

of section 411 and the regulations thereunder) to at least 50 percent of his accrued benefit derived from employer contributions.

(3) *Certain forfeitures.* Paragraph (b)(1) of this section does not apply in the case of a forfeiture permitted by section 411(a)(3)(D)(iii) and §11.411(a)-4(b)(5)(i) (relating to forfeitures of certain benefits accrued before September 2, 1974).

[T.D. 7387, 40 FR 51421, Nov. 5, 1975]

§ 11.401(b)-1 Certain retroactive changes in plan.

(a) *General rule.* (1) Under section 401(b), a stock bonus, pension, profit-sharing or annuity plan or bond purchase plan which does not satisfy the requirements of section 401(a) on any day solely as a result of a disqualifying provision (as defined in paragraph (b) of this section) shall be considered to have satisfied such requirements on such day if there is adopted during the remedial amendment period (as determined under paragraphs (c) and (d) of this section) with respect to such disqualifying provision an amendment which causes the plan to satisfy all such requirements of section 401(a), 403(a) or 405(a) for the whole of the remedial amendment period (including extension thereof).

(2) This section shall not apply to any disqualifying provision if the remedial amendment period (as determined under paragraphs (c) and (d)(1) of this section determined without regard to paragraph (d)(2) of this section) with respect to such disqualifying provision ends prior to September 2, 1974.

(b) *Disqualifying provisions.* For purposes of this section, with respect to a plan described in paragraph (a) of this section the term "disqualifying provision" means any provision of—

- (1) A plan as adopted,
- (2) A plan amendment, or

(3) The Employee Income Security Act of 1974 (Pub. L. 93-406, 88 Stat. 829), which causes such plan to fail to satisfy the requirements of section 401(a), 403(a), or 405(a).

(c) *Remedial amendment period.* (1) The remedial amendment period with respect to a disqualifying provision begins on the effective date of the disqualifying provision. For purposes of

this section, the effective date of a disqualifying provision is—

(i) In the case of a disqualifying provision in a plan as adopted, the date the plan is put into effect,

(ii) In the case of a plan amendment, the date the plan amendment is adopted or put into effect (whichever is earlier), or

(iii) In the case of a statutory provision described in paragraph (b)(3) of this section, the effective date of such provision.

(2) Unless extended as provided by paragraph (d) of this section, the remedial amendment period ends with the time prescribed by law (including extensions) for filing the return of the employer for the employer's taxable year in which falls—

(i) With respect to a disqualifying provision in a plan as adopted, or a plan amendment, the later of the date on which such provision was adopted or put into effect.

(ii) With respect to a statutory provision described in paragraph (b)(3) of this section, the effective date of such provision.

(d) *Extension for determination letters—*

(1) *In general.* If, before the end of the remedial amendment period (determined without regard to this paragraph) with respect to a disqualifying provision, the employer or plan administrator files a request pursuant to §601.210(o) of this chapter (Statement of Procedural Rules) for a determination letter with respect to the initial qualifications of the plan or the effect of such disqualifying provision on the qualified status of the plan (or a trust which is part of a plan) under section 401(a), 403(a), or 405(a), then except as provided in subparagraph (3) of this paragraph, such remedial amendment period may be extended for a period not to exceed 150 days, beginning on the day after the last day of the employers taxable year in which falls the dates described in subdivisions (i) and (ii) of paragraph (c)(2) of this section. The 150-day period does not include any day on which there is pending before the Internal Revenue Service a request for a determination letter described in this subparagraph. For this purpose, such a request is considered to be pending before the Internal Revenue Service from

the date it is filed with the Internal Revenue Service to the date on which notice of the final determination with respect to the request is issued by the Internal Revenue Service, the request is withdrawn, or the request is otherwise finally disposed of by the Internal Revenue Service.

(2) *Special rules.* Except as provided in subparagraph (3) of this paragraph, the period provided by subparagraph (1) of this paragraph shall not end prior to the later of December 31, 1975, or the expiration of 30 days after—

(i) The date on which a notice of final determination with respect to a request described in that subparagraph is issued by the Internal Revenue Service, or, where applicable,

(ii) The date on which a judgment pursuant to section 7476 (relating to declaratory judgments) by the United States Tax Court in a case or controversy involving such determination becomes final.

(3) *Overall limitation.* The period provided by subparagraph (1) of this paragraph shall not expire later than the last day (determined under section 6501) for assessment of any tax imposed by the Internal Revenue Code with respect to the taxable year of the employer immediately preceding the first day of such period.

(Sec. 401(b), Internal Revenue Code of 1954, 88 Stat. 943 (26 U.S.C. 401(b)))

[T.D. 7377, 40 FR 44544, Sept. 29, 1975]

§ 11.401(d)(1)-1 Nonbank trustees of trusts benefiting owner-employees.

(a) *Effective dates—(1) General rule.* For a plan not in existence on January 1, 1974, this section shall apply to the first plan year commencing after September 2, 1974, and all subsequent plan years.

(2) *Existing plans.* For a plan in existence on January 1, 1974, this section shall apply to the first plan year commencing after December 31, 1975, and all subsequent plan years.

(b) *In general.* For plan years to which this section applies, the trustee of a trust described in § 1.401-12(c)(1)(i) may (notwithstanding § 1.401-12(c)) be a person other than a bank (within the meaning of section 401(d)(1)) if he demonstrates to the satisfaction of the Commissioner that the manner in

which he will administer trusts will be consistent with the requirements of section 401. Such demonstration must be made by a written application to the Commissioner of Internal Revenue, Attention: E:EP, Internal Revenue Service, Washington, DC 20224. Such application must meet the requirements set forth in paragraphs (c) to (g) of this section.

(c) *Fiduciary ability.* The applicant must demonstrate in detail his ability to act within the accepted rules of fiduciary conduct. Such demonstration must include the following elements of proof:

(1) *Continuity.* (i) The applicant must assure the uninterrupted performance of its fiduciary duties notwithstanding the death or change of its owners. Thus, for example, there must be sufficient diversity in the ownership of the applicant to ensure that the death or change of its owners will not interrupt the conduct of its business. Therefore, the applicant cannot be an individual.

(ii) Sufficient diversity in the ownership of an incorporated applicant means that individuals each of whom owns more than 20 percent of the voting stock in the applicant own, in the aggregate, no more than 50 percent of such stock.

(iii) Sufficient diversity in the ownership of an applicant which is a partnership means that—

(A) Individuals each of whom owns more than 20 percent of the profits interest in the partnership own, in the aggregate, no more than 50 percent of such profits interest, and

(B) Individuals each of whom owns more than 20 percent of the capital interest in the partnership own, in the aggregate, no more than 50 percent of such capital interest.

(iv) For purposes of this subparagraph, the ownership of stock and of capital and profits interests shall be determined in accordance with the rules for constructive ownership of stock provided in section 1563(e) and (f)(2). For this purpose, the rules for constructive ownership of stock provided in section 1563(e) and (f)(2). For this purpose, the rules for constructive ownership of stock provided in section 1563(e) and (f)(2) shall apply to a capital