ERIC The ERISA Industry Committee

The Only National Association Advocating Solely for the Employee Benefit and Compensation Interests of America's Largest Employers

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

RE: Announcement 2015-19 – Revisions to Employee Plans Determination Letter Program

Ladies and Gentlemen:

The ERISA Industry Committee ("ERIC") is pleased to respond to the request of the U.S. Treasury Department and the Internal Revenue Service (collectively, the "Agencies") for comments regarding Announcement 2015-19, relating to "Revisions to the Employee Plans Determination Letter Program" (the "Announcement").

I. ERIC'S INTEREST IN THE ANNOUNCEMENT

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. ERIC has a strong interest in proposals that would affect its members' ability to provide secure pension benefits in a cost-effective manner, such as the Announcement.

Announcement 2015-19 states that effective January 1, 2017, the Agencies intend to eliminate the staggered 5-year determination letter remedial amendment cycles for individually designed plans. In addition, the Announcement would narrow the scope of the current Determination Letter program (beginning in 2017) for individually designed plans to initial plan qualification and qualification upon termination only.

Large companies amend their retirement plans on a regular basis for various reasons including to conform to changes in the law, modernize plans by providing new and innovative plan designs, and to update plans to reflect corporate activities such as mergers and acquisitions. The

Announcement would eliminate the ability of large retirement plans that are individually designed to attain favorable determination letters beginning in 2017. The lack of this IRS "seal of approval" regarding tax qualification status is potentially devastating to large plan sponsors because it would create uncertainty for the plans themselves as well as for third parties including plan auditors, plan participants, and undermine the ability of companies to execute mergers, acquisitions and spin-offs.

Specifically, the tax-qualified retirement plans sponsored by ERIC's members - - - large employers with complex plan designs and provisions - - - generally 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. The inability to secure ongoing favorable determination letters for such plans under the terms of the Announcement would adversely affect the attractiveness of retirement plans to ERIC's members, and would subject participants and beneficiaries to insecurity regarding their own tax position (as, for example, in their ability to make a rollover to another qualified plan). Although the disqualification of plans is unlikely due to the availability of the IRS's correction programs, the "Audit CAP" sanctions that apply to unsuspected (and thus undisclosed) form defects would be potentially very large for large plans (and may require companies to create tax reserves to address that risk). In short, the elimination of the current IRS cycle filing determination letter program would have a significant adverse effect on ERIC's members, and would do so to a much larger extent than for most plan sponsors.

Accordingly, ERIC appreciates the opportunity extended by the Agencies in the Announcement to provide comments on the proposed elimination of the determination letter program. This letter addresses the history and importance of the determination letter program in broad terms, but also addresses in particular (and as requested) (i) our suggested changes to the remedial amendment period under section 401(b) of the Internal Revenue Code of 1986, as amended (the "Code") (see Sections III.C and V.C, below), (ii) the additional considerations that we believe should be taken into account in connection with the current interim amendment requirement (see Section V.C, below), and (iii) our proposed changes to other IRS programs to facilitate the changes described in the Announcement (see Sections V.a and V.D, below). We note at the outset that our preferred solution to the severe budgetary constraints that led to the Announcement is a contraction of the determination letter program, rather than its outright and complete elimination. Specifically, we believe that maintaining the program for large complex plans is both prudent and responsive to such budgetary constraints. The history and crucial role played by the determination letter program over its long history, as described in Section III, below, underscore the advisability of maintaining it in some form and at some level for the large plans most in need of the protections it creates.

II. SUMMARY OF COMMENTS

The following is a summary of ERIC's comments, which are set forth in greater detail below:

- The determination letter program has been in effect since 1944, and has been heavily relied on by plan sponsors, participants, service providers, investment providers and other affected parties. The sudden and unanticipated discontinuance of that program would represent a sea change in the regulation of tax-qualified retirement plans, with unpredictable results and a possible (further) decline in plan sponsorship.

- Large employers routinely make changes to their retirement plans, such as to conform with new laws or regulations, to reflect a merger, acquisition or spin-off or to implement new and innovative changes to the plan that are in the participants' best interest. The inability of a large retirement plan to attain a favorable determination letter to reflect ongoing and regular changes to the plan would create great uncertainty in plan administration. A plan could no longer, in effect, prove that it is in compliance with current tax laws and plan provisions.

- The loss of the protection afforded by Code Section 7805(b) from the retroactive application of an IRS challenge to the qualified status of a plan for form defects would significantly increase the risk and cost of plan sponsorship.

- Similarly, the loss of an extended remedial amendment period would significantly reduce the protection afforded by Code Section 401(b), and would thereby add to the risk and cost of plan sponsorship created by the loss of Code Section 7805(b) protection.

- Various third parties that rely on a determination letter as evidence of qualification, such as plan auditors, buyers and sellers in corporate transactions, investment providers and others, would likely require much greater, and much more invasive, due diligence to confirm a plan's qualified status. The resulting disruption and added costs would serve as an added disincentive to plan sponsorship.

- To counteract these risks, we propose that certain large plans continue to have the option of applying for a favorable determination letter, over five cycles assigned to applicants in a manner similar to the approach currently in effect, but with a significantly reduced burden on IRS resources by virtue of the substantially reduced pool of applicants. Specifically, we recommend that the IRS limit the current determination letter program for individually designed plans with assets in excess of $500 million OR with 15,000 or more participants.

- Additionally and alternatively, we propose that (i) a mechanism be put into place that would fill the gap left by the loss of Code Section 7805(b) relief, (ii) audit CAP sanctions be eliminated or significantly reduced for immaterial form defects (*e.g.* defects that have no effect on a plan's operation) identified in a plan audit, (iii) a limited determination letter program be maintained for buyers and sellers in corporate transactions, (iv) a limited determination letter program also be maintained for material and significant amendments (*e.g.*, material changes in a plan's accrual or contribution formula), (v) an extended remedial amendment period be established similar to the five-cycle period currently in effect, in order to ensure that sponsors have adequate time to respond to and assimilate legislative and other changes, (vi) the IRS eliminate the requirement that "interim" amendments be adopted at all, and that discretionary amendments be adopted by the end of the related plan year, as long as the related changes are communicated to participants and beneficiaries in a timely manner, (vii) the IRS expand the provisions of the Employee Plans Compliance Resolution System ("EPCRS") regarding corrective amendments, and apply a reduced fee, and (viii) the IRS authorize a substantial increase in the use of incorporation by reference.

III. HISTORY AND ROLE OF DETERMINATION LETTER PROGRAM

A. ***History and Value of the Determination Letter Program.*** The use and preponderance of tax-qualified retirement plans date in large part from the enactment of the Revenue Act of 1942, which gave significant impetus to the establishment of such plans. Prior to 1953, sponsors were able to request an "approval" ruling on a plan's qualified status, but the manner of doing so was not formalized until the issuance of Revenue Ruling 32 in 1953, and Revenue Ruling 54-172 in 1954.[1] The IRS noted in the first of these two documents that "[a]dvance rulings as to the qualification of pension, annuity, profit-sharing, and stock bonus plans under section 165(a) of the Internal Revenue Code, as amended, are not required under the Code or corresponding regulations as a condition precedent for obtaining any of the tax benefits pertaining to qualified plans."[2] However, though advance determinations were not required, they were routinely requested: from October 21, 1942 to March 31, 1965, more than 105,000 letters were issued (not counting the plans of self-employed individuals), and the "annual rate of letters on subsequent actions [was] almost equal to those on new plans."[3]

Use of the determination letter program did not wane in subsequent years. In 1978, over 200,000 determination letter requests were filed following enactment of the Employee Retirement Income Security Act of 1974 ("ERISA"), over 450,000 were filed for "TEFRA/DEFRA/REA," almost 200,000 were filed for the Tax Reform Act of 1986, and approximately 225,000 were filed for "GUST."[4] The burden on IRS resources created by the consistent use of its determination letter program led to proposals that the program be discontinued or streamlined. Ultimately, this culminated in the issuance of Revenue Procedure 2005-66 and its successor Revenue Procedure 2007-44, which established the five/six-year cycle approach to determination letter requests, as well as the related requirement of "interim amendment" adoption.[5]

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[1] "For example, since 1944 field officers of the Bureau have had authority to issue over their own signatures rulings as to qualification of stock bonus, pension, profit sharing and annuity plans under section 165(a) of the Code." *See* "Report to the Committee on Ways and Means, House of Representatives, by the Subcommittee on Administration of Internal Revenue Laws," 31 (1953).

[2] Revenue Ruling 32, 1953-1 C.B. 265.

[3] "Miami Beach Program on Profit-Sharing Plans, Including Remarks of Isidore Goodman, Chief, Pension Trust Branch, Internal Revenue Service Washington D.C.," 19 Bull. Sec. Tax'n 63 1965-1966.

[4] "Employee Plans: Analysis and Recommendations Regarding the IRS's Determination Letter Program," Advisory Committee on Tax Exempt and Government Entities, June 9, 2010 (hereinafter, the "ACT Report"), p. 14. Note that Code Section 7476 (as added by ERISA) requires that a determination letter program be maintained by the IRS and, in the event of the program's elimination, would need to be amended by Congress.

[5] *Id.* at pp. 15 – 18.

Significantly, the IRS had previously entertained the prospect of discontinuing the determination letter program for individually-designed plans, before ultimately deciding on the approach outlined in Revenue Procedures 2005-66 and 2007-44. It entertained the notion of stopping determination letters, however, with full awareness of the faults inherent in that proposal; specifically, it noted (i) the "possible adverse impact on compliance and participant protection because individually designed plans would not be reviewed," (ii) the lack of reliance by plan sponsors, (iii) the fact that "innovation and flexibility in plan design to meet special circumstances might be discouraged," (iv) the adverse impact on compliance and participant protection, and (v) the limited reliance afforded by pre-approved plans.[6]

In sum, the determination letter program has become an integral and routinized component of qualified plan sponsorship. As such, its discontinuance could have unanticipated effects on the future of qualified retirement plans, as the IRS intuited in 2001 when it first floated the idea of doing away with the program for individually designed plans. This effect would be particularly acute for large plans that have innovative or complex designs that are typically a poor fit for a pre-approved plan document.

B. ***Code Section 7805(b).*** One crucial benefit of a favorable determination letter is the retroactive reliance it creates. Specifically, if an IRS agent determines that a qualified plan contains a facially disqualifying defect (*i.e.*, a form defect), the plan generally will not be retroactively disqualified for the period covered by a favorable IRS determination letter that originally opined on and approved the defect. This ongoing protection is particularly important for large plans, since the amount of a potential "Audit CAP" sanction for form defects is tied to the size of the plan's trust.

By way of background, Congress decided as far back as 1921 that taxpayers should be protected from the retroactive application of changes in law or regulatory decisions in certain circumstances. As a general policy, the legislative history to the Revenue Act of 1921 noted that "Congress has never seen fit to allow an administrative officer to waive a tax legally imposed." Nonetheless, "while the policy of Congress in refusing to allow an administrative officer to waive a tax legally imposed is a proper one . . . it very frequently works a great hardship."[7] To address this inequity, Code Section 1314 (the predecessor of Code Section 7805(b)) was enacted.

Accordingly, the IRS generally will not retroactively disqualify a plan for form defects related to the period covered by a favorable determination letter. This policy was first announced by the IRS as early as 1944, in its PS No. 35, which held that "[r]ulings promulgated subsequent to the issuance of approval letters are not applied retroactively in cases in which there have been no material misstatements of fact. Such rulings are not intended to nullify approvals which had previously been made."[8] Revenue Procedure 62-28 and its progeny reiterated and expanded this rule. Informally, the IRS has indicated that although Code Section 7805(b) will protect a plan

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[6] "The Future of the Employee Plans Determination Letter Program," issued as part of IRS Announcement 2001-83, 2001-2 C.B. 205 (hereinafter, the "White Paper").

[7] "Legislative History of Federal Income Tax Law, 1938-1961," J.S. Seidman, pp. 886-87 (1938).

[8] PS No. 35, reproduced in CCH Pension Plan Guide Transfer Binder (1954), ¶ 14,245.

from retroactive disqualification for form defects, it will not waive the sponsor's responsibility to retroactively correct operational effects triggered by the form defects.[9]

C. ***Code Section 401(b).*** Even if a plan sponsor does not apply for a determination letter, it has an extended period of time to (i) adopt amendments required by law, and (ii) fix amendments that violate existing law. Specifically, under Code Section 401(b), a sponsor generally has until the due date (as extended) for filing its tax return to address any "disqualifying defects" occasioned by missing or defective amendments. Treasury Department regulations extend this corrective period until 91 days after a determination letter is issued, in order to give the plan sponsor time to make any necessary changes identified by the IRS determination letter reviewer during the course of its review.[10] Thus, Code Section 401(b) and the related regulations provide limited retroactive relief to correct form (rather than operational) defects.

The value of the remedial amendment provisions of Code Section 401(b) and the related regulations largely derives from the ability to correct a facially defective amendment in response to a request from an IRS determination letter reviewer. Specifically, a plan sponsor that adopts a facially defective amendment presumably did not know that the amendment was defective; otherwise, it would not have adopted the amendment. If, however, the sponsor applies for a determination letter within the required timeframe and the IRS reviewer discovers the defect, Treasury Regulation Section 1.401(b)-1(e) permits the sponsor to correct the defect within 91 days of issuance of the letter, without any risk to the plan's qualified status. Without the benefit of IRS review and the related extension of the remedial amendment period, a plan sponsor likely would not know that it had adopted a defective amendment in the first place, and would not have any reason to correct it prior to the end of the statutory (*i.e.*, un-extended) remedial amendment period. As one commentator has argued, "[t]his statutory remedy obviously is quite narrow. In many cases, the remedial amendment period will not apply, such as when a plan defect is not discovered until after the close of the [statutory] remedial amendment period."[11]

In addition, however, the extended remedial amendment period is also valuable for purposes of changes in law and the adoption of related amendments. Typically, statutory or regulatory changes take time to be interpreted by regulators, and digested by plan sponsors. The statutory remedial amendment period is usually far too short for these purposes, and always has been. Thus, Code Section 165(d) (the predecessor of Code Section 401(b)) was originally added to the Internal Revenue Code of 1939 precisely in order to extend until December 31, 1944 the deadline for adopting amendments reflecting the Revenue Act of 1942.[12] This role of the remedial amendment period continued through subsequent legislative and regulatory changes.

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[9] At the 2012 national conference of the American Society of Pension Plan Actuaries, the IRS noted that "[w]hen the IRS formally grants 7805(b) relief, the plan must correct prior years (including 'closed' years for tax collection purposes). Section 7805(b) precludes prior year taxability that would result from a retroactive disqualification of the plan, but does not alleviate prior year corrections that are needed to comply with the applicable law."

[10] Treasury Regulation § 1.401(b)-1(e).

[11] "Paying for Sins of the Master: An Analysis of the Tax Effects of Pension Plan Disqualification and a Proposal for Reform," John D. Colombo, 34 Ariz. L. Rev. 53, 62-63 (1992).

[12] *See* Gen. Couns. Mem. 35606 (Dec. 20, 1973).

Currently, under the regime established by Revenue Procedure 2005-66, a sponsor must adopt a good faith "interim amendment" for a given statutory or regulatory change by the date established by the IRS. If it does so, the interim amendment serves as a placeholder and secures the sponsor's right to an extended remedial amendment period that ends as late as the 91-day post-letter deadline described above.

D. ***Importance of Determination Letters to Third Parties.*** A determination letter provides evidence of qualified status for purposes of annual plan audits, public company disclosures and similar transactions. In addition, representations as to plan qualification are frequently required in many agreements, including credit, merger/acquisition and investment agreements. Without a favorable determination letter program, the ability of companies to execute mergers, acquisitions and spin-off transactions would be hampered by the lack of assurances with respect to the tax qualification of a retirement plan(s) associated with the companies involved in the transaction.

With particular respect to annual plan audits, the lack of a determination letter as regulatory evidence of a plan's qualified status (in form) is likely to complicate the auditors' task. Specifically, if auditors determine that a plan contains a form defect, their responsibility vis-à-vis that defect will be unclear, which may increase costs and extend delays to the detriment of participants and beneficiaries.

With particular respect to investments, many investment providers - - - such as the trustee of a Revenue Ruling 81-100 common trust and managers of private investment funds designed to be offered only to qualified plans or tax-exempt entities - - - require a determination letter as a condition precedent to accepting a plan's investment. The lack of such official evidence of qualified status may delay and complicate the process of making investments that are otherwise advisable (from a fiduciary perspective), while increasing related costs for all affected parties.

Plan participants also rely on certainty that their retirement plan is tax qualified. Such certifications assure plan participants that their tax-favored contributions are permissible and allow participants to transfer their retirement accounts from their old employer to a new employer (typical compliance measures require that incoming retirement transfers to a plan must be certified by the "sending" retirement plan).

E. ***Importance of Determination Letters for Large Plans.*** We believe that the continued availability of the determination letter program is especially important for large plans, since they typically have a more complex design that is ill-suited to the strictures of the pre-approved plan format. Thus, for example, it is common for large defined benefit plans to have multiple benefit formulas that result from the merger in of other plans acquired by the sponsor in the course of a series of corporate acquisitions over a period of years. Code Section 411(d)(6) requires that various aspects of these merged-in plans be preserved, which necessarily complicates the governing document. Similarly, it is common for the defined benefit plans of large corporate sponsors to include both a "traditional" defined benefit formula, as well as a cash balance or pension equity formula that typically replaced the traditional formula at some later date, subsequent to the plan's inception. This introduces an element of complexity that is most readily handled through the flexibility of an individually-designed document and that needs the protection afforded by a determination letter.

Large employers make changes to their retirement plans on a regular basis. The plans must be changed to conform with modifications to the law, to reflect a merger, acquisition or spin-off or to reflect new and innovative changes to the plan that are in the participants' best interest. The inability of a large retirement plan to attain a favorable determination letter to reflect ongoing and regular changes to the plan would create great uncertainty in plan administration. A plan could no longer, in effect, prove that it is in compliance with current tax laws and plan provisions.

In its White Paper, the IRS explicitly recognized the importance of the determination letter program to the innovation and flexibility which, typically, occur in larger more complex plans. Thus, it noted that "[t]he use of models might discourage innovation and flexibility in design to meet special circumstances." Similarly, in discussing its "Option C" ("Eliminate Determination Letters for Individually Designed Plans"), the IRS expressed a concern that "innovation and flexibility in plan design to meet special circumstances might be discouraged" by such outright elimination. Although the White Paper recommended that the IRS "establish a presumption that M&P and volume submitter plans are preferred," it equally noted that it should "work towards making the individually designed plan the exception, not the rule." We agree that limited IRS resources favor such a preferential approach, but we are concerned that a full-fledged elimination of the program will eventually be the death knell of individually designed plans altogether, and with them the availability of innovative plan designs.

IV. RECOMMENDATION: PRESERVE THE CURRENT DETERMINATION LETTER PROGRAM FOR LARGE PLANS

In order to address the significant gap left by a discontinuance of the determination letter program for large individually designed plans, we propose that the IRS maintain the program, but limit it to individually designed plans with (i) assets in excess of $500 million, or (ii) a number of participants/beneficiaries in excess of 15,000. These thresholds would be determined, in both cases, by the plan's most recently filed Form 5500. In addition, we recommend that they be measured against all qualified plans maintained within a controlled group such that, for example, in the case of a controlled group with two plans that each cover 8,000 participants, both plans would be eligible for a determination letter. The effect of these parameters would be to limit the universe of plans eligible for review considerably and in a cost-efficient manner (*i.e.*, IRS resources would be used to review large plans with large numbers of participants). In order to provide the necessary funding for reviewers and related costs generated by our proposal, we would anticipate that the IRS could raise the user fee to an appropriate level.[13] We would also anticipate that the IRS could use a staggered five-cycle submission approach as is the case currently under Revenue Procedure 2007-44, in order to allow the IRS to predict and manage its workload.

From the perspective of the IRS, this proposal would avoid some of the key disadvantages of discontinuing the determination letter approach, as identified by the IRS in its 2001 White Paper. For example, our proposal would avoid (i) the implicit disincentive to the use of innovative and

[13] The proposed increase in the user fee may require some Congressional action to allow for the earmarking of funds, which would be strongly supported by ERIC members.

flexible plan designs, which typically would occur among large plans, (ii) the loss by the IRS of direct contact with plan sponsors and resulting inability to monitor emerging trends (and train IRS personnel), and (iii) the risk that examination time by IRS field auditors would be spent reviewing plan language, which could effectively shift the determination letter process to the examination function for plans under EP audit. In addition, our proposal would preserve the current Code Section 7805(b) relief, and the 91-day extended remedial amendment period, for large, complex plans that have the greatest need for those protections.

Under our proposal, plans not meeting the above-described criteria would be ineligible for a determination letter, except as otherwise provided in the Announcement. However, these smaller plans would likely be better suited to use pre-approved documents, and thus would not be inordinately disadvantaged by the loss of a favorable individual determination letter. Recent data (culled from Form 5500 filings) indicates that approximately 80 percent of all qualified plans use pre-approved documents, which is a trend that the IRS favors. Restricting determination letters to plans that truly benefit from them - - - that is, large plans, as described above - - - may accelerate the move to pre-approved documents by a subset of employers and plans already well-suited to their use.

V. ADDITIONAL/ALTERNATIVE PROPOSALS

For the reasons presented above, it is our definite preference that the determination letter program be maintained for large plans. If, however, the IRS declines to accept that recommendation, we believe the following additional proposals would help to preserve integral aspects of the program for all plan sponsors and thereby mitigate the effects of the program's elimination.

A. ***Quasi-Code Section 7805(b) Relief.*** We recommend that the IRS amend its EPCRS to allow the effective equivalent of Code Section 7805(b) relief, or that it at the least significantly reduce sanctions, for plans with document defects identified in an IRS audit that have received an opinion of qualified counsel or other appropriate reviewer (*e.g.*, a consultant or accountant subject to professional standards and oversight) that the plan document complies in form with the applicable requirements of Code Section 401(a). A similar proposal was made by the IRS in its 2001 White Paper, as "Option D" - - - "Replace the Determination Letter Program with a Third-Party Certification System."

Specifically, as contemplated by the IRS in its White Paper, "the third-party certification would give the employer reliance that would protect against disqualification if a form defect were found on examination." This sort of "up front" reliance is crucial in establishing the confidence and predictability that plan sponsors, participants/beneficiaries, and interested third parties (*e.g.*, buyers and sellers in the M&A context) require in order to set up (in the case of employers), participate in (in the case of participants and beneficiaries), and transact with (in the case of third parties) qualified plans.[14] Moreover, relief from prospective disqualification for retirement plans

[14] In its White Paper, the IRS noted that the "determination letter program promotes 'up-front' compliance by ensuring that the form of a plan document or plan amendment is qualified from inception. This approach has traditionally been viewed as the best way to ensure future compliance."

has always been viewed as particularly warranted because of the ongoing nature of such plans. Thus, a former Chief Counsel of the Internal Revenue Service has noted:

> The District Director may revoke a determination letter upon re-examination or upon audit of a taxpayer's return. In the income, profits, estate and gift tax area, such revocation is automatically retroactive. In the event that prospective application is desirable, the District Director can refer the matter to the National Office for exercise by the Commissioner of his authority to limit the modification of revocation under Section 7805(b). The revocation of a determination letter in the exempt organization and employee benefit areas, however, is generally prospective, except for a few clearly defined situations. These are set forth specifically in Rev. Proc. 62-30 and 62-31.
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> The rationale for retroactive revocation of determination letters in the income, estate and gift tax areas is simply that such a determination letter is only issued as to a completed transaction. Therefore, taxpayers could not have relied upon the determination letter in entering into the transaction initially. *Determination letters as to exempt status, however, are relied upon by taxpayers, and this accounts for the difference in treatment.*[15]

The White Paper "third-party certification" proposal described administrative procedures that would "have to be developed to determine eligibility of third-party certifiers, monitor continuing eligibility, provide for disciplinary actions, and establish conflict-of-interest rules, in addition to consideration of insurance requirements and general procedures for the certification program." Although this would create costs for sponsors, the costs pale in comparison to those potentially applicable under an Audit CAP sanction.

We also recommend that the IRS provide for either no, or a significantly reduced, sanction for a plan document defect that had no effect in operation (*e.g.*, defects in language required to comply with Code Section 436 for a plan that was never below 80% funding, or defects in top-heavy provisions for a plan that was never subject to top-heavy requirements in operation). This is similar to the approach taken by the Tax Court in its seminal Aero Rental decision, in which it held that facial defects that had no actual effect in operation should be eligible for retroactive correction with no risk of disqualification.[16]

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[15] "The Four R's: Regulations, Rulings, Reliance and Retroactivity - - - A View From Within," Mitchell Rogovin, 43 Taxes 756, 770 (1965) [Emphasis Added].

[16] 64 T.C. 331, 340 (1975) ("Moreover, the provisions to which the Commissioner objects never had any effect in this case. He objected to the provision under which a distributee's stock would have been subjected to a restriction on marketability, but no employees received any distributions in 1969, 1970 or 1971 prior to amendment of the provision; thus, no employee actually ever received any stock subject to the restriction. Another objection was based on the fact that an employee might become age 65 and be eligible to retire, although his rights would not then be fully vested, but no employee reached that age prior to the amendment of the provision.")

We note, as a final observation on this point, that establishment of quasi-7805(b) relief would not lessen the need to operationally correct defects retroactively, since that same requirement is already imposed by the IRS, even within the context of Code Section 7805(b).[17]

B. ***Significant Plan Amendments.*** Assuming that the IRS wholly or partly maintains its proposal to eliminate the determination letter program, we believe that it would be advisable to allow plan sponsors making certain significant changes in the plan to treat the change as the equivalent of establishing a new plan, and thereby to be eligible to obtain a determination letter for the amended plan under the terms of the Announcement (rather than having to terminate the existing plan and start up a new successor plan). For this purpose, a "significant" amendment could be defined in a manner roughly similar to the definition of a "core" amendment in the ACT Report; namely, amendments that "(i) materially or significantly affect any benefit, right or feature ('BRF') of importance to the general population of plan participants, (ii) permit or require an action to be taken by participants with respect to benefits under the plan, (iii) prospectively decrease or eliminate any § 411(d)(6) protected benefits, except to the extent that such plan amendment merely reduces or eliminates a § 411(d)(6) protected benefit that has already accrued in a manner that is permitted to be reduced under the applicable regulations and guidance from the Service, or (iv) are deemed to be Core Amendments as determined by the Service in its discretion and announced in published guidance." Obviously, this would not apply to large sponsors if the IRS agrees to preserve the determination letter program, as would be our preference and as suggested above for large sponsors.

C. ***Extended Code Section 401(b) Relief.*** As noted in our above-provided discussion of Code Section 401(b), the statutory remedial amendment period is mostly too short to be of significance or use to plan sponsors. Accordingly, we recommend that the IRS establish an extended remedial amendment period for statutorily or regulatory required amendments akin to the approach currently in place as provided by the current cycle filing program (*e.g.*, require that an individually designed plan be amended and restated every five years, on the same as its existing cycle, to incorporate all required-law changes effective in the interim). Although this step would not - - - absent a continuation of the determination letter program - - - ensure that an IRS reviewer identifies any defects that had escaped that sponsor's attention in drafting the amendment, it would at least give employers time to review legislative changes, discuss them with counsel, and make amendments in due course, rather than in a rush.

We also suggest, however, that the interim amendment requirement be discontinued. Specifically, we recommend that the approach in place prior to issuance of Revenue Procedure 2005-66 be restored, under which good faith "placeholder" interim amendments were not required. As has been noted elsewhere, the interim amendment requirement has proven onerous for both sponsors and the IRS. From the perspective of sponsors, "there has been a dramatic increase in the number of plans requiring interim amendment corrections through the voluntary correction program ('VCP') under EPCRS or through closing agreements. Either rectification method results in a monetary sanction for the plan sponsor, which was not the case under the prior determination letter rules."[18] A study commissioned by the IRS found widespread

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[17] See the discussion related to footnote 9, above.

[18] "Employee Plans: Analysis and Recommendations Regarding the IRS's Determination Letter Program," Advisory Committee on Tax Exempt and Government Entities (ACT), June 9, 2010, p. 25.

dissatisfaction with the interim amendment approach, noting that "the most common theme was that the current system is confusing, complex and difficult for plan sponsors, practitioners and the IRS itself."[19] From the perspective of the IRS, one IRS senior tax law specialist observed that "as difficult as it is for the practitioner community to work with interim amendments, it's also difficult for us to enforce them."[20]

In lieu of the interim amendment requirement, we suggest that amendments not be required until the end of the extended remedial amendment period. By way of background, the genesis of the interim amendment approach apparently was a concern with the gap between a plan's terms and its operation during an extended period. Thus, the White Paper notes that "another result of far greater consequence has been that, in order to comply with the law until the plans are eventually amended, plans have been required to operate outside their terms for years at a time." Arguably, however, this concern is overstated, and does not have any firm basis in the Code. One commentator has concluded that the acute emphasis on "following the terms of the plan" was not readily apparent in any IRS guidance prior to the creation of the Voluntary Compliance Resolution Program in 1994, and effectively constituted "the invention of a new qualification requirement."[21] In any event, the absence of an interim amendment requirement prior to Revenue Procedure 2005-66 and 2007-44 does not appear to have harmed participants or beneficiaries in any measurable way, but the interim amendment requirement arguably *has* added to the IRS's oversight burden, thereby increasing the very sort of costs that it now aims to avoid.

We note, in passing, that the legislative history to Code Section 401(b) suggests that an extended remedial amendment period does not necessarily depend on the existence of the determination letter program and its 91-day extension. Specifically, the legislative history states that "[i]t is expected that the regulations will provide for extension for *reasonable cause*, *such as* the filing of a bona fide request for a determination by the Service that a plan or plan amendment is qualified."[22] Similarly, the Tax Court in the Aero decision concluded that limiting the remedial amendment period solely to the statutory period described in Code Section 401(b) "is neither

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19 *Id.*

20 *Id.*

21 E. Thomas Veal, "Following the Terms of the Plan: What does It Mean? What If You Don't?", 42 *Tax Mgt. Memo. 27* (January 15, 2001). The author notes that during the period leading up to enactment of ERISA, "discrepancies between what plans said and what plan sponsors, fiduciaries and administrators did was not a major area of legislative concern, but the topic did receive a modicum of attention. ERISA-covered employee benefit plans 'must be established and maintained pursuant to a written instrument [under ERISA Section 402(a)(1)], and plan fiduciaries must carry out their duties 'in accordance with the documents and instruments governing the plan' [under ERISA Section 404(a)(1)(D)]. ERISA's extensive revisions to the Internal Revenue Code rules concerning qualified plans contain no parallel provisions. This omission is strong evidence that the authors of ERISA did not anticipate that failure to act 'in accordance with the document and instruments governing the plan' would be treated as disqualifying." The author goes on to note that "despite its virtually nonexistent foundations, the notion that 'following the terms of the plan' is a fundamental qualification requirement has become something of a shibboleth – not just at the IRS, but also among pension practitioners."

22 H. Rept. No. 93807, 93d Cong., 2d Sess. 166 (1974) [Emphasis Added].

required nor intended by section 401(b). It was intended merely as a 'safe harbor' provision."[23] In 1974, when ERISA was enacted and Code Section 401(b) was expanded, no one would have imagined that the determination letter program in effect since 1944 would be eliminated. Thus, we believe that the "reasonable cause" to which the legislative history refers can fairly be deemed to include the need for an extended remedial amendment period occasioned by the unprecedented discontinuance of that program.

If the IRS opts to maintain the interim amendment program, we suggest that it provide model amendments that would allow sponsors to make the required documentation change quickly, and with the assurance that no form defects would result. The IRS has done this at numerous points in the past (*e.g.*, the Code Section 401(a)(9) regulations), and could make that a routine part of its guidance to assist plan sponsors in meeting their responsibilities.

D. ***Plan Amendments.*** We propose that the IRS's rules regarding plan amendments be modified as follows:

- We suggest that the current requirement that discretionary amendments be adopted by the end of the year in which they are effective be discontinued; rather, if the sponsor can demonstrate that the change was adopted operationally and communicated to affected participants in a timely manner, discretionary amendments should be required only by the end of the extended remedial amendment period (or, at the least, by the end of the third plan year following the year in which they were effective). We do not believe that this delay would trigger any operational defects since, prior to the issuance of Revenue Procedure 2005-66, plans routinely had a significant delay in the required date of adoption of legally-required amendments, without any evident harm to participants.[24] In addition, many plans have a "plan operating manual" that guides administration and that can be quickly and effectively updated as needed, without the formalities and complexity that surrounds the process of drafting and adopting plan amendments.

- We suggest that the IRS expand the current EPCRS provisions allowing corrective amendments to be adopted under VCP for reduced VCP fees (*e.g.,* required-law amendments that were not adopted by the end of any specified remedial amendment period).

- The IRS currently allows certain limited provisions of the law to be incorporated by reference. We suggest that it substantially expand the use of incorporation by reference, particularly of plan terms that are in practice highly unlikely to apply in a large individually-designed plan (*e.g.,* top-heavy provisions).

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[23] Aero at 341.

[24] In a similar vein, the ACT Report notes that "each of the last three pieces of employee benefits legislation passed by Congress included its own specific deadlines for plan amendments. Presumably, Congress incorporated these adoption deadlines into its statutes in order to provide relief to plan sponsors from the existing interim amendment requirements, which would have otherwise imposed earlier adoption deadlines. The fact that Congress explicitly superseded the existing interim amendment rules on three separate occasions suggests that the applicable rules are in need of reform . . ."

E. ***Mergers and Acquisitions.*** In order to facilitate acquisitions that involve buyers/sellers with qualified retirement plans, we recommend allowing plan sponsors that are about to be acquired or are selling a subsidiary or division (*e.g.*, have signed a definitive purchase agreement) to apply for a determination letter for any qualified plans that are being transferred in the deal, with expedited processing, so that they can represent that the plan is qualified (and the buyer is protected in continuing and perhaps merging the plan). We note that absent this relief, 401(k) plans without a recent favorable determination letter will invariably end up being terminated pre-closing, with participants being involuntarily paid out their account balances, in order to protect the buyer from any consequences related to maintaining a disqualified plan; this will lead to significantly increased "leakage," contrary to Administration policy.

ERIC appreciates the opportunity to provide comments on the Announcement. If the IRS has any questions concerning our comments, or if we can be of further assistance, please contact us at (202) 789-1400.

Sincerely,

Annette Guarisco Fildes