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A Current Update of EPCRS Through Rev. Proc. 2021-30, 49 Tax Mgmt. Comp. Plan. J. No. 8 (Aug. 6, 2021)

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A Current Update of EPCRS Through Rev. Proc. 2021-30

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I. INTRODUCTION AND UPDATE FROM PRIOR GUIDANCE

A. Why Is There an EPCRS?

To the casual observer, a pension or profit sharing plan should be able to become ***qualified*** under the Internal Revenue Code (''the Code'' or ''I.R.C.'') upon its adoption and remain ***qualified*** during its existence until it is ultimately terminated.[1] A retirement plan becomes ***qualified*** under the Code in order to secure preferential tax benefits for the covered employees and the sponsoring employer. However, due to the Code's complexity and continuous legislative changes, establishing and maintaining a ***qualified*** plan has become a definite challenge for plan sponsors and plan administrators. To assist them, the Internal Revenue Service (''the Service'' or ''IRS'') has developed a correction program to assure continued and ongoing qualification for plans. This program is called the Employee Plans Compliance Resolution System (EPCRS), which is administered by the Service through its revenue procedures. There are three components to EPCRS — the Self-Correction Program (SCP), the Voluntary Correction Program (VCP), and the Audit Closing Agreement Program (Audit CAP).

Until recently, practitioners have relied upon Rev. Proc. 2019-19 for guidance as to the three correction program provided under EPCRS. However, the Service issued new guidance on July 16, 2021, with Rev. Proc. 2021-30, which updates its comprehensive system for correcting retirement plan failures. This revenue procedure modifies and supersedes Rev. Proc. 2019-19, the most recent prior consolidated statement of the correction program under EPCRS. It is a limited but important update, intended to expand SCP eligibility to permit correction of operational failures by use of retroactive plan amendments; to expand guidance on the recoupment of overpayments; and to extend the end of the SCP correction period for significant failures. The new changes are generally effective July 16, 2021.

This article is intended for those practitioners unfamiliar with EPCRS, and thus it summarizes not only the recent changes, but the cumulative effect of the changes made to EPCRS. Practitioners should also be aware that the IRS's correction program is independent of the Department of Labor's (DOL) Voluntary Fiduciary Correction Program (VFCP) and DOL's Delinquent Filer Voluntary Compliance (DFVC) Program.[2] While compliance under the DOL program does not necessarily result in compliance with the IRS's programs, the most recent revenue procedures permits reliance on ***certain*** features of the DOL program for purposes of EPCRS.

B. Updates From Rev. Proc. 2019-19

For practitioners familiar with my prior article that provided a current update of EPCRS through Rev. Proc. 2019-19, the newest revenue procedure retains the basic structure of the program but provide the following changes to the program, generally effective July 16, 2021 (unless an alternate effective date is noted):[3]

- Expands guidance on the recoupment of overpayments by providing two new correction methods for defined benefit plans (the funding exception correction method and the contribution credit correction method);[4]

- Eliminates the anonymous John Doe submission procedure under VCP, effective January 1, 2022;[5]

- Adds an anonymous, no-fee, VCP presubmission conference procedure, effective January 1, 2022;[6]

- Extends the end of the SCP correction period for significant failures from two years to three years[7] (which also the effect of extending the safe harbor correction method for Employee Elective Deferral Failures lasting more than three months but not beyond the extended SCP correction period for significant failures);[8]

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[1] The term ''qualified plan'' refers to a retirement plan that satisfies the applicable requirements of §401(a), such that it extends favorable tax treatment to the plan sponsor, as well as the plan participants and beneficiaries. For-profit employers sponsor qualified retirement plans. In contrast, tax-exempt entities such as public schools and/or governmental entities sponsor retirement plans that satisfy the applicable requirements of §403(b) or §457. All section references are to the Internal Revenue Code of 1986, as amended (the ''Code''), or the Treasury regulations thereunder, unless otherwise indicated.

[2] The finalized version of the DOL's Voluntary Fiduciary Correction Program is *available at* https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/enforcement/oe-manual/voluntary-fiduciary-correction-program (effective May 19, 2006). The DOL's DFVC Program is summarized by the DOL at https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/dfvcp.pdf (Jan. 27, 2020).

[3] Rev. Proc. 2021-30, §16.

[4] Rev. Proc. 2021-30, App. B, §2.05(3)-(4).

[5] Rev. Proc. 2021-30, §10.10.

[6] Rev. Proc. 2021-30, §10.01.

[7] Rev. Proc. 2021-30, §9.02.

[8] Rev. Proc. 2021-30, App. A, §.05(9)(b).

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- Expands the ability of using SCP to correct operational failures by plan amendment;[9]
- Requires Audit CAP sanctions be paid through the Pay.gov website beginning January 1, 2022;[10] and
- Extends by three years the sunset of the safe harbor correction method available for certain Employee Elective Deferral Failures associated with missed elective deferrals for eligible employees who are subject to an automatic contribution feature in a §401(k) or §403(b) plan from December 31, 2020, to December 31, 2023. This provision is effective January 1, 2021.[11]

The IRS invites comments on how to improve EPCRS. Comments regarding Rev. Proc. 2021-30 are due by October 14, 2021.[12] The principal author of the revenue procedure is Matthew Mulling of the Office of the Associate Chief Counsel (Employee Benefits, Exempt Organizations, and Employment Taxes).

II. OVERVIEW

The Service's correction program has been best understood as part of a two-fold comprehensive system designed to keep pension and profit-sharing plans qualified. The determination letter process (with extensions provided through the remedial amendment provisions)[13] assures ***plan document*** compliance. The correction program assures plan ***operational*** compliance and permits nonamenders[14] to make certain retroactive plan amendments to attain plan document compliance.[15] Generally, those plan sponsors who have utilized the Service's determination letter process in a timely fashion were concerned ***only*** with ongoing operational failures; whereas plan sponsors that have not taken advantage of the Service's determination letter program were concerned with ***both*** plan document and operational failures. As the IRS has been altering the determination letter program for ongoing plans in recent years, it has had to make adjustment to its correction program to coincide with these changes.

As a professor, I am always trying to analogize the law of employee benefits to the everyday experiences of my students. Reflecting on the Service's determination letter and correction program, it occurred to me that the purchase and maintenance of a new car and the establishment and maintenance of a qualified plan may have a lot in common. When I purchase a new car, I certainly expect that it will work in accordance with the owner's manual. The manual is designed to explain to me how to maintain and care for the car so that mechanical difficulties will be minimized; no one believes that difficulties won't *ever* occur. If I was lucky to secure a manufacturer's warranty on the car, it promises to cover the costs of unexpected mechanical failures, either at no charge or for a modest fee. Certain on-going maintenance items may not be covered by the warranty: oil changes, tire rotations, windshield wipers, etc. Nevertheless, it is in my best interest to perform these routine maintenance items, even at my own expense, in order to avoid later and more expensive charges that may or may not be covered under the manufacturer's warranty. As significant problems unfold (e.g., transmission leakage), it may still be more effective for me to correct the defect, whether covered under the warranty or not, and to do so in an expedited fashion. The alternative of waiting too long may result in the car's self-destruction after years of non-maintenance.

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[9] Rev. Proc. 2021-30, §4.05(2)(a)(ii).

[10] Rev. Proc. 2021-30, §13.02.

[11] Rev. Proc. 2021-30, App. A, §.05(8)(d). This correction method is available for the failure to implement an automatic contribution feature for an affected eligible employee or the failure to implement an affirmation election of an eligible employee who is otherwise subject to an automatic contribution feature.

[12] Rev. Proc. 2021-30, §17.

[13] Determination letters are written statements issued by the IRS in response to written requests from plan sponsors. The filing of such requests has become centralized, with Covington, KY, being the location to issue determination letters. A favorable determination letter issued by the Service indicates its opinion that the terms of the plan document meet the standards of §401(a). If it is determined that operational problems could develop even though there are no disqualifying plan document features, the letter will be conditional with such caveats. See Rev. Proc. 2016-37 for the rules applicable to requesting a determination letter from the Service, generally effective January 1, 2017. Section 7476 permits an applicant who has not been given a favorable determination letter to petition the U.S. Tax Court for a declaratory judgment, provided all administrative remedies have been pursued.

[14] Plan sponsors who do not make necessary corrective retroactive plan amendments within the applicable remedial amendment period are referred to as "nonamenders." In the context of nonamender failures, Rev. Proc 2008-50 added a sentence in §14.04 in the EPCRS revenue procedure, stating that a greater sanction would be assessed if the failure was discovered upon exam. Thus, §14.04 of Rev. Proc. 2008-50 provided a lower fee schedule for nonamender failures discovered during the determination letter process (which continues under the current revenue procedure, Rev. Proc. 2021-30, §14.04), as the plan sponsor voluntarily subjected itself to that process. If the nonamender failure is discovered upon examination, the higher fee is justified in order to maintain the integrity of VCP.

[15] Retroactive plan amendments may be used to correct plan document failures that would otherwise cause the plan to lose its qualified status, provided such amendments are made within the remedial amendment period as described in §401(b) and Reg. §1.401(b)-1. The remedial amendment period refers to the applicable time period during which the plan amendment must be made and retroactively effective such that the plan attains or retains qualification status.

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Likewise, every qualified plan needs an instruction manual, known as its plan document. Certainly, many small and medium-size employers utilize a standardized master or prototype plan or a volume submitter plan, which has a plan document ***pre-approved*** by the Service. In recent years, the Service has changed the terminology for these plans, and now simply refers to them as pre-approved plans.[16] Other employers desiring an individually designed plan generally draft the plan and then have the Service *later* affirm its qualified status through the determination letter process. So long as the plan document terms are followed, the Service's determination letter assured the plan sponsor that the plan document remains qualified. Likewise, as legislative changes require plan amendments, resubmission of a determination letter assured the sponsor that the plan as amended would continue to be qualified, so long as the plan amendments are made retroactively in accordance with the applicable remedial amendment period. The Service has discretion under the Code's remedial amendment period to extend the time frame for retroactive plan amendments, which it does for those sponsors seeking a determination letter.[17] Thus the determination letter program is designed to review and perfect the plan document within an appropriate time frame so that most, but not all, ***plan document*** qualification failures may be avoided.

Because operational errors can occur with the administration of the plan and since certain plan features are not covered by the Service's determination letter, the Service has initiated a second program — referred to as EPCRS — by which plan sponsors and plan administrators may correct disqualifying defects so as to avoid plan disqualification. In my analogy, it makes sense to correct defects as they occur as the future cost of noncompliance is too expensive relative to current costs. EPCRS's SCP is similar to correcting under warranty — there is no additional charge if defects are caught on a timely basis or are insignificant. Even if defects are caught outside the SCP period (e.g. outside of the warranty period), the use of EPCRS results in a less expensive correction method than waiting for the plan defects to be detected under plan examination. EPCRS is designed for use by plans qualified under §401(a), §403(b) plans, and SEPs and SIMPLE IRAs. Section 457(b) plans (sponsored by government entities as described by §457(e)(1)(A)) may apply to the IRS for corrective closing agreements under standards that are similar to EPCRS.[18]

A. The Service's Overall System to Assure Qualification

To understand the Service's correction program, it is important to step back and review the Service's overall structure to assure qualification for existing plans. To ensure that the terms of the plan document are valid, the Service's determination letter program has been, before January 1, 2017, available on a voluntary basis for individually designed plans.[19] As the plan administrator is required to administer the plan as written,[20] it made no sense to start out with a defective plan document, especially when the Service had a voluntary program to review the plan's terms. Unfortunately, the Service does not review the terms of most plan documents in advance of its actual establishment and on-going administration. For most plans, a determination letter is sought within the first years of the plan's establishment. For subsequent plan amendments required because of legislative or regulatory changes, plan sponsors of individually designed plans were able to request subsequent determination letters according to a staggered 5-year cycle. Also, when a plan terminates, it may request a determination letter to assure that the distributions are qualified plan distributions and eligible for rollover treatment.

Due to the flurry of legislative activity in the late 1990s, the Service temporarily closed its determination letter program in order to provide guidance under the new rules.[21] It utilized its discretion under the §401(b) remedial amendment provisions and postponed the adoption of the retroactive GUST plan amendments for all plans.[22] This afforded practitioners sufficient time to amend plan documents so that

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[16] *See* Rev. Proc. 2017-41.

[17] *See* Reg. §1.401(b)-1(e).

[18] *See* Rev. Proc. 2021-30, §4.09. The Service will not extend similar EPCRS standards to §457(b) plans that were established as unfunded defined contribution plans for top hat employees unless such plans were "erroneously established" to benefit the employer's nonhighly compensated employees and has been operated as such. Rev. Proc. 2021-30, §4.09.

[19] *See* IRS Pub. 794, *Favorable Determination Letter*. During the early 2000s, the Service re-examined the future of the Employee Plans Determination Letter Program, *see* IRS Announcement 2003-32 (setting forth the IRS's Second White Paper on the Future of the Employee Plans Determination Letter Program). The Determination Letter process was later bifurcated with individually designed plans operating on a different 5-year cycle than pre-approved plans. *See* Rev. Proc. 2007-44, §6.01, *modified by* Rev. Proc. 2009-36. The Service eliminated the staggered 5-year remedial amendment cycle for individually designed plans in Announcement 2015-19, but retained the 6-year cycle for pre-approved plans (previously referred to as prototype and volume submitter plans).

[20] *See* Reg. §1.401-1(a)(2).

[21] *See* Rev. Proc. 99-23, §3.01.

[22] *See* Rev. Proc. 2000-27 (extending the remedial amendment period for disqualifying provisions for nongovernmental plans until the later of (1) the last day of the first plan year beginning on or after January 1, 2001, or (2) the last day of the first plan year beginning after the 2000 legislative date. IRS Announcement 2001-12 provides a different extension for certain employers that

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they retroactively reflected the Code's new requirements. While this additional time allowed the plan document to become "picture perfect" as of the appropriate date, the plan sponsor and plan administrator were still required to operate the plan in compliance with the applicable law beginning on and after the effective date of the changes.[23] Such disconnect between the timing of the plan amendments and the effective dates of the legislative changes exposed the plan sponsor and plan administrator to the potential for *operational* failures. EPCRS was designed to permit corrections to be made for those errors.

Beginning in 2017, a plan sponsor of an individually designed plan may submit a determination letter application ***only for*** new plans, terminating plans, and in certain other limited circumstances to be determined by Treasury and the IRS; the determination letter process for preapproved plans remains virtually unchanged.[24] Thus, plan sponsors of individually designed plans no longer have the ability to receive a current favorable determination letter on subsequent plan amendments, and thus, face the uncertainty that the plan document will continue to satisfy the Code's qualification requirements. This may also cause more operational failures to occur if the subsequent plan amendments did not comply with the qualification requirements and must later be revised.

Over the past decades, the IRS has been revising and simplifying this correction program *and* its determination letter program. *By now, the EPCRS's program is so simplified and streamlined that practitioners should educate and advise plan sponsors and plan administrators that use of such correction procedures is simply "best practices" for the on-going maintenance of a qualified plan.* The costs of implementing proper practices and procedures to take advantage of this program must no longer be dismissed as unnecessary costs. Just as we had taken for granted the submission of a determination letter for initial approval of the plan document's compliance, even though there is a related user fee, now use of the IRS correction program simply makes economic sense for keeping the plan in compliance during operation. The days of playing the audit roulette wheel are over — such costs now far surpass the costs of on-going compliance.[25]

Even if a plan sponsor secures a favorable determination letter, not all aspects of the plan documents are protected under the Service's determination letter.[26] Certain terms of the plan document are operational in nature (e.g. the minimum participation and coverage rules under §410(b) and §401(a)(26) and the nondiscrimination rules under §401(a)(4))[27] and thus the Service cannot always preapprove their application. Failures to satisfy these requirements on an on-going basis are referred to as ***demographic failures***, since such failures are the result of a shift in the demographics of the sponsor's workforce.[28] Obviously such failures can only be cured through the EPCRS program. Such corrections can be differentiated from other types of operational failures as these may require corrective plan amendments to provide for *greater* benefits in order to assure compliance. Other types of operational failures (e.g. failures under §401(k) or §401(m)) may simply necessitate the use of a correction method, but not require a retroactive plan amendment.

Other operational failures can occur for a multitude of reasons — an inadvertent error is made; the terms of the plan are not followed; as legislative changes were made, the plan's administration was not in com-

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utilize master and prototype plans or volume submitter plans. GUST is an acronym for the Uruguay Round Agreements Act (GATT), Pub. L. No. 103-465; the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), Pub. L. No. 103-465; the Small Business and Job Protection Act of 1996, Pub. L. No. 104-188; the Taxpayer Relief Act of 1997 (TRA '97), Pub. L. No. 105-34; the Internal Revenue Service Restructuring and Reform Act of 1998 (RRA '98), Pub. L. No. 105-206; and the Community Renewal Tax Relief Act of 2000 (CRA), Pub. L. No. 106-554. The Service later issued Rev. Proc. 2002-35 which permitted plan sponsors who failed to timely amend their plans by the end of the GUST remedial amendment period provided they paid an enhanced user fee on or before September 3, 2002. See Rev. Proc. 2007-44, §6.01, *modified by* Rev. Proc. 2009-36, for the current system that imposed a variety of staggered remedial amendment cycles for individually designed plans versus preapproved plans (such as mater and prototypes and volume submitter plans).

[23] *See* Rev. Proc. 2000-27. Thus, the correction methods under EPCRS are not needed to correct disqualifying defects that are cured within the remedial amendment period.

[24] Rev. Proc. 2016-37, *modifying and* superseding Rev. Proc. 2007-44. See Rev. Proc. 2019-4, in which the IRS mentions a new category entitled "other circumstances" for which a determination letter can be requested. See also Rev. Proc. 2019-20, in which the IRS opened the determination letter program in a limited way for individual designed plans that are merged plans or statutory hybrid plans (e.g., cash balance plans).

[25] According to the General Accountability Office (GAO)'s findings "Pension Plans: IRS Programs for Resolving Deviations from Tax-Exemption Requirements," plans eligible to use the Service's voluntary program could have avoided sanctions that were approximately 30% higher than the audit cap fees. The GAO's findings supported the IRS's assertions that voluntary reporting and correction of plan qualification defects is far preferable to the plan sponsor than correcting such defects as a part of an IRS audit. For more information on the GAO report, *see* http://benefitslink.com/articles/audits001102.shtml.

[26] *See Ludden v. Commissioner*, 68 T.C. 826 (1977), *aff'd*, 620 F.2d 700 (9th Cir. 1980).

[27] Coverage under §410(b), the minimum participation requirements of §401(a)(26) for defined benefit plans and the nondiscrimination rules of §401(a)(4) may require testing on an annual basis to assure compliance.

[28] *See* Rev. Proc. 2021-30, §5.01(2)(c).

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pliance even though the plan document was later properly retroactively amended. Most of the time *correction* of an operational failure involves following the terms of the plan and restoring the participants and beneficiaries to the position they should have been in had the failure not occurred. However, *correction* of an operational failure may require a retroactive plan amendment so that the plan's terms match the prior operation of the plan. For example, if hardship distributions or participant loans were made from the plan but had not been authorized by the terms of the plan, correction requires a retroactive plan amendment authorizing such distributions or loans. If participant loans were made from the plan (with or without the authorization under the plan), they may have violated the terms of the Code — otherwise resulting in a taxable distribution from the plan, along with a premature excise tax, and an operational failure. EPCRS provides a cure for such failure, along with relief from the excise tax.

Finally, the adoption of a certain type of qualified plan by an employer who is *not* eligible to establish that type of plan is also a qualification failure, referred to as an *employer eligibility failure*, and can only be corrected through EPCRS. For example, employer eligibility would occur if a tax-exempt employer established a §401(k) plan between 1987 and 1996, or an employer implemented a SARSEP but has more employees than permitted under the limits of §408(k).[29]

In summary, the Service's EPCRS program permits correction of the following qualification failures:

- **plan document failures** (a plan provision or absence of a plan provision that violates §401(a)) that cannot be corrected through the determination letter program either because the plan sponsor did not seek a determination letter (''nonamender'') or the required retroactive plan amendments were not made within the remedial amendment period (''late-amender'');
- **operational failures** that occur because the terms of the plan were not followed (here correction may be accomplished either through a retroactive plan amendment or a certain type of correction method, depending on which is appropriate);
- **demographic failures** in which the coverage/participation rules of §410(b) or §401(a)(26) or the nondiscrimination testing rules of §401(a)(4) are not satisfied; and
- **employer eligibility failure** caused by the employer's inability to establish the type of qualified plan that was adopted.

[29] Rev. Proc. 2021-30, §5.01(2)(d).

B. Historical Background of EPCRS

The history of the IRS's correction program began back in 1990 with the Service's original Closing Agreement Program (CAP), utilized to avoid disqualifying a plan.[30] It was restrictive regarding the issues that could be corrected and resulted in a sanction equal to a negotiated percentage of the Maximum Payment Amount (''MAP'') (i.e., the amount that approximated the taxes owed by the plan sponsor if the plan were actually disqualified). By 1991, the Service began an administrative policy, known as APRS (Administrative Policy Regarding Sanctions) or the Non-enforcement Policy, throughout the key district offices, to correct minor operational defects without any sanctions.[31] The Voluntary Compliance Resolution (VCR) was announced in 1992,[32] and made permanent in 1994.[33] Plan sponsors utilizing VCR had to have a favorable determination letter, disclose the defect and make the correction, but paid a fixed fee to the IRS as a sanction.

For plans not eligible for VCR, the Service devised a Walk-In Closing Agreement Program (Walk-In CAP) in 1994.[34] Such program did not require a favorable determination letter and provided relief for plans with plan documents and demographic failures. By 1998, the programs were then consolidated under EPCRS, with the Service stating that on-going revenue procedures would be implemented to further perfect the program.[35] By 2000, the correction program was extended to §403(b) plans.[36] In 2001, the Service made major revisions to its correction program, consolidating it into three separate programs, which still exist today.[37] The Service made further refinements in Rev. Proc. 2002-47.[38]

[30] IRS Memo dated December 21, 1990.

[31] In a memorandum from John E. Burke, Assistant Commissioner (Employee Plans and Exempt Organizations) to Assistant Regional Commissioners (Examination) and District Directors: Brooklyn, Chicago and Cincinnati (''APRS Memo''), the Service's Administrative Policy Regarding Sanctions (APRS) was established (Mar. 26, 1991). The APRS Memo was the transmittal for inclusion in the Employee Plans Examination Guidelines Handbook in the Internal Revenue Manual, located at IRM 7(10) 54.660 (July 19, 1992), reprinted in CCH Pension Plan Guide, Extra Edition, No. 843 (Apr. 17, 1991).

[32] *See* Rev. Proc. 92-89.

[33] *See* Rev. Proc. 94-62.

[34] *See* Rev. Proc. 94-16.

[35] *See* Rev. Proc. 98-22, §16, for a chronology of the IRS's prior programs.

[36] *See* Rev. Proc. 2000-16 (extending the EPCRS programs for plans covered under §403(b) through a separate program known as TVC, Tax-Sheltered Annuity Voluntary Correction Program.

[37] *See* Rev. Proc. 2001-17.

[38] Expanding the John Doe submissions procedure; introducing the concept of Group Submissions for eligible organizations (i.e.

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Rev. Proc. 2003-44 made comprehensive and widespread changes to EPCRS, including a fixed fee schedule and revising Audit CAP.[39] It greatly simplified the submission of a plan for voluntary compliance and drastically reduced the fees for such submission. At that time, the Service indicated its intent to make *annual* changes to EPCRS. However, there was no guidance issued during 2004 or 2005, leaving practitioners wondering whether meaningful changes would really be made and how often future changes would be forthcoming. The long-awaited Rev. Proc. 2006-27,[40] updating the prior Rev. Proc. 2003-44, was released on May 5, 2006. It was cumulative in nature — reflecting Rev. Proc. 2003-44 changes and the more recent 2006 changes. While the 2006 changes were not as extensive as the prior one, they nevertheless reflected the Service's continued intention to make on-going compliance of the Code's qualification rules straightforward and without threat of an impending audit. With the passage of the Pension Protection Act of 2006 in August of 2006, Congress affirmed the Secretary of Treasury's authority and power to establish and implement the EPCRS program, as well as any other employee plans correction program, including the power to waive income, excise and other taxes.[41] It was concerned that small employers be educated as to the availability and practicality of the program, but taking into account the special issues facing small employers in compliance and correction; expansion of SCP; and the balance of sanctions against the extent of the failures.

With a two-year gap, the Service issued Rev. Proc. 2008-50, released on August 14, 2008, and published on September 2, 2008, which like its predecessor is cumulative in nature.[42] Appendix F under the 2008 revenue procedure was expanded to include additional failures that commonly occur in plans maintained by small employers, thereby reducing the burden and cost to the employer of submitting under the VCP. It also incorporated changes that the IRS has made to its determination letter program reflected in Rev. Proc. 2007-44. With a five-year gap, the Service issued Rev. Proc. 2013-12,[43] released on December 31, 2012. It too was cumulative in nature and was accompanied with Chart of Significant Changes to EPCRS and two IRS forms to be used in subsequent VCP submissions. Likewise, Rev. Proc. 2016-51[44] consolidated the correction program under EPCRS and reflects the modifications made in Rev. Proc. 2015-27 and Rev. Proc. 2015-28, as well as those under Rev. Proc. 2016-8. Rev. Proc. 2018-52 set forth new VCP submission procedures for filing a VCP submission and paying applicable user fees, including the use of the www-.Pay.gov website.[45] To ease the transition to the new procedures, plan sponsors could choose to file VCP submissions using the www.Pay.gov website or by filing paper VCP submissions; however, beginning on April 1, 2019, the IRS no longer accepted VCP paper submissions.[46] While many of the same documents used in the VCP submission filed pursuant to Rev. Proc. 2016-51 applied under the 2018 revenue procedure, there were procedural differences.[47] Rev. Proc. 2018-52 made changes to EPCRS to reflect changes the Service made to the pre-approved plan program for qualified plans and the pre-approved §403(b) plan program.[48] The user fees applicable to VCP were revised pursuant to Rev. Proc. 2018-4 and changed from a fee based on the number of plan participants to a fee based on the plan's net assets.[49]

Rev. Proc. 2019-19 mandated the electronic submission process for all VCP submissions on or after April 1, 2019.[50] It expanded the ability to use SCP for certain plan document failures and for correcting certain operational failures by plan amendment beyond those listed in §2.07 of Appendix B in the revenue procedures.[51] It also expanded SCP to correct plan loan failures by plan amendment in the case where the number of plan loans granted exceeded the number of loans permitted.[52]

Rev. Proc. 2021-30 was issued on July 16, 2021, and made modest but significant changes to the prior

sponsors of a master or prototype or volume submitter plan and organizations providing administrative services) to correct the same defect in at least 20 plans; introducing a special rule in determining the correction period in the case of an operational defect relating solely to transferred assets).

[39] *See* https://www.irs.gov/retirement-plans/correcting-plan-errors for a summary of the changes, a topical index and a presentation highlighting the changes. Also the link provides an order form for a free copy of the Retirement Plan Correction Program. Since the issuance of this revenue procedure, the Service has subsequently issued Rev. Proc. 2004-59, which is a temporary program in which qualified withholding agents who are not currently under audit may report to the Service about certain failures and steps to remediate such failures in connection with their withholding obligations under §1441-§1443 and their related payment and reporting requirements. December 31, 2005, was the last day for making a VCP submission under this program.

[40] *Modified by* Rev. Proc. 2007-49.

[41] *See* Pension Protection Act of 2006 (PPA '06), §1101, Pub. L. No. 109-280 (Aug. 17, 2006).

[42] Highlights of the recent guidance were the subject of a Special Edition Newsletter, dated August 14, 2008, issued by the IRS.

[43] *Modifying and superseding* Rev. Proc. 2008-50.

[44] *Modifying and superseding* Rev. Proc. 2013-12.

[45] Rev. Proc. 2018-52, §11.

[46] Rev. Proc. 2018-52, §11.01(2).

[47] Rev. Proc. 2018-52, §2.02(3).

[48] Rev. Proc. 2018-52, §2.03.

[49] Rev. Proc. 2018-4, App. A, §.09.

[50] Rev. Proc. 2019-19, §11.01.

[51] Rev. Proc. 2019-19, §2.02(2)-(3).

[52] Rev. Proc. 2019-19, §2.02(4)(e).

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revenue procedure. It expands guidance on the recoupment of overpayments with two new correction methods for defined benefit plans; it extends the SCP correction period for significant failures from two years to three years; it expands the ability to use SCP to correct operational failures by plan amendment; and it extends by three years the sunset of the safe harbor correction method available for certain employee elective deferral failures associated with missed elective deferrals for eligible employees who are subject to an automatic contribution feature under the plan.[53]

EPCRS is administered by the Employee Plans segment of the Tax Exempt and Government Entities Division of the Service, through different Voluntary Compliance (VC) Group Managers and EP Exam Area Managers, depending on whether VCP, SCP or Audit CAP is being utilized.[54] With the improvements under the recent revenue procedures and electronic changes in processing cases, the handling of cases is expected to be expedited.

To appreciate the relevance of the EPCRS program, it is important to understand the Service's position on disqualifying plan document and operational failures. Beginning in 1989, the Service became vocal in its position that *any* disqualifying defect, no matter how insignificant, could disqualify the plan — an insurmountable hurdle for any plan! The Tax Court affirmed the Service's literal position, regardless of either the significance of the defect, the innocence of the violation, or the unreasonableness of disqualification in light of the violation committed.[55] The Service's position is further exacerbated by its position that once a disqualifying defect occurs, the plan remains disqualified until correction, thereby subverting the statute of limitations.[56]

Given the Service's rigid position, plan sponsors have been grateful that audits of qualified plans have been relatively limited both in the number and scope.[57] But the IRS's literal focus on disqualification and the potential cost to the plan sponsor in sanctions if disqualification is pursued should heighten plan sponsors' concerns to address emerging plan disqualifying failures in a prompt fashion. The Service's EPCRS program is a welcome response for plan sponsors and plan administrators, particularly with the Service's assurances that use of such programs will not heighten the threat of a plan audit. During informal discussions with the Service, the issue was raised whether a plan sponsor who was amid self-correction or a VCP submission could continue to resolve these failures under those programs, if it found itself now under audit. The Service indicated its willingness to allow plan sponsors to finalize corrections prior to resolution under the audit correction method, affirming its intent to promote EPCRS in lieu of audit.

During the GUST restatement period, the Service's resources were diverted towards the determination letter and compliance programs, instead of the examinations. During recent years, the Service has expanded its examination program to include not only widespread audits of qualified plans, but also targeted audits on specific qualification requirements.[58]

The Service has an enforcement unit, known as the Employee Plans Compliance Unit (EPCU) that does targeted audits based on certain topics.[59] It also is aggressively targeting Abusive Tax Avoidance Transactions (known as ''ATATs'') that may involve a qualified plan or the plan sponsor.[60] In recent revenue procedures, the Service made it clear that EPCRS is not available to the plan or plan sponsor that have been a party to an ATAT, where the plan failures noted in the VCP application are related to the ATAT.[61] In such a case, a compliance statement will not be issued and

[53] Rev. Proc. 2021-30, §2.01.

[54] See Attachment 2, below, for the current list of Group Managers and EP Exam Area Managers.

[55] *See, e.g., Buzetta Construction Corporation v. Commissioner*, 92 T.C. 641 (1989); *Martin Fireproofing Profit Sharing Plan and Trust v. Commissioner*., 92 T.C. 1173 (1989); *Basch Engineering Inc. v. Commissioner*, 59 T.C.M. 482 (1990). *See also* the IRS's White Paper ''Tax Consequences of Plan Disqualification,'' available at http://www.irs.gov/Retirement-Plans/Tax-Consequences-of-Plan-Disqualification.

[56] Under theory known as the tainted asset theory, if a plan becomes disqualified for more than five years and the money remains in the plan, the Service can perpetually disqualify the plan and thus must be corrected even for years barred by the statute of limitations. *See* Rev. Rul. 73-79. *See also Martin Fireproofing Profit Sharing Plan and Trust v. Commissioner*, 92 T.C. 1173, 1188 (1989).

[57] According to 2012 ACT Report, the Employee Plans Team Audit (EPTA) is a distinct audit program within EP exams which focuses on plans with at least 2,500 participants. This unit conducts about 100 EPTA audits annually. The 2012 ACT Report is available at http://www.irs.gov/pub/irs-tege/tege_act_rpt11.pdf.

[58] See the IRS's website, available at https://www.irs.gov/retirement-plans/plan-sponsor/fixing-common-plan-mistakes, for common mistakes by plan type and by issue.

[59] For a list of current EPCU projects, *see* https://www.irs.gov/retirement-plans/employee-plans-compliance-unit-epcu (last updated June 11, 2021).

[60] See Reg. §1.6011-4(b)(2) for listed transactions that are regarded as tax avoidance transactions; these include in the employee benefits context: §401(k) accelerated deductions; prohibited allocations of ESOP securities in a S-Corporation; collective bargained welfare benefit funds for sham unions; certain trust arrangement seeking to qualify for exemption under §419; abusive Roth IRA transactions; S corporation ESOP abuses and §409 violations; deductions for excess life insurance in a §412(i) plan; and channeling Scorporation pass-through income to government retirement plans).

[61] Section 4.12 of Rev. Proc. 2016-51, Rev. Proc. 2018-52, Rev.

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the case will be referred for examination. However, if the plan failures are unrelated to the ATAT (or an ATAT did not occur), the VCP submission can continue, and a compliance statement can be issued.[62] The IRS also reserved the right to conclude that SCP and Audit CAP were not available if the plan failures relate to the ATAT.[63]

C. Goals and Structure of EPCRS

The Service has consistently listed the following items as goals for the EPCRS program:[64]

- to encourage plan sponsors to establish administrative practices and procedures;
- to have plans satisfy the applicable plan document requirements of the Code;
- to have plan sponsors make voluntary and timely correction of plan failures;
- to impose fees and sanctions that are reasonable in light of the nature, extent and severity of the violation, and to graduate such fees and sanctions to encourage prompt correction;
- to administer the program in a consistent and uniform way; and
- to provide reliance to plan sponsors in taking correction actions.

These goals are certainly important considerations in applying the features of EPCRS—especially those that are dependent upon individual facts and circumstances.

The easiest way to envision EPCRS is to view it as providing three ''doors'' of correction. Two of the doors are voluntary — the Self Correction Program (SCP) and the Voluntary Correction Program (VCP) — that are accessible only if the plan is not ''under examination.''[65] The third door for correction is actually a ''trap door'' which may be opened by the Service for unsuspecting plan sponsors upon audit of their plans. The audit fee structure obviously penalizes those plan sponsors who wait for an examination, whereas the voluntary programs encourage self-correction and offer minimal costs. Unfortunately, not all violations may be corrected through EPCRS; failures relating to diversion or misuse of plan assets cannot be corrected through any of these three programs.[66] The revenue procedure clarifies that ATATs also cannot be corrected through EPCRS.[67] Rev. Proc. 2016-51 removed the fee schedules from the EPCRS revenue procedure, and instead reference the Service's annual revenue procedure that sets forth user fees, including VCP user fees.[68]

Generally EPCRS is not available to resolve certain excise tax liabilities; income tax liabilities that are not directly related to plan disqualification; additions to tax (e.g., the §72(t) penalty); and employment tax liabilities.[69] However, the revenue procedure provides a waiver from the excise penalties for the following: §4974 (for a minimum distribution failure); §4972 (an employer contribution that is not deductible); §4979 (failure to timely perform the average deferral percentage (ADP) test under a §401(k) plan that leads to insufficient amounts of excess elective deferrals being distributed to the highly paid); §4973 (relating to ex-

Proc. 2019-19, Rev. Proc. 2021-30.

[62] *See* Rev. Proc. 2021-30, §4.12(1)(b). The prior revenue procedures were not clear as to who at the IRS makes a determination to refer the plan for examination and whether such determination can be challenged. The issue of an appeals process was not addressed in either the 2008, 2013 or 2016 revenue procedures.

[63] *See* Rev. Proc. 2021-30, §4.12(1)(c).

[64] See Rev. Proc. 2021-30 §1.02, stating the general principles underlying EPCRS. In an effort to update and improve the EPCRS program, comments are welcomed at Internal Revenue Service, Attn: CC:PA:LPD:PR, (Rev. Proc. 2021-30), Room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, D.C. 20044 or electronically via the Federal eRulemaking Portal at Regulations.gov (type IRS Revenue Procedure 2021-30 in the search field). Rev. Proc. 2021-30 at §17.

[65] *See* Rev. Proc. 2021-30, §4.02 (but insignificant operational failures may be corrected through SCP). The revenue procedure defines under examination as either an Employee Plans examination with respect to the Form 5500 series (or other Employee Plans examination) or under an Exempt Organization examination (if the Plan Sponsor is an Exempt Organization) in which the plan sponsors or its representative has received verbal or written notice of an impending exam or referral for an exam. Rev. Proc. 2021-30, §5.08. Rev. Proc. 2006-27 expanded this definition to include investigations by the Criminal Investigation Division of the IRS. It also clarified that submission of a determination letter request and later discovery by the agent of possible qualification failures and withdrawal of a determination letter request after discovery by the agent of possible qualification failures constitutes under examination. *See* Rev. Proc. 2006-27, §5.07(3). Once such period begins, it is not clear how long the plan remains under examination for purposes of EPCRS.

[66] *See* Rev. Proc. 2021-30, §4.11. Note that the Department of Labor has a Voluntary Fiduciary Correction Program (VFCP) to allow the avoidance of civil actions initiated by the Department and the assessment of civil penalties under ERISA §502(l) for certain fiduciary violations. *See* 67 Fed. Reg. 15,062 (Mar. 28, 2002).

[67] *See* Rev. Proc. 2021-30, §4.12(1)(a). The revenue procedure states that the SCP is not available to correct any operational failures related to ATATs, and if an ATAT is raised upon VCP, the issue will be referred to appropriate IRS personnel. Unrelated failures can continue to be processed under VCP, but any compliance statement will not apply to any ATAT failures. ATAT failures may be referred to examination.

[68] Rev. Proc. 2016-51, §10.01. The current user fee schedule is set forth in Rev. Proc. 2021-4.

[69] *See* Beth Levine, Stanley Pustulka, Marianne Davis, ''A Guide to the Self-Correction and Audit Closing Agreement Programs,'' 2003 IRS' Employee Plans Continuing Professional Education Program, Coursebook, Catalog No. 89089V, Chapter 11, page 45.

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cess contributions made to a §403(b) or IRA in certain circumstances); and §72(t) (for distributions to employees that do not qualify as a distributable event).[70]

The 2006 revenue procedure expanded the use of VCP and Audit CAP to ''orphan plans'' (or as the DOL refers to them as ''abandoned plans'').[71] Under EPCRS, an ''eligible party'' may demonstrate that the plan sponsor no longer exists, cannot be located, is unable to maintain the plan, or is deemed to have abandoned the plan per the DOL regulations.[72] This inclusion permits orphan plans to make distributions and closure with respect to benefit payments. The Service may permit orphan plans to make less than full correction and reserves the right to waive the usual VCP fee if a formal request is made.[73] The 2008 revenue procedure expanded the use of VCP and Audit CAP to terminated plans, whether or not a trust was still in existence.[74]

The focus of the IRS correction program is on the common defects that are routinely seen in the ongoing administration of qualified plans. In ascertaining how a given defect is going to be corrected, the revenue procedure envisions correction *either* through a retroactive plan amendment or through a correction method that will restore the plan to its qualified status. The Service's 2003 revenue procedure endorsed only three situations in which such retroactive plan amendment may be automatically made through SCP; other situations will require approval from the Service through VCP.[75] The 2006 revenue procedure permitted a fourth retroactive plan amendment in the situation where the plan is making plan loans without the necessary plan language.[76] This was added to reduce the number of Form 1099s that would otherwise have to be distributed to participants for distributions in lieu of plan loans. The 2008, 2013 and 2016 revenue procedures did not expand upon the list of retroactive plan amendments, but the 2019 revenue procedure did, by allowing other plan amendments to conform to the terms of the plan's prior operation provided (1) the plan amendment resulted in an increase in a benefit, right, or feature; (2) the increase in the benefit, right, or feature applied to *all* employees eligible to participate in the plan; and (3) the increase in the benefit, right, or feature was otherwise permitted under the Code (specifically §401(a)(4), §410(b), §411(d)(6), and §403(b)(12)) and satisfied the correction principles set forth in §6.02 of the revenue procedure.[77] The 2021 revenue procedure now eliminates the requirement that the plan amendment which increases a benefit, right, or feature must apply to all participants eligible to participate under the plan.[78]

Previously, plan document failures could not be cured through SCP, but Rev. Proc. 2019-19 allowed such cures for §401(a) and §403(b) plans.[79] As will be discussed later, plan document failures are deemed to be ''significant'' for SCP purposes and thus impacts the timing of the correction.[80] Use of the correction program for plan document failures requires the existence of a favorable determination letter.[81]

In contrast, operational defects cured by a correction method are regarded as more prevalent and thus the revenue procedure affords multiple correction methods for a variety of operational failures. If the defect is one not contemplated by the revenue procedure, or if an alternative correction method is sought for a given defect, dialogue with the Service must commence to ascertain a correction method, consistent with the model correction principles. (See Attachment 1 of the article for a summary of the four permissible retroactive plan amendments and the model correction methods for a variety of different operational failures.)

AS VCP allows the plan sponsor to receive approval from the IRS for the correction for a given user fee, it results in a compliance statement from the IRS in advance of making the necessary corrections. While the plan sponsor may do an anonymous VCP submission, this does not protect a plan sponsor if the plan is subsequent examined prior to the completion of the actual VCP. In contrast, Audit CAP requires full correction to be made before the compliance statement will be issued. Audit CAP results if the IRS discovers a qualifying failure upon exam or during the

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[70] *See* Rev. Proc. 2021-30, §6.09(1)-(6).

[71] *See* Rev. Proc. 2006-27, §5.08.

[72] An ''eligible party'' includes a court appointed representative; a person determined by the DOL as having responsibility to distribute and terminate the plan; or a surviving spouse of the plan provided it was never covered under ERISA Title I because the owner was the sole participant. *See* Rev. Proc. 2021-30, §5.03(2).

[73] *See* Rev. Proc. 2021-30, §11.11(4).

[74] *See* §4.07 of Rev. Proc. 2008-50, Rev. Proc. 2013-12, Rev. Proc. 2016-51, Rev. Proc. 2018-52, Rev. Proc. 2019-19, Rev. Proc. 2021-30.

[75] *See* Rev. Proc. 2003-44, App. B, §2.07.

[76] *See* Rev. Proc. 2006-27, App. B, §2.07.

[77] Rev. Proc. 2019-19, §4.05(1)-(2)(a).

[78] Rev. Proc. 2021-30, §4.05(2)(a)(ii).

[79] Rev. Proc. 2019-19, §4.01(1)(b) (but failure to timely adopt the initial qualified plan, or failure to adopt a written §403(b) plan timely in accordance with Reg. §1.403(b)-3(b)(3) and Notice 2009-3, while a plan document failure, is not one eligible for correction under SCP). *See also* Rev. Proc. 2021-30, §4.01(1)(b).

[80] Rev. Proc. 2021-30, §4.01(1)(b) (requiring correction to be completed by the last day of the correction period set forth in §9.02).

[81] Rev. Proc. 2021-30, §4.03(1) (see §5.01(4) for the definition of a favorable determination letter for a qualified plan and §5.02(5) for the definition of a favorable determination letter for a §403(b) plan).

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determination letter application review and then the IRS offers resolution by a closing agreement. The sanction levied during Audit CAP bears a reasonable relationship to the ‘‘nature, extent, and severity of the failure,’’ but must be both acceptable to the IRS and the plan sponsor. Nonamender failures caught on exam must be resolved under Audit CAP as they are not eligible for SCP. Audit CAP is available while the plan is under exam; it is not available on appeal, as the appeals sanction is different from the Audit CAP sanction.

1. Model Correction Principles

Under all three correction programs, there are underlying principles that the Service utilizes in designing its model correction methods/retroactive plan amendments and in accepting alternative proposals. Practitioners must be aware of these principles in order to fashion correction methods/amendments that best suits the plan sponsor's needs. Many times, the *model* correction method may not be the most cost-efficient correction method. Thus, the practitioner must work with the Service to fashion a correction method that satisfies the qualification rules consistent with the plan sponsor's desire to minimize costs and administration concerns. The Service's general correction principles are as follows:[82]

- the correction method must make full correction to all affected participants (former and active) and authorized beneficiaries for all tax years, not simply those open under the statute of limitations.[83]
- the correction method should be restitutionary in nature, restoring the participants/beneficiaries to the position they would have been in had the failure not occurred.[84]
- in correcting operational failures, the correction method must take into account the terms of the plan at the time of the failure and must adjust for earnings (or losses) and forfeitures that would have applied.[85]
- the correction method should be ‘‘reasonable and appropriate’’ for the failure.[86] The 2008 revenue procedure expanded the scope of this principle by considering correction methods that are permitted by other governmental agencies for similar failures.[87] The corrections noted under the appendices of the revenue procedure are automatically deemed to be reasonable and appropriate for correcting the related qualification failure.[88]
- the correction method, if feasible, should resemble one otherwise provided under the Code, the regulations or other authoritative guidance.[89]
- the correction method should be applied consistently in correcting failures of the same type in the same plan year.[90]
- discriminatory defects must be resolved in favor of the non-highly compensated employees (NHCEs) (e.g., failure relating to the discrimination requirements applicable to benefits allocated to the NHCEs should be corrected by contributing more to the NHCEs rather than distributions of excess to the highly compensated employees (HCEs)).[91]
- the correction method must keep assets in the plan unless the Code or official guidance per-

[82] *See* Rev. Proc. 2021-30, §6 (describing the applicable correction principles). *See* Rev. Proc. 2021-30, §6.02. However, if correction is made for a closed tax year, the Service will not redetermine the tax liability because of the correction. *See* Rev. Proc. 2021-30, §6.02(1) and §6 (describing the applicable correction principles).

[83] *See* Rev. Proc. 2021-30, §6.02. However, if correction is made for a closed tax year, the Service will not redetermine the tax liability because of the correction.

[84] *See* Rev. Proc. 2021-30, §6.02(1).

[85] *See* Rev. Proc. 2021-30, §6.02. A corrective allocation can be, but does not have to be, adjusted for plan losses. The 2008 Revenue Procedure clarified that a corrective allocation or distribution should be adjusted for earnings (losses) from the date of failure, determined without regard to any Code terms which permit a corrective allocation or distribution to be made at a later date. *See* Rev. Proc. 2008-50, §6.02(4)(e). The determination of the appropriate interest rate can be problematic especially in connection with daily value funds.

[86] *See* Rev. Proc. 2021-30, §6.02(2) (noting that the determination of whether a correction method is reasonable and appropriate is a facts and circumstances determination).

[87] *See* §6.02(2)(e) of Rev. Proc. 2008-50, Rev. Proc. 2013-12, Rev. Proc. 2016-51, Rev Proc. 2018-52, Rev. Proc. 2019-19, Rev. Proc. 2021-30. Under the 2008 revenue procedure, if a plan has a different but analogous failure to one set forth in the appendices (e.g., failure to provide a matching contribution by a governmental plan that is not subject to the rules of §401(m)), the analogous correction method set forth in the appendices is generally available to correct such failures. Note that certain problems may trigger an ERISA Title I violation but not an operational failure under ERISA Title II. For example, late deposit of employee elective §401(k) deferrals constitutes a Title I violation but may not trigger a Title II violation (unless the plan document specified the timing of the deposit).

[88] *See* Rev. Proc. 2021-30, §6.02(2).

[89] *See* Rev. Proc. 2021-30, §6.02(2)(a).

[90] *See* Rev. Proc. 2021-30, §6.02(3) (including the method used for adjusting for earnings). For Group Submissions, the consistency requirement applies on a plan by plan basis.

[91] *See* Rev. Proc. 2021-30, §6.02(2)(c).

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mits correction through distribution of assets (e.g. distribution of excess allocations).[92]

- the correction method should not violate another applicable provision of §401(a), §403(b), §408(k) or §408(p), but it may take into account a correction method recognized by the DOL.[93]
- the correction method must include a procedure to locate former participants/beneficiaries.[94]
- if the plan is subject to ERISA but the failure results from either the employer having ceased to exist, no longer maintaining the plan or similar reason, the permitted correction will be to terminate the plan and distribute assets to participants/beneficiaries in accordance with the DOL standards and procedures.[95] Similarly, in the case of fiduciary violations under Title I of ERISA, correction under the DOL's VFCP will be deemed correction for a similar failure under the Code.[96]

2. Exceptions to Model Correction Principles

There are several noted *exceptions* to these model correction principles which may serve as a welcome relief for plan sponsors:

- reasonable estimates may be used in making a correction if it is impossible to make precise calculations or if the administrative costs of exact calculations outweigh the difference between the proposed correction method and the precise corrective amount;[97] it states that the interest rate used by the DOL's VFCP Online Calculator is deemed to be a reasonable interest rate.[98]
- correction of small distributions (i.e., underpayments) of $75 or less do not have to be made if the administrative costs associated with the payment of the benefit would exceed the amount of the distribution;[99]
- correction of small excess amounts ($250 or less/participant) are not required to be distributed or forfeited;[100] Rev. Proc. 2021-30 increased the threshold from $100 to $250.
- recovery of small overpayments ($250 or less) do not have to be sought if the plan sponsor so decides;[101] Rev. Proc. 2021-30 increased the threshold from $100 to $250.
- corrective distributions to former participants/beneficiaries whose location is unknown do not have to be made;[102] and
- in the context of an orphan plan, the Service retains the discretion under VCP and/or Audit CAP whether to require full correction.[103]

D. Common Violations Found in EPCRS

On the IRS' website, it documents what appear to be the most common failures under the various programs:

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[92] *See* Rev. Proc. 2021-30, §6.02(2)(b) (noting an exception provided for under the Code, regulations or other IRS guidance for correction by participants or beneficiaries or return of plan assets to the plan sponsor).

[93] *See* Rev. Proc. 2021-30, §6.02(2)(d).

[94] *See* Rev. Proc. 2021-30, §6.02(5)(d). Reasonable action includes mailing to the individual's last known address by certified mail, and if unsuccessful, then using a search method such as a commercial locator service. The revenue procedure was recently revised to delete the reference to the Social Security letter forwarding program as it is no longer available as a method for locating lost plan participants.

[95] *See* Rev. Proc. 2021-30, §6.02(2)(e)(i). The correction must satisfy four conditions: (1) fully comply with the DOL's regulations relating to abandoned plans, (2) the qualified termination administrator must have reasonable determined whether and to what extent the Code's survivor annuity requirements apply and taken reasonable steps to comply with such requirements, (3) each participant and beneficiary must be fully vested in his/her accrued benefits as of the date of deemed termination, and (4) participants and beneficiaries must be notified of their rights under §402(f).

[96] *See* Rev. Proc. 2021-30 §6.02(2)(e)(ii). Correction under the DOL's VFCP for correction of a defaulted participant loans that provides for repayment in accordance with §72(p)(2) requires only submission of the correction under VCP and inclusion of the VCP compliance statement (with proof of any required corrective payment).

[97] *See* Rev. Proc. 2021-30, §6.02(5)(a). While the Service generally requires full correction, it acknowledges this need not occur if it is unreasonable or not feasible; however, the mere fact that the correction is inconvenient or burdensome alone is not sufficient.

[98] *See* Rev. Proc. 2021-30. The VFCP Online Calculator can be located on the web available at https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/correction-programs/vfcp.

[99] *See* Rev. Proc. 2021-30, §6.02(5)(b). According to the Service, this exception for small distribution applies to a single failure of $75, not multiple failures of $75 each. This correction refers to small corrective distributions that may not have to be made; it does not authorize the forfeiture of very small account balances. This exception also does not apply to corrective contributions, which are required to be made. Rev. Proc. 2021-30, §6.02(5)(b).

[100] *See* Rev. Proc. 2021-30, §6.02(5)(e). If the excess amount exceeds a statutory limit, the participant/beneficiary must be notified that the excess amounts plus earnings is not eligible for favorable tax. The employer is still required to contribute to the plan to make it whole for the overpayment.

[101] *See* Rev. Proc. 2021-30, §6.02(5)(c). The plan sponsor is also not required to notify the overpayment recipient that an overpayment of $250 or less is ineligible for favorable tax treatment (e.g., tax-free rollover).

[102] *See* Rev. Proc. 2021-30, §6.02(5)(d).

[103] *See* Rev. Proc. 2021-30, §6.02(5)(f).

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- Most common violations for qualified plans include: failure to amend the plan for tax law changes by the end of the period required by plan; failure to follow the plan's definition of compensation for determining contributions; failure to include eligible employees or failure to exclude ineligible employees from the plan; plan loans that do not comply with §72(p); impermissible in-service withdrawals; failure to satisfy §401(a)(9) minimum distribution rules; employer eligibility failures; failed actual deferral percentage (ADP) or actual contribution percentage (ACP) nondiscrimination tests under §401(k) and §401(m) that are not corrected in a timely manner; failure to properly provide the minimum top-heavy benefit or contribution under §416 to non-key employees; and failure to satisfy the limits of §415.[104]

- Most common violations for §401(k) plans: failure to make required matching contributions; ADP/ACP failures that are not timely corrected; deferrals in excess of the §402(g) limits; late deposits by the plan sponsor of elective deferrals; misapplication of the plan's definition of compensation; exclusion of eligible employees; misclassification of HCEs and NHCEs; and failure to follow the plan loan provisions (e.g., loan exceeds the maximum amount, loan does not meet the time and payment schedules, and loans go into default for failure to make a repayment);[105]

- Common issues in §403(b) and §457 plans include: excess §402(g) contributions, including violating the 15-year rule limitation; universal availability; excess §415 contributions; plan loans that violate §72(p); hardship distribution failures; unforeseeable emergency distributions; §457(f) plan failures in operation; §457(f) plan cafeteria-style benefits; §403(b) annuity contract problems; and ineligible plan sponsors of §403(b) and §457 plans.[106]

[104] *See* "Top Ten Failures Found in Voluntary Correction Program," IRS available at https://www.irs.gov/retirement-plans/top-ten-failures-found-in-voluntary-correction-program.

[105] *See* 401(k) Plan Fix-It Guide, IRS, available at https://www.irs.gov/retirement-plans/401k-plan-fix-it-guide.

[106] *See* "Top Ten Issues for IRC 403(b) and 457 Plans," IRS, available at https://www.irs.gov/retirement-plans/top-ten-issues-for-irc-403b-and-457-plans (last updated Nov. 23, 2020).

III. OUTLINE OF THE REVENUE PROCEDURE

The current revenue procedure is outlined as follows:[107]

- Part I introduces the various correction programs and their effects on other programs, and requests public comments for future enhancements.

- Part II explains the effect of the compliance statement and the eligibility requirements for the various programs.

- Part III defines terms used in the revenue procedure, sets forth the general correction principles, and provides rules of general applicability. This section is important when fashioning an *alternative* correction method not otherwise set forth in the revenue procedure.

- Part IV explains SCP and its use for insignificant versus significant *operational* failures, and now certain plan document failures.

- Part V explains VCP, including its eligibility requirements and submission procedures.

- Part VI explains correction under Audit Cap, with its requirements, the effect of a closing agreement, and certain applicable sanctions.

- Part VII provides effective dates and various effects on other documents.

- Appendix A sets forth nine very common operational failures and deemed reasonable correction methods which plan sponsors may rely upon for SCP correction.

- Appendix B provides various correction methods (with examples) for other operational failures (e.g., ADP/ACP failures, exclusion of eligible employees, vesting failures, §401(a)(17) and §415 failures, overpayment failures, and retroactive plan amendments) and an explanation of the earnings adjustment that is required under the correction.

- A VCP submission must include material set forth in §11.04 of the revenue procedure. Applicants may use Form 14568 (Model VCP Compliance Statement), and Schedules 1 through 9 of Form 14568 (schedules to be completed depending on the type of failure or type

[107] *See* Rev. Proc. 2021-30, Table of Contents.

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of plan) to describe the methods for correcting failures and supporting computations.[108]

IV. SCP

This EPCRS program provides a "revolving door" for the plan sponsor because it can simply self-correct as operational failures as they unfold with no IRS involvement.[109] In addition, there are no IRS compliance fees assessed.[110] The cost of correction is simply the cost of applying the corrective method to the affected participants/beneficiaries. Obviously the sooner the defect is caught, the cheaper it is to correct the defect. SCP is not available to correct ***egregious*** failures.[111] The determination of an egregious failure is a facts and circumstances determination, with examples provided in the revenue procedure.[112]

A. Prerequisites to SCP

While SCP is voluntary on the part of the plan sponsor, there are several prerequisites to utilizing this program:

- Generally, any operational failure may be corrected under SCP;
- Until recently, operational failures that ***require*** retroactive ***plan amendments*** to conform the terms of the plan to its prior operations were permitted *only* with respect to the failures noted in §2.07 of Appendix B of the revenue procedure. The prior revenue procedure expanded the plan loan failure in §2.07 of Appendix B to include not only permitting plan loans under a plan that did not provide for plan loans, but also permitting participants to receive plan loans in excess of the number permitted under the plan.[113] It also expanded the use of retroactive plan amendments to conform to the terms of the plan to its prior operations beyond those in §2.07 of Appendix B, if the following conditions are met: (1) the plan amendment results in an increase of a benefit, right, or feature (BRF); (2) the increase in the BRF applies to all participants in the plan; and (3) the increase in the BRF is permitted under §401(a)(4), §410(b), §411(d)(6), and §403(b)(12) and satisfies the correction principles of §6.02.[114] The most recent revenue procedure eliminated the requirement that the increase in the BRF had to apply to all participants eligible to participate in the plan.[115] An example of the latter would include: an employer decides to permit installment payments as a distribution option effective January 1, 2017, but does not amend the plan by December 31, 2017, to provide such option. The plan has been operating during 2017 to allow installment distributions to all participants since January 1, 2107. This failure

[108] A signed and completed Form 8950, along with all other submission documents, must be uploaded into a single PDF file. The VCP submission must be filed using the www.Pay.gov website. *See* Rev. Proc. 2021-30, §11.02.

[109] *See* Rev. Proc. 2021-30, §7. SEPs and SIMPLE IRA plans may only utilize SCP for insignificant operational failures. Rev. Proc. 2021-30 at §4.01(c). SCP is also available is the plan is under examination — for failures that are either insignificant operational failures or significant operational failures that have been substantially completed. Rev. Proc. 2021-30, §4.02.

[110] *See* Rev. Proc. 2021-30, §1.03.

[111] *See* Rev. Proc. 2021-30, §4.10.

[112] *See* Rev. Proc. 2021-30 (citing the following as examples of egregious failures: the plan has consistently and improperly covered only highly compensated employees; the plan provides more favorable benefits for an owner of the employer based on a purported collective bargaining agreement where there has in fact been no good faith bargaining between bona fide employee representatives and the employer (*see* Notice 2003-24); or there are contributions to a defined contribution plan for a highly compensated employee several times greater than the maximum dollar limitations set forth in §415).

[113] *See* Rev. Proc. 2019-19, App. B, §2.07(3) (providing four situations in which retroactive plan amendments are provided as the corrective method: (1) for §401(a)(17) failures, amending the plan to increase the allocations for employees below the §401(a)(17) limit so that the allocation becomes the same percentage of compensation as contributed for the employee having the §401(a)(17) failure); (2) amending the plan to permit hardship distributions if the plan has been providing such distributions; (3) amending the plan to permit plan loans if the plan had been providing such loans or to permit the participant to obtain a number of loans that exceeds the number of loans permitted under the terms of the plan; and (4) amending the plan to reflect that the plan has admitted employees at an earlier entry date than specified in the plan document (provided the only employee affected by the amendment are predominately NHCEs). Under prior revenue procedures, correction by plan amendment required the plan sponsor under certain circumstances to file for a determination letter application with the IRS. Rev. Proc. 2016-51 eliminated this requirement with a VCP submission.

[114] *See* Rev. Proc. 2019-19, §4.05(2). The Service will consider other corrections through retroactive amendments under VCP even though they do not fit within one of the above model amendments. In the latest revenue procedures, the IRS noted that a plan that corrects through an appropriate correction method under Appendices A or B may voluntarily amend the plan to reflect the correction (e.g., if the plan failed the ADP test and the employer corrected through the use of nonelective employer contributions not otherwise authorized under the terms of the plan, the plan could be amended to reflect such correction). *See* Rev. Proc. 2019-19, §4.05(2). Informally, the IRS has stated that the term "benefit, right, or feature" has the same meaning as used in Reg. §1.401(a)(4)-4(e) (e.g., all optional forms of benefits, ancillary benefits, hardship distributions, plan loan provisions, the right to direct investments, the right to a particular form of investment, the right to make each rate of elective contributions, and the right to each rate of matching contributions). *See* Reg. §1.401(a)(4)-4.

[115] *See* Rev. Proc. 2021-30, §4.05(2)(a)(ii).

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could be corrected under SCP by a retroactive amendment during 2018 or 2019 because it adds an optional form of benefit for all eligible employees, provided the employer had communicated the availability of installments to all employees and/or recordkeeper. Had the plan sponsor failed to communicate the availability of this installment, SCP would not be applicable, and the plan sponsor would need to pursue VCP or Audit CAP.

- The prior revenue procedure permitted certain plan document failures to be corrected under SCP, including nonamender failures, failure to adopt good faith amendments, and failures to adopt interim amendments, which previously had not been allowed through SCP.[116] Plan document failures are always regarded as *significant* failures by the IRS and thus must be cured within the new three-year window period under SCP.[117] The most recent revenue procedure extended the end of the SCP correction period for significant failures from the last day of the second plan year following the plan year in which the failure occurred to the last day of the ***third*** plan year following the plan year in which the failure occurred.[118]
- Under the prior revenue procedures, *significant* operational failures[119] had to be cured within a two-year window period under SCP, whereas *insignificant* operational failures may be cured at any time, even if the plan or plan sponsor is under examination or an operational failure is discovered under examination.[120] The most recently released revenue procedure extended this two-year window to be a three-year window.[121]
- Beginning in 2017, the Service deleted the requirement that the plan sponsor have a favorable letter (i.e., determination or advisory letter) to correct significant operational failures under SCP.[122] However, as of the date of correction, the plan sponsor must have a favorable letter to self-correct plan document failures.[123]
- The plan sponsor must have in place "practices and procedures" designed to promote and facilitate overall compliance with the Code.[124]

[116] *See* Rev. Proc. 2019-19, §4.01(1)(b). A plan document failure includes any qualification failure that is a violation of the requirements of §401(403(a) and that is not an operational failure, demographic failure, or employer eligibility failure. It does not include failure to adopt a discretionary plan amendment by the appropriate date. A plan document failure which consists of the failure to adopt the initial qualified plan or failure to adopt a written 403(b) plan pursuant to Reg. §1.403(b)-3(b)(3) and Notice 2009-3 may not be corrected under SCP. *See* Rev. Proc. 2019-19, §5.01(2)(a) and §5.02(2)(a). *See also* Rev. Proc. 2021-30, §4.01(1)(b).

[117] *See* §4.01(1)(b) of Rev. Proc. 2019-19, Rev. Proc. 2021-30.

[118] Rev. Proc. 2021-30, §9.02.

[119] *See* Rev. Proc. 2019-19, §9.02. The two-year window extended to the last day of the second plan year following the plan year for which the failure occurred. Rev. Proc. 2019-19, §9.02(1). Examples provided as to what constitutes significant failures include: plan sponsor's lack of knowledge of a failure that was discovered upon exam by the agent; lack of discrimination testing for multiple years or if tests were made, but failures were never corrected; the amounts of the vested accrued benefits for terminated participants were routinely in error or if the amount of the distributions didn't match the documented distribution amount; exclusion of a group of eligible employees, especially in the context of a recent acquisition. Generally, errors that continue to occur over multiple years are regarded as significant and errors that affect multiple employees (especially a specific group of employees, e.g., part-time employees or employees of a certain employer within the controlled group) are regarded as significant. Rev. Proc. 2019-19, §8.04.

[120] There are other extensions of the correction period. Correction of failures relating only to "transferred assets" or plans assumed in connection with a corporate merger or acquisition may be extended to the last day of the first plan year that begins after the merger or acquisition. *See* Rev. Proc. 2021-30, §9.02(2). For violations of the actual deferral percentage (ADP) and actual contribution percentage (ACP) applicable to §401(k) plans, such plans now have up to four years to correct the failure because the Reg. §1.401(k)-1(f) extends the correction for another 12 months after the plan year in which the failure occurred. Rev. Proc. 2021-30, §9.02(1). In written materials prepared by Avaneesh Bhagat, a VCP program coordinator, for the 2007 Great Lakes Benefits Conference co-sponsored by the IRS TE/GE and ASPPA, the following examples were provided, illustrating the difference between insignificant and significant operational failures: for a plan with a total of 250 participants and total annual contributions of $3,500,000, 3 participants (out of a potential pool of 50 affected participants) received allocations in excess of §415(c) of $4,550. That represents an insignificant operational failure. However, if the number of participants who received excess allocations was 18 (instead of 3) and the excess allocations totaled $150,000, that would represent a significant operational failure.

[121] Rev. Proc. 2021-30, §9.02(1).

[122] Rev. Proc. 2016-51, §4.03.

[123] Rev. Proc. 2021-30, §4.05(2)(c)(i), cross-referencing the definition of a favorable letter set forth in §5.01(4) and §5.02(5). Note that in the context of a pre-approved plan, an advisory letter from the plan sponsor certifying that the plan as adopted is identical to the plan approved under the determination letter is sufficient to qualify for SCP submission.

[124] *See* Rev. Proc. 2021-30, §4.04 (noting that the plan sponsor or administrator must have established practices and procedures (formal or informal) reasonably designed to promote and facilitate overall compliance with applicable Code requirements). While the Service does not elaborate on the types of practices and procedures that would suffice, it does note that the plan document alone is insufficient. The reason for this is that operational failures should be the result of oversight or mistakes in applying existing practices and procedures. The practice and procedures don't have to be formal, but need to be in place before the failure occurred. Examples to the agent that a plan has such "practice and proce-

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According to the IRS, a plan document is not required for §403(b) prior to 2009.[125] Thus, if the plan sponsor failed to adopt a plan document by December 31, 2009, the recent guidance permits a compliance statement to be obtained through VCP and Audit CAP correcting this failure.[126] There is still not a determination letter program for individually designed §403(b) plans; however, pre-approved §403(b) plans may apply for an advisory letter.[127] Thus, the guidance confirms that the requirement of having established practices and procedures in place in order to utilize SCP applies only for failures during periods after December 31, 2009.[128]

B. Limitations of SCP

Since SCP is "self-corrective" on the part of the plan sponsor, the Service has been reluctant to provide a blanket permission for retroactive plan amendments to cure operational failures due to its concern that such amendments could result in a cut-back of benefits in violation of §411(d)(6). Thus, prior to Rev. Proc. 2019-19, self-correction of an operational failure by means of a retroactive plan amendment was ***only*** available for the operational failures that relate to the types of failures noted in §2.07 of Appendix B of the revenue procedure: §401(a)(17) failures, hardship distribution failures, certain types of plan loan failures, and inclusion of ineligible employees failures.[129] The types of failures noted in §2.07 of Appendix B have been retained under the recent revenue procedure, with the addition of allowing a retroactive plan amendment to permit a participant to obtain a number of loans that exceeds the number of loans permitted under the terms of the plan.[130] But Rev. Proc. 2019-19 expanded the types of operational failures that may be corrected by plan amendment beyond those listed in §2.07 of Appendix B if three conditions are satisfied: (1) the plan amendment would result in an increase in a benefit, right, or feature (BRF), (2) the increase in the BRF is available to all eligible employees, and (3) providing the BRF is permitted under the Code and satisfies the correction principles set forth in §6.02 of the revenue procedure.[131] Rev. Proc. 2021-30 eliminated the requirement that the increase in the BRF be available to ***all*** participants eligible to participate under the plan.[132]

Practical Pointer: This correction method allows employers to address certain eligibility failures (e.g., a retroactive plan amendment may be made to permit a group of otherwise excluded employees to keep their §401(k) contributions in the plan as opposed to remitting them to the participants).

Retroactive plan amendments to cure *other* types of operational failures that cannot be corrected under SCP must be corrected under VCP.[133] Correction by a retroactive plan amendment previously required the plan sponsor to file for a determination letter in certain circumstances; due to the changes in the determination letter program, Rev. Proc. 2016-51 eliminated this requirement.[134]

Rev. Proc. 2019-19 also expanded as the use of plan document failures to be corrected under SCP as discussed above. These included nonamender failures; failure to adopt good faith amendments; and failure to adopt interim amendments.[135] But such failures are deemed to be significant failures, and thus, must be

dures" include: employee census data is tested against the source document; participant statements are accurate; records indicate that deferrals were timely remitted. During an agent's exam of a plan, his/her initial interview is assessing the "internal controls" in place to assure adequate compliance of the terms of the plan. The IRS revised §4.04 with Rev. Proc. 2013-12 to extend SCP eligibility so that repeated corrections of excess annual addition under §415 would not prevent plans from meeting the SCP requirement of established practices and procedures provided the correction was achieved within 2½ months after the end of the plan's limitation year. *See* Rev. Proc. 2013-12, §4.04. The new guidance permits correction of these repeated failures provided the correction is achieved within 9½ months after the end of the plan's limitation year. *See* Rev. Proc. 2021-30, §4.04.

[125] Reg. §1.403(b)-3(b)(3)(i).

[126] *See* §6.10 of Rev. Proc. 2016-51, Rev. Proc. 2018-52, Rev. Proc. 2019-1, Rev. Proc. 2021-30.

[127] *See* Rev. Proc. 2021-30 §6.10(2).

[128] Rev. Proc. 2021-30, §6.10(2).

[129] *See* Rev. Proc. 2021-30, App. B, §2.07 describes specific operational failures relations to §401(a)(17) failures; hardship distribution failures; and early inclusion of ineligible employee failures. Each of these defects has a retroactive plan amendment provided to cure such defect. However, such permitted correction amendment must also comply with the requirement of §401(a), including §401(a)(4), §410(b), and §411(d)(6).

[130] Rev. Proc. 2021-30, App. B, §2.07(3)(a).

[131] *See* Rev. Proc. 2019-19, §4.05(2)(a). To use SCP, the uniformity requirement requires that all eligible employees be offered and benefit from the retroactive plan amendment. For example, if the employer's §401(k) plan excluded overtime in the plan's definition of compensation for purposes of employee deferrals and employer matches and the employer had been including overtime in plan compensation operationally, whether SCP could be used to retroactive amend the plan to reflect its operation depends on whether all eligible employees were eligible for overtime compensation, thus assuring that the amendment would benefit all eligible employees. The retroactive plan amendment would also need to be nondiscriminatory.

[132] *See* Rev. Proc. 2021-30, §4.05(2)(a)(ii).

[133] *See* Rev. Proc. 2021-30, §4.05(1) (noting that VCP is available to correct operational failures by a plan amendment to conform the terms of the plan to its prior operations, provided such amendment complies with the requirements of §401(a)(4), §410(b), §411(d)(6), and §4.03(b)(12)).

[134] Rev. Proc. 2016-51, §6.05.

[135] Rev. Proc. 2019-19, §5.01(2)(a), §5.02(2)(a). The revenue procedure defines what are good faith amendments, interim

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corrected within the correction period for significant failures which is now the end of the third plan year following the year of failure.[136] Failure to make such timely amendments will result in pursuing correction under VCP.

For correction of other operational defects, use of any of the model correction methods described in Appendices A or B of the revenue procedure is deemed to be appropriate and reasonable.[137] However, the Service acknowledges that there may be more than one reasonable and appropriate correction for a given failure. Hence, if the plan sponsor wants assurance that the use of an *alternative* correction method is reasonable and appropriate, VCP, not SCP, must be utilized. While such alternative involves a fee under VCP, the alternative correction method approved by the Service may be less expensive for the plan sponsor than the model correction method.[138]

The revenue procedures clarify that SCP can be used to cure insignificant operational failure even if the plan or plan sponsor is ''under examination'' and even if the insignificant operational failures are discovered by an agent on examination.[139]

C. Significant Versus Insignificant Failures

SCP makes a distinction between significant and insignificant operational defects, as the former must be cured within the new three-year window.[140] The revenue procedure provides the following list of factors to be used in determining ''significance'' (but no one factor is outcome determinative, nor is the list exhaustive):

- whether the failure occurred during the period of examination;
- percentage of assets/contributions involved;
- number of years involved in the failure;
- percentage of participants who were affected and could be affected;
- whether correction occurred within a reasonable period; and
- the reason for the failure.[141]

In applying these factors, the Service has indicated that *all* failures during an applicable correction period must be *aggregated* before applying these factors.[142] Thus, plans with multiple defects will have a more difficult time justifying that the cumulative failures amount to an insignificant failure.

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amendments, and nonamender failures and directs plan sponsors to the applicable revenue procedure relating to failures to adopt such amendments. Rev. Proc. §5.01(2)(a)(ii). *See also* Rev. Proc. 2021-30, §5.01(2)(a), and §5.02(2)(a).

[136] Rev. Proc. 2021-30, §9.02(1). The plan sponsor must have a favorable determination letter or advisory letter, to make such correction as of the date the correction is made. Rev. Proc. 2021-30, §4.03(1). For example: A plan document failure occurs when the plan is not amended to correct the disqualifying provision by the end of the remedial amendment period for the provision. If a sponsor of an individually designed plan does not adopt a required amendment by the end of the second calendar year after it appears on the IRS's Required Amendments List, it can now use SCP to amend the plan no later than the end of the second plan year after the end of the remedial amendment period.

[137] *See* Rev. Proc. 2021-30, App. A, §.01(2). Note that the plan sponsor is not required to use one of EPCRS's correction methods nor is it prevented from correcting a failure for which the EPCRS presently doesn't have a correction method. However, if the plan is audited, the plan sponsor may wish to concur with the plan's auditor in advance to assure that a viable audit will be issued.

[138] The Service has indicated its willingness to dialogue with plan sponsors as to the viability of alternative corrections methods, even under SCP. Note that if the plan is subject to ERISA's auditing requirements, any correction for an error that EPCRS does not have a prescribed correction method or for an error where an alternative correction method is being used may need the auditor's approval in order to secure a favorable audit. Alternatively, if the plan is not subject to an audit, the plan sponsor must believe the correction method being utilized is sufficiently appropriate to pass the scrutiny of an IRS's agent.

[139] Rev. Proc. 2021-30, §8.01. This exception applies to operational failure, not plan document failures. *See* Rev. Proc. 2021-30§4.02(2). In contrast, a plan that does a VCP submission is generally protected from an IRS exam during the submission process.

[140] *See* Rev. Proc. 2021-30, §9.02(1). ''Under examination'' is defined in §5.08 of the revenue procedure as including the plan being notified that it is under an Employee Plans exam; the plan sponsor that is under an Exempt Organization exam is notified; or the plan is under investigation by the Criminal Investigation of the Service. Rev. Proc. 2021-30, §9.02(1). Note the revenue procedure permits the plan sponsor upon examination to continue to correct any significant failures within the three-year window as long as it had substantially completed such correction (meaning it was completed about 65% of the correction and will correct the remaining in a diligent manner). *See* Rev. Proc. 2021-30, §9.03. This rule applies to correction of operational failures, not plan document failures.

[141] *See* Rev. Proc. 2021-30 §8.02 and §8.04, *Exs.* 1-5. Also note that the Service does not construe factors such as the percentage of assets/contributions involved in the failure; number of affected participants relative to the total number of participants; and number of affected participants relative to the total number of participants who could have been affected by the failure to exclude small businesses sponsoring plans from using SCP. Generally, errors that continue over multiple years or that affect multiple employees are regarded as significant. In informal contacts with the Service, it has expressed willingness to dialogue with the plan sponsor's representative as to whether a given set of facts and circumstances would qualify as an insignificant or significant error. Such discussion should ameliorate concerns for plan sponsors as whether SCP would be sufficient compliance under a given set of facts.

[142] *See* Rev. Proc. 2021-30, §8.03.

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E. New Three-Year Window for Significant Failures

The new three-year window available for SCP begins on the date of the significant operational failure (not the date the plan sponsor discovers the error) and ends on the last day of the ***third*** plan year following the plan year in which the failure occurred.[143] For example: a plan sponsor with a calendar plan year discovers that certain eligible employees were excluded from participation as of the plan's entry date of July 1, 2021; the date of the operational failure is the applicable entry date (July 1, 2021, since the employees were excluded from participation) and the three-year ending date is December 31, 2024 (the end of the third plan year following the date of the initial plan failure). A few exceptions exist:

- If the plan becomes under examination, the correction period ends on the date notice of examination is provided (however, §9.03 of the revenue procedure recognizes that if correction has been substantially completed before that time, the plan sponsor will be permitted to complete correction);[144]

- If the operational failure is due to failing the special discrimination tests of §401(k)(3) or §401(m)(9), the correction period is extended by the additional period of time permitted under those applicable Code sections;[145]

- For §403(b) plans that do not have a plan year, the calendar year will be presumed to be used;[146]

- Special rules and an extended period exist for transferred assets; and[147]

- The safe harbor correction method for employee elective deferral failures that exceed three months but do not extend beyond the SCP correction period for significant failures now has three years to correct such failures.[148]

Practical Pointer: This additional year provides more time for plan sponsors to take advantage of self-correction.

E. Administrative Practices and Procedures

To utilize SCP, the Service requires that the plan sponsor have in place administrative practices and procedures designed to ensure compliance with the Code's qualification rules.[149] Thus, the operational failure must have occurred as a result of an oversight or mistake in application, or because of the inadequacy of the procedures.[150] While the Service doesn't offer much guidance as to what has to be in place to satisfy this practices and procedures requirement, it notes that the plan document alone is not sufficient.[151] Specifically what type of operations manual has to be in place to spot disqualifying failures is not clear from the revenue procedure. Also, it is not clear whether a plan sponsor can formulate these proce-

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[143] *See* Rev. Proc. 2021-30, §9.02(1). Because Reg. §1.401(k)-1(f) permits correction of ADP failures by the return of excess contributions to the HCEs within 12 months after the plan year in which the test failed or contribution of nonqualifying elective contributions (QNECs) for NHCEs within 12 months after the plan year in which the test was failed, such defect (if significant) now has 48 months in which it may be corrected.

[144] *See* Rev. Proc. 2021-30, §9.03 (noting that substantial completion of correction'' occurs (1) if the plan sponsor was reasonably prompt in identifying the failure, formulating a correction, and initiating the correction during the applicable period and within 120 days after that period completes the correction or (2) if the plan sponsor completes the correction with respect to 65% of the affected participants during the applicable period and diligently completes the correction for the remaining affected participants thereafter).

[145] *See* Rev. Proc. 2021-30, §9.02(1). This creates a four-year window as §401(k) plans that fail to satisfy the ADP or ACP or multiple use test have an additional 12 months after the close of the plan year of failure to make a valid correction (as provided under the statute).

[146] Rev. Proc. 2021-30

[147] *See* Rev. Proc. 2021-30, §9.02(2).

[148] Rev. Proc. 2021-30, App. A, §.05(9)(b)(iii).

[149] *See* Rev. Proc. 2021-30, §4.04.

[150] *See* Rev. Proc. 2021-30. In the context of a failure relating to ''transferred assets,'' the plan will be considered to have had established practices and procedures if they are in effect by the end of the first plan year that begins after the acquisition, merger or similar transaction. In the remarks from Michael J. Sanders, Mid-Atlantic Area Manager, and Kathleen Schaffer, Mid-Atlantic Area Coordinator, on an IRS phone forum hosted by the IRS on November 30, 2011, with the transcript available at http://www.irs.gov/pub/irs-tege/scp_cap_phoneforum_presentation.pdf, examples showing the existence of such ''practices and procedures'' would include testing employee census data against the source document; demonstrating that participant statements were accurate; and proof that elective deferrals were timely remitted. Note, the guidance makes it clear that §403(b) plan sponsors need have ''practices and procedures'' only after December 31, 2009, in order to use SCP. Rev. Proc. 2021-30, §6.10(2).

[151] APRS, the predecessor to SCP, required established practices and procedures regarding the area in which the violation occurred. Therefore, some concern exists if the plan sponsor's general checklist or procedural guidelines does not cover a specific qualification failure; whether broad categories of qualification covered by the checklist or procedure are sufficient is not yet known. *See* Rev. Proc. 92-89.

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dures on an on-going basis, as errors are uncovered, and methods are adopted to correct such errors.[152]

This requirement of pre-existing practices and procedures to facilitate on-going compliance is consistent with the Service's distinction in treatment between significant and insignificant operational defects. Such on-going practices and procedures assume that routine and insignificant defects will be uncovered and corrected on an on-going basis. To the extent a *significant* operational failure occurs but is not corrected within a three-year window, SCP is unavailable and, hence, the plan sponsor must pursue VCP, which means the Service's involvement and fees in order to bring the plan back into compliance. Such approach is certainly consistent with the philosophy that the plan's ''best practices'' should have on-going practices and procedures to identify any defects as they occur, with assumed methods of correction (from the IRS's revenue procedures), which keeps the plan in compliance and the Service at bay.

Since SCP is self-corrective on the part of the plan sponsor, certain verification information should be recorded by the plan sponsor in the event that the plan later finds itself under examination. Thus, the plan sponsor may wish to ''mockup'' the VCP form (e.g., ''memo to file'') and its related schedules to record the failures and correction, not for submission purposes, but to document how it proceeded. Such records would be extremely helpful to an IRS agent upon a subsequent plan audit. In reviewing verification of an SCP correction, the Service says it will look for the following documentation:

- that corrective contributions/distributions were adjusted for earnings;
- that significant operational failures were corrected within the applicable three-year window;
- if the correction method used was not one of the ones specifically described in the appendices of the revenue procedure, the correction method nevertheless complied with the Service's correction principles, especially those outlines in §6.02(2) of the revenue procedure regarding reasonableness and appropriateness; and
- steps were taken to verify that self-correction actually occurred.[153]

Practical Pointer: Given that the new user fees range from $1,500 to $3,500 for a regular submission,[154] plan sponsors may wish to correct through VCP, even if SCP was available, in order to receive a compliance statement from the Service that it will not treat the plan as failing to satisfy the applicable requirements of the Code on account of such failures. The cost for this additional ''insurance'' may well be worth the price.

The recent EPCRS guidance incorporates the changes made by Rev. Proc. 2015-27 such that SCP is available in the context of repeated corrections of excess annual additions under §415 as long as the plan corrects such excesses through the return of elective deferrals to affected employees within 9½ months after the end of the plan's limitation year.[155] Such failures do not constitute evidence of a lack of established practices and procedures.

V. VCP

VCP has evolved the most over the past years. This door of opportunity must be opened by the plan sponsor and does involve the Service. The variety of programs offered under Rev. Proc. 2002-47 — VCO, VCS, VCT[156] — has now been consolidated into a single VCP program to simplify the submission process. For plan sponsors with very minor defects, the prior VCO provided a flat $350 fee which was preferable to the new VCP fee schedule.[157] In all other respects the simplification and reduced fee schedule make the new VCP a more-welcomed program.[158] Prior to Rev. Proc. 2018-52, VCP submissions were sent to the IRS office in Covington, KY, with the intent to smooth out the processing time and allow the group managers more control over the allocation of cases among agents.[159] Under Rev. Proc. 2018-51, applicants submitting between January 1, 2019, through March 31, 2019, had the option of filing a paper VCP submission in accordance with Sections 10 and 11 of Rev. Proc. 2016-51; however, after March 31, 2019, all VCP submission must be filed electronically using

[152] If a plan sponsor retains an external or third-party recordkeeper, such recordkeeper's procedures should suffice for purposes of satisfying the administrative practices and procedures requirement; but as is the case in any fiduciary delegation, the plan sponsor must exercise due diligence in selecting and maintaining a given recordkeeper.

[153] *See Levine, et al.,* above, note 71, at Ch. 11, p. 13.

[154] *See* Rev. Proc. 2021-4, App. A, §.09, for applicable user fees, effective for submissions on or after January 4, 2021.

[155] Rev. Proc. 2021-30, §4.04.

[156] *See* Rev. Proc. 2002-47, §1.03 (for the definition of VCO, VCS and VCT).

[157] *See* Rev. Proc. 2002-47,§12.02.

[158] *Compare* the fee schedule in §12.02 of Rev. Proc. 2002-47, to the fee schedule in §12.02 of Rev. Proc. 2003-44.

[159] Rev. Proc. 2016-51, §11.12.

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the www.Pay.gov website and pay the applicable user fee.[160]

A. Types of Failures

VCP is available to cure a wide variety of qualifying defects, including:

- plan document failures (which includes a plan provision or the absence of a plan provision that on its face violates the requirements of §401(a) or §403(b));
- operational failures that are or are not egregious in nature;
- demographic and employer eligibility failures; and
- significant operational defects not cured within the three-year correction period (available under SCP).[161]

B. Applicable Fee Schedule

Under the current revenue procedure, for a given modest fee, the Service is willing to affirm acceptable correction methods in order for plans to rely on continued qualification, without the risk of audit. Interestingly, plan document failures were relatively rare during the past decade of compliance submission. During the past few years, the Service has indicated that plan document failures amount to a significant percentage of VCP requests. The general user fees for all VCP submissions was set forth in §6.08 of Rev. Proc. 2016-8, beginning February 1, 2016.[162] However, beginning in 2017, the user fees for VCP submissions will be published within the annual revenue procedure which sets forth user fees in general.

Under the current user fee schedule set forth in Rev. Proc. 2021-4, the VCP fees for regular (non-group) submissions are based on net plan assets (effective for submissions made on or after January 1, 2020) as follows:

Plans with assets of

(a) $500,000 or less, the user fee is $1,500

(b) over $500,000 to $10,000,000, the user fee is $3,000

(c) over $10,000,000, the user fee is $3,500.[163]

For group submissions, the compliance fee is based on the number of plans affected by the failure. The initial fee is $10,000 due at the time of submission, with an additional fee equal to $250 for each plan affected in excess of 20 plans, but a maximum fee of $50,000.[164]

The revenue procedure also provides possible relief from the excise tax penalties under §4974 (for failures to satisfy the minimum required distribution rules); §4972 (for employer contributions that are nondeductible due to the limits of §404); §4979 (due to excessive elective deferrals or matching contributions made to the HCEs resulting from testing failures); §4973 (for excess contributions made to a §403(b) or IRA provided the participant/beneficiary removes the overpayment with earnings, returns such amounts to the plan, and reports the amount as a taxable distribution for the year in which the overpayment was removed); and §72(t) (for distributions from an employee's vested account balance that was distributed but not

[160] Section 11.01 of Rev. Proc. 2018-52, Rev. Proc. 2019-19, Rev. Proc. 2021-30.

[161] *See* Rev. Proc. 2016-51, §4.01(2). The revenue procedure clarifies that the term plan document failure includes good faith amendments, interim amendments, and nonamender failures, as defined in §5.01(2)(a) for qualified plans and §5.02(2)(a) for §403(b) plans. If under VCP the Service determines that the plan or the plan sponsor was, or may have been, a party to an ATAT, the matter will be referred to relevant IRS personnel. If the failure in the VCP submission is related to the ATAT, the case will be referred to Employee Plans examination. *See* Rev. Proc. 2021-30, §4.12(1)(b). The Service also reserves the right to impose larger user fees than the usual fees in the case of egregious failures. *See* Rev. Proc. 2021-30, §4.10(3). The prior cap of 40% of the Maximum Payment Amount (MPA) for egregious failures contained in Rev. Proc. 2013-12, §12.07, has been deleted.

[162] Under Rev. Proc. 2016-8, §6.08, the fee schedule ranged from $500 for plans with 20 or fewer participants to $15,000 for plans with more than 10,000 participants. That revenue procedure also had reduced fees for certain types of failures. The reporting fees are filed on Form 8951. That revenue procedure provided reduced fees for certain failures (e.g., late adoption of interim plan amendments, other nonamender failures, if the submission related solely to the failure of the participant loans to comply with the requirements of §72(p)(2) and the failure did not affect more than 25% of the sponsor's participants, and if the submission related solely to the minimum distribution requirements of §401(a)(9) and the failure would result in the imposition of an excise tax). Rev. Proc. 2018-4, generally effective January 2, 2018, eliminated the lower user fees for VCP submissions for most of these exceptions.

[163] Rev. Proc. 2021-4, App. A, §.09(1). The IRS reserves the right to issue a special closing agreement in lieu of a compliance statement so as to impose a sanction that may be larger than the VCP user fee in the following cases: a correction methodology that permits excess amounts to remain in effected SEP/SARSEP/SIMPLE IRAs; any submission where the failures are egregious or intentional; an additional amount that the plan sponsor may pay as a condition for the IRS not to pursue some or all of the 10% additional tax under §72(t); and other situations described in Rev. Proc. 2021-30, §4.10(3), §6.09(6), §6.11(5), and §11.07.

[164] Rev. Proc. 2021-4, App. A, §.09(2). This was the same VCP fee for a group submission that was contained in Rev. Proc. 2016-51, §12.06(2). For pre-approved plans, the fee is determined based on the number of basic plan documents submitted and the number of employers who have adopted each basic plan document according to the adoption agreement associated with such document. Rev. Proc. 2021-4, App. A §.09(2).

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pursuant to a distributable event provided the amount with earnings is returned to the plan).[165] Relief from these excise tax penalties is not available through SCP.

C. Correction Methods and Retroactive Plan Amendments

Although the two voluntary doors (SCP and VCP) permit different correction methods, SCP assumes that defects listed in Appendix A of the revenue procedure will be corrected according to the model correction methods provided in the Appendices. If a retroactive plan amendment is necessary, Appendix B of the revenue procedure contemplates four different scenarios. Rev. Proc. 2019-19 expanded the use of retroactive plan amendments in situations beyond those listed in Appendix B of the revenue procedure.[166] Rev. Proc. 2021-30 modified that expansion.[167] Use of VCP permits ***alternate*** correction methods and ***alternate*** plan amendments, provided they meet with the Service's approval. The Service has indicated its willingness to engage in dialogue with the plan sponsor's representative regarding possible correction methods, realizing that one correction method may not fit all fact situations. While EPCRS is primarily focused on operational plan defects, the Service realizes that not all plan sponsors have taken advantage of the determination letter process and the various extended remedial amendment periods and thus permits plan document failures to be corrected.

D. New VCP Pre-Submission Conference

Under the newest revenue procedures, the IRS now permits a representative of the plan sponsor to request an anonymous VCP pre-submission conference regarding corrective actions for a failure that is eligible to be submitted under VCP, effective as a of January 1, 2022.[168] A request for a pre-submission conference is available only (1) for matters on which a compliance statement may be issued under the revenue procedure, (2) with respect to a requested correction method not otherwise described in Appendix A or B, and (3) subject to the discretion of the IRS and as time permits.

To request a pre-submission conference, the representative must submit a Form 8950, *Application for VCP Submission under EPCRS*, via the Pay.gov website, which must include (1) a description of the failure(s), including how and why they occurred; (2) a description of the proposed method(s) of correction; (3) a description of all relevant facts, including the type of participants affected (e.g., HCE and NHCE participants); (4) plan provisions and amendment that are relevant to the request; and (5) any other information the IRS requests.[169]

At the conference, the IRS will provide oral feedback to the plan sponsor's representative regarding the failure(s) and the proposed correction method(s) described in the request. The new VCP pre-submission conference is replacing the John Doe submission process and is more favorable to plan sponsors as it does not involve a user fee.

E. Application Process and Compliance Statement

VCP begins with the plan sponsor or his representative creating a Pay.gov account on the www.Pay.gov website, as the applicant will use this account to complete and sign Form 8950, Application for Voluntary Correction Program (VCP) Submission Under the Employee Plans Compliance Resolution System.[170] The VCP submission includes a description of the failures, proposed methods of correction, and other procedural items set forth in §11.04 of the revenue procedure, which must be converted into a single PDF

[165] Rev. Proc. 2021-30, §6.09(2)-(6). VCP is not available for events for which the Code provides tax consequences other than plan disqualification, such as the imposition of an excise tax or additional income tax (e.g., funding deficiencies, prohibited transactions, and failure to file the Form 5500 series).

[166] Rev. Proc. 2019-19, §4.05(2)(a).

[167] Rev. Proc. 2021-30, §4.05(2)(a)(ii).

[168] Rev. Proc. 2021-30, §10.01(1).

[169] Rev. Proc. 2021-30, §10.01(2). At the conference, the IRS will provide oral feedback regarding the proposed correction method. It is anticipated that the IRS instructions associated with the Form 8950 will be modified accordingly.

[170] Rev. Proc. 2021-30, §11.03(3). Prior to using the website, the applicant should read the instructions to Forms 8950 and 8951 to understand the questions that will be asked on the website and to be able to pay the user fee. Rev. Proc. 2021-30, §11.03(1). Form 8950 is the Application for Voluntary Correction Program (VCP) Submission Under the Employee Plans Compliance Resolution System, and Form 8951 is the User Fee for VCP Submission. Instructions are located at https://www.irs.gov/pub/irs-pdf/i8950.pdf. These forms were developed under Rev. Proc. 2013-12, §11.03(4), to streamline the information to be submitted and to expedite the process. The submissions were previously directed to the IRS's service center in Covington, KY. A plan representative may act on behalf of a plan sponsor by complying with the requirements of §6.02(11) and §6.02(12) of Rev. Proc. 2021-4 and filing a Form 2848. If the plan sponsor is authorizing an individual to sign and file the VCP submission, the submission must contain a document signed by the plan sponsor with the following declaration: "Under penalties of perjury, I declare that I have examined this submission, including accompanying documents, and, to the best of my knowledge and beliefs, the facts presented in support of this submission are true, correct, and complete." Rev. Proc. 2021-30, §11.04(16).

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file for purposes of the submission; a suggested ordering of documents is set forth in the revenue procedure.[171]

The last few revenue procedures have been streamlining the application process by providing model forms. Applicants may submit Form 14568 (Model VCP Compliance Statement), with attached separate narrative documents describing the qualification failures, correction methods, and the following other information described in §11.04.[172] Applicants may use Schedules 1 through 9 to Form 14568 (Forms 14568-A through 14568-I) in lieu of the separate narrative documents relating to the description and correction of identified failures and related changes in administrative procedures, and combine these forms with other submission documents into a single PDF.[173]

Section 11.04 of the revenue procedure requires the following information to be included in the submission:

- A description of the failure, the years in which the failures occurred, and the number of employees affected by each failure;
- An explanation of how and why the failures arose, including a description of the administrative procedures applicable to the failure that were in place at the time of the failure;
- A description of the proposed method for correcting the failures, including the number of employees affected and the expected cost of correction, the years involved, and calculations or assumption the plan sponsor used to determine the amounts needed for correction;
- A description of the methodology to be used to compute earnings or actuarial adjustments on any corrective contributions or distributions;
- Specific calculations for each affected employee (or a representative sample of affected employees) needed for correction (e.g., with respect to a failure to satisfy the ADP test, the plan sponsor would submit ADP test results before and affect the correction);
- The method to be used to locate and notify former employees or beneficiaries affected the failure or correction;
- A description of changes in the administrative procedures to be implemented to ensure the same failure does not recur;
- A copy of the entire plan document or the relevant portions of the plan document;
- A specific request for relief for excise taxes (§4972, §4973, §4974, or §4979) or additional tax relief under §72(t), along with the rational for such a request;
- Whether the request involves participant loans to be corrected such that they will not be treated as deemed distributions under §72(p) or whether the request wishes to report the loan as a deemed distribution in the year of correction instead of the year in which the deemed distribution occurred;
- 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 corrections; and
- The user fee that is now set forth in Appendix A of Rev. Proc. 2021-4 (and its annual successors).[174]

Under the current revenue procedure, the supporting schedules under Form 14568 reflect particular failures and particular plan types:

Form 14568-A: for failure to adopt timely interim amendments or optional change amendments;

Form 14568-B: for failure to adopt amendments to comply with required legislative or regulatory changes and failure to timely adopt a §403(b) plan;

Form 14568-C: for a SEP or SARSEP with one or more failures shown below:

- Employer eligibility failure (SARSEPs only);
- Failure to satisfy the deferral percentage test (SARSEPs only);
- Failure to make required employer contributions to the plan;

[171] Rev. Proc. 2021-30, §11.03(2). The IRS will process the submission more quickly if the documents are presented in the following order: Plan Sponsor's Penalty of Perjury Statement; Power of Attorney (Form 2848) or Tax Information Authorization (Form 8821); applicable cover letter; narrative information required under §11.04 of the revenue procedure; if the VCP includes Form 14568 and/or any schedules, any required information and enclosures; supporting computations relating to correction; relevant plan document language; copy of the plan's opinion, advisory, or determination letter (if applicable); and any other items relevant to the submission. Rev. Proc. 2021-30, §11.11.

[172] Rev. Proc. 2021-30, §11.02(1)-(2). Even if the applicant does not submit Form 14568, it may include Schedules 1-9, as applicable, as part of the VCP submission to satisfy the requirements of the revenue procedure relating to the description and correction of identified failures and related changes in administrative procedures. Rev. Proc. 2021-30, §11.02(2).

[173] Rev. Proc. 2021-30, §11.02(2)-(3).

[174] Rev. Proc. 2021-30, §11.05. Any documents that could not be included in the PDF file should be faxed to the IRS at 855-203-6996, with the Pay.gov tracking ID number, as well as the applicant's EIN, and the names of the applicant and plan on the fax coversheet. Rev. Proc. 2021-30, §11.03(7).

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- Failure to provide eligible employee with the opportunity to make elective deferrals (SARSEPs only); or
- Excess Amounts contributed to the plan.

Form 14568-D: for a SIMPLE IRA with one or more failures shown below:

- Employer eligibility failure;
- Failure to make required employer contributions to the plan;
- Failure to provide eligible employees with the opportunity to make elective deferrals; or
- Excess Amounts contribution to the plan.

Form 14568-E: for failure to administer plan loans under a qualified plan or §403(b) plan in accordance with §72(p)(2);

Form 14568-F: for failure to satisfy the criteria for an employer to sponsor either a §403(b) or §410(k) plans;

Form 14568-G: for failure to distribute elective deferrals made in excess of the §402(g) limit;

Form 14568-H: for failure to make required minimum distributions pursuant to §401(a)(9); and

Form 14568-I: for one or more of the following failures:

- §401(a)(17) failure;
- Hardship distribution failure;
- Loans permitted in operation, but not permitted under the terms of the plan, and now, loans permitted in operation in excess of the number required under the terms of the plan; or
- Early inclusion of other eligible employees.

Practice Pointer: Practitioners indicate that VCP submissions are now taking over a year to process. Thus, plan sponsors should consider correcting the failures as soon as possible to avoid paying unnecessary earnings adjustments on delayed payments. Practitioners also indicate that there is a wide disparity in handling of the VCP submissions, some reviewers affirming the submission with little adjustment, and others requiring numerous changes to the submission.[175]

One concern for practitioners is whether additional qualification defects may be added to the VCP after the initial submission has been made. While the revenue procedure notes that the Service retains discretion in allowing or rejecting new failures,[176] the Service has indicated informally that it wishes to be extremely flexible in this regard as its goal is to resolve all known qualification failures.

VCP should end with a compliance statement issued by the Service, assuring the plan sponsor that the Service will not seek to disqualify the plan based on the information submitted in the VCP.[177] The compliance statement does not have to be signed by the plan sponsor unless material changes have been made to the application. This change is intended to expedite the processing time for submission. In the unlikely event that the parties are unable to agree upon resolutions, the plan sponsor may withdraw its submission. In actuality, the Service has indicated that this rarely ever happens. The 2018 revenue procedure clarified that if the submission is complete and sets forth an acceptable correction method, the IRS may issue a compliance statement without contacting the plan sponsor or his representative.[178]

The guidance clarifies that, with respect to failures to timely amend for good faith amendments, interim amendments or plan amendments to reflect the plan's operation, the issuance of a compliance statement will result in the corrective amendments being treated as if they had been adopted during the applicable remedial amendment period in accordance with Rev. Proc. 2007-44 and Rev. Proc. 2016-37.[179] However, such statement does not constitute a determination letter as to whether the plan amendments as drafted comply with the changes in the qualification requirements. It also provides that for failures to amend the plan timely for disqualifying provisions or a failure to timely adopt applicable required amendments provided on the Required Amendments List (nonamender failures), the compliance statement will result in the corrective amendments being treated as if they had been adopted during the applicable remedial amendment period in accordance with Rev. Proc. 2016-37.[180]

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[175] For example, some IRS reviewers permit the use of the DOL's VFCP online calculator for purposes of the interest computations, whereas others require the use of the interest rate of the fund with the highest interest rate. Also, practitioners have experienced an additional six-month delay in a VCP submission if an IRS actuary is involved in the review of the actuarial equivalence computation used in correcting of a failure to pay minimum required distributions under a defined benefit plan.

[176] *See* Rev. Proc. 2021-30, §10.07(5).

[177] *See* Rev. Proc. 2021-30, §10.07(8). However, the Service reserves the right to require the plan sponsor to sign the compliance statement. Since ATATs cannot be corrected through EPCRS, any compliance statement issued by the Service through VCP may not be relied on for purposes of concluding that the plan or the plan sponsor was not a party to an abusive tax avoidance transaction. *See* Rev. Proc. 2021-30, §4.12(1)(b).

[178] *See* Rev. Proc. 2018-52, §10.06(3).

[179] *See* Rev. Proc. 2021-30, §10.08(2).

[180] *See* Rev. Proc. 2021-30, §10.08(2)(b).

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F. John Doe Submissions Being Eliminated

EPCRS began offering anonymous or ''John Doe'' submissions to VCP in 2001.[181] Originally such submissions could only address compliance failures not otherwise addressed in the appendices of the applicable revenue procedure. Prior to the issuance of this most recent revenue procedure, any type of failure permitted under EPCRS could be submitted under a ''John Doe'' basis. A ''John Doe'' submission contained the same information that is required to be submitted under the VCP, except that identifying information is redacted.[182] Once an agreement is reached between the Service and the plan sponsor's representative, there was a 21-day window in which the plan sponsor must be identified in order to move forward under VCP.[183] The objective of the Joe Doe submission process was to secure IRS approval regarding controversial issues without revealing the name of the plan sponsor. If an agreement could not be reached, the plan sponsor could remove the application while the IRS retained the application fee.

As practitioners continue to receive assurances from the Service that ''EPCRS'' is not ''EPCRS with referral for examination,'' there became less of a need for a plan sponsor to pursue a ''John Doe'' submission under VCP. If the plan sponsor could not reach an agreement under VCP with the Service, experience has demonstrated that a plan audit is not imminent, let alone automatic. Given that this is the case, pursuing ''John Doe'' submission simply forestalled the VCP process and subjected the plan to a greater time period in which it could be selected for audit.

Under the current revenue procedure, the anonymous submission procedure under VCP will be eliminated, effective January 1, 2022.[184] It is being replaced with an anonymous, *no-fee*, VCP pre-submission conference, effective January 1, 2022.[185] Such procedure may be utilized by plan sponsors to discuss requested correction methods that are not described as a safe harbor correction method in the appendices, but are held at the discretion of the IRS. To take advantage of such procedure, the plan sponsor's representative must submit the VCP pre-submission conference request via the Pay.gov website by submitting Form 8950.[186]

G. Group Submissions

Group submissions under EPCRS were introduced in 2001, by adding a separate submission process for ''Eligible Organizations'' (i.e., sponsor or administrator of an eligible master or prototype plan) to correct plan document and operational failures.[187] According to the Service, very few Eligible Organizations have taken advantage of this program. A VC Group submission may be made only for failures ''resulting from a systematic error involved the Eligible Organization that affects at least 20 plans.''[188] The Eligible Organization makes the submission, as opposed to the plan sponsors (which do not have to be identified until the compliance stage).[189] Once agreement is reached between the Eligible Organization and the Service, the revenue procedure provides a 120-day window period in which the plan sponsor's identifying information must be revealed and a 240-day window period to make the agreed-upon corrections.[190] The fee schedule for VC Group submissions is a flat fee of $10,000, with an additional fee for each plan in excess of 20 that is part of the group submission, with an overall maximum of $50,000.[191] The revenue procedure makes it clear that the group VCP submission protects all the adopting employers' plans against ex-

[181] *See* Rev. Proc. 2001-17, §10.12.

[182] *See* Rev. Proc. 2019-19, §10.09, noting that if the submission is made by the plan sponsor's representative, such individual must satisfy the power of attorney requirements set for in §11.08. As part of the submission on the www.Pay.gov website, the authorized representative must, under penalty of perjury, assert that he complies with the power of attorney requirements and that he will submit an executed copy of Form 2848, upon the disclosure of the identity of the plan sponsor. Rev. Proc. 2019-19, §10.09.

[183] *See* Rev. Proc. 2019-19. The older practice under Rev. Proc. 2013-12, §10.06(7), of refunding 50% of the paid VCP fee if the IRS and the submitter could not agree with the correction no longer applies.

[184] *See* Rev. Proc. 2021-30, §10.10.

[185] Rev. Proc. 2021-30, §10.10

[186] Rev. Proc. 2021-30, §10.01(2).

[187] *See* Rev. Proc. 2001-17, §10.14(2) (defining an ''Eligible Organization;'' as (a) a sponsor of a master or prototype plan that receives an opinion letter that considers the provisions of GUST or (ii) has received an opinion letter than considers the Tax Reform Act of 1986 (TRA '86), Pub. L. No. 99-514, and has been submitted for a GUST opinion letter by December 31, 2000; (b) an insurance company or other entity that has issued annuity contracts or provided services with respect to assets for §403(b) plans; or (c) an entity that provides its clients with administrative services with respect to qualified plans or §403(b) plans).

[188] *See* Rev. Proc. 2021-30, §10.10.

[189] The 2008 Revenue Procedure clarified that if a plan sponsor who is eligible to be included in the Group Submission and has not elected to be excluded from such submission is later notified of an impending examination, the plan sponsor's plan is deemed to be included in the Group Submission. *See* Rev. Proc. 2008-50, §10.11(3)(d). This was affirmed in §10.11(3) of Rev. Proc. 2013-12, Rev. Proc. 2021-30, and §10.10(3) of Rev. Proc. 2016-51, Rev. Proc. 2018-52, Rev. Proc. 2019-19.

[190] *See* Rev. Proc. 2021-30, §10.11(3)(c). Note the required power of attorney for each affected plan sponsor is not required. The sponsor of the master or prototype plan, the insurance company or the third-party administrator must notify all affected plan sponsors of the group submission.

[191] *See* Rev. Proc. 2021-4, App. A, §.09.

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amination but only with respect to the failures identified in the submission.[192]

H. Specific Correction Methods Under the Revenue Procedure

There are specified correction methods in Appendix A of the revenue procedure used to correct certain operational failures.[193] Appendix B expands the model correction methods for additional operational failures and provides model retroactive plan amendments that may be used to correct the plan document. Corrective allocations and distributions prescribed under a given model correction must reflect investment earnings and actuarial adjustments, if necessary. An explanation of the model correction methods is provided in Attachment 1 of this article. The following is a summary of the most common failures and model corrections set forth in Appendix A and B of the most recent guidance:

1. Excess Amounts

The 2008 revenue procedure changed the definition of the term ''excess amounts'' to include a qualification failure due to a contribution, allocation or credit made on behalf of a participant or beneficiary in excess of the maximum amount permitted, either because of the limits in the plan or statutory limits (Code or regulations).[194] The term ''excess allocation'' refers to a subset of ''excess amounts'' and covers those that do not already have a corrective mechanism provided by the Code or regulations.[195] See attachment 1 for a description of the statutory correction mechanisms used to handle failures associated with §402(g) violations; ADP/ACP failures; and associated employer matches.

Excess allocation failures are handled according to a method referred to as the ''reduction of account balance'' correction method, and generally depend on whether the failure is caused by employer monies or employee deferrals or after-tax contributions.[196] If the failure is attributable to the employer monies, the employee's account balance is reduced by the excess (plus earnings).[197] If the excess would have been allocated to the other employees in the year of failure, the excess is adjusted for earnings and reallocated according to the plan terms.[198] Otherwise, the excess (plus earnings) is placed in a suspense account.[199]

To the extent the excess is attributable to an employee's elective deferrals or after-tax contributions, the excess plus earnings are to be distributed to the participant.[200] Such distribution is not eligible for rollover or other favorable tax treatment.[201] The distribution must then be reported on Form 1099-R for the year of distribution and the taxpayer must be informed that the distribution is an excess amount and does not qualify for favorable tax treatment, specifically, not eligible for rollover.[202]

Notwithstanding the above rules, there is a special ordering rule to be used for correcting §415 violations, which is set forth in Attachment 1.

2. Overpayments

The term ''overpayment'' refers to a qualification failure as a result of payment being made to a participant or beneficiary (referred to as ''the overpayment recipient'') that exceeds the amount to be paid under

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[192] *See* Rev. Proc. 2021-30, §10.11. The 2013 revenue procedure made it clear that with respect to preapproved plans, the compliance fee is based on the number of basic plan documents and the number of employers who have adopted each basic plan by using an adoption agreement for such plan. *See* Rev. Proc. 2013-12, §12.05.

[193] *See* Rev. Proc. 2021-30, App. A (providing the original seven operational errors and correction methods approved under the original SCP program that was part of VCR.).

[194] *See* §5.01(3) of Rev. Proc. 2008-50, Rev. Proc. 2013-12, Rev. Proc. 2016-51, Rev. Proc. 2018-52, Rev. Proc. 2019-19, Rev. Proc. 2021-30. It includes: (1) elective deferrals or after-tax employee contributions in excess of the maximum contribution under the plan (e.g., 10% of compensation as the maximum limit); (2) elective deferrals or after-tax employee contributions made in excess of the limitation in §415; (3) elective deferrals in excess of §402(g); (4) excess contribution or excess aggregate contribution under §401(k) or §401(m); (5) elective deferrals or after-tax employee contribution made in excess of the limitation of §401(a)(17); (6) elective deferrals or after-tax employee contribution in excess of the limitations of §401(a)(17), §401(m) (but only with respect to the forfeiture of nonvesting matching contributions that are excess aggregate contributions, §411(a)(3)(G) or §415. Excess amounts do not include contributions, allocations or credits made to correct a different qualification failure. They are limited to contributions, allocations or annual additions under a defined contribution plan, after-tax employee contributions under a defined benefit plan, and contributions and allocations that are made to a separate account (with earnings) under a defined benefit plan. In the context of §403(b) plans, excess amount refers to amounts returned to guarantee that the plan satisfies with the requirements of §402(g) and §415 and any distributions to guarantee that the plan complies with the requirements of §403(b). *See* Rev. Proc. 2021-30, §5.02(3).

[195] *See* Rev. Proc. 2021-30, §5.02(3).

[196] Rev. Proc. 2021-30, §6.06(2).

[197] Rev. Proc. 2021-30.

[198] Rev. Proc. 2021-30.

[199] Rev. Proc. 2021-30. While such amounts remain in the suspense account, the employer is not permitted to make contributions to the plan (other than elective deferrals).

[200] Rev. Proc. 2021-30. Such amounts are to be disregarded for purposes of §402(g) and §415, and the ADP and ACP tests of §401(k).

[201] Rev. Proc. 2021-30, §6.06(1). If such amounts had been rollover over to an IRA, it is not a valid rollover contribution and may result in an excess IRA contribution, subject to a 6% penalty.

[202] Rev. Proc. 2021-30. The employer uses Code E on the Form 1099-R.

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the terms of the plan or exceeds a statutory limit (Code or regulations), including those amounts distributed too soon or in excess.[203] It includes overpayments from defined benefit and defined contribution plans.[204] The latest revenue procedure has been revised to provide that plan sponsors may allow the overpayment recipient the option of repaying the overpayment through a single sum, installment payments, or an adjustment in future payments.[205]

For defined benefit overpayments, the correction method requires the employer to take ''reasonable steps'' to have the overpayment plus earnings, returned to the plan or offset against future payments, using the same method applied for overpayments relating to a §415(b) failure, which is described in Appendix 1.[206] Otherwise, the employer (or another person) must contribute the difference to the plan.[207]

The latest revenue procedure has been revised to provide for two new overpayment correction methods for defined benefit plans: the funding exception correction method and the contribution credit correction method.[208] According to the IRS, these methods will lessen the need for defined benefit plans to seek recoupment from overpayment recipients and ease the process for overpayment recipients who are repaying overpayments.[209]

Section 6.06(3)(d)(i) sets forth the new funding exception correction method. This method does not require corrective payments to be made for a plan subject to §436 (i.e., the benefit restrictions applicable to certain defined benefit plans), provided the plan's certified or presumed adjusted funding target attainment percentage (AFTAP) is equal to at least 100% (or in the case of a multiemployer plan, the plan's most recent annual funding certification shows that the plan is not in critical, critical and declining, or endangered status, determined at the date of correction).[210] Future benefit payments to an overpayment recipient must be reduced to the correct benefit payment amount. For purposes of EPCRS, no future corrective payments from any party are required, no future reductions to future benefit payments to an overpayment recipient, or any spouse or beneficiary of an overpayment recipient, are permitted, or any spouse or beneficiary of an overpayment recipient, are permitted.[211]

Section 6.06(3)(d)(ii) sets forth the new contribution correction method. This method provides that the amount of the overpayment required to be repaid to the plan is the amount of the overpayments reduced (but not below zero) by: (A) the cumulative increase in the plan's minimum funding requirements attributable to the overpayments (including the increase attributable to the overstatement of liabilities, regardless of whether it was funded through cash contributions or through the use of a funding standard carryover balance, prefunding balance, or funding standard account credit balance), beginning with (1) the plan year for which the overpayments are taken into account for funding purposes, through (2) the end of the plan year preceding the plan year for which the corrected benefit payment amount is taken into account for funding purposes; and (B) certain additional contributions in excess of minimum funding requirements paid to the plan after the first of the overpayments was made.[212] Such reduction is referred to as a ''contribution ,credit.'' Future benefit payments to an overpayment recipient must be reduced to the correct benefit payment amount. For purposes of EPCRS, if the amount of the overpayments is reduced to zero after the contribution credit is applied, no future corrective payments from any party are required, no further reduc-

[203] Rev. Proc. 2021-30, §5.01(3)(c). In May 2021, the U.S. House Ways & Means Committee passed SECURE 2.0 (Securing a Strong Retirement Act of 2021), H.R. 2954, as a follow-up to the legislation passed in 2019, entitled Setting Every Community Up for Retirement Enhancement (SECURE Act). Under §3.01 of H.R. 2954, relief has been provided for plan sponsors' of §401(k), §403(b), or governmental plans regarding the treatment of overpayments.

[204] Rev. Proc. 2021-30. Examples of overpayments from a qualified plan includes distributions for benefits in excess of the §415 limits; amounts in excess of the plan's formula; amounts that were not vested benefits. Additional examples for defined benefit plans could include making an in-service distribution before the participant attains age 62 or paying a lump sum benefit when the plan was subject to the benefit restrictions of §436(d). Additional examples for defined contribution plans could include providing a matching contribution when the participant failed the allocation condition; making a hardship distribution when the participant was not eligible for one; or distributing an amount that should have forfeited as an ACP failure. During this latest revenue procedure, the IRS has retooled the examples to show they apply in alternate scenarios. *See* Exs. 25, 26, 27 and 28 in App. B, §2.05.

[205] Rev. Proc. 2021-30, §6.06(3), §6.06(4), and App. B, §2.05. The overpayment recipient must be notified that the overpayment is ineligible for tax-free rollover treatment.

[206] Rev. Proc. 2021-30, §6.06(3), and App. B, §2.05(2).

[207] Rev. Proc. 2021-30. Rev. Proc. 2016-51, §6.06(1), clarifies that there is flexibility in correcting an overpayment. It permits the employer or a third party to contribute the amount of the overpayment (with interest) to the plan instead of seeking recoupment from plan participants and beneficiaries or a retroactive plan amendment to have the document conform with its operations. If the overpayment is not repaid or if less than the full overpayment is returned to the plan, the employer must notify the taxpayer that the overpayment doesn't qualify for favorable tax treatment, specifically, not eligible for rollover.

[208] Rev. Proc. 2021-30, §6.06(3)(d) and App. B, §2.05(3) and §2.05(4). The IRS stated in Rev. Proc. 2015-27, §3.02(4) that it intended to make revisions regarding the correction of overpayments and solicited comments from the public on this issue.

[209] Rev. Proc. 2021-30, §2.02(3).

[210] Rev. Proc. 2021-30, §6.06(3)(d)(i), and App. B, §2.05(3).

[211] Rev. Proc. 2021-30.

[212] Rev. Proc. 2021-30, §6.06(3)(d)(ii) and App. B, §2.05(4).

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tions to future benefit payments to an overpayment recipient, or any spouse or beneficiary of an overpayment recipient, are permitted, and no future corrective payments from an overpayment recipient, or any spouse or beneficiary of an overpayment recipient, are permitted.[213] But if a net overpayment remains after the application of the contribution credit, the plan sponsor or another party must take further action to reimburse the plan for the remainder of the overpayment.[214]

For defined contribution plan (including §403(b) plans) overpayments, the correction method requires that the employer take ''reasonable steps'' to have the overpayment, plus earnings, returned to the plan.[215] If less than the amount of the overpayment is returned, the employer (or another person) must contribute the difference.[216]

3. Excluded Eligible Employees

For defined benefit plans, when an employee is excluded from eligibility, the plan sponsor corrects by contributing the benefit accruals for such employees.[217] For defined contribution plans with nonelective employer contributions, the plan sponsor corrects by contributing on the same basis as the allocation amounts were determined for other employees.[218] However, there is an alternate reallocation correction method described in Attachment 1.[219]

The more complicated question concerns elective defined contribution plans and defined benefit plans with after-tax employee contributions. If an employee otherwise is eligible but was excluded from participation, the Service had to make some assumption as to the participant's *presumed* elective contribution, as there was no actual election to implement. This was referred to as the ''missed deferral.'' Obviously, such discussion becomes more complicated depending on whether the employer relied on the nondiscrimination tests of §401(k) or whether the employer used the safe harbor rules of §401(k)(12) (both safe harbor nonelective and safe harbor match plans).[220]

Under the earlier guidance, the Service's correction for a traditional §401(k) plan required the employer to make a qualified non-elective contributions (QNEC) that had to equal 100% of the ADP percentage rate relating to the excluded employee's group (NHCE or HCE) applied to the excluded participant's compensation.[221] Beginning with the 2006 revenue procedure, EPCRS provided a correction of 50% of the presumed missed deferral (i.e., the ADP percentage rate related to the excluded employee's group (NHCE or HCE) applied to the excluded participant's compensation), referring to this as ''missed deferral opportunity.''[222] Practitioners viewed the correction as resulting in a windfall to the employee. Thus, there has been continued pressure on the Service to reduce the amount of the corrective deferral percentage based on the employee's actual election.

Under the current guidance, for ''missed deferral'' under a traditional §401(k) plan, the ''missed deferral'' continues to be the ADP percentage related to the employee's group (NHCE or HCE) multiplied by the employee's compensation, and the necessary contribution will be a QNEC equal to 50% of the ''missed deferrals'' (referred to as the ''missed deferral opportunity).[223] However, any employer matching contributions must be corrected with the necessary matching

[213] Rev. Proc. 2021-30.

[214] Rev. Proc. 2021-30.

[215] Rev. Proc. 2021-30 §6.06(4)(a), and App. B, §2.04 To the extent the overpayment was due to a premature distribution, it will be allocated to the participant's or beneficiary's account balance. Rev. Proc. 2021-30, §6.06(4)(e). Otherwise, it will be treated as an excess allocation returned to the plan and placed in a suspense account or reallocated to other employees if the plan so provides. Rev. Proc. 2021-30, §6.06(4)(d).

[216] Rev. Proc. 2021-30, §6.06(4)(b). Note there is an exception if the overpayment distributed the correct amount but did so in absence of a distributable event (e.g., in-service or lack of hardship).

[217] Rev. Proc. 2021-30, App. A, §.05(1).

[218] Rev. Proc. 2021-30, App. B, §2.02(2)(a)(ii).

[219] Rev. Proc. 2021-30, App. B, §2.02(2)(a)(iii).

[220] In a traditional §401(k) plan, the employer matches the actual elective deferrals and must satisfy both the actual deferral percentage (ADP) test of §401(k)(3) (which is applied to the elective deferrals) and the average contribution percentage (ACP) test of §401(m) (which is applied to employer matching or employee after-tax contributions other than designated Roth §401(k) contributions). To avoid these tests, there are safe harbor designs that can be used, including the use of an alternative automatic enrollment option, effective beginning in 2008. Under the safe harbor nonelective plan, the employer makes a QNEC equal to 3% of the employee's compensation, whereas under the safe harbor match plan, the employer's match must be 100% on all salary deferrals up to 3% of the employee's compensation plus 50% match on deferrals between 3% and 5% of the employee's compensation. PPA'06 new statutory safe harbor permits eligible employees who have not elected to defer to have automatic deferrals of 3% of compensation (first year); 4% (second year); 5% (third year); and 6% (fourth year). The employer match must be at least 100% on deferrals up to 1% of compensation plus 50% on deferrals over 1% and up to 6% of compensation. Similar to the prior safe harbor, the employer may make QNECs equal to at least 3% of compensation for every NHCE.

[221] *See* Rev. Proc. 99-31, §4.02.

[222] *See* App. A, §.05, and App. B, §2.02 of Rev. Proc. 2006-27, Rev. Proc. 2019-19, Rev. Proc. 2021-30.

[223] Note there is a brief exclusion rule exception in the case of a participant that was excluded for less than three months but still had the opportunity to contribute the annual limit for at least nine months during the plan year; in such context, the plan does not have to make required corrective contributions for the missed deferrals or missed after-tax deferrals, but does have to make a cor-

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percentage applied to the entire "missed deferral."[224] See Attachment 1 for the calculations of the "missed deferrals" to be used for safe harbor §401(k) plans, §403(b) plans, SIMPLE IRAs, "catch-up" contributions, after-tax employee contributions, and designated Roth contributions.

4. Failure to Obtain Required Spousal Consent

The current guidance sets forth an additional correction method in the context of failing to obtain the required spousal consent under §401(a)(11), §411(a)(11), and §417.[225] If a distribution was made without the necessary spousal consent, EPCRS recognized that consent may be given retroactively. However as it is unlikely that the spouse will provide such consent, the plan is still required to provide the survivor portion of the QJSA after the participant's death.[226] Under the 2003 revenue procedure, the plan could commence payment of the QJSA upon the participant's death (with the participant's portion of the QJSA offset by payments already made).[227] The 2006 revenue procedure provided the plan with the alternative of providing the spouse with a lump sum equivalent to the actuarial value of the survivor benefit.[228] This avoids the problem of waiting and seeing whether the spouse later claims a spousal benefit. It also eliminates the plan's liability for the survivor annuity benefit. Such lump sum payment is treated in the same manner as a distribution under §402(c)(9) for purposes of rolling over the amount to an IRA or other eligible retirement plan.

5. Retroactive Plan Amendments for Plan Loans

The 2006 revenue procedure allowed a retroactive plan amendment to be made if plan loans were actually being made but not authorized under the terms of the plan.[229] Such loans nevertheless had to comply with the Code requirements in order to retain the plan's qualification status. For example, a plan loan is made for $10,000 over a 6-year repayment schedule and the defect is discovered in year two. The loan may be re-amortized and repaid over the next 3-year period (consistent with the §72(p)(2)(B) 5-year required repayment schedule) and comply with the qualification rules. The 2013 revenue procedure clarifies that these correction principles would also apply to Audit CAP.[230]

The 2008 revenue procedure extended corrections to situations where the plan loan did not satisfy the requirements if §72(p)(2).[231]

6. Correction of Failures of the ADP, ACP, and/or Multiple Use Tests

The 2003 revenue procedure provided two correction methods for §401(k) plans for failing the §401(k)(3) (ADP test), §401(m)(2) (ACP test) or §401(m)(9) (multiple use test) required for passing the special nondiscrimination rules applicable under §401(k) and §401(m).[232] Under the 2003 revenue procedure, both methods permitted QNEC contributions to be made on behalf of NHCEs, allocated *either* on a pro rata (based on compensation) or per capita (equal amount for each eligible NHCE).[233] In December of 2004, the §401(k) final regulations eliminated the use of disproportionate QNECs to correct ADP failures[234] or ACP failures.[235] Hence, the 2006 revenue procedure updating EPCRS eliminated the per capita method of allocation under both of these correction methods.[236] The 2013 revenue procedure made it clear that QNECs needed to correct these failures may not be funded from the plan's forfeiture accounts.[237]

rective contribution with respect to any matching contributions. *See* Rev. Proc. 2021-30, App. B, §2.02(1)(a)(ii)(F).

[224] Rev. Proc. 2021-30, App. A, §.05(2)(c). Under the finalized §401(k) regulations, the QNECs may be funded from forfeiture monies, effective for plan years beginning on or after July 20, 2018. Reg. §1.401(k)-6.

[225] This correction method was added under §6.04 of Rev. Proc. 2003-44. *See also* §6.04 of Rev. Proc. 2016-51, Rev. Proc. 2018-52, Rev. Proc. 2019-19, Rev. Proc. 2021-30.

[226] *See* App. A, §.07 of Rev. Proc. 2006-27, Rev. Proc. 2008-50, Rev. Proc. 2013-12, Rev. Proc. 2016-51, Rev. Proc. 2018-52, Rev. Proc. 2019-19, Rev. Proc. 2021-30.

[227] *See* Rev. Proc. 2003-44, §6.04.

[228] *See* §6.04(2) of Rev. Proc. 2006-27, Rev. Proc. 2008-50, Rev. Proc. 2013-12, Rev. Proc. 2016-51, Rev. Proc. 2019-19, Rev. Proc. 2021-30.

[229] *See* App. B, §2.07 of Rev. Proc. 2006-27, Rev. Proc. 2008-50, Rev. Proc. 2013-12, Rev. Proc. 2016-51, Rev. Proc. 2019-19, Rev. Proc. 2021-30.

[230] *See* §6.07 of Rev. Proc. 2013-12, Rev. Proc. 2016-51, Rev. Proc. 2018-52, Rev. Proc. 2019-19, Rev. Proc. 2021-30.

[231] *See* §6.07(2)(d) of Rev. Proc. 2008-50, Rev. Proc. 2013-12, Rev. Proc. 2016-51, Rev. Proc. 2018-52, Rev. Proc. 2019-19, Rev. Proc. 2021-30. To correct any ERISA fiduciary violations associated with such failures under the DOL's Voluntary Fiduciary Correction Program (VFCP), the plan must contain plan provisions requiring that the loan comply with §72(p)(2)(A), §72(p)(2)(B), and §72(p)(2)(C), available at https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/enforcement/oe-manual/voluntary-fiduciary-correction-program.

[232] *See* Rev. Proc. 2003-44, App. A, §.03.

[233] *See* Rev. Proc. 2003-44 App. B, §2.01(1)(b)(iv)(A).

[234] *See* Reg. §1.401(k)-2(a)(6)(iv).

[235] *See* Reg. §1.401(m)-2(a)(6)(v).

[236] *See* Rev. Proc. 2006-27, App. A, §.03, and App. B, §2.01(1)(b)(iv).

[237] *See* App. A, §.03 of Rev. Proc. 2013-12, Rev. Proc. 2016-51, Rev. Proc. 2018-52, Rev. Proc. 2019-19, Rev. Proc. 2021-30. Such contributions must satisfy the definition of QNEC in Reg. §1.401(k)-6.

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7. Benefit Restrictions

The 2013 guidance addressed correction methods for defined benefit plans with benefit restrictions failures under §436.[238] Generally, failures to satisfy §436(b) (payment of unpredictable contingent event benefits when the AFTAP is below 60%), §436(c) (adoption of a plan amendment increasing liabilities when the AFTAP is below 80%), or §436(e) (not freezing benefit accruals when the AFTAP is below 60%) may be corrected with an employer contribution (plus earnings) such that the restriction no longer applies.[239] This could be a fairly large contribution depending on the level of benefits in question. The plan sponsor may also correct any such failures by treating any actual distributions as an overpayment.[240]

In the plan is subject to a restriction under §436 at the time of correction, the plan sponsor is required to make a contribution to the plan as follows: (1) if distributions were made in a single lump sum or other prohibited payments at the time the plan was subject to the restriction of §436(d), the contribution equals the amount of the corrective distribution (but only 50% if the plan was simply subject to the restriction of §436(d)(3) and §436(d)(2) if the correction is accomplished through a plan amendment at the time the plan was subject to the restriction of §436(c), the contribution equals the amount necessary to increase the funding target attributable to the corrective amendment.[241]

8. §403(b) Operational and "Late-Adopter" Plan Document Failures

Prior to 2009, the IRS did not require §403(b) plans to have a plan document. The 2007 IRS regulations added this requirement, generally effective for the 2009 plan year.[242] IRS Announcement 2009-34 and Announcement 2009-89 provided guidance on the plan document requirement, including a retroactive remedial amendment period for years after 2009, allowing employers to retroactively amend for plan document failures.[243] The 2013 EPCRS guidance added new correction principles applicable to §403(b), including the failure to timely adopt a written plan document, which begins the integration of these plans into the same correction system applicable to qualified plans.[244] The guidance stated that most of the corrections for operational failures under §403(b) are expected to be the same correction as used under a §401(k) plan, except that pre-2009 plan document failures are not correctable as there was no requirement for a pre-2009 document.[245]

The 2013 guidance clarified the four types of failures in the context of §403(b) plans:

- Plan document failures, which now includes the failure of a §403(b) plan to be adopted in written form or amended to reflect a new requirement within the plan's applicable remedial amendment period;[246]
- Operational failures, which for §403(b) plans includes failure to follow the terms of the plan beginning January 1, 2009;[247]
- Demographic failures, which for §403(b) plan is failure to satisfy the nondiscrimination requirements of §403(b)(12)(A)(i) and §403(b)(12)(A)(ii); and
- Employer eligibility failures, which could include correction by having the contributions being treated as if contributed to an annuity contract under §403(c).[248]

The special correction principles now applicable to §403(b) plan include correction under VCP and Audit CAP for failure to adopt a written plan during 2009.[249] Issuance of a compliance statement or closing agreement for such failure will result in the plan being treated as having a timely adoption within the

[238] *See* §6.02(4)(e)(i) of Rev. Proc. 2013-12, Rev. Proc. 2016-51, Rev. Proc. 2018-52, Rev. Proc. 2019-19, Rev. Proc. 2021-30. Note there are multiple avenues available to plan sponsors to avoid triggering the benefit restrictions of §436: use of credit balance; additional employer contributions; elections of "burn" funding balances. *See* Kathryn J. Kennedy, *PPA New Benefit Restrictions in Light of Recent Regulations*, 130 Tax Notes 1429 (Mar. 21, 2011).

[239] Rev. Proc. 2021-30, §6.02(4)(e).

[240] Rev. Proc. 2021-30, §6.02(4)(e)(i).

[241] Rev. Proc. 2021-30, §6.02(4)(e)(ii).

[242] Reg. §1.403(b)-3(b)(3)(i), requiring plan document be adopted by December 31, 2008. The Service granted an extension until December 31, 2009, provided the plan was adopted during 2009, effective January 1, 2009; the plan was operated in accordance with a reasonable interpretation of §403(b) and its regulations; and before the end of 2009, the sponsor made best efforts to retroactively correct any operational failures to conform to the written terms of the plan. *See* Notice 2009-3.

[243] Announcement 2009-34, Announcement 2009-89.

[244] Rev. Proc. 2013-12, §2.03.

[245] Section 6.10(3) of Rev. Proc. 2013-12, Rev. Proc. 2016-51, Rev. Proc. 2018-52, Rev. Proc. 2019-19, Rev. Proc. 2021-30.

[246] Section 5.01(2)(1) of Rev. Proc. 2013-12, Rev. Proc. 2016-51, Rev. Proc. 2018-52, Rev. Proc. 2019-19, Rev. Proc. 2021-30.

[247] *See* Rev. Proc. 2013-12, §4.01, §16; Rev. Proc. 2018-52, §4.03, clarifying that §403(b) plans could use SCP to correct significant operational failures if the plan satisfied the conditions in §6.10(2) for being treated as having a favorable letter; §4.03 of Rev. Proc. 2018-52, Rev. Proc. 2019-19.

[248] Section 2.03 of Rev. Proc. 2013-12. Section 6.10 of Rev. Proc. 2016-51, Rev. Proc. 2018-52, Rev. Proc. 2019-19, Rev. Proc. 2021-30.

[249] Rev. Proc. 2021-30, §6.10(3).

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applicable remedial amendment period.[250] To incentive such plan sponsors, the correction fee under VCP was reduced by 50% if this is the only failure in the submission and application is made by December 31, 2013.[251] Special correction principles exist for failures to provide for full vesting (including failure to maintain a separate account) and information sharing failures (which involve transfer of assets to a vendor which is not part of the plan).[252]

9. Plan Loan Failures

Plan loan failures that may now be cured under SCP include defaulted loans; failure to timely report deemed distributions; failure to obtain spousal consent; and failure to follow plan terms that limit the number of loans allowed.[253]

- A defaulted plan loan is failure to pay the loan in accordance with loan terms that satisfy §72(p)(2) (i.e., maximum dollar amount, repayment within 5 years, and level amortization repayments at least quarterly). A defaulted loan (or a portion thereof) becomes a ''deemed distribution'' for tax purposes. If the loan failure consists of a participant defaulting on a loan repayment, plan sponsors can either report the default as a deemed distribution in the year of correction or avoid the deemed distribution all together. Normally, a defaulted loan would be regarded as a deemed distribution and reported on Form 1099-R if the loan repayments were not made within the ''cure period'' defined by the plan document.[254] Now, this failure can be cured through SCP, as well as VCP, provided it is corrected before the maximum period for repayment of the loan expires.[255] The correction can be to (1) repay a single sum corrective payment equal to the repayments that would have been made had there been no failure, plus interest; (2) reamortize the outstanding balance of the loan, plus interest, over the remaining repayment period; or (3) a combination of the two above approaches.[256] If a plan sponsor wishes to have a no-action letter under the DOL's VFCP for this failure, it will need to use VCP for its correction.[257]
- If the plan loan exceeded the maximum dollar amount, correction is possible if there is payment back to the plan based on the excess loan amount. If loan repayments have already been made before correction, the prior repayments may be applied in one of three ways: (1) apply the repayments already received to the original loan amount that was not in excess of the maximum, causing the corrective repayment to equal the excess loan amount plus interest; (2) apply the repayments first to the interest that has accrued on the portion of the loan that was in excess, and then used them to reduce the principal of the loan amount that was not in excess, causing the corrective repayment to consist only of the original loan excess, but not interest on the excess; or (3) pro rate the repayments against the loan excess and the maximum allowable amount of the loan, causing the corrective repayment of the amount of the loan excess as of the date of correction. After one of these methods has been selected, the loan can be re-amortized over the remaining period.[258] This correction may only be cured under VCP or Audit Cap.
- If the plan loan did not meet the maximum repayment term requirement or the level amortization requirement, it may be corrected under VCP or Audit CAP by re-amortizing the loan balance in accordance with §72(p)(2)(C) over the remainder of the maximum period that complies with §72(p)(2)(B), as measured from the original date of the loan.[259] The above correction method is not available if the maximum period for repayment of the loan pursuant to §72(p)(2)(B) has expired.[260] In that case, a deemed distribution has occurred and may be

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[250] Rev. Proc. 2021-30. However, as noted by Bob Toth in his Business of Benefits blog, available at http://www.businessofbenfits.com/Robert-toth.html, the revenue procedure requires representation from the plan sponsor that it ''has contacted all other entities involved with the plan and has been assured of cooperation to the extent necessary to implement the applicable correction.'' See Item 25 on the Procedural Requirement Checklist on Form 8950. According to Bob Toth, this raises the issue as to what contracts are under the plan and what are not.

[251] Rev. Proc. 2013-12, §12.02(5).

[252] Rev. Proc. 2021-30, §6.10(2).

[253] Rev. Proc. 2021-30, §6.07.

[254] The ''cure period'' extends until the last day of the calendar quarter following the quarter of the missed payment. Thereafter, if repayment is not made, the loan becomes a deemed distribution. Reg. §1.72(p)-1, Q&A-10. The amount reported on Form 1099-R includes the unpaid loan principal balance and accrued, but unpaid interest. Reg. §1.72(p)-1, Q&A-10. The plan sponsor is also responsible for paying income tax withholding under certain conditions as discussed in Reg. §1.72(p)-1, Q&A-15.

[255] Rev. Proc. 2021-30, §6.07(3)(d).

[256] Rev. Proc. 2021-30, §6.07(3)(d).

[257] The DOL's Voluntary Fiduciary Correction Program (VFCP) is available at https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/enforcement/oe-manual/voluntary-fiduciary-correction-program.

[258] Rev. Proc. 2021-30, §6.07(3)(b).

[259] Rev. Proc. 2021-30, §6.07(3)(c).

[260] Rev. Proc. 2021-30, §6.07(3)(a).

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reported on Form 1099-R for the year of correction, instead of the year of failure.[261]

- EPCRS allows the plan sponsor to use SCP to correct failures to obtain spousal consent of participant loans. The correction would be to notify the participant and the participant' spouse and obtain spousal consent.[262] If spousal consent cannot be obtained, the failures must be corrected through VCP or Audit CAP.[263]
- Rev. Proc. 2019-19 permitted plan sponsors to use SCP for failures resulting from permitting multiple loans to a participant in excess of the maximum number permitted by the plan by retroactively amending the plan to permit such number.[264] This correction was previously available only under VCP or Audit CAP.

I. Scrivener's Errors

These types of errors are the most problematic for the Service as they truly involve an equitable remedy to cure the problem. The doctrine of scrivener's error permits the plan sponsor to ignore a given plan provision if it can show the terms were ambiguous and do not represent the understanding of the parties. These types of errors commonly occur with prototype documents where a plan sponsor checks off a box that it hadn't intended. But the Service has in a very few instances allowed the plan sponsor to reform the document to reflect the intent of the parties.[265] The alternatives are to go to court (which is expensive) or to live with the mistake (which also could be expensive). In any event, the plan sponsor should amend the document prospectively to eliminate the error.

J. Failure to Give Safe Harbor Notice

The safe harbor notice is a requirement for reliance on a safe harbor §401(k) plan.[266] On recent audits, the Service has been requesting evidence of proof that such safe harbor notices were in fact made. Thus, the issue becomes how to correct such defect if the notice was never made or made late. While the latest guidance does not address this issue, the IRS in its outreach through newsletters and presentations has been setting forth a possible correction method depending on whether the participant knew about his or her eligibility to made deferrals under the plan. [267] If the participant knew about his or her eligibility to defer, the correction appears to be to provide the late notice and modify the plan administrator's procedures to avoid such future failures. However, if the participant was unaware of his or her eligibility to defer, the correction appears to treat such participant as if he or she were an improperly excluded employee. Thus, the ''missed deferral'' would depend on whether the safe harbor was a matching or nonelective plan and the plan sponsor would contribute 50% of the ''missed deferral.'' If there were required matching contributions, the correction would be to contribute the matching formula to the missed deferral (not 50% of the missed deferral).[268]

K. Determination Letter Submissions

The 2013 guidance permitted a plan sponsor to submit a determination letter request with its VCP submission.[269] In fact, if the correction included a plan amendment submitted under VCP or corrected under Audit CAP during an on-cycle year, a determination letter was required.[270] A determination letter was also required to correct a nonamender failure under VCP

[261] Rev. Proc. 2021-30, §6.07(2). Under Rev. Proc. 2018-52, the relief of reporting the participant's loan as a deemed distribution in the year of correction applied only if the plan sponsor specifically requests such relief. *See* Rev. Proc. 2018-52, §6.07(1). *See* §6.07 of Rev. Proc. 2019-19, Rev. Proc. 2021-30 which states that no advance relief request is required.

[262] Rev. Proc. 2021-30, §6.07(4)(a).

[263] Rev. Proc. 2021-30, §6.07(4)(b).

[264] Rev. Proc. 2019-19, §6.07(5) and App. B, §2.07(3). *See also* Rev. Proc. 2021-30, §6.07(5) and App. B, §2.07(3). This correction is not permitted unless (1) the amendment satisfies §401(a), (2) 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, and (3) plan loans (including plan loans in excess of the number permitted under the terms of the plan) were available to either all participants or solely to one or more participants who were nonhighly compensated employees. The third condition was recently added. Rev. Proc. 2021-30, App. B, §2.07(3). The correction for hardship distributions uses the first two requirements as well. Rev. Proc. 2021-30 App. B, §2.07(2).

[265] In such instances, the Service will want extrinsic evidence of the parties' intention and a showing that the reformation will not result in a cut-back in participants' benefits. If the reformation involves a plan amendment, it will have to be cured through VCP as SCP does not generally allow operational failures to be corrected through plan amendment.

[266] *See* §401(k)(12)(D), §401(k)(13)(E).

[267] The Service requested comments as to the appropriate correction method in Rev. Proc. 2013-12, §2.05.

[268] *See* a discussion of correction for a failure to provide the safe harbor notice at the IRS webpage, available at https://www.irs.gov/retirement-plans/fixing-common-plan-mistakes-failure-to-provide-a-safe-harbor-401k-plan-notice (last updated April 30, 2021). Such failure can be corrected under SCP and VCP.

[269] Rev. Proc. 2013-12, §6.05(1).

[270] Rev. Proc. 2013-12, §6.05(2) (however, a determination letter is not required and should not be submitted under the VCP submission if the correction by plan amendment is accomplished through (1) the adoption of an amendment that is a model amend-

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or Audit CAP, whether or not the plan is submitted under or corrected under Audit CAP during an on-cycle year.[271]

Due to changes in the determination letter program,[272] the 2016 EPCRS guidance clarified how changes in the determination letter program will impact the EPCRS program.[273] SCP would be available regardless of the status of the individually designed plan's determination letter.[274] The prior requirement under SCP that a determination letter must be submitted during the plan's next on-cycle year if plan correction involved a plan amendment has been eliminated. In addition, the availability of applying for a determination letter or the requirement to file for a letter under VCP or Audit CAP has been eliminated for individually designed plans.[275]

VI. AUDIT CAP

The third door by which a plan sponsor may correct disqualifying defects is actually a ''trap door'' in which the plan sponsor finds itself, once the plan is ''under examination.'' The Service provides a closing agreement program (Audit CAP) for plans ''under examination'' to correct uncovered failures or risk plan disqualification. All types of qualification failures may be corrected under this program — plan document failures; operational failures; demographic failures; and employer eligibility failures; however, defects relating to the misuse or diversion of plan assets and ATATs may not be corrected through this program.[276] Unfortunately plan sponsors who refuse to accept correction under Audit CAP are faced with the penalties of plan disqualification.

Under Audit CAP, since the plan sponsor did not take advantage of VCP, the fixed fee schedule of VCP is no longer available. Instead the Service negotiates a sanction based on the facts and circumstances, which will not be less than the VCP user fee that would have been applicable.[277] The Service will no longer negotiate the sanction as percentage of the Maximum Payment Amount (MPA).[278]

The IRS considers the cost of correction, the financial condition of the employer, and overall practices and procedures that were in place by the plan sponsor in making this determination.[279] The sanction fee is not intended to be excessive but instead should bear a reasonable relationship to the nature, extent and severity of the failures, based on the following factors:[280]

- whether the plan sponsor has steps in place to ensure that the plan had no failures;
- whether the plan sponsor's steps identified failures that may have occurred;
- the extent to which correction had progress prior to the audit;
- the number and type of employees affected by the failure;
- the number of NHCEs that would be affected if the plan were disqualified;
- whether the failure is of the type under §401(a)(4), §410(a)(26) or §410(b) (or §403(b)(12) for §403(b) plans);
- whether the failure is solely an employer eligibility failure;
- the period of time over which the failure occurred;
- the reason for the failure; and
- the maximum payment amounts.[281]

Practitioners negotiating for a given correction method during Audit CAP should be cognizant of ne-

ment by the Service or the adoption of a prototype or volume submitter with an opinion or advisory letter on which the plan sponsor has reliance or (2) the failure is corrected as a demographic failure).

[271] Rev. Proc. 2013-12, §6.05(2)(ii).

[272] *See* Rev. Proc. 2016-37, which eliminates the staggered 5-year remedial amendment cycles for individually designated plans beginning January 1, 2017, and limits the availability of the determination letter program for individually designated plans to initial plan qualification, qualification upon plan termination, and certain other circumstances. As of January 1, 2017, the cycle system applies only to pre-approved plans.

[273] *See* Rev. Proc. 2016-51, §2.02.

[274] *See* §5.01(4)(a) of Rev. Proc. 2016-51, Rev. Proc. 2018-52, Rev. Proc. 2019-19, Rev. Proc. 2021-30.

[275] *See* §6.05(1) of Rev. Proc. 2016-51, Rev. Proc. 2018-52, Rev. Proc. 2019-19, Rev. Proc. 2021-30.

[276] While the corrections noted in Appendices A and B of the revenue procedure are safe harbor corrections for SCP and VCP, Michael J. Sanders and Kathleen Schaffer noted use of such corrections under audit CAP requires Area Counsel's approval. See, above, note 151.

[277] Rev. Proc. 2021-30, §14.01, using the facts and circumstances listed in §14.02.

[278] *See* Rev. Proc. 2021-30, §14.01, where the MPA equaled the tax the service could have collected upon disqualification of the plan due to the following: sum of the tax on realized trust earnings for all open years; income tax on the employer's disallowed deductions for the non-vested allocation of employer contributions; and the income tax on the vested allocations to participants' accounts under the plan.

[279] Additional factors considered in deciding upon the sanction include the size of the employer and the number and type of participants affected (e.g., nonhighly compensated employees). While a member of the IRS's ACT, it was learned that an assessment of the plan's ''internal controls'' is made during the initial interview by the revenue agent in a plan audit.

[280] *See* Rev. Proc. 2021-30, §14.01.

[281] *See* Rev. Proc. 2021-30, §14.02(1). In the case of non-amender failures additional factors will be considered which include whether the plan has a favorable determination letter;

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gotiating a less restrictive fee for their client. Depending on the types of failures uncovered during an audit, the plan sponsor may be required to establish administrative practices and procedures.[282]

Audit CAP should result in a closing agreement after full correction and the payment of the sanction has been made.[283] Such agreement binds both the plan sponsor and the Service regarding the tax matters identified in the agreement.[284]

VII. EFFECTIVE DATE

The effective date of Rev. Proc. 2021-30 is July 16, 2021;[285] Rev. Proc. 2019-19 is April 1, 2019; Rev. Proc. 2018-51 is effective January 1, 2019; Rev. Proc. 2016-51 is effective January 1, 2017. Rev. Proc. 2013-12, as modified by Rev. Proc. 2015-27 and Rev. Proc. 2015-28, remained in effect for 2016.

While the changes to the 2016 revenue procedure were expected so as to incorporate the changes under Rev. Proc. 2015-27 and Rev. Proc. 2015-28 and to align its requirement with changes under the determination letter program, the continued makeover of EPCRS is a welcome breath of fresh air for qualified plans and §403(b) plans. It was also refreshing to see several of the ACT recommendations implemented in the latest revenue procedures. As mentioned before, practitioners should encourage plan sponsors and plan administrators to conduct internal plan audits, not only to self-correct on an on-going basis, but to eliminate the potential for future failures. The 2012 ACT report made it clear that the IRS auditors are focusing on the plan's internal controls as a measure of its ability to keep a plan in compliance with its own terms.[286] Now plan sponsors and plan administrators are on notice that such controls will be keenly scrutinized by IRS auditors in plan examinations.

Attachment 1

Appendix A covers most correction defects, prescribing model correction methods for such defects. Appendix B expands the list of defects and correction methods. Such failures and correction methods are described as follows:

1. Appendix A now states that a plan sponsor may choose any correction method listed in the appendices to cure a failure. For example, an §401(k) plan that improperly excluded an employee may use the general correction method under the rules of §5.02; but if it has an automatic contribution features, it may also use the correction method under §5.08 if it meets those eligibility requirements.

2. Failure to make the minimum top heavy allocation/benefit: The plan sponsor must contribute and allocate the make-up top heavy contribution (for defined contribution plans) or the make-up top heavy benefit (for defined benefit plans) for non-key employees (and any other employees required under the plan) to receive the top-heavy allocation.[287]

3. Failure to pass the §401(k)(3) (APD test), the §401(m)(2) (ACP test),[288] or the §401(m)(9) (multiple use test)[289] required for passing the special nondiscrimination rules applicable under §401(k) and §401(m) and to correct within the prescribed 12-month correction period:

    a. QNEC correction method: Under the correction method specified in Appendix A, the employer must contribute QNECs for *all* eligible NHCEs (in accordance with §415) to raise the APD or ACP of the NHCEs so as to satisfy the tests.[290] This allocation is not done in accordance with the terms of the plan, but instead in conformity with the terms of the revenue procedure. QNECs must be given to all eligible NHCEs and must now be a flat percentage of compensation amount for eligible NHCEs. The 2003 revenue procedure permitted QNECs to be determined as a flat dollar amount (i.e., per capita allocation) for NHCEs (usually cheaper

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whether internal controls were implemented to ensure timely adoption of required amendments; whether any timely plan amendments were later found to be defective; the extent to which the sponsor had otherwise adopted other amendments on the Requirement Amendments List; and whether the sponsor reasonable determined that the required amendments did not apply. Rev. Proc. 2021-30 at §14.02(2).

[282] *See* Rev. Proc. 2021-30, §13.03.

[283] *See* Rev. Proc. 2021-30, §13.02. Because of changes made by the most recently released revenue procedure, payment of the sanction must now be paid using the payment methods available on the www.Pay.gov website (instead of by certified check or cashier's check), beginning January 1, 2022.

[284] *See* Rev. Proc. 2021-30, §13.05.

[285] *See* Rev. Proc. 2021-30, §16.

[286] *See* 2012 ACT Report, available at http://www.irs.gov/pub/irs-tege/tege_act_rpt11.pdf.

[287] *See* Rev. Proc. 2021-30, App. A, §.02.

[288] *See* Rev. Proc. 2021-30, App. A, §.03. Reg. §1.401(k)-2(a)(6)(i) allows the plan sponsor to contribute QNECs by the end of the 12-month period after the plan year in which the test is failed. Often time this additional 12-month period is not sufficient to correct the failed test(s) because of the amount of data needed to do the correction.

[289] *See* §666(a) of the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), Pub. L. No. 107-16 eliminated the multiple use test, effective for years beginning after December 31, 2001.

[290] *See* Rev. Proc. 2021-30, App. A, §.03. The revenue procedure makes it clear that the QNEC used to fund such amount must satisfy the requirements of Reg. §1.401(k)-6, and thus cannot be funded from forfeitures.

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than a flat percentage of compensation allocation).[291] The QNEC is considered an annual addition for §415 purposes in the year it was contributed, not the year the test was failed. Such QNECs need not be matched.

Example: ADP test is failed. Based on the applicable percentages used in the testing, $25,000 in QNECs must be contributed and allocated to NHCEs in order to pass the ADP test. [Note: correction of the ADP test could also have been made by distribution of the excess contributions (say $10,000) to the HCEs be made within 12 months after the close of the plan year of failure.[292]]

b. One-to-one correction method: Under the alternative correction method specified in Appendix B, the Service permits a one-to-one correction method to satisfy this failure. Such method may be cheaper for the employer, and thus worth considering. Under this method, the excess ADP amounts and vested excess ACP amounts for each HCE are distributed (including earnings) and the plan forfeits any nonvested excess ACP amounts and related match contributions (which are allocated per the plan's forfeiture provisions for the failed year).[293] The employer then contributes as a QNEC (including earnings) in the *same amount* (excluding the amount of the forfeited match) to a smaller group of eligible NHCEs.[294] So in the above example, if $10,000 in corrective distributions is made to HCEs, QNECs in the amount of $10,000 may be made under the one-to-one correction method. In this example, correction of $10,000 is preferable to the $25,000 amount necessary under the method proposed in Appendix A. The 2006 revenue procedure eliminated the option of a per capita allocation of contributions, which is consistent with the 2004 final §401(k) regulations which stated that disproportionate contributions could not be taken into account for purposes of satisfying the ADP test or the ACP test.[295]

4. Failure to distribute timely elective deferrals in excess of the §402(g) limit (i.e., the $19,500 annual limit for 2021 applicable to elective §401(k), §403(b), and §457 deferrals): In accordance with the rules under the Code, if the plan sponsor distributes the excess amount (plus earnings) before April 15th following the calendar year of the failure, the excess will be taxable in the year the contribution was made whereas the earnings taxable in the year of distribution.[296] If the excess and earnings are distributed after the April 15th date, both are taxable in the year of distribution (even though the excess deferral already was taxable in the year of contribution).[297] Thus, EPCRS does not provide relief for the employees for the double taxation rule.

5. Exclusion of an eligible employee from plan participation under the plan's eligibility requirements:

- For noncontributory defined benefit plans, when an employee is excluded from eligibility, the plan sponsor corrects by contributing the benefit accruals for such employees.[298] For defined contribution plans with nonelective employer contributions, the plan sponsor can correct by contributing on the same basis as the allocation amounts used to determine other eligibility employees.[299] Appendix B provides a ‘‘reallocation correction method'' as an alternative.[300] This method assumes that the employer intended on making a given contribution to be allocated among all eligible employees; the original allocation was incorrect because all eligible employees had not been considered. Hence, the proper amount may be redetermined for each eligible employee's account, realizing that this will increase the accounts of the excludible employees and decrease the accounts of the includible employees. The model correction requires that the make-up contribution be based on the allocations provided to all other employees under the plan formula, taking into account all relevant facts for the excluded employees, but the accounts of the other employees are not adjusted.

Example: The employer contributes $250,000, which resulted in an allocation of 10% for eligible employees. It was discovered that certain employ-

[291] *See* Rev. Proc. 2003-44, App. A. §.03.
[292] *See* Reg. §1.401(k)-2(b)(2)(v).
[293] *See* Rev. Proc. 2021-30, App. B, §2.01(1)(b). The 2013 revenue procedure affirms that this correction method can be used to correct a failure to satisfy the multiple use test for applicable years. *See* App. B §2.01(1)(b)(i) of Rev. Proc. 2013-12, Rev. Proc. 2016-51, Rev. Proc. 2019-19.
[294] *See* Rev. Proc. 2021-30, App. B, §2.01(1)(b).
[295] *See* Reg. §1.401(k)-2(a)(6)(iv),§1.401(m)-2(a)(6)(v).
[296] §402(g)(2).
[297] §402(g)(2)(C)(ii).
[298] *See* Rev. Proc. 2021-30, App. A, §.05(1).
[299] *See* Rev. Proc. 2021-30, App. B, §2.02(2)(a)(ii).
[300] *See* Rev. Proc. 2021-30, App. B, §2.02(2)(a)(iii).

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ees had been inadvertently excluded from participation. Once the $250,000 is reallocated according to all eligible employees, 9.75% is allocated to each participant's account. Those employees that had 10% allocated will now reflect a 9.75% allocation; those excluded employees will now receive a 9.75% allocation.

- In the case of a defined contribution plan with an employee *deferral*, the plan sponsor must contribute a QNEC based on a percentage of the missed deferral, as well as any required matching contribution on the full amount of the missed deferral.[301] A similar correction method applies to the exclusion of an eligible employee from making catch-up contributions, Roth §401(k) contributions, or after-tax employee contributions.[302]
- For traditional §401(k) plans, missed deferral equals the ADP percentage of the group to which the employee belongs (NHCE or HNCE) multiplied by the employee's compensation for the year of exclusion and the plan sponsor must contribute a QNEC equal to 50% of the missed deferral.[303]
- For a safe harbor nonelective plan, the missed deferral equals 3% of compensation and thus the plan sponsor must contribute a QNEC equal to 50% of the missed deferral.[304]
- For a safe harbor match plan, the missed deferral is equal to the greater of 3% of compensation or the maximum deferral percentage with at least a 100% match and the plan sponsor must contribute a QNEC equal to 50% of the missed deferral.[305]
- For a safe harbor qualified automatic contribution arrangement (QACA) plan, the missed deferral for the first year is 3% of compensation, but each year thereafter the missed deferral is the automatic contribution percentage designated under the plan. The plan sponsor must contribute a QNEC equal to 50% of the missed deferral.[306]
- For a §403(b) plan, the missed deferral is equal to the greater of 3% of compensation or the maximum deferral percentage with at least a 100% match and the employer must contribute a QNEC equal to 50% of the missed deferral.[307]
- For a SIMPLE IRA, the missed deferral is equal to 3% of compensation and the plan sponsor must contribute a QNEC equal to 50% of the missed deferral.[308]
- For a defined contribution with an employer match on any employee deferrals, the plan sponsor must contribute a corrective contribution equal to the matching contribution that would have been made on the amount of the full missed deferral.[309] Under the guidance, this contribution need not be a QNEC, and thus can be subject to the plan's vesting schedule.[310]
- For a §401(k) plan that provides for the optional treatment of elective deferrals as designated Roth contribution, the correction is the same as described in Appendix A §.05(2) and the same corrective employer contribution required to replace the missed deferral opportunity must be made.[311] However, none of the corrective contributions may be treated as Roth contributions, nor allocated to a Roth Account.[312]
- For a §401(k) or §403(b) plans that provide catch-up contributions, the missed deferral is equal to 50% of the applicable catch-up limit for the year in which the employee was improperly excluded and the plan sponsor must

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[301] *See* Rev. Proc. 2021-30, App. A, §.05(2).

[302] *See* Rev. Proc. 2021-30, App. A, §.05(3)-(4), and App. B, §2.01(b), *Ex.* 11.

[303] *See* Rev. Proc. 2021-30, App. A, §.05(2)(b). The 2013 and subsequent guidance continue the exception if an employee was improperly excluded for three months or less during the plan year, but provided the opportunity during the remaining months of the plan year to defer the maximum amount. In such case, a QNEC need not be made for the excluded months, but the employer must make-up any matching amounts. *See* Rev. Proc. 2021-30, App. B, §2.02(1)(a)(ii)(F).

[304] Rev. Proc. 2021-30, App. A, §.05(2)(d)(i).

[305] Rev. Proc. 2021-30, App. A, §.05(2)(d)(i).

[306] Rev. Proc. 2021-30, App. A, §.05(2)(d)(ii). Note that such correction method may be a deterrent for plan sponsors adding auto-enrollment to their plans, which is counter-intuitive, as participation in QACA plans is superior to that under traditional §401(k) plans with no auto-enrollment.

[307] Rev. Proc. 2021-30, App. A, §.05(6)(b).

[308] Rev. Proc. 2021-30, App. A, §.05(7)(b).

[309] Rev. Proc. 2021-30, App. A, §.05(2)(b) (for traditional §401(k) plans); §.05(2)(d)(i) (for safe harbor §401(k) plans); §.05(2)(d)(ii) (for safe harbor §401(k) plans with QACA); §.05(6) (for §403(b) plans).

[310] Rev. Proc. 2021-30, App. A, §.05(2)(c) (for traditional §401(k) plans); §.05(2)(d)(i) (for safe harbor §401(k) plans); §.05(2)(d)(ii) (for safe harbor §401(k) plans with QACA); §.05(6) (for §403(b) plans).

[311] Rev. Proc. 2021-30, App. A, §.05(3).

[312] Rev. Proc. 2021-30, App. A, §.05(4).

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contribute a QNEC equal to 50% of the missed deferral.[313]

- For a defined contribution plan with employee after-tax contributions, the missed after-tax contribution is equal to the ACP for the employee's group (NHCE or HCE) multiplied by compensation, and the plan sponsor must contribute a QNEC equal to 40% of the missed after-tax contribution.[314]
- All of the above employer corrective contributions are subject to any and all plan limits (and statutory limits) and must be adjusted for earnings to the date the corrective contributions are made on behalf of the employee.
- For failure to implement an employee's *actual* deferral election, catch-up deferral election or after-tax employee contribution election:

  o For the employee's deferral election, the missed deferral is the employee's actual elective deferral percentage multiplied by the employee's compensation for the year of exclusion and the plan sponsor must contribute a QNEC equal to 50% of the missed deferral.[315] Such amount may be reduced by the amount actually deferred by the employee. In the case of a partial year exclusion, the employer may use prorated compensation (as opposed to actual compensation during the excluded period).[316]

  o For the employee's after-tax election, the missed after-tax contributions are the employee's actual elected after-tax employee contribution percentage multiplied by the employee's compensation for the year of exclusion and the plan sponsor must contribute a QNEC equal to 40% of the missed after-tax contributions.[317]

  o For a missed matching employer contribution, the plan sponsor must contribute a corrective contribution equal to the matching contribution that would have been made on the amount of the full missed deferral and/or missed after-tax contributions.[318]

  o All of the above employer corrective contributions are subject to any and all plan limits (and statutory limits) and must be adjusted for earnings to the date the corrective contributions are made on behalf of the employee.

- The revenue procedure recently adopted safe harbor correction methods for failures of a short duration that involves employee elective deferrals:

  o For missed elective deferrals for eligible employees subject to an automatic contribution feature (including those who made affirmative elections that were not correctly implemented), the plan sponsor does not have to make a corrective QNEC contribution provided the failure does not extend beyond the end of the 9½ month period after the end of the plan year of failure. However, notice is required to be made to the employees with deadlines by which correct deferrals must begin.[319] This safe harbor correction method was scheduled to sunset on December 31, 2020;[320] it has been extended by three years until December 31, 2023.[321]

  o For missed elective deferrals for eligible employees, a corrective employer QNEC for a missed deferral opportunity need not be made if the failure does not exceed three months, provided certain conditions are met.[322]

  o For missed elective deferrals for eligible employees that exceed three months (or the

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[313] Rev. Proc. 2021-30, App. A, §.05(4) and §.05(6).

[314] Rev. Proc. 2021-30, App. A, §.05(2)(e).

[315] Rev. Proc. 2021-30, App. A, §.05(5)(a).

[316] Rev. Proc. 2021-30, App. B, §2.02(1)(a)(ii)(E).

[317] Rev. Proc. 2021-30, App. A, §.05(5)(b).

[318] Rev. Proc. 2021-30, App. A, §.05(5)(c).

[319] Rev. Proc. 2021-30, App. A, §.05(8)(a). Correct deferrals must begin no later than the earlier of the first payment of compensation made on or after the last day of the 9½-month period after the end of the plan year in which the failure first occurred for the affected eligible employee or, if the plan sponsor was notified of the failure by the affected eligible employee, the first payment of compensation made on or after the end of the month after the month of notification. Notice of the failure must be given to the affected eligible employees no later than 45 days after the date on which correct deferrals begin. If the eligible employees would have been entitled to additional matching contributions had the deferrals been made, the plan sponsor must make corrective allocation (with earnings) on behalf of the employees equal to the matching contributions that would have been made had the missed deferrals been contributed. Rev. Proc. 2021-30, App. A, §.05(8)(a)(i)-(iii).

[320] Rev. Proc. 2019-19, App. A, §.05(8)(d) (added in Rev. Proc. 2015-28, §4).

[321] Rev. Proc. 2021-30, App. A, §.05(9).

[322] Rev. Proc. 2021-30, App. A, §.05(9)(a). Correct deferrals must begin no later than the earlier of the first payment of compensation made on or after the last day of the three-month period that begins when the failure first occurred for the affected eligible employee, or if the plan sponsor was notified of the failure by the affected eligible employee, the first payment of compensation made on or after the end of the month after the month of notification. Notice of the failure must be given to the affected eligible

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conditions for the safe harbor correction methods described above are not met by the plan sponsor), a corrective employer QNEC for a missed deferral opportunity must be made, equal to 25% (rather than 50%) of the missed deferrals (25% QNEC), if the failure extends beyond the three months but not beyond the SCP period for significant failures, provided certain conditions are met.[323] As a result of the extension of the SCP correction period for significant failures from two years to three years, this has the result of also extending this safe harbor correction method.[324]

6. Failure to make timely required minimum distribution under §401(a)(9): The employer is required to distribute the required minimum distribution amounts for all prior years.[325]

7. Failure to obtain participant and spousal consent as required under §401(a)(11), §411(a)(11) and §417: If a non-QJSA distribution was made without the necessary spousal consent, EPCRS recognizes that consent may be given retroactively. However, that is unlikely, as the spouse has no incentive to provide such consent if the plan is required, in absence of the consent, to provide the survivor portion of the QJSA after the participant's death.[326] Under the prior 2003 revenue procedure, the plan could commence payment of the QJSA (with the participant's portion of the QJSA offset by payments already made). If the spouse did not consent to the QJSA, the spousal portion would become payable to the spouse when he/she became entitled to the benefit.[327] The 2006 revenue procedure and later guidance provided the plan with the alternative of providing the spouse with a lump sum equivalent to the actuarial value of the survivor benefit.[328] This avoids the problem of waiting and seeing whether the spouse later claims a spousal benefit.

8. Failure to limit the annual additions allocated under a *defined contribution* plan in compliance with §415: In accordance with the Preamble of the regulations under §415, the IRS has decided that all corrections should occur under EPCRS and therefore it removed the methods to correct §415 failures from the regulations.[329] In an effort to unify the correction approach for excess amounts, the 2008 revenue procedure defined ''excess amount'' as a qualification failure due to a contribution, allocation or similar credit that is made on behalf of a participant/beneficiary in excess of the maximum permitted amount according to the terms of the plan, the Code or the regulations.[330] This continues under the current guidance.[331]

For limitation years beginning on or after January 1, 2009, the ''reduction of account balance'' is the presumed correction method.[332] Under this method, the account balance of an employee receiving an excess allocation must be reduced by the excess (plus earnings). Had such excess been reallocated to other employees under the terms of the plan, it must be reallocated. If it would not have been reallocated, then it is to be placed in a sepa-

employee no later than 45 days after the date on which correct deferrals being. If the eligible employee would have been entitled to additional matching contributions had the missed deferrals been made, the plan sponsor must make corrective allocation (with earnings) on behalf of the employees equal to the matching contributions that would have been made had the missed deferrals been contributed. Rev. Proc. 2021-30, App. A, §.05(9)(a)(i)-(iii).

[323] Rev. Proc. 2021-30 App. A, §.05(9)(b)(i)-(ii). A correct deferrals must begin no later than the earlier of the first payment of compensation made on or after the last day of the third plan year following the plan year in which the failure occurred of, if the plan sponsor was notified of the failure by the affected eligible employee, the first payment of compensation made on or after the end of the month after the month of notification. Notice of the failure must be given to the affected participants no later than 45 days after the date on which correct deferrals begin. Corrective allocations must be made according to the timing requirement under SCP for significant operational failures. Rev. Proc. 2021-30 App. A, §.05(9)(b)(i)-(iii).

[324] Rev. Proc. 2021-30, App. A, §.05(9)(b)(iii). Corrective allocations must be made according to the timing requirement under SCP for significant operational failures.

[325] *See* Rev. Proc. 2021-30, App. A, §.06. For a defined contribution plan, the permitted correction method is to distribute the required minimum distribution with earnings from the date of the failure to the date of distribution. For a defined benefit plan, the permitted correction method is to distribute the required minimum distribution plus an interest payment based on the plan's actuarial equivalence factors in effect on the date the distribution should have been made. In the event the correction is made at a time when the plan is restricted on single-sum payments pursuant to §436(d), the plan sponsor must contribute to the plan the applicable amount determined under §6.02(4)(e)(ii)(A) as part of the correction. The earnings adjustment for defined benefit plan is a changed from the prior guidance which allowed used of the ''plan's rate,'' including §417(e)(3) factors.

[326] *See* Rev. Proc. 2021-30, App. A, §.07.

[327] *See* Rev. Proc. 2003-44, App. A, §.07.

[328] *See* Rev. Proc. 2006-27, App. A, §.07 and App. B, §2.06, *affirmed by* App. A, §.07 of Rev. Proc. 2013-12, Rev. Proc. 2016-51, Rev. Proc. 2018-52, Rev. Proc. 2019-19.

[329] *See* Preamble to Reg. §1.415(a)-1, 69 Fed. Reg. 78,134 (Dec. 29, 2004), noting that the final regulations do not include the correction methods for excess annual additions as such corrections should take into account the methods under VCP and Audit Cap under EPCRS.

[330] *See* Rev. Proc. 2008-50, §5.01(3).

[331] *See* Rev. Proc. 2021-30, §5.01(3).

[332] *See* Rev. Proc. 2021-30, §6.06(2).

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rate account to be used to reduce future employer contributions. While in the account, the employer is prohibited from making additional contributions to the plan other than elective deferrals. Any excess allocations attributable to elective deferrals or after-tax employee contributions must be distributed to the participant.

Regarding the ordering of the reduction if the excess allocation is attributable to both employer contributions and elective deferrals or after-tax employee contributions, the correction is completed by first distributing the unmatched employee's after-tax contributions (plus earnings), then the unmatched employee's elective deferrals (plus earnings). If any excess remains, it is apportioned first to the after-tax employee contributions with the associated matching employer contributions, and then to elective deferrals with associated matching employer contributions. Any matching or nonelective employer contributions that are excess amounts are forfeited and held in an account to be used to reduce future employer contributions.[333]

a. Appendix B provides two alternative correction methods, applicable in different fact situations. In the case where a §415 excess amount attributable to matching or nonelective contributions has been returned to the employee, Appendix B provides a ''return of overpayment'' method.[334] This method requires the employer to take reasonable steps to have the participant/beneficiary return the amount of the overpayment (plus earnings) and if such amount is not returned, then the employer must contribute the difference. The overpayment is to be placed in an unallocated account, to be used for reducing future employer contributions (or if the amount would have been allocated to other eligible employees, then reallocated according to the plan's allocation formula). The employer is required to notify the employees of the applicable tax treatment of the overpayment amount.

b. In the context where a §415 failure occurs with respect to certain NHCEs who have terminated employment, Appendix B provides an alternate ''forfeiture'' correction method.[335] If the NHCE has a §415 excess and made elective deferrals and received a match or nonelective contributions (but was 0% vested in the latter), the §415 excess may be considered to consist solely of the matching and nonelective contributions. The excess adjusted for earnings is forfeited and used to reduce future employer contributions or reallocated according to the terms of the plan.

9. Failure to satisfy §415 for *defined benefit* plans: Appendix B provides two correction methods that may be used to correct an excess benefit payment.

a. The ''return of overpayment'' correction method directs the plan sponsor to have the employee return the overpayment (i.e., the portion in excess of §415(b) limit), adjusted for earnings at the plan's earnings rate.[336] If the employee returns less than is required, the plan sponsor or another person must make up the difference. Also, the employee must be notified that the overpayment was not eligible for favorable tax treatment (e.g., tax-free rollover). This method must be used if the employee has no remaining plan benefits which could be used to offset the excess amount.[337]

b. Alternatively, there is an ''adjustment to future payments'' method that may be used if benefits are being distributed as periodic payments.[338] This method permits future payments to be reduced over the remaining payment period by the actuarial equivalence of the overpayment plus earnings. Such adjustment may not result in the reduction of any surviving spouse's joint and survivor benefits; thus, it must be returned over the employee's lifetime benefit.[339]

10. Orphan plans: When an orphan plan has one or more failures and the plan sponsor has ceased to exist, the revenue procedure permits the plan to be terminated and plan assets distributed to participants and beneficiaries.[340] However, there are four conditions that must be satisfied: (1) the correction must comply with the DOL regulations relating to abandoned plans (2) the qualified termination administrator must reasonable determine whether the survivor annuity requirements of §401(a)(11) and §417 apply to any benefits and take reasonable steps to comply with those requirements (3) each participant and beneficiary must have been provided a vested right to his/her accrued benefits as of the date of the deemed ter-

[333] Rev. Proc. 2021-30, §6.06(2).

[334] *See* Rev. Proc. 2021-30, App. B, §2.04(2)(a)(iii).

[335] *See* Rev. Proc. 2021-30, App. B, §2.04(2)(a)(ii).

[336] *See* Rev. Proc. 2021-30, App. B, §2.04(1)(a)(i).

[337] *See* Rev. Proc. 2021-30, App. B, §2.04(1)(a)(i).

[338] *See* Rev. Proc. 2021-30, App. B, §2.04(1)(a)(ii)(A).

[339] *See* Rev. Proc. 2021-30, App. B, §2.04(a)(a)(ii)(B).

[340] *See* Rev. Proc. 2021-30, App. A, §.09.

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mination and (4) such participants and beneficiaries must be notified of their rights under §402(f).[341]

11. Vesting failures: If an employee is not credited with the sufficient vesting percentage, the employer is permitted to use either the ‘‘contribution correction'' method or the ‘‘reallocation correction'' method.[342] The contribution correction method requires the employer to contribute the improperly forfeited amount; but no adjustment is made to the other participants sharing in the original improper forfeiture.[343] The reallocation correction method adjusts a variety of accounts — increasing the accounts of those who suffered an improper forfeiture (plus earnings) and decreasing the accounts of other participants to the amount they would have received had the error not occurred.[344]

12. §401(a)(17) failures: A defined contribution which allocated contributions or forfeitures on the basis of compensation that was in excess of the annual dollar limit under §401(a)(17) must be corrected under a ‘‘reduction of account balance'' correction method as described in §6.06(2) of the revenue procedure.[345]

13. Correction by Plan Amendment: Appendix B provides retroactive plan amendments as correction methods for four specific failures — failures for allocation in violation of §401(a)(17); hardship distributions made without authorizing plan document language; inclusion of ineligible employees; and most recently plan loans being made without authorizing plan document language.

a. §401(a)(17) failures: While the revenue procedure already envisions a ‘‘reduction of account balance'' as a valid correction method, Appendix B provides an additional correction in which the plan sponsor may contribute an additional amount for all other participants. Such correction requires a retroactive plan amendment which is permitted under the revenue procedure.[346]

b. Hardship distribution failures: In cases where hardship distributions have been made under a plan even though the plan document never envisioned such distributions, Appendix B permits a retroactive plan amendment to permit such hardship withdrawals.[347]

c. Inclusion of ineligible employee failures: In cases where the plan administration disregarded the plan's eligibility requirements and allowed premature eligibility for employees (e.g. plan uses quarterly entry dates, but employees were allowed to enter the plan prior to the appropriate entry date), Appendix B permits a retroactive plan amendment to change the eligibility or entry date provisions to reflect the plan's actual operations.[348] It is possible for this amendment to extend only to those ineligible employees (provided this group is predominantly NHCEs), but it may affect coverage testing for the plan year.

d. Plan loan failures: In cases where plan loans to participants have been made under a plan even though the plan document never envisioned such loans, Appendix B permits a retroactive plan amendment to permit such plan loans in certain situations.[349] The following are examples of corrections for plan loan failures:

- *Example 1:* Participant borrows $60,000 (in excess of the maximum $50,000) and the violation is discovered two years later. Correction requires the participant to repay the $10,000 excess; the remaining loan balance is re-amortized over the remaining life of the original loan; and the prior loan payments attributable to the $10,000 excess can be applied to interest on the excess if the participant pays only the $10,000 or can be applied to the remaining loan balance if the $10,000 excess plus interest is repaid.
- *Example 2*: Participant borrows $10,000 over six years instead of the required five year period and the violation is discovered two years later. Correction requires the loan to be re-amortized over the remaining

[341] Rev. Proc. 2021-30, App. A, §.09.

[342] *See* Rev. Proc. 2021-30, App. B, §2.03(1).

[343] *See* Rev. Proc. 2021-30, App. B, §2.03(1)(a).

[344] *See* Rev. Proc. 2021-30, App. B, §2.03(1)(b). IRS officials have previously indicated on an informal basis that if the allocation of unallocated forfeitures is to be reallocated among participants, the IRS does not require a retroactive reallocation if the plan administrator can demonstrate that the plan is subject to a low turnover rate. The IRS recognizes that it may be impractical to require retroactive reallocations and, thus, has permitted reallocations to be made on a current basis.

[345] *See* Rev. Proc. 2021-30, App. B, §2.06(1).

[346] *See* Rev. Proc. 2021-30, App. B, §2.07(1).

[347] *See* Rev. Proc. 2021-30, App. B, §2.07(2)(a).

[348] *See* Rev. Proc. 2021-30, App. B, §2.07(3)(a).

[349] *See* Rev. Proc. 2021-30, App. B §2.07(3).

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3-year period of the loan. Note: this correction is not available if the statutory term of the loan has expired (e.g. violation is discovered in year six).

- *Example 3*: Participant borrows $10,000 over a 5-year period but loan repayments never began, and the violation is discovered two years later. The correction provides three options: (1) the participant can make a lump sum payment (including interest) to bring the loan current and continue payments under the old payment schedule (2) the loan may be re-amortized over the remaining life of the original loan term or (3) any combination of option 1 or option 2.

14. Earnings and forfeiture adjustments: As several of the above correction methods require adjustments for earnings and forfeitures, Appendix B affords approval of various earnings adjustment methods (but not forfeiture methods).[350]

a. Correction of an operation failure that includes a corrective contribution or allocation to *increase* an employee's account balance must include an adjustment for earnings and forfeitures.[351] Such requirement does not apply to corrective distributions or corrective reductions in account balances.[352] Reasonable estimates may be used in determining earnings if the difference between an approximate versus exact determination is insignificant and the administrative cost of an exact determination significantly exceeds the approximate determination.[353]

b. The earnings rate is generally based on the investment results that would have applied to the corrective contribution or allocation had the failure not occurred.[354] If multiple investment funds are offered to participants, the earnings rate should be based on the participant's choices for the period of failure.[355] For administrative convenience, if most of the employees for whom the corrective contribution or allocation are NHCEs, the rate of return of the fund with the highest earning rates for the period of failure may be used to determine the earnings rate for all corrective contributions or allocations.[356] In the event the participant had not made any applicable investment choices, the earnings rate may be based on a weighted average of the earnings rate under the plan as a whole.[357]

c. The ''period of failure'' runs from the date of the failure through the date of the correction.[358]

d. The current guidance provides four alternative allocation method, specifically designed to facilitate the crediting of earnings where corrective contributions are made to dates between the plan's valuation dates:

(1) Plan allocation method: The earnings amount is allocated to the account balances in accordance with the plan's method for allocating earnings as if the failure had not occurred.[359]

(2) Specific employee allocation method: The earnings amount is allocated solely to the account of the employee on whose behalf the corrective is made even if the plan's allocation method would have produced an alternate result.[360] Under this method, either the entire earnings amounts for the period of failure can be allocated to the affected participant or can be treated as having been made as of the last day of the prior plan year.

(3) Bifurcated allocation method: This method is a hybrid of the plan allocation and specific employee allocation method. For valuation periods prior to the date of correction, the specific employee allocation method is used to allocate earnings attribut-

[350] *See* Rev. Proc. 2021-30, App. B, §3.01.

[351] *See* Rev. Proc. 2021-30, App. B, §3.01(1).

[352] *See* Rev. Proc. 2021-30, App. B, §3.01(1)(d).

[353] *See* Rev. Proc. 2021-30, App. B, §3.01(1)(c).

[354] *See* Rev. Proc. 2021-30, App. B, §3.01(3)(a). The revenue procedure clarified that earnings could include losses. Rev. Proc. 2021-30, §5.04.

[355] *See* Rev. Proc. 2021-30, App. B, §3.01(3)(b).

[356] *See* Rev. Proc. 2021-30, App. B, §3.01(3)(b).

[357] *See* Rev. Proc. 2021-30, App. B, §3.01(3)(b).

[358] *See* Rev. Proc. 2021-30, App. B, §3.01(2).

[359] *See* Rev. Proc. 2021-30, App. B, §3.01(4)(b). In *Ex*. 33, the plan's method for allocating earnings is determined by valuing the plan assets annually on the last day of the plan year and then allocating earnings in proportion to account balances as of the last day of the prior plan year (after reduction for distributions during the current year but without regard to contributions received during the current plan year). Had the failure not occurred, the prior account balances would have been different, and the earnings allocated to those account balances would have been different. Hence, correction under this allocation method requires adjustments to the account balances to *all* participants in the plan for each year of correction. Hence, the Service has provided alternative allocation method to address this issue.

[360] *See* Rev. Proc. 2021-30, App. B, §3.01(4)(c).

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able to those periods; for valuation periods during which the correction occurs, the plan allocation method is used.[361]

(4) Current period allocation method: This method is also a hybrid of the plan allocation and specific employee allocation method. For the first valuation period for which the correction is made, earnings are allocated under the plan method, and for all subsequent earnings, the allocation is made solely to the employee.[362]

[361] *See* Rev. Proc. 2021-30, App. B, §3.01(4)(d).

[362] *See* Rev. Proc. 2021-30, App. B, §3.01(4)(e).

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Attachment 2* Voluntary Compliance Staff and Group Managers, and EP Exam Area Managers

Name	*Title*	*Phone-Location*
William Kerr	Manager, Employee Plans Voluntary Compliance	214-413-5508 Dallas, TX
Paul Hogan	Voluntary Compliance Program Coordinator	206-946-3472 Seattle, WA
Thelma Diaz	Voluntary Compliance Program Coordinator	626-927-1415 El Monte, CA
Stephanie Bennett	Voluntary Compliance Program Coordinator	818-274-0720 Woodland Hills, CA

* This chart was prepared in 2019, thanks to the assistance of Jesse Hinton, VC Group Manager, and Jeff Milling, Exam Area Manager. The author was unable to update this chart for purposes of 2021.

Voluntary Compliance Group Managers

Name	*Title*	*Phone-Location*
Scott Feldman	Manager, Voluntary Compliance Group 7551	718-834-5023 Brooklyn, NY
Jesse Hinton	Manager, Voluntary Compliance Group 7552	312-292-4494 Chicago, IL
****Manager pending**	Manager, Voluntary Compliance Group 7553	Dallas, TX
Jennifer Widmann	Manager, Voluntary Compliance Group 7554	626-927-1456 El Monte, CA

** The new Manager for the VC Dallas group has not been selected yet. Currently, Scott Feldman is the temporary Manager for group 7553.

EP Exam Area Managers

Name	*Title*	*Phone-Location*
William Dolce	Area Manager — Northeast Area	860-756-4565 Hartford, CT
Michael Sanders	Area Manager — Mid-Atlantic Area	267-941-2140 Philadelphia, PA
Jeffrey Milling	Area Manager — Great Lakes Area	312-292-3815 Chicago, IL
Tom Petit	Area Manager — Gulf Coast Area	512-339-5506 Austin, TX
Colleen Patton	Area Manager — Pacific Coast Area	720-956-4533 Denver, CO

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