

Internal Revenue Service

Employee Plans Reconciliation Resolution System Modified

On March 27, 2015, the IRS released Revenue Procedure 2015-27 <http://www.irs.gov/pub/irs-drop/rp-15-27.pdf>, which revises the guidance on the Employee Plans Compliance Resolution System (EPCRS) provided by Revenue Procedure 2013-12 http://www.irs.gov/irb/2013-04_IRB/ar06.html. This new revenue procedure modifies, but does not supersede, Rev. Proc. 2013-12. While this revenue procedure is generally effective July 1, 2015, plan sponsors are permitted, at their option, to apply the provisions of this revenue procedure on or after March 27, 2015. In addition, written comments are requested by July 20, 2015 on expanding EPCRS correction rules to provide additional guidance on the recovery or recoupment of overpayments.

EPCRS provides 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) but have failed to do so. Submissions relating to governmental 457(b) plans are accepted by the IRS on a provisional basis outside of EPCRS through standards that are similar to EPCRS. EPCRS, which permits plan sponsors to correct failures and thereby continue to provide employees with retirement benefits on a tax-favored basis, includes the:

- Self-Correction Program (SCP),
- Voluntary Correction Program (VCP), and
- Audit Closing Agreement Program (Audit CAP).

In conjunction with the release of the revenue procedure, the IRS published a very thorough summary, including a chart explaining the areas where guidance has been modified. <http://www.irs.gov/Retirement-Plans/New-Rev-Proc-Updates-EPCRS>. As detailed in the summary, changes include:

- **Recoupment.** Clarifies correction rules for overpayments made to participants and requests public comments on recoupment of plan overpayments
- **Excess contributions.** Modifies the Self-Correction Program (SCP) for IRC Section 415(c) failures
- **Fees.** Lowers compliance fees for certain VCP submissions
- **Submission forms.** New acknowledgement letter form and other VCP model document changes
- **Miscellaneous.** Miscellaneous modifications to correction rules and revision of citations and cross references

The correction rules regarding overpayment failures in a defined contribution plan have been modified to state that:

Depending on the nature of the overpayment failure, an appropriate correction method may include having the employer or another person contribute the amount of the overpayment (with appropriate interest) to the plan in lieu of seeking recoupment from plan participants and beneficiaries.

Additionally, if a plan sponsor adopts a retroactive amendment to conform the plan document to the plan's operations (subject to specified requirements) other correction methods may be utilized that satisfy the correction principles and rules of the revenue procedure.

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Employee Plan News Article Addresses Voluntary Correction Requests by 457(b) Plans

The February 27, 2015 edition of Employee Plan News includes the article 457(b) Plan Submissions to Voluntary Compliance. http://www.irs.gov/pub/irs-tege/eptn_2015_2.pdf As explained in the article, the IRS Employee Plans Voluntary Compliance (VC) team will consider requests submitted by 457(b) plan sponsors on a provisional basis, which is outside of the Employee Plans Compliance Resolution System (EPCRS). If the IRS accepts the request, a special closing agreement will be issued.

It is important to note that the IRS will not address any corrections relating to the form of a written 457(b) plan document. According to the article, plan sponsors who want the IRS to review their 457(b) plan document or consider any other document form issue may request a private letter ruling. The article also states that governmental plan sponsors do not have to make a submission to VC to voluntarily fix problems with their 457(b) plans. Governmental plan sponsors have until the first day of the plan year that begins more than 180 days after the IRS notifies them of the failure to correct their plan failures.

IRS Updated Publications

The following publications have been revised recently:

- *SEP Plan Fix-It Guide* http://www.irs.gov/pub/irs-tege/sep_fixit_guide.pdf
- *SEP Checklist* Publication 4285 <http://www.irs.gov/pub/irs-pdf/p4285.pdf>
- *SIMPLE IRA Checklist* Publication 4284 <http://www.irs.gov/pub/irs-pdf/p4284.pdf>
- *Choosing a Retirement Plan for Your Small Business* Publication 3998 <http://www.irs.gov/pub/irs-pdf/p3998.pdf>
- *SIMPLE IRA Plans for Small Business* Publication 4334 <http://www.irs.gov/pub/irs-pdf/p4334.pdf>
- *Payroll Deduction IRAs for Small Business* Publication 4587 <http://www.irs.gov/pub/irs-pdf/p4587.pdf>
- *Profit Sharing Plans for Small Business* Publication 4806 <http://www.irs.gov/pub/irs-pdf/p4806.pdf>

IRS Invites Public Comment on 2015 – 2016 Priority Guidance Plan

In Notice 2015-27, which was released March 16, 2015, the IRS invited suggestions on guidance projects that should be worked on during the period from July 1, 2015 – June 30, 2015. http://www.irs.gov/pub/irs-utl/Notice_2015-27.pdf Recommendations are due May 1, 2015. As set forth in the Notice, the following items will be evaluated when reviewing recommendations and selecting projects for inclusion on the 2015-2016 Priority Guidance Plan:

1. *Whether the recommended guidance resolves significant issues relevant to many taxpayers;*
2. *Whether the recommended guidance promotes sound tax administration;*

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3. *Whether the recommended guidance can be drafted in a manner that will enable taxpayers to easily understand and apply the guidance;*
4. *Whether the recommended guidance involves regulations that are outmoded, ineffective, insufficient, or excessively burdensome and that should be modified, streamlined, expanded, or repealed;*
5. *Whether the Service can administer the recommended guidance on a uniform basis; and*
6. *Whether the recommended guidance reduces controversy and lessens the burden on taxpayers or the Service.*

Revised 403(b) Sample Plan Provisions and Information Package Published

On March 10, 2015, the IRS published revised Listings of Required Modifications (LRMs) for sponsors of 403(b) pre-approved plans, including prototype and volume submitter plans. http://www.irs.gov/pub/irs-tege/403b_lrm0313.pdf This extensive information package includes samples of plan provisions that the IRS has determined will satisfy the law and regulations governing 403(b) plans.

An example of updated material includes the following:

The requirement that contributions made under different vesting schedules be made to a separate account is satisfied by maintaining separate bookkeeping accounts. Physically separate accounts are not required. Similarly, the plan merely needs to maintain bookkeeping records that separately reflect the portion of such account that is vested and the portion that is not vested.

While the sample provisions have been written for 403(b) prototype plans, the IRS cautions that sample provisions may or may not be acceptable or suitable in different plans depending on the context in which used. Further, the IRS states that “insurance companies and custodians generally may also look to the language of the sample provisions in drafting those terms of annuity contracts and custodial accounts that are required by section 403(b).”

Finally, while the IRS acknowledges some 403(b) plans are subject to ERISA, the LRMs do not include sample Title I plan provisions. The information package provides:

However, the Service has developed sample plan provisions to enable section 401(a) master and prototype plans to comply with Internal Revenue Code qualification requirements that have parallel Title I requirements, and sponsors of section 403(b) pre-approved plans may find these sample plan provisions helpful in drafting plan provisions intended to comply with Title I...

IRS Extends Temporary Nondiscrimination Relief for Closed Defined Benefit Plans

Notice 2014-5, which was released December 13, 2013, provided temporary nondiscrimination relief for defined benefit plans considered to be “closed” because they have been amended to limit accruals to some or all employees who participated in the plan on a certain date. <http://www.irs.gov/pub/irs-drop/n-14-05.pdf> Notice 2015-28 extends the temporary nondiscrimination relief provided for an additional year by applying that relief to plan years beginning before 2017, if the conditions of Notice 2014-5 are satisfied. <http://www.irs.gov/pub/irs-drop/n-15-28.pdf>

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According to the IRS, the extension described in Notice 2015-28 is provided in anticipation that amendments to the 401(a)(4) regulations will be finalized and the relief provided under Notices 2014-5 and 2015-28 will expire.

As explained in Notice 2014-5, closing a defined benefit plan often occurs in conjunction with an amendment that provides new or greater contributions under a defined contribution plan intended to replace accruals under the defined benefit plan for new hires or other employees to whom the defined benefit plan is closed. The relief provided by the notice looks to the aggregated plans to satisfy the 401(a)(4) nondiscrimination requirements on the basis of equivalent benefits, even if the aggregated plans do not satisfy the current conditions for testing on that basis.

Department of Labor

Proposed Fiduciary Rule Expected to be Released Soon

As reported in the March 6, 2015 edition of *Retirement Update*, the White House announced that the Department of Labor will soon issue a notice of proposed rulemaking to better ensure that those providing investment advice to plan fiduciaries and/or plan participants and beneficiaries are subject to ERISA's standards of fiduciary conduct, if applicable.

The importance of these forthcoming proposed regulations has been highlighted in several forums recently:

- Secretary of Labor Thomas Perez told the Consumer Federation of America's Consumer Assembly on March 13, 2015 that America's retirement security is too important to be compromised by conflicts of interest in investment advice. According to the March 19, 2015 edition of *DOL News Briefs*, Perez noted that he has been talking with as many people as possible as the new proposal is developed and counts insight from the financial services industry as particularly valuable. <http://www.dol.gov/sec/newsletter/2015/20150319.htm#.VRrbPOFkZME>
- Senior Counselor to the Secretary Sharon Block addressed congressional questions on the DOL's proposed rulemaking at the "Ending the Retirement Savings Drain and Improving Economic Security" forum held on March 24, 2015. The event, which was sponsored by Sen. Elizabeth Warren and Rep. Elijah Cummings was part of their Middle Class Prosperity Project. Participants included retirement experts, state government officials and victims of conflicted retirement advice. This event was reported in the *DOL News Briefs* dated March 26, 2015. http://www.dol.gov/sec/newsletter/2015/20150326.htm#.VRra_uFkZME
- Securities and Exchange Chair Mary Jo White testified before the United States House of Representatives Committee on Financial Services on March 24, 2015. The testimony was entitled "Examining the SEC's Agenda, Operations and FY 2016 Budget Request." <http://www.sec.gov/news/testimony/2015-ts032415mjw.html#.VRMj1eFkZME> In addition to commenting on possible areas of SEC guidance for broker dealers, White stated:

Separately, the Commission staff has provided technical assistance to Department of Labor staff as they consider potential changes to the definition of "fiduciary" under the Employee Retirement Income Security Act (ERISA). The staff and I are committed to continuing these conversations with the Department of Labor, both to provide technical assistance and information with respect to the Commission's regulatory approach and to discuss the practical effect on retail investors, and investor choice, of their potential amendments to the definition of "fiduciary" for purposes of ERISA.

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Guidance Provides Two-Month Grace Period for Annual Information to Participants in Individual Account Plans

On March 18, 2015, the Department of Labor's (DOL) Employee Benefits Security Administration (EBSA) announced that a direct final rule published on March 19, 2015 changes the deadline for providing annual investment and plan-related information to participants in individual account plans covered by ERISA.

<http://webapps.dol.gov/FederalRegister/HtmlDisplay.aspx?DocId=28129&AgencyId=8&DocumentType=2>

Plan administrators had requested additional time to make disclosures required at least once in any 12-month period to save money and avoid unnecessary burdens.

Along with the direct final rule, which extends the due date of the annual disclosures by two months, the DOL issued a notice of proposed rulemaking.

<http://webapps.dol.gov/FederalRegister/HtmlDisplay.aspx?DocId=28130&AgencyId=8&DocumentType=1> According to the press release, if EBSA receives significant adverse comment during the public comment period, the direct final rule will be withdrawn and then revised. <http://www.dol.gov/ebsa/newsroom/2015/ebsa031815.html> Otherwise, the direct final rule will become effective on June 17, 2015.

In conjunction with the release of the direct final rule, a temporary enforcement policy that is effective immediately will treat a plan administrator as satisfying the current 12-month rule if annual disclosures are made within the new 14-month deadline, provided that the plan administrator reasonably determines that doing so benefits the plan's participants and beneficiaries. Finally, a comprehensive Fact Sheet was published to explain the guidance.

<http://www.dol.gov/ebsa/newsroom/fsdirectfinalrule.html>

ERISA Advisory Council 2014 Final Reports Published

The 2014 ERISA Advisory Council (Council) examined the role of outsourcing by plan sponsors and plan fiduciaries in managing and administering their employee benefit plans and recently published its final report.

<http://www.dol.gov/ebsa/publications/2014ACreport3.html> While outsourcing helps plan sponsors focus on their core business rather than building expensive expertise and technology to manage and administer their plans, the consequences of outsourcing are not necessarily appreciated by those transferring responsibility and liability.

The Council made several recommendations to the DOL in each of the following categories:

1. Educate plan sponsors on current practices with respect to outsourced services;
2. Clarify the legal framework under ERISA for delegating responsibility to service providers;
3. Provide additional guidance on the duty to select and monitor service providers;
4. Facilitate the use of multiple employer plans and similar arrangements as a means of encouraging plan formation and easing administrative burdens; and
5. Update and provide additional guidance on insurance coverage and ERISA bonding of outsourced service providers.

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The 2014 ERISA Advisory Council final report *Issues and Considerations Around Facilitating Lifetime Plan Participation* examined recent movement of participant assets out of defined contribution and defined benefit plans, and into retirement accounts not covered by ERISA, such as IRAs or other savings accounts, or as plan distributions.

<http://www.dol.gov/ebsa/publications/2014ACreport2.html>

Among the recommendations made by the Council to the DOL, the following are highlighted:

1. *Provide education and outreach to participants and plan sponsors on the considerations and benefits to participants of retaining assets within the employer-sponsored system, including providing sample educational materials that can be used by plan sponsors at all points of participation in the plan.*
2. *Develop model, plain language communications that can be provided to participants at all points of their participation in the plan, including prior to enrollment and throughout employment to help them decide what to do with retirement assets, particularly at job change and retirement, or other distribution events.*

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