IRS Updates the Employee Plans Compliance Resolution System (“EPCRS”)

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System ("EPCRS")

Revenue Procedure 2016-51 modifies and superseded Rev. Proc. 2013-12, 2013-4 I.R.B. 313, which sets forth the Employee Plans Compliance Resolution System ("EPCRS"), a comprehensive system of correction programs for sponsors of retirement plans that have failed to satisfy certain requirements under section 401(a), 403(a), 403(b), 408(k), or 408(p) of the Internal Revenue Code. EPCRS is being modified to take into account the changes in the determination letter application program, as described in Rev. Proc. 2016-37. The revenue procedure also incorporates certain modifications set forth in previous revenue procedures and incorporates modifications to the annual fee.

Specific details on the changes are below:

This revenue procedure modifies and supersedes Rev. Proc. 2013-12, 2013-4 I.R.B. 313, the prior consolidated statement of the correction programs under EPCRS. This revenue procedure also incorporates certain modifications set forth in Rev. Proc. 2015-27, 2015-16 I.R.B. 914 (correction of overpayments and certain other topics), and Rev. Proc. 2015-28, 2015-16 I.R.B. 920 (correction of failures with respect to automatic contribution features and encouraging the early correction of employee elective deferral failures), two prior revenue procedures modifying Rev. Proc. 2013-12. In addition, this revenue procedure incorporates modifications to Rev. Proc. 2013-12 set forth in Rev. Proc. 2016-8, 2016-1 I.R.B. 243 (fees for VCP submissions generally moved to annual Employee Plans (EP) revenue procedure on user fees).

Modifications relating to changes in the determination letter program

Effective January 1, 2017, the staggered 5-year remedial amendment cycles for individually designed plans will be eliminated, and the scope of the determination letter program for individually designed plans will be limited to initial plan qualification, qualification upon plan termination, and certain other circumstances. For further information, see Rev. Proc. 2016-37, 2016-29 I.R.B. 136. EPCRS is being modified to take into account the changes in the determination letter program. For information on how to submit comments regarding changes made in EPCRS to take into account changes in the determination letter program, see section 17.

Changes to Audit CAP. Section 14 of Rev. Proc. 2013-12 sets forth guidance on determining the sanction under Audit CAP.

This revenue procedure provides a revised approach for determining Audit CAP sanctions. **Section 14.01 no longer provides that the sanction will be a negotiated percentage of the Maximum Payment Amount, but instead will be determined based on the facts and circumstances, including the relevant factors described in section 14.02.** The Maximum Payment Amount is one such factor that may be considered. Section 14.01 also provides that, **in general**, the **sanction will not be less than the VCP user fee applicable to the plan**. Section 14.02(2) sets forth additional factors for Nonamender Failures discovered while the plan is Under Examination, and section 14.04 significantly modifies the sanction for Nonamender Failures discovered during the determination letter application process. In section 14.04(3), the sanction for failing to timely adopt an amendment that is corrected within three months after the expiration of the remedial amendment period has been reduced to $750, regardless of the number of plan participants.

Modifications relating to user fees

Prior to Rev. Proc. 2016-8, section 12 of Rev. Proc. 2013-12 set forth the user fees for VCP submissions. Rev. Proc. 2016-8 modified Rev. Proc. 2013-12 by setting forth the general user fees for VCP submissions in 2016. In addition, Rev. Proc. 2016-8 included cross-references to Rev. Proc. 2013-12 for special rules relating to determining the user fees for VCP submissions (such as special user fees for Group Submissions and rules relating to establishing the number of plan participants). **Beginning in 2017, all user fees and rules relating to user fees for VCP submissions will be published in the annual EP revenue procedure that sets forth user fees, including VCP user fees**. Accordingly, most of section 12 has been deleted. In addition, rules relating to certain amounts that are not user fees have been moved from section 12 to other sections in this revenue procedure (see the description of modifications in section 2.04).

Description of modifications

The modifications to Rev. Proc. 2013-12 that are reflected in this revenue procedure include the following changes –

- Revising section 4.03 to address modifications to the eligibility requirement for SCP with regard to the Favorable Letter requirement.
- Incorporating changes made by Rev. Proc. 2015-27, which revised section 4.04 to extend SCP eligibility so that repeated corrections of excess annual additions under § 415 will not prevent certain plans from satisfying the SCP requirement to have established practices and procedures, as long as the plan corrects excess annual additions through the return of elective deferrals to affected employees within 9½ months after the end of the plan's limitation year.
- Revising section 4.08 to include a sentence providing that the user fee for a terminating Orphan Plan may be waived at the discretion of the IRS and that the request

for a waiver should be made at the time of the submission.

- Removing section 4.10 in Rev. Proc. 2013-12 relating to the submission of a determination letter in light of the changes to the determination letter program.
- Adding **new section 4.10 relating to egregious failures to set forth the effect of egregious failures on the various correction programs.** In addition, section 4.10(3) provides that the **IRS reserves the right to impose a sanction that may be larger than the VCP user fee.**
- Revising section 5.01(2)(a) to clarify that the term Plan Document Failure includes Good Faith Amendments, Interim Amendments, and Nonamender Failures, and moving the definitions of those terms from section 6.05 to section 5.01(2)(a)(ii).
- Revising section 5.01(2)(b) to reflect changes made by Rev. Proc. 2016-37.
- **Revising the definition of "Favorable Letter"** in section 5.01(4) to provide that a determination letter for an individually designed plan need not be current to be a Favorable Letter.
- Moving the concept that the Maximum Payment Amount includes the tax that the IRS could collect for any plan loan that did not meet the requirements of §72(p)(2) from section 14 to the definition of Maximum Payment Amount in section 5.01(5).
- Deleting a definition for References to Rev. Proc. 2007-44, previously in § 5.06 of Rev. Proc. 2013-12.
- Incorporating changes made in Rev. Proc. 2015-27 by revising section 6.02(5)(d) to delete a reference to the Social Security letter forwarding program because the Social Security Administration has announced that the program is no longer available as a method for locating lost plan participants who are owed additional retirement benefits.
- Modifying section 6.05 to provide that **determination**

letter applications may no longer be submitted with VCP submissions and to clarify that the issuance of a compliance statement with regard to a VCP submission that involves the correction of a Plan Document Failure or an Operational Failure through a plan amendment does not constitute a determination that the plan amendment satisfies the qualification requirements.

- Incorporating changes made in Rev. Proc. 2015-27 by revising sections 6.06(3) and 6.06(4) to **clarify that that there is flexibility in correcting an Overpayment under EPCRS**. For example, depending on the nature of the Overpayment failure (such as an Overpayment failure resulting from a benefit calculation error), an **appropriate correction method may include** using rules similar to the correction methods of sections 6.06(3) and 6.06(4) in Rev. Proc. 2013-12, but **having the employer or another person contribute the amount of the Overpayment (with appropriate interest) to the plan instead of seeking recoupment from plan participants and beneficiaries**. Any correction method used must be consistent with the correction principles in section 6.02 and any applicable rules under EPCRS.
- Revising section 6.11(5)(b) to clarify that a sanction, in addition to the user fee, equal to 10% of the Excess Amount will apply when a failure involves an Excess Amount under a SEP or a SIMPLE IRA Plan and the Plan Sponsor retains the Excess Amount in the SEP or SIMPLE IRA Plan.
- Deleting rules (previously in § 9.03 of Rev. Proc. 2013-12) relating to submitting a determination letter application when correcting by plan amendment under SCP.
- Modifying section 10.01 to reflect that the **user fees for EPCRS are now published in an annual revenue procedure that sets forth user fees, including VCP user fees.**
- Deleting rules (previously in § 10.05 of Rev. Proc. 2013-12) relating to the procedure for filing a

determination letter application as part of the VCP submission to reflect changes to the determination letter program.

- Revising renumbered section 10.06(7) to reflect that, **in the case of the failure to reach resolution with regard to an Anonymous Submission, the IRS will no longer refund 50% of the applicable user fee.**
- Modifying renumbered section 10.06(9) to clarify that the correction of Interim Amendment and Nonamender Failures must be made by the date of submission and that corrective plan amendments required as part of a VCP submission must be adopted no later than 150 days after the date of the compliance statement, and to include special correction timing rules for governmental plans.
- Adding section 10.07(2)(b) to clarify that a compliance statement issued with regard to the correction of a Nonamender Failure is a determination that the corrective amendment was timely adopted, and not a determination that the corrective amendment as drafted complies with the qualification requirements or conforms to the plan's prior operation.
- Adding section 10.07(2)(c) to clarify that the compliance statement issued with regard to a corrective amendment made to correct an Operational Failure is a determination that the Operational Failure has been corrected, but is not a determination that the plan, including the plan amendment, satisfies the qualification requirements.
- Revising renumbered section 10.09 to reflect that a determination letter application should not be requested as part of an Anonymous Submission.
- Reorganizing renumbered section 10.10 with regard to Group Submissions for purposes of clarity.
- Incorporating changes made in Rev. Proc. 2015-27 by revising section 11.02 to provide that applicants may use model VCP submission documents by submitting Form 14568, *Model VCP Compliance Statement*, and Forms 14568-A

through 14568-I. A link to the IRS website is provided in section 11.02(4) for the most current versions of Form 14568 and Forms 14568-A through 14568-I.

- Removing section 11.04(3) to delete a determination letter application as a required document for a VCP submission in order to reflect changes made by Rev. Proc. 2016-37.
- Revising section 11.05 to delete procedures for the payment of the user fee for a determination letter application filed as part of the VCP submission to reflect changes made by Rev. Proc. 2016-37.
- Revising section 11.06 to reflect that VCP user fees are no longer set forth in section 12 but now are published in an annual revenue procedure that sets forth user fees, including VCP user fees.
- Revising section 11.11 to provide that an **applicant wishing to obtain an acknowledgement of receipt of a VCP submission must use IRS Letter 5265 and attach it to the VCP submission.**
- Modifying section 11.14(1) to delete procedures for including a determination letter application with a VCP submission in order to reflect the changes made by Rev. Proc. 2016-37.
- Modifying section 11.14(2)5 to reflect that the Model Compliance Statement and Schedules previously provided in Appendix C are now Forms 14568 and Forms 14569-A through Form 14568-I.
- Modifying section 11.14(2)6 to reflect that the Acknowledgement Letter previously provided in Appendix D is now Letter 5265.
- Modifying section 11.14(2)8 to delete procedures for including a determination letter application with a VCP submission in order to reflect the changes made by Rev. Proc. 2016-37.
- Deleting section 11.14(2)10 to reflect the changes made by Rev. Proc. 2016-37.
- Deleting most of section 12. For a description of the

modifications, see section 2.03.

- Moving section 12.06(2) to section 6.11(5)(b).
- Moving section 12.07 to section 4.10.
- Modifying section 14 regarding sanctions under Audit CAP (including sanctions for Nonamender Failures discovered Under Examination and during the determination letter process). For a description of the modifications, see section 2.02(2).
- Adding section .01(2) to Appendix A to clarify that a Plan Sponsor may choose any correction method in the appendices to correct a failure, as long as the plan can satisfy the eligibility requirements for that correction method.
- Incorporating changes made in Rev. Proc. 2015-28 by revising section.05 of Appendix A to add new section .05(8) to **provide a safe harbor correction method for certain Employee Elective Deferral Failures associated with missed elective deferrals for eligible employees who are subject to an automatic contribution feature in a § 401(k) plan or 403(b) Plan (including employees who made affirmative elections in lieu of automatic contributions but whose elections were not implemented correctly).**
- Incorporating changes made in Rev. Proc. 2015-28 by revising section.05 of Appendix A to add new section .05(9) to **provide two safe harbor correction methods for certain Employee Elective Deferral Failures, one for failures that do not exceed three months and a second for failures that exceed three months but do not extend beyond the SCP correction period for significant failures.** In incorporating this change, the term **"corrective contributions" was changed to "corrective allocations"** to reflect the correction principals described in section 6.02(4).
- Incorporating changes made in Rev. Proc. 2015-28 by revising section .05 of Appendix A to add a definition of Employee Elective Deferral Failures in new section

.05(10).

- Incorporating changes made in Rev. Proc. 2015-27 by deleting Appendices C and D.
- Correcting various citations and cross references.

Future enhancements.

Future updates.

It is expected that the IRS and the Department of the Treasury (Treasury Department) will continue to update the EPCRS revenue procedure, in whole or in part, from time to time, including further improvements to EPCRS based on comments received. Accordingly, the IRS and Treasury Department continue to invite further comments on how to improve EPCRS.

Comments relating to the recoupment of Overpayments failures.

Section 4.05 of Rev. Proc. 2015-27 modified §§ 6.06(3) and 6.06(4) of Rev. Proc. 2013-12 to clarify that there is flexibility in correcting an Overpayment under EPCRS in light of the concern that some Plan Sponsors may be incorrectly interpreting the correction rules under EPCRS as requiring a demand for recoupment from plan participants and beneficiaries in all cases of Overpayment failures. Those clarifications are incorporated in this revenue procedure. For a further description of the clarifications, see § 3.02 of Rev. Proc. 2015-27. Section 3.02(4) of Rev. Proc. 2015-27 stated that the IRS intends to make further revisions regarding the correction of Overpayments and solicited comments from the public on revisions to EPCRS relating to the recoupment of Overpayments. The Treasury Department and the IRS are in the process of reviewing the comments received. Comments continue to be requested on this issue and will be shared with the Department of Labor.

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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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