ASC ALERT

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IRS Issues Guidance Important to Plan Document Providers, TPAs, and Plan Sponsors

• 2019 Operational Compliance List
• Revision of Plan Correction Procedures
• Limited Expansion of Determination Letter Program

Over recent weeks, the IRS has issued several items of guidance that are important to plan document providers, TPAs, plan sponsors, and others involved with qualified retirement plans. The guidance includes the 2019 Operational Compliance List, revisions to the plan correction (EPCRS) procedures and a limited expansion of the determination letter program for individually-designed plans. The guidance generally provides helpful expansions to programs or clarifications.

2019 OPERATIONAL COMPLIANCE LIST

The IRS periodically issues an Operational Compliance List (OCL) to assist plan sponsors and practitioners in achieving operational compliance by identifying plan qualification changes that are effective during a particular calendar year. [https://www.irs.gov/retirement-plans/operational-compliance-list] The most recent OCL includes plan qualification changes for years 2016 through 2019. The last OCL, issued in March 2017, already included the changes listed for years 2016 and 2017. The new OCL adds changes for years 2018 and 2019.

ASC Insight: The OCL and the Required Amendments List (RAL) (indicating when individually-designed plans need to be amended for plan qualification changes) generally are intended to provide guidance to individually-designed plan sponsors. However, the OCL provides useful guidance to pre-approved plan providers and plan sponsors on plan qualification requirements that are effective for a given year. Unfortunately, the RAL is not applicable to pre-approved plans, which may not use the RAL in determining when interim amendments are necessary.

The OCL lists the following changes effective in 2019:

- Changes from the Bipartisan Budget Act of 2018, including the elimination of the requirement to take a loan before a participant can take a hardship distribution, the expansion of hardship distribution sources, and the elimination of the 6-month suspension requirement for hardship distributions;
- The proposed regulations regarding hardship distributions, which include regulations covering the changes from the Bipartisan Budget Act of 2018 as well as other regulations relating to hardship distributions;
- Relief for victims of Hurricanes Florence and Michael; and
- Extension of temporary nondiscrimination relief for closed defined benefit plans (Notice 2018-69).

ASC Insight: The OCL includes a statement that "Taxpayers may rely on the proposed regulations [on hardship distributions] until the date of the publication of the final regulations…" This is the first time that the IRS has "officially" indicated that plans may rely on the proposed regulations. Informally, the IRS has acknowledged that it failed to include the typical "reliance" statement in the proposed regulations, even though that was the intent. The OCL statement should provide plan providers and sponsors with the comfort that they may implement the rules in the proposed regulations without fear that the final regulations will provide retroactive rules that are more restrictive than the proposed regulations.

With regard to plan amendments for the proposed regulations on hardship distributions, the OCL generally recites the same guidance that was included in the preamble of the proposed regulations. The 2019 OCL states that "any plan amendments relating to the final regulations will be treated as integrally related to

a disqualifying provision, and will thus have the same amendment deadline as a disqualifying provision, as set forth in Rev. Proc. 2016-37." The guidance then goes on to provide specifics for individually-designed plans (i.e., amendments are not due until the end of the second calendar year that begins after the issuance of an annual RAL that includes the final regulations), but provides no specific guidance for pre-approved plans. At this time, the need for a pre-approved plan to adopt an interim amendment reflecting the proposed regulations is uncertain. ASC has requested clarification from the IRS on the timing of a pre-approved plan's interim amendment (if any). The IRS has indicated that it is in active discussions on the matter and will provide guidance in the future.

The OCL lists the following changes effective in 2018:

- The final regulations allowing the use of forfeitures to fund QNECs, QMACs and safe harbor contributions;
- Relief for the California wildfires;
- Extension of temporary nondiscrimination relief for closed defined benefit plans (Notice 2017-45);
- Extended rollover periods for certain amounts; and
- Refunds of improper tax levies.

REVISION OF PLAN CORRECTION (EPCRS) PROCEDURES

The IRS has issued Revenue Procedure 2019-19 [https://www.irs.gov/pub/irs-drop/rp-19-19.pdf], which revises its Employee Plans Compliance Resolution Program (EPCRS) procedures to expand the ability of plan sponsors to use the Self-Correction Program (SCP) to correct certain plan document failures and plan loan failures. The procedure also now allows additional methods for correcting operational failures by plan amendment under SCP.

ASC Insight: Revenue Procedure 2019-19 comes quickly after the IRS's last revision of the EPCRS procedures (Revenue Procedure 2018-52, which became effective on January 1, 2019). The new procedure reflects the IRS's response to practitioner suggestions to increase the ability of plan sponsors to self-correct certain qualification failures, rather than go through the Voluntary Compliance Program (VCP), which requires a submission to the IRS with a potentially hefty user fee. The higher VCP user fees have discouraged plan sponsors from correcting plan errors through the VCP. The new procedure will allow plan sponsors to self-correct certain errors without paying high VCP user fees.

Plan Amendment Failures

Under prior procedures, the ability for a plan sponsor to self-correct plan amendment failures was very limited. The new procedure provides that plan sponsors may use SCP to correct plan document failures due to the inclusion of a prohibited provision or the omission of a provision required for plan qualification. Because the IRS has deemed all such failures as "significant" failures, plan sponsors must self-correct within the 2-year correction period for significant failures under SCP. The self-correction procedures apply to both qualified plans under Code §401(a) and plans under Code §403(b). The procedures do not apply to the failure to timely adopt discretionary plan amendments. (Generally, plan sponsors must continue to make discretionary plan amendments by the end of the plan year for which the discretionary amendment is effective.)

ASC Insight: While the new self-correction procedures are a welcomed improvement to EPCRS, their application to pre-approved plans is somewhat unclear. Certainly, it appears that adopting employers that missed required interim amendment deadlines may avail themselves of the new procedures. Less clear is the situation where an adopting employer fails to restate its plan by the appropriate restatement deadline. (For example, pre-approved 403(b) plans have a restatement deadline of March 31, 2020 and pre-approved defined benefit plans have a restatement deadline of April 30, 2020.) The issue relates to the wording in the procedure setting forth the conditions necessary for a pre-approved plan adopter to utilize the new self-correction procedures. A strict reading could prevent adopting employers who miss the restatement deadline from self-correcting. Informally, the IRS has indicated that this result was not intended and that adopting employers that miss a restatement deadline may self-correct the failure.

Plan Loan Failures

The new EPRCS procedures greatly expand the ability of plan sponsors to self-correct plan loan failures. Prior procedures allowed correction of certain plan failures only through a costly VCP submission. Now, a plan sponsor may self-correct the following plan loan failures:

- Missed loan payments (i.e., defaulted loans) – this correction is not available if the 5-year plan loan term limit under Code §72(p)(2)(A) has expired, the loan exceeds the amount limits under Code §72(p)(B), or the loan violates the level amortization requirements under Code §72(p)(2)(C);
- Not obtaining required spousal consent to the plan loan – most 401(k) plans do not require spousal consent for plan

loans, but money purchase pension plans do; and

- Exceeding the plan-set limit on the number of outstanding loans – plan sponsors may correct this failure by a retroactive plan amendment.

The procedure also allows plan sponsors to report a "deemed distribution" for loan failures that cannot be fully corrected in the year the Form 1099-R is issued, rather than the year of the failure.

The procedure still does not allow self-correction of certain plan loan failures including loans that violate the dollar limit, the maximum loan period, or the level amortization requirement. Plan sponsors must correct these failures through a VCP submission.

ASC Insight: One of the more problematic areas for plan sponsors is the proper administration of a plan's loan provisions and procedures. Practitioners have asked for years that the IRS allow self-correction of plan loan failures and we finally have that opportunity. We suspect that this will be the most useful aspect of the new EPCRS procedures.

Correcting Operational Failures through Plan Amendment

Under the new procedures, the IRS expands the opportunity for plan sponsors to self-correct certain operational failures by adopting a conforming plan amendment. Under the new correction rules, a plan sponsor may correct an operational failure by plan amendment under SCP if three conditions are satisfied: (1) the plan amendment would result in an increase of a benefit, right, or feature, (2) the increase in the benefit, right, or feature is available to all eligible employees, and (3) providing the increase in the benefit, right, or feature is permitted under the Code and satisfies the EPCRS correction principles.

ASC Insight: Plan sponsors considering correcting an operational failure by plan amendment must carefully consider the cost ramifications of the plan amendment since all eligible employees must receive the increased benefit, right, or feature. If the plan sponsor is willing to assume this cost, this may be a useful correction method.

LIMITED EXPANSION OF THE DETERMINATION LETTER PROGRAM

Under Revenue Procedure 2017-37, the IRS significantly limited the ability of a plan sponsor to obtain a determination letter for an individually-designed qualified retirement plan. Generally, under the procedure, the IRS would only issue determination letters to an individually-designed plan upon initial plan qualification and on plan termination. In the procedure, the IRS indicated that it may expand the opportunity for plan sponsors to request a determination letter in certain situations. The IRS later asked practitioners to submit comments on specific circumstances that would warrant the expansion of the determination letter program.

In response to practitioners' comments, Revenue Procedure 2019-20 [https://www.irs.gov/pub/irs-drop/rp-19-20.pdf] now permits plan sponsors to submit individually-designed plans for determination letters in the following situations:

- Plan sponsors that want to be assured that their plans satisfy the regulations applicable to "statutory hybrid plans" (e.g., cash balance plans) – the period for submitting for these determination letters begins September 1, 2019 and ends on August 31, 2020; and
- The merger or consolidation of two or more plans maintained by unrelated entities into a single individually-designed plan.

ASC Insight: Practitioners considering the submission of an application for a determination letter under the expanded program should carefully read Revenue Procedure 2019-20. The procedure contains multiple conditions and timing constraints on such applications.

The procedure applies only to individually-designed plans and has limited, if any, impact on pre-approved plans. With respect to pre-approved cash balance plans, the IRS reviewed those plans for satisfaction of the statutory hybrid plan rules during its Cycle 2 (PPA) review process.

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