AMERICAN RETIREMENT ASSOCIATION
Working for America's Retirement

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June 26, 2018

Ms. Cathy L. Jones
Acting Director, Employee Plans
Tax Exempt and Government Entities
Internal Revenue Service
(Submitted by E-mail)

Re: Comments on Pre-Approved Plan Document Program under Revenue Procedure 2017-41

Dear Ms. Jones:

The American Retirement Association (ARA) is submitting this letter to provide input on Internal Revenue Service Revenue Procedure 2017-41, the revision of the pre-approved plan document program ("the Program"). This letter asks for clarification on certain provisions of the new procedures, makes recommendations for further enhancements to Program and requests a 5-month extension of the submission deadline for Cycle 3 defined contribution pre-approved plans. ARA appreciates the opportunity to continue to work with the IRS to improve the pre-approved plans programs.

ARA is the coordinating entity for its five underlying affiliate organizations representing the full spectrum of America's private retirement system, the American Society of Pension Professionals and Actuaries ("ASPPA"), the National Association of Plan Advisors ("NAPA"), the National Tax-deferred Savings Association ("NTSA"), the ASPPA College of Pension Actuaries ("ACOPA"), and the Plan Sponsor Council of America ("PSCA"). ARA's members include organizations of all sizes and industries across the nation who sponsor and/or support retirement saving plans and are dedicated to expanding on the success of employer sponsored plans. In addition, ARA has more than 20,000 individual members who provide consulting and administrative services to American workers, savers, and the sponsors of retirement plans. ARA's members are diverse but united in their common dedication to the success of America's private retirement system.

SUMMARY

ARA greatly appreciates the direction IRS has taken with the issuance of Rev. Proc. 2017-41, which greatly enhances the Program. ARA applauds the IRS for listening to the industry's input and revising the Program to the benefit of all parties involved. The positive impact of this collaboration is evidenced by the recent issuance of Revenue Procedure 2018-21, which revises Rev. Proc. 2017-41 to allow pre-approved defined

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benefit plans containing a cash balance formula to provide for the actual rate of return on plan assets as the rate used to determine interest credits.

The IRS has requested additional comments on how to improve the Program. After careful analysis of Revenue Procedure 2017-41, ARA submits the following requests for clarification, further enhancements to the Program and an extension of the Cycle 3 defined contribution submission deadline from October 1, 2018, to March 1, 2019. As explained below, extension of the submission deadline is an urgent matter and ARA respectfully requests that it be given immediate consideration.

In summary, ARA requests clarification on the following aspects of the revised program:

1. The extent an adopting employer maintains reliance on an Opinion Letter in the circumstances described below.
2. The ability for document providers to provide "collapsible" and "flexible" documents.
3. The ability to remove 401(k) and money purchase plan features from the adoption agreement, if not selected by the adopting employer
4. Use of the same adoption agreement for an adopting employer to select both profit sharing and money purchase features
5. The execution of interim amendments by mass submitters on behalf of Providers

Further, ARA recommends changes and enhancements to the Program relating to:

1. Interim amendments
2. Trust/custodial provisions
3. Submissions of Form 5307
4. Extension of the deadline for Cycle 3 defined contribution submissions to March 1, 2019

DISCUSSION

Requested Clarifications

While Rev. Proc. 2017-41 provides considerable detail on matters related to the Program, ARA requests clarifications on certain items. These clarifications are important for document providers to properly draft documents and advise adopting employers.

The extent to which an adopting employer maintains reliance on an Opinion letter

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An adopting employer's reliance on an Opinion Letter provides perhaps the most important benefit of the Program. Clear rules and guidelines are essential for the integrity of the Program and for consistent application by IRS staff, especially on plan examination. Sections 7 and 8 provide an extensive discussion on an adopting employer's reliance on an Opinion Letter and its ability to make certain amendments without losing reliance. For example, adopting employers may select among approved plan options, including "other" options that require employers to enter text (within specified parameters) without losing reliance. In addition, the Revenue Procedure is clear that if amendments are made to standardized pre-approved plans, such plans generally become individually designed plans.

ARA requests clarification relating to the impact on reliance where an employer modifies the language of a standardized and non-standardized pre-approved plan. ARA understands that an adopting employer may submit, under certain circumstances, a Form 5307 requesting a determination letter in the event a modification is made to a pre-approved plan. However, ARA would like confirmation that, in the event an adopting employer modifies the pre-approved plan, the adopting employer maintains reliance on provisions that are not impacted by the modification, regardless of whether a Form 5307 is submitted. This would be consistent with the position the IRS has taken under Revenue Procedure 2016-37 with respect to individually designed plans.
In addition, ARA suggests that adopting employers should be allowed to modify any provision of the plan that does not impact plan qualification, without impacting reliance.

The ability for document providers to provide "collapsible" and "flexible" documents

For Cycle 2 pre-approved documents, the IRS provided the option to provide so-called "collapsible documents" to adopting employers. A collapsible document allows the document provider to eliminate provisions from the executed adoption agreement that were not selected and that are not integral to plan qualification. The condition for using this approach was that the entire adoption agreement had to be attached to the "collapsed" plan.

The collapsible document approach is extremely valuable to document providers and provides a shorter and more understandable document to adopting employers. ARA assumes that the approach continues to be viable. ARA would recommend that the IRS discontinue the requirement that the entire adoption agreement be attached to the collapsed plan. This requirement is not consistent with the ability to shorten and make more understandable a plan document for adopting employers. ARA further recommends that the concept of collapsibility be expanded to the basic plan document for provisions

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not applicable in order to help facilitate understanding and compliance with the plan document.

Related to this point, ARA would like clarification on the "flexible plan" approach available to mass submitters. The optional provisions allowed for this approach are somewhat limited (i.e., investment, administrative and 401(k) provisions). This appears somewhat more restrictive than allowed under the prior procedures applicable to volume submitter plans. Under prior procedures, mass submitters could indicate certain volume submitter plan provisions (including provisions in the basic plan document) that would not appear if certain other provisions are selected in the adoption agreement. For example, if a non-ERISA "owners only" 401(k) plan is adopted, certain Title I related provisions would not appear. ARA would like confirmation that this approach is still acceptable.

The ability to remove 401(k) and money purchase plan features from the adoption agreement, if not selected by the adopting employer

ARA appreciates the revision that allows profit sharing, 401(k) and money purchase features in a single adoption agreement. While the Revenue Procedure is clear that a mass submitter may include a self-contained 401(k) arrangement that a Provider may include or delete, it is silent on the ability to do the same for the money purchase feature of a plan. ARA believes that this ability is important for several reasons. It makes the plan more understandable to an adopting employer and administrators operating the plan by excluding unnecessary provisions that may confuse adopting employers. This often leads to compliance complications. Excluding unnecessary provisions also allows for a shorter and less costly approach to providing written plan documents.

Use of the same adoption agreement for an adopting employer to select <u>both</u> profit sharing and money purchase features

The Revenue Procedure allows a single adoption agreement to include both profit sharing (including 401(k) features) and money purchase features. ARA would like clarification as to whether an adopting employer that maintains or wishes to maintain <u>both</u> a profit sharing plan and a money purchase plan may use the same adoption agreement to adopt both types of plans. ARA assumes that for Internal Revenue Code and Title I purposes, if this is allowed, that such an arrangement would still mean the employer maintains two separate plans.

Execution of interim amendments by mass submitters

ARA would like clarification as to whether word-for-word adopters of a mass submitter plan must formally adopt all interim amendments that the mass submitter adopts on

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behalf of the word-for-word adopters. For example, if none of a word-for-word adopter's adopting employers have the option to purchase Qualified Longevity Annuity Contracts (QLACs), is it necessary for the word-for-word adopters to adopt the an interim amendment describing the minimum distribution rules applicable to QLACs. (We discuss further recommendations relating to interim amendments in the next section of the letter.)

Recommended Changes and Further Enhancements

Interim amendments

Interim amendments for pre-approved plans are extremely problematic for mass submitters, document providers and adopting employers. While Revenue Procedure 2016-37 provides relief for individually designed plans from many of the onerous interim amendment requirements, pre-approved plans are not afforded the same relief or guidance. ARA has expressed its serious concerns about this issue in several previously-submitter comment letters [February 23, 2016 and October 1, 2015].

As new legislation is enacted and new regulations and other guidance is issued, mass submitters and document providers must draft "good faith" interim amendments that adopting employers must then associate with their plans. This is a costly, inconsistent and confusing process. Without guidance from the IRS, mass submitters and document providers must independently assess the need for and draft interim amendments. Document providers then must go through the time-consuming and expensive process of providing these amendments to their adopting employers and explaining to them the need for the amendments. While this good faith interim amendment requirement is not necessarily an annual requirement, our experience has been that interim amendments have been required in many of the years since the current amendment rules became effective. Recent legislative activity including the passage of the Tax Cuts and Jobs Act and Bipartisan Budget Act of 2018, certainly will require interim amendments in multiple years, beginning as early as 2018. Further, some interim amendments are drafted without the benefit of IRS guidance. When the applicable guidance is issued, it can be necessary to draft a second interim amendment for the same issue to conform to the IRS guidance. In many instances, legislation is enacted and regulatory guidance is provided outside the restatement cycle.

As a result, newly approved pre-approved documents must include interim amendments for clients to execute in addition to the restated document. This situation creates confusion for adopting employers. Service providers are left in the unenviable position of having to communicate what makes no sense to employers and leaving employers with the feeling they are paying for something that is deficient.

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Another issue is that a cumulative list is no longer issued annually. Historically, mass submitters would use the annual cumulative list to determine the necessity of any interim amendment.

ARA believes that the good faith interim amendment rules can be simpler and more efficient for all parties involved. To achieve that outcome, ARA recommends the following changes be made:

1. Apply the amendment principles for individually designed plans (Rev. Proc. 2016-37) to pre-approved plans. Doing so would give much needed clarity regarding the issues for which amendments are needed and a uniform date by which amendments must be adopted (which provides time to draft amendments and communications materials, program systems for delivery and time for employers to adopt amendments *after* the IRS issues guidance).

   As an example, under the current amendment rules for pre-approved plans, amendments for the changes to the hardship rules made by Bipartisan Budget Act of 2018 will generally be required by the end of 2019, but IRS regulations are not required to be issued until early 2019. The process of analyzing the regulations, drafting and fulfilling amendments and giving sufficient time to allow employers to timely adopt them will be nearly impossible. Amendment rules similar to those in Rev. Proc. 2016-37 would provide a much more reasonable time period for all of these activities to occur.

2. If the IRS decides not to apply the principals discussed in item #1 above, the IRS should specifically allow the use of the IRS Operational Compliance List as a basis for good-faith interim amendments for pre-approved plans. Further, IRS should provide sufficient time for document providers and mass submitters to draft and adopt the appropriate interim amendments. At a minimum, document providers and mass submitters should have at least until the close of the calendar year following the issuance of the Operational Compliance List.

3. If the IRS does not adopt the approaches recommended in items #1 or #2 above, the IRS should provide a list of items that the IRS deems necessary within each interim amendment. A list of such items would promote consistency and employer compliance with changes to plan rules. Model amendments are not needed, but sample language would be helpful. As recommended in #2 above, ARA recommends that IRS provide sufficient time for document providers and mass submitters to draft and adopt the appropriate interim amendments. ARA is willing to work with the IRS in developing the sample language.

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Trust/custodial provisions

Revenue Procedure 2017-41 has revised the procedures for trust/custodial provisions associated with pre-approved plans. Under prior procedures, the IRS required that pre-approved plans include trust/custodial provisions, either within the plan document itself or in a separate trust/custodial agreement associated with the plans. The IRS reviewed the pre-approved plan trust/custodial provisions to ensure that the provisions did not conflict with the other terms of the plan. Additionally, the IRS would separately review (subject to certain limitations and user fees) trust/custodial provisions that document providers wished to have associated with previously-approved pre-approved plans. Under the revised Program, while pre-approved plans must include trust/custodial provisions, the IRS will not review these trust/custodial provisions and Opinion Letters will provide no reliance that the trust/custodial provisions are acceptable. The trust/custodial provisions of the pre-approved plan must be "in a document separate from the rest of the plan." Also, the IRS will no longer separately review trust/custodial provision that Providers wish to have associated with pre-approved plans.

While ARA generally accepts the Program's revisions with respect to trust/custodial provisions, we recommend that IRS:

1. Permit pre-approved plan documents to contain generic trust/custodial language as a separate section within the basic plan document (and not necessarily in a document separate from the rest of the plan). Our experience shows that having numerous separate documents associated with a plan confuses adopting employers and leads to compliance issues, especially since documents can easily be disassociated or lost. The IRS could then caveat its Opinion Letters to clearly note that it does not cover the plan's trust provisions.

2. Provide guidance on acceptable trust/custodial provisions. While ARA understands that the IRS will not review the trust/custodial provisions under the revised Program, we believe that it would be extremely helpful if IRS provided guidance on acceptable trust/custodial provisions. Trust/custodial provisions are integral to the qualification of a plan. Guidance on acceptable terms would provide some comfort that the trust/custodial provisions of the plan are acceptable.

3. Clarify that the trustee signature may continue to be included in the pre-approved plan document (e.g., signature in the adoption agreement for the trust provisions associate with the plan). This approach will avoid placing undue burdens on employers by having to sign and keep track of two separate documents.

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Submissions of Form 5307

Under the Program, pre-approved plans with modified provisions may submit Form 5307 only during the 2-year restatement period announced with respect to applicable restatement cycle. ARA strongly recommends that the IRS accept Form 5307 beyond the end of the applicable restatement period and up to the time that an employer may adopt a plan for the next restatement cycle. This approach will further enhance plan sponsors movement to pre-approved plans.

Extension of the deadline for Cycle 3 defined contribution submissions to March 1, 2019

Importantly, the pre-approved plan document changes incorporated into Rev. Proc. 2017-41 are significant, including the addition of new design types (i.e., ESOPS and church plans). To give the IRS time to consider and implement changes to its Program and to allow time for document drafters to write their documents and communicate their Cycle 3 plan document offerings to their document provider clients, ARA strongly recommends that the IRS extend the submission deadline for Cycle 3 plans and applications to March 1, 2019. The October 1, 2018 deadline is fast approaching, and with the timing and scope of the LRMs and the Revenue Procedure, and the lack of the updated submission form, additional time is needed to properly complete these submissions. For these reasons, ARA requests that immediate consideration be given to providing a 5-month extension.

* * * *

These comments were prepared by the ARA's Government Affairs Committee and primarily drafted by members of the Plan Document Subcommittee.
Please contact Craig P. Hoffman, Esq., APM, General Counsel and Director of Regulatory Affairs, at (703) 516-9300 if you have any comments or questions on the matters discussed above. Thank you for your time and consideration.

Sincerely,

/s/
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Executive Director/CEO
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