

## Internal Revenue Service

### IRS Published *Employee Plan News*

On May 6, 2015, the IRS released Issue 2015-5 of *Employee Plan News*. [http://www.irs.gov/pub/irs-tege/eptn\\_2015\\_5.pdf](http://www.irs.gov/pub/irs-tege/eptn_2015_5.pdf). In addition to information on changes to Employee Plan determination letter application processing, articles cover modifications to the Employee Plans Compliance Resolution System (EPCRS), and information on tax-exempt employers who are eligible to sponsor a 403(b) plan.

#### Employee Plans Compliance Resolution System (EPCRS) Revised

On March 27, 2015, the IRS released Revenue Procedure 2015-27 <http://www.irs.gov/pub/irs-drop/rp-15-27.pdf>, which revised 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](http://www.irs.gov/irb/2013-04_IRB/ar06.html). This new revenue procedure modifies, but does not supersede, Rev. Proc. 2013-12. Revisions addressed include the following items noted in the article:

- **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 Voluntary Correction Program (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.

Revenue Procedure 2015-28 contains the details and conditions for new safe harbor correction methods.

[http://www.irs.gov/irb/2015-16\\_IRB/ar07.html](http://www.irs.gov/irb/2015-16_IRB/ar07.html) An article explains that plan sponsors can avoid or pay reduced corrective contributions for certain elective deferral errors in 401(k) and 403(b) retirement plans and walks through corrections available for the following deficiencies:

- Incorrect automatic contributions or automatic escalation of elective deferrals
- Failure to correctly determine or withhold elective deferrals
- Exclusion of eligible employees

Additional resources linked to the article include:

- Correcting Plan Errors <http://www.irs.gov/Retirement-Plans/Correcting-Plan-Errors>
- New Revenue Procedure Updates EPCRS <http://www.irs.gov/Retirement-Plans/New-Rev-Proc-Updates-EPCRS>
- 401(k) Plan Fix-It Guide <http://www.irs.gov/Retirement-Plans/401%28k%29-Plan-Fix-It-Guide>
- 403(b) Plan Fix-It Guide <http://www.irs.gov/Retirement-Plans/403b-Plan-Fix-It-Guide>

#### Review of Tax-Exempt Employers Eligible to Sponsor a 403(b) Plan

An article, which includes links to helpful resources, explains that only the following tax-exempt employers may sponsor a 403(b) plan:

- Tax-exempt organizations established under IRC Section 501(c)(3)
- Public school systems

*No part of this document is intended to provide tax or legal advice. Any questions involving tax or legal matters should be referred to your plan's legal counsel or tax advisor. For financial professional/Plan Sponsor use only. Not for public distribution.*

- Cooperative hospital service organizations
- Uniformed Services University of the Health Sciences Civilian faculty and staff
- Public school systems organized by Indian tribal governments
- Certain ministers who meet specified requirements.

It is important that nonprofit entities exempt from federal income tax under Internal Revenue Code Section 501(a) file an annual return reporting their operations and activities, using a Form 990 series return. (Governmental entities, including public schools, are not subject to these rules). Failure to file a required return or notice for three consecutive years results in automatic revocation of tax-exempt status, which jeopardizes the 403(b) plan. The article instructs sponsors to file an application for reinstatement, even if an application for tax-exempt status was not originally required. Finally, the article suggests that a retroactive reinstatement be requested so that 403(b) eligibility sponsorship can be maintained.

## IRS Information Release Explains Rules Governing Form 990-Series Information Returns

On May 5, 2015, the IRS published IR-2015-78 to remind tax-exempt organizations that 2014 Form 990-series information returns for most organizations were due May 15. <http://www.irs.gov/uac/Newsroom/Many-Tax-Exempt-Organizations-Must-File-with-IRS-by-May-15> It is important to note that Form 990-series information returns and notices are due on the 15th day of the fifth month after an organization's tax year ends, which for calendar year organizations is May 15.

The information release cautioned filers not to provide social security numbers, since both the IRS and most tax-exempt organizations are required to publicly disclose most parts of form filings, including schedules and attachments. Filers are suggested to file electronically to minimize the risk of inadvertent disclosure of social security numbers.

Finally, the IRS states that an online search tool, [Exempt Organizations Select Check](http://www.irs.gov/Charities-&Non-Profits/Exempt-Organizations-Select-Check), provides information about the federal tax status and filings of certain tax-exempt organizations, including whether organizations have had their federal tax exemptions automatically revoked. <http://www.irs.gov/Charities-&Non-Profits/Exempt-Organizations-Select-Check>

## IRS Spring Regulatory Agenda Released

The Treasury Department announced the Spring 2015 Regulatory Agenda.

[http://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION\\_GET\\_AGENCY\\_RULE\\_LIST&currentPub=true&agencyCode=&showStage=active&agencyCd=1500&Image58.x=36&Image58.y=16](http://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST&currentPub=true&agencyCode=&showStage=active&agencyCd=1500&Image58.x=36&Image58.y=16) The following guidance from the IRS is expected in 2015:

- Notice to Participants of Consequences of Failing to Defer Receipt of Qualified Retirement Plan Distributions; Expansions of Applicable Election Period and Period for Notices – Action scheduled for July 2015 - to finalize proposed regulations - provide guidance to a participant of his or her right, if any, to defer receipt of an immediately distributable benefit and must also describe the consequences of failing to defer receipt of the distribution. <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201504&RIN=1545-BH75>
- Determination of Governmental Plan Status – Scheduled for September 2015, the notice of proposed rulemaking would provide guidance relating to the determination of whether a plan is a governmental plan within the meaning of section 414(d). <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201504&RIN=1545-BG43>

***No part of this document is intended to provide tax or legal advice. Any questions involving tax or legal matters should be referred to your plan's legal counsel or tax advisor. For financial professional/Plan Sponsor use only. Not for public distribution.***

- Spousal IRAs, SEPs and IRA Technical Changes – A notice of proposed rulemaking is slated for to provide guidance on IRAs is slated for July 2015. <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201504&RIN=1545-BL99>
- Application of Section 409A to Nonqualified Deferred Compensation Plans – A notice of proposed rulemaking is due in December 2015. <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201504&RIN=1545-BL25>

## General Counsel Memorandum Considers 409A Failure

In General Counsel Memorandum Number 201518013, which was released May 1, 2015, the IRS discussed the correction of a failure to comply with 409A. <http://www.irs.gov/pub/irs-wd/201518013.pdf> It is important to note that the guidance applies to a specific set of facts for a taxpayer, but the analysis is informative. Given the facts provided, compensation subject to a substantial risk of forfeiture in a nonqualified deferred compensation plan during a tax year cannot be protected from income taxation if, for any part of the tax year, such compensation fails to satisfy the requirements of 409A.

The question posed in the General Counsel Memorandum and the conclusion is as follows:

### **ISSUE**

*Does the correction of a failure to comply with section 409A(a) of the Internal Revenue Code (Code) applicable only to compensation subject to a substantial risk of forfeiture avoid income inclusion under section 409A if the correction is made before the compensation vests but during the service provider's taxable year in which it vests?*

### **CONCLUSION**

*No. Section 409A(a)(1)(A)(i) provides that, if a nonqualified deferred compensation plan fails to comply, or fails to be operated in accordance, with section 409A(a)(2), (3) and(4) "at any time during a taxable year," compensation deferred under the plan that is not subject to a substantial risk of forfeiture and that has not previously been included in income is includible in the service provider's gross income for the taxable year. Deferred compensation that is subject to a substantial risk of forfeiture is subject to the requirements of section 409A(a)(2), (3), and (4) at all times during a taxable year, though a deferred amount is not includible in income under section 409A if it is subject to a substantial risk of forfeiture at all times during the taxable year. In contrast, if the amount is not subject to substantial risk of forfeiture at all times during the taxable year (generally meaning the amount is vested as of the end of the taxable year), the amount is includible in income.*

*The correction of a failure to comply with section 409A(a) during a taxable year indicates that a failure existed during the taxable year in which the correction is made. In accordance with Section 409A(a)(1)(A)(i), a failure applicable to deferred compensation subject to a substantial risk of forfeiture that lapses during the taxable year results in income inclusion of the deferred amount under section 409A, regardless of whether the failure is corrected during the same taxable year but before the substantial risk of forfeiture lapses.*

## IRS News in Brief

- The Advisory Committee on Tax Exempt and Government Entities (ACT) will hold a public meeting on Wednesday, June 17, 2015. <https://www.federalregister.gov/articles/2015/05/28/2015-12954/advisory-group-to-the-internal-revenue-service-tax-exempt-and-government-entities-division-tege> One of the five topics for discussion will be *Employee Plans: Analysis and Recommendations Regarding 403(b) Plans*.

**No part of this document is intended to provide tax or legal advice. Any questions involving tax or legal matters should be referred to your plan's legal counsel or tax advisor. For financial professional/Plan Sponsor use only. Not for public distribution.**

- The IRS is soliciting comments by July 27 concerning Notice 2015-XX, Procedures for Requesting a Waiver of the Electronic Filing Requirements for Form 8955-SSA and Form 5500-EZ. <https://www.federalregister.gov/articles/2015/05/28/2015-12952/proposed-collection-comment-request-for-notice-2015-xx> This notice is expected to provide procedures for the plan administrators of retirement plans who are required to electronically file Form 8955-SSA, Annual Registration Statement Identifying Separated Participants With Deferred Vested Benefits, or Form 5500-EZ, Annual Return of One-Participant (Owners and Their Spouses) Retirement Plan, to request a waiver of that requirement due to economic hardship.

## Department of Labor

### Audit Quality Report Published

On May 28, 2015, the Employee Benefits Security Administration (EBSA) announced the publication of a study considering the quality of benefit plan audits performed by Certified Public Accountants (CPAs).

<http://www.dol.gov/ebsa/newsroom/2015/15-1000-NAT.html>. According to *Assessing the Quality of Employee Benefit Plan Audits*, there are serious problems with the current performance of auditors, which put the benefits of participants and beneficiaries at risk. [www.dol.gov/ebsa/pdf/2014AuditReport.pdf](http://www.dol.gov/ebsa/pdf/2014AuditReport.pdf)

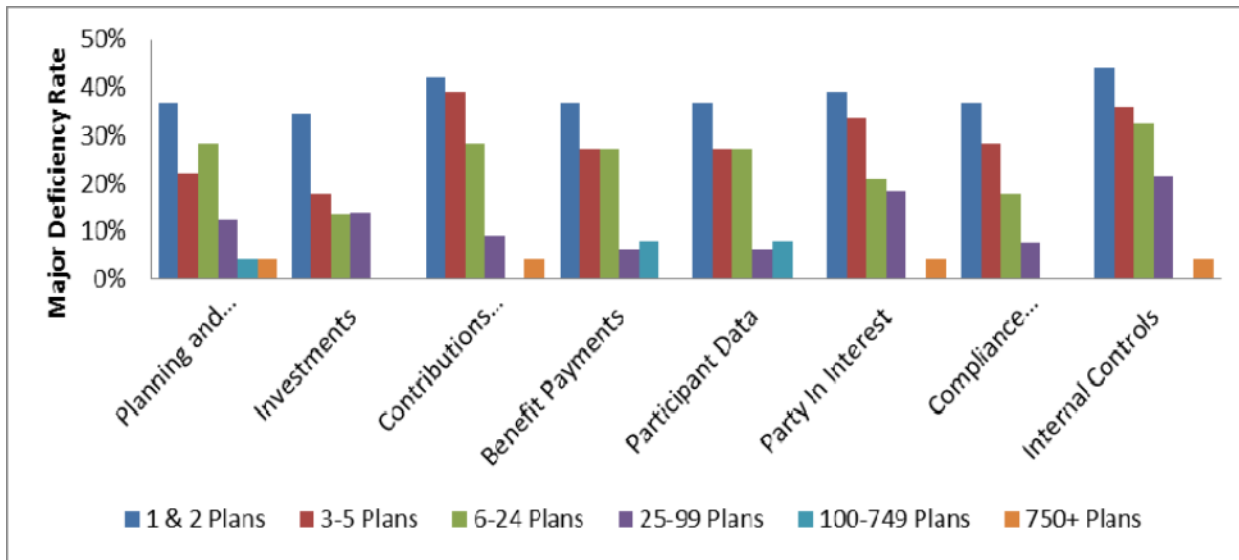
Employee benefit plans with 100 or more participants are required to have an audit as part of their obligation to file a Form 5500 series. EBSA offers information to plan sponsors about how to select an auditor so that the auditor is qualified and protects the plan from impropriety. <http://www.dol.gov/ebsa/publications/selectinganauditor.html>. Despite the length of time the requirement has been in place and the outreach efforts made by EBSA, audit performance has worsened.

Assistant Secretary of Labor Phyllis C. Borzi stated in the news release:

*The existing patchwork of regulations and rules needs to be overhauled and a meaningful enforcement mechanism needs to be created. The department is proposing, among other measures, legislation that will fix these problems.*

The report found that 61 percent of audits fully complied with professional auditing standards or had only minor deficiencies under professional standards, while the remaining 39 percent of the audits contained major deficiencies. Page 17 of the report identifies the following deficiencies, by size of plan:

**No part of this document is intended to provide tax or legal advice. Any questions involving tax or legal matters should be referred to your plan's legal counsel or tax advisor. For financial professional/Plan Sponsor use only. Not for public distribution.**



The report offers 11 specific recommendations for action to improve audit performance. In addition to increased outreach to CPAs and enforcement of audit standards by EBSA, the report proposes legislation be enacted to enhance the qualifications of a “qualified public accountant” and to give the Secretary of Labor more authority over audit requirements.

## Department of Labor Spring Regulatory Agenda Published

The Spring 2015 regulatory agenda has been published.

[http://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION\\_GET\\_AGENCY\\_RULE\\_LIST&currentPub=true&agencyCode=&showStage=active&agencyCd=1200](http://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST&currentPub=true&agencyCode=&showStage=active&agencyCd=1200) Areas of expected rulemaking during 2015 are identified below.

Also included is a reference to the end of the comment period on July 6, 2015 for the Second Notice of Proposed Rulemaking for conflicts of interest in investment advice.

<http://www.reginfo.gov/public/do/eAgendaViewRule?publd=201504&RIN=1210-AB32> The Department of Labor has announced that the deadline has been extended by 15 days and that a notice announcing the extension of the comment period, as well as the dates of the public hearings will be published in a forthcoming edition of the *Federal Register*

- **Pension Benefit Statements** – July 2015 – Notice of Proposed Rulemaking will consider whether, and how, an individual benefit statement should and could present a participant’s accrued benefits in a defined contribution plan as a lifetime income stream of payments, in addition to presenting the benefits as an account balance. <http://www.reginfo.gov/public/do/eAgendaViewRule?publd=201504&RIN=1210-AB20>
- **Claims Procedure** – November 2015 – Notice of Proposed Rulemaking is intended to strengthen, improve, and update the current rules governing the internal claims and appeals process. <http://www.reginfo.gov/public/do/eAgendaViewRule?publd=201504&RIN=1210-AB39>
- **Revision of the Form 5500 Series** – September 2015 – Notice of Proposed Rulemaking will modernize and improve the Form 5500 series. <http://www.reginfo.gov/public/do/eAgendaViewRule?publd=201504&RIN=1210-AB63>

*No part of this document is intended to provide tax or legal advice. Any questions involving tax or legal matters should be referred to your plan’s legal counsel or tax advisor. For financial professional/Plan Sponsor use only. Not for public distribution.*

- Fiduciary Requirements for Disclosure in Participant-Directed Individual Accounts Plans – June 2015 – Direct Final Rule would give plan administrators more flexibility in the timing of annual disclosure. <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201504&RIN=1210-AB68>
- Abandoned Plan Program – November 2015 – Final Rule to provide guidance on abandoned plans is expected to expand the scope of individuals entitled to be a “qualified termination administrator” (QTA). <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201504&RIN=1210-AB47>
- Adoption of Amended and Restated Voluntary Fiduciary Correction Program – September 2015 – Interim Final Rule will restate the elements of this program. <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201504&RIN=1210-AB64>

## ERISA Advisory Council Meeting Held

On May 27–29, the ERISA Advisory Council (Council) met to discuss the issues that will be studied in 2015. [www.dol.gov/ebsa/aboutebsa/erisa\\_advisory\\_council.html](http://www.dol.gov/ebsa/aboutebsa/erisa_advisory_council.html). These issues include:

1. Model Notices and Plan Sponsor Education on Lifetime Plan Participation <http://www.dol.gov/ebsa/pdf/ACmodelnotice2.pdf>, and
2. Model Notices and Disclosures for Pension Risk Transfers, which relates most frequently to defined benefit plans. <http://www.dol.gov/ebsa/pdf/ACmodelnotice1.pdf>

The first project seeks to leverage work done by previous Council studies about lifetime plan participation by developing model notices for consideration by the Secretary of Labor and EBSA. It is interesting to note that the Council acknowledges that cyber security and cyber theft are important issues since most pension information is electronically maintained. They are soliciting input on these topics.

Areas of inquiry for model notices for participants set forth in the project plan include the following:

- a. *What information should be included in such notices?*
- b. *At what point in one’s career should notices be provided?*
- c. *If provided at multiple times in a participant’s career, should notices differ in message and content?*
- d. *In what format should notices be delivered?*
- e. *What mediums of communication should be considered beyond model notices?*
- f. *How long should notices be?*
- g. *Should notices be personalized for the individual? If so, what elements should be in the notices and what challenges does this pose from a data perspective?*
- h. *How should these notices coordinate with other required or supplemental communications that a participant receives?*

**No part of this document is intended to provide tax or legal advice. Any questions involving tax or legal matters should be referred to your plan’s legal counsel or tax advisor. For financial professional/Plan Sponsor use only. Not for public distribution.**



While the Council acknowledges that the recently proposed fiduciary regulations may overlap some issues related to the model notices, the Council does not intend to address questions on the new proposed regulations.

## Voluntary Fiduciary Correction Program Workshop to be Held June 16, 2015

A Webinar on the Voluntary Fiduciary Correction Program will be held from 10:00 AM – 12:30 PM EDT on June 16, 2015. The details, along with registration information, can be found at <http://www.savingmatters.dol.gov/ebsa/pdf/vfcpwebinar061615.pdf>. Topics to be addressed include the following ERISA Eligible Transactions:

- Delinquent Participant Contributions to Retirement Plans.
- Fair Market Interest Rate Loans from Employee Benefit Plans to Parties in Interest (PIIs).
- Below Market Interest Rate Loans to Parties in Interest, or Nonparties in Interest.
- Below Market Interest Rate Loans to Non PIIs due to delays in perfecting loan collateral security.
- Participant Loans that fail to comply with plan provisions for amount, duration or level amortization.
- Default Participant Loans.
- Purchase of Assets by Plans from Parties in Interest.
- Sale of Assets by Plans to Parties in Interest.
- Sale and Leaseback of Real Property to Sponsoring Employers.
- Purchase of Assets from Non PIIs at more than Fair Market Value (FMV).
- Sale of Assets to Non PIIs at less than FMV.
- Holding of Illiquid Assets Previously Purchased by Plan
- Benefit Payments based on improper Valuation of Plan assets.
- Payment from a Plan of duplicate, excessive, or unnecessary compensation.
- Expenses Improperly Paid by a Plan, including Settlor fees.
- Payment from a Plan of dual compensation to Plan fiduciaries.

*The non-Voya Financial® Web site links mentioned in this material are provided for your information only. Although deemed reliable, accuracy cannot be assured. Voya does not exercise control over, endorse nor accept responsibility for the content, product and/or services provided at non-Voya sites.*

**No part of this document is intended to provide tax or legal advice. Any questions involving tax or legal matters should be referred to your plan's legal counsel or tax advisor. For financial professional/Plan Sponsor use only. Not for public distribution.**