CHAPTER 1-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, and the Internal Revenue Service Restructuring and Reform Act of 1998. These acts are hereinafter referred to collectively 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 plan sponsor to maintain the qualified status of its plans, but will result in plan amendments by plan sponsors wishing to take advantage of new provisions. Plan provisions which sponsors are required to amend and plan provisions which sponsors are permitted to amend pursuant to 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). In general, plan sponsors have a remedial amendment period under section 401(b) with respect to certain amendments under GUST through the last day of the first plan year beginning on or after January 1, 2001. The amendment of the plans therefore is not required prior to the last day of the plan's 2001 plan year.

This Chapter provides an overview of the requirements under Code section 401(b) as they apply to plan amendments for GUST, 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 plan amendments for changes made by GUST.

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 from a position with the employer 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 pension, profit-sharing and similar benefits (under defined benefit or defined contribution plans) that would have been received but 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 that gave plan sponsors a streamlined way to amend their plans to comply with the requirements of USERRA and Code section 414(u). Rev. Proc. 96-49 also provided that plan amendments to reflect the provisions of USERRA and Code section 414(u) generally would not be required to be made 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 the determination of the present value of a participant's benefits were generally effective for plan years beginning after December 31, 1994. GATT 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, which 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, under GATT, plan 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 would not be 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), relating to certain actuarial assumptions that must be taken into account for purposes of 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 plan sponsors to delay the implementation of the changes to Code section 415(b)(2) (E).

A pre-GATT plan is not required to apply the changes to section 415(b)(2)(E) to benefits accrued before the earlier of the date a plan 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 to adopt certain GATT changes in an amendment that was 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 to Code sections 401(a) including changes to 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 that plans could comply with the 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 certain changes under SBJPA, the amendment is not required to be made 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 the SBJPA change during the period from the effective date of the SBJPA change to the time the plan amendment is required and if the amendment is made retroactively to the date on which the provision is effective with respect to 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 plan 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 for example, the change in the cash-out threshold noted above) by providing that the plans will not be treated as failing to follow plan terms if plan 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 essentially 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.

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 requirements of the Code. In general, Code section 401(b) and Internal Revenue Regulations section 1.401(b)-1, provide that a plan which does not satisfy the Code requirements because of disqualifying provisions shall be considered as satisfying such Code 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 all purposes for the whole period of the disqualifying provisions.

Disqualifvinq 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 made effective. A disqualifying provision also includes a plan provision that results in the failure of the plan to satisfy the qualification requirements by reason of a change in those requirements effected by amendments to the Code, that 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 Code section 401(b), and to enable the Commissioner to provide appropriate relief concerning the timing of plan amendments relating to changes to the plan qualification rules made by GUST, as well as other plan amendments that may be needed as a result of 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 with respect to disqualifying provisions during the remedial amendment period.

The purpose of these changes in the regulations may be understood in the context of the types of changes made to the qualification requirements by GUST. Generally, 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 plan 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, even though plans were not required to amend for these changes to maintain qualification. This was accomplished by, in general, 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, with respect to the disqualifying provision, the plan was required to operate in accordance with the plan provision as of its effective date with respect to the plan.

In addition to changes that result in the disqualification of the plan if not timely amended, GUST also provided for a significant 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 of the Code that has been changed. Under the amended regulations, the Commissioner may designate these provisions as disqualifying provisions and allow plan amendment 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 provided the plan is amended to comply with those requirements by the last day of the remedial amendment period with respect to the disqualifying provision, and further provided that the amendment is made retroactively effective 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.

- In the case of an amendment to an existing plan, the remedial amendment period begins on the date the plan 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 such 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 the requirements of Code 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 Code 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, and whether or not a plan is maintained solely by an affiliated group of corporations (within the meaning of Code section 1504) which files a consolidated income tax return pursuant to Code section 1501 for a taxable year that includes the remedial amendment period beginning date as determined above, such plan is deemed to be maintained by one employer.

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 with respect to 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 with respect to such request for a determination letter is issued by the Service, the request is withdrawn, such 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.

Discretionarv Extension of Remedial Amendment Period

Generally, once the remedial amendment period has expired, amendments of a plan 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 at his discretion, the Commissioner may extend the remedial amendment period or may allow a particular 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 end of the time 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 the 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 retroactive amendments are made after the expiration of the remedial amendment period.

For example the qualification changes made by the GUST may require plan amendments to be made retroactively effective for several years preceding the end 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 plan amendments as a result of changes made by GUST, 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 being 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 pension, profit-sharing and stock bonus plans qualified under Code section 401(a) or 403(a), and tax-sheltered annuity plans under Code section 403(b), with respect to the date they must adopt amendments to comply with changes in the law made by SBJPA, GATT, and USERRA.

In general, the revenue procedure established a single deadline for sponsors for adopting SBJPA, GATT and USERRA amendments for their qualified plans. The revenue procedure provided that the deadline would be the same as the date by which certain plans that have extended reliance on Tax Reform Act of 1986 determination 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 authority of regulation. 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 to the Code 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 are considered to include Code section 414(u) and USERRA.

With respect to 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 added to reflect 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 as in effect before 1997. (Under some circumstances, this amendment may be required because the continued application of the family aggregation provisions in the operation of the plan would result in disqualification.)
- A change to a plan provision to make a top-paid group election or calendar year data election in determining the status of an employee as highly compensated.

Note: All of the above were discussed in greater detail in the chapters of 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 taking into account 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 pursuant to 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 the provision 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 the regulations for Code section 401(a)(4) 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. This extension in Rev. Proc. 99-23 also extended the deadline for adopting plan amendments applying the changes under Code section 415(b)(2)(E), and the deadline for adopting a plan

amendment repealing a pre-August 20, 1996, GATT plan amendment, thereby permitting the earlier plan amendment to be disregarded in applying section 767(d)(3)(A) of GATT, as 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 plan 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 plan provisions must be effective no earlier than the first day of the first plan year beginning after December 31, 1998. Thus, 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 plan provisions integral to the requirements of Code 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 the change made by 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 a plan amendment may be adopted at any time 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 plan 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 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 nonelecting church plans to the last day of the first plan year beginning on or after January 1, 2000. Nonelecting 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 nonelecting 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 plan provision that 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 that 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 plan provision may not be effective earlier than the first day on which the plan was operated in accordance with the amended provision.

Revenue Procedure 2000-20

Rev. Proc. 2000-20, 2000-6 I.R.B. 533, gives employers 12 months after a master and prototype (M&P) plan or a volume submitter plan is approved for GUST to adopt the approved plan. Employers are eligible for this 12-month period if they satisfy the following conditions:

The employer adopts an M&P plan or volume submitter specimen plan before the end of the GUST remedial amendment period; or

(1) before the end of the GUST remedial amendment period, the employer and an M&P plan sponsor or a volume submitter practitioners execute a written certification that the employer intends to amend or restate its

plan by adopting the GUST approved M&P or volume submitter specimen plan; and

(2) the sponsor or practitioner submits an application for a complete GUST opinion or advisory letter for the M&P plan or volume submitter specimen 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 M&P or volume submitter specimen 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 prototype or volume submitter plan currently in effect before the end of the remedial amendment period and not necessarily the prototype or volume submitter plan adopted for the requirements of GUST.

For example, if Flexiplace 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 Flexiplace 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 prototype or volume submitter 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 prototype or volume submitter specimen plan document of a prototype or volume submitter sponsor or practitioner will be deemed to have adopted each other prototype or volume submitter specimen 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, provided it is submitted by December 31, 2000.

For example, (considering the extension of the remedial amendment in Rev. Proc. 2000-27 below) 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 expire 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).

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 and Announcement 2000-77.

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 for purposes of the time by which employers must either adopt an M & P or volume submitter plan or certify their intent to adopt a GUST-approved M & P or volume submitter plan in order 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 nonelecting 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 nonelecting church plans now each have a single amendment deadline for all GUST and TRA'86 plan amendments, including, in the case of nonelecting church plans, amendments relating to the nondiscrimination requirements.

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

Rev. Proc. 2000-27 also opens the determination letter program to allow the Service to issue determination letters that cover all of the changes to the qualification requirements made by GUST, 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 the changes in the qualification requirements made by GUST other than those changes made by SBJPA that are first effective in plan years beginning after December 31, 1998.
>
> A GUST II ruling takes into account all of the GUST changes, including the changes made by SBJPA that are first effective in 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)(lV), 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.

Announcement 2000-77

Announcement 2000-77, 2000-36 I.R.B. 260, was issued after Rev. Proc. 2000-27 to assist practitioners and plan sponsors in filing determination letter applications for volume submitter plans where the volume submitter specimen plan has not received an advisory letter that considered all of the changes in the qualification requirements made by GUST (a GUST II Letter).

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 submits an application for a GUST advisory letter after 12-31-00. Employer should either execute an individually designed plan (and submit an application for a ruling, if one is desired) by December 31, 2001, 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 December 31, 2001 (provided that VS was submitted for an advisory letter by December 31, 2000).

EXAMPLE 5:

VS-4 submits an application for an advisory letter for its profit sharing, 401(k), money purchase and defined benefit plans on December 8, 2000 and advisory letters are issued in March of 2001. On December 31, 2000, VS4 submits an application for an advisory letter for its target benefit plan and an advisory 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 made amendments that may require amendments for annuity contracts under Code section 403(b) plans. Section 1465 of SBJPA (as discussed above) applies with respect to any required plan or contract amendments. Thus, section 1465 not only applies to qualified plans but also to any section 403(b) plan and the annuity contracts purchased under these plans.

If an amendment is required to a contract under a Code section 403(b) plan as a result of a change in the requirements by SBJPA, section 1465 provides that the amendment is not required to be made before the time prescribed in section 1465 (see language above), provided the retroactive amendment and operational requirements of section 1465 are satisfied. (Note that the remedial amendment period in Code section 401(b) does not apply to section 403(b) plans.) Therefore, Rev. Proc. 97-41 provides that amendments for SBJPA to section 403(b) plans or to annuity contracts purchased under section 403(b) plans, are not required to

be adopted before the first day of the first plan year beginning or after January 1, 1998.

For a governmental Code section 403(b) plan, the section 1465 period is treated as not expiring before 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 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 plan amendments other than those that involve disqualifying plan provisions as a result of changes made by GUST. 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 a plan amendment adopted after December 7, 1994, that 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) end with the end of the GUST remedial amendment

Revenue Procedure 2000-27 extends the remedial amendment period for the above non-GUST amendments to non-governmental plans to the last day of the first plan year beginning on or after January 1, 2001.

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

For governmental plans and nonelecting church plans, the TRA 86 remedial amendment period is also extended to coincide with the GUST remedial amendment period.

> Thus governmental plans and nonelecting 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.

The remedial amendment period for governmental plans for GUST 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, 1 999, of the governing body with authority to amend the plan, if that body does not meet continuously).

The remedial amendment period for nonelecting church plans is also extended to the end of the remedial amendment period for nongovernmental plans described above. Thus, 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 nonamender). (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 changes made by GUST (thereby creating disqualifying provisions), the same remedial amendment period as that provided for GUST. The paragraph does not allow a sponsor who never amended its plan to meet the TRA'86 requirements to use the extended remedial amendment period.

Assume that on March 10, 1996, an employer (neither tax-exempt nor government) with a calendar year plan incorrectly adopted a plan amendment, effective January 1, 1996, that violates the eligibility requirement in Code section 410(a). The employer has until December 31, 2001, to amend the plan,

retroactive to the January 1, 1 996 date, to provide for the correct eligibility requirements.

Note: A TRA'86 nonamender should apply to the appropriate Closing Agreement Coordinator (in accordance with Rev. Proc. 2000-16, 2000-6 I.R.B. 518) 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 certain situations where the extension of the remedial amendment period is not available or is otherwise limited.

- In general, section 401(b) and the regulations provide that a remedial amendment under section 401 (b) 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 with respect to other provisions of GUST. 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. Thus, these retroactive amendments must generally reflect the choices the plan 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 dollar limit had previously been set at $3,500). This TRA'97 change was effective on August 5, 1997. Assume that on February 1, 1998, a plan sponsor elects to use the new distribution rule and immediately start cashing out participants with account balances that are less than $5,000. Also, assume that the plan has a calendar-year end. 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 for his employees, which include 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. Accordingly, 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 made retroactively 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 to the plan 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) provided the amendment is effective no earlier than the first day on which the plan was operated in accordance with the amendment, and in no event 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 the TRA'86 and received favorable letters are entitled to extended reliance. During the period of the 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 administrative guidance issued since the date of the plan's 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 M & P and other preapproved 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. Thus, although plans in general may have until the end of their remedial amendment period to be amended for GUST, plans, including master or prototype and volume submitter plans, that 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 even though plan amendment is thereby required before the date that would otherwise be required for plan amendments.

For this purpose any amendment that is adopted after the date of plan termination in order to receive a favorable determination letter will be considered adopted in connection with plan termination. In addition, annuity contracts distributed from the terminated plans also must meet all the 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, in general, 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, 2000-44 I. R.B. ___ (Oct. 30, 2000), provides that determination 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

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, the chapter discussed the timing for amendments when a plan is terminated within its remedial amendment period.

Remedial Amendment Period-Published Guidance

TABLE OF CONTENTS

Final Regulations-Remedial Amendment Period

DATE: Friday, February 4, 2000

ACTION: Final and temporary regulations.

SUMMARY:

This document contains regulations relating to the remedial amendment period, during which a sponsor of a qualified retirement plan or an employer that maintains a qualified retirement plan can make retroactive amendments to the plan to eliminate certain qualification defects for the entire period. These final regulations clarify the scope of the Commissioner's authority to provide relief from plan disqualification under the regulations. These clarifications confirm the Commissioner's authority to provide appropriate relief for plan amendments relating to changes to the plan qualification rules made in recent legislation. These final regulations affect sponsors of qualified retirement plans, employers that maintain qualified retirement plans, and qualified retirement plan participants.

EFFECTIVE DATES: These regulations are effective February 4, 2000.

FOR FURTHER INFORMATION CONTACT: Linda S.F. Marshall at (202) 622-6030 or Lisa A. Tavares at (202) 622-6090 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document contains amendments to the Income Tax Regulations (26 CFR part 1) under section 401(b). These regulations provide guidance to clarify the scope of the Commissioner's authority to provide relief from plan disqualification under section 401(b) and the regulations. On August 1, 1997, temporary regulations (TD 8727) under section 401(b) were published in the Federal Register (62 FR 41272). A notice of proposed rulemaking (REG-106043-97), cross-referencing the temporary regulations,

was published in the Federal Register (62 FR 41322) on the same day. The temporary regulations enabled the Commissioner to provide appropriate relief concerning the timing of plan amendments relating to changes to the plan qualification rules made in recent legislation, as well as for other plan amendments that may be needed as a result of future changes to the Internal Revenue Code (Code).

No written comments responding to the notice of proposed rulemaking were received. No public hearing was requested or held. The proposed regulations under section 401(b) are adopted by this Treasury decision, and the corresponding temporary regulations are removed.

Explanation of Provisions

Section 401(b) provides that a plan is considered to satisfy the qualification requirements of section 401(a) for the period beginning with the date on which it was put into effect, or for the period beginning with the earlier of the date on which any amendment that caused the plan to fail to satisfy those requirements was adopted or put into effect, and ending with the time prescribed by law for filing the employer's return for the taxable year in which that plan or amendment was adopted (including extensions) or such later time as the Secretary may designate, if all provisions of the plan needed to satisfy the qualification requirements are in effect by the end of the specified period and have been made effective for all purposes for the entire period.

Section 1.401(b)-1(b) lists the plan provisions that may be amended retroactively pursuant to the rules of section 401(b). These plan provisions, termed disqualifying provisions, include the plan provisions described in section 401(b), as well as plan provisions that result in failure of a plan to satisfy the qualification requirements of the Code by reason of a change in those requirements effected by the legislation listed in § 1.401(b)-1(b)(2)(i) and (ii). Under § 1.401(b)-1(b)(2)(ii), a disqualifying provision also includes a plan provision that is integral to a qualification requirement changed by specified legislation. As in effect prior to the previously issued final and temporary regulations, § 1.401(b)-1(b)(2)(iii) provided that a disqualifying provision includes a plan provision that results in failure of the plan to satisfy the Code's qualification requirements by reason of a change in those requirements effected by amendments to the Code, that is designated by the Commissioner, at the Commissioner's discretion, as a disqualifying provision.

Section 1.401(b)-1(d) provides rules for determining the period for which the relief provided under section 401(b) applies (the "remedial amendment period").

Section 1.401(b)-1(d)(1) defines the beginning of the remedial amendment period for the disqualifying provisions listed in § 1.401(b)-(1)(b)(1) and 1.401(b)-1(b)(2)(i) and (ii).

The final regulations retain the rules set forth in the temporary regulations to clarify the scope of the Commissioner's authority to provide relief from plan disqualification under section 401(b). These changes are needed to clarify the rules relating to the plan provisions that may be designated by the Commissioner as disqualifying provisions based on amendments to the plan qualification requirements of the Internal Revenue Code. Section 1.401(b)-1(b)(3) retains the rule set forth in the temporary regulations to provide that a disqualifying provision includes a plan provision designated by the Commissioner, at the Commissioner's discretion, as a disqualifying 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 of the Code that has been changed. Section 1.401(b)-1(c)(2) retains the rule set forth in the temporary regulations to provide the Commissioner with explicit authority to impose limits and provide additional rules regarding the amendments that may be made with respect to disqualifying provisions during the remedial amendment period. Section 1.401(b)-1(d)(1)(iv) and (v) provide conforming rules, as previously provided in the temporary regulations, regarding the beginning of the remedial amendment period for disqualifying provisions described in § 1.401(b)-1(b)(3).

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because the regulation does not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking preceding these regulations was submitted to the Small Business Administration for comment on its impact on small businesses.

Drafting Information

The principal authors of these regulations are Linda S. F. Marshall and Lisa A. Tavares, Office of the Associate Chief Counsel (Employee Benefits and Exempt Organizations). However, other [*5433] personnel from the IRS and Treasury Department participated in their development.
List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1--INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 1.401(b)-1 is amended by:

1. Revising paragraphs (b)(3), (c), and (d)(1)(iv).

2. Adding paragraph (d)(1)(v).

The addition and revisions read as follows:

§ 1.401(b)-1 -- Certain retroactive changes in plan.

* * * * *

(b) * * *

(3) A plan provision designated by the Commissioner, at the Commissioner's discretion, as a disqualifying provision that either-

(i) Results in the failure of the plan to satisfy the qualification requirements of the Internal Revenue Code by reason of a change in those requirements; or

(ii) Is integral to a qualification requirement of the Internal Revenue Code that has been changed.

(c) Special rules applicable to disqualifying provisions –

Absence of plan provision. For purposes of paragraphs (b)(2) and (3) of this section, a disqualifying provision 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 Internal Revenue Code, if the plan was in effect on the date the change became effective with respect to the plan.

Method of designating disqualifying provisions. The Commissioner may designate a plan provision as a disqualifying provision pursuant to paragraph (b)(3) of this section only in revenue rulings, notices, and other guidance published in the Internal Revenue Bulletin. See § 601.601(d)(2) of this chapter.

Authority to impose limitations. In the case of a provision that has been designated as a disqualifying provision by the Commissioner pursuant to paragraph (b)(3) of this section, the Commissioner may impose limits and provide additional rules regarding the amendments that may be made with respect to that disqualifying provision during the remedial amendment period. The Commissioner may provide guidance in revenue rulings, notices, and other guidance published in the Internal Revenue Bulletin. See § 601.601(d)(2) of this chapter.

(d) * * *

(1) * * *

(iv) In the case of a disqualifying provision described in paragraph (b)(3)(i) of this section, the date on which the change effected by an amendment to the Internal Revenue Code became effective with respect to the plan; or

(v) In the case of a disqualifying provision described in paragraph (b)(3)(ii) of this section, the first day on which the plan was operated in accordance with such provision, as amended, unless another time is specified by the Commissioner in revenue rulings, notices, and other guidance published in the Internal Revenue Bulletin. See § 601.601(d)(2) of this chapter.

§ 1.401(b)-1T -- [Removed]

Par. 3. Section 1.401(b)-1T is removed.

John M. Dalrymple,

Acting Deputy Commissioner of Internal Revenue.

Approved: January 19, 2000.

Jonathan Talisman,

Acting Assistant Secretary of the Treasury.

Rev. Proc. 2000-20 –Master and Prototype and other programs

26 CFR 601.201: Rulings and determination letters.

(Also Part I, Sections 401, 403 and 501; 1.401-1, 1.403(a)-1, 1.501(a)-1.)

2000 IRB LEXIS 29; 2000-6 I.R.B. 553; REV. PROC. 2000-20

February 7, 2000

SECTION 1. PURPOSE

.01

This revenue procedure revises and combines the Service's master and prototype (M&P) and regional prototype plan programs into a unified program for the pre-approval of pension, profit-sharing, and annuity plans. This revenue procedure opens this unified program, on April 7, 2000, for mass submitter plans and May 8, 2000, for non-mass submitter plans, to allow sponsors to obtain opinion letters relating to the qualification of their plans which take into account all of the changes in the qualification requirements made by the following:

1. The Uruguay Round Agreements Act, Pub. L. 103-465 (GATT);

2. The Small Business Job Protection Act of 1996, Pub. L. 104-188 (SBJPA) (including § 414(u) of the Internal Revenue Code (Code) and the Uniformed Services Employment and Reemployment Rights Act of 1994, Pub. L. 103-353 (USERRA));

3. The Taxpayer Relief Act of 1997, Pub. L. 105-34 (TRA '97); and

4. The Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L.

105-206 (RRA).

These acts are hereinafter referred to collectively as GUST.

.02

This revenue procedure also opens the Service's volume submitter program on March 8, 2000, to allow practitioners to obtain GUST advisory letters for their volume submitter specimen plans.

.03

At the present time, employers may not obtain determination letters that consider all of the requirements of GUST. However, the Service expects to allow employers to obtain complete GUST letters in the near future.

SECTION 2. BACKGROUND AND GENERAL INFORMATION

.01

Rev. Proc. 89-9, 1989-1 C.B. 780, as modified by22 Rev. Proc. 90-21, 1990-1 C.B. 499, Rev. Proc. 91-66, 1991-2 C.B. 870, Rev. Proc. 92-41, 1992-21 I.R.B. 23, Rev. Proc. 93-9, 1993-1 C.B. 474, Rev. Proc. 93-10, 1993-1 C.B. 476, Rev. Proc. 93-12, 1993-1 C.B. 479, Rev. Proc. 94-13, 1994-1 C.B. 566, and Rev. Proc. 95-12, 1995-1 C.B. 508, sets forth the procedures of the Service on the issuance of opinion letters regarding the acceptability of the form of M&P plans.

.02

Rev. Proc. 89-13, 1989-1 C.B. 801, as modified by22 Rev. Proc. 90-21, Rev. Proc. 91-66, Rev. Proc. 92-41, Rev. Proc. 93-9, Rev. Proc. 93-10, Rev. Proc. 93-12, Rev. Proc. 94-13, Rev. Proc. 95-12, and Rev. Proc. 95-42, 1995-2 C.B. 411, sets forth the procedures of the Service on the issuance of notification letters regarding the acceptability of the form of regional prototype plans.

.03

Rev. Proc. 93-10 modified both Rev. Proc. 89-9 and Rev. Proc. 89-13 to provide for nonstandardized safe harbor plans.

.04

Rev. Proc. 97-41, 1997-2 C.B. 489, as modified by Rev. Proc. 98-14, 1998-4 I.R.B. 22, and Rev. Proc. 99-23, 1999-16 I.R.B. 5, provided a remedial amendment period under § 401(b) for amending plans for certain changes in the plan qualification requirements made by GUST. The GUST remedial amendment period ends on the last day of the first plan year beginning on or after January 1, 2000.

.05

Rev. Proc. 98-14, as modified by Rev. Proc. 98-53, 1998-53 I.R.B. 9, allowed employers, sponsors of M&P and regional prototype plans, and volume submitter practitioners to apply for determination, opinion, notification, and advisory letters that take into account most of the recent changes in law affecting plan qualification, but excluding changes under SBJPA that are effective after 1998 (that is, the safe harbors in § 401(k)(12) and § 401(m)(11) for satisfying the nondiscrimination requirements of § 401(k) and 401(m), and the repeal of the combined plan limitations under § 415(e)).

.06

Announcement 99-50, 1999-19 I.R.B. 1, announced that the Service was temporarily discontinuing acceptance of applications for opinion and notification letters for M&P and regional prototype plans until further notice.

.07

Rev. Proc. 2000-6, 2000-1 I.R.B. 187, contains the Service's general procedures for employee plan determination letter requests and requests for advisory letters for volume submitter specimen plans.

.08

Rev. Proc. 2000-8, 2000-1 I.R.B. 230, contains the Service's procedures regarding the payment of user fees for determination letter and similar requests.

SECTION 3. OVERVIEW OF THE REVENUE PROCEDURE

.01 IN GENERAL

The Service believes that it is no longer necessary or practical for it to maintain separate prototype plan approval programs for the institutional sponsoring organizations, such as banks and insurance companies, that were eligible to sponsor M&P plans under Rev. Proc. 89-9, and the practitioner sponsors that were eligible to sponsor regional prototype plans under Rev. Proc. 89-13. Therefore, this revenue procedure revises and combines Rev. Proc. 89-9, Rev. Proc. 89-13, and2 Rev. Proc. 93-10 to establish a unified program that will be available to both institutional and practitioner sponsors that seek approval of master or prototype plans. Under this unified procedure, sponsors may request opinion letters that take into account all the requirements of GUST, including the requirements of SBJPA that are effective in plan years beginning on or after January 1, 1999.

.02 ORGANIZATION OF REVENUE PROCEDURE

This revenue procedure generally is patterned after and follows the organization of Rev. Proc. 89-9.

.03 MODIFICATIONS TO REV. PROC. 89-9 AND REV. PROC. 89-13 INCORPORATED

Since Rev. Proc. 89-9 and Rev. Proc. 89-13 were published, they have been modified several times. Among the significant modifications were changes to the requirements for standardized plans that were needed to reflect the regulations under § 401(a)(4) and 410(b). In general, this revenue procedure incorporates these modifications.

.04 UNIFIED PROGRAM

Under Rev. Proc. 89-9 and Rev. Proc. 89-13, different requirements applied to M&P plans and regional prototype plans. Under the unified program in this revenue procedure, one set of requirements and procedures will apply to all sponsors. In general, this revenue procedure provides that any options that were available to sponsors or employers under either Rev. Proc. 89-9 or Rev. Proc. 89-13 will now be available to all sponsors or employers under the new program. For example, under Rev. Proc. 89-9, M&P plan sponsors were allowed to sponsor paired defined benefit and defined contribution plans, while under Rev. Proc. 89-13, regional prototype plan sponsors could sponsor paired defined contribution plans but not defined benefit plans that were paired with a defined contribution plan. Under this revenue procedure, all sponsors may sponsor paired defined benefit and defined contribution plans.

.05 RETENTION OF M&P TERMINOLOGY

Because sponsors will continue to be eligible to sponsor both master plans and prototype plans, plans that may be sponsored under this revenue procedure are referred to as M&P plans. Where appropriate, references in this revenue procedure to M&P plans include plans that were regional prototype plans under Rev. Proc. 89-13. Likewise, where appropriate, references in this revenue procedure to opinion letters include notification letters that were issued under Rev. Proc. 89-13.

.06 NEW SPONSOR DEFINITION

Under Rev. Proc. 89-9, sponsoring organization was defined to include banks, insurance companies, and certain other institutions or associations. Rev. Proc. 89-9, as modified by 22 Rev. Proc. 90-21, also included restrictions and additional requirements regarding the types of M&P plans that could be sponsored by trade or professional associations. Under Rev. Proc. 89-13, sponsor was defined as any person with an established place of business in the United States which could establish that at least 30 employers would adopt its approved regional prototype plan. In general, this revenue procedure defines sponsor using the definition in Rev. Proc. 89-13. Any person that would be eligible to sponsor a plan under Rev. Proc. 89-9 or Rev. Proc. 89-13 will be eligible to sponsor plans under this revenue procedure, provided at least 30 employers are reasonably expected to adopt a basic plan document of the sponsor within the 12-month period following its approval. In addition, any person with an established place of business in the United States may sponsor an M&P plan as a word-for-word identical adopter or minor modifier adopter of an M&P plan of a mass submitter, regardless of the

number of employers that are expected to adopt the plan. As a result of this new sponsor definition, the restrictions and additional requirements that formerly applied to M&P plans sponsored by trade or professional associations have been eliminated.

.07 SPONSOR RESPONSIBILITIES

This revenue procedure provides that by filing an application for an opinion letter, or by having an application filed on its behalf by a mass submitter, a sponsor agrees to comply with the requirements that apply to sponsors under the procedure. For example, under this procedure, sponsors must make reasonable and diligent efforts to ensure that adopting employers amend their plans when necessary. Failure to comply with these requirements may result in the loss of eligibility to sponsor M&P plans and the revocation of opinion letters that have been issued to the sponsor. This revenue procedure simplifies the record keeping requirements that applied to regional prototype plan sponsors under Rev. Proc. 89-13 and applies these simplified requirements to all sponsors. Under this revenue procedure, every sponsor will be required to maintain or have maintained on its behalf, and to provide to the Service when requested, a list of the employers that have adopted its plan, but sponsors will not have to provide the annual notices that were required by Rev. Proc. 89-13. Finally, this revenue procedure provides that in cases where a sponsor reasonably concludes that an employer's M&P plan may no longer be a qualified plan and the sponsor does not or cannot submit a request to correct the qualification failure under the Service's Employee Plans Compliance Resolution System (EPCRS), it is incumbent on the sponsor to notify the employer that the plan may no longer be qualified, advise the employer that adverse tax consequences may result from loss of the plan's qualified status, and inform the employer about the availability of EPCRS.

.08 NEW MASS SUBMITTER DEFINITION

Both Rev. Proc. 89-9 and Rev. Proc. 89-13 provided procedures for simplified processing and expedited approval of mass submitter plans. Under Rev. Proc. 89-9, a mass submitter was defined as any person that submitted applications on behalf of at least 10 sponsoring organizations that were adopting the identical plan. Under Rev. Proc. 89-13, a mass submitter was defined as any person that could establish that at least 50 unaffiliated sponsors would adopt the identical plan. In general, this revenue procedure requires that at least 30 unaffiliated adopting sponsors adopt a basic plan document of the mass submitter, but it also provides a grandfather rule so that any person that received an opinion letter as a mass submitter under Rev. Proc. 89-9 will generally qualify as a mass submitter under this revenue procedure.

.09 CHANGES TO GENERAL M&P PLAN REQUIREMENTS

This revenue procedure makes several changes and clarifications to the requirements that apply to all M&P plans. Significant among these are the following:

Rev. Proc. 89-9 and Rev. Proc. 89-13 prohibited the issuance of opinion and notification letters for plans that contain or may contain multi-tiered benefit structures. This prohibition has been reformulated as a general requirement that the allocation or benefit formula in a nonstandardized M&P plan must satisfy the following uniformity requirements of the regulations under § 401(a)(4) pertaining to safe harbor plans. In the case of a nonstandardized defined contribution plan, the allocation formula must be a uniform allocation formula, within the meaning of § 1.401(a)(4)-2(b)(2) of the regulations, or a uniform points allocation formula, within the meaning of § 1.401(a)(4)-2(b)(3)(i)(A). In the case of a nonstandardized defined benefit plan, the benefit formula must satisfy each of the uniformity requirements of § 1.401(a)(4)-3(b)(2). In addition, each nonstandardized plan must give the employer the option to select total compensation as the compensation to be used in determining allocations or benefits and each nonstandardized defined benefit plan must automatically or by option allow the adopting employer to satisfy one of the design-based safe harbors described in § 1.401(a)(4)-3(b)(3), (4), and (5). (Of course, standardized plans and nonstandardized safe harbor plans continue to be required to satisfy design-based safe harbors described in the regulations under § 401(a)(4).)

Thus, for example, an M&P plan, other than a uniform points defined contribution plan, may provide for disparity in the rates of employer contributions allocated to participants' accounts provided the plan satisfies § 401(l) in form. Exceptions to the uniformity requirements are provided for Davis-Bacon plans, plans that would fail to satisfy the requirement only because of the plans' top-heavy provisions, and plans that have continued to apply certain limitations under the Code that were repealed by GUST.

The procedure allows plans that include provisions designed to satisfy the safe harbor requirements of § 401(k)(12) to provide that the safe harbor matching or nonelective contribution requirement will be satisfied in another plan. However, this option is not available in standardized plans, other than paired defined contribution plans whose terms satisfy the requirements of Notice 98-52, 1998-46 I.R.B. 16, as modified by Notice 2000-3, 2000-4 I.R.B. 1.

The procedure clarifies the circumstances under which an adopting employer of an M&P plan must sign a new adoption agreement and provides that this requirement may

be satisfied by an electronic signature.

.10 CHANGES TO STANDARDIZED PLAN REQUIREMENTS AND EMPLOYER RELIANCE

This revenue procedure makes several changes and clarifications with respect to employer reliance and to the requirements that apply to standardized plans. Significant among these are the following:

1. The procedure provides an exception from the requirement that a standardized plan benefit all nonexcludable employees of the employer. This exception will allow the employer to avail itself of the rule in § 410(b)(6)(C), relating to the minimum coverage requirements for a plan in the transition period following a merger, acquisition, or similar transaction;

2. The procedure provides that an employer may rely on an opinion letter for a standardized defined contribution plan even though the employer has maintained another defined contribution plan(s) covering some of the same participants, provided certain conditions are met; and

3. The procedure provides that an employer may rely on an opinion letter for a standardized defined contribution plan that is first effective on or after the effective date of the repeal of § 415(e) even though the employer has maintained a defined benefit plan(s) covering some of the same participants, provided the defined benefit plan(s) has been terminated prior to the effective date of the standardized defined contribution plan.

.11 PROVISIONS RELATED TO GUST

Several provisions in this revenue procedure relate specifically to the restatement of plans for GUST. They provide that:

Sponsors may submit requests for opinion letters that take into account all of the requirements of GUST beginning May 8, 2000. Prior to that time, the Service will not accept requests for opinion letters. However, mass submitters and national sponsors may request opinion letters that take into account all of the requirements of GUST beginning April 7, 2000. The Service will begin issuing advisory letters for volume submitter specimen plans which take into account all of the requirements of GUST beginning March 8, 2000;

In general, all M&P adoption agreements must contain elective provisions (with or without default provisions) that will allow adopting employers to conform the terms of their M&P plans to the manner in which the employers' plans were operated during the transition period between the earliest effective date under GUST and when the employers adopt their GUST-restated plans. These elective provisions may be contained in a separate "snap-off" section of the adoption agreement. The M&P plan sponsor may remove this snap-off section from the adoption agreements it provides to adopting employers that are not using the M&P plan to retroactively restate a plan for GUST;

In general, M&P plans must be restated for GUST and employers must sign new adoption agreements, in part so that they may conform their adoption agreement choices to the operation of their plans during the GUST transition period;

An M&P plan, including a standardized plan, may give an employer the option to elect to continue to apply the family aggregation rules of § 401(a)(17)(A) and § 414(q)(6) (both as in effect for plan years beginning before January 1, 1997) in plan years beginning after December 31, 1996, to the extent such election conforms to the plan's operation. Likewise, an M&P plan, including a standardized plan, may give an employer the option to elect to continue to apply the combined plan limit of § 415(e) (as in effect for limitation years beginning before January 1, 2000) in limitation years beginning after December 31, 1999, to the extent such election conforms to the plan's operation. An M&P plan may not allow an employer to elect to continue to apply the pre-GUST family aggregation rules or the combined plan limit of § 415(e) in years beginning on or after the date the employer adopts its GUST-restated plan. An employer that makes either of these elections in a standardized plan will not be able to rely on the opinion letter without a determination letter with respect to the qualification of its plan for the years to which the election applies; and

An opinion letter will not be issued for an M&P plan that permits, in any plan year beginning on or after the date the employer adopts its GUST-restated plan, the use of a testing method (that is, prior year or current year) with respect to the ACP test under the plan that is different than the testing method with respect to the ADP test under the plan. This restriction does not apply with respect to plan years beginning before the date the employer adopts its GUST-restated plan.

.12 REMEDIAL AMENDMENT PERIOD

This revenue procedure includes a procedure for extending the remedial amendment

period for a plan so that employers will have sufficient time after the Service issues an opinion letter to adopt the approved M&P plan, provided the M&P plan is submitted for an opinion letter under this procedure by December 31, 2000. This procedure also applies to volume submitter specimen plans that are submitted by December 31, 2000, for advisory letters that take into account all of the requirements of GUST.

.13 OTHER CHANGES

This revenue procedure provides for reduced user fees for applications for advisory letters for volume submitter specimen plans in cases where at least 30 word-for-word identical specimen plans will be submitted.

SECTION 4. DEFINITIONS

.01 MASTER PLAN

A "master plan" is a plan (including a plan covering self-employed individuals) that is made available by a sponsor (see section 4.09) for adoption by employers and for which a single funding medium (for example, a trust or custodial account) is established, as part of the plan, for the joint use of all adopting employers. A master plan consists of a basic plan document, an adoption agreement (see sections 4.03 and 4.04), and, unless included in the basic plan document, a trust or custodial account document (see section 4.05).

.02 PROTOTYPE PLAN

A "prototype plan" is a plan (including a plan covering self-employed individuals) that is made available by a sponsor for adoption by employers and under which a separate funding medium is established for each adopting employer. A prototype plan consists of a basic plan document, an adoption agreement, and, unless the basic plan document incorporates a trust or custodial account agreement the provisions of which are applicable to all adopting employers, a trust or custodial account document.

.03 BASIC PLAN DOCUMENT

A "basic plan document" is the portion of the plan containing all the non-elective

provisions applicable to all adopting employers. No options (including blanks to be completed) may be provided in the basic plan document, except as provided in section 16.031 of this revenue procedure regarding flexible plans.

.04 ADOPTION AGREEMENT

An "adoption agreement" is the portion of the plan containing all the options that may be selected by an adopting employer. (But see section 4.05.)

.05 TRUST OR CUSTODIAL ACCOUNT DOCUMENT

(Note: This definition does not apply if the basic plan document includes a trust or custodial account agreement the provisions of which apply to all adopting employers.) A "trust or custodial account document" is the portion of an M&P plan that contains the trust agreement or custodial account agreement and includes provisions covering such matters as the powers and duties of trustees, investment authority, and the kinds of investments that may be made. Except as provided in section 5.10 and below, all provisions of the trust or custodial account document must be applicable to all adopting employers and no options (including blanks to be completed) may be provided in the trust or custodial account document. With respect to prototype plans, a sponsor or mass submitter may provide up to five separate trust or custodial account documents that are intended for use with any single basic plan document.

Thus, for example, several employers that adopt a sponsor's standardized M&P plan may have plans with different trust or custodial account documents. In addition, a sponsor or mass submitter may provide a trust or custodial account document, designated for use only by adopters of nonstandardized plans or nonstandardized safe harbor plans, which provides for blanks to be completed with respect to administrative provisions of the trust or custodial account agreement. Finally, an M&P plan may provide for the use of any other trust or custodial account document that has been approved by the Service for use with the plan as a qualified trust or as a custodial account treated as a qualified trust. Any trust or custodial account document (including one to be used by adopters of standardized plans) may provide for blanks to be completed that merely enable the adopting employer to specify the names of the plan, employer, trustee or custodian, plan administrator and other fiduciaries, the trust year, and the name of any pooled trust in which the plan's trust will participate.

.06 OPINION LETTER

An "opinion letter" is a written statement issued by the Service to a sponsor or mass submitter under this revenue procedure (or, where appropriate in the context, to a sponsoring organization under Rev. Proc. 89-9) as to the acceptability of the form of an M&P plan and any related trust or custodial account under § 401(a), 403(a), and 501(a).

.07 NOTIFICATION LETTER

A "notification letter" is a written statement issued by the Service to a regional prototype plan sponsor or mass submitter under Rev. Proc. 89-13 as to the acceptability of the form of an M&P plan and any related trust or custodial account under § 401(a), 403(a), and 501(a).

.08 TRA '86 OPINION OR NOTIFICATION LETTER

A "TRA '86 opinion or notification letter" is a favorable opinion or notification letter issued by the Service on or after January 4, 1990, under Rev. Proc. 89-9 or Rev. Proc. 89-13, which considers the effect of the Tax Reform Act of 1986, Pub. L. 99-514 (TRA '86).

.09 SPONSOR

A "sponsor" is any person that

has an established place of business in the United States where it is accessible during every business day and

represents to the Service that it has at least 30 employer-clients each of which is reasonably expected to adopt the sponsor's basic plan document and one or more of the adoption agreements associated with that basic plan document within the 12-month period following the issuance of opinion letters under this revenue procedure.

A sponsor may submit any number of adoption agreements with the basic plan document provided at least 30 employers are reasonably expected to adopt the same basic plan document within the 12-month period following the issuance of opinion letters. After representing to the Service that at least 30 employers are reasonably expected to adopt a basic plan document, the sponsor may submit other basic plan

documents and adoption agreements, regardless of the number of employers that are expected to adopt such other plans. The Service reserves the right at any time to request from the sponsor a list of the sponsor's clients that have adopted or are expected to adopt the sponsor's M&P plans, including the clients' business addresses and employer identification numbers.

Notwithstanding the above, any person that has an established place of business in the United States where it is accessible during every business day may sponsor a plan as a word-for-word identical adopter or minor modifier adopter of an M&P plan of a mass submitter, regardless of the number of employers that are expected to adopt such plan.

By submitting an application for an opinion letter for an M&P plan under this revenue procedure (or by having an application filed on its behalf by a mass submitter), a person represents to the Service that it is a sponsor, as defined above, and agrees to comply with the requirements imposed on sponsors by this revenue procedure. Failure to comply with these requirements may result in the loss of eligibility to sponsor M&P plans and the revocation of opinion letters that have been issued to the sponsor.

.10 MASS SUBMITTER

A "mass submitter" is any person that (1) has an established place of business in the United States where it is accessible during every business day and (2) submits applications on behalf of at least 30 unaffiliated sponsors each of which is sponsoring, on a word-for-word identical basis, the same basic plan document and one or more of the adoption agreements associated with that basic plan document. A flexible plan (as defined in section 16.031) which is adopted by a sponsor will be considered a word-for-word identical plan. A mass submitter may submit an application on its own behalf as one of the 30 unaffiliated sponsors.

For purposes of this definition, affiliation is determined under § 414(b) and (c). Additionally, the following will be considered to be affiliated: any law, accounting, consulting firm, etc., with its partners, members, associates, etc. Once the mass submitter has submitted applications on behalf of 30 unaffiliated sponsors with respect to any basic plan document, it will be treated as a mass submitter with respect to all the other basic plan documents and associated adoption agreements for which it requests opinion letters as a mass submitter under section 16.01, regardless of the number of identical adopters of such other plans.

Notwithstanding the above, any person that received a favorable TRA '86 opinion letter for a plan as a mass submitter under Rev. Proc. 89-9 will continue to be treated as a

mass submitter if it submits applications on behalf of at least 10 sponsors (regardless of affiliation) each of which is sponsoring, on a word-for-word identical basis, the same basic plan document and one or more of the adoption agreements associated with that basic plan document. Once the mass submitter has submitted applications on behalf of 10 sponsors with respect to any basic plan document, it will be treated as a mass submitter with respect to all the other basic plan documents and associated adoption agreements for which it requests opinion letters as a mass submitter under section 16.01, regardless of the number of identical adopters of such other plans.

.11 NATIONAL SPONSOR

A "national sponsor" is a sponsor that has either (a) 30 or more adopting employers in each of 30 or more states (treating, for this purpose, the District of Columbia as a state) or (b) 3000 or more adopting employers. The determination as to whether there are 3000 or more adopting employers or 30 or more adopting employers in each of 30 or more states may be made on any one date during the 12 month period ending on the date that is 60 days after the effective date of this revenue procedure. For this purpose, an adopting employer is any employer that has adopted any plan of the sponsor that has a TRA '86 opinion or notification letter.

.12 STANDARDIZED PLAN

A "standardized plan" is an M&P plan that meets the following requirements:

The provisions governing eligibility and participation are such that the plan by its terms must benefit all employees described in section 5.16 (regardless of whether any employer is treated as operating separate lines of business under § 414(r)) except those that may be excluded under § 410(a)(1) or (b)(3). The adoption agreement may provide options as to whether some or all of the employees described in § 410(a)(1) or (b)(3) are to be excluded, provided that the criteria for excluding employees described in § 410(a)(1) applies uniformly to all employees. A standardized plan generally may not deny an accrual or allocation to an employee eligible to participate merely because the employee is not an active employee on the last day of the plan year or has failed to complete a specified number of hours of service during the year. However, the plan may deny an allocation or accrual to an employee who is eligible to participate if the employee terminates service during the plan year with not more than 500 hours of service and is not an active employee on the last day of the plan year.

The eligibility requirements under the plan are not more favorable for highly

compensated employees (as defined in § 414(q)) than for other employees.

Under the plan, allocations, in the case of a defined contribution plan (other than any cash or deferred arrangement part of the plan), or benefits, in the case of a defined benefit plan, are determined on the basis of total compensation. For this purpose, total compensation means a definition of compensation that includes all compensation within the meaning of § 415(c)(3) and excludes all other compensation or that otherwise satisfies § 414(s) under § 1.414(s)-1(c).

Unless the plan is a target benefit plan or a § 401(k) and/or § 401(m) plan, the plan must, by its terms, satisfy one of the design based safe harbors described in § 1.401(a)(4)-2(b)(2) (taking into account § 1.401(a)(4)-2(b)(4)) or § 1.401(a)(4)-3(b)(3), (4), or (5) (taking into account § 1.401(a)(4)-3(b)(6)). (See sections 5.18 and 8.03 for rules regarding § 401(k) and § 401(m) plans and target benefit plans.)

Notwithstanding this requirement, a standardized plan may give an employer the option to elect to continue to apply the family aggregation rules of § 401(a)(17)(A) and § 414(q)(6) (both as in effect for plan years beginning before January 1, 1997) in plan years beginning after December 31, 1996, to the extent such election conforms to the plan's operation. Likewise, a standardized plan may give an employer the option to elect to continue to apply the combined plan limit of § 415(e) (as in effect for limitation years beginning before January 1, 2000) in limitation years beginning after December 31, 1999, to the extent such election conforms to the plan's operation. However, a standardized plan may not give an employer the option to elect to continue to apply the pre-GUST family aggregation rules or the combined plan limit of § 415(e) in years beginning on or after the date the employer adopts its GUST-restated plan. In addition, a plan may not continue to apply the combined plan limit of § 415(e) to the extent such application would cause the plan to fail to satisfy § 401(a) (see Q&A 8 of Notice 99-44, 1999-35 I.R.B. 326). An employer that makes either of these elections will not be able to rely on the opinion letter without a determination letter with respect to the qualification of its plan for the years to which the election applies.

All benefits, rights, and features under the plan (other than those, if any, that have been prospectively eliminated) are currently available to all employees benefiting under the plan.

Any past service credit under the plan must meet the safe harbor in § 1.401(a)(4)-5(a)(3).

A plan will not fail to satisfy the coverage requirement of subsection .121 merely because the plan provides, either as the result of an elective provision or by default in

the absence of an election to the contrary, that individuals who become employees, within the meaning of section 5.16, as the result of a "§ 410(b)(6)(C) transaction" will be excluded from eligibility to participate in the plan during the period beginning on the date of the transaction and ending on the last day of the first plan year beginning after the date of the transaction. A "§ 410(b)(6)(C) transaction" is an asset or stock acquisition, merger, or other similar transaction involving a change in the employer of the employees of a trade or business.

.13 PAIRED PLANS

"Paired plans" are either a combination of two or more defined contribution standardized plans or a combination of one or more defined contribution standardized plans and one defined benefit standardized plan (for example, a money purchase pension plan, a profit-sharing plan and a unit benefit or flat benefit pension plan), so designed that if any single plan, or combination of plans, is adopted by an employer, each plan by itself, or the plans together, will meet the nondiscrimination rules set forth in § 401(a)(4), the contribution and benefit limitations set forth in § 415, and the top-heavy provisions set forth in § 416. Paired plans must have the same sponsor. In addition, only one of the paired plans that an employer adopts may provide for disparity in contributions or benefits that is permitted under § 401(l). If one of the paired plans is a defined benefit plan that includes a final pay limitation as described in § 401(a)(5)(D), then the paired defined contribution plan(s) may not provide for disparity in contributions.

.14 NONSTANDARDIZED SAFE HARBOR PLAN

A "nonstandardized safe harbor plan" is an M&P plan that would be a standardized plan except that the plan:

- is not required, by its terms, to benefit all nonexcludable employees and may, in the case of a defined contribution plan, condition allocations on employment on the last day of the plan year and/or the completion of up to 1000 hours of service during the plan year;

- may use a § 414(s) definition of compensation for determining contributions or benefits that must be tested for nondiscrimination under § 1.414(s)-1(d); and

- may provide past service credit that fails to meet the safe harbor in § 1.401(a)(4)-5(a)(3).

The opinion letter issued for the plan will state that the plan is a nonstandardized safe harbor plan.

.15 NONSTANDARDIZED PLAN

A "nonstandardized plan" is an M&P plan that is neither a standardized plan nor a nonstandardized safe harbor plan.

.16 VOLUME SUBMITTER PLAN, SPECIMEN PLAN, AND ADVISORY LETTER

See section 9 of Rev. Proc. 2000-6.

SECTION 5. PROVISIONS REQUIRED IN EVERY M&P PLAN

.01 SPONSOR AMENDMENTS

M&P plans must provide a procedure for sponsor amendment, so that changes in the Code, regulations, revenue rulings, other statements published by the Internal Revenue Service, or corrections of prior approved plans may be applied to all employers who have adopted the plan. Sponsors must make reasonable and dilligent efforts to ensure that adopting employers of the sponsor's M&P plan have actually received and are aware of all plan amendments and that such employers complete and sign new adoption agreements when necessary. See section 5.14. Failure to comply with this requirement may result in the loss of eligibility to sponsor M&P plans and the revocation of opinion letters that have been issued to the sponsor.

.02 EMPLOYER AMENDMENTS

An employer that amends any provision of an approved M&P plan including its adoption agreement (other than to change the choice of options, if the plan permits or contemplates such a change) or an employer that chooses to discontinue participation in a plan as amended by its sponsor and does not substitute another approved M&P

plan is considered to have adopted an individually designed plan. However, this rule does not apply in the case of amendments permitted under section 5.07 and 5.11 and model amendments published by the Service which specifically provide that their adoption by an adopter of an M&P plan will not cause such plan to be treated as individually designed. An employer that amends an M&P plan because of a waiver of the minimum funding requirement under § 412(d) will also be considered to have an individually designed plan. The procedures stated in Rev. Proc. 2000-6 relating to the issuance of determination letters for individually designed plans, will then apply to the plan as adopted by the employer.

.03 UNIFORM ALLOCATION OR BENEFIT FORMULA IN NONSTANDARDIZED PLAN

In general, the allocation or benefit formula in a nonstandardized M&P plan must satisfy the following uniformity requirements of the regulations under § 401(a)(4) pertaining to safe harbor plans. In the case of a nonstandardized defined contribution plan, the allocation formula must be a uniform allocation formula, within the meaning of § 1.401(a)(4)-2(b)(2), or a uniform points allocation formula, within the meaning of § 1.401(a)(4)-2(b)(3)(i)(A) (in each case taking into account § 1.401((a)(4)-2(b)(4)). In the case of a nonstandardized defined benefit plan, the benefit formula must satisfy each of the uniformity requirements of § 1.401(a)(4)-3(b)(2) (taking into account § 1.401(a)(4)-3(b)(6)). (See sections 4.12, 4.14, and 8.03 for requirements that apply to standardized plans, nonstandardized safe harbor plans, and target benefit plans, respectively. See subsections .04 and .05 for additional requirements that apply to nonstandardized plans.) Thus, an M&P plan generally may not provide different allocation rates or different benefit formulas for different employees, such as two percent of compensation for salaried employees and one percent for hourly employees. However, an M&P plan, other than a uniform points defined contribution plan, may provide for disparity in the rates of employer contributions allocated to participants' accounts or in the rates of employer-provided benefits provided the plan satisfies § 401(l) in form. The uniformity requirements described in this paragraph do not apply to plans under which the amount of contributions or benefits is determined pursuant to requirements of the Davis-Bacon Act, 40 U.S.C. 276(a). In addition, the uniformity requirements do not apply to the extent that failure to satisfy the requirements results from the plan's top-heavy provisions or from the continued application under the plan of the pre-GUST family aggregation rules or the combined plan limit of § 415(e). However, an M&P plan may not continue to apply the pre-GUST family aggregation rules or the combined plan limit of § 415(e) in years beginning on or after the date the employer adopts its GUST-restated plan. In addition, a plan may not continue to apply the combined plan limit of § 415(e) to the extent such application would cause the plan to fail to satisfy § 401(a) (see Q&A 8 of Notice 99-44,

1999-35 I.R.B. 326).

.04 COMPENSATION REQUIREMENTS IN NONSTANDARDIZED PLANS

Each nonstandardized M&P plan must give the adopting employer the option to select total compensation as the compensation to be used in determining allocations or benefits. For this purpose, total compensation means a definition of compensation that includes all compensation within the meaning of § 415(c)(3) and excludes all other compensation or that otherwise satisfies § 414(s) under § 1.414(s)-1(c).

.05 AUTOMATIC OR OPTIONAL SAFE HARBOR PROVISIONS IN NONSTANDARDIZED DEFINED BENEFIT PLANS

Each nonstandardized M&P defined benefit plan must automatically or by option allow the adopting employer to satisfy one of the design-based safe harbors described in § 1.401(a)(4)-3(b)(3), (4), and (5) (taking into account § 1.401(a)(4)-3(b)(6)).

.06 ANTI-CUTBACK PROVISIONS

M&P plans must specifically provide for the protection provided under § 411(a)(10) and (d)(6), to the extent required, in the event that the employer amends the plan in any manner such as by revising the options selected in the adoption agreement or by adopting a new M&P plan. An M&P sponsor may not amend its plan in a manner that could result in the elimination of a benefit to the extent the benefit is required to be protected under § 411(d)(6) with respect to the plan of any adopting employer, unless permitted to do so under § 1.401(a)-4 and 1.411(d)-4. In addition, an M&P plan that does not contain vesting for all years which is at least as favorable to participants as that provided in § 416(b), must specifically provide that any vesting which occurs while the plan is top-heavy will not be cut back if the plan ceases to be top-heavy.

.07 ADOPTING EMPLOYER MODIFICATION TO SATISFY § 415 AND 416

M&P plans must provide that the plan provisions may be amended by overriding plan language completed by the employer in the adoption agreement where such language is necessary to satisfy § 415 or 416 because of the required aggregation of multiple plans under these sections. In the event of such an amendment the adopting employer

must obtain a determination letter in order to continue reliance on the plan's qualified status. Generally, a space should be provided in the adoption agreement with instructions for the employer to add such language as necessary to satisfy § 415 and 416. In addition, a space must be provided in the adoption agreement for the employer to specify the interest rate and mortality tables used for purposes of establishing the present value of accrued benefits in order to compute the top heavy ratio under § 416. Such a space must be included in both defined contribution plans and defined benefit plans.

.08 DEFINED CONTRIBUTION § 415 AGGREGATION

Plan language must be incorporated that aggregates all defined contribution M&P plans to satisfy § 415(c) and (f). Sample language provided in the Listing of Required Modifications may be obtained by writing to the Internal Revenue Service, Employee Plans Rulings and Agreements, Washington, D.C. 20224, Attention T:EP:RA:T:ICU. Requests for sample language may also be faxed to (202) 622-6199 (not a toll-free call). As soon as possible after February 7, 2000, the sample language will also be available on the Internet at the following address: http://www.irs.gov. The Listing of Required Modifications can be found under "Tax Info for Business."

.09 TOP-HEAVY REQUIREMENTS

Except to the extent described in section 7.03, relating to paired plans, each plan must either provide that all the additional requirements applicable to top-heavy plans (described in § 416) apply at all times or provide that such requirements apply automatically if the plan is top-heavy regardless of how the adoption agreement is completed. In any case where the latter option is chosen, all the requirements for determining whether the plan is top-heavy must be included in the plan. (See Questions T-35 and T-36 of § 1.416-1.)

.10 ADDITIONAL TOP-HEAVY MINIMUMS TO SATISFY § 415(E)

Each plan must provide automatically or by optional provisions, with respect to years beginning before January 1, 2000, the additional minimums described in § 416(h)(2)(A).

.11 ADOPTING EMPLOYER MODIFICATION OF TRUST OR CUSTODIAL ACCOUNT

DOCUMENT

An employer that adopts an M&P plan other than a standardized plan (or paired plans) will not be considered to have an individually designed plan merely because the employer amends administrative provisions of the trust or custodial account document (such as provisions relating to investments and the duties of trustees), provided the amended provisions are not in conflict with any other provision of the plan and do not cause the plan to fail to qualify under § 401(a). For this purpose, an amendment includes modification of the language of the trust or custodial account document and the addition of overriding language. An employer that adopts a standardized M&P plan may amend the trust or custodial account document provided such amendment merely involves the specification of the names of the plan, employer, trustee or custodian, plan administrator and other fiduciaries, the trust year, or the name of any pooled trust in which the plan's trust will participate.

.12 EFFECTIVE DATES OF M&P PLAN PROVISIONS RELATING TO GUST CHANGES

During the transition period between the effective dates of GUST and the date plans are amended for GUST, plans have in some cases been permitted, and in some cases required, to be operated in a manner that is inconsistent with the plans' terms but consistent with changes in the qualification requirements made by GUST. When the plans are amended for GUST, they must be amended retroactively and the retroactive amendments must conform to how the plans have been operated during the transition period. In order for a GUST-approved M&P plan to be available to be adopted by an employer to retroactively restate the employer's plan for GUST, the M&P plan must be able to accommodate whatever choices and elections have been made in the operation of the employer's plan during the transition period. For example, an employer with a § 401(k) plan may use either the current-year or the prior-year ADP testing method. During the transition period, an employer may have used the current-year method in 1997, the prior-year method in 1998, and the current-year method again in 1999 and 2000. If the employer adopts a GUST-approved M&P plan to retroactively restate the employer's plan for GUST, the terms of the M&P plan, as adopted by the employer, must reflect these specific year-by-year changes in the ADP testing method. This requirement will not be satisfied by provisions that state, for example, that they are effective as of the date that they have been made effective in operation where the actual date(s) is not specified in the plan. This requirement also will not be satisfied through incorporation by reference of documents outside the basic plan document and adoption agreement. In general, therefore, M&P adoption agreements must contain elective provisions (with or without default provisions) that will allow adopting employers

to conform the terms of their M&P plans to the manner in which the employers' plans were operated during the transition period. These elective provisions may be contained in a separate "snap-off" section of the adoption agreement. The M&P plan sponsor may remove this snap-off section from the adoption agreements it provides to adopting employers that are not using the M&P plan to retroactively restate a plan for GUST.

.13 PROVISIONS REQUIRED IN ADOPTION AGREEMENTS REGARDING RELIANCE

In order to avoid unnecessary confusion as to the scope of an opinion letter, sponsors must include in the adoption agreement of all M&P plans (other than standardized plans and paired plans), in close proximity to the signature blank, a statement that adopting employers may not rely on an opinion letter issued by the Service with respect to the qualification of that plan and should apply to Employee Plans Determinations for a determination letter in order to obtain reliance. Standardized plans and paired plans must also include a similar statement in the adoption agreement that the adopting employer may not rely on the opinion letter issued by the Service but must apply for a determination letter to have reliance under the circumstances described in section 6.

.14 OTHER PROVISIONS REQUIRED IN ADOPTION AGREEMENTS

Each M&P plan must contain a dated employer signature line. The employer must sign the adoption agreement when it first adopts the plan and must complete and sign a new adoption agreement if the plan has been restated. In addition, the employer must complete a new signature page if it modifies any prior elections or makes new elections in its adoption agreement. The signature requirement may be satisfied by an electronic signature that reliably authenticates and verifies the adoption of the adoption agreement, or restatement, amendment or modification thereof, by the employer. The adoption agreement must state that it is to be used with one and only one specific basic plan document. In addition, the adoption agreement must contain a cautionary statement to the effect that the failure to properly fill out the adoption agreement may result in failure of the plan to qualify. The adoption agreement must also contain a statement which provides that the sponsor will inform the adopting employer of any amendments made to the plan or of the discontinuance or abandonment of the plan.

.15 SPONSOR TELEPHONE NUMBERS

M&P plan adoption agreements must include the sponsor's address and telephone

number (or a space for the address and telephone number of the sponsor's authorized representative) for inquiries by adopting employers regarding the adoption of the plan, the meaning of plan provisions, or the effect of the opinion letter.

.16 DEFINITION OF EMPLOYEE / § 414(B), (C), (M), (N) AND (O)

Each M&P plan must include a definition of employee as any employee of the employer maintaining the plan or any other employer aggregated under § 414(b), (c), (m) or (o) and the regulations thereunder. The definition of employee shall also include any individual deemed under § 414(n) (or under regulations under § 414(o)) to be an employee of any employer described in the previous sentence.

.17 DEFINITION OF SERVICE / § 414(B), (C), (M), (N), AND (O)

Each M&P plan must specifically credit all service with any employer aggregated under § 414(b), (c), (m) or (o) and the regulations thereunder as service with the employer maintaining the plan. In addition, in the case of an individual deemed under § 414(n) (or under regulations under § 414(o)) to be the employee of any employer described in the previous sentence, service with such employer must be credited to such individual.

.18 ADDITIONAL REQUIREMENTS FOR PLANS THAT INCLUDE A CODA

An M&P plan may include a cash or deferred arrangement (CODA) only if the plan is a profit-sharing plan or a rural cooperative plan, as defined in § 401(k)(7), and the CODA is a qualified CODA, as defined in the regulations under § 401(k). In addition, the plan must satisfy the following requirements:

- The plan may not incorporate the ADP test under § 401(k)(3) or the ACP test under § 401(m)(2) by reference;

- The plan must use the same testing method (either current year or prior year) for both the ADP test under § 401(k)(3) and the ACP test under § 401(m)(2) in any plan year beginning on or after the date the employer adopts its GUST-restated M&P plan;

- If the CODA provides for hardship distributions, it must adopt the safe harbor standards in the regulations under § 401(k);

- The CODA may not be integrated with social security;

- The plan must describe the method or methods for correcting contributions in excess of those allowed under the ADP or ACP test and for correcting multiple use of the alternative limitation (within the meaning of § 401(m)(9)), including the plan to be corrected; and

A plan that uses the safe harbor methods in § 401(k)(12) and 401(m)(11) (for plan years beginning after December 31, 1998) must satisfy the nonelective or matching contribution ("safe harbor contribution") requirement using one of the following options.

First, the plan may provide that the safe harbor contributions will be made under the plan.

Second, the plan may allow the employer to elect in the adoption agreement whether the safe harbor contributions will be made under the plan or under another specified defined contribution plan that satisfies the requirements of sections IX. and XI. of Notice 98-52, as modified by Notice 2000-3. However, the latter option is not available in standardized plans, other than paired defined contribution plans whose terms satisfy the requirements of sections IX. and XI. of Notice 98-52, as modified by Notice 2000-3. See section 7.04.

The requirements in 2 and 5 of this subsection .18 do not apply to a plan that does not use the ADP test under § 401(k)(3) and the ACP test under § 401(m)(2), but uses only the alternative ("SIMPLE") method of satisfying the nondiscrimination tests in § 401(k)(11) and 401(m)(10) (for plan years beginning after December 31, 1996) or the safe harbor methods in § 401(k)(12) and 401(m)(11) (for plan years beginning after December 31, 1998).

.19 OTHER REQUIREMENTS

In addition to any other substantive requirements, M&P plans must comply with the requirements of all revenue rulings, notices, legislation, and regulations, including:

- Notice 97-45, relating to the definition of highly compensated employee under § 414(q);

- Notice 97-75 and § 1.411(d)-4, Q&A 10, relating to the minimum distribution requirements of § 401(a)(9);

- Notices 97-2, 98-1, 98-52, and 2000-3, Rev. Rul. 98-30, and Rev. Proc. 97-9, relating to the requirements for qualified cash or deferred arrangements under § 401(k), including SIMPLE § 401(k) plans and § 401(k) plan safe harbors;

- Rev. Proc. 98-14 and Rev. Proc. 98-42, relating to the repeal of the family aggregation rules under former § 414(q)(6);

- Rev. Rul. 94-76 and Rev. Proc. 96-55, relating to transfers and rollovers from money purchase pension plans to profit-sharing plans;

- Rev. Rul. 98-1 and Notice 99-44, relating to the limitations of § 415;

- Rev. Proc. 96-49, relating to the requirements of USERRA and § 414(u);

- Section 1.417(e)-1(d), relating to the determination of present value and amounts of certain benefits; and

- Notice 99-5, relating to the definition of eligible rollover distribution in § 402(c)(4) as amended by RRA.

SECTION 6. STANDARDIZED PLANS EMPLOYER RELIANCE

.01 RELIANCE

An employer adopting a standardized plan or paired plans may rely on its opinion letter, except as provided in subsections .02, .03, and .04 below.

.02 NON-RELIANCE BY EMPLOYER MAINTAINING MORE THAN ONE PLAN

Except in the case of a combination of paired plans or as otherwise provided in this subsection, an employer may not rely on an opinion letter for a standardized plan, without obtaining a determination letter, if the employer maintains at any time, or has maintained at any time, another plan, including a standardized plan, that was qualified or determined to be qualified covering some of the same participants. For this purpose, a plan that has been properly replaced by the adoption of a standardized plan is not considered another plan. The plan that has been replaced and the standardized plan must be of the same type (e.g., both money purchase pension plans) in order for the

employer to be able to rely on the standardized plan without obtaining a determination letter.

In addition, an employer that adopts a standardized defined contribution plan will not be considered to have maintained another plan merely because the employer has maintained another defined contribution plan(s), provided such other plan(s) has been terminated prior to the effective date of the standardized plan and no annual additions have been credited to the account of any participant under such other plan(s) as of any date within a limitation year of the standardized plan. Likewise, an employer that adopts a standardized defined contribution plan that is first effective on or after the effective date of the repeal of § 415(e) will not be considered to have maintained another plan merely because the employer has maintained a defined benefit plan(s), provided the defined benefit plan(s) has been terminated prior to the effective date of the standardized defined contribution plan.

.03 RELIANCE BY EMPLOYER ADOPTING A STANDARDIZED DEFINED BENEFIT PLAN

An employer that has adopted a standardized defined benefit plan may rely on an opinion letter with respect to the requirements of § 401(a)(26) only if the plan satisfies the requirements of § 401(a)(26) with respect to its prior benefit structure or is deemed to satisfy § 401(a)(26) under the regulations. However, an employer may request a determination letter if the employer wishes to have reliance as to whether the plan satisfies § 401(a)(26) with respect to its prior benefit structure.

.04 NO AUTOMATIC RELIANCE ON CERTAIN ISSUES

An employer that adopts a standardized plan may not rely on an opinion letter with respect to:

- whether the timing of any amendment to the plan (or series of amendments) satisfies the nondiscrimination requirements of § 1.401(a)(4)-5(a), except with respect to plan amendments granting past service that meet the safe harbor described in § 1.401(a)(4)-5(a)(3) and are not part of a pattern of amendments that significantly discriminates in favor of highly compensated employees; or

- whether the plan satisfies the effective availability requirement of § 1.401(a)(4)-4(c) with respect to any benefit, right, or feature.

An employer that adopts a standardized plan as an amendment to a plan other than a standardized plan may not rely on an opinion letter with respect to whether a benefit, right, or feature that is prospectively eliminated satisfies the current availability requirements of § 1.401(a)-4 of the regulations. Such an employer may request a determination letter if the employer wishes to have reliance as to whether the prospectively eliminated benefit, right, or feature satisfies the current availability requirements. A standardized plan may give an employer the option to elect to continue to apply the pre-GUST family aggregation rules in years beginning after December 31, 1996, or the combined plan limit of § 415(e) in years beginning after December 31, 1999, to the extent such election(s) conforms to the plan's operation. However, an employer that elects to continue to apply the pre-GUST family aggregation rules or the combined plan limit of § 415(e) will not be able to rely on the opinion letter without a determination letter with respect to the qualification of its plan for the years to which the election applies.

.05 EFFECT OF TERMINATION OF PAIRED PLAN

If an employer maintains paired plans, the termination of one of the paired plans will not adversely affect the employer's ability to rely on the opinion letter with respect to the other paired plan(s).

.06 SHARING BASIC PLAN DOCUMENT BY STANDARDIZED, NONSTANDARDIZED, AND NONSTANDARDIZED SAFE HARBOR PLANS

A sponsor may establish a basic plan document that applies to a standardized plan, a nonstandardized plan, and a nonstandardized safe harbor plan. Such plans may differ only by the different adoption agreements. For example, the adoption agreement(s) for the nonstandardized plan and/or the nonstandardized safe harbor plan may have additional coverage options.

SECTION 7. ADDITIONAL REQUIREMENTS FOR PAIRED PLANS

.01 LIMITS OF § 415(E) MUST BE PROVIDED IN DEFINED BENEFIT PLAN ONLY

For limitation years beginning before January 1, 2000, the benefits under a defined benefit plan in a combination of paired plans must be limited by the requirements of § 415(e), relating to the aggregation of defined benefit and defined contribution plans.

Adjustments to satisfy the requirements of § 415(e) may only be provided in the defined benefit plan with respect to benefits thereunder.

.02 SECTION 416(H) ADJUSTMENT TO § 415(E) LIMITS

For limitation years beginning before January 1, 2000, paired plans that include a defined benefit plan must compute the denominators of defined benefit and defined contribution fractions in a manner satisfying § 416(h)(1) unless the requirements of § 416(h)(2) (each as in effect for limitation years beginning before January 1, 2000) are satisfied. Paired plans providing the unreduced § 415(e) limits must provide, regardless of how the adoption agreement is completed, the additional top-heavy minimums described in § 416(h)(2)(A) and provide that the unreduced § 415(e) limits will not apply if the plan is super top-heavy as described in Question T-33 of § 1.416-1. In testing for super top-heavy, all the requirements of questions T-35 and T-36 of § 1.416-1 must be included in the plan.

.03 COORDINATION OF MINIMUM BENEFITS AND CONTRIBUTIONS UNDER TOP-HEAVY PLANS / UNIFORMITY REQUIREMENTS

Because paired plans are standardized plans that must continue to satisfy the uniform benefit or allocation formula requirements of § 1.401(a)(4)-2 and -3 when the plans are top-heavy, the plans must include provisions that comply with one of the following options:

- each of the paired plans must provide the top-heavy minimum contribution or benefit (as applicable) without regard to whether a participant is covered under the other paired plan(s); or

- any participant who benefits under any one of the paired plans must automatically benefit under the other paired plan(s).

If the second option is used, either each of the paired plans must provide the top-heavy minimum contribution or benefit (as applicable) or the paired plans may designate one of the plans to provide the top-heavy minimum contribution or benefit. That is, either the defined benefit plan must provide a 2% minimum benefit or the defined contribution plan must provide a 5% minimum contribution, or both plans may provide the top-heavy minimum.

Also, if the second option is used and one of the paired plans has been designated to

provide the top-heavy minimums, the plans must further provide that in the event the identical employees do not benefit under each paired plan, the plans will default to the first option (i.e., each plan provides the top-heavy minimum). In years beginning before January 1, 2000, if the unreduced § 415(e) limit is used, the 2% minimum benefit and the 5% minimum contribution are increased to 3% and 7 1/2%, respectively. If the paired plans designate one of the plans to provide the top-heavy minimum contribution or benefit, then, in the event of the termination of such plan, the remaining plan must provide the top-heavy minimum.

.04 SATISFACTION OF SAFE HARBOR CONTRIBUTION REQUIREMENT IN PAIRED DEFINED CONTRIBUTION PLANS THAT INCLUDE A § 401(K) SAFE HARBOR

In the case of paired defined contribution plans, if one of the plans uses the safe harbor method in § 401(k)(12) (for plan years beginning after December 31, 1998), the safe harbor contribution requirement must be satisfied using one of the following options. First, the paired plans may provide that the safe harbor contributions will be made under the plan that includes the CODA. Second, the paired plans may provide that the safe harbor contributions will be made under the other plan. However, the paired plans may provide for the latter option only if the terms of the paired plans will automatically satisfy the requirements of sections IX. and XI. of Notice 98-52, as modified by Notice 2000-3. If the paired plans provide that the safe harbor contributions will be made under the plan that does not include the CODA, then, in the event of the termination of such plan, the plan that includes the CODA must provide the safe harbor contributions.

.05 PAIRING PROVISIONS MUST BE IN THE BASIC PLAN DOCUMENT

In the case of paired plans, all provisions necessary to coordinate the plans (other than the reliance statement required under section 5.13) must be set forth in the basic plan document and not in the adoption agreement. Paired plans may allow the employer to elect in the adoption agreement which of the two options described in subsection .03 and which of the two options described in subsection .04, if applicable, will apply to the employer's plans.

.06 PAIRED PLANS LIMITED TO TWO DIFFERENT BASIC PLAN DOCUMENTS

While the sponsor is not limited in the number of sets of paired plans it may adopt, each set must be limited to two different basic plan documents: one for defined benefit plans

and one for defined contribution plans. The pairing of defined contribution plans requires only one basic plan document such as a profit-sharing plan and a money purchase plan containing the identical basic plan document and two different adoption agreements. A sponsor may provide a pairing of defined benefit and defined contribution plans in such a manner that with two different basic plan documents and three adoption agreements, an adopting employer may adopt a profit-sharing plan, a money purchase plan, and a defined benefit plan.

SECTION 8. OPINION LETTERS SCOPE

.01 GENERAL LIMITS ON OPINION LETTERS

Opinion letters will be issued only to sponsors or mass submitters and do not constitute rulings or determinations as to either the qualification of the plans as adopted by particular employers, or, in the case of prototype plans, the exempt status of related trusts or custodial accounts.

.02 NONAPPLICABILITY OF THE PROCEDURE TO IRAS AND SEPS

Opinion letters will not be issued under this revenue procedure for prototype plans intended to meet the requirements for individual savings programs or simplified employee pension programs under § 408 (see Rev. Proc. 87-50, 1987-2 C.B. 647, Rev. Proc. 97-29, 1997-1 C.B. 698, and Rev. Proc. 98-59, 1998-50 I.R.B. 8).

.03 AREAS NOT COVERED BY OPINION LETTERS

Opinion letters will not be issued for:

- Multiemployer plans or multiple employer plans, within the meaning of § 413(b) and § 413(c) respectively;

- Plans that have been negotiated pursuant to a collective bargaining agreement and submitted to the Service as a plan maintained pursuant to a collective bargaining agreement. This does not preclude an M&P plan from covering employees of the employer who are included in a unit covered by a collective bargaining agreement or the adoption of an M&P plan pursuant to such agreement as a single employer plan which covers only employees of the

employer;

- Stock bonus plans;
- Employee stock ownership plans;
- Pooled fund arrangements contemplated by Rev. Rul. 81-100, 1981-1 C.B. 326;
- Annuity contracts under § 403(b);
- Defined contribution plans under which the test for nondiscrimination under § 401(a)(4) is made by reference to benefits rather than contributions;
- Cash balance or similar plans or defined benefit plans under which the test for nondiscrimination under § 401(a)(4) is made by reference to contributions rather than benefits;
- Plans described in § 414(k) (relating to a defined benefit plan which provides a benefit derived from employer contributions which is based partly on the balance of the separate account of a participant);
- Target benefit plans, other than plans which, by their terms, satisfy each of the safe harbor requirements described in § 1.401(a)(4)-8(b)(3)(i), as well as the additional rules in § 1.401(a)(4)-8(b)(3)(ii) through (vii);
- Plans that provide for the disparity permitted under § 401(l), other than plans which use a definition of compensation that includes all compensation within the meaning of § 415(c)(3) and excludes all other compensation, or that otherwise satisfies § 414(s) under § 1.414(s)-(c);
- Defined benefit plans that provide for employee contributions not allocated to separate accounts, other than plans that provide the minimum benefit described in § 1.401(a)(4)-6(b)(3)(ii);
- Plans that would not satisfy the qualification requirements except as a governmental plan as described in § 414(d);
- Church plans described in § 414(e) that have not made the election provided by § 410(d);
- Plans under which the § 415 limitations are incorporated by reference;

- Plans that do not contain a § 414(q) definition of highly compensated employee or under which the definition is incorporated by reference;

- Fully-insured § 412(i) plans, other than plans that, by their terms, satisfy the safe harbor for § 412(i) plans in § 1.401(a)(4)-3(b)(5);

- Plans that fail to contain a provision reflecting the requirements of § 414(u) (see Rev. Proc. 96-49).

.04 DOL PARTICIPANT LOAN REGULATIONS NOT ADDRESSED BY OPINION LETTER

M&P plans may adopt procedures to comply with the Department of Labor's (DOL) participant loan regulations under § 408(b)(1) of ERISA in the plan or in a document that is separate from the basic plan document, trust, and adoption agreement. The adoption of procedures outside of the plan document that are intended to comply with these regulations will not cause an M&P plan to be considered an individually designed plan. The Service will not review loan program procedures (whether in the plan or in a separate written document) to determine whether they comply with the requirements of the DOL regulations. Also, any opinion letter issued for an M&P plan will not consider whether loan program procedures may, in the operation of the plan, have an adverse effect on the qualified status of the plan. However, the loan program procedures under the plan may not be inconsistent with the qualification requirements of § 401(a).

.05 NONTRANSFERABILITY OF OPINION LETTERS

An opinion letter issued to a sponsor is not transferable to any other entity. For this purpose, a change of employer identification number is deemed to be a change of entity.

SECTION 9. OPINION LETTERS INSTRUCTIONS TO SPONSORS

.01 EMPLOYEE PLANS RULINGS AND AGREEMENTS ISSUES OPINION LETTERS

Employee Plans Rulings and Agreements will, upon the request of a sponsor, issue an opinion letter as to the acceptability of the form of the sponsor's M&P plan and any related trust or custodial account under § 401(a), 403(a), and 501(a). Review of the

sponsor's application may be assigned to a field office.

.02 FORMS AND ADDRESS FOR REQUESTING OPINION LETTERS

A request for an opinion letter relating to an M&P plan must be submitted on the current version of Form 4461, Application for Approval of Master or Prototype Defined Contribution Plan, Form 4461-A, Application for Approval of Master or Prototype Defined Benefit Plan, or Form 4461-B, Application for Approval of Master or Prototype Plan Mass Submitter Adopting Sponsor, as appropriate. As soon as possible after February 7, 2000, these forms will be available for downloading from the Internet at the following address: http://www.irs.gov. All information on the first page of the application must be typed. The request, including the required user fee, is to be sent to the Internal Revenue Service, Employee Plans Rulings and Agreements, Attention: T:EP:RA:T:ICU, P.O. Box 14073, Ben Franklin Station, Washington, D.C. 20044.

.03 EFFECT OF FAILURE TO DISCLOSE MATERIAL FACT OR TO ACCURATELY PROVIDE INFORMATION

The Service may determine, based on the application form, the extent of review of the M&P plan. A failure to disclose a material fact or misrepresentation of a material fact on the application may adversely affect the reliance which would otherwise be obtained through issuance by the Service of a favorable opinion letter. Similarly, failure to accurately provide any of the information called for on any form required by this revenue procedure may result in no reliance.

.04 EXPEDITING REVIEW OF SUBSTANTIALLY IDENTICAL PLANS

The Service reserves the right to review applications in any order which will expedite the processing of opinion letter applications. To expedite the review of substantially identical plans which are not described in section 16, relating to mass submitter plans, the Service encourages plan drafters and sponsors to include with each opinion letter application where it is appropriate a cover letter setting forth the following information:

- The name and file folder number (if available) of the plan which, for review purposes, the plan drafter designates as the "lead plan" (including the name and EIN of the sponsor);

- A list of all plans written by the plan drafter which are substantially identical to the

lead plan (including the information described in 1);

- A description of each place where the plan for which the application is being submitted is not word-for-word identical to the language of the lead plan, including an explanation of the purpose and effect of each such difference; and

- A certification, made under penalty of perjury by the plan drafter, that the information described in 3 is true and complete.

If the sponsor or plan drafter is aware that a lead plan or any substantially identical plan has been assigned for review to a tax law specialist, the cover letter should also indicate the name of the tax law specialist, if possible. To the extent feasible, lead plans and substantially identical plans should be submitted together. The Service will regard the information and certification described in 3 and 4 above as a material representation for purposes of issuing an opinion letter.

.05 SEPARATE APPLICATIONS REQUIRED FOR DIFFERENT CATEGORIES OF M&P PLANS / USE OF SAME BASIC PLAN DOCUMENT BY MULTIPLE PLANS

An M&P plan shall not contain any combination of profit-sharing, money purchase (other than target benefit), target benefit, non-integrated defined benefit, or integrated defined benefit plan features. However, separate defined contribution plans may have the same basic plan document and separate defined benefit plans may have the same basic plan document, but the provisions of the basic plan document must be identical for all plans using that document (that is, no elective or optional features). For example, a sponsor may submit six plans with respect to a given defined benefit basic plan document:

- integrated standardized, nonstandardized, nonstandardized safe harbor plans; and

- nonintegrated standardized, nonstandardized, and nonstandardized safe harbor plans.

A sponsor may also use one defined contribution basic plan document for a money purchase plan, a target benefit plan, and a profit-sharing plan. One basic plan document may not be used with respect to both defined benefit and defined contribution plans. A separate adoption agreement and completed application form must be submitted with respect to each defined benefit plan and each defined contribution plan. In the case of a simultaneous submission of plans using the same basic plan document, only one copy

of the basic plan document need be provided. If the requests are not simultaneous, the sponsor must submit a copy of the basic plan document with each submission and include a cover letter identifying the original submission. The number of such basic plan document must remain the same as in the prior submission. Paired plans (as defined in section 4.13) must be submitted simultaneously.

.06 SAMPLE LANGUAGE

A Listing of Required Modifications (LRM) containing sample language to be used in drafting M&P plans is available from Employee Plans Rulings and Agreements. Such language is not automatically required in M&P plans but should be used as a guide in drafting such plans. An LRM may be obtained by writing to the Internal Revenue Service, Employee Plans Rulings and Agreements, Washington, D.C. 20224, Attention T:EP:RA:T:ICU. To expedite the review of their plans, sponsors are encouraged to use LRM language and to identify where such language is being used in their plan documents. Requests for LRMs may be faxed to (202) 622-6199 (not a toll-free call). As soon as possible after February 7, 2000, the LRMs will also be accessible on the Internet at the following address: http://www.irs.gov. The LRMs can be found under "Tax Info for Business."

.07 ADDITIONAL INFORMATION MAY BE REQUESTED

The Service may, at its discretion, require any additional information that it deems necessary. If a letter, requesting changes to plan documents, is sent to the plan's sponsor or authorized representative, the changes must be received no later than 30 days from the date of the letter. If the changes are not received within 30 days, the application may be considered withdrawn. An extension of the 30 day time limit will only be granted for good cause.

.08 INADEQUATE SUBMISSIONS

The Service will return, without further action, plans that are not in substantial compliance with the qualification requirements or plans that are so deficient that they cannot be reviewed in a reasonable amount of time. A plan may be considered not to be in substantial compliance if, for example, it omits or merely incorporates qualification requirements by reference to the applicable Code section. The Service will not consider these plans until after they are revised, and they will be treated as new requests as of the date they are resubmitted. No additional user fee will be charged if an inadequate

submission is amended to be in substantial compliance and is resubmitted to the Service within 30 days following the date the sponsor is notified of such inadequacy.

.09 MATERIAL FURNISHED TO ADOPTING EMPLOYERS

A sponsor must furnish each adopting employer with a copy of the approved plan, copies of any subsequent amendments, and the most recently issued Internal Revenue Service opinion letter.

.10 NONIDENTIFICATION OF QUESTIONABLE ISSUES MAY CAUSE DELAY

If the plan document submitted as part of an opinion letter request contains a provision that gives rise to an issue for which contrary published authorities exist, failure to disclose and address significant contrary authorities may result in requests for additional information, which will delay action on the request.

.11 MATERIAL FURNISHED TO EMPLOYEE PLANS DETERMINATIONS

Each mass submitter and each sponsor of a non-mass submitter plan must furnish a copy of the approved M&P plan and the Internal Revenue Service opinion letter to Employee Plans Determinations at the following address:

Internal Revenue Service
Employee Plans Determinations
P.O. Box 2508
Cincinnati, OH 45201
Attn: EP Determinations VSC Coordinator
Room 4106

In addition, each mass submitter must submit a list to Employee Plans Determinations of all sponsors that have adopted a word-for-word identical plan of the mass submitter and a copy of any plan which contains minor modifications. Each mass submitter and sponsor of a non-mass submitter plan must also furnish Employee Plans Determinations with a copy of all amendments subsequently approved as to form by the Service. Copies of word-for-word identical plans of mass submitters, as described in section 4.10 of this revenue procedure, need not be submitted to Employee Plans Determinations.

SECTION 10. AMENDMENTS

.01 OPINION LETTERS FOR SPONSOR AMENDMENTS

A sponsor may amend or restate its previously approved plan (including any related trust or custodial account) and EP Rulings and Agreements will entertain a request for a written opinion as to the acceptability, for purposes of § 401(a), 403(a), and 501(a), of the form of the plan as amended. If the sponsor is amending its plan, it must, except as provided in section 16.02 and 16.04, submit a Form 4461 or Form 4461-A, as applicable, to EP Rulings and Agreements, together with a copy of the amendment(s), a cover letter summarizing the changes to the plan effected by such amendment(s), and a copy of the plan which is being amended. As soon as possible after February 7, 2000, Form 4461 and Form 4461-A will be available for downloading from the Internet at the following address: http:/www.irs.gov. If the sponsor is restating its plan, it must, except as provided in sections 16.02 and 16.04, submit the restated plan, with the changes highlighted, along with a Form 4461 or 4461-A, as applicable. (The plan and application may be returned to the sponsor if the changes have not been highlighted.) No more than four consecutive amendments may be submitted without restating the plan. In addition, the Service may, at its discretion, require plan restatement at any time that it deems necessary to adequately review a plan. See section 18.05 regarding required restatement of M&P plans for GUST.

.02 NO OPINION LETTERS FOR CERTAIN AMENDMENTS

An M&P plan will not lose its qualified status and, except as provided in subsection .024 below, no opinion letter will be issued merely because amendments are made which solely cover the following:

- Amendments to conform a plan to the requirements of § 402(a) of Title I of the Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. 93-406, 1974-3 C.B. 1, relating to named fiduciaries.

- Amendments to conform a plan to requirements of § 503 of ERISA, relating to claims procedures.

- Amendments that merely adjust the limitations under §415, 402(g), 401(a)(17), and 414(q)(1)(B) to reflect annual cost-of-living increases, other than amendments that add an automatic cost-of-living adjustment provision to the plan.

- Amendments that merely reflect a change of a sponsor's name. However, the sponsor must notify the Service, in writing, of the change in name and certify that it still meets the conditions for sponsorship described in section 4.09. No opinion letter will be issued and no user fee will be required for a mere change in name. However, if the sponsor wants a new opinion letter, it will have to submit a new Form 4461, 4461-A or 4461-B and pay the appropriate user fee. (Also see section 8.05 regarding changes in employer identification numbers.)

SECTION 11. DETERMINATION LETTERS AND INSTRUCTIONS TO ADOPTING EMPLOYERS

Except as provided in section 6, approval by the Service of the form of an M&P plan does not constitute a determination that an employer that adopts the plan will have a qualified plan. Therefore, such an adopting employer should request a determination letter in accordance with the procedures set forth in section 8 of Rev. Proc. 2000-6.

SECTION 12. APPROVED PLANS MAINTENANCE OF APPROVED STATUS

.01 REVOCATION OF OPINION LETTER BY THE SERVICE

An opinion letter found to be in error or not in accord with the current views of the Service may be revoked. However, except in rare or unusual circumstances, such revocation will not be applied retroactively if the conditions set forth in section 13.05 of Rev. Proc. 2000-4 are met. For this purpose, such opinion letters will be given the same effect as rulings. Revocation may be effected by a notice to the sponsor to which the letter was originally issued, or by a regulation, revenue ruling or other statement published in the Internal Revenue Bulletin. The sponsor should then notify each adopting employer of the revocation as soon as possible.

.02 SUBSEQUENT REQUIRED AMENDMENTS

An approved M&P plan must be amended by the sponsor and, if necessary, the employer, to retain its approved status if any provisions therein fail to meet the requirements of law, regulations, or other issuances and guidelines affecting

qualification that become effective subsequent to the issuance of an opinion letter. Failure to so amend could result in the loss of a plan's qualified status. Sponsors are required to make reasonable and diligent efforts to ensure that each employer which, to the best of the sponsor's knowledge, continues to maintain the plan as an M&P plan amends its plan when necessary. Failure to comply with this or any other requirement imposed on sponsors by this revenue procedure may result in the loss of eligibility to sponsor M&P plans and the revocation of opinion letters that have been issued to the sponsor.

.03 AMENDMENTS FOLLOWING REVENUE RULINGS

If an approved M&P plan is required to be amended to retain its approved status as a result of publication by the Service of a revenue ruling, notice or similar statement in the Internal Revenue Bulletin (I.R.B.), then, unless specifically stated otherwise in the revenue ruling, etc., the time by which the sponsor must amend its M&P plan to conform to the requirements of the revenue ruling, etc. and request a new opinion letter shall be the end of the one-year period after its publication in the I.R.B., and with respect to any adopting employer's plan the effective date of such amendment shall be the first day of the first plan year beginning within such one-year period.

.04 LOSS OF QUALIFIED STATUS

If a sponsor reasonably concludes that an employer's M&P plan may no longer be a qualified plan and the sponsor does not or cannot submit a request to correct the qualification failure under EPCRS, it is incumbent on the sponsor to notify the employer that the plan may no longer be qualified, advise the employer that adverse tax consequences may result from loss of the plan's qualified status, and inform the employer about the availability of EPCRS. See Rev. Proc. 98-22, 1998-12 I.R.B. 11.

SECTION 13. WITHDRAWAL OF REQUESTS

.01 NOTIFICATION AND EFFECT

A sponsor may withdraw its request for an opinion letter at any time prior to the issuance of such letter by notifying EP Rulings and Agreements in writing of such withdrawal. The sponsor must also notify each employer who adopted the plan that the request has been withdrawn. Such an employer will be deemed to have an individually

designed plan.

.02 SERVICE RETAINS INFORMATION

Even though a request is withdrawn, EP Rulings and Agreements will retain all correspondence and documents associated with that request and will not return them to the sponsor. EP Rulings and Agreements may furnish its views concerning the qualified status of the plan to EP Examinations, which has audit jurisdiction over the returns of any employers that have adopted the plan.

SECTION 14. ABANDONED PLANS

.01 NOTIFICATION TO THE SERVICE

A sponsor should notify EP Rulings and Agreements in writing of an approved M&P plan that is no longer used by any employer and which the sponsor no longer intends to offer for adoption. Such written notification should be filed with EP Rulings and Agreements, Washington, D.C. 20224, Attention: T:EP:RA:T:ICU and should refer to the file folder number appearing on the latest opinion letter issued.

.02 NOTIFICATION TO EMPLOYERS

A sponsor that intends to abandon an approved M&P plan that is in use by any adopting employer must inform each adopting employer that the form of the plan has been terminated, that the employer's plan will become an individually designed plan (unless the employer adopts another approved M&P plan), and that any employer with a determination letter may continue to rely on such letter (or if the plan is standardized, may continue to rely as if it had received a determination letter) on the date the form of the plan is terminated but only until a change in law or other change in the qualification requirements. After so informing all adopting employers, the sponsor should notify EP Rulings and Agreements in accordance with subsection .01 above.

SECTION 15. RECORD KEEPING REQUIREMENTS

.01 FILING OF OPINION LETTER APPLICATION CONSTITUTES AGREEMENT TO

COMPLY WITH RECORD KEEPING REQUIREMENTS

By submitting an application for an opinion letter under this revenue procedure (or by having an application filed on its behalf by a mass submitter), an M&P plan sponsor agrees, as provided in section 4.09, to comply with the requirements imposed on the sponsor by this revenue procedure, including the record keeping requirements of this section. Failure to comply with the requirements imposed on the sponsor by this revenue procedure may result in the loss of eligibility to sponsor M&P plans and the revocation of opinion letters that have been issued to the sponsor.

.02 MAINTENANCE AND AVAILABILITY OF RECORDS OF ADOPTING EMPLOYERS

An M&P plan sponsor must maintain, or have maintained on its behalf, for each of its plans, a record of the names, business addresses, and taxpayer identification numbers of all employers that have adopted the plan. However, a sponsor need not maintain records with respect to employers that, to the best of the sponsor's knowledge, ceased to maintain the plan as an M&P plan more than three years earlier. Upon written request, a sponsor must provide to the Service a list of such adopting employers that indicates, to the best of the sponsor's knowledge, which of such employers continue to maintain the plan as an M&P plan and which of such employers have ceased to maintain the plan as an M&P plan within the preceding three years.

SECTION 16. MASS SUBMITTERS

.01 OPINION LETTERS ISSUED TO MASS SUBMITTERS

EP Rulings and Agreements will, upon request by a mass submitter, as defined in section 4.10, issue an opinion letter as to the acceptability of the form of the mass submitter's M&P plan and any related trust or custodial account under § 401(a), 403(a), and 501(a). With respect to its plan, the mass submitter must submit a completed Form 4461 or 4461-A, as applicable, to EP Rulings and Agreements. As soon as possible after February 7, 2000, these forms will be available for downloading from the Internet at the following address: http://www.irs.gov .

The first page of the Form 4461 or 4461-A must be typed. The application must include a copy of the plan (adoption agreement and basic plan document) and any separate trust or custodial account document(s). In the case of an initial submission of a basic

plan document under this revenue procedure, the mass submitter's application must also be accompanied by applications for opinion letters filed on behalf of the requisite number of identical adopters (as determined under section 4.10), unless the mass submitter has already satisfied this requirement in connection with a previous application under this revenue procedure involving another basic plan document The application must also include the required user fee. A mass submitter may submit an application on its own behalf as one of the requisite number of adopting sponsors. After satisfying the requisite number of adopting sponsors requirement, the mass submitter may submit additional applications on behalf of other sponsors that wish to adopt a word-for-word identical plan or a plan that contains minor modifications from the mass submitter plan, as provided in section 16.032. In addition, the mass submitter may then submit requests for opinion letters under this section 16.01 for its other plans, regardless of the number of identical adopters of such other plans.

.02 REDUCED PROCEDURAL REQUIREMENTS FOR SPONSORS THAT USE MASS SUBMITTER PLANS

A sponsor of an M&P plan of a mass submitter must obtain an opinion letter. For initial qualification, or where the sponsor's plan includes minor modifications, the mass submitter on behalf of the sponsor must submit to EP Rulings and Agreements a completed Form 4461-B which contains a declaration by the mass submitter under penalty of perjury that the sponsor has adopted an M&P plan that is word-for-word identical, within the meaning of this section, to a plan of the mass submitter, or an M&P plan that is a minor modification of the mass submitter's plan. As soon as possible after February 7, 2000, Form 4461-B will be available for downloading from the Internet at the following address: http://www.irs.gov. Form 4461-B must be typed. If the mass submitter's plan has been approved by the Service, the sponsor's request for an opinion letter must identify the letter serial number and date of the opinion letter issued to the mass submitter with respect to that plan. If the sponsor has previously received a letter with respect to a plan that is identical to the mass submitter's plan, the procedures described in sections 16.04 and 18.03, as applicable, should be followed. If the sponsor is sponsoring a word-for-word identical plan (including a flexible plan), a copy of the plan need not be submitted. If the mass submitter submits a plan with minor modifications, it must comply with the requirements of section 16.032. The application submitted on behalf of the sponsor must include the required user fee. Upon receipt of the request for an opinion letter, described above, the Service will, as soon as clerically feasible, issue an opinion letter to the sponsor.

.03 DEFINITIONS

1. FLEXIBLE PLAN

(a) In general

A "flexible plan" is a plan submitted by a mass submitter which contains optional provisions (as defined in (b), below). Sponsors that adopt the flexible plan may include or delete any optional provision that is designated as such in the mass submitter's plan, provided the inclusion or deletion of specific optional provisions conforms to the mass submitter's written representation to the Service concerning the choices available to sponsors and the coordination of optional provisions. A mass submitter must bracket and identify the optional provisions when submitting such plan to EP Rulings and Agreements and must also provide the Service a written representation describing the choices available to sponsors and the coordination of optional provisions. Thus, such a representation must indicate whether a sponsor's plan may contain only one of a certain group of optional provisions, may contain only a specific combination of provisions, or may exclude the provisions entirely. Similarly, if the inclusion (or deletion) of a specific optional provision in a sponsor's plan will automatically result in the inclusion (or deletion) of any other optional provision, this must be set forth in the mass submitter's representation. A flexible plan may contain only optional provisions which meet the requirements of (b), below, and must be drafted so that the qualification of any sponsor's plan will not be affected by the inclusion or deletion of optional provisions. For example, if a sponsor's defined contribution plan contains an optional provision which allows a portion of a participant's account to be invested in life insurance, then under the terms of the sponsor's plan, the application of the proceeds must meet the requirements of § 401(a)(11) and 417. A flexible plan adopted by a sponsor which differs from the mass submitter plan only because the sponsor has deleted certain optional provisions from its plan in conformance with the mass submitter's representation described above will be treated as a word-for-word identical plan to the mass submitter plan. The Service encourages mass submitters to limit the number of optional provisions described in (b)(i) and (ii), below, which they provide under a flexible plan to six investment provisions and six administrative provisions.

(b) Optional Provisions

A flexible plan may contain only optional provisions that comply with the requirements set forth below. The optional provisions may be arranged as separate optional articles or as separate optional provisions within a single article. A flexible plan may also contain optional provisions in the adoption agreement. For example, if a mass submitter

flexible plan basic plan document contains an optional provision which would allow for loans under a sponsor's M&P plan, the adoption agreement could also include an optional provision which would enable an adopting employer to elect whether loans will be available under the plan it adopts. If the sponsor does not wish to enable adopting employers to make loans available under their plans, both the basic plan document optional provision and the adoption agreement optional provision would be deleted from the sponsor's M&P plan. Sponsors may include or delete optional provisions of mass submitter plans, but once the sponsor has decided to include an optional provision, it must offer that provision to all adopting employers. Any optional provision which the Service determines does not meet the requirements of this section will have to be changed to a non-optional provision or deleted from the mass submitter's plan. The following is an exclusive list of the allowable optional provisions which a flexible plan may contain:

(i) Investment Provisions A mass submitter may offer a variety of investment provisions in its plan for sponsors to include or delete from their version of the plan. However, the plan as adopted by the sponsor must provide some method for investing trust assets. Investment provisions are those provisions that describe the plan's methods of investing the trust or custodial funds, including provisions such as the availability of loans and investments in insurance contracts or other funding media, and self-directed investments. (Also see sections 4.05 and 5.11 regarding flexibility permitted in trust or custodial account documents.)

Administrative Provisions A mass submitter may offer a variety of administrative provisions in its plan for sponsors to include or delete from their version of the plan. However, the plan as adopted by the sponsor must describe how the plan will be administered. Administrative provisions are those provisions that describe the administration of the plan, including the powers, duties, and responsibilities of a plan's custodian, trustee, administrator, employer, and other fiduciaries. Administrative provisions include the allocation of responsibilities among fiduciaries, the resignation or replacement of fiduciaries, claims procedures under the plan, and record-keeping requirements. However, procedural provisions that are required for plan qualification are not administrative provisions under this section. For example, provisions that provide for the notice to participants required by § 417 and record-keeping required by regulations under § 401(k) and (m) are not administrative provisions for purposes of this revenue procedure, and may not be optional provisions.

(ii) Cash or Deferred Arrangement A mass submitter may include a self-contained cash or deferred arrangement (as defined in § 401(k)) for sponsors to include or delete.

(c) Addition of Optional Provisions by the Mass Submitter

A mass submitter may add additional optional provisions to its plan after a favorable opinion letter is issued. Generally, the addition of such optional provisions will not be treated as a plan amendment for purposes of this revenue procedure, Rev.

Proc. 2000-6, and Rev. Proc. 2000-8, and sponsors and adopting employers will not be required to obtain new opinion and determination letters in order to preserve reliance. (However, the addition of a cash or deferred arrangement or any change to the language of the adoption agreement subsequent to the issuance of an opinion letter will be treated as a plan amendment to the mass submitter's plan and the requirements of subsection .04 will then apply.) The mass submitter must submit such additional optional provisions to the Service, along with a completed Form 4461 or 4461-A, as applicable, and a check or money order in the amount specified in section 6.04(6) of Rev. Proc. 2000-8. No opinion letter will be issued to the mass submitter or any adopting sponsor with respect to the addition of these optional provisions. Instead, an advisory letter will be issued to the mass submitter notifying it that the addition of such optional provisions will not affect the status of favorable opinion and determination letters issued to sponsors and adopting employers.

(d) Notification to Employer

If a mass submitter adds optional provisions, as described in (c), above, all adopting sponsors who wish to include the additional optional provisions must furnish each adopting employer with a copy of the plan which includes such additional provisions in accordance with section 9.09. If a sponsor decides to include or delete an optional provision after it initially adopted the plan, it must also furnish each adopting employer with a copy of the new plan in accordance with section 9.09. However, if such inclusion or deletion results in a change to the language of the adoption agreement, such change will be treated as a plan amendment and the sponsor and its adopting employers may not continue to rely on previously issued opinion or determination letters.

2. MINOR MODIFICATION

A "minor modification" is a minor change to an otherwise word-for-word identical plan of the mass submitter which does not require an in-depth technical review. For example, a change from 5 year 100% vesting to 3 year 100% vesting is a minor modification. On the other hand, a change in the method of accrual of benefits in a defined benefit plan would not be considered a minor modification. A minor modification must be submitted

by the mass submitter on behalf of the sponsor that will adopt the modified plan. Such submissions will be reviewed on an expedited basis and opinion letters will be issued to the sponsor as soon as possible. However, the Service reserves the right to determine if such changes are actually minor. If it is determined that the changes are extensive or require an in-depth technical review, the plan will not be entitled to expedited review but will be treated as a non-mass submitter plan. (In such event, the Service will notify the mass submitter in writing of its determination. Within 30 days following the date of such communication, either the mass submitter may revise the plan so that the modifications are minor and resubmit the revised plan, or the sponsor may submit an additional user fee in an amount equal to the difference between a non-mass submitter plan application user fee and a minor modifier application user fee. If, after such 30 day period neither action has been taken, the application may be considered withdrawn.) To qualify for the expeditious review, the mass submitter must submit a completed Form 4461-B. Such form must be typed. In addition, the mass submitter must submit a copy of the mass submitter's plan with the minor modifications highlighted, as well as a statement indicating the location and effect of each change. The mass submitter must certify under penalty of perjury that the plan of the sponsor, except for the delineated changes, is word-for-word identical, within the meaning of this section, to the plan for which the mass submitter received a favorable opinion letter. If a mass submitter fails to identify each modification, such failure will be considered a material misrepresentation and an employer may not rely on any opinion or determination letter that may be issued with respect to the plan. If a mass submitter repeatedly fails to identify such modifications, the Service may deny permission to that mass submitter to submit additional minor modifications.

.04 AMENDMENTS OF MASS SUBMITTER PLANS

Any plan submitted by a mass submitter must include language designating the mass submitter as agent for the sponsor for purposes of making plan amendments (see section 12.02). Any sponsor that does not wish to make the amendments made by a mass submitter may switch to another mass submitter or may submit an application for an opinion letter on its own behalf. If the mass submitter makes any change to the plan, other than the addition of optional provisions pursuant to section 16.031(c), an amendment described in section 10.02, or a model amendment published by the Service, it must comply with the requirements of section 10.01 of this revenue procedure. In addition, prior to submitting an amendment to EP Rulings and Agreements, the mass submitter must notify the Service of its intention to amend the plan. Such notification should be submitted, in writing, to EP Rulings and Agreements, Washington, D.C. 20224, Attention: T:EP:RA:T:ICU. The Service will then mail a list to the mass submitter showing all sponsors that have adopted plans that are identical to

the mass submitter's plans, as well as the specific plans adopted by each sponsor. The mass submitter must then submit the amended plan to EP Rulings and Agreements for approval, along with a list identifying all adopting sponsors' plans that will be amended, a user fee form for each such sponsor, and the appropriate user fee required under section 6.04 of Rev. Proc. 2000-8. All sponsors that have adopted the mass submitter's plan, are identified on the list submitted to the Service, and for which a user fee has been submitted, will be considered to have made such amendments and will be issued opinion letters. In the case of minor modifier plans, separate Form 4461-B applications must be filed along with copies of the plans as amended, user fee forms, and the user fee required by section 6.04 of Rev. Proc. 2000-8 for minor modifier applications. Copies of the amended plan must be sent to adopting employers and EP Determinations in accordance with section 9.11. Any adopting sponsor that is not included on the list submitted to the Service (or in the case of a minor modifier, for which a Form 4461-B application has not been filed) or which notifies the Service of its desire not to adopt such amendment will no longer participate as a mass submitter plan but must apply for an opinion letter on its own behalf to retain its status as an M&P plan.

.05 EXPEDITIOUS PROCESSING ACCORDED MASS SUBMITTER PLANS

All mass submitter plans, including the adoption of approved mass submitter plans by sponsors, will be accorded more expeditious processing than M&P plans submitted by non-mass submitters, to the extent administratively feasible.

SECTION 17. USER FEES

.01 USER FEES FOR APPLICATIONS FILED UNDER THIS REVENUE PROCEDURE

Section 6.04 of Rev. Proc. 2000-8 sets forth the user fees for applications for opinion and advisory letters for M&P plans. The user fees in section 6.04 of Rev. Proc. 2000-8 apply to all applications for opinion and advisory letters for M&P plans that are filed under this revenue procedure.

.02 REDUCED USER FEES FOR SUBMISSION OF IDENTICAL VOLUME SUBMITTER SPECIMEN PLANS

Section 6.07 of Rev. Proc. 2000-8 sets forth the user fees for applications for advisory letters for volume submitter plans. Rev. Proc. 2000-8 is modified to provide reduced

user fees for advisory letters in cases involving the submission of at least 30 identical volume submitter specimen plans under the following procedures:

- A practitioner must submit an application for an advisory letter for a specimen plan (herafter referred to as the lead specimen plan). The application must include the plan and trust and all the other information required by section 9.07 of Rev. Proc. 2000-6. However, the cover letter for the application need not include a certification that at least 30 employers are expected to adopt similar plans; instead, the cover letter must state that at least 30 practitioners are submitting applications for advisory letters for identical specimen plans and must certify that each such plan is word-for-word identical to the lead specimen plan. The cover letter must provide the name, address, and EIN of each of the practitioners.

- The application for the lead specimen plan must include a user fee in the amount of $ 3,000.

- The application for the lead specimen plan must be accompanied by separate advisory letter applications filed by each of the practitioners listed in the cover letter for the lead specimen plan. The separate application should consist of a letter stating that the practitioner is requesting an advisory letter for a specimen plan that is word-for-word identical to the lead specimen plan and that the practitioner will maintain, and furnish to the Service on request, a list of adopting employers. The practitioner does not need to indicate that at least 30 employers are expected to adopt the plan. The practitioner should not submit a copy of the plan.

- A user fee in the amount of $ 100 must be paid for each separate advisory letter application.

An application for an advisory letter for a specimen plan that has been filed under the general procedures in section 9.07 of Rev. Proc. 2000-6 can be amended at any time, even after the issuance of an advisory letter, to designate the plan as a lead specimen plan by payment of the required additional user fee and submission of the other information and fees described above.

After the initial submission of advisory letter applications by at least 30 practitioners, applications may be filed by other practitioners who will sponsor the word-for-word identical plan. The application must include the practitioner's agreement to maintain, and furnish to the Service on request, a list of adopting employers; a certification by the sponsor of the lead specimen plan that the practitioner's plan is word-for-word identical to the lead specimen plan; and a user fee in the amount of $ 100. A copy of the plan should not be submitted.

All of the above applications are to be sent to the address in section 9.07(1) of Rev. Proc. 2000-6.

SECTION 18. OPENING OF COMPLETE GUST PROGRAM FOR M&P PLANS AND VOLUME SUBMITTER SPECIMEN PLANS; OTHER PROCEDURES RELATED TO GUST

.01 OPENING OF COMPLETE GUST PROGRAM FOR M&P PLANS / DELAYED SUBMISSIONS

Applications for opinion letters for M&P plans that are filed on or after May 8, 2000, will be reviewed taking into account all requirements of GUST, including those that are effective in plan years beginning after December 31, 1998, as well as the requirements of this revenue procedure. In Announcement 99-50, the Service announced that as of May 10, 1999, it was temporarily discontinuing the acceptance of applications for opinion and notification letters for M&P and regional prototype plans. Effective May 10, 1999, therefore, and until May 8, 2000, no applications for the approval of M&P plans (other than those plans submitted pursuant to subsection .02) may be submitted. Any application received on or after May 10, 1999, and prior to May 8, 2000 (other than those submitted pursuant to subsection .02) will be returned.

.02 EARLY SUBMISSION PERIOD FOR MASS SUBMITTERS AND NATIONAL SPONSORS

Mass submitters (as defined in section 4.10) and national sponsors (as defined in section 4.11) may submit applications for approval of M&P plans beginning April 7, 2000, and will not be subject to the delayed submission requirement of subsection .01. In the case of a national sponsor, each application submitted during this early submission period must be accompanied by the sponsor's certification, made under penalty of perjury, that it maintains a list of adopting employers which establishes that the sponsor is a national sponsor as defined in section 4.11. The Service reserves the right to request a copy of such list in order to verify that these requirements have been met.

.03 SERVICE TO MAIL LISTS OF IDENTICAL ADOPTERS TO MASS SUBMITTERS APPROVED UNDER REV. PROC. 89-9 AND REV. PROC. 89-13

Within 30 days after the effective date of this revenue procedure, the Service will mail to each person that was approved as a mass submitter under Rev. Proc. 89-9 or Rev. Proc. 89-13 a list of those sponsors that have previously adopted plans that are word-for-word identical to the mass submitter's plans along with such plans' file folder numbers. Mass submitters should use these lists, in accordance with the instructions provided with such lists, in applying for opinion letters under this procedure with respect to these sponsors' plans. These instructions will allow mass submitters to submit applications for opinion letters on behalf of the identical adopters without filing Form 4461-B.

.04 TREATMENT OF IN-PROCESS APPLICATIONS

As provided in Announcement 99-50, the Service will continue to process all M&P and regional prototype plan applications submitted before May 10, 1999, in accordance with the provisions of Rev. Procs. 89-9, 89-13, 98-14, and 98-53. Any letter issued to such a plan will not consider this revenue procedure or certain provisions of GUST that are effective after 1998. Alternatively, sponsors may withdraw any pending pre-May 10, 1999-application relating to an M&P or regional prototype plan. In this case, the user fee will not be refunded. However, if a new application pertaining to the same plan is subsequently filed on or before December 31, 2000, the user fee for the new application will be waived. The sponsor should indicate on the face of the application form that the user fee is being waived pursuant to Announcement 99-50 and this revenue procedure.

.05 REQUIRED RESTATEMENT OF M&P PLANS

M&P plans must be restated the first time they are submitted for GUST opinion letters under this revenue procedure. Amendments or working copies of plans in a restated format, in lieu of actual plan restatement, will not be accepted. However, restatement will not be required if the M&P plan was restated in connection with an application for an opinion letter under Rev. Proc. 98-14 and the plan received a favorable letter. Except as provided in section 16.04, the sponsor must highlight in the restated plan all changes that have been made to the last approved version of the plan.

.06 COMPLETION OF NEW ADOPTION AGREEMENTS FOR M&P PLANS

Employers must complete new adoption agreements when M&P plans are restated for GUST. Part of the reason for this requirement is that employers must conform their adoption agreement choices to the operation of their plans during the GUST transition period. Except as provided in section 6, employers must also request new determination letters in order to have reliance as to the qualified status of their M&P plans.

.07 OPENING OF COMPLETE GUST PROGRAM FOR VOLUME SUBMITTER SPECIMEN PLANS

The Service will begin to issue advisory letters for volume submitter specimen plans that take into account all of the requirements of GUST beginning March 8, 2000.

SECTION 19. REMEDIAL AMENDMENT PERIOD

.01 PURPOSE

The purpose of this section is to ensure that employers will have 12 months after an M&P plan or volume submitter specimen plan is approved for GUST in which to adopt the approved plan as a timely GUST restatement. Employers will be eligible for this 12-month period if they are prior adopters of an M&P, regional prototype, or volume submitter specimen plan, or if they certify that they intend to restate their plan for GUST using an M&P or volume submitter specimen plan, and the M&P plan sponsor or volume submitter practitioner submits its plan for GUST-approval by December 31, 2000.

.02 EXTENSION OF REMEDIAL AMENDMENT PERIOD

If the requirements in subsection .03 are satisfied, the remedial amendment period for an employer's plan will not expire before the time described in subsection .04. For purposes of this section, the remedial amendment period means the remedial amendment period determined under § 1.401(b)-1 and Rev. Proc. 97-41 and Rev. Proc. 98-14, both as modified by Rev. Proc. 99-23. As provided in section 3.05, where it is

appropriate in this section (for example, in subsection .031), the term "M&P plan" includes regional prototype plans under Rev. Proc. 89-13, and the term "opinion letter" includes notification letters issued under Rev. Proc. 89-13.

.03 REQUIREMENTS FOR EXTENSION

The requirements of this subsection .03 are satisfied if:

- before the end of the remedial amendment period (determined without regard to the extension provided by this section), the employer adopts an M&P plan or volume submitter specimen plan (regardless of whether such plan has a TRA '86 opinion or advisory letter); or

- before the end of the remedial amendment period (determined without regard to the extension provided by this section), the employer and an M&P plan sponsor or volume submitter practitioner execute a written certification of the employer's intent to amend or restate its plan by adopting the sponsor's or practitioner's GUST-approved M&P or volume submitter specimen plan; and 3 by December 31, 2000, the sponsor or practitioner submits an application for a complete GUST opinion or advisory letter for the M&P plan or volume submitter specimen plan referred to in 1 or 2 (even if the M&P plan is an identical adoption of a mass submitter plan).

.04 PERIOD OF EXTENSION

If the preceding requirements are satisfied, the remedial amendment period for the employer's plan will not expire before the end of the twelfth month beginning after the date on which a GUST opinion or advisory letter is issued for the M&P or volume submitter specimen plan referred to in subsection .03 or the opinion or advisory letter application for the plan is withdrawn. Within this period, the employer must amend or restate its plan by adopting the GUST-approved M&P or volume submitter specimen plan (or another GUST-approved M&P or volume submitter specimen plan, or individually designed GUST amendments) and, if required for reliance, request a determination letter.

.05 PRIOR ADOPTERS DEEMED TO HAVE ADOPTED OTHER PLANS OF SPONSOR OR PRACTITIONER FOR PURPOSES OF THIS SECTION

An employer that adopts, before the end of the remedial amendment period (determined without regard to the extension provided by this section), any M&P plan or volume submitter specimen plan of a sponsor or practitioner will, for purposes of this section, be deemed to have adopted each other M&P plan or volume submitter specimen plan of that sponsor or practitioner. Likewise, an employer that certifies, before the end of the remedial amendment period (determined without regard to the extension provided by this section), its intent to adopt any M&P plan or volume submitter specimen plan of a sponsor or practitioner will, for purposes of this section, be deemed to have made such a certification with respect to each other M&P plan or volume submitter specimen plan of that sponsor or practitioner.

.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.

.07 NO EXTENSION WHERE M&P PLAN SPONSOR OR VOLUME SUBMITTER PRACTITIONER FAILS TO MAKE TIMELY REQUEST FOR GUST OPINION OR ADVISORY LETTER

If an employer's plan would otherwise be eligible for the extension described in subsection .04, but the M&P sponsor or volume submitter specimen practitioner fails to submit an application for a GUST opinion or advisory letter by December 31, 2000, the remedial amendment period for the employer's plan will not be extended.

.08 INFORMATION TO BE SUBMITTED WITH DETERMINATION LETTER APPLICATION

An employer that avails itself of the extension provided by this section must include with

its determination letter application either evidence of adoption, before the expiration of the remedial amendment period (determined without regard to this section), of an M&P or volume submitter specimen plan or a copy of the certification described in subsection .032.

.09 DISCRETIONARY EXTENSIONS

If an M&P sponsor or volume submitter practitioner determines that the extension of the remedial amendment period provided by this section does not allow sufficient time for employers to adopt the sponsor's or practitioner's GUST-approved M&P or volume submitter specimen plan and, if required for reliance, request determination letters, the sponsor or practitioner may request a further extension. At its discretion, the Service may grant such a further extension. Among the factors that the Service will consider in determining whether a further extension will be granted are whether the sponsor or practitioner has taken reasonable steps to ensure that the process of restating employers' plans for GUST is completed as promptly as possible, whether substantial hardship to employers or the sponsor or practitioner would result if such an extension were not granted, whether such an extension is in the best interests of plan participants, and whether the granting of the extension is adverse to the interests of the Government. Requests for a further extension should be addressed to the Commissioner, Tax Exempt and Government Entities Division, P.O. Box 14073, Ben Franklin Station, Washington, D.C. 20224, Attention: T:EP:RA:T:ICU. However, the Service will not accept requests for a further extension before the later of December 31, 2000, or the date of issuance of a GUST opinion or advisory letter with respect to the sponsor's or practitioner's M&P or volume submitter specimen plan.

.10 REQUIRED AMENDMENTS FOR PLANS WITH EXTENDED RELIANCE ON TRA '86 LETTERS

Under Rev. Proc. 89-9, Rev. Proc. 89-13 (both as modified by22 Rev. Proc. 93-9, 1993-1 C.B. 474), Rev. Proc. 93-39, 1993-2 C.B. 513, Announcement 94-85, 1994-26 I.R.B. 23, and Rev. Proc. 95-12, 1995-1 C.B. 508, plans that were submitted to the Service within certain deadlines for determination, opinion, or notification letters under TRA '86 and received favorable letters were entitled to extended reliance. During the extended reliance period, a plan generally was not required to comply in operation with or be amended for regulations or administrative guidance of general applicability issued after the date of the plan's letter which interpret the qualification requirements in effect when the letter was issued. As modified by Rev. Proc. 99-23, the extended reliance period continued until the earlier of the last day of the last plan year commencing prior to

January 1, 2000, or the date established for plan amendment by any legislation effective after the date of the plan's letter. As further provided in Rev. Proc. 99-23, a plan with extended reliance must be amended by the last day of the first plan year beginning on or after January 1, 2000, to the extent necessary to comply with regulations or administrative guidance of general applicability which has been issued since the date of the plan's favorable TRA '86 letter. For this purpose, plan amendments will be deemed to have been adopted on the last day of the first plan year beginning on or after January 1, 2000, if they are in fact adopted after that date but within the plan's remedial amendment period as extended by this section. The amendments must be made effective no later than the first day of the first plan year beginning on or after January 1, 2000. If the plan's remedial amendment period has been extended bythis section, the amendments may be made effective earlier than the first day of the plan year in which the amendments are adopted to the extent necessary to comply with this requirement.

SECTION 20. EFFECT ON OTHER DOCUMENTS

.01 The following revenue procedures are superseded:

Rev. Procs. 89-9, 89-13, 90-21, 92-41, 93-10, and 95-42.

.02 Section 8.03 through 8.08 of22 Rev. Proc. 91-66 is superseded.

The balance of Rev. Proc. 91-66 was previously superseded; therefore,22 Rev. Proc. 91-66 is now superseded in full.

.03 Section 4 of Rev. Proc. 93-9 is superseded. The balance of Rev. Proc. 93-9 was previously superseded; therefore, Rev. Proc. 93-9 is now superseded in full.

.04 Section 8.05 of Rev. Proc. 2000-6 is modified as follows:

- subsection (2) is modified to provide that whether an employer may rely on an opinion letter for a standardized plan without requesting a determination letter will be determined under section 6 of this revenue procedure; and

- subsection (3) is deleted.

.05 Rev. Proc. 2000-8 is modified as provided in section 17.

.06 Announcement 99-50 is modified.

SECTION 21. EFFECTIVE DATE

This revenue procedure is effective February 7, 2000.

SECTION 22. PAPERWORK REDUCTION ACT

The collections of information contained in this revenue procedure have been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1545-1674.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number.

The collections of information in this revenue procedure are in sections 5.14, 9.11, 12.02, 12.03, 15.02, 17.02, 18.06, 19.02 and 19.09. This information is required in connection with the determination of plan qualification. This information will be used to determine whether a plan is entitled to favorable tax treatment. The collections of information are mandatory. The likely respondents are banks, insurance companies, other financial institutions, law, actuarial and consulting firms, employee benefit practitioners and employers.

The estimated total annual reporting and/or record keeping burden is 408,563 hours.

The estimated annual burden per respondent/record-keeper varies from 10 minutes to 2000 hours, depending on individual circumstances, with an estimated average of 1.53 hours. The estimated number of respondents and/or record-keepers is 266,530.

The estimated annual frequency of responses (used for reporting requirements only) is once every three years.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

DRAFTING INFORMATION

The principal author of this revenue procedure is James Flannery of the Tax Exempt and Government Entities Division. For further information regarding this revenue

procedure, contact the Employee Plans telephone assistance service between the hours of 1:30 and 3:30 p.m. Eastern time, Monday through Thursday, on (202) 622-6074/75. (These telephone numbers are not toll-free.)

Rev. Proc. 2000-27 –Determination letter program

26 CFR 601.201: Rulings and determination letters

(Also, Part I, sec. 401, 403; 1.401(b)-1.)

June 26, 2000

SECTION 1. PURPOSE

.01 This revenue procedure opens the Internal Revenue Service's determination letter program to allow sponsors of qualified plans to obtain determination letters that take into account all the changes in the qualification requirements made by "GUST", including those changes made by the Small Business Job Protection Act of 1996, Pub. L. 104-188 ("SBJPA"), that are first effective in plan years beginning after December 31, 1998. This procedure also extends until the last day of the first plan year beginning on or after January 1, 2001, the remedial amendment period under sec. 401(b) of the Code for amending plans for GUST, as well as the TRY '86 remedial amendment period for governmental and nonelecting church plans. Finally, this revenue procedure extends by an additional year the period of extended reliance for certain plans that received favorable determination, opinion, or notification letters under TRA '86.

.02 The term "GUST" refers to the following:

- the Uruguay Round Agreements Act, Pub. L. 103-465 ("GATT");
- the Uniformed Services Employment and Reemployment Rights Act of 1994, Pub. L. 103-353 ("USERRA");
- SBJPA;
- the Taxpayer Relief Act of 1997, Pub. L. 105-34 ("TRA '97"); and
- the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. 105-206 ("RRA '98").

SECTION 2. BACKGROUND

.01 Prior to June 26, 2000, plan sponsors could not request determination letters under sec. 401(a) or sec. 403(a) that take into account the changes in the qualification requirements made by SBJPA that are first effective in plan years beginning after December 31, 1998, unless the determination related to a terminating plan. Instead, sponsors of individually-designed plans, including volume submitter plans, could request letters that take into account all the changes in the qualification requirements made by GUST other than those changes made by SBJPA that are first effective in plan years beginning after December 31, 1998. (These letters are referred to in this revenue procedure as "GUST I letters.") Alternatively, sponsors of individually-designed plans, including volume submitter plans, had the option to request determination letters that do not take into account any of the changes made by GUST, except for changes to sec. 401(a)(26) and sec. 414(n). (These letters are referred to as "pre-GATT letters.") Determination letters for master or prototype (M&P) or regional prototype plans that have not yet been amended by their sponsors for GUST do not consider the changes made by GUST. See Rev. Proc. 98-14, 1998-1 C.B. 371, as modified by Rev. Proc. 98-53, 1998-2 C.B. 456, and section 3.03 of Rev. Proc. 2000-6, 2000-1 I.R.B. 187.

.02 Proposed regulations under sec. 411(d)(6), which were published in the Federal Register on March 29, 2000 (65 Fed. Reg. 16546), would permit qualified defined contribution plans to be amended to eliminate some alternative forms in which an account balance can be paid under certain circumstances, and would permit certain transfers between defined contribution plans that are not permitted under regulations now in effect. The proposed regulations are proposed to be effective upon publication of final regulations in the Federal Register and cannot be relied upon before finalization.

.03 Under sec. 401(b), plan sponsors have a remedial amendment period in which to adopt GUST plan amendments. Rev. Proc. 99-23, 1999-16 I.R.B. 5, provides that the GUST remedial amendment period for nongovernmental plans ends on the last day of the first plan year beginning on or after January 1, 2000. For governmental plans, as defined in sec. 414(d), the GUST remedial amendment period ends on the later of (i) the last day of the last plan year beginning before January 1, 2001, or (ii) 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 after December 31, 1998, of the governing body with authority to amend the plan, if that body does not meet continuously). The remedial amendment period can be further extended by the timely submission of a determination letter application. The end of the GUST remedial amendment period is the deadline for making all GUST plan amendments, including plan amendments reflecting the repeal of sec. 415(e) and other plan amendments specifically enumerated in Rev. Proc. 99-23. The GUST remedial amendment period

also applies with respect to all disqualifying provisions of new plans adopted or effective after December 7, 1994, and with respect to all plan amendments adopted after December 7, 1994, which would cause an existing plan to fail to be qualified.

.04 Rev. Proc. 2000-20, 2000-6 I.R.B. 553, includes a procedure for extending the GUST remedial amendment period for employers adopting M&P or volume submitter plans. To be eligible for the extension, employers must either adopt an M&P or volume submitter plan before the end of the GUST remedial amendment period (determined without regard to the extension) or, before such time, certify their intent to adopt a GUST-approved M&P or volume submitter plan. Additionally, the M&P sponsor or volume submitter practitioner must request a GUST opinion or advisory letter by December 31, 2000.

.**05** Rev. Proc. 99-23 extended the TRA '86 remedial amendment period for governmental plans to the end of the GUST remedial amendment period for governmental plans described above. The plan amendments to which the TRA '86 remedial amendment period applies are those required to comply with the Tax Reform Act of 1986, Pub. L. 99-514 ("TRA '86") and subsequent legislation through the Omnibus Budget Reconciliation Act of 1993, Pub. L. 103-66 ("OBRA '93").

.06 Under Notice 98-39, 1998-2 C.B. 205, nonelecting church plans are not required to be amended to comply with regulations under sec. 401(a)(4), 401(a)(5), 401(l), and 414(s) until the last day of the first plan year beginning on or after January 1, 2001. However, under Rev. Proc. 99-23, these plans are required to be amended to comply with other applicable provisions of TRA '86 and subsequent legislation through OBRA '93 by the end of the generally applicable GUST remedial amendment period, that is, the end of the first plan year beginning on or after January 1, 2000.

.**07** Plans that were submitted to the Service within certain deadlines for determination, opinion, or notification letters under TRA '86 and received favorable letters were entitled to extended reliance on their letters. However, plans with extended reliance are required to be amended to comply with regulations and administrative guidance of general applicability issued since the date of the plan's favorable TRA '86 letter. Rev. Proc. 99-23 extended the time for adopting such amendments to the end of the GUST remedial amendment period.

SECTION 3. PROGRAM OPENING

.01 Applications for determination letters under sec. 401(a) or sec. 403(a) that are filed with the Service on or after June 26, 2000, for individually-designed plans, including

volume submitter plans, will be reviewed taking into account all the changes in the qualification requirements made by GUST, including those changes made by SBJPA that are first effective in plan years beginning after December 31, 1998, unless the sponsor asks the Service to limit the extent to which the plan is reviewed for GUST, as described below. (Determination letters that take into account all the GUST changes are referred to in this revenue procedure as "GUST II letters.") Except in the case of terminating plans, the review of applications for determination letters for M&P plans will take into account the GUST changes only to the extent that the M&P plan sponsor has amended the plan for GUST and received a favorable opinion letter.

.02 Until further notice, sponsors of individually-designed plans, including volume submitter plans, will continue to have the option of limiting the extent to which their plans are reviewed for GUST by requesting either a GUST I letter or a pre-GATT letter, rather than a GUST II letter. The sponsor should make this request in a cover letter with the application. (This option does not apply to applications for determination on plan termination.) Under this option, the sponsor will need to submit another application and pay another user fee to obtain a GUST II letter.

.03 Because the proposed regulations under sec. 411(d)(6) may not be relied upon prior to finalization, the proposed regulations will not be taken into account by the Service for purposes of issuing determination letters. Until such regulations are finalized, the Service will not issue a favorable determination letter for a plan that is amended to eliminate or reduce benefits in a manner that is not permitted under regulations now in effect. Therefore, sponsors who are considering submitting determination letter applications before the proposed regulations under sec. 411(d)(6) are finalized should also be aware that they may have to submit another application and pay another user fee if they wish to adopt plan amendments as a result of the final regulations.

.04 In general, plans must be restated when they are submitted for GUST II determination letters. For this purpose, submission of a working copy of the plan in a restated format will suffice. A plan is generally exempt from the requirement to restate, however, if there have been fewer than four consecutive amendments since the plan was last restated, excluding amendments making only nonsubstantive plan changes, the plan has a favorable TRA '86 determination letter, and the plan meets either of the following conditions:

- The plan is a defined contribution plan under which the only contributions are nonelective employer contributions; or

- The plan has a favorable GUST I determination letter and is not adding

provisions designed to satisfy the safe harbor requirements of sec. 401(k)(12) or sec. 401(m)(11).

The Service nevertheless reserves the right to require restatement of a plan or submission of a working copy of a plan in a restated format in any case in which this is determined to be necessary.

.05 In general, Form 6406, Short Form Application for Determination for Minor Amendment of Employee Benefit Plan, may not be used to apply for either a GUST I or a GUST II letter. However, if use of Form 6406 is not otherwise precluded by section 11 of Rev. Proc. 2000-6, Form 6406 may be used to apply for a GUST II letter for a defined contribution plan with a favorable GUST I letter which does not include provisions designed to satisfy the safe harbor requirements of sec. 401(k)(12) or sec. 401(m)(11). In this case, the application should include a cover letter indicating the application is for a GUST II letter. The Service reserves the right to require the filing of a Form 5300 series application in any case in which it determines that the use of Form 6406 is inappropriate.

.06 The Service will attempt to contact each plan sponsor who has a Form 5300 determination letter application being reviewed by a determination letter specialist on June 26, 2000, to determine if the sponsor wishes to convert the application to a GUST II application. The Service will continue to process each other pending application in accordance with the procedures in effect prior to June 26, 2000.

SECTION 4. EXTENSION OF THE REMEDIAL AMENDMENT PERIOD

.01 The GUST remedial amendment period for nongovernmental plans is extended to the last day of the first plan year beginning on or after January 1, 2001. The remedial amendment period for governmental plans, as defined in sec. 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 the 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).

.02 In general, all plan provisions that either cause a plan to fail to satisfy the qualification requirements of the Code because of changes to those requirements made by GUST or are integral to a qualification requirement changed by GUST are disqualifying provisions under sec. 1.401(b)-1(b) of the regulations. Thus, this extension of the GUST remedial amendment period applies to all GUST plan amendments,

including all those specifically enumerated in Rev. Proc. 99-23. In addition, this extends the remedial amendment period with respect to all disqualifying provisions of new plans adopted or effective after December 7, 1994, and with respect to all plan amendments adopted after December 7, 1994, which would cause an existing plan to fail to be qualified.

.03 This extension also applies for purposes of the time by which employers must either adopt an M&P or volume submitter plan or certify their intent to adopt a GUST-approved M&P or volume submitter plan in order 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.

.03 The TRA '86 remedial amendment period for governmental plans is extended to the end of the GUST remedial amendment period for governmental plans described above. The TRA '86 remedial amendment period for nonelecting church plans is extended to the end of the GUST remedial amendment period for nongovernmental plans described above. Thus, nonelecting church plans now have a single amendment deadline for all GUST and TRA '86 plan amendments, including amendments relating to the nondiscrimination requirements. The additional administrative relief provided under Notice 92-36, 1992-2 C.B. 364, continues to be available to governmental and nonelecting church plans through the end of their respective remedial amendment periods with respect to the applicable nondiscrimination requirements.

SECTION 5. EXTENSION OF EXTENDED RELIANCE PERIOD

The TRA '86 extended reliance period is extended by an additional year. A plan with extended reliance must be amended by the end of the GUST remedial amendment period to the extent necessary to comply with regulations or administrative guidance of general applicability issued since the date of the plan's favorable TRA '86 determination letter. These amendments must be made effective no later than the first day of the plan year in which the GUST remedial amendment period ends, and, except in the case of M&P or volume submitter plans, no earlier than the first day of the plan year in which the amendments are adopted. (But see Rev. Rul. 94-76, 1994-2 C.B. 46, and Rev. Rul. 96-47, 1996-2 C.B. 35.)

SECTION 6. EFFECT ON OTHER DOCUMENTS

Rev. Procs. 98-14, 99-23, 2000-6, and 2000-20 are modified.

SECTION 7. EFFECTIVE DATE

This revenue procedure is effective June 26, 2000.

DRAFTING INFORMATION

The principal author of this revenue procedure is James Flannery of the Tax Exempt and Government Entities Division. For further information regarding this revenue procedure, contact the Employee Plans Division's telephone assistance service between the hours of 1:30 and 3:30 p.m. Eastern time, Monday through Thursday, on (202) 622-6074/75. (These telephone numbers are not toll-free.)

Announcement 2000-77

Determination Letter Applications for Volume Submitter Plans

September 5, 2000

Purpose

The purpose of this announcement is to assist practitioners and plan sponsors in filing determination letter applications for volume submitter plans where the volume submitter specimen plan has not received an advisory letter that considers all the changes in the qualification requirements made by GUST. The announcement provides guidance on the types of plan amendments that may be needed to obtain a favorable determination letter. It also discusses certain procedural requirements related to the application process.

Background

Rev. Proc. 2000-27, 2000-26 I.R.B. 1272, provides that determination letter applications for individually-designed plans, including volume submitter plans, that are filed with the Service on or after June 26, 2000, will generally be reviewed taking into account all the changes in the qualification requirements made by GUST. (GUST is an acronym for the Uruguay Round Agreements Act (GATT), the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), the Small Business Job Protection Act of 1996 (SBJPA), the Taxpayer Relief Act of 1997 (TRA '97) and the Internal Revenue Service Restructuring and Reform Act of 1998 (RRA '98).) A letter that takes into account all of the requirements of GUST is referred to as a GUST II letter.

Prior to June 26, 2000, plan sponsors could not request complete GUST letters except for terminating plans. Rather, they had the option of requesting one of two limited scope determination letters:

- a letter that excludes consideration of any of the qualification changes made by

GUST,

- or a letter that generally considers GUST but excludes consideration of certain qualification changes effective after 1998.

These letters are referred to as pre-GATT and GUST I letters, respectively. Until further notice, plan sponsors will continue to have the option of requesting either of these limited scope letters, except, of course, in the case of terminating plans. However, unless the plan sponsor requests a limited scope review in the cover letter for its application, a determination letter application for an individually-designed plan, including a volume submitter plan, that is filed on or after June 26, 2000, will be reviewed taking into account all of the requirements of GUST. See section 3.01 of Rev. Proc. 2000-27.

Volume submitter practitioners have been able to obtain GUST II advisory letters for their volume submitter specimen plans since March 8, 2000. However, as of now, the latest advisory letter issued for most specimen plans is either a pre-GATT letter or a GUST I letter.

General Guidelines for Determination Letter Applications for Volume Submitter Plans That Have Not Received GUST II Advisory Letters

The guidelines that follow are intended to ensure that volume submitter determination letter applications are processed efficiently and correctly. Practitioners and plan sponsors should note that failure to follow these guidelines may result in processing delays, unnecessary taxpayer contacts, requests for plan restatement, new applications or additional user fees, and possible issuance of incorrect letters.

The effect of Rev. Proc. 2000-27 on the review of applications for determination letters for volume submitter plans that are filed on or after June 26, 2000, is as follows: These applications will be reviewed as GUST II applications in all cases, even if the latest advisory letter for the specimen plan is a GUST I or pre-GATT letter, unless the application or cover letter specifically requests a GUST I or pre-GATT determination letter.

Consequently, practitioners and plan sponsors who will be filing determination letter applications for volume submitter plans where a GUST II advisory letter has not been issued for the specimen plan should carefully consider the requirements that may have to be satisfied in order to receive a GUST II determination letter. In addition to necessary plan amendments, these requirements may entail plan restatement, the filing of Form 5300 instead of Form 5307 and the payment of a higher user fee. These

requirements, including certain plan amendments that may be needed, are discussed below under Specific Guidelines for Determination Letter Applications for Volume Submitter Plans That Have Not Received GUST II Advisory Letters.

In addition, practitioners and plan sponsors are reminded that until proposed regulations under § 411(d)(6) of the Code are finalized, the Service will not issue a favorable determination letter for a plan that is amended to eliminate or reduce benefits in a manner that is not permitted under regulations now in effect. Therefore, plan sponsors who are considering submitting determination letter applications before the proposed regulations under § 411(d)(6) are finalized should also be aware that they may have to submit another application and pay another user fee if they wish to adopt plan amendments as a result of the final regulations. In view of the foregoing, plan sponsors may wish to consider deferring their requests for determination letters until the final § 411(d)(6) regulations have been issued and a GUST II letter has been issued for the volume submitter specimen plan. Also see section 19 of Rev. Proc. 2000-20, 2000-6 I.R.B. 553, and section 4 of Rev. Proc. 2000-27 regarding the remedial amendment period for volume submitter plan sponsors.

If the plan sponsor desires a GUST II letter, the determination letter application should include all necessary GUST amendments as well as any other permissible amendments the plan sponsor wishes to make. The practitioner and plan sponsor are also urged to include a cover letter stating that the application is for a GUST II determination letter. In accordance with section 9.08(2)(e) of Rev. Proc. 2000-6, 2000-1 I.R.B. 187, the application must also include a statement by the practitioner identifying and describing each deviation from the language of the approved specimen plan.

If the plan sponsor does not desire a GUST II letter, it must indicate on the application or in a cover letter whether it is requesting a pre-GATT or GUST I determination letter.

Specific Guidelines for Determination Letter Applications for Volume Submitter Plans That Have Not Received GUST II Advisory Letters

The following guidelines address the plan amendments that may be needed to obtain a GUST II determination letter where the specimen plan's latest advisory letter is a GUST I letter. The guidelines also address the situations in which a request for a GUST II determination letter may require plan restatement, use of Form 5300 instead of Form 5307 and payment of a higher user fee.

Where the latest advisory letter for the specimen plan is a GUST I letter:

If the plan is not intended to satisfy the safe harbors under § 401(k)(12) and § 401(m)(11), the plan amendments that may be needed for a GUST II determination letter should in most cases be limited. These include amendments related to the repeal of the combined plan limitation of § 415(e) and, for § 401(k), profit-sharing and stock bonus plans, amendments related to the addition of § 402(c)(4)(C) which changed the definition of eligible rollover distribution. See Notice 99-44, 1999-35 I.R.B. 326, Notice 99-5, 1999-3 I.R.B. 10, and Notice 2000-32, 2000-26 I.R.B. 1274, regarding these changes. These amendments should usually be minor and should not, of themselves, either require plan restatement or affect the plan sponsor's ability to use Form 5307.

If the plan is adding the safe harbors under § 401(k)(12) and § 401(m)(11), the plan must be restated and the plan sponsor cannot use Form 5307 but must instead use Form 5300 and pay the user fee for an individually-designed plan that is not a volume submitter plan.

Where the latest advisory letter for the specimen plan is a pre-GATT letter:

Except as provided in B., below, the plan must be restated and the plan sponsor cannot use Form 5307 but must instead use Form 5300 and pay the user fee for an individually-designed plan that is not a volume submitter plan.

If the plan is a defined contribution plan under which the only contributions are nonelective employer contributions, then the plan does not have to be restated and the plan sponsor can use Form 5307.

Part III

Administrative, Procedural, and Miscellaneous

26 CFR 601.201: Rulings and determination letters
(Also, Part I, § 401; 1.401(b)-1.)

Rev. Proc. 99-23

SECTION 1. PURPOSE

.**01** This revenue procedure extends until the last day of the first plan year beginning on or after January 1, 2000, the remedial amendment period under § 401(b) of the Code for amending plans that are qualified under § 401(a) or § 403(a) for changes made by the Small Business Job Protection Act of 1996, Pub. L. 104-188 ("SBJPA") and for other recent changes in the law. It also designates as a disqualifying provision for which this extended remedial amendment period is available any plan provision that causes a plan to fail to satisfy the qualification requirements of the Code because of the repeal of the combined plan limitation under § 415(e) or that is integral to this repealed qualification requirement. The repeal of § 415(e) is effective for limitation years beginning after December 31, 1999.

.**02** This revenue procedure provides that the extension of the remedial amendment period also applies:

1 to all disqualifying provisions of new plans adopted or effective after December 7, 1994, and all disqualifying provisions of existing plans arising from a plan amendment adopted after December 7, 1994;

2 to the deadline for adopting certain amendments relating to § 415(b)(2)(E);

3 to the deadline for adopting amendments of disqualifying provisions that are integral to a qualification requirement changed by a provision of SBJPA that became effective on the first day of the first plan year beginning after December 31, 1998; and

4 to the deadline for adopting amendments of disqualifying provisions that are integral to the requirements of § 401(a)(31) to reflect the change made

by § 6005(c)(2) of the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. 105-206 ("RRA 98").

.03 This revenue procedure also provides that the extension of the remedial amendment period applies to the time for adopting amendments of defined benefit plans to provide that benefits will be determined in accordance with the applicable interest rate rules and applicable mortality table rules of ' 1.417(e)-1(d) of the Income Tax Regulations. However, such a plan amendment must provide that, with respect to distributions with annuity starting dates that are on or after the effective date of the amendment but before the adoption date of the amendment, the distribution will be the greater of the amount that would be determined under the plan without regard to the amendment and the amount determined under the plan with regard to the amendment.

.04 This revenue procedure extends by one year the period of extended reliance for certain plans that received favorable determination, opinion, or notification letters under the Tax Reform Act of 1986, Pub. L. 99-514 ("TRA 86").

.05 Finally, this revenue procedure extends the TRA 86 remedial amendment period for governmental and nonelecting church plans to the end of the remedial amendment period for SBJPA. This extension ensures that no such plan need be submitted for a determination letter until the end of the SBJPA remedial amendment period. Sponsors of nonelecting church plans continue to have until the end of the 2001 plan year to adopt amendments relating to the nondiscrimination requirements.

SECTION 2. BACKGROUND

.01 In recent years, the following public laws have made changes affecting the requirements for qualification of pension, profit-sharing, and stock bonus plans under § 401(a) or § 403(a):

1 the Uruguay Round Agreements Act, Pub. L. 103-464 ("GATT@);

2 the Uniformed Services Employment and Reemployment Rights Act of 1994, Pub. L. 103-353 (AUSERRA");

3 SBJPA;

4 the Taxpayer Relief Act of 1997, Pub. L. 105-34 ("TRA 97"); and

5 RRA 98.

.02 Rev. Proc. 97-41, 1997-33 I.R.B. 51, provided a remedial amendment period under § 401(b) with respect to certain amendments for GATT, SBJPA, and USERRA. The remedial amendment period that was provided under Rev. Proc. 97-41 generally permits plan amendments to be made retroactively effective if they are adopted before the end of the remedial amendment period and they relate to GATT, SBJPA, and USERRA qualification changes that are effective before the first day of the first plan year beginning on or after January 1, 1999. Rev. Proc. 98-14, 1998-4 I.R.B. 22, provided that the remedial amendment period described in Rev. Proc. 97-41 will also apply to plan amendments that relate to TRA 97. For plans other than governmental plans, the remedial amendment period under Rev. Proc. 97-41 and Rev. Proc. 98-14 ends on the last day of the first plan year beginning on or after January 1, 1999.

For governmental plans, as defined in § 414(d), the remedial amendment period ends on the later of

(i) the last day of the last plan year beginning before January 1, 2001, or

(ii) 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 after December 31, 1998, of the governing body with authority to amend the plan, if that body does not meet continuously).

Those amendments that are required to be made to retain qualified status as a result of changes in the qualification requirements must be made retroactively effective as of the date on which the qualification change became effective with respect to the plan, and, in general, operational compliance prior to actual amendment is required. Those amendments that are not required but that amend plan provisions that are integrally related to qualification changes may be made retroactively effective as of the first day on which the plan was operated in accordance with the amended plan provision.

.03 The remedial amendment period described in Rev. Proc. 97-41 also applies with respect to all disqualifying provisions of new plans adopted or effective after December 7, 1994, and with respect to all plan amendments adopted after December 7, 1994, which would cause an existing plan to fail to be qualified.

.04 The end of the remedial amendment period described in Rev. Proc. 97-41 is also the deadline for adopting plan amendments applying the changes under § 415(b)(2)(E). It is, likewise, the deadline for adopting a plan amendment repealing a pre-August 20, 1996, GATT plan amendment, thereby permitting the earlier plan amendment to be disregarded in applying§ 767(d)(3)(A) of GATT, as modified by § 1449(a) of SBJPA.

.05 Notice 98-52, 1998-46 I.R.B. 16, provided guidance on the nondiscrimination safe harbor methods in § 401(k)(12) and § 401(m)(11). This notice designates as disqualifying provisions under § 401(b) plan provisions that are integral to a qualification requirement changed by a provision of SBJPA that becomes effective on the first day of the first plan year beginning after December 31, 1998, provided two conditions are satisfied. First, the plan provisions must generally be amended by no later than the last day of the first plan year beginning after December 31, 1998. Second, the plan provisions, as amended, must be effective as of the first day of the first plan year beginning after December 31, 1998. Notice 98-52 also provides that a plan amendment that satisfies these conditions will not be treated as violating § 411(d)(6) merely because the plan amendment imposes the withdrawal restrictions required by § 401(k)(12)(E)(i), provided that those withdrawal restrictions do not apply with respect to contributions allocated as of a date before the first day of the first plan year beginning after December 31, 1998.

.**06** Notice 99-5, 1999-3 I.R.B. 10, provided guidance relating to the exception to the definition of eligible rollover distribution for certain hardship distributions which was added to § 402(c)(4) and 403(b)(8)(B) by § 6005(c)(2)(A) and (B) of RRA 98. This definition is relevant in the application of the direct rollover requirements of § 401(a)(31).

This notice designates as disqualifying provisions under § 401(b) plan provisions that are integral to the requirements of § 401(a)(31), but only to the extent such provisions are amended to reflect the change made by § 6005(c)(2) of RRA 98, provided two conditions are satisfied. First, the plan provisions must generally be amended to reflect the change made by § 6005(c)(2) of RRA 98 by no later than the last day of the first plan year beginning after December 31, 1998. Second, the plan provisions, as amended, must be effective as of the first day the plan operates in accordance with the change made by § 6005(c)(2) of RRA 98.

.**07** Under § 417(e)(3), as amended by § 767 of the Retirement Protection Act of 1994 (ARPA 94," which is part of GATT), and § 1.417(e)-1(d), a defined benefit plan must provide that the present value of any accrued benefit and the amount of any distribution must not be less than the amount calculated using the applicable interest rate described in § 1.417(e)-1(d)(3) and the applicable mortality table described in § 1.417(e)-1(d)(2). Prior to amendment by § 767 of RPA 94, § 417(e)(3) required, instead of the applicable interest rate, an interest rate based on the rate that would be used by the Pension Benefit Guaranty Corporation ("PBGC") for a trusteed single-employer plan to value the participant=s vested benefit ("PBGC rate"), and it did not impose any restrictions on the mortality table to be used. Section 767 of RPA 94 and § 1.417(e)-1(d) are generally effective for distributions with annuity starting dates in plan years beginning after

December 31, 1994. However, § 417(e)(3)(B) provides a transition rule for plans adopted and in effect as of December 7, 1994 ("pre-GATT plans").

In general, under this rule, the present value of a distribution from a pre-GATT plan that is made before the earlier of

(i) the first plan year beginning after December 31, 1999, or

(ii) the later of the adoption or effective date of a plan amendment applying the changes made to § 417(e)(3) to the plan is to be determined under the plan=s pre-GATT terms. Thus, for pre-GATT plans, amendments applying the changes to § 417(e)(3) to plan years beginning before January 1, 2000, could not be adopted retroactively, and these plans could not be operated in accordance with the changes prior to plan amendment.

.**08** Section 767(d)(2) of RPA 94 provides that a participant's accrued benefit is not considered to be reduced in violation of § 411(d)(6) merely because the benefit is determined in accordance with the applicable interest rate rules and the applicable mortality table rules of § 417(e)(3)(A), as amended by RPA 94. Section 1.417(e)-1(d)(10) explains the scope of relief from the requirements of § 411(d)(6). A plan amendment to comply with the applicable interest rate rules and the applicable mortality table rules of § 417(e)(3)(A), as amended by RPA 94, must apply to all distributions with annuity starting dates that occur in plan years beginning after December 31, 1999.

.09 Section 1.401(b)-1T(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 that has been designated by the Commissioner as a disqualifying provision under § 401(b).

.10 Under Rev. Proc. 89-9, 1989-1 C.B. 780, Rev. Proc. 89-13, 1989-1 C.B. 801 (both as modified by Rev. Proc. 93-9, 1993-1 C.B. 474), Rev. Proc. 93-39, 1993-2 C.B. 513, Announcement 94-85, 1994-26 I.R.B. 23, and Rev. Proc. 95-12, 1995-1 C.B. 508, 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. The sponsor of a plan that is entitled to extended reliance on a favorable TRA 86 letter may rely on that letter until the earlier of the last day of the last plan year commencing prior to January 1, 1999, 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, 1999, to the extent necessary to comply with regulations or administrative guidance of general applicability that has been issued since the date of the plan§s

favorable TRA 86 letter. These amendments must be made effective no later than the first day of the first plan year beginning on or after January 1, 1999, and no earlier than the first day of the plan year in which the amendments are adopted. (But see Rev. Rul. 94-76, 1994-2 C.B. 46, and Rev. Rul. 96-47, 1996-2 C.B. 35.)

.11 For nonelecting church plans, Notice 98-39, 1998-33 I.R.B. 11, extended the remedial amendment period for plan amendments relating to regulations under § 401(a)(4), 401(a)(5), 401(l), and 414(s) ("TRA 86 remedial amendment period") until the last day of the first plan year beginning on or after January 1, 2001. The remedial amendment period was not extended for other amendments covered by the TRA 86 remedial amendment period, such as amendments required to satisfy the Omnibus Budget Reconciliation Act of 1993 ("OBRA 93"), the Unemployment Compensation Act of 1992 ("UCA"), or the changes to the law under TRA 86 other than changes to the nondiscrimination rules. Sponsors of nonelecting church plans were required by Notice 96-64, 1996-2 C.B. 229, to adopt amendments satisfying those changes in law by the last day of the first plan year beginning on or after January 1, 1999.

.**12** For governmental plans, Notice 96-64, citing Announcement 95-48, 1995-23 I.R.B. 13, provided that the TRA 86 remedial amendment period for plan amendments relating to regulations under § 401(a)(4), 401(a)(26), 401(k), 401(m), 410(b), and 414(s) was extended to the last day of the first plan year beginning on or after the later of January 1, 1999, or 90 days after the opening of the first legislative session beginning on or after January 1, 1999 ("1999 legislative date"). This extension of the TRA 86 remedial amendment period for governmental plans applied to all amendments relating to TRA 86, UCA, and OBRA 93, not just the nondiscrimination requirements.

SECTION 3. EXTENSION OF REMEDIAL AMENDMENT PERIOD

.01 The remedial amendment period described in Rev. Proc. 97-41 and Rev. Proc. 98-14, hereafter referred to as the AGUST" remedial amendment period, is, in the case of nongovernmental plans, hereby extended to the last day of the first plan year beginning on or after January 1, 2000. This extension does not alter the GUST remedial amendment period for governmental plans described in Rev. Proc. 98-14.

.02 This extension also applies to the remedial amendment period with respect to disqualifying provisions of new plans adopted or effective after December 7, 1994, and with respect to plan amendments adopted after December 7, 1994, which would cause an existing plan to fail to be qualified.

.03 This extension also extends the deadline for adopting plan amendments applying

the changes under § 415(b)(2)(E) and the deadline for adopting a plan amendment repealing a pre-August 20, 1996, GATT plan amendment, thereby permitting the earlier plan amendment to be disregarded in applying § 767(d)(3)(A) of GATT, as modified by § 1449(a) of SBJPA.

.**04** The deadline, under Notice 98-52, for amending plan provisions that are integral to a qualification requirement changed by a provision of SBJPA that becomes effective on the first day of the first plan year beginning after December 31, 1998, is also extended to the end of the GUST remedial amendment period. In addition, the requirement, under Notice 98-52, that such plan provisions, as amended, must be effective as of the first day of the first plan year beginning after December 31, 1998, is eliminated. Instead, such plan provisions, as amended, must be effective no earlier than the first day of the first plan year beginning after December 31, 1998. Thus, for example, an existing § 401(k) plan may be amended by the last day of the 2000 plan year, retroactive to the first day of that year (or to the first day of the 1999 plan year), to satisfy the safe harbors in § 401(k)(12) and § 401(m)(11) for the 2000 plan year (or for both the 1999 and 2000 plan years). Lastly, Notice 98-52 is modified to provide that a plan amendment that is made within the GUST remedial amendment period will not be treated as violating § 411(d)(6) merely because the plan amendment imposes the withdrawal restrictions required by § 401(k)(12)(E)(i), but only if those withdrawal restrictions do not apply with respect to contributions allocated as of a date before the first day of the first plan year for which the plan satisfies the safe harbor.

.**05** The deadline, under Notice 99-5, for amending plan provisions that are integral to the requirements of § 401(a)(31) to reflect the change made by § 6005(c)(2) of RRA 98 is also extended to the end of the GUST remedial amendment period. The requirement, under Notice 99-5, that such plan provisions, as amended, must be effective as of the first day the plan operates in accordance with the change made by § 6005(c)(2) of RRA 98 continues to apply.

.**06** Finally, the extension of the remedial amendment period also applies to the time for adopting amendments of defined benefit plans to provide that benefits will be determined in accordance with the applicable interest rate rules and applicable mortality table rules of § 1.417(e)-1(d). Thus, such a plan amendment may be adopted at any time up to the last day of the extended remedial amendment period, provided the amendment is made effective for distributions with annuity starting dates occurring in plan years beginning after December 31, 1999. However, pursuant to the Commissioner=s authority in §1.401(b)-1T(c)(3), if such a plan amendment is adopted after the last day of the last plan year beginning before January 1, 2000, the amendment must provide that, with respect to distributions with annuity starting dates that are after the last day of that plan year but before the date of adoption of the

amendment, the distribution will be the greater of the amount that would be determined under the plan without regard to the amendment and the amount determined under the plan with regard to the amendment.

.**07** The TRA 86 remedial amendment period for governmental plans is hereby extended to the end of the GUST remedial amendment period for governmental plans described in Rev. Proc. 98-14, and the TRA 86 remedial amendment period for nonelecting church plans is hereby extended to the last day of the first plan year beginning on or after January 1, 2000. Accordingly, governmental plans need not be amended to comply with TRA 86, UCA, or OBRA 93 (to the extent the provisions of those acts apply) until the date described in Rev. Proc. 98-14. In accordance with Notice 98-39, nonelecting church plans need not be amended to comply with the regulations under § 401(a)(4), 401(l), 410(b), or 414(s) until the last day of the first plan year beginning on or after January 1, 2001. For all other applicable provisions of those acts, however, nonelecting church plans must be amended by the last day of the first plan year beginning on or after January 1, 2000. The additional administrative relief provided under Notice 92-36, 1992-2 C.B. 364, continues to be available to governmental and nonelecting church plans through the end of their respective remedial amendment periods with respect to the applicable nondiscrimination requirements.

SECTION 4. DESIGNATION OF PLAN PROVISIONS INTEGRAL TO § 415(e) AS DISQUALIFYING PROVISIONS

A plan provision is hereby designated as a disqualifying provision under § 1.401(b)-1(b) if the plan provision causes a plan to fail to satisfy the qualification requirements of the Code because of the repeal of the combined plan limitation of § 415(e) by § 1452(a) of SBJPA or if the provision is integral to the limitation of § 415(e), as in effect prior to its repeal by § 1452(a) of SBJPA, provided the following conditions are satisfied. First, the plan provision must be amended to reflect the repeal of § 415(e) by the end of the GUST remedial amendment period. Second, in the case of a plan provision that is integral to the limitation of § 415(e), the plan provision, as amended, may not be effective earlier than the first day on which the plan was operated in accordance with the amended provision.

SECTION 5. EXTENSION OF EXTENDED RELIANCE PERIOD

The TRA 86 extended reliance period is extended by one year. A plan with extended reliance must therefore be amended by the end of the GUST remedial amendment period to the extent necessary to comply with regulations or administrative

guidance of general applicability that have been issued since the date of the plan's favorable TRA 86 letter. These amendments must be made effective no later than the first day of the first plan year beginning on or after January 1, 2000, and, except in the case of master or prototype or other pre-approved plans, no earlier than the first day of the plan year in which the amendments are adopted. (But see Rev. Rul. 94-76 and Rev. Rul. 96-47.)

SECTION 6. EFFECT ON OTHER DOCUMENTS

The following revenue procedures and notices are modified: Rev. Proc. 89-9, Rev. Proc. 89-13, section 13 of Rev. Proc. 93-39, Rev. Proc. 95-12, Rev. Proc. 97-41, Rev. Proc. 98-14, Notice 92-36, Notice 96-64, Notice 98-39, Notice 98-52, and Notice 99-5.

SECTION 7. EFFECTIVE DATE

This revenue procedure is effective April 19, 1999.

DRAFTING INFORMATION

The principal author of this revenue procedure is James Flannery of the Employee Plans Division. For further information regarding this revenue procedure, contact the Employee Plans Division's telephone assistance service between the hours of 1:30 and 3:30 p.m. Eastern time, Monday through Thursday, on (202) 622-6074/75. (These telephone numbers are not toll-free.)

Rev. Proc. 98-14

26 CFR 601.601: Rules and regulations.

(Also Part I, § 401; 1.401(b)-1.)

1998-1 C.B. 371; 1998 IRB LEXIS 17; 1998-4 I.R.B. 22; REV. PROC. 98-14

January 26, 1998

SECTION 1. PURPOSE

.01 This revenue procedure opens the Internal Revenue Service's determination letter program for qualified plans that seek to comply with the changes in the qualification requirements made by the Uruguay Round Agreements Act, Pub. L. 103-465 (GATT), and the Taxpayer Relief Act of 1997, Pub. L. 105-34 (TRA '97), as well as those changes in the qualification requirements made by the Small Business Job Protection Act of 1996, Pub. L. 104-188 (SBJPA) (including § 414(u) and the Uniformed Services Employment and Reemployment Rights Act of 1994, Pub. L. 103-353 (USERRA)), that are effective before the first day of the first plan year beginning on or after January 1, 1999. Beginning April 27, 1998, the Service will consider these changes when it reviews applications for determination of the tax-qualified status of pension, profit-sharing and stock bonus plans and applications for opinion and notification letters for pre-approved plans. This revenue procedure provides guidance to plan sponsors regarding this change in the Service's procedures.

.**02** This revenue procedure also provides that the remedial amendment period for amending plans for GATT and SBJPA, which was described in Rev. Proc. 97-41, 1997-33 I.R.B. 51, will apply to plan amendments that relate to TRA '97. In addition, this revenue procedure extends the remedial amendment period under Rev. Proc. 97-41 for amending governmental plans to the extent the period would otherwise end before the last day of the last plan year beginning before January 1, 2001.

.**03** Finally, this revenue procedure clarifies that a plan will not satisfy any of the nondiscrimination in amount safe harbors in the regulations under § 401(a)(4) if the plan's provisions reflecting the family aggregation requirements of § 414(q)(6) or §

401(a)(17)(A), as in effect prior to their repeal by SBJPA, continue to apply.

SECTION 2. BACKGROUND

.**01** GATT and SBJPA made a number of changes to the plan qualification requirements. Many of these changes are already in effect for most plans while other changes do not take effect until plan years beginning after December 31, 1998 or December 31, 1999. TRA '97 also made several changes to the qualification requirements. The TRA '97 changes are generally effective for plan years beginning after December 31, 1997, but certain changes are effective for plan years beginning after the date of enactment of TRA '97, August 5, 1997.

.**02** In Rev. Proc. 97-41, the Service provided a remedial amendment period under § 401(b) with respect to certain amendments for GATT and SBJPA. The remedial amendment period generally permits plan amendments to be made retroactively effective if they are adopted on or before the last day of the first plan year beginning on or after January 1, 1999, and they relate to GATT and SBJPA qualification changes that are effective before the first day of that plan year. (In the case of governmental plans, as defined in § 414(d), the plan amendment deadline is the later of (i) the first day of the first plan year beginning on or after January 1, 2000, or (ii) 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 that body does not meet continuously).) Those amendments that are required to be made to retain qualified status as a result of GATT and SBJPA qualification changes must be made retroactively effective as of the date on which the qualification change became effective with respect to the plan. Operational compliance prior to actual amendment is required if the qualification change is effective before the first day of the first plan year beginning on or after January 1, 1998 (or January 1, 2000, in the case of a governmental plan). Those amendments that are not required but that amend plan provisions that are integrally related to SBJPA qualification changes may be made retroactively effective as of the first day on which the plan was operated in accordance with the amended plan provision.

.**03** Rev. Proc. 98-6, 1998-1 I.R.B. 183, contains the Service's general procedures for employee plan determination letter requests. Section 3.03 of Rev Proc. 98-6 states that until further notice is given, determination letters, other than those issued for terminating plans, will not include consideration by the Service of any amendments to the qualification requirements made by TRA '97 or by GATT or SBJPA, except for § 1432 and § 1454 of SBJPA, which amended § 401(a)(26) and § 414(n), respectively.

.04 Section 1431(b)(1) of SBJPA repealed the family aggregation requirements of § 414(q)(6), effective for years beginning after December 31, 1996. Section 1431(b)(2) of SBJPA also repealed the family aggregation requirement that formerly applied under § 401(a)(17)(A), effective for years beginning after December 31, 1996. Prior to its repeal, § 414(q)(6) required the compensation and benefits of certain family members of a highly compensated employee who was a 5-percent owner or among the ten highest paid employees of the employer to be combined with the compensation and benefits of the highly compensated employee. The resulting family unit was treated as one employee for purposes of applying the nondiscrimination requirements of § 401(a)(4) to a plan. Section 401(a)(17)(A) provided similar rules with respect to the application of the limitation on compensation that may be taken into account under a qualified plan.

SECTION 3. PROGRAM OPENING

.**01** Applications for determination, opinion, notification, and advisory letters involving § 401(a) or § 403(a) that are filed with the Service on or after April 27, 1998 will be reviewed taking into account the changes in the qualification requirements made by GATT and TRA '97, as well as those changes in the qualification requirements made by SBJPA that are effective before the first day of the first plan year beginning on or after January 1, 1999. However, except in the case of terminating plans, applications for determination letters involving master or prototype (M&P) and regional prototype plans that have not yet been amended to comply with the changes in the qualification requirements made by GATT, SBJPA, and TRA '97 will be reviewed without taking these changes into account.

.**02** Until further notice, the Service's review of applications for determination and other letters will not consider changes in the qualification requirements made by SBJPA that are first effective in a plan year beginning after December 31, 1998. Thus, for example, the Service's review will not consider the § 401(k)(12) and § 401(m)(11) safe harbors described in § 1433(a) and (b) of SBJPA, which are effective for plan years beginning after December 31, 1998, or the repeal of § 415(e) by § 1452(a) of SBJPA, which is effective for limitation years beginning after December 31, 1999. Nevertheless, the review will take into account the changes to § 417(e) and § 415(b) made by § 767 of GATT and § 1449 of SBJPA, even though application of these changes may not be required until the first plan (or limitation) year beginning after December 31, 1999. Although defined benefit plans that are submitted for determination on or after April 27, 1998 will be required to incorporate provisions that reflect the changes to § 417(e) and § 415(b) made by GATT and SBJPA, the application of such provisions may be deferred under the plan to the extent permitted by § 417(e)(3)(B) and § 767(d)(3) of GATT (as

amended by § 1449(a) of SBJPA), respectively. Likewise, the vesting provisions of multiemployer plans submitted on or after April 27, 1998 will have to reflect the repeal of § 411(a)(2)(C) by § 1442 of SBJPA, although application of this change may be deferred under the plan to the extent permitted by § 1442(c) of SBJPA.

.**03** Except as provided below, favorable letters that are issued with respect to applications for determination or other letters filed on or after April 27, 1998 will contain a statement to the effect that the determination (or opinion) takes into account the requirements of GATT and TRA '97, as well as those requirements of SBJPA that are effective before the first day of the first plan year beginning on or after January 1, 1999.

.**04** The statement described in the preceding paragraph will not be included in determination letters issued with respect to applications filed on Form 6406, Short Form Application for Determination for Minor Amendment of Employee Benefit Plan. The statement described in the preceding paragraph also will not be included in determination letters issued with respect to applications filed by adopters of M&P or regional prototype plans on Form 5307, Application for Determination for Adopters of Master or Prototype, Regional Prototype, or Volume Submitter Plans, regardless of whether the opinion or notification letter for the plan contains such statement. The statement described in the preceding paragraph will be included in opinion and notification letters issued with respect to applications filed on Form 4461-B, Application for Approval of Master or Prototype Plan, or Regional Prototype Plan/Mass Submitter Adopting Sponsor, only if a letter containing such a statement has been issued with respect to the mass submitter's plan.

SECTION 4. REMEDIAL AMENDMENT PERIOD FOR CHANGES IN PLAN QUALIFICATION REQUIREMENTS MADE BY TRA '97

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01 Section 1541 of TRA '97 contains provisions relating to plan amendments that are adopted as a result of TRA '97. If § 1541 applies to a plan amendment, § 1541(a) provides that the plan will be treated as operated in accordance with its terms and will not fail to satisfy the requirements of § 411(d)(6) by reason of the amendment. Section 1541 applies to a plan amendment that is made pursuant to a legislative change in the pension and employee benefit provisions of TRA '97, provided the following conditions are satisfied. First, the plan amendment must be adopted before the first day of the first plan year beginning on or after January 1, 1999 (2001, in the case of a governmental plan, as defined in § 414(d)). Second, the plan must be operated in accordance with the terms of the plan amendment beginning on the date the legislative change takes effect, or, if the amendment is not required by the legislative change, the effective date of the amendment specified by the plan. Third, the plan amendment must be made

retroactively effective.

.**02** Pursuant to the Commissioner's authority under § 1.401(b)-1, a plan provision is hereby designated as a disqualifying provision under § 1.401(b)-1(b) to which the remedial amendment period described in section 6 of Rev. Proc. 97-41 applies if the provision causes a plan to fail to satisfy the qualification requirements of the Code because of changes made to those requirements by TRA '97 or if the provision is integral to a qualification requirement changed by TRA '97. The operational compliance and retroactive amendment conditions described in § 1541(b)(2) of TRA '97 must be satisfied throughout such remedial amendment period with respect to any amendment of a disqualifying provision described in the preceding sentence.

.**03** For example, § 1071 of TRA '97 increased the amount of the accrued benefit subject to involuntary distribution under § 411(a)(11) from $ 3,500 to $ 5,000, effective for plan years beginning after August 5, 1997. A plan provision that reflects the $ 3,500 limit under § 411(a)(11), as in effect prior to TRA '97, is integral to a qualification requirement changed by TRA '97. Thus, for example, a plan that contains the $ 3,500 limit may, for plan qualification purposes, be operated during the remedial amendment period in anticipation of a retroactive amendment reflecting the increase in the limit under § 1071 of TRA '97, provided the amendment is adopted on or before the last day of the remedial amendment period and is made retroactively effective as of the beginning of the remedial amendment period. In this case, the plan provision containing the $ 3,500 limit is integrally related to a qualification requirement changed by TRA '97 but the plan provision would not disqualify the plan as a result of the statutory change. Therefore, the remedial amendment period begins on the date on or after the first day of the first plan year beginning after August 5, 1997, on which the plan was first operated in anticipation of the amendment increasing the limit to $ 5,000. In the case of a nongovernmental plan, the remedial amendment period ends on the last day of the first plan year beginning on or after January 1, 1999.

SECTION 5. REMEDIAL AMENDMENT PERIOD FOR GOVERNMENTAL PLANS

Pursuant to the Commissioner's authority under § 1.401(b)-1, the remedial amendment period described in section 6 of Rev. Proc. 97-41 with respect to governmental plans, as defined in § 414(d), is hereby extended to the later of (i) the last day of the last plan year beginning before January 1, 2001, or (ii) the last day of the first plan year beginning on or after the "1999 legislative date." Thus, the remedial amendment period for amending a governmental plan for GATT, SBJPA, and TRA '97 will not end before the amendment deadline applicable to governmental plans under §

1541 of TRA '97.

SECTION 6. EFFECT OF REPEAL OF FAMILY AGGREGATION ON NONDISCRIMINATION SAFE HARBORS

.**01** The regulations under § 401(a)(4) provide safe harbors that a plan may meet to satisfy the requirement that either the contributions or the benefits under the plan be nondiscriminatory in amount. See, for example, § 1.401(a)(4)-2(b) and § 1.401(a)(4)-3(b). The safe harbors generally are designed to ensure that a plan that meets a safe harbor will automatically satisfy the nondiscrimination in amount requirement if the plan is operated in accordance with its terms. In general, the safe harbors require a uniform allocation or benefit formula, although formulas that provide lower allocations or benefits for highly compensated employees are permitted.

.**02** In section 6.09 of Rev. Proc. 97-41, it was noted that in many cases plans would remain qualified even though the family aggregation rules of § 414(q)(6) and § 401(a)(17)(A) continued to apply under the plans subsequent to the repeal of these rules. Nevertheless, the continued application of family aggregation will cause a plan to fail to be a safe harbor plan. This is because the application of family aggregation may, in some circumstances, result in lower allocations or benefits for employees who are not highly compensated.

.**03** Thus, a plan will not satisfy a nondiscrimination in amount safe harbor for a plan year beginning after December 31, 1996, unless family aggregation is disregarded in the operation of the plan and the plan is amended within the remedial amendment period, retroactive to the first day of such plan year, to eliminate its family aggregation provisions. Therefore, in an application for a determination letter (other than with respect to an M&P or regional prototype plan) that is filed on or after April 27, 1998, an employer may not designate a plan as one that is intended to satisfy a nondiscrimination in amount safe harbor if the family aggregation rules continue to apply under the plan. Instead, the employer must either demonstrate that the plan satisfies the general test for nondiscrimination in amount or request a letter that contains a caveat regarding the nondiscrimination in amount requirement.

SECTION 7. EFFECT ON OTHER DOCUMENTS

Rev. Proc. 98-6 and Rev. Proc. 97-41 are modified.

SECTION 8. EFFECTIVE DATE

This revenue procedure is effective January 26, 1998.

DRAFTING INFORMATION

The principal author of this revenue procedure is James Flannery of the Employee Plans Division. For further information regarding this revenue procedure, contact the Employee Plans Division's telephone assistance service between the hours of 1:30 and 3:30 p.m. Eastern time, Monday through Thursday, on (202) 622-6074 (not a toll-free call). Mr. Flannery can be contacted by calling (202) 622-6214 (also not a toll-free call).

Rev. Proc. 97-41

26 CFR 601.601: Rules and regulations.

(Also, Part I, 401, 403; 1.401(b)-1.)

1997 IRB LEXIS 240; 1997-33 I.R.B. 51; REV. PROC. 97-41

August 18, 1997

SECTION 1. PURPOSE

.**01** This revenue procedure provides guidance to sponsors of pension, profit-sharing and stock bonus plans qualified under ' 401(a) or 403(a) of the Internal Revenue Code (qualified plans) and tax-sheltered annuity plans described in ' 403(b) (' 403(b) plans) with respect to the date by which they must adopt amendments to comply with changes in the law made by the Small Business Job Protection Act of 1996, Pub. L. 104-188 (SBJPA), the Uruguay Round Agreements Act, Pub. L. 103-465 (GATT), and the Uniformed Services Employment and Reemployment Rights Act of 1994, Pub. L. 103-353 (USERRA). This revenue procedure provides that:

1 In general, there is a single deadline for adopting SBJPA, GATT and USERRA amendments to qualified plans.

2 The deadline for adopting SBJPA, GATT and USERRA amendments is the same as the date by which certain plans that have extended reliance on Tax Reform Act of 1986 (TRA '86) determination letters must be amended.

3 Plan sponsors are allowed, for qualification purposes, to anticipate in plan operation certain plan amendments that they intend to adopt as a result of changes in the qualification requirements.

.**02** Specifically, under this revenue procedure:

1 Qualified plans have a remedial amendment period under ' 401(b) with respect to certain amendments for SBJPA, GATT or USERRA through the

last day of the first plan year beginning on or after January 1, 1999. Thus, these amendments will not have to be adopted before the last day of a plan's 1999 plan year.

2 The deadline for adopting plan amendments to reflect certain limitations under ' 415(b), as amended by GATT and SBJPA, is also the last day of the first plan year beginning on or after January 1, 1999. In addition, relief is provided so that a plan amendment described in ' 1499(d)(2) of SBJPA repealing an earlier plan amendment that implemented certain amendments made by GATT to ' 415(b) need not be adopted before the last day of the first plan year beginning on or after January 1, 1999.

3 Plan sponsors are advised of the Service's intention to publish procedures for obtaining determination letters that include consideration of the changes to the qualification requirements made by SBJPA and GATT as soon as possible after necessary guidance is issued.

4 4 Amendments for SBJPA to ' 403(b) plans, or to annuity contracts purchased under ' 403(b) plans, are not required to be adopted before the first day of the first plan year beginning on or after January 1, 1998.

PART I. BACKGROUND

SECTION 2. SBJPA

.**01** SBJPA changed several of the requirements of the Code that apply to pension, profit-sharing and stock bonus plans qualified under ' 401(a) or 403(a). While a number of these changes are effective in plan years beginning after December 31, 1996, others are not effective until later years.

.**02** Section 1465 of SBJPA generally provides an extended period for amending plans and annuity contracts as required by SBJPA. Under ' 1465, if any provision of subtitle D (Pension Simplification) of SBJPA requires an amendment to any plan or annuity contract, the amendment is not required to be made before the first day of the first plan year beginning on or after January 1, 1998, provided (1) the amendment is made effective retroactively to the date on which the provision of SBJPA became effective with respect to the plan or contract and (2) the plan or contract is operated in accordance with the requirements of the provision as of its effective date. For a

governmental plan (as defined in ' 414(d) of the Code), the year "2000" is substituted for the year "1998" in ' 1465. Section 1465 applies to plans and contracts in existence on or after the date of enactment of SBJPA, August 20, 1996.

.**03** In Rev. Proc. 96-49, 1996-43 I.R.B. 74, the Service stated that plan amendments to reflect the provisions of USERRA and ' 414(u), which was added by ' 1704(n) in subtitle G (Technical Corrections) of SBJPA, are not required to be made before the date plan amendments are required to be made under ' 1465 of SBJPA.

SECTION 3. GATT

.**01** GATT, which was enacted December 8, 1994, also changed several of the Code's qualification requirements. These included the rules relating to the determination of certain benefits under § 411(a)(11)(B), 415(b)(2)(E) and 417(e)(3).

.**02** The changes to '411(a)(11)(B) and 417(e)(3), relating to the determination of the present value of certain plan distributions, were generally effective for plan years beginning after December 31, 1994. However, ' 767(a)(2) of GATT provided a transition rule with respect to the determination under ' 411(a)(11)(B) and 417(e)(3) of the present value of distributions from plans that were adopted and in effect as of December 7, 1994 ("pre-GATT plans"). In general, under this transition rule, the present value of a distribution from a pre-GATT plan that is made before the earlier of (i) the first plan year beginning after December 31, 1999, or (ii) the later of the adoption or effective date of a plan amendment applying the GATT changes to ' 411(a)(11)(B) and 417(e)(3) to the plan is to be determined under the plan's pre-GATT terms. Thus, for pre-GATT plans, amendments applying the GATT changes to ' 411(a)(11)(B) and 417(e)(3) to the plan cannot be adopted retroactively. As a result, these plans are not permitted to operate in accordance with these changes prior to the adoption of plan amendments.

.**03** Under section 767(d) of GATT, the changes to ' 415(b)(2)(E), relating to required adjustments to certain benefits for limitation purposes, were effective for limitation years beginning after December 31, 1994. In addition, ' 767(d) of GATT required plans to be operated in accordance with the GATT changes to ' 415(b)(2)(E) as of the first limitation year beginning after December 31, 1994, even though, under ' 767(d)(3)(B) of GATT, plan amendments applying these changes to the plan would not be required until such date as the Secretary provides.

.**04** Section 1449 of SBJPA amended ' 767(d)(3)(A) of GATT, however, to permit plan sponsors to delay the implementation of the GATT changes to ' 415(b)(2). Section

1449 provides that a pre-GATT plan is not required to apply the GATT changes to ' 415(b)(2)(E) with respect to benefits accrued before the earlier of (i) the later of the date a plan amendment applying the changes is adopted or effective or (ii) the first day of the first limitation year beginning after December 31, 1999. Further, ' 1449(d) of SBJPA provides that an amendment applying specified GATT changes that was adopted or effective before August 20, 1996, will be disregarded in applying ' 767(d)(3)(A) of GATT, as modified by ' 1449(a) of SBJPA, if that amendment is repealed by another plan amendment that is adopted no later than August 20, 1997.

SECTION 4. THE REMEDIAL AMENDMENT PERIOD UNDER ' 401(b)

.**01** Section 401(b) provides a remedial amendment period during which a plan may be amended retroactively, under certain circumstances, to comply with the Code's qualification requirements. Temporary and proposed amendments to the regulations under ' 401(b) were published in the Federal Register on August 1, 1997. Section 1.401(b)-1(f) of the regulations grants the Commissioner the discretion to extend the remedial amendment period. Absent such an extension, however, the remedial amendment period is generally determined as described below.

.**02** Section 1.401(b)-1 provides that a plan that fails to satisfy the requirements of ' 401(a) solely as a result of a disqualifying provision defined under ' 1.401(b)-1(b) need not be amended to comply with those requirements until the last day of the remedial amendment period with respect to the disqualifying provision, provided the amendment is made retroactively effective to the beginning of the remedial amendment period. Under ' 1.401(b)-1T(b)(3), a disqualifying provision includes a plan provision designated, at the Commissioner's discretion, as a disqualifying provision that either (i) results in the failure of the plan to satisfy the qualification requirements of the Code by reason of a change in those requirements; or (ii) is integral to a qualification requirement of the Code that has been changed. For this purpose, ' 1.401(b)-1T(c)(1) provides that a disqualifying provision includes the absence from a plan of a provision required by or, if applicable, integral to the applicable change in the qualification requirements of the Code, if the plan was in effect on the date the change in those requirements became effective with respect to the plan.

.**03** For a disqualifying provision described in ' 1.401(b)-1T(b)(3), the remedial amendment period generally begins with the date on which the change becomes effective with respect to the plan or, in the case of a provision that is integral to a qualification requirement that has been changed, the first day on which the plan was operated in accordance with the provision as amended.

The remedial amendment period for a disqualifying provision described in ' 1.401(b)-1T(b)(3) generally ends with the later of (1) the due date (including extensions) for filing the income tax return for the employer's taxable year that includes the date on which the remedial amendment period begins or (2) the last day of the plan year that includes the date on which the remedial amendment period begins. A plan maintained by more than one employer need not be amended until the last day of the tenth month following the last day of the plan year in which the remedial amendment period begins.

.**04** Section 1.401(b)-1 also provides that in the case of a new plan which contains (or fails to contain) a provision that causes the plan to fail to satisfy the requirements of ' 401(a) as of the date the plan is put into effect, the plan need not be amended to comply with those requirements until the later of the due date including extensions for filing the employer's tax return 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. A new plan maintained by more than one employer need not be amended until the last day of the tenth month following the last day of the plan year in which falls the date the plan is put into effect.

.**05** Section 1.401(b)-1 also provides that in the case of an amendment to an existing plan which causes the plan to fail to satisfy the requirements of ' 401(a) as of the date the amendment is adopted or effective (whichever is earlier), the plan need not be amended to correct the amendment until the later of the due date for filing the employer's tax return (including extensions) for the taxable year in which the amendment is adopted or effective (whichever is later) or the last day of the plan year in which the amendment is adopted or effective (whichever is later). In the case of an amendment to an existing plan maintained by more than one employer, the plan need not be amended until the last day of the tenth month following the last day of the plan year in which the amendment is adopted or effective (whichever is later).

SECTION 5. EXTENDED RELIANCE

.**01** Under Rev. Proc. 89-9, 1989-1 C.B. 780, Rev. Proc. 89-13, 1989-1 C.B. 801 (both as modified by Rev. Proc. 93-9, 1993-1 C.B. 474), Rev. Proc. 93-39, 1993-2 C.B. 513, Announcement 94-85, 1994-26 I.R.B. 23, and Rev. Proc. 95-12, 1995-1 C.B. 508, plans that were submitted to the Service within certain deadlines for determination, opinion, or notification letters under the Tax Reform Act of 1986, Pub. L. 99-514 (TRA '86), and received favorable letters are entitled to extended reliance. During the extended reliance period, a plan is generally 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 interpret 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 commencing prior to January 1, 1999, or the date established for plan amendment by any legislation that is effective after the date of the plan's letter.

PART II. TIME FOR AMENDING QUALIFIED PLANS FOR SBJPA, GATT, AND USERRA

SECTION 6. DESIGNATION OF CERTAIN PLAN PROVISIONS RELATING TO SBJPA, GATT AND USERRA CHANGES AS DISQUALIFYING PROVISIONS

.**01** Pursuant to the Commissioner's authority under ' 1.401(b)-1T(b)(3), a plan provision is hereby designated as a disqualifying provision under ' 1.401(b)-1(b) if the plan provision causes a plan to fail to satisfy the qualification requirements of the Code because of changes made to those requirements by SBJPA or GATT that are effective before the first day of the first plan year beginning on or after January 1, 1999.

.**02** A plan provision is also hereby designated as a disqualifying provision if the plan provision is 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 prior to the end of the remedial amendment period as described in section 6.04, below. For purposes of this paragraph, the changes in the qualification requirements made by SBJPA include ' 414(u) and USERRA. In accordance with ' 1.401(b)-1T(d)(1)(v), an amendment of a disqualifying provision described in this paragraph may be made retroactively effective only to the first day on which the plan was operated in accordance with the provision. For example, Announcement 97-24, 1997-11 I.R.B. 24, and Announcement 97-70, 1997-29 I.R.B. 14, provide that an employer may offer certain employees an option to defer commencement of benefits under its qualified plan provided the employer amends the plan retroactively to conform the plan to its pre-amendment operation regarding the option to defer. These announcements also state that future guidance will provide the date by which such a retroactive amendment must be adopted. The retroactive amendment described in Announcements 97-24 and 97-70 is an amendment to a plan provision that is integral to a qualification requirement changed by SBJPA and must therefore be adopted by the end of the remedial amendment period as described below. Generally, plan provisions reflecting the family aggregation rules as in effect prior to 1997 would also be integrally related to SBJPA qualification changes. See section 6.09.

.**03** A plan provision that causes a plan to fail to satisfy ' 401(a) because of a change made by SBJPA or GATT to the qualification requirements that is effective on or after the first day of the first plan year beginning on or after January 1, 1999, is not a disqualifying provision under section 6.01. A plan provision that is integral to a qualification requirement changed by SBJPA is not a disqualifying provision under section 6.02 if the change in the qualification requirement is effective on or after the first day of the first plan year beginning on or after January 1, 1999, or if the plan provision as amended is not effective prior to the end of the remedial amendment period as described in section 6.04, below. Thus, for example, ' 401(b) and the regulations thereunder would not apply to permit the adoption of the ' 401(k) and ' 401(m) safe harbors described in ' 1433(a) and (b) of SBJPA on a retroactive basis, because the provisions of ' 1433(a) and (b) are effective for plan years beginning after December 31, 1998. A plan provision that is integral to the limitation under ' 415(e), which was repealed by ' 1452(a) of SBJPA effective for limitation years beginning after December 31, 1999, also is not a disqualifying provision under section 6.02.

.**04** Pursuant to the Commissioner's authority under ' 1.401(b)-1(f), with respect to plans other than governmental plans, the remedial amendment period for disqualifying provisions described in sections 6.01 and 6.02 is hereby extended to the last day of the first plan year beginning on or after January 1, 1999. Thus, for example, a single employer calendar year nongovernmental plan that does not satisfy the requirements of ' 401(a) because of a disqualifying provision described in section 6.01 or 6.02 may be retroactively amended to meet those requirements by December 31, 1999. For governmental plans, the remedial amendment period for disqualifying provisions described in sections 6.01 and 6.02 is extended to the later of (i) the first day of the first plan year beginning on or after January 1, 2000, or (ii) 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 that body does not meet continuously).

.**05** In addition, the remedial amendment period with respect to all disqualifying provisions of new plans adopted or effective after December 7, 1994, and all disqualifying provisions of existing plans arising from a plan amendment adopted after December 7, 1994, that causes the plan to fail to satisfy the requirements of ' 401(a) as of the date the amendment is adopted or effective (whichever is earlier), will not expire earlier than the last day of the first plan year beginning on or after January 1, 1999. For a governmental plan, this period will not expire before the later of (i) the first day of the first plan year beginning on or after January 1, 2000, or (ii) the last day of the first plan year beginning on or after the 1999 legislative date.

.**06** Although plan amendments are not required before the end of the remedial amendment period, plan sponsors must operate their plans in compliance with the provisions of SBJPA or GATT prior to the time plan amendments are required to the extent earlier operational compliance is required by law or regulation or by revenue ruling, notice or other guidance published in the Internal Revenue Bulletin. In these cases, any retroactive amendments will have to reflect the choices the plan sponsor has already made in the operation of the plan. The following are examples where earlier operational compliance is required.

1 Section 1465 of SBJPA generally requires plans to be operated in compliance with any provision of SBJPA that is effective before the first day of the first plan year beginning on or after January 1, 1998 (or January 1, 2000, in the case of a governmental plan), as of such provision's effective date.

2 Section 401(m)(6)(A) requires correction of excess aggregate contributions to ' 401(m) plans to be accomplished within 12 months of the end of the plan year in which the contributions were made. Thus, to this extent, for example, a sponsor of a ' 401(m) plan will have to operate the plan in a manner that satisfies ' 401(a) as amended by SBJPA and any retroactive amendments must reflect the choices that the plan sponsor has already made in the operation of the plan (for example, the definition of highly compensated employee).

3 Section 1.401(b)-1T(d)(1)(v) permits a remedial amendment of a disqualifying provision that is integral to a qualification requirement changed by SBJPA (including ' 414(u) and USERRA) to be made retroactively effective only to the first day on which the plan was operated in accordance with the provision as amended.

.**07** Earlier plan amendment may be required by law or regulation or by revenue ruling, notice or other guidance published in the Internal Revenue Bulletin. In these cases plan sponsors may not rely on the remedial amendment period as a basis for making an amendment retroactively effective. The following are examples where the remedial amendment period may not be relied on as a basis for making an amendment retroactively effective.

1 1 Except as provided in Rev. Proc. 97-9, 1997-2 I.R.B. 55, a plan sponsor may not retroactively amend a ' 401(k) plan to adopt the alternative ("SIMPLE") method of satisfying the ' 401(k) and ' 401(m)

nondiscrimination tests added by ' 1422 of SBJPA.

2 As provided in ' 417(e)(3)(B), the present value of a distribution from a pre-GATT plan that is made prior to the first plan year beginning after December 31, 1999, and before a plan amendment applying the GATT changes to ' 417(e)(3) to the plan has been adopted and made effective generally must be determined under the plan's pre-GATT terms.

.**08** Any amendment that would result in an elimination or reduction of ' 411(d)(6) protected benefits may not be made retroactively effective unless specifically permitted by law or regulation or by revenue ruling, notice, or other guidance published in the Internal Revenue Bulletin.

.**09** Section 1431(b)(1) of SBJPA eliminated the family aggregation requirements of ' 414(q)(6), effective for years beginning after December 31, 1996. Section 1431(b)(2) of SBJPA also eliminated the family aggregation requirement that formerly applied under ' 401(a)(17)(A), effective for years beginning after December 31, 1996. A plan's family aggregation provisions generally would be disqualifying provisions under ' 401(b) because they would be integrally related to a qualification requirement of the Code that has been changed by SBJPA, effective before 1999. In certain limited circumstances, the continued application of the family aggregation rules in the operation of a plan could result in the loss of qualified status. The plan's family aggregation provisions also would then be disqualifying provisions because they would cause disqualification as a result of SBJPA changes to the qualification requirements effective before 1999. Regardless of whether a plan's family aggregation provisions are disqualifying provisions because they are integrally related to SBJPA qualification changes or because they would cause plan disqualification, a plan amendment eliminating the provisions will not violate the requirements of ' 411(d)(6) provided the amendment is effective no earlier than the first day on which the plan was operated in accordance with the amendment, and in no event earlier than the first day of the first plan year beginning after December 31, 1996.

SECTION 7. TIME FOR ADOPTING CERTAIN AMENDMENTS RELATING TO ' 415

For purposes of ' 767(d)(3)(B) of GATT, the date provided by the Secretary for adopting plan amendments reflecting the changes to ' 415(b)(2)(E) is the last day of the plan's remedial amendment period under section 6.04. Moreover, as discussed in section 3.04, ' 1449(d) of SBJPA provides that an amendment applying specified GATT changes that was adopted or effective before August 20, 1996, will be disregarded in applying ' 767(d)(3)(A) of GATT, as modified by ' 1449(a) of SBJPA, if that amendment

is repealed by another plan amendment that is adopted no later than August 20, 1997. Pursuant to this revenue procedure, a plan amendment applying the amendments made by ' 767 of GATT which was adopted or made effective on or before August 20, 1996, also shall not be taken into account in applying ' 767(d)(3)(A) of GATT as amended by ' 1449(a) of SBJPA, if the amendment is repealed by another plan amendment that is adopted on or before the last day of the plan's remedial amendment period under section 6.04. This relief will not fail to be available merely because a plan is not operated in accordance with the repealing amendment prior to the date specified in future guidance. The Service intends to issue additional guidance concerning the GATT and SBJPA changes to the limitations under ' 415(b) in the near future.

SECTION 8. MINIMUM FUNDING REQUIREMENTS

Section 412 provides minimum funding standards applicable to pension plans that are or were qualified plans under ' 401. Section 1.412(c)(3)-1 provides rules concerning the reasonable funding methods for defined benefit pension plans. Section 1.412(c)(3)-1(d)(1)(i) provides that, except as provided by the Commissioner, a reasonable funding method does not anticipate changes in plan benefits that become effective, whether or not retroactively, in a future plan year or that become effective during a plan year but after the first day thereof. Section 412(c)(12), which was added by GATT, provides that the funding method of a collectively bargained plan described in ' 413(a) (other than a multiemployer plan) must anticipate benefit increases scheduled to take effect during the term of the collective bargaining agreement applicable to the plan. Therefore, except to the extent required by ' 412(c)(12) or as otherwise provided by the Commissioner, in determining the minimum funding standards for a defined benefit plan under ' 412, amendments that become effective, whether or not retroactively, in a future plan year may not be anticipated, even though the amendments are made before the end of any applicable remedial amendment period. Contributions to a defined benefit plan will be deductible subject to the limitations of ' 404, with the ' 412 minimum funding standards determined without anticipating such future amendments.

SECTION 9. TERMINATING PLANS

A plan (including a master or prototype, regional prototype, or volume submitter plan) that is terminated after the effective date of changes in the qualification requirements made by SBJPA or GATT but before the date that plan amendments would otherwise be required must be amended in connection with the plan termination to comply with the changes as of their effective date with respect to the plan. For this purpose, any

amendment that is adopted after the date of plan termination in order to receive a favorable determination letter will be considered as adopted in connection with the plan termination. In addition, annuity contracts distributed from such terminated plans also must meet all the applicable requirements of SBJPA and GATT. In the case of changes in the qualification requirements to which ' 1465 of SBJPA applies, the operational compliance requirement of ' 1465 must also be satisfied. (See Notice 87-57, 1987-2 C.B. 368, and Announcement 88-8, 1988-4 I.R.B. 32, which enunciated the same principles with respect to plans that terminated before the amendment date described in ' 1140 of TRA '86.)

SECTION 10. PLANS WITH EXTENDED RELIANCE

As described above, the sponsor of a plan that is entitled to extended reliance on a favorable TRA '86 letter may rely on that letter until the earlier of the last day of the last plan year commencing prior to January 1, 1999, 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, 1999, to the extent necessary to comply with regulations or administrative guidance of general applicability that has been issued since the date of the plan's favorable TRA '86 letter. These amendments must be made effective no later than the first day of the first plan year beginning on or after January 1, 1999, and no earlier than the first day of the plan year in which the amendments are adopted. (But see Rev. Rul. 94-76, 1994-2 C.B. 46, and Rev. Rul. 96-48, 1996-40 I.R.B. 7.) Also see section 11, below, regarding preapproved plans.

SECTION 11. DETERMINATION AND OPINION LETTER PROGRAMS

.**01** Effective with the date of enactment of SBJPA or GATT, as applicable, and until further notice is given, determination, opinion, notification, and advisory letters, other than determination letters issued for terminating plans, will not include consideration by the Service of any amendments to the qualification requirements made by SBJPA or GATT, with the following two exceptions. First, determination letters will include consideration of the changes made to ' 401(a)(26) by ' 1432 of SBJPA, which limited the applicability of ' 401(a)(26) to defined benefit plans and made certain other changes. See Announcement 97-2, 1997-2, I.R.B. 62. Second, determinations of leased employee status under ' 414(n) will reflect the "primary direction or control" test under ' 414(n)(2)(C), as amended by ' 1454 of SBJPA, that replaces the former "historically performed" test.

.**02** Until further notice is given, plans (including master or prototype, regional prototype, and volume submitter plans), other than terminating plans, that include provisions that reflect the SBJPA or GATT amendments to the qualification requirements will not be subject to adverse letters by reason of the inclusion of the provisions. This will not preclude the issuance of adverse letters for other reasons, such as an impermissible elimination or reduction of ' 411(d)(6) protected benefits resulting from the adoption of amendments for SBJPA or GATT. However, favorable letters issued for plans, other than terminating plans, may not be relied upon with respect to whether the plans satisfy the qualification requirements as amended by SBJPA or GATT.

.**03** The Service will begin reviewing both preapproved plans and individually designed plans for compliance with the qualification requirements as amended by SBJPA and GATT as soon as possible after the issuance of additional guidance pertaining to the requirements of SBJPA. Prior to that time, the Service intends to publish procedures relating to the issuance of determination, opinion, notification and advisory letters for plans that take into account the requirements of SBJPA and GATT. The procedures are also expected to include rules pertaining to the required time for sponsors to amend preapproved plans for SBJPA and GATT and actions that may be required of adopters of these plans.

PART III. TIME FOR AMENDING ' 403(b) PLANS

SECTION 12. SECTION 403(b) PLANS

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01 SBJPA also made certain changes that may require the amendment of tax-sheltered annuity plans described in ' 403(b) or annuity contracts purchased under these plans. The provisions of ' 1465 of SBJPA apply with respect to any plan or annuity contract that is required to be amended by any provision of subtitle D of SBJPA. Section 1465 thus applies not only to qualified plans but also to ' 403(b) plans and annuity contracts purchased under these plans. Therefore, if a provision of subtitle D of SBJPA requires an amendment to a ' 403(b) plan or an annuity contract purchased under the plan, the amendment will not be required to be made before the time described in ' 1465 of SBJPA, provided the retroactive amendment and operational compliance requirements of ' 1465 are satisfied. For this purpose, the time described in ' 1465 with respect to a ' 403(b) plan that is a governmental plan will be treated as not expiring before 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 that body does not meet continuously.

.**02** For example, ' 1450(c)(1) of SBJPA amended ' 403(b)(1)(E) to provide that each contract purchased under a ' 403(b) plan salary reduction agreement must provide that elective deferrals made under the contract may not exceed the annual limit on elective deferrals under ' 402(g)(1). Prior to this amendment, the ' 403(b) plan, not each contract, was required to provide this limitation. Section 1450(c)(2) provides that this amendment applies to years beginning after December 31, 1995, except a contract will not be required to meet any change in any requirement by reason of the amendment before the 90th day after enactment of SBJPA (that is, November 18, 1996). Because ' 1465 applies to any annuity contract purchased under a ' 403(b) plan, such a contract is not required to be amended to comply with ' 1450(c)(1) before the first day of the first plan year beginning on or after January 1, 1998 (or, in the case of a contract purchased under a ' 403(b) plan that is a governmental plan, the later of (i) the first day of the first plan year beginning on or after January 1, 2000, or (ii) the last day of the first plan year beginning on or after the 1999 legislative date), provided the retroactive amendment and operational compliance requirements of ' 1465 are satisfied with respect to the contract.

SECTION 13. EFFECTIVE DATE

This revenue procedure is effective August 18, 1997.

DRAFTING INFORMATION

The principal author of this revenue procedure is James Flannery of the Employee Plans Division. For further information regarding this revenue procedure, please contact the Employee Plans Division's taxpayer assistance telephone service between the hours of 1:30 p.m. and 4 p.m. Eastern Time, Monday through Thursday, by calling (202) 622-6074/6075, or Mr. Flannery on (202) 622-6214. (These telephone numbers are not toll-free numbers.)

EP DETERMINATIONS QUALITY ASSURANCE BULLETIN--Code sections which may be incorporated by reference

FY-2001 No. 1

Date: 10/11/00

In general, incorporation by reference of the Code and Regulations is not permitted unless specifically authorized by the Code, Regulations or other authority. No language may be incorporated if there is a choice to be made. In addition to the guidance listed below, see also Treasury Information Release 1334 Q&A M-1. This document does not take into account any changes in the law or other guidance after October 1, 2000.

PERMITTED SECTIONS (some or all incorporation by reference allowed)	**AUTHORITY**
410(a)(3), 411(a)(5), DOL Regs. section 2530.200b-2(b) & (c) hours of service (determining hours of service for reasons other than the performance of duties and crediting hours of service to computation periods)	*DOL Regs. 2530.200b-2(f)*
401(a)(9) - required distributions must contain language specified in proposed regulations and some choices relating to later changes to section 401(a)(9). (For example, the SBJPA changes to the required beginning date allow plans to be amended within a stated time period so certain participants may stop distributions and recommence them later. See Notice 97-75.)	*Prop. Regs. 1.401(a)(9)-1, A-3* *EP/EO Review Bulletin #5 2/26/96, Notice 97-75*
401(k)(3), 1.401(k)-1(b) - ADP test generally may be incorporated by reference but must specify test method (current or prior year) and if using prior year, must	*Reg. section 1.401(k)-1(b)(2)(iii), Notice 98-1*

specify whether first year NHCE ADP is 3% or actual ADP.
Must also provide that subsequent IRS guidance issued under applicable Code provisions is incorporated by reference.
For more details, see Notice 98-1, Section IX.
If aggregating or disaggregating plans or using the rule in 401(k)(3)(F), must specify which participants are included in ADP test(s).
Definition of compensation must be in the plan.

1.401(k)-1(b) - coverage and nondiscrimination requirements generally may be incorporated by reference but if a plan is using safe harbor provisions (or switching between provisions) certain language is required — *Reg. section 1.401(k)-1(b)(2)(iii), Notice 98-52, Sec. XI, Notice 2000-3*

401(m)(2), 1.401(m)-1(b) - ACP test must specify test method and incorporate subsequent guidance (make same changes for ACP as above under 401(k)(3)). — *Reg. section 1.401(m)-1(b)(2), Notice 98-1*

1.401(m)-1(b) - QNECs and/or elective contributions may be used as matching and plan aggregation rules. May be incorporated by reference to some extent. — *Reg. section 1.401(m)-1(b)(2)*

401(m)(9) - Multiple use rules 1.401(m)-2 — *Reg. section 1.401(k)-1(b)(2)(iii) 1.401(m)-1(b)(2)*

414(p) - QDRO — *Reg. section 1.401(a)-13(g)*

414(u) - USERRA model amendment incorporating 414(u) may be made by some sponsors — *Rev. Proc. 96-49*

415- limitations may be incorporated except: — *Notice 87-21, Q&A-11*
415(b) - how adjustments are made if two or more DB plans — *Reg. section 1.415-1(d)*
415(c) - how adjustments are made if two or more DC plans
415(e) - how adjustments are made
(415(e) does not apply after 1999)
1.415-6(b)(6) - method used to establish suspense account
Plan provisions must preclude the possibility that limits

under 415 will be exceeded.

416(i) - Key employee and non-key employee may be incorporated in the plan by reference to applicable Code sections, but must state definition of compensation *Reg. section 1.416-1, Q&A T-36*

416(g) - Top heavy ratio may be incorporated by reference *Reg. section 1.416-1, Q&A T-36*

If employer has only one plan and a single benefit structure that will always satisfy 416, then no 416 language is required.