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QRP Document Restatement

Cycle Three

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Learning Objectives

At the completion of this course you will be able to

- Review and understand QRP pre-approved document requirements
- Review and understand amendment types and deadlines
- Review and understand the remedial amendment cycle process
- Identify opportunities and next steps for you and your employer clients

Icon Legend


Individual Exercise


Group Exercise


Group Discussion


Example


Job Aid


Additional Information

Background

The IRS' pre-approved plan document program provides an economical and efficient means through which financial professionals can make retirement plans available to employers. At its core, the program has remained relatively static throughout the years. The IRS' qualified retirement plan (QRP) determination letter program, however, has become a much smaller component of the process of establishing and maintaining qualified plans, in particular, preapproved plans.

In 2005 the IRS released Revenue Procedure (Rev. Proc.) 2005-66. Before Rev. Proc. 2005-66, QRPs were required to be restated at random intervals determined by the IRS, usually after enactment of significant legislation. In between restatements, amendments were rarely required. Rev. Proc. 2005-66 (superseded by Rev. Proc. 2007-44 and Rev. Proc 2015-36) ushered in a new era of determination letter procedures, including plan amendment and restatement rules.

We are now on Cycle Three of the pre-approved document cycle under these rules. Rev. Proc. 2017-41 is the most recent update to the pre-approved plan document process.

This course reviews QRP plan document compliance requirements, with an emphasis on the Cycle Three pre-approved plan restatement.

Fundamental QRP Legal Concepts

Several fundamental concepts are key to understanding QRP amendments and restatements. Each of these fundamentals is described below.

Written Plan Document

Internal Revenue Code Section (IRC Sec.) 401(a) and ERISA Section 402(a) both require—in part—that QRPs be written arrangements. This requirement has been interpreted more and more literally in recent years, giving rise to the increased frequency of plan amendments. In addition to the written plan requirement, IRC Sec. 401(a) contains a complete list of requirements a retirement plan must satisfy to be qualified and subject to favorable tax treatment. Two main types of written plan documents are discussed throughout this course—pre-approved and individually designed plans. An individually designed plan is a unique plan written by a practitioner for each employer. Pre-approved plans have been drafted and submitted to the IRS for review and approval before adoption by an employer.

Pre-approved Plans

Before Cycle Three

Before the Cycle Three guidelines were released, pre-approved plan documents took several different forms.

- Prototype
- Master Trust
- Volume Submitter

A *prototype plan* is a pre-approved plan document that is made available by a document sponsor for adoption by individual employers and consists of an adoption agreement and a basic plan document. Prototype plans generally must be used by document sponsors and adopting employers exactly as they are approved by the IRS for the document provider (e.g., Ascensus). The IRS issues an *opinion letter*, a letter from the IRS saying that the form of the document has been reviewed and approved, for prototype plans.

A *master trust* plan is very similar to a prototype plan, except that instead of each employer establishing its own trust, employers on a shared master trust plan share a single trust. Like prototype plans, master trust plans receive opinion letters from the IRS.

A *volume submitter* plan is a pre-approved plan document targeted at more sophisticated plan sponsors. It allows for changes from the text submitted to the IRS and does not have to be adopted as a word-for-word version. The IRS permits document providers to include plan design features that are prohibited on prototype and master trust documents. Volume submitter plans are issued an *advisory opinion* from the IRS, saying that the form of the document has been reviewed and approved. The advisory opinion does not cover changes made by an adopter from the original text of the plan document.

Existing plans that use a pre-approved plan document must use one of these types of documents.

Cycle Three

Under Rev. Proc. 2017-41, prototype, master trust, and volume submitter plans have been combined into a single "pre-approved plan" type. The IRS will offer an opinion letter on the pre-approved plan to the document provider, and additional document sponsors can submit an identical document and apply for their own opinion letters. Under the new pre-approved plan type, the IRS will permit adopting employers to make minor customizations to the document just like the current volume submitter plan type.

Under the pre-approved program, the IRS provides two exceptions for document sponsors to make changes from the original document sent for pre-approval. The first exception is the option to add or delete optional provisions under what the IRS calls the "flexible plan" feature. The flexible plan feature allows document sponsors to choose to have its document provider add or delete certain investment or administrative features on its behalf, and have those changes included under the protection of the opinion letter.

Examples of optional provisions include

- loan provisions,
- insurance provisions, and
- participant direction of investments.

The second exception is known as a minor modification to the document. A minor modification is a change to the prototype document on behalf of a document sponsor that is reviewed and approved by the IRS. There is no list of what is and is not a minor modifier. Instead, the IRS determines on a case-by-case basis whether a change is minor, depending on whether the change requires an in-depth review before it can be approved.

Reliance

There are significant tax benefits provided to employers that maintain QRPs and the employees and beneficiaries who participate in them. Such benefits are the primary reason employers want assurance that the "form" of their QRPs (i.e., the written plan documents) satisfies the qualification requirements under IRC Sec. 401(a). This assurance is referred to as "reliance" and is one of the primary goals of employers that maintain QRPs. Employers who know their plan documents and follow the terms of their documents have a greater chance of operating their plans in compliance with the rules. With the rollout of standard restatement cycles that focus on plan establishment, restatement, and termination, the IRS has significantly reduced the frequency with which its approval is needed to maintain reliance. Even though the process of obtaining reliance varies depending on plan type, the importance of obtaining reliance begins the moment employers establish plans.

The means of obtaining reliance varies depending on the type of plan maintained by an employer. An employer that maintains an individually designed plan, for example, obtains reliance by applying for and receiving a determination letter from the IRS. In general, employers maintaining pre-approved plans can rely on the favorable IRS opinion letters they receive from their document providers as long as the plans are used on a word-for-word basis. Under the new pre-approved plan program, the reliance offered by the opinion letter only extends to the language as originally reviewed by the IRS.

Customizations are not included under the reliance of the opinion letter. As long as the changes are considered minor, the plan will still retain reliance as a pre-approved document. An employer that makes significant changes to the underlying plan document will be considered to have adopted an individually-designed document and will not be able to rely upon the opinion letter.

The Remedial Amendment Period

IRC Sec. 401(b) and the accompanying regulations provide a "remedial amendment period" (RAP) during which QRPs may be amended retroactively to comply with the plan qualification requirements.

The RAP applies when new plans are established, when existing plans are amended, or when there are changes to the qualification requirements. For example, if there is an error in or omission of a qualification requirement in a QRP established by an employer, IRC Sec. 401(b) permits the employer to retroactively amend the plan to correct the problem. Similarly, if an employer amends an existing plan or if the qualification requirements change (e.g., through the enactment of a new law), then the employer also may retroactively amend the plan to comply with the requirements.

In addition to the direct changes in the qualification requirements, the RAP includes amendments for changes that are "integral" to the qualification requirements. In general, the RAP begins on the date that a plan, amendment, or change to the qualification rules is effective and ends the later of

- the due date (including extensions) for filing the employer's income tax return for the taxable year that the plan, amendment, or change becomes effective; or
- the last day of the plan year that the plan, amendment, or change becomes effective.

Remedial Amendment Cycles

Using its authority under IRC Sec. 401(b), the IRS created a system of remedial amendment cycles (RACs) for QRPs that is currently described in Rev. Proc. 2016-37. The primary purpose of this system is to give structure to a previously random, ill-defined process and to level out the resource needs of the IRS, plan document providers, financial organizations/practitioners, and employers.

- Provides for the six-year restatement cycles for pre-approved plans (offset for defined contribution and defined benefit plans)
- Eliminates the five-year restatement cycle that previously applied to individually-designed plans
- Defines the remedial amendment adoption period for changes required for existing individually designed plans
- Extends the IRC Sec. 401(b) remedial amendment period for new plans

Pre-Approved Plans

To continue to have reliance, every pre-approved plan sponsor and employer must apply for a new opinion letter once every six years. Pre-approved defined contribution plans have different six-year RACs than pre-approved defined benefit plans. The same six-year cycle applies for all pre-approved defined contribution plans and a separate six-year cycle applies for all pre-approved defined benefit plans.

If the plan is…	Cycle Three begins on…	And ends on …
Defined Contribution	October 2, 2017	January 31, 2023
Defined Benefit	February 1, 2019	January 31, 2025

For Cycle Three defined contribution opinion letter submissions, the schedule would typically provide that the submission window run from February 1, 2017, to January 1, 2018. However, Rev. Proc. 2017-41 delayed the submission window so it would begin October 2, 2017, and end October 1, 2018. Rev. Proc. 2018-42 later extended the ending date to December 31, 2018.

The IRS stated that it will announce at a later date a delay in the defined benefit Cycle Three submission date.

Individually Designed Documents

Individually designed plans can request a determination letter to establish reliance on the plan document under limited circumstances. Under Rev. Proc. 2016-37, a plan sponsor can request a determination letter only if

- it is the initial plan qualification, as long as the plan has never received a favorable determination letter previously;
- the plan is terminating, but must be filed within 12 months of asset distribution; or
- the IRS has granted a special exception based on program capacity and other factors, such as significant law changes or new approaches to plan design.

Under Rev. Proc. 2019-20, the individually designed determination letter program was expanded for two special cases.

- From September 1, 2019, through August 31, 2020, an individually designed statutory hybrid plan can submit an application for a determination letter.
- On an ongoing basis, merged plans that result in a single individually designed plan (and meet specific requirements as outlined in Rev. Proc 2019-20) will be allowed to request a determination letter.

An overview of determination letters is provided in IRS Publication 794, *Favorable Determination Letter*, and the process of securing determination letters is provided in Rev. Proc. 2018-1. Details regarding when determination letters are required for reliance are provided in Rev. Proc. 2016-37.

Amendments

In the early years of the pre-approved program, the written plan requirement was generally considered satisfied if employers adopted a written QRP and restated every 6 to 10 years—when the IRS determined the rules had changed enough to warrant a restatement. Over time, the IRS and Treasury Department developed a more conservative view of the written plan requirement and began requiring plan documents to be updated on a pseudo-real time basis as described below. From time to time employers must amend their QRPs. Some changes occur because of business considerations, while others occur because of changes in law, regulations, or other forms of guidance. Regardless of whether an amendment is required or discretionary, there are several forms of amendments that may be available to prototype sponsors, practitioners, and employers.

Forms of IRS Amendments

Amendments come in several forms. First, the IRS sometimes provides "model" amendments. Model amendments are those that can be adopted as drafted and released by the IRS—they are considered a sort of "safe harbor" amendment. The IRS is moving away from model amendments due in part to its staffing constraints and the increasing variations in plan design. In place of model amendments, the IRS periodically issues sample amendment language that may be used by document providers and practitioners to draft amendments. The third form of amendment is simply a "good faith" amendment that is drafted by document providers and practitioners, often without any IRS assistance. In recent years, the IRS has mainly relied upon the use of good faith amendments.

Types of IRS Amendments

Mandatory Plan Amendments

When changes are made to the IRC Sec. 401(a) qualification requirements (or to rules that are integral to such requirements) that affect QRP plan documents, the adoption of an amendment generally is required.

For individually designed plans, the IRS will publish a "Required Amendments List" after October 1 of each year. Generally, existing plan sponsors must adopt any item placed on the Required Amendments List by the end of the second calendar year following the year the list was published. For example, plan amendments for items on the 2017 Required Amendments list, contained in Notice 2017-72, generally had to be adopted by December 31, 2019. Notice 2018-91, *2018 Required Amendments List for Qualified Retirement Plans*, noted there were no new qualifications items to list for 2018. Plans must be operationally compliant with any required amendment items as of their effective dates.

For pre-approved plans, an employer is considered to have timely adopted the amendment if it is adopted by the end of the remedial amendment period, unless a statutory provision or IRS-issued guidance sets a later deadline.

Examples of mandatory amendments include

- final cash balance/hybrid plan regulations, and
- hardship withdrawal regulations.

A mandatory amendment that is required to be completed before the next pre-approved document restatement cycle is often called an "interim amendment", because it happens in the interim period between restatement events.

Discretionary Plan Amendments

Discretionary amendments are amendments other than mandatory amendments. Usually, they are for legislative or regulatory changes that are not mandatory to adopt. A recent example is the regulatory update to the definition of qualified nonelective and qualified matching contributions.

Under Rev. Proc. 2016-37, an employer that amends its plan to offer or change an optional plan feature generally must amend its plan by the end of the plan year in which the amendment is effective.

Exceptions to Amendment Deadlines

The amendment deadlines described previously apply except when a statutory provision or IRS guidance requires an earlier deadline. Congress also often overrides the IRS' amendment deadlines to give the IRS time to issue guidance and to give employers ample time to understand the changes. For example, the Pension Protection Act (PPA) was enacted in 2006, but PPA amendments were not required until the end of employers' 2009 plan years. When laws change but Congress does not address amendment deadline extensions, the IRS can create exceptions in order to develop guidance and provide adequate time for employers to draft and execute amendments. An IRS extension is most often used when legislation becomes effective upon passage or shortly afterward.

Three additional exceptions exist based on the nature of an employer. For example, the amendment deadline for a governmental entity is generally the later of the deadline determined under the rules for a nongovernmental entity or the end of the next legislative session beginning after the amendment's effective date. This exception applies to both interim mandatory and discretionary amendments and prevents a governmental entity from having to hold special sessions to approve plan amendments. For purposes of interim amendments, the tax return deadline for tax-exempt entities is generally the later of the fifteenth day of the tenth month after the employer's tax year (calendar year if there is no tax year) or the deadline for filing IRS Form 990-T, *Exempt Organization Business Income Tax Return*. Finally, under the authority of IRC Sec. 401(b) and the accompanying regulations, the IRS can extend amendment deadlines as needed under various facts and circumstances.

Significant Changes to the Cycle Three Pre-approved Document Program

Following is a discussion of some of the more significant changes to the Cycle Three document program, as outlined in Rev. Proc 2017-41. This list is not exhaustive, but intended to highlight some key differences.

Nonstandardized adoption agreements may permit minor changes.

Previously, only volume submitter documents were allowed to make minor changes to the plan language and retain reliance. With Cycle Three, nonstandardized pre-approved documents can make minor changes. Those changes are not covered by the opinion letter, but still allow reliance for the rest of the plan document. Standardized adoption agreements must still be adopted word-for-word.

The IRS will no longer rule on a plan document's trust or custodial account language.

Document providers must remove embedded trust or custodial language from the plan documents. All plan documents will need to provide separate trust or custodial agreements.

Combining money purchase plan document with a 401(k) or profit sharing document.

Document providers may streamline their document offering by combining money purchase plan document language (that is not a target benefit plan) with 401(k) or profit sharing plan document language.

Employee Stock Ownership Plan (ESOP) language can be added to nonstandardized pre-approved plan documents.

This is the first cycle the IRS has permitted ESOP language on a pre-approved document.

Restatement Approaches

A document sponsor can take several different approaches to fulfilling its responsibility to restate plan documents every six years.

Mapping Approach

The most comprehensive approach involves mapping a plan's current adoption agreement selections from the PPA to the Cycle Three adoption agreement. Mapping assumes the document sponsor has access to copies of the current adoption agreement and amendments and can dedicate the resources needed with this approach. The pros and cons to mapping adoption agreement elections are as follows.

Pros

- High employer satisfaction
- More compliant document
- Option to obtain an electronic signature

Cons

- More labor intensive
- Must have copies of PPA adoption agreements
- Employers rely on the mapped document without a thorough review

Questionnaire Approach

If copies of current adoption agreements are not available, a questionnaire can be sent out to employers to gather plan provisions. The document sponsor then maps the answers from the questionnaire to an adoption agreement and mails a signature-ready document to the employer for execution. Because the questionnaire is not the legal document, it can be less formal in tone and language and thus less complicated for the employer to complete. The questionnaire can be designed with defaults to many of the questions that generally are answered the same by all employers to cut down on the work the employer needs to do. The questionnaire is also a great tool to obtain email addresses for electronic delivery of plan documents, saving on mailing costs. The pros and cons of a questionnaire approach are as follows.

Pros

- Easy for the employer to understand
- Flexibility in designing questionnaire
- No need for copies of existing adoption agreements
- Option to obtain an electronic signature

Cons

- Requires two responses from the employer
- Labor intensive
- Additional cost for second mailing

Default Provisions Approach

If the PPA adoption agreement is not available, or the document sponsor does not have the expertise or resources to map over provisions, an adoption agreement can be sent with default provisions selected. It can be difficult to prepare an adoption agreement completely with defaults. Certain provisions like the initial effective date, eligibility requirements, and money purchase pension contribution amount are often unique to each plan. However, by completing some of the adoption agreement with defaults, the process can be streamlined for the employer and result in fewer questions. The pros and cons to using the default approach are as follows.

Pros

- Document generation is simpler
- Fewer questions from employers

Cons

- Must determine and explain defaults
- Employers may not understand defaults and end up with a document that is not consistent with plan operations

Blank Document Approach

If resources are tight and prior adoption agreements are not available, a document sponsor can fulfill its responsibility by mailing out a blank adoption agreement to employers. The employers are then responsible for completing the adoption agreement and returning it to the document sponsor. At a minimum, a document sponsor should know the type of plan the employer maintains so the correct blank adoption agreement can be provided. The pros and cons to this approach are as follows.

Pros

- Document generation is simpler
- Limited liability for document sponsor

Cons

- Difficult for employer
- Lots of room for employer error
- Low response rate
- Generates lots of questions to a call center

Restatement Considerations

Budget

A restatement can be expensive for prototype sponsors. The chosen approach is the largest factor in determining cost. The document sponsor should weigh budget constraints against customer service and compliance. Some of the costs are hard to quantify, like the increase in call volume to call centers, while others are easy—such as postage. With an expected 2021 restatement deadline (although the IRS may delay), document sponsors have plenty of time to factor the restatement costs into upcoming budget planning.

Workflow and Procedures

If any approach other than the blank document approach is used, financial organizations must determine how adoption agreements and supporting documents will be generated. Many document providers offer document generation software. Document generation software often includes built in compliance logic, making it an ideal tool to create compliant documents. In addition, most software creates a customized Summary Plan Description (SPD), making it easy for the employer to fulfill its SPD notice requirement.

With the advances in technology since the last restatement, it makes sense to consider ways to streamline the process and reduce costs. If a financial organization has email addresses for employers, significant savings can be realized by eliminating printing and mailing costs. Many document sponsors now use electronic signature technology, and the response rate can dramatically increase versus requiring an employer to print, sign, and return an adoption agreement. Electronic signature technology only works with the mapping or questionnaire approach, or if a fillable document is provided electronically.

Tracking and Nonresponders

A document sponsor is responsible for providing a list of adopting employers to the IRS upon request. The best way to create an accurate list is to require signed adoption agreements from employers. A process should be developed to track responses and to review for accuracy and completeness. An adoption agreement commonly comes back without signatures.

Two methods exist for handling nonresponders. The first method involves reminder letters, which are highly recommended for nonresponders. A final reminder letter can be sent stating that the document sponsor assumes the employer executed the documents provided and future amendments and restatements will be provided to the employer by the document sponsor.

A second method is to resign as document sponsor to all nonresponders. A resignation letter should provide a resignation date at least 30 days in the future, giving the employer a chance to respond. The resignation letter should state that no future amendments will be provided and the plan is deemed to be on an individually designed document.

A document sponsor also is responsible for informing an adopting employer about the IRS Employee Plans Corrections Resolution System (EPCRS) if it has reason to believe the employer may be out of compliance. A resignation letter to a nonresponder is an appropriate place to provide this message. If resignation letters are sent, the document sponsor can remain custodian of the assets, but it should remove the plan from its document sponsor list.

Training

Regardless of the approach, staff must be trained. If a mapping or questionnaire approach is used, a thorough understanding of the both the PPA document and amendments and the new Cycle Three document is imperative. Training call center staff and financial advisors on the restatement process also is critical to a successful restatement.

Challenges for Financial Organizations

Profitability of QRP Business

Rising IRS fees, as well as other costs associated with being a document sponsor, makes the business proposition of sponsoring a plan document more complicated. Sponsors must consider the best business model to provide plan documents to their clients to ensure their program design is profitable.

Unresponsive Employers

To address compliance concerns that stem from nonresponsive employers, document sponsors should have a well-planned follow-up process to address unresponsive employers as part of the restatement operations plan. Using multiple contact methods, such as regular postal mail, email, and telephone can significantly improve employer response levels.

Terminating Plans

Some employers may ask if they need to restate their plan documents if they plan to terminate the plan before the signature deadline. Plans are required to adopt any required document amendments and restatements at plan termination. Not doing so is a compliance failure, and would need to be addressed through EPCRS.

Maintaining Market Share/Client Retention

A final challenge for financial organizations that sponsor plan documents is retaining their market share and their clients. Plan documents are a required element of maintaining a qualified plan, and employers rely heavily on their financial organizations to help maintain document compliance. A restatement window is a time when financial organizations proactively interact with their qualified plan clients. A well-executed and thoughtful restatement program can help maintain existing relationships and reputation. Conversely, failure to invest enough resources or planning into a document restatement event can be a retention risk.