Internal Revenue bulletin

Bulletin No. 2004-18
May 3, 2004

HIGHLIGHTS OF THIS ISSUE

These synopses are intended only as aids to the reader in identifying the subject matter covered. They may not be relied upon as authoritative interpretations.

INCOME TAX

Rev. Rul. 2004–43, page 842.

Partnership mergers. This ruling describes the application of sections 704(c)(1)(B) and 737 of the Code to assets-over partnership mergers. The ruling holds that section 704(c)(1)(B) applies to newly created section 704(c) gain or loss in property contributed by the transferor partnership to the continuing partnership in an assets-over partnership merger, but does not apply to newly created reverse section 704(c) gain or loss resulting from a revaluation of property in the continuing partnership. The ruling also holds that for purposes of section 737(b), net precontribution gain includes newly created section 704(c) gain or loss in property contributed by the transferor partnership to the continuing partnership in an assets-over partnership merger, but does not include newly created reverse section 704(c) gain or loss resulting from a revaluation of property in the continuing partnership.

REG–106681–02, page 852.

Proposed regulations under section 856 of the Code clarify that an entity that is disregarded as separate from its owner, a qualified REIT subsidiary, or a qualified subchapter S subsidiary is treated as an entity separate from its owner if the entity is liable for federal taxes. A public hearing is scheduled for July 22, 2004.

EMPLOYEE PLANS

Notice 2004–32, page 847.

Weighted average interest rate update. The weighted average interest rate for April 2004 and the resulting permissible range of interest rates used to calculate current liability and to determine the required contribution are set forth.

Notice 2004–34, page 848.

Minimum funding standards; interest rates; section 101 of Pension Funding Equity Act. This notice describes the method for determining the permissible range of interest rates for current liability under section 412 of the Code as amended by section 101 of the Pension Funding Equity Act of 2004. In addition, comments are requested on this notice.

Announcement 2004–32, page 860.

Employee Plans determination letter program; individually designed plans. This announcement describes the Service's decisions resulting from its review of comments following the issuance of two white papers on the future of the Employee Plans determination letter program.

Announcement 2004–33, page 862.

Pre-approved employee plans; proposed revenue procedure; request for comments. This announcement describes and contains a draft proposed revenue procedure pertaining to those employee plans (master and prototype (M&P) and volume submitter (VS)) that are pre-approved by the Service. Portions of the draft procedure are reserved pending comments.

Announcement 2004–38, page 878.

Minimum funding standards; alternative deficit reduction election. This announcement describes how an election to make an alternative deficit reduction contribution under section 412(l) of the Code may be made and describes some of the background to that election.

(Continued on the next page)

Finding Lists begin on page ii.

Department of the Treasury
Internal Revenue Service

EXEMPT ORGANIZATIONS

Announcement 2004–31, page 854.
A list is provided of organizations now classified as private foundations.

Announcement 2004–41, page 879.
Kids Voting SD of Rapid City, SD, no longer qualifies as an organization to which contributions are deductible under section 170 of the Code.

ADMINISTRATIVE

Rev. Rul. 2004–41, page 845.
Limited Liability Company. This ruling discusses the issue of whether the IRS can collect employment taxes owed by a multi-member domestic Limited Liability Company (LLC) from the members.

REG–106681–02, page 852.
Proposed regulations under section 856 of the Code clarify that an entity that is disregarded as separate from its owner, a qualified REIT subsidiary, or a qualified subchapter S subsidiary is treated as an entity separate from its owner if the entity is liable for federal taxes. A public hearing is scheduled for July 22, 2004.

Notice 2004–33, page 847.
Credit for sales of fuel produced from a nonconventional source, inflation adjustment factor, and reference price. This notice publishes the nonconventional source fuel credit, the inflation adjustment factor, and the reference price under section 29 of the Code for calendar year 2003. This data is used to determine the credit allowable on sales of fuel produced from a nonconventional source.

The IRS Mission

Provide America's taxpayers top quality service by helping them understand and meet their tax responsibilities and by applying the tax law with integrity and fairness to all.

Introduction

The Internal Revenue Bulletin is the authoritative instrument of the Commissioner of Internal Revenue for announcing official rulings and procedures of the Internal Revenue Service and for publishing Treasury Decisions, Executive Orders, Tax Conventions, legislation, court decisions, and other items of general interest. It is published weekly and may be obtained from the Superintendent of Documents on a subscription basis. Bulletin contents are compiled semiannually into Cumulative Bulletins, which are sold on a single-copy basis.

It is the policy of the Service to publish in the Bulletin all substantive rulings necessary to promote a uniform application of the tax laws, including all rulings that supersede, revoke, modify, or amend any of those previously published in the Bulletin. All published rulings apply retroactively unless otherwise indicated. Procedures relating solely to matters of internal management are not published; however, statements of internal practices and procedures that affect the rights and duties of taxpayers are published.

Revenue rulings represent the conclusions of the Service on the application of the law to the pivotal facts stated in the revenue ruling. In those based on positions taken in rulings to taxpayers or technical advice to Service field offices, identifying details and information of a confidential nature are deleted to prevent unwarranted invasions of privacy and to comply with statutory requirements.

Rulings and procedures reported in the Bulletin do not have the force and effect of Treasury Department Regulations, but they may be used as precedents. Unpublished rulings will not be relied on, used, or cited as precedents by Service personnel in the disposition of other cases. In applying published rulings and procedures, the effect of subsequent legislation, regulations, court decisions, rulings, and procedures must be considered, and Service personnel and others concerned are cautioned against reaching the same conclusions in other cases unless the facts and circumstances are substantially the same.

The Bulletin is divided into four parts as follows:

Part I.—1986 Code.
This part includes rulings and decisions based on provisions of the Internal Revenue Code of 1986.

Part II.—Treaties and Tax Legislation.
This part is divided into two subparts as follows: Subpart A, Tax Conventions and Other Related Items, and Subpart B, Legislation and Related Committee Reports.

Part III.—Administrative, Procedural, and Miscellaneous.
To the extent practicable, pertinent cross references to these subjects are contained in the other Parts and Subparts. Also included in this part are Bank Secrecy Act Administrative Rulings. Bank Secrecy Act Administrative Rulings are issued by the Department of the Treasury's Office of the Assistant Secretary (Enforcement).

Part IV.—Items of General Interest.
This part includes notices of proposed rulemakings, disbarment and suspension lists, and announcements.

The last Bulletin for each month includes a cumulative index for the matters published during the preceding months. These monthly indexes are cumulated on a semiannual basis, and are published in the last Bulletin of each semiannual period.

For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

Part I. Rulings and Decisions Under the Internal Revenue Code of 1986

Section 704.—Partner's Distributive Share

26 CFR 1.704–3: Contributed property.
(Also: §§ 708, 737, 1.704–1, 1.704–3, 1.704–4, 1.708–1, 1.737–1, 1.737–2, 1.737–3.)

Partnership mergers. This ruling describes the application of sections 704(c)(1)(B) and 737 of the Code to assets-over partnership mergers. The ruling holds that section 704(c)(1)(B) applies to newly created section 704(c) gain or loss in property contributed by the transferor partnership to the continuing partnership in an assets-over partnership merger, but does not apply to newly created reverse section 704(c) gain or loss resulting from a revaluation of property in the continuing partnership. The ruling also holds that for purposes of section 737(b), net precontribution gain includes newly created section 704(c) gain or loss in property contributed by the transferor partnership to the continuing partnership in an assets-over partnership merger, but does not include newly created reverse section 704(c) gain or loss resulting from a revaluation of property in the continuing partnership.

Rev. Rul. 2004–43

ISSUES

1) Does § 704(c)(1)(B) of the Internal Revenue Code apply to § 704(c) gain or loss that is created in an assets-over partnership merger?

2) For purposes of § 737(b), does net precontribution gain include § 704(c) gain or loss that is created in an assets-over partnership merger?

FACTS

Situation 1. On January 1, 2004, *A* contributes Asset 1, with a basis of \$200*x* and a fair market value of \$300*x* to partnership *AB* in exchange for a 50 percent interest. On the same date, *B* contributes \$300*x* of cash to *AB* in exchange for a 50 percent interest. Also on January 1, 2004, *C* contributes Asset 2, with a basis of \$100*x* and a fair market value of \$200*x* to partnership *CD* in exchange for a 50 percent interest. *D* contributes \$200*x* of cash to *CD* in exchange for a 50 percent interest.

On January 1, 2006, *AB* and *CD* undertake an assets-over partnership merger in which *AB* is the continuing partnership and *CD* is the terminating partnership. At the time of the merger, *AB*'s only assets are Asset 1, with a fair market value of \$900*x*, and \$300*x* in cash, and *CD*'s only assets are Asset 2, with a fair market value of \$600*x* and \$200*x* in cash. After the merger, the partners have capital and profits interests in *AB* as follows: *A*, 30 percent; *B*, 30 percent; *C*, 20 percent; and *D*, 20 percent.

The partnership agreements for *AB* and *CD* provide that the partners' capital accounts will be determined and maintained in accordance with § 1.704–1(b)(2)(iv) of the Income Tax Regulations, distributions in liquidation of the partnership (or any partner's interest) will be made in accordance with the partners' positive capital account balances, and any partner with a deficit balance in the partner's capital account following the liquidation of the partner's interest must restore that deficit to the partnership (as set forth in § 1.704–1(b)(2)(ii)(*b*)(*2*) and (*3*)). *AB* and *CD* both have provisions in their partnership agreements requiring the revaluation of partnership property upon the entry of a new partner. *AB* would not be treated as an investment company (within the meaning of § 351) if it were incorporated. Neither partnership holds any unrealized receivables or inventory for purposes of § 751. *AB* and *CD* do not have a § 754 election in place. Asset 1 and Asset 2 are nondepreciable capital assets.

On January 1, 2012, *AB* has the same assets that it had after the merger. Each asset has the same value that it had at the time of the merger. On this date, *AB* distributes Asset 2 to *A* in liquidation of *A*'s interest in *AB*.

Situation 2. The facts are the same as in *Situation 1*, except that on January 1, 2012, Asset 1 has a value of \$275*x*, and *AB* distributes Asset 1 to *C* in liquidation of *C*'s interest in *AB*.

LAW

Under § 704(b) and the regulations thereunder, allocations of a partnership's items of income, gain, loss, deduction, or credit provided for in the partnership agreement will be respected if the allocations have substantial economic effect. Allocations that fail to have substantial economic effect will be reallocated according to the partners' interests in the partnership.

Section 1.704–1(b)(2)(iv)(*f*) provides that a partnership may, upon the occurrence of certain events (including the contribution of money to the partnership by a new or existing partner), increase or decrease the partners' capital accounts to reflect a revaluation of the partnership property.

Section 1.704–1(b)(2)(iv)(*g*) provides that, to the extent a partnership's property is reflected on the books of the partnership at a book value that differs from the adjusted tax basis, the substantial economic effect requirements apply to the allocations of book items. Section 704(c) and § 1.704–1(b)(4)(i) govern the partners' distributive shares of tax items.

Section 1.704–1(b)(4)(i) provides that if partnership property is, under § 1.704–1(b)(2)(iv)(*f*), properly reflected in the capital accounts of the partners and on the books of the partnership at a book value that differs from the adjusted tax basis of the property, then depreciation, depletion, amortization, and gain or loss, as computed for book purposes, with respect to the property will be greater or less than the depreciation, depletion, amortization, and gain or loss, as computed for federal tax purposes, with respect to the property. In these cases the capital accounts of the partners are required to be adjusted solely for allocations of the book items to the partners (see § 1.704–1(b)(2)(*iv*)(*g*)), and the partners' shares of the corresponding tax items are not independently reflected by further adjustments to the partners' capital accounts. Thus, separate allocations of these tax items cannot have economic effect under § 1.704–1(b)(2)(ii)(*b*)(*1*), and the partners' distributive shares of tax items must (unless governed by § 704(c)) be determined in accordance with the partners' interests in the partnership. These tax items must be shared among the partners in a manner that takes account of the variation between the adjusted tax basis of the property and its book value in the same manner as variations between the adjusted tax basis and fair market value of property contributed to the partnership are taken into account in determining the partners' shares of tax items under § 704(c).

Section 704(c)(1)(A) provides that income, gain, loss, and deduction with respect to property contributed to the partnership by a partner shall be shared among the partners so as to take account of the variation between the basis of the property to the partnership and its fair market value at the time of contribution.

Section 1.704–3(a)(2) provides that, except as provided in § 1.704–3(e)(2) and (3), § 704(c) and § 1.704–3 apply on a property-by-property basis.

Section 1.704–3(a)(3)(i) provides that property contributed to a partnership is § 704(c) property if at the time of contribution its book value differs from the contributing partner's adjusted tax basis. For purposes of § 1.704–3, book value is determined as contemplated by § 1.704–1(b). Therefore, book value is equal to fair market value at the time of contribution and is subsequently adjusted for cost recovery and other events that affect the basis of the property.

Section 1.704–3(a)(3)(ii) provides that the built-in gain on § 704(c) property is the excess of the property's book value over the contributing partner's adjusted tax basis upon contribution. The built-in gain is thereafter reduced by decreases in the difference between the property's book value and adjusted tax basis.

Section 1.704–3(a)(6) provides that the principles of § 1.704–3 also apply to "reverse § 704(c) allocations" which result from revaluations of partnership property pursuant to § 1.704–1(b)(2)(iv)(*f*).

Section 1.704–3(a)(7) provides that, if a contributing partner transfers a partnership interest, built-in gain or loss must be allocated to the transferee partner as it would have been allocated to the transferor partner. If the contributing partner transfers a portion of the partnership interest, the share of built-in gain or loss proportionate to the interest transferred must be allocated to the transferee partner.

Section 704(c)(1)(B) provides that if any property contributed to the partnership by a partner is distributed (directly or indirectly) by the partnership (other than to the contributing partner) within seven years of being contributed: (i) the contributing partner shall be treated as recognizing gain or loss (as the case may be) from the sale of the property in an amount equal to the gain or loss which would have been allocated to the partner under § 704(c)(1)(A) by reason of the variation described in § 704(c)(1)(A) if the property had been sold at its fair market value at the time of the distribution; (ii) the character of the gain or loss shall be determined by reference to the character of the gain or loss which would have resulted if the property had been sold by the partnership to the distributee; and (iii) appropriate adjustments shall be made to the adjusted basis of the contributing partner's interest in the partnership and to the adjusted basis of the property distributed to reflect any gain or loss recognized under § 704(c)(1)(B).

Section 1.704–4(c)(4) provides that § 704(c)(1)(B) and § 1.704–4 do not apply to a transfer by a partnership (transferor partnership) of all of its assets and liabilities to a second partnership (transferee partnership) in an exchange described in § 721, followed by a distribution of the interest in the transferee partnership in liquidation of the transferor partnership as part of the same plan or arrangement. Section 1.704–4(c)(4) also provides that a subsequent distribution of § 704(c) property by the transferee partnership to a partner of the transferee partnership is subject to § 704(c)(1)(B) to the same extent that a distribution by the transferor partnership would have been subject to § 704(c)(1)(B).

Section 1.704–4(d)(2) provides that the transferee of all or a portion of the partnership interest of a contributing partner is treated as the contributing partner for purposes of § 704(c)(1)(B) and § 1.704–4 to the extent of the share of built-in gain or loss allocated to the transferee partner.

Section 708(a) provides that, for purposes of subchapter K, an existing partnership shall be considered as continuing if it is not terminated.

Section 708(b)(2)(A) provides that in the case of the merger or consolidation of two or more partnerships, the resulting partnership shall, for purposes of § 708, be considered the continuation of any merging or consolidating partnership whose members own an interest of more than 50 percent in the capital and profits of the resulting partnership.

Section 1.708–1(c)(3)(i) provides that when two or more partnerships merge or consolidate into one partnership under the applicable jurisdictional law without undertaking a form for the merger or consolidation, or undertake a form for the merger or consolidation that is not described in § 1.708–1(c)(3)(ii), any merged or consolidated partnership that is considered terminated under § 1.708–1(c)(1) is treated as undertaking the assets-over form for federal income tax purposes. Under the assets-over form, the merged or consolidated partnership that is considered terminated under § 1.708–1(c)(1) contributes all of its assets and liabilities to the resulting partnership in exchange for an interest in the resulting partnership, and immediately thereafter, the terminated partnership distributes interests in the resulting partnership to its partners in liquidation of the terminated partnership.

Section 737(a) provides that, in the case of any distribution by a partnership to a partner, the partner shall be treated as recognizing gain in an amount equal to the lesser of (1) the excess (if any) of (A) the fair market value of property (other than money) received in the distribution over (B) the adjusted basis of the partner's interest in the partnership immediately before the distribution reduced (but not below zero) by the amount of money received in the distribution, or (2) the net precontribution gain of the partner. Gain recognized under the preceding sentence shall be in addition to any gain recognized under § 731. The character of the gain shall be determined by reference to the proportionate character of the net precontribution gain.

Section 737(b) provides that for purposes of § 737, the term "net precontribution gain" means the net gain (if any) which would have been recognized by the distributee partner under § 704(c)(1)(B) if all property which (1) had been contributed to the partnership by the distributee partner within seven years of the distribution, and (2) is held by the partnership immediately before the distribution, had been distributed by the partnership to another partner.

Section 1.737–1(c)(1) provides that the distributee partner's net precontribution gain is the net gain (if any) that would have been recognized by the distributee partner under § 704(c)(1)(B) and § 1.704–4 if all property that had been contributed to the partnership by the distributee partner within seven years of the distribution and is held by the partnership immediately before the distribution had been distributed by the partnership to another partner other than a partner who owns, directly or indirectly, more than 50 percent of the capital or profits interest in the partnership.

Section 1.737–1(c)(2)(iii) provides that the transferee of all or a portion of a contributing partner's partnership interest succeeds to the transferor's net precontribution gain, if any, in an amount proportionate to the interest transferred.

Section 1.737–2(b)(1) provides that § 737 and § 1.737–2 do not apply to a transfer by a partnership (transferor partnership) of all of its assets and liabilities to a second partnership (transferee partnership) in an exchange described in § 721, followed by a distribution of the interest in the transferee partnership in liquidation of the transferor partnership as part of the same plan or arrangement.

Section 1.737–2(b)(3) provides that a subsequent distribution of property by the transferee partnership to a partner of the transferee partnership that was formerly a partner of the transferor partnership is subject to § 737 to the same extent that a distribution from the transferor partnership would have been subject to § 737.

ANALYSIS

Section 1.704–4(c)(4) describes the effect of an assets-over partnership merger on pre-existing § 704(c) gain or loss for purposes of § 704(c)(1)(B). Under § 1.704–4(c)(4), if the transferor partnership in an assets-over merger holds contributed property with § 704(c) gain or loss, the seven year period in § 704(c)(1)(B) does not restart with respect to that gain or loss as a result of the merger. Section 1.704–4(c)(4) does not prevent the creation of new § 704(c) gain or loss when assets are contributed by one partnership to another partnership in an assets-over merger. Section 704(c)(1)(B) applies to this newly created § 704(c) gain or loss if the assets contributed in the merger are distributed to a partner other than the contributing partner (or its successor) within seven years of the merger.

Section 1.737–2(b)(1) and (3) describes the effect of an assets-over partnership merger on net precontribution gain that includes pre-existing § 704(c) gain or loss. Under § 1.737–2(b)(3), if the transferor partnership in an assets-over merger holds contributed property with § 704(c) gain or loss, the seven year period in § 737(b) does not restart with respect to that gain or loss as a result of the merger. Section 1.737–2(b)(3) does not prevent the creation of new § 704(c) gain or loss when assets are contributed by one partnership to another partnership in an assets-over merger. This gain or loss must be considered in determining the amount of net precontribution gain for purposes of § 737 if the continuing partnership distributes other property to the contributing partner (or its successor) within seven years of the merger.

Section 1.704–3(a)(6)(i) provides that the principles of § 1.704–3 apply to reverse § 704(c) allocations. In contrast, the regulations under § 704(c)(1)(B) and § 737 contain no similar rule requiring that the principles of § 704(c)(1)(B) and § 737 apply to reverse § 704(c) allocations. Under those regulations, § 704(c)(1)(B) and § 737 do not apply to reverse § 704(c) allocations.

In both of the situations described above, on the date of the partnership merger, *CD* contributes cash and Asset 2 to *AB* in exchange for an interest in *AB*. Immediately thereafter, *CD* distributes, in liquidation, interests in *AB* to *C* and *D*. Asset 2 has a basis of $100*x* and a fair market value of $600*x* upon contribution. Of the $500*x* of built in gain in Asset 2, $100*x* is pre-existing § 704(c) gain attributable to *C*'s contribution of Asset 2 to *CD*, and $400*x* is additional § 704(c) gain created as a result of the merger. As the transferees of *CD*'s partnership interest in *AB*, *C* and *D* each succeed to one-half of *CD*'s $400*x* of § 704(c) gain in Asset 2 (each $200*x*). Section 1.704–3(a)(7). Thus, *C*'s share of § 704(c) gain is $300*x*, and *D*'s share of § 704(c) gain is $200*x*.

The entry of *CD* as a new partner of *AB* causes partnership *AB* to revalue its property. When *CD* enters as a new partner of *AB*, Asset 1 has a basis of $200*x* and a fair market value of $900*x*. Of the $700*x* of built-in gain in Asset 1, $100*x* is pre-existing § 704(c) gain attributable to the contribution of Asset 1 by *A*. The revaluation results in the creation of $600*x* of reverse § 704(c) gain in Asset 1. This layer of reverse § 704(c) gain is shared equally by *A* and *B* ($300*x* each). Thus, *A*'s share of § 704(c) gain is $400*x*, and *B*'s share of § 704(c) gain is $300*x*. The calculation of § 704(c) gain in each asset is summarized in the following table.

	Adjusted Tax Basis	Value on Date of Contribution	§ 704(c) Gain on Date of Contribution	Value on Date of Merger	§ 704(c) Gain Created by Merger	Total § 704(c) Gain After Merger
Asset 1	$200*x*	$300*x*	$100*x*	$900*x*	$600*x*	$700*x*
Asset 2	$100*x*	$200*x*	$100*x*	$600*x*	$400*x*	$500*x*
Cash	$500*x*	$500*x*	$0*x*	$500*x*	$0*x*	$0*x*
Total	$800*x*	$1,000*x*	$200*x*	$2,000*x*	$1,000*x*	$1,200*x*

The partners' share of § 704(c) gain in each of *AB*'s assets after the merger is summarized in the following table.

	A's Share of § 704(c) Gain	*B*'s Share of § 704(c) Gain	*C*'s Share of § 704(c) Gain	*D*'s Share of § 704(c) Gain	Total § 704(c) Gain
Asset 1	$400*x*	$300*x*	$0*x*	$0*x*	$700*x*
Asset 2	$0*x*	$0*x*	$300*x*	$200*x*	$500*x*
Cash	$0*x*	$0*x*	$0*x*	$0*x*	$0*x*
Total	$400*x*	$300*x*	$300*x*	$200*x*	$1,200*x*

In *Situation 1*, the distribution of Asset 2 to *A* occurs more than seven years after the contribution of Asset 2 to *CD*. Therefore, § 704(c)(1)(B) does not apply to the $100*x* of pre-existing § 704(c) gain attributable to that contribution. However, the distribution of Asset 2 to *A* occurs within seven years of the contribution of Asset 2 by *CD* to *AB*. The contribution of Asset 2 by *CD* to *AB* creates § 704(c) gain of $400*x*. As the transferees of *CD*'s partnership interest in *AB*, *C* and *D* each succeed to one-half of the $400*x* of § 704(c) gain created by the merger. Section 1.704–3(a)(7). Section 704(c)(1)(B) applies to that § 704(c) gain, causing *C* and *D* each to recognize $200*x* of gain.

The distribution of Asset 2 to *A* occurs more than seven years after the contribution of Asset 1 to *AB*, and *A* made no subsequent contributions to *AB*. Therefore, *A*'s net precontribution gain for purposes of § 737(b) at the time of the distribution is zero. *AB*'s $600*x* of reverse § 704(c) gain in Asset 1, resulting from a revaluation of *AB*'s partnership property at the time of the merger, is not net precontribution gain. Accordingly, *A* will not recognize gain under § 737 as a result of the distribution of Asset 2.

In *Situation 2*, § 704(c)(1)(B) does not apply to the distribution by the continuing partnership of Asset 1 to *C* on January 1, 2012. The distribution of Asset 1 to *C* occurs more than seven years after the contribution of Asset 1 to *AB*, and § 704(c)(1)(B) does not apply to the reverse § 704(c) gain in Asset 1 resulting from a revaluation of *AB*'s partnership property at the time of the merger. Accordingly, neither *A* nor *B* will recognize gain under § 704(c)(1)(B) as a result of the distribution of Asset 1 to *C*.

The distribution of Asset 1 to *C* occurs more than seven years after the contribution of Asset 2 to *CD*. Therefore, *C*'s net precontribution gain at the time of the distribution does not include *C*'s $100*x* of pre-existing § 704(c) gain attributable to that contribution. However, the distribution of Asset 1 to *C* occurs within seven years of the contribution of Asset 2 by *CD* to *AB*. The contribution of Asset 2 by *CD* to *AB* creates net precontribution gain of $400*x*. As the transferees of *CD*'s partnership interest in *AB*, *C* and *D* each succeed to one-half of *CD*'s $400*x* of net precontribution gain in Asset 2. Section 1.737–1(c)(2)(iii). Thus, *C*'s portion of *CD*'s net precontribution gain created by the merger is $200*x*. The excess of Asset 1's fair market value, $275*x*, over the adjusted tax basis of *C*'s interest in *AB* immediately before the distribution, $100*x*, is $175*x*, which is less than *C*'s $200*x* of net precontribution gain. Therefore, *C* will recognize $175*x* of capital gain under § 737 as a result of the distribution. Because no property is distributed to *D* and none of the property treated as contributed by *D* is distributed to another partner, *D* recognizes no gain under § 737 or § 704(c)(1)(B).

HOLDINGS

1) Section 704(c)(1)(B) applies to newly created § 704(c) gain or loss in property contributed by the transferor partnership to the continuing partnership in an assets-over partnership merger, but does not apply to newly created reverse § 704(c) gain or loss resulting from a revaluation of property in the continuing partnership.

2) For purposes of § 737(b), net precontribution gain includes newly created § 704(c) gain or loss in property contributed by the transferor partnership to the continuing partnership in an assets-over partnership merger, but does not include newly created reverse § 704(c) gain or loss resulting from a revaluation of property in the continuing partnership.

DRAFTING INFORMATION

The principal author of this revenue ruling is Heather Faught of the Associate Chief Counsel (Passthroughs and Special Industries). For further information regarding this revenue ruling, contact Heather Faught at (202) 622–3060 (not a toll-free call).

Section 708.—Continuation of Partnership

A revenue ruling describes the application of section 704(c)(1)(B) and section 737 to assets-over partnership mergers. See Rev. Rul. 2004-43, page 842.

Section 737.—Recognition of Precontribution Gain in Case of Certain Distributions to Contributing Partner

A revenue ruling describes the application of section 704(c)(1)(B) and section 737 to assets-over partnership mergers. See Rev. Rul. 2004-43, page 842.

Section 6331.—Levy and Distraint

26 CFR 301.6331–1: Levy and distraint.

Limited Liability Company. This ruling discusses the issue of whether the IRS can collect employment taxes owed by a multi-member domestic Limited Liability Company (LLC) from the members.

Rev. Rul. 2004–41

ISSUE

When a multi-member domestic Limited Liability Company ("LLC") incurs federal employment tax liabilities, can the IRS collect the employment taxes owed by the LLC from the members, including by levy on the members' property and rights to property?

BACKGROUND

A multi-member domestic LLC is an eligible entity that may be, and by default is, classified as a partnership for federal tax purposes under Section 301.7701–1 *et. seq*. of the Procedure and Administration Regulations. For states that permit LLCs, state law generally provides that the members of an LLC are not liable for the debts of the LLC in their capacity as members of the LLC, subject to certain limited exceptions. Questions have arisen as to whether classification of an LLC as a partnership for federal tax law purposes permits the IRS to collect federal employment tax liabilities of the LLC from the LLC members as if they were general partners of a partnership.

FACTS

X, Y, and Z are the members of a domestic LLC ("XYZ") formed in state A. XYZ is an employer for federal tax purposes and has incurred a federal employment tax liability that remains unpaid. X, Y, and Z have assets that would be sufficient to satisfy all or a portion of the employment tax liability. Under the laws of state A, the members of an LLC generally are not liable for the debts of the LLC.

LAW AND ANALYSIS

State law generally provides that the general partners of a partnership are jointly and severally liable for the partnership's obligations. With respect to federal tax liabilities incurred by a partnership, such as federal employment taxes, the Service may seek to collect those federal tax liabilities from the general partners of the partnership. *See United States v. Papandon*, 331 F.3d 52, 55–56 (2d Cir. 2003) (state law determines a partner's liability for partnership obligations, including federal tax liabilities); *Remington v. United States*, 210 F.3d 281, 283 (5th Cir. 2000) ("Accordingly, under Texas law, the IRS is entitled to collect the trust fund tax liability, indisputably a partnership debt, from any one of the general partners ...."); *see also United States v. Galletti*, 72 U.S.L.W. 4252 (U.S. March 23, 2004). In contrast, an LLC member generally is not liable under state law for the LLC's debts. *E.g.*, N.Y. Ltd. Liab. Co. Law § 609(a) (McKinney Supp. 2003). Thus, the Service, as a general matter, cannot collect the LLC's employment tax liability from the LLC members. Therefore, because the members, X, Y, and Z, are not liable under the law of state A for the debts of XYZ, the IRS may not levy on the property and rights to property of the members, in their capacity as members, to collect the employment taxes owed by XYZ.

There, however, may be special circumstances such as a fraudulent transfer of assets from the LLC to its members which might expose the members to liability. *See generally Scott v. Commissioner*, 236 F.3d 1239 (10th Cir. 2001) (imposing transferee liability under I.R.C. § 6901 on person receiving fraudulent transfer of assets from taxpayer-corporation); *Stanko v. Commissioner*, 209 F.3d 1082 (8th Cir. 2000) (same). Also, depending on the facts of a particular case, a member may be liable for the trust fund recovery penalty under I.R.C. § 6672.

HOLDING

If under state law the members of the LLC are not liable for the debts of the LLC, then absent fraudulent transfers or other special circumstances, the IRS may not collect the LLC's employment tax liability from the members, including by levy on the property and rights to property of the members.

DRAFTING INFORMATION

The principal author of this revenue ruling is Walter Ryan of the Office of the Associate Chief Counsel, Procedure and Administration (Collection, Bankruptcy & Summonses Division). For further information regarding this revenue ruling, contact Branch 1 of the Collection, Bankruptcy & Summonses Division at (202) 622–3610 (not a toll-free call).

Part III. Administrative, Procedural, and Miscellaneous

Weighted Average Interest Rate Update

Notice 2004–32

Sections 412(b)(5)(B) and 412(l)(7)(C)(i) of the Internal Revenue Code provide that the interest rates used to calculate current liability and to determine the required contribution under § 412(l) must be within a permissible range around the weighted average of the rates of interest on 30-year Treasury securities during the four-year period ending on the last day before the beginning of the plan year.

Notice 88–73, 1988–2 C.B. 383, provides guidelines for determining the weighted average interest rate and the resulting permissible range of interest rates used to calculate current liability.

Section 417(e)(3)(A)(ii)(II) of the Code defines the applicable interest rate, which must be used for purposes of determining the minimum present value of a participant's benefit under § 417(e)(1) and (2), as the annual rate of interest on 30-year Treasury securities for the month before the date of distribution or such other time as the Secretary may by regulations prescribe. Section 1.417(e)–1(d)(3) of the Income Tax Regulations provides that the applicable interest rate for a month is the annual interest rate on 30-year Treasury securities as specified by the Commissioner for that month in revenue rulings, notices or other guidance published in the Internal Revenue Bulletin.

The rate of interest on 30-year Treasury Securities for March 2004 is 4.74 percent. Pursuant to Notice 2002–26, 2002–1 C.B. 743, the Service has determined this rate as the monthly average of the daily determination of yield on the 30-year Treasury bond maturing in February 2031.

The following rates were determined for the plan years beginning in the month shown below.

Month	Year	Weighted Average	90% to 105% Permissible Range	90% to 110% Permissible Range
April	2004	5.18	4.67 to 5.44	4.67 to 5.70

Drafting Information

The principal authors of this notice are Paul Stern and Tony Montanaro of the Employee Plans, Tax Exempt and Government Entities Division. For further information regarding this notice, please contact the Employee Plans' taxpayer assistance telephone service at 1–877–829–5500 (a toll-free number), between the hours of 8:00 a.m. and 6:30 p.m. Eastern time, Monday through Friday. Mr. Stern may be reached at 1–202–283–9703. Mr. Montanaro may be reached at 1–202–283–9714. The telephone numbers in the preceding sentences are not toll-free.

Nonconventional Source Fuel Credit, Section 29 Inflation Adjustment Factor, and Section 29 Reference Price

Notice 2004–33

This notice publishes the nonconventional source fuel credit, inflation adjustment factor, and reference price under § 29 of the Internal Revenue Code for calendar year 2003. These are used to determine the credit allowable on fuel produced from a nonconventional source under § 29. The calendar year 2003 inflation-adjusted credit applies to the sales of barrel-of-oil equivalent of qualified fuels sold by a taxpayer to an unrelated person during the 2003 calendar year, the domestic production of which is attributable to the taxpayer.

BACKGROUND

Section 29(a) provides for a credit for producing fuel from a nonconventional source, measured in barrel-of-oil equivalent of qualified fuels, the production of which is attributable to the taxpayer and sold by the taxpayer to an unrelated person during the tax year. The credit is equal to the product of $3.00 and the appropriate inflation adjustment factor.

Section 29(b)(1) and (2) provides for a phaseout of the credit. The credit allowable under § 29(a) must be reduced by an amount which bears the same ratio to the amount of the credit (determined without regard to § 29(b)(1)) as the amount by which the reference price for the calendar year in which the sale occurs exceeds $23.50 bears to $6.00. The $3.00 in § 29(a) and the $23.50 and $6.00 must each be adjusted by multiplying these amounts by the 2003 inflation adjustment factor. In the case of gas from a tight formation, the $3.00 amount in § 29(a) must not be adjusted.

Section 29(c)(1) defines the term "qualified fuels" to include oil produced from shale and tar sands; gas produced from geopressurized brine, Devonian shale, coal seams, or a tight formation, or biomass; and liquid, gaseous, or solid synthetic fuels produced from coal (including lignite), including such fuels when used as feedstocks.

Section 29(d)(1) provides that the credit is to be applied only for sale of qualified fuels the production of which is within the United States (within the meaning of § 638(1)) or a possession of the United States (within the meaning of § 638(2)).

Section 29(d)(2)(A) requires that the Secretary, not later than April 1 of each calendar year, determine and publish in the Federal Register the inflation adjustment factor and the reference price for the preceding calendar year.

Section 29(d)(2)(B) defines "inflation adjustment factor" for a calendar year as the fraction the numerator of which is the GNP implicit price deflator for the calendar year and the denominator of which is the GNP implicit price deflator for calendar year 1979. The term "GNP implicit price deflator" means the first revision of the implicit price deflator for the gross national product as computed and published by the Department of Commerce.

Section 29(d)(2)(C) defines "reference price" to mean with respect to a calendar year the Secretary's estimate of the annual average wellhead price per barrel for all domestic crude oil the price of which is not subject to regulation by the United States.

Section 29(d)(3) provides that in the case of a property or facility in which more than one person has an interest, except to the extent provided in regulations prescribed by the Secretary, production from the property or facility (as the case may be) must be allocated among the persons in proportion to their respective interests in the gross sales from the property or facility.

Section 29(d)(5) provides that the term "barrel-of-oil equivalent" with respect to any fuel generally means that amount of the fuel which has a Btu content of 5.8 million.

INFLATION ADJUSTMENT FACTOR AND REFERENCE PRICE

The inflation adjustment factor for calendar year 2003 is 2.1336. The reference price for calendar year 2003 is $27.56. These amounts will be published in the Federal Register on April 7, 2004.

PHASEOUT CALCULATION

Because the calendar year 2003 reference price does not exceed $23.50 multiplied by the inflation adjustment factor, the phaseout of the credit provided for in § 29(b)(1) does not occur for any qualified fuel sold in calendar year 2003.

CREDIT AMOUNT

The nonconventional source fuel credit under § 29(a) is $6.40 per barrel-of-oil equivalent of qualified fuels ($3.00 x 2.1336). This amount will be published in the Federal Register on April 7, 2004.

DRAFTING INFORMATION CONTACT

The principal author of this notice is Jaime Park of the Office of Associate Chief Counsel (Passthroughs and Special Industries). For further information regarding this notice, contact Ms. Park at (202) 622–3120 (not a toll-free call).

Weighted Average Interest Rate Modification

Notice 2004–34

This notice provides guidance as to the determination of the weighted average interest rate and the resulting permissible range of interest rates used to calculate current liability for the purpose of the additional funding requirements under § 412(l) of the Internal Revenue Code and the minimum full funding limitation of § 412(c)(7)(E) of the Code, the corresponding requirements and limitation under §§ 302(c)(7)(E) and 302(d) of the Employee Retirement Income Security Act of 1974 (ERISA). In addition, this notice sets forth the interest rate under § 4006(a)(3)(E)(iii)(V) of ERISA, which is needed in the determination of unfunded vested benefits for purposes of determining premiums payable to the Pension Benefit Guaranty Corporation (PBGC). This notice implements changes to the rules regarding those interest rates that were enacted in section 101 of the Pension Funding Equity Act of 2004, P.L. 108-218.

BACKGROUND AND PRIOR LAW

Under § 412(b)(5)(A) of the Code, the funding standard account (and items therein) must be charged or credited with interest at the appropriate rate consistent with the rate or rates of interest used under the plan to determine costs.

Section 412(b)(5)(B) provides special rules for the interest rate that is used to determine a plan's current liability for purposes of § 412(l) and for purposes of the minimum full funding limitation under § 412(c)(7)(E). In general, that interest rate must fall within a specified corridor based on the weighted average of the rates of interest on 30-year Treasury constant maturities during the 4-year period ending on the last day before the beginning of the plan year, as published monthly in the Internal Revenue Bulletin. See Notice 88–73, 1988–2 C.B. 383. Under Notice 2002–26, 2002–1 C.B. 743, the interest rate used in determining the weighted average interest rate currently is based on the yield on the 30-year Treasury bonds maturing in February 2031.

In general, § 412(l)(7)(C)(i)(II) specifies that, for years after 1998, the interest rate used to determine the deficit reduction contribution must be not more than 105% of the weighted average interest rate. A special rule for 2002 and 2003 was enacted in the Job Creation and Worker Assistance Act of 2002 (Pub. L. No. 107–147, 116 Stat. 21) to provide for the deficit reduction contribution under § 412(l) to be calculated using a corridor capped at 120% of the weighted average interest rate rather than 105% of the weighted average interest rate.

PENSION FUNDING EQUITY ACT OF 2004

The Pension Funding Equity Act was enacted on April 10, 2004. Section 412(b)(5)(B)(ii)(II) of the Code, which was added by section 101 of the Pension Funding Equity Act, provides that, for plan years beginning in 2004 and 2005, the interest rate used to determine current liability must not be above and must not be more than 10 percent below the weighted average of the rates of interest on amounts invested conservatively in long-term investment-grade corporate bonds during the 4-year period ending on the last day before the beginning of the plan year. Under § 412(b)(5)(B)(ii)(II), the Treasury Department must prescribe a method for periodically determining the rates. These rates must be based on the use of two or more indices that are in the top three quality levels available. The Treasury Department must make the permissible range, and the indices and methodology used to determine the average rate, publicly available.

Section 412(l)(7)(C)(i)(IV), which was also added by the Pension Funding Equity Act, provides that, for plan years beginning in 2004 and 2005, the interest rate used to determine current liability for purposes of determining the deficit reduction contribution must be the same as the rate used under § 412(b)(5).

INTERIM GUIDANCE

This notice provides interim guidance on the determination of the weighted average interest rate under § 412(b)(5)(B)(ii)(II) of the Code and § 302(b)(5)(B)(ii)(II) of ERISA. In addition, this notice provides interim guidance as to the interest rate under § 4006(a)(3)(E)(iii)(V) of ERISA, which is needed in the determination of unfunded vested benefits for purposes of determining premiums payable to the PBGC. Taxpayers can rely on this interim guidance until the publication of further guidance. Any further guidance will not apply to plan years beginning before the publication of further guidance. The determination of the weighted average involves: a specification of the indices; the determination of the rate of interest on amounts invested conservatively in investment-grade corporate bonds (the "composite corporate bond rate"); and the determination of a 4-year weighted moving average of the composite corporate bond rate (the "corporate weighted average interest rate").

Specification of Indices

The following indices are designated for use in determining composite corporate bond rates beginning with January 1997 and ending August 2000.

1. Citigroup High Grade Corporate Index (AAA/AA, 10+ Years)
2. Merrill Lynch US Corporates AA-AAA Rated 10+ Years
3. Merrill Lynch US Corporates A Rated 15+ Years

The following indices are designated for use in determining the composite corporate bond rates beginning with September 2000 and continuing until further guidance is issued:

1. Citigroup High Grade Credit Index[1] (AAA/AA, 10+ Years)
2. Merrill Lynch US Corporates AA-AAA Rated 10+ Years
3. Lehman Brothers US A Long Credit

All of these indices reflect interest rates on long-term corporate bonds that are in the top three quality levels.

Composite Corporate Bond Rate

The composite corporate bond rate for a month is determined using the indices designated in this notice. For each index designated for inclusion in determining the composite corporate bond rate for a month, a monthly rate is determined based on the average of the daily values for the yield to maturity for the bonds that are included in the index, as determined by the financial service firm maintaining the index. The composite corporate bond rate for the month is determined by computing the average of these monthly rates. Table 1 lists the composite corporate bond rates for the months January 2000 through March 2004.

Corporate Weighted Average Interest Rate and Section 412(b)(5)(B)(ii)(II) Permissible Range

The corporate weighted average interest rate under § 412(b)(5)(B)(ii)(II) for a month is determined by applying the weighting methodology set forth in Notice 88–73 to the composite corporate bond rates for the 48 months preceding that month. Thus, in determining the 48-month weighted average of the composite corporate bond rate, the composite corporate bond rate for each of the months within the immediately preceding 12 months receives a weight of 4, those that are 13–24 months in the past receive a weight of 3, those that are 25–36 months in the past receive a weight of 2 and those that are 37 or more months before the determination receive a weight of 1. The § 412(b)(5)(B)(ii)(II) permissible range is 90% to 100% of the corporate weighted average interest rate. Table 2 lists the corporate weighted average interest rates and the permissible range for plan years beginning in the months January 2001 through April 2004.

Lookback Rules

Under section 101(d)(2) of the Pension Funding Equity Act of 2004, for purposes of applying section 412(l)(9)(B)(ii) and section 412(m)(1) of the Code (and section 302(d)(9)(B)(ii) and section 302(m)(1) of ERISA) to plan years beginning after December 31, 2003, the amendments made by section 101 of the Pension Funding Equity Act of 2004 may be applied as if such amendments have been in effect for all prior years. Thus, for example, for the plan year beginning January 1, 2004, in determining whether the plan's funded current liability percentage was at least 90 percent for two consecutive years of the previous three years under section 412(l)(9)(B)(ii), the funded current liability percentage may be recalculated using the corporate weighted average interest rate applicable for plan years beginning in January 2001, 2002, and 2003. Similarly, in determining whether a plan is subject to quarterly contributions under section 412(m)(1) for the plan year beginning January 1, 2004, the funded current liability percentage for 2003 may be recalculated using the corporate weighted average interest rate.

However, for purposes of computing the required installment under section 412(m)(4) for plan years beginning in 2004, the required amount for plan years beginning in 2003 may not be recalculated using the corporate weighted average interest rate. Instead, the required amount for 2003 will continue to be determined based upon an interest rate which is within the range of 90 to 120 percent of the weighted average of the rate of interest on 30-year Treasury securities.

Monthly Publication of Rates

The IRS will publish by notice each month the composite corporate bond rate, the corporate weighted average interest rate, and the § 412(b)(5)(B)(ii)(II) permissible range. The same notice will specify a change in the group of indices that are taken into account in determining the component corporate bond rate, and the manner they are taken into account, if any such change takes place.

Request for Comments

Comments are requested regarding the determination of the composite corporate bond rate set forth in this notice. Specifically, comments are requested regarding the appropriateness of the indices that are used in the determination of this rate, whether other indices would be more appropriate for this purpose, and the appropriateness of the weight given to each index.

Comments should be submitted by August 2, 2004, to CC:PA:LPD:RU (Notice 2004–34), Room 5203, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, D.C. 20044. Comments may be hand delivered between the hours of 8 a.m. and 5 p.m., Monday through Friday to CC:PA:LPD:RU (Notice 2004–34), Courier's Desk, Internal Revenue Service, 1111 Constitution

[1] The name of the Citigroup High Grade Corporate Index was changed to the Citigroup High Grade Credit Index in April 2001, when a new Citigroup High Grade Corporate Index was created.

Ave., NW, Washington D.C. Alternatively, comments may be submitted electronically via e-mail to the following address: *Notice.Comments@irscounsel.treas.gov*, with "Notice 2004–34" in the subject line. All comments will be available for public inspection.

Drafting Information

The principal author of this notice is Tony Montanaro of the Employee Plans, Tax Exempt and Government Entities Division. For further information regarding this notice, please contact the Employee Plans' taxpayer assistance telephone service at 1–877–829–5500 (a toll-free number), between the hours of 8:00 a.m. and 6:30 p.m. Eastern time, Monday through Friday. Mr. Montanaro may be reached at 1–202–283–9714 (not a toll-free number).

Table 1

Composite Corporate Bond Rates

Month	Composite Rates for: 2000	2001	2002	2003	2004
January	7.94	7.34	6.92	6.07	5.68
February	7.84	7.21	6.86	5.90	5.63
March	7.87	7.08	7.10	5.89	5.44
April	7.84	7.28	7.03	5.91	
May	8.27	7.28	6.99	5.42	
June	8.05	7.17	6.76	5.24	
July	7.93	7.13	6.74	5.77	
August	7.82	6.95	6.57	6.19	
September	7.87	7.05	6.27	5.95	
October	7.85	6.91	6.47	5.91	
November	7.82	6.82	6.30	5.86	
December	7.51	7.07	6.18	5.81	

Table 2

Corporate Bond Weighted Average Interest Rates

For Plan Years Beginning in: Year	Month	Corporate Bond Weighted Average	Permissible Range 90%	100%
2001	January	7.44	6.69	7.44
2001	February	7.44	6.69	7.44
2001	March	7.44	6.69	7.44
2001	April	7.43	6.68	7.43
2001	May	7.42	6.68	7.42
2001	June	7.42	6.68	7.42
2001	July	7.41	6.67	7.41
2001	August	7.40	6.66	7.40
2001	September	7.39	6.65	7.39
2001	October	7.37	6.64	7.37
2001	November	7.36	6.62	7.36
2001	December	7.34	6.61	7.34
2002	January	7.34	6.60	7.34
2002	February	7.33	6.60	7.33
2002	March	7.32	6.59	7.32
2002	April	7.32	6.58	7.32
2002	May	7.31	6.58	7.31
2002	June	7.30	6.57	7.30

Table 2

Corporate Bond Weighted Average Interest Rates—Continued

For Plan Years Beginning in: Year	Month	Corporate Bond Weighted Average	Permissible Range 90%	100%
2002	July	7.28	6.55	7.28
2002	August	7.26	6.53	7.26
2002	September	7.23	6.51	7.23
2002	October	7.20	6.48	7.20
2002	November	7.17	6.46	7.17
2002	December	7.14	6.43	7.14
2003	January	7.11	6.40	7.11
2003	February	7.07	6.36	7.07
2003	March	7.03	6.33	7.03
2003	April	6.98	6.29	6.98
2003	May	6.94	6.25	6.94
2003	June	6.87	6.19	6.87
2003	July	6.80	6.12	6.80
2003	August	6.75	6.08	6.75
2003	September	6.72	6.05	6.72
2003	October	6.68	6.01	6.68
2003	November	6.63	5.97	6.63
2003	December	6.59	5.93	6.59
2004	January	6.55	5.89	6.55
2004	February	6.50	5.85	6.50
2004	March	6.45	5.81	6.45
2004	April	6.40	5.76	6.40

Part IV. Items of General Interest

Notice of Proposed Rulemaking and Notice of Public Hearing

Modification of Check the Box

REG–106681–02

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed regulations that clarify that qualified REIT subsidiaries, qualified subchapter S subsidiaries, and single owner eligible entities that are disregarded as entities separate from their owners are treated as separate entities for purposes of any Federal tax liability for which the entity is liable. This document also provides notice of a public hearing.

DATES: Written or electronic comments must be received by June 30, 2004. Outlines of topics to be discussed at the public hearing scheduled for July 22, 2004, at 10:00 a.m., must be received by July 1, 2004.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–106681–02), room 5203, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to: CC:PA:LPD:PR (REG–106681–02), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC. Alternatively, taxpayers may submit electronic comments directly to the IRS internet site at *http://www.irs.gov/regs*. The public hearing will be held in the Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, James M. Gergurich, (202) 622–3070; concerning submissions and the hearing, Treena Garrett, (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

Under the Internal Revenue Code and its regulations, three types of entities may be disregarded as entities separate from their owners: qualified REIT subsidiaries (within the meaning of section 856(i)(2)), qualified subchapter S subsidiaries (within the meaning of section 1361(b)(3)(B)), and single owner eligible entities (within the meaning of §301.7701–3(a)) (each, a disregarded entity).

Section 856(i)(1) provides that a qualified REIT subsidiary (QRS) shall not be treated as a separate corporation. Under section 856(i)(2), a QRS is defined as any corporation 100 percent of the stock of which is held by a real estate investment trust (REIT), unless the REIT and the corporation jointly elect under section 856(l) that the corporation shall be treated as a taxable REIT subsidiary. Such election may be revoked at any time with the consent of both the corporation and the REIT.

Section 1361(b)(3)(A) similarly provides that a qualified subchapter S corporation (QSub) shall not be treated as a separate corporation. Under section 1361(b)(3)(B), a QSub is defined as any eligible domestic corporation that is wholly owned by an S corporation and that the S corporation elects to treat as a QSub.

In addition, under §301.7701–3(b)(1) and (2), an eligible entity with a single owner may be disregarded as an entity separate from its owner. Section 301.7701–3(b)(1)(ii) provides that a domestic eligible entity with a single owner is disregarded unless the entity makes an election to be classified as an association (and thus a corporation under §301.7701–2(b)(2)). Section 301.7701–3(b)(2)(C) provides that a foreign eligible entity with a single owner that does not have limited liability is disregarded unless the entity elects to be classified as a corporation. Under §301.7701–3(c), a single owner eligible entity that has elected to be treated as a corporation and a foreign eligible entity with a single owner that has limited liability (that would otherwise be treated as a corporation under §301.7701–3(b)(2)(i)(B)) may elect, subject to certain limitations, to be disregarded.

Explanation of Provisions

As described above, a taxable entity may become disregarded in a variety of circumstances. For example, if a REIT acquires all of the stock of a corporation, the corporation will become a QRS that is not treated as a separate corporation. Likewise, an S corporation may elect to treat a wholly owned eligible domestic corporation as a QSub that is not treated as a separate corporation. It is also possible for a disregarded entity to be the survivor of a merger of a taxable entity (for example, a corporation) and the disregarded entity. Although a disregarded entity generally is not liable for Federal tax liabilities of its owner with respect to taxable periods during which it is disregarded, the disregarded entity may be liable for Federal taxes with respect to taxable periods during which it was not disregarded or because it is the successor or transferee of a taxable entity.

The proposed regulations do not address the question of whether the disregarded entity is, in fact, either liable for Federal taxes or entitled to a refund or credit of Federal tax. Rather, the regulations clarify that if a disregarded entity is liable for Federal taxes, the disregarded entity will be treated as an entity separate from its owner for purposes of those liabilities, such that assessment may be made against the disregarded entity, the assets of the disregarded entity may be subject to lien and levy, and the disregarded entity may consent to extend the period of limitations on assessment. In addition, the regulations clarify that if a disregarded entity is entitled to a refund or credit of Federal tax, the disregarded entity will be treated as an entity separate from its owner for purposes of that refund or credit.

Proposed Effective Date

These regulations are proposed to apply on or after April 1, 2004.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive

Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations and, because the regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Therefore, a Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Code, these regulations will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Public Hearing

Before this proposed regulation is adopted as a final regulation, consideration will be given to any written (a signed original and (8) copies) or electronic comments that are submitted timely to the IRS. The IRS and Treasury Department request comments on the clarity of the proposed rules and how they can be made easier to understand. All comments will be available for public inspection and copying.

A public hearing has been scheduled for July 22, 2004, at 10:00 a.m., in the Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW, Washington, DC. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. For information about having your name on the building access list to attend the hearing, see the FOR FURTHER INFORMATION CONTACT portion of this preamble. The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments must submit written or electronic comments by June 30, 2004, and an outline of the topics to be discussed and the time to be devoted to each topic (a signed original and eight (8) copies) by July 1, 2004. A period of 10 minutes will be allotted to each person for making comments. An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal author of these regulations is James M. Gergurich of the Office of the Associate Chief Counsel (Passthroughs & Special Industries), IRS. However, other personnel from the IRS and Treasury participated in their development.

* * * * *

Proposed Amendments to the Regulations

Accordingly, 26 CFR parts 1 and 301 are proposed to be amended as follows:

PART 1—INCOME TAX

Paragraph 1. The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 1.856–9 is added to read as follows:

§1.856–9 Treatment of certain qualified REIT subsidiaries.

(a) *In general*. A qualified REIT subsidiary, even though it is otherwise not treated as a corporation separate from the REIT, is treated as a separate corporation for purposes of:

(1) Federal tax liabilities of the qualified REIT subsidiary with respect to any taxable period for which the qualified REIT subsidiary was treated as a separate corporation.

(2) Federal tax liabilities of any other entity for which the qualified REIT subsidiary is liable.

(3) Refunds or credits of Federal tax.

(b) *Examples*. The following examples illustrate the application of paragraph (a) of this section:

Example 1. X, a calendar year taxpayer, is a domestic corporation 100 percent of the stock of which is acquired by Y, a real estate investment trust, in 2002. X was not a member of a consolidated group at any time during its taxable year ending in December 2001. Consequently, X is treated as a qualified REIT subsidiary under the provisions of section 856(i). In 2004, the Internal Revenue Service ("IRS") seeks to extend the period of limitations on assessment for X's 2001 taxable year. Because X was treated as a separate corporation for its 2001 taxable year, X is the proper party to sign the consent to extend the period of limitations.

Example 2. The facts are the same as in *Example 1*, except that upon Y's acquisition of X, Y and X jointly elect under section 856(l) to treat X as a taxable REIT subsidiary of Y. In 2003, Y and X jointly revoke that election. Consequently, X is treated as a qualified REIT subsidiary under the provisions of section 856(i). In 2004, the IRS determines that X miscalculated and underreported its income tax liability for 2001. Because X was treated as a separate corporation for its 2001 taxable year, the deficiency may be assessed against X and, in the event that X fails to pay the liability after notice and demand, a general tax lien will arise against all of X's property and rights to property.

Example 3. X is a qualified REIT subsidiary of Y under the provisions of section 856(i). In 2001, Z, a domestic corporation that reports its taxes on a calendar year basis, merges into X in a state law merger. Z was not a member of a consolidated group at any time during its taxable year ending in December 2000. Under the applicable state law, X is the successor to Z and is liable for all of Z's debts. In 2004, the IRS seeks to extend the period of limitations on assessment for Z's 2000 taxable year. Because X is the successor to Z and is liable for Z's 2000 taxes that remain unpaid, X is the proper party to sign the consent to extend the period of limitations.

(c) *Effective date*. This section applies on or after April 1, 2004.

Par. 3. Section 1.1361–4 is amended as follows:

1. In paragraph (a)(1), the first sentence is amended by adding the language "and (a)(6)" immediately following the language "Except as otherwise provided in paragraph (a)(3)".

2. Paragraph (a)(6) is added.

The addition reads as follows:

§1.1361–4 Effect of Qsub election.

(a) * * * (1) * * *

(6) *Treatment of certain QSubs*—(i) *In general*. A QSub, even though it is generally not treated as a corporation separate from the S corporation, is treated as a separate corporation for purposes of:

(A) Federal tax liabilities of the QSub with respect to any taxable period for which the QSub was treated as a separate corporation.

(B) Federal tax liabilities of any other entity for which the QSub is liable.

(C) Refunds or credits of Federal tax.

(ii) *Examples*. The following examples illustrate the application of paragraph (a)(6)(i) of this section:

Example 1. X has owned all of the outstanding stock of Y, a domestic corporation that reports its taxes on a calendar year basis, since 2001. X and Y do not report their taxes on a consolidated basis. For 2003, X makes a timely S election and simultaneously makes a QSub election for Y. In 2004, the Internal Revenue Service ("IRS") seeks to extend the period of limitations on assessment for Y's 2001 taxable year. Because Y was treated as a separate corporation for its 2001 taxable year, Y is the proper party to sign the consent to extend the period of limitations.

Example 2. The facts are the same as in *Example 1*, except that in 2004, the IRS determines that Y miscalculated and underreported its income tax liability for 2001. Because Y was treated as a separate corporation for its 2001 taxable year, the deficiency for Y's 2001 taxable year may be assessed against Y and, in the event that Y fails to pay the liability after notice and demand, a general tax lien will arise against all of Y's property and rights to property.

Example 3. X is a QSub of Y. In 2001, Z, a domestic corporation that reports its taxes on a calendar year basis, merges into X in a state law merger. Z was not a member of a consolidated group at any time during its taxable year ending in December 2000. Under the applicable state law, X is the successor to Z and is liable for all of Z's debts. In 2003, the IRS seeks to extend the period of limitations on assessment for Z's 2000 taxable year. Because X is the successor to Z and is liable for Z's 2000 taxes that remain unpaid, X is the proper party to execute the consent to extend the period of limitations on assessment.

(iii) *Effective date.* This paragraph (a)(6) applies on or after April 1, 2004.

PART 301—PROCEDURE AND ADMINISTRATION

Par. 4. The authority citation for part 301 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 5. Section 301.7701–2 is amended as follows:

1. Paragraph (c)(2)(iii) is added.

2. Paragraph (e) is revised.

The addition and revision read as follows:

§301.7701–2 Business entities; definitions.

* * * * *

(c) * * *

(2) * * * (i) * * *

(iii) *Tax liabilities of certain disregarded entities*—(A) *In general.* An entity that is otherwise disregarded as separate from its owner is treated as an entity separate from its owner for purposes of:

(*1*) Federal tax liabilities of the entity with respect to any taxable period for which the entity was not disregarded.

(*2*) Federal tax liabilities of any other entity for which the entity is liable.

(*3*) Refunds or credits of Federal tax.

(B) *Examples.* The following examples illustrate the application of paragraph (c)(2)(iii)(A) of this section:

Example 1. In 2001, X, a domestic corporation that reports its taxes on a calendar year basis, merges into Z, a domestic LLC wholly owned by Y that is disregarded as an entity separate from Y, in a state law merger. X was not a member of a consolidated group at any time during its taxable year ending in December 2000. Under the applicable state law, Z is the successor to X and is liable for all of X's debts. In 2004, the Internal Revenue Service ("IRS") seeks to extend the period of limitations on assessment for X's 2000 taxable year. Because Z is the successor to X and is liable for X's 2000 taxes that remain unpaid, Z is the proper party to sign the consent to extend the period of limitations.

Example 2. The facts are the same as in *Example 1*, except that in 2002, the IRS determines that X miscalculated and underreported its income tax liability for 2000. Because Z is the successor to X and is liable for X's 2000 taxes that remain unpaid, the deficiency may be assessed against Z and, in the event that Z fails to pay the liability after notice and demand, a general tax lien will arise against all of Z's property and rights to property.

* * * * *

(e) *Effective date.* (1) Except as otherwise provided in this paragraph (e), the rules of this section apply as of January 1, 1997, except that paragraph (b)(6) of this section applies on or after January 14, 2002, to a business entity wholly owned by a foreign government regardless of any prior entity classification, and paragraph (c)(2)(ii) of this section applies to taxable years beginning after January 12, 2001. The reference to the Finnish, Maltese, and Norwegian entities in paragraph (b)(8)(i) of this section is applicable on November 29, 1999. The reference to the Trinidadian entity in paragraph (b)(8)(i) of this section applies to entities formed on or after November 29, 1999. Any Maltese or Norwegian entity that becomes an eligible entity as a result of paragraph (b)(8)(i) of this section in effect on November 29, 1999, may elect by February 14, 2000, to be classified for Federal tax purposes as an entity other than a corporation retroactive to any period from and including January 1, 1997. Any Finnish entity that becomes an eligible entity as a result of paragraph (b)(8)(i) of this section in effect on November 29, 1999, may elect by February 14, 2000, to be classified for Federal tax purposes as an entity other than a corporation retroactive to any period from and including September 1, 1997.

(2) Paragraph (c)(2)(iii) of this section applies on or after April 1, 2004.

Mark E. Matthews,
Deputy Commissioner for Services and Enforcement.

(Filed by the Office of the Federal Register on March 31, 2004, 8:45 a.m., and published in the issue of the Federal Register for April 1, 2004, 69 F.R. 17117)

Foundations Status of Certain Organizations

Announcement 2004-31

The following organizations have failed to establish or have been unable to maintain their status as public charities or as operating foundations. Accordingly, grantors and contributors may not, after this date, rely on previous rulings or designations in the Cumulative List of Organizations (Publication 78), or on the presumption arising from the filing of notices under section 508(b) of the Code. This listing does *not* indicate that the organizations have lost their status as organizations described in section 501(c)(3), eligible to receive deductible contributions.

Former Public Charities. The following organizations (which have been treated as organizations that are not private foundations described in section 509(a) of the Code) are now classified as private foundations:

24 Straight, Denver, CO
Academic Services, Inc., Tucson, AZ
Advanced Leadership Institute, Inc., Denver, CO
African American Online Writers Guild, Houston, TX
African Resources Forum, Riverton, UT
Agape N Ministries, Houston, TX
Aggressive Aids Prevention, Inc., San Francisco, CA
Akademlink, Inc., Sacramento, CA
Albuquerque Medical Education Association, Albuquerque, NM
All About Style, Puyallup, WA
All African Peoples Organization, Omaha, NE
All Nations Preschool and Daycare, Tacoma, WA
Alliance for Workers Rights, Reno, NV
Alliance of Black Telcommunications Professionals, Bellevue, WA
Alliance of Orthodox Churches, Santa Fe, NM
Alresool Education Center, Inc., Phoenix, AZ
Alternative Choices Intervention Programs, Houston, TX
American Resource Center for African Culture, Houston, TX
Angel Foundation, Inc., Arvada, CO
Angelitas Amigos, Phoenix, AZ

Angelos Choral Mission Group, Salinas, CA
Animal Assistance and Education League an International, Aurora, CO
Arena of Hope, Blackfoot, ID
Arizona Abstinence Alliance, Inc., Chandler, AZ
Arizona Childrens Alliance of Southern Apache County, Springville, AZ
Arizona Employer Support of the Guard and Reserve, Tucson, AZ
Arizona Hate Crime Advisory Board, Inc., Phoenix, AZ
Arizona Peak Performance Volleyball Club, Scottsdale, AZ
Arizona Traffic Investigators Association, Chandler, AZ
Arrive Alive, Inc., Las Vegas, NV
Asian Pacific American Police Association, Las Vegas, NV
Athletics Instead of Depression and Sickness, Inc., Santa Barbara, CA
Autonomy House, Incorporated, Salt Lake City, UT
Azores Relief Fund, San Jose, CA
Aztec Wrestling Club, Tucson, AZ
B & C Ranch School, Inc., Koosharem, UT
Baby Steps Developmental Series, Inc., Lake Havasu City, AZ
Bakersfield Aid Project, Bakersfield, CA
Balkan Humanitarian Society, Las Vegas, NV
Ballet Contempo, Inc., Santa Barbara, CA
Bango, Carnation, WA
Basketball Academy of Texas, Inc., Alexandria, VA
Bay Area Circus Center, Mountain View, CA
Because Education Matters, Houston, TX
Bellaire High School JROTC Parents Club, Bellaire, TX
Bethesda House, Inc., Bacliff, TX
Better a Millstone, Inc., A Nevada Corp., Monterey, CA
Bibles for Jails Project, Lakewood, CO
Big River Soccer Club, E. Wenatchee, WA
Bill Crowles Sr. Supportive Services, Bakersfield, CA
Black & Whaley Enterprises, Los Angeles, CA
Blaine County Search & Rescue, Inc., Chinook, MT
Bonner County EMS Advisory Board, Ponderay, ID
Books for Belize, Inc., St. Petersburg, FL
Border Collie Rescue Texas, Inc., Houston, TX
Boulder Valley Wrestling Club, Boulder, CO
Bourland Trestle Partnership, Groveland, CA
Boys & Girls Club of Tri-County, Inc., Helena, MT
Boys and Girls Club of Cottonwood, Cottonwood, AZ
Bradams, Inc., Gallup, NM
Bright Wings, Inc., Durango, CO
Brighton Bombers Baseball, Ft. Lupton, CO
Building Families Foundation, Ogden, UT
Butte Youth Traveling Basketball Association, Butte, MT
Bypac, Inc., Breckenridge, CO
Caddie Foundation of Arizona, Glendale, AZ
California Space, Incorporated, Santa Maria, CA
California Taekwondo Junior Olympic Team, San Jose, CA
Cardoza Foundation, Modesto, CA
Carson City Urban Indian Consortium, Inc., Carson City, NV
Cascade Assistance Dogs Educational Training Center, Inc., Bow, WA
Cascade Community Childrens Fund, Eugene, OR
Cascade Rowing, Seattle, WA
Cass Kids Farm Safety, Kindred, ND
Cat Hoop Club, Carmel, CA
Center for Mission Education, Denver, CO
Center for Nanospace Technologies, League City, TX
Center for the Arts in Telluride, Ophir, CO
Center for the Study of Biodiversity and Ecosystems, Las Vegas, NV
Center for Transformational Healing, Tucson, AZ
Central Valley Group Home and Family Services, Inc., Modesto, CA
CFHS Touchdown Club, Tucson, AZ
Charter, Inc., Denver, CO
Chatham-Meier Foundation, Claremont, CA
Cheyenne Childrens Museum, Cheyenne, WY
Childrens Brain Tumor Research & Family Relief Foundation, Redmond, WA
Childrens Charities International, Walnut Creek, CA
Childrens Field, Tijeras, NM
Childrens Place Child Care & Early Learning Foundation, Inc., Sugar City, ID
Chimayo Youth Center, Chimayo, NM
Choteau Baseball Commission, Inc., Choteau, MT
Christian Drug Education Center, Westminster, CO
Citizens Institute for Voter Information in Colorado, Vermillion, SD
Clarence Project, Bellevue, WA
Clothesminded, Inc., Tempe, AZ
Coeur Dalene Area Swim Team, Inc., Post Falls, ID
Collegiate Broadcast Network, Denver, CO
Colorado Arts and Crafts Society, Golden, CO
Colorado Christian Community Fund, Wheat Ridge, CO
Colorado Clinical Guidelines Collaborative, Denver, CO
Colorado Girls Awesome Softball Association CGASA, Denver, CO
Colorado Mule Deer Association, Grand Junction, CO
Colorado Organization Development Network, Englewood, CO
Colorado Prairie Preserve, Inc., Boulder, CO
Colorado Springs Racquet Club Swim Team, Inc., Colorado Springs, CO
Colorado Springs Youth Cycling, Colorado Springs, CO
Colorado Youth Center for Alternative Sports, Inc., Fort Collins, CO
Columbia Public Interest Policy Institute, Bellevue, WA
Communities United for Sustainable Progress, Atascadero, CA
Community for the Advancement of Family Education, Wenatchee, WA
Community Group Homes, Fresno, CA
Community Prevention Services, Salt Lake City, UT
Community Technical Services, Inc., Las Vegas, NV
Community Wellness Alliance, Palo Alto, CA
Computer Literacy Resources, Inc., Prescott, AZ
Confluence Art Center, Winthrop, WA
Conifer High School Instrumental Music Boosters, Inc., Conifer, CO
Creating New Life Ministries, Inc., Houston, TX
Creative Alternatives for Resolution Ent., Fresno, CA
Credo International, Monroe, WA
Cripple Creek-Victor and Canon City Railroad Museum, Inc., Cripple Creek, CO

Cross Streets, Tucson, AZ
CTD Resource Network, Inc., Los Banos, CA
CUPIG Acres, Inc., Sedona, AZ
Damas Dog Foundation, Inc., Rigby, ID
Dancevision, Fort Collins, CO
Danssa Brasil, Thousand Oaks, CA
Dasira Narada Human Energy Studies Foundation, Milpitas, CA
Dateland Historical and Military Museum, Sun City, AZ
David Nathan Blanco Foundation, Carson, CA
De Colores Foundation, Chula Vista, CA
Deer Park Enterprise, Lyons, CO
Denver Athletic Club Scholarship Fund, Denver, CO
Denver Latino International Film Festival, Denver, CO
Deron A. Dickman Legacy Foundation, Salt Lake City, UT
Dirtworks, Livingston, MT
Dome of Hope Organization, Inc., Stockton, CA
Don Carlos Communities, Inc., Concord, CA
Dreamskate, Kirkland, WA
Dubrovnik Inter University Centre Educational Foundation, Santa Barbara, CA
Eagle Rock Transport, Idaho Falls, ID
Earth-People Foundation, Inc., Sedona, AZ
Eastside Rays, Brier, WA
Ecoforestry Services for Farmers, Arcata, CA
Education for Excellence, Redondo Beach, CA
EFA Private Funding, Inc., Payette, ID
El Bienestar De Familias, Tira Amarilla, NM
El Pueblo, Palo Alto, CA
Elder Heart Foundation, Inc., Phoenix, AZ
Elite Health Care Systems, Inc., San Jose, CA
Elko Emergency Services Chaplains, Elko, NV
Eloha Foundation, Kalaheo, HI
Emergence the American Indian Credit Association, Inc., E. Glacier, MT
Emergency Management Foundation of Spokane, Spokane, WA
Equity First Credit Foundation, Salt Lake City, UT
Esther Korson Ministries, Inc., Phoenix, AZ
Eud-Ktv Productions, Houston, TX
Evergreen Search Dogs, Vancouver, WA
Excel Foundation for the Advancement of Societal Causes, Camarillo, CA
Eye Heritage Organization, Inc., Houston, TX
Fairfield Emergency Medical Services Association, Fairfield, MT
Faith Alive Christian Center, Inc., Las Vegas, NV
Family Support Services, Vancouver, WA
Fathers House of Victory Threw the Holy Family, Inc., Santa Maria, CA
Feline Lovers Lodge, Tucson, AZ
Fia Kay House, Spokane, WA
F I G L E A F Educational Festivals, Fresno, CA
Financial Health and Fitness Foundation, Inc., Evanston, WY
First Judicial District Bar Association Legal Assistance Program, Lakewood, CO
First National Fire Service Incident Management System Consortium, Deer Park, TX
Fish Forever, Gwynn Oak, MD
Flames of Glory, Colorado Springs, CO
Flathead Watershed Residents for Responsible Development, Polson, MT
Foothills Childrens Foundation, Cave Creek, AZ
For Fun and for Free, Flagstaff, AZ
Foundation for Fair Campaign Reporting, Kirkland, WA
Foundation for Handicapped Entrepreneurs, Westminster, CO
Free Spirit Community Services Program, Inc., Modesto, CA
Fresh Start Childrens Services, Aurora, CO
Friends of Bear Creek Redwoods Region Preserve, Los Gators, CA
Friends of Feral Felines, Searchlight, NV
Friends of Kiel Ranch Historic Site, North Las Vegas, NV
Friends of Meadowdale High School, Edmonds, WA
Friends of River Oaks Park, Houston, TX
Friends of the Children, Bakersfield, CA
Friends of the Ogden Eccles Conference Center, Ogden, UT
Friends of Wasatch State Park, Inc., Midway, UT
Fuente Ballet of New Mexico, Inc., Albuquerque, NM
Function 1 Foundation, Inc., Las Cruces, NM
Fund Raiser, Inc., Las Vegas, NV
Fusion Dance Troupe, Seattle, WA
Future Leaders, Inc., Visalia, CA
Galveston Mainland Dmat, Inc., La Marque, TX
Garnered Grain, Elk Ridge, UT
Gate City Volleyball Club, Pocatello, ID
Gathering of the Governors, Seattle, WA
Girls on the Go Foundation, Boulder, CO
Global Cultural & Arts, Inc., San Mateo, CA
Global Interactive Educational Adventures, Boulder, CO
Global Learning & Observations to Benefits the Environment New Mexico, Sante Fe, NM
Gloriana, Inc., of Colorado, Tacoma, WA
God Help Rebuilding Broken Lives, Inc., Beverly Hills, CA
Gods G I F T Ministries, Scottsdale, AZ
Golden Empire Football League, Bakersfield, CA
Golf Academy of the Southwest, Rio Rancho, NM
Good Shepherd Learning Center, Phoenix, AZ
Good Soil Ministry, Everett, WA
Goodhope Community Clinic, Houston, TX
Gospel Power Ministries, Inc., Lancaster, CA
Great Commission Broadcasting Company, Inc., Meeker, CO
Great Falls Elks Lodge Charitable Corp., Great Falls, MT
Greensong, Inc., Santa Fe, NM
Gregory Sidon Foundation, Sparks, NV
Greyhounds First, Inc., La Veta, CO
Grief Education & Support Services, Inc., Houston, TX
Ground Water Cleanup Center, Inc., Sacramento, CA
Guadalupe Yaqui Cultural Organization, Inc., Guadalupe, AZ
Guest House Associates, Inc., Peoria, AZ
Guglielmo Prison Ministries, Inc., Modesto, CA
Guild of Santa Clara Valley, San Jose, CA
Hands-on-Horses, Flagstaff, AZ
Harmonious Homes, Hollywood, CA
Harmony, Inc., Albuquerque, NM
Haven of Hope, Inc., Westminster, CO
Hayuchee Native American Art Foundation, Houston, TX
Hearts and Hands of Merced County, Merced, CA
HEP C Hope, Inc., Houston, TX
Heterochat, Thatcher, AZ
Hispanic Museum of Nevada, Las Vegas, NV

HIV Aids Education and Prevention Council of Ravalli County, Stevensville, MT
Hoa Tu Bi, Milpitas, CA
Home Town Hospice, Inc., Pinedale, WY
Hoops of Hope Basketball Ministry, Inc., Colorado Springs, CO
Hospice Artists Guild, Albuquerque, NM
Hospice Memorial Foundation of Northern New Mexico, Inc., Santa Fe, NM
House of Corinth, Houston, TX
Houston Area Mental Health Advocates, Inc., Houston, TX
Houston Hispanic Architects & Engineers Society, Inc., Houston, TX
HRT Riding and Training, Las Cruces, NM
Hugh Douglas Foundation, Inc., Missouri City, TX
Humanity International, Seattle, WA
Idaho Association of Complimentary and Alternative Therapies, Inc., Boise, ID
Idaho Issues, Inc., Lewiston, ID
IGA Nephropathy Foundation, Palo Alto, CA
Ika Progressive Organization, Houston, TX
Immanuel Caring Ministries, Inc., Peoria, AZ
Immigration Reform Network of Silicon Valley, Los Gatos, CA
In Step Ministries, Puyallup, WA
Inland Empire Parents Helping Parents, Inc., Bonners Ferry, ID
Inspired Arts & Media Foundation, Irvine, CA
Institute for Interactive Learning, Downey, CA
Institute for Science, Manhattan Beach, CA
Institute for Veteran Transition, Fresno, CA
Institute of Puppetology, Corrales, NM
Integrity Debt Management, Inc., Santa Barbara, CA
International Bridge of Hope Foundation, Conroe, TX
International Hemodynamic Society, Irvine, CA
International Youth Soccer Foundation, Inc., Phoenix, AZ
Island Park Library Friends, Macks Inn, ID
Jacobs Ladder International, Inc., Longmont, CO
Jefferson Co. Correctional Complex Visitors Center, Inc., Beaumont, TX
Jehovah Provides Ministries, Tacoma, WA
Jerusalem Historical Society, Nassau Bay, TX
Jester Hairston Music Association, Inc., Las Vegas, NV
Jesus on the Way to Galilee Corporation, Scottsdale, AZ
Jewish Community Center of Greater Albuquerque, Inc., Albuquerque, NM
Joe Rincon Golf Scholarship Foundation, Inc., Houston, TX
John Giannoni Scholarship Foundation, Lodi, CA
Joint Commission for Pharmacist Care Accreditation, Boulder, CO
Jordanian Orphan Relief Agency, Inc., Houston, TX
K & M Communication, Inc., Las Vegas, NV
Kairos Evangelistic Ministries, Houston, TX
Kam Family Educational Assistance, Inc., Houston, TX
Keeper of the Park Foundation, Tooele, UT
Kids Corral, Incorporated, Clancy, MT
Kids in Need-the-Vic Thomas Memorial, Scottsdale, AZ
Kidsinit, Santa Clara, CA
Kingman Interfaith Caregivers Coalition, Kingman, AZ
Knights of St. George and St. John, Inc., Las Vegas, NV
Knockouts, Tucson, AZ
Kofa Band Boosters, Yuma, AZ
Korean Community Center of Houston Inc., of Texas, Bellaire, TX
L Humanite Pour Haiti for Haiti, Inc., Albuquerque, NM
Lacey Olympia Tumwater Area Dogs Off-Leash Group, Olympia, WA
Law Enforcement Supporters, Inc., Boise, ID
Lea County Womens Network, Hobbs, NM
Lee Street Community Development Corporation, Inc., Tucson, AZ
Libby Dam Cooperative Assn., Inc., Libby, MT
Life and Miraculous Beginnings, Genessee, ID
Lifenet Care Management, Lompoc, CA
Living Farmacy, Soquel, CA
Living Legacy Farm, Spanish Fork, UT
Living Room, Fresno, CA
Living Waters Foundation, Anaheim, CA
Lompoc Police Activities Leaque, Lompoc, CA
Los Alamos Community Foundation, Los Alamos, NM
Lost in the 50s, Inc., Sandpoint, ID
Lovinac Outreach Ministries, Fort Worth, TX
Lydia Lodge, Walla Walla, WA
Mana, Inc., Scottsdale, AZ
Mark Kenoly International Ministries, Inc., Santa Clara, CA
Marlow & Vella Woodward Foundation, Inc., N. Salt Lake, UT
Masternet Foundation, Saint George, UT
Meadow Rangers-Educators, Inc., Phoenix, AZ
Medhelp Foundation, Phoenix, AZ
Medical Ministries International, Tivy Valley, CA
Men Fellowship Northwest, Sedro Wooley, WA
Mens Self Advocacy Council of Durango, Inc., Durango, CO
Merced Association, Merced, CA
Mile High Rollers Care and Bike Club, Littleton, CO
Ministerios Asociados Hispanos De Houston-Associated Hispanic, Houston, TX
Ministry in Night Time, Inc., Tempe, AZ
Miracles Rein, Oroville, CA
Mission Recovery, Inc., San Jose, CA
Mission to the Children, Inc., Tucson, AZ
Missions Empowerment Movement, Inc., Sugar Land, TX
Modesto Titans Youth Football Organization, Modesto, CA
Montana Big Sky Sapphires, Helena, MT
Montana Council on Problem Gambling, Billings, MT
Montana Highlanders Association, Kalispell, MT
Monterey Police Citizens Academy Alumni Associations, Monterey, CA
Motorcyle Association for Special Services, Auburn, WA
Mount Diablo Regional Mayors Committee for the Employment of People, Livermore, CA
Mountain Air Community Radio, Flagstaff, AZ
Mountain One Volleyball Club, Bozeman, MT
Mourning Tree Services, Merced, CA
Multiple Sclerosis Alliance, Inc., Denver, CO
Museum Educators of Puget Sound, Seattle, WA
Mustang Soccer Club, Woodlands, TX
M Y E Theatre Company, El Segundo, CA

Nampa Youth Golf, Inc., Nampa, ID
Napavine High School Scholarship Foundation, Napavine, WA
National Association for Beginning Teachers, Henderson, NV
National Centenarian Awareness Project, Inc., Phoenix, AZ
National Child Finders, Inc., Reno, NV
National Conference of Black Mayors Annual Conference Denver Host Committee, Denver, CO
National Encephalitis Foundation, Inc., San Jose, CA
National Korean War Museum, W. Valley City, UT
Native American 2002 Foundation, Salt Lake City, UT
Native Americans Corporation, Ely, NV
Native Winds Environmental Corporation, Idaho Falls, ID
Natura Educational Programs, Boulder, CO
Natural History Exhibit Hall, Livingston, MT
Naturals, Houston, TX
Near Westside Los Angeles Community Coalition, Los Angeles, CA
Nestings, Seattle, WA
Nevada Employees for the Right to Work, Las Vegas, NV
Nevada Native American Cultural Society, Inc., Pahrump, NV
New Beginnings, Inc., Clemmons, NC
New Haven New Earth, Sedona, AZ
New Horizon Ministries, Inc., Chandler, AZ
New Horizon of Angkor, San Jose, CA
New Mexico Chapter of the Order of Ahepa 501, Inc., Albuquerque, NM
New Mexico Urban League, Albuquerque, NM
New Mount Calvary Ministries C D C, Inc., Houston, TX
Newman Foundation at Arizona State University, Tempe, AZ
Niche Ministries, Incorporated, Sonora, CA
Nisei Baseball Research Project, Fresno, CA
North American Foundation, Littleton, CO
North Central Volunteer Firefighters, Inc., Kerman, CA
Northern Arizona Soccer League, Flagstaff, AZ
Northshore Marching Band, Redmond, WA
One Accord, Inc., N. Hollywood, CA
Operation Outreach, San Jose, CA
Operation Santas Helper, Phoenix, AZ
Operation Warmheart, Mountain Home AFB, ID
Our Kids Inc., an Arizona Non-Profit Corporation, Scottsdale, AZ
Our Lord and Savior Jesus Christ, Denver, CO
Oversea Vietnamese Catholic Community of Northern California, Campbell, CA
Pacific Northwest Tae Kwon Do Association, Spanaway, WA
Pacific Trail K-9 Search and Rescue, Inc., La Center, WA
Padres De America, Tucson, AZ
Pakistan Relief Fund, Lynnwood, WA
Paraclete International, Mill Creek, WA
Paradigm Development and Consulting, Inc., Fort Collins, CO
Parent Awareness Network, Inc., Humble, TX
Park County Emergency Services Council, Inc., Bailey, CO
Paso Robles Vintners and Growers Foundation, Paso Robles, CA
Patricia Kabbah Memorial Scholarship Fund, Greeley, CO
Payson Fine Art Guild, Inc., Payson, AZ
Peaceproject Images, Incorporated, Reno, NV
Philanthropy Group, Boulder, CO
Phoenix Holistic Healing Foundation, Las Vegas, NV
Pilar Community Association, Embudo, NM
Port Arthur Track Club, Port Arthur, TX
Positive Access, Inc., Las Vegas, NV
Positive Friends of Washington, Olympia, WA
Positive Steps, Inc., Missouri City, TX
Powerhouse Community Youth Center, Glendale, AZ
Prison Evangelists Ministry, Inc., Las Vegas, NV
Pro Camps Foundation, Puyallup, WA
Project Row Houses Foundation, Houston, TX
Project Sunrise, League City, TX
Pronghorn Power Booster Club, Farson, WY
Propane Education & Research Council of Colorado, Scottsdale, AZ
Public School Apparel Foundation, Phoenix, AZ
Qacba, Inc., Seattle, WA
Quay County Community Foundation, Inc., Tucumcari, NM
Quest for Excellence, Inc., American Fork, UT
Quest for Gold Foundation, San Luis Obispo, CA
Radar, Inc., Reno, NV
Radio Daze, Houston, TX
Raices Grupo Folklorico, Sacramento, CA
Rands Training Center, Buckeye, AZ
Reach for Greatness, Bakersfield, CA
Reaching the World With Hammer and Sword Mitchell Ministries, Inc., Tulsa, OK
Ready to Work, Inc., Denver, CO
Reasons to Believe-Houston, Houston, TX
Reclamation of the Sacred Sites of the Lower Chehalis Indians, Satsop, WA
Red Card Productions, Seattle, WA
Reno Heart Foundation, Reno, NV
Restoration Seminars of Northern California, Inc., San Jose, CA
River Nile Corporation, Milpitas, CA
Roaring Fork Training Officers Association, Snowmass Village, CO
Rocky Mountain Golf Charities, Salt Lake City, UT
Rose Petal Education Foundation, Inc., Tucson, AZ
R S & V P Property One, Inc., Albuquerque, NM
Rudy C. Burrola Memorial Foundation, Phoenix, AZ
Rural Youth Center Council of Fresno County, Fresno, CA
S W Washington Development Association, Castle Rock, WA
Safenight, San Francisco, CA
Safety Zone Community Development Corporation, Houston, TX
Saint Charbel Medical Foundation, Fargo, ND
Sakya Foundation, Everett, WA
San Francisco Tres Dias, Saratoga, CA
San Luis Obispo County Access Media, Los Osos, CA
Santa Barbara Search for Christian Maturity, Goleta, CA
Santa Fe Public Radio Association, Santa Fe, NM
Saratoga Community Playground Project, Saratoga, WY
Save Franceschi House, Santa Barbara, CA
Schraderville Community Council, Inc., Maricopa, AZ
Scottsdale Youth Foundation, Scottsdale, AZ
Second Chance Project, Santa Cruz, NM
Sequim Schools Athletic Booster Club, Sequim, WA
Servants of Divine Mercy, Phoenix, AZ

Shamrocks Youth Sports Association, Aurora, CO
Share Nepal, Inc., Aurora, CO
Share the Future Clt, Heber, UT
Shareef Abdur Rahim Foundation, Atlanta, GA
Show Low Fire Fighters Association, Show Low, AZ
S L A P Diving School, Salt Lake City, UT
Sluggers Select Baseball, Inc., Kingwood, TX
Smile, Inc., Boise, ID
Snake River Valley Building Contractors Foundation, Inc., Nampa, ID
Soaring Dragon Health Aid Association, Mountain View, CA
Social Phobia-Social Anxiety Foundation, Phoenix, AZ
Solar Motions, Fremont, CA
Soledad Education Foundation, Soledad, CA
Sought Out and Not Forsaken Ministries, Inc., Huntsville, TX
S O U L Foundation, Las Vegas, NV
South Boise Village Foundation, Inc., Boise, ID
Southeast Family Community Center, Inc., Houston, TX
Southeast Restoration Community Development Program, League City, TX
Southeast Texas Community Development Financial Institution, Beaumont, TX
Southern High Plains Grassland Agricultural Education & Experiment Station, Springfield, CO
Southland Community Housing Renewal, Los Angeles, CA
Southwest Contract Connection, Inc., Tucson, AZ
Southwest German Society, Fountain Hills, AZ
Southwest Stone Carving Symposium, Jemez Springs, NM
Springwood Resident Council, Kent, WA
St. Brigid Foundation, Seattle, WA
Star Station One Institute, Incorporated, Houston, TX
Sterling Cornerstone Foundation, Inc., Wray, CO
Steven Brooks International, Newport Beach, CA
Strait and Narrow House, Inc., Kingwood, TX
Strategic Communications Group, Simi Valley, CA
Success Scholarship Center, Houston, TX
Sudanese Christian Association of Utah, Portland, ME
Suicide Prevention Posse, Inc., West Jordan, UT
Summation, Inc., Lakewood, CO
T4C, Ojai, CA
Talking Leaves Ranch, Inc., Prescott, AZ
Tarrant County Young at Heart 1351 E Bardin Rd Tdprs, Fort Worth, TX
Task for Christian Employers, Inc., Bellaire, TX
Tennis Against Gangs, Inc., Oxnard, CA
Terminal Illness Support, Ltd., Las Vegas, NV
Terrell Davis Migraine Foundation, Inc., Aurora, CO
Tesseract Tuition Organization, Phoenix, AZ
That You May Know Ministries, Tacoma, WA
Theta Pi Lambda Foundation Aka TPL Foundation, Las Vegas, NV
Thunderbolt Sanctuary, Santa Fe, NM
Thupden Chokorling Temple, Tucson, AZ
Tiny Tims Foundation for Kids, Provo, UT
TLC Childrens Center, Inc., Oakhurst, CA
Tongans Outreach Project, Inc., Salt Lake City, UT
Total Focus Sports, Kirkland, WA
Tracer Productions, Denver, CO
Trail Riders for Youth, Castle Rock, CO
Trees for Cayucos, Cayucos, CA
Triple Diamond Warehouse, Inc., Eagle, ID
T R O O Gamerz, Fresno, CA
Tucson Quarter Midget Association, Tucson, AZ
Turlock Junior High School Renaissance Foundation, Turlock, CA
Umbro Elite, Inc., Albuquerque, NM
Uncle Eddiys Theatre Company, Inc., Santa Fe, NM
United Service Alliance, Fallbrook, CA
Utah Ballroom Dance Sport Company, Orem, UT
UVURU Community Library Fund, Seattle, WA
Van Diest Ministries, Incorporated, Mercer Island, WA
Ventura Police Dog Foundation, Inc., Ventura, CA
Veterans in Community Advocacy, Modesto, CA
Vietnam Center, Inc., Houston, TX
Vietnamese American Community of Northern CA, San Jose, CA
Vietnamese Interest Protection Group, Ballaire, TX
Vintage Panthers, Inc., Englewood, CO
Violence Immunization Program Professional Center, Madera, CA
Vision Heir, Puyallup, WA
Visions of Hope, Inc., Phoenix, AZ
Walk In Time Theater, Inc., Moorpark, CA
Wallaces Saddle Up, Inc., Tyler, TX
Warren Senior Citizens, Blair, OK
Wasatch County Habitat for Humanity, Inc., Heber City, UT
Wasatch Dance Collective, Salt Lake City, UT
Washington Biodiversity Trust, Bainbridge Island, WA
Washoe County Bar Foundation, Reno, NV
Waters of Grace Foundation, Houston, TX
Waxahachie Help East Action Team, Waxahachie, TX
Webster Community Center, Magna, UT
West Clean Elections Institute, Inc., Phoenix, AZ
West County Theatre Arts Guild, Los Angeles, CA
West Valley Sonoran Land Trust, Inc., Glendale, AZ
Western Oklahoma Historical Center, Inc., Weatherford, OK
Westside Daycare, Inc., Dumas, AR
Whatever It Takes Ministries, Inc., Oklahoma City, OK
Where Are They, Inc., Reno, NV
White Buffalo Research Development and Training, Tucson, AZ
White Dove Ministries, Inc., Channelview, TX
White Eagle of the Rockies Foundation, Sheridan, WY
Wildcat Creek Stables, Richmond, VA
Willis Saddler Foundation, Tulsa, OK
Willow Brook Childrens Center, Pflugerville, TX
Win International Dallas, Inc., Dallas, TX
Windsong Ministries, Monroe, LA
Wiseman Ministries, Bellevue, WA
Wishes Are Forever Foundation, Sandy, UT
Worldwide Assembly of Yhwh, Inc., Houston, TX
Wren Foundation, Inc., Las Vegas, NV
Wu Wei Tao, Hope, ID
Yardley Health Services, Inc., Pittsfield, MA
Yavapai County School to Work Partnership, Inc., Prescott, AZ
Yellowstone Valley Railway Club, Billings, MT
Yes & Know, San Francisco, CA

Young Adult Services of Washington, Bellevue, WA
Young Parents Foundation, Inc., Pittsburgh, PA
Young Skandia Dansers, Clinton, WA
Youth Development Center, Ceres, CA
Youth Network, Atascadero, CA
Youth Sports, Greeley, CO
Youth Sports Authority, Littleton, CO
Zia Athletic Club, Peoria, AZ

If an organization listed above submits information that warrants the renewal of its classification as a public charity or as a private operating foundation, the Internal Revenue Service will issue a ruling or determination letter with the revised classification as to foundation status. Grantors and contributors may thereafter rely upon such ruling or determination letter as provided in section 1.509(a)–7 of the Income Tax Regulations. It is not the practice of the Service to announce such revised classification of foundation status in the Internal Revenue Bulletin.

Update on Future of the EP Determination Letter Program

Announcement 2004–32

This announcement provides an update on the status of the Service's continuing review of the Employee Plans determination letter program. The Service has considered the public comments on the second white paper on the future of the program that was published last year and has decided to implement a system of staggered remedial amendment periods under § 401(b) of the Internal Revenue Code for individually designed plans. This system will be implemented initially to stagger the expiration of individually designed plans' remedial amendment periods for the Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. 107–16 (EGTRRA). The Service will closely monitor the implementation of this system so that any appropriate adjustments or changes to the system can be promptly made. The Service is also contemplating implementation of a system of six-year amendment/approval cycles for pre-approved plans (that is, master and prototype (M&P) and volume submitter plans), beginning with the submission of these plans for EGTRRA opinion and advisory letters.

Background

The Service has maintained an Employee Plans determination letter program for many years, essentially in its present form. Under this program, the Employee Plans (EP) component of Tax Exempt and Government Entities (TE/GE) issues letters of determination regarding the qualified status of retirement plans under § 401(a) and the status of related trusts under § 501(a). Determination letters provide assurance to plan sponsors, participants and other interested parties that the terms of employer-sponsored retirement plans satisfy the qualification requirements of the Code. Qualified plans offer significant tax advantages to employers and participants.

In recent years, the Service has undertaken a comprehensive review of its policies and procedures for issuing determination letters on the qualified status of retirement plans. The impetus for this review was a need for the Service to strike a more effective balance in the application of its limited resources among the EP determinations, examinations, voluntary compliance and customer education and outreach programs. The current determination letter program has been subject to periodic fluctuations (that is, peaks and valleys) in workload as a result of legislative changes. These fluctuations make resource planning and allocation difficult and may have an overall negative effect on the administration of the various EP programs. Thus, a goal of the program review has been to identify program improvements that will result in a more level determination letter workflow. While this review is still ongoing, the Service has already made a number of significant improvements to the determination letter program. See, for example, Announcement 2001–77, 2001–2 C.B. 83.

As part of the program review, the Service has published on its web site two white papers on the future of the EP determination letter program. The first white paper, published in August 2001, described a number of options for change as the Service looks to the future. The second white paper, published in May 2003, provided a more detailed explanation of a proposed system of staggered remedial amendment periods under § 401(b) that was one of the original options.

The staggered remedial amendment period system would establish regular five-year cycles for plan amendment and determination letter renewal. The cycles, which would be based on taxpayer identification numbers, would ensure that employers would not have to request determination letter applications more frequently than every five years.

The white paper proposed that the staggered remedial amendment period system could be implemented beginning with the remedial amendment period for EGTTRA. Notice 2001–42, 2001–2 C.B. 70, provides that the remedial amendment period for EGTRRA will not end before the end of the first plan year beginning on or after January 1, 2005.

Commentators on the second white paper were asked to express their preference between a staggered system and the status quo with respect to the remedial amendment period rules under § 401(b). The commentators were also asked to respond to specific questions about other options described in the second white paper. The commentators' responses to these questions, and the Service's conclusions, are summarized in general terms below.

Comments and Conclusions

1. Staggered versus status quo.

On the question that asked commentators to indicate a preference between a staggered remedial amendment period system and the status quo, comments were divided. More commentators recommended the status quo than the staggered system, but several made a strong argument that the staggered system would make the amendment and determination letter process considerably more manageable for employers and practitioners and would also improve compliance. Even among those who expressed reservations with the staggered system, several described changes to the system outlined in the white paper that would improve the system and perhaps tilt the balance in its favor.

The Service has continued to examine the effect of the fluctuations in determination letter workload on its resources and other programs. Despite significant changes that have already been made to the determination letter program, and the resource savings that the changes have generated, the Service has concluded that the limitations on its resources and the interests of sound tax administration require consideration of a more fundamental change. Accordingly, the Service has decided to implement a staggered remedial amendment period system for individually designed plans. The system will be implemented initially to stagger the expiration of individually designed plans' remedial amendment periods for EGTRRA. The system will generally be designed along the lines of the white paper proposal, so that, for example, plans may use their EGTRRA remedial amendment periods to adopt retroactive remedial amendments for guidance changes. The Service recognizes that the system described in the white paper may have to be adjusted or changed based on actual experience. The Service will closely monitor the initial implementation of the system and, on the basis of its experience and the experience of parties affected by the system, will make appropriate changes as quickly as possible.

2. Annual Plan Updates

The second white paper discussed the possibility of requiring plans to be updated annually. An annual plan update requirement could be established either without making other changes to the current determination letter program or in combination with a system of staggered remedial amendment periods. In the latter case, plan sponsors would not need to request determination letters more frequently than every five years to have reliance even though plan amendments could be required every year.

Although a few commentators recommended a requirement for annual plan updates as the surest way to keep plans in compliance and safeguard participant rights, most commentators expressed the opinion that such a requirement would be so costly and burdensome as to be an impediment to plan formation and preservation. While annual plan updates are desirable, the Service will not consider this option further at this time. The Service may revisit this option in the future.

The Service will, when appropriate, require plan sponsors to adopt good faith plan amendments sooner than the end of the plans' remedial amendment periods. In this case, plan sponsors will have the full remedial amendment period in which to perfect any good faith amendments adopted earlier within the period. The Service will endeavor to publish model or sample amendments to assist plan sponsors in the adoption of required amendments and will design the amendments to permit their adoption by sponsors of M&P and volume submitter plans on behalf of adopting employers whenever practicable.

3. Pre-approved Plans

The second white paper proposed alternative special remedial amendment period rules for pre-approved plans (M&P and volume submitter (VS) plans). One alternative would require pre-approved plans to be amended every year so that the plans would always be up-to-date for employers whose five-year cycle ended in any given year. The other alternative would establish five-year cycles for updating the pre-approved document. This alternative would ensure that the pre-approved document would not have to be re-approved more than once every five years, based on the TIN of the document sponsor. Under this alternative, adopting employers' cycles would be the same as the cycle of their pre-approved document (rather than being based on the employers' TINs).

Persons who commented on these alternative rules generally expressed the opinion that the annual amendment alternative would be too burdensome. Many also noted that the other alternative would result in some pre-approved plans being significantly more up-to-date than others at any given time, a result also considered undesirable. As a result of these comments, the Service is considering a new approach with respect to pre-approved plans.

The new approach now being proposed would establish regular six-year amendment/approval cycles for all pre-approved plans, beginning with the submission of these plans for EGTRRA opinion and advisory letters. This system would generally work as follows: In year one, all pre-approved defined contribution plans would be required to be updated and submitted for approval based on the law in effect at that time. The Service would process these applications in years two and three. Adopting employers would then have a fixed date by which to adopt the approved plans (for example, by the end of year five). Meanwhile, in year three, all pre-approved defined benefit plans would be required to be updated and submitted for approval based on the law in effect at that time. The Service would process these applications in years four and five and adopting employers would have to adopt the approved plans by the end of year seven. The cycle would begin again in year seven; that is, in year seven, all pre-approved defined contribution plans would again be required to be updated and submitted for approval based on the law in effect at that time. As noted above, good faith plan amendments will be required to be adopted sooner than the end of plans' cycles, when appropriate.

While the general approach describes a fixed cycle repeating itself every six years that would not be interrupted or changed due to changes in law, the Service recognizes that the system would need to be flexible to allow the cycle to be modified when appropriate, particularly in response to the changing needs of plan sponsors. (For example, if it became clear that needed plan changes were more complex and time-consuming than anticipated, an appropriate delay could be provided.) Nevertheless, it is hoped that this system would introduce more predictability into the current process and allow for better planning.

This system would also eliminate the so-called 12-month rule on which the determination of adopting employers' remedial amendment period was formerly based. It would substitute a fixed, easily communicated and understood date that would apply to all adopting employers. It is also anticipated that this system would allow sponsors and VS practitioners to amend their plans and apply for new letters in years when they would not otherwise be required to file, provided that the plans are again amended, as necessary, and resubmitted in the next cycle year. Of course, applications filed in cycle years (that is, required applications) would be accorded higher priority and would therefore be reviewed before applications filed in "off-cycle" years.

Under this system, employers who are not adopters of a pre-approved plan, but who certify, before the end of their plan's remedial amendment period, their intent to adopt a pre-approved plan, will be granted the appropriate extension of the remedial amendment period. For example, assume the remedial amendment period for an employer's individually designed plan ends on December 31, 2010, and on that date the employer certifies its intent to adopt M&P plan *A* which was updated and submitted for a new opinion letter in 2010. In this case, the plan's remedial amendment period will be extended to the end of the fixed period for "timely" adopting plan *A* after the new opinion letter is issued.

The Service is also considering whether there may be appropriate, limited circumstances in which the remedial amendment period for a plan that is not a pre-approved plan, but is substantially similar to a pre-approved plan and submitted by the pre-approved plan's sponsor, should be extended to the end of the period for "timely" adopting the pre-approved plan. The Service believes that providing such an extension generally to all "substantially similar" plans could undermine the pre-approved plan programs and invite abuse. However, the Service welcomes comments identifying limited circumstances where such an extension would be appropriate and would not pose such risks, and also welcomes suggestions for criteria to be used in determining that a plan is substantially similar to a pre-approved plan.

Next Steps

The Service intends to proceed with the development of guidance necessary to implement a staggered remedial amendment period system, essentially along the lines of the white paper. In developing this guidance, the Service will carefully consider those suggestions that have been made to improve the system outlined in the white paper. In addition, interested persons will be given opportunity for further input as the appropriate guidance is developed. The Service will initially implement the staggered remedial amendment period system in conjunction with the opening of the determination letter program for EGTRRA.

In Announcement 2004–33, page 862, this bulletin, the Service has asked for public comments on a draft revenue procedure for pre-approved plans. Persons submitting comments in response to Announcement 2004–33 are also invited to comment on the six-year amendment cycle for pre-approved plans described in this announcement.

Drafting Information

The principal author of this announcement is James Flannery of the Employee Plans, Tax Exempt and Government Entities Division. For further information regarding this announcement, please contact the Employee Plans' taxpayer assistance telephone service at 1–877–829–5500 between the hours of 8:00 a.m. and 6:30 p.m. Eastern time, Monday through Friday (a toll-free number). Mr. Flannery may be reached at 1–202–283–9888 (not a toll-free number).

Request for Comments on Revenue Procedure for Pre-Approved Plans

Announcement 2004–33

This announcement includes a draft revenue procedure that contains the Service's procedures for issuing opinion and advisory letters as to the acceptability under § 401(a) of the Code of the form of pre-approved plans (that is, master and prototype (M&P) plans and volume submitter (VS) plans). The Service seeks public input before finalizing these procedures and invites interested persons to submit comments.

Background

The Service has maintained an Employee Plans determination letter program for many years, essentially in its present form. Under this program, the Employee Plans (EP) component of Tax Exempt and Government Entities (TE/GE) issues letters of determination regarding the qualified status of retirement plans under § 401(a) of the Internal Revenue Code and the status of related trusts under § 501(a). Determination letters provide assurance to plan sponsors, participants and other interested parties that the terms of employer-sponsored retirement plans satisfy the qualification requirements of the Code. Qualified plans offer significant tax advantages to employers and participants.

In recent years, the Service has undertaken a comprehensive review of its policies and procedures for issuing determination letters on the qualified status of retirement plans. As part of that review, the Service has published on its web site two white papers on the future of the EP determination letter program. While this review is still ongoing, the Service has already made a number of significant improvements to the determination letter program. See, for example, Announcement 2001–77, 2001–2 C.B. 83.

Key components of the EP determination letter program are the Service's programs for pre-approving the form of retirement plans. The Service has for many years maintained two programs for the "pre-approval" of plans qualified under § 401(a) — the M&P program and the VS program. These programs allow employee benefits practitioners and financial organizations, such as banks and insurance companies, to obtain advance approval of the form of "prototype" and "specimen" plans. Employers who adopt these pre-approved plans generally have assurance, without having to request a determination letter, that the form of their plan is qualified. In those cases where the employer still needs to obtain a determination letter, the use of a pre-approved plan greatly simplifies and reduces the time and expense of applying for a determination letter. The pre-approval process is beneficial not only to employers but also to the Service and practitioners and financial organizations because of the efficiencies it produces.

The M&P and VS programs originated to serve different purposes and each has had its own set of rules. Until now, those rules were contained in different revenue procedures. Several of the changes that have been introduced in recent years have eliminated some of the distinctions between the two programs. For example, recent changes regarding employer reliance on opinion letters for M&P plans and advisory letters for VS plans have diminished the disparities between the two types of plans. Also, an extended remedial amendment period under § 401(b) has been provided for both types of plans.

While the Service will continue to maintain two programs separately, the narrowing of the differences between the M&P and VS programs makes it appropriate to set forth the rules for both programs in a single revenue procedure. The draft revenue procedure does that.

Program Changes

Although the draft revenue procedure makes additional changes to the M&P and VS programs that continue the trend of making the programs more alike, the revenue procedure leaves unchanged the most fundamental distinctions between the two types of plans. That is, M&P plans will continue to consist of a basic plan document and adoption agreement that may not be amended by adopting employers, except by choosing among permitted options under the adoption agreement, without the loss of M&P status. Likewise, VS plans will continue to be allowed in either adoption agreement or "individually designed" format and employer amendments will not cause the loss of VS status provided the extent and complexity of the amendments are not inconsistent with the purposes of the VS program.

It has been suggested that the program changes that have been made so far and the changes introduced in the draft revenue procedure might eliminate the need for a separate M&P program altogether, with a modified VS program left as the only program for plan pre-approval. The draft revenue procedure does not go so far. The Service believes it is important to retain the M&P program because of the long history and familiarity of the program to M&P sponsors and employers. Equally important is the desirability of keeping a program that limits the extent to which employers, who may lack expertise or advice, can modify the pre-approved document.

The draft revenue procedure does, however, make significant changes. The principal changes are as follows:

(1) The revenue procedure allows adopting employers of nonstandardized defined contribution M&P plans to adopt an allocation formula that is designed to be cross-tested for nondiscrimination on the basis of equivalent benefits under § 1.401(a)(4)–8.

(2) The revenue procedure permits, but does not require, VS plans to include a provision that allows the VS practitioner to amend the plan on behalf of adopting employers for changes in the Code, etc. The Service will evaluate this new feature over time to determine whether to preserve it as a permanent feature of the VS program.

The revenue procedure also makes changes to simplify and streamline the two programs. For example, under the procedure, nonstandardized safe harbor plans and paired standardized plans are discontinued as separate categories of M&P plan. This change has been made because recent changes in the deduction limitations and the procedures for employer reliance have diminished the utility of these types of plans.

Under the procedure, sponsors and practitioners that sponsor both M&P plans and VS plans will submit both types of plans to the same office of the Service for review and approval. However, the draft revenue procedure does not otherwise specify where opinion and advisory letter applications are to be filed. A decision is reserved at this time.

EGTRRA

It is intended that the revenue procedure, when finalized, will announce the opening of the pre-approved plan programs for the Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. 107–16 (EGTRRA). The decision on when the program will open is reserved at this time, pending a decision with regard to possible changes to the remedial amendment period rules (discussed below), feedback on the draft revenue procedure, and possible other guidance.

When the opening of the EGTRRA opinion and advisory letter programs is announced, sponsors and practitioners will be given a window period in which to file applications. M&P mass submitters, VS mass submitters, and national sponsors/VS practitioners will be allowed to file sometime in advance of other applicants. (A "mass submitter" is a person that submits opinion or advisory letter applications on behalf of 30 or more sponsors or practitioners that sponsor the same M&P basic plan document or VS specimen plan. A "national sponsor/VS practitioner" is a sponsor or VS practitioner that has either (a) 30 or more adopting employers in each of 30 or more states or (b) 3000 or more adopting employers.) The final revenue procedure may also address other matters pertaining to EGTRRA, EGTRRA-related guidance, and non-EGTRRA guidance.

Remedial Amendment Period

A white paper on the future of the determination letter program that was published on the Internet in May, 2003 described a proposal for a staggered remedial amendment period system that would establish regular five-year cycles for plan amendment and determination letter renewal for individually designed plans (that is, plans that are not pre-approved plans). Having considered the public comments on this proposal, the Service has decided to implement a system of staggered remedial amendment periods for individually designed plans. *See* Announcement 2004–32, page 860, this Bulletin.

The white paper also proposed alternative special remedial amendment period rules that would apply to pre-approved plans instead of staggered remedial amendment periods. Having considered the public comments on these proposed special rules, the Service has concluded that a different approach is needed for pre-approved plans. The new approach now being proposed for your consideration and comment would establish regular six-year amendment/approval cycles for all pre-approved plans, beginning with the submission of these plans for EGTRRA opinion and advisory letters. Announcement 2004–32 describes this six-year amendment cycle.

Request for Comments

Interested persons are invited to comment on the draft revenue procedure, the other issues addressed in this announcement, the six-year amendment cycle described in Announcement 2004–32, or any other aspect of the pre-approved plan programs or the determination letter program, generally.

Written comments should be submitted by August 2, 2004, to CC:PA:LPD:RU (Announcement 2004–33), Room 5203, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, D.C. 20044. Comments may be hand delivered between the hours of 8 a.m. and 5 p.m., Monday through Friday to CC:PA:LPD:RU (Announcement 2004–33), Courier's Desk, Internal Revenue Service, 1111 Constitution Ave., NW, Washington, D.C. Alternatively, comments may be submitted electronically via e-mail to the following address: *Notice.Comments@irscounsel.treas.gov*. All comments will be available for public inspection.

Drafting Information

The principal author of this announcement is James Flannery of Employee Plans, Tax Exempt and Government Entities Division. For further information regarding this announcement, please contact the Employee Plans' taxpayer assistance telephone service at 1–877–829–5500 between the hours of 8:00 a.m. and 6:30 p.m. Eastern time, Monday through Friday (a toll-free number). Mr. Flannery may be reached at 1–202–283–9888 (not a toll-free number).

Draft revenue procedure

Part III

Administrative, Procedural, and Miscellaneous

26 CFR 601.201: Rulings and determination letters.
(Also Part I, §§ 401, 403 and 501; 1.401–1, 1.403(a)–1, 1.501(a)–1.)

Rev. Proc.

Table of Contents

SECTION 1. PURPOSE

.01 This revenue procedure sets forth the Service's procedures for issuing opinion and advisory letters regarding the acceptability under § 401 of the Code of the form of pre-approved plans (that is, master and prototype (M&P) and volume submitter (VS) plans). The revenue procedure revises the existing procedures to eliminate several of the differences between the M&P and VS programs while maintaining the essential distinctive features of each program.

.02 This revenue procedure provides that the Service will begin accepting applications for opinion and advisory letters for pre-approved plans that take into account the requirements of the Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. 107–16 (EGTRRA) beginning [RESERVED].

SECTION 2. BACKGROUND

.01 The procedures of the Service on the issuance of opinion letters regarding the acceptability of the form of M&P plans are set forth in Rev. Proc. 2000–20, 2000–1 C.B. 553, as modified by Notice 2001–42, 2001–2 C.B. 70, and Rev. Proc. 2004–6, 2004–1 I.R.B. 197.

.02 Rev. Proc. 2004–6 sets forth the general procedures of the Service on the issuance of employee plan determination letters and advisory letters regarding the acceptability of the form of volume submitter plans.

.03 Notice 2001–42 provides that opinion, advisory and determination letters that take into account EGTRRA will not be issued until further notice.

SECTION 3. OVERVIEW OF THE REVENUE PROCEDURE

.01 Single Revenue Procedure — The Service has for many years maintained two programs for the "pre-approval" of plans qualified under § 401 — the M&P program and the VS program. The two programs originated to serve different purposes and each has had its own set of rules. Until now, those rules were contained in different revenue procedures. In recent years, there have been changes that have eliminated several of the distinctions between the two programs. While the Service will continue to maintain two programs separately, the narrowing of the differences between the programs makes it appropriate to set forth the rules for both programs in a single revenue procedure.

.02 Program Changes — The fundamental distinction between M&P and VS plans is unchanged by this revenue procedure. That is, M&P plans will continue to consist of a basic plan document and adoption agreement that may not be amended by adopting employers, except by choosing among permitted options under the adoption agreement, without the loss of M&P status. Likewise, VS plans will continue to be allowed in either adoption agreement or "individually designed" format and employer amendments will not cause the loss of VS status provided the extent and complexity of the amendments are not inconsistent with the purposes of the VS program. However, the revenue procedure eliminates some of the other differences between the M&P and VS programs. The principal changes are as follows:

(1) The revenue procedure eliminates the requirement that the allocation or benefit formula in a nonstandardized M&P plan satisfy the uniformity requirements for safe harbor plans under § 1.401(a)(4)–2(b)(2) or § 1.401(a)(4)–3(b)(2) of the Income Tax Regulations. This change will allow adopting employers of nonstandardized defined contribution M&P plans to adopt an allocation formula that is designed to be cross-tested for nondiscrimination on the basis of equivalent benefits under § 1.401(a)(4)–8.

(2) The revenue procedure permits, but does not require, VS plans to include a provision that allows the VS practitioner to amend the plan on behalf of adopting employers for changes in the Code, etc. By choosing to include such a provision in the VS plan, the VS practitioner agrees to comply with certain recordkeeping and notice requirements that apply to sponsors of M&P plans. The Service will evaluate this new feature over time to determine whether to preserve it as a permanent feature of the VS program.

The revenue procedure also makes changes to simplify and streamline the two programs. For example, under the procedure, nonstandardized safe harbor plans and paired standardized plans are discontinued as separate categories of M&P plan. This change has been made because recent changes in law and the procedures for employer reliance have diminished the utility of these types of plans. The revenue procedure also provides that sponsors and practitioners that sponsor both M&P plans and VS plans will submit both types of plans to the same office of the Service for review and approval.

.03 Provisions Related to EGTRRA [RESERVED].

.04 Remedial Amendment Period [RESERVED].

PART I — M&P PLANS

SECTION 4. DEFINITIONS

.01 Master Plan — A "master plan" is a plan (including a plan covering self-employed individuals) that is made available by a sponsor for adoption by employers and for which a single funding medium (for example, a trust or custodial account) is established, as part of the plan, for the joint use of all adopting employers. A master plan consists of a basic plan document, an adoption agreement, and, unless included in the basic plan document, a trust or custodial account document.

.02 Prototype Plan — A "prototype plan" is a plan (including a plan covering self-employed individuals) that is made available by a sponsor for adoption by employers and under which a separate funding medium is established for each adopting employer. A prototype plan consists of a basic plan document, an adoption agreement, and, unless the basic plan document incorporates a trust or custodial account agreement the provisions of which are applicable to all adopting employers, a trust or custodial account document.

.03 Basic Plan Document — A "basic plan document" is the portion of a plan containing all the non-elective provisions applicable to all adopting employers. No options (including blanks to be completed) may be provided in the basic plan document, except as provided in section 12.03(1) of this revenue procedure regarding flexible plans.

.04 Adoption Agreement — An "adoption agreement" is the portion of the plan containing the options that may be selected by an adopting employer.

.05 Trust or Custodial Account Document (*Note: This definition does not apply if the basic plan document includes a trust or custodial account agreement the provisions of which apply to all adopting employers.*) — A "trust or custodial account document" is the portion of an M&P plan that contains the trust agreement or custodial account agreement and includes provisions covering such matters as the powers and duties of trustees, investment authority, and the kinds of investments that may be made. Except as provided in section 5.09 and below, all provisions of the trust or custodial account document must be applicable to all adopting employers and no options (including blanks to be completed) may be provided in the trust or custodial account document. With respect to prototype plans, an M&P sponsor or M&P mass submitter may provide up to five separate trust or custodial account documents that are intended for use with any single basic plan document. Thus, for example, several employers that adopt a sponsor's standardized M&P plan may have plans with different trust or custodial account documents. In addition, a sponsor or M&P mass submitter may provide a trust or custodial account document, designated for use only by adopters of nonstandardized plans, which provides for blanks to be completed with respect to administrative provisions of the trust or custodial account agreement. Finally, an M&P plan may provide for the use of any other trust or custodial account document that has been approved by the Service for use with the plan as a qualified trust or as a custodial account treated as a qualified trust. Any trust or custodial account document (including one to be used by adopters of standardized plans) may provide for blanks to be completed that merely enable the adopting employer to specify the names of the plan, employer, trustee or custodian, plan administrator and other fiduciaries, the trust year, and the name of any pooled trust in which the plan's trust will participate.

.06 Opinion Letter — An "opinion letter" is a written statement issued by the Service to a sponsor or M&P mass submitter as to the acceptability of the form of an M&P plan under § 401(a) or § 403(a), and, in the case of a master plan, the acceptability of the master trust under § 501(a).

.07 Sponsor — A "sponsor" is any person that (1) has an established place of business in the United States where it is accessible during every business day and (2) represents to the Service that it has at least 30 employer-clients each of which is reasonably expected to adopt the sponsor's basic plan document within the 12-month period following the issuance of opinion letters.

A sponsor may request opinion letters for any number of basic plan documents and adoption agreements provided the 30-employer requirement is met with respect to at least one basic plan document. The Service reserves the right at any time to request from the sponsor a list of the employers that have adopted or are expected to adopt the sponsor's M&P plans, including the employers' business addresses and employer identification numbers.

Notwithstanding the above, any person that has an established place of business in the United States where it is accessible during every business day may sponsor a plan as a word-for-word identical adopter or minor modifier adopter of a plan of an M&P mass submitter, regardless of the number of employers that are expected to adopt the plan.

By submitting an application for an opinion letter for an M&P plan under this revenue procedure (or by having an application filed on its behalf by an M&P mass submitter), a person represents to the Service that it is a sponsor, as defined above, and agrees to comply with any requirements imposed on sponsors by this revenue procedure. Failure to comply with these requirements may result in the loss of eligibility to sponsor M&P plans and the revocation of opinion letters that have been issued to the sponsor.

.08 M&P Mass Submitter — An "M&P mass submitter" is any person that (1) has an established place of business in the United States where it is accessible during every business day and (2) submits opinion letter applications on behalf of at least 30 unaffiliated sponsors each of which is sponsoring, on a word-for-word identical basis, the same basic plan document. A flexible plan (as defined in section 12.03(1)) that is adopted by a sponsor will be considered a word-for-word identical plan. An M&P mass submitter may submit an opinion letter application on its own behalf as one of the 30 unaffiliated sponsors. For purposes of this definition, affiliation is determined under § 414(b) and (c). Additionally, the following will be considered to be affiliated: any law, accounting, consulting firm, etc., with its partners, members, associates, etc. An M&P mass submitter will be treated as an M&P mass submitter with respect to all its M&P plans provided the 30 unaffiliated sponsor requirement is met with respect to at least one basic plan document.

Notwithstanding the above, any person that received a favorable TRA '86 opinion letter for a plan as an M&P mass submitter under Rev. Proc. 89–9, 1989–1 C.B. 780, will continue to be treated as an M&P mass submitter with respect to all its M&P plans if it submits applications on behalf of at least 10 sponsors (regardless of affiliation) each of which is sponsoring, on a word-for-word identical basis, the same basic plan document.

.09 Standardized Plan — A "standardized plan" is an M&P plan that meets the following requirements:

(1) The provisions governing eligibility and participation are such that the plan by its terms must benefit all employees described in section 5.13 (regardless of whether any employer is treated as operating separate lines of business under § 414(r)) except those that may be excluded under § 410(a)(1) or (b)(3). The adoption agreement may provide options as to whether some or all of the employees described in § 410(a)(1) or (b)(3) are to be excluded, provided that the criteria for excluding employees described in § 410(a)(1) or (b)(3) applies uniformly to all employees. A standardized plan generally may not deny an accrual or allocation to an employee eligible to participate merely because the employee is not an active employee on the last day of the plan year or has failed to complete a specified number of hours of service during the year. However, the plan may deny an allocation or accrual to an employee who is eligible to participate if the employee terminates service during the plan year with not more than 500 hours of service and is not an active employee on the last day of the plan year.

(2) The eligibility requirements under the plan are not more favorable for highly compensated employees (as defined in § 414(q)) than for other employees.

(3) Under the plan, allocations, in the case of a defined contribution plan (other than any cash or deferred arrangement part of the plan), or benefits, in the case of a defined benefit plan, are determined on the basis of total compensation. For this purpose, total compensation means a definition of compensation that includes all compensation within the meaning of § 415(c)(3) and excludes all other compensation or that otherwise satisfies § 414(s) under § 1.414(s)–1(c).

(4) Unless the plan is a target benefit plan or a § 401(k) and/or § 401(m) plan, the plan must, by its terms, satisfy one of the design based safe harbors described in § 1.401(a)(4)–2(b)(2) (taking into account § 1.401(a)(4)–2(b)(4)) or in § 1.401(a)(4)–3(b)(3), (4), or (5) (taking into account § 1.401(a)(4)–3(b)(6)).

(5) All benefits, rights, and features under the plan (other than those, if any, that have been prospectively eliminated) are currently available to all employees benefiting under the plan.

(6) Any past service credit under the plan must meet the safe harbor in § 1.401(a)(4)–5(a)(3).

A plan will not fail to satisfy the coverage requirement for standardized plans merely because the plan provides, either as the result of an elective provision or by default in the absence of an election to the contrary, that individuals who become employees, within the meaning of section 5.13, as the result of a "§ 410(b)(6)(C) transaction" will be excluded from eligibility to participate in the plan during the period beginning on the date of the transaction and ending on a date that is not later than the last day of the first plan year beginning after the date of the transaction. A "§ 410(b)(6)(C) transaction" is an asset or stock acquisition, merger, or other similar transaction involving a change in the employer of the employees of a trade or business.

.10 Nonstandardized Plan — A "nonstandardized plan" is an M&P plan that is not a standardized plan.

SECTION 5. PROVISIONS REQUIRED IN EVERY M&P PLAN

.01 Sponsor Amendments — M&P plans must provide a procedure for sponsor amendment, so that changes in the Code, regulations, revenue rulings, other statements published by the Internal Revenue Service, or corrections of prior approved plans may be applied to all employers who have adopted the plan. Sponsors must make reasonable and diligent efforts to ensure that adopting employers of the sponsor's M&P plan have actually received and are aware of all plan amendments and that such employers complete and sign new adoption agreements when necessary. See section 5.11. Failure to comply with this requirement may result in the loss of eligibility to sponsor M&P plans and the revocation of opinion letters that have been issued to the sponsor.

.02 Employer Amendments — An employer that amends any provision of an approved M&P plan including its adoption agreement (other than to change the choice of options, if the plan permits or contemplates such a change) or an employer that chooses to discontinue participation in a plan as amended by its sponsor and does not substitute another approved M&P plan is considered to have adopted an individually designed plan. However, this rule does not apply in the case of amendments permitted under section 5.06 and 5.09 and model amendments published by the Service which specifically provide that their adoption by an adopter of an M&P plan will not cause such plan to be treated as individually designed. Also see section 19.03 regarding the effect of employer amendments on an employer's ability to rely on an opinion letter. An employer that amends an M&P plan because of a waiver of the minimum funding requirement under § 412(d) will also be considered to have an individually designed plan. The procedures stated in Rev. Proc. 2004–6 relating to the issuance of determination letters for individually designed plans, will then apply to the plan as adopted by the employer.

.03 Compensation Requirements in Nonstandardized Plans — Each nonstandardized M&P plan must give the adopting employer the option to select total compensation as the compensation to be used in determining allocations or benefits. For this purpose, total compensation means a definition of compensation that includes all compensation within the meaning of § 415(c)(3) and excludes all other compensation or that otherwise satisfies § 414(s) under § 1.414(s)–1(c).

.04 Automatic or Optional Safe Harbor Provisions in Nonstandardized Plans — Each nonstandardized M&P must automatically or by option allow the adopting employer to satisfy one of the design-based safe harbors described in § 1.401(a)(4)–2(b)(2) or § 1.401(a)(4)–3(b)(3), (4), and (5). A nonstandardized defined contribution plan is permitted to include allocation formulas which must be general tested under § 1.401(a)(4)–2(c) or cross-tested under § 1.401(a)(4)–8. A nonstandardized defined benefit plan is permitted to include benefit formulas that must be general tested under § 1.401(a)(4)–3(c).

.05 Anti-Cutback Provisions — M&P plans must specifically provide for the protection provided under § 411(a)(10) and (d)(6), to the extent required, in the event that the employer amends the plan in any manner such as by revising the options selected in the adoption agreement or by adopting a new M&P plan. An M&P sponsor may not amend its plan in a manner that could result in the elimination of a benefit to the extent the benefit is required to be protected under § 411(d)(6) with respect to the plan of any adopting employer, unless permitted to do so under §§ 1.401(a)–4 and 1.411(d)–4. In addition, an M&P plan that does not contain vesting for all years that is at least as favorable to participants as that provided in § 416(b), must specifically provide that any vesting that occurs while the plan is top-heavy, will not be cut back if the plan ceases to be top-heavy.

.06 Adopting Employer Modification to Satisfy §§ 415 and 416 — M&P plans must provide that the plan provisions may be amended by overriding plan language completed by the employer in the adoption agreement where such language is necessary to satisfy § 415 or 416 because of the required aggregation of multiple plans under these sections. Generally, a space should be provided in the adoption agreement with instructions for the employer to add such language as necessary to satisfy §§ 415 and 416. In addition, a space must be provided in the adoption agreement for the employer to specify the interest rate and mortality tables used for purposes of establishing the present value of accrued benefits in order to compute the top-heavy ratio under § 416. Such a space must be included in both defined contribution plans and defined benefit plans.

.07 Defined Contribution § 415 Aggregation — Plan language must be incorporated that aggregates all defined contribution M&P plans to satisfy § 415(c) and (f). Sample language provided in the Listing of Required Modifications may be downloaded from the Internet at the following address: ***http://www.irs.gov***.

.08 Top-heavy Requirements — Each plan must either provide that all the additional requirements applicable to top-heavy plans (described in § 416) apply at all times or provide that such requirements apply automatically if the plan is top-heavy regardless of how the adoption agreement is completed. In any case where the latter option is chosen, all the requirements for determining whether the plan is top-heavy must be included in the plan. (See Questions T–35 and T–36 of § 1.416–1.)

.09 Adopting Employer Modification of Trust or Custodial Account Document — An employer that adopts an M&P plan other than a standardized plan (or paired plans) will not be considered to have an individually designed plan merely because the employer amends administrative provisions of the trust or custodial account document (such as provisions relating to investments and the duties of trustees), provided the amended provisions are not in conflict with any other provision of the plan and do not cause the plan to fail to qualify under § 401(a). For this purpose, an amendment includes modification of the language of the trust or custodial account document and the addition of overriding language. An employer that adopts a standardized M&P plan may amend the trust or custodial account document provided such amendment merely involves the specification of the names of the plan, employer, trustee or custodian, plan administrator and other fiduciaries, the trust year, or the name of any pooled trust in which the plan's trust will participate.

.10 Provisions Required in Adoption Agreements Regarding Reliance — The adoption agreement of every nonstandardized M&P plan must include, in close proximity to the signature blank, a statement that describes the limitations on employer reliance on an opinion letter without a determination letter and the circumstances under which an employer will have no reliance without a determination letter. See section 19.02 and section 19.03. Standardized plans must also include a similar statement in the adoption agreement that the adopting employer may not rely on the opinion letter issued by the Service but must apply for a determination letter to have reliance under the circumstances described in section 19.01.

.11 Other Provisions Required in Adoption Agreements — Each M&P plan must contain a dated employer signature line. The employer must sign the adoption agreement when it first adopts the plan and must complete and sign a new adoption agreement if the plan has been restated. In addition, the employer must complete a new signature page if it modifies any prior elections or makes new elections in its adoption agreement. The signature requirement may be satisfied by an electronic signature that reliably authenticates and verifies the adoption of the adoption agreement, or restatement, amendment or modification thereof, by the employer. The adoption agreement must state that it is to be used with one and only one specific basic plan document. In addition, the adoption agreement must contain a cautionary statement to the effect that the failure to properly fill out the adoption agreement may result in failure of the plan to qualify. The adoption agreement must also contain a statement that provides that the sponsor will inform the adopting employer of any amendments made to the plan or of the discontinuance or abandonment of the plan.

.12 Sponsor Telephone Numbers — M&P plan adoption agreements must include the sponsor's address and telephone number (or a space for the address and telephone number of the sponsor's authorized representative) for inquiries by adopting employers regarding the adoption of the plan, the meaning of plan provisions, or the effect of the opinion letter.

.13 Definition of Employee / § 414(b), (c), (m), (n), and (o) — Each M&P plan must include a definition of employee as any employee of the employer maintaining the plan or any other employer aggregated under § 414(b), (c), (m), or (o) and the regulations thereunder. The definition of employee shall also include any individual deemed under § 414(n) (or under regulations under § 414(o)) to be an employee of any employer described in the previous sentence.

.14 Definition of Service / § 414(b), (c), (m), (n), and (o) — Each M&P plan must specifically credit all service with any employer aggregated under § 414(b), (c), (m), or (o) and the regulations thereunder as service with the employer maintaining the plan. In addition, in the case of an individual deemed under § 414(n) (or under regulations under § 414(o)) to be the employee of any employer described in the previous sentence, service with such employer must be credited to such individual.

SECTION 6. OPINION LETTERS — SCOPE

.01 General Limits on Opinion Letters — Opinion letters will be issued only to sponsors or M&P mass submitters. Opinion letters constitute determinations as to the qualification of the plans as adopted by particular employers only under the circumstances, and to the extent, described in section 19. In the case of prototype plans, opinion letters do not constitute rulings or determinations as to the exempt status of related trusts or custodial accounts.

.02 Nonapplicability of the Procedure to IRAs and SEPs — Opinion letters will not be issued under this revenue procedure for prototype plans intended to meet the requirements for individual savings programs or simplified employee pension programs under § 408 (see Rev. Proc. 87–50, 1987–2 C.B. 647, Rev. Proc. 97–29, 1997–1 C.B. 698, and Rev. Proc. 98–59, 1998–2 C.B. 727).

.03 Areas Not Covered by Opinion Letters — Opinion letters will not be issued for:

(1) Multiemployer plans and multiple employer plans;

(2) Union plans (This does not preclude an M&P plan from covering employees of the employer who are included in a unit covered by a collective bargaining agreement or the adoption of an M&P plan pursuant to such agreement as a single employer plan that covers only employees of the employer.);

(3) Stock bonus plans;

(4) Employee stock ownership plans;

(5) Pooled fund arrangements contemplated by Rev. Rul. 81–100, 1981–1 C.B. 326;

(6) Annuity contracts under § 403(b);

(7) Cash balance plans or other defined benefit plans under which the test for nondiscrimination under § 401(a)(4) is made by reference to contributions rather than benefits;

(8) Plans described in § 414(k) (relating to a defined benefit plan that provides a benefit derived from employer contributions that is based partly on the balance of the separate account of a participant);

(9) Target benefit plans, other than plans which, by their terms, satisfy each of the safe harbor requirements described in § 1.401(a)(4)–8(b)(3)(i), as well as the additional rules in § 1.401(a)(4)–8(b)(3)(ii) through (vii);

(10) Defined benefit plans that provide for employee contributions;

(11) Plans that would not satisfy the qualification requirements except as governmental plans as described in § 414(d);

(12) Church plans described in § 414(e) that have not made the election provided by § 410(d);

(13) Plans under which the § 415 limitations are incorporated by reference;

(14) Plans that incorporate the ADP test under § 401(k)(3) or the ACP test under § 401(m)(2) by reference;

(15) Section 401(k) plans that provide for hardship distributions under circumstances other than those described in the safe harbor standards in the regulations under § 401(k);

(16) Fully-insured § 412(i) plans, other than plans that, by their terms, satisfy the safe harbor for § 412(i) plans in § 1.401(a)(4)–3(b)(5);

(17) Plans that fail to contain a provision reflecting the requirements of § 414(u) (see Rev. Proc. 96–49);

(18) Plans that include so-called fail-safe provisions for § 401(a)(4) or the average benefit test under § 410(b);

(19) Plans that include blanks or fill-in provisions for the employer to complete unless the provisions have parameters that preclude the employer from completing the provisions in a manner that could violate the qualification requirements.

The Service may, in its discretion, decline to issue opinion letters for other types of plans not described in this section 6.03.

SECTION 7. OPINION LETTERS — INSTRUCTIONS TO SPONSORS

.01 Employee Plans Rulings and Agreements Issues Opinion Letters — Employee Plans Rulings and Agreements will, upon the request of a sponsor, issue an opinion letter as to the acceptability of the form of the sponsor's M&P plan and any related trust or custodial account under §§ 401(a), 403(a), and 501(a).

.02 Procedure for Requesting Opinion Letters — A request for an opinion letter relating to an M&P plan must be submitted on the current version of Form 4461, *Application for Approval of Master or Prototype Defined Contribution Plan*, Form 4461–A, *Application for Approval of Master or Prototype Defined Benefit Plan*, or Form 4461–B, *Application for Approval of Master or Prototype Plan Mass Submitter Adopting Sponsor*, as appropriate. These forms may be downloaded from the Internet at the following address: ***http://www.irs.gov***. All information on the first page of the application must be typed. See section 20 for the address where to file the application.

.03 Expediting Review of Substantially Identical Plans — The Service reserves the right to review applications in any order that will expedite the processing of opinion letter applications. To expedite the review of substantially identical plans that are not mass submitter plans, the Service encourages plan drafters and sponsors to include with each opinion letter application where it is appropriate a cover letter setting forth the following information:

(1) The name and file folder number (if available) of the plan that, for review purposes, the plan drafter designates as the "lead plan" (including the name and EIN of the sponsor);

(2) A list of all plans written by the plan drafter that are substantially identical to the lead plan (including the information described in (1));

(3) A description of each place where the plan for which the application is being submitted is not word-for-word identical to the language of the lead plan, including an explanation of the purpose and effect of each such difference; and

(4) A certification, made under penalty of perjury by the plan drafter, that the information described in (3) is true and complete.

If the sponsor or plan drafter is aware that a lead plan or any substantially identical plan has been assigned for review to a specialist, the cover letter should also indicate the name of specialist, if possible. To the extent feasible, lead plans and substantially identical plans should be submitted together. The Service will regard the information and certification described in (3) and (4) above as a material representation for purposes of issuing an opinion letter.

.04 Separate Applications Required for Different Categories of M&P Plans / Use of Same Basic Plan Document by Multiple Plans — An M&P plan shall not contain any combination of profit-sharing, money purchase (other than target benefit), target benefit, non-integrated defined benefit, or integrated defined benefit plan features. However, separate defined contribution plans may have the same basic plan document and separate defined benefit plans may have the same basic plan document, but the provisions of the basic plan document must be identical for all plans using that document (that is, no elective or optional features). For example, a sponsor may submit four plans with respect to a given defined benefit basic plan document: integrated standardized and nonstandardized; and nonintegrated standardized and nonstandardized plans. A sponsor may also use one defined contribution basic plan document for a money purchase plan, a target benefit plan, and a profit-sharing plan. One basic plan document may not be used with respect to both defined benefit and defined contribution plans. A separate adoption agreement and completed application form must be submitted with respect to each defined benefit plan and each defined contribution plan. In the case of a simultaneous submission of plans using the same basic plan document, only one copy of the basic plan document should be provided. If the requests are not simultaneous, the sponsor must submit a copy of the basic plan document with each submission and include a cover letter identifying the original submission. The number of such basic plan document must remain the same as in the prior submission.

.05 Sample Language — A Listing of Required Modifications (LRM) containing sample language to be used in drafting M&P plans is available from Employee Plans Rulings and Agreements. Such language is not automatically required in M&P plans but should be used as a guide in drafting such plans. To expedite the review of their plans, sponsors are encouraged to use LRM language and to identify where such language is being used in their plan documents. LRMs may be downloaded from the Internet at the following address: ***http://www.irs.gov***.

.06 Material Furnished to Adopting Employers — A sponsor must furnish each adopting employer with a copy of the approved plan, copies of any subsequent amendments, and the most recently issued Internal Revenue Service opinion letter.

.07 Material Furnished to Employee Plans Determinations — Each M&P mass submitter and each sponsor of a non-mass submitter plan must furnish a copy of the approved M&P plan and the Internal Revenue Service opinion letter to Employee Plans Determinations at the following address:

Internal Revenue Service
Employee Plans Determinations
P.O. Box 2508
Cincinnati, OH 45201
Attn: EP Determinations VSC
Coordinator
Room 5106

In addition, each M&P mass submitter must submit a list to Employee Plans Determinations of all sponsors that have adopted a word-for-word identical plan of the M&P mass submitter and a copy of any plan that contains minor modifications. Each M&P mass submitter and sponsor of a non-mass submitter plan must also furnish Employee Plans Determinations with a copy of all amendments subsequently approved as to form by the Service. Copies of word-for-word identical plans of M&P mass submitters should not be submitted to Employee Plans Determinations.

SECTION 8. APPROVED PLANS — MAINTENANCE OF APPROVED STATUS

.01 Subsequent Required Amendments — An approved M&P plan must be amended by the sponsor and, if necessary, the employer, to retain its approved status if any provisions therein fail to meet the requirements of law, regulations, or other issuances and guidelines affecting qualification that become effective subsequent to the issuance of an opinion letter. Failure to so amend could result in the loss of a plan's qualified status. Sponsors are required to make reasonable and diligent efforts to ensure that each employer which, to the best of the sponsor's knowledge, continues to maintain the plan as an M&P plan amends its plan when necessary. Failure to comply with this or any other requirement imposed on sponsors by this revenue procedure may result in the loss of eligibility to sponsor M&P plans and the revocation of opinion letters that have been issued to the sponsor.

.02 Amendments Following Revenue Rulings — If an approved M&P plan is required to be amended to retain its approved status as a result of publication by the Service of a revenue ruling, notice or similar statement in the Internal Revenue Bulletin (I.R.B.), then, unless specifically stated otherwise in the revenue ruling, etc., the time by which the sponsor must amend its M&P plan to conform to the requirements of the revenue ruling, etc., and request a new opinion letter shall be the end of the one-year period after its publication in the I.R.B., and with respect to any adopting employer's plan the effective date of such amendment shall be the first day of the first plan year beginning within such one-year period.

.03 Loss of Qualified Status — If a sponsor reasonably concludes that an employer's M&P plan may no longer be a qualified plan and the sponsor does not or cannot submit a request to correct the qualification failure under EPCRS, it is incumbent on the sponsor to notify the employer that the plan may no longer be qualified, advise the employer that adverse tax consequences may result from loss of the plan's qualified status, and inform the employer about the availability of the Employee Plans Compliance Resolution System. See Rev. Proc. 2002–47, 2002–2 C.B. 133.

SECTION 9. WITHDRAWAL OF REQUESTS

.01 Notification and Effect — A sponsor may withdraw its request for an opinion letter at any time prior to the issuance of such letter by notifying EP Rulings and Agreements in writing of such withdrawal. The sponsor must also notify each employer who adopted the plan that the request has been withdrawn. Such an employer will be deemed to have an individually designed plan.

.02 Service Retains Information — Even though a request is withdrawn, EP Rulings and Agreements will retain all correspondence and documents associated with that request and will not return them to the sponsor. EP Rulings and Agreements may furnish its views concerning the qualified status of the plan to EP Examinations, which has audit jurisdiction over the returns of any employers that have adopted the plan.

SECTION 10. ABANDONED PLANS

.01 Notification to the Service — A sponsor should notify EP Rulings and Agreements in writing of an approved M&P plan that is no longer used by any employer and which the sponsor no longer intends to offer for adoption. Such written notification should be sent to the address in section 20 and should refer to the file folder number appearing on the latest opinion letter issued.

.02 Notification to Employers — A sponsor that intends to abandon an approved M&P plan that is in use by any adopting employer must inform each adopting employer that the form of the plan has been terminated, that the employer's plan will become an individually designed plan (unless the employer adopts another approved M&P plan), and that any employer reliance will not continue if there is a change in law or other change in the qualification requirements. After so informing all adopting employers, the sponsor should notify EP Rulings and Agreements in accordance with subsection .01 above.

SECTION 11. RECORDKEEPING REQUIREMENTS

.01 Filing of Opinion Letter Application Constitutes Agreement to Comply with Recordkeeping Requirements — By submitting an application for an opinion letter under this revenue procedure (or by having an application filed on its behalf by an M&P mass submitter), an M&P plan sponsor agrees, as provided in section 4.07, to comply with the requirements imposed on the sponsor by this revenue procedure, including the recordkeeping requirements of this section. Failure to comply with the requirements imposed on the sponsor by this revenue procedure may result in the loss of eligibility to sponsor M&P plans and the revocation of opinion letters that have been issued to the sponsor.

.02 Maintenance and Availability of Records of Adopting Employers — An M&P plan sponsor must maintain, or have maintained on its behalf, for each of its plans, a record of the names, business addresses, and taxpayer identification numbers of all employers that have adopted the plan. However, a sponsor need not maintain records with respect to employers that, to the best of the sponsor's knowledge, ceased to maintain the plan as an M&P plan more than three years earlier. Upon written request, a sponsor must provide to the Service a list of such adopting employers that indicates, to the best of the sponsor's knowledge, which of such employers continue to maintain the plan as an M&P plan and which of such employers have ceased to maintain the plan as an M&P plan within the preceding three years.

SECTION 12. M&P MASS SUBMITTERS

.01 Opinion Letters Issued to M&P Mass Submitters — EP Rulings and Agreements will, upon request by an M&P mass submitter, as defined in section 4.08, issue an opinion letter as to the acceptability of the form of the mass submitter's M&P plan and any related trust or custodial account under §§ 401(a), 403(a), and 501(a). With respect to its plan, the M&P mass submitter must submit a completed Form 4461 or 4461–A, as applicable, to the address in section 20. The first page of the Form 4461 or 4461–A must be typed. The application must include a copy of the plan (adoption agreement and basic plan document) and any separate trust or custodial account document(s). In the case of an initial submission of a basic plan document under this revenue procedure, the M&P mass submitter's application must also be accompanied by applications for opinion letters filed on behalf of the requisite number of identical adopters (as determined under section 4.08), unless the M&P mass submitter has already satisfied this requirement in connection with a previous application under this revenue procedure involving another basic plan document. The application must also include the required user fee. An M&P mass submitter may submit an application on its own behalf as one of the requisite number of adopting sponsors. After satisfying the requisite number of adopting sponsors requirement, the M&P mass submitter may submit additional applications on behalf of other sponsors that wish to adopt a word-for-word identical plan or a plan that contains minor modifications from the mass submitter plan, as provided in section 12.03(2). In addition, the M&P mass submitter may then submit requests for opinion letters under this section 12.01 for its other plans, regardless of the number of identical adopters of such other plans.

.02 Reduced Procedural Requirements for Sponsors That Use Mass Submitter Plans — A sponsor of an M&P plan of a mass submitter must obtain an opinion letter. For initial qualification, or where the sponsor's plan includes minor modifications, the M&P mass submitter on behalf of the sponsor must submit to EP Rulings and Agreements a completed Form 4461-B which contains a declaration by the M&P mass submitter under penalty of perjury that the sponsor has adopted an M&P plan that is word-for-word identical, within the meaning of this section, to a plan of the M&P mass submitter, or an M&P plan that is a minor modification of the mass submitter's plan. Form 4461-B must be typed. If the M&P mass submitter's plan has been approved by the Service, the sponsor's request for an opinion letter must identify the letter serial number and date of the opinion letter issued to the M&P mass submitter with respect to that plan. If the sponsor has previously received a letter with respect to a plan that is identical to the M&P mass submitter's plan, the procedures described in sections 12.04 should be followed. If the sponsor is sponsoring a word-for-word identical plan (including a flexible plan), a copy of the plan need not be submitted. If the M&P mass submitter submits a plan with minor modifications, it must comply with the requirements of section 12.03(2). The application submitted on behalf of the sponsor must include the required user fee. Upon receipt of the request for an opinion letter, described above, the Service will, as soon as clerically feasible, issue an opinion letter to the sponsor.

.03 Definitions —

(1) Flexible Plan —

(a) In general — A "flexible plan" is a plan submitted by an M&P mass submitter that contains optional provisions (as defined in (b), below). Sponsors that adopt the flexible plan may include or delete any optional provision that is designated as such in the M&P mass submitter's plan, provided the inclusion or deletion of specific optional provisions conforms to the M&P mass submitter's written representation to the Service concerning the choices available to sponsors and the coordination of optional provisions. An M&P mass submitter must bracket and identify the optional provisions when submitting such plan to EP Rulings and Agreements and must also provide the Service a written representation describing the choices available to sponsors and the coordination of optional provisions. Thus, such a representation must indicate whether a sponsor's plan may contain only one of a certain group of optional provisions, may contain only a specific combination of provisions, or may exclude the provisions entirely. Similarly, if the inclusion (or deletion) of a specific optional provision in a sponsor's plan will automatically result in the inclusion (or deletion) of any other optional provision, this must be set forth in the M&P mass submitter's representation. A flexible plan may contain only optional provisions which meet the requirements of (b), below, and must be drafted so that the qualification of any sponsor's plan will not be affected by the inclusion or deletion of optional provisions. For example, if a sponsor's defined contribution plan contains an optional provision which allows a portion of a participant's account to be invested in life insurance, then under the terms of the sponsor's plan, the application of the proceeds must meet the requirements of §§ 401(a)(11) and 417. A flexible plan adopted by a sponsor which differs from the M&P mass submitter plan only because the sponsor has deleted certain optional provisions from its plan in conformance with the M&P mass submitter's representation described above will be treated as a word-for-word identical plan to the M&P mass submitter plan. The Service encourages M&P mass submitters to limit the number of optional provisions described in (b)(i) and (ii), below, which they provide under a flexible plan to six investment provisions and six administrative provisions.

(b) Optional Provisions — A flexible plan may contain only optional provisions that comply with the requirements set forth below. The optional provisions may be arranged as separate optional articles or as separate optional provisions within a single article. A flexible plan may also contain optional provisions in the adoption agreement. For example, if an M&P mass submitter flexible plan basic plan document contains an optional provision that would allow for loans under a sponsor's M&P plan, the adoption agreement could also include an optional provision that would enable an adopting employer to elect whether loans will be available under the plan it adopts. If the sponsor does not wish to enable adopting employers to make loans available under their plans, both the basic plan document optional provision and the adoption agreement optional provision would be deleted from the sponsor's M&P plan. Sponsors may include or delete optional provisions of M&P mass submitter plans, but once the sponsor has decided to include an optional provision, it must offer that provision to all adopting employers. Any optional provision that the Service determines does not meet the requirements of this section will have to be changed to a non-optional provision or deleted from the M&P mass submitter's plan. The following is an exclusive list of the allowable optional provisions that a flexible plan may contain:

(i) Investment Provisions — An M&P mass submitter may offer a variety of investment provisions in its plan for sponsors to include or delete from their version of the plan. However, the plan as adopted by the sponsor must provide some method for investing trust assets. Investment provisions are those provisions that describe the plan's methods of investing the trust or custodial funds, including provisions such as the availability of loans and investments in insurance contracts or other funding media, and self-directed investments. (Also see (4) and (5) regarding flexibility permitted in trust or custodial account documents.)

(ii) Administrative Provisions — An M&P mass submitter may offer a variety of administrative provisions in its plan for sponsors to include or delete from their version of the plan. However, the plan as adopted by the sponsor must describe how the plan will be administered. Administrative provisions are those provisions that describe the administration of the plan, including the powers, duties, and responsibilities of a plan's custodian, trustee, administrator, employer, and other fiduciaries. Administrative provisions include the allocation of responsibilities among fiduciaries, the resignation or replacement of fiduciaries, claims procedures under the plan, and recordkeeping requirements. However, procedural provisions that are required for plan qualification are not administrative provisions under this section. For example, provisions that provide for the notice to participants required by § 417 and recordkeeping required by regulations under §§ 401(k) and (m) are not administrative provisions for purposes of this revenue procedure, and may not be optional provisions.

(iii) Cash or Deferred Arrangement — An M&P mass submitter may include a self-contained cash or deferred arrangement (as defined in § 401(k)) for sponsors to include or delete.

(c) Addition of Optional Provisions by the M&P Mass Submitter — An M&P mass submitter may add additional optional provisions to its plan after a favorable opinion letter is issued. Generally, the addition of such optional provisions will not be treated as a plan amendment for purposes of this revenue procedure, Rev. Proc. 2004–6, and Rev. Proc. 2004–8, 2004–1 I.R.B. 240, and sponsors and adopting employers will not be required to obtain new opinion and determination letters in order to preserve reliance. (However, the addition of a cash or deferred arrangement or any change to the language of the adoption agreement subsequent to the issuance of an opinion letter will be treated as a plan amendment to the M&P mass submitter's plan and the requirements of subsection .04 will then apply.) The M&P mass submitter must submit such additional optional provisions to the Service, along with a completed Form 4461 or 4461–A, as applicable, and a check or money order in the amount specified in section 6.04(6) of Rev. Proc. 2004–8. No opinion letter will be issued to the M&P mass submitter or any adopting sponsor with respect to the addition of these optional provisions. Instead, a letter will be issued to the M&P mass submitter notifying it that the addition of such optional provisions will not affect the status of favorable opinion and determination letters issued to sponsors and adopting employers.

(d) Notification to Employer — If an M&P mass submitter adds optional provisions, as described in (c), above, all adopting sponsors who wish to include the additional optional provisions must furnish each adopting employer with a copy of the plan that includes such additional provisions. If a sponsor decides to include or delete an optional provision after it initially adopted the plan, it must also furnish each adopting employer with a copy of the new plan. However, if such inclusion or deletion results in a change to the language of the adoption agreement, such change will be treated as a plan amendment and the sponsor and its adopting employers may not continue to rely on previously issued opinion or determination letters.

(2) Minor Modification — A "minor modification" is a minor change to an otherwise word-for-word identical plan of the M&P mass submitter that does not require an in-depth technical review. For example, a change from 5 year 100% vesting to 3 year 100% vesting is a minor modification. On the other hand, a change in the method of accrual of benefits in a defined benefit plan would not be considered a minor modification. A minor modification must be submitted by the M&P mass submitter on behalf of the sponsor that will adopt the modified plan. Such submissions will be reviewed on an expedited basis and opinion letters will be issued to the sponsor as soon as possible. However, the Service reserves the right to determine if such changes are actually minor. If it is determined that the changes are extensive or require an in-depth technical review, the plan will not be entitled to expedited review but will be treated as a non-mass submitter plan. (In such event, the Service will notify the M&P mass submitter in writing of its determination. Within 30 days following the date of such communication, either the M&P mass submitter may revise the plan so that the modifications are minor and resubmit the revised plan, or the sponsor may submit an additional user fee in an amount equal to the difference between a non-mass submitter plan application user fee and a minor modifier application user fee. If, after such 30 day period neither action has been taken, the application may be considered withdrawn.) To qualify for the expeditious review, the M&P mass submitter must submit a completed Form 4461-B. Such form must be typed. In addition, the M&P mass submitter must submit a copy of the M&P mass submitter's plan with the minor modifications highlighted, as well as a statement indicating the location and effect of each change. The M&P mass submitter must certify under penalty of perjury that the plan of the sponsor, except for the delineated changes, is word-for-word identical, within the meaning of this section, to the plan for which the M&P mass submitter received a favorable opinion letter. If an M&P mass submitter fails to identify each modification, such failure will be considered a material misrepresentation and an employer may not rely on any opinion or determination letter that may be issued with respect to the plan. If an M&P mass submitter repeatedly fails to identify such modifications, the Service may deny permission to that M&P mass submitter to submit additional minor modifications.

.04 Amendments of M&P Mass Submitter Plans — Any plan submitted by an M&P mass submitter must include language designating the M&P mass submitter as agent for the sponsor for purposes of making plan amendments (see section 12.02). Any sponsor that does not wish to make the amendments made by an M&P mass submitter may switch to another M&P mass submitter or may submit an application for an opinion letter on its own behalf. If the M&P mass submitter makes any change to the plan, other than the addition of optional provisions pursuant to section 12.03(1)(c), an amendment described in section 21.02, or a model amendment published by the Service, it must comply with the requirements of section 21.01 of this revenue procedure. In addition, prior to submitting an amendment to EP Rulings and Agreements, the M&P mass submitter must notify the Service of its intention to amend the plan. Such notification should be submitted, in writing, to the address in section 20. The Service will then mail a list to the M&P mass submitter showing all sponsors that have adopted plans that are identical to the M&P mass submitter's plans, as well as the specific plans adopted by each sponsor. The M&P mass submitter must then submit the amended plan to EP Rulings and Agreements for approval, along with a list identifying all adopting sponsors' plans that will be amended, a user fee form for each such sponsor, and the appropriate user fee required under section 6.04 of Rev. Proc. 2004–8. All sponsors that have adopted the M&P mass submitter's plan, are identified on the list submitted to the Service, and for which a user fee has been submitted, will be considered to have made such amendments and will be issued opinion letters. In the case of minor modifier plans, separate Form 4461–B applications must be filed along with copies of the plans as amended, user fee forms, and the user fee required by section 6.04 of Rev. Proc. 2000–8 for minor modifier applications. Copies of the amended plan must be sent to adopting employers and EP Determinations in accordance with section 7.11. Any adopting sponsor that is not included on the list submitted to the Service (or in the case of a minor modifier, for which a Form 4461–B application has not been filed) or which notifies the Service of its desire not to adopt such amendment will no longer participate as an M&P mass submitter plan but must apply for an opinion letter on its own behalf to retain its status as an M&P plan.

.05 Expeditious Processing Accorded M&P Mass Submitter Plans — All M&P mass submitter plans, including the adoption of approved M&P mass submitter plans by sponsors, will be accorded more expeditious processing than M&P plans submitted by non-mass submitters, to the extent administratively feasible.

PART II — VOLUME SUBMITTER PLANS

SECTION 13. DEFINITIONS

.01 Volume Submitter Plan — A "volume submitter plan" or "VS plan" refers to either a specimen plan of a VS practitioner or a plan of a client of the VS practitioner that is substantially similar to the VS practitioner's approved specimen plan.

.02 Specimen Plan — A "specimen plan" is a sample plan of a VS practitioner (rather than the actual plan of an employer). A specimen plan may include an adoption agreement.

.03 Advisory Letter — An "advisory letter" is a written statement issued by the Service to a VS practitioner or VS mass submitter as to the acceptability of the form of a specimen plan and any related trust or custodial account under § 401(a) or § 403(a).

.04 VS Practitioner — A "VS practitioner" is any person that (1) has an established place of business in the United States where it is accessible during every business day and (2) represents to the Service that it has at least 30 employer-clients each of which is reasonably expected to adopt a plan that is substantially similar to the VS practitioner's specimen plan within the 12-month period following the issuance of an advisory letter.

A VS practitioner may submit any number of specimen plans for advisory letters provided the 30-employer requirement is separately satisfied with respect to each specimen plan. The Service reserves the right at any time to request from the VS practitioner a list of the employers that have adopted or are expected to adopt the VS practitioner's specimen plans, including the employers' business addresses and employer identification numbers.

Notwithstanding the above, any person that has an established place of business in the United States where it is accessible during every business day may sponsor a specimen plan as a word-for-word identical adopter of a specimen plan of an VS mass submitter, regardless of the number of employers that are expected to adopt the plan.

By submitting an application for an advisory letter for a specimen plan under this revenue procedure (or by having an application filed on its behalf by a VS mass submitter), a person represents to the Service that it is a VS practitioner, as defined above. If the VS practitioner's specimen plan permits the VS practitioner to amend the VS plan on behalf of adopting employers, as permitted by section 15, the VS practitioner also agrees to comply with any requirements imposed on sponsors of M&P plans by this procedure. Failure to comply with these requirements may result in the loss of eligibility to sponsor specimen plans and the revocation of advisory letters that have been issued to the VS practitioner.

.05 VS Mass Submitter — A "VS mass submitter" is any person that (1) has an established place of business in the United States where it is accessible during every business day and (2) submits advisory letter applications on behalf of at least 30 unaffiliated practitioners each of which is sponsoring, on a word-for-word identical basis, the same specimen plan. A VS mass submitter may submit an advisory letter application on its own behalf as one of the 30 unaffiliated practitioners. For purposes of this definition, affiliation is determined under § 414(b) and (c). Additionally, the following will be considered to be affiliated: any law, accounting, consulting firm, etc., with its partners, members, associates, etc. A VS mass submitter will be treated as a VS mass submitter with respect to each specimen plan for which the 30 unaffiliated practitioner requirement is separately met.

SECTION 14. PROVISIONS REQUIRED IN EVERY VS PLAN

.01 Anti-Cutback Provisions — VS plans must specifically provide for the protection provided under § 411(a)(10) and (d)(6), to the extent required, in the event that the employer amends the plan in any manner. If a VS plan authorizes the VS practitioner to amend the plan on behalf of employers, the VS practitioner may not amend the plan in a manner that could result in the elimination of a benefit to the extent the benefit is required to be protected under § 411(d)(6) with respect to the plan of any adopting employer, unless permitted to do so under §§ 1.401(a)–4 and 1.411(d)–4. In addition, a VS plan that is not exempt from the top-heavy requirements and that does not contain vesting for all years which is at least as favorable to participants as that provided in § 416(b), must specifically provide that any vesting that occurs while the plan is top-heavy will not be cut back if the plan ceases to be top-heavy.

.02 Definition of Employee / § 414(b), (c), (m), (n), and (o) — Each VS plan must include a definition of employee as any employee of the employer maintaining the plan or any other employer aggregated under § 414(b), (c), (m), or (o) and the regulations thereunder. The definition of employee shall also include any individual deemed under § 414(n) (or under regulations under § 414(o)) to be an employee of any employer described in the previous sentence.

.03 Definition of Service / § 414(b), (c), (m), (n), and (o) — Each VS plan must specifically credit all service with any employer aggregated under § 414(b), (c), (m), or (o) and the regulations thereunder as service with the employer maintaining the plan. In addition, in the case of an individual deemed under § 414(n) (or under regulations under § 414(o)) to be the employee of any employer described in the previous sentence, service with such employer must be credited to such individual.

SECTION 15. AMENDMENTS ON BEHALF OF ADOPTING EMPLOYERS

.01 Option to Permit Practitioner Amendment — A VS practitioner may amend its specimen plan and request a new advisory letter with respect to the amended plan. Ordinarily, the amendments will apply only to the plans of employers who adopt the plan after it has been amended and will not apply to plans of employers who adopted the plan prior to the amendment. However, a VS plan may, but is not required to, include a provision that authorizes the VS practitioner to amend the plan on behalf of employers who have previously adopted the plan, so that changes in the Code, regulations, revenue rulings, other statements published by the Internal Revenue Service, or corrections of prior approved plans may be applied to all employers who have adopted the plan. The provision must state that the practitioner will no longer have the authority to amend the plan on behalf of the adopting employer as of the date the Service requires the employer to file Form 5300 as an individually designed plan because of substantial employer modifications of the specimen plan. The provision must also state that if the employer is required to obtain a determination letter in order to have reliance (for example, because the employer has modified the specimen plan), the practitioner's authority to amend the plan on behalf of the adopting employer is conditioned on the plan being covered by a favorable determination letter.

.02 A VS practitioner who is authorized to adopt plan amendments on behalf of adopting employers must comply with the requirements in sections 7.06 and 8 through 11 that apply to M&P sponsors. Failure to do so may result in the loss of eligibility to sponsor VS plans and the revocation of advisory letters that have been issued to the VS practitioner. Thus, the VS practitioner must maintain, or have maintained on its behalf, a record of the employers that have adopted the plan, and the VS practitioner must make reasonable and diligent efforts to ensure that adopting employers have actually received and are aware of all plan amendments and that such employers adopt new documents when necessary.

SECTION 16. ADVISORY LETTERS — SCOPE

.01 General Limits on Advisory Letters — Advisory letters will be issued only to VS practitioners or VS mass submitters. Advisory letters constitute determinations as to the qualification of the plans as adopted by particular employers only under the circumstances, and to the extent, described in section 19. Advisory letters do not constitute rulings or determinations as to the exempt status of related trusts or custodial accounts.

.02 Areas Not Covered by Advisory Letters — Advisory letters will not be issued for:

(1) Multiemployer plans;

(2) Union plans (This does not preclude a VS plan from covering employees of the employer who are included in a unit covered by a collective bargaining agreement or the adoption of a VS plan pursuant to such agreement as a single employer plan which covers only employees of the employer.);

(3) Stock bonus plans;

(4) Employee stock ownership plans;

(5) Pooled fund arrangements contemplated by Rev. Rul. 81–100, 1981–1 C.B. 326;

(6) Annuity contracts under § 403(b);

(7) Cash balance plans or other defined benefit plans under which the test for nondiscrimination under § 401(a)(4) is made by reference to contributions rather than benefits;

(8) Plans described in § 414(k) (relating to a defined benefit plan which provides a benefit derived from employer contributions which is based partly on the balance of the separate account of a participant);

(9) Target benefit plans, other than plans which, by their terms, satisfy each of the safe harbor requirements described in § 1.401(a)(4)–8(b)(3)(i), as well as the additional rules in § 1.401(a)(4)–8(b)(3)(ii) through (vii);

(10) Defined benefit plans that provide for employee contributions;

(11) Church plans described in § 414(e) that have not made the election provided by § 410(d);

(12) Governmental plans that include so-called "DROP" provisions or similar provisions;

(13) Plans under which the § 415 limitations are incorporated by reference;

(14) Plans that incorporate the ADP test under § 401(k)(3) or the ACP test under § 401(m)(2) by reference;

(15) Section 401(k) plans that provide for hardship distributions under circumstances other than those described in the safe harbor standards in the regulations under § 401(k);

(16) Fully-insured § 412(i) plans, other than plans that, by their terms, satisfy the safe harbor for § 412(i) plans in § 1.401(a)(4)–3(b)(5);

(17) Plans that fail to contain a provision reflecting the requirements of § 414(u) (see Rev. Proc. 96–49);

(18) Plans that include so-called fail-safe provisions for § 401(a)(4) or the average benefit test under § 410(b);

(19) Plans that include blanks or fill-in provisions for the employer to complete unless the provisions have parameters that preclude the employer from completing the provisions in a manner that could violate the qualification requirements.

The Service may, in its discretion, decline to issue advisory letters for other types of plans not described in this section 16.02.

SECTION 17. ADVISORY LETTERS — INSTRUCTIONS TO VS PRACTITIONERS

.01 Employee Plans Rulings and Agreements Issues Advisory Letters — Employee Plans Rulings and Agreements will, upon the request of a VS practitioner, issue an advisory letter as to the acceptability of the form of the VS practitioner's specimen plan under § 401(a) or § 403(a).

.02 Procedure for Requesting Advisory Letters — A request for an advisory letter relating to a specimen plan must be submitted on Form 4461–V, *Application for Approval of VS Specimen Plan*. This is a new form, first published in [RESERVED FOR INITIAL PUBLICATION DATE OF FORM 4461–V]. The form may be downloaded from the Internet at the following address: ***http://www.irs.gov***. All information on the first page of the application must be typed. See section 20 for the address to file the application. The request must include the following:

(1) a copy of the specimen plan, including adoption agreement, if applicable, and any related specimen trust instrument;

(2) the required user fee submitted with Form 8717, *User Fee for Employee Plan Determination Letter Request*; and

(3) an index/table of contents listing the location of all variable sections.

.03 Separate Specimen Plans and Applications Required for Different Categories of Plans — A separate specimen plan and application is required for the following categories of plans: a profit-sharing plan (without a § 401(k) arrangement), a profit-sharing plan (with a § 401(k) arrangement), a money purchase pension plan (other than a target benefit plan), a target benefit plan, and a defined benefit plan. Different categories may not be combined in a single specimen plan or application.

.04 Sample Language — A Listing of Required Modifications (LRM) containing sample plan language is available from Employee Plans Rulings and Agreements. Although the sample language is designed for use in M&P plans, which use an adoption agreement format, VS practitioners should refer to the sample language as a guide in drafting VS plans. To expedite the review of their plans, VS practitioners are encouraged to use LRM language where appropriate and to identify where such language is being used in their plan documents. LRMs may be downloaded from the Internet at the following address: ***http://www.irs.gov***.

SECTION 18. VS MASS SUBMITTERS

.01 Advisory Letters Issued to VS Mass Submitters — EP Rulings and Agreements will, upon request by an VS mass submitter, as defined in section 13.05, issue an advisory letter as to the acceptability of the form of the VS mass submitter's specimen plan under § 401(a) or § 403(a). .] See section 20 for the address to file the application.

.02 The requirements for the VS mass submitters application are as follows:

(1) The application must include the plan and trust and all the other information required by section 17. The application must include a cover letter that states that at least 30 VS practitioners are submitting applications for advisory letters for identical specimen plans and must certify that each such plan is word-for-word identical to the VS mass submitter specimen plan. The cover letter must provide the name, address, and EIN of each of the VS practitioners.

(2) The application for the VS mass submitter specimen plan must include the required user fee under Rev. Proc. 2004–8.

(3) The application must be accompanied by separate advisory letter applications filed by each of the VS practitioners listed in the cover letter.

(4) The required user fee for an identical adopter application under Rev. Proc. 2004–8 must also be submitted.

(5) After the initial submission of advisory letter applications for at least 30 VS practitioners, applications may be filed by other VS practitioners who will sponsor the word-for-word identical plan. A copy of the plan should not be submitted.

PART III — ALL PRE-APPROVED PLANS

SECTION 19. EMPLOYER RELIANCE

.01 Standardized M&P Plans — An employer adopting a standardized M&P plan may rely on that plan's opinion letter, except as provided in (1) through (3) and section 19.03 below, if the sponsor of such plan or plans has a currently valid favorable opinion letter, the employer has followed the terms of the plan(s), and the coverage and contributions or benefits under the plan(s) are not more favorable for highly compensated employees (as defined in § 414(q)) than for other employees.

(1) An employer may not rely on an opinion letter for a standardized plan with respect to the requirements of §§ 415 and 416, without obtaining a determination letter, if the employer maintains at any time, or has maintained at any time, another plan, including a standardized plan, that was qualified or determined to be qualified covering some of the same participants. For this purpose, a plan that has been properly replaced by the adoption of a standardized plan is not considered another plan. The plan that has been replaced and the standardized plan must be of the same type (*e.g.*, both defined benefit plans) in order for the employer to be able to rely on the standardized plan with respect to the requirements of §§ 415 and 416 without obtaining a determination letter. In addition, an employer that adopts a standardized defined contribution plan will not be considered to have maintained another plan merely because the employer has maintained another defined contribution plan(s), provided such other plan(s) has been terminated prior to the effective date of the standardized plan and no annual additions have been credited to the account of any participant under such other plan(s) as of any date within a limitation year of the standardized plan. Likewise, an employer that adopts a standardized defined contribution plan that is first effective on or after the effective date of the repeal of § 415(e) will not be considered to have maintained another plan merely because the employer has maintained a defined benefit plan(s), provided the defined benefit plan(s) has been terminated prior to the effective date of the standardized defined contribution plan.

(2) An employer that has adopted a standardized defined benefit plan may rely on an opinion letter with respect to the requirements of § 401(a)(26) only if the plan satisfies the requirements of § 401(a)(26) with respect to its prior benefit structure or is deemed to satisfy § 401(a)(26) under the regulations. However, an employer may request a determination letter if the employer wishes to have reliance as to whether the plan satisfies § 401(a)(26) with respect to its prior benefit structure.

(3) An employer that adopts a standardized plan may not rely on an opinion letter with respect to: (a) whether the timing of any amendment to the plan (or series of amendments) satisfies the nondiscrimination requirements of § 1.401(a)(4)–5(a), except with respect to plan amendments granting past service that meet the safe harbor described in § 1.401(a)(4)–5(a)(3) and are not part of a pattern of amendments that significantly discriminates in favor of highly compensated employees; or (b) whether the plan satisfies the effective availability requirement of § 1.401(a)(4)–4(c) with respect to any benefit, right, or feature. An employer that adopts a standardized plan as an amendment to a plan other than a standardized plan may not rely on an opinion letter with respect to whether a benefit, right, or feature that is prospectively eliminated satisfies the current availability requirements of § 1.401(a)(4)–4 of the regulations. Such an employer may request a determination letter if the employer wishes to have reliance as to whether the prospectively eliminated benefit, right, or feature satisfies the current availability requirements.

.02 Nonstandardized M&P Plans and Volume Submitter Plans — An employer adopting a nonstandardized M&P or volume submitter plan may rely on that plan's opinion or advisory letter as described below if the employer's plan is identical to an approved M&P or specimen plan with a currently valid favorable opinion or advisory letter, the employer has chosen only options permitted under the terms of the approved plan, and the employer has followed the terms of the plan. (Also see section 19.03(3) below.) These employers can forego filing Form 5307 and rely on the plan's favorable opinion or advisory letter with respect to the qualification requirements, except as provided in section (1) through (4) and section 19.03 below.

(1) Except as provided in section 19.03(2) and (3), adopting employers of nonstandardized M&P plans and volume submitter plans may not rely on a favorable opinion or advisory letter with respect to the requirements of:

(a) §§ 401(a)(4), 401(a)(26), 401(l), 410(b) or 414(s); or

(b) if the employer maintains or has ever maintained another plan covering some of the same participants, §§ 415 or 416.

For this purpose, whether an employer maintains or has ever maintained another plan will be determined using principles consistent with section 19.01 above.

(2) Adopting employers of nonstandardized M&P plans and volume submitter plans may rely on the opinion or advisory letter with respect to the requirements of §§ 410(b) and 401(a)(26) (other than the § 401(a)(26) requirements that apply to a prior benefit structure) if 100 percent of all nonexcludable employees benefit under the plan.

(3) Nonstandardized M&P plans must give adopting employers the option to elect a safe harbor allocation or benefit formula and a safe harbor compensation definition. Adopting employers of nonstandardized M&P plans that elect a safe harbor allocation or benefit formula and a safe harbor compensation definition may rely on an opinion letter with respect to the nondiscriminatory amounts requirement under § 401(a)(4). Adopting employers of nonstandardized M&P plans that are § 401(k) and/or § 401(m) plans may rely on an opinion letter with respect to whether the form of the plan satisfies the actual deferral percentage test of § 401(k)(3) or the actual contribution percentage test of § 401(m)(2) if the employer elects to use a safe harbor definition of compensation in the test. Adopting employers of nonstandardized M&P plans described in § 401(k)(11) and/or § 401(m)(12) may rely on an opinion letter with respect to whether the form of the plan satisfies these requirements unless the plan provides for the safe harbor contribution to be made under another plan.

.03 Other Limitations and Conditions on Reliance — The following conditions and limitations apply with respect to standardized and nonstandardized M&P plans as well as volume submitter plans:

(1) An adopting employer can rely on a favorable opinion or advisory letter for a plan that amends or restates a plan of the employer only if the plan that is being amended or restated was qualified.

(2) An adopting employer has no reliance if the employer's adoption of the plan precedes the issuance of an opinion or advisory letter for the plan.

(3) An adopting employer can rely on an opinion or advisory letter only if the employer's plan is identical to an approved M&P or specimen plan with a currently valid favorable opinion or advisory letter; that is, the employer has not added any terms to the approved M&P or VS plan and has not modified or deleted any terms of the plan other than choosing options permitted under the plan or, in the case of an M&P plan, amending the document as permitted under sections 5.06 and 5.09. Thus, for example, in the case of a VS plan, the employer's plan must be identical to the approved specimen plan except as the result of the employer's selection among options that are permitted under the terms of the approved specimen plan. An employer's plan will not fail to be identical to an approved M&P or specimen plan merely because the employer modifies or amends the plan to add or change a provision and/or to specify or change the effective date of a provision, provided the employer is permitted to make the modification or amendment under the terms of the approved M&P or specimen plan as well as under § 401(a), and, except for the effective date, the provision is identical to a provision in the approved plan. Thus, an employer is not required to restate its M&P or volume submitter plan in order to change options under the plan or to specify different effective dates Also see section 5.02, which limits an employer's ability to amend an M&P plan without causing the plan to be treated as an individually designed plan, and section 5.11, which requires the employer to complete a new signature page when the employer changes options in an M&P adoption agreement.

(4) An adopting employer cannot rely on an opinion or advisory letter if the adopting employer has modified the terms of the plan's approved trust in a manner that would cause the plan to fail to be qualified.

.04 Reliance Equivalent to Determination Letter — If an employer can rely on a favorable opinion or advisory letter pursuant to this section, the opinion or advisory letter shall be equivalent to a favorable determination letter. For example, the favorable opinion or advisory letter shall be treated as a favorable determination letter for purposes of section 21 of Rev. Proc. 2004–6, regarding the effect of a determination letter, and section 5.01(4) of Rev. Proc. 2002–47, regarding the definition of "favorable letter" for purposes of the Employee Plans Compliance Resolution System. Of course, the extent of the employer's reliance may be limited, as provided above.

SECTION 20. WHERE TO FILE AND OTHER RULES FOR APPLICATIONS AND LETTERS

.01 Opinion Letters — Except as provided in section 20.03, applications for opinion letters, including applications filed by M&P mass submitters, should be sent to: [RESERVED].

.02 Advisory Letters — Except as provided in section 20.03, applications for advisory letters, including applications filed by VS mass submitters, should be sent to: [RESERVED].

.03 Sponsors of Both M&P and VS Plans — Sponsors, practitioners, or mass submitters who sponsor both M&P plans and VS plans should send applications for both types of plans to: [RESERVED].

.04 Effect of Failure to Disclose Material Fact or to Accurately Provide Information — The Service may determine, based on the application, the extent of review of the pre-approved plan. A failure to disclose a material fact or misrepresentation of a material fact in the application may adversely affect the reliance that would otherwise be obtained through issuance by the Service of a favorable opinion or advisory letter. Similarly, failure to accurately provide any of the information called for on any form required by this revenue procedure may result in no reliance.

.05 Additional Information May Be Requested — The Service may, at its discretion, require any additional information that it deems necessary, including a demonstration of how the variables (options or alternatives) in the M&P or specimen plan interrelate to satisfy the qualification requirements of the Code. If a letter, requesting changes to plan documents, is sent to the sponsor or VS practitioner or an authorized representative, the changes must be received no later than 30 days from the date of the letter, and the response must include either a copy of the plan with the changes highlighted or, if the changes are not extensive, replacement pages. If the changes are not received within 30 days, the application may be considered withdrawn. An extension of the 30-day time limit will only be granted for good cause.

.06 Inadequate Submissions — The Service will return, without further action, plans that are not in substantial compliance with the qualification requirements or plans that are so deficient that they cannot be reviewed in a reasonable amount of time. A plan may be considered not to be in substantial compliance if, for example, it omits or merely incorporates qualification requirements by reference to the applicable Code section. The Service will not consider these plans until after they are revised, and they will be treated as new requests as of the date they are resubmitted. No additional user fee will be charged if an inadequate submission is amended to be in substantial compliance and is resubmitted to the Service within 30 days following the date the sponsor or VS practitioner is notified of such inadequacy.

.07 Nonidentification of Questionable Issues May Cause Delay — If the plan document submitted as part of an opinion or advisory letter request contains a provision that gives rise to an issue for which contrary published authorities exist, failure to disclose and address significant contrary authorities may result in requests for additional information, which will delay action on the request.

.08 DOL Participant Loan Regulations not Addressed by Opinion or Advisory Letter — Pre-approved plans may adopt procedures to comply with the Department of Labor's (DOL) participant loan regulations under § 408(b)(1) of ERISA in the plan or in a separate document. The adoption of procedures outside of the plan document that are intended to comply with these regulations will not cause a pre-approved plan to be considered an individually designed plan. The Service will not review loan program procedures (whether in the plan or in a separate written document) to determine whether they comply with the requirements of the DOL regulations. Also, any opinion or advisory letter issued for a pre-approved plan will not consider whether loan program procedures may, in the operation of the plan, have an adverse effect on the qualified status of the plan. However, the loan program procedures under the plan may not be inconsistent with the qualification requirements of § 401(a).

.09 Nontransferability of Opinion and Advisory Letters — An opinion or advisory letter issued to a sponsor or VS practitioner is not transferable to any other entity. For this purpose, a change of employer identification number is deemed to be a change of entity.

SECTION 21. AMENDMENTS

.01 Opinion Letters for Sponsor or VS Practitioner Amendments — A sponsor or VS practitioner may amend or restate its previously approved plan and the Service will entertain a request for an opinion or advisory letter as to the acceptability, for purposes of § 401(a) or § 403(a), of the form of the plan as amended. If the sponsor or VS practitioner is amending its plan, it must, except as provided in section 12, submit an application under the procedures in section 7 or section 17, together with a copy of the amendment(s), a cover letter summarizing the changes to the plan effected by such amendment(s), and a copy of the plan which is being amended. If the sponsor is restating its plan, it must, except as provided in section 12, submit the restated plan, with the changes highlighted, along with the application. (The plan and application may be returned to the sponsor if the changes have not been highlighted.) No more than four consecutive amendments may be submitted without restating the plan. In addition, the Service may, at its discretion, require plan restatement at any time that it deems necessary to adequately review a plan.

.02 No Opinion or Advisory Letters for Certain Amendments — A pre-approved plan will not lose its qualified status and, except as provided in (4) below, no opinion or advisory letter will be issued merely because amendments are made which solely cover the following:

(1) Amendments to conform a plan to the requirements of § 402(a) of Title I of the Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. 93–406, 1974–3 C.B. 1, relating to named fiduciaries.

(2) Amendments to conform a plan to requirements of § 503 of ERISA, relating to claims procedures.

(3) Amendments that merely adjust the limitations under §§ 415, 402(g), 401(a)(17), and 414(q)(1)(B) to reflect annual cost-of-living increases, other than amendments that add an automatic cost-of-living adjustment provision to the plan.

(4) Amendments that merely reflect a change of a sponsor's or VS practitioner's name. However, the sponsor or VS practitioner must notify the Service, in writing, of the change in name and certify that it still meets the conditions for sponsorship described in section 4.07 or 13.04. No opinion or advisory letter will be issued and no user fee will be required for a mere change in name. However, if the sponsor or VS practitioner wants a new opinion letter, it will have to submit a new application and pay the appropriate user fee. (Also see section 20 regarding changes in employer identification numbers.)

SECTION 22. REVOCATION

Revocation of Opinion or Advisory Letter by the Service — An opinion or advisory letter found to be in error or not in accord with the current views of the Service may be revoked. However, except in rare or unusual circumstances, such revocation will not be applied retroactively if the conditions set forth in section 13.05 of Rev. Proc. 2004–4 are met. For this purpose, opinion and advisory letters will be given the same effect as rulings. Revocation may be effected by a notice to the sponsor or VS practitioner to which the letter was originally issued, or by a regulation, revenue ruling or other statement published in the Internal Revenue Bulletin. The sponsor or VS practitioner should then notify each adopting employer of the revocation as soon as possible.

SECTION 23. EGTRRA

[RESERVED]

SECTION 24. REMEDIAL AMENDMENT PERIOD

[RESERVED]

SECTION 25. EFFECT ON OTHER DOCUMENTS

Rev. Proc. 2000–20 is superseded. Rev. Proc. 2004–6 is modified.

SECTION 26. EFFECTIVE DATE

[RESERVED]

SECTION 27. PAPERWORK REDUCTION ACT

[RESERVED]

DRAFTING INFORMATION

[RESERVED]

Election of Alternative Deficit Reduction Contribution

Announcement 2004–38

This announcement sets forth the procedures for electing an alternative deficit reduction contribution under § 412(l)(12) of the Internal Revenue Code (the Code) as added by section 102 of the Pension Funding Equity Act of 2004, Pub. L. 108-218.

I. Background

Section 102 of the Pension Funding Equity Act of 2004 added § 412(l)(12) to the Code and section 302(d)(12) to the Employee Retirement Income Security Act of 1974 (ERISA). Section 412(l)(12) of the Code permits certain employers who are required to make additional contributions under § 412(l) to elect a reduced amount of those contributions ("alternative deficit reduction contributions") for certain plan years. An employer is eligible to make such an election if it is (1) a commercial passenger airline, (2) primarily engaged in the production or manufacture of a steel mill product or the processing of iron ore pellets, or (3) an organization described in § 501(c)(5) and which established a plan on June 30, 1955, to which § 412 now applies. Section 302(d)(12) of ERISA permits an identical election and provides identical requirements with respect to the minimum funding standard of section 302.

The election can be made for any plan year beginning after December 27, 2003, and before December 28, 2005. An election for a plan of an eligible employer must be made annually and cannot be made for more than two plan years for each plan. An election of an alternative deficit reduction contribution may only be made with respect to a plan for which the additional contributions under § 412(l) of the Code and section 302(d) of ERISA for the plan year beginning in 2000 did not apply (determined without regard to the special rule for small plans under § 412(l)(6) of the Code and section 302(d)(6) of ERISA). Section 412(l)(12)(B) of the Code and section 302(d)(12)(B) of ERISA contain restrictions on the plan amendments that may be made during a year for which an alternative deficit reduction contribution is elected.

Section II of this announcement sets forth the information that must be contained in the election and the address to which the election must be sent. If an employer elects an alternative deficit reduction contribution for any plan year, the employer must provide written notice of the election to the plan's participants and beneficiaries and to the Pension Benefit Guaranty Corporation within 30 days of filing the election.

II. Election of Alternative Deficit Reduction Contribution

A. As an officer of the employer maintaining the plan, I hereby elect an alternative deficit reduction contribution under § 412(l)(12) of the Code and section 302(d)(12) of ERISA and include the following information:

(Continued on the following page)

1. The employer is:
_______ (a) a commercial passenger airline,
_______ (b) primarily engaged in the production or manufacture of a steel mill product or the processing of iron ore pellets, or
_______ (c) an organization described in § 501(c)(5) of the Code and which established a plan on June 30, 1955, to which § 412 now applies.

2. The name and EIN of the employer: ______________________________

3. The name and plan number of the plan: ______________________________

4. The plan year to which the election relates: ______________________________

5. Specify the plan year beginning in 2000 for which the additional contributions under § 412(l) did not apply: ______________________________

6. If any of the information in items 2 or 3 was different from the name of the employer or the plan, etc., than in the plan year for which the election is being made, enter the plan name, plan number, and name and EIN of the employer for the 2000 plan year:
____
____

7. Signature of employer ______________________________ Date _______

The election must be signed by an officer of the employer maintaining the plan. An authorized representative of the employer, plan administrator, or enrolled actuary may not sign this election on behalf of the employer.

B. This election must be filed at the following address:

Internal Revenue Service
Commissioner, Tax Exempt and
Government Entities Division
Attention: SE:T:EP:RA:T
Alternative DRC Election
P.O. Box 27063
McPherson Station
Washington, D.C. 20038

III. Paperwork Reduction Act

The collection of information contained in this announcement has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1545–1883.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number.

The collection of information in this announcement is in section II. This information is required to enable the Commissioner, Tax Exempt and Government Entities Division of the Internal Revenue Service to monitor and make valid determinations with respect to employers that elect an alternative deficit reduction contribution for certain plans. As a result of such elections, an employer's deficit reduction contribution for certain plans will be based on amounts specified under § 412(l)(12) of the Code. Such an election may cause the excise tax for failure to meet the minimum funding standards not to be incurred. The likely respondents are businesses or other for-profit institutions, nonprofit institutions, and small businesses or organizations.

The estimated total annual reporting and/or recordkeeping burden is 800 hours.

The estimated annual burden per respondent/recordkeeper varies from 3 to 5 hours, depending on individual circumstances, with an estimated average of 4 hours. The estimated number of respondents and/or recordkeepers is 200.

The estimated frequency of responses is occasional.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. § 6103.

Deletions From Cumulative List of Organizations Contributions to Which are Deductible Under Section 170 of the Code

Announcement 2004–41

The name of an organization that no longer qualifies as an organization described in section 170(c)(2) of the Internal Revenue Code of 1986 is listed below.

Generally, the Service will not disallow deductions for contributions made to a listed organization on or before the date of announcement in the Internal Revenue Bulletin that an organization no longer qualifies. However, the Service is not precluded from disallowing a deduction for any contributions made after an organization ceases to qualify under section 170(c)(2) if the organization has not timely filed a suit for declaratory judgment under section 7428 and if the contributor (1) had knowledge of the revocation of the ruling or determination letter, (2) was aware that such revocation was imminent, or (3) was in part responsible for or was aware of the activities or omissions of the organization that brought about this revocation.

If on the other hand a suit for declaratory judgment has been timely filed, contributions from individuals and organizations described in section 170(c)(2) that are otherwise allowable will continue to be deductible. Protection under section 7428(c) would begin on May 3, 2004, and would end on the date the court first determines that the organization is not described in section 170(c)(2) as more particularly set forth in section 7428(c)(1). For individual contributors, the maximum deduction protected is $1,000, with a husband and wife treated as one contributor. This benefit is not extended to any individual, in whole or in part, for the acts or omissions of the organization that were the basis for revocation.

Kids Voting SD,
Rapid City, SD

Definition of Terms

Revenue rulings and revenue procedures (hereinafter referred to as "rulings") that have an effect on previous rulings use the following defined terms to describe the effect:

Amplified describes a situation where no change is being made in a prior published position, but the prior position is being extended to apply to a variation of the fact situation set forth therein. Thus, if an earlier ruling held that a principle applied to A, and the new ruling holds that the same principle also applies to B, the earlier ruling is amplified. (Compare with *modified*, below).

Clarified is used in those instances where the language in a prior ruling is being made clear because the language has caused, or may cause, some confusion. It is not used where a position in a prior ruling is being changed.

Distinguished describes a situation where a ruling mentions a previously published ruling and points out an essential difference between them.

Modified is used where the substance of a previously published position is being changed. Thus, if a prior ruling held that a principle applied to A but not to B, and the new ruling holds that it applies to both A and B, the prior ruling is modified because it corrects a published position. (Compare with *amplified* and *clarified*, above).

Obsoleted describes a previously published ruling that is not considered determinative with respect to future transactions. This term is most commonly used in a ruling that lists previously published rulings that are obsoleted because of changes in laws or regulations. A ruling may also be obsoleted because the substance has been included in regulations subsequently adopted.

Revoked describes situations where the position in the previously published ruling is not correct and the correct position is being stated in a new ruling.

Superseded describes a situation where the new ruling does nothing more than restate the substance and situation of a previously published ruling (or rulings). Thus, the term is used to republish under the 1986 Code and regulations the same position published under the 1939 Code and regulations. The term is also used when it is desired to republish in a single ruling a series of situations, names, etc., that were previously published over a period of time in separate rulings. If the new ruling does more than restate the substance of a prior ruling, a combination of terms is used. For example, *modified* and *superseded* describes a situation where the substance of a previously published ruling is being changed in part and is continued without change in part and it is desired to restate the valid portion of the previously published ruling in a new ruling that is self contained. In this case, the previously published ruling is first modified and then, as modified, is superseded.

Supplemented is used in situations in which a list, such as a list of the names of countries, is published in a ruling and that list is expanded by adding further names in subsequent rulings. After the original ruling has been supplemented several times, a new ruling may be published that includes the list in the original ruling and the additions, and supersedes all prior rulings in the series.

Suspended is used in rare situations to show that the previous published rulings will not be applied pending some future action such as the issuance of new or amended regulations, the outcome of cases in litigation, or the outcome of a Service study.

Abbreviations

The following abbreviations in current use and formerly used will appear in material published in the Bulletin.

A—Individual.
Acq.—Acquiescence.
B—Individual.
BE—Beneficiary.
BK—Bank.
B.T.A.—Board of Tax Appeals.
C—Individual.
C.B.—Cumulative Bulletin.
CFR—Code of Federal Regulations.
CI—City.
COOP—Cooperative.
Ct.D.—Court Decision.
CY—County.
D—Decedent.
DC—Dummy Corporation.
DE—Donee.
Del. Order—Delegation Order.
DISC—Domestic International Sales Corporation.
DR—Donor.
E—Estate.
EE—Employee.
E.O.—Executive Order.
ER—Employer.
ERISA—Employee Retirement Income Security Act.
EX—Executor.
F—Fiduciary.
FC—Foreign Country.
FICA—Federal Insurance Contributions Act.
FISC—Foreign International Sales Company.
FPH—Foreign Personal Holding Company.
F.R.—Federal Register.
FUTA—Federal Unemployment Tax Act.
FX—Foreign corporation.
G.C.M.—Chief Counsel's Memorandum.
GE—Grantee.
GP—General Partner.
GR—Grantor.
IC—Insurance Company.
I.R.B.—Internal Revenue Bulletin.
LE—Lessee.
LP—Limited Partner.
LR—Lessor.
M—Minor.
Nonacq.—Nonacquiescence.
O—Organization.
P—Parent Corporation.
PHC—Personal Holding Company.
PO—Possession of the U.S.
PR—Partner.
PRS—Partnership.
PTE—Prohibited Transaction Exemption.
Pub. L.—Public Law.
REIT—Real Estate Investment Trust.
Rev. Proc.—Revenue Procedure.
Rev. Rul.—Revenue Ruling.
S—Subsidiary.
S.P.R.—Statement of Procedural Rules.
Stat.—Statutes at Large.
T—Target Corporation.
T.C.—Tax Court.
T.D. —Treasury Decision.
TFE—Transferee.
TFR—Transferor.
T.I.R.—Technical Information Release.
TP—Taxpayer.
TR—Trust.
TT—Trustee.
U.S.C.—United States Code.
X—Corporation.
Y—Corporation.
Z —Corporation.

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[1] A cumulative list of all revenue rulings, revenue procedures, Treasury decisions, etc., published in Internal Revenue Bulletins 2003–27 through 2003–52 is in Internal Revenue Bulletin 2003–52, dated December 29, 2003.

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[1] A cumulative list of current actions on previously published items in Internal Revenue Bulletins 2003–27 through 2003–52 is in Internal Revenue Bulletin 2003–52, dated December 29, 2003.

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