

Stakeholders Propose Ideas for Expanding the Determination Letter Program

IRS received comments from trade organizations, law firms, and other stakeholders on what special circumstances beyond initial plan qualification and plan termination should merit a review of plan changes. It remains to be seen whether the IRS will allow determination letter applications for significant design changes, mergers, multiemployer plans, governmental plans, or other circumstances raised in these comments.

Background

A favorable IRS determination letter affirms that the plan sponsor has timely amended its plan document to incorporate all required law and regulatory changes since receiving the plan's previous determination letter, and that any discretionary plan amendments were timely and met qualification requirements. Plan sponsors can generally rely on a determination letter to avoid retroactive disqualification if the IRS subsequently identifies document errors upon audit.

Until recently, IRS had established a system of applying for determination letters for individually designed plans using five-year cycles that allowed for staggered review of these requests. IRS ended this process, effective January 1, 2017, citing staffing and budgetary concerns. IRS announced that it would continue to accept determination letter applications 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. (See our [July 8, 2016 For Your Information.](#))

This April, in [Notice 2018-24](#), the IRS asked for comments on the potential expansion of the individually designed plan determination letter program for 2019 — namely, what special circumstances would warrant IRS review. IRS also received [recommendations](#) on the determination letter program from the Advisory Committee on Tax Exempt and Government Entities (ACT).



Common Themes

The main themes in comments from employee benefits trade organizations — namely, [ERIC](#) (joined by the In-House Benefits Counsel Network), ABC, [ARA](#), IFEBP and from ACT — included:

Significant Legislative and Regulatory Changes

Plan sponsors should be able to request determination letters for a review of design changes spurred on by significant legislation and regulatory changes, such as the recent final hybrid regulations. (See our [November 16, 2015 For Your Information](#).)

Significant Plan Design Changes

With changing business needs, plan sponsors may need significant plan design changes. If assurances about the plan's ongoing qualification status is not available, they might instead choose to terminate their plans instead of continuing them in a new form. Cited examples of complex design changes in DB plans include:

- Conversions to cash balance designs
- Traditional plan formula changes
- Amendments to a plan benefit formula such that it no longer qualifies as a safe harbor formula under the nondiscrimination rules, or to comply with any closed plan relief
- Lump sum windows
- Restatement to an individually designed plan due to provisions that are not permitted in a pre-approved plan

In the DC plan space, trade organizations suggested ESOP changes would merit review, such as adding an ESOP to an existing DC plan.

Mergers and Acquisitions

Another common concern in the comments involved plan mergers, specifically in response to corporate reorganizations and consolidations — that is, trustees and corporate buyers should have a mechanism for assuring that merging plans will not taint the qualification status of the plan that results from the merger.

Under the previous determination letter program, in recognition of the complexity of these transactions, the IRS provided longer remedial amendment periods and assurances about retroactive challenges. Specific recommendations included allowing requests in 2019 for plans that do not have a current letter that covers the merger event; longer remedial amendment periods and the option to submit for IRS review; accepting submissions specifically for mergers involving DB plans with multiple formulas and/or grandfathered benefits, mid-year mergers of safe harbor 401(k) plans with non-safe harbor 401(k) plans; certain pre-approved plans relying on an opinion letter into an individually designed plan; and expedited processing for these time-sensitive transactions.

Specialty Areas

Some letters asked that the IRS give the following specific types of plan sponsors and plans special consideration in any expanded program:

- Certain individually designed 403(b) plans, many of which are incompatible with the pre-approved program due to multiple legacy platform providers and investment contracts
- Multiple employer plans, many of which have more participants and employers than pre-approved plans, to provide assurances to participating employers and employees that their plan satisfies the Code's qualification requirements
- Multiemployer plans, because they are excluded from the pre-approved plan opinion letter program
- Governmental plans, which also cannot convert to pre-approved plans, given the importance of determination letters as evidence for entities such as financial institutions, custodians, auditors, actuaries, and investment advisors

Ideas on Alternative Approaches

The comments also included recommendations on other avenues for obtaining the IRS stamp of approval.

Third-Party Certification

Under one approach, IRS would establish or provide official recognition of a third-party certification system to fill the void left when it contracted the determination letter program — an idea that IRS raised in its [2001 White Paper](#). IRS would retain oversight through certification of third parties enlisted to conduct the reviews, and employers would be able to rely on the certification to avoid retroactive disqualification in the case of a subsequent IRS audit.

Letter Rulings

Another idea involved offering private letter rulings to individually designed plans on certain qualification issues when significant regulatory or legislative changes affect a broad range of plans and the qualification requirement at issue has not been addressed by IRS guidance of general applicability or in model amendments.

Limited Scope Reviews

With a limited scope process in which a plan sponsor could ask for review of specified changes since the plan's prior determination letter, a sponsor could use a format like [Form 5307, Application for Determination for Adopters of Modified Volume Submitter Plans](#), to identify specific changes to be reviewed. The review could be limited to discretionary amendments, or to amendments addressing items listed in the annual Required Amendments List. The plan's prior determination letter would continue to cover unchanged plan provisions.

Additional Recommendations

Suggestions for guidance that would give plan sponsors comfort about the status of the letter previously issued to the plan included:

- Providing further confirmation that letters do not expire if no changes are made, that letters continue to be valid if the only change is the name of the plan, and that letters would extend to "cloned" plans as part of a divestiture transaction
- Expanding IRS instructions for pre-approved plans to make that program as broad as possible, and lengthening the time for adopting these plans

- Allowing full determination letter review 10 or 15 years after the last determination letter, or after a set number of amendments (with limits based on a minimum time period) — with review periods staggered to help address IRS workflow

In Closing

Given its limited resources available for performing reviews, IRS may embrace the less time-consuming suggestions like reaffirming the ongoing validity of previously issued determination letters. It could also address the concern about retroactive disqualification with generic 7805(b) relief without reviewing changes made to plan documents. It is not clear when, or in what form, IRS will issue guidance in response to these comments.

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