The Future of the Employee Plans Determination Letter Program

Evaluation of Public Comments and Additional Explanation of Staggered Remedial Amendment Period Option

May 1, 2003

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I. Introduction

On August 8, 2001, the Internal Revenue Service published on its internet web site a white paper, *The Future of the Determination Letter Program: Some Possible Options*, and invited the public to participate in a dialogue on the future of the program. We published the white paper to engage the public in our effort to improve the EP determination letter program. Our goal is to identify alternatives to the current program that will help us strike a more effective balance in the application of our resources among the EP determinations, examinations, voluntary compliance and customer education and outreach programs and thereby improve service to each and all of our customers.

The white paper presented a number of possible alternatives to the current program, as well as other tools and strategies for improving the program and achieving compliance. These alternatives or options range from maintaining the status quo to completely eliminating the determination letter program. Among the options are third-party certification or outsourcing of the program to the private sector and adoption of a system of staggered remedial amendment periods and determination letter cycles that would create a more even determination letter workflow for both the Service and practitioners. All of the options are listed below. Readers should refer to the white paper for more explanation of these options.

We have received a number of comments in response to the white paper from a wide range of stakeholders. This follow-up white paper uses the comments we have received to evaluate the options, tools and strategies described in the first white paper. Our evaluation of the comments leads us to eliminate all but three of the original options. The three remaining options are: maintenance of the status quo, replacement of the determination letter program with a third-party certification system, and implementation of a staggered remedial amendment period system to spread out the filing of determination letter applications over time.

Many commentators raised serious objections to third-party certification. Although some commentators have suggested ways in which these objections might be overcome, we conclude that there is not enough support for this option for us to pursue it further at this time. However, we believe third-party certification remains a potentially viable option in the long term, and we may revisit it at a later time.

Thus, two of the original options remain under active consideration: the status quo and staggered remedial amendment periods. In this white paper, we provide more detail on how a staggered remedial amendment period system could work. The original white paper described variations of the staggered remedial amendment period option that would require plans to be amended immediately for law changes or for both law and guidance changes. While a number of commentators objected to any immediate amendment requirement, some have suggested that the development of appropriate procedures to both require and assist plans to be updated annually would be feasible and desirable. Therefore, this white paper eliminates the immediate plan amendment

variations on the staggered remedial amendment period option described in the first white paper and in their place suggests a new option – annual plan amendment. This option could be implemented independently (i.e., the determination letter program would otherwise remain in the status quo) or in combination with a staggered remedial amendment period system.

We again invite comments from the public. Specifically, we ask the public to comment on the questions listed at the end of this white paper. The timetable that follows shows when we would expect to implement the staggered remedial amendment period and/or annual plan update options should we decide to go forward with either option.

II. Timetable

Publication of 2nd White Paper……………………………………….May 1, 2003

End of Public Comment Period………………………………………September 2, 2003

Announcement of Decision Whether to Implement Option(s)….December 1, 2003

Publication of Procedures and/or Regs. and Implementation.…By December 31, 2005

III. List of Options in the First White Paper

Option A – Maintain the Status Quo

Option B - Eliminate EP Determination Letters; Provide Model Plans for Employers Who Want Reliance

Option C - Eliminate Determination Letters for Individually Designed Plans

These are two alternative subparts of Option C -

> Option C-1 - Continue to Issue Opinion and Advisory Letters but No Determination Letters
>
> Option C-2 - Continue to Issue Opinion and Advisory Letters and Determination Letters For Adopters of Volume Submitter and M&P Plans

Option D - Replace the Determination Letter Program with a Third-Party Certification System

Option E - Replace the Determination Letter Program with a Self-Certification System

Option F - Replace the Determination Letter Program with a Registration System That Includes a Certified Compliance Checklist

There is also a variant of Option F -

> Option F-1 - Issue Determination Letters Only for Initial Plan Adoption and Plan Termination and Require Registration of Amendments

Option G – Stagger the Expiration of the Remedial Amendment Period

Variant of Option G -

> Option G-1 - Stagger the Remedial Amendment Period But Require Immediate Plan Amendment for Law Changes

Option H - Require Immediate Amendment for Law Changes and Guidance Changes

Variant of Option H -

> Option H-1 - Require Immediate Amendment for Law Changes and Cyclical Amendment for Guidance Changes

IV. Evaluation of Comments on the First White Paper

This section summarizes some of the comments we received regarding the various options, tools and strategies in the original white paper. We received many specific, helpful comments about these and also about other aspects of the determination letter program. The comments were too numerous and specific for us to address them all here. Rather, we attempt to summarize the general reaction of the employee benefits community to the options we described in our first white paper.

A. General Comments

In general, commentators noted that the determination letter program is an important function that provides major benefits to plan sponsors, employees and the government. There were no comments supporting elimination of the program altogether. While the comments expressed many divergent opinions, the single option that many commentators throughout the community commented on favorably was the staggered remedial amendment period option.

B. Specific Comments

Option A – Maintain the Status Quo

Most commentators did not comment directly on this option, although many indicated that changes to the current program should be considered. The one alternative to the status quo that attracted widespread support was the staggered remedial amendment period option. However, even commentators who support the staggered remedial amendment period option expressed reservations about potential complexity and other concerns with this option. We attempt to address these concerns in the more detailed description of the staggered remedial amendment period option later in this white paper.

We note that program changes since the options in the original white paper were developed may have turned the status quo into a more attractive option. The program changes first announced in Announcement 2001-77 have reduced the determination letter application filing burden for many plan sponsors and allowed many others to forego filing altogether and still have reliance regarding the qualified form of their plan. The introduction of the Tax Exempt Determinations System (TEDS) will speed up the process of issuing determination letters and introduce other enhancements into the system. Of course, these changes also reduce the burden of the determination letter program on the Service, which was a driving force behind the first white paper. Consequently, this option remains on the table.

Option B – Eliminate EP Determination Letters; Provide Model Plans for Employers Who Want Reliance

As noted earlier, there was no support among commentators for elimination of the determination letter program. Rather, most commentators described many reasons for its continuance. Therefore, we will not consider the option of elimination of the program further.

Several commentators addressed model plans and we have been involved in continuing discussion about the wisdom of pursuing the development of model plans. Viewpoints regarding this question have been widely divergent. We are continuing to evaluate this issue.

Option C – Eliminate Determination Letters for Individually Designed Plans

Commentators did not express support for this option and we will not pursue it further.

Option D - Replace the Determination Letter Program with a Third-Party Certification System

Most commentators who addressed this option opposed it, citing various reasons, particularly the increased cost to employers that would result if attorneys or other third parties had to assume liability. Commentators who commented favorably on this option provided helpful suggestions for how it might work. One commentator specifically addressed issues concerning which persons could qualify as third-party certifiers, the scope of their authority, reliance, technical support from the Service, conflict of interest, third-part liability and sponsor cost, among others. We believe these comments would be very helpful in any further consideration of this option. However, the comments from the community did not support this option, and in view of the substantial effort that would be involved in developing this option further, we have decided not to pursue it at this time.

Option E – Replace the Determination Letter Program with a Self-Certification System

No commentators recommended adoption of this option and several expressed grave misgivings with it. We will not pursue this option.

Options F and F-1 – Replace the Determination Letter Program with a Registration System That Includes a Certified Compliance Checklist

Commentators did not support the replacement of the determination letter program with a third-party registration system, nor generally the variant option (Option F-1) that would retain determination letters on plan establishment and termination but otherwise replace them with a registration system. Therefore, we will not pursue these options. However, one commentator recommended consideration of registration and compliance certification as an addition to the Form 5500 filing requirements that would

improve compliance. We are looking at issues related to compliance, particularly small plan compliance, in a separate project and we will consider this recommendation as part of that project.

Option G – Stagger the Expiration of the Remedial Amendment Period

Many commentators supported adoption of this option, noting that it addresses employer and practitioner, as well as Service, concerns with the peaks and valleys in determination letter workload under the present system. However, commentators pointed out that a system of staggered remedial amendment periods and determination letter cycles would need to address the determination of the cycle in special circumstances, such as plan mergers, and that this could create complexity. Some commentators suggested rules for determining the cycle in these circumstances. For example, some commentators suggested that in the case of a merger the cycle would be the earliest of the plans being merged. One commentator suggested the adoption of a "two-year rule" that would provide that a plan's cycle would not need to be earlier than 2 years from the prior remedial amendment period. This commentator also suggested that the cycle be stated in the plan, while some commentators recommended that the determination letter should include an "expiration date." Some commentators also suggested that the cycle for plans maintained by more than one employer should be the earliest that would apply to any of the employers.

After consideration of these comments, we have outlined below the details of how a staggered remedial amendment period system could work. This outline addresses the determination of the staggered remedial amendment period or cycle in the various special circumstances that have been identified. In developing this outline, we have opted for what we believe is the simplest approach in all of these circumstances. While this approach will occasionally result in plans' cycles being shortened or extended, we believe that this is an acceptable trade-off for the simplicity of the rule. Under this system, determination letters would specify their "expiration date."

Commentators also noted that the staggered remedial amendment period option would have to address the frequency with which master and prototype (M&P) and volume submitter plans would have to be updated and submitted for new opinion and advisory letters to accommodate employers with different cycles. Some commentators suggested that these plans would have to be updated and submitted annually. The outline below adopts this approach. However, we also describe an alternative under which these plans would be updated and submitted every five years and adopting employers' cycles would be based on the cycle of the M&P or volume submitter plan.

We believe a staggered remedial amendment period system could be implemented through regulations under existing law. We would be interested in hearing others' views on this question.

Options G-1, H and H-1 – Require Immediate Plan Amendment for Law Changes

or for Law and Guidance Changes

Several commentators stated that a requirement for immediate plan amendment for either law or guidance changes would be unduly burdensome and costly. Some commentators expressed the view that "good faith" amendments are not sufficiently detailed to provide operational guidance. Some suggested that only employer elections (and only those employer elections not adopted by a majority of employers) should be required to be reflected in immediate plan amendments. On the other hand, some commentators supported a requirement for immediate amendments for law changes.

C. New Option

One commentator suggested another alternative – annual plan amendments and annual determination letters. Under this option, the Service would annually publish a list of required plan changes and plan sponsors would have a year or more to adopt the changes and submit determination letter requests. This commentator suggested that annual amendments could become routine and thus less costly to employers. We believe that a requirement for annual plan updates will increase compliance, reduce operational errors and safeguard participants' rights. We therefore describe below a new option based on this commentator's suggestion. However, our option could be adopted in combination with the staggered remedial amendment period option, in which case employers would not have to request letters more frequently than every five years to preserve reliance. In view of this new option, we will not pursue the immediate amendment options described in the original white paper.

We believe the new option described below could be implemented through regulations under existing law. We would be interested in hearing others' views on this question.

D. Other Comments

Tools and Strategies for Improving the Program and Achieving Compliance

Some commentators addressed the other tools and strategies described in the original white paper, including the possibility of requiring a plan operating manual, combining the M&P and volume submitter programs, and other strategies. We are continuing to evaluate these tools and strategies.

V. Additional Explanation of the Staggered Remedial Amendment Period Option

A. Summary

The system of staggered remedial amendment periods (RAPs) that we envision would create 5-year RAP “cycles” for each plan, with the cycles ending in different years for different plans, so that we would expect the RAP to end for about the same number of plans (on average, 20% of the total number of plans) every year. Under this system, a favorable determination letter would be valid (i.e., it would provide reliance) until the end of the plan’s 5-year cycle, akin to a driver’s license or car registration.

In Part VI, below, we describe another option – annual plan updates. Either option, that is, staggered RAPs or annual plan updates, could be adopted by itself or in combination with the other option. If the staggered RAP option were adopted by itself, that is, without the annual plan update option, plans would not have to be amended more frequently than every five years. If the staggered RAP option were adopted in combination with the annual plan update option, annual plan amendments would be required, although a new determination letter would not be needed until the end of the 5-year RAP.

The details of the staggered RAP system we envision are described below. Also included are several examples of how this system would work. The description of the staggered RAP system and the examples in this Part V show how this system would work if we were to adopt the system by itself, that is without the annual plan update option described in Part VI. The examples in Part VI show the effect of adopting the staggered RAP system in combination with the annual plan update option.

We recognize that some plans would have more time than others to “transition” into a staggered RAP system. This would be an unavoidable consequence of moving to staggered RAPs.

B. The 5-Year RAP Cycle – Basic Elements

1. Staggered RAPs would be implemented beginning with the RAP for the Economic Growth and Tax Relief Reconciliation Act (EGTRRA), as now set forth. (Notice 2001-42 provided that a plan’s EGTRRA RAP would not end before the end of the first plan year beginning on or after January 1, 2005.)
2. The existing rules would continue to apply to new and terminating plans. Thus, the RAP for a new single employer plan would generally end on the tax return due date for the tax year ending with or within the initial plan year. Terminating plans would have to be amended as necessary on termination.
3. After a plan’s initial RAP, there would be staggered RAPs. The staggered RAP would permit the adoption of retroactive remedial amendments of disqualifying provisions resulting from legislative changes, including plan provisions integrally

related to the changes, within the 5-year period ending on the last day of the RAP. The staggered RAP would also permit retroactive remedial amendments for guidance changes, including plan provisions integrally related to the changes.

4. The staggered RAP would also permit the adoption of retroactive remedial amendments of disqualifying provisions resulting from plan amendments adopted within the 5-year period ending on the last day of the RAP. Thus, plan sponsors would not have to request determination letters more frequently than every five years, even for discretionary plan amendments.
5. A plan sponsor would have to retroactively amend its plan by the end of the RAP to comply with all changes that have become effective for the plan at any time during the 5-year period beginning after the last day of the plan's prior RAP and to correct disqualifying provisions resulting from plan amendments adopted within this period.
6. A plan's RAP would be based on the last digit of the plan sponsor's taxpayer identification number (TIN):

Last Digit of Employer's TIN	EGTRRA RAP Ends In	Subsequent 5-Year RAP Cycles End In
0, 5	2005	2010, 2015, etc.
1, 6	2006	2011, 2016, etc.
2, 7	2007	2012, 2017, etc.
3, 8	2008	2013, 2018, etc.
4, 9	2009	2014, 2019, etc.

7. The 5-year RAP cycles would be based on calendar years. Thus, the RAP would end on December 31 of the 5th year of the cycle.

Example

The following example illustrates the basic rules of the staggered RAP system in the context of individually designed plans:

<u>Example</u>

Employer A, a calendar year taxpayer, maintains three plans, Plans X, Y and Z. Plan X is a calendar year plan first established in 1990. Plan Y is a June 30 year-end plan, also established in 1990. Plan Z is a calendar year plan established in 2008. The last digit of Employer A's TIN is 2.

Under the staggered RAP option described above, the EGTRRA RAP for both Plan X and Plan Y would end on December 31, 2007. Assuming Plans X and Y are timely amended for EGTRRA, the next RAP for both plans would end on December 31, 2012. The initial RAP for Plan Z would end on the due date, including extensions, for Employer A's 2008 federal income tax return. The next RAP for Plan Z would also end on December 31, 2012.

By December 31, 2012, Employer A would have to amend Plans X, Y and Z to comply with changes in the plan qualification requirements that have become effective for the plans after the end of the plans' preceding RAPs and before January 1, 2013.

Assume Employer A adopts a discretionary plan amendment to Plan X that is both adopted and effective on January 1, 2009, and the amendment results in a disqualifying provision. Employer A would be required to correct the disqualifying plan amendment by adopting a remedial amendment by December 31, 2012, that is, the end of the 5-year RAP cycle in which the discretionary plan amendment was adopted.

C. The 5-Year Cycle – Special Circumstances

1. Multiemployer plans and multiple employer plans. The EGTRRA RAP for these plans would end in 2005 and subsequent RAPs would end in 2010, 2015, etc., regardless of the TINs of the employers that maintain the plan.
2. Plans maintained by multiple members of a controlled group or affiliated service group. The RAP is based on the TIN that is or will be used to report the plan on Form 5500.
3. Spin-offs. If the spun-off plan is maintained by a different plan sponsor, the RAP of the spun-off plan is based on the TIN of the new plan sponsor, regardless of whether this shortens or extends the plan's current cycle. For example, if a portion of a multiple employer plan is spun-off as a single employer plan, the RAP of the spun-off plan is based on the TIN of the employer that maintains the spun-off plan.
4. Mergers. If plans of different plan sponsors are merged, the RAP of the merged plan is based on the TIN of the plan sponsor that maintains the merged plan, regardless of whether this shortens or extends the current cycle of any of the plans that have been merged.
5. Change in sponsorship. If a new plan sponsor acquires the plan or there is otherwise a change in the TIN of the plan sponsor, the RAP is based on the new TIN, regardless of whether this shortens or extends the plan's current cycle.
6. M&P and volume submitter plans. M&P plan sponsors and volume submitter practitioners would be required to update their plans and have them re-approved every year. Employers with a RAP ending in a particular year could update using the approved M&P or volume submitter document that was last approved prior to the calendar year in which the employer's RAP ends. For example, if an employer's RAP ends in 2006, the employer could use the latest version of the prototype that was approved prior to 2006 (e.g., 2005 if the last version was approved in 2005).

Examples

The following examples illustrate the application of the staggered RAP system to M&P and volume submitter plans and in other special circumstances:

Example 1

Employers A and B are adopters of volume submitter plan P. The RAP for Employer A's plan ends in 2005, 2010, etc. The RAP for Employer B's plan ends in 2006, 2011, etc. At the end of 2008, guidance requiring qualified plans to be amended is published. The guidance is effective for plan years beginning in 2009. The practitioner/sponsor of Plan P amends the plan for this change and requests a new advisory letter by December 31, 2009. A new advisory letter is issued in December 2010.

In updating its plan for the RAP that ends in 2010, Employer A could use the Plan P document that was last approved prior to 2010, even though this document would not reflect the guidance effective in 2009. (Of course, Employer A could use the document approved in December 2010, if available.) In this case, when Employer A updates its plan for the RAP that ends in 2015, it would have to adopt plan provisions reflecting the guidance effective in 2009 retroactive to the first day of the 2009 plan year. In addition, Employer A could be required to operate its plan in accordance with the guidance effective in 2009 prior to the time the plan is actually amended.

In updating its plan for the RAP that ends in 2011, Employer B would have to use the Plan P document approved in December 2010, or a later approved version of Plan P, if available. Employer B would have to adopt any adoption agreement or other plan changes required as a result of the guidance changes effective in 2009 by December 31, 2011. Plan provisions reflecting the guidance effective in 2009 would have to be adopted retroactive to the first day of the 2009 plan year and operational compliance prior to amendment could be required.

Example 2

Plan X is a multiple employer plan. Under item 1 of The 5-Year Rule – Special Circumstances, above, the RAP for Plan X ends in 2005, 2010, etc. Employer A, whose TIN ends in 6, is one of the employers that maintain Plan X. In 2007, part of Plan X is spun off to be maintained by Employer A as a single employer plan, Plan Y. The 5-year RAP cycle for Plan Y ends in 2011, 2016, etc.

Example 3

Assume the same facts as Example 2, except Employer A's TIN ends in 2. In this case, the 5-year RAP cycle for Plan Y ends in 2007, 2012, etc.

Example 4

Employer A maintains Plan X. The RAP for Plan X which is based on Employer A's TIN, ends in 2005, 2010, etc. Employer B maintains Plan Y. The RAP for Plan Y, which is based on Employer B's TIN, ends in 2009, 2014, etc. In 2009, Employer A sells part of its business to Employer B. As part of the transaction, Plan X is merged

into Plan Y. The 5-year RAP cycle for the “XY” merged plan is 2009, etc., because the RAP is based on the TIN of the employer that maintains the merged plan, in this case, Employer B. (If the transaction was reversed and Plan Y was merged into Plan X, to be maintained by Employer A, the RAP for the merged plan would be 2010, 2015, etc.)

Example 5

Employer A maintains Plan X. Employer A’s TIN ends in 5. Therefore, the RAP for Plan X is 2005, 2010, etc. In 2010, Employer B, who’s TIN ends in 2, purchases Employer A and Plan X. As a result of the transaction, Employer B now maintains Plan X. Plan X’s RAP does not end in 2010 because Employer B has acquired it before the end of 2010. The RAP for Plan X is instead 2012, 2017, etc.

D. The 5-Year RAP Cycle – Determination Letters

1. Adopters of M&P and volume submitter plans would continue to be able to rely on opinion and advisory letters without having to request determination letters to the extent now provided.
2. Except for M&P and volume submitter plans, a determination letter issued for an application filed within the last year of a plan’s RAP would cover all of the changes in the plan qualification rules for which provisions would be required in the plan as of the end of the RAP under The 5-Year Cycle – Basic Elements, above.
3. In the case of M&P and volume submitter plans, a determination letter issued for an application filed within the last year of a plan’s RAP would cover all of the changes in the plan qualification rules reflected in the approved document submitted with the application.
4. In all cases, a determination letter issued for an application filed within the last year of a plan’s current RAP would provide reliance until the end of the plan’s next RAP. (Continued reliance could be conditioned on operational compliance with changes that become effective during the 5-year period following the end of the current RAP.)
5. A plan sponsor could submit a determination letter application at any time. However, a letter issued for an application filed before the last year of a plan’s RAP would provide reliance only until the end of the current RAP.
6. Determination letters would state their “expiration date.”

Example

Refer to the facts in Example 1 under The 5-Year Rule – Special Circumstances, above. Assume Employer A files a determination letter application in December 2010, using the version of Plan P last approved prior to 2010. This document does not reflect the guidance effective in 2009. Therefore, the determination letter issued to Employer A would not provide reliance with respect to this guidance change even though the letter would otherwise provide reliance until 2015. When Employer A’s plan is amended for the guidance effective in 2009, the amendment must be effective

retroactive to the first day of the 2009 plan year and operational compliance prior to amendment could be required. Assuming Employer A requests a new determination letter in 2015, that determination letter would provide reliance that Employer A's plan was timely and correctly amended for the guidance changes effective in 2009.

E. The 5-year Cycle – Alternative Rule for M&P and Volume Submitter Plans

This is an alternative to item 5 under The 5-Year Rule - Special Circumstances, above. (This alternative could be used only if the annual plan update option described in Part VI, below, were not adopted.) Under this alternative, M&P plans and volume submitter plans would be required to be amended and submitted for new opinion and advisory letters every five years, with the 5-year cycle based on the last digit of the sponsor's or practitioner's TIN. An employer that adopted the approved plan within one year of its approval would be treated as adopting the plan within the RAP. In other words, the 5-year cycle for the M&P sponsor or volume submitter practitioner would serve as the basis for the RAP cycle of the employer's plan. Amending an individually designed plan to make the plan an M&P or volume submitter plan would change the plan's RAP cycle to the cycle of the M&P or volume submitter, regardless of whether this shortens or extends what would otherwise be the plan's RAP. Amending an M&P or volume submitter plan to make the plan an individually designed plan would cause the RAP cycles for the plan to be determined under the rules applicable to individually designed plans.

Examples

Example 1

V is a volume submitter practitioner. Based on V's TIN, the 5-year cycle for amending and resubmitting V's volume submitter plan is 2007, 2012, etc. Employers A and B are adopters of V's plan. V amends and resubmits its plan during 2007 and again during 2012. Favorable advisory letters are issued in December 2007 and October 2013. If Employers A and B adopt V's plan by December 31, 2008, and again by October 31, 2014, they will be treated as having adopted the plan within the RAP.

Example 2

Refer to the preceding example. Employer C maintains an individually designed plan, Plan X. The RAP for Plan X ends in 2006, 2011, etc. In 2010, Employer C restates Plan X using V's plan that was approved in 2007. Under the alternative rule, the next RAP for Plan X ends in October 2014, even though this is more than 5 years after Plan X's preceding RAP.

Assume the same facts, except that the RAP for Plan X ends in 2009, 2014, etc. By restating Plan X using V's plan in 2010, Employer C advances the end of Plan X's next RAP from December 31, 2014 to October 31, 2014.

Example 3

Refer to Example 1. Assume that in January 2011 Employer B amends its plan, Plan Y, to make the plan an individually designed plan and that Employer B's TIN ends in 5. Under the alternative rule, the first RAP for Plan Y, following this amendment, would end in 2015.

VI. New Option – Annual Plan Updates

A. Elements

This option would ensure that plans are amended as soon as possible for changes in law and guidance. In some cases, this may require plans to be amended as frequently as every year. The Service would assist in this process by publishing lists of required amendments annually and by publishing model amendments. This option could be adopted by itself or in combination with the staggered RAP option. However, if the option were to be adopted by itself, that is, without any changes to the remedial amendment period rules, plan sponsors might have to request new determination letters as frequently as every year in some cases in order to preserve reliance. This option would work as follows:

1. Before the beginning of each calendar year ("the first calendar year"), or early in the year, the Service would publish a list of law and guidance changes that are effective in the first calendar year and for which plan amendments are required or may be necessary. This would include changes that are first effective for plan years beginning with or within the first calendar year and changes that are first effective for plan years ending within the first calendar year. Plan amendments for the changes would have to be adopted by the end of the next calendar year ("the second calendar year") even in the case of non-calendar year plans.
2. The Service would endeavor to publish model or sample amendments if appropriate.
3. Individually designed plans would have to be amended as necessary.
4. Volume submitter plans would have to be amended to allow the volume submitter practitioner to adopt plan amendments on behalf of adopting employers. M&P plans are already required to include a provision allowing the sponsor to amend the plan on behalf of adopting employers.
5. By December 31 of the first calendar year, M&P sponsors and volume submitter practitioners would be required to submit applications for new opinion and advisory letters for the plan amendments required to be adopted by the end of the second calendar year. Copies of approved amendments and the new opinion or advisory letter would have to be given to adopting employers. If adopting employers were required to make adoption agreement changes or otherwise amend their plans (because, for example, the employers are required to make an election), they would have to do so within 12 months of the issuance of the new opinion or advisory letter. Of course, in many cases, employers would not have to take any action. The M&P sponsor or volume submitter practitioner would simply send employers copies of the plan amendments that have been adopted on the employers' behalf.
6. If the staggered RAP option were adopted, compliance with the annual plan amendment requirements would be a condition precedent for the remedial amendment period and for continued reliance on a determination letter prior to its "expiration date." By the end of the 5-year RAP cycle, a plan sponsor would be required to retroactively "true-up" its plan with respect to all amendments

required to be adopted within the 5-year cycle. That is, the plan sponsor would have to retroactively adopt any additional amendments required by subsequent guidance.

B. Examples

The following examples illustrate how this option would work. The examples show how the option would affect both individually designed plans and pre-approved (M&P and volume submitter) plans. The examples also illustrate the effect of the option if it were to be adopted in combination with the staggered RAP option.

Example 1

In December 2005, the Service publishes a list of law and guidance changes that are effective in calendar year 2006 and for which plan amendments are required or may be necessary. An individually designed plan would have to be amended for these changes by December 31, 2007, even if the plan is a non-calendar year plan, and the changes would have to be made retroactively effective as of their respective effective dates. If the staggered RAP option were not adopted, a determination letter application would also have to be filed by December 31, 2007, in order for the plan to have reliance that the amendments were properly made. If the staggered RAP system were adopted, a determination letter application would not have to be filed until the end of the plan's current 5-year RAP cycle, by which time the employer would have to "true-up" the plan with respect to all amendments that were required to be adopted within the 5-year cycle. Of course, the determination letter would cover all the amendments that were required to be adopted within the 5-year cycle.

Example 2

Same facts as Example 1, except that the plan is a volume submitter plan. The volume submitter practitioner would have to amend the plan and request a new advisory letter by December 31, 2006. Assuming a new advisory letter is issued by June 30, 2007, if employers were required to make adoption agreement changes or otherwise amend the plan, they would have to do so by June 30, 2008. If a determination letter were needed for reliance and the staggered RAP option were not adopted, a determination letter application would also have to be filed by June 30, 2008. If the staggered RAP option were adopted, a determination letter application would not have to be filed until the end of the plan's current 5-year RAP cycle. In making that application, an employer could use the volume submitter document that was last approved prior to the calendar year in which the employer's 5-year cycle ends. In this case, the application and the determination letter would cover the amendments reflected in the approved volume submitter document.

Request for Comments

We invite the public to comment on the annual plan update and staggered RAP options described in this white paper. We are particularly interested in any suggestions for simplifying a staggered RAP system. We ask commentators to address the following questions:

1. Do you recommend adoption of a staggered remedial amendment period system or maintenance of the status quo?
2. If the status quo is maintained, do you support adoption of an annual plan update requirement?
3. If a staggered remedial amendment period system is adopted, do you support adoption of an annual plan update requirement?
4. Do you recommend adoption of the alternative 5-year rule for M&P and volume submitter plans described above rather than a requirement that these plans be amended and submitted annually? Please indicate in your response whether you are an M&P sponsor or volume submitter practitioner.

Comments should be submitted in writing by September 2, 2003. Comments should reference Announcement 2003-32 and should be submitted, preferably in duplicate, to the following address:

CC:PA:RU (Announcement 2003-32), room 5226
Internal Revenue Service
POB 7604, Ben Franklin Station
Washington, DC 20044

Alternatively, comments may be hand delivered between the hours of 8:30 a.m. and 4:00 p.m. to:

CC:PA:RU (Announcement 2003-32)
Courier's Desk
Internal Revenue Service
1111 Constitution Avenue NW
Washington, DC

All written comments will be open to public inspection.