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Gearing Up for EGTRRA Restatements

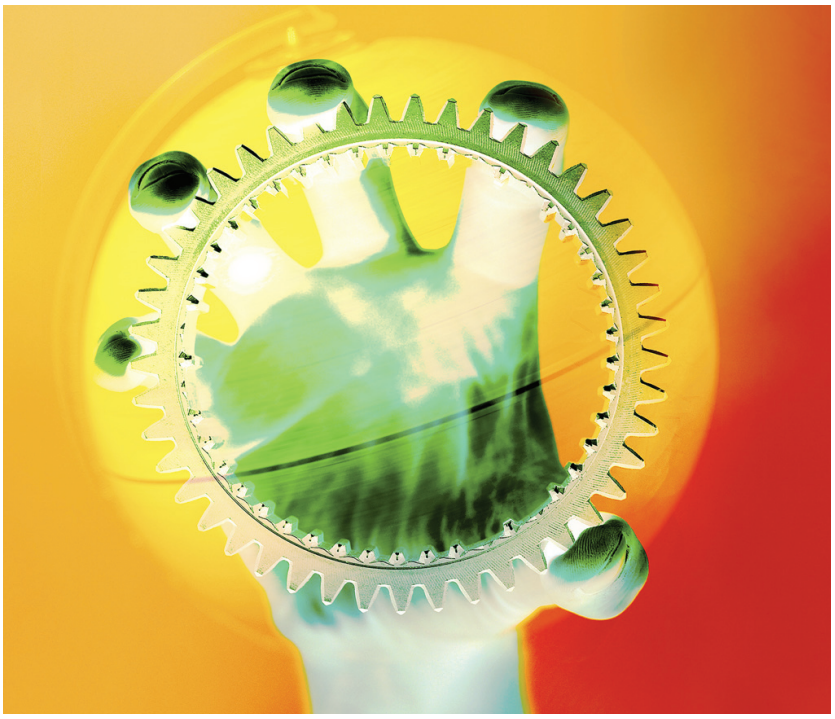
by Timothy M. McCutcheon, APM

In late 2005, the Internal Revenue Service (IRS) announced a new procedure that established regular restatement cycles for qualified retirement plans (Revenue Procedure 2005-66). The revenue procedure provided uniform six-year cycles for master and prototype and volume submitter plans (pre-approved plans) and a staggered five-year cycle for all other individually-designed plans.

The primary purpose of this new system was to better manage IRS resources. During the GUST restatements, the IRS was forced to transfer employees from plan audit and other functions to deal with the deluge of applications because all sponsors had the same filing deadline. Another purpose of the staggered deadlines was to ensure that plan sponsors would only need to apply for new determination letters once every six years if the sponsor adopted a pre-approved plan, or every five years if the sponsor adopted an individually-designed plan.

Earlier this year the IRS released Revenue Procedure 2007-44, which updated the 2005 procedure. Revenue Procedure 2007-44 clarified some questions from the prior revenue procedure but, as will be discussed later, some questions remain. Revenue Procedure 2007-44 is the source of most of the material discussed in this article.

All pre-approved defined contribution plans are on the same six-year cycle, and all pre-approved defined benefit plans are on a different six-year cycle. While individually-designed plans only need to be restated every five years, the deadline for restatement for a given individually-designed plan will generally be based on the last digit of the plan sponsor's employer identification number (EIN). It is important to note that the EIN of the plan sponsor is relevant only for an individually-designed plan. The EIN is *not* used to determine the amendment cycle for an employer who has adopted a pre-approved plan.



In order to attempt to limit confusion surrounding the use of terms, this article will refer to the sponsor of a pre-approved plan [such as a third party administrator (TPA) or a bank] as a "pre-approved sponsor" and the employer who ultimately adopts the plan as the "adopting employer."

Because pre-approved plans account for approximately 94% of all qualified retirement plans, this article will discuss the restatement procedures relating to such plans. The rules relating to the five-year cycle for individually-designed plans will only be discussed to illuminate some differences in the two programs.

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Six-year Cycle for Pre-approved Plans

As mentioned above, all pre-approved defined contribution plans are on the same six-year cycle. The IRS is currently reviewing the pre-approved defined contribution plans and anticipates that such review will be completed in early 2008. Once the review is completed, the IRS will release the favorable 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 or about April 1, 2008, and will close on or about March 31, 2010. Assuming the IRS holds to its anticipated schedule, all defined contribution pre-approved plans must be restated by March 31, 2010.

Pre-approved defined benefit plans are on a different six-year cycle. The deadline for submission of pre-approved plans by pre-approved sponsors (mass submitter and non-mass submitter) is January 31, 2008. The IRS anticipates it will review the submitted documents in the two-year period ending
January 31, 2010, and the two-year window for adopting employers to restate pre-approved defined benefit plans is anticipated to start after that date.

When a Pre-approved Plan Is Eligible for the Six-year Cycle

The first question is to determine whether a given plan is a pre-approved plan or an individually-designed plan. A plan is a pre-approved plan eligible for the six-year cycle if it falls within one of the four categories described below. Most pre-approved plans will be either a prior adopter or a new adopter.

A list of the requirements for a plan to be on the six-year cycle follows. Please note that the following is a summary and each category is subject to a number of terms and conditions. (Refer to IRS Revenue Procedure 2007-44 if you have any questions as to whether or not a plan is a pre-approved plan.)

- The employer is a prior adopter. An employer is a prior adopter if it has adopted, as of February 15, 2005 (or February 1, 2007, for a defined benefit plan), either:
  - (i) an existing pre-approved plan, or
  - (ii) an interim pre-approved plan (a new plan that is based on a prior pre-approved plan that is intended to comply with EGTRRA and the pre-approved plan sponsor timely submits the plan for approval).
- The employer is a new adopter. An employer is a new adopter if:
  - (i) the employer either maintains an individually-designed plan, or is not currently maintaining any qualified plan and has not maintained any such plan during the current five-year remedial amendment cycle applicable to the employer, and
  - (ii) the employer adopts either an existing pre-approved plan or an interim pre-approved plan before the end of the employer's five-year remedial amendment cycle.
- The employer is an intended adopter. An employer is an intended adopter if it currently maintains an individually-designed plan and it executes Form 8905, Certification of Intent to Adopt Pre-approved Plan, before the end of the employer's five-year remedial amendment cycle. The IRS has clarified that an employer who executes Form 8905 may adopt a different pre-approved plan with either the same or a different sponsor instead of the one designated on Form 8905.
- The employer is an adopter of a replacement plan. A replacement plan is a plan that is intended to replace a current pre-approved plan that is not submitted for an opinion or advisory letter because the plan is to be replaced by the plan of another sponsor or practitioner as a result of a change in business circumstances. For example, if TPA 1 is acquired by TPA 2 and TPA 1's clients will be adopting TPA 2's document, TPA 1's clients will be adopters of a replacement plan (providing all of the other requirements are met).

When a Pre-approved Plan Becomes an Individually-designed Plan

Any amendment to a pre-approved plan, including its adoption agreement (other than to change the choice of options), must be reviewed carefully to determine whether the plan stays on the six-year amendment cycle or ultimately transfers to the five-year cycle for individually-designed plans. 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 or the use of a prototype document in a multiple employer context) will result in the plan switching to the five-year staggered cycle. For a complete list of prohibited plans, please refer to Rev. Proc. 2005-16 Section 6.03 (prototype plans) and Section 16.02 (volume submitter plans).

Retain Eligibility for Six-year Cycle on Continuing Basis

Any amendment where the amendment does not convert the plan to a type not allowed in the pre-approved program (such as an ESOP or cash-balance defined benefit plan) will allow the plan to remain in the six-year cycle. 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. For example, an employer modifies a prototype plan to provide for an eligibility provision that is not offered in the prototype. Even though the plan is now an individually-designed plan, the six-year cycle continues to apply because the modification was not adding a provision that is prohibited in pre-approved plans.

Retain Temporary Eligibility for Six-year Cycle

An employer who subsequently: (i) adopts an individually-designed plan, or (ii) makes an amendment to convert the plan to a type not allowed in the pre-approved program and who adopts the amendment *more* than one year after the date the employer initially adopted the pre-approved plan, will cause its plan to ultimately

switch to the five-year cycle of an individually-designed 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 12 calendar months after the end of the six-year cycle, then the plan's five-year cycle is extended for 12 calendar months (and the following five-year cycle is shortened by one year).

Immediately Switch to Five-year Cycle

An employer who makes an amendment to a pre-approved plan to convert the plan to a type not allowed in the pre-approved program and who adopts the amendment *less* than one year after the date the employer initially adopted the pre-approved plan, will immediately cause its plan to be subject to the five-year cycle for individually-designed plans. In addition, 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. It is not entirely clear what type of amendment would cause the plan to be ineligible for the six-year cycle under the preceding sentence. Perhaps an extensive revision to the document or an amendment that incorporates by reference an Internal Revenue Code rule that is not allowed in the pre-approved program (*e.g.,* ADP/ACT test or Code Section 415 limitations) would be sufficient to convert the plan to the six-year cycle.

Form 8905

In order to help ensure that a given qualified plan remains in the six-year cycle, some practitioners have had all of their clients execute a Form 8905 (*i.e.*, to be an intended adopter). This approach was used because under the prior Revenue Procedure, the intended adopter category was much broader (*i.e.,* it could be used as an alternative means of being entitled to the six-year cycle). Conversely, other practitioners had decided that having all of their clients execute a Form 8905 might not be worth the effort to mail the forms and to deal with the inevitable client questions that result from any mass mailing to clients. However, due to changes made by Revenue Procedure 2007-44, it is not clear how useful Form 8905 will be. A strict reading of the Revenue Procedure would indicate that the form only applies where the adopting employer sponsors an individually-designed plan.

As with any new IRS procedure, no one knows yet what level of scrutiny the IRS will take when reviewing plan documents on audit or as a part of the determination letter application should such application be necessary or desirable. One possible hidden problem (and one reason to use Form 8905) is the fact that prototype plans may not be used in a multiple employer context. Unlike other impermissible plans that must be affirmatively amended to be an impermissible plan, a plan may become a multiple employer plan by virtue of a change in ownership of which the client contact person and the TPA may not be aware. For example, if an adopting employer who is a member of a controlled group adopts a prototype plan on July 1, 2011, and then as a result of a change in ownership the plan becomes a multiple employer plan on January 15, 2012, the plan would immediately be placed in a five-year cycle. The deadline for the five-year cycle for multiple employer plans of January 31, 2013 could pass before the document preparer is aware of the transaction. As indicated in the previous paragraph, a strict reading of the Revenue Procedure would indicate that a Form 8905 may not work in this situation—but it is currently the only step the adopting employer can take to avoid being considered a non-amender.

Cross-testing in EGTRRA Prototype Documents

The IRS had indicated in Rev. Proc. 2005-16 that cross-testing would be allowed in prototype plans. The IRS stated that "[t]his change will allow adopting employers of nonstandardized defined contribution M&P plans to adopt an allocation formula that is designed to be cross-tested for non-discrimination on the basis of equivalent benefits under §1.401(a)(4)-8." However, the IRS subsequently issued LRM #94 on cross-tested profit sharing plans that would appear to restrict, but not prohibit, the use of cross-testing in prototype plans. Please note that volume submitter plans may still implement cross-testing in largely the same manner as in the past, including the ability to have each participant be in his or her own group. The principal limiting factor for cross-testing in prototype plans is the fact that the number of NHCE groups is limited. However, the number of HCE groups is not limited and LRM #94 allows each HCE to be in his or her own group. The following chart illustrates the maximum number of NHCE groups.

Number of Eligible NHCEs	Maximum Number of NHCE Groups
1 to 2	1
3 to 8	2
9 to 11	3
12 to 19	4
20 to 29	5
30 or more	Number of eligible NHCEs divided by 5 (rounded down), but not to exceed 25

The LRM also requires that the grouping of eligible NHCEs be done in a reasonable manner and must reflect a reasonable classification in accordance with 1.410(b)-4(b) (without regard to the last sentence which provides that excluding an individual by name is deemed to be unreasonable).

New EPCU Audit Program for Pre-approved Plans

The IRS has informally announced that its Employee Plans Compliance Unit (EPCU) will begin an audit of pre-approved sponsors and adopting employers to make sure that pre-approved plans are in compliance with regard to plan operation and plan documentation. IRS apparently believes that some pre-approved plan sponsors are not keeping adopting employers informed of plan operational and plan document requirements. The IRS currently only has anecdotal evidence of these alleged problems and is using EPCU to gather a large amount of data relatively quickly. The EPCU is more "nimble" than the traditional audit function because it relies on mass mailing of questionnaires rather than an extensive multi-day audit.

If you or a client receives a letter from EPCU you should treat it with the same care and diligence as a regular audit request.

When to File for a Favorable Determination Letter

GUST Documents. The IRS is still accepting applications on Form 5307 for pre-approved GUST documents. The IRS will establish a cut-off date some time later this year, after which filings for pre-approved GUST documents will not be accepted.

EGTRRA Documents. The window for adopting employers of pre-approved defined contribution plans to restate for EGTRRA will open on or about April 1, 2008 and will close on or about March 31, 2010. It is anticipated that the filing window for adopting employers of pre-approved defined benefit plans to restate for EGTRRA will open on or about April 1, 2010, and will close on or about March 31, 2012.

Determination letter requests that are filed in the two-year window for pre-approved plans and that are filed in the applicable one-year window for individually-designed plans are considered to be "on-cycle" filings. Determination letter requests that are filed outside of the respective window are considered to be "off-cycle" filings.

It is not clear whether the IRS will allow adopting employers of pre-approved EGTRRA documents to make any "off-cycle" filings. For individually-designed plans subject to the five-year cycle, the IRS permits off-cycle filings. However, the off-cycle filings generally have a very low priority (*i.e.,* it could be years before a determination letter is issued). Due to concerns raised by practitioners, the new Revenue Procedure provides that off-cycle submissions in four circumstances (set forth below) will be treated as on-cycle submissions (and thus will not be subject to a low priority). A strict reading of the new Revenue Procedure would indicate that the four exceptions would only apply to individually-designed plans. However, it appears that the IRS may continue to accept certain off-cycle filings from adopters of pre-approved plans such as in the case of terminating plans filing on a Form 5310 or in the situation where an application must be made as a part of an EPCRS filing. Apparently no final decision has been made by the IRS as to what type of off-cycle filings may be made by adopters of pre-approved defined contribution plans after the two-year window closes in early 2010. A list of the off-cycle individually-designed plan filings that may be entitled to the same priority of review as on-cycle filings follows:

- A terminating plan;
- A new individually-designed plan whose next regular on-cycle submission period 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; or
- A sponsor of a plan may request that an off-cycle application be given the same priority review as an on-cycle application due to urgent business need. The IRS will consider such requests based on the facts and circumstances. However, it is expected that such an application will be given the same priority as an on-cycle application only in limited cases where exceptional circumstances exist.

In addition, any off-cycle (or on-cycle) filing must generally be made using a restated document. The IRS no longer permits filings on a Form 6406 for minor amendments.

Whether a Filing is Necessary

Optional Filing

An adopting employer may rely on a pre-approved sponsor's opinion/advisory letter if no changes have been made to the pre-approved document (both prototype and volume submitter). In this situation, an application for favorable determination letter on a Form 5307 is optional.

Generally speaking, a terminating plan must be restated for current law through the date of termination. However, it is not always clear which amendments the IRS would require for a terminating plan. The only way to ensure that a terminating plan is properly amended is to file for a favorable determination letter using Form 5310. Apart from the time and expense of preparing the Form 5310 filing, it should be noted that the IRS oftentimes conducts a mini audit of the plan during the review of a Form 5310 filing that may reach back more than ten years. If there are any "skeletons in the closet," you may wish to forego a Form 5310 filing.

Mandatory Filing—Plan Allowed in Pre-approved Program

A "mandatory" filing is one that is necessary because an adopting employer may not rely on the pre-approved plan's opinion/advisory letter. A determination letter is never technically mandatory unless it is required as a part of an EPCRS filing.

An adopting employer that adopts an amendment that modifies the pre-approved document where the amendment does not convert the plan to a type not allowed in the pre-approved program must file for a favorable determination letter in the two-year window that opens in early 2008 for defined contribution plans and in early 2010 for defined benefit plans.

If the modification is to a prototype document, the filing must be on a Form 5300 and the adopting employer must pay a minimum $1,000 filing fee (unless the adopting employer qualifies for an exemption for certain new plans). Procedures for filing Form 5300 are similar to the procedures set forth in section 9 in Rev. Proc. 2007-6 for volume submitter plans, except for the following:

- A list of modifications is not required to be included, and
- Any changes adopted by the adopting employer must be made in the form of an amendment and not incorporated into the underlying plan document.

If the modification is to a volume submitter document, the filing must be on a Form 5307 and the adopting employer must pay a minimum $300 filing fee.

Mandatory Filing—Plan Not Allowed in Pre-approved Program

However, an adopting employer that adopts an amendment that converts the plan to a type not allowed in the pre-approved program must file for a favorable determination letter on a Form 5300 with the minimum $1,000 filing fee. In addition, the pre-approved sponsor no longer has the authority to amend on behalf of the adopting employer. As explained earlier, the 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 filings for pre-approved sponsors appear to be even more limited. An off-cycle filing for a pre-approved sponsor is one made after the January 31, 2006 deadline for defined contribution plans and the January 31, 2008 deadline for defined benefit plans.

However, once a pre-approved sponsor submits an application for an opinion or advisory letter, it may not again make an off-cycle filing with regard to the same plan. In other words, a pre-approved sponsor may not revise the plan and resubmit for another opinion or advisory letter until the next six-year cycle opens.

However, the IRS will accept applications for new pre-approved plans created after the submission period for the applicable six-year cycle. The conditions for doing so are rather restrictive because the adopting employer does not automatically get retroactive reliance with the new pre-approved plan (*i.e.,* the plan may not be used to correct defective amendments made prior to the date the EGTRRA document is adopted). In order for the adopting employer to get retroactive reliance it must file for a favorable letter on Form 5300 with a $1,000 fee.

The IRS also allows an off-cycle filing for a pre-approved defined contribution sponsor who has a GUST opinion/advisory letter but missed the January 31, 2006 deadline for pre-approved sponsors. Informal discussions have indicated that a compliance fee for such a submission would most likely not be required.

Prototype vs. Volume Submitter

In the past, one of the primary advantages to using a prototype document as opposed to a volume submitter document was the ease of use, the ability for the pre-approved sponsor to amend the plan on the behalf of the adopting employer and the fact that in most cases the adopting employer could rely on the pre-approved plan's opinion letter.

However, now may be the time to consider using the volume submitter document as your default document as the three historical advantages of the prototype document are now available to the volume submitter document. In addition, the 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. However, if the adopting employer of a volume submitter plan is required to obtain a determination letter for any reason in order to maintain reliance on the advisory letter, the practitioner's authority to amend the plan on behalf of the adopting employer is conditioned on the plan receiving a favorable determination letter; and
- 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 continue to build upon the refinements and clarifications contained in Revenue Procedure 2007-44 and will take into account practitioner comments when considering modifications to the restatement procedures.

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