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## **IRS Modifies EPCRS to Make it Easier to Correct Automatic Contribution and Other Salary Deferral Failures**

The Employee Plans Compliance Resolution System (“EPCRS”) sets forth a comprehensive system of correction programs for sponsors of retirement plans that are intended to satisfy the requirements of § 401(a), 403(a), 403(b), 408(k), or 408(p) of

the Internal Revenue Code (“Code”), but that have failed to meet those requirements for a period of time.

The most recent restatement of EPCRS is set forth in Rev. Proc. 2013-12, 2013-4 I.R.B. 313. Rev. Proc. 2015-28, modifies Rev. Proc. 2013-12 to reflect:

- New safe harbor EPCRS correction methods relating to automatic contribution features (including automatic enrollment and automatic escalation of elective deferrals) in plans described in § 401(k) and § 403(b); and
- Special safe harbor correction methods for plans (including those with automatic contribution features) that have failures that are of limited duration and involve elective deferrals.

These modifications make it easier and give the employer more time to make corrections before the employer must contribute qualified nonelective contributions. Currently, these modifications are only available for failures beginning on or before December 31, 2020 although the IRS will determine at a later date if it will extend the program.

To fully implement any correction, a Plan sponsor should carefully consider all the provisions of [IRS Revenue Procedure 2015-28](#) and consider consulting their ERISA attorney. Some brief highlights of Rev. Proc. 2015-28 modifications, include, but are not limited to:

- If the failure to implement an automatic contribution feature for an affected eligible employee does not extend beyond the end of the 9½ month period after the end of the plan year of the failure (which is generally the filing deadline of the Form 5500 series return, including automatic extensions), no qualified nonelective contribution (“QNEC”) for the missed elective deferrals is required.

- If an affected eligible employee has not affirmatively designated an investment alternative, missed Earnings may be calculated based on the plan's default investment alternative.
- No QNEC for the missed elective deferrals is required if the corrections qualify under the safe harbor correction method for Employee Elective Deferral Failures that do not exceed three months.
- A new safe harbor correction method is established for Employee Elective Deferral Failures for which the period of failure exceeds three months but do not extend beyond the Self Correction Program correction period for significant failures. This new safe harbor correction permits the Plan Sponsor to make a corrective contribution equal to 25% of the missed deferrals (25% QNEC) in lieu of the higher QNEC required in Rev. Proc. 2013-12.

For specifics on the corrections please see below as well as IRS Revenue Procedure 2015-28.

## BACKGROUND

The Internal Revenue Service ("Service") has received comments requesting special correction methods with respect to a failure to implement automatic contribution features. Commenters have stated that the cost associated with correcting failures to implement automatic contribution features under the current rules in EPCRS, as set forth in Rev. Proc. 2013-12, discourages employers from adopting plans with automatic contribution features because implementation errors are more common for plans with automatic contribution features (particularly automatic escalation features). The commenters also noted that implementation errors typically are discovered in connection with the preparation of a plan's Form 5500 series return/report for a plan year. In addition, commenters expressed the view that current EPCRS safe harbor correction methods for the exclusion of eligible employees in

a § 401(k) plan or § 403(b) Plan, or for failing to implement a salary reduction election, create a “windfall” for affected employees because those employees receive both their full salary and a 50% make-up corrective contribution. Commenters argue that this correction overcompensates affected participants for failures that last a short period of time because the participants usually have the opportunity to increase elective deferrals in later periods.

## DESCRIPTION OF MODIFICATIONS TO EPCRS

This revenue procedure modifies, but does not supersede, Rev. Proc. 2013-12. The modifications are discussed below.

### **(1) Modified safe harbor correction method for Employee Elective Deferral Failures to implement an automatic contribution feature.**

If the failure to implement an automatic contribution feature for an affected eligible employee or the failure to implement an affirmative election of an eligible employee who is otherwise subject to an automatic contribution feature does not extend beyond the end of the 9<sup>1</sup>/<sub>2</sub> month period after the end of the plan year of the failure (which is generally the filing deadline of the Form 5500 series return, including automatic extensions), no qualified nonelective contribution (“QNEC”) (as defined in § 1.401(k)-6 of the Income Tax Regulations) for the missed elective deferrals is required, provided that the following conditions are satisfied:

(a) correct deferrals begin no later than the earlier of (i) the first payment of compensation made on or after the last day of the 9½ month period after the end of the plan year in which the failure first occurred for the affected eligible employee or (ii) if the Plan Sponsor was notified of the failure by the affected eligible employee, the first payment of compensation made on or after the last day of the month after the month of notification;

(b) notice of the failure that satisfies specified requirements in new section .05(8)(c) of Appendix A of Rev. Proc. 2013-12 is given to the affected eligible employee not later than 45 days after the date on which correct deferrals begin; and

(c) corrective contributions to make up for any missed matching contributions are made in accordance with timing requirements under SCP for significant operational failures (described in section 9.02 of Rev. Proc. 2013-12) and are adjusted for Earnings.

**(2) Calculation of Earnings for certain failures to implement automatic contribution features.**

Rev. Proc. 2015-28 provides an alternative safe harbor method for calculating Earnings for Employee Elective Deferral Failures under § 401(k) plans or § 403(b) Plans that have automatic contribution features and that are corrected in accordance with the procedures in this revenue procedure. If an affected eligible employee has not affirmatively designated an investment alternative, missed Earnings may be calculated

based on the plan's default investment alternative, provided that, with respect to a correction made in accordance with the procedures in section 3.02(1) of this revenue procedure, any cumulative losses reflected in the Earnings calculation will not result in a reduction in the required corrective contributions relating to any matching contributions.

### **(3) Availability of safe harbor correction method.**

The safe harbor correction method under this revenue procedure is available only for plans with respect to failures that begin on or before December 31, 2020. At a later date, the Service will consider whether to extend the safe harbor correction method for failures that begin in later years. In deciding whether to extend the safe harbor correction method, the Service will take into account, among other relevant factors, the extent to which there is an increase in the number of plans implemented with automatic contribution features.

### **Description of modifications to encourage the early correction of Employee Elective Deferral Failures.**

#### **(1) Safe harbor correction method for Employee Elective Deferral Failures that do not exceed three months.**

This safe harbor correction method creates a rolling correction period for Employee Elective Deferral Failures that do not exceed three months. Under this safe harbor, no QNEC for the missed elective deferrals is required provided that

the following conditions are satisfied:

- correct deferrals begin no later than the earlier of (i) the first payment of compensation made on or after the three-month period that begins when the failure first occurred for the affected eligible employee or (ii) if the Plan Sponsor was notified of the failure by the affected eligible employee, the first payment of compensation made on or after the last day of the month after the month of notification;
- notice of the failure that satisfies specified requirements in new section .05(9)(c) of Appendix A of Rev. Proc. 2013-12 is given to the affected eligible employee not later than 45 days after the date on which correct deferrals begin; and
- corrective contributions to make up for any missed matching contributions are made in accordance with timing requirements under SCP for significant operational failures and are adjusted for Earnings.

**(2) Safe harbor correction method for Employee Elective Deferral Failures that extend beyond three months but do not extend beyond the SCP correction period for significant failures.**

Rev. Proc. 2015-28 creates a safe harbor correction method for Employee Elective Deferral Failures if the period of failure exceeds three months. This safe harbor correction would permit the Plan Sponsor to make a corrective contribution equal to 25% of the missed deferrals (25% QNEC) in lieu of the higher QNEC required in sections .05(2)(b) and .05(5)(a) of Appendix A and section .02(1)(B) of Appendix B to Rev. Proc. 2013-12. In order to use this safe harbor correction, the Plan Sponsor

must satisfy the following conditions:

- correct deferrals begin no later than the earlier of (i) the first payment of compensation made on or after the last day of the second plan year following the plan year in which the failure occurred or (ii) if the Plan Sponsor was notified of the failure by the affected eligible employee, the first payment of compensation made on or after the last day of the month after the month of notification;
  
- notice of the failure that satisfies specified requirements in new section .05(9)(c) of Appendix A of Rev. Proc. 2013-12 is given to the affected eligible employee not later than 45 days after the date on which correct deferrals begin; and
  
- corrective contributions (including the 25% QNEC and employer contributions to make up for any missed matching contributions) are made in accordance with timing requirements under SCP for significant operational failures and are adjusted for Earnings.

#### **Employee Elective Deferral Failure.**

For purposes of Rev. Proc. 2015-28, an Employee Elective Deferral Failure is a failure to correctly implement elective deferrals in a § 401(k) plan or § 403(b) Plan including elective deferrals pursuant to an affirmative election or pursuant to an automatic contribution feature (including an automatic escalation feature) and a failure to afford an employee the opportunity to make an affirmative election because the employee was improperly excluded from the plan.



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## Who We Are

Torrillo & Associates, LLC specializes in employee benefit plan audits including 401k audits, 403b audits, pension plan audits, and other retirement plan audits. We are licensed in 10 states including Pennsylvania, New Jersey, Delaware, New York and Florida. We are also able to practice in additional states that have passed firm mobility.

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