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Practice Update

New 2019 Governmental Guidance Impacting Retirement Plans

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Since our March, 2019 alert on retirement plan guidance and compliance trends, the Internal Revenue Service (IRS) and the Department of Labor (DOL) have been quite busy issuing further waves of new guidance impacting tax-qualified retirement plans. This article provides a high-level overview of some of the new guidance. For your convenience, the below sections are hyperlinked to facilitate navigation of this update.

- Expansion of the Use of Self-Correction for Loan Failures
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- DOL MEP Transition Relief for Form 5500 Reporting

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Expansion of the Use of Self-Correction Under EPCRS (i.e., loans and retroactive amendments)

Revenue Procedure 2019-19 was released on April 19, 2019 and is the most current IRS guidance outlining the provisions of the Employee Plans Compliance Resolution System (EPCRS). Rev. Proc. 2019-19 identifies a variety of retirement plan qualification failures, including plan document failures and operational failures, pertaining to tax-qualified retirement plans that are capable of voluntarily being addressed and corrected by plan sponsors within defined parameters. As a welcome extension of the IRS' flexibility in handling certain plan failures in a practical manner, Rev. Proc. 2019-19 had expanded self-correction capability for certain plan loan failures. Plan loan failures that are now capable of self-correction include the following four:

1. Participant defaulted loans must be reported as "deemed distributions" on Form 1099-R. Previously, the Form 1099-R inclusion required reporting in the year of the failure. If not immediately caught in the year of the failure and the failure then continued past the end of the tax year, corrected Form 1099-Rs would have been required to be issued, which equally then had implications for re-filing corrected Form 1040s for that same year. Further, these types of errors were also required to be submitted through EPCRS. Rev. Proc. 2019-19 now permits the deemed distribution to be reported on Form 1099-R in the year of correction. From a practical perspective, this now virtually eliminates the formal requirement to submit a voluntary compliance program (VCP) submission through EPCRS as the error can simply be reported in the year of correction without required notice or permission of the IRS.
2. Historically when a participant failed to repay a plan loan in accordance with its terms (i.e., late payments, missed payments, etc.), to correct such failure approval had to be requested from IRS via a VCP submission. Rev. Proc. 2019-19 now permits a plan to self-correct these types of loan failures directly with the impacted participant by making (i) a single sum catch-up payment, (ii) re-

amortization at the remaining loan balance, or (iii) a combination of (i) and (ii).

3. In some instances where spousal consent was otherwise required to make the loan but was not secured (such as under a money purchase pension plan account), Rev. Proc 2019-19 now permits the plan sponsor to self-correct this error by notifying both the participant and his/her spouse and simply obtain the requisite spousal consent now. To the extent such spouse will not provide such consent, any further plan correction action must then use the more formal VCP submission process.
4. Finally, where a plan limits the number of loans a participant may take from the plan and has inadvertently violated that rule, so long as certain conditions are satisfied, Rev. Proc. 2019-19 will permit the plan sponsor to simply adopt a retroactive plan amendment to conform the terms of the plan to its operational procedures/actions. Use of such correction in this situation is only available if (a) the retroactive amendment itself satisfies Section 401(a) on the Internal Revenue Code of 1986, as amended (the Code), (b) the plan would have satisfied Code Section 72(p) and 401(a) had the amendment been part of the plan when loans were first available, and (c) the loans, including those in excess of the number permitted under the plan, were available to all participants (or only to a few participants who were non-highly compensated employees).

Keep in mind that the above four situations are not the universe of all plan loan failures. Any plan loan failure not listed above (e.g. did not use level amortization, loan exceeded the maximum dollar limit, or loan period exceeded maximum allowed by law) can only be fully corrected via the VCP mechanism.

Another welcome extension offered under self-correction through Rev. Proc. 2019-19 is additional flexibility in the use of retroactive plan amendments

where an operational failure has occurred due to the failure to follow the plan's terms. Rev. Proc. 2019-19 now allows plan sponsors to retroactively amend their plans to conform the plans terms to the plan's operations but only if: (A) the amendment will result in an increase of a benefit, right or feature, (B) the increase is available to all eligible participants, and (C) provided the increase is permitted under the Code and otherwise satisfies the general correction principles of EPCRS (such as the nondiscrimination requirements). If all three of the above provisions cannot be met, the retroactive amendment can still be submitted via VCP.

Finally, the self-correction program was further extended to incorporate retroactive amendments for failure to adopt legally-required interim amendments issued by the IRS for retirement plans. Rev. Proc. 2019-19 specifically notes that this does not include the failure to timely adopt a qualified plan or a failure to timely adopt a written Code Section 403(b) plan document. Self-correction through a retroactive amendment is only available if the plan has already received a prior favorable IRS letter AND the correction is occurring within the time period for correcting significant failures for self-correction (normally two (2) years).

Although the expansion of the use of self-correction for loans and certain retroactive amendments is not significantly far reaching, it is a very welcome change by plan sponsors to have a more practical approach for correcting many of these types of failures.

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Limited Expansion of IRS Determination Letter Program

With the outcry related to the discontinuation of the IRS determination letter program pertaining to tax-qualified retirement plans, the IRS released Rev. Proc. 2016-37, which provided that a plan sponsor

continues to be permitted to submit a determination letter application for initial retirement plan qualification and for qualification upon retirement plan termination. However, after further review and consideration, on May 1, 2019, the IRS released Rev. Proc. 2019-20 providing for the further limited expansion of the determination letter program.

Under this limited expansion, the IRS has announced that it will accept determination letter applications for:

1. Individually designed statutory hybrid pension plans during a twelve (12)-month period beginning September 1, 2019 and ending August 30, 2020, and
2. Individually designed Merged Plans (defined below) on an ongoing basis.

With respect to statutory hybrid plans, the IRS's review will be based on the 2017 Required Amendments List (Notice 2017-72). The review will also take into account all Required Amendments Lists and Cumulative Lists issued prior to 2016. Once the window closes on August 30, 2020, the statutory hybrid plans can only be submitted for a determination letter based on the original rule set forth in Rev. Proc. 2016-37.

(a) The date of the plan merger must occur no later than the last day of the first plan year that begins after the plan year that includes the date of a corporate merger, acquisition, or other similar business transaction between unrelated entities, and

(b) A determination letter application for the Merged Plan must be submitted within the period beginning on the date of the plan merger and ending on the last day of the first plan year of the Merged Plan that begins after the date of the plan merger (i.e., the Merged Plan submission period).

The IRS's review of individually designed Merged Plans will be based on the Required Amendments

List that was issued during the second full calendar year preceding the submission of the determination letter application. The review will also take into account all previously issued Required Amendments Lists and Cumulative Lists.

The IRS did specifically note that it is mindful that certain provisions being reviewed in these situations would not necessarily have been enacted or in scope based on the plan's last remedial amendment cycle. Therefore, Rev. Proc. 2019-20 confirms that no sanction will be imposed on a plan submitted for review if a failure is found in the following circumstances:

(A) A document failure under a statutory hybrid plan for a plan provision that is needed to meet the requirements of Regulation Section 1.411(a)(13)-1 and 1.411(b)(5)-1; or

(B) A document failure under a Merged Plan that is needed to effectuate the plan merger.

If an application is filed and the IRS identifies either (i) a document failure in a hybrid plan not related to the hybrid plan regulations (as noted above), or (ii) a document failure in merged plans unrelated to the plan merger, the IRS will then impose a "special sanction" equal to the applicable user fee for such failure under EPCRS (as if the plan sponsor had identified the failure and submitted the plan for consideration under EPCRS), but only if either of the following conditions apply:

(I) The amendment that creates the failure (without regard to whether that amendment was required to be adopted) was adopted timely and in good faith with the intent of maintaining the qualified status of the plan; or

(II) In the case of an amendment required because of a change in qualification requirements, the plan sponsor reasonably and in good faith determined that no amendment was required

because the qualification change does not impact provisions of the written plan document.

As is the normal procedure with respect to EPCRS filings, the IRS will make the final determination as to whether an amendment was adopted in good faith with the intent of maintaining the qualified status of the plan, or whether a plan sponsor reasonably and in good faith determined that no amendment was required. With that being said, if the plan document failure is determined to not qualify for the above "special sanction" relief, the IRS may impose a sanction that is equal to 150% or 250% (depending on the duration of the failure) of the applicable user fee that would apply had the plan submitted under EPCRS.

For plan sponsors maintaining statutory hybrid pension plans or recently Merged Plans, it is recommended to evaluate the complexity of the plan documentation and its operation and determine whether the expanded IRS review program should be utilized to submit for a further IRS assessment for purposes of securing a more updated determination letter.

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Final Regulations Issued on Hardship Distributions

The Bipartisan Budget Act of 2018 made several changes to the safe harbor requirements for hardship distributions to make those requirements less restrictive and to make retirement assets generally more available to participants who needed access to them. The primary financial hardship changes included:

1. Elimination of the requirement that a participant's contributions to a Code Section 401(k) plan and all other employer plans be suspended for at least six (6) months following the receipt of a hardship distribution;

2. Elimination of the requirement that a participant take all available loans from the Code Section 401(k) plan and all other employer plans before receiving a hardship distribution. Notwithstanding this, a participant must represent to the plan sponsor in writing that he or she has insufficient cash or other liquid assets to satisfy the financial need;
3. Allowing hardship distributions from the following sources under the Plan in addition to participant's own Code Section 401(k) contributions: qualified nonelective contributions (QNECs), qualified matching contributions (QMACs), employer safe harbor contributions and earnings on those contributions as well as earnings on 401(k) contributions; however, with respect to code Section 403(b) plans, sources are NOT expanded to included earnings (due to Code Section 403(b)(11)), or QNECs and QMACs in a Code Section 403(b) custodial account; and
4. Expanding the list of safe harbor expenses and losses deemed to be an immediate and heavy financial need to incorporate expenses and losses incurred as a result of a federally declared disaster (where the participant's principal residence or place of employment is located in the designated disaster area).

Proposed Regulations on these changes were issued by the Department of the Treasury on November 14, 2018. The final regulations were recently released on September 19, 2019 and contained very few substantive changes from the Proposed Regulations.

One specific clarification in the final regulations worth mentioning is the statement that there is no imposed requirement on plan administrators to inquire into the financial condition of employees who are seeking hardship distributions so long as "the plan administrator does not have actual knowledge that is contrary to the representation." According to the preamble of the final regulations, this rule is limited to situations in which the plan

administrator already possesses sufficiently accurate information "to determine the veracity of an employee representation."

The final hardship regulations make it clear that the rules apply to distributions made on and after January 1, 2020 and plan sponsors must amend their tax-qualified retirement plans to reflect this. However, the rules may be applied to distributions made in plan years beginning after December 31, 2018 and the elimination of the requirement to suspend an employee's contributions as a condition of obtaining a hardship distribution may be applied as of the first day of the first plan year beginning after December 31, 2018. Further, if the new rules were applied earlier than January 1, 2020, the requirements pertaining to employee representation and requiring a suspension of contributions may also be disregarded with respect to those distributions. Further, if early application of the new rules was not chosen, then the rules prior to issuance of these final regulations will apply to any hardship distribution made before January 1, 2020. As such, it is crucial to ensure an appropriate amendment is made to each tax-qualified retirement plan that accurately memorializes the operational procedures used with respect to hardship distributions both before and after the issuance of the final regulations.

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Guidance on Remedial Amendment Periods for Code Section 403(b) Plans

On September 30, 2018, the IRS issued Revenue Procedure 2019-39 that is intended to accomplish two things: (1) creates a system of recurring remedial amendment periods for correcting form defects in individually designed and pre-approved Code Section 403(b) plans that occur after the initial remedial amendment period ends on March 31, 2020, and (2) provides a limited extension of the initial remedial amendment period for certain form

defects (such as form defects that are related to a change in Code Section 403(b) plan requirements that were effective prior to 2019 but not formally set forth in a required amendments list).

The primary focus on Rev. Proc. 2019-39 is establishing a system of Code Section 403(b) pre-approved plan cycles under which a Code Section 403(b) pre-approved plan sponsor may submit a proposed Code Section 403(b) pre-approved plan for review and approval by the IRS (whereby Code Section 403(b) plans now have the same type of IRS review and approval platforms available to pre-approved Code Section 401(k) plans). The Rev. Proc. notes that once such Code Section 403(b) plan is pre-approved by the IRS, that pre-approved plan may then be made available for adoption by eligible employers.

This revenue procedure also provides deadlines for the adoption of plan amendments for individually designed Code Section 403(b) plans (as set forth in Section 6 of Rev. Proc. 2019-39 and pre-approved Code Section 403(b) plans (as set forth in Section 11 of Rev. Proc. 2019-39). In general, a change in the Code Section 403(b) requirements will be included on an IRS required amendments list after guidance with respect to the change (including a model amendment, if applicable) has been provided in regulations or other guidance published in the Internal Revenue Bulletin.

According to Rev. Proc. 2019-39, additional guidance will be issued before the date that Code Section 403(b) pre-approved plans are next required to be submitted for review.

Rev. Proc. 2019-39 became effective September 30, 2019.

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Flexibility Created Under DOL Final Regulations on Association Retirement Plans (a/k/a Multiple Employer Retirement Plans (MEPs)

MEPs are a type of retirement plan that covers employees of more than one employer. The final regulations on MEPs were issued on July 31, 2019 (MEP Final Rule) and were a direct response to President Trump's Executive Order 13847 which directed the Secretary of Labor to examine policies that would (1) expand the circumstances under which US employers, especially small and mid-sized businesses, may sponsor or adopt a MEP as a workplace retirement savings option for their employees, and (2) increase retirement security for part-time workers, sole proprietors and other entrepreneurial workers with nontraditional employer-employee relationships by expanding their access to workplace retirement savings plans, specifically including MEPs. The DOL believes that expanding access to MEPs will allow small and mid-size businesses to economies of scale for administrative costs and investment choices currently enjoyed by large employers. Further, the final rules anticipate that participating in a MEP will lowers costs and decrease the regulatory burden as well as the fiduciary liability on small and mid-size businesses.

According to Section 4(a)(1) of the Employee Retirement Income Security Act of 1974, as amended (ERISA), ERISA applies to employee benefit plans that are sponsored by an employer. As "employer" (as defined in Section 3(5) of ERISA) is "any person acting directly as an employer, or indirectly in the interests of any employer, in relation to an employee benefit plan, and includes a group or association of employers acting for an employer in such capacity.

Under the MEP Final Rule, a bona fide group or association of employers is considered an "employer" and may sponsor a MEP for its members if certain conditions are satisfied. The four (4) most significant conditions include:

1. The group or association must have a formal organizational structure (including a governing body and by-laws or other similar indications of formality);
2. The group or association must be controlled by its employer members (and the employer members the participate in the plan control the plan, which must exist both in form and in substance);
3. The group or association must have at least one substantial business purpose unrelated to the offering and providing of employee benefits to its members (where a substantial business purpose is considered to exist if the group or association would be a viable entity in the absence of sponsoring the employee benefit plan); and
4. The plan's participation in limited to employees and former employees of employer members of the group or association.

Further, among the employer members of the group or association, they must have a commonality of interest (e.g., the employers are all in the same trade, industry or profession, or they all exist in the same region that does not exceed the boundaries of a single State or metropolitan area). With respect to the participating employer members, each employer must directly act as an employer to at least one employee participating in the MEP. Lastly, the group or association must not be a financial services firm (including a pension recordkeeper or third-party administrator).

The increased flexibility of not requiring all employer members to be in the same industry does present an opportunity to expand the usage of MEPs and make them more readily available to businesses wishing to participate in such arrangements (and not independently sponsor one on their own). However, as with any retirement offering, the fiduciary aspects of offering an ERISA retirement plan must be addressed and the Preamble to these final regulations highlights the following key take-aways:

1. A MEP is subject to all of the provisions under Title I of ERISA applicable to employee pension benefit plans, including the fiduciary responsibility and prohibited transaction provisions;
2. The bona fide group or association that sponsors the MEP is the entity that assumes and retains responsibility for operating and administering the MEP, including ensuring compliance with the MEP Final Rules. As such, that will mean that the MEP's sponsor (and not the participating employers) will generally be the Named Fiduciary and the Plan Administrator (i.e., responsible for testing, reporting and disclosure);
3. Notwithstanding paragraph (2) above, each participating employer member still retains fiduciary responsibility for prudently selecting and monitoring the MEP sponsor and securing periodic report on the fiduciary's management and administration of the MEP (in other words, the duty to monitor other fiduciaries applies equally to MEPs as it does to single-employer plans); and
4. Finally, any decision with respect to plan investments – such as to include a fund in the offered investment line-up or to delete any fund from the plan's slate of options – would be subject to ERISA's fiduciary rules, whether that decision is made by the MEP sponsor or by one or more participating employer members.

Lastly, the MEP Final Rules provide an extremely helpful severability provision that if any of the provisions in the final regulations are found to be invalid or stayed pending further agency action, the remaining portions of the final rule will continue to be operative and available for qualifying employer groups and associations. This back stop is to provide a way for MEPs created or implemented under the MEP Final Rules to remain operational even if one aspect of the regulations is found defective or challenged by the courts.

It is unknown how pervasively MEPs will be used following the issuance of the MEP Final Rules but their enactment does provide a gateway for potentially expanding retirement plans to a wider net of employers on a most cost-effective basis. For example, MEPs may pose an excellent option for private equity groups to consider who have multiple lines of business but would prefer to migrate to a single benefits platform for all of their holdings.

Although Professional Employer Organizations (PEOs) and their retirement offerings are also a topic included in the MEP Final Rules, a detailed analysis of those provisions is beyond the scope of this article.

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DOL MEP Transition Relief for Form 5500 Reporting

Closely connected to the MEP Final Rules, the DOL released on June 25, 2019 Field Assistance Bulletin 2019-01 which provides temporary penalty relief from retirement plans that have failed to comply with the Form 5500 reporting requirements for MEPs under ERISA Section 103(g). With the enactment of ERISA Section 103(g) in 2014, a MEP is required to include with its annual report (i.e., Form 5500):

1. A list of participating employers in the MEP; and
2. A good faith estimate of the percentage of total contributions made by such participating employers during the plan year.

This new reporting requirement became effective for plan years beginning after December 31, 2013.

The DOL issued an interim final rule in 2014 by adding the new requirements under ERISA Section 103(g) to the first question on the face of the 2014 Form 5500, at Part I, Line A. However, the DOL, in reviewing the 2014 Form 5500 data, found that some

MEPs had failed to include a complete and accurate list of participating employers with their Form 5500 filing. In light of this, the DOL initiated enforcement actions commencing in 2019. In response to this, the DOL commenced a dialog with the National Association of Professional Employer Organizations who contended that filing the participating employer list imposes materials costs and burdens on MEPs and PEO-sponsored plans. The DOL has taken the position that it does not have the authority to otherwise change the law enacted by Congress.

As such, in light of the possibility that some plan fiduciaries may have misunderstood the annual reporting requirement now required under ERISA Section 103(g), the DOL will provide transition relief to plan administrators of MEPs who voluntarily comply with the requirements of ERISA Section 103(g) and commencing filing complete and accurate participating employer information for their 2018 plan year and forward. Specifically, the DOL will not reject a 2017 Form 5500 filing on behalf of a MEP (or any prior plan years) or seek to assess civil penalties against the plan administrator with respect to any such filing solely on the basis of the failure to include the requisite participating employer information as required under ERISA Section 103(g). Again, the relief is only available so long as the MEP files all required information with respect to the 2018 plan year and beyond.

In conjunction with this, MEPs are immediately provided under DOL FAB 2019-01 a special filing extension of up to 2½ months for making their 2018 Form 5500 submission. For calendar year MEPs, this extension is until October 15, 2019. MEPs need to check the “special extension” box under Part I, Line D on the 2018 Form 5500 and enter “FAB 2019-01″ as the description to use this extension. MEPs using this special extension do not need to file Form 5558 with the IRS.

If you would like to discuss any of the above areas and their application in more depth, please reach out

to your Akerman contact for more information.

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