

Pension Plan Fix-It Handbook

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IRS Procedural, Letter Changes Reflect Shift To Audits From Reviewing Plan Documents

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It appears that the IRS has begun channeling its resources to audits rather than reviewing retirement plan documents. As part of this refocus, the IRS has issued four pieces of guidance on determination letters. The guidance:

- eliminates the five-year remedial amendment cycle system for individually designed plans. Determination letters for individually designed plans generally will be issued by the agency only upon initial qualification and termination;
- means expiration dates on determination letters issued before Jan. 4, 2016, are no longer operative;
- decreases Voluntary Correction Program fees in certain cases; and
- increases determination letter application fees in some circumstances.

Announcement 2015-19 eliminated the staggered five-year determination remedial amendment cycles for individually designed plans. (Note: the six-year cycle for pre-approved plans remains in effect.) Determination letters for individually designed plans will be limited to initial plan qualification and plans seeking qualification upon plan termination. (See related June 2015 story.)

The announcement asked for comments regarding a number of issues related to plan documents. Subsequently, the IRS issued IRS Notice 2016-03, which includes issues related to controlled groups, determination letter expiration dates and extends the Cycle A (see Fig. 1120-A in the *Pension Plan Fix-It Handbook*) end date in certain circumstances.

Revenue Procedure 2016-6 is a general update of Rev. Proc. 2015-6, 2015-1 I.R.B 194, which contains the Service's general procedures for employee plans

determination letter requests and is not discussed in this column.

Finally, Rev. Proc. 2016-8 updates fees for determination letters and VCP filings among other things.

A Little History

There was a time (long ago) when the majority of retirement plans were individually designed defined benefit plans. Before 401(k) plans, defined contribution plans were commonly known as savings plans and profit sharing plans. These plans were individually designed, meaning that provisions were written specifically to reflect the plan sponsor's benefit philosophy. Determination letters (see ¶1120) are not required but are generally requested. Upon an IRS tax audit, a determination letter helped justify deductions taken for employer contributions to the plan.

Plans were periodically amended to reflect law or design changes. Plans were generally restated and a new determination letter requested when there were five or six amendments since the last determination letter.

The advent of 401(k) plans brought about the popularity of prototype or volume submitter plans that were pre-approved by the IRS. Defined benefit plans began to decrease as the popularity of 401(k) plans increased with employer plan sponsors. Although individually designed plans continue to exist amid the popularity of these pre-approved plans, they are used primarily for legacy defined benefit plans and by some defined contribution plans.

What Is the Big Deal?

Determination letters approve the "form" of the plan document. This means that the plan provisions are in accordance with the regulatory guidance at the time the determination letter is issued. A determination letter does

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not in any way opine on the plan’s operational compliance. (See July 2013 story.)

Currently, sponsors of individually designed plans can apply for a determination letter usually every five years (as opposed to every six years for pre-approved plans) to incorporate guidance issued since the last determination letter as well as plan design changes. The five-year period is referred to as a “cycle” and is based on the last digit of the plan sponsor’s EIN.

Effective Jan. 1, 2017, the five-year cycle for individually designed plans will be eliminated. However, Cycle A plans have until Jan. 31, 2017, to submit for a determination letter. The elimination of the determination letters will require that any amendments to a plan document be carefully drafted to comply with government regulations. Without the ability to request a determination letter, an IRS audit may be the only way for plan sponsors to know if the amended plan is in compliance.

More IRS Guidance Regarding Determination Letters

Notice 2016-03, issued in January, addressed determination letter expiration dates, controlled groups and provided an extension to April 30, 2017, for certain pre-approved plans.

The determination letters are issued with expiration dates tied to the five-year cycle, basically requiring plan sponsors to request another determination letter at the expiration date. The IRS announcement regarding the end of the current determination letter process for individually designed plans raised questions regarding the effect of regulatory changes that are issued after the expiration of a determination letter.

Notice 2016-03 provides that expiration dates on determination letters issued before Jan. 4, 2016, are no

longer operative — meaning the letter doesn’t expire at the indicated date. We can expect more IRS guidance about the extent to which a plan sponsor can rely on a determination letter if the law changes or if the plan is amended.

Plan sponsors in controlled groups and affiliated service groups that maintain more than one individually designed plan are permitted to submit a determination letter application during Cycle A (Feb. 1, 2016, through Jan. 31, 2017; see Fig. 1120-A) provided that a previous Cycle A submission was made by Jan. 31, 2012.

Pre-approved plans adopted after Jan. 1, 2016 (other than as a modification and restatement of a plan adopted by an employer before Jan. 1, 2016) have until April 30, 2017, to adopt a pre-approved plan and apply for a determination letter. A plan sponsor that adopted a pre-approved plan before Jan. 1, 2016, continues to have until April 30, 2016, to adopt a modification and restatement with the current six-year remedial amendment period cycle for defined contribution plans.

Individually designed defined contribution plans also have until April 30, 2017, to submit a determination letter request. This appears to be an IRS effort to encourage plan sponsors with individually designed plans to switch to a more uniform pre-approved plan.

IRS Reduces Fees in Rev. Proc. 2016-8

In an effort to encourage employers sponsoring 401(k) qualified retirement plans and 403(b) plans to correct plan failures through its Voluntary Correction Program, the IRS reduced the general VCP fees for most new submissions made on or after Feb. 1, 2016. The general fee amount for plans with 101 to 500 participants remains unchanged.

New General VCP fees Based On Number of Participants

	Submissions after Feb. 1, 2016	Submissions before Feb. 1, 2016
20 or fewer	\$500	\$750
21-50	\$750	\$1,000
51-100	\$1,500	\$2,500
101-1,000	\$5,000	\$5,000 - \$8,000
1,001-10,000	\$10,000	\$15,000-\$20,000
more than 10,000	\$15,000	\$25,000

The IRS also increased some fees related to the determination letter submission process. See table on Page 3.

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IRS Determination Letter User Fees

	After Feb. 1, 2016	Before Feb. 1, 2016
Form 5300 (Application for Determination for Employee Benefit Plan)	\$2,500	\$2,500
Form 5307 (Application for Determination for Adopters of Modified Volume Submitter Plans)	\$800	\$500
Form 5310 (Application for Determination for Terminating Plan)	\$2,300	\$2,000
Multiple employer plans (Form 5300), regardless of number of forms submitted	\$4,000	\$3,000-\$15,000

A complete list of all the fee changes can be found in Section 6 of Announcement 2015-19, tweaked by Notice 2016-03.

Form 5500 Compliance Questions

The IRS added compliance questions on the 2015 Form 5500 series. After some lobbying by retirement advocacy groups, the IRS made the questions optional for 2015. Then on Feb. 17 the IRS announced on its website that retirement plan sponsors should not complete the proposed 2015 compliance questions appearing on Forms 5500 and 5500-SF. Those new questions on the annual filing forms, as well as on Schedules H, I, and R, were not approved by the Office of Management and Budget when the 2015 Form 5500 and Form 5500-SF were published on Dec. 7, 2015, so the IRS said it has decided that plan

sponsors should not respond to these questions for the 2015 plan year.

The following provides a flavor of some of the questions:

- For 401(k) plans, does the plan satisfy the nondiscrimination requirements for employee deferrals and employer matching contributions as required under applicable Code sections?
- If the ADP/ACP test is used, did the 401(k) plan perform testing using the “current year testing method” for non-highly compensated employees?
- How did the plan satisfy the coverage requirements under Section 410(b) (ratio percentage test or average benefit test)?
- Has the plan been timely amended for all required tax law changes?

Bottom Line for Plan Sponsors

The IRS has openly admitted that it is constrained by lack of resources. We should expect to see continued efforts to streamline IRS processes and redesign forms to enable the agency to capture as much compliance information as possible.

It is important that you stay on top of the IRS changes. Contact your service provider or counsel now, to determine how this latest IRS guidance affects your particular situation. ❖

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