Department of the Treasury
Internal Revenue Service

memorandum

date: December 19, 2003

to: Manager, EP Determinations
Manager, EP Determinations Quality Assurance
Director, EP Examinations

from: Director, EP Rulings and Agreements */s/ Paul T. Shultz*

re: Technical Assistance on Timing of EGTRRA Amendments

This memorandum provides general technical assistance regarding the effect of restating a qualified plan for GUST after the plan has been amended for EGTRRA. The guidance in this memo should be followed in resolving issues that may be identified in the course of a determination or examination.

Background

Notice 2001-42, 2001-2 C.B. 70, provides generally that good faith plan amendments for the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) must be adopted by the later of the end of the plan year in which the EGTRRA amendments are effective or the end of the GUST remedial amendment period. However, as explained in Notice 2001-42, EGTRRA does not provide relief from the anti-cutback prohibition of section 411(d)(6) of the Internal Revenue Code for plan amendments adopted as a result of EGTRRA changes in the plan qualification requirements. In some cases, therefore, in order to make an EGTRRA change effective for a plan year, a plan may have to be amended for the change before the time when good faith EGTRRA plan amendments would otherwise be required to be adopted. For example, EGTRRA made changes affecting the determination of whether a plan is top-heavy. As a result, a plan that would be top-heavy for 2002 under pre-EGTRRA law may not be top-heavy for 2002 under EGTRRA. In order for the EGTRRA changes to the top-heavy rules to be made effective under such a plan for 2002, a plan amendment reflecting the changes would have to be adopted before the minimum benefit determined under the plan's pre-EGTRRA terms accrues, i.e., the last day of the 2002 plan year, in the case of a defined contribution plan. The increase in the compensation limit under section 401(a)(17) in a defined contribution plan is an example of another EGTRRA change that might have to be adopted before the time EGTRRA good faith plan amendments would otherwise be required to be adopted.

Thus, some plan sponsors adopted EGTRRA good faith plan amendments before amending their plans for GUST. Adopters of pre-approved (M&P and volume submitter) plans that have an extended GUST remedial amendment period may be more likely to have done this than adopters of individually designed plans. We have learned that a number of these plan sponsors have subsequently adopted GUST plan restatements that do not incorporate or otherwise reflect the previously adopted EGTRRA good faith plan amendments. We have received several inquiries as to whether, in these cases, the Service would require the plan sponsors to readopt their previously adopted EGTRRA amendments.

Issues and Analysis

If a GUST plan restatement is treated as superseding previously adopted EGTRRA plan amendments because the restatement does not incorporate or otherwise reflect those amendments, significant adverse consequences may ensue. For example, the restatement may result in violations of qualification requirements, including the requirement to operate a plan in accordance with its terms and the prohibition on elimination or reduction of benefits protected by section 411(d)(6). Even if the plan has a remedial amendment period that would permit the reinstatement of the prior EGTRRA plan amendments on a retroactive basis, readoption of the EGTRRA plan amendments would also violate section 411(d)(6) if the readoption reduced the benefits of those participants whose benefits would be greater under the GUST restatement without the EGTRRA plan amendments. There may also be problems related to plan funding and deductions that have been based on the EGTRRA plan amendments.

Although a plan restatement generally supersedes prior versions of the plan, including all amendments thereto, as of the effective date of the restatement, in many cases there may be ambiguity as to the effect of a GUST restatement that does not incorporate or otherwise reflect previously adopted EGTRRA plan amendments. For example, a GUST restatement will frequently have a general effective date that precedes the effective date of the previously adopted EGTRRA plan amendments. Moreover, the previously adopted EGTRRA plan amendments may include a provision that resolves any inconsistencies between the plan and the amendments in favor of the amendments.

We also recognize that, absent other facts that would lead to a contrary conclusion, the failure to incorporate the previously adopted EGTRRA plan amendments does not establish an intent to supersede those amendments. Rather, the adoption of the EGTRRA plan amendments evidences an intent to comply with Notice 2001-42, which requires a mandatory good faith EGTRRA plan amendment to remain in effect until the end of the EGTRRA remedial amendment period. Notice 2001-42 also requires an optional good faith EGTRRA plan amendment to be in effect each year in which the plan sponsor chooses to operate the plan in a manner consistent with the optional provision of EGTRRA. Consequently, the continued operation of a plan in a manner that is consistent with the EGTRRA plan amendments is evidence that the GUST

restatement is not meant to supersede the previously adopted EGTRRA plan amendments.

Conclusion

In view of the above considerations, a GUST plan restatement should not be treated as superseding previously adopted EGTRRA plan amendments that are not incorporated or reflected in the restatement provided the plan is operated in a manner consistent with the EGTRRA plan amendments. For this purpose, a plan should be presumed to be operating in compliance with the EGTRRA plan amendments in any case (such as a determination letter application) in which the operation of the plan cannot be determined. This guidance applies for all purposes, including the determination of plan qualification, funding requirements, and deductions.