

Eligibility for Exemption from User Fee Requirement for Employee Plans Determination Letter Applications Filed On or After January 1, 2017

Notice 2017-1

I. Purpose

Section 7528(b)(2)(B) of the Internal Revenue Code provides an exemption from the requirement to pay a user fee for certain requests to the Internal Revenue Service (IRS) for determination letters with respect to the qualified status of pension, profit-sharing, stock bonus, annuity, and employee stock ownership (ESOP) plans maintained by small employers. Under § 7528(b)(2)(B), the exemption from the user fee does not apply to any request made after the later of (i) the fifth plan year of the plan's existence or (ii) the end of any remedial amendment period with respect to the plan beginning within the first five plan years (a "qualifying open remedial amendment period"). Section 7528(b)(2)(A) also permits the Secretary of the Treasury to provide exemptions from the user fee requirement. This notice describes the circumstances under which, in light of changes to the remedial amendment period rules set forth in Rev. Proc. 2016-37, 2016-29 I.R.B. 136, the IRS will treat an application for a determination letter as being filed within a qualifying open remedial amendment period (one of the requirements for the user fee exemption). Specifically, this notice provides that the IRS will treat an application for a determination letter as being filed within a qualifying open remedial amendment period if the plan was first in existence no earlier than January 1 of the tenth calendar year preceding the year in which the application is filed ("the ten-year rule").

This notice also provides that an application that satisfies the requirements for the user fee exemption in § 7528(b)(2)(B), but that does not meet the requirements for the ten-year rule described in the preceding paragraph, may be filed without a user fee. However, the application must include a statement describing how the application satisfies the exemption under § 7528(b)(2)(B).

II. Background

Section 7528(a)(1) provides the general rule that the Secretary of the Treasury is to establish a program requiring the payment of user fees for requests to the IRS for determination letters. The IRS user fee program procedures for requests involving employee plans and exempt organizations are published as part of the annual revenue procedures issued by the IRS. See, for example, Rev. Proc. 2016-8, 2016-1 I.R.B. 243.

Section 7528(b)(2)(A) provides that the Secretary shall provide for such exemptions from the user fee requirement (and reduced fees) as the Secretary determines to be appropriate.

Section 7528(b)(2)(B) provides that, in general, a request for a determination letter with respect to the qualified status of a pension benefit plan or any trust that is part of the plan shall be exempt from the user fee requirement if the plan is maintained solely by one or more eligible employers. Under § 7528(b)(2)(C)(i), a pension benefit plan means a pension, profit-sharing, stock bonus, annuity, or ESOP plan. Under § 7528(b)(2)(C)(ii), an eligible employer means an employer that has no more than 100 employees who received at least \$5,000 of compensation from the employer for the preceding year, and that has at least one employee who is not a highly compensated employee (as defined in § 414(q)) and is participating in the plan. However, the § 7528(b)(2)(B) user fee exemption does not apply if the request is made after the later of (1) the last day of the fifth plan year the plan is in existence, or (2) the end of any qualifying open remedial amendment period. The § 7528(b)(2)(B) user fee exemption also does not apply to any request made by the sponsor of any prototype or similar plan that the sponsor intends to market to participating employers.

Rev. Proc. 2007-44, 2007-2 C.B. 54, provides for a system of cyclical remedial amendment periods and staggered submission periods for determination letter applications for individually designed plans and pre-approved plans. Under Rev. Proc. 2007-44, the remedial amendment cycle for individually designed plans is five years and the remedial amendment cycle for pre-approved plans is six years.

Rev. Proc. 2016-37 eliminates the remedial amendment cycle system for individually designed plans set forth in Rev. Proc. 2007-44, as of January 1, 2017. The revenue procedure provides that sponsors of Cycle A plans may continue to file under the remedial amendment cycle system until January 31, 2017. In addition, the revenue procedure makes clarifying changes to the ongoing six-year remedial amendment cycle system for pre-approved qualified plans. It also provides that the deadline for certain employers to adopt a newly approved pre-approved defined contribution plan that was based on the 2010 Cumulative List, and to apply for a determination letter, is extended from April 30, 2016, to April 30, 2017, for any newly approved pre-approved defined contribution plan adopted on or after January 1, 2016.

Notice 2002-1, 2002-1 C.B. 283, as amplified by Notice 2003-49, 2003-2 C.B. 294, provides guidance with respect to the requirements for the § 7528(b)(2)(B) user fee exemption, including an explanation of when a plan is “in existence” for that purpose (see Q&A-4 of Notice 2002-1). In addition, Notice 2011-86, 2011-45 I.R.B. 698, amplifies Notice 2002-1 by providing rules for determining, under the remedial amendment cycle system, if an application for a determination letter has been filed within a qualifying open remedial amendment period.

III. Applications Treated as Being Filed Within a Qualifying Open Remedial Amendment Period

An application for a determination letter with respect to a pension, profit-sharing, stock bonus, annuity, or ESOP plan maintained by an eligible employer that is filed with the IRS by the later of (1) the last day of the fifth plan year the plan is in existence, or (2) the end of any qualifying open remedial amendment period, will be eligible for the user fee exemption under § 7528(b)(2)(B), provided that the application satisfies all other applicable requirements for the exemption.

In order to simplify the process for establishing whether the user fee exemption under § 7528(b)(2) is available and, thus, whether a user fee is required to be paid with a determination letter application for a plan, the IRS will, pursuant to the authority under § 7528(b)(2)(A), treat an application as being filed within a qualifying open remedial amendment period (one of the requirements for the user fee exemption) if the plan was first in existence no earlier than January 1 of the tenth calendar year preceding the year in which the application is filed. For example, if an application for a determination letter for a plan that was first in existence during 2007 is filed on December 1, 2017, then the IRS will treat the application as having been filed within a qualifying open remedial amendment period for purposes of § 7528(b)(2). In contrast, if the plan in this example had first been in existence during 2006, then the IRS would not treat the application as being filed within a qualifying open remedial amendment period.

If an application does not satisfy the requirements of the ten-year rule described in the preceding paragraph (and, accordingly, is not treated under that rule as being filed within a qualifying open remedial amendment period), but the application nevertheless satisfies the requirements for the user fee exemption under § 7528(b)(2)(B) (for example, in a case in which a qualifying open remedial amendment period ends more than ten years after the year in which the plan is first in existence), then no user fee is required. In such a case, in lieu of including a user fee with the application, the applicant should explain in a cover letter how the application satisfies the requirements for the exemption under § 7528(b)(2)(B). If the IRS determines that the application does not meet the requirements for the user fee exemption under § 7528(b)(2)(B), the applicant will be asked to submit the required user fee.

IV. Effect on Other Documents

Notice 2002-1 is amplified.

Notice 2011-86 is obsolete.

V. Effective Date

This notice generally applies to all applications for determination letters that are filed on or after January 1, 2017. However, the rules under Notice 2011-86 continue to apply to (1) an application for a determination letter that is filed on or before January 31, 2017, under Cycle A with respect to an individually designed plan; and (2) an application for a determination letter that is filed on or before April 30, 2017, with respect to a newly approved pre-approved defined contribution plan that is based on the 2010 Cumulative List and adopted on or after January 1, 2016.

VI. DRAFTING INFORMATION

The principal author of this notice is Patrick T. Gutierrez of the Office of Associate Chief Counsel (Tax Exempt and Government Entities). For further information regarding this notice contact Mr. Gutierrez at (202) 317-4148 (not a toll-free call).