



IRS Revenue Procedure 2016-37:

Changes to the Determination Letter Program,
Ongoing Plan Compliance and Best Practices for
Plan Sponsors

Today's Speakers

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Today's Discussion Topics

- Introduction: Importance of Determination Letters
- Background: Staggered Remedial Amendment Cycles, IRS Announcement 2015-19, and IRS Notice 2016-03
- Advisory Committee on Tax Exempt and Government Entities (ACT): Public Survey and Recommendations Regarding Changes to the Determination Letter Program
- Current Guidance: Revenue Procedure 2016-37
- Ongoing Compliance: Action Steps for Plan Sponsors

The Importance of Determination Letters

- Determination Letter = A determination by the IRS that the form of a retirement plan document satisfies all applicable requirements to be tax-qualified under Internal Revenue Code (Code) Section 401(a)
- Generally, if the employer operates its plan according to the terms of a plan document that has a favorable determination letter, the plan will satisfy the requirements of Code Section 401(a) in operation

The Importance of Determination Letters

- For a plan sponsor, a determination letter provides assurances that:
 - An IRS audit will not uncover plan document defects
 - If the plan is operated in accordance with the plan document, an IRS audit will not uncover plan operation defects
- Reliance on a determination letter also matters to:
 - Employers contemplating corporate transactions
 - Recordkeepers, custodians, auditors and other plan service providers
 - Investment vehicles that limit eligibility of investors to tax-qualified plans
 - Federal agencies such as the SEC, PBGC, and DOL

Determination Letters on Independent Audits

- The audit guide for qualified plans devotes an entire chapter to the consideration of the plan's tax status
- Within this section, the format of the plan document is considered and there is consideration of plans that do not have a determination letter

Determination Letters on Independent Audits

- The auditor has assertions related to the plan's tax status including the following related to qualification:
 - The trust is qualified as exempt from tax and whether transactions might have occurred to jeopardize this status
 - Relative to uncertain tax positions, the plan has taken the position that “more likely than not” has been attained
 - Plan assets reflect any asserted and unasserted claims and adjustments due to possible loss of tax-exempt status, or these are disclosed

Determination Letters on Independent Audits

- There are specific risks related to plan qualification that the auditor is called to consider in planning and conducting the audit:
 - The plan document is not timely implemented, updated or amended
 - Plan is not current with changes in governing law
 - Amendments for regulatory changes are not made to the document in the year following the change
- Due to these issues, auditors must design their audit procedures to assess the tax status of the plan

Staggered Remedial Amendment Cycles

- Staggered 5-year determination letter program was established in Revenue Procedure 2007-44
 - Sponsors of individually designed tax-qualified plans (IDPs) were assigned remedial amendment cycles (A – E) based on the last digit of the sponsor’s EIN (a few special rules applied)
 - Each cycle had a 12-month submission period (Feb. 1 – Jan. 31) in which to request an “on-cycle” favorable determination letter
 - On-cycle determination letters provided assurance that the plan terms complied with the qualification requirements listed in the “Cumulative List of Plan Qualification Requirements” issued immediately prior to the start of the 12-month submission period

Staggered Remedial Amendment Cycles

- First 5-year remedial amendment cycle was the EGTRRA remedial amendment cycle
 - Cycle A opened February 1, 2006; Cycle E ended January 31, 2011
- Second 5-year remedial amendment cycle was the PPA remedial amendment cycle
 - Cycle A opened February 1, 2012; Cycle E ended January 31, 2016
- Prior to the 5-year cycle system, plan sponsors requested determination letters on an ad hoc basis – when the plan sponsor determined that it would be prudent to obtain the assurances discussed earlier (e.g., after significant plan redesign or law change)

IRS Announcement 2015-19

- July 2015: IRS announced the end of the staggered 5-year determination letter remedial amendment cycles for IDPs, effective Jan. 1, 2017
- Key Points in the Announcement:
 - Cycle E (Feb. 1, 2015 – Jan. 31, 2016) and Cycle A (Feb. 1, 2016 – Jan. 31, 2017) determination letter applications still accepted
 - As of Jul. 21, 2015, off-cycle determination letter applications accepted **only** for new IDPs, plan terminations, and “certain other limited circumstances”

IRS Notice 2016--03

- January 2016: IRS issued additional guidance on determination letter program changes in Notice 2016-03
- Key Points in the Notice:
 - Expiration dates for determination letters issued prior to Jan. 4, 2016 are no longer effective
 - Plan sponsors that elected prior to Jan. 31, 2012 to file all controlled group plans in Cycle A are still permitted to file determination letter applications for controlled group plans during Feb. 1, 2016 – Jan. 31, 2017 Cycle A
 - Deadline for a defined contribution IDP to convert to pre-approved defined contribution plan is extended to Apr. 30, 2017 (previous deadline was Apr. 30, 2016)

ACT Public Survey regarding Changes to the Determination Letter Program

- January 2015: The Employee Plans Subcommittee of the Advisory Committee on Tax Exempt and Government Entities (ACT) conducted a public survey to assess the employee plans community's response to the elimination of the determination letter program
- The survey questions solicited EP community members' feedback on:
 - How important determination letters are for IDPs
 - Factors that influence a plan sponsor's decision to convert to a pre-approved plan format
 - Events for which the IRS should consider reopening the determination letter program (e.g., significant law changes, corporate transactions)
 - Types of plans for which the IRS should consider allowing ongoing determination letter applications (e.g., large plans based on assets, multiple employer plans)

ACT Report to the IRS

- June 2016: ACT presented its annual report to the IRS, which included the Employee Plans Subcommittee’s “Analysis and Recommendations Regarding Changes to the Determination Letter Program”
- [Fifteenth Report of the ACT - June 8, 2016](#)
- One initial goal of the ACT was to raise awareness of uses of Determination Letters beyond the scope of IRS utilization by various “stakeholders”. Much of this was done directly with the IRS in advance of the report, but there is some reference within the report

ACT Report to the IRS

■ Survey Results

- The survey received 440 responses from the benefits community – a very high number relative to prior efforts, and beyond expectations
- Almost all respondents worked with single-employer plans; however those working with governmental, church, multiple employer or multiemployer plans were very consistent with the responses of the former group
- As 94% of respondents agreed that initial Determination Letters are extremely or very important, 90% of respondents felt Determination Letters are equally important on plan amendment
- Noteworthy was the uncertainty among respondents as to how they will respond to the change in policy

ACT Report to the IRS

■ Interviews with Pre-Approved Plan Providers

- User fees associated with various EP programs are published annually in the “08” Revenue Procedure
 - Previous \$12,000 per base document, \$1,000 per adoption agreement
 - Currently \$16,000 base + 1 adoption agreement, \$11,000 each additional
- For a sample submission like PPA consisting of 14 adoption agreements the price under the prior fee schedule would be \$26,000 and under the current fee schedule would be \$159,000, an increase of 133,000 - more than five-fold
- At a time when pre-approved plans should expand, providers are planning to contract and not offer little-used adoption agreements

ACT Report to the IRS

- Recommendation 1: “Don’t do it!”
- Recommendation 2: “Use current position as a transition while working with the benefits community for a long-term solution”
- Recommendation 3: “Implement the change in the least harmful manner”
 - Provided several points of consideration in moving ahead
 - See the [ACT Report](#) pages 44 – 53 for additional information

Revenue Procedure 2016-37

- Key Changes for Individually Designed Plans:
 - Confirmed elimination of staggered 5-year determination letter program
 - Changed approach to remedial amendment period for correcting disqualifying plan provisions
 - Extended remedial amendment deadline transition rule
 - Annual Required Amendments List
 - Annual Operational Compliance List
 - Reliance on existing determination letters

Revenue Procedure 2016-37: Confirmed Elimination of Staggered 5-Year Determination Letter Program

- Rev. Proc. confirms prior IRS guidance – the staggered 5-year determination letter program for IDPs is eliminated
- A determination letter application for an IDP may be submitted:
 - Initial Plan Qualification – “initial” means that the plan has never filed a Form 5300 or Form 5307 (not that the plan is “new”)
 - Plan Termination – application must be filed within 1 year after the effective date of the termination, or the date the action terminating the plan is taken (if later), and in no event later than 12 months after the date that substantially all plan assets have been distributed

Revenue Procedure 2016-37: Confirmed Elimination of Staggered 5-Year Determination Letter Program

- A determination letter application for an IDP may be submitted in “other circumstances”
 - No clear guidance on what “other circumstances” might cause the IRS to reopen the determination letter program in the future – IRS intends to evaluate annually whether to accept determination letter applications, taking into account:
 - Significant law changes
 - New approaches to plan design
 - IRS case load and resources available to process applications
 - Public comments on additional situations that warrant reopening the determination letter program
 - Despite the guidance, IRS officials have informally emphasized that the determination letter program is not going away permanently

Revenue Procedure 2016-37: Changed Approach to Remedial Amendment Period

- Eliminating the 5-year determination letter cycle means that the extended remedial amendment period (RAP) to correct disqualifying plan provisions also must change
- The Rev. Proc. describes new RAP deadlines for correcting disqualifying provisions in:
 - Newly established IDPs
 - Existing IDPs when the disqualifying provision relates to a change in qualification requirements
 - Existing IDPs when the disqualifying provision results from an amendment to the plan

Revenue Procedure 2016-37: Changed Approach to Remedial Amendment Period

- RAP when there is a change in qualification requirements:
 - Changes in qualification requirements will be listed on the annual Required Amendments List
 - Plan amendment to address changes in qualification requirements must be adopted by the end of the second calendar year after the requirement appears on the Required Amendments List
- RAP when a disqualifying provision results from a plan amendment:
 - Corrective plan amendment must be adopted by the end of the second calendar year after the amendment is adopted or effective (if later)

Revenue Procedure 2016-37: Changed Approach to Remedial Amendment Period

- RAP for a disqualifying provision in a new plan:
 - Corrective plan amendment must be adopted by the later of (i) the 15th day of the 10th calendar month after the end of the plan's initial plan year, or (ii) the plan's "modified Code Section 401(b) expiration date"
 - Modified Code Section 401(b) Expiration Date
 - Plan sponsor's due date for filing its income tax return, determined as if the extension applies (even if plan sponsor doesn't file for extension)
 - For tax-exempt plan sponsor, due date for filing the Form 990 series, determined as if the extension applies (if the Form 990 series is not required, 15th day of the 10th month after the end of the plan sponsor's tax year)

Revenue Procedure 2016-37: Changed Approach to Remedial Amendment Period

- RAP for a terminating plan:
 - RAP ends on the plan termination date
 - Plan must be amended for all qualification changes on or before the plan termination date, even if a qualification change has not yet been published on the Required Amendments List
 - IRS may request additional amendments to the plan in connection with issuing a final determination letter

Revenue Procedure 2016-37: Extended Remedial Amendment Deadline Transition Rule

- RAP for disqualifying provisions identified on Cumulative Lists for current 5-year remedial amendment cycles is extended to Dec. 31, 2017 (from Dec. 31, 2016)
- *Example: A Cycle B filer that received a determination letter based on the 2011 Cumulative List may amend its plan for qualification changes on the 2012 – 2016 Cumulative Lists on or before Dec. 31, 2017*

Revenue Procedure 2016-37: Annual Required Amendments List

- Annually, starting in 2016, the IRS will publish a Required Amendments List describing changes in qualification requirements
- IRS' intent is to include qualification requirements on the Required Amendments List after the IRS has published sufficient guidance for plan sponsors to amend their plans for the change, whenever possible
- As noted, RAP for disqualifying provisions based on the Required Amendments List will end Dec. 31 of the second year after an item appears on the list

Revenue Procedure 2016-37: Annual Operational Compliance List

- Annually, starting in 2016, the IRS will post on its website an Operational Compliance List describing changes in plan operation that must be made for legal compliance
- In many cases, operational changes on the Operational Compliance List will need to be implemented before the deadline for adopting the corresponding plan amendment for a qualification change

Revenue Procedure 2016-37: Reliance on Existing Determination Letters

- Expiration dates for determination letters are eliminated – both prospectively and retroactively
- A plan sponsor can continue to rely on a plan's existing determination letter for any plan terms that are not added to the plan, amended, or affected by a law change
- A plan sponsor cannot rely on a plan's existing determination letter to the extent of any new plan terms, amended plan terms, or plan terms affected by a change in the law post-determination letter

Action Steps for Plan Sponsors

- For plan sponsors that were Cycle B, C, D, or E filers, review plan documents for compliance with requirements on Cumulative Lists issued after previous determination letter application was filed (i.e., 2012 – 2015, as applicable)
- When Required Amendments List is published, review plan documents to assess compliance and determine whether amendments are needed – amend by end of RAP
- When Operational Compliance List is posted, conduct a plan compliance review to assess compliance

Action Steps for Plan Sponsors

- Review plan documents annually to confirm that all discretionary amendments are timely adopted
- Develop a schedule for conducting periodic, in-depth compliance reviews to assess operational compliance
- Annually, determine whether the IRS is accepting determination letter applications – if so, determine if your plan meets the requirements to submit a determination letter application

Action Steps for Plan Sponsors

- For a plan sponsor establishing a new IDP, determine the timing and requirements to request a determination letter
- For a plan sponsor considering terminating its IDP, determine whether plan amendments are required in connection with the plan termination, and determine whether the plan sponsor will request a determination letter in connection with the plan termination
- Work with legal counsel and retirement plan advisors to stay informed about IRS guidance on determination letters

More Guidance Anticipated

- The IRS is working on additional guidance related to the determination letter program changes, including:
 - Revisions to the Employee Plans Compliance Resolution System to clarify that an applicant is no longer permitted to apply for a determination letter in connection with certain Voluntary Correction Program (VCP) applications
 - Additional requests for comments on the changes to the determination letter program
 - Required Amendments List for 2016
 - Operational Compliance List for 2016

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