

December 22, 2010

## IRS Further Expands Availability of Rev. Rul. 81-100 Group Trusts, and Extends Time to Spin Off Puerto Rican Participants from U.S. Plans

In [Rev. Rul. 2011-1](#), released in advance form on December 16, 2010, the Internal Revenue Service (the Service) expanded the types of employee benefit plans that may participate in Rev. Rul. 81-100 group trusts, effective January 11, 2011, and extended until December 31, 2011, the time to spin off the assets related to Puerto Rican participants in a U.S. qualified retirement plan to a separate Puerto Rico plan.

### Rev. Rul. 81-100 Group Trusts

By way of background, the Internal Revenue Code treats as tax-exempt the trusts funding a number of retirement or employee benefit plans subject to, among other things, an exclusive benefit requirement – generally, that the trust assets be used only for the exclusive benefit of plan participants and their beneficiaries. In Rev. Rul. 81-100, the Service continued a ruling position dating to 1956 that, subject to specified conditions, certain types of retirement plans may pool their trust assets for investment in a group trust, without violating the exclusive benefit rule, and the group trust would enjoy the same tax exemption as the trusts for the participating plans. In [Rev. Rul. 2004-67](#), the Service permitted additional types of retirement arrangements to participate in these group trusts.

In Rev. Rul. 2011-1, the Service again expanded the types of plans that may invest in Rev. Rul. 81-100 trusts, and also clarified or added certain requirements for these trusts, as follows. It appears that all Rev. Rul. 81-100 trusts are subject to the restated requirements, and not just group trusts that take advantage of the expanded availability provided by Rev. Rul. 2011-1.

	Through January 10, 2011	Effective January 11, 2011
Permissible Plans	Section 401(a) plans Individual retirement accounts Section 457(b) governmental plans	Section 401(a) plans Individual retirement accounts Section 457(b) governmental plans Section 403(b)(7) custodial accounts Section 403(b)(9) retirement income accounts Section 401(a)(24) governmental plans (including those providing retiree welfare benefits) Puerto Rico IRC §1165 plans (on an interim basis, and subject to additional conditions discussed below)
	Group trust is adopted as a part of each plan/IRA.	
	Group trust instrument expressly limits trust participation to enumerated plans/IRAs.	
	Group trust instrument prohibits violation of exclusive benefit rule.  Rev. Rul. 2011-1 clarifies that using the assets of one participating plan to provide benefits under another plan would violate this rule, even if the benefitted participant or beneficiary is the same person.	

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	Through January 10, 2011	Effective January 11, 2011
		Each participating plan/IRA is itself tax-exempt under §408(e) or §501(a) (or is treated as tax-exempt under §501(a)). A §401(a)(24) governmental plan is treated as meeting this requirement if it is not subject to federal income taxation.
		<p>Each participating plan/IRA expressly and irrevocably prohibits in its governing document violation of the exclusive benefit rule.</p> <ul style="list-style-type: none"> <li>▪ Plans that satisfy Treas. Reg. §1.401(a)-2 (for qualified plans), §1.403(b)-8(d)(2)(iii) (for §403(b)(7) custodial accounts), §1.403(b)-9(a)(2)(i)(C) (for §403(b)(9) retirement income accounts), §1.408-2(b) (for IRAs), and §1.457-8(a)(2)(i) (for §457(b) governmental plans) are deemed to comply.</li> <li>▪ Either loan or other extension of credit from assets in the group trust to employer, or use of assets of participating plan/IRA to provide benefits under another participating plan even if the benefitting participant or beneficiary is the same person, violates this rule.</li> </ul>
		Group trust instrument expressly limits the assets that may be held by the group trust to assets that are contributed by, or transferred from, a participating plan/IRA to the group trust (and the earnings thereon).
		<p>Group trust instrument expressly provides for separate accounts (and appropriate records) to be maintained to reflect the interest of each participating plan/IRA, including separate accounting for contributions to the group trust, disbursements made from the group trust, and investment experience of the group trust allocable to that account.</p> <ul style="list-style-type: none"> <li>▪ Transaction or accounting method which has the effect of directly or indirectly transferring value from the account of one adopting plan into the account of another adopting plan violates this requirement.</li> <li>▪ Transaction that merely exchanges investments at fair market value between the accounts of one adopting plan to another account of that adopting plan does not violate this requirement.</li> </ul>
		Group trust instrument must prohibit the assignment by a participating plan/IRA of any part of its equity or interest in the group trust.
		Group trust must be created or organized in the U.S. and be maintained at all times as a U.S. domestic trust.

Among other things, the ruling also addresses the following points:

- Commingled trust funds maintained by the PBGC as statutory trustee for terminated tax-qualified plans may permissibly participate in Rev. Rul. 81-100 trusts.
- Section 403(b)(7) accounts may participate only in group trusts that restrict investments to stock of regulated investment companies.
- The Service requested comment (due by April 11, 2011) on whether annuity contracts and/or other tax-favored accounts held by §401(a) or §403(b) plans, such as pooled separate accounts treated as trusts under §401(f), should be permitted to participate in Rev. Rul. 81-100 trusts. As a policy matter, it seems sensible that Rev. Rul. 81-100 trusts should be available to intermediary products in which only the enumerated plans/IRAs may invest.
- The Service provided model amendments to incorporate (i) the expanded availability of these group trusts and (ii) the separate accounting requirement. A group trust that
  - adopts either or both of the model amendments (either verbatim, or in another form that is substantially similar in all material respects), and any conforming amendments to modify or delete inconsistent prior provisions, and
  - by its terms, provides that group trust amendments automatically pass through to participating plans/IRAs,
 may continue to rely on a favorable IRS determination letter issued before January 11, 2011. If the group trust document does not include a pass-through amendment provision, however, it may not continue to rely on a prior determination letter if it adopts the model amendments.
- The ruling specifies no timetable for amending group trust documents to reflect the new requirements.

*Comment:* Although now allowed by the tax law, investment by IRAs or §403(b) accounts, for example, in certain group trusts may be precluded by securities law or other considerations, depending on the structure of the trust.

## Puerto Rico Plans

Rev. Rul. 2011-1 also provides guidance with respect to the spin-off of assets related to Puerto Rican participants into a separate Puerto Rico-qualified plan, and the availability of Rev. Rul. 81-100 trusts to a Puerto Rico plan.

- Many sponsors of dual U.S./Puerto Rico tax-qualified plans are considering whether to spin off assets and liabilities for residents of Puerto Rico to a separate Puerto Rico-qualified plan, in order to avoid potential U.S. tax complications under [Rev. Proc. 2004-37](#). [Rev. Rul. 2008-40](#) provided transition relief, permitting such spin-offs to be made on or before December 31, 2010, without adversely affecting qualified status and without future taxation to residents of Puerto Rico. Rev. Rul. 2011-1 extends the time allowed to spin off Puerto Rican participants from a U.S. qualified plan into a separate Puerto Rico plan until December 31, 2011.
- The Service intends to issue future guidance on whether a plan that is tax-qualified in Puerto Rico only may (through its trust) participate in a Rev. Rul. 81-100 trust. Until that guidance is issued, a Puerto Rico-qualified plan may continue to participate in the group trust if either (1) it was participating in the group trust as of January 10, 2011, or (2) it holds assets that had been held by a U.S. qualified plan immediately prior to the transfer of those assets to the Puerto Rico plan, pursuant to the transition relief in Rev. Rul. 2008-40 (as modified Rev. Rul. 2011-1).

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