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Hybrid plans seeking determination letters still have time to act

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Hybrid defined benefit (DB) plan sponsors have just under seven months left to take advantage of the temporary window for requesting IRS determination letters under [Rev. Proc. 2019-20](#). This is the first opportunity for hybrid plan sponsors to get IRS approval for changes relating to the final hybrid plan regulations, which were largely excluded from the scope of previous determination letters. This article discusses some reasons why sponsors might consider taking advantage of the window.

Statutory hybrid plans

The Pension Protection Act of 2006 (PPA) defined a category of retirement plans dubbed “applicable defined benefit plans” in the statute and “statutory hybrid plans” in the regulations. These plans are eligible for special age-discrimination rules but also subject to several additional tax-qualification requirements. Statutory hybrid plans include cash balance plans and pension equity plans (PEPs), as well as certain other designs that IRS determines to have a similar effect, such as plans using indexed career-average formulas or variable annuity formulas with hurdle rates below 5%.

Regulatory guidance

IRS has issued three sets of final regulations for statutory hybrid plans:

- **October 2010.** Generally effective for plan years starting on or after Jan. 1, 2011, the first set of final [regulations](#) provided guidance on PPA’s age-discrimination standard, whipsaw relief, three-year vesting requirement, preservation-of-capital rules and restrictions on cash balance conversions. The regulations also gave partial guidance on market rates of return, with a delayed effective date.

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- **September 2014.** Initially effective for plan years starting on or after Jan. 1, 2016, but later delayed by 2015 transition guidance (next bullet), these [regulations](#) provided an exclusive list of market rates, including new requirements for lump sum-based benefit formulas.
- **November 2015.** These [transition rules](#) delayed the effective date of the market-rate rules for another year — to plan years beginning on or after Jan. 1, 2017 (with a later effective date for some collectively bargained plans). The transition rules also provided anti-cutback relief for amendments to bring a plan's rate of return into compliance before the market-rate rules took effect.

Plan amendment deadlines

Plans had various amendment deadlines to comply with PPA's statutory requirements and the related regulations:

- Sponsors that needed to eliminate whipsaw calculations had to amend their plans by the end of the 2009 plan year to receive relief from Section 411(d)(6) anti-cutback rules (with a later deadline for collectively bargained plans).
- Amendments to comply with the final regulations — including the vesting, preservation-of-capital and special plan termination rules that took effect in 2011 — had to be adopted before the 2017 plan year (or the later effective date for collectively bargained plans).
- Amendments for the final market-rate rules were on the [2017 Required Amendments \(RA\) List](#) for non-collectively bargained plans and the [2019 RA List](#) for collectively bargained plans, setting amendment deadlines of Dec. 31, 2019, and Dec. 31, 2021, respectively. However, to receive anti-cutback relief, sponsors had to amend their plans earlier — before the rules took effect for their plans.

Determination letters unavailable starting in 2017

Before 2017, employers seeking assurance that their plan documents complied with all applicable qualification standards could apply for an IRS determination letter in staggered five-year cycles, determined by employer identification number (EIN). After Jan. 31, 2017, IRS significantly curtailed the determination letter program for individually designed plans to accept requests only upon initial qualification and termination ([Rev. Proc. 2016-37](#)). This indefinite moratorium was problematic for all plans, but particularly for hybrid plans, which faced sweeping PPA changes without any way of obtaining IRS approval that plan documents properly reflected the new requirements.

One-year window for determination letter requests

Responding to plan sponsor feedback, IRS [announced](#) in 2019 a one-year window for sponsors of individually designed statutory hybrid plans to request a determination letter. The window runs from Sept. 1, 2019, to Aug. 31, 2020, and covers cumulative changes through the [2017 RA List](#). At the same time,

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IRS also opened the determination letter program on an ongoing basis to certain merged plans in corporate transactions.

Why get a new letter?

Hybrid plan sponsors aren't required to request a new determination letter, but many might jump at the opportunity. Letters provide comfort to employers that their plan documents comply with applicable qualification requirements and give sponsors protection if an IRS audit finds a faulty provision. In the past, determination letters have also been useful in several other contexts:

- Plan and IRA administrators often looked to determination letters to ensure that an incoming rollover is from a qualified plan.
- Financial institutions used a determination letter as evidence of a plan's tax-qualified status to take advantage of securities registration exemptions for investment vehicles offered to qualified plans.
- Buyers in corporate transactions often requested determination letters during due diligence.

Final hybrid plan regulations

A hybrid plan sponsor's most recent determination letter generally won't cover amendments for the 2014 and 2015 final regulations unless the letter was issued upon initial qualification or plan termination. This is true even if sponsors amended their plans early for the final rules before last requesting a determination letter under the old system of five-year cycles.

However, some Cycle E filers (whose last determination letter requests were due by Jan. 31, 2016) might have broader coverage. In the [2014 Cumulative List](#), IRS said Cycle E filers that had already amended their plans for the 2014 regulations could request that their determination letters cover those amendments. But they are the only lucky ones. Earlier filers couldn't have received this review, and the [2015 Cumulative List](#) for the final Cycle A specifically said letters issued for that cycle would not cover amendments for the 2014 or 2015 regulations — with no exception for plans already amended for the regulations.

Sponsors may be particularly enticed by this chance to obtain a determination letter if their plans have complex interest-crediting rates or have undergone significant design changes (even if they didn't affect the hybrid portion of the plan). In addition, sponsors that needed anti-cutback relief to comply with the 2014 and 2015 regulations may want confirmation that their amendments satisfied the requirements for that relief. Even sponsors with very straightforward plans and recent letters may want to take advantage of this window, which may offer the only opportunity to get the IRS's blessing before plan termination.

Will new letters cover the final hybrid regulations for collectively bargained plans? As noted above, IRS reviews during the window will consider all amendments up to and including ones on the 2017 RA List. However, for collectively bargained plans, the final hybrid plan regulations appear on the [2019 RA List](#). So Rev. Proc. 2019-20 seems to suggest letters issued to sponsors of collectively bargained plans during the

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window won't cover the final rules. Why IRS would draw such a distinction isn't clear (and may not have been the agency's intent). Sponsors of collectively bargained plans might want to amend their plans for the final regulations this year and include those amendments with a determination letter request during the window. In the worst case, IRS simply will exclude those amendments from the determination letter.

Final partial lump sum/annuity regulations

The [2016 final regulations](#) on the minimum present value rules for partial lump sum and annuity distributions appeared on the 2017 RA List, with an amendment deadline of Dec. 31, 2019. These amendments may be especially relevant for hybrid plans that converted from a traditional DB formula and now offer lump sums for the cash balance portion but not the traditional portion, resulting in split lump sum and annuity payments.

IRS issued [model amendments](#) for the final regulations in 2017, and sponsors using those models have reliance that their plan terms for determining the split payouts comply with the final regulations. However, some sponsors may have modified the models (losing reliance) or used their own individually designed amendments. Other sponsors may have concluded that they needed no amendment since the rules appeared in Part B of the RA List, which contains changes that IRS anticipates will require amendments only for plans with unusual provisions. A new determination letter obtained through this window would eliminate any uncertainty about a sponsor's partial annuity provisions.

Other plan provisions

A new determination letter would cover other significant plan amendments adopted since the sponsor's last letter. Such amendments might include, for example, revised plan terms for the 2013 decision on same-sex marriage in [United States v. Windsor](#) (570 U.S. 744) and any optional design changes the sponsor has made since its last letter. A complete list of required changes can be found on the [IRS Required Amendments List](#) and [Cumulative List](#) webpages.

Sweeteners

Along with offering the window, Rev. Proc. 2019-20 provides two inducements for hybrid plan sponsors considering applying for a determination letter:

- Extension of any remedial amendment period still open Sept. 1, 2019, until the later of Aug. 31, 2020, or 91 days after IRS issues a determination letter
- Reduced or eliminated sanctions for any plan document failures discovered during the IRS review

Related resources

Non-Mercer resources

- [Rev. Proc. 2019-20](#) (IRS, May 1, 2019)
- [Required Amendments List webpage](#) (IRS)
- [Cumulative List of Changes in Retirement Plan Qualification Requirements webpage](#) (IRS)
- [Rev. Proc. 2016-37](#) (IRS, June 29, 2016)
- [Transitional Amendments To Satisfy the Market Rate of Return Rules for Hybrid Retirement Plans](#) (Federal Register, Nov. 16, 2015)
- [Additional Rules Regarding Hybrid Retirement Plans](#) (Federal Register, Sept. 19, 2014)
- [Hybrid Retirement Plans](#) (Federal Register, Oct. 19, 2010)

Mercer Law & Policy resources

- [Cash balance determination letter window opens](#) (Sept. 16, 2019)
- [IRS expands determination letters for hybrid, merged plans](#) (May 2, 2019)
- [IRS issues 2019 procedures for retirement plan determination letters, rulings, other guidance](#) (Jan. 18, 2019)

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