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## LEGAL DEVELOPMENTS

### *Combined Pre-Approved Plan Program Is Here*

*This column provides a summary of the key points of Revenue Procedure 2023-37, which is a welcomed development for pre-approved plan providers of defined contribution plans, defined benefit plans, and 403(b) plans.*

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The Internal Revenue Service (IRS) has been talking about consolidating its various pre-approved plan programs into a single platform,

taking the best of the various options, to develop a more comprehensive and consistent program. Well, newly issued Revenue Procedure 2023-37 does just that, and is a welcomed development for pre-approved plan providers of defined contribution (DC) plans, defined benefit (DB) plans, and 403(b) plans.

Adopting plan sponsors will also benefit from a single program, which most notably permits the same amendment timing rules as individually designed plans—permitting amendments to follow the IRS Required Amendment List—granting plan sponsors and providers two years following the issuance of the notice to adopt the listed amendments. This will largely eliminate the annual interim amendments that document providers send to their plan sponsor clients for adoption each year.

The program generally tracks the format and provisions of its predecessor, Revenue Procedure 2017-41, but is expanded and modified to apply to DC plans (including ESOP special provisions), DB plans (including hybrid/cash balance special provisions), and 403(b) plans (bringing in the rules of Rev. Proc. 2021-37). Below is a summary of the key points of the new program, which can be broken down into three main categories: (1) timing of plan amendments/remedial amendment period; (2) provider's IRS application process for an IRS opinion letter providing that the plan document as to its terms (but not plan operations) complies with the Section 401(a) or 403(b) qualification requirements of the Internal Revenue Code (Code); and (3) the employer's application process on Form 5307 for a determination letter for the pre-approved plan.

### Timing of Plan Amendments

The program sets forth the rules for when plan amendments due to law or design changes must be adopted. The deadline for amendments is now as follows:

- Interim Amendments (generally, IRS-required law changes)—must adopt by the last day of the second calendar year that begins after the issuance of the Required Amendment List (which historically only applied to individually designed plans) in which the change appears.
- Discretionary Amendments (generally optional plan design changes)—must adopt by the end of the plan year in which the plan amendment is operationally put into effect.
- Additional time is available for governmental plans—90 days after the close of the second regular legislative session of the legislative body with amendment authority that begins on or after the amendment becomes effective.

These rules are effective as of November 21, 2023. Of course, these general deadlines can be overridden by statutory or other IRS guidance.

In general, every pre-approved plan has a recurring six-year remedial amendment period (RAP) cycle, ending with a two-year window for employers to adopt a fully restated, updated plan document (the prior four years of the cycle are spent by the document providers designing their documents, and the IRS reviewing those documents for pre-approval). The plan document needs to be in compliance with law changes outlined

in the IRS Cumulative List and Required Amendment List (RAL) by the end of the Cycle. However, if there is a change in the rules during that Cycle, and an interim amendment is not timely adopted to conform to those changes, the RAP expires with the deadline for such amendment (as indicated above).

If an employer does not correct a failure to adopt an interim amendment within two years after this RAL deadline, then the plan will be treated as an individually designed plan at the end of that two-year period. (The IRS correction program, EPCRS [Rev. Proc. 2021-30], may be needed if the late amendment causes the plan to fail to meet the qualification rules in the interim.)

### Opinion Letter Process

The program sets forth the particulars for a plan document provider to file its request for an opinion letter on a pre-approved plan document. These procedures apply to: (1) Cycle 4 (and later) filings for DC Plans, for which the filing period begins February 1, 2024, and ends January 31, 2025; (2) Cycle 4 (and later) filings for DB Plans, for which the Cycle 4 filing period begins April 1, 2025; and (3) the Cycle 3 (and later) filings for 403(b) Plans. This process will cover Starter 401(k)/403(b) plans under SECURE 2.0, but there is no indication of coverage of PEP (pooled employer plan) documents.

The changes to the program, many of which are made to track the more recent 403(b) procedure, include: (1) eliminating the fixed 6-year Cycle process—now each Cycle ends with the end of the two-year window for adopting employers to adopt the new document (which may not be exactly six years from the end of the previous cycle); (2) lowering the number of employer/clients (and unaffiliated providers for a mass submitter) needed to adopt the plan to 15; (3) a non-governmental plan must have a normal retirement age of at least age 55; (4) no loss of opinion letter reliance as a result of an IRS closing agreement or voluntary correction program (VCP) compliance statement; and (5) other miscellaneous changes (failure to disclose material fact/identify a modification, how to discontinue a pre-approved plan, filing address, notification required for “knowledge” of a qualification failure).

Notably, the IRS recently issued the Cumulative List (which indicates the law changes that the IRS will review) and the List of Requirement Modifications (LRMs) (which contains model plan document language), both of which are imperative to the Cycle 4 DC restatement and amendment process.

Lastly, a new employer plan cannot be adopted until the pre-approved document has been submitted to the IRS. Moreover, as in the past, the opinion letter will not be issued for amendments made between submission periods.

### Determination Letter Process

Adopting employers that want to obtain a determination letter on the pre-approved plan can follow these new procedures. They will apply for Cycle 2 (and later) 403(b) Plans, and for Cycle 4 (and later) DC and DB Plans.

A Form 5307 can generally be filed for (1) a non-standardized plan that makes modifications to the terms of the plan that are not extensive (that is, the IRS determines, in its sole discretion, that the plan is no longer substantially similar to the provider's document); or (2) Code Section 415/416 language for required aggregation of plans. There are certain types of changes that require filing a Form 5300 (for example, normal retirement age ruling, multiple employer plan, extensive changes).

The timing of the Form 5307 (or 5300) filing is generally within the two-year window to adopt the new document. However, for a new pre-approved plan, the employer has until the start of the employer adoption window for the next Cycle to apply for a determination letter.

### Conclusion

This long-anticipated consolidation of the various pre-approved plan programs does a nice job in simplifying the various rules and establishing a single program for pre-approved plans. The most notable changes—extending the RAL to pre-approved plans, and extending the determination letter program beyond the two-year window period for new pre-approved plans—are welcomed improvements that plan sponsors and providers alike will quickly come to appreciate. And as the IRS has now issued the various other pieces of guidance (Cumulative List (Notice 2024-3) and LRMs), providers will get busy next year with DC Plan submissions. ■

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