



Pensions on PEACHTREE 2023



REPORTING BACK AND PLAN REDESIGN



Carolyn Cumbee, Esq., LL.M
Jason Douthit, Esq.
Lindsey Dolbeer, QKC

AGENDA

- Document Considerations
- Operational Impacts
- Plan Redesign
- Legal Points and Best Practices

Pensions on
PEACHTREE
2023

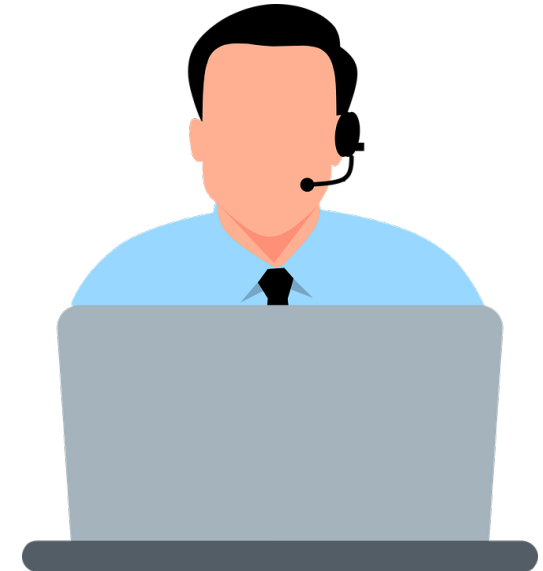


DOCUMENT CONSIDERATIONS



DOCUMENT CONSIDERATIONS

- Comprehensive Approach
 - Prepare Plan Comparison and Analysis – Identify:
 - Protected Benefits
 - Transaction-Related Updates
 - Other Provisional Variances
 - Hold Design Call with Client – Discuss:
 - All Above items - Confirm Changes and timing of each
 - Related-procedural updates for both client and acquired entities
 - Implement Updates



PROVISIONAL COMPARISON – EXAMPLE

Category		Client / Buyer's Plan	Acquisition / Merging Plan	Difference (formula)
Plan Info	Plan Name			
	Lead Employer Name			
	Participating Employers			
	Plan Yearend			
	Valuation Frequency			
Eligibility / Comp	Excluded Employees			
	Service Crediting Method			
	Eligibility Age & Service			
	Entry Dates			
	Other Employer Prior Service			
	Compensation Definition			
	Compensation Exclusions			
Deferrals	Roth Deferrals			
	Catch Ups			
	Deferral Limit			
	Automatic Enrollment			

Protected
May Be Protected



PROVISIONAL COMPARISON – EXAMPLE

Employer Contribution	Safe Harbor Contribution			
	Discretionary Matching			
	Match Limits			
	Match Determination Period			
	Match Allocation Conditions			
	Profit Sharing			
	PS Allocation			
	PS Allocation Conditions			
NRA/Vesting	Normal Retirement Age			
	Early Retirement Age			
	Vesting Service			
	Vesting Schedule (Percentage)			
	100% Vested Events			
Distributions	Hardship Distribution			
	In-Service Distributions			
	Distribution Timing			
	Form of Distribution			
	Dist Medium (Cash/In-Kind)			
	Force Out Limit			

Protected
May Be Protected



PROTECTED BENEFITS

- Anti-Cutback Rule – IRC 411(d)(6) says:
 - An amendment cannot reduce or eliminate an accrued benefit
 - Designed to protect certain plan benefits: “Protected Benefits”
- Protection only applies to current balance/accrued benefit; Future benefit accruals can be reduced or eliminated
 - Example: Amendment signed on 12/1/23 to change NRA from Age 60 to Age 65. NRA is a protected benefit. Change is more restrictive
 - The prior NRA of age 60 will continue to apply to balances prior to the amendment effective date. New NRA of age 65 will apply to future contributions as of 12/1/23

PROTECTED BENEFITS – EXAMPLES

- Protected Benefits (PB) include, but are not limited to:
 - Employer contribution allocation formula (if conditions already met)
 - Vesting percentage and acceleration
 - Normal Retirement Age
 - Early Retirement Age, only if the plan permits 100% vesting at ERA
 - In-Service distributions, excluding hardships
 - Distribution timing
 - Distribution medium (Cash vs. In-Kind)



PROTECTED BENEFITS – APPLICATION

- Can always make provision more generous to participants
- Two approaches when changing PB to more restrictive:
 - Apply new provision only to new participants (req. BRF testing), or
 - Apply only to new monies (req. separate sources per participant)
- Regardless of client decision, detail PB in Plan Document!
- Question:
 - How do you administer/track BRF testing each year to ensure it's not missed?



PROTECTED BENEFITS – APPLICATION (CONT.)

- More Restrictive PB: Incredibly challenging to administer/track
 - Even harder for the Client to administer correctly
- PB issues often arise as a result of M&A
 - Upon merging plan assets, recommend alignment to more generous provision so only one to administer, if possible – Discuss with Client
 - Example: Buyer's Plan NRA is Age 65; Seller's Plan NRA is Age 60
 - Age 60 protected for Seller's participants accrued benefits
 - Simplest solution: Amend Buyer's Plan NRA to Age 60 (one NRA for all)
 - Some circumstances may prevent aligning (i.e., adamant client)
 - Make sure it's clear and in writing who will administer!



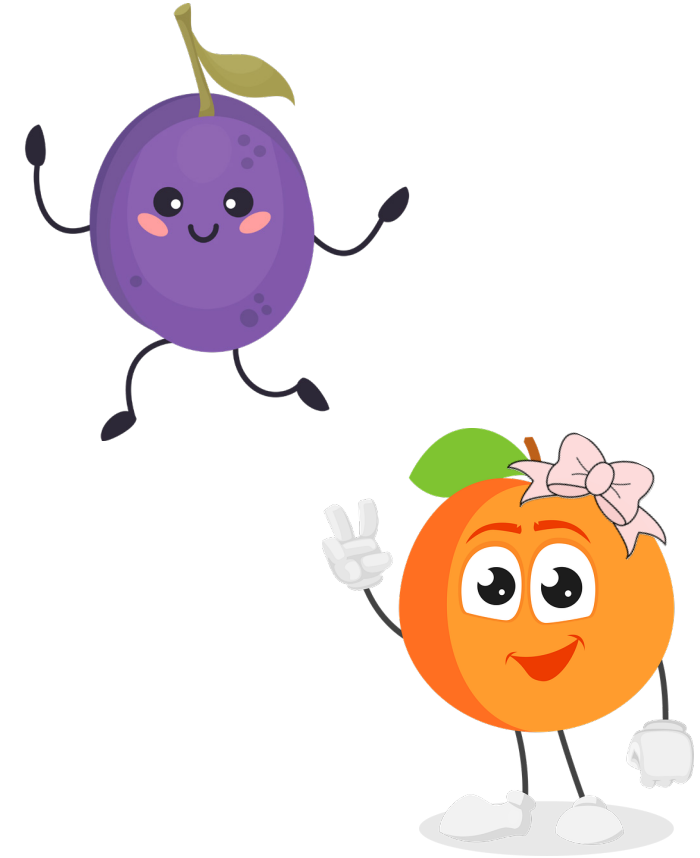
IDENTIFY PROTECTED BENEFITS

Protected
May Be Protected

Pensions on
PEACHTREE
2023

- Peach & Plum Plans Comparison – How many PB issues?

Category	Miss Peach Cobbler Plan	Plum Lucky Plan
Other Employer Prior Service	No	No
Match Determination Period	Plan Year	Plan Year
Match Allocation Conditions	Last Day	Last Day
Profit Sharing Allocation	Grouping - Each own class	Grouping - Each own class
PS Allocation Conditions	Last day & 1 YOS	None
Normal Retirement Age	Age 65	Age 62
Early Retirement Age	None	Age 55
Vesting	4 year graded	6 year graded
100% Vested Events	Death, Disability, NRA	Death, Disability, NRA, ERA
59.5 In-Service Distributions	No	Yes - 100% vested sources
NRA In-Service Distribution	Yes	Yes
Other In-Service Distributions	None	Upon disability
Distribution Timing	Immediate	Immediate
Cash/In-Kind	Cash Only	Cash or In-Kind
Distribution from RO account	Permitted at any time	Permitted at any time



IDENTIFY PROTECTED BENEFITS

Protected
May Be Protected

Pensions on
PEACHTREE
2023

- Peach & Mustard Plans Comparison – How many PB issues?

Category	Miss Peach Cobbler Plan	Plum Lucky Plan	Mustard Plan
Other Employer Prior Service	No	No	No
Match Determination Period	Plan Year	Plan Year	Plan Year
Match Allocation Conditions	Last Day	Last Day	1,000 Hours & Last Day
Profit Sharing Allocation	Grouping - Each own class	Grouping - Each own class	Pro Rata
PS Allocation Conditions	Last day & 1 YOS	None	None
Normal Retirement Age	Age 65	Age 62	Age 60
Early Retirement Age	None	Age 55	None
Vesting	4 year graded	6 year graded	4 year graded
100% Vested Events	Death, Disability, NRA	Death, Disability, NRA, ERA	Death, Disability, NRA
59.5 In-Service Distributions	No	Yes - 100% vested sources	No
NRA In-Service Distribution	Yes	Yes	Yes
Other In-Service Distributions	None	Upon disability	None
Distribution Timing	Immediate	Immediate	Immediate
Cash/In-Kind	Cash Only	Cash or In-Kind	Cash Only
Distribution from RO account	Permitted at any time	Permitted at any time	Permitted at any time

TRANSACTION-RELATED UPDATES

- Determine Transaction-related Updates
 - Look at facts and circumstances of transaction and discussion
 - Transaction date and type? Changes in payroll? Payroll check dates?
 - What are the terms of the client's plan document?
 - Client's intent for the acquired employee's participation in their plan?
 - Examples:
 - Addition of Participating Employer, Addition of Related Employer, Update to reflect Employer is in a Controlled Group/ASG
 - Counting Prior Service for Acquired Entity
 - One-Time Waiver of Eligibility Requirements



TRANSACTION-RELATED UPDATES – PEACH PLAN

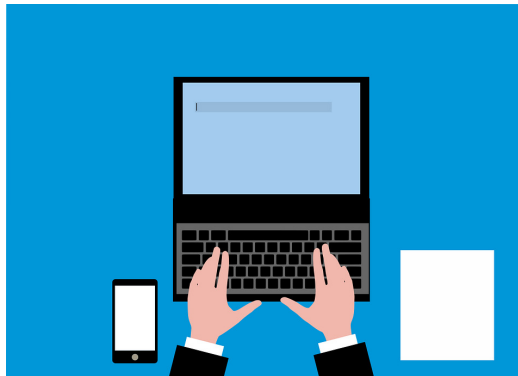
- Plan document recognizes prior service with acquired entities
 - What transaction-related updates are needed?

Category	Miss Peach Cobbler Document Provisions
In Controlled Group or ASG?	No
Related Employers	None
Participating Employers	None
Other Employer Prior Service	None
Merged Plans (may be in appendix)	None



OTHER VARIANCES

- Look at all other provisions to identify differences
 - How does the Client want to handle? Any updates they want to make?
 - Do those enrolling acquired EEs understand Buyer's Plan provisions?
- Consider potential procedural impacts
 - Payroll system setup, deferral change process/timing, deposit timing
 - Distribution and loan process changes
 - If missed, may result in omissions and errors down the road which can be costly to correct



OTHER VARIANCES – PEACH AND PLUM

Category	Miss Peach Cobbler Document Provisions	Plum Lucky Plan Document Provisions
Excluded Employees	Union, Leased	Union, NRAs, Interns
Entry Dates	Semi-Annual	Monthly
Compensation Exclusions	Pre-entry pay, bonus, fringe benefits	Pre-entry pay, post-severance pay
Roth Deferrals	Permitted	Not Permitted
Non-Zero Deferral Changes	Semi-Annual	Each Payroll Period
Hardship Distribution	Not Permitted	Permitted
Form of Distribution	Lump Sum, Partial for RMD	Lump Sum, Installments



OTHER VARIANCES – PEACH AND MUSTARD

Category	Miss Peach Cobbler Document Provisions	Mustard Plan Document Provisions
Excluded Employees	Union, Leased	Part-Time, Temp, Seasonal
Compensation Exclusions	Pre-entry pay, Bonus, Fringe benefits	None
Non-Zero Deferral Changes	Semi-Annual	Per Administrative Procedure
Max # of Loans	Maximum of 1 loan	Maximum of 5 loans
Life insurance	None	Yes



IMPLEMENTATION

- What changes might Miss Peach want to make?
 - Re-evaluate Plan and Client's Intent
 - Has their goal for the plan changed post-acquisition?
 - Do they intend to continue remitting employer contributions as is, or increase/decrease? Or if not remitting, do they intend to start?
- When can amendments be effective?
 - Accrued benefit considerations
 - Don't forget the Transition Period!



OPERATIONAL IMPACTS



TRANSITION PERIOD – IRC § 410(B)(6)(C)

- **(C) Special rules for certain dispositions or acquisitions**
 - **(i) In general** – If a person becomes, or ceases to be, a member of a group described in subsection (b), (c), (m), or (o) of section 414, then the requirements of this subsection shall be treated as having been met during the transition period with respect to any plan covering employees of such person or any other member of such group if —
 - (I) such requirements were met immediately before each such change, and
 - (II) the coverage under such plan is not significantly changed during the transition period (other than by reason of the change in members of a group) or such plan meets such other requirements as the Secretary may prescribe by regulation.

TRANSITION PERIOD – IRC § 410(B)(6)(C)

- **(C) Special rules for certain dispositions or acquisitions**
 - **(ii) Transition period** – For purposes of clause (i), the term "transition period" means the period —
 - (I) beginning on the date of the change in members of a group, and
 - (II) ending on the last day of the 1st plan year beginning after the date of such change.



TRANSITION PERIOD – TRANSLATION

- Jason's Shorthand Version of IRC § 410(b)(6)(C):
 - IF a “person” (business)
 - becomes part of or stops being part of a CG/ASG
 - and a plan of any employer involved in the transaction
 - was passing coverage immediately prior to the change
 - THEN the plan is deemed to pass coverage testing
 - until the end of the plan year that follows the transaction
 - UNLESS significant changes are made to the plan's coverage



TRANSITION PERIOD – TERMINATION

- Termination of the Transition Period
 - Ends on the last day of the plan year following the transaction
 - i.e., transaction date is February 1, 2022; Plan year-end is December 31
 - Transition Period ends December 31, 2023 (23 months)
 - i.e., transaction date is February 1, 2022; Plan year-end is March 31
 - Transition Period ends March 31, 2023 (13 months)



TRANSITION PERIOD – TERMINATION (CONT.)

- Termination of the Transition Period (cont.)
 - Significant changes to coverage causes early termination of TP
 - Would these amendments be significant?
 - include or exclude employees at a given location
 - Change from a uniform profit sharing rate to allocation groups
 - IRS interprets § 410(b)(6)(C) broadly with regard to significant changes to “coverage.”
 - See Rev. Rul. 2004-11



TRANSITION PERIOD – PLAN DOCUMENT

- Plan Document determines whether acquired employees are included or excluded during transition period for plan purposes
 - FIS Cycle 3 Basic Plan Document:

(c) "Code §410(b)(6)(C) transactions." Employees who became Employees as the result of a "Code §410(b)(6)(C) transaction" will, unless otherwise specified in the Adoption Agreement, only be Eligible Employees after the expiration of the transition period beginning on the date of the transaction and ending on the last day of the first Plan Year beginning after the date of the transaction. A

the Employees of a trade or business that is subject to the special rules set forth in Code §410(b)(6)(C). However, regardless of any election made in the Adoption Agreement, if a separate entity becomes an Affiliated Employer as the result of a "Code §410(b)(6)(C) transaction," then Employees of such separate entity will not be treated as Eligible Employees prior to the date the entity adopts the Plan as a Participating Employer or, with respect to a standardized Adoption Agreement, if earlier, the expiration of the transition period set forth above.



TRANSITION PERIOD – PLAN DOCUMENT (CONT.)

- FIS Cycle 3 Adoption Agreement:

- p. ☐ **Code §410(b)(6)(C) inclusion.** The Code §410(b)(6)(C) exclusion set forth in Plan Section 1.28 will not apply with respect to the following (such Employees must still satisfy any applicable eligibility conditions) (select one):
- ☐ All Employees.
 - ☐ Only the following Employees _____ (e.g., those who became Employees due to the acquisition of the assets of ABC Company)



TRANSITION PERIOD – PLAN DOCUMENT (CONT.)

- ASC's Cycle 3 Adoption Agreement:

3-2 EMPLOYEES OF AN EMPLOYER ACQUIRED AS PART OF A CODE §410(b)(6)(C) TRANSACTION. *[Note: For this purpose, a Code §410(b)(6)(C) transaction includes an asset sale, stock sale or other disposition or acquisition that results in the movement of Employees from one Employer to another Employer or causes a change in status as a Related Employer group.]*

- ☐ (a) An Employee acquired as part of a Code §410(b)(6)(C) transaction will become an Eligible Employee as of the date of the transaction (unless otherwise excluded under AA §3-1 or this AA §3-2). (See Section 2.02(d) of the Plan.)
- ☒ (b) Employees of an Employer acquired as part of a Code §410(b)(6)(C) transaction will not become an Eligible Employee until after the expiration of the transition period described in Code §410(b)(6)(C)(ii) (i.e., the period beginning on the date of the transaction and ending on the last day of the first Plan Year beginning after the date of the transaction). (See Section 2.02(d) of the Plan.)
- ☐ (c) All Employees of any Employer acquired as part of a Code §410(b)(6)(C) transaction are excluded and will NOT become an Eligible Employee upon the expiration of the transition period described in Code §410(b)(6)(C)(ii), unless otherwise provided elsewhere under the Plan.
- ☐ (d) The following Employees of acquired employers are excluded/included under the Plan:

[Note: This subsection may be used to provide for the inclusion or exclusion of Employees with respect to specific Employers at a time other than provided under this AA §3-2.]

- ☐ (e) Describe any special rules that apply for purposes of applying the rules under this AA §3-2: _____

TRANSITION PERIOD – PLAN DOCUMENT (CONT.)

- ASC's Cycle 3 Basic Plan Document:

(d) **Employees of an Employer acquired as part of a Code §410(b)(6)(C) transaction.** The Employer may designate under AA §3-2 to include/exclude Employees acquired as part of a Code §410(b)(6)(C) transaction. The Employer may elect under AA §3-2 that an Employee acquired as part of a Code §410(b)(6)(C) transaction will or will not become an Eligible Employee until after the expiration of the transition period described in Code §410(b)(6)(C)(ii) (i.e., the period beginning on the date of the transaction and ending on the last day of the first Plan Year beginning after the date of the transaction). For this purpose, a Code §410(b)(6)(C) transaction includes an asset sale, stock sale or other disposition or acquisition that results in the movement of Employees from one Employer to another Employer or causes a change in status as a Related Employer group. (See AA §4-5 for rules regarding the crediting of service with a Predecessor Employer to determine if an Employee has satisfied the Plan's minimum age and service conditions).

Regardless of any selection under AA §3-2, an Employee of a Related Employer will be eligible to participate under the Plan only if the Related Employer executes a Participating Employer Adoption Agreement as set forth in subsection (c) above.

TRANSITION PERIOD – OTHER CONSIDERATIONS

- Impact of an asset versus a stock sale
- Usually favorable to exclude acquired employees during transition period
- Service Crediting for stock sale – Check the plan document (AA and BPD) for recognition of service prior to the transaction
 - Relius – Recognizes all service with related entity
 - FT William – Does not automatically recognize service with related entity prior to the transaction
 - ASC – Recognizes all service with related entity

SAFE HARBOR PLAN

- 401(k) Safe Harbor Plan Issues
 - Mid-Year Acquisition
 - Mid-year termination is permissible for 410(b)(6)(C) transaction
 - Unable to aggregate for testing if:
 - Safe Harbor Plan and Non-Safe Harbor Plan
 - Differing Safe Harbor formulas



REDESIGN



COVERAGE TEST: PEACH PLAN 2024 PROJECTION

- Discretionary Match: 50% up to 6%, Plan Year; Last Day Required

Peach Plan	Total EEs	Total NHCEs	Bene NHCEs	Total HCEs	Bene HCEs
Peach	140	135	100	5	5
Plum	50	48	25	2	2
Mustard	57	53	39	4	4
Scarlett	38	36	20	1	1
Georgia Green	1	0	0	1	0
Peacock Pumps	40	35	0	5	0
	326	307	184	18	12
Peach Coverage				HCE %	66.67%
		NHCE %	59.93%		
Peach Plan Ratio Percentage			89.90%	PASS	



COVERAGE TEST: PEACOCK PLAN 2024 PROJECTION

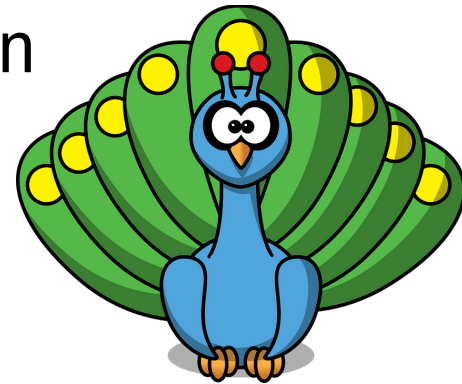
- Safe Harbor Basic Match, Each Payroll Period

Peacock Plan	Total EEs	Total NHCEs	Bene NHCEs	Total HCEs	Bene HCEs
Peach	140	135	0	5	0
Plum	50	48	0	2	0
Mustard	57	53	0	4	0
Scarlett	38	36	0	1	0
Georgia Green	1	0	0	1	0
Peacock Pumps	40	35	35	5	5
	326	307	35	18	5
Peacock Coverage				HCE %	27.78%
		NHCE %	11.40%		
Peacock Plan Ratio Percentage			41.04%	FAIL	



PEACOCK PLAN REDESIGN

- Peach and Peacock are related
 - Peach passes coverage; Peacock fails coverage
- Peacock is a safe harbor plan; Peach is not a safe harbor plan
 - Unable to aggregate for testing
- Possible Solutions for Peacock Plan
 - Exclude all HCEs from Peacock Plan (NHCEs only = Pass coverage)
 - Can permit Peacock's HCEs to participate in the Peach Plan
 - Align the Peacock plan and Peach plan provisions to aggregate for testing



SELECT COMPLIANCE TESTING ISSUES

- Coverage Testing
- General Nondiscrimination Testing
 - To aggregate or not to aggregate?
- ADP/ACP Testing
 - Current Year vs. Prior Year
 - Aggregation – Mandatory (multiple plans w/same HCE) vs Permissive
- Top-Heavy Testing



LEGAL CONSIDERATIONS



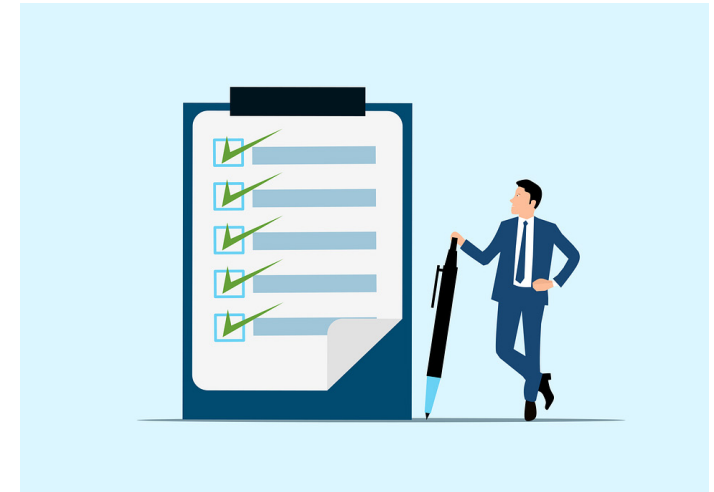
LEGAL CONSIDERATIONS: DUE DILIGENCE SERVICE

- Consider Offering a Due Diligence Service
 - Advanced Review of Target Plan (prior to transaction)
 - Charge a Fee
 - Have Client engage you for the service before getting started
 - Consider adding language to your Service Agreement
 - Even if in SA, discuss with client prior to commencing data collection
 - Should be clear: Not part of standard services – Separate fee applies
 - Consider disclaimer to client regarding professional opinion



LEGAL CONSIDERATIONS: ADVANCED REVIEW

- Target Plan Preliminary Review
 - List of all plans sponsored in last 6 years
 - If Pension Plan previously sponsored, what happened with it?
 - Union Employees - Do you or have you ever had any?
 - Have you ever contributed to or had an obligation to contribute to a multiemployer plan
 - If so, could have very costly withdrawal liability
 - Latest Year-end Trust Report



LEGAL CONSIDERATIONS: ADVANCED REVIEW (CONT.)

- Target Plan Preliminary Review (cont.)
 - Last 3 years of Form 5500s
 - Verify if any late deposits or other failures
 - Reconcile 5500 ending balance to Trust Report ending balance
 - Review receivables and forfeiture balance
 - Plan Documents - Latest restatement + all subsequent amendments
 - Review Provisions (safe harbor/non-safe harbor)
 - Verify applying compensation definition correctly



LEGAL CONSIDERATIONS: ADVANCED REVIEW (CONT.)

- Target Plan Preliminary Review
 - Compliance and Non-Discrimination Testing for Last 3 Years
 - Determine contributions calculated and review to Trust Report
 - Verify Receivables funded, check Forfeiture activity... (note: new regs)
 - If issues identified, correct prior to merging plan assets and expand review to additional prior years
 - Resources to consider implementing:
 - Pre-Acquisition Checklist – For clients to share with their M&A attorney
 - Due Diligence Checklist – For TPAs to use as a guide for review



LEGAL CONSIDERATIONS: TPA BEST PRACTICES

- How to get ahead of the M&A game?
- Best Practices:
 - Service Agreement Language – Protect Yourself:
 - Client obligation to notify TPA of M&A activity prior to transaction date
 - Due Diligence Review Service
 - If Client is sensitive about disclosure, offer Non-Disclosure Agreement
 - Alternatively, include NDA language in Service Agreement



LEGAL CONSIDERATIONS: TPA BEST PRACTICES (CONT.)

- Best Practices: (cont.)
 - *Ask, Ask, and Ask Again*
 - During onboarding/plan setup process
 - Reminder in annual census request/annual questionnaire
 - Reminder in annual valuation letter
 - Include in document restatement communications
 - For your serial buyers, check-in quarterly – automate the inquiry



QUESTIONS?



CONTACT INFORMATION



Carolyn M. Cumbee, Esq., LL.M.

Senior Associate Attorney



(678) 699-6612



ccumbee@ferenczylaw.com



Jason Douthit, Esq.

Senior Associate Attorney



(678) 699-6614



jdouthit@ferenczylaw.com



Lindsey Dolbeer, QKC

Consulting Team Co-Director



(678) 699-6609



ldolbeer@ferenczylaw.com



Feel free to contact
us with any questions!

Visit our website:
<https://ferenczylaw.com>

Sign up to receive
updates and articles!



THANK YOU TO OUR SPONSORS!

