Part III. Administrative, Procedural, and Miscellaneous

26 CFR 601.201: Rulings and determination letters.
(Also, Part I, §§ 401, 403 and 501; 1.401(a)–1, 1.403(a)–1, 1.501(a)–1.)

Rev. Proc. 2005–16

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SECTION 1. PURPOSE

.01 This revenue procedure sets forth the Service's procedures for issuing opinion and advisory letters regarding the acceptability under § 401 and § 403(a) of the Internal Revenue Code (the "Code") of the form of pre-approved plans (that is, master and prototype (M&P) and volume submitter (VS) plans). The revenue procedure revises the existing procedures to eliminate several of the differences between the M&P and VS programs while maintaining the distinctive features of each program.

.02 This revenue procedure provides that the Service will accept applications for opinion and advisory letters beginning February 17, 2005, for defined contribution pre-approved plans that take into account the requirements of the Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. 107–16 (EGTRRA) as well as other changes in qualification requirements and guidance. The submission period for these pre-approved plans will end on January 31, 2006. The Service will announce the deadline for timely adoption by employers after the pre-approved documents have been reviewed. In addition, the Service intends to accept applications for determination letters for individually designed plans beginning on or after February 1, 2006, and applications for opinion and advisory letters for pre-approved defined benefit plans beginning February 1, 2007. The opening of these programs will be announced at a future date.

SECTION 2. BACKGROUND

.01 The procedures of the Service on the issuance of opinion letters regarding the acceptability of the form of M&P plans are set forth in Rev. Proc. 2000–20, 2000–1 C.B. 553, as modified. This revenue procedure modifies and supersedes Rev. Proc. 2000–20.

.02 Rev. Proc. 2005–6, 2005–1 I.R.B. 200, sets forth the general procedures of the Service on the issuance of employee plan determination letters and advisory letters regarding the acceptability of the form of volume submitter plans.

.03 Notice 2001–42, 2001–2 C.B. 70, and Rev. Proc. 2005–6 provide that opinion, advisory and determination letters that take into account EGTRRA will not be issued until further notice.

.04 Announcement 2004–33, 2004–18 I.R.B. 862, contains a draft revenue procedure that applies to both the M&P and VS programs, with the rules for issuing opinion letters and advisory letters for pre-approved plans. This revenue procedure finalizes and replaces the draft revenue procedure in Announcement 2004–33.

.05 Announcement 2004–71, 2004–40 I.R.B. 569, contains a draft revenue procedure that describes 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. Under the draft revenue procedure, sponsors and practitioners of pre-approved plans must submit requests for opinion or advisory letters by a specified time period within a six-year cycle in order to continue to rely on their opinion or advisory letters. The draft revenue procedure on remedial amendment cycles is expected to be finalized in the near future.

.06 Announcement 2004–71 also contains a discussion of the annual Cumulative List of Changes in Plan Qualification Requirements (Cumulative List). This Cumulative List identifies statutory changes and other guidance affecting qualification requirements that are considered by the Service in its review of plans for the applicable cycle. The 2004 Cumulative List was published in Notice 2004–84, 2004–52 I.R.B. 1030. This 2004 Cumulative List was issued in conjunction with the opening of the EGTRRA opinion and advisory letter program providing that the Service will accept applications with respect to defined contribution pre-approved plans beginning February 17, 2005, and ending January 31, 2006, as set forth in section 23 of this revenue procedure. The 2004 Cumulative List reflects law changes under EGTRRA with technical corrections made by the Job Creation and Worker Assistance Act of 2002, Pub. L. 107–147 (JCWAA), as well as regulations and guidance published by the Service that are effective after December 31, 2001. However, in order to be qualified, a plan must comply with all relevant qualification requirements, not just those on the 2004 Cumulative List. The Service will not review plan language for guidance issued after December 14, 2004, unless it is on the 2004 Cumulative List. Thus, sponsors of pre-approved plans generally may not rely on opinion or advisory letters with respect to any guidance issued after December 14, 2004, unless that guidance is on the 2004 Cumulative List.

SECTION 3. OVERVIEW OF THE REVENUE PROCEDURE

.01 Single Revenue Procedure — The Service maintains two programs for the "pre-approval" of plans qualified under § 401 and § 403(a) — the M&P program and the VS program. The two programs originated to serve different purposes and each has had its own set of rules. Until now, those rules were contained in different revenue procedures. In recent years, there have been changes that have eliminated several of the distinctions between the two programs. While the Service will continue to maintain the two programs separately, the narrowing of the differences between the programs makes it appropriate to set forth the rules for both programs in a single revenue procedure.

.02 Program Changes — The fundamental distinction between M&P and VS plans is unchanged by this revenue procedure. That is, M&P plans will generally continue to consist of a basic plan document and adoption agreement that may not be amended by adopting employers, except by choosing among permitted options under the adoption agreement, without the loss of M&P status. VS plans will continue to be allowed in either adoption agreement or "individually designed" format and employer amendments will not cause the loss of VS status provided the extent and complexity of the amendments are not inconsistent with the purposes of the VS program. However, the revenue procedure eliminates some of the other differences between the M&P and VS programs. The principal changes are as follows:

(1) The revenue procedure eliminates the requirement that the alloca-

tion or benefit formula in a nonstandardized M&P plan satisfy the uniformity requirements for safe harbor plans under § 1.401(a)(4)–2(b)(2) or § 1.401(a)(4)–3(b)(2) of the Income Tax Regulations. This change will allow adopting employers of nonstandardized defined contribution M&P plans to adopt an allocation formula that is designed to be cross-tested for nondiscrimination on the basis of equivalent benefits under § 1.401(a)(4)–8.

(2) The revenue procedure permits, but does not require, VS plans to include a provision that allows the VS practitioner to amend the plan on behalf of adopting employers. By choosing to include such a provision in the VS plan, the VS practitioner agrees to comply with certain record keeping and notice requirements that apply to sponsors of M&P plans. The Service will evaluate this new feature over time to determine whether to preserve it as a permanent feature of the VS program.

(3) The revenue procedure simplifies and streamlines the two programs. For example, under the procedure, nonstandardized safe harbor plans and paired standardized plans are discontinued as separate categories of M&P plans. This change has been made because recent changes in law and the procedures for employer reliance have diminished the utility of these types of plans.

.03 Additional Changes in this Revenue Procedure

Announcement 2004–33 contained a draft revenue procedure setting forth the rules for both the M&P and VS programs. The Service sought public comment before finalizing these procedures. This final revenue procedure retains the general structure and much of the substance of the draft, including the program changes listed in 3.02 above that were also contained in the draft. However, the Service has made additional changes to the revenue procedure after considering specific recommendations from commentators. In addition to minor revisions and clarifying language, the following changes have been made:

(1) The definition of VS practitioner is expanded. Generally, a VS practitioner must have at least 30 employer-clients reasonably expected to timely adopt a plan that is substantially similar to the VS practitioner's specimen plan. This revenue procedure lowers the requirement for a VS practitioner, so that it may have 10 employer/clients reasonably expected to timely adopt a money purchase pension plan (MP Plan), but only if a practitioner has a specimen MP Plan and at least one other type of specimen plan. (sec. 13.04)

(2) The number of trust or custodial account documents that may be submitted by an M&P sponsor or mass submitter with a single plan document is increased from 5 to 10. Additional submissions of trusts or custodial account documents will be permitted for an additional fee. (sec. 4.05)

(3) The category of plans eligible for advisory letters is expanded to include VS plans that provide for non safe-harbor hardship distributions under § 401(k), provided that nondiscriminatory and objective criteria are contained in the plans. (sec. 16.02)

(4) The category of plans eligible for advisory letters is expanded to include defined benefit plans that provide for employee contributions, by eliminating this category from the list of plans not covered by advisory letters. (sec. 16)

(5) The category of plans not eligible for advisory or opinion letters is revised to include plans designed to satisfy the provisions of § 105. (secs. 6.03(20) and 16.02(19))

(6) The instructions to VS practitioners are revised to specify that one specimen plan and application is required for a VS profit-sharing plan, with or without a § 401(k) arrangement. (sec. 17.03)

(7) The submission procedure for modifications of M&P mass submitter plans has been clarified to provide that an M&P mass submitter should submit only the first page of the applicable form along with the applicable fee as part of an initial submission, rather than the entire plan document. (sec. 12.03(2))

(8) The procedures for issuing opinion letters to M&P mass submitters and sponsors, and advisory letters to VS mass submitters and practitioners have been changed to provide that the Service will send an interim email notifying an M&P or VS mass submitter, sponsor or practitioner that review of the applicable plan has been completed, subject to final approval in the form of an opinion or advisory letter. (sections 7.07, 12.01, 17.05, 18.01)

(9) The requirement of word-for-word identical documents in order for an employer to have reliance is clarified to provide that typographical errors and cross-references may be corrected without affecting reliance, provided that these corrections do not change the original intended meaning or impact any qualification requirements, and an employer may adopt model, sample or other required good faith amendments. (sec. 19.03)

(10) The provisions on employer reliance have been expanded to specify that an adopting employer of a VS plan may rely on an advisory letter with respect to the nondiscrimination in amounts requirement under § 401(a)(4) when the adopting employer selects and utilizes certain design-based safe harbors and compensation definitions, under the conditions specified. (sec. 19.02)

(11) The provision on remedial amendment cycles is clarified to specify the circumstances in which the six-year remedial amendment cycle applies to an employer that has adopted a VS or M&P plan and has changed the plan so that it is considered to be an individually designed plan. (sec. 24)

(12) The VS provisions have been clarified to specify that amending the administrative provisions of the trust or custodial documents is allowed. This language is identical to the provisions that apply to nonstandardized M&P plans in section 5.09. (sec. 14)

(13) The definition of "National Sponsor" and "VS Practitioner" is revised to include a sponsor or practitioner that has 3000 or more adopting employers or 30 or more adopting employers in 30 or more states. This definition was included in Announcement 2004–33 but was not in the draft revenue procedure attached to that announcement. (sec. 4.09 and 13.04)

(14) The VS submission procedures specify that Form 4461 is being revised to incorporate VS applications. Until the Form is published, the VS submission must include a cover letter requesting approval. (sec. 17.02)

(15) The application procedure is streamlined to provide that VS and M&P applications are now submitted to the same address. This address was formerly used for VS applications but is a change of address for M&P applications. (sec. 20)

(16) The revocation procedures contain a requirement that the content of the notification to each adopting employer must ex-

plain how the revocation affects reliance. (sec. 22)

(17) The provision on employer amendments is revised to specify that sample, model or other required good faith amendments adopted by certain employers will not cause the plan to be individually designed. (sec. 5.02, sec. 15, sec. 19)

(18) The provision on amendments of M&P mass submitter plans is revised to include references to sample or model amendments. (sec. 12.04)

(19) The revenue procedure is revised throughout so that its provisions are consistent with the draft revenue procedure attached to Announcement 2004–71 on remedial amendment periods.

.04 Provisions Related to EGTRRA — This revenue procedure announces the opening of the pre-approved defined contribution plan programs as of February 17, 2005, for EGTRRA and other applicable guidance. The 2004 Cumulative List reflects law changes under EGTRRA including technical corrections made by JCWAA as well as regulations and guidance published by the Service that are effective after December 31, 2001, that will be considered by the Service in its review of plans. Section 23 of this revenue procedure provides further details on the scope of this Cumulative List. This Cumulative List will be updated and published annually to identify statutory, regulatory and guidance changes that will be considered by the Service in its review of plans whose remedial amendment cycles are proposed to end on the January 31 of the second calendar year following publication of the list.

.05 Remedial Amendment Period — In Announcement 2004–71, the Service included a draft revenue procedure containing the Service's procedures for issuing opinion and advisory letters for pre-approved plans under a regular, six-year remedial amendment cycle under § 401(b) of the Internal Revenue Code. The draft also contains procedures for issuing determination letters under a staggered remedial amendment period system that establishes regular, five-year cycles for determination letters for individually designed plans. The Service intends to issue guidance that will supersede and finalize the draft revenue procedure attached to Announcement 2004–71 in the near future.

PART I — M&P PLANS

SECTION 4. DEFINITIONS

.01 Master Plan — A "master plan" is a plan (including a plan covering self-employed individuals) that is made available by a sponsor for adoption by employers and for which a single funding medium (for example, a trust or custodial account) is established, as part of the plan, for the joint use of all adopting employers. A master plan consists of a basic plan document, an adoption agreement, and, unless included in the basic plan document, a trust or custodial account document.

.02 Prototype Plan — A "prototype plan" is a plan (including a plan covering self-employed individuals) that is made available by a sponsor for adoption by employers and under which a separate funding medium is established for each adopting employer. A prototype plan consists of a basic plan document, an adoption agreement, and, unless the basic plan document incorporates a trust or custodial account agreement the provisions of which are applicable to all adopting employers, a trust or custodial account document.

.03 Basic Plan Document — A "basic plan document" is the portion of a plan containing all the non-elective provisions applicable to all adopting employers. No options (including blanks to be completed) may be provided in the basic plan document, except as provided in section 12.03(1) of this revenue procedure regarding flexible plans.

.04 Adoption Agreement — An "adoption agreement" is the portion of the plan containing the options that may be selected by an adopting employer.

.05 Trust or Custodial Account Document (*Note: This definition does not apply if the basic plan document includes a trust or custodial account agreement the provisions of which apply to all adopting employers.*) —

(1) A "trust or custodial account document" is the portion of an M&P plan that contains the trust agreement or custodial account agreement and includes provisions covering such matters as the powers and duties of trustees, investment authority, and the kinds of investments that may be made.

(2) Except as provided in section 5.09 and below, all provisions of the trust or custodial account document must be applicable to all adopting employers of that trust or custodial account, and no options (including blanks to be completed) may be provided in the trust or custodial account document.

(3) With respect to prototype plans, a sponsor or mass submitter may provide up to 10 separate trust or custodial account documents that are intended for use with any single basic plan document. Notwithstanding the above, a sponsor or mass submitter may submit more than 10 separate trust or custodial account documents intended for use with any single basic plan document, along with an additional user fee that applies to submissions above the 10 trust (or custodial account) limit. The amount of the applicable user fee will be specified in future guidance.

(4) As provided in section 5.09, a sponsor or M&P mass submitter may provide a trust or custodial account document, designated for use only by adopters of nonstandardized plans, which provides for blanks to be completed with respect to administrative provisions of the trust or custodial account agreement.

(5) Any trust or custodial account document (including one to be used by adopters of standardized plans) may provide for blanks to be completed that merely enable the adopting employer to specify the names of the plan, employer, trustee or custodian, plan administrator and other fiduciaries, the trust year, and the name of any pooled trust in which the plan's trust will participate.

.06 Opinion Letter — An "opinion letter" is a written statement issued by the Service to a sponsor or M&P mass submitter as to the acceptability of the form of an M&P plan under § 401(a) or § 403(a), and, in the case of a master plan, the acceptability of the master trust under § 501(a).

.07 Sponsor — A "sponsor" is any person that (1) has an established place of business in the United States where it is accessible during every business day and (2) represents to the Service that it has at least 30 employer-clients each of which is reasonably expected to timely adopt the sponsor's basic plan document. The deadline for timely adoption will be announced by the Service in future guidance.

A sponsor may request opinion letters for any number of basic plan documents and adoption agreements provided the 30-employer requirement is met with respect to at least one basic plan document. The Service reserves the right at any time to request from the sponsor a list of the employers that have adopted or are expected to adopt the sponsor's M&P plans, including the employers' business addresses and employer identification numbers.

Notwithstanding the above, any person that has an established place of business in the United States where it is accessible during every business day may sponsor a plan as a word-for-word identical adopter or minor modifier adopter of a plan of an M&P mass submitter, regardless of the number of employers that are expected to adopt the plan.

By submitting an application for an opinion letter for an M&P plan under this revenue procedure (or by having an application filed on its behalf by an M&P mass submitter as required for a minor modifier), a person represents to the Service that it is a sponsor, as defined above, and agrees to comply with any requirements imposed on sponsors by this revenue procedure. Failure to comply with these requirements may result in the loss of eligibility to sponsor M&P plans and the revocation of opinion letters that have been issued to the sponsor.

.08 M&P Mass Submitter — An "M&P mass submitter" is any person that (1) has an established place of business in the United States where it is accessible during every business day and (2) submits opinion letter applications on behalf of at least 30 unaffiliated sponsors each of which is sponsoring, on a word-for-word identical basis, the same basic plan document. A flexible plan (as defined in section 12.03(1)) that is adopted by a sponsor will be considered a word-for-word identical plan. An M&P mass submitter may submit an opinion letter application on its own behalf as one of the 30 unaffiliated sponsors. For purposes of this definition, affiliation is determined under § 414(b) and (c). Additionally, the following will be considered to be affiliated: any law, accounting, consulting firm, etc., with its partners, members, associates, etc. An M&P mass submitter will be treated as an M&P mass submitter with respect to all its M&P plans provided the 30 unaffiliated sponsor requirement is met with respect to at least one basic plan document.

Notwithstanding the above, any person that received a favorable TRA '86 opinion letter for a plan as an M&P mass submitter under Rev. Proc. 89–9, 1989–1 C.B. 780, will continue to be treated as an M&P mass submitter with respect to all its M&P plans if it submits applications on behalf of at least 10 sponsors (regardless of affiliation) each of which is sponsoring, on a word-for-word identical basis, the same basic plan document.

.09 National Sponsor — A "national sponsor" is a sponsor that has either (a) 30 or more adopting employers in each of 30 or more states (treating, for this purpose, the District of Columbia as a state) or (b) 3000 or more adopting employers. The determination as to whether there are 3000 or more adopting employers or 30 or more adopting employers in each of 30 or more states may be made on any one date during the 12 month period ending on the date that is 60 days after the effective date of this revenue procedure. For this purpose, an adopting employer is any employer that has adopted any plan of the sponsor that has a GUST opinion letter. GUST is an acronym for the Uruguay Round Agreements Act (GATT), the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), the Small Business Job Protection Act of 1996 (SBJPA), the Taxpayer Relief Act of 1997 (TRA '97), the Internal Revenue Service Restructuring and Reform Act of 1998 (RRA '98), and the Community Renewal Tax Relief Act of 2000 (CRA)

.10 Standardized Plan — A "standardized plan" is an M&P plan that meets the following requirements:

(1) The provisions governing eligibility and participation are such that the plan by its terms must benefit all employees described in section 5.13 (regardless of whether any employer is treated as operating separate lines of business under § 414(r)) except those that may be excluded under § 410(a)(1) or (b)(3). The adoption agreement may provide options as to whether some or all of the employees described in § 410(a)(1) or (b)(3) are to be excluded, provided that the criteria for excluding employees described in § 410(a)(1) or (b)(3) applies uniformly to all employees. A standardized plan generally may not deny an accrual or allocation to an employee eligible to participate merely because the employee is not an active employee on the last day of the plan year or has failed to complete a specified number of hours of service during the year. However, the plan may deny an allocation or accrual to an employee who is eligible to participate if the employee terminates service during the plan year with not more than 500 hours of service and is not an active employee on the last day of the plan year.

(2) The eligibility requirements under the plan are not more favorable for highly compensated employees (as defined in § 414(q)) than for other employees.

(3) Under the plan, allocations, in the case of a defined contribution plan (other than any cash or deferred arrangement part of the plan), or benefits, in the case of a defined benefit plan, are determined on the basis of total compensation. For this purpose, total compensation means a definition of compensation that includes all compensation within the meaning of § 415(c)(3) and excludes all other compensation or that otherwise satisfies § 414(s) under § 1.414(s)–1(c) of the Income Tax Regulations.

(4) Unless the plan is a target benefit plan or a § 401(k) and/or § 401(m) plan, the plan must, by its terms, satisfy one of the design-based safe harbors described in § 1.401(a)(4)–2(b)(2) (taking into account § 1.401(a)(4)–2(b)(4)) or in § 1.401(a)(4)–3(b)(3), (4), or (5) (taking into account § 1.401(a)(4)–3(b)(6)).

(5) All benefits, rights, and features under the plan (other than those, if any, that have been prospectively eliminated) are currently available to all employees benefiting under the plan.

(6) Any past service credit under the plan must meet the safe harbor in § 1.401(a)(4)–5(a)(3).

A plan will not fail to satisfy the coverage requirement for standardized plans merely because the plan provides, either as the result of an elective provision or by default in the absence of an election to the contrary, that individuals who become employees, within the meaning of section 5.13, as the result of a "§ 410(b)(6)(C) transaction" will be excluded from eligi-

bility to participate in the plan during the period beginning on the date of the transaction and ending on a date that is not later than the last day of the first plan year beginning after the date of the transaction. A "§ 410(b)(6)(C) transaction" is an asset or stock acquisition, merger, or other similar transaction involving a change in the employer of the employees of a trade or business.

.11 Nonstandardized Plan — A "nonstandardized plan" is an M&P plan that is not a standardized plan.

SECTION 5. PROVISIONS REQUIRED IN EVERY M&P PLAN

.01 Sponsor Amendments — M&P plans must provide a procedure for sponsor amendment, so that changes in the Code, regulations, revenue rulings, other statements published by the Internal Revenue Service, or corrections of prior approved plans may be applied to all employers who have adopted the plan. Sponsors must make reasonable and diligent efforts to ensure that adopting employers of the sponsor's M&P plan have actually received and are aware of all plan amendments and that such employers complete and sign new adoption agreements when necessary. See section 5.11. Failure to comply with this requirement may result in the loss of eligibility to sponsor M&P plans and the revocation of opinion letters that have been issued to the sponsor.

.02 Employer Amendments — An employer that amends any provision of an approved M&P plan including its adoption agreement (other than to change the choice of options, if the plan permits or contemplates such a change) or an employer that chooses to discontinue participation in a plan as amended by its sponsor and does not substitute another approved M&P plan is considered to have adopted an individually designed plan. However, this rule does not apply in the case of amendments permitted under sections 5.06 and 5.09 and sample or model amendments published by the Service (or other required good faith amendments) that specifically provide that their adoption by an adopter of an M&P plan will not cause such plan to be treated as individually designed. Also see section 19.03 regarding the effect of employer amendments on an employer's ability to rely on an opinion letter and section 24 with respect to applicable remedial amendment periods. An employer that amends an M&P plan because of a waiver of the minimum funding requirement under § 412(d) will also be considered to have an individually designed plan. The procedures stated in Rev. Proc. 2005–6 relating to the issuance of determination letters for individually designed plans will then apply to the plan as adopted by the employer.

.03 Compensation Requirements in Nonstandardized Plans — Each nonstandardized M&P plan must give the adopting employer the option to select total compensation as the compensation to be used in determining allocations or benefits. For this purpose, total compensation means a definition that includes all compensation within the meaning of § 415(c)(3) and excludes all other compensation or that otherwise satisfies § 414(s) under § 1.414(s)–1(c).

.04 Automatic or Optional Safe Harbor Provisions in Nonstandardized Plans — Each nonstandardized M&P plan must automatically or by option allow the adopting employer to satisfy one of the design-based safe harbors described in § 1.401(a)(4)–2(b)(2) or § 1.401(a)(4)–3(b)(3), (4), and (5). A nonstandardized defined contribution plan is permitted to include allocation formulas which must be general tested under § 1.401(a)(4)–2(c) or cross-tested under § 1.401(a)(4)–8. A nonstandardized defined benefit plan is permitted to include benefit formulas that must be general tested under § 1.401(a)(4)–3(c).

.05 Anti-Cutback Provisions — M&P plans must specifically provide for the protection provided under § 411(a)(10) and (d)(6), to the extent required, in the event that the employer amends the plan in any manner such as by revising the options selected in the adoption agreement or by adopting a new M&P plan. An M&P sponsor may not amend its plan in a manner that could result in the elimination of a benefit to the extent the benefit is required to be protected under § 411(d)(6) with respect to the plan of any adopting employer, unless permitted to do so under §§ 1.401(a)–4 and 1.411(d)–4. In addition, an M&P plan that does not contain vesting for all years that is at least as favorable to participants as that provided in § 416(b), must specifically provide that any vesting that occurs while the plan is top-heavy, will not be cut back if the plan ceases to be top-heavy.

.06 Adopting Employer Modification to Satisfy §§ 415 and 416 — M&P plans must provide that the plan provisions may be amended by overriding plan language completed by the employer in the adoption agreement where such language is necessary to satisfy § 415 or 416 because of the required aggregation of multiple plans under these sections. Generally, a space should be provided in the adoption agreement with instructions for the employer to add such language as necessary to satisfy §§ 415 and 416. In addition, a space must be provided in the adoption agreement for the employer to specify the interest rate and mortality tables used for purposes of establishing the present value of accrued benefits in order to compute the top-heavy ratio under § 416. Such a space must be included in both defined contribution plans and defined benefit plans.

.07 Defined Contribution § 415 Aggregation — Plan language must be incorporated that aggregates all defined contribution M&P plans to satisfy § 415(c) and (f). Sample language provided in the Listing of Required Modifications may be downloaded from the Internet at the following address: ***http://www.irs.gov***.

.08 Top-heavy Requirements — Each plan must either provide that all the additional requirements applicable to top-heavy plans (described in § 416) apply at all times or provide that such requirements apply automatically if the plan is top-heavy regardless of how the adoption agreement is completed. In any case where the latter option is chosen, all the requirements for determining whether the plan is top-heavy must be included in the plan. (See Questions T–35 and T–36 of § 1.416–1.)

.09 Adopting Employer Modification of Trust or Custodial Account Document — An employer that adopts a nonstandardized M&P plan will not be considered to have an individually designed plan merely because the employer amends administrative provisions of the trust or custodial account document (such as provisions relating to investments and the duties of trustees), provided the amended provisions are not in conflict with any other provision of the plan and do not cause the plan to fail to qualify under § 401(a). For this purpose, an amendment includes modifi-

cation of the language of the trust or custodial account document and the addition of overriding language.

An employer that adopts a standardized M&P plan may amend the trust or custodial account document provided such amendment merely involves the specification of the names of the plan, employer, trustee or custodian, plan administrator and other fiduciaries, the trust year, or the name of any pooled trust in which the plan's trust will participate.

.10 Provisions Required in Adoption Agreements Regarding Reliance — The adoption agreement of every nonstandardized M&P plan must include, in close proximity to the signature blank, a statement that describes the limitations on employer reliance on an opinion letter without a determination letter and the circumstances under which an employer will have no reliance without a determination letter. See section 19.02 and section 19.03. Standardized plans must also include a similar statement in the adoption agreement that the adopting employer may not rely on the opinion letter issued by the Service but must apply for a determination letter to have reliance under the circumstances described in section 19.01.

.11 Other Provisions Required in Adoption Agreements — Each M&P plan must contain a dated employer signature line. The employer must sign the adoption agreement when it first adopts the plan and must complete and sign a new adoption agreement if the plan has been restated. In addition, the employer must complete a new signature page if it modifies any prior elections or makes new elections in its adoption agreement. The signature requirement may be satisfied by an electronic signature that reliably authenticates and verifies the adoption of the adoption agreement, or restatement, amendment or modification thereof, by the employer. The adoption agreement must state that it is to be used with one and only one specific basic plan document. In addition, the adoption agreement must contain a cautionary statement to the effect that the failure to properly fill out the adoption agreement may result in failure of the plan to qualify. The adoption agreement must also contain a statement that provides that the sponsor will inform the adopting employer of any amendments made to the plan or of the discontinuance or abandonment of the plan.

.12 Sponsor Telephone Numbers — M&P plan adoption agreements must include the sponsor's name, address and telephone number (or a space for the address and telephone number of the sponsor's authorized representative) for inquiries by adopting employers regarding the adoption of the plan, the meaning of plan provisions, or the effect of the opinion letter.

.13 Definition of Employee / § 414(b), (c), (m), (n) and (o) — Each M&P plan must include a definition of employee as any employee of the employer maintaining the plan or any other employer aggregated under § 414(b), (c), (m) or (o) and the regulations thereunder. The definition of employee shall also include any individual deemed under § 414(n) (or under regulations under § 414(o)) to be an employee of any employer described in the previous sentence.

.14 Definition of Service / § 414(b), (c), (m), (n), and (o) — Each M&P plan must specifically credit all service with any employer aggregated under § 414(b), (c), (m) or (o) and the regulations thereunder as service with the employer maintaining the plan. In addition, in the case of an individual deemed under § 414(n) (or under regulations under § 414(o)) to be the employee of any employer described in the previous sentence, service with such employer must be credited to such individual.

SECTION 6. OPINION LETTERS — SCOPE

.01 General Limits on Opinion Letters — Opinion letters will be issued only to sponsors or M&P mass submitters. Opinion letters constitute determinations as to the qualification of the plans as adopted by particular employers only under the circumstances, and to the extent, described in section 19. In the case of prototype plans, opinion letters do not constitute rulings or determinations as to the exempt status of related trusts or custodial accounts.

.02 Nonapplicability of the Procedure to IRAs and SEPs — Opinion letters will not be issued under this revenue procedure for prototype plans intended to meet the requirements for individual savings programs or simplified employee pension programs under § 408 (see Rev. Proc. 87–50, 1987–2 C.B. 647, Rev. Proc. 97–29, 1997–1 C.B. 698, and Rev. Proc. 98–59, 1998–2 C.B. 727).

.03 Areas Not Covered by Opinion Letters — Opinion letters will not be issued for:

(1) Multiemployer plans and multiple employer plans;

(2) Union plans (This does not preclude an M&P plan from covering employees of the employer who are included in a unit covered by a collective bargaining agreement or the adoption of an M&P plan pursuant to such agreement as a single employer plan that covers only employees of the employer.);

(3) Stock bonus plans;

(4) Employee stock ownership plans;

(5) Pooled fund arrangements contemplated by Rev. Rul. 81–100, 1981–1 C.B. 326 (as modified by Rev. Rul. 2004–67, 2004–28 I.R.B. 28);

(6) Annuity contracts under § 403(b);

(7) All cash balance plans and any other defined benefit plans (regardless of whether they are cash balance plans) under which the test for nondiscrimination under § 401(a)(4) is made by reference to contributions rather than benefits;

(8) Plans described in § 414(k) (relating to a defined benefit plan that provides a benefit derived from employer contributions that is based partly on the balance of the separate account of a participant);

(9) Target benefit plans, other than plans which, by their terms, satisfy each of the safe harbor requirements described in § 1.401(a)(4)–8(b)(3)(i), as well as the additional rules in § 1.401(a)(4)–8(b)(3)(ii) through (vii);

(10) Defined benefit plans that provide for employee contributions;

(11) Plans that would not satisfy the qualification requirements except as governmental plans as described in § 414(d);

(12) Church plans described in § 414(e) that have not made the election provided by § 410(d);

(13) Plans under which the § 415 limitations are incorporated by reference;

(14) Plans that incorporate the ADP test under § 401(k)(3) or the ACP test under § 401(m)(2) by reference;

(15) Section 401(k) plans (standardized and nonstandardized) that provide for hardship distributions under circumstances other than those described in the

safe harbor standards in the regulations under § 401(k);

(16) Fully-insured § 412(i) plans, other than plans that, by their terms, satisfy the safe harbor for § 412(i) plans in § 1.401(a)(4)–3(b)(5);

(17) Plans that fail to contain a provision reflecting the requirements of § 414(u) (see Rev. Proc. 96–49, 1996–2 C.B. 369);

(18) Plans that include so-called failsafe provisions for § 401(a)(4) or the average benefit test under § 410(b);

(19) Plans that include blanks or fill-in provisions for the employer to complete unless the provisions have parameters that preclude the employer from completing the provisions in a manner that could violate the qualification requirements.

(20) Plans designed to satisfy the provisions of § 105.

The Service may, in its discretion, decline to issue opinion letters for other types of plans not described in this section 6.03.

SECTION 7. OPINION LETTERS — INSTRUCTIONS TO SPONSORS

.01 Employee Plans Rulings and Agreements Issues Opinion Letters — Employee Plans Rulings and Agreements will, upon the request of a sponsor, issue an opinion letter as to the acceptability of the form of the sponsor's M&P plan and any related trust or custodial account under §§ 401(a), 403(a), and 501(a).

.02 Procedure for Requesting Opinion Letters — A request for an opinion letter relating to an M&P plan must be submitted on the current version of Form 4461, *Application for Approval of Master or Prototype Defined Contribution Plan*, Form 4461–A, *Application for Approval of Master or Prototype Defined Benefit Plan*, or Form 4461–B, *Application for Approval of Master or Prototype Plan Mass Submitter Adopting Sponsor*, as appropriate. The forms (and instructions) specify what to include with the application. These forms may be downloaded from the Internet at the following address: ***http://www.irs.gov***. All information on the first page of the application must be typed. The request must be sent to the address in section 20. The Service intends to revise Form 8717, *User Fee for Employee Plan Determination Letter Request*, so that it applies to a request for an opinion letter under the M&P program. Until the form has been revised, an M&P request should continue to include the applicable user fee with the submission.

.03 Expediting Review of Substantially Identical Plans — The Service reserves the right to review applications in any order that will expedite the processing of opinion letter applications, subject to section 21.03. To expedite the review of substantially identical plans that are not mass submitter plans, the Service encourages plan drafters and sponsors to include with each opinion letter application, where it is appropriate, a cover letter setting forth the following information:

(1) The name and file folder number (if available) of the plan that, for review purposes, the plan drafter designates as the "lead plan" (including the name and EIN of the sponsor);

(2) A list of all plans written by the plan drafter that are substantially identical to the lead plan (including the information described in (1) above);

(3) A description of each place where the plan for which the application is being submitted is not word-for-word identical to the language of the lead plan, including an explanation of the purpose and effect of each such difference; and

(4) A certification, made under penalty of perjury by the plan drafter, that the information described in (3) above is true and complete.

If the sponsor or plan drafter is aware that a lead plan or any substantially identical plan has been assigned for review to a specialist, the cover letter should also indicate the name of specialist, if possible. To the extent feasible, lead plans and substantially identical plans should be submitted together. The Service will regard the information and certification described in (3) and (4) above as a material representation for purposes of issuing an opinion letter.

.04 Separate Applications Required for Different Categories of M&P Plans / Use of Same Basic Plan Document by Multiple Plans — An M&P plan shall not contain any combination of profit-sharing, money purchase (other than target benefit), target benefit, non-integrated defined benefit, or integrated defined benefit plan features. However, separate defined contribution plans may have the same basic plan document and separate defined benefit plans may have the same basic plan document, but the provisions of the basic plan document must be identical for all plans using that document (that is, no elective or optional features). For example, a sponsor may submit four plans with respect to a given defined benefit basic plan document: integrated standardized and nonstandardized; and nonintegrated standardized and nonstandardized plans. A sponsor may also use one defined contribution basic plan document for a money purchase plan, a target benefit plan, and a profit-sharing plan. One basic plan document may not be used with respect to both defined benefit and defined contribution plans. A separate adoption agreement and completed application form must be submitted with respect to each defined benefit plan and each defined contribution plan. In the case of a simultaneous submission of plans using the same basic plan document, only one copy of the basic plan document should be provided. If the requests are not simultaneous, the sponsor must submit a copy of the basic plan document with each submission and include a cover letter identifying the original submission. The number of such basic plan document must remain the same as in the prior submission.

.05 Sample Language — A Listing of Required Modifications (LRM) containing sample language to be used in drafting M&P plans is available from Employee Plans Rulings and Agreements. Such language is not automatically required in M&P plans but should be used as a guide in drafting such plans. To expedite the review of their plans, sponsors are encouraged to use LRM language and to identify where such language is being used in their plan documents. LRMs may be downloaded from the Internet at the following address: ***http://www.irs.gov***.

.06 Material Furnished to Adopting Employers — A sponsor must furnish each adopting employer with a copy of the approved plan, copies of any subsequent amendments, and the most recently issued Internal Revenue Service opinion letter.

.07 Timing of Issuance of Opinion Letters — The Service intends to issue opinion letters to M&P mass submitters and sponsors (as well as advisory letters to VS mass submitters and practitioners) at approximately the same time within the ap-

plicable 6-year cycle. In the interim, the Service will send an email to the applicable M&P or VS mass submitter, sponsor, or practitioner, if the Service determines that the plan appears to be in full compliance with the applicable qualification requirements, based on the submissions and the completed review. Notwithstanding the above, this email only provides assurance that the Service believes the plan appears to meet the applicable qualification requirements under review as of the date of the email. This email correspondence is for the convenience of the applicable sponsor, practitioner or mass submitter, but does not constitute an official opinion or advisory letter. Until issuance of the official opinion or advisory letter no reliance exists. In addition, the Service reserves the right to require changes after the email is sent, in its sole discretion.

SECTION 8. APPROVED PLANS — MAINTENANCE OF APPROVED STATUS

.01 Cumulative List in Six-Year Cycle — Future guidance described in section 3.05 of this revenue procedure will provide that sponsors of pre-approved M&P plans must submit requests for opinion letters by a specified time period within a six-year cycle in order to continue to rely on their opinion letters. Sponsors may apply for opinion letters at other times, but these filings will be "off-cycle" filings as described in section 21.03. The Service will review the plans that have been submitted by the specified time period within a six-year cycle taking into account the applicable Cumulative List that identifies changes in the qualification requirements of the Code as well as items of published guidance relating to the plan qualification requirements, such as regulations and revenue rulings. However, in order to be qualified, a plan must comply with all relevant qualification requirements, not just those on the applicable Cumulative List. The letter will not take into account, and a sponsor may not rely on opinion letters with respect to, statutory changes enacted, and/or any guidance issued, after the issuance of the applicable Cumulative List, unless those changes and/or guidance are listed on the applicable Cumulative List.

.02 Subsequent Required Amendments — Except as otherwise provided in future guidance, in the event of changes in qualification requirements resulting from future guidance, or other regulatory or statutory changes that were not taken into account in issuing the opinion letter, an approved M&P plan must be amended by the sponsor and, if necessary, the employer, to retain its approved status if any provisions therein fail to meet the requirements of law, regulations, or other issuances and guidelines affecting qualification. Failure to so amend could result in the loss of a plan's qualified status. However, this does not change the applicable period during the six-year cycle when sponsors must request opinion letters, which will still occur only once every six years. Sponsors are required to make reasonable and diligent efforts to ensure that each employer which, to the best of the sponsor's knowledge, continues to maintain the plan as an M&P plan, amends its plan when necessary.

Even if future guidance provides that the plan need not be amended during a six year cycle to reflect a change in the qualification requirements, the plan must operationally comply with any changes in qualification requirements and the terms of the plan as ultimately amended to reflect the change. Failure to comply with this or any other requirement imposed on sponsors by this revenue procedure may result in the loss of eligibility to sponsor M&P plans and the revocation of opinion letters that have been issued to the sponsor.

.03 Amendments Following Revenue Rulings — If an approved M&P plan is required to be amended to retain its approved status as a result of publication by the Service of a revenue ruling, notice or similar statement in the Internal Revenue Bulletin (I.R.B.), with changes that were not taken into account in issuing the opinion letter then, unless specifically stated otherwise in the revenue ruling, etc., the time by which the sponsor must amend its M&P plan to conform to the requirements of the revenue ruling, etc., shall be the end of the one-year period after its publication in the I.R.B., and with respect to any adopting employer's plan the effective date of such amendment shall be the first day of the first plan year beginning within such one-year period. As noted in section 8.02, this does not change the applicable period during the six-year cycle when sponsors must request opinion letters, which will still only occur once every six years. Further, sponsors must make reasonable and diligent efforts to ensure that each employer amends its plan when necessary as noted in section 8.02.

.04 Adopting Employers — The Service will announce when adopting employers must adopt amendments to comply with new guidance issued by the Service. Regardless of when amendments are required to be made, adopting employers must operationally comply as of the applicable effective date of the new guidance.

.05 Loss of Qualified Status — If a sponsor reasonably concludes that an employer's M&P plan may no longer be a qualified plan and the sponsor does not or cannot submit a request to correct the qualification failure under the Employee Plans Compliance Resolution System (EPCRS), it is incumbent on the sponsor to notify the employer that the plan may no longer be qualified, advise the employer that adverse tax consequences may result from loss of the plan's qualified status, and inform the employer about the availability of EPCRS. See Rev. Proc. 2003–44, 2003–1 C.B. 1051.

SECTION 9. WITHDRAWAL OF REQUESTS

.01 Notification and Effect — A sponsor may withdraw its request for an opinion letter at any time prior to the issuance of such letter by notifying EP Rulings and Agreements in writing of such withdrawal. The sponsor must also notify each employer who adopted the plan that the request has been withdrawn. Such an employer will be deemed to have an individually designed plan.

.02 Service Retains Information — Even though a request is withdrawn, EP Rulings and Agreements will retain all correspondence and documents associated with that request and will not return them to the sponsor. EP Rulings and Agreements may furnish its views concerning the qualified status of the plan to EP Examinations, which has audit jurisdiction over the returns of the employers that have adopted the plan.

SECTION 10. ABANDONED PLANS

.01 Notification to the Service — A sponsor should notify EP Rulings and

Agreements in writing of an approved M&P plan that is no longer used by any employer and which the sponsor no longer intends to offer for adoption. Such written notification should be sent to the address in section 20 and should refer to the file folder number appearing on the latest opinion letter issued.

.02 Notification to Employers — A sponsor that intends to abandon an approved M&P plan that is in use by any adopting employer must inform each adopting employer that the form of the plan has been terminated, that the employer's plan will become an individually designed plan (unless the employer adopts another approved M&P plan), and that any employer reliance will not continue if there is a change in law or other change in the qualification requirements. After so informing all adopting employers, the sponsor should notify EP Rulings and Agreements in accordance with subsection .01 above.

SECTION 11. RECORD KEEPING REQUIREMENTS

.01 Filing of Opinion Letter Application Constitutes Agreement to Comply with Record Keeping Requirements — By submitting an application for an opinion letter under this revenue procedure (or by having an application filed on its behalf by an M&P mass submitter), an M&P plan sponsor agrees, as provided in section 4.07, to comply with the requirements imposed on the sponsor by this revenue procedure, including the record keeping requirements of this section. Failure to comply with the requirements imposed on the sponsor by this revenue procedure may result in the loss of eligibility to sponsor M&P plans and the revocation of opinion letters that have been issued to the sponsor.

.02 Maintenance and Availability of Records of Adopting Employers — An M&P plan sponsor must maintain, or have maintained on its behalf, for each of its plans, a record of the names, business addresses, and taxpayer identification numbers of all employers that have adopted the plan. However, a sponsor need not maintain records with respect to employers that, to the best of the sponsor's knowledge, ceased to maintain the plan as an M&P plan more than three years earlier. Upon written request, a sponsor must provide to the Service a list of such adopting employers that indicates, to the best of the sponsor's knowledge, which of such employers continue to maintain the plan as an M&P plan and which of such employers have ceased to maintain the plan as an M&P plan within the preceding three years.

SECTION 12. M&P MASS SUBMITTERS

.01 Opinion Letters Issued to M&P Mass Submitters —

(1) EP Rulings and Agreements will, upon request by an M&P mass submitter, as defined in section 4.08, issue an opinion letter as to the acceptability of the form of the mass submitter's M&P plan and any related trust or custodial account under §§ 401(a), 403(a), and 501(a). With respect to its plan, the M&P mass submitter must submit a completed Form 4461 or 4461-A, as applicable, to the address in section 20. The first page of the Form 4461 or 4461-A must be typed. The application must include a copy of the plan (adoption agreement and basic plan document) and any separate trust or custodial account document(s). In the case of an initial submission of a basic plan document under this revenue procedure, the M&P mass submitter's application must also be accompanied by applications for opinion letters filed on behalf of the requisite number of identical adopters (as determined under section 4.08), unless the M&P mass submitter has already satisfied this requirement in connection with a previous application under this revenue procedure involving another basic plan document. The Service intends to revise Form 8717, *User Fee for Employee Plan Determination Letter Request*, so that it applies to such a request. Until the form has been revised, an M&P request should continue to include the applicable user fee with the submission. An M&P mass submitter may submit an application on its own behalf as one of the requisite number of adopting sponsors.

(2) After satisfying the requisite number of adopting sponsors requirement, the M&P mass submitter may submit additional applications on behalf of other sponsors that wish to adopt a word-for-word identical plan or a plan that contains minor modifications from the mass submitter plan, as provided in section 12.03(2). In addition, the M&P mass submitter may then submit requests for opinion letters under this section 12.01 for its other plans, regardless of the number of identical adopters of such other plans.

(3) The Service intends to send opinion letters to M&P mass submitters and sponsors (as well as advisory letters to VS mass submitters and practitioners) at approximately the same time within the applicable six-year cycle. In the interim, the Service will send an email to the applicable M&P or VS mass submitter, sponsor, or practitioner, if the Service determines that the plan appears to be in full compliance with the applicable qualification requirements based on the submissions and the completed review. Notwithstanding the above, this email only provides assurance that the Service believes the plan appears to meet the applicable qualification requirements under review as of the date of this email. This email correspondence is for the convenience of the applicable sponsor, practitioner or mass submitter, but does not constitute an official opinion or advisory letter. Until issuance of the official opinion or advisory letter no reliance exists. The Service reserves the right to require changes after the email is sent, in its sole discretion.

.02 Reduced Procedural Requirements for Sponsors That Use Mass Submitter Plans — A sponsor of an M&P plan of a mass submitter must obtain an opinion letter. For initial qualification, or where the sponsor's plan includes modifications, the M&P mass submitter on behalf of the sponsor must submit to EP Rulings and Agreements a completed Form 4461-B which contains a declaration by the M&P mass submitter under penalty of perjury that the sponsor has adopted an M&P plan that is word-for-word identical, within the meaning of this section, to a plan of the M&P mass submitter, or an M&P plan that is a minor modification of the mass submitter's plan. The Form 4461-B must be typed. If the sponsor is sponsoring a word-for-word identical plan (including a flexible plan), a copy of the plan need not be submitted. If the M&P mass submitter submits a plan with minor modifications, it must comply with the requirements of section 12.03(2). The application submitted on behalf of the sponsor must include the required user fee. Upon receipt of the request for an opinion letter, described above, the Service will, as soon as cleri-

cally feasible, issue an opinion letter to the sponsor.

.03 Definitions —

(1) Flexible Plan —

(a) In general — A "flexible plan" is a plan submitted by an M&P mass submitter that contains optional provisions (as defined in (b), below). Sponsors that adopt the flexible plan may include or delete any optional provision that is designated as such in the M&P mass submitter's plan, provided the inclusion or deletion of specific optional provisions conforms to the M&P mass submitter's written representation to the Service concerning the choices available to sponsors and the coordination of optional provisions. An M&P mass submitter must bracket and identify the optional provisions when submitting such plan to EP Rulings and Agreements and must also provide the Service a written representation describing the choices available to sponsors and the coordination of optional provisions. Thus, such a representation must indicate whether a sponsor's plan may contain only one of a certain group of optional provisions, may contain only a specific combination of provisions, or may exclude the provisions entirely. Similarly, if the inclusion (or deletion) of a specific optional provision in a sponsor's plan will automatically result in the inclusion (or deletion) of any other optional provision, this must be set forth in the M&P mass submitter's representation. A flexible plan may contain only optional provisions which meet the requirements of (b), below, and must be drafted so that the qualification of any sponsor's plan will not be affected by the inclusion or deletion of optional provisions. For example, if a sponsor's defined contribution plan contains an optional provision which allows a portion of a participant's account to be invested in life insurance, then under the terms of the sponsor's plan, the application of the proceeds must meet the requirements of §§ 401(a)(11) and 417. A flexible plan adopted by a sponsor which differs from the M&P mass submitter plan only because the sponsor has deleted certain optional provisions from its plan in conformance with the M&P mass submitter's representation described above will be treated as a word-for-word identical plan to the M&P mass submitter plan. The Service encourages M&P mass submitters to limit the number of optional provisions described in (b)(i) and (ii), below, which they provide under a flexible plan to six investment provisions and six administrative provisions.

(b) Optional Provisions — A flexible plan may contain only optional provisions that comply with the requirements set forth below. The optional provisions may be arranged as separate optional articles or as separate optional provisions within a single article. A flexible plan may also contain optional provisions in the adoption agreement. For example, if an M&P mass submitter flexible plan basic plan document contains an optional provision that would allow for loans under a sponsor's M&P plan, the adoption agreement could also include an optional provision that would enable an adopting employer to elect whether loans will be available under the plan it adopts. If the sponsor does not wish to enable adopting employers to make loans available under their plans, both the basic plan document optional provision and the adoption agreement optional provision would be deleted from the sponsor's M&P plan. Sponsors may include or delete optional provisions of M&P mass submitter plans, but once the sponsor has decided to include an optional provision, it must offer that provision to all adopting employers. Any optional provision that the Service determines does not meet the requirements of this section will have to be changed to a non-optional provision or deleted from the M&P mass submitter's plan. The following is an exclusive list of the allowable optional provisions that a flexible plan may contain:

(i) Investment Provisions — An M&P mass submitter may offer a variety of investment provisions in its plan for sponsors to include or delete from their version of the plan. However, the plan as adopted by the sponsor must provide some method for investing trust assets. Investment provisions are those provisions that describe the plan's methods of investing the trust or custodial funds, including provisions such as the availability of loans and investments in insurance contracts or other funding media, and self-directed investments. (Also see 4.05 and 5.09 regarding flexibility permitted in trust or custodial account documents.)

(ii) Administrative Provisions — An M&P mass submitter may offer a variety of administrative provisions in its plan for sponsors to include or delete from their version of the plan. However, the plan as adopted by the sponsor must describe how the plan will be administered. Administrative provisions are those provisions that describe the administration of the plan, including the powers, duties, and responsibilities of a plan's custodian, trustee, administrator, employer, and other fiduciaries. Administrative provisions include the allocation of responsibilities among fiduciaries, the resignation or replacement of fiduciaries, claims procedures under the plan, and record-keeping requirements. However, procedural provisions that are required for plan qualification are not administrative provisions under this section. For example, provisions that provide for the notice to participants required by § 417 and record-keeping required by regulations under § 401(k) and (m) are not administrative provisions for purposes of this revenue procedure, and may not be optional provisions.

(iii) Cash or Deferred Arrangement — An M&P mass submitter may include a self-contained cash or deferred arrangement (as defined in § 401(k)) for sponsors to include or delete.

(c) Addition of Optional Provisions by the M&P Mass Submitter — An M&P mass submitter may add additional optional provisions to its plan after a favorable opinion letter is issued. Generally, the addition of such optional provisions will not be treated as a plan amendment for purposes of this revenue procedure, Rev. Proc. 2005–6, and Rev. Proc. 2005–8, 2005–1 I.R.B. 243, and sponsors and adopting employers will not be required to obtain new opinion and determination letters in order to preserve reliance. (However, the addition of a cash or deferred arrangement or any change to the language of the adoption agreement subsequent to the issuance of an opinion letter will be treated as a plan amendment to the M&P mass submitter's plan and the requirements of subsection .04 will then apply.) The M&P mass submitter must submit such additional optional provisions to the Service, along with a completed Form 4461 or 4461-A, as applicable, and a check or money order in the amount specified in section 6.04(6) of Rev. Proc. 2005–8. No opinion letter will be issued to the M&P mass submitter or any adopting sponsor with respect to the addition of

these optional provisions. Instead, a letter will be issued to the M&P mass submitter notifying it that the addition of such optional provisions will not affect the status of favorable opinion and determination letters issued to sponsors and adopting employers.

(d) Notification to Employer — If an M&P mass submitter adds optional provisions, as described in (c), above, all adopting sponsors who wish to include the additional optional provisions must furnish each adopting employer with a copy of the plan that includes such additional provisions. If a sponsor decides to include or delete an optional provision after it initially adopted the plan, it must also furnish each adopting employer with a copy of the new plan. However, if such inclusion or deletion results in a change to the language of the adoption agreement, such change will be treated as a plan amendment and the sponsor and its adopting employers may not continue to rely on previously issued opinion or determination letters.

(2) Minor Modifications —

(a) A "minor modification" is a minor change to an otherwise word-for-word identical plan of the M&P mass submitter that does not require an in-depth technical review. For example, a change from 5 year 100% vesting to 3 year 100% vesting is a minor modification. On the other hand, a change in the method of accrual of benefits in a defined benefit plan would not be considered a minor modification. A minor modification must be submitted by the M&P mass submitter on behalf of the sponsor that will adopt the modified plan. Subject to sections 12.05 and 21.03 and the provisions of this section, submissions with respect to minor modifications will be reviewed on an expedited basis and opinion letters will be issued to the sponsor as soon as possible.

(b) The Service reserves the right to determine if such changes are actually minor. If it is determined that the changes are extensive or require an in-depth technical review, the plan submitted under section (c) below will not be entitled to expedited review and will otherwise be treated as a non-mass submitter plan. (In the event the plan is treated as a non-mass submitter plan, the Service will notify the M&P mass submitter in writing of its determination. Within 30 days following the date of such communication, either the M&P mass submitter may revise the plan so that the modifications are minor and resubmit the revised plan, or the sponsor may submit Form 4461 or 4461-A, whichever is applicable, and an additional user fee in an amount equal to the difference between a non-mass submitter plan application user fee and a minor modifier application user fee. If, after such 30 day period neither action has been taken, the application may be considered withdrawn.)

(c) The M&P mass submitter must initially submit the first page of the applicable Form 4461-B, as a placeholder. Such form must be typed. When the lead plan has been approved, the M&P mass submitter must submit a copy of the M&P mass submitter's plan with the modifications highlighted, as well as a statement indicating the location and effect of each change. The M&P mass submitter must certify under penalty of perjury that the plan of the sponsor, except for the delineated changes, is word-for-word identical, within the meaning of this section, to the plan for which the M&P mass submitter received a favorable opinion letter. If an M&P mass submitter fails to identify each modification, such failure will be considered a material misrepresentation and an employer may not rely on any opinion or determination letter that may be issued with respect to the plan. If an M&P mass submitter repeatedly fails to identify such modifications, the Service may deny permission to that M&P mass submitter to submit additional modifications.

.04 Amendments of M&P Mass Submitter Plans — Any plan submitted by an M&P mass submitter must include language designating the M&P mass submitter as agent for the sponsor for purposes of making plan amendments (see section 12.02). Any sponsor that does not wish to make the amendments made by an M&P mass submitter may switch to another M&P mass submitter or may submit an application for an opinion letter on its own behalf. If the M&P mass submitter makes any change to the plan, other than the addition of optional provisions pursuant to section 12.03(1)(c), an amendment described in section 21.02, or a sample or model amendment required by the Service, it must comply with the requirements of section 21.01 of this revenue procedure. In addition, prior to submitting an amendment to EP Rulings and Agreements, the M&P mass submitter must notify the Service of its intention to amend the plan. Such notification should be submitted, in writing, to the address in section 20. The Service will then mail a list to the M&P mass submitter showing all sponsors that have adopted plans that are identical to the M&P mass submitter's plans, as well as the specific plans adopted by each sponsor. The M&P mass submitter must then submit the amended plan to EP Rulings and Agreements for approval (regardless of whether it is an off-cycle or on-cycle filing under section 21.03), along with a list identifying all adopting sponsors' plans that will be amended, a user fee form for each such sponsor, and the appropriate user fee required under section 6.04 of Rev. Proc. 2005–8. All sponsors that have adopted the M&P mass submitter's plan, are identified on the list submitted to the Service, and for which a user fee has been submitted, will be considered to have made such amendments and will be issued opinion letters. In the case of modified plans, separate Form 4461 applications must be filed along with copies of the plans as amended, user fee forms, and the user fee required by section 6.04 of Rev. Proc. 2005–8. Copies of the amended plan must be sent to adopting employers. Any adopting sponsor that is not included on the list submitted to the Service (or in the case of a minor modifier, for which a Form 4461-B application has not been filed) or which notifies the Service of its desire not to adopt such amendment will no longer participate as an M&P mass submitter plan but must apply for an opinion letter on its own behalf to retain its status as an M&P plan.

.05 Expeditious Processing Accorded M&P Mass Submitter Plans — Subject to section 21.03, all M&P mass submitter plans, including the adoption of approved M&P mass submitter plans by sponsors, will be accorded more expeditious processing than M&P plans submitted by non-mass submitters, to the extent administratively feasible.

PART II — VOLUME SUBMITTER PLANS

SECTION 13. DEFINITIONS

.01 Volume Submitter Plan — A "volume submitter plan" or "VS plan" refers to either a specimen plan of a VS practitioner or a plan of a client of the VS practitioner that is substantially similar to the VS practitioner's approved specimen plan.

.02 Specimen Plan — A "specimen plan" is a sample plan of a VS practitioner (rather than the actual plan of an employer). A specimen plan may include an adoption agreement.

.03 Advisory Letter — An "advisory letter" is a written statement issued by the Service to a VS practitioner or VS mass submitter as to the acceptability of the form of a specimen plan and any related trust or custodial account under § 401(a) or § 403(a).

.04 VS Practitioner — A "VS practitioner" is any person that (1) has an established place of business in the United States where it is accessible during every business day and (2) represents to the Service that it has at least 30 employer-clients each of which is reasonably expected to timely adopt a plan that is substantially similar to the VS practitioner's specimen plan. Notwithstanding the above, the required number of employer-clients reasonably expected to timely adopt a substantially similar money purchase pension specimen plan is reduced to 10 in the case of a VS practitioner that has specimen plans for two or more separate categories described in section 17.03, one of which is a money purchase pension plan. For example, if a VS practitioner has a money purchase pension specimen plan and no other types of plans, or if a VS practitioner has plans described in two or more categories, none of which is a money purchase pension plan, the employer-client requirement remains at 30. The deadline for timely adoption will be announced by the Service in future guidance.

A VS practitioner may submit any number of specimen plans for advisory letters provided the 30 employer requirement (or 10, if applicable) is separately satisfied with respect to each specimen plan. The Service reserves the right at any time to request from the VS practitioner a list of the employers that have adopted or are expected to adopt the VS practitioner's specimen plans, including the employers' business addresses and employer identification numbers.

Notwithstanding the above, any person that has an established place of business in the United States where it is accessible during every business day may sponsor a specimen plan as a word-for-word identical adopter of a specimen plan of an VS mass submitter, regardless of the number of employers that are expected to adopt the plan.

A VS practitioner is also a practitioner that has either (a) 30 or more adopting employers in each of 30 or more states (treating, for this purpose, the District of Columbia as a state) or (b) 3000 or more adopting employers. The determination as to whether there are 3000 or more adopting employers or 30 or more adopting employers in each of 30 or more states may be made on any one date during the 12 month period ending on the date that is 60 days after the effective date of this revenue procedure. For this purpose, an adopting employer is any employer that has adopted any plan of the sponsor that has a GUST opinion letter.

By submitting an application for an advisory letter for a specimen plan under this revenue procedure (or by having an application filed on its behalf by a VS mass submitter), a person represents to the Service that it is a VS practitioner, as defined above. If the VS practitioner's specimen plan permits the VS practitioner to amend the VS plan on behalf of adopting employers, as permitted by section 15, the VS practitioner also agrees to comply with any requirements imposed on sponsors of M&P plans by this procedure. Failure to comply with these requirements may result in the loss of eligibility to sponsor specimen plans and the revocation of advisory letters that have been issued to the VS practitioner.

.05 VS Mass Submitter — A "VS mass submitter" is any person that (1) has an established place of business in the United States where it is accessible during every business day and (2) submits advisory letter applications on behalf of at least 30 unaffiliated practitioners each of which is sponsoring, on a word-for-word identical basis, the same specimen plan. A VS mass submitter may submit an advisory letter application on its own behalf as one of the 30 unaffiliated practitioners. For purposes of this definition, affiliation is determined under § 414(b) and (c). Additionally, the following will be considered to be affiliated: any law, accounting, consulting firm, etc., with its partners, members, associates, etc. A VS mass submitter will be treated as a VS mass submitter with respect to each specimen plan for which the 30 unaffiliated practitioner requirement is separately met.

SECTION 14. PROVISIONS REQUIRED IN EVERY VS PLAN

.01 Anti-Cutback Provisions — VS plans must specifically provide for the protection provided under § 411(a)(10) and (d)(6), to the extent required, in the event that the employer amends the plan in any manner. If a VS plan authorizes the VS practitioner to amend the plan on behalf of employers, the VS practitioner may not amend the plan in a manner that could result in the elimination of a benefit to the extent the benefit is required to be protected under § 411(d)(6) with respect to the plan of any adopting employer, unless permitted to do so under §§ 1.401(a)–4 and 1.411(d)–4. In addition, a VS plan that is not exempt from the top-heavy requirements and that does not contain vesting for all years which is at least as favorable to participants as that provided in § 416(b), must specifically provide that any vesting that occurs while the plan is top-heavy will not be cut back if the plan ceases to be top-heavy.

.02 Definition of Employee / § 414(b), (c), (m), (n) and (o) — Each VS plan must include a definition of employee as any employee of the employer maintaining the plan or any other employer aggregated under § 414(b), (c), (m) or (o) and the regulations thereunder. The definition of employee shall also include any individual deemed under § 414(n) (or under regulations under § 414(o)) to be an employee of any employer described in the previous sentence.

.03 Definition of Service / § 414(b), (c), (m), (n), and (o) — Each VS plan must specifically credit all service with any employer aggregated under § 414(b), (c), (m)

or (o) and the regulations thereunder as service with the employer maintaining the plan. In addition, in the case of an individual deemed under § 414(n) (or under regulations under § 414(o)) to be the employee of any employer described in the previous sentence, service with such employer must be credited to such individual.

.04 Adopting Employer Modification of Trust or Custodial Account Document — An employer will not be considered to have an individually designed plan merely because the employer amends administrative provisions of the trust or custodial account document (such as provisions relating to investments and the duties of trustees), provided the amended provisions are not in conflict with any other provision of the plan and do not cause the plan to fail to qualify under § 401(a). For this purpose, an amendment includes modification of the language of the trust or custodial account document and the addition of overriding language.

.05 Other Required Provisions — Requirements similar to those under sections 5.11 and 5.12 relating to M&P plans apply with respect to VS plans, except as otherwise provided in this revenue procedure.

SECTION 15. APPROVED PLANS — MAINTENANCE OF APPROVED STATUS

.01 Cumulative List in Six-Year Cycle — Future guidance described in section 3.05 of this revenue procedure will provide that practitioners of pre-approved VS plans must submit requests for advisory letters by a specified time period within a six-year cycle in order to continue to rely on their advisory letters. Practitioners may apply for advisory letters at other times, but these filings will be "off-cycle" filings, as described in section 21.03. The Service will review the plans that have been submitted by the specified time period within a six-year cycle taking into account the applicable Cumulative List that identifies changes in the qualification requirements of the Code as well as items of published guidance relating to the plan qualification requirements, such as regulations and revenue rulings. However, in order to be qualified, a plan must comply with all relevant qualification requirements, not just those on the applicable Cumulative List. The letter will not take into account, and a practitioner may not rely on advisory letters with respect to, statutory changes enacted, and/or any guidance issued, after the issuance of the applicable Cumulative List, unless those changes and/or guidance are listed on the applicable Cumulative List.

.02 Subsequent Required Amendments — Except as otherwise provided in future guidance, in the event of changes in qualification requirements resulting from future guidance, or other regulatory or statutory changes that were not taken into account in issuing the advisory letter, an approved VS plan must be amended by the practitioner and, if necessary, the employer, to retain its approved status if any provisions therein fail to meet the requirements of law, regulations, or other issuances and guidelines affecting qualification. Failure to so amend could result in the loss of a plan's qualified status. However, this does not change the applicable period during the six-year cycle when practitioners must request advisory letters, which will still occur only once every six years. Practitioners are required to make reasonable and diligent efforts to ensure that each employer which, to the best of the practitioner's knowledge, continues to maintain the plan as a VS plan, amends its plan when necessary.

Even if future guidance provides that the plan need not be amended during a six-year cycle to reflect a change in the qualification requirements, the plan must operationally comply with any changes in qualification requirements and the terms of the plan as ultimately amended to reflect the change. Failure to comply with this or any other requirement imposed on practitioners by this revenue procedure may result in the loss of eligibility to sponsor VS plans and the revocation of advisory letters that have been issued to the practitioner.

.03 Amendments Following Revenue Rulings — If an approved VS plan is required to be amended to retain its approved status as a result of publication by the Service of a revenue ruling, notice or similar statement in the Internal Revenue Bulletin (I.R.B.), with changes that were not taken into account in issuing the advisory letter then, unless specifically stated otherwise in the revenue ruling, etc., the time by which the practitioner must amend its VS plan to conform to the requirements of the revenue ruling, etc., shall be the end of the one-year period after its publication in the I.R.B., and with respect to any adopting employer's plan the effective date of such amendment shall be the first day of the first plan year beginning within such one-year period. As noted in section 15.02, this does not change the applicable period during the six-year cycle when practitioners must request advisory letters, which will still only occur once every six years. Further, practitioners must make reasonable and diligent efforts to ensure that each employer amends its plan when necessary as noted in section 15.02.

.04 Adopting Employers — The Service will announce when adopting employers must adopt amendments to comply with new guidance issued by the Service. Regardless of when amendments are required to be made, adopting employers must operationally comply as of the applicable effective date of the new guidance.

.05 Option to Permit Practitioner Amendment — A VS practitioner may amend its specimen plan and request a new advisory letter with respect to the amended plan. Ordinarily, the amendments will apply only to the plans of employers who adopt the plan after it has been amended and will not apply to plans of employers who adopted the plan prior to the amendment. However, a VS plan may, but is not required to, include a provision that authorizes the VS practitioner to amend the plan on behalf of employers who have previously adopted the plan, so that changes in the Code, regulations, revenue rulings, other statements published by the Internal Revenue Service (including model, sample or other required good faith amendments that specifically provide that their adoption will not cause such plan to be individually designed), or corrections of prior approved plans may be applied to all employers who have adopted the plan. The provision must state that the practitioner will no longer have the authority to amend the plan on behalf of the adopting employer as of the date the Service requires the employer to file Form 5300 as an individually designed plan as a result of an employer amendment to the plan to incorporate a type of plan not allowable in the VS program (*e.g.*, the addition of an ESOP) or as a result of amendments described in section 24.03. The provision must also state that if the employer is required to obtain a determination letter in order to have reliance (for example,

because the employer has modified the specimen plan), the practitioner's authority to amend the plan on behalf of the adopting employer is conditioned on the plan being covered by a favorable determination letter.

.06 Responsibilities of Practitioner — A VS practitioner who is authorized to adopt plan amendments on behalf of adopting employers must comply with the requirements in this section 15 as well as sections 7.06 and 9 through 11 that apply to M&P sponsors. Failure to do so may result in the loss of eligibility to sponsor VS plans and the revocation of advisory letters that have been issued to the VS practitioner. Thus, the VS practitioner must maintain, or have maintained on its behalf, a record of the employers that have adopted the plan, and the VS practitioner must make reasonable and diligent efforts to ensure that adopting employers have actually received and are aware of all plan amendments and that such employers adopt new documents when necessary.

.07 Loss of Qualified Status — If a practitioner reasonably concludes that an employer's VS plan may no longer be a qualified plan and the practitioner does not or cannot submit a request to correct the qualification failure under the Employee Plans Compliance Resolution System (EPCRS), it is incumbent on the practitioner to notify the employer that the plan may no longer be qualified, advise the employer that adverse tax consequences may result from loss of the plan's qualified status, and inform the employer about the availability of EPCRS. See Rev. Proc. 2003–44.

SECTION 16. ADVISORY LETTERS — SCOPE

.01 General Limits on Advisory Letters — Advisory letters will be issued only to VS practitioners or VS mass submitters. Advisory letters constitute determinations as to the qualification of the plans as adopted by particular employers only under the circumstances, and to the extent, described in section 19. Advisory letters do not constitute rulings or determinations as to the exempt status of related trusts or custodial accounts.

.02 Areas Not Covered by Advisory Letters — Advisory letters will not be issued for:

(1) Multiemployer plans;

(2) Union plans (This does not preclude a VS plan from covering employees of the employer who are included in a unit covered by a collective bargaining agreement or the adoption of a VS plan pursuant to such agreement as a single employer plan which covers only employees of the employer.);

(3) Stock bonus plans;

(4) Employee stock ownership plans;

(5) Pooled fund arrangements contemplated by Rev. Rul. 81–100 (as modified by Rev. Rul. 2004–67)

(6) Annuity contracts under § 403(b);

(7) All cash balance plans and any other defined benefit plans (regardless of whether they are cash balance plans) under which the test for nondiscrimination under § 401(a)(4) is made by reference to contributions rather than benefits;

(8) Plans described in § 414(k) (relating to a defined benefit plan which provides a benefit derived from employer contributions which is based partly on the balance of the separate account of a participant);

(9) Target benefit plans, other than plans which, by their terms, satisfy each of the safe harbor requirements described in § 1.401(a)(4)–8(b)(3)(i), as well as the additional rules in § 1.401(a)(4)–8(b)(3)(ii) through (vii);

(10) Church plans described in § 414(e) that have not made the election provided by § 410(d);

(11) Governmental plans that include so-called "DROP" provisions or similar provisions;

(12) Plans under which the § 415 limitations are incorporated by reference;

(13) Plans that incorporate the ADP test under § 401(k)(3) or the ACP test under § 401(m)(2) by reference;

(14) Section 401(k) plans that provide for hardship distributions under circumstances other than those described in the safe harbor standards in the regulations under § 401(k), unless these distributions are subject to nondiscriminatory and objective criteria contained in the plan;

(15) Fully-insured § 412(i) plans, other than plans that, by their terms, satisfy the safe harbor for § 412(i) plans in § 1.401(a)(4)–3(b)(5);

(16) Plans that fail to contain a provision reflecting the requirements of § 414(u) (see Rev. Proc. 96–49);

(17) Plans that include so-called failsafe provisions for § 401(a)(4) or the average benefit test under § 410(b);

(18) Plans that include blanks or fill-in provisions for the employer to complete unless the provisions have parameters that preclude the employer from completing the provisions in a manner that could violate the qualification requirements.

(19) Plans designed to satisfy the provisions of § 105.

The Service may, in its discretion, decline to issue advisory letters for other types of plans not described in this section 16.02.

SECTION 17. ADVISORY LETTERS — INSTRUCTIONS TO VS PRACTITIONERS

.01 Employee Plans Rulings and Agreements Issues Advisory Letters — Employee Plans Rulings and Agreements will, upon the request of a VS practitioner, issue an advisory letter as to the acceptability of the form of the VS practitioner's specimen plan under § 401(a) or § 403(a).

.02 Procedure for Requesting Advisory Letters — A request for an advisory letter relating to a specimen plan must be submitted in accordance with the procedures described in this section. Forms 4461, 4461–A, and 4461–B, currently applicable to M&P plans, are being revised to incorporate VS submissions. The Service expects to announce revised procedures for requesting advisory letters that include submission on these forms in the near future. When Forms 4461, 4461–A and 4461–B are published, the following requirements will be incorporated into the instructions to the forms. Until then, VS submissions should include:

(1) a cover letter requesting approval of VS submissions, indicating the type of plan for which approval is requested. The request must include a certification that the VS practitioner meets the requirements, including that it has at least 30 employer-clients (or 10, if applicable) each of which is reasonably expected to timely adopt a plan that is substantially similar to the VS practitioner's specimen plan, as described in section 13.04.

(2) a copy of the specimen plan, including adoption agreement, if applicable, and any related specimen trust instrument;

(3) the required user fee submitted with Form 8717, *User Fee for Employee Plan Determination Letter Request*; and

(4) an index/table of contents listing the location of all variable sections.

See section 20 for the address to file the application.

.03 Separate Specimen Plans and Applications Required for Different Categories of Plans — A separate specimen plan and application is required for the following categories of plans: a profit-sharing plan (with or without a § 401(k) arrangement), a money purchase pension plan (other than a target benefit plan), a target benefit plan, and a defined benefit plan. Different categories may not be combined in a single specimen plan or application.

.04 Sample Language — A Listing of Required Modifications (LRM) containing sample plan language is available from Employee Plans Rulings and Agreements. Although the sample language is designed for use in M&P plans, which use an adoption agreement format, VS practitioners should refer to the sample language as a guide in drafting VS plans. To expedite the review of their plans, VS practitioners are encouraged to use LRM language where appropriate and to identify where such language is being used in their plan documents. LRMs may be downloaded from the Internet at the following address: ***http://www.irs.gov***.

.05 Timing of Issuance of Advisory Letters — The Service intends to issue advisory letters to practitioners and VS mass submitters (as well as opinion letters to M&P mass submitters and sponsors) at approximately the same time within the applicable 6-year cycle. In the interim, the Service will send an email to the applicable M&P or VS mass submitter, sponsor, or practitioner if the Service determines that the plan appears to be in full compliance with the applicable qualification requirements, based on the submissions and the completed review. Notwithstanding the above, this email only provides assurance that the Service believes the plan appears to meet the applicable qualification requirements under review as of the date of the email. This email correspondence is for the convenience of the applicable sponsor, practitioner or mass submitter but does not constitute an official opinion or advisory letter. Until issuance of the official opinion or advisory letter no reliance exists. The Service reserves the right to require changes after the email is sent, in its sole discretion.

SECTION 18. VS MASS SUBMITTERS

.01 Advisory Letters Issued to VS Mass Submitters — EP Rulings and Agreements will, upon request by an VS mass submitter, as defined in section 13.05, issue an advisory letter as to the acceptability of the form of the VS mass submitter's specimen plan under § 401(a) or § 403(a). See section 20 for the address to file the application. The provisions of section 17.05 on the timing of the issuance of advisory letters and an interim email notification by the Service also apply to this section.

.02 As noted in section 17.02, Forms 4461, 4461-A and 4461-B are being revised. Until these revisions are completed, the requirements for the VS mass submitter's application are as follows:

(1) The application must include the plan and trust and all the other information required by section 17. The application must include a cover letter that states that at least 30 VS practitioners are submitting applications for advisory letters for identical specimen plans and must certify that each such plan is word-for-word identical to the VS mass submitter specimen plan. The cover letter must provide the name, address, and EIN of each of the VS practitioners.

(2) The application for the VS mass submitter specimen plan must include the required user fee under Rev. Proc. 2005–8.

(3) The application must be accompanied by separate advisory letter applications filed by each of the VS practitioners listed in the cover letter.

(4) The required user fee for an identical adopter application under Rev. Proc. 2005–8 must also be submitted.

(5) After the initial submission of advisory letter applications for at least 30 VS practitioners, applications may be filed by other VS practitioners who will sponsor the word-for-word identical plan. A copy of the plan should not be submitted.

PART III — ALL PRE-APPROVED PLANS

SECTION 19. EMPLOYER RELIANCE

.01 Standardized M&P Plans — An employer adopting a standardized M&P plan may rely on that plan's opinion letter, except as provided in (1) through (3) and section 19.03 below, if the sponsor of such plan or plans has a currently valid favorable opinion letter, the employer has followed the terms of the plan(s), and the coverage and contributions or benefits under the plan(s) are not more favorable for highly compensated employees (as defined in § 414(q)) than for other employees.

(1) An employer may not rely on an opinion letter for a standardized plan with respect to the requirements of §§ 415 and 416, without obtaining a determination letter, if the employer maintains at any time, or has maintained at any time, another plan, including a standardized plan, that was qualified or determined to be qualified covering some of the same participants. For this purpose, a plan that has been properly replaced by the adoption of a standardized plan is not considered another plan. The plan that has been replaced and the standardized plan must be of the same type (*e.g.*, both defined benefit plans) in order for the employer to be able to rely on the standardized plan with respect to the requirements of §§ 415 and 416 without obtaining a determination letter. In addition, an employer that adopts a standardized defined contribution plan will not be considered to have maintained another plan merely because the employer has maintained another defined contribution plan(s), provided such other plan(s) has been terminated prior to the effective date of the standardized plan and no annual additions have been credited to the account of any participant under such other plan(s) as of any date within a limitation year of the standardized plan. Likewise, an employer that adopts a standardized defined contribution plan that is first effective on or after the effective date of the repeal of § 415(e) will not be considered to have maintained another plan merely because the employer has maintained a defined benefit plan(s), provided the defined benefit plan(s) has been terminated prior to

the effective date of the standardized defined contribution plan.

(2) An employer that has adopted a standardized defined benefit plan may rely on an opinion letter with respect to the requirements of § 401(a)(26) only if the plan satisfies the requirements of § 401(a)(26) with respect to its prior benefit structure or is deemed to satisfy § 401(a)(26) under the regulations. However, an employer may request a determination letter if the employer wishes to have reliance as to whether the plan satisfies § 401(a)(26) with respect to its prior benefit structure.

(3) An employer that adopts a standardized plan may not rely on an opinion letter with respect to: (a) whether the timing of any amendment to the plan (or series of amendments) satisfies the nondiscrimination requirements of § 1.401(a)(4)–5(a), except with respect to plan amendments granting past service that meet the safe harbor described in § 1.401(a)(4)–5(a)(3) and are not part of a pattern of amendments that significantly discriminates in favor of highly compensated employees; or (b) whether the plan satisfies the effective availability requirement of § 1.401(a)(4)–4(c) with respect to any benefit, right, or feature. An employer that adopts a standardized plan as an amendment to a plan other than a standardized plan may not rely on an opinion letter with respect to whether a benefit, right, or feature that is prospectively eliminated satisfies the current availability requirements of § 1.401(a)(4)–4 of the regulations. Such an employer may request a determination letter if the employer wishes to have reliance as to whether the prospectively eliminated benefit, right, or feature satisfies the current availability requirements.

.02 Nonstandardized M&P Plans and Volume Submitter Plans — An employer adopting a nonstandardized M&P or volume submitter plan may rely on that plan's opinion or advisory letter as described below if the employer's plan is identical to an approved M&P or specimen plan with a currently valid favorable opinion or advisory letter, the employer has chosen only options permitted under the terms of the approved plan, and the employer has followed the terms of the plan. Also see section 19.03(3) below. These employers can forego filing Form 5307 and rely on the plan's favorable opinion or advisory letter with respect to the qualification requirements, except as provided in section (1) through (4) and section 19.03 below.

(1) Except as provided in section 19.03(2), (3) and (4), adopting employers of nonstandardized M&P plans and volume submitter plans may not rely on a favorable opinion or advisory letter with respect to the requirements of:

(a) §§ 401(a)(4), 401(a)(26), 401(l), 410(b) or 414(s); or

(b) if the employer maintains or has ever maintained another plan covering some of the same participants, §§ 415 or 416.

For this purpose, whether an employer maintains or has ever maintained another plan will be determined using principles consistent with section 19.01 above.

(2) Adopting employers of nonstandardized M&P plans and volume submitter plans may rely on the opinion or advisory letter with respect to the requirements of §§ 410(b) and 401(a)(26) (other than the § 401(a)(26) requirements that apply to a prior benefit structure) if 100 percent of all nonexcludable employees benefit under the plan.

(3) Nonstandardized M&P plans must give adopting employers the option to elect a safe harbor allocation or benefit formula and a safe harbor compensation definition. Adopting employers of nonstandardized M&P plans that elect a safe harbor allocation or benefit formula and a safe harbor compensation definition may rely on an opinion letter with respect to the nondiscriminatory amounts requirement under § 401(a)(4). Adopting employers of nonstandardized M&P plans that are § 401(k) and/or § 401(m) plans may rely on an opinion letter with respect to whether the form of the plan satisfies the actual deferral percentage test of § 401(k)(3) or the actual contribution percentage test of § 401(m)(2) if the employer elects to use a safe harbor definition of compensation in the test. Adopting employers of nonstandardized M&P plans described in § 401(k)(11) and/or § 401(m)(12) may rely on an opinion letter with respect to whether the form of the plan satisfies these requirements unless the plan provides for the safe harbor contribution to be made under another plan.

(4) A VS plan may give an adopting employer the ability to select an allocation formula for the employer non-elective contribution which satisfies one of the design-based safe harbors in § 1.401(a)(4)–2(b)(2) or a benefit formula which satisfies one of the design-based safe harbors under § 1.401(a)(4)–3(b)(3), (4), or (5), and the ability to select a safe harbor compensation definition for such formula which satisfies § 1.414(s)–1(c). If the adopting employer selects (utilizes) such formula and compensation definition, then the adopting employer may rely on an advisory letter with respect to the nondiscriminatory amounts requirement under § 401(a)(4).

.03 Other Limitations and Conditions on Reliance — The following conditions and limitations apply with respect to both M&P and VS plans:

(1) An adopting employer can rely on a favorable opinion or advisory letter for a plan that amends or restates a plan of the employer only if the plan that is being amended or restated was qualified.

(2) An adopting employer has no reliance if the employer's adoption of the plan precedes the issuance of an opinion or advisory letter for the plan.

(3) An adopting employer can rely on an opinion or advisory letter only if the requirements of this section 19 are met, and the employer's plan is identical to an approved M&P or specimen plan with a currently valid favorable opinion or advisory letter; that is, the employer has not added any terms to the approved M&P or VS plan and has not modified or deleted any terms of the plan other than choosing options permitted under the plan or, in the case of an M&P plan, amended the document as permitted under section 5.06 or 5.09 or, in the case of a VS plan, modified the document as permitted under sections 14 and 15. Thus, for example, in the case of a VS plan, the employer's plan must be identical to the approved specimen plan except as the result of the employer's selection among options that are permitted under the terms of the approved specimen plan and modifications permitted under sections 14 and 15.

(4) An employer's plan will not fail to be identical to an approved M&P or specimen plan merely because the employer modifies or amends the plan to:

(a) Add or change a provision and/or to specify or change the effective date of a provision, provided the employer is permitted to make the modification or

amendment under the terms of the approved M&P or specimen plan as well as under § 401(a), and, except for the effective date, the provision is identical to a provision in the approved plan. Thus, an employer is not required to restate its M&P or volume submitter plan in order to change options under the plan or to specify different effective dates. Also see section 5.02, which limits an employer's ability to amend an M&P plan without causing the plan to be treated as an individually designed plan, and section 5.11, which requires the employer to complete a new signature page when the employer changes options in an M&P adoption agreement.

(b) Correct obvious and unambiguous typographical errors and/or cross-references that merely correct a reference but that do not in any way change the original intended meaning of the provisions. No such changes may affect any qualification requirements of the plan. The Service in its discretion may determine that any such changes are not considered identical.

(c) Adopt model, sample or other required good faith amendments that specifically provide that their adoption by an adopter of a VS and or M&P plan will not cause the plan to be treated as an individually designed plan or cause the plan to fail to be "identical" to the approved M&P or specimen plan within the meaning of this section.

(5) An adopting employer cannot rely on an opinion or advisory letter if the adopting employer has modified the terms of the plan's approved trust in a manner that would cause the plan to fail to be qualified.

.04 Reliance Equivalent to Determination Letter — If an employer can rely on a favorable opinion or advisory letter pursuant to this section, the opinion or advisory letter shall be equivalent to a favorable determination letter. For example, the favorable opinion or advisory letter shall be treated as a favorable determination letter for purposes of section 21 of Rev. Proc. 2005–6, regarding the effect of a determination letter, and section 5.01(4) of Rev. Proc. 2003–44, regarding the definition of "favorable letter" for purposes of the Employee Plans Compliance Resolution System. Of course, the extent of the employer's reliance may be limited, as provided above.

SECTION 20. WHERE TO FILE AND OTHER RULES FOR APPLICATIONS AND LETTERS

.01 Opinion Letters — Applications for opinion letters, including applications filed by M&P mass submitters, should be sent to the attention of:

Internal Revenue Service
P.O. Box 2508
Cincinnati, OH 45201
Attn: M&P Coordinator
Room 5106

.02 Advisory Letters — Applications for advisory letters, including applications filed by VS mass submitters, should be sent to:

Internal Revenue Service
P.O. Box 2508
Cincinnati, OH 45201
Attn: VSC Coordinator
Room 5106

.03 In both .01 and .02 above, a request shipped by Express Mail or a delivery service should be sent to the attention of the VSC Coordinator or the M&P Coordinator, whichever is applicable, to:

Internal Revenue Service
550 Main Street
P.O. Box 2508
Cincinnati, OH 45202
Room 5106

.04 Effect of Failure to Disclose Material Fact or to Accurately Provide Information — The Service may determine, based on the application, the extent of review of the pre-approved plan. A failure to disclose a material fact or misrepresentation of a material fact in the application may adversely affect the reliance that would otherwise be obtained through issuance by the Service of a favorable opinion or advisory letter. Similarly, failure to accurately provide any of the information called for on any form required by this revenue procedure may result in no reliance.

.05 Additional Information May Be Requested — The Service may, at its discretion, require any additional information that it deems necessary, including a demonstration of how the variables (options or alternatives) in the M&P or specimen plan interrelate to satisfy the qualification requirements of the Code. If a letter, requesting changes to plan documents, is sent to the sponsor or VS practitioner or an authorized representative, the changes must be received no later than 30 days from the date of the letter, and the response must include either a copy of the plan with the changes highlighted or, if the changes are not extensive, replacement pages. If the changes are not received within 30 days, the application may be considered withdrawn. An extension of the 30-day time limit will only be granted for good cause.

.06 Inadequate Submissions — The Service will return, without further action, plans that are not in substantial compliance with the qualification requirements or plans that are so deficient that they cannot be reviewed in a reasonable amount of time. A plan may be considered not to be in substantial compliance if, for example, it omits or merely incorporates qualification requirements by reference to the applicable Code section. The Service will not consider these plans until after they are revised, and they will be treated as new requests as of the date they are resubmitted. No additional user fee will be charged if an inadequate submission is amended to be in substantial compliance and is resubmitted to the Service within 30 days following the date the sponsor or VS practitioner is notified of such inadequacy.

.07 Nonidentification of Questionable Issues May Cause Delay — If the plan document submitted as part of an opinion or advisory letter request contains a provision that gives rise to an issue for which contrary published authorities exist, failure to disclose and address significant contrary authorities may result in requests for additional information, which will delay action on the request.

.08 DOL Participant Loan Regulations not Addressed by Opinion or Advisory Letter — Pre-approved plans may adopt procedures to comply with the Department of Labor's (DOL) participant loan regulations under § 408(b)(1) of ERISA in the plan or in a separate document. The adoption of procedures outside of the plan document that are intended to comply with these regulations will not cause a pre-approved plan to be considered an individually designed plan. The Service will not review loan program procedures (whether in the plan or in a separate written docu-

ment) to determine whether they comply with the requirements of the DOL regulations. Also, any opinion or advisory letter issued for a pre-approved plan will not consider whether loan program procedures may, in the operation of the plan, have an adverse effect on the qualified status of the plan. However, the loan program procedures under the plan may not be inconsistent with the qualification requirements of § 401(a) of the Code.

.09 Nontransferability of Opinion and Advisory Letters — An opinion or advisory letter issued to a sponsor or VS practitioner is not transferable to any other entity. For this purpose, a change of employer identification number is deemed to be a change of entity.

SECTION 21. AMENDMENTS

.01 Opinion or Advisory Letters for Sponsor or VS Practitioner Amendments — A sponsor or VS practitioner may amend or restate its previously approved plan and the Service will entertain a request for an opinion or advisory letter as to the acceptability, for purposes of § 401(a) or § 403(a), of the form of the plan as amended, during the specified time period within the six-year cycle, as provided in section 8.01 and section 15.01. If the sponsor or VS practitioner is amending its plan, it must, except as provided in section 12 or section 18, submit an application under the procedures in section 7 or section 17, together with a copy of the amendment(s), a cover letter summarizing the changes to the plan that are effected by such amendment(s), and a copy of the plan which is being amended. If the sponsor or practitioner is restating its plan, it must, except as provided in section 12 or section 18, submit the restated plan along with the application. No more than four consecutive amendments may be submitted without restating the plan. In addition, the Service may, at its discretion, require plan restatement at any time that it deems necessary to adequately review a plan.

.02 No Opinion or Advisory Letters for Certain Amendments — A pre-approved plan will not lose its qualified status and, except as provided in (4) below, no opinion or advisory letter will be issued merely because amendments are made which solely cover the following:

(1) Amendments to conform a plan to the requirements of § 402(a) of Title I of the Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. 93–406, 1974–3 C.B. 1, relating to named fiduciaries.

(2) Amendments to conform a plan to the requirements of § 503 of ERISA, relating to claims procedures.

(3) Amendments that merely adjust the limitations under §§ 415, 402(g), 401(a)(17), and 414(q)(1)(B) of the Code to reflect annual cost-of-living increases, other than amendments that add an automatic cost-of-living adjustment provisions to the plan.

(4) Amendments that merely reflect a change of a sponsor's or VS practitioner's name. However, the sponsor or VS practitioner must notify the Service, in writing, of the change in name and certify that it still meets the conditions for sponsorship described in section 4.07 or 13.04. No opinion or advisory letter will be issued and no user fee will be required for a mere change in name. However, if the sponsor or VS practitioner wants a new opinion or advisory letter, it will have to submit a new application and pay the appropriate user fee. (Also see section 20 regarding changes in employer identification numbers.) .

.03 Off-Cycle Filing — If a pre-approved plan requests an opinion or advisory letter that is not submitted during the specified period within the six-year cycle, the application will not be reviewed until all on-cycle plans (including applications for determination letters for individually designed plans within their staggered 5-year cycle) have been reviewed and processed. However, the Service may, in its discretion, determine whether the processing of off-cycle filings may be prioritized and accelerated under certain circumstances.

SECTION 22. REVOCATION

Revocation of Opinion or Advisory Letter by the Service — An opinion or advisory letter found to be in error or not in accord with the current views of the Service may be revoked. However, except in rare or unusual circumstances, such revocation will not be applied retroactively if the conditions set forth in section 13 and 14 of Rev. Proc. 2005–4, 2005–1 I.R.B. 128, are met. For this purpose, opinion and advisory letters will be given the same effect as rulings. Revocation may be effected by a notice to the sponsor or VS practitioner to which the letter was originally issued, or by a regulation, revenue ruling or other statement published in the Internal Revenue Bulletin. The sponsor or VS practitioner should then notify each adopting employer of the revocation as soon as possible. The content of the notification to each adopting employer must explain how the revocation affects any reliance an adopting employer has on the applicable advisory or opinion letter and on any determination letter issued.

SECTION 23. EGTRRA

This revenue procedure announces the opening of the pre-approved plan programs. The Service will begin accepting applications for opinion and advisory letters for defined contribution pre-approved plans that take into account the requirements of the EGTRRA as well as other changes in qualification requirements and guidance beginning February 17, 2005. The submission period for these pre-approved plans will end January 31, 2006. The Service will announce the deadline for timely adoption by employers after the pre-approved documents have been reviewed. In addition, the Service intends to accept applications for determination letters for individually designed plans beginning on or after February 1, 2006, in accordance with a five-year staggered cycle, and applications for pre-approved defined benefit plans beginning February 1, 2007. The opening of these programs for individually designed plans and pre-approved defined benefit plans will be officially announced at a future date.

As noted in section 2.06, the Service published the 2004 Cumulative List in Notice 2004–84. The 2004 Cumulative List reflects law changes under EGTRRA with technical corrections made by JCWAA, as well as regulations and guidance published by the Service that are effective after December 31, 2001. (Prior law changes, as well as regulations and guidance, effective on or before December 31, 2001, should generally have been taken into account in the GUST opinion or advisory letters issued to pre-approved plans that were in existence prior to January 1, 2002.) The

changes identified on the 2004 Cumulative List will be considered by the Service in its review of pre-approved defined contribution plans that must be submitted by January 31, 2006. However, a plan must comply with all relevant qualification requirements, not just those on the 2004 Cumulative List. The Service will not review plan language for statutory changes enacted, or guidance issued, after December 14, 2004, unless it is on the 2004 Cumulative List. Thus, sponsors of defined contribution pre-approved plans submitting applications during the submission period that will end January 31, 2006, may not rely on opinion or advisory letters with respect to statutory changes enacted, or any guidance issued, after December 14, 2004, unless that guidance is listed on the 2004 Cumulative List.

SECTION 24. REMEDIAL AMENDMENT PERIOD

.01 Announcement 2004–71, 2004–40 I.R.B. 569, contained a draft revenue procedure with the Service's procedures for issuing letters for pre-approved plans under a regular, six-year remedial amendment cycle and individually designed plans under a staggered five-year remedial amendment cycle. That revenue procedure is expected to be finalized in the near future. It will extend a plan's EGTRRA remedial amendment period to the end of the applicable cycle. It will also explain the conditions under which an adopting employer who timely adopts the pre-approved plan will be treated as having adopted the plan within the employer's six-year remedial amendment cycle, and which Cumulative List will apply in the case of plans that become individually designed under the circumstances described in 24.02 below. The Service will announce the deadline for timely adoption after the pre-approved documents have been reviewed, but it is expected that employers will generally have two years in which to adopt.

.02 An employer that has adopted an M&P plan or a VS specimen plan may have modified the plan in such a way that the plan, as adopted by the employer, would not be considered an M&P plan or a VS plan. Nevertheless, such a plan will generally be treated as an M&P or VS plan and will be allowed to remain within the six-year remedial amendment cycle. Notwithstanding the above, if the employer has amended the plan to incorporate a type of plan not allowable in the VS or M&P program, whichever is applicable, (for example, to incorporate an ESOP, which is not allowed in either the M&P or VS program) the employer's plan will be considered to be an individually designed plan for purposes of this revenue procedure. In that case, the remedial amendment cycle in which the employer impermissibly amends the VS or M&P plan will remain the six-year remedial amendment cycle until that cycle expires. However, the subsequent remedial amendment period is the five-year remedial amendment cycle.

.03 Notwithstanding any of the above provisions in .02, the Service may in its discretion determine that such a plan is an individually designed plan that will not receive an extended remedial amendment cycle, due to the nature and extent of the amendments.

SECTION 25. EFFECT ON OTHER DOCUMENTS

Rev. Proc. 2000–20 is modified and superseded. Rev. Proc. 2005–6, Rev. Proc. 2005–8, and Announcement 2001–77, 2001–2 C.B. 83, are modified.

SECTION 26. EFFECTIVE DATE

This revenue procedure is effective February 17, 2005.

SECTION 27. PAPERWORK REDUCTION ACT

The collection of information contained in this revenue procedure has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1545–1674.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

The collection of information in this revenue procedure is in sections 5.11, 8.02, 11.02, 12, 14.05, 15.02, 18 and 24. This information is required to enable the Commissioner, Tax Exempt and Government Entities Division of the Internal Revenue Service to make determinations in connection with plan qualification. This information will be used to determine whether a plan is entitled to favorable tax treatment. The likely respondents are banks, insurance companies, other financial institutions, law, actuarial and consulting firms, employee benefit practitioners and employers.

The estimated total annual reporting and/or recordkeeping burden is 1,058,850 hours.

The estimated annual burden per respondent/recordkeeper varies from 1/2 to 2,000 hours, depending on individual circumstances, with an estimated average of 3.56 hours. The estimated number of respondents and/or recordkeepers is 297,750.

The estimated frequency of responses is occasional.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. § 6103.

DRAFTING INFORMATION

The principal author of this revenue procedure is Ingrid Grinde of the Employee Plans, Tax Exempt and Government Entities Division. For further information concerning this revenue procedure, please contact the Employee Plans' taxpayer assistance telephone service at 1–877–829–5500 between 8:30 a.m. and 6:30 p.m., Eastern Time, Monday through Friday (a toll-free number). Ms. Grinde may be reached at (202) 283–9888 (not a toll-free number).

Part IV. Items of General Interest

Notice of Proposed Rulemaking by Cross-Reference to Temporary Regulations and Notice of Public Hearing

Returns Required on Magnetic Media

REG–130671–04

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking by cross-reference to temporary regulations and notice of public hearing.

SUMMARY: In this issue of the Bulletin, the IRS is issuing temporary regulations (T.D. 9175) relating to the requirements for filing corporate income tax returns, S corporation returns, and returns of organizations required under section 6033 on magnetic media under section 6011(e) of the Internal Revenue Code (Code). The text of those regulations also serves as the text of these proposed regulations. This document also provides notice of a public hearing on these proposed regulations.

DATES: Written or electronic comments must be received by February 28, 2005. Requests to speak (with outlines of topics to be discussed) at the public hearing scheduled for March 16, 2005, must be received by February 28, 2005.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–130671–04), Room 5203, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to: CC:PA:LPD:PR (REG–130671–04), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC. Alternatively, taxpayers may submit comments electronically via the IRS internet website at *www.irs.gov/regs*, or via the Federal eRulemaking Portal, *www.regulations.gov* (IRS-REG–130671–04). The public hearing will be held in the auditorium of the Internal Revenue Building, 1111 Constitution Avenue, NW, Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Michael E. Hara, (202) 622–4910 concerning submissions of comments, the hearing, and/or to be placed on the building access list to attend the hearing, Robin Jones at (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

Temporary regulations in this issue of the Bulletin amend the Regulations on Procedure and Administration (26 CFR part 301) relating to the filing of corporate income tax returns, S corporation returns, and returns of organizations required under section 6033 on magnetic media under section 6011(e). The temporary regulations require corporations and certain organizations to file their Form 1120, "*U.S. Corporation Income Tax Return*," Form 1120S, "*U.S. Income Tax Return for an S Corporation*," Form 990, "*Return of Organization Exempt From Income Tax*," and Form 990-PF, "*Return of Private Foundation or Section 4947(a)(1) Nonexempt Charitable Trust Treated as a Private Foundation*," electronically if they are required to file at least 250 returns during the calendar year ending with or within their taxable year. The text of those regulations also serves as the text of these proposed regulations. The preamble to the temporary regulations explains the amendments.

Special Analyses

It has been determined that these proposed regulations are not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. Because these regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. The IRS and Treasury Department note that these regulations only prescribe the method of filing returns that are already required to be filed. Further, these regulations are consistent with the requirements imposed by statute.

Section 6011(e)(2)(A) provides that, in prescribing regulations providing standards for determining which returns must be filed on magnetic media or in other machine-readable form, the Secretary shall not require any person to file returns on magnetic media unless the person is required to file at least 250 returns during the calendar year. Consistent with the statutory provision, these regulations do not require Forms 1120, Forms 1120S, Forms 990, or Forms 990-PF to be filed electronically unless 250 or more returns are required to be filed.

Further, if a taxpayer's operations are computerized, reporting in accordance with the regulations should be less costly than filing on paper. If the taxpayer's operations are not computerized, the incremental cost of filing Forms 1120, Forms 1120S, Forms 990, and Forms 990-PF electronically should be minimal in most cases because of the availability of computer service bureaus. In addition, the proposed regulations provide that the IRS may waive the electronic filing requirements upon a showing of hardship.

Pursuant to section 7805(f) of the Code, these proposed regulations will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. The IRS and Treasury Department request comments on the clarity of the proposed regulations and how they can be made easier to understand. The IRS and Treasury Department also request comments on the procedures and criteria for hardship waivers from the electronic filing requirements. The IRS and Treasury Department also request comments on the accuracy of the certification that the regulations in this document will not have a significant eco-