

## Part IV

### Items of General Interest

#### Simplification of Employee Plans Determination Letter Application Procedures

##### Announcement 2001-77

The Service is simplifying its application procedures for determination letters on the qualification of pension, profit-sharing, stock bonus, and annuity plans under 401(a) and 403(a) of the Internal Revenue Code. These changes will give plan sponsors the flexibility to request a determination letter that considers either the form of the plan only or both the form of the plan and compliance with the requirements of 401(a)(4), 401(a)(26) and 410(b). The Service is also modifying its procedures to facilitate plan compliance with new final regulations on the use of cross-testing in the application of the nondiscrimination requirements of 401(a)(4).

Specifically, the Service is:

- Modifying its procedures and revising the determination letter application forms to give plan sponsors the option to request determination letters without furnishing information on how plans satisfy the nondiscrimination requirements of 401(a)(4), the additional participation requirements of 401(a)(26) or the minimum coverage requirements of 410(b).
- Modifying its procedures to allow adopting employers of nonstandardized master and prototype (M&P) plans or certain volume submitter plans to rely on a favorable opinion or advisory letter with respect to most qualification requirements without requesting a determination letter.
- Modifying its procedures to allow an employer maintaining a multiple employer plan to rely on a favorable determination letter for the plan with respect to most qualification requirements without submitting a separate Form 5300.
- Encouraging practitioners to highlight the changes to plans that have previously received favorable determination letters.
- Making available, during the second half of 2001, and updating periodically, a list of the M&P plans and volume submitter specimen plans that were submitted to the Service for GUST<sup>1</sup> advisory and opinion letters by December

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<sup>1</sup> The term "GUST" refers to:

- the Uruguay Round Agreements Act, Pub. L. 103-465;
- the Uniformed Services Employment and Reemployment Rights Act of 1994, Pub. L. 103-353;

31, 2000, indicating the dates on which opinion and advisory letters were issued or the applications were withdrawn.

- Allowing practitioners to amend volume submitter specimen plans to reflect the recently published final regulations on cross-testing.
- Allowing plan sponsors to request determination letters that take into account the final regulations on cross-testing, beginning August 22, 2001.

The Service is also taking a number of other steps to improve the efficiency of its case processing. The changes described in this announcement are separate from any long-term changes to the determination letter program that may result from the Service's ongoing study of the future of the Employee Plans determination letter program. The Service expects to publish a white paper as part of this study in the near future.

## SECTION I. CHANGES TO DETERMINATION LETTER APPLICATION PROCEDURES AND FORMS

### A. Current Procedures

Under current procedures, plans are generally reviewed for compliance with form and operational coverage and nondiscrimination requirements, including, for example, the ratio-percentage test of 410(b)(1). In addition, at the election of the plan sponsor, a plan may also be reviewed for compliance with the average benefit test of 410(b)(2) and the nondiscriminatory availability of benefits, rights and features requirement and the general test for nondiscrimination in amount of contributions or benefits of 401(a)(4).

Applicants must file Schedule Q (Form 5300), *Nondiscrimination Requirements*, providing demographic data for coverage and nondiscrimination requirements to be considered by the Service in reviewing the plan.

### B. New Procedures

Under the new procedures, plan sponsors can elect to have a plan reviewed for compliance with the form requirements only or with both the form requirements and the coverage and nondiscrimination requirements of 401(a)(4), 401(a)(26) and 410(b) that the plan sponsor elects to have considered. For example, a plan sponsor no longer must provide demographic data for the ratio-percentage test, but may choose to do so to have compliance with 410(b)

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- 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 ("CRA").

considered in the determination letter. Thus, the filing of Schedule Q is now optional.

### C. Revised Application Forms

The following forms are being revised:

Form 5300, *Application for Determination for Employee Benefit Plan Schedule Q (Form 5300), Nondiscrimination Requirements*  
 Form 5307, *Application for Determination for Adopters of Master or Prototype, Regional Prototype or Volume Submitter Plans*  
 Form 5309, *Application for Determination of Employee Stock Ownership Plan*  
 Form 5310, *Application for Determination for Terminating Plan*  
 Form 5310-A, *Notice of Plan Merger or Consolidation, Spinoff, or Transfer of Plan Assets or Liabilities; Notice of Qualified Separate Lines of Business*  
 Form 6088, *Distributable Benefits From Employee Benefit Pension Plans*  
 Form 6406, *Short Form Application for Determination for Minor Amendment of Employee Benefit Plan*  
 Form 8717, *User Fee for Employee Plan Determination Letter Request.*

Form 5303, *Application for Determination for Collectively Bargained Plan*, currently used to apply for a determination letter for a collectively bargained plan, is eliminated. Applications previously submitted using Form 5303 will now be submitted using Form 5300.

### D. Draft Forms Will Be Available on the Internet

To assist entities developing software used in preparing determination letter applications, as well as plan sponsors and practitioners, the Service will soon post draft Forms 5300, 5307, 5310, 6406 and Schedule Q to: <http://www.irs.gov/ep>. Although the Service does not anticipate making changes to the content of these draft forms, users are cautioned that these forms are subject to substantive and formatting changes before final versions are available. It is anticipated that final forms will be available in August.

### E. Changes to Forms 5300, 5307, 5310 and Schedule Q

The following are the principal changes regarding Forms 5300, 5307, 5310 and Schedule Q:

1. Schedule Q, an optional form, must be attached to Form 5300 or Form 5307 if the applicant wishes to request a determination letter that covers one or more of certain coverage and nondiscrimination requirements.
2. Certain questions are being eliminated from the Schedule Q, including those related to 401(a)(26). A determination letter application for a defined benefit plan will be reviewed for compliance with 401(a)(26) if the application

requests consideration of 410(b), or if a cover letter requests consideration of 401(a)(26) and the applicant provides data supporting the request.

3. Questions related to the ratio-percentage test under 410(b) and the nondiscriminatory amount design-based safe harbors under 401(a)(4) are included in Forms 5300 and 5307 as optional questions.
4. Questions related to the minimum coverage requirements, including the average benefit test, and the nondiscriminatory amounts requirement, including the general test and the design-based safe harbors, are being added to Form 5310. Form 5310 applicants will continue to be required to demonstrate compliance with the minimum coverage and nondiscriminatory amounts requirements, including the average benefit and general tests, unless the conditions described in section 11.04 of Rev. Proc. 2001-6, 2001-1 I.R.B. 194, have been satisfied. Applicants may file Schedule Q with Form 5310 to request a determination that covers any of the other nondiscrimination requirements addressed by the Schedule Q, such as the requirement that a plan not discriminate in the availability of benefits, rights and features under the plan.

#### F. Changes Regarding Favorable Determination Letters

Under current procedures, determination letters may include separate caveats indicating that the applicant has demonstrated that the plan satisfies specific coverage and nondiscrimination requirements, such as the average benefit test and the general test. However, the actual scope of reliance on a favorable determination letter is based on the information and demonstrations submitted with the application and the failure of an applicant to retain this information might limit the scope of reliance. (See section 21.01 of Rev. Proc. 2001-6.) The use of multiple caveats has sometimes resulted in confusion and administrative complications.

To improve the quality of the letters and processing efficiency, the Service will generally discontinue the use of separate caveats for the coverage and nondiscrimination requirements. The extent of reliance on a favorable letter will not change. Thus, a letter may be relied on with regard to specific determination requests made with the application, provided the relevant information and demonstrations are retained by the applicant.

#### G. Effective Dates and Transition Rules

1. Determination letter applications filed before July 23, 2001 must comply with the procedures in Rev. Proc. 2001-6 and the current determination letter application forms.

2. Between July 23, 2001 and December 31, 2001, applicants requesting determination letters on Form 5300 or 5307 may choose to:
  - submit the revised Form 5300 or 5307 either including or omitting the revised Schedule Q, once the forms are finalized;
  - submit the current Form 5300 or 5307 with the current Schedule Q, following the procedures in Rev. Proc. 2001-6;
  - submit the current Form 5300 or 5307 omitting Schedule Q; or
  - submit the current Form 5300 or 5307 with the current Schedule Q, completing only Part I of the Schedule Q and those line items relating to the specific coverage and nondiscrimination requirements for which the applicant requests a determination.

In the latter two cases, the applicant must include a cover letter indicating that the determination requested is only on the form of the plan or on both the form of the plan and those issues selected on Schedule Q. If this information is not included in the cover letter, the Service will not contact the applicant but will assume the omission or partial completion of the Schedule Q correctly reflects the scope of the determination requested by the applicant.

3. Determination letter applications filed on Form 5310 before January 1, 2002 must comply with the procedures in Rev. Proc. 2001-6 and the current forms.
4. Determination letter applications filed after December 31, 2001 must be submitted on the revised forms.

#### H. User Fees

The user fee for an application will continue to be based on the form on which the application is submitted and whether the application involves a determination of the average benefit or general test.

## SECTION II. CHANGES TO RELIANCE PROCEDURES FOR ADOPTING EMPLOYERS OF M&P AND VOLUME SUBMITTER PLANS

### A. Current Reliance Procedures

Under current procedures, an employer that adopts a nonstandardized M&P plan or a volume submitter plan must request a determination letter to have reliance. An employer that adopts a standardized M&P plan (including paired plans) generally must request a determination letter to have reliance if the employer maintains another plan.

### B. New Reliance Procedures

Adopting employers of M&P and volume submitter plans can rely on a favorable opinion or advisory letter issued to the M&P sponsor or volume submitter practitioner as described below if the employer adopts a plan that is identical to an approved M&P or specimen plan and chooses only options permitted under the terms of the approved plan. These employers can forego filing Form 5307 and rely on a favorable opinion or advisory letter issued to the M&P sponsor or volume submitter practitioner with respect to the qualification requirements, except as provided in 1 through 5 of this paragraph B and in paragraph C of this section, below.

1. Except as provided herein, adopting employers of nonstandardized M&P plans and volume submitter plans cannot rely on a favorable opinion or advisory letter with respect to the requirements of:
  - (a) 401(a)(4), 401(a)(26), 401(l), 410(b) or 414(s); or
  - (b) if the employer maintains or has ever maintained another plan covering some of the same participants<sup>2</sup>, 415 or 416.
2. Adopting employers of nonstandardized M&P plans and volume submitter plans can rely on the opinion or advisory letter with respect to the requirements of 410(b) and 401(a)(26) (other than the 401(a)(26) requirements that apply to a prior benefit structure) if 100 percent of all nonexcludable employees benefit under the plan.
  1. Nonstandardized M&P plans must give adopting employers the option to elect a safe harbor allocation or benefit formula and a safe harbor compensation definition. Adopting employers of nonstandardized M&P plans that elect a safe harbor allocation or benefit formula and a safe harbor compensation definition can rely on an opinion letter with respect to the nondiscriminatory amounts requirement under 401(a)(4) and the requirements of 401(k) and 401(m) (except where the M&P plan is a safe harbor 401(k) plan that provides for the safe harbor contribution to be made under another plan).
  4. Adopting employers of nonstandardized safe harbor M&P plans (which require adopting employers to elect a safe harbor allocation or benefit formula) are entitled to the same reliance as adopting employers of nonstandardized plans except that they have automatic reliance with respect to the nondiscriminatory amounts requirement if they elect a safe harbor definition of compensation.
  5. Adopting employers of standardized M&P plans (including paired plans) that maintain or have ever maintained another plan can rely on a favorable

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<sup>2</sup> For this purpose, whether an employer maintains or has ever maintained another plan will be determined using principles consistent with section 6.02 of Rev. Proc. 2000-20, 2000-6 I.R.B. 553.

opinion letter except with respect to the requirements of 415 and 416 and the requirements of 401(a)(26) that apply to prior benefit structures.

### C. Other Limitations and Conditions on Reliance

1. An adopting employer of an M&P or volume submitter plan can rely on a favorable opinion or advisory letter only if the letter has taken into account the requirements of GUST and the plan has been amended to the extent necessary to comply with the requirements of 314(e) of CRA, relating to changes to the definition of compensation under 414(s) and 415(c)(3). In addition, if the opinion or advisory letter is a "GUST I" letter (as defined in Rev. Proc. 2000-27, 2000-26 I.R.B. 1272), the plan must have been amended to the extent necessary to comply with the requirements of GUST that are effective after 1998.
2. An adopting employer can rely on a favorable opinion or advisory letter for a plan that amends or restates a plan of the employer only if the plan that is being amended or restated satisfies the qualification requirements as in effect prior to GUST and the operational compliance requirements of GUST, and the GUST amendments are retroactively effective to the extent required.
1. An adopting employer cannot rely on an opinion or advisory letter for a plan if the repealed family aggregation rules continued to apply under the plan after 1996 or if the repealed 415(e) limits continued to apply under the plan after 1999. The continued application of these rules and limits in years following their repeal could cause a plan to fail to satisfy one or more requirements of 401(a).
4. An adopting employer cannot rely on an advisory letter issued after the date the employer adopts the GUST-amended plan.
5. An adopting employer can rely on an opinion or advisory letter only if the employer has not added any terms to the approved M&P or volume submitter plan document and has not modified or deleted any terms of the document other than choosing options permitted under the document or, in the case of an M&P plan, amending the document as permitted under sections 5.07 and 5.11 of Rev. Proc. 2000-20. Thus, for example, in the case of a volume submitter plan, the employer's plan must be identical to the approved specimen plan except as the result of the employer's selection among options that are permitted under the terms of the approved specimen plan.
6. An adopting employer cannot rely on an opinion or advisory letter if the adopting employer has modified the terms of the plan's approved trust in a manner that would cause the plan to fail to be qualified.

### D. Reliance Equivalent to Determination Letter

To the extent an employer can rely on a favorable opinion or advisory letter pursuant to this announcement or Rev. Proc. 2000-20 and Rev. Proc. 2001-6, the opinion or advisory letter shall be equivalent to a favorable determination letter. For example, the favorable opinion or advisory letter shall be treated as a favorable determination letter for purposes of section 21 of Rev. Proc. 2000-6, regarding the effect of a determination letter, and section 5.01(4) of Rev. Proc. 2001-17, 2001-7 I.R.B. 589, regarding the definition of favorable letter for purposes of the Employee Plans Compliance Resolution System.

#### E. Change to Conditions for Extended Remedial Amendment Period

The GUST remedial amendment period generally ends on the last day of the first plan year beginning on or after January 1, 2001. However, certain plans may be eligible for an extended remedial amendment period under the provisions of section 19 of Rev. Proc. 2000-20. Section 19.04 of Rev. Proc. 2000-20 requires plans eligible for the extension to request a determination letter by the end of the extended period if a determination letter is required for reliance. Thus, current procedures would require adopting employers of nonstandardized M&P plans and volume submitter plans to request determination letters within the extended period.

An employer eligible for reliance without a determination letter, as described in this section, is not required to request a determination letter to be entitled to the extension of the remedial amendment period under section 19 of Rev. Proc. 2000-20, provided that the employer adopts the GUST-approved M&P or specimen plan within the extended remedial amendment period.

### SECTION III. CHANGES TO APPLICATION PROCEDURES FOR EMPLOYERS THAT MAINTAIN MULTIPLE EMPLOYER PLANS

#### A. Current Application Procedures

Under current procedures, an application for a determination letter for a multiple employer plan must include separate Form 5300 applications for each employer maintaining the plan. In addition, demonstrations to be included with Schedule Q must separately demonstrate compliance with the relevant coverage or nondiscrimination requirement by each employer.

#### B. New Application Procedures

A determination letter applicant can request either (1) a letter for the plan or (2) a letter for the plan and a letter for each employer maintaining the plan with respect to whom a separate Form 5300 is filed.

1. An applicant requesting a letter for the plan submits one Form 5300 application for the plan, filed on behalf of one employer, omitting the optional



minimum coverage questions and Schedule Q and either including or omitting the design-based safe harbor questions. The user fee for a single employer plan will apply. An employer maintaining a multiple employer plan can rely on a favorable determination letter issued for the plan except with respect to the requirements of 401(a)(4), 401(a)(26), 401(l), 410(b) and 414(s), and, if the employer maintains or has ever maintained another plan, 415 and 416.

2. An applicant requesting a letter for the plan and an employer must submit the filing required in (1) above and a separate Form 5300 application, completed through line 8, for each employer requesting a separate letter. Each employer may elect to respond to the Form 5300 questions regarding minimum coverage and design-based safe harbors and to file Schedule Q to request a determination on the average benefit test, the general test or any other nondiscrimination requirement addressed by the Schedule Q. The user fee for the application will be determined under the user fee schedules for multiple employer plans in section 6.06 of Rev. Proc. 2001-8, 2001-1 I.R.B. 239, substituting the number of Forms 5300 filed for the number of employers maintaining the plan and treating the entire application as a general test or average benefit test application if any employer requests a determination on either of these tests.

#### C. Other Limitations and Conditions

Rules similar to the rules in Section II.C and D above also apply in the case of an employer maintaining a multiple employer plan.

#### SECTION IV. HIGHLIGHTING DOCUMENT CHANGES

The Service encourages practitioners to highlight changes to plan documents that have previously received determination letters in such a way as makes the nature and purpose of the changes apparent and assists Service personnel in reviewing the plan. This practice may speed the review of plan documents; however, the Service retains the discretion to review the entire document.

#### SECTION V. LISTS OF M&P AND VOLUME SUBMITTER PLANS

The period of extension of the GUST remedial amendment period under section 19 of Rev. Proc. 2000-20 is 12 months. The 12-month period begins on the date of approval of the last M&P or specimen plan of the employer's M&P sponsor or volume submitter practitioner to receive a favorable GUST opinion or advisory letter. In Notice 2001-42, p. **[INSERT PAGE NUMBER OF NOTICE 2001-42]**, this bulletin, the Service has provided that the 12-month period shall be treated as not ending before December 31, 2002.

The Service has been asked to make available lists of M&P and volume submitter plans to assist employers in determining the expiration of their GUST

remedial amendment period. Therefore, the Service plans to make available on the Internet a list of all the M&P and volume submitter plans that were submitted to the Service for GUST opinion or advisory letters by December 31, 2000, the deadline for filing under Rev. Proc. 2000-20. This list will include the name of the M&P sponsor or volume submitter practitioner, the name of each plan submitted by the sponsor or practitioner, and the file folder or other number assigned to each plan. This list will be posted as early as possible in the second half of 2001.

As soon as practical after publication of the list, and periodically thereafter, the Service will amend the list to include the date on which each plan is approved or the application is otherwise closed.

## SECTION VI. FINAL CROSS-TESTING REGULATIONS

### A. Publication of Final Regulations

Final regulations under 401(a)(4), published in the Federal Register on June 29, 2001 (the "final cross-testing regulations") amend 1.401(a)(4)-8, 1.401(a)(4)-9 and 1.401(a)(4)-12 of the Income Tax Regulations. The final cross-testing regulations describe the conditions under which defined contribution plans, and defined contribution and defined benefit plans that are tested together, are permitted to demonstrate compliance with nondiscrimination requirements on a benefits basis. The regulations are effective for plan years beginning on or after January 1, 2002.

### B. Permitted Amendment of Pending Specimen Plans in Conjunction with GUST

Practitioners that sponsor volume submitter plans with "cross-testing formulas" or provisions may wish to amend their specimen plans for the regulations to help adopting employers ensure that their plans will be eligible to cross-test. In order to facilitate the amendment of specimen plans for the final cross-testing regulations during the GUST plan restatement process, the Service will allow practitioners to submit final regulation amendments to their specimen defined contribution plans to be reviewed in conjunction with the review of the plan for compliance with GUST, provided the amendments are submitted by October 22, 2001. When submitting such amendments, practitioners should include a cover letter that identifies the specimen plan to which the amendments relate and the status of the application (if known) and that describes the nature of the amendments. The Service will not issue an advisory letter for a defined contribution specimen plan before October 22, 2001 without first obtaining the concurrence of the practitioner.

### C. Permitted Amendment of Previously Approved Specimen Plans

Practitioners that have already received a GUST advisory letter for a defined contribution specimen plan may resubmit the plan by October 22, 2001 to include

final regulation amendments. The submission should include the plan and any amendments, a copy of the GUST advisory letter, and a cover letter which describes the nature of the changes to the specimen plan and indicates that the application is being submitted pursuant to Announcement 2001-77. In this case, a favorable advisory letter issued with respect to the amendments will be treated as the initial GUST advisory letter for the specimen plan for purposes of determining the 12 month period under Rev. Proc. 2000-20.

#### D. Determination Letter Applications

For determination letter applications filed on or after August 22, 2001, employers may request a determination that takes the final cross-testing regulations into account. If a demonstration involving cross-testing relates to the 2002 or later plan year, the demonstration must address the requirements of the regulations. Estimated data for the 2002 plan year may be used for purposes of this demonstration.

### SECTION VI. RELIANCE PRIOR TO PUBLICATION OF MODIFIED REVENUE PROCEDURES

The changes described in this announcement will be published as modifications to Rev. Procs. 2000-20, 2001-6 and 2001-8. Until the modifications to the revenue procedures are published, plan sponsors may rely on this announcement regarding the changes.

#### DRAFTING INFORMATION

The principal drafter of this announcement is James Flannery of Employee Plans. For further information regarding this announcement, please contact Employee Plans' taxpayer assistance telephone service at (202) 283-9516 or (202) 283-9517, between the hours of 1:30 p.m. and 3:30 p.m. Eastern Time, Monday through Thursday. Mr. Flannery may be reached at (202) 283-9613. These telephone numbers are not toll-free.