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Client Alert

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RESTATEMENT WINDOW FOR IRS PRE-APPROVED DC PLANS IS CLOSING THIS MONTH

If you are an employer maintaining an Internal Revenue Service (“IRS”) pre-approved (formerly called a prototype or volume submitter) defined contribution (“DC”) plan, the window for its restatement will close on **July 31, 2022**. This applies to 401(k) plans, other profit-sharing plans, ESOPs and money purchase pension plans. As you may be aware, all such pre-approved plans are on a six-year cycle, during which the IRS reviews plan documents submitted by plan providers for compliance with certain required document changes, issues approval letters to the plan provider and opens a two-year window for adopting employers of that plan to adopt and sign the approved restatement of that plan. The signed restatement is required in order to maintain reliance on the approval letter for that plan whether or not the employer has made any substantive changes to its plan terms or whether or not any of the updated plan language even applies to the employer’s plan. So if you are an employer maintaining such a plan and have not signed a new restatement since August 1, 2020 (which was the opening of this current Cycle 3—or first post-PPA Cycle—for such DC plans), then you should promptly contact your plan provider or benefits counsel while there is still time.

A few technical points should be noted:

- The DC Cycle 3 restatement will only cover document changes required prior to February 1, 2017, which are listed in IRS Notice 2017-37 (so-called “2017 Cumulative List”). Thus, it will not cover, for example, the final hardship withdrawal rules nor the voluntary or mandatory provisions of the SECURE Act or the CARES Act. This lag in coverage is normal. These later provisions will need to be covered by interim amendments to the new restatement, presumably made available by the document provider after the IRS issues necessary guidance and/or model amendment language and before the separate deadlines for such interim amendments occur. For example, for the foregoing two Acts, a separate deadline of the end of the 2022 plan year currently exists, but the needed guidance/model language has not yet been issued or finalized.
- The trust under the plan will now have to be “unbundled” into a separate document that is no longer part of the approved plan itself.
- If you miss the July 31, 2022 deadline, all is not lost. The plan is not automatically disqualified—it just becomes an individually designed plan, which, however, can no longer rely on the pre-approved plan’s approval letter and might have different deadlines for required document provisions. The good news, though, is that the IRS has just posted on its website guidance (which is literally applicable to defined benefit restatements but can be reasonably assumed to equally apply to DC restatements) that the IRS’s three-year self-correction window (under their

comprehensive correction program known as EPCRS) will apply to these pre-approved plan restatements. This is helpful because it should avoid the need for a VCP (voluntary correction program) submission under EPCRS that would otherwise be required for a missed restatement. It should not, however, be a reason to avoid or delay otherwise timely compliance with the specified window because the plan will not have reliance on the pre-approved plan's approval letter after that date until the plan is in fact restated.

In sum, time is short for pre-approved DC plan sponsors to complete their Cycle 3 DC restatements and the maintenance of a plan's proper documentation is their responsibility. On the other hand, rushing into the adoption of a restatement that their TPA or recordkeeper might have hurriedly provided to meet the July 31, 2022 deadline without a proper review might be a bigger mistake. In pre-approved plan, just checking off (or leaving unchecked) the wrong box in an adoption agreement can be a very costly mistake, especially if it is not caught for some time (e.g., incorrect inclusion/exclusion of bonuses). It therefore really does behoove the plan sponsor, who is ultimately responsible for any such mistakes and often will not be able to look to the TPA or recordkeeper for indemnification, to seek the advice of and review by competent benefits counsel. It might also be a good time to review the plan terms to be sure they are in accord with the employer's current goals. Such competent benefit counsel advice is all the more important if the plan sponsor does find itself in a situation where it has missed the window period, since even under the self-correction program proper retroactive effective dates need to be assured.

If you are affected by these deadlines or issues, hopefully by now you have already taken action to comply with them. If not, or if you have any questions, we are available for assistance. You can call us at **508-785-0250** or email us at **zjskapars@skapars.com**.

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If you would like more information on these or other employee benefits issues, please contact us at 508-785-0250 or through email:
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