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View From Groom: The Shape of Things to Come—New IRS Guidance on Downsized DL Program

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Last summer, the Internal Revenue Service (the ''Service'' or ''IRS'') announced dramatic changes in its longstanding determination letter program for tax-qualified plans (Announcement 2015-19). Effective January 1, 2017, the Service will eliminate the staggered 5-year determination letter remedial amendment cycles for individually designed plans (''IDPs''), and effective July 21, 2015, no longer accepts off-cycle determination letters.

Notice 2016-03 (Jan. 19 *IRS Bulletin*) announced that expiration dates on determination letters issued before January 4, 2016 are no longer operative — and new letters no longer have them. The Service added that future guidance will clarify the extent to which employers may rely on these ''evergreen'' letters when the law changes or the plan is amended. Consistent with the Service's 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 plan to adopt one (and apply for a determination letter, if permitted). This applies to new and existing defined contribution IDPs.

Revenue Procedure 2016-37 (the ''Revenue Procedure''), issued on June 29, solidifies and expands on the changes announced last summer and earlier this year. On a positive note, some of the changes appear to be designed to ease the compliance burden on sponsors of IDPs who have been concerned about the ability to maintain their plans' tax-qualified status under the new regime. Exactly how much comfort plan sponsors will take in this new guidance, however, remains to be seen.

Below we describe key changes made by the Revenue Procedure, including changes applicable to all IDPs generally. (IDPs generally include all single employer plans — as well as multiemployer plans and multiple employer plans — that are not pre-approved plans.) Parts III and IV highlight special rules applicable to IDPs maintained by governmental and tax-exempt entities and Part V below covers expected changes for pre-approved plans.

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I. Limited Filing Opportunities For IDPs

Old Rule: For IDPs, current rules allow new plans, existing plans, and terminating plans to apply for determination letters regarding their qualified status. For existing plans, current rules provide for a staggered five-year remedial amendment cycle under which determination letters are effective for five years from the date they are issued (the expiration dates were eliminated earlier this year under Notice 2016-03), and plans can file requests for determination letters every five years. Off-cycle filings also may be made, but are discouraged and processed last (the ability to make off-cycle filings, except for new plans or terminating plans was eliminated effective July 21, 2015 under Announcement 2015-19).

Observation: Cycle A filers (employers with EINs ending in 1 or 6) have one last chance under the current system to submit a determination letter application by January 31, 2017 — this deadline was not changed under the Revenue Procedure.

New Rule: Effective January 1, 2017, the Service will accept determination letter applications only upon initial plan qualification, plan termination, and in certain

other limited circumstances yet to be determined by the Service. The Service issued a draft of the new Form 5300 on June 24, which they expect to finalize in December 2016.

New Plans. For plans that have never received a favorable determination letter under Forms 5300 (Application for Determination for Employee Benefit Plan) or 5307 (Application for Determination for Adopters of Modified Volume Submitter Plans), plan sponsors may submit a plan for initial qualification on a Form 5300. The Service will review determination letter applications based on an annual ''Required Amendments List,'' which the Service intends to publish each October. Plans will be reviewed against the Required Amendments List issued during the second calendar year preceding the submission of the determination letter application.

Under the new rules, when a plan receives a favorable determination letter, the letter will no longer contain an expiration date. Instead, an employer maintaining a qualified plan for which a favorable determination letter has been issued may continue to rely on that determination letter with respect to plan provisions that have not been amended or otherwise affected by a change in the law. However, for provisions that *have* been amended or affected by a change in the law, an employer no longer has ''reliance.''

When a new plan contains a ''disqualifying provision'' — that is, a plan provision (or absence of a provision) that does not satisfy the applicable tax-qualification requirements of the Internal Revenue Code — the employer may correct the defect by adopting an amendment during the plan's ''remedial amendment period,'' described in Part II below.

Terminating Plans. Under the new rules, the Service will continue to accept determination letter applications in connection with plan terminations on Form 5310 (Application for Determination for Terminating Plan). A determination letter application on plan termination must be filed by the later of (i) one year from the effective date of the termination, or (ii) one year from the date on which the action terminating the plan is taken. In any case, the determination letter application must be filed no later than 12 months from the date that substantially all plan assets are distributed in connection with the plan termination.

As described below, the termination of a plan ends the plan's remedial amendment period. When reviewing an application for a determination letter upon plan termination, the Service will review the plan for amendments required to be adopted as of the termination date, regardless of whether such requirements are included on the applicable Required Amendments List. Thus, it is especially important that, *before* the plan termination date, the employer updates the plan for all plan qualification requirements effective on or prior to the plan's termination date.

Observation: Employers considering plan terminations should review plan terms to identify qualification issues and correct such issues by adopting remedial amendments prior to the plan termination date. The Operational Compliance List (described below) may be helpful in determining what remedial amendments may be required, to the extent not covered on the Required Amendments List.

Other Circumstances. Beginning with 2018, the Service will annually consider whether determination letters will be accepted under specified circumstances other than for initial qualification and termination – taking into account any significant law changes, new approaches to plan design, and the inability of certain types of plans to convert to pre-approved documents. The Service will also take into account its current case load and resources available. Additional determination letter filing opportunities will be announced in published guidance and the Service will periodically seek comments on appropriate additional opportunities.

II. Remedial Amendment Period and Related Changes

Required Amendment Deadlines.

Old Rule: Under existing rules, currently found in Revenue Procedure 2007-44 (but originally set out in Treasury Regulation Section 1.401(b)-1), if there is a change in the legal requirements for plan qualification and such a change would require a modification of the written plan terms to ''fix'' a disqualifying provision, plan sponsors must adopt an amendment relating to the disqualifying provision (known as an ''interim amendment'') by the applicable deadline.

Generally, plan sponsors must adopt interim amendments by the due date of the employer's income tax return for the tax year including the beginning of the remedial amendment period or the last day of the plan year in which the remedial amendment period begins, whichever is later. For plans maintained by more than one employer, the interim amendment must be adopted by the last day of the tenth month following the last day of the plan year in which the remedial amendment period begins.

New Rule: The Revenue Procedure significantly revises the rules for amendments that ''fix'' disqualifying provisions. Specifically, it eliminates the interim amendment requirement and sets up a new scheme to address disqualifying provisions. Under the new rules, the deadline to adopt a remedial amendment for a disqualifying provision varies for new plans, amendments to existing plans, and changes in qualification requirements. The new deadlines, described below, are applicable for disqualifying provisions that are first effective on or after January 1, 2016.

New Plans. For new plans, a remedial amendment must be adopted by the later of (i) the 15th day of the 10th calendar month after the end of initial plan year or (ii) the ''modified 401(b) expiration date'' which, for single employer plans, generally means the extended tax return due date (all plan sponsors are treated as having received extensions) for the employer's tax year which includes the date the plan is adopted or effective, whichever is later.

Existing Plans. For existing plans that have been amended to include a disqualifying provision (other than due to a change in qualification requirements), a remedial amendment must be adopted by the end of the second calendar year following the calendar year in which the disqualifying amendment is adopted or effective, whichever is later.

Change in Qualification Requirements. If a change in qualification requirements (such as a new law, regulation or ruling) results in a disqualifying provision, a remedial amendment must be adopted by the end of the second calendar year that begins after the Required

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Amendments List, including the change in qualification requirements, is issued.

Transition Rule. Rev. Proc. 2016-37 also includes a transitional rule for disqualifying provisions for which, as of January 1, 2017, the remedial amendment period under existing rules (under the 5-year remedial amendment cycle) has not expired. For such disqualifying provisions, a remedial amendment must be adopted by December 31, 2017.

Observations: The revised amendment periods under the Revenue Procedure generally provide plan sponsors more time to adopt remedial amendments than under current rules. The provision of model amendments, along with the extension of time for adopting remedial amendments, should ease some of the administrative uncertainty resulting from the elimination of the current system.

However, in one respect the new rules may be more restrictive than before. That is because, under Rev. Proc. 2007-44, the remedial amendment period for a disqualifying provision that would otherwise apply was extended to the end of the applicable remedial amendment cycle where the employer adopted an amendment to an existing plan timely and in good faith with the intent of maintaining the qualified status of the plan (or reasonably and in good faith determined that no amendment was required). The Revenue Procedure ''clarifies, modifies and supersedes'' Rev. Proc. 2007-44, and does not expressly include a reasonable, good faith exception other than for pre-approved plans, so it is unclear whether one continues to apply for IDPs.

Required Amendments List. Under the new rules, Treasury and the Service will issue a Required Amendments List annually. Generally, an item will be included on the Required Amendments List only after guidance on such item (including a model amendment) has been issued. The Service retains discretion to include items on the Remedial Amendments List in other circumstances (*e.g.*, when a statutory change has been enacted and no further guidance is anticipated).

Operational Compliance List. The remedial amendment periods allow plans to be amended retroactively to comply with changes in plan qualification requirements. However, plans must be operated in compliance with any change in qualification requirements from the date that the change becomes effective. To help plan sponsors align their plan operations with changes to plan qualification requirements, the Service intends to issue an annual ''Operational Compliance List.'' This list will identify changes in qualification requirements that are effective in a particular calendar year.

Observation: It is possible that this list will have a role in ''EPCRS,'' the Service's plan correction system, in some way still to be announced.

Anti-Cutback Rules Continue to Apply. Consistent with existing rules, the Revenue Procedure provides that nothing in the new rules can be read to provide relief from the Internal Revenue Code's anti-cutback rules (Code Section 411(d)(6)). Plan sponsors should therefore avoid plan amendments, including any amendments that are retroactively effective under the new rules, which could potentially decrease accrued benefits or otherwise violate the anti-cutback rules.

Deadline for Discretionary Amendments Unchanged. Consistent with existing rules, the Revenue Procedure provides that discretionary amendments (*i.e.*, amendments not related to a disqualifying provision) must be adopted by the end of the plan year in which the plan amendment is operational, unless otherwise provided by statute, regulations or other guidance.

III. Governmental Plans

Governmental plan sponsors may feel a bit of whiplash from the Service's decision to cease issuing determination letters in most situations. That is because, for many years, it was common for governmental plans to not request IRS review. While there were advantages to having a determination letter (though governments don't claim tax deductions), many governmental plans only filed for a letter after the Service made a special push to the governmental plan community beginning in 2008 known as the IRS Governmental Plans Initiative, to encourage them to file. And now, of course, they are generally being told not to file.

Special Remedial Amendment Period for Governmental Plans. The new Revenue Procedure provides governmental plans a special remedial amendment period, depending on the type of amendment.

Old Rule: For governmental plans, the prior adoption deadline for an amendment was: the later of (a) the regular remedial amendment period for interim amendments or discretionary amendments, as applicable, or (b) the last day of the next regular legislative session beginning after the amendment's effective date in which the governing body with authority to amend the plan can consider a plan amendment under its laws and procedures.

New Rule: The adoption deadline for governmental plans is now as follows:

- for remedial amendments, the later of: (a) the regular remedial amendment period for interim amendments, or (b) 90 days after the close of the *third* regular legislative session of the legislative body with authority to amend the plan that begins on or after the amendment's effective date.

- for discretionary amendments, the later of: (a) the regular remedial amendment period for discretionary amendments, or (b) 90 days after the close of the *second* regular legislative session of the legislative body with authority to amend the plan that begins on or after the amendment's effective date.

Observation: Governmental plans rarely implement changes without an actual amendment, so the more practical concern is likely going to be whether any amendments required on account of changes in the law are sufficient and timely. The provision of the new procedure allowing two more legislative sessions to pass before the amendment is required is an improvement.

IV. Tax-Exempt Organizations

IDPs sponsored by tax-exempt organizations are generally subject to the same rules as IDPs sponsored by for-profit entities. In some instances (such as the modified remedial amendment periods), application of these rules varies for tax-exempt organizations.

Old Rule: Under existing rules, the general interim amendment deadline described above for IDPs applies

for plans sponsored by for-profit entities, as well as those sponsored by tax-exempt organizations. For tax-exempt employers, the deadline for adopting an interim amendment varies based on whether the employer files its tax return on a Form 990.

If an employer files a Form 990-T or 990-EZ, the due date of the employer's tax return is the later of the 15th day of the 10th month after the end of the employer's tax year or the due date for filing the Form 990 series (plus extensions). An employer is not treated as having obtained an extension of time for filing the Form 990 series unless such extension is actually obtained.

The due date for tax-exempt employers that do not file a Form 990 is the 15th day of the 10th month after the end of the employer's tax year (treating the calendar year as the tax year if the employer does not have a tax year).

New Rule: For new plans, the remedial amendment period will continue to be determined in the same way as under existing rules (*i.e.*, based on the due date of the employer's tax return). However, unlike the existing rules, the Revenue Procedure provides that an employer will be deemed to have obtained an extension for filing the Form 990, which may allow a tax-exempt organization a slightly extended period of time to adopt required amendments.

V. Pre-Approved Plans

Although the Revenue Procedure focuses primarily on changes applicable to IDPs, Part III of Revenue Procedure makes minor modifications to the six-year remedial amendment cycle system for master and prototype (M&P) and volume submitter (VS) plans (collectively referred to as ''pre-approved plans''). These modifications are primarily intended to reflect changes made to the determination letter program for IDPs, including the elimination of the 5-year remedial amendment cycle. We anticipate that the Service will make more significant changes to the pre-approved program in the future, but for now, it remains largely unchanged. Below we briefly summarize what has and has not changed for pre-approved plans under the new regime.

Six-Year Remedial Amendment Cycle Remains Unchanged. Under existing guidance, M&P sponsors and VS practitioners have a six-year remedial amendment cycle, which means that providers of these plans may apply for new opinion or advisory letters every six years. There are two separate six-year cycles – one for defined contribution plans, which now includes employee stock ownership plans (ESOPs), and one for defined benefit plans, including cash balance plans. Employers adopting these plans generally have a two-year period within which to adopt the updated pre-approved plan.

No changes have been made to the six-year remedial amendment cycles for defined contribution and defined benefit plans.

Good Faith Interim Amendments Still Required. Under the Revenue Procedure, good faith interim amendments will continue to be required for preapproved plans. The deadline for adopting interim amendments is generally unchanged from prior guidance. This means that the new two-year remedial amendment period for IDPs, as described above, does not apply to pre-approved plans.

Revised Remedial Amendment Period for Pre-Approved Governmental Plans. Under the Revenue Procedure, pre-approved governmental plans have a slightly extended remedial amendment period (but again, not the two-year period applicable to IDPs). As with IDPs, the length of the remedial amendment period depends on the type of amendment:

- interim amendments must be adopted by the later of: (a) the regular remedial amendment period for interim amendments, or (b) 90 days after the close of the *third* regular legislative session of the legislative body with authority to amend the plan that begins on or after the amendment's effective date,
- discretionary amendments must be adopted by the later of: (a) the regular remedial amendment period for discretionary amendments, or (b) 90 days after the close of the *second* regular legislative session of the legislative body with authority to amend the plan that begins on or after the amendment's effective date.

IRS to Continue Cumulative List for Pre-Approved Plans. **Old Rule:** Historically, the Service published Cumulative Lists of Changes in Plan Qualification Requirements (''Cumulative Lists'') annually, which were used both by pre-approved plan sponsors and IDP sponsors submitting determination letter applications for the following year's remedial amendment cycle submission period.

New Rule: The Service will continue to publish a Cumulative List for use by pre-approved plans in preparing opinion or advisory letter submissions, but not on an annual basis. For each applicable cycle, the Cumulative List is targeted to be published in December of the year preceding the year in which the pre-approved defined contribution plan or defined benefit plan submission period begins (*e.g.*, 2016 for defined contribution, and 2018 for defined benefit). As noted above with respect to IDPs, the Service will provide an annual Operational Compliance List to identify qualification changes that are effective during a calendar year. This may be a useful tool, particularly for years during which an updated Cumulative List is not available.

Defined Contribution Submission Period Extended.

Old Rule: For the third six-year remedial amendment cycle, which begins on February 1, 2017 and ends on January 31, 2023, the submission period for pre-approved defined contribution plans would have opened on February 1, 2017, and continued through January 31, 2018.

New Rule: The Revenue Procedure extends the opening of the submission period for pre-approved defined contribution plans by six months, *i.e.*, opening on August 1, 2017, and closing on July 31, 2018. Note that both the defined contribution and defined benefit pre-approved plan remedial amendment cycles, as well as the submission periods, may be revised if necessary, as determined by the Service.

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Pre-Approved Plan Remedial Amendment Cycles		
Type of Plan	Second Remedial Amendment Cycle	Third Remedial Amendment Cycle
Defined Contribution	February 1, 2011 - January 31, 2017	February 1, 2017 - January 31, 2023 (includes ESOPs) ***New Submission Period: August 1, 2017 - July 31, 2018***
Defined Benefit	February 1, 2013 - January 31, 2019	February 1, 2019 - January 31, 2025

Adoption Deadline for Pre-Approved Defined Contribution Plan Extended. As first announced in Notice 2016-03, the Revenue Procedure confirms that an employer who adopts a pre-approved defined contribution plan *on or after January 1, 2016*, has until April 30, 2017 to adopt a PPA restatement and, if applicable, file for a determination letter. (Before the extension, the deadline was April 30, 2016.) An employer who converts from an IDP to a pre-approved plan after January 1, 2016 may still file a determination letter application for the pre-approved plan on a Form 5307, even if the employer had previously submitted that plan as an IDP.

For an employer who maintained a pre-approved plan *prior to January 1, 2016*, the deadline to adopt the PPA restatement and to apply for a determination letter (if applicable) remains April 30, 2016.

Observation: This extension of the adoption period for new adopters of pre-approved plans is intended to provide another opportunity for sponsors of IDPs to convert to pre-approved plans within the most recent six-year remedial amendment cycle, in light of the significant curtailment to the IDP determination letter program. It is too soon to tell whether this extension will result in an increased use of pre-approved plans by employers.

Effect of Employer Amendments on Six-Year Cycle. Old Rule: Under prior guidance, if significant changes were made such that the pre-approved plan is considered to be an IDP, the plan would remain in the six-year remedial amendment cycle temporarily, and the employer could submit a determination letter application on Form 5300 during that cycle's submission period. Going forward, the plan would be submitted on Form 5300 during the next five-year remedial amendment cycle based on the plan sponsor's EIN.

New Rule: If an employer amends a preapproved plan, the employer will continue to be eligible for the six-year cycle on a continuing basis (except if the employer amends the document within one year of initial adoption to incorporate a type of plan not otherwise permitted in the applicable pre-approved program). If a pre-approved plan is amended to make significant changes, the employer cannot submit the plan for a determination letter on Form 5300 except under the limited circumstances described above for IDPs, *e.g.*, initial plan qualification or termination.

Observation: Employers using pre-approved plans should carefully consider the potential implications before amending the pre-approved plan document. As under prior guidance, if an employer amends a pre-approved plan, the employer generally loses reliance on the opinion or advisory letter. For VS specimen plan users, the employer's ability to submit a Form 5307 (for minor modifications) is unchanged, but it is only available in limited circumstances. For M&P plans, the Form 5307 is not available. Without the ability to convert to the 5-year remedial amendment cycle and file a Form 5300, many pre-approved plan users will no longer have the ability to regain reliance once it is lost.

VI. What's Next?

The recent guidance covers a number of important issues, but a long path forward remains — for both the Service and the benefits community.

The Service still needs to tackle many critical issues, including developing a substitute for the ''current determination letter'' requirement for a plan's eligibility for EPCRS. A senior IRS official recently indicated that such guidance may be released ''very soon.'' IRS officials also indicated that further guidance can be expected on issues of plan drafting and administration. For example, the Service may encourage ''incorporation by reference'' — currently allowed only in limited circumstances, such as Section 415 provisions — in other areas.

Most importantly, the onus will fall on plan sponsors and their advisers to come up with workable ways to maintain the qualification of their plans on an ongoing basis. In this regard, plan sponsors may want to adopt processes for regular external review of their plan documents. For example, plans with recent determination letters may wish to have an annual ''checkup'' so that a plan sponsor can have comfort that discretionary amendments do not create ''disqualifying provisions,'' and the sponsor is able to provide necessary support to plan auditors, investment managers, etc. who request it.