Determination Letters

Options for Change

Views of the American Society of Pension Actuaries

response to the

Internal Revenue Service
Second White Paper on

The Future of the Employee Plans Determination Letter Program
Announcement 2003-32

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Comments on
The Future of the Employee Plans
Determination Letter Program

The American Society of Pension Actuaries ("ASPA") offers the following comments on the proposals presented in Announcement 2003-32 ("second White Paper"), which included an evaluation of comments on the first White Paper and further thoughts on the staggered remedial amendment period option.

ASPA is a national organization of over 5,000 members who provide actuarial, administrative, consulting, legal, and other professional services for qualified and other retirement plans. ASPA members rely on the ability to provide documents as sponsoring organizations of Master and Prototype (M&P) plans and volume submitter plans, in addition to those plans requiring individual design.

Summary of Comments

ASPA's comments on the second White Paper include the following recommendations:

- Continuation of the current system rather than adoption of a staggered remedial amendment period system.
- Support for an annual plan amendment requirement, subject to certain parameters.
- Consolidation of the M&P and volume submitter programs.

Discussion

Remedial Amendment Period System

After careful consideration, ASPA has concluded that it supports the current remedial amendment period system, in part, because the reliance simplification first established in Announcement 2001-77 has not been in place long enough to readily determine whether further changes are warranted. ASPA's comments on the first White Paper included a detailed description of how the staggered remedial amendment period could be structured. Those initial comments acknowledged that the development of rules to address all possible scenarios would be a challenge, thereby impeding the ability of the IRS to actually implement a staggered approach. ASPA has determined that, for the majority of plan sponsors and ASPA members, the disadvantages of a staggered remedial amendment period system outweigh the advantages of such a system. The most significant disadvantages are discussed below.

- Under the staggered approach, M&P plans would need to be updated every year. This would increase the IRS's workload and require that the mass submitter maintain multiple versions of software used to generate the plans. In addition, plan advisors would have to coordinate staff training on five different versions of documents and the idiosyncrasies in the various versions may cause inadvertent operational failures.

- The special rules that would need to be applied to determine an employer's applicable remedial amendment deadline will result in confusion and a greater likelihood that deadlines will be missed. For example, a change in business structure resulting in a new taxpayer identification number could trigger the need for a plan update again in that year. It would be very easy to overlook the new deadline, especially if the change in business structure takes place late in the year. It is possible that a plan sponsor would need updates in two consecutive years just because of a change in business structure.

- Updates required on a more frequent basis result in higher costs to plan sponsors.

- The proposed alternative 5-year rule for M&P sponsoring organizations and volume submitter practitioners would alleviate some concerns of many large institutions. Without this alternative, however, up to five different versions of an M&P or volume submitter plan would need to be maintained and it would be difficult, if not impossible, to provide adequate customer support. Adopting an alternative rule (which, in essence, is permitting the status quo to be elected) also requires the implementation of other rules. For example, if an employer were to change vendors, a practitioner would need to be able to determine whether the prior vendor had elected to use the special rule.

Recommendation: ASPA recommends that more time under the current structure elapse before making changes of the magnitude of a staggered remedial amendment period. An evaluation of the status quo may indicate that the changes initiated in Announcement 2001-77, coupled with annual plan amendments as described below, have sufficiently eased the burdens of the past determination letter program.

Annual Plan Updates

The reaction of practitioners to an annual plan amendment requirement is generally negative because it increases costs, especially for smaller plan sponsors. However, the IRS believes that "a requirement for annual plan updates will increase compliance, reduce operational errors and safeguard participants' rights." In general, ASPA supports an annual plan amendment requirement only if, prior to the beginning of a year, the IRS is required to issue a list of all amendments needed for the year along with suggested good faith language. If an item is not on the list, or if there is no good faith language issued, then no amendment would be required for that year. Furthermore, ASPA only supports an annual plan amendment if the following parameters also apply to any such requirement:

1. "Immediate" amendments (*i.e.,* amendments during a remedial amendment period) should only be required to memorialize elections that are available to employers. Furthermore, even in those situations where an election is available, amendments should not be needed in situations where it is clear that the majority of plan sponsors would want to make the election (*e.g.,* the majority of employers would want to implement the higher

EGTRRA Code §415 limits). A plan amendment should only be needed for those employers that do not want to take advantage of higher limits.

2. The issuance of the sample "good faith" language would start the period for determining when an employer needs to amend its plan. As set forth in the second White Paper, employers would be required to amend their plans by the end of the second calendar year following the issuance of the language.

3. A plan should be treated as having made an immediate amendment for purposes of Internal Revenue Code §411(d)(6), in situations where:

   a. Pursuant to 1 above, an immediate amendment requirement was waived because the sponsor either had no options or because there were options, but a majority of sponsors were expected to make the same election; or

   b. Pursuant to 2 above, an amendment was required, but the plan sponsor had a two-year period to adopt the amendment.

   This would help ensure that when an employer actually makes the true amendment within the applicable remedial amendment period, there has not been an impermissible elimination of a protected benefit.

4. The volume submitter program should be modified to permit, but not require, volume submitter practitioners to amend plans on behalf of adopting plan sponsors.

ASPA does not support the proposal in the second White Paper that annual determination letters be required. Rather, ASPA recommends that the adoption of good faith amendments be covered by the remedial amendment period.

Eliminating unnecessary costs to plan sponsors is a critical concern of ASPA; however, ASPA believes a balance can be struck between the cost and system benefits of requiring annual updates.

To the extent a change in the law or regulations does not require any elections to be made on behalf of a plan sponsor, then the cost of amending plans outweighs the benefits. In many cases the language in the amendment will not be detailed enough to provide meaningful guidance to an employer. While the amendment will serve as notice to adopting employers that the law has changed, other avenues should be explored to accomplish the need for an amendment. Going through the exercise of formally amending a plan just to notify employers is cumbersome and expensive.

On the other hand, amending plans where elections are available to plan sponsors would be beneficial for the following reasons:

1. The status quo is inefficient and costly. For example, plans that have been updated for GUST need to be updated for EGTRRA, deemed §125 compensation (Rev. Rul. 2002-47), and the regulations issued under Internal Revenue Code §401(a)(9). All three of these have potentially different deadlines for adoption and have created confusion among

practitioners. By adopting the recommendation herein, a single IRS source can be used to determine what updates are required and provide for a single adoption deadline.

2. Amending plans on a somewhat more current basis to set forth elections made by an employer with respect to the operation of the plan will make future updates easier, thus reducing costs. For example, during the GUST remedial amendment period, plan sponsors are permitted to apply certain elections in operation. These elections must be set forth in the plan when it is updated for GUST; however, obtaining this prior information is cumbersome and inefficient, particularly where multiple service providers are being used or when there has been a change in service providers.

3. While the IRS has permitted operational compliance with provisions during remedial amendment periods, there is no protection for doing so under Title I of ERISA. Thus, an annual amendment would provide additional protection to plan sponsors.

Recommendation: ASPA recommends that annual plan amendments only be required when it involves employer elections, as described herein.

Consolidation of the M&P and Volume Submitter Programs

A single consolidated "pre-approved plan" program, which encompasses the benefits of both the M&P and volume submitter programs, will be more efficient for both the IRS and practitioners. A new program can be structured to satisfy the concerns of the IRS and meet the needs of practitioners and service providers.

Due to the changes in the reliance rules, there is no compelling reason to maintain separate programs. The primary advantage of the M&P program over the volume submitter program is the ability of an M&P sponsoring organization to amend a plan on behalf of all adopting employers. This amending ability should be extended to volume submitter plans. Since some volume submitter practitioners would not want to have, nor use, this amending authority, the authority should be made an optional feature.

In virtually all other respects, the volume submitter program is more advantageous than the M&P program. For example, an adopting employer can make minor modifications of the basic document and a broader number of plan provisions can be offered under the volume submitter program (*e.g.,* cross-tested defined contribution plans). In addition, a volume submitter plan can be formatted as a self-contained document or as a "prototype" (*i.e.,* a basic plan document and an adoption agreement).

If the volume submitter program is modified to enable the adoption of amendments on behalf of adopting employers, then the need for a separate M&P program is eliminated, or at the very least, significantly reduced. Existing M&P sponsoring organizations who prefer the adoption agreement and basic plan document format or who want to ensure that adopting employers do not make modifications to the approved specimen plan would be able to structure a volume submitter plan in such a fashion (in fact, this could be done under the current volume submitter program). The only gap in the consolidation of the two programs is with respect to "pairing" (*i.e.,* reliance on the coordinating language in standardized plans for purposes of Internal Revenue Code §§ 415 and 416). The consolidated program should preserve the rules for standardized plans.

Recommendation: ASPA recommends that the M&P and volume submitter programs be consolidated whereby the best features of both programs are maintained. It is absolutely essential for any version of a combined program to provide the flexibility currently available under the volume submitter program so as not to impair the ability of practitioners to create documents that meet the varied needs of plan sponsors.

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These comments were prepared the Reporting & Disclosure and Plan Documents Subcommittee of the Government Affairs Committee. We appreciate the opportunity to provide these comments and are available to discuss them with you further.

Sincerely,

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