AMERICAN RETIREMENT ASSOCIATION
Working for America's Retirement

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June 4, 2018

CC:PA:LPD:PR (Notice 2018-24)
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC

Submitted Electronically

Re: Comments on Expanding the Determination Letter Program (Notice 2018-24)

The American Retirement Association ("ARA") is writing in response to IRS Notice 2018-24 to recommend the expansion of the scope of the determination letter program for individually designed plans during the 2019 calendar year. ARA thanks the Internal Revenue Service ("IRS" or "Service") for the opportunity to provide input on these matters. 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 and 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.

ARA thanks the Service for its willingness to consider expanding the determination letter program for individually designed plans beyond issuing determination letters for initial qualification and qualification upon plan termination. We appreciate the efforts in expanding and simplifying the pre-approved program to allow more flexibility in plan design. However, some plan sponsors maintain plan designs that are ineligible for the pre-approved program. Other plan sponsors maintain plan designs which cannot be converted to a pre-approved program (e.g., governmental plans contained within city ordinances) or have unique designs and provisions that could not be incorporated without substantially changing pre-approved language; yet others have found a pre-approved plan will not meet their objectives in providing a retirement program for their workforce. Allowing plan sponsors maintaining individually designed plans the opportunity to obtain a determination on the qualified status of these plans in specified circumstances where plan language needs to be substantially modified is important in maintaining ongoing compliance of qualified plans.

We appreciate the resource limitations the Service faces in expanding the program. We therefore tried to identify specific situations that would resolve the most critical open

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issues that impact the qualified status of the form of the plan and would reduce burdens on the plan sponsors. Many of these situations will occur only once, if at all, during the life of a plan. Further, we note that increased user fees for subsequent determination letters (above the cost for an initial letter) may be warranted.

ARA recommends the expansion of the scope of the program to the following plans/circumstances, listed in order of priority with the first items being the plans with the most urgent need to submit for determination letters:

1. **Plans with designs impacted by changes made in regulations issued after the Cumulative List for the plans' last cycle.**

In particular, *ARA recommends* the Service permit cash balance and other hybrid plans with existing determination letters that do not include a ruling on the hybrid plan regulations. Many hybrid plans were permitted to submit and did receive a determination letter that covered the hybrid plan regulations. Other hybrid plans, such as plans that were formerly Cycle B plans, never had the opportunity to apply for a determination letter on the hybrid plan rules. The hybrid plan rules are complex and integral to proper operation of the hybrid plans. Therefore, hybrid plans should be permitted to submit for a determination letter on the final hybrid plan rules.

2. **Plans designed to cover controlled groups of businesses, affiliated service groups, or both.**

ARA also recommends expanding the program to include determinations on whether a group of entities can participate as a single employer. The rules regarding affiliated service groups are particularly difficult to apply. Therefore, if the Service has resources to permit plans to submit on only issue (either controlled group or affiliated service group), *ARA recommends* that it permit plans designed to cover an affiliated service group to submit for a determination that the plan is a single employer plan. However, *ARA also recommends* that the Service allow plans that need determinations with respect to controlled groups involving disregarded interests and options to also submit for a determination under the program.

Certain qualification rules apply differently depending on whether the plan is a single employer or multiple employer plan. The guidance necessary to make this determination properly is generally outdated, withdrawn, or non-existent for both affiliated service group determinations as well as for controlled groups involving disregarded interests and options. Therefore, a determination letter program is critical to making a proper determination and will reduce the burdens facing employers attempting to make the

single-employer or multiple-employer plan determination, and will enhance plans compliance with the qualification requirements.

3. **Plans that have made significant design changes since applying for the last favorable determination letter.**

As businesses or business needs change, plan sponsors often need to consider significant plan design changes. The ability to receive a determination on the continued qualification of the plan after a significant design change will help preserve retirement savings by eliminating risks that cause plan sponsors to terminate instead of amend plans. Certainty that a new accrual formula or new benefit design meets the qualification requirements is critical to ensuring the plan's compliance, particular with more complex designs such as a change to a cash balance formula or the addition of an ESOP feature. In addition, ESOPs have been uniquely disadvantaged by the timing of the closing of the determination cycle program and the delayed opening of the pre-approved program for these plans.

Therefore, *ARA recommends* the Service permit plans that have made any of the following changes since their last favorable determination letter to submit for a determination letter in 2019:

- Defined benefit plans that converted to cash balance plans.
- Defined benefit plans that amend the plan benefit formula such that it no longer qualifies as a safe harbor formula for purposes of Code Section 401(a)(4).
- Defined contribution plans that convert to an ESOP or add an ESOP feature.
- Existing ESOPs moving from unleveraged to leveraged.
- A plan that was restated to an individually designed plan due to provisions than are not permitted in a preapproved plan, if the plan's most recent letter was received after filing Form 5307.

4. **Plans that have experienced a merger of plans as a result of merger and acquisition activity by the plan sponsor since applying for the last favorable determination letter.**

A merger of plans can cause significant uncertainty about the qualified status of the merged plan when the plans being merged have substantially different plan designs. ARA acknowledges that allowing a new determination letter for any plan merger may be burdensome on the IRS, therefore *ARA recommends* expanding the program for mergers involving the following circumstances:

- A merger of defined benefit plans where the plans include multiple formulas and/or grandfathered benefits.
- A merger of a safe harbor 401(k) plan (either under Code Section 401(k)(12) or (13)) and a non-safe harbor 401(k) plan mid-year.

The rules related to safe harbor plans during a plan merger can make a plan sponsor maintaining such plans unattractive to an acquiring company. Expanding the program to these situations would encourage plan sponsors to maintain and adopt these plans.

- A merger of a pre-approved plan that relies on an opinion letter into an individually designed plan where the pre-approved plan has been in existence for more than two 6-year cycles. In these circumstances, the pre-approved plan essentially converts to an individually designed plan that would be eligible for an initial determination letter but for the merger into a plan with an existing letter. Further, the existing plan's reliance on its determination letter is put at risk and the accumulation of documents that need to be retained and reviewed at the ultimate termination of the plan (or on plan audit) is a burden on both the plan sponsor and the resources of the IRS, which would be lessened by allowing a filing when documentation can still be easily obtained and efficiently reviewed by the Service.

5. **Individually designed Section 403(b) plans.**

While ARA is thankful to the Service for the preapproved program for 403(b) plans, it also recognizes that 403(b) plans often have unique contribution formulas and distribution options, which are complicated by multiple legacy platform providers and investment contracts that cannot be easily altered and often make the plan incompatible with the pre-approved program. Further, although the pre-approved program is available to non-electing church plans, pre-approved plans are not yet readily available for these plan sponsors. *ARA recommends* that the Service expand the types of plans permitted to receive a determination letter to include 403(b) plans that contain provisions that are not permitted in the 403(b) preapproved program.

These comments and recommendations are submitted on behalf of and were prepared by ASPPA's IRS Subcommittee, Kelsey Mayo, Chair. If you have any questions concerning the matters discussed herein, please contact Craig Hoffman, ARA General Counsel, at (703) 516-9300.

Thank you for your time and consideration.

Sincerely,

/s/
Brian H. Graff, Esq., APM
Executive Director/CEO
American Retirement Assoc.

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