

# Plan Correction Programs

## Recognizing Client Problems and Finding Solutions

Robert Higgins, JD, AIFA, CEBS

**2013 fi360 Conference**

**Scottsdale, AZ**

**April 18-19, 2013**

# Plan Corrections Programs

- Internal Revenue Service (IRS)
  - Tax Exempt and Government Entities (TEGE)
    - Employee Plans Compliance Resolution System (EPCRS)
- Department of Labor (DoL)
  - Employee Benefits Security Administration (EBSA)
    - Voluntary Fiduciary Corrections Program (VCP)
    - Delinquent Filer Voluntary Corrections Program (DFVCP)

# Employee Plans Compliance Resolution System (EPCRS)

- Opening Day:

System update effective April 1, 2013.

- Rev. Proc. 2013-12

- 403(b) plans now included

- 457 (b) plans of tax-exempt may now submit

# EPCRS

- Government recognizes that inadvertent “Plan Operational Errors” frequently happen during plan administration.
  - EPCRS allows plans to fix these errors.
  - Broad availability encourages compliance and protects participants
  - Preferred methods of corrections.

**IGNORE AT YOUR CLIENT’S PERIL**

# EPCRS

## Three Components:

### 1. SCP: Self-Correction Program

- No compliance fee
- No contact with IRS

### 2. VCP: Voluntary Correction Program

- File with IRS
- Payment of fee (based on number of participants)

### 3. Audit CAP [after an IRS examination or discovery of a compliance error during Determination Letter application]

- File with IRS
- Payment of substantial fees and penalties

# Effect Of EPCRS Reliance

- For a Qualified Plan, a 403(b), a SEP, or a SIMPLE IRA Plan, if the eligibility requirements are satisfied and the Plan Sponsor corrects a failure in accordance with the applicable requirements of SCP..., VCP..., or Audit CAP..., **the Service will not treat the plan as failing to meet the requirements of § 401(a), 403(b), 408(k), or 408(p), as applicable, because of the failure.**
- Thus, for example, if the Plan Sponsor corrects a failure in accordance with the requirements of this revenue procedure, [it] will not thereby be treated as failing to satisfy § 401(a), 403(b), 408(k), or 408(p), as applicable, for purposes of applying §§ 3121(a)(5) (FICA taxes) and 3306(b)(5) (FUTA taxes).

# SCP: Self-Correction Program

- Determine the error.
  - “Insignificant operational error.”
  - “Significant operational error.” [Generally must correct by the last day of the second plan year following the year of the error.]
- Fix the error (including earnings adjustment.)
- Take measures to prevent a recurrence.
- Document all research and corrections (in case of future examination or audit.)
- If you don’t know how – get expert help.

# Voluntary Correction Program

(2) VCP. Qualified Plans, 403(b) Plans, SEPs, and SIMPLE IRA Plans are eligible for VCP. VCP provides general procedures for correction of all Qualification Failures: Operational, Plan Document, Demographic, and Employer Eligibility. VCP also provides general procedures for the correction of participant loans that did not comply with the requirements of § 72(p)(2).

Rev. Proc. 2013-12, Section 4



# VCP: Voluntary Correction Program

- Determine the error (more significant than SCP type or “egregious”).
- Prepare the fix (including earnings.)
- Submit to IRS:
  - Standardized format and submission checklist available on-line.
  - Provide Power of Attorney (Form 2848).
  - Enclose required fees (see next slide.)

# VCP Submission Fees

Generally, the compliance fee for Qualified Plan and 403(b) Plan VCP submission (including Anonymous Submissions) is determined as follows:

<b><u>Number of Participants</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 1,000	\$ 8,000
1,001 to 5,000	\$ 15,000
5,001 to 10,000	\$ 20,000
Over 10,000	\$ 25,000

**NOTE:**

The applicable fee for a VCP submission that contains only nonamender failures is reduced by 50% if it is submitted within a one-year period following the expiration of the plan's remedial amendment period for complying with such changes.

# Common errors submitted under VCP

## **Specific correction methods are provided for the following failures**

- Failure to properly provide the minimum top-heavy benefit under § 416 to non-key employees.
- Failure to satisfy the ADP..., ACP..., or, for plan years beginning on or before December 31, 2001, the multiple use tests...
- Failure to distribute elective deferrals in excess of the § 402(g) limit.
- Exclusion of an eligible employee from all contributions or accruals under the plan for one or more plan years.
- Failure to obtain participant or spousal consent for a distribution subject to the participant and spousal consent rules .
- Failure to satisfy the § 415 limits in a defined contribution plan.
- 403(b) failures for orphan contracts or other assets.

# Common errors submitted under VCP

The following failures are described in the Schedules:

- (a) Interim and Certain Discretionary Nonamender Failures (Schedule 1):
- (b) Nonamender Failures and Failure to Adopt a 403(b) Plan Timely (Schedule 2)
- (c) SEPs and SARSEPs (Schedule 3)
- (d) SIMPLE IRAs (Schedule 4)
- (e) Plan Loan Failures (Schedule 5)
- (f) Employer Eligibility Failure (Schedule 6)
- (g) Failure to Distribute Elective Deferrals in Excess of the § 402(g) Limit (Schedule 7)
- (h) Failure to Pay Required Minimum Distributions Timely under §401(a)(9) (Schedule 8)
- (i) Correction by Plan Amendment (in accordance with Appendix B) (Schedule 9)

# Audit CAP

**Effect of examination.** If the plan or Plan Sponsor is Under Examination, VCP is not available and SCP is only available as follows: while the plan or Plan Sponsor is Under Examination, insignificant Operational Failures can be corrected under SCP; and, if correction of significant operational failures has been completed or substantially completed ...before the plan or Plan Sponsor is Under Examination, correction of those failures can be completed under SCP.

Rev. Proc. 2013-12, Section 4

# AUDIT CAP SANCTION

Determination of sanction. ..., the sanction under Audit CAP is a negotiated percentage of the Maximum Payment Amount. Sanctions will not be excessive and will bear a reasonable relationship to the nature, extent, and severity of the failures....

In the case of any participant loan that did not comply with the requirements of § 72(p)(2), the Maximum Payment Amount will include the tax the Service could collect as a result of the loan not being excluded from gross income under § 72(p)(2).

# Maximum Payment Amount

... a monetary amount that is approximately equal to the tax the Service could collect upon plan disqualification and is the sum for the open taxable years of the:

- a) tax on the trust (Form 1041) (and any interest or penalties applicable to the trust return),
- b) additional income tax resulting from the loss of employer deductions for plan contributions (and any interest or penalties applicable to the Plan Sponsor's return),
- c) additional income tax resulting from income inclusion for participants in the plan (Form 1040), including the tax on plan distributions that have been rolled over to other qualified trusts (as defined in § 402(c)(8)(A)) or eligible retirement plans (as defined in § 402(c)(8)(B)) and any interest or penalties applicable to the participants' returns, and
- d) any other tax that results from a Qualification Failure that would apply but for correction under this revenue procedure.

# Voluntary Fiduciary Correction Program (VFCP)

- **Who Is Eligible**

Anyone who may be liable for fiduciary violations under ERISA, including employee benefit plan sponsors, officials, and parties in interest, may voluntarily apply for relief from enforcement actions, provided they comply with the criteria and satisfy the procedures outlined in the VFCP.

- **VFCP Criteria**

Persons using the VFCP must fully and accurately correct violations. Incomplete or unacceptable applications may be rejected. If rejected, applicants may be subject to enforcement action, including assessment of civil monetary penalties under Sections 502(l) and 502(i) of ERISA.



# VFCP

## How To Apply

Applicants do not need to consult or negotiate with EBSA to use the VFCP. They merely need to follow published procedures. Violations can be fully and correctly resolved in four easy steps:

- Identify any violations and determine whether they fall within the transactions covered by the VFCP;
- Follow the process for correcting specific violations (e.g., improper loans or incorrect valuation of plan assets);
- Calculate and restore any losses or profits with interest, if applicable, and distribute any supplemental benefits to participants; and
- File an application with the appropriate EBSA regional office that includes documentation showing evidence of corrective action taken.

# VFCP Covered Transactions (Retirement Plans)

- Delinquent Participant Contributions and Participant Loan Repayments to Pension Plans
- Fair Market Interest Rate Loans to Parties in Interest
- Below Market Interest Rate Loans to Parties in Interest
- Below Market Interest Rate Loans to Non-Parties in Interest
- Below Market Interest Rate Loans Due to Delay in Perfecting Security Interest
- Participant Loans Failing to Comply with Plan Provisions for Amount, Duration, or Level Amortization
- Defaulted Participant Loans
- Purchase of Assets by Plans from Parties in Interest
- Sale of Assets by Plans to Parties in Interest
- Sale and Leaseback of Property to Sponsoring Employers
- Purchase of Assets from Non-Parties in Interest at More Than Fair Market Value
- Sale of Assets to Non-Parties in Interest at Less Than Fair Market Value
- Holding of an Illiquid Asset Previously Purchased by Plan
- Benefit Payments Based on Improper Valuation of Plan Assets
- Payment of Duplicate, Excessive, or Unnecessary Compensation
- Improper Payment of Expenses by Plan
- Payment of Dual Compensation to Plan Fiduciaries

# VFCP Acceptable Corrections

- Conduct valuations of plan assets using generally recognized markets for the assets or obtain written appraisal reports from qualified professionals that are based on generally accepted appraisal standards;
- Restore to the plan the principal amount involved, plus the greater of lost earnings, starting on the date of the loss and extending to the recovery date, or profits resulting from the use of the principal amount, starting on the date of the loss and extending to the date the profit is realized;
- Pay the expenses associated with correcting transactions, such as appraisal costs or fees associated with recalculating participant account balances; and
- Make supplemental distributions when appropriate to former employees, beneficiaries, or alternate payees, and provide proof of the payments.

# VFCP - Restitution To Plans

- Applicants must restore the plan, participants, and beneficiaries to the condition they would have been in had the breach not occurred.
  - The VFCP includes an [online calculator](#) to assist applicants by automatically calculating correction amounts that must be paid to the plan.
  - Plans must then file, where necessary, amended returns to reflect corrected transactions or valuations.
- Applicants also must provide proof of payment to participants and beneficiaries, or properly segregate the affected assets in cases where the plan is unable to identify the location of missing individuals.
  - Payment of the correction amount may be made directly to the plan where distributions to separated participants would be less than \$20 and the cost of correction exceeds the distributions owed.

# Delinquent Filer Voluntary Corrections Program (DFVCP)

- DFVCP encourages voluntary compliance with ERISA's annual reporting requirements and gives delinquent plan administrators a way to avoid higher civil penalty assessments by satisfying the program's requirements and voluntarily paying a reduced penalty.
- January 2013 EBSA Notice provided a comprehensive update and restatement of the DFVC Program in recognition of multiple technological (e.g., EFAST2), regulatory and technical developments

# DFVCP

## What to File for Prior Year Form 5500s or to Amend Prior Year Filings

- With the change to an all electronic filing system and to the Form 5500..., you may have questions about what to file for plan years prior to the current year or how to amend prior year filings. The [Form 5500 Version Selection Tool](#) will help you to determine which version of the Form 5500 and which schedules you should use.
- For informational copies of the Forms, visit [www.dol.gov/ebsa/5500main.html](http://www.dol.gov/ebsa/5500main.html).
- To file, go to [www.efast.dol.gov](http://www.efast.dol.gov). For more information on filing electronically, visit the [EFAST2 FAQs](#). There are four easy steps to use this tool:
  - In the plan filing field, enter the first day of the plan year for which you want to file. For Direct Filing Entity (DFE) filings, enter the last day of the plan year for which you want to file.
  - If you are amending a previously filed Form 5500, check the box.
  - If your plan is a Code 403(b) arrangement or if you are filing for a DFE, other than a Group Insurance Arrangement (GIA), check the appropriate box. If neither applies to your plan, leave the boxes unmarked.
  - Select the get results box. A general description of what you are required to file will be displayed. The form year(s) that are available for you to file will be displayed in bold. If there are any prior year schedules that must be attached, they will be listed in the "Exceptions". Any prior year schedules must be attached as a PDF file and are generally available at both [www.efast.dol.gov](http://www.efast.dol.gov) and [www.irs.gov](http://www.irs.gov).

# DFVCP

- EBSA provides a web-based calculator and payment system.
- The online [DFVCP penalty calculator](#) helps filers accurately calculate the payment needed to participate in the DFVCP. Filers may also make the payment electronically over the internet.
- Filers are not required to use the online calculator or make payments electronically to participate in the DFVCP. However, by using these options, filers will avoid making errors that would unnecessarily delay their participation in the program.

# DFVCP

- The calculator can be used for only one plan at a time. Separate penalty calculations are required when filing for more than one plan.
- Filings for multiple years must be included in a single submission for a plan.
- Penalties are capped at:
  - \$1,500 per submission for “small plans” (generally, fewer than 100 participants at the beginning of the plan year); and
  - \$4,000 per submission for “large plans” (generally, 100 participants or more at the beginning of the plan year).
- Further reduced penalty caps are applicable to submissions for certain 501(c)(3) organizations and for Top Hat and Apprenticeship programs.



# Case Study

Your firm has recently taken over the plan and you have been assigned to the transition/conversion team.

- The plan (a Volume Submitter document):
  - a 401(k) with automatic enrollment, deferrals and matching contributions.
  - There are 50 current participants.
  - Company payroll is twice monthly on the 1<sup>st</sup> and 15<sup>th</sup> and all contributions have been sent to the plan before the 5<sup>th</sup> of each subsequent month.
  - Processed Roth contributions in 2012 but no amendment has been provided.
- You requested copies of Form 5500 filings for the prior three years but have not yet received them. A quick electronic search found all but the 2010 filing online.
- There are several discrepancies between payroll and plan records regarding employee eligibility and matching contribution calculations.
- The plan's financial adviser (brother of the plan sponsor's Chief Executive) has provided all requested investment information and everything there seems to be in order.

# Thank You