GROOM LAW GROUP CHARTERED

BENEFITS BRIEF

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New IRS Guidance on Downsized DL Program – In Brief

Background/Guidance to Date – Last summer, the IRS announced dramatic changes in its longstanding determination letter program for tax-qualified plans (Announcement 2015-19). Effective January 1, 2017, the IRS eliminated the staggered 5-year determination letter remedial amendment cycles for individually designed plans, and effective July 21, 2015, no longer accepted off-cycle determination letters. The new program will be limited to (1) initial plan qualification for a plan that has not filed a Form 5300 or for a plan that filed a Form 5300 but a determination letter was not issued, regardless of when the plan was adopted, (2) qualification upon plan termination (Form 5310), and (3) in certain other limited circumstances to be determined from time to time by the IRS and Treasury in published guidance. The IRS said it will also make corresponding changes to the remedial amendment period (RAP) for disqualifying provisions, and extend the RAP to at least December 31, 2017.

Notice 2016-3 (Jan. 19 *IRS Bulletin*) announced that expiration dates on DLs issued before January 4, 2016 are no longer operative – and new letters no longer have them. IRS added that future guidance will clarify the extent of reliance on these "evergreen" letters when the law changes or the plan is amended.

Consistent with the IRS' objective to move more employers with individually designed plans to pre-approved plans, Notice 2016-03 also provided a one-year extension – from April 30, 2016 to April 30, 2017 – for an employer not currently on a pre-approved defined contribution ("DC") plan to adopt one (and apply for a DL, if permitted). This applies to new and existing individually designed DC plans.

New Guidance – On June 29, the Service released guidance covering a number of important changes in this area, including the "remedial amendment period" under Code section 401(b), plan amendment adoption deadlines, and issues for pre-approved plans. Brief highlights of Revenue Procedure 2016-37, which generally replaces Rev. Proc. 2007-44 (which announced the "staggered 5-year filing system"), effective January 1, 2017, include the following.

- The Service did not specify when sponsors of existing individually designed plans may apply for updated letters, but clarified it is an annual determination and that none will be permitted for 2017. Thus far, initial letters and plan termination are the only times applications may be filed (except for Cycle A filers in the current year).

- The Service will publish a "Required Amendments List" on an annual basis for individually designed plans. In general, plan sponsors will have at least two full years (longer for governmental plans) to adopt a required amendment after the year in which the requirement is announced. This is an improvement over the current "interim amendment" position, which generally required amendments by the due date for the plan sponsor's tax return for the year to which the amendment would first apply

("discretionary" amendments would still be required to be adopted by the end of the plan year in which they are effective). Significantly, the Service added that, generally, an item will not be included on the Required Amendments List until guidance on the issue has been provided, including a model amendment.

- For individually designed plans, the Service also announced that the "remedial amendment period" for disqualifying provisions effective on or after January 1, 2016, generally extends to the end of the second calendar year after the calendar year the amendment is adopted or is effective, whichever is later (and the RAP does not end before December 31, 2017). Unfortunately, without IRS review or additional guidance, it is often unclear how a plan sponsor would know a discretionary amendment (and perhaps also a required one) is in fact "disqualifying" (and there is no anti-cutback relief).

- Recognizing that most changes in qualification rules must be operationally effective from the new rule's effective date, the Service will begin to publish an "Operational Compliance List." This will help sponsors know what rules they should be following before the required amendment must be (and is) adopted.

- Practitioners have wanted to know how long a plan may continue to rely on a determination letter – a question that the guidance answers in a taxpayer-friendly manner. The new guidance provides that a plan sponsor may continue to rely on a determination letter with respect to plan provisions that are not amended or affected by a change in law. (Longstanding IRS guidelines for such reliance, *e.g.*, that all material facts were disclosed in the earlier review, would continue to apply.) Thus, for the vast majority of previously-reviewed provisions in an existing plan, employers can continue to rely on existing letters if they don't change the plan provisions, unless Congress changes it or the IRS comes out with a new ruling or regulation.

- For pre-approved plans, the 6-year remedial amendment period and the existing Cumulative List continue with the same amendment deadlines (except governmental plans get a slightly extended period, depending on the type of amendment). Application of the 6-year cycle and, in particular, the impact of employer amendments still needs to be carefully considered, because they may well result in a loss of reliance on the opinion/advisory letter and there is no special relief for obtaining determination letters.

- The guidance includes a 6-month extension for filing for new opinion/advisory letters for pre-approved defined contribution plans (submission period currently reflected as August 1, 2017 – July 31, 2018, but is subject to change).

- Individually designed plans that convert to pre-approved DC plans after 2015 still have through April 30, 2017 to adopt a PPA restatement (and file a Form 5307, if applicable).

Observations – We will provide more details and analysis of this important new Rev. Proc. soon. Obviously, it will take a lot more time for the Service to flesh out the workings of the new system – and for employers, plan administrators and other stakeholders to adapt to the changes.