obtain prior determinations from the Internal Revenue Service when adopting a plan or modification.[1]

As the number of plan qualification requirements has proliferated, the regulations, rulings and other guidance have become voluminous. Clearly, the ability to obtain a DL is more important than ever, so that employers can have some degree of certainty not only about the qualified status of their plans, but also about the appropriateness of any associated tax deductions and tax reporting and withholding. Without this certainty, employers may be pressured to establish significant tax reserves to prepare for the possibility of disqualification. Periodic determination letters provide confirmation that, as legal requirements and possibly IRS interpretations change, a plan's design remains compliant. Given the volume of requirements and frequency and complexity of changes, the DL Program enables employers to have close and frequent coordination with the IRS, thereby promoting compliance.

B. Growth of Retirement Capital

Retirement plans are the largest single source of US capital. According to the Investment Company Institute, as of March 31, 2015 –

- the private defined benefit segment held $3.2 trillion in assets,
- the governmental defined benefit segment held $5.1 trillion in assets, and
- the defined contribution segment – including all forms of DC plans – held $6.8 trillion in assets.

C. Among the Largest Tax Expenditures

In 1974, the Joint Tax Committee staff estimated the so-called "tax expenditure" for the "net exclusion of pension contributions and earnings" at $5 billion. For 2015 – 40 years later – the estimate stands at nearly $112 billion – over 22 times larger. And the 5-year estimate for 2014-18 is a staggering $700 billion – the third largest in the entire tax code.

[1] H.R. Rep. 807, 93d Cong. 2d Sess., p. 105 (1974).

We respectfully submit that the IRS should allocate the resources needed to maintain a responsible system for determining that plans are entitled to these valuable tax benefits.

II. Why Having Current Determination Letters is Critical

During the 70 years of its existence, the IRS determination letter has become an integral part of the retirement plan universe in a host of critical areas and has been woven into the fabric of retirement plan-related transactions. Some of these areas reflect legal, business and accounting standards and practices. Others reflect areas of law and regulation that build on the existence of an IRS determination letter to support legal compliance and confer other economic benefits on plan sponsors and/or participants.

We highlight many of these areas below with brief explanations.

A. Professional, Business and Accounting Standards

Mergers and Acquisitions – It has become standard practice for a party acquiring an entity with one or more qualified plans to require "representations and warranties" concerning the tax-qualification of the acquired entity's plan(s). The existence of a current DL is prima facie support for this practice. The current system facilitates the acquisition and continuation of qualified plans in many cases. Without a current DL, however, acquiring companies may be reluctant to merge new plans into existing plans, and may even initiate plan terminations instead of maintaining separate plans at increased costs. This will hurt participants by causing more "leakage."

Accounting Standards—Plan auditors must address potential tax liabilities of entities being audited as part of their audits and financial statement preparation. A current DL provides the best support for the auditors not requiring a "tax reserve" for the plan/trust under review.

Corporate Legal Compliance Functions – In the wake of the Sarbanes-Oxley and Dodd-Frank corporate reforms, many larger companies have established "chief compliance" (or similar) officers to oversee and support the entire organization's legal compliance function. Again, current DLs provide the necessary support for this important function as it relates to the company's plans.

Plan Custodians/Recordkeepers – As a matter of practice, plan custodians and recordkeepers customarily request evidence that incoming retirement plan customers are "tax-qualified." Among other reasons, this is necessary to ensure that tax reporting and withholding is done properly (*e.g.*, reporting and withholding for qualified plans under Code sections 6047 and 3405, instead of general reporting under Code section 6041 and wage withholding under Section 6051), to ascertain that available reporting exemptions for qualified plans (*e.g.*, Form 1099-INT) are available, etc.

B. Additional Tax-Related Areas

Tax-qualified plans give rise to valuable tax benefits including current deductibility of employer contributions, tax exemption of trust investment earnings, and, of course, tax-deferral/rollover opportunities for participants. But there are many others, some of which are noted below.

Employment Tax Rules – For decades, employer contributions to qualified plans on behalf of employees have been exempt from Social Security and unemployment taxes. IRC §§ 3121; 3306.

Insurance Company Pension Contracts – Under Subchapter L of the Code, life insurance companies are not subject to tax on reserves held under qualified "pension plan contracts." Code § 818(a). DLs provide the necessary support for insurers' reserve tax treatment.

Tax Treaties – Qualified plan trusts typically are eligible for exemptions from foreign withholding taxes under tax treaties between the US and foreign countries. The DL is the best evidence of a trust's entitlement to claim such exemptions via Form 6166.

Plan Investments – Defined benefit plans often invest through limited partnerships and other pass-through entities where the general partner/manager needs to know the tax status of the various parties. Again, the DL is commonly used to support exempt status.

"Group Trusts" – Under longstanding IRS policy, groups trusts that consist of qualified plan investors may themselves be treated as "tax-exempt/qualified" trusts. Rev. Ruls. 81-100, 2011-1 and 2014-24. A review of the specific requirements for such trusts under Rev. Rul. 2011-1 clearly shows the heavy reliance on IRS qualification. Typically, investment in a group or collective trust is expressly conditioned on the existence of a current DL. In this regard, collective trust investments have garnered favorable attention in recent years because they typically offer less expensive investment options for 401(k) plans, helping to bring down the cost of 401(k) investments for plan participants.

C. Other Federal Agencies/Laws

Department of Labor ("DOL") – Under ERISA's "division of labor," the IRS has primary jurisdiction over the regulation and interpretation of Part II of ERISA, *i.e.*, the participation, vesting and benefit accrual standards. As a result, the DOL typically defers to IRS in the most critical areas directly affecting plan participants and beneficiaries. The IRS' DL Program goes a long way to ensure uniformity and consistency in the interpretation and administration of these benefit provisions.

Pension Benefit Guaranty Corporation ("PBGC") – Under Title IV of ERISA, the PBGC insures benefits accrued under an ERISA-covered plan "which has, in practice, met" the plan qualification rules of the Code for the preceding 5 plan years, or "is, or has been determined" by Treasury to be "a plan described in chapter 1" of the Code. Thus, the PBGC relies on DLs as part of its insurance coverage determinations.

Securities and Exchange Commission ("SEC") – Longstanding statutory and administrative rules establish that qualified plans – and commingled investment vehicles involving primarily qualified plans – are exempt from SEC registration, as "securities" under the Securities Exchange Act of 1933, and as "investment companies" under the Investment Company Act of 1940. Indeed, it is customary for the financial institutions that sponsor and maintain these vehicles to require current DLs as part of the investor admission process.

Federal Bankruptcy Laws – Under 2005 amendments to the federal bankruptcy laws (Section 224), participants' interests in funds that are "exempt from taxation under section 401" (and certain other Code provisions) are protected from creditors in individual bankruptcy proceedings. In addition, rollover contributions to IRAs from such funds are generally exempt. For example, the law specifically provides that –

> (A) If the retirement funds are in a retirement fund that has received a favorable determination under section 7805 of the Internal Revenue Code of 1986, and that determination is in effect as of the date of the filing of the petition in a case under this title, those funds shall be presumed to be exempt from the estate.

In addition, loans under "plans established under section 401" are expressly exempt from discharge in bankruptcy (*i.e.*, the loans are not extinguished). Thus, current DLs are critical to the protection of participants' retirement benefits.

D. State Laws

A brief search indicates that nearly 1,500 state statutes make reference to "plans described in Code section 401." New York law contains 25 such references in provisions that cover state taxes, banking and insurance, bankruptcy, retirement systems, and estates and trusts.

While we do not contend that a DL is necessary to support the desired state law treatment in each instance, DLs clearly do facilitate compliance.

E. A Multitude of Stakeholders Are Adversely Affected

We respectfully submit that this brief overview of the numerous key areas that rely on plan qualification for compliance, financial and/or tax benefits demonstrates the far-reaching impact the DL Program's curtailment will have. In short, it is not only employers who stand to

lose from the lack of a regular comprehensive system of review, but a host of other parties who will bear the burdens of these drastic changes, including

- most importantly, plan participants and their families who risk immediate taxation of their accrued benefits and other potential adverse effects,
- recordkeepers, trustees and custodians, which administer the plans and hold their assets,[2]
- financial institutions, including banks, insurance companies and investment advisors, which invest plan assets around the world,
- other federal agencies such as the DOL, PBGC and SEC – as well as offices of the IRS outside the DL Program,
- lawyers and accountants who will have to develop new ways to help their clients assess tax-qualified status (which can only be determined by the IRS in the final analysis), and
- state agencies and courts interpreting and applying laws that require plan qualification determinations.

III. The DL System Does Not Have to be Perfect to Have Great Value

We understand that the IRS is concerned that DL reviews may not allow sufficient time for IRS reviewers to verify compliance. We also understand that errors are made, that the review is not all-encompassing, the IRS faces major budget challenges, etc.

We nevertheless ask the IRS to recognize that the fact that plans are submitted – and must be submitted regularly – itself operates as a major enhancement to qualified plan compliance. The process of preparing to submit a plan for review typically engages a team of in-house and external experts to focus on the plan document, recent transactions, plan records, plan operations, etc. This process, in and of itself, has the salutary effect of identifying possible errors which the

[2] Although Rev. Rul. 2014-9 permits plans to confirm qualified status by locating the plan's Form 5500 filing on the DOL's eFast website, this guidance, while well-intended, is often impractical for a number of reasons, including that the plan information provided by the participant on the rollover form may not match the plan information on the Form 5500 (which can occur if more than one employer uses a similar name or as a result of the abbreviations required by the eFast software), and some recordkeepers are unwilling to absorb the increased personnel costs that would result if each rollover contribution requires the additional step of online research.

parties can then remedy, as needed, through the Employee Plans Compliance Resolution System ("EPCRS") or other reasonable correction measures.

Experience teaches that legal deadlines/systems are the most effective way of ensuring that "the 'i's' are dotted and the 't's crossed." We are concerned that the absence of any IRS review in the life of a plan after it is "born" (and is initially qualified) until its "death" (through plan termination, which may involve 50 or more years) is likely to result in numerous gaps that are currently avoided by the rigors of the staggered filing system (or even the prior system of a uniform IRS-imposed deadline for submission). As explained below, a number of changes can be made to alleviate the IRS' concerns well short of the draconian "solution" under serious consideration.

IV. Pre-Approved Documents Do Not Meet the Needs of Large Employers

It is widely recognized that large plan sponsors of all types – private, governmental and church plans – cannot use pre-approved documents to provide retirement benefits. Typically, large companies have maintained their plans for decades, and they include a host of historical provisions, unique definitions, references to specific employee groups and eligibility rules, etc. that fall outside the strict parameters of a pre-approved document. Conversely, pre-approved documents often contain a host of options and provisions that have no application to the particular employer that is using the document and may be hard to understand and apply.

Similarly, governmental plans usually have state or local statutes as their source, and plan qualification rules are typically applied to them in ways that are different than the private sector. The same is true for church plans, which also have a long history and face unique issues from private plans. Accordingly, all these organizations – employing millions of US workers – must continue to use individually designed plan documents.

Finally, it is undisputed that private and governmental plans benefit the largest number of workers covered by retirement plans. The March 2015 Bureau of Labor statistics survey (July 24, 2015) indicates that, for establishments with 500 workers or more, 91% provide access to a retirement plan of some type – and 87% of their workers actually participate. (This includes private (non-household) and public sector workers (except the federal government).) Further, for 2014, the IRS issued DLs for amendments to 7,700 plans covering nearly 37 million participants – an average of 4,800 participants per plan.[3]

In summary, we respectfully submit that all of the above facts strongly support the IRS maintaining a DL Program that is much closer to the current one. In effect, such a system represents an efficient use of IRS resources to help ensure that plan documents covering the largest number of workers and families are in compliance with the applicable tax rules.

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[3] IRS Data Book, *Table 23: Determination Letters Issued on Employee Pension Plans, by Type and Disposition of Plan and Fiscal Year* (2014), http://www.irs.gov/pub/irs-soi/14databk.pdf.

V. Recommendations for Remedial Amendment Period and Additional Opportunities to Seek Determination Letters or Private Letter Rulings

As the foregoing discussion establishes, there are ample policy reasons to retain a comprehensive DL Program for individually designed plans. Certainly, steps could be taken to further smooth out the burdens, such as extending the staggered filing system from five years to seven or eight years, or developing a stream-lined submission process with checklists similar to those used with pre-approved plans.

If the IRS continues to believe that severe curtailment is needed, we strongly recommend the creation of additional opportunities to seek DLs (or private rulings) and developing other ways that plan sponsors who act in a reasonable good faith manner are protected from adverse audit sanctions and risk of retroactive plan disqualification. Our recommendations in this area – many of which are built around the remedial amendment period concept of Section 401(b), where the IRS has very broad discretion under the statute – follow.

A. Extended Remedial Amendment Period ("RAP") For Diligent Plan Sponsors

Plan sponsors that diligently monitor, and take the necessary steps to maintain, the tax-qualified status of their plans should not be subject to unduly large sanctions if an error is discovered during an IRS audit. For example, if a plan is regularly reviewed by legal counsel (internal or external) knowledgeable in the Code requirements that apply to tax-qualified plans and updated as necessary, the plan should be eligible for an extended remedial amendment period through the end of an IRS audit – to permit retroactive document changes without IRS sanctions – especially where the plan sponsor had adopted a reasonable, good faith interpretation of a Code requirement. If, despite the plan sponsor's diligence, the IRS auditor still wishes to impose a sanction, the amount should be limited to the schedule of fees currently in Revenue Procedure 2013-12 (related to errors that are timely discovered as part of the determination letter process). In order to show that the plan had been regularly monitored and updated, the IRS should continue to publish the annual Cumulative List (or other similar periodic IRS checklist that reflects the IRS views on current legal changes that may impact plan qualification); the plan's legal counsel could complete a form annually evidencing the plan's compliance with this list.

B. "Evergreen" Determination Letter Provisions

Without the ability to obtain updated determination letters for compliance with the ever-changing Code provisions, it is critical to preserve Code section 7805(b)'s protection against retroactive disqualification for plan provisions covered by a prior determination letter that remained materially unchanged. Among other things, this protection is needed to prevent a retroactive application of a change in the law or a new IRS or judicial interpretation of a Code or regulation provision (*e.g.*, the 2004 Supreme Court ruling in the *Heinz* case, 541 US 739, interpreting the "anti-cutback" rule). Accordingly, instead of the current approach of including

an "expiration date" on a plan's DL, a plan's most recent favorable IRS determination letter should continue to apply with regard to all of the legal requirements covered in conjunction with that letter consistent with current guidelines (*e.g.*, absent a change in that plan provision or applicable Code rule).

C. Limited Ability to Seek Individual Determination Letter or Private Letter Ruling ("PLR")

Currently, the IRS will not issue a PLR on plan qualification issues, especially on areas normally covered by a determination letter. In light of the fact that determination letters will no longer be generally available, plan sponsors should be permitted to seek determination letters or PLRs for non-routine amendments, such as those affecting a plan's benefit formula or eligibility provisions, as well as in the context of a plan merger or spin-off. For example, a plan sponsor could obtain IRS approval of the form of the document in the case of a change in the benefit formula that applies to less than all participants (*e.g.*, the formula is grandfathered for current participants) or where participation in a plan is frozen with respect to certain groups of employees. The user fee for such a determination letter or PLR could be 50% of the current VCP filing fee (based on the plan size), up to a maximum of $12,500 for a large company. The IRS could even retain some discretion to decline to rule, and return the user fee, within 60 days of the filing date.

D. Enforce Existing Relief for "Good faith" Plan Amendments

In light of the lack of ability to obtain periodic IRS review, it is important that a plan sponsor not be penalized for timely adopting a plan amendment (or making a reasonable decision that no amendment is needed) in good faith with the intent of maintaining the qualified status of the plan. Current guidance mandates this result, but it will be even more important going forward without regular IRS review of plan documents.[4] Accordingly, if an IRS auditor disagrees with a plan sponsor's interpretation of a legal requirement, but the plan sponsor's interpretation that no amendment was necessary, or that a sufficient and timely amendment was made, was done in good faith with the intent of maintaining the tax-qualified status of the plan, the remedial amendment period should be extended to cover a retroactive amendment to correct the language without triggering a sanction on audit. "Good faith" should be determined by the IRS on the basis of the facts and circumstances, including whether (1) the IRS has issued formal guidance, (2) the plan sponsor's position is based on reasoned legal advice, and (3) the amendment or failure to amend has had any material impact on the plan or its participants and beneficiaries.

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[4] Rev. Proc. 2007-44, Section 5.03.

E. Special M&A Relief

In the M&A context, the IRS should permit a new remedial amendment period for up to two years (similar to Code section 410(b)(6)(C) coverage relief) for the buyer to clean-up any plan document issues that are discovered post-closing and, at a minimum, permit any acquired plan to be treated as a "new" plan for eligibility to obtain a determination letter.

F. Special Governmental Plan Relief

Governmental plans could even be more severely affected by failure to issue DLs. For example, the IRS has indicated that it may still issue DLs for individually designed plans on initial plan qualification and qualification upon plan termination. However, few new governmental plans are being created, and few are ever terminated, so these exceptions are of little use to governmental employers. The IRS should consider allowing governmental plans to be submitted for DLs upon other significant events, such as statutory changes that materially affect the amount or form of plan benefits, such as a new benefit "tier," or creation of a "DROP" account. In light of the fact that the "controlled group" rules as applied to governmental employers are not clear, the IRS should also consider whether to eliminate the minimum number of employers to file a volume submitter or master and prototype plan for governmental employers similar to how it has done for pre-approved 403(b)(9) church plans under Rev. Proc. 2013-22. Finally, since governmental plans do not file Form 5500, once they can no longer obtain DLs, the IRS must determine how it will process requests for Forms 6166 for governmental plans so that they can claim treaty benefits.

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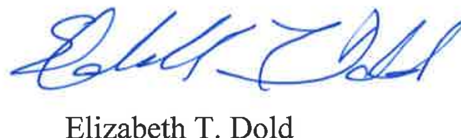
As discussed, above, we strongly urge the IRS to rethink its decision to largely eliminate the DL Program. The constituency that relies on this Program is broad and deep, with $15 trillion dollars at stake. Moreover, on the whole, the Program has worked well for decades and been highly customer focused – affording certainty and ensuring the compliance of tens of thousands of plans and their sponsors and benefitting tens of millions of participants.

We greatly appreciate your consideration of these comments and would welcome an opportunity to discuss them with you.

Sincerely,



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