



AMERICAN BENEFITS  
COUNCIL

December 15, 2016

Delivered via email to [notice.comments@irscounsel.treas.gov](mailto:notice.comments@irscounsel.treas.gov)

Internal Revenue Service  
CC:PA:LPD:PR (Announcement 2016-32)  
Room 5203  
P.O. Box 7604  
Ben Franklin Station  
Washington, D.C. 20044

**Re: Announcement 2016-32: Comments on Facilitating Compliance with Qualified Plan Document Requirements**

Dear Sir or Madam:

The American Benefits Council (“Council”) appreciates the opportunity to provide comments to the Department of the Treasury (“Treasury”) and the Internal Revenue Service (“IRS”) on ways in which Treasury and the IRS “can improve compliance with plan qualification requirements by making it easier for plan sponsors to satisfy requirements for qualified plan documents.”<sup>1</sup> Such comments were requested by Treasury and the IRS in light of the upcoming changes to the IRS’ determination letter program. In particular, determination letters for individually designed plans will be eliminated effective January 1, 2017, except in the cases of initial plan qualification, plan termination, and certain other circumstances that have not yet been determined.

The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council’s members either directly sponsor or provide services to retirement and health plans that cover more than 100 million Americans.

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<sup>1</sup> Announcement 2016-32, 2016-40 I.R.B. 434.

As Treasury and the IRS are aware, the forthcoming changes to the determination letter program have caused significant concern among plan sponsors of individually designed plans (including many of the Council's members) who rely on determination letters for assurance that their plans meet the qualification requirements, especially during plan audits, mergers, and acquisitions. In this vein, any steps the IRS can take to allow plan sponsors to ensure their plan documents satisfy the qualification requirements would be extremely helpful.

In Announcement 2016-32, Treasury and the IRS requested comments on three specific items regarding ways to streamline or minimize a plan sponsor's burden with respect to maintaining a plan's qualification status. In addition, comments were requested on "any additional guidance or other actions by Treasury and the IRS that would facilitate compliance with qualified plan document requirements, particularly in light of the changes to the determination letter program." Our comments fall under this latter category, as we are focused on very common situations that the three items listed in the Announcement would not address.

#### **SUMMARY OF THE COUNCIL'S REQUEST**

As described in more detail below, the Council has three core comments:

- We would like to continue to work with the IRS on how best to structure a flexible program under which determination letters can be available to serve critical plan sponsor needs, such as the need for determination letters in connection with mergers and acquisitions, loan agreements, and plan audits.
- Because multiple employer plans provide many of the same efficiencies as pre-approved plans, multiple employer plans should be eligible for determination letters.
- In order to address key compliance issues, we believe that private letter rulings ("PLRs") should be issued with respect to certain plan qualification issues. Specifically, PLRs could be requested with respect to amendments:
  - That relate to a change in the qualification requirements,
  - That relate to an unclear issue under such change,
  - For which there is not a model amendment provided, and
  - [That are submitted by a third party on behalf of a group of plans seeking similar assurance.]

As discussed below, we ask that the PLR approach be considered both with and without the bracketed requirement regarding third party submissions.

## **NEED FOR CONTINUED FLEXIBILITY**

Determination letters have been integral to plan maintenance in many respects. For example, merger and acquisition agreements often require determination letters to validate the status of plans being acquired. Similarly, determination letters may be required under loan agreements. And determination letters can be very helpful in audit contexts. In short, determination letters provide a source of much needed validation in many contexts that the plan sponsor has addressed the qualification issues that need to be addressed.

The question has been raised as to whether opinion letters from law firms could serve the same function as determination letters. In some cases, that may be possible, but our members have indicated to us that in many other cases, such as large mergers and acquisitions, there is a real need for the greater reliance achieved through the determination process. Legally, an opinion letter does not provide the same level of reliance as a determination letter.

Accordingly, we would like to continue to work with the IRS on how best to structure a flexible program under which determination letters can be available to serve these critical needs. We fully recognize the efficiencies created by a world without determination letters on individually designed plans. But we are concerned that plan sponsors may grow concerned about such a world, and could slowly gravitate away from qualified plans in the absence of a mechanism to achieve greater validation of their plans.

We anticipate contacting you in the near future with ideas regarding how to implement a flexible program that addresses plan sponsor needs while still conserving IRS resources.

In accordance with our request for additional flexibility, we include below two key examples dealing with (1) multiple employer plans and (2) the use of PLRs.

## **SPECIFIC RECOMMENDATION REGARDING MULTIPLE EMPLOYER PLANS**

We believe that the IRS determination letter program should be modified to permit determination letters for individually designed multiple employer plans. This expansion could be limited to multiple employer plans that cover a minimum number of participating employers (such as 100). The rationale is that multiple employer plans may well cover as many or more participants and employers as some pre-approved plans. Thus, multiple employer plans provide the IRS with the same efficiency as pre-approved plans, justifying similar treatment.

In the alternative, under section 4.03(3), “Other Circumstances” in Rev. Proc. 2016-37, “new approaches to plan design” could be defined to automatically include any material change to the plan terms of a multiple employer plan that covers a minimum number of participating employers. A “material change” would include any change to the plan’s eligibility, vesting, benefit formula, form of benefit payment, or other change to the way the benefit is determined or service is credited under the plan.

## **SPECIFIC RECOMMENDATION REGARDING THE USE OF PLRS TO ADDRESS QUALIFICATION ISSUES**

### **Background on Availability of PLRs with Respect to Plan Qualification Issues**

Very generally, a PLR is a written statement issued by the IRS to a specific taxpayer that interprets and applies the tax laws to the taxpayer’s specific situation. PLRs are issued in response to written requests and may not be relied on by other taxpayers. Each year, the IRS publishes a revenue procedure specifying areas of the Internal Revenue Code (“Code”) in which private letter rulings: (1) will not be issued; (2) will not ordinarily be issued, and (3) will not be issued until the IRS resolves an issue with respect to an area that is under study.<sup>2</sup> In the past, PLRs have generally not been available with respect to questions regarding form compliance with the Code’s plan qualification requirements because the IRS’ determination letter program provided an avenue through which plan sponsors could periodically submit their plans for a compliance review.

In 2015, the annual revenue procedure described above was changed in part from the previous year by adding new section 4.02(12). New section 4.02(12) was carried over in substantially similar form to the 2016 annual revenue procedure, Rev. Proc. 2016-3. Section 4.02(12) of Rev. Proc. 2016-3 states the following with respect to “general areas” in which rulings will not ordinarily be issued:

(12) Whether a tax-qualified plan satisfies the requirements for qualification under §§ 401 through 420 and § 4975(e)(7). These matters are generally handled through the Employee Plans Determinations program as provided in Rev. Proc. 2016-6, this Bulletin, Rev. Proc. 2007-44, 2007-28 I.R.B. 54, and Rev. Proc. 2015-36, 2015-27 I.R.B. 20. **Notwithstanding the preceding sentence, the Office of Associate Chief Counsel (TEGE) may issue a ruling if (i) the taxpayer has demonstrated to the Office of Associate Chief Counsel's (TEGE) satisfaction that the qualification issue involved is unique and requires immediate guidance, (ii) as a practical matter, it is not likely that such issue will be addressed through the determination letter process, and (iii) the Office determines that it is in the interest of good tax administration to provide guidance**

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<sup>2</sup> See, e.g., Rev. Proc. 2016-3, Rev. Proc. 2015-3, Rev. Proc. 2014-3, and Rev. Proc. 2013-3.

**to the taxpayer with respect to such qualification issue.** [Emphasis added.]

Thus, as set forth above, the current position of the IRS is that PLRs will generally not be issued with respect to a plan's compliance with the qualification requirements unless a narrow set of circumstances is present, including that the issue is "unique" to the taxpayer. In the context of the changes in the determination letter program, the uniqueness requirement will either result in a lack of helpful PLRs (if too many requests are rejected as not being unique) or a burden on the IRS (if too many requests are accepted).

### **Requested Change to Areas in which PLRs Will Be Issued on Plan Qualification Matters**

As stated above, the Council requests that the IRS revise the exception, as currently set forth in section 4.02(12) of Rev. Proc. 2016-3, to the general rule that the IRS will not issue PLRs with respect to whether a tax-qualified plan satisfies the qualification requirements. We believe that a very targeted expansion of the exception to discrete situations is warranted in light of the upcoming changes to the determination letter program, and that it would not overly burden the IRS with a large increase in the number of PLR requests received on such matters.

The purpose of our suggested change, which is set forth below, is to utilize the existing PLR program to provide a mechanism through which plan sponsors who are faced with changes to the plan qualification requirements may obtain from the IRS some level of certainty that their plan amendments comply with such changes in the law. We are not asking the IRS to review the entire plan for compliance with the qualification requirements.

With the above-described situation in mind, we request that the IRS revise section 4.02(12) of the annual revenue procedure described above by adding a new sentence at the end:

(12) Whether a tax-qualified plan satisfies the requirements for qualification under §§ 401 through 420 and § 4975(e)(7). These matters are generally handled through the Employee Plans Determinations program as provided in Rev. Proc. 2016-6, this Bulletin, Rev. Proc. 2007-44, 2007-28 I.R.B. 54, and Rev. Proc. 2015-36, 2015-27 I.R.B. 20. Notwithstanding the preceding sentence, the Office of Associate Chief Counsel (TEGE) may issue a ruling if (i) the taxpayer has demonstrated to the Office of Associate Chief Counsel's (TEGE) satisfaction that the qualification issue involved is unique and requires immediate guidance, (ii) as a practical matter, it is not likely that such issue will be addressed through the determination letter process, and (iii) the Office determines that it is in the

interest of good tax administration to provide guidance to the taxpayer with respect to such qualification issue.

In addition, the Office of Associate Chief Counsel (TEGE) may issue a ruling if:

- (i) the plan is an individually designed plan that has received an initial determination letter but may not submit an application for a new determination letter with respect to the qualification issue because the plan is neither terminating nor meets the criteria for any special circumstances under which the IRS has announced it will accept determination letter applications, as provided for in Rev. Proc. 2016-37;
- (ii) the qualification issue arises from or relates to the issuance of significant regulatory or legislative guidance affecting a broad range of plans where such guidance has taken effect or will take effect within 12 months of the date of the request for the ruling;
- (iii) the qualification issue addressed in the request for a ruling relates to an issue that is not addressed by guidance of general applicability, nor has the IRS issued a model amendment with respect to such issue; and
- [(iv) the request is submitted by a third party on behalf of a sufficient number of plans with a similar issue, so that addressing such issue would be in the interest of good tax administration.]

We bracketed the fourth requirement because we would like the IRS to consider our suggestion both with and without the fourth requirement. On the one hand, including the fourth requirement could achieve some material efficiencies, which is an important objective. The IRS has already moved very significantly in this “third party direction” in many respects. The entire pre-approved program is based on economies of scale achieved through the use of a third party plan design. In addition, Section 10.10 of EPCRS authorizes Group VCP Submissions. We believe that a PLR system available to groups is the next logical step in this evolving trend toward a combination of service and efficiency. The plan amendments submitted by the third party on behalf of the different plans would not need to be identical. However, there would need to be one or more legal issues that are common to all the plan amendments, such that resolution of those issues enables the IRS to provide a PLR with respect to all such amendments.

On the other hand, including the fourth requirement would introduce changes to the PLR program. For example, in order to make the fourth requirement work, each plan submitted would have to be identified (though not to each other) and the PLR would have to apply to all such plans. We believe that this could be a very workable and efficient solution, but we recognize that any such change would need to be carefully considered.

Regardless of the potential issues with respect to the fourth requirement, we believe that this new type of PLR could provide enormous help to plan sponsors in critical

areas where new guidance is taking effect (or has recently taken effect). Hybrid plans are a prime example, where new requirements taking effect in January of 2017 are causing extensive amendments to plans.

Some have asked why Revenue Rulings or Notices could not satisfy the same need for guidance on new issues as the PLR program we are suggesting. We believe that Revenue Rulings and Notices are a critical source of guidance, and, given a choice in any instance, we would prefer Revenue Rulings and Notices to PLRs. But we do not see a reason why this should be an either/or choice. By adopting the broader PLR program we are suggesting, the IRS would be giving itself another mechanism to consider in addressing the needs of retirement plans and the millions of participants they serve.

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Again, we appreciate the opportunity to provide comments with respect to how Treasury and the IRS can help facilitate compliance with the qualified plan document requirements in light of the changes being made to the determination letter program. If you have any questions or would like to discuss these comments further, please contact me at 202-289-6700 or [ldudley@abcstaff.org](mailto:ldudley@abcstaff.org).

Sincerely,



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