

Insights: Alerts

IRS Provides Guidance for the Post-Determination Letter Era

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In July of 2015, the IRS announced that it would end its regular determination letter program for individually designed plans effective January 1, 2017. (See our prior [blogpost](#).) At the time of this announcement, many plan sponsors and other interested stakeholders expressed concern about how this seismic change would impact the retirement plan landscape. In several pieces of guidance issued in 2016, the IRS has answered many of the questions as to how the end of the determination letter program will impact qualified retirement plans.

- Revenue Procedure 2016-37 describes the IRS's plan for addressing amendments required by law changes, including amendment deadlines, and other issues relating to the ending of the determination letter program.
- Announcement 2016-32 requests comments on any other changes that the IRS should make to improve compliance in light of the end of the determination letter program.
- Revenue Procedure 2016-51 in relevant part addresses how the Employee Plans Compliance Resolution System (EPCRS), the IRS's correction for qualified plans and 403(b) plans, will operate after the regular determination letter program ends.

This guidance is addressed below.

Amendment Process and Determination Letters

Under the still existing regular determination letter program, sponsors of individually designed plans can submit applications for a determination letter periodically based on a staggered five-year "remedial amendment cycle." A favorable determination letter (FDL) provides the IRS's opinion that the form of plan document submitted in the application complies with the tax qualification requirements of the Internal Revenue Code (Code). FDLs provide assurances for many purposes and in many contexts. For example, in transactions, buyers view an FDL with respect to a seller's plan as evidence that the plan complied with law.

Under the current regular determination letter program, if the IRS finds disqualifying provisions when reviewing a determination letter application, the plan sponsor can amend the plan retroactively without penalty during its assigned remedial amendment cycle as long as the employer adopted good faith amendments for law changes and applied for a determination letter based on that cycle. With the end of the regular determination letter program, both the regular opportunity to have the IRS review and "bless" a plan document and the five-year

remedial amendment cycle no longer applies, which means that plans are in need of guidance as to how they can obtain assurance that plan documents conform to the Code's tax qualification requirements.

Revenue Procedure 2016-37 provides this guidance as follows:

- **Required Amendments List.** Each year the IRS will publish a Required Amendments List that identifies plan amendments required by changes in law. The IRS intends to put items on the Required Amendments List only after it has issued regulations or other guidance, including model amendments, on the law changes. The deadline for amending plans for items on the Required Amendments List will generally be the last day of the second plan year following the year in which the item first appears on the Required Amendments List unless another deadline is specified in the Required Amendments List.
- **Operational Compliance List.** The IRS also intends to publish an Operational Compliance List, which identifies law changes that plans will be required to comply with operationally prior to the deadline for amending the plan.
- **No Interim Amendments.** The IRS has generally required "interim amendments" to be adopted for law changes, which reflect the plan's operational changes for a law change in advance of the amendment deadline. The IRS will no longer require interim amendments for items on the Required Amendments List.
- **Discretionary Amendments.** Plan amendments that are not required by law changes (e.g., design changes) must be adopted by the end of the year in which the plan amendment is put into effect operationally.
- **Effect on Existing Determination Letters.** Any expiration date included in determination letters will no longer be operable. Plans will continue to be able to rely on a determination letter with respect to provisions that are not subsequently amended or affected by changes in law.
- **Availability of Determination Letters.** Determination letters will continue to be available for new individually designed plans or for terminating plans. As is the case now, terminating plans will be required to be amended for all law changes at the time of termination regardless of whether an item has been included on the Required Amendments List. The IRS is considering whether there are other circumstances in which determination letters should be available, such as when there are significant law changes or a plan has a significant design change, which it would announce in future guidance.
- **Converting to Pre-Approved Plans.** As previously announced in Notice 2016-03, employers who wish to convert from an individually designed plan to a pre-approved plan can do so by adopting the pre-approved plan on or before April 1, 2017. (See our prior [blogpost](#).)

Commentary: The new Operational Compliance List appears to be an important tool to assist plan sponsors. The elimination of the interim amendment requirement means that plan sponsors need only amend their plans once to reflect a change in the law, *i.e.*, when that change is listed on the Required Amendments List. However, the IRS will generally only include items on the Required Amendments List only after it has issued regulations or other guidance, including model amendments, on those changes. Once a change in the law is listed on the Required Amendments List, a plan sponsor will generally still have two more years for the adoption of the amendments. Depending how quickly that the IRS is able to issue regulations or other guidance, this could mean there will be a significant time lag between changes in the law and when plans must be amended to comply with the law. Accordingly, the new Operational Compliance List will become the critical roadmap for ongoing regular compliance efforts by plan sponsors.

Requests for Comments Relating to End of Determination Letter Program

Announcement 2016-32 request comments on certain issues to facilitate compliance following the end of the determination letter process. Comments are requested on the following items:

- Whether the IRS should expand the ability of plans to incorporate required law changes by reference to avoid inadvertent errors in plan amendments.
- Whether there should be more circumstances where the IRS does not require plan amendments for law changes that do not impact the plan (e.g., the IRS requires a diversification of employer securities amendment even for plans that do not hold employer securities).
- Whether there are any impediments that prevent individually designed plans from converting to pre-approved plans that the IRS can address.
- Whether there the IRS should publish any other guidance or take any actions to facilitate compliance.

Comments on these issues must be submitted in writing on or before December 15, 2016.

Changes to EPCRS under Revenue Procedure

EPCRS allows for plan sponsors to correct a plan's qualification failures through a self-correction program (SCP) or voluntary correction program (VCP), which provides for IRS approval of a correction. Many aspects of EPCRS depend on the determination letter program. Accordingly, the ending of the regular determination letter program requires a number of changes to EPCRS. Revenue Procedure 2016-51 confirms that the changes to EPCRS will not be substantial. The primary changes are to remove references to the determination letter program operating in tandem with EPCRS, as described below:

- **Eligibility for SCP.** One of the current requirements of eligibility to self-correct operational failures under SCP is that the plan have a current favorable determination letter. Revenue Procedure 2016-51 retains the condition that a plan have a "favorable letter." However, there is no longer a requirement that the determination letter be current because, as noted above, determination letters no longer have expiration dates.
- **Nonamender Failures.** Plans with disqualifying provisions that have not been corrected within the remedial amendment period (*i.e.*, "nonamender failures") are eligible for correction with IRS approval with reduced penalties under VCP. Currently, plan sponsors who have nonamender failures must file a determination letter application at the same time as a VCP application. Revenue Procedure 2016-51 provides that plan sponsors who submit under VCP will still be able to obtain a compliance statement that will treat a corrective amendment for a nonamender failure as if it has been timely adopted. However, plan sponsors will not be able to obtain a determination letter to show that the corrective amendment and the plan as a whole is in compliance with the Internal Revenue Code, regulations, and guidance. However, as noted above, the IRS intends to issue model amendments for most amendments required by law changes in the future, so there should be less of a risk of technical noncompliance in required amendments.
- **Interim Amendment Failures.** Currently, when a plan corrects a failure to adopt an interim or good faith amendment, the plan is permitted to file for a determination letter at the same time only if the plan is on its assigned cycle for filing a determination letter. For plans that are off-cycle, the VCP compliance statement can only be relied upon to treat a corrective amendment as timely adopted. Under Revenue Procedure

2016-51, a VCP compliance statement may still be relied upon to treat a late interim amendment as timely adopted. However, as noted above, the IRS does not intend to require interim amendments in the future.

- **Retroactive Amendments for Operational Failures.** In the event of a failure to follow the terms of the plan (an Operational Failure), the IRS can approve a retroactive plan amendment to conform the terms of the plan to its prior administration under VCP. In limited circumstances, Operational Failures can be corrected by a retroactive plan amendment under SCP. Correction of Operational Failures through retroactive amendment is still available under Revenue Procedure 2016-51. However, the compliance statement will only reflect the IRS's determination that the Operational Failure has been corrected by the retroactive amendment. Because of the end of the determination letter program, there will be no opportunity to obtain a determination letter an employer can rely on to show that the plan, as amended by the retroactive amendment, complies with the requirements of the Internal Revenue Code.

In addition to the changes related to the end of the determination letter program, Revenue Procedure 2016-51 includes the following changes to EPCRS:

- **VCP Fees.** Previously, VCP fees were set forth in the Revenue Procedure setting forth the EPCRS program. Earlier this year, the IRS published guidance reducing the amount of VCP fees. (See our prior [blogpost](#).) Revenue Procedure 2016-51 says that beginning in 2017, VCP fees will be published in the IRS's annual guidance on user fees.
- **Anonymous Submissions.** Previously, plan sponsors who submitted an anonymous submission could receive a 50 percent refund of VCP fees if they failed to reach a resolution with the IRS. VCP fees will not be refunded in the event of a failure to reach a resolution under Revenue Procedure 2016-51.

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