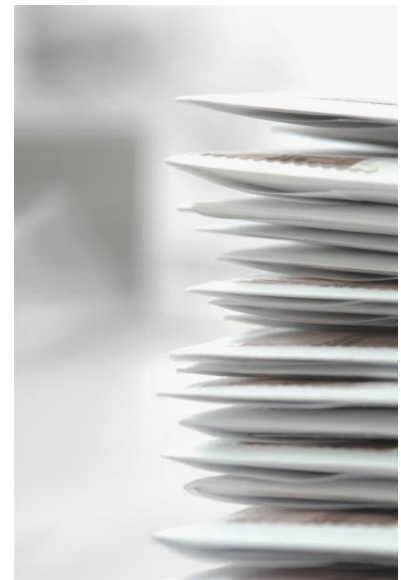


As Expected, IRS Formally Contracts Its Determination Letter Program

IRS has formally eliminated the staggered five-year remedial amendment cycle for individually designed plans, effective January 1, 2017. After that time, it will accept applications for a determination letter only for initial plan qualification, qualification upon plan termination, and in “other circumstances” — which it will consider and announce every year for situations such as significant law changes, new approaches to plan design, and inability to use pre-approved plan documents. IRS will publish an annual Required Amendments List, as well as an annual Operational Compliance List identifying qualification changes effective during a calendar year. Plan sponsors should consider compliance processes to ensure timely amendments and plan operations, given that, going forward, they can rely on an existing determination letter only to the extent a plan provision has not been amended or affected by a change in law.

Background

In July 2015, IRS unveiled major changes to its determination letter program, through which sponsors of qualified retirement plans can request a determination on whether the form of their plan satisfies the various requirements for favorable treatment under tax law. Specifically, it announced that the existing five-year remedial amendment cycle will end effective January 1, 2017, with Cycle A plans sponsored by employers with EINs ending in 1 or 6 (and certain controlled and affiliated service groups) as the last group that can obtain a determination letter under the current program. Going forward, individually designed plans will be able to obtain a determination letter only for initial plan qualification, qualification upon termination, and in “other limited circumstances.” The guidance also stated that the current remedial amendment period (meaning, the deadline for adopting amendments to reflect mandated changes and fix errors in discretionary changes) that extends to the end of the plan’s applicable amendment cycle will no longer be available after December 31, 2016 — although any open remedial amendment periods for individually designed plans are open until December 31, 2017. (See our [July 21, 2015 For Your Information.](#))



[Subsequent guidance](#) in the IRS' annual update to its procedural rules provided that determination letters issued to individually designed plans on or after January 4, 2016 will no longer contain an expiration date. This was followed by an [additional notice](#) advising that expiration dates in determination letters issued prior to January 4, 2016 are no longer operative; controlled and affiliated service groups that previously made a Cycle A election can submit a determination letter application during the final Cycle A submission period (February 1, 2016 to January 31, 2017); and employers have until April 30, 2017 to establish or adopt a defined contribution pre-approved plan, and, if permissible, apply for a determination letter (previously, the deadline was April 30, 2016).

IRS Stuck to Its Guns, But Provided Some Clarifications

As expected, in [Rev. Proc. 2016-37](#), IRS formally eliminated the staggered five-year remedial amendment cycle for individually designed plans, effective January 1, 2017. Over strong objections from trade groups representing large plan sponsors, IRS will accept an application for a determination letter only upon initial plan qualification, plan termination, and in other yet to be announced circumstances.

What Other Circumstances?

IRS said it will consider annually whether to accept determination letter applications for individually designed plans in other circumstances, such as in the case of significant law changes, new approaches to plan design, and the inability of certain types of plans to use pre-approved plan documents (for example, multiemployer plans). IRS will announce these opportunities in published guidance and intends to periodically request comments on situations “where the submission of a determination letter application may be appropriate.”

Based on its current analysis, resources, and case load, however, the IRS will not accept applications during 2017 — other than for initial determinations and plan terminations.

Amendment Deadlines and Operational Compliance

Plan sponsors no longer need to adopt interim amendments that would have had an adoption deadline on or after January 1, 2017. Instead, by October 1 of each year, IRS and Treasury will publish an annual Required Amendments List (RA List) that will include all amendments required to maintain qualified status. The RA List will also set forth the date the remedial amendment period expires for changes to those qualification requirements. Generally, plan sponsors must adopt any item placed on the RA List by the end of the second calendar year following the year the RA List is published. This deadline is the same for all plan years.

Remedial Amendment Periods

Different remedial amendment periods apply to new plans and governmental plans. Additionally, plan termination ends the plan's remedial amendment period and any retroactive or other required amendments must be adopted in connection with the plan termination, even if they are not included on the RA List.

For example, plan amendments for items on the 2016 RA List generally must be adopted by December 31, 2018.

Discretionary amendments will still be required by the end of the plan year in which the amendment is operationally put into effect — meaning when the plan is administered consistent with the change.

For example, if a calendar year plan pays increased benefits during 2018, the deadline for adoption of a discretionary amendment to implement those increased accrued benefits is December 31, 2018. Where the

plan year ends June 30 and the plan improves benefit accruals in December 2017, the deadline for adoption of a discretionary amendment to implement the change is June 30, 2018.

In addition to timely adopting plan amendments, employers must operate their plans in compliance with any change in qualification requirements beginning on the effective date of the change — the remedial amendment period is irrelevant. To this end, IRS intends to provide an annual Operational Compliance List (OC List) that identifies qualification changes that are effective during a calendar year.

Limited Reliance on Determination Letters

Plan sponsors can only rely on an existing determination letter for a plan provision that is not amended or affected by a change in law. They cannot rely on a determination letter for subsequently amended provisions or those affected by law changes.

Changes to Pre-Approved Plan Program

The guidance also makes clarifying changes to the six-year remedial amendment cycle for pre-approved qualified plans, as well as some modifications in light of changes to the program for individually designed plans. (See our [July 2, 2015 For Your Information](#) to learn more about the pre-approved plan program.)

Consequences and Considerations

Determination letters have played an important role for individually designed plans over the years. They have prevented the IRS from finding that old flaws disturb the plan's qualified status and served as proof of qualified status for plan auditors as well as for individual participant rollovers and corporate mergers and acquisitions. And they have been required for access to the IRS's Employee Plans Compliance Retirement System (EPCRS).

Comment. It is not clear when the IRS is will issue guidance recognizing or addressing the effect of the determination letter program changes on EPCRS.

In light of the general unavailability, effective January 1, 2017, of determination letters other than in the case of new plans and terminating plans, plan sponsors should work with advisors to carefully review forthcoming RA and OC Lists and ensure timely amendments and plan operation. Sponsors might also think about obtaining a legal opinion on a plan's qualified status for provisions amended, or affected by changes in law, subsequent to the plan's last determination letter.

In Closing

Despite opposition of the large retirement plan sponsor community, these significant changes to the determination letter program for individually designed plans are a reality. Now is the time for plan sponsors to consider compliance processes designed to ensure timely amendments and plan operations — and, if eligible for a Cycle A submission, to take advantage of the opportunity to get what may be the last letter for a long time.

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