



IRS Finally Issues New Procedures for Pre-Approved Plan Submissions

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Defined Contribution Application Deadline is January 31, 2012 ASci Gears Up for Submissions

Since February 1, 2011, plan sponsors and mass submitters have had the opportunity to submit their pre-approved defined contribution plans to the Internal Revenue Service to obtain new opinion and advisory letters. This was the beginning of the second 6-year remedial amendment cycle for pre-approved (master & prototype (M&P) and volume submitter) plans. However, since the IRS also had indicated that it intended to issue revised procedures relating to these submissions, few, if any, plan sponsors or mass submitters have submitted their plans. Now the IRS finally has issued the guidance in the form of Revenue Procedure 2011-49.

ASC Institute (ASci) and our DGEM plan sponsors had anxiously awaited the new guidance, hoping for expansion of the pre-approved program and further clarification on certain matters. This hope was driven by several meetings that practitioners, including ASci attorneys, had with the IRS over the past several years and recommendation letters sent by ASPPA and other organizations. Unfortunately, the new revenue procedure offers only minor changes from the prior guidance under Revenue Procedure 2005-16.

This ASci Alert discusses the more important changes to the pre-approved plan submission procedures. In addition, it sets forth the process that ASci will use to revise its prototype and volume submitter plans and the submission of applications on behalf of our adopting plan sponsors.

Changes to Pre-Approved Plan Submission Procedures

While the immediate concern is the submission of pre-approved defined contribution plans, Revenue Procedure 2011-49 applies to both pre-approved defined contribution plans and pre-approved defined benefit plans. As mentioned, the changes to the pre-approved submission procedures were modest. The following discusses key changes and makes observations.

Submission deadline

All pre-approved defined contribution plan sponsors and mass submitters must submit defined contribution plans and applications for new opinion (M&P plans) and advisory (volume submitter) letters by January 31, 2012.

Observation: Mass submitters had an October 31, 2011 deadline. However, due to the delay in providing guidance, IRS extended the deadline to January 31, 2012 – the same deadline as for plan sponsors not utilizing a mass submitter's plans. ASci understands that IRS is considering an extension of the January 31, 2012 deadline. However, we are going forward with the expectation that January 31, 2012 is the deadline for revising our prototype and volume submitter plans and filing appropriate applications.

Delivery of amendments to adopting employers

Rev. Proc. 2011-49 now requires M&P and volume submitter sponsors to provide interim amendments, including the date of adoption, to their adopting employers. Under the revenue procedure, plan sponsors must "...make reasonable and diligent efforts to ensure adopting employers have actually received and are aware of all plan amendments and that such employers adopt new amendments when necessary." The IRS may ask plan sponsors for copies of the amendments. Failure to provide interim amendments may result in revocation of pre-approved plan sponsor status.

ASci Insight: The delivery of amendments requirement is not new, but Rev. Proc. 2011-49 clarifies the need to provide DATED interim amendments to adopting sponsors. ASci has provided interim amendments, with amendment dates, under the DGEM system. The revenue procedure does not address the many issues relating to the adoption of interim amendments, which are considered the most burdensome plan documentation requirement for plan sponsors and employers. Hopefully, IRS will provide some relief from the interim amendment requirement in future guidance.

M&P and volume submitter plans becoming more similar

While ASci and some other practitioners had hoped the IRS would eliminate the distinctions between M&P and volume submitter plans, the IRS made only minor changes in this direction, including:

- M&P plans may now provide for adoption as multiple

employer plans. Previously only volume submitter plans could accommodate multiple employer plans.

- Volume submitter sponsors may amend a plan on behalf of an adopting employer without having to obtain a determination letter for the amended plan. This change fixes a problem volume submitter sponsors had under the prior procedures. This correction now puts M&P and volume submitter sponsors in the same position.
- Based on the new List of Required Modifications (LRMs), it appears as though the IRS is no longer placing restrictions on cross-tested plan designs under an M&P plan. M&P and volume submitter plans now have available the same cross-tested plan options, including having each participant in his or her own group.

- Hybrid defined benefit plans (this includes cash balance plans)
- Combination 401(k) and defined benefit plans under Code §414(x)
- Plans with retiree medical accounts under Code §401(h)

ASCI Insight: The exclusion of ESOPs and cash balance plans is unfortunate. ASCi had gotten the impression that the IRS was considering these types of plans for the M&P and volume submitter programs. Now these plans must continue to take the form of an individually designed plan with the accompanying significantly higher determination letter user fees.

Amendment certification requirement

With their application for opinion or advisory letters, M&P and volume submitter plan sponsors must include a SIGNED certification that they, as plan sponsors, have made all required amendments to retain their plans' qualified status and timely communicated the amendments to adopting employers.

ASCI Insight: The amendment certification requirement is new and places an important burden on plan sponsors. The IRS has provided a sample of the certification, which reads: "Under penalties of perjury, I hereby certify to the best of my knowledge and belief that all necessary interim amendments required by the Internal Revenue Service to retain the qualified status of my master and prototype plans and/or volume submitter specimen plans have been made a part of such pre-approved plans and communicated timely to all my adopting employers."

ASCI Process for Submitting Applications for Pre-Approved Defined Contribution Plans

With the issuance of the new procedures, ASCi and plan sponsors must gear up for the document revision and application process. With the January 31, 2012 deadline looming for pre-approved defined contribution plan submissions, time is of the essence.

Process for Plan Sponsors Using ASCi Mass Submitter Plans

1. Determine which ASCi prototype and/or volume submitter documents you wish to sponsor.
2. Decide whether you wish adopt ASCi M&P plans on a word-for-word basis or as a "minor modifier" of the ASCi M&P plan. (The minor modification approach is not available for ASCi's volume submitter plans.)
3. Complete an ASCi enrollment package. This will include:
 - A form indicating the plans you wish to adopt.
 - A signed Form 2848, Power of Attorney, which authorizes ASCi to act on your behalf.
 - A signed certification that you, as plan sponsor, have made all required amendments to retain your plans' qualified status and communicated the amendments to adopting employers.
 - Appropriate fees.

Despite fewer distinctions, there remain differences between M&P and volume submitter plans, including:

- Only volume submitter plans may include governmental plan provisions. A volume submitter sponsor must provide for governmental plan provisions in a separate plan document (i.e., separate basic plan document or specimen "text-style" plan).
- Only volume submitter plans may take the form of a "text-style" plan. M&P must have a basic plan document (BPD) and adoption agreement (AA) format. As under prior procedures, volume submitter plans also may use the BPD-AA format.
- M&P plans, whether standardized or nonstandardized, may only use the safe harbor hardship distribution rules. In addition to the safe harbor distribution options, volume submitter plans may permit hardship distribution options that include nondiscriminatory and objective criteria.
- M&P sponsors may submit under the "minor modifier" rules, under which a plan sponsor may modify a mass submitter's plan to accommodate minor changes from a word-for-word adoption. Adopters of volume submitter plans may make minor modifications to the volume submitter specimen plan without submitting as a "minor modifier."
- M&P defined benefit plans may not include employee contributions, while volume submitter defined benefit plans may.

ASCI Insight: Unfortunately, even with fewer distinctions between M&P and volume submitter plans, plan sponsors must decide which and how many different formats they wish to support for their clients. Generally, the volume submitter plan provides the greatest flexibility, including the ability to make minor changes to the document and still use the Form 5307 for the determination letter filing. Changes to an M&P plan cause the plan to become an individually designed plan, which necessitates the use of the more expensive Form 5300x.

Ineligible plans

The revenue procedure specifically lists the following types of plans as ineligible to receive opinion or advisory letters:

- ESOPs

4. On or before January 31, 2012, ASCi will file on your behalf your Form 4461-B, your amendment certification, user fees and other necessary forms.

Expected Process after Submission whether Non-Mass Submitter or Mass Submitter Adopter

After the pre-approved plans are filed on or before January 31, 2012, the IRS must enter all the applications into their computer system. The plans then will be assigned to IRS employee plans specialists for review. Mass submitter plans receive priority review. If history is any indication, the review process will take about two years. The IRS will issue all opinion and advisory letters at the same time. We would predict that letters will be issued some time before May 1, 2014. This date will likely be the start of the two-year window for employers to adopt restated pre-approved defined contribution plans. The two-year window likely will run from May 1, 2014 through April 30, 2016.

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