

Employee Benefits Corner

IRS' Pre-Approved Plan Program Gets a Make-Over (with Extensions)

By David N. Levine and Elizabeth Thomas Dold

The IRS recently issued Rev. Proc. 2017-41, which streamlines and enhances the pre-approved plan program in light of the drastic changes that were made to the determination letter program for individually designed plans. Many of these changes were in response to the benefits community comments on ways to help improve the program and facilitate transition of plan sponsors to these pre-approved programs.

The IRS also issued the 2017 Cumulative List (Notice 2017-37), which was historically used by both pre-approved and individually designed plans but is now only used for pre-approved plans. The list sets forth the required plan amendments that needed to be made to the pre-approved defined contribution plans and which will be the subject of review when these plans are submitted to the IRS for approval beginning in October 2017.

We summarize this guidance below. Plan sponsors of individually designed plans may want to consider this guidance if they are considering moving to a pre-approved plan document. And plan sponsors who already use pre-approved plans may want to review the guidance to see what changes will be coming. Of course, these new defined contribution documents will not be available for a few more years.

Rev. Proc. 2017-41

The new Revenue Procedure makes a large number of changes to the pre-approved program, so many so that running a red-line version of the document compared to its predecessor Rev. Proc. 2015-36 will bring a sea of red. We summarize the key changes below:

- **Opinion Letters Only.** Previously, the retirement service provider community received opinion letters from the IRS for master and prototype plans, and advisory letters for volume submitter plans. Now, the terms master and prototype and volume submitter plans have been eliminated and replaced with a single pre-approved plan program that will receive an IRS opinion letter that the plan document complies with the plan qualification requirements under the Internal Revenue Code ("the Code") as to the form (and not operations) of the document. This single program is made up of two types of plans: (1) standardized (which the plan is designed to meet an IRS safe harbor benefit



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formula) and (2) non-standardized plans (all other plans, and designed to permit the same flexibility was permitted under a volume submitter plan).

- **Document Format and IRS Filing Fee.** The format of a pre-approved plan can be either a basic plan document and adoption agreement or a single plan document. And a single plan document/adoption agreement can provide for a money purchase pension plan and a 401(k) or profit sharing plan (no longer are separate documents required). The pre-approved submission fees vary on the type of document: (1) adoption agreement/basic document—\$16,000, plus \$11,000 for each additional adoption agreement (which was the M & P pricing), or (2) each single document plan of \$28,000. This is a helpful change as a volume submitter plan that used adoption agreement was to pay \$28,000 for each adoption agreement, and now the fees are more uniform.

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- **No Trust Document Review.** Previously, pre-approved sponsors were able to submit a trust document (either within the plan document or as a stand-alone document) for IRS review. This process was rather burdensome on both the sponsors and the IRS, particularly in light of the fact that very few Code provisions were part of these documents (rather more a focus of DOL and Title I of ERISA), and it raised concerns when changes were made to the trust provisions. As a result, this review has been eliminated, and the IRS added a requirement that there must be no conflict between the terms of the plan and the trust or custodial agreement. But without IRS review of the document, there may be some concern whether a trust constitutes a tax-exempt trust under Code Sec. 501(a) and that the plan terms control, which may result in a need for additional tax opinions, this time on the trust documents.
- **Coverage of Additional Plan Designs.** In 2015, the pre-approved program was extended to provide for ESOPs and cash balance plans. However, the cash balance

plans were not permitted to include a market rate of return interest rate, and ESOPs were not permitted to include a cash or deferred arrangement (*e.g.*, KSOP). This new guidance expands the program to permit KSOPs and to allow a market rate of return for cash balance plans, provided that all participants in the plan are subject to this market rate. These are welcomed expansions to the program, as they are very popular plan designs. Moreover, the pre-approved program was expanded to permit non-electing church plans to use them, and to permit a non-standardized 401(k) plan to use either a safe harbor or non-safe harbor hardship distribution.

- **Form 5307 Determination Letter Filings.** Previously, only certain adopters of volume submitter plans were able to file for a determination letter under Form 5307. Now, as long as the plan is a non-standardized plan, an adopting employer can obtain a determination letter using Form 5307 for minor modifications to the plan. Moreover, the Form 5307 can also be used by standardized plans who seek reliance under Code Secs. 415 (contribution limits) and 416 (top heavy restrictions) due to maintenance of multiple plans covering some of the same participants.
- **Power to Amend.** All pre-approved plans will be required to include language providing for the provider's ability to amend the plan on behalf of adopting employers. Also, all mass submitters will be able to submit minor modifier applications (IRS fee of \$700) for their providers.

Notably, the IRS also asked for guidance on possibly permitting opinion letter reliance for plans that cover legacy benefit formulas, which might facilitate conversion from individually designed plans to pre-approved plans. It also clarified that the IRS will not review for (and the opinion letter will not cover) Title I ERISA issues.

Notice 2017-37

The 2017 Cumulative List includes 21 pieces of IRS guidance that may require a plan amendment for compliance and covers guidance issued on or prior to February 1, 2017. This list only applies to defined contribution plans, and the new items (that were not previously included in the 2011–2015 Cumulative Lists) are summarized below:

- **Notice 2015-86.** This notice provides that plans were not required to make additional changes to the plan for same-sex marriages following the Supreme Court's decision in *Obergefell v. Hodges*.¹ However, a plan sponsor was permitted to make certain discretionary plan amendments following the decision, if desired.

- *Code Sec. 401(a) Proposed Regulations.*² This proposed regulation provides special safe harbor guidance for the definition of “normal retirement age” for governmental pension plans, which includes a definition based on years of service at any age.
- *Notice 2016-16.* This long awaited guidance permits mid-year changes to safe harbor 401(k) plans under certain circumstances.
- *Code Sec. 401(k)(m) Proposed Regulations.*³ The proposed regulations permit the use of forfeitures for qualified matching contributions (QMACs), qualified non-elective contributions (QNECs) (e.g., corrective contributions under EPCRS), and safe harbor plan contributions. The Notice states that plan sponsors

may choose to rely on these proposed regulations currently and for prior periods.

- *Section 306 of the PATH Act of 2015.* This statutory change permits rollovers from a qualified plan to a SIMPLE IRA pursuant to Code Sec. 408(p)(1)(B).

The guidance also extended the opening of the pre-approved defined contribution program two months from August to October 2017, so pre-approved sponsors will have a bit of time to digest these new rules. But prior to submitting any filings to the IRS, the IRS will need to issue the applicable “List of Required Modifications” (LRMs) on its website and issue updated Form 4461 (Appendix A of the Rev. Proc. includes a sample filing letter if the Form 4461 has not yet been updated).

ENDNOTES

¹ *Obergefell v. Hodges*, SCT, 135 SCt 2584 (2015).

² 81 FR 4599, January 27, 2016.

³ 82 FR 5477, January 18, 2017.

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