

403(b) Perspectives



Insights into the Administration of §403(b) Tax-Sheltered Arrangements

SUMMER 2015

403(b) Preapproved Document Submitted to the IRS for Approval

On April 30, 2015, we submitted our new Volume Submitter 403(b) plan to the IRS for an advisory letter under Revenue Procedure 2013-22. It included changes from the revised List of Required Modifications (LRMs) issued in March of 2015. Thus, the two-year IRS review and negotiation of the language of the document period has started. The first ever preapproved 403(b) plan restatement period will begin when the IRS announces that the review is finished. The IRS will

then announce the actual beginning and end dates for the restatement period (at this time, we anticipate it will likely start sometime in 2017). The new document will include all the flexibility that our current model 403(b) plans contain, including plan design choices, such as, multiple contribution formulas, safe harbor provisions, automatic enrollment, a variety of vesting options, and much more flexibility. We will keep you posted as we hear news from the IRS about the approval of the document. ■

Rev. Proc. 2015-28 EPCRS Missed Deferrals

On April 2, 2015, the IRS issued guidance updating its Employee Plans Compliance Resolution System (EPCRS) regarding corrections involving elective deferral failures in 403(b) and 401(k) plans. The guidance was issued in response to comments the IRS received that said the existing elective deferral correction rules overcompensate participants (especially in situations where failures last for short periods) and that participants have the opportunity to increase elective deferral

contributions in later periods. The IRS also received feedback indicating that high costs related to correcting elective deferral failures in automatic arrangements were discouraging employers from adopting automatic enrollment features. Revenue Procedure 2015-28 provides relief by introducing new correction methods that significantly reduce the cost of corrections related to short-term deferral failures in 403(b) and 401(k) plans. It is effective April 2, 2015.

Continued on Page 2



Rev. Proc. 2015-28 EPCRS Missed Deferrals

Continued from Page 1

The new guidance provides relief for failures related to missed deferrals for automatic contribution arrangement plans, automatic increases in deferrals, affirmative deferral elections that were not implemented, and for excluding eligible employees.

Prior Rules

Prior to the Rev. Proc. 2015-28 change, the missed deferral opportunity cost was generally:

- Fifty percent of the missed deferral, based on either the average of the actual deferral percentage for the group the participant is in (highly compensated employee or nonhighly compensated employee), or
- For safe harbor 401(k) plans, 50% of 3% (Note that enhanced match = 50% on \$/\$ amount)
- Fifty percent of the amount elected by the participant, when the salary deferral election form is filed with the employer, but the election form is not implemented

There was an exception to the missed opportunity cost in the above bullet points if there was at least nine months of the plan year remaining from when the deferrals started.

For matching contributions, the employer made the total matching contribution that the participant would have received had his or her deferrals been handled as intended. This applied to all of the above rules.

New Rules Under Rev. Proc. 2015-28.

I. There will be no missed deferral opportunity cost for automatic enrollment and automatic increases if the failure is found and corrected by the first payroll date after the earlier of:

- **Nine and a half months after the end of the plan year in which the automatic contribution or increase should have occurred or**
- **The last day of the month following the month in which the participant advises the sponsor of the problem**

Example 1: An individual became eligible to participate in his or her employer's plan on June 1, 2015, and the plan administrator failed to automatically enroll the individual. This error is discovered on February 1, 2016. The individual is automatically enrolled in the plan on the next payroll date and provided a notice of the failure within 45 days of the elective deferral beginning. The plan administrator is not required to make a corrective contribution under EPCRS due to the fact that the

error was discovered within 9½ months after the end of the plan year in which it occurred and the elective deferral began on the next payroll date.

Note: If the employer did not enroll the participant by the first payroll date after the last day of the month following the month in which the participant advises the sponsor of the problem, the new EPCRS relief would not be available and a corrective contribution would need to be made.

II. The missed deferral opportunity cost for errors in implementing deferral elections, automatic enrollment, and automatic increases found within three months:

There will be no employer corrective contribution required for the missed deferrals that happened within the prior three months (this is a "rolling three-month period") if deferrals are restarted by the first payroll date after the earlier of:

- **Three months after the missed deferrals occurred or**
- **The last day of the month following the month in which the individual advises the sponsor of the problem**

Example 2: An individual became eligible to participate in his or her employer's plan on June 1, 2015, and the plan administrator failed to auto enroll the individual. This error is discovered by the individual on July 31, 2015. After informing the plan administrator of this issue on July 31, the individual is auto enrolled in the plan on August 28, 2015. The plan administrator is not required to make a corrective contribution under EPCRS because the elective deferral began before the end of the month after the month the plan sponsor was notified of the problem, and the individual was provided a notice of the failure within 45 days of the elective deferral beginning.

Note: If the employer did not enroll the participant by the first payroll date after the last day of the month following the month in which the participant advises the sponsor of the problem, the new EPCRS relief would not be available and a corrective contribution would need to be made.

III. The missed deferral opportunity cost for errors in implementing deferral elections, automatic enrollment, and automatic increases found within the EPCRS self-correction period:

The employer corrective contribution required for the missed deferrals is reduced from the old 50%

level to 25% for missed deferrals that fall outside of the time periods in the prior examples but are fixed by the last day of the second year following the plan year in which the error occurred (i.e., the normal deadline for SCP correction of significant errors).

Example 3: In August of 2015, a plan administrator discovers they failed to implement a participant's salary deferral election form, which increased deferrals from 3% to 6% on September 12, 2011. Since this error occurred more than two years after the end of the 2011 plan year, the plan administrator is not eligible to take advantage of the reduced 25% qualified nonelective employer contribution (QNEC), they must make a missed deferral opportunity QNEC in the amount of 50% of the 3% deferral (i.e., 1.5% QNEC plus earnings). There is a 50% up to 6% matching formula in this plan. The corrective contribution for the match would be based on the intended amount that should have been deferred, i.e., the additional 3% deferral. So, the corrective matching contribution is 1.5% (i.e., 50% of 3% increase in matching). Note the corrective matching contribution may be either a QMAC, QNEC, or a corrective matching contribution. If a corrective matching contribution is made, it may be subject to the vesting schedule for matching contributions.

IV. Under all these new correction methods, the employer must also:

1. Make the matching contribution that the participant would have received had the deferrals been originally handled correctly,

2. Provide a notice to the affected participants within 45 days of the date on which the proper deferrals started occurring (contents of notice listed later in this article), and

3. For any corrective contribution being made, the calculation of earnings will be made as follows:

- A. Rev. Proc. 2015-28 provides a new Section .05(8) to Appendix A (of Rev. Proc. 2013-12) for an alternative safe harbor for calculating earnings. This is only for automatic contribution

plans where no investment election has been filed. In such a case, any missed earnings may be calculated based on the plan's default investment alternative — provided that if there are losses, the calculation will not result in a reduction of the required corrective contribution. The plan sponsor may also use the earnings adjustment methods in Section 3 of Appendix B, of Rev. Proc. 2013-12.

- B. Corrections other than those in A. above (for example, for corrections using the SCP time-frame and providing the 25% QNEC), must calculate earnings under the existing methods in Rev. Proc. 2013-12, Appendix B, Sec. 3.

Notice Content Requirements

General information about the failure, i.e., the percentage of eligible compensation that should have been deferred and the approximate date that the compensation should have begun to be deferred. You need not include the dollar amounts that should have been deferred.

A statement that deferrals began to be contributed to the plan or will begin shortly and that corrective contributions have been made.

A statement that the participant may increase the deferral percentage to make up for the missed deferrals.

The name of the plan and plan contact information (including name, street address, e-mail address, and telephone number of a plan contact).

Failure to Implement Elective Deferral in Automatic Contribution Feature

The guidance stated that this safe harbor will apply to these types of failures that begin on or before December 31, 2020. The IRS will consider whether or not to extend this safe harbor by taking various factors into consideration, including whether there is an increase in plans that implement automatic contribution features. ■

Rev. Proc. 2015-27 EPCRS Changes

On March 27, 2015, the IRS published Revenue Procedure 2015-17 revising certain correction methods under the Employee Plans Compliance Resolution System (EPCRS) and makes changes to Rev. Proc. 2013-12, the current version of EPCRS. This is the first time the IRS has revised EPCRS without re-issuing the entire EPCRS revenue procedure and the IRS states that such changes will be made from time to time without the entire EPCRS being reissued. The effective date is

July 1, 2015, but plan sponsors are permitted to apply these provisions as of its publication on March 27, 2015. The chart below highlights the major revisions in Rev. Proc. 2015-27. Note the reduced fees for missed required minimum distributions (RMDs) (4.12) and loan corrections (4.13). Also note the longer time period (9½ months rather than 2½ months) to refund deferrals due to an excess annual addition failure (4.01) and the new correction option for overpayments (4.06 and 4.07). ■

RP 2015-27 Section	Revises RP 2013-12 Section	Subject	Change												
4.01	4.04	Excess annual additions	Time to return elective deferrals is changed from 2½ months to 9½ months												
4.05	6.05(1),(2), (3)(c)	DL application removed	Requirement to submit for a DL no longer applies to: 1. A preapproved plan, provided changes are permitted on preapproved program, and 2. In cases where 12 months have passed since distribution of substantially all of the plan assets following plan termination												
4.06	6.02	Overpayments: DB plans	Flexibility in correcting DB overpayments to also allow: 1. Employer or another person to repay overpayments plus interest, using Appendix B Sec. 2.04(1), or 2. A retroactive amendment to conform the plan to the plan's operation (subject to Sec. 4.05)												
4.07	6.06(4)(f) added	Overpayments: DC plans	Flexibility in correcting DC overpayments to also allow: 1. Employer or another person to repay overpayments plus interest, using Sec. 6.04(a), or 2. A retroactive amendment to conform the plan to the plan's operation (subject to Sec. 4.05)												
4.09	11.01 and 11.02	Appendix C Deleted	Appendix C Schedules 1-9 become Forms 14568-A through 14568-I. Appendix C deleted from Rev. Proc. 2013-12 as they are now IRS forms												
4.11	11.11	Appendix D	VCP submission acknowledgment letter is now Form 5265 and not Appendix D. Appendix D is deleted from EPCRS												
4.12	12.02(2)	RMD fee revised	VCP fee for solely missed RMDs (401(a)(9) failures) changed from \$500 for 50 or less participant failures to: <table style="width: 100%; border: none;"> <tr> <td style="width: 70%;">Number of Participants Affected</td> <td style="width: 30%;">Fee</td> </tr> <tr> <td>Up to 150</td> <td>\$500</td> </tr> <tr> <td>151 to 300</td> <td>\$1,500</td> </tr> <tr> <td>Over 300</td> <td>General fee under Sec. 12.02</td> </tr> </table>	Number of Participants Affected	Fee	Up to 150	\$500	151 to 300	\$1,500	Over 300	General fee under Sec. 12.02				
Number of Participants Affected	Fee														
Up to 150	\$500														
151 to 300	\$1,500														
Over 300	General fee under Sec. 12.02														
4.13	12.02(3)	Loan fee revised	VCP fee for solely loan failures under 72(p) affecting not more than 25% of participants in any plan year, changed to: <table style="width: 100%; border: none;"> <tr> <td style="width: 70%;">Number of Participants With Loan Failures</td> <td style="width: 30%;">Fee</td> </tr> <tr> <td>13 or fewer</td> <td>\$300</td> </tr> <tr> <td>14 to 50</td> <td>\$600</td> </tr> <tr> <td>51 to 100</td> <td>\$1,000</td> </tr> <tr> <td>101 to 150</td> <td>\$2,000</td> </tr> <tr> <td>Over 150</td> <td>\$3,000</td> </tr> </table>	Number of Participants With Loan Failures	Fee	13 or fewer	\$300	14 to 50	\$600	51 to 100	\$1,000	101 to 150	\$2,000	Over 150	\$3,000
Number of Participants With Loan Failures	Fee														
13 or fewer	\$300														
14 to 50	\$600														
51 to 100	\$1,000														
101 to 150	\$2,000														
Over 150	\$3,000														

Although 403(b) Perspectives is drafted by ERISA attorneys, the answers to issues addressed herein do not constitute legal opinions of McKay Hochman Consulting, nor does McKay Hochman Consulting guarantee that the IRS and the DOL will agree with the content of this newsletter. Accordingly, readers of 403(b) Perspectives should consult their attorneys or tax advisors before relying on any of the statements herein. Please direct any questions or comments to William C. Grossman at 973.492.1880.