

EP DETERMINATIONS QUALITY ASSURANCE BULLETIN

FY 2004 NO. 3

Date: June 8, 2004

Processing of Examination Referrals

I. Purpose:

In response to a request from EP Classification to discontinue the shipment of determination case files involving plans that are referred for examination while a determination request for the plan is pending, EP Determinations has developed procedures for determination specialists to follow when an exam referral is mandatory or deemed necessary based on the specialist's evaluation of the file. These procedures are intended to improve efficiency in the processing of examination referrals through increased communication among determination specialists, EP Classification and EP Examinations.

This bulletin supersedes the corresponding provisions of the Best Practices memorandum of December 21, 1998.

II. Referral of issues not affecting plan qualification:

If the referral is for examination of issues that do not affect plan qualification (i.e. prohibited transaction, minimum funding, unrelated business income, deemed distribution), the determination case file should be closed in accordance with established procedures. Form 5666 should be prepared, and any documentation from the file pertaining to the potential issue should be attached to the Form 5666. See page 2 for instructions on preparing Form 5666. Prior to case closure, the employer and/or POA should be advised of the referral. The Form 5666 should be forwarded to EP Classification at the address below:

EP Classification
9350 Flair Drive, 2nd Floor
El Monte, CA 91731-2885

If a plan submitted under Form 5310 has a minimum funding deficiency, the determination specialist should ask if Form 5330 has been filed. If so, the specialist should obtain a copy of the return(s). The copies of Form 5330 and a copy of Form 5310 should be attached to Form 5666. If no Form 5330 has been filed, this should be noted on Form 5666.

The following line items should be completed on each Form 5666: items A – E, J(if applicable), P1 -12, P40 – 42 and O. The name of the referring determination specialist should be printed on line L, and the specialist's manager must approve the referral by signing item M.

Item O should include a request for the specialist to be contacted by one of the following, depending on the disposition of the referral: 1) EP Classification if the referral is not accepted, 2) the EP Examination group manager if the plan will not be examined or 3) the examining agent at the time he or she is assigned the referral.

III. Referral of issues affecting plan qualification:

If the referral involves potential qualification failures in plan operation, a Form 5666 addressed to EP Classification should be prepared in accordance with the instructions noted above. Any relevant documentation from the case file should be attached to the Form 5666. The Form 5666 should be forwarded to EP Classification at the address listed on page 1.

If the EP Examination group manager declines to examine the plan, or if EP Classification does not assign the referral to EP Examinations, the determination specialist should work the case to completion and issue the determination letter. Before the letter is issued, the specialist should consult with the closing agreement coordinator about the necessity of a closing agreement to remedy the operational failure(s).

If the plan is examined, the determination case should be placed in group suspense until the examination is closed. The determination specialist should maintain periodic contact with the examining agent to keep informed of the status of the examination.

If the qualification failures are limited to defects in plan language, no examination referral is necessary. The specialist should contact the closing agreement coordinator to discuss the possibility of a closing agreement to remedy the defects and avert disqualification of the plan.

IV. Referral of Certain Tax Abuse Issues to Exam Planning and Programs:

Abusive Transactions and Emerging Issues refer to abusive tax shelter schemes and transactions and emerging issues that may be questionable, improper or abusive. Many abusive tax shelters are identified as "listed transactions". A listed transaction is a transaction that is the same as or substantially similar to one that the Service has determined to be a tax avoidance transaction and

identified as such by IRS notice or other form of published guidance. Published guidance for listed abusive tax shelters and transactions can be found by clicking on “EP Abusive Tax Transactions” under “related topics” at: <http://www.irs.gov/retirement/index.html>.

The IRS has identified the following as listed transactions which involve employee benefit plans:

- 401(k) accelerated deductions
- S Corporation ESOP abuse of delayed effective date for § 409(p)
- Collectively bargained welfare benefit funds under § 419A(f)(5)
- Certain trust arrangements seeking to qualify for exemption from § 419
- Abusive Roth IRA transactions
- S Corporation ESOP abuses: Certain business structures held to violate Code § 409(p)
- Deductions for excess life insurance in a § 412(i) or other defined benefit plan

For more information about emerging issues that may be EP abusive tax transactions, click on “EP Abusive Tax Transactions” under “related topics” at <http://www.irs.gov/retirement/index.html>.

These tax abuse issues may be identified during the course of an examination or determination case. Information regarding listed transactions or questionable and improper tax abuse issues and emerging issues may be communicated to you by a letter or a telephone call from persons within the Service or the private sector. The issue may or may not be specific to a particular case, plan sponsor or taxpayer.

If an abusive transaction or emerging issue has been discovered, then consult with your manager. Once the decision to report the abusive transaction or emerging issue is made, all pertinent information should be sent to:

TE/GE Division
EP Examinations Planning and Programs
Attention: Tim Adle
31 Hopkins Plaza, Room 1542
Baltimore, MD 21201

To find out more information concerning this topic, go to: <http://www.irs.gov/retirement/index.html>