PPA DC
Restatements - What to Expect
August 22, 2012
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Agenda

• Pre-approval/Restatement Basics
  • Pre-approved
    • Prototypes
    • Volume submitters
  • What's new for PPA cycle
  • New determination letter procedures
  • Individually designed plans
  • 403(b) pre-approval updates

• IRS Determination Letter Liaison Group - Updates

• Signatures
  • When are they needed?
  • ERISA Plan Amendment Procedures
  • E-SIGN
PRE-APPROVAL & RESTATEMENT BASICS
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 (reliance on approval letter)
- 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" 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

• Pre-EGTRRA
  • Prior restatement deadline established by IRS under IRC 401(b)
  • Separate pre-approval offices
    • *Prototypes - DC office*
    • *Volume Submitters – Cincinnati*
  • In general, no interim amendments
  • GUST was the last restatement under the old rule (2003)
Plan Document Pre-approval
Brief History

- DC plans (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 paid preparer/credentialing requirements
    - 5500 forms for 2012 will have optional section for paid preparer
    - Signature of paid preparer not “currently” required
    - Interim amendment certification for PPA
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 may start in October, 2012
    - Content of docs is determined by 2010 LRM
- All DB plans on same cycle
  - EGTRRA deadline April 30, 2012
What **Can't** Cause Loss of 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)
- Amendments to adjust limitations under 415, 402(g), 401(a)(17) and 414(q)(1)(B) to reflect cost of living increases.
- Amendments that change sponsor/practitioner's name
  - May not be eligible for new opinion/advisory letter (change EIN)
What Can't Cause Loss of Pre-Approved Status?

• Amendments for DOL requirements:
  • To conform/comply with ERISA 402(a), related to named fiduciaries
  • To conform a plan's claims procedures with ERISA 503
  • To conform with FAB 2008-1 related to specifying duties of trustees to collect delinquent contributions
  • To comply with participant loan regulations under ERISA 408(b)(1)
What Can Cause Loss of Pre-Approved Status?*

- Custom language
  - Discretionary amendments that do not use pre-approved language
  - 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)

- Using outside trust agreement that is not pre-approved

*or loss of reliance on Volume Submitter advisory letter
Trust Language

- Most common to use ftwilliam trust language
- Trust company may require its own language
  - Trust language pre-approved to work with ftw 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?
Effect of Loss of Pre-Approved Status

• Temporary eligibility for 6-year cycle (Rev. Proc. 2007-44, section 19)
  • The employer must submit a determination letter application during the two-year restatement period within the six-year remedial amendment cycle
  • The plan will switch to the five-year cycle after the end of its current six-year cycle.
WHAT'S NEW FOR THE NEXT CYCLE - PPA ('POST-EGTRRA')
What's New for the PPA Cycle
Rev Proc 2011-49/LRM

• 2010 LRM prohibits forfeitures from being reallocated as safe harbor contribution – *In EGTRRA LRM but not enforced*

• Differences between vol subs and prototypes narrowing

• Interim amendment certification requirement

• Not much else...
## Prototypes vs. Vol Subs

<table>
<thead>
<tr>
<th></th>
<th>Prototype</th>
<th>Volume submitter</th>
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<tbody>
<tr>
<td><strong>Document format</strong></td>
<td>Adoption agreement and basic plan document</td>
<td>All-in-one document or adoption agreement (&quot;prototype&quot;) format</td>
</tr>
<tr>
<td><strong>Modifications to pre-approved language</strong></td>
<td>Plan becomes individually designed</td>
<td>Most changes are 'minor modifications'</td>
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<tr>
<td><strong>Hardship</strong></td>
<td>Safe harbor only</td>
<td>Safe harbor or non-safe harbor permitted</td>
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<tr>
<td><strong>Participant waiver/ Irrevocable opt-out</strong></td>
<td>Not permitted</td>
<td>Permitted</td>
</tr>
<tr>
<td><strong>Cross-testing - each participant in his own group</strong></td>
<td>EGTRRA: number of groups limited by number of NHCES PPA: works same as volume submitters</td>
<td>No limit on number of groups</td>
</tr>
<tr>
<td><strong>Multiple Employer Plan</strong></td>
<td>EGTRRA: not permitted</td>
<td>Permitted</td>
</tr>
</tbody>
</table>
Prototypes vs. Vol Subs for PPA

• 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 opt out (should never/rarely be used)
  • May use non-safe harbor hardship requirements
  • Choice of document formats (adoption agreement or "all-in-one"/traditional vol sub)
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)
Interim Amend Certification

• Expanded requirement for PPA (Rev Proc 2011-49)
  • Required now for applications for letter in own name
  • This certification will be required of all ftwilliam.com customers – even if no opinion letter
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.

Type or print name of M&P Sponsor and/or VS Practitioner

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

Dated ____________________________
Interim Amendments - Background

- Why?
  - Treasury appointees (Republican and Democratic) concerned participants could be adversely affected if current rules not in the plan.
  - Hypothetical concern

- 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
Interim Amendments

• The following factors are generally irrelevant in determining whether interim amendment is required:
  • Pre-approval status
  • 5 or 6 year cycle
  • Restatement status

• What does matter?
  • Has the plan timely adopted/been updated for the interim requirement?

• Format may vary as described above (tack-on or incorporation)
NEW DETERMINATION LETTER PROCEDURES
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
  • New approach to audits by IRS? See slides on DL Liaison Group below.

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

• During applicable restatement window

• Exceptions – individually designed plan
  • 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
  • Terminating plan
Form 8717 Developments

- Use Pay.gov web site 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 PLANS
IDPs

- Plans not eligible for pre-approval – use 5 year cycle/determination letters:
  - Cash balance plans, ESOPs
  - Multiemployer plans
  - Governmental plans with "DROP" provisions
  - Non-electing Church plans (plans not electing ERISA coverage)
  - Any 401(a) plan that can't be drafted on pre-approved plan

- Other plans (403(b), Nonqualified plans, welfare plans, etc.) – no pre/post approval process. Private Letter Ruling may be available.
<table>
<thead>
<tr>
<th>EIN end</th>
<th>Exceptions</th>
<th>Cycle</th>
<th>Cycle 2 Open - End</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 or 6</td>
<td>controlled / affiliated service group*</td>
<td>A</td>
<td>2/1/11 - 1/31/12</td>
</tr>
<tr>
<td>2 or 7</td>
<td>MEPs*</td>
<td>B</td>
<td>2/1/12 - 1/31/13</td>
</tr>
<tr>
<td>3 or 8</td>
<td>Govt*</td>
<td>C</td>
<td>2/1/13 - 1/31/14</td>
</tr>
<tr>
<td>4 or 9</td>
<td>multiemployer</td>
<td>D</td>
<td>2/1/14 - 1/31/15</td>
</tr>
<tr>
<td>5 or 0</td>
<td></td>
<td>E</td>
<td>2/1/15 - 1/31/16</td>
</tr>
</tbody>
</table>

* Not required to use 5-year cycle. Generally could be on pre-approved documents.
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)
PRE-APPROVAL OF 403(B) PLANS
Background

- Final 403(b) regulations (2007)
  - New requirement for written plan (always required for ERISA-covered plans)
  - Notice 2009-3 extended the requirement to 12/31/09 for most plans

- **Draft Revenue Procedure** for pre-approval program (Announcement 2009-34)
  - Prototype program (no minor modifications)
  - Standard/non-standardized plans
  - A few glaring omissions/issues (no vesting schedules; no church-specific language permitted)
  - Determination letter procedure to follow
403(b) RAP

• Remedial Amendment Period (Announcement 2009-89)
  • Written plan on or prior to 12/31/09 (or when established if later)
  • Meet other Notice 2009-3 requirements
    • Operate plan in 2009 according to reasonable interpretation of 403(b) rules
    • Best effort to correct operational failures in 2009
  • No interim amendments currently required
  • Adopt pre-approved plan or apply for determination letter when available
    • Currently no end date for RAP
    • Final rev proc will establish – to be released "soon"
Fixing 403(b) Errors

• EPCRS applies to 403(b) plans
  • Rev Proc 2008-50
  • New Rev Proc coming "soon" to address 403(b) written plan failures

• Current EPCRS
  • Available for: operational, demographic and employer eligibility failures (Rev Proc 2008-50, section 5.02)
  • Not available for: written plan defects, failure to follow written plan
IRS DETERMINATION LETTER
LIAISON GROUP MEETING
AUGUST 15, 2012
DL Liaison Group

- Comprised of representatives from industry, IRS and Treasury
- Meets approximately once per year
- Discuss current developments/future enhancements
- Met August 15, 2012
DL Liaison Group

- Recommended changes to pre-approved program
  - Combine prototype and vol sub programs
  - Three DC documents with best of both:
    - Non-standardized prototype style
    - Standardized prototype style
    - IDP/Contract style
  - Not likely to occur for several years

- Pre-approved Cash Balance and ESOP Program
  - Actively working on ESOP pre-approved program
  - Looking at Cash Balance
    - Driving force: budgetary concerns, staffing
  - Resolve inconsistent reviews
Technical Advice Memorandum on Cash Balance Accrued Benefit

- Amount of Benefit vs. sec. 411 accrual rules (133-1/3)
- Coming soon

Interim Amendments

- IRS is working on relief
- Driving force: budgetary concerns
  - Scope of audit
  - DL letter review
- Options considered: fixed schedule/411(d)(6)/Core
- IRS gave informal 2012 list at ABA – at this time none needed except DB section 436.
DL Liaison Group

- Verification of prior plan document on audit/DL
  - Should only go back one “law” - currently EGTRRA.
  - Agent requesting older documents must get consent of manager whose name must appear on the request.
  - Audit and DL personnel will receive combined training.

- Fifty Shades of ‘Soon’
Is Signature Required?

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

- Not required – interim amendments
  - Employer must use defaults
  - Use ftwilliam.com signed amendment
    - The plan is on the applicable ftwilliam.com document at the time the amendment was signed;
    - Preparer does not have a letter in own name for the applicable plan type; and
  - Entity with letter in own name must sign interim amendment
    - Does not matter if on ftwilliam or other vendor document
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.
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.”

Court:
- Use standard corporate law – any officer or agent may bind the “Company”
- The standard reservation clause was adequate
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)
Electronic Signatures in Global and National Commerce Act (E-SIGN)

• Purpose: “To facilitate the use of electronic records and signatures in interstate or foreign commerce”

• Section 101(a):
  • IN GENERAL.—Notwithstanding any statute, regulation, or other rule of law (other than this title and title II), with respect to any transaction in or affecting interstate or foreign commerce—
    • (1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form; and
    • (2) a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation.
• Section 101(b): PRESERVATION OF RIGHTS AND OBLIGATIONS.—This title does not—

  • (1) limit, alter, or otherwise affect any requirement imposed by a statute, regulation, or rule of law relating to the rights and obligations of persons under such statute, regulation, or rule of law other than a requirement that contracts or other records be written, signed, or in nonelectronic form; or

  • (2) require any person to agree to use or accept electronic records or electronic signatures, other than a governmental agency with respect to a record other than a contract to which it is a party.

• ERISA §402(b)(3) is not changed except that it cannot require a manual signature
E-SIGN – Continued

• Allows storage of “original” documents in electronic form (Section 101(d))

• Allows electronic notarization (recognized in IRS rules re QJSA)

• Numerous exceptions (family law, wills, etc.) but not ERISA

• Federal agency may interpret E-SIGN via regulation or guidance published in the Federal Register
E-SIGN – Continued

• **Definitions**
  
  • ELECTRONIC.—The term "electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.
  
  • ELECTRONIC RECORD.—The term "electronic record" means a contract or other record created, generated, sent, communicated, received, or stored by electronic means.
  
  • ELECTRONIC SIGNATURE.—The term "electronic signature" means an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.
E-SIGN – Continued

• House Report 106-341, Part 1 to E-SIGN
  • “Electronic signatures can range from simply typing a name at the end of an email message, to a digital signature to a unique biometric identifier such as a fingerprint or iris scan.”
  • “The Committee intends that the definition of electronic signature cover a broad range of electronic signature technologies that can be used to sign an electronic record. This includes, but is not limited to, digital signature technology, a personal identification number (PIN), biometric technologies (such as fingerprints, iris scans, or signature dynamics), and any new electronic signature technologies that may be developed or used in the future.”
Mr. GRAMM. It is my understanding that this act, for example, covers … all activities relating to employee benefit plans or any other type of tax-favored plan, annuity or account such as an IRA, a 403(b) annuity, or an education savings program, including all related tax and other required filings and reports. Is this correct?

Mr. ABRAHAM. Yes, and as a result, the act would apply to such activities as the execution of a prototype plan adoption agreement by an employer, the execution of an IRA application by an individual, and the waiver of a qualified joint and survivor annuity by a plan participant's spouse and the designation of any beneficiary in connection with any retirement, pension, or deferred compensation plan, IRA, qualified State tuition program, insurance or annuity contract, or agreement to transfer ownership upon the death of a party to a transaction.
E-SIGN – Continued

• E-SIGN pre-empts all state law to the extent state law is inconsistent with E-SIGN except the Uniform Electronic Transactions Act.

• Both Senate and House Committees recognized E-SIGN as a stop-gap measure until the Uniform Electronic Transactions Act was adopted by all states.
Uniform Electronic Transactions Act (UETA)

- Uniform Electronic Transactions Act (UETA) was drafted by the National Conference of Commissioners on Uniform State Laws
  - Can be found via web search or the link below:
  - Adopted by all 50 states except Washington, Illinois and New York
  - E-SIGN is the law in effect in Washington, Illinois and New York and UETA is the law in all other states
• Provisions of UETA

• Parties must agree to use electronic signatures. (Section 5)

• A record or signature may not be denied legal effect or enforceability solely because it is in electronic form. (Section 7)

• An electronic record or electronic signature is attributable to a person if it was the act of the person. The act of the person may be shown in any manner, including a showing of the efficacy of any security procedure applied to determine the person to which the electronic record or electronic signature was attributable. (Section 9)

• Definitions of Electronic, Electronic Record and Electronic Signature essentially the same as E-SIGN
UETA – Continued

• Drafting Comments - Electronic Signature

• This definition includes as an electronic signature the standard webpage “click through” process.

• A digital signature using public key encryption technology would qualify as an electronic signature, as would the mere inclusion of one’s name as a part of an e-mail message – so long as in each case the signer executed or adopted the symbol with the intent to sign.

• Illustration 2: A sends the following e-mail to B: “I hereby offer to buy 100 widgets for $1000, delivery next Tuesday. /s/ A.” B responds with the following e-mail: “I accept your offer to purchase 100 widgets for $1000, delivery next Tuesday. /s/ B.” ….. The transaction may not be denied legal effect solely because there is not a pen and ink “writing” or “signature”.
UETA – Continued

• Section 9 provides that the security procedures in place are evidence to determine the validity of an electronic signature.

• UETA definition of “security procedure”:
  
  • “Security procedure” means a procedure employed for the purpose of verifying that an electronic signature, record, or performance is that of a specific person…. The term includes a procedure that requires the use of algorithms or other codes, identifying words or numbers, encryption, or callback or other acknowledgment procedures.

• Drafting Comments:
  
  • A security procedure may be technologically very sophisticated, such as an asymmetric cryptographic system…. It may include the use of a mother’s maiden name or a personal identification number (PIN). Each of these examples is a method for confirming the identity of a person or accuracy of a message.
IRS Determination Letter Guidance

• Revenue Procedure 2011-49, Section 5.11
  • The signature requirement may be satisfied by an electronic signature that reliably authenticates and verifies the adoption of the adoption agreement, or restatement, amendment or modification thereof, by the employer.
  • Similar language for volume submitters
  • No guidance for non pre-approved plans
• Retirement Plan FAQs regarding the Determination Letter Process (#10)
  • Provide a statement from the master & prototype sponsor that the employer electronically signed the adoption agreement through a system that reliably authenticates and verifies the employer’s adoption of the adoption agreement. The statement must also indicate the date on which the employer electronically signed the adoption agreement.
  • As an alternative, the employer could submit dated correspondence from the master & prototype sponsor acknowledging receipt of the employer’s electronically signed adoption agreement. Other types of information may also be acceptable.
  • http://www.irs.gov/retirement/article/0,,id=97158,00.html
What’s a Practitioner To Do?

• E-SIGN/UETA Requires
  • Agreement
  • Signature
    • *An electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.*
    • *Any digital “X” such as “/s/ Joe Johnson”*
  • Security Procedure. Examples are:
    • *PIN*
    • *Mothers maiden name*
    • *Log-in/password*
What’s a Practitioner To Do?

- What’s wrong with using EFAST 2 procedures to sign a retirement plan document?
  - Signature
    - Signer enters a PIN
    - Could have been any electronic mark
  - Security
    - Signer only receives PIN after registering at DOL website
    - Also met via password-protected, third-party site – recognized in Treas. Reg. 1.401(a)-21 Ex 3
    - “In order to apply for a loan, Plan C requires a participant to enter the participant’s account number and PIN in order to preclude any person other than the participant from making the election.”

- EFAST 2 seems to work
Upcoming Webinars

- [https://www.ftwilliam.com/webinar.html](https://www.ftwilliam.com/webinar.html)
- Health Care Reform for Account-Based Welfare Plans: 9/11/12
- Form 5500 Software Refresher Course: 9/20/12
- Safe Harbor Plans: 9/26/12
- Detailed look at ftwilliam.com PPA document: TBA