IRS Opinion Letter Program Changes

Simplification and Liberalization to Encourage Pre-approved Plan Utilization

On June 30, 2017, Revenue Procedure (Rev. Proc.) 2017-41 was issued by the IRS in an effort to simplify and liberalize the Pre-approved Plan program. Rev. Proc. 2017-41 modifies and supersedes in part Rev. Proc. 2015-36, 2015-27 I.R.B. 20 and modifies several other Revenue Procedures and Bulletins.[1] Pre-approved Plans undergo six-year cycles in which the plans are redrafted for changes to retirement plan rules, are then approved by the IRS for document providers' use, and finally restated and adopted by Plan Sponsors. We are currently in the third six-year cycle, with the first being referred to as the EGTRRA restatement and the second known as the PPA restatement, so called for the major laws that shaped the changes in the documents, the Economic Growth Tax Relief Reconciliation Act of 2011 and the Pension Protection Act of 2006, respectively.

Changes Ahead

Beginning with this third restatement cycle, the IRS has instituted several changes with Rev. Proc. 2017-41 as follows:

- The program is simplified by eliminating the distinction between master and prototype plans (M&P plans) and volume submitter plans (VS plans). The combined plan types, called simply "pre-approved plans" will now be in a single opinion letter program with two plan types, Standardized and Nonstandardized.[2] The revised program attempts to maintain the best portions of M&P and VS plans.[3]

- Pre-approved plans may use one of two formats, either a single document plan or an adoption agreement plan. A single document plan includes all provisions within one document whereas an adoption agreement plan has two parts, an adoption agreement where individual provision selections are identified and a basic plan document which includes the non-elective provisions applicable to all adopters of the document. Basic plan documents may underpin several adoption agreements.

- Nonstandardized plans can adopt minor modifications to the pre-approved plan document without becoming an individually designed plan. Standardized plans that are customized will then be considered individually designed plans.

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[1] IRS. (2017, June 30). Revenue Procedure 2017-41.

[2] Practical Law Employee Benefits & Executive Compensation. (2017, July 11). *IRS Revises Opinion Letter Procedures for Pre-Approved Plans in Revenue Procedure 2017-41 and Issues 2017 Cumulative List in Notice 2017-37.* Retrieved July 16, 2017, from Thomson Reuters Practical Law

[3] ERISA News. (2017, July 12). *Washington Pulse: IRS Makes Major Changes to Qualified Pre-approved Plan Program.* Retrieved July 26, 2017, from Ascensus.

- The program is liberalized by permitting more types of plans to be eligible for the pre-approved program and more plan provisions to be combined in a single document. Cash Balance plans, ESOPs, and nonelecting church plans are now included in the program. Money purchase plans and profit sharing or 401(k) provisions can now be combined in the same pre-approved document. A nonstandardized ESOP may now also include a 401(k) feature and a nonstandardized cash balance plan can now permit the Interest Credit rate to be based on the Plan's actual return, however this must be the full plan's return and not be based on the return of a subset of plan assets.

- A nonstandardized plan can now permit hardships for reasons other than those identified as safe harbor reasons. This allows hardships to be approved in a nonstandardized plan that meet a facts and circumstances determination.

- The IRS will no longer evaluate trust provisions or custodial agreements. In fact, they may no longer be included in the plan document and instead are required to be in a separate document from the plan.

What to expect

The changes in Rev. Proc. 2017-41 simplify the pre-approved plan program and may incent Plan Sponsors to forego their individually designed plan in favor of a pre-approved document, especially with the significant scaling back of the determination letter program earlier this year. For more information on the determination letter program, see our articles The IRS Determination Letter Program and A New Determination Letter Program.

As document types and provisions combine under the new rules, you may see slightly longer documents. You will almost certainly see a delay in third restatement cycle, as the IRS has afforded document providers more time to adapt to the modified structure presented in the Revenue Procedure. Most likely, plan sponsors will not be adopting the current restatement documents until 2021.