



PLAN RESTATEMENT ISSUES AND DESIGN POSSIBILITIES

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What We'll Cover

- Timeframes
- PPA restatement steps
- Review of PPA plans
- Modification of pre-approved plans
- Mapping over plan provisions
- Plan design considerations

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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

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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

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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

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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?

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PPA Restatement Steps

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Restatement Steps

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

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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

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Restatement Steps

- 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

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Restatement Steps

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

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Restatement Steps

- 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

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Review of PPA Document

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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)

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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

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Noteworthy Items in Review Process

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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

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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

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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

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Modifications of Pre-approved Plans



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Concerns with Modifications

- Impact on 6-year cycle
- Impact on Reliance
- Different rules for each

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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

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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)

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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

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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 that weed half eny)

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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)

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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?

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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”?

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IRS User Fees

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

Form	2014
5307	\$500
5300	\$2,500
5310	\$2,000

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

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Exemption from User Fees

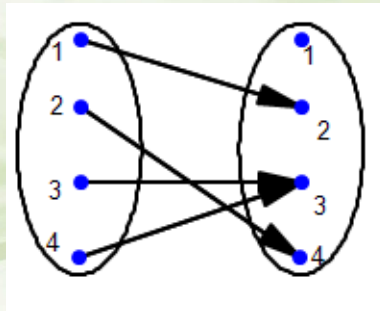
- Advice: See the instructions to Form 8717 (user fees) for explanation of the rules
- General Rule:
 - Exempt if DC plan was established on or after 1/1/2004
- Must be an “eligible ER”
 - An “eligible ER” is defined in IRC §408(p)(2)(C)(i)(I) is an employer which had no more than 100 employees who received at least \$5,000 of compensation from the ER in prior year
 - Must also have at least 1 NHCE participating

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Mapping Over Plan Provisions



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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

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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?

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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?

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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

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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?

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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?

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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?

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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?

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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

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Interim Amendments

- All amendments other than one is included in the PPA documents
- Roth Conversion will continue to be tack-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?

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Plan Design Considerations

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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

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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

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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

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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.

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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.

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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.

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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.

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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

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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

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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

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Handling the Duty to Collect

- Do you need to determine who has the duty?
- Maybe not for qualification
 - Yes for SPD

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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)

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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

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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.

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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.

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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

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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)

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QUESTIONS!



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