June 27, 2016

The Honorable John A. Koskinen  
The Honorable William J. Wilkins  
Commissioner  
Chief Counsel  
Internal Revenue Service  
Internal Revenue Service  
1111 Constitution Avenue, NW  
1111 Constitution Avenue, NW  
Washington, DC 20224  
Washington, DC 20224

Re: Comments on Announcement 2015-19

Dear Messrs. Koskinen and Wilkins:

Enclosed please find comments on revisions to the employee plans determination letter program (“Comments”). These Comments are submitted on behalf of the American Bar Association Section of Taxation and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.

The Section of Taxation would be pleased to discuss the Comments with you or your staff if that would be helpful.

Sincerely,

George C. Howell, III
Chair, Section of Taxation

Enclosure

cc: William M. Paul, Deputy Chief Counsel (Technical), Internal Revenue Service  
Victoria Judson, Associate Chief Counsel (Tax Exempt & Government Entities), Internal Revenue Service  
Stephen B. Tackney, Deputy Associate Chief Counsel (Employee Benefits), Internal Revenue Service  
Angelique Carrington, Attorney, Office of the Associate Chief Counsel (Tax Exempt & Government Entities), Internal Revenue Service  
Hon. Mark Mazur, Assistant Secretary (Tax Policy), Department of the Treasury  
Emily McMahon, Deputy Assistant Secretary (Tax Policy), Department of the Treasury  
Robert J. Neis, Benefits Tax Counsel, Department of the Treasury
These comments (“Comments”) are submitted on behalf of the American Bar Association Section of Taxation and have not been approved by the House of Delegates or Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.

Principal responsibility for preparing these Comments was exercised by Christina Crockett and Robert A. Miller of the Employee Benefits Committee of the Section of Taxation. Substantive contributions were made by Venessa Blanco, Matthew Eickman, Peg Friel, Sarah Fry, Annemarie McGavin, Anne Meyer, Rhonda Migdail, Thomas Pevarnik, Stefan Smith, and Lisa Tavares. These Comments were reviewed by W. Walden Lloyd, Vice Chair of the Committee and Susan A. Wetzel, Chair of the Committee. These Comments were further reviewed by Mark A. Bodron of the Section’s Committee on Government Submissions, Kurt L.P. Lawson, Council Director for the Committee and Peter H. Blessing, Vice Chair (Government Relations) of the Section.

Although the members of the Section of Taxation who participated in preparing these Comments have clients who would be affected by the federal income tax principles addressed by these Comments, or have advised clients on the application of such rules, no such member (or the firm or organization to which such member belongs) has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of, the specific subject matter of these Comments.

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Date: June 27, 2016
EXECUTIVE SUMMARY

The following Comments are submitted in response to the request for comments made by the Department of the Treasury (the “Treasury”) and the Internal Revenue Service (the “Service”) in Announcement 2015-19 regarding changes to the determination letter (“DL”) program with respect to individually designed plans (“IDPs”). We appreciate the opportunity to comment on these important developments.

These Comments are divided into several parts. Parts I and II discuss the history and current state of the DL program. Part III responds directly to the proposed changes described in Announcement 2015-19. Part IV contains additional recommendations which we hope the Service will find helpful as it develops future guidance in a post-DL environment. Part V discusses whether the proposed changes are consistent with the statutory history of ERISA and congressional intent. More specifically, in Parts III and IV:

1. We recommend that an extended remedial amendment period be preserved for IDPs under section 401(b), on the condition that plan sponsors adopt good-faith interim amendments within specified periods. Specifically, we recommend that the remedial amendment period for disqualifying provisions be extended either until the date of plan termination (with an extension for a timely filed DL application upon plan termination) or, similarly, until a reasonable time after the Service notifies the plan sponsor of the plan document qualification issue on audit or as part of a DL request.

2. We recommend that, except as otherwise required to satisfy section 411(d)(6), the Service not require interim amendments to be adopted any earlier than the last day of the plan year commencing one year or less after the date that the Service issues model language for the change in law to which the interim amendment relates, on the condition that the plan is in operational compliance during such period. With respect to discretionary amendments, we recommend that, except as otherwise provided under section 411(d)(6), the Service continue the current requirement that the amendment be adopted no later than the end of the plan year during which the change becomes effective or, preferably, the due date with extensions for the Form 5500 for the year in which the amendment becomes effective.

3. We recommend that the Service expand the use of incorporation by reference for regulatory provisions and certain statutory ones. This could be done either (i) by specifying Code provisions with respect to which incorporation of regulatory provisions by reference would be permitted, or (ii) by providing a general rule under which, the Code requires a plan document to contain certain provisions, the


2 References herein to “ERISA” are to Pub. L. No. 93-406, 88 Stat. 829 (1974), as amended, unless otherwise indicated.

3 References herein to a “section” are to a section of the Internal Revenue Code of 1986, as amended (the “Code” or “I.R.C.”), unless otherwise indicated.
requirement may be satisfied merely by setting forth the Code provisions, incorporating by reference the provisions of any related regulations, and specifying how they will be applied if they can be applied in more than one manner. In addition, we recommend that the Service expand situations in which incorporation by reference of statutory provisions themselves is permissible. Finally, we recommend that the Service, in consultation and coordination with the Department of Labor (“DOL”), require a plan’s summary plan description to include a summary description of the Code and regulatory provisions that are incorporated by reference that addresses such issues as the amount, timing of receipt, form of payment and other changes or requirements that impact plan benefits so that participants are aware of these provisions and how they may be impacted by the particular incorporated by reference provisions.

4. We recommend creating a glide path to assist plan sponsors with converting IDPs to preapproved documents by (i) expanding the types of plans and plan provisions which preapproved plans may encompass, (ii) allowing the use of multiple preapproved documents to collectively serve as the plan document, and (iii) allowing the combination of an existing IDP to govern existing accrued benefits and a preapproved document to govern future benefit accruals.

5. We recommend eliminating requirements for DLs and simultaneous DL submissions under the Service’s Employee Plans Compliance Resolution System (“EPCRS”), including (i) allowing self-correction under the Self-Correction Program (“SCP”) in EPCRS for significant operational failures without regard to whether the plan has any determination letter, (ii) permitting plan sponsors to adopt retroactive amendments to self-correct operational failures without a requirement to submit a simultaneous determination letter application, and (iii) eliminating the requirement for a determination letter application with respect to any nonamender failures under the Voluntary Correction Program (“VCP”) in EPCRS.

6. We recommend that the Service expand VCP to allow for a limited-scope determination regarding the form and substance of the submitted amendment.

7. We recommend a reduced flat Audit Closing Agreement Program (“Audit CAP”) sanction for failures related to untimely good faith, interim, or optional amendments related to law changes.

8. We recommend that except in egregious cases involving willful and material violation of the qualification requirements, the Service not require retroactive correction of plan document errors identified on audit, as part of a DL request at termination, or in connection with EPCRS, for periods prior to those covered by the Forms 5500 due or filed for the plan during the six years prior to the date of

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the audit or date of plan termination, and that for situations involving only minor plan document errors, only prospective corrections be required.

9. We recommend that the Service review Cycle B defined benefit plans that employers would have submitted for a DL between February 1, 2017, and January 31, 2018, or, at least, open a limited review program (similar to the modified Form 6406 program described below) to allow for review of the section 436 provisions of these plans until January 31, 2018.

10. We recommend that the Service continue reviewing, pursuant to the existing staggered remedial amendment cycle structure, IDPs of a type for which preapproved plan documents either are limited or remain unavailable, including, at a minimum, the following types of plans: (i) hybrid plans that are not cash balance plans; (ii) multiemployer defined benefit plans; (iii) ESOPs with reshuffling, leveraging or S-Corporation features or that hold section 409(l)(3) securities; (iv) multiple-employer plans; and (v) defined benefit pension plans with benefit structures that are too complex to reasonably fit within a preapproved plan design. In addition, we recommend that cash balance plans be permitted a limited opportunity to apply for and receive DLs covering issues which include those under the final hybrid plan regulations.

11. We recommend that the Service issue clarifying guidance concerning the meaning of “new” plan, and that the concept include any plan that has not received a DL as an IDP pursuant to a Form 5300 application, regardless of the plan’s adoption date.

12. We recommend that the Service implement a modified Form 6406 program to allow for review of specific types of plan amendments.

I. INTRODUCTION

For a retirement plan to be a tax-qualified plan — whether in the form of a pension, profit sharing (including a cash or deferred arrangement) or stock bonus plan — it must comply with the requirements of section 401(a) both in operation and in form (that is those requirements that must be reflected in the plan document itself). Regarding the form requirements, for many years IDPs have been able to request and receive a DL\(^5\) from the Service that it finds the plan meets the section 401(a) form requirements and is a qualified plan based on the documents submitted to the Service for review with the application.\(^6\)

\(^5\) References herein to a “determination letter” or “DL” are solely to a favorable determination letter or DL.

\(^6\) The current form of the DL generally provides that the plan’s continued qualification in its present form depends on its effect in operation, citing Reg. § 1.401-1(l)(b)(3) for this principle. Thus, the DL provides no protection from any operational errors that the Service may uncover during a plan audit. However, if the plan has a current DL, the Service generally will not challenge the plan’s qualified status based on the provisions of the plan document.
In Announcement 2015-19, the Service stated its intention to eliminate the determination letter program for IDPs, except in the case of new and terminating plans, effective January 1, 2017. At the end of Announcement 2015-19, the Service asked for comments on a number of specific issues related to the elimination of the DL program for IDPs. Part III of these Comments responds directly to proposed changes in Announcement 2015-19. Part IV contains additional recommendations which we hope the Service will find helpful as it develops future guidance in a post-DL environment. Part V discusses whether the proposed changes are consistent with the statutory history of ERISA and congressional intent. These Comments begin with a discussion of the history and current state of the DL program.

II. OVERVIEW, HISTORY AND IMPORTANCE OF THE DETERMINATION LETTER PROGRAM

The DL program dates back at least to 1953, when the Service issued Revenue Ruling 32, which established concrete procedures for requesting rulings on the tax qualification of a plan. The Service formalized the DL program in Revenue Ruling 54-172, which authorized District Directors of the Service to issue a “determination letter” when “a determination can be made on the basis of clearly established rules as set forth in the statute, Treasury Decisions or Regulations, or rulings, opinions or court decisions published in the Internal Revenue Bulletin,” and contained the first-ever voluntary limitation by the Service on the exercise of its power to modify its positions retroactively.

Congress effectively endorsed the Service’s DL program by adding new procedural rules to it as part of ERISA. These included a requirement to notify interested parties when a DL request is filed and a procedure for requesting declaratory judgments directly from the Tax Court in the event of “a failure by the Secretary or his delegate to make a determination” regarding a plan’s initial or continuing tax qualification. While ERISA did not require employers to seek DLs for their plan’s qualified status under the Code, the legislative history shows that the sponsors of the law expected most employers to do so.

Regulation section 601.201(o) and various Revenue Procedures outline the process for requesting DLs from key district directors, and set forth the specific provisions for which letters may be issued — sections 401, 403(a), 405, and 501 — with respect to the initial qualification a

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8 Rev. Rul. 54-172, 1954-1 C.B. 394, § 2.03; see also Rev. Rul. 54-172, 1954-1 C.B. 394, § 4.04 (“The authority and procedure provided in Revenue Ruling 32, C. B. 1953-1, 265, with respect to the disposition by District Directors of requests covering the qualification of plans under section 165(a) of the Internal Revenue Code is continued, but for this purpose the letters issued by District Directors in response to such requests shall be considered and designated as ‘determination letters.’”).
10 See General Motors Corp. v. Buha, 623 F.2d 455, 462 n.4 (6th Cir. 1980) (“In presenting the Conference Report to the Senate, Senator Harrison Williams, Chairman of the Committee on Labor and Public Welfare, stated: ‘... it is probable that in view of the new requirements [of ERISA] almost all pension plans will seek tax qualification ...’” (1974) U.S. Code Cong. & Admin. News at pp. 5187-5188.”).
plan, as well as “amendments, curtailments, or terminations.” They also contain appeal procedures.

In the early 2000s, in circumstances similar to today’s, the Service undertook an extensive review of the DL program as it applies to IDPs. It published a white paper outlining several possible alternatives to the existing program. Ultimately, it chose to revise the DL program (rather than eliminate it) to include staggered remedial amendment cycles. Basically, under the staggered cycle structure, an IDP falls into one of five five-year cycles based on the plan’s employee identification number. Subject to certain limited exceptions, the plan is able to request a DL during the cycle’s 12-month filing period (referred to as a “on-cycle” filing) and the resulting DL remains in effect until the plan’s next five-year cycle opens. The current procedures for review and approval of DLs for IDPs under the staggered remedial amendment cycles are reflected in Revenue Procedure 2007-44.

In Announcement 2015-19, the Service stated its intention to eliminate the DL program for IDPs, except in the case of new plans and terminating plans, effective January 1, 2017. Service representatives explained that this was necessary for a variety of reasons, including budget and manpower constraints and a desire to allocate resources to where they will be most effective, based, in part, on “lean six sigma” principles.

We respectfully disagree with the Service’s plan regarding the future of the DL program. We believe it underestimates the value of IDPs and the importance of a robust DL program in encouraging employers to adopt and maintain plans and protect participant benefits provided under such plans. DLs have tremendous practical value to sponsors of IDPs. They provide universally recognized evidence that the plan satisfies certain baseline qualification requirements under the Code and thus facilitate many kinds of common transactions. For example, a plan sponsor may be required to produce a current DL in the following common situations:

1. When a participant rolls account balances to another qualified plan or IRA, the recipient plan or IRA will often request a copy of the distributing plan’s most recent DL;

2. When the qualified plan’s annual required audit is conducted by the independent auditor, the auditor will require the plan sponsor to produce a copy of the most recent DL;

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11 Reg. § 601.201(o)(2)(i) and (ii).
15 See Michael L. George, Lean Six Sigma: Combining Six Sigma Quality with Lean Production Speed (2002).
3. When the stock or assets of another entity that sponsors a qualified plan are acquired by another party, the purchaser invariably will require the seller to produce a copy of the most recent DL for each of the plans it sponsors;

4. When all or a portion of a qualified plan’s assets are invested in a fund that limits participation to qualified plans, the investment manager for the fund will typically require the plan sponsor to provide a copy of the most recent DL or a representation that there is a current letter in effect (or a letter from plan counsel providing a general assessment on the plan’s tax-qualified status, which generally will based on the fact that the plan has a current DL); and

5. When the DOL investigates a qualified plan for ERISA compliance, the DOL agent will require the plan sponsor to produce a copy of the most recent DL for the plan as part of the investigation.

In addition, the DL provides essential insurance against plan disqualification for many kinds of form defects (which in some cases could be due to technical defects that do not impact participant benefits under the plan), without which a plan sponsor would face significant financial exposure from maintaining the plan. The price to the plan sponsor for obtaining that insurance — and the corresponding benefit to the Service and the qualified plan system — is regular attention to good plan drafting, including the timely adoption of required plan amendments for both design and law changes.

We believe the above supports the view that the current system provides for an appropriate allocation of risk to plan sponsors. This is especially true with respect to items two and five above. Without the availability to obtain a DL regarding a qualified plan’s documentation compliance for their IDPs, law firms may be called upon by plan sponsors to issue opinion letters on plan qualification. We submit that, based on discussions with our members, the number of law firms that will be willing to issue such an opinion letter will be limited. And, with respect to those firms that will be willing to issue such an opinion letter, the cost will be substantial in many cases (e.g., a complex pension plan that has multiple formulas dating back decades), resulting in a substantial annual expense that may be charged to the plan itself, and the opinion most likely will have numerous caveats that may diminish the strength of the opinion. Moreover, in the case of defined contribution plans that cost in many cases will be borne directly by plan participants and beneficiaries.

We believe the value of the existing system to plan sponsors, participants and beneficiaries is worth emphasizing even in the face of the serious budgetary challenges faced by the Service because “lean six sigma” principles are fundamentally value-driven, i.e., they start with an assessment of customer needs and wants and then work backward to determine the best ways for a business or government agency to meet them with the resources available.

Nevertheless, we wish to be helpful regardless of the final outcome of this debate, and therefore, as indicated above, these Comments offer various recommendations for modifying the Service’s proposal in Announcement 2015-19 to address both its budgetary and liability concerns and the plan community’s need for it to continue reviewing IDP language to the extent possible, either through the DL program or otherwise.
III. SPECIFIC REQUESTS FOR COMMENTS IN ANNOUNCEMENT 2015-19

A. Changes to the Remedial Amendment Period that Otherwise Would Apply to Individually Designed Plans under Section 401(b), and Additional Considerations in Connection with the Current Interim Amendment Requirement

1. Background

The discussion that follows in this subpart A focuses on the Service’s proposal in Announcement 2015-19 to eliminate DLs for IDPs except at inception or on termination. The comments and suggestions should be considered in that context.

Under section 401(b), Regulation section 1.401(b)-1 and other guidance, a qualified plan will be treated as satisfying section 401(a) even if the plan document does not contain all of the provisions it is required to contain or contains provisions that otherwise are inconsistent with the requirements of section 401(a) (together “disqualifying provisions”) as long as an amendment correcting the disqualifying provision is adopted within the plan’s remedial amendment period. The remedial amendment period during which an IDP may be timely amended ends on the later of: (1) the due date (including extensions) for filing the income tax return for the employer’s taxable year that includes the date on which the remedial amendment period begins; and (2) the last day of the plan year that includes the date on which the remedial amendment period begins. Provided the employer or plan administrator files a timely DL application for the plan amendment, the remedial amendment period extends until the end of the 91-day period following the issuance of a DL from the Service.

Pursuant to the discretion granted in Regulation section 1.401(b)-1(f), the Service has extended the regular remedial amendment period for disqualifying provisions to the end of a plan’s applicable remedial amendment cycle, provided the plan sponsor timely adopted all required good-faith amendments. Section 9 of Revenue Procedure 2007-44 (and Revenue Procedure 2005-66 before that) established a system of five-year remedial amendment cycles for IDPs. In general, a plan’s five-year remedial amendment cycle is determined by the last digit of the plan sponsor’s employer identification number. A timely filed DL application will extend a remedial amendment period based on one of these five-year remedial amendment cycles just as it will extend a regular remedial amendment period.

Announcement 2015-19 explains that the Service will eliminate the remedial amendment cycle system in Revenue Procedure 2007-44 effective January 1, 2017. As a result, the extension of the remedial amendment period provided in section 5.03 of Revenue Procedure 2007-44 will not be available after December 31, 2016. The regular remedial amendment period definition in Regulation section 1.401(b)-1 would appear to apply from that point on.

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16 See Rev. Proc. 2007-44, § 5.01, and similar previous guidance.
17 Reg. § 1.401(b)-1(d).
18 Reg. § 1.401(b)-1(e)(3).
19 Rev. Proc. 2007-44, § 5.03(1).
By submitting a timely DL application, the existing system under Regulation section 1.401(b)-1 and Revenue Procedure 2007-44 allows an employer to extend the remedial amendment period long enough to provide the Service an opportunity to review the plan document and issue its determination that the plan document satisfies the section 401(a) requirements. If the Service determines that the plan document contains a disqualifying provision during its review of the plan document, the employer generally has an opportunity to amend the plan document retroactively so that it complies with section 401(a) because the plan is still within its remedial amendment period.

2. Recommendations

**Recommendation 1 — Preserve an Extended Remedial Amendment Period for Employers Making Timely Interim Amendments**

**Issue**

Eliminating the opportunity for plan sponsors to have the Service regularly review their plans for compliance with the technical tax qualification requirements during the life of the plan leaves employers without assurance that their plans are qualified as to form, unless the period during which a plan may be retroactively amended under section 401(b) to satisfy qualification requirements (that is, the remedial amendment period) extends to a date following the issuance of the next generally available DL.

**Recommendation**

We recommend that an extended remedial amendment period be preserved for IDPs under section 401(b), on the condition that plan sponsors adopt good-faith interim amendments within specified periods. Specifically, we recommend that the remedial amendment period for disqualifying provisions be extended either until the date of plan termination (with an extension for a timely filed DL application upon plan termination) or, similarly, until a reasonable time after the Service notifies the plan sponsor of the plan document qualification issue on audit or as part of a DL request.

**Explanation**

An essential element of the DL program always has been the ability of a plan sponsor to address plan document issues raised by the Service, during the DL review process, by adopting an amendment that the Service would treat as retroactively satisfying the formal qualification requirements. Within the context of the DL program, this ability to make retroactive amendments has been provided through the remedial amendment period provisions of section 401(b) and related regulations and revenue procedures. Because an IDP sponsor may not apply for a DL under the new approach until plan termination, it appears appropriate, as explained below, to extend the remedial amendment period until that time (and further, assuming that the sponsor files a timely DL application in connection with the plan termination).

Without an ability to correct a plan document defect identified by a Service agent during a DL review, submitting a DL application on plan termination increases (rather than decreases) the potential exposure for plan sponsors, fiduciaries and participants. Moreover, it undercuts an
underlying purpose of the DL program, namely to provide a ready mechanism under which plan qualification can be maintained and plan qualification requirements satisfied.

Extending the remedial amendment period until plan termination (or until a reasonable time after the employer is notified of the issue on a Service audit or DL request) is very similar to the approach which applies to section 457(b) plans maintained by governmental employers, which also cannot receive a DL. Section 457(b)(6) generally permits sponsors to amend such plans for compliance by the first day of the first plan year commencing “at least 180 days after the date of notification by the Secretary of the inconsistency” between plan administration and the requirements of section 457(b). Such an approach allows plan sponsors to address plan document issues uncovered as part of an audit. Utilizing a parallel approach with respect to IDPs would allow plan document issues uncovered as part of an audit or a DL request (such as on plan termination) to be addressed as part of those processes, without the imposition of penalties, as long as the requisite corrective amendment was adopted within a reasonable time after the issue was identified (e.g., in the case of an audit, before the beginning of the plan year starting at least 180 days after the audit, or in the case of a DL, within 90 days after the issuance of the DL). In the absence of regular opportunities for IDPs to receive DLs, we believe that the section 457(b)(6) approach reflects an appropriate model.

Even though we recommend that the remedial amendment period be extended, we recognize that it is important for plan documents to be kept in reasonable alignment with plan operations and changes in law. Consequently, we think it is appropriate for the extension of the remedial amendment period to be contingent upon timely adoption of good-faith amendments, as discussed in the next recommendation. This requirement will help ensure that the plan document remains an appropriate reference for plan administrators and participants regarding plan operations.

In the event that an indefinite extension of the remedial amendment period is deemed to be undesirable, an alternative approach would be to extend the remedial amendment period until the sixth anniversary of the due date (with extensions) of the Form 5500 for the year in which the amendment was first required (or in the case of a discretionary amendment, first adopted). Such an approach would allow plan sponsors a reasonable time, of a relatively similar length to the current five-year remedial amendment cycle, to adjust language previously adopted for more fulsome compliance, and also would allow the plan sponsor to address without penalty plan document issues, at least of relatively recent vintage, that are raised on audit.

Although the extensions described above would be helpful, they would not solve all of the fundamental issues involved with eliminating DLs for IDPs between implementation and termination. The benefit of having a plan reviewed periodically is that a compliant document provides the administrator with an accurate guide to rely on to ensure that plan operations follow the legal requirements throughout the life of the plan. Although extending the remedial amendment period until plan termination (or until a reasonable time after the employer is notified of the issue on a Service audit or DL request) will remove the gap in a plan’s technical qualification, from a practical administrative standpoint, the employer may not discover (and subsequently correct) errors in the document until the review on plan termination. By that time, any prior errors could have existed for decades, potentially generating operational issues that
would be much more expensive and difficult (if not virtually impossible) to fully correct than if identified during a periodic Service DL review under the current five-year cycle system.

**Recommendation 2 — Extend the Deadline for Interim and Discretionary Amendments**

**Issue**

Under the current five-year remedial amendment cycle system, the remedial amendment period for disqualifying provisions is extended to the end of a plan’s applicable remedial amendment cycle, provided the plan sponsor timely adopts all required good-faith amendments.\(^{20}\) Section 5 of Revenue Procedure 2007-44 provides the rules and procedures regarding the timely adoption of good-faith amendments. It specifically requires a “discretionary amendment” to be adopted by the end of the plan year in which it becomes effective, and requires an “interim amendment” to be adopted by the end of the regular remedial amendment period under Regulation section 1.401(b)-1(b)(3) (typically, the later of the tax return due date with extensions for the tax year in which the remedial amendment period begins or the last day of the plan year in which the remedial amendment period begins). Earlier or later dates for such interim amendments can be set by law, regulation, or the Commissioner. For this purpose, an “interim amendment” generally is an amendment to a plan provision that either results in the failure of the plan to satisfy the qualification requirements of the Code by reason of a change in those requirements that is effective after December 31, 2001, or is integral to a qualification requirement of the Code that is changed effective after December 31, 2001; and a “discretionary amendment” is any other amendment. With the elimination of the five-year remedial amendment cycles, questions arise as to whether the concept of good-faith amendments continues to be relevant, and the dates by which plan amendments related to qualification requirements should be adopted.

**Recommendation**

We recommend that, except as otherwise required to satisfy section 411(d)(6), the Service not require interim amendments to be adopted any earlier than the last day of the plan year commencing one year or less after the date that the Service issues model language for the change in law to which the interim amendment relates, on the condition that the plan is in operational compliance during such period. In the event the Service does not issue model language with respect to a law change, we recommend that, except as otherwise required to satisfy section 411(d)(6), the Service not require interim amendments to be adopted any earlier than the due date with extensions for the Form 5500 for the plan year following the plan year during which the law change is effective, again, on the condition that the plan is in operational compliance during such period. With respect to discretionary amendments, we recommend that, except as otherwise provided under section 411(d)(6), the Service continue the current requirement that the amendment be adopted no later than the end of the plan year during which the change becomes effective or, preferably, the due date with extensions for the Form 5500 for the year in which the amendment becomes effective.

\(^{20}\) Rev. Proc. 2007-44, § 5.03(1).
**Explanation**

When there is a change in the law affecting plan qualification requirements, the Service typically needs time to issue regulations or other clarifying guidance regarding the impact of the change, and, after such guidance is issued, it often develops model language for use by plan sponsors. With the elimination of five-year cycle submissions, it is all the more important that model language be available with respect to changes in law, so that plan sponsors can use that language (either verbatim or with reasonable adjustments to conform with plan definitions and terms) to assure compliance with the documentary requirements for plan qualification. Absent the ability to receive a DL in a relatively timely manner, it appears to us unfair to require plan sponsors to adopt language to address changes in law before model language is available. Inevitably the language the plan sponsor adopts will deviate from subsequently issued model language or related guidance in some way. With no five-year review cycle, employers will be left for long periods of time without any assurance they have adopted compliant language or will have time to correct noncompliant language unless the Service does not require amendments before a reasonable time after issuing model language.

As further background with respect to interim amendments and their timing, it is noteworthy that the requirement to adopt interim amendments in order to obtain extended remedial amendment period relief is relatively new, and generally has been accompanied by the issuance of model amendments. During many past extended remedial amendment periods, such as for the Tax Reform Act of 1986, interim amendments were not required. Moreover, Congress has sometimes waived any requirements for interim amendments, as it did in section 1107 of the Pension Protection Act of 2006 (the “PPA”). This history suggests that although interim amendments may be desirable in certain respects, they are not intrinsic to extended remedial amendment period relief.

In cases where the Service believes it is imperative for plan amendments related to changes in law to be adopted prior to the availability of model language, or for some reason cannot provide model language, we suggest that the deadline not be earlier than the due date with extensions for the Form 5500 for the plan year following the plan year during which the law becomes effective, provided the plan is in operational compliance during that period of time and subject to earlier adoption in cases where required to comply with section 411(d)(6). The reason for this suggestion is that in the absence of periodic DL submissions under the five-year remedial amendment cycle, the annual audit process associated with the Forms 5500 is likely to become an even more important part of the oversight of timely adoption of plan amendments, so allowing adoption by the Form 5500 due date would allow accountants, actuaries and practitioners to all provide input and oversight in a coordinated manner, at a time tied to regular annual plan processes, and provide plan sponsors with sufficient time to make the required plan amendments.

With respect to discretionary amendments, the Service could consider either retaining the current rule under which plan amendments must be adopted by the end of the plan year in which they become effective, or providing a rule under which, except to the extent required by section 411(d)(6) or other specific statutory requirements (such as the inability to retroactively adopt a

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401(k) arrangement), discretionary amendments could be adopted by the due date with extensions for the Form 5500 for the plan year in which the amendment became effective. Either approach would allow the plan document to be kept in reasonable alignment with plan operation. The advantage of the Form 5500 due date approach is the same one mentioned in the preceding paragraph — tying the amendment deadline to the Form 5500 would more readily allow the annual audit process to serve as a check on timely adoption of plan amendments. Moreover, in the event that the Service determines that interim amendments should be required prior to the issuance of model language, this approach would allow interim and discretionary amendments to have a single due date, which would simplify administration and lower confusion among all parties, including plan sponsors, plan fiduciaries, practitioners, accountants, the Service auditors and the Service agents, while still allowing plan documents to remain relatively current.

Whichever approach is used with respect to interim amendments, the Service would need to continue to publish guidance each year concerning required plan amendments. This guidance could also provide details on the deadlines for adopting interim amendments.

Recommendation 3 — Expand the Use of Incorporation by Reference in Plan Documents, including Interim Amendments

Issue

The Code provisions relating to qualified plans often indicate that plans shall contain certain terms. Typically, the related regulations will contain considerably longer and more detailed rules regarding the interpretation and application of the statutory provisions. Historically, the Service has endorsed incorporation by reference of either statutory or regulatory requirements only in limited, specified circumstances.

Recommendation

We recommend that the Service expand the use of incorporation by reference for regulatory provisions. This could be done either (i) by specifying Code provisions with respect to which incorporation of regulatory provisions by reference would be permitted, or (ii) by providing a general rule under which, where the Code requires a plan document to contain certain provisions, the requirement may be satisfied merely by setting forth the Code provisions, incorporating by reference the provisions of any related regulations, and specifying how they will be applied if they can be applied in more than one manner. In addition, we recommend that the Service expand situations in which incorporation by reference of statutory provisions themselves is permissible. Finally, we recommend that the Service, in consultation and coordination with the DOL, require a plan’s summary plan description to include a summary description of the Code and regulatory provisions that are incorporated by reference that addresses such issues as the amount, timing of receipt, form of payment and other changes or requirements that impact plan benefits so that participants are aware of these provisions and how they may be impacted by the particular incorporated by reference provisions.

Explanation

The rules related to qualified plans are extraordinarily complex and lengthy. Section 401 itself contains many subsections, and the regulations related to qualified plans are voluminous.
Although it is appropriate for plan documents to reflect applicable legal requirements and limitations with respect to plan benefits in a reasonable manner, in reality it is unnecessary to have highly detailed plan provisions which to a large extent merely repeat those legal requirements and limitations. The administration of those legal requirements and limitations in the case of IDPs typically is handled by professional in-house HR staff, third-party plan administrators, record-keepers, actuaries, accountants, consultants and other professionals, who have ready access to the Code and regulations themselves, and neither plan participants nor most plan sponsors are likely to refer to the provisions or understand them if they are set forth in the plan document. If anything, cross-referencing the Code and regulations will put anyone reading the plan document on notice that the relevant provision must be applied in a manner consistent with certain guidance, alert him or her to the fact that the guidance is technical in nature, and tell him or her exactly where to find it. Consequently, broader use of incorporation by reference is reasonable.

With the elimination of the five-year remedial amendment cycle for IDPs, there is an even more compelling argument for incorporation by reference. Permitting incorporation by reference provides greater certainty that plan language satisfies the qualification requirements.

A logical starting point for expanding the ability to incorporate by reference is to permit plans to include those terms which the Code itself may indicate are to be provided in the plan document, while incorporating by reference the more extensive and detailed regulations interpreting the statutory terms. Where the regulations afford a plan sponsor a choice between compliance approaches, the plan would be required to set forth the choice that has been selected (or be treated as selecting the default alternative), but would not be required to set forth detailed provisions of the regulations themselves. This approach would honor the statutory terms while avoiding the additional length and complexity involved with having plan provisions set forth the regulatory provisions.

In the event the Service is not comfortable adopting a rule generally permitting plans to set forth Code provisions and incorporate regulatory requirements by reference, an alternative approach would be for the Service to provide a list of regulatory requirements which could be so incorporated. We suggest that such a list include sections 416 (in all cases) and 436, in addition to section 415, which by statute may already be incorporated by reference, and other regulatory provisions that already are permitted to be incorporated by reference.23

In certain cases, the statutory terms themselves may be particularly lengthy and complex, and in those situations, the Service could consider permitting incorporation by reference of all or part of the statutory terms as well as the regulations. For example, with respect to section 416, it may be appropriate for the Service to permit plans to incorporate by reference the statutory rules for determining which employees are key employees and whether a plan is top heavy, while setting forth the statutory provisions regarding the enhanced vesting and minimum benefits to be provided if the plan is top heavy, and incorporating the regulatory provisions regarding all of the statutory requirements.

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The incorporation by reference of a provision could make it more difficult for a participant to understand how the provision impacts his or her benefits. We believe that this can be avoided by requiring a plan’s summary plan description to include a summary, non-technical description of the Code and regulatory provisions that are incorporated by reference so that participants are aware of these provisions and how they may be impacted by them.

B. Guidance to Assist Plan Sponsors that Wish to Convert an Individually Designed Plan into a Preapproved Plan

1. Background

There are many types of plan provisions in IDPs that would be challenging (if not impossible) to fit within the confines of a document “preapproved” pursuant to Revenue Procedures 2015-36 and 2011-49. Examples of such provisions include special eligibility rules or service counting rules for different employee groups, unique compensation definitions, unique benefit formulas or contribution allocation requirements, and a significant number of grandfathered contributions and corresponding vesting schedules, any or all of which may represent longstanding design elements, tailored over time to the employer’s market, workplace, practices and systems, or to specific business units within the plan sponsor’s controlled group. Additionally, some sponsors wanting to implement simple (yet novel) employer nonelective contribution designs may find it challenging to add those new nonelective contributions to a preapproved plan solely for certain groups of non-highly compensated employees over a specific contribution period not reflected in the document. Furthermore, large plans with long histories of continually changing controlled groups may contain numerous appendices with special provisions, multiple benefit structures or even effectively separate plan documents for different groups of participants. Even if features applicable only to grandfathered frozen benefits could be accommodated in preapproved plan appendices, attempting to provide different ongoing benefit structures to different populations within a single preapproved plan would be problematic under the current preapproved plan program. Moreover, trying to make benefit structures uniform, or more uniform, so that they could fit within a preapproved plan will often generate significant human resources or anti-cutback rule concerns under section 411(d)(6). Indeed, in many cases compliance with the anti-cutback rules is the reason that plans of employers with long histories of acquisitions continue to maintain multiple benefit structures. In addition, the remedial amendment rules and the alignment of remedial amendment cycles for IDPs and preapproved plans further complicate the conversion process.

2. Recommendations

Recommendation 4 — Create “Glide Path” for Converting Individually Designed Plans with Complex or Relatively Novel Benefit Structures to Utilize Preapproved Plans

Issue

To the extent that employers with IDPs with complex designs or novel benefit structures, and their employees, no longer will be able to rely on DLs, the employers will need to consider what to do next. Unless a realistic pathway to convert these plans to preapproved plans is provided, there is a significant risk that many of them will be terminated.

Recommendation

We recommend creating a glide path to assist plan sponsors with converting IDPs to preapproved documents by (i) expanding the types of plans and plan provisions which preapproved plans may encompass, (ii) allowing the use of multiple preapproved documents to collectively serve as the plan document, and (iii) allowing the combination of an existing IDP to govern existing accrued benefits and a preapproved document to govern future benefit accruals.

Explanation

Given the central role that the protections afforded by DLs historically have played in the development of the voluntary employer-sponsored retirement plan system, it seems likely that in the new regime many sponsors of IDPs will seek to convert them into preapproved plans. To the extent a clear pathway to such conversions does not exist, there is a significant risk that employers maintaining IDPs will be tempted to terminate those arrangements or replace them with simpler but less creative or generous arrangements. Presumably, the Service does not intend to encourage such a result or the leakage and detriment to retirement savings that would occur. Therefore, it would seem critical to take steps to ensure that preapproved plan documents can be structured in such a way that they could realistically encompass virtually all types of IDPs. Ideally, this could be done even for the largest and most complex IDPs. Although the number of those plans may be markedly lower than the number of plans already using preapproved documents, the amount of retirement plan assets in them, and participants covered by them clearly are substantial. So, all parties (employers, employees, the government, and society as a whole) have a very real stake in making sure the new regime can work for those types of plans, as well as for less complex plans with less history.

A number of steps would be necessary to accomplish this goal. First, the preapproved plan program would need to be expanded to cover all of the major types of plan designs. An important step in this direction was taken by expanding the preapproved plan program to encompass ESOPs and cash balance plans. Nevertheless, there remain some types of plans which fall outside the preapproved plan program, including for example pension equity arrangements and multiemployer plans. In the event the Service determines it is not practicable

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to modify the preapproved plan program to encompass those types of plans, then we would urge
the Service to continue to allow those types of plans to submit DL requests.

Second, the preapproved plan program would need to be expanded to address the
situation, fairly common in large, complex plans, under which different employee groups have
different benefit structures. Some examples include: different compensation definitions,
different service counting provisions, different vesting schedules, different benefit or allocation
formulas, different normal, early and vested deferred retirement eligibility, different options
regarding time and form of distribution, different death or disability benefits, different loan,
hardship or in-service distribution provisions, and different actuarial equivalency factors with
respect to ongoing accruals, as well as with respect to grandfathered frozen benefits. Some
provisions such as distribution options concededly could be reconciled for consistency absent
cutback concerns, but modifying certain other provisions that are fundamental to participants’
accrued benefits (e.g., compensation definition, service count, and benefit formula) may not be
possible for any number of reasons (for example, due to collective bargaining requirements).

Third, in some instances, the Service would need to allow the plan document to be
comprised of multiple preapproved plan documents, for instance with separate adoption
agreements for different groups of participants. Section 414(l) and the regulations thereunder
clearly permit a single plan to utilize multiple plan documents. Making clear that such an
approach could also be utilized in the preapproved plan environment would remove a significant
barrier to the use of preapproved plans by large, complex plans. Such an approach also would
ensure that the plan document in its entirety contains language with respect to the legal
requirements which the Service had previously reviewed and approved, a result which would
give comfort to both the Service and the employer. Although having different benefit structures
for different groups of employees might result in nondiscrimination testing complexities, those
issues currently are handled as a matter of plan administration, subject to audit, rather than in a
DL request, so this aspect should not preclude expanding the preapproved plan program to
permit use of multiple preapproved plan documents to constitute the plan.

Another approach which could be of significant assistance to sponsors of complex IDPs
that would like to shift to a preapproved plan would be to allow the plan to consist of the existing
IDP for benefits accrued until the time of the conversion, and one or more preapproved plan
documents with respect to accruals after that date. The existing IDP benefit accruals accrued
prior to the conversion would remain protected by the plan’s prior DL (with respect to the plan
language and issues covered thereby, as recommended above), and future accruals would then be
protected by the use of the preapproved plan document or documents. This approach would
allow plans with existing provisions which are sufficiently unique as to not readily be brought
into a preapproved plan document to nonetheless shift to use of a prototype plan in a manner
which would not generate anti-cutback rule concerns (which conversions from an IDP to a
prototype plan document often entails, even for relatively simple plans). The existing plan
document covering the pre-conversion accruals would still need to be updated for changes in
law, but that could be accomplished in a variety of ways (for example, by using the Service’s
model language, or providing that the substance of legally required amendments to the
preapproved document would also apply to the prior document). Again, this approach would
appear to be advantageous for both the Service and the employer by helping ensure both parties
that the plan language, both before and after the conversion, had been reviewed for compliance.
We suggest that the Service also consider some additional steps as part of the glide path to assist plan sponsors with converting complicated plan designs to preapproved documents. These steps could include (i) step-by-step instructions for moving specific provisions to a preapproved document, (ii) a list of approved design options (possibly based on sample design trends from Form 5307 filings) that could be reflected in an adoption agreement addendum, and (iii) further relief for anti-cutback concerns related to the document changes.

C. Changes to Other Programs to Facilitate the Changes Described in Announcement 2015-19

Recommendation 5 — Remove Determination Letter Requirements from the SCP, VCP and Audit CAP

Issue

EPCRS currently requires a DL in a number of instances. First, plans must have DLs to self-correct significant operational failures under SCP. Also, to correct certain other failures, EPCRS requires a simultaneous VCP and DL application filing (i.e., certain operational failures corrected during the last twelve months of the plan’s remedial amendment period, certain nonamender failures, and certain other operational failures corrected by adopting a plan amendment to reconcile the document’s language with prior plan operations). Additionally, the factors considered in determining penalties associated with Audit CAP include whether (i) there is a current DL and (ii) the Service discovered a nonamender issue during its review of a separate, unrelated DL application.

Recommendation

We recommend eliminating requirements for DLs and simultaneous DL submissions under EPCRS, including (i) allowing self-correction under SCP for significant operational failures without regard to whether the plan has any DL, (ii) permitting plan sponsors to adopt retroactive amendments to self-correct operational failures under SCP without a requirement to submit a simultaneous DL application, and (iii) eliminating the requirement for a DL application with respect to any nonamender failures under VCP.

Explanation

Because DLs will be broadly unavailable for IDPs in the future, fairness requires eliminating requirements that a plan have a DL in order to utilize EPCRS and other programs. Eliminating the DL requirement would provide consistency between IDPs and preapproved plans. It would also facilitate the correction of operational failures.

For example, failing to remove the DL requirement for SCP would cause many IDPs to be ineligible for self-correction. We recommend that the Service also permit a retroactive

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27 Rev. Proc. 2013-12, § 4.03.
28 Rev. Proc. 2013-12, § 6.05.
amendment under SCP without a requirement to submit a DL application, especially when there is no negative impact on participants’ benefits (in other cases, the Service could require a limited scope DL application with respect to the amendment itself). For example, if a 401(k) plan’s compensation definition excludes bonuses and the plan sponsor erroneously includes bonuses in the definition of compensation, we recommend that the Service permit the plan sponsor to amend the plan’s compensation definition retroactively to include bonuses using SCP.

With respect to nonamender failures that currently require simultaneous VCP and DL application filings, we recommend that the requirement for a DL application be eliminated for reasons similar to those indicated above. This change removes any requirement for a simultaneous VCP and DL application filing for operational failures. We assume this result — fewer DL applications — is consistent with the aims of Announcement 2015-19. Alternatively, the Service could require or permit a simultaneous limited scope DL application focused on the amendment itself, as suggested in the next section.

As a tangential matter, certain other Service programs require a DL as proof of qualified status. For example, the Service issues a Form 6166 U.S. residency certification for employee benefit plans with foreign investments. Plans with valid certifications in place may apply to foreign tax authorities, pursuant to various U.S. income tax treaties, for certain favorable tax treatment (e.g., special withholding rates on certain distributions). We recommend the Service review all programs that currently require DLs as proof of qualified status and eliminate the requirement, or replace it (if necessary) with alternative documentation, such as an affirmation by the employer that the plan is intended to be a qualified plan, or a listing of key provisions which have language of a type normally included in qualified plans (such as provisions related to section 401(a)(17) or 415 limits).

Recommendation 6 — Provide VCP Compliance Statements with Substantive Relief

**Issue**

Compliance statements received in connection with EPCRS do not constitute a determination that a corrective amendment complies with the qualification requirements or that the amendment conforms plan terms to prior operations.\(^{30}\) A VCP compliance statement merely permits an employer to treat the corrective amendment as timely for purposes of determining the availability of the remedial amendment period.

**Recommendation**

We recommend that the Service expand VCP to allow for a limited-scope determination regarding the form and substance of the submitted amendment.

**Explanation**

In the absence of the five-year remedial amendment cycle program, we think it would be appropriate for the Service to expand VCP to include a limited-scope determination regarding

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\(^{30}\) Rev. Proc. 2013-12, § 10.08(2)(a).
the form and substance of the submitted amendment. Alternatively, the Service could allow the employer to submit a simultaneous modified limited scope Form 6406 DL request to obtain a similar determination. For employers that seek such a determination, the Service could eliminate the reduced fee schedule for nonamender failures so that no reduced fees applied to any compliance request that included a determination that the amendment complied, in substance, with the section 401(a) qualification requirements.

Recommendation 7 — Reduce Audit CAP Sanctions for Nonamender Failures

Issue

Audit CAP sanctions vary significantly depending on the size of the plan and severity of a plan failure, including a nonamender failure.

Recommendation

We recommend a reduced flat Audit CAP sanction for failures related to untimely good faith, interim, or optional amendments related to law changes.

Explanation

Currently, Audit CAP sanctions regarding failures to timely amend plans vary significantly depending on the size of the plan and severity of the failure, considering that plan sponsors are in position to seek DL reviews. However, with Announcement 2015-19, plan sponsors will lose the ability to seek DL review and make minor plan corrections in conjunction with that process. As a result, plan sponsors will face the risk that nonamender failures (ordinarily discovered during the DL process) will not be detected until the plan enters Audit CAP. We, accordingly, recommend a reduced flat Audit CAP sanction for failures related to untimely good faith, interim, or optional law changes.

There is precedent for a reduced sanction for these nonamender failures. Section 14.04(3) of Revenue Procedure 2013-12\(^{31}\) currently provides a 40% reduction of the fee otherwise applicable if the sole failure consists of the failure to adopt good faith, interim, or optional law change amendments before the plan’s extended remedial amendment period expires. Additionally, if the sole failure consists of a failure to adopt an amendment required in connection with a DL within the remedial amendment period, the applicable fee is $1,000 regardless of the number of participants if the employer adopts the amendment within three months of the expiration of the remedial amendment period for adopting that amendment.\(^{32}\) Considering that plan sponsors may lose extended remedial amendment period protection after December 31, 2017, and reduced sanctions in section 14.04(3) and (4) of Revenue Procedure 2013-12 only apply if the remedial amendment period is open, we recommend that the Service expand this relief to cover a broader range of nonamender failures in a manner complimentary to the changes implemented for remedial amendment period and interim amendment guidance.

\(^{31}\) 2013-4 I.R.B. 313.

Recommendation 8 — Limit Requirements for Retroactive Corrections of Plan Document Failures to the Standard Audit Cycle

**Issue**

Historically, there has been a concern that once a plan qualification issue has arisen, the plan’s qualified status remains subject to question until the qualification issue has been resolved retroactively to the year in which it arose, regardless of how many years in the past that may have occurred.\(^{33}\)

**Recommendation**

We recommend that, except in egregious cases involving willful and material violation of the qualification requirements, the Service not require retroactive correction of plan document errors identified on audit, as part of a DL request at termination, or in connection with EPCRS, for periods prior to those covered by the Forms 5500 due or filed for the plan during the six years prior to the date of the audit or date of plan termination, and that for situations involving only minor plan document errors, only prospective corrections be required.

**Explanation**

Under the current and prior procedures regarding DL requests, sponsors of IDPs could receive periodic review of plan documents for compliance with qualification requirements and address document failures in a reasonably prompt manner. Failures which had arisen during the five-year cycle, such as due to a failure to timely amend for a change in law, could be corrected back to the time the failure occurred, but that timeframe could not extend earlier than the beginning of the five-year cycle. Moreover, although a Service agent reviewing a DL request might identify issues predating the five-year cycle with respect to previously approved plan language, any corrections with respect to that language could be made only prospectively.

In contrast, under the anticipated new regime, the Service’s review and approval of plan language for IDPs generally would be available only for a new plan or upon plan termination. Plans typically exist for decades — indeed one of the qualification requirements is that they be intended to be permanent. Consequently, on plan audit or as part of a DL request made upon plan termination, a Service agent may in the future identify a plan document qualification issue which arose decades in the past. If such a plan document failure is required to be corrected retroactive to the time it initially arose, it is possible, and in many cases even likely, that years’ worth of operational corrections might need to be made, disrupting the good faith expectations of plan sponsors, fiduciaries and participants, alike. The potential expense, disruption and exposure involved are likely to cause many plan sponsors and their advisors to view continuing a plan under such a regime to be untenable.

To avoid this result, and make the new procedures fairer and more viable, we think it would be appropriate to limit the extent to which plan document failures must be retroactively corrected.

corrected in order for the plan to be treated as qualified on an ongoing basis. A range of potential limits could be considered, but tying the limit to the periods covered by Forms 5500 due or filed within the six years before the audit or plan termination seems both legally justified and to strike a reasonable balance between the competing concerns of appropriate tax administration and risks to employers, employees and plan fiduciaries. In most contexts, the Service generally is foreclosed from investigating tax issues or seeking recovery with respect to periods that predate the standard three-year audit cycle, except that in the case of substantial underreporting, that period is extended to cover returns due or filed within the six years prior to the audit (“the extended six-year audit cycle”). The potential ability of the Service under the new regime to mandate changes which could go back before the beginning of that extended six-year audit cycle, and potentially decades before that time, would be anomalous, and effectively treat qualified plans and the employers that decided to voluntarily maintain them in a considerably harsher manner than other taxpayers. On the other hand, if only prospective changes were required, even with respect to meaningful plan document failures, employers might not have sufficient incentive to attempt to maintain their plans in a qualified manner. Having a standard which, in general, requires retroactive correction to the beginning of the extended six-year audit cycle would provide substantial incentive for employers, plan fiduciaries and their advisors to keep plan provisions and operations in compliance with applicable qualification requirements, thus reducing the potential exposure. Moreover, it would allow the Service auditors to focus, as presumably they typically would, on issues integrally related to audit periods the Service generally would use, rather than to the potentially distant past.

Section 1101 of PPA and section 7805 both provide authority to take the steps recommended herein. PPA section 1101 grants the Secretary “full authority to establish and implement the Employee Plans Compliance Resolution System (or any successor program) and any other employee plans correction policies, including the authority to waive income, excise, or other taxes to ensure that any tax, penalty, or sanction is not excessive and bears a reasonable relationship to the nature, extent, and severity of the failure.” The ability to determine the scope of corrections required is an inherent part of the authority to establish and implement a correction policy, and the ability to forego requiring corrections retroactive to distant periods of time also would reasonably come within the authority to waive sanctions. Similarly, the general regulatory authority of the Service to “prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue” would encompass rules regarding the extent to which retroactive corrections with respect to prior years must be satisfied for a plan to be treated as qualified during a current year.

Furthermore, the position that in order for a plan to be qualified, any potential qualification issues must be corrected retroactively to the time that the issue first arose does not appear to be explicitly required by sections 401 and related provisions. Indeed, sections 402 and 404 focus on whether a plan is qualified during the relevant taxable year of the trust, employer, distributee or participant involved. Moreover, one could reasonably argue that the statute of limitation provisions in the Code provide a constraint on the ability (or at least appropriateness) of the Service requiring corrections with respect to events in closed years in order for a plan to be treated as satisfying the qualification requirements in a current year. Although requiring retroactive correction for plan document failures going back to the year in which the failure first occurred may be supportable on policy grounds in a context where DLs are available on a
periodic basis, the fairness of rigidly maintaining such a position where such DLs are not available is questionable.

The approximate length of retroactive corrections under an extended six-year audit cycle standard also seems appropriate in light of other existing legal standards. For example, it would roughly comport with (though be somewhat longer than) the maximum length of retroactive corrections under the current five-year remedial amendment cycle procedures, for plans which have sought and received current DLs. It also would be similar to the length of potential retroactive corrections under the six-year remedial amendment period for preapproved plans. It also would be similar to the general six-year statute of limitations applicable under ERISA with respect to fiduciary breaches.\(^\text{34}\) Plan document errors generally would not constitute fiduciary breaches, of course, since adopting plan amendments is a settlor function. Nevertheless, the six-year statute of limitations for fiduciary breach actions seems a reasonable standard for this purpose. If the plan document had been correct from the outset but the fiduciary had improperly administered it, any resulting claim for fiduciary breach would be subject to that general six-year statute of limitations.

In two situations, it would appear appropriate to diverge from the extended six-year audit cycle standard. The first is a situation in which the plan document failure involves a willful and material violation of the qualification requirements. Although the vast majority of plan sponsors design their plans in a good faith attempt to satisfy the qualification requirements, where there is a willful, material violation, it would appear inappropriate to shield an employer from the need to retroactively correct the issue back to the date of the failure. The second is a situation at the opposite end of the spectrum — in which the plan language failure is minor, such as a small deviation from what the Service agent may conclude would have been the correct language. In our view, such foot faults should not require retroactive correction. Similarly, where the plan provisions at issue were not called into operation, in our view retroactive correction should not be required.\(^\text{35}\)

IV. OTHER RECOMMENDATIONS CONCERNING INDIVIDUALLY DESIGNED PLANS THAT SHOULD BE PERMITTED TO APPLY FOR DETERMINATION LETTERS

Announcement 2015-19 suggests that the Service will continue reviewing DL applications in limited circumstances and will seek public comment periodically to help identify situations appropriate for continued plan qualification review.

Recommendation 9 — Allow Limited Review Program for Section 436 Provisions for Cycle B Plans

\(^{34}\) ERISA § 413, 29 U.S.C. § 1113.

\(^{35}\) Although not directly on point, \textit{Aero Rental v. Commissioner}, 64 T.C. 331 (1975), viewed the fact that no circumstances arose which caused the objectionable provisions of the plan to be called into operation, as well as the employer’s exercise of reasonable diligence in attempting to obtain a DL, as sufficient grounds to allow relief from the amendment timing requirements of section 401(b). The first factor would also seem relevant in weighing the extent to which retroactive amendments should be required under correction programs going forward, in a context in which DLs for ongoing IDPs are not available.
Issue

Unlike all other defined benefit IDPs, those which fall into Cycle B have not had an opportunity to receive a DL that covers the requirements of section 436.

Recommendation

We recommend that the Service review Cycle B defined benefit plans that employers would have submitted for a DL between February 1, 2017, and January 31, 2018, or, at least, open a limited review program (similar to the modified Form 6406 program described below) to allow for review of the section 436 provisions of these plans until January 31, 2018.

Explanation

Unlike other defined benefit IDPs, Cycle B defined benefit IDPs currently have no DL that covers the section 436 amendment. Notice 2011-97 explicitly stated that the Service would not review a Cycle B plan’s section 436 language, even if the submission included that language.

Recommendation 10 — Permit Determination Letters for Certain Types of Individually Designed Plans

Issue

Currently, preapproved plan documents are not available for a number of types of plans. To the extent that the preapproved plan program is not expanded in a manner that will realistically cover those types of plans, eliminating their access to a DL program raises substantial policy and fairness concerns.

Recommendation

We recommend that the Service continue reviewing, pursuant to the existing staggered remedial amendment cycle structure, IDPs of a type for which preapproved plan documents either are limited or remain unavailable, including, at a minimum, the following types of plans: (i) hybrid plans that are not cash balance plans; (ii) multiemployer defined benefit plans; (iii) ESOPs with reshuffling, leveraging or S-Corporation features or that hold section 409(l)(3) securities; (iv) multiple employer plans; and (v) defined benefit pension plans with benefit structures that are too complex to reasonably fit within a preapproved plan design. In addition, we recommend that cash balance plans also be permitted a limited opportunity to apply for and receive a DL covering issues which include those under the final hybrid plan regulations.

Explanation

Although the Service has expanded the preapproved plan program to accommodate certain types of plans for which preapproved documents were not previously available, including cash balance plans and certain basic ESOPs, and although these Comments include additional

suggestions for making preapproved documents more useful to large, complex plans, we believe there still are plans that will not fit within a preapproved plan document structure due to their type or their prior history. For these plans, we recommend that DL submissions remain available in accordance with the existing five-year remedial amendment cycle system. The number of plans that fall into these categories is likely to be modest, so reviewing applications for these specific plan types at the end of their respective remedial amendment cycles should pose only a limited burden on the Service. Many, if not most, of these plans involve unusual issues or include numerous participants. The disqualification risks to the sponsors and participants of these plans outweigh the costs expended to review their DL applications.

The expedited handling rules set forth in Revenue Procedure 2015-4, Section 9.03(3), also provide circumstances that may be appropriate for a limited DL review (generally, circumstances outside the employer’s control that create a need for a letter to avoid serious business consequences).

Finally, the Service has only recently issued the final set of hybrid plan regulations related to changes under the PPA, and certain of the applicable requirements will become effective only for plan years beginning on or after January 1, 2017. Cash balance plans, as well as other hybrid plans, have not yet had an opportunity to receive DLs covering these very significant changes. Many employers have, however, shifted to hybrid plan designs, or made amendments to existing hybrid plans, with the reasonable expectation that a DL plan program would be available that would address the hybrid plan requirements. In this context, we think it is appropriate for the Service to provide the opportunity for all hybrid IDPs, including cash balance plans, to be submitted for a DL that covers the totality of the final hybrid plan regulations.

Recommendation 11 — Issue Guidance Clarifying the Meaning of “New” Plan

Issue

Announcement 2015-19 suggests that a new plan is a plan that has not received a DL by way of a Form 5300 application (regardless of its adoption date) and elsewhere refers to new plans as those “defined in section 14.02(2) of Rev. Proc. 2007-44.” These two categorizations are not consistent.

Recommendation

We recommend that the Service issue clarifying guidance concerning the meaning of “new” plan and that the concept include any plan that has not received a DL as an IDP pursuant to a Form 5300 application, regardless of the plan’s adoption date.

Explanation

Although we believe the Service intended the term “new plan” in Announcement 2015-19 to include more than recently established plans and (for purposes of the revised DL process) to include plans that have no DL, the reference to new plans “as defined in section 14.02(2) of Revenue Procedure 2007-44” adds an element of confusion. That section states that:
For this purpose, a new individually designed plan is a new plan that as of the
date the application is submitted with respect to the plan would be a new plan
within its initial remedial amendment cycle under section 1.401(b)-1(b)(1) of the
regulations, as summarized in section 2.03 of this revenue procedure (determined
without regard to the extension under section 5.03 of this revenue procedure).

Under that definition, a plan would constitute a new plan only until the tax return due date with
extensions after its initial adoption date. It would not encompass plans that have existed for a
longer timeframe, but which a plan sponsor had not yet decided to submit. We believe the
Service intends such existing plans to have an opportunity to make an initial DL submission, and
would urge such an approach as the appropriate one. It is important to both plan sponsors and
participants for plans to have an opportunity to receive at least one DL, and, but for the
anticipated curtailment of the DL program, such sponsors would have been permitted to submit
their plans for DLs at any time in the future.

In addition, we think it is important to clarify the “new plan” concept in connection with
plans that are formed through a plan merger, consolidation, spinoff or asset transfer, such as may
often occur in a corporate transaction, in order to avoid confusion, both for plan sponsors, plan
participants and the Service, regarding the scope of any remaining protection afforded by any
prior DLs issued with respect to the prior plans in the transaction. In general, we believe that it
is appropriate to view such transactions as creating new plans which should be eligible for initial
DLs. We also recommend the Service clarify that at least through the time that such a DL can
reasonably be requested and obtained, the employer, employees and plan fiduciaries will be
entitled to continued reliance on the DLs covering the plans involved prior to the plan merger,
consolidation, spinoff or asset transfer.

Not providing a DL program for IDPs involved in mergers, spinoffs or asset transfers in
connection with corporate transactions is a real concern because it could have a chilling effect on
a purchaser’s willingness to assume sponsorship of, or transfers of assets from, the plans of
sellers or the acquired entities. This will be the case especially if there are concerns that the plan
might not meet the section 401(a) requirements (and purchasers often have these concerns, if for
no other reason than the fact that they would have little in-depth knowledge regarding plan
operations until after an acquisition). There already is a trend among purchasers to terminate
plans, especially those sponsored by smaller target companies, before finalizing (or otherwise in
connection with) a transaction, rather than merging them into the purchasers’ plans. Removing
the opportunity for a current DL that clearly covers the resulting plan may exacerbate this type of
termination activity, significantly impacting retirement savings and creating unnecessary leakage
with cash distributions at termination.

Finally, we think it would be helpful to clarify that an employer that adopts a
preapproved plan but makes an amendment that causes it to become an IDP (for example,
amending the basic plan document to permit an affiliated service group member that is not a
controlled member to participate in the plan) will be allowed to request an initial DL for the plan.
Announcement 2015-19 states that with the elimination of the five-year remedial amendment
cycle system, a sponsor of an IDP may submit a request for a DL as an initial application, if no
prior Form 5300 has been filed with respect to the plan. Announcement 2015-19 goes on to say
that the Service will provide guidance on limited circumstances when this limitation will be
waived. The circumstance here (amending a preapproved plan to become an IDP) should be one of those “limited circumstances.” The language in Announcement 2015-19 could be read to permit this already, but it would be helpful to have this interpretation confirmed. Obviously, further guidance also would have to indicate the due date for filing the application. We believe that one reasonable option would be the due date for the tax return of the sponsor’s taxable year in which the amendment was made.

Recommendation 12 — Reopen a Modified Limited Review Determination Letter Program

**Issue**

In prior years, employers and other plan sponsors and administrators could file a Form 6406\(^{37}\) to request a review of particular amendments rather than the entire plan.

**Recommendation**

We recommend that the Service implement a modified Form 6406 program to allow for review of specific types of plan amendments.

**Explanation**

The prior Form 6406 program permitted employers to request review of certain minor amendments. Such a review provided protection with respect to the amendment’s terms, but did not require the Service to review the entire plan. Minor amendments under the prior program did not include significant changes to plan benefits, coverage, and changes affecting other plan qualification provisions.

We recommend that the revised program be designed to encompass more than “minor” plan amendments, while not being sufficiently broad to require the Service to review an entire plan. For example, the resulting program could refuse applications requesting a DL review for an entire plan restatement. On the other hand, the limited DL program could review:

1. Amendments correcting egregious errors submitted to VCP;
2. Amendments adding cash balance or other hybrid plan features;
3. Amendments required in connection with a sponsor’s bankruptcy proceeding;
4. Amendments directly impacting the amount of a sponsor’s deduction (e.g., benefit formula increase, employer contributions (nonelective or matching) for specified employee groups rather than all participants);
5. Cycle B defined benefit plans, until January 31, 2018 (or, as explained above, the section 436 amendment adopted for these plans); and
6. Other amendments identified by the Service.

\(^{37}\) Form 6406 (Short Form Application for Determination for Minor Amendment of Employee Benefit Plan).
Eligibility for the prior program required a favorable GUST DL.\textsuperscript{38} Similarly, the revised program could require a favorable EGTRRA DL.\textsuperscript{39}

Reinstating a modified Form 6406 program would be helpful especially for employers with IDPs that, as a practical matter, are unable to convert to a preapproved document.

The Service could extend the revised Form 6406 program to merger and acquisition activity that meets certain requirements, for example, a threshold plan asset value in the acquired plan or participant count in the acquired plan.

V. Changes to Determination Letter Program May be Inconsistent with the Statutory History of ERISA and Congressional Intent

Congress both acknowledged and solidified the DL program for qualified plans by adding several provisions with the passage of ERISA. Section 7476 and ERISA section 3001 were added as a process for obtaining declaratory judgments and requirements for notices to interested parties, respectively. The DL program is thus tied to these statutory provisions.

ERISA’s legislative history is illustrative of Congress’ intent for enacting these additional protections:

As a practical matter, there is no effective appeal from a Service determination (or refusal to make a determination) that a proposed pension plan fails to qualify for the special tax benefits. In these cases, although there may be a real controversy between the employer and the Service, present law permits the employer to go to court only after he has made contributions to the plan, deducted them, and had those deductions disallowed. The long time period and the related uncertainty, coupled with the threat of the ultimate loss of the tax deduction, almost always causes the employer to go along with the Service, even if he disagrees with the Service’s position. In addition, the determination letter procedure does not permit employees, or their unions, to question the qualification of plans. [The] committee believes that both employers and employees should have a right to court adjudication in the situations described above.\textsuperscript{40}

Section 7476 and ERISA section 3001 may be read as indicating Congress’s intent and expectation that the Service continue providing a DL program, arguably including one that

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covers ongoing IDPs. More expansively, as the Service has previously accepted,⁴¹ there is a reasonable argument that these sections should be viewed as requiring the Service to provide such a program. Even without reading the language so broadly, if the Service ceases to provide such a program for IDPs, plan sponsors might seek a declaratory judgment from the Tax Court as to plan qualification. Consequently, even if the Service is not required by statute to provide a DL program for on-going IDPs, we believe that failing to do so may run counter to the intent of Congress, lead to unnecessary burdens on the Tax Court due to the potential filing of numerous declaratory judgment actions, and result in inefficient administration of the law for the courts, plan sponsors, employees, and ultimately the Service.

**Declaratory Judgments and Notice to Interested Parties**

Under section 7476(a), employers (and certain other parties including the plan administrator, employees who are interested parties, and the Pension Benefit Guaranty Corporation (“PBGC”)) may obtain a declaratory judgment from the Tax Court regarding the initial or continuing qualification of a plan in several circumstances. Under section 7476(a)(2), those circumstances include where the Service fails to make a determination with respect to (i) the initial qualification of a plan, or (ii) the continuing qualification of a plan, where the issue arises from a plan amendment or plan termination.⁴²

Section 7476 also provides that the Tax Court must determine that the petitioner (usually, the sponsor) issued any required notice to interested parties of the request for a determination from the Service and exhausted all administrative remedies available with the Service before the Court can issue a declaratory judgment or decree.⁴³ Additionally, the statute indicates that “[a] petitioner is not deemed to have exhausted its administrative remedies merely because the Service has failed to make a determination before the 270th day following the request for such determination.” The Service’s Internal Revenue Manual explains that the purpose of the 270-day period of section 7476(b)(3) “is a minimum period, enabling respondent to consider ruling requests without judicial interference.”⁴⁴

ERISA section 3001 provides for certain procedures in connection with DLs, including notice to interested parties and also their opportunity to comment on the determination request. Interested parties here include employees who are interested parties under section 7476, and also the Secretary of Labor and PBGC.⁴⁵

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⁴¹ See the discussion in the “Statutory and Regulatory Framework” section of the white paper referenced in Announcement 2003-32, *The Future of Employee Plans Determination Letter Program: Some Possible Options* (Aug. 8, 2001) (to implement such changes to the DL program “enabling legislation modifying or eliminating the [7476 and 3001] requirements would be needed”).

⁴² I.R.C. § 7476(a)(2)(A) and (B).

⁴³ I.R.C. § 7476(b)(2) & (3).

⁴⁴ I.R.M. 35.3.8.2 (Aug. 11, 2004).

⁴⁵ ERISA § 3001(b)(1).
Scope of Relief Afforded by Section 7476

A plain reading of section 7476 indicates that relief, in the form of a declaratory judgment, is available whenever the Service has failed to provide a ruling as to the qualified status of a plan. Moreover, this relief is available not only to receive an initial determination or a determination on plan termination, but also to receive a determination with respect to the impact of any amendment on an ongoing plan. By its terms, the relief is available whenever the Service declines to provide such a ruling, assuming the petitioner provided interested parties with notice and exhausted its administrative remedies. As regards exhaustion of administrative remedies, all the statute requires is that the petitioner have made a request (i.e. asked the Service to provide a determination) and not received a favorable determination within 270 days. The legislative history evidences the purpose of the relief provided by section 7476:

Both the House bill and the Senate amendment provide a procedure for obtaining a declaratory judgment with respect to the tax-qualified status of an employee benefit plan. Under both the House and the Senate versions of the bill, jurisdiction to issue a declaratory judgment is given to the United States Tax Court. This remedy is available only if the Internal Revenue Service has issued a determination as to the status of the plan which is adverse to the party petitioning in the Tax Court, or has failed to issue a determination but the petitioner has exhausted his administrative remedies inside the Internal Revenue Service.46

Nothing in the statute states that access to the relief in section 7476 is contingent on the Service deciding to continue to provide a DL program with respect to plans in general or any subset of them, including ongoing IDPs. Arguably, the Service’s failure to provide such a DL program merely demonstrates that DL requests to the Service for ongoing IDPs are futile, and that the petitioner has exhausted its administrative remedies and is all the more entitled to a ruling regarding such a plan from the Tax Court. Consequently, if the Service continues with its proposal to eliminate the DL program for ongoing IDPs, the result may be to burden the Tax Court with the need to make such determinations.

Such a result would be inefficient for the Tax Court, employers and participants alike. Given that Congress clearly intended for employers and other participants to have recourse to the Tax Court where the Service failed to timely provide a favorable determination as to a plan’s qualification, it might be inferred that Congress’ expectation and intent was that the Service would continue to provide a DL program, including with respect to ongoing plans. In that context, in most situations the Service would either resolve the qualification issue with the plan sponsor, or have made an adverse determination, so that the Tax Court would be in position to act in its typical role of reviewing determinations made by the Service, as opposed to making the initial determination as to a qualification issue.

It is evident from the legislative history that Congress did not expect the remedy provided by section 7476 to stand alone absent determinations by the Service through the DL program. Thus, it would not be unreasonable to interpret section 7476 as containing an implied requirement for the Service to maintain a DL procedure for ongoing plans, including IDPs, rather

than as only having efficacy for such time as a DL program is in effect. Such an interpretation would be bolstered by the underlying purpose of section 7476 to ensure that employers and other petitioners would have a mechanism for receiving a determination as to a plan’s tax qualification, and of ERISA section 3001 to provide a mechanism for participants and other interested parties, including DOL and as applicable PBGC, to receive notice and opportunity to comment with respect to determinations as to plan’s qualified status. Therefore, based on the foregoing, we believe that eliminating DLs for ongoing qualification of IDPs may be inconsistent with Congressional intent. The Service itself has noted in the past that to implement such changes to the DL program “enabling legislation modifying or eliminating the [7476 and 3001] requirements would be needed.”

Conclusion

We believe that there is a reasonably strong argument that eliminating the DL program for ongoing qualification of IDPs would be inconsistent with Congressional intent. The statute itself does not carve out IDPs, nor does it differentiate between providing protection for initial or continuing qualification. Failing to allow plan sponsors to seek continuing qualification also could result in placing the burden on the Tax Court, rather than the Service, to make the initial determination as to plan qualification issues arising with respect to ongoing plans.

Such an approach could result in an inefficient and inappropriate use of government resources (for both the Tax Court and the Service) and private sector resources, alike, which would seem out of alignment with the “lean six sigma” principles which have been cited as a rationale for the proposed approach. Moreover, requiring the entire range of potential plan qualification issues to be evaluated initially by the Tax Court, rather than through an organized review process by experienced agents at the Service, also could lead to the uncertainty “coupled with the threat of the ultimate loss of the tax deduction” that Congress tried to avoid when it enacted section 7476 and ERISA section 3001.

Based on these considerations, we respectfully urge the Service to reconsider eliminating DL program for ongoing IDPs.

\[47 \text{ See note 41.}\]