Internal Revenue bulletin

Bulletin No. 2007-28
July 9, 2007

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. 2007–42, page 44.

Section 355. Using different scenarios, this ruling addresses whether a corporation that holds a membership interest in a limited liability company that is classified as a partnership for federal tax purposes is engaged in the active conduct of a trade or business for purposes of section 355(b) of the Code. Rev. Rul. 92–17 modified.

Rev. Rul. 2007–44, page 47.

Federal rates; adjusted federal rates; adjusted federal long-term rate and the long-term exempt rate. For purposes of sections 382, 642, 1274, 1288, and other sections of the Code, tables set forth the rates for July 2007.

REG–103842–07, page 79.

Proposed regulations under section 199 of the Code modify the definition of a qualified film produced by a taxpayer under regulations section 1.199–3(k); correct section 1.199–7(e), Example 10, of the final regulations; and remove the section 199 closing of the books election for expanded affiliated groups under section 1.199–7(f)(1)(ii) of the final regulations. A public hearing is scheduled for October 2, 2007.

EMPLOYEE PLANS

Rev. Rul. 2007–43, page 45.

Section 411(d)(3); partial termination; turnover. This ruling holds that based on its facts and circumstances, there is a presumption of a partial termination within the meaning of section 411(d)(3) of the Code where the turnover rate for employees participating in the qualified plan is at least 20 percent.

Rev. Proc. 2007–44, page 54.

Qualification; determination letters; staggered remedial amendment periods. Rev. Proc. 2005–66, containing the Service's procedures for issuing determination letters pursuant to section 401(a) of the Code with respect to a staggered remedial amendment period system both for plans that are and are not pre-approved, is clarified, modified, and superseded. Rev. Proc. 2005–16 modified.

Announcement 2007–61, page 84.

Pre-approved defined benefit plans; GUST amendments. This announcement states that the program for GUST amendments for pre-approved defined benefit plans is being closed.

ESTATE TAX

Rev. Rul. 2007–45, page 49.

Special use value; farms; interest rates. The 2007 interest rates to be used in computing the special use value of farm real property for which an election is made under section 2032A of the Code are listed for estates of decedents.

REG–119097–05, page 74.

Proposed regulations under sections 2036 and 2039 of the Code provide guidance on the portion of a trust that is properly includible in the grantor's gross estate if the grantor has retained the use of property in a trust or the right to an annuity, unitrust, or other income payment from such a trust for life, for any period not ascertainable without reference to a grantor's death, or for a period that does not in fact end before the grantor's death. A public hearing is scheduled for September 26, 2007.

(Continued on the next page)

Finding Lists begin on page ii.

Department of the Treasury
Internal Revenue Service

ADMINISTRATIVE

T.D. 9327, page 50.

Final regulations under section 6103 of the Code describe the circumstances under which officers or employees of the Treasury Department, a state tax agency, the Social Security Administration, or the Department of Justice, may disclose returns and return information to obtain property or services for tax administration purposes, pursuant to a written contract or agreement.

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 42.—Low-Income Housing Credit

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of July 2007. See Rev. Rul. 2007-44, page 47.

Section 280G.—Golden Parachute Payments

Federal short-term, mid-term, and long-term rates are set forth for the month of July 2007. See Rev. Rul. 2007-44, page 47.

Section 355.—Distribution of Stock and Securities of a Controlled Corporation

26 CFR 1.355–3: Active conduct of a trade or business.

Section 355. Using different scenarios, this ruling addresses whether a corporation that holds a membership interest in a limited liability company that is classified as a partnership for federal tax purposes is engaged in the active conduct of a trade or business for purposes of section 355(b) of the Code. Rev. Rul. 92–17 modified.

Rev. Rul. 2007–42

ISSUE(S)

Under the facts described below, is a corporation (D) that owns a membership interest in a limited liability company (LLC) classified as a partnership for Federal tax purposes engaged in the active conduct of a trade or business for purposes of § 355(b) of the Internal Revenue Code?

FACTS

Situation 1.

LLC is a domestic limited liability company that has been classified as a partnership for Federal tax purposes since its date of organization. For more than five years, LLC has owned several commercial office buildings that are leased to unrelated third parties. LLC has one class of membership interests outstanding. For more than five years, D has owned a 33 1/3-percent membership interest in LLC, and has owned all the stock of a subsidiary (C), a corporation that has been engaged for more than five years in the active conduct of a trade or business that is unrelated to D's activities.

LLC continuously seeks additional properties to expand its rental business. When a property is located, LLC negotiates its purchase and financing and determines whether renovations or alterations are necessary to make the building suitable for rental. LLC periodically repaints and refurbishes its existing properties.

Pursuant to the terms of its leases, LLC provides day-to-day upkeep and maintenance services for its office buildings. These services include trash collection, ground maintenance, electrical and plumbing repair, and insect control. Additionally, LLC advertises for new tenants, verifies information contained in lease applications, negotiates leases, handles tenant complaints, prepares eviction notices and warnings for delinquent tenants, collects rent, and pays all expenses, including gas, water, sewage, electricity and insurance for the office buildings. LLC also maintains financial and accounting records to reflect income and expenses relating to each of its rental properties as well as LLC's general expenses.

The above described activities of LLC have been conducted for more than five years. The employees of LLC perform all management and operational functions with respect to LLC*'s* rental business. Neither D nor any other member of LLC performs services with respect to LLC's business.

For a valid business purpose, D proposes to distribute all its C stock *pro rata* to D's shareholders in a transaction intended to satisfy the requirements of § 355.

Except for the issue of whether D is engaged in the active conduct of a trade or business under § 355(b), the transaction will otherwise meet all the requirements of § 355.

Situation 2.

The facts are the same as *Situation 1* except that D owns a 20-percent membership interest in LLC.

LAW AND ANALYSIS

Section 355(a) provides that, under certain circumstances, a corporation may distribute stock or securities in a corporation it controls to its shareholders or security holders in a transaction that is nontaxable to such shareholders or security holders. Sections 355(a)(1)(C) and 355(b) require that both the distributing and controlled corporations be engaged, immediately after the distribution, in the active conduct of a trade or business that has been actively conducted throughout the five-year period ending on the date of distribution.

Section 1.355–3(b)(2)(ii) of the Income Tax Regulations, in defining "trade or business" for purposes of § 355, provides that a corporation is treated as engaged in a trade or business immediately after the distribution if a specific group of activities are being carried on by the corporation for the purpose of earning income or profit, and the activities included in such group include every operation that forms a part of, or a step in, the process of earning income or profit. Such group of activities ordinarily must include the collection of income and the payment of expenses.

Section 1.355–3(b)(2)(iii) provides that the determination whether a trade or business is actively conducted will be made from all the facts and circumstances. Generally, for a trade or business to be actively conducted, the corporation is required itself to perform active and substantial management and operational functions. Generally, activities performed by the corporation itself do not include activities performed by persons outside the corporation, including independent contractors. A corporation may, however, satisfy the active trade or business test through the activities that it performs itself, even though some of its activities are performed by others.

Under § 1.355–3(b)(2)(iv), the active conduct of a trade or business does not include the holding of property for investment purposes. It also does not include the ownership and operation (including leasing) of property used in a trade or business, unless the owner performs significant services with respect to the operation and management of the property.

The fact that a partnership engages in activities that would constitute the active conduct of a trade or business if conducted by a corporation does not necessarily mean that each partner in the partnership is considered to be engaged in the active conduct of a trade or business for purposes of § 355(b). In such a case, the determination of whether a partner is considered to be engaged in the active conduct of a trade or business must be based on the requirements of § 355 and the regulations thereunder taking into account the activities of the partner (if any), the partner's interest in the partnership, and the activities of the partnership.

Rev. Rul. 92–17, 1992–1 C.B. 142, considers whether D, a corporate general partner in a limited partnership, is engaged in the active conduct of a trade or business within the meaning of § 355(b). For more than five years, D owned a 20-percent interest in LP, a limited partnership that owned several commercial office buildings leased to unrelated third parties. D's officers performed active and substantial management functions with respect to LP, including the significant business decision-making of the partnership, and regularly participated in the overall supervision, direction, and control of LP's employees in operating LP's rental business. Rev. Rul. 92–17 concludes that D is engaged in the active conduct of a trade or business within the meaning of § 355(b). Rev. Rul. 2002–49, 2002–2 C.B. 288, reaches a similar conclusion where D and another corporation (X) each own a 20-percent interest in a member-managed LLC that is classified as a partnership for Federal tax purposes and D and X jointly manage the LLC's business.

By comparison, § 1.368–1(d)(4)(iii)(B), regarding the continuity of business enterprise requirement applicable to corporate reorganizations, provides that the issuing corporation will be treated as conducting a business of a partnership if members of the qualified group, in the aggregate, own an interest in the partnership representing a significant interest in that partnership business. Those regulations indicate that a one-third interest in the partnership represents a significant interest in the partnership business, and a corporation that owns such interest but does not perform active and substantial management functions for the business of the partnership is nevertheless treated as conducting the business of the partnership.

In *Situation 1*, D is engaged in the active conduct of LLC's rental business for purposes of § 355(b) because D owns a significant interest in LLC and LLC performs the required activities that constitute an active trade or business under the regulations.

In *Situation 2*, D is not engaged in the active conduct of LLC's rental business for purposes of § 355(b) because D neither owns a significant interest in LLC nor performs active and substantial management functions for LLC.

HOLDING

In *Situation 1*, D is engaged in the active conduct of a trade or business for purposes of § 355(b).

In *Situation 2*, D is not engaged in the active conduct of a trade or business for purposes of § 355(b).

EFFECT ON OTHER REVENUE RULINGS

Rev. Rul. 92–17 is modified to the extent it indicated that a partner must perform management functions in order for the partner to be treated as engaged in the active conduct of the trade or business of the partnership.

DRAFTING INFORMATION

The principal authors of this revenue ruling are Russell P. Subin and Rubin B. Ranat of the office of Associate Chief Counsel (Corporate). For further information regarding this revenue ruling, contact Mr. Subin at (202) 622–7790 or Mr. Ranat at (202) 622–7530 (not toll-free calls).

Section 382.—Limitation on Net Operating Loss Carryforwards and Certain Built-In Losses Following Ownership Change

The adjusted applicable federal long-term rate is set forth for the month of July 2007. See Rev. Rul. 2007-44, page 47.

Section 401.—Qualified Pension, Profit-Sharing, and Stock Bonus Plans

26 CFR 1.401(b)–1: Certain retroactive changes in plan.

The timing of submissions for individually designed and pre-approved qualified pension, profit-sharing and stock bonus plans is described. See Rev. Proc. 2007-44, page 54.

Section 411.—Minimum Vesting Standards

26 CFR 1.411(d)–2: Termination or partial termination; discontinuance of contributions.

Section 411(d)(3); partial termination; turnover. This ruling holds that based on its facts and circumstances, there is a presumption of a partial termination within the meaning of section 411(d)(3) of the Code where the turnover rate for employees participating in the qualified plan is at least 20 percent.

Rev. Rul. 2007–43

ISSUE

Is there a partial termination of a plan under § 411(d)(3) of the Internal Revenue Code under the facts described in this revenue ruling?

FACTS

Employer X maintains Plan A, a defined contribution plan qualified under § 401(a). The plan year for Plan A is the calendar year. The plan participants include both current and former employees. Plan A provides that an employee of Employer X has a fully vested and nonforfeitable interest in his or her account balance upon either completion of 3 years of service or attainment of age 65. The plan also provides for each participant to have a fully vested and nonforfeitable right to his or her account balance upon the plan's termination or upon a partial termination of the plan that affects the participant.

Employer X ceases operations at one of its four business locations. As a result, 23 percent of the Plan A participants who are employees of Employer X cease active participation in Plan A due to a severance from employment (excluding any severance from employment that is either on account of death or disability, or retirement on or after normal retirement age) during the plan year. Some of these participants are fully vested due to having completed 3 years of service or having attained age 65. Plan A is not terminated.

LAW

Section 411(d)(3) provides in relevant part that a plan will not be qualified unless the plan provides that, upon its partial termination, the rights of all affected employees to benefits accrued to the date of such partial termination, to the extent funded on that date, or the amounts credited to their accounts, are nonforfeitable.

Section 1.411(d)–2(b)(1) of the Income Tax Regulations provides that whether or not a partial termination of a qualified plan occurs (and the time of such event) is determined by the Commissioner with regard to all the facts and circumstances in a particular case. The facts and circumstances include the exclusion, by reason of a plan amendment or severance by the employer, of a group of employees who have previously been covered by the plan, as well as plan amendments that adversely affect the rights of employees to vest in benefits under the plan.

Section 1.411(d)–2(b)(2) provides a special rule with respect to a defined benefit plan that ceases or decreases future benefit accruals under the plan. A partial termination is deemed to occur if a potential reversion to the employer maintaining the plan is created or increased as a result of such cessation or decrease. This special rule does not apply to defined contribution plans.

Section 1.411(d)–2(b)(3) provides that, if a termination occurs, § 411(d)(3) only applies to the part of the plan that is terminated.

In Rev. Rul. 73–284, 1973–2 C.B. 139, an employer established a qualified pension plan that covered all of its 15 employees. The employer later acquired a new business location 100 miles away and closed the original one. All employees were given the opportunity to transfer to the new location and continue to participate in the plan, but only 3 chose to do so. The other 12 employees were discharged and their participation under the plan ended. The employer hired replacements for them at the new location. The revenue ruling concludes that there was a partial termination due to the termination of these employees in connection with the change in business location.

In Rev. Rul. 81–27, 1981–1 C.B. 228, the employer established a qualified defined benefit pension plan that covered employees in the two divisions of its businesses. The plan covered 165 employees. The employer closed down one division and terminated 95 participants. The revenue ruling concludes that the discharge by the employer of 95 of 165 participants constituted a partial termination.

Weil v. Terson Co. Retirement Plan Administrative Committee, 933 F.2d 106 (2d Cir. 1991), holds that the turnover rate in both vested and nonvested participants is taken into account in determining whether there has been a reduction in the workforce that constitutes a partial termination for purposes of § 411(d)(3). *See* 933 F.2d at 110.

Matz v. Household International Tax Reduction Investment Plan, 388 F.3d 570 (7th Cir. 2004), holds that there is a rebuttable presumption that a 20 percent or greater reduction in plan participants is a partial termination for purposes of § 411(d)(3). The court holds that this presumption is rebuttable depending on other facts and circumstances. *See* 388 F.3d at 578. The court, relying on *Weil*, bases the 20 percent calculation on the ratio of those participants who lose coverage, whether or not vested, to all participants, whether or not vested.

ANALYSIS

Based on the foregoing, whether a partial termination of a plan under § 411(d)(3) has occurred depends on the facts and circumstances, including the extent to which participating employees have had a severance from employment. If the turnover rate is at least 20 percent, there is a presumption that a partial termination of the plan has occurred. The turnover rate is determined by dividing the number of participating employees who had an employer-initiated severance from employment during the applicable period by the sum of all of the participating employees at the start of the applicable period and the employees who became participants during the applicable period. The applicable period depends on the circumstances: the applicable period is a plan year (or, in the case of a plan year that is less than 12 months, the plan year plus the immediately preceding plan year) or a longer period if there are a series of related severances from employment.

All participating employees are taken into account in calculating the turnover rate, including vested as well as nonvested participating employees. Employer-initiated severance from employment generally includes any severance from employment other than a severance that is on account of death, disability, or retirement on or after normal retirement age. An employee's severance from employment is employer-initiated even if caused by an event outside of the employer's control, such as severance due to depressed economic conditions. In certain situations, the employer may be able to verify that an employee's severance was not employer-initiated. A claim that a severance from employment was purely voluntary can be supported through items such as information from personnel files, employee statements, and other corporate records.

Employees who have had a severance from employment with the employer maintaining the plan on account of a transfer to a different controlled group are not considered as having a severance from employment for purposes of calculating the turnover rate if those employees continue to be covered by a plan that is a continuation of the plan under which they were previously covered (*i.e.,* if a portion of the plan covering those employees was spun off from the plan in accordance with the rules of § 414(l) and will continue to be maintained by the new employer).

Whether or not a partial termination of a qualified plan occurs on account of participant turnover (and the time of such event) depends on all the facts and circumstances in a particular case. Facts and circumstances indicating that the turnover rate for an applicable period is routine for the employer favor a finding that there is no partial termination for that applicable period. For this purpose, information as to the turnover rate in other periods and the extent to which terminated employees were actually replaced, whether the new employees performed the same functions, had the same job classification or title, and received comparable compensation are relevant to determining whether the turnover is routine for the employer. Thus, there are a number of factors that are relevant to determining whether a partial termination has occurred as a result of turnover, both in the case where a partial termination is presumed to have occurred due to the turnover rate being at least 20 percent and in the case where the turnover rate is less than 20 percent.

In the present case, there is a presumption that a partial termination has occurred because the turnover rate is 20 percent or more. The facts and circumstances support the finding of a partial termination because the severances from employment occurred as a result of the shutdown of one of the employer's business locations (and not as a result of routine turnover). Therefore, a partial termination of Plan A has occurred.

If a partial termination occurs on account of turnover during an applicable period, all participating employees who had a severance from employment during the period must be fully vested in their accrued benefits, to the extent funded on that date, or in the amounts credited to their accounts.

A partial termination of a qualified plan can also occur for reasons other than turnover. For example, a partial termination can occur due to plan amendments that adversely affect the rights of employees to vest in benefits under the plan, plan amendments that exclude a group of employees who have previously been covered by the plan, or the reduction or cessation of future benefit accruals resulting in a potential reversion to the employer.

HOLDING

Under the facts described in this revenue ruling, a partial termination has occurred.

DRAFTING INFORMATION

The principal author of this revenue ruling is Ingrid E. Grinde of the Employee Plans, Tax Exempt and Government Entities Division. For further information regarding this revenue ruling, contact the Employee Plans taxpayer assistance answering service between the hours of 8:30 a.m. and 4:30 p.m., Eastern time, Monday through Friday at 1–877–829–5500 (a toll-free number) or Ms. Grinde at *RetirementPlanQuestions@irs.gov.*

Section 412.—Minimum Funding Standards

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of July 2007. See Rev. Rul. 2007-44, page 47.

Section 467.—Certain Payments for the Use of Property or Services

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of July 2007. See Rev. Rul. 2007-44, page 47.

Section 468.—Special Rules for Mining and Solid Waste Reclamation and Closing Costs

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of July 2007. See Rev. Rul. 2007-44, page 47.

Section 482.—Allocation of Income and Deductions Among Taxpayers

Federal short-term, mid-term, and long-term rates are set forth for the month of July 2007. See Rev. Rul. 2007-44, page 47.

Section 483.—Interest on Certain Deferred Payments

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of July 2007. See Rev. Rul. 2007-44, page 47.

Section 642.—Special Rules for Credits and Deductions

Federal short-term, mid-term, and long-term rates are set forth for the month of July 2007. See Rev. Rul. 2007-44, page 47.

Section 807.—Rules for Certain Reserves

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of July 2007. See Rev. Rul. 2007-44, page 47.

Section 846.—Discounted Unpaid Losses Defined

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of July 2007. See Rev. Rul. 2007-44, page 47.

Section 1274.—Determination of Issue Price in the Case of Certain Debt Instruments Issued for Property

(Also Sections 42, 280G, 382, 412, 467, 468, 482, 483, 642, 807, 846, 1288, 7520, 7872.)

Federal rates; adjusted federal rates; adjusted federal long-term rate and the long-term exempt rate. For purposes of sections 382, 642, 1274, 1288, and other sections of the Code, tables set forth the rates for July 2007.

Rev. Rul. 2007–44

This revenue ruling provides various prescribed rates for federal income tax purposes for July 2007 (the current month). Table 1 contains the short-term, mid-term, and long-term applicable federal rates (AFR) for the current month for purposes of section 1274(d) of the Internal Revenue Code. Table 2 contains the short-term, mid-term, and long-term adjusted applicable federal rates (adjusted AFR) for the current month for purposes of section 1288(b). Table 3 sets forth the adjusted federal long-term rate and the long-term tax-exempt rate described in section 382(f). Table 4 contains the appropriate percentages for determining the low-income housing credit described in section 42(b)(2) for buildings placed in service during the current month. Table 5 contains the federal rate for determining the present value of an annuity, an interest for life or for a term of years, or a remainder or a reversionary interest for purposes of section 7520. Finally, Table 6 contains the blended annual rate for 2007 for purposes of section 7872.

REV. RUL. 2007–44 TABLE 1

Applicable Federal Rates (AFR) for July 2007

Period for Compounding

	Annual	*Semiannual*	*Quarterly*	*Monthly*
Short-term				
AFR	4.97%	4.91%	4.88%	4.86%
110% AFR	5.47%	5.40%	5.36%	5.34%
120% AFR	5.98%	5.89%	5.85%	5.82%
130% AFR	6.48%	6.38%	6.33%	6.30%
Mid-term				
AFR	4.95%	4.89%	4.86%	4.84%
110% AFR	5.45%	5.38%	5.34%	5.32%
120% AFR	5.96%	5.87%	5.83%	5.80%
130% AFR	6.46%	6.36%	6.31%	6.28%
150% AFR	7.47%	7.34%	7.27%	7.23%
175% AFR	8.74%	8.56%	8.47%	8.41%
Long-term				
AFR	5.15%	5.09%	5.06%	5.04%
110% AFR	5.68%	5.60%	5.56%	5.54%
120% AFR	6.20%	6.11%	6.06%	6.03%
130% AFR	6.73%	6.62%	6.57%	6.53%

REV. RUL. 2007–44 TABLE 2

Adjusted AFR for July 2007

Period for Compounding

	Annual	*Semiannual*	*Quarterly*	*Monthly*
Short-term adjusted AFR	3.66%	3.63%	3.61%	3.60%
Mid-term adjusted AFR	3.81%	3.77%	3.75%	3.74%
Long-term adjusted AFR	4.32%	4.27%	4.25%	4.23%

REV. RUL. 2007–44 TABLE 3

Rates Under Section 382 for July 2007

Adjusted federal long-term rate for the current month	4.32%
Long-term tax-exempt rate for ownership changes during the current month (the highest of the adjusted federal long-term rates for the current month and the prior two months.)	4.32%

REV. RUL. 2007–44 TABLE 4

Appropriate Percentages Under Section 42(b)(2) for July 2007

Appropriate percentage for the 70% present value low-income housing credit	8.18%
Appropriate percentage for the 30% present value low-income housing credit	3.50%

REV. RUL. 2007–44 TABLE 5

Rate Under Section 7520 for July 2007

Applicable federal rate for determining the present value of an annuity, an interest for life or a term of years, or a remainder or reversionary interest	6.0%

REV. RUL. 2007–44 TABLE 6

Blended Annual Rate for 2007

Section 7872(e)(2) blended annual rate for 2007	4.92%

Section 1288.—Treatment of Original Issue Discount on Tax-Exempt Obligations

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of July 2007. See Rev. Rul. 2007-44, page 47.

Section 2032A.—Valuation of Certain Farm, etc., Real Property

26 CFR 20.2032A–4: Method of valuing farm real property.

Special use value; farms; interest rates. The 2007 interest rates to be used in computing the special use value of farm real property for which an election is made under section 2032A of the Code are listed for estates of decedents.

Rev. Rul. 2007–45

This revenue ruling contains a list of the average annual effective interest rates on new loans under the Farm Credit System. This revenue ruling also contains a list of the states within each Farm Credit System Bank Chartered Territory.

Under § 2032A(e)(7)(A)(ii) of the Internal Revenue Code, rates on new Farm Credit System Bank loans are used in computing the special use value of real property used as a farm for which an election is made under § 2032A. The rates in this revenue ruling may be used by estates that value farmland under § 2032A as of a date in 2007.

Average annual effective interest rates, calculated in accordance with § 2032A(e)(7)(A) and § 20.2032A–4(e) of the Estate Tax Regulations, to be used under § 2032A(e)(7)(A)(ii), are set forth in the accompanying Table of Interest Rates (Table 1). The states within each Farm Credit System Bank Chartered Territory are set forth in the accompanying Table of Farm Credit System Bank Chartered Territories (Table 2).

Rev. Rul. 81–170, 1981–1 C.B. 454, contains an illustrative computation of an average annual effective interest rate. The rates applicable for valuation in 2006 are in Rev. Rul. 2006–32, 2006–1 C.B. 1170. For rate information for years prior to 2006, see Rev. Rul. 2005–41, 2005–2 C.B. 69, and other revenue rulings that are referenced therein.

DRAFTING INFORMATION

The principal author of this revenue ruling is Lane Damazo of the Office of the Associate Chief Counsel (Passthroughs and Special Industries). For further information regarding this revenue ruling, contact Lane Damazo at (202) 622–3090 (not a toll-free call).

REV. RUL. 2007–45 TABLE 1

TABLE OF INTEREST RATES
(Year of Valuation 2007)

Farm Credit System Bank Servicing State in Which Property is Located	Rate
AgFirst, FCB	7.17
AgriBank, FCB	6.10
CoBank, ACB	5.58
Texas, FCB	6.08
U.S. AgBank, FCB	5.81

REV. RUL. 2007–45 TABLE 2

TABLE OF FARM CREDIT SYSTEM BANK CHARTERED TERRITORIES

Farm Credit System Bank	Location of Property
AgFirst, FCB	Delaware, District of Columbia, Florida, Georgia, Maryland, North Carolina, Pennsylvania, South Carolina, Virginia, West Virginia.
AgriBank, FCB	Arkansas, Illinois, Indiana, Iowa, Kentucky, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, South Dakota, Tennessee, Wisconsin, Wyoming.
CoBank, ACB	Alaska, Connecticut, Idaho, Maine, Massachusetts, Montana, New Hampshire, New Jersey, New York, Oregon, Rhode Island, Vermont, Washington.
Texas, FCB	Alabama, Louisiana, Mississippi, Texas.
U.S. Agbank, FCB	Arizona, California, Colorado, Hawaii, Kansas, New Mexico, Nevada, Oklahoma, Utah.

Section 6103.—Confidentiality and Disclosure of Returns and Return Information

26 CFR 301.6103(n)–1: Disclosure of returns and return information in connection with written contracts or agreements for the acquisition of property or services for tax administration purposes.

T.D. 9327

DEPARTMENT OF THE TREASURY Internal Revenue Service 26 CFR Part 301

Disclosure of Returns and Return Information in Connection With Written Contracts or Agreements for the Acquisition of Property or Services for Tax Administration Purposes

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final Regulations.

SUMMARY: This document contains final regulations relating to the disclosure of returns and return information pursuant to section 6103(n) of the Internal Revenue Code (Code). The final regulations describe the circumstances under which officers or employees of the Treasury Department, a State tax agency, the Social Security Administration, or the Department of Justice, may disclose returns and return information to obtain property or services for tax administration purposes, pursuant to a written contract or agreement. The final regulations also set forth safeguard requirements that are designed to protect the confidentiality of returns and return information in the hands of contractors, agents, and subcontractors, and their officers and employees, and notification requirements that must be provided, in writing, to officers and employees of the contractors, agents, and subcontractors to inform them that any returns or return information they receive pursuant to these regulations may only be used for the purpose for which it is disclosed to them and that they are subject to the civil and criminal provisions of sections 7431, 7213, and 7213A for the unauthorized inspection or disclosure of the returns or return information.

The final regulations will affect officers and employees of the Treasury Department, a State tax agency, the Social Security Administration, or the Department of Justice, who disclose returns or return information in connection with a written contract or agreement for the acquisition of property or services for tax administration purposes. The final regulations also will affect any person, or officer, employee, agent, or subcontractor of the person, or officer or employee of the agent or subcontractor, who receives returns or return information in connection with a written contract or agreement for the acquisition of property or services.

DATES: *Effective Date*: These regulations are applicable June 5, 2007.

Applicability Date: For dates of applicability, see §301.6103(n)–1(g).

FOR FURTHER INFORMATION CONTACT: Helene R. Newsome, 202–622–4570 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in these final regulations has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under control number 1545–1821.

The collection of information in these final regulations is in §§301.6103(n)–1(d) and 301.6103(n)–1(e)(3). This information is required and will be used to ensure compliance with the internal revenue laws and regulations, and to protect the privacy of taxpayers.

Estimated total annual reporting burden: 250 hours. Estimated average annual burden per respondent: 6 minutes.

Estimated number of respondents: 2500.

Estimated annual frequency of responses: Annually.

Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be sent to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, SE:W:CAR:MP:T:T:SP, Washington, DC 20224 and to the **Office of Management and Budget**, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503.

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

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 return information are confidential, as required by 26 U.S.C. 6103.

Background

Under section 6103(a), returns and return information are confidential unless the Code authorizes disclosure. Section 6103(n) authorizes, pursuant to regulations prescribed by the Secretary, returns and return information to be disclosed to any person, including any person described in section 7513(a), for purposes of tax administration, to the extent necessary in connection with: (1) the processing, storage, transmission, and reproduction of returns and return information; (2) the programming, maintenance, repair, testing, and procurement of equipment; and (3) the providing of other services.

On January 12, 2005, a notice of proposed rulemaking (REG–148867–03, 2005–1 C.B. 646) was published in the **Federal Register** (70 FR 2076). The proposed regulations clarified that redisclosures of returns or return information by contractors to their agents or subcontractors are permissible provided that the IRS, in writing, authorizes the redisclosures. The proposed regulations also clarified that agents and subcontractors are persons described in section 6103(n) and, accordingly, are subject to the civil and criminal penalty provisions of sections 7431, 7213, and 7213A for the unauthorized inspection or disclosure of returns or return information. The proposed regulations further clarified that agents and subcontractors are required to comply with any written notification requirements and safeguard restrictions that may be imposed by the IRS.

Finally, the proposed regulations clarified that section 6103(n) applies to written contracts or agreements that are entered into to obtain property or services for tax administration purposes, including contracts that are not awarded under the Federal Acquisition Regulations, 48 CFR parts 1 through 53.

One written comment responding to the notice of proposed rulemaking was received. No public hearing was requested or held. After consideration of the comment, the regulations are adopted as proposed.

Summary of Comment

The commentator recommended that the final regulations provide that any contractor and its agent or subcontractor, who has access to returns or return information under section 6103(n), be required to designate a natural person in the employ of each contractor, agent, or subcontractor who shall have: (1) cognizance and control over all disclosures by such contractor, agent, or subcontractor; (2) the authority to flow down the sanctions set forth in §301.6103(n)–1(e)(4) to lower-tiered agents or subcontractors in the event of their breach of or noncompliance with §301.6103(n)–1; and (3) the authority to apprise promptly the IRS and/or higher-tiered contractors, agents, or subcontractors of such breaches or noncompliance. The commentator explained that imposition of the above requirement would be helpful in discouraging and preventing unauthorized disclosures of returns and return information in the context of contracting and subcontracting. Because the comment was more in the nature of a contractual (case-by-case) rather than a regulatory recommendation, the final regulations do not adopt this recommendation.

Special Analyses

It has been determined that this Treasury decision 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. It is hereby certified that the collection of information in these regulations will not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that any burden on taxpayers is minimal in that the estimated average burden per respondent for complying with the collection of information imposed by these regulations is 6 minutes. Therefore, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Code, the proposed regulations preceding these regulations were submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small businesses.

Drafting Information

The principal author of these regulations is Helene R. Newsome, Office of the Associate Chief Counsel (Procedure & Administration), Disclosure & Privacy Law Division.

* * * * *

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 301 is amended as follows:

PART 301—PROCEDURE AND ADMINSTRATION

Paragraph 1. The authority citation for part 301 continues to read, in part, as follows:

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

Par. 2. Section 301.6103(n)–1 is revised to read as follows:

§301.6103(n)–1 Disclosure of returns and return information in connection with written contracts or agreements for the acquisition of property or services for tax administration purposes.

(a) *General rule*. (1) Pursuant to the provisions of section 6103(n) of the Internal Revenue Code and subject to the conditions of this section, officers and employees of the Treasury Department, a State tax agency, the Social Security Administration, or the Department of Justice, are authorized to disclose returns and return information (as defined in section 6103(b)) to any person (including, in the case of the Treasury Department, any person described in section 7513(a)), or to an officer or employee of the person, for purposes of tax administration (as defined in section 6103(b)(4)), to the extent necessary in connection with a written contract or agreement for the acquisition of—

(i) Equipment or other property; or

(ii) Services relating to the processing, storage, transmission, or reproduction of returns or return information, the programming, maintenance, repair, or testing of equipment or other property, or the providing of other services.

(2) Any person, or officer or employee of the person, who receives returns or return information under paragraph (a)(1) of this section, may—

(i) Further disclose the returns or return information to another officer or employee of the person whose duties or responsibilities require the returns or return information for a purpose described in this paragraph (a); or

(ii) Further disclose the returns or return information, when authorized in writing by the Internal Revenue Service (IRS), to the extent necessary to carry out the purposes described in this paragraph (a). Disclosures may include disclosures to an agent or subcontractor of the person, or officer or employee of the agent or subcontractor.

(3) An agent or subcontractor, or officer or employee of the agent or subcontractor, who receives returns or return information under paragraph (a)(2)(ii) of this section, may further disclose the returns or return information to another officer or employee of the agent or subcontractor whose duties or responsibilities require the returns or return information for a purpose described in this paragraph (a).

(4) Any person, or officer, employee, agent or subcontractor of the person, or officer or employee of the agent or subcontractor, who receives returns or return information under this paragraph (a), may, subject to the provisions of §301.6103(p)(2)(B)–1 (concerning disclosures by a Federal, State, or local agency, or its agents or contractors), further disclose the returns or return information for a purpose authorized, and subject to all applicable conditions imposed, by section 6103.

(b) *Limitations*. (1) Disclosure of returns or return information in connection with a written contract or agreement for the acquisition of property or services described in paragraph (a) of this section will be treated as necessary only if the performance of the contract or agreement cannot otherwise be reasonably, properly, or economically carried out without the disclosure.

(2) Disclosure of returns or return information in connection with a written contract or agreement for the acquisition of property or services described in paragraph (a) of this section shall be made only to the extent necessary to reasonably, properly, or economically perform the contract. For example, disclosure of returns or return information to employees of a contractor for purposes of programming, maintaining, repairing, or testing computer equipment used by the IRS or a State tax agency shall be made only if the services cannot be reasonably, properly, or economically performed without the disclosure. If it is determined that disclosure of returns or return information is necessary, and if the services can be reasonably, properly, or economically performed by disclosure of only parts or portions of a return or if deletion of taxpayer identity information (as defined in section 6103(b)(6)) reflected on a return would not seriously impair the ability of the employees to perform the services, then only the parts or portions of the return, or only the return with taxpayer identity information deleted, may be disclosed.

(c) *Penalties*. Any person, or officer, employee, agent or subcontractor of the person, or officer or employee of the agent or subcontractor, who receives returns or return information under paragraph (a) of this section, is subject to the civil and criminal penalty provisions of sections 7431, 7213, and 7213A for the unauthorized inspection or disclosure of the returns or return information.

(d) *Notification requirements*. Any person, or agent or subcontractor of the person, who receives returns or return information under paragraph (a) of this section shall provide written notice to his, her, or its officers and employees receiving the returns or return information that—

(1) Returns or return information disclosed to the officer or employee may be used only for a purpose and to the extent authorized by paragraph (a) of this section and that the officer or employee is subject to the civil and criminal penalty provisions of sections 7431, 7213, and 7213A for the unauthorized inspection or disclosure of the returns or return information;

(2) Further inspection of any returns or return information for a purpose or to an extent not authorized by paragraph (a) of this section constitutes a misdemeanor, punishable upon conviction by a fine of as much as $1,000, or imprisonment for as long as 1 year, or both, together with costs of prosecution;

(3) Further disclosure of any returns or return information for a purpose or to an extent not authorized by paragraph (a) of this section constitutes a felony, punishable upon conviction by a fine of as much as $5,000, or imprisonment for as long as 5 years, or both, together with the costs of prosecution;

(4) Further inspection or disclosure of returns or return information by any person who is not an officer or employee of the United States for a purpose or to an extent not authorized by paragraph (a) of this section may result also in an award of civil damages against that person in an amount not less than $1,000 for each act of unauthorized inspection or disclosure; or the sum of actual damages sustained by the plaintiff as a result of the unauthorized inspection or disclosure plus, in the case of a willful inspection or disclosure or an inspection or disclosure that is the result of gross negligence, punitive damages. In addition, costs and reasonable attorneys fees may be awarded; and

(5) A conviction for an offense referenced in paragraph (d)(2) or (3) of this section shall, in addition to any other punishment, result in dismissal from office or discharge from employment if the person

convicted is an officer or employee of the United States.

(e) *Safeguards*. (1) Any person, or agent or subcontractor of the person, who may receive returns or return information under paragraph (a) of this section, shall agree, before disclosure of any returns or return information to the person, agent, or subcontractor, to permit an inspection by the IRS of his, her, or its site or facilities.

(2) Any person, or officer, employee, agent or subcontractor of the person, or officer or employee of the agent or subcontractor, who receives returns or return information under paragraph (a) of this section, shall comply with all applicable conditions and requirements as the IRS may prescribe from time to time (prescribed requirements) for the purposes of protecting the confidentiality of returns and return information and preventing any disclosure or inspection of returns or return information in a manner not authorized by this section.

(3) The terms of any written contract or agreement for the acquisition of property or services as described in paragraph (a) of this section shall provide, or shall be amended to provide, that any person, or officer, employee, agent or subcontractor of the person, or officer or employee of the agent or subcontractor, who receives returns or return information under paragraph (a) of this section, shall comply with the prescribed requirements. Any contract or agreement shall be made available to the IRS before execution of the contract or agreement. For purposes of this paragraph (e)(3), a written contract or agreement shall include any contract or agreement between a person and an agent or subcontractor of the person to provide the property or services described in paragraph (a) of this section.

(4) If the IRS determines that any person, or officer, employee, agent or subcontractor of the person, or officer or employee of the agent or subcontractor, who receives returns or return information under paragraph (a) of this section, has failed to, or does not, satisfy the prescribed requirements, the IRS, consistent with the regulations under section 6103(p)(7), may take any actions it deems necessary to ensure that the prescribed requirements are or will be satisfied, including—

(i) Suspension of further disclosures of returns or return information by the IRS to the State tax agency, the Social Security Administration, or the Department of Justice, until the IRS determines that the conditions and requirements have been or will be satisfied;

(ii) Suspension of further disclosures by the Treasury Department otherwise authorized by paragraph (a) of this section; and

(iii) Suspension or termination of any duty or obligation arising under a contract or agreement with the Treasury Department.

(f) *Definitions*. For purposes of this section—

(1) The term *Treasury Department* includes the IRS, the Office of the Chief Counsel for the IRS, and the Office of the Treasury Inspector General for Tax Administration;

(2) The term *State tax agency* means an agency, body, or commission described in section 6103(d); and

(3) The term *Department of Justice* includes offices of the United States Attorneys.

(g) *Effective date*. This section is applicable on June 5, 2007.

Kevin M. Brown,
Deputy Commissioner for Services and Enforcement.

Approved May 19, 2007.

Eric Solomon,
Assistant Secretary for Tax Policy.

(Filed by the Office of the Federal Register on June 4, 2007, 8:45 a.m., and published in the issue of the Federal Register for June 5, 2007, 72 F.R. 30974)

Section 7520.—Valuation Tables

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of July 2007. See Rev. Rul. 2007-44, page 47.

Section 7872.—Treatment of Loans With Below-Market Interest Rates

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of July 2007. See Rev. Rul. 2007-44, page 47.

Part III. Administrative, Procedural, and Miscellaneous

26 CFR 601.201: Rulings and determination letters.
(Also, Part I, §§ 401; 1.401(b)–1.)

Rev. Proc. 2007–44

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PART I — OVERVIEW

SECTION 1. PURPOSE

.01 Rev. Proc. 2005–66, 2005–2 C.B. 509, established a system of cyclical remedial amendment periods under § 401(b) of the Internal Revenue Code (Code) for individually designed and pre-approved qualified plans. This revenue procedure updates and supersedes Rev. Proc. 2005–66. Section 3 describes the changes to Rev. Proc. 2005–66 in this revenue procedure.

(1) Under this system, every individually designed plan qualified under § 401(a) has a regular, five-year remedial amendment cycle. The cycles are staggered and spread over five-year periods. That is, the cycles commence in different years for different plans within a five-year period, so that different plans have different cycles. The effect of this system is that plan sponsors need to apply for new determination letters generally only once every five years in order to continue to have a letter on which to rely.

(2) In addition, under this system, every pre-approved plan (that is, every master and prototype (M&P) and volume submitter (VS) plan), generally has a regular, six-year remedial amendment cycle. As a result, sponsors, practitioners (including mass submitters and national sponsors), as defined in Rev. Proc. 2005–16, 2005–1 C.B. 674, and generally referred to collectively in this revenue procedure as "sponsors or practitioners" unless otherwise noted, as well as adopters of pre-approved plans, generally need to apply for new opinion, advisory, or determination letters only once every six years. Pre-approved defined contribution plans have different six-year remedial amendment cycles than pre-approved defined benefit plans. Thus, the same six-year remedial amendment cycle applies with respect to all pre-approved defined contribution plans, and a separate six-year remedial amendment cycle applies with respect to all pre-approved defined benefit plans. Also, this revenue procedure provides rules for adopting employers to adopt a pre-approved plan after the review process is completed.

.02 The system for staggered five-year remedial amendment cycles and the system for six-year amendment/approval cycles are established pursuant to the Commissioner's authority under § 401(b) of the Code and its underlying regulations to extend the remedial amendment period, and pursuant to the Commissioner's authority under § 7805(b) to establish the effective date of any rule or regulation. As a result, sponsors, practitioners, and plan sponsors submit their plan only once for an opinion, advisory, or determination letter that rules on all amendments adopted and made effective within the applicable remedial amendment cycle.

.03 These remedial amendment cycles are coordinated with the Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. 107–16 (EGTRRA) remedial amendment period, as defined further in section 2.07 of this revenue procedure, for both individually designed and pre-approved plans.

(1) The EGTRRA remedial amendment period for individually designed plans extends to the end of the initial applicable five-year remedial amendment cycle as provided in the chart found in section 12.01. Therefore, plan sponsors may avoid unnecessarily filing two determination letter applications by waiting to file their EGTRRA determination letter applications until the twelve-month period preceding the end of the plan's initial applicable five-year remedial amendment cycle.

(2) The EGTRRA remedial amendment period for pre-approved plans extends to the end of the initial applicable six-year remedial amendment cycle as provided in section 18.01.

SECTION 2. BACKGROUND

.01 Section 401(b) of the Code provides a remedial amendment period during which a plan may be amended retroactively to comply with the Code's qualification requirements. Section 1.401(b)–1 of the Income Tax Regulations describes the disqualifying provisions that may be amended retroactively and the remedial amendment period during which retroactive amendments may be adopted. The regulations also grant the Commissioner the discretion to designate certain plan provisions as disqualifying provisions and to extend the remedial amendment period.

.02 Section 1.401(b)–1 provides that a plan that fails to satisfy the requirements of § 401(a) solely as a result of a disqualifying provision defined under § 1.401(b)–1(b) need not be amended to comply with those requirements until the last day of the remedial amendment period with respect to the disqualifying provision, provided the amendment is made retroactively effective to the beginning of the remedial amendment period. Under § 1.401(b)–1(b)(1), a disqualifying provision includes a provision of a new plan, the absence of a provision from a new plan, or an amendment to an existing plan which causes the plan to fail to satisfy the requirements of the Code applicable to the qualification of the plan as of the date the plan or amendment is first made effective. Under § 1.401(b)–1(b)(3), a disqualifying provision includes a plan provision designated, at the Commissioner's discretion, as a disqualifying provision that either (i) results in the failure of the plan to satisfy the qualification requirements of the Code by reason of a change in those requirements; or (ii) is integral to a qualification requirement of the Code that has been changed. For this purpose § 1.401(b)–1(c)(1) provides that a disqualifying provision includes the absence from a plan of a provision required by or, if applicable, integral to the applicable change in the qualification requirements of the Code, if the plan was in effect on the date the change in those requirements became effective with respect to the plan. Under § 1.401(b)–1(c)(3), the Commissioner may impose limits and provide additional rules regarding the amendments that may be made with respect to disqualifying provisions described in § 1.401(b)–1(b)(3).

.03 For a disqualifying provision of a new plan described in § 1.401(b)–1(b)(1), the remedial amendment period begins on the date the plan is put into effect and, in the case of a plan maintained by one employer, ends on the later of the due date (including extensions) for filing the employer's tax return for the taxable year in which the plan is put into effect or the last day of the plan year in which the plan is put into effect. A new plan maintained by more than one employer need not be amended until the last day of the tenth month following the last day of the plan year that includes the date the plan is put into effect.

.04 For a disqualifying provision that is an amendment to an existing plan described in § 1.401(b)–1(b)(1), the remedial amendment period begins on the earlier of the date the plan amendment is adopted or put into effect and, in the case of a plan maintained by one employer, ends on the later of the due date for filing the employer's tax return (including extensions) for the taxable year in which the amendment is adopted or effective (whichever is later) or the last day of the plan year in which the amendment is adopted or effective (whichever is later). In the case of an amendment to an existing plan maintained by more than one employer, the plan need not be amended until the last day of the tenth month following the last day of the plan year in which the amendment is adopted or effective (whichever is later).

.05 For a disqualifying provision described in § 1.401(b)–1(b)(3), the remedial amendment period begins on the date on which the change becomes effective with respect to the plan or, in the case of a provision that is integral to a qualification requirement that has been changed, the first day on which the plan is operated in accordance with the provision as amended. In the case of a plan maintained by one employer, the remedial amendment period for a disqualifying provision described in § 1.401(b)–1(b)(3) ends on the later of: (1) the due date (including extensions) for filing the income tax return for the employer's taxable year that includes the date on which the remedial amendment period begins or (2) the last day of the plan year that includes the date on which the remedial amendment period begins. A plan maintained by more than one employer need not be amended until the last day of the tenth month following the last day of the plan year in which the remedial amendment period begins.

.06 Section 1.401(b)–1(f) provides that the Commissioner may extend the remedial amendment period at his discretion.

.07 Notice 2001–42, 2001–2 C.B. 70, provided a remedial amendment period under § 401(b), ending no earlier than the end of the 2005 plan year, in which any needed retroactive remedial plan amendments for EGTRRA must be adopted (the EGTRRA remedial amendment period). The availability of the EGTRRA remedial amendment period was conditioned on the timely adoption of required good faith EGTRRA plan amendments. In general, a good faith EGTRRA plan amendment is adopted timely if it is adopted by the later of the end of the plan year that includes the effective date of the EGTRRA change or the end of the plan's GUST remedial amendment period.[1] However, an employer's ability to rely on a favorable determination letter will not be adversely affected by the timely adoption of good faith EGTRRA plan amendments.

.08 The end of the EGTRRA remedial amendment period is also the last day on which retroactive remedial amendments may be adopted with respect to the requirements of the final regulations under § 401(a)(9) of the Code (required minimum distributions), Rev. Rul. 2001–62, 2001–2 C.B. 632 (applicable mortality table), and Rev. Rul. 2002–27, 2002–1 C.B. 925 (deemed § 125 compensation). Except with respect to the requirements of the final § 401(a)(9) regulations for defined benefit plans, the availability of the remedial amendment period with respect to these three requirements is conditioned on the adoption of plan amendments by the time specified in the applicable guidance (or, in the case of the final § 401(a)(9) regulations published on April 17, 2002 with respect to defined contribution plans, in Rev. Proc. 2002–29, 2002–1 C.B. 1176, as modified by Rev. Proc. 2003–10, 2003–1 C.B. 259).

.09 Rev. Proc. 2004–25, 2004–1 C.B. 791, extended the remedial amendment period with respect to disqualifying provisions described in § 1.401(b)–1(b)(1) that are put into effect (in the case of new plans) or adopted (in the case of existing plans) after December 31, 2001, to the end of the EGTRRA remedial amendment period. The effect of Rev. Proc. 2004–25 is to ensure that plan sponsors do not need to apply for more than one determination letter during the EGTRRA remedial amendment period simply because they have put a plan into effect or adopted voluntary plan amendments after December 31, 2001. The revenue procedure did not extend any other existing plan amendment or determination letter submission deadlines, such as the deadline for adoption of good faith plan amendments for EGTRRA or the final § 401(a)(9) regulations.

.10 In Notice 2004–84, 2004–2 C.B. 1030, the Service published the 2004 Cumulative List of Changes in Plan Qualification Requirements which contains qualification requirements for defined contribution pre-approved plans to be used for their first submission under the six-year remedial amendment cycle.

.11 In Rev. Proc. 2005–16, 2005–1 C.B. 674, the Service announced the opening of the initial six-year remedial amendment cycle for defined contribution pre-approved plans. As of February 17, 2005, the Service began to accept applications for opinion and advisory letters for defined contribution pre-approved plans which take into account the qualification requirements set forth in the 2004 Cumulative List. The revenue procedure also

[1] The term "GUST" refers to the following:

- the Uruguay Round Agreements Act, Pub. L. 103–465;
- the Uniformed Services Employment and Reemployment Rights Act of 1994, Pub. L. 103–353;
- the Small Business Job Protection Act of 1996, Pub. L. 104–188;
- the Taxpayer Relief Act of 1997, Pub. L. 105–34;
- the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. 105–206; and
- the Community Renewal Tax Relief Act of 2000, Pub. L. 106–554.

The GUST remedial amendment period generally ended on the later of February 28, 2002, or the end of a plan's 2001 plan year. However, for certain plans eligible for an extended GUST remedial amendment period under Rev. Proc. 2000–20, 2000–1 C.B. 553, the period generally ended on September 30, 2003.

contains the rules for issuing opinion and advisory letters for pre-approved plans.

.12 In Announcement 2005–36, 2005–1 C.B. 1095, the Service announced the submission deadline for sponsors and practitioners maintaining defined contribution mass submitter and national sponsor plans for the initial six-year remedial amendment cycle is October 31, 2005.

.13 In Rev. Proc. 2005–66, 2005–2 C.B. 509, the Service established a system of cyclical remedial amendment periods for qualified plans as described in section 1.01 above, and provided deadlines for the timely adoption of interim or discretionary amendments to plans in section 5.05.

(1) Plan sponsors or practitioners maintaining defined contribution non-mass submitter plans, as well as word-for-word identical adopters and minor modifiers, had until January 31, 2006, the end of the initial applicable remedial amendment cycle submission period (as stated in section 23 of Rev. Proc. 2005–16, 2005–1 C.B. 674), to submit their M&P and volume submitter plans for review, taking into account the requirements of EGTRRA and other items identified on the 2004 Cumulative List. Rev. Proc. 2005–66 also extended the deadline from October 31, 2005 to January 31, 2006, for sponsors and practitioners maintaining defined contribution mass submitter plans and national sponsor plans.

(2) The determination letter program for the initial remedial amendment cycle for some individually designed plans opened on February 1, 2006. On that date, the Service began to accept applications for determination letters for individually designed plans that take into account the requirements of EGTRRA and other items identified on the 2005 Cumulative List.

.14 Notice 2005–95, 2005–2 C.B. 1172, discussed the general timing rules for plan amendments and provides that the deadlines set forth under section 5.05 of Rev. Proc. 2005–66 apply, with certain exceptions. See section 5.07 of this revenue procedure and section V of Notice 2005–95 for a list of specific exceptions. In addition, Notice 2005–95 gave transitional relief to plan sponsors, practitioners and employers, providing them with an extension of the otherwise applicable deadline under section 5.05 of Rev. Proc. 2005–66 for adopting certain plan amendments reflecting the final retroactive annuity starting date regulations, the automatic rollover requirements under § 401(a)(31)(B), and the final § 401(k) and § 401(m) regulations.

.15 In Notice 2005–101, 2005–2 C.B. 1219, the Service published the 2005 Cumulative List of Changes in Plan Qualification Requirements, which contains qualification requirements for single employer individually designed defined contribution plans (including employee stock ownership plans) and defined benefit plans, to be used primarily by plan sponsors of such plans that fall in Cycle A.

.16 In Rev. Proc. 2006–6, 2006–1 C.B. 204, the Service provided that it would begin to accept applications for determination letters for some individually designed plans (depending on their cycle) that take into account the qualification requirements of the Code as amended by EGTRRA.

.17 In Rev. Proc. 2007–6, 2007–1 I.R.B. 189, the Service published the annual update containing procedures for issuing determination letters on the qualified status of plans.

.18 In Notice 2007–3, 2007–2 I.R.B. 255, the Service published the 2006 Cumulative List of Changes in Plan Qualification Requirements, which contains qualification requirements for defined benefit pre-approved plans for their first submission under the initial six-year remedial amendment cycle, qualification requirements for single employer individually designed defined benefit plans and single employer individually designed defined contribution plans (including employee stock ownership plans), to be used primarily by plan sponsors of such plans that fall in Cycle B, and qualification requirements for plan sponsors of multiple employer plans which are in Cycle B.

SECTION 3. CHANGES TO REVENUE PROCEDURE 2005–66

In addition to minor revisions and clarifying language, the following changes have been made to Rev. Proc. 2005–66:

.01 The revenue procedure contains more detail on the plan qualification requirements the Service will consider in its review of opinion, advisory or determination letter applications. It clarifies that:

(1) Except as otherwise provided on the applicable Cumulative List, the Service will not consider any guidance or statutes issued or enacted after the October 1st preceding the date the applicable Cumulative List is issued, qualification requirements that become effective in a calendar year following the calendar year in which the submission period begins with respect to the applicable Cumulative List, or statutes that are first effective in the year in which the submission period begins with respect to the applicable Cumulative List, for which there is no guidance specified on the Cumulative List. (sections 4.03 and 4.04); and

(2) Special rules apply with respect to the Service's review of plans for amendments to reflect the Pension Protection Act of 2006 (PPA '06) and the procedures to submit those amendments. Although individually designed plans and multiple employer plans submitting determination letter applications may be amended for PPA '06, the Service will not consider these PPA '06 provisions in its review of plans using the 2006 and 2007 Cumulative Lists. In contrast, pre-approved defined benefit plans must be amended for certain provisions of PPA '06, and the Service will consider these amendments in its review of opinion and advisory letter applications. (section 4.05)

(3) The limitations on the Service's review of certain plans summarized in (1) and (2) above do not apply to terminating plans. (sections 4.03 and 4.05)

.02 More detail on adoption deadlines for interim and discretionary amendments is provided, including special deadlines for governmental and tax-exempt employers. In addition, the revenue procedure clarifies that other statutory provisions or guidance may set forth earlier or later deadlines, such as the delayed amendment deadline under section 1107 of PPA '06. (sections 5.05, 5.06 and 5.07)

.03 The exceptions to the general rule for determining a plan's five-year remedial amendment cycle (cycle) are expanded and clarified to provide:

(1) A governmental plan's cycle (Cycle C), applies to a governmental plan that is also a multiemployer plan, as well as to a governmental plan that is also a multiple employer plan. (section 10.04)

(2) Another exception is added for a jointly trusteed single employer collectively bargained plan, where the joint board of trustees is treated as the plan sponsor for purposes of Form 5500. The cycle for such a plan is determined based

on the EIN used on the Form 5500. (section 10.05)

(3) The exception specifying that a plan's cycle for multiple members of a controlled group or an affiliated service group under § 414(b), (c) or (m) is determined with reference to the last digit of the EIN used to report the plan on the Form 5500 is clarified to provide that this exception does not apply to multiemployer, multiple employer, or governmental plans. (section 10.05)

(4) The rules on alternative elections and the rules on entities that may make these elections have been revised. This revenue procedure clarifies that members of a controlled group or affiliated service group (controlled group) that may make the election to choose Cycle A include a parent-subsidiary controlled group as well as a controlled group that is not a parent-subsidiary controlled group. A parent-subsidiary group may choose an alternative election which is determined by reference to the last digit of the parent's EIN. The parent generally makes the election. Members of a controlled group, including a parent-subsidiary controlled group, that may not make this election include governmental plans and jointly trusteed collectively bargained plans, as well as multiemployer and multiple employer plans. (section 10.06)

(5) A new exception is added allowing an election to be made by certain groups of tax-exempt organizations that are not controlled groups or affiliated service groups under § 414 of the Code. An election may be made by a centralized organization that the cycle is determined based on the EIN of the centralized organization, if such centralized organization handles the administration and operation of plans that have substantially the same terms and are maintained by separate tax-exempt organizations (or related taxable entities in the group maintaining plans whose terms are substantially the same). (section 10.07)

(6) Details on what to include and when to file the alternative elections under section 10.06 are provided, including a new requirement that the election be filed with each determination letter application. This revenue procedure specifies that the election applies to members maintaining qualified plans, that a new member of a controlled group or affiliated service group must make an election in order for the existing members to retain the original joint election, and that an updated list of current members and plans must be maintained. In the case of a parent-subsidiary controlled group or a group described in section 10.07 with a centralized organization, a new election does not have to be made each time a member joins or leaves the group, but an updated list must be maintained by the parent. (section 10.08)

(7) In the case of a parent that has no EIN, the highest level entity in the U.S. that has an EIN is permitted to be substituted for the parent for purposes of making the alternative elections. (section 10.09)

.04 The definitions of cycle-changing events, such as merger or acquisition, change in plan sponsorship etc., have been expanded to include a plan changing its status by becoming or ceasing to be a multiemployer plan or a multiple employer plan. Details are provided on when a change in status occurs pursuant to certain elections to be a multiemployer plan. In addition, the rules cover more scenarios to determine the applicable cycle after a cycle-changing event, describing the interaction and significance of the pre-change, post-change, open, and expired cycles. (sections 11.01 and 11.02)

.05 Additional rules relating to determination letter applications specify that individually designed plans must be restated when they are submitted for determination letters and Form 6406 may no longer be used to apply for determination letters. (sections 12.03 and 12.04)

.06 Details are provided on the types of off-cycle applications for determination letters that will be given the same priority as on-cycle applications. Applications for determination letters for terminating plans, certain new plans and applications due to urgent business need are listed. (section 14.02)

.07 Rules are rewritten to clarify that the initial remedial amendment cycle for a new plan is the applicable cycle that includes the date on which the plan's initial remedial amendment period under § 1.401(b)–1 (determined without regard to the extension in section 5.03) ends. (sections 5.03 and 14.04)

.08 More examples are added or revised to reflect what the Service will review based on the Cumulative List and to illustrate the rules regarding submissions for a new plan or existing plan whose remedial amendment cycle ends after the applicable § 401(b) remedial amendment period. (section 15)

.09 More details are provided on when an employer's plan is treated as a pre-approved plan and is eligible for a six-year remedial amendment cycle, including clarifying definitions of prior adopter, new adopter, intended adopter, and existing and interim plans. (sections 17.01 – 17.06)

.10 The submission deadline to submit applications for opinion and advisory letters for sponsors and practitioners maintaining defined benefit mass submitter plans and national sponsors is extended from October 31, 2007 to January 31, 2008. (section 18.02)

.11 Rules are clarified on when an employer is entitled to remain in the six-year remedial amendment cycle (six-year cycle) after adopting an individually designed plan and making certain types of amendments, with examples. These clarifying rules include the following:

(1) With certain exceptions described in (2) and (3) below, an employer that modifies a plan so that it is no longer considered an M&P or VS plan will nevertheless stay in the six-year cycle for the current and subsequent six-year cycles. (section 19.02)

(2) An employer that is an intended adopter or prior adopter of a pre-approved plan that instead adopts an individually designed plan, or an employer that amends an M&P or VS plan to incorporate a type of plan not allowed in the pre-approved program and makes such amendment more than one year after the date the employer initially adopted the pre-approved plan, remains in the six-year cycle for the current cycle, and then switches to the five-year remedial amendment cycle (five-year cycle). (section 19.03)

(3) If (a) the nature and extent of amendments made by the employer fall within section 24.03 of Rev. Proc. 2005–16, or (b) an employer amends an M&P or VS plan to incorporate a type of plan not allowed in the pre-approved plan program within one year after the date the employer initially adopted the pre-approved plan, the applicable cycle is immediately the five-year cycle. (section 19.04)

.12 This revenue procedure removes the rule under which an M&P sponsor's authority to amend on behalf of an adopting employer is conditioned on the plan being covered by a favorable determination letter if the employer is required to obtain a determination letter in order to have reliance. It also clarifies that a sponsor should generally continue to amend on behalf of the adopting employer even if the adopting employer makes amendments to the plan. However, the sponsor no longer has the authority to amend on behalf of the employer if the Service has exercised its authority under section 24.03 of Rev. Proc. 2005–16 or the amendment is an impermissible type not allowed in the M&P pre-approved program. (section 19.05(3))

.13 New details on what constitutes an off-cycle filing for pre-approved plans are added that clarify the provisions of Rev. Proc. 2005–16 on off-cycle filings including:

(1) When to submit applications for new pre-approved plans created after the submission period for the applicable six-year cycle, when adopting employers must adopt such plans, and the applicable Cumulative List that will be used in reviewing these plans. (section 20.01)

(2) Sponsors or practitioners who submitted applications for opinion or advisory letters prior to the submission deadline for the applicable six-year cycle, with respect to pre-approved plans that were in existence prior to such submission deadline, may not also submit off-cycle applications for such plans. (section 20.02)

.14 A provision is added stating the conditions under which sponsors, practitioners or employers who made a determination with respect to a particular plan based on a reasonable and good faith interpretation of Rev. Proc. 2005–66 prior to the issuance of this revenue procedure will be deemed to have complied with this revenue procedure. (section 21)

PART II — ALL PLANS

SECTION 4. CUMULATIVE LIST OF CHANGES IN PLAN QUALIFICATION REQUIREMENTS

.01 The Service intends to publish annually a Cumulative List of Changes in Plan Qualification Requirements (Cumulative Lists). The target date for publication of the Cumulative List is mid-November of each year. The Cumulative Lists are intended to identify, on a year-by-year basis, all changes in the qualification requirements resulting from changes in statutes, or from regulations or other guidance published in the Internal Revenue Bulletin that are required to be taken into account in the written plan document that is submitted to the Service for an opinion, advisory or determination letter, as applicable.

.02 Each annual Cumulative List identifies changes in the qualification requirements of the Code as well as items of published guidance relating to the plan qualification requirements, such as regulations and revenue rulings, that will be considered by the Service in its review of plans whose submission period (whether for an opinion or advisory letter in the case of a pre-approved plan, or for a determination letter in the case of an individually designed plan) begins on the February 1st following issuance of the Cumulative List. For example, sponsors or practitioners maintaining non-mass submitter, mass submitter and national sponsor defined contribution pre-approved plans had until January 31, 2006 to submit opinion and advisory letter applications. The Service's review of these plans is based upon the 2004 Cumulative List. Similarly, in the case of Cycle A individually designed plans submitted for determination letters between February 1, 2006 and January 31, 2007, the Service's review of these plans is on the basis of the 2005 Cumulative List.

.03 Except as provided in the applicable Cumulative List or in section 8 of this revenue procedure, the Service will not consider in its review of any opinion, advisory or determination letter application any:

(1) guidance issued after the October 1 preceding the date the applicable Cumulative List is issued (this October 1 date may be extended in the applicable Cumulative List with respect to opinion or advisory letter applications);

(2) statutes enacted after the October 1 preceding the date the applicable Cumulative List is issued;

(3) qualification requirements that become effective in a calendar year after the calendar year in which the submission period begins with respect to the applicable Cumulative List (*e.g.*, qualification requirements first effective in 2009, for applications submitted during the period beginning February 1, 2008, based on the 2007 Cumulative List); or

(4) statutes that are first effective in the year in which the submission period begins with respect to the applicable Cumulative List for which there is no guidance identified on the applicable Cumulative List.

Applications submitted which contain qualification requirements described in section 4.03(1) – (4) must identify those requirements that are in the plan, in a cover letter or in an attachment to the application. The determination letter cannot be relied upon with respect to the qualification requirements described in section 4.03(1) – (4).

.04 The Service will, however, consider in its review of any opinion, advisory or determination letter application all qualification requirements that are not described in section 4.03(1) – (4). Thus, for example, a determination letter may be relied on with respect to guidance issued on or before the October 1st preceding the issuance of the applicable Cumulative List and which is effective during the calendar year in which the submission period begins, whether or not identified on the applicable Cumulative List.

.05 Special rule for PPA Amendments

(1) Except with respect to terminating plans described under section 8 of this revenue procedure, the Service will not consider provisions of the Pension Protection Act of 2006, Pub. L. No. 109–280 (PPA '06) in its review of applications for determination letters for individually designed plans and multiple employer plans using the 2006 and 2007 Cumulative Lists. Individually designed plans and multiple employer plans can be amended, at the option of plan sponsors, to include the applicable PPA '06 provisions (other than those described in section 4.03(3) above) whether or not guidance has been issued on any particular amendment. Applications submitted with respect to individually designed plans and multiple employer plans must identify, in a cover letter or in an attachment to the application, which PPA '06 provisions the plan has been amended to include and the plan provisions that reflect those PPA '06 provisions. Determination letters issued for individually designed plans and multiple employer plans using the 2006 and 2007 Cumulative Lists may not be relied upon with respect to any plan provision identified as reflecting PPA '06, regardless of whether the plan has been amended to reflect PPA '06 pro-

visions or whether the determination letter is caveated for such dated amendments.

(2) M&P plan sponsors and VS practitioners are required to include PPA ’06 law changes listed on the 2006 Cumulative List that are effective in 2006 and 2007, in plan documents submitted with their opinion and advisory letter applications for pre-approved defined benefit plans. The Service will consider PPA ’06 provisions effective in 2006 and 2007 in issuing opinion and advisory letters, and such letters may be relied on with respect to such PPA ’06 provisions, but only for certain PPA ’06 provisions specifically listed on the 2006 Cumulative List (as noted in section IV of Notice 2007–3).

SECTION 5. ADOPTION OF INTERIM AND DISCRETIONARY PLAN AMENDMENTS AND EXTENSION OF THE REMEDIAL AMENDMENT PERIOD

.01 Designation of disqualifying provision. Unless otherwise provided in future guidance, in addition to the plan provisions designated as disqualifying provisions subject to the EGTRRA remedial amendment period as described in sections 2.07, 2.08, and 2.09 of this revenue procedure, a plan provision is designated as a disqualifying provision under § 1.401(b)–1(b)(3) if the provision either —

(1) results in the failure of the plan to satisfy the qualification requirements of the Code by reason of a change in those requirements that is effective after December 31, 2001; or

(2) is integral to a qualification requirement of the Code that has been changed effective after December 31, 2001 but only if the provision is integral to a plan provision that is a disqualifying provision under section 5.01(1) with respect to the plan.

.02 A change in a qualification requirement includes a statutory change or a change in the requirements provided in regulations or other guidance published in the Internal Revenue Bulletin. For purposes of section 5.01, a disqualifying provision includes the absence from a plan of a provision required by or, if applicable, integral to the applicable change in the qualification requirements of the Code. An amendment with respect to a disqualifying provision described in section 5.01(1) or (2) is referred to as an interim amendment for purposes of this revenue procedure.

.03 This section 5.03 extends the remedial amendment period for the disqualifying provisions described below as follows:

(1) The remedial amendment period for any disqualifying provision described in § 1.401(b)–1(b)(1) that would otherwise apply under § 1.401(b)–1 is extended to the end of the applicable remedial amendment cycle described in section 6.01 that includes the date on which the remedial amendment period would otherwise end if the disqualifying provision was a provision of, or absence of a provision from, a new plan and the plan was intended, in good faith, to be qualified. The same extension of the remedial amendment period applies to a disqualifying provision (including a disqualifying provision described in section 5.01) in the case where the employer adopts an amendment to an existing plan (without regard to whether that amendment was required to be adopted) if the amendment was adopted timely and in good faith with the intent of maintaining the qualified status of the plan. The Service will make the final determination in all cases as to whether a new plan or an amendment was adopted with the good faith intention of being qualified or maintaining qualified status.

(2) In addition, the same extension of the remedial amendment period applies to a disqualifying provision described in section 5.01 in the case where the employer (or sponsor or practitioner, if applicable) reasonably and in good faith determines during the period when an interim amendment to reflect a qualification change would otherwise be required under section 5.05 that no amendment is required because the qualification change does not impact provisions of the written plan document. Thus, for example, if a sponsor, practitioner, or employer makes such a determination and the Service in its review of the opinion, advisory, or determination letter application finds that an amendment is required, the plan would still be eligible for the five or six-year remedial amendment cycle to correct the disqualifying provision as described in section 5.01. The Service will make the final determination in all cases as to whether the sponsor’s, practitioner’s or employer’s determination that no interim amendment was required was reasonable and in good faith.

.04 A qualified plan must be operated in accordance with written plan documents. Thus, when there are statutory or regulatory changes with respect to plan qualification requirements that will impact provisions of the written plan document, the adoption of an interim amendment will generally be required by the deadline set forth in section 5.05. The Service intends to concurrently identify statutory and regulatory changes to facilitate compliance with this requirement.

.05 Except as otherwise provided in section 5.06 and 5.07, the deadline for the timely adoption of an amendment with respect to any plan is determined as follows:

(1) In the case of an interim amendment, an employer (or a sponsor or a practitioner, if applicable) will be considered to have timely adopted the amendment if the plan amendment is adopted by the end of the remedial amendment period described in section 2.05 (determined without regard to the extension under section 5.03 of this revenue procedure).

(2) In the case of a discretionary amendment (*i.e.*, one which is not an interim amendment described in section 5.02), an employer (or a sponsor or a practitioner, if applicable) will be considered to have timely adopted the amendment, if the plan amendment is adopted by the end of the plan year in which the plan amendment is effective.

.06 Special deadlines for governmental and tax exempt employers

(1) Governmental Plans Within the Meaning of § 414(d) of the Code. The adoption deadline for interim amendments or discretionary amendments is: the later of (a) the deadline that would apply under the regular applicable rules of section 5.05(1) and (2), or (b) the last day of the next regular legislative session beginning after the amendment’s effective date in which the governing body with authority to amend the plan can consider a plan amendment under the laws and procedures applicable to the governing body’s deliberations.

(2) Tax Exempt Employers. In the case of a tax exempt employer, the adoption deadline for interim amendments is set forth in section 2.05 as modified in this section 5.06(2). For purposes of determining the tax filing deadline, the following is

substituted for the language under section 2.05(1) describing the due date (including extensions) for filing the income tax return for the employer's taxable year. The due date for filing the employer's tax return in the case of a tax exempt employer that files Form 990–T (Form 990 or Form 990–EZ if no Form 990–T is filed) is the later of the 15^{th} day of the 10^{th} month after the end of the employer's tax year (treating the calendar year as the tax year if the employer does not have a tax year) or the due date for filing the Form 990 series (plus extensions). An employer will not be treated as having obtained an extension of time for filing the Form 990 series unless such extension is actually applied for and granted. The due date for filing the employer's tax return in the case of a tax exempt employer that is not required to file a Form 990 series return is the 15^{th} day of the 10^{th} month after the end of the employer's tax year (treating the calendar year as the tax year if the employer does not have a tax year).

.07 Exceptions to section 5.05 amendment adoption deadlines

(1) Section 5.05 applies except when a statutory provision or guidance issued by the Service sets forth an earlier deadline to timely adopt a discretionary amendment with respect to a plan year (*e.g.*, an amendment to add a qualified cash or deferred arrangement to a profit sharing plan cannot be adopted retroactively) or where a statutory provision or guidance provides another specific deadline for the adoption of a particular type of interim amendment that is earlier or later than the deadlines under section 5.05. For example, section V of Notice 2005–95 lists specific deadlines to amend for specific provisions.

(2) Section 1107 of PPA '06 is a statutory provision that changes otherwise applicable deadlines under section 5.05. Under section 1107 of PPA '06, a plan sponsor is permitted to delay adopting a plan amendment pursuant to statutory provisions under PPA '06 (or pursuant to any regulation issued under PPA '06) until the last day of the first plan year beginning on or after January 1, 2009 (January 1, 2011 in the case of governmental plans). This amendment deadline applies to both interim and discretionary amendments that are made pursuant to PPA '06 statutory provisions or any regulation issued under PPA '06. If section 1107 of PPA '06 applies to an amendment of a plan, such a plan shall not fail to meet the requirements of Code § 411(d)(6) by reason of such amendment, except as provided by the Secretary of the Treasury. Accordingly, future guidance issued by the Secretary may limit the availability of a retroactive plan amendment under PPA section 1107 in order for the plan to meet the requirements of Code § 411(d)(6). For additional special rules relating to PPA '06 amendments, see section 4 of this revenue procedure.

.08 For purposes of this revenue procedure, a pre-approved or individually designed plan restatement which is generally effective as of a certain date should not be treated as superseding a previously adopted interim plan amendment that is effective after the restatement's effective date and that has not been incorporated or reflected in the restatement provided the pre-approved or individually designed plan is operated in a manner consistent with the interim plan amendment. For this purpose, a plan is presumed to be operating in compliance with the interim plan amendments in any case (such as a determination letter application) in which the operation of the plan cannot be determined. This section 5.08 applies for all purposes, including the determination of plan qualification, funding requirements, and deductions.

SECTION 6. PLAN AMENDMENTS AND OPERATIONAL REQUIREMENTS UNDER FIVE-YEAR AND SIX-YEAR REMEDIAL AMENDMENT CYCLES

.01 The five-year remedial amendment cycles for individually designed plans are established in section 9, and the extension and schedule of the end of the five-year remedial amendment cycles are provided in section 12.01. The six-year remedial amendment cycles for pre-approved plans are established in section 16, and the extension and schedule of the end of the six-year remedial amendment cycles are provided in section 18.01. The effect of these extensions is that a sponsor, practitioner, or employer generally will not need to apply for a new opinion, advisory, or determination letter more than once during any remedial amendment cycle.

.02 An interim amendment adopted timely and in good faith to correct a disqualifying provision as described in section 5.01 can itself be a disqualifying provision as described in § 1.401(b)–1(b)(1). In this situation, a remedial amendment to correct this second disqualifying provision (that is, the interim amendment which was found to be itself a disqualifying provision) must be adopted by the end of the applicable five or six-year cycle. This remedial amendment will correct both disqualifying provisions.

.03 If as described in section 5.03, a sponsor, practitioner, or employer determined that no amendment was required, but that determination was incorrect, then the sponsor, practitioner, or employer must adopt a remedial amendment to correct the disqualifying provision by the end of the applicable five-year or six-year cycle.

.04 Operational compliance with an amended plan provision that has a retroactive effective date is required for the remedial amendment period for the amended provision to begin as of the retroactive effective date. In the situation where a sponsor, practitioner, or employer timely adopted in good faith an amendment which is not a disqualifying provision as described in § 1.401(b)–1(b)(1) and the sponsor, practitioner, or employer failed to operate the plan according to the terms of the amendment, the employer should correct the operational failure under the Voluntary Correction Program (see Rev. Proc. 2006–27, 2006–1 C.B. 945).

.05 This revenue procedure does not provide relief from the requirements of § 411(d)(6) for any plan amendments including plan amendments adopted as a result of statutory or guidance changes in the plan qualification requirements. Except to the extent permitted under § 411(d)(6) and the regulations thereunder, or under a statutory provision such as section 1107 of PPA '06, § 411(d)(6) prohibits a plan amendment that decreases a participant's accrued benefits or that has the effect of eliminating or reducing an early retirement benefit or retirement-type subsidy, or eliminating an optional form of benefit, with respect to benefits attributable to service before the amendment. However, an amendment that eliminates or decreases benefits that have not yet accrued does not violate § 411(d)(6), provided the amendment is adopted and effective before the benefits accrue.

SECTION 7. EXTENSION OF EGTRRA REMEDIAL AMENDMENT PERIOD

.01 The EGTRRA remedial amendment period is extended to the end of the initial five-year and six-year remedial amendment cycles, respectively.

.02 This extension of the EGTRRA remedial amendment period extends the remedial amendment period for all disqualifying provisions to which the EGTRRA remedial amendment period applies, including plan provisions required or permitted to be amended for EGTRRA, final regulations under § 401(a)(9) of the Code, Rev. Rul. 2001–62, Rev. Rul. 2002–27, and disqualifying provisions described in Rev. Proc. 2004–25.

.03 This extension is only available to plans that satisfy the conditions for eligibility for the EGTRRA remedial amendment period as set forth in Notice 2001–42 which requires the adoption of timely good faith EGTRRA plan amendments or other plan amendments.

SECTION 8. PLAN TERMINATION

The termination of a plan ends the plan's remedial amendment period, and thus, will generally shorten the remedial amendment cycle for the plan. Accordingly, any retroactive remedial plan amendments or other required plan amendments for a terminating plan must be adopted in connection with the plan termination (that is, plan amendments required to be adopted to reflect qualification requirements that apply as of the date of termination regardless of whether such requirements are included on the most recently published Cumulative List). An application will be deemed to be filed in connection with plan termination if it is filed no later than the later of (i) one year from the effective date of the termination, or (ii) one year from the date on which the action terminating the plan is adopted. However, in no event can the application be filed later than twelve months from the date of distribution of substantially all plan assets in connection with the termination of the plan. See section 14 with respect to the Service's review of an application for a determination letter with respect to a terminating plan.

PART III — INDIVIDUALLY DESIGNED PLANS

SECTION 9. ESTABLISHMENT OF FIVE-YEAR REMEDIAL AMENDMENT CYCLES FOR INDIVIDUALLY DESIGNED PLANS

.01 This Part III sets forth rules and procedures for the five-year remedial amendment cycles for individually designed plans.

.02 In general, a plan's five-year remedial amendment cycle is determined by reference to the last digit of the employer identification number (EIN) of the employer that sponsors the plan (including a self-employed person with no employees). However, in particular circumstances, as described in section 10, a different rule is, or may be, used to determine a plan's five-year remedial amendment cycle.

.03 Under the general rule, a plan's five year remedial amendment cycle is determined as follows:

If the last digit of the plan sponsor's EIN is —	The plan's cycle is —
1 or 6	Cycle A
2 or 7	Cycle B
3 or 8	Cycle C
4 or 9	Cycle D
5 or 0	Cycle E

SECTION 10. EXCEPTIONS TO THE GENERAL RULE FOR DETERMINING A PLAN'S FIVE-YEAR REMEDIAL AMENDMENT CYCLE

.01 The following rules apply to determine the five-year remedial amendment cycle of a plan maintained by more than one employer, a plan maintained by multiple members of a controlled group under § 414(b) or (c) or employers that are members of an affiliated service group under § 414(m), a governmental plan and other special situations.

.02 For a plan that is a multiemployer plan under § 414(f), the plan's five-year remedial amendment cycle is Cycle D.

.03 For a plan that is a multiple employer plan, the plan's five-year remedial amendment cycle is Cycle B.

.04 For a plan that is a governmental plan under § 414(d), including a governmental plan that is described in section 10.02 or 10.03, the plan's five-year remedial amendment cycle is Cycle C.

.05 In the case of (1) a jointly trusteed single employer collectively bargained plan where the joint board of trustees is treated as the plan sponsor for purposes of Form 5500, or (2) a plan maintained by multiple members of a controlled group under § 414(b) or (c) or an affiliated service group under § 414(m) (other than a plan described in sections 10.02, 10.03 or 10.04), the plan's five year remedial amendment cycle is determined with reference to the last digit of the EIN that is or will be used to report the plan on Form 5500, *Annual Return/Report of Employee Benefit Plan*.

.06 In lieu of the rules described in sections 9 or 10.05 for determining a plan's five-year remedial amendment cycle, if more than one plan is maintained by members of a controlled group under § 414(b) or (c) or an affiliated service group under § 414(m), the employers may elect that the five-year remedial amendment cycle for all plans maintained by any members of the group (other than a plan described in sections 10.02, 10.03, 10.04 or 10.05(1)) will be Cycle A. The Cycle A election must be made jointly by all members of the controlled or affiliated service group, except that this election may be made on behalf of all of the members by the parent, in the case of a parent-subsidiary controlled group. Alternatively, if more than one plan is maintained by a controlled group under § 414(b) or (c) that is a parent-subsidiary controlled group, the election may be made that the remedial amendment cycle for each plan (other than a plan described in sections 10.02, 10.03, 10.04 or 10.05(1)) is determined by reference to the last digit of the parent's EIN. This alternative parent's EIN election must be made by the parent.

.07 Notwithstanding the above, if (1) separate tax-exempt organizations which are a group of related organizations but are not a controlled group under § 414(b) or (c) or an affiliated service group under § 414(m) are maintaining separate plans, (2) the terms of those plans are substantially the same, and (3) all or substantially all of the discretionary authority concerning the plans' administration and operation is handled by a centralized organization (such as a national headquarters or a common administrative committee), then an election may be made by such centralized organization that the remedial amendment cycle for all of the plans is determined based on the EIN of the centralized organization (other than a plan described in sections 10.02, 10.03, 10.04 or 10.05(1)). If the group of related organizations also includes related taxable entities to which this section 10.07 would apply if they were tax-exempt, the plans maintained by those taxable entities whose terms are substantially the same are permitted to apply the same election that can be applied for the tax-exempt entities.

.08 The elections described in sections 10.06 and 10.07 must be made (*i.e.*, signed and dated) by the end of the earliest cycle (determined as of the date of the election) for which a determination letter application would have been required to be submitted (or by the end of Cycle A, in the case of an election to choose Cycle A under section 10.06). For example, if one member is in Cycle B and another member is in Cycle C, the election to choose Cycle A under section 10.06 must be made by the due date for Cycle A.

(1) In the case of an election under section 10.06 that does not involve a parent-subsidiary controlled group, the election must be made jointly by all members sponsoring qualified plans and must list all members of the group sponsoring qualified plans that are eligible for the election (*i.e.*, plans other than those described in 10.02, 10.03, 10.04, and 10.05(1)), including each member's EIN, and the election must list all such qualified plans that are sponsored by each member of the group. If a new member joins the controlled group, that member must make an election no later than one year from the date the new member joins the controlled group in order for other members to maintain the existing election. The members already in the group do not need to make a new election each time a new member joins, or when a member leaves the controlled group. Each time the election is filed with a determination letter application, the group must attach a copy of the original election, a copy of any additional elections executed by new members, and an updated list with current information.

(2) In the case of an election made by a parent in a parent-subsidiary controlled group, the parent must include information described in (1) and may include a designation that the election made by the parent will also apply to qualified plans eligible for the election that are maintained by subsidiaries acquired in the future, and that the election will not apply to plans of subsidiaries that, in the future, are no longer in the controlled group. If the election includes such a provision, the parent does not have to make another election each time it acquires or loses subsidiaries. However, it must maintain a list providing the information under (1) above and attach this list to the election each time the election is filed. This list must be updated to provide current information each time the election is filed with a determination letter application.

(3) In the case of an election made by a centralized organization in a group described in section 10.07, the centralized organization must include all applicable information described in (1) and may include a designation that the election made by the centralized organization will also apply to qualified plans eligible for the election that are maintained by entities added to the group in the future, and that the election will not apply to plans of entities that in the future are no longer in the group described in section 10.07. If the election includes such a provision, the centralized organization does not have to make another election each time it adds or loses members. However, it must maintain a list providing the information under (1) above and attach this list to the election each time the election is filed. The updated list must be maintained by the employer and attached to the election submitted with a determination letter application.

(4) The election must be filed with each determination letter application that is submitted in accordance with this revenue procedure for qualified plans eligible for the election that are maintained by any member of the group. Once made, the election will apply and may not be modified or revoked, except as provided in this section and in section 11.

(5) If an election under section 10.06 and 10.07 to choose a particular cycle for all plans is not timely or correctly made in accordance with this section 10.08, a plan's applicable five-year cycle may change. See section 11 below on how to determine a plan's applicable cycle after a cycle-changing event.

.09 In the case of a parent that has no EIN (such as a foreign entity) the highest level entity in the U.S. that has an EIN is permitted to be substituted for the parent for purposes of making either election in section 10.06, for maintaining the updated list described in section 10.08(2), and for determining the relevant EIN where the election is determined by reference to the parent's EIN. In such case, a cover letter or an attachment must be submitted with each determination letter application explaining how this EIN was determined.

SECTION 11. RULES FOR DETERMINING FIVE-YEAR REMEDIAL AMENDMENT CYCLE IN CASES OF MERGER OR ACQUISITION, CHANGE IN PLAN SPONSORSHIP, PLAN SPIN-OFF, OR OTHER EVENTS

.01 Except as provided in section 11.02 and 11.03, in the case of a merger or acquisition, a change in plan sponsorship, or a plan spin-off, a plan's five-year remedial amendment cycle is determined as follows regardless of whether this would shorten or extend the five-year remedial amendment cycle of the plan. The change could result in the need to file a new election pursuant to section 10.08:

(1) If plans with different five-year remedial amendment cycles are merged, the five-year remedial amendment cycle of the merged plan is thereafter determined as provided in section 9 or 10 on the basis of the EIN, controlled group status, affiliated

service group status, etc., of the employer that maintains the merged plan;

(2) If one employer acquires another employer and maintains its plan, the five-year remedial amendment cycle of the plan is thereafter determined as provided in section 9 or 10 on the basis of the EIN, controlled group status, affiliated service group status, etc., of the employer that is maintaining the plan;

(3) If there is a change in the EIN (including the expiration of the EIN), controlled group status, affiliated service group status, etc., of the employer that maintains a plan, the five-year remedial amendment cycle of the plan is thereafter determined as provided in section 9 or 10 on the basis of the changed EIN, controlled group status, affiliated service group status, etc., of the employer that maintains the plan;

(4) If a portion of a plan is spun off, the five-year remedial amendment cycle of the spun-off plan is determined as provided in section 9 or 10 on the basis of the EIN, controlled group status, affiliated service group status, etc., of the employer that maintains the spun-off plan;

(5) If a self-employed person with no employees submits a determination letter application based upon the last digit of the individual's social security number (SSN) instead of the EIN for the first determination letter submitted under this revenue procedure, the determination letter application will be processed based upon the SSN with the other on-cycle determination letter applications. However, subsequent five-year remedial amendment cycles will be determined based upon the last digit of the employer's EIN as provided in section 9 or 10 (see Publication 583, *Starting a Business and Keeping Records*);

(6) If a plan changes its status by becoming or ceasing to be a multiemployer plan or a multiple employer plan, the five-year remedial amendment cycle of the plan is thereafter determined as provided in section 9 or 10, as applicable, on the basis of the changed status of the plan. Section 1106 of PPA '06, as amended by section 6611 of the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007, Pub. L. No. 110–28, added ERISA § 3(37)(G) and Code § 414(f)(6) allowing certain plans to make an election by August 17, 2007, to be a multiemployer plan or to revoke a previous election to not treat the plan as a multiemployer plan. Such a plan may make an election pursuant to a submission to the Pension Benefit Guaranty Corporation (PBGC). For purposes of determining the five-year remedial amendment cycle of such a plan under this revenue procedure, the change in status of the plan is deemed to occur on the date of the submission to the PBGC. However, such a plan's future five-year remedial amendment cycle will depend on the plan's status in that cycle (either as a multiemployer plan or other type of plan with a different cycle).

.02 As a result of one of the cycle-changing events described in this section, a plan's five-year remedial amendment cycle may change. In such case, a cover letter or attachment to the determination letter application with respect to the plan should note the cycle change and explain why there was a change in the plan's cycle. All relevant information directly related to the cycle-changing event should be submitted with the determination letter application. For example, if the cycle-changing event was a plan merger or spin-off, the determination letter application should include the corporate resolutions or actions that relate to the merger or spin-off. Section 11.03 provides rules on how to determine a plan's applicable cycle immediately after such an event. However, the rules under section 11.01 will apply for the plan's next following five-year remedial amendment cycle, absent any other changes that continue to make sections 11.02 and 11.03 applicable.

.03 For purposes of the rules under this section 11.03, the following definitions apply. A "post-change" cycle is the plan's applicable five-year remedial amendment cycle that would apply to the plan after the cycle-changing event under the rules in section 11.01. A "pre-change" cycle is the five-year remedial amendment cycle that applied to the plan before the cycle-changing event. An "expired" cycle is the applicable five-year cycle for which the plan's on-cycle submission period (which occurs during the last twelve months of each applicable five-year cycle) has expired as of the date of the cycle-changing event. An "open" cycle is the applicable five-year cycle during which the plan's on-cycle submission period has not expired as of the date of the cycle-changing event. An "applicable" cycle is the five-year cycle that applies to the plan after applying the rules under section 11.02 and this section 11.03.

(1) If a plan's post-change cycle is an open cycle, and the period remaining in the post-change cycle is less than twelve calendar months, the plan's post-change cycle is extended for twelve months from the last day of the open cycle submission period. The next five-year cycle will be shortened accordingly. This plan will be reviewed using the same Cumulative List that would be used for an application for an on-cycle plan submitting on the same date as this plan's submission (*i.e.*, the applicable Cumulative List is based on the date of the plan's submission).

(2) If a plan's post-change cycle is an expired cycle, the plan's applicable cycle remains the pre-change cycle.

(3) If a plan's post-change cycle ends later than the plan's pre-change cycle, and that pre-change cycle is an open cycle, the plan is permitted to treat the pre-change cycle as the applicable cycle.

(4) If a plan's post-change cycle ends later than the plan's pre-change cycle, and that pre-change cycle is an expired cycle, the plan is permitted to treat the pre-change cycle as the applicable cycle (*i.e.*, the plan sponsor does not have to resubmit a determination letter application during the post-change cycle).

(5) If neither the plan's post-change cycle nor its pre-change cycle is an open cycle, the plan's applicable cycle is the post-change cycle, regardless of whether this post-change cycle begins before or after the pre-change cycle.

SECTION 12. EXTENSION OF THE EGTRRA REMEDIAL AMENDMENT PERIOD, SCHEDULE OF NEXT FIVE-YEAR REMEDIAL AMENDMENT CYCLE AND ADDITIONAL RULES RELATING TO DETERMINATION LETTER APPLICATIONS

.01 The end of the initial remedial amendment cycle (*i.e.*, EGTRRA remedial amendment period) as extended in section 7 is illustrated in the following chart. The chart also provides the end dates of the next five-year remedial amendment cycle.

Extension of the EGTRRA Remedial Amendment Period and Schedule of Next Five-Year Remedial Amendment Cycle			
If the EIN of the employer ends in —	The plan's cycle is —	The last day of the initial cycle (*i.e.*, EGTRRA remedial amendment period) is —	The next five-year remedial amendment cycle ends on —
1 or 6	Cycle A	January 31, 2007	January 31, 2012
2 or 7	Cycle B	January 31, 2008	January 31, 2013
3 or 8	Cycle C	January 31, 2009	January 31, 2014
4 or 9	Cycle D	January 31, 2010	January 31, 2015
5 or 0	Cycle E	January 31, 2011	January 31, 2016

.02 In accordance with section 7 of this revenue procedure, the end of a plan's EGTRRA remedial amendment cycle is the time by which plan sponsors must apply for a new determination letter, in order to have a letter on which to rely for qualification changes that have first been listed in the Cumulative Lists at least twelve months before the end of the plan's EGTRRA remedial amendment period and other qualification changes not described in section 4.03, whether or not identified on the applicable Cumulative List.

.03 In general, (except with respect to amendments reflecting the provisions of PPA '06 as described in section 4.05(1)), individually designed plans must be restated when they are submitted for determination letters for the initial remedial amendment cycle (that is, EGTRRA remedial amendment period) and subsequent remedial amendment cycles. As a result, the determination letter filing may accelerate the deadline for the incorporation of interim amendments into a restated plan document from the date described in section 5.05(1) of this revenue procedure (generally the employer's income tax return filing date (including extensions)), to an earlier date. For this purpose, submission of a working copy of the plan in a restated format will suffice, provided that copies of timely executed interim and discretionary amendments are also separately submitted with the application. In addition, submitting a restated plan in proposed form is permitted, provided that the copies of timely executed interim and discretionary amendments and the prior plan document to which these amendments apply are also submitted with the application. A plan that is submitted in proposed form, and any proposed amendments, in the case of a plan submitted as a working copy, must be adopted no later than 91 days after the date of the determination letter.

.04 Effective as of July 9, 2007, Form 6406, *Short Form Application for Determination for Minor Amendment of Employee Benefit Plan*, may not be used to apply for a determination letter. An application submitted with this form will no longer be accepted by the Service.

SECTION 13. ON-CYCLE FILING FOR DETERMINATION LETTERS

.01 In general, plan sponsors of individually designed plans that wish to preserve reliance on a plan's favorable determination letter must apply for a new determination letter for each remedial amendment cycle during the last twelve months of their plan's remedial amendment cycle, that is between February 1 and January 31 of the last year of the cycle. This is referred to as "on-cycle" filing.

.02 Determination letters issued for individually designed plans will include a statement that the letter may not be relied on after the end of the plan's first five-year remedial amendment cycle that ends more than twelve months after the application was received, and will include the specific "expiration date." Thus, determination letters issued for applications filed more than twelve months prior to the end of a five-year remedial amendment cycle may not be relied on after that cycle.

.03 In appropriate circumstances, the Service may, through generally applicable published guidance, extend the expiration dates of determination letters for a particular cycle year or years.

SECTION 14. OFF-CYCLE FILING FOR DETERMINATION LETTERS

.01 If an application for a determination letter is submitted prior to or after the last twelve month period of a plan's remedial amendment cycle (that is, the twelve-month period beginning on February 1 and ending on January 31 of the last year of the cycle), the application is filed "off-cycle" and does not satisfy section 13.01. Except with respect to terminating plans described in section 8 that must adopt amendments to reflect qualification requirements that apply as of the date of termination, the off-cycle filing will be reviewed using the same Cumulative List that would be used for an application that was filed "on-cycle" on the same date as the "off-cycle" filing date. This means that the determination letter issued for the plan may not take into account any or all of the changes in qualification requirements for which the plan must be amended within the plan's current remedial amendment cycle. Further, as stated in section 13.02, the determination letter may not be relied on after the end of the plan's first five-year remedial amendment cycle that ends more than twelve months after the application is received. Consequently, the plan may need to be further amended within the cycle and another determination letter application will need to be filed within the last twelve months of the cycle if the plan sponsor wishes to preserve reliance on a determination letter. These rules also apply to off-cycle applications that are given priority review as if they were on-cycle as described below (except for terminating plans).

.02 Generally, an off-cycle application will not be reviewed until all on-cycle plans have been reviewed and processed.

However, effective as of the date of publication of this revenue procedure, the types of applications listed below under (1)–(3) will be given the same priority as on-cycle applications. The types of applications given such review priority are:

(1) A terminating plan described in section 8.

(2) A new individually designed plan whose next regular on-cycle submission period ends at least two years after the end of the off-cycle submission period during which the plan sponsor submits its application. For this purpose, a new individually designed plan is a new plan that as of the date the application is submitted with respect to the plan would be a new plan within its initial remedial amendment cycle under §1.401(b)–1(b)(1) of the regulations, as summarized in section 2.03 of this revenue procedure (determined without regard to the extension under section 5.03 of this revenue procedure).

(3) An off-cycle application submitted in accordance with published guidance issued by the Service specifying that a determination letter must be submitted in connection with a particular event.

.03 A sponsor of a plan may request that an off-cycle application be given the same priority review as an on-cycle application due to urgent business need. The Service will consider such requests based on the facts and circumstances. However, it is expected that such an application will be given the same priority as an on-cycle application only in limited cases where exceptional circumstances exist.

.04 Although a new plan may file off-cycle and will receive review priority under section 14.02 if it is described in section 14.02(2), a new plan does not have to be submitted for a determination letter off-cycle. This is because the initial remedial amendment period for a new plan is extended to the end of the applicable remedial amendment cycle in which the remedial amendment period would otherwise end. See section 5.03.

SECTION 15. EXAMPLES RELATING TO REMEDIAL AMENDMENT CYCLES AND PLAN AMENDMENTS

For the following examples, refer to the chart found above in section 12.01 and section 12.02 which is the Extension of the EGTRRA Remedial Amendment Period and Schedule of Next Five-Year Remedial Amendment Cycle. In the following examples, both the tax year of the employer and the plan year are the calendar years and, except as otherwise provided, the plan has been operated in accordance with the plan terms, including any interim and discretionary amendments.

Example 1: Employer M is a C corporation. The last digit of Employer M's EIN is 7. Employer M adopts a new plan, Plan X on January 1, 2006. The cycle for Plan X is Cycle B. Since Employer M timely adopted Plan X in good faith with the intent of sponsoring a qualified plan, the initial remedial amendment cycle for Plan X ends January 31, 2008. Any remedial amendments required for Plan X to correct a disqualifying provision as described in § 1.401(b)–1(b)(1) must be adopted by January 31, 2008, unless an application for a determination letter is submitted by that date. To the extent there have been interim or discretionary amendments made, these amendments may be included in a working copy, and such working copy must be submitted in a restated format. A copy of each signed interim or discretionary amendment must be included with the application. The determination letter issued for the plan would apply as of the first day of the 2006 plan year. The subsequent 5-year remedial amendment cycles end on January 31, 2013, January 31, 2018, etc.

Example 2: Same facts as Example 1. On July 1, 2010, Employer M starts to operate the plan in a manner which is inconsistent with the written plan document but an amendment to reflect the plan change when made retroactively effective would not violate § 411(d)(6). This change is unrelated to a change in qualification requirement or published guidance. To conform the plan document with the plan's operation, Employer M adopts an amendment by December 31, 2010 that reflects the change in operation and such amendment is adopted in good faith with the intent of maintaining the qualified status of Plan X. Employer M submits a determination letter application on or before the end of the second five-year remedial amendment cycle (that is, January 31, 2013). During the review of the determination letter application, the Service finds that the adoption of the amendment caused the plan to fail to satisfy the requirements of the Code as of the date the amendment was first made effective. Once the Service informs Employer M that the amendment is a disqualifying provision as described in § 1.401(b)–1(b)(1), Employer M would be required to adopt an amendment which corrects the disqualifying provision by 91 days after the date of the favorable determination letter. The amendment would be retroactively effective as of July 1, 2010 and Employer M must correct its operation to the extent necessary to reflect the corrective amendment.

Example 3: Same facts as Example 1. The last day of the third five-year remedial amendment cycle for Employer M is January 31, 2018. Since the first day of the third remedial amendment cycle, (February 1, 2013) Employer M has adopted interim plan amendments timely and in good faith with the intent of maintaining the qualified status of Plan X. In 2017, Employer M updates Plan X for the qualification requirements stated in the 2016 Cumulative List by restating the plan in proposed form. Employer M submits a determination letter application using the restated plan in proposed form on or before January 31, 2018. Employer M receives a favorable determination letter. Employer M must adopt the proposed restated plan by 91 days after the date of the favorable determination letter to be considered timely under § 401(b) of the Code.

Example 4: The remedial amendment cycle for Plan Y is based on the last digit of Employer N's EIN, which is a 4. Plan Y's cycle is therefore Cycle D. The initial remedial amendment cycle (that is, EGTRRA remedial amendment period) for Plan Y ends January 31, 2010, and the subsequent 5-year remedial amendment cycle ends January 31, 2015. In November 2008, guidance that would affect the qualification of Plan Y is issued effective for the plan years beginning on or after January 1, 2009. The guidance first appears on the 2009 Cumulative List. Employer N updates Plan Y for the remedial amendment cycle that ends January 31, 2010 for qualification requirements listed on the 2008 Cumulative List. Employer N submits a determination letter application on July 1, 2009. Since the guidance was issued after the October 1 preceding the date the 2008 Cumulative List was issued and was not identified and included on such list, the Service will not consider the guidance in its review until Employer N's subsequent remedial amendment cycle. To reflect this guidance, Employer N must adopt an interim amendment timely and in good faith (that is, by the tax filing date (including extensions) for 2009). The interim amendment is effective as of the first day of the 2009 plan year and will be reviewed as part of the determination letter application submitted in the subsequent five-year remedial amendment cycle.

Example 5: Same facts as Example 4, except that the guidance was issued in September 2008, effective for the plan years beginning on or after January 1, 2010. Since this guidance was effective in a calendar year following the calendar year in which the submission period began with respect to the applicable Cumulative List, as described in section 4.03 of this revenue procedure, and was not identified and included on such list, the Service will not consider the guidance in its review until Employer N's subsequent remedial amendment cycle. To reflect this guidance, Employer N must adopt an interim amendment timely and in good faith (that is, by the tax filing date (including extensions) for 2010). The interim amendment is effective as of the first day of the 2010 plan year and will be reviewed as part of the determination letter application submitted in the subsequent five-year remedial amendment cycle.

Example 6: The remedial amendment cycle for Plan Z is based on the last digit of Employer L's EIN, which is 0. Plan Z's cycle is Cycle E. The initial five-year remedial amendment cycle (that is, EGTRRA remedial amendment period) for Plan Z ends January 31, 2011, and the subsequent 5-year remedial amendment cycle ends January 31, 2016. Employer L submits a determination letter application on March 1, 2009. The 2008 Cumulative List will be used to review Employer L's determination letter submission. Since the initial five-year remedial amendment cycle will expire on January 31, 2011, Employer L must submit a new determination letter application during the last twelve months of the remedial amendment cycle (between February 1, 2010 to January 31,

2011) to continue to have reliance on a determination letter after that date.

Example 7: Employer Q establishes Plan K on December 18, 2006. Plan K's cycle is Cycle A. The § 401(b) remedial amendment period with respect to Plan K (determined without regard to section 5.03 of this revenue procedure) ends on September 15, 2007, since Employer Q has received an extension to file its tax return for 2006. Accordingly, under section 5.03, the remedial amendment period is extended to the end of Employer Q's next remedial amendment cycle, *i.e.*, Cycle A (January 31, 2012). Employer Q submits an application for a determination letter for Plan K on September 4, 2007. Employer Q's application is given the same priority as an on-cycle filing pursuant to section 14.02(2) for purposes of determining the priority of the Service's review, and the application will be reviewed based on the 2006 Cumulative List.

Example 8: Same as Example 7, except Employer Q submits an application for a determination letter by January 31, 2007. The 2005 Cumulative List will be used to review Employer Q's submission and Plan K must contain all of the provisions that any other Cycle A plan would be required to have.

Example 9: Same as Example 7, except that Employer Q decides to wait until the applicable submission period for Cycle A plans, February 1, 2011 through January 31, 2012, to submit an application for a determination letter. The remedial amendment period will extend to the end of that remedial amendment cycle, with respect to the adoption of Plan K and all interim amendments that Employer Q has timely adopted for all applicable periods. The Service will review Employer Q's application based on the 2010 Cumulative List.

Example 10: Employer R establishes Plan L on December 18, 2006. Plan L's cycle is Cycle D. The § 401(b) remedial amendment period with respect to Plan L (determined without regard to section 5.03 of this revenue procedure) ends on September 15, 2007, since Employer R has received an extension to file its tax return for 2006. The initial five-year remedial amendment cycle for Plan L ends on January 31, 2010. Employer R submits an application for a determination letter for Plan L on September 4, 2007. Employer R's application is given the same priority as an on-cycle filing pursuant to section 14.02(2) and the application will be reviewed based on the 2006 Cumulative List. The result would be the same for purposes of the priority of the Service's review if Plan L's cycle was Cycle E, with the same facts, (except that the initial remedial amendment cycle for Plan L as a Cycle E plan would end on January 31, 2011). However, if Plan L's cycle was Cycle C, the plan would not be given the same priority as an on-cycle filing.

Example 11: Employer S adopts Plan M on December 18, 2005, effective January 1, 2005. Plan M's cycle is Cycle A. Employer S adopts an interim amendment in 2006. Employer S submits the initial application for a determination letter for Plan M on July 1, 2011. The § 401(b) remedial amendment period with respect to the interim amendment adopted for Plan M in 2006 (determined without regard to section 5.03 of this revenue procedure) ends on September 15, 2007, since Employer S has received an extension to file its tax return for 2006. Accordingly, under section 5.03, the remedial amendment period with respect to the interim amendment adopted in 2006 is extended to the end of the next remedial amendment cycle (January 31, 2012). Similarly, there is an extension of the remedial amendment period with respect to amendments timely adopted in subsequent years to the end of the remedial amendment cycle. However, this extension does not apply to the adoption of the plan in 2005 and any amendments made in 2005, since the § 401(b) remedial amendment period for 2005 (September 15, 2006 with extensions) was already extended to January 31, 2007 and expired at that time (the end of the Cycle A remedial amendment cycle). Because Employer S did not submit a determination letter application during the February 1, 2006 through January 31, 2007 Cycle A submission period, Plan M's initial remedial amendment period (taking into account the extension under section 5.03) ended January 31, 2007. Therefore, Employer S would not be permitted under § 401(b) to adopt any remedial amendments that might be necessary retroactively to 2005.

Example 12: Employer T adopted Plan N in August 2004, effective January 1, 2004. Employer T submits Plan N for a determination letter application in September 2006. The proposed Plan N restatement includes required § 401(k) amendments, effective January 1, 2006. The initial remedial amendment cycle for Plan N is Cycle A, ending on January 31, 2007. Employer T received an extension to file its income tax return for 2006 to September 15, 2007. The Service issued the determination letter in February 2007. Employer T must adopt restated Plan N, including the § 401(k) amendments, no later than 91 days after the date of the issuance of the determination letter, which is earlier than September 15, 2007. If Employer T had submitted a working copy with proposed amendments, these proposed amendments would also need to be adopted no later than 91 days after the date of the issuance of the determination letter.

PART IV — PRE-APPROVED PLANS

SECTION 16. ESTABLISHMENT OF SIX-YEAR AMENDMENT/APPROVAL CYCLE FOR PRE-APPROVED PLANS

.01 This Part IV sets forth rules and procedures for the six-year remedial amendment/approval cycles for pre-approved plans.

.02 Sponsors and practitioners maintaining non-mass submitter plans generally have until January 31st of the calendar year following the opening of the six-year remedial amendment cycle to submit applications for opinion and advisory letters. In addition, the deadline for word-for-word identical adopters and minor modifier placeholder applications is January 31st of the calendar year following the opening of the six-year remedial amendment cycle (see section 12 of Rev. Proc. 2005–16 for more details). Sponsors and practitioners maintaining mass submitter plans and national sponsors generally have until October 31st of the calendar year in which the six-year remedial amendment cycle opens to submit opinion and advisory letter applications.[2] In addition, sponsors and practitioners maintaining mass submitter plans are encouraged to submit their word-for-word and minor modifier placeholder applications by the earlier mass submitter submission deadline, October 31st. The Service will evaluate this new provision (that is, a different deadline for applications of mass submitter plans versus word-for-word and minor modifier placeholder applications) and may, at its discretion and through applicable published guidance, change the deadline date for the word-for-word and minor modifier placeholder applications in future six-year remedial amendment cycles.

.03 When the review of a cycle for pre-approved plans has neared completion (after approximately a two-year review process), the Service will publish an announcement providing the date by which adopting employers must adopt the newly approved plans. This will be a uniform date that will apply to all adopting employers. Depending upon the length of the review process, it is expected that this date will give virtually all employers approximately a two-year window to adopt their updated plans. For purposes of this revenue procedure, an adopting employer means an employer who satisfies the requirements described under section 17 of this revenue procedure.

.04 An adopting employer that adopts the approved M&P or VS plan by the announced deadline will have adopted the plan within the employer's six-year remedial amendment cycle. The announced deadline will be the end of the plan's remedial amendment cycle with respect to all disqualifying provisions for which the remedial amendment period would otherwise end during the cycle.

[2] With respect to the initial EGTRRA application, section 18.02 provides a later deadline of January 31, 2006 for defined contribution M&P and VS plans and January 31, 2008 for defined benefit M&P and VS plans to be submitted by national sponsors and sponsors and practitioners maintaining mass submitter plans.

.05 If necessary, the Service may revise the schedule described in this section to respond to changing circumstances and needs of plan sponsors.

SECTION 17. ELIGIBILITY FOR SIX-YEAR AMENDMENT/APPROVAL CYCLE

.01 An employer's plan is treated as a pre-approved plan and is therefore eligible for a six-year amendment/approval cycle if:

(1) The employer is either a prior adopter described in section 17.02, a new adopter described in section 17.03, an intended adopter described in section 17.04, or the adopter of a replacement plan that meets the conditions described in section 17.05, and

(2) The sponsor or practitioner maintaining an existing or interim pre-approved plan (defined in (3) below) timely submits an opinion or advisory letter application for the plan:

(a) by the application deadline of October 31st or January 31st, whichever is applicable, in the first year of the six-year remedial amendment cycle for pre-approved plans, as described in section 18 of this revenue procedure, and

(b) receives a favorable current opinion or advisory letter from the Service before the employer adopts the plan as described in sections 17.02 through 17.05 below):

(3) For purposes of this section 17:

(a) An existing pre-approved plan is a plan that has received a valid opinion or advisory letter for the six-year cycle immediately preceding the opening of the current six-year cycle (or, in the case of the initial six-year remedial amendment cycle, February 16, 2005 for defined contribution pre-approved plans or January 31, 2007 for defined benefit pre-approved plans). An existing pre-approved plan contains separate interim and discretionary amendments attached to the plan that have not been integrated into the plan document in restated form (but that will be integrated before the plan is submitted for an opinion or advisory letter under section 17.01(2) above).

(b) An interim pre-approved plan is either:

(i) a plan that has not previously applied for or received an opinion or advisory letter because it was not in existence before the deadline for submitting such plans in the immediately preceding period (*e.g.*, GUST deadline), or

(ii) a plan that has received a valid opinion or advisory letter for the six-year cycle immediately preceding the opening of the current six-year cycle (or, in the case of the initial six-year remedial amendment cycle, February 16, 2005 for defined contribution pre-approved plans or January 31, 2007 for defined benefit pre-approved plans). An interim pre-approved plan does not contain the interim and discretionary amendments in separate documents because they have been integrated into the plan document in a restated format for purposes of submitting the plan for an opinion or advisory letter on or before the applicable date under section 17.01(2) above.

(c) A newly approved version of a plan is a plan described in section 17.01(2)(b).[3]

.02 An employer is a prior adopter if:

(1) the employer adopted and made effective a pre-approved plan as of the last day of the six-year remedial amendment cycle immediately preceding the opening of the current six-year cycle and that employer's pre-approved plan was an existing plan, or an interim pre-approved plan (under section 17.01(3)(b)(ii)) that has a valid opinion or advisory letter for the period preceding the opening of the current six-year cycle, and

(2) the employer, within the announced adoption period described in sections 16.03 and 16.04,

(a) adopts the newly approved version of that pre-approved plan or

(b) adopts the newly approved version of a different pre-approved plan maintained by either the same sponsor or a different sponsor.

.03 An employer is a new adopter if:

(1) the employer maintains an individually designed plan, or

(2) the employer is not currently maintaining any qualified plan (individually designed or pre-approved) and has not maintained any such plan during the current five-year remedial amendment cycle applicable to the employer, and

(3) the employer adopts either an existing pre-approved plan or an interim pre-approved plan before the end of the employer's five-year remedial amendment cycle as determined under Part III of this revenue procedure,

An employer may only adopt an interim or an existing pre-approved plan that is not the newly approved version of the plan if the employer adopts such plan before the beginning of the adoption period described in section 16.03 and 16.04 during the applicable six-year cycle. Such an employer must re-adopt either the newly approved version of the same plan or a newly approved version of a different pre-approved plan during the adoption period. Any employer whose five-year cycle has not ended may adopt a plan during or after the adoption period, but such employer must adopt the newly approved version of a pre-approved plan.

.04 An employer is an intended adopter if:

(1) the employer currently maintains a qualified individually designed plan and

(2) such employer and a sponsor or practitioner who maintains an existing pre-approved plan or an interim pre-approved plan execute Form 8905, *Certification of Intent To Adopt a Pre-approved Plan*[4], before the end of the employer's five-year remedial amendment cycle as determined under Part III of this revenue procedure.[5] However, if the employer's five-year remedial amendment cycle ends during or after the announced adoption period described in section 16.03 and 16.04 associated with the applicable six-year cycle, rather than execute Form 8905, the employer should instead adopt the newly approved version of a pre-approved plan (and will be treated as a new adopter under section 17.03).

.05 Replacement Plan

(1) An employer is an adopter of a replacement plan (defined in section 17.05(1)) under the following situations:

(a) The employer timely adopted a pre-approved plan that is to be replaced by a "replacement" plan (that is, the plan docu-

[3] See section 20 of this revenue procedure for special rules applicable to an opinion or advisory letter application for a new pre-approved plan created after the submission period for the applicable six-year cycle.

[4] Form 8905, *Certification of Intent To Adopt a Pre-approved Plan*, is available at *www.irs.gov/ep*.

[5] An employer who executes Form 8905 may adopt a different pre-approved plan with either the same or a different sponsor instead of the one designated on Form 8905.

ment remaining after one of the situations described in section 17.05(1)(c)); and

(b) A sponsor or practitioner maintaining the pre-approved plan does not request an opinion or advisory letter during the current six-year approval/amendment cycle because the plan is to be replaced by the plan of another sponsor or practitioner as a result of a change in business circumstances described in section 17.05(1)(c); and

(c) The sponsor or practitioner of the replacement plan and the sponsor or practitioner of the replaced plan are related in one of the following ways: (a) one was merged into the other before the last day of the submission period as described in section 17.01(2) or (b) as of the last day of the submission period as described in section 17.01(2) both are members of the same controlled group of corporations within the meaning of § 414(b) or are trades or businesses which are under common control within the meaning of § 414(c).

(2) Effect of Adoption of Replacement Plan

(a) If the employer intends to adopt the replacement plan, the employer will not be required to execute Form 8905, *Certification of Intent To Adopt a Pre-approved Plan*.

(b) If the employer applies for a determination letter for a replacement plan, the application must include a statement from the sponsor or practitioner maintaining the replacement plan indicating that the sponsor or practitioner maintaining the replaced plan was bought out or merged with the sponsor or practitioner maintaining the replacement plan.

.06 If an employer described in section 17.02, 17.03, 17.04 or 17.05 adopts a pre-approved plan or individually designed plan after the adoption and/or submission deadline established by the Service for the current six-year remedial amendment cycle and the employer is unable to utilize its five-year remedial amendment cycle, (*e.g.*, the employer's submission deadline under the five-year remedial amendment cycle precedes the adoption and/or submission deadline under the current six-year cycle), then the adopting employer may be eligible to correct for late adoption under the Voluntary Correction Program.

Examples 13 through 17 below illustrate an employer's eligibility for the six-year cycle. In the following examples, both the tax year of the employer and the plan year are the calendar years and, except as otherwise provided, the plan has been operated in accordance with the plan terms, including any interim and discretionary amendments.

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

Sponsor M notified Employer L that it no longer qualified as a sponsor because it did not have the requisite number of employers (30) reasonably expected to adopt the pre-approved plan. Therefore, Sponsor M did not submit a new opinion letter application within the six-year cycle by January 31, 2006. Employer L timely adopts Plan Y of Sponsor N within the two-year window period. Employer L will be considered to be a "prior adopter" within the meaning of section 17.02 of this revenue procedure and has timely adopted the plan within the six-year cycle. The result would be the same if Employer L switched to Plan Y because Sponsor M did not timely submit an application by January 31, 2006 for that prototype plan, or Sponsor M timely submitted an application by January 31, 2006 but later withdrew the application, or Employer L was dissatisfied with Sponsor M for other reasons.

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

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

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

Example 17: Employer Q, whose EIN ends in 1, currently maintains an individually designed defined benefit plan (IDP). Employer Q decides to switch from an IDP to a defined benefit pre-approved plan. On January 15, 2007, Employer Q and Sponsor S execute Form 8905, *Certification of Intent To Adopt a Pre-approved Plan*. The defined benefit pre-approved plan adopted by Employer Q was timely submitted for an opinion letter by the applicable deadline. Employer Q is an intended adopter because Employer Q and Sponsor S signed Form 8905 timely (*i.e.*, before the end of Employer Q's five-year remedial amendment cycle).

SECTION 18. EXTENSION OF THE EGTRRA REMEDIAL AMENDMENT PERIOD AND SCHEDULE OF NEXT SIX-YEAR REMEDIAL AMENDMENT CYCLE

.01 The end of the initial remedial amendment cycle (that is, EGTRRA remedial amendment period) as extended in section 6 is illustrated in the following chart. The chart also provides the end dates (unless otherwise provided by the Service) of the next six-year remedial amendment cycle.

Extension of the EGTRRA Remedial Amendment Period and Schedule of Next Six-Year Remedial Amendment Cycle

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

.02 In general, sponsors of M&P plans and practitioners maintaining VS plans must apply for new opinion or advisory letters for the plans every six years, according to the following schedule:

(1) Defined Contribution Plans

Initial EGTRRA application due —	*Next application due —*
Non-Mass Submitter Sponsors and Practitioners, Word-for-Word Identical Adopters, and M&P Minor Modifier Placeholder Applications:	
February 17, 2005 through January 31, 2006	February 1, 2011 through January 31, 2012
Mass Submitters and National Sponsors:	
February 17, 2005 through January 31, 2006	February 1, 2011 through October 31, 2011

(2) Defined Benefit Plans

Initial EGTRRA application due —	*Next application due —*
Non-Mass Submitter Sponsors and Practitioners, Word-for-Word Identical Adopters and M&P Minor Modifier Placeholder Applications	
February 1, 2007 through January 31, 2008	February 1, 2013 through January 31, 2014
Mass Submitters and National Sponsors:	
February 1, 2007 through January 31, 2008	February 1, 2013 through October 31, 2013

.03 In accordance with section 7 of this revenue procedure, the end of a plan's EGTRRA remedial amendment cycle is the time by which an employer adopts the approved plan by the end of the deadline as announced by the Service. An adopting employer that timely adopts the approved plan will be treated as having adopted the plan within the employer's six-year remedial amendment cycle.

SECTION 19. EFFECT OF EMPLOYER AMENDMENTS OR ADOPTION OF INDIVIDUALLY DESIGNED PLAN ON SIX-YEAR REMEDIAL AMENDMENT CYCLE

.01 General Rule

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) is considered to have adopted an individually designed plan. (See section 5.02 of Rev. Proc. 2005–16.) An employer amending provisions of a VS plan is also considered to have adopted an individually designed plan, although such an employer has traditionally had more discretion to make amendments that differ from the specimen document and stay in the VS program. (See section 8 and section 9 of Rev. Proc. 2007–6, 2007–1 I.R.B. 189.)

.02 Eligibility for Six-Year Cycle on Continuing Basis

Except as otherwise provided in section 19.03 and 19.04, an employer who modifies a plan in such a way that the plan, as adopted by the employer, would not be considered an M&P plan or a VS plan, will nevertheless be allowed to remain within the six-year remedial amendment cycle due to the nature of the modifications, as described in section 24.02 of Rev. Proc. 2005–16. Thus, plan amendments (other than those described in sections 19.03 and 19.04 below) that are adopted timely and in good faith with the intent of maintaining the qualified status of the plan by employers sponsoring M&P and VS plans will be disregarded for purposes of determining an employer's remedial amendment cycle. In this case, the employer will remain eligible for the six-year remedial amendment cycle. Thus, the plan will continue to be treated as an M&P or VS plan for purposes of this revenue procedure and therefore eligible for the six-year remedial amendment cycle on a continuing basis as provided in section 24.02 of Rev. Proc. 2005–16.

.03 Temporary Eligibility for Six-Year Cycle

An employer who adopts an individually designed plan under (1) or (2) below or makes certain amendments to its M&P or VS plan as described under (3) and (4) below is entitled to remain in the six-year remedial amendment cycle only for the current remedial amendment cycle. This temporary eligibility for the six-year cycle applies if:

(1) the employer is an intended adopter (as described in section 17.04) and after timely executing the Form 8905, the employer decides to adopt an individually designed plan whose underlying plan document is not based on a pre-approved plan, or

(2) the employer is a prior adopter of a pre-approved plan (as described in section 17.02) and after adopting this pre-approved plan the employer replaces that plan with an individually designed plan whose underlying plan document is not based upon a pre-approved plan document, or

(3) the employer amends an approved M&P plan, including its adoption agreement, to incorporate a type of plan not allowed in the M&P program (and that amendment is adopted more than one year after the date the employer initially adopted the M&P plan (see section 6.03 of Rev. Proc. 2005–16)), or

(4) the employer amends an approved VS plan to incorporate a type of plan not allowed in the VS program (and that amendment is adopted more than one year after the date the employer initially adopted the VS plan (see section 16.02 of Rev. Proc. 2005–16));

In order to obtain reliance, such employer must submit a determination letter application during the approximate two-year period within the six-year remedial amendment cycle that the Service announces for employers to adopt plans and submit them for determination letters. The employer's plan will be reviewed using the applicable Cumulative List based on the date of the application. The subsequent remedial amendment cycle is the first five-year cycle, as determined under section 9 or 10 of this revenue procedure that ends after the closing of the six-year cycle in which the determination letter application was submitted. However, if the end of the first five-year cycle that ends after the closing of the six-year cycle is less than twelve calendar months after the date of the favorable determination letter, then the plan's current cycle is extended for twelve calendar months and the next five-year cycle will be shortened accordingly.

.04 Ineligibility for Six-Year Cycle

Notwithstanding the above, if an employer amends an approved M&P plan including its adoption agreement or an approved VS plan to such an extent that the Service determines in its discretion that the plan falls under section 24.03 of Rev. Proc. 2005–16, then the plan will be considered individually designed for purposes of this revenue procedure (that is, the employer will be subject to the applicable five-year remedial amendment cycle based on the last digit of their EIN). The same rule applies if the employer adopts an amendment described under section 19.03(3) and (4) above within one year of adopting either the M&P plan or the VS plan.

.05 Determination letter procedures

With respect to an M&P or VS plan, an employer that adopts an amendment which causes such a plan to be treated as an individually designed plan under section 19.02 and .03 of this revenue procedure, but for remedial amendment cycle purposes remains eligible for the six-year remedial amendment cycle either on a continuing or temporary basis, must file a determination letter application for reliance. The determination letter application must be filed during the approximate two-year period within the six-year remedial amendment cycle that the Service announces for employers to adopt and submit determination letter applications, (if applicable). Depending on whether a Form 5307 or 5300 is filed, the Service will use the Cumulative List used to review the underlying document, or the Cumulative List based on the date of the determination letter submission in its review. (See examples 18 through 22).

(1) Determination letter filing procedures for VS plans are set forth in section 9 of Rev. Proc. 2007–6.

(2) With respect to M&P plans, except as otherwise provided in section 9 of Rev. Proc. 2007–6 describing when a Form 5307 must be used, an employer that adopts amendments and submits a request for a determination letter must file a Form 5300. Procedures for filing the Form 5300 are similar to the procedures set forth in section 9.09 in Rev. Proc. 2007–6, for VS plans, except for the following:

(a) A list of modifications is not required to be included.

(b) Any changes adopted by the employer must be made in the form of an amendment and not incorporated into the underlying M&P plan document.

(3) While it is expected that an M&P sponsor will generally continue to amend on behalf of the adopting employer even if the adopting employer adopts amendments to the plan, the sponsor no longer has the authority to amend on behalf of the employer if the amendment falls into one of the categories listed in section 6.03 of Rev. Proc. 2005–16 or the Service has exercised its authority under section 24.03 of Rev. Proc. 2005–16.

.06 Examples

Examples 18 through 22 below illustrate how different types of employer amendments to a pre-approved plan affect an employer's eligibility for the six-year remedial amendment cycle and which Cumulative List the Service will use to review an employer's submission. In the following examples, both the tax year of the employer and the plan year are the calendar years and, except as otherwise provided, the plan has been operated in accordance with the plan terms, including any interim and discretionary amendments.

Example 18: Practitioner S maintains a defined contribution VS specimen plan. Practitioner S timely submits an advisory letter application for the initial six-year remedial amendment cycle (that is, EGTRRA remedial amendment period) on or before January 31, 2006. Practitioner S receives an advisory letter dated January 31, 2008. The Service announces that February 1, 2008 until January 31, 2010 is the time period when employers must adopt a restated pre-approved plan and, if necessary, file a determination letter application. Employer T adopts the VS specimen plan, now Plan K, on or before January 31, 2010. Employer T amends Plan K so that it is no longer word-for-word identical to the VS specimen plan. Employer T submits a determination letter application using Form 5307, *Application for Determination for Adopters of Master or Prototype or Volume Submitter Plans*, on January 15, 2010. The Service will review the determination letter application based upon the Cumulative List used to review the underlying plan document, the 2004 Cumulative List.

The 2004 Cumulative List is used in this instance because the Service in its review determined that the amendments to the VS specimen plan did not rise to the level that necessitated the treatment of Plan K as an individually designed plan which would require Employer T to file Form 5300, *Application for Determination for Employee Benefit Plan*. Accordingly, Employer T's subsequent remedial amendment cycle will continue to be determined under Part IV of this revenue procedure. Practitioner S would submit an application for an advisory letter within the next six-year remedial amendment cycle, which ends on January 31, 2017, on or before the submission deadline for such cycle of January 31, 2012. Employer T would adopt the restated pre-approved plan and, if necessary, file a determination letter application within the time period announced by the Service.

Example 19: Employer X has maintained Plan M, a defined contribution pre-approved plan, since 2002. The last digit of Employer X's EIN is 8. Plan M is timely submitted for the initial six-year remedial amendment cycle (that is, the EGTRRA remedial amendment period) by the sponsor/practitioner on or before January 31, 2006. Generally, Employer X will have until January 31, 2011 (unless otherwise provided by the Service) to adopt the EGTRRA approved version of the pre-approved plan and have such adoption be considered timely under § 401(b) of the Code.

In 2007, Employer X decides Plan M no longer offers the flexibility it desires in providing the retirement benefits to its employees. As a result, Employer X amends and restates Plan M in 2007 into a defined contribution individually designed plan (with the intent of maintaining the qualified status of Plan M). Though Employer X is now sponsoring an individually designed plan, Employer X, a prior adopter as described in section 17.02, is still eligible for the six-year remedial amendment cycle under section 19.03.

The Service announces that February 1, 2008 until January 31, 2010 is the time period when employers must adopt a restated pre-approved plan and, if necessary, file a determination letter application. On June 1, 2009, Employer X submits a determination letter application using Form 5300, *Application for Determination for Employee Benefit Plan*, and pays the higher user fee. The Service will review the determination letter application based upon the 2008 Cumulative List (that is, the annual Cumulative List based on the date of the determination letter submission). The subsequent remedial amendment cycle is the first five-year cycle as determined under section 9 or 10 of this revenue procedure that ends after the closing of the six-year cycle in which the determination letter application was submitted; thus, the next five-year remedial amendment cycle ends January 31, 2014.

Example 20: Employer Y, whose EIN ends with an 8, maintains Plan N. Plan N is an adoption of an M&P defined benefit plan as of 2002. The M&P plan is timely submitted for the initial six-year remedial amendment cycle (that is, EGTRRA remedial amendment period) by the sponsor on or before January 31, 2008 and the sponsor receives an opinion letter dated January 31, 2010 for the M&P plan. The Service announces February 1, 2010 until January 31, 2012, as the time period for employers to adopt a restated pre-approved plan and, if necessary, file a determination letter application.

On November 19, 2011, Employer Y adopts the restated EGTRRA approved version of an M&P plan which includes an amendment to Plan N that creates a plan described under § 414(k). Although Employer Y adopts this amendment timely and in good faith with the intent of maintaining the qualified status of Plan N, this amendment changes the provisions of the M&P plan to create a type of plan that is not allowed in the M&P program. Since Employer Y has amended the M&P plan to incorporate a type of plan for which the Service will not issue an opinion letter, Plan N is an individually designed plan. Though Employer Y is now sponsoring an individually designed plan, Employer Y is still eligible for the six-year remedial amendment cycle under section 19.03 because Employer Y is a prior adopter as described in section 17.02 and the amendment was adopted more than one year after the date Employer Y adopted Plan N in 2002.

Employer Y submits a determination letter application using Form 5300, *Application for Determination for Employee Benefit Plan*, and pays the higher user fee on December 31, 2011. The Service will review the determination letter application based upon the 2010 Cumulative List (that is, the annual Cumulative List based on the date of the determination letter submission). Employer Y receives a favorable determination letter dated March 31, 2013. Employer Y's subsequent remedial amendment cycle is the first five-year cycle, as determined under section 9 or 10 of this revenue procedure that ends after the closing of the six-year cycle in which the determination letter application was submitted; thus, the next five-year remedial amendment cycle ends January 31, 2014. However, since the end of the first five-year cycle that ends after the closing of the six-year cycle is less than twelve calendar months after the date of the favorable determination letter, the current five-year cycle is extended by twelve calendar months as provided in section 19.03. Thus the end of the five-year cycle is January 31, 2015 and not January 31, 2014. The subsequent remedial amendment cycle is shortened accordingly but the submission period deadline remains January 31, 2019.

Example 21: Employer Z, whose EIN ends with a 2, maintains Plan V. Plan V is a defined contribution plan and is an adoption of a VS plan as of January 1, 2011. The VS specimen plan is timely submitted for the second six-year remedial amendment cycle by the practitioner on or before January 31, 2012. The VS practitioner receives an advisory letter dated January 31, 2014 for the VS specimen plan. Generally, Employer Z will have until January 31, 2016 (unless otherwise provided by the Service) to adopt the approved VS plan and to have such adoption be considered timely under § 401(b) of the Code.

On November 15, 2013, Employer Z adopts an amendment to Plan V that creates an employee stock ownership plan (more than one year after Employer Z adopted Plan V). Although Employer Z adopts this amendment timely and in good faith with the intent of maintaining the qualified status of Plan V, this amendment changes the provisions of the VS plan to create a type of plan that is not allowed in the VS program. Since Employer Z has amended the VS plan to incorporate a type of plan for which the Service will not issue an advisory letter, Employer Z submits a determination letter application for Plan V by November 20, 2013 using Form 5300, *Application for Determination for Employee Benefit Plan*, and pays the higher user fee. The Service would use the 2012 Cumulative List in its review of the determination letter submission. Employer Z receives a favorable determination letter dated November 20, 2014. Employer Z's subsequent remedial amendment cycle is the first five-year cycle, as determined under section 9 or 10 of this revenue procedure that ends after the closing of the six-year cycle in which the determination letter application was submitted; thus, the next five-year remedial amendment cycle ends January 31, 2018.

Example 22: Same as Example 21, except that Employer Z adopts an amendment to Plan V that creates an employee stock ownership plan in 2011, the same year Employer Z adopted Plan V. Since Employer Z amended the VS plan to incorporate a type of plan for which the Service will not issue an advisory letter, within one year of adopting the VS plan, the plan is an individually designed plan that is not eligible for the six-year remedial amendment cycle. Employer Z must submit a determination letter application for Plan V during the applicable submission period for Cycle B, February 1, 2012 through January 31, 2013, using Form 5300, *Application for Determination for Employee Benefit Plan*, and pay the higher user fee. The Service would use the 2011 Cumulative List in its review of the determination letter submission.

SECTION 20. OFF-CYCLE FILING

.01 If an opinion or advisory letter application for a new pre-approved plan (a plan created after the submission period for the applicable six-year cycle) is submitted outside of the submission period within an applicable six-year cycle, the application is filed "off-cycle". The application will be reviewed using the Cumulative List the Service would have used if the plan had been submitted as an on-cycle plan during the most recently expired submission period that would have applied for that particular type of plan.

(1) An opinion or advisory letter with respect to an application filed off-cycle is not retroactive and therefore may not be relied upon by sponsors, practitioners, or adopting employers for the period prior to the date of the submission for approval.

(2) As described in sections 16.03 and 16.04, the Service will publish an announcement providing the date by which adopting employers must adopt the newly approved plans when the review of a cycle for pre-approved plans has neared completion. Depending on the length of the review process, it is expected that this date will give virtually all employers approximately a two-year window to adopt their updated plans. However, the adoption period for employers to adopt such new plans could be shorter than this approximate two-year window, depending on when the Service finishes the review and approves such new plans. In any event, for adopting employers of such new plans to be eligible for the applicable six-year cycle, sponsors or practitioners must submit new pre-approved plans prior to the beginning of such announced adoption period, to give the Service time to review such plans and to provide time for adopting employers to adopt such plans.

(3) Adopting employers must adopt such plans within the adoption period and must file a Form 5307 or Form 5300 as appropriate. For example, employers adopting new defined contribution pre-approved plans created after January 31, 2006, will be eligible for the six-year cycle if such opinion or advisory letter applications for new pre-approved plans are submitted before the beginning of the

announced adoption period for employers to adopt such plans (although the letter will not be retroactively effective prior to the date of the submission for approval during the first six-year cycle in which a new pre-approved plan is adopted, as described above).

.02 If a pre-approved plan in existence prior to the submission deadline for the six-year remedial amendment cycle was submitted for an application for an opinion or advisory letter by the applicable deadline, then the sponsor or practitioner of that pre-approved plan may not also submit an application for an off-cycle opinion or advisory letter.

.03 Future guidelines will address how the Service will process a pre-approved plan in existence prior to the submission deadline for the six-year remedial amendment cycle that was not submitted for an opinion or advisory letter by the applicable submission deadline.

.04 The Service has the discretion to determine whether a sponsor or practitioner is subject to section 20.03 or is submitting an application for a new pre-approved plan under section 20.01.

Example 23: Sponsor S submits an application for an opinion letter for a new defined contribution M&P pre-approved plan, Plan Y, on December 31, 2007. This is after the submission period that ended on January 31, 2006 for the current cycle, and, under the facts of this example, before the beginning of the approximate two-year window that the Service will announce for employers to adopt pre-approved plans. Sponsor S's application will be reviewed using the 2004 Cumulative List. The opinion letter will only provide reliance for the period on or after December 31, 2007. An adopting employer may not rely on the opinion letter issued for Plan Y to extend the remedial amendment period for the employer's plan to the end of the initial six-year remedial amendment cycle, regardless of whether the employer adopts Plan Y during the approximate two-year period within the six-year remedial amendment cycle that the Service announces for employers to adopt the newly approved plans (announced adoption period). Thus, an employer adopting Plan Y to restate a plan that was established prior to December 31, 2007 would generally need to file a timely determination letter application as an individually designed plan in order to have reliance for the period prior to December 31, 2007.

SECTION 21. EFFECT ON OTHER DOCUMENTS

.01 Generally, this revenue procedure is effective on June 13, 2007.

.02 Rev. Proc. 2005–66 is clarified, modified and superseded. Rev. Proc. 2005–16 is modified.

.03 Notwithstanding section 21.02, if an employer, sponsor or practitioner (entity) has made a determination with respect to a particular plan based on a reasonable and good faith interpretation of Rev. Proc. 2005–66 that the plan is not a Cycle A plan, and under this revenue procedure the plan is a Cycle A plan, which should have been submitted to the Service by January 31, 2007, then the entity has six months from July 9, 2007 to submit the plan to the Service. The plan will be considered on-cycle for Cycle A and will be reviewed by the Service using the annual Cumulative List based on the date of the determination letter submission. Thus, for example, a plan submitted on July 31, 2007 will be reviewed on the basis of the 2006 Cumulative List and the plan will be considered to have been submitted within the extended remedial amendment period.

.04 The Service will make the final determination in all cases as to whether the determination of the entity with respect to a particular plan is reasonable and in good faith, including whether it is practicable for the entity to change the determination to be consistent with this revenue procedure. An entity will not be considered to have made a determination under a reasonable and good faith interpretation of Rev. Proc. 2005–66 if it did not comply with the provisions of Rev. Proc. 2005–66 or this revenue procedure, and the reason for not complying is unrelated to the above changes (*e.g.*, missing the deadline to submit an application for an opinion or advisory letter to the Service is unrelated to the changes).

DRAFTING INFORMATION

The principal author of this revenue procedure is Ingrid Grinde of the Employee Plans, Tax Exempt and Government Entities Division. For further information regarding this revenue procedure, please contact the Employee Plans taxpayer assistance answering service at 1–877–829–5500 (a toll-free number) between the hours of 8:30 a.m. and 4:30 p.m., Eastern time, Monday through Friday or Ms. Grinde at *RetirementPlanQuestions@irs.gov*.

Part IV. Items of General Interest

Notice of Proposed Rulemaking and Notice of Public Hearing

Grantor Retained Interest Trusts—Application of Sections 2036 and 2039

REG–119097–05

AGENCY: Internal Revenue Service (IRS), Treasury.

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

SUMMARY: This document contains proposed regulations providing guidance on the portion of a trust properly includible in a grantor's gross estate under Internal Revenue Code (Code) sections 2036 and 2039 if the grantor has retained the use of property in a trust or the right to an annuity, unitrust, or other income payment from such trust for life, for any period not ascertainable without reference to the grantor's death, or for a period that does not in fact end before the grantor's death. This document also provides notice of a public hearing on these proposed regulations.

DATES: Written or electronic comments must be received by September 5, 2007. Outlines of topics to be discussed at the public hearing scheduled for September 26, 2007, must be received by September 5, 2007.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–119097–05), Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered to the Courier's Desk, Internal Revenue Service, Attn: CC:PA:LPD:PR (REG–119097–05), room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington DC 20044. Alternatively, 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–119097–05), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC, or sent electronically via the Federal eRulemaking Portal at *www.regulations.gov* (IRS REG–119097–05). 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, Theresa M. Melchiorre, (202) 622–7830; concerning submissions of comments, the hearing, and/or to be placed on the building access list to attend the hearing, Richard Hurst, (202) 622–7180 (not toll-free numbers) or e-mail at *Richard.A.Hurst@irscounsel.treas.gov.*

SUPPLEMENTARY INFORMATION:

Background

The proposed regulations provide guidance on what portion of a trust is includible in the deceased grantor's gross estate under section 2036 if the grantor retained the right to use property in the trust or the right to receive from that trust an annuity, unitrust, or other income payment for the grantor's life, for any period not ascertainable without reference to the grantor's death, or for any period that does not in fact end before the grantor's death. In addition, the proposed regulations provide guidance on the possible application of section 2039 to trusts in which the decedent has retained the use of property held in the trust or has retained an annuity, unitrust, or other income interest that is includible in the decedent's gross estate under section 2036. These trusts include without limitation certain charitable trusts (collectively CRTs) such as charitable remainder annuity trusts (CRATs) within the meaning of section 664(d)(1), charitable remainder unitrusts (CRUTs) within the meaning of section 664(d)(2) or (d)(3), and charitable remainder trusts that do not qualify under section 664, as well as other trusts established by a grantor (collectively GRTs) such as grantor retained annuity trusts (GRATs), grantor retained unitrusts (GRUTs), and various forms of grantor retained income trusts (GRITs), such as qualified personal residence trusts (QPRTs) and personal residence trusts (PRTs). A CRT is within the scope of these proposed regulations whether or not the CRT meets the qualifications of sections 664(d)(1), (2), or (3) and a GRT is within the scope of these proposed regulations whether or not the grantor's retained interest is a "qualified interest" as defined in section 2702(b). This guidance does not apply to trusts or other contractual arrangements arising by reason of a decedent's employment and generally does not apply to annuities purchased by the decedent, as these types of interests fall within the ambit of section 2039.

Under section 2036(a), a decedent's gross estate includes the value of any interest in property transferred by the decedent in which the decedent retained for the decedent's life, for any period not ascertainable without reference to the decedent's death, or for any period that does not in fact end before the decedent's death, either the possession or enjoyment of the property or a right to the income from the property, or the right (either alone or with another) to designate the persons who may possess or enjoy the property or its income. Section 20.2036–1(a) provides generally that, if the decedent retained or reserved an interest with respect to all of the property transferred by the decedent, the amount to be included in the gross estate under section 2036 is the value of the entire property on the date of death. If the decedent retained a right with respect to only part of the property transferred, the amount to be included in the decedent's gross estate under section 2036 is the corresponding proportionate amount of the corpus. Rev. Rul. 76–273, 1976–2 C.B. 268, and Rev. Rul. 82–105, 1982–1 C.B. 133 (See §601.601(d)(2)), generally provide that the portion of the corpus of a CRUT and CRAT includible in the decedent's gross estate under section 2036 is that portion of the trust corpus necessary to generate a return sufficient to provide the decedent's retained annuity or unitrust payment.

Rev. Rul. 76–273 considers a situation where the decedent created an intervivos trust that provided for a stated unitrust percentage of 6 percent to be paid each year to the decedent during life. At the decedent's death, the remainder is to be paid to a charitable organization. The revenue ruling concludes that, for purposes of section 2036(a), the portion of the value of the trust corpus includible in the decedent's gross estate is the portion necessary to yield (at the then current interest rate specified under the applicable regulations) the amount of the annual unitrust payment in perpetuity. Based upon the valuation rules and interest rate assumptions specified in §20.2031–10 (the regulations applicable at the time the ruling was issued), the revenue ruling provides the following formula to be used to determine this includible portion of the trust corpus: equivalent income interest rate divided by the interest rate mandated by the applicable regulations at the date of death, where the equivalent income interest rate = adjusted payout rate/1 minus adjusted payout rate. The result, however, is limited to 100 percent of the trust corpus. (Since the issuance of this revenue ruling, the regulations (§20.2031–7(d)(1)) have been changed to instead require the use of the section 7520 interest rate in lieu of the rate specified in §20.2031–10). The revenue ruling concludes that, because the equivalent income interest of the unitrust payment exceeds the equivalent income interest required to produce that unitrust payment, the grantor retained an interest in the entire corpus of the trust, and thus the entire trust corpus is includible in the deceased grantor's gross estate under section 2036.

Rev. Rul. 82–105 considers a situation where the decedent created an inter-vivos CRAT, pursuant to which the decedent retained the right to receive a fixed annuity for life. The ruling confirms that the decedent's retained annuity represents the retained right to receive all of the income from all or a specific portion of the trust for purposes of section 2036. That portion of the trust corpus with respect to which the decedent retained a right to receive all of the income is properly includible in the decedent's gross estate under section 2036(a)(1). Under the ruling, the amount of the corpus with respect to which the decedent retained the income is that amount of corpus that would be sufficient to yield the annual annuity based on the assumed rate of return prescribed by the regulations as of the applicable valuation date. The ruling prescribes the following formula for this determination: (Annual Annuity) / (Assumed Rate of Return) = Amount Includible. Assuming a rate of return of 6 percent, as specified under §20.2031–10 (the regulation applicable at the time the ruling was issued), the ruling concludes that only a portion of the trust's corpus is includible in the deceased grantor's gross estate. (Since the issuance of this revenue ruling, the regulations (§20.2031–7(d)(1)) have been changed to instead require the use of the section 7520 interest rate in place of the rate specified in §20.2031–10.) Rev. Rul. 82–105 expressly qualifies this conclusion by stating that the ruling does not consider the amount, if any, that may be includible in the gross estate under any other provisions of the Code.

Section 2039(a) provides that a decedent's gross estate includes the value of an annuity or other payment under any form of contract or agreement (other than an insurance policy on the decedent's life) receivable by any beneficiary by reason of surviving the decedent if, under the contract or agreement, an annuity or other payment was payable to the decedent, or the decedent possessed the right to receive such annuity or other payment, for the decedent's life or for any period not ascertainable without reference to the decedent's death, or for any period that does not in fact end before the decedent's death.

Section 2039(b) provides, in part, that the amount includible in the decedent's gross estate is limited to that portion of the value of the annuity or other payment receivable under the contract or agreement as is proportionate to the portion of the purchase price of the contract or agreement that was contributed by the decedent. Section 20.2039–1(b)(1) provides, in part, that the term "annuity or other payment," as used with respect to both the payment receivable by the decedent and by the beneficiary, has reference to one or more payments extending over any period of time, whether the payments are equal or unequal, conditional or unconditional, periodic or sporadic. The term "contract or agreement" includes any arrangement, understanding, or plan, or any combination of them, arising by reason of the decedent's employment. Section 20.2039–1(b)(1).

As is acknowledged in Rev. Rul. 82–105, section 2036 as well as other sections of the Code might apply to the same interest or trust for purposes of the Federal estate tax. Although either section 2036 or section 2039 may be applied to include at least some portion of a trust in the decedent's gross estate if the decedent transfers property during life to a trust and retains the right to use the trust's property or the right to an annuity, unitrust, or other payment from the trust, the amount includible may differ depending upon which section is applied for this purpose.

Explanation of Provisions

The proposed regulations amend §20.2036–1 to incorporate the guidance provided in Rev. Rul. 76–273 and Rev. Rul. 82–105. The proposed regulations provide that, if a decedent transfers property during life to a trust and retains the right to an annuity, unitrust, or other income payment from, or retains the use of an asset in, the trust for the decedent's life, for a period that does not in fact end before the decedent's death, or for a period not ascertainable without reference to the decedent's death, the decedent has retained the right to income from all or a specific portion of the property transferred as described in section 2036. The portion of the trust corpus includible in the decedent's gross estate is that portion of the trust corpus, valued as of the decedent's death (or the alternate valuation date, if applicable) necessary to yield that annual payment (or use) using the appropriate section 7520 interest rate. In this regard, because the specific portion of corpus includible in the gross estate is properly determined as of the decedent's death, the appropriate section 7520 rate is the rate in effect on the decedent's date of death (or on the alternate valuation date, if applicable). The proposed regulations provide both rules and examples for calculating the amount of trust corpus to be included in a deceased grantor's gross estate under section 2036 in such a case.

The IRS and Treasury Department believe that in many cases both section 2036 and section 2039 may be applicable to these annuity and unitrust interests and to such other payments retained by a deceased grantor. Although the language of section 2039 is broad enough to include all or a portion of a trust's corpus if the grantor retains an annuity or unitrust interest in, or other payments from, a trust, the IRS and Treasury Department believe that, in the interest of ensuring similar tax treatment for similarly situated taxpayers, it is appropriate in this circumstance to provide regulatory rules under which only one of these two potentially applicable Code sections (section 2036 and section 2039) will be applied in the future. For the reasons mentioned below, the IRS and Treasury Department have concluded that section 2036 (and therefore, when applicable, section 2035), rather than section 2039, will be applied in the future to these interests. First, section 2039 appears to have been intended to address annuities purchased by or on behalf of the decedent and annuities provided by the decedent's employer. Second, the interests retained by grantors in the types of trusts described in this guidance are more similar in most relevant respects to the interests addressed under section 2036 than those most clearly addressed under section 2039. Accordingly, the proposed regulations also amend §20.2039–1(b)(1) by providing that section 2039 shall not be applied to an annuity, unitrust, or other payment retained by a deceased grantor in a CRT or GRT.

Although these proposed regulations provide guidance as to which section of the Code (specifically, section 2036 or section 2039) is to be used in certain circumstances when each of those sections applies to the same CRT or GRT, these proposed regulations should not be construed to imply that only one section of the Code may apply to a particular situation or interest. These proposed regulations are not intended to foreclose the possibility that any applicable section of the Code (sections 2035 through 2039, or any other section) properly may be applied in the future by the IRS in appropriate circumstances beyond those described in these proposed regulations. (For example, although section 2039 generally will apply to govern the includability of annuities purchased by or on behalf of the decedent and annuities provided by the decedent's employer in the decedent's gross estate, section 2036 may instead be applied if the facts and circumstances indicate that the annuity constituted a retained interest in the property exchanged for that annuity.)

Proposed Effective Date

The first, second, and fourth sentences in §20.2039–1(a) and the provisions in §20.2036–1(a)(1), (a)(2), and (c)(1)(i) are applicable to the estates of decedents dying after August 16, 1954. The fifth sentence of §20.2039–1(a) is applicable to the estates of decedents dying on or after October 27, 1972, and to the estates of decedents for which the period for filing a claim for credit or refund of an estate tax overpayment ends on or after October 27, 1972. The provisions of §20.2036–1(c)(1)(ii) and (2), §20.2039–1(e), and the third, sixth, and seventh sentences of §20.2039–1(a) apply to the estates of decedents for which the valuation date of the gross estate is on or after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**.

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 these regulations do not impose on small entities a collection of information requirement, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, this regulation has been 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 these proposed regulations are adopted as final regulations, consideration will be given to any written (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. The IRS and Treasury Department also 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 September 26, 2007 in the auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW, Washington, DC. Due to building security procedures, visitors must use the main building 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 more information about having your name placed on the list to attend the hearing, see the "FOR FURTHER INFORMATION CONTACT" section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit written (a signed original and eight (8) copies) or electronic comments by September 5, 2007, and an outline of the topics to be discussed and the time to be devoted to each topic by September 5, 2007. 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 Theresa M. Melchiorre, Office of Chief Counsel, IRS.

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Proposed Amendments to the Regulations

Accordingly, 26 CFR part 20 is proposed to be amended as follows:

PART 20—ESTATE TAX; ESTATES OF DECEDENTS DYING AFTER AUGUST 16, 1954

Paragraph 1. The authority citation for part 20 continues to read in part as follows:

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

Par. 2. Section 20.2036–1 is amended by:

1. Redesignating paragraphs (a)(i) and (a)(ii) as paragraphs (a)(1) and (a)(2), respectively.

2. Designating the undesignated text following newly-designated paragraph (a)(2) as paragraph (c)(1)(i) and adding new paragraph headings.

3. Adding paragraphs (c)(1)(ii), (c)(2), and (c)(3).

The additions read as follows:

§20.2036–1 Transfers with retained life estate.

* * * * *

(c) *Retained or reserved interest*—(1) *Amount included in gross estate*—(i) *In general*. * * *

(ii) *Example*. The application of paragraph (c)(1)(i) of this section is illustrated in the following example:

Example. In 2001, Decedent (D) creates an irrevocable intervivos trust. The terms of the trust provide that all of the trust's income is to be paid to D and E, D's spouse who is a US citizen, in equal shares during their joint lives and, on the death of either of them, all of the income is to be paid to the survivor of them. On the death of the survivor of D and E, the remainder is to be paid to another individual, F. In 2006, D dies with E still surviving. A portion of the trust's corpus is includible in D's gross estate because D retained the right to receive a portion of the income from the trust for a period that does not in fact end before D's death. The portion of the trust's corpus includible in D's gross estate bears the same ratio to the entire corpus as D's income interest in the trust bears to the entire income interest in the trust. Therefore, in this case, because D and E share equally in the trust's income, 50 percent of the trust's corpus is includible in D's gross estate under section 2036. If instead E had predeceased D, D would have died while entitled to all of the income from the trust, so that the entire trust corpus would have been includible in D's gross estate under section 2036.

(2) *Retained annuity and unitrust interests in trusts*—(i) *In general*. This paragraph (c)(2) applies to a grantor's retained use of an asset held in trust or a retained annuity, unitrust, or other income interest in any trust (other than a trust constituting an employee benefit) including without limitation the following (collectively referred to in this paragraph (c)(2) as "trusts"): certain charitable trusts (collectively CRTs) such as a charitable remainder annuity trust (CRAT) within the meaning of section 664(d)(1), a charitable remainder unitrust (CRUT) within the meaning of section 664(d)(2) or (d)(3), and any charitable remainder trust that does not qualify under section 664(d), as well as other trusts established by a grantor (collectively GRTs) such as a grantor retained annuity trust (GRAT), a grantor retained unitrust (GRUT), and various other forms of grantor retained income trusts (GRITs), whether or not the grantor's retained interest is a qualified interest as defined in section 2702(b), including without limitation qualified personal residence trusts (QPRTs) and personal residence trusts (PRTs). If a decedent transferred property into such a trust, and retained or reserved the right to use such property or the right to an annuity, unitrust, other income interest in such trust with respect to the property so transferred by the decedent, or to determine the persons who may possess or enjoy the property or its income, for the decedent's life, for any period not ascertainable without reference to the decedent's death, or for a period that does not in fact end before the decedent's death, then the decedent's right to use the property or retained annuity, unitrust, or other income interest (or to designate the beneficiaries of the property) represents the retained right to receive all of the income from all or a specific portion of the trust for purposes of section 2036. The portion of the trust's corpus includible in the decedent's gross estate for Federal estate tax purposes is that portion of the trust corpus necessary to yield the decedent's retained use or retained annuity, unitrust, other income payment as determined in accordance with §20.2031–7 (or §20.2031–7A, if applicable).

(ii) *Examples*. The application of paragraph (c)(2)(i) of this section is illustrated in the following examples:

Example 1. (i) In 2000, Decedent (D) transferred $100,000 to a trust that qualifies as a CRAT under section 664(d)(1). The trust agreement provides for an annuity of $12,000 to be paid each year to D for D's life, then to D's child (C) for C's life, with the remainder to be distributed upon the survivor's death to N, a charitable organization described in sections 170(c), 2055(a), and 2522(a). The annuity is payable to D or C, as the case may be, annually on each December 31st. D died in 2006, survived by C who was then age 40. On D's death, the value of the trust assets was $300,000 and the section 7520 interest rate was 6 percent. D's executor did not elect to use the alternate valuation date.

(ii) The amount of corpus with respect to which D retained the right to the income, and thus the amount includible in D's gross estate under section 2036, is that amount of corpus necessary to yield the annual annuity payment to D. In this case, the formula for determining the amount of corpus necessary to yield the annual annuity payment to D is: annual annuity / section 7520 interest rate = amount includible under section 2036. The amount of corpus necessary to yield the annual annuity is $12,000 / .06 = $200,000. Therefore, $200,000 is includible in D's gross estate under section 2036(a)(1). (The result would be the same if D had irrevocably relinquished D's annuity interest no more than 3 years prior to D's death because of the application of section 2035.) D's estate is entitled to a charitable deduction under section 2055 for the present value of N's remainder interest in the CRAT. The applicable annuity factor (based on C's age on D's death and the section 7520 rate applicable on that date) is 14.1646. Therefore, the present value of the annuity is $169,975.20 (14.1646 x $12,000). As a result, the allowable charitable deduction for D's estate is $30,024.80 ($200,000 - $169,975.20). Under the facts presented, the Internal Revenue Service (IRS) will not seek (and the estate will not be permitted) to include under section 2039 any amount in D's gross estate by reason of this retained annuity. See §20.2039–1(e).

Example 2. (i) D transferred $100,000 to a GRAT in which D's annuity is a qualified interest described in section 2702(b). The trust agreement provides for an annuity of $12,000 per year to be paid to D for a term of ten years or until D's earlier death. The annuity amount is payable at the end of each month in twelve equal installments. At the expiration of the term of years or on D's earlier death, the remainder is to be distributed to C, D's child. No additional contributions were made to the trust after D's transfer at the creation of the trust. D dies prior to the expiration of the ten-year term. On the date of D's death, the value of the trust assets was $300,000 and the section 7520 interest rate was 6 percent. D's executor did not elect to use the alternate valuation date.

(ii) The amount of corpus with respect to which D retained the right to the income, and thus the amount includible in D's gross estate under section 2036, is that amount of corpus necessary to yield the annual annuity payment to D. In this case, the formula for determining the amount of corpus necessary to yield the annual annuity payment to D is: annual annuity (adjusted for monthly payments) / section 7520 interest rate = amount includible under section 2036. The Table K adjustment factor for monthly annuity payments in this case is 1.0272. Thus, the amount of corpus necessary to yield the annual annuity is ($12,000 x 1.0272) / .06 = $205,440. Therefore, $205,440 is includible in D's gross estate under section 2036(a)(1). Under the facts presented, the IRS will not seek (and the estate will not be permitted) to include under section 2039 any amount in D's gross estate by reason of this retained annuity. See §20.2039–1(e).

Example 3. (i) In 2000, D created a CRUT within the meaning of section 664(d)(2). The trust instrument directs the trustee to hold, invest, and reinvest the corpus of the trust and to pay to D for D's life, and then to D's child (C) for C's life, in equal quarterly installments payable at the end of each calendar quarter, an amount equal to 6 percent of the fair market value of the trust as valued on December 15 of the prior taxable year of the trust. At the termination of the trust, the then corpus, together with any and all the accrued income, is to be distributed to N, a charitable organization described in sections 170(c), 2055(a), and 2522(a). D died in 2006, survived by C, who was then age 55. The value of the trust assets on D's death was $300,000 and D's executor did not elect to use the alternate valuation date.

(ii) The amount of the corpus with respect to which D retained the right to the income, and thus the amount includible in D's gross estate under section 2036, is that amount of corpus necessary to yield the unitrust payments. In this case, such amount of corpus is determined by dividing the trust's equivalent income interest rate by the section 7520 rate (which was 6 percent at the time of D's death). The equivalent income interest rate is determined by dividing the trust's adjusted payout rate by the excess of 1 over the adjusted payout rate. Based on §1.664–4(e)(3) of the Income Tax Regulations, the appropriate adjusted payout rate for the trust at D's death is 5.786 percent (6 percent x .964365). Thus, the equivalent income interest rate is 6.141 percent (5.786 percent / (1 - 5.786 percent)). The ratio of the equivalent interest rate to the assumed interest rate under section 7520 is 102.35 percent (6.141 percent / 6 percent). Because this exceeds 100 percent, D's retained payout interest exceeds a full income interest in the trust, and D effectively retained the income from all the assets transferred to the trust. Accordingly, because D retained for life an interest at least equal to the right to the income from all the property transferred by D to the CRUT, the entire value of the corpus of the CRUT is includible in D's gross estate under section 2036(a)(1). D's estate is entitled to a charitable deduction under section 2055 for the present value of N's remainder interest in the CRAT. The remainder factor (based on C's age at D's death, the section 7520 rate in effect on D's death, and the timing and frequency of the payments) is 0.28253. Therefore, the charitable deduction allowable to D's estate is $84,759 ($300,000 x 0.28253). Under the facts presented, the IRS will not seek (and the estate will not be permitted) to include under section 2039 any amount in D's gross estate by reason of D's retained unitrust interest. See §20.2039–1(e).

(iii) If instead D had retained the right to a unitrust amount having an adjusted payout for which the corresponding equivalent interest rate would be less than the 6 percent assumed interest rate of section 7520, then a correspondingly reduced proportion of the trust corpus would be includible in D's gross estate under section 2036(a)(1). Alternatively, if the interest retained by D was instead only one-half of the 6 percent unitrust interest, the computation of the portion of the trust includable in D's gross estate (set forth in *Example 3* (ii)) would be reduced by one-half. In each case, the amount of the estate's charitable deduction for the remainder interest in the trust also would be reduced. All of the results in this *Example 3* (except those relating to the charitable deduction) would be the same if the trust was a GRUT instead of a CRUT.

Example 4. During D's life, D established a 15-year GRIT for the benefit of individuals who are not members of D's family within the meaning of section 2704(c)(2). D retained the right to receive all of the net income from the GRIT, payable annually, during the GRIT's term. D died during the third year of the GRIT term. D's executor did not elect to use the alternate valuation date. In this case, the GRIT's corpus is includible in D's gross estate under section 2036 because D retained the right to receive all of the income from the GRIT for a period that did not in fact end before D's death. If instead, D had retained the right to receive 60 percent of the GRIT's net income, then 60 percent of the GRIT's corpus would have been includible in D's gross estate under section 2036.

Example 5. D transfered D's personal residence to a trust that met the requirements of a qualified personal residence trust (QPRT) as set forth in §25.2702–5(c) of this chapter. Pursuant to the terms of the QPRT, D retained the right to use the residence for 10 years or until D's prior death. D died before the end of the term. D's executor did not elect to use the alternate valuation date. In this case, the fair market value of the QPRT's assets on the date of D's death are includible in D's gross estate under section 2036 because D retained the right to use the residence for a period that did not in fact end before D's death.

(3) *Effective dates*. Paragraphs (a)(1), (a)(2), and (c)(1)(i) of this section are applicable to the estates of decedents dying after August 16, 1954. Paragraphs (c)(1)(ii) and (c)(2) of this section apply to the estates of decedents for which the valuation date of the gross estate is on or after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**.

Par. 3. Section 20.2039–1 is amended by:

1. Revising paragraph (a).
2. Adding a new paragraph (e).

The revision and addition reads as follows:

§20.2039–1 Annuities.

(a) *In general*. A decedent's gross estate includes under section 2039(a) and (b) the value of an annuity or other payment receivable by any beneficiary by reason of surviving the decedent under certain agreements or plans to the extent that the value of the annuity or other payment is attributable to contributions made by the decedent or his employer. Section 2039(a) and (b), however, has no application to an amount which constitutes the proceeds of insurance under a policy on the decedent's life. Paragraph (b) of this section describes the agreements or plans to which section 2039(a) and (b) applies; paragraph (c) of this section provides rules for determining the amount includible in the decedent's gross estate; paragraph (d) of this section distinguishes proceeds of life insurance; and paragraph (e) of this section distinguishes annuity, unitrust, and other income interests retained by a decedent in certain trusts. The fact that an annuity or other payment is not includible in a decedent's gross estate under section 2039(a) and (b) does not mean that it is not includible under some other section of part III of subchapter A of chapter 11. However, see section 2039(c) and (d) and §20.2039–2 for rules relating to the exclusion from a decedent's gross estate of annuities and other payments under certain "qualified plans." Further, the fact that an annuity or other payment may be includible under section 2039(a) will not preclude the application of another section of chapter 11 with regard to that interest. For annuity interests in trust, see paragraph (e)(1) of this section.

* * * * *

(e)(1) *No application to certain trusts*. Section 2039 shall not be applied to include in a decedent's gross estate all or any portion of a trust (other than a trust constituting an employee benefit, but including those described in the following sentence) if the decedent retained a right to use property of the trust or retained an annuity, unitrust, or other income interest in the trust, in either case as described in section 2036. Such trusts include without limitation the following (collectively referred to in this paragraph (e)(1) as "trusts"): certain charitable trusts (collectively CRTs) such as a charitable remainder annuity trust (CRAT) within the meaning of section 664(d)(1), a charitable remainder unitrust (CRUT) within the meaning of section 664(d)(2) or (d)(3), and any other charitable remainder trust that does not qualify under section 664(d), as well as other trusts established by a grantor (collectively GRTs) such as a grantor retained annuity trust (GRAT), a grantor retained unitrust (GRUT), and various forms of grantor retained income trusts (GRITs), whether or not the grantor's retained interest is a qualified interest as defined in section 2702(b), including without limitation qualified personal residence trusts (QPRTs) and personal residence trusts (PRTs). For purposes of determining the extent to which a retained interest causes all or a portion of a trust to be included in a decedent's gross estate, see §20.2036–1(c)(1), (2), and (3).

(2) *Effective date*. The first, second, and fourth sentences in paragraph (a) of this section are applicable to the estates of decedents dying after August 16, 1954. The fifth sentence of paragraph (a) of this section is applicable to the estates of decedents dying on or after October 27, 1972, and to the estates of decedents for which the period for filing a claim for credit or refund of an estate tax overpayment ends on or after October 27, 1972. The third, sixth, and seventh sentences of paragraph (a) of this section and this paragraph (e) are applicable to the estates of decedents for which the valuation date of the gross estate is on or after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**.

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Kevin M. Brown,
Deputy Commissioner for Services and Enforcement.

(Filed by the Office of the Federal Register on June 6, 2007, 8:45 a.m., and published in the issue of the Federal Register for June 7, 2007, 72 F.R. 31487)

Notice of Proposed Rulemaking and Notice of Public Hearing

Qualified Films Under Section 199

REG–103842–07

AGENCY: Internal Revenue Service (IRS), Treasury.

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

SUMMARY: This document contains proposed amendments to the regulations involving the deduction for income attributable to domestic production activities under section 199. The proposed amendments affect taxpayers who produce qualified films under section 199(c)(4)(A)(i)(II) and (c)(6) and taxpayers who are members of an expanded affiliated group under section 199(d)(4). This document also contains a notice of a public hearing on these proposed regulations.

DATES: Written or electronic comments must be received by September 5, 2007. Outlines of topics to be discussed at the public hearing scheduled for October 2, 2007, must be received by September 11, 2007.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–103842–07), room 5203, Internal Revenue Service, PO Box 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–103842–07), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC, or sent electronically, via the Federal eRulemaking Portal at *www.regulations.gov* (indicate IRS REG–103842–07). The public hearing will be held in the auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning §1.199–3(k) of the proposed regulations, David McDonnell, at (202) 622–3040; concerning §1.199–7 of the proposed regulations, Ken Cohen (202) 622–7790; concerning submissions of comments, the hearing, or to be placed on the building access list to attend the hearing, Richard Hurst, at *Richard.A.Hurst@irscounsel.treas.gov* or (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

This document contains proposed amendments to §§1.199–3(k) and 1.199–7 of the Income Tax Regulations (26 CFR Part 1). Section 1.199–3(k) relates to the definition of qualified film produced by the taxpayer under section 199(c)(4)(A)(i)(II) and (c)(6) of the Internal Revenue Code (Code) and §1.199–7 involves expanded affiliated groups under section 199(d)(4). Section 199 was added to the Code by section 102 of the American Jobs Creation Act of 2004 (Public Law 108–357, 118 Stat. 1418), and amended by section 403(a) of the Gulf Opportunity Zone Act of 2005 (Public Law 109–135, 119 Stat. 25), section 514 of the Tax Increase Prevention and Reconciliation Act of 2005 (Public Law 109–222, 120 Stat. 345), and section 401 of the Tax Relief and Health Care Act of 2006 (Public Law 109–432, 120 Stat. 2922).

General Overview

Section 199(a)(1) allows a deduction equal to 9 percent (3 percent in the case of taxable years beginning in 2005 or 2006, and 6 percent in the case of taxable years beginning in 2007, 2008, or 2009) of the lesser of (A) the qualified production activities income (QPAI) of the taxpayer for the taxable year, or (B) taxable income (determined without regard to section 199) for the taxable year (or, in the case of an individual, adjusted gross income).

Section 199(c)(1) defines QPAI for any taxable year as an amount equal to the excess (if any) of (A) the taxpayer's domestic production gross receipts (DPGR) for such taxable year, over (B) the sum of (i) the cost of goods sold (CGS) that are allocable to such receipts; and (ii) other expenses, losses, or deductions (other than the deduction under section 199) that are properly allocable to such receipts.

Section 199(c)(4)(A)(i) provides that the term DPGR means the taxpayer's gross receipts that are derived from any lease, rental, license, sale, exchange, or other disposition of (I) qualifying production property (QPP) that was manufactured, produced, grown, or extracted by the taxpayer in whole or in significant part within the United States; (II) any qualified film produced by the taxpayer; or (III) electricity, natural gas, or potable water produced by the taxpayer in the United States.

Section 199(c)(6) defines a qualified film to mean any property described in section 168(f)(3) if not less than 50 percent of the total compensation relating to production of the property is compensation for services performed in the United States by actors, production personnel, directors, and producers. The term does not include property with respect to which records are required to be maintained under 18 U.S.C. 2257 (generally, films, videotapes, or other matter that depict actual sexually explicit conduct and are produced in whole or in part with materials that have been mailed or shipped in interstate or foreign commerce, or are shipped or transported or are intended for shipment or transportation in interstate or foreign commerce).

Section 199(d)(4)(A) provides that all members of an expanded affiliated group (EAG) are treated as a single corporation for purposes of section 199. Under section 199(d)(4)(B), an EAG is an affiliated group as defined in section 1504(a), determined by substituting "more than 50 percent" for "at least 80 percent" each place it appears and without regard to section 1504(b)(2) and (4).

Section 199(d)(8) authorizes the Secretary to prescribe such regulations as are necessary to carry out the purposes of section 199, including regulations that prevent more than one taxpayer from being allowed a deduction under section 199 with respect to any activity described in section 199(c)(4)(A)(i).

Explanation of Provisions

Qualified Film Produced by the Taxpayer

On June 1, 2006, final regulations (T.D. 9263, 2006–1 C.B. 1063) under section 199 were published in the **Federal Register** (71 FR 31268). Subsequent to the publication of the final regulations, the IRS and Treasury Department became aware that the definition of a qualified film produced by a taxpayer as outlined in the final regulations may not be consistent with the statute. Under section 199(c)(4)(A)(i)(II), a taxpayer's gross receipts qualify as DPGR if the receipts are derived from any lease, rental, license, sale, exchange, or other disposition of any qualified film (as defined in section 199(c)(6)) produced by the taxpayer. A film must be both a "qualified film" under section 199(c)(6) and "produced by the taxpayer" under section 199(c)(4)(A)(i)(II) in order for the gross receipts to qualify as DPGR. Section 1.199–3(k)(5) of the final regulations addresses these two requirements by adding "by the taxpayer" to the not-less-than-50-percent-of-the-total-compensation requirement under §1.199–3(k)(1). However, under the test provided in §1.199–3(k)(5) of the final regulations, a film that was produced entirely within the United States could fail to qualify for the section 199 deduction if less than 50 percent of the total compensation relating to production was paid "by the taxpayer."

The proposed regulations more closely follow the statutory language in section 199(c)(6) by revising the fraction in §1.199–3(k)(5) for determining the not-less-than-50-percent-of-the-total-compensation requirement under §1.199–3(k)(1). Under the fraction set forth in the proposed regulations, the numerator of the revised fraction is the compensation for services performed in the United States and the denominator is the total compensation for services regardless of where the production activities are performed. The revised fraction essentially compares (in the numerator) the sum of the compensation for services paid by the taxpayer for services performed in the United States and the compensation for services paid by others for services performed in the United States to (in the denominator) the sum of the total compensation for services paid by the taxpayer for services and the total compensation for services paid by others for services regardless of location. The proposed regulations also clarify in §1.199–8(a) that, for purposes of §§1.199–1 through 1.199–9, use of terms such as "payment," "paid," "incurred," or "paid or incurred" is not intended to provide any specific rule based upon the use of one term versus another. In general, the use of the term "payment," "paid," "incurred," or "paid or incurred" is intended to convey the appropriate standard under the taxpayer's method of accounting.

Under §1.199–3(k)(6) of the proposed regulations, a film that is a qualified film under §1.199–3(k)(1) will be treated as "produced by the taxpayer" for purposes of section 199(c)(4)(A)(i)(II) if the production activity performed by the taxpayer is substantial in nature within the meaning of §1.199–3(g)(2). The special rules of §1.199–3(g)(4) regarding a contract with an unrelated person and aggregation apply in determining whether the taxpayer's production activity is substantial in nature. Section 1.199–3(g)(2) and (4) are applied by substituting the term "qualified film" for QPP and disregarding the requirement that the production activity must be within the United States. Thus, a qualified film will be treated as produced by the taxpayer if the production of the qualified film by the taxpayer is substantial in nature taking into account all of the facts and circumstances, including the relative value added by, and relative cost of, the taxpayer's production activity, the nature of the qualified film, and the nature of the production activity that the taxpayer performs.

The rules provided in §1.199–3(k)(5) of the proposed regulations closely follow the statutory language in section 199(c)(6) by referencing all compensation for services related to the production as opposed to a more limited "by the taxpayer" compensation test. Commentators have expressed concern over the difficulty of obtaining information related to the compensation paid by others. In response to this concern, the IRS and Treasury Department have provided a safe harbor in §1.199–3(k)(7) of the proposed regulations provides a safe harbor that will treat a film as a qualified film if not less than 50 percent of the total compensation for services paid by the taxpayer is compensation for services performed in the United States. The safe harbor further provides that a qualified film will be treated as produced by the taxpayer if the taxpayer satisfies the safe harbor in §1.199–3(g)(3) with respect to the qualified film, which requires that the direct labor and overhead costs incurred by the taxpayer to produce the qualified film within the United States account for 20 percent or more of the total costs of the film.

Similar to §1.199–3(k)(6) of the proposed regulations, the special rules of §1.199–3(g)(4) regarding a contract with an unrelated person and aggregation apply in determining whether the taxpayer satisfies §1.199–3(g)(3). Section 1.199–3(g)(3) and (4) are applied by substituting the term "qualified film" for QPP but not disregarding the requirement that the direct labor and overhead of the taxpayer to produce the qualified film must be within the United States. Thus, a taxpayer will be treated as having produced a qualified film if, in connection with the qualified film, the direct labor and overhead of the taxpayer to produce the qualified film within the United States account for 20 percent or more of the taxpayer's CGS of the qualified film, or in a transaction without CGS (for example, a lease, rental, or license) account for 20 percent or more of the taxpayer's "unadjusted depreciable basis" (as defined in §1.199–3(g)(3)(ii)) in the qualified film.

Expanded Affiliated Groups

After issuance of the final regulations, several commentators noted that §1.199–7(e), *Example 10*, of the final regulations misapplies §1.1502–13 of the consolidated return regulations. In *Example 10*, a member of a consolidated group sells QPP to another member of the consolidated group. Before the QPP is sold to an unrelated party, the purchasing corporation is disaffiliated from the consolidated group. *Example 10* provides that neither the selling corporation nor the purchasing corporation has DPGR. After further consideration, the IRS and Treasury Department have determined that *Example 10* does not properly apply §1.1502–13 of the consolidated return regulations and that both the selling corporation and the purchasing corporation have DPGR in the facts described. Accordingly, the proposed regulations remove *Example 10* of the final regulations and replace it with a new *Example 10*, properly applying §1.1502–13 of the consolidated return regulations.

In addition, the IRS and Treasury Department discovered a problem concerning the section 199 closing of the books method under §1.199–7(f)(1)(ii) of the final regulations. A corporation that becomes or ceases to be a member of an EAG during its taxable year must allocate its taxable income or loss, QPAI, and W-2 wages between the portion of the taxable year that it is a member of the EAG and the portion of the taxable year that it is not a member of the EAG. In general, this allocation is made by using the *pro rata* allocation method described in §1.199–7(f)(1)(i) of the final regulations. Section 1.199–7(f)(1)(ii) provides that in lieu of the *pro rata* allocation method, a corporation may elect to apply the section 199 closing of the books method under which a corporation treats its taxable year as two separate taxable years, the first of which ends at the close of the day on which the corporation's status as a member of the EAG changes and the second of which begins at the beginning of the day after the corporation's status as a member of the EAG changes.

In certain situations, the section 199 closing of the books method can create a larger section 199 deduction than is warranted. The facts of the *Example* in §1.199–7(g)(3) of the final regulations demonstrate such a situation. In the *Example*, Corporations X and Y, calendar year corporations, are members of the same EAG for the entire 2007 taxable year. Corporation Z, also a calendar year corporation, is a member of the EAG of which X and Y are members for the first half of 2007 and not a member of any EAG for the second half of 2007. During the 2007 taxable year, Z does not join in the filing of a consolidated return. Z makes a section 199 closing of the books election. As a result, Z has $80 of taxable income and $100 of QPAI that is allocated to the first half of 2007 and a $150 taxable loss and ($200) of QPAI that is allocated to the second half of 2007. In addition to the facts presented in the *Example*, assume that X and Y each have $60 of taxable income and QPAI in 2007, Z has $170 of taxable income and QPAI in 2008, and that X, Y, and Z each have W-2 wages in excess of the section 199(b) wage limitation for all relevant periods. After applying the section 199 closing of the books method, the EAG has $200 of taxable income and $220 of QPAI in 2007. Accordingly, the EAG will have a section 199 deduction of $12 (6 percent of the lesser of the EAG's $200 of taxable income and $220 of QPAI). Z, as a stand-alone corporation for the second half of 2007, will have both negative taxable income and negative QPAI and therefore will have no section 199 deduction. In 2008, notwithstanding that Z made a section 199 closing of the books election pursuant to which Z is deemed to have a $150 taxable loss for the second half of 2007, for purposes of computing its taxable income in 2008, Z only has a $70 NOL carryover from 2007. Accordingly, Z will have taxable income of $100 in 2008 and will have a section 199 deduction of $6 (6 percent of the lesser of its $100 of taxable income and $170 of QPAI). Because X and Y had a total of $120 of taxable income and Z had total taxable income in 2007 and 2008 of $100, the maximum aggregate section 199 deduction should have been $13.20 (6 percent of the aggregate taxable income of X, Y, and Z of $220), instead of the aggregate $18 deduction derived in the above example because of the use of the section 199 closing of the books method. The section 199 closing of the books method effectively eliminated $80 of Z's losses from being used to offset taxable income for purposes of the section 199 deduction in either 2007 or 2008.

The proposed regulations remove the section 199 closing of the books method and revise the *Example* in §1.199–7(g)(3) to apply the *pro rata* allocation method. However, the IRS and Treasury Department invite comments concerning the necessity for a section 199 closing of the books method and suggestions under which a section 199 closing of the books election would be allowable, provided that the election does not create an unwarranted section 199 deduction nor does it impose an undue burden on either taxpayers or the government.

Proposed Effective Date

Sections 1.199–3(k), 1.199–7(e), *Example 10*, and 1.199–7(f)(1) are proposed to be applicable to taxable years beginning on or after the date the final regulations are published in the **Federal Register**. Until the date the final regulations are published in the **Federal Register**, taxpayers may rely on §1.199–3(k) and §1.199–7(e), *Example 10*, of the proposed regulations for taxable years beginning after December 31, 2004. However, for taxable years beginning before June 1, 2006, a taxpayer may rely on §1.199–3(k) of the proposed regulations only if the taxpayer does not apply Notice 2005–14, 2005–1 C.B. 498 (see §601.601(d)(2)(ii)(*b*)) or REG–105847–05, 2005–2 C.B. 987 (see §601.601(d)(2)) to the taxable year.

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. Pursuant to section 7805(f) of the Internal Revenue Code, this notice of proposed rulemaking has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. Comments are requested on all aspects of the proposed regulations. In addition, the IRS and Treasury Department specifically 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 October 2, 2007, at 10 a.m. in the auditorium of the Internal Revenue Building, 1111 Constitution Avenue, NW, Washington, DC. Because of access restrictions, visitors will not be admitted beyond the Internal Revenue Building lobby more than 30 minutes before the hearing starts. 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. For information about having your name placed on the building access list to attend the hearing, see the "FOR FURTHER INFORMATION CONTACT" section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit electronic or written comments by September 5, 2007, and submit an outline of the topics to be discussed and the time to be devoted to each topic (signed original and eight (8) copies) by September 11, 2007. 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 authors of these regulations are Lauren Ross Taylor and David M. McDonnell, Office of the Associate Chief Counsel (Passthroughs and Special Industries), IRS. However, other personnel from the IRS and Treasury Department participated in their development.

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Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

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

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

Section 1.199–3 also issued under 26 U.S.C. 199(d). * * *

Section 1.199–7 also issued under 26 U.S.C. 199(d). * * *

Section 1.199–8 also issued under 26 U.S.C. 199(d). * * *

Par. 2. Section 1.199–3 is amended by:

1. Revising paragraphs (k)(1), (k)(4), and (k)(5).

2. Redesignating paragraph (k)(6) as (k)(9).

3. Redesignating paragraph (k)(7) as (k)(10).

4. Adding new paragraphs (k)(6), (k)(7), and (k)(8).

5. Revising *Example 6* of newly designated paragraph (k)(10).

The revisions and additions read as follows:

§1.199–3 Domestic production gross receipts.

* * * * *

(k) * * *

(1) *In general*. The term *qualified film* means any motion picture film or video tape under section 168(f)(3), or live or delayed television programming (film), if not less than 50 percent of the total compensation relating to the production of such film is compensation for services performed in the United States by actors, production personnel, directors, and producers. For purposes of this paragraph (k), the term *actors* includes players, newscasters, or any other persons who are compensated for their performance or appearance in a film. For purposes of this paragraph (k), the term *production personnel* includes writers, choreographers and composers who are compensated for providing services during the production of a film, as well as casting agents, camera operators, set designers, lighting technicians, make-up artists, and other persons who are compensated for providing services that are directly related to the production of the film. Except as provided in paragraph (k)(2) of this section, the definition of a qualified film does not include tangible personal property embodying the qualified film, such as DVDs or videocassettes.

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(4) *Compensation for services*. For purposes of this paragraph (k), the term *compensation for services* means all payments for services performed by actors, production personnel, directors, and producers relating to the production of the film, including participations and residuals. Payments for services include all elements of compensation as provided for in §1.263A–1(e)(2)(i)(B) and (3)(ii)(D). Compensation for services is not limited to W-2 wages and includes compensation paid to independent contractors. In the case of a taxpayer that uses the income forecast method of section 167(g) and capitalizes participations and residuals into the adjusted basis of the qualified film, the taxpayer must use the same estimate of participations and residuals in determining compensation for services. In the case of a taxpayer that excludes participations and residuals from the adjusted basis of the qualified film under section 167(g)(7)(D)(i), the taxpayer must use the amount expected to be paid as participations and residuals based on the total forecasted income used in determining income forecast depreciation in determining compensation for services.

(5) *Determination of 50 percent*. The not-less-than-50-percent-of-the-total-compensation requirement under paragraph (k)(1) of this section is calculated using a fraction. The numerator of the fraction is the compensation for services performed in the United States and the denominator is the total compensation for services regardless of where the production activities are performed. A taxpayer may use any reasonable method that is satisfactory to the Secretary based on all of the facts and circumstances, including all historic information available, to determine the compensation for services performed in the United States and the total compensation for services regardless of where the production activities are performed. Among the factors to be considered in determining whether a taxpayer's method of allocating compensation is reasonable is whether the taxpayer uses that method consistently from one taxable year to another.

(6) *Produced by the taxpayer*. A qualified film will be treated as produced by the taxpayer for purposes of section 199(c)(4)(A)(i)(II) if the production activity performed by the taxpayer is substantial in nature within the meaning of paragraph (g)(2) of this section. The special rules of paragraph (g)(4) of this section regarding a contract with an unrelated person and aggregation apply in determining whether the taxpayer's production activity is substantial in nature. Paragraphs (g)(2) and (4) of this section are applied by substi-

tuting the term *qualified film* for QPP and disregarding the requirement that the production activity must be within the United States. The production activity of the taxpayer must consist of more than the minor or immaterial combination or assembly of two or more components of a film. For purposes of paragraph (g)(2) of this section, the relative value added by affixing trademarks or trade names as defined in §1.197–2(b)(10)(i) will be treated as zero.

(7) *Qualified film produced by the taxpayer — safe harbor*. A film will be treated as a qualified film under paragraph (k)(1) of this section and produced by the taxpayer under paragraph (k)(6) of this section (qualified film produced by the taxpayer) if the taxpayer meets the requirements of paragraphs (k)(7)(i) and (ii) of this section. A taxpayer that chooses to use this safe harbor must apply all the provisions of this paragraph (k)(7).

(i) *Safe harbor*. A film will be treated as a qualified film produced by the taxpayer if not less than 50 percent of the total compensation for services paid by the taxpayer is compensation for services performed in the United States and the taxpayer satisfies the safe harbor in paragraph (g)(3) of this section. The special rules of paragraph (g)(4) of this section regarding a contract with an unrelated person and aggregation apply in determining whether the taxpayer satisfies paragraph (g)(3) of this section. Paragraphs (g)(3) and (4) of this section are applied by substituting the term *qualified film* for QPP but not disregarding the requirement that the direct labor and overhead of the taxpayer to produce the qualified film must be within the United States. Paragraph (g)(4)(ii)(A) of this section includes any election under section 181.

(ii) *Determination of 50 percent*. The not-less-than-50-percent-of-the-total-compensation requirement under paragraph (k)(7)(i) of this section is calculated using a fraction. The numerator of the fraction is the compensation for services paid by the taxpayer for services performed in the United States and the denominator is the total compensation for services paid by the taxpayer regardless of where the production activities are performed. For purposes of this paragraph (k)(7)(ii), the term *paid by the taxpayer* includes amounts that are treated as paid by the taxpayer under paragraph (g)(4) of this section. A taxpayer may use any reasonable method that is satisfactory to the Secretary based on all of the facts and circumstances, including all historic information available, to determine the compensation for services paid by the taxpayer for services performed in the United States and the total compensation for services paid by the taxpayer regardless of where the production activities are performed. Among the factors to be considered in determining whether a taxpayer's method of allocating compensation is reasonable is whether the taxpayer uses that method consistently from one taxable year to another.

(8) *Production pursuant to a contract*. With the exception of the rules applicable to an expanded affiliated group (EAG) under §1.199–7 and EAG partnerships under §1.199–3T(i)(8), only one taxpayer may claim the deduction under §1.199–1(a) with respect to any activity related to the production of a qualified film performed in connection with the same qualified film. If one taxpayer performs a production activity pursuant to a contract with another party, then only the taxpayer that has the benefits and burdens of ownership of the qualified film under Federal income tax principles during the period in which the production activity occurs is treated as engaging in the production activity.

* * * * *

(10) * * *

Example 6. X creates a television program in the United States that includes scenes from films licensed by X from unrelated persons Y and Z. Assume that Y and Z produced the films licensed by X. The not-less-than-50-percent-of-the-total-compensation requirement under paragraph (k)(1) of this section is determined by reference to all compensation for services paid in the production of the television program, including the films licensed by X from Y and Z, and is calculated using a fraction as described in paragraph (k)(5) of this section. The numerator of the fraction is the compensation for services performed in the United States and the denominator is the total compensation for services regardless of where the production activities are performed. However, for purposes of calculating the denominator, in determining the total compensation paid by Y and Z, X need only include the total compensation paid by Y and Z to actors, production personnel, directors, and producers for the production of the scenes used by X in creating its television program.

Par. 3. Section 1.199–7 is amended by:

1. Revising *Example 10* of paragraph (e).

2. Revising paragraphs (f)(1) and (g)(3).

The revisions read as follows:

§1.199–7 Expanded affiliated groups.

* * * * *

(e) * * *

Example 10. (i) *Facts*. Corporation P owns all of the stock of Corporations S and B. P, S, and B file a consolidated Federal income tax return on a calendar year basis. P, S, and B each use the section 861 method for allocating and apportioning their deductions. In 2010, S MPGE QPP in the United States at a cost of $1,000. On November 30, 2010, S sells the QPP to B for $2,500. On February 28, 2011, P sells 60% of the stock of B to X, an unrelated person. On June 30, 2011, B sells the QPP to U, another unrelated person, for $3,000.

(ii) *Consolidated group's 2010 QPAI*. Because S and B are members of a consolidated group in 2010, pursuant to §1.199–7(d)(1) and §1.1502–13, neither S's $1,500 of gain on the sale of QPP to B nor S's $2,500 gross receipts from the sale are taken into account in 2010. Accordingly, neither S nor B has QPAI in 2010.

(iii) *Consolidated group's 2011 QPAI*. B becomes a nonmember of the consolidated group at the end of the day on February 28, 2011, the date on which P sells 60% of the B stock to X. Under §1.199–7(d)(1) and §1.1502–13(d), S takes the intercompany transaction into account immediately before B becomes a non-member of the consolidated group. Pursuant to §1.1502–13(d)(1)(ii)(A)(*1*), because the QPP is owned by B, a nonmember of the consolidated group immediately after S's gain is taken into account, B is treated as selling the QPP to a nonmember for $2,500, B's adjusted basis in the property, immediately before B becomes a nonmember of the consolidated group. Accordingly, immediately before B becomes a nonmember of the consolidated group, S takes into account $1,500 of QPAI (S's $2,500 DPGR received from B - S's $1,000 cost of MPGE the QPP).

(iv) *B's 2011 QPAI*. Pursuant to §1.1502–13(d)(2)(i)(B), the attributes of B's corresponding item, that is, its sale of the QPP to U, are determined as if the S division (but not the B division) were transferred by the P, S, and B consolidated group (treated as a single corporation) to an unrelated person. Thus, S's activities in MPGE the QPP before the intercompany sale of the QPP to B continue to affect the attributes of B's sale of the QPP. As such, B is treated as having MPGE the QPP. Accordingly, upon its sale of the QPP, B has $500 of QPAI (B's $3,000 DPGR received from U - B's $2,500 cost of MPGE the QPP).

* * * * *

(f) *Allocation of income and loss by a corporation that is a member of the expanded affiliated group for only a portion of the year*—(1) *In general*. A corporation that becomes or ceases to be a member of an EAG during its taxable year must allocate its taxable income or loss, QPAI, and W-2 wages between the portion of the taxable year that it is a member of the EAG and the portion of the taxable year that it is not a member of the EAG. This allocation of items is made by using the *pro rata* allocation method described in this paragraph (f)(1). Under the *pro rata* allocation method, an equal portion of a corporation's taxable income or loss, QPAI, and W-2 wages for the taxable year is assigned to each day of the corporation's taxable year. Those items assigned to those days that the corporation was a member of the EAG are then aggregated.

* * * * *

(g) * * *

(3) *Example*. The following example illustrates the application of paragraphs (f) and (g) of this section:

Example. (i) *Facts*. Corporations X and Y, calendar year corporations, are members of the same EAG for the entire 2010 taxable year. Corporation Z, also a calendar year corporation, is a member of the EAG of which X and Y are members for the first half of 2010 and not a member of any EAG for the second half of 2010. During the 2010 taxable year, neither X, Y, nor Z join in the filing of a consolidated Federal income tax return. Assume that X, Y, and Z each have W-2 wages in excess of the section 199(b) wage limitation for all relevant periods. In 2010, X has taxable income of $2,000 and QPAI of $600, Y has a taxable loss of $400 and QPAI of ($200), and Z has taxable income of $1,400 and QPAI of $2,400.

(ii) *Analysis*. Pursuant to the *pro rata* allocation method, $700 of Z's 2010 taxable income and $1,200 of Z's 2010 QPAI are allocated to the first half of the 2010 taxable year (the period in which Z is a member of the EAG) and $700 of Z's 2010 taxable income and $1,200 of Z's 2010 QPAI are allocated to the second half of the 2010 taxable year (the period in which Z is not a member of any EAG). Accordingly, in 2010, the EAG has taxable income of $2,300 (X's $2,000 + Y's ($400) + Z's $700) and QPAI of $1,600 (X's $600 + Y's ($200) + Z's $1,200). The EAG's section 199 deduction for 2010 is therefore $144 (9% of the lesser of the EAG's $2,300 of taxable income or $1,600 of QPAI). Pursuant to §1.199–7(c)(1), this $144 deduction is allocated to X, Y, and Z in proportion to their respective QPAI. Accordingly, X is allocated $48 of the EAG's section 199 deduction, Y is allocated $0 of the EAG's section 199 deduction, and Z is allocated $96 of the deduction. For the second half of 2010, Z has taxable income of $700 and QPAI of $1,200. Therefore, for the second half of 2010, Z has a section 199 deduction of $63 (9% of the lesser of its $700 taxable income or $1,200 QPAI for the second half of 2010). Accordingly, X's 2010 section 199 deduction is $48, Y's 2010 section 199 deduction is $0, and Z's 2010 section 199 deduction is $159, the sum of the $96 section 199 deduction of the EAG allocated to Z for the first half of 2010 and Z's $63 section 199 deduction for the second half of 2010.

Par. 4. Section 1.199–8 is amended by:

1. Adding two sentences at the end of paragraph (a).

2. Adding new paragraphs (i)(8) and (i)(9).

The revisions and additions read as follows:

§1.199–8 Other rules.

(a) * * * For purposes of §§1.199–1 through 1.199–9, use of terms such as *payment*, *paid*, *incurred*, or *paid or incurred* is not intended to provide any specific rule based upon the use of one term versus another. In general, the use of the term *payment*, *paid*, *incurred*, or *paid or incurred* is intended to convey the appropriate standard under the taxpayer's method of accounting.

* * * * *

(i) * * *

(8) *Qualified film produced by the taxpayer*. Section 1.199–3(k) is proposed to be applicable to taxable years beginning on or after the date the final regulations are published in the **Federal Register**. Until the date the final regulations are published in the **Federal Register**, taxpayers may rely on §1.199–3(k) of these proposed regulations for taxable years beginning after December 31, 2004. However, for taxable years beginning before June 1, 2006, a taxpayer may rely on §1.199–3(k) of the proposed regulations only if the taxpayer does not apply Notice 2005–14, 2005–1 C.B. 498 (see §601.601(d)(2)(ii)(*b*) of this chapter), or REG–105847–05, 2005–2 C.B. 987 (see §601.601(d)(2)(ii)(*b*) of this chapter), to the taxable year.

(9) *Expanded affiliated groups*. Section 1.199–7(e), *Example 10*, and §1.199–7(f)(1) are proposed to be applicable to taxable years beginning on or after the date the final regulations are published in the **Federal Register**. Until the date the final regulations are published in the **Federal Register**, taxpayers may rely on §1.199–7(e), *Example 10*, of these proposed regulations for taxable years beginning after December 31, 2004.

Kevin M. Brown,
Deputy Commissioner for Services and Enforcement.

(Filed by the Office of the Federal Register on June 6, 2007, 8:45 a.m., and published in the issue of the Federal Register for June 7, 2007, 72 F.R. 31478)

Closing of the GUST Program for Pre-Approved Defined Benefit Plans

Announcement 2007–61

On September 7, 2007, the Service will discontinue accepting applications for opinion and advisory letters for pre-approved (*i.e.*, master and prototype (M&P) and volume submitter (VS)) defined benefit plans that have not been restated to comply with the Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. 107–16, ("EGTRRA") and other changes in plan qualification requirements listed in Notice 2007–3, 2007–2 I.R.B. 254 ("the 2006 Cumulative List"). The Service is taking this action because the timely submission period for the initial (EGTRRA) six-year amendment/approval cycle for pre-approved defined benefit plans described in Rev. Proc. 2007–44, page 54, this Bulletin, is now open.

Rev. Proc. 2007–44 and Rev. Proc. 2005–16, 2005–1 C.B. 674, describe a staggered remedial amendment system for plans that are qualified under § 401(a) of the Internal Revenue Code, with five-year amendment/approval cycles for individually designed plans and six-year cycles for pre-approved plans. The submission period for the initial cycle for pre-approved defined benefit plans started on February 1, 2007 and runs through January 31, 2008. Sponsors and practitioners are required to restate their pre-approved defined benefit plans for EGTRRA and the 2006 Cumulative List and apply for new opinion or advisory letters during this submission period.

Applications for opinion/advisory letters for pre-approved defined benefit plans that were filed before February 1, 2007 will be reviewed by the Service for compliance with GUST[1] and letters for these plans will not consider EGTRRA or subsequent changes in the plan qualification re-

[1] The term "GUST" refers to the following:

- the Uruguay Round Agreements Act, Pub. L. 103–465;
- the Uniformed Services Employment and Reemployment Rights Act of 1994, Pub. L. 103–353;
- the Small Business Job Protection Act of 1996, Pub. L. 104–188;
- the Taxpayer Relief Act of 1997, Pub. L. 105–34;
- the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. 105–206; and
- the Community Renewal Tax Relief Act of 2000, Pub. L. 106–554.

quirements. Applications filed on or after February 1, 2007 and before September 7, 2007, will also be reviewed only for GUST unless the plan submitted with the application was restated to comply with EGTRRA and the 2006 Cumulative List.

Because the plans described in the preceding paragraph must be restated for EGTRRA and resubmitted to the Service during the current submission period, sponsors and practitioners may wish to withdraw applications for such plans that are currently pending with the Service. In this case, the user fee paid with the application will not be refunded, but the user fee requirement will be waived for a new application for the same plan that is filed within the submission period. The sponsor or practitioner should indicate on the face of the application form that the user fee is being waived pursuant to Announcement 2007–61.

Applications for opinion/advisory letters for pre-approved defined benefit plans that are filed on or after September 7, 2007, will be returned if the plan has not been restated for EGTRRA and the 2006 Cumulative List.

This announcement does not affect the ability of employers to apply for individual determination letters. Thus, the Service will continue to accept applications for determination letters on Form 5307, *Application for Determination for Adopters of Master or Prototype or Volume Submitter Plans*, which are filed by adopters of both defined contribution and defined benefit pre-approved plans.

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 2007–1 through 2007–26 is in Internal Revenue Bulletin 2007–26, dated June 25, 2007.

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[1] A cumulative list of current actions on previously published items in Internal Revenue Bulletins 2007–1 through 2007–26 is in Internal Revenue Bulletin 2007–26, dated June 25, 2007.

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