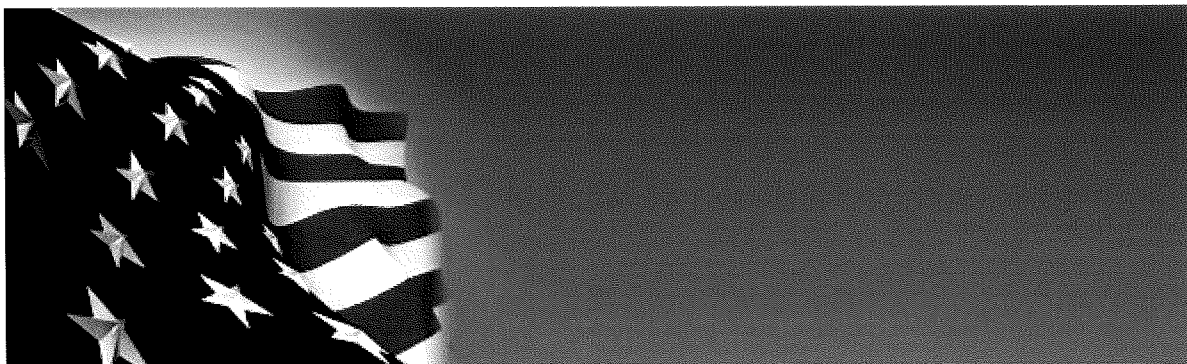


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CYPEN & CYPEN NEWSLETTER SPECIAL SUPPLEMENT for JANUARY 30, 2015

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Stephen H. Cypen, Esq., Editor

Never Forget September 11, 2001

and

Always Remember May 2, 2011

IRS THROWS A CURVE

We previously advised you that the Internal Revenue Service National Office issued a memorandum indicating that (1) defined contribution deferred retirement option programs are not defined contributions plans for purposes of applying the IRS limit on plan contributions and (2) the annual DROP deposits (that is, the annual sum of the monthly return of benefit adjustments credited to a particular DROP account) are not subject to the annual additions limitation applicable to defined contribution plans (See [C&C Special Supplement Newsletter for January 8, 2015](#) and [C&C Special Supplement Newsletter for January 13, 2015](#)).

At the time, we believed the memo resolved all the IRS issues relating to defined contribution DROPs (which refer to DROP accounts that

are adjusted for the actual investment performance of a particular investment options). However, according to Florida attorney Rick Burke, the issue has not been completely resolved. Burke says the IRS National Office informed the IRS Cincinnati District Office (which is in charge of the governmental plans favorable determination letter project) that the memo was only intended to address application of the rules relating to the IRS limit on plan contributions/benefits and no other qualification requirement.

Unfortunately, due to the change in position reflected in the memo, the IRS Cincinnati District Office is now uncertain how DC DROP accounts satisfy the definitely determinable benefit requirement. Essentially, that rule requires the level of benefits must be determinable from an examination of the plan documents and from factors not within control of the sponsoring employer. Based on this concern, Burke says the Cincinnati District Office intends to request an explanation from representatives of the approximately 75 pending governmental plan favorable determination letter requests containing DC DROPs as to why these arrangements satisfy the definitely determinable benefit rule. We are currently examining various alternatives as to how to proceed with the situation.

Based on the IRS National Office's former position, the definitely determinable benefit rule was not a concern. Thus, Burke says, this new problem stems solely from the change of position contained in the memo. It is very disturbing to receive guidance from the IRS National Office that DC DROPs are not subject to the annual additions limitation applicable to defined contribution plans, only to be subsequently informed that this position raises concerns with the determinable benefit rule!

We suggest that trustees keep informed of the status of the situation and turn to their counsel for specific advice. If we learn anything else, we report it here. Just when you thought it was safe to go back in the water... .