

**The Future of the Employee Plans Determination Letter Program**

Some Possible Options

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## Executive Summary

1. Employee Plans Rulings and Agreements is undertaking a project to consider the long-term future of the EP determination letter program. This project grew out of discussions on how to manage the demands of all of EP's programs at a time when determination letter inventory is expected to increase significantly. The project is a search to determine whether there is a better alternative to the current determination letter program - an alternative that efficiently promotes compliance, particularly up-front compliance, and allows EP to carry out all of its responsibilities with high quality service.
2. There are several challenges with the present determination letter program:
  - Periodic increases in inventory on account of changes in the law draw down resources from other essential programs and impose additional training costs. In addition, these periodic increases make it harder to ensure that plans are correctly written, and operated. The risks of incorrect provisions are often borne by plan participants.
  - The program may discourage plan adoption and may not promote efficient, qualified plan operation.
  - The program may not efficiently allocate resources to provide the greatest benefit to the greatest number of participants and plan sponsors.
3. Any alternative program should provide a high level of assurance of form compliance as well as promote operational compliance, protect participants' rights, ease plan administration and employer burden, and encourage plan adoption.
4. The results of this project may be extrapolated to apply to section 403(b) and section 457 plans.
5. Ten options have been identified as alternatives to the present program. Most of the options retain employer reliance, one of the principal benefits of the present program. Legislative changes may be required to implement some of the options. The options are presented as an invitation to other stakeholders to enter into a dialogue on the future of the program.
6. The options range from maintaining the status quo, to requiring immediate plan amendments whenever the qualification requirements are changed and issuing determination letters on these amendments. Other suggestions are to eliminate determination letters, and have EP provide model plans for employers who want reliance. A variation on this would eliminate determination letters but continue to issue opinion and advisory letters to promote plans that are adopted by many

different employers. Another thought is to replace the determination letter program with self- or third-party certification. An alternative is to issue determination letters for initial adoption and plan termination only and require registration of amendments. Another idea is to stagger the expiration of each plan's reliance period to establish determination letter cycles.

## Introduction

The Employee Plans (EP) Rulings and Agreements segment of the Tax Exempt and Government Entities (TE/GE) Division of IRS is undertaking a project to consider the future of the EP determination letter program.<sup>1</sup> The implementation of a new organizational structure in EP and an anticipated large increase in determination workload on account of the “GUST”<sup>2</sup> plan amendments make this an appropriate time to take a fresh look at whether the determination letter process might be improved in the future after the GUST amendments. This project grew out of discussions within EP on how to manage the competing demands of the determination, examination, voluntary compliance, and customer education and outreach functions of EP at a time when determination workload is expected to spike and draw resources away from the other functions. Although the impetus for this project was effective resource management, the aim is to provide the best possible service to each and all of our customers.

Simply put, the purpose of this project is to explore whether there is a better alternative to the present determination letter program. The project is a search for a more efficient way to promote compliance, particularly “up-front compliance.”<sup>3</sup> This white paper consolidates our efforts on the project to date. The project has already produced some immediate improvements in the determination letter program (Announcement 2001-77, 2001-30 I.R.B. 83). However, the focus of the project is long term – perhaps five or more years into the future.

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1 Under the EP determination letter program, EP Rulings and Agreements issues determination letters regarding the qualified status of retirement plans under section 401(a) of the Internal Revenue Code and the status of related trusts under section 501(a). EP Rulings and Agreements also issues opinion and advisory letters approving the use of master and prototype (M&P) and volume submitter plans, respectively. M&P and volume submitter plans are plan documents that financial institutions, trade associations, and benefits practitioners provide to clients that wish to adopt qualified plans. EP “pre-approves” these documents for adoption by employers. Depending on the form of the pre-approved plan and employers' particular circumstances, employers may or may not request determination letters for these plans.

2 The term “GUST” refers to the following:

- the Uruguay Round Agreements Act, Pub. L. 103-465;
- the Uniformed Services Employment and Reemployment Rights Act of 1994, Pub. L. 103-353;
- the Small Business Job Protection Act of 1996, Pub. L. 104-188;
- the Taxpayer Relief Act of 1997, Pub. L. 105-34;
- the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. 105-206; and
- the Community Renewal Tax Relief Act of 2000, Pub. L. 106-554.

3 The determination letter program promotes “up-front compliance” by ensuring that the form of a plan document or plan amendment is qualified from inception. This approach has traditionally been viewed as the best way to ensure future compliance.

## **How the Options Were Identified and Analyzed**

A team of EP employees including the Director, Rulings & Agreements, managers, revenue agents, and tax law specialists identified alternatives to the present determination letter program. The team identified the pros and cons of several options and prepared written outlines of each option. These outlines form the heart of this white paper.

This white paper describes several options that we have identified as possible alternatives to the present EP determination letter program. The paper describes each option and discusses the pros and cons. The paper also includes other ideas on ways to promote plan compliance and IRS efficiency. Finally, the paper includes additional background information on why we are undertaking this project and what we have done so far.

The ideas in this white paper are just that – ideas. They are the products of brainstorming within EP. Those involved have been encouraged to think “outside the box” and not to let their thinking be constrained by current requirements and policy. We note that statutory changes may be required to implement some of the options in this paper. Our purpose is to generate and analyze a wide range of ideas. While we are committed to an exploration of the possibility of several changes to the EP determination letter program, we are not committed to any one of the options or ideas described in this paper. We also have not ruled out or made any final conclusions regarding these or any other options that might be considered.

This white paper is an initial step in what we think will be a long-term project, and it reflects only initial analysis within Employee Plans. We hope this paper will serve as an invitation to other stakeholders in the determination letter process, in and outside of government, to participate in a discussion of the future of the EP determination letter program.

## **Why IRS Is Considering Alternatives to the Present Employee Plans Determination Letter Program**

### Background

The EP determination letter program has existed for many years. Section 7476 of the Internal Revenue Code, which was added by ERISA,<sup>4</sup> mandates the program. Section 7476 provides that the Tax Court may make a declaratory judgment with respect to the qualification of a retirement plan if the IRS fails to make a determination on the plan's qualification and the petitioner has exhausted administrative remedies within the IRS. Thus, the IRS is required to make determinations with respect to the qualification of retirement plans upon request.

Administering the determination letter program, which operates to ensure that plans are qualified in form, is only one of EP's responsibilities. EP's other responsibilities include the examination of plans for qualification in operation; protection of participant rights; encouragement of voluntary compliance; enforcement of minimum funding, reporting and filing requirements; and the determination of liability for excise and other taxes. To carry out these responsibilities, EP has a customer education and outreach program that helps plan sponsors and others comply with the law, an examination program that audits plans for compliance, a technical program that provides guidance and assistance, and a voluntary compliance program (the Employee Plans Compliance Resolution System or "EPCRS") that allows plans that are in violation of the rules to be restored to compliance. EP directs its limited staff resources to address each of its areas of responsibility in a way that most efficiently supports compliance and achieves the highest possible level of service to each and all of its customers.

### Challenges With the Present Determination Letter Program

In years when the number of determination letter applications is high, substantial staff resources that would otherwise be devoted to EP's other responsibilities are necessarily diverted to the determination letter program in order to timely process customer requests. For example, increases in determination letter workload have historically been accompanied by decreases in examination activity. Spikes in determination letter workload have occurred with ERISA, TEFRA/DEFRA/REA,<sup>5</sup> and TRA '86,<sup>6</sup> and a new spike is expected with GUST. EP is now attempting to place much greater emphasis on customer education and outreach and voluntary

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4 The Employee Retirement Income Security Act of 1974, Pub. L. 93-406.

5 The Tax Equity and Fiscal responsibility Act of 1982, Pub. L. 97-248 (TEFRA), the Deficit Reduction Act of 1983, Pub. L. 98-369 (DEFRA), and the Retirement Equity Act of 1984, Pub. L. 98-397 (REA).

6 The Tax Reform Act of 1986, Pub. L. 99-514.



compliance, but the peak in determination work for GUST could draw resources away from these other programs. There are also other costs, including training, associated with the crossover of agents from other programs to determinations.

EP managers have met regularly to determine effective management of resources to process the large volume of GUST determination letter applications. The managers are concerned about the historical seesaw between determination and examination activity and the deleterious effect this has had on consistent examination coverage. Other concerns are the costs and complexities of reassigning agents from one program to another.

In response to these concerns over the years, EP has encouraged practitioners who file many determination letter applications for similar plans, or who use a document producer's plan, to submit the plans under the volume submitter program or master and prototype (M&P) program. These programs identify the plans as similar and thus allow EP to review the plans in the most efficient manner. Although we have had great success in promoting these programs, we believe there are many practitioners who are eligible but either choose not to participate in the programs or are unaware of them.

A practitioner may file separate determination letter applications for many similar plans or submit applications for plans that are modified versions of a document producer's plan. If a practitioner does not indicate that a plan is similar to another plan, the agent assigned to review the plan does not benefit from the work done by others. This results in inefficient use of substantial resources.

Finally, we are concerned with the inability of the current determination letter program to respond in a timely way to changes in law. The pace of change in pension law has continued unabated since ERISA was enacted in 1974. Inevitably, interpretive guidance is needed before determination letters can be issued on new provisions, and the IRS has repeatedly had to extend remedial amendment periods under section 401(b).<sup>7</sup> As a result, EP has had to maintain what are in effect multiple determination letter programs: one for plans that defer all law change amendments until the end of the remedial amendment period; a second for plans that amend for the law changes for which guidance has been issued; and a third for terminating plans, which must amend for all effective law changes.

Another result of far greater consequence has been that, in order to comply with the law until the plans are eventually amended, plans have been required to operate outside their terms for years at a time. For example, plans that are submitted for GUST letters will be amended for six statutory changes enacted over seven years, and the amendments will have effective dates spread over eight plan years. This means that

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<sup>7</sup> Section 401(b) provides a remedial amendment period during which a plan may be retroactively amended to correct a disqualifying plan provision. The provisions of section 401(b) have generally been applied to permit plans to delay adoption of plan amendments for changes in law until interpretive guidance has been issued.

plan sponsors are unable to determine from the terms of their plan how the plan is supposed to be operated. Similarly plan participants are unable determine their rights from the terms of the plan.

### Customer Service Concerns

EP has three principal groups of customers: employee-participants, plan sponsors, and the employee benefits practitioners who draft, administer, and provide legal, actuarial, and other services to plans. While there is no doubt that the determination letter program provides benefits to each of these groups, the question is whether the present program enables the IRS to efficiently provide the highest level of service to these groups.

For example, the present program enables us to determine if a plan's terms are qualifying and, at the sponsor's election, if the plan meets minimum coverage and nondiscrimination requirements. But there is a concern that disproportionate resources are expended relative to the number of employers and employees served.

If the diversion of resources from examinations to determinations reduces the chance of an audit so much that plan sponsors are not encouraged to self-audit and correct under EPCRS, is EP effectively serving the needs of all of our customers? Does the present program encourage plan adoption and promote efficient, qualified plan operation? Would our time be better spent providing customer education and outreach to encourage new plans and facilitate operational compliance rather than reviewing plans that are similar to plans that have already been reviewed?

### Benefits of the Present Program

- The program promotes up-front compliance. As such TE/GE has been a forerunner in the IRS in providing “pre-filing” assurance.
- Employers obtain reliance. Reliance provides stability by protecting the plan against retroactive disqualification and the adverse consequences of disqualification for plan participants and employers.
- The program can identify issues and problem areas at an early stage.
- Under EPCRS, a favorable determination letter is a pre-requisite for self-correction and the voluntary compliance program.
- The present program encourages plans to be updated for changes in the law.
- Filing an application for a determination letter requires disclosure to interested parties and gives the interested parties the right to submit comments to the government.

- The program helps to protect participant rights by ensuring that the correct rules are included in the plan document.

The project to examine the future of the determination letter program grew out of consideration of the challenges and concerns expressed above and a desire to find a better, more efficient way to achieve the objectives of the program, and to provide better service to all segments of the EP customer community.

## Goals

The task of fostering compliance requires us to be concerned with both the form of a plan and its compliance in operation. The purpose of this project is to find if there is a better alternative to the present determination letter program that allows EP to strike a more effective balance in the application of limited staffing resources. The primary goals are to provide a high level of assurance that the form and operation of a plan satisfies Code and regulation requirements, protect participants rights, ease plan administration and, thus, encourage employers to adopt plans.

### Section 403(b) and Section 457 Plans

The law does not require the IRS to issue determination letters for section 403(b) and section 457 plans. We do issue private letter rulings regarding these plans, but the process of obtaining a ruling for a section 403(b) or section 457 plan may be more expensive than the process of obtaining a determination letter for a qualified plan. Also, a private letter ruling may not offer the scope of reliance of a determination letter. For example, if an employer requests a private letter ruling on limited issues in connection with a section 403(b) plan, the letter will not provide the same scope of reliance as a determination letter issued for a qualified plan. In relative terms, we receive far fewer requests for private letter rulings for section 403(b) and section 457 plans than requests for determination letters for qualified plans.

We at the same time have concerns about the level of compliance in the section 403(b) and section 457 plan areas. The establishment of a determination letter program has been suggested as one way to address these concerns. The analysis we have begun of alternatives to the present determination letter program for qualified plans could prove of great value if we were to consider establishing a determination letter program for section 403(b) and section 457 plans.

### List of Options

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

Elements of some of these options could also be combined. For example, Option E could be combined with Option C-2 to preserve the determination letter program for volume submitter and M&P plans and require registration with a certified compliance checklist for individually designed plans.

## Statutory and Regulatory Framework

The current statute and regulation requirements regarding determination letters are a major factor to be considered in evaluating the options. The following are relevant requirements:

Section 7476 - As noted earlier, this section requires the IRS to issue determination letters upon request. In order to implement some of the options, enabling legislation modifying or eliminating this requirement would be needed.

Section 7805(b) and Rev. Proc. 2001-6 - Section 7805(b) gives the Commissioner the authority to prescribe the extent to which any determination will be applied without retroactive effect. The revenue procedure provides that, except in rare or unusual circumstances, the revocation of a favorable determination letter that is found to have been issued in error will not be applied retroactively if -

1. there has been no misrepresentation or omission of material facts;
2. the facts subsequently developed are not materially different from the facts on which the determination letter was based;
3. there has been no change of applicable law; and
4. the employer acted in good faith in relying on the letter.

The term "reliance" is used to summarize these rules. The general effect of reliance is as follows. If an employer receives a favorable determination letter and follows the plan's terms in operation, the plan generally will not be retroactively disqualified if the IRS later discovers that the form of the plan is not qualified. Reliance operates to insure the employer's deductions and the favorable tax treatment of the trust and the plan participants. It is the principal reason employers request determination letters. All but a couple of the options presented in this paper will preserve a reliance feature.

ERISA section 3001, section 1.7476 of the Income Tax Regulations and Rev. Proc. 2001-6 - These require determination letter applicants to notify interested parties, including plan participants and the Pension Benefit Guaranty Corporation (PBGC), of the filing of a determination letter application. They also give interested parties the right to comment, or to ask the Department of Labor (DOL) to comment, on the application. Under one option, enabling legislation might be needed to preserve these rights. Some other options would effectively eliminate these rights.

Other enabling legislation, in addition to that mentioned above, might be required in connection with some of the options.

## Options

### OPTION A – MAINTAIN THE STATUS QUO

General Description: Maintain the determination letter program in its present form, incorporating appropriate limited enhancements such as those announced in Announcement 2001-77.

#### I. Pros

- A. Because there is no major change, adaptation by stakeholders is not required.
- B. The benefits of the present program are known and would be preserved.
- C. This option does not require risk-taking by any parties.
- D. No legislative changes required.

#### II. Cons

- A. Does nothing to address the challenges and concerns that exist regarding the present program.
- B. May not provide the highest possible level of service to our customers.

## OPTION B - ELIMINATE EP DETERMINATION LETTERS; PROVIDE MODEL PLANS FOR EMPLOYERS WHO WANT RELIANCE

General Description: EP would issue no letters of any kind on plan qualification.

### I. Details

- A. The EP determination letter program would be entirely eliminated, including issuance of opinion and advisory letters for master and prototype (M&P) and volume submitter plans.
- B. All EP determination staff would be reassigned to the EP technical, voluntary compliance, customer education and outreach, or examination programs.
- C. Employers could rely on practitioners' opinions that plans satisfy qualification requirements, but EP would not extend reliance to protect employers against adverse tax consequences if the IRS finds that the form of a plan is not qualified. Correction under EPCRS would continue to be available.
- D. EP would develop model plans. Employers who adopt the models would have reliance on the plan's qualification.

### II. Pros

- A. More EP resources could be devoted to technical assistance, customer education and outreach, examination, and voluntary compliance.
- B. EP employees would master only one specialty, reducing the need for training that is incurred when agents are reassigned to the determination program from examinations or other programs.
- C. There would be an incentive to adopt model plans.

### III. Cons

- A. EP would lose the oversight it has with respect to the qualification of the plan document. Up-front assurance of compliance, for which TE/GE has been a model, would be sacrificed.
- B. The use of models might discourage innovation and flexibility in plan design to meet special circumstances.
- C. EP would monitor many fewer plans through the examination and voluntary compliance programs than it does currently through the



combination of these programs and the determination letter program.

- D. EP would lose direct contact with thousands of plan sponsors which would leave us unable to monitor emerging trends, problems and errors that are noticed through the determination letter program.
- E. Examination time would be spent reviewing plan language. This might essentially shift the determination process to the examination function for plans under EP audit.
- F. The need to develop, maintain and update an array of model plans would require a large resource commitment.
- G. Participants would lose the ability to comment on the qualification of a plan absent some alternative arrangement for interested party comment.

## OPTION C - ELIMINATE DETERMINATION LETTERS FOR INDIVIDUALLY DESIGNED PLANS

General Description: This option would eliminate determination letters for individually designed plans but maintain a letter program of some kind for volume submitter and M&P plans.

### I. Details

- A. Eliminate the determination letter program for individually designed plans.
- B. Continue to maintain a determination letter program for M&P and volume submitter plans under Option C-1 or Option C-2.
- C. OPTION C-1. Issue opinion and advisory letters with respect to the plan document but do not issue determination letters to employers adopting the pre-approved document.
- D. OPTION C-2. Issue opinion and advisory letters with respect to the plan document and also issue determination letters to employers adopting the pre-approved document.

### II. Pros

- A. Improves the efficiency of the determination letter program by limiting the program to pre-approved plans that are adopted by many employers.
- B. More EP resources could be devoted to technical assistance, customer education and outreach, examination, and voluntary compliance.
- C. OPTION C-1
  - 1. More employers would adopt standardized plans to obtain reliance.
  - 2. Decreased volume could result in better program administration.
  - 3. There would be fewer applications filed with incorrect user fees.
- D. OPTION C-2
  - 1. Adopting employers of pre-approved plans would receive reliance.
  - 2. Plan design flexibility would be encouraged but EP would have more control over allowable plan options.

III. Cons

- A. Possible adverse impact on compliance and participant protection because individually designed plans would not be reviewed.
- B. Employers who adopt individually designed plans will have no reliance.
- C. Innovation and flexibility in plan design to meet special circumstances might be discouraged.
- D. Option C-1
  - 1. Possible adverse impact on compliance and participant protection because pre-approved plans as adopted by employers would not be reviewed.
  - 2. Employers who adopt pre-approved plans or volume submitter plans will have limited reliance.

## OPTION D - REPLACE THE DETERMINATION LETTER PROGRAM WITH A THIRD-PARTY CERTIFICATION SYSTEM

General Description: The determination letter program would be eliminated. In its place employers could obtain a certification that the form of a plan is qualified from an authorized third party.

### I. Details

- A. The third-party certification would give the employer reliance that would protect against retroactive disqualification if a form defect were found on examination.
- B. The rights of interested parties and declaratory judgement could be preserved.
- C. If the third-party certifier is unable to certify the plan qualification, the application would be referred to EP for review, appeal and final adverse letter.
- D. Administrative procedures would have to be developed to determine eligibility of third-party certifiers, monitor continuing eligibility, provide for disciplinary actions, and establish conflict-of-interest rules, in addition to consideration of insurance requirements and general procedures for the certification program.

### II. Pros

- A. Assurance of up-front compliance for certified plans.
- B. Rights of interested parties to comment preserved.
- C. Depending on the resources needed to regulate a third-party certification system, EP might be able to focus more resources on other programs.
- D. Employers would have reliance.
- E. EP would remain involved in ensuring the quality of plans through oversight of the certification process.

### III. Cons

- A. The cost of establishing and maintaining a plan might be increased.
- B. Employers may forego certification because of cost.

- C. Lack of direct IRS involvement in plan review may foster greater inconsistency among plans.
- D. Substantial resources may be required to regulate the system.

## OPTION E - REPLACE THE DETERMINATION LETTER PROGRAM WITH A SELF-CERTIFICATION SYSTEM

General Description: This option would allow employers to self-certify that their plan satisfies the qualification requirements and thereby obtain the benefits of reliance. The option would preserve interested parties' comment and declaratory judgment rights.

### I. Details

- A. Self-certification would be made by the employer or its representative and would be filed annually, either with Form 5500 or with the employer's tax return.
- B. The self-certification could require specific information besides the certification.
- C. The self-certification could address qualification in operation as well as in form.
- D. The self-certification could include a penalty-of-perjury jurat, with respect to either the certification itself or any statements of fact included in the certification.
- E. The self-certification would provide reliance, but there would be no reliance for certifications that are unreasonable or not made in good faith or that omit or misrepresent facts.
- F. Interested parties would retain the right to submit comments and IRS could make a determination that would nullify the self-certification for reliance purposes. Declaratory judgment would also be preserved.

### II. Pros

- A. Could significantly lower the cost of establishing and maintaining a plan.
- B. Would free-up IRS resources for other programs.

### III. Cons

- A. Likely to result in widespread noncompliance that IRS could not address, even with added resources.
- B. Participants' rights and protections would be seriously endangered.

## OPTION F - REPLACE THE DETERMINATION LETTER PROGRAM WITH A REGISTRATION SYSTEM THAT INCLUDES A CERTIFIED COMPLIANCE CHECKLIST

General Description: This option would replace whatever part of the determination letter program is eliminated with a registration system that includes a certified compliance checklist.

### I. Detail

- A. The registration system could be built into the existing Form 5500 filing process or the current system to receive determination letter applications.
- B. The certified compliance checklist would be completed under penalty of perjury and would request specific information that would indicate whether the plan is qualified in form and operation.
- C. Use of model plans and/or language might be substituted for part or all of the certification.
- D. If only part of the determination letter program is eliminated, a complete checklist would be required only for those plans (other than model plans) that cannot receive a determination letter.
- E. The certified compliance checklist would be furnished or made available to each interested party. Interested party comments would be sent to EP.
- F. There could be penalties for non-completion or improper completion of the checklist.

### II. Pros

- A. EP could focus more resources on other programs.
- B. Determination letter costs would be eliminated.
- C. The certified compliance checklist would require employers to take an in-depth look at plan form and operation and could be used to identify and direct plans that need to utilize EPCRS.
- D. Employers would have reliance to the extent the certified compliance checklist has no material misstatements, even if the checklist is not reviewed by the IRS.
- E. The certified compliance checklist could enhance selection of plans for examination.

III. Cons

- A. The certified compliance checklist could increase the burden and cost of maintaining a plan.
- B. The value of the certified compliance checklist and the assurance of up-front compliance would be dependent on the quality and clarity of the questions and the level of understanding by the employer or person completing the checklist.
- C. Lack of direct IRS involvement in plan review may foster greater inconsistency among plans.



## OPTION F-1 - ISSUE DETERMINATION LETTERS ONLY FOR INITIAL PLAN ADOPTION AND PLAN TERMINATION AND REQUIRE REGISTRATION OF AMENDMENTS

General Description: This option is a variant of Option F. This option would retain the determination letter program but determination letters would not be issued on plan amendments. Instead, these amendments would be registered with the IRS.

### I. Details

- A. Plans would be able to obtain determination letters on initial plan adoption and plan termination, but would not be able to obtain a determination letter for a plan amendment, including an amendment required by law.
- B. A certified compliance checklist could accompany the determination letter application for plan adoption or termination.
- C. The registration might require a description of the amendment and might require the sponsor to answer specific questions about amendments for recent law changes, in the form of a certified compliance checklist.
- D. Any interim checklist probably would not cover form matters other than the amendment, but might address operation.
- E. The use of model plans and/or language could enhance this option.

### II. Pros

- A. Plans would be reviewed at the most critical times – when they are adopted and when they terminate.
- B. Determination letter workload would decrease substantially allowing more focus on other programs.
- C. Despite the decrease in determination activity, all plans would continue to be reviewed.
- D. Costs of maintaining plans could be reduced.

### III. Cons

- A. There would possibly be less compliance after initial qualification.
- B. The certified compliance checklist could increase the burden and cost of maintaining a plan.

## OPTION G – STAGGER THE EXPIRATION OF THE REMEDIAL AMENDMENT PERIOD

General Description: The current determination letter program would generally be retained but each plan's reliance would expire after a certain period.

### I. Details

- A. All plans will be assigned a reliance period after which they could renew reliance by amending the plan for intervening changes in qualification law and rules and requesting a determination letter covering those changes.
- B. The length of initial reliance periods would be randomly distributed among plans so that expiration of reliance periods would be spread out over a multi-year period. Thereafter the number of years in each plan's cycle could be the same, but the cycles would end in different years.
- C. Plans would be required to operate in accordance with the applicable law (as is current requirement).
- D. New plans, as now, would have an initial remedial amendment period that would end on the tax return due date for the year in which the plan is effective. Then they would move into a cycle.
- E. If the remedial amendment period became synonymous with the reliance period under this option, extensions of the 401(b) period would be rare.
- F. Plans should be restated, with incorporation of all of the amendments since the last determination letter to reflect the options used in operation of the plan during the period.
- G. The IRS could use data from the 5500 filings to monitor determination letter status.
- H. Miscellaneous Considerations:
  - 1. All plans should be amended to a state of current compliance before this option is implemented. This will make it possible for IRS to review only the changed or amended portions of plans.
  - 2. Termination applications - No change. Plans must be amended to comply with all laws in effect up to the date

of termination.

3. M&P sponsors would make amendments with each law change and all clients of the M&P sponsor would amend as appropriate. As with current procedures, some amendments to M&P plans will not require specific adoption by the individual adopters.
4. The appropriate length of a reliance period would have to be determined.

## II. Pros

- A. This option should create a more even and predictable determination workload for both the government and private sectors.
- B. The ability to forecast expected determination workload with accuracy would enable EP to maintain a consistent level of coverage and resources devoted to other programs.
- C. This option may mitigate the current situation of plans operating outside their terms.
- D. Under this option, EP would continue to be directly involved in up-front plan compliance.
- E. Reliance, interested party rights and declaratory judgement rights would not change.
- F. Enabling legislation may be needed, although the Secretary's authority under section 401(b) may be broad enough to implement this option by regulatory change.

## III. Cons

- A. There will be many questions that arise in the administration of this option, such as questions relating to the determination cycle when plans are merged or spun-off.
- B. This option may make administration of pre-approved plans more difficult by requiring sponsors to track adopters' individual cycles or, alternatively, by requiring annual adoption of amendments.

## OPTION G-1 - STAGGER THE REMEDIAL AMENDMENT PERIOD BUT REQUIRE IMMEDIATE PLAN AMENDMENT FOR LAW CHANGES

General Description: This is a variant of Option G. Plans would be required to be amended to comply with statutory changes when the changes are effective. Regulatory changes, on the other hand, would be incorporated in the next plan restatement. Compare to Option G-1.

### I. Details

- A. The IRS would establish determination letter cycles as described in Option F.
- B. Plans would be required to be amended for, and to operate in compliance with, statutory changes when the changes are effective but the remedial amendment period for any needed corrections would remain open through the plan's reliance cycle. Determination letters would not be issued before guidance is issued or the end of the plan's reliance cycle.
- C. Employers would operate their plans under a good faith, reasonable interpretation standard.
- D. Plan amendments for regulatory changes would not be required until the end of the plan's reliance cycle. Regulatory guidance would either require operational compliance as of the guidance effective date or would postpone the compliance until the required amendment deadline.

### II. Pros

- A. This option provides all of the benefits of Option F.
- B. In addition, it mitigates the concern that plans are operated outside their terms.
- C. It increases the likelihood of compliance in form and operation and the protection of the rights of participants.

### III. Cons

- A. These are generally the same as for Option F.
- B. This option requires more frequent plan amendment.

## OPTION H - REQUIRE IMMEDIATE AMENDMENT FOR LAW CHANGES AND GUIDANCE CHANGES

General Description: This option would require plans to be amended when a change in law is effective and again when regulatory guidance is issued. (Contrast this to the GUST changes under which plans were not required to be amended at the time the changes in the law were effective. Instead, they were given 401(b) relief that allowed them to postpone amendment until regulatory guidance was issued, provided that the plan was operated in compliance with the new law.)

### I. Details

- A. Plans would be required to be amended when a statutory change in the qualification requirements is effective.
- B. EP would not provide a 401(b) period for amending plans to comply with the change.
- C. EP would issue determination letters covering the change regardless of whether guidance had been issued.
- D. Employers would operate their plans under a good faith, reasonable interpretation standard.
- E. Plans would have to be amended again when guidance is issued and EP would issue another determination letter.

### II. Pros

- A. Statutory language is incorporated in plan as it awaits guidance.
- B. There is a greater chance of operational compliance.

### III. Cons

- A. Employer burden and expense may increase because of the need to amend twice for each qualification change.
- B. There will be more frequent spikes in determination workload related to qualification changes.
- C. Plans will be reviewed twice for the same qualification change, possibly overwhelming sponsors of pre-approved plans, who might have to secure multiple amendments from employers for each law change.

- D. In the absence of guidance, unreasonable applications of the law may receive reliance.

## OPTION H-1 - REQUIRE IMMEDIATE AMENDMENT FOR LAW CHANGES AND CYCLICAL AMENDMENT FOR GUIDANCE CHANGES

General Description: This is a variant of Option G. Plans would be required to be amended for statutory changes when they are effective and no 401(b) period would be provided for the change in law. Plan amendments for regulatory guidance changes would be required on a cyclical or periodic basis. Compare this to Option F-1.

### I. Details

- A. Plans would be required to be amended when a statutory change in the qualification requirements is effective.
- B. EP would not provide a 401(b) period for amending plans to comply with the change.
- C. EP would issue determination letters covering the change regardless of whether guidance had been issued.
- D. Employers would operate their plans under a good faith, reasonable interpretation standard.
- E. Plans would not be required to be amended for regulatory changes until either the end of an established determination letter cycle or until some scheduled future time. Regulatory guidance could require immediate operational compliance or could defer operational compliance until the amendment deadline.
- F. EP would issue another determination letter when the plan is amended for regulatory changes.

### II. Pros

- A. Statutory language is in plan as it awaits guidance.
- B. There is a greater chance of operational compliance.
- C. Allowing guidance amendments on a cyclical basis removes some of the determination spikes that would occur under Option G.

### III. Cons

- A. Plans may incur greater costs because of the need to amend twice for a qualification change.
- B. Although this option eliminates some of the determination



letter spikes, the spikes for law changes remain.

- C. This option will still increase determination workload by requiring plans to be reviewed twice for the same qualification change.

## Other Tools For Achieving Long-Term Goals

### Other Suggestions for the Determination Letter, M&P and Volume Submitter Programs

1. Establish a presumption that M&P and volume submitter plans are preferred. Work towards making the individually designed plan the exception, not the rule.

Suggestions -

- Require practitioners to certify that they do not have 30 clients adopting substantially the same plan.
- Encourage applicants to be represented by employee benefit professionals when applying for determination letters.

2. Combine the M&P program and the volume submitter program into one program.

This will achieve better consistency in documents and eliminate duplication of efforts. Practitioners can submit a core document containing language that can be structured to meet the requirements of both programs. The core document will contain safe harbor style provisions that will allow the document to be structured as an M&P plan (as well as provisions limited only to M&P plans). The core document will also contain non-safe harbor provisions appropriate for the volume submitter program.

3. Require all M&P plans to be standardized plans.

4. Consider proposing a tax credit for plan sponsors, in appropriate circumstances, to help defray the cost of obtaining a certification.

5. Develop model plans; continue to develop model plan provisions.

6. Publicize and encourage adoption of section 408(p) SIMPLE plans, which do not require determination letters.

## Other Strategies for Achieving Plan Compliance

### 1. Require plans to have a plan operating manual (POM).

Practitioners have commented that noncompliance in the operation of plans and the failure to follow plan terms is fairly widespread among certain categories of plan adopters. A POM might address this problem. This suggestion might also be considered in combination with some of the preceding options. For example, a POM could be a condition precedent for receiving an opinion letter, a determination letter or consideration under EPCRS. EP invites comments from stakeholders regarding this suggestion.

Suggested contents for POM -

The manual should contain a calendar outlining various duties and time frames, such as:

- Preparation and filing of annual 5500 returns
- Summary annual report
- 401(k)/401(m) safe harbor notifications

The manual should also contain procedures and guidelines (and possibly sample forms) for notices, elections, etc., such as:

- Application for participation and designation of beneficiaries
- Qualified domestic relations order (QDRO) procedures
- Notices of and elections to waive the qualified preretirement survivor annuity (QPSA) and the qualified joint and survivor annuity (QJSA)
- Participant consent agreement for distributions
- Notice on withholding on payments

The operating manual should contain instructions and times for various activities, including:

- Making and allocating contributions
- Running the actual deferral percentage and actual contribution percentage (ADP/ACP) tests
- Determining the timing and amounts of distributions

The manual should also contain a section on the records that must be kept.

Issues, concerns and suggestions -

- Can EP require a plan sponsor to prepare a POM?
- Should reliance be contingent on the use of a POM?
- What will we require to be included in the POM? Qualification, non-qualification, ERISA Title I fiduciary requirements?
- Will an argument be made that the POM takes the place of the plan?
- What standards will we use to determine if a POM is acceptable?
- If a POM were required to be submitted with an application for an opinion or a determination letter, we would probably have to review the POM to ensure it agrees with the plan document.
- What will give us the power to change the POM, or what if the practitioner disagrees?
- If the plan is amended and this change would affect operations, the POM would also have to be amended.
- This would not save IRS resources, but it may be an extremely effective tool for compliance and the impact on up-front compliance may require fewer resources on the enforcement side.

2. Identify and monitor the responsibilities of all parties, especially third-party administrators, who have responsibilities with respect to the plan.

This could include the following -

- Identify which parties are responsible for specific compliance functions under a plan, such as ADP testing and calculation of minimum distributions and determination of plan compensation.
- Explore the feasibility of establishing competency requirements/determinations for third-party administrators.

Describe the requirements that apply to M&P sponsors with respect to plan operational compliance (e.g., if the M&P sponsor does not assume the responsibility for ADP testing, the sponsor may be required to provide the employer a detailed checklist/worksheet that will enable the employer to test the plan.