

WHAT'S NEW? LATE RESTATEMENTS AND PRE-AUDIT OPPORTUNITIES



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Your Presenters Today

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Introduction

- The IRS issued two pieces of “soft” guidance that will be affecting many plans and practitioners over the next several months:
 - Guidance regarding how to handle late restatements
 - The new IRS Pre-Examination Compliance Program
- We will discuss both of these today ...



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You're Late, You're Late! The C3 Restatement Didn't Get Done by 7/31!



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Failure to Restate: The Way it Was

- On more than one occasion, the IRS said that the failure to timely restate a preapproved plan was a disqualifying document failure
 - IRS provided VCP submission kits
 - IRS offered umbrella Audit CAP correction with PPA restatement



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Failure to Restate: The Way it Was (cont.)

- In 2019, the IRS changed EPCRS to allow self-correction of many document failures
 - Some question about whether it would apply to late restatement



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IRS Changes Its Tune



- May 23 Employee Benefits News (EBN)
- Failure to timely restate isn't a disqualifying defect
 - The plan is no longer a preapproved plan



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IRS Changes Its Tune (cont.)

- Discussed the consequences in terms of:
 - Cycle 2 DB restatements due 7/31/2020
 - Cycle 1 403(b) restatements due 6/30/2020
- Didn't discuss late Cycle 3 DC restatements due 7/31/2022
 - But it's easy to extrapolate



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What Do You Mean It Isn't a Document Failure?

- EPCRS defines a document failure as a plan provision, or the absence of a provision, that on its face causes the plan to violate the Code.
 - Including the failure to timely adopt a required interim amendment
 - Such as the hardship amendment for 401(k) plans



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What Do You Mean It Isn't a Document Failure? (cont.)

- The Code requires that plan documents spell out what plans must do and restrict those things it cannot do
- The Code does not require periodic restatements
 - Restatements are no longer part of IDPs



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Example

- Employer has valid Cycle 2 (PPA) defined contribution volume submitter plan
 - Employer entitled to reliance
- Employer timely adopted all amendments to properly reflect plan operations
 - No reliance because the IRS didn't review
 - Assume the amendments themselves satisfied all requirements of the law



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Example (cont.)

- Employer doesn't sign a Cycle 3 document
- The Cycle 2 (PPA) document, with the various amendments, correctly states all things the plan must do and forbids those things the plan cannot do
- There is no document failure
 - No required correction
 - No VCP



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Am I Good? Not So Fast!

- The EBN says of a late DB restatement:
 - “If a restatement is not adopted by the Cycle 2 deadline, an employer's retirement plan is no longer a pre-approved plan...”
 - “The employer is no longer considered a prior adopter because the employer hasn't timely adopted a pre-approved plan for the cycle immediately preceding the opening of the current cycle.”



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Am I Good? Not So Fast! (cont.)

- The EBN says of a late DB restatement (cont.):
 - “The plan therefore is an individually designed plan, and as a result, the plan must be reviewed to determine if there are form defects”



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Defect?! What Kind of Defects?

- “Any prior interim and discretionary amendments made while the plan was a pre-approved plan will need to be reviewed and corrected if they do not meet the requirements of IRC 401(a).”
- “The rules for individually designed plans (Rev. Proc. 2016-37, section 5) would govern the remedial amendment period applicable for those, and all other required changes, to determine how far back the form error occurred if one exists.”



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Key Difference Between IDP and Preapproved

- Preapproved plan interim amendments:
 - Good faith standard
 - So long as amendment is timely and adopted in good faith with the intent of maintaining qualified status, remedial amendment period (RAP) extended to end of cycle
 - If employer determines reasonably in good faith that amendment is not required (but it actually is), that also is correctable within extended RAP



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Key Difference Between IDP and Preapproved (cont.)

- IDP Amendments
 - Perfection
 - Amendment must satisfy law as of the end of RAP



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End of RAP for IDPs (Non-governmental)

New Plan	Interim Amendments Required for Law Changes	Discretionary Amendments
<ul style="list-style-type: none">• 15th day of 10th month after end of first plan year• Could be longer depending on tax return deadline	<ul style="list-style-type: none">• December 31 of 2nd calendar year beginning after item appears on Required Amendments List	<ul style="list-style-type: none">• December 31 of 2nd calendar year beginning after amendment adopted (or, if later, effective)

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So What Does That Mean for Late Restatements?

- EBN: “Any prior interim and discretionary amendments made while the plan was a pre-approved plan will need to be reviewed and corrected if they do not meet the requirements of IRC 401(a).”

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So What Does That Mean for Late Restatements? (cont.)

- Example:
 - Brand X documents prepares a hardship amendment for a 401(k) plan
 - The amendment satisfies the good faith requirements that apply to preapproved plans
 - The amendment does not satisfy the requirements that apply to IDPs
 - Document failure that must be corrected



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How Far Back Do We Have to Go?

- Failure to timely restate DB:
 - Go back to Cycle 1 document
 - Based on 2006 Cumulative List
- Failure to timely restate DC:
 - Go back to Cycle 2 document
 - Based on 2010 Cumulative List
- That's when you last had reliance



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Where Do I Look?

Cumulative Lists

Year	IRS Notice	Cycle
2022	Notice 2022-08	Cycle 2 403(b)
2020	Notice 2020-14	Cycle 3 DB
2017	Notice 2017-37	Cycle 3 DC
2015	Notice 2015-84	(All since 2011)
2014	Notice 2014-77	
2013	Notice 2013-84	
2012	Notice 2012-76	Cycle 2 DB
2011	Notice 2011-97	
2010	Notice 2010-90	Cycle 2 DC
2009	Notice 2009-98	
2008	Notice 2008-108	
2007	Notice 2007-94	
2006	Notice 2007-3	Cycle 1 DB

Required Amendments Lists

Year	Deadline	Notice	Applies to
2021	12/31/2023	Notice 2021-64	DB
2020	12/31/2022	Notice 2020-83	Some DC/DB
2019	12/31/2021	Notice 2019-64	DC/DB/403(b)
2018	12/31/2020	Notice 2018-91	None
2017	12/31/2019	Notice 2017-72	DB
2016	12/31/2018	Notice 2016-80	Some DB

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What About 403(b) Plans?

- Cycle 1 is . . . Cycle 1
 - The prior document, the 2009 good faith document, has no reliance
 - It was prepared in good faith based on 2007 regs
 - Not necessarily including PPA, HEART, WRERA
- IRS didn't issue Cumulative Lists for 403(b) and didn't start including 403(b) on Required Amendments Lists until 2019



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403(b) Remedial Amendment Period

- Started 1/1/2010
 - 2009 was under good faith standard
- Ended June 30, 2020
- Many practitioners thought interim/discretionary amendments not needed:
 - Clean it up in RAP
- Late restatement missed the RAP



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Can I Just Restate Now?

- Sure; You can move from IDP to preapproved plan
- You'll have reliance from the date you restate
- So if your document is good, just restate now
 - But you have no reliance that it's "good"
- And if there are any prior failures, they are not corrected by the restatement
 - Except for EPCRS self-correction



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How Do I Correct a Document Failure?

- Adopt an amendment with the proper provisions
 - Retroactively effective
 - Potentially newly adopted preapproved plan (updated for interim amendments) could do it
 - Make sure the effective dates are correct
- Correctly show the date it is signed



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Can I Self-Correct?

- Default position: No. File under VCP
- Exception - You can self-correct if:
 1. Plan had practices and procedures reasonably designed to promote compliance
 2. Plan had prior letter (it probably did)



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Can I Self-Correct? (cont.)

3. Failure is corrected by the last day of the third plan year following the plan year for which the failure occurred
 - Example: CB regs were on 2017 Cumulative List
 - Amendment deadline 12/31/2019
 - Last day for calendar year plan to self-correct is 12/31/2022
4. Self-correction window ends if IRS audits plan:
Audit CAP



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What About the “Prior Letter”?

- EBN says for qualified plan:
 - As an individually designed plan, your plan would meet the Self Correction Program (SCP) requirement of a prior letter (Rev Proc 2021-30 section 5.01(4)). Reliance on the opinion or advisory letter from when the employer first adopted a pre-approved plan is equivalent to a determination letter (Rev Proc 2015-36, section 19.04).



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What About the “Prior Letter”? (cont.)

- EBN says for 403(b) plan:
 - Since a 403(b) plan could not apply for a determination letter, the prior letter requirement has a more lenient condition to meet. A 403(b) plan meets the favorable letter condition in Rev Proc 2021-30 section 4.03(1), if the employer had a written plan document in place in 2009, or if later, in the year the plan was first adopted.



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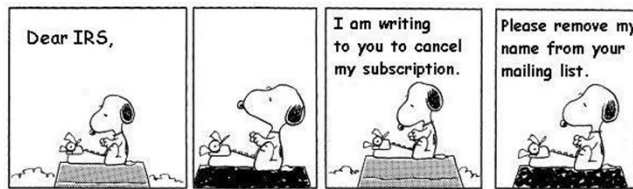
What Do I Tell Employers Who Didn't Sign Their Cycle 3 Restatement?

SIGN IT NOW!



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You're Being Examined by the IRS Let's Play Nice!



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Employee Benefits News 6/3/2022

- Announced a new pilot procedure for plan examinations
- Permits plan sponsors to:
 - Self-correct discovered failures after receipt of notice of examination
 - Make a pre-examination request for a closing agreement to resolve discovered failures under favorable terms



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Historically (and Normally)

- Once an examination notice is received, if there are qualification failures:
 - Can't self-correct significant failures
 - Can't submit failures under VCP
 - Can still self-correct insignificant operational
 - IRS will determine what is insignificant
 - Only solution for significant failures or failures that cannot be self-corrected: Audit CAP



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Features of Audit CAP

- IRS has the discretion to offer
 - It is not required to give a plan sponsor an opportunity to fix the problem on a favorable basis
 - Can simply move to close the case and disqualify the plan
- Usually, IRS offers to resolve the situation in Audit CAP



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Features of Audit CAP



- Audit CAP elements
 - IRS and plan sponsor agree how to correct failures
 - IRS agrees not to disqualify
 - Plan sponsor pays a negotiated sanction, based on several factors
 - For small employers, commonly in the \$15-20,000 range
 - Almost never below VCP filing fee



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IRS Examination Reality

- Even if a plan has no failures, an IRS examination is a time-consuming (and potentially expensive) process
 - Putting together the information requested
 - Meeting with the IRS examiner to answer questions
 - Discussing issues that are discovered
 - Correction process if needed



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IRS Stated Goals in New Program

- Reduce the Taxpayer burden of examination
- Reduce the IRS time spent on retirement plan examinations



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New Program Lifespan

- Began June 2022, indefinite ending date
- “Pilot” program, so will end at some point
- At end of the program, the IRS will:
 - Evaluate the program’s effectiveness
 - Determine if it is to be a permanent “part of our overall compliance strategy”



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New Program Advantage #1: The Examination May Be Avoidable

- In its notice of the potential examination, the IRS will choose one primary issue it wants to consider
 - E.g., Section 415 limitations
- If plan sponsor provides information to confirm compliance and the IRS agrees, it will issue a closing letter “with no further contact”



New Program Advantage #2 Self-Correction is Still An Option

- Suppose sponsor review of IRS primary issue reveals noncompliance
 - If self-correction is permitted by EPCRS, can do so
 - Provide IRS with description of failure and means and proof of self-correction
 - If IRS agrees that self-correction was permitted and method used was permissible, the IRS will issue a closing letter “with no further contact”

New Program Advantage #3

Kinder and Gentler IRS-Guided Correction

- Suppose sponsor review of IRS primary issue reveals noncompliance and self-correction is not an option
 - Reasons self-correction is not permitted:
 - Operational failure that is more than 3 years old
 - Document failure that is more than 3 years old
 - Demographic failure (discrimination, coverage, 401(a)(26) issue)
 - Other (e.g., failure to adopt plan initially)



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New Program Advantage #3 (cont.)

Kinder and Gentler IRS-Guided Correction

- Suppose sponsor review of IRS primary issue reveals noncompliance and self-correction is not an option
 - Solution: request a closing agreement
 - Instead of normal closing agreement sanction, IRS will use the VCP fees to determine the amount to be paid
 - Does that mean sanction will equal VCP fee?



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What Could Go Wrong?

- The IRS may conduct either a limited or a full scope examination if:
 - IRS disagrees with your self-correction method
 - You discover other compliance issues that you disclose to the IRS
 - You don't respond within the 90-day period
 - IRS will schedule an examination
 - Are you in worse shape than if the program didn't exist because you were nonresponsive?



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Substantiation of Compliance or Self-Correction

- Signed plan documents and amendments relating to year under examination
 - Shows form compliance
 - Shows that methods used complied with the plan
- Calculations reflecting compliance or correction
- Description of correction method
- As appropriate: allocation schedules, census reports, Forms W-2, n/d testing, coverage testing



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Substantiation of Compliance or Self-Correction (cont.)

- Calculations of earnings corrections
- Documentation of distributions made to affected participants
- “Any other documents or explanations you believe will help in our review.”



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Why Admit to Other Failures?

- Presumably get favorable sanction in requested Closing Agreement, even though this is outside the “primary issue.”
- Demonstrating culture of compliance can lead to leniency by IRS



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If You Have Questions About the IRS Request

- The notice provides a name and phone number to call



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Recommendations

- Use the 90-day period to:
 - Thoroughly review the primary issue
 - If issues are found, initiate self-correction if permitted
 - If there are any questions about how to correct, call the IRS and ask
 - Do a compliance review of the plan to search for other noncompliance to resolve under favorable terms



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Recommendations

- There is likely no value in refusing to cooperate
 - The IRS examination will be more thorough than the proposed review
 - The IRS may look askance at your failure to cooperate in the program
 - Look harder for problems
 - Recommend a higher than normal sanction for issues discovered



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Recommendations

- If you are a TPA or other practitioner:
 - Make sure that you don't guarantee (explicitly or implicitly) that your 90-day period compliance review will reveal everything the IRS could find
 - Use a special engagement letter supplement to document what you will and will not do



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Recommendations



- If you are a TPA or other practitioner:
 - If you do a compliance review, use techniques:
 - Have someone other than the person who did the work do the review
 - Have a checklist of what you're looking for (IRS audit guidelines may be a place to start)
 - If you need technical assistance, get help
 - If you don't have the bandwidth, get help



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A Few Reminders

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