

LEGAL DEVELOPMENTS

A New Year Brings New IRS Fees and Updates on the Determination Letter Program

The IRS has kicked off the year with several pieces of guidance that are important for plan sponsors of qualified plans to be aware of, as they impact maintaining the tax-qualified status of the plans and the cost of obtaining IRS assistance.

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The IRS guidance includes:

- The annual Cumulative List (Notice 2015-84) that summarizes the new regulatory and case law guidance that may need to be reflected in the qualified plan document. Even if a plan may not file for a determination letter, this 2015 Cumulative List is helpful to review against the plan document and operations for compliance with various tax qualification issues.
- Notice 2016-3, which provides new insights into the severely scaled down determination letter program for individually designed plans and extends the timing to adopt pre-approved plans for another year to encourage plan sponsors with individually designed plans to make the switch.
- Its annual user fee guidance (Revenue Procedure 2016-8) that consolidates many of the user fees applicable for employee plan issues into one place, with some clear winners and some clear losers, when it comes to the cost to obtain IRS assistance.

Each aspect of the guidance is briefly summarized below.

A. 2015 Cumulative List—Plan Document Review

Beginning February 1, 2016, the IRS opened the determination letter process to “Cycle A” plans (for example, individually designed plans sponsored by an employer whose EIN ends in 1 or 6). The IRS will review these plans for legal changes listed on the recently issued 2015 Cumulative List. [Notice 2015-84, 2015-52 I.R.B. 880] The favorable letters issued by the IRS on these plans will cover only the items listed on this Cumulative List (as well as discretionary amendments) that are effective within the five-year remedial amendment period. Sponsors of Cycle A plans should file their plans with the IRS for review between February 1, 2016, and January 31, 2017. As IRS Announcement 2015-19 states, this may well be the last opportunity for an existing single-employer plan to receive a favorable IRS letter, unless the plan is being terminated.

The 2015 Cumulative List deletes all items that were reviewed by the IRS during the prior Cycle A submission period. However, if a plan was not previously reviewed for items on the prior Cycle A Cumulative List (for example, a new plan established after the end of the previous Cycle A period), these items will be reviewed. Some of the more significant items on the latest Cumulative List include the following:

1. **New Items.** The new list includes guidance on a number of new issues, including:
 - a. The extension, through plan years beginning before 2017, of the temporary non-discrimination relief provided for certain “closed” defined benefit plans;
 - b. The July 2015 guidance that shut down a popular “derisking” strategy of providing

- a lump-sum window for retirees in pay status, due to minimum required distribution restrictions;
- c. Special rules to determine “normal retirement age” under Code Section 411(f) for certain governmental defined benefit plans in existence as of December 8, 2014;
 - d. The extension until the end of 2025 to transfer excess defined benefit plan assets to a Section 401(h) account pursuant to Code Section 420; and
 - e. Relief for certain multi-employer plans in critical and declining status to suspend benefits under certain circumstances.
2. **2014 Final Hybrid Regulations.** Similar to the 2014 Cumulative List, the Notice includes the 2014 final regulations under Code Section 411(b)(1), which address the variable interest crediting rate, published in September 2014, but none of the other hybrid plan regulations. However, unlike last year’s list, this Cumulative List does not state that the IRS will review the plan in light of these regulations upon request. We understand this change was made in part due to the delayed effective date of these provisions following the issuance of the final regulations.
 3. **United States v. Windsor.** The IRS guidance regarding same-sex spouses is included on the list. In a footnote, the IRS refers to its recent guidance (Notice 2015-86) regarding the US Supreme Court’s decision in *Obergefell v. Hodges*, which provides that state laws that limited marriage to opposite-sex couples are invalid. [Notice 2015-86, 2015-52 I.R.B. 887] Because this guidance is noted only in a footnote, it seems the IRS will not review amendments made to reflect this recent case. But it is unlikely an amendment will be required by the IRS in any event following this decision, as most—if not all—of the retirement plan-related issues raised by these same-sex marriage rulings were addressed following the *Windsor* decision.

B. Notice 2016-3—Determination Letter and Pre-Approved Program

The latest news with the determination letter program was explained in Notice 2016-3 [2016-3 I.R.B. 278], which addresses a few specific issues related to the soon-to-be downsized qualified plan determination

letter (DL) program. The Service expects to release new guidance in this area periodically throughout 2016. This new guidance covers the following three issues:

1. **Expiration Dates Dropped.** When it created the staggered filing system, the Service began to put a five-year expiration date (based on the end of that cycle) on the DL. As expected, Notice 2016-3 announces that expiration dates on DLs issued before January 4, 2016, are no longer operative (and presumably new letters will no longer have them). IRS says future guidance will clarify the extent of reliance on these “evergreen” letters when the law changes or the plan is amended.
2. **Cycle A Controlled Group Filings Limited.** Under Revenue Procedure 2007-44, a controlled group of employers described in Code Sections 414(b) or (c) may make an election for all members to submit during Cycle A, the first slot of the staggered system. As noted above, the last Cycle A will run from February 1, 2016, through January 31, 2017. The Notice cuts off the ability to make the Cycle A election unless it was made in a prior cycle. In our experience, this was not an overly popular option, and cannot now be used to end-run the elimination of the off-cycle submissions.
3. **Extra Year for Some Employers to Adopt Pre-Approved DC Plans.** Consistent with the IRS’s objective to move more employers with individually designed plans to pre-approved plans, the IRS has provided a one-year extension—from April 30, 2016, to April 30, 2017—for an employer *not* currently on a pre-approved plan to adopt one (and apply for a DL if permitted). This applies to new and existing individually designed defined contribution plans. The extension does not apply to employers currently maintaining a pre-approved plan—the April 30, 2016, deadline remains for these employers.

Notably, the IRS Advisory Committee on Tax-Exempt and Government Entities recently released a 15-question survey to get practitioners’ input on a variety of issues related to the scaled-back DL program. Presumably, this input will be shared with Employee Plans leadership to help fashion future priorities and guidance.

The Survey explores a number of key areas including:

- Which other types of plans, and categories of plan sponsors, should be included in pre-approved programs (the Service is already working on cash balance plans and ESOPs);
- What are key deterrents to employer/practitioner use of pre-approved plans; and
- The importance of individual DLs to plan sponsors in various circumstances (*e.g.*, mergers, plan conversions).

User Fees for Employee Benefit Issues

The IRS's annual update of user fees has some "good news" of sorts for most plan sponsors filing for IRS review of plan error corrections under the IRS Voluntary Correction Program (Revenue Procedure 2013-12, as amended). On or after February 1, 2016, under recent Revenue Procedure 2016-8 [2016-1 I.R.B. 243], only sponsors of plans with 101 to 500 participants must continue to pay the same (\$5,000) fee. The fees in a variety of special situations (for example, failure to amend for changes required by a DL) continue to be listed in section 12 of Revenue Procedure 2013-12.

Here is a snapshot of the old and new VCP fees:

Number of Participants	Old VCP Fee	New VCP Fee
20 or fewer	\$750	\$500
21 to 50	\$1,000	\$750
51 to 100	\$2,500	\$1,500
101 to 500	\$5,000	\$5,000
501 to 1,000	\$8,000	\$5,000
1,001 to 5,000	\$15,000	\$10,000
6,000 to 10,000	\$20,000	\$10,000
Over 10,000	\$25,000	\$15,000

Other fees for determination letters and private letter rulings are summarized below.

Assistance	Old Fee	New Fee
Form 5300 Filings, Single Employer Plan (Determination Letters)	\$2,500	\$2,500
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Form 5307, Pre-Approved modified volume submitter plan determination letter	\$500	\$800
Form 5310, Terminated plan determination letter	\$2,000	\$2,300
Private Letter Ruling, Employee Plans	\$10,000	\$10,000
Private Letter Ruling, 60-day rollover extension	\$500–\$3,000	\$10,000

Conclusion

For plan sponsors with individually designed plans, take care to remember that it is the last call for determination letters for Cycle A filers, and even if you are not a Cycle A filer, read over Notice 2015-84 to ensure operational and document compliance with the items on the IRS list. And all plan sponsors take note of the new fee lineup set forth in Revenue Procedure 2016-8 when you are considering seeking IRS guidance. For example, do not rely on Revenue Procedure 2013-12 (EPCRS), as amended, alone to determine the applicable VCP fees. ■