

Part III

Amendment of Qualified Plans for the Economic Growth and Tax Relief Reconciliation Act of 2001

Notice 2001-42

I. Purpose

This notice provides guidance concerning amendments to plans qualified under 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 require plan amendment to preserve qualification and changes that require plan amendment only if the plan sponsor chooses to change the plan.

The effects of this notice are to:

- avoid further delays in amending plans for GUST¹;
- prevent disruption of the GUST determination letter process that has already been undertaken by thousands of plan sponsors;
- facilitate timely adoption of EGTRRA plan amendments;
- ensure that plan terms reflect the actual operation of the plan;
- allow plan sponsors to minimize the cost and burden of adopting EGTRRA plan amendments;
- provide plan sponsors with the opportunity to retroactively amend their good faith EGTRRA plan amendments, if necessary; and
- facilitate the timely amendment of master and prototype (M&P) and volume submitter plans (pre-approved plans) for GUST and EGTRRA.

Specifically, this notice provides the following:

- The GUST remedial amendment period for individually designed plans, which ends on the last day of the 2001 plan year, is not being extended. However, a separate, later remedial amendment period is being provided for EGTRRA.

¹ The term GUST refers to the following:

- the Uruguay Round Agreements Act, Pub. L. 103-465;
- the Uniformed Services Employment and Reemployment Rights Act of 1994, Pub. L. 103-353;
- the Small Business Job Protection Act of 1996, Pub. L. 104-188;
- the Taxpayer Relief Act of 1997, Pub. L. 105-34 (TRA 97");
- the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. 105-206; and
- the Community Renewal Tax Relief Act of 2000, Pub. L. 106-554 ("CRA").

- The GUST remedial amendment period provided to prior adopters of pre-approved plans and employers that timely certify their intent to adopt a pre-approved plan that has been restated for GUST will be treated as not expiring earlier than December 31, 2002. This change will simplify the determination of the GUST amendment deadline for these plans and facilitate timely amendment of the plans for GUST and EGTRRA.
- A plan is required 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.
- Before the end of August 2001, the Service will publish sample EGTRRA plan amendments that plan sponsors and sponsors of pre-approved plans can adopt or use in drafting individualized plan amendments. 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.
- Plan provisions that are amended by a timely good faith EGTRRA plan amendment or that 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.
- 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 411(d)(6).
- Individually designed plans submitted for GUST determination letters may reflect the changes made by EGTRRA. Also, 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, until further notice, determination, opinion and advisory letters will not consider the EGTRRA changes.

II. Background

Section 401(b). Section 401(b) and the regulations thereunder provide a remedial amendment period during which an amendment to a disqualifying provision may be made retroactively effective, under certain circumstances, to comply with the requirements of 401(a). Section 1.401(b)-1(b)(3) authorizes the Commissioner to designate as a disqualifying provision under 401(b) a plan provision that either (1) results in the failure of the plan to satisfy the qualification requirements of the Code by reason of a change in those requirements, or (2) is integral to a qualification requirement that has been changed. Section 1.401(b)-1(c)(3) authorizes the Commissioner to impose limits and provide additional rules regarding the amendments that may be made within the remedial amendment period with respect to a plan provision designated as a disqualifying provision. Section 1.401(b)-1(f) grants the Commissioner the discretion to extend the remedial amendment period.

The GUST Remedial Amendment Period and Determination Letter Program. The remedial amendment period for GUST disqualifying provisions for individually designed plans generally ends on the last day of the first plan year beginning on or after January 1, 2001 (the 2001 plan year). Many sponsors of individually designed plans have already amended or are in the process of amending plans for GUST.

Sponsors of pre-approved plans were required to submit these plans to the Service by December 31, 2000. The Service is currently reviewing and issuing opinion and advisory letters for pre-approved plans that have been amended for GUST. Section 19 of Rev. Proc. 2000-20, 2000-6 I.R.B. 553, as modified by Rev. Proc. 2000-27, 2000-26, I.R.B. 1272, provides an extension of the GUST remedial amendment period for employers that have adopted a pre-approved plan, or certified their intent to adopt a pre-approved plan that has been restated for GUST, by the end of the 2001 plan year. If the requirements for the extension are satisfied, the GUST remedial amendment period for the employer's plan will not end before the end of the 12th month beginning after the date on which the Service issues a GUST opinion or advisory letter for the pre-approved plan.

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.

White Paper on Future Determination Letter Process. The Service is considering the design of the Employee Plans determination letter process and will publish in the near future a white paper that explores some options for long-term changes and alternatives to the current process. Some of the options in the white paper will deal with the timing of plan amendments to comply with law changes and the application of the remedial amendment provisions of 401(b).

III. Remedial Amendment Period for EGTRRA

Designation as Disqualifying Provisions. A plan provision is hereby designated as a disqualifying provision under § 1.401(b)-1(b) if:

- (1) the plan provision either (i) causes the plan to fail to satisfy the qualification requirements of the Code because of a change in those requirements made by EGTRRA or (ii) is integral to a qualification requirement that has been changed by EGTRRA; and
- (2) if a good faith EGTRRA plan amendment is required to be in effect with respect to the provision, the plan provision was added or changed by a good faith EGTRRA plan amendment adopted no later than the later of (i) the end of the plan year in which the EGTRRA change in the qualification requirements is required to be, or is optionally, put into effect under the plan or (ii) the end of the GUST remedial amendment period for the plan.

Extension of the EGTRRA Remedial Amendment Period. The remedial amendment period under § 401(b) for a disqualifying provision described in the preceding paragraph shall not end prior to the last day of the first plan year beginning on or after January 1, 2005 (the 2005 plan year).

Good Faith EGTRRA Plan Amendments. A plan is required 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.

For purposes of this notice, a plan amendment is a good faith EGTRRA plan amendment if the amendment represents a reasonable effort to take into account all of the requirements of the applicable EGTRRA provision and does not reflect an unreasonable or inconsistent interpretation of the provision. A plan amendment that merely incorporates by reference an EGTRRA change in a qualification requirement that would not otherwise be permitted to be incorporated by reference is not a good faith EGTRRA plan amendment.

Section 411(d)(6). Section 411(d)(6) generally prohibits plan amendments that decrease accrued benefits or have the effect of eliminating or reducing an early retirement benefit or retirement-type subsidy, or eliminating an optional form of benefit, for benefits attributable to service before the amendment.

EGTRRA does not provide relief from the requirements of § 411(d)(6) for plan amendments adopted as a result of EGTRRA changes in the plan qualification requirements. Therefore, in order to have a provision effective for a plan year, a plan may have to be amended for provisions of EGTRRA before the time when good faith EGTRRA plan amendments would otherwise be required under this notice. However, a plan amendment that eliminates or decreases benefits that have not yet accrued does not violate § 411(d)(6).

For example, in a top-heavy defined contribution plan, only those non-key employees who are participants and have not separated from service by the end of the plan year must receive the top-heavy minimum benefit. (See § 1.416-1, Q&A M-10.) A benefit that is conditioned on employment at the end of the plan year does not accrue until the participant satisfies the end-of-the-plan-year employment requirement. Thus, the top-heavy minimum benefit in a defined contribution plan that provides minimum contributions only to non-key employees who have not separated from service by the end of the plan year does not accrue until the end of the plan year. A good faith amendment of such a plan that modifies the plan's top-heavy rules in accordance with § 613 of EGTRRA will not result in an impermissible decrease of accrued minimum benefits provided the amendment is adopted before the end of the 2002 plan year.

In a top-heavy defined benefit plan, under § 1.416-1, Q&A M-4, only those non-key employees who are participants and have at least one thousand hours of service for an accrual computation period must accrue the top-heavy minimum benefit for that accrual computation period. (In a top-heavy defined benefit plan that credits benefit accrual service using the elapsed time method described in § 1.410(a)-7, minimum benefits must be credited for all periods of service required to be credited for benefit accrual.) A benefit that is conditioned on completion of one thousand hours of service does not accrue until the participant satisfies the service requirement. Thus, the top-heavy minimum benefit in a defined benefit plan that provides minimum benefits only to non-key employees who have at least one thousand hours of service in an accrual computation period does not accrue until the participant has one thousand hours of service in the period. A good faith amendment of a defined benefit plan that modifies the plan's top-heavy rules in accordance with § 613 of EGTRRA will not be treated as impermissibly decreasing accrued minimum benefits provided the amendment is adopted on or before May 31, 2002 or, in the case of a plan that credits service using elapsed time, March 31, 2002.

Effect of This Section. A plan amendment to a disqualifying provision described in this section III can be made retroactively effective within the EGTRRA remedial amendment period to the extent necessary either to satisfy the qualification requirements as amended by EGTRRA, as interpreted in published guidance, or to make the plan provisions consistent with plan operation. To the extent necessary, such a remedial amendment may be made retroactively effective as of the effective date of the good faith EGTRRA plan

amendment or, where the plan provision automatically reflects the EGTRRA change, as of the effective date of the change.

No Extension of GUST Remedial Amendment Period. The EGTRRA remedial amendment period applies only to disqualifying provisions described in this section. It does not extend the GUST remedial amendment period.

IV. Sample EGTRRA Plan Amendments

Publication of Sample Good Faith EGTRRA Plan Amendments. Before the end of August 2001, the Service will publish sample EGTRRA plan amendments that can be adopted verbatim or used in drafting individualized plan amendments for individually designed and pre-approved plans. The sample EGTRRA plan amendments will be for both the required and optional changes under EGTRRA. Additional guidance on amending pre-approved plans will be included with the sample EGTRRA amendments. 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 for purposes of this notice. However, plan amendments will not fail to be good faith plan amendments merely because they differ materially from the sample EGTRRA plan amendments.

Possible Subsequent Required Amendments. Plans amended by adoption of the sample EGTRRA amendments may have to be amended again within the EGTRRA remedial amendment period to continue to satisfy the plan qualification requirements as amended by EGTRRA.

V. Effect on Determination Letter Programs and Reliance

In General. Until further notice, determination, opinion and advisory letters will not consider and may not be relied on with respect to the EGTRRA changes. However, 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.

Individually Designed Plans. Individually designed plans submitted for GUST determination letters may incorporate the changes made by EGTRRA; however the GUST determination letter will not extend to amendments incorporating EGTRRA provisions.

Pre-Approved Plans. M&P sponsors and volume submitter practitioners may amend pre-approved plans for EGTRRA through the adoption 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. The sample EGTRRA plan amendments will provide additional guidance on the amendment of pre-

approved plans. Until further notice, EGTRRA amendments of pre-approved plans should not be submitted to the Service.

Determination Letter Applications for Pre-Approved Plans. Until further notice, 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.

VI. Extension of 12-Month Period Under Rev. Proc. 2000-20

The extended GUST remedial amendment period available to certain adopters of pre-approved plans is determined by reference to the date on which the Service issues a favorable GUST opinion or advisory letter for the pre-approved plan. Pursuant to this notice, if the requirements of section 19 of Rev. Proc. 2000-20, as modified, and Announcement 2001-77, p.**[INSERT PAGE NUMBER OF ANNOUNCEMENT 2001-77]**, this bulletin, are satisfied, the extension of the GUST remedial amendment period thereunder will be treated as not expiring earlier than December 31, 2002. This change will simplify the determination of the GUST remedial amendment deadline for pre-approved plans and facilitate timely amendment of the plans for GUST and EGTRRA.

VII. Effect on Other Documents

Rev. Proc. 2000-20 and Rev. Proc. 2001-6, 2001-1 I.R.B. 194, are modified.

DRAFTING INFORMATION

The principal drafter of this notice is James Flannery of Employee Plans. For further information regarding this notice, please contact Employee Plans' taxpayer assistance telephone service at (202) 283-9516 or (202) 283-9517, between the hours of 1:30 p.m. and 3:30 p.m. Eastern Time, Monday through Thursday. Mr. Flannery may be reached at (202) 283-9613. These telephone numbers are not toll-free.