

Part III – Administrative, Procedural and Miscellaneous

Sample Amendment for Roth Elective Deferrals

Notice 2006-44

I. Purpose

This notice provides a sample plan amendment for sponsors, practitioners, and employers (plan sponsors) who want to provide for designated Roth contributions in their § 401(k) plans. The sample amendment will help those plan sponsors comply with the requirement to timely adopt a discretionary amendment by the end of the plan year in which the amendment is effective, as set forth in section 5.05(3) of Rev. Proc. 2005-66, 2005-37 I.R.B. 509.

II. Background

Section 402A was added to the Code by section 617 of the Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. 107-16 (EGTRRA) to provide for the treatment of elective deferrals as designated Roth contributions, effective for taxable years beginning on or after January 1, 2006. Amendments to the final regulations under §§ 401(k) and 401(m) relating to designated Roth contributions were published in the *Federal Register* on January 3, 2006 (71 F.R. 6).

III. Sample Plan Amendment

In General. A sample plan amendment is provided in the Appendix that individual plan sponsors and sponsors of pre-approved plans can adopt or use in drafting individualized plan amendments. Because the amendment in the Appendix is a sample amendment plan sponsors are not required to adopt the amendment verbatim. In fact, it may be necessary for plan sponsors to modify the sample amendment to conform to their plan's terms. In addition, some plan sponsors may need to revise the sample amendment to conform the amendment to the administration of the plan. An issue not addressed in the sample amendment is the extent to which an employee can elect that a distribution (other than a corrective distribution of excess distributions) is to be made from either the designated Roth account or any other account of the employee under the plan. A plan sponsor is permitted to (and may find it necessary to conform the amendment to the plan's operation) revise the amendment in the Appendix (including the default provisions of the amendment) to address this issue.

Time and Manner of Adoption. Plan sponsors who want to provide for designated Roth contributions in their § 401(k) plans must adopt a discretionary amendment as provided in Notice 2005-95, 2005-51 I.R.B. 1172. The deadline to adopt a discretionary amendment is the end of the plan year in which the amendment is effective, as set forth in section 5.05(3) of Rev. Proc. 2005-66. The timely adoption of

the amendment must be evidenced by a written document that is signed and dated by the employer (including an adopting employer of a pre-approved plan).

Maintaining the Pre-approved Status of a Pre-approved Plan. The Service will not treat the adoption of the sample plan amendment provided in the Appendix or an individualized plan amendment that reflects the qualification requirements of the regulations under §§ 401(k) and 401(m) relating to designated Roth contributions as affecting the pre-approved status of a master and prototype (M&P) or volume submitter plan. That is, such amendment to an M&P plan that is adopted by an employer will not cause the plan to fail to be an M&P plan. Similarly, such amendment to a volume submitter plan that is adopted by an employer will not cause the plan to fail to be a volume submitter plan. In either case, the amendment will not result in the loss of reliance on a favorable opinion, advisory, or determination letter. In the case where the amendment causes the plan to fail to satisfy § 401(a), the plan will not be disqualified if a remedial amendment that corrects the failure is adopted before the end of the remedial amendment period.

Format of the Sample Amendment. The format of the sample plan amendment generally follows the design of pre-approved plans, including all M&P plans, that employ a “basic plan document” and an “adoption agreement.” Thus, the sample plan amendment includes language designed for inclusion in a basic plan document and language designed for inclusion in an adoption agreement to allow the employer to indicate whether, or when, the corresponding basic plan document provision will be effective in the employer’s plan and to select among options related to the application of the basic plan document provision. Sponsors of plans that do not use an adoption agreement should modify the format of the amendment to incorporate the appropriate adoption agreement options in the terms of the amendment. In such case, the “notes” in the adoption agreement portion of the sample amendment should not be included in the amendment that will be signed and dated by the employer. Designated Roth contributions are referred to as Roth elective deferrals and designated Roth accounts are referred to as Roth elective deferral accounts in the sample amendment in the Appendix.

DRAFTING INFORMATION

The principal authors of this notice are Roger Kuehnle of the Employee Plans, Tax Exempt and Government Entities Division and Dana Barry of the Office of the Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). For further information regarding this notice, please contact the Employee Plans’ taxpayer assistance telephone service at 1-877-829-5500 (a toll-free number) between the hours of 8:30 a.m. and 4:30 p.m. Eastern Time, Monday through Friday (a toll free call). Mr. Kuehnle may be reached at (202) 283-9888 and Ms. Barry may be reached at (202) 622-6060 (not toll-free numbers).

Appendix

Sample Plan Amendment

Article _____. ROTH ELECTIVE DEFERRALS

Section 1. General Application.

1.1 This article will apply to contributions beginning with the effective date specified in the adoption agreement but in no event before the first day of the first taxable year beginning on or after January 1, 2006.

1.2 As of the effective date under section 1.1, the plan will accept Roth elective deferrals made on behalf of participants. A participant's Roth elective deferrals will be allocated to a separate account maintained for such deferrals as described in section 2.

1.3 Unless specifically stated otherwise, Roth elective deferrals will be treated as elective deferrals for all purposes under the plan.

Section 2. Separate Accounting

2.1 Contributions and withdrawals of Roth elective deferrals will be credited and debited to the Roth elective deferral account maintained for each participant.

2.2 The plan will maintain a record of the amount of Roth elective deferrals in each participant's account.

2.3 Gains, losses, and other credits or charges must be separately allocated on a reasonable and consistent basis to each participant's Roth elective deferral account and the participant's other accounts under the plan.

2.4 No contributions other than Roth elective deferrals and properly attributable earnings will be credited to each participant's Roth elective deferral account.

Section 3. Direct Rollovers

3.1 Notwithstanding section _____, a direct rollover of a distribution from a Roth elective deferral account under the plan will only be made to another Roth elective deferral account under an applicable retirement plan described in § 402A(e)(1) or to a Roth IRA described in § 408A, and only to the extent the rollover is permitted under the rules of § 402(c).

3.2 Notwithstanding section _____, unless otherwise provided by the employer in the adoption agreement, the plan will accept a rollover contribution to a Roth elective deferral account only if it is a direct rollover from another Roth elective deferral account under an applicable retirement plan described in § 402A(e)(1) and only to the extent the rollover is permitted under the rules of § 402(c).

3.3 The plan will not provide for a direct rollover (including an automatic rollover) for distributions from a participant's Roth elective deferral account if the amount of the distributions that are eligible rollover distributions are reasonably expected to total less than \$200 during a year. In addition, any distribution from a participant's Roth elective deferral account is not taken into account in determining whether distributions from a participant's other accounts are reasonably expected to total less than \$200 during a year. However, eligible rollover distributions from a participant's Roth elective deferral account are taken into account in determining whether the total amount of the participant's account balances under the plan exceeds \$1,000 for purposes of mandatory distributions from the plan.

3.4 The provisions of the plan that allow a participant to elect a direct rollover of only a portion of an eligible rollover distribution but only if the amount rolled over is at least \$500 is applied by treating any amount distributed from the participant's Roth elective deferral account as a separate distribution from any amount distributed from the participant's other accounts in the plan, even if the amounts are distributed at the same time.

Section 4. Correction of Excess Contributions

4.1 In the case of a distribution of excess contributions, a highly compensated employee may designate the extent to which the excess amount is composed of pre-tax elective deferrals and Roth elective deferrals but only to the extent such types of deferrals were made for the year.

4.2 If the highly compensated employee does not designate which type of elective deferrals are to be distributed, the plan will distribute pre-tax elective deferrals first.

Section 5. Definition

5.1 Roth Elective Deferrals. A Roth elective deferral is an elective deferral that is:

(a) Designated irrevocably by the participant at the time of the cash or deferred election as a Roth elective deferral that is being made in lieu of all or a portion of the pre-tax elective deferrals the participant is otherwise eligible to make under the plan; and

(b) Treated by the employer as includible in the participant's income at the time the participant would have received that amount in cash if the participant had not made a cash or deferred election.

(Adoption Agreement Provisions)

Article _____, Roth Elective Deferrals:
(Check and complete, if applicable.)

_____ shall apply to contributions after January 1, 2006.

_____ shall apply to contributions after _____. (Enter a date later than
January 1, 2006.)

**(Note: If neither option is chosen, the amendment will not be effective even if the
amendment is signed and dated.)**

Section _____, Direct Rollovers:
(Check, if applicable.)

The plan:

_____ will not

accept a direct rollover from another Roth elective deferral account under an applicable
retirement plan as described in § 402A(e)(1).

**(Note: The default position is that the plan will accept a direct rollover of Roth
elective deferrals from another Roth elective deferral account. The default
position will apply unless this option is checked.)**

Employer's signature and date