26 CFR 601.202: Closing agreements.

Rev. Proc. 96–29

SECTION 1. PURPOSE

.01 This revenue procedure modifies Rev. Proc. 94–62, 1994–2 C.B. 778, which describes the Voluntary Compliance Resolution (VCR) Program, and Rev. Proc. 94–16, 1994–1 C.B. 576, which describes the Walk-in Closing Agreement Program (Walk-in CAP), to change the definition of when a plan is ineligible for those programs because it is under examination. The modification conforms the definition to that set forth in Rev. Proc. 95–24, 1995–1 C.B. 694, which describes the Tax Sheltered Annuity Voluntary Correction (TVC) Program.

.02 This revenue procedure also modifies Rev. Proc. 94–62 to provide that a plan that is submitted under the VCR program on or after January 1, 1996, will not be considered ineligible for the VCR program solely by reason of its not having received a favorable determination letter that considers the Tax Reform Act of 1986 (TRA '86) if certain conditions have been met at the time of the plan's submission under the VCR program. These conditions require that the plan have received a favorable letter that considers 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), and, at the time of its VCR submission, have been submitted within the plan's § 401(b) remedial amendment period for a determination letter that considers TRA '86. Those plans for which the § 401(b) remedial amendment period has not expired (including adopters of certain master and prototype plans, regional prototype plans, volume submitter plans, governmental plans, and plans maintained by tax-exempt organizations), may be submitted for consideration under the VCR program on or after January 1, 1996, if the plan is the subject of a favorable letter that considers TEFRA, DEFRA, and REA.

SECTION 2. BACKGROUND

.01 The Internal Revenue Service has developed a number of voluntary compliance programs over the past several years for plans, annuities, or other arrangements (''plans'') qualified under § 401(a), or described in § 403(b), of the Code. Under each of these programs, the employer corrects defects in the plan for all years and the Service treats the plan as qualified under § 401(a), or as satisfying § 403(b), with respect to those defects. Plans submitted under these compliance programs must meet certain eligibility requirements.

.02 *Background concerning eligibility of plans under examination for the VCR program, Walk-in CAP, and the TVC program.*

(1) *VCR program.* On November 16, 1992, the Service established the VCR program as a temporary, experimental program, that was later extended indefinitely with the publication of Rev. Proc. 94–62. The VCR program permits plan sponsors to pay a fixed compliance fee and correct operational qualification defects in their § 401(a) plans. Regarding the eligibility of plans under examination, section 4.07 of Rev. Proc. 94–62 provides in part that ''[a] plan that is under an Employee Plans examination (that is, an examination of a Form 5500 series return) is not eligible for the VCR program. A plan that is under an Employee Plans examination includes any plan for which the plan sponsor, or a representative, has received verbal or written notification from the EP/EO Division of an impending Employee Plans examination.''

(2) *Walk-in CAP.* On January 31, 1994, the Service established Walk-in CAP with the publication of Rev. Proc. 94–16. Walk-in CAP permits plan sponsors of § 401(a) plans that are not eligible for the VCR program to pay a negotiated, limited, monetary sanction and correct form and operational qualification defects. Participation in Walk-in CAP must be voluntary. Section 3.06 of Rev. Proc. 94–16 provides in part that ''a request is voluntary if it is made before the plan sponsor, or a representative, has received verbal or written notification from the EP/EO Division of an impending Employee Plans examination.''

(3) *Voluntary compliance program for § 403(b) plans.* On May 1, 1995, the Service established the TVC program as a temporary, experimental program pursuant to Rev. Proc. 95–24. The TVC program will sunset on October 31, 1996. The TVC program permits plan sponsors to correct defects in their § 403(b) plans, and to pay a fixed correction fee and a negotiated sanction. Section 5.04 of Rev. Proc. 95–24 provides in part that ''a 403(b) plan that is under Employee Plans or Exempt Organization examination (that is, an examination of a Form 5500 series, a Form 990 series or other Employee Plans or Exempt Organizations examination) is not eligible for the program. This includes any plan for which the employer, or a representative, has received verbal or written notification from the EP/EO Division of an impending Employee Plans or Exempt Organizations examination.''

.03 *Background concerning eligibility for the VCR program of plans that do not have a favorable determination, opinion, or notification letter for TRA '86.*

(1) Section 4.02 of Rev. Proc. 94–62 provides that the VCR program is available only for an individually designed plan that has reliance on a favorable determination letter, a plan that is an adopter of a master or prototype plan with an opinion letter,

or a plan that is an adopter of a regional prototype plan with a notification letter. Under section 4.02(2) of that revenue procedure, for VCR requests submitted on or after January 1, 1996, a plan must have received a favorable determination, opinion, or notification letter that takes into account TRA '86.

(2) Section 13.05 of Rev. Proc. 94–62 provides that a plan's VCR submission must be accompanied by certain documents. These include a copy of the determination letter that considered TEFRA, DEFRA, and REA, and any subsequent letter. After December 31, 1995, the letter must have considered TRA '86.

(3) Rev. Proc. 95–12, 1995–1 C.B. 508, extends the deadline by which employers may request determination letters for certain plans and be considered to have amended their plans timely to comply with TRA '86. Under Rev. Proc. 95–12, the filing of a determination letter request for certain plans within three months after the end of the plan's remedial amendment period (as modified therein) is treated as having been filed on or before the end of the plan's remedial amendment period. In addition, Rev. Proc. 95–12, at section 3, extends the remedial amendment period for adopters of certain regional prototype, master and prototype, and volume submitter plans that comply with TRA '86 to, in general, six months after a favorable letter is issued with respect to the plan.

(4) Announcement 95–48, 1995–23 I.R.B. 13, extends the remedial amendment period for governmental plans described in § 414(d) to the last day of the first plan year beginning on or after the later of January 1, 1999, or 90 days after the opening of the first legislative session beginning on or after January 1, 1999, of the governing body with authority to amend the plan, if that body does not meet continuously. Announcement 95–48 also extends the remedial amendment period for plans maintained by organizations exempt from income tax under § 501(a), other than non-electing church plans described in § 410(c)(1)(B), to the last day of the first plan year beginning on or after January 1, 1997. For non-electing church plans, Announcement 95–48 extends the remedial amendment period to the last day of the first plan year beginning on or after January 1, 1999.

SECTION 3. DEFINITION OF PLAN UNDER EXAMINATION

.01 Section 4.07 of Rev. Proc. 94–62 is hereby modified to read as follows:

.07 *Plans under examination.* If a plan or plan sponsor is under an Employee Plans or Exempt Organizations examination (that is, an examination of a Form 5500 series, a Form 990 series or other Employee Plans or Exempt Organizations examination) the plan is not eligible for the VCR program.

(1) A plan or plan sponsor that is under an Employee Plans or Exempt Organizations examination includes any plan for which the employer, or a representative, has received verbal or written notification from the EP/EO Division of an impending Employee Plans or Exempt Organizations examination, or of an impending referral for Employee Plans or Exempt Organizations examination, and also includes any plan that has been under an Employee Plans or an Exempt Organizations examination and is now in Appeals or in litigation for issues raised in the Employee Plans or Exempt Organizations examination.

(2) An Employee Plans examination also includes a case in which a plan sponsor has submitted a Form 5310, Application for Determination of Qualification Upon Termination, and the EP Agent notifies the plan sponsor, or a representative, of possible defects, whether or not the plan sponsor is officially notified of an ''examination.'' For example, if an employer has applied for a determination letter on plan termination, and an EP Agent notifies the employer that there are partial termination concerns, the plan is no longer eligible for the VCR program.

(3) The VCR program is available with respect to any other plan of the plan sponsor that is not aggregated for purposes of satisfying the qualification requirements of § 401(a), or the requirements of § 403(b), with the plan (or plans) under examination. In addition, the VCR program is available for a plan that is aggregated with a plan that is under an Employee Plans examination with respect to a defect that is not related to provisions for which the plans are aggregated. Thus, for example, a plan sponsor of a plan aggregated with a plan that is under examination could request consideration under the VCR program for a defect arising under the spousal consent rules of § 417, or the vesting rules of § 411, but could not ask for consideration of a defect under provisions for which the plans are aggregated, including the nondiscrimination provisions (§§ 401(a)(4), 410(b), etc.), § 415, or § 416. For purposes of this revenue procedure, the term aggregation does not include consideration of benefits provided by various plans for purposes of the average benefits test set forth in § 410(b)(2).

.02 Section 3.06 of Rev. Proc. 94–16 is hereby modified to read as follows:

.06 If a plan or plan sponsor is under an Employee Plans or Exempt Organizations examination (that is, an examination of a Form 5500 series, a Form 990 series or other Employee Plans or Exempt Organizations examination) the plan is not eligible for voluntary consideration under CAP.

(1) A request for consideration under CAP is voluntary if it is made before the plan sponsor, or a representative, has received verbal or written notification from the EP/EO Division of an impending Employee Plans or Exempt Organizations examination, or of an impending referral for Employee Plans or Exempt Organizations examination, and also includes any plan that has been under an Employee Plans or an Exempt Organizations examination and is now in Appeals or in litigation for issues raised in the Employee Plans or Exempt Organizations examination.

(2) A request for consideration under CAP will not be considered voluntary if it is made as part of a determination letter application.

(3) An Employee Plans examination also includes a case in which a plan sponsor has submitted a Form 5310, Application for Determination of Qualification Upon Termination, and the EP Agent notifies the plan sponsor, or a representative, of possible defects, whether or not the plan sponsor is officially notified of an ''examination.'' For example, if an employer has applied for a determination letter on plan termination, and an EP Agent notifies the employer that there are partial termination concerns, a request for consideration under CAP will not be considered voluntary.

(4) Walk-in CAP is available with respect to any other plan of the plan sponsor that is not aggregated for

purposes of satisfying the qualification requirements of § 401(a), or the requirements of § 403(b), with the plan (or plans) under examination. In addition, Walk-in CAP is available for a plan that is aggregated with a plan that is under an Employee Plans examination with respect to a defect that is not related to provisions for which the plans are aggregated. Thus, for example, a plan sponsor of a plan aggregated with a plan that is under examination could voluntarily request consideration under CAP for a defect arising under the spousal consent rules of § 417, or the vesting rules of § 411, but could not ask for consideration of a defect under provisions for which plans are aggregated, including the nondiscrimination provisions (§§ 401(a)(4), 410(b), etc.), § 415, or § 416. For purposes of this revenue procedure, the term aggregation does not include consideration of benefits provided by various plans for purposes of the average benefits test set forth in § 410(b)(2).

SECTION 4. PLANS THAT HAVE NOT YET RECEIVED A TRA '86 LETTER

.01 Section 4.02(2) of Rev. Proc. 94–62 is hereby modified to read as follows:

For VCR requests submitted on or after January 1, 1996, the plan must (1) have received a favorable determination, opinion, or notification letter that considered TEFRA, DEFRA, and REA, and, (2) at the time of the request, have been submitted within the plan's § 401(b) remedial amendment period for a determination, opinion, or notification letter that considers TRA '86 (TRA '86 remedial amendment period). This second condition does not apply in the case of plans for which the TRA '86 remedial amendment period has not yet expired, such as adopters of master and prototype plans, regional prototype plans, and volume submitter plans, described in section 3 of Rev. Proc. 95–12; governmental plans described in Announcement 95–48; and plans maintained by tax-exempt organizations, including non-electing church plans, described in Announcement 95–48.

.02 Section 13.05(3) of Rev. Proc. 94–62 is hereby modified to read as follows:

(3) A copy of the determination letter, opinion letter, or notification letter that considered TEFRA, DEFRA, and REA, and any subsequent letter. For VCR requests submitted after December 31, 1995, either the letter must have considered TRA '86 or the following additional documentation must be supplied:

(a) For individually designed plans (including volume submitter plans) for which the TRA '86 remedial amendment period under § 401(b) has expired, but which have not yet received a favorable determination letter that considers TRA '86, a copy of the letter acknowledging receipt of the TRA '86 determination letter application (Form 2693).

(b) For plans for which the TRA '86 remedial amendment period has not yet expired, a statement that explains the reason why the period has not yet expired (for example, because the plan is a governmental plan, or because it is an adopter of a master or prototype plan that is still entitled to continued or interim reliance under Rev. Proc. 89–9, 1989–1 C.B. 780).

SECTION 5. EFFECTS ON OTHER DOCUMENTS

Rev. Proc. 94–16 and Rev. Proc. 94–62 are modified.

SECTION 6. EFFECTIVE DATE

This revenue procedure is effective on April 15, 1996.

DRAFTING INFORMATION

The principal author of this revenue procedure is Diane S. Bloom of the Employee Plans Division. For more information concerning this revenue procedure, call the Employee Plans Division VCR telephone number (202) 622-8165 (not a toll-free number). Ms. Bloom may be reached at (202) 622-6214 (also not a toll-free number).