Updates on the Determination Letter Program and the Pre-Approved Plans Program

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Special Assistant Pre-Approved Plans Program

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Indiana Benefits Conference
Published Guidance Relevant to Presentation

- Rev. Proc. 2005-16 - discusses the M&P and VS Plans (Pre-Approved Plans) program

- Rev. Proc. 2005-66 - discusses the staggered 5-yr. cycle for individually designed plans and the 6-yr. cycle for the pre-approved plan programs

- Announcement 2005-37 - discusses the ability of VS practitioners to amend on behalf of their adopting employers

- Rev. Proc. 2006-6 - discusses the procedures for the issuance of determination letters
Purpose of Rev. Proc. 2005-16

- Opens the Defined Contribution (DC) Pre-approved Plans Program for EGTRRA effective 2/17/05
Purpose of Rev. Proc. 2005-16

- DC Pre-Approved Plans of sponsors/practitioners and mass submitters submitted by 1/31/06 will be eligible for the new six (6) year remedial amendment cycle.

- DC Pre-Approved Plans of mass submitters originally had to be submitted by an earlier date of 10/31/05, according to Announcement 2005-36, to be eligible for the new six (6) year remedial amendment cycle; however, Rev. Proc. 2005-66 extended this date to 1/31/06.
Purpose of Rev. Proc. 2005-16

- DC Pre-approved Plans submitted after 1/31/06 will **NOT** be eligible for the new six (6) year remedial amendment cycle

- Late submitted existing DC Pre-approved Plans will be offered EPCRS
### Timely EGTRRA Pre-Approved Plans Inventory

<table>
<thead>
<tr>
<th>Description</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total VS and M&amp;P mass submitter and non-mass submitter plans received</td>
<td>766*</td>
</tr>
<tr>
<td>Total VS and M&amp;P word-for-word received</td>
<td>10,200</td>
</tr>
<tr>
<td>Total M&amp;P minor modifiers received</td>
<td>200*</td>
</tr>
</tbody>
</table>

*These require specialist review – over 85% of the inventory has been assigned*
Changes to the Pre-Approved Plans Program Under Rev. Proc. 2005-16

- The procedures governing the VS program are now within the same Revenue Procedure as that for the M&P program
- Sections 4 through 12 apply solely to M&P plans
- Sections 13 through 18 apply solely to VS plans
- Sections 19 through 27 apply to both the VS and M&P plans
Changes to the Pre-Approved Plans Program Under Rev. Proc. 2005-16

- No blanks or fill-ins without parameters
- See sections 6.03 and 16.02 for all other plans or plan features not permitted in the Pre-Approved Plans program

Don’t Forget the Parameters!
Changes to the Pre-Approved Plans Program Under Rev. Proc. 2005-16

• Non-standardized M&P plans and VS plans can use cross-testing (M&P plans will be limited to the cross-testing LRM) – see Exhibit C

• A VS money purchase pension plan can now be approved with only ten (10) adopting employers as long as another type of VS plan is maintained

• Up to ten (10) trust documents can be approved with each prototype basic plan document
Changes to the Pre-Approved Plans Program Under Rev. Proc. 2005-16

- VS plans can now optionally include a provision which allows the VS practitioner to make amendments on behalf of its adopting employers

- See Announcement 2005-37 for guidance on implementing this ability and sample language to add to existing adopting employers’ plans
Changes to the Pre-Approved Plans Program Under Rev. Proc. 2005-16

- All advisory/opinion letters will be issued at one time as opposed to their issuance as plans are finished being reviewed.

- However, an email will be sent to the practitioner or sponsor indicating an “Unofficial” acceptance of the plan once it is finished being reviewed – this email in no way provides reliance.
Changes to the Pre-Approved Plans Program Under Rev. Proc. 2005-16

The employer reliance on an advisory or opinion letter will not be hindered...

- where the only deviations are to correct certain typos and/or to add an effective date(s) to specific provision(s)

- by subsequent adoption of IRS model, sample, or other required good faith amendments
Changes to the Pre-Approved Plans Program Under Rev. Proc. 2005-16

- Employer reliance for IRC 401(a)(4) IS NOW POSSIBLE with an advisory letter
Submission Procedures of Rev. Proc. 2005-16

• Approval letters issued for Pre-approved Plans submitted between 2/17/05 and 1/31/06 will be reviewed only for the statutory, regulatory, and guidance changes to the qualification requirements listed in the 2004 Cumulative List

• See Notice 2004-84
Submission Procedures of Rev. Proc. 2005-16

For information on the documents to include with your submission, see sections 7, 12, and 20, for M&P plans, and sections 17, 18, and 20, for VS plans, and the “New Submission Procedures for Pre-Approved Plans” topic within the “Determinations” topic on our website IRS.GOV/EP
Section 20 contains the address for filing a Pre-Approved Plan submission:

Internal Revenue Service
Attn: VS or M&P Coordinator
PO Box 2508, Room 5-106
Cincinnati, OH  45201
How a Submission will be Reviewed by the Service

- Every Pre-approved Plan will be subject to two (2) levels of review

- The practitioner or sponsor will usually only interact with the first level reviewer and, generally, will not know the identity of the 2nd level reviewer
How a Submission will be Reviewed by the Service

Both specialists assigned to a DC Pre-approved Plan will ensure it complies with all required qualification changes identified in the Cumulative List of Notice 2004-84.

The first level specialist will give you 30 days to respond to a request letter - the specialist will have the authority to grant an extension to this response period.
• Sections 16 through 20 of Rev. Proc. 2005-66 relate solely to ER adoption of VS and M&P plans
Establishes a system of 6-year remedial amendment cycles (RACs) staggered by plan type (i.e., DC or DB) for adopters of pre-approved plans:

- **Year 1**: Submission Period
- **Year 2 and 3**: IRS Review
- **Year 4 and 5**: Employer adopts and submits for determination letter, if necessary
- **Year 6**: Flexible or Idle Year

*This is also mentioned briefly in section 24 of Rev. Proc. 2005-16.*
Section 18 of Rev. Proc. 2005-66

- Includes a chart of the staggered 6-year RACs for adopters of Pre-approved Plans

- The initial (EGTRRA) 6-year RAC for DC Pre-approved Plans opened on 2-17-05 (release of Rev. Proc. 2005-16)

- The initial (EGTRRA) 6-year RAC for DB Pre-approved Plans does not open until 2-1-07
Section 17 of Rev. Proc. 2005-66

Describes who is eligible for a 6-year remedial amendment cycle (RAC)

Four eligible categories:
(1) Prior adopter
(2) New adopter
(3) Intended adopter, or
(4) Replacement plan adopter

Of course, for each category, the pre-approved plan utilized must be submitted timely – for EGTRRA DC Pre-approved Plans, the deadline was 1/31/06
Sections 17 and 19 of Rev. Proc. 2005-66

- Discusses effect on 6-year remedial amendment cycle (RAC) by certain employer modifications to a Pre-approved plan

- “Infamous”
  
  (a) 6/6 – permissible
  (b) 6/5 – impermissible
  (c) 5/5 – egregious

This is also discussed in section 24 of Rev. Proc. 2005-16
Sections 17 and 19 of Rev. Proc. 2005-66

- Where the employer modifications to the Pre-approved Plan required the employer to file a determination letter application under Form 5300, the determination specialist will require the Pre-approved Plan to be updated for a later Cumulative List than the one used for the Pre-approved Plan.
The Service has received numerous questions from sponsors and practitioners who dropped one (1) or more pre-approved plans originally maintained under GUST.

Is a Certification of Intent (Form 8905) needed?
Generally, an employer who adopts another timely pre-approved plan by the announced deadline (2 year window) will remain on the 6-year cycle, if other conditions in section 17 of Rev. Proc. 2005-66 are met.
RAC Applicable to Employers Adopting Different Pre-Approved Plans

Must meet section 17.01 and 17.02 of Rev. Proc. 2005-66

(1) Section 17.01 – sponsor or practitioner must file new application for pre-approved plan by application deadline (e.g., January 31, 2006 for DC Pre-approved Plans)

(2) Section 17.02 – an employer is a “prior adopter” if the pre-approved plan was both adopted and effective as the last day of the six (6) year cycle immediately preceding opening of current six (6) year cycle (For example: For DC plans 2/16/05)
Can an employer who was a prior adopter adopt a plan of either the same or different sponsor or an individually designed plan in the 6-year cycle?
The following are six (6) scenarios where the employer adopts another plan of the same sponsor or a different sponsor who filed timely by 1/31/06. Assume there are no IRC 411(d)(6) violations (for example, where a MPP merged with a PSP and restated as a PSP)
Scenario 1

- Sponsor abandons M&P plan
- Employer was a prior adopter as of 2/16/05
- Sponsor notifies employer and Service of abandonment
- Service opens two (2) year window
- Employer adopts another timely filed sponsor’s plan who received a good opinion letter
For Scenario 2 – 6 assume the following:

(a) The employer was a prior adopter as of 2/16/05

(b) The sponsor (same or different) timely filed by 1/31/06

(c) The employer timely adopts another plan to replace prior plan in the two (2) year window

(d) All plans are defined contribution plans
Scenario 2

• Sponsor abandons their prototype but employer adopts same sponsor’s volume submitter

Oh No – I’m Abandoned
Scenario 3

- Sponsor has basic plan document (BPD) and several adoption agreements
- Sponsor drops money purchase adoption agreement
- Employer timely adopts sponsor’s profit sharing plan as a restatement to replace the money purchase plan
Scenario 4

- Sponsor has several BPD’s each having several adoption agreements
- Sponsor drops a BPD and its adoption agreements
- Employer timely adopts another plan of same sponsor
Scenario 5

- Sponsor submits late, after 1/31/06 for DC plans
- Employer timely adopts another sponsor’s plan who did submit timely
- Consideration – Service may utilize EPCRS for late sponsor and eliminate the need for employer to go to another sponsor
Scenario 6

- Sponsor submits timely
- Employer decides he or she would rather adopt another sponsor’s timely submitted plan in a timely manner (in the two (2) year window)
The Use of Form 8905

- Form 8905, Certification of Intent to Adopt a Pre-Approved Plan, became available to the public in April 2006

- The form is used to qualify as an “intended adopter” under section 17.04 of Rev. Proc. 2005-66
The Use of Form 8905

- Must be signed and dated by both the employer and the M&P sponsor or VS practitioner before the end of the employer’s applicable 5-year remedial amendment cycle in order to switch the employer over to the 6-year remedial amendment cycle
The Use of Form 8905

- The signed and dated Form 8905 is **NOT** filed separately with the Service.
- It **MUST** be filed with the employer’s determination letter application (i.e. Form 5300, 5307, or 5310) during the announced 2-year window of the 6-year cycle to prove the employer is entitled to the 6-year cycle.
The Use of Form 8905

• Individually designed versions of the Form 8905 are **NOT** permitted

• This is because the form has been created to bring uniformity to both the design and content of the certification

• In addition, the form has been designed to be compatible with a computer processing system for determination letter applications (which is currently in the very early stages of implementation)
The Use of Form 8905

• The wording of line 4 of Part III of Form 8905 has caused some concern in the sponsor and practitioner community

• In particular, the words, “was filed” of line 4 have caused concern

• This is because employers who maintain Cycle A (cycle ends 1/31/07) DB plans who want to switch over to the 6-year cycle via Form 8905 must sign and date the form along with the sponsor or practitioner prior to the time (e.g. 10/31/07 or 1/31/08) the sponsor/practitioner is required to file the pre-approved DB plan
The Use of Form 8905

- The same is possible with cycle B DB plans

- The Service is taking the position the instructions to line 4 alleviate this concern and have clarified this in a FAQ on our website

- This is one of fifteen frequently asked questions (FAQs) under the title “FAQs on Pre-Approved and Individually Designed Plan Programs (including Form 8905)” on our website at www.irs.gov/ep

- Approval of Form 8905 - send emails to: JoAnna.H.Weber@irs.gov
### Five (5) Year Cycle for Individually Designed Plans

<table>
<thead>
<tr>
<th>Last digit of Plan Sponsor’s TIN</th>
<th>Cycle</th>
<th>Cycle Submission Period ends</th>
<th>Expiration Date of Determination Letter</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 or 6</td>
<td>A</td>
<td>1/31/2007</td>
<td>1/31/2012</td>
</tr>
<tr>
<td>2 or 7</td>
<td>B</td>
<td>1/31/2008</td>
<td>1/31/2013</td>
</tr>
<tr>
<td>3 or 8</td>
<td>C</td>
<td>1/31/2009</td>
<td>1/31/2014</td>
</tr>
<tr>
<td>4 or 9</td>
<td>D</td>
<td>1/31/2010</td>
<td>1/31/2015</td>
</tr>
<tr>
<td>5 or 0</td>
<td>E</td>
<td>1/31/2011</td>
<td>1/31/2016</td>
</tr>
</tbody>
</table>
Special amendment and submission rules:

- Multiple employer plans = Cycle B
- Governmental plans = Cycle C
- Multiemployer plans = Cycle D
- Sole proprietors may use last digit of SSN for initial submission cycle then all future submissions will be based on EIN assigned by the Service
Five (5) Year Cycle for Individually Designed Plans

Special Submission Rules - CG or ASG with More than One Plan:

- Based upon filer’s EIN, or
- May elect (irrevocably) into Cycle A
- Alternatively, may (in parent-sub group) elect into parent’s EIN cycle
- File with determination application at earliest cycle - forms in EP newsletter
Five (5) Year Cycle for Individually Designed Plans

- The standard of review is the Cumulative List issued prior to first day of cycle
- Thus, on-cycle cycle A plans will be reviewed against the 2005 Cumulative List under Notice 2005-101
- Off-cycle plans will be reviewed against the Cumulative List in effect as of submission date and will still need to amend during on-cycle period
There are three (3) different remedial amendment periods under the staggered approach: see Sections 5.04 and 5.05 of Rev. Proc. 2005-66

- Interim mandatory amendments
- Interim discretionary amendments
- Remedial amendment cycle amendments (e.g. DB 401(a)(9))
EGTRRA Determination Letter Program

Interim Amendments

- Mandatory amendments (i.e. new statute) that enact disqualifying provision must be executed by due date of tax return

- Discretionary amendments are non-mandatory for compliance must be executed by end of effective year

- Both can be corrected in the restated plan document within the extended remedial amendment period
Strongly encourage on-cycle filers to submit their applications expeditiously.

Conversely, urge the pension community to resist filing off-cycle as permitted by section 14 of Rev. Proc. 2005-66.

We will treat plan terminations, voluntary compliance applications, and “special rulings” applications (i.e. ASG, leased employees) as on-cycle.

Off Cycle applications will be processed last.
Technical Tips for Determinations

- All off-cycle applications received will be placed in suspense (and the POA/TP will be notified by a letter of the suspense) until all on-cycle applications have been processed.

- If an application received off-cycle is not reviewed until the plan’s on-cycle, then a new application with possible additional user fees would be required - i.e. new restated plan document updated to the applicable Cumulative List plus any interim amendments since the initial application’s applicable Cumulative List etc.
Off-cycle filing **DOES NOT** preserve a plan sponsor’s remedial amendment cycle

- Only amendments inclusive to the applicable Cumulative List of the application will have the extended 401(b) period

- Any amendments executed after an off-cycle application will have their own 401(b) period which will not be extended by the earlier application
Our current procedures provide that interim amendments will be caveated in the favorable determination letter.

Determination specialists will review interim amendments to confirm their 401(b) compliance.

The determination letter will contain a caveat indicating that the letter provides no reliance for interim amendments adopted after the applicable Cumulative List (pertaining to the application) is issued.
Technical Tips for Determinations


Applications submitted prior to July 1, 2006 will be processed at the current fee schedule – If off-cycle applications are not reviewed until they are on-cycle, additional fees under the post July 1, 2006 fee structure will be required.

Form 6406 is expected to be discontinued (see section 11.05 of Rev. Proc. 2006-6 and also section 14 of Rev. Proc. 2005-66)
Any comments from off-cycle filers who should receive expedited treatment need to email the reason(s) to Bob Bell at Robert.P.Bell@irs.gov
(1) Incomplete Submissions

- Will receive letter 1014 (see Exhibit A)
- Cases may be on or off cycle filings
- Reason - many plans have not been restated as required, but tack-on amendments and good-faith EGTRRA amendments have been submitted instead
- User fee is refunded

Dear Applicant:

We have reviewed your application and have determined that the procedural requirements of Revenue Procedure (Rev. Proc.) 2006-6, 2006-1 I.R.B. 294 were not satisfied.

Sections 9 and 16 of Revenue Procedure 2005-60, 2005-17 I.R.B. 599 define a plan's applicable remedial amendment cycle. Generally, individually designed plans have a five-year cycle based on the last digit of the employer's identification number (EIN). Pre-approved plans and prototype (MAP) or volume submitter (VSS) plans are generally on a five-year cycle. The submission period for employers to adopt pre-approved plans will be a two-year window to be announced by the Service at a later date. To remain on a six-year cycle the application should be submitted during that two-year period.

A revised plan must be submitted for a plan that has not previously received a determination letter failing to account all the requirements of I.R.C. § 411. The plan must be amended to meet the requirements in the applicable Cumulative List that will be considered by the Service in its review of plans whose submission period begins on February 4, following the issuance of the Cumulative List. For example, individually designed plans submitting for a determination letter between February 1, 2006, and January 31, 2007, must be amended to meet the Cumulative List requirements issued in Notice 2005-101, 2008-51 I.R.B. 1212. Further, Notice 2005-101 states that a plan must comply with all relevant qualification requirements, that is, all qualification requirements in effect, or guidance published before the issuance of the Cumulative List, not just those on the 2005 Cumulative List.

Since your application does not meet the above requirements, we are returning your application and all attachments. We will refund any user fee paid, if applicable, the refund should be processed within six to eight weeks.

The Service encourages all plan sponsors to file during their applicable remedial amendment cycle. Plan sponsors that wish to preserve reliance on a plan's favorable determination letter must apply for a new determination letter during the last twelve months of each five-year plan's remedial amendment cycle (i.e., between February 1 and January 31 of the last year of the cycle). Your plan should follow the procedures under Rev. Proc. 2006-6 and 2005-66.

If you wish to submit your application as an 'off-cycle' cycle, you will need to make the necessary corrections as noted above, and resubmit an entire application package to the address as indicated in Section 6.17 of Rev. Proc. 2006-6. Please note that all off-cycle applications will be placed in suspense until all on-cycle applications are reviewed. However, in order to preserve reliance, you must also file an on-cycle application during the appropriate submission period. A copy of this letter should be included in your resubmission package.

If you have any questions, please contact the person named above.

Thank you for your cooperation.

Sincerely,

Robert P. Bell
Manager, BF Determinations

Exhibit A
1014 Letter
(2) User Fees Must be Correct

- New user fees under Rev. Proc. 2006-8 effective for submissions on or after 7/1/2006

(3) Copies of Executed Amendments

- All amendments will need to be submitted with the application, even if they have been integrated into a restatement plan document or documents to verify timeliness
- Re: good faith EGTRRA amendments, IRC 401(a)(9) minimum distribution rules, GAR ’94 mortality table, automatic rollovers, etc.
(4) Form 5300 filed for Pre-Approved Plans with Amendments (On or Off Cycle)

- Most have been prototypes with cross testing
- Must do a Form 5300 based on the current Cumulative List when submitted (e.g. Notice 2005-101 for filing within Cycle A)
- Recommendation – should be waiting until “two (2) year window” to submit
- Any submission on or after 2/1/2006 is bound by current Cumulative List
(5) **All Off-Cycle Filings will Receive Letter 1940 (see Exhibit B)**

- Off-cycle cases are suspended until on-cycle cases have been worked

- You may withdraw your off-cycle case and receive a refund of the user fee, if you do not want the application to be suspended
Exhibit B

1940 Letter

necessary interim amendments while a determination letter application for the plan is pending.

If you have any questions concerning this letter, please contact the person whose name and telephone number are shown above.

We have sent a copy of this letter to your representative as indicated in the power of attorney.

Thank you for your cooperation.

Sincerely,

Robert D. Roll
Manager, EP Determinations
Post-GUST Amendments for Terminating and Ongoing Plans (Overview)

- All plan types
- Terminating and ongoing must be amended for:
  - Statutory changes,
  - Final Regulations, and
  - Other changes integral to the qualification requirements of the Internal Revenue Code brought about by guidance published in the Internal Revenue Bulletin.
The New (Old) IRC 401(b) and Rev. Proc. 2005-66 Due Date to Amend is:

- For plan years beginning after 12/31/2001
- Required law changes must be adopted by the due date of the taxpayers tax return (plus extensions), applicable to the tax year the new law provision is first effective under the plan, or the end of the plan year, (if later)
- Unless extended by Notice 2005-95
Post-GUST Amendments for Terminating Plans (Overview)

- A terminating plan must be amended for all applicable statutory law changes, regulatory law changes, and other guidance.

- Which amendments depend on plan type that is effective prior to the date of the plan’s proposed date of termination.
Post-GUST Amendments: Required (Interim) and Discretionary

- Interim amendments are required
- For new statutory provisions, final regulations published, and other guidance published in the Internal Revenue Bulletin, (after 12/31/2001), that is integral to the plan’s qualification, and which differs from the plan’s current language.
- Plans must be amended by the end of that required provision’s 401(b) period.
- Discretionary amendments (non-mandatory) must be amended by the end of the plan year the provision is first applied.
Post GUST Amendments for Ongoing Plans (Overview)

Is also applicable to:

- Cycle A filers under Rev. Proc. 2005-66
- Individually designed plans
What Provisions Must a Terminating Plans be Amended for, as of the Date of Termination?

- Plans that terminate after the effective date of a change in law, and before the date that amendments are otherwise required.
- Must comply with all “applicable law in effect” as of the date of termination, based upon the date the law is effective.
- See Rev. Proc. 2006-6 Section 12.06
Compliance With “Applicable Law In Effect”

- Plans must be amended for all applicable law in effect for the plan at the date of termination. See Rev. Proc. 2006-6

- “Applicable law” includes:
  - Items listed on the most recent Cumulative List (CL)
  - Laws effective prior to the most recent CL, but not contained in the CL
  - Laws effective subsequent to the most recent CL
General Remedial Amendment Period for Ongoing Plans

The remedial amendment period that applies to a plan is extended only if:

- The employer amends for all of the applicable interim and/or discretionary amendments that are required or optionally chosen, based upon a change in law or guidance by the end of the applicable 401(b) period that applies to that provision,

- Is adopted timely and in good faith with the intent of maintaining the qualified status of the plan. See section 5.03 of Rev. Proc. 2005-66
Interim Amendments are Required

- Where there is a required statutory, regulatory, or other guidance change
- That affects a plan’s qualification requirements
- The plan must adopt an interim amendment, within the applicable 401(b) period
- To align plan provisions with the changes in statute or regulation so that a plan is operated properly in accordance with a written plan document.
Interim Amendment Adoption
Period: The Literal 401(b) Period

The period to amend a plan for a provision that is otherwise designated by the Commissioner to be disqualifying: Begins on the date on which the change in law becomes effective with respect to the plan, and ends on the later of: (1) the due date for filing the income tax return for the tax year the RAP begins, or (2) the last day of the plan year, if later.
Discretionary Amendment

• An amendment made to apply an optional provision to a plan

• For example – amendments to allow Roth contributions to a 401(k) plan
The adoption period for an optional amendment to a plan (a discretionary amendment) ends on the last day of the plan year in which the provision is first effective.

See 5.05(3) of Rev. Proc. 2005-66
Effect of Interim and Discretionary Amendments

- When interim or discretionary amendments are adopted timely and in good faith, the remedial amendment period to correct any related disqualifying provisions is extended through the applicable remedial amendment cycle date set forth in Rev. Proc. 2005-66 for an on-going plan.
Termination Changes The Compliance Date

- Termination usually shortens a plan’s remedial amendment cycle - The remedial amendment cycle is used to determine the determination letter application period and required amendments for an ongoing plan.

- Termination ends a plan's remedial amendment period (unless an application for a letter is filed in connection with the termination.)
An application is deemed to be “filed in connection with a termination” if it is filed before the latest of (i) one year from the date of the termination, or (ii) one year from the date on which the action terminating the plan is adopted.

However, such an application cannot be filed later than one year from the date of distribution of substantially all plan assets.

Rev. Proc. 2005-66, Section 8
Determination Upon Termination Controls the End of the RAP

- An application filed in connection with a termination extends the remedial amendment period to the date that is 91 days after the issuance of a favorable determination letter.
Mandatory Law Provisions-First Effective In The Year Of Termination

Mandatory law provisions that become effective during the year of plan termination and prior to the end of their prescribed adoption period (if the plan was ongoing) can be amended:

- Prior to the proposed termination date, or
- During the determination process where an application is filed in conjunction with plan termination
Terminating Plan Compliance

- Terminating plans must be amended for all legislation currently in effect, as of the date of plan termination – see Rev. Proc. 2006-6
- The plan’s proposed date of termination determines which law provisions apply to the plan
- For mandatory law changes, applicability is determined by the new law provision’s effective date, relative to the plan’s proposed date of termination.
- For discretionary provisions, the date the provision was first applied controls
EGTRRA (P.L. 107-16) for DC Plans

- Plans must adopt a “good faith” EGTRRA amendment by the end of the plan year in which the EGTRRA change is required to be put into effect under the plan or the end of the GUST remedial amendment period for the plan - effective 1/1/2002

- A pre-approved plan may be amended by the sponsor to the extent authorized - if the amendment of a pre-approved plan includes an addendum to the adoption agreement, it is effective only if signed and dated by the employer
Mandatory Amendments - DC Plans
IRC 416

• The Key Employee is now defined as a:
  – 5% owner,
  – officer with 415 compensation over $130,000, or
  – 1% owner with 415 compensation over $150,000

• The look-back period for determining key-employee status was reduced from 5 years to the 1 year period ending on the determination date

• Employer matching contributions are taken into account as part of the employer’s required contribution in a top-heavy year

• Effective 1/1/2002
• Plans that meet the safe harbor of IRC 401(k)(12) and contain matching contributions which satisfy the safe harbor of IRC 401(m)(11) are exempted from the top-heavy requirements

• Effective 1/1/2002
Mandatory Amendments - DC Plans
IRC 415/401(a)(17)

- IRC 415(c) annual contribution limits are the lesser of: (1) $40,000 dollar limit, or (2) 100% of 415(c)(3) compensation – see Rev. Proc. 2001-51

- IRC 401(a)(17) - the $150,000 annual compensation limit has changed to $200,000

- Effective 1/1/2002
Mandatory Amendments – DC Plans
IRC 401(k)/401(m)

Employer matching contribution vesting must be either a 3-year cliff or top-heavy vesting schedule

- The multiple use test has been eliminated
- Hardship distributions are not eligible rollover distributions under 401(a)(31) and cannot be paid directly to an eligible retirement plan
- Effective 1/1/2002
Mandatory Amendments – DC Plans
IRC 401(k)/401(m) Final Regs

- A contribution can become an elective contribution only if it is made after the employee performs services for the employer
- Roth elective contributions are included in the ADP test
- ESOP & Non-ESOP plans may be aggregated in testing for compliance with the ADP and ACP tests
- Effective 1/1/2006
Mandatory Amendments – DC Plans
IRC 401(k)/401(m) Final Regs

• “Bottom-up leveling” is limited - QNECs and QMACs cannot be included in the ADP and ACP tests to the extent they exceed the greater of 5% of compensation or 2 times the plans representative rate

• QMACs are limited to 100% of elective contributions

• In aggregating plans in which highly compensated employees participate you will need to include all deferrals to all cash or deferred arrangements of same employer that can be aggregated under IRC 410, even if different plan years are involved

• Effective 1/1/2006
• 401(k) and 401(m) plans that terminate after 2005 will have to be amended to comply with the Final Regulations

• The Final Regulations could have optionally been applied to any plan year ending after December 29, 2004 as a discretionary amendment

• Notice 2005-95 extended the adoption date for such a discretionary amendment to December 31, 2005
Mandatory Amendments – ESOP Subchapter S Corporation

• An ESOP holding S-Corp stock must provide that no portion of the assets of the plan attributable to employer securities may accrue or be allocated under any plan of the employer to any disqualified person during a nonallocation year – a nonallocation year occurs when a disqualified person owns or is considered to own 50 percent of the S-Corp stock.

• **Effective Date:** Applies to plan years beginning after December 31, 2004 - however, in the case of any S-Corporation ESOP established after March 14, 2001, applies to plan years ending after March 14, 2001.
Mandatory Amendments – ESOP S Corporation - Direct IRA Rollover

- In the event of a rollover of an account balance of an ESOP that contains S-Corp stock (an IRA cannot hold S-Corp stock)

- The terms of the ESOP must provide either- 1) the S-Corp repurchases the “rolled over” S-Corp stock contemporaneously with, and effective on the same day as, the distribution, or, 2) the ESOP itself assumes the right and obligation of the S-Corp to repurchase the stock upon the ESOP's distribution of the stock to an IRA and the ESOP actually repurchases the stock contemporaneously with, and effective on the same day as, the distribution; and no income or loss attributable to the distributed S-Corp stock is allocated to the IRA
Mandatory 1.401(a)(4)-8(b) Cross-Test Minimum Allocations

- For cross-tested defined contribution plans
- Mandatory amendments only to the extent of any conflicting language in the plan document (e.g. failsafe language)
- Gateway
  - 5% of 415(c)(3) compensation or
  - NHCE (lowest) is 1/3 of HCE (highest) percentage
- Non-Gateway
  - Broadly available allocation rated
  - Age weighted gradually increasing rate or target benefit safe satisfied
- Effective 1/1/2002
Mandatory - 1.401(a)(4)-9 - DB/DC Aggregation Rules

- For cross-tested DC/DB aggregated plans
- Mandatory amendment only to the extent of any conflicting language in the plan document (e.g. failsafe language)
- Gateway
  - 7 1/2% of the NHCEs 415(c)(3) compensation or
  - Graduated scale if HCE rate below 35%
- Non-Gateway
  - Broadly available separate plans
  - Primarily DB in Character
- Effective 1/1/2002

- Designated beneficiaries are determined as of September 30th of the calendar following the plan year of the employee’s death.

- Default distribution rules—distributions to a designated beneficiary are made over a beneficiary’s lifetime rather than using the 5 year rule—if there is no designated beneficiary the 5 year rule applies.

- Distribution Tables, Single Life, Uniform Life, Joint and Survivor Table 1.401(a)(9)-9 are used to determine distribution periods.
Where an employee does not consent to a mandatory distribution, the employer must roll or directly transfer the distribution to an IRA established for the employee – see Notice 2005-5

- Applies to mandatory distributions over $1,000 up to $5,000
- Applies to mandatory distributions on and after March 28, 2005
- Notice 2005-95 extended the amendment date to December 31, 2005
Defined Contribution Interim Amendments - from the Cumulative List

Mandatory Amendments for DC Plans:

EGTRRA (E/D 1/1/2002)
Nondiscrimination Gateways (E/D 1/1/2002)  
(To the extent of conflicting plan language)
401(a)(9) (E/D 1/1/2003)
ESOPs Sub-S (E/D varies)
401(k)/(m) Final Regs. (E/D 1/1/2006)
Discretionary Amendments under EGTRRA—D.C. (Effective when applied)

- Rollovers to various plan arrangements under 401(a)(31), e.g. 457, 403(b), 408 IRAs ,etc.
- Catch-Up contributions under 414(v) (401(k) Plans)
- Reduction of waiting period to defer after a hardship distribution from 12 months to 6 months, (required for 401(k) Safe-Harbor)
- Distributions of elective deferrals upon severance from employment
- Establishment of deemed IRAs, within the plan
- Mandatory distributions (rollovers disregarded)
Discretionary Amendment – 401(k) Plans - Roth Provisions

- Roth regulations were published January 3, 2006, as part of the Final 401(k) Regulations published December 29, 2004.
- They have an effective date of January 1, 2006.
- Discretionary amendments - must be adopted by the end of the plan year in which it is first effective.
- Separate Roth accounts must be maintained.
- Deductible E/Cs must be part of the plan.
- Roth and non-Roth E/Cs must satisfy 402(g) and the ADP test.
Discretionary Amendment - ESOP – (Effective when applied – after 2001)

• ESOP dividends may be reinvested in qualifying employer securities and still be entitled to the dividend deduction

• Notice 2002-2 provides guidance on the plan language relevant to participant elections on the options for handling ESOP dividends
Discretionary - ESOP S Corp
ATAT avoidance under
Rev. Rul. 2004-4

• Transactions where a S-Corp establishes an ESOP and a qualified S-Corp subsidiary that are structured in a manner to avoid income taxation are “listed transactions”

• However, an amendment to the ESOP that provides for distribution, as income, of synthetic equity before March 15, 2004 can avoid the excise tax under 4979 and classification as a listed transaction
Defined Contribution Discretionary Amendments - from the Cumulative List

Defined Contribution Plans, Discretionary Items:

- EGTRRA (When Applied)
- Plan Loans (When Applied)
- ESOP Dividends (When Applied)
- 401(k)/(m) Final Regs. (Applied Early)
- Roth 401(k) Plans (When Applied)
Post Gust Interim Amendments
Defined Benefit Plans for Ongoing Plans

- Effective after 12/31/2001
- Individually Designed Plans/Non-authorizing Volume Plans
- Must be amended for all statutes, regulations, and other guidance as published in the Internal Revenue Bulletin
- That is contrary to or a change to the plan’s current language
- Must be amended by the end of that provision’s 401(b) period
Post Gust Interim Amendments
Defined Benefit Plans for Ongoing Plans

- The 401(b) period is the due date for the employer’s tax return (plus extensions)
- Applicable to the employer’s tax year in which the provision first becomes effective or the end of the applicable plan year, if later, unless extended by Notice 2005-95
- Discretionary Amendments must be amended by the last day of the plan year that the provision first becomes effective
Post Gust Interim Amendments
Defined Benefit Plans-Terminating Plans

- Terminating plans must be amended for all required law changes that includes statutory, published regulations, and other guidance published in the Internal Revenue Bulletin

- Which have an effective date prior to the plan’s proposed date of termination
Defined Benefit Plans - Mandatory Interim Amendments

- EGTRRA (E/D 1/1/2002)
- Applicable Mortality Table (E/D 12/31/2002)
- PFEA (E/D 1/1/2003)
- Retroactive ASD (E/D 1/1/2004)
- Heinz (E/D 6/7/2004)
- 411(d)(6) (E/D 8/12/2005)
- 401(a)(9) (E/D 1/1/2006)
Defined Benefit Plans - Mandatory
EGTRRA Interim Amendments

- IRC 415(b)(1)(A): $160,000 annual dollar limit as adjusted by COLAs

- IRC 415(b)(2)(E) -- adjustment to the 415(b)(1)(A) dollar limit: 5% and the applicable mortality table adjustment above age 65 and 5% and the applicable mortality table adjustment below age 62, (Rev. Rul. 2001-51, Sec. 611 P.L. 107-16)

- The IRC 415(b) changes brought about by EGTRRA are effective as of the first day of the plan year that ends after 12/31/2001
Defined Benefit Plans - Mandatory
EGTRRA Amendments

- IRC 416 - key employee definition (i. 5% owner, ii. officer earning over $130,000, iii. 1% owner earning over $150,000)
- Frozen DB plans and 416 (no minimum accrual required)
- IRC 401(a)(17) - annual compensation limits increase from $150,000 to $200,000
- The 401(b) Period for the “good faith” interim EGTRRA amendment is the due date of the employer’s tax return plus extensions which includes the date 1/1/2002, or the end of their GUST RAP, whichever is later
- Effective 1/1/2002
The New Applicable Mortality Table - Mandatory

- Rev. Rul. 2001-62
- ‘94 GAR table using 50% unloaded male and 50% unloaded female rates projected to 2000
- Effective date applies for distributions made on or after 12/31/2002
- Rev. Rul. 2001-62 requires that the interim amendment for the ‘94 GAR table, as the applicable mortality table, must be executed by the last day of the plan year that contains the plan’s ‘94 GAR effective date (12/31/2002).
Retroactive Annuity Starting Date – Mandatory (If the plan provides for RASD)

- If the plan provides for Retroactive Annuity Starting Dates (RASD) then the plan language must satisfy the Final Regulations for RASDs published July 17, 2003, 1.417(e)-1

- Effective 1/1/2004

- Therefore, the interim amendment, (if the plan provides for RASDs), is the due date for the employer’s tax return, plus extensions which contains the date 1/1/2004, of if later 12/31/2004 - this was extended by Notice 2005-95 to 12/31/2005
Pension Funding Equity Act of 2004 (PFEA) - Mandatory

- Applies to plan years beginning after 12/31/2003
- The interest rate used for determining equivalent annual benefits, for optional forms of benefits subject to IRC 417(e)(3), under IRC 415(b)(2)(E), is 5.5%, which is used along with the applicable mortality table.
- In order to test optional forms of benefits subject to 417(e)(3), under IRC 415(b)(2)(E), the larger equivalent annual benefit is used, that calculated using the plan rate and plan mortality table or that using 5.5% and the applicable mortality table.
Pension Funding Equity Act of 2004 (PFEA) - Mandatory

- Applicable to plan years beginning after 12/31/2003
- The effective date of the legislation applies to plan years beginning in 2004 and 2005, but plans are not required to be amended for this provision until the first day of the plan year beginning after 12/31/2005 – see Notice 2004-78 and Notice 2005-95.
- Since terminating plans must be amended for all laws currently in effect - plans that terminate in 2004 or 2005 will be required to amend for PFEA.

- A multi-employer plan can provide that union members who retire and then work in the same industry but as non-union workers or as managers of union or non-union workers, may have their benefits suspended for that period of employment.
- Retirees may not have their benefits suspended during such periods, to the extent that the suspension was caused by an amendment, that applies to benefits already accrued, prior to the later of the execution date or effective date of that amendment.
- The amendment due date is last day of plan’s EGTRRA RAP – see Rev. Proc. 2005-23
Final Regulations published 8/12/2005

Defined benefit plans can be amended to eliminate non-core optional forms of benefits that are part of a family of similar optional forms - these forms can only be eliminated by an amendment with a 4 year delayed effective date and core optional forms of benefits cannot be eliminated.

Elimination of duplicate optional forms

The 401(b) period would be the employer’s tax return due date plus extensions for the tax year that contains the date 8/12/2005.
Relative Values Requirement as part of the QJSA Notice and Explanation

- Applies to a DB plan that offers optional forms of benefits
- Final Regulations published 12/17/2003
- Effective for annuity starting dates (ASD) beginning on or after 2/1/2006, unless an optional form of benefit, subject to 417(e)(3), is less valuable than the QJSA, then the effective date for an ASD is beginning on or after 10/1/2004
Automatic Rollovers under IRC
411(a)(11) & 401(a)(31) - Mandatory

- The DOL published Final Regulations on 9/28/2004 based upon Section 657(d) of EGTRRA
- Effective for Mandatory Distributions made on or after March 28, 2005
- For terminating plans, it is effective March 28, 2005
- For ongoing plans, they must be amended for the interim amendment by the later of: the due date plus extensions for the filing of the employer’s tax return for the tax year containing the date March 28, 2005, or the last day of the plan year containing March 28, 2005, or December 31, 2005
Minimum Distributions—401(a)(9) Mandatory

- 401(a)(9) Final and Temporary Regulations were published on 4/17/2002
- 1.401(a)(9)-6 of the Final 401(a)(9) Regulations were published on 5/15/2004
- Rev. Proc. 2003-10, Notice 2003-2 delayed the effective date and delayed the date required to amend defined benefit plans for the 401(a)(9) Final Regulations until 1/1/2006
- For terminating plans the effective date is 1/1/2006
- For ongoing plans, the required amendment date is the end of the plan’s EGTRRA remedial amendment date – see Notice 2005-95.
Required Interim Amendments for Defined Benefit Plans

- EGTRRA (E/D 1/1/2002)
- Applicable Mortality Table (E/D 12/31/2002)
- PFEA (E/D 1/1/2003)
- RASD (E/D 1/1/2004)
- Heinz (E/D 6/7/2004)
- 411(d)(6) (E/D 8/12/2005)
- 401(a)(9) (E/D 1/1/2006)
- Relative Values (E/D 2/1/2006)
IRC 412(i) Defined Benefit Plans and Interim Amendments

- Rev. Rul. 2004-20
- If a 412(i) Defined Benefit Plan holds life insurance contracts and annuity contracts for benefits at NRA that are in excess of a participant’s benefits at NRA under the plan, the plan must be amended to comply with Rev. Rul. 2004-20, mandatory interim amendment (effective date is 2/13/2004)
- If the employer elects to use the alternative deficit reduction contribution then the plan must be amended to comply with Notice 2004-59
**Miscellaneous Provisions: Discretionary Amendment for Deemed 125 Compensation**

- Applies to both DB and DC plans
- Is a discretionary amendment and applies only to mandatory employee contributions required for employer health insurance plans where the employee has not demonstrated that they carry their own health insurance
- This should not be confused with the requirement that the IRC 415(c)(3) definition of compensation required 125 contributions to be included, per section 1434 of Public Law 104-188, other than deemed 125 contributions.
- When first effective or applied to the plan.
Miscellaneous Provisions: Discretionary Amendment for IRC 72(p) Final Regulations - Plan Loans

- If the plan provides for plan loans, amending for these regulations would be mandatory, effective 1/1/2004
- IRC 72(p) Final Regulations relating to plan loans - these regulations are effective 12/3/2002, but only apply to assignments, pledges and loans made on or after 1/1/2004
- For terminating plans this would apply for 2004
- For ongoing plans, the date by which the interim amendment must be executed relates to the employer’s tax return plus extensions that relates to the tax year containing 1/1/2004
Miscellaneous Provisions –
Discretionary Plan Amendments

- Katrina
- Distributions up to $100,000 exempt from IRC 72(t)
- Plan loans can go up to $100,000 under IRC 72(p)
- Hardship distributions apply
- Applies to distributions made on or after 8/25/05 but before 1/1/2007
- May apply to companies with employees or offices who are residents or employed in the declared disaster area on 8/29/05
How to Get in Touch with Me?

By Phone: 513-263-3559

By Email: Milo.S.Atlas@irs.gov
EXHIBIT C
DC LRM for Cross Testing

To access this on the internet:

Go to www.irs.gov/ep and click on More Topics, Info for Benefits Practitioners, Determinations, and Listing of Required Modifications (LRM)
LRM #94 on cross-tested profit-sharing plans – This LRM has been updated since it was posted to the EP website in draft form in June 2005 (as LRM #25B). The final version of LRM #94 follows immediately below:

* * * * *

94. Document Provision, Nonstandardized plans only


Sample Plan Language:

As elected by the employer in the adoption agreement, the employer will determine the total amount of contributions for each plan year and either (1) allocate such total amount to participant groups (the “Participant Group Allocation method”), or (2) allocate such total amount using age weighted allocation rates (the “Age Weighted Allocation method”). Employer contributions will be allocated to each eligible employee.

Participant Group Allocation method. If the employer has elected the Participant Group Allocation method in the adoption agreement, each eligible employee of the employer will constitute a “separate allocation group” for purposes of allocating contributions. Only a limited number of allocation rates (defined below) is permitted, and the number of allocation rates cannot be greater than the maximum allowable number of allocation rates. The maximum allowable number of allocation rates is equal to the sum of the allowable number of allocation rates for eligible nonhighly compensated employees (eligible NHCEs) and the allowable number of allocation rates for eligible highly compensated employees (eligible HCEs). The allowable number of allocation rates for eligible HCEs is equal to the number of eligible HCEs, limited to 25. The allowable number of NHCE allocation rates depends on the number of eligible NHCEs, limited to 25.
The allocation will be made as follows: First, the total amount of contributions is allocated among the deemed aggregated allocation groups in portions determined by the employer. A deemed aggregated allocation group consists of all of the separate allocation groups that have the same allocation rate. Second, within each deemed aggregated allocation group, the allocated portion is allocated to each employee in the ratio that such employee’s compensation, as defined in section _____ of the plan, bears to the total compensation of all employees in the group. An allocation rate is the amount of contributions allocated to an employee for a year, expressed as a percentage of compensation, as defined in section ______ of the plan. The number of eligible NHCEs to which a particular allocation rate applies must reflect a reasonable classification of employees, and no employee can be assigned to more than one deemed aggregated allocation group for a plan year.

(Note to reviewer: The blanks should be filled in with the plan section number that corresponds to Option B in the Sample Adoption Agreement language in LRM #31.)

(Note to Reviewer: Check whether the allowable number of allocation rates are distributed among the eligible NHCEs in a reasonable manner and that reasonable classifications are used.

For plans with only one or two eligible NHCEs, the allowable number of NHCE allocation rates is one. For plans with 3 to 8 eligible NHCEs, the allowable number of NHCE allocation rates cannot exceed two. For plans with 9 to 11 eligible NHCEs, the allowable number of NHCE allocation rates cannot exceed three. For plans with 12 to 19 eligible NHCEs, the allowable number of NHCE allocation rates cannot exceed four. For plans with 20 to 29 eligible NHCEs, the allowable number of NHCE allocation rates cannot exceed five. For plans with 30 or more eligible NHCEs, the allowable number of NHCE allocation rates cannot exceed the number of eligible NHCEs divided by five (rounded down to the next whole number if the result of dividing is not a whole number), but shall not exceed 25.
Age Weighted Allocation method. If the Age Weighted Allocation method is elected in the adoption agreement, the total employer contribution will be allocated to each eligible employee such that the equivalent benefit accrual rate for each participant is identical. The equivalent benefit accrual rate is the annual annuity commencing at the participant’s testing age, expressed as a percentage of the participant’s compensation as defined in section _____ of the plan which is provided from the allocation of employer contributions and forfeitures for the plan year, using standardized actuarial assumptions that satisfy 1.401(a)(4)-12 of the Income Tax Regulations. The employee’s testing age is the later of normal retirement age, or the employee’s current age.

(Note to reviewer: The blank should be filled in with the plan section number that corresponds to Option B in the Sample Adoption Agreement language in LRM #31.)

Minimum allocation gateway. Any allocation of contributions must satisfy the minimum allocation gateway:

Each eligible NHCE must have an allocation rate (defined above) that is not less than the lesser of 5%, or one-third of the allocation rate of the HCE with the highest allocation rate.

(Note to reviewer: There are other gateways that may be used in order for a defined contribution plan to cross-test using equivalent benefits under 1.401(a)(4)-8(b). The plan may provide for a different gateway other than the minimum allocation gateway (for instance, the broadly available allocation rate requirement of Regulations section 1.401(a)(4)-8(b)(1)(iii) or the gradual age or service based allocation rate requirement of section 1.401(a)(4)-8(b)(1)(iv)); however, sample language for other gateways is not provided herein. If a sponsor wishes to use other gateways, it is important to ensure that the benefits provided under the plan remain definitely determinable. In order for plan benefits to remain definitely determinable, the plan document should specify which gateway is used. The plan document could allow adopting employers to elect between different gateways, but in order to provide definitely determinable benefits it is not sufficient for the plan document merely to specify that one of the gateway requirements will be satisfied.)
(Note to reviewer:  No section 401(a)(4) failsafe language is allowed. The plan must pass nondiscrimination testing based on Income Tax Regulations sections 1.401(a)(4)-1 through 1.401(a)(4)-13.)

Sample Adoption Agreement Language:

(  ) Contributions will be allocated under the following method (select one)
A. (  ) Participant Group Allocation

    Plan participants will be divided into the following groups (one or more) with the same allocation ratio:

Specify groups by category of participant, including both HCEs and NCHEs:

    __________________________

(The specific categories of participants should be such that resulting allocations are provided in a definite predetermined formula that complies with 1.401-1(b)(1)(ii). The number of allocation rates must not exceed the maximum allowable number of allocation rates. HCEs may each be in separate allocation groups. Eligible NCHEs must be grouped using allocation rates specified in plan language. The grouping of eligible NCHEs must be done in a reasonable manner and should reflect a reasonable classification in accordance with 1.410(b)-4(b). Also, standard interest rate and standard mortality table assumptions in accordance with 1.401(a)(4)-12 must be used when testing the plan for satisfaction of nondiscrimination requirements. In the case of self-employed individuals (i.e., sole proprietorships or partnerships), the requirements of 1.401(k)-1(a)(6) continue to apply, and the allocation method should not be such that a cash or deferred election is created for a self-employed individual as a result of application of the allocation method.)

(  ) Age Weighted Allocation

The following assumptions will be used to calculate the equivalent benefit accrual rate:

Pre-retirement Mortality _______________
Post-retirement Mortality _______________
Pre-retirement Interest _______________
Post-retirement Interest _______________

(Standard interest rate and standard mortality table assumptions in accordance with 1.401(a)(4)-12 must be used when testing the plan for satisfaction of nondiscrimination requirements. A table of age-weighted factors (that comply with the previous sentence) may also be used.)