September 3, 2013

Mr. Daniel Werfel  
Acting Commissioner  
Internal Revenue Service  
1111 Constitution Avenue, NW  
Washington, DC 20024  

Re: Comments Concerning Revenue Procedure 2013-12  

Dear Acting Commissioner Werfel:  

Enclosed are comments concerning Revenue Procedure 2013-12 (Employee Plans Compliance Resolution System). These comments represent the view of the American Bar Association Section of Taxation. They have not been approved by the Board of Governors or the House of Delegates of the American Bar Association, and should not be construed as representing the policy of the American Bar Association.  

Sincerely,  

Michael Hirschfeld  
Chair  

Enclosure  

cc: Mark J. Mazur, Assistant Secretary (Tax Policy), Department of the Treasury  
William J. Wilkins, Chief Counsel, Internal Revenue Service  
Emily S. McMahon, Deputy Assistant Secretary (Tax Policy), Department of Treasury  
Janet Mak, Manager, Employee Plans Voluntary Compliance
These comments ("Comments") are submitted on behalf of the American Bar Association Section of Taxation (the "Section") and have not been approved by the House of Delegates or Board of Governors of the American Bar Association. Accordingly, the Comments should not be construed as representing the position of the American Bar Association.

Principal responsibility for preparing these Comments was exercised by Lisa A. Tavares of the Section’s Employee Benefits Committee (the “Committee”) and Chair of the Committee’s Subcommittee on Self-Correction, Determination Letters and Other Administrative Practices (the “Subcommittee”), Stefan P. Smith, Vice-Chair of the Subcommittee and Joy M. Mercer, Immediate Past Chair of the Subcommittee. Substantive contributions were made by Christina Crockett, Matthew Eickman, Kenneth Ginder, Anne Meyer, Daniel Morgan, Carol Myers, Rita Patel, Craig Pett, and David Rosner. The Comments were reviewed by Martha Hutzelman, Chair of the Committee, Susan A. Wetzel, Vice Chair of the Committee, and Mark A. Bodron, Immediate Past Chair of the Committee. The Comments were further reviewed by David Mustone and James R. Raborn on behalf of the Section’s Committee on Government Submissions and by Pamela Baker, Council Director for the Committee.

Although the members of the Section of Taxation who participated in preparing these Comments have clients who might be affected by the federal income tax principles addressed by these Comments or have advised clients on the application of such principles, no such member or the firm or organization to which such member belongs has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of, the specific subject matter of these Comments.

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Date: September 3, 2013
EXECUTIVE SUMMARY

These Comments are submitted in response to a request by the Internal Revenue Service (the “Service”) and the Department of the Treasury (“Treasury”) for comments on how to improve the Employee Plans Compliance Resolution System (“EPCRS”), as set forth in Rev. Proc. 2013-12,1 regarding issues arising with respect to correcting certain compliance failures in form or operation under sections 401(a) and 403(b).2 We appreciate the opportunity to provide these Comments.

A summary of our recommendations are as follows:

1. Expansion of Streamlined Non-Amender Filing Procedure

   a. We recommend that Rev. Proc. 2013-12 be modified to provide that the schedules to Appendix C Part II include submissions covering all discretionary amendments, the adoption of which is not prohibited under another section of the Code, such as section 411(d)(6), and, if the submission is only for a failure to timely adopt a discretionary amendment(s), then the reduced $375 compliance fee will apply.

   b. We recommend that the Service expand the categories of corrective amendments that may be adopted under the Self-Correction Program (“SCP”) and eliminate the requirement that SCP amendments be filed with the Service. Other possible candidates for inclusion as SCP amendments are the failure of a plan sponsor to amend a plan to reflect an increase in the rate of matching contributions or the failure of an affiliate of a plan sponsor, which becomes a participating employer under a plan, to timely adopt the plan.

2. Voluntary Correction Program Compliance Fee

   We recommend that the determination of the general Voluntary Correction Program (“VCP”) compliance fees under EPCRS for operational errors be revised to provide that the number of plan participants actually affected by a failure, instead of the total number of participants, be the determining factor for calculating an appropriate compliance fee.

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1 2013-4 I.R.B. 313. See § 2.05.

2 References to a “section” are to a section of the Internal Revenue Code of 1986, as amended (the “Code”), unless otherwise indicated.
3. Calculation of Earnings Adjustments

   a. We recommend that EPCRS be revised to permit the use of the online interest rate calculator adopted by the U.S. Department of Labor (“DOL”) under the Voluntary Fiduciary Correction Program (“VFCP Online Calculator”) as an alternative in all cases in which corrective plan contributions must be adjusted to account for lost earnings.

   b. As an alternative to the foregoing recommendation in 3(a) (in the event the use of the VFCP Online Calculator cannot be accepted in all cases), we recommend that the VFCP Online Calculator be permitted as an alternative in all cases in which the corrective plan contribution (before calculation of the earnings adjustment) to an individual participant will not exceed a stated dollar threshold. For this purpose, we recommend that the stated dollar threshold be an objectively determined threshold that adjusts with cost-of-living index changes and that the threshold be established at a level that permits use of the VFCP Online Calculator in all situations that do not involve significant corrective plan contributions. We believe that using a stated per plan participant dollar threshold of at least $5,000 for the year of correction would fall within that criterion.

4. Streamlining the Correction of Certain Plan Loan Failures

   We recommend that the provisions of SCP be expanded to include the correction of plan loan failures in two discrete circumstances: (i) where an employer fails to begin a non-highly compensated employee (“HCE”) participant’s withholding of loan repayment amounts as an after-tax payroll deduction for a period of one year or less after the date on which such repayment should have commenced under normal plan procedures; and (ii) where an employer withholds an incorrect amount as an after-tax payroll deduction for a non-HCE participant’s loan repayment for a period of one year or less after the date on which such repayment commenced under normal plan procedures. Under these circumstances, we recommend that the employer be required to do the following in order to qualify for relief under SCP:

   (i) begin or adjust withholding of loan repayment amounts and comply with the requirements of section 72(p)(2) with a new measurement date as of the date that the repayments initially commence or adjust;

   (ii) make a non-elective contribution to the participant’s account equal to the amount of accrued interest during the period which repayment did not occur or for which there was an underpayment; and

   (iii) maintain sufficient records indicating full compliance with these SCP correction procedures and provide such records, if requested, upon an audit.

   As an alternative to our recommendation 2 above (in the event it is not acceptable), we recommend that the Service adopt a revised compliance fee structure for plan loan failures by expanding the current VCP compliance fee structure for plan loan failures and
establishing a $500 compliance fee in instances where (i) the only failure under the VCP submission is the failure of participant loans to comply with the requirements of section 72(p)(2) and (ii) the plan loan failure affects 10 or fewer participants in any year of the failure. This provision will prevent abuse of the reduced compliance fee since it limits the use of the reduced compliance fee only to instances in which 10 or fewer participants were affected in any year by the plan loan failure. Under this revised structure, the VCP compliance fee for plan loan failures would have the following three tiers:

(i) for VCP submissions in which the only failure is the failure of participant loans to comply with the requirements of section 72(p)(2) and the failure affects 10 or fewer participants in any year of the failure, a compliance fee of $500;

(ii) for VCP submissions in which the only failure is the failure of participant loans to comply with the requirements of section 72(p)(2) and the failure affects 25% or less of the plan participants in any year of the failure, the compliance fee is 50% of the VCP compliance fee determined under the provisions of section 12.02(1) of Rev. Proc. 2013-12 (i.e., no change from the current fee structure); and

(iii) for VCP submissions for all other loan failures, a compliance fee determined under the provisions of section 12.02(1) of Rev. Proc. 2013-12 (i.e., no change from the current fee structure).

5. De Minimis Corrective Contributions

We recommend that the de minimis distribution principle described in section 6.02(5)(b) of Rev. Proc. 2013-12 be expanded to cover corrective contributions for former participants.
COMMENTS

As practitioners in the retirement plans community, we greatly appreciate the important role that EPCRS plays in both protecting the interests of plan participants and providing a tool for plan sponsors and administrators to effectively fulfill their duties related to the administration and compliance of qualified plans. Since its inception, EPCRS has continually been updated, improved, and augmented to address the needs of the retirement plans community, and we appreciate the extent to which the Service has been a willing participant and partner in the effort to provide plan sponsors and administrators with an effective program for voluntarily reporting and correcting plan-related errors.

Congress recognized the value of EPCRS in enacting section 1101(a) of the Pension Protection Act (“PPA”), which codified the authority of the Service to establish and implement EPCRS (or any successor program) and any other employee plan correction policy, including the authority to waive income, excise or other taxes to ensure that any tax, penalty, or sanction is not excessive and bears a reasonable relationship to the nature, extent, and severity of the plan failure. PPA section 1101(a) clarifies that the Service has wide authority to expand the scope of EPCRS. Finally, PPA section 1101(b) provides that the “Secretary of Treasury shall continue to update and improve the Employee Plan Compliance Resolution System.”

The latest iteration of EPCRS is found in Rev. Proc. 2013-12, which replaces Rev. Proc. 2008-50. Rev. Proc. 2013-12 is generally effective April 1, 2013, and will remain effective until subsequent guidance is issued. Consequently, Rev. Proc. 2013-12 may serve as relevant guidance for a significant period. In view of this observation, the importance of the issues discussed below, and the Service’s own stated desire to continue to improve EPCRS and receive comments on an ongoing basis, we offer a number of recommendations relating to certain aspects of Rev. Proc. 2013-12 that we believe will enhance the program.

1. Expansion of Streamlined Non-Amender Filing Procedure

A. Summary of Current Procedure

Sections 6.05, 11.02, and 12.03 of Rev. Proc. 2013-12, together, provide plan sponsors with a streamlined and less costly method for correcting certain plan document failures with the approval of the Service. Pursuant to existing guidance, a submission that contains only a failure to adopt timely interim amendments or amendments required to implement optional law changes may be filed on Appendix C Part II, and the compliance fee for such a submission is reduced to $375.

In the event a submission contains only a non-amender failure, other than the failure to adopt timely interim amendments or amendments required to implement optional law changes, and is submitted within a one-year period following the expiration of the plan’s remedial amendment period for complying with such changes, the plan sponsor will still be eligible for a

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reduced compliance fee equal to fifty percent (50%) of the otherwise applicable fee under section 12.02.

In addition to the relief described in the preceding paragraph, section 4.05(2) of Rev. Proc. 2013-12 and section 2.07 of Appendix B to Rev. Proc. 2013-12 allow the retroactive correction of certain qualification failures with respect to section 401(a)(17), hardship distributions, plan loans and early inclusion of otherwise eligible employees, by plan amendment under SCP, provided the plan sponsor submits a determination letter application for the plan, including the corrective plan amendment, during the plan’s next on-cycle year (or if earlier, in connection with the plan’s termination).\(^5\)

We commend the Service for adopting such an approach. While these streamlined procedures and reduced fees have been very well received by plan sponsors, we believe that there is still an excellent opportunity to make EPCRS more accessible, particularly with respect to small employers, by (i) expanding the list of plan document and non-amender failures that can be corrected under Appendix C Part II, (ii) further reducing the compliance fees associated with such submissions, and (iii) expanding the list of corrective amendments that may be adopted under SCP.

B. Recommendations

(a) We recommend that Rev. Proc. 2013-12 be modified to provide that the schedules to Appendix C Part II include submissions covering all discretionary amendments, the adoption of which is not prohibited under another section of the Code, such as section 411(d)(6), and, if the submission is only for a failure to timely adopt a discretionary amendment(s), then the reduced $375 compliance fee will apply.

(b) We further recommend that the Service expand the categories of corrective amendments that may be adopted under SCP. Other possible candidates for inclusion as SCP amendments are the failure of a plan sponsor to amend a plan to reflect an increase in the rate of matching contributions or the failure of an affiliate of a plan sponsor, which becomes a participating employer under a plan, to timely adopt the plan.

C. Explanation

Echoing PPA section 1101(a), section 2.02(4) of Rev. Proc. 2008-50 (the predecessor to Rev. Proc. 2013-12) provides that the Secretary of the Treasury has the authority to establish and implement EPCRS and to continue to update and improve EPCRS, by, among other strategies, (i) taking into account special concerns and circumstances that small employers face with respect to compliance and correction of compliance failures, and (ii) assuring that any tax, penalty, or sanction that is imposed by reason of a compliance failure is not excessive and bears a reasonable relationship to the nature, extent, and severity of the failure.

As reflected in Rev. Proc. 2008-50 and Rev. Proc. 2013-12, EPCRS has been updated in the past to include modifications that are designed to make its programs more accessible,

particularly with respect to small employers, and address failures that commonly occur in plans maintained by small employers. Through its adoption of many of these prior modifications to EPCRS, the Service has consistently and successfully reduced the burden and cost to employers that desire to take advantage of the EPCRS programs. Further improvements that could be made to help achieve these goals include expanding the list of failures that may be corrected under Appendix C Part II to include additional plan document failures and reducing the compliance fee that is required for submissions addressing such failures. In addition, the recommendations with respect to SCP corrective amendments would reduce the paperwork, administrative cost and complexity of correcting a potentially broad range of benign qualification missteps.

Many plan amendments, both mandatory and discretionary, address legal requirements and day-to-day functions that are very similar in scope and nature to those changes that are addressed by interim amendments and amendments that are intended to implement optional law changes. Under existing guidance, however, the correction of a failure to timely adopt an amendment covering a disqualifying provision or discretionary plan change can expose the plan sponsor to significantly more burden and expense than when correction can be completed under Appendix C Part II. In addition, the threshold analysis of whether a particular plan amendment is properly classified as an interim amendment, an integral amendment, an amendment addressing a disqualifying provision, or a discretionary amendment often requires significant time, effort, and expense. And in some cases, even after such time, effort and expense, a plan sponsor may not have complete certainty that it has properly classified the amendment.

We recognize that the Service currently is reviewing its policy with respect to interim amendments. From secondary source reports of discussions with Service officials, we understand that the year-end interim amendment requirement may be modified to include only amendments that (i) incorporate benefit cutbacks, (ii) implement statutory changes, and (iii) incorporate certain high priority, Service-required provisions. In our view, the contemplated changes are good steps in the direction of acknowledging the often complicated task of identifying the deadlines that apply to various types of amendments. The current interim amendment process is frustrating for practitioners and plan sponsors because they have to determine the interim amendments that are required and the deadline for adopting the amendments, which at times is difficult to ascertain. We also understand that the interim amendments result in the slowdown in processing of determination letters, which could be improved by simplifying the process for practitioners and the Service. Any alternative that is established, in our view, should clearly identify what changes must be reflected in plan amendments and should not create multiple amendment deadlines.

We commend the Service for encouraging practitioners to participate in the development of the new interim amendment policy. There are several issues with interim amendments related to timing and amendment formalities. We are hopeful that the open dialogue will continue as the new policy is created.

Notwithstanding the interim amendment concerns, the recommendation to modify Appendix C Part II will create additional incentives for plan sponsors to voluntarily correct plan document failures, will reduce the burdens and expenses that exist under the current programs, and will not increase the opportunity for abuse by plan sponsors because prohibitions already exist under the law, such as section 411(d)(6), that address the timing and retroactive effect of
certain discretionary amendments. The proposed expansion of Appendix C Part II and SCP would not include discretionary amendments that could not be adopted on a retroactive basis under otherwise applicable provisions of the Code.

2. Voluntary Correction Program Compliance Fee

A. Summary of Current Procedure

Section 12.02 of Rev. Proc. 2013-12 currently provides that the general compliance fee for submissions under VCP is graduated, based solely on the number of plan participants, as shown in the following table.

<table>
<thead>
<tr>
<th>Number of Participants</th>
<th>Fee</th>
</tr>
</thead>
<tbody>
<tr>
<td>20 or Fewer</td>
<td>$750</td>
</tr>
<tr>
<td>21 to 50</td>
<td>$1,000</td>
</tr>
<tr>
<td>51 to 100</td>
<td>$2,500</td>
</tr>
<tr>
<td>101 to 500</td>
<td>$5,000</td>
</tr>
<tr>
<td>501 to 1,000</td>
<td>$8,000</td>
</tr>
<tr>
<td>1,001 to 5,000</td>
<td>$15,000</td>
</tr>
<tr>
<td>5,001 to 10,000</td>
<td>$20,000</td>
</tr>
<tr>
<td>Over 10,000</td>
<td>$25,000</td>
</tr>
</tbody>
</table>

With the exception of reduced fees in the case of submissions relating to certain amendment failures, limited failures under sections 72(p)(2) and 401(a)(9), and orphan plans, and the potential for increased fees in the case of egregious and intentional failures, there is no provision under EPCRS for applying a qualitative standard to the calculation of VCP compliance fees. Thus, under the current fee structure, a single “foot fault” such as single loan failure, may result in an enormous fee.

As noted previously, Congress recognized the need for an ongoing evaluation of EPCRS and, in PPA section 1101(b)(5), encouraged the Service to “continue to update and improve the Employee Plans Compliance Resolution System . . . giving special attention to [, among other items,] assuring that any tax, penalty, or sanction that is imposed by reason of a Compliance Failure is not excessive and bears a reasonable relationship to the nature, extent, and severity of the failure.”

B. Recommendation

We recommend that the determination of general VCP compliance fees under EPCRS for operational errors be revised to provide that the number of plan participants actually affected by such failure, instead of the total number of participants, should be the determining factor for calculating an appropriate compliance fee.6

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6 We recognize that there may be instances when a plan sponsor may only be able to provide a good faith estimate of the number of plan participants actually affected by such failure. However, in most instances, it is unlikely that the
C. **Explanation**

As stated above, the PPA encourages the Service to update and improve the correction program and to give special attention to ensuring that any tax, penalty, or sanction imposed by reason of a compliance failure is not excessive and bears a reasonable relationship to the nature, extent, and severity of the failure. See also section 2.02(4) of Rev. Proc. 2008-50, which makes the same suggestion. The current VCP compliance fee table arguably does not bear any reasonable relationship to the nature, extent, and severity of a failure, especially for submissions made by larger plans.

For many reasons, including the restrictions and limitations of SCP and the fact that the correction guidance and examples under EPCRS do not address every type of failure, plan sponsors often desire the closure and peace of mind that comes with seeking out the approval of the Service under VCP. Failures included in VCP submissions, whether those of small or large plans, are not always more significant in scope and/or nature than those that could be corrected under SCP or another streamlined VCP procedure. The compliance fees for such submissions, however, especially for larger plans, can often far outweigh the magnitude of the error and the financial cost of correction. Accordingly, potentially large VCP compliance fees can have a chilling effect and act as a disincentive for larger plans to pursue correction.

We believe that a compliance fee schedule that is based on the number of participants actually affected by the failure would be fairer and more equitable, would not penalize large plans and employers, and would further the goals of EPCRS of making its programs more accessible to the retirement plans community. Such a fee schedule would be simple to administer and consistent with the instructions set forth in the PPA. Based on this, we recommend that the chart in section 12.02 of Rev. Proc. 2013-12 be revised to read as follows:

<table>
<thead>
<tr>
<th>Number of Participants Affected</th>
<th>Fee</th>
</tr>
</thead>
<tbody>
<tr>
<td>20 or Fewer</td>
<td>$750</td>
</tr>
<tr>
<td>21 to 50</td>
<td>$1,000</td>
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<tr>
<td>51 to 100</td>
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<td>$20,000</td>
</tr>
<tr>
<td>Over 10,000</td>
<td>$25,000</td>
</tr>
</tbody>
</table>

We note that our recommendation is consistent with the recommendation made by the Advisory Committee on Tax Exempt and Government Entities (“ACT”) in section V.B.1.C(1) of good faith estimate would have an impact on the required fee given the substantial spread between each fee gradation.
its report titled “Improving the Employee Plans Compliance Resolution System: A Roadmap for Greater Compliance,” which is dated June 11, 2008.7

Determining the fee based on the number of participants affected would allow the Service to simplify the fee schedules and eliminate the special rules for loans and minimum required distributions. In determining who is “affected,” we suggest that it be the number of participants who potentially require an adjustment to their benefit. This would require, for example, that all of the affected participants be included in a situation where a contribution reallocation is required. This proposal is intended to cover operational errors, and not cover plan amendment failures addressed in recommendation 1 above. This proposal, therefore, is not intended to eliminate the $375 application fee for a streamlined Appendix C Part II filing.

If the Service does not believe that this proposal regarding fees is workable or otherwise acceptable, we respectfully request the Service to consider the alternative fee structure for correction of loan errors outlined below in recommendation 4 below.

3. Calculation of Earnings Adjustments

A. Summary of Current Procedure

Section 6.02(5)(a) of Rev. Proc. 2013-12 provides that reasonable estimates may be used in calculating the appropriate correction if either (i) it is possible to make a precise calculation but the probable difference between the approximate and the precise restoration of a participant’s benefits is insignificant and the administrative cost of determining the precise restoration would significantly exceed the probable difference or (ii) it is not possible to make a precise calculation. This section also provides that if it is not feasible to make a reasonable estimate of what the actual investment results would have been, a reasonable interest rate may be used. For this purpose, the VFCP Online Calculator8 is deemed to be a reasonable earnings rate.

Plan fiduciaries use the VFCP Online Calculator to determine the dollar amount to restore to a plan after a loss resulting from certain fiduciary breaches, such as the failure to timely transfer participant contributions to the plan. The VFCP Online Calculator is a reliable tool for calculating lost earnings in the event there is a need to make a corrective plan contribution and an exact earnings calculation cannot be obtained. It uses the underpayment rates in effect under sections 6621(a)(2) and (c)(1) during the time period of the failure and the corresponding factors from Rev. Proc. 95-17,9 which reflect daily compounding. Over the past 20 years, these interest rates have ranged from a low of four percent to a high of 12%.

7 “[T]he ACT believes that the EPCRS program has progressed to the point where encouraging correction should be the primary goal. Accordingly, the ACT recommends that the VCP fee should not be dependent on the size of the employer or total number of plan Participants; instead, the fee should be based on the number of affected Participants or on a fixed schedule dependent upon the specific Plan Failure.” Improving the Employee Plans Compliance Resolution System: A Roadmap for Greater Compliance, § V.B.1.C, Advisory Committee on Tax Exempt and Government Entities (ACT) Report of Recommendations, Public Meeting Washington, DC (June 11, 2008).


9 1995-1 C.B. 611.
The VFCP Online Calculator is very easy to use. Access to the calculator is available through the DOL’s Employee Benefits Security Administration website at www.dol.gov/ebsa. The calculator requires that the user input the date on which the applicable amount should have been contributed to the plan, the date on which the applicable amount was actually contributed to the plan, and the date on which final correction of the earnings amount will be completed. The applicable interest rates have been programmed into the calculator so lost earnings are automatically calculated based on the dates that are input by the user. In addition to providing results that are easy to understand, the VFCP Online Calculator results can be easily printed for inclusion with a voluntary correction application.

Where there are corrections to be made under both EPCRS and VFCP for the same matter, using two different methods to calculate earnings yields different results for earnings particularly where earnings information is accessible.

B. Recommendations

(a) We recommend that EPCRS be revised to permit the use of the VFCP Online Calculator as an alternative in all cases in which corrective plan contributions must be adjusted to account for lost earnings.

(b) As an alternative to the foregoing recommendation in (a) (in the event use of the VFCP Online Calculator cannot be accepted in all cases), we recommend that the VFCP Online Calculator be permitted as an alternative in all cases in which the corrective plan contribution (before calculation of the earnings adjustment) to an individual participant will not exceed a stated dollar threshold. For this purpose, we recommend that the stated dollar threshold be an objectively determined threshold that adjusts with cost-of-living index changes and that the threshold is established at a level that will permit use of the VFCP Online Calculator in all situations that do not involve significant corrective plan contributions. We believe that using a stated per plan participant dollar threshold of at least $5,000 for the year of correction would fall within that criterion.

C. Explanation

The calculation of historical plan and account earnings can create hardships for plan sponsors and often causes significant delays in the correction process while such historical information is located and calculated. In many cases, the administrative cost of locating the information, preparing the calculations and paying consultants or attorneys to review the calculations far exceeds the amount that will be deposited to participant accounts as earnings on the corrective contributions. In addition, it also is particularly difficult for section 403(b) plans to obtain information regarding rates of return.

The diversion of administrative resources of the employer to locate the necessary information and perform the calculations is significant and again, often is disproportionate to the amount of the actual corrective earnings adjustment benefit that will be provided to the affected participants. This extensive use of employer resources when combined with the expense of the earnings calculation process is a significant deterrent to employers who wish to use the voluntary correction process.
It is the experience of the practitioners drafting this Comment that there is a broad range of costs associated with the calculation of earnings including hourly or per occurrence fees. The range for certain recordkeepers is from $75 to $300 per hour. For example, one large recordkeeper charges $150 per hour with a two hour minimum and another large recordkeeper charges $75 per hour. In the case of a small correction of a failure over a short time frame, the $300 minimum would far exceed the actual earnings. A third party administrator may charge significantly higher amounts for calculating expenses than a large recordkeeper. Another administrative issue employers face when completing an EPCRS correction involving the calculation of earnings is limited access to historical investment return data, since their recordkeeper or third-party investment service providers generally are the sole parties with access to this information. Accordingly, the employers are forced to rely on the input and cooperation of these vendors with respect to earnings calculations, and cannot complete and submit an application under EPCRS until the applicable earnings data is received. This process often leads to significant delay. In addition, the earnings data provided by the outside vendors can be indecipherable and employers are typically not in possession of any data necessary to verify the accuracy or completeness of the earnings data they receive from the vendors. Allowing employers greater access to the VFCP Online Calculator in connection with EPCRS will give the employers greater control over the correction process and may significantly reduce the time and expense associated with the correction process that is a deterrent to voluntary self-correction.

The guidance under Rev. Proc. 2013-12 acknowledges these hardships and deterrent factors by permitting a plan sponsor to deem that a calculation of lost earnings using the VFCP Online Calculator shall suffice as a reasonable estimation of plan earnings. The guidance under Rev. Proc. 2013-12, however, does not provide adequate clarification of when administrative expenses and burdens can be deemed in good faith to outweigh the value of making precise earnings calculations. Accordingly, while the Service has provided plan sponsors with much needed access to this valuable tool, enough questions still exist to decrease its value, especially in the context of corrections under SCP and corrections involving small and medium sized corrective contributions.

Again, considering the fact that PPA encouraged the Secretary of the Treasury to continuously improve EPCRS, we believe that adopting the VFCP Online Calculator as a generally acceptable method for calculating earnings under section 3 of Appendix B of Rev. Proc. 2013-12 when corrective contributions must be made to a plan is in keeping with the Congressional charge in PPA. The adoption of this calculator will (i) alleviate potentially significant burdens on plan administrators faced with the necessity of adjusting corrective contributions to account for lost earnings and (ii) serve the interests of affected plan participants because the interest rates and compounding factors used by the VFCP Online Calculator will often result in comparable earnings when compared with the methods that are currently accepted under section 3 of Appendix B of Rev. Proc. 2013-12.\(^{10}\) Thus, using the VFCP Online Calculator will greatly simplify correction for employers and make SCP more attractive, in

\(^{10}\) “If it is not feasible to make a reasonable estimate of what the actual investment results would have been, a reasonable interest rate may be used. For this purpose, the interest rate used by the Department of Labor’s Voluntary Fiduciary Correction Program Online Calculator (‘VFCP Online Calculator’) is deemed to be a reasonable interest rate.” Rev. Proc. 2013-12, § 6.02(5)(a).
particular where there also is a fiduciary breach resulting from the same operational error to be corrected under VFCP. At the same time, to avoid potential abuse, we recognize that a plan sponsor should not have the option to pick and choose between using the calculator or other methods from year to year for corrections that span more than one year. Thus, we believe that whatever method is used in these circumstances, plan sponsors should be required to use the same method for all affected participants for all years involved.

4. **Streamlining the Correction of Certain Plan Loan Failures**

   **A. Summary of Current Procedure**

   The correction methods set forth in sections 6.07(2)(b), (c), and 6.07(3) of Rev. Proc. 2013-12 are available for plan loan failures that are corrected through the VCP, provided the maximum period for repayment of the loan pursuant to section 72(p)(2)(B) has not expired. In addition, unless correction is made in accordance with section 6.07(2) or (3) of Rev. Proc. 2013-12, a deemed distribution under section 72(p)(1) will arise in connection with the failure. A deemed distribution is the taxable event that occurs when a purported plan loan does not satisfy the Code’s criteria and requires the outstanding loan balance to be included in the plan participant’s gross income. Deemed distributions must be reported on Form 1099-R with respect to the affected participant for the year of the failure.

   Section 12.02(3) of Rev. Proc. 2013-12 provides for a 50% reduction in the VCP compliance fees for a plan loan failure if (i) the only failure under the VCP submission is the failure of participant loans to comply with the requirements of section 72(p)(2) and (ii) the failure does not affect more than 25% of the plan sponsor’s participants in any year of the failure. For all other plan loan failures, the VCP compliance fee is determined using the table set forth in section 12.02(1) of Rev. Proc. 2013-12.

   **B. Recommendations**

   We recommend that the provisions of the SCP be expanded to include the correction of plan loan failures in two discrete circumstances: first, where an employer fails to begin a non-HCE participant’s withholding of loan repayment amounts as an after-tax payroll deduction for a period of one year or less after the date on which such repayment should have commenced under normal plan procedures; second, where an employer withholds an incorrect amount as an after-tax payroll deduction for a non-HCE participant’s loan repayment for a period of one year or less after the date on which such repayment commenced under normal plan procedures. Under these circumstances, we recommend that the employer be required to do the following in order to qualify for relief under SCP: (i) begin or adjust withholding of loan repayment amounts and comply with the requirements of section 72(p)(2) with a new measurement date as of the date that the repayments initially commence or adjust; (ii) make a non-elective contribution to the participant’s account equal to the amount of accrued interest during the period which repayment did not occur or for which there was an underpayment; and (iii) maintain sufficient records indicating full compliance with these SCP correction procedures and provide such records, if requested, upon an audit.
As an alternative to recommendation 2 above (in the event it is not acceptable), we recommend that the Service consider adopting a revised compliance fee structure for plan loan failures. We recommend that the current VCP compliance fee structure for plan loan failures be expanded by establishing a $500 compliance fee in instances where (i) the only failure under the VCP submission is the failure of participant loans to comply with the requirements of section 72(p)(2) and (ii) the plan loan failure affects 10 or fewer participants in any year of the failure. This provision will prevent abuse of the reduced compliance fee because it limits the use of the reduced compliance fee only to instances in which 10 or fewer participants were affected in any year by the plan loan failure. Under this revised structure, the VCP compliance fee for plan loan failures would have the following three tiers:

(i) for VCP submissions in which the only failure is the failure of participant loans to comply with the requirements of section 72(p)(2) and the failure affects 10 or fewer participants in any year of the failure, the compliance fee is $500;

(ii) for VCP submissions in which the only failure is the failure of participant loans to comply with the requirements of section 72(p)(2) and the failure affects 25% or less of the plan participants in any year of the failure, the compliance fee is 50% of the VCP compliance fee determined under the provisions of section 12.02(1) of Rev. Proc. 2008-50 (i.e., no change from the current fee structure); and

(iii) for all other loan failures, the VCP compliance fee is determined under the provisions of section 12.02(1) of Rev. Proc. 2013-12 (i.e., no change from the current fee structure).

C. Explanation

Plan loan failures are common occurrences. Such errors, however, usually occur early in the life of the plan loan, are often solely the fault of the plan sponsor or a plan service provider, and can be easily and efficiently corrected. Yet, the current correction principles are overly burdensome and costly for both plan sponsors, who must address all plan loan failures by filing under VCP, and plan participants, who are often unexpectedly required to report significant deemed distributions. For this reason, we believe that the SCP should be expanded to permit correction of certain limited plan loan failures.

Under our recommended change to SCP, because the plan loan failure was not the direct fault of the affected plan participant and involves failure of the plan sponsor to act within a limited period of time, correction should be permitted without treating the loan as defaulted or by reporting the unpaid balance of the loan as a deemed distribution, even if the maximum period for repayment of the loan has expired (e.g., by allowing reamortization over the period remaining under section 72(p)(2)(B) plus the number of months during which no payments or incorrect payments were made as a result of the failure). By allowing this plan loan failure correction under SCP to be available to non-HCEs only, any concerns regarding abuse, discrimination, or fairness are avoided. It is often the case that the plan sponsor is unaware of delinquent plan loans. Plan sponsors typically transmit payroll information including loan repayments to the trust for the section 401k plans directly and in some cases through payroll providers or other third party systems. Also, many companies now outsource payroll to a third party and the plan
The modern recordkeeping system has made it difficult to monitor plan loans and to determine whether administrative errors caused loan repayments to be delinquent. As a result, the expansion of SCP would allow plan sponsors to make corrections once errors are identified and reduce the amount of deemed distributions that result in a tax on participants. Therefore, SCP for plan loan failures that are not the direct result of action of the affected plan participant is in the best interest of participants.

If the compliance fee proposal in recommendation 2 above is not accepted by the Service, we recommend that an alternative reduced compliance fee be implemented in order to (i) encourage both small and large employers to correct plan loan failures and (ii) further the goals of EPCRS by making its programs more accessible to the retirement plans community. The compliance fees to correct plan loan failures through VCP are often disproportionate to the magnitude of the loan failure and financial cost of correcting. As a result, many plan sponsors do not correct plan loan failures through VCP, which ultimately harms plan participants who are required to report significant deemed distributions. Similar to the reduced compliance fee for section 401(a)(9) failures, a reduced compliance fee of $500 when a plan loan failure affects 10 or fewer participants would bear a more reasonable relationship to the nature, extent and severity of the failure, which is one of the goals of EPCRS as articulated in section 2.02(4) of Rev. Proc. 2008-50.

5. De Minimis Corrective Contributions

A. Summary of Current Procedure

Under section 6.02(5)(b) of Rev. Proc. 2013-12, a plan sponsor is not required to make a corrective distribution if (i) the total corrective distribution due a participant or beneficiary is $75 or less and (ii) the reasonable direct costs of processing and delivering the distribution to the participant or beneficiary would exceed the amount of the distribution.

However, section 6.02(5)(b) does not apply to corrective contributions. Thus, it appears that any amount, no matter how small, may have to be processed in the case of a corrective contribution to a former employee who in many cases has already received a full distribution of his or her plan benefit. This is the case even if the costs associated with processing and delivering the corrective contribution offsets in total the amount of the distribution.

B. Recommendation

We recommend that the de minimis distribution principle described in section 6.02(5)(b) of Rev. Proc. 2013-12 be expanded to cover corrective contributions for former participants.
C. **Explanation**

We believe that it is appropriate for the amount of corrective contributions to be considered in relation to the cost of the administrative services required to establish (and subsequently close out) new accounts for former plan participants. Just as in the case of corrective distributions, corrective contributions of small amounts on behalf of former plan participants can be more administratively burdensome and expensive than corrective distributions of such amounts for several reasons. First, plan recordkeepers and third-party administrators regularly charge account set-up and other administrative fees to establish accounts on behalf of former participants. In some cases, the fee to set up a new account will exceed the amount of the corrective contribution.

Second, generally, the former plan participant’s contribution will be reduced or completely lost by a distribution charge imposed by the plan recordkeeper. Based on our experience, the average distribution fee charged by many recordkeepers is between $75 and $100.

Third, if plan records are outdated (or if the plan is a terminating plan), plan administrators may need to engage commercial locator services to find missing plan participants. Although some of these fees and expenses could be charged to a former participant’s new plan account, these administrative fees collectively could equal or exceed the amount of the small corrective contribution. As a result, in many cases, the participant does not benefit from the de minimis corrective contributions. The plans are intended to provide income for retirement and a small corrective contribution that is ultimately set off by fees does not further that goal.

In guidance concerning updates to VFCP, the DOL introduced a similar de minimis rule whereby fiduciaries who make corrective contributions to a plan need not make a distribution of $20 or less to a former employee, beneficiary, or alternate payee who does not have an account balance and does not have a right to future benefits under the plan. To forego the corrective plan contributions on behalf of persons who no longer have an interest in the plan, however, the fiduciary must show that the cost of making the distribution to such persons exceeds the amount of the payment actually due. In the event that a fiduciary makes the required showing, under the DOL guidance the fiduciary must pay to the plan a contribution equal to the total of all the de minimis amounts that the fiduciary did not distribute.

Likewise, in order to improve the administrative consistency of EPCRS and avoid unnecessary effort and expense, we believe that a corrective contribution to a former participant should not be required if the amount of that contribution is $75 or less and the plan sponsor determines that the reasonable direct costs of calculating the corrective contribution and earnings and delivering the contribution likely exceeds the amount of the contribution. These de minimis contributions then could be reallocated either among the remaining population of active plan participants or allocated to the plan’s forfeiture account and used in the manner set forth under the plan document.

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