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The IRS Wants You! Are You in Compliance?

prepared for

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presented by

John A. Nixon, Partner

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IRS Plan Audit - Why Us ☹️

Adverse Press Reports

Member Requests

- Retiree Association
- Represented Members

No Determination Letter

What are the Stakes?

- Disqualification
- Political Embarrassment
- Penalties via Audit Cap under Employee Plan Compliance Resolution System, IRS Rev. Proc. 2016-56

EPCRS – Audit Cap/VCP Fee

- Under the old EPCRS the penalty used to be calculated based on “Maximum Payment Amount”. The term “Maximum Payment Amount” is defined as a monetary amount that is approximately equal to the tax the Service could collect upon plan disqualification and is the sum for the open taxable years of the:
 - - tax on the trust . . .
 - - additional income tax resulting from income inclusion for participants in the plan and (including the tax on plan rollovers) and any interest or penalties applicable to the participants’ returns, Sec. 5.01(5), Rev. Proc. 2008-50

Floor is typically VCP Fees Schedule, Sec. 14.01, Rev. Proc. 2016-51

- Under Rev. Proc. 2015-51, penalties are lowered.
- Penalty is based on “facts and circumstances” taking into account the following factors:
 - the steps taken by the Plan Sponsor to ensure that the plan had no failures;
 - the steps taken by the Plan Sponsor to identify failures that may have occurred;
 - the extent to which correction had progressed before the examination was initiated, including full correction;
 - the number and type of employees affected by the failure;

- the number of nonhighly compensated employees who would be adversely affected if the plan disqualified;
- whether the failure is solely an Employer Eligibility Failure;
- the period over which the failure occurred (for example, the time that has elapsed since the end of the applicable remedial amendment period under § 401(b) for a Plan Document Failure);
- the reason for the failure (for example, data errors such as errors in transcription of data, the transposition of numbers, or minor arithmetic errors), and
- the Maximum Payment Amount.

Sec. 14.02, Rev. Proc. 2016-51

- Additional factors for Nonamender Failures in Qualified Plans. The factors considered for Nonamender Failures in Qualified Plans also include:
 - whether the plan is the subject of a Favorable Letter;
 - the internal controls implemented by the Plan Sponsor to ensure the timely adoption of required amendments;
 - the extent to which the Plan Sponsor had adopted a timely plan amendment which later is found not to satisfy the qualification requirements of the Code;
 - the extent to which the Plan Sponsor had otherwise adopted applicable amendments identified; or determined that such amendments were not necessary.

Rev. Proc. 2016-51 Sec. 14.02

Process

- Initial Letter (Exhibit A)
- Develop Strategy
- Meeting with the IRS Representatives
- Information Document Requests (“IDRs”)
- Q & As; Preliminary findings; Discussion; Negotiation
- Resolution

Strategy

- Cooperation, Compromise or Conflict
- Identify “contact points”
- The “Information Document Request” (“IDR”)
- Interaction with the Agent
- Communications with Interested Parties
 - to sponsor
 - to board
 - to membership

Contact Points

IRS

Examiner

Regional Coordinator

Legal

Actuary

Computer Audit Specialist

Fund

Executive Director

Benefits Administrator

General Counsel

Outside Counsel

Actuary

Information Services

Information Document Requests

IRS Form 4564 - Key to the Audit Process

- The IDR is the IRS's primary information gathering tool (Exhibit B)
- Response time is typically two weeks.
- Initial information may be provided in an “on-site” document room
- IDRs will seek specific documents, data responses to specific questions

Responding to IDRs

- Plan documents - ANYTHING that governs the terms of the plan; statute, regulations, resolutions, actuarial assumptions
- Plan data – Benefit calculations, distribution data and forms, participant information, comp data, etc.
- Process data – how is information communicated from employer to fund, from fund to member
- Respond in Writing, ALWAYS

Responding to IDRs

But note, Audit Examinations differ from Qualification Examination. Counsel can refuse to respond to certain requests based on:

- Attorney-Client Privilege
- Attorney work doctrine
- Outside of Scope of IRS Authority (Exhibit D)
 - Information regarding Trustees
 - Investment Documents
- Unreasonable Requests
- Legal Arguments

Dealing with the Agent

Respect, Respect, Respect!!

Remember, you both want this to end soon.

Contact points:

Good Cop - Exec. Director, Benefits
Administrator

Bad Cop – Outside Counsel

Counsel must frame a narrative and **ADVOCATE**,
not merely respond to requests

Communication with Interested Parties

- Notifying your Board
 - Executive Session
 - Is examination subject to Sunshine?
 - Give complete picture of potential exposure
- Notifying the Sponsor
- Notifying the Members
- Who is the Client?

Areas of Potential Exposure

- Required Minimum Distributions
- Compensation in excess of 401(a)(17) limits
- Eligibility problems
- 415(b) violations
- Improper “cash or deferred arrangements”
- “Normal Retirement Age” definitions
- Overpayments or Underpayments

Resolution

- EPCRS sets the floor and under the VCP fee schedule, the best case scenario unless there is a finding of compliance.
- VCP Fees
 - Under \$500,000 in plan assets - \$1,500
 - Between \$500,000 and \$10,000 - \$3,000
 - Over \$10,000,000 - \$3,500.

Rev. Proc. 2018-04.