

Employee Benefits and Executive Compensation Alert

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IRS Releases Updated Retirement Plan Correction Procedures

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The IRS recently released the long-awaited updated version of the Employee Plans Compliance Resolution System (EPCRS), Revenue Procedure 2013-12. EPCRS allows the sponsor of a tax-deferred retirement plan to voluntarily correct plan qualification failures. The primary change to EPCRS is the expansion of the correction methods available for 403(b) plans. In addition, there are a number of other key changes, some of which are described below. The new EPCRS applies as of April 1, 2013, although plan sponsors may choose to use it now.

Correction of 403(b) Plan Document Failures Now Available

Prior to January 1, 2009, 403(b) plans were not required to have written plan documents. As such, there was no concept of a “403(b) plan document failure” in the prior versions of EPCRS. As of January 1, 2009, however, 403(b) plans must have written plan documents, but there has been no way to correct the failure to timely adopt a 403(b) plan document until now.

The new EPCRS allows 403(b) plan document failures to be submitted to the IRS under the Voluntary Correction Program (VCP). During 2013, a 403(b) plan sponsor that did not timely adopt a plan document (by December 31, 2009) may submit a VCP application and pay only 50% of the generally applicable VCP fee based on plan size. After 2013, the full fee will apply.

The new EPCRS also extends to 403(b) plans certain other EPCRS concepts previously applicable only to qualified plans.

Corrective Employer Contributions (QNECs and Otherwise)

Corrective contributions to remedy a failed ADP or ACP nondiscrimination test must be qualified non-elective contributions (QNECs). That is, the contributions may *not* be made through allocating existing forfeitures within the plan, but rather, must be newly contributed by the plan sponsor. Moreover, such contributions must be fully vested when made, and subject to the distribution restrictions applicable to employee elective deferrals.

By contrast, corrective contributions to remedy certain employer contribution failures are no longer required to be QNECs. That is, such contributions may be made through allocating existing forfeitures within the plan. Moreover, such contributions need not be fully vested when made, and need not be subject to the distribution restrictions applicable to employee elective deferrals.

Streamlined Application Process

EPCRS now requires VCP applications to be submitted using new IRS Forms 8950 and 8951. These forms are intended to streamline the application process, by ensuring standardization and completeness in submissions. VCP applications must now be sent to a central processing location in Covington, Kentucky (in a manner similar to determination letter applications).

The new EPCRS also modifies the rules for when determination letter applications must (and may) be submitted with VCP applications addressing corrective amendments.

Defined Benefit Plans Subject to Code Section 436 Restrictions

Underfunded defined benefit plans may be subject to certain benefit restrictions imposed by Section 436 of the Internal Revenue Code. The new EPCRS provides correction methods for certain benefit payments made in violation of Section 436, and also addresses instances where a corrective action would otherwise violate Section 436.

Investment Losses

The new EPCRS changes the requirements, in certain instances, regarding adjustments to reflect investment losses.

457(b) Plans

The IRS will continue to accept 457(b) plan submissions outside of EPCRS under standards similar to EPCRS. However, generally, only governmental 457(b) plans, not tax-exempt entity 457(b) plans, will be accepted.

Missing Participants

As of August 31, 2012, the IRS Letter Forwarding Program was discontinued as a means to search for missing participants and beneficiaries. The new EPCRS contains conforming changes. Specifically, plan sponsors must attempt to send certified mail to the individual's last known mailing address, and if that is unsuccessful, use an additional search method (e.g., the Social Security letter forwarding program, a commercial locator service, a credit reporting agency, Internet search tools, etc.).

Our attorneys have extensive experience with correction of plan qualification failures. If you have any questions about the new EPCRS, please contact any member of the **Employee Benefits and Executive Compensation Group**.