

Part III

Administrative, Procedural, and Miscellaneous

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

Rev. Proc. 2009-36

SECTION 1. PURPOSE

.01 This revenue procedure modifies Rev. Proc. 2007-44, 2007-2 C.B. 54, to provide that a remedial amendment cycle with respect to a governmental plan within the meaning of § 414(d) of the Code (“governmental plan”) will not end before the expiration of the 91st day after the close of the first legislative session that begins more than 120 days after a determination letter is issued for the plan (or after the occurrence of certain other events relating to a determination letter application), provided that the application for the determination letter was timely submitted to the Service.

.02 This revenue procedure also modifies Rev. Proc. 2007-44 to provide that the sponsor of an individually designed governmental plan may elect Cycle E (instead of Cycle C) as the initial (EGTRRA) remedial amendment cycle for the plan. This change (which was announced in the November 5, 2008, *Special Edition* of the *EP News* <http://www.irs.gov/pub/irs-tege/se1108.pdf> is a one-time modification that does not apply in determining a plan’s remedial amendment cycle after the initial (EGTRRA) cycle.

SECTION 2. BACKGROUND

.01 Section 401(b) provides a remedial amendment period during which a plan may be amended retroactively to comply with the qualification requirements of § 401(a). Section 1.401(b)-1 of the Income Tax Regulations describes the disqualifying provisions that may be amended retroactively and the remedial amendment period during which retroactive amendments may be adopted. The regulations also grant the Commissioner the discretion to designate certain plan provisions as disqualifying provisions.

.02 Section 1.401(b)-1(e)(3) permits the timely adoption of retroactive remedial amendments that have been determined to be necessary for the issuance of a favorable determination letter, provided that the application for a determination letter was filed with the Service before the end of the remedial amendment period. Section 1.401(b)-1(e)(3) also provides that if an application for a determination letter on the qualified status of a plan is filed with the Service on or

before the end of a remedial amendment period, the period is extended until the expiration of the 91st day after:

(1) The date on which notice of the final determination with respect to the application is issued by the Service, the application is withdrawn, or the application is otherwise disposed of by the Service; or

(2) If a petition is timely filed with the U.S. Tax Court for a declaratory judgment under § 7476 with respect to the final determination (or the failure of the Service to make a final determination) in response to such application, the date on which the decision of the Tax Court in such proceeding becomes final.

.03 Section 1.401(b)-1(f) provides that the Commissioner may extend the remedial amendment period at the Commissioner's discretion.

.04 Rev. Proc. 2007-44 provides a system of staggered, cyclical remedial amendment periods under § 401(b). Under this system, every individually designed plan has a five-year remedial amendment period or cycle, and every pre-approved plan (that is, a master and prototype or volume submitter plan) has a six-year remedial amendment period or cycle. In general, Rev. Proc. 2007-44 extends the remedial amendment period for any disqualifying provision to the end of a plan's remedial amendment cycle that includes the date on which the remedial amendment period with respect to the provision would otherwise end under § 1.401(b)-1.

.05 In general, the end of a plan's remedial amendment cycle is the last day by which the plan may be retroactively amended to correct disqualifying provisions for which the remedial amendment period under § 1.401(b)-1 would otherwise end during that cycle. However, if an application for a determination letter is filed with the Service before the end of a plan's remedial amendment cycle, the remedial amendment period, and thus the deadline for retroactively amending disqualifying provisions, is extended as provided in § 1.401(b)-1(e)(3).

.06 The cycle applicable to an individually designed plan is generally based on the sponsoring employer's taxpayer identification number. However, the initial remedial amendment cycle for individually designed governmental plans (Cycle C) ended on January 31, 2009, and each subsequent Cycle C ends on each fifth anniversary thereof. The six-year remedial amendment cycle for pre-approved plans, including governmental plans that are pre-approved plans, is contained in section 18 of Rev. Proc. 2007-44.

.07 The Service recognizes that the 91-day extension of the remedial amendment period provided by § 1.401(b)-1(e)(3) may not allow enough time for governmental plans to be amended to adopt retroactive remedial amendments that have been determined to be necessary for the issuance of a favorable determination letter. This is because the governing body with authority to amend

the plan may be prevented, under the laws and procedures applicable to the governing body's deliberations, from considering the amendments until some time after the 91-day extension under § 1.401(b)-1(e)(3) has expired.

.08 Rev. Proc. 2009-6, 2009-1 I.R.B. 196, contains the Service's procedures regarding the issuance of determination letters for plans qualified under § 401(a). Section 19 of Rev. Proc. 2009-6 provides that an application for a determination letter may be withdrawn by the applicant, but that any user fee paid with the application generally will not be returned to the applicant.

SECTION 3. APPLICATION OF § 1.401(b)-1(e)(3) TO GOVERNMENTAL PLANS

Pursuant to the Commissioner's authority under § 1.401(b)-1(f), if an application for a determination letter on the qualified status of a governmental plan is filed with the Service on or before the end of the plan's remedial amendment cycle, the remedial amendment period will be extended until the expiration of the 91st day after the last day of the first regular legislative session beginning more than 120 days after the date in (1) or (2) below in which the governing body with authority to amend the plan can consider a plan amendment under the laws and procedures applicable to the governing body's deliberations:

(1) The date on which notice of the final determination with respect to the application is issued by the Service, the application is withdrawn, or the application is otherwise disposed of by the Service; or

(2) If a petition is timely filed with the U.S. Tax Court for a declaratory judgment under § 7476 with respect to the final determination (or the failure of the Service to make a final determination) in response to such application, the date on which the decision of the Tax Court in such proceeding becomes final.

SECTION 4. OPTION TO ELECT CYCLE E AS INDIVIDUALLY DESIGNED GOVERNMENTAL PLAN'S INITIAL REMEDIAL AMENDMENT CYCLE

.01 The sponsor of an individually designed governmental plan may elect Cycle E (instead of Cycle C) as the plan's initial (EGTRRA) remedial amendment cycle. The election is made by filing a determination letter application for the plan during the one-year submission period for the initial Cycle E (February 1, 2010 through January 31, 2011). No election form or notice to the Service is required. A sponsor of an individually designed governmental plan that submitted a determination letter application for the plan during the submission period for the initial Cycle C (February 1, 2008 through January 31, 2009) may withdraw the application. If the application was filed on or before November 7, 2008, the user fee paid with the application will be returned to the applicant, provided a written request to withdraw the application was submitted to the Service (postmarked)

on or before January 31, 2009. Otherwise, as provided in section 19 of Rev. Proc. 2009-9, the user fee generally will not be returned.

.02 If the sponsor of an individually designed governmental plan elects to file a determination letter application for the plan during the Cycle E submission period, all requirements for an individually designed plan submitted for a determination letter during the Cycle E submission period are applicable to the sponsor's plan, including the requirement to amend the plan for all applicable items on the Cycle E Cumulative List and the requirement to timely adopt any interim amendments that are required for a governmental plan during Cycle C and Cycle D.

.03 A sponsor's election of Cycle E, instead of Cycle C, as the initial (EGTRRA) remedial amendment cycle for an individually designed governmental plan applies only to that plan and only to that cycle. For any subsequent remedial amendment cycle, the plan's cycle will revert to Cycle C. Therefore, if a sponsor of a governmental plan files a determination letter application for the plan during the initial Cycle E submission period ending on January 31, 2011, the determination letter that is issued will expire at the end of the Cycle C that next follows the initial Cycle C (January 31, 2014).

SECTION 5. EFFECT ON OTHER DOCUMENTS

Rev. Proc. 2007-44 is modified.

SECTION 6. EFFECTIVE DATE

This revenue procedure is effective on August 31, 2009, but plan sponsors may rely on this revenue procedure with respect to the modification contained in section 4 as of November 5, 2008.

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 the Employee Plans taxpayer assistance answering service at 1-877-829-5500 (a toll-free number) or e-mail Mr. Flannery at *RetirementPlanQuestions@irs.gov*.