

# Planning For EGTRRA Restatements

(or how to spend your summer vacation)

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# An Edition of Employee Plans News Once Suggested that it would serve as your summer beach reading:

- This presentation is designed to give you some thoughts about how to spend your summer:
  - Setting out your calendar
  - Budgeting your time and resources
  - Cleaning house
  - Gathering the materials you need
  
- To truly be ready for EGTRRA Restatements (and continued life under staggered amendment periods)

# Pull out your calendar:

(See Appendix for Chart of Key Dates)

- Period for amending pre-approved DC plans opens on May 1, 2008
- Period for amending pre-approved DC plans ends on April 30, 2010
  - Use employer/plan fiscal years to fine tune your planning and timing
  - Keep in mind requirement that discretionary/design amendments must be in place by the end of the plan year to be effective
    - And some design changes may need to be made at the beginning on a plan year

# Pull out your calendar:

- Don't forget that Cycle C individually designed plans must be submitted by January 31, 2009 and Cycle D individually designed plans must be submitted by January 31, 2010 at the same time that the period for amending pre-approved DC plans opens May 1, 2008 and closes April 30, 2010
  - Be alert to potential IRS incentives for early FDL filers
  - But consider desirability of including as many amendments or discretionary changes in a FDL application as possible

# Pull out you calendar:

- Don't lose sight of small adopter exemption for filing fees – See Form 8717
  - Eligibility is determined as of the date of the request
  - No more than 100 employees who received at least \$5,000 in compensation for the year preceding the FDL request
  - Generally must apply within first five plan years
    - Automatically meet for DC plans first effective on or after 1/2/1997 and for DB plans first effective on or after 1/3/1996
  - Plan must have at least one participating NHCE

# Pull out your calendar:

- For the
  - Period between May 1, 2008 and April 30, 2010
    - Determine which DC plans are likely to terminate
      - Keep your eye on interim amendment requirements and cumulative list changes
      - Factor in timing for favorable determination letters on plan termination (one year from date of termination)
        - » could mean a different filing deadline

# Create a budget for your time and staffing:

- Period for amending pre-approved plans opens on May 1, 2008
- Period for amending pre-approved plans ends on April 30, 2010
  
- Project the amount of time necessary to perform all work from beginning to completion
  - Consider setting up monthly target dates for submissions so that notices to interested parties can be standardized and staff days can be blocked off in advance for completing submissions
  - Include time for changing course when IRS guidance or procedures change

# Create a budget for your time and staffing:

- Period for amending pre-approved plans opens on May 1, 2008
- Period for amending pre-approved plans ends on April 30, 2010
  
- Project the amount of time necessary to perform all work from beginning to completion
  - Consider other non-amendment deadlines during this period during this period
    - Consider timing amendment of safe harbor plans with timing of issuance of other notices so employees communications can be consolidated and limited

# Create a budget for your time and staffing:

- Period for amending pre-approved plans opens on May 1, 2008
- Period for amending pre-approved plans ends on April 30, 2010
- Project the amount of time necessary to perform all work from beginning to completion
  - Include time for updating employee disclosure documents
    - SPDs and SMMs
    - QDIA notices
    - Safe harbor notices
    - Automatic enrollment notices

# Create a budget for your time and staffing:

- Period for amending pre-approved plans opens on May 1, 2008
- Period for amending pre-approved plans ends on April 30, 2010
  
- Don't forget potential for IRS comments on any FDL application
- Consider other pulls on your time throughout this entire period
  - Such as amendments and restatements and submissions of individually designed plans

# Clean House Before You Start Packing:

- Audit plan files
  - Make sure you have all plan documents in one place, with a chronological index
    - Include effective date and date actually executed
    - Include missing (or potentially missing) documents in chronology
  - Gather any missing or unexecuted documents
  - Update employers' information
    - Current decision makers
    - Boards of directors or members
    - Other service providers with input
    - Changes in employer ownership or management structure

# Clean House Before You Start Packing:

- Audit plan files
  - Determine Which Clients Need Design Changes
    - Automatic enrollment
    - Changes in vesting
    - Exclusion or inclusion of new groups of employees
      - Implications of leased or temporary employees
      - Changes in testing structure
    - Consider shortening plan names
  - Determine Which Clients May Need Compliance Reviews

# Clean House Before You Start Packing:

- Audit plan files
  - Determine Which Clients Need Interim Plan Amendments
    - Code Section 415 Amendments
    - Roth IRA Amendments
    - PPA operational changes
  - Timing may be different than the end of the remedial amendment period for EGTRRA restatements

# Clean House Before You Start Packing:

- Audit plan files
  - Determine whether to file for individual favorable determination letters
    - Consider nature of employers' business and likelihood of commercial transactions requiring representations about qualified status
      - Acquisitions or sales
      - Significant financing transactions
    - Consider size of employer and whether subject to auditing requirements

# Clean House Before You Start Packing:

- Audit plan files
  - Determine whether to file for individual favorable determination letters
    - Consider likelihood of plan termination
      - Comfort level with accuracy and completeness of required interim amendments
      - Potential for burdensome recordkeeping in absence recent individual favorable letter

# Update Your Repair Kits:

- EPCRS Non-Amender Procedures
  - Make Check for any missing or unexecuted documents
  - Determine availability under EPCRS Section 12.03 of abbreviated VCP submission for fee of \$375 for each late year for untimely:
    - EGTRRA good faith amendments
    - 401(a)(9) amendments and
    - Interim amendments listed in Rev. Proc. 2005-66 (check Rev. Proc. 2007-44 for any updates)

# Update Your Repair Kits:

- EPCRS Non-Amender Procedures
  - Remember that regular VCP fee is reduced by 50% if non-amender failure is submitted within one-year period following expiration of plan's remedial amendment period for making the missing amendment
  - Otherwise regular VCP fee will apply to a non-amender. See Section 12.02 of Rev. Proc. 2006-27.

# What you need to pack:

- Your notebook of IRS guidance
  - See the suggested IRS procedural toolbox in Appendix. Of particular interest are:
    - Notice 2004-84 2004 Cumulative List of Changes
    - Notice 2007-94 2007 Cumulative List of Changes
    - Rev. Proc. 2007-44 describing operation of the 5 and 6 year cycle remedial amendment periods
    - Rev. Proc. 2008-6 annual “bible” for the determination letter process
    - Ann. 2008-23 issuance of opinion letters for pre-approved defined contribution plans

# What You Need to Pack

- Your subscription to the IRS Employee Plan News
  - So you can check for periodic updates and guidance with easy links to the IRS website at guidance, for example, to
    - Keep up with PPA guidance on the “PPA” web page
    - Get updates on Enrolled Retirement Plan Agent or “ERPA” program
    - Get guidance on the best way to contact the Service with questions and inquiries (see summer 2007 edition)

# What You Need to Pack

- How do you subscribe to IRS Employee Plan News?
  - Go to <http://www.irs.gov/> and click on the Retirement Plans Community web page and select “Newsletters”
  - Prior issues of the newsletter are also archived here

# What You Need to Pack

- Your lap top so you can spend some time cruising the IRS web site. Of recent particular interest are the:
  - Retirement Plans Frequently Asked Questions (FAQs), particularly Section 5.5 concerning EGTRRA Submissions for Pre-Approved Plans and Favorable Determination Letter Program
    - See Appendix for current version and insights into amendment requirements for volume submitter and M & P plans

# What You Need to Pack

- Your lap top so you can spend some time cruising the IRS web site. Of continuing interest are the:
  - Listing of Required Modifications (“LRMs”)  
<http://www.irs.gov/retirement/article/0,,id=97182,00.html>
    - Designed to provide guidance to drafts of pre-approved plans, but also instructive for individually designed plans and stand alone amendments
  - FAQs on plan mergers
    - See Appendix

# What You Need to Pack

- Cruising the IRS web site:
  - Recent guidance that may require Interim or Discretionary Amendments – in essence the supplement to the current cumulative list that you need for a plan termination and to keep plans in compliance on an ongoing basis
    - See Appendix for current list as of February 15, 2008 (further update anticipated by the end of August, 2008)

# What You Need to Pack for Favorable Determination Letter Filings

- See Appendix
  - Focus on Form 5307 Changes Issued at the end of March (with Full Credit to Brenda Grote for the Form Comparison)
    - Form designed to be optically scanned (can still use prior form through September 30, 2008)
    - Change to 1(a) is for “green ink” number for those who intend to submit 30 or more on cycle filings at the same time
    - Addition of 1(g) “country”

# What You Need to Pack for Favorable Determination Letter Filings

- Focus on Form 5307 Changes Issued at the end of March
  - Will now need to number and list out all plan amendments included with signature and effective dates
    - Amendments prior to last FDL won't be considered
    - Advised to associate amendments after current application with that application

# What You Need to Pack for Favorable Determination Letter Filings

- Focus on Form 5307 Changes Issued at the end of March
  - New Line 3(n) asks more detailed information on offset plans (even if a Schedule Q isn't included) and copies of pertinent plan provisions for offset
  - Line 4a plan name now can't exceed 70 characters
    - Instructions suggest that terms like “Employees” and “Trust” aren't critical to plan names

# What You Need to Pack for Favorable Determination Letter Filings

- Focus on Form 5307 Changes Issued at the end of March
  - New Line 8(f) asks for detailed information on plan mergers
    - Including verification that each plan involved in the merger was qualified at the time of the merger
      - Copy of most recent FDL
      - Otherwise signed and dated copy of most recent restatement and amendments
      - FDL will only be given for plan for which application is made

# What You Need to Pack for Favorable Determination Letter Filings

- Focus on Form 5307 Changes Issued at the end of March
  - New Line 8(g) asks for detailed information on changes in plan type
    - Requires statement explaining the change
  - New Line 10(f) requires disclosure of use of Voluntary Compliance Resolution Program under EPCRS
    - Including statement of issues involved and contact information for agent involved

# What You Need to Pack for Favorable Determination Letter Filings

- Spring 2008 Employee Plans News suggests that we should expect similar changes to
  - Form 5300 and Form 5310
  - As well as
    - Schedule Q
    - Form 5309
    - Form 5310A
  - See Appendix

## Check up on the latest things:

- IRS Announcement 2008-23 issued on March 14, 2008
  - What to include with Form 5307
    - Do not include EGTRRA Good Faith Amendments or any interim amendments adopted at Plan sponsor level for M & P Plans
      - Service may however request evidence of good faith adoption
    - VS plans that did not authorize amendments at the plan sponsor level must include EGTRRA good faith and any interim amendments adopted for changes on the 2004 Cumulative List

## Check up on the latest things:

- IRS Announcement 2008-23 issued on March 14, 2008
  - What to include when required to file on Form 5300 because plan is a multiple employer VS or because of request for affiliated service group or leased employee determination
    - Except for VS plans that did not authorize amendments at the plan sponsor level do not include EGTRRA Good Faith Amendments or any interim amendments
      - Service may however request evidence of good faith adoption

# Check up on the latest things:

- IRS Announcement 2008-23 issued on March 14, 2008
  - What to include when required to file on Form 5300
    - because a VS is amended “in a manner that is too extensive or complex or otherwise determined by the Service to be incompatible with the purposes of the volume submitter program” or
    - an M & P plan is amended
      - in a manner other than choosing among the options permitted under the plan or
      - as described 5.02 & 19.03 of Rev. Proc. 2005-16
        - » To make the plan an individually designed plan

# Check up on the latest things:

- IRS Announcement 2008-23 issued on March 14, 2008
  - Include EGTRRA Good Faith Amendments and any interim amendments
    - Must include amendments for the cumulative list that is in effect when the application is filed
      - So for applications made prior to January 31, 2009, this means the 2007 cumulative list
      - And suggests for applications made between February 1, 2009 and January 31, 2010, this would mean the 2008 cumulative list
      - And further suggests that for such applications made after January 31, 2010, but before April 30, 2010 this would mean the 2009 cumulative list

## Check up on the latest things:

- Rev. Proc. 2007-44
  - Service won't review amendments for PPA
    - For individually designed plans submitted under either Cycle B or Cycle C must include amendments for the cumulative list that is in effect when the application is filed
  - Plan sponsors can delay adopting plan amendments pursuant to PPA until last day of first plan year beginning on or after January 1, 2009

# Check up on the latest things:

- Rev. Proc. 2007-44
  - Service generally won't add to next cumulative list any guidance issued
    - after the October 1 preceding the date the next cumulative list is to be issued
    - Qualification requirements that become effective in calendar year after the calendar year in which the submission period begins with respect to applicable cumulative list
      - So for Cycle C which began 2/1/08, statutory changes that become effective in 2009 wouldn't be included on the 2007 cumulative list

## Check up on the latest things:

- Rev. Proc. 2007-44
  - Sections 19.02 – 19.04 clarify when employer is entitled to remain on a 6 year cycle after adopting an individually designed plan or making certain types of amendments
    - generally permitted to stay on at least one six year cycle, at least on an initial basis, unless Service decides in its discretion that nature and extent of amendments don't merit ability to use six-year cycle even initially – reference Section 24.03 of Rev. Proc. 2005-16

# Check up on the latest things:

- Rev. Proc. 2007-44
  - Sections 19.03 – temporary eligibility for 6 year cycle if
    - Employer is an intended adopter of pre-approved plan on Form 8905, but actually adopts an individually designed plan document
    - Prior adopter of pre-approved plan who replaces the plan with an individually designed plan
    - Employer amends approved M & P or VS plan to type of plan not permitted under these programs more than one year after adoption of approved plan
      - See listings under Sections 6.03 and 16.02 of Rev. Proc. 2005-16.

# Check up on the latest things:

- Rev. Proc. 2007-44
  - Sections 19.03 – temporary eligibility for 6 year cycle means:
    - Employer must file in two year cycle for pre-approved plans with Form 5300 and provide amendments based on cumulative list at time of submission
    - Thereafter file under 5 year cycle that ends after closing of the six year cycle
      - So initial Cycle E or next cycles depending upon EIN (See chart in Appendix)
      - Unless that is less than 12 months after the date of the FDL under the six year cycle, then this 5 year cycle is extended for 12 months and the next 5 year cycle (the one beyond the chart) is shortened

# Review some of the old things and consider their implications:

- IRS Rev. Proc 2005-66 § 3.03:
  - “When a plan qualification requirement changes either due to a statutory change, a regulation, or other published guidance, causing a plan to no longer be qualified, a *timely adopted interim amendment will generally be required.*” (*italics added*)
    - Amendments to Comply with final 415 Regulations
      - Effective for limitation years beginning on or after July 1, 2007

Review some of the old things and consider their implications:

- IRS Rev. Proc 2005-66 § 5.03(3):
  - Any amendment which is not a disqualifying provision or integral to a disqualifying provision
  - **Amendment must be made by the end of the plan year in which the amendment is effective**

# Review some of the old things and consider their implications:

- Terminating Plans
  - Must be updated at the time of termination
  - May need more than the items on the latest Cumulative List because law may have changed in period between issuance of Cumulative List and plan termination date
  - All plans will be treated as individually designed at time of termination

# Review some of the old things and consider their implications:

- Terminating Plans
  - Service will generally recognize the selected termination date unless assets are distributed more than a year after selected date
  - If your selected termination date is upheld, a plan amendment for a change in law effective after that date will not be required even if the effective date is the date after the plan termination date Must be updated at the time of termination

# Review some of the old things and consider their implications:

- Terminating Plans
  - Service will generally recognize the selected termination date unless assets are distributed more than a year after selected date
  - If your selected termination date is upheld, a plan amendment for a change in law effective after that date will not be required even if the effective date is a date after the plan termination date and before an application is made for a favorable letter

# To complete your summer vacation:

- Don't procrastinate – calendar dates
  - But be thoughtful about how you order your work
    - Consider ways to come to clients once
    - Consider ways to combine work
    - Consider whether sooner is better than later or whether later is better than sooner
      - Example of revised Form 5307
- Keep on top of guidance and its implications
  - Start checklists for your style of document
- Plan