CHAPTER 9-THE REMEDIAL AMENDMENT PERIOD

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INTRODUCTION

Within the past several years, legislation has been enacted that makes a number of amendments to Internal Revenue Code provisions relating to qualified plans. These acts are the Uruguay Round Agreements Act, the Uniformed Services Employment and Reemployment Rights Act of 1994, the Small Business Job Protection Act of 1996, the Taxpayer Relief Act of 1997, the Internal Revenue Service Restructuring and Reform Act of 1998, and the Community Renewal Tax Relief Act of 2000. We'll refer to all these acts together as GUST.

GUST made several changes that may require plans to be amended to remain qualified. GUST also made extensive liberalizing changes that generally will not require plan amendments in order for a sponsor to maintain the qualified status of its plans. However plans can be amended by sponsors wishing to take advantage of new provisions. Provisions which sponsors are required to amend, and provisions which sponsors are permitted to amend for GUST, are generally disqualifying provisions subject to the remedial amendment period under section 401 (b) of the Internal Revenue Code ("the Code").

Revenue Procedures 97-41, 98-14, 99-23, 2000-20, and 2000-27 make the GUST changes subject to the remedial amendment period under section 401(b). Plan sponsors have a remedial amendment period under the above for certain GUST amendments through the last day of the first plan year beginning on or after January 1, 2001. This date was extended by Revenue Procedure 2001-55 to February 28, 2002 and further extended to June 30, 2002 for plans directly affected by the attacks on 9/11/01. Also, these extensions apply for all disqualifying provisions of new plans adopted or effective after 12/7/94 and plan amendments adopted after 12/7/94 that would cause an existing plan to fail qualification.
Note: Additional extensions for plans directly affected by the attacks on 9/11/01 also may be granted to December 31, 2002 under Revenue Procedure 2001-55.

This Chapter provides an overview of the requirements under section 401(b) for GUST amendments, effective dates for retroactive plan amendments for changes made by GUST, and the requirements for plans terminating before the end of their remedial amendment period.

OBJECTIVES

At the end of this lesson you will be able to determine:

When retroactive plan amendments for GUST are permitted under Code section 401 (b).

1. The effective dates for GUST amendments.
2. The timing of amendments for terminating plans.

RECENT ACTS AFFECTING CODE REQUIREMENTS

USERRA

The Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"), enacted on October 13, 1994, codified, revised and restated the federal law protecting veterans' reemployment rights. Under USERRA an employee who is absent because of military service is generally entitled to reemployment with the employer, subject to certain limits and exceptions. On reemployment an employee is entitled to receive certain retirement benefits (under defined benefit or defined contribution plans) which would have been received except for the employee's absence during military service. USERRA is generally effective for reemployments initiated on or after December 12, 1994.

Section 414(u) was added by SBJPA so that a plan complying with USERRA would not violate the qualification requirements of Code section 401(a). Section 414(u) is effective December 12, 1994.

Revenue Procedure 96-49, 1996-2 C.B. 369 provided a model amendment to comply with the requirements of USERRA and Code section 414(u). Rev. Proc. 96-49 also provided that plan amendments to comply with USERRA and Code section 414(u) generally would not be required before 1998. This date has been extended by the remedial amendment period discussed below.

GATT

The Uruguay Round Agreement Act ("GATT") was enacted on December 8, 1994. GATT changed several Code sections including rules relating to determination of certain benefits under Code sections 411 (a)-11 (B), 415(b)(2)(E) and 41 7(e)(3).

Changes in Code sections 411(a)(11)(B) and 417(e)(3) relating to determination of the present value of a participant's benefits were generally effective for plan years beginning after December 31, 1994. GATT also contained a transitional rule for determining the present value of a participant's benefits for distributions from plans that were adopted and in effect as of December 7, 1994. This rule provides that the present value of distributions from such plans that are made before the earlier of the first plan year beginning after December 31, 1999, or the adoption or effective date of a GATT plan amendment (whichever is later) will be determined under the plan's pre-GATT terms. Therefore, amendments applying the GATT changes to Code sections 411(a) and 417(e) to a pre-GATT plan could not be adopted retroactively. As a result, these plans are not permitted to operate in accordance with these changes prior to the adoption of the plan amendment.

Act Section 732(b)(2) amended Code section 415(c)(1)(A) effective for limitation years beginning after December 31, 1994, by striking "(or, if greater, 1/4 of the dollar limitation in effect under subsection (b)(1)(A))" after "$30,000".

GATT also made changes to Code section 415(b)(2)(E) for certain actuarial assumptions that must be taken into account for adjustments under Code section 415(b)(2)(B), (C) and (D). The changes made to Code section 415(b)(2)(E) were generally effective for limitation years beginning after December 31, 1994. The Small Business Job Protection Act amended GATT to permit sponsors to delay implementing changes to Code section 415(b)(2) (E).

A pre-GATT plan is not required to apply section 415(b)(2)(E) changes to benefits accrued before the earlier of the date an amendment is adopted or effective (whichever is later) or the first day of the first limitation year beginning after December 31, 1999. If a plan had been amended for certain GATT changes that were adopted or effective on or before August 20, 1996, SBJPA allowed a plan to repeal that amendment with another amendment adopted no later than August 20, 1997. This date has been extended by the remedial amendment period described below. Also, see Rev. Rul. 98-1, 1998-2 I.R.B. 5, and the chapter in the 1998 CPE text concerning the section 415 changes.

SBJPA

The Small Business Job Protection Act of 1996 ("SBJPA") was enacted on August 20, 1996. SBJPA changed various qualification requirements under Code section 401(a) including the definition of highly compensated employees under Code section 414(q), the nondiscrimination tests under Code sections 401(k) and (m), and the distribution requirements under Code section 401(a)(9). SBJPA also repealed the combined limit under Code section 415(e) and repealed the family aggregation rule under Code sections 401(a)(17) and 414(q). As noted earlier, SBJPA also added Code section 414(u) so plans could comply with requirements of USERRA without violating the requirements of Code section 401(a).

The qualification changes made by SBJPA are generally effective for plan years beginning after December 31, 1996. Certain changes are effective in later years. For example, a change to the definition of compensation under section 415(c)(3) is effective in 1998, alternative nondiscrimination rules (safe harbor) for section 401(k) plans are effective in 1999, and the repeal of section 415(e) is effective in 2000.

Section 1465 of SBJPA provides that if a plan or annuity contract amendment is required by SBJPA, the amendment is not required before the first day of the first plan year beginning on after January 1, 1998 (January 1, 2000 for a governmental plan as defined in Code section 414(d)), if the plan or contract is operated in accordance with SBJPA from the effective date of the SBJPA change to the time the amendment is required. In addition, the amendment must be retroactive to the effective date of the provision for the plan or contract. Section 1465 applies to plans and contracts in existence on or after the date of the enactment of SBJPA.

TRA'97

The Taxpayer Relief Act of 1997 ("TRA'97") enacted on August 5, 1997, contained provisions relating to various amendments required because of changes to the Code. Among other changes, TRA'97 increased the $3,500 limit under Code sections 411(a)(11) and 417(e) to $5,000, modified the exclusion allowance under Code section 403(b), and made changes to the funding requirements under Code section 412. The change under sections 411(a)(11) and 417(e) is effective for plan years beginning after August 5, 1997.

Section 1541 of TRA'97 generally allows plans to be operated as if they had already been amended for the changes in TRA'97 (including the change in the cash-out threshold) by providing that the plans will not be treated as failing to follow plan terms if amendments are adopted retroactively before the first day of first plan year beginning on or after January 1, 1999 (2001 for governmental plans).

Both section 1465 of SBJPA and section 1541 of TRA'97 have been subsumed in the remedial amendment period described below.

RRA

The Internal Revenue Service Restructuring and Reform Act of 1998 (RRA), enacted on July 22, 1998, contained a provision changing the direct rollover requirement under Code section 401 (a)(31). RRA added Code section 402(c)(4)(C) which provided that hardship distributions from qualified cash or deferred arrangements and tax-sheltered annuities are not eligible rollover distributions. This change is effective for distributions after December 31, 1998.

CRA

The Community Renewal Tax Relief Act of 2000 (CRA) changed the definitions of compensation to reflect the amount of reductions elected for qualified transportation fringes not includible in an employee's gross income under section 132(f)(4). This affects code sections 403(b)(3), 414(s)(2), and 415(c)(3). Notice 2001-37 also provides that qualified plans must operate in accordance with CRA for plan and limitation years beginning on or after January 1, 2001. Any CRA changes must be adopted within the GUST RAP and effective no later than the first day of the first plan and LY beginning on or after January 1, 2001.

BACKGROUND - REMEDIAL AMENDMENT PERIOD

Code section 401(b) provides for a remedial amendment period during which a plan may, under certain circumstances, be amended retroactively to comply with the Code. Code section 401(b) and I.T.R section 1.401(b)-1 provide that a plan which does not satisfy the Code because of disqualifying provisions shall be considered as satisfying such requirements if on or before the last day of the remedial amendment period all provisions of the plan necessary to satisfy the requirements are in effect and have been made effective for the whole period of the disqualifying provisions.

DISQUALIFVING PROVISIONS

Under section 401(b)-1 of the regulations, a disqualifying provision is defined as a provision in a new plan (or the absence of a provision) or an amendment to a provision in an existing plan that causes the plan to fail to satisfy the qualification requirements in the Code as of the date the provision or amendment is first effective. A disqualifying provision also includes a provision that results in the failure of the plan to satisfy the qualification requirements because of a change in those requirements generated by amendments to the Code, which is designated by the Commissioner at his discretion, as a disqualifying provision.

AMENDMENT TO CODE SECTION 401(B) REGULATIONS

On August 1, 1997, temporary and proposed amendments were made to the regulations under Code section 401(b) to clarify the scope of the Commissioner's authority to provide relief from plan disqualification under section 401(b). This enabled the Commissioner to provide relief for timing of plan amendments relating to changes to qualification rules made by GUST, in addition to other amendments that might be required due to future changes to the Code. These regulations were finalized on February 4, 2000.

The amended regulations at section 1.401(b)-1(b)(3) added a third definition of a disqualifying provision to include a plan provision designated by the Commissioner (through the issuance of revenue rulings, notices or other guidance), at the Commissioner's discretion, as a disqualifying provision that either results in the failure of the plan to satisfy the qualification requirements of the Code by reason of a change in those requirements, or is integral to a qualification requirement of the Code that has been changed.

Section 1.401(b)-1(c) provides that for purposes of section 1.401(b)-1(b)(3), a disqualifying provision also includes the absence from a plan of a provision required by, or if applicable, integral to the applicable change to the qualification requirements of the Code, if the plan was in effect on the date the change became effective with respect to the plan.

If the Commissioner designates a provision as disqualifying, the regulations under Code section 401(b), as amended, also provide the Commissioner with explicit authority to impose limits and provide additional rules (through the issuance or revenue rulings, notices, or other guidance in the Internal Revenue Bulletin) regarding the amendments that may be made regarding disqualifying provisions during the remedial amendment period.

The purpose of these changes in the regulations should be understood in the context of the types of changes made to the qualification requirements by GUST. In the past, most legislative changes to the plan qualification rules have required plan amendment to maintain plan qualification. The Commissioner's authority under the regulations prior to their amendment allowed these changes to be designated as disqualifying provisions, thus permitting remedial amendment under section 401(b). When the Tax Reform Act of 1986 ("TRA'86") became law, most of its provisions relating to plan qualification also required amendments to maintain plan qualification. However, there were some provisions of TRA'86 that liberalized the qualification requirements.

Therefore, when the regulations under section 401(b) were amended in 1988 to permit the retroactive remedial amendment of plans for the TRA'86 changes, the definition of disqualifying provision was broadened to pull in the liberalizing changes in TRA'86, though plans were not required to amend for these changes to maintain qualification. This was accomplished by providing that a disqualifying provision includes any plan provision that is integral to a qualification requirement changed by TRA'86 or any requirement treated by the Commissioner, directly or indirectly, as if section 1140 of TRA'86 applied to it. Also, for a disqualifying provision, the plan was required to operate in accordance with the plan provision as of its applicable effective date.

In addition to changes that result in the disqualification of the plan if not timely amended, GUST also provided for a number of changes that liberalized the Code requirements. Therefore, the amended regulations extend to future laws (including GUST) the Commissioner's authority to designate plan provisions as disqualifying provisions where the plan provisions do not result in the disqualification of the plan because of a change in the Code, (but are integral to a qualification requirement that has been changed.) Under the amended regulations, the Commissioner may designate these provisions as disqualifying provisions and allow amendments for these provisions on a retroactive basis within the remedial amendment period.

REMEDIAL AMENDMENT PERIOD - DEFINED

Regulations section 1.401 (b)-1 provides that if a plan fails to satisfy the requirements of Code section 401(a) on any day solely as a result of a disqualifying provision, the plan will be considered to satisfy the requirements of Code section 401(a) on that day if the plan is amended to comply by the last day of the remedial amendment period. The Regulations further provide that the amendment must be retroactive in form and in fact to the beginning of the remedial amendment period.

When does the remedial amendment period begin?

- For a provision or absence of a provision from a new plan, the remedial amendment period begins on the date the plan is put into effect.
- For an amendment to an existing plan, the remedial amendment period begins on the date the amendment is adopted or put into effect, whichever is earlier.
- If the disqualifying provision is a plan provision that is integral to a qualification requirement that has been changed, the remedial amendment period begins on the first day on which the plan was operated in accordance with that plan provision, as amended, unless another time is specified by the Commissioner in revenue rulings, notices or other guidance published in the Internal Revenue Bulletin.

When does the remedial amendment period end?

- For a new plan maintained by one employer which contains (or fails to contain) a provision that causes the plan to fail to satisfy section 401(a) as of the date the plan is put into effect, the remedial amendment period ends on the later of the due date for filing the employer's tax return (including extensions) for the taxable year in which the plan is put into effect or the last day of the plan year in which the plan is put into effect. **However, the remedial amendment period does not permit a plan to be made retroactively effective, for qualification purposes, for a taxable year prior to the taxable year of the employer in which the plan was adopted.** [Section 1.401-1(a)(2) of the regulations specifies that a plan must be a definite written program, which is communicated to the employees. In *Engineered Timber Sales v. Commissioner,* 74 T.C. 808 (1980), the court held that a plan was not a definite written program until it was adopted. If the documents contain uncertain items, are merely preparatory in nature and are tentative when viewed in their entirety, the instruments fail to present the features essential to a "plan" as intended by Code section 401(a). The court further held that in order to qualify for retroactive amendment under section 401(b), a qualified plan must be in existence, and to stretch 401(b) to apply to adoption of the initial plan document would be a flagrant abuse of the intent of Congress. Thus no remedial amendment period can apply until the plan is adopted.]

- In the case of an amendment to an existing plan maintained by one employer which causes the plan to fail to satisfy the requirements of section 401(a) as of the date the amendment is adopted or effective (whichever is earlier), the remedial amendment period ends on the later of the due date for filing the employer's tax return (including extensions) for the taxable year in which the amendment was adopted or made effective (whichever is later) or the last day of the plan year in which the amendment was adopted or effective (whichever is later).

- In the case of a plan provision designated by the Commissioner as a disqualifying provision that results in the failure of the plan to satisfy the qualification requirements of the Code because of a change in those requirements, the remedial amendment period ends on the later of the due date for filing the employer's tax return (including extensions) for the taxable year that includes the effective date (for the plan) of the change or the last day of the plan year that includes such effective date.

- In the case of a plan provision designated by the Commissioner as a disqualifying provision that is integral to a qualification requirement that was changed, the remedial amendment period ends on the later of the due date for filing the employer's tax return (including extensions) for the taxable year that includes the first day on which the plan was operated in accordance with the plan provision, as amended, or the last day of the plan year that includes such first day.

- In the case of a plan maintained by more than one employer, the remedial amendment period ends on the last of the tenth month following the last day of the plan year in which falls the latest of (a) the date the plan is put into effect; (b) the date the amendment is adopted or is effective (whichever is later); or (c) in the case of a plan provision designated by the Commissioner as a disqualifying provision, the date the remedial amendment period begins, as described above.

A master or prototype plan is considered to be maintained by one employer, whether or not it is maintained by an affiliated group of corporations (within the meaning of Code section 1504) which files a consolidated tax return under section 1501 for a taxable year that includes the remedial amendment period beginning date as determined above.

EXTENSION OF THE REMEDIAL AMENDMENT PERIOD

If on or before the end of the remedial amendment period, the employer files a request for a determination letter for the initial or continuing qualification of the plan, the remedial amendment period is extended until 91 days after the date on which notice of the final determination is issued by the Service, the request is withdrawn, the request is otherwise finally disposed of by the Service, or, where a petition is timely filed for a declaratory judgment under section 7476, a decision of the U.S. Tax Court becomes final.

DISCRETIONARY EXTENSION OF REMEDIAL AMENDMENT PERIOD

Generally, after the remedial amendment period has expired, amendments to eliminate a qualification defect will not cause the plan to be qualified for a year prior to the year in which the amendment has been adopted or put into effect. However, the regulations at section 1.401 (b)-1 (f) provide that the Commissioner may extend the remedial amendment period or may allow a plan to be amended after the expiration of its remedial amendment period and any applicable extension of such period.

In Revenue Ruling 82-66, 1982-1 C.B. 61, the Service stated that a retroactive amendment after the expiration of a plan's remedial amendment period will only be allowed if:

(1) the plan is retroactively amended to comply with the qualification requirement as of the time the defect in the plan arose, and

(2) the employee benefit rights are retroactively restored to levels at which they would have been at had the plan complied with the qualification requirements all along.

Under the revenue ruling, the plan will be qualified for the plan year in which a request for a determination letter is made, or is pending with the Service, and for the plan year prior to the plan year in which the application is submitted for a determination letter, if the application is submitted by the due date for filing the employer's tax return (including extensions) for the employer's taxable year beginning with or within that prior plan year.

Therefore, a plan that is amended retroactively for plan years prior to the plan year immediately preceding the plan year in which the request for a determination letter is made will not be qualified for such prior years as a result of the retroactive amendments if such amendments are made after the expiration of the remedial amendment period.

The applicability of Revenue Ruling 82-66 to plan amendments that are made for GUST after the end of the remedial amendment period may be further limited.

For example, although a remedial amendment period is available under section 401(b) for adopting GUST plan amendments, the law may require plans to be operated in compliance with the changes before the plans are amended. If a plan fails to satisfy the operational compliance requirement, neither section 401(b) nor Rev. Rul. 82-66 provides a remedy.

Also, if a plan is operated in a manner that anticipates a retroactive liberalizing amendment (i.e., in the case of a disqualifying provision that is integral to a changed qualification requirement) and the amendment is not adopted within the remedial amendment period, the plan will then have an operational defect (failure to follow the plan's terms) and Rev. Rul. 82-66 would not apply.

TIME FOR AMENDING CODE SECTION 401(A) PLANS FOR USERRA, SBJPA, GATT, TRA'97 AND RRA

This section describes the revenue procedures that have been issued since 1997 to extend the GUST remedial amendment period.

REVENUE PROCEDURE 97-41

Rev. Proc. 97-41, 1997-2 C.B. 489, provided guidance to sponsors of retirement plans qualified under Code section 401(a) or 403(a), and tax-sheltered annuity plans under Code section 403(b), regarding the date by which they must adopt amendments to comply with SBJPA, GATT, and USERRA.

The revenue procedure established a single deadline for sponsors to adopt SBJPA, GATT and USERRA amendments. The revenue procedure provided that the deadline would be the same as the date by which certain plans that have extended reliance on TRA’86 letters must be amended. Additionally, the revenue procedure provided that, for qualification purposes, plans would be

permitted to anticipate in plan operation certain plan amendments that they intend to adopt as a result of changes in the qualification requirements.

In Rev. Proc. 97-41, under I.T.R. section 1.401(b)-1T(b)(3), the Service designated as disqualifying provisions any plan provision that causes the plan to fail qualification requirements because of changes made by SBJPA and GATT that are effective before the first day of the first plan year beginning on or after January 1, 1999.

The Service also designated as disqualifying provisions plan provisions that are integral to a qualification requirement changed by SBJPA, but only to the extent the change in the qualification requirement is effective before the first day of the first plan year beginning on or after January 1, 1999 and the plan provision as amended is effective before the end of the remedial amendment period. For this purpose, changes in qualification requirements made by SBJPA include Code section 414(u) and USERRA.

Regarding the designation of plan provisions that are integral to the qualification requirements changed by SBJPA as disqualifying provisions, in accordance with section 1.401(b)-1T(d)(1)(v), an amendment of a disqualifying provision may be made retroactively effective only to the first day on which the plan was operated in accordance with the provision, as amended.

The following provisions are generally integral to qualification requirements changed by SBJPA.

- A plan provision for the addition of Code section 414(u).
- Certain changes to plan language affecting the timing of distributions under Code section 401 (a)(9):
  - ♦ A plan provision where the employer offers certain employees an option to defer commencement of benefits under its qualified plan.
  - ♦ A plan provision containing an option for a participant currently in pay status to elect to stop receiving distributions and recommence distributions after retirement from employment.
- The deletion of a plan provision that provided for the family aggregation rules in effect before 1997. (Under some circumstances, this amendment may be required because the continued use of the family aggregation provisions in plan operation could result in disqualification.)
- A change to a plan provision to make a top-paid group election or calendar year data election to determine the status of an employee as highly compensated.

Note: All of the above is discussed in detail in the 1998 CPE text. The changes to the definition of highly compensated employee under Notice 97-45 are discussed in the 1999 CPE text.

REVENUE PROCEDURE 98-14

Revenue Procedure 98-14, 1998-1 C.B. 371, provided that effective April 27, 1998, the Service would begin reviewing applications for determination letters, opinion and notification letters considering changes in the plan qualification requirements made by GATT, TRA'97, and USERRA, as well as those changes in the qualification requirements made by SBJPA that are effective before the first plan year beginning on or after January 1, 1999.

Rev. Proc. 98-14 provided that per the Commissioner's authority under section 1.401(b)-1, a plan provision is designated as a disqualifying provision to which the remedial amendment period applies if it causes the plan to fail to satisfy the qualification requirements of the Code because of changes to those requirements made by TRA'97 or if the provision is integral to a qualification requirement changed by TRA'97.

For all the disqualifying provisions discussed above, pursuant to his authority under 1.401 (b)-1 (f), the Commissioner extended the remedial amendment period (in Rev. Proc. 97-41 and Rev. Proc. 98-14) as follows:

(1) for a nongovernmental plan, the remedial amendment period was extended to the last day of the first plan year beginning on or after January 1, 1999;

(2) for a governmental plan the remedial amendment period was extended to the later of the last day of the last plan year beginning before January 1, 2001 or the last day of the first plan year beginning on or after the "1999 legislative date" (that is, the 90th day 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 the body does not meet continuously).

Finally, the revenue procedure clarified that a plan will not satisfy any of the nondiscrimination safe harbors under 401(a)(4) regulations if the plan provisions reflecting family aggregation requirements in effect prior to their repeal by SBJPA continue to apply.

REVENUE PROCEDURE 99-23

Rev. Proc. 99-23 extended the GUST remedial amendment period for nongovernmental plans to the last day of the first plan year beginning on or after January 1, 2000.

This did not extend the GUST remedial amendment period for governmental plans described in Rev. Proc. 98-14. Rev. Proc. 99-23 also extended the deadline for adopting plan amendments applying the changes under Code section 415(b)(2)(E), and for adopting a plan amendment repealing a pre-August 20, 1996 GATT plan amendment. This permitted the earlier plan amendment to be disregarded in applying section 767(d)(3)(A) of GATT, modified by section 1449(a) of SBJPA.

Rev. Proc. 99-23 provided that the deadline, under Notice 98-52, for amending plan provisions that are integral to a qualification requirement changed by SBJPA that becomes effective on the first day of the first plan year beginning after December 31, 1998, is extended to the end of the GUST remedial amendment period. Also, the requirement in Notice 98-52 that such provisions must be effective as of the last day of the first plan year beginning after December 31, 1998, is replaced by the rule that such provisions must be effective no earlier than the first day of the first plan year beginning after December 31, 1998. Therefore, Rev. Proc. 99-23 permitted the adoption, at any time within the GUST remedial amendment period, of plan provisions satisfying the Code sections 401(k) and (m) safe harbors retroactive to the 1999 plan year.

The deadline under Notice 99-5, 1999-3 I.R.B. 10, for amending provisions integral to section 401(a)(31) to reflect the change made by section 6005(c)(2) of RRA (adding section 402(c)(4)(C) to the Code to provide that a hardship distribution under a cash or deferred arrangement is not an eligible rollover distribution) was extended to the end of the GUST remedial amendment period. This amended provision must be effective as of the first day the plan operates in accordance with Section 6005(c)(2) of RRA.

The extension of the remedial amendment period also applied to the time for adopting amendments of defined benefit plans to provide that benefits will be determined under the applicable interest rate and mortality table rules of section 1.417(e)-1(d) of the regulations. Such an amendment may be adopted up to the last day of the extended remedial amendment period, as long as the amendment is effective for distributions with annuity starting dates in plan years beginning after December 31, 1999. If the amendment is adopted after the last day of the last plan year beginning before January 1, 2000, the amendment

must provide, with respect to distributions with annuity starting dates after the last day of that plan year but before the date of adoption of the plan amendment, that the distribution will be the greater of the amount that would be determined under the plans without regard to the amendment, and the amount determined with regard to the amendment.

The extension of the remedial amendment period also applied to disqualifying provisions of new plans adopted or effective after December 7, 1994, and all disqualifying provisions of existing plans due to a plan amendment adopted after December 7, 1994.

Rev. Proc. 99-23 extended the TRA 86 remedial amendment period for government plans to the end of the GUST remedial amendment period for governmental plans described in Rev. Proc. 98-14 (the later of the last day of the last plan year beginning before January 1, 2001, or the last day of the first plan year beginning on or after the "1999 legislative date").

Also Rev. Proc. 99-23 extends the TRA 86 remedial amendment period for non-electing church plans to the last day of the first plan year beginning on or after January 1, 2000. Non-electing church plans had to be amended to comply with regulations under sections 401(a)(4), 401(a)(5), 401(1) and 414(s) by the last day of the first plan year beginning on or after January 1, 2001. For all other applicable provisions of TRA 86, UCA and OBRA 93, Rev. Proc. 99-23 provided that non-electing church plans would have to be amended by the last day of the first plan year beginning on or after January 1, 2000.

Rev. Proc. 99-23 designated as a disqualifying provision, a provision which causes a plan to fail to satisfy the qualification requirements of the Code because of the repeal by section 1452(a) of SBJPA of the section 415(e) combined plan limitation, or a provision which is integral to the limitation. Plans must be amended to reflect the repeal of section 415(e) by the end of the GUST remedial amendment period. Also, in the case of a plan provision that is integral to the section 415(e) limitation, the amended provision may not be effective earlier than the first day on which the plan was operated according to the amended provision.

REVENUE PROCEDURE 2000-20

Rev. Proc. 2000-20, 2000-6 I.R.B. 533, gives employers 12 months after a pre-approved plan is approved for GUST to adopt that plan. Employers are eligible for this 12-month period if they satisfy the following conditions:

The employer adopts a pre-approved plan before the end of the GUST remedial amendment period; or

(1) before the end of the GUST remedial amendment period, the employer and a sponsor of a pre-approved plan sign a certification that the employer intends to amend or restate its plan by adopting the pre-approved GUST plan; and

(2) the sponsor or practitioner submits an application for a complete GUST opinion or advisory letter for the pre-approved plan by December 31, 2000.

If the above conditions are satisfied, the remedial amendment period for the employer's plan will be extended to the end of the twelfth month beginning after the date a GUST opinion or advisory letter is issued for the pre-approved plan or the opinion or advisory letter for the plan is withdrawn. During this period, the employer must amend or restate its plan by adopting the GUST-approved plan, another GUST-approved plan, or individually designed amendments, and, if required for reliance, request a determination letter. Note that the extension of the remedial amendment period will be determined by the pre-approved plan currently in effect before the end of the remedial amendment period and not necessarily by the pre-approved plan adopted for GUST.

For example, if Flexi-place Industries, Inc. adopted Prototype Plan A for TRA 86 but converts to Prototype Sponsor Plan B for the requirements of GUST, the remedial amendment period for Flexi-place Industries, Inc. will be determined under the remedial amendment period that applies for Prototype Plan A for purposes of GUST.

The rules under Rev. Proc. 2000-20 for determining when an employer must amend its pre-approved plan for GUST differ from past rules. Revenue Procedure 2000-20 provides that an employer who adopts, before the end of the remedial amendment period, a pre-approved plan will be deemed to have adopted each other pre-approved plan of that sponsor for purposes of the remedial amendment period. In other words the remedial amendment period will be determined based upon the last plan approved by the sponsor for all plans of the sponsor, if it is submitted by December 31, 2000.

For example, assume that Dr. Za adopts a calendar year profit-sharing plan sponsored by Prototype sponsor A. This plan is approved on November 12, 2000. On December 28, 2000, Prototype Sponsor A submits a defined benefit plan for approval, which is approved on August 23, 2001. The remedial amendment period for Dr. Za will end on August 31, 2002 (the date applicable to the last plan of the sponsor (defined benefit)) and not December 31, 2001 (i.e., the later of November 12, 2001 or the end of the 2001 plan year).
Note: This example does not consider extensions under Rev. Proc. 2001-55, discussed later.

For further illustrations of the points in Rev. Proc. 2000-20 see Examples 1 through 5 below following the discussion of Rev. Proc. 2000-27.

REVENUE PROCEDURE 2000-27

Rev. Proc. 2000-27, 2000-26 I.R.B. 1272, extends the GUST remedial amendment period for nongovernmental plans until the last day of the first plan year beginning on or after January 1, 2001. This extension also applies to the time by which employers must either adopt a pre-approved GUST plan or certify their intent to adopt a GUST pre-approved plan to be eligible for the extension described in section 19 of Rev. Proc. 2000-20. However, the December 31, 2000, deadline for submission of applications for opinion and advisory letters under section 19 of Rev. Proc. 2000-20 is NOT extended.

Rev. Proc. 2000-27 also extends the TRA'86 remedial amendment period for non-electing church plans to the end of the GUST remedial amendment period for nongovernmental plans described above. The remedial amendment period for governmental plans for TRA'86 and GUST, as defined in section 414(d), is extended to the later of

(i) the last day of the first plan year beginning on or after January 1, 2001, or

(ii) the last day of the first plan year beginning on or after the "2000 legislative date" (that is, the 90th day after opening of the first legislative session beginning after December 31, 1999, of the governing body with authority to amend the plan, if that body does not meet continuously).

Thus governmental and non-electing church plans now each have a single amendment deadline for all GUST and TRA'86 plan amendments, including, in the case of non-electing church plans, amendments relating to nondiscrimination requirements.

The additional administrative relief provided under Notice 92-36, 1992-2 C.B. 364, continues to be available to governmental and non-electing church plans through the end of their respective remedial amendment period for the applicable discrimination requirements.

Rev. Proc. 2000-27 also opens the determination program to allow the Service to issue letters that cover all of the changes for GUST qualification requirements including changes made by the SBJPA effective in plan years beginning after December 31, 1998. As such, Rev. Proc. 2000-27 makes a distinction between a full GUST ruling ("Gust II ruling") and a GUST I ruling.

A GUST I ruling takes into account all changes in the qualification requirements made by GUST except changes made by SBJPA that are effective for plan years beginning after December 31, 1998.

A GUST II ruling takes into account all GUST changes, including the changes made by SBJPA that are effective for plan years beginning after December 31, 1998.

The specific changes applicable to GUST II are:

(1) an eligible rollover distribution described in Code section 402(c)(4) excludes hardship withdrawals as defined in section 401(k)(2)(B)(i)(IV), i.e., attributable to elective deferrals,

(2) the sections 401(k)(12) and 401(m)(11) safe harbors, and

(3) (3) repeal of the limits under section 415(e), i.e., the DB/DC fraction.

Rev. Proc. 2000-27 also extends the TRA 86 extended reliance period by an additional year.

REVENUE PROCEDURE 2001-55

INTRODUCTION

Rev. Proc. 2001-55 extends the GUST remedial amendment period for all qualified plans to end no earlier than February 28, 2002. This extension also applies to the time by which governmental and non-electing church plans must be amended for TRA '86. It also provides for an additional extension to June 30, 2002 for plans directly affected by the 9/11 attacks. Finally, this procedure also gives the Service authority to grant even further extensions of the GUST RAP up to December 31, 2002 for substantial Hardship for plans directly affected by the attacks. (Only the 2/28/02 extension would apply to the time by which an employer must either adopt a pre-approved plan or certify its intent to do so to be eligible for extension of the GUST RAP.)

This revenue procedure extends the GUST remedial amendment period under Section 401(b) of the Code for qualified retirement plans.

The revenue procedure:

- extends the GUST remedial amendment period for all plans to February 28, 2002, if the period would otherwise end before then.
- provides an additional extension to June 30, 2002, for plans that were directly affected by the September 11, 2001, terrorist attack on the United States (the "Terrorist Attack").
- provides that in cases of substantial hardship resulting from the Terrorist Attack the Service may, in its discretion, grant additional extensions of the GUST remedial amendment period to particular plans up to December 31, 2002.

GENERAL EXTENSION OF REMEDIAL AMENDMENT PERIOD

The GUST remedial amendment period is extended to February 28, 2002, if the period would otherwise end before then.
This extension applies to:

- all GUST plan amendments, including all those plan amendments specifically enumerated in Rev. Proc. 99-23,
- all disqualifying provisions of new plans adopted or effective after December 7, 1994, and

- all plan amendments adopted after December 7, 1994, that would cause an existing plan to fail to be qualified.

This extension also applies to the TRA '86 remedial amendment period for governmental and non-electing church plans. The extension also applies to the time by which an employer must either adopt a pre-approved plan or certify its intent to adopt such a plan in order to be eligible for the extension of the GUST remedial amendment period under Rev. Proc. 2000-20, as modified.

EXTENSION OF REMEDIAL AMENDMENT PERIOD FOR PLAN DIRECTLY AFFECTED BY A TERRORIST ATTACK

The GUST remedial amendment period for directly affected plans is extended to June 30, 2002, if the period would otherwise end before then.

This extension of the GUST remedial amendment period applies to:

- all GUST plan amendments of directly affected plans, including all those plan amendments specifically enumerated in Rev. Proc. 99-23.
- all disqualifying provisions of directly affected new plans adopted or effective after December 7, 1994, and
- all plan amendments adopted after December 7, 1994, that would cause a directly affected existing plan to fail to be qualified.

Defining "directly affected by a terrorist attack"

A plan will be considered to be directly affected by the Terrorist Attack if any of the following were located at the time of the attack in the area of the New York City borough of Manhattan bounded on the north by 14th Street:

1. the principal place of business of any employer that maintains the plan; the office of the plan or the plan administrator;
2. the office of the primary record keeper serving the plan; or
3. the office of an attorney, enrolled actuary, certified public accountant or other advisor retained by the plan (or by the employer with respect to issues involving the plan).

A plan will also be considered to be directly affected by the Terrorist Attack if:

- any individual required under the terms of the plan or corporate rules to approve plan amendments,
- the plan administrator,
- an attorney,
- an enrolled actuary,
- a certified public accountant or
- other advisor retained by the plan (or by the employer with respect to issues involving the plan)

was injured or killed or is missing as a result of the Terrorist Attack.

Plan sponsor may ask Service to designate plan as directly affected by Terrorist Attack

A plan sponsor of a plan that is not described above may ask the Service to designate the plan as directly affected by the Terrorist Attack if the plan sponsor's ability to amend the plan and file a determination letter application has been severely impaired as a direct result of the Terrorist Attack. Upon a showing of such directly related, severe impairment, as determined by the Service in its discretion, the Service will designate the plan as directly affected by the Terrorist Attack.

The plan sponsor's request should be sent to the following address:

Manager, EP Determinations
Attention: RAP Extension Coordinator
550 Main Street
Room 5106
Cincinnati, Ohio 45202

The request must be made by the later of

- December 31, 2001, or
- the 60th day preceding the end of the plan's GUST remedial amendment period (determined without regard to the extensions under this revenue procedure).

The request must explain how the Terrorist Attack has directly and severely impaired the ability to amend the plan and file a determination letter application.

The Service will not designate a plan as directly affected by the Terrorist Attack on account of delays experienced by a significant segment of the nation, such as disruptions in transportation or mail delivery and delays associated with diversion of resources to other activities as a result of the Terrorist Attack.

If the request is denied, the GUST remedial amendment period for the plan will end on the later of the date it would otherwise end or the date that is one month after the date of the letter denying the request.

Directly affected governmental and non-electing plans' TRA '86 RAP also extended

The TRA '86 remedial amendment period for directly affected governmental plans and non-electing church plans is also extended to June 30, 2002, if the period would otherwise end before then.

Procedures for directly affected plans

Plan sponsors who file determination letter applications utilizing the extension provided by this section must include with their application **an attachment**, labeled "September 11, 2001 Terrorist Attack." Such attachment must describe how the plan meets the criteria above (for example, that at the time of the Terrorist Attack the office of the plan administrator was located in the area of Manhattan bounded on the north by 14th Street).

This label must be on the attachment and not on the envelope. If the Service has designated the plan as directly affected in response to a request submitted by the plan sponsor, a copy of the Service's letter so designating the plan should be attached to the determination letter application in place of the attachment.

Further extension for directly affected plan

A plan sponsor of a directly affected plan described above who can show that it will not be able to:

- amend the plan for GUST or
- file a determination letter application within the plan's GUST remedial amendment period (including the extension above)

without incurring substantial hardship directly related to the Terrorist Attack may request a further extension under Section 1.401(b)-1(f).

The request should be addressed to the Manager, EP Determinations, at the address above and must be made by the later of

- April 30, 2002, or
- the 60th day preceding the end of the plan's GUST remedial amendment period.

This request may be **combined** with a request to be designated as directly affected, provided, however, that the combined request is made by the later of

- December 31, 2001, or
- the 60th day preceding the end of the plan's GUST remedial amendment period (determined without regard to the extensions under this revenue procedure).

The request must clearly demonstrate the hardship that will be incurred without a further extension. For example, if the extension is needed because of delays in obtaining documents and information needed to amend the plan, the request must include:

1. a description of such documents and information,
2. an explanation of how these delays are directly related to the Terrorist Attack,
3. an explanation of steps taken to date to amend the plan, and
4. the requested extension date, including specific justification for the extension date.

In no event will an extension beyond December 31, 2002, be granted.

If the request for a further extension is denied, the GUST remedial amendment period for the plan will end on the later of:

- the date on which it would otherwise end (including the extension to June 30, 2002, if applicable,) or
- the date that is one month after the date of the letter denying the request.

The terrorist attack-related extension do not apply to the time by which an employer must either adopt a pre-approved plan or certify its intent to adopt such a plan in order to be eligible for the extension of the GUST remedial amendment period under Rev. Proc. 2000-20, as modified.

EXAMPLES 1 THROUGH 5

The following examples are presented to illustrate the extended remedial amendment period for adopters of volume submitter and prototype documents.

For purposes of these examples the designation VS will mean a volume submitter document that has an advisory letter from the Service. VS-1, VS-2 etc. will designate volume submitter documents prepared by different sponsors.

EXAMPLE 1:

Employer has timely adopted VS-1's TRA '86 document. VS-1 is submitted for a complete GUST advisory letter on December 15, 2000. On June 19, 2001, VS-1's document receives an advisory letter for their GUST document. The remedial amendment period ends June 30, 2002 because the Service issued the advisory letter during June of 2001 (section 19.04 of Rev. Proc. 2000-20). Employer signs and submits VS-1's GUST document on June 30, 2001. This is timely.

EXAMPLE 2:

Employer has timely adopted VS-1's TRA '86 document. VS-1's remedial amendment period ends June 30, 2002. However, the Employer signs and submits VS-2's GUST document on June 30, 2002. This is still timely because the remedial amendment period is determined by the VS-1 document.

EXAMPLE 3:

Employer has timely adopted VS-1's TRA '86 document. VS-1's remedial amendment period ends June 30, 2002. Employer signs and submits VS-2's GUST document on June 30, 2002. However, VS-2's remedial amendment period ends May 30, 2002. This is timely. Employer is entitled to VS-1's remedial amendment period (even though VS-2's GUST document was adopted) since Employer had previously adopted VS-1's TRA '86 document.

EXAMPLE 4:

Employer has timely adopted VS-3's TRA '86 document. VS-3 applies for a GUST advisory letter after 12-31-00. Employer should either execute an individually designed plan (and submit an application for a determination letter, if desired) by February 28, 2002, or execute a VS from a provider that did make an application for a GUST letter by December 31, 2000, or execute a certification of intent to adopt a GUST approved VS of a specific sponsor by February 28, 2002 (provided that VS was submitted for an advisory letter by December 31, 2000).

EXAMPLE 5:

VS-4 applies for an application for an advisory letter for its profit sharing, 401(k), money purchase and defined benefit plans on December 8, 2000, and letters are issued in March of 2001. On December 31, 2000, VS4 applies for an advisory letter for its target benefit plan, and a letter is issued in October of 2001. The remedial amendment period for VS-4's target benefit plan ends on October 31, 2002 and the remedial amendment period for VS-4's profit sharing, 401(k), money purchase and defined benefit plans are deemed to also expire as of October 31, 2002 (section 19.05 of Rev. Proc. 2000-20).

TIME FOR AMENDING ANNUITY CONTRACTS UNDER CODE SECTION 403(b) PLANS

SBJPA also may require amendments for annuity contracts under Code section 403(b) plans. Section 1465 of SBJPA (as discussed above) applies to any required plan or contract amendments. Therefore, section 1465 not only applies to qualified plans but also to section 403(b) plans and their related annuity contracts.

If an amendment to a contract is required under a 403(b) plan, due to a change in the SBJPA requirements, section 1465 provides that the amendment is not required before the time prescribed in section 1465, provided the retroactive amendment and operational requirements of section 1465 are satisfied. (Note that the remedial amendment period in section 401(b) does not apply to 403(b) plans.) Therefore, Rev. Proc. 97-41 provides that SBJPA amendments to 403(b) plans, or to related annuity contracts, are not required to be adopted before the first day of the first plan year beginning on or after January 1, 1998.

For a governmental 403(b) plan, the section 1465 period will not expire before the last day of the first plan year beginning on or after the 1999 legislative date (the 90th day 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).

Rev. Procs. 99-23, 2000-20 and 2000-27 do not extend the section 1465 period with respect to section 403(b) plans.

TIME FOR MAKING OTHER PLAN AMENDMENTS AND FOR AMENDING NEW PLANS

Rev. Proc. 97-41 provides that a remedial amendment period is also available for amendments other than those that involve disqualifying provisions resulting from GUST changes. The remedial amendment period for all disqualifying provisions in new plans adopted or effective after December 7, 1994, and all disqualifying provisions of existing plans arising from an amendment adopted after December 7, 1994, which causes the plan to fail to satisfy the requirements of Code section 401(a) as of the date the amendment is adopted or effective (whichever is earlier) ends with the expiration of the GUST remedial amendment period.

Revenue Procedure 2001-55 extends the remedial amendment period for non-GUST amendments to non-governmental plans to the last day of the first plan year beginning on or after January 1, 2001, or February 28, 2002, if later.

> Thus the remedial amendment period set forth in Rev. Proc. 97-41 was also extended for all disqualifying provisions of new plans adopted or effective after December 7, 1994, and for all plan amendments adopted after December 7, 1994, which would cause an existing plan to fail to be qualified.

For governmental plans and non-electing church plans, the TRA 86 remedial amendment period was also extended to coincide with the GUST remedial amendment period.

Thus governmental plans and non-electing church plans now each have a single amendment deadline for all GUST and non-GUST amendments, including amendments relating to TRA 86 and to the nondiscrimination requirements.

(i) The remedial amendment period for governmental and non-electing church plans for GUST (including the TRA 86 RAP) was recently extended by Rev. Proc. 2001-55 so that it would not expire before February 28, 2002. The extensions for plans directly affected by the 9/11 attacks are also available to governmental and non-electing church plans.

Also, the remedial amendment period for non-GUST amendments is the same as for GUST amendments.

EXAMPLE 6:

An employer (neither tax-exempt nor government), did not timely amend its single employer plan for TRA'86 (a non-amender). (The remedial amendment period for TRA'86 changes for such plan ended on the last day of the first plan year beginning on or after January 1, 1994.) However, the plan was amended for TRA'86 changes on October 1, 1997. Can the employer rely on the above paragraph to argue that it is entitled to a remedial amendment period that ends on the last day of the first plan year beginning on or after January 1, 2001? No. The paragraph above gives employers with existing plans who incorrectly amend their plan for amendments, other than those relating to GUST changes (thereby creating disqualifying provisions), the same remedial amendment period as for GUST. The paragraph does not allow a sponsor who never amended its plan to meet TRA'86 to use the extended remedial amendment period.

Assume that on March 10, 1996, an employer with a timely amended CY TRA’86 plan (neither tax-exempt nor government) incorrectly adopted an amendment, effective January 1, 1996, which violates the eligibility requirement in Code section 410(a). The employer has until February 28, 2002, to amend the plan, retroactive to January 1, 1996 to correct the eligibility requirements.

Note: A TRA'86 non-amender should apply to the appropriate Closing Agreement Coordinator (in accordance with Rev. Proc. 2001-17) to enter into a closing agreement with the Service.

EXTENDED REMEDIAL AMENDMENT PERIOD NOT AVAILABLE

Although the remedial amendment period was extended for changes required by GUST, Rev. Proc. 97-41 provides that there are situations in which the extension of the remedial amendment period is not available or is limited.

- In general, section 401(b) and the regulations provide that a remedial amendment must be made retroactively effective for all purposes under the plan throughout the whole of the remedial amendment period so that the plan is retroactively brought into operational compliance with the change. Although operational compliance in anticipation of the amendment is not required, if an amendment is required because of a legislative change that causes the plan to fail to satisfy the qualification requirements, the plan must generally operate in accordance with the requirements of the change as of its effective date. Operational compliance is also required for other GUST provisions. Also, under the amended section 401(b) regulations, if a plan provision is integral to a changed qualification requirement, the plan can be retroactively amended only to the point where the plan first began operating in accordance with the amended plan provision. Therefore, these retroactive amendments must generally reflect the choices the sponsor has made in the operation of the plan.

EXAMPLE 7:

TRA'97 changed Code section 411 (a)(11) to provide that a plan may involuntarily cash out a participant if the present value of the participant's nonforfeitable accrued benefit does not exceed $5,000 (the previous dollar limit was $3,500). This TRA'97 change was effective on August 5, 1997. Assume that on February 1, 1998, a CY plan sponsor elects to use the new distribution rule and immediately start cashing out participants with account balances that are less than $5,000. The plan provision increasing the dollar limit is a disqualifying provision because it is integral to a qualification requirement that has been changed. Thus, the remedial amendment period begins on February 1, 1998, the date on which the plan was operated in accordance with the change made to Code section 411 (a).

EXAMPLE 8:

An employer maintains a profit-sharing plan, which covers a husband, and wife who each earns $100,000. The terms of the plan provide that compensation taken into account is limited to $160,000 and, in applying this limit, the compensation of family members, as defined in former Code section 414(q)(6), is combined. Using the family aggregation rules for the 1998 plan year, the employer made and allocated contributions to the plan, limiting the combined compensation taken into account for the husband and wife to $160,000. Assume that Code section 401 (a)(4) was satisfied for the 1998 plan year. During 1999, the employer amends the plan to eliminate the family aggregation rules. The employer wants to make this amendment effective retroactive to the 1998 plan year and reallocate the contributions without combining family members' compensation in applying the $160,000 limit. As discussed above, where a plan provision is integral to a qualification change made by SBJPA, the provision cannot be made effective prior to the date the plan was first operated in accordance with the amendment. Therefore, the employer may not make its amendment repealing the plan's family aggregation rules effective for 1998.

- Also, there are situations where an earlier plan amendment may have been required by law or regulation, revenue ruling, notice or other guidance published in the Internal Revenue Bulletin. If this is the case, the plan sponsor cannot rely on the remedial amendment period as a basis for making an amendment retroactively effective.

  For example, generally a plan sponsor cannot make a retroactive amendment to adopt the alternative (SIMPLE) method of satisfying the Code section 401 (k) and (m) nondiscrimination tests added by SBJPA. Similarly, an amendment cannot be retroactive to provide that the determination of the present value of a distribution from a pre-GATT plan (which is made prior to the first plan year beginning after December 31, 1999 and before a plan amendment applying the GATT changes has been adopted and made effective) will be determined using GATT terms.

- Finally, the remedial amendment period cannot be used if an amendment would result in an elimination or reduction of Code section 411(d)(6) protected benefits. In this case a provision cannot be made retroactively effective unless specifically permitted by law or regulations or by revenue ruling, notice or other guidance published in the Internal Revenue Bulletin.

In this regard, the family aggregation rules under Code sections 401 (a)(17) and 414(q) were eliminated by SBJPA for years beginning after December 31, 1996. A plan provision providing for family aggregation would be a disqualifying provision under Code section 401(b) generally because it is integrally related to a qualification requirement of the Code that was changed by SBJPA, effective before 1999. In Rev. Proc. 97-41, the Service stated that a plan amendment eliminating the family aggregation provisions will not violate the requirements of Code section 411(d)(6) if the amendment is effective no earlier than the first day on which the plan was operated in accordance with the amendment, but no earlier than the first day of the plan year beginning after December 31, 1996.

REMEDIAL AMENDMENT PERIOD FOR PLANS WITH EXTENDED RELIANCE

Plans that were submitted to the Service within certain deadlines for determination, opinion, or notification letters under TRA'86 and received favorable letters are entitled to extended reliance. During the period of extended reliance the plan is not required to operationally comply with, or be amended for, regulations or administrative guidance of general applicability issued after the date of the plan's letter which interprets the qualification requirements in effect when the letter was issued.

The extended reliance period continues until the earlier of the last day of the last plan year beginning prior to January 1, 2001, or the date established for plan amendment by any legislation that is effective after the date of the plan's letter. A plan with extended reliance must be amended by the last day of the first plan year beginning on or after January 1, 2001, to the extent necessary to comply with regulations or other guidance issued since the date of the favorable TRA'86 letter. Plan amendments must be made effective no later than the first day of the first plan year beginning on or after January 1, 2001, and no earlier than the first day of the first plan year in which the amendments are adopted.

In the case of pre-approved plans, the amendments may be made effective earlier than the first day of the plan year in which the amendments are adopted.

PLANS TERMINATING DURING THE REMEDIAL AMENDMENT PERIOD

Terminating plans must be amended to meet the qualification requirements in effect at the time the plans are terminated. Although plans may have until the end of their remedial amendment period to be amended for GUST, plans (including pre-approved plans which are terminated after the effective date of changes made to the qualification requirements by GUST) must be amended in connection with the termination to comply with these qualification requirements as of the effective date of the changes.

For this purpose any amendment that is adopted after the date of termination in order to receive a favorable letter will be considered adopted in connection with plan termination. In addition, any annuity contracts distributed from terminated plans must meet all applicable GUST requirements. Also, if applicable, the operational compliance required by section 1465 of SBJPA must be satisfied.

APPLICATIONS FOR DETERMINATION LETTERS

Revenue Procedure 2000-27 provides that effective June 26, 2000, the Service will review applications for determination letters, opinion and notification letter taking into account all of the changes in the qualification requirements made by GUST. This includes the changes that are first effective in plan years beginning after December 31, 1998. This is referred to as a GUST II letter. Announcement 2000-71 provides that letters which are issued with respect to plans for which an application is filed with the Service on or after September 6, 2000 will take into account the final regulations under Code section 411(d)(6).

SUMMARY OF NOTICE 2001-42

Notice 2001-42, 2001-30 I.R.B. 70 provides guidance concerning amendments to plans qualified under sections 401(a) and 403(a) of the Internal Revenue Code related to the Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. 107-16 ("EGTRRA").

Changes made by EGTRRA to the Code provisions related to qualified plans include changes that:

1. Require plan amendment to preserve qualification and
2. Require plan amendment only if the plan sponsor chooses to change the plan.

GUST DETERMINATION LETTER APPLICATIONS DO NOT CONSIDER EGTRRA AMENDMENTS

The purpose of this notice was, among other things, to avoid further delays for GUST amendments (and the determination letter program) and to facilitate timely adoption of EGTRRA plan amendments.

This notice specifically provides that the GUST remedial amendment period for individually designed plans was not being extended due to the passage of EGTRRA.

- Determination, opinion, and advisory letters will not consider the EGTRRA changes. Thus, the GUST determination letter will not extend to amendments incorporating EGTRRA provisions
- The notice requires certain "good faith" amendments to be made to the plan.
- The notice also gives employers an opportunity to retroactively amend their "good faith" EGTRRA amendments by providing a separate, later remedial amendment period for EGTRRA.

Individually designed plans submitted for GUST determination letters may reflect the changes made by EGTRRA. An employer's ability to rely on a favorable determination, opinion, or advisory letter will not be adversely affected by the timely adoption of "good faith" EGTRRA plan amendments.

Pre-approved plans submitted for GUST determination letters may include EGTRRA amendments in the form of a separate, clearly identified addendum to the plan (or basic plan document) and/or adoption agreement that is limited to the provisions of EGTRRA. However, determination letter applications for pre-approved plans that include EGTRRA amendments in a form other than a separate, clearly identified addendum to the plan (or basic plan document) and/or adoption agreement that is limited to the provisions of EGTRRA will be treated as individually designed plans.

PLANS THAT HAVE TO BE AMENDED FOR EGTRRA

EGTRRA, which was enacted on June 7, 2001, includes numerous changes to the qualified plan rules. Almost all of these changes are effective in years beginning after December 31, 2001.

> While many of the changes are not mandatory, a plan sponsor that chooses to implement an optional provision of EGTRRA will have to amend its plan to conform plan provisions to plan operation.

This notice requires a plan to have a "good faith" EGTRRA plan amendment in effect for a year if:

(1) the plan is required to implement a provision of EGTRRA for the year, or the plan sponsor chooses to implement an optional provision of EGTRRA for the year, and

(2) the plan language, prior to the amendment, is not consistent either with the provision of EGTRRA or with the operation of the plan in a manner consistent with EGTRRA, as applicable.

Sample EGTRRA amendments are provided in 2001-57, 2001-38 I.R.B. 279. Plan sponsors can use these sample amendments in drafting their plans. A sample EGTRRA plan amendment, or a plan amendment that is materially similar to a sample EGTRRA plan amendment, will be a "good faith" EGTRRA plan amendment. A plan amendment will not fail to be a good faith amendment merely because it differs materially from the sample amendments. The key is that the amendment must represent a reasonable effort to take into account all the requirements of the statute and must not reflect an unreasonable or inconsistent interpretation of the statute.

"Good faith" EGTRRA plan amendments must be adopted no later than the later of

(1) the end of the plan year in which the amendments are required to be, or are optionally, put into effect or

(2) the end of the GUST remedial amendment period.

In limited situations, earlier amendment may be required to avoid a decrease or elimination of benefits prohibited by Section 411(d)(6).

EGTRRA REMEDIAL AMENDMENT PERIOD

Plan provisions that:

- Are amended by a timely "good faith" EGTRRA plan amendment or
- automatically reflect a statutory EGTRRA change (for example, as a result of permitted incorporation by reference)

have a remedial amendment period ending no earlier than the end of the 2005 plan year in which any needed retroactive remedial EGTRRA plan amendments may be adopted.

EXCERPT FROM EMPLOYEE PLANS NEWS, SUMMER EDITION 2001 REGARDING CERTIFICATION OF INTENT TO ADOPT

The GUST remedial amendment period for a plan generally ends on the last day of the 2001 plan year. However, the period may be extended if the plan is a pre-approved plan (that is, a master and prototype (M&P) or volume submitter plan)or if the employer timely certifies its intent to amend or restate the plan for GUST by adopting a pre-approved plan.

A certification of intent to adopt a pre-approved plan is timely if it is executed no later than the last day of the 2001 plan year. These rules are contained in section 19 of Rev.Proc.2000-20,2000-6 I.R.B.553,as modified by Notice 2001-42,2001-30 I.R.B.70,and in Announcement 2001-12,2001-6 I.R.B.526.

The Service has been asked to provide a sample certification that meets the requirements of Rev.Proc.2000-20.Although the Service ’s procedures do not prescribe a format, the certification should indicate the employer ’s intent to amend or restate a specific plan by adopting a specific M&P or volume submitter specimen plan that was submitted to the Service for a GUST opinion or advisory letter by December 31,2000.The certification must be signed and dated by both the employer and the M&P sponsor or volume submitter practitioner by the last day of the 2001 plan year. The employer should keep the certification with its other plan records. The certification is not binding.

The following sample certification meets the requirements of Rev.Proc.2000-20:

_____*(name, address and EIN of employer)* certifies that it intends to adopt

_____*(name of M&P or volume submitter specimen plan and file folder number, if available)*,sponsored by _____*(name, address and EIN of M&P or volume submitter practitioner)*,as approved for GUST by a favorable opinion or advisory letter. This plan will amend or restate _____*(name and plan number of the employer 's plan being amended or replaced)* and will be adopted within the extended GUST remedial amendment period under Rev.Proc.2000-20 as modified by Notice 2001-42. _____*(name of M&P or volume submitter practitioner)*certifies that an application for a GUST opinion or advisory letter for the M&P or volume submitter specimen plan identified above was filed with the IRS by December 31,2000.

_____
Employer 's signature Date

_____
Sponsor 's or practitioner 's signature Date

The GUST remedial amendment period for a plan generally ends on the last day of the 2001 plan year. However, the period may be extended if the plan is a pre-approved plan.

To be entitled to the extension of the remedial amendment period under Rev.Proc.2000-20, as modified, an employer may be required to request a determination letter within the extended period. In general, this will be the case if the employer 's GUST-amended or restated plan is an individually designed plan or an M&P or volume submitter plan that has been modified in any way other than by the choice of options permitted under the document (See section 19 of Rev.Proc.2000-20 and Announcement 2001-77,2001-30 I.R.B.83, for additional details).

An employer that certifies its intent to amend or restate a plan by adopting a pre-approved plan must include a copy of the certification with any request for a GUST determination letter for the plan that is filed after the end of the 2001 plan year.

EXCERPT FROM EMPLOYEE PLANS NEWS-FALL EDITION—PAGE 11 REGARDING GUST AMENDMENTS

Individualized Amendment of an M&P or Volume Submitter Plan Will Not Make the Plan Ineligible for the Extended GUST Remedial Amendment Period Under Rev. Proc. 2000-20.

This article discusses the effect of Section 19.06 of Rev. Proc. 2000-20, 2000-6 I.R.B. 553. The GUST remedial amendment period generally ends on the later of February 28, 2002, or the last day of the first plan year beginning on or after

January 1, 2001. However, Rev. Proc. 2000-20, as modified by Rev. Proc. 2000-27, 2000-26 I.R.B. 1272, Notice 2001-42, 2001-30 I.R.B. 70, and Rev. Proc. 2001-55, 2001-49 I.R.B. 551, provides an extended GUST remedial amendment period for employers who have adopted, or intend to adopt, M&P or volume submitter plans.

The extended GUST remedial amendment period is available to an employer who, by the later of February 28, 2002, or the last day of the first plan year beginning on or after January 1, 2001, adopts or certifies its intent to adopt a timely-submitted M&P plan or volume submitter specimen plan. In this case, the GUST remedial amendment period for the plan is extended to the later of December 31, 2002, or the last day of the 12th month beginning after the date of the last opinion or advisory letter issued to the M&P plan sponsor or volume submitter practitioner.

An M&P plan or volume submitter specimen plan is considered "timely submitted" if an application for a GUST opinion or advisory letter for the plan was filed by December 31, 2000. The rules described in the preceding paragraph are contained in Section 19 of Rev. Proc. 2000-20. Section 19.06 of Rev. Proc. 2000-20 discusses the effect of the adoption of an individually designed amendment of an M&P or volume submitter plan on the plan's eligibility for the extended GUST remedial amendment period. The text of Section 19.06 follows:

> .06 Certain Employer Amendments Disregarded for Purposes of This Section - An employer that has adopted an M&P plan or a volume submitter specimen plan may have modified the plan in a such a way that the plan, as adopted by the employer, would not be considered an M&P plan or a volume submitter plan. Nevertheless, for purposes of this section, such a plan will be treated as an M&P or volume submitter plan and will be eligible for the remedial amendment period extension provided by this section. For example, an employer may have adopted an individually designed GUST-related amendment to an M&P plan that would have caused the plan to be considered an individually designed plan under Section 5.02 of Rev. Proc. 89-9. Despite the individually designed amendment, the plan will be treated as an M&P plan for purposes of this section.

The Service has been asked if Section 19.06 is intended to be limited to GUST-related amendments, or if it also encompasses other types of amendments that would cause an M&P or volume submitter plan to be treated as individually designed, including amendments adopting provisions not allowed in M&P or volume submitter plans. Specifically, sponsors have asked if the amendment of an M&P plan to adopt a non-uniform allocation formula that is intended to pass

nondiscrimination using cross-testing will make the plan ineligible for the extended GUST remedial amendment period under Rev. Proc. 2000-20.

An M&P or volume submitter plan that has been amended in a way that would cause the plan to be treated as individually designed is still eligible for the extended GUST remedial amendment period under Section 19 of Rev. Proc. 2000-20, regardless of the nature of the modification or whether the modification was adopted subsequent to, or in conjunction with, the initial adoption of the M&P or volume submitter plan. An amendment of an M&P plan to provide for a non-uniform formula is only one example of an amendment that would cause the plan to be treated as individually designed yet not cause the plan to be ineligible for the extended GUST remedial amendment period under Section 19 of Rev. Proc. 2000-20. Other amendments, including amendments adopting provisions not allowed in M&P or volume submitter plans, would be treated in a like manner and thus would not adversely affect a plan's eligibility for the extended GUST remedial amendment period. In addition, the adoption of multiple individually designed amendments will not cause an M&P or volume submitter plan to be ineligible for the extended GUST remedial amendment period.

Although an amendment that would cause an M&P or volume submitter plan to be treated as individually designed will not make the plan ineligible for the extended GUST remedial amendment period, the amendment will nevertheless have the effect of requiring the employer to apply for an individually designed plan determination letter on Form 5300 in order to have reliance. In addition, because a determination letter is required for reliance, pursuant to Section 19.04 of Rev. Proc. 2000-20, the employer must apply for a determination letter within the extended GUST remedial amendment period. Individualized Amendment

SUMMARY

This chapter has summarized the requirements under Code section 401(b) as to when a plan may be retroactively amended and retain its qualified status. The chapter also discussed the effective dates for plan amendments under GUST. Finally, this chapter discussed the timing for amendments when a plan is terminated within its remedial amendment period.