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Michael Julianelle  
Director, Employee Plans  
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1750 Pennsylvania Avenue, NW  
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**Re: ASPPA Comments Relating to the Revision of Revenue Procedure 2007-44**

Dear Michael:

The American Society of Pension Professionals & Actuaries (ASPPA) appreciates this opportunity to comment on the revision of Revenue Procedure 2007-44.

ASPPA is a national organization of more than 7,000 members who provide consulting and administrative services for qualified retirement plans covering millions of American workers. ASPPA members are retirement professionals of all disciplines, including consultants, investment professionals, administrators, actuaries, accountants and attorneys. Our large and broad-based membership gives ASPPA a unique insight into current practical applications of ERISA and qualified retirement plans, with a particular focus on the issues faced by small-to-medium-sized employers. ASPPA's membership is diverse but united by a common dedication to the employer-sponsored retirement system.

### Summary of Recommendations

The restatement and approval process for pre-approved plans has been significantly improved with the introduction of the six-year remedial amendment period cycle. Clear deadlines assist both practitioners and the IRS in managing workflow. ASPPA's recommendations below are designed to further improve the program. Unless stated otherwise, the Section references in the discussion of recommendations below refer to the section number in Rev. Proc. 2007-44.

### Discussion of Recommendations

#### A. Interim Amendments for Pre-approved Plans (Section 5)

Section 5.08 of Rev. Proc. 2007-44 generally provides that a restatement of a plan does not supersede an interim amendment that had been previously adopted if the effective date of the restatement precedes the effective date of the interim amendment. This concept originated from a December 19, 2003 Technical Assistance Memo (TAM) ([http://www.irs.gov/pub/irs-tege/egtrra\\_tam.pdf](http://www.irs.gov/pub/irs-tege/egtrra_tam.pdf)). The TAM provided that a restatement for GUST that inadvertently omitted a previously-adopted EGTRRA good-faith amendment would be deemed to include the EGTRRA good-faith amendment as long as

the plan was operated in compliance with the EGTRRA amendment. Rev. Proc. 2005-66 included this rule, but only to the extent the effective date of the restatement precedes the effective date of the interim amendment. Rev. Proc. 2005-66 also expanded this rule to include all good faith amendments adopted between restatements. In Rev. Proc. 2007-44, however, the Service specifically defined “interim amendments” to exclude discretionary amendments (see Section 5.02). Therefore, only required amendments are entitled to the treatment described in Section 5.08 of Rev. Proc. 2007-44. The exclusion of discretionary amendments appears to have been an unintended modification.

Employers have numerous interim and discretionary amendments that are adopted during each cycle. As noted in the December 19, 2003 TAM, significant qualification issues can result if an employer inadvertently fails to readopt, upon a plan restatement, a previously adopted amendment. In those cases where it is clear that there was no intent to alter the previously adopted amendment, such as where the operation of the plan continues to conform to the amendment, the amendment should remain intact, regardless of whether it's a discretionary or interim amendment and regardless of what the effective date of the restatement.

**ASPPA recommends** that Section 5.08 of Rev. Proc. 2007-44 be expanded to include discretionary amendments so that these amendments, just like interim amendments, are not inadvertently superseded when a plan is restated with a retroactive effective date. In addition, the Section should be expanded (in a manner similar to the TAM) so that the rule is not contingent on whether a plan uses a retroactive restatement effective date or a current restatement effective date.

## B. Plan Termination (Section 8)

Plan terminations frequently occur, particularly under the current economic conditions. Many of these plan terminations coincide with cessation of the business of the adopting employer. One of the challenges for practitioners (and presumably the IRS) in ensuring that plans are amended to reflect the law in effect at the time of termination is knowing which provisions of the law must be included in a plan at termination. There is no list of legislative, regulatory or other changes that must be reflected in a plan at termination. The Cumulative List is helpful, but it only includes provisions that the IRS will review for ongoing plans. Having a comprehensive list of provisions that a terminating plan must include is essential for both practitioners and the Service (i.e., for those at the Service who process determination letter requests on terminating plans). This list could then be easily pared down by the Service to create the Cumulative List.

**ASPPA recommends** that the IRS provide a list of required plan termination amendments. This list would be published (or posted on the IRS website) as the requirements change.

### C. Five-Year Remedial Amendment Cycle in Cases of Merger or Acquisition, Change in Plan Sponsorship, Plan Spin-off, or Other Events (Section 11)

The special rules set forth in Section 11 of Rev. Proc. 2007-44 relating to changes to a plan's 5-year cycle need clarification. The rules are complex and practitioners would benefit if examples were provided for each of the cycle-changing events addressed in the section. In addition, the definitions of the terms "expired cycle" and "open cycle" need clarification. An "open" cycle is the 5-year cycle in which a cycle-changing event occurs, provided the submission period for the cycle has not expired. An "expired" cycle is one where the submission period has expired at the time of the cycle-changing event. There is confusion, however, because a plan can have, at the same time, both an "open" cycle and an "expired" cycle. For example, assume a plan's pre-change cycle was Cycle D (ending February 1, 2009) and, due to a cycle-changing event in 2010, will become a Cycle A plan (the next Cycle A submission period will end January 31, 2011). At the time of the cycle-changing event, the pre-change cycle is both "open" and "expired" and the post-change Cycle is also "open" and "expired" (the first Cycle A closed on January 31, 2007 but the second Cycle A closes on January 31, 2011). This becomes an issue when one attempts to apply the rules enumerated in Section 11.03.

**Example 1.** Employer had an EIN of 5 and was under Cycle E (ending February 1, 2010). In June 2010 there is a cycle-changing event and Employer has a new EIN ending in 4 (Cycle D). Cycle D closed on February 1, 2010 and will close again on January 31, 2015. Special rule (2) applies where the post-change cycle is expired (in which case the plan remains on the pre-change cycle). Does the plan in this example remain under Cycle E? Or, does the special rule in (3) apply so that the plan can elect to remain under the pre- or post-change cycle? The rule in (3) applies where the plan's post change cycle ends later than the pre-change cycle and the pre-change cycle is open. In this example, the post-change cycle (E) would end January 31, 2015 and the pre-change cycle (D) would end January 31, 2014.

**Example 2.** On October 1, 2009, a cycle-changing event occurs that changes a plan's cycle from Cycle D to Cycle E. Since the submission period for Cycle D did not end until February 1, 2010, the plan sponsor may elect to remain on Cycle D. Presumably, the general rules would apply in determining the next cycle, which would be Cycle E ending January 31, 2011. Thus, the plan would be subject to cycles ending in consecutive years. Providing an example in the Rev. Proc. would assist practitioners in understanding the application and ramifications of this election.

**ASPPA recommends** that Rev. Proc. 2007-44 be modified to provide specific examples covering the special rules set forth in Section 11.03. In addition, clarification is needed regarding the definitions of "open" cycle and "expired" cycle. The Service may find it easier to create an override to the special rules to provide that the application of the above rules may not result in a cycle being more than five years (or six years if the rule of 11.03(1) applies).

#### D. Off-cycle Filing for Determination Letters (Section 14)

Section 14 deals with the off-cycle filing for determination letters for individually designed plans subject to the five-year cycle. There is not a corresponding section for the off-cycle filing of pre-approved plans. Adopters of pre-approved plans might also want to submit plans off-cycle for circumstances similar to those set forth in Section 14. The workload of the Service would not increase significantly by permitting these off-cycle submissions, since the determination letter process for these plans is much more streamlined.

**ASPPA recommends** that Section 14 be modified so that it also applies to the off-cycle submission of pre-approved plans.

#### E. Eligibility for Six-Year Amendment/Approval Cycle (Section 17)

ASPPA appreciates the effort to provide broad eligibility for the six-year amendment/approval cycle. However, some of the definitions need to be clarified and/or modified to expand the ability of an adopting employer to use a pre-approved plan.

1. Section 17.02, which defines a "prior" adopter, needs clarification. There are two different ways of interpreting Section 17.02(1). This can best be explained by using the EGTRRA restatement process for defined contribution plans as an example. Under one interpretation, an employer is a prior adopter if (1) the employer adopted a GUST approved defined contribution plan by February 15, 2005, or (2) adopted an interim (i.e., unapproved draft of a pre-approved plan) at any time prior to approval (i.e., before *or after* February 15, 2005). The other interpretation is that a prior adopter is an employer that has adopted, prior to February 15, 2005, either a GUST pre-approved plan or an interim plan (i.e., regardless of the plan used, it must have been adopted and made effective prior to February 15, 2005).

Section 17.02(2) provides that in order to be a prior adopter, the employer must adopt, by the applicable deadline, the newly approved pre-approved plan or another pre-approved plan. However, Sections 17.06 and 19.03 permit the employer to also adopt an individually designed plan by the applicable deadline.

**ASPPA recommends** that the IRS clarify and expand the definition of a "prior" adopter. Regardless of when the plan is adopted, an employer that adopts a plan that was pre-approved in the immediately preceding cycle or an interim pre-approved plan in the current cycle should be considered a prior adopter. Alternatively, the definition of new adopter should be expanded, as recommended below.

**ASPPA also recommends** that Section 17.02(2) be deleted. The determination of whether a plan is a prior adopter should not be conditioned on the type of plan that an

employer uses for its restatement. Once an employer has determined that the six-year cycle applies, then the only requirement would be that the employer restate its plan by the end of the applicable cycle.

2. Section 17.03 defines the term "new" adopter. The definition should be expanded to clarify that an individually designed plan includes an individually designed plan based on a pre-approved plan. In addition, the requirement that a new adopter may only adopt the newly approved version of the plan is too restrictive as it does not consider the time period between the approval of a pre-approved plan and its initial release by the mass submitter or pre-approved plan sponsor. Once an opinion letter or advisory letter is issued on a pre-approved plan, it takes time for the approved plan to be distributed to the various individuals involved in the process of setting up an employer's plan. Accordingly, providers may continue using the prior approved version of the plan for a period of time even though there is a newly approved version (adopters of the existing plan would, of course, need to adopt the newly approved version before the expiration of the applicable cycle).

**ASPPA recommends** that the last sentence of Section 17.03(3) be revised to state: "Any employer whose five-year cycle has not ended may adopt any existing pre-approved plan or an interim pre-approved plan so long as the employer adopts the newly approved version of the pre-approved plan by the end of the adoption period."

3. Section 17.04 provides that an "intended" adopter only is limited to an employer that maintains an individually designed plan (and that timely, and in good-faith, executes Form 8905). Under Rev. Proc. 2005-66, an intended adopter included any employer that timely adopted Form 8905, regardless of the type it was currently maintaining. While the expanded definitions of prior adopter and new adopter help ensure that most employers are entitled to the six-year cycle, many practitioners used Form 8905 as either a safety-net or as an easier method to determine entitlement to the six-year cycle. Furthermore, as part of the GUST determination letter program, many IRS agents found it easier to prove entitlement to the extended remedial amendment period by verifying whether a certification of intention to adopt a pre-approved plan had been executed. The expanded use of Form 8905 would not result in any abuses as the form would still need to be signed timely and in good-faith. Such an expanded use would make it easier on both practitioners and the IRS.

**ASPPA recommends** that the IRS change the definition of intended adopter back to the way it was defined in Rev. Proc. 2005-66 (i.e., that it includes any employer that timely, and in good-faith, adopts Form 8905).

## F. Extension of EGTRRA Remedial Amendment Period and Schedule of Next Six-year Remedial Amendment Cycle (Section 18)

Section 18.01 includes tables setting forth deadlines under the cycles. The wording seems to imply that these dates are absolute. However, Section 19.06, Example 19 includes language stating that these dates apply "unless otherwise provided by the Service."

*ASPPA recommends* that similar language contained in Section 19.09, Example 19 be included in Section 18.01.

## G. Effect of Employer Amendments or Adoption of Individually Designed Plan on Six-year Remedial Amendment Cycle (Section 19)

Section 19.05(3) provides that an M&P sponsor has the ability to continue adopting amendments on behalf of adopting employers even if the employer has amended the M&P plan. There is no corresponding provision for volume submitter plans. Rather, the rules in Rev. Proc. 2005-16 provide that if an employer does not have automatic reliance on the volume submitter plan, then the volume submitter practitioner only retains the right to adopt amendments on behalf of the adopting employer if the plan is submitted for a determination letter. This rule would be difficult to apply, and might increase the need of practitioners to submit off-cycle submissions. For example, assume an employer restates its volume submitter plan by April 30, 2010. After April 30, 2010, the employer needs to amend the plan to include a provision that is permissible in a volume submitter plan but not offered in the volume submitter plan it is using. The employer would no longer have reliance on the plan and would need to obtain a determination letter in order for the volume submitter practitioner to retain the right to adopt interim amendments on behalf of the employer. This is contrary to one of the goals of the staggered remedial amendment period system, which is to reduce off-cycle submissions.

*ASPPA recommends* that Rev. Proc. 2007-44 be modified to extend the application of Section 19.05(3) to volume submitter plans. This change would ensure consistency between the M&P and volume submitter programs and would also foster a reduction in off-cycle submissions.

## H. Off-Cycle Filing (Section 20)

ASPPA thanks the Service for the modification to Section 20 as contained in Rev. Proc. 2008-56. However, ASPPA strongly feels that pre-approved plans must be eligible to be submitted to the Service at any time during the applicable six-year cycle. Without this relief, the ability of service providers to engage in legitimate business transactions (such as acquisition or conversion of a book of business where another provider is exiting the industry or a market segment) where an issue of prototype sponsorship (or the need to associate another trust agreement with an existing pre-approved plan) is involved is greatly constricted.

**ASPPA recommends** that new sponsors be allowed to submit plans for opinion or advisory letters up to one month before the close of the six-year cycle.

**ASPPA also recommends** that in the circumstances described in Rev. Proc. 2008-56, adopting employers not be required to file for a determination letter in order to have reliance on a prospective basis.

**ASPPA also recommends** that non-mass submitters be permitted to submit at any time during the applicable six-year cycle. ASPPA feels that this will increase the use of pre-approved plans. The significant user fee required with such a submission will keep the usage minimal.



These comments were prepared by ASPPA's Plan Document subcommittee of the Government Affairs Committee, and were primarily authored by Elizabeth T. Hallam, CPC and Lanning R. Hochhauser, APM. Please contact Craig Hoffman, General Counsel and Director of Regulatory Affairs at (703) 516-9300 ext.128, if you have any comments or questions regarding the matters discussed herein. Thank you for your consideration of these comments.

Sincerely,

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