

**Rev. Proc. 2009-6**

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**SECTION 1. WHAT IS THE PURPOSE OF THIS REVENUE PROCEDURE?**

**Purpose of revenue procedure**

.01 This revenue procedure sets forth the procedures of the various offices of the Internal Revenue Service for issuing determination letters on the qualified status of pension, profit-sharing, stock bonus, annuity, and employee stock ownership plans (ESOPs) under §§ 401, 403(a), 409 and 4975(e)(7) of the Internal Revenue Code of 1986, and the status for exemption of any related trusts or custodial accounts under § 501(a). Also see Rev. Proc. 2007–44, 2007–28 I.R.B. 54, which contains a description of the determination letter program, including when to submit a request for a determination letter within the 5-year and 6-year staggered remedial amendment cycles, that apply to individually designed and pre-approved plans.

**Organization of revenue procedure**

.02 Part I of this revenue procedure contains instructions for requesting determination letters for various types of plans and transactions. Part II contains procedures for providing notice to interested parties and for interested parties to comment on determination letter requests. Part III contains procedures concerning the processing of determination letter requests and describes the effect of a determination letter.

**SECTION 2. WHAT CHANGES HAVE BEEN MADE TO THIS PROCEDURE?**

**In general**

.01 This revenue procedure is a general update of Rev. Proc. 2008–6, 2008–1 I.R.B. 192, which contains the Service’s general procedures for employee plans determination letter requests.

**Other changes**

.02 In addition to minor revisions, such as updating references, the following changes have been made:

(1) Section 2.03 is revised to reference the 2008 Cumulative List, Notice 2008–108, 2008–50 I.R.B. 1275; Announcement 2008–23, 2008–14 I.R.B. 731; and Rev. Proc. 2008–56, 2008–40 I.R.B. 826.

(2) Section 3.03 is revised to reference the first submission period for Cycle D individually designed plans and § 414(f) multiemployer plans.

(3) Section 6.05 is revised to eliminate the requirement that all changes made to the prior plan document be identified.

(4) Section 6 is revised to eliminate the pre-notification requirement when submitting 30 or more on-cycle individually designed plans at one time.

(5) Section 7.02 is revised to reference the first submission period for Cycle D individually designed plans and § 414(f) multiemployer plans; and to include Form 8905, *Certification of Intent To Adopt a Pre-approved Plan*, as an item to be submitted with a determination letter application.

(6) Section 7.04 is revised to clarify that a working copy of a plan is not a document that is intended to be adopted.

(7) Section 9.02 is revised to include the applicable provisions of Announcement 2008–23.

(8) Section 9.02(2) is revised to include Form 8905, *Certification of Intent To Adopt a Pre-approved Plan*, as an item to be submitted with a determination letter application.

(9) Section 9.03 is revised to include the applicable provisions of Announcement 2008–23.

(10) Section 9.04(3) is clarified with respect to the necessity of the trust or custodial agreement in order to verify that the trustee executed the document.

(11) Section 9.05 is revised to include the applicable provisions of Announcement 2008–23.

(12) Section 9.07 is revised to include the dates of the two-year window (May 1, 2008 through April 30, 2010).

(13) Section 10.02 is revised to include the applicable provisions of Announcement 2008–23.

(14) Section 14.02(3) is revised to explain that an employer subject to § 414(m) or § 414(n) must submit a restated plan that reflects the Cumulative List in effect when the application is filed, unless the plan is a pre-approved plan.

(15) Section 14.08 is revised to provide that when an employer, that has adopted a pre-approved plan, is requesting a determination regarding affiliated service group status or leased employees, the plan will be reviewed on the basis of the Cumulative List that was used to review the underlying pre-approved plan.

(16) The effective date in Section 23 is revised to coincide with the beginning of Cycle D (February 1, 2009).

(17) The Appendix addresses § 420 transfers, however, the Service is not updating the Appendix for § 420(e)(5) or § 420(f), as amended by PPA '06, pending the inclusion of these PPA '06 changes in a future Cumulative List.

## **Other guidance**

.03 Other guidance affecting this revenue procedure:

Rev. Proc. 2005–16, 2005–1 C.B. 674, describes the procedures for the “pre-approval” of plans under the master and prototype (M&P) program and the volume submitter (VS) program. Rev. Proc. 2007–44 describes a new system of remedial amendment cycles that applies to pre-approved plans and individually designed plans, and the deadlines to submit applications for opinion, advisory and determination letters. The Service issues a Cumulative List every year identifying changes affecting plan qualification requirements to be used by plans whose remedial amendment cycle begins in the month of February following the publication of the Cumulative List. The 2004 Cumulative List is contained in Notice 2004–84, 2004–2 C.B. 1030, the 2005 Cumulative List is contained in Notice 2005–101, 2005–2 C.B. 1219, the 2006 Cumulative List is contained in Notice 2007–3, 2007–2 I.R.B. 255, and the 2007 Cumulative List is contained in Notice 2007–94, the 2008 Cumulative List is contained in Notice 2008–108, 2008–50 I.R.B. 1275. Announcement 2007–90 temporarily closes the determination letter program for pre-approved defined contribution plans. Announcement 2008–23, 2008–14 I.R.B. 731 provides information with respect to the issuance of opinion and advisory letters, and the opening of the EGTRRA determination letter program for pre-approved defined contribution plans. Revenue Procedure 2008–56, 2008–40 I.R.B. 826, modifies Rev. Proc. 2007–44 with respect to certain restrictions that apply to the issuance of opinion and advisory letters for new pre-approved plans.

## PART I. PROCEDURES FOR DETERMINATION LETTER REQUESTS

### SECTION 3. ON WHAT ISSUES MAY TAXPAYERS REQUEST WRITTEN GUIDANCE UNDER THIS PROCEDURE?

#### Types of requests

.01 Determination letters may be requested on completed and proposed transactions as set forth in the table below:

TYPE OF REQUEST	FORMS	REV. PROC. SECTION
<b>1. Initial Qualification, etc.</b>		
a. Individually-Designed Plans including collectively bargained plans)	5300, Schedule Q (optional)	7
b. ESOPs	5300, 5309 Schedule Q (optional)	7
c. Adoptions of Master & Prototype Plans	5307, Schedule Q (optional)	9
d. Adoptions of Volume Submitter Plans	5307, Schedule Q (optional)	9
e. Multiple Employer Plans	5300, Schedule Q (optional)	10
f. Group Trusts	Cover letter	13
<b>2. Termination</b>		
a. In general	5310, 6088 Schedule Q (optional)	12
b. Multiemployer plan covered by PBGC insurance	5300, 6088, Schedule Q (optional)	12
<p>Note: Form 5310–A, <i>Notice of Plan Merger or Consolidation, Spinoff, or Transfer of Plan Assets or Liabilities; Notice of Qualified Separate Lines of Business</i>, generally must be filed not less than 30 days before the merger, consolidation or transfer of assets and liabilities. The filing of Form 5310–A will not result in the issuance of a determination letter.</p>		
<b>3. Special Procedures</b>		
a. Affiliated Service Group Status (§ 414(m)), Leased Employees (§ 414(n))	5300, Schedule Q (optional)	14
b. Minimum Funding Waiver	5300, Schedule Q (optional)	15
c. Section 401(h) Determination Letters	5300, Schedule Q (optional)	16
d. Section 420 Determination Letters Including Other Matters Under § 401(a)	5300, Schedule Q (optional), Cover letter, Checklist	16
e. Section 420 Determination Letters Excluding Other Matters Under § 401(a)	Cover letter, Checklist	16

#### Areas in which determination letters will not be issued

.02 Determination letters issued in accordance with this revenue procedure do not include determinations on the following issues within the jurisdiction of the Commissioner, TE/GE:

(1) Issues involving §§ 72, 79, 105, 125, 127, 129, 402, 403 (other than 403(a)), 404, 409(l), 409(m), 412, 457, 511 through 515, and 4975 (other than 4975(e)(7)), unless these determination letters are authorized under section 7 of Rev. Proc. 2009-4, page 118, this Bulletin.

(2) Plans or plan amendments for which automatic approval is granted pursuant to section 19.01 of Rev. Proc. 2005-16.

(3) Plan amendments described below (these amendments will, to the extent provided, be deemed not to alter the qualified status of a plan under § 401(a)).

(a) An amendment solely to permit a trust forming part of a plan to participate in a pooled fund arrangement described in Rev. Rul. 81-100, 1981-1 C.B. 326, as clarified and modified by Rev. Rul. 2004-67, 2004-2 C.B. 28;

(b) An amendment that merely adjusts the maximum limitations under § 415 to reflect annual cost-of-living increases under § 415(d), other than an amendment that adds an automatic cost-of-living adjustment provision to the plan; and

(c) An amendment solely to include language pursuant to § 403(c)(2) of Title I of the Employee Retirement Income Security Act of 1974 (ERISA) concerning the reversion of employer contributions made as a result of mistake of fact.

(4) This section applies to determination letter requests with respect to plans that combine an ESOP (as defined in § 4975(e)(7) of the Code) with retiree medical benefit features described in § 401(h) (HSOPs).

(a) In general, determination letters will not be issued with respect to plans that combine an ESOP with an HSOP with respect to:

(i) whether the requirements of § 4975(e)(7) are satisfied;

(ii) whether the requirements of § 401(h) are satisfied; or

(iii) whether the combination of an ESOP with an HSOP in a plan adversely affects its qualification under § 401(a).

(b) A plan is considered to combine an ESOP with an HSOP if it contains ESOP provisions and § 401(h) provisions.

(c) However, an arrangement will not be considered covered by section 3.02(4) of this revenue procedure if, under the provisions of the plan, the following conditions are satisfied:

(i) No individual accounts are maintained in the § 401(h) account (except as required by § 401(h)(6));

(ii) No employer securities are held in the § 401(h) account;

(iii) The § 401(h) account does not contain the proceeds (directly or otherwise) of an exempt loan as defined in § 54.4975-7(b)(1)(iii) of the Pension Excise Tax Regulations; and

(iv) The amount of actual contributions to provide § 401(h) benefits (when added to actual contributions for life insurance protection under the plan) does not exceed 25 percent of the sum of: (1) the amount of cash contributions actually allocated to participants' accounts in the plan and (2) the amount of cash contributions used to repay principal with respect to the exempt loan, both determined on an aggregate basis since the inception of the § 401(h) arrangement.

## EGTRRA

.03 On February 1, 2009, the Service will begin to accept applications for determination letters for some individually designed plans (depending on their cycle) and § 414(f) multiemployer plans that take into account the qualification requirements of the Code as amended by EGTRRA, and other items identified on the 2008 Cumulative List in Notice 2008-108. This opening of the determination letter program for the initial remedial amendment cycle (*i.e.*,

EGTRRA remedial amendment period) is for individually designed plans and § 414(f) multiemployer plans that fall within Cycle D, and the submission period for Cycle D plans ends on January 31, 2010. The cycles commence in different years for different plans within a staggered five-year period, so not all individually designed plans will have the same cycle or submission period. Further, the submission periods for pre-approved defined contribution and defined benefit plans are different than those that apply to individually designed plans. See Rev. Proc. 2005-16 and Rev. Proc. 2007-44 for details.

#### **SECTION 4. ON WHAT ISSUES MUST WRITTEN GUIDANCE BE REQUESTED UNDER DIFFERENT PROCEDURES?**

##### **TE/GE**

.01 Other procedures for obtaining rulings, determination letters, opinion letters, etc., on matters within the jurisdiction of the Commissioner, TE/GE are contained in the following revenue procedures:

(1) Employee Plans Technical (EP Technical) letter rulings, information letters, etc.: *See* Rev. Proc. 2009-4, page 118, this Bulletin.

(2) M&P and VS plans: *See* Notice 2001-42, 2001-2 C.B. 70, Notice 2001-57, 2001-2 C.B. 279, Rev. Proc. 2001-55, 2001-2 C.B. 552, Rev. Proc. 2002-29, 2002-1 C.B. 1176 (as modified by Rev. Proc. 2003-10, 2003-1 C.B. 259), Rev. Proc. 2002-73, 2002-2 C.B. 932, Rev. Proc. 2003-72, 2003-2 C.B. 578, Rev. Proc. 2004-25, 2004-1 C.B. 791, Notice 2004-84, 2004-2 C.B. 1030, Rev. Proc. 2005-16, and Rev. Proc. 2007-44 (as modified by Rev. Proc. 2008-56, 2008-40 I.R.B. 826), and Notice 2007-3, 2007-1 C.B. 255.

(3) Technical advice requests: *See* Rev. Proc. 2009-5, page 161, this Bulletin.

##### **Chief Counsel's revenue procedure**

.02 For the procedures for obtaining letter rulings, determination letters, etc., on matters within the jurisdiction of the Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities), or within the jurisdiction of other offices of Chief Counsel, see Rev. Proc. 2009-1, page 1, this Bulletin.

#### **SECTION 5. WHAT IS THE GENERAL SCOPE OF A DETERMINATION LETTER?**

##### **Scope of this section**

.01 This section delineates, generally, the scope of an employee plan determination letter. It identifies certain qualification requirements, relating to nondiscrimination, that are considered by the Service in its review of a plan only at the election of the applicant. This section also identifies certain qualification requirements that are not considered by the Service in its review of a plan and with respect to which determination letters do not provide reliance. This section applies to all determination letters other than letters relating to the qualified status of group trusts; and certain letters relating solely to the requirements of § 420, regarding the transfer of assets in a defined benefit plan to a health benefit account described in § 401(h). For additional information pertaining to the scope of reliance on a determination letter, see sections 8, 9 and 21 of this revenue procedure, and section 19 of Rev. Proc. 2005-16.

##### **Scope of determination letters**

.02 In general, employee plans are reviewed by the Service for compliance with the form requirements (that is, those plan provisions that are required as a condition of qualification under § 401(a)). In addition, as described below, certain nondiscrimination requirements are considered if the applicant specifically requests that they be considered. For terminating plans, the requirements are those that apply as of the date of termination. See Rev. Proc. 2007-44 for further details on the scope of the Service's review of determination letter applications.

##### **Nondiscrimination in amount requirement**

.03 Unless the applicant elects otherwise, a plan will not be reviewed for, and a determination letter may not be relied on with respect to, whether a plan satisfies one of the safe harbors or the general test for nondiscrimination in amount of contributions or benefits requirements under § 1.401(a)(4)-1(b)(2) of the Income Tax Regulations.



**Minimum coverage and § 401(a)(26) participation requirements**

.04 Unless the applicant elects otherwise, a plan will not be reviewed for, and a determination letter may not be relied on with respect to, the minimum coverage requirements of § 410(b). If the applicant demonstrates that the plan satisfies the coverage requirements of § 410(b), the determination letter may also be relied on with respect to the participation requirements of § 401(a)(26).

**Nondiscriminatory current availability requirement**

.05 If the applicant demonstrates that the plan satisfies the coverage requirements of § 410(b), the determination letter may also be relied on as to whether the plan satisfies the nondiscriminatory current availability requirements of § 1.401(a)(4)–4(b) with respect to those benefits, rights, and features that are currently available (within the meaning of § 1.401(a)(4)–4(b)(2)) to all employees in the plan's coverage group. The plan's coverage group consists of those employees who are treated as currently benefiting under the plan (within the meaning of § 1.410(b)–3(a)) for purposes of demonstrating that the plan satisfies the minimum coverage requirements of § 410(b). Applications will not be reviewed as to, and determination letters may not be relied on with respect to, whether the plan satisfies the requirements of § 1.401(a)(4)–4(b) with respect to any benefit, right, or feature other than the ones described above, except those that are specified by the applicant and for which the applicant has provided information relevant to the determination.

**Other nondiscrimination requirements**

.06 An applicant may also ask that the review of its plan consider certain other nondiscrimination requirements which are described in Schedule Q (Form 5300), such as whether a definition of compensation satisfies § 414(s).

**Reliance conditioned on retention of information**

.07 A favorable determination letter may be relied on with respect to whether a plan satisfies a coverage or nondiscrimination requirement only if the application, demonstrations and other information submitted to the Service in support of a favorable determination is retained by the applicant.

**Effective availability requirement**

.08 In no event will any plan be reviewed to determine, and a determination letter may not be relied on with respect to, whether any benefit, right, or feature under the plan satisfies the effective availability requirement of § 1.401(a)(4)–4(c).

**Other limits on scope of determination letter**

.09 Determination letters may generally be relied on with respect to whether the timing of a plan amendment (or series of amendments) satisfies the nondiscrimination requirements of § 1.401(a)(4)–5(a) of the regulations, unless the plan amendment is part of a pattern of amendments that significantly discriminates in favor of highly compensated employees. A favorable determination letter does not provide reliance for purposes of § 404 and § 412 with respect to whether an interest rate (or any other actuarial assumption) is reasonable. Furthermore, a favorable determination letter will not constitute a determination with respect to the use of the substantiation guidelines contained in Rev. Proc. 93–42, 1993–2 C.B. 540, *e.g.*, a determination letter will not consider whether data submitted with an application is substantiation quality. Lastly, a favorable determination letter will not constitute a determination with respect to whether any requirements of § 414(r), relating to whether an employer is operating qualified separate lines of business, are satisfied. However, if an employer is relying on § 414(r) to satisfy the minimum coverage or § 401(a)(26) participation requirements, and the applicant so requests, a determination letter will take into account whether the plan satisfies the nondiscriminatory classification test of § 410(b)(5)(B). In this case, if the requirements of § 410(b) or § 401(a)(26) are to be applied on an employer-wide basis under the special rules for employer-wide plans, a determination letter will take into account whether the requirements of the applicable special rule set forth in § 1.414(r)–1(c)(2)(ii) or § 1.414(r)–1(c)(3)(ii) are met.

**Publication 794**

.10 Publication 794, *Favorable Determination Letter*, contains other information regarding the scope of a determination letter, including the requirement that all information submitted with the application be retained as a condition of reliance. In addition, the specific terms of each letter may further define its scope and the extent to which it may be relied upon.

## **SECTION 6. WHAT IS THE GENERAL PROCEDURE FOR REQUESTING DETERMINATION LETTERS?**

- Scope** .01 This section contains procedures that are generally applicable to all determination letter requests. Additional procedures for specific requests are contained in sections 7 through 16.
- Qualified trustee plans** .02 A trust created or organized in the United States and forming part of a pension, profit-sharing, stock bonus or annuity plan of an employer for the exclusive benefit of its employees or their beneficiaries that meets the requirements of § 401 is a qualified trust and is exempt from federal income tax under § 501(a) unless the exemption is denied under § 502, relating to feeder organizations, or § 503, relating to prohibited transactions, if, in the latter case, the plan is one described in § 503(a)(1)(B).
- Qualified nontrusteed annuity plans** .03 A nontrusteed annuity plan that meets the applicable requirements of § 401 and other additional requirements as provided under § 403(a) and § 404(a)(2), (relating to deductions of employer contributions for the purchase of retirement annuities), qualifies for the special tax treatment under § 404(a)(2), and the other sections of the Code, if the additional provisions of such other sections are also met.
- Complete information required** .04 An applicant requesting a determination letter must file the material required by this revenue procedure with the Employee Plans Determinations manager (EP Determinations) at the address in section 6.17. The filing of the application, when accompanied by all information and documents required by this revenue procedure, will generally serve to provide the Service with the information required to make the requested determination. However, in making the determination, the Service may require the submission of additional information. Information submitted to the Service in connection with an application for determination may be subject to public inspection to the extent provided by § 6104. The applicant should include Employee Plans Compliance Resolution System documentation, if any, (*e.g.*, closing agreement or compliance statement) with the determination letter application.
- Complete copy of plan and trust instrument required** .05 Except in the case of applications involving master and prototype plans filed on Form 5307 or determination letters for volume submitter plans under section 9.02(2)(d), a complete copy of the plan and trust instrument is required to be included with the determination letter application. All changes made to the most recently approved version of the plan may be, but are not required to be, redlined or highlighted. The determination letter application must also include a copy of the signed and dated timely good faith EGTRRA amendments, required interim and other plan amendments (even if these amendments are dated earlier than a previous determination letter issued with respect to the plan) to show that the conditions for eligibility for the EGTRRA remedial amendment period as set forth in Notice 2001-42 are satisfied. Also see sections 7.03 and 7.04 for what must be included with applications involving plan amendments.
- Section 9 of Rev. Proc. 2009-4 applies** .06 Section 9 of Rev. Proc. 2009-4 is generally applicable to requests for determination letters under this revenue procedure.
- Separate application for each single § 414(l) plan** .07 A separate application is required for each single plan within the meaning of § 414(l). This requirement does not pertain to applications regarding the qualified status of group trusts.
- Coverage and nondiscrimination requirements** .08 An applicant may request that the plan be reviewed to determine that the ratio percentage test of § 410(b)(1) is satisfied or that the plan satisfies one of the design-based safe harbors under § 401(a)(4) by completing the appropriate elective lines on Form 5300 or Form 5307. Schedule Q (Form 5300) may be filed with the application to request consideration of the general test under § 401(a)(4), the average benefit test of § 410(b)(2), or any of the other requirements described on Schedule Q. The applicant must include with the application form the material and demonstrations called for in the instructions to Form 5300 or Form 5307, and, if applicable, Schedule Q.

**Prior letters**

.09 If the plan has received a favorable determination letter in the past, the application must include a copy of the latest determination letter, if available. If the letter is not available, an explanation must be included with the application, and the employer must include a copy of the prior plan or adoption agreement, including the opinion or advisory letter, if applicable.

**User fees**

.10 The appropriate user fee, if applicable, must be paid according to the procedures of Rev. Proc. 2009–8, page 229, this Bulletin. Form 8717, *User Fee for Employee Plan Determination, Opinion, and Advisory Letter Request*, must accompany each determination letter request. If the criteria for the user fee exemption are met in accordance with Notice 2003–49, 2003–2 C.B. 294, the certification on Form 8717 must be signed. Stamped signatures are not acceptable.

**Interested party notification and comment**

.11 Before filing an application, the applicant requesting a determination letter must satisfy the requirements of section 3001(a) of ERISA, and § 7476(b)(2) of the Code and the regulations thereunder, which provide that an applicant requesting a determination letter on the qualified status of certain retirement plans must notify interested parties of such application. The general rules of the Service with respect to notifying interested parties of requests for determination letters relating to the qualification of plans involving §§ 401 and 403(a) are set out below in sections 17 and 18 of this revenue procedure.

**Contrary authority must be distinguished**

.12 If the application for determination involves an issue where contrary authorities exist, failure to disclose or distinguish such significant contrary authorities may result in requests for additional information, which will delay action on the application.

**Employer/employee relationship**

.13 The Service ordinarily does not make determinations regarding the existence of an employer-employee relationship as part of its determination on the qualification of a plan, but relies on the applicant's representations or assumptions, stated or implicit, regarding the existence of such a relationship. The Service will, however, make a determination regarding the existence of an employer-employee relationship when so requested by the applicant. In such cases, the application with respect to the qualification of the plan should be filed in accordance with the provisions of this revenue procedure, contain the information and documents in the instructions to the application, and be accompanied by a completed Form SS–8, *Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding*, and any information and copies of documents the organization deems appropriate to establish its status. The Service may, in addition, require further information that it considers necessary to determine the employment status of the individuals involved or the qualification of the plan. After the employer-employee relationships have been determined, EP Determinations may issue a determination letter as to the qualification of the plan.

**Incomplete applications returned**

.14 If an applicant requesting a determination letter does not comply with all the required provisions of this revenue procedure, EP Determinations, in its discretion, may return the application and point out to the applicant those provisions which have not been met. The failure to provide information required by an application, including any supplemental information required by the instructions for the application, may result in the application being returned to the applicant as incomplete. The request may also be returned pursuant to Rev. Proc. 2009–8 if the correct user fee is not attached. If such a request is returned to the applicant, the 270-day period described in § 7476(b)(3) will not begin to run until such time as the provisions of this section have been satisfied.

**Effect of failure to disclose material fact**

.15 The Service may determine, based on the application form, the extent of review of the plan document. A failure to disclose a material fact or misrepresentation of a material fact on the application may adversely affect the reliance that would otherwise be obtained through issuance by the Service of a favorable determination 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.

**Data requirements**

.16 The applicant is responsible for the accuracy of any factual representations and conclusions contained in the application. In some circumstances, applicants may not be able to use precise data in preparing demonstrations or schedules that may be required to be submitted

with the application. Therefore, the use of estimated data in these demonstrations and schedules is not prohibited. In addition, the data used may be for a prior plan year, provided the following conditions are satisfied: (1) the data is the most recent data available, (2) there is no misstatement or omission of material fact with respect to such prior year's data, (3) there has been no material change in the facts (including a change in the benefits provided under the plan and employee demographics) since such prior plan year, (4) the same data is used throughout the application, (5) the data is relevant to the operational effect of the plan provisions that are under review, and (6) the applicant clearly discloses that prior year's data is being submitted with the application. The use of estimated or prior year's data is not a misrepresentation of material fact. A determination letter that is based on estimated or prior year's data, however, may not be relied upon to the extent that such data does not satisfy the substantiation guidelines in Rev. Proc. 93-42. Regardless of whether the data is actual or estimated, or whether it is for the current or a prior year, data that is presented in a determination letter application must reflect any changes in the law that are considered by the Service in its determination of the plan's qualified status.

#### **Where to file requests**

.17 Requests for determination letters are to be addressed to EP Determinations at the following address:

Internal Revenue Service  
P.O. Box 12192  
Covington, KY 41012-0192

Requests shipped by Express Mail or a delivery service should be sent to:

Internal Revenue Service  
201 West Rivercenter Blvd.  
Attn: Extracting Stop 312  
Covington, KY 41011

Determination letter applications will not be accepted via fax.

#### **Submission of related plans**

.18 If applications for two or more plans of the same employer are submitted together, each application should include a cover letter that identifies the name of the employer and the plan numbers and employer identification numbers of all the related plans submitted together.

#### **Withdrawal of requests**

.19 The applicant's request for a determination letter may be withdrawn by a written request at any time prior to the issuance of a final adverse determination letter. If an appeal to a proposed adverse determination letter is filed, a request for a determination letter may be withdrawn at any time prior to the forwarding of the proposed adverse action to the Chief, Appeals Office. In the case of a withdrawal, the Service will not issue a determination of any type. A failure to issue a determination letter as a result of a withdrawal will not be considered a failure of the Secretary or his delegate to make a determination within the meaning of § 7476. However, the Service may consider the information submitted in connection with the withdrawn request in a subsequent examination. Generally, the user fee will not be refunded if the application is withdrawn.

#### **Right to status conference**

.20 An applicant for a determination letter has the right to have a conference with the EP Determinations Manager concerning the status of the application if the application has been pending at least 270 days. The status conference may be by phone or in person, as mutually agreed upon. During the conference, any issues relevant to the processing of the application may be addressed, but the conference will not involve substantive discussion of technical issues. No tape, stenographic, or other verbatim recording of a status conference may be made by any party. Subsequent status conferences may also be requested if at least 90 days have passed since the last preceding status conference.

#### **How to request status conference**

.21 A request for a status conference with the EP Determinations Manager is to be made in writing and is to be sent to the specialist assigned to review the application or, if the applicant

does not know who is reviewing the application, to the EP Determinations Manager at the address in section 6.17. If, pursuant to section 15, the application for a determination letter has been submitted to Employee Plans Technical (EP Technical) together with a request for a waiver of minimum funding, the request for a status conference should be sent to the address in section 15.03. In this case, the right to a status conference will be with the EP Technical Manager or designee.

## **SECTION 7. INITIAL QUALIFICATION, ETC.**

### **Scope**

.01 This section 7 contains the procedures for requesting determination letters for individually-designed defined contribution and defined benefit plans including employee stock ownership plans in the following circumstances:

- (1) Initial qualification.
- (2) Amendment.
- (3) Restatement of plan.
- (4) Qualification of a plan in the event of a partial termination.

(5) Change in scope of determination letter. This means that the applicant has previously received a favorable determination letter for the plan and now wishes to modify the scope of the letter, for example, by requesting the Service to review the plan for certain nondiscrimination requirements that were not within the scope of the earlier letter.

(6) Other circumstances (excluding plan termination) such as a change in the demographics of the employer or a change in the method of testing the plan that was used in a demonstration submitted in support of an earlier application.

### **Forms**

.02 A determination letter request for the items listed in section 7.01 is made by filing the appropriate form according to the instructions to the form and any prevailing revenue procedures, notices, and announcements. In addition, all determination letter submissions must be submitted timely under the procedures set forth in Rev. Proc. 2007-44. The timing of the submission period for any particular individually designed plan within staggered remedial amendment cycles will depend on the plan's particular cycle. The first submission period for Cycle D individually designed plans and § 414(f) multiemployer plans will begin February 1, 2009 and will end on January 31, 2010. See, Rev. Proc. 2007-44 for details. Generally, an off-cycle application will not be reviewed until all on-cycle plans have been reviewed and processed. See, Rev. Proc. 2007-44, section 14.02. Section 14.02, (1)-(3) of Rev. Proc. 2007-44 lists the types of applications that may be submitted off-cycle and given the same priority as on cycle applications.

(1) Form 5300, *Application for Determination for Employee Benefit Plan*, must be filed to request a determination letter for individually designed plans, including collectively bargained plans.

(2) Form 5309, *Application for Determination of Employee Stock Ownership Plan*, must be filed as an attachment with a Form 5300, in order to request a determination whether the plan is an ESOP under § 409 or § 4975(e)(7).

(3) Schedule Q, (Form 5300), *Elective Determination Requests*, may be filed as an attachment with Form 5300.

(4) Form 8905, *Certification of Intent To Adopt a Pre-approved Plan*, filed before the end of the employer's 5-year remedial cycle as determined under Part III of Rev. Proc. 2007-44, if applicable.

### **Application must include copy of plan and amendments**

.03 Because a plan amendment may affect other portions of a plan so as to cause plan disqualification, a determination letter issued on such an amendment to a plan will express an

opinion on the entire plan, as amended. Therefore, the determination letter application must include a copy of the plan and trust instrument plus all plan amendments made to the date of the application. The application must also include a statement explaining how any amendments made since the last determination letter affect the plan or any other plan maintained by the employer. In addition, the applicant must send the Service any amendments that are adopted and/or proposed after the date of the determination letter application and before the Service issues the determination letter. The applicant must submit a cover letter that references the date that the pending application was submitted, the identity of the employer and the plan, and any other helpful identifying information. The amendments must be attached to the letter. Send the cover letter and the attachments to: Internal Revenue Service, TE/GE Correspondence Unit, P.O. Box 2508, Room 4024, Cincinnati, Ohio 45201. Although all such amendments must be provided to the Service, it is possible that the determination letter may not provide reliance for all of these amendments. *See*, Rev. Proc. 2007-44 for the scope of the Service's review with respect to a particular determination letter application.

In general, a determination letter may not be relied upon for any period preceding the beginning of the remedial amendment cycle for which the letter is issued. Thus, for example, if an application for a determination letter includes a plan amendment that was effective before the beginning of the plan's current remedial amendment cycle, the determination letter may not be relied upon with respect to the effect of the amendment for the period preceding the beginning of the cycle.

#### **Restatements required**

.04 Individually designed plans must be restated when they are submitted for determination letter applications. For this purpose, submission of a working copy of the plan in a restated format will suffice. Where a working copy is submitted with executed amendments integrated into the working copy, all such amendments must also be separately submitted. The Service considers a working copy as a document that incorporates all previously executed amendments into one restated document. The intended purpose of a working copy in a restated format is only for ease of review and plan administration and it is not a document that is intended to be adopted. The Service reserves the right to make a determination as to whether the working copy is in a restated format that will facilitate the review of the plan.

#### **Controlled groups, etc.**

.05 For a controlled group of corporations as defined in § 414(b), trades or businesses under common control as defined in § 414(c), an affiliated service group within the meaning of § 414(m), and entities utilizing the services of leased employees within the meaning of § 414(n), the coverage items on the application forms referred to in this revenue procedure must be completed as though the controlled group, commonly controlled trades or businesses, affiliated service group, etc., constitutes a single entity. Leased employees within the meaning of § 414(n) must be included as employees of the recipient entity (except in the case of a safe-harbor plan described in § 414(n)(5)). See sections 9 through 11 of Rev. Proc. 2007-44 for a discussion of the five-year remedial amendment cycle that applies in certain special circumstances, including the cycle that applies to plans maintained by multiple members of a controlled group and to plans maintained by employers that are members of an affiliated service group under § 414(m).

### **SECTION 8. EMPLOYER RELIANCE ON M&P AND VOLUME SUBMITTER PLANS**

#### **Scope**

.01 The conditions under which, and the extent to which, adopting employers of M&P and volume submitter plans may rely on favorable opinion or advisory letters without having to request individual determination letters are set forth in section 19 of Rev. Proc. 2005-16. Rev. Proc. 2005-16 describes the requirements that apply to M&P and volume submitter plans and the procedures for requesting opinion letters and advisory letters on M&P and volume submitter plans. Section 9 of this revenue procedure describes the procedures for requesting determination letters on M&P and volume submitter plans for adopting employers who need to obtain a determination letter in order to have reliance or who otherwise wish to obtain a determination letter, for example to expand the scope of reliance.

**Reliance equivalent to determination letter**

.02 If an employer can rely on a favorable opinion or advisory letter pursuant to section 19 of Rev. Proc. 2005–16, 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 this revenue procedure, regarding the effect of a determination letter, and section 5.01(4) of Rev. Proc. 2008–50, 2008–35 I.R.B. 464, regarding the definition of “favorable letter” for purposes of the Employee Plans Compliance Resolution System.

**SECTION 9. DETERMINATION LETTER FILING PROCEDURES FOR M&P AND VOLUME SUBMITTER PLANS**

**Scope**

.01 This section contains procedures for requesting determination letters for adopting employers of volume submitter plans and M&P plans.

**Determination letter for adoption of volume submitter plan**

.02 An application for a determination letter that is filed on Form 5307 generally need not include the plan’s EGTRRA good faith amendments that were adopted prior to the adoption of the EGTRRA-restated plan or any interim plan amendments, regardless of when adopted, unless the plan is a volume submitter plan that does not authorize the practitioner to amend on behalf of the adopting employer. The Service may, however request evidence of adoption of good faith and interim amendments during the course of its review of a particular plan. With respect to determination letters for adopting employers of volume submitter plans:

(1) A request for a determination letter for an employer’s adoption of an approved volume submitter plan must be sent to the address provided in section 6.17.

(2) The request for a determination letter must include the following:

(a) Form 5307, *Application for Determination for Adopters of Master or Prototype or Volume Submitter Plans* (Schedule Q is optional);

(b) Form 2848, *Power of Attorney and Declaration of Representative*, or other written authorization allowing the volume submitter practitioner to act as a representative of the employer with respect to the request for a determination letter;

(c) Form 8905, *Certification of Intent To Adopt a Pre-approved Plan*, filed before the end of the employer’s 5-year remedial cycle as determined under Part III of Rev. Proc. 2007–44, if applicable.

(d) A copy of the advisory letter for the practitioner’s volume submitter specimen plan;

(e) A copy of the plan and trust instrument or, if the employer has made no changes to the specimen plan and trust other than completing options permitted under the adoption agreement, a copy of the completed adoption agreement;

(f) A written representation made by the volume submitter practitioner which:

(i) states whether the plan and trust instrument are word-for-word identical to the approved specimen plan;

(ii) if the plan and trust are not word-for-word identical to the approved specimen plan, explains how the plan and trust instrument differ from the approved specimen plan, describing the location, nature and effect of each deviation from the language of the approved specimen plan; and

(iii) if the latest advisory letter for the approved specimen plan does not consider all the changes made by GUST, states that the plan satisfies all requirements of GUST, including those first effective in plan years beginning after December 31, 1998, and identifies those deviations

from the language of the approved specimen plan that are intended to satisfy specific GUST requirements;

(g) A copy of the plan's latest favorable determination letter, if applicable;

(h) Applications filed on Form 5307 for volume submitter plans that do not authorize the practitioner to amend on behalf of the adopting employer must include the plan's EGTRRA good faith amendments and any interim amendments that were adopted for qualification changes on the 2004 Cumulative List; and

(i) Any other information or material that may be required by the Service.

(3) Deviations from the language of the approved specimen plan will be evaluated based on the extent and complexities of the changes. If the changes are determined not to be compatible with the volume submitter program, the Service may require the applicant to file Form 5300 and pay the higher user fee. *See also*, Rev. Proc. 2007-44, section 19.

(4) An employer will not be treated as having adopted a volume submitter plan if the employer has signed or otherwise adopted the plan prior to the date on the volume submitter specimen plan's advisory letter. In this case, the determination letter application for the employer's plan may not be filed on Form 5307 and will not be eligible for a reduced user fee. A determination letter application for a volume submitter plan must be based on the approved volume submitter specimen plan with any applicable modifications.

(5) In addition, the practitioner will be able to file determination letter requests on behalf of employers adopting substantially similar plans who need a determination letter to have reliance or who otherwise desire a determination letter.

#### **Determination letter for adoption of M&P plan**

.03 Form 5307 must be filed to request a determination letter for the adoption of an M&P plan by an adopting employer. Schedule Q may be filed as an attachment to Form 5307. An application for a determination letter that is filed on Form 5307 generally need not include the plan's EGTRRA good faith amendments that were adopted prior to the adoption of the EGTRRA-restated plan or any interim plan amendments, regardless of when adopted. The Service may, however request evidence of adoption of good faith and interim amendments during the course of its review of a particular plan.

#### **Required information**

.04 The determination letter request must include the following:

(1) An adoption agreement showing which elections the employer is making with respect to the elective provisions contained in the plan;

(2) A copy of the plan's most recent opinion letter; and

(3) In the case of a determination letter request for an M&P plan that uses a separate trust or custodial account, a copy of the employer's trust or custodial account document. This information is necessary in order to verify that the trustee executed the document.

#### **Amended plan is treated as an individually-designed plan**

.05 Except to the extent provided in section 5.02 and 19.03 of Rev. Proc. 2005-16, an employer that amends any provision of an M&P plan or its adoption agreement (other than to choose among the options offered by the sponsor if the plan permits or contemplates such options), or an employer that chooses to discontinue participation in such a plan as amended by its sponsor and does not substitute another approved plan referred to in this section is considered to have adopted an individually-designed plan. The requirements stated in this revenue procedure relating to the issuance of determination letters for individually-designed plans will then apply to such plan. Also see section 19.01 of Rev. Proc. 2007-44 and Ann. 2008-23.

#### **Requests made prior to the issuance of opinion letter**

.06 An application submitted by an employer with respect to an M&P plan will be treated as an application for an individually-designed plan if it is executed prior to the time the M&P plan is approved. Also see sections 5.11 and 19.03 of Rev. Proc. 2005-16 regarding the requirement that adopting employers sign new adoption agreements when M&P plans are restated.



## EGTRRA

.07 In accordance with Part IV of Rev. Proc. 2007-44, adopting employers of M&P plans and volume submitter plans have a six-year remedial amendment cycle. The Service's announced deadline for an adopting employer to adopt the approved M&P or volume submitter plan will be the end of the plan's remedial amendment cycle with respect to all disqualifying provisions for which the remedial amendment period would otherwise end during the cycle. An adopting employer of a M&P plan or a volume submitter plan who must obtain a determination letter for reliance under EGTRRA or who desires a determination letter for additional reliance under EGTRRA must not submit such determination letter application until the Service's announced deadline for employers to adopt a pre-approved plan and, if necessary, file a determination letter application, as described in Part IV of Rev. Proc. 2007-44. See section 17 of Rev. Proc. 2007-44 for the eligibility requirements that must be satisfied in order to be considered an adopting employer of a M&P plan or a volume submitter plan and thus eligible for the six-year remedial amendment cycle. The Service began accepting applications for individual determination letters for EGTRRA-approved M&P and volume submitter defined contribution plans starting May 1, 2008. An adopting employer whose plan is eligible for the six-year remedial amendment cycle under section 17 of Rev. Proc. 2007-44 and that adopts an EGTRRA-approved M&P or volume submitter defined contribution plan by April 30, 2010, will have adopted the plan within the employer's six-year remedial amendment cycle.

## SECTION 10. MULTIPLE EMPLOYER PLANS

### Scope

.01 This section contains procedures for applications filed with respect to plans described in § 413(c). A plan is not described in § 413(c) if all the employers maintaining the plan are members of the same controlled group or affiliated service group under § 414(b), (c) or (m).

### Options to file for the plan only or for both the plan and employers maintaining the plan

.02 A determination letter applicant for a multiple employer plan can request either (1) a letter for the plan in the name of the controlling member or (2) a letter for the plan in the name of the controlling member and a letter for each employer maintaining the plan with respect to whom a separate Form 5300 is filed.

(1) An applicant requesting a letter for the plan submits one Form 5300 application for the plan in the name of the controlling member, omitting the optional minimum coverage questions and Schedule Q and either including or omitting the design-based safe harbor questions. The user fee for a single employer plan will apply. An employer maintaining a multiple employer plan can rely on a favorable determination letter issued for the plan without having to request its own determination letter except with respect to the requirements of §§ 401(a)(4), 401(a)(26), 401(l), 410(b) and 414(s), and, if the employer maintains or has ever maintained another plan, §§ 415 and 416.

(2) An applicant requesting a letter for the plan and an employer must submit the filing required in (1) above as well as a separate Form 5300 application, completed through line 8, and, if applicable, a completed adoption agreement, for each employer requesting a separate letter. Each employer may elect to respond to the Form 5300 questions regarding minimum coverage and design-based safe harbors and to file Schedule Q to request a determination on the average benefit test, the general test or any other nondiscrimination requirement addressed by the Schedule Q. The user fee for the application will be determined under the user fee schedules for multiple employer plans in section 6.07 of Rev. Proc. 2009-8, treating the entire application as a general test or average benefit test application if any employer requests a determination on either of these tests.

(3) Rules similar to the rules in section 19 of Rev. Proc. 2005-16 also apply in the case of an employer maintaining a multiple employer plan. See also Rev. Proc. 2007-44, including section 10. An application for a determination letter on a pre-approved plan that is required to file Form 5300 only because the plan is a multiple employer plan will be reviewed on the basis of the Cumulative List that was used to review the underlying pre-approved plan. See Ann. 2008-23.

## Where to file

.03 The complete application, including all Forms 5300 (and, if applicable, adoption agreements) for employers maintaining the plan who request separate letters must be filed as one package submission with EP Determinations. The application is to be sent to the address in section 6.17.

## Determination letter sent to each employer who files Form 5300

.04 The Service will mail a determination letter to each employer maintaining the plan for whom a separate Form 5300 has been filed.

## Addition of employers

.05 An employer may continue to rely on a favorable determination letter after another employer commences participation in the plan, regardless of whether the first employer's reliance is based on its own letter or the letter issued for the plan and regardless of whether an application for a determination letter for the new employer is filed. An application for a determination letter that takes into account the addition of such other employer should include a completed Form 5300 for the plan in the name of the controlling member on the Form 5300 filed pursuant to section 10.02 above, and a supplemental Form 5300 and optional Schedule Q (and, if applicable, adoption agreement) for each new employer who desires a separate determination letter. The Service will send the determination letter only to the applicant and the new employers. However, a new employer that joins a multiple employer plan after the existing multiple employer plan was timely submitted in Cycle B (the applicable cycle as described in section 10 of Rev. Proc. 2007-44), will be subject to the rules under Rev. Proc. 2007-44, including the off-cycle filing rules under section 14 of that revenue procedure.

## SECTION 11. Form 6406 has been eliminated

Effective July 9, 2007, Form 6406, *Short Form Application for Determination for Minor Amendment of Employee Benefit Plan*, may not be used to apply for a determination letter. An application submitted with this form will no longer be accepted by the Service. See, Rev. Proc. 2007-44, section 12.04.

## SECTION 12. TERMINATION OR DISCONTINUANCE OF CONTRIBUTIONS; NOTICE OF MERGERS, CONSOLIDATIONS, ETC.

### Scope

.01 This section contains procedures for requesting determination letters involving plan termination or discontinuance of contributions. This section also contains procedures regarding required notice of merger, consolidation, or transfer of assets or liabilities.

### Forms

#### .02 Required Forms

(1) Form 5310, *Application for Determination for Terminating Plan*, is filed by plans other than multiemployer plans covered by the insurance program of the Pension Benefit Guaranty Corporation (PBGC).

(2) Form 5300, *Application for Determination of Employee Benefit Plan*, is filed in the case of a multiemployer plan covered by PBGC insurance.

(3) Schedule Q, *Elective Determination Requests*, may be filed as an attachment to Form 5310 or Form 5300.

(4) Form 6088, *Distributable Benefits From Employee Pension Benefit Plans*, is also required of a sponsor or plan administrator of a defined benefit plan or an underfunded defined contribution plan who files only an application for a determination letter regarding plan termination. For collectively bargained plans, a Form 6088 is required only if the plan benefits employees who are not collectively bargained employees within the meaning of § 1.410(b)-6(d). A separate Form 6088 is required for each employer employing such employees.

(5) Form 5310-A, *Notice of Plan Merger or Consolidation, Spinoff, or Transfer of Plan Assets or Liabilities; Notice of Qualified Separate Lines of Business*, if required, generally must be filed not later than 30 days before merger, consolidation or transfer of assets and liabilities. The filing of Form 5310-A will not result in the issuance of a determination letter.

(6) Form 8905, *Certification of Intent To Adopt a Pre-approved Plan*, filed before the end of the employer's 5-year remedial cycle as determined under Part III of Rev. Proc. 2007-44.

#### **Supplemental information**

.03 The application for a determination letter involving plan termination must also include any supplemental information or schedules required by the forms or form instructions. For example, the application must include copies of all records of actions taken to terminate the plan (such as a resolution of the board of directors) and a schedule providing certain information regarding employees who separated from vesting service with less than 100% vesting.

#### **Required demonstration of nondiscrimination requirements**

.04 An applicant requesting a determination letter upon termination may not decline to elect that the plan be reviewed for the minimum coverage requirements or the nondiscrimination in amount requirement, as otherwise permitted, unless the following conditions are satisfied:

(1) With respect to the coverage requirements, in the year of termination the plan must use the average benefit test and the plan must have received a prior favorable determination letter that considered whether the plan satisfied the requirements of the test;

(2) With respect to the nondiscrimination in amount requirement, in the year of termination the plan must use either a nondesign-based safe harbor or the general test for nondiscrimination in amount and the plan must have received a prior favorable determination letter that considered whether the plan satisfied the requirements of either a nondesign-based safe harbor or the general test;

(3) The favorable determination letter was issued during the immediately preceding three plan years; and

(4) There has been no material change in the facts (including benefits provided under the plan and employee demographics) or law upon which the determination was based.

If these conditions are satisfied, but the prior determination letter does not state that the average benefit test, general test or nondesign-based safe harbor (as applicable) was considered, the applicant must include a copy of the prior submission in order to decline to have the test or safe harbor considered in the review of the application for determination on plan termination.

#### **Compliance with Title IV of ERISA**

.05 In the case of plans subject to Title IV of ERISA, a favorable determination letter issued in connection with a plan's termination is conditioned on approval that the termination is a valid termination under Title IV of ERISA. Notification by PBGC that a plan may not be terminated will be treated as a material change of fact.

#### **Termination prior to time for amending for change in law**

.06 A plan that terminates after the effective date of a change in law, but prior to the date that amendments are otherwise required, must be amended to comply with the applicable provisions of law from the date on which such provisions become effective with respect to the plan. Because such a terminated plan would no longer be in existence by the required amendment date and therefore could not be amended on that date, such plan must be amended in connection with the plan termination to comply with those provisions of law that become effective with respect to the plan on or before the date of plan termination. (Such amendments include any amendments made after the date of plan termination that were required in order to obtain a favorable determination letter.) In addition, annuity contracts distributed from such terminated plans also must meet all the applicable provisions of any change in law. See also section 8 of Rev. Proc. 2007-44.

#### **Restatement not required for terminating plan**

.07 A terminating plan does not have to be restated. However, see .06 above.

### **SECTION 13. GROUP TRUSTS**

#### **Scope**

.01 This section provides special procedures for requesting a determination letter on the qualified status of a group trust under Rev. Rul. 81-100, as clarified and modified by Rev. Rul. 2004-67.

## **Required information**

.02 A request for a determination letter on the status of a group trust as described in Rev. Rul. 81-100 is made by submitting a written request demonstrating how the group trust satisfies the five criteria listed in Rev. Rul. 81-100, together with the trust instrument and related documents. Rev. Rul. 2004-67 extends the ability to participate in group trusts to eligible governmental plans under § 457(b) and clarifies the ability of certain individual retirement accounts under § 408 to participate. The revenue ruling provides model language, one for group trusts that have received favorable determination letters and the other for trusts that have received letter rulings.

## **SECTION 14. AFFILIATED SERVICE GROUPS; LEASED EMPLOYEES**

**Scope** .01 This section provides procedures for determination letter requests on affiliated service group status under § 414(m), and the effect of leased employees on a plan's qualified status.

**Types of requests under § 414(m) and § 414(n)** .02 In accordance with section 7.01, an employer that is subject to § 414(m) or (n) may request a determination letter under the following circumstances: (1) with respect to the initial qualification of its plan, (2) on a plan amendment, and (3) in certain other circumstances (for example, where there has been a change in membership in the affiliated service group or where the employer did not previously have reliance). In any of these circumstances, the plan that is submitted with the application must be restated to reflect the Cumulative List in effect when the application is filed, unless the plan is a pre-approved plan.

**Employer must request the determination under § 414(m) or § 414(n)** .03 Generally, a determination letter will cover § 414(m) or § 414(n) only if the employer requests such determination, and submits with the determination letter application the information specified in section 14.09 or section 14.10 below.

**Forms** .04 Form 5300 (with Schedule Q optional) is submitted for a request on affiliated service group status or leased employee status. Form 5307 cannot be used for this purpose.

**Employer is responsible for determining status under § 414(m) and § 414(n)** .05 An employer is responsible for determining at any particular time whether it is a member of an affiliated service group and, if so, whether its plan(s) continues to meet the requirements of § 401(a) after the effective date of § 414(m), including § 414(m)(5). An employer or plan administrator is also responsible for taking action relative to the employer's qualified plan if that employer becomes, or ceases to be, a member of an affiliated service group. An employer that is the recipient of services of leased employees within the meaning of § 414(n) is also responsible for determining at any particular time whether a leased employee is deemed to be an employee of the recipient for qualified plan purposes.

**Omission of material fact** .06 Failure to properly indicate that there is or may be an affiliated service group and to provide the information specified in section 14.09 of this revenue procedure, or failure to properly indicate that an employer is utilizing the services of leased employees and to provide the information specified in section 14.10, is an omission of a material fact. The failure of the employer to follow the procedures in this section will result in the employer being unable to rely on any favorable determination letter concerning the effect of § 414(m) or § 414(n) on the qualified status of the plan.

**Service will indicate whether § 414(m) or § 414(n) was considered** .07 If the Service considers whether the plan of an employer satisfies the requirements of § 414(m) or § 414(n), the determination letter issued to the employer will state that questions arising under § 414(m) or § 414(n) have been considered, and that the plan satisfies qualification requirements relating to that section. Absent such a statement pertaining to § 414(m) or § 414(n), a determination letter does not apply to any qualification issue arising by reason of such provisions.

**M&P plans** .08 An employer that has adopted an M&P plan (including a standardized plan) and wants a determination as to the effect of § 414(m) or § 414(n) on the qualified status of its plan must attach the information required by section 14.09 or section 14.10 of this revenue procedure to Form 5300 and submit the information, Form 5300, and any other materials necessary to make a determination. When an employer requests a determination regarding affiliated service group

status or leased employees, the plan will be reviewed on the basis of the Cumulative List that was used to review the underlying pre-approved plan.

**Required information for § 414(m) determination**

.09 A determination letter issued with respect to a plan's qualification under § 401(a), 403(a), or 4975(e)(7) will be a determination as to the effect of § 414(m) upon the plan's qualified status only if the application includes:

(1) A description of the nature of the business of the employer, specifically whether it is a service organization or an organization whose principal business is the performance of management functions for another organization, including the reasons therefor;

(2) The identification of other members (or possible members) of the affiliated service group;

(3) A description of the business of each member (or possible member) of the affiliated service group, describing the type of organization (corporation, partnership, etc.) and indicating whether the member is a service organization or an organization whose principal business is the performance of management functions for the other group member(s);

(4) The ownership interests between the employer and the members (or possible members) of the affiliated service group (including ownership interests as described in § 414(m)(2)(B)(ii) or § 414(m)(6)(B));

(5) A description of services performed for the employer by the members (or possible members) of the affiliated service group, or vice versa (including the percentage of each member's (or possible member's) gross receipts and service receipts provided by such services, if available, and data as to whether such services are a significant portion of the member's business) and whether, as of December 13, 1980, it was not unusual for the services to be performed by employees of organizations in that service field in the United States;

(6) A description of how the employer and the members (or possible members) of the affiliated service group associate in performing services for other parties;

(7) In the case of a management organization under § 414(m)(5):

(a) A description of the management functions, if any, performed by the employer for the member(s) (or possible member(s)) of the affiliated service group, or received by the employer from any other members (or possible members) of the group (including data explaining whether the management functions are performed on a regular and continuous basis) and whether or not it is unusual for such management functions to be performed by employees of organizations in the employer's business field in the United States;

(b) If management functions are performed by the employer for the member (or possible members) of the affiliated service group, a description of what part of the employer's business constitutes the performance of management functions for the member (or possible member) of the group (including the percentage of gross receipts derived from management activities as compared to the gross receipts from other activities);

(8) A brief description of any other plan(s) maintained by the members (or possible members) of the affiliated service group, if such other plan(s) is designated as a unit for qualification purposes with the plan for which a determination letter has been requested;

(9) A description of how the plan(s) satisfies the coverage requirements of § 410(b) if the members (or possible members) of the affiliated service group are considered part of an affiliated service group with the employer;

(10) A copy of any ruling issued by the headquarters office on whether the employer is an affiliated service group; a copy of any prior determination letter that considered the effect of § 414(m) on the qualified status of the employer's plan; and, if known, a copy of any such ruling or determination letter issued to any other member (or possible member) of the same

affiliated service group, accompanied by a statement as to whether the facts upon which the ruling or determination letter was based have changed.

**Required information for § 414(n) determination**

.10 Unless the plan provides that all leased employees within the meaning of § 414(n)(2) are treated as common law employees for all purposes under the plan, a determination letter issued with respect to the plan's qualification under § 401(a), 403(a), or 4975(e)(7) will be a determination as to the effect of § 414(n) upon the plan's qualified status only if the application includes:

(1) A description of the nature of the business of the recipient organization;

(2) A copy of the relevant leasing agreement(s);

(3) A description of the function of all leased employees within the trade or business of the recipient organization (including data as to whether all leased employees are performing services on a substantially full-time basis);

(4) A description of facts and circumstances relevant to a determination of whether such leased employees' services are performed under primary direction or control by the recipient organization (including whether the leased employees are required to comply with instructions of the recipient about when, where, and how to perform the services, whether the services must be performed by particular persons, whether the leased employees are subject to the supervision of the recipient, and whether the leased employees must perform services in the order or sequence set by the recipient); and

(5) If the recipient organization is relying on any qualified plan(s) maintained by the employee leasing organization for purposes of qualification of the recipient organization's plan, a description of such plan(s) (including a description of the contributions or benefits provided for all leased employees which are attributable to services performed for the recipient organization, plan eligibility, and vesting).

**SECTION 15. WAIVER OF MINIMUM FUNDING**

**Scope**

.01 This section provides procedures with respect to defined contribution plans for requesting a waiver of the minimum funding standard account and requesting a determination letter on any plan amendment required for the waiver.

**Applicability of Rev. Proc. 2004-15**

.02 The procedures in Rev. Proc. 2004-15, 2004-1 C.B. 490, apply to the request for a waiver of the minimum funding requirement. Section 2 of that revenue procedure contains the procedures for obtaining waivers of the minimum funding standards in the instance of defined benefit plans. In order to provide maximum flexibility in requesting a waiver for a defined contribution pension plan, section 3 of the revenue procedure contains three alternative methods as described more fully in Rev. Proc. 2004-15.

**Waiver request submitted to EP Technical**

.03 The first two alternatives involve (1) a waiver ruling only, without submission of a plan amendment, and (2) a waiver ruling only, with submission of a plan amendment. Under these first two procedures, requests for waivers must be submitted to:

Employee Plans  
Internal Revenue Service  
Commissioner, TE/GE  
Attention: SE:T:EP:RA  
P.O. Box 27063  
McPherson Station  
Washington, DC 20038

In both cases, the applicant must satisfy the requirements of section 2 of Rev. Proc. 2004-15, other than the parts applicable only to defined benefit plans.

If a plan amendment is not submitted or is not already part of a plan, the Service will supply an amendment which will, if adopted, satisfy section 3 of Rev. Rul. 78-223, 1978-1 C.B. 125. The waiver will be conditioned upon the plan being amended by adoption of that amendment, within a reasonable period of time, and will contain a caveat stating that the ruling is not a ruling as to the effect the plan provision may have on the qualified status of the plan. The applicant may request reconsideration within 60 days of the date of the letter if the amendment is inappropriate, by submitting a letter to the above address.

If the request for the waiver is submitted along with a plan amendment, the plan provisions necessary to satisfy section 3 of Rev. Rul. 78-223 must be included. All waivers issued pursuant to this alternative will contain a caveat indicating that the ruling is not a ruling as to the effect any plan provision may have on the qualified status of the plan.

#### **Waiver and determination letter request submitted to EP Technical**

.04 The third alternative is a request for a waiver ruling and a determination letter request. Both requests must be submitted by the applicant to EP Technical where it will be treated as if it had been submitted as a request for technical advice from the Determinations Manager. The request must:

- (1) satisfy all the procedural requirements of 3.03 of Rev. Proc. 2004-15;
- (2) include a completed Form 5300 and all necessary documents, plan amendments and information required by the Form 5300 and Rev. Proc. 2004-15 for approval;
- (3) indicate which Area Office has audit jurisdiction over the return; and
- (4) submit the user fee for both requests to EP Technical.

In addition, the procedures for notice and comment by interested parties, contained in sections 17, 18 and 19 of this revenue procedure, and the notice and comment procedures provided in section 2.02 of Rev. Proc. 2004-15 must be satisfied. Comments will be forwarded to the Determinations Office that is considering the determination letter request for the plan amendments.

#### **Handling of the request**

.05 The waiver request described in section 15.04 above will be handled by EP Technical as follows:

(1) The waiver request and supporting documents will be forwarded to EP Technical, SE:T:EP:RA:T, which will treat the request as a technical advice on the qualification issue with respect to the plan provisions necessary to satisfy section 3 of Rev. Rul. 78-223.

(2) The appropriate Determinations Office will be notified of the request. In order not to delay the processing of the request, all materials relating to the determination letter request will be forwarded by EP Technical to the Determinations Manager for consideration while the technical advice request is completed.

(3) EP Technical will consider both issues. If a waiver is to be granted and if EP Technical believes that qualification of the plan is not adversely affected by the plan amendment, the mandatory technical advice memorandum will be issued to the Determinations Manager. The Determinations Manager must decide within 10 working days from the date of the technical advice memorandum either to furnish the applicant with the technical advice memorandum and with a favorable advance determination letter, or to ask for reconsideration of the technical advice memorandum. This request must be in writing. An initial written notice of intent to make this request may be submitted within 10 working days of the date of the technical advice memorandum and followed by a written request within 30 working days from the date of such written notice. If the Determinations Manager does not ask for reconsideration of the technical advice memorandum within 10 working days, EP Technical will issue the waiver ruling. This ruling will not contain the caveat described in section 3.02 of Rev. Proc. 2004-15.

#### **When waiver request should be submitted**

.06 In the case of a plan other than a multiemployer plan, all waiver requests must be submitted to the Service no later than the 15th day of the third month following the close of the plan year for which the waiver is requested. The Service may not extend this statutory deadline. A

request for a waiver with respect to a multiemployer plan generally must be submitted no later than the close of the plan year following the plan year for which the waiver is requested.

In seeking a waiver with respect to a plan year that has not yet ended, the applicant may have difficulty in furnishing sufficient current evidence in support of the request. For this reason it is generally advisable that such advance request be submitted no earlier than 180 days prior to the end of the plan year for which the waiver is requested.

## **SECTION 16. SECTION 401(h) AND § 420 DETERMINATION LETTERS**

**Scope** .01 This section provides procedures for requesting determination letters (i) with respect to whether the requirements of § 401(h) are satisfied in a plan with retiree medical benefit features and (ii) on plan language that permits, pursuant to § 420, the transfer of assets in a defined benefit plan to a health benefit account described in § 401(h).

**Required information for § 401(h) determination** .02 EP Determinations will issue a determination letter that considers whether the requirements of § 401(h) are satisfied in a plan with retiree medical benefit features only if the plan sponsor's application includes, in addition to the application forms and any other material required by this revenue procedure, a cover letter that requests consideration of § 401(h). The cover letter must specifically state that consideration is being requested with regard to § 401(h) in addition to other matters under § 401(a) and must specifically state the location of plan provisions that satisfy the requirements of § 401(h). Part I of the checklist in the Appendix of this revenue procedure may be used to identify the location of relevant plan provisions.

**Required information for § 420 determination** .03 EP Determinations will consider the qualified status of certain plan language designed to comply with § 420 only if the plan sponsor requests such consideration in a cover letter. The cover letter must specifically state (i) whether consideration is being requested only with regard to § 420, or (ii) whether consideration is being requested with regard to § 420 in addition to other matters under § 401(a). (If consideration of other matters under § 401(a) is being requested, the application forms and other material required by this revenue procedure must also be submitted.) The cover letter must specifically state the location of plan provisions that satisfy each of the following requirements. Parts I and II of the checklist in the Appendix of this revenue procedure may be used to identify the location of relevant plan provisions.

(1) The plan must include a health benefits account as described in § 401(h).

(2) The plan must provide that transfers shall be limited to transfers of "excess assets" as defined in § 420(e)(2).

(3) The plan must provide that only one transfer may be made in a taxable year. However, for purposes of determining whether the rule in the preceding sentence is met, a plan may provide that a transfer will not be taken into account if it is a transfer that:

(a) Is made after the close of the taxable year preceding the employer's first taxable year beginning after December 31, 1990, and before the earlier of (i) the due date (including extensions) for the filing of the return of tax for such preceding year, or (ii) the date such return is filed; and

(b) Does not exceed the expenditures of the employer for qualified current retiree health liabilities for such preceding taxable year.

(4) The plan must provide that the amount transferred shall not exceed the amount which is reasonably estimated to be the amount the employer will pay out (whether directly or through reimbursement) of the health benefit account during the taxable year of the transfer for "qualified current retiree health liabilities," as defined in § 420(e)(1).

(5) The plan must provide that no transfer will be made after December 31, 2013.



(6) The plan must provide that any assets transferred, and any income allocable to such assets, shall be used only to pay qualified current retiree health liabilities for the taxable year of transfer.

(7) The plan must provide that any amounts transferred to a health benefits account (and income attributable to such amounts) which are not used to pay qualified current retiree health liabilities shall be transferred back to the defined benefit portion of the plan.

(8) The plan must provide that the amounts paid out of a health benefits account will be treated as paid first out of transferred assets and income attributable to those assets.

(9) The plan must provide that the accrued pension benefits for participants and beneficiaries must become nonforfeitable as if the plan had terminated immediately prior to the transfer (or in the case of a participant who separated during the 1-year period ending on the date of transfer immediately before such separation). In the case of a transfer described in § 420(b)(4) that relates to a prior year, the plan must provide that the accrued benefit of a participant who separated from service during the taxable year to which such transfer relates will be recomputed and treated as nonforfeitable immediately before such separation.

(10) The plan must provide that a transfer will be permitted only if each group health plan or arrangement under which health benefits are provided contains provisions satisfying § 420(c)(3). The plan must define “applicable employer cost”, “cost maintenance period”, and “benefit maintenance period”, as applicable, consistent with § 420(c)(3), as amended. If applicable, the provisions of the plan must also reflect the transition rule in § 535(c)(2) of the Tax Relief Extension Act of 1999 (TREA '99). The plan may provide that § 420(c)(3) is satisfied separately with respect to individuals eligible for benefits under Title XVIII of the Social Security Act at any time during the taxable year and with respect to individuals not so eligible.

(11) The plan must provide that transferred assets cannot be used for key employees (as defined in § 416(i)(1)).

## **PART II. INTERESTED PARTY NOTICE AND COMMENT**

### **SECTION 17. WHAT RIGHTS TO NOTICE AND COMMENT DO INTERESTED PARTIES HAVE?**

#### **Rights of interested parties**

.01 Persons who qualify as interested parties under § 1.7476-1(b), have the following rights:

(1) To receive notice, in accordance with section 18 below, that an application for an advance determination will be filed regarding the qualification of plans described in §§ 401, 403(a), 409 and/or 4975(e)(7);

(2) To submit written comments with respect to the qualification of such plans to the Service;

(3) To request the Department of Labor to submit a comment to the Service on behalf of the interested parties; and

(4) To submit written comments to the Service on matters with respect to which the Department of Labor was requested to comment but declined.

#### **Comments by interested parties**

.02 Comments submitted by interested parties must be received by EP Determinations by the 45th day after the day on which the application for determination is received by EP Determinations. (However, see sections 17.03 and 17.04 for filing deadlines where the Department of Labor has been requested to comment.) Such comments must be in writing, signed by the interested parties or by an authorized representative of such parties (as provided in section 9.02(11) of Rev. Proc. 2009-4), addressed to EP Determinations at the address in section 6.17, and contain the following information:

- (1) The names of the interested parties making the comments;
- (2) The name and taxpayer identification number of the applicant for a determination;
- (3) The name of the plan, the plan identification number, and the name of the plan administrator;
- (4) Whether the parties submitting the comment are:
  - (a) Employees eligible to participate under the plan,
  - (b) Employees with accrued benefits under the plan, or former employees with vested benefits under the plan,
  - (c) Beneficiaries of deceased former employees who are eligible to receive or are currently receiving benefits under the plan,
  - (d) Employees not eligible to participate under the plan.
- (5) The specific matters raised by the interested parties on the question of whether the plan meets the requirements for qualification involving §§ 401 and 403(a), and how such matters relate to the interests of the parties making the comment; and
- (6) The address of the interested party submitting the comment (or if a comment is submitted jointly by more than one party, the name and address of a designated representative) to which all correspondence, including a notice of the Service's final determination with respect to qualification, should be sent. (The address designated for notice by the Service will also be used by the Department of Labor in communicating with the parties submitting a request for comment.) The designated representative may be one of the interested parties submitting the comment or an authorized representative. If two or more interested parties submit a single comment and one person is not designated in the comment as the representative for receipt of correspondence, a notice of determination mailed to any interested party who submitted the comment shall be notice to all the interested parties who submitted the comment for purposes of § 7476(b)(5) of the Code.

**Requests for DOL to submit comments**

.03 A request to the Department of Labor to submit to EP Determinations a comment pursuant to section 3001(b)(2) of ERISA must be made in accordance with the following procedures.

- (1) The request must be received by the Department of Labor by the 25th day after the day the application for determination is received by EP Determinations. However, if the parties requesting the Department to submit a comment wish to preserve the right to comment to EP Determinations in the event the Department declines to comment, the request must be received by the Department by the 15th day after the day the application for determination is received by EP Determinations.
- (2) The request to the Department of Labor to submit a comment to EP Determinations must:
  - (a) Be in writing;
  - (b) Be signed as provided in section 17.02 above;
  - (c) Contain the names of the interested parties requesting the Department to comment and the address of the interested party or designated representative to whom all correspondence with respect to the request should be sent. See also section 17.02(6) above;
  - (d) Contain the information prescribed in section 17.02(2), (3), (4), (5) and (6) above;
  - (e) Indicate that the application was or will be submitted to EP Determinations at the address in section 6.17;

(f) Contain a statement of the specific matters upon which the Department's comment is sought, as well as how such matters relate to the interested parties making the request; and

(g) Be addressed as follows:

Deputy Assistant Secretary  
Employee Benefits Security Administration  
U.S. Department of Labor  
200 Constitution Avenue, NW  
Washington, DC 20210  
Attention: 3001 Comment Request

**Right to comment if DOL declines to comment**

.04 If a request described in 17.03 is made and the Department of Labor notifies the interested parties making the request that it declines to comment on a matter concerning qualification of the plan which was raised in the request, the parties submitting the request may still submit a comment to EP Determinations on such matter. The comment must be received by the later of the 45th day after the day the application for determination is received by EP Determinations or the 15th day after the day on which notification is given by the Department that it declines to submit a comment on such matter. (See section 17.07 for the date of notification.) In no event may the comment be received later than the 60th day after the day the application for determination was received. Such a comment must comply with the requirements of section 17.02 and include a statement that the comment is being submitted on matters raised in a request to the Department upon which the Department declined to comment.

**Confidentiality of comments**

.05 For rules regarding the confidentiality of contents of written comments submitted by interested parties to the Service pursuant to section 17.02 or 17.04, see § 601.201(o)(5) of the Statement of Procedural Rules.

**Availability of comments**

.06 For rules regarding the availability to the applicant of copies of all comments on the application submitted pursuant to section 17.01(1), (2), (3) and (4) of this revenue procedure, see § 601.201(o)(5) of the Statement of Procedural Rules.

**When comments are deemed made**

.07 An application for an advance determination, a comment to EP Determinations, or a request to the Department of Labor shall be deemed made when it is received by EP Determinations, or the Department. Notification by the Department that it declines to comment shall be deemed given when it is received by the interested party or designated representative. The notice described in section 18.01 below shall be deemed given when it is posted or sent to the person in the manner described in § 1.7476-2. In the case of an application, comment, request, notification, or notice that is sent by mail or a private delivery service that has been designated under § 7502(f), the date as of which it shall be deemed received will be determined under § 7502. However, if such an application, comment, request, notification, or notice is not received within a reasonable period from the date determined under § 7502, the immediately preceding sentence shall not apply.

**SECTION 18. WHAT ARE THE GENERAL RULES FOR NOTICE TO INTERESTED PARTIES?**

**Notice to interested parties**

.01 Notice that an application for an advance determination regarding the qualification of a plan that is described in §§ 401, 403(a), 409 and 4975(e)(7) and that is subject to § 410 is to be made must be given to all interested parties in the manner prescribed in § 1.7476-2(c) and in accordance with the requirements of this section. A notice to interested parties is deemed to be provided in a manner that satisfies § 1.7476-2(c) if the notice is delivered using an electronic medium under a system that satisfies the requirements of § 1.402(f)-1 Q&A-5.

**Time when notice must be given**

.02 Notice must be given not less than 10 days nor more than 24 days prior to the day the application for a determination is made. If, however, an application is returned to the applicant for failure to adequately satisfy the notification requirements with respect to a particular group

or class of interested parties, the applicant need not cause notice to be given to those groups or classes of interested parties with respect to which the notice requirement was already satisfied merely because, as a result of the resubmission of the application, the time limitations of this subsection would not be met.

#### **Content of notice**

.03 The notice referred to in section 18.01 shall contain the following information:

(1) A brief description identifying the class or classes of interested parties to whom the notice is addressed (*e.g.*, all present employees of the employer, all present employees eligible to participate);

(2) The name of the plan, the plan identification number, and the name of the plan administrator;

(3) The name and taxpayer identification number of the applicant for a determination;

(4) That an application for a determination as to the qualified status of the plan is to be made to the Service at the address in section 6.17, and stating whether the application relates to an initial qualification, a plan amendment, termination, or a partial termination;

(5) A description of the class of employees eligible to participate under the plan;

(6) Whether or not the Service has issued a previous determination as to the qualified status of the plan;

(7) A statement that any person to whom the notice is addressed is entitled to submit, or request the Department of Labor to submit, to EP Determinations, a comment on the question of whether the plan meets the requirements of § 401 or 403(a); that two or more such persons may join in a single comment or request; and that if such persons request the Department of Labor to submit a comment and the Department of Labor declines to do so with respect to one or more matters raised in the request, the persons may still submit a comment to EP Determinations with respect to the matters on which the Department declines to comment. The Pension Benefit Guaranty Corporation (PBGC) may also submit comments. In every instance where there is either a final adverse termination or a distress termination, the Service formally notifies the PBGC for comments;

(8) The specific dates by which a comment to EP Determinations or a request to the Department of Labor must be received in order to preserve the right of comment (see section 17 above);

(9) The number of interested parties needed in order for the Department of Labor to comment; and

(10) Except to the extent that the additional informational material required to be made available by sections 18.05 through 18.09 are included in the notice, a description of a reasonable procedure whereby such additional informational material will be available to interested parties (see section 18.04). (Examples of notices setting forth the above information, in a case in which the additional information required by sections 18.05 through 18.09 will be made available at places accessible to the interested parties, are set forth in the Exhibit attached to this revenue procedure.)

#### **Procedures for making information available to interested parties**

.04 The procedure referred to in section 18.03(10), whereby the additional informational material required by sections 18.05 through 18.09 will (to the extent not included in the notice) be made available to interested parties, may consist of making such material available for inspection and copying by interested parties at a place or places reasonably accessible to such parties, or supplying such material by using a method of delivery or a combination thereof that is reasonably calculated to ensure that all interested parties will have access to the materials, provided such procedure is immediately available to all interested parties, is designed to supply them with such additional informational material in time for them to pursue their rights within the time period prescribed, and is available until the earlier of: 1) the filing of a pleading commencing a declaratory judgment action under § 7476 with respect to the qualification

of the plan; or 2) the 92nd day after the day the notice of final determination is mailed to the applicant. Reasonable charges to interested parties for copying and/or mailing such additional informational material are permissible.

**Information to be available to interested parties**

.05 Unless provided in the notice, or unless section 18.06 applies, there shall be made available to interested parties under a procedure described in section 18.04:

- (1) An updated copy of the plan and the related trust agreement (if any); and
- (2) The application for determination.

**Special rules if there are less than 26 participants**

.06 If there would be less than 26 participants in the plan, as described in the application (including, as participants, former employees with vested benefits under the plan, beneficiaries of deceased former employees currently receiving benefits under the plan, and employees who would be eligible to participate upon making mandatory employee contributions, if any), then in lieu of making the materials described in section 18.05 available to interested parties who are not participants (as described above), there may be made available to such interested parties a document containing the following information:

- (1) A description of the plan's requirements respecting eligibility for participation and benefits and the plan's benefit formula;
- (2) A description of the provisions providing for nonforfeitable benefits;
- (3) A description of the circumstances which may result in ineligibility, or denial or loss of benefits;
- (4) A description of the source of financing of the plan and the identity of any organization through which benefits are provided;
- (5) A description of any optional forms of benefits described in § 411(d)(6) which have been reduced or eliminated by plan amendment; and
- (6) Any coverage schedule or other demonstration submitted with the application to show that the plan meets the requirements of §§ 401(a)(4) and 410(b).

However, once an interested party or designated representative receives a notice of final determination, the applicant must, upon request, make available to such interested party (whether or not the plan has less than 26 participants) an updated copy of the plan and related trust agreement (if any) and the application for determination.

**Information described in § 6104(a)(1)(D) should not be included**

.07 Information of the type described in § 6104(a)(1)(D) should not be included in the application, plan, or related trust agreement submitted to the Service. Accordingly, such information should not be included in any of the material required by section 18.05 or 18.06 to be available to interested parties.

**Availability of additional information to interested parties**

.08 Unless provided in the notice, there shall be made available to interested parties under a procedure described in section 18.04, any additional document dealing with the application which is submitted by or for the applicant to the Service, or furnished by the Service to the applicant; provided, however, if there would be less than 26 participants in the plan as described in the application (including, as participants, former employees with vested benefits under the plan, beneficiaries of deceased former employees currently receiving benefits under the plan, and employees who would be eligible to participate upon making mandatory employee contributions, if any), such additional documents need not be made available to interested parties who are not participants (as described above) until they, or their designated representative, receive a notice of final determination. The applicant may also withhold from such inspection and copying information described in § 6104(a)(1)(C) and (D) which may be contained in such additional documents.

**Availability of notice to interested parties**

.09 Unless provided in the notice, there shall be made available to all interested parties under a procedure described in section 18.04 the material described in sections 17.02 through 17.07 above.

## **PART III. PROCESSING DETERMINATION LETTER REQUESTS**

### **SECTION 19. HOW DOES THE SERVICE HANDLE DETERMINATION LETTER REQUESTS?**

**Oral advice**

.01 Oral advice.

(1) The Service does not issue determination letters on oral requests. However, personnel in EP Determinations ordinarily will discuss with taxpayers or their representatives inquiries regarding: substantive tax issues; whether the Service will issue a determination letter on particular issues; and questions relating to procedural matters about submitting determination letter requests. Any discussion of substantive issues will be at the discretion of the Service on a time available basis, will not be binding on the Service, and cannot be relied upon as a basis of obtaining retroactive relief under the provisions of § 7805(b). A taxpayer may seek oral technical assistance from a taxpayer service representative when preparing a return or report, under established procedures. Oral advice is advisory only, and the Service is not bound to recognize it in the examination of the taxpayer's return.

(2) The advice or assistance furnished, whether requested by personal appearance, telephone, or correspondence will be limited to general procedures, or will direct the inquirer to source material, such as pertinent Code provisions, regulations, revenue procedures, and revenue rulings that may aid the inquirer in resolving the question or problem.

**Conferences**

.02 EP Determinations may grant a conference upon written request from a taxpayer or his representative, provided the request shows that a substantive plan, amendment, etc., has been developed for submission to the Service, but that special problems or issues are involved, and EP Determinations concludes that a conference would be warranted in the interest of facilitating review and determination when the plan, etc., is formally submitted. See section 6.21 and 6.22 regarding the right to a status conference on applications pending for at least 270 days.

**Determination letter based solely on administrative record**

.03 Administrative Record

(1) In the case of a request for a determination letter, the determination of EP Determinations or the appeals office on the qualification or non-qualification of the retirement plan shall be based solely upon the facts contained in the administrative record. The administrative record shall consist of the following:

(a) The request for determination, the retirement plan and any related trust instruments, and any written modifications or amendments made by the applicant during the proceedings within the Service;

(b) All other documents submitted to the Service by, or on behalf of, the applicant with respect to the request for determination;

(c) All written correspondence between the Service and the applicant with respect to the request for determination and any other documents issued to the applicant from the Service;

(d) All written comments submitted to the Service pursuant to sections 17.01(2), (3), and (4) above, and all correspondence relating to comments submitted between the Service and persons (including PBGC and the Department of Labor) submitting comments pursuant to sections 17.01(2), (3), and (4) above; and

(e) In any case in which the Service makes an investigation regarding the facts as represented or alleged by the applicant in the request for determination or in comments submitted

pursuant to sections 17.01(2), (3), and (4) above, a copy of the official report of such investigation.

(2) The administrative record shall be closed upon the earlier of the following events:

(a) The date of mailing of a notice of final determination by the Service with respect to the application for determination; or

(b) The filing of a petition with the United States Tax Court seeking a declaratory judgment with respect to the retirement plan.

(3) Any oral representation or modification of the facts as represented or alleged in the application for determination or in a comment filed by an interested party, which is not reduced to writing shall not become a part of the administrative record and shall not be taken into account in the determination of the qualified status of the retirement plan by EP Determinations or the appeals office.

#### **Notice of final determination**

.04 In the case of final determination, the notice of final determination:

(1) Shall be the letter issued by EP Determinations or the appeals office which states that the applicant's plan satisfies the qualification requirements of the Code. The favorable determination letter will be sent by certified or registered mail where either an interested party, the Department of Labor, or the PBGC has commented on the application for determination.

(2) Shall be the letter issued, by certified or registered mail, by EP Determinations or the appeals office subsequent to a letter of proposed determination, stating that the applicant's plan fails to satisfy the qualification requirements of the Code.

#### **Issuance of the notice of final determination**

.05 EP Determinations or the appeals office will send the notice of final determination to the applicant, to the interested parties who have previously submitted comments on the application to the Service (or to the persons designated by them to receive such notice), to the Department of Labor in the case of a comment submitted by the Department, and to PBGC if it has filed a comment.

### **SECTION 20. EXHAUSTION OF ADMINISTRATIVE REMEDIES**

#### **In general**

.01 For purposes of § 7476(b)(3), a petitioner shall be deemed to have exhausted the administrative remedies available within the Service upon the completion of the steps described in sections 20.02, 20.03, 20.04, or 20.05 subject, however, to sections 20.06 and 20.07. If applicants, interested parties, or the PBGC do not complete the applicable steps described below, they will not have exhausted their respective available administrative remedies as required by § 7476(b)(3) and will, thus, be precluded from seeking declaratory judgment under § 7476 except to the extent that section 20.05 or 20.08 applies.

#### **Steps for exhausting administrative remedies**

.02 In the case of an applicant, with respect to any matter relating to the qualification of a plan, the steps referred to in section 20.01 are:

(1) Filing a completed application with EP Determinations pursuant to this revenue procedure;

(2) Complying with the requirements pertaining to notice to interested parties as set forth in this revenue procedure and § 1.7476-2 of the regulations; and,

(3) Appealing to the appropriate appeals office pursuant to paragraph 601.201(o)(6) of the Statement of Procedural Rules, in the event a notice of proposed adverse determination is issued by EP Determinations.

#### **Applicant's request for § 7805(b) relief**

.03 Consideration of relief under § 7805(b) will be included as one of the applicant's steps in exhausting administrative remedies only if the applicant requests EP Determinations to seek technical advice from EP Technical on the applicability of such relief. The applicant's request

must be made in writing according to the procedures for requesting technical advice (*see* section 19 of Rev. Proc. 2009–5).

#### **Interested parties**

.04 In the case of an interested party or the PBGC, the steps referred to in section 20.01 are, with respect to any matter relating to the qualification of the plan, submitting to EP Determinations a comment raising such matter in accordance with section 17.01(2) above, or requesting the Department of Labor to submit to EP Determinations a comment with respect to such matter in accordance with section 17.01(3) and, if the Department of Labor declines to comment, submitting the comment in accordance with section 17.01(4) above, so that it may be considered by the Service through the administrative process.

#### **Deemed exhaustion of administrative remedies**

.05 An applicant, an interested party, or the PBGC shall in no event be deemed to have exhausted administrative remedies prior to the earlier of:

(1) The completion of those steps applicable to each as set forth in sections 20.01, 20.02, 20.03 or 20.04, which constitute their administrative remedies; or,

(2) The expiration of the 270-day period described in § 7476(b)(3), which period shall be extended in a case where there has not been a completion of all the steps referred to in section 20.02 and the Service has proceeded with due diligence in processing the application for determination.

#### **Service must act on appeal**

.06 The step described in section 20.02(3) will not be considered completed until the Service has had a reasonable time to act upon the appeal.

#### **Service must act on § 7805(b) request**

.07 Where the applicant has requested EP Determinations to seek technical advice on the applicability of § 7805(b) relief, the applicant's administrative remedies will not be considered exhausted until EP Technical has had a reasonable time to act upon the request for technical advice.

#### **Effect of technical advice request**

.08 The step described in section 20.02(3) will not be available or necessary with respect to any issue on which technical advice has been obtained from EP Technical.

### **SECTION 21. WHAT EFFECT WILL AN EMPLOYEE PLAN DETERMINATION LETTER HAVE?**

#### **Scope of reliance on determination letter**

.01 A determination letter issued pursuant to this revenue procedure contains only the opinion of the Service as to the qualification of the particular plan involving the provisions of §§ 401 and 403(a) and the status of a related trust, if any, under § 501(a). Such a determination letter is based on the facts and demonstrations presented to the Service in connection with the application for the determination letter and may not be relied upon after a change in material fact or the effective date of a change in law, except as provided. The Service may determine, based on the application form, the extent of review of the plan document. Failure to disclose a material fact or misrepresentation of a material fact may adversely affect the reliance that would otherwise be obtained through the issuance by the Service of a favorable determination 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. Applicants are advised to retain copies of all demonstrations and supporting data submitted with their applications. Failure to do so may limit the scope of reliance.

#### **Sections 13 and 14 of Rev. Proc. 2009–4 applicable**

.02 Except as otherwise provided in this section, determination letters are governed, generally, by the provisions of sections 13 and 14 of Rev. Proc. 2009–4.

#### **Effect of subsequent publication of revenue ruling, etc.**

.03 The prior qualification of a plan as adopted by an employer will not be considered to be adversely affected by the publication of a revenue ruling, a revenue procedure, or an administrative pronouncement within the meaning of § 1.6661–3(b)(2) of the regulations where:

(1) The plan was the subject of a favorable determination letter and the request for that letter contained no misstatement or omission of material facts;



(2) The facts subsequently developed are not materially different from the facts on which the determination letter was based;

(3) There has been no change in the applicable law; and

(4) The employer that established the plan acted in good faith in reliance on the determination letter.

However, all such plans must be amended to comply with the published guidance for subsequent years, in accordance with the rules set forth in Rev. Proc. 2007–44. See, in particular, Part II of that revenue procedure.

**Determination letter does not apply to taxability issues**

.04 While a favorable determination letter may serve as a basis for determining deductions for employer contributions thereunder, it is not to be taken as an indication that contributions are necessarily deductible as made. This latter determination can be made only upon an examination of the employer's tax return, in accordance with the limitations, and subject to the conditions of, § 404.

**SECTION 22. EFFECT ON OTHER REVENUE PROCEDURES**

Rev. Proc. 2008–6 is superseded.

**SECTION 23. EFFECTIVE DATE**

This revenue procedure is effective February 1, 2009.

**SECTION 24. PAPERWORK REDUCTION ACT**

The collections of information contained in this revenue procedure have 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 1545–1520.

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 collections of information in this revenue procedure are in sections 6.05, 6.16, 6.18, 6.19, 6.20, 7.04, 13, 14, 15, 16, 19.02, and 21.04. This information is required to determine plan qualification. This information will be used to determine whether a plan is entitled to favorable tax treatment. The collections of information are mandatory. The likely respondents are businesses or other for-profit institutions.

The estimated total annual reporting and/or recordkeeping burden is 163,186 hours.

The estimated annual burden per respondent/recordkeeper varies from 1 hour to 40 hours, depending on individual circumstances, with an estimated average of 2.02 hours. The estimated number of respondents and/or recordkeepers is 80,763.

The estimated annual frequency of responses (used for reporting requirements only) is once every three years.

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 Angelique Carrington of the Employee Plans, Tax Exempt and Government Entities Division. For further information regarding this revenue procedure, please contact the Employee Plans taxpayer assistance telephone service at 1–877–829–5500 (a toll-free number) or Ms. Carrington at *RetirementPlanQuestions@irs.gov*.

**EXHIBIT: SAMPLE NOTICE  
TO INTERESTED PARTIES**

The Exhibit set forth below, may be used to satisfy the requirements of section 18 of this revenue procedure.

**EXHIBIT: SAMPLE NOTICE TO INTERESTED PARTIES**

1. Notice To: \_\_\_\_\_ [describe class or classes of interested parties]

An application is to be made to the Internal Revenue Service for an advance determination on the qualification of the following employee pension benefit plan:

2. \_\_\_\_\_

(name of plan)

3. \_\_\_\_\_

(plan number)

4. \_\_\_\_\_

(name and address of applicant)

5. \_\_\_\_\_

(applicant EIN)

6. \_\_\_\_\_

(name and address of plan administrator)

7. The application will be filed on \_\_\_\_\_ for an advance determination as to whether the plan meets the qualification requirements of § 401 or 403(a) of the Internal Revenue Code of 1986, with respect to the plan's \_\_\_\_\_ [initial qualification, amendment, termination, or partial termination].

The application will be filed with:

EP Determinations  
Internal Revenue Service  
P.O. Box 12192  
Covington, KY 41012-0192

8. The employees eligible to participate under the plan are:
9. The Internal Revenue Service \_\_\_\_\_ [has/has not] previously issued a determination letter with respect to the qualification of this plan.

**RIGHTS OF INTERESTED PARTIES**

10. You have the right to submit to EP Determinations, at the above address, either individually or jointly with other interested parties, your comments as to whether this plan meets the qualification requirements of the Internal Revenue Code.

You may instead, individually or jointly with other interested parties, request the Department of Labor to submit, on your behalf, comments to EP Determinations regarding qualification of the plan. If the Department declines to comment on all or some of the matters you raise, you may, individually, or jointly if your request was made to the Department jointly, submit your comments on these matters directly to EP Determinations.

**REQUESTS FOR COMMENTS BY THE DEPARTMENT OF LABOR**

11. The Department of Labor may not comment on behalf of interested parties unless requested to do so by the lesser of 10 employees or 10 percent of the employees who qualify as interested parties. The number of persons needed for the Department to comment with respect to this plan is \_\_\_\_\_. If you request the Department to comment, your request must be in writing and must specify the matters upon which comments are requested, and must also include:

- (1) the information contained in items 2 through 5 of this Notice; and
- (2) the number of persons needed for the Department to comment.

A request to the Department to comment should be addressed as follows:

Deputy Assistant Secretary  
Employee Benefits Security Administration  
ATTN: 3001 Comment Request  
U.S. Department of Labor  
200 Constitution Avenue, NW  
Washington, DC 20210

#### COMMENTS TO THE INTERNAL REVENUE SERVICE

12. Comments submitted by you to EP Determinations must be in writing and received by it by \_\_\_\_\_. However, if there are matters that you request the Department of Labor to comment upon on your behalf, and the Department declines, you may submit comments on these matters to EP Determinations to be received by it within 15 days from the time the Department notifies you that it will not comment on a particular matter, or by \_\_\_\_\_, whichever is later, but not after \_\_\_\_\_. A request to the Department to comment on your behalf must be received by it by \_\_\_\_\_ if you wish to preserve your right to comment on a matter upon which the Department declines to comment, or by \_\_\_\_\_ if you wish to waive that right.

#### ADDITIONAL INFORMATION

13. Detailed instructions regarding the requirements for notification of interested parties may be found in sections 17 and 18 of Rev. Proc. 2009-6. Additional information concerning this application (including, where applicable, an updated copy of the plan and related trust; the application for determination; any additional documents dealing with the application that have submitted to the Service; and copies of section 17 of Rev. Proc. 2009-6 are available at \_\_\_\_\_ during the hours of \_\_\_\_\_ for inspection and copying. (There is a nominal charge for copying and/or mailing.)

**APPENDIX**

**Checklist** As part of a § 401(h) or § 420 determination letter request described in section 16 of this revenue procedure the following checklist may be completed and attached to the determination letter request. If the request relates to § 401(h) but not to § 420, complete Part I only. If the request relates to § 420, complete Parts I and II.

**PART I**

	<i>CIRCLE</i>	<i>SECTION</i>
1. Does the Plan contain a medical benefits account within the meaning of § 401(h) of the Code? If the medical benefits account is a new provision, items “a” through “h” should be completed.	Yes No	
a. Does the medical benefits account specify the medical benefits that will be available and contain provisions for determining the amount that will be paid?	Yes No	_____
b. Does the medical benefits account specify who will benefit?	Yes No	_____
c. Does the medical benefits account indicate that such benefits, when added to any life insurance protection in the Plan, will be subordinate to retirement benefits? (This requirement will not be satisfied unless the amount of actual contributions to provide § 401(h) benefits (when added to actual contributions for life insurance protection under the Plan) does not exceed 25 percent of the total actual contributions to the Plan (other than contributions to fund past service credits), determined on an aggregate basis since the inception of the § 401(h) arrangement.)	Yes No	_____
d. Does the medical benefits account maintain separate accounts with respect to contributions to key employees (as defined in § 416(i)(1) of the Code) to fund such benefits?	Yes No	_____
e. Does the medical benefits account state that amounts contributed must be reasonable and ascertainable?	Yes No	_____
f. Does the medical benefits account provide for the impossibility of diversion prior to satisfaction of liabilities (other than item “7” below)?	Yes No	_____
g. Does the medical benefits account provide for reversion upon satisfaction of all liabilities (other than item “7” below)?	Yes No	_____
h. Does the medical benefits account provide that forfeitures must be applied as soon as possible to reduce employer contributions to fund the medical benefits?	Yes No	_____

**PART II**

2. Does the Plan limit transfers to “Excess Assets” as defined in § 420(e)(2) of the Code?	Yes No	_____
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- |     |   |        |       |
|-----|---|--------|-------|
| 3.  | Does the Plan provide that only one transfer may be made in a taxable year (except with regard to transfers relating to prior years pursuant to § 420(b)(4) of the Code)?   | Yes No | _____ |
| 4.  | Does the Plan provide that the amount transferred shall not exceed the amount reasonably estimated to be paid for qualified current retiree health liabilities?   | Yes No | _____ |
| 5.  | Does the Plan provide that no transfer will be made after December 31, 2013?  | Yes No | _____ |
| 6.  | Does the Plan provide that transferred assets and income attributable to such assets shall be used only to pay qualified current retiree health liabilities for the taxable year of transfer?   | Yes No | _____ |
| 7.  | Does the Plan provide that any amounts transferred (plus income) that are not used to pay qualified current retiree health liabilities shall be transferred back to the defined benefit portion of the Plan?  | Yes No | _____ |
| 8.  | Does the Plan provide that amounts paid out of a health benefits account will be treated as paid first out of transferred assets and income attributable to those assets?   | Yes No | _____ |
| 9.  | Does the Plan provide that participants' accrued benefits become nonforfeitable on a termination basis (i) immediately prior to transfer, or (ii) in the case of a participant who separated within 1 year before the transfer, immediately before such separation? | Yes No | _____ |
| 10. | In the case of transfers described in § 420(b)(4) of the Code relating to 1990, does the Plan provide that benefits will be recomputed and become nonforfeitable for participants who separated from service in such prior year as described in § 420(c)(2)?        | Yes No | _____ |
| 11. | Does the Plan provide that transfers will be permitted only if each group health plan or arrangement contains provisions satisfying § 420(c)(3) of the Code, as amended?  | Yes No | _____ |
| 12. | Does the Plan define "applicable employer cost", "cost maintenance period" and "benefit maintenance period", as needed, consistently with § 420(c)(3) of the Code, as amended?  | Yes No | _____ |
| 13. | Do the Plan's provisions reflect the transition rule in section 535(c)(2) of TREA '99, if applicable?   | Yes No | _____ |
| 14. | Does the Plan provide that transferred assets cannot be used for key employees?   | Yes No | _____ |