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# How to Resolve Common Deficiencies Uncovered During 403(b) Plan Audits

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**T**his is the last of three articles focusing on 403(b) plan audits. It describes the IRS and DOL correction programs under which plan sponsors may self-correct plan operational errors and compliance failures. The IRS program is offered through the Employee Plans Compliance Resolution System (EPCRS) and the DOL programs are known as the Voluntary Fiduciary Correction Program (VFCP) and Delinquent Filer Voluntary Compliance Program (DFVCP).

Earlier in the series, private school Worthy Academy found that it had misapplied the “20-hour” exception to the “universal availability” rule and improperly excluded three non-highly compensated employees from participation in the plan. Since this compliance failure could put the plan’s tax-qualified status at risk, Worthy has elected to use available self-correction programs to put affected employees in the position that they would have been in, had the error not occurred.

Worthy Academy is in luck, because on Dec. 31, 2012, the IRS

issued Revenue Procedure (Rev. Proc.) 2013-12, which provides authoritative guidance for 403(b) plan failures. Rev. Proc. 2013-12 supersedes and modifies Rev. Proc. 2008-50.

Rev. Proc. 2013-12 allows plan failures arising from noncompliance with the form and operational requirements of 403(b) plan regulations to be corrected in the same manner as other qualified plans with the same failure. Appendix A includes a safe harbor correction method for missed deferrals and defines qualified non-elective contributions (QNECs). Current IRS regulations prohibit the plan from using forfeitures to fund QNEC contributions. 403(b) plans that have failed to adopt a written plan document may use the Voluntary Correction Program (VCP) procedures outlined in Appendix C and Schedule 2.

The submission procedures for VCP applications have changed substantially. Two new IRS forms that must accompany VCP submissions made on or after April 1, 2013, were released on Feb. 7, 2013. Form 8950 is a VCP application form and Form 8951 accompanies the compliance fee for the application. In addition, the VCP application and completed forms are now mailed to the IRS Service Center in Covington, KY instead of Washington, DC. Application fees may be reduced under certain conditions.

It is important for practitioners to note that many of the procedures, particularly with regard to the VCP, are changed significantly in Rev. Proc. 2013-12. Care should be taken to follow Appendix C and Schedule 2 instructions. Furthermore, if the 403(b) plan failure occurred prior to Jan. 1, 2009, plans must use the definitions provided in Rev. Proc. 2008-50 in order to determine which failures may be resolved under EPCRS.

The effective date of Rev. Proc. 2013-12 is April 1, 2013; however, plan sponsors may apply provisions of the procedure on or after Dec. 31, 2012. Accordingly, early in 2013, Worthy Academy makes the prescribed correction for failures to satisfy the



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universal eligibility rule, which is to contribute to the plan an amount equal to 50% of the missed deferrals, plus earnings, on behalf of affected participants. They elect to use the actual deferral percentage for non-highly compensated employees for the plan year in which the error occurred, which was 2% of covered wages.

A wide variety of fiduciary violations, such as failure to remit participant contributions to the plan in a timely manner, may be self-corrected by the plan sponsor through the DOL VFPC. There is no cost for this program. All plan sponsors should consider participating in this program in order to reduce the risk of investigation by the DOL and potential fine. A list of specific violations that may be corrected is found at [www.dol.gov/ebsa/newsroom/fs2006vfpc.html](http://www.dol.gov/ebsa/newsroom/fs2006vfpc.html).

Participation in this program requires the plan sponsor to restore all affected plan participants to the condition they would have been in had the violation not occurred. In the case of late remitted participant contributions,

lost earnings on the contributions are required to be paid to the plan. Once the correction has been accurately completed through the VFPC Program, the DOL will issue a “no action” letter that absolves the plan sponsor from future penalties associated with the identified defect.

Administrators of large plans that fail to file an annual return (Form 5500) for the plan may be fined up to \$2,000 per plan per year due to the failure. The penalty is assessed for each year that the returns are not filed. Plan administrators may cap the penalty at \$4,000 per plan by entering into the DFVCP. This program requires the administrator to pay the fine and file the overdue reports before the DOL notifies the administrator of the failure. Plan assets may not be used to pay this fine. Practitioners should note that the DFVCP was updated on Jan. 29, 2013, to fully integrate with EFAST, the electric filing program for Form 5500s. **B**



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