Heritage Pension Advisors, LLC

Plan Sponsor Insights

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A Quarterly Newsletter for Retirement Plan Sponsors

The Restatement Process: From EGTRRA to PPA

A qualified retirement plan must operate according to its plan document. Plan documents, however, are not static. There are ongoing legal and regulatory changes that must be incorporated.

To do this, the IRS requires that master, prototype, and volume submitter plans be rewritten, reviewed, and approved by the IRS every six years. Once approved, the plan sponsors who use them must adopt the new plan documents. This is called the restatement process. **Note:** Individually designed plans must be restated every five years.

IRS Approval and Plan Sponsor Reliance

IRS approval provides a plan sponsor with "reliance," which means the sponsor does not have to worry about an IRS auditor challenging the way the plan document is written. The plan must still be operated in compliance with its document, and plan sponsors adopting a prototype plan may not make any changes to the document (other than to select allowable elections or fill in blanks subject to the parameters provided). If they do, they will lose reliance.

The IRS issues approval in the form of an "opinion letter" for prototype plans and an "advisory letter" for volume submitter plans. Individually designed plans go through a different process and receive a "determination letter." **Note:** The IRS no longer issues determination letters for prototype plans and significantly limits their availability for volume submitter plans.

The EGTRRA Document

The preapproved defined contribution plan document currently in effect is the EGTRRA document, named for the Economic Growth and Tax Relief Reconciliation Act of 2001. The EGTRRA document incorporated relevant laws and regulations as of the end of 2004, including the final Section 401(k) and (m) regulations. The IRS approved the document by early 2008, and plan sponsors had from May 1, 2008, until April 30, 2010 (the "EGTRRA restatement period"), to adopt it.

The PPA Document

Since the EGTRRA document, guidance has been released and various laws have been enacted that affect qualified plans. These include the Pension Protection Act of 2006 (PPA); the final 415 regulations; the Heroes Earnings Assistance and Relief Tax (HEART) Act and the Worker, Retiree, and Employer Recovery Act (WRERA) of 2008; the Katrina Emergency Tax Relief Act of 2005 (KETRA); and the Gulf Opportunity Zone Act of 2005 (GOZA). This restatement cycle is known as the "PPA document restatement" because most of the document changes reflect PPA provisions.

Restatement Is Not Optional

PPA restatement is required. Failure to restate by the deadline is a plan disqualification issue that could have adverse tax repercussions for plan sponsors and participants. Sponsors may also be subject to penalties. The window for sponsors of preapproved defined contribution plans to adopt the PPA document opened on May 1, 2014, and will close on April 30, 2016.

Creating a New Plan Document

Firms that create plan documents dedicate significant resources to the process. The PPA plan document was

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created by taking the EGTRRA document and adding language based on the legislative changes that have become effective post-EGTRRA. Some of the legislative changes required plans to adopt "good faith" amendments to remain in compliance. These interim "snap-on" amendments have also been incorporated into the preapproved PPA document. In addition, document preparers must take care to prevent any prior plan provisions from being accidentally removed or changed as the plan's specifications are mapped onto the new document.

The Cumulative List

The IRS keeps track of the changing qualification requirements by publishing a cumulative list each year. The cumulative list simplifies the amendment and review process by establishing cutoff dates. Generally, any law and/or guidance issued after one cumulative list is published will automatically be included on the next list for the next restatement cycle. For example, the PPA plan document was written based on the cumulative list issued at the end of 2010 (IRS Notice 2010-90). Since there have been no major law changes since the 2010 Cumulative List, the PPA document does not have any required interim snap-on amendments. However, there are discretionary amendments (e.g., the optional in-plan Roth conversion).

Best Practices

When plan sponsors receive their new PPA document, they are urged to conduct a complete review of the document to:

1) Become acquainted with some of the new provisions that were not previously part of the EGTRRA document and
2) Ensure that the plan's prior provisions were correctly mapped over to the PPA document.

Any issues discovered during the review should be quickly addressed. **Note:** This is also the perfect time for sponsors to make any plan design changes they may be contemplating.

The document should be signed by an authorized officer of the plan sponsor, and plan participants and beneficiaries will need to be provided with an updated summary plan description (SPD).

After the restatement is completed, the PPA plan document supersedes the EGTRRA document. However, ERISA requires that plan sponsors retain *all* plan documents in a manner that can easily be retrieved for audit purposes, for proof of the plan's provisions, and for allocation and benefit purposes. It is common for auditors to request a copy of the prior document when a previous plan year is under examination.

Rollover Documentation Guidance

When individuals roll retirement accounts into their current employer's plan, the plan administrator is generally responsible for determining whether the rollover contribution is valid and can be accepted. The IRS recently released guidance to assist plan administrators with the task. The IRS introduced two methods (Revenue Ruling 2014-9) for verifying whether a rollover contribution to a qualified plan, such as a 401(k), is valid. **Note:** This only applies to plans that permit rollover contributions.

Verifying a Qualified Plan to Qualified Plan Rollover

A plan administrator of a profit sharing plan is attempting to determine if an incoming check representing an employee's direct rollover contribution from a prior employer is an acceptable rollover contribution. According to the IRS guidance, the plan administrator should access the prior plan sponsor's latest Form 5500 on the U.S. Department of Labor's publicly available Form 5500 database on the EFAST2 web page and look at line 8a to see if there is a Code 3C. Code 3C indicates the plan is *not* intended to be qualified under Code Section 401, 403, or 408. If there is no Code 3C, the plan administrator may reasonably conclude that the rollover is from a plan that is qualified. (On Form 5500-SF, the administrator must look on line 9a for Code 3C.)

In addition, the administrator must check the employee's date of birth to ensure the rollover does not include a required minimum distribution (RMD). RMDs may not be rolled over.

Verifying an IRA to Qualified Plan Rollover

An individual requests his or her balance in a traditional individual retirement account (IRA) be transferred directly to a profit sharing plan. If the administrator receives a check payable to the plan for the employee's benefit, and the check

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Form 5500 Series: New Penalty Relief Rules

The U.S. Department of Labor (DOL) has a correction program — the Delinquent Filer Voluntary Compliance (DFVC) program — for retirement plan sponsors that are late filing their Form 5500 or Form 5500-SF. Plans that file Form 5500-EZ are not eligible to participate in the DFVC, however, because those plans are not subject to Title I of ERISA and are therefore not governed by the DOL.

Absent a correction program, plans that are late filing Form 5500-EZ are subject to full IRS penalties. The IRS has been working on a late filer program for many years. At long last, here it is.

Pilot Program for Form 5500-EZ Filers

Revenue Procedure 2014-32 created a pilot correction program for Form 5500-EZ late filers that will run from June 2, 2014, to June 2, 2015. There is no penalty, fee, or other payment required under the pilot program. Form 5500-EZ filers must complete and submit the late form(s) for the appropriate year(s), carefully following the rules in the revenue procedure.

Relief for one-participant plans. The pilot program is available for one-participant plans: retirement plans that cover only the owner and the owner's spouse or one or more partners and their spouses. The term "partner" was modified by the Pension Protection Act of 2006 to include an individual who owns more than 2% of an S corporation. To be eligible to file Form 5500-EZ, the plans cannot provide benefits for other individuals (e.g., common law employees). Plans that provide benefits for other individuals must file either Form 5500 or Form 5500-SF.

Note: If the assets of a one-participant plan plus the assets of all other one-participant plans maintained by the same employer do not exceed $250,000, the plan does not have to file an annual Form 5500-EZ. However, a final Form 5500-EZ is required in the event of a plan termination, regardless of the size of the plan.

Relief for foreign plans. Some foreign plans may also be eligible for the pilot correction program. A foreign plan is a retirement plan maintained outside of the United States primarily for nonresident aliens. A plan is eligible for relief if the plan sponsor is a domestic or foreign employer with income derived from sources within the U.S. who deducts plan contributions on its U.S. income-tax return, including foreign subsidiaries of domestic employers.

Additional points. Plan sponsors submitting forms after the program's end date (June 2, 2015) will not be entitled to relief under the pilot program. However, they may request relief for "reasonable cause." The IRS is soliciting input from the public about replacing the pilot program with a permanent program after June 2, 2015. **Note:** There would be a fee associated with a permanent program, similar to the DFVC program.

If a plan sponsor already submitted a late filing and received a CP 283, *Penalty Charged on Your Form 5500 Return*, from the IRS before the guidance was issued, then a penalty has already been assessed and the relief provided under this revenue procedure is not available. In lieu of the relief, filers may continue to request relief from late filing penalties due to reasonable cause.

Changes for Form 5500 and 5500-SF Late Filers

Prior to the new IRS guidance in Notice 2014-35, if a plan sponsor that had not filed a Form 5500 or Form 5500-SF decided to correct the mistake under the DFVC program by filing the missing forms, paying the fee, and meeting the DFVC requirements for relief, then the DOL and the IRS would waive their late filing penalties.

The new guidance changes the criteria for obtaining IRS penalty relief. Now, in addition to filing under the DFVC program, late filers are required to file a Form 8955-SSA with the IRS for the year at issue. Form 8955-SSA was introduced in 2009 and replaces Schedule SSA. It is used to report participants who separate from service and leave a vested benefit in the plan.

At press time, there was no system for filing a delinquent Form 8955-SSA electronically. When a Form 8955-SSA is required as part of a DFVC filing, it must be filed on paper. The deadline is 30 calendar days after the DFVC filing is completed or December 31, 2014, whichever is later. This requirement applies to all DFVC filings submitted through EFAST2 (i.e., generally all filings for plan year 2009 and after).

Example: A DFVC filing for a delinquent 2009 and 2010 Form 5500 was filed in 2012, but information required on Form 8955-SSA was never filed. To qualify for penalty relief, the sponsor must file a paper Form 8955-SSA for the 2009 and 2010 plan years by December 31, 2014. The prudent course of action is to review any DFVC program submissions made after December 31, 2009, to see if a Form 8955-SSA was required. If it was, it's best to file one.

Recent Developments

IRA Bankruptcy Ruling

In a decision that is likely to impact future estate planning considerations with respect to retirement plan assets, the Supreme Court (the Court) decided, in a 9-0 ruling, that inherited individual retirement accounts (IRAs) are not eligible for federal bankruptcy protection (*Clark et ux. v. Rameker, Trustee, et al.*, No. 13-299). The Court held that inherited IRAs do not qualify as "retirement funds" within Section 522(b)(3)(C) of the federal Bankruptcy Code.

The Bankruptcy Abuse Protection Act of 2005 provides bankruptcy protection for assets held in IRAs. When an individual files for bankruptcy, retirement funds are one of the asset categories that can be exempt from the bankruptcy estate. In 2010, an individual and her spouse filed for federal bankruptcy protection, listing an inherited IRA worth roughly $300,000 as exempt from the bankruptcy estate. The bankruptcy trustee and unsecured creditors objected, claiming the inherited IRA was not considered "retirement funds" under the existing Code. The Bankruptcy Court agreed and disallowed the exemption. A District Court reversed, finding that the exemption covers any account that contained funds originally intended for retirement purposes.

The Court held there are three legal characteristics of inherited IRAs that provide evidence that they are not retirement funds. Individuals who have inherited IRAs:

1) May never invest additional money into the account.
2) Are required to receive distributions from these accounts regardless of their proximity to retirement.
3) May withdraw the entire account balance at any time and use the proceeds for any purpose without being subject to the 10% early withdrawal penalty.

A spouse beneficiary also has the option of rolling the deceased participant's funds to his or her own traditional IRA, which would then be exempt from bankruptcy.

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stub indicates the employee's traditional IRA is the check's source, the administrator can reasonably conclude it is an acceptable rollover.

The administrator will also want the employee to certify that the IRA distribution does not include any after-tax amounts (only pretax IRA amounts may be rolled into a qualified plan) and that he or she will not reach age 70½ (or older) by the end of the year in which the check is issued.

In cases where an employee is age 70½ or older in the year the check is issued, the plan administrator cannot conclude that RMD requirements are satisfied without obtaining additional information, such as a statement providing details that an RMD, if required, was satisfied prior to the rollover contribution check being issued. Keep in mind that if an individual has more than one traditional IRA, the RMD amounts from each IRA may be combined and the aggregated RMD amount may be taken from one (or more) IRAs.

Note: A Roth IRA may only be rolled into another Roth IRA.