

EMPLOYEE PLANS DETERMINATIONS QUALITY ASSURANCE BULLETIN

FY-2009 No. 1 Revised

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EGTRRA STAGGERED REMEDIAL AMENDMENT PERIOD AND REMEDIAL AMENDMENT CYCLE FOR PRE-APPROVED DEFINED CONTRIBUTION PLANS

SECTION I OVERVIEW

This bulletin supplements QAB 2007-2 to include the pre-approved plan requirements in accordance with [Revenue Procedure 2007-44](#).

Pre-approved plans have a six-year remedial amendment cycle (RAC) and [Revenue Procedure 2005-16](#) announced the opening of the initial six-year RAC for defined contribution (DC) plans. Generally, EGTRRA DC Master and Prototype (M&P) and Volume Submitter (VS) plans received letters dated March 31, 2008 considering the 2004 Cumulative List (CL) under [Notice 2004-84](#). The following table indicates the types of letters that were issued. Please note "late" means the pre-approved DC plan was submitted after the one-year submission period of the six-year cycle which ended on January 31, 2006.

| Letter Number | Type of Plan |
|---------------|---|
| 4333 | Standardized M&P |
| 4334 | Non-standardized M&P |
| 4335 | Volume Submitter |
| 4336 * | Late new sponsor or late new Standardized M&P |
| 4337 * | Late new sponsor or late new Non-standardized M&P |
| 4338 * | Late new Volume Submitter (VS) Practitioner or late new Volume Submitter (VS) |

*Letters 4336, 4337, and 4338 were issued and included a prospective caveat and only gave reliance from the date the plan was submitted for the advisory or opinion letter. However, per [Revenue Procedure 2008-56](#) these letters were reissued on October 29, 2008 using Letters 4333, 4334, and 4335 respectively. Therefore, the Letters 4336, 4337, and 4338 are no longer being issued. In addition, Rev. Proc. 2008-56 allows word-for-word sponsors to continue to submit for opinion or advisory letters during the two-year window and the Service will continue to issue opinion or advisory letters to such plans. An eligible employer may rely on such a pre-approved plan's EGTRRA opinion or advisory letter to retroactively amend its plan for EGTRRA and the other qualification changes listed in the 2004 CL by adopting the pre-approved plan within the adoption period ending on April 30, 2010.

If a pre-existing pre-approved DC plan (i.e., a pre-approved DC plan with a GUST opinion or advisory letter) is/was submitted after the January 31, 2006 deadline, letter 4333, 4334, or 4335, was issued, but on a date after the two year period of the six-year cycle has started as a result of the late filing. See [Revenue Procedure 2007-49](#).

Plan sponsors or practitioners maintaining pre-approved Defined Benefit (DB) plans had until January 31, 2008, the end of the applicable DB RAC submission period, to submit their M&P and volume submitter plans for review, taking into account the requirements of EGTRRA and other items identified on the 2006 CL under [Notice 2007-3](#). A separate QAB will be issued later to cover pre-approved defined benefit plans. Employers may continue to submit for determination letters for DB plans using their GUST pre-approved documents, until further notice. See [Announcement 2007-90](#).

SECTION II
SIX-YEAR RAC

In general, the six-year RAC for pre-approved DC plans is determined by the opening of the pre-approved plan program and ending no later than January 31st of the 6th year which is explained in the following chart.

1st DC Six- Year Cycle

| DC 6-Year Cycle | DC Plans |
|--------------------------------|--|
| One/2005 (2/17/05-1/31/06) | All DC M&P and VS Plans submitted based on the 2004 CL |
| Two/2006 (2/1/06-1/31/07) | IRS Review |
| Three/2007 (2/1/07-4/30/08) | IRS Review |
| Four/2008 (5/1/08-4/30/09) | Employers Restate DC Plans |
| Five/2009 (5/1/09-4/30/10) | Employers Restate DC Plans |
| Six/2010 (5/1/10-1/31/11) | No Action |

2nd DC Six-Year Cycle Begins

| Subsequent DC 6-Year Cycle | DC Plans |
|---|---|
| 2 nd DC Cycle Year 1 (2/1/11-1/31/12)(ends 10/31/11 for Mass Submitter Lead and Specimen & National sponsor) | DC M&P and VS Plans submitted based on the applicable CL. |
| 2 nd DC Cycle Year 2 (2/1/12-1/31/13) | IRS Review |

[Announcement 2008-23](#) was released on March 14, 2008 and announced the opening of the two-year submission period for employer's to adopt DC plans. The two-year period as the chart above indicates is defined as beginning on May 1, 2008 and ending on April 30, 2010. The end of the remedial amendment period (RAP) for an employer with respect to EGTRRA and the changes to the qualification requirements on the 2004 CL is April 30, 2010 where such employer is entitled to and relying on the six-year RAC to restate its plan for EGTRRA. Thus, an employer that adopts the EGTRRA pre-approved M&P or VS DC plan after the date of its opinion or advisory letter and on or before April 30, 2010, will have adopted the plan within the employer's RAP. In addition, employers otherwise entitled to the six-year RAC, but who decide not to adopt a pre-approved plan, also have until April 30, 2010 to adopt an EGTRRA restated individually designed plan. If an employer is entitled to the six-year RAC and is seeking reliance on an individual determination letter, the application must be submitted no later than April 30, 2010. The Service began accepting applications for employers entitled to and relying on the six-year RAC on May 1, 2008.

SECTION III **ELIGIBILITY FOR SIX-YEAR RAC**

ELIGIBILITY

Generally, an employer who is under a GUST pre-approved plan as of February 16, 2005 (known as a "prior adopter") continues on the six-year RAC, if such employer adopts an EGTRRA pre-approved plan after the issuance date of the opinion/advisory letter, but no later than April 30, 2010. An employer who is an "intended adopter," a "new adopter," or a "replacement plan adopter," (as defined in section 17 of Rev. Proc. 2007-44), may also be eligible for the six-year RAC, if the conditions described in section 17 are met.

CONTINUING BASIS

Except as described below, an employer who modifies a plan in such a way that the plan, as adopted by the employer, would not be considered a pre-approved plan, will be allowed to stay on the six-year RAC on a continuing basis.

TEMPORARY BASIS

An employer will remain on the six-year RAC for the current cycle and then will switch to the five-year cycle, if:

- i. The employer met the eligibility requirements of section 17 of Rev. Proc. 2007-44 which entitled them to the six-year cycle but then subsequently adopts an individually designed plan, or
- ii. The employer amends the pre-approved plan on or after 2-17-2005 (i.e., the first day of the first six-year cycle applicable to DC pre-approved plans) to adopt a type of provision or plan that is not allowed in the EGTRRA pre-approved plan program (e.g. ESOP) and that amendment is adopted **more than one year** after the initial adoption of the pre-approved plan.

INELIGIBLE

An employer is immediately switched to the five-year RAC if the employer amends the pre-approved plan to:

- i. Incorporate a type of plan or amendment not allowed in the pre-approved program prior to 2-17-2005 or incorporated a type of plan or amendment **within one year** of first adopting the pre-approved plan (see section 6.03 and 16.02 of Rev. Proc. 2005-16 for list of impermissible provisions), or
- ii. Such an extent that the Service determines in its discretion that the plan falls under section 24.03 of Rev. Proc. 2005-16. Section 24.03 states that the Service may in its discretion determine that a plan is an individually designed plan that will not be entitled to a six-year RAC due to the nature and extent of the amendment(s).

SECTION IV **DETERMINATION LETTER SUBMISSION RULES WHERE THE PRE-APPROVED** **PLAN HAS BEEN MODIFIED BY THE EMPLOYER**

1.) M&P PLANS

An employer that adopts an amendment which causes a M&P plan to be treated as an individually designed plan, but for remedial amendment purposes remains eligible for the six-year RAC either on a continuing or temporary basis, must file a determination letter application (that is, a Form 5300) "to obtain reliance"

See section 5.02 of Rev. Proc. 2005-16 for a description of the amendments that will cause a M&P plan to be treated as an individually designed plan. The determination letter application, Form 5300, must be filed on or after May 1, 2008 but no later than April 30, 2010, which is the two-year period within the six-year RAC that the Service announced in Announcement 2008-23. The specialist will consider the applicable CL based on the date of the determination letter submission in reviewing the employer's plan versus the 2004 CL used in reviewing the M&P plan. See section V for special situations which are an exception to this rule. Procedures for filing the Form 5300 are similar to the procedures set forth in section 9.02 in Rev. Proc. 2008-6, for volume submitter plans, except for the following:

- (1) A list of modifications to the M&P plan is not required to be included.
- (2) Any changes adopted by the employer **must** be made in the form of a separate amendment and not incorporated into the underlying M&P plan document.

If the only modification to the pre-approved M&P plan is an amendment that reflects the [DOL Field Assistance Bulletin \(FAB\) 2008-1](#), Fiduciary Responsibility for Collection of Delinquent Contribution, then a Form 5300 will not be required.

2.) VS PLANS

An employer that adopts an amendment to a VS plan but for remedial amendment period purposes remains eligible for the six-year RAC either on a continuing basis or a temporary basis, must file a determination letter application for reliance. Again, the determination letter application must be filed on or after May 1, 2008 but no later than April 30, 2010. Generally, the specialist reviewing the determination letter application must make the determination as to whether the employer modification(s) to the VS plan allow the submission to remain on the Form 5307 or require it to be converted to a Form 5300. If the Form 5300 must be used, the specialist will consider the applicable CL based on the date of the determination letter submission in its review of the employer's plan versus the 2004 CL used in reviewing the VS plan. See section V for special situations which are an exception to this rule. Employer modifications can be integrated into a restatement involving a VS plan or submitted as tack-on amendments. In any event a list of modifications is required. See Section 9 of [Revenue Procedure 2008-6](#).

SECTION V
TREATMENT OF FORM 5300 AS A FORM 5307 FOR SPECIAL SITUATIONS

Multiple employer VS plans must file Form 5300, but **will not** be required to update for the current CL if submitted on or after May 1, 2008 and no later than April 30, 2010. Reliance will be based on the 2004 CL only (as approved in the VS). Please note this only applies if the employer files Form 5300 solely as a result of the plan being a multiple employer plan. If the VS plan was amended to add the multiple employer plan provisions, then the Form 5300 application must include a restated plan document that is update for the current CL.

Also, adopters of pre-approved plans that are using the Form 5300 to request a determination regarding a partial termination, affiliated service group status, or a leased employee ruling, will not have to update for the current CL if submitted on or after May 1, 2008 and no later than April 30, 2010. Reliance will be based on the 2004 CL only (as approved in the pre-approved plan). Again, the treatment described here will only apply if the need to file using Form 5300 is solely the result of one of the aforementioned special ruling requests.

The cover letter should certify that the plan is word-for-word identical to the pre-approved plan, and the only reason the Form 5300 application is being filed is because it is a multiple employer plan or a special ruling request (partial termination, affiliated service group status or a leased employee ruling).

SECTION VI
WHEN TO SUBMIT EGTRRA GOOD FAITH & INTERIM AMENDMENTS

Existence of power to amend provision in a pre-approved plan

M&P plans are required to include a provision within the plan which authorizes the M&P sponsor to amend the plan on behalf of an adopting employer. VS plans are not required to include such a provision in the plan, but may elect to do so. See sections 5.01 and 15.05 of Rev. Proc. 2005-16 for further information regarding the power to amend on behalf of provision.

For processing purposes, a list of those VS practitioners who elected to include such provision in their VS plan(s) will be made available and placed on the shared server, which is FOR INTERNAL USE ONLY.

Form 5307 filed during the two year period

If the Form 5307 application is filed for an adopter of a pre-approved plan that authorizes the plan sponsor/practitioner to amend the plan on behalf of the adopting employer, such application will not be required to include with the application submission package, copies of the EGTRRA good faith amendments or any interim amendments. However, if the employer adopted any discretionary amendments (e.g. changing option(s) in the adoption agreement) since the last determination letter, copies of these amendments should be included. Based on facts and circumstances, the Service may request evidence of timely adoption of EGTRRA good faith and other interim amendments.

If the Form 5307 application is filed for an adopter of a VS plan which does not authorize the VS practitioner to amend the plan on behalf of the adopting employer, the application package must include with its submission a copy of the EGTRRA good faith amendments (adopted by the employer), all interim amendments adopted relative to the qualification changes reflected on the 2004 CL, and any discretionary amendments adopted since the last determination letter.

Form 5300 filed during the two year period

Plans described in Section V of this QAB (Treatment of Form 5300 as a Form 5307 For Special Situations) should follow the procedures described above for a Form 5307 relative to whether copies of EGTRRA good faith amendments and any other interim amendments are required to be filed with the Form 5300.

If Form 5307 cannot be used because of the modifications to the pre-approved plan, the Form 5300 application package must include copies of the EGTRRA good faith amendments (adopted by the employer, if applicable. and all interim amendments adopted for purposes of the qualification changes identified on the CL in effect at the time of filing the determination letter application. In addition, all discretionary amendments adopted since the last determination letter must be submitted.

Form 5310 PLAN TERMINATION

A pre-approved plan that terminates after the adoption of the EGTRRA M&P or VS plan that requests a favorable determination letter must be amended for all law currently in effect up through the proposed date of termination. Copies of all interim amendments adopted for qualification changes subsequent to the 2004 CL and up through those changes in effect as of the proposed date of termination must be submitted along with any discretionary amendments adopted since the last favorable determination letter.

Currently the employer can submit the pre-approved GUST document along with all interim and discretionary amendments when submitting the Form 5310 application.

SECTION VII

DETERMINATION LETTER CAVEATS

The Letter 2002 will be issued on all applications received under Announcement 2008-23.

Specialists should use caveat 25 with the variable "2004" for the CL for applications submitted on Form 5307, and the applicable year for other Form 5300 submissions. In addition, the following caveat will be required to indicate expiration of reliance on the letter for those applications entitled to the six-year cycle on a continuing basis.

“This letter expires on the earlier of the date of the employer’s next determination letter or the end of the subsequent two-year period announced by the Service and which comprises part of the next six-year remedial amendment /approval cycle applicable to adopting employers of pre-approved defined contribution plans.”

The above caveat is number 26 on the Letter 2002 and should be used on all applications that are entitled to the six-year cycle on a continuing basis.

For those applications entitled to the six-year cycle on a temporary basis or ineligible for the six-year cycle the Letter 2002 will include the applicable caveat that includes the expiration date to reflect the end of the employer’s subsequent five-year cycle.

Interim amendments will only be secured for volume submitter plans that did not authorize the volume submitter practitioner to amend on the employer’s behalf. Therefore, interim amendments should **not** be caveated on the Letter 2002 except for plans that do not have the authority to amend provision. Generally, M&P plans and VS plans that have the authority to amend provision will not include the date of the interim amendments on the Letter 2002.