

Plan Determination Letter Notice Offers Employers Hope

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By

 **STEPHANIE CUMINGS**
Contact Author

An IRS notice requesting comments on expanding the determination letter program will be welcome news for employers, practitioners told Tax Analysts.

Robin M. Solomon of Ivins, Phillips & Barker Chtd. saw the April 5 issuance of the notice as an encouraging sign and said that expanding the program would be especially beneficial for qualified plans with complex benefit formulas or multiple legacy arrangements where prototypes aren't a viable alternative.

[Notice 2018-24](#), 2018-17 IRB 1, requests comments on potentially expanding the scope of the program for individually designed plans in 2019. Limited resources forced the IRS to [drastically curtail the program](#) at the beginning of 2017.

"Employers would really like to see an expansion of the determination letter program because they face pretty real liability if their plan gets disqualified," said Kevin L. Walsh of Groom Law Group, echoing the concern many practitioners voiced since the program's demise. According to Solomon, hiring a law firm to provide an opinion letter may offer peace of mind to third parties, such as lenders or accounting firms, but it offers no real protection against plan disqualification by the IRS.

A frequently overlooked benefit of the determination letter process is that it imposes a periodic compliance framework for reviewing, restating, and updating a qualified plan, said Solomon, who teaches on qualified retirement plans at Georgetown University Law Center. "It would take tremendous discipline for employers to replicate this process without the structure of the determination letter program," she said.

IRS officials have said on several occasions that the agency would like to reopen the program in a limited capacity in the future. Kyle Brown, division counsel, IRS Tax-Exempt and Government Entities Division, said March 9 that the IRS had made strides in clearing its backlog of letters and is [considering whether to permit applications](#) for large defined benefit plans and plans involved in mergers and acquisitions.

"It's unrealistic to believe the IRS will revert back to the scale of the prior program," said Ryan R. Montgomery of Morgan, Lewis & Bockius LLP, adding that the plans highlighted by Brown are two of the most pressing.

Elizabeth Thomas Dold, also of Groom, said that new plan designs are a good candidate to receive determination letters in the event the IRS does expand the program. New laws that affect qualified plans also present a need for determination letters to ensure that new features are appropriately adopted, she said. For example, the Bipartisan Budget Act of 2018 ([P.L. 115-123](#)) includes hardship distribution provisions intended to streamline plan participants' access to funds. Cash balance plans would have been another good candidate for determination letters, Dold said. However, the IRS recently issued [Rev. Proc. 2018-21](#), 2018-14 IRB 467, which [expanded the use of preapproved cash balance plans](#).

Dold said that because Form 5300, "Application for Determination for Employee Benefit Plan," was recently streamlined, expanding the program shouldn't be as resource intensive as it was in the past.

Dold also said the notice has also assuaged concerns about the system heading in the wrong direction after the IRS raised the Employee Plans Compliance Resolution System (EPCRS) [user fees for small plans](#).

"EPCRS helps make sure you're operating in compliance with the plan document, but we still need to make sure that the document is correct, and EPCRS will not bless your plan amendment," Dold said. "We still need the IRS to bless these plan amendments and plan documents." The American Retirement Association asked the IRS in an [April 4 letter](#) for an

expansion of the EPCRS self-correction program to decrease the burden of the raised fees for the voluntary correction program.

Montgomery said one possible concern for the IRS involves the agency not wanting to be viewed as favoring large plan sponsors over small ones, adding that this concern could affect both how the IRS decides to expand the program and what it would charge for those letters.

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AUTHORS

STEPHANIE CUMINGS

INSTITUTIONAL AUTHORS

TAX ANALYSTS

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