PPA Plan Restatements – It’s That Time Again

Presented by:
Charles Lockwood, J.D., LL.M.
www.asc-net.com
clockwood@asc-net.com

Recent IRS Guidance

• Announcement 2014-16
  □ Announces opening of two-year restatement period for pre-approved DC plans beginning 5/1/14

• Announcement 2014-4
  □ Extends period for submitting pre-approved DB plans to IRS, including cash balance plans, until 2/2/15
    • Extended to 5/30/15 under Announcement 2014-41

  □ Establishes pre-approval program for 403(b) plans and extends submission period until 4/30/15
  □ IRS supposed to issue LRMs “soon”
Types of Plans

• Pre-approved program still provides for both prototype and volume submitter documents

• Prototype plans = opinion letter
  □ Must use Basic Plan Document / Adoption Agreement
  □ Standardized documents = must be designed to guarantee plan will satisfy coverage/discrimination
  □ Nonstandardized documents
    • Allowed to have “Describe” lines as long as plan contains parameters

• Volume submitter plans = advisory letter
  □ May be designed as “paragraph” style document or Adoption Agreement format

Differences in Plans

• Prototype plans do not permit ERs to modify approved document
  □ Prototype sponsor can obtain approval as a “minor modifier” of a mass submitter’s document
    • Lower user fee than submitting separate submission
    • If ER modifies document = IDP with Form 5300

• Volume submitter provides ER with some flexibility to modify specimen plan
  □ ER may retain VS status and file on Form 5307 if changes are “insignificant”

• Using Describe lines is not a modification of document if follow parameters
**Certain Provisions Not Allowed**

- Governmental plan provisions under prototype plans
  - Allowed in VS plans = must be in separate plan document

- Non-electing church plans

- Fail safe provisions affecting discrimination or average benefits testing

- Non-safe harbor hardship provisions for deferrals
  - Only prohibited in prototype plans = allowed in VS plans

- Waiver of participation
  - Only prohibited in prototypes = allowed in VS plans

- Multiemployer plans
  - Prototype and VS plans may offer multiple ER plans

- Forfeitures may not be used to reduce QNECs or SH contributions
  - May wish to delay restatement to use forfeitures

- ESOP plans = currently not permitted
  - May be permitted as part of next DC cycle (2020?)
Determination Letter Program

- IRS will no longer issue determination letters for identical adopters of pre-approved plans
  - If modify document outside of Describe lines = may submit on Form 5300

- IRS will only issue determination letters for Volume Submitter plans that have been “modified”
  - Use of approved Describe lines should not be treated as “modification” to plan if meet parameters
  - May need to “modify” document outside of Describe lines if wish to submit for DL using Form 5307

PPA Restatement Process

- Restatement period opened May 1, 2014

- All EGTRRA pre-approved documents will need to be restated by April 30, 2016

- If using separate trust = must submit trust document to IRS if want reliance on trust language

- Must provide any interim amendments to ERs
  - Only current snap-on amendment in pre-approved documents is for in-plan Roth conversions
  - If plan has language inconsistent with Windsor decision = may need interim amendment
PPA Restatement Process

- Will need to map provisions from EGTRRA documents to PPA documents
  - Be careful of Code 411(d)(6) cut-backs
    - If ER wishes to eliminate protected benefit option = will have to protect protected option for accrued benefits
    - Example. ER wishes to change distribution provisions to delay distribution until Plan Year following termination
  - IRS very restrictive on allowing changes to correct "scrivener error"
    - If inadvertently "check" or "un-check" box under Adoption Agreement = IRS will ask for how provisions were communicated to EEs (e.g., SPD)

Restatement Effective Date

- Plan may be restated retroactively (e.g., back to as early as 1/1/2007) or prospectively
  - Need to review plan document to ensure allows for prospective restatement
  - Plan should contain applicable effective dates for PPA provisions
  - If amend retroactively, may need to address amendments that occurred since effective date of restatement
  - Special rules may apply to safe harbor 401(k) plans
Amendment of Safe Harbor Plans

• ABC Corp maintains a safe harbor 401(k) plan for its EEs. On July 1, 2014, ABC contacts you to find out about making certain changes to the SH plan. What do you advise?
  
  (a) Eliminate safe harbor contribution effective 7/1/14
  
  (b) Add discretionary ER contribution
  
  (c) Amend plan to add Roth or loan provision
  
  (d) Amend plan mid-year to cover EEs of XYZ, who were purchased as part of an asset sale on July 1
  
  (e) Suppose instead of amending the plan, the ER is simply restating the document for PPA

Amendment of Safe Harbor Plans

• Permitted mid-year amendments
  
  □ Addition of Roth provision
  
  □ Addition of Roth conversion provisions
  
  □ Inclusion of hardship provisions with respect to designated beneficiaries
  
  □ Elimination of safe harbor contribution
    • No need to show business hardship if provide “maybe not” notice
Amendment to Safe Harbor Plan

- IRS expanded permitted amendments in 2012 ASPPA Q&As to allow following amendments:
  - Change of plan year
  - Change of trustee / investment provider
  - Retroactive corrective amendment to address a coverage failure
  - Expand coverage to include EEs previously not covered under plan (provided existing participants are not affected)
    - Since the amendment applies solely to EEs who are not otherwise covered by the plan = no SH notice was required with respect to such EEs

Amendment of Safe Harbor Plans

- ABC Corp maintains a safe harbor 401(k) plan for its EEs. On July 1, 2014, ABC contacts you to find out about making certain changes to the SH plan. What do you advise?
  - (a) Eliminate safe harbor contribution effective 7/1/14
  - (b) Add discretionary ER contribution
  - (c) Amend plan to add Roth or loan provision
  - (d) Amend plan mid-year to cover EEs of XYZ, who were purchased as part of an asset sale on July 1
  - (e) Suppose instead of amending the plan, the ER is simply restating the document for PPA
Terminating Plans

• Do terminating plans need to be restated if terminated during restatement period?
  □ No technical requirement to restate the plan document
  □ EGTRRA documents have interim amendments that have not been reviewed by IRS
    • Restating plan will provide reliance on interim amendments since those have been incorporated into PPA plan
  □ IRS has indicated no restatement need be made if filing Form 5310 for determination letter since IRS will require all prior amendments

FAB 2008-01

• Plan trustees are responsible for monitoring and collecting delinquent plan contributions and may not contract around that duty

• IRS required pre-approved plans to remove any language limiting trustees’ responsibility to collect delinquent contributions
  □ It is responsibility of named fiduciary with authority to hire and monitor trustees to assure that responsibilities with respect to collecting delinquent contributions have been properly assigned to a trustee or investment manager
FAB 2008-01

• Discretionary trustee, directed trustee (if so directed) or investment manager should be delegated authority to collect contributions
  □ If no trustee or investment manager has obligation to collect contributions = fiduciary with authority to hire trustees may be liable for plan losses because fiduciary failed to specifically allocate responsibility

• Trustee (including directed trustee) must take appropriate steps to remedy delinquent contributions where trustee knows no other party has assumed that responsibility

FAB 2008-01

• Appropriate steps might include:
  □ advising the named fiduciary or DOL of the breach
  □ reporting the breach to other plan fiduciaries
  □ taking actions to collect the contribution, including seeking a court order mandating a proper allocation of fiduciary responsibility for contributions

• Steps necessary to collect delinquent contributions = based on facts of each case
  □ Extent to which trustee must pursue other actions is based on value of assets involved, the likelihood of successful recovery, and expenses involved
FAB 2008-01

• When do trustees become subject to collection requirement?
  □ When contributions become plan assets
    ▪ Deferrals/loan payments = as soon as can reasonably be segregated from general assets (7 day safe harbor for small ERs)
    ▪ SH contribution must be made within 12 months following end of plan year
    ▪ ER contributions must be made by end of 415 period
      ○ 30 days after due date for filing tax return plus extensions

Defects Found During EP Audits

• Failure to have proper internal controls
• Failure to follow terms of plan
• Failure to use correct compensation
• Failure to properly include/exclude EEs
• Improper calculation of match
• Vesting issues
• Loan/distribution issues, including hardships
• ADP/ACP test failures
• Partial terminations
Eligibility Provisions

- ER may wish to review eligibility provisions (especially if using faster eligibility than 1 YOS)
  - May ER amend eligibility provisions retroactively?
  - If eligibility provisions are amended, may such provisions apply to existing EEs?
    - Example. Plan currently has 6 months/1 HOS eligibility provision. Wayne worked for GBA for 3 years and participated in plan but never completed 1,000 HOS in any year. As part of PPA restatement, Plan is amended to 1 YOS eligibility. May Wayne be removed from plan?

Compensation Definitions

- Total Compensation
  - W-2 compensation
  - Withholding wages
  - Code §415 compensation

- Plan Compensation
  - Safe harbor exclusions
    - Salary Deferrals
    - Fringe benefits
    - Compensation above $______
  - Non-safe harbor exclusions

- Testing Compensation
Common Violations

• Make sure using proper definition in plan document
  □ Plan includes bonuses in definition of compensation but ER does not allow EEs to defer on bonuses
  □ ER pays unique types of compensation (e.g., non-cash compensation) but does not exclude fringe benefits
  □ SH 401(k) plan uses definition of compensation that does not satisfy Code §414(s)

• May want to simplify definition of compensation as part of restatement

Matching Contributions

• ER may wish to review its matching contribution formula

• Definition of compensation will affect amount of matching contribution
  □ ER should determine if wants to make true-up contributions
    • If ER does not wish to make true-up contributions – should define compensation as payroll compensation
    • If compensation is defined as full-year compensation = must provide true-up contribution
Mandatory Cash-Out Provisions

• Many plans were amended to lower mandatory cash-out provision to $1,000 to avoid automatic rollover rules

• Now that automatic rollover rules have become more commonplace = may wish to increase mandatory contribution level to $5,000
  □ Not treated as impermissible cut-back
  □ Will allow ER to “clean up” small accounts

Other Provisions

• Automatic contribution arrangements

• Roth/Catch-up contributions
  □ May wish to review in-Plan Roth conversion options

• ERISA Spending Accounts

• Revocation of spouse as beneficiary upon divorce
  □ May not longer apply upon legal separation

• Expanded claims provisions
Duties of Sponsor

• Must provide each adopting ER with a copy of approved plan, subsequent amendments and IRS opinion/advisory letter

• Must make “reasonable and diligent” efforts to ensure plan is amended for required law changes and ERs are aware of amendments

• If sponsor reasonably concludes than an adopting ER’s plan is no longer qualified = must notify ER that adverse tax consequences may result from loss of qualified status and inform ER of availability of EPCRS program

Duties of Sponsor

• Must maintain record of names, addresses, and EINs of all adopting ERs
  □ Must keep information for three years for any ER that ceases to maintain plan
  □ Must provide list to IRS upon written request

• If no longer maintaining plan = must inform IRS and must notify each adopting ER that plan will become individually designed (unless ER adopts another pre-approved plan)
  □ Adopting ER may continue to use plan = but will need to make own interim amendments