

Time to Restate 401(k) Prototype and Volume Submitter Plans

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If your 401(k), or other defined contribution plan document is a prototype or volume submitter plan, then it may seem like just yesterday you were contacted by your document provider and asked to restate your plan document for Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA"). In fact, six years have passed since the EGTRRA restatement window opened, and it is now time for the latest restatement window, what is being referred to this time around as the Pension Protection Act of 2006 ("PPA") restatement window. In [Announcement 2014-16](#), the IRS announced the opening of the PPA restatement window for defined contribution, including 401(k), prototype and volume submitter plan documents. The PPA restatement documents must be adopted by April 30, 2016. Failure to complete the restatement by the April 30, 2016 deadline will jeopardize a plan's tax-qualified status. The IRS also announced that it will begin to accept individual determination letter applications for the PPA restatement documents from May 1, 2014, through April 30, 2016.

Pre-approved Plan 6-year Cycle

The IRS revamped the restatement timing and related remedial amendment system back in 2005. At that time, the IRS established a 6-year cycle for pre-approved plan documents such as prototype and volume submitter documents. The initial 6-year cycle ended on April 30, 2010, the deadline for plan sponsors using a prototype or volume submitter document to adopt an EGTRRA restatement. The second 6-year cycle is now in full swing. It began with the provider's submission of prototype and volume submitter documents to the IRS for new opinion or advisory letters between February 1, 2011 and April 2, 2012. In [Announcement 2014-16](#), the IRS notified practitioners and sponsors that those opinion and advisory letters would be issued on March 31, 2014, or soon thereafter. As a result, plan sponsors utilizing pre-approved plan documents can begin to adopt the PPA restatements, and beginning on May 1, 2014, those plan sponsors can submit individual determination letter applications for such documents if they choose to do so.

Determination Letter Applications for Pre-Approved Plans

In recent years, the IRS limited the categories of pre-approved plan documents that can be submitted for an individual determination letter on Form 5307. If your plan uses a standardized or nonstandardized prototype document, the plan may not apply for an individual determination letter but instead can rely on the prototype document's IRS opinion letter. If your plan uses a volume submitter document that has been modified, but not so extensively as to be considered

an individually designed plan document, you may apply for an individual determination letter for the plan using Form 5307. The Form 5307 can be submitted at any time from May 1, 2014 through April 30, 2016.

PPA Restatement Changes

Since the IRS approved the EGTRRA restatements in 2007, several pieces of legislation and regulations issued by the IRS have required amendments to pre-approved plan documents. These amendments, referred to as "interim amendments", were previously required to be adopted at various deadlines and addressed the following legislation and regulations:

- Final 415 Treasury regulations, the Katrina Emergency Tax Relief Act of 2005;
- The Gulf Opportunity Zone Act of 2005, the PPA;
- The Heroes Earnings Assistance and Tax Relief Act of 2008 ("HEART"); and
- The Worker, Retiree, and Employer Recovery Act of 2008 ("WRERA").

The new PPA restatements incorporate those amendments into the terms of the pre-approved plan documents.

PPA Restatement Process

We are aware that many providers of pre-approved documents are beginning to contact plan sponsors to notify them that the plans will be restated onto the new PPA restatement document. If you use a pre-approved document but have not been contacted by the provider of the pre-approved document, we suggest that you proactively contact them and ask when you can expect a copy of your restated plan document for review. You can also review the IRS [list of pre-approved plans](#) on the IRS website to determine if the IRS has issued an opinion or advisory letter for your pre-approved plan document. The IRS updates the list from time-to-time as the IRS issues additional letters.

While the PPA restatement document may look very similar to the EGTRRA restatement document, it is important that you review the new restatement in detail to ensure not only that the new document properly reflects the interim amendments' provisions, but also that the individual selections not affected by the interim amendments are properly drafted. While pre-approved plan sponsors make every effort to prepare restated documents accurately, errors can occur; for instance, if the plan sponsor's selections regarding categories of excluded employees are not carried over from one document to the next. In that case, employees that are not intended to be eligible to participate in a plan may inadvertently become eligible, potentially resulting in an operational error that can affect the plan's qualified status. In addition, if the plan sponsor would like to make changes in the plan design in conjunction with the restatement process, you should review the documents to confirm that the intended changes are properly implemented in the terms of the new document.

For assistance reviewing your PPA restatement, don't hesitate to contact any of the Trucker ♦ Huss attorneys.

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