Part IV. Items of General Interest

Relief With Respect to IRAs Whose Owners Have Entered Into Certain Agreements With Brokers or Other Financial Institutions

Announcement 2011–81

This announcement provides temporary relief with respect to Individual Retirement Accounts (IRAs) in circumstances in which the IRAs' owners have signed certain indemnification agreements or granted certain security interests in accounts that may have an effect on their IRAs.

On October 20, 2011, the Department of Labor (DOL) issued Advisory Opinion 2011–09A regarding circumstances under which an individual IRA owner's agreement to indemnify a broker in order to cover indebtedness of, or arising from, the individual's IRA with the broker would be an impermissible "extension of credit," as described in § 4975(c)(1)(B) of the Code and whether, in such cases, any prohibited transaction would be covered by DOL class exemption PTE 80–26. Subsequent to the issuance of Advisory Opinion 2011–09A, similar issues have been raised regarding the IRA owner's grant of a security interest among the non-IRA accounts and the IRA (referred to collectively as cross-collateralization agreements) with a broker or other financial institution. Previously, on October 27, 2009, the DOL issued Advisory Opinion 2009–03A, holding that the grant by an individual to a broker of a security interest in the individual's non-IRA accounts with the broker would be an impermissible extension of credit to the individual's IRA, as described in § 4975(c)(1)(B) of the Code. Advisory Opinion 2011–09A concludes that PTE 80–26 does not provide relief for such extensions of credit.[1]

The DOL has advised the Internal Revenue Service (IRS) that DOL is considering further action with respect to the issues described above, including consideration of a class exemption request expected to be submitted to the DOL. Pending further action by the DOL and until issuance of further guidance from the IRS superseding this announcement, the IRS will determine the tax consequences relating to an IRA without taking into account the consequences that might otherwise result from a prohibited transaction under § 4975 resulting from entering into any indemnification agreement or any cross-collateralization agreement similar to the agreements described in DOL Advisory Opinions 2009–03A and 2011–09A, provided there has been no execution or other enforcement pursuant to the agreement against the assets of an IRA account of the individual granting the security interest or entering into the cross-collateralization agreement. No inference with respect to the application of any Code section other than § 4975 should be drawn from this announcement.

Employee Plans Determination Letter Program Changes

Announcement 2011–82

This announcement describes several important changes to the Employee Plans determination letter program that will take effect in 2012. These changes eliminate features of the determination letter program that are of limited utility to plan sponsors in comparison with the burdens they impose. The changes also are expected to improve Internal Revenue Service ("Service") efficiency by reducing the time it takes the Service to process determination letter applications. Under these modified procedures, many employers will no longer apply for determination letters.

The changes to the determination letter filing procedures described in this announcement will be reflected in Rev. Proc. 2012–6, which will be published in I.R.B. 2012–1 on January 3, 2012. Revenue Procedure 2012–6 will set forth the procedures for issuing determination letters on the qualified status of employee plans. The changes to the determination letter filing procedures eliminate elective demonstrations regarding coverage and nondiscrimination requirements and provide that only employers that have made limited modifications to a pre-approved volume submitter (VS) plan may file Form 5307, *Application for Determination for Adopters of Master or Prototype or Volume Submitter Plans*. In conjunction with the latter change, the Service expects to revise the language of opinion and advisory letters to clarify the circumstances in which these letters are equivalent to a determination letter. *See*, section 19 of Rev. Proc. 2011–49, 2011–44 I.R.B. 608.

Background

Revenue Procedure 2012–6 will set forth the procedures of the Service for issuing determination letters. Under the procedures in effect prior to Rev. Proc. 2012–6, the Service allowed plan sponsors to elect to expand the scope of a determination letter application by completing *Schedule Q* (Form 5300), *Elective Determination Requests*, and submitting data demonstrating compliance with coverage and nondiscrimination requirements.

The Service also permitted an employer that adopted a pre-approved (master and prototype (M&P) or VS) plan to apply for an individual determination letter on Form 5307, which is a shorter application form available only to adopters of these plans. Although the employer is generally entitled to rely directly on the opinion or advisory letter for the M&P or VS plan with respect to most qualification requirements, the employer could apply for a determination letter to obtain reliance regarding the coverage and nondiscrimination requirements by filing Form 5307 and including *Schedule Q* and data demonstrating compliance with coverage and nondiscrimination requirements. In addition, an employer could make limited modifications to an approved VS plan, in which case a determination letter was required for reliance and could be obtained by filing Form 5307.

[1] Under Reorganization Plan No. 4 of 1978, effective December 31, 1978, the authority of the Secretary of the Treasury to issue interpretations with respect to § 4975 of the Code was transferred, with certain exceptions not here relevant, to the Secretary of Labor.

Elimination of Demonstrations Regarding Coverage and Nondiscrimination Requirements

The issuance of a determination letter that is based on a demonstration of compliance with a coverage or nondiscrimination requirement does not obviate the need for subsequent testing of a plan; reliance based on a demonstration is limited to the facts presented in the demonstration. This need for subsequent testing reduces the value of the elective demonstration feature, especially where the costs of preparing and reviewing demonstrations are taken into account. Accordingly, this elective demonstration feature of the determination letter program is being eliminated.

As a result, except as provided below, the Service's review of a determination letter application for a plan will not consider, and a determination letter may not be relied on with respect to, whether the plan satisfies the requirements of section 401(a)(4), 401(a)(26), or 410(b). The Service will continue to determine whether a plan's benefit or contribution formula satisfies the requirements of a nondiscriminatory design-based safe harbor and will also continue to determine whether a plan's terms satisfy sections 401(k) and 401(m). This change is effective for applications filed on or after February 1, 2012, in the case of plans under a 5-year remedial amendment cycle (other than terminating plans), and May 1, 2012, in the case of terminating plans and plans under a 6-year remedial amendment cycle.

As of the effective date of this change with respect to a plan, *Schedule Q* and accompanying demonstrations regarding the coverage and nondiscrimination requirements should not be submitted with any determination letter application for the plan, including an application for a terminating plan filed on Form 5310, *Application for Determination for Terminating Plan*, because such demonstrations will not be considered in the Service's review of the plan. In addition, determination letter applicants should no longer complete line 13 of Form 5300, *Application for Determination for Employee Benefit Plan*, line 11 of Form 5307, or lines 13 or 14e of Form 5310, regarding coverage data and nondiscrimination, when submitting an application on or after the effective date of this change. Further, the listing in Column A of Form 8717, *User Fee for Employee Plan Determination, Opinion, and Advisory Letter Request*, of user fees for applications with coverage and nondiscrimination demonstrations, will cease to apply. These forms will be revised in the future to reflect these changes.

Form 5307 Applications Limited to Adopters of VS Plans Who Modify Pre-Approved Terms

Effective May 1, 2012, determination letter applications filed on Form 5307 will be accepted only from adopters of VS plans that modify the terms of the pre-approved VS specimen plan (and only if the modifications are not so extensive as to cause the plan to be treated as an individually designed plan). Any such application that is filed on or after May 1, 2012, but before the plan's next "on-cycle" submission period begins, is an "off-cycle" application under Rev. Proc. 2007–44, 2007–2 C.B. 54, and generally will not be reviewed until all on-cycle applications have been reviewed.

The Service will not accept determination letter applications that are filed on Form 5307 on or after May 1, 2012 by adopters of VS plans that have not made any changes to the terms of the pre-approved VS specimen plan (except to select among options under the plan) or by adopters of M&P plans. These VS and M&P adopters may rely on the advisory or opinion letter issued with respect to the VS or M&P plan to the extent provided in section 19 of Rev. Proc. 2011–49.

Form 5300 Applications for M&P and VS Plans

In certain circumstances, an application for a determination letter for an M&P or VS plan must be filed on Form 5300. Under Rev. Proc. 2012–6, the circumstances in which an application for a pre-approved plan must be filed on Form 5300 will remain the same as under prior procedures, with two additions. First, effective May 1, 2012, an application for a determination letter for an M&P plan must be filed on Form 5300 if the employer has added language to the pre-approved M&P plan to satisfy the requirements of sections 415 and 416 because of the required aggregation of plans. Second, effective May 1, 2012, an application for a determination letter for a pre-approved pension plan with a normal retirement age earlier than age 62 must be filed on Form 5300.

Thus, under Rev. Proc. 2012–6, an employer will be able to obtain a determination letter as an adopter of a pre-approved plan by filing Form 5300 under the following circumstances: (1) the application also requests a determination regarding affiliated service group or leased employee status or partial plan termination; (2) the plan is a multiple employer plan; (3) a determination letter is required by the Service (for example, in connection with a request for a funding waiver); (4) the employer has added language to an M&P plan to satisfy the requirements of sections 415 and 416 because of the required aggregation of plans; or (5) the plan is a pension plan with a normal retirement age earlier than age 62. In each of these circumstances, the mere use of Form 5300 will not mean that the plan must be restated for changes in qualification requirements included in the Cumulative List in effect when the application is filed. The plan will instead be reviewed on the basis of the Cumulative List that was considered in issuing the opinion or advisory letter for the plan. In any of these cases, the employer must indicate in the cover letter the reason for using Form 5300 and must include with the application a copy of the opinion or advisory letter issued with respect to the M&P or VS plan.

Until May 1, 2012, an employer may file Form 5307 to obtain a determination letter for both a pre-approved pension plan with a normal retirement age earlier than age 62 and an M&P plan that includes language added by the employer to satisfy the requirements of sections 415 and 416 because of the required aggregation of plans, provided that the employer is otherwise eligible to file Form 5307. After May 1, 2012, an application for a determination letter must be filed on Form 5300 in these cases.

Form 5307 Applications That Are Filed Before May 1, 2012

Sponsors are reminded that the on-cycle submission period for pre-approved defined benefit plans under Rev. Proc. 2007–44 ends on April 30, 2012. The Service will continue to accept, through April 30, 2012, applications filed on Form

5307 for VS plans and M&P plans, including defined contribution plans, under procedures currently in effect. A Form 5307 application for a "new" defined contribution plan (that is, a plan whose initial remedial amendment period under section 1.401(b)–1 of the Income Tax Regulations ends after April 30, 2010) that is filed before May 1, 2012 will be treated as an on-cycle application. A Form 5307 application for any other defined contribution plan that is filed before May 1, 2012 will be treated as an off-cycle application and might not be reviewed before the next two-year filing window available for pre-approved plans.

DRAFTING INFORMATION

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