The New Determination Letter Program
-- Revenue Procedure 2005-66

By

Pamela D. Perdue
Summers, Compton, Wells & Hamburg
St. Louis, Missouri

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I. Introduction

The Internal Revenue Service (“Service”) has now finalized its new procedures governing determination letter application submissions. The new procedures represent a significant change in the process and will affect all types of plans making submission including both pre-approved and individually designed plans.

As part of this process, the Service has now opened its determination letter program for sponsors of pre-approved defined contribution plans for review for compliance with the provisions of the Economic Growth and Tax Relief Reconciliation Act (“EGTRRA”) and related changes. This means that opening of the determination letter program for the individual adopters of such plans as well as for pre-approved defined benefit plans and their adopters will be forthcoming. Individually designed plans are subject to a schedule separate and apart from that applicable to their pre-approved counterparts.

II. Filing for Determination Letter

A. Background

Announcement 2004-71, 2004-40 IRB 569, contained a draft revenue procedure describing procedures for implementing a system of six-year remedial amendment cycles for pre-approved plans and five-year staggered remedial amendment cycles for individually designed plans. The draft revenue procedure has now been finalized in the form of Revenue Procedure 2005-66, 2005-57 IRB 509.

B. EGTRRA Remedial Amendment Period

Under Rev. Proc. 2005-66, every individually designed qualified plan has a regular five-year remedial amendment cycle and every pre-approved (that is, master and prototype and volume submitter) plan has a regular six-year remedial amendment cycle.

The revenue procedure provides further that the EGTRRA remedial amendment period extends the remedial amendment period for all disqualifying provisions to which the EGTRRA remedial amendment period applies, including plan provisions required or permitted to be amended for EGTRRA, final regulations under IRC §401(a)(9), Rev. Rul. 2001-62, Rev. Rul. 2002-27 and disqualifying provisions described in Rev. Proc. 2004-25, subject to the requirement to have adopted any interim amendment as a requirement
of obtaining the extended remedial amendment date.

With respect to terminating plans, because the plan termination ends the remedial amendment cycle for the plan, any retroactive remedial plan amendment or other required amendments for a terminating plan must be adopted in connection with the plan termination (that is, plan amendments required to be adopted to reflect qualification requirements that apply as of the date of termination even if the date of termination is subsequent to the latest annual Cumulative Lists). An application will be deemed to be filed in connection with plan termination if it is filed no later than, the later of: (1) one year from the effective date of the termination, or (2) one year from the date on which the action terminating the plan is adopted. However, in no event can the application be filed later than twelve months from the date of distribution of substantially all plan assets.


C. Impact of Cumulative Lists

The Service intends to publish annually a Cumulative List of Changes in Plan Qualification Requirements (“Cumulative Lists”) which are intended to identify, on a year-by-year basis, all changes in the qualification requirements resulting from changes in statutes, or from regulations or other guidance published in the Internal Revenue Bulletin that are required to be taken into account in the written plan document. Each Cumulative Lists sets forth guidance that will be considered by the Service in its review of plans whose submission periods begins on February 1st following issuance of the Cumulative List. For example, sponsors or practitioners maintaining non-mass submitter defined contribution pre-approved plans have until January 31, 2006 to submit opinion and advisory letter applications. The Service will review these plans based upon the 2004 Cumulative Lists. Similarly, Cycle A individually designed plans will be submitted for determination letters between February 1, 2006 and January 31, 2007 and the Service will review these plans on the basis of the Cumulative List that is expected to be issued in the latter part of 2005. The target date for publication of each year’s Cumulative List is mid-November. In November 2004, the Service published its first Cumulative List.

In addition to the changes and requirements identified in each year’s Cumulative List, the Service will also consider, in its review of any opinion, advisory or determination letter application, all qualification requirements, in effect, or guidance published, before the issuance of the Cumulative List. [Rev. Proc. 2005-66, Part I, Section 3.04]

The end of a plan’s EGTRRA remedial amendment cycle is the time by which the plan sponsor must apply for a new determination letter for qualification changes that have first been listed in the Cumulative List at least twelve months before the end of the plan’s EGTRRA remedial amendment period and other qualification changes published prior to the issuance of the applicable Cumulative List but not so identified.
D. Individually Designed Plans

Rev. Proc. 2005-66 provides that on February 1, 2006, the Service will begin to accept applications for determination for individually designed plans that take into account the requirements of EGTRRA and other items identified on the 2005 Cumulative List. [Rev. Proc. 2005-66, Part I, Section 1.02]

Rev. Proc. 2005-66 finalizes the extension of the EGTRRA remedial amendment period for individually designed plans in accordance with the following schedule:

<table>
<thead>
<tr>
<th>Last Digit of EIN</th>
<th>Cycle</th>
<th>EGTRRA RAP Ends In</th>
<th>Next 5-Year RAP Cycle Ends On</th>
</tr>
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<tbody>
<tr>
<td>1, 6</td>
<td>A</td>
<td>01/31/2007</td>
<td>01/31/2012</td>
</tr>
<tr>
<td>2, 7</td>
<td>B</td>
<td>01/31/2008</td>
<td>01/31/2013</td>
</tr>
<tr>
<td>3, 8</td>
<td>C</td>
<td>01/31/2009</td>
<td>01/31/2014</td>
</tr>
<tr>
<td>4, 9</td>
<td>D</td>
<td>01/31/2010</td>
<td>01/31/2015</td>
</tr>
<tr>
<td>5,0</td>
<td>E</td>
<td>01/31/2011</td>
<td>01/31/2016</td>
</tr>
</tbody>
</table>

Example: Employer M is a C corporation. The last digit of Employer M’s EIN is 7. Employer M adopts a new plan, Plan X, on January 1, 2006. The cycle for Plan X is Cycle B. Since Employer M timely adopted Plan X in good faith with the intent of sponsoring a qualified plan, the initial remedial amendment cycle for Plan X ends January 31, 2008. Any remedial amendments required for Plan X to correct a disqualifying provision as described in Treas. Reg. §1.401(b)-1(b)(1) must be adopted by January 31, 2008, unless an application for a determination letter is submitted by that date. The plan would then be retroactively effective to the first day Employer M adopted Plan X in 2006. The subsequent 5-year remedial amendment cycles ends on January 31, 2013, January 31, 2018 etc. [Rev. Proc. 2005-66, Part III, Section 12.02, Example 1]

Example: Assume the same facts as in Example 1. On July 1, 2010, Employer M starts to operate the plan in a manner which is inconsistent with the written plan document but an amendment to reflect the plan change when made retroactively effective would not violate Section 411(d)(6). This change is unrelated to a change in qualification requirement or published guidance. To conform with plan operation, Employer M must adopt an amendment by the end of the plan year in