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## IRS and US Department of Labor Continue to Expand, Encourage and Simplify Correction Programs in 2013 Updates to EPCRS and DFVCP

By Carrie A. Roberts

Plan sponsors know that errors and failures in administering a retirement plan happen. All too often, changes in administrators, service providers and other staff uncover errors and compliance problems that should be corrected to protect a retirement plan's tax-favored status or address a fiduciary breach.

The Internal Revenue Service (IRS) and the Employee Benefits Security Administration (EBSA) of the US Department of Labor also know that these errors and failures happen. To help plan sponsors fix such errors, streamline the corrections and reduce the respective agency's audit burden, the IRS and EBSA have established correction programs to encourage plan sponsors to correct errors and establish administrative practices and procedures that ensure that these plans are operated properly. Generally, fees and sanctions are structured to be incentives for plan sponsors to correct errors promptly, rather than wait for a governmental auditor to discover the errors and require corrections along with a hefty sanction.

This year, the IRS and EBSA have updated their correction programs. The IRS updated the Employee Plan Compliance Resolution System (EPCRS) and the EBSA updated the Delinquent Filer Voluntary Compliance Program (DFVCP). The EBSA still maintains the Voluntary Fiduciary Compliance Program (VFCP), but an update for this correction program was not issued; the last formal update to that program was in 2006.

The 2013 updates continue along the following themes that have generally occurred each time these types of programs have been updated:

- **Expand correction**

**EPCRS.** The IRS expanded EPCRS to (1) permit the correction of new types of plans, (2) address new compliance issues, and (3) include clarifications of how to apply corrections.

**DFVCP.** The EBSA explained that, although the IRS and Pension Benefit Guaranty Corporation (PBGC) sanctions are not specifically covered by the DFVCP, both agencies are expecting to provide certain penalty relief when the conditions of the DFVCP are satisfied.

- **Encourage prompt and voluntary correction**

**EPCRS.** Fees under the EPCRS program continue to encourage correction as soon as possible and the self-correction program allows for correction without a fee. The EPCRS program fee schedule often reflects that the longer a problem has continued without correction, the higher the fee will be.

**DFVCP.** The DFVCP also continues to specifically structure its fees to encourage prompt and complete compliance beginning with a per-day fee schedule and ending with a per-plan fee cap to encourage full, voluntary compliance.

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- **Simplify correction**

**EPCRS.** The IRS provides forms and checklists to assist employers in the application process as well as continue to provide a self-correction for many errors.

**DFVCP.** The EBSA continues to provide online calculators, model application forms and online fact sheets to assist in determining how to correct errors and ascertain what information needs to be submitted.

## Overview of Specific Changes in the Updated Correction Programs

### **EPCRS**

The updated program is effective April 1, 2013; however, the new guidelines may be used immediately. EPCRS allows sponsors to correct errors and compliance problems using three different programs: the self-correction program, the voluntary correction program (VCP) and the audit closing agreement program. EPCRS is available for the following types of plans: tax qualified retirement plans, 403(a) and 403(b) annuity plans, SEPs, SIMPLE IRAs, and as of 2013, 457 plans sponsored by certain nonprofit organizations, local, state and federal governments and agencies. In addition, the 2013 EPCRS program allows for more corrections to apply to 403(b) plans.

The VCP still allows for anonymous submissions and group submissions. All VCP submissions are now required to include completed new Form 8950 and Form 8951 and new addresses are provided for mailings under the VCP. These forms and addresses may be used immediately, but must be used on and after April 1, 2013.

Although several changes were made to the program, the majority of those changes were additions and revisions to clarify situations and the meanings of terms under the program. Specifically, updates worth noting include:

- Correction for failure to satisfy IRS Code Section 436, which was added to the IRS Code by the Pension Protection Act of 2006 and limited the accrual and payment of benefits under certain underfunded traditional pension plans.
- Explanation of how an employer should take action to locate participants now that the IRS Letter Forwarding Program is no longer available as a way to locate missing participants to whom benefits are owed.
- Clarification of when a determination letter application may not be submitted under the program and what is meant by certain procedural terms under the VCP when using the corrections available by plan amendment.
- Correction for a 403(b) plan failure to timely adopt a written plan document, including a temporary fee reduction if certain conditions are met.
- Revision of Appendices D and F, as a two-part Appendix C.
- Clarification of fees needed for certain prototype and specimen plans, multiemployer and multiple employer plans.
- Updated fee schedule for those non-amenders discovered during the determination letter process, clarification of applicable payment for a submission with multiple failures and instructions on how to determine the number of participants in a plan when the plan is not required to file a Form 5500 series return.
- Addition of a new compliance fee for failure to timely adopt an amendment required by the IRS as a condition of a favorable determination letter (as long as it is adopted within three months of the expired deadline).
- Clarification and addition of correction methods for improper exclusion of employees from safe harbor 401(k) plans.
- Requirement for anonymous submissions being made by a person representing the plan sponsor to provide a penalty of perjury statement indicating that the representative satisfies the power of attorney requirements.
- Revision of correction principles of overpayments for defined benefit plans, addition of corrections for overpayments from defined contribution plans and clarification for when an employer contribution to correct an overpayment is required.
- Addition of a section to the program for addressing corrective amendments to pre approved plans.
- Establishment of procedures and practices to promote compliance with excess annual additions.

### **DFVCP**

The DFVCP allows an employer who has failed to timely file an annual report (i.e., a Form 5500 and its applicable schedules) to file the delinquent form and pay a reduced penalty compared to the civil penalties normally assessed under Title I of the ERISA. Generally, broad-based retirement plans and group health and welfare plans are eligible to participate.

The DFVCP has been updated periodically on the DFVCP website since its last program update in 2002; thus, no “phase-in” was allowed under the program and it was made effective immediately. The EBSA intends to continue updating the program’s details by using the website to reflect any procedural changes. Updates that will help with using the DFVCP include the following:

- **Online Penalty Calculator.** One of the helpful additions to the website and updated program is the online penalty calculator, which assists employers in determining the penalty amount.
- **EFAST2 and Online Payments.** Just as all timely Forms 5500 must file using the EFAST2 electronic filing system, all Forms 5500 being filed under the DFVCP must also use EFAST2. No paper filings of any kind are acceptable. An electronic online payment process is available on the website, but the EBSA is still also accepting payments through the mail.
- **Which Forms 5500 to Use.** The updated DFVCP clarifies that delinquent filers must use the most recent year’s forms and identify the year being filed in the space provided on the Form 5500. In many cases, delinquent filers will need to attach PDFs of the schedules applicable to the particular plan year. To determine which Forms 5500 and schedules to file for a particular plan, the EBSA website has an online tool that identifies the correct versions of the forms and schedules to use.
- **IRS and PBGC Coordination.** The updated DFVCP emphasizes that the Schedule SSA (Form 5500) or IRS Form 8955-SSA should be submitted directly to the IRS. Information on filing delinquent information is available on the IRS website. The EBSA also explained that, although the IRS and the PBGC do not provide relief to filers under the DFVCP, both expect to provide certain penalty relief when the conditions of the DFVCP are satisfied.

## Our Experience with Correction Programs

**EPCRS.** EPCRS is probably the most commonly used correction program. Errors are often discovered during a routine audit conducted for the Form 5500 filing. More and more auditors are requiring assurance from the employer or providers that this program is being used to issue the auditor’s report for the Form 5500. Katten can help determine if the self-correction program can be used to correct the error or help coordinate and prepare a VCP submission, if needed. We encourage you to identify problems with regular compliance reviews and correct the errors by using the EPCRS program in order to reduce future sanctions.

**DFVCP.** We often see employers who realize Forms 5500 were never filed for a plan during the due diligence of a merger and acquisition transaction. Dealing with missed Forms 5500 uses valuable resources of time and money when trying to sell a company. Sometimes a plan has operated for years under the initial, incorrect determination that it does not have a filing requirement under ERISA. Once these errors are discovered, the logical approach is to use the DFVCP to get the plan up-to-date on its filing obligations. Katten has experience in helping clients with the issues and concerns that occur after discovery that a plan has missed several years of filings.

**VFCP.** Many of our clients have discovered untimely deposits of employee deferrals. A change in payroll procedures can trip up the most careful of employers on this strict timing requirement by the US Department of Labor. Generally, we encourage a VFCP for those errors, and can assist in its preparation. On occasion an over- or underpayment or payment to a party-in-interest occurs in a plan and Katten can help with a careful analysis of the error and determination of whether a VFCP should be used.

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