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# PLAN DOCUMENT UPDATES — EGTRRA AND BEYOND

by

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# PLAN DOCUMENT UPDATES — EGTRRA AND BEYOND

## I. TAX QUALIFIED RETIREMENT PLANS.

### A. Introduction.

1. For professionals and other small business owners, qualified retirement plans have been vastly improved by EGTRRA and the Pension Protection Act of 2006 (PPA). Qualified plans can be structured to provide large benefits for professionals and other key employees at a minimal cost for benefits for rank and file employees.
2. Whether the key employee is motivated by a desire to provide for his retirement or solely to shelter income from taxes, the same result is attained — he retains more of what he earns by diverting a substantial portion of his earnings into a tax-sheltered retirement plan.
3. Qualified retirement plans serve two major functions — they provide employee benefits and they act as tax shelters. As a general rule, the tax shelter aspect is emphasized in smaller plans and employee benefits are emphasized in larger plans. Both features are present in all plans, however, and should be recognized when designing a plan and when reviewing a plan with a client. Even in a plan designed primarily as a tax shelter for a key employee, the funding of benefits for rank and file employees should not be viewed in an entirely negative light. Participation in a pension plan should always be presented to employees in a positive manner and can be used to encourage employee loyalty and longevity and to thereby reduce employee dissatisfaction and turnover. Thus, participation by non-key employees engenders a more cohesive staff and can reduce employee training and turnover costs. Remember: proper and positive communication to employees is the key to employee appreciation of pension and other fringe benefits.
4. Retirement Plan Assets at 12/31/2006.
  - a. IRAs: \$ 4.2 Trillion
  - b. Defined Contribution Plans: \$ 4.1 Trillion
  - c. Defined Benefit Plans: \$ 2.3 Trillion
  - d. Government Employee Plans: \$ 4.2 Trillion
  - e. Annuities: \$ 1.6 Trillion
  - Total: \$ 16.4 Trillion

Retirement plan assets account for 39% of all U.S. household assets. In 1974, retirement plan assets accounted for 12% of U.S. household assets (Investment Company Institute, July, 2007).

5. Importance of Employer Sponsored Plans.
  - a. 10% of individuals eligible to contribute to an IRA do contribute to an IRA.
  - b. 75% of individuals eligible to contribute to a 401(k) plan do contribute to a 401(k) plan.

B. Tax advantages of qualified plans:

1. Employer contributions are deductible in the year made. Contributions are deductible if made prior to the due date for the corporate tax return, including extensions. IRC §404(a).
2. Participants are taxed only when they receive payments from the trust. IRC §402(a).
3. The retirement trust is tax-exempt and the trust funds accumulate income tax free. IRC §501(a).
4. Income tax brackets are generally lower at the time benefits are received following the participant's retirement or death. Additionally, Social Security taxes are paid neither on employer contributions to tax-qualified retirement plans nor on distributions to participants from such plans.
5. Qualified plans provide a means of forced savings and protection of assets from creditors claims.
6. *Comparison to non-qualified deferred compensation plan.* A nonqualified deferred compensation plan is an unfunded, unsecured promise to pay benefits at a future date.
  - a. Contributions to a non-qualified plan are only deductible in the year that the employee picks up the benefit in income.
  - b. There is no tax-free or tax-deferred growth.
  - c. Although non-qualified plans may be informally funded, the employee/beneficiary is, at best, an unsecured general creditor of the employer and the benefits are subject to claims by the employer's creditors.

## II. TYPES OF RETIREMENT PLAN DOCUMENTS.

### A. Prototype Plan Documents

1. Prototype documents are pre-approved by the IRS and consist of two separate documents: the prototype document and the adoption agreement.
  - a. The prototype document is a document that cannot be changed or modified by the adopting employer. It contains the required "boilerplate" provisions for the plan.
  - b. The adoption agreement contains various options that can be selected to adapt the documents to the preferences of the individual adopting employer.
2. There are two types of adoption agreements: Standardized and Non-Standardized.
3. *A Standardized Adoption Agreement* contains strict limitations on the election options for the adopting employer. In most circumstances, however, the IRS Approval Letter issued for the Prototype Plan can be considered to apply to the employer adopting the plan without the need for the employer to request an individual IRS determination letter for the employer's adoption of the plan.

Standardized Adoption Agreements cannot:

- a. Require employment on the last day of a plan year to receive a contribution (last day requirement);
  - b. Require 1,000 Hours of Service in a plan year to receive a contribution (1,000 hour requirement);
  - c. Exclude categories of employees from plan participation other than statutory exclusions permitted by the IRC.
4. *A Non-Standardized Adoption Agreement* can contain many more optional provisions for the adopting employer. An employer may choose to exclude certain specified categories of employees (e.g., custodian employees) from coverage under the plan. The plan can also contain last day and 1,000 hour requirements for participants to receive contributions to the plan for a given plan year.
    - a. The prototype approval letter generally applies to the adoption of the plan by the individual employer.

- b. The employer may file an IRS Form 5307 to request an individual determination letter for the employer's adoption of the Non-Standardized Adoption Agreement.
5. Any additions to or deletions from the prototype plan or the adoption agreement can cause the plan to lose its prototype status and cause the IRS approval letter for the prototype to be not applicable to the plan. If changes are made to the plan it is treated as an individually designed plan without a determination letter (unless one is applied for on a Form 5300 by the adopting employer).
6. In what situations can an employer adopting a pre-approved plan with a valid opinion or advisory letter rely on that letter without requesting its own determination letter?
  - a. In general an employer that makes no changes or only specified minor changes to the plan document can rely on the opinion or advisory letter for the pre-approved plan. Minor changes allowed include: changing the effective date of a provision, correcting typographical errors, adopting model, sample or other required good faith amendments that specifically provide that their adoption won't cause the plan to be individually designed. See Rev. Proc. 2005-16 for details.

**B. *Volume Submitter Plan Documents.***

1. Along with the prototype plans, volume submitter plans are referred to as "pre-approved plans".
2. A volume submitter plan looks like an individually designed plan. The provisions of the plan have, however, been pre-approved by the IRS.
3. The adopting employer can make modifications to the language of the volume submitter plan. Such modifications are pointed out to the IRS as variances when the employer files for an individual determination letter on IRS Form 5307.
4. If an employer is a "word-for-word" adopter of the plan (i.e., no changes have been made to the approved plan document), the IRS volume submitter determination letter may be relied upon by the adopting employer.

**C. *Individually Designed Plan Documents.***

1. Many complicated documents are individually designed plans. Large defined benefit plans, cash balance plans, collectively bargained plans and ESOPs are often individually designed plans.

2. Individually designed plans are not pre-approved by the IRS. Such plans should always be filed with the IRS with a Form 5300 determination letter request.

D. Types of Plan Amendments.

A plan amendment can either be an interim amendment or a discretionary amendment.

1. Interim Amendment.

An interim amendment is a required amendment of a disqualifying provision or an amendment that is integrally related to a disqualifying provision. A disqualifying provision may arise, for example, when there is a change in the plan qualification requirements and the plan provisions do not reflect the change. Amendments required to keep a written plan document up to date between a plan's submission periods during the applicable remedial amendment cycles are interim amendments.

2. Discretionary Amendment.

Discretionary amendments are all other types of amendments. An amendment that allows participants to receive plan loans is an example of a discretionary amendment.

E. Adoption Dates for Interim and Discretionary Amendments.

1. Interim Amendments.

An interim amendment for a disqualifying provision (or a provision that is integral to a disqualifying provision) must be adopted by the later of:

- a. the due date, including extensions, for filing the employer's tax return for the taxable year that includes the date on which the remedial amendment period begins; or
- b. the last day of the plan year that includes the date on which the remedial amendment period begins.

2. Discretionary Amendments.

A discretionary amendment must be adopted by the end of the plan year in which the amendment is effective.

**III. EGTRRA DOCUMENT UPDATES/REMEDIAL AMENDMENT PERIOD. REV. PROC. 2007-44; ANNOUNCEMENT 2008-23.**

**Part I: Six-Year Cycle for Pre-Approved Plans.**

**A. Six-Year Cycle for Pre-Approved Plans.**

The IRS has established a six-year cycle for the updating of the pre-approved plans (i.e., prototype and volume submitter plans). The six-year cycle begins in 2005 for Defined Contribution (DC) Plans and in 2007 for Defined Benefit (DB) Plans. Rev. Proc. 2007-44 (superseding Rev. Proc. 2005-66).

**1. Six-Year Cycle for Pre-Approved Defined Contribution (DC) Plans.**

<u>Year</u>	<u>Step</u>	
2005	Step One.	All pre-approved DC Plans must be updated (based on the law in effect at time of update) and submitted to IRS for approval by January 31, 2006.
2006-2008	Step Two.	IRS processes applications for pre-approved plans.
5/1/2008-4/30/2010	Step Three.	Employers restate DC plans by adopting pre-approved plans.
2011	Step One begins again	

2. The last day of the EGTRRA Remedial Amendment Period (RAP) for employers to adopt pre-approved defined contribution plans is April 30, 2010. The IRS will accept applications for individual determination letters submitted by adoptees of pre-approved plans starting on May 1, 2008. IRS Announcement 2008-23.

**B. Defined Benefit Plans.**

The six-year cycle for pre-approved Defined Benefit (DB) Plans will commence in 2007 with the submission of prototype and volume submitter lead documents to IRS. Employers will adopt the restated DB documents beginning in 2011. The last day of the EGTRRA RAP cycle for defined benefit plans is January 31, 2013.

<b>If the plan is —</b>	<b>The last day of the initial cycle (i.e., EGTRRA remedial amendment period) is —</b>	<b>The next six-year remedial amendment cycle ends on —</b>
Defined Contribution	January 31, 2011	January 31, 2017
Defined Benefit	January 31, 2013	January 31, 2019

C. Interim Amendments.

Good faith interim amendments (e.g., the amendments for compliance with the IRC Section 401(a)(9) final regulations on minimum required distributions) may be required based on new laws or updated IRS guidance.

1. Amendments for compliance with the Pension Protection Act of 2006 must be adopted by the end of the 2009 plan year.
2. Interim Amendments since GUST update include:
  - a. EGTRRA Amendment;
  - b. Required Minimum Distribution/IRC Section 401(a)(9) Amendment;
  - c. Involuntary Cash-Out/Direct IRA Rollover Amendment;
  - d. Section 401(k) Final Regulations Amendment;
  - e. Section 415 Final Regulations Amendment;
  - f. Pension Protection Act (PPA) of 2006 (for plans terminating after August 17, 2006).
    - i. Ongoing plans have until the end of the 2009 Plan Year to be amended for both mandatory and discretionary PPA amendments.
    - ii. Terminating plans must be in compliance with all laws in effect at the time of the plan's termination.

D. Eligibility For Six-Year Amendment/Approval Cycle.

1. An employer's plan is treated as a pre-approved plan and is therefore eligible for a six-year amendment/approval cycle if:
  - a. The employer is either a prior adopter, a new adopter, an intended adopter, or the adopter of a replacement plan that meets the conditions described in Section 17.05 of Rev. Proc. 2007-44, and
  - b. The sponsor or practitioner maintaining an existing or interim pre-approved plan timely submits an opinion or advisory letter application for the plan:
    - i. by the application deadline in the first year of the six-year remedial amendment cycle for pre-approved plans, and

- ii. receives a favorable current opinion or advisory letter from the Service before the employer adopts the plan.

2. Definitions.

- a. An *existing pre-approved plan* is a plan that has received a valid opinion or advisory letter for the six-year cycle immediately preceding the opening of the current six-year cycle (or, in the case of the initial six-year remedial amendment cycle, February 16, 2005 for defined contribution pre-approved plans or January 31, 2007 for defined benefit pre-approved plans). An existing pre-approved plan contains separate interim and discretionary amendments attached to the plan that have not been integrated into the plan document in restated form (but that will be integrated before the plan is submitted for an opinion or advisory letter).
- b. An *interim pre-approved plan* is either:
  - i. A plan that has not previously applied for or received an opinion or advisory letter because it was not in existence before the deadline for submitting such plans in the immediately preceding period (e.g., GUST deadline), or
  - ii. a plan that has received a valid opinion or advisory letter for the six-year cycle immediately preceding the opening of the current six-year cycle (or, in the case of the initial six-year remedial amendment cycle, February 16, 2005 for defined contribution pre-approved plans or January 31, 2007 for defined benefit pre-approved plans). An interim pre-approved plan does not contain the interim and discretionary amendments in separate documents because they have been integrated into the plan document in a restated format for purposes of submitting the plan for an opinion or advisory letter.
- c. A *newly approved version of a plan* is a plan that receives a favorable current opinion or advisory letter from the Service before the employer adopts the plan.
- d. An employer is a *prior adopter* (Rev. Proc. 2007-44, §17.02) if:
  - i. the employer adopted and made effective a pre-approved plan as of the last day of the six-year remedial amendment cycle immediately preceding the opening of the current six-year cycle and that employer's pre-approved plan was an existing plan, or an interim pre-approved plan that has a

valid opinion or advisory letter for the period preceding the opening of the current six-year cycle, and

- ii. the employer, within the announced adoption period,
  - a) adopts the newly approved version of that pre-approved plan or
  - b) adopts the newly approved version of a different pre-approved plan maintained by either the same sponsor or a different sponsor.

e. An employer is a *new adopter* (Rev. Proc. 2007-44, §17.03) if:

- i. the employer maintains an individually designed plan, or
- ii. the employer is not currently maintaining any qualified plan (individually designed or pre-approved) and has not maintained any such plan during the current five-year remedial amendment cycle applicable to the employer, and
- iii. the employer adopts either an existing pre-approved plan or an interim pre-approved plan before the end of the employer's five-year remedial amendment cycle for individually designed plans.

An employer may only adopt an interim or an existing pre-approved plan that is not the newly approved version of the plan if the employer adopts such plan before the beginning of the adoption period during the applicable six-year cycle. Such an employer must re-adopt either the newly approved version of the same plan or a newly approved version of a different pre-approved plan during the adoption period. Any employer whose five-year cycle has not ended may adopt a plan during or after the adoption period, but such employer must adopt the newly approved version of a pre-approved plan.

f. An employer is an *intended adopter* (Rev. Proc. 2007-44, §17.04) if:

- i. the employer currently maintains a qualified individually designed plan and
- ii. such employer and a sponsor or practitioner who maintains an existing pre-approved plan or an interim pre-approved plan execute Form 8905, Certification of Intent to Adopt

Pre-approved Plan, before the end of the employer's five-year remedial amendment cycle. However, if the employer's five-year remedial amendment cycle ends during or after the announced adoption period associated with the applicable six-year cycle, rather than execute Form 8905, the employer should instead adopt the newly approved version of the pre-approved plan (and will be treated as a new adopter). An employer who executes Form 8905 may adopt a different pre-approved plan with either the same or a different sponsor instead of the one designated on Form 8905.

g. *Replacement Plan* (Rev. Proc. 2007-44, §17.05).

i. An employer is an adopter of a replacement plan under the following situations:

- a) The employer timely adopted a pre-approved plan that is to be replaced by a "replacement" plan; and
- b) A sponsor or practitioner maintaining the pre-approved plan does not request an opinion or advisory letter during the current six-year approval / amendment cycle because the plan is to be replaced by the plan of another sponsor or practitioner as a result of a change in business circumstances; and
- c) The sponsor or practitioner of the replacement plan and the sponsor or practitioner of the replaced plan are related in one of the following ways: 1) one was merged into the other before the last day of the submission period or 2) as of the last day of the submission period both are members of the same controlled group of corporations within the meaning of §414(b) or are trades or businesses which are under common control within the meaning of §414(c).

ii. Effect of Adoption of Replacement Plan.

- a) If the employer intends to adopt the replacement plan, the employer will not be required to execute Form 8905, Certification of Intent to Adopt Pre-approved Plan.
- b) If the employer applies for a determination letter for a replacement plan, the application must include a

statement from the sponsor or practitioner maintaining the replacement plan indicating that the sponsor or practitioner maintaining the replacement plan was bought out or merged with the sponsor or practitioner maintaining the replacement plan.

iii. *Late Adopter.*

- a) If an employer described in Section 17.02, 17.03, 17.04 or 17.05 of Rev. Proc. 2007-44 adopts a pre-approved plan or individually designed plan after the adoption and/or submission deadline established by the Service for the current six-year remedial amendment cycle and the employer is unable to utilize its five-year remedial amendment cycle (e.g., the employer's submission deadline under the five-year remedial amendment cycle precedes the adoption and/or submission deadline under the current six-year cycle), then the adopting employer may be eligible to correct for late adoption under the Voluntary Correction Program.
- b) Examples 13 through 17 below illustrate an employer's eligibility for the six-year cycle. In the following examples, both the tax year of the employer and the plan year are the calendar years and, except as otherwise provided, the plan has been operated in accordance with the plan terms, including any interim and discretionary amendments.

Example 13: Employer L adopted and made effective Plan X on January 1, 2005. Plan X is a pre-existing defined contribution pre-approved prototype plan sponsored by Sponsor M. Sponsor N of Plan Y, also a defined contribution prototype plan, timely submitted an application by January 31, 2006. In 2008 the Service announced that May 1, 2008 through April 30, 2010 would be the two-year window for employers to adopt restated pre-approved plans and file determination letters, if necessary.

Sponsor M notified Employer L that it no longer qualified as a sponsor because it did not have the requisite number of employers (30) reasonably expected to adopt the pre-approved plan. Therefore, Sponsor M did not submit a new opinion

letter application within the six-year cycle by January 31, 2006. Employer L timely adopts Plan Y of Sponsor N within the two-year window period. Employer L will be considered to be a "prior adopter" within the meaning of Section 17.02 of Rev Proc. 2007-44 and has timely adopted the plan within the six-year cycle. The result would be the same if Employer L switched to Plan Y because Sponsor M did not timely submit an application by January 31, 2006 for that prototype plan, or Sponsor M timely submitted an application by January 31, 2006 but later withdrew the application, or Employer L was dissatisfied with Sponsor M for other reasons.

Example 14: The facts are the same as Example 13 except Employer L adopts a different defined contribution pre-approved prototype plan, Plan Z, sponsored by Sponsor M within the announced two-year window period and Sponsor M timely submitted an application for an opinion letter by January 31, 2006 for Plan Z. Employer L is considered to be a prior adopter and gets the six-year remedial amendment cycle.

Example 15: Same as Example 13 except Employer L adopts a defined contribution VS plan, Plan V, instead of a prototype plan within the announced two-year window period and the Sponsor timely submitted an application for an advisory letter for Plan V by January 31, 2006. Employer L is considered to be a prior adopter and gets the six-year remedial amendment cycle.

Example 16: Employer P, whose EIN ends in 6, has never maintained a qualified plan. Sponsor S timely submitted an application for an opinion letter for Plan Y, an existing pre-approved defined contribution prototype plan, by January 31, 2006. Employer P adopts Plan Y on December 15, 2006, which is prior to the end of Employer P's five-year remedial amendment cycle (Cycle A). Employer P is a new adopter and gets the six-year remedial amendment cycle.

Example 17: Employer Q, whose EIN ends in 1, currently maintains an individually designed

defined benefit plan (IDP). Employer Q decides to switch from an IDP to a defined benefit pre-approved plan. On January 15, 2007, Employer Q and Sponsor S execute Form 8905, Certification of Intent to Adopt a Pre-approved Plan. The defined benefit pre-approved plan adopted by Employer Q was timely submitted for an opinion letter by the applicable deadline. Employer Q is an intended adopter because Employer Q and Sponsor S signed Form 8905 timely (i.e., before the end of Employer Q's five-year remedial amendment cycle).

**IV. EGTRRA DOCUMENT UPDATES / REMEDIAL AMENDMENT PERIOD.**

**Part II. Five-Year Cycle for Individually Designed Plans.**

**A. Five-Year Cycle for Individually Designed Plans.**

The IRS established a five-year cycle for updating individually designed plans. The cycle provides that plans sponsored by employers with employer identification numbers (EINs) ending in 1 or 6 must be restated in the first year (2006) of the program and restated again in 2011. Employers with EINs ending in 2 or 7 will be restated in 2007 and again in 2012, and so on for the other EINs. Rev. Proc. 2007-44.

1. Each year's deadline is actually January 31 of the following year. Therefore, plans that must be submitted in 2006 will actually have a remedial amendment period beginning on February 1, 2006 and ending on January 31, 2007.
2. As with the pre-approved plans, individually designed plans may need to adopt needed amendments in interim years for compliance with changes in laws or IRS guidance.
3. Five-Year Cycle for Individually Designed Plans.

<u>Last Digit of EIN of Sponsoring Employer</u>	<u>Cycle</u>	<u>Year to be Restated</u>
1 or 6	A	2/1/06 – 1/31/07
2 or 7	B	2/1/07 – 1/31/08
3 or 8	C	2/1/08 – 1/31/09
4 or 9	D	2/1/09 – 1/31/10
5 or 0	E	2/1/10 – 1/31/11

4. Rev. Proc. 2008-6 requires that a redlined version noting changes from the prior plan be filed with a Form 5300 determination letter request.

- B. Special Rules for Five Year Cycle/Individually Designed Plans.
1. Multiemployer (Collectively Bargained) Plans are updated under Cycle D.
  2. Multiple Employer Plans are updated under Cycle B.
  3. Governmental Plans (including governmental multiple employer plans and governmental multiemployer plans) are updated under Cycle C.
  4. Controlled Group maintaining more than one plan:
    - a. Can make election to file all plans under parent's EIN; or
    - b. All members of controlled group can elect to file under Cycle A.
- C. Cycle-Changing Events.

1. The definition of cycle-changing events, such as merger or acquisition, change in plan sponsorship and plan spin-off have been expanded by Rev. Proc. 2007-44 to include a plan changing its status by either becoming or ceasing to be a multi-employer plan or a multiple employer plan. If a plan's cycle changes, the change must be pointed out in the determination letter application, including a detailed explanation of why the change occurred. Proof of such change, for example, the corporate resolution in the case of a merger or spin-off, should be attached to the explanation.
2. The general rule under Section 11.01 of Rev. Proc. 2007-44 is that a plan's five-year remedial amendment cycle is determined on the basis of the EIN or status of the employer that is maintaining the plan after a cycle-changing event such as a merger, acquisition or a spin-off. However, special rules under Section 11.03 may apply for determining a plan's applicable cycle immediately after the event. (Assume for the purposes of these examples that there are no future changes after the described cycle-changing events described below in each example, so the general rule under Section 11.01 would apply for the plan's next-following five-year remedial amendment cycle as provided in Section 11.02.)

**Example 1 (Section 11.01)**

Plan S was on Cycle C (pre-change cycle) until a cycle-changing event occurred on 10/1/07. Employer X maintains Plan S after the event. Employer X's EIN ends in 4. Thus, Plan S's cycle changed from Cycle C to Cycle D. The general rule under Section 11.01 applies, and the plan's cycle (post-change cycle) is Cycle D.

### **Example 2 (Section 11.03(1))**

A cycle-changing event occurred on 12/31/07. Plan N's cycle before the event (pre-change cycle) was D. Employer Y maintains Plan N after the cycle-changing event. Employer Y's EIN ends in 2. Plan N's post-change cycle (Cycle B) is open because the 12-month submission period had begun but had not expired as of the date of the cycle-changing event. Section 11.03(1) applies rather than the general rule under Section 11.01, because the last day of Cycle B is 1/31/08 and the period remaining in the post-change cycle is less than 12 calendar months. Accordingly, Plan N's post-change cycle is extended for 12 months from the last day of the open cycle submission period, to 1/31/09. The next five-year cycle will be shortened accordingly (the submission under the next Cycle B ends 1/31/2013, a period of four years after the 1/31/09 extended deadline). Plan N will be reviewed using the applicable Cumulative List based on the date of Plan N's submission.

### **Example 3 (Section 11.03(2))**

On 7/31/08, a cycle-changing event caused Plan O's cycle to change from Cycle C to Cycle A. Plan O's applicable cycle is Cycle C with a deadline of 1/31/09, since the submission deadline of 1/31/07 for the post-change cycle, Cycle A, has expired at the time of the cycle-changing event. However, the rules under Section 11.01 will apply for the plan's next five-year remedial amendment cycle. Thus, the next five-year cycle for Plan O will be Cycle A, with a submission deadline of 1/31/2012.

### **Example 4 (Section 11.03(3))**

Plan P's pre-change cycle was Cycle C. On 7/31/08 (during the 12-month submission period for Cycle C), Plan P had a cycle-changing event. Its post-change cycle is Cycle E, a cycle that is not yet open because the plan's on-cycle submission period has not yet begun. Cycle C is open at the time of the cycle-changing event since the submission period for Cycle C is ongoing and ends on 1/31/09. Plan P is permitted (but not required) to treat Cycle C as the applicable cycle. The next five-year cycle for Plan P is Cycle E, with a submission deadline of 1/31/2016.

### **Example 5 (Section 11.03(4))**

Plan Q's pre-change cycle was Cycle A. A determination letter application was timely submitted for Plan Q by the Cycle A deadline of 1/31/07. On 3/1/07 Plan Q had a cycle-changing event that changed its cycle to Cycle C. Plan Q can treat Cycle A (which has expired since the 12-month submission period has ended) as its applicable cycle, so it does not need to resubmit for a determination letter in Cycle C by 1/31/09. The

next five-year cycle for Plan Q is Cycle C, with a submission deadline of 1/31/2014.

**Example 6 (Section 11.03(5))**

Plan R's pre-changing cycle was Cycle E. Plan R had a cycle-changing event on 9/30/07 (which was during the submission period for Cycle B). Plan R's post-changing cycle is Cycle D. Plan R's cycle is the post-change cycle, Cycle D, since neither cycle was open at the time of the cycle-changing event (i.e., the 12-month submission periods for Cycle D and Cycle E have not yet begun). This is the same result as the general rule under Section 11.01.

**D. Off-Cycle Filings.**

In general, if an application for a determination letter is submitted prior to or after the last 12-month period of a plan's remedial amendment cycle, the application is filed off-cycle. However, Rev. Proc. 2007-44 provides that an off-cycle application generally will not be reviewed until all on-cycle plans have been reviewed and processed. Exceptions to this rule include: (1) applications for terminating plans, (2) new individually designed plans whose next regular on-cycle submission period ends at last two years after the end of the off-cycle submission period during which the sponsor submits its application and (3) plans which are determined by the IRS to be subject to an urgent business need (as determined on a facts and circumstances basis). A plan falling within one of the above exceptions will be given the same processing priority as if it were an on-cycle application. Rev. Proc. 2007-44, §14.

**E. Cumulative List**

1. The Cumulative List of Changes in Plan Qualification is a list of changes required to be included in a plan for qualification purposes based upon the plan's particular submission cycle. It is anticipated that the Cumulative List will be issued each year in approximately mid-November.
2. Revenue Procedure 2007-44 clarifies that, except as specifically provided in the applicable Cumulative List and except in the case of terminating plans, the Service will not consider in its review of any opinion, advisory or determination letter application any:
  - a. guidance issued after the October 1 preceding the date the applicable Cumulative List is issued; (that this October 1 date may be extended in the applicable Cumulative List with respect to opinion or advisory letter applications);
  - b. statutes enacted after the October 1 preceding the date the applicable Cumulative List is issued;

- c. qualification requirements that become effective in a calendar year following the calendar year in which the submission period begins with respect to the applicable Cumulative List, (e.g., qualifications requirements first effective in 2009, for applications submitted during the period beginning February 1, 2008 based on the 2007 Cumulative List), or
    - d. statutes that are first effective in the year in which the submission period begins with respect to the applicable Cumulative List, for which there is no guidance specified on the applicable Cumulative List.
  - 3. Applications submitted which contain qualification requirements described above (i.e., not contained in the Cumulative List) are required to identify those requirements that are in the plan, in a cover letter or in an attachment to the application. The determination letter cannot be relied upon with respect to such provisions. (Rev. Proc. 2007-44, §4.03)
  - 4. The Service will, however, consider in its review of any opinion, advisory, or determination letter application, all qualification requirements not described above. This means, for example, that a determination letter may be relied on with respect to guidance issued on or before the October 1st preceding the issuance of the applicable Cumulative List and which is effective during the calendar year in which the submission period begins, whether or not identified on the applicable Cumulative List. (Rev. Proc. 2007-44, §4.04)
- F. Switch From Individually Designed Plan to Pre-Approved Plan. Form 8905.

The IRS issued FAQs relating to the use of Form 8905, *Certification of Intent to Adopt a Pre-Approved Plan*. Sections 17.01 and 17.04 of Rev. Proc. 2007-44 provide that an employer's plan is treated as a pre-approved plan and is eligible for the six-year remedial amendment cycle if an employer and a Master and Prototype (M&P) sponsor or a Volume Submitter (VS) practitioner who maintains the pre-approved plan execute Form 8905 before the end of the employer's five-year remedial amendment cycle. Thus, this Form is used to shift from the five-year remedial amendment cycle used for individually designed plans to the six-year remedial amendment cycle applicable to pre-approved plans.

- 1. May Form 8905 be signed with an electronic signature?

Yes, but only the M&P sponsor or VS practitioner may use an electronic signature. The employer must manually sign and date the form. The employer cannot use stamped or scanned signatures or dates.

2. Who is responsible for keeping the signed original of Form 8905?

The employer is responsible for retaining the Form 8905 certification as signed and dated by the employer and the M&P sponsor or VS practitioner. The original should be filed with the appropriate application (Form 5300, 5307, 5310) to the Service if such an application is filed.

3. When should a plan M&P sponsor, VS practitioner or employer file a Form 8905 with the Service?

Form 8905 should only be filed as part of an application on Form 5300, 5307 or 5310. Only at that time should Form 8905 be attached to the application. If no Form 5300, 5307, or 5310 filing is made, the employer should keep the original certification in its records, but should not file Form 8905.

4. Should the Form 8905 ever be filed separately?

No. Form 8905 should not be filed with the Service except as part of a filing with the Form 5300, 5307 or 5310 applications discussed under FAQ 3 above.

5. Can Form 8905 be used if the five-year remedial amendment cycle applicable to a particular employer ends before the deadline for the M&P sponsor or VS practitioner to submit an application for approval of its pre-approved plan?

Yes. The Instructions to Form 8905, Part III, Line 4, state that the M&P sponsor or VS practitioner should enter the application deadline for an opinion or advisory letter application next to its signature (e.g., this would apply for Cycle A employers whose five-year remedial amendment cycle ends before pre-approved defined benefit plans are submitted during the 12-month period from February 1, 2007 to January 31, 2008).

6. Can Form 8905 be used even though it refers to Rev. Proc. 2005-66?

Yes. Form 8905 is still valid and is currently being considered for revision to reflect the updated Rev. Proc. 2007-44.

G. Switch From Master and Prototype Plan to Individually Designed Plan.

1. What are the procedural submission requirements for an M&P plan where an adopting employer has made changes to the pre-approved basic plan document or adoption agreement?

An employer that makes changes to the underlying plan document may be considered to have adopted an individually designed plan depending on the changes made, as described in Section 5.02 of Rev. Proc. 2005-16. In

such a case, Form 5300 must be filed if a determination letter application is submitted to the Service. Since the plan is treated as an individually designed plan, it must be updated for the applicable Cumulative List based on the date of submission for a determination letter during the announced period (approximately a two-year window) for adopting employers to adopt the updated plans within the 6-year cycle. This would require submission of the approved EGTRRA adoption agreement along with the interim amendments made for the later applicable Cumulative List. The interim amendments must be in the form of tack-on amendments and cannot be integrated into the EGTRRA approved adoption agreement or basic plan document.

## **V. IRS ANNOUNCEMENT 2008-23.**

### **Issuance of Opinion and Advisory Letters and Opening of the EGTRRA Determination Letter Program for Pre-Approved Defined Contribution Plans**

#### **Announcement 2008-23**

The Service will soon issue opinion and advisory letters for pre-approved (i.e., master and prototype (M&P) and volume submitter (VS)) defined contribution plans that were timely filed with the Service to comply with the Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. 107-16, ("EGTRRA") and other changes in plan qualification requirements listed in Notice 2004-84, 2004-2 C.B. 1030 ("the 2004 Cumulative List"). The Service expects to issue the letters on March 31, 2008, or, in some cases, as soon as possible thereafter. Employers using these pre-approved plan documents to restate a plan for EGTRRA will be required to adopt the EGTRRA-approved plan document by April 30, 2010. The Service will accept applications for individual determination letters submitted by adopters of these pre-approved plans starting on May 1, 2008. This announcement describes certain changes to the determination letter application procedures for pre-approved plans that will simplify the application process for many applicants, and it informs plan sponsors that revised application forms for these plans will be available in the near future.

#### *Background*

Rev. Proc. 2007-44, 2007-28, I.R.B. 54, and Rev. Proc. 2005-16, 2005-1 C.B. 674, describe a staggered remedial amendment system for plans that are qualified under §401(a) of the Internal Revenue Code, with five-year amendment/approval cycles for individually designed plans and six-year cycles for pre-approved plans. The submission period for the initial cycle for pre-approved defined contribution plans was February 17, 2005, through January 31, 2006. Sponsors and practitioners were required to restate their pre-approved defined contribution plans for EGTRRA and the 2004 Cumulative List and apply for new opinion or advisory letters during this submission period.

Section 16.03 of Rev. Proc. 2007-44 provides that when the review of a cycle for pre-approved plans has neared completion, the Service will publish an announcement providing the date by which adopting employers must adopt the newly approved plans.

This date is intended to give adopting employers a window of approximately two years in which to adopt the plans.

Procedures for filing determination letter applications are contained in Rev. Proc. 2008-6, 2008-1 I.R.B. 192. Section 6.05 of Rev. Proc. 2008-6 requires a determination letter application to include a copy of the plan's signed and dated timely good faith EGTRRA amendments, interim and other plan amendments. These documents are in addition to the restated plan or, in the case of M&P and certain VS plans, the completed adoption agreement.

In general, an application for an individual determination letter on a pre-approved plan is to be filed on Form 5307, Application for Determination for Adopters of Master or Prototype or Volume Submitter Plans. These applications will be reviewed on the basis of the Cumulative List of Changes in Plan Qualification Requirements that was used to review the underlying pre-approved plan, that is, the 2004 Cumulative List in the case of an application filed for the cycle that includes the pre-approved plan submission period that ended on January 31, 2006.

In certain circumstances, however, an application for an individual determination letter on a pre-approved plan is to be filed on Form 5300, Application for Determination for Employee Benefit Plan, rather than Form 5307. These circumstances include the following: (1) where the adopter of an M&P plan amends the basic plan document or adoption agreement, other than by choosing among options permitted under the plan or amending the plan in the manner described in sections 5.02 and 19.03 of Rev. Proc. 2005-16; (2) where the adopter of a VS plan makes changes to the pre-approved plan that are too extensive or complex or otherwise determined by the Service to be incompatible with the purposes of the volume submitter program; and (3) where the adopter of a preapproved plan is requesting a determination regarding partial termination, affiliated service group status or leased employees, or where the pre-approved plan is a multiple employer VS plan.

Except as otherwise provided in this announcement, an application for an individual determination letter on a pre-approved plan that is filed on Form 5300 will be reviewed on the basis of the Cumulative List in effect when the application is filed. For example, a determination letter application filed on Form 5300 on May 1, 2008, will be reviewed on the basis of the 2007 Cumulative List (Notice 2007-94, 2007-51 I.R.B. 1179).

*Deadline for Employer Adoption of EGTRRA-approved Defined Contribution M&P and VS Plans*

An adopting employer whose plan is eligible for the six-year remedial amendment cycle under section 17 of Rev. Proc. 2007-44 and that adopts an EGTRRA-approved M&P or VS defined contribution plan by April 30, 2010, will have adopted the plan within the employer's six-year remedial amendment cycle.<sup>1</sup> The end of the plan's remedial

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<sup>1</sup> Section 20 of Rev. Proc. 2007-44 provides that an opinion or advisory letter for anew pre-approved plan submitted for approval after the end of the submission period may not be relied on for the period prior to the date of submission.

amendment cycle with respect to EGTRRA and the changes in plan qualification requirements on the 2004 Cumulative List is April 30, 2010.

*Individual Determination Letter Filing Procedures for Pre-approved Plans*

The Service will accept applications for individual determination letters for EGTRRA-approved M&P and VS defined contribution plans starting May 1, 2008. The procedures for filing such applications are clarified and revised as follows:

An application for a determination letter that is filed on Form 5307 generally need not include the plan's EGTRRA good faith amendments that were adopted prior to the adoption of the EGTRRA-restated plan or any interim plan amendments, regardless of when adopted, unless the plan is a VS plan that does not authorize the practitioner to amend the plan on behalf of the adopting employer. The Service may, however, request evidence of adoption of good faith and interim amendments during the course of its review of a particular plan. Applications filed on Form 5307 for VS plans that do not authorize the practitioner to amend the plan on behalf of the adopting employer must include the plan's EGTRRA good faith amendments and any interim amendments that were adopted for qualification changes on the 2004 Cumulative List.

An application for a determination letter on a pre-approved plan that is required to file Form 5300 only because the plan is a multiple employer VS plan or because the employer is requesting a determination regarding partial termination, affiliated service group status or leased employees will be reviewed on the basis of the Cumulative List that was used to review the underlying pre-approved plan, that is, the 2004 Cumulative List, as if the application had been filed on Form 5307. The Service's review of the application will not consider changes in the qualification requirements subsequent to the 2004 Cumulative List. Except in the case of VS plans that do not authorize the practitioner to amend the plan on behalf of the adopting employer, an application described in this paragraph need not include the plan's EGTRRA good faith amendments that were adopted prior to the adoption of the EGTRRA-restated plan or any interim plan amendments, regardless of when adopted. The Service may, however, request evidence of adoption of good faith and interim amendments during the course of its review of a particular plan. An application for a VS plan that is described in this paragraph but which does not authorize the practitioner to amend on behalf of the adopting employer must include the plan's EGTRRA good faith amendments and any interim amendments that were adopted for qualification changes on the 2004 Cumulative List.

An application for a determination letter on any other pre-approved plan that is required to file Form 5300 will be reviewed on the basis of the Cumulative List in effect on the date the application is filed. The application must include a copy of the plan's signed and dated timely good faith EGTRRA amendments, and interim and other plan amendments for all the changes in qualification requirements on the Cumulative List that is in effect when the application is filed. Applications described in this paragraph include (1) applications for determination letters on M&P plans that have been amended by the adopting employer in a manner other than to choose among options permitted under the plan or as described in sections 5.02 and 19.03 of Rev. Proc. 2005-16, and (2)

applications for determination letters on VS plans that have been modified by the adopting employer in a manner that is too extensive or complex or otherwise determined by the Service to be incompatible with the purposes of the volume submitter program.

These changes will be published as modifications to Rev. Proc. 2008-6 when that revenue procedure is next revised. Until the modifications to the revenue procedures are published, plan sponsors may rely on this announcement regarding the changes.

Plan sponsors and their advisors are encouraged to review the frequently asked questions on the following web site: <http://www.irs.gov/retirement/article/0,,id=179990,00.html> for additional information regarding the issuance of opinion, advisory and determination letters for pre-approved plans and the documents that must be submitted with a determination letter application.

#### *Revision of Form 5307*

Form 5307 is being revised to allow the form to be optically scanned and thereby improve the Service's processing of determination letter applications filed with the form. It is expected that the revised form will be available soon. However, applications filed with the current form (revised 2001) will continue to be accepted through September 30, 2008.