USING THE NEW IRS REMEDIAL AMENDMENT PERIOD RULES

THE YEAR IN EMPLOYEE BENEFITS: INSIGHTS AND STRATEGIES FOR RETIREMENT, HEALTH, AND EXECUTIVE COMPENSATION PLANS

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When Must a Qualified Retirement Plan Be Amended?: Introductory Thoughts. When we think about the laws that apply to employee benefit programs, we typically think first about the Employee Retirement Income Security Act of 1974 ("ERISA") and the Internal Revenue Code (the "Code" or the "Tax Code"). What do ERISA and the Tax Code tell us about when a qualified retirement plan must be amended? Well, ERISA tells us surprising little. I say surprisingly little because there aren't many fiduciary obligations under ERISA (only four), and yet one of them is to follow the terms of the plan document (unless doing so would be inconsistent with Titles I or IV of ERISA). ERISA § 404(a)(1)(D). Given the importance ERISA attaches to following the plan document, you might think it would tell us the deadline by which a plan must be amended to reflect a change in plan terms. In particular, it would seem important in administering and interpreting a plan to know whether, and in what circumstances, a plan administrator may anticipate changes it expects to be made to the plan document. Nonetheless, ERISA's statutory provisions, and related Department of Labor regulations, tell us precious little of value about the deadline for incorporating plan changes into a plan document, other than as part of the anti-cutback/protected benefit rules of ERISA Section 204(g).

So, ERISA doesn't explicitly tell us much about when a qualified retirement plan (or other employee benefit program) must be amended to effectuate a change. What about the Tax Code?[1] As the reader well knows, the Tax Code's rules governing qualified retirement plans are lengthy and complex. And as with any complex set of rules, smart and knowledgeable people can read and understand those rules differently. This is a point of particular sensitivity since to enjoy the tax benefits accorded qualified retirement plans, it is important that the plan document be written and administered in a fashion consonant with the IRS' interpretation of the rules. Although the qualified retirement plan rules seem to grow inexorably more complicated, and correspondingly more confusing to some of us, even the quaintly simpler rules in effect prior to ERISA's enactment in 1974 were complicated enough, and the stakes for failing to satisfy those requirements were great enough, that the IRS began permitting employers and other plan sponsors to submit qualified retirement plan documents to the IRS for its review as early as the first half of the 1950s, and, on a less formal basis, apparently as early as the first half of the 1940s.[2]

[1] I know many Tax Code provisions of interest are technically in Title II of ERISA, and realize that many, though certainly not all, of the important rules governing qualified retirement plans are duplicated in parallel provisions in Parts 2 and 3 of Title I of ERISA. Nonetheless, in this outline I will follow the common practice among employee benefits professionals of using the term "ERISA" to mean only the provisions of Titles I and IV of the Employee Retirement Income Security Act of 1974. In referring to the Tax Code, I will typically be thinking of the provisions of Subchapter D of Chapter 1 of Subtitle A of the Tax Code – that is, Sections 401 et seq.

[2] See Rev. Rul. 32 (1953); Rev. Rul. 54-172; and the following excellent resources: Comments from the Groom Law Firm to the IRS dated October 1, 2015 (concerning IRS Announcement 2005-19); Comment from the ERISA Industry Committee ("ERIC") to the IRS dated October 1, 2015 (concerning IRS Announcement 2015-19); and the IRS

We know the determination letter program (for individually designed plans) will be markedly circumscribed under IRS Announcement 2015-19, IRS Notice 2016-03, and IRS Revenue Procedures, 2016-37 and 2017-4. And, of course, there has been public mourning about this. To properly consider the consequences of this effective elimination of the type of determination letter program we have known our entire professional lives, it is important to understand when qualified retirement plans may be amended retroactively. That is the key to understanding whether the maiming of the determination letter program matters. After all, if an employer or other plan sponsor has unlimited ability to retroactively amend a plan, it becomes relatively unimportant whether the IRS will issue a determination letter saying the form of the plan appears consistent with the Tax Code requirements for qualified retirement plans. That is because if a flaw in the plan document were later discovered, it could then be fixed by way of a retroactive amendment. And that is all a determination letter addresses – whether a plan document properly incorporates the Tax Code's qualification requirements, not whether the plan is being properly administered or otherwise operated. See, generally, Rev. Proc. 2017-4, Section 9.02.

Actually, this is an oversimplification. Even if we could retroactively amend a plan to meet the Tax Code's qualification requirements, we would still worry whether doing so is permitted under ERISA. And, relatedly, we would need to consider the efficacy of a retroactive amendment in the face of potential participant claims for benefits promised under the terms of the plan in effect prior to the retroactive amendment.

But these ERISA issues are typically not the focus of our thinking when we consider the evisceration of the determination letter program. Instead, we think about whether a plan meets the Tax Code's requirements for qualified retirement plans. Actually, more accurately and specifically, we usually consider whether the IRS will think the plan meets those requirements, and whether other parties will think the IRS thinks so. Those other parties wanting assurance that the IRS will believe the plan document is compliant may include plan auditors, lenders to the plan sponsor, parties to a merger or acquisition involving the plan sponsor, certain investment vehicles, private litigants challenging the availability of a prohibited transaction exemption or other favorable rule under ERISA accorded to plans only if they are qualified (such as prohibited transaction exemptions and anti-cutback relief for ESOPs), the Department of Labor, the Securities and Exchange Commission, banking regulators, other state or federal government agencies interpreting rules with favorable provisions for qualified retirement plans, and courts considering private litigation or actions brought by government agencies where the relevant rule depends on whether a plan is qualified (such as may be the case in bankruptcy litigation involving a plan participant).

So, let's look at what the Tax Code and Treasury Regulations say about when a retirement plan that is intended to be qualified may be retroactively modified. Again, it bears repeating that if one is interested only in whether a plan document meets the qualification requirements, and not what plan terms may be enforced by participants or other parties, this retroactivity question is the whole ballgame.

Advisory Committee on Tax Exempt and Government Entities (ACT) Report of Recommendations dated June 9, 2010 (specifically, the recommendation titled "Analysis and Recommendations Regarding the IRS' Determination Letter Program").

Need for Ability to Retroactively Amend. It is a practical necessity that employers and other plan sponsors have some ability to retroactively change the terms of their qualified retirement plans. Otherwise, a plan, as initially adopted, would need to be "perfect." And any change in the qualified plan rules, whether effected by statutory modification, regulatory change, or court interpretation, would need to be reflected in the plan document by the time that change is effective. In some circumstances, this might be impossible or close to it. Consider, for example, the Supreme Court's conclusions in *City of Los Angeles Dept. of Water & Power v. Manhart*, 433 U.S. 702 (1978) and *Arizona Governing Comm. v. Norris*, 463 U.S. 1073 (1983), concerning gender discrimination in defined benefit plans that the Court held violated Title VII, invalidating a very common practice among plans at the time, and *U.S. v. Windsor*, 133 S. Ct. 2675 (2013), holding the Defense of Marriage Act to be unconstitutional at a time when a substantial number of qualified retirement plans did not treat same-sex spouses as spouses for purposes of the Tax Code's survivor annuity rules. One might argue that while these cases directly affected qualified plans, they did not expressly and specifically interpret the Tax Code's qualified plan requirements. That is fair, but the Supreme Court's decision in *Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739 (2004) addressed the ERISA anti-cutback rule that is duplicated in the Tax Code's qualified plan requirements. Absent some period to allow plans to adjust to that interpretation, certain plans – those that had taken action akin to that addressed in *Heinz* – would have a disqualifying defect that could not be remedied. As it turns out, this qualification defect could be remedied (or perhaps more accurately, forgiven) under relief from retroactivity offered by the IRS, but the fundamental point is that fixing some qualification errors may require retroactive modification of the plan document.

More generally, given that a court holding is typically an interpretation of a law already in effect, rather than an announcement of some future change in law, without the ability to retroactively amend a plan (or have a prior disqualifying defect forgiven by the IRS), plan sponsors might not be able to comply with judicial interpretations of qualified plan rules that differ from those sponsors', and the IRS', prior understanding of those rules.

Statutory Retroactive Amendment Relief: Code Section 401(b). So, what do the Tax Code and Treasury Regulations say about the ability to retroactively amend a plan that is intended to be qualified? The Tax Code addresses on its face the ability to retroactively modify a plan to meet the Tax Code's qualified retirement plan requirements. Specifically, Code Section 401(b) reads as follows:

> **(b) Certain retroactive changes in plan**
> A stock bonus, pension, profit-sharing, or annuity plan shall be considered as satisfying the requirements of subsection [401](a) for the period beginning with the date on which it was put into effect, or for the period beginning with the earlier of the date on which there was adopted or put into effect any amendment which caused the plan to fail to satisfy such requirements, and ending with the time prescribed by law for filing the return of the employer for his taxable year in which such plan or amendment was adopted (including extensions thereof) or such later time as the Secretary may designate, if all provisions of the plan which are necessary to satisfy such requirements are in effect by the end of such period and have been made effective for all purposes for the whole of such period.

Notice that under the statutory provision above the deadline for retroactively adopting a corrective amendment ends with the due date for the employer's tax return for the year in which the plan or amendment was adopted (including extensions), <u>or such later time</u> as the Secretary of the Treasury may designate. Treasury regulations do, in fact, extend (and elaborate on) this deadline, notably in the event a determination letter application is filed by the otherwise applicable deadline for retroactive correction. If a determination letter application is timely filed, the plan sponsor typically gets 91 days after the issuance of a favorable determination to make any changes necessary to make the plan compliant. Treas. Reg. § 1.401(b)-1(e)(3)(i). As the reader knows, the changes to be made during that 91 day period are typically changes the IRS has, during its consideration of the determination letter application, indicated need to made for the plan to be qualified. A draft amendment reflecting these changes will usually have been submitted to the IRS in proposed form during the back and forth between the IRS agent reviewing the application and the attorney for (or other representative of) the plan sponsor. And the favorable determination will normally state that it is conditioned on the timely adoption of the proposed, corrective amendment.

We note as an aside that the statutory provision above, read literally, allows a retroactive amendment to correct a plan's failures only if the corrective amendment is perfect. That is, the statutory provision allows a retroactive corrective amendment "if all provisions of the plan which are necessary to satisfy [the qualified plan] requirements are in effect by the [deadline] and have been made effective for all purposes for the whole of [the retroactive correction period]."

<u>Treasury Regulations: Remedial Amendment Period</u>. The regulations associated with Code Section 401(b) – the statutory provision above permitting retroactive correction – are found at Treasury Regulation Section 1.401(b)-1. These regulations call the period for which retroactive correction may be the "**remedial amendment period**." Treas. Reg. § 1.401(b)-1(a), (d). The last day of the remedial amendment period is the deadline for making a corrective amendment. The regulations permit retroactive correction back to the beginning of the remedial amendment period. It is rare for the beginning of the remedial amendment period to be of concern because the remedial amendment period usually begins early enough. Specifically, in the case of a new plan, the remedial amendment period begins on the date the plan is put into effect. In the case of an amendment to an existing plan that <u>causes</u> the plan to fail to meet the qualified plan requirements, the remedial amendment period begins on the date the amendment is adopted or put into effect, whichever is earlier. Treas. Reg. § 1.401(b)-1(d)(1)(i) and (ii).

So far, so good. But there is more to consider. What about the <u>absence</u> of a required provision in an ongoing plan (that is, in a plan that is not new) that causes the plan to fail to meet the qualified plan requirements? What is the beginning of the remedial amendment period for that failure? In particular, what about, for example, a <u>failure to amend</u> a plan in a timely fashion for a change in the Tax Code, Treasury regulations, or Treasury or IRS interpretations of the law? In the case of certain major statutory changes (ERISA, TEFRA, TRA '86, OBRA '86, and OBRA '87) (or a provision "integral to" a qualification requirement changed by those statutes), the remedial amendment period begins when those changes became effective. Treas. Reg. § 1.401(b)-1(d)(1)(iii). So, that's good too.

But what about a plan's failure to include a provision reflecting changes in the law not effected by one of the statutes listed in the paragraph above? Fortunately, the Treasury has explicit authority under its regulations to designate as "disqualifying provisions" other plan provisions that result in the failure of the plan to satisfy the qualification requirements by reason of a change in those qualification requirements. If so designated, these disqualifying plan provisions can be retroactively corrected back to the date the change in qualification requirements became effective (as can plan provisions that are "integral to" the qualification requirements that were changed). Treas. Reg. § 401(b)-1(d)(1)(iv) and (v), and -1(b)(3). The Treasury has often used this authority on an ad hoc basis to give plan sponsors time to incorporate into their plan documents new or changed qualification requirements.

The concern with whether the beginning date of a remedial amendment period is early enough arises in this latter scenario, if it arises at all – that is, where the Tax Code's qualification requirements change but the plan's existing provisions do not satisfy the requirements as modified. In this event, practitioners need to carefully observe what the IRS may say about whether the change is one it has designated as a disqualifying provision eligible for retroactive correction under the Treasury's discretionary authority described in the preceding paragraph. As noted earlier, the IRS often designates plan provisions that fail to comply with changes in the law as disqualifying provisions, thereby enabling employers and other plan sponsors to retroactively amend their plans to comply. But if the Treasury does not do so, any amendment necessary to conform a plan to a change in qualification requirements would need to be adopted, and in effect, by the date the new qualification requirement becomes effective.

<u>Disqualifying Provisions</u>. Before moving on, let me say a bit about the term "disqualifying provision." That is the term Treasury regulations use to describe the types of plan document defects that enjoy the benefit of the rules above permitting retroactive correction. If we were to examine the definition of "disqualifying provision," you would therefore hear an echo of the discussion above. Let's do that, since doing so will not only add precision to the analysis, but will also reinforce the points made above.

For a new plan, these "disqualifying provisions" include the absence of a provision from the plan that causes the plan to fail to meet the qualified plan requirements applicable to the plan as of the plan's effective date. Treas. Reg. § 1.401(b)-1(b)(1). For an existing plan, the term "disqualifying provision" includes an amendment that modifies the plan in a way that <u>causes</u> the plan to fail to meet the qualification requirements as of the date the amendment is first made effective. *Ibid*. This does not include the <u>failure to amend</u> the plan to meet a qualification requirement. But the term "disqualifying provision" also includes a plan provision that results in the failure of the plan to meet the qualification requirements by reason of a change in those requirements effected by ERISA, TEFRA, TRA '86, OBRA '86, and OBRA '87. Treas. Reg. § 1.401(b)-1(b)(2). Note that this includes a failure to amend for those statutes only to the extent the failure to amend leaves in place an old provision that is inconsistent with the listed statutes. But what if there is an absence of a provision that results in the failure? As I will explain a couple paragraphs below, other provisions of the regulations offer relief in that circumstance – that is, where an existing plan fails to reflect a new requirement.

Under a rule that is very important with respect to changes in the law, the term "disqualifying provision" includes a plan provision designated by the IRS as a disqualifying provision that either (a) results in the failure of a plan to meet the qualification requirements by reason of a change in those requirements, or (b) is "integral to" a qualification requirement that has been changed. Treas. Reg. § 1.401(b)-1(b)(3). Plan provisions can be designated by the IRS as disqualifying provisions under this rule only in revenue rulings, notices, or other guidance published in the Internal Revenue Bulletin. Treas. Reg. § 1.401(b)-1(c)(2). And where the IRS has designated a provision as a disqualifying provision in this way, it may impose limits and additional rules regarding amendments that may be made with respect to the disqualifying provision during the correction period (that is, during the "remedial amendment period"). Treas. Reg. § 1.401(b)-1(c)(3).

Notice that in describing what constitutes a "disqualifying provision," the regulations generally refer to a plan provision that results in a failure to meet the qualification requirements. But what about the <u>absence</u> from a plan of a required provision? Well, in the case of a new plan, the absence of a provision needed to meet the qualification requirements is a "disqualifying provision" eligible to be corrected through a retroactive plan amendment. Treas. Reg. § 1.401(b)-1(b)(1). With respect to the other categories of disqualifying provisions above (those relating to changes in the qualification requirements made by specified acts, such as ERISA, or changes in the qualification requirements specifically designated by the IRS), the regulations indicate that a disqualifying provision includes the absence from a plan of a provision required by, or if applicable, integral to, the applicable change to the qualification requirements, if the plan was in effect on the date the change became effective with respect to the plan. Treas. Reg. § 1.401(b)-1(c)(1).

<u>Deadline for Corrective Amendment</u>. A corrective amendment must be made by the last day of the remedial amendment period in order for a retroactive change to save the plan from failing to meet the Tax Code's qualification requirements. Treas. Reg. § 1.401(b)-1(a). For a new single employer plan, the deadline under the regulations for adopting a corrective amendment is the deadline, including extensions, for filing the income tax return of the employer for the employer's taxable year in which the plan was put into effect, or the last day of the first plan year, if later. Treas. Reg. § 1.401(b)-1(d)(2)(i)(A) and (ii)(A). For a plan maintained by more than one employer, the deadline is the last day of the tenth month following the last day of the plan year in which the plan was put into effect. Treas. Reg. § 1.401(b)-1(d)(2)(iii).

Generally, in the case of a plan amendment that affirmatively violates the qualification requirements, the deadline under the regulations for adopting a corrective amendment to a single employer plan is the latest of the following: (a) the deadline, including extensions, for filing the income tax return of the employer for the taxable year in which the amendment is adopted or made effective, whichever is later, or (b) the last day of the plan year in which the amendment is adopted or made effective, whichever is later. Treas. Reg. § 1.401(b)-1(c)(2)(i) and (ii). For a plan maintained by more than one employer, the deadline is typically the last day of the 10th month following the last day of the plan year in which the amendment is adopted or made effective, whichever is later. Treas. Reg. § 1.401(b)-1(c)(2)(iii). As explained more fully later, Revenue Procedure 2016-37 has slightly extended this corrective amendment deadline. For a plan that is missing provisions necessary to comply with a change in qualification requirements, the deadline for adopting a corrective amendment has typically been set in the IRS guidance designating the change as eligible for "disqualifying provision" treatment.

<u>Determination Letter Application Extends Deadline for Corrective Amendment</u>. For individually designed plans, the regulations indicate that if by the end of the remedial amendment

period the employer or plan administrator files a determination letter request with respect to the initial or continuing qualification of the plan (or for a trust that is a part of the plan), the remedial amendment period is extended. In that event, the remedial amendment period is extended until the expiration of 91 days after (a) the date on which notice of a final determination is issued by the IRS, the determination letter request is withdrawn, or the determination letter request is otherwise "finally disposed of" by the IRS, or (b) if a petition is timely filed with the Tax Court for a declaratory judgment under Code Section 7476 with respect to the final determination or the failure of the IRS to make a final determination, the date on which the Tax Court's decision becomes final. Treas. Reg. § 1.401(b)-1(e)(3).

Discretionary Extension of RAP. The IRS has the discretion to extend the remedial amendment period, and may allow a particular plan to be amended after expiration of its remedial amendment period. Treas. Reg. § 1.401(b)-1(f). With regard to a particular plan, a request for extension of time must be submitted prior to the expiration of the remedial amendment period, or within such time thereafter as the IRS considers reasonable under the circumstances.

Aside About the Beginning Date of the Remedial Amendment Period: Code Section 401(b) says, on its face, that where a plan amendment causes a plan to fail to meet the qualified plan requirements, if the plan is retroactively modified to correct this error, the plan will be protected back to the earlier of the date the amendment was adopted or put into effect. This, of course, is as far back as one would need the relief afforded by Section 401(b) given that it is the earliest date as of which the amendment could have caused a failure.

But what about the failure to amend the plan in a timely fashion to reflect a change in the relevant qualification requirements? If that error is timely corrected by the last day of the remedial amendment period, so there is protection under the Section 401(b) regulations, does that protection go back only to the date the new or modified qualification requirements became effective – that is, to the beginning of the remedial amendment period (Treas. Reg. § 1.401(b)-1(d)(1)(iii) and (iv)) – or does the protection conceivably extend to an earlier date? Consider, for example, whether a plan could use a remedial amendment period associated with a change in the law to effectively retroactively amend the plan to a date prior to the effective date of the change, in order to correct defects dating from an earlier time? Presumably a plan could not do so. Not only would this be a curious result, a careful reading of the regulations seems to preclude it. In describing the relief available under the remedial amendment period rules, the regulations say a plan that does not satisfy the qualification requirements on any day solely as the result of a disqualifying provision will be considered to have satisfied those requirements if properly amended in time (that is, by the end of the remedial amendment period with respect to that disqualifying provision). In the case of a change in the law, the disqualifying provision is the failure of the plan to meet the qualification requirements by reason of that change. But there could be no such failure prior to the effective date of the change. Since the relief provided by the regulations applies only to a plan's failure that is solely a result of a disqualifying provision, relief would not extend to a date earlier than the date the change in qualification requirements became effective.

Let's Reminisce: Effect of Revenue Procedure 2007-44 on Remedial Amendment Period. When the IRS, in Revenue Procedure 2007-44, introduced five-year remedial amendment cycles for individually designed plans, and six-year remedial amendment cycles for pre-approved plans, it also changed the deadline for making retroactive corrective amendments. This made sense since after this new schedule for requesting determination letters was put in place, the old deadline for adopting a corrective amendment could expire before a plan sponsor was permitted to submit an on-cycle determination letter application. This mattered because the remedial amendment period is extended to the 91st day after receipt of a determination letter, but only if a determination letter application is filed by what would otherwise be the end of the remedial amendment period. And this extension is a practical necessity to accommodate any changes the IRS requires during the course of its determination letter application review. So, without an extension of the remedial amendment period to match the new remedial amendment cycle rules, on-cycle determination letter applications could not have been filed early enough to preserve this extension.

The IRS harmonized (a) the old statutory and regulatory remedial amendment period rules with (b) the new remedial amendment cycle paradigm by extending the remedial amendment period. Specifically, in the case of a disqualifying provision that was a provision of, or absence of a provision from, a new plan, the remedial amendment period was extended to the end of the applicable remedial amendment cycle that included the date on which the remedial amendment period would otherwise have ended under the Treasury regulations. This assumed the plan was intended, in good faith, to be qualified. Rev. Proc. 2007-44, Section 5.03(1). This same extension applied to disqualifying provisions of the type where the employer adopted an amendment to an existing plan that caused the plan to fail to meet the qualification requirements. Again, this assumed the amendment was adopted timely and in good faith, with the intent of maintaining the qualified status of the plan. This extension was available whether or not the amendment was required to be adopted. *Ibid*.

A similar extension of the remedial amendment period applied where an employer (or other plan sponsor) reasonably and in good faith determined during a period when an "interim amendment" to reflect a qualification change would otherwise have been required that, in fact, no amendment was required because the change did not impact the provisions of the written plan document. Rev. Proc. 2007-44, Section 5.03(2). Under this rule, if an employer decided an amendment was not required, but the IRS concluded that it was, the plan could still have been corrected by the end of the five-year remedial amendment cycle (for individually designed plans). Note, though, that if an amendment was required to the adopted before expiration of the remedial amendment cycle (under the amendment deadlines for "interim amendments" described in the next paragraph), but was not timely adopted (for reasons other than a determination made reasonably and in good faith that the amendment was not required), the remedial amendment period was not extended to the end of the remedial amendment cycle.

Revenue Procedure 2007-44 also set out the general deadline for the timely adoption of plan amendments. Other than for governmental plans and tax-exempt employers, the deadline to adopt an "interim amendment" was the end of the remedial amendment period under the old Treasury regulation provisions. An "interim amendment" was generally an amendment with respect to a plan provision that (i) resulted in the failure of the plan to satisfy the qualification requirements by reason of a change in those requirements that was effective after December 31, 2001, or (ii) was integral to a qualification requirement that was changed effective after December 31, 2001 (but only if the provision was integral to a plan provision that was a disqualifying provision under part (i) with respect to the plan). Rev. Proc. 2007-44, Sections 5.02 and 5.01(1) and (2). The term "interim amendment" also included the <u>absence</u> from a plan of a provision required by, or if applicable integral to, the applicable change in the qualification requirements. Rev. Proc. 2007-44, Section 5.02.

Recall that the amendment deadline under the old Treasury regulations, and therefore the Revenue Procedure 2007-44 deadline for making a good faith attempt at modifying a plan to comply with a change in the qualification requirements, was the later of (a) the due date (including extensions) for filing the income tax return for the employer's taxable year that included the date on which the remedial amendment period began (which was the date the change in the qualification requirements became effective or, in the case of a provision that was integral to a qualification requirement that had been changed, the first day on which the plan was operated in accordance with the provision as amended), or (b) the last day of the plan year that included the date on which the remedial amendment period began. Rev. Proc. 2007-44, Section 2.05. A plan maintained by more than one employer was not, however, required to be amended until the last day of the 10th month following the last day of the plan year in which the remedial amendment period began. *Ibid*; Treas. Reg. § 1.401(b)-1(d)(2)(iii).

For "discretionary amendments" – that is, ones that were not interim amendments – an employer (or other plan sponsor) was considered to have timely adopted the amendment if the amendment was adopted by the end of the plan year in which the plan amendment became effective. Rev. Proc. 2007-44, Section 5.05(2). Essentially this same rule as to the deadline for discretionary amendments remains in effect under Revenue Procedure 2016-37, as explained later.

Special amendment deadlines for governmental plans and tax-exempt employers were set forth in Revenue Procedure 2007-44, Section 5.06. The revenue procedure also noted that in some cases statutory provisions or IRS guidance might set an earlier deadline for adopting discretionary amendments, such as an amendment to add a qualified cash or deferred arrangement to a profit sharing plan (which cannot be adopted retroactively), or where a statutory provision or IRS guidance sets a different specific deadline for the adoption of a particular type of interim amendment that is earlier or later than the deadlines just described. Rev. Proc. 2007-44, Section 5.07(1).

<u>IRS Announcement 2015-19</u>. The IRS announced its dramatic curtailment of the determination letter program in IRS Announcement 2015-19. In that same announcement, the Service explained the effect of the resulting inability of individually designed plans to regularly request determination letters between the birth and death of the plan – that is, between the adoption and termination of the plan. One consequence of the elimination of the five-year remedial amendment cycles is, not surprisingly, that plans no longer enjoy an extension of the remedial amendment period to the end of the plan's remedial amendment cycle. That extension is not available after December 31, 2016. Instead, the IRS indicated that the "remedial amendment period" definition set forth in Treasury regulations (Section 1.401(b)-1, as discussed above) would apply. The Service signaled, however, that it intended to extend the remedial amendment period for individually designed plans to a date that it expected would be no earlier than December 31, 2017.

<u>Revenue Procedure 2016-37</u>. More detail came in Revenue Procedure 2016-37. In it, the IRS explained the new remedial amendment period rules applicable to disqualifying provisions first effective on or after January 1, 2016. Rev. Proc. 2016-37, Section 5. The Service reminded

us that under Treasury Regulation Section 1.401(b)-1(b)(1), a disqualifying provision includes a provision of a new plan, the absence of a provision from a new plan, or an amendment to an existing plan that causes the plan to fail to satisfy the requirements of the Code applicable as of the date the plan or amendment is first made effective. In addition, under Regulation Section 1.401(b)-1(b)(3), a disqualifying provision includes a plan provision that has been designated by the IRS as a disqualifying provision by reason of changes in the qualified plan requirements. In accordance with this latter authority, the IRS, in Revenue Procedure 2016-37, designated a plan provision as a qualifying provision if it: (a) results in the failure of the plan to satisfy the qualification requirements of the Code by reason of a change in those requirements that is effective after December 31, 2001 (this picks up the corresponding date from Section 5.01 of Revenue Procedure 2007-44), or (b) if integral to such a disqualifying provision. Rev. Proc. 2016-37, Section 5.03. For this purpose, changes in the qualification requirements of the Code include statutory changes or changes in the requirements provided in regulations or other guidance published in the Internal Revenue Bulletin. In addition, a disqualifying provision includes the absence from a plan of a provision required by (or, if applicable, integral to) a change in the qualification requirements of the Code. Rev. Proc. 2016-37, Section 5.04.

Extension of Remedial Amendment Period for Non-Governmental Plans. Revenue Procedure 2016-37 extends slightly the remedial amendment period that would otherwise apply under Treasury regulations for certain disqualifying provisions of plans that are not governmental plans. (As always, the extension does not apply to the extent a different deadline is established by statute, regulation, or other guidance published in the Internal Revenue Bulletin.) Specifically, in the case of a new plan, the remedial amendment period for a disqualifying provision with respect to a provision of the new plan, or the absence of a provision from the new plan, is extended to the later of (a) the 15th day of the 10th calendar month after the end of the plan's initial plan year, or (b) the "modified § 401(b) expiration date." Rev. Proc. 2016-37, Section 5.05(1). The "modified § 401(b) expiration date" for a plan not maintained by a tax-exempt employer is typically the later of (a) the extended tax return due date for the employer's taxable year that includes the date on which the plan is put into effect, or (b) the last day of the initial plan year. Rev. Proc. 2016-37, Section 5.05(1)(a) and Treas. Reg. § 1.401(b)-1(d)(2).

Amendment Causing Disqualification. For an amendment to an existing plan that causes the plan to fail to meet the qualification requirements (other than an amendment due to a change in the qualification requirements), the remedial amendment period is extended to the end of the second calendar year following the calendar year in which the amendment is adopted or effective, whichever is later. Rev. Proc. 2016-37, Section 5.05(2).

Changes in Qualification Requirements. For a disqualifying provision with respect to a change in the qualification requirements, the remedial amendment period is extended to the end of the second calendar year that begins after the issuance of the "Required Amendments List" (more on this later) on which the change in qualification requirements appears. Rev. Proc. 2016-37, Section 5.05(3).

Governmental Plans. Special remedial amendment period deadlines apply to governmental plans, in deference to the vagaries of the scheduling of regular legislative sessions of the legislative body with the authority to amend the plan. Rev. Proc. 2016-37, Section 5.06.

December 31, 2017 Extension. The Service also extended the remedial amendment period to December 31, 2017, for disqualifying provisions for which, as of January 1, 2017, the old remedial amendment period (under the remedial amendment cycle rules) had not expired. Rev. Proc. 2016-37, Section 6. This extension does not, however, apply to disqualifying provisions set forth on the 2016 Required Amendments List (again, more on this list later).

Section 411(d)(6). These extensions of the end of the remedial amendment period do not, of course, provide relief from the Code Section 411(d)(6) anti-cutback rules. Rev. Proc. 2016-37, Section 5.07.

Plan Termination. The termination of a plan ends the plan's remedial amendment period. As a consequence, any retroactive remedial plan amendment or other required plan amendments for a terminated plan – that is, amendments required to be adopted to reflect qualification requirements that apply as of the date of termination – must be adopted "in connection with" the plan termination, even if those requirements are not included on a Required Amendments List. Rev. Proc. 2016-37, Section 7.

Determination Letter Application Filing. Although Revenue Procedure 2016-37 describes the remedial amendment period as being "extended" under the rules above, it is notable that the rules do not reflect any extension under Treasury Regulation Section 1.401(b)-1(e)(3) in the event a determination letter is requested. One might assume the old regulatory extension in the event a determination letter is requested continues to be available if and only if the plan is eligible to request a determination letter in time under the new determination letter scheme of Revenue Procedure 2017-4 and IRS Announcement 2015-19. By "in time," I mean the determination is requested by the end of the remedial amendment period as "extended" by Revenue Procedure 2016-37. Perhaps the Treasury will clarify in an amendment to the Section 401(b) regulations whether this reading is correct, but it seems to be the implication of Example 2 set forth in the revenue procedure (which example is reproduced later in this outline).

As an aside, it may be worth noting that the regulatory extension where a determination letter is sought applies only if the employer or plan administrator requests a determination "pursuant to § 601.201(s) of this chapter (Statement of Procedural Rules)." The cited provision catches me a bit by surprise, given that it is a different subsection, Section 6.01.201(o), that generally sets out provisions relating to the issuance of determination letters. But to the extent the citation in the regulation remains the relevant one, the cited provision would seem to give the Service great discretion as to whether and when it issues determination letters (note that Code Section 7476 may call this discretion into question, as discussed later in this outline). Specifically, the subsection referenced by the regulation (in the context of timely requesting a determination letter to extend the remedial amendment period) – subsection (s) – reads in its totality as follows:

> (s) Advance rulings or determination letters –
>
> (1) General. It is the practice of the Service to answer written inquiries, when appropriate and in the interest of sound tax administration, as to the tax effects of acts or transactions of individuals and organizations and as to the status of certain organizations for tax purposes prior to the filing of returns or reports as required by the Revenue laws.

> (2) Exceptions. There are, however, certain areas where, because of the inherently factual nature of the problems involved or for other reasons, the Service will not issue advance rulings or determination letters. Ordinarily, an advance ruling or determination letter is not issued on any matter where the determination requested is primarily one of fact (e.g., market value of property), or on the tax effect of any transaction to be consummated at some indefinite future time or of any transaction or matter having as a major purpose the reduction of Federal taxes. A specific area or a list of these areas is published from time to time in the Internal Revenue Bulletin (see, for example, Rev. Proc. 80-22, 1980-1, C.B. 654). Such list is not all inclusive. Whenever a particular item is added to or deleted from the list, however, appropriate notice thereof will be published in the Internal Revenue Bulletin. The authority and general procedures of the National Office of the Internal Revenue Service and of the offices of the district directors of internal revenue with respect to the issuance of advance rulings and determination letters are outlined in paragraphs (b) and (c) of this section.

Plan Amendment Deadline Under Revenue Procedure 2016-37. After explaining the new rules concerning remedial amendment periods, Revenue Procedure 2016-37 sets out the deadline for plan amendments. With respect to a disqualifying provision, the plan amendment deadline is, quite logically, the date on which the remedial amendment period expires (except, of course, to the extent a statute, regulation, or other guidance published in the Internal Revenue Bulletin sets a different deadline). Rev. Proc. 2016-37, Section 8.01. This is presumably the remedial amendment period as modified by the revenue procedure, as just described above.

With respect to a discretionary amendment (that is, an amendment that is not made with respect to a disqualifying provision), the deadline for adopting the amendment is the end of the plan year in which the amendment is operationally put into effect. Rev. Proc. 2016-37, Section 8.02(1). This, again, assumes no amendment deadline has otherwise been set by statute, regulation, or other guidance published in the Internal Revenue Bulletin.

So, under these rules, for a non-governmental plan the deadline for adopting a discretionary amendment with respect to calendar year plan that increases participants' accrued benefits and is operationally put into effect during 2018 is December 31, 2018. The date the amendment is operationally put into effect is the key. So, for example, the deadline for adopting a discretionary amendment with respect to a calendar year plan that is operationally put into effect during 2018 to provide a new right or benefit as of January 1, 2011, with respect to participants with same-sex spouses is December 31, 2018.

Presumably, though, if a discretionary amendment is timely adopted (by the end of the plan year in which it is operationally put into effect), if the amendment causes the plan to fail to meet the Tax Code's qualification requirements, this failure may be corrected by retroactive amendment adopted by the end of the remedial amendment period. In that event, the deadline for the corrective amendment would be the last day of the second calendar year following the calendar year in which the amendment is adopted or effective, whichever is later.

A special rule applies to discretionary amendments to governmental plans, in which case the deadline is the later of (a) the end of the plan year in which the plan amendment is operationally put into effect, or (b) 90 days after the close of the second regular legislative session of the legislative body with the authority to amend the plan that begins on or after the date the plan amendment is operationally put into effect.

Required Amendments List. The Treasury and IRS intend to publish annually a "Required Amendments List" of changes in the qualification requirements that become effective on or after January 1, 2016. Helpfully, this Required Amendments List will establish the date the remedial amendment period expires for changes in qualification requirements contained on the list. Rev. Proc. 2016-37, Section 9.01. This is the list I refer to above when describing the extension of the remedial amendment period for disqualifying provisions with respect to a change in qualification requirements. As noted earlier, the remedial amendment period for such a disqualifying provision is extended to the end of the second calendar year that begins after the issuance of the Required Amendments List on which the change in qualification requirements appears.

In general, an item will be included on a Required Amendments List after guidance with respect to that item (including any model amendment) has been provided in regulations or other guidance published in the Internal Revenue Bulletin. However, the IRS has the discretion to include an item on a Required Amendments List in other circumstances, such as when a statutory change is enacted and it is anticipated no guidance will be issued. Rev. Proc. 2016-37, Section 9.02.

Operational Compliance List. As the reader well knows, for a retirement plan to be qualified, not only must the plan document properly reflect the Tax Code's qualified plan requirements, the plan must also be operated in compliance with those requirements. Although under the remedial amendment period rules a plan may be amended retroactively to comply with changes in plan qualification requirements, a plan must be operated in compliance with a change in the qualification requirements from the effective date of the change. To help plan sponsors with this, the IRS intends to provide annually an Operational Compliance List, identifying changes in qualification requirements that are effective during a calendar year. Even so, a plan must comply operationally with each relevant qualification requirement even if the requirement is not included on an Operational Compliance List. Rev. Proc. 2016-37, Section 10.

Examples of Extended Remedial Amendment Period Under Revenue Procedure 2016-37. Revenue Procedure 2016-37 includes the following seven examples, illustrating the extended remedial amendment period for new plans, amendments to existing plans that are not made as a result of changes in qualification requirements, and amendments to existing plans that are made as a result of changes in qualification requirements. These examples assume the plan is an individually designed plan and that any amendments meet the requirements of the Code Section 411(b)(6) anti-cutback rules. Here are the examples:

> *Example 1*: *Remedial amendment period for a new plan*. Employer A, which is not a tax exempt employer, adopts a new individually designed plan, Plan M, on July 1, 2017. Plan M is effective January 1, 2017. Plan M's plan year and Employer A's tax year are the calendar year. Plan M contains a provision that does not satisfy the qualification requirements (a disqualifying provision under § 401(b)). Employer A discovers the disqualifying provision in February 2018. Pursuant to section 5.05(1) of this revenue procedure, the remedial amendment period for this disqualifying

provision is extended to the later of (i) October 15, 2018 (the 15th day of the 10th calendar month after the end of the plan's initial plan year), or (ii) the modified § 401(b) expiration date. The modified § 401(b) expiration date is the later of September 15, 2018 (the due date for filing Employer A's tax return plus extensions) and the last day of the plan year in which the plan is put into effect (December 31, 2017). Thus, Employer A must correct the disqualifying provision in Plan M by October 15, 2018, retroactively effective beginning January 1, 2017, in order for Plan M to be qualified, and must correct Plan M's operation to the extent necessary to reflect the corrective amendment.

Example 2: *Determination letter application filed for a new plan*. The facts are the same as in *Example 1*, except that, instead of Employer A identifying the disqualifying provision, Employer A files a determination letter application and the IRS discovers the error. If Employer A submits Plan M for a determination letter by October 15, 2018, then, pursuant to § 1.401(b)-1(e)(3), Employer A would have until 91 days after the date a favorable determination letter is issued with respect to Plan M to adopt an amendment that corrects the disqualifying provision retroactively effective beginning January 1, 2017 (the effective date of Plan M). To maintain plan qualification, Employer A must correct Plan M's operation to the extent necessary to reflect the corrective amendment.

Example 3: *Remedial amendment period for amendment to an existing plan*. Employer B maintains Plan N, an individually designed plan. In 2014, the IRS issued a determination letter for Plan N. On January 1, 2018, Employer B adopts and makes effective an amendment to Plan N's vesting schedule. This amendment causes Plan N to fail to satisfy the requirements of the Code. Pursuant to section 5.05(2) of this revenue procedure, a remedial amendment to correct this disqualifying provision generally must be adopted by December 31, 2020, the end of the second calendar year following the calendar year in which the amendment is adopted or effective (whichever is later). The remedial amendment must be retroactively effective beginning January 1, 2018, the date the earlier plan amendment was effective, in order for Plan N to be qualified. Also, to maintain plan qualification, Employer B must correct Plan N's operation to the extent necessary to reflect the corrective amendment.

Example 4: *Remedial amendment period for a change in qualification requirements*. Employer C maintains Plan O, an individually designed plan. In July 2016, guidance is published in the Internal Revenue Bulletin that would require an amendment to Employer C's plan in order to retain the plan's qualification. The guidance is effective in 2017. The guidance is included on the 2017 Required Amendments List. Pursuant to section 5.05(3) of this revenue procedure, the remedial amendment period for items identified on the 2017 Required Amendments List expires December 31, 2019, the end of the second calendar year that begins after the issuance of the Required Amendments List in which the guidance appears; therefore, the expiration of the remedial amendment period for the disqualifying provision in Plan O is December 31, 2019. The plan amendment deadline for the change in qualification requirements is also December 31, 2019, pursuant to section 8.01 of this revenue procedure.

Example 5: *Correction of amendment made due to a change in qualification requirements*. Employer D maintains Plan P, an individually designed plan. In 2015, the IRS issued a determination letter for Plan P. On April 1, 2018, Employer D amends Plan P based on a change in a qualification requirement that was identified on the 2017 Required Amendments List. This amendment was effective January 1, 2017. Pursuant to section 5.05(3) of this revenue procedure, the remedial amendment period for the change in qualification requirements expires December 31, 2019, the end of the second calendar year that begins after the issuance of the Required Amendments List in which the change in qualification requirements was identified. In October 2019, Employer D discovers the amendment does not satisfy the qualification requirements of the Code; therefore, Plan P still contains a disqualifying provision. To maintain plan qualification, Employer D must correct the disqualifying provision in Plan P by amending the plan not later than December 31, 2019, retroactively effective beginning January 1, 2017, and must correct Plan P's operation to the extent necessary to reflect the corrective amendment.

Example 6: *Governmental Plans - remedial amendment period for a change in qualification requirements*. State E maintains Plan Q, a governmental plan within the meaning of § 414(d). In September 2015, the IRS issued a determination letter for Plan Q. The legislature of State E annually convenes January 4 and adjourns March 31. On March 1, 2020, the legislature of State E amends Plan Q based on a change in a qualification requirement that was identified on the 2018 Required Amendments List. This amendment is effective January 1, 2020. In January 2021, State E discovers the amendment created a disqualifying provision. Generally, pursuant to section 5.06(3) of this revenue procedure, the legislature of State E has until the later of (i) December 31, 2020 (which is the end of the second calendar year that begins after the issuance of the Required Amendments List in which the change in qualification requirements was identified), or (ii) June 29, 2021 (which is 90 days after the close of the third regular legislative session of the legislative body of State E that began on or after the date of the issuance of the 2018 Required Amendments List) to amend Plan Q, retroactively effective beginning January 1, 2020, to correct the disqualifying provision in order for Plan Q to be qualified. To maintain plan qualification, State E must also correct Plan Q's operation to the extent necessary to reflect the corrective amendment.

Example 7: *Extended remedial amendment period transition rule*. Employer F maintains Plan R, an individually designed plan. Plan R's plan year is the calendar year. Under Rev. Proc. 2007-44, section 9.03, Plan R's cycle is Cycle B. Employer F submitted Plan R for a determination letter during the Cycle B submission period for the second five-year remedial amendment cycle (February 1, 2012 – January 31, 2013) and received a determination letter in July, 2014. In October 2014, Employer F adopted a timely interim amendment, in accordance with section 5.04 and 5.05 of Rev. Proc. 2007-44, for a change in qualification requirements identified on the

> 2013 Cumulative List of Changes (Notice 2013-84, 2013-52 I.R.B. 82). Because Employer F adopted a timely amendment for the change in qualification requirements, the remedial amendment period for the change was extended to the end of the third Cycle B remedial amendment cycle (January 31, 2018) pursuant to section 5.03 of Rev. Proc. 2007-44.
>
> On January 1, 2017, the five-year remedial amendment cycle system will be eliminated. As a result, the remedial amendment period under Rev. Proc. 2007-44 for the change in qualification requirements for Plan R would not extend beyond December 31, 2016. However, pursuant to the extended remedial amendment period transition rule in section 6 of this revenue procedure, the expiration of the remedial amendment period is extended to December 31, 2017, with respect to any disqualifying provision for which, as of January 1, 2017, the remedial amendment period (as extended by Rev. Proc. 2007-44) has not expired. Thus, Plan R's extended remedial amendment period for the change in qualification requirements identified on the 2013 Cumulative List will expire December 31, 2017.

<u>What is the Value of a Determination Letter</u>? Why do employers and other plan sponsors request determination letters? Well, I suppose there are a couple of types of reasons for that. The first is the most straightforward. It is the desire to gain the IRS' view on whether the plan satisfies the Tax Code's qualified plan requirements. This, of course, is more valuable when a determination letter application is filed by the end of what would otherwise be the end of the remedial amendment period. That way, any changes the IRS identifies during the determination letter process as needing to be made can retroactively be made by the 91st day after the determination letter is issued. Treas. Reg. § 1.401(b)-1(e)(3)(i).

Gaining the IRS' view on the adequacy of a plan document is especially helpful if doing so in some sense makes it harder for the Service to later complain about the plan's terms. I will say more about this in a moment. But before doing so, let me mention the second type of reason an employer or other plan sponsor may wish to seek a determination letter. It is because favorable determination letters have gained currency among many third parties as a sort of pseudo-certification of a plan's qualified status. This is a bit odd. Determination letters appear to give third parties an unrealistic level of assurance that a plan is qualified. As the reader knows, it is common for plans to have operational failures that are at least theoretically disqualifying. These operational flaws may concern a failure to follow Tax Code provisions that are not explicitly reflected in the plan document. Or they may involve a failure to faithfully follow plan terms that reflect the Tax Code's provisions. As to this latter type of failure, it seems to have been the IRS' position since at least the time the Service created the Administrative Policy Regarding Self-correction in 1996, and perhaps as far back as the Administrative Policy Regarding Sanctions in 1991 (or even earlier), that a failure to follow the terms of a plan is itself disqualifying. Although I am unaware of any statutory or clear regulatory authority for this position where the plan provision not followed is not a qualification requirement, the IRS seems to hew to it. Despite a lack of clear statutory or regulatory authority for the position, the IRS did, in Revenue Ruling 70-315, hold that a failure to make benefit distributions in accordance with the terms of a defined benefit pension plan "will be considered in determining whether the plan continues in a qualified status." In somewhat dubious support of this conclusion, the revenue ruling cites Treasury Regulation Section 1.401-1(b)(3), which states that "the law is concerned not only with the form of a plan but also with its effects in operation." In the context of the cited regulation, I would have read this quoted language as commenting on the need for a plan to operate in accordance with the qualified plan rules, not as a statement that it is per se disqualifying to fail to follow a plan term that is not compelled by, or at least grounded in, the Tax Code's qualification requirements.

In explaining the curtailment of the determination letter program, the IRS noted that a lack of staffing resources prevents the Service from giving the level of attention to plan document review it thinks necessary to maintain a credible determination letter program. Even were that not the case, one should not confuse a favorable determination letter with absolute assurance that a plan's terms include (a) all the provisions the plan must include in order to meet the Code's qualification requirements, and (b) no terms that violate those requirements. In spite of this, plan auditors, lenders, parties to corporate transactions, investment vehicles, bankruptcy courts, Department of Labor investigators, and sometimes IRS agents, treat determination letters as talismans.

I mentioned earlier that part of a determination's letter value is the hope it carries that it will keep the IRS from later complaining that the plan's terms have not met the qualified plan requirements. But will a determination letter really keep the IRS from later complaining about plan terms covered by the letter? The answer is maybe, sort of. First of all, note that an employer cannot rely on a favorable determination letter if (a) the determination letter application contained a misstatement or omission of material fact, (b) the facts subsequently developed are materially different than the facts on which the determination was made, or, (c) most importantly, there is a change in applicable law. See "What is a favorable determination letter?" on the IRS website at https://www.irs.gov/retirement-plans/determination-opinion-and-advisory-letter-for-retirement-plans-scope-and-benefit-of-a-favorable-determination-opinion-or-advisory-letter; Rev. Proc. 2017-4, Section 23.

What is the effect of a determination letter after the law changes? May a favorable determination letter be relied on with respect to plan provisions not affected by the change in law? Fortunately, the IRS has indicated that although a plan sponsor may not continue to rely on a determination letter with respect to a plan provision that is subsequently amended, or that is subsequently affected by a change in law, the sponsor may continue to rely on the determination letter with respect to plan provisions that are not amended or affected by a change in law. Rev. Proc. 2016-37, Section 13.03. See, generally, Rev. Proc. 2016-4, Sections 13 and 14, and Rev. Proc. 2017-4, Section 23.04.

The real fear is that the IRS will revoke or modify a determination letter and that this will have some degree of retroactive effect. In general, a determination may be revoked or modified. Rev. Proc. 2017-4, Section 23.05. In that event, the revocation or modification <u>applies to all years open</u> under the period of limitation <u>unless</u> the Service uses its discretionary authority under Code Section 7805(b) to limit the retroactive effect of the revocation or modification. Rev. Proc. 2016-4, Sections 13.04 and 14. Under Section 7805(b), the Service may, however, prescribe the extent to which a revocation or modification of a determination letter will be applied without retroactive effect. Rev. Proc. 2017-4, Section 23.08.

The Director, Employee Plans, has the authority to revoke or modify a determination letter without referring the matter to any other office of the Service. Rev. Proc. 2017-4, Section 23.05.

The Director, Employee Plans, does not have authority under Code Section 7805(b) to limit the revocation or modification of a determination letter issued by Employee Plans Ruling and Agreements. However, in the event the Director, Employee Plans, proposes to revoke or modify a determination letter, the taxpayer may request limitation of the retroactive effect of the revocation or modification by submitting to the Director, Employee Plans, a request for assistance from the Office of Division Counsel (TEGEDC), to whom the Director, Employee Plans, forwards the taxpayer's request. Rev. Proc. 2017-4, Section 23.08.

There are certain circumstances in which IRS guidance instructs that a revocation or modification of a determination letter should be applied retroactively, such as where there was a misstatement or omission of controlling facts. Rev. Proc. 2017-4, Section 23.06. In other circumstances, where a determination letter was issued "for a proposed transaction," and the taxpayer acted in good faith in relying on the determination letter (and the law has not changed), the revocation or modification of the determination letter will generally not be applied retroactively. Rev. Proc. 2017-4, Section 23.07.

Even if there is no assurance of 7805(b) relief, seeking a determination when possible seems only prudent, if for no other reason than that the failure to have sought a determination letter may be interpreted by an IRS agent or DOL investigator as an indication that the employer or other plan sponsor has not been careful or prudent in establishing and operating its plan.

Ultimately, the degree to which the loss of a plan's ability to periodically obtain determination letters will be important vis-à-vis its dealings with the IRS will depend on how charitable the IRS is upon discovering what it believes to be a disqualifying plan document defect. If the IRS is reasonable, and uses its authority and discretion in a fashion consistent with a philosophy of encouraging qualified retirement plans, the trimming back of the determination letter program may not prove calamitous. One hopes the IRS will use its discretion in the way it did before we had detailed Section 401(a)(4) regulations and prior to the formal IRS correction programs. In those days, which I can remember, good faith mistakes, even if of consequence, did not ineluctably cause the IRS to threaten to disqualify a plan.

<u>Scope of IRS' Plan Review When Determination Letter is Sought</u>. As noted above, and not surprisingly, a determination letter application does not offer any protection with respect to subsequent changes in applicable law. This raises a question about the date as of which the law is considered when the IRS issues a determination letter. In Revenue Procedure 2016-37, the IRS explained that under its new determination letter regime, the IRS will review determination letter applications for individually designed plans based on its Required Amendments List issued during the second calendar year preceding submission of the application. Rev. Proc. 2016-37, Section 12. So, for example, with respect to a plan submitted for a determination letter during the 2020 calendar year, the IRS' review will be based on the Required Amendments List issued in 2018. This will be true even though the plan otherwise would not be required to be amended for items on the 2018 Required Amendments List until December 31, 2020. This review will also take into account all previously issued Required Amendments Lists (and Cumulative Lists issued prior to 2016). Plans submitted for initial qualification during the 2017 calendar year will be reviewed based on the 2015 Cumulative List. *Ibid*. With the exception of a terminating plan, an individually designed plan must, when a determination letter application is submitted, be restated to incorporate

all previously adopted amendments. Terminating plans will be reviewed for amendments required to be adopted in connection with plan termination. *Ibid*.

Why do Third Parties Rely on Determination Letters? As the reader knows, qualified retirement plans offer a number of impressive tax advantages. First, the employer can deduct contributions to the plan for the year in which those contributions are made (up to the applicable deductibility limits), even if participants are not yet taxed on the benefits associated with those contributions. This is different from the normal "matching" rule, under which an employer is entitled to a deduction for compensation it pays only when the employee is required to take that compensation into income. In addition, contributions to qualified plans grow tax-deferred until distributed from the plan, typically through accumulation in a tax-exempt trust fund. And third, participants enjoy favorable tax treatment. The fundamental, though not sole, tax advantage to participants is their ability to defer income taxes on amounts contributed to the plan (other than Roth contributions) until benefits are distributed.

These distinctive and favorable tax features of qualified retirement plans have salutary financial consequences for employers. They determine, in part, the proper timing and amount of the employer's tax deductions for contributions to the plan, and the proper handling of federal income tax withholding and employment taxes relating to plan participants' compensation. In similar fashion, the qualified status of a plan affects the tax reporting and disclosure obligations applicable to the employer (or other plan sponsor) and plan administrator. For these reasons, it is not surprising that accounting firms preparing an employer's financial statements, or auditing a plan because of an ERISA requirement (such as the requirement to file an audit with a Form 5500) or as required under plan or trust provisions, want assurance that a plan is qualified. The qualified status of the plan may, after all, affect the finances of the employer, the taxability of the trust used to fund the plan, and the proper method for complying with reporting and disclosure obligations relating to the plan.

For similar reasons, lenders to employers and parties to corporate transactions, such as mergers and acquisitions involving the employer, may want assurance that a plan is qualified. The qualified status of a plan may also have ramifications under the bankruptcy laws affecting plan participants, as well as rules related to federal or state regulation of financial institutions, investment vehicles, and (other) securities.

An employer or other plan sponsor could, and not uncommonly will, be asked to opine that a plan is qualified, or at least that it is intended to be qualified. But as the reader knows, it is also routine for those wanting assurance that an employer's plan is qualified to ask for a copy of a favorable determination letter. As noted earlier, third parties probably derive too much comfort from determination letters, but those letters have nonetheless served employers and other plan sponsors well in fending off deeper inquiries about the qualified status of their plans.

The risk for a third party in relying on a determination letter is, in part, that having a plan document with all the right provisions does not assure that the plan will be qualified. The plan document must not only include the proper provisions, the plan must also be operated in accordance with the Tax Code's qualification requirements. Helpfully, the IRS has said "generally, if the employer operates the plan according to the terms of a plan document with a favorable determination, opinion or advisory letter, the plan will satisfy the law in operation." See

"What is a favorable determination letter?" on the IRS website at https://www.irs.gov/retirement-plans/determination-opinion-and-advisory-letter-for-retirement-plans-scope-and-benefit-of-a-favorable-determination-opinion-or-advisory-letter. Though encouraging, this statement seems a bit over broad. It may be accurate to the degree the plan document reflects every qualified plan requirement. In that event, following the plan provisions to the "t" would ensure that the plan is following the Tax Code's qualified plan requirements. But if there are qualification requirements not reflected in the terms of the plan document, and the employer, other plan sponsor, or plan administrator takes actions violative of qualified plan requirements not reflected in the plan's terms – such as by modifying the plan to eliminate protected benefits in a fashion that violates the anti-cutback rules Code Section 411(b)(6) – following the terms of the plan would not, by itself, ensure the plan's qualified status. Nonetheless, the quoted statement from the IRS website rings generally true (and, in fairness, only purports to state a general rule). The rub, of course, for a third party wishing to rely on a determination letter as assurance that a plan is qualified is that it is not at all unusual for plans to not be operated precisely in accordance with their terms.

When Can One Get a Determination Letter? Under the IRS' new determination letter scheme, determination letters for individually designed plans may generally be sought only with respect to "new" plans and terminating plans. Rev. Proc. 2017-4, Section 8.04. The Treasury and IRS may permit determination letter applications to be filed for individually designed plans in years after 2017 in certain, as yet unspecified, "other limited circumstances." IRS Announcement 2015-19.

For individually designed plans, the question for an employer or other plan sponsor wanting a determination letter is whether it has a "new" plan or a terminating plan. Actually, in Revenue Procedure 2017-4, the IRS seems to have abandoned its prior use of the term "new" plan. Previously, it appears that a new individually designed plan (that is, a plan for which a determination letter could be requested) may have been a plan that as of the date the determination letter application was submitted would be a new plan within its initial remedial amendment period under Treasury Regulation Section 1.401(b)-1(b)(1). Rev. Proc. 2016-6, Section 7.03; Rev. Proc. 2007-44, Section 14.02(2). But in Revenue Procedure 2017-4, the Service indicated instead that it will accept applications for determination letters for plans "seeking initial qualification." Rev. Proc. 2017-4, Section 8.04. This revised standard for determining whether a plan is eligible to request a determination letter seems to turn not so much on whether the plan is new, but instead on whether it has ever received a favorable determination letter. If it has never received a favorable determination letter it seems to be eligible to seek a determination letter. See Rev. Proc. 2016-37, Section 4.03(1) and Rev. Proc. 2017-4, Sections 8.04, 11.01(1), and 12.01(4). So, at least arguably this would permit an old plan that has never sought a determination letter application to make an initial filing at any time. But if that filing is made after the end of the plan's initial remedial amendment period, there may be no ability for the plan sponsor to retroactively adopt a plan amendment correcting qualifying defects the IRS identifies during its review.

Particularly in the case of mergers and acquisitions, there may now be some advantage in creating a new plan that "clones" the plan of an acquisition target, rather than continuing the target's old plan. This would be in the hope that a determination letter application can be submitted with respect to the clone plan. If so, and if a favorable letter were received, the acquirer might then feel comfortable merging the existing target plan into the new clone plan, since the language of the two plans would be substantially the same. In fact, one might, at least theoretically, argue that this tactic could be used even where there is no corporate transaction, by running two plans in parallel during the period a determination letter application is pending for a new plan that is a clone of an existing plan. The ability to run a new (clone) plan and old plan simultaneously would depend, in part, on this not causing either plan to fail to meet Tax Code nondiscrimination rules, such as those under the Sections 410(b) or 401(a)(26), without the benefit of the Section 410(b)(6)(C) relief available in the context of a corporate transaction. To the degree employers and other plan sponsors are creative in taking advantage of the availability of determination letters for new plans, it is possible, of course, that the IRS will respond by refining and clarifying what it means by a plan "seeking initial qualification," to foreclose the opportunity to seek determination letters in these circumstances.

Opinions of Counsel. In light of the curtailment of the determination letter program, a natural question is whether outside employee benefits counsel serving employers and other plan sponsors will issue opinions as to the qualified status of retirement plans. This question arises not so much because it is likely employers or other plan sponsors will ask for such an opinion to satisfy their own curiosity, but instead because they may want an opinion to use in responding to requests from plan auditors or other third parties seeking evidence that a plan is qualified. In other words, the question is whether legal counsel might provide an opinion that could serve the function a determination letter has traditionally served in giving comfort to plan auditors, lenders, parties to corporate transactions, and others with an interest in whether an employer's plan is qualified.

The initial reaction of many law firms following the IRS' announcement that it would dramatically cut back the availability of determination letters was that they would be quite hesitant to issue opinions on the qualified status of plans. After all, a law firm's client's plans are often of considerable age, and were drafted and have been amended by other law firms (or non-lawyers) over a period of many years (often decades). And the law firm may not even have access to some prior versions of the plan document.

At least two major law firms have, however, announced that they are willing to opine on plan documents for plans that are intended to be qualified. One firm has indicated that it will review an individually designed retirement plan document and amendments, and issue an opinion letter regarding the plan document's tax-qualified status. The firm has said that for most plan sponsors it intends to provide this new service on an annual basis, for a flat fee, "to address qualification requirements as they are updated each year."

A second firm has indicated that it will issue opinions "intended to confirm continued benefaction of the IRS' document requirement applicable to an employer's plan(s)." This firm indicated that its service will be "targeted to individually designed plans that have current IRS determination letters," and will build on (a) the plan's last determination letter from the IRS, (b) the IRS' Required Amendment List, and (c) the law firm's "extensive and continuous monitoring of legal developments as they arise."

For a look at what a law firm opinion letter might look like, see Pam Perdue's excellent outline entitled "The End of the Determination Letter Program as We Know It – Implications, Options and Alternatives," from last year's version of this program ("The Year in Employee Benefits 2016: Insights and Strategies for Retirement, Health, and Executive Compensation Plans," April 13-15, 2016).

What would an opinion letter need to say to serve a client's need? For a plan that has an existing determination letter, one approach might be for a law firm to limit its opinion in a couple of ways. First, since the IRS has indicated that (a) expiration dates in determination letters issued under the now-defunct remedial amendment cycle system are no longer operative (Rev. Proc. 2016-37, Section 13.02, and Rev. Proc. 2017-4, Section 23.02(2)), and (b) even after the law changes, determination letters continue to be valid with respect to those plan provisions not affected by the change in law (Rev. Proc. 2016-37, Section 13.03, and Rev. Proc. 2017-4, Section 23.04), a law firm opinion might relate only to those plan document changes that have been made, or need to be made, in response to changes in the law occurring after the date as of which the law was taken into account under the existing determination letter.

Second, an opinion might indicate that the scope of the law firm's plan review is restricted in the same way the IRS says it will restrict its analysis under Revenue Procedure 2016-37, Section 12. Specifically, the IRS will review individually designed plans for which a determination letter application is permitted based on the Required Amendments List issued during the second calendar year preceding the submission of the application. For terminating plans, the IRS will review the plan for amendments required to be adopted in connection with the plan termination (basically, those amendments necessary to bring the plan up-to-date through current law). So, a law firm opinion might be restricted to considering whether the plan includes those provisions necessary to reflect changes in the law since the date the law was taken into account under the existing determination letter, but not beyond those changes set forth on the Required Amendments List issued during the second calendar year preceding the date of the opinion. For plans with determination letters issued under the recently-departed remedial amendment cycle system, the opinion might be more specific, indicating that it has been reviewed only for changes required by changes in the law reflected on the Cumulative Lists following the one taken into account under the most recent determination letter, plus changes reflected on the Required Amendments Lists through the Required Amendments List issued during the second calendar year preceding the date of the legal opinion.

Any opinion would presumably include disclaimers similar to those applicable to determination letters, such as that the opinion is not valid if facts were misstated to the law firm or were not disclosed to the law firm, or, in particular, if there are additional plan documents that were not provided to the law firm. Rev. Proc. 2017-4, Sections 23.02(1) and 21.03. In addition, similar to the caveat applicable to a determination letter, the opinion would presumably indicate that it may not be relied on to the extent there is a change in a material fact or applicable law. Rev. Proc. 2017-4, Section 23.02(1).

One of the great concerns with respect to opinion letters is a law firm's need to properly take into account the likelihood third parties will wish to rely on it. One may surmise that the very reason an employer or plan sponsor will ask a law firm for an opinion as to the qualified status of a plan will be to satisfy a third party. Particularly where that understanding is explicit, it would presumably then be difficult for the law firm to expressly and effectively prevent those third parties from relying on the opinion. To state the obvious, this poses a considerable possibility of risk for a law firm to consider.

The wild card in the strategy for getting determination letter protection is Code Section 7476. That section reads as follows:

(a) **Creation of remedy** In a case of actual controversy involving –

(1) a determination by the Secretary with respect to the initial qualification or continuing qualification of a retirement plan under subchapter D of chapter 1, or

(2) a failure by the Secretary to make a determination with respect to –

(A) such initial qualification, or

(B) such continuing qualification if the controversy arises from a plan amendment or plan termination, upon the filing of an appropriate pleading, the Tax Court may make a declaration with respect to such initial qualification or continuing qualification. Any such declaration shall have the force and effect of a decision of the Tax Court and shall be reviewable as such. For purposes of this section, a determination with respect to a continuing qualification includes any revocation of or other change in a qualification.

(b) **Limitations**

(1) Petitioner

A pleading may be filed under this section only by a petitioner who is the employer, the plan administrator, an employee who has qualified under regulations prescribed by the Secretary as an interested party for purposes of pursuing administrative remedies within the Internal Revenue Service, or the Pension Benefit Guaranty Corporation.

(2) Notice

For purposes of this section, the filing of a pleading by any petitioner may be held by the Tax Court to be premature, unless the petitioner establishes to the satisfaction of the court that he has complied with the requirements prescribed by regulations of the Secretary with respect to notice to other interested parties of the filing of the request for a determination referred to in subsection (a).

(3) Exhaustion of administrative remedies

The Tax Court shall not issue a declaratory judgment or decree under this section in any proceeding unless it determines that the petitioner has exhausted administrative remedies available to him within the Internal Revenue Service. A petitioner shall not be deemed to have exhausted his administrative remedies with respect to a failure by the Secretary to make a determination with respect to initial qualification or continuing qualification of a retirement plan before the expiration of 270 days after the request for such determination was made.

(4) Plan put into effect

No proceeding may be maintained under this section unless the plan (and, in the case of a controversy involving the continuing qualification of the plan because of an amendment to the plan, the amendment) with respect to which a decision of the Tax Court is sought has been put into effect before the filing of the pleading. A plan or amendment shall not be treated as not being in effect merely because under the plan the funds contributed to the plan may be refunded if the plan (or the plan as so amended) is found to be not qualified.

(5) Time for bringing action
If the Secretary sends by certified or registered mail notice of his determination with respect to the qualification of the plan to the persons referred to in paragraph (1) (or, in the case of employees referred to in paragraph (1), to any individual designated under regulations prescribed by the Secretary as a representative of such employee), no proceeding may be initiated under this section by any person unless the pleading is filed before the ninety-first day after the day after such notice is mailed to such person (or to his designated representative, in the case of an employee).

(c) Retirement plan
For purposes of this section, the term "retirement plan" means –
(1) a pension, profit-sharing, or stock bonus plan described in section 401(a) or a trust which is part of such a plan, or
(2) an annuity plan described in section 403(a).

(d) Cross reference
For provisions concerning intervention by Pension Benefit Guaranty Corporation and Secretary of Labor in actions brought under this section and right of Pension Benefit Guaranty Corporation to bring action, see section 3001(c) of subtitle A of title III of the Employee Retirement Income Security Act of 1974.

So, an employer or plan administrator, among others, may file an action in the Tax Court seeking a determination with respect to the continuing qualification of a plan where there is a controversy about that qualification of a plan amendment. And recall that the regulatory extension of the remedial amendment period that applies where a determination letter application has been timely filed, also applies where a petition is timely filed with the Tax Court for a declaratory judgment under Section 7476. In the latter case, retroactive corrections can be made up to the 91st day after the Tax Court's decision becomes final. Treas. Reg. § 1.401(b)-1(e)(3)(ii).

One assumes that only where much is at stake, such as where a large plan adopts a plan amendment about which there is a real question as to its effect on the plan's qualified status, would making such a filing be worth the effort. There is an exhaustion of remedy requirement that would require that a determination letter application somehow be filed, perhaps using the forms and processes in place for new plans while noting prominently that the request does not relate to a new plan. See Rev. Proc. 2017-4, Section 22. As to the cost of proceeding under Section 7476, it is helpful that these declaratory judgment decisions are often made based on the materials provided by the plan sponsor to the IRS with the determination letter application and any other administrative record, without resort to extensive discovery or a trial. See, generally, the helpful discussion in this regard the IRS 2002 CPE outline by Jeanette Checchia, John Messman, and Don Parkinson entitled "Summary of Declaratory Judgment, Administrative Record, and Building a Case for Litigation." For a superb discussion of the possibility of using a Section 7476 declaratory judgment action to obtain a determination letter for an ongoing plan, see the article by Fred Oliphant, Gary Quintiere, and Nicholas Wamsley entitled "Need a Determination Letter? A Declaratory Judgment Might Work," at Tax Notes, October 26, 2015, pp. 533 et seq. To make an obvious point, seeking a declaratory judgment may not endear the plan sponsor to the IRS. In deciding whether to utilize Section 7476, one should certainly take into account the risks associated with antagonizing the Service.

A number of commentators have reviewed the history of Section 7476 and raised an apparently legitimate question as to whether the Service has the ability to curtail the determination letter program to the degree it has done so. One way to test whether the Service has the authority to circumscribe the determination letter program in the fashion it has announced might be for a great number of employers or plan administrators to file determination letter applications for ongoing plans, and upon the refusal of the IRS to issue letters, seek declaratory judgments. This may be impractical given the effort and cost this would entail. It would be easier to accomplish if a class action were a proper vehicle for the declaratory judgment request, but it seems difficult to imagine how one could proceed on a class action basis, if for no other reason because the qualification issues would be plan-specific, differing too greatly from plan to plan.