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February 5, 2016

Via email to Notice.Comments@irscounsel.treas.gov

Internal Revenue Service
CC:PA:LPD:PR
(Announcement 2015-19)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

RE: Comments on Internal Revenue Service Announcement 2015-19

Dear Sirs and Madams:

On behalf of the Tax Section of the State Bar of Texas, I am pleased to submit the enclosed response to the request of the Internal Revenue Service (the "Service") in Announcement 2015-19 for comments regarding changes to the determination letter program for individually designed plans.

THE COMMENTS ENCLOSED WITH THIS LETTER ARE BEING PRESENTED ONLY ON BEHALF OF THE TAX SECTION OF THE STATE BAR OF TEXAS. THE COMMENTS SHOULD NOT BE CONSTRUED AS REPRESENTING THE POSITION OF THE BOARD OF DIRECTORS, THE EXECUTIVE COMMITTEE OR THE GENERAL MEMBERSHIP OF THE STATE BAR OF TEXAS. THE TAX SECTION, WHICH HAS SUBMITTED THESE COMMENTS, IS A VOLUNTARY SECTION OF MEMBERS COMPOSED OF LAWYERS PRACTICING IN A SPECIFIED AREA OF LAW.

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THE COMMENTS ARE SUBMITTED AS A RESULT OF THE APPROVAL OF THE COMMITTEE ON GOVERNMENT SUBMISSIONS OF THE TAX SECTION AND PURSUANT TO THE PROCEDURES ADOPTED BY THE COUNCIL OF THE TAX SECTION, WHICH IS THE GOVERNING BODY OF THAT SECTION. NO APPROVAL OR DISAPPROVAL OF THE GENERAL MEMBERSHIP OF THIS SECTION HAS BEEN OBTAINED AND THE COMMENTS REPRESENT THE VIEWS OF THE MEMBERS OF THE TAX SECTION WHO PREPARED THEM.

We commend the Service for inviting comments regarding its rules and procedures relating to the "Employee Plans determination letter program for qualified retirement plans" as described in Announcement 2015-19, and we appreciate being extended the opportunity to participate in this process.

Respectfully submitted,

Alyson Outenreath

Alyson Outenreath, Chair
State Bar of Texas, Tax Section

COMMENTS ON CHANGES TO THE
DETERMINATION LETTER PROGRAM FOR
INDIVIDUALLY DESIGNED PLANS,
AS DESCRIBED IN ANNOUNCEMENT 2015-19

These comments regarding the Service's proposed changes to the determination letter program for individually designed plans are submitted on behalf of the Tax Section of the State Bar of Texas. The principal drafters of these comments were Sarah Fry, Vice Chair of the Committee on Employee Benefits ("CEB") of the Tax Section of the State Bar of Texas, and Henry Talavera, Co-Chair of CEB. The Committee on Government Submissions ("COGS") of the Tax Section of the State Bar of Texas has approved these Comments. Robert Probasco, Co-Chair of COGS, reviewed these Comments. Russell Gully also reviewed these comments and made substantive suggestions on behalf of COGS.

Although members of the Tax Section who participated in preparing these comments have clients who would be affected by the principles addressed by these comments or have advised clients on the application of such principles, no such member (or the firm or organization to which such member belongs) has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of, the specific subject matter of these comments.

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Date: February 5, 2016

These comments are provided in response to the Service's invitation for comments regarding proposed changes to the determination letter program for individually designed plans intended to be tax-qualified ("Qualified Plans") under section 401(a) of the Internal Revenue Code of 1986, as amended (the "Code"),[1] as announced in Announcement 2015-19. The Tax Section's comments are primarily in response to the Service's request for comments concerning changes that should be made to other Service programs to facilitate the changes described in Announcement 2015-19. We appreciate the opportunity to comment on the Service's proposed changes to the determination letter program for Qualified Plans.

We are providing comments on five (5) topics that we respectfully suggest the Service consider:

1. Keeping the determination letter program in its current form to the extent possible. The determination letter program has offered the opportunity for many points of contact. Generally, we believe that broad, cordial and cooperative communication has existed between employers who sponsor Qualified Plans, along with their advisors, (collectively the "Plan Sponsors"[2]) and the Service. We respectfully suggest that this cooperative relationship may deteriorate if the determination letter program is eliminated, leading to, among other things, fewer Plan Sponsors offering Qualified Plans and Plan Sponsors terminating and liquidating the assets of existing Qualified Plans. As a result, we are concerned that the decision by the Service to eliminate the determination letter program will lead to lower assets available to many retirees upon reaching retirement age and, worst case, an overall weakening of our retirement system.

2. Assuming the Service proceeds as intended, allowing a Plan Sponsor alternatives to the determination letter process that would preserve its rights to correct a potential form and/or operational defect under a Qualified Plan through a Voluntary Correction Program ("VCP) application under the Employee Plans Compliance Resolution System ("EPCRS"), as documented in Rev. Proc. 2013-12, as modified by Rev. Proc. 2015-27 and Rev. Proc. 2015-28. Such alternatives might include permitting Plan Sponsors to: (i) make a streamlined submission to the Service, (ii) raise any potential issues on the Form 5500 submitted each year, or (iii) notify the Service of any potential disqualification issues within a reasonable period after the Service commences an audit of the Qualified Plan. If such alternatives are permitted, Plan Sponsors could raise potential defects related

[1] Except as otherwise specified, all references to "section" are references to the applicable sections of the Code.

[2] For purposes of this comment, we treat employer (and/or collectively bargained organization) sponsors of Qualified Plans, along with their corresponding accountants, brokers, administrators, attorneys, agents, third-party record-keepers, consultants and other practitioners as a single "Plan Sponsor" community. In our experience, it takes a village, along with the Service, the U.S. Department of Labor and the Pension Benefit Guaranty Corporation, to keep a Qualified Plan in compliance with the Code and other applicable law. We believe that a critical component of such compliance has been the determination letter program.

to a Qualified Plan for the Service's consideration, particularly in situations when it is not certain that a qualification error or defect has occurred, as is currently permitted as part of the determination letter process.

3. Allowing a Plan Sponsor the discretion to exclude or omit from a Qualified Plan provisions related to changes in the law that have no practical impact on the status of such Qualified Plan. For example, we would suggest that the Service not require provisions in a Qualified Plan relating to the employer-stock diversification requirement of section 401(a)(35) if such plan does not permit investment in the stock of such Plan Sponsor. Alternatively, we suggest that the Service not impose sanctions, or reduce the amount of such sanctions, in those cases.

4. Allowing a Plan Sponsor to obtain rulings on (a) affiliated service group and leased employee issues under section 414, (b) whether a partial termination has occurred, and (c) perhaps a few other selected discrimination and qualified separate line of business issues.

5. Amending the Audit Closing Agreement Program ("Audit CAP") under EPCRS to limit the extent of the review and amount of sanctions for Qualified Plans operating in reasonable, good faith compliance with the Code and applicable law. Since there will likely be fewer direct contacts between Plan Sponsors and the Service once the determination letter program is essentially eliminated as proposed, we respectfully suggest that the Service consider providing more leeway for Plan Sponsors to correct defects or errors that are not egregious or do not benefit "highly compensated employees" as determined under section 414(q) ("HCEs"). We also suggest that the reduced VCP fee for streamlined non-amender corrections should apply if a Plan Sponsor has made an amendment that is intended to comply with applicable legal requirements but is deficient for any reason.

I. WE RESPECTFULLY SUGGEST THAT THE SERVICE CONSIDER KEEPING THE DETERMINATION LETTER PROGRAM IN ITS CURRENT FORM TO THE EXTENT POSSIBLE

A. *Background*

As discussed in more detail below, we respectfully suggest that the Service consider keeping the determination letter program intact to the extent possible. We believe that the elimination of the determination letter program[3] may lead to:

[3] The determination letter program is essentially eliminated because a Qualified Plan may only request a determination letter upon initial adoption of the Qualified Plan and termination of the Qualified Plan.

(i) An increased burden for the Service and Plan Sponsors in their efforts to achieve or evidence compliance with respect to Qualified Plans;

(ii) More of an adversarial relationship between Plan Sponsors and the Service; and

(iii) More terminations and complete liquidations of Qualified Plans.

In the absence of such program, most Plan Sponsors will first learn about potential Qualified Plan defects either during a Qualified Plan audit by the Service or as part of a business/corporate transaction. Restoring the qualification of a Qualified Plan during an audit by the Service or as part a business transaction is, in our experience, typically a very expensive, confrontational and time consuming process.

A Plan Sponsor is not required to obtain a determination letter from the Service. However, many Plan Sponsors have regularly and historically (since at least 1954) filed for a determination letter, among other reasons, to make it easier to represent to their outside auditors that their Qualified Plans are compliant in form with the Code.[4] *See* Rev. Rul. 54-172, 1954-1 C.B. 394. The existence of a determination letter also facilitates transfers of Qualified Plan assets to other Qualified Plans in the ordinary course and provides comfort to purchasers/acquirors in business transactions that a Qualified Plan has been properly maintained in form.

A Plan Sponsor's regular submission for a determination letter has become a best practice for maintaining the qualified status of a Qualified Plan, even for pre-approved plans. "Generally, if the employer operates the plan according to the terms of a plan document with a favorable determination, opinion or advisory letter, the plan will satisfy the law in operation." https://www.irs.gov/Retirement-Plans/Determination-Opinion-and-Advisory-Letter-for-Retirement-Plans-Scope-and-Benefit-of-a-Favorable-Determination-Opinion-or-Advisory-Letter.

The knowledge gained from, and cooperation with, the Service during the determination letter application process has, in our experience, generally translated to better understanding of pre-approved plans by Plan Sponsors. In our experience, historically there has been cooperation and a free flow of information between the Service and Plan Sponsors as a result of the determination letter process. We believe that the elimination of the determination letter program for Qualified Plans may adversely affect Plan Sponsors and Qualified Plan participants.

[4]Typically, the annual required audit by accountants does not address qualification of the underlying form of the Qualified Plan document, as the accountants require Plan Sponsors to certify as to compliance of the Qualified Plan document. This certification will likely become more burdensome, or at least more tenuous or expensive, for Plan Sponsors to provide to their outside auditors, among other parties. In the absence of the determination letter program, we suggest that Plan Sponsors may not have a readily available manner to certify such compliance, at least with respect to the form (or written documentation) of such Qualified Plans.

B. *Cooperation Among All Parties May Be Adversely Affected By Elimination of the Determination Letter Program*

We believe these increased touch points have led to increased compliance of Qualified Plans with the Code and other laws. Without the Service's determination letter program, we are concerned that Plan Sponsors will be unable to comply with the Code and other law with respect to their Qualified Plans, because, among other reasons, such persons may have no practical way of understanding that a particular provision in a Qualified Plan is of concern to the Service prior to contact by the Service. Further, we are concerned that a Plan Sponsor will, as a practical matter, be unable to add provisions to a Qualified Plan to address governance and fiduciary issues under the Employee Retirement Income Security Act of 1974, as amended ("ERISA").

A Plan Sponsor may adopt a "pre-approved" document (e.g., a master and prototype plan or a volume submitter plan) to evidence compliance in form for such Qualified Plan to the extent an approved document provider has received an advisory or opinion letter from the Service with respect to the form of such Qualified Plan. However, a Plan Sponsor must properly tailor the provisions of such pre-approved Qualified Plan to the needs of its business and employees. Regardless, the underlying advisory or opinion letter received cannot be relied upon by the Plan Sponsor to conclusively evidence compliance of the form of the Plan with the Code in most cases, particularly if, among other reasons, an adopting Plan Sponsor tailors the provisions of the pre-approved plan in any respect or has not properly completed such pre-approved plan. *See* section 19 of Rev. Proc. 2016-8.

In such cases, we believe that a pre-approved Qualified Plan document may not be a practical option for certain Plan Sponsors and may not address all laws that may apply to such Qualified Plan. For instance, it may not be feasible to effectively and practically support certain types of Qualified Plans on a pre-approved document. For example, in our experience, there are Plan Sponsors that have maintained their Qualified Plans for decades. Such Qualified Plans, especially defined benefit plans, contain numerous historical provisions, which must be grandfathered and maintained. It may be difficult to effectively replicate these historical provisions in a pre-approved document.[5] Several acquired plans may have been merged into such Qualified Plans. Without the ability to seek an individualized determination letter, we are concerned that many such Qualified Plans (some of the largest) may also be terminated and all assets liquidated, to avoid difficult administrative and related concerns as a result of the elimination of the determination letter program.

[5]Many Plan Sponsors do not make a Form 5310 application to the Service for a determination letter regarding the status on termination of the Qualified Plan. In our experience, many purchasers will simply refuse to accept rollovers (or a trust-to-trust transfer, i.e., merger) of any assets from such terminating Qualified Plans to avoid any liability and any seller simply wants to avoid the cost and expense of such a filing on termination. As a general rule, rollovers (as opposed to a trust-to-trust transfer) can arguably be accepted without risk only if an administrator knows of no potential qualification defect in the Qualified Plan to be transferred. *See generally,* Rev. Rul. 2014-9 (such administrator must "reasonably conclude" that a rollover contribution from another Qualified Plan is valid).

More importantly, many third-party document sponsors (i.e., preparers) of pre-approved plans ("Document Sponsors") do not adequately address all issues that might need to be addressed in a Qualified Plan, particularly as it relates to ERISA or governance issues. As one example, many pre-approved plans arguably do not adequately address "ERISA accounts or ERISA budget accounts, which are designed to help plans control costs by recapturing some revenue sharing dollars and allowing plans to use them to pay plan expenses." *See* http://www.dol.gov/ebsa/faqs/faq-sch-c-supplement.html; *see also generally* Department of Labor ("DOL") Advisory Opinion 2013-03A (July 2, 2013) (such accounts are subject to ERISA's fiduciary rules).

Many Plan Sponsors would like for the pre-approved plan documents to expressly address allocation issues with respect to these excess assets attributable to such Qualified Plan, and there is some debate as to any language which might be required in a Qualified Plan to adequately address any related ERISA issues with respect to ERISA budget accounts. However, the Document Sponsor may not expressly address the allocation issues with respect to ERISA budget accounts in any respect in the pre-approved Qualified Plan. Since this issue does not affect the qualified status of the Qualified Plan, the Plan Sponsor may not be in a position to require the Document Sponsor or the Service to address this concern in such document. On the other hand, under the determination letter program this issue could be directly addressed by the Plan Sponsor with the Service. Once the determination letter program is removed, this issue can be addressed directly, if at all, by a Plan Sponsor only if a Qualified Plan is terminated.

In addition, it is not uncommon for the Service to question language that may be inserted to comply with ERISA matters. As an example, the U.S. Supreme Court in *US Airways, Inc. v. McCutchen*, 133 S. Ct. 1537 (2013), concluded that ERISA plan provisions could not be trumped in certain cases in the event that benefits were wrongly paid from such plan. *See generally* http://www.americanbar.org/content/newsletter/publications/aba_health_esource_home/aba_health_law_esource_1307_garbe.html.

While the *McCutchen* case addressed welfare plan provisions (e.g., medical, disability, dental), certain Plan Sponsors would like to add similar language in Qualified Plans to provide that such Qualified Plan may have an "equitable lien" on any amounts wrongly paid from such Qualified Plan. This equitable lien provision is unrelated to a provision of the Code, but arguably provides the Plan Sponsor and its Qualified Plan some comfort under ERISA in the event of any dispute with the DOL or a participant regarding amounts incorrectly paid from such Qualified Plan. Outside of the determination letter program, it would be practically impossible to add any such protective language in a Qualified Plan on a timely basis, if at all, as the Document Sponsor can simply choose not to address this issue. Moreover, if "equitable lien" provisions were submitted by a Plan Sponsor during the determination letter process for the review of the Service, the Service might reject such language, but it is this give and take between Plan Sponsors and the Service that has been the cornerstone of Qualified Plan compliance with all law, not just the Code.

It is typical, in our experience, for an examining agent to raise a potential Qualified Plan document failure during a determination letter filing or contest the adequacy or legality of

Qualified Plan provisions submitted by the Plan Sponsor. It is fairly rare for a Plan Sponsor to receive a determination letter back from the Service without some contact from the Service. In cases where the agent raises questions during the determination letter process, he or she prepares questions that Plan Sponsors can respond to with: (i) the best arguments possible to prove that no issue exists, (ii) additional information to satisfy the Service; or (iii) additional modified provisions which satisfy the Service and keep such Qualified Plan in compliance. In the event of a potential qualification failure, VCP has been an alternative to the extent any such potential issues have been adequately raised by the Plan Sponsor. We believe that this give and take and review of the Qualified Plan during the determination letter process improves all parties' understanding of the law, including applicable provisions of the Code and corresponding guidance, in arguably the same way as "iron sharpens iron." Without the buffer of the determination letter program, we are concerned that it will be more burdensome for the Service and practitioners to resolve any potential qualification disputes.

Even if such Document Sponsor could timely and properly address all governance and ERISA issues, there still remains a concern as the Document Sponsor is not typically a law firm that warrants proper completion of the pre-approved plan. In our experience, such pre-approved Qualified Plan documents are routinely improperly completed in some material respect. Periodic approval by the Service of individually designed Qualified Plans (along with pre-approved plans which could also be independently submitted to the Service until recently) through the determination letter process has served as a useful form of compliance check with applicable provisions of the Code and has fostered cooperation between all parties involved in the determination letter process. In addition, the experience gained during the determination letter process for individually designed Qualified Plans has carried over and provided guidance for practitioners and Plan Sponsors to properly complete pre-approved Qualified Plans.

C. *Business Transactions and Qualified Plans*

Finally, a determination letter also makes it easier to merge, or make direct trust-to-trust transfers between, Qualified Plans, as the letter provides assurance that the Qualified Plan or trust is qualified in form under sections 401(a) and section 501(a), respectively. *See* https://www.irs.gov/Retirement-Plans/Determination-Opinion-and-Advisory-Letter-for-Retirement-Plans-Scope-and-Benefit-of-a-Favorable-Determination-Opinion-or-Advisory-Letter.

Determination letters from the Service have historically played a significant role in business transactions, such as mergers, acquisitions and other business transactions. It has been standard practice during an acquisition for the acquiring entity to require a representation and warranty that an acquired entity's Qualified Plans are qualified in form under section 401(a). This representation and warranty is generally accomplished through the acquiring entity's document review of the acquired entity's Qualified Plan, along with the inclusion of a determination letter that covers the acquired entity's Qualified Plan.

The existence of a determination letter during a business transaction provides specific comfort to all involved that the acquired entity regularly maintained the form of its Qualified Plan in conformance with the Code. A Qualified Plan is, in our experience, more likely to be

assumed and continued by a buyer if a current determination letter has been issued for such Qualified Plan. If the acquired entity does not have a determination letter, the Qualified Plan is more likely to have form defects, particularly with pre-approved Qualified Plans.

Qualified Plan sponsors do not typically properly complete pre-approved documents as necessary to provide comfort that the Qualified Plan is in compliance upon transfer to the new Plan Sponsor, particularly as to any Qualified Plans which have previously merged into the Qualified Plan to be transferred to any such purchaser. This has resulted in the termination of many Qualified Plans prior to an acquisition, along with expensive and time consuming VCP filings and related filings, rather than assumption and merger of such plan. Consequently, Qualified Plan assets have been lost for later years as not all assets are rolled over to an individual retirement account or another Qualified Plan.

We believe that the elimination of the determination letter program will likely accelerate this leakage of Qualified Plan assets and may lead to the overall weakening of the U.S. retirement system as more assets are distributed earlier than anticipated, in the absence of any such Qualified Plan termination and liquidation. In such event, Qualified Plan assets may not be available when most needed, at and after retirement age.

II. OTHER CONCERNS WITH THE SERVICE'S PROPOSED ELIMINATION OF THE DETERMINATION LETTER PROGRAM

A. *Preservation of Rights*

Under Announcement 2015-19, the Service anticipates eliminating the determination letter program for Qualified Plans beginning on January 1, 2017. Without the determination letter program, a Plan Sponsor will no longer be able to secure a determination that its Qualified Plan is qualified in form under the Code, but will instead likely adopt a pre-approved Qualified Plan document provided by a Document Sponsor in order to be able to rely, at least in part, on the opinion or similar letter issued to certain pre-approved plans. Currently, an application for a determination letter may preserve important rights if a provision in such plan is later found to be defective. If the potentially defective provision is specifically identified in the application, Plan Sponsors and administrators can submit a VCP application rather than be subject to correction under the Audit CAP.

The Service currently and expressly allows potential defects to be raised as part of the determination letter application for a Qualified Plan, as follows:

> (3) An Employee Plans examination also includes a case in which a Plan Sponsor has submitted any Form 5300, 5307, or 5310 and the Employee Plans agent notifies the Plan Sponsor, or a representative, of possible failures, whether or not the Plan Sponsor is officially notified of an "examination." This would include a case where, for example, a Plan Sponsor has applied for a determination letter on plan termination, and an Employee Plans agent notifies the Plan Sponsor that there are partial termination concerns. In addition, if, during the review

> process, the agent requests additional information that indicates the existence of a failure not previously identified by the Plan Sponsor, the plan is considered to be under an Employee Plans examination. If, in such a case, the determination letter request under review is subsequently withdrawn, the plan is nevertheless considered to be under an Employee Plans examination for purposes of eligibility under SCP and VCP with respect to those issues raised by the agent reviewing the determination letter application. The fact that a Plan Sponsor voluntarily submits a determination letter application does not constitute a voluntary identification of a failure to the Service. **In order to be eligible for VCP, the Plan Sponsor (or the authorized representative) must identify each failure, in writing, to the reviewing agent before the agent recognizes the existence of the failure or addresses the failure in communications with the Plan Sponsor (or the authorized representative)**.

Section 5.09(3) of Rev. Proc. 2013-12 (emphasis added).

In the past, Plan Sponsors have had the ability to identify potential issues as part of the determination letter process. Many times the agent determines that no qualification defect exists and does not require a VCP application with respect to the Qualified Plan provision at issue. At other times, Plan Sponsors have been permitted to make a VCP application at a much reduced compliance fee as determined under EPCRS, generally between $375 and $25,000 depending upon the number of participants in the Qualified Plan and error at issue. *See generally* Section 12 of Rev. Proc. 2013-12. If the defect is resolved as part of Audit CAP, however, there can be a significant sanction amount based in the worst case on a percentage of total assets of a Qualified Plan. *See generally* Section 13 & 14 of Rev. Proc. 2013-12, as modified by Rev. Proc. 2015-27. Without the determination letter process, Plan Sponsors are left with no good alternatives to raise potential issues prior to audit and avoid these significant sanctions.

A Plan Sponsor's ability to preserve its rights to apply to VCP, rather than being subject to sanctions under Audit CAP, is useful and helps foster compliance with the Code and other applicable law. For instance, a Qualified Plan document may be amended to comply with law changes or certain discretionary changes, but such amendment may not follow a particular model amendment (to meet the particular needs of a Plan Sponsor) or there may be no model amendment to follow. The language of any such amendments may not be compliant and several years may pass before the Service might review such language. Without the determination letter process, this might occur, if at all, during the Service's audit of the Qualified Plan.

If a Service agent reviewing the Qualified Plan document during the determination letter process contests the validity of such amendment or questions whether it was made in "good faith," the Qualified Plan might be eligible for VCP and the reduced fees, rather than the sanctions under Audit CAP, if the potential defect was properly raised by the Plan Sponsor. This process assists the Service, because more difficult issues are timely brought to the Service's attention. Further, Plan Sponsors could make changes to their Qualified Plans without the concern that their Qualified Plan might face disqualification due to the manner in which a particular provision was drafted as long as the issue was properly raised to the attention of the Service.

For instance, certain provisions in a Qualified Plan are commonly changed as a result of collective bargaining agreements between representatives of a union and a Plan Sponsor. Many times those collectively bargained revisions to corresponding Qualified Plans might not be incorporated timely or properly into such Qualified Plans, although arguably the language in the Qualified Plans may otherwise be compliant with applicable laws. If a Plan Sponsor raises the potential issue with respect to the collective bargaining agreement (e.g., approval of increased/lower benefits) as part of the determination letter application, the Service might approve the language or simply allow the Plan Sponsor to submit a VCP application, while holding the determination letter application in abeyance pending approval by the Service of the proposed change.

Further, Plan Sponsors have raised issues as part of a Service determination letter application for a Qualified Plan in cases when a change in the law arguably did not impact the Qualified Plan. Examples are the "employer stock diversification" requirements under section 401(a)(35) or "compensation" changes required under section 415. In some cases, those provisions were arguably inapplicable, because the Qualified Plan held no employer securities, or benefits were not based upon compensation (e.g., a defined benefit plan that provided a fixed dollar amount and/or benefits based only on years of service). In those cases, the Service has permitted Plan Sponsors to proceed to VCP when the potential defect/error had been expressly raised during the determination letter process.

With the contemplated elimination of the determination letter program, Plan Sponsors will not be able to preserve their right to VCP after 2016. We respectfully suggest that non-compliance with the Code will increase substantially without such an avenue to raise potential defects. It is our understanding that under VCP the Plan Sponsor must admit to a Qualified Plan defect to avail itself of this program. *See* Section 10.03 of Rev. Proc. 2013-12 (a Plan Sponsor must identify "failures."). In our experience, the Service typically rejects VCP applications when Plan Sponsors do not admit to qualification failures with respect to the affected Qualified Plans, even when reasonable arguments might exist that no defect exists under the Code or other applicable law.

We respectfully suggest that the Service consider amending EPCRS to allow Plan Sponsors to preserve their rights to VCP for Qualified Plan issues which Plan Sponsors reasonably believe Service agents may question. For example, when a Plan Sponsor is notified that a Qualified Plan is under audit, the Service might permit a Plan Sponsor a reasonable period of time (e.g., 30 to 60 days) to identify document provisions and/or operational provisions that the Plan Sponsor believes may be of concern to the Service or may be potential qualification defects under the Code.

Alternatively, the Service might permit Plan Sponsors to raise issues as part of the Form 5500 filing process either directly on the Form 5500 or to a certified auditor of the Qualified Plan that can be preserved in the event that the Qualified Plan is ever audited by the Service. Finally, the Service may wish to consider establishing a modified VCP program under which an issue may be raised with the Service for its review and comment without the Plan Sponsor admitting

that an error exists. As long as the Plan Sponsor specifically identifies an issue, we believe that the Qualified Plan should be protected, or at least eligible for the lower compliance fees of VCP.

In our experience, many Plan Sponsors of individually designed plans generally do their utmost to strive to maintain their Qualified Plans in compliance with the legal requirements. There are instances, however, when Qualified Plans arguably (or actually) fail to be in full compliance due to uncertainty concerning the proper application of the Code or other law. We respectfully ask that the Service consider implementing a substitute compliance program in lieu of section 5.09(3) of Rev. Proc. 2013-12. If the determination letter program is eliminated, we believe that the preservation by of a Plan Sponsor's rights to proceed under VCP (in lieu thereof) will foster further cooperation between all stakeholders interested in the maintenance of such Qualified Plans in compliance with law.

B. *Suggested Leeway with Respect to Plan Language of Concern to the Service*

We are also concerned that without the determination letter program Plan Sponsors may be subject to increased sanctions when amending their Qualified Plans for changes in the law. There is much uncertainty and much room for interpretation in many provisions affecting Qualified Plans depending upon the facts and circumstances at issue. EPCRS has allowed Plan Sponsors an avenue to raise thorny issues with the Service without risk of disqualification. It is for this reason that the Service arguably has provided for a reasonable, good faith compliance standard when a Plan Sponsor amends a Qualified Plan to comply with potentially disqualifying provisions under the Code. *See generally* Section 5 through 7 of Rev. Proc. 20007-44 (the Service discusses reasonable and good faith attempts to comply with provisions added to a Qualified Plan).

There has been a long history of cooperation among practitioners and the Service as it relates to Qualified Plan compliance. We are hopeful that this cooperation will continue to the extent possible, even with the proposed elimination of the determination letter program for Qualified Plans. For example, the Pension Protection Act of 2006 ("PPA") required Qualified Plans with employer securities to allow participants to diversify out of such employer stock. *See* Section 401(a)(35). Many Plan Sponsors did not amend their plans to comply with section 401(a)(35), because their Qualified Plans did not include employer stock as an investment option. During the determination letter submission process, the Service required numerous plans to be amended to include language consistent with section 401(a)(35) even if the Qualified Plan did not invest in employer stock.[6] We cite this example to show that Plan Sponsors may not know what is required without some dialogue between the Service and Plan Sponsors in situations that might be subject to some uncertainty.

Therefore, we respectfully suggest that the Service consider providing some leeway to Plan Sponsors. We agree that Qualified Plans should be required to adopt changes to the law that

[6] We know of instances when Qualified Plans sponsored by partnerships, which cannot offer employer stock as an investment, were required to include such section 401(a)(35) diversification language.

are applicable to such Qualified Plan. However, we respectfully suggest that Qualified Plans and their Plan Sponsors should not be sanctioned for a failure to include a change to the law that is not applicable to such Qualified Plan in operation.

Additionally, the Service may want to consider providing more detailed guidance to Plan Sponsors about required changes to the law. An example of such guidance may include an annual checklist of required provisions similar to the Cumulative List currently provided for determination letter submissions, but with additional information such as whether a law change is:

(i) Required in all such Qualified Plans regardless of applicability in operation;

(ii) Required only if such change is applicable to a Qualified Plan; or

(iii) Optional and only included at the Plan Sponsor's discretion.

The Service has provided such guidance in other circumstances. We suggest that such guidance will be even more critical if the determination letter program is eliminated.

C. *Suggested Maintenance of Rulings on Affiliated Service Groups, Leased Employees, Partial Terminations, and Other Discrimination Issues*

It is unclear from Announcement 2015-19 whether the Service will continue to issue rulings on affiliated service group and leased employee status under section 414, along with partial termination rulings. The Service currently allows for a Plan Sponsor to receive rulings as part of a determination letter application on whether: (i) the employer is a member of an affiliated service group, (ii) leased employees are deemed employees of the employer, and (iii) a partial termination has occurred under section 411(d)(3). *See* Section 5.08 of Rev. Proc. 2015-6.

We respectfully suggest that the Service consider continuing to provide Plan Sponsors an avenue to secure a ruling on those issues and related issues. For example, it is no longer possible to secure a ruling on any coverage or other discrimination issues under sections 401(a)(4) or 410(b). In addition, no such ruling appears possible for a qualified separate line of business ("QSLOB") under section 414(r). For instance, the Service may provide that certain QSLOBs are not discriminatory based upon facts and circumstances, notwithstanding the fact that such Qualified Plan does not meet certain enumerated safe harbors in the Treasury Regulations. *See* Treas. Reg. § 1.414(r)-8(b)(2)(iii)(B) (the Commissioner may determine based upon facts and circumstances that a QSLOB is not discriminatory with respect to a certain coverage test). Currently, there is no readily available way to secure such a ruling for QSLOBs. Further, a Plan Sponsor now may no longer receive any assurance that the process it has adopted in conducting a discriminatory test is compliant with the Code.

As a result, we suggest that the Service consider allowing limited, streamlined determination letter applications on these issues. We would suggest that such rulings not include a review of the Qualified Plan for general compliance with section 401(a) and related provisions.

Rather, we suggest that the Service would review only the facts and circumstances submitted by the Plan Sponsor and provide a determination letter as to the specific, distinct request made by the Plan Sponsor.

D. *Suggested Revisions to Audit CAP*

We are concerned that Qualified Plans may go several years without a review by the Service. During an audit by the Service, the reviewing Service agent would routinely request the Qualified Plan document. Many Qualified Plan documents contain errors or defects that date back several years, if not decades, that may not have been discovered during normal review of such Qualified Plan.

As a result, we respectfully suggest that the Service reduce the Audit CAP sanctions for Qualified Plan document errors or defects with respect to which the Plan Sponsor has complied in reasonable, good faith with changes in the law. If the Plan Sponsor can demonstrate that the Qualified Plan was generally amended on a timely basis for (i) required law, (ii) discretionary changes or (iii) Code changes, but certain provisions were omitted from such amendment or such amendment was otherwise found to be defective, then Audit CAP sanctions should arguably be limited to the VCP fee. We suggest that the VCP fee be used as a cap on any Audit CAP sanction if any amendment was timely adopted by a Plan Sponsor to comply with such law, but such amendment was not compliant in all respects.

For example, the PPA included numerous law changes and required amendments to Qualified Plans. Some Plan Sponsors missed amendments to include a "Roth IRA" as an eligible retirement plan for rollovers. In such case, the plan sponsor complied with all other provisions of the PPA and may have allowed Roth IRA rollovers to such Qualified Plan. We suggest that if overall, general compliance is evidenced with respect to any particular Qualified Plan amendment, then the Plan Sponsor should generally be eligible for a reduced sanction in Audit CAP, which we suggest should be the VCP fee. In this way, as long as a Plan Sponsor has shown that it has generally complied with making amendments timely, the Qualified Plan should not be disqualified simply because some aspect of such amendment was not in compliance with the law.

In particular, we respectfully suggest more leeway for Plan Sponsors for defects and errors that are not specific violations of the Code (compared to violations under section 415 or other provisions of the Code) or which do not benefit "highly compensated employees" as determined under section 414(q) ("HCEs"). *See generally Time Oil Co. v. Comm'r*, 258 F.2d 237 (9th Cir. 1958) (*de minimis* variations should not lead to disqualification); *see also Winger's Dep't Store Inc. v. Comm'r*, 82 T.C. 869 (1984) (discussing case law which suggested that disqualification should occur when a Qualified Plan loan that was non-compliant with such plan benefitted solely the majority shareholder of the employer); *but see Fleming Cardiovascular, P.A. v. Comm'r*, T.C. Memo 2015-224 (Nov. 23, 2015) (concluding that a deviation from terms caused a Qualified Plan to be disqualified, which Qualified Plan was found to also have violated section 415).

Otherwise, we specifically suggest that the Service not disqualify a Qualified Plan solely due to such plan's failure to comply with its terms in form or operation. This is generally consistent with longstanding case law, which we would respectfully suggest the Service consider adopting in light of the fact that the determination letter program may no longer be available.