

MEMO# 13692

June 29, 2001

IRS ISSUES GUIDANCE ON PLAN AMENDMENTS RELATING TO THE ECONOMIC GROWTH AND TAX RELIEF RECONCILIATION ACT OF 2001

[13692] June 29, 2001 TO: PENSION MEMBERS No. 23-01 PENSION OPERATIONS ADVISORY COMMITTEE No. 42-01 RE: IRS ISSUES GUIDANCE ON PLAN AMENDMENTS RELATING TO THE ECONOMIC GROWTH AND TAX RELIEF RECONCILIATION ACT OF 2001 The Internal Revenue Service recently issued Notice 2001-42, which provides guidance on amendments to qualified plans under the Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA").¹ As you are aware, EGTRRA, which was signed into law on June 7, 2001, contains significant retirement savings provisions.² The Notice also addresses the interaction of such plan amendments with the "GUST" remedial amendment process. Specifically, the Notice provides the following:

- The GUST remedial amendment period for individually designed plans, which ends on the last day of the 2001 plan year, is not being extended.
- The GUST remedial amendment period provided to prior adopters of volume submitter ("pre-approved") plans and employers that timely certify their intent to adopt a pre-approved plan that has been restated for GUST will be treated as not expiring earlier than December 31, 2002. This change is intended to simplify the determination of the GUST amendment deadline for these plans and facilitate timely amendment of the plans for GUST and EGTRRA.
- A plan is required to have "good faith" EGTRRA plan amendment in effect for a year if: (1) the plan is required to implement a provision of EGTRRA for the year, or

1 The Notice provides that the intent of the guidance is to (1) avoid further delays in amending plans for "GUST"; (2) prevent disruption of the GUST determination letter process that has already been undertaken by thousands of plan sponsors; (3) facilitate the timely adoption of EGTRRA plan amendments; (4) ensure that plan terms reflect the actual operation of the plan; (5) allow plan sponsors to minimize the cost and burden of adopting EGTRRA plan amendments; (6) provide plan sponsors with the opportunity to retroactively amend the "good faith" EGTRRA amendments, if necessary; and (7) facilitate the timely amendment of master and prototype and volume submitter plans for GUST and EGTRRA. 2 See Institute Memorandum to Pension Members No. 21-01 and Pension Operations Advisory Committee No. 35-01, dated May 31, 2001, for details regarding the retirement savings provisions in EGTRRA. 2the plan sponsor chooses to implement an optional provision of EGTRRA for the year, and (2) the plan language, prior to the amendment, is not consistent either with a provision of EGTRRA or with the operation of the plan in a manner consistent with EGTRRA, as applicable.³

- "Good faith" EGTRRA plan amendments must be adopted no later than the later of (1) the end of the plan year in which the amendments are required to be, or are optionally, put into effect, or (2) the end of the GUST remedial amendment

period. In limited situations, earlier amendment may be required to avoid a decrease or elimination of benefits prohibited by Code section 411(d)(6).⁴ • Before the end of August 2001, the IRS will publish sample EGTRRA plan amendments that plan sponsors and sponsors of pre-approved plans can adopt or use in drafting individualized plan amendments. The sample plan amendments will be for both the required and optional changes under EGTRRA; additional guidance on amending pre-approved plans will be included with the sample amendments. A plan amendment identical to the sample EGTRRA amendment or one that is materially similar to such a sample will be viewed as a “good faith” EGTRRA plan amendment.⁵ • Plan provisions that are amended by a timely “good faith” EGTRRA plan amendment or that automatically reflect a statutory EGTRRA change have a remedial amendment period ending no earlier than the end of the 2005 plan year in which any needed retroactive remedial EGTRRA plan amendments may be adopted. • Individually designed plans submitted for GUST determination letters may reflect the changes made by EGTRRA. Also, pre-approved plans submitted for GUST determination letters may include EGTRRA amendments in the form of a separate, clearly identified addendum to the plan (or basic plan document) and/or adoption agreement that is limited to the provisions of EGTRRA. However, until further notice, determination, opinion and advisory letters will not consider the EGTRRA changes. ³ Under the Notice, a “good faith” plan amendment is one that represents a reasonable effort to take into account all of the requirements of the applicable EGTRRA provision and does not reflect an unreasonable or inconsistent interpretation of the provision. A plan amendment that merely incorporates by reference an EGTRRA change in a qualification requirement that would not otherwise be permitted to be incorporated by reference is not a “good faith” EGTRRA plan amendment. ⁴ The Notice states that EGTRRA does not provide relief from the section 411(d)(6) requirements for plan amendments adopted as a result of EGTRRA’s changes to the current plan qualification requirements. Thus, in order to have a provision effective for a plan year, a plan may need to be amended in light of EGTRRA before the time when “good faith” EGTRRA plan amendments would otherwise be required under the Notice. However, a plan amendment that eliminates or decreases benefits that have not yet accrued does not violate section 411(d)(6). The Notice provides examples illustrating these section 411(d)(6) issues in the context of “top heavy” plans. ⁵ The Notice, however, provides that plans amended by adoption of the sample EGTRRA amendments may be required to be amended again within the EGTRRA remedial amendment period to continue to satisfy the plan qualification requirements as amended by EGTRRA. ³The Notice also indicates that the IRS is reviewing the design of the Employee Plans determination letter process and will publish in the near future a “white paper” that explores options for long-term changes and alternatives to the current process. Some of the options in the white paper will deal with the timing of plan amendments to comply with law changes and the application of the remedial amendment provisions of section 401(b). Thomas T. Kim Assistant Counsel

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