

EPCRS Issues

Association of Employee Benefit
Planners of New Orleans

October 26, 2009

George C. Patterson

EP Voluntary Compliance Coordinator

Tax Exempt & Government Entities

Group 7553

Internal Revenue Service

1100 Commerce Street,

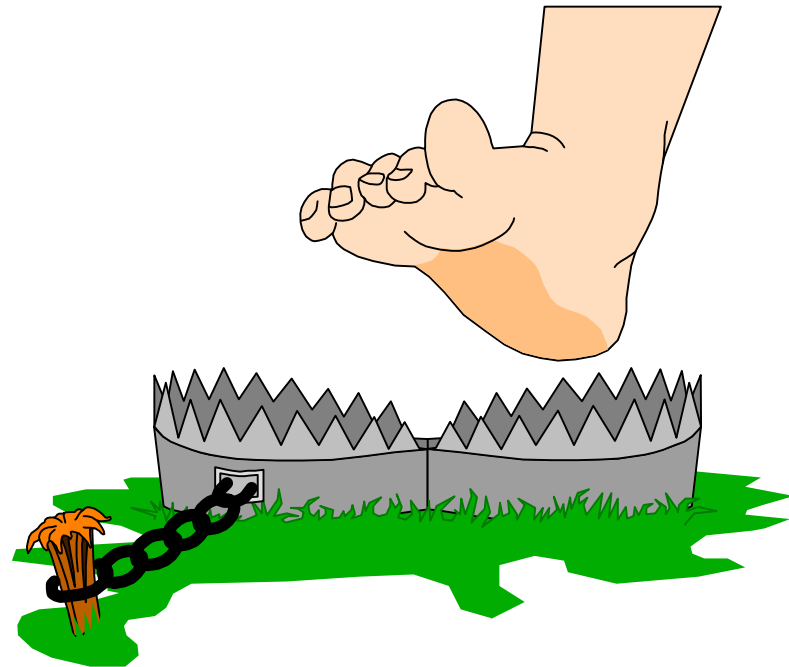
MC 4922 DAL

Dallas, Texas 75242



DISCLAIMER

- The opinions expressed in this presentation are my own and not necessarily those of the Internal Revenue Service



EPCRS Overview

- Three correction programs:
 - Self-Correction Program (SCP)
 - Voluntary Correction Program (VCP)
 - Audit Closing Agreement Program (Audit CAP)
- Available for qualified plans (IRC § 401(a)), 403(b) plans, SEPs and SARSEPs (IRC § 408(k)) and SIMPLE IRAs (IRC § 408(p))
- § 457(b) eligible governmental plans on a provisional basis outside of EPCRS



EPCRS Overview- Continued

- Objectives/Goals:
 - Continued qualification under IRC § 401(a) for qualified plans
 - Continued compliance with IRC §§ 403(b), 408(k), and 408(p) for 403(b) plans, SEPs, and SIMPLE IRAs
 - Income tax relief under IRC §§ 72(p) (expanded) and 72(t)[IRA Simple IRAs only] and excise tax relief under IRC §§ 4972, 4973, 4974 and 4979
- Correction principles: Full correction; restore plan/participants; reasonable and appropriate for the failure

Short overview of current status of Voluntary Compliance Program

- VCP has been very successful, the amount of new applications have been increasing monthly. Currently the Gulf Coast Group has one manager, one coordinator, and eight (8) agents. The manager of the Group is Keith Ruprecht. I am the VCP Group Coordinator. Group has agents in Dallas, Knoxville, TN, Huntsville, AL, Athens, GA, Baltimore, MD, Austin, TX, and Columbus, OH.
- Based on your participation and feedback, the program is a success. In 1821, Charles Caleb Colton, an English Cleric wrote "Imitation is the sincerest form of flattery." If this is true than our program is a success. Exempt Organization is developing a voluntary compliance programs. Other parts of the IRS is considering similar types of programs.



APPENDICES D AND F

- It is easier to prepare Appendices D and F by filling in the blanks. This should translate to less time to prepare the submission. Fillable forms for Appendices C through F have been posted on the Correcting Plan Errors page on the IRS web site.

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

- **PLEASE NOTE:** Instructions to the Appendices D and F have just been added to the website.

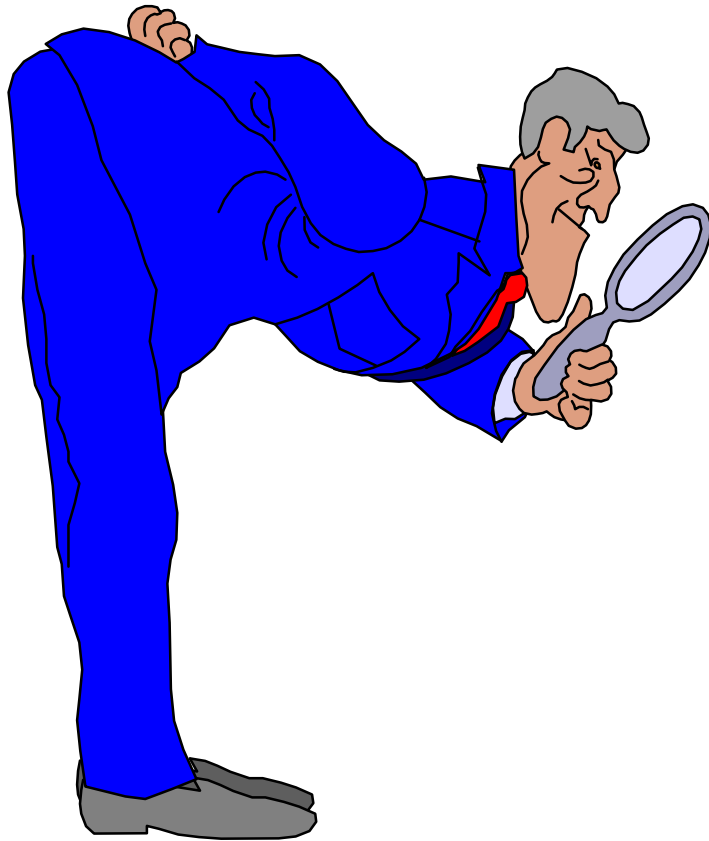


What are **ADVANTAGES** of using Appendix D and Appendix F



- In preparing the Appendix C checklist, no may only need to prepare part of the Appendix C or you not need to prepare this appendix at all.
- Appendix D -Complete Appendix C with the **EXCEPTION** of Part I of Appendix C
- Appendix F - Do **NOT** prepare Appendix C

APPENDICES D AND F

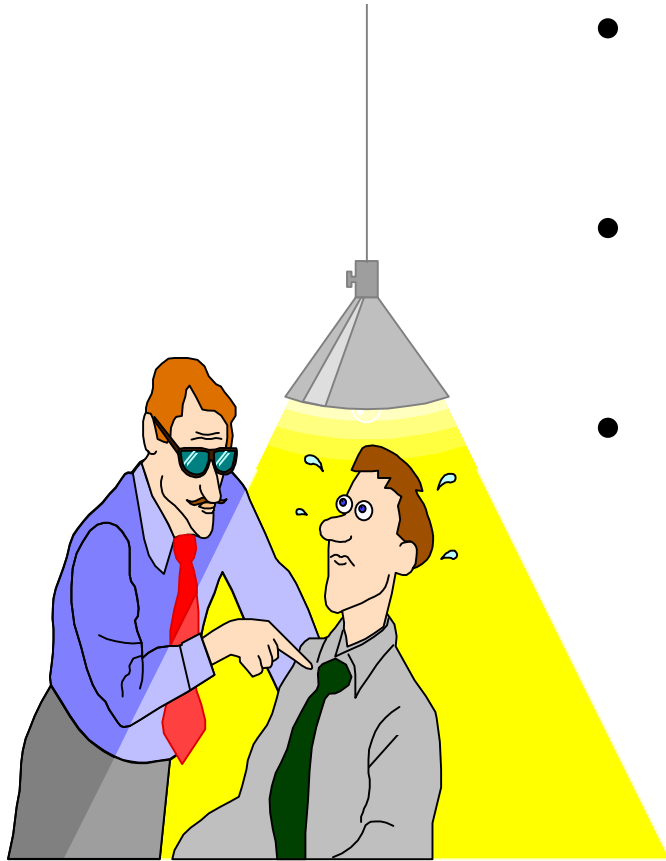


- Appendices D and F require you to indicate the plan assets as reported on the last Form 5500. This saves the Agent working on the case the amount of the assets is required for the agent to enter on case closing documents. The agent will not have to ask you what the assets or do research to determine the amount of the assets.

APPENDICES D AND F

- Appendices D and F specify the type of excise tax that you might request a waiver for. If you do not request a waiver, the Service will not automatically grant the waiver. **You CANNOT request relief from IRC 4975 Excise Tax.**
- Appendices D and F specify the type of tax treatment that you might request for the correction of a loan waiver. If you do not request a type of tax treatment, the Service will not automatically grant the type of tax treatment.
- The Applicants representations and the penalty perjury statement are part of the submission. The penalty of perjury statement must be signed by the plan sponsor **not** by the POA

What types of common mistakes are made on Appendices D or F submissions



- The Representative prepares the Appendix on their firms' letterhead.
- The Name of the Plan, EIN, and Plan Number is not written on the top of each page.
- The Enforcement Resolution is not attached. The form reads **PART IV: ENFORCEMENT RESOLUTION (to be completed by IRS only)** The boxes on the form are checked and signed by the Service, but the form needs to be prepared by the submitter.

What types of common mistakes are made on Appendices D or F submissions



- The request for the specific waiver of excise tax is not marked. If you do not request a waiver, the Service will not automatically grant the waiver. The agent must contact you and requested a corrected page of the appendix.
- The request for the type of “favorable” tax treatment for loans is not marked. The Service will not automatically grant the type of “favorable” tax treatment. The agent must contact you and requested a corrected page of the appendix.
- Other issues not specified for use on Appendix F are added on as a supplement to Appendix F.

IRC 72(t)

Appendix D Section V Allows you to mark a box requesting waiver of the 10% Early Withdrawal Excise Tax. This request for a waiver of the early withdrawal excise tax only applies to an overpayment into an IRA. that is withdrawn This is stated in Revenue Procedure 2008-50.

- **Revenue Procedure 2008-50 Section 6.09(6)** As part of VCP, in the appropriate cases, the Service will not pursue the 10% additional income tax under § 72(t) (or will pursue only a portion thereof) if, as part of the proposed correction for Overpayments that were not made pursuant to a distributable event, the participant or beneficiary (“recipient”) removes the amount improperly distributed and rolled over (plus earnings) from the recipient’s IRA and returns that amount to the plan.
- **This is clarified in the Enforcement Section (VI) which is signed by the IRS**
- **This confusion does not happen if you use Appendix F, Schedule 5**



Participant Loans

- Relief from reporting loans as deemed distributions under IRC § 72(p); 72(p) provisions do not need to be in the plan § 4.01 Rev. Proc. 2008-50
- 50% reduction in VCP fee in certain instances (loan failure is sole failure; no more than 25% of employees affected in each year of the failure) § 12.02(3) Rev. Proc. 2008-50
- Streamlined VCP application procedure available under certain circumstances. App. F & related Sch. 5 Rev. Proc. 2008-50; § 11.03 Rev. Proc. 2008-50
- Provision for resolution of failure under Audit CAP. MPA increases. §§ 13.01, 14.01 Rev. Proc. 2008-50

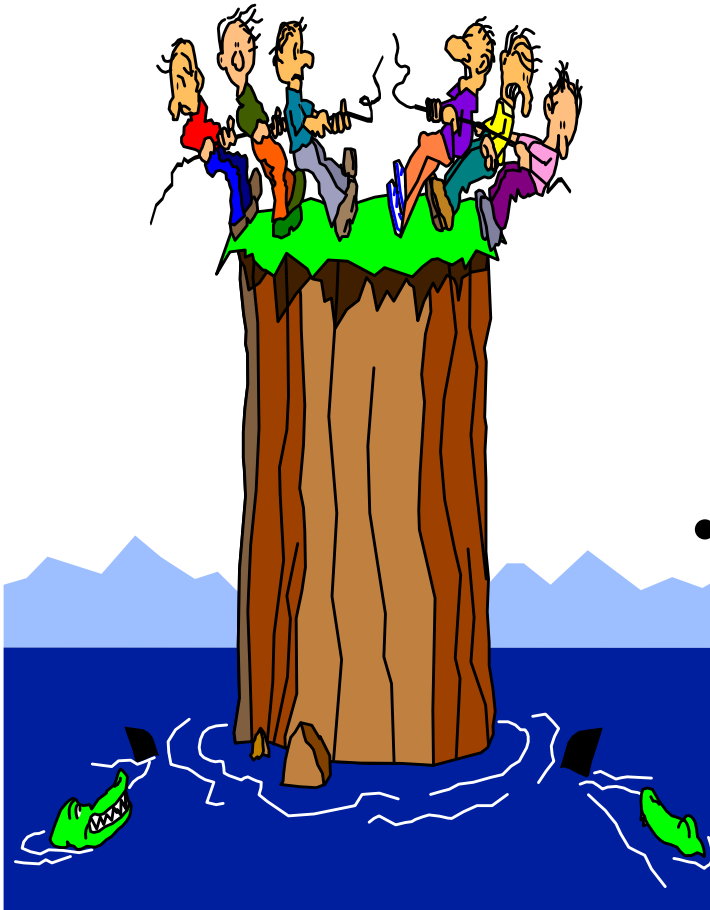
Exclusion of Otherwise Eligible Employees Issue

- **Correction Methods and Examples Exclusion of Otherwise Eligible Employees - Appendix B Section 2.02 (a)(ii)(F)**
- **Special Rule for Brief Exclusion from Elective Deferrals and After-Tax Employee Contributions.**
- An employer is not required to make a corrective contribution with respect to elective deferrals (including designated Roth contributions) or after-tax employee contributions, as provided in sections 2.02(1)(a)(ii)(B) and (C), but is required to make a corrective contribution with respect to any matching contributions, as provided in section 2.02(1)(a)(ii)(D) for an employee for a plan year if the employee has been provided the opportunity to make elective deferrals or after-tax employee contributions under the plan for a period of at least the last 9 months in that plan year and during that period the employee had the opportunity to make elective deferrals or after-tax employee contributions in an amount not less than the maximum amount that would have been permitted if no failure had occurred. (See Examples 6 and 7.)

Exclusion of Eligible Employees

- Failure to implement employee elections *App. A .05(5) Rev. Proc. 2008-50; Ex. 12 App. B*
 - Use employee's elected deferral percentage instead of ADP
- Failure to permit eligible participants to make catch-up contributions *App. A .05(4) Rev. Proc. 2008-50; Ex. 11 App. B*
 - Assume participant would have made catch-up contribution equal to half of the catch-up contribution limit
- Exclusion of employee from plan that also provides the employee with the ability to designate elective deferrals as Roth contributions. *App. A .05(3) Rev. Proc. 2008-50*
 - $QNEC = 50\% \times ADP$ correction unchanged; also does not change corrections for failure to implement employee elections; catch-up contributions. QNECs not treated as Roth contributions

Discussion Questions



- ***How would you correct this violation if the Participant was eligible to enter the Plan on January 1, 2008, but the error was not detected until February 15, 2009, and the participant began participating on March 1, 2009?***
- ***How would you calculate earnings/losses on corrective contributions if the participants terminated employment and took their distributions and after the participant took their distribution the plan's earnings were negative?***

Exclusion of Otherwise Eligible Employees Issue – Example 6

- **Example 6:**
- Employer D sponsors a § 401(k) plan. The plan has a one year of service eligibility requirement and provides for January 1 and July 1 entry dates. Employee Y, who should have been provided the opportunity to elect and make elective deferrals on January 1, 2006, was not provided the opportunity to elect and make elective deferrals until July 1, 2006. The employee made \$5,000 in elective deferrals to the plan in 2006. The employee was a highly compensated employee with compensation for 2006 of \$200,000. Employee Y's compensation from January 1 through June 30, 2006 was \$130,000. The ADP for highly compensated employees for 2006 was 10%. The ADP for nonhighly compensated employees for 2006 was 8%. The § 402(g) limit for deferrals made in 2006 was \$15,000.
- **Correction:**
- Corrective contribution for missed deferral: Employee W's missed deferral is equal to the 10% ADP for highly compensated employees multiplied by \$130,000 (compensation earned for the portion of the year in which Employee W was erroneously excluded, i.e., January 1 through June 30, 2006). The missed deferral amount, based on this calculation is \$13,000. However, the sum of this amount (\$13,000) and the previously made elective contribution (\$5,000) is \$18,000. The 2006 § 402(g) limit for elective deferrals is \$15,000. In accordance with the provisions of section 2.02(1)(a)(ii)(B), the missed deferral needs to be reduced by \$3,000, to ensure that the total elective contribution complies with the applicable § 402(g) limit. Accordingly, the missed deferral is \$7,000 (\$10,000 minus \$3,000) and the required corrective contribution is \$3,500 (i.e., 50% multiplied by the missed deferral of \$7,000). The corrective contribution is adjusted for earnings.

Exclusion of Otherwise Eligible Employees Issue – Example 7

- **Example 7:**
- Employer E maintains a § 401(k) plan. The plan provides for matching contributions for each payroll period that are equal to 100% of an employee's elective deferrals that do not exceed 2% of the eligible employee's plan compensation during the payroll period. The plan also provides that the annual limit on matching contributions is \$750. The plan provides for after-tax employee contributions. The after-tax employee contribution cannot exceed \$1,000 during a plan year. The plan provides that employees who complete one year of service are eligible to participate in the plan on the next January 1 or July 1 entry date. Employee Z, a nonhighly compensated employee who met the eligibility requirements and should have entered the plan on January 1, 2006 was not offered the opportunity to participate in the plan. In March of 2006, the error was discovered and Employer E offered the employee an election opportunity as of April 1, 2006. Employee Z had the opportunity to make the maximum elective deferrals and/or after-tax employee contributions that could have been made under the terms of the plan for the entire 2006 plan year. The employee made elective deferrals equal to 3% of the employee's plan compensation for each payroll period from April 1, 2006 through December 31, 2006 (resulting in elective deferrals of \$960). The employee's plan compensation for 2006 was \$40,000 (\$8,000 for the first three months and \$32,000 for the last nine months). Employer E made matching contributions equal to \$640 for the excluded employee, which is 2% of the employee's plan compensation for each payroll period from April 1, 2006 through December 31, 2006 (\$32,000). After being allowed to participate in the plan, the employee made \$500 in after-tax employee contributions. The ADP for nonhighly compensated employees for 2006 was 3% and the ACP for nonhighly compensated employees for 2006 was 2.3%. The portion of the ACP attributable to matching contributions for nonhighly compensated employees for 2006 was 1.8%. The portion of the ACP attributable to after-tax employee contributions for nonhighly compensated employees for 2006 was 0.5%.

Exclusion of Otherwise Eligible Employees Issue – Example 7 Correction

- **Correction:**
- Employer E uses the correction method for partial year exclusions, pursuant to section 2.02(1)(a)(ii), to correct the failure to include an eligible employee in the plan. Because Employee Z was given an opportunity to make elective deferrals and after-tax employee contributions to the plan for at least the last 9 months of the plan year (and the amount of the elective deferrals or after-tax employee contributions that the employee had the opportunity to make was not less than the maximum elective deferrals or after-tax employee contributions that the employee could have made if the employee had been given the opportunity to make elective deferrals and after-tax employee contributions on January 1, 2006), under the special rule set forth in section 2.02(1)(a)(ii)(F), Employer E is not required to make a corrective contribution for the failure to provide the employee with the opportunity to make either elective deferrals or after-tax employee contributions. The employer only needs to make a corrective contribution for the failure to provide the employee with the opportunity to receive matching contributions on deferrals that could have been made during the first 3 months of the plan year. The calculation of the corrective contribution required to correct this failure is shown as follows:
- The missed matching contribution is determined by calculating the matching contribution that the employee would have received had the employee been provided the opportunity to make elective deferrals during the period of exclusion, i.e., January 1, 2006 through March 31, 2006. Assuming that the employee elected to defer an amount equal to 3% of compensation (which is the ADP for the nonhighly compensated employees for the plan year), then, under the terms of the plan, the employee would have been entitled to a matching contribution of 2% of compensation. Pursuant to the provisions of section 2.02(1)(a)(ii)(E), Employer E determines compensation by prorating Employee Z's annual compensation for the portion of the year that Employee Z was not given the opportunity to make elective deferrals or after-tax employee contributions. Accordingly, the required matching contribution for the period of exclusion is obtained by multiplying 2% by Employee Z's compensation of \$10,000 (3/12ths of the employee's 2006 plan compensation of \$40,000). Based on this calculation, the missed matching contribution is \$200. However, when this amount is added to the matching contribution already received (\$640), the total (\$840) exceeds the \$750 plan limit on matching contributions by \$90. Accordingly, pursuant to section 2.02(1)(a)(ii)(D), the missed matching contribution figure is reduced to \$110 (\$200 minus \$90). The required corrective contribution is \$110. The corrective contribution is adjusted for earnings.

Excess Allocations

- Provision of correction mechanism for excess allocations in cases where code/regs. do not provide for a specific method of correction (e.g., plan limits):
- Excess employer contribution:
 - Correction mechanism based on plan provisions;
 - Reallocation among other participants; OR
 - Reallocation to unallocated account to be used to reduce Employer contributions §§ 5.01(3), 6.06 *Rev. Proc. 2008-50*
- Excess elective deferrals or after-tax employee contributions:
 - Distribute excess (plus earnings) to employee. Report as income in year of distribution. See § 3 *Rev. Proc. 92-93*.
- 415 ordering rules

Answer

- ***The Participant will receive a corrective contribution for the elective deferrals and missing matching contribution for the 2008 Plan year. For the 2009 Plan Year the Participant will receive only the corrective contribution for the missing matching contribution, but not for the elective deferral.***
- ***The participant will have at least 9 months to make elective deferrals during the plan year***

Excess Allocations (415 limits)

- If annual additions include after-tax employee contributions, elective deferrals, employer contributions correction should be made in the following order:
 - Unmatched after-tax employee contributions, elective deferrals
 - Matched after-tax employee contributions, elective deferrals and forfeiture of related match; and
 - Forfeiture of other employer contributions

Notice 2009-82 Waiver of 2009 Required Minimum Required Distributions

- Notice 2009-82 provides guidance and transition relief relating to the waiver of 2009 required minimum distributions, described in § 401(a)(9) of the Code, from certain plans under the Worker, Retiree, and Employer Recovery Act of 2008 (“WRERA”), P.L. 110-458.
- The notice also provides two sample plan amendments that give recipients a choice as to whether to receive waived required minimum distributions and certain related payments and that specify the application of the direct rollover rules to the distributions.
- The sample amendments can be used by plan sponsors that are uncertain as to the treatment under plan terms of waived required minimum distributions and certain related payments or that otherwise desire to give recipients a choice as to whether to receive such distributions.



Default to continue 2009 RMDs

- For use by plan sponsors that want to give participants and beneficiaries an election between receiving and not receiving distributions that include 2009 RMDs and where the default that applies in the absence of a participant's or beneficiary's election will be to continue making distributions that include 2009 RMDs.

Sample Amendment 1

- Notwithstanding section _____ of the plan, a participant or beneficiary who would have been required to receive required minimum distributions for 2009 but for the enactment of section 401(a)(9)(H) of the Code (“2009 RMDs”), and who would have satisfied that requirement by receiving distributions that are (1) equal to the 2009 RMDs or (2) one or more payments in a series of substantially equal distributions (that include the 2009 RMDs) made at least annually and expected to last for the life (or life expectancy) of the participant, the joint lives (or joint life expectancy) of the participant and the participant’s designated beneficiary, or for a period of at least 10 years (“Extended 2009 RMDs”), will receive those distributions for 2009 unless the participant or beneficiary chooses not to receive such distributions. Participants and beneficiaries described in the preceding sentence will be given the opportunity to elect to stop receiving the distributions described in the preceding sentence. In addition, notwithstanding section _____ of the plan, and solely for purposes of applying the direct rollover provisions of the plan, certain additional distributions in 2009, as chosen by the employer in the adoption agreement, will be treated as eligible rollover distributions. If no election is made by the employer in the adoption agreement, a direct rollover will be offered only for distributions that would be eligible rollover
 - distributions without regard to section 401(a)(9)(H). (*Adoption agreement provision*)
 - Direct Rollovers:
 - For purposes of the direct rollover provisions of the plan, the following will also be treated as eligible rollover distributions in 2009:
 - (Check one or none.)
 - _____ 2009 RMDs and Extended 2009 RMDs (both as defined in the plan).
 - _____ 2009 RMDs (as defined in the plan) but only if paid with an additional amount that is an eligible rollover distribution without regard to section 401(a)(9)(H).
 - _____
 - _____
 - Name of Employer
 - _____
 - By: Signature Date
 - _____
 - Name and title



Default to discontinue 2009 RMDs

- For use by plan sponsors that want to give participants and beneficiaries an election between receiving and not receiving distributions that include 2009 RMDs and where the default that applies in the absence of a participant's or beneficiary's election will be to discontinue making distributions that include 2009 RMDs.

Sample Amendment 2

- Notwithstanding section _____ of the plan, a participant or beneficiary who would have been required to receive required minimum distributions for 2009 but for the enactment of section 401(a)(9)(H) of the Code (“2009 RMDs”), and who would have satisfied that requirement by receiving distributions that are (1) equal to the 2009 RMDs or (2) one or more payments in a series of substantially equal distributions (that include the 2009 RMDs) made at least annually and expected to last for the life (or life expectancy) of the participant, the joint lives (or joint life expectancy) of the participant and the participant’s designated beneficiary, or for a period of at least 10 years (“Extended 2009 RMDs”), will not receive those distributions for 2009 unless the participant or beneficiary chooses to receive such distributions. Participants and beneficiaries described in the preceding sentence will be given the opportunity to elect to receive the distributions described in the preceding sentence. In addition, notwithstanding section _____ of the plan, and solely for purposes of applying the direct rollover provisions of the plan, certain additional distributions in 2009, as chosen by the employer in the adoption agreement, will be treated as eligible rollover distributions. If no election is made by the employer in the adoption agreement, a direct rollover will be offered only for distributions that would be eligible rollover
- distributions without regard to section 401(a)(9)(H). (*Adoption agreement provision*)
- **Direct Rollovers:**
- For purposes of the direct rollover provisions of the plan, the following will also be treated as eligible rollover distributions in 2009:
- (Check one or none.)
- _____ 2009 RMDs and Extended 2009 RMDs (both as defined in the plan).
- _____ 2009 RMDs (as defined in the plan) but only if paid with an additional amount that is an eligible rollover distribution without regard to section 401(a)(9)(H).
- _____
- _____
- Name of Employer
- _____
- By: Signature Date
- _____
- Name and title



Determination Letter Submissions

– Submission Required

- Nonamenders (VCP and Audit CAP)
- On-cycle corrections by plan amendment (VCP and Audit CAP)
- SCP corrections by plan amendment to be submitted in next determination letter cycle

– Submission Not Required

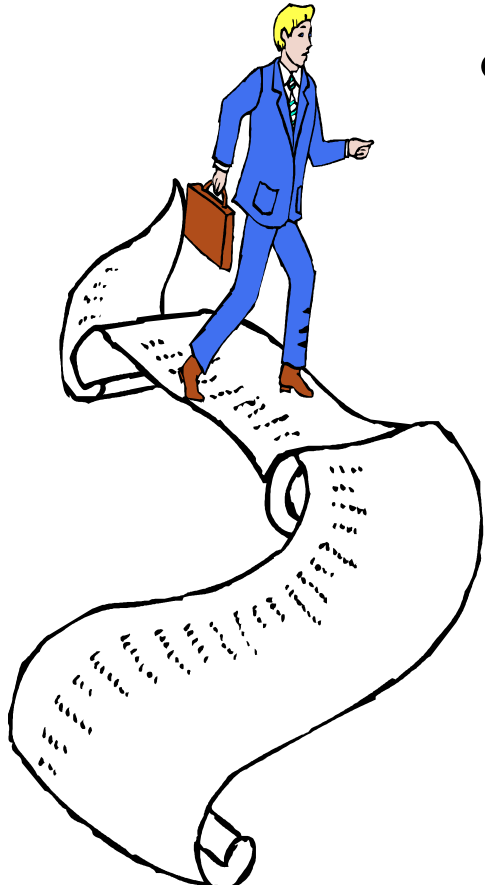
- Correction of interim amendments, discretionary amendments relating to optional law changes prior to expiration of cycle
- Off-cycle corrections by plan amendment (VCP and Audit CAP);
Note - amendments to be submitted in next determination letter cycle

– Submission Optional

- Situations described in §§ 14.02 or 14.03 Rev. Proc. 2007-44 (e.g., urgent business need)



Anonymous Submission



- There is a new requirement that if you submit an anonymous submission that you must submit an affidavit that you are authorize to represent your client

Declaration of Authorized Representative – Anonymous Submission

Under penalties of perjury, I declare that I am authorized to represent the plan sponsor making this Voluntary Correction Program (“VCP”) submission (and, if applicable, related determination letter application) before the Internal Revenue Service (“Service”) and that I am one of the following:

- Attorney—a member in good standing of the bar of the highest court of any state, territory or possession of the United States, including a Commonwealth or the District of Columbia.
- Certified Public Accountant—duly qualified to practice as a certified public accountant in any state, territory or possession of the United States, including a Commonwealth or the District of Columbia.
- Enrolled Agent—enrolled as an agent under the requirements of Treasury Department Circular No. 230 (31 CFR, Part 10).
- Enrolled Actuary—enrolled as an actuary by the Joint Board for the Enrollment of Actuaries under 29 U.S.C. 1242.
- Enrolled Retirement Plan Agent—enrolled as a retirement plan agent under the requirements of Treasury Department Circular No. 230.
- Any other person, as described in section 9.02(11)(e) of Revenue Procedure 2009-4, 2009-1 I.R.B. 118, who has received a “Letter of Authorization” from the Director, Office of Professional Responsibility under section 10.7(d) of Treasury Department Circular No. 230.

I further declare that I am in possession of a properly executed Form 2848 (Power of Attorney and Declaration of Representative) authorizing me to represent the plan sponsor in connection with this VCP submission.

When and if I provide the information that identifies the plan sponsor as required under Section 10.10 of Revenue Procedure 2008-50, I will submit a properly executed Form 2848 verifying that the plan sponsor has authorized me to represent it in connection with the VCP submission (and, if applicable, the related determination letter application.)

(signature) (date)
(printed name)



Questions to Group:

- ***How has the economic downturn affected the use of VCP?***
- ***What factors are considered in using or not using VCP?***

DOL VFCP Online Calculator

- VFCP online calculator can be used to calculate earnings adjustments in situations where it is not feasible to determine an actual earnings adjustment. This may occur because either:
 - Actual data cannot be obtained; or
 - The probable difference in the use of actual data, instead of the estimate, is small and the cost associated with obtaining actual data would exceed the probable difference

§ 6.02(5)(a) Rev. Proc. 2008-50



VCP Case Processing: Frequently Made Errors on VCP Submissions

- Failure to submit voluntary compliance fee (it will be returned).
- Failure to submit determination letter fee and current revision of Form 8717 when requesting a determination letter.
- Failure to submit checklist.
- Failure to submit documents with original signatures.
- Sending in checks with no explanation and no identification of submission or taxpayer.
- Sending in stale checks.
- Submitting Form 2848 with improper representative designated.
- Mailing submission to incorrect mailing address.



VCP Case Processing: Frequently Made Errors on VCP Submissions (Con't)

- Submitting incomplete submission.
- Submitting additional information and/or fees days or months after the initial submission was filed.
- Multiple EINs and plan numbers submitted in the same submission for one plan.
- The same goes for the plan number, for example the plan is numbered 001, 002, 333 in the same submission.
- Failure to send in redacted documents with anonymous submissions.
- *Review the application before you sign it to ensure the submission is complete.*

You Can Call or Email Me

George C. Patterson

EP Voluntary Compliance Coordinator
Tax Exempt & Government Entities Group 7553
Internal Revenue Service
1100 Commerce Street, MC 4922 DAL
Dallas, Texas 75242

George.C.Patterson@irs.gov

(214) 413-5525 (Office)
(214) 413-5507 (Fax)

