

EP DETERMINATIONS QUALITY ASSURANCE BULLETIN

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VERIFICATION OF PRIOR PLAN DOCUMENTS IN THE ABSENCE OF A DETERMINATION LETTER

Background

This Bulletin is an update to QAB 2006-5 and is interim guidance pending the issuance of IRM section 7.11.1.16. A specialist must always verify that a plan under review for a determination letter was properly amended for prior legislation. This bulletin is intended to promote a consistent, equitable approach to this aspect of determination case review. Generally, a specialist is only responsible for verifying one cycle prior to the plan's current remedial amendment cycle. If a specialist determines additional verification of prior law is required, the specialist must receive managerial approval to expand the scope of the determination.

Notice 2001-42, 2001-2 C.B. 70, provided a remedial amendment period under IRC §401(b), ending no earlier than the end of the 2005 plan year, in which required retroactive remedial plan amendments for EGTRRA must be adopted (the EGTRRA remedial amendment period). Only plans that timely adopt good faith amendments can take advantage of the EGTRRA remedial amendment period.

Rev. Proc. 2005-66, as clarified, modified and superseded by Rev. Proc. 2007-44, established a system of cyclical remedial amendment periods for qualified plans. The new cycle system has the effect of extending the EGTRRA remedial amendment period until the plan's appropriate cycle. Two cycles were created; individually designed plans have a five-year cycle and pre-approved plans have a six-year cycle. The availability of the EGTRRA remedial amendment cycle (RAC) was conditioned on the timely adoption of required good faith plan amendments for both individually designed plans and pre-approved plans.

Individually Designed Plans

Initial remedial amendment cycle (2005 through 2009 Cumulative Lists):

Determination specialists who are processing applications for individually designed plans filed during the initial round of remedial amendment cycles must verify the timely adoption of GUST, as well as good-faith EGTRRA amendments and all interim amendments required to be made during the plan's initial remedial amendment cycle. Specialists must also verify the timely adoption of any discretionary amendments, including interim amendments adopted on an optional basis. If the amendments were timely adopted, the remedial amendment cycle remains intact, and any defective provisions in the amendments can be corrected by the end of the cycle. The remedial amendment

cycle is extended to the 91st day after the date of the determination letter if the application was filed on or before the final day of the cycle.

Pursuant to section 5.03 of Rev. Proc. 2007-44, if a good faith EGTRRA, interim or discretionary amendment has not been timely adopted, or if the absence of an interim amendment was not reasonable or in good faith, the remedial amendment cycle is no longer applicable to the plan. In this instance, a Plan Document Failure, as defined in section 5.01 of Revenue Procedure 2008-50, has occurred and a closing agreement under the Audit CAP procedures of the Employee Plans Compliance Resolution System will be necessary to restore the remedial amendment cycle and preserve plan qualification.

For more information on the determination of the remedial amendment cycle and the applicable Cumulative List for a plan, refer to Quality Assurance Bulletin 2007-2, EGTRRA Staggered Remedial Amendment Period and Remedial Amendment Cycle for Individually Designed Plans.

Second remedial amendment cycle (2010 through 2014 Cumulative Lists):

Determination specialists who are processing applications for individually designed plans filed during the second round of remedial amendment cycles must verify the timely adoption of good-faith amendments and all interim amendments required to be made since the plan's initial remedial amendment cycle. Specialists must also verify the timely adoption of any discretionary amendments, including interim amendments adopted on an optional basis. If the amendments were timely adopted, the remedial amendment cycle remains intact, and any defective provisions in the amendments can be corrected by the end of the cycle. The remedial amendment cycle is extended to the 91st day after the date of the determination letter if the application was filed on or before the final day of the cycle.

If the plan did not receive a favorable determination letter with respect to its initial remedial amendment cycle, the specialist should verify the plan was timely amended for the requirements of the Cumulative List applicable to the plan's initial remedial amendment cycle, including good-faith EGTRRA. If the specialist verifies that the amendments were timely and in full compliance for the initial remedial amendment cycle, the specialist should not verify any prior laws unless the facts of the case indicate additional verification is necessary and the specialist has managerial approval.

Pursuant to section 5.03 of Rev. Proc. 2007-44, if an interim or discretionary amendment has not been timely adopted, or if the absence of an interim amendment was not reasonable or in good faith, the remedial amendment cycle is no longer applicable to the plan. In this instance, a Plan Document Failure, as defined in section 5.01 of Revenue Procedure 2008-50, has occurred and a closing agreement under the Audit CAP procedures of the Employee Plans Compliance Resolution System will be necessary to restore the remedial amendment cycle and preserve plan qualification.

Pre-Approved Plans

Defined Contribution Pre-Approved Plans:

Announcement 2008-23 provides the initial RAP for EGTRRA-approved defined contribution plans expired on April 30, 2010. Notice 2010-48 and EP News summer 2010 edition contain some exceptions regarding the end of the remedial amendment cycle. Rev. Proc. 2011-6, section 9, provides that an application for a determination filed on Form 5307 generally need not include the plan's EGTRRA good faith amendments that were adopted prior to the adoption of the EGTRRA-restated plan or any interim plan amendments regardless of when adopted, unless the plan is a volume submitter (VS) plan that does not authorize the practitioner to amend the plan on behalf of the adopting employer. A specialist reserves the right to request evidence of adoption of good faith

and interim amendments during the course of the review of a particular plan, if the facts of the case support the request. Applications filed on Form 5307 for VS plans that do not authorize the practitioner to amend the plan on behalf of the adopting employer must include the plan's EGTRRA good faith amendments and any interim amendments that were adopted for qualification changes on the 2004 Cumulative List. See Rev. Proc. 2011-6, section 9, for additional details regarding filing requirements for pre-approved plans using Form 5300.

The specialist should confirm whether or not the plan's initial Remedial Amendment Cycle (RAC) has expired. The end of the initial RAC expired on April 30, 2010, with some exceptions. Since the initial RAC has expired, the specialist should confirm full compliance for all requirements on the 2004 Cumulative List (C.L.). Generally, if the employer adopts a pre-approved defined contribution plan on or before April 30, 2010, with exceptions specified in Notice 2010-48 and the EP News Summer 2010 edition, and otherwise meets the eligibility requirements for the six-year cycle under Rev. Proc. 2007-44, section 17.01, the adoption of the EGTRRA-approved plan cures any defects in the good-faith interim amendments for the 2004 C.L.

Defined Benefit Pre-approved Plans:

Announcement 2010-20 provides the initial RAP for EGTRRA-approved defined benefit plans expires on April 30, 2012. Rev. Proc. 2011-6, section 9, provides the application for a determination letter filed on Form 5307 generally need not include the plan's EGTRRA good-faith amendments that were adopted prior to the adoption of the EGTRRA-restated plan or any interim amendments, regardless of when adopted, unless the plan is a volume submitter that does not authorize the practitioner to amend on behalf of the adopting employer. The specialist reserves the right to request evidence of adoption of good-faith and interim amendments during the course of the review of a particular plan, if the facts of the case support the request. Applications filed on Form 5307 for VS plans that do not authorize the practitioner to amend the plan on behalf of the adopting employer must include the plan's EGTRRA good faith amendments and any interim amendments that were adopted for qualification changes on the 2006 Cumulative List. See Rev. Proc. 2011-6, section 9, for additional details regarding filing requirements for pre-approved plans using Form 5300.

The initial RAP for pre-approved defined benefit plans expires on April 30, 2012. Since the pre-approved defined benefit plans are in their first cycle, the specialist must still verify GUST for these plans. If a GUST letter has been issued, then confirmation that the plan was timely amended for GUST is not required.

Required Verification of Prior Plan Documentation

The requirements for verification of prior plan document compliance with applicable law are based on the premise that we should make every attempt possible to ensure that the rights of plan participants and their beneficiaries are adequately protected. Such rights are derived entirely from the terms of a legally-binding plan document which has been formally adopted by the employer.

Generally, the scope of review in the absence of a determination letter should include verification of compliance with the cycle immediately preceding the current cycle in which the application was submitted. However, if the specialist determines that the application warrants verification of compliance for additional laws based on the facts of the application, the specialist must secure managerial approval to expand the inquiry.

Initial remedial amendment cycle for individually designed plans:

Compliance with GUST must be verified in every instance. If a plan has a GUST I determination letter issued under Revenue Procedure 98-14, the employer must verify timely adoption of all

applicable GUST provisions which are effective for plan years beginning after 1998. If a plan has a GUST II letter issued under Revenue Procedure 2000-27, the employer must verify that the plan was timely amended to comply with the Community Renewal Tax Relief Act of 2000.

If a GUST determination letter has not been issued for a plan, all GUST documents adopted by the employer and not enclosed with the determination letter application must be requested and reviewed in their entirety. If the employer provides a timely adopted GUST plan document, the agent is not required to verify any other prior law.

If it is determined that a plan has not been amended for all applicable provisions of GUST retroactive to the correct effective date of each provision (or the year in which the plan became effective, if later), such failure to comply with GUST would be considered a Plan Document Failure. A Plan Document Failure is also deemed to have occurred if a plan is amended for GUST at any time after the close of the applicable remedial amendment period under IRC §401(b), even if the GUST amendments are adopted in a plan year with a closed statute of limitations.

If the specialist determines additional verification of prior law is warranted, based on the facts of the case, the specialist must secure managerial approval to expand the scope of the verification to include laws prior to GUST.

Second remedial amendment cycle for individually designed plans:

Compliance with the plan's applicable cumulative list for its initial remedial amendment cycle must be verified in every instance. If a plan has a determination letter issued under the cumulative list for the plan's initial remedial amendment cycle, the specialist should verify timely adoption of interim amendments for the plan's second remedial amendment cycle.

If a determination letter has not been issued for a plan, all interim amendments, including good-faith EGTRRA, listed on the cumulative list for that plan's initial remedial amendment cycle must be requested and reviewed in their entirety. The specialist should also review all discretionary amendments pertaining to the plan's initial remedial amendment cycle. If the specialist determines that all interim and good-faith amendments were timely adopted, the specialist is not required to verify any other prior laws. Any language deficiencies relating to the interim amendments must have been corrected prior to the end of the plan's initial remedial amendment cycle.

If it is determined that a plan has not been timely or properly amended for all applicable provisions of the plan's cumulative list for its initial remedial amendment cycle retroactive to the correct effective date of each provision (or the year in which the plan became effective, if later), such failure to comply with the plan's initial cumulative list would be considered a Plan Document Failure. A Plan Document Failure is also deemed to have occurred if a plan is amended for the plan's initial cumulative list at any time after the close of the applicable remedial amendment period under IRC §401(b), even if the interim amendments are adopted in a plan year with a closed statute of limitations.

If the specialist determines additional verification of prior law is warranted, based on the facts of the case, the specialist must secure managerial approval to expand the scope of the verification to include laws prior to the plan's initial cumulative list.

Required Verification of Adoption of Plan in Initial Plan Year

For plans that are effective after 2001, a specialist must confirm that such a plan was adopted within its initial plan year and was qualified from its inception. Most, if not all, current and former

participants would be impacted by the provisions of the initial document, and the qualification of any subsequent restatement could be affected if its terms conflict with those of the original plan. The specialist generally will not be required to secure the initial plan document for plans that are effective prior to 2002.

Securing and Evaluating Evidence of Prior Plan Documentation

Before contacting an employer to request any available evidence of a prior plan document, the specialist reviewing the application should research all internal sources of data such as EPMF, EDS and TEDS. If EDS indicates that a determination letter was issued for a GUST document, no additional verification is required. If the EPMF confirms that a determination letter application for a GUST restatement was previously submitted, this would be sufficient evidence of a prior document, and no further action would be necessary.

If verification of pre-GUST documentation is necessary, the specialist should secure evidence of the documentation from the employer. The evidence may include a prior determination letter, plan document, board of directors' resolution, corporate minutes, summary plan description, annual reports, allocation reports, trust account statements, collective bargaining agreements that reference the documentation at issue, internal plan-related memoranda or mailings to employees of the employer, or documents related to presentations to employees informing them of prominent plan features and the opportunity to participate in the plan. Any requests should initially be limited to a copy of a prior determination letter or plan document; if neither is available, the specialist should request the evidence. The decision regarding whether a document actually existed should be based on the particular facts and circumstances of the case and must be approved by the manager.

NOTE: An employer who cannot provide a comprehensive plan document or a series of plan amendments to verify the initial adoption of the plan may submit documented evidence of the type described in the previous paragraphs in support of their assertion that the plan was established within the initial plan year. Such evidence may, on a case by case basis, satisfy the definite written program requirement of Treas. Reg. §1.401-1(a) if it, 1) sets forth essential plan features (eligibility, vesting, CODA (if applicable), distributions, contribution/benefit formula) and other pertinent plan provisions in a manner which establishes legally-enforceable participant and beneficiary rights, and 2) affirms the intent of the employer to establish and maintain a qualified retirement plan by communicating such provisions to its employees.

If the specialist concludes that the evidence sufficiently demonstrates that a document was in effect, the issue of plan existence should not be pursued further. Otherwise, the plan will not be considered a definite written program and arrangement under Treas. Reg. §1.401-1(a) for the period in question, and the resulting Plan Document Failure must be remedied through a closing agreement in order to preclude a proposed disqualification of the plan.

In summary, the determination regarding whether a prior plan document is deemed to exist should only be made after a thorough evaluation of the information submitted by the employer, and it should be based entirely on the particular facts and circumstances of the case.

Appendix

The following examples describe the application of the procedures described above to actual determination case processing:

Example 1:

Employer Q, with an EIN ending in 4, submits a determination letter request for an individually designed restatement of its plan in January 2010. The case file contains a standardized GUST prototype plan adopted on February 28, 2002 with the opinion letter and the individually designed plan restatement adopted on December 31, 2009. The plan was originally effective in 1993 and has never received a determination letter. Since the plan was timely amended for GUST, no further review of prior documentation is necessary.

Example 2:

Employer P, with an EIN ending in 1, submits a determination letter request for an individually designed restatement of its plan in June 2011. The case file contains only the restatement for the 2010 Cumulative List adopted on December 31, 2010. The plan was initially effective in 2000 and has not received a determination letter. The specialist requested documentation of prior law compliance. The employer provided a copy of its individually designed GUST plan document signed September 30, 2003, but cannot provide any other documents. The specialist should verify good faith EGTRRA, 401(a)(9), and all other items on the 2005 Cumulative List for full compliance since the first Remedial Amendment Cycle has closed. The specialist should verify all interims for 2006 through 2010 for good faith compliance and ensure the language is correct in the restatement for the 2010 Cumulative List. The specialist should pursue a closing agreement for late GUST since the remedial amendment period for individually designed plans ended on February 28, 2002 and the employer cannot verify that the plan was amended for GUST on or before that date. Generally, the specialist would not be required to verify the initial plan document since the plan was effective prior to 2002. However, since the plan was a late amender for GUST, the specialist should consult the manager to determine if any other prior documents should be secured.

Example 3:

Employer Q submits a Form 5307 application for a defined contribution plan on April 30, 2010. The plan was initially effective in 1997 and has not received a determination letter. The case file contains only an adoption agreement executed March 31, 2010 and the opinion letter issued March 31, 2008. The specialist checks EDS and discovers that the plan received a Letter 835 on January 4, 2004. EDS further provides that the application was a Form 5307. Since the plan was timely amended for GUST, no further review of prior documentation is necessary.

Example 4:

Employer R submits a Form 5307 application for a defined contribution plan on April 30, 2010. The plan was initially effective 1999 and has not received a determination letter. The case file contains only an adoption agreement executed April 30, 2010 and the advisory letter issued March 31, 2008. The specialist requests verification of prior law. The employer provides a GUST plan document adopted September 30, 2003 with its advisory letter and a good faith EGTRRA amendment adopted December 31, 2003. Since the plan was timely amended for GUST, the specialist does not need to verify any other prior laws or secure the initial plan document. However, the plan appears to have been amended late for good faith EGTRRA and may require a closing agreement.