PLAN RESTATEMENT ISSUES AND DESIGN POSSIBILITIES

Richard A Hochman, JD, APM, GFS McKay Hochman Co. Inc.

Robert M. Richter, J.D., LL.M., APM SunGard Relius

What We’ll Cover

• Timeframes
• PPA restatement steps
• Review of PPA plans
• Modification of pre-approved plans
• Mapping over plan provisions
• Plan design considerations
Timeline for DC PPA Restatements

• Restatement period is May 1, 2014 – April 30, 2016 (Announcement 2014-16)
  – Pre-approved DC plans must be restated during this period
• If desired, must also file for a determination letter (DL) during this period
  – DL is always optional
  – IRS will not accept 5307 of identical adopters
  – IRS will not accept 5307 off-cycle (i.e., outside of the 2 year period)
• IRS will not accept 5307 for prototype plans

IRS Approval Letters

• Letters have been issued for all plans that were timely submitted
  – That is, plans that were submitted by April 2, 2012
• If entity sponsored an EGTRRA pre-approved plan but submitting PPA pre-approved plan after April 2, 2012 then letters will not be issued until on or after October 1, 2014
  – Restatement deadline of April 30, 2016 will still apply
Do Terminating Plans Need to be Restated?

• If terminating before April 30, 2016 deadline, technical answer is no (see of RP 2014-6 § 12.06)
• Practical answer: recommended that plan be restated if not filing for a determination letter (i.e., using Form 5310)
  – If no submission then employer is using “good-faith” interim amendments with no reliance

When is a Plan Terminated?

• IRS will generally recognize stated plan termination date as long as assets distributed within reasonable period of time
  – 12 months deemed to be reasonable
• As the 4/30/16 deadline approaches, may be concern if something goes wrong and assets not distributed timely
  – E.g., stated termination date is December 31, 2015 and plan not restated by 4/30/16; In 2017 assets still not distributed - has plan missed restatement deadline?
  – Is there really a restatement requirement?
Restatement Steps

- Define Your Steps
  - Planning
  - Preliminary
  - Processing
  - Final
Restatement Steps

• Planning Stage
  – Fees
  – Communications
  – How to deliver the message and restatement package
  – Resources
  – Timeline – target end of 2015 to give time to address those who fall through the cracks

• Preliminary Stage
  – Review and understand impacts of PPA document
  – Preliminary correspondence
  – Make sure documents are up-to-date with...
    • Required IRS Amendments
    • Discretionary Amendments
    • Demographic information
    • Validate checklist for accuracy
Restatement Steps

• Processing Stage
  – Convert to PPA
  – Analyze/Validate Converted Plans
  – Apply defaults
  – Deliver/Review drafts
  – Update document (if necessary)
    • Validate again

• Final Stage
  – Create and deliver final restatement package
  – Sign by deadline (April 30, 2016)
  – Receive/Store signed documents
  – Submit for Determination Letter (if applicable)
  – Reconciliation
Review of PPA Document

What Will Now Be Allowed in Prototype Plans

- MEPs (IRS will allow but DOL issues still exist on “open” MEPs)
- Cross-testing without limitations on the number of NHCE allocation rates
  - Each person can be in a group (even if entity has self-employed individuals)
What can be in a VS but not an M&P

• Governmental plans (but no DROP – Deferred Retirement Option)
• Facts-and-circumstances hardship for deferrals
• Election not to participate
  – Must be irrevocable and made prior to being eligible

Noteworthy Items in Review Process
Noteworthy Items

• Forfeitures cannot reduce QNECs or SH contributions
  – Effective for plan years after the year of the restatement
• Plans must conform to DOL FAB 2008-01 (duty to collect delinquent contributions)
  – Will be an issue for directed trustees
• IRS initially wanted plans to include language to prevent a ROBS (Rollover Business Start-up) arrangement
  – IRS backed down on this
  – Operation of plan will still be scrutinized on audit
Noteworthy Items

- MEPs – IRS will not allow provision allowing distribution upon withdrawal of participating employer if no mirror plan is created
  - Without this, must create a mirror plan, spin-off to that plan and then terminate
- IRS will not allow plan to have an NRA of Social Security Retirement Age solely for purposes of testing age for nondiscrimination tests
  - Effective for plan years after the year of the restatement

On a Positive Note

- Each person in a group for X-testing survived
- There is considerable flexibility on MEP participation agreements (i.e., participation agreement can include any options that are part of the AA)
- IRS permits “other” and “describe” lines as long as adequate parameters
Modifications of Pre-approved Plans

Concerns with Modifications

• Impact on 6-year cycle
• Impact on Reliance
• Different rules for each
Impact of Modifications – 6-year Cycle

- General rule – still an adopter of a pre-approved plan regardless of modification
- Anti-abuse provisions – IRS has discretion to determine that 6-year cycle does not apply
- If modification is to add impermissible provision in pre-approved plan (e.g., ESOP), then lose ability to use 6-year cycle in following cycle if amend after 1 year
  - If amend within 1 year of adopting pre-approved plan, then not entitled to use 6-year cycle at all

Example

- ABC Company adopted a new DC prototype plan on 12/1/13
- Employer wants to convert to an ESOP for 2014
- If amendment adopted before 12/1/2014 (less than 12 months after adoption of prototype) then 6-year cycle does not apply
- If amendment adopted after 12/1/2014 then restatement not needed until end of next 6-year cycle (i.e., April 30, 2016)
Impact of Modifications - Reliance

- Loss of Reliance (subject to exceptions - on next slide)
  - Still able to adopt amendments on behalf of adopting employers (unless impermissible or abusive modifications)
- Prototype becomes individually designed
- Volume submitter (VS) may still be VS if changes are not extensive
  - In most cases, if DL desired, submit Form 5307

Permissible Amendments

- Reliance not lost if modification is for:
  - Trust or custodial provisions (other than replacement of entire trust)
  - Special effective dates if restatement could accomplish same result
  - Sponsor level adoption of interim amendments
  - Amendments to change named fiduciaries, claims procedure, FAB 2008-01, COLAs
- Completion of blank, “describe” or “other” NOT a modification if parameters are met
- IRS used to permit corrections of typos – no longer allowed (nut thet weed half eny)
Determination Letters

• Identical adopters of pre-approved plans cannot submit plans for Determination Letters (DLs)
  – Bankruptcy concerns among some practitioners
• If modification to pre-approved plans affects reliance, a DL is not required –
  – Highly recommended
  – Not entitled to use EPCRS self-correction
• IRS will not rule on coverage and nondiscrimination (Announcement 2011-82)

Determination Letters

• Prototype plans must use Form 5300 (cannot use 5307)
• PPA documents based on 2010 Cumulative List
• Do interim and discretionary amendments need to be integrated into plan or will IRS accept tack-on amendments?
Determination Letters

• Employers using VS Plans can make “minor” modifications and submit using Form 5307 with lower user fee
• If DL submission made, VS practitioner must be on the Power of Attorney (Form 2848)
  – No worse off than prototype - can always use Form 5300 and no POA needed
• How do you know if change is “minor”? 

IRS User Fees

• User Fees for 2014 (Rev. Proc. 2014-8)

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Fees for multiple employer plans on Form 5300 vary based on number of submissions: $3,000 - $15,000
Exemption from User Fees

• Advice: See the instructions to Form 8717 (user fees) for explanation of the rules

• General Rule:
  – Exempt if DC plan was established on or after 1/1/2004

• Must be an “eligible ER”
  – An “eligible ER” is defined in IRC §408(p)(2)(C)(ii)(I) is an employer which had no more than 100 employees who received at least $5,000 of compensation from the ER in prior year
  – Must also have at least 1 NHCE participating

Mapping Over Plan Provisions
Issues to Consider

• Handling defaults where PPA document offers new elections
• Restatement Date - retroactive vs. current
• Historical special effective dates
  – Waiver of eligibility conditions
  – Old RMD rules (later of 70 ½ vs. retirement and impact on existing participants)
  – Old pre-GUST or pre-EGTRRA vesting schedules

Retroactive Effective Date

• Plan is restated with a 1/1/2007 effective
  – That’s when most PPA provisions are effective
• How do you handle discretionary amendments made between 2007 and 2014?
Current Effective Date

- Plan is restated in 2014 with a 1/1/2014 effective date
- Statutory changes in the law are covered in plan
- Does plan need to reflect discretionary amendments made since last restatement?

Current Effective Date – Delayed Signature

- Plan is prepared in 2014 with a 1/1/2014 restatement effective date
- Employer does not sign document until early 2015
- Any problems?
  - Yes if 2014 discretionary changes were included in the restatement
ADP Safe Harbor Plans

• IRS general rule is no mid-year amendments may be made to ADP test SH plan
• Does restating the plan in 2014 with a 1/1/2014 effective date violate this rule?

ADP Safe Harbor Plans

• If only restating for PPA and making no changes then no problem
• Safe to use prospective effective date (e.g., if restating in 2014 use 1/1/15 effective date)
• If amending plan provisions, may need to use a prospective date
  – Is a change to deal with FAB 2008-01 a problem?
Old Baggage - Example 1

- Plan requires 1 YOS/age 21
- Plan waived eligibility conditions for individuals employed on 7/1/2013
- Plan requires 1 YOS/age 21
- Plan is restated in 2014 with a 1/1/14 effective date and waiver is not included
- Rich entered on 7/1/13 but he is under 21
  - Is Rich still in the plan?

Old Baggage - Example 2

- CY plan had a short PY beginning 7/1/12 ending 12/31/12
- Plan is restated in 2014 with a 1/1/14 effective date
- Short PY is not reflected in restated plan
- Is this a problem?
Scrivener Errors

- What happens when a mistake is made in the restatement process?
  - IRS does not like “scrivener error” corrections
  - Plan document failures can generally only be fixed through VCP
  - Make sure you have proof
    - If error favors participants it will be tougher to correct
    - Verizon case is a notable (and rare) exception

Interim Amendments

- All amendments other than one is included in the PPA documents
- Roth Conversion will continue to be tacked-on amendment
  - Deadline to adopt for those employers using the provisions is 12/31/14 (Notice 2013-74)
- What about the Windsor decision?
- What about the new ADP SH exiting rules?
- What about the Heimeshoff v. Hartford US Sup. Ct. decision on limitations on claims?
Plan Design Considerations

Forfeitures and ADP SH Plans

• Plan is exempt from top-heavy rules if it consists solely of:
  – Elective Deferrals
  – ADP SH Contributions
  – ACP SH Contributions

• Concern is that allocation of forfeitures will destroy exemption
Forfeitures and ADP SH Plans

- Use forfeitures to pay plan expenses
- Add a discretionary match that satisfies the ACP test SH
  - Cannot take into account deferrals that exceed 6% of compensation
  - Cannot exceed 4% of compensation
  - No allocation conditions
- Will need to include this in SH notices

Forfeitures and ADP SH Plans

- If EGTRRA plans allows use of forfeitures to reduce SH contributions, consider delaying restatement
- Can rely on EGTRRA plan until it is restated
Forfeitures and Integrated Allocations

• Forfeiture amounts can be used in different ways including, among other things, both increasing the participants’ allocations and reducing the employer’s contribution amount.

• While either approach might work in most circumstances where there is a discretionary allocation, beware of plan designs with set contribution formulas.

Forfeitures and Integrated Allocations

• One example of a potential problem is with a base integration formula where the participants will receive a fixed contribution up to the plan’s taxable wage base and another fixed amount above the wage base.

• In this case, the plan should provide for reducing the employer contribution.
Safe Harbor NECs
 Fixed or Flexible

• Safe Harbor Non Elective Contributions (NECs) can be made either on a guaranteed or flexible basis.
• To avoid dealing with the extra notice requirement many plans locked into the fixed NEC formula. When the economic crisis hit in 2008, they regretted that decision.

Safe Harbor NECs
Fixed or Flexible

• With the recently announced guidance about being able to stop contributions mid-year with the proper safe harbor notice, employers may find it more advantageous to go with the flexible contribution approach and the “may not” notice.
Put Each Person in a Group

• For PS allocations, use the election to have each person in a group
• Doesn’t force you to use cross-testing
• Gives you maximum flexibility

Matching Problems

• If you have a case with a last day requirement to receive an employer matching contribution, you do not want to compute it on a payroll, monthly or quarterly basis
• EPCRS self-correction requires procedures to prevent error from recurring
Clean up Old Provisions

• If the employer has not made profit-sharing contributions and has no intention of making them, eliminate the discretionary profit-sharing provision from the plan
  – Also remove from SPD

Handling the Duty to Collect

• Do you need to determine who has the duty?
• Maybe not for qualification
  – Yes for SPD
Mandatory Distributions

• Now may be time to clean out small accounts
• Permissible to increase mandatory distribution from $1K to $5K
  – 1.411(d)-4 Q&A2 (b)(2)(v)

Treatment of Irregular Pay

• Irregular pay, such as bonuses, create problems
  – Exclude from comp if not eligible to defer
  – Only needs to be reasonable and is not subject to 414(s)
• If eligible to defer, then ensure operation conforms to procedures
  – Significant issue on CPA audits
Definition of Compensation

• There are many different permissible definitions of “compensation”. Multiple definitions may be used for different plan applications.

• If using a pure W-2 definition for purposes of elective deferrals, have a potential issue with the deferral election percentages not lining up with actual deferral amounts.

Definition of Compensation

• W-2 Compensation includes many non-cash fringe benefits that can not be deferred against.

• Want to make sure that using permissible safe-harbor exclusion so that those fringe benefit amounts are not included in the definition of compensation for deferral and matching purposes.
Non-Safe Harbor Exclusions from Compensation

• Try to avoid
• If 414(s) fails, might be subject to general testing
• Not clear how to handle if ADP SH contribution based on discriminatory definition of compensation

Automatic Contribution Arrangements

• Considerable activity in this area – most are not EACAs or QACAs
• Work with payroll to ensure rules can be met
• Consider changing plan procedures on hardship suspensions (or it could be similar to automatic contributions)
QUESTIONS!