



## **Flashpoint: Can We Self-Correct a Missed Restatement? You Bet! Well, Maybe...**

There has been a lot of confusion as to whether the Internal Revenue Service's ("IRS") most recent plan correction procedure (i.e., the Employee Plans Compliance Resolution System ("EPCRS"), Revenue Procedure 2021-30) permits a plan sponsor to self-correct a failure to restate the plan when required. Put more simply, if we miss the July 31, 2022, deadline for our Tricycle DC restatement, can we self-correct the failure by adopting the Tricycle document within three years? The IRS issued "soft guidance" in the form of its Employee Plans News email ("EBN"), to discuss this issue on May 23, 2022.

The answer to this question is: it's not quite that easy.

**The failure to timely adopt the Tricycle restatement results in a termination of the plan's ability to rely on the preapproval as a means of meeting current qualification requirements.**

There are two pieces to that statement.

1. The IRS does not regard failure to timely restate as a disqualifying defect in and of itself. This is a departure from positions the IRS has taken in the past.
2. Failure to timely restate transforms the preapproved plan into an individually designed plan ("IDP"). The reliance normally associated with a preapproved plan is gone.

Does that mean we can't self-correct the plan restatement failure? The EBN makes it clear that this is no longer the correct question to ask, since the missing restatement is not a qualification failure at all. The correct question is whether there are actual document failures that must be corrected.

### **How do we determine if there are document failures?**

To identify what provisions must be present in an IDP for that plan to meet these form qualification requirements, you need to refer to the Required Amendments Lists ("RALs") (the most recent of this is Rev. Proc. 2021-64) for the period since the last preapproved document restatement. The

RAL is an annual publication that lists the changes to the document requirements for IDPs that came into being during that year through legislation or regulation or other IRS guidance. Once an issue appears on the RAL, you have until the second December 31<sup>st</sup> following the date of such appearance to amend the plan to comply. Before 2016, these document modifications were identified in the annual Cumulative Lists of Changes (“CLCs”).

*Let’s use a concrete example.*

The requirement to amend a 401(k) plan to comply with the new hardship rules under the Bipartisan Budget Act of 2018 (i.e., the inability to suspend deferrals after a hardship distribution and the ability to distribute QNECs and QMACs) first appeared on the RAL for 2019 (Notice 2019-64). The last day for an IDP to timely adopt this amendment was the second December 31<sup>st</sup> following the publication of the RAL, in this case December 31, 2021.

Preapproved documents contain a “patch amendment” that needed to be adopted by December 31, 2021, to comply with these changes. If this was not done, or if the patch amendment was not sufficient, this becomes something that must be corrected to reclaim the plan’s qualification.

### **Why would the patch amendment not be sufficient?**

When an interim amendment is prepared for a preapproved plan, IRS procedures provide that it need only be a “good faith” attempt at compliance. The next restatement of the preapproved document happens within the remedial amendment period for the interim amendment, and provides an opportunity to remedy any deficiencies in the good faith amendment.

On the other hand, when a remedial amendment to an IDP is adopted to correct a document failure, that amendment must be fully compliant; simple good faith language is not sufficient. Therefore, we would recommend that a lawyer be consulted to examine or draft the proposed corrective amendment to ensure that it embodies all necessary elements that might not have been in the version prepared for the preapproved plan. A similar concern applies to any discretionary amendments that were adopted.

It’s important to note this analysis goes back many years. The failure to timely adopt the Tricycle DC restatement, for example, means the plan was last able to rely on its PPA restatement, which was based on the 2010 Cumulative List. Your review of the RALs or CLCs should go back to 2010!

The ability to correct a document failure that may have been caused if your defined benefit plan was not restated by July 31, 2020, follows the same rules. If you review your pension plan and compare it to all relevant RALs and CLCs and find that the document, when treated as an IDP, is missing required changes, you must correct those failures to protect the plan’s qualification.

### **Okay, so can we just adopt the new preapproved document late and have that correct the amendment failure from 2021?**

No. When you adopt a new preapproved document outside the remedial amendment period, your ability to rely on the preapproval of that plan begins on the date of the restatement. During the time in between the date on which the plan ceased to be in compliance with the document requirements, and the date on which you adopt the preapproved document, the plan remains uncorrected. This taints the plan going forward. To repair this, the document failure must be

corrected for that interim period, which requires either self-correction or the IRS Voluntary Correction Program (VCP).

### **So, how do we correct for that interim period?**

You must first adopt or correct the necessary amendment, and that amendment must be fully compliant. It should be dated currently, but effective as of the time when it became required.

If the remedial amendment period for the interim amendment expired more than three years previously, it cannot be self-corrected (i.e., the self-correction period has expired). The only way to make the correction under EPCRS at that point is to go through VCP.

If, on the other hand, the amendment deadline passed fewer than three years ago, you can self-correct the failure to adopt (or other document defects) under EPCRS.

Once you have corrected interim amendment form failures, you can then adopt the preapproved document, and be back on the six-year cycle.

Incidentally, the EBN points out that the IRS views the prior adoption of a preapproved plan as equivalent to having a favorable determination letter for the plan. Having a favorable letter is a prerequisite to being able to self-correct.

The self-correction period expires if the IRS notifies the employer that the plan has been selected for audit. Therefore, it is important to make any needed corrections as soon as possible.

### **What if the Remedial Amendments Lists and Cumulative Lists of Changes (if applicable) contain no required changes that we haven't already made?**

If the plan document, viewed as an IDP, has all required provisions, and all of the plan's amendments were fully compliant, then the plan's qualification is in place. You can then adopt a preapproved document and reclaim the six-year cycle.

### **403(b) plans**

The above rules apply similarly to 403(b) plans, although there is no such thing as a favorable determination letter for a 403(b) plan. EPCRS provides that the "favorable determination letter" requirement is met if the 403(b) plan is in writing in 2009 (or when adopted, if later) or that the failure to have a written document has been previously corrected. If that is so, then the determination letter requirement is met, and the same correction timing rules discussed above apply.

The remedial amendment period for 403(b) plans, IDP or preapproved, ended 6/30/2020. Therefore, the plan is well within the three-year self-correction period.

### **Conclusion**

So, in sum, if your plan meets all the form requirements for qualification (or is corrected to do so through self-correction or VCP) when considered to be an IDP, you can restate the plan onto a new preapproved document. For example, a DC plan will meet the form requirements through July 31, 2022 (for a defined contribution plan) under the preapproved document; it will meet the form requirements after July 31, 2022, as an IDP (either because it contained all required

language or because you correct that document through EPCRS). And, it will meet the form requirements after you adopt a new preapproved document from that point forward.

That said, there is no substitute for the certainty that is provided with timely restatement. Defined contribution plan providers should strongly urge employers to sign restatements no later than the corresponding IRS deadline (i.e., July 31, 2022, for the Tricycle restatement) to avoid the potential uncertainty associated with a late restatement. Take this seriously even though corrections are available.



**FERENCZY**  
BENEFITS LAW CENTER

ERISA  
*We are your ^ solution™*

Ilene Ferenczy • [ilene@ferenczylaw.com](mailto:ilene@ferenczylaw.com) | Alison Cohen • [acohen@ferenczylaw.com](mailto:acohen@ferenczylaw.com)  
Adrienne Moore • [amoore@ferenczylaw.com](mailto:amoore@ferenczylaw.com) | Adriana Starr • [astarr@ferenczylaw.com](mailto:astarr@ferenczylaw.com)  
Tia Thornton • [tthornton@ferenczylaw.com](mailto:tthornton@ferenczylaw.com) | Leah Dean • [ldean@ferenczylaw.com](mailto:ldean@ferenczylaw.com)

---

2635 Century Parkway Suite 200, Atlanta, GA 30345  
T 404.320.1100 | F 404.320.1105 | [www.ferenczylaw.com](http://www.ferenczylaw.com)