

January 31, 2018

IRS ISSUES FIRST "REQUIRED AMENDMENTS LIST" FOR TAX-QUALIFIED RETIREMENT PLANS UNDER NEW PROGRAM

To Our Clients and Friends:

In Revenue Procedure 2016-37 (issued in June 2016), the Internal Revenue Service substantially modified its determination letter program for tax-qualified retirement plans, such as pension plans and 401(k) plans. (See the Gibson Dunn client alert: <http://www.gibsondunn.com/publications/Pages/IRS-Additional-Guidance--Changes-to-Determination-Letter-Program-for-Qualified-Retirement-Plans.aspx>). In the past, retirement plans would be eligible to submit an application for a determination letter every five years, and adopt "interim amendments" each year based on an IRS-provided list. A favorable IRS determination letter states that the IRS has concluded that the terms of the retirement plan comply with the tax laws in effect at the time that the letter is issued. It has the practical effect of preventing the IRS from asserting that the form of the plan does not comply with the extremely complicated tax laws regulating retirement plans, and arguing that as a result, the plan should be disqualified from enjoying the favorable tax treatment for tax-qualified retirement plans under the Internal Revenue Code. Since one of the consequences of disqualification is the immediate taxation of all vested benefits of every participant in the plan as well as current taxation of all earnings on plan investments, retirement plans have routinely applied to obtain a favorable determination letter every five years. The IRS letter has been widely viewed as a form of inexpensive insurance against the risk of plan disqualification.

The new determination letter program dramatically reduces the number of retirement plans that are eligible to request an individual determination letter from the IRS. As a general rule, only newly adopted plans and terminating plans may apply for determination letters. Ongoing retirement plans are basically excluded from requesting this letter. Thus, many plan sponsors will not have the comfort of an IRS "seal of approval" that a plan continues to be tax-qualified in form.

Under the new program, it becomes much more important to follow the IRS's publication of updated amendments and incorporate them into an ongoing plan in a timely manner. Under Rev. Proc. 2016-37, the so-called "remedial amendment period" (the period during which legally-required plan amendments must be adopted) runs through the end of the second plan year beginning after the IRS issues its "required amendment list" (the "RA List"). The IRS recently issued its first RA List under the new program in Notice 2017-72. Since most tax-qualified retirement plans use the calendar year as their plan year, the amendments set forth in Notice 2017-72 will need to be adopted by a calendar year retirement plan no later than December 31, 2019.

This first RA List addresses only three items. First, and, most broadly applicable, cash balance and other "hybrid" pension plans must be amended to reflect final regulations that were issued in 2014 and 2015

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and generally became effective in 2017. Second, "eligible cooperative plans" and "eligible charity plans" must include provisions restricting benefit distributions in certain circumstances that are applicable pursuant to the Pension Protection Act of 2006. Third, for defined benefit plans that offer partial annuity options, regulations issued in 2016 must be incorporated to the extent necessary. Thus, this first RA List has limited applicability. Among other things, there are no provisions affecting 401(k) and other defined contribution plans.

The most important takeaway from Notice 2017-72 is the reminder that the determination letter program has effectively ended for most retirement plans. This will put more pressure on plan sponsors to ensure plans are timely updated and periodically reviewed by knowledgeable experts. It can also be expected that plan auditors and acquirors in corporate transactions may seek legal opinions or other comfort that plans are tax-qualified in form since with the passage of time, the last IRS determination letter issued to a plan will become increasingly dated. Employers who last received a favorable determination letter several years ago also should carefully review whether all prior IRS-required amendments have been adopted, because adopting "interim amendments" and then waiting until the next 5-year determination letter cycle to update plan documents is no longer an option.



Gibson, Dunn & Crutcher lawyers are available to assist in addressing any questions you may have regarding these issues. Please contact the Gibson Dunn lawyer with whom you usually work, or the following:

*Stephen W. Fackler - Palo Alto and New York (+1 650-849-5385 and 212-351-2392,
sfackler@gibsondunn.com)*

Michael J. Collins - Washington, D.C. (+1 202-887-3551, mcollins@gibsondunn.com)

Sean C. Feller - Los Angeles (+1 310-551-8746, sfeller@gibsondunn.com)

Krista Hanvey - Dallas (+1 214-698-3425; khanvey@gibsondunn.com)

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