MAKING GOOD DESIGNS WORK WITH BAD FACTS:
PLAN RESTRUCTURING AND PERMISSIVE AGGREGATION &
DISAGGREGATION AS DESIGN TOOLS

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General. .................................................................................................................................................. 23

A. Permissive Aggregation For Ratio Percentage And Nondiscriminatory
Classification Test. Employer May Designate Two Or More Separate Plans As A Single Plan.

1 Aggregated Single Plan. See Treas. Reg. §1.410(b)-7(d) for the permissive aggregation rules. For example, for purposes of applying the ratio percentage and nondiscriminatory classification tests, an employer may take two or more of its separate plans and treat them as a single plan. Once this election is made, the employer must carry this over to Code Sec. 401(a)(4) and treat those separate plans as a single plan for testing nondiscrimination in contributions and benefits Thus, an aggregated single plan must satisfy 401(a)(4) as one plan.

In applying the ratio percentage and nondiscriminatory classification tests, an employer may generally designate two or more separate plans as a single plan. But there are two exceptions to this rule. First, an employer can't elect to aggregate two or more plans if the disaggregation rules apply. Thus, an employer cannot elect to aggregate:

- portions of a plan that are mandatorily disaggregated under the rules discussed above,
- two or more separate plans that would be disaggregated under the mandatory disaggregation rules if they were portions of the same plan, or
- an ESOP with another ESOP, unless permitted under Reg §54.4975-11(e).

An employer may not combine the same plan with two or more other plans to form more than one single plan (“duplicative aggregation”). Reg §1.410(b)-7(d)(1) et seq..

Example (from RIA). Corpco maintains three plans—Plan A, Plan B, and Plan C. It can't form two single plans by aggregating Plans A and B and Plans A and C. But it can aggregate the plans to form one—and only one—of the following combinations: Plan ABC, Plans AB and C, Plans AC and B, or Plans A and BC.

A special rule generally permits—but doesn't require—an employer to aggregate the portions of two or more plans that benefit employees of the same qualified separate line of business. It doesn't matter whether the employer aggregates the portions of the same plans that benefit employees of the other qualified separate lines of business. Reg §1.410(b)-7(d)(4).

2 Benefits, Rights and Features. If an employer permissively aggregates two or more plans to satisfy the coverage requirements, dissimilar but unsubsidized QJSAs, QPSAs and other spousal death benefits will be deemed to satisfy
the nondiscrimination requirements, provided each plan meets the requirements of Code Sec. 401(a)(11). (Spousal death benefits payable under a defined contribution plan are considered unsubsidized for this purpose.) Any subsidized QJSA, QPSA or other spousal death benefit must separately satisfy the nondiscrimination requirements. Whether a benefit is subsidized is determined using any reasonable actuarial assumptions. Reg §1.401(a)(4)-4(d)(5).

3 Same Plan Year Requirement. An employer may not aggregate two or more plans and treat them as a single plan under the permissive aggregation rules unless they have the same plan year. Reg §1.410(b)-7(d)(5). The testing group consists of the plan being tested and all other plans of the employer that could be permissively aggregated under Reg §1.410(b)-7(d), relating to permissive aggregation for ratio percentage and nondiscriminatory classification purposes. However, the rule at Reg §1.410(b)-7(d)(5), which does not permit aggregation of two or more plans unless they have the same plan year, does not apply.

4 Disaggregation. But cannot aggregate mandatorily disaggregated plans, which are discussed below.

5 Top Heavy. Plan A is a Top Heavy plan. Plan B is not a Top Heavy plan and covers no key employees. Plan A and Plan B, when aggregated, pass 410 and 401(a)(4). Therefore, under Reg. 1.416-1; T-7, Plan A and Plan B form a permissive aggregation group. If the plans are aggregated for ADP/ACP testing, does this mean plan B must provide Top Heavy minimums if the combined plan AB is Top Heavy? No—see Reg. §1.416-1 Q. T-11. Only members of the required aggregation group must provide the top heavy benefits. As given above, these plans would not be part of a required aggregation group, even though they are being aggregated for ADP/ACP testing purposes.

6 Documentation Issues. What documentation is necessary to permissibly aggregate plans? Plan language is not a general precondition for aggregating plans for nondiscrimination testing purposes. However, language specifying the aggregated plans(s) may be required if the aggregation determines participants' benefits under the plan (e.g., top-heavy), as outlined above.

7 401(k). Two 401(k) plans (A and B) are permissibly aggregated. Before aggregation, plan A fails ADP/ACP testing but plan B passes ADP/ACP testing. After aggregation, the aggregated plan AB still fails ADP/ACP testing but the margin is smaller and one participant in plan B would require a refund if the plans were treated as one. Is this the case or are the refunds calculated for participants in plan A only, i.e., if plan A is aggregated with plan B, does this mean plan B is aggregated with plan A? The IRS has stated at an ASPA