

MAJOR CHANGES TO IRS DETERMINATION PROGRAM FOR INDIVIDUALLY DESIGNED PLANS

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Practices & Industries

Employee Benefits

Effective this year, the IRS has overhauled its determination letter program in a revenue procedure (2016-37) that sweeps away the staggered five-year remedial amendment periods previously used to gauge whether individually designed retirement plan documents conformed to the requirements of the Code. The IRS will no longer periodically review and issue determination letters for individually designed plans. IRS determination letters will only be available for individually designed plans upon commencement and termination of the plan. Going forward, individually designed retirement plans may not seek a determination from the IRS for any interim amendments. The IRS will provide an annual “Required Amendments List” and “Operational Compliance List” to help plan sponsors track their plan’s conformity to changes in the law.

With this guidance, individually designed plans can continue to rely upon an existing favorable determination letter only respecting plan provisions that are not amended or altered through subsequent changes in the law. Future legislation or design changes will eventually erode the plan sponsor’s ability to rely upon its existing determination letter. As determination letters are essential legal compliance documents for employers who sponsor tax qualified retirement plans, plan sponsors should consider carefully whether they wish to adopt a pre-approved plan, or maintain the qualified status of their customized document through active review and management utilizing the annual IRS lists. That decision may hinge on the extent to which custom formulas, legacy benefits or other unique features can be accommodated in a pre-approved plan format.

Alongside its decision to dismantle the determination letter program for individually designed retirement plans, the IRS has issued a revenue procedure (2017-41) substantially restructuring the opinion letter process for pre-approved plans (i.e. prototype plan documents, volume submitter plan documents, etc.). The restructured opinion letter process broadens the availability and flexibility of pre-approved plans, which may encourage some sponsors of individually designed plans to convert to pre-approved plans. For plan sponsors electing not to convert to a pre-approved plan format, it is essential to develop a process for monitoring the annual IRS lists and demonstrating both the qualified status of the plan document and the internal controls in place to ensure operational compliance.

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The discontinuation of the determination letter program for individually designed plans creates uncertainty and risk for plan sponsors. The inability to definitively demonstrate the qualified status of a retirement plan document may affect plan sponsors in many circumstances, including mergers and acquisitions, obtaining and maintaining credit facilities, responding to auditors, utilizing voluntary compliance programs, and responding to potential IRS examination. Plan sponsors of individually designed plans should work with their legal advisors to develop a strategy to address the significant changes brought about by the elimination of the IRS determination letter program.