

Publications

Checklists For Updating Qualified Plans For EGTRRA And Other Recent Guidance

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SERVICES

The attached checklists identify amendments that must or may be included in IRS-qualified defined contribution and defined benefit plans as a result of changes made by the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), technical corrections made by the Job Creation and Worker Assistance Act of 2002 (JCWAA), the Sarbanes-Oxley Act of 2002, and other regulatory guidance issued in 2002 and 2003. Changes that normally are purely operational in nature, which should not typically require changes to plan provisions, are generally not included. For example, changes made by EGTRRA to the defined benefit plan funding and employer deduction rules are not covered, as such rules are not commonly described in plan documents. The checklists generally only cover provisions that are effective for 2002 and 2003. Accordingly, possible provisions for Roth 401(k) plans (effective for 2006) and the July 2003 proposed 401(k)/(m) regulations are not covered.

Generally, pursuant to IRS Notice 2001-42, an EGTRRA “good faith” plan amendment must be timely adopted in order to rely on the EGTRRA remedial amendment period, which extends to (at least) the end of the 2005 plan year. A “good faith” plan amendment includes the proper adoption of the IRS’ sample amendments (see Notice 2001-57), plan amendments that are materially similar to the sample amendments, or plan amendments that are not materially similar to the sample amendments if they represent a reasonable effort to take into account all of the applicable EGTRRA requirements and do not reflect an unreasonable or inconsistent interpretation of the provision.

To be timely adopted, “good faith” EGTRRA amendments must be adopted by the later of (1) the end of the plan year in which the EGTRRA amendments are required to be, or are optionally, put into effect, or (2) the end of the GUST remedial amendment period (this includes the 91 day period following issuance of a favorable GUST letter). (Victims of Hurricane Isabel were granted a one-month extension of the

GUST remedial amendment period that would have ended on or after September 18, 2003 – the new deadline is November 18, 2003.) Accordingly:

- most individually designed plans needed to be amended in some manner by the end of the 2002 plan year (or, if later, the end of the 91st day after the date of the GUST letter);
- pre-approved plans (M&P and volume submitter plans) that don't file for GUST letters had until September 30, 2003 (or, if later, the end of the 12th month period following the plan sponsor's GUST opinion or advisory letter); and
- pre-approved plans have until January 31, 2004 to timely file for a GUST determination letter, and therefore have until the end of the 91st day following the date of the GUST letter to adopt a "good faith" EGTRRA amendment.

While plans may not be amended until the end of such period, they must still be operated in accordance with provisions that become effective before that time. Moreover, plan operation must be consistent with published guidance beginning no later than the effective date of the guidance. Although further amendments will not be required until the end of the EGTRRA remedial amendment period, when the plan is amended, the amendments must reflect the original effective date of the change in the law and any interim or transition provisions that were followed during the applicable period.

Although the deadlines for adopting "good faith" EGTRRA amendments are as described above, there is no anti-cutback relief for these amendments. Therefore, in some situations, earlier plan amendments may be required to avoid any prohibited decrease or elimination of protected benefits. For example, depending on plan terms,

- A top-heavy DC plan that conditions benefits on employment at the end of the plan year should adopt a "good faith" top-heavy amendment before the end of the 2002 plan year. See Notice 2001-42.A
- top-heavy DB plan that conditions benefits on completion of 1000 hours of service in the plan year should adopt a "good faith" top-heavy amendment on or before May 31, 2002 (or March 31, 2002 for elapsed time plans). See Notice 2001-42.
- A plan that incorporates the section 401(a)(17) compensation limit by reference, but (1) does not wish to apply the \$200,000 cap to pre-2002 years, and/or (2) wants to limit the amount of compensation taken into account under the plan's allocation formula, should be amended before the 2002 plan year begins to avoid cutback issues.
- A defined benefit plan that incorporates the 415 limits by reference, and that wishes to limit benefits to the pre-EGTRRA 415 limits, should be amended before June 30, 2002.
- A plan that incorporates the in-service distribution restrictions by reference to Code section 401(k)(2), and that wishes to limit distribution rights to those in existence before EGTRRA (i.e., "same desk" restriction), should be amended before January 1, 2002 to avoid a potential cutback.

Revenue Procedure 2003-44 (EPCRS) provides that late EGTRRA amenders may apply for correction statements.

The IRS has not yet opened up the determination letter process for amendments related to EGTRRA, but their adoption will not impact GUST filings or letters. Any pre-approved (M&P or volume submitter) plan must adopt the EGTRRA amendments as a separate, clearly identified addendum; otherwise, the plan will be treated as an individually designed plan. Although this same approach is not required for individually designed plans, we recommend that such plans follow this approach because it is simple to implement and enables plan sponsors to avoid extensive details that could conflict with subsequent IRS guidance.

In addition to the EGTRRA amendments, plans will generally have to adopt the following amendments by the end of the GUST remedial amendment period: (1) section 132(f)(4) deferral, (2) new mortality table set forth in Rev. Rul. 2001-62 (for defined benefit plans), (3) minimum required distribution amendments (for defined contribution plans), and (4) deemed 125 compensation (if applicable). Also, recent guidance on loans, catch-up contributions, deemed IRAs, 204(h) notices, and retroactive annuity starting dates may require plan amendments in 2003. See attached charts for specific amendment deadlines.

[Checklist Of Required And Optional EGTRRA Amendments And Other Recent Guidance For Qualified Defined Benefit PlansDownload](#)

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