

Part III

Administrative, Procedural, and Miscellaneous

26 CFR 601.201: Rulings and determination letters
(Also, Part I, §§ 401; 1.401(b)-1.)

Rev. Proc. 2008-56

SECTION 1. PURPOSE

This revenue procedure modifies Rev. Proc. 2007-44, 2007-28 I.R.B. 54 with respect to certain restrictions that apply to the issuance of opinion and advisory letters for new pre-approved plans. These restrictions were included in Rev. Proc. 2007-44 primarily to ensure that the use of Service resources to administer the pre-approved plan program does not adversely affect the determination letter program. After further evaluation and consideration of comments from pre-approved plan sponsors, the Service is relaxing these restrictions. In general, the changes in this revenue procedure apply only to plans that are identical to mass submitter plans. Since the plans affected by the changes have, in effect, already been reviewed and approved, the Service is able to make the changes without reducing resources needed for the determination letter program.

SECTION 2. BACKGROUND

.01 Rev. Proc. 2007-44 provides a system of cyclical remedial amendment periods under § 401(b) of the Internal Revenue Code for amending plans qualified under § 401(a) and obtaining determination letters. Under this system, every pre-approved plan (that is, a master and prototype (M&P) or volume submitter (VS) plan) must be submitted to the Service for a new opinion or advisory letter every six years, during the one-year submission period at the beginning of the plan's six-year cycle. Pre-approved defined contribution plans have a different six-year cycle than pre-approved defined benefit plans. The cycles and submission periods are set forth in section 18 of Rev. Proc. 2007-44.

.02 After the Service issues a new opinion or advisory letter, the pre-approved plan's adopting employers must adopt the newly approved restatement of the plan within the adoption period announced by the Service. An eligible employer that adopts the restated pre-approved plan within the adoption period will have adopted the plan within the employer's six-year remedial amendment cycle. In Announcement 2008-23, 2008-14 I.R.B. 731, the Service announced that the adoption period for pre-approved defined contribution plans that have received opinion or advisory letters under the Economic Growth and Tax Relief

Reconciliation Act of 2001, Pub. L. 107-16, (“EGTRRA”) will end on April 30, 2010.

.03 Certain exceptions to the preceding rules apply to new pre-approved plans. A new pre-approved plan is one that is created after the submission period for the applicable six-year cycle. An application for an opinion or advisory letter for a new pre-approved plan that is submitted outside of the submission period within an applicable six-year cycle is filed “off-cycle.” Section 20 of Rev. Proc. 2007-44 provides the following exceptions to the rules described in sections 2.01 and 2.02, above:

(1) In order for the adopting employers of a new pre-approved plan to be eligible for an applicable six-year cycle, the pre-approved plan must be submitted to the Service for an opinion or advisory letter prior to the beginning of the announced adoption period for that cycle.

(2) The opinion or advisory letter with respect to an off-cycle application is not retroactive and may not be relied upon for the period prior to the date of submission of the application.

(3) A sponsor or practitioner that submits an application for an opinion or advisory letter within the submission period for an applicable six-year cycle may not also submit an off-cycle application for an opinion or advisory letter.

In accordance with paragraph (2), some EGTRRA opinion and advisory letters include a caveat stating that the letter is not retroactive and may not be relied upon for the period prior to the date of submission of the application.

.04 Rev. Proc. 2005-16, 2005-1 C.B. 674, which contains the Service’s procedures for the issuance of opinion and advisory letters, contains rules applicable to “mass submitter” plans, that is, pre-approved plans that are submitted to the Service on a word-for-word identical basis by a minimum number of sponsoring organizations or practitioners.

SECTION 3. MODIFICATION OF REV. PROC. 2007-44

.01 Rev. Proc. 2007-44 is modified to provide the following:

(1) A sponsor or practitioner is not precluded from submitting an off-cycle application for an opinion or advisory letter on account of having also submitted an on-cycle application, provided the new application is for a plan that is word-for-word identical to a mass submitter plan that has received a favorable EGTRRA opinion or advisory letter, or for which an application for such a letter is pending, and the new application is filed according to the procedures governing mass submitter plans under Rev. Proc. 2005-16.

(2) Adopting employers of a new pre-approved plan that is word-for-word identical to a mass submitter plan will not fail to be eligible for an applicable six-year cycle merely because the pre-approved plan is submitted to the Service for an opinion or advisory letter after the beginning of the announced adoption period for that cycle. Regardless of when the application is filed or when the opinion or advisory letter is issued, however, the announced adoption period for any applicable six-year cycle will not be extended.

(3) An otherwise eligible adopting employer as described in section 17 of Rev. Proc. 2007-44 may rely on a pre-approved plan's current opinion or advisory letter to retroactively amend its plan under § 401(b) and Rev. Proc. 2007-44 by adopting the pre-approved plan within the announced adoption period for the applicable six-year cycle, regardless of whether the opinion or advisory letter application for the plan was filed off-cycle (and regardless of whether the plan is word-for-word identical to a mass submitter plan). Thus, for example, an eligible employer may rely on a pre-approved plan's EGTRRA opinion or advisory letter to retroactively amend its plan for EGTRRA and the other qualification changes listed in Notice 2004-84, 2004-2 C.B. 1030, ("the 2004 Cumulative List") by adopting the pre-approved plan within the adoption period ending on April 30, 2010, even if the application for the opinion or advisory letter for the plan was submitted off-cycle. Any EGTRRA opinion or advisory letters that have been issued with a caveat prohibiting retroactive reliance will be reissued by the Service to remove the caveat.

.02 Until further notice, the Service will continue to accept off-cycle applications for opinion or advisory letters filed by M&P and VS mass submitters for pre-approved plans that are word-for-word identical to the mass submitter's currently approved plan or to a plan of the mass submitter for which an application is currently pending with the Service. The Service will not accept applications for opinion or advisory letters for other plans submitted after the beginning of the adoption period announced by the Service for an applicable six-year cycle because there will not be sufficient time for the Service to review the plans and for employers to then adopt the plans before the end of the adoption period.

SECTION 4. EFFECT ON OTHER DOCUMENTS

Rev. Proc. 2007-44 is modified.

SECTION 5. EFFECTIVE DATE

The modification in this revenue procedure will be treated as in effect as of the effective date of Rev. Proc. 2007-44, June 13, 2007.

DRAFTING INFORMATION

The principal author of this revenue procedure is James P. Flannery of the

Employee Plans, Tax Exempt and Government Entities Division. For further information regarding this revenue procedure, please contact Mr. Flannery via e-mail at RetirementPlanQuestions@irs.gov.