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Protecting Your Qualified Retirement Plan Now that the IRS Determination Program is (Mostly) Closed

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A lot has been written over the last few months about what to do now that the IRS has closed its determination letter program for ongoing individually designed tax-qualified retirement plans. Some see this as cause for celebration because we no longer have to go through the trouble of collecting documents, filling out forms, and negotiating with the IRS over renewals of qualification determinations. Another “positive” result of the IRS position is that existing determination letters will no longer expire—although they will become stale as time passes, due to plan changes and legal developments.

But most of the focus seems to have been on fear: as time passes, how will we know whether a retirement or 401(k) plan is still qualified? The answer to this question is important because plan sponsors and administrators have historically relied on determination letters for a host of purposes, including:

- Representations for M&A, financing, and other corporate transactions;
- Representations to auditors;
- Representations to investment trustees and fund managers;
- Government audits; and
- Rollovers and other plan asset transfers.

We have seen a range of ideas, from moving to a prototype or volume submitter plan to obtaining a law firm or consulting firm "opinion" that is marketed as analogous to an IRS determination letter. In our view, a more practical solution is to continue the discipline forced by the old determination program and use that discipline for systematic reviews of ongoing compliance. This does not mean constant full-scale review, but rather setting up a system to ensure that key elements of the plan document and administration will be reviewed periodically (perhaps a little at a time to keep things manageable).

We have developed tools to help clients with this process, ranging from self-help diagnostic checklists (at no cost) to larger-scale compliance reviews with specific analysis and recommendations, all designed to manage compliance risk, add value, and protect confidentiality—think of it as the Proskauer Compliance Resolution System (PCRS).

In considering a prudent path forward, it is important to think about what an IRS determination letter is, and what it isn't. An IRS determination letter reflects the IRS's binding determination that a plan's written document satisfies the formal requirements for tax qualification. An IRS determination letter is binding on the IRS; it precludes the IRS from retroactively disqualifying a plan because of a defect in the plan's language.

But even if a plan has a favorable determination letter, the IRS can still disqualify the plan for many reasons, including:

1. If the IRS discovers that the plan is not operating in accordance with its terms;

2. If the IRS finds that a once-compliant plan document was not amended to comply with a change in law or was amended in a way that violates a technical qualification requirement; or

3. If the IRS finds that the language in a previously approved plan was impermissible and should not have been approved. In this case, a prior determination letter protects against disqualification retroactively; but the IRS would still require a change going forward, and dealing with the IRS tends to be complicated if the change involves a potential cut-back of benefits or rights.

Separately, a favorable IRS determination letter generally does not help in defense of claims by participants and beneficiaries under Title I of ERISA, such as a claim for benefits owed or a breach of fiduciary duty. So even with an up-to-date determination letter, plan sponsors and administrators need to stay on top of plan document and operational compliance.

Given these limitations, the real question for plan sponsors and administrators is how best to manage ongoing plan qualification and compliance risk. A formal opinion letter from a private third party, like a law firm or consulting firm, might seem like an attractive way to make up for losing the determination letter piece of the puzzle. It is undoubtedly worthwhile to review the plan document—and ideally its administration too—and to correct any defects before the IRS or a disgruntled plan participant discovers them.

But the value in any qualified plan compliance exercise is found more in the quality of the review and steps taken to mitigate risk than in what is written into a third party's formal written opinion. For example, when the IRS audits a qualified plan, the existence of a third-party opinion letter is not likely to affect the auditor's independent findings and may have little or no bearing on the penalties that the

IRS may assess if it concludes there is an error. Similarly, in a benefit claim or litigation, a third party's written opinion is not likely to persuade a fact-finder. To the contrary, an opinion can potentially cause harm if it leaves a discovery trail of issues that were identified but not adequately corrected, or issues that were spotted but ultimately resolved without action due to a plan-favorable interpretation of the law.

In most cases, the best value is to emphasize substance over form by working with reliable and pragmatic counsel, and by continuing to allocate resources to proactive plan compliance efforts. Systematic ongoing review is the best way to mitigate risks that arise from a technical web of constantly changing rules and an ever-more-creative plaintiffs' bar.

Compliance reviews come in many varieties. For example, when merging a small and simple plan into a larger, more complex plan, a quick review of required documents and basic processes might be enough. In other cases, a more detailed review is warranted. The important point is that every plan needs to be reviewed periodically to stay up to date and to ensure that operations remain consistent with plan terms and best practices.

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