Mergers & Acquisitions

Questions and Answers

1. Can you address items that need addressed when either of the plans merging is a safe harbor and the merger is not happening of the first day of a plan year?

There are a lot of considerations in this. But, here is the quick skinny (and a general recommendation not to merge until the beginning of the following year):

- *<u>Midyear merger of safe harbor match plan and safe harbor NEC plan</u>: cannot do this, because you cannot amend a plan to change types of SH formulas mid-year, and you cannot maintain two formulas in one plan, because no HCE can get a larger contribution at any level of comp/deferral than any similarly situated NHCE.*
- *<u>Midyear merger of two safe harbor match plans that have different formulas (i.e., only one is an enhanced match)</u>: can do this, but must use enhanced match formula and apply it to all employees in the merged plan retroactively to beginning of year (you cannot reduce the level of the match for anyone).*
- *<u>Midyear merger of safe harbor plan with nonsafe harbor plan</u>:*
    - *If the surviving plan is a safe harbor plan, you can only amend an existing nonsafe harbor plan to be a safe harbor plan mid-year if you did a "maybe" notice at the beginning of the year. So, the merging-in plan would have needed to have a maybe notice for that year for this merger to be okay. No "maybe" notice, no mid-year merger.*
    - *If the surviving plan is the nonsafe harbor plan, then the safe harbor merging plan can be converted to a nonsafe harbor plan only if that plan issued a "maybe not" notice at the beginning of the year. No "maybe not" notice, no midyear merger.*

So, in sum, the ability to merge safe harbor plans mid-year is dependent on the mid-year amendment rules and how the merger effectuates an amendment. If it's permissible, you can do it. If it's not permissible, you can't. But, either way, it's really a mess and I recommend you hold off to the beginning of the year.

2. With regard to a dentist that just got taken over by dental 365...They are classifying the purchase as good will? The old LLC remains...what type of transaction would this be?

Not sure from these facts (and I have no idea what dental 365 is). It's best that you contact your client. (But, for what it's worth, it sounds like an asset purchase.)

3. What are differences if you have a company buying only a division - in a stock sale?

A "division" is not a separate entity – it is part of a company. So, if an entity is buying the division, it is either buying the assets that make up that division or the division is really a wholly-owned subsidiary and the company is selling its stock. You need to discuss this with your client. (It is also possible that this is a complex M&A transaction under which the seller is first creating a subsidiary, moving the assets of the division into the subsidiary, and then selling the stock of the new subsidiary to the buyer.)

4. Would the merging of companies be applicable to non-profit companies?

I would believe so, but you should talk to the companies at issue (and maybe their lawyer) about how they are doing such a transaction.

5. In an asset purchase that leads to a partial plan termination do the employees that go to work for the buyer become 100% vested in the seller's Plan?

Only if the percentage of participants who terminate employment with the seller is sufficient to cause a partial plan termination (generally assumed to be 20%). For example, suppose you have a 1,000-person company and they sell a portion of the company to a buyer. In connection with that sale, 10 employees terminate employment and go to work for the buyer. That is not sufficient to cause a partial plan termination (i.e. it's only 1% of the employees), so there is no partial plan termination and no 100% vesting. If the number of employees leaving in connection with the sale is sufficient to cause a partial plan termination, those people (and likely others who terminated during that year and perhaps even the prior year) would be fully vested. Partial plan terminations are very fact-sensitive.

6. So during a merge: if Chuck had a plan and Ilene had a plan does chuck need to terminate his plan since everyone is now a part of the Ilene company

If the two companies merged, then the new surviving company sponsors both plans. If the company only wants to have one plan, it can terminate one (assuming that it is not a 401(k) plan that has problems with termination and pay out when there is an alternate defined contribution plan) or it can merge the two plans together. If the survivor wants to continue to cover the two sets of employees under different plans, it can do so, so long as it defines it properly in the two plans and can pass coverage after the transition period is over. (Because, in a merger, the employees of both companies end up working for the surviving company, the plans cannot differentiate between the two employee groups based on the employing company – there is only one left! So, you would need to amend the plan to say something like, "This plan covers the folks in the Kokomo facility" or "This plan covers the folks who sell hot dogs" or whatever differentiates the two groups.)

7. Two employers become a controlled group due to an acquisition. Each have their own plan. If they can pass the 410(b) coverage test in aggregate, are they still subject to BRF testing if their plan designs are different? What if one plan is a safe harbor plan design, the other non-safe harbor?

When you say, "They can pass 410(b) in the aggregate," I assume (1) you are talking about after the transition period; and (2) you mean that you are doing one coverage test that combines the plans and the employees, which also means that you are testing them together for nondiscrimination. In that case, it is impermissible to aggregate a safe harbor plan with a non-safe harbor plan (or, for that matter, one plan using current year testing and one plan using prior year testing) for nondiscrimination testing and coverage purposes. Assuming, however, that you have two plans that can be aggregated (such as, two plans that are current year tested), you would need to meet BRF testing in the aggregate. In other words, you need to treat the aggregated plans as if the provisions existed in one plan – and that means testing BRFs if they are different.

8. One of my plans had a participating employer inside the plan that was owned by the same owners as the plan sponsor. In June 2019 they sold that company and it spun off into its own plan as of 6/7/2019. Is there any rule that would allow the original Plan Sponsor to not have to

include the spun off company employees in the year end contribution calculations? The ERPS does have a year-end employment requirement.

Just to make sure I understand the question: this was originally a parent-subsidiary controlled group situation, and then the subsidiary was sold to an unrelated buyer. At that time, the portion of the plan covering the sold subsidiary was spun off.

Assuming those are the facts, I don't see a problem. You won't be giving contributions to the subsidiary employees, which creates a bunch of nonbenefiting employees in the Seller's remaining plan. But that is a coverage issue, and you have a "bye" from coverage testing due to the transition rule. You still need to pass nondiscrimination testing, however. The subsidiary spin-off will need to meet coverage and nondiscrimination testing after the spinoff.

9. What if the Target was a participating employer in the seller's plan and they ceased participation before the buyer could set up their own plan for the acquired employees? Is this a distributable event?

As long as the 3 requirements outlined in the slide deck are met – 1) sale to an unrelated company; 2) unrelated company does not adopt the plan or accept a spin-off or transfer of the plan's assets (rollovers are okay); and 3) the subsidiary is never a participating employer after the sale – distributions can be made to the employees of the sold subsidiary. From the facts you show in the question, if the target ceased being a participating employer before the transaction, distributions should be permitted. If they did not cease participation until later, there is no distributable event.

10. In an asset sale can the buyer assume sponsorship of Target plan and thus not payout to "terminated" target employees?

Yes.

11. If a company sells a division and the resulting spin-off is a brand new company with a brand new plan, does service with the selling company count for eligibility purposes if the new plan document is silent regarding prior service? When running ADP for the new plan, can we disaggregate based on all employees having a hire date of the transaction date? This effectively pushes all employees into the participants that do not meet statutory requirements category, effectively "passing" ADP.

Based on what you say above, the company sold assets, and the buyer created a new company to receive those assets. This is an asset sale, the employees are new employees to the buyer, and their date of hire is the date on which they started working for the buyer.

Be careful, though. It is also possible that the seller spun off a division into a new subsidiary and then sold the stock of the subsidiary. Those facts are different, and you might need to consider the original date of hire. The essence of the transaction is critical here, and you need to get the complete facts.

There is nothing that stops you from using the early entrant disaggregation. BUT, remember that everyone (including the HCEs) are early entrants. So, they are part of your early entrant group (and you're back to the functional equivalent of regular ADP testing). Alternatively, you can be use the testing option where you can ignore the NHCE early entrants and only test the HCE early entrants and the balance of the plan … and since, in that circumstance, there is no "balance of the plan" (i.e., everyone

was an early entrant), you have only HCEs in that part of the plan, and it will thus automatically fail testing.

12. In an asset sale where 100% of target employees are moving to the buyer, can those employees who choose to roll their balances to the buyer plan, be allowed to have the transfer done as a trust-to-trust transfer to streamline the process?

This is actually a more complex question than it sounds. A trust-to-trust transfer is really tantamount to a spinoff/merger of that part of the plan. Nothing prevents that from happening if it is properly documented, but it may change the nature of the accounts, future distribution rights for the participants, and even the right to full vesting. It also may affect the qualification of the recipient plan if the seller's plan has qualification failures that are uncorrected. This question illustrates some of the murkiness of the language of M&A.

In a vacuum analysis (i.e., where I'm not consulting with a client and I don't know the actual concerns of the parties), I would recommend either spinoff/merger or distributions, and not a combination of both.

13. For Non Discrimination Testing, can we discuss HCE determination with the different situations, specifically when the buying plan credits service? Thank you!

Sure. The answer is: everyone is a new hire for an asset transaction, so they are only HCEs in the year of acquisition if they own stock (i.e., they have no prior year comp at the buyer in the year of acquisition).

In a stock sale or merger, there is no guidance, so no one really knows the answer, and the analysis gets very complex. I have a recommendation if both the new parent and the acquired entity have their own plan: assume the HCEs after the transaction are the same folks who were HCEs for that year before the transaction. If the acquired folks are going to participate in the new parent's plan, then there is no clear answer. You can argue that there is no prior compensation in the "controlled group" so that no one is an HCE if they did not own stock in either the acquired entity before or the new parent either before or after the acquisition. Alternatively, you could argue that you need to consider the compensation history for the prior year in both companies (so someone who earned more than the HCE comp limit in the subsidiary would be an HCE after the acquisition). Not very satisfying, is it? The best answer: get a lawyer involved and make him/her take responsibility for this recommendation.

14. With a stock acquisition, is it the target's company's role to decide whether to terminate their prior plan? Or, is the buyer's responsibility to make the decision to terminate that target company's prior plan? Or, is it a little more convoluted than that just based on the % of stock bought in the transaction?

In real life, a smart buyer has a good lawyer and the buyer requires the pre-acquisition termination of the target's plan as a condition of the purchase. But, the legal answer to your question is that the right to keep or terminate a plan is subject to the plan sponsor. In a parent-subsidiary situation, the parent will exert its control over the subsidiary through its rights as the 100% or majority shareholder or its appointment of members of the Board of Directors of the subsidiary to make sure the subsidiary takes the action it wants it to take.

Having said all that, this is really a matter of company governance, a clearly legal consideration, and the lawyer should be involved.

15. In a stock sale, why wouldn't the target just terminate their plan prior to the sale of stock?

That's what normally happens. The problem is that (a) the selling shareholders won't independently think of this unless someone involved in the transaction is advising them, because all they are thinking about is life on the beach after the company sale; and (b) sometimes the selling shareholders don't want to do that, because they are afraid that the sale will fall through at the last minute, and then they will have a terminated plan but an ongoing company. As I mentioned in the presentation, if that happens, they can "re-adopt" the plan (or "unterminated it," I guess, which sounds very Alice-in-Wonderland-like), but they won't be able to unvest the people who were fully vested when they amended the plan to terminate. They just need to get over it.

16. Does this cover all testing or only coverage? I.e. you'll still need to combine for ADP testing? TH, etc.?

Not sure what you mean by "this," but assuming you are talking about the coverage transition period, it applies for coverage and 401(a)(26), but not for nondiscrimination testing. If the plans are not aggregated for nondiscrimination testing, then there is no real effect. Each plan must be tested separately, and coverage is a non-issue due to the transition period. But, if one or both plans is general-tested and you are using the average benefit test, then you need at some point to consider all benefits of all plans of the employer, and you will need to take into account the acquired plan at that point.

17. Can acquired employees be brought into buyer's plan prior to transition period or does it have to be on 12/31 of following plan year?

You can bring in the acquired employees at any time you want, assuming the plan at issue permits it. And, if the plan at issue requires people to enter prior to the end of the transition period, you must follow the terms of the plan.

18. Regarding Stock Sales & Termination of Seller's plan prior to closing, would you touch on IRC 401(k)(10)(A) and whether elective deferral contributions may not be distributed on account of the plan's termination if the ER maintains and alternate defined contribution plan.

If the plan is terminated while the company sponsors an alternate defined contribution plan, it cannot distribute 401(k)-type accounts, but must either maintain them in the plan or transfer them to the company's other DC plan. The regulations to this section provide that the existence of an alternate defined contribution plan is determined when the action to terminate occurs. So, if the plan is terminated prior to the stock sale, there is no alternate DC plan (unless the target sponsors another plan prior to the transaction), so the plan may be terminated and paid out without consideration of the buyer's plan's existence. However, make sure that the distribution happens promptly; the IRS's position is that if assets are not paid out within 1 year, the plan is presumed to be frozen and not terminated.

19. What if you have another acquisition before the end of the transition period applicable to the first acquisition? Do I have to bring the employees associated with the first transaction into the plan in order to satisfy the requirement that the plan satisfy 410(b) immediately before the transaction?

Great question. Any amendment of the plan that affects eligibility or coverage clearly terminates all transition periods. If you have a client that does successive transactions and wants to preserve the

transition period for later transactions, it needs to be proactive early in the process. What we recommend to our clients is to document the plan to say what will happen when acquisitions occur as a general provision, based on what the client desires. This requires the client to think it through ahead of time and have a "policy" for all transactions.

For example, the plan could be amended to say (in legal terms): when we acquire a company in a stock acquisition, if the number of employees in the company that become our employees is less than 50, those folks will enter this plan immediately after the transaction and we will credit service with the company we acquired in this plan; if there are 50 or more people who become our employees, they won't be eligible to enter until after the end of the transition period and we won't credit past service.

If this is done, when an acquisition occurs, no amendments are needed that can terminate transition periods; it's all dealt with in the plan document before the transaction takes place.

If your plan is preapproved, you might want to submit such language under a Form 5307 for a determination letter.

20. I missed the first few minutes. Don't know if you are mentioning H&W plans. Does the transition period apply to H&W plans?

Didn't discuss H&W. Sorry.

21. Can we amend to change trustee? It was a stock sale and the seller (also sole trustee) has skipped town. But we don't want to lose transition period.

That shouldn't affect your transition period. It's not a significant amendment, and it doesn't affect who is in the plan.

22. For an asset purchase, do you use the lookback year to determine HCE's?

In an asset purchase, the acquired folks are new employees. All you care about is their salary history with the buyer, and they have none.

23. Would we test on 12/31/2020 or start testing 1/1/2021

I assume this question is asking: if the transition period ends 12/31/2020, do we need to test on that date? The answer is "no," the "bye" from testing goes through that date, and you need to meet the coverage rules on 1/1/21.

24. What about a company starting up a brand new company. Same ownership as existing company. Is this covered by the transitional rule? Theresa Driver 02:33 PM

There's no transition rule for a new subsidiary that is not the result of an acquisition. Nice try, though.

25. So if I have an acquisition/merger on 11/5/2019, I don't have to run any 410b coverage testing as of 12/31/2019? Not the companies together or each company separately?

Assuming you met coverage prior to the transaction, you do not do any coverage testing for the period after the acquisition through the coverage transition period. So, no coverage testing for 12/31/19 or 12/31/20. Coverage must be met normally for the 2021 plan year.

26. I assume freezing the plan, especially DB plans, would be significant. Correct?

Yes. IMO. See Rev. Rul. 2004-11, which said that a significant change to a DB benefit formula terminates the transition period.

27. If the Seller's plan merges with the Buyers' plan during the transition period is this considered a significant amendment that precludes the use of the transition period?

Yes. IMO. But, not sure that you need the transition period if you've done this. After all, the new merged plan covers everyone.

28. what if it was an asset purchase and they remained in their plan BUT the EEs upon asset purchase they are paid by the new entity with that EIN - does the 410b transitional rule still apply - new entity meant - ER that acquired the company

You've got a bigger problem. Your plan is covering employees of an unrelated entity. If your plan does not permit this (i.e., if the buyer hasn't adopted the plan as a participating employer), you've got an exclusive benefit rule violation and a qualification failure to failing to follow the terms of the plan. If your plan does permit, you have a multiple employer plan.

Having said all that, assuming that you are operating within the confines of your plan and assuming that no amendment was made, you have the benefit of the transition period.

29. If the buyers plan can pass coverage testing each year, can the target plan maintain a separate plan for an indefinite period?

Yes. Absolutely. Of course, <u>both</u> the buyer's plan and the target plan must pass coverage separately.

30. What can we do BEFORE the official close date to avoid this after transition period?

Sorry, what is "this"? (Feel free to email me to elucidate.)

31. If, as you said, you only count Buyer employee service from the date they become "one" employer with Target, aren't all the Buyer's employees excludible for testing, so won't affect Target's coverage?

It depends on what the plans say. If the plan of the Buyer has immediate entry and the Buyer is excluding the acquired employees, there is a coverage issue. It might be alleviated by using early entrant testing and the like, but that doesn't mean that coverage isn't a consideration. The transition period solves that.

32. How do successor rules weave through this?

Not sure what the question means. Sorry. If you mean the "alternate defined contribution plan" rules in relation to terminating a 401(k) plan, please see Q&A 18.

33. I thought a frozen plan still has to meet coverage; so, I do not see how a Target Plan that fails coverage is helped by freezing it. (slide 45)

For DC plans, if no HCE benefits, you automatically meet coverage and nondiscrimination. See Treas. Reg. §1.410(b)-2(b)(6). If it's a DB plan, you need to deal with 401(a)(26), and freezing the plan might

not solve your problem. (BTW, when I refer in the speech and slides to the "Target Plan," I don't mean a target benefit plan; I mean the plan that was sponsored by the Target of the acquisition.)

34. During the IBM example (slide #43) where the Target (New Subsidiary) had immediate eligibility so the Buyer's employees were attributed with immediate eligibility as well, why did the 410...Transition Period not apply (employee populations kept separate)?

It did. But, the transition period solves a coverage problem that occurs when you exclude employees from a plan. It does <u>not</u> permit you to ignore the terms of the plan. So, if the Target's plan has immediate eligibility and covers all employees of the CG, the employees of the new parent would immediately enter the Target's plan, notwithstanding the transition period.

Look at this from the other side to see what the transition rule does (versus what it doesn't do). Say the Target plan <u>excluded</u> the new parent's employees. The Target plan after the transaction would cover very few employees and exclude a whole bunch of employees. Likely, that would fail coverage. The transition rule says: it's okay to ignore the coverage implications of the exclusion during the transition period.

35. An acquisition has already occurred. A Buyer wants to keep Target employees out of the Buyer plan as long as possible. Can the transition period be used even if excluding employees as a result an acquisition is not listed in the plan document?

You must follow the terms of the plan. If the plan would let the Target employees enter during the transition period, they must be permitted to enter. If the Buyer wants to keep the Target employees out and the plan does not so provide, the Buyer must amend its plan, and that amendment will terminate the transition period. That means that the Buyer will need to meet coverage with that exclusion in place.

So, the result is: you must amend the plan <u>prior to the acquisition</u> to exclude the Target employees if you want to preserve the transition period.

36. Not clear on stock sale and eligibility. If you could provide clarification on that.

You're not clear because the law is not clear. (I'm sure you feel much better knowing that …. Not!) It is not clear from the law whether you need to include service with the new subsidiary earned prior to the acquisition for purposes of the buyer's plan. So, if you interpret the law and the terms of the plan to indicate that the date of hire for purposes of the Buyer's plan is the date of the transaction, you would use that for eligibility. If, on the other hand, you interpret the law to give past service credit (or if the Buyer's plan document does so), then you would use the employees' actual date of hire with the company that was purchased.

If the new subsidiary independently adopts a plan, then prior service cannot be excluded for eligibility purposes under Code section 410(a).

37. Can the two plans be merged after transaction instead of terminating one of them?

Absolutely!

38. So could we terminate a plan effective 1/1/21 and sign today, and then have the acquisition occur 12/2019?

I assume you are asking if that would prevent you from having an "alternate defined contribution plan." I don't think so. I think the idea that you judge that on the date that the action is taken to terminate the plan would require the plan to be terminated as of that date, as well. But, check out Treas. Reg. 1.401(k)-1(d) and see if you disagree.

39. By terminating the target plan before the transaction, this means the effective date of the plan termination, correct? Not that all assets have to be distributed by this date.

Yes. The action to terminate, not the actual distribution.

40. What if the Target freezes the plan rather than terminates the plan prior to a stock purchase? Could they freeze it and then terminate it after the stock purchase is completed?

Yes, but they cannot pay out the 401(k)-type assets if there is another DC plan.

41. Company A sponsors a 401(k) plan. Company A is owned 100% by Mr. A. Dentist opened up a 2nd practice; separate company owned 100% by him. The 410(b)(c)(6) transition period wouldn't apply in this situation would it?

No. you need a transaction, such as an acquisition, disposition, or merger. On the other hand, new employees of the second practice would be new, so you can exclude them under the eligibility requirements.

42. In an asset sale, if the target was a participating employer in the seller's plan and they ceased participation before the buyer could set up their own plan for the acquired employees, is this a distributable event or can the seller keep the participants until the buyer sets up their plan and transfer everything over?

In an asset sale, you have a bona fide termination of employment by people who cease to work for the seller and go to work for the buyer. So, these folks are entitled to a distribution. The buyer cannot "keep" the benefits of those employees if they have a legal right to a distribution.

If the buyer wants to adopt the plan of the seller, it can do so and there is no longer a distributable event once that happens. Similarly, if the buyer is buying only a portion of the selling company's assets, the seller could spin off the portion of its plan containing the benefits of the employees who are going to work for the buyer, and the buyer could accept that spinoff into a new or existing plan. Again, that would forestall there being a distributable event for those employees.

43. I appreciate you talking about safe harbor 401(k) plan considerations during asset acquisitions, but could you discuss considerations for when we're in a mid-year merger situation?

See Q&A 1 above.

44. If we wish to terminate a target plan prior to a stock acquisition what is the notification requirements of the termination to the target participants. Sometimes seller does not want participants to know until sale consummated

If the plan is a pension plan, you have to do a §204(h) notice (unless the plan is already frozen). If it's a DB plan subject to the PBGC, you have the PBGC-related notices. But, assuming you are talking about a profit sharing or 401(k) plan, there is no advance notice requirement and you can wait until the sale is

consummated. Having said that, I'd have a notice about the plan ready to go so that the employees, who will already be freaked out by the company sale, are assuaged about concerns about the plan from the get-go.

45. Company A sponsors a 401(k) plan. Company A is owned 100% by Mr. A. Mr. A. starts another company in 2019 of which he also owns 100%. The 410(b)(6)(c) transition period wouldn't apply in this situation would it?

This is a repeat of Q&A-41.

46. What happens to the forfeiture account balance in a spin off situation? Does it get split based on the participants that spun off?

The spin-off documentation should address that. However, the buyer should remember that, if someone hasn't had a 5-year break in service and his account was forfeited and he returns to service, the account will need to be restored. So, if the forfeiture was left behind in the old plan, the buyer is going to have to put money in the plan to restore the amount to the employee. Of course, this happens anytime that forfeitures are used within the 5-year break period.

47. If a plan is in transition period and it contains a new comp. structure, can the new comp, portion of the plan be separately tested?

The only thing that changes in the transition period is that the coverage and 401(a)(26) testing is not needed. So, you can still cross-test. However, the average benefit portion of the cross-testing, assuming it is used, will need to include all plans of the employer and all benefits, including any acquired employees and plan.

48. What if a company that is part of a controlled group wants to start their own plan? Ownership percentages changed and there is no longer a controlled group. All employees were with the parent company and starting 1/1 some employees will be employed with the other company. Are these employees considered terminated with the parent company?

A change in ownership percentage of a company does not, in and of itself, create a distribution event. So, if a parent owns 85% of a subsidiary (making it a controlled group), and the parent sells 10% of the sub, there is no longer a controlled group. But, that is not a permissible distributable event in a 401(k) plan.

As noted in the presentation, if the entire interest of the sub is sold to an unrelated buyer, there is no transfer or spinoff of benefits from the seller's plan to the buyer's, and the participation of the subsidiary in the plan does not continue past the transaction, then there is a distributable event for the employees of the sold subsidiary.

49. Does that transition rule also apply to the 401(a)(4) test or just the 410(b) test? This is for cross-tested allocations.

See Q&A 16 above.

50. What if a company that is part of a controlled group ceases to exist? Can you force out all of these (former) employees no matter how large their balances are (i.e. over $5000)?

How does the company "ceasing to exist" happen? I would assume that those former employees have terminated employment. Force-outs of over $5,000 are not permitted unless the plan is terminated, in which case there is an exception that permits auto rollovers.

51. If the plan requires that a controlled group adopt via a participation agreement, is the newly acquired employer considered to be excluded from the plan until they sign a participation agreement?

Yes. But read the plan carefully.

52. When have a spin off - is it a new plan? Successor plan issues?

For what purpose? If you are spinning off the plan, there should be no right to distribution, so the "alternate defined contribution plan" issues for plan termination do not apply. Is that what you meant?

53. Is there a definition of "what in conjunction with" a transaction means. Can a plan stay open several months?

Sorry, not sure of the context of your question. Feel free to email me to elucidate.

54. In a stock transaction, can you amend a safe harbor plan to exclude the employees of a target company before the transaction without losing the safe harbor status?

Per Notice 2016-16, which contains the permissible mid-year changes to safe harbor plans, you can modify the eligibility provisions for employees who are not yet eligible to enter the plan.

55. Did you say a division sale is always a stock sale (not an asset sale)?

I said that it is an asset sale. See Q&A 3 above.

56. Company A purchased Company B during 2018. Their transition period is over on 12/31/2019. The plans for the two companies are planning on merging as of 1/1/2020. Is this acceptable, or should the merger happen by 12/31/2019?

1/1/20 is fine. You get transition period coverage through 12/31/19 and need to meet coverage rules as of 1/1/20. Note, however, that if you merge on 1/1, you need to do the final form 5500 for that year. On the other hand, there may be other ramifications to merging on 12/31/19, depending on the plan's terms.