



## **Correcting Plan Errors**

How to fix the mistakes almost every plan makes

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# Agenda

- Agency Oversight
- Types of correction programs
  - IRS - Employee Plans Compliance Resolution System (EPCRS)
  - DOL - Voluntary Fiduciary Correction Program (VFCP)
  - DOL - Delinquent Filers Voluntary Compliance Program (DFVCP)
- Documentation of Corrections

# Agency Oversight

- Internal Revenue Service – Internal Revenue Code (IRC)
- Department of Labor – Employee Retirement Income Security Act (ERISA)

Both agencies have the authority to:

- Perform on-site audits
- Require submission of reports, books, and records
- Inspect books and records
- Question individuals regarding investigation
- Subpoena records and testimony in connection with investigation
- Subpoena records and testimony of service providers

# Agency Oversight

## Department of Labor

- ERISA has a 6 year statute of limitation for fiduciary breaches
- Generally audits will not go back further than 2-3 years

## Internal Revenue Service

- Code generally allows for 3 year statute of limitations
- IRS enforcement hammer is disqualification

# Employee Compliance Resolution System (EPCRS)

The Internal Revenue Service maintains the Employee Compliance Resolution System (EPCRS) to provide plan sponsors with the opportunity to self-correct most instances of noncompliance in a specified and uniform way

- Self-Correction Program (SCP)
- Voluntary Correction Program (VCP)
- Audit Closing Agreement Program (Audit CAP)
  
- IRS Fix-It Guide
  - [http://www.irs.gov/pub/irs-tege/401k\\_mistakes.pdf](http://www.irs.gov/pub/irs-tege/401k_mistakes.pdf)

# EPCRS

Issues that cannot be resolved under EPCRS

- Diversion or misuse of assets
- Matters subject to excise or other taxes
  - Funding deficiencies
  - Prohibited transactions
  - Failure to file Form 5500
  - Additional income tax liabilities
  - Employment tax liabilities

# EPCRS

## Revenue Procedure 2013-12

- New Submission Procedures for VCP
  - IRS Forms 8950 and 8951
- Amendments to Pre-Approved Plans
- 403(b) Plans
- Matching Contribution Failures
- Safe Harbor Plan Failures
- Testing Failures
  - QNECs used to correct ADP or ACP test failures
- 415(c) Failures
- Locating Lost Participants
  - IRS policy change
  - August 31, 2012 the IRS terminated its letter forwarding program

# EPCRS

Covers most defined contribution qualified retirement plan arrangements

- 401(a)
- 403(a)
- SEP
- SARSEP
- SIMPLE IRA
- 403(b)



# Self Correction Program (SCP)

- *Insignificant* Operational Failures – may be corrected at any time
- *Significant* Operational Failures – may be corrected within two years of the problem year
  - SCP may not be used to correct *significant* Operational Failures for SEP or Simple IRA
  - SCP may not be used to correct *egregious* Operational Failures
- Correction by plan amendment for:
  - IRC 401(a)(17) failures
  - Hardship distribution failures
  - Loan permitted under the plan without underlying plan provisions
  - Early inclusion of otherwise eligible employee failures
- SCP requires no application fee
- Restricted to Operational Failures
  - Not following the plan document provisions

# What is Insignificant?

1. Determine whether other failures occurred during the period being examined
2. Determine the percentage of plan assets and contributions involved with the failure
3. Determine the number of years the failure has occurred
4. Determine the number of participants who could have been affected as a result of the failure
5. Determine the number of participants affected relative to the total participants
6. Determine whether correction was made within a reasonable time after discovery of the failure
7. Determine the reason of the failure

The sponsor is eligible for self-correction under the insignificant policy, **only if** the Operational Failures in the aggregate are insignificant

# Voluntary Correction Program (VCP)

- Used to correct Significant Operational Failures not available for correction under SCP
- Used to correct Qualification Failures
  - Failure to comply with the applicable IRS code section
  - Must be made prior to the plan being selected for an IRS examination
- IRS requires an extensive application and plan sponsor must pay a fee determined per instance and variable by number of participants
  - \$375 - \$25,000

# Audit Closing Agreement Program (Audit CAP)

- Used in conjunction with an IRS examination
- Corrective action prescribed will depend on the error(s) discovered during examination

# Voluntary Fiduciary Correction Program (VFCP)

Correction of most eligible VFCP transaction involves repayment of a Principal Amount

## Eligible VFCP Transactions

- Delinquent remittance of participant funds
  - Delinquent Participant Contributions and Participant Loan Repayments
  - Delinquent Participant Contributions to Insured Welfare Plans
  - Delinquent Participant Contributions to Welfare Plan Trusts
- Loans
  - Loan at Fair Market Interest Rate to a Party in Interest with Respect to the Plan
  - Loan at Below-Market Interest Rate to a Party in Interest with Respect to the Plan
  - Loan at Below-Market Interest Rate to a Person Who is Not a Party in Interest with Respect to the Plan
  - Loan at Below-Market Interest Rate Solely Due to a Delay in Perfecting the Plan's Security Interest
- Participant loans
  - Loans failing to comply with plan provisions for amount, duration or level amortization
  - Default Loans
- Purchases, sales, and exchanges
  - Purchase of an Asset by a Plan from a Party In Interest
  - Sales of an Asset by a Plan to a Party In Interest
  - Sale and Leaseback of Real Property to Employer
  - Purchase of an Asset by a Plan from a Person who is not a Party In Interest at a price more than Fair Market Value
  - Sales of an Asset by a Plan to a Person who is not a Party In Interest Price Less than Fair Market Value
  - Holding of an illiquid asset previously purchased by a Plan
- Benefits
  - Payment of benefits without properly valuing plan assets on which payment is based
- Plan Expenses
  - Duplicative, excessive, or unnecessary compensation paid by a Plan
  - Expenses improperly paid by a plan
  - Payment of dual compensation to a Plan Fiduciary

# Voluntary Fiduciary Correction Program (VFCP)

Voluntary Fiduciary Correction Program

<http://www.dol.gov/ebsa/regs/fedreg/notices/2006003674a.pdf>

Voluntary Fiduciary Correction Program Online Calculator

<http://www.dol.gov/ebsa/calculator/>

Voluntary Model Application Form

<http://www.dol.gov/ebsa/calculator/2006vfcpapplication.html>

# Delinquent Filer Voluntary Compliance Program (DFVCP)

Plan administrators who have not been notified in writing by the Department of Labor regarding a failure to file a timely annual report under Title 1 of ERISA

1. Electronically file with EFAST2 a complete for 5500
  - To ensure proper processing, the “DFVC program” box on line “D” of Part I of the 5500 must be checked
2. Electronically submit the filing information and payment to the DFVCP using the DFVC calculator
  - <http://www.dol.gov/ebsa/calculator/dfvcpmain.html>

## Penalty Structure

- Basic penalty under the program is \$10 / day for delinquent filings
- “Per filing” cap – Maximum penalty for a single late annual report is \$750 for a small plan and \$2,000 for a large plan
- “Per plan” cap – Limits penalties for multiple year filings to \$1,500 for a small plan and \$4,000 for a large plan

Small plans sponsored by certain tax-exempt organizations are subject to a “per plan” cap of \$750 applies to a small plan sponsored by an organization that is tax-exempt under the IRC §501(c)(3)

# Workpaper Documentation

Workpapers should be properly documented with sufficient evidence to support your conclusions

- The issues that were raised on audit
- The steps or analysis that you used to determine the extent of the failure, and
- The methods or analysis that you used to arrive at the correction methodology
- Corrective measures taken to ensure the error does not recur



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