

Maintaining Retirement Plan Documents after Revenue Procedure 2016-37

2016 Joint Fall CLE Meeting

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Karen Field



Andrew Liazos

McDermott
Will & Emery

Rhonda Migdail



Stuart Sirkin



Agenda

- Key Changes under Revenue Procedure 2016-37
- Impact on Annual Audit?
- Impact on Plan Drafting?
- Impact on Choice of Plan?
- Impact on Existing Plan Administration?
- Impact on EPCRS?
- Impact on Other Transactions?

Key Changes under Revenue Procedure 2016-37

- Determination letter (DL) may only be requested for an individually designed plan (IDP) with respect to:
 - Initial plan qualification
 - Plan termination
 - Special exceptions to be determined (“significant law changes”, “inability . . . to convert to a prototype plan”)
- No DL requests for IDP amendments after Cycle A
- IRS to publish annually a list of all amendments for an IDP to retain its qualified status (RA List)

Key Changes under Revenue Procedure 2016-37

- An extended §401(b) remedial amendment period (RAP) will be tied to the RA List
- Existing plans must be amended for items on RA List by the end of the 2nd year after its published
 - A shorter RAP applies to new plans (Oct. 15th of following year)
- No special RAP for discretionary amendments – changes must be made by end of plan year
- Limits scope of IRS review for an initial DL
 - Does not necessarily cover all required plan provisions
- Expiration dates in DLs no longer apply

Impact on Annual Audit?

- Auditor report addresses plan's tax-qualified status
- DL plus representation typically satisfy auditors
- What additional level of review will auditor perform for plan provisions without a DL?
- Under what circumstances legal opinions be needed? If so, what type of opinion will suffice (e.g., level of opinion, scope)?
- If plan document violation is identified, can unqualified opinion be issued before correction?

Impact on Plan Drafting?

- Increasing use of incorporation by reference and/or standardized, overbroad language?
- Less use of discretionary amendments?
- Reluctance to change existing plan provisions subject to a DL?
- To what extent will the ability to obtain an opinion on a plan document influence drafting?
- Will EPCRS allow for more flexible and less costly ways to correct plan drafting errors?

Impact on M&A?

- Can a new plan be established to receive amounts from target plan and be eligible for a DL?
- What changes should be made to existing P&S representations?
- Should the indemnity period be extended for tax-qualified plans due to increased uncertainty?
- Will more buyers insist on plan terminations to reduce risk?
- Will counsel be willing to provide opinion letters to facilitate plan continuation?

Impact on Choice of Plan?

- Likely increased use of prototype and volume submitter (VS) plans
- Recent changes to IRS programs for prototype and VS plans encourage their use
 - Expansion to include cash balance plans and ESOPs
 - Simplified process to convert to prototype and VS plans

Impact on Existing Plan Administration?

- What procedures should be put in place so that required amendments are made timely?
- Who assumes responsibility for additional required document reviews?
- Will vendors require opinion letter or other protection to administer IDPs?
- Should existing third party administrator (TPA) agreements need to be amended?
- Will TPAs be willing to provide covenants regarding items on the Operational Compliance List (OCL)?

Impact on EPCRS?

- Favorable DL required to self-correct significant failures under EPCRS
- DL request required for certain VCP corrections involving a plan amendment
- DL request required to for certain sanctioned self-corrections involving a retroactive plan amendment
- Factors for determining Audit CAP penalty include whether there is a favorable DOL
- Area of future IRS guidance

Impact on Other Transactions?

- Rollovers
 - Will administrative procedures need to be changed to assure distributing plan is tax qualified?
- Collective investment funds (e.g., group trusts)
 - What representations will be required initially and thereafter?
- Financial transactions
 - ESOP financing (if initial DL request is not available)
 - Plan sponsor financings
- Bankruptcy filings by participants
 - What information will satisfy a bankruptcy judge that a plan is “qualified” under *Patterson*?