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End of Determination Letter Program: Nearly a Year Later, the Future is Still Uncertain

It has been nearly a year since the IRS generated shockwaves in the retirement plan community by announcing its intention to end its regular, periodic determination letter program for qualified retirement plans due to budget constraints. (See our previous posts on the end of the regular determination letter process here and here.) The Advisory Committee on Tax Exempt and Government Entities' 2016 Report of Recommendations ("Advisory Committee Report"), released on June 8, 2016, shows that the uncertainties caused by the IRS's announcement have largely been left unresolved.

Under the determination letter process, employers can periodically apply for an IRS determination letter, which they can then rely on to show that their plan documents are in compliance with all requirements of the Internal Revenue Code, regulations and guidance. The importance of this letter goes far beyond the employer's reliance. Other parties conducting business with employers or their affiliates (such as in mergers & acquisitions or financings) or with the plan itself typically view the determination letter as a critical part of their due diligence in assessing potential risks.

The IRS is not eliminating the determination letter program entirely. The IRS intends to continue to issue determination letters on new plans or terminating plans and, possibly, in other situations. Further, the IRS has announced that expiration dates will no longer apply to determination letters. However, it has not yet provided any guidance on the extent to which employers will be able to rely on a determination letter after the regular program has ended.

Not surprisingly, the Advisory Committee Report's primary recommendation is that the IRS reconsider its decision to end its regular determination letter program. If the IRS does not have the funds to administer the program, Treasury can seek an increase in user fees dedicated to the program from Congress. Alternatively, the Advisory Committee Report recommends that the IRS scale back the regular determination letter program rather than eliminating it. This could include extending the filing cycle so that employers file every 7 – 10 years rather than the current five-year cycle, re-opening the program cycles for significant law changes, or allowing for filings for special circumstances, such as new plan designs or mergers and acquisitions. These proposals are intended to reduce the IRS's backlog of filings while securing the availability of a determination letter in at least those situations where there would be the most uncertainty over the tax compliance of the plan due to changes in law or plan terms.

The Advisory Committee Report also offers a number of other alternatives that are intended to soften the blow if the regular determination letter process is ended. These include:

- Publishing more model amendments and allowing plans to incorporate more tax provisions by reference.

- Adding more flexibility to the pre-approved plan program.
- Allowing employers to self-correct plan document failures.
- Offering leniency for “immaterial” plan documents failures discovered on audit.

At this point, no one has any idea what the future holds for determination letters or how the retirement plan community would adapt if they are no longer available. The Advisory Committee Report raises a number of important issues, but we are still awaiting guidance on many critical issues nearly a year after the IRS's initial announcement that it will end the regular, periodic determination letter program.