

**Rev. Proc. 2011-49**

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SECTION 1. PURPOSE

.01 Revenue Procedure 2005-16, 2005-1 C.B. 674, sets forth the procedures of the Internal Revenue Service (Service) 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). This revenue procedure modifies and supersedes Rev. Proc. 2005-16. Section 3 describes the changes to Rev. Proc. 2005-16 in this revenue procedure.

.02 The second six-year remedial amendment cycle for pre-approved defined contribution plans began on February 1, 2011 and ends on January 31, 2017. This revenue procedure provides that as of February 1, 2011, the Service began accepting opinion and advisory letter applications for pre-approved defined contribution plans for the second six-year remedial amendment cycle. The 12-month applicable on-cycle submission period for non-mass submitter sponsors and practitioners, word-for-word identical adopters, and M&P minor modifier placeholder applications will end on January 31, 2012. Section 18.02(1) of Rev. Proc. 2007-44, 2007-2 C.B. 54, provides that the 9-month applicable on-cycle submission period for sponsors and practitioners maintaining defined contribution mass submitter plans will end on October 31, 2011. Section 23 of this revenue procedure extends the submission deadline to submit applications for opinion and advisory letters for sponsors and practitioners maintaining defined contribution mass submitter plans from October 31, 2011 to January 31, 2012. The 2010 Cumulative List of Changes in Plan Qualification Requirements, Notice 2010-90, 2010-2 C.B. 909 (2010 Cumulative List), is to be used by plan sponsors and practitioners submitting determination, opinion or advisory letter applications for plans during these periods. The Service will announce the deadline for timely adoption

by employers when the review of the pre-approved documents is close to being completed. Applications for opinion and advisory letters for pre-approved defined benefit plans will be accepted beginning February 1, 2013.<sup>1</sup> It is expected that the procedures for applying for opinion and advisory letters will be updated from time to time.

SECTION 2. BACKGROUND

.01 The procedures of the Service on the issuance of opinion and advisory letters regarding the acceptability of the form of pre-approved plans are set forth in Rev. Proc. 2005-16, as modified. This revenue procedure modifies and supersedes Rev. Proc. 2005-16.

.02 Revenue Procedure 2011-6, 2011-1 I.R.B. 195, sets forth the general procedures of the Service on the issuance of employee plans determination letters including determination letters for M&P and VS plans.

.03 Revenue Procedure 2007-44, (as modified by Rev. Proc. 2008-56, 2008-2 C.B. 826; Rev. Proc. 2009-36, 2009-2 C.B. 304; Notice 2009-97, 2009-2 C.B. 972; and Notice 2010-48, 2010-27 I.R.B. 9), describes a system of cyclical remedial amendment periods under the Code. Under this system, every individually designed plan qualified under § 401(a) or 403(a) has a regular, five-year remedial amendment cycle, staggered and spread over five-year periods, so that different categories of plans have different cycles. The effect of this system is that plan sponsors may apply for new determination letters generally only once every five years in order to continue to have a letter on which to rely. In addition, under this system every pre-approved plan generally has a regular, six-year remedial amendment cycle. Every pre-approved plan must be submitted to the Service for a new opinion or advisory letter every six years, during the applicable on-cycle submission period at the beginning of the plan's six-year cycle. Pre-approved defined contribution

plans have a different six-year cycle than pre-approved defined benefit plans.

.04 Sponsors and practitioners of pre-approved defined contribution plans submitted their opinion and advisory letter applications to the Service from February 17, 2005 to January 31, 2006. The Service's review took into account the requirements of the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) and other items identified in Notice 2004-84, 2004-2 C.B. 1030 (2004 Cumulative List). Adopting employers of these pre-approved plans generally had until April 30, 2010, to adopt the plans and to apply for a determination letter. <sup>2</sup>Sponsors and practitioners of pre-approved defined benefit plans submitted their applications to the Service from February 1, 2007 to January 31, 2008. The Service's review took into account the requirements of EGTRRA and other items identified in Notice 2007-3, 2007-1 C.B. 255 (2006 Cumulative List). Adopting employers of these pre-approved plans have until April 30, 2012 to adopt the plans and to apply for a determination letter.

.05 The 2010 Cumulative List consists of statutory, regulatory, and guidance changes to plan qualification requirements that will be considered by the Service in its review of the pre-approved defined contribution plans submitted during the applicable on-cycle submission period for the second six-year cycle, as well as single employer individually designed Cycle A plans. All items from the 2004 Cumulative List have been deleted from the 2010 Cumulative List. Section 23 of this revenue procedure provides further details on the scope of the 2010 Cumulative List.

SECTION 3. CHANGES TO REVENUE PROCEDURE 2005-16

In addition to minor revisions and clarifying language, the following changes have been made to Rev. Proc. 2005-16:

.01 The revenue procedure updates the purpose and background sections to summarize the second six-year remedial

<sup>1</sup> Applications for determination letters for Cycle A individually designed plans are accepted from February 1, 2011 to January 31, 2012.

<sup>2</sup> This deadline was extended by Notice 2010-48 for plans affected by certain federally declared disasters. In addition, certain plans such as Cycle E plans, Cycle D plans with a plan year ending on or after February 1, 2010, and governmental plans filing in Cycle E had a deadline of January 31, 2011, as explained in the Service's Summer 2010 Retirement News for Employers.

amendment cycle for pre-approved defined contribution and defined benefit plans, and provides that as of February 1, 2011, the Service began accepting applications for pre-approved defined contribution plans. (sections 1 and 2)

.02 The revenue procedure makes the following changes to the M&P pre-approved plan program:

(1) The definition of M&P mass submitter is clarified to provide that a mass submitter may be counted as one of the 30 unaffiliated sponsors required for purposes of determining whether this sponsorship requirement is met without needing to submit a separate opinion letter application (Form 4461-B) on behalf of that mass submitter. The mass submitter may also be counted as a sponsor under the special rule for mass submitters that received a favorable opinion letter (submitting applications on behalf of 10 sponsors) under the Tax Reform Act of 1986, Public Law 99-514 (100 Stat. 2481) (TRA '86). (section 4.08)

(2) The National Sponsor category is deleted. (section 4)

(3) The effect of employer amendments on pre-approved plan status is clarified. (sections 5.01 and 5.02)

(4) The list of areas not covered by opinion letters is expanded to include: hybrid plans; plans with section 401(h) accounts; and plans under section 414(x). (section 6.03)

(5) The revenue procedure provides that opinion letters will now be issued for multiple employer plans, by deleting this category from the list of areas not covered by opinion letters. (section 6.03)

(6) The procedures for requesting opinion letters are revised to refer to the applicable Form 4461, Form 4461-A, Form 4461-B, and Form 8717 (and to specify what to include until these forms are revised), and to require that the sponsor's certification regarding interim amendments be submitted as part of the application. (sections 7.02 & 12.01)

(7) The description of the six-year remedial amendment cycle and other amendment requirements are updated to conform to the interim amendment requirements (including deleting former section 8.03 regarding a special one-year rule to amend following the issuance of a revenue ruling or other guidance). (section 8)

(8) Provisions are added to clarify that a pre-approved M&P plan becomes an individually designed plan if a request for an opinion letter is withdrawn, unless the employer adopts another pre-approved plan. (section 9.01)

(9) Provisions are added to clarify that an M&P mass submitter amending its plan should submit a restated plan during the applicable on-cycle submission period for the next six-year cycle, rather than submitting the amendments between submission periods and to state that the M&P mass submitter must provide copies of the amendments to sponsors who have adopted the plan. (section 12.04)

.03 The revenue procedure makes the following changes to the VS pre-approved plan program:

(1) Language is added to clarify that each adoption agreement counts as one specimen plan for purposes of the 30-employer requirement (or 10, if applicable). (section 13.05)

(2) The revenue procedure is clarified to provide that a VS mass submitter may be counted as one of the 30 unaffiliated sponsors for purposes of determining whether this sponsorship requirement is met without needing to submit a separate advisory letter application (Form 4461-B) on behalf of that mass submitter. (section 13.06)

(3) The provisions required for VS plans with an adoption agreement format are specified. (section 14.05)

(4) The revenue procedure removes the rule under which a VS practitioner's authority to amend on behalf of an adopting employer is conditioned on the plan being covered by a favorable determination letter (if the employer is required to obtain a determination letter in order to have reliance), and clarifies other provisions with respect to the practitioner's authority to amend on behalf of an adopting employer. (sections 15.03 and 15.05)

(5) The revenue procedure is clarified to provide that the responsibilities of a VS practitioner apply to VS practitioners generally, not just those practitioners authorized to adopt plan amendments on behalf of employers. (section 15.04)

(6) The list of areas not covered by advisory letters is expanded to include: hybrid plans; plans with section 401(h) accounts; and plans under section 414(x). (section 16)

(7) The procedures for requesting advisory letters for VS plans are revised to refer to the applicable Form 4461, Form 4461-A, Form 4461-B, and Form 8717 (and to specify what to include until these forms are revised) and to require that the practitioner's and mass submitter's certification regarding interim amendments be submitted as part of the application (sections 17 and 18)

(8) The procedures for requesting advisory letters for VS plans are revised to clarify when separate specimen plans and applications are required for different categories of plans and to specify that a governmental plan (*i.e.*, a plan described in § 414(d)) is one of the categories of plans that requires a separate specimen plan. (section 17)

.04 The revenue procedure makes the following changes applicable to all pre-approved plans:

(1) The revenue procedure is modified to: (a) clarify the types of employer modifications and amendments to a plan that will not cause the plan to fail to be identical to an approved M&P or VS plan; (b) provide that an employer or sponsor may adopt interim or discretionary amendments for which the remedial amendment cycle ends later than the remedial amendment cycle to which the opinion or advisory letter applies; (c) provide that an employer may adopt model or sample amendments that the Service has indicated will not cause the plan to be treated as an individually designed plan; and (d) delete provisions under Rev. Proc. 2005-16 that provided that the employer could modify or amend the plan to correct typographical errors and/or cross references. (section 19.03)

(2) The address to which applications for opinion and advisory letters should be submitted is updated. (section 20)

(3) The revenue procedure is modified to clarify the circumstances under which an opinion or advisory letter is nontransferable to another entity. (section 20.09)

(4) The revenue procedure is modified to clarify that plans must be amended to comply with statutory and regulatory changes pursuant to Rev. Proc. 2007-44 and to clarify that the amendments do not change the applicable on-cycle submission period for the six-year cycle during which sponsors or practitioners must request opinion or advisory letters. The

revenue procedure further provides that interim amendments adopted by a pre-approved sponsor or practitioner on behalf of adopting employers must be provided to the adopting employers, and the date of the adoption must be provided with the amendments. It also states that the Service may in its discretion request copies of interim amendments that the sponsor or practitioner has adopted on behalf of all adopting employers. (section 21.01)

(5) Rules for submitting word-for-word identical plans and off-cycle filings have been clarified and updated. (section 21.03)

(6) Reasons for which an advisory or opinion letter may be revoked are clarified. (section 22)

(7) The revenue procedure describes the applicable on-cycle submission period for the second six-year cycle and extends the deadline to submit applications for opinion and advisory letters for sponsors and practitioners maintaining defined contribution mass submitter plans from October 31, 2011 to January 31, 2012. It also updates the description of the remedial amendment period, and provides guidance for the next cycle. (sections 23 and 24)

## **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 of 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 this section 4.05, all provisions of the trust or custodial account document must be applicable to all adopting employers of that trust, 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 preceding sentence, 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, provided that an additional user fee is submitted for each trust or custodial account document in excess of 10.

(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, that 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 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 preceding two paragraphs, 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), a person represents to the Service that it is a sponsor, as defined in this section 4.07, 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. For purposes of determining whether 30 unaffiliated sponsors sponsor, on a word for word basis, the same basic plan document, the mass submitter is treated as an unaffiliated sponsor. For purposes of this definition, affiliation is determined under § 414(b) and (c). Additionally, the following will be considered to be affiliated: any law firm, accounting firm, 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 of its M&P plans provided the 30 unaffiliated sponsor requirement is met with respect to at least one basic plan document.

Notwithstanding the preceding paragraph, 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 of its M&P plans if it submits applications on behalf of at least 10 sponsors (regardless of affiliation), each of which is sponsoring the same basic plan document on a word-for-word identical basis. For purposes of determining whether 10 sponsors sponsor the same basic plan document on a word-for-word identical basis, the mass submitter is counted as one of the 10 sponsors.

.09 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 benefits 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 agree-

ment 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) apply 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).

(7) Any hardship distribution must satisfy the safe harbor standards in the regulations under § 401(k).

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 eligibility 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.

.10 Nonstandardized Plan — A “non-standardized plan” is an M&P plan that is not a standardized plan.

## SECTION 5. PROVISIONS REQUIRED IN M&P PLANS

.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 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. The provision for sponsor amendment must provide that, for purposes of reliance on the opinion letter, the sponsor will no longer have the authority to amend the plan on behalf of the adopting employer as of the date of the adoption of an employer amendment to the plan to incorporate a type of plan not allowable in the M&P program described in section 6.03 (e.g., the addition of an ESOP) or as of the date the Service notifies the sponsor that the plan is being treated as an individually designed plan pursuant to section 24.03. 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 selected, 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 without substituting 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 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. Additionally, a plan will not be treated as individually designed if a closing agreement under the Audit Closing Agreement Program or a compliance statement under the Voluntary Correction Program has been issued with respect to the employer's plan with regard to the amendment.<sup>3</sup> 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. 2011-6 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 in § 1.401(a)(4)-3(b)(3), (4), and (5). A non-

standardized defined contribution plan or defined benefit plan is permitted to include allocation or benefit formulas that must be general tested under § 1.401(a)(4)-2(c) or 3(c) or cross-tested under § 1.401(a)(4)-8.

.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 rules for all years that are at least as favorable to participants as those 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 plan provisions may be amended by plan language completed by the employer in the adoption agreement where such overriding 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).

.08 Top-heavy Requirements — Each plan must either provide that all of 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 of 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 modification 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 sections 19.02 and 19.03. Standardized plans must also include a similar statement in the adoption agreement that, under the circumstances described in section 19.01, the adopting employer may not rely on the opinion letter issued by the Service, but must apply for a determination letter to have reliance.

.11 Other Provisions Required in Adoption Agreements — Each M&P plan must

<sup>3</sup> See Rev.Proc. 2008-50, 2008-2 C.B. 464, and Memorandum for Directors, EP Examinations and EP Rulings & Agreements, dated March 11, 2009, as posted [http://www.irs.gov/pub/irs-tege/corrective\\_amendments.pdf](http://www.irs.gov/pub/irs-tege/corrective_amendments.pdf).

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 under § 401(a) or 403(a). 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 this Revenue Procedure to IRAs (including traditional IRAs, Roth IRAs, SEPS, and Simple IRAs) and section 403(b) Plans — Opinion letters will not be issued under this revenue procedure for prototype plans intended to meet the requirements for individual retirement arrangements under § 408 or for § 403(b) plans (see Rev. Proc. 87-50, 1987-2 C.B. 647; Rev. Proc. 97-29, 1997-1 C.B. 698; Rev. Proc. 98-59, 1998-2 C.B. 727; and Rev. Proc. 2010-48, 2010-50 I.R.B. 828).

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

- (1) Multiemployer 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, 2004-2 C.B. 28, and Rev. Rul. 2011-1, 2011-2 I.R.B. 251);
- (6) Applicable defined benefit plans within the meaning of § 411(a)(13)(C) (Hybrid Plans);

(7) 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);

(8) Target benefit plans, other than plans that, 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);

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

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

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

(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 (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);

(15) Fully-insured § 412(e)(3) plans, other than plans that, by their terms, satisfy the safe harbor 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, 1996-2 C.B. 369);

(17) Plans that include so-called fail-safe 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;

(20) Plans that include § 401(h) accounts;

(21) Eligible combined plans within the meaning of § 414(x)(2).

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 LETTER APPLICATIONS — 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 documents 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 or Volume Submitter Defined Contribution Plans*, Form 4461-A, *Application for Approval of Master or Prototype or Volume Submitter Defined Benefit Plans*, or Form 4461-B, *Application for Approval of Master or Prototype or Volume Submitter Plans Mass Submitter Adopting Sponsor or Practitioner*, as appropriate. The Service intends to revise Forms 4461, 4461-A and 4461-B. Until the forms have been revised, a request for an opinion letter should be accompanied by the appropriate form with the following items, if applicable, completed:

(1) Form 4461 — Complete Part 1, items 1–9, and Attachment 1 which can be accessed at [http://www.irs.gov/pub/irs-tege/form4461\\_attachment.pdf](http://www.irs.gov/pub/irs-tege/form4461_attachment.pdf).

(2) Form 4461-B — Complete in its entirety.

(3) Form 4461-A (relates to DB plans) — Complete Part 1, and an attachment that the Service will provide at a future date.

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 of this revenue procedure. The M&P request must be accompanied by the required user fee submitted with Form 8717, *User Fee for Employee Plan Determination, Opinion, and Advisory Letter Request*, and a signed certification that all necessary amendments required by the Service to retain the qualified status of the M&P sponsor's plan have been made and communicated to all adopting employers.<sup>4</sup>

See [http://www.irs.gov/pub/irs-tege/cert\\_interim\\_amendments.pdf](http://www.irs.gov/pub/irs-tege/cert_interim_amendments.pdf) for certification.

.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 the 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, integrated (*i.e.*, provide for permitted disparity) defined benefit, or nonintegrated defined benefit plan features. How-

ever, 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 plans; 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/retirement/article/0,,id=97182,00.html>.

.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 opinion letter from the Service.

<sup>4</sup> Form 8717, *User Fee for Employee Plan Determination, Opinion and Advisory Letter Request*, has not been updated to reflect new user fees. Until the form is updated, the current Form 8717 (rev. May 2009) should continue to be used. However, submissions must include the correct user fees as noted in Rev. Proc. 2011–8, 2011–1 I.R.B. 237, User fees for employee plans and exempt organizations, as modified by Announcement 2011–8, 2011–5 I.R.B. 446.

.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 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 preceding sentence, 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 — Rev. Proc. 2007–44 provides that sponsors of pre-approved M&P plans must submit requests for opinion letters during the applicable on-cycle submission period for 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 of this revenue procedure. The Service will review the plans that have been submitted during the applicable on-cycle submission period for 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 in operation with all relevant qualification requirements, not just those on the applicable Cumulative List.

.02 Subsequent Required Interim Amendments — Except as otherwise pro-

vided 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. See section 5.01 of Rev. Proc. 2007–44 regarding the time by which such amendments must be adopted. Failure to so amend could result in the loss of a plan’s qualified status. However, this does not change the applicable on-cycle submission period for 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 that, to the best of the sponsor’s knowledge, continues to maintain the plan as an M&P plan amends its plan when necessary.

The plan must operationally comply with any changes in qualification requirements and the terms of the plan as ultimately amended to reflect the changes.

.03 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. 2008–50.

#### 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, at the address provided in section 20.01. The sponsor must also notify each employer who adopted the plan that the request has been withdrawn. The plan of such an employer will become an individ-

ually designed plan unless the employer adopts another pre-approved plan. See Rev. Proc. 2007–44.

.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 any employers that have adopted the plan.

#### SECTION 10. ABANDONED PLANS

.01 Notification to the Service — A sponsor must notify EP Rulings and Agreements in writing if an approved M&P plan is no longer used by any employer and the sponsor no longer intends to offer the plan for adoption. Such written notification must be sent to the address in section 20 and must 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, and that the employer’s plan will become an individually designed plan (unless the employer adopts another pre-approved plan). After so informing all adopting employers, the sponsor should notify EP Rulings and Agreements in accordance with subsection 10.01 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, 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 documents 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 documents. 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. 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). The M&P request must be accompanied by the required user fee submitted with Form 8717, *User Fee for Employee Plan Determination, Opinion and Advisory Letter Request*, and a signed certification that all necessary amendments required by the Service to retain the qualified status of the M&P mass submitter's plan have been made and communicated to all adopting sponsors.<sup>5</sup> See [http://www.irs.gov/pub/irs-tege/cert\\_interim\\_amendments.pdf](http://www.irs.gov/pub/irs-tege/cert_interim_amendments.pdf) for certification.

(2) After satisfying the requirement as to the number of adopting sponsors, 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 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 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 preceding sentence, 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.

.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 qualification, or where the sponsor's plan includes modifications, the M&P mass submitter must submit on behalf of the sponsor 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 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, the Service will, as soon as administratively feasible, issue an opinion letter with respect to the sponsor's plan (provided that an opinion letter has been issued with respect to the M&P mass submitter's plan).

.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

<sup>5</sup> See footnote 4 for interim user fee information under Rev. Proc. 2011-8, User fees for employee plans and exempt organizations, as modified by Announcement 2011-8, until Form 8717, *User Fee for Employee Plan Determination, Opinion and Advisory Letter Request*, is updated.

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 that 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 that 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 that 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 in this paragraph 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, that they provide under a flexible plan to six investment provisions and six administrative provisions.

(b) **Optional Provisions** — A flexible plan may contain optional provisions that comply with the requirements set forth in this paragraph. 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 op-

tional 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 sections 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. 2011-6, and Rev. Proc. 2011-8, 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. 2011-8. 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 the preceding paragraph, 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 five-year 100% vesting to three-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 the next paragraph 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 Service sends an email to the applicable sponsor with respect to the lead plan indicating that the Service has determined that the plan appears to be in full compliance with the applicable qualification requirements, as described in section 7.07 above, the M&P mass submitter must submit a copy of the M&P mass submitter’s plan with the mod-

ifications 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 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 — If an M&P mass submitter amends the plan, the mass submitter must provide copies of the amendment to sponsors who have adopted the plan. 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 during the next applicable on-cycle submission period for pre-approved plans. An M&P mass submitter should not submit an application for an opinion letter with respect to plan amendments. The Service will not issue an opinion letter with respect to amendments made between the applicable on-cycle submission periods and the M&P mass submitter should submit a restated plan, including the amendments, during the next six-year cycle.

.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 be a single document that does not use an adoption agreement, or it may consist of a basic plan document and an adoption agreement, within the meaning of section 4.03 and section 4.04, respectively.

.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 documents under § 401(a) or 403(a).

.04 Trust or Custodial Account Document — A “trust or custodial account document” is the portion of a VS 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.

.05 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 adopt a plan that is substantially similar to the VS practitioner’s specimen plan. Notwithstanding the preceding sentence, the required number of employer-clients reasonably expected to 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. For this purpose, where an adoption agreement format is used, each adoption agreement is treated as one 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 preceding two sentences, 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 a VS mass submitter, regardless of the number of employers that are expected to adopt the plan.

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 in this section 13.05. 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.

**.06 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. For purposes of determining whether 30 unaffiliated practitioners sponsor on a word-for-word basis the same specimen plan, the VS mass submitter is treated 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 firm, accounting firm, 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 rules for all years that are at least as favorable to participants as those 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 Provisions Required in Adoption Agreements** — Each VS 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 specimen plan. 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 under § 401(a) or 403(a). If the VS practitioner has the authority to amend the plan on behalf of employers who have adopted the plan, as described under section 15.03 below, the adoption agreement must also contain a statement that provides that the practitioner will inform the adopting employer of any amendments made to the plan or of the discontinuance or abandonment of the plan.

**.06 Practitioner Telephone Numbers** — VS plan adoption agreements must include the VS practitioner's name, address, and telephone number (or a space for the address and telephone number of the practitioner's authorized representative) for inquiries by adopting employers regarding the adoption of the plan, the meaning of plan provisions, or the effect of the advisory letter.

**SECTION 15. APPROVED PLANS  
— MAINTENANCE OF APPROVED  
STATUS**

.01 Cumulative List in Six-Year Cycle — Rev. Proc 2007–44 provides that practitioners of pre-approved VS plans must submit requests for advisory letters during the applicable on-cycle submission period for 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 of this revenue procedure. The Service will review the plans that have been submitted during the applicable on-cycle submission period for 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 in operation with all relevant qualification requirements, not just those on the applicable Cumulative List.

.02 Subsequent Required Interim 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. See section 5.01 of Rev. Proc. 2007–44 regarding the time by which such amendments must be adopted. Failure to so amend could result in the loss of a plan’s qualified status. However, this does not change the applicable on-cycle submission period for 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 that, to the best of the practitioner’s knowledge, continues to maintain the plan as a VS plan amends its plan when necessary.

The plan must operationally comply with any changes in qualification re-

quirements and the terms of the plan as ultimately amended to reflect the changes.

.03 Option to Permit Practitioner Amendment — A VS practitioner may amend its specimen 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 Service (including model and sample 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 for practitioner amendment must provide that, for purposes of reliance on the advisory letter, the practitioner will no longer have the authority to amend the plan on behalf of the adopting employer as of the date of the adoption of an employer amendment to the plan to incorporate a type of plan not allowable in the VS program described in section 16.03 (e.g., the addition of an ESOP) or as of the date the Service notifies the practitioner that the plan is being treated as an individually designed plan pursuant to section 24.03.

.04 Responsibilities of Practitioner — A VS practitioner 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. 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.

.05 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 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. 2008–50.

**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 Nonapplicability of this Revenue Procedure to section 403(b) Plans — Advisory letters will not be issued under this revenue procedure for plans intended to meet the requirements under § 403(b) (see Rev. Proc. 98–59).

.03 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 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 (as modified by Rev. Rul. 2004–67 and Rev. Rul. 2011–1);
- (6) Applicable defined benefit plans within the meaning of § 411(a)(13)(C) (Hybrid Plans);
- (7) 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);
- (8) 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);

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

(10) Governmental plans that include so-called “DROP” provisions or similar provisions;

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

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

(13) Section 401(k) plans that provide for hardship distributions under circumstances not 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;

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

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

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

(17) 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;

(18) Plans designed to satisfy the provisions of § 105;

(19) Plans that include § 401(h) accounts;

(20) Eligible combined plans within the meaning of § 414(x)(2).

The Service may, in its discretion, decline to issue advisory letters for other types of plans not described in this section 16.03.

## 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 on the current version of Form 4461, *Application for Approval of Master or Prototype or Volume Submitter Defined Contribution Plans*, Form 4461-A, *Application for Approval of Master or Prototype or Volume Submitter Defined Benefit Plans*, or Form 4461-B, *Application for Approval of Master or Prototype or Volume Submitter Plans Mass Submitter Adopting Sponsor or Practitioner*, as appropriate. The Service intends to revise Forms 4461, 4461-A, and 4461-B. Until the forms have been revised, a request for an advisory letter should be accompanied by the appropriate form with the following items, if applicable, completed:

(1) Form 4461 — Complete Part 1, items 1–9, and Attachment 1 which can be accessed at [http://www.irs.gov/pub/irs-tege/form4461\\_attachment.pdf](http://www.irs.gov/pub/irs-tege/form4461_attachment.pdf)

(2) Form 4461-B — Complete in its entirety.

(3) Form 4461-A (relates to DB plans) — Complete Part 1 and an attachment that the Service will provide at a future date

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 VS request must be accompanied by the required user fee submitted with Form 8717, *User Fee for Employee Plan Determination, Opinion and Advisory Letter Request*, and a signed certification that all necessary amendments required by the Service to retain the qualified status of the VS practitioner’s specimen plan have been made and communicated to all adopting employers.<sup>6</sup> See [http://www.irs.gov/pub/irs-tege/cert\\_interim\\_amendments.pdf](http://www.irs.gov/pub/irs-tege/cert_interim_amendments.pdf) for certification.

.03 Separate Specimen Plans and Applications Required for Different Categories of Plans

(1) Specimen plans that consist of a basic plan document and adoption agreement. Except as provided in this section 17.03(1), the rules in section 7.04 (disregarding references therein to standardized and nonstandardized plans) apply to a specimen plan that consists of a basic plan

document and adoption agreement as if the specimen plan were an M&P plan. Thus, a single basic plan document may not be used in conjunction with both defined contribution specimen plans and defined benefit specimen plans. In addition, a defined contribution specimen plan may not include any combination of profit-sharing, money purchase (other than target benefit), and target benefit plan. Accordingly, separate adoption agreements are required for each of these types of defined contribution specimen plans. The separate defined contribution adoption agreements may be associated with the same defined contribution basic plan document, but the provisions of the basic plan document must be identical for all specimen plans using that document (that is, no elective or optional features). Likewise, multiple defined benefit adoption agreements may be associated with a single defined benefit basic plan document if the provisions of the basic plan document are identical for all specimen plans using that document (that is, no elective or optional features). Separate adoption agreements are not required for defined benefit specimen plans that are integrated (*i.e.*, provide for permitted disparity) and defined benefit specimen plans that are non-integrated. Instead, a single defined benefit adoption agreement may provide options for both integrated and non-integrated benefit formulas.

In addition, the same basic plan document may not be used for both nongovernmental specimen plans (*i.e.*, specimen plans that are not described in § 414(d)) and governmental specimen plans. However, separate governmental defined contribution specimen plans may have the same basic plan document and separate governmental defined benefit specimen plans may have the same basic plan document.

A separate application form is required to be submitted for each specimen plan, that is, for each basic plan document/adoption agreement combination (where the specimen plan consists of a basic plan document and adoption agreement). 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

<sup>6</sup> See footnote 4 for interim user fee information under Rev. Proc. 2011–8, User fees for employee plans and exempt organizations, as modified by Announcement 2011–8, until Form 8717, *User Fee for Employee Plan Determination, Opinion and Advisory Letter Request*, is modified.

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 plan number of such basic plan document must remain the same as in the prior submission.

(2) Specimen plans that consist of a single document without an adoption agreement. A separate specimen plan and application is required for each of the following categories of specimen plans where the specimen plan consists of a single document without an adoption agreement: 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. In addition, a separate specimen plan and application is required for each of the categories of plans in the preceding sentence if the specimen plan is a governmental plan. Different categories may not be combined in a single specimen plan or application. Thus, for example, separate specimen plans and application forms must be submitted for a governmental defined benefit specimen plan that consists of a single document without an adoption agreement and a nongovernmental defined benefit specimen plan that consists of a single document without an adoption agreement.

.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/retirement/article/0,,id=97182,00.html>.

.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 ap-

proximately 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 preceding sentence, 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 a VS mass submitter, as defined in section 13.06, 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 under this section.

.02 As noted in section 17.02, a VS mass submitter's application must be submitted on the current version of Form 4461, *Application for Approval of Master or Prototype or Volume Submitter Defined Contribution Plans*, Form 4461-A, *Application for Approval of Master or Prototype or Volume Submitter Defined Benefit Plans*, or Form 4461-B, *Application for Approval of Master or Prototype or Volume Submitter Plans Mass Submitter Adopting Sponsor or Practitioner*, as appropriate. The Service intends to revise Forms 4461, 4461-A, and 4461-B. Until the forms have been revised, a request for an opinion letter should be accompanied by the appropriate form with the following items, if applicable, completed:

(1) Form 4461 — Complete Part 1, items 1–9, and Attachment 1 which can be accessed at [http://www.irs.gov/pub/irs-tege/form4461\\_attachment.pdf](http://www.irs.gov/pub/irs-tege/form4461_attachment.pdf)

(2) Form 4461-B — Complete in its entirety.

(3) Form 4461-A (relates to DB plans) — Complete Part 1, and an attachment that the Service will provide at a future date.

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 VS request must be accompanied by the required user fee submitted with Form 8717, User Fee for Employee Plan Determination, Opinion, and Advisory Letter Request, and a signed certification that all necessary amendments required by the Service to retain the qualified status of the VS practitioner's specimen plan have been made and communicated to all adopting employers.<sup>7</sup> See [http://www.irs.gov/pub/irs-tege/cert\\_interim\\_amendments.pdf](http://www.irs.gov/pub/irs-tege/cert_interim_amendments.pdf) for certification.

## 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 prop-

<sup>7</sup> See footnote 4 for interim user fee information under Rev. Proc. 2011–8, User fees for employee plans and exempt organizations, as modified by Announcement 2011–8 until, Form 8717, User Fee for Employee Plan Determination, Opinion and Advisory Letter Request, is updated.

erly replaced by the adoption of a standardized plan is not considered another plan. For example, 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.

(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 VS plan may rely on that plan's opinion or advisory letter as described in this section 19 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 not amended the plan other than to choose options provided under the approved plan or to make amendments as described in section 19.03(3), and the employer has followed the terms of the plan. 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 subparagraphs (1) through (4) and section 19.03 below.

(1) Except as provided in section 19.02(2), (3) and (4), adopting employers of nonstandardized M&P plans and VS 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 VS 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 employer non-elective contributions that satisfies one of the design-based safe harbors in § 1.401(a)(4)–2(b)(2) or a benefit formula that 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 that satisfies § 1.414(s)–1(c). If the plan of the adopting employer allocates contributions or provides benefits using one of the designed based safe harbors in § 1.401(a)(4)–2(b)(2) or § 1.401(a)(4)–3(b)(3), (4), or (5), and the plan defines compensation using a definition that satisfies § 1.414(s)–1(c) 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.

For purposes of this section 19.03(3), a plan will not fail to be identical to an approved M&P or specimen plan if:

(a) the employer modifies or amends the plan to 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) or 403(a), and, except for the effective date, the provision is identical to a provision in the approved plan;

(b) the employer, sponsor or practitioner adopts an interim or discretionary amendment in accordance with section 21 or Rev. Proc. 2007-44; or

(c) the employer adopts a model or sample amendment that the Service has indicated will not cause the plan to be treated as an individually designed plan.

For example, an employer is not required to restate its M&P or VS 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. 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 under § 401(a).

**.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. 2011-6, regarding the effect of a determination letter, and section 5.01(4) of Rev. Proc. 2008-50, regarding the definition of "favorable letter" for purposes of EPCRS. Of course, the extent of the employer's reliance may be limited, as provided in this section.

## 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: Pre-Approved Plans 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: Pre-Approved Plans Coordinator  
Room 5106

**.03** For purposes of .01 and .02 above, a request shipped by Express Mail or a delivery service should be sent to the attention of the Pre-Approved Plans Coordinator, to:

Internal Revenue Service  
550 Main Street  
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 on the favorable opinion letter or advisory letter.

**.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 of § 401(a) or 403(a) 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, as required in section 6.12 of Rev. Proc 2011-6, 2011-1 I.R.B. 195, 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 section 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 document) 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. In the case of a change in entity, a letter issued to a sponsor or VS practitioner may not be relied upon by a different entity. If a different entity assumes sponsorship of the plan, it must submit an application for a new letter. Such an application may be filed at the time of the assumption of sponsorship and the filing is not limited to the applicable on-cycle submission period. The application will be subject to a reduced user fee as provided in section 6.03(8) or 6.04(4) of Rev. Proc. 2011-8. The new letter will recognize the change in sponsorship and will not modify the scope of or change the reliance on the original letter. The Service may in appropriate circumstances request documentation of the assumption of sponsorship prior to issuing a letter to the new entity. Examples of a change in entity include, but are not limited to, a change in the employer identification number, the acquisition of a sponsor by another entity or the sale or transfer of the stock or assets of the sponsor to another entity.

## SECTION 21. AMENDMENTS

.01 Opinion or Advisory Letters for Sponsor or VS Practitioner Amendments — A plan must be operated in accordance with the written plan document. When there are changes with respect to plan qualification requirements that will impact the provisions of the written plan document, the adoption of interim amendments will generally be required in accordance with the rules set forth in Rev. Proc. 2007-44. Interim amendments adopted by a pre-approved sponsor or practitioner on behalf of adopting employers must be provided to the adopting employers. The date on which each amendment is adopted by the M&P sponsor or VS practitioner must be provided with the amendment. The requirement to provide the date for each amendment is effective for amendments adopted by the sponsor or practitioner on or after the effective date of this revenue procedure. However, this does not change the applicable on-cycle submission period for the six-year cycle when sponsors or VS practitioners must request opinion or advisory letters, which will still only occur once every six years. 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 restated, during the applicable on-cycle submission period for the six-year cycle, as provided in section 8.01 and section 15.01. The sponsor or VS practitioner 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 plan's certification regarding interim amendments, a cover letter summarizing the changes to the plan that are affected by such amendment(s), and a copy of the plan that is being restated. The Service retains the right to request and secure from the sponsor/practitioner in appropriate circumstances copies of all interim amendments reflected on the applicable Cumulative List that the sponsor/practitioner has adopted on behalf of its adopting employers.

.02 Loss of Qualified Status for Certain Amendments — A pre-approved plan will not lose its qualified status merely because amendments are made that cover any of the following:

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

(3) Amendments to conform the plan to the requirements of DOL Field Assistance Bulletin No. 2008-1, which provides guidance on the need for plans to specify the duties of trustees with respect to the responsibility for collection of delinquent contributions.

(4) Amendments that 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 automatic cost-of-living adjustment provisions to the plan.

(5) Amendments that reflect a change of a sponsor's or VS practitioner's name. 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 13.05. (Also see section 20 regarding changes in employer identification numbers.)

.03 Off-Cycle Filing — An application for an opinion or advisory letter for a plan that is word-for-word identical to an approved mass submitter that has a current advisory or opinion letter will not be treated as off-cycle merely because it is submitted after the end of the applicable on-cycle submission period for the six-year cycle.

Any other application for an opinion or advisory letter that is submitted after the applicable on-cycle submission period for the six-year cycle will be treated as an off-cycle filing. If such an off-cycle application is submitted before the beginning of the two year period for employer adoption announced by the Service for an applicable 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 five-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. Off-cycle applica-

tions that are submitted during or after the two-year period will not be accepted.

## 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. Also, see sections 4.07 and 13.05. Except in rare or unusual circumstances, such revocation will not be applied retroactively if the conditions set forth in sections 13 and 14 of Rev. Proc. 2011–4, 2011–1 I.R.B. 123, 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 publication 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. SECOND ON-CYCLE SUBMISSION PERIOD (POST - EGTRRA) FOR PRE-APPROVED DC PLANS

The second on-cycle submission period (post-EGTRRA) began on February 1, 2011, and ends on January 31, 2012, for applications for opinion and advisory letters for defined contribution plans that take into account the changes identified on the 2010 Cumulative List. However, a plan must comply in operation with all relevant qualification requirements, not just those on the 2010 Cumulative List.

The Service is accepting opinion and advisory letter applications for pre-approved defined contribution plans during the second six-year remedial amendment cycle that began on February 1, 2011. As provided in section 18.02(1) of Rev. Proc. 2007–44, the on-cycle submission period for non-mass submitter sponsors and practitioners, word-for-word identical adopters, and M&P minor modifier placeholder applications will end on January 31, 2012. Section 18.02(1) of Rev. Proc. 2007–44

also provides that the 9-month submission period for mass submitter sponsors and practitioners will end on October 31, 2011. The deadline to submit applications for opinion and advisory letters for sponsors and practitioners maintaining defined contribution mass submitter plans is extended from October 31, 2011 to January 31, 2012. The 2010 Cumulative List is to be used by plan sponsors and practitioners submitting determination, opinion or advisory letter applications for plans during this period. However, if a plan has not been previously reviewed for items on earlier cumulative lists, the plan must still take those items into account. For example, pre-approved defined contribution plans have not yet been reviewed for items on the 2005 Cumulative List, so those items have been retained on the 2010 Cumulative List. The Service will announce the deadline for timely adoption by employers when the review of the pre-approved documents is close to being completed. Applications for opinion and advisory letters for pre-approved defined benefit plans will be accepted beginning February 1, 2013. It is expected that the procedures for applying for opinion and advisory letters will be updated from time to time.

## SECTION 24. REMEDIAL AMENDMENT PERIOD

.01 Revenue Procedure 2007–44 contains 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 extended a plan's EGTRRA remedial amendment period to the end of the plan's first applicable cycle. It explains the conditions under which an adopting employer who timely adopts a 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 section 24.02.

.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. The effect of employer amendments or the adoption of an individually designed plan on employers eligible for the six-year remedial amendment cycle is described in section 19 of Rev. Proc. 2007–44.

.03 In addition to the provisions described in section 19 of Rev. Proc. 2007–44, the Service may in its discretion determine that 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. 2005–16 is modified and superseded. Rev. Proc. 2011–6 and Rev. Proc. 2011–8 are modified.

## SECTION 26. EFFECTIVE DATE

This revenue procedure is effective October 31, 2011.

## 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 Kathleen Herrmann 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 (a toll-free number) or email Ms. Herrmann at [RetirementPlanQuestions@irs.gov](mailto:RetirementPlanQuestions@irs.gov).

Use this Revenue Procedure to prepare Tax Year 2011 and prior year information returns for submission to Internal Revenue Service (IRS) electronically.

**This Revenue Procedure is not revised every year. Updates will be printed as needed in the Internal Revenue Bulletin. General Instructions for Form 1042-S are revised every year. Be sure to consult current instructions when preparing Form 1042-S.**

**Following is a list of related instructions and forms for filing Form 1042-S Electronically:**

- **Current paper Instructions for Form 1042-S**
- **Form 4419 — Application for Filing Information Returns Electronically (FIRE)**
- **Form 8508 — Request for Waiver From Filing Information Returns Electronically**
- **Form 8809 — Application for Extension of Time To File Information Returns**
- **Publication 515 — Withholding of Tax on Nonresident Aliens and Foreign Entities (for general information and explanation of tax law associated with Form 1042-S)**
- **Publication 901 — U.S. Tax Treaties**

The Internal Revenue Service (IRS), Information Returns Branch (IRB) encourages filers to make copies of the blank forms in the back of this publication for future use. You can also download forms and publications from the IRS Web Site at [IRS.gov](http://irs.gov). These forms can also be obtained by calling 1-800-TAX-FORM (1-800-829-3676).

#### Caution to filers:

**Please read this publication carefully. Persons or businesses required to file information returns electronically may be subject to penalties for failure to file or include correct information if the instructions in this Revenue Procedure are not followed.**

#### IMPORTANT NOTES:

**The IRS internet connection for filing information returns electronically is <http://fire.irs.gov>. The Filing Information Returns Electronically (FIRE) system will be down from 6 p.m. Eastern Time (ET) December 16, 2011, through January 3, 2012 for yearly updates. In addition, the FIRE system may be down every Wednesday from 2:00 a.m. to 5:00 a.m. ET for programming updates. The FIRE system will not be available for submissions during these times.**

**Form 4419, Application for Filing Information Returns Electronically (FIRE) is subject to review before the approval to transmit electronically is granted. IRS may require additional documentation. If a determination is made concerning the validity of the documents transmitted electronically, IRS has the authority to revoke the Transmitter Control Code (TCC) and terminate the release of the files.**

*The FIRE system does not provide fill-in forms for filing information returns.*