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Defined Contribution Plan Amendments from GUST to WRERA

by William C. Grossman, QPA

Prior to the GUST document, qualified plans generally operated in a simpler world in which law changes and regulatory changes did not often require an amendment.

Generally, a qualified plan simply operated under a law change as of the applicable effective date and incorporated the law into the document when the IRS next required a full restatement. Terminating plans were the exception as at the time of the termination the plan was required to be amended to incorporate all the changes since the last restatement as part of the termination process. There were occasional exceptions, such as the amendment for the Unemployment Compensation Amendment Act (UCA) of 1992's eligible rollover distribution rules and the snap-on for the OBRA '93 compensation cap amendment. Luckily, for some vendors, an amendment, such as for UCA, was able to be included in the 1993 IRS preapproved document as it was being finalized. Thus, for those plans, when auditors looked for an amendment for UCA '92, the auditor was able to be shown that it was already in the '93 preapproved plan document.

Snap-on Amendments

The era of the GUST restatement (circa 2001-2003) saw the beginning of the increase of "snap-on" amendments, whereby plans were required to add an amendment for law changes and regulation changes as they occurred, versus operating under the law until the next restatement. By 2009, we have become accustomed to living with recurring "snap-on" amendments and look forward to when they can be sponsor level amendments versus employer-by-employer signature required amendments.



Unfortunately, for the employer (who is really just trying to provide a benefit to his or her employees), "snap-on" amendments add complications and often involve fees for the additional services required. Both the GUST and EGTRRA preapproved defined contribution plans have not seemed to be "preapproved documents" because each came with at least one or two "snap-on" amendments. [GUST was accompanied by an EGTRRA good-faith "snap-on" amendment and before the GUST deadline, there was also a required minimum distribution (RMD) final regulation "snap-on." The EGTRRA prototype document has a "snap-on" amendment for the Pension Protection Act of 2006 (PPA) and a separate amendment for the final 415 regulations.]

It seems we are at the point where offering a new "IRS preapproved plan document" for the employer to adopt, without a "snap-on" or two amending the brand-new "preapproved" document, might never be possible.

Chart of Defined Contribution Plan Amendments Since the GUST Document

Amendment	Usage	Deadline	Type
Community Renewal Tax Relief Act	Salary reduction amounts under 132(f)(4) must be included	First plan year beginning after December 31, 2000	Interim
2001 Proposed RMD Regulations	Needed if 2001 Pro. RMD Regs used in 2001 or 2002	By end of year used, <i>i.e.</i> , 2001 or 2002	Discretionary
125 Cafeteria Amendment	Needed if a §125 plan also exists	By the end of the 2002 plan year	Integral
EGTRRA Good Faith Amendment	All qualified plans	By later of last day of 2002 plan year or the end of the GUST RAP	Interim
RMD Amendment	All DC, 403(b) and IRA	By the end of 2003	Interim
Deemed IRA	Optional	By the end of the plan year in which deemed IRA contributions are first accepted	Discretionary
Roth Amendment	Optional	By the end of the plan year in which Roth 401(k) contributions are first accepted, starting with 2006. Notice 2005-95 and 2006-44	Discretionary
Automatic Rollover	Required for all plans using involuntary cash-out	Later of December 31, 2005 or tax filing deadline for plan year that included March 28, 2005	Integral
401(k) and 401(m) Final Regulations	Required for all 401(k) and (m) plans. Also required for plans that have hardship: <i>i.e.</i> , profit sharing plans and 403(b) plans	Generally by the end of 2006	Interim
401(k) and 401(m) Final Regulations	For profit sharing with hardship	Generally by the end of 2006	Integral
KETRA, GOZA	Plans incorporating the hurricane provisions	By the end of the 2007 plan year	Discretionary
Notice 2005-70	IRS agency relief for Hurricane Katrina	By the end of the 2006 plan year	Discretionary
Final 415 Regulations	All qualified plans	Last day of the first limitation year starting with limitation years beginning on or after July 1, 2007	Interim
PEO-sponsored Plans	PEO multiple employer DC plans must meet exclusive benefit rule by amendment to plan or restatement onto individual plan for each employer	Rev. Proc. 2002-21 and Rev. Proc. 2003-86 detailed the process and provided deadline as of the end of the EGTRRA RAP	Interim
EGTRRA Restatement	All qualified plans	EGTRRA restatement cycle set forth in Rev. Proc. 2007-44	Restatement
Job Creation and Worker Assistance Act of 2002 (JCWAA) <i>(Though not a plan amendment, note the point under the deadline column.)</i>	Clarified catch-up provisions; Ordering of pre and post tax amounts distributions; Deduction limit for combined DB/DC plans doesn't apply if only DC amounts are elective deferrals (no employer amounts); Top heavy distributions taken into account for only one year after termination of employment	Small business tax credit for new plan expenses only applicable for the new plans first effective after 2001. Plans with an effective date before 2002 are not entitled to this.	Amendment not required
PPA Amendment	All qualified plans	By the end of the 2009 plan year	Interim
HEART Amendment	All qualified plans	By the end of the 2010 plan year	Interim
EESA	Plans incorporating the EESA Midwest Disaster Relief Provisions (Similar to KETRA provisions)	By the end of the 2010 plan year	Discretionary
WRERA	All affected DC plans	By the end of the 2011 plan year	Interim

Note: Governmental plans generally have two years beyond the deadlines stated above, except for WRERA, for which they have one year.

There is currently a growing list of pending and optional “snap-ons” to the “preapproved plan,” such as for PPA, 415, HEART, EESA and WRERA. (See the section on Laws Since EGTRRA.)

Congress, unlike the IRS, has provided lengthier deadlines to adopt “snap-on” amendments that are needed due to legislative changes. For example, PPA was enacted in 2006 with provisions effective on various dates ranging from before enactment through 2009. However, Congress wrote that plans were not to be amended for PPA until the last day of the 2009 plan year. Thus, Congress was having the employer operate the plan in compliance with the law for years prior to 2009 without a “snap-on” amendment.

GUST Restatement Deadline

February 28, 2002 was the GUST restatement deadline for individually designed documents. For preapproved plan documents that were on a mass submitter list as of December 31, 2000, the deadline was extended more than once so that the preapproved plans needed to be restated onto a GUST document by September 30, 2003. As a last possible extension, Rev. Proc. 2003-72 provided the ability for non-amenders to adopt a preapproved plan by January 31, 2004, provided that the plan was submitted to the IRS for a determination letter with a fee of \$250.

Post-GUST Required Amendments

Community Renewal Tax Relief Act

The Community Renewal Tax Relief Act of 2000 (CRA) requires plans to be amended to include qualified transportation fringe benefits. This provision needs to be included in the definition of compensation in the plan document. The relevant Internal Revenue Code citation is 132(f)(4). Although this amendment is listed as a post-GUST amendment, it was able to be included in certain GUST preapproved documents. To see if it is in a preapproved document, look at the definition of compensation to see if Code Section 132(f)(4) is referenced.

EGTRRA Good-faith Amendment

IRS Notice 2001-42 required that all qualified plans adopt a good-faith EGTRRA amendment generally by the end of the GUST restatement deadline.

Required Minimum Distribution Final and Temporary Regulation Amendment

The final and temporary required minimum distribution regulations were required to be used to calculate the 2003 distribution calendar year minimum distributions for defined contribution plans, 403(b)s and IRAs. Temporary defined benefit rules were incorporated in these regulations although the final defined benefit regulations were not issued for another two years and will be part of the EGTRRA DB restatement. The defined contribution RMD regulation amendment had to be added to DC plans by the end of the 2003 plan year.

Automatic Rollover Amendment

EGTRRA required involuntary cash-out amounts between \$1,000 and \$5,000 to be rolled into an IRA instead of being paid out in cash in order to prevent leakage of retirement plan assets over time. The DOL issued final regulations effective March 28, 2005. Plans needed to be amended to add these automatic rollover rules by the later of December 31, 2005 or the tax filing deadline for the plan year that included March 28, 2005.

401(k) and (m) Final Amendment

The final 401(k) and (m) regulations were issued on December 29, 2004 and were effective for plan years beginning on or after January 1, 2006 (early implementation was available). The regulations were issued just in time to be incorporated in the preapproved EGTRRA defined contribution plan document. The amendment affected 401(k) plans and plans permitting hardship distributions, such as 403(b) plans and some profit sharing plans. The deadline for the amendment was generally the end of the 2006 plan year.

Final 415 Regulations

The final 415 regulations affected the definition of compensation. The amendment was due by the end of the limitation year beginning on or after July 1, 2007. This amendment is unusual in that the effective date is based on the limitation year rather than the plan year, tax year or calendar year. The timing of this amendment created a need for it to be added to the GUST preapproved plan just before the EGTRRA restatement was made. Without clear guidance, it is wise to also add this amendment to the EGTRRA preapproved plan.

Post-GUST Optional Amendments

2001 Proposed RMD Regulations

The proposed RMD regulations were optional regulations, and for the year 2001, the plan sponsor had the choice of using either the 1987 proposed regulations or the new 2001 proposed regulations. For 2002, the plan sponsor had the optional choice of using either the 1987 or 2001 proposed regulations or 2002 final RMD regulations. The 2001 proposed regulations only needed to be adopted if they were used to calculate the RMDs for either the 2001 or 2002 distribution calendar year.

Deemed Section 125 Cafeteria Amendment

Revenue Ruling 2002-27 had very limited application, but required an amendment for those few employers to which it applied. The Rev. Rul. provides that an employer may “deem” an amount to be excluded under IRC Section 125 if an employee does not have an opportunity to elect cash in lieu of group health coverage because the employee cannot certify that he or she has other health coverage. Thus, the cash-out amount could be included in compensation (just as other amounts that are excluded pursuant to IRC Section 125 can be included in compensation).

Deemed IRA

This EGTRRA-created optional plan provision was first available in 2003 and the amendment to add this provision needs to be made by the end



of the year in which the Deemed IRA was first utilized. IRS Proposed Regulations issued May 20, 2003 and final and temporary regulations issued July 14, 2004.

Designated Roth

This EGTRRA-created optional plan provision was first available in 2006 and the amendment to add this provision needs to be made by the end of the year in which the Designated Roth was first utilized.

KETRA, GOZA

These laws permitted special rules for loans, distributions and rollovers for qualified individuals in qualified plans that adopted these provisions. The amendment was due by the end of the 2007 plan year. Notice 2005-95.

Notice 2005-70 Katrina Relief

Notice 2005-70 preceded KETRA and permitted special distribution provisions for qualified individuals in qualified retirement plans. The amendment was due by the end of the 2006 plan year.

EGTRRA Document Restatement

Provided a good-faith EGTRRA amendment was timely adopted (see above), plans must be restated for EGTRRA in accordance with the five and six-year restatement cycles in Rev. Proc. 2007-44 (which was initially contained in Rev. Proc. 2005-66). These procedures also introduced the interim amendment process and created the new categorization of plan amendments (see below). As part of this process, the IRS announced that the deadline for employers adopting an EGTRRA preapproved defined contribution plan is April 30, 2010.

Laws Since EGTRRA

JCWAA

The Jobs Creation and Workers Assistance Act of 2002 (JCWAA) contained the technical corrections to EGTRRA and did not require a separate amendment. However, recently IRS auditors have been seeking a change in the good-faith EGTRRA amendment wording of separation from service to severance of employment. This may seem strange as the IRS model good-faith amendment for EGTRRA in IRS Notice 2002-57 used the term separation from service and there was no further IRS guidance requiring this wording to be changed. Nonetheless, it is suggested that the good-faith amendment be amended if an IRS auditor requests it.

PPA, HEART, EESA, WRERA

The Pension Protection Act of 2006 (PPA) is required to be amended into the plan document for the 2009 plan year. Although the Heroes Earnings Assistance and Relief Tax Act of 2008 (HEART) amendment is not due until the 2010 plan year, plans are incorporating provisions of HEART at the same time as PPA. Although the Emergency Economic Stabilization Act of 2008 (EESA) amendment is not due until the 2010 plan year, plans are incorporating provisions of EESA at the same time as PPA. An amendment for the Required Minimum Distribution suspension provision contained in the Worker, Retiree, and Employer Recovery Act of 2008 (WRERA) is not due until the 2011 plan year; however, we await IRS guidance on the scope and timing of the amendment.

New Names for Types of Amendments

Under the IRS Revenue Procedures dealing with restatement cycles and interim amendments (2005-16, 2005-66, 2007-44), amendments have been categorized by new names. Specifically, amendments required due to law regulation change are interim amendments. Amendments made at the option of the employer are discretionary amendments.

EPCRS Non-amender Process

In 2008, the IRS updated the Employee Plans Compliance Resolution System (EPCRS) (Rev. Proc. 2008-50). With the establishment of remedial amendment cycles (initially under Rev. Proc. 2005-66 and then updated under Rev. Proc. 2007-44), interim (previously referred to as required) and discretionary amendment rules were formally made part of the on-going restatement procedures. Rev. Proc. 2008-50 added a category of failures to amend a plan document, consisting of discretionary amendments for law changes that are optional for plans to adopt.

EPCRS 12.03 VCP for non-amender failures are subject to the normal fee schedule based on the number of participants in the plan for a restatement that was not done during the remedial amendment period. If the restatement is made during the first 12 months after the RAP has passed, the penalty is 50% of the amount on the schedule.

A certain amount of confusion exists about whether a particular amendment is interim or discretionary, therefore the IRS decided to apply the same rules to both categories of amendment failures. EPCRS gives an employer until the end of the remedial amendment cycle to correct good faith, discretionary and interim non-amender

Fee Schedule for Non-amenders

Number of Participants	EGTRRA/ Subsequent Legislation	GUST/ 401(a)(9) Regs	UCA/OBRA '93	TRA '86	TEFRA/ DEFRA/ REA	ERISA
20 or fewer	\$ 2,500	\$ 3,000	\$ 3,500	\$ 4,000	\$ 4,500	\$ 5,000
21 - 50	\$ 5,000	\$ 6,000	\$ 7,000	\$ 8,000	\$ 9,000	\$ 10,000
51 - 100	\$ 7,500	\$ 9,000	\$ 10,500	\$ 12,000	\$ 13,500	\$ 15,000
101 - 500	\$ 12,500	\$ 15,000	\$ 17,500	\$ 20,000	\$ 22,500	\$ 25,000
501 - 1,000	\$ 17,500	\$ 21,000	\$ 24,500	\$ 28,000	\$ 31,500	\$ 35,000
1,001 - 5,000	\$ 25,000	\$ 30,000	\$ 35,000	\$ 40,000	\$ 45,000	\$ 50,000
5,001 - 10,000	\$ 32,500	\$ 39,000	\$ 45,500	\$ 52,000	\$ 58,500	\$ 65,000
More than 10,000	\$ 40,000	\$ 48,000	\$ 56,000	\$ 64,000	\$ 72,000	\$ 80,000

failures. Employers can voluntarily correct these failures under the Voluntary Correction Program (VCP) or as part of the Audit Closing Agreement Program (Audit CAP). Under VCP, the correction fee is \$375 for a plan of any size. An employer is permitted to correct these types of failures by amending its plan to reflect the actual operation of the plan, rather than having to change its plan operations to reflect what the plan says.

Under EPCRS, there are certain situations that will require employers to submit requests for determination letters in order to correct a failure. Determination letter requests are not required when employers correct failures to adopt discretionary amendments. A determination letter application will be required if a plan failed to adopt a required amendment. Failing to amend for GUST and failing to amend during a plan's assigned remedial amendment cycle will also require the employer to submit a determination letter request when correcting the failures under VCP or Audit CAP.

Interim Plan Amendments

IRS now defines interim amendments to include:

- amendments required to be made to a plan as a result of changes to qualification requirements that are effective after December 31, 2001; and
- integral amendments—amendments that a plan sponsor chooses to adopt that are integral to both a change in the qualification requirements and to a plan provision that is required to be amended as a result of a change to the qualification requirements.

As with the EGTRRA good-faith amendment requirement, the effect of timely adopting an interim amendment that is adopted in good faith with the intent of maintaining qualified status is the eligibility of the employer for an extended remedial amendment period (RAP)—to the end of the plan's applicable remedial amendment cycle (cycle)—in which to correct good faith mistakes in the plan document related to such amendments.

Discretionary Amendments

Discretionary amendments are plan amendments other than interim amendments. Discretionary plan amendments include:

- amendments that a plan sponsor adopts as a result of a change in the qualification requirements that are neither required nor integral, and
- amendments made to a plan that are not related to a change in the qualification requirements.

For more information on Nonamenders and the Voluntary Correction Program (VCP), visit www.irs.gov/retirement/article/0,,id=205524,00.html.

Fees for Non-amenders

Rev. Proc. 2006-27 introduced the above reduced fee schedule for use when the IRS finds an amendment missing when an employer submits for a determination letter. This schedule has been carried forward into Rev. Proc. 2008-50. Frequently, an employer is unaware that an amendment is missing until its plan is submitted for a determination letter and the IRS discovers that an earlier amendment is missing. Under the updated EPCRS, a new fee schedule will apply. The penalties are greater than those imposed by the VCP submission schedule but fewer than those under the Audit Cap program. The penalty schedule is tiered according to number of participants and has a separate fee for each amendment that may be missing. ↗



William C. Grossman, QPA, ERPA, is the director of education and communications at McKay Hochman Co., Inc. in Butler, NJ. Bill is also the editor of E-mail Alert, mhco.com, Retirement Plan News, Prototype Plan News and 403(b) Perspectives. (bgrossman@mhco.com)