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July 30, 2013

Ms. Joyce Kahn
Acting Director, EP Rulings & Agreements
Internal Revenue Service
1111 Constitution Ave NW
Washington, DC 20224-0002

Re: Comments on Revenue Procedure 2013-12

Dear Ms. Kahn:

The American Society of Pension Professionals & Actuaries ("ASPPA") appreciates this opportunity to comment on the recent updates and enhancements to the Employee Plans Compliance Resolution System, published in Revenue Procedure 2013-12 ("EPCRS").

ASPPA is a national organization of more than 16,000 retirement plan professionals who provide consulting and administrative services for qualified retirement plans covering millions of American workers. ASPPA members are retirement professionals of all disciplines, including consultants, investment professionals, administrators, actuaries, accountants and attorneys. Our large and broad-based membership gives ASPPA unique insight into current practical applications of ERISA and qualified retirement plans, with a particular focus on the issues faced by small- to medium-sized employers. ASPPA's membership is diverse but united by a common dedication to the employer-sponsored retirement plan system.

Discussion

I. Treatment of Adoption of Prototype or Volume Submitter Retroactive Amendments

Section 6.05(1)(a) of the EPCRS[1] provides that "a determination letter application is not required and may not be submitted with the [Voluntary Correction Program ("VCP")] submission" where the correction by plan amendment is achieved through the adoption of a prototype or volume submitter plan with an opinion or advisory letter on which the plan sponsor has reliance (or is treated as having reliance pursuant to Section 6.05(5)). A plan sponsor meeting the conditions of Section 6.05(1)(a) may correct the VCP failure by retroactive amendment under Section 4.05(2) without filing for a determination letter. Section 6.05(1)(a) appears to be specific about the type of amendment required (*i.e.,* adopting a model amendment or adopting a prototype document); however, the rule should be expanded to apply to a plan sponsor that has adopted a volume submitter or prototype plan document prior to filing the VCP submission.

[1] Unless stated otherwise, a reference to a "Section" in this letter shall be to a section of the EPCRS.

ASPPA recommends that the Internal Revenue Service (the "IRS") update the EPCRS to provide that a plan sponsor who has adopted a volume submitter or prototype plan document prior to filing a VCP submission and who amends the plan through the VCP process by changing its selections on the pre-approved plan document fits into the exception under Section 6.05(1) from the requirement to apply for a determination letter in relation to a VCP submission.

II. Established Practices and Procedures for Self-Correction of Code Section 415 Violations

Section 4.04 states that in order to use the Self-Correction Program ("SCP") of the EPCRS, the plan sponsor or administrator must have established practices and procedures reasonably designed to promote compliance with requirements of the Internal Revenue Code of 1986, as amended (the "Code"), which are generally beyond the terms of the plan document itself. That Section also provides that a plan is not treated as failing to have established practices and procedures to prevent the occurrence of a Code section 415(c) violation if the plan regularly corrects Code section 415(c) excess annual additions by returning elective deferrals to the affected employee within 2½ months after the end of the plan's limitation year. It is ASPPA's position that this presumption should also apply to other corrections of Code section 415(c) violations, which are regularly corrected in accordance with Section 6.06(2) [correction of excess allocations].

ASPPA recommends that the IRS update the EPCRS to expand the presumption under Section 4.04 to apply to corrections of Code section 415 violations that are made (a) under Section 6.06; or (b) beyond the stated 2½ month period, because implementing Code section 415 corrections under this timeframe is often not possible.

III. Plan Characterization of Missed Matching Contributions

The correction in Section .05(2)(c) of Appendix A for "improperly excluded employees" includes the requirement that the employer make the missed matching contributions in the form of non-elective contributions which are not required to be qualified non-elective contributions. Many plans are designed to treat matching contributions and non-elective contributions differently in a number of respects. For example, many plans treat matching contributions as being attributed to a separate "bucket" to which vesting schedules or distribution options are applied in a different manner than the portion of the account balance attributable to the discretionary profit sharing (*e.g.*, non-elective contribution) "bucket." Because these non-elective contributions are being made to the plan to correct missed matching contributions, they should be treated as matching contributions (and, not non-elective contributions) for all purposes under the plan.

ASPPA recommends that the IRS update the EPCRS to provide that non-elective contributions made to correct missed matching contributions be permitted to retain all plan characteristics associated with matching contributions.

IV. Auto-enrollment Request for Comments.

Section 2.05(2) requests comments regarding the failure to properly implement automatic enrollment provisions in certain defined contribution plans. Specifically, this Section requested comments on the "methods to correct the failure to timely provide a safe harbor notice under a plan

designed to satisfy the requirements of [Code sections] 401(k)(12), 401(k)(13), 401(m)(11), 401(m)(12), or 414(w)."

ASPPA recommends that the IRS update the EPCRS to provide that no penalty will be imposed for a failure to timely provide notices under Code sections 401(k)(12), 401(k)(13), 401(m)(11), 401(m)(12), or 414(w), provided that such notices (a) are distributed within the first 90 days of the plan year; (b) clearly indicate how participants can receive the maximum employer contribution under the plan in light of the shortened deferral period; and (c) would open a 90-day withdrawal period (for a Code section 401(k)(13) plan where automatic enrollment was implemented) similar to the Code section 414(w) period, regardless of whether that feature is offered under the affected Code section 401(k)(13) plan.

ASPPA further recommends that the IRS update the EPCRS to provide that where the failure to send the required notice is not corrected in the first 90 days of the plan year, the employer may correct the failure by distributing the notice and treating and correcting the failure as a missed deferral opportunity. This would result in an additional contribution being made by the employer equal to 50% of the missed deferral opportunity (with no related match) from the date the notice was required to be provided to the date notice was delivered. Under this correction method, the applicable safe harbor would still be available for the plan year.

ASPPA further recommends that the IRS update the EPCRS to provide that if the error is significant and the notice described above is not distributed within the first 90 days of the plan year, the employer may instead correct the failure by providing late notice (as described above) and completing the applicable nondiscrimination testing for the affected plan year. The employer would still be required to meet all other safe harbor conditions for the plan year under this correction method, including making the applicable safe harbor employer contribution.

V. Designated Roth Contributions Request for Comments.

Section 2.05(2) requests comments regarding designated Roth contributions corrections. Because designated Roth contributions are being utilized in defined contribution plans on a more regular basis, it is important that the EPCRS include correction methods specifically applicable to these contributions.

ASPPA recommends that the IRS update the EPCRS to provide that the missed opportunity for making a designated Roth contribution is 50% of either (a) the employee's missed designated Roth contribution (if known); or (b) the average deferral percentage ("ADP") for the employee's group (either highly or non-highly compensated).

ASPPA further recommends that the IRS update the EPCRS to include a correction (as suggested in Section 2.05(3)) which would provide participants with the option of having missed contributions treated as either designated Roth contributions or pre-tax contributions and having such missed contributions corrected through an in-plan Roth conversion (if the corrective contribution is being treated as a designated Roth contribution). If the participant elects the in-plan Roth conversion, the five-year period for qualifying Roth distributions would begin as of the date the first deferral should have been made, rather than the date of correction, which would restore the participant to where he or she would have been had the failure not occurred.

ASPPA further recommends that the IRS update the EPCRS to provide that the special rule for brief exclusion from elective deferrals and after-tax employee contributions set forth in Section 2.02(1)(a)(ii)(F) of Appendix B also applies to the brief exclusion from designated Roth contributions.

VI. Code Section 403(b) Plan Issues

A. Fees for tax-exempt and governmental plan sponsors. Section 12.02 sets forth the fees for Qualified Plan and 403(b) Plan VCP submissions, which generally range from $750 to $25,000 (which may be reduced in certain circumstances), depending on the number of participants in the plan. In general, the number of participants in Code section 403(b) plans is often higher than in comparable plans sponsored by for-profit organizations due to the universal availability rule in Code section 403(b)(12)(A)(ii). Therefore, under the current structure, the VCP submission fee may be higher for failures related to Code section 403(b) plans. ASPPA members are concerned that these VCP submission fees may deter voluntary compliance by certain tax-exempt and governmental plan sponsors due to their fundamental organizational purposes. If VCP submission fees are paid by the tax-exempt or governmental plan sponsor, then the funds used to make the payment will either be (1) diverted from being used for the organization's charitable mission; or (2) paid by taxpayers. When added to the required legal fees to prepare and file the VCP submission, many tax-exempt and governmental plan sponsors may decide that compliance is too expensive (leaving them faced with alternatives that include terminating the plan or risking the failure being discovered during an IRS plan audit).

ASPPA recommends that the IRS update the EPCRS to revise the schedule set forth in Section 12.02 as follows, with the IRS reserving the right to impose higher fees in appropriate circumstances: (a) the fee for K-12 public schools is $250, regardless of the number of participants; (b) the fee for governmental entities and governmental universities is $500, regardless of the number of participants; and (c) the fee for tax-exempt organizations, including religious organizations, is either (i) 50% of the fees set forth in the existing table; or (ii) the following reduced-fee table, which recognizes the organizational purpose of tax-exempt organizations:

Number of Participants	Fee
100 or fewer	$ 250
101 to 500	$ 500
501 to 1,000	$1,000
1,001 to 5,000	$1,500
Over 5,000	$2,000

This fee structure is consistent with Section 12.06, which imposes a $250 compliance fee for simplified employee pension plans ("SEPs") and SIMPLE IRA plans.

ASPPA further recommends that the IRS update the EPCRS to provide that the 50% reductions to the compliance fee permitted under Sections 12.02(3) [loan failures] and 12.02(5) [failure to adopt a written Code section 403(b) plan timely] also apply to the proposed fee schedules set forth above.

B. Fees for failures affecting multiple plans sponsored by the same employer. Section 12.02 sets forth VCP submission fees assuming that only one plan of the plan sponsor (often, the only plan) will be affected by a failure and included in the sponsor's VCP submission. However, sponsors of Code section 403(b) plans frequently also offer a Code section 401(a) plan or multiple Code section 403(b) plans. Operational failures in one plan may result in operational failures in the other plan(s) of the plan sponsor. For example, the failure to permit eligible employees to contribute to a Code section 403(b) plan may result in insufficient matching contributions in the plan sponsor's Code section 401(a) plan or second Code section 403(b) plan. In addition, a loan issued by a vendor in a Code section 403(b) plan may result in an excess loan being issued from another plan sponsored by the same employer. Furthermore, it is frequently the case that employees participate in multiple plans at the same time and are considered a participant in each. ASPPA members are concerned that plan sponsors will be required to file a separate VCP submission for each plan, especially if the plans are dissimilar (Code section 401(a) vs. Code section 403(b)).

ASPPA recommends that the IRS update the EPCRS to include the following VCP submission rules for situations involving more than one plan of a plan sponsor:

- Multiple plans of the plan sponsor may be included in one VCP submission, regardless of the type of plan involved (*e.g.,* Code section 401(a) and Code section 403(b));
- A separate compliance statement will be issued for each plan included in the VCP submission;
- The compliance fee will be based on the total number of participants in all plans included in the VCP submission; and
- Where there is overlap in participant populations (*e.g.*, employees are participating in two or more plans included in the VCP submission), the "number of participants" can be based on unique social security numbers, thereby avoiding double-counting participants.

C. Filing procedures for VCP Submissions. Section 11.03(11) requires that VCP submissions for Code section 403(b) plans include a statement that "the Plan Sponsor has contacted *all other entities* involved with the plan and has been assured of cooperation in implementing the applicable correction, to the extent necessary." (Emphasis added.) This is a significant step for most Code section 403(b) plan sponsors and requires clarification by the IRS, especially if an "other entity" is uncooperative.

The plan sponsor will typically not have any leverage over the "other entity" if: (a) the plan is no longer remitting contributions to the other entity, (b) the other entity has refused to cooperate, or (c) the other entity is ignoring the provisions of an "information sharing agreement" (and, assets are frozen with the other entity and generally cannot be moved without individual participant consent). The inability to obtain the cooperation of an "other entity" should not derail the plan sponsor's efforts to make corrections under EPCRS.

ASPPA recommends that the IRS update the EPCRS to incorporate the following changes in the VCP submission requirements:

- "All other entities" shall be treated as the same set of providers that would be considered part of the Code section 403(b) plan for IRS compliance purposes under Code Section 403(b), Treasury Regulation Section 1.403(b)-11(g), and Section 8.01 of Rev. Proc. 2007-71.

- If any such "other entity" is uncooperative, a plan sponsor's reasonable, good faith efforts to contact the entity to obtain cooperation will be sufficient for purposes of VCP submissions. In this situation, the IRS will accept the following statement in satisfaction of Section 11.03(11): "The Plan Sponsor has used reasonable, good faith efforts to contact all other entities involved with the plan and obtain, or reasonably try to obtain, the entity's cooperation in implementing the applicable correction, to the extent necessary."

D. Correction of an invalid Code section 403(b) plan exchange or transfer. Treasury Regulation Section 1.403(b)-10(b)(2) permits an in-plan exchange between providers only if the employer enters into an information sharing agreement with the provider into which the funds are exchanged. If an exchange is made prior to an information sharing agreement being adopted, the plan sponsor should be entitled to correct this failure through SCP by entering into such an agreement following the exchange.

ASPPA recommends that the IRS update the EPCRS to provide that an exchange made without an information sharing agreement may be corrected by the plan sponsor under SCP through the adoption of a post-exchange information sharing agreement with the provider into which the funds were exchanged.

E. Clarification regarding contracts excludable under Rev. Proc. 2007-71. Section 8.02 of Revenue Procedure 2007-71 provides that a Code section 403(b) plan will not be treated as failing to satisfy the requirements of Treasury Regulation section 1.403(b)-3(b)(3) if it does not include terms relating to "a contract that has been issued before January 1, 2009, under a § 403(b) plan that is held on behalf of a participant who, on January 1, 2009, is a former employee of the employer or for a beneficiary." Because such contracts are not required to be included in the terms of a Code section 403(b) plan in order to satisfy the relevant regulation, they should not be included in any corrections required under the EPCRS programs.

ASPPA recommends that the IRS update the EPCRS to specifically state that Code section 403(b) contracts, which are excludable from a Code section 403(b) plan under Revenue Procedure 2007-71, are not required to be included in corrections undertaken by a plan sponsor through the various EPCRS programs.

F. Individually designed Code Section 403(b) plan documents. Internal Revenue Bulletin 2013-18 (the "Bulletin") states that, given the IRS's limited resources, it is not feasible for the IRS to establish a determination letter application program at this time. Therefore, the Bulletin "does not contemplate the issuance of individual determination letters to sponsors of [Code section] 403(b) plans. Thus, a sponsor of a [Code section] 403(b) plan will be able to obtain reliance as to

the acceptability of the form of its plan only if the plan is a pre-approved plan as described in this revenue procedure or if the employer is a public school that has adopted the model plan language included in Rev. Proc. 2007-71 and is entitled to reliance under that revenue procedure."

There are situations under the EPCRS in which a determination letter application is required to be submitted.[2] As stated above, an individually designed Code section 403(b) plan will no longer be able to obtain a determination letter from the IRS. Unless the EPCRS is updated, sponsors of individually designed Code section 403(b) plans will not be afforded access to all of the features of the program.

ASPPA recommends that the IRS update the EPCRS to clarify that individually designed Code section 403(b) plans will be treated as having a determination letter for purposes of EPCRS, even if such plans do not have a determination letter after the implementation of the pre-approved plan program.

VII. Self-Correction of Loan Failures Under SCP

Failures relating to the payroll deduction of loan payments and similar administrative errors can cause a loan that satisfied the requirements of Code section 72(p) when it was made to become a defaulted loan. There is no self-correction for failures of this nature under the EPCRS. Many times, these failures occur early in the repayment period of the loan, making re-amortization within the original loan repayment period a reasonable solution for the participant who wants to avoid the tax consequences related to the loan default. Failures can also arise when participants terminate employment and cease making loan repayments via payroll deductions (but defer taking a distribution from the plan) or other similar circumstances that result in a loan default. Generally, these failures are the result of an error by a plan service provider or employer, rather than the unwillingness on the part of the participant to repay the loan.

ASPPA recommends that the IRS update the EPCRS to add two standard corrections under SCP for insignificant loan errors caused by an employer or a plan service provider that involve non-highly compensated employees:

- A correction similar to Section 6.07(3), allowing: (a) a lump sum repayment equal to any missed payments, plus interest; or (b) re-amortization of the loan balance, including accrued interest, over the remaining loan term (or over the maximum period permitted under Code section 72(p)(2)(B), measured from the original loan date); or any combination of (a) and (b).

- A correction allowing loan defaults/deemed distributions to be reported in the year of correction, rather than the year of default, to avoid the burden on participants of filing amended tax returns.

[2] *See* Rev. Proc. 2013-12, Section 6.05.

VIII. Uniform *De Minimis* rule

Establishing and maintaining small account balances can be expensive. Many third party administrators charge a distribution fee between $25 and $50, as well as other per-account fees to cover the operational costs of the plan. As a result, a significant portion (if not all) of a small account balance may be applied to pay these administrative fees.

Under the EPCRS, the IRS recognizes these challenges and provides various forms of relief from corrective actions:

- Delivery of small benefits of $75 or less, if the costs would exceed benefit.[3]
- Recovery of small overpayments of $100 or less.[4]
- Distribution or forfeiture of small excess amounts of $100 or less.[5]

However, there is currently no *de minimis* exception for corrective contributions.

ASPPA recommends that the IRS update the EPCRS to provide a universal $100 or less *de minimis* threshold, without regard to the costs of correction, which would apply to corrective contributions, forfeitures and distributions.

IX. Special Rule for Brief Exclusion from Elective Deferrals

Section 2.02(1)(a)(ii)(F) of Appendix B includes a special rule for the brief exclusion from elective deferrals. Under this rule, an employer is not required to make up elective deferrals if the opportunity to make contributions was available to the employee for at least the last nine (9) months of the plan year, but the employer is required to make up missed matching contributions (the "nine-month rule"). However, the nine-month rule only applies to participants who become eligible to make elective deferral during the first three (3) months of the plan year. The current rule has no applicability to employees who miss an opportunity to defer later in the plan year (*e.g.,* two weeks during the fourth month of a plan year). ASPPA members strongly believe that a participant, after missing deferrals for a short period of time, has a reasonable opportunity to defer for a plan year if the participant can make the contribution he or she intended by increasing contributions for the balance of the plan year.

ASPPA recommends that the IRS update the EPCRS to provide that no correction is required for a brief exclusion from elective deferrals where there is a failure to implement a participant's salary deferral election for up to 30 days (beyond the first 90 days of the plan year), so long as the affected participant has at least 30 days left in the same plan year to make additional deferrals and has the opportunity to change his or her deferral elections after receiving notice of the failure. *This correction should also be available for designated Roth contributions and be in addition to the proposed safe harbor correction for automatic contribution arrangements set forth in our September 19, 2012 letter to Mr. Mark Iwry.*

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[3] *Id.* at Section 6.02(5)(b).
[4] *Id.* at Section 6.02(5)(c).
[5] *Id.* at Section 6.02(5)(e).

X. Mistaken Over-Inclusion of a Class of Employees

Currently, Section 2.07(3) of Appendix B permits correction by plan amendment under SCP for instances where otherwise eligible employees who have not yet satisfied the plan's age and/or service requirements are allowed to participate in plan. There are other instances of this type of failure where there is little policy reason to not permit correction by retroactive amendment under SCP (*e.g.*, mistaken inclusion of leased employees, or inclusion of other classes of employees in a controlled group), provided the included group is not primarily highly compensated employees ("HCEs").

ASPPA recommends that the IRS update the EPCRS to provide for correction by retroactive plan amendment under SCP where the plan, in operation, covers a broader class of employees than is permitted in the plan document.

XI. Correction for early payment of accrued benefit restricted under IRC §436(d)

Section 6.04(4)(e) indicates that Section 6.06(3) addresses "an Overpayment (including a payment of benefits that exceeds the limitations imposed by §436(d) or …)". Section 6.06(3) simply indicates that a correction should be made "in accordance with rules similar to …correction mechanisms described in section 2.04(1) of Appendix B" which relate to overpayments under Code section 415.

Overpayments due solely to the limitations on accelerated distributions from a defined benefit plan under Code section 436(d) are more similar to payments made from a defined contribution plan without a distributable event than to payments that are in excess of those permitted under Code section 415. The benefit has been paid prematurely but no excess accrual has been paid. Requiring repayment of the full amount of the overpayment in these situations is essentially accelerating the funding of the plan. Section 6.06(4)(b) specifically excludes overpayments from a defined contribution plan before a distributable event from the requirement that an employer make the plan whole if the participant or beneficiary declines to repay the amount to the plan. A similar rule should apply to overpayments from defined benefit plans due solely to the limitations on accelerated distributions under Code section 436(d), provided the plan sponsor has requested the recipient to return the funds and informed the recipient that the distribution paid too early is not eligible for rollover treatment.

ASPPA recommends that the IRS update the EPCRS to provide a correction under SCP for overpayments to non-HCEs due solely to the limitations on accelerated distributions from a defined benefit plan under Code section 436(d) which would not require the plan sponsor or other party to make a contribution to the plan to make it whole, provided the plan sponsor has requested return of the funds from the recipient and informed the recipient that the distribution paid too early is not eligible for rollover treatment. If the overpayment is to an HCE, the payment required of the plan sponsor or other party should be limited to an amount necessary to make the plan 80% funded, assuring the funded status of the plan will not decrease because of the accelerated payment. A lump sum payment to a "top-25" participant would not be eligible for this correction, even if there was a Code section 436(d) failure as well as a Code section 401(a)(4) failure for the overpayment.

These comments were prepared by the joint effort of the 401(k), IRS, Tax Exempt and Government Plans, and Plan Documents Subcommittees of the ASPPA Government Affairs Committee, primarily coordinated by Michelle Ueding. Please contact Craig Hoffman, General Counsel and Director of Regulatory Affairs, at (703) 516-9300 if you have any comments or questions regarding the matters discussed above. Thank you for your consideration of these comments.

Sincerely,

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/s/
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