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From:
Sent: Wednesday, January 07, 2009 1:41 PM
To:
Cc:
Subject: RE: Amendments to plans that are not pre-approved prototype plans

There is no requirement that , as sponsor of the prototype plan involved in this case, must submit it for an opinion letter or that an employer, such as , must obtain a determination letter before offering the plan to its employees. However, the sponsor of a plan that does not have an opinion letter does not have reliance that the plan is qualified in form when it offers it to its clients, and an adopting employer that has not complied with the requirements of any applicable guidance does not have any assurance that it is offering its employees a qualified plan or that the employer will qualify to deduct contributions to the plan when paid and the employees will qualify for the tax deferral associated with participation in a qualified plan. See Rev. Proc. 2005-16, 2005-1 C.B. 674, 680, 689-691, sections 6.01 and 19 (scope of employer reliance on opinion letters).

was correct when he said that a Revenue Procedure is "not law" because a Revenue Procedure does not have the force and effect of law, as a regulation does, but the underlying requirements of EGTRRA and the minimum distribution provisions are provisions of the Internal Revenue Code, and failure to comply with them will result in disqualification of the plan and loss of the tax benefits of qualified plan status. Rev. Proc. 2005-16, 2005-1 C.B. 674, 682, section 8 (maintenance of approved status by an M&P plan). Under that provision of Rev. Proc. 2005-16, the sponsor of an M&P plan is required to amend the plan to conform to changes in the law that were not taken into account when the opinion letter covering the plan was issued. In addition, each employer adopting a sponsor's M&P plan is responsible for adopting any amendments to its plan required in order to comply with new guidance issued by the Service. The plan sponsor is required to "make reasonable and diligent efforts to ensure" that each adopting employer amends its plan when necessary to comply with guidance issued by the Service after the employer's adoption of the plan. Rev. Proc. 2005-16, supra, at section 8.02. Accordingly, the Revenue Agent was correct in telling that his law firm could not act on behalf of its clients in adopting the employer amendments required to conform to the provisions of EGTRRA and to the minimum distribution requirements. Those amendments have to be made by each adopting employer.

Since the employer in your case apparently did not adopt the amendments required to conform to the provisions of EGTRRA and to the minimum distribution requirements of the Code, the EP agent should proceed to examine the plan and issue an adverse determination letter holding that the plan is disqualified if that is the result of the examination.