

Revisions to the Employee Plans Determination Letter Program Regarding Cycle A Elections, Determination Letter Expiration Dates, and Extension of Deadlines for Certain Defined Contribution Pre-Approved Plans

Notice 2016-03

I. PURPOSE

In anticipation of the elimination, effective January 1, 2017, of the 5-year remedial amendment cycle system for individually designed plans under the Employee Plans determination letter program, this notice provides that the Department of the Treasury (Treasury) and the Internal Revenue Service (IRS) will issue guidance providing that: (1) controlled groups and affiliated service groups that have previously made a Cycle A election are permitted to submit determination letter applications during the Cycle A submission period beginning February 1, 2016, and ending January 31, 2017; (2) expiration dates on determination letters issued prior to January 4, 2016, are no longer operative; and (3) the period during which certain employers may, on or after January 1, 2016, establish or adopt a defined contribution pre-approved plan and, if permissible, apply for a determination letter, is extended from April 30, 2016, to April 30, 2017.

The changes described in this notice will be reflected in an update to Revenue Procedure 2007-44, 2007-2 C.B. 54. Employers may rely on this notice until Rev. Proc. 2007-44 is updated to include these changes.

II. BACKGROUND

Rev. Proc. 2007-44 sets forth rules and procedures for 5-year remedial amendment cycles for individually designed plans and 6-year remedial amendment/approval cycles for pre-approved plans.

Section 9.03 of Rev. Proc. 2007-44 provides that, in general, an individually designed plan's 5-year remedial amendment cycle is determined based on the last digit of the plan sponsor's employer identification number. However, under section 10.06 of Rev. Proc. 2007-44, if more than one plan is maintained by members of a controlled group under § 414(b) or (c) or an affiliated service group under § 414(m), the employers may elect that the 5-year remedial amendment cycle for all plans maintained by any members of the group (other than multiemployer plans under § 414(f), multiple employer plans, governmental plans under § 414(d), or certain jointly trustee single employer collectively bargained plans) will be Cycle A. In general, the Cycle A election must be made jointly by all members of the controlled group or affiliated service group. However, in the case of a parent-subsidiary controlled group, this election may be made on behalf of all of the members by the parent. Section 10.08(1) of Rev. Proc. 2007-44 provides that, in the case of a Cycle A election under section 10.06 that does not

involve a parent-subsidary controlled group, if a new member joins the controlled group, that member must make an election no later than one year from the date the new member joins the controlled group in order for other members to maintain the existing election.

Section 10.08 of Rev. Proc. 2007-44 provides that the Cycle A election must be made by the end of Cycle A. For example, if, absent the Cycle A election, the remedial amendment cycle for one member of a controlled group would be Cycle B and the remedial amendment cycle for another member of the controlled group would be Cycle C, the Cycle A election would have to be made by the end of Cycle A.

Section 13.02 of Rev. Proc. 2007-44 provides that determination letters issued for individually designed plans will include a statement that the letter may not be relied on after the end of the plan's first 5-year remedial amendment cycle that ends more than 12 months after the application was received, and will include the specific "expiration date."

Section 13.03 of Rev. Proc. 2007-44 provides that, in appropriate circumstances, the IRS may, through generally applicable published guidance, extend the expiration dates of determination letters.

Section 16.03 of Rev. Proc. 2007-44 provides that when the review of a 6-year remedial amendment cycle for pre-approved plans has neared completion, the IRS will publish an announcement providing the date by which adopting employers must adopt the newly approved plans in order to be eligible for such cycle. This date is intended to give adopting employers a window of approximately 2 years in which to adopt newly approved pre-approved plans and, if permissible, to apply for individual determination letters.

Rev. Proc. 2011-49, 2011-44 I.R.B. 608, provides that the second 6-year remedial amendment cycle for pre-approved defined contribution plans began on February 1, 2011, and ends on January 31, 2017, and that the on-cycle submission period for opinion and advisory letter applications began on February 1, 2011, and ended on January 31, 2012 (later extended to April 2, 2012, by Ann. 2012-3, 2012-4 I.R.B. 335). The 2010 Cumulative List of Changes in Plan Qualification Requirements, Notice 2010-90, 2010-52 I.R.B. 909 (2010 Cumulative List), was to be used by plan sponsors and practitioners submitting opinion or advisory letter applications for plans during that period.

Announcement 2014-16, 2014-17 I.R.B. 983, provides generally that an adopting employer whose defined contribution plan is eligible for the 6-year remedial amendment cycle under section 17 of Rev. Proc. 2007-44 and who adopts, by April 30, 2016, a master and prototype (M&P) or volume submitter (VS) defined contribution plan that was approved based on the 2010 Cumulative List, will be considered to have adopted the plan within the second 6-year remedial amendment cycle.

Announcement 2015-19, 2015-32 I.R.B. 157, describes changes the Treasury and the IRS intend to make to the Employee Plans determination letter program for qualified retirement plans. Effective January 1, 2017, staggered 5-year remedial amendment cycles for individually designed plans will be eliminated and the scope of the determination letter program will be limited to initial plan qualification, qualification upon plan termination, and certain other limited circumstances. Ann. 2015-19 provides that sponsors of Cycle A plans described in section 9.03 of Rev. Proc. 2007-44 (that is, sponsors with employer identification numbers ending in 1 or 6) will continue to be permitted to submit determination letter applications during the period beginning February 1, 2016, and ending January 31, 2017. The announcement also provides that the Commissioner intends to extend the remedial amendment period for individually designed plans to a date that is expected to end no earlier than December 31, 2017.

Sections 8 and 9 of Revenue Procedure 2016-6, 2016-1 I.R.B. 200, set forth the limited circumstances under which an employer that has adopted a pre-approved plan may apply for a determination letter.

Section 21.01(2) of Rev. Proc. 2016-6 provides that, effective as of January 4, 2016, determination letters issued to individually designed plans will no longer contain expiration dates (currently required under section 13.02 of Rev. Proc. 2007-44). In response to comments submitted with respect to Ann. 2015-19, Rev. Proc. 2016-6 provides that Treasury and the IRS intend to issue guidance with respect to the status of existing expiration dates on determination letters issued prior to January 4, 2016.

III. CYCLE A ELECTIONS MADE BY CONTROLLED GROUPS AND AFFILIATED SERVICE GROUPS

Rev. Proc. 2007-44 will be modified to provide that controlled groups and affiliated service groups that maintain more than one plan are permitted to submit determination letter applications during the Cycle A submission period beginning February 1, 2016, and ending January 31, 2017, provided that a prior Cycle A election with respect to the controlled group or affiliated service group had been made by January 31, 2012 (the last day of the previous Cycle A submission period).

IV. EXPIRATION DATES ON DETERMINATION LETTERS ISSUED PRIOR TO JANUARY 4, 2016, ARE NO LONGER OPERATIVE

Rev. Proc. 2007-44 will be modified to provide that expiration dates included in determination letters issued prior to January 4, 2016, are no longer operative. Future guidance will clarify the extent to which an employer may rely on a determination letter after a subsequent change in law or plan amendment.

V. EXTENSION OF ADOPTION PERIOD AND DETERMINATION LETTER SUBMISSION PERIOD FOR CERTAIN ADOPTERS OF DEFINED CONTRIBUTION PRE-APPROVED PLANS

Rev. Proc. 2007-44 will be modified to provide that the deadline for an employer to adopt a current defined contribution pre-approved plan and to apply for a determination letter, if otherwise permissible, is extended from April 30, 2016, to April 30, 2017, with respect to any defined contribution pre-approved plan adopted on or after January 1, 2016, other than a plan that is adopted as a modification and restatement of a defined contribution pre-approved plan that had been maintained by the employer prior to January 1, 2016. This extension will facilitate a plan sponsor's ability to convert an existing individually designed plan into a current defined contribution pre-approved plan. For purposes of this section V, a "current defined contribution pre-approved plan" is one that was approved based on the 2010 Cumulative List.

An employer that had adopted a defined contribution pre-approved plan prior to January 1, 2016, continues to have until April 30, 2016, to adopt a modification and restatement of the defined contribution pre-approved plan within the current 6-year remedial amendment cycle for defined contribution plans and to apply for a determination letter, if permissible.

Examples

Example 1. Employer A currently maintains Plan X, a defined contribution individually designed plan. Employer A is considering converting Plan X into a defined contribution pre-approved plan. Employer A has until April 30, 2017, to adopt a current defined contribution pre-approved plan within the current 6-year remedial amendment cycle for defined contribution plans and to apply for a determination letter, if permissible.

Example 2. Employer B establishes Plan Y, a defined contribution individually designed plan, on January 1, 2016. Employer B is considering converting Plan Y into a defined contribution pre-approved plan. Employer B has until April 30, 2017, to adopt a current defined contribution pre-approved plan within the current 6-year remedial amendment cycle for defined contribution plans and to apply for a determination letter, if permissible.

Example 3. On April 1, 2010, Employer C initially adopted the defined contribution VS plan of Sponsor Z, which was approved based on the 2004 Cumulative List. On January 15, 2016, Employer C adopts the current defined contribution VS plan of Sponsor Z as a modification and restatement of Employer C's existing defined contribution VS plan. Employer C continues to have until April 30, 2016, to apply for a determination letter, if permissible.

Example 4. On April 1, 2010, Employer C initially adopted the defined contribution VS plan of Sponsor Z, which was approved based on the 2004 Cumulative

List. On January 15, 2016, Employer C adopts the current defined contribution VS plan of Sponsor Y as a modification and restatement of Employer C's existing defined contribution VS plan, instead of adopting the current defined contribution VS plan of Sponsor Z. Employer C continues to have until April 30, 2016, to apply for a determination letter, if permissible.

VI. RELIANCE

Employers may rely on this notice until Rev. Proc. 2007-44 is updated to implement the changes referenced in this notice.

DRAFTING INFORMATION

The principal author of this notice is Angelique Carrington of the Office of Associate Chief Counsel (Tax Exempt and Government Entities). For further information regarding this notice, contact Ms. Carrington at (202) 317-4148 (not a toll-free number).