



Legal Alert: IRS Expands Group Trusts

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Since 1956, tax-qualified plans have been permitted to pool assets with other qualified plans by investing in a vehicle known as a "group trust," which would itself be exempt from tax as if it formed a part of each of the investing plans, provided that certain relatively innocuous requirements were met. In the fifty-plus years since the issuance of Revenue Ruling 56-267, the rules governing those group trusts have been changed, both by IRS Revenue Rulings and by changes to the Internal Revenue Code, to expand the list of plans that may pool their funds by investing in group trusts. For example, IRAs, governmental 457(b) plans and certain other governmental funds have been permitted to invest along with plans qualified under section 401(a) of the Code. The IRS has now issued Revenue Ruling 2011-01 (the "Ruling"), which modifies and replaces the currently-applicable authorities (Revenue Ruling 81-100, as modified by Revenue Ruling 2004-67) and adds to the list of authorized investors: (i) Section 403(b)(7) custodial accounts; (ii) Section 403(b)(9) retirement income accounts; (iii) commingled trusts maintained by the Pension Benefit Guaranty Corporation to hold the assets of certain terminated defined benefit plans; and (iv) temporarily, certain Puerto Rican plans, which are not qualified under the U.S. Internal Revenue Code, but which are qualified under Section 1165 of the Puerto Rico Internal Revenue Code, and which had previously invested in a group trust. These changes are effective beginning January 10, 2011, and are subject to the following requirements being satisfied by the group trust and, if applicable, by the investing entities (each of which is referred to in the Ruling as a "group trust retiree benefit plan"). (1) The group trust is itself adopted as a part of each adopting group trust retiree benefit plan. (2) The group trust instrument expressly limits participation to some or all of the types of group trust retiree benefit plans. (3) The group trust instrument expressly prohibits any part of its corpus or income that equitably belongs to any adopting group trust retiree benefit plan from being used for, or diverted to, any purpose other than for the exclusive benefit of the participants and the beneficiaries of the group trust retiree benefit plan. (The Ruling provides that a plan's assets are treated as used in violation of this requirement if the assets of one plan are used to provide benefits under another plan, even if the person receiving the benefits is a participant or beneficiary under both plans.) (4) Each group trust retiree benefit plan which adopts the group trust is itself a trust, custodial account, or similar entity that is tax-exempt under section 408(e) of the Code, is tax-exempt (or is treated as tax-exempt) under section 501(a) of the Code, or, in the case of a section 401(a)(24) governmental plan, is not subject to Federal income taxation. (5) Each group trust retiree benefit plan which adopts the group trust expressly and irrevocably provides in its governing document that no part of the corpus or income of the group trust retiree benefit plan may be used for, or diverted to, purposes other than for the exclusive benefit of the plan participants and beneficiaries. (6) The 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 group trust retiree benefit plan to the group trust (and the earnings thereon), and the group trust instrument expressly provides for separate accounts to reflect the interest of each adopting group trust retiree benefit plan, including separate accounting for contributions to, disbursements from, and investment experience allocable to the adopting plan's interest in the group trust. (7) The group trust instrument expressly prohibits assignment by an adopting group trust retiree benefit plan of any part of its interest in the group trust. (8) The group trust itself is created or organized in the United States and is maintained at all times as a domestic trust in the United States. (9) In the case of a group trust that permits investment by section 403(b)(7) custodial accounts (which themselves are permitted to invest only in mutual fund shares), the group trust instrument must provide that the assets of the group trust may be invested only in mutual fund shares. This could result in separate group trusts being maintained by providers for use by section 403(b)(7) custodial accounts, and by all other group trust retiree benefit plans. The Ruling also provides two model amendments that may be used in different circumstances to amend group trusts that comply with current rules (i.e., Revenue Ruling 81-100) so that they may accept contributions from the newly-authorized categories of group trust retiree benefit plans. A group trust may adopt the model amendments, along with any necessary conforming amendments, and continue to have the right to rely on an existing determination letter *provided that* amendments to the group trust, by its terms, are automatically deemed adopted by the participating group trust retiree benefit plans. However, if a group trust does not provide for such amendments to pass through to the adopting entities, then the group trust may not continue to rely on an outstanding determination letter after adopting one of the model amendments. If you have any questions regarding these new group trust requirements, or how they may apply to your retirement plans, you may contact the author of this Legal Alert, Jeffrey Ashendorf, at jashendorf@fordharrison.com, any other member of Ford & Harrison's Employee Benefits Practice Group, or the Ford & Harrison attorney with whom you usually work.