

February 23, 2016

Mr. Rob Choi
Director, Employee Plans
Internal Revenue Service
999 North Capitol Street, NE
Washington, DC 20002

RE: Suggested Enhancements to Pre-Approved Plan Programs

Dear Mr. Choi:

The American Retirement Association (“ARA”) is submitting this letter which proposes enhancements to the current pre-approved 401(a) and 403(b) plan programs. This letter complements ARA’s Comments on IRS Announcement 2015-19 submitted on October 1, 2015.¹ ARA appreciates the opportunity to provide input on the pre-approved plan programs, which are vital for the effective delivery and maintenance of America’s private retirement plan system.

The ARA is a national organization of more than 25,000 members who provide consulting and administrative services to American workers, savers and sponsors of retirement plans and IRAs. ARA members are a diverse group of retirement plan professionals of all disciplines including financial advisers, consultants, administrators, actuaries, accountants, and attorneys. The ARA is the coordinating entity for its four underlying affiliate organizations, the American Society of Pension Professionals and Actuaries (“ASPPA”), the National Association of Plan Advisors (“NAPA”), the National Tax-deferred Savings Association (“NTSA”) and the ASPPA College of Pension Actuaries (“ACOPA”). ARA members are diverse but united in a common dedication to America’s private retirement system.

Summary

Since shortly after the enactment of ERISA in 1974, the IRS has promoted the use of pre-approved plan documents for the adoption of qualified retirement plans by employers. The program has proven to be a tremendous success for employers, practitioners and the IRS. Over time, the IRS periodically has enhanced and expanded the pre-approved program to more effectively attain its goal of making the establishment and maintenance of qualified retirement plans more accessible and cost effective for employers, especially small and mid-sized employers.

¹ Available at

<http://www.asppa.org/Portals/2/PDFs/Comment%20Letters/Comments%20on%20IRS%20Announcement%202015-19%2010115%20final.pdf>.

Through the years, the IRS has had a very positive relationship with practitioners involved in the pre-approved plan program. Mass submitters, pre-approved plan sponsors and other stakeholders have worked closely with IRS staff in improving and expanding the pre-approved plan program. This close relationship has resulted in significant benefits to adopting employers, practitioners and the IRS. We believe that the enhancements we propose in this letter will continue the positive growth of the pre-approved plan programs. The suggested enhancements are even more important in light of the announced changes to the determination letter program under Announcement 2015-19.

ARA recognizes the resource limitations the IRS currently faces. The enhancements proposed in this letter are intended to assist the IRS in more efficiently utilizing its limited resources, while improving the pre-approved plan program for adopting employers and practitioners.

In an effort to further enhance the effectiveness of the current pre-approved plan programs, the **ARA recommends:**

1. The establishment of a single, streamlined revenue procedure that covers both 401(a) qualified plans and 403(b) plans, incorporating the best features of the current programs and eliminating distinctions (substantive, procedural and terminology) currently associated with “M&P” and “volume submitter” plans.
2. Specific enhancements to improve and expand the availability of pre-approved plans in light of the changes to the determination letter program for individually designed plans.
3. An initial restatement period of three (3) years for employers adopting pre-approved 403(b) plans.
4. The addition of 457(b) plans to the pre-approved plan program.

Discussion

The Establishment of a Single, Streamlined Revenue Procedure

Through the years, the IRS has revised and improved its procedures relating to pre-approved plans, often incorporating input from the benefits practitioner community. The most recent procedures for pre-approved 401(a) plans – Revenue Procedure 2015-36 – incorporate several practitioner recommendations (e.g., the addition of cash balance plans and ESOPs as permissible pre-approved plan designs) that expand the ability to utilize pre-approved plans by adopting employers. These are all positive and welcome enhancements.

Under Revenue Procedure 2013-22, the IRS introduced its new 403(b) pre-approved plan program. Employers and practitioners have welcomed this addition to the pre-approved plan

program. The manner in which the IRS developed the program - soliciting input from practitioners on draft procedures and LRMs prior to finalizing the program – helped to address many issues and make initial submissions more efficient.

Even with the substantial improvements and additions to the pre-approved plan programs over the years, ARA believes that the procedures still contain numerous areas that the IRS could improve to enhance the availability of pre-approved plans for employers, lessen the review and administrative burdens on the IRS and assist in the drafting efforts of document providers. This is especially important in light of the new restrictions on the ability of employers using individually-designed plans to receive favorable determination letters, which we believe will encourage more employers to use pre-approved plans.

In order to streamline the pre-approved plan procedures, IRS should eliminate, to the extent possible, the procedural, substantive and terminology distinctions currently incorporated in the pre-approved 401(a) and 403(b) programs. ARA's experience indicates that most employers adopting and maintaining qualified retirement plans only care that the plan is pre-approved by the IRS. For this reason, the distinctions between master & prototype (M&P) and volume submitter plans are irrelevant to them and, in fact, create confusion as practitioners try to explain the differences. Over the years, the distinctions between the M&P and volume submitter plans programs have lessened, especially with the ability of volume submitter plans to take the form of a basic plan document and adoption agreement. In fact, most mass submitters who utilize both M&P and volume submitter adoption agreement-style plans, submit virtually identical plans under the pre-approved plan programs. This causes redundant and unnecessary review by IRS staff.

The recent experience with the submission of pre-approved 403(b) plans illustrates that most document providers prefer a single type of pre-approved plan. Nearly all pre-approved 403(b) plans submitted utilized the volume submitter format, which under the procedures gives adopting employers and practitioners the most flexibility. Without any change to the 401(a) pre-approved program, we expect during the next defined contribution pre-approved plan cycle a continuing trend toward the use of one type of pre-approved plan, probably the more flexible volume submitter plan. This is especially likely in light of the significant increase in user fees and the changes in the determination letter program. Failure to eliminate the distinctions between M&P and volume submitter plans will continue an unnecessary review burden on the IRS and a drafting burden on document providers.

ARA generally recommends: While ARA recognizes the statutory and regulatory differences between 401(a) qualified plans and 403(b) plans, we believe that the next evolution of the pre-approved plan programs should be the establishment of a single, streamlined revenue procedure that covers both 401(a) qualified plans and 403(b) plans. Such a comprehensive revenue procedure will provide many benefits, including more cost effective utilization of IRS resources. To the extent possible, the procedural and substantive rules of the program would be consistent and, therefore, less confusing. This would help IRS staff, many of whom review both 401(a) plans

and 403(b) plans, and practitioners, many of whom draft both pre-approved 401(a) plans and 403(b) plans. Efficiencies for both IRS and practitioners would improve.

ARA specifically recommends the following with respect to a single, streamlined revenue procedure for pre-approved plans:

- IRS should establish the single comprehensive pre-approved program revenue procedure for defined contribution, defined benefit and 403(b) plans **effective for cycles beginning in 2018 and thereafter**.
- The procedure should encompass “the best of all worlds” approach (i.e., the best features of the current programs) to enhance the availability of pre-approved plans for employers and lessen the review burden for the IRS.
- The procedure should eliminate all distinctions (substantive, procedural and terminology) currently associated with M&P and volume submitter plans and use the terms “pre-approved 401(a) plan” and “pre-approved 403(b) plan” (eliminating the terms M&P and volume submitter plans).
- Procedures should be the same, to the extent possible, for all pre-approved 401(a) and 403(b) plans. Distinctions should only apply for specific regulatory differences in the plans. Consistent definitions (e.g., mass submitter) should apply.
- The IRS should expand the pre-approved plan program to allow as many plan designs and elections as possible to take a pre-approved plan approach. In light of new determination letter restrictions, all plan designs allowed under current regulations for each plan type should be acceptable. This includes allowing across all pre-approved plans - multiple employer plans (including 403(b) MEPs); 401(a) church plans; cash balance plans satisfying regulatory rules (including using fair market rate of return); pre-ERISA options for governmental employers and church 401(a) and 403(b); etc.
- Eliminate the need to use separate basic plan documents (BPDs) for different plan types (e.g., governmental and non-governmental 401(a) plans), by allowing more liberal use of “flexible” or “alternative” provisions in designing pre-approved BPDs. This becomes even more critical now that the IRS has announced significant increases in many submission user fees.
- Allow the combination of profit sharing, 401(k), money purchase and target benefit plan provisions into a single adoption agreement.
- Allow both basic plan document/adoption agreement and text/contract formats for both 401(a) qualified plans and 403(b) plans.

- Allow non-safe harbor hardship distribution provisions in all pre-approved plans.
- Allow governmental plan options, church plan options and MEP provisions in all pre-approved plans.
- Provide for consistent “minor modifier” rules for all pre-approved plans.

Other Enhancements to the Pre-Approved Plan Program

ARA envisions increased popularity of the pre-approved plan program in future years, especially as employers convert from individually-designed plans to pre-approved plans. Many of the recommendations ARA made in its Comments on Announcement 2015-19 submitted on October 1, 2015, including rationales for recommendations, apply to the pre-approved plan program. With these in mind, **ARA recommends** the following:

- IRS should provide, on an annual basis, a list of necessary interim amendments needed for pre-approved plans and provide model, sample, and/or suggested plan language. Reliance should be provided for plan language that is substantially similar to the IRS-provided plan language. The IRS should solicit practitioner input on any model, sample, and/or suggested language (including LRM language) before publishing the language. The deadline for adopting the amendment should be at least 12 months after IRS provides the plan language.
- IRS should clarify the level of “reliance” on favorable pre-approved plan letters, including the ramifications of a single disqualifying provision, the addition of provisions outside of the parameters allowed for “describe” lines in an adoption agreement and other modifications. Please see our comment letter dated October 1, 2015 for further discussion of this important topic.
- IRS should extend the current reliance provided to adopters of 403(b) volume submitter plans (i.e., that adopting employers retain reliance on the pre-approved plan letter if the plan is “substantially similar” to the approved plan) to all pre-approved plans.
- Improve the existing program for approval of separate trusts that can be used with pre-approved plans by working directly with trust companies rather than through mass submitters and non-mass submitter pre-approved plan sponsors.
- Allow an entry date of 90 days (i.e., a “reasonable administrative period”) for a plan to initiate salary deferrals for newly eligible or rehired participants to make 403(b) deferrals.

- Allow a 403(b) plan eligibility exclusion for participation in either a governmental or tax-exempt 457(b) plan which is consistent with the Code.
- Allow adopting employers of pre-approved plans (both 401(a) and 403(b) plans) to submit for favorable determination letters using Form 5307 for modifications to the approved pre-approved plan.
- IRS should expand the ability of pre-approved plan sponsors and/or adopting employers to amend administrative and non-qualification provisions (e.g., Title I provisions that are not required for plan qualification) without affecting the reliance on a favorable pre-approved plan letter.
- The IRS should allow increased usage of incorporation by reference in pre-approved plans, including in interim amendments, which would save the IRS considerable time when reviewing plan provisions. The ARA discussed this matter in a comment letter dated October 1, 2015 and intends to submit additional comments on the topic.
- The IRS should recognize workflow concerns for IRS staff, document providers and adopting employers in establishing filing and restatement deadlines. In general, document providers, particularly mass submitters, provide multiple forms of pre-approved plans (defined contribution, defined benefit and 403(b) plans) and have limited staff to draft plans and deal with administrative filing requirements. Non-mass submitter pre-approved plan sponsors, including word-for-word adopters of mass submitter plans, provide multiple forms of pre-approved plans to their clients. These sponsors generally provide ancillary services as well (e.g., TPA services, compliance testing, Form 5500 filing) that restrict the ability of sponsor staff to efficiently deal with plan restatements and amendments if deadline conflicts exist.
- Allow electronic filing of pre-approved plan submission forms (Forms 4461, 2848, 8717, etc.) and plan documents. Current paper-filing procedures are inefficient and costly to the IRS and practitioners. IRS administrative staff would benefit from easier processing and retention of forms. IRS reviewers would benefit in their review of plan documents.

Initial Restatement Period for Employers Adopting Pre-Approved 403(b) Plans

The IRS currently is reviewing the initial submission of pre-approved 403(b) plans under Revenue Procedure 2013-12. At this time, the IRS has not announced any timeframes for the completion of the review, the issuance of approval letters or the restatement period for employers adopting pre-approved plans. Document providers will need sufficient time to program their document generation systems, to explain the restatement process to employers,

and secure executed plan documents. These steps are complicated by the fact that the pre-approved 403(b) program is new to the IRS, practitioners and adopting employers.

ARA's experience is that employers maintaining 403(b) plans generally are less sophisticated than employers maintaining 401(a) plans. Tax-exempt, governmental and church organizations rarely have dedicated staff devoted to retirement plan matters and have significant budget restrictions and decision timeframes. Also, the design and execution of a formal retirement plan document often involves an extended review and approval process by 403(b) plan sponsors.

Document providers must educate 403(b) plan sponsors of the importance of timely restating their plans. Without sufficient time, many 403(b) plan sponsors may not be able to comply with their new plan restatement requirement.

ARA recommends that the IRS provide an initial restatement period of three (3) years for employers adopting pre-approved 403(b) plans to enhance compliance with this new program.

Consider the Addition of 457(b) Plans to the Pre-Approved Plan Program

Many tax exempt and governmental employers maintain deferred compensation plans under Code §457(b). These plans provide significant retirement benefits to employees. Some tax exempt and government employers use 457(b) plans as their sole retirement plan, while others use 457(b) plans as a complement to other types of retirement plans (e.g., 401(a) and 403(b) plans.) Currently, the IRS does not provide a determination letter program or a pre-approved plan program for 457(b) plans. The only means that an employer may use to receive IRS approval of the terms of a 457(b) plans is through a private letter ruling. Given the extremely high cost of seeking a private letter ruling (legal fees and IRS user fees), most tax exempt and governmental employers cannot afford a private letter ruling.

The tax rules applicable to 457(b) plans, especially those maintained by governmental employers, are similar to, and as difficult as, the rules for 401(a) and 403(b) plans. Many employers maintaining 457(b) plans are at risk of noncompliance if there is no accessible IRS program to ensure that the terms of the plans meet applicable requirements.

ARA recommends that the IRS add 457(b) plans to the pre-approved plan program to facilitate the establishment and maintenance of these retirement plans. We recommend that the IRS incorporate 457(b) plans into the streamlined 401(a) and 403(b) pre-approved plan procedures, with similar terminology and requirements.

Conclusion

ARA looks forward to working with the IRS in improving the pre-approved plan programs. We believe that this letter is a good start in that direction.

We particularly believe that a meeting, arranged as soon as possible, of the IRS, ARA and other practitioners involved in providing pre-approved and individually-designed plans would be extremely productive for all concerned. In the past, the IRS annually convened the Determination Letter Liaison group to discuss plan document issues. A similar type of meeting would be helpful in discussing the recommendations and suggestions presented in this letter and other matters. Furthermore, as many IRS staff members involved with pre-approved plans have changed recently, a meeting would continue the close, collaborative relationship between the IRS and practitioners in their collective efforts to improve the employer-based retirement plan system.

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These comments were prepared by the ARA's Government Affairs Committee and primarily drafted by John P Griffin, J.D., LL.M., members of the Plan Document Subcommittee and the National Tax-deferred Savings Association.

Please contact Craig P. Hoffman, Esq., APM, General Counsel and Directory 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.

/s/

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