ASC ALERT

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IRS Issues New Procedures for Pre-Approved Plans

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ASC will offer a free webcast discussing the new procedures for pre-approved plans on September 26, 2017. Please register at www.asc-net.com/AlertWebcast

The IRS has issued Revenue Procedure 2017-41, which makes significant changes to the IRS Pre-Approved Plan program. These changes are effective for pre-approved defined contribution and defined benefit plans beginning with the next six-year remedial amendment cycle. As provided under the new Revenue Procedure, the new deadline for the submission of pre-approved defined contribution plans is October 1, 2018. For Pre-Approved Plan sponsors with defined benefit plans, the new procedures will not have an impact until the next defined benefit submission period, likely in 2021 or later. The new Revenue Procedure does not cover 403(b) or 457(b) plans.

Background

The plan document world has been in a state of flux for the last few years as the IRS announced significant changes to its determination letter program for individually-designed plans. Individually-designed plans can now only receive determination letters for initial approval and upon plan termination. The IRS abolished the five-year restatement cycle for individual-designed plans as of the January 1, 2017 and, at this time, employers that restate or amend their individually-designed plans after initial approval may not apply for new determination letters until plan termination.

In light of the changes to the determination letter program and with the goal to encourage the use of Pre-Approved Plans, the IRS decided to revise its procedures for the Pre-Approved Plan program. Fortunately, before issuing new procedures, the IRS reached out to industry experts soliciting recommendations for the new program. After reviewing a series of recommendation letters, the IRS met with an industry task force, including ASC's John Griffin and Rich Hochman, last September. As reflected in the new Revenue Procedure, the IRS accepted many of the industry recommendations.

Highlights of the New Revenue Procedure

In general, the Revenue Procedure significantly streamlines the Pre-Approved Plan program, but retains the best aspects of the current program. Terminology is simplified and flexibility in plan design is enhanced.

ASC Insight: ASC is pleased with the direction the IRS has taken with the Pre-Approved Plan program. Over the years, the IRS has expanded its Pre-Approved Program and lessened the distinctions between different Pre-Approved Plan types. The new program continues this trend by making the Pre-Approved Plan program much more straight-forward and cost effective. This is beneficial to organizations sponsoring Pre-Approved Plans and adopting employers. The new program also helps the IRS in dealing with its budget and staff issues, by encouraging the use of Pre-Approved Plans rather than individually-designed plans.

Among the highlights of the new program are:

- The new program eliminates the terms "master and prototype (M&P)" and "volume submitter" plans and instead uses the term "Pre-Approved Plans." Organizations that sponsor a Pre-Approved Plan are now referred to as "Providers." Pre-Approved Plans may utilizethe basic plan document/adoption agreement format or atext-based format. While the procedure continues to usethe terms "standardized" and "nonstandardized" plans, the meaning has changed to reflect the elimination of M&P and volume submitter plans.
- Providers will receive "opinion letters" on their Pre-Approved Plans. The term "advisory letter" (previously used for approval letters for volume submitter plans) will no longer be applicable.
- The types of plan designs acceptable under the Pre-Approved Plan program is expanded. The previous procedure added cash balance plans and ESOPs as permissible Pre-Approved Plan designs. Thenew procedure also will allow church plans and ESOPs with 401(k) features to utilize the Pre-Approved Plan format.

- A Pre-Approved Plan may combine profit sharing, 401(k) and money purchase plan features into a single plan. This means that a single adoption agreement may include profit sharing, 401(k) and money purchase features.
- Cash balance plans may base the interest crediting rate on actual rates of return on plan assets, in addition to other safe harbor interest crediting methods. The use of the interest crediting rate based on actual rates of return on plan assets is not permissible under the current procedure.

ASC Insight: As previously mentioned, the new procedure affects the NEXT (i.e., the third) cycle of Pre-Approved Plans. The IRS currently is reviewing second cycle cash balance plans, which are not allowed to base the interest crediting rate on actual rates of return on plan assets. Since the third cycle is so far in the future, ASC and other practitioners have asked the IRS to consider allowing second cycle cash balance plans to base the interest crediting rate on actual rates of return on plan assets. The IRS is considering this and ASC and other practitioners are working with the IRS to develop acceptable plan language.

- The IRS will continue to accept determination letter applications (using Form 5307) for Pre-Approved Plans that are modified.
- The procedure clarifies that the IRS only considers tax qualification requirements and does not review Title I of ERISA requirements when issuing its opinion letters. Thus, adopting employers have no reliance that the provisions of the plans satisfy any requirements under Title I.
- The IRS will no longer review the trust/custodial provisions of a Pre-Approved Plan and trust/custodial provisions MUST be in a document separate from the plan provisions.

ASC Insight: Currently, ASC documents incorporate the trust provisions within the basic plan document and, under a separate program, the IRS will review and approve trust provisions in a separate document (with a $600 fee). This will not continue under the new procedure. ASC has concerns about the new approach to trust provisions. The IRS has not provided any guidance on acceptable trust language and creates compliance concerns by mandating that the trust provisions be set forth separate from the basic plan document.

- The IRS has clarified that electronic signatures are acceptable under the Pre-Approved Plan program. As stated in the procedures, "The signature requirement may be satisfied by an electronic signature that reliably authenticates and verifies the adoption of the adoption agreement, or restatement, amendment, or modification thereof, by the employer."

ASC Insight: ASC has facilitated the use of electronic signatures on its plan documents for many years. It is nice to see the IRS confirm its position. Practitioners who may have been reluctant to use the electronic signatures for its plans may now wish to consider use of this ASC document feature. Please contact sales@asc-net.com if you have questions.

Next Steps

The new Revenue Procedure brings welcomed enhancements to the Pre-Approved Plan program. These enhancements help plan drafters, Pre-Approved Plan providers and adopting employers. All plan providers should carefully read the new Revenue Procedure. Providers must fulfill certain responsibilities set forth under the Revenue Procedure to receive and maintain status as a "Provider" under the Pre-Approved Plan program. The specifics of the program have changed and Providers must become familiar with these changes.

The IRS has asked for comments on the new Revenue Procedure. Certainly, there are issues that need clarification, including the extent of reliance on opinion letters, guidance on the interim amendment requirements for Pre-Approved Plans, permissible trust language, etc. Also, the IRS will likely need to revise the procedures for Pre-Approved 403(b) Plans before the next submission cycle.

ASC Insight: ASC is closely reviewing the new Revenue Procedure and assessing its impact on its plan offerings. ASC is working with other document providers to provide comments on the new Revenue Procedure tothe IRS. The new procedure will significantly affect thedefined contribution plans ASC will submit as a masssubmitter for the next cycle. The submission deadline is October 1, 2018. Please feel free to provide ASC with your input on the new Revenue Procedure and possibleapproaches for our defined contribution plans.