June 4, 2018

CC:PA:LPD:PR
Announcement 2015-19
Room 5203
Internal Revenue Service
POB 7604
Ben Franklin Station
Washington, DC 20044

RE: Notice 2018-24 – Request for Comments on Scope of Determination Letter Program for Individually Designed Plans during Calendar Year 2019

Ladies and Gentlemen:

The ERISA Industry Committee ("ERIC") and the In-House Benefits Counsel Network (the "IBCN") are pleased to respond to the request of the U.S. Treasury Department and the Internal Revenue Service (collectively, the "Agencies") for comments regarding Notice 2018-24, relating to their "Request for Comments on Scope of Determination Letter Program for Individually Designed Plans during Calendar Year 2019" (the "Notice").

I. OUR INTEREST IN THE NOTICE

ERIC is the only national trade association advocating solely for the employee benefit and compensation interests of the country's largest employers. ERIC supports the ability of its large employer members to tailor health, retirement, and compensation benefits for millions of employees, retirees, and their families. ERIC's members provide comprehensive retirement benefits to tens of millions of active and retired workers and their families.

The IBCN is a vital network of in-house employee benefits attorneys that offers a forum for members to share practice issues, concerns, and ideas. Our members advise their respective employers on all manner of employee benefit issues. As in-house lawyers, our members have a unique view of the benefits issues facing employers because they must apply their legal expertise directly in a business context and be accountable for those results. Consequently, our members have a special interest in ensuring the availability and sustainability of the determination letter program.

Notice 2018-24 requests comments on the potential expansion of the scope of the determination letter program for individually designed plans during the 2019 calendar year (beyond the issuance of determination letters on initial qualification and termination), as contemplated by section 4.03(3) of Revenue Procedure 2016-37. That section of Revenue Procedure 2016-37 permits the IRS to consider, on an annual basis, whether determination letter applications should be considered for circumstances other than initial and plan termination qualification, such as for "significant law changes, new approaches to plan design, and the inability of certain types of plans to convert to pre-approved (that is, M&P and VS) plan documents."

The overwhelming majority of the members of both ERIC and the IBCN are or represent large employers that sponsor individually designed plans with complex plan designs that contain unique provisions reflective of individual company benefit priorities and culture. Many of these plans have been in existence for decades and include merged plans that often must operate almost as if they were separate plans. Also, many of these plans are ongoing or frozen defined benefit plans and/or plans that are negotiated heavily through collective bargaining with one or more adopting employers. As a result, our member company retirement plans frequently cannot use pre-approved documents due to the inherent limitations of that format, and similarly cannot use Internal Revenue Service ("IRS") model amendments without substantial revision.

Accordingly, ERIC and the IBCN appreciate the opportunity extended by the Agencies in the Notice to provide comments on the potential expansion of the determination letter program during the 2019 calendar year. In particular, we appreciate the opportunity to comment on the expansion of the determination letter program during the 2019 calendar year with respect (i) plan mergers, and (ii) certain types of plans for which IRS review is particularly appropriate. In addition, this comment letter discusses the use of a third-party certification system as a potential permanent alternative to the annual expansion provision of Revenue Procedure 2016-37.

II. SUMMARY OF COMMENTS

The following is a summary of our comments, which are set forth in greater detail in Part III below:

- Plan sponsors should be allowed to request a determination letter during the 2019 calendar year with respect to a plan merger that has occurred since the plan's last determination letter was issued, in light of the significantly magnified risk of disqualification to the transferee plan if (i) the transferor plan does not have a current and recent favorable determination letter from the IRS that covers all amendments adopted as of the merger date, and (ii) the transferee plan does not have the option of obtaining one from the IRS after the date of merger to cleanse any resulting document defects.

- Hybrid plans (including "cash balance" and "pension equity" plans), employee stock ownership plans ("ESOPs") and plans incorporating a non-safe harbor accrual or allocation formula should be allowed to request a determination letter with respect to certain matters on which the IRS did not previously opine, due to the current gaps in regulatory guidance (in the case of hybrid plans), and the inherent complexity of their design (in all four cases).

- As a more permanent matter, the IRS should consider establishing or providing official recognition of a third-party certification system that would fill the void left by the suspension of the determination letter program, in lieu of the annual determination letter expansion provision of Revenue Procedure 2016-37.

III. RECOMMENDATIONS

A. ***Plan Mergers.*** In addition to the broad concerns previously expressed by ERIC in its letter to the Agencies dated December 15, 2016, ERIC and IBCN members have recently

expressed a particular concern regarding the effect of Announcement 2015-19 and Revenue Procedure 2016-37 on merged plans.

Specifically, plan mergers occur on a daily basis as both a feature of corporate reorganizations and as a matter of intra-controlled group plan consolidations (for reasons of cost and other settlor prerogatives). Under the prior regime set forth in Revenue Procedure 2007-44, the sponsor and fiduciary of the receiving (transferee/surviving) plan, as well as related actors (trustees, corporate buyers, etc.), could be assured that the transferor plan would not taint the transferee plan with respect to form defects as long as the transferor plan had a current favorable determination letter ("FDL"). To the extent of any subsequent amendments made to the transferor plan after the issuance of its FDL, the amendments had an extended remedial amendment period described in section 11 of Revenue Procedure 2007-44 ("Rules for Determining Five-Year Remedial Amendment Cycle in Cases of Merger, Acquisition, Change in Plan Sponsorship, Plan Spin-Off, or Other Events"). Moreover, any post-merger FDL issued to the merged plan itself would provide remedial amendment relief for disqualifying defects in the related merger amendment, and would also include relief from the threat of retroactive challenge to the post-merger FDL pursuant to section 7805(b) of the Internal Revenue Code of 1986, as amended (the "Code").

In contrast, post-FDL amendments to the transferor plan that are first effective on or after January 1, 2016 have a shorter remedial amendment period that ends under section 5.05(2) of Revenue Procedure 2016-37 at the end of the second calendar year following the calendar year in which the amendment is adopted or effective, whichever is later.[1] To the extent that the amendment of the merged plan itself results in any disqualifying provisions - - - as, for example, if the merger amendment improperly incorporated the protections of Code Section 411(a)(10)(A) - - - the remedial amendment period would similarly end at the conclusion of the related second calendar year. Merger-related defects identified by the IRS on audit after the end of the remedial amendment period would trigger significant and possibly draconian costs of correction, including recalculating years of benefits and potentially having to resolicit elections or spousal consents for hundreds or even thousands of participants and spouses. To avoid these costs, plan sponsors may be tempted to simply terminate the transferor plan as a settlor decision, to avoid the potential risks associated with a plan merger.

To address these well-founded and financially significant concerns, we believe that the IRS should allow sponsors of merged plans to submit for a determination letter during calendar year 2019 in the circumstances described above (*i.e.*, the transferee/surviving plan does not have a current FDL that covers the merger event because the merger occurred after the plan's last determination letter). Although this might trigger short-term staffing burdens to the IRS, the alternative is to delay those burdens to a later stage in the plan's life. Stated differently, and as the IRS noted in its August 8, 2001 White Paper entitled "The Future of the Employee Plans Determination Letter Program" (the "White Paper"), the absence of the determination letter program means "examination time would be spent reviewing plan language. This might essentially shift the determination process to the examination function for plans under EP audit."

[1] Certain amendments adopted prior to Revenue Procedure 2016-37 under the auspices of Revenue Procedure 2007-44 had a remedial amendment period that expired no later than December 31, 2017; *see* section 6 of Revenue Procedure 2016-37.

ERIC believes expanding the determination letter program at the front end is a more efficient use of the IRS's resources and an effective incentive for sponsors to maintain plans, rather than terminating them to avoid the alternative uncertainty and lingering threat of disqualification.

B. ***Hybrid and Other Specialized Plans.*** Cash balance, pension equity and other "hybrid" plans have emerged as at least a limited bulwark against the tide of defined benefit plan freezes and terminations. It is generally conceded by legislators, academics and practitioners that defined benefit plans provide certain advantages vis-à-vis defined contribution plans (*e.g.*, guaranteed lifetime income options) that should be encouraged as a matter of social policy. However, the regulatory structure supporting hybrid plans is still incomplete and, to that extent, creates uncertainty and a reluctance on the part of sponsors to adopt and maintain them. The discontinuance of the ongoing determination letter program exacerbates this concern.

As a result, we believe that it would be appropriate for the IRS to allow such plans to submit for a determination letter during 2019 to the extent that they have not already been issued one covering the hybrid features of their plans' design. Thus, sponsors would be eligible to apply for a determination letter if and to the limited extent that the IRS had not yet opined on the hybrid plan design, but they would not be eligible to apply for other, routine matters (such as amendments to the plan's eligibility provisions). As a practical matter, this would only affect ongoing plans that had been converted into a hybrid plan without securing a related determination letter prior to 2017; newly-adopted hybrid plans are already eligible for a determination letter under section 1.01 of Revenue Procedure 2016-37 and thus do not need a 2019 application window.

Similarly, plans that have been amended to constitute an ESOP or a "non-safe harbor" plan (as to non-discrimination testing under Code Section 401(a)(4)) without a related FDL should be allowed to submit for one during 2019 to the limited extent of that amendment. These plans are complicated but integral parts of the qualified plan landscape, and they are typically ill-suited to conversion to a pre-approved plan format. Presumably, as a matter of social policy, the IRS does not want to discourage their use in favor of a simplified, reductionist design across the board, but the lack of extended remedial amendment and Code Section 7805(b) relief points firmly in that direction. We believe that it would be appropriate for the IRS to allow sponsors of these amended plans to apply for a determination letter during 2019.

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C. ***Third-Party Certification System.*** As the IRS itself noted in its 2001 White Paper, one possible substitute for the IRS determination letter program - - - as a broad and more permanent sequel to the annual program expansion described above - - - is the establishment of a third-party certification system. Our respective members have expressed significant interest in that option, to the extent it truly provides employers reliance in the context of ongoing IRS regulation and oversight of the third-party certification structure.

Specifically, the IRS's White Paper noted the "third-party certification would give the employer reliance that would protect against retroactive disqualification if a form defect were found on examination." The IRS further noted that although "EP would remain involved in ensuring quality of plans through oversight of the certification process," EP nonetheless "might be able to focus more resources on other programs." Our members believe this option would accomplish both the objectives of the IRS - - - a reduced burden on its limited resources - - - and

the objectives of plan sponsors, i.e., reliance that their plans would not be disqualified on audit. Accordingly, ERIC and the IBCN encourage the IRS to revisit this option that it first publicly described in 2001, and to work with employers and the benefit community to design its structure. Doing so would avoid the annual recurring expansion of the determination letter program contemplated by section 4.03(3) of Revenue Procedure 2016-37 in favor of a permanent compromise that would eliminate the disincentive to plan creation and sponsorship created by Announcement 2015-19.

We appreciate the opportunity to provide comments on the Notice. If the IRS has any questions concerning our comments, or if we can be of further assistance, please contact us ERIC at (202) 789-1400 or the IBCN at (301) 380-6089.

Sincerely,

The ERISA Industry Committee
In-House Benefits Counsel Network