DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

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MEMORANDUM FOR DIRECTOR, EP EXAMINATIONS
DIRECTOR, EP RULINGS & AGREEMENTS

FROM: Michael D. Julianelle
Director, Employee Plans

SUBJECT: Corrective Amendments to Pre-Approved Plans

Purpose - This memorandum sets forth procedures applicable to securing corrective amendments to pre-approved plans under the Examination and Voluntary Compliance programs, where the amendment would result in the pre-approved plan being treated as an individually designed plan under the provisions of Rev. Proc. 2007-44, 2007-2 C.B. 54.

Background - With limited exceptions[1], section 19 of Rev. Proc. 2007-44 permits an employer sponsoring a pre-approved plan to remain within the six-year remedial amendment cycle on a continuing basis, despite a modification to the plan that results in the plan being treated as an individually designed plan (that is, where the employer modifies the basic plan document or modifies the adoption agreement, other than to change an option already provided for in the adoption agreement)[2]. However, if the plan sponsor wants reliance with respect to the plan, it must submit a determination letter application request during the two-year window in which employers adopt pre-approved plans, and, if it sponsors an M&P plan, it must do so using a Form 5300 (which means updating the plan for the cumulative list in effect at the time of the determination letter submission.

Under Audit CAP and VCP, agents can permit a plan sponsor to amend its plan to correct qualification failures (as long as the amendment satisfies the requirements of the Internal Revenue Code (Code)). For example, in the case of

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[1] Section 19.03 provides that an employer is entitled to remain in the six-year remedial amendment cycle only for the current remedial amendment cycle if the employer adopts an individually designed plan, or amends the plan to incorporate a type of plan not permitted under the pre-approved program. Section 19.04 treats a plan as ineligible for the six-year cycle if the amendments listed in section 19.03 occur within one year of adopting the plan and grants the Service discretion to treat a plan as ineligible for the six-year cycle depending on the degree to which the plan is modified.

[2] Note that not every amendment to a pre-approved plan results in the plan being treated as individually designed. See Rev. Proc. 2005-16, section 19.

an operational failure (a failure to operate in accordance with the terms of the plan) in appropriate cases, a plan amendment that conforms the terms of the plan to the operation of the plan may be secured. In the case of a pre-approved plan, these amendments often can be made by the employer by simply changing a checked option in the adoption agreement of the plan. However, in some cases, the permitted amendment is not provided for in the adoption agreement of the plan, and a corrective plan amendment will cause the plan to be considered individually designed under Rev. Proc. 2007-44.

In the context of Audit CAP, the issue requiring corrective amendments has arisen in relation to section 412(i) plans[3]. Many approved prototype plans permit an adopting employer to designate the actuarial equivalency factors for determining plan benefits in a way that results in plan benefits not satisfying the requirements of the Code and regulations. For example, many section 412(i) plans permit employers to check a box in the adoption agreement designated as "N/A" with respect to the plan's actuarial equivalent factors for determining plan benefits. In addition, some plans permit the employer to designate the factors for actuarial equivalence by reference to an insurance or annuity contract and the way in which the contract is currently drafted or subsequently amended results in plan benefits violating the definitely determinable requirement. Requiring a corrective amendment in this situation, like the correction of operational failures through plan amendment, will result in the plan being considered individually designed under Rev. Proc. 2007-44.

(Note that the sample adoption agreement language in DB LRM #42 has been modified to prevent future EGTRRA approved prototype plans from allowing an employer to select an option that could provide for a benefit that is not definitely determinable and can be used as a tool for securing a corrective amendment involving a section 412(i) plan. The revised sample adoption agreement language for DB LRM #42 is attached to this memorandum.)

Reliance and submission of a determination letter application – Under this memorandum, under both Audit CAP and VCP, the document provided to the plan sponsor, whether it be an Audit CAP closing agreement or a VCP compliance statement, will constitute a determination of the effect of the corrective plan amendment on the qualification of the plan, and a concurrent or subsequent filing of a determination letter request relating to the corrective amendment to the plan covered by the Audit CAP closing agreement or VCP compliance statement will not be required as provided below. That is, the plan sponsor will be able to rely on the issuance of the Audit CAP closing agreement

[3] A section 412(i) plan is a plan that satisfies the requirements of section 412(i) of the Code as it existed prior to its amendment by the Pension Protection Act of 2006 (PPA). Pre-PPA section 412(i) is now contained in section 412(e)(3) of the Code.

or the VCP compliance statement, as applicable, with respect to whether the amendment satisfies the qualification requirements of the Code as provided in this paragraph.

For section 412(i) plans, the plan language used to correct the plan document error will mirror the language provided in the revised LRM. EGTRRA pre-approved defined benefit plans will also contain the language in the revised LRM. Therefore, in the future, when the plan sponsor adopts its EGTRRA restatement, the amendment adopted will be part of the prototype sponsor's basic plan document or adoption agreement, and nothing further need be done by the plan sponsor with respect to the formerly disqualifying plan language.

For defined contribution plans, under both Audit CAP and VCP, where a plan error (usually operational) is being corrected through a plan amendment, the closing agreement or compliance statement will provide reliance on the corrective plan amendment. Since the EGTRRA opinion and advisory letters have already been issued for defined contributions plans, when an adopting employer adopts its EGTRRA plan, the plan document or adoption agreement may or may not contain language that is consistent with the corrective amendment approved under VCP or Audit CAP. However, under this memorandum, adopting employers may continue to rely on the compliance statement or closing agreement issued with respect to the corrective plan amendment through the end of the next 6-year cycle (currently January 31, 2017, as provided in section 18.01 of Rev. Proc. 2007-44, or, if different, the deadline announced by the Service, as provided in section 18.03 of that revenue procedure), provided that no other provision of the underlying plan document or adoption agreement has been modified that would cause the employer to otherwise lose reliance on the plan's opinion or advisory letter or would affect the employer's eligibility for the six-year remedial amendment cycle.

With respect to defined contribution plans, the procedures of this memorandum apply only where a corrective amendment proposes to insert additional language within a pre-approved plan for which an opinion or advisory letter has been issued, and for which the language of such plan, as approved, is acceptable. If an agent or specialist discovers language in a pre-approved plan that appears to be incorrect, the procedures in EP Determinations Quality Assurance Bulletin FY-2008 No. 2, *Correcting Pre-Approved Master, Prototype and Volume Submitter Plan Language*, apply. This bulletin requires the agent or specialist to not address the error, but, instead, to complete a referral to the Determinations Pre-approved Plan Coordinators to determine what further action, if any, should be taken. In no event should an agent or specialist contact a pre-approved sponsor or practitioner to discuss proposed amendments to a pre-approved plan.

Procedures – The procedures applicable to an amendment secured to correct a qualification failure that would result in a pre-approved plan being treated as an individually designed plan but for which the plan will be treated as eligible for the six-year remedial amendment cycle on a continuing basis under section 19 of Rev. Proc. 2007-44 follow.

Section 412(i) Plans – The agent will secure the amendment from the employer and ensure that it satisfies the requirements of the Code, including the requirements of section 411(d)(6). The agent should not secure a determination letter application with respect to the amendment.

The following language may be inserted in an Information Document Request:

> As part of our proposed correction, we are requesting the Employer retroactively amend the master and prototype (M&P) or volume submitter (VS) plan under examination. Adopting this amendment will not cause the plan to lose its status as an M&P or VS plan and the Employer will be allowed to remain within the six-year remedial amendment cycle, as long as no other provision of the plan document or adoption agreement has been modified. Thus, the Plan will continue to be treated as an M&P or VS plan for purposes of Revenue Procedure 2007-44, 2007-2 C.B. 54, and therefore will be eligible for the six-year remedial amendment cycle on a continuing basis. In addition, the execution by the Service of a closing agreement that addresses the correction of this failure will constitute a determination of the effect of the corrective plan amendment on the qualification of the plan, and a subsequent filing of a determination letter request on the amendment to the plan covered by the closing agreement will not be required; the Employer will be able to rely on the issuance of the closing agreement with respect to whether the amendment satisfies the qualification requirements of the Internal Revenue Code.

The closing agreement must contain the following paragraph:

> With regard to __(reference failure)_____, provided that no modification has been made to either the plan document or adoption agreement of the plan that would otherwise cause the employer to lose reliance on the plan's opinion or advisory letter, the corrective amendment will not cause the plan to lose its status as an M&P or VS plan and the Employer will be allowed to remain within the six-year remedial amendment cycle described in Revenue Procedure 2007-44, 2007-2 C.B. 54, on a continuing basis (provided that no modification has been made that would otherwise affect

the employer's eligibility for the six-year remedial amendment cycle). In addition, the issuance of this closing agreement constitutes a determination of the effect of the corrective plan amendment on the qualification of the plan, and a subsequent filing of a determination letter request on such amendment will not be required.

Defined Contribution Plans

VCP - The agent/specialist will coordinate with Angelo Noe or Milo Atlas, the Determinations Pre-Approved Plan Coordinators, before securing the amendment and ensure that the amendment satisfies the requirements of the Code and the pre-approved plan rules. The agent/specialist should not secure a determination letter application with respect to the amendment. The VCP compliance statement should include the following language incorporated into the enforcement resolution:

> With regard to (reference failure), (provided that no modification has been made to either the plan document or adoption agreement of the plan that would otherwise cause the employer to lose reliance on the plan's opinion or advisory letter), the corrective amendment will not cause the plan to lose its status as an M&P or VS plan and (provided that no modification has been made that would otherwise affect the employer's eligibility for the six-year remedial amendment cycle) the employer will be allowed to remain within the six-year remedial amendment cycle described in Revenue Procedure 2007-44, 2007-2 C.B. 54, on a continuing basis until the expiration of the next six-year remedial amendment cycle (currently January 31, 2017, as provided in section 18.01 of Rev. Proc. 2007-44, or, if different, the deadline announced by the Service, as provided in section 18.03 of that revenue procedure). In addition, the issuance of this compliance statement constitutes a determination of the effect of the corrective plan amendment on the qualification of the plan, and a subsequent filing of a determination letter request on such amendment will not be required until the expiration of the next six-year remedial amendment cycle.

Audit CAP – The agent/specialist will coordinate with Angelo Noe or Milo Atlas, the Determinations Pre-Approved Plan Coordinators, before securing the amendment and ensure that the amendment satisfies the requirements of the Code and the pre-approved plan rules. The agent/specialist should not secure a determination letter application with respect to the amendment. The closing agreement should include the following language:

With regard to ___(reference failure)_____, provided that no modification has been made to either the plan document or adoption agreement of the plan that would otherwise cause the employer to lose reliance on the plan's opinion or advisory letter, the corrective amendment will not cause the plan to lose its status as an M&P or VS plan and, provided that no modification has been made that would otherwise affect the employer's eligibility for the six-year remedial amendment cycle, the employer will be allowed to remain within the six-year remedial amendment cycle described in Revenue Procedure 2007-44, 2007-2 C.B. 54, on a continuing basis until the expiration of the next six-year remedial amendment cycle (currently January 31, 2017, as provided in section 18.01 of Rev. Proc. 2007-44, or, if different, the deadline announced by the Service, as provided in section 18.03 of that revenue procedure). In addition, the issuance of this closing agreement constitutes a determination of the effect of the corrective plan amendment on the qualification of the plan, and a subsequent filing of a determination letter request on such amendment will not be required until the expiration of the next six-year remedial amendment cycle.

We anticipate that these procedures will be reflected in the next update of Rev. Proc. 2007-44 and Rev. Proc. 2008-50.

If you have any questions regarding this memorandum, please contact your Voluntary Compliance or Area Coordinator.

Attachment

Sample Adoption Agreement Language:

A. Except as provided in section _____ of the plan, actuarial equivalence will be determined based on the following interest and mortality assumptions:

(Note to reviewer: The blank above should be filled in with the plan section number corresponding to LRM #42.)

Interest rate: _____% (must be between 7 ½% & 8 ½% if the plan provides for permitted disparity under section 401(l) of the Internal Revenue Code)

Mortality table: _____(must be standard mortality table as described in section 1.401(a)(4)-12 of the Income Tax Regulations if the plan provides for permitted disparity under section 401(l) of the Internal Revenue Code)

(Note to Reviewer: The following optional provision allows the adopting employer to indicate, in a manner that satisfies the definitely determinable benefits requirement of section 1.401-1(b)(1)(i) of the regulations, that actuarial equivalence will be determined with reference to a specified insurance or annuity contract.)

(Instead of specifying the interest and mortality assumptions, the plan may determine actuarial equivalence by reference to a specified insurance or annuity contract. However, if the plan provides for permitted disparity under section 401(l) of the Internal Revenue Code, the plan may determine actuarial equivalence by reference to a specified insurance or annuity contract only if the interest and mortality assumptions under the contract are a standard interest rate (i.e., between 7 ½% and 8 ½%) and a standard mortality table under section 1.401(a)(4)-12 of the Income Tax Regulations.

To provide that actuarial equivalence under the plan will be determined by reference to a specified insurance or annuity contract, leave the preceding interest rate and mortality table elections blank and enter information about the contract below.)

The interest and mortality assumptions specified in the following insurance or annuity contract:

Contract name/number: _____

Company that issued the contract: _____

Date of issuance: _____

If the insurance or annuity contract specifies different interest and mortality assumptions for different purposes under the contract, the assumptions that will be used to determine actuarial equivalence under the plan are those assumptions specified under the contract for purposes of determining: _____ (e.g., the amount of benefits payable in different forms under the contract or the cash surrender value of the contract).

Any change in the insurance or annuity contract, including the substitution of a different contract, that results in a change in the interest and mortality assumptions used to determine actuarial equivalence under the plan shall be treated as an amendment of the plan for purposes of section _____ of the plan.

(Note to reviewer: The blank above should be filled in with the plan section number corresponding to LRM #66.)

B. For purposes of the time for determining the applicable interest rate, the stability period under the plan is:

( ) one calendar month

( ) one plan quarter

( ) one calendar quarter

( ) one plan year

( ) one calendar year

C. The lookback month, relating to the stability period under the plan, is the:

( ) first

( ) second

( ) third

( ) fourth

( ) fifth

calendar month preceding the first day of the stability period.