

# Benefits Alert

## Deadline Looming for Retirement Plan Amendments and IRS Qualification

The deadline is finally here for amending your 401(k), profit sharing or pension plan to include the statutory changes required by several years of congressional action, collectively referred to by the acronym "GUST." This deadline has been extended several times, but the IRS recently stated definitively that there will be no further extensions. Therefore, if you have a calendar year plan that is not a prototype plan, the deadline for amending your plan and filing it with the IRS for qualification purposes is **December 31, 2001**.

### New Tax Law

The Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA") contains many benefit plan changes, some of which will become effective in 2002. These changes, along with the rules for amending your plan to comply with EGTRRA, will be described in a future bulletin. However, while you are reviewing your plans in connection with the amendment process, you should discuss with your advisors the impact of EGTRRA on your planning for next year.

### Qualifying Individually Designed Plans

To comply with GUST, the remedial amendment period for all individually designed non-governmental plans ends on the last day of the first plan year beginning in 2001 (IRS Revenue Procedure 2000-27). The IRS filing for qualification must also be made by that date. With quite limited exceptions, your plan must be completely restated to include these new provisions.

**Therefore, to comply with the law you should now be amending your plan and preparing the related IRS filing.**

### Making Other Changes

In updating your plan for legal compliance, you should also review design features which could be modified to improve their effectiveness, such as the form or amount of any match, or the authority or structure of the administrative committee. You should also review plan issues which have been the focus of IRS activity in recent years. For instance, under recently finalized IRS regulations (confirmed by EGTRRA), it is possible for plans to **eliminate certain annuity forms of distribution**. Taking advantage of these new provisions may be helpful in dealing with residual features of acquired plans that have been merged into your plan, as well as in eliminating old provisions in plans that may have initially been maintained with insurance companies and therefore contain rarely used annuity provisions.

In addition, the issue of **employee classification** has become an important one in the benefits area, and plan provisions dealing with the exclusion of certain employees from plan participation should be carefully reviewed. For example, the IRS has tried to limit the ability of employers to exclude employees classified as temporary or part-time from participation. Nonetheless, carefully drafted exclusions of special project employees or "very" part-time employees is still possible. Plans may appropriately exclude independent contractors and leased employees, but it is important for the plan documents to help guard against a reclassification of such individuals for income tax purposes which would require their retroactive inclusion in the plan. It is also important to anticipate whether the number of such

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*If you have a calendar year plan, the deadline for amending your plan and filing it with the IRS for qualification purposes is approaching.*

exclusions is so large that a subsequent reclassification could affect the plan's ability to satisfy the participation rules of ERISA.

### Qualifying Prototype Plans

If you have a prototype plan, you may be eligible for a later deadline if certain requirements are met. To be eligible for the later deadline, you must, before the end of the regular GUST remedial amendment period described in the prior section (for calendar year plans, by December 31, 2001), either:

- have adopted a prototype plan; or
- jointly certify with a sponsor of a prototype plan that you intend to amend your plan for GUST by adopting the prototype plan after it has received IRS approval.

In addition, the sponsor of the prototype plan must have filed a request for an IRS qualification letter of its plan amended for GUST no later than December 31, 2000. If these requirements are met, the IRS has recently confirmed that your deadline for amending your plan to comply with GUST will not be before December 31, 2002 (or, if later, the end of the twelfth month beginning after the date on which the IRS issues an approval letter for the prototype plan).

By this deadline, you must either (a) adopt the GUST approved prototype or (b) adopt another GUST approved prototype or an individually designed GUST amendment and (c) you must request an IRS determination by the end of this extended period, if a determination letter is required for reliance.

### Finishing the Process

- **Step 1:** Make sure that your plan is either being amended to reflect GUST or is eligible for the extended reliance period for prototype plans (as well as volume submitter plans). You should also confirm that your plan has been operating in accordance with terms of the amendment, going back to the effective date of the relevant GUST provision (which may be as early as 1994).
- **Step 2:** Establish a targeted IRS filing date, taking into account how long it will take to gather the demographic information necessary to complete the filing. Note that participants must receive seven to ten day advance notice of the filing.
- **Step 3:** Consider any voluntary design changes, either to improve your plan's effectiveness or its administration.
- **Step 4:** Proceed with the mechanics of the filing. This includes scheduling corporate action or signatures required to amend the plan and planning for the distribution of the required notice to plan participants. The IRS now permits the notice to plan participants to be delivered **electronically**, subject to certain requirements. Always anticipate the possibility of delay and the problems of completing the filing package during the December holidays.

We are happy to help with any aspect of this process even if you are adopting a prototype plan. In some cases this includes reviewing recordkeeping agreements and trust documents or problems that arise when plans have not been administered in conformance with GUST during this long reliance period.

*In addition to complying with GUST, consider design changes to improve effectiveness and administration.*

### Tax Bulletin/ Benefits Alert

This publication is not intended as legal advice. Readers should not act upon information contained in this publication without professional legal counseling. For more information, contact Hale and Dorr LLP's Executive Compensation and Employee Benefits Group.

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