

Internal Revenue Service Provides Guidance on the Scope of the New Determination Letter Program for Individually Designed Plans

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The IRS issued Revenue Procedure [2016-37](#) on June 29, 2016, which provides much anticipated guidance on the elimination of the determination letter program for individually designed retirement plans effective January 1, 2017. The following is a summary of Revenue Procedure 2016-37 in order to assist plan sponsors with making timely decisions with respect to their individually designed retirement plans and to alert them to the new compliance requirements.

Elimination of Staggered Five-Year Remedial Amendment Cycle

The staggered five-year remedial amendment cycle system for individually designed retirement plans is eliminated, meaning that a plan sponsor will not be permitted to apply for a determination letter once every five years. The last cycle permitted to file under the current system is the Cycle A submission period (for plan sponsors with employer identification numbers ending in 1 or 6) beginning February 1, 2016 and ending January 31, 2017. Controlled groups and affiliated service groups that maintain one or more plans may submit determination letter applications for such plans during Cycle A in accordance with prior Cycle A election(s).

Determination Letter Requests on or after January 1, 2017

Limited Access to Determination Letter Program

A plan sponsor of an individually designed retirement plan may submit a determination letter application to the IRS only in the following limited circumstances:

- **Initial Plan Qualification.** An application for initial plan qualification on a Form 5300 will be accepted by the IRS if a favorable determination letter has never been issued for the plan (including any favorable determination letter issued pursuant to Form 5307).
- **Qualification Upon Plan Termination.** A determination letter filed in connection with a plan termination on Form 5310 will be accepted by the IRS if the filing is made no later than the later of (i) one year from the effective date of the termination, or (ii) one year from the date on which the action terminating the plan is taken, but in any case not later

than twelve months after the date that substantially all plan assets have been distributed in connection with the plan termination.

- **Other Circumstances.** The IRS will consider whether determination letter applications will be accepted for individually designed retirement plans under circumstances other than initial qualification or plan termination. The IRS indicates that it will consider several factors when making this consideration including, for example, significant law changes, new approaches to plan design, the inability of certain plans to convert to a pre-approved plan document, and the IRS's case load and resources available to process determination letter applications. The IRS and Treasury intend to solicit comments on a periodic basis on the scope of these additional circumstances and will announce the additional circumstances in an annual Internal Revenue Bulletin. However, at this time, the IRS will only accept requests for determination letters for individually designed retirement plans in the case of Cycle A submissions (through January 31, 2017), initial plan qualification and qualification upon plan termination.

Scope of IRS Review of a Plan on Determination Letter Request

For an individually designed retirement plan for which a determination letter has been requested, the IRS's review will be based on the "Required Amendments List" (described below) issued during the second calendar year preceding the submission of the application. The IRS's review will also consider all previously issued Required Amendments Lists (and Cumulative Lists issued prior to 2016). In addition, a terminating plan will be reviewed for amendments required to be adopted in connection with plan termination (discussed below). Plans submitted for initial qualification in 2017 will be reviewed based on the 2015 Cumulative List. Individually designed retirement plans (except terminating plans) must be restated to incorporate all previously adopted amendments when a determination letter application is submitted.

Reliance on a Favorable Determination Letter

Effective January 4, 2016, favorable determination letters issued by the IRS to sponsors of individually designed retirement plans will no longer contain expiration dates, and expiration dates in determination letters issued prior to January 4, 2016 are no longer operative. A plan sponsor maintaining an individually designed plan for which a favorable determination letter has been issued and that is otherwise entitled to rely on the determination letter may not continue to rely on the determination letter with respect to any plan provision that is subsequently amended or is subsequently affected by a change in the law. However, the plan sponsor may continue to rely on such determination letter for plan provisions that are not amended or affected by a change in the law.

Plan Amendments Guidance

Elimination of Interim Amendments

Plan sponsors of individually designed retirement plans are no longer required to adopt interim plan amendments as described in Revenue Procedure [2007-44](#) with adoption deadlines on or after January 1, 2017.

Extension of Remedial Amendment Period

A “disqualifying provision” generally is a provision, or the absence of a provision, in a new plan or an amendment to an existing plan that causes a plan to fail to satisfy the requirements of the Code as of the date the plan or amendment is first effective. Additionally, a disqualifying provision includes a plan provision that has been designated by the IRS as a disqualifying provision by reason of a change in those requirements. Effective for any disqualifying provision that is first effective on or after January 1, 2016, the remedial amendment period for an individually designed plan (excluding a governmental plan) is extended as, follows:

- **New Plan.** The remedial amendment period is extended to the later of (i) the fifteenth day of the tenth calendar month after the end of the plan’s initial plan year or (ii) the “modified Code Section 401(b) expiration date,” defined below.
 - **Plan Not Maintained by a Tax-Exempt Employer:** The modified Code Section 401(b) expiration date generally is the due date for the employer’s income tax return or partnership return of income, determined as if the extension applies.
 - **Plan Maintained by a Tax-Exempt Employer:**
The modified Code Section 401(b) expiration date generally is the due date for the Form 990 series, determined as if the extension applies or, if no Form 990 series filing is required, the fifteenth day of the tenth month after the end of the employer’s tax year (treating the calendar year as the tax year if the employer has no tax year).
- **Existing Plan.** The remedial amendment period for a disqualifying provision related to an amendment to an existing plan which is not on the Required Amendments List generally ends on the last day of the second calendar year following the calendar year in which the amendment is adopted or effective, whichever is later.
- **Change in Qualification Requirements.** The remedial amendment period for a disqualifying provision related to a change in qualification requirements which is on the Required Amendments List generally ends on the last day of the second calendar year following the year the list is issued.

Remedial Amendment Period Transition Rule

The remedial amendment period for disqualifying provisions identified in Revenue Procedure 2007-44 that was set to expire on December 31, 2016, is extended to December 31, 2017, except for a disqualifying provision that is on the 2016 Required Amendments List. The remedial amendment period for a disqualifying provision on the 2016 Required Amendments Lists ends on the last day of the second calendar year that begins after the issuance of the Required Amendments List.

Disqualifying Provisions

The deadline for a plan sponsor to adopt an amendment to an individually designed retirement plan (excluding a governmental plan) with respect to any disqualifying provision is generally the date on which the remedial amendment period (described above) expires, unless otherwise provided by statute, regulations or other guidance.

Discretionary Amendments

The deadline for a plan sponsor to adopt a discretionary amendment (generally, any amendment not related to a disqualifying provision) to an individually designed retirement plan (excluding a governmental plan) is the end of the plan year in which the amendment is operationally put into effect, unless otherwise provided by statute, regulations or other guidance. An amendment is operationally put into effect when the plan is administered in a manner consistent with the intended plan amendment (rather than existing plan terms). This generally is the current rule applicable to the deadline for discretionary amendments under Code Section 401(b) except in the case of amendments that reduce or eliminate benefits.

Required Amendments at Plan Termination

A plan sponsor's termination of an individually designed retirement plan generally ends the plan's remedial amendment period. As a result, retroactive remedial plan amendments or other required plan amendments for a terminating plan must be adopted in connection with the plan termination even if such amendments are not on the Required Amendments List. This means that a plan sponsor should include all required amendments with its Form 5310 filing.

New Annual IRS Lists

Annual Required Amendments List

The IRS and Treasury intend to publish an annual Required Amendments List beginning with changes in qualification requirements that become effective on or after January 1, 2016. The Required Amendments List will establish the date that the remedial amendment period (described above) expires for changes in qualification requirements contained on the list. In general, an item will appear on a Required Amendments List after guidance with respect to that item (including any model amendments) has been provided in regulations or in other guidance published in the Internal Revenue Bulletin, except as otherwise determined at the discretion of the IRS.

Annual Operational Compliance List

Although the deadline for amending an individually designed plan retroactively to comply with a change in plan qualification requirements is the last day of the remedial amendment period (described above), a plan must be operated in compliance with a change in qualification requirements as of the effective date of the change. To assist plan sponsors in achieving operational compliance, the IRS intends to issue an annual Operational Compliance List to identify changes in qualification requirements that are effective during a calendar year. Plan sponsors remain responsible for complying with all relevant qualification requirements, even if the requirement is not included on an Operational Compliance List.

Next Steps for Plan Sponsors of Individually Designed Retirement Plans

In light of the changes made by Revenue Procedure 2016-37, plan sponsors who continue to maintain individually designed retirement plan documents should consider taking the following steps:

- Conduct annual reviews of their plan documents for compliance with the current (and any applicable prior) Required Amendments List and determine whether plan amendments are required, and if so, the applicable remedial amendment period.
- Conduct annual compliance reviews to evaluate compliance with the current (and any applicable prior) Operational Compliance List and determine if any failures need to be corrected in accordance with IRS guidelines.
- If applicable, evaluate the need for and timing of a determination letter request for a new or terminating individually designed retirement plan.
- Update their administrative procedures to monitor compliance with plan document and other qualification requirements in the absence of a favorable determination letter and consider the impact on the representations made in mergers and acquisitions, in the annual benefit plan audit, and in correcting errors under the IRS's Employee Plans Compliance Resolutions System ("EPCRS") (the IRS should issue guidance on the impact of these changes on EPCRS in the future).

We will continue to monitor and provide our clients with updates on future guidance from the IRS and the Treasury relating to the determination letter program. If you have questions or need assistance, please contact the author of this article or the Trucker Huss attorney with whom you normally work.

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