

Limited Expansion of the Determination Letter Program – Is Your Plan Eligible for Review?

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On May 1, 2019, the Internal Revenue Service (IRS) issued good news in the form of Revenue Procedure 2019-20, which announced a limited expansion of the determination letter program for individually designed hybrid and merged plans. The IRS will begin accepting determination letter applications for these plans effective September 1, 2019, subject to the conditions described below.

Background

Effective as of January 1, 2017, the IRS scaled back its determination letter program and permitted plan sponsors of individually designed plans to submit a determination letter application only for a ruling on initial plan qualification and for qualification upon plan termination. However, the IRS reserved the right to open limited review periods in other specified circumstances, at its discretion. In 2018, the Treasury Department and the IRS requested comments on whether the determination letter program should be expanded. In response to receiving numerous comments, the determination letter program is being expanded, as summarized below.

Statutory Hybrid Plans – One-Year Review Period

Plan sponsors may submit determination letter applications for individually designed statutory hybrid plans, such as cash balance pension plans and pension equity plans, for the 12-month period beginning September 1, 2019, and ending August 31, 2020. The IRS will review individually designed statutory hybrid plans for compliance with the 2017 Required Amendments List and all Required Amendments and Cumulative lists issued prior to 2016.

Merged Plans

In addition, beginning on September 1, 2019, the IRS will accept determination letter applications for certain individually designed “merged plans” on an ongoing basis. In this regard, the IRS defines a merged plan as a plan that results from the merger or consolidation of two or more plans maintained by previously unrelated entities into a single individually designed plan in connection with a corporate merger, acquisition, or other similar business transaction among unrelated entities.

The IRS will accept a determination letter application for merged plans, provided the following two requirements are satisfied:

- 1) The date on which the plan merger occurs must not be later than the last day of the first plan year that begins after the plan year which includes the effective date of the transaction that resulted in the merger; and
- 2) The application for the determination letter must be submitted within a period beginning on the date of the plan merger and ending on the last day of the first plan year of the merged plan that begins after the date of the plan merger.

By way of example: Company A and Company B enter into a merger agreement with a merger effective date of July 1, 2018. Company A maintains the Company A 401(k) Plan, and Company B maintains the Company B 401(k) Plan. Company A and Company B decide to merge the Company A 401(k) Plan into the Company B 401(k) Plan effective September 1, 2019. The Company B 401(k) Plan is an individually designed plan and uses a calendar year plan year. The last day of the Company B 401(k) Plan's first plan year after the corporate merger is December 31, 2019. Because the plan merger occurs before December 31, 2019, Company B may submit a determination letter application on behalf of the merged plan by December 31, 2020.

Limited Extension of Remedial Amendment Period

The IRS is also extending any remedial amendment period still open on the date a plan sponsor becomes eligible to submit a determination letter application until the last day the sponsor may submit a determination letter application under the new guidance. Treasury Regulation § 1.401(b)-1(e)(3), which provides that the submission for a determination letter application extends the remedial amendment period until 91 days after the IRS issues a determination letter, will continue to be applicable.

Sanction Relief

Finally, the IRS is offering sanction relief to certain plan document failures discovered during the review of a plan submitted for a determination letter pursuant to the new revenue procedure.

For statutory hybrid plans, the IRS will not impose a sanction for plan provisions that fail to comply with the final hybrid plan regulations in Treas. Reg. §§ 1.411(a)(13)-1 and 1.411(b)(5)-1. For merged plans, the IRS will not impose a sanction for any plan document failure with respect to a plan provision included to effectuate the plan merger.

Plan document failures which are unrelated to the final hybrid plan regulations, or to a plan provision included to effectuate a plan merger, may be eligible for a reduced sanction equal to the applicable Employee Plans Compliance Resolution System (EPCRS) Voluntary Correction Program (VCP) user fee the sponsor would pay to correct such failure, provided that:

- The plan sponsor timely and in good faith adopted the amendment that creates the failure and had the intent of maintaining the qualified status of the plan; or

- Where an amendment was required because of a change in qualification requirements, the plan sponsor reasonably and in good faith determined that the amendment was not required because the change did not impact provisions of the plan document.

If the conditions for the special sanction structure are not satisfied, then the general sanction structure under EPCRS will apply for plan document failures discovered by the IRS during the determination letter process equal to 150% to 250% of the applicable VCP user fee, depending on the duration of the failure.

Conclusion

Obtaining a new determination letter provides important protection in the event of an IRS examination of the plan. For this reason, we recommend that plan sponsors of statutory hybrid plans consider submitting a determination letter application during the limited window beginning September 1, 2019 and ending August 31, 2020. In addition, plan sponsors involved in a corporate transaction should consult with their benefits counsel to determine whether they have the opportunity to request a determination letter on behalf of a merged plan.

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