

DETERMINATION LETTERS AND EPCRS: WHERE WE ARE AND WHAT TO EXPECT

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Determination Letter Program

- Last filings were for “Cycle A,” which expired on 1/31/2017
- Determination letters no longer automatically expire as of a specified date (see IRS Notice 2016-03 and Rev. Proc. 2016-6)
- Plan sponsors cannot rely on existing favorable determination letters with respect to plan provisions that are subsequently (1) amended or (2) affected by a change in the law (see Rev. Proc. 2016-37)

Plan Sponsor and Practitioner Concerns

- ⦿ Determination letters are relied upon by auditors and in the context of M&A transactions
- ⦿ Determination letters help provide assurance that individually designed plans meet IRS standards
- ⦿ Program changes may require plan sponsors to obtain an opinion letter or participate in a substitute program offered by a law firm
 - Increases potential costs of plan sponsorship
 - Solution for individually designed plans that are not a good fit for a pre-approved document

Potential Solutions

- ⦿ Provide more model amendments
- ⦿ Expand ability to incorporate statutory and regulatory requirements by reference
- ⦿ Expand opportunities to self-correct documentation errors under EPCRS
- ⦿ Minimize variable amendment deadlines
 - “Interim amendments” were eliminated through Rev. Proc. 2016-37

Revenue Procedure 2016-37

- ⦿ Generally effective 1/1/2017
- ⦿ Individually designed plans can apply for a letter when:
 - The plan has never received a favorable determination letter
 - The plan is terminating
 - The IRS determines that there are “other circumstances” that warrant acceptance of determination letters, based on factors such as:
 - Significant law changes
 - New approaches to plan design
 - The inability of certain types of plans to convert to a pre-approved structure
 - Current case load and available resources
 - Any additional situations permitting determination letter requests will be considered annually and announced in future IRS guidance

Required Amendment Timing

- Generally determined by a “Required Amendment List,” unless otherwise provided by legislation, regulations, or other IRS guidance
 - Annual list published after October 1 of each year
 - Applicable deadline will generally be the end of the second calendar year following the year the list is published
 - Ex: Plan amendments on the Required Amendment List published in 2016 must be adopted by 12/31/2018
 - Changes not anticipated to appear on the list until guidance has been provided
 - Includes any model amendments

Required Amendment Timing

(cont'd)

- ⦿ Five-year remedial amendment period eliminated for periods after 12/31/2016
 - Transition rule applies to certain provisions
- ⦿ Plan amendment deadline for a “disqualifying provision” is generally the date on which the remedial amendment period (“RAP”) for that provision expires
 - Applies to disqualifying provisions that are first effective on or after 1/1/2016, for:
 - New plans
 - Amendments to existing plans
 - Changes in the qualification requirements (e.g., statutory or regulatory changes)
 - Disqualifying provisions specifically designated by IRS

How is the RAP Determined?

- ⦿ ***New Plans:*** Later of (1) the 15th day of the 10th calendar month after the end of the plan's initial plan year or (2) the "modified Section 401(b) expiration date"
 - The "modified Section 401(b) expiration date" is generally the last day of the RAP determined under the Section 401(b) regulations, applied as though the employer has an extension to file its income tax return
- ⦿ ***Existing Plans:*** Later of the end of the second calendar year following the calendar year in which the amendment is adopted or effective
- ⦿ ***Change in Qualification Requirements:*** End of the second calendar year that begins after the issuance of the Required Amendments List in which the change appears
- ⦿ Special rules for governmental plans and new plans sponsored by tax-exempt employers

RAP Examples

- ⦿ Employer A adopts a ***new plan*** on 7/1/2017, effective as of 1/1/2017, that contains a disqualifying provision. A calendar year tax year and plan year apply. The remedial amendment period is extended to the later of (1) 10/15/2018 ***or*** (2) the modified Section 401(b) expiration date, which is 9/15/2018. The RAP will end on 10/15/2018.
 - The modified Section 401(b) expiration date in this case is the later of (a) the due date for Employer A's tax return plus extensions, or 9/15/2018, or (b) the last day of the plan year in which the plan is put into effect, or 12/31/2017
- ⦿ Employer B has an ***existing plan*** and, on 1/1/2018, adopts a disqualifying amendment to the plan's vesting schedule. The amendment is effective as of 1/1/2018. A remedial amendment to correct this provision must be adopted by 12/31/2020.
- ⦿ ***A plan's operation must also be corrected as necessary to reflect a corrective amendment.***

Transition Rule

- The RAP is extended to 12/31/2017, for disqualifying provisions if the RAP described in Rev. Proc. 2007-44 had not yet expired as of 1/1/2017
 - Does not apply to any disqualifying provision on the 2016 Required Amendments List
 - Remedial amendment period would instead end at the end of 2018
 - Ex: Employer C maintains a plan with a calendar year plan year. The plan was a “Cycle B” plan and received a favorable determination letter in July 2014 (the last Cycle B submission period ended on 1/31/2013). In October 2014, Employer C adopted a timely interim amendment for a change in qualification requirements identified on the 2013 Cumulative List of Changes (Notice 2013-84). As a result of adopting the timely amendment, the RAP for the change was extended to 1/31/2018, pursuant to Rev. Proc. 2007-44. The RAP remains open until 12/31/2017 under the transition rule.

Other Points to Note

- ⦿ Discretionary amendments must still be adopted by the end of the plan year in which the amendment is put into effect in operation
- ⦿ No relief from the requirements of Code Section 411(d)(6) for any plan amendments
- ⦿ No change to the requirement that plans must be operated in practice with qualification requirements from the effective date of the change
 - The IRS will also release an annual “Operational Compliance List” that identifies any changes in qualification requirements that are effective during a calendar year

Determination Letter Resources

- Applying for a determination letter on an individually designed plan:
<https://www.irs.gov/retirement-plans/apply-for-a-determination-letter-individually-designed-plans>
- Required Amendments List:
<https://www.irs.gov/retirement-plans/required-amendments-list>
- Resources for modifying plan language:
<https://www.irs.gov/retirement-plans/amend-or-update-a-plan>

Employee Plans Compliance Resolution System (EPCRS)

- ⦿ Used to correct certain plan mistakes and avoid the consequences of plan disqualification
- ⦿ Current procedures found in Rev. Proc. 2016-51
 - Self-Correction Program (SCP)
 - Voluntary Correction Program (VCP)
 - Audit Closing Agreement Program (Audit CAP)

New EPCRS Developments

- ⦿ Changes in case flow system
 - Electronic conversion and casework
 - Up-front screening to identify quick closures
- ⦿ Bringing on and training new staff
 - Around 1,000 submissions higher than last year
 - Over 300 new submissions each month

Common Submission Errors

- ⦿ Modifying the format or content of model submission forms
 - Modifying the Enforcement Resolution section that is to be completed by the IRS only or Modifying Schedules
- ⦿ General information errors
 - Exs: Missing plan asset or participant account information, missing Schedule pages, or incomplete Appendices or Schedules
- ⦿ Incorrect user fee (or no user fee) submitted. See article at: <https://www.irs.gov/retirement-plans/avoid-overpaying-user-fees-for-your-voluntary-correction-program-submission>
- ⦿ Tax relief check boxes selected even though the tax would not apply to the reported failures
- ⦿ No justification provided for a request for special tax relief

Common Submission Errors (cont'd)

- ⦿ Failure to include specific proposed changes to administrative procedures or to address the steps that would be taken to prevent a failure from recurring
- ⦿ The submission does not state a plan qualification failure or statement is unclear
 - The IRS will not review the submission to identify the plan failure on the applicant's behalf
 - For late plan amendments, the applicant must specify the particular plan section or provisions that were not timely amended and check the appropriate boxes on the applicable Schedule (1 or 2)
 - Exs: Checking too many boxes or boxes that relate to defined benefit plan provisions for a 401(k) plan

Common Submission Errors

(cont'd)

- ⦿ Required signatures:
 - Power of Attorney form (Form 2848) must be signed by an officer of the plan sponsor and included to authorize the IRS to discuss the application with the sponsor's representative (note the check mark)
 - Applicant's Representations page (page 1 of the form 8950 - Penalty of Perjury Statement) must be signed by an officer of the plan sponsor, even when there is an authorized legal representative
- ⦿ Submission of supplemental information
 - Attention to detail up front expedites the process
- ⦿ Link: <https://www.irs.gov/retirement-plans/top-mistakes-in-voluntary-correction-program-vcp-submissions>

Common Compliance Failures

- ⦿ Common issues:
 - Late Good Faith/Interim/Integral Amendments
 - Non/Late Amender for major tax law
 - Loans – 72(p) with/without tax relief
 - Defaulted loans that were not timely repaid
 - Participation related issues
 - Exclusion of Eligible Employees
 - Participation agreements not executed (Multiple/multi-employer Plan)
 - Failure to withhold proper amount of elective deferrals per plan terms
- ⦿ Uptick in failure to withhold proper amount of elective deferrals per plan terms and/or salary reduction form
- ⦿ Uptick in failure to make required distributions under Code section 401(a)(9) in a timely manner

EPCRS Resources

- Rev. Proc. 2016-51 Webinar: <https://www.irsvideos.gov/EmployeePlansComplianceResolutionSystemChangesRevenueProcedure2016-51>
- Fix-It Guides: <https://www.irs.gov/retirement-plans/plan-sponsor/fix-it-guides-common-problems-real-solutions>
- VCP Fill-In Forms: <https://www.irs.gov/retirement-plans/correcting-plan-errors-fill-in-vcp-submission-documents>
- Tips for correcting plan errors: <https://www.irs.gov/retirement-plans/correcting-plan-errors>
- Tips for avoiding common mistakes: <https://www.irs.gov/retirement-plans/tips-to-avoid-processing-delays-with-your-voluntary-correction-program-submission>
- EP Compliance Unit Projects: <https://www.irs.gov/retirement-plans/employee-plans-compliance-unit-epcu>

Other Upcoming IRS Changes

- ⦿ Continuing to refine processes/procedures to make them more effective/efficient
 - Ex: additional areas that could be subject to quick closure
- ⦿ Focus on providing useful information to Sponsors and Practitioners on IRS.gov
 - Wealth of useful information (see links throughout this presentation)
 - Information on enforcement and compliance focuses

Voluntary Closing Agreement Procedures

- Requests for a voluntary closing agreement can be submitted to EP Voluntary Compliance to address issues that cannot be corrected under EPCRS
- Uniform system has been adopted for handling these requests
- IRS will decide when a voluntary closing agreement is appropriate
- See <https://www.irs.gov/retirement-plans/employee-plans-voluntary-closing-agreements> for more information

Maintaining Plan Compliance Going Forward

- ⦿ Many plans identified documentation and related operational issues in connection with filing “cycle” submissions
 - *How can practitioners and the IRS work together to ensure this opportunity to identify concerns is not lost?*
- ⦿ Potential “self-audit” checklists
 - Would expand on existing IRS initiatives such as fix-it guides and Employee Plans Compliance Unit projects