EP DETERMINATIONS QUALITY ASSURANCE BULLETIN

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VERIFICATION OF PRIOR PLAN DOCUMENTS IN THE ABSENCE OF A DETERMINATION LETTER

Background:

The review of determination letter applications includes confirmation of the extent to which a plan has been amended for prior legislation, including, but not necessarily limited to the Uruguay Round Agreements Act of 1994 (GATT), the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), the Small Business Job Protection Act of 1996 (SBJPA), the Taxpayer Relief Act of 1997 (TRA '97), the Internal Revenue Service Restructuring and Reform Act of 1998 and the Community Renewal Tax Relief Act of 2000, collectively, "GUST". The policies and procedures set forth in this bulletin are intended to facilitate a consistent, equitable approach to this aspect of determination case review.

The instructional materials provided by the Service to retirement plan sponsors who request determination letters for a plan clearly require the sponsor to document any prior ruling by the Service on the qualified status of the plan. For example, the instructions to Forms 5300 require any filing to include a copy of the latest determination letter if the plan is being submitted after initial qualification, and the instructions to Form 5307 require a copy of the latest determination letter if the plan received a letter at any time in the past. In addition, the instructions to Form 5310 require a copy of all amendments made since the last determination letter as well as a copy of the letter (latest opinion or notification letter for a standardized prototype plan). The great majority of cases we process involve plans with a GUST determination letter or volume submitter and master or prototype plans with a valid GUST advisory or opinion letter. As a result, verification of compliance with prior law with respect to statutory requirements that became effective prior to 2002 will largely be limited to GUST. Any statutory changes that became effective after 2001 are subject to the good faith amendment guidelines set forth in Notice 2001-42 and the interim amendment guidelines set forth in Revenue Procedure 2005-66. These guidelines are discussed in the paragraphs below.

The scope of inquiry into prior plan documentation will be expanded to include the Tax Reform Act of 1986, the Unemployment Compensation Amendments Act of 1992 and the Omnibus Budget Reconciliation Act of 1993, collectively, “TRA ‘86”, only when a particular set of facts necessitate a more thorough review; e.g., when evidence of timely amendment for GUST was missing. If warranted by the facts of a case, the Service will also inquire into the existence of a document which was intended to comply with the Tax Equity and Fiscal Responsibility Act of 1982, the Deficit Reduction Act of 1984 and the Retirement Equity Act of 1984, collectively, ”TDR”, and the Employee Retirement Income Security Act of 1974 (ERISA).

Impact of Notice 2001-42 and Revenue Procedure 2005-66:

Notice 2001-42 established the remedial amendment period (RAP) to amend plans to comply with the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) and provided that the EGTRRA RAP expired at the end of the 2005 plan year. Notice 2001-42 made the EGTRRA RAP contingent on the timely adoption of good faith EGTRRA amendments. A good faith EGTRRA plan amendment was required to be adopted by the later of: a) the end of the plan year in which the amendment is required to be, or is optionally, put into effect under the plan, or b) the end of the GUST RAP for the plan.

The good faith amendment concept was expanded further by Revenue Procedure 2005-66, which dramatically altered the application of Code section 401(b) by establishing remedial amendment cycles which are based on the last digit of the plan sponsor’s EIN, the plan’s status as a member of controlled group or affiliated service group and other criteria. Under this revenue procedure, sponsors are now generally required to adopt interim plan amendments which are necessary to conform the plan to any changes in the qualification requirements effected by statute, regulation or related guidance by the later of 1) the due date (including extensions) for filing the employer’s income tax return for the taxable year that includes the date on which the RAP begins, or 2) the last day of the plan year in which the RAP begins. The RAP for a change in the qualification requirements begins on the date the provision initially becomes effective under the plan. Notice 2005-95 extended the deadlines to adopt certain amendments to comply with certain statutory and regulatory requirements.

Revenue Procedure 2005-66 also imposed a RAP for discretionary amendments to a plan which are not otherwise necessary to comply with changes in the qualification requirements effected by statute, regulation or related guidance. A discretionary amendment must be adopted by the end of the plan year in which the amendment is effective.

Section 5.03 of Rev. Proc. 2005-66 extended the EGTRRA RAP and the RAP for timely adopted interim and discretionary amendments to the end of the applicable remedial amendment cycle for the plan.

Determination specialists who are processing applications for individually designed plans filed on or after February 1, 2006 must verify the timely adoption of good faith EGTRRA amendments and all interim amendments required to be made during the plan's remedial amendment cycle, regardless of whether the provisions were identified on the applicable Cumulative List. Specialists must also verify the timely adoption of any discretionary amendments, including interim amendments adopted on an optional basis. If the amendments were timely adopted, the remedial amendment cycle remains intact, and any defective provisions in the amendments can be corrected by the end of the cycle. The remedial amendment cycle is extended to the 91st day after the date of the determination letter if the application was filed on or before the final day of the cycle.

Pursuant to section 5.03 of Rev. Proc. 2005-66, if a good faith EGTRRA, interim or discretionary amendment has not been timely adopted, or if the absence of an interim amendment was not reasonable or in good faith, the remedial amendment cycle is no longer applicable to the plan. In this instance, a Plan Document Failure as defined in section 5.01 of Revenue Procedure 2006-27 has occurred, and a closing agreement under the Audit CAP procedures of the Employee Plans Compliance Resolution System will be necessary to restore the remedial amendment cycle and preserve plan qualification.

For more information on the determination of the remedial amendment cycle and the applicable Cumulative List for a plan, refer to Quality Assurance Bulletin 2006-2, EGTRRA Staggered Remedial Amendment Period and Remedial Amendment Cycle for Individually Designed Plans.

Required Verification of Prior Plan Documentation – GUST and TRA '86:

The requirements for verification of prior plan document compliance with applicable law are based on the premise that we should make every attempt possible to ensure that the rights of plan participants and their beneficiaries are adequately protected. Such rights are derived entirely from the terms of a legally-binding plan document which has been formally adopted by the employer.

Compliance with GUST must be verified in every instance. If a plan has a GUST I determination letter issued under Revenue Procedure 98-14, the employer must verify timely adoption of all applicable GUST provisions which are effective for plan years beginning after 1998. If a plan has a GUST II letter issued under Revenue Procedure 2000-27, the employer must verify that the plan was timely amended to comply with the Community Renewal Tax Relief Act of 2000. If a GUST determination letter has not been issued for a plan, all GUST documents adopted by the employer and not enclosed with the determination letter application must be requested and reviewed in their entirety. If it is determined that a plan has not been amended for all applicable provisions of GUST retroactive to the correct effective date of each provision (or the year in which the plan became effective, if later), such failure to comply with GUST would be considered a Plan Document Failure. A Plan Document Failure is also deemed to have occurred if a plan is amended for GUST at any time after the close of the applicable remedial amendment period under IRC 401(b), even if the GUST amendments are adopted in a plan year with a closed statute of limitations.

Except as noted below, if a plan was effective prior to 1997, no verification of pre-GUST documentation is necessary if the plan has been timely amended for GUST. If the plan was not timely amended for GUST, verification of full compliance with TRA ’86 is required. The majority of TRA ’86 provisions became effective for the plan year beginning in 1989, and if a plan has not been amended for TRA ’86, the plan will be a nonamender for numerous statutory changes over a span of time which now exceeds 17 years in many instances. Accordingly, in view of the potential impact of noncompliance with TRA ’86 on plan participants and beneficiaries, and consistent with the above-stated policy on protection of participant and beneficiary rights, the employer must demonstrate that the plan was amended to comply with all applicable provisions of TRA ’86.

If a plan has a TRA ’86 determination letter issued under Rev. Procs. 90-20, 91-41, 91-66, 92-60 and 93-39, no further verification, other than timely adoption of IRC 401(a)(17)/ IRC 401(a)(31) provisions for plans submitted prior to Rev. Proc. 93-39, is necessary. If a TRA ’86 determination letter has not been issued for a plan, all TRA ’86 documents adopted by the employer must be requested and reviewed in their entirety. If it is determined that a plan has not been amended for all applicable provisions of TRA ’86 for all plan years beginning in 1989 (or the year in which the plan became effective, if later), such failure to comply with TRA ’86 would be considered a Plan Document Failure.

Full verification of compliance with TRA ’86 is also required if uncorrected operational violations of TRA-related provisions are revealed during an examination or determination case review, and the scope and frequency of such violations strongly suggest that a valid TRA ’86 document was never adopted and put into effect. For example, if an examining specialist discovers that the compensation limits of IRC 401(a)(17) and the nondiscrimination testing requirements of IRC 401(m) were never implemented in operation, the specialist, with the concurrence of his or her manager, should verify full compliance with TRA ’86 in accordance with the foregoing paragraph.

Required Verification of Prior Plan Documentation – TDR and ERISA:

In rare instances, the scope of verification should be expanded further to include TDR and ERISA. The procedures for securing such verification are described in detail in the paragraphs below.

The law changes effected by TDR significantly impacted the benefit rights of all participants and spousal and non-spousal beneficiaries; e.g., top-heavy rules, joint and survivor annuity requirements, IRC 401(a)(9)/minimum distribution requirements, revisions to vesting, cashout and break-in-service requirements, IRC 411(d)(6), 410(a) and 415, etc. Although many TDR provisions have been modified or superseded by subsequent legislation, an employee or beneficiary of an employee who was an active participant in a retirement plan during the 1980’s and who asserts that his or her benefit was improperly vested, reduced, underfunded or distributed on account of the failure of his employer to adhere to such provisions could, pursuant to ERISA section 502, initiate legal action against the employer

to seek recovery of the disputed amount and/or restoration of rights under the plan. It should be noted that the scope of this review does NOT include a determination of the accuracy of benefit accruals or contribution allocations for plan years impacted by TDR. Although Rev. Proc. 2006-27 allows for correction of Qualification Failures that occurred in years with a closed statute of limitations, it would be unreasonable to expect an employer to provide detailed information regarding plan operation in years prior to 1989 except in very limited circumstances (e.g., an IRC 412 issue involving a money purchase or defined benefit plan unfunded since 1986).

If no GUST or TRA ’86 amendments have been made, verification of TDR plan documentation is required only if operational violations of TDR-related provisions which are recurring and substantial are revealed during a determination case review. For example, if a specialist discovers that the survivor annuity requirements of section 417 and the 5-year break-in-service rules of section 411 were never implemented in operation after they initially became effective in 1985, the specialist, with the concurrence of his or her manager, should attempt to obtain verification of the existence of a valid TDR document.

Although ERISA was enacted over 30 years ago, benefits which accrued during this era could still be the subject of litigation, and IRS would not be acting in the best interest of plan participants if it merely disregarded the issue during its review of a determination letter application. As with TDR, the scope of this review is limited to verification of a prior document, and no attempt to ensure the accuracy of benefit accruals or contribution allocations for plan years impacted by ERISA should be made. Even if adequate verification of a TDR document cannot be secured, an inquiry into the existence of an ERISA document should not be initiated unless uncorrected operational violations that occurred in a plan year beginning before 1984 are identified during a determination case review, and the specialist and his manager determine that such violations are substantial enough to imply that the plan had never been amended for ERISA.

With respect to TDR and ERISA, the scope of required verification will be limited to confirmation of the existence of a written instrument which established plan provisions that were binding on the employer and plan participants and their beneficiaries. This exception to the general requirement for full compliance with all applicable law acknowledges the fact that prior plan documents adopted in the 1970’s and 1980’s are very difficult, if not impossible, to obtain in many instances. The paragraphs below set forth detailed procedures for securing and evaluating evidence of a TDR or ERISA plan document.

<u>Required Verification of Adoption of Plan in Initial Plan Year:</u>

The evaluation of timely adoption of a plan within its initial plan year is not required for plans effective prior to 1997 unless a determination case review reveals operational violations in such year that are deemed by the specialist and his manager to be sufficient to warrant an inquiry into the existence of a document at some point during the year. If such an inquiry is made, the scope of required verification described above for TDR and ERISA is applicable.

If the plan is effective before 1989, no evaluation of timely adoption of the initial document is necessary in any circumstance, as it would be impractical to focus on one particular plan year which occurred over 15 years ago when plan records for that era would be, at best, sporadic in most instances.

The limited scope of review described above is not available for plans that are effective after 1996, and a specialist still must confirm that such a plan was adopted within its initial plan year and qualified from its inception. Most, if not all, current and former participants would be impacted by the provisions of the initial document, and the qualification of any subsequent restatement could be affected if its terms conflict with those of the original plan.

Securing and Evaluating Evidence of Prior Plan Documentation:

Before contacting an employer to request any available evidence of a prior plan document, the specialist reviewing the application should research all internal sources of data such as EPMF microfiche, determination and examination case microfiche or EDS. If EDS indicates that a determination letter was issued for a TDR document, no additional verification would be required. If the EPMF confirms that a determination letter application for a TDR restatement was previously submitted, this would be sufficient evidence of a prior document, and no further action would be necessary. Finally, if microfiche of a determination or examination case file that involves a TDR document is available, the existence of the document would be confirmed beyond question. In each circumstance, no Plan Document Failure has occurred, and the determination letter for the plan currently under review can be issued.

If verification of the existence of pre-TRA ’86 documentation is necessary, any available evidence of such; e.g. prior determination letter, plan document, board of directors resolution, corporate minutes, summary plan description, annual reports, allocation reports, trust account statements, collective bargaining agreements which reference the documentation at issue, internal plan-related memoranda or mailings to employees of the employer, documents related to presentations to employees informing them of prominent plan features and the opportunity to participate in the plan, etc., should be obtained from the employer. Any requests should initially be limited to a copy of a prior determination letter or plan document; if neither is available, the remaining items of evidence described above should be requested. The evidence should be evaluated to determine if the existence of an actual plan document can reasonably be inferred. The submission of a prior determination letter for a TRA ’86, TDR or ERISA document or a copy of the document itself will automatically confirm its existence, and the issue can be disregarded.

If necessary, the inquiry should be expanded to include all plan years that precede the first year in which a document was actually adopted and in effect, regardless of the date on which the plan was initially effective. The decision regarding whether a document actually existed should be based on the particular facts and circumstances of the case and must be approved by the manager.

NOTE: An employer who cannot provide a comprehensive plan document or a series of plan amendments to verify the initial adoption of the plan may submit documented evidence of the type described in the previous paragraph in support of their contention that the plan was established within the initial plan year. Such evidence may, on a case by case basis, satisfy the definite written program requirement of Regs. section 1.401-1(a) if it 1) sets forth essential plan features (eligibility, vesting, CODA (if applicable), distributions, contribution/benefit formula) and other pertinent plan provisions in a manner which establishes legally-enforceable participant and beneficiary rights, and 2) affirms the intent of the employer to establish and maintain a qualified retirement plan by communicating such provisions to its employees.

If it is concluded that the evidence sufficiently demonstrates that a document was in effect during the plan year(s) under review, the issue of plan existence should not be pursued further. Otherwise, the plan will not be considered a definite written program and arrangement under Regs. section 1.401-1(a) for the period in question, and the resulting Plan Document Failure must be remedied through a closing agreement in order to preclude a proposed disqualification of the plan.

If the existence of an ERISA or TDR document cannot be reasonably established, the plan is also deemed to be a nonamender for ERISA or TDR, and this is an additional Plan Document Failure that must be addressed through CAP to avert proposed disqualification. A Plan Document Failure is also deemed to have occurred if a plan received a determination letter which did not express an opinion on DEFRA and REA, and the employer cannot provide adequate evidence of full compliance with TDR.

In summary, the determination regarding whether a prior plan document is deemed to exist should only be made after a thorough evaluation of the data submitted by the employer, and it should be based entirely on the particular facts and circumstances of the case.

If the review of plan documentation made available during an examination or submitted with a determination letter application confirms beyond question that a plan was 1) never amended for TDR or ERISA, or 2) if effective between 1989 and 1996, not adopted within the initial plan year, a Plan Document Failure is deemed to have occurred. An example of this would be a determination case file for a 2006 restatement of the plan to comply with the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) and subsequent legislation which includes only the current document and a 1978 ERISA document. If the employer concedes that the ERISA document remained in effect until it was superseded by the EGTRRA restatement, the plan would be subject to disqualification as a nonamender for TDR in its entirety unless the employer elects to enter into a closing agreement.

The following examples describe the application of the procedures described above to actual determination case processing:

Example 1:

Employer Q submits a determination letter request for an individually designed restatement of its plan in January 2005. The plan was originally effective in 1978, and the employer adopted a standardized GUST prototype plan in 2001. Since the plan was timely amended for GUST, no further review of prior documentation is necessary, and the determination letter can be issued.

Example 2:

Same facts as in Example 1, except the plan has never received a determination letter, and no prior document was enclosed with the application. The specialist requested a copy of the GUST and TRA ’86 plan documents; in response, the employer provided a copy of a TRA ’86 prototype plan adopted in 1998 and confirmed that the plan had not been amended for GUST. Because the employer has adopted TRA ’86 amendments, no verification of TDR compliance is required, and the specialist can limit his or her review to the restatement and the closing agreement that is necessary to resolve the GUST and TRA ’86 nonamenders.

Example 3:

Same facts as in Example 2, except that no GUST and TRA ’86 documents are available. A review of internal files revealed that microfiche of an examination of the 1989 plan year was available. The specialist reviewed the microfiche and verified that the plan was amended for TDR in 1985. Because the specialist was able to confirm the existence of a TDR document, no request for pre TRA ’86-documentation from the employer is necessary.

Example 4:

Same facts as in Example 3, except that EPMF microfiche indicates that a Form 5307 application for a determination letter was filed in 1986. This item alone is sufficient evidence of the existence of a prior document. However, the balance of the data obtained from EPMF (ie: employer name and EIN, plan name and number) must be consistent with the relevant information from the case file. Otherwise, the specialist may not rely entirely on EPMF research to verify prior documentation unless the discrepancies resulted from procedural matters such as a change in plan name pursuant to an amendment or a change in the employer’s name that was limited to name only and did not reflect a merger or acquisition that could have impacted on the employees actually covered under the plan subsequent to the transaction.

Example 5:

Same facts as in Example 4, except no information from internal sources is available. The employer was unable to locate a TDR determination letter or plan document, and the only prior documentation it could provide was an ERISA adoption agreement executed in 1981. Upon further request, a copy of a 1985 board resolution which adopted a TDR prototype document was submitted to the agent working the case. The adoption agreement and board resolution confirm the existence of prior documents, and the scope of review is limited to the restatement for which a determination letter is requested and resolution of the GUST and TRA ’86 nonamender issues through a closing agreement.

Example 6:

Employer Y submits a determination letter request for amendments to its profit sharing plan in May 2005. The plan was originally effective in 1971. No prior determination letters or plan documentation are available. The specialist requested other evidence that a prior document existed; in response, the employer submitted copies of a summary plan description from 1977 and annual reports prepared by the plan administrator for the 1981, 1985 and 1986 plan years that that contained a description of plan provisions for eligibility, vesting, contribution allocations and distributions in addition to a detailed summary of plan activity for each year. The employer’s name and EIN and the plan name and number shown on the summary plan description and annual reports are identical to similar disclosures on the application and in the plan document. The annual reports for 1985 and 1986 are sufficient evidence of a TDR document, and no further verification is necessary, although the summary plan description and 1981 annual report do confirm the apparent existence of an ERISA document. As with the plan described in examples 2 – 5, the failure to demonstrate full compliance with GUST and TRA ’86 must be addressed through CAP in order to preserve plan qualification.

Example 7:

Same facts as in Example 6, except that the employer’s name and EIN and plan name differ from what is listed on the application and in the plan document. An inquiry into the discrepancy reveals that the company who established the plan was sold in 1988, and the acquiring employer assumed sponsorship of the plan. The current employer submitted a board resolution which confirmed it had become the sponsoring employer pursuant to the acquisition of the predecessor employer, who had initially adopted the plan in 1971. The board resolution resolved the inconsistency in plan information, and the summary plan description and annual reports are acceptable evidence of prior documentation.

Example 8:

Employer Z submits a determination letter request for its money purchase plan in March 2006. The plan was amended on November 1, 2005 by adoption of a GUST-approved master and prototype plan. The plan document and Form 5300 application list an effective date of January 1, 1975. However, there is no record of the plan anywhere within the Service, and the employer is unable to provide any evidence of a prior document. After several inquiries, a board resolution from 1975 which authorized an officer of the company to investigate the feasibility of establishing a retirement plan was finally submitted to the specialist reviewing the application. The resolution is silent with respect to the adoption of an actual plan document, and it cannot be considered evidence of such. The complete absence of any evidence of the plan's existence prior to adoption of the 2005 restatement renders the plan subject to disqualification as; 1) a nonamender for EGTRRA, GUST, TRA '86, and TDR, and 2) a plan which failed to comply with the definite written program requirements of Regs. section 1.401-1(a) for the 1975 – 2004 plan years.

NOTE: The determination letter application was filed after February 1, 2006, and the plan must be reviewed for compliance with EGTRRA. The GUST master and prototype plan adopted by the employer in 2005 was amended for EGTRRA by the sponsor of the plan; however, the employer adopted the prototype plan after the deadline to timely adopt EGTRRA good-faith amendments expired at the end of the 2002 plan year, and the plan is an EGTRRA nonamender.

Example 9:

Employer A, with an employer identification number that ends in 1, submits a determination letter request for a profit sharing plan on January 31, 2007, the final day of Cycle A, the plan's remedial amendment cycle under Revenue Procedure 2005-66. The plan is a calendar year plan, and the plan's GUST RAP ended on September 30, 2003. The plan received a GUST determination letter in March 2004. Employer A adopted EGTRRA good-faith amendments on June 2, 2004. The plan was amended on September 12, 2006 to adopt interim amendments that were initially effective on January 1, 2005. The due date of the Form 1120 filed for 2005 was March 15, 2006. The deadline to adopt the interim amendment was not extended by Notice 2005-95. A discretionary amendment adopted on December 31, 2006 was effective January 1, 2006.

The discretionary amendment was timely adopted by the end of the 2006 plan year in which it became effective. However, the plan was not timely amended for EGTRRA by the close of the GUST RAP, and the interim amendment was not timely adopted by the due date of the 2005 Form 1120 filed for the 2005 taxable year in which the RAP began. A closing agreement will be necessary to resolve the EGTRRA nonamender and the failure to timely adopt the interim amendment.

Example 10:

Same facts as Example 9, except that the plan's GUST RAP ended February 28, 2002, and the EGTRRA amendments were adopted December 31, 2002. Additionally, the extended due date of the 2005 Form 1120 was September 15, 2006 and the discretionary amendment was effective January 1, 2005.

The plan was timely amended for EGTRRA, as the provisions of the amendment were effective for the 2002 plan year. The interim amendment was timely adopted by the extended due date of the 2005 Form 1120. A closing agreement will be necessary to resolve the failure to adopt the discretionary amendment by the end of the 2005 plan year in which it became effective.