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VEBA Reference Guide Sheet

Answers in shaded boxes indicate possible problems---see accompanying explanation sheet

1	Is the applicant organized as a separate entity from the employer?	Yes	No
2	Was Form 1024 filed within 27 months of the end of the month in which the applicant was created?	Yes	No
3	Was Form 1024 signed by the plan administrator or trustee?	Yes	No
4	Does the applicant have a small membership?	Yes	No
5	Does the membership consist of individuals having an employment-related common bond?	Yes	No
6	Do non-employees comprise more than 10% of total membership?	Yes	No
7	Do eligibility criteria limit membership to officers, shareholders, or highly-compensated employees?	Yes	No
8	Is membership voluntary?	Yes	No
9	Are life, sick, accident, or other similar benefits provided to members?	Yes	No
10	Are substantially all of the applicant's operations in furtherance of providing life, sick, accident, or other similar benefit?	Yes	No
11	Are non-qualifying benefits provided in greater than de minimis amounts?	Yes	No
12	Is there a plan document that is sufficiently complete so that, for each benefit offered, it can be determined which persons are eligible recipients, what conditions trigger the payment or distribution of the benefit, whether and to what extent employees are offered the benefit upon different conditions, and how the amount of the benefit is calculated or determined?	Yes	No
13	Is each class of benefit provided under a classification of employees that does not discriminate in favor of highly-compensated individuals? (This question is not applicable to collectively-bargained plans)	Yes or N/A	No
14	For each class of benefits, do such benefits discriminate in favor of highly-compensated individuals? (This question is not applicable to collectively-bargained plans)	Yes	No or N/A
15	Is the applicant controlled either by its membership, independent trustees, or fiduciaries, at least some of whom are designated by or on behalf of the membership?	Yes	No
16	Does the trust instrument (or other instrument by which the applicant was created) provide that on dissolution assets will be distributed to the members' contributing employer?	Yes	No

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Explanations to questions on the VEBA Reference Guide Sheet.

1. Is the applicant organized as a separate entity from the employer?

There must be an organization separate from the employer. An application Form 1024 will not be accepted for any organization or trust before such entity has been organized. Most VEBAs are organized as trusts, but a VEBA may also be organized as a corporation or an unincorporated association treated as a corporation. (*See* Reg. 1.501(c)(9)-2(c)(1)).

2. Was Form 1024 filed within 27 months of the end of the month in which the applicant organization was created?

A VEBA must notify the IRS that it is applying for recognition of exemption. Form 1024, Application for Recognition of Exemption Under Section 501(a), is used for this purpose. The notice may be filed by either the plan administrator or the trustee. Reg. 1.505(c)-1T, A-3.

Although section 505(a)(1) requires that an organization claiming exemption under section 501(c)(9) must file Form 1024 within 15 months from the end of the month in which it was organized for it to be recognized as exempt from the date it was created, if the VEBA fails to file within the 15-month period, it is entitled to an automatic extension of time of an additional 12 months. Reg. 301.9100-2(a)(2)(iii). If the required notice is filed timely, the organization's exemption will be recognized retroactively to the date of its organization. Reg. 1.505(c)-1T, A-7. Further extensions of time for filing Form 1024 may be granted if the request is submitted before the end of the applicable period and it is demonstrated that additional time is needed. Reg. 1.505(c)-1T, A-6. Finally, an application that is filed after the 27-month period may be granted retroactive exemption when the application is filed provided the organization can (1) demonstrate that it acted reasonably and in good faith, and (2) exemption from the date of creation would not be detrimental to government interests. Reg. 301.9100-3

3. Was Form 1024 signed by the plan administrator or trustee?

4. Does the VEBA have a small membership?

A VEBA with just one member cannot qualify for exemption. Rev. Rul. 85-199, 1985-2 C.B. 163. A VEBA with only a few members (usually less than 15-20) is at great risk of being used to provide impermissible deferred compensation benefits or other forms of prohibited inurement. This is particularly true when a small business or a key employee effectively controls the VEBA.

VEBA's have sometimes been promoted as tax sheltering arrangements in which an employer funds a purported VEBA and watches the assets grow on a tax-free basis. If key employees have the power to control the VEBA, they can generally control the timing of its dissolution so that they receive the preponderant share of the accumulated amounts in the VEBA. Or they may find other ways to subvert the purposes of the VEBA for their own benefit. Where such control exists, the IRS considers the VEBA's assets to inure to the benefit of the key employees. Further, the VEBA is effectively providing deferred compensation to the key employees, an impermissible benefit. Reg. 1.501(c)(9)-3(f)). Although not to be cited as precedent, the rationale for denying exemption in such cases can be found in GCM's 39801 and 39818.

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5. Does the membership consist of individuals having an employment-related common bond?

A VEBA must have a membership consisting of individuals (not organizations) who are entitled to participate by reason of their being employees whose eligibility for membership is defined by reference to objective standards that constitute an employment-related common bond. Reg. 1.501(c)(9)-2(a). The employment-related common bond requirement may be met by defining membership in one of the following ways:

- By reference to a common employer
- By reference to affiliated employers
- By reference to membership in a labor union
- By reference to coverage under one or more collective bargaining agreements
- By reference to employers in the same line of business in the same geographic locale (An area is a single geographic locale if it does not exceed the boundaries of three contiguous states. Although not precedent, Prop. Reg. 1.501(c)(9)-2(d) provides a description of the geographic locale rule.

The entire membership must share such a common bond.

6. Do non-employees comprise more than 10% of total membership?

At least 90% of the total membership on one day of each quarter during the taxable year must be employees. Membership may include some individuals who are not employees provided that such individuals share an employment-related bond with employee-members. Reg. 1.501(c)(9)-2(a)(1).

Whether an individual is an "employee" is determined with reference to the legal and bona fide relationship of employer and employee. In addition, the term "employee" includes an individual who would otherwise qualify as such but for the fact that the individual: (i) is retired, disabled or laid off; (ii) is on a leave of absence; or (iii) works temporarily for another employer or as an independent contractor. Reg. 1.501(c)(9)-2(b).

7. Do eligibility criteria limit membership to officers, shareholders, or highly compensated employees?

Any objective criteria used to restrict eligibility for membership or benefits may not be selected or administered in a manner that limits membership or benefits to officers, shareholders, or highly compensated employees of an employer contributing to the association.

Eligibility for membership may be restricted by geographic proximity or by objective conditions or limitations which are reasonably related to employment (e.g., minimum period of service, maximum compensation, or employment on a full-time basis).

Eligibility for benefits may be restricted by objective conditions relating to the type and amount of benefits offered (e.g., minimum health standards or membership in another organization which offers similar benefits for which the employee is eligible).
Reg. 1.501(c)(9)-2(a)(2).

8. Is membership voluntary?

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Membership in a VEBA must be voluntary. Membership will be considered voluntary, although membership is required of all employees, as long as the employee does not incur a detriment (e.g., deductions from pay) because of such membership. An employer will not be deemed to have imposed involuntary membership on an employee if membership is required as a result of a collective bargaining agreement. Reg. 1.501(c)(9)-2(c)(2).

9. Are life, sick, accident, or other similar benefits provided to members?

A VEBA must provide life, sick, accident or other benefits. The term "other benefits" includes only benefits that are similar to life, sick or accident benefits. Permissible "other benefits" are only those that are intended to safeguard or improve the health of a member or a member's dependents, or are provided upon the occurrence of a contingency that interrupts or impairs a member's earning power. Reg. 1.501(c)(9)-3(d).

Retirement or annuity benefits payable at the time of mandatory or voluntary retirement do not qualify as a permissible "other benefit." A benefit is considered to be similar to that provided under a retirement plan if it provides for deferred compensation that becomes payable by reason of the passage of time rather than as the result of an unanticipated event. Reg. 1.501(c)(9)-3(f).

All VEBAs may provide the following benefits: term life insurance; group whole life insurance (as defined in section 79); accidental death and dismemberment insurance; medical and dental insurance; disability insurance; vacation pay; vacation facilities; recreational expenses; child care; job readjustment allowances; income maintenance payments in time of economic dislocation; temporary living expense loans and grants in times of disaster; supplemental unemployment compensation benefits; severance pay (if provided in accordance with 29 CFR 2510.3-2(b)); and education or training benefits or courses for members. Reg. 1.501(c)(9)-3(b), (c), and (e).

Collectively bargained VEBAs may provide the following additional qualifying benefits: educational or training benefits for dependents of members; and worker's compensation benefits.

10. Are substantially all of the applicant's operations in furtherance of providing life, sick, accident, or other similar benefit?

Substantially all of a VEBAs operation must be in furtherance of providing life, sick, accident, or other benefits. Reg. 1.501(c)(9)-1(c).

11. Are non-qualifying benefits provided in greater than de minimis amounts?

Benefits that are not qualifying benefits under the regulations may not be provided except in de minimis amounts. The following are examples of non-qualifying benefits for VEBAs: whole life insurance that does not qualify under section 79; accident insurance on property; homeowners insurance; commuting expenses; malpractice insurance; loans (other than in times of distress); savings facilities; pensions; annuities payable at retirement; stock bonus or profit-sharing plans; any other deferred compensation benefits; dependent's education (noncollectively bargained plans); and supplemental retirement benefits. Reg. 1.501(c)(9)-3(f).

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12. Is there a plan document that is sufficiently complete so that, for each benefit offered, it can be determined which persons are eligible recipients, what conditions trigger the payment or distribution of the benefit, whether and to what extent employees are offered the benefit upon different conditions, and how the amount of the benefit is calculated or determined?

Form 1024 must include a full description of the benefits available to participants under the VEBA plan document. Terms and conditions of eligibility for membership and benefits must be set forth. The information may be contained in a separate document, such as a "plan document", or it may be contained in the creating document of the entity (e.g., the trust indenture). For benefits provided through a policy or policies of insurance, all such policies must be included with the application. The benefits must be sufficiently described so that each benefit is definitely determinable. A benefit is said to be definitely determinable if the amount of the benefit, its duration and the persons eligible to receive it are ascertainable from a plan document itself. Thus, such benefits may not be subject to the discretion of a person or a committee, for such benefits are said to be not definitely determinable. Reg. 1.505(c)-1T, A-4.

13. Is each class of benefit provided under a classification of employees that does not discriminate in favor of highly compensated individuals? (Does not apply to collectively-bargained plans)

and

14. For each class of benefits, do such benefits discriminate in favor of highly compensated individuals? (Does not apply to collectively-bargained plans)

A VEBA will be exempt only if each class of benefits is provided under a classification of employees, set forth in the plan that does not discriminate in favor of highly compensated employees and, in the case of each class of benefits such benefits do not discriminate in favor of highly compensated individuals. A life insurance, disability, severance pay or supplemental unemployment compensation benefit shall not be considered to fail to meet the nondiscrimination requirements merely because the benefits bear a uniform relationship to the total compensation, or the basic or regular rate of compensation, of employees covered under the plan. Section 505(b)(1).

Certain employees may be excluded when considering whether benefits discriminate in favor of highly compensated individuals. Such employees include those who (i) have not completed three years of service, (ii) are less than half-time employees, (iii) are seasonal employees, or (iv) have not attained age 21. Section 505(b)(2).

The nondiscrimination requirements of section 505(b)(1) are not applied to a benefit if another Code provision contains nondiscrimination rules for that benefit. In such a case, the Code provision applicable to the specific benefit is used in lieu of the Section 505(b)(1) nondiscrimination rule. Section 505(b)(3). Examples of benefits that are not subject to section 505(b)(1) are self-insured medical benefits under section 105(h); supplemental unemployment compensation benefits described in section 501(c)(17); group term life benefits (which are generally subject to section 79); dependent care assistance described in section 129; and educational assistance described in section 127.

IRM sections 7.25.9.3.3.1—7.25.9.3.4.8 set forth safe harbor guidelines under section 505(b). These guidelines generally depend upon whether or not the benefit being offered is an income

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replacement benefit. An income replacement benefit is generally a benefit designed to protect against a contingency that interrupts or impairs earning power. Examples are life insurance, death benefits, disability benefits, severance benefits, and supplemental unemployment compensation benefits. The safe harbor guidelines applicable to income replacement benefits generally provide that a benefit may be offered as a uniform percentage of compensation of employees covered by the plan.

A benefit that is not an income replacement benefit includes any benefit that is not provided as a substitute for wages. Examples include medical and dental benefits, child care, educational expenses, and vacation facilities. The safe harbor guidelines applicable to these benefits do not apply the uniform percentage of compensation formula. Instead, all such benefits must be offered in equal amounts under equal terms, eligibility requirements and conditions, without regard to salary level, position or ownership interest in the employer.

15. Is the applicant controlled either by its membership, independent trustees, or fiduciaries, at least some of whom are designated by or on behalf of the membership?

A VEBA must be controlled either by its membership, independent trustees, or fiduciaries, at least some of whom are designated by or on behalf of the membership.

A plan will be considered to be controlled by its membership if it is controlled by one or more trustees designated pursuant to a collective bargaining agreement.

A plan will be considered to be controlled by independent trustees if it is an “employee welfare benefit plan” as defined in section 3(1) of the Employee Retirement Income Security Act of 1974 (ERISA) and, as such, is subject to the requirements of Parts 1 and 4 of Subtitle B, Title 1 of ERISA. Reg. 1.501(c)(9)-2(c)(3). However, ERISA requirements do not apply to any welfare benefit plan that is a governmental plan (as defined in section 3(32) or ERISA) or a church plan (as defined in section 3(33) of ERISA) with respect to which no election has been made under section 410(d). Section 4(b) of ERISA.

16. Does the trust instrument (or other instrument by which the applicant was created) provide that on dissolution assets will be distributed to the members' contributing employer?

An association is not described in section 501(c)(9) if its corporate charter, articles of association, trust instrument, or other written instrument by which the association was created provides that on dissolution its assets will be distributed to its members’ contributing employers. Reg. 1.501(c)(9)-4(d).