

January 8, 2013

The Fix Is In: IRS Updates Retirement Plan Correction Programs

The Internal Revenue Service (IRS) provided some alternative entertainment on New Year's Eve by releasing the long-awaited updated Employee Plans Compliance Resolution System (EPCRS) revenue procedure on December 31, 2012. The primary change in [Rev. Proc. 2013-12](#) is the expansion of the correction programs for section 403(b) plans, the details of which are discussed in our other [Legal Alert](#) entitled "IRS Expands Retirement Plan Correction Programs for 403(b) Plans." This Legal Alert focuses on the changes to EPCRS that apply to all types of retirement plans. Rev. Proc. 2013-12 is effective April 1, 2013, but plan sponsors may rely on this new guidance after December 31, 2012.

The chart below describes some of the more significant changes made in Rev. Proc. 2013-12. Most of the changes are technical or procedural in nature. Many areas of EPCRS that seemed ripe for possible modifications have generally not changed, including loan corrections, methods for determining earnings, de minimis rules, and fee amounts.

Topic	Change Under Rev. Proc. 2013-12
Correction Methods	
Correcting Missed Matching Contributions	Under Rev. Proc. 2008-50, if a plan erroneously excluded an eligible employee from participation or failed to implement a deferral election, it had to make a QNEC equal to 50% of the "missed deferral," and a QNEC equal to what would have been contributed as a matching contribution if the eligible employee had deferred the full "missed deferral." Under Rev. Proc. 2013-12, the employer still has to make a corrective contribution for the missed matching contribution, but the contribution does not have to be a QNEC and can be subject to the plan's vesting schedule and distribution rules for matching contributions.
Overpayments	Generally, to the extent a participant does not repay an overpayment to the plan, the employer must repay the plan. Rev. Proc. 2013-12 clarifies that if the overpayment arose because a payment was made in the absence of a distributable event, but was otherwise a permissible distribution (e.g., an impermissible in-service distribution), the employer does not have to repay the overpayment if the participant does not do so.
Section 436 Underfunding Restrictions	Rev. Proc. 2013-12 adds correction procedures for failures with respect to the section 436 benefit restrictions when a plan is underfunded. In some cases, the Rev. Proc. requires the employer to make a contribution to the plan when funds are distributed to participants as part of a correction at a time when the plan is subject to the section 436 benefit restrictions.
QNEC for Nondiscrimination Errors	When an employer corrects certain nondiscrimination testing errors (such as ADP or ACP) with a QNEC, the contribution must meet the definition of a QNEC in the regulations. This means that, under current IRS regulations, the contribution will not be able to be made from the plan's forfeiture account.

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Locating Lost Participants	In connection with the cessation of the IRS letter forwarding program on August 31, 2012, Rev. Proc. 2013-12 updates the requirements for locating lost participants. The Rev. Proc. provides that reasonable actions to locate lost participants include a mailing to the individual's last known address using certified mail and, if that is unsuccessful, using other methods, including the Social Security letter forwarding program, a commercial locator service, a credit reporting agency, or Internet search tools.
Self-Correction by Plan Amendment	Rev. Proc. 2013-12 highlights that, if a plan sponsor self-corrects an error by a plan amendment, in the next determination letter submission, the amendment should be identified as one that was adopted pursuant to the EPCRS self-correction program.
De Minimis	Rev. Proc. 2013-12 clarifies that corrective contributions are required without regard to any de minimis rule for "a participant with an account in the plan." While not entirely clear, this may suggest that the de minimis rule for corrective distributions can be used for a correction with respect to a participant who no longer has an account in the plan.
72(t) 10% Tax Waiver	Under Rev. Proc. 2008-50, the potential waiver of the section 72(t) 10% premature distribution tax appeared to apply only when a participant rolled over an overpayment from the plan and subsequently returned the overpayment to the plan; Rev. Proc. 2013-12 clarifies that the waiver applies when a participant receives a direct distribution of the overpayment and returns the funds to the plan.
Defined Benefit Plan Interest	Rev. Proc. 2013-12 clarifies that interest in connection with a defined benefit plan correction (e.g., a minimum required distribution failure) should be determined based on the plan's definition of actuarial equivalence.
Procedural	
New Forms and Address	<p>There are several changes to the VCP submission format:</p> <ul style="list-style-type: none"> ▪ A submission must use new IRS Form 8950, which requires much of the information that previously was provided in a cover letter or in other formats. Form 8950 also includes an extensive checklist for submissions. ▪ The VCP fee must be submitted with IRS Form 8951. ▪ With the new forms, the IRS eliminated the "streamlined application" procedures that were contained in Appendix F of Rev. Proc. 2008-50. However, Rev. Proc. 2013-12 includes a series of schedules that can be used for a number of standard errors (e.g., non-amender, loans, 402(g) excess, required minimum distributions). ▪ The new IRS Forms have not yet been finalized. ▪ VCP submissions will now be sent to the same Covington, Kentucky, address used for determination letter submissions, rather than the previous Washington, D.C. address. Until April 1, 2013, VCP submissions may be sent to either address, provided that the appropriate forms are used in accordance with the applicable Rev. Proc.

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Fees	<p>The VCP fee schedule generally remains the same, with a few exceptions:</p> <ul style="list-style-type: none"> ▪ In addition to other reduced fees, Rev. Proc. 2013-12 provides that the fee for a submission that only contains a failure to adopt an amendment upon which a favorable determination letter is conditioned within the required time is \$500 if the amendment is adopted within three months following the deadline. ▪ If a VCP submission includes multiple failures, each of which is eligible for a reduced fee, the fee for the entire submission will be the lesser of the sum of the reduced fees or the fee determined pursuant to the regular fee schedule. ▪ Rev. Proc. 2013-12 clarifies that the fees for a multiple employer plan or multiemployer plan are based on the number of participants, not the amount of assets. ▪ The fees for non-amender failures discovered during the processing of a determination letter application were slightly increased and modified to address future amendment cycles. ▪ The IRS may process the fees via electronic fund transfer based on the information provided on the fee check, rather than normal check processing.
Determination Letters	Rev. Proc. 2013-12 makes clear that, generally, a determination letter application is not required to be submitted with a VCP submission, except for limited circumstances.
457(b) Plans	Rev. Proc. 2013-12 clarifies that for 457(b) plans, EPCRS is generally available only for governmental plans, not for the plans of other tax-exempt entities.
Other	
Comments	The IRS requests comments on the correction of failures involving auto-escalation features, safe harbor 401(k) plan, and Roth contributions.



If you have any questions about this development, please feel free to contact any of the attorneys listed below or the Sutherland attorney with whom you regularly work.

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