PART XX: Plan Errors & Corrections

Compliance Requirements and Common Errors

Q. 2501. Why are the compliance requirements for qualified pension plans important?

A qualified plan, whether a defined contribution or defined benefit retirement plan, by its nature will likely run decades. It is expected to continue beyond current management and possibly even current ownership in the case of family-owned, closely held companies. In order to obtain and maintain the desired tax and other qualified plan benefits of a plan for the participants (e.g., in the case of a 401(k), primarily income tax deferral and tax-free growth of earnings) and for the sponsoring company (business expense deduction for employee and employer contributions to the plan), the plan must operate according to the plan-documented design for the life of the plan. The compliance period extends until the plan is officially terminated under both the Internal Revenue Code (Code) and ERISA requirements. The law requires the plan to be in both form and operational compliance for both the Internal Revenue Service (IRS) and the US Department of Labor (DOL). This includes demographic eligibility compliance with the plan document for the life of the plan.

The best reason to comply is that there is the possibility of the plan losing its qualified plan status, resulting in immediate taxation of all plan participants in the case of a 401(k) plan, as well as the loss of the employer’s business expense deduction for all contributions made to a plan for two years.

Although losing qualified plan status is bad enough, there are even worse potential consequences. The plan sponsor and its designated officials in charge of the plan take on certain fiduciary duties and other legal responsibilities with regard to the plan and can be personally liable if there is not proper qualified plan compliance. and (see Part XIX). For example, the DOL has instituted a special program to track down and recover from fiduciaries the employee salary reduction contributions that should have been made to a plan by the employer and were not. The fiduciary liability for these missed employee contributions (or misdirected and misused contributions due the plan) is not avoided by either corporate or personal bankruptcies.[[1]](#footnote-1) In effect they are like income tax obligations owed; they may not be avoided. In the case of a breach of fiduciary requirements under ERISA, the DOL can assess penalty excise taxes and criminal liability can apply if there is evidence of intent.

It is therefore important that a plan be maintained in compliance and not just when implemented. When errors in either form or operational compliance occur and are discovered, the plan sponsor must seek to get the plan back into compliance. Fortunately, the IRS and the DOL both have mechanisms for self-correction of common compliance errors under its three-part Employee Plans Compliance Resolution Systems. In recent history, the IRS has systematically expanded the opportunities for self-correction under its: a.) Voluntary Correction Program (VCP) and b.) Self Correction Program (SCP) versus its c.) Audit Closing Agreement Program (Audit CAP). The DOL has two self-correction programs: a.) the Delinquent Filer Voluntary Compliance Program (DFVCP), and b.) the Voluntary Fiduciary Correction Program (VFCP). Sponsors should diligently seek to make the necessary corrections to a plan error as soon as the error is discovered using the least burdensome and most inexpensive means and follow the applicable correction procedures of one or more agencies.

Q. 2502. How can plan sponsors use the IRS EPCRS to correct errors of both form and operation of qualified plans?

The current IRS EPCRS actually consists of three (3) separate programs as follows:

1. *Self-Correction Program (SCP).* This IRS correction program generally allows plan sponsors to make corrections as to nonegregious operational failures in the plan. It allows the sponsor to make the correction without notifying IRS of the correction, and without paying any penalty fee. Although the SCP is targeted to address insignificant plan violations, some significant plan violations can also be corrected under the program so long as they are corrected by the end of the second plan year following the year of the violation. Unfortunately, the determination as to whether a violation is significant or insignificant is subjective and is based upon a variety of factors such as the percentage of assets or contributions involved and the number of plan years involved, as well as the percentage of participants affected. However, the determination is not necessarily limited to these factors alone.

**Figure 20.1 Availability & Timing - Retirement SCP Correction**

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| --- | --- | --- | --- |
| **TYPE OF FAILURE** | **TYPE OF PLAN** | **SELF\_CORRECTION  AVAILABLE** | **WHEN MUST  CORRECTION BE COMPLETED?** |
| **Insignificant Operational** | Any | Yes | Any time |
| **Significant Operational** | 401(k),profit- sharing or other qualified plan  403(b) plans | Yes | Before the end of the  secondplan yr. after failure occurred  Substantially corrected within a reasonable time |
| **Significant Operational** | SIMPLE IRA  SEP Plan | No | NA. Use VCP |
| **Plan Acquired In a Merger** | Special Rule[[2]](#footnote-2) | Yes | “Substantially corrected (see **Q 2506A**) before the end of the plan yr. beginning after the business transaction  Allowed even if failure occurred more than two plan yrs. earlier |
| **ADP or ACP Errors** | Special Rule[[3]](#footnote-3) | Yes | “Substantially corrected” (see **Q. 2506A**) before the end of thesecond plan year following the plan yr. that includes the last day of the additional period for correction permitted under IRC, §§ 401(k)(8) 0r 401(m)(6) |
| **Egregious Errors** | Any | Yes | NA. Use VCP |

2. *Voluntary Correction Program (VCP).* This IRS correction program allows a sponsor to make a correction at any time prior to an audit by:

a. submitting an application;

b. paying a more limited penalty fee; and

c. receiving IRS “official” approval of the sponsor’s proposed correction method presented in the application.

3. *Audit Closing Agreement Program (Audit CAP*). This IRS correction program allows a plan sponsor to correct an error or violation that has been identified during an audit or determination letter review and pay a penalty fee (usually higher than in the VCP), based upon the nature, scope, and severity of the error or violation.

According to the IRS, the goal of the EPCRS is:

1. to preserve tax-deferred benefits for plan participants in 401(k) plans;[[4]](#footnote-4) and

2. to provide income tax and excise tax relief for:

a. Code section 72 loans;

b. Code section 72(t) early distributions;

c. Code section 4974 minimum distributions;

d. Code sections 4972 and 4973 excess contributions; and

e. Code section 4979 ADP/ACP test failures.

Under Revenue Procedure 2013-12, section 6[[5]](#footnote-5) the guiding principles for making 401(k) plan corrections are as follows:

1. Full correction must include all taxable years, whether or not the taxable year is already closed.

2. The correction method used should restore the plan and its participants to the position that they would have been in absent the error or violation.

3. The correction must be reasonable and appropriate for the error or violation.

With regard to this requirement for a reasonable and appropriate solution, use of the corrections outlined in IRS Appendix A and Appendix B of Revenue Procedure 2013-12, as amended by Rev. Proc, 2015-27 and 2015-28, is deemed to be reasonable by the IRS. Solutions that are consistent with the Code, provide benefits to nonhighly compensated employees, and keep assets in the plan are also factors suggesting a reasonable and appropriate correction solution.

The 401(k) plan generally must have a determination letter and compliance procedures in place to qualify to use IRS’s SCP. Also, it is important to check the total number of participants affected, the level of the mistake, and the plan years in which the violation occurred when considering using the SCP to determine whether the error or violation qualified as significant or insignificant under the SCP. In the case of certain significant operational failures, special deadlines allow the correction to be made under the SCP. As noted in Q. 2504, these opportunities to use both the SCP and VCP have been expanded and fees reduced to encourage such self-correction.

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**Planning Tip:** In general, the more self-corrective the correction procedure (when available) the less burdensome and expensive the correction.However, it is often better to opt for IRS’s VCP program to achieve the maximum protection for the plan sponsor and fiduciary. This is because the IRS must approve the correction method as part of the mandated process. The VCP is available for a broad variety of correction activities so long as IRS has *not* yet identified the violation in an audit or as part of determination letter review. Following Revenue Procedure 2013-12, as amended by Rev. Procs. 2015-27 and 2015-28, the VCP covers common violations such as failure to follow deferral limitation requirements, failure to include eligible participants, failure to provide a deferral opportunity, failure to withhold the right amount of deferral, overpayments, and failures in connection with plan loans, to name a few.

If the error or violation has been discovered on audit, or if caught by an IRS reviewer during a determination letter review, the Audit CAP will be the only available option for correction. The plan sponsor can expect higher penalties to be applied than under the VCP (as an acknowledgement of the severe tax consequences if the plan were to be disqualified)[[6]](#footnote-6).

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**Planning Tip:** Resolution of the error or violation with IRS under the Audit CAP guidelines, if necessary, is usually preferable to litigating the issue in light of the courts’ historic support of IRS in these situations.[[7]](#footnote-7)

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IRS Correction Programs

Q. 2503. Does the IRS provide for self-correction of errors in form and operation of qualified pension plans?

Yes. The most recent correction procedures as of 2015 can be found in Revenue Procedure 2013-12, as modified by Rev. Proc. 2015-27 and 2015-28.[[8]](#footnote-8) Changes under 2015-12 were also made to take account of the need for corrections procedures for 403(b) plans involving tax-exempt organizations. However, much of the focus of IRS modifications to correction programs under 2015-12, 2015-27 and 2015-28, especially self-correction procedures, has been directed toward liberalization of corrections procedures for 401(k) qualified plan error because of the popularity of 401(k) plans.

Revenue Procedure 2013-12[[9]](#footnote-9) modified and superseded prior governing Revenue Procedure 2008-50.[[10]](#footnote-10) Rev. Proc. 2015-27 and Rev. Proc. 2015-28 further modified but did *not* supersede Rev. Proc. 2013-12. Rev, Proc, 2013-12 (as modified by Rev. Proc. 2015-27 and Rev. Proc. 2015-28) remains the core source for the Employee Plans Compliance Resolution System (EPCRS).Recent significant changes to the IRS EPCRS include:

* expanded corrections for 403(b) plan failures as noted (see Rev. Proc. 2013-12, Part XXIII);
* revised VCP submission procedures ;
* rules for plans subject to Code section 436 restrictions;
* changes to safe harbor correction methods and fee structures;
* reduced VCP fees for certain loan violations;
* reduced VCP fees for required minimum distribution failures;
* more flexible plan overpayment recoupment rules;
* extended SCP eligibility for repeated 415(c) violations;
* new forms for Model VCP Submission Documents;
* expanded rules for failure to implement automatic enrollment plan provisions;
* expanded rules for elective deferral failures of less than 3 months; and
* expanded rules for elective deferral failures that do not extend beyond the SCP correction period governing “significant failures”

Q. 2504. What are the new submission procedures for the voluntary compliance program (VCP) under Rev. Proc. 2015-12, as amended by Rev Proc. 2015-27 and 20-15-28?

The following summarize the new VCP submission procedures and compares the changes with prior procedures.

|  |  |  |
| --- | --- | --- |
| **Figure 20.2** | | |
| **PROVISION** | **REVISED ECPRS VCP**  **REV PROC 2015-27** | **PRIOR ECPRS VCP**  **REV PROC 2013-12** |
| ***Plan Loan Error Fees*** | Reduced VCP filing fee is as follows if the loan error meets prior 3 conditions to claim the discount of 2013-22:  **Participants/Errors Fee**  13 or fewer: $ 300  14-50: 600  51-100: 1,000  101-150: 2,000  Over 150: 3,000 | VCP filing fee was based upon the participant count. A 50% fee discount applies if: (a) VCP submission of a loan error corrected under prescribed correction procedures; (b) error does not impact more than 25% of participants in the year the error occurred; and (c) the error is the only error. |
| ***RMD Error Fees*** | Reduced VCP filing fee as follows if RMD error meets prior 2 conditions of 2013-12:  **Participant/Errors…….Fee**  Up to 150 $ 500  151-300 1,500[[11]](#footnote-11)  More than 300 Reg. VCP fee[[12]](#footnote-12) | VCP filing fee was reduced to $500 for RMD errors if 50 or less participants affected, if (a) no other errors included in the submission; and (b) the error would result in the imposition of the Section 4974 50% excise tax[[13]](#footnote-13) |
| ***Repeated 415 Errors***  ***SCP Eligibility*** | 9 ½ month correction period replaces 2 ½ month correction period after end of plan’s limitation year. New calendar year plans have till 10/15 instead of 3/15 to correct.  Note: Correction allows most plans to avoid monitoring 415 limit *during* the year. | Sponsor eligible for SCP correction on elective deferrals and nonelective contribution errors if it corrects Section 415(c) excess annual additions errors within 2 1/12 months after the end of plan’s limitation year. This rule does not apply to plans with matching contributions. |
| **Overpayments (OP)** | Correction for DB and DC plans (including 403(b)] may now allow, depending on the facts & circumstances, either of the following:   1. employer or another person can contribute OP and interest to plan (instead of asking the participant to repay it); or 2. adopt a retroactive plan amendment to conform the plan documentation to plan operations under VCP or Audit CAP.   Note: The IRS requested comments through July 20, 2015 on certain other ideas for correction of overpayments, so there may be additional options available for correction after tge date of this publication. | Corrections for DB, and DC/403(b) plans under similar rules and requires the sponsor to take reasonable steps to have the OP and appropriate interest paid back to the sponsor by the participant. |
| **Model VCP Document Submission & Other Changes**  **Acknowledgment Letters** | The Model Submission Document in Appendix C has been replaced with IRS Form 14568. Appendix C, Part I and VCP Submission Statement, & Forms 145-A through 14568-I, which now comprise the available schedules.  Now uses IRS Letter 5265, *Acknowledgement Letter*, contained in Appendix D, for acknowledgement of a submission. | The Model Compliance Statement in Appendix C, Part I, along with the schedules in Part II The schedules 1-9 in Part II provided standardized formats and method for correcting common qualification errors.  The plan sponsor submitted the *Acknowledgement Form contained in Appendix D of rev Proc 2013-12 to obtain an IRS acknowledgement of a submission* |
| **Figure 20.3** | | |
| **PROVISION** | **REVISED ECPRS VCP**  **REV PROC 2015-28** | **PRIOR ECPRS VCP**  **REV PROC 2013-12** |
| Automatic Enrollment Errors[[14]](#footnote-14) | No QNEC is required for a missed deferral if the following conditions are satisfied:   1. corrective deferrals begin no later than the earlier of (i) first paycheck made on or after the last day of the 9 ½ month period following the end of the year in which the error occurred; or (ii) the first paycheck made on or after the last day of the month after the month the sponsor notifies the employee of the error. 2. To use the notification alternative, notice must be given to the affected employee not later than 45 days after the date the deferral should have commenced, and must state- (i) general information re: the error such as correct deferral percentages and the date deferrals should have begun[[15]](#footnote-15) (ii) that the appropriate amounts have begun to be deducted and contributed to the plan or will shortly; (iii) corrective contributions relating to any missing matched contributions have been made or will be made[[16]](#footnote-16); (iv)an explanation that the participant may increase their deferral percentages to make up for the missed deferral opportunity[[17]](#footnote-17); and (v) the name of the plan and plan contact information to include name, street address, email address and phone number of plan contact.   Missing matching contributions as adjusted by earnings[[18]](#footnote-18) must be made consistent with SCP significant operational failures timing requirements ( not later than the end of the second year following the plan year in which the missing error occurred) | The sponsor made a QNEC to the plan representing the participant’s missed deferral opportunity in the case of a failure to implement a pre-tax deferral election (both a deemed election or an affirmative election). The QNEC must generally be 50% of the participant’s deferral percentage times the participant’s compensation adjusted for earnings[[19]](#footnote-19) When the plan provides for matching employer contributions, the sponsor must also make a QNEC equal to the missed match the employee would have received but for the error, as adjusted for earnings to the date of the corrective contribution. |
| Employee Elective Deferral Errors Not Exceeding 3 Months | Added safe harbor correction method in the case of “employee elective deferral failures” corrected by the end of any 3-month period. The corrective deferrals must begin no later than the same rules for *an automatic enrollment error*, including the same requirements for the 45-day notice as described above, and missing matching contribution. Earnings are allowed to be calculated using the plan’s default investment alternative when the employee has made no investment election.[[20]](#footnote-20) | NO corrective contribution is required if the affected employee has the opportunity to make elective deferrals up to the maximum permitted amount for at least 9 months during the plan year. QNEC for the missing matching contributions (with earnings) for the first 3 months is still required.[[21]](#footnote-21) |
| Employee Elective Deferral Errors Not Exceeding SCP Period for Significant Failures | The plan sponsor can make an SCP correct of an employee elective failure by making a QNEC equal to 25% of the missed deferrals if following the same conditions imposed on failures involving *automatic enrollments* above are satisfied, including the 45 day notice and missing matching contributions[[22]](#footnote-22), plus the 25% QNEC, requirements. | There was no SCP corrective procedure for missed deferrals within 2 years following the error prior to Rev. Proc. 2015-28. |

**Q. 2504.01. Is there a special location to send all VCP mail submissions?**

Yes. VCP mail submissions should be sent to the IRS Service Center, P.O. Box 12192, Covington, KY 41011, rather than to Washington, DC. as in some prior years.

**Q. 2504.02. Does the IRS have a program to help find lost plan participants?**

*No.* As of August 31, 2012, the IRS Letter Forwarding Program was terminated as a search method for locating lost plan participants who are owed additional retirement benefits. Rev Proc. 2015-12 revises the reasonable actions that a plan sponsor must take to locate lost plan participants who are owed additional retirement benefits. It provides a limited extension of the self-correction program (SCP) correction period and the VCP 150-day correction period for certain plan sponsors taking action to locate lost participants.[[23]](#footnote-23)

**Q. 2504.03. What are the effective dates for the current IRS corrective procedure regulations?**

Revenue Procedure 2013-12 is generally effective as of April 1, 2013. Plan sponsors were allowed to elect to apply these revised provisions on or after December 31, 2012*.* Rev. Proc 2015-27 was generally effective on July 1, 2015, but plan sponsors are allowed to elect to apply the provisions on or after March 27, 2015. Rev. Proc. 2015-28 was generally effective as of April 2, 2015.

**regulations?**

Q. 2505. Are there new forms to be used with the updated VCP submission procedure?

Yes. In April, 2015, the IRS issued a new model VCP submission documents package that includes nine schedules and a compliance statement. These new forms do notmaterially change the content of the correction schedules as they used to appear in Appendix C of Revenue Procedure 2013-12. The new 2015 version of the forms are readily available online in the IRS’s ***VCP Submission Kit***.[[24]](#footnote-24) Here is a brief summary of the fillable forms available in IRS’s 14568 series:

* **Form 14568**, Part I: Model VCP Submission Compliance Statement
* **Form 14568-A**, Schedule 1: Interim and Certain Discretionary Nonamender Failures
* **Form 14568-B**, Schedule 2: Nonamender Failures (other than those to which Schedule 1 applies) and Failure to Adopt a 403(b) Plan Timely
* **Form 14568-C**, Schedule 3: SEPs and SARSEPs
* **Form 14568-D**, Schedule 4: SIMPLE IRAs
* **Form 14568-E**, Schedule 5: Plan Loan Failures (Qualified Plans and 403(b) Plans)
* **Form 14568-F**, Schedule 6: Employer Eligibility Failure (401(k) and 403(b) Plans only)
* **Form 14568-G**, Schedule 7: Failure to Distribute Elective Deferrals in Excess of the section 402(g) Limit
* **Form 14568-H**, Schedule 8: Failure to Pay Required Minimum Distributions Timely under section 401(a)(9)
* **Form 14568-I**, Schedule 9: Correction by Plan Amendment (in accordance with Appendix B)

Q. 2506. What is required to make a submission under the IRS VCP?

If the plan sponsor cannot file for correction under the preferred SCP method, then a VCP correction submission must be made. The SCP generally only covers operational errors, so all documentation errors, except for certain remedial errors necessary under GUST, EGTRRA, HEART/WERA (see Q. **2508),** must file for correction under the VCP. Guidance for assembling a VCP submission can be found in section 11.14 of Revenue Procedure 2013-12, as amended by Rev. Proc. 2015-27 and 2015-28.. This guidance requires the submission package to be organized in the following order:

1. *Form 8950, Application for Voluntary Correction Program (VCP Under the Employee Plans Compliance resolution System (EPCRS), signed properly*
2. *Form 8951*, *Compliance Fee for Application for Voluntary Correction Program*, with proper fee.

3. *Form 14568, Part I –Model VCP Submission Statement. Use this Statement, along with the appropriate Form 14568 Schedules (A-I) to explain the nature of the failure, how it will be corrected, and what steps are taken to prevent it from happening again. See Forms but generally as follows:*

a. Descriptions of the failures.

b. Explanation of the how and why for the failures.

c. Description of the method proposed for curing the failures (and earnings methodology and supporting calculations if appropriate).

d. Description of the method(s) used to find and notify any former employees or beneficiaries affected by the failures or proposed corrections. The narrative information here should affirmatively state that there are no former employees or beneficiaries affected by the failures or proposed corrections if this is, in fact, the case.

e. Description of the administrative procedural changes to be implemented to avoid the listed failures in the future.

f. Whether the correction request seeks to have participant loans corrected so as not to be treated as deemed distributions under Code section 72(p) with the supporting reasoning for the request. If not, the narrative should state that the request with respect to loan corrections is made on the basis that loans will be treated as section 72(p) deemed distributions in the year of correction.

g. Whether the relief is being sought from excise taxes under Code sections 4972, 4973, 4974, or 4979, or from the 10 percent excise tax under Code section 72(t), along with the supporting reasoning for such relief.

Include any required information and enclosures and any schedules necessary, including Form 14568 (Model Compliance Statement) and any of the 14568 Schedules Forms A-I, Appendix C, Part I is made part of the VCP submission.

4. Acknowledgement Letter IRS Form 5265..

5. Copies of any IRS opinion, advisory, or determination letters when applicable.

6. Relevant plan document or plan document language, and a second copy of the plan document or plan document amended language if the VCP submission includes a determination letter application.[[25]](#footnote-25)

7. All other items that may be pertinent to the VCP submission.

8. The determination letter application with all required documentation when appropriate.

9. Check made payable to the United States Treasury, plus a photocopy of the check both attached to Form 8951.

This submission is no longer sent to Washington, DC; under Revenue Procedure 2013-12, as modified by Rev. Proc. 2015-27 and 2015-28, all VCP submissions and accompanying determination letter applications (if applicable) should now be sent, based upon the method of delivery, to:[[26]](#footnote-26)

|  |
| --- |
| Internal Revenue Service |
| P.O. Box 12192-0192 |
| Covington , KY 41011 |

When using express mail or a private delivery service, the address is:

|  |
| --- |
| Internal Revenue Service |
| 201 W. Rivercenter Blvd. |
| Attn: Extracting Stop 312 |
| Covington, KY 41011  Q 2506.01.When is a correction of an operational failure “substantially completed”?  The correction of an operational failure may be consider to be substantially completed for purposes of the EPCRS if during the correction period   1. the correction is completed with respect to 85% of all affected participants and the plan sponsor completes correction for the remainder of the affected participants in a diligent manner. 2. The plan sponsor is reasonably prompt in identifying the operational failure, formulating a correction method, and initiating correction in a manner that demonstrates a commitment to completing correction as expeditiously as practicable, and within 90 days after the last day of the corrective period, the plan sponsor completes a correction of the operational failure[[27]](#footnote-27) |

Q. 2507. What documentation is required to make a correction with the IRS?

The primary problem in the area of plan documentation in the correction process is the failure to provide or demonstrate the existence of plan authorization and approval. The plan sponsor’s file must contain a signed copy of the plan document and of any mandatory or discretionary amendments made to the plan during its existence.

In the case of a new plan, the plan sponsor’s file should reflect corporate authorization for the plan prior to the time that deferrals are withheld from plan participants’ salaries and are deposited in the plan’s trust.

In the case of amendments to the plan required because of changes in the law (e.g., GUST EGTTTA, HEART/WERA), these amendments must be incorporated into the plan as directed by IRS during the remedial amendment period (RAP). There is now an SCP self-correction procedure for the late adoption of these required amendments after expiration of the remedial amendment period. However, Revenue Procedure 2013-12[[28]](#footnote-28), added new forms and procedures to accomplish this documentary correction under the SCP.

In the case of other amendments to the plan, the general rule is that corporate authorization must occur before the last day of the plan year in which the change is to take effect. In the case of “take away” amendment changes, the authorization must be immediately before the change.

According to IRS, a review of the documentation would include:

1. the original plan document;

2. subsequent amendments or restatements;

3. adoption agreements;

4. any opinion letter or advisory letter issued by IRS;

5. any determination letter issued by IRS;

6. Board of director resolutions and minutes with reference to the plan; and

7. the summary plan description (SPD).

Corrections to errors in the plan documentation would generally involve two steps: (a) adoption of the necessary amendments to properly confirm the plan document and (b) VCP submission to IRS.

As to the VCP submission, IRS has indicated that Form 14568-A (formerly IRS Appendix C, Schedule 1), is available for interim amendments if the extended RAP has not expired. IRS Form 14568-B (formerly Appendix C, Schedule 2), is available for nonamenders when the extended RAP for mandatory law changes has already expired. Finally, a determination letter application is required if the correction is made on an individually designed plan.[[29]](#footnote-29)

**Planning Point:** To avoid plan document mistakes, the plan sponsor should use the following quick checklist.

|  |  |
| --- | --- |
| \_\_\_\_1) | Maintain plan document records. |
| \_\_\_\_2) | Have periodic but frequent interaction with service providers on the plan. |
| \_\_\_\_3) | Maintain a calendar with deadlines for the adoption of any mandatory and discretionary amendments. |
| \_\_\_\_4) | Maintain the consistency between the plan and the summary plan description (SPD), and any other communication materials, as amendments occur. |

Q. 2508. What is the process for correcting operational errors for the IRS?

Generally, when a 401(k) plan is not operated in compliance with the plan’s terms, it must seek to correct the error or violation under one of the programs offered by IRS under the EPCRS or the DOL’s Delinquent Filer Voluntary Compliance Program (DFVCP) or Voluntary Fiduciary Correction Program (VFCP) administered by the Employee Benefits Security Administration (EBSA). The question of whether the plan fiduciary or sponsor administratively is following the terms of the plan is more complex. In general, the 401(k) plan must always operate in agreement with the plan’s terms unless compliance is tied to a change in the tax law during the remedial amendment period (RAP). However, the fiduciary is not required to follow the plan’s terms, if compliance would involve a breach of a fiduciary duty by the plan fiduciary.

IRS recommends that plan sponsors identify and avoid operational plan errors with their 401(k) plan by:

1. making certain that the employer, employees, and all service providers on the plan are familiar with its terms, including special communication as necessary to make certain that the proper definition of “compensation” is used for determining elective deferrals to the payroll;

2. conducting a periodic review of plan operations against current plan terms, including reviews of various systems and processes, such as automatic enrollment and auto-escalation; and

3. making use of checklists geared to the plan sponsor’s plan IRS provides an Operational Checklist[[30]](#footnote-30) that may be used to create a custom checklist for the plan sponsor.[[31]](#footnote-31)

Q. 2509. What are some common errors needing correction by plan sponsors?

The following are some common errors that can be corrected through the various IRS correction programs.

Missed Deferral Opportunity for Excluded Employees (Including Employer Matches)

This failure usually occurs when employees are not provided with timely notification of their eligibility to participate in a plan. More recently it has been occurring because the plan excludes the employee from an automatic enrollment for some period of time. Finally, it also occurs when the employer fails to process a participant’s election to defer in a timely manner. The employee or participant may also miss employer matches as a consequence of the delayed participation.

To correct, the employer usually makes a qualified nonelective contribution (QNEC) in an amount equal to 50 percent of the employee’s or participant’s missed deferral opportunity (40 percent for a missed after-tax contribution) applying the participant’s elected deferral amount, or the plan’s average deferral percentage rate, whichever is applicable.. To this amount, the employer must include the missed match, which must be calculated using 100 percent of the missed deferral or after-tax opportunity, as well as applicable earnings. In addition, there are now the new correction safe harbors choices for missed deferral opportunity errors under Rev. Proc. 2015-28 (see Figure 20.2) in Q. 2504).

However, under Revenue Procedure 2013-12, the missed match contribution now need not be a QNEC, which requires immediate vesting, withdrawal restrictions, and an inability to fund with forfeitures, unless the plan is a safe harbor 401(k) plan. The missed contributions may now be made as a non-QNEC, employer corrective contribution that follows the vesting schedule in the employer’s plan. Corrections for this violation are also now available for 401(k) safe harbor plans under Code section 401(k)(13).[[32]](#footnote-32)

The correction process for Code section 401(k)(12) plans was carried forward into Revenue Procedure 2013-12, which says that a missed deferral is deemed equal to the greater of 3 percent or the maximum deferral percentage rate that is at least as favorable as 100 percent of the elective deferral made by the employee.[[33]](#footnote-33) Note that if the failure occurs for a period that does not extend past the first day of the first plan year that begins after the date on which the first deferral would have been made (but for the failure), then the missed deferral is deemed equal to 3 percent. However, if the failure occurs during a period subsequent to this, the missed deferral for each subsequent plan year will be deemed equal to the qualified percentage specified in the plan document in order to comply with Code section 401(k)(13(C)(iii).[[34]](#footnote-34)

If any contribution error affects a terminated participant, the employer can apply the *de minimis* distribution rule (differences of $75 or less may be disregarded) to any corrective contribution.[[35]](#footnote-35) This is unique because the *de minimis* rule is normally limited to use with corrective distributions only—not as to contributions.

Too Early Participation Opportunity

If an employee is allowed to participate in a plan before the proper eligibility date there is an operational violation. The correction is to return the improper contributions to the employee, and to forfeit any employer matches and earnings attributable to them.

Missed or Late Contributions

In general, payroll salary deductions and loan repayments must be remitted to the plan trust on a timely basis. The DOL recently released new guidance on timely remittance of these amounts, and they are very stringent. [[36]](#footnote-36) Although the regulations require remittance to the plan’s trust within an “administratively reasonable” time period, the latest date for remittance is the fifteenth day of the month immediately following the month in which the plan contribution was withheld or payable by the plan sponsor-employer. However, the safe harbor for timely deposits in companies with fewer than 100 employees is a mere seven days.

The failure to make consistent and timely deposits in these time frames over an extended time period is considered a breach of fiduciary duty that requires corrective action under a DOL (not IRS EPCRS) correction program.

Excess Contributions

A plan violation occurs when a plan allows a participant to contribute more than the Code section 402(g) maximum annual amount permitted ($18,000 in 2015 (adjusted annually for inflation), unless over age 50 and eligible for a catch-up contribution of an additional $1,000), or more than that permitted when applying ADP and ACP tests in any given plan year. To correct this violation, the excess contributions must be distributed to the plan participant. Any employer contributions made on account of these excess contributions are transferred to the plan’s forfeiture account, and then the plan follows the plan’s rules for disposition of forfeitures, which usually is to pay plan expenses or reduce employer future contributions. In the event of a terminated participant, an effort must be made to recover the excess amount involved.

A violation also occurs if the employer contributes an amount for the employee that is in excess of the deferral amount elected by the participant. To correct this violation, the employer merely returns the excess amount to the employee and reports the amount on a Form 1099-R as a corrective distribution not subject to a rollover.[[37]](#footnote-37)

Overpayments

The employer must take reasonable steps to have the overpayment amount, as adjusted for the earnings at the plan’s earnings rate from the date of distribution to the date of repayment, returned by the participant or beneficiary under the plan. To the extent the amount of the overpayment as adjusted by earnings is not repaid to the plan, the employer or another person must contribute the difference to the plan. However, the employer does not have to contribute the difference if “the failure arose solely because a payment was made from the plan to a participant or beneficiary in the absence of a distributable event,” but was otherwise determined in accordance with the terms of the plan (e.g., an impermissible in service distribution).[[38]](#footnote-38)

If the overpayment has already been rolled over to an individual retirement account (IRA), the employer must notify the terminated employee of the amounts rolled over that are not eligible for a tax-free rollover and the taxable consequences of the situation.[[39]](#footnote-39) There will be immediate normal income taxation and perhaps imposition of the premature distribution penalty if the participant is not yet age fifty-nine and a half.

In addition, there is now a new correction choice for both overpayment and RMD distribution errors under Rev. Proc. 2015-27 (see Figures 20.2 and 20.3 in Q 2504)). The IRS has also asked in Rev. Proc. 2015-27 for comment on the issue of correction procedures and more correction alternatives may soon be available.

Plan Limit Violations

This violation occurs when a plan participant exceeds the deferral contribution plan limits specified in the plan document. This violation and its correction are not addressed directly in the EPCRS. However, according to one major 401(k) plan provider, two correction approaches have been used by plans and their legal counsel that rest upon the general principle of restoring the participant and the plan to the same position they would have occupied if the violation had not occurred:

1. have the participant forfeit the excess contributions (see previous paragraph titled Excess Contributions), and have the employer make the participant whole for the amounts outside the plan (special bonus); or
2. distribute the excess participant deferrals from the plan to the participant.

In either approach, the participant would forfeit any associated employer matches as well.[[40]](#footnote-40)

Financial Hardship Distributions

This violation generally occurs when a participant qualifies for and receives a hardship distribution, and should have his or her elective pre-tax and after-tax deferrals suspended for the balance of the plan year following the hardship distribution, but the contributions are not suspended as required. This violation is not directly addressed in the EPCRS. However, IRS has indicated that the plan must distribute the participant’s elective deferrals made during the suspension period, any associated match should be forfeited, as well as any applicable earnings attributable to either. This is essentially the same correction procedure imposed on a plan limit violation.

In its May 1 ***Employee Plans Newsletter (EPN)[[41]](#footnote-41)***, the IRS has taken the position that a plan participant cannot self-certify that a valid reason for a financial hardship exists and it is the plan sponsor’s duty to make that assessment for purposes of a hardship distribution. Failure to make a valid hardship assessment would constitute an error that would endanger the qualification status of the plan. There was no indication of timing in the May EPN, and so it is unclear if such a failure constitutes an error that requires correction and how such an error ought to be corrected, although recovery to the plan of the distribution at interest from the participant would seem to be the likely correction. Of note, the IRS did indicate that a participant could self-certify the amount of the hardship and the need for the hardship amount to come from the participant’s plan account.

Loan Repayments

Failure to report a loan as taxable income because of a participant’s failure to repay plan loans in accordance with the terms of the plan is a violation of operational requirements. By regulation, the failure to repay a plan loan should result in deemed taxable income to the participant in the amount of the unpaid loan in the tax year of the first missed repayment.

Under Revenue Procedure 2008-50,[[42]](#footnote-42) the only correction to avoid this result was to file under IRS’s VCP and get IRS’s approval to correct the violation without reporting income. If this violation was the result of an operational failure, correction required the employer to have the participant:

1. make a lump-sum repayment equal to the repayments that the participant would have made if there had been no failure to repay, and add to it interest as accrued on the missed repayments;

2. reamortize the outstanding balance on the loan, including accrued interest, over the remaining payment schedule of the term of the loan or the period remaining had the loan been amortized over the maximum period (normally five years) that complies with Code section 72(p)(2)(B), measuring from the original date of the loan; or

3. any combination of 1 or 2.

IRS has clearly indicated that if the loan repayments are not remitted to the plan by the end of the maximum period of correction, the loan cannot be reamortized. It remains in default and the violation continues.[[43]](#footnote-43)

Revenue Procedure 2013-12, as amended by Rev. Proc. 2015-27 and 2015-28, has apparently not added any new corrective alternatives to this corrective process that would allow a plan sponsor to use IRS’s SCP for loan violations.[[44]](#footnote-44) Currently it would appear that IRS’s VCP filing is still the only IRS correction program available to make a loan violation correction (assuming it is not already under audit). If the failure to repay was not a result of the employer’s operational failure, the employer can choose to treat the defaulted loans as taxable in the tax year in which the failure occurred or, alternatively, treat the loan as taxable to the participant in the year of the correction. However, the ability of an employer to treat the defaulted loan as taxable in the current year of correction still requires filing under IRS’s VCP to receive approval for this correction method from IRS.

Roth Violations

Revenue Procedure 2013-12 contains a correction procedure for the error of allowing a plan participant to make an after-tax Roth contribution to a plan that has no provision for Roth contributions under the terms of the plan. In some cases, correction may require complete removal of the Roth feature. In plans properly authorizing Roth contributions, there are three options for correction under Revenue Procedure 2013-12 when a participant’s after-tax Roth contributions are accidentally placed in a pre-tax account. The three all involve unwinding the error, moving the contribution from the pre-tax account to the after-tax Roth account, and then correcting the participant’s W-2.[[45]](#footnote-45)

Q. 2510. Are the “Compliance Fee” and any corrective contributions deductible on a plan sponsor’s tax return?

Rev. Proc. 2013-12 defines the “Compliance Fee” as the VCP Fee[[46]](#footnote-46), and per the Enforcement Resolution requires applicants to agree not to deduct the “Compliance Fee” shown on the VCP Fee Schedule as part of the submission. There is no similar prohibition against an income tax deduction to the plan sponsor for corrective plan contributions, either currently or retroactively (by filing an amended return) currently in Rev. Proc. 2013-12, as amended by Rev. Proc. 2015-27 or Rev. Proc. 2015-28.

Correction Programs

Department of Labor Correction Programs

Q. 2511. What are the DOL’s correction programs for errors made in connection with ERISA requirements for qualified plans?

The Employee Benefits Security Agency (EBSA) in the DOL has two voluntary self-correction programs for plan sponsor administrators who need help in correcting ERISA errors and failure of requirements for ERISA-covered plans:

1. *Delinquent Filer Voluntary Compliance Program (DFVCP):* This DOL program assists plan sponsors who are late or who missed filing Form 5500 in becoming current with corrected filings. Participation in the DFVCP is a two-part process. EBSA provides all the information, including a calculator to help accurately determine the penalty payment needed to participate in the DFVCP as well as an option of paying the penalty electronically.

2. *Voluntary Fiduciary Correction Program (VFCP):* This DOL program affords plan sponsors and officials the chance to identify and fully correct certain transactions such as prohibited purchases, sales and exchanges, improper loans, delinquent participant contributions, and improper plan expenses. The VFCP currently covers nineteen specific prohibited transactions. The VFCP also provides immediate relief from payment of excise taxes under a class exemption that currently covers six prohibited transactions. Violations can be fully and correctly resolved in four steps.

Sponsors and their advisors can go online for a complete list of violations and safe harbor corrective actions, along with the current addresses of EBSA Regional Offices that can help with correction applications.[[47]](#footnote-47)

There are also a number of tools online to assist plan sponsors and their advisors in using the VFCP, including an online calculator, a model application, and a useful and required checklist. The checklist is used to ensure submission of a complete VFCP application. The applicant must actually sign and date the checklist and include it with the application. The checklist requires a “Yes,” “No,” or “N/A” next to each item. According to the instructions for the checklist, a “No” answer or the failure to include a completed checklist will delay review of the VFCP application until all required items are received by EBSA.

Figure 20.1 contains examples of common errors and the proper DOL or IRS (or both) correction programs that can be used to bring a 401(k) plan back into compliance. Note the overlap between the common errors highlighted by the IRS and the DOL.

**Figure 20.4**

|  |  |
| --- | --- |
| **CORRECTION PROGRAMS FOR COMMON ERRORS** | |
| *Plan Error or Violation* | *Use* |
| Form 5500: Late or missed filing | DFVCP |
| Late or missed deposits of employee salary reduction contributions | VFCP |
| Participant loan failures (for example, loans that exceed the maximum permitted dollar amount) | EPCRS VFCP (for certain failures – after using the EPCRS) |
| Failure to timely amend plan to keep it updated with changes in the law or discretionary changes | EPCRS |
| Plan operational errors arising from the failure to follow plan terms (for example, an employee who meets the plan’s eligibility requirements but is not allowed to participate) | EPCRS |
| Specified plan prohibited transactions (for example, sales or loans between the plan and a party in interest) | VFCP |

As Figure 20.4suggests, plan sponsors or fiduciaries may, generally speaking, self-correct unintentional (nonegregious) qualification errors and violations under IRS’s SCP. They can also use IRS’s VCP to make corrections, if the error or violation has notyet been identified either on audit or during the course of a determination letter filing. They must use the IRS’s Audit CAP should IRS catch the violation problem first.

In the case of certain ERISA requirements, plan sponsors can use EBSA’s DFVCP to resolve late or missed Form 5500s (and failure to file the one-time “top hat” nonqualified deferred compensation plan notice). The maximum caps under the DFVCP on penalties—$1,500 per small plan and $4,000 per large plan maximum on multiple year filing corrections—are reasonable, which makes DFVCP an attractive correction solution. Of note, the DOL DFVCP can still be used even if an IRS notice has been issued noting the late filing or nonfiling of Form 5500.

EBSA’s other correction program, the VFCP, does not allow self-correction. It requires an application to be made to EBSA. However, the VFCP can be used to resolve late contributions as well as certain enumerated fiduciary prohibited transaction violations, such as loans to parties in interest or asset sales or purchases from the plan. The VFCP requires that the fiduciary make a complete correction to include restoration of any principal, any lost profits or earnings, and transaction costs as well, and may even require notice be given to plan participants. There is an online calculator to assist the plan sponsor and fiduciaries to determine the necessary correction amounts. However, correction under the VFCP does provide relief from excise taxes imposed on the prohibited transactions. See Part XXI for a more detailed discussion of the remedies available under the VCFP.

Q. 2512. What are the most common errors made in connection with a 401(k) plan?

According to the IRS,[[48]](#footnote-48) the most common errors in connection with qualified plans, specifically a 401(k) defined contribution plan, are as follows:

1. Failure to update the required plan document to reflect required mandatory law changes governing 401(k) plans;

2. Failure to follow the terms of the plan document in operation, generally as to those common errors that follow;

3. Failure to use the same plan definition of “compensation” correctly for handling all deferral elections and allocations in the plan;

4. Failure to make employer matching contributions to all the appropriate employees;

5. Failure to apply the 401(k) ADP and ACP nondiscrimination test results to highly compensated employee (HCE) contributions resulting in excess HCE contributions in the plan;

6. Failure to include all the employees in the plan eligible to make a deferral election resulting in lost deferral opportunity (i.e., exclusion of eligible employees);

7. Failure to limit amounts in the plan under Code section 402(g) for a calendar year and failure to make the required distribution of those deferrals (excess deferrals) that exceeded this limit back to the affected participants;

8. Failure to routinely deposit employee elective deferral amounts on a timely basis;

9. Failure of participant loans to conform to both the requirements of the document and Code section 72(p) in operation;

10. Failure to handle financial hardship distributions properly, including cessation of deferrals for the balance of the plan year as required;

11. Failure to make the required minimum employer contributions to the plan when the plan is “top heavy”; and

12. Failure to file the required annual Form 5500 return or distribute the annual summary plan description to plan participants.

Nonqualified Plans

Q. 2513. Can a plan sponsor make a correction as to form or operation of a nonqualified deferred compensation program covered by Code section 409A under the IRS EPCRS or the DOL’s correction programs?

Generally, no. A “nonqualified deferred compensation plan” covered by Code section 409A is not subject to correction under IRS’s EPCRS. A nonqualified deferred compensation plan can be created separately without the existence of a 401(k) plan. However, a so-called top-hat, “excess benefit” or “select group” (named for the two available ERISA exemptions) nonqualified deferred compensation plan is often created in conjunction with a qualified plan, as in the case of a 401(k) plan, to allow HCEs, who are otherwise capped on contributions by the Code section 402(g) annual limit ($17,500 in 2014), to defer amounts above these caps on a pre-tax basis in a manner similar to their monies going into the qualified 401(k) plan. These nonqualified plans have different tax and ERISA requirements for both plan participants and sponsors than qualified plans and so must comply separately according to the laws and regulations governing these top-hats, nonqualified deferred compensation plans.

Most excess benefit or select group nonqualified deferred compensation plans associated or linked to a qualified plan, like a 401(k) plan, are generally subject to their own special form and operational requirements under Code section 409A. IRS has provided special rules for “linked” nonqualified deferred compensation plans so that they will not violate 409A. In general, such nonqualified plans are harder to establish than before the enactment of section 409A, because the requirements for certain actions, like the timing of participant deferral elections, are distinctly different.

The nonqualified deferred compensation plan, even if just an excess benefit plan, must meet these section 409A requirements in order to achieve income tax deferral on amounts deferred and on earnings until distributed, and likewise avoid immediate taxation and the imposition of a special 20 percent excise tax as well as a punitive penalty AFR interest rate that may be applied back to the date of the original deferral. These section 409A penalties are applied to the individual plan participant rather than the plan sponsor. These nonqualified plans specifically cannot follow the timing of deferral elections and plan distribution elections of the 401(k) plan, because the rules are totally different.

Q. 2514. Are there any exceptions that allow the use of IRS or ERISA corrective procedures for nonqualified deferred compensation plans?

The sole exception to the use of IRS and ERISA corrective procedures is that the DOL DFVCP may be used to correct a failure to file the required alternative one-time reporting notice to the DOL on the creation of a nonqualified deferred compensation plan that allows a plan to avoid having to file an annual Form 5500 on the nonqualified deferred compensation plan. The correction requires filing the “letter style” notice with the DOL for the “top hat” plans and paying a fee, currently $750 in 2014, regardless of the number of plans or participants.[[49]](#footnote-49) This can be done online, like other corrections under the DOL’s DFVCP, although the current set-up of the online page for correction of this alternative top-hat filing error is confusing, because it would suggest that each plan must be corrected separately with a separate fee for each, which is not correct.[[50]](#footnote-50)

Q. 2515. How are corrections made for nonqualified deferred compensation plans?

If an error or violation occurs as to Code section 409A form (documentation) or operational (administrative) requirements for a top-hat nonqualified deferred compensation plan, corrections are not generally made under the IRS or DOL’s qualified plan correction programs discussed previously in this chapter. Instead, IRS has created two correction programs especially for section 409A plans to correct documentation and operational errors of the section 409A requirements. Documentation errors are corrected according to the guidelines in Notice 2010-6[[51]](#footnote-51) and Notice 2010-80.[[52]](#footnote-52) Operational errors are corrected under Notice 2008-113.[[53]](#footnote-53) Both correction programs reduce the penalties that would accrue in the worst case section 409A violation scenario, but they do require filing notices with IRS and the affected participants in most cases. The IRS has recently taken the position in regard to its auditors that failure to correct an error concerning vesting in the tax year before the vesting year instead of the tax year in which vesting occurred prevented the sponsor from completing a correction of the document in time to prevent a plan violation as to of Section 409A.[[54]](#footnote-54)

**Planning Point:** Unfortunately, these section 409A correction programs for nonqualified deferred compensation plans are very narrow and restrictive as to the violations that may be corrected when compared to the programs for qualified 401(k) plans. As a consequence, legal practitioners have considered possible alternative correction approaches based on the premise that section 409A is “additive” income tax law; therefore, prior concepts and techniques for correction of errors ought to be available for corrections of current plan errors and violations.[[55]](#footnote-55) IRS, with its strict constructionist view of section 409A, is unlikely to agree. In any event, these “other” correction techniques would certainly remain applicable to plans grandfathered from section 409A, or excepted from section 409A coverage.

**Q. 2516. Can a 457(b) nonqualified plan of a tax exempt organization be corrected under the EPCRS?**

Yes and no. According to the IRS as of July, 2015[[56]](#footnote-56), plan sponsors may submit requests for voluntary correction of a 457(b) nonqualified plan under Rev. Proc.2013-12, Section 4.09. The IRS Employee Plans Voluntary Correction Team will then consider such requests on a “provisional basis outside of EPCRS.” However, the IRS team retains the complete discretion to accept or reject this request. If the request is accepted, the team will issue a “special closing agreement.

There are two primary exceptions:

1. The IRS team will not consider any issue related to the documentation of a written 457(b) plan; and,
2. Governmental (i.e., state, local governmental entities) 457(b) plan sponsors do not have to make a submission to the IRS team to make corrections to voluntarily fix problems with their 457(b) plan.

*Nongovernmental Private tax exempts:*

To make the correction submission a private tax exempt with a 457(b) plan should resolve it in accordance with Rev. Proc. 2103-12, Section4.09:

1. Complete IRS Form 8950, *Application for Voluntary Correction Program (VCP).*
2. Mail Form 8950, along with a ***cover letter that describes the problem and the proposed solution***  to the VCP listed in the instructions to form 8950 and mailing the package to the IRS address in the Form 8950 instructions (see **Q. 2506).**

***Note:*** *Do not mail your submission to the California address used for voluntary closing agreements related to issues that cannot be addressed under the EPCRS, and do not submit it to the EP Examinations or Determinations function.*

*Nongovernmental Private Tax exempt Plan Document Issues*: As noted, plan sponsors should not submit requests for correction of alleged untimely adoption or amendment as a result of an income tax law or regulation change. or income tax regulation. The IRS team will not issue closing agreements on these kinds of issues and will decline and return these submissions, along with any payments received. As to remedial amendments (e.g., HEART), The IRS Team reminds Plan sponsors of 457() plans that these concepts and definitions in Rev. Proc. 2007-44 *do not* apply to 457(b) plans. In general, this means that qualified plan deadlines do not apply to 457(b) plans of nongovernmental private tax exempts.

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**Planning Point:** Per the IRS, the only way to currently get a 457(b) plan documentation form reviewed by the Service or other form requirement issue resolved is for a plan sponsor to submit a request for a private letter ruling under Rev. Proc. 2015-1 or successor revenue procedures.

*Governmental 457(b) Plan Corrections:* Governmental 457(b) plans may generally self-correct plans not in compliance with law or regulations by applying EPCRS-like self-correction processes. Governmental entities are given until the first day of the plan year that begins 180 days after the IRS notifies them of a failure to correct their plan failures.[[57]](#footnote-57) This means that most entities will not need to ever file a voluntary submission to the Service. However, a plan sponsor may file for a submission to the IRS Team under Rev. Rul. 2013-12, Section 4.09 if a sponsoring entity wants to file for additional relief or wants the IRS to approve a correction for a nonplan document error. It must indicate it is aware of self-correction offered by Code § 457(b)(6) and Treas. Reg. § 1.457-9(a) but still wants to proceed with a written VC application, and should generally follow the process for

nongovernmental tax exempts in doing so.[[58]](#footnote-58)

**Planning Point:** Questions about submitting a request for voluntary correction of a 457(b) plan to the IRS Team, whether the sponsor is a private or governmental sponsor, can be sent to [TEGE\_EP.VC@irs.gov](mailto:TEGE_EP.VC@irs.gov) as of July, 2015.

1. . *See e.g., Harris v. Cougar Package Designers Inc., Civil Action* No. 1:13-cv-05078 (N.D. Ill. 2013). [↑](#footnote-ref-1)
2. ### **ADP and ACP test corrections for violations.** Available during the 2-year period that starts after the close of the 12-month correction period that is provided by the 401(k) and (m) regulations.

   **Example**: The ADP test is failed for the plan year ending December 31, year 1. The regulatory correction period ends December 31, year 2. The self-correction period would extend for two plan years beyond the end of the regulatory correction period, ending on December 31, year 4. [↑](#footnote-ref-2)
3. ### **Plan errors related to plan mergers and acquisitions** is a significant failure related to: (a) transferred assets from another plan, or (b) assumption of a plan in connection with a corporate merger, acquisition, or similar business transaction, can be self-corrected until the last day of the plan year that begins after the business transaction, even if the failure occurred more than two plan years earlier.

   [↑](#footnote-ref-3)
4. . The EPCRS also applies to 403(b) tax sheltered annuity plans, 408(k) SEPs and SARSEPs, and 408(p) SIMPLE IRA. [↑](#footnote-ref-4)
5. . 2013-4 IRB 313. [↑](#footnote-ref-5)
6. *See,* Rev. Proc. 2013-12, Section 4.02. [↑](#footnote-ref-6)
7. *. See e.g.,* *Christy & Swan Profit Sharing Plan v. Comm’r*, TC Memo 2011-62 (March 15, 2011); and *Michael C. Hollen, DDS v. Comm’r*, TC Memo (Jan. 4, 2011) involving an ESOP. [↑](#footnote-ref-7)
8. . 2013-4, IRB 313 (Rev. Proc. 2013-12); 2015-16 IRB, 914 (Rev. Proc. 2015-27); Rev. Proc. 2015 16 IRB, 920 (Rev. Proc. 2015-28). Rev. Proc. 2013-12 was effective April 1, 2013 and sponsors could apply these provisions after Dec. 31, 2012. Rev. Proc. 2015-27 was generally effective July 1, 2015, but plan sponsors may apply its provisions on or after March 27, 2015. Rev. Proc. 2015-28 was effective as of April 23, 2015. [↑](#footnote-ref-8)
9. . Ibid. A copy of Rev. Proc. 2013-12, 2015-27 and Rev. Proc. 2015-28 may be found on-line at http://www.irs.gov/, last accessed on July XX, 2015.. [↑](#footnote-ref-9)
10. . 2008-2 C.B. 464. [↑](#footnote-ref-10)
11. Based on the total plan participant population. [↑](#footnote-ref-11)
12. The fee is based upon the total plan participant population. [↑](#footnote-ref-12)
13. The I.R.C., § 4974 excise tax is imposed on participant who should have received the RMD. [↑](#footnote-ref-13)
14. This safe harbor provision is set to expire on 12/31/2020. However, the IRS has indicated that it may extend it based upon all relevant factors, of which the increase in the number of plans with automatic enrollment features will probably prove the most important. [↑](#footnote-ref-14)
15. Dollar amounts are not required to be disclosed. [↑](#footnote-ref-15)
16. The amount of the missing match and the date it will be contributed is not required to be disclosed. [↑](#footnote-ref-16)
17. This increase is subject to the I.R.C, § 402(g) limits. [↑](#footnote-ref-17)
18. The plan sponsor may use the earnings adjustment methods described in Appendix B, § 3. [↑](#footnote-ref-18)
19. This calculation is subject to applicable plan and Code limitations, [↑](#footnote-ref-19)
20. *See* Rev. Proc, 2013-12, Appendix B., § .02(i)(a)(iii)(F). [↑](#footnote-ref-20)
21. *See* Rev. Proc, 2013-12, Appendix B., § .02(i)(a)(iii)(F) as modified by Rev Proc 2015-28. [↑](#footnote-ref-21)
22. *See* Rev Proc 2013-12, Appendix A, § .05(9)(a)(iii) as modified by Rev. Proc 2015-28. [↑](#footnote-ref-22)
23. . *See* IRC Sec. 6.02(5)(d) of Rev. Proc. 2013-12. [↑](#footnote-ref-23)
24. . IRS, Retirement Plan Forms and Publications, http://www.irs.gov/Retirement-Plans/Retirement-Plan-Forms-and-Publications. Last accessed on Aug. 14, 2014. [↑](#footnote-ref-24)
25. . More information on the requirements for submission when a determination letter application is to be included with the VCP submission may be found at section 11.14(1) of Rev. Proc. 2013-12. [↑](#footnote-ref-25)
26. . Section 11.12 of Rev. Proc. 2013-12. [↑](#footnote-ref-26)
27. [↑](#footnote-ref-27)
28. . 2013-4 IRB 313. [↑](#footnote-ref-28)
29. . IRS Webinar, *Plan Corrections: The Employee Plans Compliance Resolution System (EPCRS)*, Slides 14-17, 8-1-2013. [↑](#footnote-ref-29)
30. . The most current version of the IRS Operational Checklist may be found at [www.IRS.gov/pub/irs-pdf/p4531.pdf](http://www.IRS.gov/pub/irs-pdf/p4531.pdf), last accessed Aug. 14, 2014. [↑](#footnote-ref-30)
31. . *See* Rev. Proc. 2013-12, Appendix A, section .05 and related examples in Appendix B. Also see IRS Webinar, *Plan Corrections: The Employee Plans Compliance Resolution System (EPCRS)*, Slides 7-9, 8-1-2013. [↑](#footnote-ref-31)
32. *. See* Rev. Proc. 2013-12, Appendix A, section .05 and related examples in Appendix B. Also see IRS Webinar, *Plan Corrections: The Employee Plans. Compliance Resolution System (EPCRS)*, Slides 7–9, 8-1-2013. [↑](#footnote-ref-32)
33. . IRS Webinar, *Plan Corrections: The Employee Plans Compliance Resolution System (EPCRS)*, Slides 8 and 9, 8-1-2013. [↑](#footnote-ref-33)
34. . IRS Webinar, Plan Corrections: The Employee Plans Compliance Resolution System (EPCRS) Slides 8 and 9, 8-1-2013. [↑](#footnote-ref-34)
35. . Comments made by IRS speaker during IRS Webinar, *Plan Corrections: The Employee Plans Compliance Resolution System (EPCRS)*, 8-1-2013. [↑](#footnote-ref-35)
36. . *See* Final DOL Reg. §2510.3-102, specifically (a)(1) and (f)(1), as to timely 401(k) plan deposits, which subsections were amended effective as of July 14, 2010. [↑](#footnote-ref-36)
37. . Comments made by IRS speaker during IRS Webinar, *Plan Corrections: The Employee Plans Compliance Resolution System (EPCRS)*, 8-1-2013. [↑](#footnote-ref-37)
38. . IRS Webinar, *Plan Corrections: The Employee Plans Compliance Resolution System (EPCRS)*, Slide 11, 8-1-2013. [↑](#footnote-ref-38)
39. . Comments made by IRS speaker during IRS Webinar, *Plan Corrections: The Employee Plans Compliance Resolution System (EPCRS)*, 8-1-2013. [↑](#footnote-ref-39)
40. . *See e.g., Regulatory Brief 2008-6*, Vanguard, October 2008, pg. 4. The correction suggestions for this violation would appear to remain valid after Rev. Proc. 2013-12, as amended by Rev. Procs. 2015-27 and 2015-28. [↑](#footnote-ref-40)
41. *See,* ***IRS Employee Plans Newsletter, May 1, 2015*** [↑](#footnote-ref-41)
42. . 2008-2 C.B. 464. [↑](#footnote-ref-42)
43. . Comments made by IRS speaker during IRS Webinar, *Plan Corrections: The Employee Plans Compliance Resolution System (EPCRS)*, 8-1-2013. [↑](#footnote-ref-43)
44. . *See generally, Regulatory Brief: IRS updates plan correction program*, Vanguard, July 2013, pg. 3. [↑](#footnote-ref-44)
45. Comments made by IRS speaker during IRS Webinar, *Plan Corrections: The Employee Plans Compliance Resolution System (EPCRS)*, 8-1-2013. [↑](#footnote-ref-45)
46. *See, Section 12.01* [↑](#footnote-ref-46)
47. . See http://www.savingmatters.dol.gov/ebsa/publications/correctionprograms.html. The EBSA’s Office of Chief Accountant also provides support for program participants. [↑](#footnote-ref-47)
48. . For a current update of the 401(k) *Plan Fix-It Guide*, see http://www.irs.gov/Retirement-Plans/401%28k%29-Plan-Fix-It-Guide, last accessed July 19, 201. [↑](#footnote-ref-48)
49. *. See generally*, 60 Fed. Reg. 20876 (1995) and 67 Fed. Reg. 15060 (2002) for DFVC procedure to correct for failure to make required alternative one-time report required for nonqualified deferred compensation plans exempt from ERISA coverage. [↑](#footnote-ref-49)
50. *. See* Richey, Baier & Phelan, *The Nonqualified Deferred Compensation Plan Advisor: Plans Covered & Exempt under Section 409A*, 5th Edition, (National Underwriter Company, 2013), pg. 128 and footnote 25 to Chapter 5. [↑](#footnote-ref-50)
51. . 2010-3 IRB 275. [↑](#footnote-ref-51)
52. . 2010-51 IRB 853. [↑](#footnote-ref-52)
53. . 2008-51 IRB 1305. [↑](#footnote-ref-53)
54. GCM 201518013 (May 1, 2015). [↑](#footnote-ref-54)
55. . *See* generally. Barker, 409A *Failures Correcting With and Without the IRS Formal Correction Programs*, Outline N, 46th Ann. Fed. Southern Tax Institute, Sept. 19–23, 2011. [↑](#footnote-ref-55)
56. *See,* [www.irs.gov.gov/Retirement-Plans/457b-Plan-Submissions-to-Voluntary-Compliance](http://www.irs.gov.gov/Retirement-Plans/457b-Plan-Submissions-to-Voluntary-Compliance). [↑](#footnote-ref-56)
57. IRC, § 457(b)(6); Treas. Reg. § 1.457-9(a). [↑](#footnote-ref-57)
58. *See,* [www.irs.gov.gov/Retirement-Plans/457b-Plan-Submissions-to-Voluntary-Compliance](http://www.irs.gov.gov/Retirement-Plans/457b-Plan-Submissions-to-Voluntary-Compliance). [↑](#footnote-ref-58)