



IRS Updates EPCRS Corrections Program for Qualified Plans

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Earlier this week the IRS released Revenue Procedure 2013-12, which updates its corrections guidance for qualified plans, the Employee Plans Compliance Resolution System (EPCRS), for the first time since 2008. (Updated EPCRS)

The new guidance is effective April 1, 2013, but may be relied on prior to that date. Here are some of the key changes and clarifications:

New IRS Forms: All VCP submissions must be filed using the new IRS Forms 8950 and 8951. These forms replace many (but not all!) of the forms and checklists required by prior iterations of the EPCRS program.

Lost Participants: A plan will not be considered to have failed to correct an issue due to the inability to locate an affected individual, if the plan administrator takes "reasonable actions" to locate the individual.

- "Reasonable actions" includes sending certified mail to the individual's last known address, plus one or more of the following: the Social Security letter forwarding service, a commercial locator service, a credit reporting agency, and internet search tools (e.g., LexisNexis). The IRS letter forwarding service no longer exists.

DB Plan Corrective Distributions: Corrective payments to a participant should be increased to take into account the delayed benefit, and the IRS has attempted to clarify this actuarial adjustment. The payment should be computed using "the plan's provisions for actuarial equivalence" that were in effect at the time the distribution should have been made.



| 2 | IRS Updates EPCRS Corrections Program for Qualified Plans

- It is unclear how this methodology would apply where there has been a series of missed payments (i.e., whether the sponsor would use the factors in effect at the annuity starting date, or separate factors for each missed payment).
- The plan's 417(e)(3) factors should be used only when the missed payments were part of a form of benefit that is subject to Section 417(e)(3). For other forms of benefit, the plan's general actuarial factors should be used instead. For example, the plan's general actuarial factors would be used to calculate a lump sum make-up payment of a series of missed payments under a single life annuity, even though the make-up payment is made as a lump sum.

DC Plan Overpayments: The new guidance includes various clarifications on repayment.

- Earnings should be calculated using the plan's earnings rate for the period between the distribution and the repayment. It is unclear whether this refers to the plan's overall earnings rate, or the earnings the participant would have received but for the overpayment.
- If the participant fails to repay the plan, the employer generally is required to make the plan whole, by contributing the difference to an unallocated forfeiture account. The IRS now waives this make-whole requirement if the payment was made at an impermissible time (e.g., in-service prior to age 59), but the participant was otherwise entitled to the amounts paid.
- Repayments of premature distributions should be allocated to the participant's account rather than a forfeiture account.

Earnings Adjustments: "Earnings" is now defined to specifically include both investment gains and investment losses. As such, corrective allocations from a DC plan generally may be reduced to reflect losses incurred by the plan following a failure, although this is not required.

Traps for the Unwary

- If a defined benefit plan is subject to the benefit restrictions under Code section 436 at the time a corrective payment is made as a lump sum, the plan sponsor may need to make an additional contribution to the plan to avoid a violation of section 436, even if the underlying benefit is not a "prohibited payment."
- Depending on the context, corrective contributions to a defined contribution plan may consist of company contributions, which are subject to the plan's general vesting and distribution rules for company contributions, or QNECs, which must vest immediately and generally are not available for in-service withdrawals (including hardship withdrawals) prior to age 59. As a result, corrective QNECs may require the plan's record-keeper to establish a separate sub-account. Also, QNECs may not be paid from the plan's forfeiture account.



| 3 | IRS Updates EPCRS Corrections Program for Qualified Plans

- A VCP submission must include a check for the applicable fee, as well as a photocopy of the check.
- There is a new mailing address for VCP submissions - the submissions must be sent to the same address in Covington, Kentucky that the IRS uses for determination letter submissions.
- The Appendices to the new Revenue Procedure have been modified and streamlined to correspond to the new IRS Forms 8950 and 8951.

Some Additional Tidbits

- With very limited exceptions, the new guidance does not require off-cycle determination letter filings in conjunction with a VCP submission.
- The new guidance adds correction methods for the improper exclusion of employees from both traditional and automatic enrollment safe harbor plans, including specific rules for calculating the corrective QNEC contributions.
- The IRS has requested comments regarding failures to offer or implement Roth contribution elections. Roth contribution failures may be easier to fix in light of the fiscal cliff legislation passed earlier this week, which permits plans to offer in-plan Roth conversions to all participants.