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More Powerful Medicine For Your Retirement Plans – The New and Improved EPCRS (Revenue Procedure 2013-12)

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Employee Plans Compliance Resolution System (EPCRS)

- Revenue Procedure
 - 2013-12 superseded Revenue Procedure 2008-50
- Rev. Proc. 2013-12 became effective April 1, 2013



Today's Agenda

- An EPCRS overview and refresher
- Review of significant changes within Rev. Proc. 2013-12
 - Review new forms required for each Voluntary Correction Program (VCP) Submission
 - Highlight new model compliance Statements and new Appendices
 - Significant expansion of relief for 403(b) plans
 - Review other important changes to EPCRS



EPCRS Factoids

- Sixty-five percent of all plan sponsors are aware of EPCRS
- Six percent of all plan sponsors have used EPCRS

EPCRS Factoids

	Awareness	Used EPCRS
Very large plans	92%	59%
Large plans	72%	19%
Medium plans	63%	4%
Small plans	71%	3%

- Small Plans: 0-5 participants
- Medium Plans: 6-100 participants
- Large Plans: 101-2,500 participants
- Very Large Plans: more than 2,500 participants



EPCRS Refresher

- EPCRS covers four types of failures
 - Plan Document Failures
 - Operational Failures
 - Demographic Failures
 - Employer Eligibility Failures



EPCRS Refresher

- EPCRS consists of three programs:
 - **Self-Correction Program (“SCP”)** – generally available only for Operational Failures
 - **Voluntary Correction Program (“VCP”)** – available for correction of Operational Failures, Plan Document Failures, Demographic Failures and Employer Eligibility Failures
 - **Audit Cap** – available for all failures found on examination by IRS that have not been previously corrected under SCP or VCP



EPCRS Refresher

- Two types of Operational Failures:
 - Insignificant failures – may be self-corrected at any time
 - Significant failures – limited timeframe to correct



Gimme a Break - Exceptions to Full Correction

- Plan sponsor can use reasonable estimates
- Corrective distribution that is due to a participant is \$75 or less (only applies if the amount of the distribution exceeds the reasonable direct cost of processing)
- \$100 or less overpayment or excess amount



New VCP Forms

Form 8950 - Application for Voluntary Correction Program

- Required for each VCP submission
- Similar to Determination letter application
- Q 12 – Gotcha question by IRS
- Accessible via internet - <http://www.irs.gov/Retirement-Plans/Correcting-Plan-Errors>



New VCP Forms

Form 8951 - Compliance Fee for Application for Voluntary Correction Program

- Required for each VCP submission
- Similar to Form 8717 for Determination letter user fee
- General fee range is still \$750 - \$25,000
- Accessible via internet - <http://www.irs.gov/Retirement-Plans/Correcting-Plan-Errors>



New Mailing Address

All VCP submissions and provisional submissions involving 457(b) plans, and any related determination application, if applicable, must be mailed to:

Internal Revenue Service
P.O. Box 12192
Covington, KY 41012-0192

VCP submissions shipped by express mail or a delivery service should be sent to:

Internal Revenue Service
201 West Rivercenter Blvd.
Attn: Extracting Stop 312
Covington, KY 41011



Assembling the VCP Submission

- Separate processing of VCP submissions and accompanying determination letter applications (if applicable)
- File in duplicate any documents required for both the VCP submission and the accompanying determination letter application

Goodbye to Old Appendices

- Former Appendices C, D, E and F that were part of Rev. Proc. 2008-50 are no longer available under the new EPCRS Rev. Proc. 2013-12
- However, some of the former Appendix C, VCP Checklist items have been revised and incorporated into the Form 8950 Procedural Requirement Checklist
- Appendix D, VCP Submission, under Rev. Proc. 2008-50 has been replaced with Appendix D, Acknowledgement Letter
- There is no longer an Appendix E or F

New Model Compliance Statement and Appendices

- Rev. Proc. 2013-12 includes a brand new Appendix C that contains:
 - Part I: Model VCP Submission Compliance Statement
 - Optional but not required
 - Combine with Appendix C Schedules 1 through 9
 - Part II: Model VCP Schedules 1 through 9 (formerly App. F) that provide deemed safe-harbor corrections for various types of common failures

403(b) Plans – Relief, At Last

- Finally, plan sponsors of 403(b) plans may correct new plan document and operational failures involving 403(b) plans that failed to comply with the final 403(b) regulations beginning with the 2009 plan year
- May still correct 403(b) failures arising in pre-2009 plan years by complying with Rev. Proc. 2008-50 definitions



403(b) Plans – Relief, At Last

- Correction for a 403(b) Plan generally expected to be the same as the correction required for a Qualified Plan with the same Failure (i.e., Plan Document Failure, Operational Failure, Demographic Failure, and Employer Eligibility Failure)



403(b) Plans – Specific Differences

- Some 403(b) failures can be corrected by treating a contract as a § 403(c) annuity contract
- A 403(b) Plan generally will be deemed to have a Favorable Letter if they have timely adopted a written 403(b) plan
- Correction of Operational Failures under SCP
 - The requirement to have established practices and procedures only applies for failures occurring after December 31, 2009




403(b) Plans – Written Plan Document Failure

- Failure to timely adopt a written 403(b) plan
- Deadline was January 1, 2009, extended by Notice 2009-3 to December 31, 2009
- Paperclip method may save the day



403(b) Plans – Plan Document Failure

- Issuance of a compliance statement or closing agreement for the failure to adopt a written 403(b) plan timely will result in the plan being treated as if it had been adopted timely for the purpose of making available the extended remedial amendment period in Announcement 2009-89
- 403(b) plan sponsors may now correct other plan document failures
 - A plan document failure arises when a plan document provision (or the absence of a provision) on its face violates Code Section 403(b)



403(b) Plans – Fee Discount

50% fee discount if you jump thru these hoops:

- The VCP submission involves a failure to adopt a written 403(b) plan timely in accordance with the final regulations under § 403(b) and Notice 2009-3
- Is the only failure included in the submission
- The VCP must be sent to the Service no later than **December 31, 2013** in order to be eligible for the reduced fee



403(b) Plans – VCP Submissions Made Under Rev. Proc. 2008-50

- Pending 403(b) Plan submissions, with plan document failures or certain operational failures arising from failure to comply with the final 403(b) regulations, that were not closed or returned by December 31, 2012, will have the option to apply Rev. Proc. 2013-12
 - The plan sponsor or their Power of Attorney will be asked to submit a written request asking the IRS to process the submission under Rev. Proc. 2013-12 requirements
 - The written request should **not** be submitted until instructed by the VC specialist that has been assigned to work the VCP case
 - The VCP submission will have to be revised depending on the format in which the submission was submitted under Rev. Proc. 2008-50



Other Changes – SCP Eligibility for 415(c) Failures

- Promotion of SCP for § 415(c) failures in certain defined contribution plans experiencing recurring excess annual additions if certain specified actions are taken in a timely manner by the plan sponsor
 - Limited to a plan that provides for elective deferrals and non-elective employer contributions that are not matching contributions; and
 - Excess annual additions under § 415(c) (\$51,000 for 2013) are regularly corrected by return of elective deferrals to the affected employee within two and a half months after the end of the plan's limitation year


457(b) Plan Corrections

	Governmental Plans	Tax-exempt plans
Rev. Proc. 2006-27	<u>generally</u> limited	<u>generally</u> limited
Rev. Proc 2008-50	<u>generally</u> limited	not allowed under any circumstances.
Rev. Proc 2013-12	<u>generally</u> limited	Very restrictive (e.g. plan was erroneously established to benefit the entity's non-highly compensated employees and the plan has been operated in a manner that is similar to a Qualified Plan.)



IRS Taketh Back – Funding of QNECs

- Clarification that for purposes of correcting a failed ADP, ACP or multiple use test, plan forfeitures may longer be used
- Why – not a QNEC
- Does not prevent forfeitures for use in other errors



Other Modifications – DB Underpayments

- Question - How do you determine the corrective distribution when you have a delayed payment
 - Old Way – consistent with actuarial adjustments
 - New way - Increase in accordance with the plan's provisions for actuarial equivalence in effect at time distribution should have been made
- Corrective distributions are not subject to the requirements of § 417(e)(3) if made to make up for missed payments for a benefit not subject to the requirements of § 417(e)(3)



Section 436 Failures

- Corrective contributions generally required to be made to the plan to pay for corrective distributions or corrective amendments while subject to § 436 restrictions
- Examples:
 - RMD
 - Spousal consent

Impact of § 436

- Appendix B, Section 2.07(3) was revised to clarify that corrective plan amendments, used to resolve the early inclusion of otherwise eligible employees in a defined benefit plan, must take into account § 436 rules if the plan is subject to restrictions on increase in liability for benefits under § 436(c) at the time of correction

Land of the Lost Participants

- As of August 31, 2012, the IRS eliminated use of the Letter forwarding program for missing/lost plan participants who are owed benefits
 - Impact - IRS letter forwarding program is no longer available as a safe harbor search method
 - Alternative methods that may be used to find lost participants if mailing to last known address is unsuccessful:
 - Social Security Administration locator program
 - A commercial locator service
 - A credit reporting agency
 - Internet search tools
 - May require one or more methods based on facts and circumstances; need to establish prudence
 - Keep careful records of actions taken



Submit or Not Submit a Determination Letter – That is the Question

- A determination letter application **should not** be submitted under EPCRS when there is a :
 - Model amendment or IRS approved pre-approved plan used to fix any type of qualification failure
 - Demographic failure
 - Non-amender failure limited to specific late “good faith amendments”, interim amendments” and “optional law changes”
 - Operational failure corrected via plan amendments by off-cycle plan sponsors. Will need to submit a DL application when on-cycle
 - Failure to adopt amendments required under the terms of a favorable determination letter



Other Changes – Correction of Overpayments

- Overpayments from defined contribution plans
- If plan sponsor does not recover from participant or beneficiary, a corrective employer contribution is not needed to fix premature distributions in some cases



Anonymous Submissions

- An individual representing the plan sponsor who submits an anonymous VCP submission must satisfy the Power of Attorney requirements and provide a penalty of perjury statement



Other Changes – Required VCP Documents

- Identification of corrective plan language in the restated plan that fixes the disclosed qualification failures
- Photocopy of the check for the VCP compliance fee to be included with the submission
- VCP compliance fee checks may be converted into an electronic fund transfer

Show Me the VCP Fees

- VCP compliance fee for multiple employer plans or multi-employer plans is based on participants rather than assets
- May calculate separately based on the participants attributable to the separate employer rather than the entire plan



IRS Yard Sale– Reduced VCP Fees

- \$500 compliance fee if submitted through VCP:
 - The only failure of the submission is the failure to adopt an amendment (upon which a favorable determination letter is conditioned) within the 91-day remedial amendment period; and
 - The required amendment is or was adopted within three months of the expiration of the remedial amendment period for adopting the proposed amendment. Generally, if the amendment was adopted more than six months from the date of the original determination letter it does not qualify for the reduced compliance fee
 - CAP Fees Associated with Determination Letter Applications
 - Flat \$1,000 fee

IRS Yard Sale– Reduced VCP Fees

- If a VCP submission includes multiple failures, each of which is subject to a reduced fee, then the fee for the submission will be the lesser of:
 - The sum of the reduced fees; or
 - The regular compliance fee
- What if you're not required to file a Form 5500 series return for a plan that is VCP eligible?

Determination CAP

Fee schedule updated for non-amenders discovered during the determination letter application process that are not related to a VCP submission

Number of Participants	Employer's 2 nd 5 or 6 year Remedial Amendment Cycle	Employer's 1 st 5 or 6 year Remedial Amendment Cycle	GUST/ 401(a)(9) Regs	UCA/ OBRA '93	TRA '86	T/D/R	ERISA
20 or fewer	\$ 2,500	\$ 3,000	\$ 3,500	\$ 4,000	\$ 4,500	\$ 5,000	\$ 5,500
21-50	\$ 5,000	\$ 6,000	\$ 7,000	\$ 8,000	\$ 9,000	\$10,000	\$11,000
51-100	\$ 7,500	\$ 9,000	\$10,500	\$12,000	\$13,500	\$15,000	\$16,500
101-500	\$12,500	\$15,000	\$17,500	\$20,000	\$22,500	\$25,000	\$27,500
501-1,000	\$17,500	\$21,000	\$24,500	\$28,000	\$31,500	\$35,000	\$38,500
1,001-5,000	\$25,000	\$30,000	\$35,000	\$40,000	\$45,000	\$50,000	\$55,000
5,001-10,000	\$32,500	\$39,000	\$45,500	\$52,000	\$58,500	\$65,000	\$71,500
Over 10,000	\$40,000	\$48,000	\$56,000	\$64,000	\$72,000	\$80,000	\$88,000



Other Modifications – CAP Fees Associated with Determination Letter Applications

- If the sole failure consists of a failure to timely adopt:
 - Good faith amendments
 - Interim amendments, or
 - Amendments required to reflect the changed operation of the plan on account of the Plan Sponsor's decision to implement optional law changes by their applicable deadlines,

AND

- Plan' extended remedial amendment period has not expired, THEN
- The fee is 40% of the applicable fee under “Employer’s 2nd Remedial Amendment Cycle” on the chart in Section 14.04(1)



Missed Matching Contributions

- Matching contribution owed to a participant may be made in the form of a corrective employer matching contribution, instead of a QNEC
- Corrective employer matching contribution (unlike a QNEC) would be subject to the vesting schedule under the plan that applies to employer matching contributions
- Impact – eliminates participant windfall

Safe Harbor Corrections

- Expansion of corrections for improper exclusions of employees to traditional safe harbor 401(k) plans under § 401(k)(12) and QACAs under § 401(k)(13):
 - Missed deferral amounts assumed to be equal to 3% of compensation
 - May be higher if the plan provides matching contributions on deferrals above 3% or if the plan's automatic deferral rate is higher
 - No ADP/ACP testing allowed under this safe harbor correction method

403(b) Exclusions

- Improper exclusions of employees from making elective deferrals to 403(b) Plans - Universal availability failure:
 - Missed deferral amounts assumed to be equal to 3% of compensation. May be higher if the plan provides matching contributions on deferrals above 3%
 - No ADP/ACP testing allowed under this safe harbor correction method

Example:

- NHCE compensation = \$50K
- NHCE ADP = 6%
- Plan provides match equal to 100% of first 3% of compensation
- Correction:
 - Missed deferral = \$1,500 ($\$50K \times 3\%$)
 - QNEC for missed deferral opportunity = \$750 (missed deferral $\times 50\%$)
 - QNEC for matching contribution = \$1,500 ($\$50K \times 3\%$)



SIMPLE IRA Plans– Appendix A

- Improper exclusions of employees from making elective deferrals to SIMPLE IRA Plans:
 - Missed deferral amounts assumed to be equal to 3% of compensation

Uncle Sam Wants You to Use EPCRS





QUESTIONS?

Thank You!