



Gearing Up for EGTRRA Restatements



By: Tim McCutcheon



Introduction

- | In late 2005, IRS announced a new procedure for plan restatements
- | Uniform six-year cycles for master and prototype and volume submitter plans ("pre-approved plans")
- | Staggered five-year cycle for all other individually designed plans
- | Pre-Approved plans apply every six years
- | Individually designed plans apply every five years



Introduction – Cont.

- | Deadline for restatement of an individually designed plan is generally based on the last digit of the plan sponsor's employer identification number ("EIN")
- | The EIN is **NOT** used to determine the amendment cycle for an employer who sponsors a pre-approved plan
- | No one, including IRS, is certain how new procedures operate



Five Year Cycle

- | IRS Quality Assurance Bulletin FY-2006 No. 2
(Revised Date: July 5, 2006) **OUT OF DATE**
- | 1 or 6 Cycle A - 1-31-07
- | 2 or 7 Cycle B - 1-31-08
- | 3 or 8 Cycle C - 1-31-09
- | 4 or 9 Cycle D - 1-31-10
- | 5 or 0 Cycle E - 1-31-11



Five Year Cycle - Cont

- | Individually designed plan:
 - Cash Balance
 - ESOP
 - Multiemployer Plan
 - Multiple Employer Prototype Plan
- | More later in presentation



Five Year Cycle - Cont

- I New Cash Balance plan adopted 12/31/07-
EIN ends in 2
 - File by 1/31/08?
 - If RAP ends within one year, file by end of next
RAP 1/31/13. May also file as new plan.
- I Other Exceptions
 - Cycle changing events
 - Controlled groups/CBA/etc
 - Mergers and Acquisitions



Six-year Cycle for Pre-approved Plans

I Defined Contribution

- IRS currently reviewing pre-approved DC plans
- Review will be completed in early 2008.
- When review is completed the IRS will release opinion/advisory letters to pre-approved sponsors at the same time.
- Each adopting employer will then have a two year window in which to restate its plan.
- The informal word from the IRS is that the window for adopting employers to restate pre-approved defined contribution plans will open on about April 1, 2008 and will close on or about March 31, 2010.



Six-year Cycle - Cont

I Defined Benefit

- Different six-year cycle
- Deadline for submission of pre-approved plans by pre-approved sponsors (mass submitter and non mass submitter) is January 31, 2008
- Review completed January 31, 2010
- Two-year window for adopting employers to restate pre-approved defined benefit plans is anticipated to start after that date.



When a PAP Is Eligible for the Six-year Cycle

- | Prior adopter
- | New adopter
- | Intended adopter
- | Adopter of a replacement plan



Effect of Amendment to PAP

- | Retain Eligibility for Six-Year Cycle on Continuing Basis
- | Retain Temporary Eligibility for Six-Year Cycle
- | Immediately Switch to Five-Year Cycle



Retain Eligibility for Six-Year Cycle on a Continuing Basis

- | The amendment does not convert the plan to a type not allowed in the pre-approved program
- | The plan will continue to be treated as a pre-approved plan for purposes of the six-year remedial amendment cycle on a continuing basis.



Type of Plan Not Allowed in PAP Program

- | Any amendment into a type of plan not allowed in the pre-approved plan program (e.g., a cash balance plan, a multiemployer plan, an ESOP) will result in the plan switching to the five-year staggered cycle.
- | Rev. Proc. 2005-16
 - Section 6.03 (prototype plans)
 - Section 16.02 (volume submitter plans)



Type of Plan Not Allowed in PAP Program - Cont

I Differences:

- Volume submitter plans may be multiple employer plans
- Volume submitter defined benefit plans may provide for employee contributions
- Volume submitter plans may be governmental plans
- Volume submitter plans may have non safe harbor hardship criteria.



Type of Plan Not Allowed in PAP Program - Cont

I Similarities:

- Employee stock ownership plans and stock bonus plans.
- Multiemployer plans
- Union plans. Plan may cover CBA employees and plan may be a single employer plan which covers only employees of the employer.
- All cash balance plans and any other defined benefit plans under which the test for nondiscrimination under § 401(a)(4) is made by reference to contributions rather than benefits



Retain Temporary Eligibility for Six-Year Cycle

- | Adopt an individually designed plan, or make an amendment to convert a PAP to a type not allowed in the pre-approved program **AND** adopt the amendment **more** than one year after the date the employer initially adopted the pre-approved plan
- | 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.
- | The employer must submit a determination letter application during the approximate two-year period within the six-year remedial amendment cycle



Immediately Switch to Five-Year Cycle

- | Adopt an individually designed plan, or make an amendment to convert a PAP to a type not allowed in the pre-approved program **AND** adopt the amendment **less** than one year after the date the employer initially adopted the pre-approved plan
- | A plan will immediately convert to the five-year cycle due to the nature and extent of the amendments if the IRS determines that the plan is not eligible for the six-year cycle.



Form 8905 - Certification of Intent to Adopt Pre-approved Plan

- | Reasons to execute:
 - Staff time
 - Employer questions
- | Reasons NOT to execute :
 - New IRS procedure
 - Unknown level of scrutiny by IRS when reviewing
 - Prototype plans may not be used in a multiple employer context.
 - | Adopt a prototype plan on 07/01/2011
 - | Change in ownership - multiple employer plan on 01/15/2012
 - | Plan would immediately revert to a five-year cycle - deadline now 01/31/2013



Cross Testing in EGTRRA Prototype Documents

- | Rev. Proc. 2005-16 allows cross testing in prototype plans.
- | LRM #94 Limits on the number of NHCE Groups:

NHCEs	Groups
- 3 to 8	Two
- 9 to 11	Three
- 12 to 19	Four
- 20 to 29	Five
- 30 or more	NHCEs/5

- | The grouping of eligible NHCEs must be done in a reasonable manner and must reflect a reasonable classification in accordance with 1.410(b)-4(b).
- | Discussions are continuing with the IRS



New EPCU Audit Program for Pre-approved Plans

- | Employee Plans Compliance Unit (EPCU) will begin an audit of pre-approved sponsors and adopting employers
- | Determine whether pre-approved plans are in compliance with regard to plan operation and plan documentation
- | IRS apparently believes that some plan providers are not keeping adopting employers informed of plan operational and plan document requirements
- | EPCU relies on mass mailing of questionnaires
- | Treat letter from EPCU with the same care and diligence as a regular audit request



When to File for a Favorable Determination Letter

- | GUST DC Documents. IRS is considering establishing a cut-off date some time later this year
- | EGTRRA DC
 - Open on or about April 1, 2008
 - Close on or about March 31, 2010
- | EGTRRA DB
 - Open on or about April 1, 2010
 - Close on or about March 31, 2012



Off Cycle Filings Individually Designed

- | 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



Off Cycle Filings - Pre-approved Plans of Adopting Employers

- | “Off Cycle” if filed outside of two year window
- | Four exceptions would only apply to individually designed plans
- | IRS may continue to accept certain off-cycle filings from pre-approved plans
 - Terminating plans filing on a Form 5310
 - Application made as a part of an EPCRS filing.
- | No final decision by IRS



Whether a Filing is Necessary

- | **Optional**
- | **Mandatory** - Plan Allowed in Pre-Approved Program
- | **Mandatory** - Plan Not Allowed in Pre-Approved Program



Optional

- | No changes made to the pre-approved document
 - Prototype and volume submitter
 - Form 5307
- | Terminating Plan
 - Terminating plan must be restated for current law through the date of termination
 - Not clear what are required amendments
 - File a Form 5310 to ensure all amendments are made
 - However, IRS often conducts a mini audit of the Plan during the review of Form 5310. All years are considered “open.”



Mandatory - Plan Allowed in Pre-Approved Program

- I Modify the pre-approved document and plan allowed in the pre-approved program
 - File in two year window
 - Prototype document - Form 5300 with \$1,000 filing fee
 - Volume submitter document - Form 5307 with \$300 filing fee.



Mandatory - Plan Not Allowed in Pre-Approved Program

- I Amendment that converts plan to a type not allowed in the pre-approved program
 - Form 5300 with the \$1,000 filing fee
 - Pre-approved sponsor no longer has the authority to amend on behalf of the adopting employer.
 - Filing date is based on whether the amendment was adopted more or less than one year after the adoption of the pre-approved document.



Filing Deadlines for Pre-approved Sponsors

- | Off cycle if:
 - DC Plans - after January 31, 2006
 - DB Plans - after January 31, 2008
- | Plans submitted on cycle may not submit off-cycle applications
- | Sponsor with GUST may file by early 2008
- | New sponsor.
 - Plan may not be used to correct defective amendments made prior to the date the EGTRRA document is adopted unless adopting employer files for a favorable letter on Form 5300 with a \$1,000 fee
 - OK for new and takeover plans after two year window closes



Prototype vs. Volume Submitter

- | Historical advantage of a prototype document may no longer apply
- | Volume submitter document may have some advantages over the prototype document:
 - Full cross-testing allowed; including one group per participant.
 - May be amended by the pre-approved sponsor even in the case of a multiple employer plan but not in the case where adopting employer is required to obtain a determination letter
 - 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).



Conclusion

- | There still remains some uncertainty regarding the submission process, particularly for pre-approved documents.
- | Hopefully, the IRS will take into account practitioner comments when considering modifications to the restatement procedures.



Questions

