LESSON 3

THE REMEDIAL AMENDMENT PERIOD

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Employee Plans CPE Technical Topics for 1998

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 Taxpayer Relief Act of 1997, the Small Business Job Protection Act of 1996, the Uruguay Round Agreements Act and the Uniformed Services Employment and Reemployment Rights Act of 1994 ("the Acts"). These Acts 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. In general, plan sponsors have a remedial amendment period under section 401(b) of the Internal Revenue Code ("the Code") with respect to certain amendments under the Acts through the last day of the first plan year beginning on or after January 1, 1999. The amendment of the plans therefore is not required prior to the last day of the plan's 1999 plan year. This Chapter provides an overview of the requirements under Code section 401(b) as they apply to plan amendments for the Acts, effective dates for retroactive plan amendments for changes made by the Acts, and the requirements for plans terminating before the end of their remedial amendment period.

Employee Plans CPE Technical Topics for 1998

OBJECTIVES

At the end of this lesson you will be able to determine:

1. When retroactive plan amendment for the Acts are permitted under Code section 401(b).

2. The effective dates for plan amendments for changes made by the Acts.

3. 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, 1996-43 I.R.B. 74, 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 417(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, plan amendments, applying the GATT changes to Code sections 411(a) and 417(e) to a pre-GATT 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 the plan amendment.

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, 1988-2 I.R.B. 5, and the chapter in this 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 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.

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.

Disqualifying 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 the Acts, as well as other plan amendments that may be needed as a result of future changes to the Code.

The amended regulations at section 1.401(b)-1T(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 his 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)-1T(c) provides that for purposes of section 1.401(b)-1T(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 the Acts. 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, the Acts also provided for a significant number of changes that liberalized the Code requirements. Therefore, the amended regulations extend to future laws (including the Acts) 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 the 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 results from a failure of the plan to satisfy the qualification requirements of the Code by reason of a change in those requirements, the remedial amendment period begins on the date on which the change effected by amendment to the Code became effective with respect to the plan.

- 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.

- 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 from a 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 (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 (as well as a regional prototype plan) is considered to be maintained by one employer. Additionally, whether or not a plan is maintained by more than one employer is determined without regard to section 414(b) and (c). However, a plan maintained solely by an affiliated group of corporations (within the meaning of section 1504) which files a consolidated income tax return pursuant to section 1501 for a taxable year that includes the remedial amendment period beginning date as determined above 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.

Discretionary 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 Acts 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 the Acts 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 the Acts, 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 provide 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 PLANS FOR USERRA, SBJPA, GATT AND TRA'97

Revenue Procedure 97-41

Rev. Proc. 97-41, 1977-33 I.R.B. 51, provides 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 establishes a single deadline for sponsors for adopting SBJPA, GATT and USERRA amendments for their qualified plans. The revenue procedure provides that the deadline is 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 provides that, for qualification purposes, plans are permitted to anticipate in plan operation certain plan amendments that they intend to adopt as a result of changes in the qualification requirements.

Revenue Procedure 98-14

Revenue Procedure 98-14, 1998-4 I.R.B. 22, provides that effective April 27, 1998, the Service will 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 also provides that the remedial amendment period described in Rev. Proc. 97-41 for GATT and SBJPA applies to plan amendments that relate to TRA'97. Additionally, the remedial amendment period under Rev. Proc. 97-41 for amending governmental plans is extended if the remedial amendment period would end before the last day of the last plan year beginning before January 1, 200l. (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 section 1541 of TRA'97.) Finally, the revenue procedure clarifies 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.

Amendment of Code section 401(a) Plans

In Rev. Proc. 97-41, under authority of reg. 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 has 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 (the last day of the first plan year beginning on or after January 1, 1999). 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 are discussed in greater detail in other chapters of this CPE text.

If a plan provision causes a plan to fail to satisfy Code section 401(a) because of changes made by SBJPA and GATT to the qualification requirements that are effective on or after the first day of the first plan year beginning on or after January 1, 1999, the plan provision is not a disqualifying provision. Also, a plan provision is not a disqualifying provision if the provision is integral to a qualification requirement changed by SBJPA if the change to a 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 amended plan provision is not effective prior to the end of the remedial amendment period. For example, Code section 401(b) would not apply to permit a plan sponsor to adopt Code section 401(k) and (m) safe harbors added by SBJPA on a retroactive basis because SBJPA provided that these sections are effective for plan years beginning after December 31, 1998. Also, Code section 401(b) would not permit an amendment eliminating the age 70½ distribution option after the end of the remedial amendment period. (See the CPE chapters in this text concerning Code sections 401(k) and (m), and 401(a)(9) changes.)

Rev. Proc. 98-14 provides 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 described in Rev. Proc. 97-41 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 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 is extended to the last day of the first plan year beginning on or after January 1, 1999. Thus, a nongovernmental employer with a calendar year single employer plan can retroactively amend its plan to meet the requirements anytime on or before December 31, 1999;

(2) for a governmental plan the remedial amendment period is 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).

Amendment of Code Section 403(b) Plans

SBJPA also made amendments that may require plan amendments for Code section 403(b) plans. Section 1465 of SBJPA (as discussed above) applies with respect to any required plan 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 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 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).

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 SBJPA, USERRA, GATT and TRA'97. 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 on the last day of the first plan year beginning on or after January 1, 1999. For governmental plans the remedial amendment period ends on 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 (as defined in the preceding paragraph).

EXAMPLE (1):

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, 1999? No, the paragraph above is intended to provide employers with existing plans who incorrectly amend their plan for amendments other than those relating to changes made by the Acts (thereby creating disqualifying provisions), to have the same remedial amendment period as that provided for the Acts. 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 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, 1999, to amend the plan, retroactive to the January 1, 1996 date, to provide for the correct eligibility requirements.

Note: A TRA'86 nonamender should apply to the appropriate key district office to enter into a closing agreement with the Service. See the CPE Chapter in this text which discusses Revenue Procedure 98-22, 1988-12 I.R.B. 11.

EXTENDED REMEDIAL AMENDMENT PERIOD NOT AVAILABLE

Although, the remedial amendment period was extended for changes required by SBJPA, USERRA, GATT and TRA'97, 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 the Acts. 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 (2):

TRA'97 changed Code section 411(a)(11) to provided 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 (3):

An employer maintains a profit-sharing plan for his employees, which include a husband and wife who each earn $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 contributions to the plan for the husband and wife based on total compensation limited to $160,000 and allocated this contribution between the husband and wife. 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 can not 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 retroactively to adopt the alternative (SIMPLE) method of satisfying the Code section 401(k) and (m) nondiscrimination tests added by SBJPA. Similarly, an amendment can not 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, 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 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, 1999, and no earlier than the first day of the first 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 SBJPA and GATT, plans, including master or prototype, regional prototype, and volume submitter plans, that are terminated after the effective date of changes made to the qualification requirements by SBJPA or GATT 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 SBJPA and GATT requirements. Also, if applicable, the operational compliance required by section 1465 of SBJPA must be satisfied.

APPLICATIONS FOR DETERMINATION LETTERS

Revenue Procedure 98-14 provides that applications for determination, opinion, notification and advisory letter involving Code section 401(a) or section 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 to 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 for terminating plans, applications for determination letters involving master and prototype plans or regional prototype plans that have not been amended to comply with GATT, SBJPA and TRA'97 will be reviewed without taking those changes into account.

Changes made by SBJPA first effective after December 31, 1998, will not be reviewed by the Service until further notice.

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 USERRA, GATT, SBJPA and TRA'97. Finally, the chapter discussed the timing for amendments when a plan is terminated within its remedial amendment period.