

Employee Plans News

Issue 2013-10, December 19, 2013

Closing agreement requests allow plan sponsors to [resolve](#) income or excise tax issues that can't be corrected under the Employee Plans Compliance Resolution System

Limited, temporary relief from nondiscrimination requirements for [closed defined benefit plans](#)

Determination letter applications

- [2013 Cumulative List](#) of changes in qualification requirements for plans beginning February 1, 2014
- [Tips to expedite](#) your determination letter application review

Monika Templeman, EP Exam Director bids [farewell](#)

Charitable contributions of up to \$100,000 per year by IRA owners, age 70½ or over, directly [transferred](#) to an eligible charity before December 31 are tax-free

In-plan Roth rollovers – deadline extended to add [Roth provisions](#) for 2013

Updated:

[Publication 4334](#), *SIMPLE IRA Plans for Small Businesses*

[Publication 4333](#), *SEP Plans for Small Businesses*

[Publication 4482](#), *403(b) Tax-Sheltered Annuities for Participants*

[Publication 4483](#), *403(b) Tax-Sheltered Annuity Plans for Sponsors*

Employee Plans Voluntary Closing Agreements

Retirement plan sponsors can submit voluntary closing agreement requests to the IRS Employee Plans Voluntary Compliance function.

In the past, EP's Examinations, Determinations and Voluntary Compliance agents, tax law specialists, and managers have received requests from plan sponsors or their representatives seeking closing agreements to resolve retirement plan issues that couldn't be addressed under the [Employee Plans Compliance Resolution System](#) (currently in [Revenue Procedure 2013-12](#)).

We have established a uniform system for handling these requests in EP Voluntary Compliance.

When is an EP voluntary closing agreement request appropriate?

Plan sponsors may request a closing agreement to resolve certain income or excise tax issues involving tax-deferred retirement plans established under Internal Revenue Code Sections 401(a), 403(a), 403(b), 408(k) or 408(p) that can't be corrected through EPCRS. The IRS will decide when entering into a closing agreement with a plan sponsor is appropriate.

When is an EP voluntary closing agreement request not appropriate?

Employee Plans will not consider a request for a voluntary closing agreement in the following situations:

1. Under examination or investigation - The plan, plan sponsor or entity responsible for signing the closing agreement:

- is under any IRS examination or investigation at the time the request is submitted, or
- has any matters in Appeals or before the Tax Court.

If, after the entity submits their request, the IRS later examines them, the entity must inform EP Voluntary Compliance. Depending on the situation, this may prevent them from processing the request for a closing agreement.

2. Issues that can be resolved under the Voluntary Correction Program (VCP) - If the issue is eligible for resolution under VCP, then it should be resolved using Revenue Procedure 2013-12. This voluntary closing agreement process is not intended to be an alternative to VCP. If a submission has issues that are eligible under VCP and issues that are not eligible under VCP, we may conclude that a closing agreement is necessary. However, the IRS will consider the provisions of Revenue Procedure 2013-12 to determine the appropriate resolution for the issues that were eligible under VCP.

3. 457(b) plans - Plan failures related to IRC Section 457(b) should be resolved in accordance with Revenue Procedure 2013-12, Section 4.09 by completing [Form 8950, Application for Voluntary Correction Program \(VCP\)](#). Mail Form 8950 with a cover letter that describes the problem and proposed solution to the IRS address listed in the [instructions](#).

4. 457(f) plans - IRC Section 457(f) plans aren't eligible for voluntary closing agreements.

5. Abusive tax avoidance transactions - If the plan, plan sponsor or any other party to the closing agreement was or may have been a party to an abusive tax avoidance transaction, the IRS may determine that it is inappropriate to enter into a closing agreement.

6. **Willful tax avoidance** - A voluntary closing agreement is generally not appropriate when there has been a willful or intentional plan to avoid or evade paying or reporting taxes.

Guidelines for submitting EP voluntary closing agreement requests

1. In most cases, the IRS won't bargain or negotiate over any income or excise tax amounts, including interest, but may discuss penalty abatement.
2. For plans subject to Title 1 of ERISA, a plan sponsor should correct a prohibited transaction using the [Department of Labor's Voluntary Fiduciary Correction Program](#) before making a request for a closing agreement.
3. All actions identified in the closing agreement must be completed by the date the taxpayer signs the closing agreement.
4. A closing agreement request does not preclude any IRS examination of the plan or plan sponsor. If the plan or plan sponsor is examined after submitting a voluntary closing agreement request, EP Voluntary Compliance will consult with the examination function to see if the issue under consideration should be precluded from the examination while EP Voluntary Compliance considers the closing agreement request. For anonymous closing agreement requests, if the plan or plan sponsor is under examination after they have submitted their request, but before they have disclosed their identity to the IRS, then EP Voluntary Compliance cannot consider their request. Instead, the issues in the closing agreement request will have to be resolved as part of the IRS examination.
5. A voluntary closing agreement is not appropriate to address a future event that may impact the tax-favored status of a retirement plan or to seek guidance on issues or actions that may impact retirement plans.
6. If the IRS determines that there was a willful or intentional plan to avoid or evade paying or reporting taxes, EP reserves the right to convert the voluntary closing agreement submission into an examination referral.

What should a plan sponsor show in an EP closing agreement request?

To increase the likelihood that the IRS will enter into a voluntary closing agreement, a taxpayer should be prepared to show:

- the taxpayer is willing to furnish necessary facts and documentation to establish its tax liabilities,
- the agreement is in the best interest of both the IRS and the taxpayer,
- the federal government will suffer no disadvantage from entering into the closing agreement, and
- any Internal Revenue Code violation or tax deficiency was unintentional.

How to request

1. Authorized individuals

The individual submitting the request must be:

- an authorized employee of the plan or plan sponsor, or
- a legally authorized representative of the affected taxpayer who is eligible to sign Form 2848, *Power of Attorney and Declaration of Representative*.

2. Written request for agreement

Submit a detailed letter that includes:

- an explanation of the problem, including how and why it occurred, number of people affected, and amount of contributions, distributions, etc.
- an explanation of how you will correct the identified problem or issue
- an explanation of how you calculated the tax, interest or penalties
- calculations of any tax or correction method included in your request
- proposed sanction amounts and an explanation justifying the amount

3. Anonymous requests

A voluntary closing agreement may be initiated anonymously (sometimes referred to as "John Doe" submissions) through a power of attorney or authorized employee of the taxpayer. However, gaining approval for voluntary closing agreements will depend on the individual facts and circumstances, and the representative or power of attorney will eventually need to reveal the taxpayer's identity and the facts surrounding the agreement for proper consideration.

If your request is anonymous, include:

- a unique identifying number that the representative or taxpayer has assigned to the specific closing agreement request and not used for any other closing agreement request from the representative.
- a signed statement stating the following:

Under penalties of perjury, I declare that I am an authorized representative of the taxpayer who would be party to any closing agreement. I comply with the power of attorney requirements described in 26 C.F.R. § 601.501-601.509 (2005). I will submit an executed Form 2848 upon the disclosure of the identity of the taxpayer to the IRS. I also declare that the issues and information included with this request are true, correct, and complete to the best of my knowledge and belief.

4. Don't send a fee with your submission - an appropriate fee or sanction will be determined later.

5. Mail your request to:

Internal Revenue Service
TE/GE:EP:VC Group 7554
Request for Voluntary Closing Agreement
9350 Flair Drive, 3rd Floor
El Monte, CA 91731

Additional resources

- IRC Section [7121](#)
 - Treasury Regulation Section [301.7121-1](#)
 - Internal Revenue Manual [1.2.47.4](#)
 - Revenue Procedure 68-16, 1968-1 C.B. 770
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Closed Defined Benefit Plans Guidance

The IRS recently issued [Notice 2014-5](#) giving limited, temporary relief for closed defined benefit plans that are having difficulty meeting the nondiscrimination requirements under Internal Revenue Code Sections 401(a)(4) and 410(b).

During recent years, many employers have moved away from providing retirement benefits in a traditional DB plan. To ease the transition, many of these employers allowed the employees who were already in the plan to continue to earn pension benefits, but closed the plan to all other employees.

These plans are still required to meet the nondiscrimination rules, including:

- coverage rules under IRC Section 410(b), and
- nondiscrimination in amounts of benefits rules under IRC Section 401(a)(4).

Closed plans find it more difficult to meet these requirements after a period of time, because the group of employees still earning benefits under the plan tends to become more highly compensated. This is because they usually continue to receive pay raises, and new employees (who are generally lower-paid) are not covered by the plan.

When a closed DB plan can't meet these requirements on a stand-alone basis, the regulations allow the plan to be tested by combining it with the employer's defined contribution (DC) plan. Plan sponsors generally find that it's easier to meet the nondiscrimination requirements if they test the combined DB/DC plan based on the benefits provided to the employees (as opposed to the contributions going into the plan). However, under current regulations, a DB/DC plan can't use this approach unless

it meets one of three conditions. Typically, the practical result of those three conditions is that, after a closed DB plan has been closed for awhile, the employer must provide employer contributions of at least 5% to all participants in the DC plan.

Several employers and industry groups approached the IRS and Treasury to ask for relief. They say they're finding it difficult to meet the nondiscrimination requirements and that the minimum DC contributions are too high to keep wage and benefit costs competitive. They warned that if the plans can't meet the nondiscrimination requirements, employers will tend to freeze or terminate the plans altogether, leaving more people without the protection of lifetime income available through a DB plan.

However, the IRS and Treasury were concerned that making changes in one area of the nondiscrimination regulations could have unintended consequences for other plans. In particular, we noted that some ongoing plans could encounter similar challenges in meeting the nondiscrimination rules – and we didn't want to create an incentive for these employers to close their DB plans so they could use this relief.

Instead, the IRS and Treasury agreed to provide limited, temporary relief so that we can continue to consider whether (and if so, how) to provide permanent relief. The notice asks for comments by February 28, 2014, on specific issues to help us determine how best to proceed.

Notice 2014-5 allows sponsors to test a combined DB/DC plan on a benefits basis for plan years beginning before January 1, 2016, if:

- The DB/DC plan includes a DB plan that was closed by an amendment that was adopted before December 13, 2013 (even if the effective date of the closure is after that date), and each DB plan in the DB/DC plan satisfies one of the following two conditions:
 - For the plan year beginning in 2013, the DB plan was part of a DB/DC plan that either was primarily defined benefit in character or consisted of broadly available separate plans (that is, the DB plan was part of a DB/DC plan that was eligible for testing on a benefits basis, without being required to make a minimum employer contribution to all DC plan participants), or
 - For DB plans that were amended before December 13, 2013, to provide that only employees who participated in the DB plan on a specified date continue to accrue benefits under the plan, the DB plan was not tested as part of a DB/DC plan for the plan year beginning in 2013, because the plan was able to meet the coverage and nondiscrimination requirements on a stand-alone basis.

(This is a summary of the rules – please see Notice 2014-5 for the specific requirements that plans must meet to qualify for the relief.)

This temporary relief would not affect any other statutory or regulatory requirements. In particular, it doesn't grant any relief for minimum participation under IRC Section 401(a)(26) or failure to provide benefits, rights, and features on a nondiscriminatory basis.

Tips to Expedite the Determination Letter Process

Follow these tips to help speed the review of your determination letter application.

- To ensure that your application is complete, use the procedural requirements checklist on the last page of Forms [5300](#), [5307](#), [5310](#) and [5316](#).
- Failure to provide all required information may result in your incomplete application being returned without contact or consideration.
- Please don't staple, bind or fold plan documents, and use 8½ × 11 inch paper.

Form 5310

Board of Directors resolution

Include a copy of the resolution or other documentation formally terminating the plan. The date of the resolution must be before the date of termination.

Plan documentation

Amend your plan for all law changes up to the termination date even if those changes are not listed on the latest Cumulative List.

Forms 5300 and 5307

Cover letter

Include a cover letter with your application to alert us to significant and relevant information for the plan, including:

- whether you are filing the application on or [off-cycle](#), and if you're filing off-cycle, please indicate the reason why;
- any unique circumstances such as a "special ruling request" or urgent business needs for which you're requesting expedited treatment;
- whether the plan is part of a controlled or affiliated service group or multiple employer plan arrangement, or if you're submitting it with a related plan (include the related plan's tax identification and plan numbers); and
- if the plan was involved in a merger or consolidation of plan assets.

If you are filing as the sponsor of a group or pooled trust, please file Form 5316, *Application for Group or Pooled Trust Ruling*.

Current forms

Use the current version of all applicable forms and ensure that the forms are completed, signed, and dated.

Employer Identification Number (EIN)

Use the [employer identification number](#) of the plan sponsor and not the associated trust.

Correct user fee

Submit the appropriate fee based on the current [user fee schedule](#). If you're eligible for user fee exemption, sign and date the certification line on [Form 8717, User Fee for Employee Plan Determination, Opinion, and Advisory Letter Request](#). Stamped signatures aren't acceptable.

Prior determination letter

Include the last favorable determination letter we issued to the plan sponsor. If the plan has never received a prior determination letter, send signed and dated copies of all prior plan documents. For adopters of pre-approved plans using adoption agreements, include only the [adoption agreements](#) and applicable opinion/approval letters. See the [EP Determinations Quality Assurance Bulletin \(Sept. 8, 2006\)](#) for additional guidance. Also, include the plan's current [Form 8905, Certification of Intent to Adopt a Pre-approved Plan](#), if applicable.

Plan documents

Include a copy of the plan, adoption agreement and all amendments since the last determination letter. Include interim and discretionary amendments unless you adopted a pre-approved plan which has a current opinion/advisory letter. Ensure that the copies you submit include adoption dates and signatures.

- Your plan document must be restated for all current guidance on the applicable Cumulative List for your filing. You can use the Alert Guidelines to help you verify that your plan is updated.
- List the plan language and sections that have been modified by amendment(s).
- Submit all required interim amendments, including evidence that you've adopted the amendments.

Pre-approved plan adopters

If you adopted a pre-approved plan, include the approval letter for the plan document and write the letter number from the prior approval letter on the plan document.

- Include the plan's current [Form 8905, Certification of Intent to Adopt a Pre-approved Plan](#), if applicable.

- If you adopted a volume submitter document that uses an adoption agreement, please include a copy of the associated plan. Also, include the most recently approved version of the volume submitter document.
- **Volume submitter modifications** - Include either a list of modifications (items added, deleted or modified from the volume submitter specimen plan identifying the plan sections affected), or a certification that your plan is word-for-word identical to the specimen plan.
- **Form 2848, Power of Attorney and Declaration of Representative** for [volume submitters](#) - identify the volume submitter practitioner in Part I, line 2 (Representative) and include the practitioner's signature in Part II (Declaration of Representative). See the Form 2848 instructions.

Other supplemental documents

Include all other pertinent documents, such as merger agreements, plan documents for merged plans, voluntary compliance statements or collective bargaining agreements referenced in the plan document. Identify and explain changes to plan sponsorship, plan name, EIN, and any other plan changes that have occurred since we issued the prior favorable determination letter, if applicable.

Attachments relating to application questions

Some questions on the application require supplemental explanatory information, such as a controlled group statement for employers maintaining plans on behalf of a controlled group of affiliated employers. Please include all required supplemental material.

Notice to interested parties

If you answer "yes" to the "Notice to Interested Parties" question on the application form, you don't have to send a copy of the notice with your application.

Multiple plan information (Form 5307, line 9)

If you answered "yes," please include a statement listing the name, type, form and number of the plan; whether each plan has received a determination letter or has a pending application; and whether there are paired plans. If applicable, indicate the serial number of the letter issued for the paired plan.

Additional resources

- [Determination, Opinion and Advisory Letters](#)
 - [Apply for a determination letter](#) -for an individually designed plan
 - [Pre-approved retirement plans](#)
 - [Check the status of your letter](#)
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One More Retirement Topic – Mine

Yes, the title is correct. After over 26 years working at the Internal Revenue Service, including 23 years as a manager or an executive, it is time for me to say good-bye. Effective January 11, 2014, I will be enjoying the world's longest coffee break – retirement. Before I leave, I wanted to express my sincere appreciation to all of you.

To the plan sponsors - thank you for sponsoring retirement plans to provide retirement security for both your employees and yourselves. Financial security is a concern for all of us when our retirement date gets closer. By adopting a plan, you have helped your employees lessen the stress and concern about having the money they need for their golden years. Please continue to ensure that these plans have effective internal controls to help you find, fix and avoid compliance problems. Remember that it is important to administer these plans and perform the necessary tasks to keep them running smoothly.

To the benefits practitioners - thank you for being true partners in promoting voluntary compliance. Your dedicated work in the pension field is greatly appreciated. I know you put in countless hours to keep up with the laws and to ensure that your clients maintain a **qualified** plan. I have talked with many of you at benefits conferences across the country and am impressed with your continuing efforts to stay abreast of frequently changing complex laws and regulations and dialogue with the IRS about retirement plan hot topics. Your dedication is a major factor in keeping retirement plans qualified.

To the practitioners who proactively "step-to-the-plate" to enhance the quality of outreach and education - thank you for your tireless efforts during my time in Employee Plans. Your willingness to partner with me and with Employee Plans to make everybody's job easier will continue to pay dividends in the foreseeable future. For example, you assisted us in creating the [EP Examination Process Guide](#). This guide provides the various steps in the examination process and introduces our customers to resources on the Retirement Plans Community website. You also helped us create the [EP Team Audit](#) page. These are just two examples of your many invaluable contributions. I am very grateful for your willingness to share your time and expertise to help us create numerous products and resources for your peers to more effectively promote voluntary compliance.

To my fellow conference panel members - thank you for making my numerous speaking engagements to large audiences very enjoyable and for assisting me in providing both a public and private sector perspective. Your pension knowledge and presentation skills made each session smooth and successful. It has been a pleasure to sit next to each of you on the rostrum.

Also, due to recent budget and travel constraints, I am impressed and grateful that you adapted quickly and worked seamlessly with me and my staff to deliver our key messages to conference attendees in virtual ways.

To the organizations - thank you for allowing me the time to address your attendees and share key messages. Your diligent efforts to make sure my schedule worked with yours and to allow me adequate time to get my materials together so I could provide my most current and relevant retirement plan messages did not go unnoticed and was greatly appreciated.

To my employees - I recently shared my appreciation with you at various times in December, but it is worth repeating. I am so blessed to have spent the last 26 years working with the incredibly dedicated and wonderful people in Employee Plans. I believe the term "team player" has been redefined by you. Your support helped Employee Plans continually progress and achieve the success it has during my tenure. You made my job easier and made me proud to be the Examination Director. I wish each one of you, and Employee Plans as a whole, future success. Thank you for the treasured memories

I am looking forward to my retirement and being able to spend more time with my family and friends. I have ordered my 2014 calendar that lists every day as Saturday.

I wish you all the very best. – Monika

Deadline Extended to Add New In-Plan Roth Rollover Provisions

In [Notice 2013-74](#), the IRS extended the deadline to adopt a discretionary plan amendment to allow in-plan Roth rollovers in 2013 of amounts in a plan that could not be distributed to the participant:

- **401(k) and governmental 457(b) plans** – to the later of the last day of the first plan year in which the amendment is effective or December 31, 2014. **Safe Harbor 401(k) plans** have until December 31, 2014, to add the amendment effective for 2013 and 2014.
- **403(b) plans** – to the later of the last day of the first plan year in which the amendment is effective or the end of the plan's remedial amendment period. The end date of the remedial amendment period has not been announced, but it will not be before 2015.

The amendment's effective date must be the date the plan first allows the designated Roth account transactions permitted by the amendment.

The extended amendment deadline also applies to related amendments that permit:

- in-plan Roth rollovers of some or all otherwise distributable amounts,
- designated Roth accounts to accept rollovers, and
- elective deferrals under the plan to be designated as Roth contributions.

Rules for in-plan Roth rollovers of otherwise nondistributable amounts

- The plan must separately account for any in-plan Roth rollovers of otherwise nondistributable amounts.
- The amounts rolled over remain subject to the distribution restrictions that applied to them before the in-plan Roth rollover.
- The rollover must be direct; 60-day rollovers are not permitted if the amount was otherwise nondistributable.
- Tax withholding does not apply.

Amounts now eligible for in-plan Roth rollovers

Regardless of the participant's age, a plan may permit in-plan Roth rollovers of:

- elective deferrals
- matching (including safe harbor 401(k) matching) contributions
- nonelective (including safe harbor 401(k) nonelective) contributions
- earnings

Adding or removing Roth provisions

A plan isn't required to offer designated Roth accounts or in-plan Roth rollovers. A plan may also limit the types and amounts of contributions eligible for Roth rollovers and the frequency of rollovers. For example, a plan could provide that only otherwise distributable amounts are eligible for in-plan Roth rollovers.

A plan may also discontinue the availability of in-plan Roth rollovers. An employee's ability to make in-plan Roth rollovers is not protected by the anti-cutback rules in Internal Revenue Code Section 411(d)(6).

Background on in-plan Roth rollovers

Since 2010, plan participants have been able to roll over certain amounts in a 401(k), 403(b) or governmental 457(b) plan to a designated Roth account in the same plan. But the amounts rolled over had to be eligible for distribution from the plan.

Beginning in 2013, a plan may also allow in-plan Roth rollovers of amounts that aren't otherwise distributable (Internal Revenue Code Section 402A(c)(4)(E), as amended by the American Taxpayer Relief Act of 2012).

Additional resources

- [Designated Roth accounts](#)
- [FAQs: designated Roth accounts](#)