

# e RISA UPDATE

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**E**PCRS was the most significant new development this past quarter. The latest update, Rev. Proc. 2013-12, provides additional correction guidance for 403(b) plans, revises VCP submission procedures, reflects IRC §436 in the correction guidance for defined benefit plans, and clarifies a number of items, including when a determination letter application is required with a VCP submission. IRS was the busiest of the agencies this quarter, issuing several significant pieces of guidance in addition to Rev. Proc. 2013-12. In this issue of eRISA Update, you will find summaries of the following: (1) the IRS' latest update of the EPCRS Procedure, (2) the pension-related provisions in the American Taxpayer Relief Act of 2012 (relating to in-plan Roth conversions and qualified charitable distributions from IRAs), (3) the 2013 dollar limits, (4) the annual update of the IRS' determination letter procedures and user fees, (5) a delay in the amendment deadline for IRC §436 amendments, (6) Hurricane Sandy relief from the IRS, DOL, and PBGC, (7) an option for governmental plans to elect Cycle E for the second remedial amendment cycle under Rev. Proc. 2007-44, (8) a private letter ruling concluding that the compensation of participants who are eligible for a plan's 401(k) arrangement but who do not share in the allocation of any employer contributions is disregarded in computing the 25% deduction limit under IRC §404(a)(3), (9) a new anti-cutback exception allowing the elimination of certain optional forms of benefit from a defined benefit plan maintained by an employer in bankruptcy reorganization, (10) a proposed revision of Circular 230 to consolidate the standards for written advice and allow for immediate suspension of practitioners

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who fail to satisfy their Federal tax filing obligations, (11) proposed DOL regulations that would expand its abandoned plan program to cover plans maintained by plan sponsors that are liquidating in bankruptcy, allowing the bankruptcy trustee to serve as a qualified termination administrator, and making corresponding amendments to PTE 2006-06, (12) an extension of the IRS' voluntary program to reclassify nonemployee workers as employees for employment tax purposes, (13) a private letter ruling allowing for IRC §4980F penalty relief with respect to the failure to give the ERISA §204(h) notice to alternate payees and unions representing plan participants, (14) a court case ruling that prevailing wage contributions required to be made by an employer are not plan assets until contributed, and (15) a court case ruling that the weekend/holiday rule does not apply to determine when amendments can be adopted with respect to a plan termination date that falls on a weekend or holiday.

## **CHANGES COMING FOR OUR NEWSLETTER SUBSCRIPTIONS**

Starting in 2013, we will be discontinuing ERISA Views as a regular publication. eRISA Update will continue to be published and will be the only regular newsletter subscription from TRI Pension Services. On a periodic basis we will publish special releases, along the lines of what we have done with ERISA Views, when a timely topic warrants it. When those are published, subscribers to eRISA Update will have an opportunity to purchase that release at a discounted price. More details will follow with the Spring 2013 issue of eRISA Update. Additional information also will be published at our website, [www.cyberisa.com](http://www.cyberisa.com), by the end of March.

## **CAUTION: COMPUTING DEDUCTION LIMITS FOR 401(k) PLANS**

In this issue we report on an IRS private letter ruling that takes a contrary position to what had been expressed by IRS representatives at past employee benefits conferences. Specifically, [PLR 2012229012](#) concludes that, since IRC §404(n) states that elective deferrals are not to be taken into account in applying the deduction limit under IRC §404(a)(3) to any other contributions, a participant's compensation may not be taken into account solely because he or she is eligible for a 401(k) arrangement under the plan. Therefore, the deduction limit is determined by taking into account only the aggregate compensation of the employees who participate in the allocation of the employer contribution to the plan for the year for which such contribution is made. This would include the allocation of either employer matching contributions or nonelective contributions. Accordingly, if an employee is eligible to make elective deferrals and chooses not to do so, and therefore, also receives no matching contributions, that employee's compensation may not be taken into account under IRC §404(a)(3) unless he or she receives an allocation of nonelective contributions. Practitioners need to consider this private letter ruling in computing an employer's deduction limit for contributions to a 401(k) plans.

## **FOR THOSE JOINING US FOR THE FIRST TIME . . .**

We have some new subscribers to *eRISA Update* whose subscriptions are starting with this issue of *eRISA Update*. If you did not order the past issues with your subscription, but you would like to order the last 4 issues (one year's worth), please go to [erisa\\_newsletter\\_form.htm](#) and follow the instructions to print out an order form, and check the box for ordering the 4 past issues. After completing the order form: (1) fax it (303-265-9100), (2) scan it and send it by e-mail (or, in lieu of scanning, send all of the information in order form in the body of an email) to [tripensionservices@gmail.com](mailto:tripensionservices@gmail.com), or (3) mail your order to TRI Pension Services, 1550 Larimer St., #423, Denver, CO 80202. PLEASE NOTE THE NEW MAILING ADDRESS!

## **ATTENTION ERISA OUTLINE BOOK SUBSCRIBERS**

Each current developments summary in *eRISA Update* includes a cross-reference to the section of The ERISA Outline Book that is affected by that new development. This will help these subscribers easily identify information in the most current edition of the EOB that will need to be modified by a particular new development when the new edition is released.

## **INDEX OF PARAGRAPH NUMBERS**

We have posted at the TRI Pension Services website ([www.cyberisa.com](http://www.cyberisa.com)) a file explaining the paragraph numbering system we use to identify the Current Developments Summaries that comprise each issue of *ERISA Update*. For the most recent index that has been posted, click on the link below.  
[http://www.cyberisa.com/docs/eRISAUpdate\\_index\\_numbers.pdf](http://www.cyberisa.com/docs/eRISAUpdate_index_numbers.pdf)

## **JUST WANT THE NEWS IN A NUTSHELL?**

Please remember that there is a brief discussion of the more significant current developments in this Cover Letter. See "What's New This Quarter?" starting on the next page of this Cover Letter Section. Some subscribers to *ERISA Update* like to keep up-to-date, but are not interested in reading extensive material on these current developments. This is why we set up each issue the way we do. If you don't have an interest in getting a lot of detail on one or more of the items reported in this issue (or you don't have the time to), the information in this Cover Letter section should be sufficient to at least keep you informed. When you want more detail on one or more items, consult the Summaries of Current Developments Section of this issue. There is a hyperlink to each Current Developments Summary, both in the brief update in "What's New This Quarter" and also in the separate Table of Contents to the Current Developments Summary section. Note that most Current

Developments Summaries are started on a new page, so that it is easier for subscribers to print out only those summaries in which they have an interest.

## WHAT'S NEW THIS QUARTER?

This issue of eRISA Update reports current developments issued since the previous issue of eRISA Views. The update below provides a brief discussion of the most important items.

### Legislation Update

\* **American Taxpayer Relief Act of 2012 (ATRA 2012).** The “fiscal cliff” negotiations resulted in ATRA 2012, which includes two provisions relating to retirement plans. First, Congress has expanded the availability of [in-plan Roth conversions](#) to allow for such conversions with respect to non-Roth funds that are not currently distributable (e.g., pre-tax elective deferrals held for an active employee who has not reached age 59½). Second, Congress has extended until the end of 2013, the right to make [qualified charitable distributions](#) from an IRA with respect to an individual who is receiving required minimum distributions.

### IRS/Treasury Update

\* **2013 dollar limits announced.** The IRS issued the [dollar limits in effect for 2013](#). Increases were made to the elective deferral limit under IRC §402(g), the IRC §415 limits, the compensation limit under IRC §401(a)(17), and the SIMPLE contribution limit.

\* **Revised EPCRS procedure.** [Rev. Proc. 2013-12](#) supersedes Rev. Proc. 2008-50 with respect to the IRS’ Employee Plans Compliance Resolution System (EPCRS). The key modifications to Rev. Proc. 2008-50 relate to: (1) 403(b) failures (including a procedure for correcting a failure to adopt a timely written document), (2) determination letter procedures with respect to VCP submissions involving plan amendments, (3) VCP submission forms (introduces Forms 8950 and 8951), (4) VCP compliance fees, (5) the practices and procedures definition to promote correction of IRC §415(c) failures, (6) corrective contributions relating to missed matching contributions (allows for such contributions to be subject to a vesting schedule), (7) the correction of overpayments, (8) the use of QNECs to make certain corrections (restricting the use of forfeitures to fund such contributions if used to correct ADP or ACP failures), (9) additional corrections for improper exclusion of employees from safe harbor 401(k) plans, 403(b) plans, and SIMPLE plans, (10) the correction of failures to

adopt good faith amendments, interim amendments, and optional law change amendments, (11) corrective amendments to pre-approved plans (allowing continued reliance on the advisory letter or opinion letter), (12) failures under IRC §436 and coordination with IRC §436 when other corrective distributions or amendments under a defined benefit plan, (13) actuarial equivalence factors used for corrective distributions under defined benefit plans, (14) the location of former employees and beneficiaries to reflect that the IRS’ letter forwarding program is no longer available, and (15) the use powers-of-attorney in a VCP submission.

\* **Determination letters and user fees.** The IRS has issued its annual update of its determination letter application procedures (see [Rev. Proc. 2013-6](#)) and the user fees for obtaining advisory, determination and opinion letters, and private letter rulings (see [Rev. Proc. 2013-8](#)). Rev. Proc. 2013-6 clarifies the documents that are to be submitted with an application, and adds references to Form 8821. Rev. Proc. 2013-8

does not increase any user fees, but introduces Form 8717-A for transmitting user fees relating to advisory letter and opinion letter applications.

\* **IRC §436 amendment.** [Notice 2012-70](#) extends for another year the deadline for adopting plan amendments required to comply with IRC §436, modifying the deadline published in Notice 2011-96. The extended deadline is the latest of: (1) the last day of the 2013 plan year (instead of the 2012 plan year), (2) the last day of the plan year for which IRC §436 is first effective, or (3) the due date (including extensions) for filing the employer's tax return for the tax year that contains the first day of the plan year for which IRC §436 is first effective.

\* **Remedial amendment cycle for governmental plans.** [Rev. Proc. 2012-50](#) modifies [Rev. Proc. 2007-44](#) to allow governmental plans, which normally are on Cycle C, to elect Cycle E for the post-EGTRRA remedial amendment cycle (which is on-cycle from February 1, 2015, through January 31, 2016), which is the second remedial amendment cycle under [Rev. Proc. 2007-44](#).

\* **Deduction limits - 401(k) participants.** In [PLR 2012229012](#), the IRS ruled that, since IRC §404(n) states that elective deferrals are not to be taken into account in applying the deduction limit under IRC §404(a)(3) to any other contributions, a participant's compensation may not be taken into account solely because he or she is eligible for a 401(k) arrangement under the plan. Therefore, the deduction limit is determined by taking into account only the aggregate compensation of the employees who participate in the allocation of the employer contribution to the plan for the year for which such contribution is made. This would include the allocation of either employer matching contributions or nonelective contributions. This is a reversal from what appeared to be the IRS' interpretation expressed at past employee benefits conferences.

\* **Bankruptcy and the anti-cutback rule.** The Treasury has [finalized its regulations](#) permitting a defined benefit plan amendment to be adopted that eliminates an optional form of benefit that includes a prohibited payment described in IRC §436(d)(5) (e.g., a lump sum distribution), provided that the plan sponsor is in bankruptcy reorganization and other specified conditions are satisfied.

\* **Circular 230.** The IRS is [proposing to amend Circular 230](#) to revamp the standards in §10.35 of Circular 230 with respect to written advice relating to "covered opinions" in response to: (1) a determination that the rules are overbroad, difficult to apply, and do not necessarily produce higher quality tax advice, (2) evidence that practitioners are more likely to provide oral advice, which is not governed by §10.35, and (3) the "unrestrained use" of disclaimers on nearly every practitioner communication regardless of whether the communication contains tax advice. The proposed regulation also will require firms to have procedures in place to ensure compliance with all aspects of Circular 230, and to extend the immediate suspension to a practitioner's failure to satisfy tax filing obligations.

\* **Hurricane Sandy relief.** [Announcement 2012-44](#) provides relief from certain verification procedures that may be required for participant loans and hardship distributions to victims of Hurricane Sandy. A plan amendment may need to be adopted by the end of the 2013 plan year.

\* **Voluntary reclassification of workers.** [Announcement 2012-45](#) modifies and extends the IRS' program allowing employers to voluntarily reclassify workers as employees for federal

employment tax purposes on a prospective basis. Substantial employment tax relief is provided to those who participate.

\* **Penalty relief for ERISA §204(h) notice failure.** In [PLR 201243021](#), the IRS ruled that a failure to provide 204(h) notices to alternate payees and unions representing covered employees, which was corrected within 30 days after the plan sponsor discovered the error, satisfied the requirements for the reasonable diligence exception to the IRC §4980F penalty under IRC §4980F(c)(2).

### DOL/EBSA Update

\* **Hurricane Sandy relief.** The DOL has provided [guidance for Hurricane Sandy victims](#) relating to: (1) verification procedures for plan loans and distributions, (2) the transmittal of participant contributions and loan repayments, (3) blackout notices, and (4) group health plan claims and COBRA notices. Weblinks are also provided for extensions granted by the PBGC for certain

obligations under Title IV of ERISA.

\* **Orphan plans - bankruptcy.** The DOL has issued [proposed regulations](#) that would expand the orphan plan termination program to allow bankruptcy trustees to terminate plans maintained by plan sponsors who are liquidating under Chapter 7 of the Bankruptcy Code. The plan would be deemed to be abandoned when the employer files for bankruptcy, and the bankruptcy trustee could serve as the qualified termination administrator (QTA), even if it is not a financial institution. Corresponding [amendments would be made to PTE 2006-06](#), which provides prohibited transaction exemptions with respect to certain transactions taken to terminate and liquidate an abandoned plan. The amendments would recognize that a bankruptcy trustee serving as a QTA would not have all of the same options available to a regular type of QTA because it generally wouldn't be a financial institution holding assets of the plan.

### PBGC Update

*See [Hurricane Sandy](#) under the [DOL/EBSA Update](#).*

### Litigation Update

\* **Plan assets under ERISA.** In [Pantoja v. Edward Engel & Son Express, Inc.](#), the Eleventh Circuit ruled that unpaid prevailing wage contributions were not plan assets, even though the employer was obligated to make them.

\* **Plan termination date.** A district court in Kentucky ruled in [PBGC v. Town & Country Bank and Trust Company](#), that the weekend/holiday rule does not apply to an amendment adopted after the plan's termination date to determine the terms of the plan as of the termination date. The termination date for the plan was stated in the termination notice as a Saturday, but the employer didn't adopt PPA-related amendments until the following Monday.

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