

Part III. Administrative, Procedural, and Miscellaneous

Eligibility for Exemption from User Fee Requirement for Employee Plans Determination Letter Applications Filed After January 31, 2011

Notice 2011–86

I. Purpose

This notice provides guidance on § 7528(b)(2) of the Internal Revenue Code. Section 7528(b)(2) provides for exemption from the requirement to pay a user fee for certain applications to the Service for determination letters on the qualified status of pension, profit-sharing, stock bonus, annuity, and employee stock ownership (ESOP) plans. The guidance in this notice generally pertains to such applications that are filed with the Service after January 31, 2011. This notice amplifies Notice 2002–1, 2002–1 C.B. 283, by explaining how to determine, for purposes of eligibility for exemption from the user fee requirement, if such an application has been filed within a remedial amendment period with respect to the plan beginning within the plan’s first five plan years.

II. Background

Section 7528 directs the Secretary of the Treasury to establish a program requiring the payment of a user fee for requests to the Service for ruling letters, opinion letters, determination letters, and other similar requests. Rev. Proc. 2011-8, 2011-1 I.R.B. 237, as corrected by Announcement 2011-8, 2011-5 I.R.B. 446, contains the procedures under the Service’s user fee program with respect to requests involving employee plans and exempt organizations.

Section 7528(b)(2)(A) provides that the Secretary shall provide for such exemptions from the user fee requirement (and reduced fees) as the Secretary deems appropriate. Section 7528(b)(2)(B) and (C) provides that an application for a determination letter on the qualified status of a pension, profit-sharing, stock bonus, annuity, or ESOP plan or the exempt status of any trust which is part of the plan shall be exempt from the user fee requirement if the plan is maintained solely by one or more eligible employers (within the meaning of § 7528(b)(2)(C)(ii)) and the application is filed by the later of the last day of the fifth plan year the plan is in existence or the last day of any remedial amendment period with respect to the plan beginning within the first five plan years.

Section 7528 was added to the Code in 2003, effective for requests made after October 1, 2003. Provisions identical to § 7528(b)(2)(B) and (C) were set forth in section 620 of the Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. 107-16 (EGTRRA), and applied to requests made after December 31, 2001 and before the effective date of § 7528. Notice 2002–1, as amplified by

Notice 2003-49, 2003-2 C.B. 294, provides guidance on section 620 of EGTRRA, including guidance on who is an eligible employer, when a plan is in existence, the types of determination letter applications that are eligible for exemption from the user fee requirement, and when a plan's EGTRRA remedial amendment period begins for purposes of determining if a determination letter application is eligible for exemption from the user fee requirement. The guidance in Notice 2002-1, as amplified by Notice 2003-49, applies to § 7528(b)(2)(B) and (C), as well as to section 620 of EGTRRA, and continues to be effective, as further amplified by this notice.

Rev. Proc. 2007-44, 2007-2 C.B. 54, provides for a system of cyclical remedial amendment periods and staggered submission periods for determination letter applications for employee plans. Under the system set forth in Rev. Proc. 2007-44, applications for determination letters for a plan are generally not submitted more frequently than once every five or six years, depending on whether the plan is (1) individually designed and subject to a 5-year remedial amendment cycle or (2) pre-approved and subject to a 6-year cycle. Any remedial amendment period with respect to a plan that would otherwise expire before the end of the plan's current 5- or 6-year cycle (and after the end of the plan's preceding cycle) is extended to the end of the plan's current cycle.

For example, the current 5-year remedial amendment cycle for an individually designed Cycle A plan (as defined in section 9 of Rev. Proc. 2007-44) ends on January 31, 2012, and the one-year determination letter submission period for the plan under the current cycle runs from February 1, 2011 to January 31, 2012. Any remedial amendment period with respect to the plan that would otherwise expire after January 31, 2007 and before January 31, 2012 is extended to January 31, 2012. The current 5-year remedial amendment cycles for individually designed Cycle B, C, D, and E plans end on January 31, 2013, 2014, 2015, and 2016, respectively. Similar remedial amendment cycle rules apply to pre-approved plans, except that the cycles are six years in length and are based on whether a plan is a defined contribution or a defined benefit plan.

III. Remedial Amendment Period Beginning Within First Five Plan Years

An application for a determination letter does not meet the requirements in § 7528(b)(2)(B) and (C) for exemption from the user fee requirement if the application is not submitted to the Service by the later of the last day of the fifth plan year the plan is in existence or the last day of any remedial amendment period with respect to the plan beginning within the first five plan years. Ascertaining whether a particular application satisfies this requirement would require consideration of the effective dates with respect to the plan of changes in law and published guidance, the adoption and effective dates of the plan and amendments to the plan, and the plan's current remedial amendment cycle. A separate analysis could be required for every application that is otherwise eligible for exemption from the user fee requirement.

In order to simplify the process for establishing whether a user fee is required to be paid with a determination letter application for a plan, for purposes of § 7528(b)(2), the Service will treat an application as having been filed by the last day of a remedial amendment period with respect to the plan beginning within the first five plan years if both of the following conditions are met: (1) the application is filed with the Service by the last day of the submission period for the plan's current remedial amendment cycle, and (2) the plan is first in existence no earlier than January 1 of the tenth calendar year immediately preceding the year in which the submission period for the plan's current remedial amendment cycle begins. For example, for purposes of § 7528(b)(2), the Service will treat an application for a determination letter for a Cycle A plan as filed by the last day of a remedial amendment period with respect to the plan beginning within the first five plan years if the application is filed with the Service by January 31, 2012 (i.e., the last day of the submission period for the plan's current remedial amendment cycle) and the plan is first in existence no earlier than January 1, 2001 (i.e., January 1 of the tenth calendar year immediately preceding 2011, the year in which the submission period for the plan's current remedial amendment cycle begins). An application for a determination letter for a Cycle B plan will be treated as filed by the last day of a remedial amendment period with respect to the plan beginning within the first five plan years if the application is filed with the Service by January 31, 2013, and the plan is first in existence no earlier than January 1, 2002.

There may be certain situations in which an application that is filed by the last day of a remedial amendment period with respect to the plan beginning within the first five plan years would nevertheless not be treated as such under the rule described in the preceding paragraph (i.e., where a remedial amendment period beginning within the first five plan years ends on the last day of a submission period that begins more than ten years after the year in which the plan is first in existence). In such cases, where the other requirements for exemption from user fees are also met, the applicant should not include payment of a user fee with the application but should explain in a cover letter how the application meets the requirements for exemption. If the Service determines that the application is not exempt, the applicant will be asked to submit the required user fee.

The preceding rules apply to all applications for determination letters that are filed with the Service after January 31, 2011, other than applications filed by April 30, 2012 for EGTRRA determination letters for defined benefit plans that are eligible for the 6-year EGTRRA remedial amendment cycle ending on April 30, 2012. Notice 2003-49 explains how to determine eligibility for exemption from the user fee requirement for a determination letter application filed within a plan's EGTRRA remedial amendment period. Notice 2003-49 applies to applications for determination letters for defined benefit plans that are eligible for the 6-year EGTRRA remedial amendment cycle ending on April 30, 2012, regardless of whether such an application is filed on Form 5307, *Application for Determination*

for Adopters of Master or Prototype or Volume Submitter Plans, or Form 5300, Application for Determination for Employee Benefit Plan.

IV. Effect on Other Documents

Notice 2002-1 is amplified.

V. Effective Date

This notice is effective with respect to applications for determination letters on the qualified status of employee plans that are filed with the Service after January 31, 2011.

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) or Mr. Flannery at *RetirementPlanQuestions@irs.gov*.