

The End of an Era? IRS Considers Eliminating Periodic Determination Letter Process

Many of you may have already heard the rumors about a major overhaul of the IRS determination letter program for individually designed plans (IDPs) – plans that are not operating under a pre-approved vendor-sponsored master and prototype or volume submitter plan document – including public retirement systems operating under statutory provisions.

It turns out there may be something to these rumors. In fact, it has been reported that Sunita Lough, Commissioner of the IRS Tax Exempt and Governmental Entities Division, recently told an American Bar Association, Joint Committee on Employee Benefits, meeting that the IRS is considering eliminating periodic individually-designed determination letters altogether. According to Ms. Lough, this would occur after the current 2015-2016 submission period for Cycle E, leaving the determination letter process open for IDPs only for initial plan adoption and plan termination in the future.

Under the current IRS determination letter system established in 2007, each individually-designed plan is generally assigned a five-year period, each of which begins in a different year, based on the last digit of the plan sponsor's IRS-assigned employer-identification number (EIN). Determination letter applications for individually designed plans must generally be submitted during the fifth year of the assigned period. Plans submitted during this period are considered filed "on-cycle," and are given higher priority than plans filed "off-cycle." Plan sponsors with EINs that end in 5 or 0, and governmental plan sponsors that did not file in Cycle C, which ended on January 31, 2014, generally have until January 31, 2016, to file their plans for Cycle E.

Several factors are likely driving the IRS to consider such drastic changes to what is arguably one of its most popular programs. First, the IRS has experienced a reduced budget and fewer personnel, making it more difficult to process the large volume of applications it receives in a timely fashion while still supporting its other programs such as audits. Based on our past experience, it often takes more than a year to get a determination letter. Second, changes made by the IRS to its procedures for



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incomplete applications in Revenue Procedure 2015-6, which give plan sponsors only 30 days to perfect incomplete applications or risk losing on-cycle filing status, suggest that the IRS may have experienced a large volume of incomplete applications leading to further backlog.

Plan sponsors whose EINs end in 5 or 0, and governmental plan sponsors who did not file in Cycle C, clearly should consider filing their plans prior to January 31, 2016, to provide as much protection as possible in the event of a future IRS audit because this may be the last opportunity to do so. Individually designed plans that have never received a favorable determination letter are probably at the most risk in the event of an IRS audit, since they have had no official IRS determination that their plans are qualified in form at any point in time.

Without the current ability to make protected corrections during each determination letter filing cycle, it will be critical to continue to review plan documents at least annually before plan year end, and consult with legal counsel to determine if any plan amendments are needed to comply with any law changes during the year. These periodic "checkups" will become even more important to ensuring an individually-designed plan's continued qualification if the IRS eliminates periodic determination letters for these plans going forward. There will be no advance warning of an IRS audit – and in the future there may be no current determination letter available to "short-cut" the IRS auditor's review of the plan.

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