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employee benefits lawflash

April 1, 2013

## Expanded Guidance from IRS on 403(b) Plans

*IRS amends EPCRS, significantly affecting 403(b) plans, and issues guidance to assist 403(b) plan sponsors in identifying and correcting defects.*

On December 31, 2012, the Internal Revenue Service (IRS) issued its updated Employee Plans Compliance Resolution System (EPCRS),<sup>1</sup> which expands and updates existing compliance corrections programs available to retirement plans generally and also now provides 403(b) plan sponsors with expanded opportunities to correct a wide range of retirement plan defects. These new EPCRS provisions were available to 403(b) plan sponsors on a voluntary basis prior to April 1, 2013, but they are mandatory effective April 1, 2013. In addition, to help 403(b) plan sponsors identify and correct possible defects, the IRS issued a plain-English 403(b) plan “fix it” guide on February 21, 2013. Lastly, on March 28, 2013, the IRS issued Revenue Procedure 2013-22,<sup>2</sup> which provides new IRS procedures for issuing opinion and advisory letters for Internal Revenue Code section 403(b) pre-approved plans. The IRS also issued an information package<sup>3</sup> that contains samples of plan provisions that have been found to satisfy certain requirements of section 403(b) of the Internal Revenue Code, the applicable regulations, and related guidance. The information package is intended to assist 403(b) plan sponsors that are preparing pre-approved plan documents and to accelerate the review and approval of the plans by the IRS. This LawFlash focuses on the new EPCRS and the “fix it” guide. We expect to provide further detail on Revenue Procedure 2013-22 and the information package in a separate LawFlash.

### What Does the New EPCRS Mean for Section 403(b) Plans?

Sponsors of 403(b) plans may use the new EPCRS to correct a wide range of defects related to operations, demographics, employer eligibility, and plan documents. Such defects include the failure to follow the terms of a written 403(b) plan document, implement elective deferrals, make required matching contributions, or pay required minimum distributions on time, as well as failures relating to the improper exclusion of eligible employees from making deferrals under the plan.

Similar to the existing EPCRS, plan sponsors may correct errors using one of the following three component programs of the new EPCRS:

- Self-Correction Program (SCP), which enables plan sponsors to correct insignificant (and, under limited circumstances, some significant) operational failures.
- Voluntary Correction Program (VCP), which enables plan sponsors to correct errors by paying a compliance fee and having the correction approved by the IRS.
- Audit Closing Agreement Program (Audit CAP), which enables plan sponsors to correct failures identified as a result of an IRS audit. Corrections under the Audit CAP require 403(b) plans to pay a sanction to the IRS.

In addition to these broader changes, there are several specific changes applicable to 403(b) plans. One of the

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1. The IRS updated its EPCRS through the issuance of Revenue Procedure 2013-12. For more information on the new provisions, view our January 31, 2013, LawFlash, “IRS Updates and Expands Qualification Correction Program,” available at [http://www.morganlewis.com/pubs/EB\\_LF\\_IRSUpdatesQualificationCorrectionProgram\\_31Jan13](http://www.morganlewis.com/pubs/EB_LF_IRSUpdatesQualificationCorrectionProgram_31Jan13).

2. View Revenue Procedure 2013-22 at <http://www.irs.gov/pub/irs-drop/rp-13-22.pdf>.

3. View the information package at [http://www.irs.gov/pub/irs-tege/403b\\_lrm0313.pdf](http://www.irs.gov/pub/irs-tege/403b_lrm0313.pdf).

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more significant changes is that 403(b) plan sponsors that missed the January 1, 2009, deadline to adopt a written plan document may use the new EPCRS to correct this failure. Furthermore, if the failure to timely adopt a written plan document is the only error, the 403(b) plan may correct the failure under the VCP. The VCP compliance fee will be temporarily reduced by 50%, provided VCP submissions are mailed to the IRS by December 31, 2013. The new EPCRS also added a “safe harbor” correction method for 403(b) plans that have improperly excluded eligible employees from making elective deferrals to the plan in violation of the “universal availability rule.”

Although 403(b) plans may use the new EPCRS to retroactively correct errors occurring on or after January 1, 2009, errors occurring before January 1, 2009, must be corrected using the pre-amended version of the EPCRS.

## Where Can 403(b) Plan Sponsors Find Guidance on Avoiding and Correcting Defects?

The IRS’s recently released “403(b) Plan Fix-It Guide” includes practical tips on how to identify, correct, and avoid 10 of the most common plan document and operational mistakes related to 403(b) plans. The user-friendly guide is available at [http://www.irs.gov/Retirement-Plans/403\(b\)-Plan-Fix-It-Guide](http://www.irs.gov/Retirement-Plans/403(b)-Plan-Fix-It-Guide). In addition to the 403(b) Plan Fix-It Guide, the IRS has published new and updated guidance applicable to 403(b) plan sponsors that need assistance or have questions related to correcting operational and plan document failures.<sup>4</sup> The guidance includes a VCP submission kit for plan sponsors that missed the deadline to adopt a written 403(b) plan document, responses to frequently asked questions related to retirement plan corrections programs, and a topical index for Revenue Procedure 2013-12, which will enable plan sponsors to quickly find provisions relevant to 403(b) plans in the new EPCRS.

## What Should 403(b) Plan Sponsors Do Now?

The IRS has indicated that it intends to increase its enforcement and compliance efforts related to 403(b) plans. As such, 403(b) plan sponsors should consider conducting an internal review to determine whether they have errors in need of correction. Because of the lower compliance fees associated with the SCP and the VCP, it will likely be less expensive for 403(b) plan sponsors to voluntarily correct compliance defects rather than wait to correct compliance defects during an IRS audit. In particular, 403(b) plan sponsors that failed to timely adopt a written 403(b) plan document should take corrective action before the end of 2013 to take advantage of the IRS’s temporary VCP compliance fee reduction. Lastly, the IRS granted special transition relief to 403(b) plan sponsors that have yet to adopt a written plan and that are under audit (or receive notification of an audit before April 1, 2013). These 403(b) plan sponsors will be permitted to participate in the VCP to correct their failure to timely adopt a written plan document and pay the reduced compliance fee available under the VCP, even though they are under audit.

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4. View the VCP Submission Kit at [http://www.irs.gov/pub/irs-tege/vcp\\_submission\\_kit\\_403b.pdf](http://www.irs.gov/pub/irs-tege/vcp_submission_kit_403b.pdf) and the other guidance at [http://www.irs.gov/Retirement-Plans/403\(b\)-Plan-Fix-It-Guide--403\(b\)-Plan-Overview](http://www.irs.gov/Retirement-Plans/403(b)-Plan-Fix-It-Guide--403(b)-Plan-Overview).

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