

Pension Plan Fix-It Handbook

Employee Benefits Series

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Found a Problem in Your Plan Audit? Next Step May Be IRS Voluntary Correction Program

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ERISA is a statute built on process and as a result is best complied with through careful documentation of plan design and activities. However, documentation alone is not enough when there's a problem in your plan that needs fixing. A periodic compliance audit of existing procedures will help you uncover operational errors before the government agencies do. One of the most important IRS programs to use if you discover a problem is the Employee Plans Compliance Resolution System. Familiarity with the IRS' recommended corrective actions can save you legal fees and IRS penalties.

EPCRS enables plan sponsors to keep their plan in compliance in three ways: through a Self-correction Program, a Voluntary Correction Program for plans not eligible for SCP and the Correction on Audit option for plans with compliance issues identified on audit.

As discussed in April ("Could IRS' Self-correction Program Help Your Plan Sort 'Insignificant' Errors?"), on Dec. 31, 2012, IRS issued Revenue Procedure 2013-12, which updated EPCRS and replaced Rev. Proc. 2008-50. Rev. Proc. 2013-12 became effective April 1. IRS also issued a 14-page summary highlighting the changes from Rev. Proc. 2008-50 at http://www.irs.gov/pub/irs-tege/rp13_12_changes_chart.pdf.

In April, we discussed the SCP. This column will discuss the VCP and the Audit CAP program.

Voluntary Correction Program

A VCP filing can be anonymous, part of a group submission or submitted by the plan sponsor. There are special procedures for group and anonymous submissions. This column will focus on plan sponsor submissions.

Under VCP, the plan sponsor voluntarily reports certain plan failures (those not eligible for SCP), pays a compliance fee and corrects the identified failures. The submission can be made any time before a plan is under examination. A plan is defined by IRS as being under examination once it has been notified orally or in writing by IRS of an impending examination.

Some Things Remain the Same

The underlying principles of the correction program remain the same (see ¶1110, Fig.1110-A in the *Handbook*).

A VCP submission will not make a plan a target for future IRS examinations but it also does not prevent a future IRS visit. IRS does not view the VCP submission as an admission of failure when conducting future examinations. In fact, a plan that has been properly submitted under VCP will not be examined while the submission is pending (unless the submission is part of a group submission).

Most Important Changes

Rev. Proc. 2013-12 introduced two forms:

- Form 8950 — Application for Voluntary Correction Under the Employee Plans Compliance Resolution System
- Form 8951 — Application for Voluntary Correction Program

See *IRS VCP*, p. 2

Forget to include these two forms and the VCP submission will be considered seriously deficient. IRS will refund the compliance fee and return the filing if there hasn't been "substantive processing," and then the plan sponsor must start the process over.

Generally, the VCP fees remained the same (see Fig. 1112-C):

- The fee is \$500 if the VCP submission involves only a minimum distribution failure for 50 or fewer participants and the failure would result in a Section 4974 excise tax.
- The fee for loan failure submissions is reduced by 50 percent if the loan failure is corrected in accordance with the revenue procedure, does not affect more than 25 percent of the participants in any year that the failure occurred and the loan failure is the only VCP failure.
- If requested, the compliance fee may be waived for Orphan Plan termination submissions at the discretion of IRS. An orphan plan is one that is abandoned by all fiduciaries designated to manage and operate it and its assets. The fee for non-amender submissions is reduced depending on the particular failure. Fees range from \$375 for good faith amendments or optional law changes to a 50-percent reduction for VCP submissions made within one year of the applicable remedial amendment period.

But some fees changed. Important alterations to the fee schedule include:

- The fee imposed for 403(b) plan submissions for failure to adopt a written plan document is reduced by 50 percent if the VCP submission is submitted no later than Dec. 31, 2013, and is the only reason for the submission.
- The fee for failure to adopt an amendment upon which a favorable determination letter is based within the remedial amendment period is \$500 if the amendment was adopted within three months of the remedial amendment period and the failure to adopt the amendment is the only reason for the VCP submission.
- VCP submissions with *multiple failures* also are subject to a reduced fee if the failures themselves are subject to a reduced fee (for example, minimum distributions and loans). The reduced fee is the lower of the sum of the reduced fee or the general fee.

Other changes to note include:

- VCP submissions are now made to Covington, Ky., rather than Washington, D.C.;
- 403(b) corrections have been expanded;
- a determination letter application is not required, and must not be submitted with certain VCP submissions;
- qualified nonelective contributions are no longer required to correct matching and nonelective contributions errors attributable to excluded employees unless they are used to satisfy the 401(k) safe harbor plan — this means that corrective matching contributions may have a vesting schedule;
- correction methods are established for defined benefit plans with Section 436 failures (operations and distributions);
- corrective contributions are no longer required when an overpayment is related solely to a premature distribution of a participant's vested benefit that was determined in accordance with the plan's terms; and
- more details are provided on locating lost participants.

A Quick Look at Some of the Changes

Distributions to correct delayed payments from defined benefit plans should be actuarially increased to account for the delay, using the plan's actuarial equivalence factors for participants that were in effect on the date the distribution should have been made.

Code Section 436 (see the March 2012 column, "Amending Your Defined Benefit Plan For Code Section 436") places limits on the accrual of benefits and payments in an underfunded defined benefit plan. Failure to properly apply the restrictions can be corrected through an additional employer contribution.

As always, reasonable actions must be taken to locate lost participants. Appropriate actions can include:

- mailing to the last known address using certified mail;
- using the Social Security letter forwarding program;
- hiring a commercial locator or credit agency; or
- using an Internet search tool.

See *IRS VCP*, p. 3

Correction on Audit

Audit CAP is available if IRS finds an error upon examination before the plan sponsor has either: (1) found a correctible error; or (2) substantially completed correcting any identified errors. Under Audit CAP, the plan sponsor must correct the error and pay a sanction. The sanction will take into account the nature, extent and severity of the failure as well as the extent to which any corrections were made before the audit.

The Audit CAP sanction for non-amenders discovered during the determination letter process increased slightly (see Fig. 1113-A) and provides for reduced sanctions (40 percent of the applicable fee) if the only failure is not adopting good faith amendments, interim amendments

or amendments required by the applicable deadline to reflect discretionary amendments.

In addition, the fee is \$1,000 if the only failure is not adopting an amendment upon which a favorable determination letter is conditioned within the remedial amendment period.

What Does This Mean for Plan Sponsors?

It is always important that you document current procedures and decisions regarding your plan. However, in some cases, documenting is not enough. An audit will uncover operational errors before the government agencies find them. In light of recent EPCRS changes, a helpful reminder: Becoming familiar with recommended corrective actions can save you legal fees and IRS penalties. 



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