




WPBC 2010 Spring Summit


Plan Design Issues Specifically Crafted to Meet the Current Economic Conditions

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What we'll cover

- o Safe Harbor in distress
- o Late 401(k) Deposits
- o Interim Valuation for Pooled Accounts
- o Partial Termination issues
- o Defined Benefit Plans
- o Billing Issues



Safe Harbor 401(k)

- o If plan was 3% NEC, prior single option was plan termination.
- o Contrast to Match Safe Harbor
- o Contrast to 3% Supplemental Notice Safe Harbor

Unwinding Safe Harbor

- If the Plan is currently a 3% NEC Safe Harbor, there are only two ways to eliminate Employer contributions:
 1. Terminate the plan; or
 2. Suspend employer contributions, allowing deferrals to continue.

Unwinding Safe Harbor

- Termination has downsides:
 - Full vesting all sources
 - Successor plan rule
 - Administrative expense: termination and distribution fees
 - Not SH in final year
- May still keep SH status if termination is "for cause".
- Top heavy accruals cease upon termination

Unwinding Safe Harbor

- Suspending Safe Harbor Contributions:
 - Historically only available to SH Match.
 - Must give Notice
 - Allow Participants to change elections
 - Amend Plan
 - Fund to cessation date
 - Lose SH status: pass ADP/ACP test
 - Prorate 401(a)(17) compensation to exit date (match and NEC)

Unwinding Safe Harbor

- Suspension now also to 3% NEC SH
 - Prop. Regulation issued 5/18/09 (with interim reliance)
- Requires “substantial business hardship”
 - Apply waiver rules of IRC 412
 - Employer operating at loss
 - Substantial unemployment in industry
 - Plan won't continue unless plan change is made

Unwinding Safe Harbor

- Beware Top Heavy!
 - Must use full year comp for top heavy minimum
 - Could “cost” more than SH Match

Unwinding Safe Harbor

- Best TPA Practices:
 - Ensure admin staff are trained on options
 - Ensure clients know of potential “escape plans”
 - Appropriately charge for SH Notices (“free” Notices devalues them and drops issue below radar)
 - Consider Supplemental Notice approach

Partial Terminations

- Guidance
- Section 1.411(d) – 2
- Current Situations or food for thought
- Real Life Examples
- References

Guidance

- Historical Progression to Revenue Ruling 2007-43
 - 401 Regulations 1963
 - ERISA added 411(d)(3) 1974
 - Regulations issued in 1977

Section 1.411(d) - 2

- Requires nonforfeitability
 - Upon termination or partial termination
 - Upon complete discontinuance of contributions
- Requires allocations
 - In defined contribution plans not subject to 412
 - In defined benefit plans

Section 1.411(d) - 2

- o Defines Partial Termination
 - General Rule is Facts and Circumstances
 - Special Rule for freezing or curtailment in DB plan
 - Effects only the part of plan terminated

Section 1.411(d) - 2

- o Defines Complete Discontinuance
 - Facts and circumstances again
 - o Suspension or really discontinuance?
 - o Recurring and substantial
 - o Probability of future contributions
 - Time discontinuance deemed to occur
 - o Based on taxable year of employer

Current Situations

- o Freeze DB with Excess Assets
- o Amend PS to a 401K
 - o 401K Plan has already distributed
- o Full terminations of DB plans
 - Excess assets
 - Insufficient assets

Real Life Examples

- o Micro-market situations
- o Extension of time period over multiple plan years

References

Rev. Rul. 2007-43
Code Section 411(d)(3)
IRS Reg. §1.411(d)-(2)
IRS Reg. §1.401-(6)(b)(2)
Rev. Rul. 81-27
Rev. Rul. 73-284
Rev. Rul. 72-439

Interim Valuations

- o Persistence of "balance forward" plans in micro market
 - Ease of operation
 - Expense of daily valuation magnified with micro plans
 - Profit sharing plans
 - "One man" plan that adds employees

Interim Valuations

- Impact of Market Volatility
 - Up market: Plan “wins” by paying out under lower prior year valuation
 - Down market: Terminee wins by receiving payout under higher prior year valuation
- Does the plan document allow interim valuation?

Interim Valuations

- Who should the Fiduciary favor?
 - Not a 411(d)(6) issue
 - Could be a 401(a)(4) issue: discriminatory Benefit, Right or Feature
- What is the TPA’s obligation?
 - Must we offer when we “deem appropriate”?
 - Must we decline when obviously discriminatory?
 - Do we like the “F” word?

Interim Valuations

- Best TPA Practices
 - Install policy on interim valuations:
 - Distribution timing near year end
 - Distribution amount
 - Consistency of practice: across plans
 - Beware Discrimination
 - Ensure staff are trained to issue

Final Rules-Timing of Participant Contributions

- o Timing Requirements History
- o DOL Summary and Findings
- o Safe Harbor Rule
- o Plans Eligible for Safe Harbor Rule
- o Examples

Timing Requirements History

- o 1988 – 90 days
- o 1996 – 15th day of following month
- o 2-2008 – Proposed 7 day safe harbor
- o 1-2010 – Final 7 day safe harbor

DOL Summary and Findings

- o DOL reviewed 487 small plans
- o 90% of plans deposited within 7 days
 - Consistently or at least occasionally
 - Leaves 10% always outside of 7 days
- o DOL estimates additional 34.5 million in investment returns (8.3% average annual return)
- o Nearly 90% of VFPC applications are for delinquent participant contribution violations

Safe Harbor Rule

- What is 7th business day?
- What is a small plan?
 - When is the money deemed deposited?
 - Is the rule mandatory?

Plans Eligible for Safe Harbor Rule

- Fewer than 100 participants first day of plan year
- Applies to:
 - Small pension plans
 - Small welfare plans
 - SIMPLE IRAs
 - Salary Reduction SEPS

Correcting Timing Failures

- DOL Interest Calculator
- Form 5330 for Excise Tax
- 5500 Reporting
- Voluntary Fiduciary Correction Program

Defined Benefit Plans

- o Significant DB plan attrition based on economic downturn and PPA regulation
- o PPA Regulation impacts actuarial flexibility
- o AFTAP: What to do about missed AFTAPs and 436 Notices?

Defined Benefit Plans

- o PBGC AFN: Added complexity; to charge or not?
- o Valuation date: BOY or EOY?
- o DB EGTRRA: Déjà vu all over again
- o And yet...Small and Micro DB plans still very popular

Best TPA DB Practices

- o Carefully watch benefit formulas
- o Frequently advise on amending or "freezing" benefit formula (at least once a year, prior to 1000 hours).
- o Look hard to soften client funding difficulty (ask twice, think creative, etc.)
- o Be ready to deliver the "bad news"

Best TPA DB Practices

- o Review your internal staff technical training
- o Communicate well and often regarding regulatory and legal changes and your tpa response
- o Be ready to close new DB plans!

Fees for Services

- o Can we get paid if client goes BK?
- o Do we have to provide services if not paid?
- o Can we hold client records for non-payment?
- o Contractual versus negligence limitations
