PPA DC Restatements
- What to Expect
Monday, April 29, 2013

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Agenda

- Pre-approval/Restatement Basics
- What’s new for PPA cycle
  - Trusts
  - Multiple Employer Plans
  - New determination letter procedures
  - Individually designed plans
- Signatures
  - ERISA Plan Amendment Procedures
  - When are they needed?
- Recent IRS Public Statements
Types of "Letters" From IRS

- Opinion Letter: Pre-approval letter for a prototype plan
- Advisory Letter: Pre-approval letter for a volume submitter plan
- Determination Letter: An IRS approval letter for a plan after it has been drafted for a particular employer (filed on a Form 5307 or 5300)

Why Pre-approve a Document?

- Form of the document is deemed to be tax-qualified (operation is not...)
  - Except in extreme situations, amend to cure defect is made prospectively only
- Most retirement plans that file a 5500 use a pre-approved plan document (at least 80%)
- Assumption is that all eligible plans should/could be pre-approved
Plan Document Pre-approval

- Plans eligible for pre-approval:
  - 401(k)/profit-sharing plans
  - Money purchase plans
  - Target benefit plans
  - Traditional defined benefit plans

- Plans not eligible:
  - 403(b) plans - will "soon" (6/2013) have a pre-approval process; no determination letter process yet
  - Cash balance plans, ESOPs – determination letter available
  - Multiemployer plans – determination letter available
  - Nonqualified plans, welfare plans, all others – no pre/post approval process. Private Letter Ruling may be available.

Plan Document Pre-approval
Brief History

- DC plans only (DB are 2 years behind):
  - EGTRRA – 2008-2010 – First 6 year cycle
    - Centralized review of vol subs and prototypes
  - PPA – next cycle

- General trends:
  - Prototypes and volume submitters becoming more similar
  - Moving toward a paid preparer/credentialing requirements
    - 5500 forms for 2012 will have optional section for paid preparer
    - Signature of paid preparer not “currently” required
Pre-approved plan = 6-Year Cycle

- 2-year restatement period
- All DC (401(a)) plans on same cycle
  - EGTRRA deadline April 30, 2010
  - PPA anticipated early 2014 – 2016
    - First draft of PPA document for pre-approved sponsors was due April 2, 2012 – IRS review started in fall of 2012
    - Content of docs is determined by 2010 LRM
  - All DB plans on same cycle
    - Last deadline was April 30, 2012
    - Pre-approved sponsor deadline around end of 2013
    - Two year restatement window 2016-2018

When to File for Determination Letter

- During applicable restatement window (Vol Sub Only)
- Exceptions – IDP
  - Terminating plan
  - New plan whose next regular cycle ends at least two-years after the end of the off-cycle submission period during which the plan sponsor submits its application
  - An off-cycle application submitted in accordance with another IRS program such as EPCRS
  - Sponsor may request due to “urgent business need.” Likely available in limited cases where exceptional circumstances exist
- Exceptions – Pre-approved - None
Pre-Approved vs. Individually Designed

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<th>Pre-approved</th>
<th>Individually Designed</th>
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<td>Cycle length</td>
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<td>5-year cycle</td>
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<td>Plan Types</td>
<td>prototypes or volume submitters</td>
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What Can Cause Loss of Pre-Approved Status?

- Custom language
  - Discretionary amendments
  - Incorrect use of fill-in-the-blank
  - Format of the document is irrelevant
- If a request for an opinion letter is withdrawn, unless the employer adopts another pre-approved plan
- An employer that chooses to discontinue participation in a plan as amended by its sponsor without substituting another approved M&P plan
- Abandonment (exiting the business) by pre-approval sponsor (rare)
What Can’t Cause Loss Pre-Approved Status?

• Failure to pay document vendor
• Interim/required amendment language (language is not pre-approved)
• Amendments to administrative provisions of the trust or custodial account document (such as provisions relating to investments and the duties of trustees)
• Amendment to adopt procedures to comply with the Department of Labor’s (DOL) participant loan regulations under section 408(b)(1) of ERISA

Effect of Loss of Pre-Approved Status

• The employer must submit a determination letter application during the approximate two-year period within the six-year remedial amendment cycle.
  • What if on prototype document?

• The plan will switch to the five-year cycle after the end of its current six-year cycle. However, if the end of the first five-year cycle is less than twelve calendar months after the end of the six-year cycle, then the plan’s five-year cycle is extended for twelve calendar months.
What's New for the PPA Cycle
Rev Proc 2011-49/LRM

• 2010 LRM's reflect language that prohibits forfeitures from being reallocated as safe harbor contribution
  • In EGTRRA LRM's but not enforced
• Differences between vol subs and prototypes narrowing
• Interim amendment certification requirement
• Answers only adoption agreements
• Not much else...

Differences Btw Prototypes & Vol Subs

• Multiple employer plans can use prototype docs in upcoming PPA cycle (*NEW*)
  • Currently only allowed in vol subs (EGTRRA)
  • Currently if single employer on a prototype becomes multiple (ownership changes) the doc becomes individually designed – MEP slides below
• Differences still exist (next two slides)
Differences Btw Prototypes & Vol Subs

• Document Modifications
  • Minor change to prototype document for a particular employer = Individually designed plan (Form 5300 determ letter, higher fee)
  • Volume Submitters with minor modifications to pre-approved language can file 5307 for a particular employer

• Cross Testing
  • Differences have been eliminated
  • EGTRRA:
    • Non-standardized prototype plans restrict the number of cross-tested allocation rate groups for non-highly compensated employees that may be used (LRM 94)
    • Each participant in own group - possible to the full extent as was allowed in vol sub doc

Differences Btw Prototypes & Vol Subs Cont.

• Non-safe harbor hardship only allowed in Vol Sub

• Participation waiver only allowed in Vol Sub
Prototypes vs. Vol Subs

• Use a volume submitter document
  • If minor changes are made to the volume submitter document it may be submitted on a Form 5307 (if minor changes are made to a prototype document it must be submitted on a Form 5300 with a higher user fee).
  • Participant may opt out of vol sub (should never be used)
  • May use non-safe harbor hardship requirements

Interim Amend Certification

• Expanded requirement for PPA (Rev Proc 2011-49)

• Required for applications for letter in own name (word for word adopters)

• This certification is now also required of all “middlemen.”
  • A “middleman” is a TPA/consultant who “borrows” letters from document vendor.
CERTIFICATION REGARDING INTERIM AMENDMENTS

Under penalties of perjury, I hereby certify to the best of my knowledge and belief that all necessary interim amendments required by the Internal Revenue Service to retain the qualified status of my master and prototype plans and/or volume submitter specimen plans have been made a part of such pre-approved plans timely and communicated timely to all my adopting employers.

Signed _________________________________
(person authorized to sign for M&P Sponsor and/or VS Practitioner)

Dated _________________________________

“Answers Only” Adoption Agreements

• For a plan that uses an adoption agreement format, the adoption agreement reflects only the final choices made by the adopting employer. This document will consist of:
  • Basic Plan Document (BPD).
  • Appendix A to the BPD which lists all of the various choices an adopting employer has regarding plan provisions and the applicable text for each choice.
  • Adoption agreement which is capable of identifying only the choices the employer has made, and includes a dated employer signature line as well as any other items required by Rev. Proc. 2011-49 to be included in the adoption agreement, such as the reliance statement and the M&P sponsor or VS practitioner contact information.
Answers Only Adoption Agreements – Cont.

- A required statement must appear at the end of the adoption agreement directly above the signature block:
  - “By signing this adoption agreement, the adopting employer acknowledges having reviewed the Appendix A and certifies that all choices reflected in this adoption agreement have been taken from such appendix.”
- Only adoption agreement required for a determination letter request.

Interim Amendments

- Most retirement plans require an interim amendment nearly every year for changes in law.
  - Pre-approved plans must tack-on "good faith" language when restating
  - Individually drafted plans can incorporate/restate
- The following factors are generally irrelevant in determining whether interim amendment is required:
  - Pre-approval status
  - 5 or 6 year cycle
- What does matter? Has the plan timely adopted/been updated for the interim requirement?
Trust Language

• Most common to use vendor trust language **but**
• Trust company may require its own language
  • Trust language pre-approved to work with vendor doc
    • Approval not automatic
    • Is trust company using standard language?
  • If not pre-approved
    • Vol sub: minor modification/5307 recommended
    • Prototype: individually designed
• Which trust/which version?

Multiple Employer Plans

• DOL Advisory Opinion 2012-04A 'clarified' the commonality requirement
  • What level of common ownership is enough commonality?
• What about the Non-MEP MEP?
  • Joinder agreement specifies that the employer is “adopting the master plan as a separate plan” rather than “adopting the master plan as an additional sponsor”
  • Result:
    • No one bad apple rule
    • Still get leverage with assets
    • Still get scale with uniform administration
    • Separate 5500s/Audits (103-12 investment entity may apply)
New Determination Letter Procedures

• Effective May 1, 2012 (Rev. Proc. 2012-6):
  • No 5307 applications for prototype plans
  • 5307 only accepted for vol subs with minor modifications

• Can no longer file for coverage and nondiscrimination demonstrations
  • Generally filed on Schedule Q
  • Effective Feb/May 2012 (indiv designed/pre-approved)

Form 8717 Developments

• Use Pay.gov website to file Form 8717 and submit payment
• File 5300 with Pay.gov payment confirmation sheet
• IRS “hopes” that through the use of Pay.gov, EP Determinations will be moving one step forward towards electronic submissions
  • However, current IRS system cannot accept data from Pay.gov
Individually Designed = 5 Year Cycle

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<td>E</td>
<td>2/1/15 - 1/31/16</td>
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Moving from 5 to 6-Year Cycle

- Majority of qualified plans can use pre-approved document
- Even if special provisions, most are minor modifications (volume submitter only)
- If 5-year cycle ending soon:
  - Restate to EGTRRA document or
  - Wait and use 8905
    - Use Form 8905 instead of restating ("Certification of Intent To Adopt a Pre-approved Plan") during 5-year restatement window
- In either case, restate to PPA document during 6-year window (likely 2014 - 2016)
ERISA Amendment Procedures

• ERISA § 402(b)(3)
  • Every employee benefit plan shall "provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan"
  • Apparently ERISA is not as concerned with a procedure for “adopting” a plan.
• Curtiss Wright Corp. v. Schoonejongen (U.S. S.Ct. 1995)
  • Plan document contained the standard reservation clause: “The Company reserves the right at any time and from time to time to modify or amend, in whole or in part, any or all of the provisions of the Plan.”
  • Use standard corporate law – any officer or agent may bind the “Company”

Commonly Accepted Means of Amending a Plan

• Board action
• Certification of Secretary (actually requires a board meeting)
• Consent Resolution
• Union contract
• Officer/Agent of sponsor
• Pre-approved plan sponsor (still requires signature of pre-approved plan sponsor)
Signature Requirements

• Signature required
  • Plan document/restatement
  • Discretionary amendment (adding loans, for example)
  • Interim amendment not meeting requirements below

• Not required – interim amendments
  • Employer must use defaults
  • If not word-for-word adopter must use amendment provided by document vendor. Document vendor must sign.
  • If word-for-word adopter, may use any amendment and adopter must sign.

Recent IRS Public Statements
DL Liaison/Baltimore TE/GE

• Determination Letter Liaison Group
  • Recommendations to IRS:
    • Combine volume submitter and prototype programs with best of both
    • Pre-approved ESOP documents
    • Pre-approved Cash Balance documents
  • News from IRS
    • Technical Advice Memorandum on Cash Balance Accrued Benefit
      • Tension between amount of benefits and accrual rules
    • New interim amendment procedures in process
    • Review or prior documents on examination and determination letter submissions

• Baltimore TE/GE
  • 403(b) pre-approval guidance out in June 2013