

Part IV. – Items of General Interest

Issuance of Opinion and Advisory Letters and Opening of the EGTRRA Determination Letter Program for Pre-Approved Defined Contribution Plans

Announcement 2008-23

The Service will soon issue opinion and advisory letters for pre-approved (i.e., master and prototype (M&P) and volume submitter (VS)) defined contribution plans that were timely filed with the Service to comply with the Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. 107-16, (“EGTRRA”) and other changes in plan qualification requirements listed in Notice 2004-84, 2004-2 C.B. 1030 (“the 2004 Cumulative List”). The Service expects to issue the letters on March 31, 2008, or, in some cases, as soon as possible thereafter. Employers using these pre-approved plan documents to restate a plan for EGTRRA will be required to adopt the EGTRRA-approved plan document by April 30, 2010. The Service will accept applications for individual determination letters submitted by adopters of these pre-approved plans starting on May 1, 2008. This announcement describes certain changes to the determination letter application procedures for pre-approved plans that will simplify the application process for many applicants, and it informs plan sponsors that revised application forms for these plans will be available in the near future.

Background

Rev. Proc. 2007-44, 2007-28, I.R.B. 54, and Rev. Proc. 2005-16, 2005-1 C.B. 674, describe a staggered remedial amendment system for plans that are qualified under § 401(a) of the Internal Revenue Code, with five-year amendment/approval cycles for individually designed plans and six-year cycles for pre-approved plans. The submission period for the initial cycle for pre-approved defined contribution plans was February 17, 2005, through January 31, 2006. Sponsors and practitioners were required to restate their pre-approved defined contribution plans for EGTRRA and the 2004 Cumulative List and apply for new opinion or advisory letters during this submission period.

Section 16.03 of Rev. Proc. 2007-44 provides that when the review of a cycle for pre-approved plans has neared completion, the Service will publish an announcement providing the date by which adopting employers must adopt the newly approved plans. This date is intended to give adopting employers a window of approximately two years in which to adopt the plans.

Procedures for filing determination letter applications are contained in Rev. Proc. 2008-6, 2008-1 I.R.B. 192. Section 6.05 of Rev. Proc. 2008-6 requires a determination letter application to include a copy of the plan’s signed and dated timely good faith EGTRRA amendments, interim and other plan amendments. These documents are in addition to the restated plan or, in the case of M&P and certain VS plans, the completed adoption agreement.

In general, an application for an individual determination letter on a pre-approved plan is to be filed on Form 5307, *Application for Determination for Adopters of Master or Prototype or Volume Submitter Plans*. These applications will be reviewed on the basis of the Cumulative List of Changes in Plan Qualification Requirements that was used to review the underlying pre-approved plan, that is, the 2004 Cumulative List in the case of an application filed for the cycle that includes the pre-approved plan submission period that ended on January 31, 2006.

In certain circumstances, however, an application for an individual determination letter on a pre-approved plan is to be filed on Form 5300, *Application for Determination for Employee Benefit Plan*, rather than Form 5307. These circumstances include the following: (1) where the adopter of an M&P plan amends the basic plan document or adoption agreement, other than by choosing among options permitted under the plan or amending the plan in the manner described in sections 5.02 and 19.03 of Rev. Proc. 2005-16; (2) where the adopter of a VS plan makes changes to the pre-approved plan that are too extensive or complex or otherwise determined by the Service to be incompatible with the purposes of the volume submitter program; and (3) where the adopter of a pre-approved plan is requesting a determination regarding partial termination, affiliated service group status or leased employees, or where the pre-approved plan is a multiple employer VS plan.

Except as otherwise provided in this announcement, an application for an individual determination letter on a pre-approved plan that is filed on Form 5300 will be reviewed on the basis of the Cumulative List in effect when the application is filed. For example, a determination letter application filed on Form 5300 on May 1, 2008, will be reviewed on the basis of the 2007 Cumulative List (Notice 2007-94, 2007-51 I.R.B. 1179).

Deadline for Employer Adoption of EGTRRA-approved Defined Contribution M&P and VS Plans

An adopting employer whose plan is eligible for the six-year remedial amendment cycle under section 17 of Rev. Proc. 2007-44 and that adopts an EGTRRA-approved M&P or VS defined contribution plan by April 30, 2010, will have adopted the plan within the employer's six-year remedial amendment cycle.¹ The end of the plan's remedial amendment cycle with respect to EGTRRA and the changes in plan qualification requirements on the 2004 Cumulative List is April 30, 2010.

Individual Determination Letter Filing Procedures for Pre-approved Plans

The Service will accept applications for individual determination letters for EGTRRA-approved M&P and VS defined contribution plans starting May 1, 2008. The procedures for filing such applications are clarified and revised as follows:

¹ Section 20 of Rev. Proc. 2007-44 provides that an opinion or advisory letter for a new pre-approved plan submitted for approval after the end of the submission period may not be relied on for the period prior to the date of submission.

- An application for a determination letter that is filed on Form 5307 generally need not include the plan's EGTRRA good faith amendments that were adopted prior to the adoption of the EGTRRA-restated plan or any interim plan amendments, regardless of when adopted, unless the plan is a VS plan that does not authorize the practitioner to amend the plan on behalf of the adopting employer. The Service may, however, request evidence of adoption of good faith and interim amendments during the course of its review of a particular plan. Applications filed on Form 5307 for VS plans that do not authorize the practitioner to amend the plan on behalf of the adopting employer must include the plan's EGTRRA good faith amendments and any interim amendments that were adopted for qualification changes on the 2004 Cumulative List.
- An application for a determination letter on a pre-approved plan that is required to file Form 5300 only because the plan is a multiple employer VS plan or because the employer is requesting a determination regarding partial termination, affiliated service group status or leased employees will be reviewed on the basis of the Cumulative List that was used to review the underlying pre-approved plan, that is, the 2004 Cumulative List, as if the application had been filed on Form 5307. The Service's review of the application will not consider changes in the qualification requirements subsequent to the 2004 Cumulative List. Except in the case of VS plans that do not authorize the practitioner to amend the plan on behalf of the adopting employer, an application described in this paragraph need not include the plan's EGTRRA good faith amendments that were adopted prior to the adoption of the EGTRRA-restated plan or any interim plan amendments, regardless of when adopted. The Service may, however, request evidence of adoption of good faith and interim amendments during the course of its review of a particular plan. An application for a VS plan that is described in this paragraph but which does not authorize the practitioner to amend on behalf of the adopting employer must include the plan's EGTRRA good faith amendments and any interim amendments that were adopted for qualification changes on the 2004 Cumulative List.
- An application for a determination letter on any other pre-approved plan that is required to file Form 5300 will be reviewed on the basis of the Cumulative List in effect on the date the application is filed. The application must include a copy of the plan's signed and dated timely good faith EGTRRA amendments, and interim and other plan amendments for all the changes in qualification requirements on the Cumulative List that is in effect when the application is filed. Applications described in this paragraph include (1) applications for determination letters on M&P plans that have been amended by the adopting employer in a manner other than to choose among options permitted under the plan or as described in sections 5.02 and 19.03 of Rev. Proc. 2005-16, and (2) applications for determination letters on VS plans that have been modified by the adopting employer in a manner that is too extensive or complex or otherwise determined by the Service to be incompatible with the purposes of the volume submitter program.

These changes will be published as modifications to Rev. Proc. 2008–6 when that revenue procedure is next revised. Until the modifications to the revenue procedures are published, plan sponsors may rely on this announcement regarding the changes.

Plan sponsors and their advisors are encouraged to review the frequently asked questions on the following web site:
<http://www.irs.gov/retirement/article/0,,id=179990,00.html> for additional information regarding the issuance of opinion, advisory and determination letters for pre-approved plans and the documents that must be submitted with a determination letter application.

Revision of Form 5307

Form 5307 is being revised to allow the form to be optically scanned and thereby improve the Service's processing of determination letter applications filed with the form. It is expected that the revised form will be available soon. However, applications filed with the current form (revised 2001) will continue to be accepted through September 30, 2008.