IRS Makes Significant Changes to Qualified Plan Determination Letter Program

The IRS has announced significant changes to its qualified plan determination letter program. These changes, which become effective January 1, 2017, impact individually-designed plans.

Favorable determination letters give assurance that the plan document, as drafted, complies with applicable laws. Plan documents that do not comply with the law could result in plan "disqualification," causing adverse tax treatment for participants' benefits and disallowance of the sponsor's prior tax deductions for employer contributions. A determination letter, however, does not provide protection with regard to plan operations.

NO MORE CYCLICAL DETERMINATION LETTERS FOR INDIVIDUALLY-DESIGNED PLANS

Effective January 1, 2017, the 5-year remedial amendment cycles for individually-designed plans are being eliminated. However, Cycle A plans (plan sponsor's EIN ends in 1 or 6) may be submitted for determination letters between February 1, 2016, and January 31, 2017. As of July 21, 2015, the IRS will not accept "off-cycle" determination letter applications (except for new or terminating plans). An application is "off cycle" if it is filed at any time other than the 12-month period ending on January 31 of the applicable cycle.

Brownstein Comment: The IRS has picked an arbitrary date to end the cyclical determination letter program. While Cycle A plans can make a "last" filing (from January 1, 2016,through January 31, 2017), all other plans are left out in the cold, merely as a result of the last digit of the plan sponsor's EIN. Further, the IRS has not yet indicated how sponsors of these plans may continue to rely on determination letters that contain an express expiration date (*e.g.,* determination letters for Cycle C plans (last filed between February 1, 2013, and January 31, 2014) expressly state that it expires on January 31, 2019.)

Recommendation*: **If your plan is a Cycle A plan, you would be well-advised to file for a determination letter before January 31, 2017.***

After December 31, 2016, an individually-designed plan may be submitted for a determination letter solely for initial qualification and for qualification upon plan termination. The IRS in its discretion may determine other limited circumstances when a plan sponsor will be permitted to file for a determination letter.

The IRS is considering ways to facilitate a qualified plan's ongoing compliance with changes in the law and may issue model amendments, allow incorporation by reference, or excuse the adoption of irrelevant plan provisions or amendments (for example, because of the type of plan, employer, or benefits offered).

410 17th Street, Suite 2200
Denver, Colorado 80202

COMMENTS, PLEASE!

If you are the sponsor of an individually-designed plan, we encourage you to submit comments regarding the changes to the determination letter process. If an industry group to which you belong is going to submit comments, be certain to let them know what you think. The comment deadline is October 1, 2015.

The IRS is seeking comment on:

◊ What guidance would assist plan sponsors in converting their individually-designed plans to pre-approved plans?

◊ What changes should be made to the self-correction program (EPCRS) in light of the fewer opportunities for IRS review of plan documents through the determination letter process?

BHFS Comment: The IRS will need to address the "catch-22" created by the curtailment of the determination letter program with respect to plan document corrections. Currently, submissions under the voluntary compliance program ("VCP") require a recent determination letter. And, plan document corrections can only be made through a VCP filing.

◊ What changes should be made to the remedial amendment period and interim amendment requirements?

BHFS Comment: While we would have liked to have seen the IRS take an interim step, such as changing the determination letter cycles to once every 10 or 15 years, with the need for the IRS to effectively allocate its very limited resources, such an interim step would not allow the IRS to achieve that goal. We believe that a plan sponsor should be permitted to file for a determination letter upon plan merger, that is, when two or more plans are combined to form a single plan. Also, as in the past before the implementation of the 5-year cycles, we believe that a plan sponsor should be allowed to file for a determination letter when there have been significant changes in the law (*e.g.,* TEFRA, DEFRA, REA, TRA'86).

WHAT'S A PLAN SPONSOR TO DO?

Reliance on determination letters is widespread in the business community. This reliance ranges from individual participants who want to make a rollover to another plan or IRA, to employers making representations about their plans in corporate acquisitions and dispositions, to businesses entering into credit facilities.

There has been some speculation that law firms should be able to issue legal opinions as to the tax-qualified nature of a retirement plan. Unfortunately, law firms are unlikely to do so, not only because of the extensive liability risk if it should turn out that the plan is not qualified (the law firm could be liable for

the cost of benefits of all participants as well as employer contribution tax-deduction issues), but also because it is unlikely that the professional liability carriers of law firms will allow the issuance of such opinions.

Finally, despite the curtailment of the determination letter program, plan sponsors will remain responsible for timely updating plan documents to reflect applicable changes in the law.

For more information, see Announcement 2015-19 (July 21, 2015), **http://www.irs.gov/pub/irs-drop/a-15-19.pdf**.

Nancy A. Strelau
Shareholder
nstrelau@bhfs.com
Denver
303.223.1151

David M. Spaulding
Shareholder
dspaulding@bhfs.com
Denver
303.223.1241