

## IRS Issues More Guidance on 457(b) Plan Corrections



Article By

[Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. Law Firm](#)

[Mintz](#)

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In a recent edition of its Employee Plans News publication, the **IRS** provided further guidance on what formal voluntary corrections it will accept from **457(b) plan** sponsors that discover their plans are not in compliance with **Internal Revenue Code** requirements. The [guidance](#), released on the IRS website on March 4, 2014, clarifies that (1) the IRS will not accept submissions for corrections that involve errors in the “form” of a written 457(b) plan; and (2) governmental 457(b) plan sponsors will often not have to submit a formal correction with the IRS for failures to comply with Code § 457(b), given the expansive self-correction provisions built into Code § 457(b) and related Treasury regulations.

### ***History of Formal 457(b) Plan Corrections***

As discussed in our December 31, 2013 advisory, the IRS only recently opened up its

formal correction program (the Employee Plans Compliance Resolution System, or “EPCRS”) to certain 457(b) plan sponsors. For 457(b) plans sponsored by governmental entities, the IRS allows for the review of applications to correct 457(b) plan errors “on a provisional basis outside of EPCRS through standards that are similar to EPCRS” but gives no further detail. For non-governmental 457(b) plan sponsors, formal correction with the IRS is even more limited; however, the IRS did state that it “may consider a submission where, for example, the plan was erroneously established to benefit the entity’s non-highly compensated employees and the plan has been operated in a manner that is similar to a Qualified Plan.”

At an ABA Tax Section meeting in May 2013, IRS officials unofficially commented that a 457(b) plan sponsored by a non-governmental entity would not be eligible for correction under EPCRS for errors such as miscalculation of catch-up contributions, allowing participants to make excess deferrals, and depositing contributions into a trust (in violation of Code § 457(b)(6), which requires contributions and income attributable to a 457(b) plan sponsored by a nongovernmental entity to remain subject to the employer’s general creditors). According to the IRS, correction may be possible “under a closing agreement or special arrangement” but, again, not through EPCRS.

## ***Most Recent Guidance***

The latest IRS [guidance](#) on 457(b) plan corrections, further limits formal IRS correction options for non-governmental 457(b) plan sponsors. By way of background, the guidance states that since the IRS opened the door to 457(b) plan corrections, it has received submissions related to failures to timely adopt a written 457(b) plan and failures to amend a 457(b) plan for “some tax law or income regulation.” The guidance states that the IRS will not review submissions of this type. Instead, the IRS suggests correction through private letter rulings “for plan sponsors who want the IRS to review their 457(b) plan document or consider any other document form issue.”

It is not clear whether the IRS is including failures to amend plans for compliance with the requirements of Code § 457(b) itself in its general description of failures to amend a 457(b) plan for “some tax law or income regulation”—submissions that it will not accept. However, the fact that the IRS goes on to remind plan sponsors that “the remedial amendment concepts and definitions in Rev. Proc. 2007-44,” which provide set time periods for adopting required plan amendments to qualified plans (such as 401(k) and pension plans) as a result of law changes, “do not apply to 457(b) retirement plans” suggests that the amendment failures it has refused to accept may have had to do with qualification requirements entirely inapplicable to 457(b) plans, thus leaving the door open to submissions of plan document errors relating to failures to comply with the requirements of Code § 457(b).

With respect to governmental 457(b) plans, the guidance reminds governmental plan sponsors that they have until the first day of the plan year that begins more than 180 days after the IRS notifies them of the failure to correct a plan failure. This generous correction period is stated in Code § 457(b)(6) and Treas. Reg. § 1.457-9(a). Like non-governmental plans, a governmental 457(b) plan cannot request an IRS-approved correction for a “form” error in its plan document. And while governmental 457(b)

plan sponsors can submit formal corrections to the IRS through EPCRS (even in cases where it is not required), this new guidance directs a governmental plan sponsor taking this approach to indicate on the Form 8950 submitted with its application that it is “aware of the self-correction rule in IRC Section 457(b)(6) and Treas. Reg. Section 1.457-9, but still wants to proceed with a written VC [voluntary correction] application.”

## ***Action Items***

Given this most recent guidance, 457(b) plan sponsors should consider the nature of any plan error before submitting a correction application. It is clear that applications should not be submitted for failures to timely adopt a plan document and, possibly, for certain errors in the plan document causing it to fail to comply with the provisions of Code § 457(b). Other errors, more in the nature of “operational failures” (as they are referred to in ECPRS) may, however, be correctable, including, for non-governmental plan sponsors, offering plan participation to employees outside of the top-hat group (potentially what the IRS means when it says it would consider a correction application from a plan “established to benefit . . . nonhighly compensated employees” that is being operated “in a manner that is similar to a Qualified Plan”).

It remains to be seen exactly what type of corrections the IRS will entertain based on the limited guidance issued to this point. However, regardless of whether a formal correction with the IRS is possible, plan sponsors should review their 457(b) plan documents to ensure they are consistent with plan operations and with the requirements of Code § 457(b). Any errors discovered should be corrected through self-correction procedures for certain errors in the form of the document or, for other errors, through formal application with the IRS.

We will likely know more about the parameters of the IRS’s formal 457(b) plan correction system in the coming months as submissions are processed and more informal guidance is issued and encourage you to reach out to one of our employee benefits attorneys for guidance in this emerging area.

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