

PPA Aftermath and 403(b) Document Update



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PPA Aftermath and 403(b) Document Update

- Pre-approved defined contribution and defined benefit plans
 - Current pre-approved plan program procedures
 - Restatement cycle for pre-approved defined contribution plans
 - Failure to restate timely and EPCRS corrections
 - Changes to the IRS' Determination Letter Program and impact on pre-approved plans
 - Interim amendments and remedial amendment period

PPA Aftermath and 403(b) Document Update

- Pre-approved 403(b) plan update
 - Status of pre-approved 403(b) plans review
 - Special remedial amendment period rules for 403(b) plans
 - Church plan issues
- Future of the pre-approved plan program

Pre-Approved Plan Program Procedures

- IRS Revenue Procedure 2015-36 expanded pre-approved plan program
 - IRS announced reason - “... promotes the IRS’ ongoing objective of increasing the availability of pre-approved plans to small and mid-sized employers”
 - IRS unannounced reason - IRS will benefit from fewer individually designed plans to review through its determination letter program
- Major change – expansion of pre-approved program to include cash-balance plans and ESOPs

Pre-Approved Plan Program Procedures

- Continued narrowing of procedural and substantive differences between prototype (M&P) and volume-submitter plans
 - Adoption agreement format for volume-submitter plans
 - Procedural – minor modifier for M&P, minor modification for VS, Form 5307 for VS, standardized M&P
 - Substantive – governmental plans, hardship distributions, elections to not participate

Restatements for Pre-Approved Defined-Contribution Plans

- Defined-contribution plan restatements
 - PPA (second) restatement cycle closed April 30, 2016
 - Interim amendments, if necessary
 - Third restatement cycle
 - Document submissions by July 31, 2018 (delayed under RP 2016-37)
 - Employer restatement period – GUESS – May 1, 2020 – April 30, 2022
 - ESOP features accepted

Restatements for Pre-Approved Defined-Benefit Plans

- Defined-benefit plan restatements
 - Existing defined-benefit plans
 - EGTRRA (first) restatement cycle ended April 30, 2012
 - New defined-benefit plans
 - Still use EGTRRA documents
 - Make sure interim amendments are included
 - PPA restatements (second cycle)
 - October 30, 2015 submissions in review
 - Employer restatement period
 - May 1, 2018 – April 30, 2020

Failure to Restate Timely

- Failure to amend/restate is one of the top qualification failures
- Non-amenders are eligible for VCP, but not self-correction
- VCP submission kit available

VCP Fees

Number of participants	VCP fee
20 or fewer	\$500
21-50	\$750
51-100	\$1,500
101-1,000	\$5,000
1,001-10,000	\$10,000
Over 10,000	\$15,000

VCP Fees

- Failures submitted within one year of expiration of remedial-amendment period – 50 percent of general fee
- Interim amendments
 - Failure to adopt timely, good-faith interim amendment subject to \$375 VCP fee if filed before the end of the remedial-amendment period

VCP Fees

- New VCP option for non-amenders – financial institutions or other service providers may request a closing agreement on behalf of non-amenders
 - Minimum of 20 plans
 - \$5,000 for first 20 plans plus \$250 for each additional plan (first year)
 - Consent from employer
 - Prior document compliance

Changes to Determination-Letter Program

- IRS Announcement 2015-19 – revisions to the Employee Plans Determination-Letter Program
 - Effective January 1, 2017, the IRS eliminated/will eliminate the staggered five-year remedial-amendment cycles for individually designed plans
 - Effective January 1, 2017, a sponsor of an individually designed plan may only submit a determination letter application:
 - For a plan on initial plan qualification
 - For qualification upon plan termination
 - For certain other limited circumstances

Revenue Procedure 2016-37

- Significant modifications to determination-letter program for individually designed plans
- Minor changes to pre-approved plan program
- Formalizes announced changes to determination-letter program (Announcement 2015-19)
- Effective January 1, 2017
- Guidance is not completely comprehensive

Revenue Procedure 2016-37

- Five-year restatement cycle eliminated for IDPs
- Determination letters only available on initial plan qualification and plan termination
 - IRS may provide exceptions, but none provided in RP 2016-37
- No more interim amendments for IDPs after 2016

Revenue Procedure 2016-37

- Required Amendment List
 - Published in fourth quarter of each year
 - Adoption of required amendments by the end of the second calendar year after the first year the amendment is included in the Required Amendment List
 - IRS may issue model or sample amendments
 - Changes in law not added to Required Amendment List until IRS issues guidance
 - No Code §411(d)(6) relief

Revenue Procedure 2016-37

- Operational Compliance List
 - IRS will issue an Operational Compliance List each year
 - Rules that are effective in the next year
 - Not an exhaustive list!!

Revenue Procedure 2016-37

- Remedial Amendment Period (RAP) rules
 - New plans – later of the 15th day of the tenth calendar month after the end of the initial plan year or the due date of the employer's tax return for the year in which the plan is adopted (deemed extension)
 - For a disqualifying provision in an amendment, the RAP ends at the end of the second calendar year following the calendar year during which the change is effective
 - Special rules for governmental entities
 - Discretionary amendments – by the end of the plan year in which the amendment is operationally put into effect

Revenue Procedure 2016-37

- Extent of reliance on determination letter
 - Plan sponsor has continued reliance on the terms of the plan other than with respect to any provisions affected by an amendment (whether discretionary or required)
 - Reliance continues with respect to provisions unaffected by the amendment
 - Impact on restatements rather than amendments

RP 2016-37 – Impact on Pre-Approved Plans

- No substantial changes to pre-approved plan program (yet!!!)
- Six-year cycle remains
- Uniform restatement period for DC and DB plans
- Interim amendments still required by the end of the RAP designated in the regulations!!
 - Due date of tax return plus extensions
 - Special deadlines for governmental plans and tax-exempt employers
 - Next submission period for pre-approved defined-contribution plans is August 1, 2017 to July 31, 2018

RP 2016-37 – Impact on Pre-Approved Plans

- IRS will use Cumulative List issued in preceding year to review pre-approved plans
- During restatement cycle, Form 5307 application for determination letter for volume submitter plan still available
- “Extensive” modification of volume submitter plan may require Form 5300 application, if initial qualification

Interim Amendments

- What is an interim amendment?
 - Interim amendments are required to keep a written plan document up to date between a plan's submission periods during the applicable remedial amendment cycles
 - Disqualifying defect may result as a change in the law or regulations or issuance of other published guidance
 - A disqualifying provision includes the absence of a plan provision required by, or if applicable, integral to the applicable qualification change
 - An amendment that addresses a disqualifying provision is an interim amendment

Interim Amendments

- What is an interim amendment?
 - Extension of RAP applies to a disqualifying provision that is an amendment to an existing plan if the amendment was timely adopted and in good faith with the intent of maintaining the qualified status of the plan (“good-faith amendment”)
 - The extension of RAP also applies when the practitioner, sponsor, or employer determines, reasonably and in good faith, that the plan did not require an interim amendment. If the IRS determines that an interim amendment is required, the plan would still be eligible for the extension to the end of the remedial amendment cycle to correct the disqualifying provision.

Interim Amendments

- Determining whether a “good faith” interim amendment is required
 - Keeping track of law and regulation changes and other published guidance and effective dates
 - IRS’ Cumulative List of Changes in Plan Qualification Requirements, which is applicable to individually designed plans
 - NO DEFINITIVE GUIDANCE ON REQUIRED INTERIM AMENDMENTS!!!
 - Generally looking at required provisions to maintain qualified status
 - Sometimes adding clarifying provisions

Revisions to Forms 5300 and 5307

- Draft Form 5300
 - Revisions reflect the changes affecting individually designed plans Revenue Procedure 2016-37 major revisions in format and information required
 - Only three pages
 - Final version of Form 5300 expected in December 2016
- IRS working on revision of Form 5307

Pre-Approved 403(b) Plan Update

- A little history
 - Written plan document requirement in regulations
 - Originally, plan had to be adopted by January 1, 2009
 - Notice 2009-3 – transition relief
 - Written plan adopted by January 1, 2010
 - Announcement 2009-89 – if plan adopted before 2010, the sponsor has a remedial amendment period to correct defects in form of the plan, retroactive to January 1, 2010, provided sponsor adopts a pre-approved plan or timely applies for a determination letter

Pre-Approved 403(b) Plan Update

- Rev. Proc. 2013-22 - establishes procedures for issuing pre-approval letters for prototype and volume submitter 403(b) plans
 - No determination letters!
- Submissions and applications were due April 30, 2015
 - Word-for-word adopters may still submit applications

Pre-Approved 403(b) Plan Update

- Remedial amendment period (RAP) for 403(b) plans
 - If the employer adopts a pre-approved 403(b) plan before the end of the RAP with its provisions retroactively effective to the first day of the remedial amendment period (January 1, 2010), the adopting employer is protected against adverse tax consequences with respect to defects in the form of the plan
 - Under the special remedial amendment period rules for 403(b) plans, IRS does not impose interim amendment requirements
 - Operational compliance required
 - EPCRS available for non-amenders

Pre-Approved 403(b) Plan Update

- Status of IRS review
 - Most plans have now received first-level review
 - IRS hoping to finish plans this year or early next year
 - Likely employer restatement period – May 1, 2017

Pre-Approved 403(b) Plan Update

- Revelations from IRS review
 - Possibility of three-year restatement period?
 - Determination letter program?
 - Same IRS personnel reviewing pre-approved 403(b), defined benefit, and defined contribution plans
 - Universal availability
 - Exclusions from definition of compensation for deferral purposes
 - Multiple employer plan designs
 - Definition of spouse

Pre-Approved 403(b) Plan Update

- Retirement Income Accounts under Code §403(b)(9) – Church
 - Program decision to not allow Non-Qualified Church Controlled Organizations (NQCCO) or Qualified Church Controlled Organization (QCCO) to maintain a pre-approved RIA
 - Only “church-related organizations” and self-employed ministers
 - Problematic for existing NQCCOs and QCCOs

Pre-Approved 403(b) Plan Update

- Related church plan issues
 - Litigation attacks claiming plans are not ERISA-exempt church plans
 - Have IRS rulings been wrong?
 - Stapleton v. Advocate Health Care Network
 - Hospital plan not church plan and therefore subject to ERISA

Future of Pre-Approved Plan Program

- Establishment of single, streamlined program covering 401(a), 403(b), and (additionally) 457(b) plans
- Suggested enhancements
 - No more prototype/volume submitter terminology
 - “Best-of-all-worlds” approach
 - Open plan-design options
- Interim amendments
- Reliance on approval letters
- Reconsider user fees

Questions?

