

***Plan Correction Methods —  
IRS EPCRS Program and  
DOL Voluntary Compliance Programs***

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# *Plan Correction Methods — IRS EPCRS Program and DOL Voluntary Compliance Programs*

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## **INTRODUCTION**

Within the past several years, the Internal Revenue Service (IRS) has instituted several programs to assist the sponsors, plan administrators and trustees of tax-qualified retirement plans in correcting potentially disqualifying plan failures while maintaining the tax qualified status of the plans. The various IRS voluntary compliance programs were consolidated by the IRS in Rev. Proc. 98-22 into a coordinated program called the Employee Plans Compliance Resolution System (EPCRS). Rev. Proc. 2000-16, Rev. Proc. 2001-17, Rev. Proc. 2002-47, Rev. Proc. 2003-44, Rev. Proc. 2006-27, Rev. Proc. 2008-50 and Rev. Proc. 2013-12 further modify the EPCRS programs.

The Pension Protection Act of 2006 (PPA) endorses the EPCRS program. PPA Section 1101 gives the IRS formal authority to improve EPCRS including the ability to waive income and excise taxes and to adjust penalties to the facts and circumstances of individual cases. The IRS is encouraged to reduce the need for IRS approvals of voluntary corrections and should specifically consider the circumstances faced by small employers.

### **I. EPCRS OVERVIEW.**

#### **A. Three Correction Programs:**

1. Self Correction Program (SCP).
2. Voluntary Correction Program (VCP).
3. Audit Closing Agreement Program (Audit CAP).

#### **B. EPCRS is available for:**

1. Qualified plans (IRC §401(a)).
2. Section 403(b) plans.
3. SEPs and SARSEPs (IRC §408(k)).
4. SIMPLE IRAs (IRC §408(p)).
5. Voluntary correction for §457(b) eligible government plans is available on a provisional basis outside of EPCRS.

#### **C. Objectives and Goals:**

1. Continued qualification and compliance for covered plans.

2. Income tax relief under §§72(p) and 72(t).
  3. Excise tax relief under IRC 4972, 4973, 4974 and 4979.
- D. Correction Principles:
1. Full correction.
  2. Restore plan and participants to where they would have been if failure had not occurred.
  3. Reasonable and appropriate correction for the failure.
- E. EPCRS identifies four categories of qualification failures::
1. Operational failures, where the plan was not operated according to the plan document or Code requirements.
  2. Plan document failures, where the document does not comply with the Code's requirements, including the failure to timely adopt required amendments.
  3. Demographic failures, where the plan fails minimum coverage, minimum participation or nondiscrimination testing.
  4. Employer eligibility failures, where the employer is not eligible to sponsor a type of retirement plan (*e.g.*, a for-profit corporation trying to sponsor a Code section 403(b) plan).
- F. Pension Protection Act of 2006 (PPA) Section 1101:
1. Increase awareness and knowledge of small employers concerning availability and use of EPCRS.
  2. IRS should take into account the special concerns and circumstances that small employers face regarding compliance and correction of failures.
  3. Extend the duration of self correction under SCP for significant compliance failures.
  4. Expand availability to correct insignificant compliance failures under SCP during audit.
  5. Assure that any tax, penalty, or sanction imposed due to compliance failure is not excessive and bears a reasonable relationship to the nature, extent, and severity of the failure.
- G. VCP Submission Procedures revised by Rev. Proc. 2013-12:
- All VCP Submissions made on or after April 1, 2013, are required to include a completed Form 8950, Application for Voluntary Compliance Program (VCP) under the Employee Plans Compliance Resolution System (EPCRS), and a Form 8951, Compliance Fee for Application for Voluntary Correction Program Submission Under the Employee Plans Compliance Resolution System (EPCRS). Section 11.12

provides new addresses that must be used when mailing VCP Submissions to the Service.

For a summary of the significant changes made to EPCRS by Rev. Proc. 2013-12, please see the Appendix attached at the end of this chapter.

## II. PLAN DISQUALIFICATION

### A. Advantages of a qualified plan.

#### 1. Tax savings to the employer:

- a) Immediate deduction of employer contributions. (IRC §404(a)(1), (2), (3), (6), (7)).
- b) Employer contributions are not considered wages and are not subject to FICA/FUTA/Income tax withholding. (IRC §§3121(a)(5), (v)(1); 3306(b)(5), (r)(1); 3401(a)(12)).

#### 2. Tax savings to the employee:

Employer contributions made on behalf of an employee are not taxable to the employee in the year in which they are made. Income recognition occurs during the year in which the employee takes a distribution from the plan. (Note: Distributions do not include eligible rollovers to other eligible retirement plans or IRAs.) IRC §402(a), (c))

#### 3. Tax exempt trust:

Earnings on contributions made to the trust that forms a part of the qualified plan are not taxable to the trust. The trust is exempt from taxation. (IRC §501(a))

### B. Consequences of plan disqualification.

#### Loss of tax advantages:

1. Contributions are deductible to the employer, only to the extent that they are includible in the gross income of employees participating in the plan. (IRC §404(a)(5))
2. Employer contributions to a disqualified plan are not exempt from FICA/FUTA/income tax withholding.
3. Contributions made to a trust on behalf of participating employees are includible as gross income to the employees, to the extent that the employees are vested in those contributions. (IRC §402(b)).
4. Distributions from the trust are not eligible for tax favored rollover.
5. Trust earnings are not exempt from taxation.

### III. THE INTERNAL REVENUE SERVICE AUDIT CLOSING AGREEMENT PROGRAM: AUDIT CAP<sup>1</sup>

#### A. Audit CAP.

For Audit CAP to apply, a plan must have a qualification or 403(b) (other than failure that has been corrected in accordance with SCP or VCP) failure. The failure may be either in form or Operational. All failures are eligible except failures involving a diversion of plan assets or repeated, deliberate or flagrant failures. Additionally, Audit CAP applies to participant loans that did not comply with §72(p)(2) (if such loans were not corrected under SCP or VCP). Settlement under Audit CAP is an alternative to the revocation of the plan's qualified status by the IRS.

Audit CAP is administered from the IRS Key District Office. Full correction is required (including the "closed" years). If appropriate, administrative procedures must be in place so that the defects will not recur.

On audit, Audit CAP is an alternative to disqualification of the plan. The Audit CAP settlement amount is based on the plan's *Maximum Payment Amount (MPA)*<sup>2</sup> and generally should not exceed one hundred percent of such amount. Settlements of seventy percent or less of the MPA are not unusual.

The tax court upheld the disqualification of a tax-qualified retirement plan in *Christy & Swan Profit Sharing Plan v. Commissioner*, T.C. Memo 2011-62. The plan had not been amended to comply with various changes in law. Upon audit, the IRS offered the sponsoring employer a closing agreement and the employer refused.

#### B. Audit CAP Sanction.

##### 1. Determination of sanction.

The sanction under Audit CAP is a negotiated percentage of the Maximum Payment Amount. For 403(b) plans, SEPs and SIMPLE IRA Plans, the sanction is a negotiated percentage of the Total Sanction Amount. Sanctions will not be excessive and will bear a reasonable relationship to the nature, extent, and severity of the failures, based on the factors below. In the case of any participant loan that did not comply with the requirements of §72(p)(2), the MPA will include the tax the Service could collect as a result of the loan not being excluded from gross income under §72(p)(2). Rev. Proc. 2013-12, Part VI, § 14.

##### 2. Factors considered.

Factors include: (i) the steps taken by the Plan Sponsor to ensure that the plan had no failures; (ii) the steps taken to identify failures that may have

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<sup>1</sup> Rev. Proc. 2013-12, Part VI.

<sup>2</sup> MPA is defined as the tax the IRS could collect upon plan disqualification for the open tax years, including: (1) tax on the trust (Form 1041); (2) additional income tax resulting from the loss of employer deductions for plan contributions; and (3) additional income tax resulting from income inclusion for participants in the plan (Form 1040) including distributions that were rolled over; and (4) any other tax that would result from a qualification failure. Rev. Proc. 2013-12, 5.01(5).

occurred; (iii) the extent to which correction had progressed before the examination was initiated, including full correction; (iv) the number and type of employees affected by the failure; (v) the number of non-highly compensated employees who would be adversely affected if the plan were not treated as qualified or as satisfying the requirements of § 403(b), § 408(k), or § 408(p); (vi) whether the failure is a failure to satisfy the requirements of § 401(a)(4), § 401(a)(26), or § 410(b), either directly or through § 403(b)(12), (vii) whether the failure is solely an employer eligibility failure; (viii) the period over which the failure(s) occurred (for example, the time that has elapsed since the end of the applicable remedial amendment period under § 401(b) for a Plan Document Failure), and (ix) the reason for the failure(s) (for example, data errors such as errors in transcription of data, the transposition of numbers, or minor arithmetic errors). Factors relating only to Qualified Plans also include: (i) whether the plan is the subject of a Favorable Letter and (ii) whether the failures were discovered during the determination process. If one of the failures discovered during an employee plans examination includes the failure to amend the plan timely for relevant legislation, it is expected that the sanction will be greater than the applicable fee described in Section 14.04 of Rev. Proc. 2013-12. An additional factor taken into account with respect to a participant loan that did not comply with the requirements of §72(p)(2) is the extent to which the failure is a result solely of action (or inaction) of the employer or its agents (or the extent to which the failure is a result of the employee's or beneficiary's actions or inactions).

3. Transferred Assets.

If the examination involves a plan with Transferred Assets and the Service determines that the failures did not occur after the end of the second plan year that begins after the corporate merger, acquisition, or other similar employer transaction occurred, the sanction under Audit CAP will not exceed the sanction that would apply if the Transferred Assets were maintained as a separate plan.

4. Fees for Nonamenders discovered during the determination letter application not related to a VCP submission.

The compliance fee for Nonamenders not voluntarily identified by the Plan Sponsor, but instead discovered by the Service in connection with a determination letter application process is determined in accordance with the chart below. This fee schedule applies if the only failure in the submission is the Nonamender failure. Rev. Proc. 2013-12, § 14.04.

Number of Participants	Employer's 2 <sup>nd</sup> 5 or 6 Year Remedial Amendment Cycle	Employer's 1 <sup>st</sup> 5 or 6 Year Remedial Amendment Cycle	GUST / 401(a)(9) Regs.	UCA/OBRA	TRA '86	T/D/R	ERISA
20 or fewer	\$ 2,500	\$ 3,000	\$ 3,500	\$ 4,000	\$ 4,500	\$ 5,000	\$ 5,500
21-50	\$ 5,000	\$ 6,000	\$ 7,000	\$ 8,000	\$ 9,000	\$ 10,000	\$ 11,000
51-100	\$ 7,500	\$ 9,000	\$ 10,500	\$ 12,000	\$ 13,500	\$ 15,000	\$ 16,500
101-500	\$ 12,500	\$ 15,000	\$ 17,500	\$ 20,000	\$ 22,500	\$ 25,000	\$ 27,500
501-1,000	\$ 17,500	\$ 21,000	\$ 24,500	\$ 28,000	\$ 31,500	\$ 35,000	\$ 38,500
1,001-5,000	\$ 25,500	\$ 30,000	\$ 35,000	\$ 40,000	\$ 45,000	\$ 50,000	\$ 55,000
5,001-10,000	\$ 32,500	\$ 39,000	\$ 45,500	\$ 52,000	\$ 58,500	\$ 65,000	\$ 71,500
Over 10,000	\$ 40,000	\$ 48,000	\$ 56,000	\$ 64,000	\$ 72,000	\$ 80,000	\$ 88,000

#### IV. VOLUNTARY CORRECTION PROGRAM (VCP): CORRECTION WITH IRS APPROVAL

##### A. Overview of VCP.

A Plan Sponsor, at any time before audit, may pay a limited fee and receive the Service's approval for correction of all Qualification Failures: Operational, Plan Document, Demographic, and Employer Eligibility. Qualified Plans, 403(b) Plans, SEPs, and SIMPLE IRA Plans are all eligible for VCP. Under VCP, there are special procedures for Anonymous Submissions and Group Submissions. **Rev. Proc. 2013.12**, Part V, Sections 10.10 and 10.11.

##### B. VCP.

VCP replaces the prior Walk-In Closing Agreement Program (Walk-In CAP), the Voluntary Compliance Resolution Program (VCR) and the Tax Sheltered Annuity Voluntary Correction Program (TVC).

Rev. Proc. 2003-44 streamlined EPCRS by consolidating all voluntary correction procedures (VCO, VCS, VCT, and VCSEP) into VCP.

A Plan Sponsor may voluntarily contact the IRS for consideration of VCP. This can be done on a "John Doe" basis under an Anonymous Submission procedure. The IRS and Plan Sponsor negotiate the method of correction of the failure. Correction must be made for all years to which the failure applies (not just the open years). The IRS and the Plan Sponsor also negotiate a sanction amount.

If the VCP request is voluntary (defined as made before the Plan Sponsor or a representative has received verbal or written notification of an impending investigation or of an impending referral for investigation by the IRS, or that the plan is not in appeals or litigation), the VCP fee is determined based on the chart contained in **Rev. Proc. 2013.12**. The sanction cannot be paid from the plan except under limited circumstances.<sup>3</sup>

<sup>3</sup> IRS Field Directive (February 21, 1995).

The submission from the Plan Sponsor must contain the following:<sup>4</sup>

1. A statement identifying the type of plan submitted (e.g., Qualified Plan, 403(b) Plan, SEP, or SIMPLE IRA Plan) and, if applicable, whether the submission is a Group Submission, an Anonymous Submission, a nonamender submission, a multiemployer or multiple employer plan submission, or an Orphan plan submission. Additionally, if the submission involves a Qualified Plan, the statement should also identify the type of Qualified Plan being submitted (e.g. Defined Benefit, Money Purchase, Profit Sharing, or Stock Bonus and 401(k) or ESOP);
2. A complete description of the failures and the years in which the failures occurred, including closed years, and the number of employees affected by each failure;
3. An explanation of how and why the failures arose, including a description of the administrative procedures applicable to the failure in effect at the time the failures occurred;
4. A description of the methods for correcting the failures that the Plan Sponsor has implemented or proposes to implement;
5. A description of the methodology that will be used to calculate earnings or actuarial adjustments on any corrective contributions or distributions;
6. Specific calculations for each affected employee or a representative sample of affected employees;
7. The method that will be used to locate and notify former employees and beneficiaries, or an affirmative statement that no former employees or beneficiaries were affected by the failures or will be affected by the correction;
8. A description of the measures that have been or will be implemented to ensure that the same failures will not recur;
9. A statement that, to the best of the Plan Sponsor's knowledge, neither the plan nor the Plan Sponsor is Under Examination;
10. A statement that neither the plan nor the Plan Sponsor has been a party to an abusive tax avoidance transaction or a brief identification of any abusive tax avoidance transaction to which the plan or the Plan Sponsor has been a party;
11. A specific request for relief needs to be made if the applicant either wants relief from reporting a corrected participant loan as a deemed distribution or wants to report the loan as a deemed distribution in the year of correction instead of the year in which the deemed distribution occurred;
12. If a submission includes a failure that relates to Transferred Assets and the failure occurred prior to the transfer, a description of the transaction;

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<sup>4</sup> Rev. Proc. 2013-12, Part V.

13. A statement, if applicable, that the plan is currently being considered in a determination letter application that is not related to the VCP application;
14. In the case of a 403(b) Plan submission, a statement that the Plan Sponsor has contacted all other entities involved with the plan and has been assured of cooperation in implementing the applicable correction, to the extent necessary;
15. A Group Submission must be signed by the Eligible Organization or the Eligible Organization's authorized representative and accompanied by a copy of the relevant portions of the plan document(s); and
16. In the case of an Orphan Plan, whether relief from the VCP application fee or correction fee is being requested, and supporting rationale for such relief.

The submission must be accompanied by:

1. Forms 8950 and 8951;
2. A copy of the entire plan document or the relevant portions of the plan document;
3. In any case in which correction of a Qualification Failure is made by plan amendment, as permitted, other than the adoption of an amendment by the Service as a model amendment or the adoption of a prototype or volume submitter plan for which the Plan Sponsor has reliance on the plan's opinion or advisory letter and the Plan Sponsor is submitting a determination letter request, as permitted, the Plan Sponsor must submit a copy of the amendment, the appropriate application form (i.e. Form 5300 series), and the appropriate user fee concurrently and to the same address as the VCP submission;
4. VCP fee submitted by check made payable to the United States Treasury. The check must be attached to the front of Form 8951;
5. The signature of the Plan Sponsor or the Sponsor's authorized representative. If signed by the Plan Sponsor's representative, a power of attorney must be filed; and
6. A penalty of perjury statement.

The documents comprising a VCP submission, including any required determination letter application, must be mailed to the Service in a single package. As the Service will process the VCP submission and accompanying determination letter application separately, any documents required to be filed for both the VCP submission and the accompanying determination letter application must be provided in duplicate.

If the IRS discovers an unrelated Qualification or 403(b) Failure while the request is pending, that failure generally will be added to the failures under consideration. However, the Service retains the discretion to determine that a failure is outside the scope of the voluntary request for consideration because the Plan Sponsor did not voluntarily bring it forward. In this case, if the additional failure is significant, all

aspects of the plan may be examined and the rules pertaining to Audit CAP will apply.<sup>5</sup>

Additionally, if the IRS and the Plan Sponsor cannot reach an agreement with respect to the submission, the matter will be closed, the compliance fee will not be returned, and the case may be referred to Employee Plans Examinations.<sup>6</sup> In the case of an Anonymous Submission that fails to reach a resolution under EPCRS, the service will refund 50% of the applicable VCP fee.

C. VCP Fees.

1. Qualified Plans and 403(b) Plans

The compliance fee for a submission under VCP for Qualified Plans and 403(b) Plans (including Anonymous Submissions) is determined in accordance with the following chart<sup>7</sup>:

<b><u>Number of Participants/Employees</u></b>	<b><u>Fee</u></b>
20 or fewer	\$ 750
21 to 50	\$ 1,000
51 to 100	\$ 2,500
101 to 500	\$ 5,000
501 to 1000	\$ 8,000
1,001 to 5,000	\$ 15,000
5,001 to 10,000	\$ 20,000
over 10,000	\$ 25,000

2. Nonamenders

The compliance fee for plans with a nonamender failure is determined in accordance with the VCP fee chart used for Qualified Plans and 403(b) Plans. The applicable fee is reduced by 50% for nonamenders that submit under VCP within a one-year period following the expiration of the plan's remedial amendment period for complying with the tax law changes. *See*: Section 11.02 of Rev. Proc. 2008-50 for VCP streamlined submission procedure for the failure to adopt timely certain amendments.

3. Group Submissions

The compliance fee for a Group Submission is based on the number of plans affected by the failure as described in the compliance statement. The initial fee is \$10,000 for the first 20 plans. An additional fee is due equal to the product of the number of plans in excess of 20 multiplied by \$250, up to a maximum of \$50,000.

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<sup>5</sup> Rev. Proc. 2013-12, § 10.07(5).

<sup>6</sup> Rev. Proc. 2013-12, § 10.07(7).

<sup>7</sup> Rev. Proc. 2013-12, § 12.02.

4. SEPs and SIMPLE IRA Plans

In general, the compliance fee for a SEP or SIMPLE IRA Plan submission (including an Anonymous Submission) is \$250. However, the IRS reserves the right to impose larger fees in appropriate circumstances.

5. Egregious or Intentional Failures

In cases involving egregious or intentional failures, the compliance fee for Qualified Plans, 403(b) Plans, SEPs, and SIMPLE IRA Plans is the greater of the fee as determined above (based either on the chart for Qualified Plans and 403(b) Plans or \$250 for SEPS and SIMPLE IRA Plans) or an amount equal to the negotiated percentage of the Maximum Payment Amount.

6. Additional Fees

In any case in which a SEP or SIMPLE IRA Plan correction is not similar to a correction for a similar Qualification Failure, the IRS may impose an additional fee. If the failure involves an Excess Amount to a SEP or SIMPLE IRA Plan and the Plan Sponsor retains the Excess Amount in the SEP or SIMPLE IRA Plan, a fee equal to at least 10% of the Excess Amount, excluding the earnings, will be imposed.

7. Establishing the Number of Plan Participants

Compliance fees are determined based on the number of plan participants. For new plans and ongoing plans, the number of plan participants is determined from the most recently filed Form 5500 series. In the case of a terminated plan, the Form 5500 used to determine the number of plan participants must be the one filed for the plan year prior to the plan year for which the Final Form 5500 return was filed. If the submission involves a plan with Transferred Assets and no new incidents of the failure occurred after the end of the second plan year that begins after the corporate merger, acquisition, or other similar employer transaction, the Plan Sponsor may calculate the number of plan participants based on the Form 5500 information that would have been filed by the Plan Sponsor for the plan year that includes the employer transaction if the Transferred Assets were maintained as a separate plan. In the case of a Qualified Plan or 403(b) Plan not required to file a Form 5500, the number of plan participants for compliance fee purposes will generally be the number of plan participants as of the last day of the most recently completed plan year preceding the date of the VCP submission.

D. Operational Failures and Correction Methods

The following sets forth Operational Failures and Correction Methods relating to Qualified Plans. These correction methods are acceptable under VCP and SCP. To the extent the failure listed below could occur under a 403(b) Plan, a SEP, or a SIMPLE IRA Plan, the correction method listed for such failure may be used to correct the failure.<sup>8</sup>

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<sup>8</sup> Rev. Proc. 2013-12, Appendix A.

1. Failure to provide the minimum top-heavy benefit under I.R.C. § 416 to non-key employees.

In a Defined Contribution plan, contribute and allocate the required top-heavy minimums to the plan in the manner provided for in the plan on behalf of the non-key employees.

In a Defined Benefit plan, the minimum required benefit must be accrued in the manner provided in the plan.

2. Failure to satisfy the actual deferral percentage (ADP) test, the actual contribution percentage (ACP) test or the multiple use test for plan years beginning on or before December 31, 2001.

Make qualified non-elective contributions on behalf of the non-highly compensated employees to the extent necessary to raise the actual deferral percentage or actual contribution percentage of the non-highly compensated employees to the percentage needed to pass the test.

3. Failure to distribute elective deferrals in excess of the I.R.C. § 402(g) limit.

Distribute the excess deferral to the employee and report the amount as taxable in the year of the deferral and the year distributed.

4. Exclusion of an eligible employee from all contributions or accruals under the plan for one or more years.

Make a contribution to the plan (defined contribution plan) or provide benefit accruals on behalf of the employees excluded from the plan (defined benefit plan). If the employee was denied eligibility under a cash or deferred arrangement, the employer must make a QNEC to the plan on behalf of the employee that is equal to 50% of the average deferral percentage for the employee's group (either highly compensated or non-highly compensated). Moreover, any match that would have applied to the elective deferral must be applied to the QNEC.

5. Failure to timely pay the minimum distribution under I.R.C. § 401(a)(9).

Distribute the required minimum distribution amount and any applicable gains from the date of the failure to the date of distribution.

6. Failure to obtain participant and/or spousal consent for a distribution subject to the participant and spousal consent rules under I.R.C. §§ 401(a)(11), 411(a)(11) and 417.

Give the affected employees the choice of providing informed consent for the distribution actually made or receiving a qualified joint and survivor annuity. In the event that participant and/or spousal consent is required but cannot be obtained, the participant must receive a qualified joint and survivor annuity. This annuity may be offset for any amounts already received by the participant. In the event that spousal consent is required but cannot be

obtained, the employer must provide a survivor annuity. A spousal survivor annuity may not be offset by any amounts received by the participant.

7. Failure to satisfy the I.R.C. § 415 limits in a defined contribution plan.

Place the excess annual additions into an unallocated I.R.C. § 415 suspense account to be used as an employer contribution in the succeeding year (or years).

E. Rev. Proc. 2013-12 New Items.

1. Please see chart of significant changes to EPCRS in Appendix to this chapter.

2. Distribution of Small Amounts:

- a. If the total corrective distribution is \$75 or less, the plan sponsor is not required to make a corrective distribution if the reasonable direct costs of processing and delivering the distribution to the participant or beneficiary would exceed the amount of the distribution (previously distribution amount was \$50 or less). §6.02(5)(b) Rev. Proc. 2013-12.

F. Nonamender Failures.

1. Nonamender failures limited to EGTRRA good faith, interim and/or optional amendment failures.

- a. Plan sponsor must submit Appendix C, Part II, with Schedule 1 attached.
- b. Under VCP, the resolution of an EGTRRA good faith, interim and/or optional amendment failure results in the corrective amendment being treated as if it had been adopted timely for purposes of determining the availability of the extended remedial amendment. Thus, a plan sponsor can resolve these failures under VCP only while the plan's applicable cycle remains open. Once the plan's applicable cycle closes, these failures are not accorded the treatment described because once the applicable extended remedial amendment period expires, there is no relief to grant. Once the applicable cycle has expired, the plan's sponsor should use Appendix C, Part II, Schedule 2 to resolve its nonamender failures. The fee for nonamender failures submitted under Schedule 1 is \$375.00

2. Nonamender failures other than EGTRRA good faith, interim and/or optional amendments covered under Schedule 1.

- a. Unlike failures submitted under Schedule 1, above, resolution of failures submitted under Schedule 2 includes a determination as to whether plan provisions comply with the qualification requirements.
- b. The fee for nonamender failure submitted under Schedule 2 is determined under the fee schedule contained in Section 12.02(1) of Rev. Proc. 2013-12. However, pursuant to Section 12.03, the fee in

that schedule is reduced by one-half if the submission is made within one year of the expiration of the plan's cycle.

3. See attached Appendix with regard to VCP Appendix C, Part II, in Schedules 1 and 2.

## V. SELF-CORRECTION PROGRAM (SCP).

### A. Availability of SCP.

Plan administrators who discover Operational Failures in self-audits can take advantage of the Self-Correction Program (SCP). SCP offers incentives for plan administrators to conduct timely self-audits. Operational Failures discovered and corrected within two years of the end of the plan year in which the failures occurred (not discovered) are eligible for SCP relief, even if the Operational Failure is not insignificant. SCP is also available for insignificant Operational Failures that are discovered after the time period for self-correcting the failure has lapsed.

### B. Eligibility for SCP.

The eligibility requirements for SCP are that:

1. It is available only for eligible Operational Failures;
  - a. Qualified Plans and 403(b) Plans are eligible with respect to significant and insignificant Operational Failures.
  - b. SEPs and SIMPLE IRA Plans are eligible with respect to insignificant Operational Failures only.
2. There must be established plan procedures that are "reasonably designed to promote and facilitate overall compliance";
3. Any failure must have occurred as a result of an oversight or mistake in applying the plan's procedures or "because the procedures that were in place, while reasonable, were not sufficient to prevent the occurrence of a failure"; and
4. The Plan Sponsor must make retroactive correction to all relevant failures.

### C. Operational Failures Only.

A Plan Sponsor may use SCP for a Qualified Plan to correct an Operational Failure by a plan amendment to conform the terms of the plan to the plan's prior operations only to correct Operational Failures. The amendments must comply with the requirements of § 401(a), including the requirements of §§ 401(a)(4), 410(b), and 411(d)(6). Moreover, SCP is not available for plans with disqualifying provisions (as defined in the Regulations under I.R.C. § 401(b)) for which the remedial amendment period has expired. Finally, SCP is not available to a Plan Sponsor for failing to timely amend its plan.

D. Not Available for Misuse of Plan Assets.

SCP is *not* available for exclusive benefit failures relating to the misuse or diversion of plan assets.

E. Established Practices and Procedures Required.

Eligibility for participating in the SCP requires that the plan administrators have established practices and procedures in place, both formal and informal, that are reasonably designed to promote and facilitate overall compliance with qualification requirements of the I.R.C. Examples of these procedures include a checklist to track allocations and identifying key employees. A plan document alone will not constitute evidence of established procedures.

F. Full Correction Required.

The Plan Sponsor must make full correction of all failures for all years for which the failures exist. The correction method should restore to both current and former participants and their beneficiaries the benefits and rights they would have had if the failure not occurred. The correction method should restore the plan to the position it would have been in had the failure not occurred.

G. Correction Within Two Plan Years.

Any Operational Failure, whether or not the failure would be considered insignificant, that is corrected by the Plan Sponsor by the end of the second plan year following the plan year in which the Operational Failure occurred is a non-disqualifying event. There are no limitations on the number of years a Plan Sponsor can use this self-correction procedure.

H. Current IRS Determination Letter or Opinion Letter Required.

This self-correction procedure is available only to a sponsor of an individually designed plan (including a volume submitter plan) with a current determination letter, an adopter of a master or prototype plan with a current opinion letter, or an adopter of a regional prototype plan with a current notification letter.

I. Insignificant Operational Failures.

Operational Failures that are not self-corrected within the time period described above are nevertheless considered non-disqualifying events and eligible for SCP if, given all the facts and circumstances of a case, the Operational Failures are considered to be insignificant.

The factors to be considered in determining whether Operational Failures under the plan are significant include (but are not limited to):

1. Whether other failures have occurred during the period being examined (for this purpose a failure is not considered to have occurred more than once merely because more than one participant is affected by the failure);
2. The percentage of plan assets and contributions involved in the failure;
3. The number of years the failure occurred;

4. The number of participants affected relative to the number of participants in the plan;
5. The number of participants affected as a result of the failure relative to the number of participants that could have been affected by the failure;
6. Whether correction was made within a reasonable time after discovery of the failure; and
7. The reason for the failure (*e.g.*, data errors, transposition of numbers or minor arithmetic errors).

No single factor is determinative. The fact that one or more factors are not applicable to a given case will not prevent the plan from being eligible for SCP.

A plan with more than one Operational failure in a single year may be eligible for SCP if the violations in the aggregate are considered insignificant. Failures will not be considered significant merely because they incur in more than one year.

**Rev. Proc. 2013-12** provides numerous examples of SCP and other EPCRS correction methods.

#### J. Correction By Retroactive Plan Amendment.

Under SCP, plan amendments can only be used for situations and corrections methods provided for in Appendix B of Rev. Proc. 2013-12. (In order to complete correction by plan amendment under SCP a determination letter application must be submitted before the end of the plan's remedial amendment period.) They are:

1. Failure to comply with IRC §401(a)(17) limit. The employer contributes an additional amount on behalf of each of the other employees (excluding each employee for whom there was a §4.01(a)(17) failure) who received an allocation for the year of the failure, amending the plan (as necessary) to provide for the additional allocation.
2. Contrary to the terms of the plan document, the plan provides for hardship distributions. The plan is amended retroactively to provide for the hardship distributions that were made available. This amendment is permissible if the amendment does not cause the plan to violate another 401(a) provision, *e.g.*, benefits, rights and features issues under IT Reg. 1.401(a)(4)-4).
3. Contrary to the terms of the plan document, the plan provides for participant loans. The plan is amended retroactively to provide for the loans that were made available. This amendment is permissible if the amendment (i) satisfies 401(a) and (ii) the plan as amended would have satisfied the qualification requirements of 401(a) (and the requirements applicable to plan loans under §72(p)) had the amendment been adopted when plan loans were first made available.
4. Ineligible employees (age and service; entry dates). The plan is amended retroactively to change the eligibility provisions to provide for the inclusion of the ineligible employee to reflect the plan's actual operations. This amendment is permissible if the amendment does not cause the plan to violate another 401(a) provision.

Ineligible employees include employees who either (i) have not completed the plan's minimum age or service requirements; or (ii) have completed the plan's minimum age or service requirements but became participants earlier than the applicable entry date.

## **VI. VCP CORRECTION FOR SIMPLIFIED EMPLOYEE PENSIONS (SEPs) AND SIMPLE IRA PLANS.**

### **A. Correction for SEPs and SIMPLE IRA Plans Generally.**

Generally, the correction for a SEP or a SIMPLE IRA Plan is expected to be similar to the correction required for a Qualified plan with a similar Qualification Failure.

### **B. Special Correction for SEPs and SIMPLE IRA Plans.**

In any case in which correction similar to that for a Qualified Plan is not feasible for a SEP or SIMPLE IRA Plan or in any other case determined by the Service in its discretion (including failures relating to I.R.C. §§ 402(g), 415, and 401(a)(17), failures relating to deferral percentages, discontinuance of contributions to a SARSEP or SIMPLE IRA Plan, and retention of Excess Amounts for cases in which there has been no violation of a statutory limitation), the Service may provide for a different correction.

### **C. Correction of Failure to Satisfy Deferral Percentage Test.**

If the failure involves a violation of the deferral percentage test under I.R.C. § 408(k)(6)(A)(iii) applicable to a SARSEP, there are several methods to correct the failure. This failure may be corrected in one of the following ways.

1. The Plan Sponsor may make contributions that are 100% vested to all eligible non-highly compensated employees (to the extent permitted by I.R.C. § 415) necessary to raise the deferral percentage needed to pass the test. This amount may be calculated as the same percentage of compensation (regardless of the terms of the SEP).
2. The Plan Sponsor may effect distribution of excess contributions, adjusted for earnings through the date of correction, to highly compensated employees to correct the failure. The Plan Sponsor must also contribute to the SEP an amount equal to the total amount distributed. This amount must be allocated to (i) current employees who were non-highly compensated employees in the year of the failure; (ii) current non-highly compensated employees who were non-highly compensated employees in the year of the failure; or (iii) employees (both current and former) who were non-highly compensated employees in the year of the failure.

### **D. Treatment of Undercontributions to a SEP or SIMPLE IRA Plan.**

1. Make-up contributions; earnings.

The Plan Sponsor should correct undercontributions to a SEP or SIMPLE IRA Plan by contributing make-up amounts that are fully vested, adjusted for earnings credited from the date of the failure to the date of correction.

2. Earnings adjustment methods.
  - a. The earnings rate generally is based on the investment results that would have applied to the corrective contribution if the failure had not occurred.
  - b. Insofar as SEP and SIMPLE IRA Plan assets are held in IRAs, there is no earnings rate under the SEP or SIMPLE IRA Plan as a whole. If the Plan Sponsor is unable to determine what the actual investment results would have been, a reasonable interest rate may be used.

E. Treatment of Excess Amounts under a SEP or a SIMPLE IRA Plan.

1. Distribution of Excess Amounts.

An Excess Amount is an amount contributed on behalf of an employee that is in excess of an employee's benefit under the plan, or an elective deferral in excess of the limitations of §§ 402(g) or 408(k)(6)(A)(iii). If an Excess Amount is attributable to elective deferrals, the Plan Sponsor may effect distribution of the Excess Amount, adjusted for earnings through the date of correction, to the affected participant. The amount distributed to the affected participant is includible in gross income in the year of distribution. The distribution is reported on Form 1099-R for the year of distribution with respect to each participant receiving the distribution. In addition, the Plan Sponsor must inform affected participants that the distribution of an Excess Amount is not eligible for favorable tax treatment accorded to distributions from a SEP or a SIMPLE IRA Plan (and, specifically, is not eligible for tax-free rollover). If the Excess Amount is attributable to employer contributions, the Plan Sponsor may effect distribution of the employer Excess Amount, adjusted for earnings through the date of correction, to the Plan Sponsor. The amount distributed to the Plan Sponsor is not includible in the gross income of the affected participant. The Plan Sponsor is not entitled to a deduction for such employer Excess Amount. The distribution is reported on Form 1099-R issued to the participant indicating the taxable amount as zero.

2. Retention of Excess Amounts.

If an Excess Amount is retained in the SEP or SIMPLE IRA Plan, a special fee, in addition to the VCP submission fee, will apply. The Plan Sponsor is not entitled to a deduction for an Excess Amount retained in the SEP or SIMPLE IRA Plan. In the case of an Excess Amount retained in a SEP that is attributable to a § 415 failure, the Excess Amount, adjusted for earnings through the date of correction, must reduce affected participants' applicable § 415 limit for the year following the year of correction (or for the year of correction if the Plan Sponsor so chooses), and subsequent years, until the excess is eliminated.

3. De minimis Excess Amounts.

If the total Excess Amount in a SEP or SIMPLE IRA Plan, whether attributable to elective deferrals or employer contributions, is \$100 or less,

the Plan Sponsor is not required to distribute the Excess Amount and the special fee will not apply.

## VII. DELINQUENT FILER VOLUNTARY COMPLIANCE PROGRAM (DFVC)

The Delinquent Filer Voluntary Compliance Program<sup>9</sup> (DFVC) is available to all pension and welfare plan administrators who have not filed timely annual reports for plan years beginning on or after January 1, 1988 and who have not yet received notification from the DOL that the plan has failed to file a timely annual report. The DFVC program also applies to top hat plans which failed to file the standard registration statement with the DOL.

### A. Penalties For Improper Filing or Non-Filing of IRS 5500 Series Forms

In order to appreciate the significance of the DOL's program for waiving penalties on the late filing of 5500 series forms, a brief review of the IRS and DOL penalties is in order.

A penalty of \$25 per day (up to a maximum of \$15,000 per return) may be assessed by the IRS for non-filing or delinquent filing of returns for certain deferred compensation plans, certain trusts and annuities, bond purchase plans and plans listed in I.R.C. § 6039D (certain fringe benefit plans including Cafeteria plans, Group Legal Services plans and Educational Assistance plans).<sup>10</sup> Additionally, a penalty of \$1 per day may be assessed (up to \$5,000) for each participant not listed on the required Schedule;<sup>11</sup> a penalty of \$1 per day (up to \$1,000) for failing to report a change in the status of the plan;<sup>12</sup> and a penalty of \$1,000 for not filing the actuarial statement (Schedule B).<sup>13</sup>

The DOL may assess a penalty of \$50 per day for a late filer, up to \$1,100 per day if the plan administrator fails or refuses to file a complete return, and a penalty of \$300 per day (up to a maximum of \$30,000 per return, per year) for a non-filer.<sup>14</sup> For egregious omissions, penalties may be doubled. The DOL also assesses penalties for the following deficiencies:

	<u>Per Day</u>	<u>Cap</u>
Missing accountant report	\$150	\$50,000
Financial information	\$110	\$36,500
Other information (per employee, not per day)	\$ 11	\$ 3,650

<sup>9</sup> January 29, 2013 Federal Register.

DOL Press Release (dated January 29, 2013).

For information: (202) 693-8360 (Jennifer Warner or Scott Albert).

<sup>10</sup> I.R.C. § 6652(e).

<sup>11</sup> I.R.C. § 6652(d)(1).

<sup>12</sup> I.R.C. § 6652(d)(2).

<sup>13</sup> I.R.C. § 6692.

<sup>14</sup> ERISA § 502(c)(2).

B. Who is Eligible for DFVC.

Eligibility for the DFVC Program continues to be limited to plan administrators with filing obligations under Title I of ERISA who comply with the provisions of the program and who have not been notified in writing by the Department of a failure to file a timely annual report under Title I of ERISA. For example, Form 5500-EZ filers and Form 5500 filers for plans without employees (as described in 29 CFR 2510.3-3(b) and (c)), are not eligible to participate in the DFVC Program because such plans are not subject to Title I.

C. Program Criteria.

A plan administrator electing to file a late annual report under the DFVC Program must file with a complete Form 5500 Series Annual Return/Report, including all schedules and attachments, for each year relief is requested electronically in accordance with the EFAST2 electronic filing requirements. Special simplified rules apply to "top hat" plans and apprenticeship and training plans. The plan administrator shall pay the applicable penalty amount by submitting electronic payment in accordance with the online penalty calculator and the web payment system on the DOL's website. Plan administrators may also send the penalty payment by check by mail to the address specified on the DOL's website, along with a paper copy of the electronically submitted Form 5500 or Form 5500-SF (without schedules or attachments).

D. Penalty Structure.

The late filing penalties under the DFVC Program are as follows:

<u>Plan Type</u>	<u>Per Day Penalty</u>	<u>Per Filing Penalty</u>	<u>Multiple Filings — Per Plan Penalty</u>
Small Plan	\$10	\$ 750	\$1,500
Large Plan	\$10	\$2,000	\$4,000

Per day penalty. The basic penalty under the program is \$10 per day for delinquent filings.

"Per filing" cap. The maximum penalty for a single late annual report is \$750 for a small plan (generally a plan with fewer than 100 participants at the beginning of the plan year) and \$2,000 for a large plan.

"Per plan" cap. The DFVC Program also includes a "per plan" cap. This cap is designed to encourage reporting compliance by plan administrators who have failed to file an annual report for a plan for multiple years. The "per plan" cap limits the penalty to \$1,500 for a small plan and \$4,000 for a large plan regardless of the number of late annual reports filed for the plan at the same time. There is no "per administrator" or "per sponsor" cap. If the same person is the administrator or sponsor of several plans required to file annual reports under Title I of ERISA, the maximum applicable penalty amounts would apply for each plan.

Small plans sponsored by certain tax-exempt organizations. A special "per plan" cap of \$750 applies to a small plan sponsored by an organization that is tax-exempt under Internal Revenue Code §501(c)(3). The \$750 limitation applies regardless of the

number of late annual reports filed for the plan at the same time. It is not available, however, if as of the date the plan files under the DFVC Program, there is a delinquent annual report for a plan year during which the plan was a large plan.

"Top hat" plans and apprenticeships and training plans. The penalty amount for "top hat" plans and apprenticeship and training plans is \$750.

- E. Please see Appendix for updated FAQs and a Fact Sheet re: DFVC.
- F. IRS and PBGC Penalty Relief.

**In addition to the DOL's civil penalties, the IRS has the authority to assess penalties for a plan's failure to timely comply with the tax code's annual reporting requirements. The IRS, in *Notice 2002-23*<sup>15</sup>, and the Pension Benefit Guaranty Corporation (PBGC) also announced penalty relief for delinquent filings of Form 5500 if the plans satisfy the conditions of the DOL's DFVC Program.**

#### **VIII. DEPARTMENT OF LABOR VOLUNTARY FIDUCIARY CORRECTION PROGRAM (VFC)**

Title I of ERISA, 29 U.S.C. §§ 1001 *et seq.*, establishes certain standards with which officials of employee benefit plans covered by ERISA must comply. A fiduciary who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by Title I of ERISA shall be personally liable to make good to a plan any losses to the plan resulting from each such breach and to restore to such plan any profits which have been made through the use of assets of the plan by the fiduciary. The Secretary of Labor has the authority to bring civil actions to enforce the provisions of Title I of ERISA<sup>16</sup> and a civil penalty in an amount equal to twenty percent of the amount recovered must be assessed in any action initiated by the Secretary.<sup>17</sup>

On March 15, 2000, the DOL announced the Voluntary Fiduciary Correction Program (VFC Program). The VFC Program was adopted by the EBSA on a permanent basis in March 2002. Final changes were adopted by the EBSA effective May 19, 2006. The VFC Program is administered by each of the DOL's ten regional offices.

Under the VFC Program, persons who are potentially liable for a breach of the fiduciary duties imposed by Title I of ERISA will be relieved of the possibility of a civil investigation of that breach and/or civil action by the Secretary with respect to that breach, and imposition of civil penalties, if they satisfy conditions for correcting the breach, as described in the VFC Program. If an applicant is in full compliance with all of the terms and procedures set forth in the VFC Program, EBSA will issue a "no action letter" with respect to the breach described in the application.

The relief that the VFC Program offers is limited to transactions identified in the application and the persons who corrected those transactions. Where the EBSA becomes aware of possible criminal behavior, material misrepresentations or omissions in the VFC application, or other abuse of the VFC Program, relief will not be available under the VFC Program and

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<sup>15</sup> IRS Notice 2002-23 (March 27, 2002)

<sup>16</sup> ERISA § 502(a)(2), 502(a)(5).

<sup>17</sup> ERISA § 502(l).

the Department may initiate an investigation which may lead to enforcement action. Furthermore, full correction under the VFC Program does not preclude any other governmental agency, including the IRS, from exercising any right it may have with respect to the transactions that are the subject of the application.

A VFC Program application must be prepared by the plan official, or his or her authorized representative, and should contain the following information: the name, address and telephone number of a contact person familiar with the contents of the application, with authority to respond to the EBSA; a detailed narrative describing the breach and the corrective action, a list of the persons materially involved in the breach and corrections, the employee identification number, plan number and address of the plan sponsor and administrator; the date the plan's most recent Form 5500 was filed; an explanation of the breach, including the date it occurred; an explanation of how the breach was corrected, by whom and when; and specific calculations demonstrating how the principal amount and lost earnings or restoration of profits were computed (or the data elements required to be input into the online calculator if the online calculator is used) and an explanation of why payment of lost earnings or restoration of profits was chosen to correct the breach.

The application must be accompanied by the following documentation: a copy of the plan document, and any other pertinent documents (such as the adoption agreement, trust agreement, or insurance contract) with relevant sections identified; documentation that supports the narrative description of the transaction and correction; documentation establishing a lost earnings amount, including documentation of the return on the plan's other investments during the time period on which the lost earnings is calculated; documentation establishing the amount of restored profits; proof of payment of the principal amount and lost earnings or restoration of profits; a completed signed and submitted checklist; any other documents required under Section 6 of the VFC Program.

A plan official or authorized representative must sign the application. If signed by the authorized representative, a power of attorney form must be completed. The submission must also contain a penalty of perjury statement in the form prescribed by the DOL. The application should be mailed to the appropriate regional EBSA office.

In order to become eligible to make a VFC Program Application, the plan and the applicant may not be under investigation and the application must not contain evidence of a potential criminal violation, as determined by EBSA.

In addition to the aforementioned general eligibility requirements, the EBSA has identified nineteen breaches and methods of correction which are suitable for the VFC Program. The following are a list of those breaches which have been identified by the EBSA and appropriate corrections:

A. Delinquent Participant Contributions and Participant Loan Repayments to Pension Plans.

If, instead of forwarding the contributions for investment in accordance with the provisions of the plan and within the time frames described by the Department's regulations, an employer retains the contributions for a longer period of time, the breach may be corrected under the VFC Program. The same applies in the case of participant loan repayments when instead of applying such repayments to outstanding loan balances within a reasonable time per Department regulations and in accordance to plan provisions, the employer retains such repayments for a longer period of time.

For unpaid contributions or participant loan repayments, the following correction amount must be paid to the plan: the principal amount plus the greater of (i) lost earnings on the principal amount or (ii) restoration of profits due to the employer's use of principal amount. For late contributions or participant loan repayments, the only correction required is to pay to the plan the greater of (i) lost earnings or (ii) restoration of profits due to the employer's use of a principal amount.

A submission for this type of defect should contain the following additional documentation: a statement from a plan official identifying the earliest date on which the participant contributions and/or repayments reasonably could have been segregated from the employer's general assets, along with the supporting documentation on which the plan official relied in reaching the conclusion; if restored participant contributions and/or repayments (exclusive of lost earnings) (i) total \$50,000.00 or less, or (ii) exceed \$50,000.00 and were remitted to the plan within 180 calendar days from the date such amounts were received by the employer, or the date such amounts otherwise would have been payable to the participant in cash, submit a narrative describing the applicant's contribution and/or repayment remittance practices before and after the period of unpaid or late contributions and/or repayments and summary documents demonstrating the amount of unpaid or late contributions and/or repayments; and if restored participant contributions and/or repayments (exclusive of lost earnings) exceeded \$50,000.00 and were remitted more than 180 calendar days after the date such amounts were received by the employer, or the date such amounts otherwise would have been payable to the participants in cash, submit a narrative describing the applicant's contribution and/or repayment remittance practices before and after the period of unpaid or late contributions and/or repayments, for participant contributions and/or repayments received from participants, a copy of the accounting records which identify the date and amount of each contribution received, and for participant contributions and/or repayments withheld from employee paychecks, a copy of the payroll documents showing the date and amount of each withholding.

B. Delinquent Participant Contributions to Insured Welfare Benefit Plans.

(1) Description of Transaction.

Benefits are provided exclusively through insurance contracts issued by an insurance company or similar organization qualified to do business in any state or through a health maintenance organization (HMO) defined in section 1310(c) of the Public Health Service Act, 42 U.S.C. 300e-9(c). An employer receives directly from participants or withholds from employees' paychecks certain amounts that the employer forwards to an insurance provider for the purpose of providing group health or other welfare benefits. The employer fails to forward such amounts in accordance with the terms of the plan (including the provisions of any insurance contract) or the requirements of the Department's regulation at 29 CFR 2510.3-102. There are no instances in which claims have been denied under the plan, nor has there been any lapse in coverage, due to the failure to transmit participant contributions on a timely basis.

- (2) Correction of Transaction.
  - (i) Pay to the insurance provider or HMO the Principal Amount, as well as any penalties, late fees or other charges necessary to prevent a lapse in coverage due to such failure. Any penalties, late fees or other such charges shall be paid by the employer and not from participant contributions.
  - (ii) For this transaction, the Principal Amount is the amount of delinquent participant contributions retained by the employer.
- (3) Documentation. In addition to the documentation typically required, submit the following documents:
  - (i) A statement from a Plan Official: (A) Identifying the earliest date on which the participant contributions reasonably could have been segregated from the employer's general assets, along with the supporting documentation on which the Plan Official relied in reaching this conclusion; (B) attesting that there are no instances in which claims have been denied under the plan for nonpayment, nor has there been any lapse in coverage; and (C) attesting that any penalties, late fees or other such charges have been paid by the employer and not from participant contributions;
  - (ii) Copies of the insurance contract or contracts for the group health or other welfare benefits for the plan; and
  - (iii) If restored participant contributions (A) total \$50,000 or less, or (B) exceed \$50,000 and were remitted to the plan within 180 calendar days from the date such amounts were received by the employer, or the date such amounts otherwise would have been payable to the participants in cash (regarding amounts withheld by an employer from employees' paychecks), submit:
    - (1) A narrative describing the applicant's contribution practices before and after the period of unpaid or late contributions, and (2) Summary documents demonstrating the amount of unpaid or late contributions; and
  - (iv) If restored participant contributions exceed \$50,000 and were remitted more than 180 calendar days after the date such amounts were received by the employer, or the date such amounts otherwise would have been payable to the participants in cash (regarding amounts withheld by an employer from employees' paychecks), submit:
    - (A) A narrative describing the applicant's contribution remittance practices before and after the period of unpaid or late contributions,

- (B) For participant contributions received directly from participants, a copy of the accounting records which identify the date and amount of each contribution received, and
- (C) For participant contributions withheld from employees' paychecks, a copy of the payroll documents showing the date and amount of each withholding.

C. Delinquent Participant Contributions to Welfare Plan Trusts

- (1) Description of Transaction. An employer receives directly from participants or withholds from employees' paychecks certain amounts that the employer forwards to a trust maintained to provide, through insurance or otherwise, group health or other welfare benefits. The employer fails to forward such amounts in accordance with the terms of the plan or the requirements of the Department's regulation at 29 CFR 2510.3-102. There are no instances in which claims have been denied under the plan, nor has there been any lapse in coverage, due to the failure to transmit participant contributions on a timely basis.
- (2) Correction of Transaction.
  - (i) Unpaid Contributions. Pay to the trust (A) the Principal Amount, and, where applicable, any penalties, late fees or other charges necessary to prevent a lapse in coverage due to the failure to make timely payments, and (B) the greater of (1) Lost Earnings on the Principal Amount or (2) Restoration of Profits resulting from the employer's use of the Principal Amount as described in section 5(b). The Loss Date for such contributions is the date on which each contribution would become plan assets under 29 CFR 2510.3-102. Any penalties, late fees or other charges shall be paid by the employer and not from participant contributions.
  - (ii) Late Contributions. If participant contributions were remitted to the trust outside of the time period required by the regulation, the only correction required is to pay to the trust the greater of (A) Lost Earnings or (B) Restoration of Profits resulting from the employer's use of the Principal Amount as described in section 5(b). Any penalties, late fees or other such charges shall be paid by the employer and not from participant contributions.
  - (iii) For this transaction, the Principal Amount is the amount of delinquent participant contributions retained by the employer.
- (3) Documentation. In addition to the documentation typically required, submit the following documents:
  - (i) A statement from a Plan Official:
    - (A) Identifying the earliest date on which the participant contributions reasonably could have been segregated from

the employer's general assets, along with the supporting documentation on which the Plan Official relied in reaching this conclusion, and

(B) Attesting that there are no instances in which claims have been denied under the plan for nonpayment, nor has there been any lapse in coverage;

(ii) If restored participant contributions (exclusive of Lost Earnings) (A) total \$50,000 or less, or (B) exceed \$50,000 and were remitted to the plan within 180 calendar days from the date such amounts were received by the employer, or the date such amounts otherwise would have been payable to the participants in cash (regarding amounts withheld by an employer from employees' paychecks), submit:

(1) A narrative describing the applicant's contribution practices before and after the period demonstrating the amount of unpaid or late contributions; and

(iii) If restored participant contributions (exclusive of Lost Earnings) exceed \$50,000 and were remitted more than 180 calendar days after the date such amounts were received by the employer, or the date such amounts otherwise would have been payable to the participants in cash (regarding amounts withheld by an employer from employees' paychecks), submit:

(A) A narrative describing the applicant's contribution remittance practices before and after the period of unpaid or late contributions,

(B) For participant contributions received directly from participants, a copy of the accounting records which identify the date and amount of each contribution received, and

(C) For participant contributions withheld from employees' paychecks, a copy of the payroll documents showing the date and amount of each withholding.

D. Loan at Fair Market Interest Rate to a Party in Interest.

A plan that makes a loan to a party in interest at an interest rate no less than that for loans with similar terms to a borrower of similar credit-worthiness must be corrected by paying off the loan in full, including any repayment penalties. An independent commercial lender must also confirm in writing that the loan was made at a fair market interest rate for a loan with similar terms to a borrower of similar credit-worthiness.

In addition to the documentation typically required in a submission, the applicant should also submit a narrative describing the process used to determine the fair market interest rate at the time the loan was made, validated in writing by an independent commercial lender.

E. Loan at Below Market Interest Rate to Party in Interest.

If a plan loan was made to a party in interest at a below market interest rate, the breach must be corrected by paying off the loan in full, including any prepayment penalties. In addition, the plan must be reimbursed the principal amount, plus the greater of (i) the lost earnings; or (ii) the restoration of profits. The principal amount, in this instance, is equal to the excess of the interest payments that would have been received if the loan had been made at the fair market interest rate over the interest payments actually received under the loan terms during such period.

In addition to the documentation typically required in a submission, the applicant should submit the following documents: a narrative describing the process used to determine fair market rate at the time the loan was made; a copy of the independent commercial lender's fair market interest rate determination; and a copy of the independent fiduciary's dated, written approval of fair market interest rate determination.

F. Loan at Below Market Interest Rate to a Person Who Is Not a Party in Interest.

If the plan made a loan to a person who is not a party in interest at an interest rate that was a below market interest rate, the breach can be corrected by paying to the plan the principal amount plus lost earnings through the recovery date. Each loan payment has a principal amount equal to the excess of interest payments that would have been received until the recovery date if the loan had been made at the fair market value interest rate over the interest actually received under the loan terms. From the inception of the loan to the recovery date, the amount to be paid to the plan is the lost earnings on the series of principal amounts. From the recovery date to the maturity date of the loan, the amount to be paid to the plan is the present value of the remaining principal amounts, as determined by an independent commercial lender. Instead of calculating the present value, it is acceptable for administrative convenience to pay the sum of the remaining principal amounts.

In addition to the documentation typically required, the applicant must submit a narrative describing the process used to determine the fair market interest rate at the time the loan was made and a copy of the independent commercial lender's fair market interest rate determination.

G. Loan at Below Market Interest Rate Solely Due to a Delay in Perfecting the Plan's Security Interest.

If a plan made a purportedly secured loan to a person who is not a party in interest, but there was a delay in recording or otherwise perfecting the plan's interest in the loan collateral, the loan is treated as an unsecured loan until the plan's interest was perfected. This breach is corrected by paying to the plan the principal amount plus lost earnings through the date the loan is fully secured. The principal amount is equal to the difference between interest payments actually received and interest payments that would have been received if the loan had been made at a fair market interest rate for an unsecured loan. The fair market interest rate must be determined by an independent commercial lender. In addition, if the delay in perfecting the loan security caused permanent change in the risk characteristics of the loan, the fair market interest rate for the remaining term of the loan must be determined by an independent commercial lender. In that case, the correction amount includes an additional payment to the plan.

In addition to the documentation typically required, the applicant must submit to the plan a narrative describing the process used to determine the fair market interest rate for the period that the loan was unsecured and, if applicable, the remaining term of the loan and a copy of the independent commercial lender's fair market interest rate determination.

H. Participant Loans Failing to Comply with Plan Provisions for Amount, Duration or Level Amortization.

If a plan extended a loan to a plan participant who is a party in interest with respect to the plan based solely on his or her status as an employee of any employer whose employees are covered by the plan and the loan terms do not comply with applicable plan provisions, which incorporated the requirements of IRC §72(p) concerning the amount of the loan, the duration of the loan, or the level amortization of the loan repayment, then officials must make a voluntary correction of the loan with IRS approval under the VCP of the EPCRS.

The applicant must provide proof of payment and a copy of the IRS compliance statement.

I. Participant Default Loans.

If a plan extended a loan to a plan participant who is a party in interest with respect to the plan based solely on his or her status as an employee of any employer whose employees are covered by the plan and during the loan repayment period, the plan official responsible for loan administration failed to properly withhold a number of loan repayments from the participant's wages and included the amount of such repayment in the participant's wages based on administrative or system processing errors, the breach must be corrected under the VCP of the EPCRS.

The applicant must provide proof of payment and a copy of the IRS compliance statement.

J. Purchase of an Asset by the Plan from a Party in Interest.

If the plan purchased an asset with cash from a party in interest and no prohibited transaction exemption applies, the transaction must be corrected by the sale of the property back to the party in interest who originally sold the asset to the plan or to a person who is not a party in interest. Whether the asset is sold to a person who is not a party in interest with respect to the plan or is sold back to the original seller, the plan must receive the higher of (i) the fair market value of the asset at the time of resale without reduction for the cost of sale plus restoration to the plan of the party in interest's investment return from the proceeds of the sale to the extent they exceed the plan's net profits from owning the property; or (ii) the principal amount plus the greater of lost earnings on the principal amount or the restoration of profits. Alternatively, the plan may retain the assets and receive (i) the greater of lost earnings or the restoration of profits, if any, on the principal amount, but only to the extent that such lost earnings or restoration of profits exceeds the difference between the fair market value of the asset as of the recovery date and the original purchase price; and (ii) the amount by which the principal amount exceeded the fair market value of the asset (at the time of the original purchase) plus the greater of (1) lost earnings or (2) restoration of profits, if any, on such excess provided an independent fiduciary determines that the plan will realize a greater benefit from this correction

than it would from the resale of the asset. For this type of transaction, the principal amount is the plan's original purchase price.

In addition to the documentation typically required, the applicant must submit documentation of the plan's purchase, including the date of purchase, the plan's purchase price, the identity of the seller; a narrative describing the relationship between the seller of the asset and the plan; and the qualified independent appraiser's report addressing the fair market value of the asset purchased by the plan both at the time of the original purchase and recovery date; and, if applicable, a report of the independent fiduciary's determination that the plan will realize a greater benefit by receiving the correction amount than by reselling the property.

K. Sale of an Asset (Including Real Property) by the Plan to a Party in Interest.

If the plan sold an asset for cash to a party in interest with respect to the plan, in a non-exempt transaction, the breach may be corrected by the plan receiving the principal amount plus the greater of lost earnings or restoration of profits, if any. As an alternative to repayment of the principal amount, if it is determined that the plan will realize a greater benefit by repurchasing the property, the plan may repurchase the asset from the party in interest at the lower of the price for which it sold the property or fair market value of the property as of the recovery date plus restoration of the party in interest's net profits.

In addition, documentation typically required, the applicant must submit documentation, the plan's sale of the asset, including the date of sale, sale price, the identity of original purchaser; a narrative describing the relationship of the purchaser to the asset and the relationship of the purchaser to the plan; the qualified, independent appraiser's report addressing fair market value of the property at the time of the sale from the plan as of the recovery date; and, if applicable, the independent fiduciary report the plan will realize a greater benefit by receiving the corrected amount than by repurchasing the property.

L. Sale and Lease Back of Real Property to the Employer.

If the plan sponsor sold a parcel of real property to the plan, which was then leased back to the sponsor, in a transaction that was not otherwise exempt, the breach may be corrected by the sale of the parcel of real property back to the plan sponsor or to a person who is not a party in interest with respect to the plan. The plan must receive the higher of the fair market value of the asset at the time of resale, without reduction for the costs of sale; or the principal amount plus the greater of lost earnings on the principal amount, or the restoration of profits, if any.

If the plan has not been receiving rent at fair market value, as determined by a qualified, independent appraiser, the sale price of the real property should not be based on historical below market rent that was paid to the plan. In addition, if the plan was not receiving rent at fair market value as determined by a qualified, independent appraiser, the principal amount for correction also includes the difference between rent actually paid and the rent that should have been paid at fair market value. The plan sponsor must pay to the plan this additional amount plus the greater of lost earnings or restoration of profits resulting from the plan sponsor's use of the principal amount.

In addition to the documentation typically submitted, the applicant must submit documentation of the plan's purchase of the real property, including the date of purchase, the plan's purchase price, and the identity of the original seller; documentation of the plan's sale of asset, including the date of sale, the sale price, and the identity of the purchaser; a narrative describing the relationship of the original seller to the plan and the relationship of the purchaser to the plan; a copy of the lease; documentation of the date and amount of each lease payment received by the plan; and the qualified, independent appraiser's report addressing both the fair market value of the property at the time of the original sale and at the recovery date, and the fair market value of the lease payments.

M. Purchase of an Asset (including real property) by a Plan from a Person Who Is Not a Party in Interest with Respect to the Plan at a Price More Than Fair Market Value.

If plan acquires an asset from a person who is not a party in interest with respect to the plan, without determining the asset's fair market value and, as a result, the plan paid more than it should have for the asset, the breach is corrected by the plan receiving the principal amount plus lost earnings. The principal amount is the difference between the actual purchase price and the asset's fair market value at the time of purchase.

In addition to the documentation typically required, the applicant must submit documentation of the plan's original purchase price of the asset, including the date of purchase, the purchase price, and the identity of the seller; a narrative describing the relationship of the seller to the plan; and a copy of the qualified, independent appraiser's report addressing the fair market value at the time of plan's purchase.

N. Sale of an Asset (including real property) by a Plan to a Person Who Is Not a Party in Interest with Respect to the Plan at a Price Less Than Fair Market Value.

If plan sold an asset to a person who is not a party in interest with respect to the plan, without determining the asset's fair market value, and the plan received less than it would have from the sale, the breach may be corrected by the plan receiving the principal amount plus lost earnings. The principal amount is the amount by which the fair market value of the asset as of the recovery date exceeds the price which the plan sold the property.

In addition to the typical documentation, the applicant must submit documentation of the plan's original sale of the asset, including the date of sale, the sale price, and the identity of the buyer; a narrative describing the relationship of the buyer to the plan; and a copy of the qualified, independent appraiser's report addressing the fair market value at the time of plan's sale.

O. Holding of an Illiquid Asset Previously Purchased by a Plan.

The holding of an illiquid asset may be corrected by the sale of the asset to a party in interest, provided the plan receives the higher of (1) the fair market value of the asset at the time of resale, without a reduction for the costs of sale or (2) the principal amount, plus lost earnings. The plan official may cause the plan to sell the asset to a party in interest. The principal amount is the plan's original purchase price of the asset.

In addition to the documentation typically required, the applicant must submit the following documents: documentation of the plan's original purchase of the asset, including the date of purchase, the plan's purchase price, the identity of the original seller, any description of the relationship, if any, between the original seller and the plan; the qualified, independent appraiser's report addressing the fair market value of the asset purchased by the plan at the recovery date; a narrative describing the plan's efforts to sell the asset to persons who are not parties in interest with respect to the plan and any documentation of such efforts to sell the asset; a statement from a plan official attesting that (i) the asset failed to appreciate, failed to provide a reasonable rate of return, or caused a loss to the plan, (ii) the sale of the asset is in the best interest of the plan, (iii) the asset is an illiquid asset, and (iv) the plan made reasonable efforts to sell the asset to persons who are not parties in interest with respect to the plan without success; and in the case of an illiquid asset that is a parcel of real estate, a statement from a plan official attesting that no party in interest owns real estate that is contiguous to the plan's parcel of real estate on the recovery date.

P. **Payment of Benefits Without Properly Valuing Plan Assets on Which Payment Is Based.**

In this type of transaction, a defined contribution pension plan pays benefits based on the value of plan assets. If one or more of the plan assets are not valued at the current value, the benefit payments are not correct. If the plan's assets are overvalued, the current benefit payments will be too high. If the plan's assets are undervalued, the current benefit payments will be too low.

In order to correct the transaction, the applicant should establish the correct value of the improperly valued asset for each plan year, starting with the first plan year in which the asset was improperly valued. Then, restore to the plan for distribution to the affected plan participants, or restore directly to the plan participants, the amount by which all affected participants were underpaid distributions to which they were entitled under the terms of the plan, plus the lost earnings. The Annual Report Form 5500 must be amended and refiled for the last three plan years or all plan years in which the value of the asset was reportedly improper, whichever is less.

To correct the valuation defect, a plan official must determine the fair market value of the improperly valued asset for each year in which the asset was valued improperly. Once the fair market value has been determined, the participant's account balance for each year must be adjusted accordingly.

The plan official or the plan administrator must determine who received distributions from the plan during the time the asset was valued improperly. For distributions that were too low, the amount of the underpayment is treated as a principal amount for each individual who receives the distribution and the principal amount's and lost earnings must be paid to the affected individuals. For distributions that were too high, the total of the overpayments constitutes the principal amount for the plan. The principal amount plus lost earnings must be restored to the plan or to the participant.

In addition to the documentation typically required, the applicant must submit a copy of the qualified, independent appraiser's report for each plan year in which the asset was revalued; a written statement confirming the date that the amended Annual Report Form 5500 with correct valuation data were filed; if losses are restored to the plan, proof of payment to the plan and copies of the adjusted participants' account balances and if supplemental distributions are made, proof of payment to the individuals entitled to receive the supplemental distributions.

Q. Duplicative, Excessive or Unnecessary Compensation Paid by a Plan.

A plan which paid excessive compensation, including commissions or fees, to a service provider (such as an attorney, accountant, actuary, financial advisor, or insurance agent) or if a plan paid two or more persons providing the same service, or if the plan paid a service provider for unnecessary services, the principal amount plus the greater of lost earnings or restoration of profits must be restored to the plan. The principal amount is the difference between the amount actually paid by the plan to the service provider and the reasonable market value of such services.

In addition to the documentation typically required in a submission, the Applicant must submit the following documents: a written estimate of the reasonable market value of the services; the estimator's qualifications; and the cost of the services at issue during the period that such services were provided to the plan.

R. Expenses Improperly Paid by a Plan.

In this type of transaction a plan used plan assets to pay expenses, including commissions or fees, which should have been paid by the plan sponsor, to a service provider (i.e., an attorney, accountant, record keeper, actuary, financial advisor, or insurance agent) for services provided in connection with the administration and maintenance of the plan in circumstances where a plan provision requires that such plan expenses be paid by the plan sponsor, or services provided in connection with the establishment, design, or termination of the plan which relate to the activities of the plan sponsor in its capacity as seller. To correct this type of transaction, the principal amount, plus the greater of lost earnings or restoration of profits resulting from the use of the principal amount must be restored to the plan. The principal amount is the entire amount improperly paid by the plan to the service provider for expenses that should have been paid by the plan sponsor.

In addition to the documentation typically required, copies of the plan's accounting records which show the date and amount of expenses paid by the plan to the service provider must be provided.

S. Payment of Dual Compensation to a Plan Fiduciary.

In this type of transaction, plan pays the fiduciary for services rendered to the plan when the fiduciary already receives full-time pay from an employer or association of employees, whose employees are participants in the plan, or from an employee organization whose members are participants in the plan. The plan's payments to the plan fiduciary are not mere reimbursements of expenses properly and actually incurred by the fiduciary. To correct this type of transaction, the principal amount plus the greater of lost earnings or restoration of profits must be restored to the plan. The principal amount is the difference between the amount actually paid by the plan to the fiduciary.

In addition to the typical documentation required, the applicant must submit copies of the plan's accounting records which show the date and amount of compensation paid by the plan to the identified fiduciary.

## IX. CONCLUSION

The IRS and DOL realize that the retirement planning area is very complex and that disqualification is a harsh result. These programs offer the means to correct potentially disqualifying defects and provide alternatives to disqualification.

If a plan has disqualifying defects, the plan administrator or Plan Sponsor should consider voluntarily reporting the defect to the IRS. The plan administrator, Plan Sponsor or its representative may have a hypothetical consultation with the CAP coordinator. Moreover, voluntary reporting is one of the "equities" considered when negotiating the dollar amount of the sanction portion of the settlement.

When negotiating the sanction amount, consider all possible equitable arguments. Some common equitable arguments include: (1) the failure is an isolated, insignificant instance; (2) the plan has a history of compliance or, if the plan is new, the failure was corrected before examination; (3) the Plan Sponsor or administrator has established procedures and practices to ensure compliance; (4) the established procedures were followed and the failure occurred through an oversight or mistake; (5) where the mistake involves dollar amounts (*e.g.*, excess allocations, the amounts are insubstantial in light of the whole case; (6) the taxpayer makes an immediate and complete correction to cure the failure once it is discovered so that no participant or beneficiary suffers substantial detriment; (7) plan sponsor's good faith; (8) substantial compliance; and (9) no resulting detriment to participants.

Payment of the sanction may be made by the Plan Sponsor, the plan administrator and/or some or all of the participants. The IRS will not permit any tax benefit to be derived from the sanction payment. For example, the Plan Sponsor would not be entitled to a deduction for the sanction payment. Also, if a participant made a sanction payment, the participant would not be entitled to any basis in his or her benefits as a result of such payment.

Finally, in addition to negotiating the sanction amount, the plan administrator or Plan Sponsor should also negotiate the CAP document. The CAP document is not a form document and may be revised to fit each plan's circumstances. The CAP document should cover all years and ensure that all years are closed for all taxes. Only the person or entities paying the sanction need to sign the agreement. However, the agreement should protect the non-signing parties (*e.g.*, the participants will not be taxed since the plan was not disqualified).

## Appendix I

### Web Resources and IRS Contact Information

#### A. Web Resources:

1. Correcting Plan Errors Link [go to [www.irs.gov](http://www.irs.gov); click on Retirement Plans Community; click on Correcting Plan Errors]

<http://www.irs.gov/retirement/article/0,,id=96907,00.html>

2. Employee Plans newsletters. (Ability to subscribe electronically) [to go [www.irs.gov](http://www.irs.gov); click on Retirement Plans Community; click on Newsletters]

- a. Retirement News for Employers. (There is a regular article on plan correction issues entitled "The Fix Is In: Common Plan Mistakes".

<http://www.irs.gov/retirement/article/0,,id=122823,00.html>

- b. Employee Plans News

<http://www.irs.gov/retirement/article/0,,id=96731,00.html>

3. Fix It Guides

- a. 401(k) Fix It Guide: Finding, Fixing and Avoiding Common Plan Mistakes

[http://www.irs.gov/pub/irs-tege/401k\\_mistakes.pdf](http://www.irs.gov/pub/irs-tege/401k_mistakes.pdf)

- b. SEP Fix It Guide: Finding, Fixing and Avoiding Common Plan Mistakes

[http://www.irs.gov/pub/irs-tege/sep\\_fixit\\_guide.pdf](http://www.irs.gov/pub/irs-tege/sep_fixit_guide.pdf)

- c. SIMPLE IRA Fix It Guide: Finding, Fixing and Avoiding Common Plan Mistakes

[http://www.irs.gov/pub/irs-tege/simple\\_fixit\\_guide.pdf](http://www.irs.gov/pub/irs-tege/simple_fixit_guide.pdf)

#### B. IRS Contact Information:

(re: questions on correction issues)

1. Program Coordinators:

<u>Name</u>	<u>Phone</u>	<u>E-mail Address</u>
Avaneesh Bhagat	(626) 312-3628	<a href="mailto:Avaneesh.K.Bhagat@irs.gov">Avaneesh.K.Bhagat@irs.gov</a>

2. "Where is my VCP submission?" question: Please call (626) 312-4921

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[http://www.irs.gov/pub/irs-tege/sep\\_fixit\\_guide.pdf](http://www.irs.gov/pub/irs-tege/sep_fixit_guide.pdf)

- c. SIMPLE IRA Fix It Guide: Finding, Fixing and Avoiding Common Plan Mistakes

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## Appendix II

### Chart of Significant Changes to EPCRS

Rev. Proc. 2013-12 Section	Topic	Changes from Rev. Proc. 2008-50
<b>2.02 (new)</b>	VCP submission procedures	<ul style="list-style-type: none"> <li>• Completed Forms 8950 and 8951 must be included with all VCP submissions</li> <li>• New mailing addresses for VCP submissions (Section 11.12)</li> <li>• Plan sponsors may elect to apply the new procedures early (as permitted by Section 16)</li> </ul>
<b>2.03 (new)</b>	403(b) plans	<ul style="list-style-type: none"> <li>• May correct failures to comply with the §403(b) final regulations</li> <li>• Definitions for 403(b) failures are now substantially the same as those for qualified plans (use Rev. Proc. 2008-50 for pre-2009 failures)</li> <li>• Correction principles take into account relief provided by:               <ul style="list-style-type: none"> <li>○ Notice 2009-3</li> <li>○ Announcements 2009-34 and 2009-89</li> </ul> </li> </ul>
<b>2.04 (new)</b>	List of Modifications	Lists other modifications to Rev. Proc. 2008-50
<b>2.05 (formerly section 2.02)</b>	Request for comments	<p>Asks for comments on EPCRS improvements including:</p> <ul style="list-style-type: none"> <li>• How to correct failures to implement automatic enrollment for elective deferrals in a 401(k) or 403(b) plan</li> <li>• Whether Appendix A.05(2)(d)(ii) should also be applied to a 401(k)(13) safe harbor plan that has automatic escalation in elective deferrals</li> <li>• How to resolve specific issues relating to safe harbor notices and designated Roth contributions</li> </ul>
<b>4.04</b>	SCP and excess contributions	<ul style="list-style-type: none"> <li>• Promotes use of SCP by plans experiencing recurring excess annual additions if timely actions are taken</li> <li>• Limited to a plan that provides for</li> </ul>

## Significant changes to EPCRS under Revenue Procedure 2013-12

Rev. Proc. 2013-12 Section	Topic	Changes from Rev. Proc. 2008-50
		<p>elective deferrals and nonelective employer contributions that are not matching contributions</p> <ul style="list-style-type: none"> <li>• Excess annual additions are regularly corrected by return of elective deferrals to the affected employee within two and half months after the end of the plan's limitation year</li> </ul>
<b>4.08</b>	Orphan plans	Clarifies that SCP is not available for orphan plans.
<b>4.09</b>	457(b) plans	Provides a limited expansion for voluntary submissions (outside of EPCRS) involving 457(b) plans sponsored by certain tax-exempt entities.
<b>5.02</b>	Definitions for 403(b) plans	<p>Provides new definitions for 403(b) failures that occurred on or after January 1, 2009 because of the application of the 403(b) final regulations:</p> <ul style="list-style-type: none"> <li>• 403(b) plan document failure added</li> <li>• Modified definitions of Operational Failure, Demographic Failure, Employer Eligibility failure, and Excess Amount.</li> <li>• Overpayment and Favorable Letter definitions added.</li> </ul>
<b>5.04 (new)</b>	Defined term for Earnings calculations	Defines earnings for EPCRS purposes. Generally includes both gains and losses.
<b>6.02(4)(c)</b>	Funding of corrective contributions	Clarifies that for purpose of correcting a failed ADP, ACP, or multiple use test, any amounts used to fund QNECs must satisfy the definition of QNEC in Reg. §1.401(k)-6.
<b>6.02(4)(d)</b>	Defined benefit plans - corrective distributions	<ul style="list-style-type: none"> <li>• Clarifies the actuarial equivalence factors that should be used to determine a corrective distribution from a defined benefit plan.</li> <li>• Provides that a corrective distribution isn't subject to the §417(e)(3) present value rules if it is made to make up for</li> </ul>

## Significant changes to EPCRS under Revenue Procedure 2013-12

Rev. Proc. 2013-12 Section	Topic	Changes from Rev. Proc. 2008-50
		missed payments for a benefit not subject to these requirements.
<b>6.02(4)(e)(i) (new)</b>	Defined benefit plans – failing to comply with §436 restrictions in operation	<ul style="list-style-type: none"> <li>• Generally requires a sponsor to make a corrective contribution to a defined benefit plan to correct a failure to satisfy §436(b), (c), or (e).</li> <li>• Premature payment of benefits exceeding the §436(d) limitations will be treated and corrected as overpayment failures according to section 6.06(3).</li> <li>• Plan sponsors may correct overpayment failures arising from payments exceeding the limitations under §436(b), (c), or (e) by following section 6.06(3).</li> </ul>
<b>6.02(4)(e)(ii) (new)</b>	Defined benefit plans – impact of §436 restrictions on corrective distributions	Provides that if a defined benefit plan is under a §436 restriction at the time of correction, the plan sponsor must make a special contribution to the plan in order to make a corrective distribution or corrective plan amendment. Also, no special corrective contribution is required if the corrective distribution is not a prohibited payment under §436.
<b>6.02(5)(d)</b>	Locating lost participants	<p>Clarifies and provides additional details regarding the reasonable actions that must be taken to locate lost plan participants who are owed additional retirement benefits. In general, such actions include, but are not limited to:</p> <ol style="list-style-type: none"> <li>1. A mailing to the individual's last known address using certified mail, and, if that is unsuccessful,</li> <li>2. An additional search method, such as the Social Security letter forwarding program, a commercial locator service, a credit reporting agency, or Internet search tools.</li> </ol> <p>Depending on the facts and circumstances,</p>

## Significant changes to EPCRS under Revenue Procedure 2013-12

Rev. Proc. 2013-12 Section	Topic	Changes from Rev. Proc. 2008-50
		<p>the use of more than one of these additional search methods may be appropriate.</p> <p>The IRS letter Forwarding Program is no longer available as of August 31, 2012 as a search method for locating lost plan participants who are owed additional retirement benefits (Rev. Proc. 2012-35).</p> <p>Provides a limited extension of the SCP correction period and the VCP 150-day correction period for plan sponsors who are taking action to locate lost participants.</p>
6.03	Employer eligibility failure	Minor changes to improve clarity.
6.04(2)(c)	Defined benefit plans – spousal consent	Adds a sentence to take into account the §436 requirements if a single employer defined benefit plan is under restriction at the time of correction.
6.05(1), 6.05(2), 6.05(3)(a), 6.05(3)(c)	Determination letter application-not required	<p>Revised to clarify the situations when a determination letter application need not be submitted with a VCP submission. This includes:</p> <ul style="list-style-type: none"> <li>• Cases where the plan document failures are limited to late good faith amendments, late interim or late optional law changes</li> <li>• Demographic failures</li> <li>• Plan document failures corrected with IRS pre-approved plan documents</li> <li>• Off-cycle taxpayers who are adopting plan amendments to fix an operational failure. However, a determination letter application will have to be submitted during the next on-cycle year.</li> </ul>
6.05(3)(a)	Interim and good faith amendments	Clarifies the terms “good faith amendments,” “interim amendments” and “optional law changes.”
6.05(3)(a) & 6.05(3)(b)	Issued compliance	Revising section 6.05(3)(a) and adding a new section 6.05(3)(b) to improve clarity. It

## Significant changes to EPCRS under Revenue Procedure 2013-12

Rev. Proc. 2013-12 Section	Topic	Changes from Rev. Proc. 2008-50
(new)	statement	specifies the matters covered by an issued compliance statement in resolving certain late amender failures described in section 6.05(3)(a).
<b>6.05(3)(c) (new)</b> (formerly section 6.05(3)(b))	Determination letter application - not required	Specifies that the submission of a determination letter application is not required and may not be submitted to correct a demographic failure. A sentence was added to clarify that a compliance statement or closing agreement is limited to specific failures and years described within such documents and does not provide reliance for any other year.
<b>6.05(3)(d) (new)</b>	Determination letter application- not required	Clarifies that a new determination letter application isn't required and must not be submitted with a VCP submission for a failure to adopt amendments required under the terms of a favorable determination letter.
<b>6.05(5) (new)</b>	Determination letter application not required – preapproved plans	Addresses corrective amendments to pre-approved plans and provides limited circumstances that would prevent the plan sponsor from losing reliance on the plan's opinion or advisory letter.
<b>6.06(3)</b>	Overpayments – defined benefit plans	Modified to address the correction of overpayments from defined benefit plans.
<b>6.06(4) (new)</b>	Overpayments – defined contribution plans, including 403(b)	Clarifies that a corrective contribution isn't necessary if the overpayment was related solely to a premature distribution of the participant's vested benefit that was determined in accordance with plan terms. Repayments of premature distributions by the affected participants or beneficiaries must be reallocated to the participant's account.
<b>6.07</b>	Plan loan failures	Clarifies that the correction principles in that section also apply to Audit CAP.
<b>6.09</b>	Excise tax and other taxes	Edited for clarity

## Significant changes to EPCRS under Revenue Procedure 2013-12

Rev. Proc. 2013-12 Section	Topic	Changes from Rev. Proc. 2008-50
9.03	Correcting by plan amendment	Clarifies when a determination application must be submitted if required by section 6.05.
6.10 (new)	Correction principles - 403(b) plans	Added correction principles applicable to 403(b) plans, including the failure to timely adopt a written 403(b) plan.
10.07(1), (10)	VCP Forms 8950 and 8951	Revised to indicate that completed Forms 8950 and Form 8951 must be included with all VCP submissions. A VCP submission that does not include these forms will be considered seriously deficient and may be returned to the plan sponsor.
10.07(8)	Issuance of compliance statement	Revised to: <ul style="list-style-type: none"> <li>• Improve clarity</li> <li>• Explain how the new model compliance statement in Appendix C Part 1 will be issued and applicable restrictions</li> <li>• Explain what happens if a VCP submission is materially modified after being submitted to the IRS.</li> </ul>
10.08	Compliance statement	Reorganized to improve clarity and to work with the new Appendix C Part I VCP Submission Model Compliance Statement. <ul style="list-style-type: none"> <li>• Addresses the failure to timely adopt a 403(b) plan.</li> <li>• Clarifies that the reliance provided by a compliance statement is limited to the specific failures and years specified and does not provide reliance for any other failure or year.</li> </ul>
10.10	New Penalty of Perjury statement- anonymous submissions	Clarifies that if a VCP Anonymous Submission is made by an individual representing the plan sponsor, that individual must satisfy the power of attorney requirements and must provide an appropriate statement to that effect under penalty of perjury.
10.11(1)	Group submissions	Clarifies that the fee for master and prototype or volume submitter plans is based on the number of basic plan documents, not adoption agreements.
10.12(2)	Multiemployer and	Clarifies that if a qualification failure does not

## Significant changes to EPCRS under Revenue Procedure 2013-12

Rev. Proc. 2013-12 Section	Topic	Changes from Rev. Proc. 2008-50
	multiple employer plans	apply to all participating employers in a multiemployer or multiple employer plan, then the plan administrator may choose to have the compliance fee (in section 12) or sanction (in section 14) calculated separately for each employer based on the participants attributable to that employer, rather than basing it on the participants of the entire plan. Previously this was based upon plan assets.
<b>11.01</b>	Mandatory use of Forms 8950 & 8951  New Appendix C	Completely revised to: <ul style="list-style-type: none"> <li>• Require that Forms 8950 and 8951 be included with all VCP submissions</li> <li>• Make conforming changes consistent with this requirement</li> <li>• Consolidate Appendices D and F plus former Appendix F Schedules into a new two-part Appendix C</li> </ul>
<b>11.02</b>	Use of Appendix C Part II Schedules	Revised to discuss the use of the Appendix C Part II Schedules: <ul style="list-style-type: none"> <li>• Can be used for your VCP submission for certain failures and correction methods</li> <li>• Multiple Schedules may be included in a single VCP submission</li> <li>• A Schedule may be used only if it applies to the applicant's situation without modification</li> <li>• Detailed descriptions of each Schedule</li> </ul>
<b>11.03</b>	VCP submission requirements	Completely revised to reflect the use of Form 8950 and to refer to the new two-part Appendix C. Many of the previously listed items in this section have been moved to the Form 8950 application and its procedural requirements checklist.
<b>11.04(1) (new)</b>	Required documents	Revised to require the inclusion of completed Forms 8950 and 8951.

## Significant changes to EPCRS under Revenue Procedure 2013-12

Rev. Proc. 2013-12 Section	Topic	Changes from Rev. Proc. 2008-50
<b>11.04(3) (formerly 11.04(2) under Rev. Proc. 2008-50)</b>	Additional information	Requires the plan sponsor to include an attachment or cover letter that identifies the page and section of the document that fixes the qualification failures specified in the VCP submission if a restated plan document is being submitted as evidence of correction.
<b>11.05</b>	Copy of compliance fee check	Requires that a photocopy of the check for the VCP compliance fee be included with the submission.
<b>11.08</b>	Penalty of Perjury statements	<ul style="list-style-type: none"> <li>• Indicates that a plan sponsor must sign the penalty of perjury statement on the Form 8950 as part of a VCP submission. A separate penalty of perjury statement must be submitted if new or modified facts are presented or if there is a change to the VCP submission.</li> <li>• Clarifies that if a VCP Anonymous Submission is made by an individual representing the plan sponsor, that individual must satisfy the power of attorney requirements and must provide an appropriate statement to that effect under penalty of perjury.</li> </ul>
<b>11.09 (formerly 11.10 under Rev. Proc. 2008-50)</b>	Procedural requirements checklist	Eliminates the requirement to submit an Appendix C Checklist and refers to the Procedural Requirements Checklist on Form 8950.
<b>11.10 (formerly 11.11 under Rev. Proc. 2008-50)</b>	Orphan Plans (formerly "Designations")	<ul style="list-style-type: none"> <li>• Deletes unnecessary items that are addressed on Form 8950</li> <li>• A cover letter to the IRS should indicate if the submission concerns an Orphan Plan and include information that establishes that the VCP submission is being made by an Eligible Person as defined in section 5.03.</li> </ul>
<b>11.11 (formerly 11.12)</b>	Acknowledgment letter	Replaces references to Appendix E with Appendix D
<b>11.12 (formerly 11.13 under Rev. Proc.)</b>	Mailing address for VCP submissions	Revised to provide new mailing addresses for all VCP submissions made under this revenue

## Significant changes to EPCRS under Revenue Procedure 2013-12

Rev. Proc. 2013-12 Section	Topic	Changes from Rev. Proc. 2008-50
2008-50))		procedure. VCP submissions will no longer be mailed to a Washington, DC address. They will be mailed to the IRS Service Center in Covington, KY.
<b>11.14 (formerly 11.15 under Rev. Proc. 2008-50)</b>	Assembling the VCP submission	<ul style="list-style-type: none"> <li>• Requires the inclusion of Forms 8950 and 8951</li> <li>• Remove duplicative items captured by Form 8950</li> <li>• Clarifies that attachments and other necessary documents cannot be shared between a VCP submission and a related determination letter application</li> </ul>
<b>12.01</b>	VCP Fees and Notice of Electronic Fund Transfer	Adds that a completed Form 8951 must accompany all VCP submissions along with the initial compliance fee. It also provides notice that compliance fee checks may be converted into an electronic fund transfer.
<b>12.02(5) (new)</b>	Temporary VCP compliance fee reduction for 403(b) plans whose written plan was not adopted timely	Provides for a 50% fee reduction for a VCP submission that is limited to a failure to adopt a 403(b) plan timely in accordance with Notice 2009-3 if the VCP submission is mailed to the IRS by December 31, 2013.
<b>12.03(3) (new)</b>	VCP compliance fee	Provides that the VCP compliance fee will be limited to \$500 if: <ul style="list-style-type: none"> <li>• The sole failure of the submission is the failure to adopt an amendment (on which the favorable determination letter is conditioned) within the applicable remedial amendment period, and</li> <li>• The required amendment was or is adopted within three months of the expiration of the remedial amendment period for adopting the amendment.</li> </ul>
<b>12.04 (new)</b>	VCP compliance fee amount - multiple reduced fees	Provides that the fee for a VCP submission with multiple failures, each of which is subject to a reduced fee, is the lesser of: <ol style="list-style-type: none"> <li>1. the sum of the reduced fees, or</li> <li>2. the general fee determined under the</li> </ol>

## Significant changes to EPCRS under Revenue Procedure 2013-12

Rev. Proc. 2013-12 Section	Topic	Changes from Rev. Proc. 2008-50
		chart in section 12.02(1).
<b>12.05</b>  (formerly section 12.04 under Rev. Proc. 2008-50)	Group submissions	Clarifies that the compliance fee for a group submission for preapproved plans is based on the number of basic plan documents submitted and the number of employers who have adopted each basic plan.
<b>12.08</b> (formerly section 12.07 under Rev. Proc. 2008-50)	Number of plan participants for compliance fee purposes	Clarifies how to determine the number of plan participants if a Form 5500 series return is not required to be filed with regard to a qualified plan or 403(b) plan.
<b>14.04(1) &amp; (2)</b>	Audit CAP sanction	Updates the fee schedule and acronyms for non-amenders discovered during the determination letter application process not related to a VCP submission.
<b>14.04(3) (new)</b>	Audit CAP sanction	Limits the sanction imposed if a failure to timely adopt good faith amendments, interim amendments or amendments required to implement optional law changes (described in section 6.05(3)(a)) is the sole failure found by the IRS during the determination letter application process. The fee will be 40% of the applicable fee for "Employer's 2 <sup>nd</sup> Remedial Amendment Cycle" on the chart in section 14.04(1).
<b>14.04(4) (new)</b>	Audit CAP sanctions	Limits the sanction imposed if the sole failure discovered by the IRS during the determination letter application process consists of a failure to timely adopt an amendment (on which a favorable determination letter was conditioned) within the applicable remedial amendment period. The sanction is \$1,000, regardless of the number of plan participants, if the required amendment was adopted within three months of the expiration of the remedial amendment period for adopting such amendment.
<b>16</b>	Effective date	Generally effective April 1, 2013. Plan sponsors may elect to apply the provisions

**Significant changes to EPCRS under Revenue Procedure 2013-12**

Rev. Proc. 2013-12 Section	Topic	Changes from Rev. Proc. 2008-50
		of this revenue procedure on or after December 31, 2012. Plan Sponsors that choose this option must include required forms with their VCP submissions and must use the new mailing addresses. For 403(b) plans, the definitions under Rev. Proc. 2008-50 apply to failures that occurred in taxable years beginning before January 1, 2009.
<b>Appendix A.01</b>	General rule	Clarified to say that Appendix A and B corrections are reasonable and acceptable. Any correction method used that is not described in Appendix A or B would need to satisfy the correction principles of section 6.02 and other applicable rules set forth in this revenue procedure.
<b>Appendix A.03</b>	QNECs	In order to apply the safe harbor correction method used to correct a failed ADP, ACP, or multiple use tests, any amounts used to fund QNEC contributions must satisfy the definition of QNEC in Reg. §1.401(k)-6.
<b>Appendix A.05</b>	QNECs	In some cases, a matching contribution owed to a participant may be made by a corrective employer matching contribution instead of a QNEC. The corrective employer matching contribution would, unlike a QNEC, be subject to the plan's vesting schedule applicable to employer matching contributions. See also the examples in Appendix B.
<b>Appendix A.05(2)(d)</b>	Safe harbor 401(k) – excluded employees	Provides an additional safe harbor correction method for the improper exclusion of employees from safe harbor 401(k) plans designed to comply with §401(k)(12) or 401(k)(13). Generally, missed deferrals are deemed to equal 3% of compensation; however, it may be a higher amount if matching contributions are provided.
<b>Appendix A.05(6) (new)</b>	403(b) plan – excluded employees	Provides safe harbor correction methods for the improper exclusion of employees from making elective deferrals to a 403(b) plan because of a failure to comply with the

## Significant changes to EPCRS under Revenue Procedure 2013-12

Rev. Proc. 2013-12 Section	Topic	Changes from Rev. Proc. 2008-50
		universal availability requirement of §403(b)(12)(A)(ii). The missed deferral is deemed equal to the greater of: 3% of compensation, or the maximum deferral percentage for which the plan sponsor provides a matching contribution rate that is at least as favorable as 100% of the elective deferral made by the employee.
<b>Appendix A.05(7) (new)</b>	SIMPLE IRA plan – excluded employees	Provides safe harbor correction methods for the improper exclusion of employees from a SIMPLE IRA plan. The missed deferral is deemed to be 3% of compensation.
<b>Appendix A.06</b>	Defined benefit plan – corrective contributions	Under the safe harbor, to correct a failure to timely pay a required minimum distribution in a defined benefit plan that is subject to a restriction under §436 at the time of correction, the plan sponsor must make a special corrective contribution to the plan as part of the correction.
<b>Appendix A.07(2)</b>	Spousal consent	Under the safe harbor, payment of a lump sum to a spouse to correct a failure to obtain spousal consent before making distributions to a participant may be unavailable if the plan is subject to a restriction on accelerated benefit distributions under §436(d) at the time of correction. Such a payment would only be available if the plan sponsor (or other party) makes a special corrective payment to the plan.
<b>Appendix B</b>	Corrective matching contributions	Examples were modified to provide that, in some cases, a matching contribution owed to a participant may be made by a corrective employer matching contribution instead of a QNEC. The corrective employer matching contribution would, unlike a QNEC, be subject to the plan's vesting schedule applicable to employer matching contributions.
<b>Appendix B, Section 2.07(3)</b>	Defined benefit plan – early inclusion of	Clarifies that corrective plan amendments to resolve the early inclusion of otherwise eligible employees in a defined benefit plan must

## Significant changes to EPCRS under Revenue Procedure 2013-12

Rev. Proc. 2013-12 Section	Topic	Changes from Rev. Proc. 2008-50
	employees	consider the rules of §436 if the plan is subject to a restriction on increases in liability for benefits under §436(c) at time of correction.
<b>Appendix C (Based upon Former Appendices D and F and related Appendix F Schedules in Rev. Proc. 2008-50)</b>	New Appendix C	Revises Appendix C to consist of two parts: <ul style="list-style-type: none"> <li>• Part I: A Model VCP Submission Compliance Statement;</li> <li>• Part II: Various Schedules (formerly Appendix F Schedules) containing standardized failure descriptions and correction methods for use with VCP submissions.</li> </ul> None of the formatting and wording in these Appendix C documents may be modified by a VCP applicant or representative.
<b>Appendix C</b>	New model compliance statement and schedules	<ul style="list-style-type: none"> <li>• Model compliance statement and various schedules are divided into “Sections” rather than “Parts”</li> <li>• New Section IV will need to contain details and information regarding the specific methodology that will be used to locate affected former participants, including lost participants.</li> <li>• Adds enforcement language pertaining to 403(b) plans where the written plan was not timely adopted. Allows taxpayers to use the extended remedial amendment period set forth in Announcement 2009-89.</li> <li>• Clarifies that reliance on a compliance statement is limited to the specific failures and years described within such documents. It does not provide reliance for any other year.</li> </ul>
<b>Appendix C Part II Schedule 1 (formerly Appendix F, Schedule 1 under Rev. Proc. 2008-50)</b>	Late interim amendments	<ul style="list-style-type: none"> <li>• Reformatted</li> <li>• Gives instructions on when to use Schedule 1 and how to complete it</li> </ul>
<b>Appendix C Part II Schedule 2, (formerly Appendix F, Schedule</b>	Late amendments	Updated to include failures to timely amend for the 2004, 2008, 2009, 2010, 2011 and 2012 cumulative lists. Also includes:

## Significant changes to EPCRS under Revenue Procedure 2013-12

Rev. Proc. 2013-12 Section	Topic	Changes from Rev. Proc. 2008-50
<b>2 under Rev. Proc. 2008-50)</b>		<ul style="list-style-type: none"> <li>• Failure to timely adopt an amendment required by a favorable determination letter</li> <li>• Failure to adopt pre-approved defined benefit plans by April 30, 2012</li> <li>• Failure to timely adopt a written §403(b) plan</li> </ul>
<b>Appendix C Part II, Schedules 3, 4, &amp; 9 (formerly Appendix F, Schedules 3, 4, &amp; 9)</b>	Lost participants	<ul style="list-style-type: none"> <li>• Correction methods for failures affecting lost participants have been revised</li> <li>• Applicants will provide information on methods to be used to find missing or lost plan beneficiaries</li> <li>• Use as an attachment to Section IV of the Appendix C Part I Model VCP Submission Compliance Statement or any issued compliance statement</li> </ul>
<b>Appendix D (Formerly Appendix E under Rev. Proc. 2008-50)</b>	Acknowledgement letter	A new formatted Acknowledgement Letter can be found in Appendix D.

# Frequently Asked Questions about the Delinquent Filer Voluntary Correction Program



U.S. Department of Labor  
Employee Benefits Security Administration  
January 29, 2013

## **Q1. What is the Delinquent Filer Voluntary Compliance Program (DFVCP)?**

In an effort to encourage pension and welfare plan administrators to file overdue annual reports (commonly referred to as the Form 5500), the Department of Labor's Employee Benefits Security Administration (EBSA) is providing plan administrators with the opportunity to pay reduced civil penalties for voluntarily complying with the annual reporting requirements.

## **Q2. Who is eligible to participate in the DFVCP?**

Plan administrators are eligible to pay reduced civil penalties under the program if the required filings under the DFVCP are made prior to the date on which the administrator is notified in writing by the Department of Labor (Department) of a failure to file a timely annual report under Title I of the Employee Retirement Security Act of 1974 (ERISA).

## **Q3. How does a plan administrator file a delinquent Form 5500 or Form 5500-SF (for eligible small plans) under the DFVCP?**

Participation in the DFVCP is a two part process:

**First** – Electronically file a complete Form 5500 or Form 5500-SF Annual Return/Report, including all schedules and attachments, for each year the plan administrator is requesting relief.

Check the box labeled “DFVC program” located in Part I, Line D of the Form 5500 or Form 5500-SF.

The Form 5500 and Form 5500-SF must be electronically transmitted to EFAST2 according to the directions found at [www.efast.dol.gov](http://www.efast.dol.gov). FAQ4 of the Frequently Asked Questions on the EFAST2 Electronic Filing System (available at [www.dol.gov/ebsa/faqs/faq-EFAST2.html](http://www.dol.gov/ebsa/faqs/faq-EFAST2.html)) explains how to submit a delinquent Form 5500 electronically to EFAST2 for plan years prior to 2009.

Do not attach any information on separated deferred vested participants (i.e., Schedule SSA or Form 8955-SSA) for the applicable plan year to any filing under EFAST2. Rather, submit the required information directly to the IRS (on Form 8955-SSA and required attachments). See [www.irs.gov/ep](http://www.irs.gov/ep) for additional information.

**Second** – Use the online calculator to compute the correct penalty amount. After using the calculator, you can choose to make your payment electronically simply by following the on-screen instructions when the calculator has computed the penalty amount. You will be automatically given a receipt for your electronic submission.

**IMPORTANT:** We strongly recommend you electronically submit your payment to the DFVCP. This will help you avoid making costly errors calculating the payments due the DFVCP.

You may also make your payment by check by printing out and mailing a paper copy of the electronically completed and filed Form 5500 or Form 5500-SF, without schedules or attachments, and a penalty check made to the Department of Labor for the applicable penalty amount (described below).

DFVCP  
P.O. Box 71361  
Philadelphia, PA 19176-1361

There is no address to receive submissions from a private delivery service.

Receipts are NOT given for payments by check.

**IMPORTANT:** Even if submitting the penalty check by mail, to avoid costly errors, you should use online penalty calculator when calculating the payment due to the DFVCP. The calculator is available at <https://www.askebsa.dol.gov/dfvcepay/calculator>.

All paper submissions to the DFVCP must be included in the same envelope or package to ensure that those filings count towards the per-plan capped penalty amount. Similarly, filers submitting to the DFVCP electronically must include information for all filings in the same online transaction in order for the penalty cap to apply.

#### **Q4. What is the applicable penalty amount?**

**Small Plan Filers.** In the case of a plan with fewer than 100 participants at the beginning of the plan year (hereinafter small plan), the applicable penalty amount is \$10 per day for each day the annual report is filed after the date on which the annual report was due (without regard to any extensions), not to exceed \$750. In the case of a DFVCP submission relating to more than one delinquent annual report filing for the same plan, the maximum penalty amount is \$750 for each annual report, not to exceed \$1,500 per plan.

**Note:** The “80 to 120” participant rule described in 29 § CFR 2520.103-1(d) is applicable in determining whether a plan is a small or large plan.

**Example 1.** An administrator of a **small plan** with a calendar year plan year files the annual report for the 2009 plan year on March 31, 2011. Under DFVCP, the applicable penalty amount is \$750 (though the penalty amount calculated at \$10 per day would be \$2,430 for 243 days, the per-filing cap for small plans of \$750 applies).

**Example 2.** Assume the same facts as in Example 2, except that the filer filed annual reports for the same plan for the 2006, 2007, and 2008 plan years on March 31, 2011. Under the DFVCP, the applicable penalty amount is \$1,500, which is the per-plan filing cap for small plans.

**Large Plan Filers.** In the case of a plan with 100 or more participants at the beginning of the plan year and which is not eligible for the 80/120 participant rule (hereinafter large plan), the applicable penalty amount is \$10 per day for each day the annual report is filed after the date on which the annual report was due (without regard to any extensions), not to exceed \$2,000. In the case of a DFVCP submission relating to more than one delinquent filing for the same plan, the maximum penalty amount is \$2,000 for each annual report, not to exceed \$4,000 per plan.

Filers submitting to the DFVCP electronically must include information for all filings in the same online transaction in order for the penalty cap to apply. Similarly, all paper submissions to the DFVCP must be included in the same envelope or package to ensure that those filings count towards the per-plan capped penalty amount.

**Example 1.** An administrator of a **large plan** with a calendar year plan year files the annual report for the 2009 plan year on August 6, 2010. The administrator failed to properly extend the filing due date of July 31, 2010. Under the DFVCP, the applicable penalty amount would be \$60 (6 days x \$10).

**Example 2.** Assume the same facts as in Example 1, except that the filer filed the annual report on March 31, 2011. Under the DFVCP, the applicable penalty amount is \$2,000 (though the penalty amount calculated at \$10 per day would be \$2,430 for 243 days, the per-filing cap of \$2,000 applies).

**Example 3.** Assume the same facts as in Example 2, except that the filer filed annual reports for the same plan for the 2006, 2007, and 2008 plan years on March 31, 2011. Under the DFVCP, the applicable penalty amount is \$4,000, which is the per-plan filing cap for large plans.

**Example 4.** Assume the same facts as in Example 3, except that the filer is also submitting an additional plan year 2006 filing under the DFVCP for another plan. Under the DFVCP, the penalty amount is \$6,000 (\$4,000 applicable to the three filings discussed in Example 3, plus \$2,000 for the Form 5500 filed for the other plan).

There is now an online DFVCP penalty calculator available to help you easily and accurately compute the amount you owe to participate in the program. We encourage you to use this calculator so you can avoid any errors that could delay your participation on the program.

**Q5. If not submitting payment electronically, to whom should the check be made payable?**

The penalty check should be made payable to the Department of Labor.

**Q6. Is participation under the DFVCP available to all Form 5500 Series filers?**

No. The relief under the DFVCP is available only to the extent that a Form 5500 is required to be filed under Title I of ERISA. If annual reporting for a plan is only required under the Internal Revenue Code, it is not eligible for penalty relief under DFVCP. However, IRS penalties may still apply. For example, plans covering only self-employed individuals sole owners (and their spouses) or partners (and their spouses) are not subject to Title I of ERISA. Such plans electing to file Form 5500-SF with EFAST2 instead of filing the Form 5500-EZ with the IRS are not eligible to participate in the DFVCP program. Plan administrators may call **202-693-8360** if they have questions about whether the program applies to their filings.

**Q7. Which version of the Form 5500 should be filed?**

Generally, the filer should file using the correct year form that is delinquent. However, there are exceptions. The Department has available on its website at **[www.dol.gov](http://www.dol.gov)** an online tool to help delinquent filers determine which versions of Forms 5500/5500-SF and schedules to use. Filers simply enter very limited information as prompted (such as the beginning date of the plan year for which the late filings are made) and the tool identifies the correct versions of the Forms 5500/5500-SF to use.

FAQ 4 of the Frequently Asked Questions on the EFAST2 Electronic Filing System (available at **[www.dol.gov/ebsa/faqs/faq-EFAST2.html](http://www.dol.gov/ebsa/faqs/faq-EFAST2.html)**) explains how to submit a delinquent Form 5500 electronically to EFAST2 for plan years prior to 2009.

**CAUTION:** Do not include a Schedule SSA or IRS Form 8955-SSA (information on separated, deferred vested participants) in an electronic filing with EFAST2. Rather, submit the Form 8955-SSA to the IRS (along with all required attachments). See **[www.irs.gov/ep](http://www.irs.gov/ep)** for additional information.

**Q8. What civil penalties may be assessed by the Department against plan administrators who fail to file a timely annual report and who do not participate in the DFVCP?**

The following penalties may be assessed against plan administrators:

- **Late Filers** - Plan administrators filing a late annual report (i.e., after the date the report was required to be filed, including extensions) may be assessed \$50 per day, with no limit, for the period they failed to file, determined without regard to any extensions for filing.
- **Non-Filers** - Plan administrators who fail to file an annual report may be assessed a penalty of \$300 per day, up to \$30,000 per year, until a complete annual report is filed.

**Q9. A plan administrator for a plan is delinquent on annual report filings for multiple years. If during that period, the plan's classification has shifted between being a large and small plan, which penalty cap applies to the plan's DFVCP submission?**

If, during the years of non-filing, there is at least one year where the plan is a large plan, for purposes of the DFVCP the plan must use the large plan penalty amounts of \$10 per day up to a maximum of \$2,000 per filing, not to exceed \$4,000 per plan.

**Q10. Is there a different per-plan penalty cap that applies to administrators of small plans sponsored by Internal Revenue Code (Code) section 501(c)(3) organizations (including Code section 403(b) small plans)?**

Yes. In the case of a small plan sponsored by a Code section 501(c)(3) organization (including a Code section 403(b) small plan required to file an annual report), the applicable penalty amount is \$10 per day for each day the annual report is filed after the date on which the annual report was due (without regard to any extensions), not to exceed \$750 regardless of the number of delinquent annual reports for the plan submitted as part of the same DFVCP submission.

This per-plan penalty cap, however, will not be available if, as of the date the plan files under the DFVCP, there is a delinquent or late annual report due for a plan year during which the plan was a large plan, in which case the large plan cap will apply.

If you are using the online penalty calculator or choose to submit to the program electronically, you must answer "Yes" on the calculator to the question "Are you a 501(c)(3) organization?" If you are paying by mail you must include the notation "501(c)(3) Organization" in the upper-right corner of the first page of the paper print out of the electronically filed Form 5500 or Form 5500-SF that must be mailed to the DFVCP, along with the penalty check.

**Q11. Are extensions considered when calculating penalties under the DFVCP?**

No. All penalties under the DFVCP are calculated at \$10 per day, beginning on the day after the date the filing was due, without regard to any extensions.

**Q12. May plans participate in the DFVCP if they have already received correspondence from the Department or the IRS?**

Plan administrators are eligible to pay reduced civil penalties under the program if the required filings under the DFVCP are made prior to the date on which the administrator is notified in writing by the Department of a failure to file a timely annual report under Title I of ERISA.

An IRS late-filer letter will not disqualify a plan from participating in the DFVCP.

A Department of Labor Notice of Intent to Assess a Penalty will always disqualify a plan.

**Q13. Does a plan administrator waive any rights upon filing under the DFVCP?**

Yes. Payment of the penalty amount under the terms of the DFVCP constitutes, with regard to the filings submitted under the Program, a waiver of the right both to receive notice of the penalty assessment from the Department and to contest the Department's assessment of the DFVCP penalty amount.

**Q14. If a filing has been made under the DFVCP, will the plan administrator be liable for any other Department of Labor annual reporting civil penalties?**

Annual reports that are filed under the DFVCP are subject to the usual edit checks and other enforcement reviews. Plan administrators generally will have an opportunity to correct deficiencies in accordance with the procedures described in 29 CFR § 2560.502c-2. The failure to correct deficiencies in accordance with these procedures may result in the assessment of further deficient filer penalties.

**Q15. Can plan assets be used to pay the civil penalties assessed under ERISA § 502(c)(2)?**

No. The plan administrator is personally liable for the payment of civil penalties assessed under ERISA § 502(c)(2). Civil penalties, including penalties paid under the DFVCP, cannot be paid from the assets of an employee benefit plan.

**Q16. May an administrator of an apprenticeship and training plan, as described in 29 CFR § 2520.104-22, or an administrator of a top hat plan, as described in 29 CFR § 2520.104-23, participate in the DFVCP?**

Yes. Administrators of apprenticeship and training plans and administrators of pension plans for a select group of management or highly compensated employees (top hat plans), may file the applicable notice and statement described in regulation §§ 2520.104-22 and 2520.104-23, respectively, under the DFVCP in lieu of filing any past due annual reports. By properly filing these statements as described in regulation §§ 2520.104-22 and 2520.104-23 and meeting the other applicable DFVCP requirements, administrators will be considered as having elected compliance with the exemption and/or alternative method of compliance prescribed in §§ 2520.104-22, or 2520.104-23, as appropriate, for all subsequent plan years.

**Q17. How does an administrator of an Apprenticeship & Training Plan participate in the DFVCP?**

The plan administrator must prepare the statement described in regulation section 29 CFR § 2520.104-22 and file it at the following address:

U.S. Department of Labor  
Employee Benefits Security Administration  
Apprenticeship and Training Plan Exemption  
200 Constitution Avenue, NW, N-1513  
Washington, DC 20210

The plan administrator must also submit to the DFVC program, either electronically or on paper through mail or using a private delivery service.

If submitting to the DFVCP electronically, follow the calculator instructions for online payment at [www.efast.dol.gov](http://www.efast.dol.gov). Use plan number 999 for all apprenticeship and training plans. You will be given a receipt for your electronic submission.

If sending your DFVCP submission to the Program using paper and making payment by check, the plan administrator must complete the most current Form 5500 Annual Return/Report (without schedules or attachments), items 1a–1b, 2a–2c, 3a–3c, and use plan number 999 for all apprenticeship and training plans. The paper copy of the form must be signed and dated, and be accompanied by a check for \$750 made payable to the U.S. Department of Labor, and mailed to:

DFVCP  
P.O. Box 71361  
Philadelphia, PA 19176-1361

There is no address to receive submissions from a private delivery service.

Receipts are NOT given for payments by check.

Note: A paper submission of the Form 5500 to the DFVC program is in addition to the submission of the statement described in regulation section 29 CFR § 2520.104-22 that is filed directly with the Department. Additionally, the Form 5500 prepared for DFVCP purposes should not be filed with EFAST2.

The applicable \$750 penalty cap is for each DFVCP submission, without regard to the number of plans maintained by the same plan sponsor for which the notices and statements are being filed or the number of participants covered by the plan or plans.

### **Q18. How does an administrator of a Top-Hat Plan participate in the DFVCP?**

The plan administrator must prepare the statement described in regulation section 29 CFR § 2520.104-23 and file it at the following address:

U.S. Department of Labor  
Employee Benefits Security Administration  
Top Hat Plan Exemption  
200 Constitution Avenue, NW, N-1513  
Washington, DC 20210

**Note:** If a plan sponsor has more than one top hat plan that is participating in the DFVC program at the same time, a single statement covering all of the plans may be filed consistent with the general requirements for top hat plan filings under 29 CFR § 2520.104-23.

The plan administrator must also submit to the DFVC program, either electronically or on paper through the mail or by using a private delivery service.

If submitting to the DFVCP electronically, follow the calculator instructions for online payment at [www.efast.dol.gov](http://www.efast.dol.gov). Use the plan number 888 for all top hat plans. You will be given a receipt for your electronic submission.

If sending your DFVCP submission to the Program using paper and making payment by check, complete the most current Form 5500 Annual Return/Report (without schedules or attachments), items 1a–1b, 2a–2c, 3a–

3c, and use plan number 888 for all the top hat plans covered by the top hat plan filing under 29 CFR § 2520.104-23. The paper copy of the form must be signed and dated, and be accompanied by a check for \$750 made payable to the U.S. Department of Labor, and mailed to:

DFVCP  
P.O. Box 71361  
Philadelphia, PA 19176-1361

There is no address to receive submissions from a private delivery service.

Receipts are NOT given for payments by check.

**Note:** A paper submission of the Form 5500 to the DFVC program is in addition to the submission of the statement described in regulation section 29 CFR § 2520.104-22 that is filed directly with the Department. Additionally, the Form 5500 prepared for DFVCP purposes should not be filed with EFAST2.

The applicable \$750 penalty cap is for each DFVCP submission, without regard to the number of plans maintained by the same plan sponsor for which the notices and statements are being filed or the number of participants covered by the plan or plans.

**Q19. Is the DFVCP applicable to filings made by direct filing entities (DFEs) (i.e., master trust investment accounts, pooled separate accounts, common/collective trusts, 103-12 IEs, and group insurance arrangements)?**

The DFVCP is not applicable to DFE filings made for master trust investment accounts, pooled separate accounts, common/collective trusts and 103-12 IEs. The Form 5500 filed by these DFEs is an integral part of the annual report of the participating employee benefit plans. If a Form 5500 was timely filed for the participating employee benefit plans, a failure to timely file a DFE Form 5500 for these entities may cause the plan's annual report to be incomplete or inaccurate, but it does not result in the plan being a late or non-filer. The plan's Form 5500, however, may be subject to rejection for being incomplete or inaccurate, and, if rejected, a plan administrator who failed to correct the problem would be subject to penalty assessments by the Department.

A Form 5500 filed for a group insurance arrangement (GIA) under the Department's regulations relieves the plan administrators of the individual plans participating in the GIA from the requirement to file a separate Form 5500/Form 5500-SF for each plan. The Department will allow a GIA that failed to file a GIA Form 5500 on time to use the DFVCP to correct the late filing. GIAs participating in the DFVCP are subject to the conditions applicable to large plan filers.

**Q20. Is it possible to obtain a waiver from the applicable Department penalty amount under the DFVCP if the plan administrator can demonstrate that there is reasonable cause why the penalty should not be assessed?**

No. Payment of a penalty under the terms of the DFVCP constitutes a waiver of an administrator's right both to receive a notice of assessment from the Department and to contest the Department's assessment of the penalty amount. If the plan administrator chooses not to waive these rights, the plan administrator must file the delinquent annual report in the regular manner and not pursuant to the DFVCP; the administrator can then contest the Department's assessment of the normal late penalty amount.

**Q21. Does participation in the DFVCP protect the plan administrator from other penalties that may be assessed by the Internal Revenue Service (IRS) or the Pension Benefit Guaranty Corporation (PBGC) for failing to timely file a Form 5500 Annual Return/Report?**

The Department understands that the IRS may provide relief from filing penalties under the Internal Revenue Code for a delinquent Form 5500 or Form 5500-SF for a Title I plan if (i) all applicable conditions of the DFVC Program have been satisfied, and (ii) any information required concerning separated deferred vested participants (Form 8955-SSA) for the applicable plan year has been filed directly with the IRS.

The Department understands the PBGC has agreed to provide certain penalty relief under the Code and Title IV of ERISA for delinquent Form 5500s filed for Title I plans where the conditions of the DFVCP have been satisfied. Check with the IRS and PBGC for further information on penalty relief under the Code and Title IV of ERISA.

**Q22. How can a plan administrator obtain Form 5500 and Form 5500-SF forms and related schedules and instructions?**

To obtain correct-year schedules and related instructions, go to <http://www.dol.gov/ebsa/5500main.html> and print the schedules and instructions of the form year that corresponds to the plan year for which you are filing. FAQ4 of the Frequently Asked Questions on the EFAST2 Electronic Filing System (available at [www.dol.gov/ebsa/faqs/faq-EFAST2.html](http://www.dol.gov/ebsa/faqs/faq-EFAST2.html)) explains how to submit a delinquent Form 5500 electronically to EFAST2 for plan years prior to 2009 or otherwise outside of the EFAST2 current processing cycle.

**Q23. Where can a plan administrator obtain more information about the DFVCP?**

For more information about the DFVCP, call EBSA's Office of the Chief Accountant at 202-693-8360 or visit our web site at [www.efast.dol.gov](http://www.efast.dol.gov).

# Fact Sheet



U.S. Department of Labor  
Employee Benefits Security Administration  
January 29, 2013

## Delinquent Filer Voluntary Compliance Program

The Delinquent Filer Voluntary Compliance Program (DFVCP) is designed to encourage voluntary compliance with the annual reporting requirements under the Employee Retirement Income Security Act (ERISA). The DFVCP gives delinquent plan administrators a way to avoid potentially higher civil penalty assessments by satisfying the program's requirements and voluntarily paying a reduced penalty amount. To increase incentives for delinquent plan administrators to voluntarily comply with ERISA's annual reporting requirements, the Department further reduced penalties under the DFVCP, and updated and simplified the rules governing participation in the program.

### Who is Eligible

Eligibility for the DFVCP continues to be limited to plan administrators with filing obligations under Title I of ERISA who comply with the provisions of the program and who have not been notified in writing by the Department of a failure to file a timely annual report under Title I of ERISA. For example, Form 5500-EZ filers, and filers electing to file a Form 5500-SF instead of a Form 5500-EZ for "one-participant plans," are not eligible to participate in the DFVCP because such plans are not subject to Title I. A "one-participant plan" for this purpose is a plan that covers only the self-employed (e.g., a sole proprietor (and spouse) or one or more partners (and spouses)).

### Program Criteria

Participation in the DFVCP is a two-part process:

First, electronically file with EFAST2 a complete Form 5500 or, if eligible, Form 5500-SF, Annual Return/Report, including any required schedules and attachments, for each year relief is requested. However, do not submit to EFAST2 the information on separated deferred vested participants (Form 8955-SSA); file this directly with IRS.

To ensure proper processing, the "DFVC program" box on line "D" of Part I of the 5500 or 5500-SF must be checked. Special simplified rules apply to "top hat" plans and apprenticeship and training plans.

Second, electronically submit the filing information and payment to the DFVCP using the DFVC Calculator at <http://www.dol.gov/ebsa/calculator/dfvcmain.html>. You may also submit your payment and filing information to the DFVCP through the mail. The plan administrator is personally liable for the applicable penalty amount. Amounts paid under the DFVCP shall not be paid from the assets of an employee benefit plan.

### Penalty Structure

The basic penalty under the program is \$10 per day for delinquent filings.

**"Per filing" cap.** The maximum penalty for a single late annual report is \$750 for a small plan (generally a plan with fewer than 100 participants at the beginning of the plan year) and \$2,000 for a large plan.

**"Per plan" cap.** The DFVCP also includes a "per plan" cap. This cap is designed to encourage reporting compliance by plan administrators who have failed to file an annual report for a plan for multiple years. The "per plan" cap limits the penalty to \$1,500 for a small plan and \$4,000 for a large plan regardless of the number of late annual reports filed for the plan at the same time. There is no "per administrator" or "per sponsor" cap. If the same

person is the administrator or sponsor of several plans required to file annual reports under Title I of ERISA, the maximum applicable penalty amounts would apply for each plan.

Small plans sponsored by certain tax-exempt organizations. A special “per plan” cap of \$750 applies to a small plan sponsored by an organization that is tax-exempt under Internal Revenue Code §501(c)(3). The \$750 limitation applies regardless of the number of late annual reports filed for the plan at the same time. It is not available, however, if as of the date the plan files under the DFVCP, there is a delinquent annual report for a plan year during which the plan was a large plan.

“Top hat” plans and apprenticeship and training plans. The “per plan” cap for plans eligible to use the “top hat” plan and apprenticeship and training plan options is \$750.

## **DFVCP Participation Procedures**

The procedures governing participation in the DFVCP are intended to make the program easy to use:

- File the delinquent Form 5500/5500SF electronically with EFAST2. Please refer to the FAQs on EFAST2 Form 5500 Processing at [www.dol.gov/ebsa/faqs/faq-EFAST2.html](http://www.dol.gov/ebsa/faqs/faq-EFAST2.html) for details on which forms and schedules are to be used for delinquent filings.
- Use the online calculator at [www.efast.dol.gov](http://www.efast.dol.gov) to compute the correct penalty amount. After using the calculator, you can choose to make your payment electronically simply by following the on-screen instructions when the calculator has computed the penalty amount. You will be automatically be given a receipt for your electronic payment.

You may also make your payment by check by sending it with the required information to the addresses written in the DFVCP FAQs. If you pay by check, you must print out a paper copy of the electronically filed Form 5500 or Form 5500-SF and include it with your check. In addition, receipts for payment are NOT given for payments by check.

## **IRS and PBGC Penalties**

DFVCP does not relieve filing penalties under the Internal Revenue Code or Title IV of ERISA. The Department understands that the IRS may provide relief from late-filing penalties under the Internal Revenue Code for a delinquent Form 5500 or Form 5500-SF of a Title I plan if (i) all applicable conditions of the DFVC Program have been satisfied, and (ii) any information required concerning separated deferred vested participants (Form 8955-SSA) for the applicable plan year has been filed directly with the IRS.

The Pension Benefit Guaranty Corporation may provide certain penalty relief for delinquent annual returns/reports filed for Title I plans where the conditions of the DFVCP have been satisfied.

Contact the IRS and PBGC for further information.

## **Contacts for Additional Information**

For more detailed information, or if you have questions about the DFVCP, either call EBSA at [202-693-8360](tel:202-693-8360) or visit [www.dol.gov/ebsa](http://www.dol.gov/ebsa). For additional information about the Form 5500 and Form 5500-SF Annual Return/Report, visit the EFAST Internet site at [www.efast.dol.gov](http://www.efast.dol.gov), or call the EBSA help desk at [1-866-463-3278](tel:1-866-463-3278).

This fact sheet has been developed by the U.S. Department of Labor, Employee Benefits Security Administration, Washington, DC 20210. It will be made available in alternate formats upon request: Voice phone: 202-693-8664; TTY: 202-501-3911. In addition, the information in this fact sheet constitutes a small entity compliance guide for purposes of the Small Business Regulatory Enforcement Fairness Act of 1996.