

Morgan Lewis

seminar

Employee Plans  
Compliance Resolution System (EPCRS)  
Revenue Procedure  
2008-50

**Presenters**

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# Agenda

- EPCRS overview
- Review of significant changes in Rev. Proc. 2008-50
- Question and answer – anytime during the presentation

# EPCRS Programs

- EPCRS contains three correction programs:
  - Self-Correction Program (**SCP**)
  - Voluntary Correction Program (**VCP**)
  - Audit Closing Agreement Program  
(**Audit CAP**)

# Types of Plans Covered

- Qualified Plans – 401(a)
- Tax-Sheltered Annuity Plans – 403(b)
- Governmental 457(b) plans

# Effect of EPCRS

- **For § 401(a), § 403(b), IRAs, and SIMPLE IRAs: continued qualification/compliance of plan**
- **Service will not pursue FICA/FUTA taxes**

# Qualification Failures

- Plan Document Failure
  - Plan provision (or absence of provision) that violates the Code
- Operational Failure
  - Plan document complies with the Code but plan doesn't operate in accordance with its provisions

# Qualification Failures

- Demographic Failure
  - Failure to satisfy requirements of:
    - *Minimum participation – 401(a)(26)*
    - *Coverage – 410(b)*
    - *Nondiscrimination – 401(a)(4)*

# Qualification Failures

- Employer Eligibility Failure
  - Employer was not eligible to adopt plan

# Principles and Correction Methods

- Full correction required for all plan years
- Acceptable correction methods & retroactive plan amendments
- Model correction methods provided in Appendices A & B of Rev. Proc. 2008-50

# Principles and Correction Methods

- Noted exceptions to the full correction principle

# Excise Tax Remedies

- **Service will not pursue excise tax penalties for minimum distribution failures in certain limited circumstances**

# Excise Tax Remedies

- **Service will not pursue excise tax for nondeductible employer contributions in certain circumstances**

# Excise Tax Remedies

- **Service will not pursue excise tax on excess § 401(k) contributions that were not distributed in a timely matter in certain circumstances**

# Expansion of Excise Tax Relief

- **Service will not pursue excise tax on excess contributions made to IRAs in certain circumstances**

# Income Tax Relief

- **Service will not pursue part or all of the 10% additional income tax under 72(t) in certain circumstances**

# SCP - Self Correction Program

- **No disclosure to IRS, no fee, no sanctions**
- **Only operational failures**
- **Unavailable for ATATs**
- **Must have a Determination Letter**
- **Must have established practices & procedures to assure ongoing compliance**

# SCP versus VCP

- Distinction between insignificant and significant errors
- List of Factors to Consider
  - whether failure occurred during period of exam
  - % of assets/contributions involved
  - # of years involved
  - % of participants affected
  - % of participants who could have been affected
  - correction within reasonable period
  - reason for the failure
- Uncertainty for plan sponsor

# VCP – Voluntary Compliance Program

- **Single program and single-admission process**
- **Submission procedures**
- **Ends with a compliance statement – don't need to sign statement**
- **Determination Letter/Retroactive Plan Amendment may result in Determination Letter if plan on-cycle**

# VCP – Fee chart

Number of Plan Participants	Compliance Fee
20 or fewer	\$750
21 to 50	\$1,000
51 to 100	\$2,500
101 to 500	\$5,000
501 to 1,000	\$8,000
1,001 to 5,000	\$15,000
5,001 to 10,000	\$20,000
Over 10,000	\$25,000

# Rev. Proc. 2008-50: New Fee Schedules

- **VCP fee unchanged**
- **Compliance fee for § 401(a)(9) failures reduced to \$500**
- **Fee for failure to amend for EGTRRA good-faith amendments, § 401(a)(9) interim amendments, and amendments required to implement optional law changes: flat \$375**

# Rev. Proc. 2006-27: New Fee Schedule

- New fee schedule for late amenders discovered via Determination Letter process
- Based on:
  - (1) number of participants
  - (2) legislation for which plan was not amended

# VCP Enhancements

- Streamlined Application Procedures

# VCP – Voluntary Compliance Program

- Model correction methods in Appendices A, B, and F
- John Doe – anonymous submission is possible
- Group Submissions

# Audit CAP

- **Higher sanction**
- **Factors used in determining sanction:**
  - **practices in place to identify and prevent plan failures**
  - **steps taken to correct failures**
  - **reason for the failures**

# Audit CAP

- length of time that failures occurred
- number of NHCEs affected if plan is disqualified
- existence of a favorable determination letter
- whether the error involves a demographic failure
- whether the only failure is an employer eligibility failure

# EPCRS – What is Not Covered

- Form 5500 filing delinquencies
- Prohibited transactions
- Funding deficiencies

# Rev. Proc. 2008-50 Effective Date

- Two key dates
  - September 2, 2008
  - January 1, 2009

# Overview of Changes

- Simplifying use of programs
- Improving customer service
- Other relief

# Overview of Changes

- Increasing accessibility to programs

# Increased Accessibility – Plan Loans

- Under VCP, service will allow correction where plan loans did not comply with:
  - Limit on loans pursuant to IRC § 72(p)(2)(A) (e.g., Participant borrows \$60K)
  - Plan term requirements of IRC § 72(p)(2)(B) or (C) (e.g., Participant borrows \$10K over six-year period; should have been five years)
  - Plan repayment terms, resulting in default of loan (e.g., Loan Payments never begin)
- Correction permitted where “appropriate” and where statutory term of loan (generally five years) has not expired

# Plan Loans

- **Correction methods under VCP for plan loans are now permitted even if the plan does not contain provisions relating to § 72(p) of the Code**

# Plan Loans

- Streamlined schedule for plan loan failures

# Plan Loans

- Reduced fee if the following requirements are met:
  - Plan loan failure is the sole failure of submission
  - Affected participants are < 25% of total participants in any plan year
  - Error entails failure to follow § 72(p) of the Code

# 401(k) Excluded Employee

- **Exclusion of eligible § 401(k) employees: characterized as “missed opportunity to defer”**
  - **Missed §401(k) contribution: 50% of class ADP rate**
  - **Missed §401(k) contribution (safe harbor using nonelective contributions): 50% of “3%” (instead of the ADP rate)**
  - **Missed §401(k) contribution (safe harbor using matching contributions): 50% of “Greater of 3% or deferral rate providing for at least 100% match” (instead of the ADP rate)**
  - **Missed after-tax contribution: 40% of the average after-tax rate**

## Increased Accessibility – 401(k) Excluded Employee (2)

- Matching contribution correction
  - Based on match that would have been received had employee made deferral
  - Based on full amount of missed deferral, not missed opportunity cost

# Example 1: Failure To Implement EE Election in 401(k) Plan

- Example:
  - NHCE compensation = \$30K
  - NHCE ADP = 4%
  - NHCE election = 10%
  - Plan provides match equal to 100% of first 3% of compensation
- Correction:
  - Missed deferral = \$3,000 ( $\$30,000 \times 10\%$ )
  - QNEC for missed deferral opportunity = \$1,500 (missed deferral  $\times$  50%)
  - QNEC for matching contribution = \$900 ( $\$30,000 \times 3\%$ )

## Example 2: Failure to Include EE in 401(k) Plan (catch-up contribution)

- Example:
  - NHCE has compensation of \$50K and was erroneously prevented from making catch-up contributions (\$5,000 for 2008)
- Correction:
  - Missed deferral = \$2,500 ( $\$5,000 \times 50\%$ )
  - QNEC for missed deferral opportunity = \$1,250 (missed deferral  $\times$  50%)

## Example 3: Failure to Include EE in 401(k) Plan – Designated Roth Contribution

- Example:
  - NHCE has compensation of \$50K
  - Plan provides match equal to 100% of first 3% of compensation and 50% of the next 2% of compensation
  - NHCE ADP = 5%
- Correction:
  - Missed deferral = \$2,500 ( $\$50,000 \times 5\%$ )
  - QNEC for missed opportunity cost of deferral = \$1,250 ( $\$50,000 \times 5\% \times 50\%$ )

## Example 3: Failure to Include EE in 401(k) Plan – Designated Roth Contribution

- QNEC for matching contribution is equal to the matching contribution that would apply based on the full amount of missed deferral
  - QNEC for matching contribution is \$2,000 ( $\$50,000 \times \text{first } 3\% \text{ of comp}$ ) + ( $\$50,000 \times 2\% \times 50\% \text{ of comp}$ )

# Rev. Proc. 2008-50 modifications

- Earnings – DOL calculator

# Other Procedural and Administrative Changes

- **Expansion of “Reasonable and Appropriate” Correction Principle**
- **Modification of Compliance Statement**

# Simplifying Use of Programs – DL App Requirement - SCP

- DL submission required:
  - correction of a qualification failure through plan amendment during on-cycle year
  - Nonamender failure
- DL submission not required
  - Interim/discretionary amendments
  - Operational or demographic failure in off-cycle year
- DL optional
  - Certain new individually designed plans
  - Urgent business need

# Request for Comments

- Comments requested on how to correct certain failures under EPCRS
  - Automatic enrollment
  - Designated Roth contributions

# Section 1101 of PPA

- Congressional approval of EPCRS in Section 1101 of the Pension Protection Act (PPA)
- Continuing trend of expansion of relief

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