



A Summary of 403(b) EPCRS Rules (Rev. Proc. 2013-12)

The Employee Plans Compliance Resolution System (EPCRS) revenue procedure was released December 31, 2012. Rev. Proc. 2013-12 is effective April 1, 2013, but plan sponsors may rely on the guidance after December 31, 2012.

Rev. Proc. 2013-12 is particularly important for 403(b) plans. EPCRS permits 403(b) corrections for written plan failures. In addition, the revenue procedure attempts to make 403(b) plans fit into the 401(a) correction scheme provided in the previous revision of EPCRS (Rev. Proc. 2008-50).

This summary focuses on the expansion of the correction programs available for section 403(b) plans.

Correcting Written Plan Failures

As described above, the most significant change with respect to 403(b) plans is that EPCRS is now available to correct written plan failures. A written plan failure occurs when a plan provision or the absence of a plan provision, causes the plan to fall out of compliance with 403(b) requirements. A written plan failure also occurs when an employer fails to have a written plan or fails to amend the written plan to reflect a new requirement within the applicable remedial amendment period.¹

The updated EPCRS procedure reiterates that to the extent the remedial amendment period applies, a 403(b) plan will not have a written plan failure provided that it is corrected through a retroactive plan amendment that is adopted by the end of the current 403(b) remedial amendment period.

Late Written Plan Adopters

The final 403(b) regulations, issued in 2007, imposed a written plan requirement on 403(b) plans, requiring that written 403(b) plans be adopted by December 31, 2008. Notice 2009-3 later granted an extension of the written plan requirement until December 31, 2009, as long as certain conditions were met.

The failure to timely adopt a 403(b) written plan in accordance with the final regulations under 403(b) and Notice 2009-3, may be corrected under the EPCRS Voluntary Correction Program (VCP).

Revised Definition of Operational Failure

The definition of a 403(b) operational failure has been revised to mean the failure to follow the provisions of the written plan. Prior to the update, 403(b) plans could only correct failures to comply with specific Code Section 403(b) violations as operational defects. Under the new guidance, 403(b) plans are eligible to correct operational failures on substantially the same basis as qualified plans. However, because certain requirements applicable to 403(b) plans are unique, inconsistencies with the accepted 401(a) correction methods still remain.

The definition of operational failure under the previous version of EPCRS (Rev. Proc. 2008-50) will continue to apply to 403(b) operational failures that occurred in taxable years before January 1, 2009.

“Favorable Letter” Treatment

Under EPCRS, significant operational defects can be self-corrected (i.e., corrected without a submission to the IRS) only if the plan has a “Favorable Letter.”

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For qualified retirement plans, this refers to a determination letter issued by the IRS.

However, because there is not yet an operating determination letter program for 403(b) plans, Rev. Proc. 2013-12 provides that, pending additional guidance, a 403(b) plan will generally be treated as having a "Favorable Letter" if either:

- a) the employer is an eligible employer and, on or before December 31, 2009 (or the date the plan was established, if later) the employer has adopted a written plan that is intended to satisfy section 403(b) (including the regulations thereunder), or
- b) the employer has failed to adopt a written 403(b) plan timely, but has corrected the failure under EPCRS.

Other Changes

Rev. Proc. 2013-12 also adds a safe harbor correction method for the exclusion of employees in violation of the universal availability requirement.

Under this method, corrective contributions of missed deferrals are deemed to be 3% of the affected participants' compensation or, if greater, the maximum deferral percentage for which at least a 100% matching contribution is provided.

In Summary

MetLife recognizes that 403(b) plan sponsors take their plan's compliance status seriously. We strive to provide timely and relevant information that will assist plan sponsors in taking the necessary steps to maintain a compliant plan for the benefit of their employees.

We do stress, however, that the information we make available is general in nature and that you should consult with and rely on your own independent legal and tax advisers regarding your plan's particular set of facts and circumstances.

¹The current 403(b) remedial amendment period described in Announcement 2009-89 began on January 1, 2010 and will end on a date to be announced in the forthcoming 403(b) determination letter program.

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