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PPA Restatements Are Right Around the Corner

Right now is a good time to brush up on the requirements and nuances of the process for filing restatements for pre-approved plans.

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The next restatement period for qualified, pre-approved retirement plans is fast approaching. A lot has happened since the last restatement period, most notably enactment of the Pension Protection Act of 2006 (PPA), which many consider the most sweeping pension reform legislation since ERISA, and other legislation affecting retirement plans. And the IRS has issued regulations interpreting the new laws and some old ones as well.

Most plans are currently operating under "good faith" amendments applying the new rules but have not yet been able to get IRS approval of the changes. The next window for restating pre-approved defined contribution plans will open on or about May 1, 2014, and close on or about April 30, 2016. (Pre-approved defined benefit plans are on a different cycle. The two-year window to restate DB plans is expected to open at the close of the DC plan window — on or about May 1, 2016.)

RESTATEMENT DEADLINES

All tax-qualified retirement plans are required to have a written plan document. The document may be either a pre-approved plan, in the form of either a prototype

(PT) or volume submitter (VS) plan, or an individually designed plan (IDP). In the case of a pre-approved plan, the IRS has already reviewed its features and determined that it meets the requirements for tax qualification. An IDP must be separately submitted to the IRS for review if the plan sponsor wants a determination that the IDP meets the qualification requirements.

To better manage its resources for plan review and reduce the compliance burden for plan sponsors, the IRS established "remedial amendment cycles" (Rev. Proc. 2005-66, updated by Rev. Proc. 2007-44). The cycles provide for restatement and approval of pre-approved plans every six years and of IDPs every five years.

Employers often ask if they are legally required to restate their plans or get a determination letter from the IRS each amendment cycle. The short answer is "no." However, this procedure guarantees the plan protection if it includes a non-compliant provision. Otherwise, the consequence of non-compliance is potential IRS disqualification — resulting in lost tax benefits for the employer and plan participants.

> "Many plan sponsors historically relied on favorable determination letters as their 'free pass' during IRS audits to demonstrate plan document compliance."

IS MY PLAN ELIGIBLE FOR THE SIX-YEAR CYCLE?

An employer's plan is treated as a pre-approved plan and is eligible for the six-year cycle if the adopting employer:

- adopted a pre-approved plan in the prior six-year cycle and adopts the PPA version of that plan or another pre-approved plan within the next window period (a "Prior Adopter");
- maintained an IDP during the prior amendment cycle and adopts a pre-approved plan before the close of the applicable five-year cycle (a "New Adopter"); or
- maintained an IDP and executes a Form 8905 indicating its intent to adopt a pre-approved plan before the close of the applicable five-year cycle (an "Intended Adopter").

These terms are further defined in Section 17 of Rev. Proc. 2007-44.

If an employer modifies the provisions of a pre-approved plan, the plan could lose its eligibility for the six-year cycle. Generally, the IRS views minor changes to a PT plan as creating an IDP for purposes of reliance but not for purposes of the six-year cycle. If, however, an Intended Adopter ultimately elects not to adopt a pre-approved plan or a Prior or New Adopter replaces its pre-approved plan with an IDP, then the plan generally loses its eligibility for the six-year cycle.

WHEN DOES MY PLAN BECOME INDIVIDUALLY DESIGNED?

If an employer modifies the pre-approved provisions by adopting a provision that is not permitted in a pre-approved plan, the plan will no longer be eligible for the six-year cycle. Rev. Proc. 2011-49 describes the impermissible provisions. Examples include ESOPs, incorporation of the Section 415 limits or ADP or ACP tests by reference, and failsafe provisions for satisfying the Section 401(a)(4) discrimination rules.

If an employer whose plan was eligible for the six-year cycle either adopts an IDP or impermissibly modifies the pre-approved plan more than one year after initial adoption, the plan does not immediately convert to the five-year cycle, although it will be required to apply for its own determination letter during the six-year cycle. (See "IRS Letters" below.) The first applicable five-year cycle is the cycle that ends after the close of the current six-year cycle. If the first five-year cycle ends less than 12 months after the date of the favorable determination letter, then the plan's first five-year cycle is extended for 12 calendar months and its next five-year cycle is shortened accordingly.

If an employer impermissibly modifies the pre-approved plan less than 12 months after initially adopting the plan, the plan document immediately converts to a five-year cycle.

The IRS can also determine upon review that modifications to a pre-approved plan, while they do not adopt impermissible provisions, make the plan ineligible for the six-year cycle. If the IRS determination results

in the plan missing its applicable five-year cycle, the plan may be unable to correct deficiencies on a retroactive basis. IRS guidance does not specifically describe the types of modifications that would result in such a determination. However, agents administering the pre-approved plan program indicate this provision is directed at extensive modifications that undermine the efficiencies of the pre-approved plan program, particularly those making substantive changes that impact participant benefits. If there is any doubt about plan modifications, it may be safer to treat the plan as individually designed.

IRS LETTERS

To retain their tax-qualified status, plans must comply with Code Section 401(a) in both form (*i.e.,* the plan document) and operation. There are no protections if a plan does not comply in operation. However, a plan is protected from disqualification because of a noncomplying plan provision if the plan has a current IRS letter. There are two different types of IRS letters:

- A letter the IRS issues to the sponsor of a pre-approved plan stating that the options and provisions offered under the master plan meet the qualification requirements. This is either an opinion letter, if the master plan is a PT, or an advisory letter, if the master plan is a VS.
- A letter that the IRS issues to an adopting employer stating that the provisions of the employer's plan meet the qualification requirements. This is a determination letter.

To get protection, an IDP must apply for its own determination letter during the applicable cycle. However, an employer that adopts a pre-approved plan may rely on the opinion or advisory letter issued to the document provider for plan qualification, unless the employer modifies the pre-approved provisions. An employer that modifies the pre-approved provisions of a PT plan document cannot rely on the document provider's letter and must apply for its own determination letter for protection.

Previously, an employer that did not modify the pre-approved provisions could apply for its own determination letter, using a simplified application form (Form 5307) and paying a reduced user fee. However, this has changed for the new cycle. Only an employer that has adopted a VS plan and modifies the pre-approved provisions can apply for its own determination letter using the simplified form. Any other adopter of a pre-approved plan that wants or needs its own determination letter must file on the standard form (Form 5300) and pay the appropriate fee. In addition, except in certain circumstances, the plan will be treated as if it were an IDP. (See Section 8.02 of Rev. Proc. 2013-6.) If a pre-approved plan is treated as an IDP, it must be restated to include any legal changes made since the pre-approved master plan was submitted to the IRS. (Otherwise, a pre-approved plan would not need to include those changes until the next six-year cycle.)

To make up for this change in treatment, the IRS specifically provides that if a plan is entitled to rely on a document provider's letter, the document provider's letter is equivalent to the employer's own favorable determination letter for all legal purposes, including whether the plan has a "favorable letter" for purposes of the Employee Plans Compliance Resolution System (EPCRS).

While the burdens of filing for a determination letter have increased for employers adopting pre-approved plans, there may be circumstances in which an employer will still want or require its own determination letter. Many plan sponsors historically relied on favorable determination letters as their "free pass" during IRS audits to demonstrate plan document compliance. It remains to be seen whether this will alter the approach taken by IRS reviewing agents during the next audit cycle for PPA plans. PC

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