

Letter to Carol Gold, Director, Employee Plans Division, Internal Revenue Service, regarding Extension of GUST Remedial Amendment Period

October 26, 1998

Ms. Carol Gold
Director, Employee Plans Division
Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, D.C. 20224

Re: Extension of GUST Remedial Amendment Period

Dear Ms. Gold:

On behalf of The American Society of Pension Actuaries (ASPPA), we are writing to offer suggestions, in response to comments you and other IRS representatives have made, regarding the updating of plans to comply with GUST ("GUST" refers to the required amendments under GATT, the Uniformed Services Employment and Reemployment Rights Act, the Small Business Job Protection Act of 1996 (SBJPA) and the Taxpayer Relief Act of 1997). We understand that the IRS does not currently contemplate an extension of the GUST remedial amendment period. However, we also understand that the IRS is contemplating giving employers who adopt approved prototype documents an additional 12 months to adopt the plan after the organization sponsoring the prototype receives approval of the "lead" document. Finally, we understand that the IRS is considering a similar 12-month extension for volume submitter plan documents.

While we recognize the desirability of prompt updating of plan documents for GUST, we believe that the IRS, plan sponsors, and ultimately plan participants will be better served if the remedial amendment period for GUST is extended uniformly for all plans for the reasons indicated below.

I. The RAP should be extended for all plans.

Under Revenue Procedure 97-41, as modified by Revenue Procedure 98-14, the 401(b) remedial amendment period (RAP) for the GUST amendments is generally set to expire at the end of the plan year beginning in 1999. We think, for the following three reasons, the RAP should be extended for all plans in order to provide adequate time for the GUST updating process. In addition, we believe it is in the best interests of both the IRS and plan sponsors to announce an extension now rather than waiting until the end of 1999.

- A. The GUST determination letter program is not completely open yet. Under Revenue Procedure 97-41, determination letters can only be issued with respect to the provisions of GUST which are effective prior to 1998. We are aware that the IRS is working on guidance for the 401(k) and 401(m) safe harbor provisions (Code Sections 401(k)(12) and 401(m)(11)) and the repeal of Code Section 415(e). By the time this guidance is released and the full determination letter program for GUST is open, it is likely that plan sponsors will have less than a year to amend and submit plans for GUST if the 1999 plan year deadline is not extended.

Many of our members wait until their "lead" prototype or volume submitter documents are approved before they do their individually designed plans. This makes it easier for both the IRS and employers if the majority of the plan language being used to create an individually designed plan has been approved by the IRS. Once the full determination letter program is open, it will probably take several months to get the "lead" plan approved. If a practitioner has a large number of plans to update, it would be virtually impossible to update the plans by the end of their 1999 plan year.

In addition, the only guidance we have regarding the updating process is that individually designed plans and Master and Prototype Plans need to be restated if there have been more than four consecutive

amendments. The effect of this rule is that Master and Prototype sponsors and sponsors of individually designed plans that updated their plans early in the TRA '86 restatement process may end up needing a restatement whereas sponsors that waited until the end of TRA '86 remedial amendment period might need only an amendment to update their plans. This is because most Master and Prototype plans and many individually designed plans were approved in 1990 and the plans may have been amended four times since then (the possible amendments are for the final 401(k) regulations, UCA, OBRA '93 and the model amendment pertaining to the merger of money purchase pension plans into profit sharing plans).

Thus, it is possible that those who updated their plans for TRA '86 on a timely basis will be at a disadvantage this time around. The effect of this is to further discourage the updating of any plans until the IRS has issued all final guidance relating to GUST. We believe that, at the very least, IRS model amendments should not count toward the four amendment limit.

- A. The second reason for extending the deadline for all plans is to have a single deadline applied to all plans. We believe it is confusing (even to IRS agents in the field) to have different rules for different kinds of plans. It will inevitably lead to some people missing deadlines because of that confusion. A single deadline applicable to all plans will facilitate compliance. If the IRS provides individual 12-month extensions for Master and Prototype and Regional Prototype Plans, then there would be multiple deadlines depending upon the plan document being used.

Under the procedures in place for TRA '86, if the sponsor switched to a plan where it had no automatic reliance (i.e., to any plan other than a standardized plan on which has automatic reliance), then the sponsor was required to submit the plan to the IRS for a determination letter in order to use the 12-month extension for the prototype it had originally intended to adopt. This just adds further confusion to the process and increases the potential for violations.

C. The last reason for extending the deadline is due to a delay in guidance from the IRS regarding the GUST amendment process. It is not clear whether the GUST update can be handled through a short amendment or whether an entire restatement is needed. The instructions to Form 6406 indicate that a GUST amendment cannot be submitted using that Form. But, that leaves open the fundamental issue of whether a restatement is required, since plan sponsors could submit a GUST short amendment using Form 5307 or 5300.

The same lack of guidance exists for Master and Prototype and Regional Prototype Plans. The only guidance which exists is under Rev. Proc. 89-9 which also provides that if more than 4 consecutive amendments have been made, a restatement will be required. (There is no similar provision for Regional Prototype Plans in Rev. Proc. 89-13.)

To summarize, we urge the IRS to extend the GUST remedial amendment period for all plans because of the lack of complete guidance which is needed in order to complete the GUST amendments and because of the desirability of a uniform deadline.

II. The RAP should, at the least, be extended for Master and Prototype and Regional Prototype Plans.

If the IRS does not provide for a single extended deadline, then there should be an extended RAP for Master and Prototype and Regional Prototype Plans (and for volume submitter plans as discussed in III. below). The additional time for prototype adoption was a feature of the TRA '86 restatement process. (See Rev. Proc. 95-12 and the prior guidance cited therein.) Under that procedure, plan sponsors adopting Master and Prototype Plans had 12 months from the date of issuance of the TRA '86 opinion letter to update their existing plan documents, provided the prototype sponsoring organization had submitted its TRA '86 update by March 31, 1991. Sponsors using any other national prototype or any regional prototype plan had six months to adopt the approved TRA '86 prototype, provided the TRA '86 update was submitted before July 1, 1994.

Similar rules should be applied to plans which are updated for the GUST changes using a timely submitted Master and Prototype or Regional Prototype Plan which is submitted for GUST as a replacement of an existing TRA '86 Master and Prototype or Regional Prototype Plan. The 12-month period should be extended to both Master and Prototype and Regional Prototype Plans (on the assumption that the IRS will

continue to recognize the distinction between Master and Prototype plans and Regional Prototypes, even though there has been a consolidation of the determination letter process into Cincinnati) because for this update it is possible to have a "replacement" Regional Prototype Plan. For TRA '86, there could not have been a "replacement" Regional Prototype Plan because the Regional Prototype program was started as a part of the TRA '86 restatement process.

Another change which would ease the process of updating for GUST is to eliminate the requirement that a sponsor submit a plan for a determination letter within the applicable 12-month period. In order to be entitled to use the extended 12-month RAP for TRA '86, if an employer did not have reliance on a standardized adoption agreement, the plan was required to be submitted to the IRS for a determination letter. Ordinarily, a plan is not required to be submitted for a determination letter. Requiring a plan submission as a condition for the 12-month extension complicates the process and presents another trap for the unwary.

III. The RAP should be extended for volume submitter plans.

In order to encourage the use of pre-approved plans, volume submitter plans should be treated in the same manner as Master and Prototype and Regional Prototype Plans. Specifically, if Master and Prototype and Regional Prototype Plans are provided with a 12-month extension, the same 12-month extension should be applied to sponsors intending to adopt volume submitter plans. Under TRA '86, the extension which applied to Regional Prototype Plans also applied to volume submitter plans (Rev. Proc. 95-12). Since the concept of a "replacement" plan can now be applied to volume submitter plans, providing for a 12-month extension for "replacement" volume submitter specimen plans would be equitable.

The rules could be similar to the rules set forth in Rev. Proc. 95-12. Specifically, the sponsor and the volume submitter sponsoring practitioner would need to execute a written certification, before the end of the otherwise applicable RAP, that the sponsor intends to adopt the approved specimen volume submitter plan. Alternatively, a certification would not be required if the sponsor has adopted either the TRA '86 approved specimen plan or the GUST specimen plan which is pending approval.

If the certification approach is not used, it would be necessary to determine what constitutes a previously adopted volume submitter plan. To protect the plan sponsor, we believe that the IRS should adopt a clear standard for determining whether the sponsor has adopted a TRA '86 volume submitter plan. One possible approach might be to require that the plan (or amendment) have a TRA '86 determination letter which was obtained as a volume submitter if the plan was established or amended before December 8, 1994 (plans or amendments adopted after December 7, 1994, fall within the GUST RAP pursuant to Rev. Proc. 97-41 and should not be required to obtain a determination letter). The reason for this requirement is because sponsors adopting a volume submitter plan are permitted to make modifications to the approved specimen plan. If the changes are "significant," the IRS can reject the plan as a volume submitter and treat it as an individually designed plan. The only way to know whether the changes are significant is by submitting the plan for a determination letter. Thus, if the IRS accepted a TRA '86 submission as a volume submitter plan, that should satisfy the requirement that the sponsor intends to adopt the GUST approved replacement specimen plan.

Sponsors who ultimately find that they can't fit under the GUST approved volume submitter plan (e.g., due to extensive modifications) would be able to adopt an individually designed plan (including another volume submitter plan) or a prototype plan within the 12-month period which is based on the date of the advisory letter issued with respect to the specimen plan they had intended to adopt. As mentioned above for prototype plans, this should not be contingent upon whether the employer submits the plan for a determination letter within such 12-month period.

IV. Volume Submitter Plans should be permitted to have adoption agreements

Revenue Procedure 98-6 modified the volume submitter program by prohibiting a volume submitter plan from having adoption agreements. This approach has been popular in the past and will become even more popular due to another change in the Revenue Procedure which permits volume submitter plans to be used to establish plans which use cross-testing to pass the 401(a)(4) non-discrimination requirements.

IV. Other Issues

The IRS should consider issuing model amendments for GUST updates. This would expedite the process significantly.

The Master and Prototype and Regional Prototype programs should be modified to permit cross-tested allocations. For example, a volume submitter plan can permit cross-testing but a prototype document cannot. It seems as though it would ease the burden on the both the IRS and sponsors if a prototype basic plan document which has been approved for GUST could be used as the basis for a cross-tested prototype plan.

We would welcome the opportunity to discuss these comments with you.

Very truly yours,

Craig P. Hoffman, Co-Chair
Government Affairs Committee

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Brian H. Graff, Esq.
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