

EGTRRA Restatements: Tips and Traps

ASPPA WEBCAST

Presenters

- Milo Atlas, EP Determinations, Special Assistant Pre-Approved Plans Program, IRS
- Ingrid Grinde, Tax Law Specialist, IRS
- Angelo Noe, EP Determinations Pre-Approved Plans Program Coordinator, IRS
- Robert M. Richter, J.D., LL.M., APM, SunGard Relius

What We'll Cover

1. The EGTRRA Restatement Deadline
2. What to expect in the EGTRRA documents
3. Interim amendments
4. Determination letter submissions

THE RESTATEMENT DEADLINE

A Brief History

- 3 key documents
 - Rev. Proc. 2005-16: General rules for prototype (M&P) and Volume Submitter (VS) plans
 - Rev. Proc. 2007-44 (restates Rev. Proc. 2005-66): Sets forth the Staggered Remedial Amendment Period (RAP)
 - Announcement 2008-23: Sets forth the pre-approved DC plan restatement period

The Concept

- 5-year staggered RAP for individually designed plans (IDPs) generally based on last digit of employer's EIN
- 6-year staggered RAP for pre-approved plans (prototype and volume submitter plans) based on type of plan (DB vs. DC)

Cumulative List

- Each November, the IRS will issue Cumulative List of changes (Notices 2004-84, 2005-101, 2007-3, and 2007-94)
- Plans submitted during a cycle are reviewed based on the Cumulative List issued prior to opening of the cycle
 - E.g., The Nov. 2007 list is used to review plans submitted in the cycle beginning 2/1/08 and ending 1/31/09

5-year Cycle for IDPs

- Staggered RAP based on last digit of employer's EIN
- 5-year cycle applies to all plans not on the 6-year cycle
 - Defined Benefit
 - Defined Contribution

IDP – 5 Year Cycles

| If EIN ends in | Amendment Cycle | EGTRRA submission period begins | End of EGTRRA RAP | End of 2 nd Amendment Cycle |
|----------------|-----------------|---------------------------------|-------------------|--|
| 1 or 6 | A | Feb 1 2006 | Jan 31 2007 | Jan 31 2012 |
| 2 or 7 | B | Feb 1 2007 | Jan 31 2008 | Jan 31 2013 |
| 3 or 8 | C | Feb 1 2008 | Jan 31 2009 | Jan 31 2014 |
| 4 or 9 | D | Feb 1 2009 | Jan 31 2010 | Jan 31 2015 |
| 5 or 0 | E | Feb 1 2010 | Jan 31 2011 | Jan 31 2016 |

Special Rules for 5-year cycle

- Multiple employers (Code §413(c)) – Cycle B
- Governmental – Cycle C
- Multiemployer (union) — Cycle D
- Controlled group, ASG, etc. (Code §414(b), (c), (m), etc.) – Options:
 - Cycle based on 5500 EIN
 - Or can elect:
 - CG Parent's cycle
 - Cycle A if more than 1 plan
- Related tax exempts can choose parent's cycle

5-year Cycle for IDPs

- 1 year rule exception if a change in EIN
- Current RAP extended for 1 year and next RAP will be less than 5 years

New Rule for New Plans

- First cycle is the cycle which includes the year the normal RAP ends
- Example:
 - Calendar year fiscal and plan year
 - Employer in Cycle B (ends 1/31/2008)
 - Adopted IDP 12/31/2007
 - Normal RAP ends on extended deadline for 2007 return
 - Since return is due after 1/31/08, first cycle ends 1/31/2013 but could submit now

6-year Cycle

- DCs and DBs will be on separate 6 year cycles
- Year 1 for DC plans ended 1/31/06
- IRS will review/approve in years 2 and 3
- Employers will update in years 4 and 5
- DBs submitted in year 3 (1/31/2008)

6-Year Cycle

| Deadline | DC Plans | DB Plans |
|----------|---|---------------------------------|
| 1/31/06 | All DC plans submit | |
| 1/31/07 | IRS review | |
| 1/31/08 | | All DB plans submit |
| 1/31/09 | 2-year employer adoption period (5/1/08 – 4/30/10) | IRS review |
| 1/31/10 | | |
| 1/31/11 | 6-year cycle ends | 2-year employer adoption period |
| 1/31/12 | All DC plans submit | |

Timing for employer adoption period approximate

Notes on 6-year Cycle

- Everyone gets approval letters at roughly the same time
- 2 year EGTRRA restatement period begins after the date of the approval letter and ends April 30, 2010
- The date to submit for a determination letter (optional) began May 1, 2008 and ends April 30, 1010

Entitlement to Use 6-year Cycle

- Plan must fall within 1 of 4 categories:
 1. Adopter of replacement plan (sponsor acquisitions)
 2. Prior adopter
 3. New adopter
 4. Intended adopter

Prior Adopter

- Employer is prior adopter if:
 - Pre-approved GUST DC plan in place February 16, 2005; or pre-approved DB plan in place January 31, 2007
 - “In place” = adopted and effective

New Adopter

- Employer is new adopter if:
 - Either of the following is true:
 - The employer maintains an IDP, or
 - ER isn't maintaining **a qualified plan** and hasn't maintained a plan during current 5-year cycle
 - And employer adopts either:
 - Existing pre-approved plan (GUST) before end of 5-year cycle and prior to start of 2-year adoption period
 - Must adopt newly approved EGTRRA plan during 2-year adoption period
 - Newly approved EGTRRA plan before end of 5-year cycle (during or after 2-year adoption period)

Intended Adopter

- Employer is intended adopter if both of the following are true:
 - Employer has individually designed plan and
 - Employer completes Form 8905 prior to earlier of:
 - 5-year cycle (1/31/07 always safe)
 - End of 2-year employer adoption period

Form 8905

- Certification of Intention to use Pre-approved plan
 - It is good-faith intention; will not work for cash-balance plans, ESOPs, DB plans with 414(k) accounts
- Rev. Proc. 2005-66 permitted use as alternative method of entitlement to the 6-year cycle
- New Rev. Proc. limits use to existing IDP
- Do not send to IRS unless submitting for a determination letter

Issues with the 6-year Cycle

- ER has prototype DB plan and wants to add DC plan due to PPA deduction rules
 - Not a prior adopter, new adopter or intended adopter
- ER had a DC plan which it terminated within its current 5-year cycle. Wants to adopt another DC plan
 - Same as above
- IRS to fix?
- Certifications for all?

Issues with the 6-year Cycle

- In 2006 Employer established a new plan using Sponsor A's prototype
- Employer is New Adopter
- Employer changed providers and now uses Sponsor B's products
- New Adopter category requires Employer to update with pre-approved plan
 - Can Employer use B's pre-approved plan?
 - Cannot use an IDP

NEW GUIDANCE COMING

- IRS will be providing additional guidance
- FAQs on IRS website at:
 - <http://www.irs.gov/retirement/article/0,,id=178060,00.html>
 - Or, go to IRS.gov and search for “Retirement Plans Frequently Asked Questions”

Non-identical Adopters

- General rule is considered a prior adopter of pre-approved plan regardless of modification
- If modification is to add something not permitted in pre-approved plan (e.g., ESOP or cash-balance), then lose ability to use 6-year cycle in following cycle if amend after 1 year
 - If amend within 1 year then not entitled to use 6-year cycle
- Anti-abuse provisions – IRS has discretion to determine that 6-year cycle does not apply

Special Note About 403(b) Arrangements

- There is no determination letter or preapproved program for 403(b) plans
- Preamble to final 403(b) regulations contemplates compliance with written plan requirement by 1/1/09, not the end of 2009
- IRS issued model language for very basic 403(b) plan
- IRS is considering a pre-approved plan program for 403(b) plans – but this will take time to be implemented

**What Provisions Will be in the new
plans**

Key Changes for EGTRRA

- Rules for VS and M&P plans in Rev. Proc. 2005-16
- Key changes
 - Uniformity requirement eliminated for M&P plans (cross-testing allowed)
 - VS practitioners can amend plan on behalf of adopting employers
 - Reliance rules for VS will be same as M&Ps

Impermissible Provisions

- ESOPs/stock bonus plans
- Multiemployer union plan
- Cash balance plans
- 414(k) plans
- Non-ERISA church plans
- Prototype multiple employer plans
- Others-see Rev. Proc. 2005-16 6.03 and 16.02

Wins

- Addendum for less common elections
- 414(s) compensation-operational
- Correction for failed ADP/ACP test-operational
- Each person in a group for cross-testing

Losses

- Election not to participate (prototype only)
- Use of separate trusts
- QNEC in anticipation of failed ADP/ACP test under prior year testing
- Cross-testing limitations (limits on groups and must be reasonable (prototype only); note on earned income)

Cross-Testing

- Prototypes and Volume Submitters – each person can be in a group (even if entity has self-employed individuals)
- Prototypes Only (Listing of Required Modifications #94 and IRS FAQ)
 - HCEs limited to 25 allocation rate groups
 - NHCE allocation rate groups based on number of eligible NHCEs
 - Must be reasonable classification

Cross-Testing (Prototype)

| # of Eligible NHCEs | Maximum NHCE "Allocation" Rate Groups |
|---------------------|---|
| 2 | 1 |
| 3 to 8 | 2 |
| 9 to 11 | 3 |
| 12 to 19 | 4 |
| 20 to 29 | 5 |
| 30 or more | Divide by 5, round down, maximum of 25 |

X-Testing and Earned Income

- Both Prototypes and VS plans must have note regarding Earned Income (EI)
- Grouping of individuals with EI must not be done in manner that results in a disguised cash-or-deferred arrangement (CODA)
 - Just a ‘note’ and no further IRS guidance
 - If each partner in a group, then try to have contributions determined at partnership level

Prototype Cross-Testing Example

- Plan has 7 eligible NHCEs/5 eligible HCEs
 - Maximum of 2 NHCE allocation rate groups
 - No limit on HCE allocation rate groups
- Each EE is in a group
- Employer can pick which NHCEs will receive 5% gateway each year
- Employer can have 1 additional NHCE allocation rate (e.g., 100% rate) as long as grouping is reasonable
 - Picking person who only worked 1 day may be problem
 - Picking janitors, even if only 1, may be OK

**MAKE SURE INTERIM
AMENDMENTS HAVE BEEN
ADOPTED**

Amendment Timing Deadlines

- Service generally will require the adoption of interim plan amendments
- Timing is different for adoption of interim amendment vs. discretionary provision
- Plan amendment must match operation

Deadline for Discretionary Amendment

- End of plan year in which plan amendment is effective
- A discretionary amendment is an amendment that is not a disqualifying provision or integral to a disqualifying provision

Deadline for Interim Amendments

- Later of:
 - due date (including extensions) for filing income tax return for employer's taxable year that includes date on which remedial amendment period (RAP) begins, or
 - last day of plan year that includes date on which RAP begins
- Exception if plan maintained by more than one employer – Last day of 10th month following last day of plan year in which RAP begins
- Governmental plan: Later of regular deadline or last day of next legislative session after effective date

Tack-on Amendments for GUST Plans

- EGTTTRA
- Post-EGTRRA (includes 401(a)(9) final regulations)
- Automatic IRA rollover for mandatory distributions
- Final 401(k) regulations
- Final 415 regulations
- Hurricane related amendments (if applicable)
- Final NRA regulations
- Pension Funding Equity Act (2008) (DB only)

Tack-on Amendments for EGTRRA Plans

- Final 415 regulations
- PPA (end of 2009 PY)
 - Deadline applies to both optional and required PPA provisions
- 402(g) gap period income – same deadline as PPA
- Heroes Earnings Assistance and Relief Tax Act of 2008 (HEART) – end of 2010

415 Regulations

- May be mandatory and voluntary - mandatory change to IRC §415 compensation; voluntary change to use for benefit purposes
 - Must exclude pure severance pay
 - Must include regular pay
 - May include vacations/holidays, disability and military pay
- Possible issues with IRC § 411(d)(6)

Pension Protection Act of 2006

- Amendments not required prior to 2009
- IRC §411(d)(6) relief (except as provided by IRS)
- Rev. Proc. 2007-44 confirms 2009 deadline even for discretionary PPA provisions
- May need updated Summary of Material Modifications

Process of Amending Pre-approved Plans

- M&P Sponsors have authority to amend on behalf of adopting employers
- VS Practitioners will have similar authority under EGTRRA documents (if included in plan)
- No IRS guidance regarding operation of this authority

Interim Amendments and Restatements

- If plan is restated, do interim amendments need to be re-adopted?
- Restatement means entire plan is being replaced
- Rev. Proc. retains interim amendment if effective date of restatement is prior to effective date of interim amendment (e.g., if EGTRRA restatement date is 1/1/02, then final 415 regulation amendment survives b/c restatement date is prior to effective date of final regulations (limitation years beginning after 6/30/2007))

Failure to Timely Adopt Tack-Ons

- You CANNOT self-correct
- Go through VCP
 - Filing fee could be \$375
- If IRS catches you during DL process, correction fee much higher
 - Could be \$80,000
 - Moral: Check it out before you request DL
- If IRS catches you during audit, correction fee is higher still

**Take Appropriate
Action**

Summary of Actions to Take

- Update plan
 - Any plan may be used (unless new adopter)
 - Must restate (Form 6406 not accepted)
- Submission for determination letter is optional – even if no automatic reliance
- Scope of review – if submit pre-approved plan as an individually designed plan, current Cumulative List will be used
 - Tack-on amendment must be used
 - Tracked changes for IDP submission helpful but not required

Action to Take at End of RAP

- Prior adopter or intended adopter (8905) must update by using any plan
 - Newly approved plan (doesn't matter who sponsor is)
 - Individually designed plan not based on pre-approved plan
- New adopter **must** adopt final pre-approved plan of sponsor
- Replacement adopter **must** adopt final pre-approved plan of substitute sponsor
- Submission for determination letter is optional – even if no automatic reliance
- Scope of review – if submit pre-approved plan as an IDP, current Cumulative List must be used so plan must be brought up-to-date from 2004 to current list

Example – Modification to Prototype

- Employer restates plan in October 2008 using EGTRRA approved DC prototype
- Modification made to prototype (not an impermissible prototype provision)
- Employer submits for DL at end of 2 year deadline (April 30, 2010)
- Plan must be updated to reflect Cumulative List issued in Nov. 2009 even though 2004 Cumulative List used to review prototype

Failure to Restate

- Disqualifying Defect?
 - What if all interim amendments were adopted timely and are compliant with law?
- EPCRS (VCP) must be used to correct the problem
 - Sanction based on size of employer

Automatic Reliance Rules

- Automatic reliance as to form of plan if identical adopter of pre-approved plan
- Automatic reliance as to coverage and nondiscrimination if standardized M & P
- Automatic reliance as to coverage and nondiscrimination for other pre-approved plans depends on elections made by employer

Automatic Reliance (EGTRRA)

- General Rule: no reliance as to form of plan if any modification is made
- Reliance as to form retained if modification is for:
 - IRS §§415 and 416
 - Trust or custodial provisions for non-standardized or VS plan
 - Correction of typos
 - Special effective dates if restatement could accomplish same result

To Submit for DL or Not

- Advantages
 - Reliance if there are any questionable choices or completion of “other” options
 - I may not have to provide ALL prior plan documents under an audit or future submission
 - Bankruptcy concerns
 - IRS might not accept off-cycle pre-approved plan filings
- Disadvantages – time and money

Bankruptcy Concerns

Rev. Proc. 2008-6: If an employer can rely on a favorable opinion or advisory letter pursuant to this section, the opinion or advisory letter shall be equivalent to a favorable determination letter. For example, the favorable opinion or advisory letter shall be treated as a favorable determination letter for purposes of section 21 of this Revenue Procedure, regarding the effect of a determination letter, and section 5.01(4) of Revenue Procedure 2006-27 regarding the definition of “favorable letter” for purposes of EPCRS

Bankruptcy Concerns

Bankruptcy Abuse Prevention and Consumer Protection Act of 2005:

(A) If the retirement funds are in a retirement fund that has received a favorable determination of section 7805 of the Internal Revenue Code of 1986, and that determination is in effect as of the date of the filing of the petition in a case under this title, those funds shall be presumed to be exempt from the estate

Bankruptcy Concerns

- Bankruptcy Abuse Prevention and Consumer Protection Act of 2005
- (B) If the retirement funds are in a retirement fund that has not received a favorable determination under such section 7805, those funds are exempt from the estate if the debtor demonstrates that –
 - (i) no prior determination to the contrary has been made by a court or the Internal Revenue Service; and
 - (ii) (I) the retirement fund is in substantial compliance with the applicable requirements of the Internal Revenue Code of 1986; or
 - (II) the retirement funds fails to be in substantial compliance with the applicable requirements of the Internal Revenue Code of 1986 and the debtor is not is not materially responsible for that failure

Off-cycle Filing: General Rules

- Off-cycle filing: Go to the bottom of the pile
 - Not reviewed until all on-cycle plans processed
- If reviewed:
 - Use current cumulative list
 - DL expires at end of current cycle
- IRS might not accept off-cycle 5307 filings

Priority Review for Some Off-cycle IDP Filings

- Terminating plans
- Off-cycle submitted under published guidance requiring determination letter submission (e.g., EPCRS)
- New IDP with a regular cycle ending more than two years after end of off-cycle period
 - Example: New plans in Cycles E or A would have priority filing today; C and D would not
- Urgent business need

Plan Termination

All bets are off!!

Terminating Plans

- Must be updated at time of termination
- Not necessarily the latest Cumulative List
- All plans treated as IDPs at time of termination
- Restate onto newly approved EGTRRA DC plans?
 - Rev. Proc. 2008-6 Section 12.07 provides: “A terminating plan does not have to be restated”

When Is Plan Terminated?

- Example:
 - Stated termination date is November 2007
 - Calendar year plan year
 - Assets are distributed in April 2008
 - Is interim amendment required to reflect 2008 provisions?
 - Probably not
 - File for determination letter to be safe
 - Note the PBGC applies laws in effect as of termination date, not distribution date

2008 DC Plan Termination – What May be Needed

- EGTRRA good-faith amendment
- IRA contribution provisions
- Deemed 125 compensation
- EGTRRA technical corrections
- RMD (IRC §401(a)(9))
- Automatic IRA rollover
- 401(k)/401(m) regulations
- Hurricane related amendments
- Roth
- PEO modifications
- Final 415 Regulations

2008 DC Plan Termination

- 402(g) gap period income
- PPA provisions:
 - vesting
 - In-service distributions at age 62
 - Beneficiary hardship distributions
 - Non-spousal beneficiary rollovers
 - 90 to 180 days for 402(f), consent to a distribution, QJSA Notice
 - Divestment of employer securities
 - Qualified reservist distribution
 - Qualified Optional Survivor Annuity
- HEART Act

2008 DB Plan Termination – What May Be Needed (DB)

- In addition to applicable items from preceding:
 - Retroactive Annuity Starting Date
 - Final 401(a)(9) regulations (RMDs)
 - Pension Funding Equity Act (PFEA)
 - Mortality Table (Rev. Rul. 2001-62)
 - Suspension of benefits (Heinz decision)
 - Pension Protection Act of 2006 (415 limits and 436 benefit restrictions)

QUESTIONS

