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IRS Announces Cycle 3 Pre-Approved Defined Contribution Plan Submission Extension and the Ability to Use Electronic Signatures along with the Final Regulations on the Use of Forfeitures to Fund QNECs, QMACs and Safe Harbor 401(k) Plan Contributions

Cycle 3 Defined Contribution Plan Submission Extension

The IRS has just issued Revenue Procedure 2018-42 announcing an extension, to December 31, 2018, of the deadline to submit pre-approved defined contribution plans and pre-approved plan provider applications for Cycle 3. Under Revenue Procedure 2017-41, the deadline had been October 1, 2018. Several document providers, including ASC, requested the extension since numerous issues remain with regard to the document and application submissions. Hopefully, with the extension in place, the IRS will have time to provide guidance on these issues so that mass submitters and other document providers can draft appropriate plan provisions for their Cycle 3 pre-approved defined contribution plans.

ASC Insight: Among the issues that the IRS needs to address are:

- Clarifications on the extent of reliance on an opinion letter
- The new requirement to exclude the trust provisions from a pre-approved plan document
- Issues relating to interim amendments
- The need for updated submission forms
- Guidance on Church Plan provisions

Without clarification from the IRS, these issues will make Cycle 3 plan document submissions uncertain and more time consuming for document drafters and adopters.

Electronic Signatures Allowed on Cycle 3 Submission Documents

The IRS has revised its procedures to allow for the use of electronic signatures on the Cycle 3 submission documents, including application forms, required certifications and the Form 2848 – Power of Attorney. Previously, the IRS required “wet” signatures for these documents. Under the new IRS procedures, electronic signatures must use one of the following formats: an electronic handwritten signature; a digital signature with a printed name and unique identification number; or a scanned copy of a physically signed document. The ability to use electronic signatures should facilitate the submission process. However, mass submitters and others will need to revise their plan provider enrollment process to accommodate electronic signatures. (Note that the IRS will still allow “wet” signatures on the documents.)

ASC Insight: The change in IRS position on electronic signatures was a direct result of a request by ASC. ASC is very pleased that the IRS was willing to consider and act on our request. Facilitating the enrollment process by allowing the use of electronic signatures is a welcomed change. (Note, although Document Providers (i.e. TPAs and financial institutions) may now submit their Cycle 3 applications to mass submitters, such as ASC, electronically, the IRS will still require that ASC, and others, submit paper copies of those applications to the IRS! ASC is exploring the most efficient manner of revising the Cycle 3 enrollment process and will include appropriate instructions in our enrollment packages.

Final Regulations on the Use of Forfeitures to Fund QNECs, QMACs and Safe Harbor 401(k) Plan Contributions

On July 20, 2018, the IRS issued final regulations on the use of forfeitures to fund qualified nonelective employer contributions (QNECs), qualified matching contributions (QMACs) and safe harbor 401(k) plan contributions. The final regulations closely parallel the proposed regulations issued in January 2017. (See [ASC Alert 2017-01](#).) The final regulations change the definitions of QNECs and QMACs by requiring such contributions to be nonforfeitable and subject to distribution restrictions “when they are allocated to participants’ accounts” rather than “when they are contributed to the plan.” Accordingly, these regulations permit plans to use forfeitures of prior contributions to fund QNECs, QMACs and safe harbor plan contributions.

The regulations themselves are substantively the same as the proposed regulations. However, the preamble of the final regulations indicates, without elaboration, that issues relating to the pre-approved plan program were referred to the IRS division specifically responsible for the program. Also, the preamble provides a brief explanation of the anti-cutback issues and the impact of the regulations on plans that use forfeitures to first plan expenses.

ASC Insight: Generally, after issuance of the proposed regulation in January 2017, document providers, including ASC, amended their pre-approved defined contribution plans to reflect the changed IRS position on the use of forfeitures to fund QNECs, QMACs and safe harbor plan contributions. Since the final regulations are substantially the same as the proposed regulations further amendments to reflect the final regulations will not be necessary.

The final regulations apply to plan years beginning on or after July 20, 2018. However, plan sponsors may apply the regulations to “earlier periods.”

ASC Insight: The IRS did not explain the ability for plan sponsors to apply the regulations to “earlier periods,” which appears open-ended. However, in the IRS’ LRM, which provides suggested plan language for Cycle 3 pre-approved 401(k) plans, the IRS notes that plan sponsors may rely on the regulations for periods prior to the effective date, **but no earlier than January 18, 2017.**

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