

EP DETERMINATIONS QUALITY ASSURANCE BULLETIN

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NOTE: This supersedes the revised version issued on 12/15/00.

VERIFICATION OF PRIOR PLAN DOCUMENTS IN THE ABSENCE OF A DETERMINATION LETTER

Background:

As part of our review of determination letter applications, we attempt to confirm the extent to which a plan has been amended for prior legislation, including, but not necessarily limited to the Tax Reform Act of 1986 (TRA '86), the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), the Deficit Reduction Act of 1984 (DEFRA) and the Retirement Equity Act of 1984 (REA). There are conflicting points of view regarding exactly what verification of compliance with prior law should routinely be obtained. This bulletin is intended to establish policies and procedures that will facilitate a consistent, equitable approach to this aspect of determination case review.

The instructions to Forms 5300 and 5303 require any filing to include a copy of the latest determination letter if the plan is being submitted after initial qualification. The instructions to Form 5307 require a copy of the latest determination letter if the plan received a letter at any time in the past. The instructions to Form 5310 require a copy of all amendments made since the last determination letter as well as a copy of the letter (latest opinion or notification letter for a standardized prototype plan). The great majority of cases we process involve plans with a TRA '86 determination letter or volume submitter and prototype plans with a valid TRA '86 advisory, notification or opinion letter. As a result, verification of compliance with prior law has largely been limited to TRA '86. The scope of inquiry into prior plan documentation has been expanded to include TDR only when a particular set of facts necessitated a more thorough review; e.g. when evidence of timely amendment for TRA '86 was missing.

Another approach, which has occasionally been used, is to require an employer to verify the existence of ALL prior plan documentation in the absence of a determination letter, regardless of when the plan was effective. This approach has resulted in numerous potential nonamender cases due to employers' inability to locate prior plan documents. Given the frequent transfer of plan records that can occur over an extended period due to corporate mergers and acquisitions and/or the sale of plan administrators to other pension firms, the fact that certain documents are reported as missing is not at all

surprising. After extensive consideration, EP Determinations Quality Assurance developed the following policy regarding the extent to which plan document compliance with prior law should be verified in the case of a plan that has not previously been approved by IRS pursuant to a Form 5300, 5303, 5307 or 5310 submission.

Required Verification of Prior Plan Documentation:

The requirements for verification of prior plan document compliance with applicable law are based on the premise that we should make every attempt possible to ensure that the rights of plan participants and their beneficiaries are adequately protected. Such rights are derived entirely from the terms of a legally-binding plan document which has been formally adopted by the employer.

Compliance with TRA '86 must be verified in every instance. If a plan has a TRA '86 determination letter issued under Rev. Procs. 90-20, 91-41, 91-66, 92-60 and 93-39, no further verification, other than timely adoption of IRC 401(a)(17)/(31) provisions for plans submitted prior to Rev. Proc. 93-39, is necessary. If a TRA '86 determination letter has not been issued for a plan, all TRA '86 documents adopted by the employer and not enclosed with the determination letter application must be requested and reviewed in their entirety. If it is determined that a plan has not been amended for all applicable provisions of TRA '86 for all plan years beginning in 1989 (or the year in which the plan became effective, if later), such failure to comply with TRA '86 would be considered a Plan Document Failure as defined in section 5.01 of Rev. Proc. 2001-17. The scenario described in the previous sentence would also apply to any failure to amend the plan to comply with the requirements of IRC 401(a)(17)/(31). A Plan Document Failure is also deemed to have occurred if a plan is amended for TRA '86 at any time after the close of the applicable remedial amendment period under IRC 401(b), even if the TRA '86 amendments are adopted in a plan year with a closed statute of limitations.

If a plan was effective prior to 1989, no verification of pre-TRA '86 documentation is necessary if the plan has been amended for TRA '86 to any extent. If no TRA '86 amendments have been made, verification of TDR plan documentation is limited to instances in which uncorrected operational violations of TDR-related provisions are revealed during an examination or determination case review, and the scope and frequency of such violations strongly suggest that a valid TDR document was never adopted and put into effect. For example, if an examining agent discovers that the survivor annuity requirements of section 417 and the 5-year break-in-service rules of section 411 were never implemented in operation, the agent, with the concurrence of his manager, should attempt to obtain verification of the existence of a valid TDR document in accordance with procedures that have been developed to ensure that proper verification of prior plan documentation is obtained by the Service before a determination letter is issued. These procedures are described in detail in the paragraphs below.

The law changes effected by TDR significantly impacted the benefit rights of all participants and spousal and non-spousal beneficiaries; e.g. top-heavy rules, joint and survivor annuity requirements, IRC 401(a)(9)/minimum distribution requirements, revisions to vesting, cashout and break-in-service requirements, IRC 411(d)(6), 410(a) and 415, etc. Although many TDR provisions have been modified or superseded by subsequent legislation, an employee or beneficiary of an employee who was an active participant during the TDR era and who asserts that his or her benefit was improperly vested, reduced, underfunded or distributed on account of the failure of his employer to adhere to such provisions could, pursuant to ERISA section 502, initiate legal action against the employer to seek recovery of the disputed amount and/or restoration of rights under the plan. It should be noted that the scope of this review does NOT include a determination of the accuracy of benefit accruals or contribution allocations for plan years impacted by TDR. Although Rev. Proc. 2000-17 allows for correction of Qualification Failures that occurred in years with a closed statute of limitations, it would be unreasonable to expect an employer to provide detailed information regarding plan operation in years prior to 1989 except in very limited circumstances (e.g. an IRC 412 issue involving a money purchase or defined benefit plan unfunded since 1986) .

Although ERISA was enacted over 25 years ago, benefits which accrued during this era could still be the subject of litigation, and IRS would not be acting in the best interest of plan participants if it merely disregarded the issue during its review of a determination letter application. As with TDR, the scope of this review is limited to verification of a prior document, and no attempt to ensure the accuracy of benefit accruals or contribution allocations for plan years impacted by ERISA should be made. Even if adequate verification of a TDR document cannot be secured, an inquiry into the existence of an ERISA document should not be initiated unless uncorrected operational violations that occurred in a plan year beginning before 1984 are identified during an examination or determination case review, and the agent and his manager determine that such violations are substantial enough to imply that the plan had never been amended for ERISA.

With respect to TDR and ERISA, the scope of required verification will be limited to confirmation of the existence of a written instrument which established plan provisions that were binding on the employer and plan participants and their beneficiaries. This exception to the general requirement for full compliance with all applicable law acknowledges the fact that prior plan documents adopted in the 1970's and 1980's are very difficult, if not impossible, to obtain in many instances.

The evaluation of timely adoption of a plan within its initial plan year is no longer required for plans effective between 1989 and 1994 unless an examination or determination case review reveal operational violations in such year that are deemed by the agent and his manager to be sufficient to warrant an inquiry into the existence of a document at some point during the year. If such an inquiry is made, the scope of required verification described

in the previous paragraph is applicable.

If the plan is effective before 1989, no evaluation of timely adoption of the initial document is necessary in any circumstance, as it would be impractical to focus on one particular plan year which occurred 12+ years ago when plan records for that era would be, at best, sporadic in most instances.

The limited scope of review described above is not available for plans that are effective after 1994, and an agent still must confirm that such a plan was adopted within its initial plan year and qualified from its inception. Most, if not all current and former participants would be impacted by the provisions of the initial document, and the qualification of any subsequent restatement could be affected if its terms conflict with those of the original plan.

Before contacting an employer to request any available evidence of a prior plan document, the specialist reviewing the application should research all internal sources of data such as EPMF microfiche, determination and examination case microfiche or EDS. If EDS indicates that a determination letter was issued for a TDR document, no additional verification would be required. If the EPMF confirms that a determination letter application for a TDR restatement was previously submitted, this would be sufficient evidence of a prior document, and no further action would be necessary. Finally, if microfiche of a determination or examination case file that involves a TDR document is available, the existence of the document would be confirmed beyond question. In each circumstance, no Plan Document Failure has occurred, and the determination letter for the plan currently under review can be issued.

If verification of the existence of pre-TRA '86 documentation is necessary, any available evidence of such; e.g. prior determination letter, plan document, board of directors resolution, corporate minutes, summary plan description, annual reports, allocation reports, trust account statements, etc., should be obtained from the employer. Any requests should initially be limited to a copy of a prior determination letter or plan document; if neither is available, the remaining items of evidence described above should be requested. The evidence should be evaluated to determine if the existence of an actual plan document can reasonably be inferred. The submission of a prior determination letter for a TDR or ERISA document or a copy of the document itself will automatically confirm its existence, and the issue can be disregarded. If necessary, the inquiry should be expanded to include all plan years that precede the first year in which a document was actually adopted and in effect, regardless of whether such years began after 1988. The decision regarding whether a document actually existed should be based on the particular facts and circumstances of the case and must be approved by the manager. If it is concluded that the evidence sufficiently demonstrates that a document was in effect during this period, the issue of plan existence should not be pursued further. Otherwise, the plan will not be considered a definite written program and arrangement under Regs. section 1.401-1(a) for the period in question, and the resulting Plan Document Failure must be remedied through a closing agreement in order to preclude a proposed disqualification of the plan.

If the existence of a TDR document cannot be reasonably established, the plan is also deemed to be a nonamender for TDR, and this is an additional Plan Document Failure that must be addressed through CAP to avert proposed disqualification. A Plan Document Failure is also deemed to have occurred if a plan received a determination letter which did not express an opinion on DEFRA and REA, and the employer cannot provide adequate evidence of full compliance with TDR. If applicable, the absence of sufficient confirmation of the existence of a document at any time during the initial plan year is another Plan Document Failure which must be remedied through CAP.

In summary, the determination regarding whether a prior plan document is deemed to exist should only be made after a thorough evaluation of the data submitted by the employer, and it should be based entirely on the particular facts and circumstances of the case.

If the review of plan documentation made available during an examination or submitted with a determination letter application confirms beyond question that a plan was 1) never amended for TDR or ERISA, or 2) if effective between 1989 and 1994, not adopted within the initial plan year, a Plan Document Failure is deemed to have occurred. An example of this would be a determination case file for a 2001 GUST II restatement which includes only the current document and a 1978 ERISA document. If the employer concedes that the ERISA document remained in effect until it was superseded by the GUST II restatement, the plan would be subject to disqualification as a nonamender for TDR in its entirety unless the employer elects to enter into a closing agreement.

The following examples describe the application of the procedures described above to actual determination case processing:

Example 1:

Employer Q submits a determination letter request for a plan amendment adopted in 1999. The plan was originally effective in 1978, and it adopted a standardized TRA '86 prototype plan in 1995. Since the plan was amended for TRA '86, no further review of prior documentation is necessary, and the determination letter can be issued.

Example 2:

Same facts as in Example 1, except the most recent document was adopted in 1979. The agent requested a copy of the TRA '86 and TDR plan documents, and the employer provided a copy of a TDR prototype plan adopted in 1985. The TDR prototype plan is adequate confirmation of the existence of a prior document, and the agent can limit his review to the 1999 restatement and the closing agreement that is necessary to resolve

the TRA '86 nonamender issue.

Example 3:

Same facts as in Example 2, except that the employer has used a standardized prototype since the plan's inception. A review of internal files revealed that microfiche of an examination of the 1989 plan year was available. The agent reviewed the microfiche and verified that the plan had been amended for TDR in 1985. Since the agent was able to confirm the existence of a prior document internally, no request for additional information from the employer is necessary.

Example 4:

Same facts as in Example 3, except that EPMF microfiche indicates that a Form 5307 application for a determination letter was filed in 1986. This item alone is sufficient evidence of the existence of a prior document. However, the balance of the data obtained from EPMF (ie: employer name and EIN, plan name and number) must be consistent with the relevant information from the case file. Otherwise, the agent may not rely entirely on EPMF research to verify prior documentation unless the discrepancies resulted from procedural matters such as a change in plan name pursuant to an amendment or a change in the employer's name that was limited to name only and did not reflect a merger or acquisition that could have impacted on the employees actually covered under the plan subsequent to the transaction.

Example 5:

Same facts as in Example 4, except no information from internal sources is available. The employer was unable to locate a TDR determination letter or plan document, and the only prior documentation it could provide was an ERISA adoption agreement executed in 1981. Upon further request, a copy of a 1985 board resolution which adopted a TDR prototype document was submitted to the agent working the case. The adoption agreement and board resolution confirm the existence of prior documents, and the scope of review is limited to the document for which a determination letter is requested and resolution of the TRA '86 nonamender issue.

Example 6:

Employer Y submits a determination letter request for a 1999 restatement of a profit sharing plan originally effective in 1971. No prior determination letters or plan documentation are available. The agent requested other evidence that a prior document existed; in response, the employer submitted copies of a summary plan description from 1977 and annual reports from 1981, 1985 and 1986 that contained a description of plan provisions for eligibility, vesting,

contribution allocations and distributions in addition to a detailed summary of plan activity for each year. The employer's name and EIN and the plan name and number shown on the summary plan description and annual reports are identical to similar disclosures on the application and in the plan document. The annual reports for 1985 and 1986 are sufficient

evidence of a TDR document, and no further verification is necessary, although the summary plan description and 1981 annual report do confirm the apparent existence of an ERISA document. As with the plan described in examples 2 – 5, the failure to demonstrate full compliance with TRA '86 must be addressed through CAP in order to preserve plan qualification.

Example 7:

Same facts as in Example 6, except that the employer's name and EIN and plan name differ from what is listed on the application and in the plan document. An inquiry into the discrepancy reveals that the company who established the plan was sold in 1988, and the acquiring employer assumed sponsorship of the plan. The current employer submitted a board resolution which confirmed it had become the sponsoring employer pursuant to the acquisition of the predecessor employer, who had initially adopted the plan in 1971. The board resolution resolved the inconsistency in plan information, and the summary plan description and annual reports are acceptable as evidence of prior documentation.

Example 8:

Employer Z submits a determination letter request for its money purchase plan in 2000. The plan document and Form 5300 application list an effective date of January 1, 1975. However, there is no record of the plan anywhere within the Service, and the employer is unable to provide any evidence of a prior document. After several inquiries, a board resolution from 1975 which authorized an officer of the company to investigate the feasibility of establishing a retirement plan was finally submitted to the agent reviewing the application. The resolution is silent with respect to the adoption of an actual plan document, and it cannot be considered evidence of such. The complete absence of any evidence of the plan's existence prior to adoption of the 2000 restatement renders the plan subject to disqualification as; 1) a late amender for TRA '86, 2) a nonamender for TDR and 3) a plan which failed to comply with the definite written program requirements of Regs. section 1.401-1(a) for the 1975 – 1999 plan years.

If you have any questions, please contact EP Reviewer Rick Parker at (513) 263-3410.

