

June 2003

## IRS Correction Program Updated and Expanded

As employers are generally aware, mistakes and errors in maintaining tax-qualified pension plans, such as 401(k) plans, are easy to make. For the past few years, the Internal Revenue Service (IRS) has offered ways to correct operational and administrative errors under the Employee Plan Compliance Resolution System (EPCRS), including those that might jeopardize plan qualification. The EPCRS is updated periodically, the most recent being Rev. Proc. 2003-44 (Update). The Update makes a number of significant changes that provide clearer guidance to those choosing to use the EPCRS. The changes are generally effective as of October 1, 2003, but employers may choose to apply them on or after June 5, 2003.

The following is a summary of key additions and/or highlights in Rev. Proc. 2003-44:

### Program Consolidation

EPCRS had a number of voluntary correction procedures, each with its own name and rules. Under the Update, all the procedures are consolidated into a single Voluntary Correction Program (VCP).

As a specific expansion to the eligibility requirements under EPCRS, plans that missed adopting EGTRRA amendments in time may now submit as non-amenders under the VCP. In addition, the EPCRS will now also cover Simple IRA plans which, with SEPs and 403(b) plans, can comply with expanded guidance for such plans.

### Fee Structures

Fees have been consolidated into a fixed fee structure based on the number of plan participants ranging from \$750 for 20-participant plans to \$25,000 for plans with more than 10,000 participants. For plans that fail to amend before the end of an applicable remedial amendment period, fees are reduced by 50% as long as the

EPCRS filing is made within a year of the missed deadline.

A big change is that payment of the fee will be required to be made with the filing and not after IRS review of the submission or entry into a compliance statement. In some instances, additional fees may be due when the compliance statement is due. Egregious failures are still subject to a negotiated percentage (not more than 40%) of the maximum payment amount under the VCP.

### Correction Principles and Methods

The Update added or clarified certain provisions for corrections that:

- ◆ provide a method for correction where spousal consent was not obtained;
- ◆ allow estimated correction amounts where it is impossible to obtain plan data;
- ◆ direct reporting of failed plan loans as deemed distributions on Form 1099-R in the year of correction;
- ◆ permit correction of terminated plans, even if the trust is no longer in existence;
- ◆ expand correction for a participant with an incorrect plan entry date; and
- ◆ require a notice to participants who receive overpayments that the overpayment is not eligible for favorable tax treatment, whether or not the plan sponsor actually seeks recovery of a small overpayment.

### Application Requirements

- ◆ Group and anonymous submissions procedures were expanded to include all VCP submissions. Where a group of plans are submitted, the power of attorney form has been eliminated.

- ◆ For all submissions, copies of Form 5500s are no longer required. The requirement for certified or cashier's checks was eliminated.
- ◆ A sample format for most submissions is contained in an appendix to the Update. A separate format for non-amender filings is also provided.

**Types of Common Correctable Problems Under EPCRS:**

1) Plan fails to allocate discretionary contribution pursuant to the terms of the plan; 2) Plan allows for matching contributions in excess of the percentages under the terms of the plan; or 3) Plan requires 401(k) contributions to be remitted to the trust within an administratively reasonable time. However, plan fails to timely remit 401(k) contributions and periodic loans payments to the trust.

While the latest changes to EPCRS are both procedural and substantive, the overall thrust is to make it easier for plan sponsors to comply with the complex retirement plan rules and retain the favorable tax status of their plans. EPCRS offers plan sponsors and administrators a roadmap to correcting technical and administrative problem with their plans.

*If you have any questions about the use of the IRS correction programs for any qualified plan, please contact the Seyfarth Shaw employee benefits group attorney with whom you work or any employee benefits group attorney listed on the website at [www.seyfarth.com](http://www.seyfarth.com).*

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