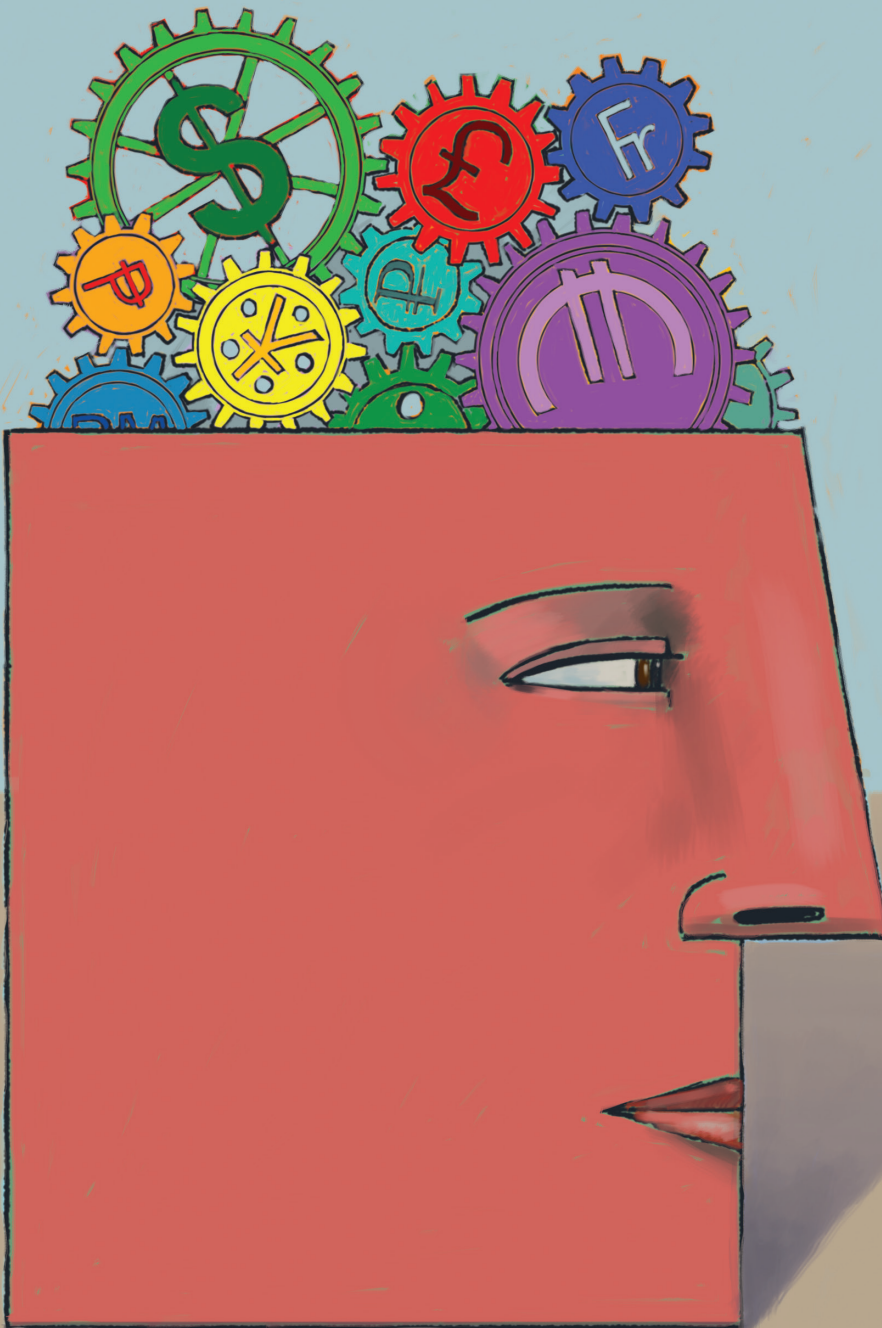


AN OFFICIAL PUBLICATION OF ASPPA

# PLANET CONSULTANT

FALL 2014



## Game Changer

Why BeFi Will Transform  
What You Do

Non-ERISA 403(b)s for Non-Profits

More RMD Answers



# The PPA Restatement Process

BY KATHERINE TEITGEN AND AIMEE NASH

Answers to questions about PPA restatements and important considerations to bear in mind as plans are restated.

**T**he PPA restatement process is underway! The Pension Protection Act of 2006 restatement process for pre-approved defined contribution, 401(a) plans, which began May 1, 2014, will run until April 30, 2016.

Not a lot has changed since EGTRRA — plans have already adopted interim amendments for most of the new plan provisions, which should make this a relatively pain-free restatement process. Other updates being newly incorporated and pre-approved for the PPA cycle include the final 415 regulations, the Heroes Earnings Assistance and Relief Tax Act (HEART) and the Worker, Retiree and Employer Recovery Act (WREERA).

This article addresses frequently asked questions about the restatement process and suggests some broad considerations to bear in mind as plans are restated.

## WHY DO WE HAVE TO RESTATE?

The IRS requires that employers using a pre-approved prototype or volume submitter

document restate their plan every six years to incorporate changes made to the governing tax laws and regulations in order to maintain pre-approved status.<sup>1</sup> Using pre-approved plans saves plan sponsors tremendous costs in preparation and in IRS filing fees and, most importantly, provides reliance that the document language should not be challenged by the IRS.

Restating a plan for PPA is an excellent opportunity to review plan provisions, ensure plans are meeting plan sponsors' objectives and to take groups of plans in a new direction. Below are a few suggestions. *These suggestions are general and do not purport to be right for every plan.*

## CONSIDER SIMPLIFICATION WHERE POSSIBLE

Simple plan designs obviously lend themselves to a reduction in operational errors. For example:

- **Use one definition of compensation.** We recommend using a W-2 definition that has the advantage of being generally understood by

<sup>1</sup> We are frequently asked how the deadline applies to terminating plans. As long as the plan is fully terminated and brought up to date for any required interim amendments before the restatement deadline (April 30, 2016), the plan is not required to restate to a PPA document. However, restating these plans is recommended as it helps illustrate the document was brought up to date prior to termination.

employers, employees and payroll providers. If you are excluding compensation or adding back in non-taxable compensation, you must be prepared to not only collect the data but also to test the compensation (assuming the modification results in a non-safe harbor definition of compensation).

- **Keep service rules simple.** We generally recommend against using the rule of parity and one-year hold out options. The rule of parity rarely applies and requires administrative resources to review each employee upon rehire. It likely goes without saying that keeping all contribution eligibility rules consistent greatly helps reduce administrative costs.
- **Use administrative policies where processes are complicated and change frequently.** Administrative policies provide greater flexibility to adjust as facts and circumstances require it. In particular, we suggest using these for automatic enrollment. Of course, if you are using an administrative policy, you must be prepared to actually document the policy.

### SAFE HARBOR PLANS

One of the obstacles to providing a safe harbor plan is the prohibition against mid-year plan amendments. There are a few limited circumstances in which mid-year changes are specifically allowed by the IRS, and restatement is not a reason that has been specifically listed in written guidance. The safest and simplest way to ensure that safe harbor plans do not make mid-year amendments to their plans is to restate prospectively, making plans effective the first day of the following plan year.

### FORFEITURES

The IRS has long espoused the opinion that qualified non-elective contributions (QNECs) and qualified matching contributions (QMACs) may not be funded with forfeiture allocations based on their interpretation of Internal Revenue Code language.

“Using pre-approved plans saves plan sponsors tremendous costs in preparation and in IRS filing fees and, most importantly, provides reliance that the document language should not be challenged by the IRS.”

Notably, many EGTRRA documents were approved with specific language allowing forfeitures to be used as employer contributions.

For PPA, the IRS zeroed in on enforcing these forfeiture restrictions and required all PPA pre-approved plans to include language prohibiting the use of forfeitures to fund QNECs and QMACs where prior language would have allowed the practice. These new forfeiture restrictions, when combined with concerns about mid-year amendments, provide more reason to delay restatement of safe harbor plans and use prospective effective dates to the first of the following plan year.

While restating plans for PPA, it is a good time to review forfeiture policies as a whole and to ensure forfeited amounts are spent as soon as administratively feasible. We generally recommend against using a suspense account to hold forfeitures as this practice could lead to allowing forfeitures to accumulate over several years. In the newsletter, *Source Retirement News For Employers*, Vol. 7,

Spring 2010, the IRS wrote:

*No forfeitures in a suspense account should remain unallocated beyond the end of the plan year in which they occurred. No forfeiture should be carried into a subsequent plan year... [T]here should be plan language and administrative procedures to ensure that current year forfeitures will be used up promptly in the year in which they occurred or in appropriate situations no later than the immediately succeeding plan year.*

### OPEN MEPS

Any “open MEPS” (multiple employer plans generally available for any employer to join) still available in the marketplace may need to reconsider their plan design since the Department of Labor Advisory Opinion 2012-04A — which requires commonality between employers in a MEP. The PPA restatement offers the opportunity to consider a new approach.

We have seen many open MEPS attempt to address the 2012 Advisory Opinion by simply filing multiple 5500s for each employer in the MEP but continuing to offer a MEP design in the plan documents. While we understand this may be a reaction to the continuing market pressure to offer an open MEP, we think an alternative approach of an aggregated arrangement should be considered.

Aggregated plans are still structured in the same manner as a MEP but instead adopt agreements that establish a separate plan (with the same/similar provisions to a lead plan). The advantages include: no “one bad apple” rule, continued leverage with assets, and scale with uniform administration.

### STATUTE OF LIMITATIONS OPTION

Many plan sponsors may now have the option of adding a statute of limitations to their pre-approved plans. This provision stems from the 2013 Supreme Court decision, *Heimeshoff v. Hartford Life & Accident*

*Ins. Co.* 134 S. Ct. 604. The Supreme Court held that an ERISA disability plan's three-year statute of limitations period, running from the date of proof of loss, was enforceable even though the statute of limitations began to run before the participant's cause of action accrued. *Heimeshoff* confirms that plan sponsors and administrators may include, and now enforce, contractual limitations. There has been no guidance at this point from the IRS or DOL as to what a reasonable statute of limitations would mean. Clearly, a three-year statute of limitation would be permitted based upon the facts of *Heimeshoff*. The period of limitations should run from a date certain, such as the date of proof of loss, rather than from the plan's final denial of a claim to encourage benefit decisions based on timely information rather than years after critical events.

## **SAME-SEX MARRIAGES AND WINDSOR**

If not previously amended, plans restated for PPA should ensure their definition of spouse is inclusive of same-sex couples. Under Revenue Rulings 2013-17 and 2014-19, the IRS and DOL ruled that qualified retirement plans must recognize same-sex marriages as of June 26, 2013, a direct response to *State v. Windsor*, 133 S. Ct. 2675 (2013), in which the Supreme Court struck down Section 3 of the Defense of Marriage Act (DOMA). In general, most pre-approved plans did not define spouse and would not require an amendment for the *Windsor* decision.

## **CONCLUSION**

Restating a large number of plans in a relatively short period of time is a challenge for retirement plan service providers. This challenge also brings business opportunities and an opportunity to help employers keep plans in compliance, make plans easier for employers to understand and help employers reach the goals they have for their plans in the first place. **PC**



*Katherine Teitgen, J.D., is a writer/analyst at ftwilliam.com-Wolters Kluwer Law and Business. She has been integral in drafting and coding the PPA restatement documents for ftwilliam.com and assists customers with document drafting strategy and technical support.*



*Aimee Nash, J.D., is a senior writer/analyst at ftwilliam.com-Wolters Kluwer Law and Business. She is the primary drafter of the PPA defined contribution documents, 403(b), nonqualified and welfare plans offered by ftwilliam.com and oversees support and general compliance issues for all software products offered by the firm.*

Reprinted from the Fall 2014 issue of ASPPA's *Plan Consultant*. The American Society of Pension Professionals & Actuaries (ASPPA) is an organization of actuaries, consultants, administrators and other benefits professionals. For more information about ASPPA, call 703.516.9300 or visit the website at [www.asppa-net.org](http://www.asppa-net.org).