The New and Improved (?) IRS
Determination Letter Program

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The RAP

• A qualified plan must have a written document that conforms to the law
  – Plan must be operated in accordance with the written plan

• The Remedial Amendment Period (RAP) is a period during which a disqualifying plan provision can be retroactively corrected
  – Without the RAP, disqualifying plan provisions can generally only be corrected using VCP
The Regulatory RAP

• The regulatory RAP generally
  – Starts as of effective date of plan or amendment
  – Ends on the due date of the sponsor’s tax return, including any extensions, for the year in which the disqualifying provision is effective
  – For multiple employer plans it is the 10th month after the end of the applicable PY
  – For governmental plans it is tied to legislative sessions

Procedural Extension

• The IRS has provided procedural extensions to the end of the RAP:
  – 5-year and 6-year restatement cycles
  – Permits plan sponsors to retroactively correct plan document defects that have occurred during the applicable cycle
The RAP for IDPs

• Rev. Proc. 2016-37 eliminates the 5-year cycle for individually designed plans (IDPs) after 2016

• In place of the 5-year cycles, IDPs have 2 new procedural RAPs:
  – All plan sponsors will be deemed to have filed for an extension of their tax return
  – Interim (required) amendments are covered by a new procedural rule

Example of First New Rule

• An employer has an IDP 401(k) plan using current year ACP testing
• The plan is amended to change to the prior year testing method
• The employer had not been using the current year testing method for 5 years so the amendment violates the regulations
• This is a plan document failure and absent the RAP, could only be corrected using VCP
• The RAP allows the plan to be retroactively amended as long as the corrective amendment is adopted by the due date of the employer’s tax return, including extensions (even if the employer is not on an extension), for the year in which the change was effective
  – The plan must have operationally complied with the law
Interim Amendments for IDPs

• IRS will annually issue a “Required Amendments List”

• An item will be put on the RA list when:
  – The law changes and the IRS determines no guidance is needed
  – The law changes and the IRS has issued guidance on the subject
  – The IRS issues changed guidance (such as the final 415 regulations)

• New RAP for IDPs: Employers must adopt amendment by the end of the second calendar year after the year of inclusion on the RA List
  – No exception for IRC §411(d)(6)
The new amendment rules are effective January 1, 2017

- Amendments required prior to this date would still need to be adopted timely under the existing rules
- For example, cash balance plans using an interest crediting rate that does not conform to the final regulations would need to adopt an amendment by the last day of the 2016 PY

The RA List is also used in issuing DLs for IDPs

- Use list issued two years earlier
- Example: the 2018 list applies to DL requests made in 2020

Plans must be operated in accordance with effective law, even if the deadline to adopt amendments is later

IRS will annually issue an Operational Compliance List identifying changes in operational requirements effective during a calendar year

- Would apply to both IDP and preapproved plans
- Good checklist for terminating plans
The Cumulative List of Changes will no longer be used for IDPs. Only used for pre-approved plans and will only be issued twice every 6 years:
- Used for opinion/advisory letters
- Used for 5300/5307 submissions that are based on pre-approved plan

Transition Rules

- The elimination of the 5-year cycle shortens the RAP for some IDPs (i.e., those that would have been restated at their next 5-year cycle):
  - Adopters of IDPs will have a RAP ending December 31, 2017 (but this doesn’t mean a determination letter can be filed)
  - Adopters of IDPs may also adopt a pre-approved defined contribution plan by April 30, 2017 and be considered timely adopters under the 6-year cycle RAP
Goodbye 8905

• Rev. Proc. 2007-44 had a category for intended adopter:
  – Employer has individually designed plan
    • Employer completes Form 8905 prior to end of its 5-year cycle
    • Employer fall under the 6-year cycle
  
• End of 5 year cycle means there is no need for Form 8905
  – Just adopt newly approved plan in 2-year window

IRS Approval Letters

Muppets covering the Beatles’ “Letter B”
3 Types of IRS Approval Letters

• Opinion letter issued to M&P sponsoring organization
• Advisory letter issued to volume submitter (VS) practitioner
• Determination Letter (DL) issued to adopting employer

“One and Done”

• For IDPs, can only request a DL:
  – If plan has never received a DL
  – On plan termination (Form 5310)
  – Other circumstances identified by IRS
    • Don’t hold your breath
“One and Done”

• If a plan has ever received a DL (Form 5300 or Form 5307), cannot request one via Form 5300
  – Exceptions
    • Form 5307 or 5310
    • Cycle A restatements (deadline 1/31/2017)
    • Special circumstances IRS may identify

“One and Done”

  – For purposes of “one and done,” reliance on pre-approved plan is not the same as having received a DL
  – Example: Employer has traditional DB on an M&P plan and has reliance
    • Employer adds cash balance provisions
    • Employer could submit for a DL as an initial plan qualification
      – In many cases this won’t be necessary as most cash balance provisions will be permitted in pre-approved plans
Reliance – What Does it Mean?

• Reliance means you can rely on the terms of the plan as approved
  – IRC §8905(b) relief
• Bankruptcy protection?
• EPCRS modified by Rev. Proc. 2016-51 (covered later)
• Having to produce old documents
QAB 2012-1

• Quality Assurance Bulletin 2012-1
• “Generally, a specialist is only responsible for verifying one cycle prior to the plan’s current remedial amendment cycle. If a specialist determines additional verification of prior law is required, the specialist must receive managerial approval to expand the scope of the determination.”

When is Reliance Lost?

• New rule for IDPs:
  – If a plan is amended, reliance is only lost on provisions affected by the amendment
  – Risky to restate a plan once the plan has received a DL
Pre-approved Plans

• No reliance on IRC §415 or 416 if maintain another plan covering some of the same participants
• No reliance on IRC §411(b)(1) if cash balance formula with principal credits that increase with age, service or other measure

Modifications to Pre-approved Plan

• General rule: modification destroys reliance on opinion/advisory letter
  – File for a DL to get reliance
    • Form 5307 for VS plan if amendments aren’t extensive
    • Form 5300 for M&P plan or VS plan if amendments are extensive
      – Not available if plan previously received a DL
    • Form 5310 for terminating plan
• But, you generally stay in 6-year cycle for purposes of the RAP
Blowin’ it Big Time

• Cannot use 6-year RAP cycle if either:
  – IRS believes modifications are too extensive (has to be pretty abusive)
  – Within one year after adopting pre-approved plan, employer amends plan to add an impermissible provision
  • Example:
    – Adding cash balance feature IRS does not permit in pre-approved plan

Special Rules

• A modification to a pre-approved plan does not destroy reliance if:
  – Adding special effective dates
  – Modifying trust or custodial provisions provided it does not conflict with §401(a) (generally limited to VS and nonstandardized plans)
  – Modifying for named fiduciaries, claims procedures, DOL FAB 2008-01, COLA adjustments or name of sponsoring organization
Scope of Review

• Submission of pre-approved plans for a DL
  – Only permitted if a modification to the pre-approved plan was made
  – Only permitted during the 2-year restatement period (i.e., no off-cycle submissions)
  – Review is based on Cumulative List that was used for the pre-approved plan

QAB 2008-2

• Quality Assurance Bulletin 2008-02
• If an IRS specialist or agent believes there is an error in a pre-approved plan, it should be referred to the pre-approved plans coordinator
IMPERMISSIBLE PROVISIONS

Impermissible Provisions

- Multi-employer plans (union plans)
- Stock bonus plans
- ESOPs with MP provisions or that hold preferred stock
- Non-electing church plans
- Failsafe provisions for 401(a)(4) or average benefits test of 410(b)
Impermissible Provisions

- Plans with 401(h) accounts (post-retirement medical)
- DB/K plans
- DB plans with 414(k) accounts
- Governmental plans with DROP features

Impermissible Provisions

- Hybrid plans
  - That are not cash balance formula (e.g., pension equity plan)
  - That have interest crediting rate based on participant’s choice; rate of return on assets; or a rate that doesn’t satisfy the regulations
  - Traditional DB conversion unless it’s an A + B
  - That use 3% or fractional accrual method
Impermissible Provisions

• Hybrid plans
  – That are fully insured (IRC §412(e)(3))
  – That are offset plans unless certain conditions are met (such as minimum accrued benefit of 0.5% of comp for each year of credited service)

EPCRS UPDATE: Rev. Proc. 2016-51
EPCRS

- EPCRS was updated to reflect changes to the DL program (as well as other changes)
- To self-correct significant errors, a plan must have a “Favorable Letter”

Favorable Letter

- Favorable Letter means:
  - For IDPs, a letter (does not need to be current)
  - For pre-approved plans, a current letter
  - For 403(b) plans, plan that was timely adopted and conforms, in good-faith, to final 403(b) regulations
SCP

• Not new: The only amendments that can be adopted as part of self-correction under EPCRS are:
  – Adding hardship distributions or loans
  – Increasing contributions to correct an IRC §401(a)(17) failure
  – Correcting the improper inclusion of an employee
  – Correcting an operational failure under Appendix B that requires a conforming plan amendment (e.g., adding QNECs to plan to correct failed ADP test)

VCP or Audit CAP

• DL request can no longer be made if correction under VCP or audit CAP involves a plan amendment
• The compliance letter issued on such a VCP or audit CAP submission is not a determination as to the form of the plan
Effect of Corrective Amendment

• If correcting by amendment as part of VCP or audit CAP, reliance is not lost if:
  – Provision is offered in the pre-approved plan, or
  – Provision is:
    • Not offered in pre-approved plan but could have been offered (i.e., it is not an impermissible provision), and
    • No other modification has been made to the plan
Future of the DL Program

• Form 5307 submissions will (hopefully) still be available
• There will likely be some limited exceptions for IDP submissions
• What about rulings? Draft Form 5300 does not have option to request a ruling on ASG or leased employee status or partial termination