

# Employee Benefits Corner

## Recent IRS Changes Impact Retirement Plan Compliance

*By Elizabeth Thomas Dold and David N. Levine*

Each New Year usually brings new changes to IRS qualified plan programs, filing procedures and related fees. 2016 is yet another year of updates. However, it is a significant year as the IRS's budget continues to be under very significant pressure and the employee plans world faces significant changes—from elimination of the IRS determination letter program to reductions in personnel headcount—that dramatically impact the relationship between the IRS and employee plans stakeholders.

This quarter, we take a look at the latest IRS guidance and its potentially significant impacts. This guidance includes:

- Notice 2016-3,<sup>1</sup> which outlines upcoming changes to and the significant curtailment of the IRS's long-standing determination letter program;
- Notice 2015-84,<sup>2</sup> which sets out the cumulative list of amendments for Cycle A—the last cycle of the pre-curtailment determination letter program;
- Rev. Proc. 2016-8,<sup>3</sup> which, of significance, outlines new, reduced filing fees for Voluntary Compliance Program filings; and Akers, 44 REAL PROP. TR. & EST. L. J. , at
- Revised 2015 Form 5500, which includes additional IRS compliance questions that were made optional for the 2015 year but foreshadow an increasing Form 5500 compliance burden.

### I. Notice 2016-3—Determination Letter Changes

To set the stage for the scaled-back determination letter program described in Announcement 2015-19,<sup>4</sup> which historically offered employers of individually designed qualified plans the right to obtain an IRS review of the form of their plan document for compliance with the Code, the IRS recently provided the following updates:

- *Cycle A Elections.* The final cycle for a determination letter is Cycle A, which runs beginning February 1, 2016 through January 31, 2017. Cycle A filers include employers whose EIN ends in 1 or 6, as well as controlled



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groups and affiliated service groups that make an election for all the applicable plans to be filed under Cycle A. Unfortunately, the Notice expressly provides that this Cycle A election for controlled groups and affiliated service groups that maintain more than one plan is not permitted unless the group made such an election by January 31, 2012 (the last day of the last Cycle A submission period). This curtailment is not surprising in that the IRS has been actively working (such as through the elimination of the review of “off cycle” determination letter applications) to shrink and limit the

defined contribution plan documents.

## II. Notice 2015-84—Cumulative List of Changes in Plan Qualification Requirements

As noted above, beginning February 1, 2016, the IRS will open the determination letter process to “Cycle A” plans for the final time (*i.e.*, individually designed plans sponsored by an employer whose employer identification number (EIN) ends in 1 or 6 or made the Cycle A election). The IRS will review these plans for legal changes listed on this 2015 Cumulative List, along with discretionary amendments effective within the remedial amendment period.

*As such it is important that plan sponsors and fiduciaries carefully review the Form 5500 and these new questions.*

### New Items

The new list includes guidance addressing (1) the extension, through plan years beginning before 2017, of the temporary nondiscrimination relief provided for certain “closed” defined benefit plans; (2) the July 2015 IRS announcement that it will issue guidance under Code Sec. 401(a)(9) to prohibit lump sum distributions to retirees in pay status in association with a “derisking” amendment; (3) the addition of Code Sec. 411(f), which provides a special rule for determining normal retirement age for certain governmental defined benefit plans in existence as of December 8, 2014; (4) the extension, until December 31, 2025, of the ability to transfer excess defined benefit plan assets to a Code Sec. 401(h) account pursuant to Code Sec. 420; and (5) the ability of certain multiemployer plans in critical and declining status to suspend benefits under certain circumstances.

availability of the determination letter process.

- *Expiration Dates on Determination Letters.* Future guidance will provide that the expiration dates reflected on determination letters issued prior to January 4, 2016 will no longer be operative. As the expiration dates on existing favorable IRS determination letters were designed to coordinate with the employer’s next determination letter cycle filing, which will no longer be available, this change was anticipated. The future guidance will also clarify the extent to which an employer may rely on an existing determination letter after a subsequent change in law or plan amendment. Many hope for a broad, flexible level of reliance on these now “historic” favorable determination letters.
- *New Adopters of Pre-Approved Plans.* For individually designed defined contribution plans as of January 1, 2016 that want to move to a pre-approved document, which is covered by an opinion or advisory letter, the Service indicated that future guidance will permit conversion through April 30, 2017 (and determination letter filings under Form 5307 through such date for certain volume submitter plans). This is a one-year extension for the existing deadline for employers to adopt pre-approved defined contribution, Pension Protection Act plan documents. Notably, this extension does not apply to plan sponsors already utilizing pre-approved

### 2014 Final Hybrid Regulations

Similar to the 2014 Cumulative List, the Notice includes only the 2014 final regulations under Code Sec. 411(b)(1) (relevant to a variable interest crediting rate), published in September 2014, but no other hybrid plan regulations. However, unlike the 2014 Cumulative List, this Cumulative List does not state that the IRS will review the plan in light of these regulations on request. As already noted, this approach is consistent with the continuing curtailment of the IRS’s determination letter program.

*Windsor Capital Corp.*<sup>5</sup>

The IRS's latest guidance regarding same-sex spouses is included on the list. Specifically, in a footnote, the IRS refers to its recent guidance Notice 2015-86 regarding the U.S. Supreme Court's decision in *Obergefell v. Hodges*,<sup>6</sup> which provides that state laws that limited marriage to opposite-sex couples are invalid. Notice 2015-86 makes clear that no additional amendments are required to be made to qualified retirement plans (or to health and welfare plans) as a result of the case, but following Notice 2014-19<sup>7</sup> employers can make discretionary amendments in light of *Obergefell*.

All plan sponsors should review this 2015 Cumulative List to ensure compliance with the various Code provisions therein.

### III. Rev. Proc. 2016-8 Provides New Fees for VCP Filings

Each year the IRS issues an updated Revenue Procedure that sets forth the various IRS filing fees imposed for qualified plan issues. This Revenue Procedure—2016-8—has now been extended to the Employee Plans Compliance Resolution System (EPCRS), which has historically provided for its own filing fee structure.

The old and new VCP filing fees for regular VCP submissions for qualified plans and Code Sec. 403(b) plans are reflected in Table 1, which result in a nice bit of savings for plan sponsors. Note that Form 8951 has not yet been revised to reflect the new fee structure.

TABLE 1.			
Number of Participants	VCP—Pre 2/1/16	VCP—Post 2/1/16	Savings
20 or fewer	750	500	250
21 to 50	1,000	750	250
51 to 100	2,500	1,500	1,000
101 to 500	5,000	5,000	n/a
501 to 1,000	8,000	5,000	3,000
1,001 to 5,000	15,000	10,000	5,000
6,000 to 10,000	20,000	10,000	10,000
Over 10,000	25,000	15,000	10,000

The guidance also updates other various fees, including determination letter filings: Form 5300 for single employer remains unchanged at \$2,500 (but a generally reduced flat fee of \$4,000 applies for multiple employer plans, regardless of the number of forms filed or the number of participants); Form 5307 (*Application for Determination*

*for Adopters of Modified Volume Submitter Plans*) increased from \$500 to \$800; and Form 5310 (*Application for Determination for Terminating Plans*) increased from \$2,000 to \$2,300. But the fees for pre-approved sponsor filings were subject to large increases.

The changes in fees are interesting in that the IRS, possibly in response to its curtailment of the determination letter program, actually reduced the user fees for VCP filings, which is a positive change. At the same time, the increase in the fees for pre-approved plans appears potentially incongruent with the IRS's efforts to encourage the wider use of these same plans.

### IV. 2015 Form 5500—New IRS Compliance Questions

The 2015 Form 5500/5500-SF includes a line of new IRS compliance questions, along with a paid preparer signature requirement. Importantly, the IRS compliance questions are found in Schedules H, I and R and are optional for the 2015 plan year. The IRS recently released an initial FAQ document to help address some of the confusion regarding some of the more common questions about the new items on the forms.

The new IRS items reflect an effort to again collect some compliance information, much of which used to be required on old Schedule T or Schedule R that was lost when the Form 5500 was converted to an electronic filing format. The form also includes some new data points that may well be a challenge for plan sponsors and their recordkeepers. The requested information includes:

- whether the plan is a 401(k) plan,
- whether the plan is a safe-harbor plan or uses the ADP/ACP test,
- if the ADP/ACP test is used, whether the current year testing method is used,
- whether coverage testing is satisfied by the ratio percentage test or average benefits test,
- whether permissive aggregation with other plans is used to satisfy coverage and nondiscrimination testing,
- whether the plan has been timely amended for all tax law changes,
- dates and other information related to the most recent plan restatement,
- opinion or advisory letter information for adopters of pre-approved master and prototype documents or volume submitter plans or determination letter information for plans that are individually designed,

- if the trust had unrelated business taxable income and the amount, and
- whether in-service distributions were made during the plan year and the amounts.

The exact usage of this information is to be determined but could certainly put a plan sponsor, a plan and its fiduciaries in a challenging position on future audit or even participant activity. As such it is important that plan sponsors and fiduciaries carefully review the Form 5500 and these new questions. To the extent an item is left blank, a Form 5500 filer should ensure that it is part

of the optional IRS provisions and think about action steps for next year to make sure procedures are in place to gather these new data.

#### ENDNOTES

- <sup>1</sup> Notice 2016-3, IRB 2016-3, 278.
- <sup>2</sup> Notice 2015-84, IRB 2015-52, 880.
- <sup>3</sup> Rev. Proc. 2016-8, IRB 2016-1, 243.
- <sup>4</sup> Announcement 2015-19, IRB 2015-32, 157.
- <sup>5</sup> *Windsor Capital Corp.*, SCt, 133 SCt 2675, 186 LEd2d 808 (2013).
- <sup>6</sup> *Obergefell v. Hodges*, SCt, 2015-1 usrc ¶150,357, 135 SCt 2868.
- <sup>7</sup> Notice 2014-19, IRB 2014-17, 979.

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