



November 3, 2015

Mr. Rob Choi
Director, Employee Plans
Internal Revenue Service
999 North Capitol Street, NE
Washington, DC 20002

RE: Treatment of Overpayments Under EPCRS

Dear Mr. Choi:

The American Society of Pension Professionals & Actuaries (“ASPPA”) is writing in response to your request in Revenue Procedure 2015-27 for recommendations with respect to the treatment of overpayments, as defined in sections 5.01(3)(c) and 5.02(4) of Revenue Procedure 2013-12, under the Employee Plans Compliance Resolution System (“EPCRS”).

ASPPA is part of the American Retirement Association. The American Retirement Association is a national organization of more than 20,000 retirement plan professionals who provide consulting and administrative services for qualified retirement plans covering millions of American workers. The American Retirement Association also is home to the ASPPA College of Pension Actuaries (ACOPA), the National Association of Plan Advisors (NAPA) and the National Tax-deferred Accounts Association (NTSA). ASPPA members are retirement professionals of all disciplines, including consultants, administrators, actuaries, accountants, and attorneys. ASPPA is particularly focused on the issues faced by small- to medium-sized employers. ASPPA’s membership is diverse but united by a common dedication to the employer-based retirement plan system.

In Revenue Procedure 2015-27, the Service requested recommendations on the following four issues:

1. Whether, and under what circumstances and conditions, correction should require employer make-whole contributions rather than recouping prior overpayments from participants and beneficiaries;
2. Whether guidance should be provided on overpayments relating to benefit calculation errors and whether the correction method should follow rules similar to the rules on the recoupment of overpayments issued by the Pension Benefit Guaranty Corporation (“PBGC”) in 29 C.F.R. §4022.82;



3. Whether additional guidance is needed regarding the calculation of interest on overpayments for benefit calculation errors; and
4. Whether any other changes or additional guidance is needed relating to the recoupment of overpayments, including guidance on any unusual circumstances in which full corrective payments to a plan should not be required for overpayments.

ASPPA is providing comments and recommendations on each point.

Summary

ASPPA recommends that the Service continue to provide employers with flexibility to correct errors that result in overpayments. ASPPA specifically recommends the following:

1. Employers should always be permitted to request recoupment from participants, but the Service should implement safeguards to protect participants;
2. Employers should be permitted (but in no way required) to utilize a correction method similar to the rules on the recoupment of overpayments issued by the PBGC in 29 C.F.R. §4022.82, but such correction method should permit the recoupment of earnings and exclude the PGBC's limits on the amount that may be recouped;
3. The Service should provide safe harbor rates that employers may use to calculate interest on overpayments; and
4. The Service should clarify the following items involving overpayments:
 - a. Overpayments may be corrected by reducing future benefits from the plan if a participant does not repay an overpayment, and, in certain circumstances, the overpayment may continue to be treated as an eligible rollover distribution; and
 - b. The circumstances that may be taken into account in determining whether the plan has been made whole for the overpayments and the amount of the employer's corrective contribution to the plan.

In addition, ASPPA recommends that the Service expand EPCRS to permit an employer to correct overpayments through the Self Correction Program (SCP) by adopting a retroactive amendment if the overpayments are eligible for self-correction under EPCRS and the plan could have been amended to provide the benefits actually paid without violating any Code requirement (such as Code sections 401(a)(4) and 415).

Discussion

ASPPA appreciates the Service's efforts to continue expanding the corrections available under EPCRS. The importance of the employer-based retirement system in ensuring the U.S. population is able to achieve retirement security cannot be overstated. Employees who have



access to workplace retirement are significantly more likely to save for retirement.¹ However, the complexity of maintaining a compliant retirement plan and the potential costs of noncompliance may be a significant barrier that discourages employers from offering retirement plans. ASPPA believes that flexibility to correct errors will encourage the offering of retirement plans. ASPPA appreciates the additional flexibility to correct overpayments that the Service provided in Revenue Procedure 2015-27 and recommends that the Service continue to provide employers with flexible correction options.

1. Recoupment of Overpayments

The Service requested comments on whether, and under what circumstances and conditions, correction should require employer make-whole contributions rather than recouping prior overpayments from participants and beneficiaries. The circumstances in which an overpayment might occur are innumerable. The ability to fashion a correction under EPCRS that follows the guidelines and intent of EPCRS while also taking into account the plan's unique circumstances is an extremely valuable feature of EPCRS. Creating any bright-line rules that restrict the ability of employers to take into account the unique circumstances that resulted in the overpayment will reduce the value of EPCRS and discourage voluntary correction. In addition, prohibiting recoupment from participants might make corrections unduly burdensome for employers and result in significant windfalls to participants. This would contravene the objective of putting the plan and the participant in the position they would have been had the error not occurred. As a result, ASPPA believes the Service should always permit employers to seek recoupment of overpayments.

However, ASPPA recognizes that, in certain circumstances, requests for recoupment have a potential to disadvantage participants. Rather than limiting an employer's ability to request recoupment, ASPPA believes that the Service should preserve the current flexibility to request recoupment, but protect participants and beneficiaries by adding the following two requirements to any request for return of an overpayment:

- A. The participant should be permitted to reduce the amount owed to the plan by any direct expenses the participant incurs as the result of the overpayment (such as the cost of filing an amended tax return and any excise taxes due on the overpayment), without fear of legal action from the employer seeking recoupment; and
- B. The participant should be informed of, and the IRS should provide a model notice describing, relevant information concerning the avoidance of excise taxes and income taxes on the overpayment, such as information on obtaining relief from income taxes under IRC §1341 ("computation of tax where taxpayer restores substantial amount held

¹ "Workers who participate in, and contribute to, a retirement savings plan at work (44 percent) are considerably more likely to have saved at least \$50,000 than those who are offered a plan but choose not to participate (13 percent) or are not offered a plan (15 percent). Participating workers are much less likely than others to report having saved less than \$10,000 (18 percent vs. 58 percent who choose not to participate and 54 percent who are not offered a plan)." **2014 RCS Fact Sheet #6**, EBRI. <http://ebri.org/pdf/surveys/rcs/2014/RCS14.FS-6.Preparet.Final.pdf>.



under claim of right”) and, in the case of funds that had been rolled over to an IRA, information on obtaining relief afforded by IRC §408(d)(5) (regarding rollovers attributable to erroneous information).

ASPPA believes these protections will adequately protect participants while preserving EPCRS’s intent to place both the plan and the participant in the position they would have been had the error not occurred.

Therefore, **ASPPA recommends** that the Service always permit employers to request recoupment of overpayments from participants. **ASPPA also recommends** that the Service amend EPCRS to provide that, as a condition of the relief afforded by EPCRS, (1) an employer cannot take legal action against a participant for recoupment in excess of the overpayment amount (plus earnings) minus any direct expenses the participant incurs as the result of the overpayment, (2) the request for return of the overpayment must notify the participant of his or her right to reduce the amount repaid for such direct expenses, and (3) the request for return of an overpayment must include an informational notice regarding avoidance of excise taxes and income taxes on the overpayment, and the IRS should provide model language for such notice.

2. Overpayments Related to Benefit Calculation Errors

The Service also requested comments on whether guidance should be provided on overpayments relating to benefit calculation errors and whether the correction method should follow rules similar to the rules on the recoupment of overpayments issued by the PBGC in 29 C.F.R. §4022.82

ASPPA agrees with the Service that employers should be permitted to correct overpayments using an approach similar to that used by the PBGC. Employers should be permitted to recoup the overpayment or reduce future benefits paid. However, two differences from the PBGC method should be permitted:

- A. Employers should be permitted to recoup the overpayment as well as earnings on the overpayment, and
- B. The limit on benefit reduction described in 29 C.F.R. §4022.82(a)(2) should not apply.

These differences are consistent with EPCRS’s goals of ensuring both the plan and the participant are returned to the position they would have been in had the error not occurred. In addition, because the plan is returned to the position it would have been in had the error not occurred, the employer should not be required to contribute an amount to make the plan whole for the overpayments.

Therefore, **ASPPA recommends** that the Service amend EPCRS to clarify that (1) employers are permitted to correct overpayments using an approach similar to that used for the PBGC, but modified to permit the recoupment of earnings on overpayments and permit reductions over the limits described in 29 C.F.R. §4022.82(a)(2) and (2) an employer that uses such an approach is not required to contribute an amount make the plan whole for the overpayments.



3. Interest Calculations Related to Overpayments

The Service also inquired whether additional guidance is needed regarding the calculation of interest on overpayments for benefit calculation errors. Because EPCRS does not provide safe harbor earnings methodologies for defined benefit plans, there is significant uncertainty regarding the calculation of interest on overpayments when using SCP. As a result, some employers may elect to file a VCP application to gain certainty even though the error qualified for SCP. These additional VCP applications add an unnecessary burden to the Service's already taxed resources.

ASPPA believes that the Service could enhance the usability of EPCRS and provide employers additional certainty to use SCP by clarifying the permissible interest calculations related to overpayments. Interest is calculated on overpayments primarily for two purposes under EPCRS—requesting recoupment from a participant and calculating the amount required to make the plan whole for overpayments.

Because employers are not required to seek recoupment from participants at all, employers should not be required to request recoupment of interest. However, employers should continue to be permitted to seek recoupment of interest that is calculated using a reasonable rate. To provide employers with the requisite certainty needed to utilize SCP, the Service should clarify what rates will be deemed reasonable.

Therefore, **ASPPA recommends** that the Service amend EPCRS to clarify that (1) an employer may request recoupment of an overpayment without interest and (2) if an employer does request recoupment of an overpayment from a participant, any reasonable rate may be used to calculate interest on such overpayment, but the following rates will be deemed reasonable:

- the 417(e) first segment rate or
- the rate that was used for the benefit calculation, such as the 5.5% interest rate that typically limits lump sums when the 415 limit applies.

Regardless of whether the employer requests recoupment from a participant, EPCRS requires the employer to ensure that the plan is made whole. To provide employers with the requisite certainty needed to utilize SCP, the Service should clarify what rates will be deemed reasonable in calculating this amount.

ASPPA recommends that the Service amend EPCRS to clarify that any reasonable rate may be used to calculate interest on overpayments for purposes of determining the amount required to make the plan whole for such overpayments, but that the average earnings on plan assets for the period will be deemed reasonable.

4. Other Clarifications Related to Overpayments

Finally, the Service requested comments on whether any other changes or additional guidance is needed relating to the recoupment of overpayments, including guidance on any unusual circumstances in which full corrective payments to a plan should not be required for



overpayments. ASPPA believes that the Service should clarify issues related to benefit reductions and make whole contributions.

A. Benefit Reduction as Correction

Overpayments may occur for a variety of reasons other than benefit calculation errors. As noted above, ASPPA agrees with the Service that employers should be able to reduce future benefits to recoup overpayments due to benefit calculation errors. However, ASPPA believes that this correction should not be limited only to errors related to benefit calculations. Where a participant receives an overpayment, but has additional benefits due from the plan, it is equitable for the participant's future benefit to be reduced to recover the overpayment (even if the participant is not in pay status). This correction will further EPCRS's objective of ultimately placing the participant and the plan in same position they would have been in had an error not occurred.

ASPPA recognizes, however, that there are circumstances in which a reduction in future benefits should not be the sole correction method for an overpayment. For example, where a participant did not elect a distribution (e.g., due to an improper involuntary cashout), the participant should first be given the opportunity to repay the distribution. This ensures the participant's interests are preserved and allows the participant an opportunity to put himself in the position he would have been in had the error not occurred. If a distribution is not repaid, then the employer should be entitled to use this future benefit reduction correction to make a current adjustment to the participant's account balance or accrued benefit to recover the overpayment (and related interest or earnings).

In addition, ASPPA believes that EPCRS's current treatment of overpayments presents a practical barrier to use of the benefit reduction correction. Currently EPCRS provides that overpayments may not be treated as eligible rollover distributions (even if the original distribution otherwise qualified)². As a result, if a participant rolled the overpayment into an IRA, the participant is presented with the burden of taking steps to remedy the excess distribution, which might include amending tax returns and/or paying excise taxes on the amount. ASPPA agrees with this treatment where the overpayment was in excess of the participant's accrued benefit because the participant received more than he or she was ultimately due from the plan. However, where the overpayment was not in excess of the participant's accrued benefit, this treatment creates undue burdens on the participant. To minimize the negative impact of such an overpayment on participants, the prior payment should continue to be treated as an eligible rollover distribution (if it otherwise qualified for rollover) to the extent the overpayment did not exceed the participant's accrued benefit and the participant's future benefit is reduced to recover the overpayment. This is equitable because the participant was ultimately entitled to the benefit and should not have to disgorge the IRA of money to which he was ultimately entitled.

² Rev. Proc. 2013-12 §6.06(4)(e), 2.04(1) of App. B.



Finally, in situations where a participant's future benefit is reduced to recover the overpayment, no amount should be required to make the plan whole for the prior overpayments. Because the plan is made whole by reducing its liabilities for plan benefits, no additional contribution should be required. Therefore, **ASPPA recommends** that the Service amend EPCRS to extend the existing rules so that (1) overpayments may be corrected by reduction of future benefits in both defined benefit and defined contribution plans, provided that in situations where the participant was not given an opportunity to elect the distribution (such as an automatic cashout), the participant should first be given an opportunity to repay the distribution, with earnings; (2) if the original payment was an eligible rollover distribution (but for the overpayment), then the overpayment may continue to be treated as an eligible rollover distribution to the extent the future benefit is reduced to recover the overpayment; and (3) to the extent the participant's remaining benefit is reduced to recover the overpayment, no amount is necessary to make the plan whole.

B. Employer Make-Whole Contribution for Overpayments

Significant questions also exist with respect to an employer's obligation to make the plan whole for overpayments. ASPPA agrees with the Service that employers should be required to ensure the plan is made whole. However, where the plan could have been amended to provide for the additional benefit (without violating any IRC requirements, such as 401(a)(4) and 415) and the overpayments are corrected by retroactive amendment, no contribution should be necessary to make the plan whole. The plan is put in the same place as it would have been had the plan been timely amended and the error not occurred. An additional contribution would only be a windfall to the plan. Additionally, a defined benefit plan is further protected because any such retroactive amendment would be treated in the same manner as any other plan amendment (generally requiring the employer to contribute the amount necessary to increase the plan's AFTAP to 80%).

When an overpayment is not corrected by retroactive amendment, the employer should be required to ensure the plan is made whole. EPCRS makes it clear that any amounts recouped from participants are counted in determining whether the plan is made whole.³ ASPPA agrees with this treatment and believes certain additional circumstances should be taken into account.

- **Defined Contribution Plan:**
 - If the overpayment would not have been allocated to other participants (i.e., it would have been forfeited to a suspense account and used to offset future employer contributions or to pay plan expenses), then:
 - No additional amount is necessary to make the plan whole.
 - Or, absent this relief, all employer contributions made since the overpayment occurred may be taken into account in determining if the plan has already been made whole.
- **Defined Benefit Plan:**

³ Rev. Proc. 2013-2 §6.06(4)(b).



- Any contributions made since the overpayment occurred that were above the minimum required contribution and were not added to the pre-funding balance may be taken into account in determining if the plan has been made whole;
- The employer may elect to reduce the plan's prefunding balance to satisfy all or part of the obligation to make the plan whole; and
- The amount required to make the plan whole for the overpayments should not exceed 100% of the unpaid accrued benefits, less assets, adjusted for prefunding balance.

ASPPA believes these rules are equitable because, in the defined contribution context, the over-allocation that resulted in the overpayment would have been forfeited to a suspense account and used to reduce future contributions. In this situation, no participants were harmed by the overpayment, and, if the employer made an additional contribution, the plan would be in a better situation than it would have been in had the error not occurred. As a result, ASPPA believes that a make whole contribution is not appropriate in this situation. Further, because the employer did not reduce its future contributions to account for the over-allocation, the employer's contributions after the error already made the plan whole. Similarly, in a defined benefit plan, an employer's contributions that are not used to satisfy the minimum funding requirements are completely voluntary and, had the employer been aware of the overpayment obligation, the employer could have elected to designate those voluntary contributions as the contribution necessary to make the plan whole for the overpayments. As a result, the employer's contributions after the error that were not used to satisfy the minimum funding requirements have already made the plan whole.

Therefore, **ASPPA recommends** that the Service amend EPCRS to clarify that (1) if overpayments are corrected by retroactive amendment, then no contribution is necessary to make the plan whole; (2) if an overpayment in a defined contribution plan occurred and the amount would not have been allocated to other participants, then no additional amount is necessary to make the plan whole; and (3) in determining the employer's obligation to make the plan whole, the rules described above will apply.

5. Correction of Overpayments by Amendment

ASPPA believes that the Service should expand the corrections available through SCP. If a plan has been operated in a manner that resulted in one or more overpayments, such operational errors are eligible for correction under SCP, and the plan could have been amended to provide the benefits actually paid (and still complied with 401(a)(4) and 415), then the plan sponsor should be permitted to adopt a retroactive amendment under SCP, and such amendment should not be treated as a violation of Code section 401(a)(9).

ASPPA believes the safeguards inherent in the eligibility criteria for SCP adequately protect the Service's interest in ensuring administrators operate their plans in accordance with the plan criteria. Further, because overpayment corrections will be significantly less burdensome if discovered and corrected quickly, broadening the SCP eligibility criteria will likely enhance the Service's objective that sponsors and administrators make voluntary, timely, and efficient



correction of any overpayment errors. Additionally, to the extent that an employer is not eligible for correction under SCP, the Service will continue to have the Audit CAP program to protect its interests.

Therefore, **ASPPA recommends** that the Service amend EPCRS to permit employers to correct overpayments through SCP by adopting a retroactive amendment (provided the operational failure is otherwise eligible to be corrected under SCP).

These comments were prepared by ASPPA’s IRS Subcommittee of the Government Affairs Committee, with primary authorship by Kelsey Mayo. Please contact Craig P. Hoffman, General Counsel for the American Retirement Council at (703) 516-9300 if you have any comments or questions on the matters discussed above.

Thank you for your time and consideration.

Sincerely,

/s/

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