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Working for America's Retirement

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Mr. Eric Slack
Director, Employee Plans (SE:TEGE:EP)
Internal Revenue Service
999 N. Capitol Street, NE
Washington, DC 20002

SUBMITTED VIA EMAIL

Re: Determination Letter Program for Individually Designed Plans

On May 27, 2021, the American Retirement Association ("ARA") provided input on Internal Revenue Service Notice 2021-28 related to the 2021-2022 Priority Guidance Plan. In that letter, ARA recommended that the IRS continue to address issues related to the changes to the determination letter program (DLP) for individually designed plans (IDPs), including a window for individually designed § 403(b) plans and pooled employer plans. The letter also stated it would provide additional comments relating to the determination letter program.[1] The following letter provides specific suggestions on this matter.

The ARA is the coordinating entity for its five underlying affiliate organizations representing the full spectrum of America's private retirement system, the American Society of Pension Professionals and Actuaries ("ASPPA"), the National Association of Plan Advisors ("NAPA"), the National Tax-Deferred Savings Association ("NTSA"), the American Society of Enrolled Actuaries ("ASEA"), and the Plan Sponsor Council of America ("PSCA"). ARA's members include organizations of all sizes and industries across the nation who sponsor and/or support retirement savings plans and are dedicated to expanding on the success of employer-sponsored plans. In addition, ARA has nearly 31,000 individual members who provide consulting and administrative services to sponsors of retirement plans. ARA's members are diverse but united in their common dedication to the success of America's private retirement system.

Background

Rev. Proc. 2013-22 established the pre-approved opinion letter program for § 403(b) plans. Section 4.02 of Rev. Proc. 2013-22 indicates that a determination letter program for individually designed § 403(b) plans, while initially considered by the IRS, could not be established due to resource constraints.

Rev. Proc. 2016-37 changed the scope of the IDP DLP, generally providing that an IDP sponsor may submit a determination letter application only for initial plan qualification and for qualification upon plan termination. Section 4.03(3) of Rev. Proc. 2016-37 provides that the Treasury Department and the IRS will consider each year whether to accept determination letter applications for IDPs in specified circumstances other than for initial qualification and qualification upon plan termination.

Notice 2018-24 requested comments on expanding the scope of the DLP for IDPs.

Rev. Proc. 2019-20 expanded the DLP for IDPs by accepting determination letter applications for individually designed statutory hybrid plans during the 12-month period beginning September 1, 2019 and ending August 31, 2020, and for certain individually designed merged plans on an ongoing

[1] https://araadvocacy.org/wp-content/uploads/2021/06/ARA-Advocacy-2021-Comment-Letter-2021-05-27-ARA-Recommends-Benefits-Items-for-2021-2022-IRS-Priority-Guidance-Plan.pdf

basis. Section 9 of Rev. Proc. 2019-20 indicates the Treasury Department and IRS will continue to consider comments regarding additional situations in which determination letter applications should be accepted.

Rev. Proc. 2021-37 generally conformed the § 403(b) pre-approved plan document program more closely to that for § 401(a) pre-approved plans, including replacing "volume submitter" and "prototype" plan terminology with the single designation of "pre-approved" plans. Rev. Proc. 2021-37 also expanded the remedial amendment period (RAP) for § 403(b) plans to generally conform to the RAP for § 401(a) qualified plans, which was modified by Rev. Proc. 2021-38.

Recommendations

1. **Expand the DLP to include individually designed § 403(b) plans, similar to how the DLP includes individually designed § 401(a) qualified plans.** When the opinion letter program for pre-approved plans was initially created for § 403(b) plans, Rev. Proc. 2013-22 indicated that resources did not permit establishing a DLP for individually designed § 403(b) plans. While we understand that resources remain a constant issue, we believe the resources needed to extend the current DLP to individually designed § 403(b) plans are significantly less than the prior cycle-based program. ARA recommends a DLP for individually designed § 403(b) plans follow the same general terms as the DLP for individually designed § 401(a) plans, permitting determination letter (DL) application upon plan inception, plan termination, and other circumstances announced by the IRS.

   We were not able to obtain a reliable estimate of the total number of 403(b) plans; however, we were able to poll administrators of nearly 20,000 403(b) plans and obtained the following information:

Type of Plan	Number in Sample	Percent Preapproved	Approx. Number IDP in Sample
Governmental	13722	85.16%	2036
Non-Profit ERISA	871	96.33%	32
Non-Profit Non-ERISA	3628	93.47%	237
Church	1268	93.06%	88
Total	19489	87.72%	2393

   ARA believes these employers share the same concerns and desires to obtain reliance on an IRS determination letter as any employer sponsoring an individually designed § 401(a) plan, and therefore any information the Service possesses regarding the percentage of IDP sponsors who generally apply for a DL would likely apply similarly to a 403(b) program.

   If the IRS cannot commit to opening the DLP to individually designed § 403(b) plans, ARA recommends the IRS create a window program to permit sponsors of such plans to file a determination letter application, similar to the window program for statutory hybrid plans established in Rev. Proc. 2019-20.

2. **Expand eligibility for a DL to the first instance in which a plan document is drafted using an individually designed document, even if that is a restatement from a previous pre-approved plan that had obtained a DL.** In other words, ***ARA recommends*** that a plan's ability to submit for a letter upon "initial qualification" should include the first instance it requests a DL on an individually designed document, even if the plan is a continuation of a plan that had obtained a DL using Form 5300 or 5307 while using a pre-approved document. There are a multitude of reasons a plan might change from a pre-approved document to an

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individually designed document, and the changes can be so significant that reliance on any prior letter could be eliminated. ARA believes this would be a limited expansion that would not tax the Service's resources, but would be valuable to plan sponsors who need to transition from a pre-approved plan to an individually designed plan document and would help the Service ensure the new IDP document is drafted in accordance with the Code and regulations.

3. **Expand the DLP to include a determination on related entities considered a single employer for qualification purposes.** Correctly determining the entities that should be aggregated under §§ 414(b), (c), and (m) is essential to ensuring compliance of retirement plans. However, the rules determining a related group of entities can be difficult to resolve, with the affiliated service group rules being particularly difficult to apply. Therefore, ARA recommends that the Service permit plans designed to cover all or a portion of an affiliated service group to submit for a determination regarding whether the group is an affiliated service group or submit for rulings on isolated issues under the affiliated service group determination, such as:

    - Whether a particular organization is a service organization;
    - Whether, based on the facts presented, two entities are regularly associated in performing services for third parties (for purposes of the A-organization test);
    - Whether services are of the type historically performed by employees of organizations in that service field in the U.S. on December 13, 1980 (for purposes of the B-organization test); and/or
    - Whether particular services are management services (for purposes of management services group test).

    If the DLP cannot be expanded to provide rulings on affiliated service group issues, ***ARA recommends*** that the Service expand the higher-fee private letter ruling (PLR) program to permit the issuance of PLRs on some or all of the affiliated service group issues noted above.

    In addition, the May 27, 2021 ARA comment letter previously mentioned noted that guidance on the affiliated service group rules was dropped from the 2020-2021 Plan. While ARA recommended re-including such guidance on the 2021-2022 Plan, guidance on the affiliated service group rules was not included in the recently released plan. The ***ARA continues to recommend*** that the IRS consider guidance on this issue a priority, as it is critically important to plan sponsors and the retirement service provider industry.

4. **Permit plans that experienced certain significant changes to submit for a DL.** Certain changes to a plan are so significant that plans experiencing such changes should be eligible to submit for a DL, in the same way that a plan may submit for an initial DL. ARA recommends the Service permit plans that have made any of the following changes since their last favorable DL to submit for a DL:

    a. *Defined benefit plans that converted to cash balance plans.* Conversion of a traditional defined benefit plan to a cash balance or other statutory hybrid plan imposes a whole series of new qualification requirements on the plan, such as new vesting requirements, satisfaction of the market rate of return requirements for the plan's interest crediting rate, and specific transition requirements for the plan conversion.

b. *Defined benefit plans amended from using a safe harbor formula* for nondiscrimination purposes to using a non-safe harbor formula and performing general nondiscrimination testing. Certain such changes can present significant issues for the plan sponsor, such as cash balance plans using actual rates of return changing the calculation method or other changes to interest crediting rates.

c. *Defined contribution plans that convert to an ESOP or add an ESOP feature.* The addition of ESOP requirements to an existing plan also imposes a whole series of new qualification requirements, such as diversification requirements. Similarly, an existing ESOP that is amended to permit an ESOP loan likewise becomes subject to a variety of new qualification requirements.

d. *A plan restated to an individually designed plan document due to the addition of provisions than are not permitted in a pre-approved plan,* if the plan's most recent DL was received after filing Form 5307.

5. **Expand the types of plan mergers eligible to submit for a DL.** Even with the recent change in Rev. Proc. 2019-20 allowing certain merged plans to submit for a DL, other types of plan mergers, especially those involving plans with substantially different plan designs, can cause significant uncertainty about the qualified status of the merged plan. ARA acknowledges that allowing a new DL for any plan merger may strain IRS resources, and therefore ***ARA recommends*** expanding the DLP for plan mergers in the following circumstances:

   a. A merger of defined benefit plans where the plans include multiple formulas and/or grandfathered benefits. This should be permitted regardless of the timing of the plan merger in relation to any corporate transaction as various considerations may prevent defined benefit plans from being merged close in time to a corporate transaction.

   b. *A merger of a safe harbor § 401(k) plan (either under § 401(k)(12) or (13)) and a non-safe harbor § 401(k) plan mid-year.* The rules related to safe harbor plans during a plan merger can make a plan sponsor maintaining such plans unattractive to an acquiring company. Expanding the program to these situations would encourage plan sponsors to maintain and adopt these plans.

   c. *A merger of a pre-approved plan and an IDP where the pre-approved plan has been in existence for at least two 6-year cycles.* In these circumstances, the pre-approved plan essentially converts to an IDP that would be eligible for an initial DL except for the merger into a plan with an existing DL. This places the existing plan's reliance on its DL at risk. Further, the accumulation of documents that must be retained and reviewed at the ultimate termination of the plan (or on plan audit) is a burden on both the plan sponsor and the resources of the IRS, which would be lessened by allowing the plan sponsor to request a DL sooner.

6. **Continue acceptance of 5307 for a non-identical adopter of a pre-approved plan.** ARA thanks the Service for continuing to accept these submissions, which we believe will encourage the use of pre-approved plans. ARA encourages the continuation of this practice.

7. **Clarify that a plan sponsor may continue to rely upon a favorable DL following amendment.** A plan sponsor should be able to rely on a favorable DL after adoption of an IRS model amendment or an amendment that is substantially similar to an IRS model

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amendment, and continue to rely on a favorable DL with regard to all plan terms not changed by any other type of plan amendment. In addition, the fact that the IRS opens the DLP for a specified issue and the plan sponsor does not submit a DL application should not result in any change in the plan sponsor's reliance on the existing DL. For example, a plan sponsor who is eligible to submit a DL application due a plan merger under Rev. Proc. 2019-20, but does not submit such an application should retain reliance on plan terms covered under the existing DL(s) to the extent they remain unchanged from when the DL was issued. The mere fact that a topic becomes available for a letter and the plan sponsor does not take advantage of this opportunity should not mean that the sponsor loses reliance on any previous DL. This will provide some comfort and protection that, upon an IRS examination or later DL filing (such as on plan termination), a plan sponsor will not be subject to adverse consequences for plan provisions that were not modified after the issuance of the initial DL. Of course, this reliance would not extend to unmodified plan terms that should have been modified to reflect laws, regulations, or other qualification requirements that changed since the initial DL was issued.

These comments are submitted on behalf of and were prepared by ASPPA's IRS Subcommittee and Plan Documents Subcommittee on behalf of ARA. If you have any questions regarding the matters discussed herein, please contact Kelsey N.H. Mayo, Director of Regulatory Policy, at (704) 342-5307 or kmayo@usaretirement.org. Thank you for your time and consideration.

Sincerely,

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