

# Elimination of User Fees for Certain Determination Letter Requests Pursuant to Section 620 of the Economic Growth and Tax Relief Reconciliation Act of 2001

## Notice 2002-1

### I. Purpose

This notice provides guidance on section 620 of the Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. 107-16 (EGTRRA) which provides that, for requests made after December 31, 2001, the Secretary of the Treasury or the Secretary's delegate shall not require payment of user fees for requests to the Internal Revenue Service (Service) for certain determination letters with respect to the qualified status of a pension, profit-sharing, stock bonus, annuity, or employee stock ownership plan. The guidance in this notice will help a plan sponsor determine if it is required to pay a user fee for a determination letter application.

### II. Background

Rev. Proc. 2002-6 (2002-1 I.R.B. 203) (January 7, 2002), contains the procedures of the Service for issuing determination letters on the qualified status of employee plans under §§ 401(a), 403(a), 409, and 4975(e)(7) of the Internal Revenue Code and the exempt status of related trusts or custodial accounts under § 501(a). Section 3.01 of Rev. Proc. 2002-6 describes the types of determination letters that may be requested by a taxpayer.

Rev. Proc. 2002-8 (2002-1 I.R.B. 252) (January 7, 2002) provides guidance for complying with the Service's user fee program as it pertains to requests for determination letters on matters under the jurisdiction of the Commissioner, Tax Exempt and Government Entities (TE/GE). Form 8717, *User Fee for Employee Plan Determination Letter Request*, is used as an attachment to a determination

letter application to transmit the payment of the required user fee.

Notice 98-4 (1998-1 C.B. 269) provides guidance regarding SIMPLE IRA plans under § 408(p).

### III. Questions and Answers on EGTRRA section 620

Q-1: What does section 620 of EGTRRA provide?

A-1: In general, section 620 of EGTRRA provides that the Secretary of the Treasury or his delegate shall not require, for requests made after December 31, 2001, payment of user fees for certain requests to the Service for determination letters with respect to the qualified status of a pension, profit-sharing, stock bonus, annuity, or employee stock ownership plan maintained solely by one or more eligible employers, as defined in Q&A-5, or the exempt status of any trust which is part of the plan. In order to be exempt from the user fee with respect to a determination letter request, an eligible employer must also meet the requirements of Q&A-3.

Q-2: Which determination letter requests are eligible for elimination of the user fee?

A-2: In general, any determination letter request described in section 3.01 of Rev. Proc. 2002-6 that meets the requirements of this notice is exempt from the user fee. However, a request for a determination letter on the qualified status of a group trust under Rev. Rul. 81-100 (1981-1 C.B. 326) and a request for a waiver of the minimum funding requirement are not eligible for elimination of the user fee. In addition, user fees are not eliminated for any opinion or advisory letter request made by a sponsor of any master or prototype or volume submitter specimen plan that the sponsor intends to market to participating employers.

Q-3: Are user fees eliminated for all determination letter requests filed by an eligible employer after December 31, 2001?

A-3: No. User fees are not eliminated for any determination letter request made after the later of (a) the fifth plan year the plan is in existence or (b) the end of any

remedial amendment period with respect to the plan beginning within the first five plan years.

Q-4: When is a plan "in existence" for this purpose?

A-4: In general, a plan is in existence on the first day the plan was in effect. Thus, payment of a user fee generally will not be required for any determination letter request filed by an eligible employer before the first day of a plan's sixth plan year. However, a plan established as a result of a spin-off from another plan will be treated as in existence on the first day the plan from which it was spun off was in effect. Also, a plan established as the result of a merger of two or more plans will be treated as in existence on the earliest date any of the merged plans was in effect.

Q-5: Who is an "eligible employer" for purposes of determining eligibility for elimination of the user fee?

A-5: An "eligible employer" means an eligible employer (as defined in § 408(p)(2)(C)(i)(I) of the Code) that has at least one employee who is not a highly compensated employee (as defined in § 414(q)) and is participating in the plan. Under § 408(p)(2)(C)(i)(I), an employer is an eligible employer for a year if the employer had no more than 100 employees who received at least \$5,000 of compensation from the employer for the preceding year. In general, the determination of who is an eligible employer is to be made in accordance with the provisions of Q&As B-1, B-5, C-4, and C-5 of Notice 98-4 (1998-1 C.B. 269) relating to SIMPLE IRA Plans under § 408(p), as described below. Thus, for example, in determining if an employer is an eligible employer for purposes of the elimination of the user fee, all employers aggregated under § 414(b), (c) or (m) are treated as a single employer and leased employees described in § 414(n) are treated as employed by the employer.

Q-6: When is the determination of whether an employer is an eligible employer made?

A-6: The determination of whether an employer is an eligible employer is made as of the date the determination request is

made. Thus, an employer will be an eligible employer with respect to a determination letter application if the following two conditions are met. First, the employer must have had no more than 100 employees who received at least \$5,000 of compensation from the employer for the calendar year immediately preceding the calendar year in which the determination letter request is filed (“the preceding calendar year”). Second, at least one employee who was not a highly compensated employee for the plan year immediately preceding the plan year in which the determination letter request is filed (“preceding plan year”) must have participated in the plan for the preceding plan year. If the determination letter request is filed in the first plan year, then at least one employee who is not a highly compensated employee must participate in the plan for the plan year. See Q&A-9 regarding when an employee is treated as participating in a plan.

Q-7: Which employees are taken into account for purposes of determining if the employer had no more than 100 employees who received at least \$5,000 of compensation from the employer for the preceding calendar year met?

A-7: For this purpose, all employees employed at any time during the preceding calendar year, including self-employed individuals described in § 401(c)(1) who received earned income from the employer during the preceding calendar year, are taken into account, regardless of whether they were eligible to participate in the plan. Thus, for example, employees who are excludable under the rules of § 410(b)(3) or who have not met the plan’s minimum eligibility requirements must be taken into account.

Q-8: What definition of compensation is used to determine if an employee received at least \$5,000 of compensation from the employer for the preceding calendar year?

A-8: For purposes of determining if an employee received at least \$5,000 of compensation from the employer for the preceding calendar year, in the case of an individual who is not a self-employed individual, compensation means the amount described in § 6051(a)(3) (wages, tips, and other compensation from the employer subject to income tax withholding under § 3401(a)) and amounts described in § 6051(a)(8) (elective deferrals within the meaning of § 402(g)(3) and compensation deferred under § 457). In the case of a self-employed individual, compensation means net earnings determined from self-employment under § 1402, prior to subtracting elective deferral contributions made on behalf of the individual.

Q-9: When is an employee treated as participating in a plan for purposes of determining if at least one employee who is not a highly compensated employee participated in the plan for the preceding plan year?

A-9: For this purpose, an employee is treated as participating in a plan for a plan year if the employee benefits under the plan (within the meaning of § 1.410(b)-3 of the Income Tax Regulations) for the plan year. If the plan year in which the determination letter request is filed is the first plan year of the plan, then an employee is treated as participating if the employee is eligible to benefit under the plan for the year, subject to the satisfaction of applicable conditions for accruing a benefit or receiving an allocation for the year provided in the terms of the plan (whether or not the employee satisfies these conditions).

Q-10: Is the user fee for an application for a determination letter for a plan maintained by more than one employer eliminated if any of the employers that maintain the plan are not eligible employers?

A-10: No. The user fee for an application for a determination letter for a plan maintained by more than one employer is

not eliminated unless each employer that maintains the plan meets the requirements for an eligible employer under this notice. For example, the user fee for an application for a determination letter for a multiple employer plan is not eliminated unless each employer that maintains the plan is an eligible employer, even if the application is for a letter only for the plan and not for any employer that maintains the plan.

Q-11: When is the elimination of user fees effective?

A-11: The elimination of user fees is effective with respect to determination letter requests made after December 31, 2001. The user fee for any application filed before January 1, 2002, is not eliminated, regardless of when the GUST<sup>1</sup> remedial amendment period for the plan ends. Failure to include the proper user fee with an application filed before January 1, 2002, may result in the return of the application and possible adverse effect if the application is not resubmitted with the correct user fee within 30 days. See section 9.03 of Rev. Proc. 2002-8.

Q-12: For purposes of determining if a user fee is eliminated, when does the GUST remedial amendment period begin?

A-12: The date the GUST remedial amendment period begins can vary from plan to plan. The earliest date on which a plan’s GUST remedial amendment period could have begun is December 8, 1994, the date of enactment of the Uruguay Round Agreements Act (GATT). For user fee purposes, the Service will treat the GUST remedial amendment period as beginning on December 8, 1994, in all cases. The first day of the 5-year period ending on December 8, 1994, is December 9, 1989. Thus, a GUST determination letter application for a plan that was first in existence on or after December 9, 1989, may be eligible for elimination of the user fee.

<sup>1</sup>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.

Q-13: If a determination letter application filed before January 1, 2002, is withdrawn after December 31, 2001, will the user fee be refunded?

A-13: No. As provided in section 10.01 of Rev. Proc. 2002-8, unless the Service declines to rule, a user fee will not be refunded, regardless of when the application is withdrawn.

Q-14: If a determination letter application filed before January 1, 2002, is modified after December 31, 2001, will the user fee be affected?

A-14: Generally, the modification after December 31, 2001, of a determination letter application filed before January 1, 2002, will not result in a refund of the applicable user fee. Furthermore, if the effect of the modification of the application is to change the subcategory of the application under section 6.06 of Rev. Proc. 2002-8 to a different subcategory with a higher user fee, the applicant will be required to pay the additional user fee.

For example, assume an application for a determination letter for a single-employer plan is filed on Form 5300 before January 1, 2002. The application does not request a determination with respect to the general test for nondiscrimination in amount of contributions or benefits or the minimum coverage average benefit test. The application includes payment of the required \$700 user fee. After December 31, 2001, the applicant modifies the application to request a determination regarding the average benefit test. The Service will not issue a determination letter covering the average benefit test unless the applicant pays an additional \$550, the difference between the \$700 fee and the \$1,250 fee that applies to a request for a determination with respect to the general test or the average benefit test.

Q-15: Does a form have to be filed to indicate that a user fee for a determination letter is not required?

A-15: Yes. Form 8717 is being revised to allow applicants to indicate that the application meets the requirements for elimination of the user fee and to provide for the applicant's signature in these cases. The revised Form 8717 is to be used with all section 620 applications that are filed after December 31, 2001 (which is when that section becomes effective). The revised form will be available to be

downloaded from the IRS Web Site at [http://www.irs.gov/forms\\_pubs/forms.html](http://www.irs.gov/forms_pubs/forms.html). Failure to include Form 8717, or to sign it, if required, may result in the return of the determination letter application.

#### IV. Effect on Documents

Rev. Proc. 2002-6 and Rev. Proc. 2002-8 are modified.

#### Drafting Information

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

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