Welcome!

Correcting Problems With Your Retirement Plan

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IRS Top 10 List of 401(k) Errors

1. Failure to **update / amend Plan Document**
2. Failure to **follow Plan terms**
3. Failure to correctly apply Plan's **definition of Compensation**
4. Failure to follow **matching contribution provisions**
5. Failure to satisfy **ADP/ACP nondiscrimination testing**
6. Failure to **include all eligible employees**
7. Failure to **limit elective deferrals** to IRC 402(g) limits
8. Failure to **timely deposit elective deferrals**
9. Failure to follow the **Plan's loan provisions**
10. Failure to follow Plan terms regarding **hardship distributions**

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Smith Anderson Corrections in the last 3-5 years*

IRS #	Error Types	# of Clients	Correction Programs (number)
3	Compensation – Failure to use plan definition	9	SCP (3) / VCP (3) / VCP – John Doe / Audit CAP
1	Amendments – Failure to timely adopt (including 403(b) plan failure to timely adopt written plan)	8	Audit / VCP / Non-amender
6	Eligibility – Exclusion of eligible employees / Impermissible eligibility provisions	7	SCP / VCP (3) / None (1)
	Prohibited Transactions	7	Audit / Settlements
8	Late Deposit (deferrals)	5	VFCP (2-3) / None / Audit
2	Allocations – Failure to follow plan terms re allocations	4	VCP (1-2) / SCP (2-3)
4	Contributions – Over / under-match; excess / insufficient employer contributions	4	SCP (3) / VCP – John Doe
	Forfeitures – Failure to allocate / use forfeitures appropriately	3	SCP
	Controlled Group – Failure to properly recognize controlled group status	2	VCP / VCP – John Doe
9	Loan – Failure to follow plan loan rules	2	SCP / Audit
	Valuation	2	Audit
	Actuarial – Actuarial errors in converting DB to cash balance	1	VCP
7	Deferrals – Failure to distribute excess / failure to follow election	1	SCP
	Distributions – Failure to timely pay an RMD	1	SCP
10	Hardship – Hardship suspension rule	1	SCP
	Investments – Direction of funds to wrong investment	1	SCP
5	Nondiscrimination – ADP/ACP testing failure	1	TBD
	Tax – FICA re mandatory contributions	1	VCP
	Vesting – Failure to follow plan terms re vesting	1	SCP / VCP
	Intentional Disqualification	1 (2?)	

*Does not reflect all self-corrections or conclusions that no correction was required

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Ways Errors Come to our Attention

- Client questions regarding plan administration
- Plan audits
- TPA/recordkeeper
- M&A
- Participant questions/issues
- Other

Overview of IRS Correction Programs (EPCRS)

More Control — **Less Control**

	Self-Correction Program (SCP)	Voluntary Correction Program (VCP)	Audit Closing Agreement Program (CAP)
Error Types	Operational failures only – insignificant anytime or significant within 2 plan years	Any qualification failure; plan loans that fail 72(p)(2)	Any qualification or plan loan failure discovered on audit
Correction Limitations	Retroactive amendment for limited corrections only	Must be approved by IRS	Must be approved by IRS
Submission / Fee	None	Submit to IRS prior to audit Fee is based on number of plan participants ($750 to $25,000) with certain exceptions (e.g., non-amender failure is reduced fee)	No submission; IRS initiates for errors discovered on audit Sanction is negotiated with IRS and related to maximum payment amount (tax that could be imposed upon DQ for all open years).
Special Requirements	Established procedures to facilitate overall compliance Favorable determination letter (if “significant” problem)	Implementation of correction within 150 days of issue of compliance statement	
Special Features	No special documentation required, but prudent to retain memorandum describing correction	John Doe submission Group submission (except demographic failure)	
Standard requirements	Full correction Earnings / losses (losses optional for corrective contributions) Determination letter submission required for corrective amendment except to preapproved plan (timing rules vary)		

Less Expensive — **More Expensive**

SCP – Significant vs. Insignificant Errors

Factors to Consider (per EPCRS 8.02):

1. whether other failures occurred during the period being examined (for this purpose, a failure is not considered to have occurred more than once merely because more than one participant is affected);
2. the percentage of plan assets and contributions involved;
3. the number of years the failure occurred;
4. the number of participants affected relative to the total number of participants;
5. the number of participants affected relative to the number of participants who could have been affected;
6. whether correction was made within a reasonable time after discovery; and
7. the reason for the failure (for example, data errors such as errors in the transcription of data, the transposition of numbers, or minor arithmetic errors).

Multiple failures (single year or multiple years) are insignificant only if insignificant in the aggregate.

DOL's Voluntary Correction of Form 5500 Failures (DOL's DFVCP)

- Retirement plans (regardless of size) and welfare plans with 100+ participants are required to file an annual report on Form 5500
- Failure to timely file can result in significant penalties if discovered on audit by the DOL or IRS:
  - Non-filers may be assessed a penalty of up to $300 per day (capped at $30,000 per year) until a complete Form 5500 is filed
  - Late/deficient filers may be assessed a penalty of $50+ per day
- The DOL's Delinquent Filer Voluntary Compliance Program (DFVCP) allows voluntarily correction for much lower penalties:
  - Large Plans (100 or more participants) may file under DFVCP with maximum penalty of $2,000 per year (capped at $4,000 per plan)
  - Small Plans (fewer than 100 participants) may qualify for a lower, $750 per year maximum (capped at $1,500 per plan)

DOL's Voluntary Fiduciary Correction Program (VFCP)

- DOL program used to correct fiduciary violations under ERISA
- 19 categories of transactions covered
- Correction involves:
  - Identifying violations and determining whether they fall within the transactions covered by VFCP
  - Following the process for correcting specific violations (e.g., improper loans or incorrect valuation of plan assets)
  - Calculating and restoring any losses or profits with interest, if applicable, and distribute any supplemental benefits to participants
  - Filing an application with the appropriate EBSA regional office that includes documentation showing evidence of corrective action taken

Case Study

- Your auditor calls you to report that they have compared your 401(k) deferrals for 2013 to the W-2 information you provided and identified an error. You failed to take deferrals from the new "Atta-Boy Bonuses" you paid in December of 2013. 20 of your 105 participants received these bonuses. All 20 had 401(k) deferral elections in place. The estimated amount that should have been deferred is $20k.
- What should you do? What outcome is most likely on these facts?

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Case Study (continued)

- Same facts as the last slide except that 2013 was the first year you were required to have a plan audit and your auditor has determined that your plan has failed to take deferrals from all bonuses paid over the past 4 years. You investigate and determine that your plan has always provided for deferrals from bonuses and the problem began when Peggy Precedent joined your payroll group. Peggy didn't take deferrals from bonuses because that wasn't how they did it at her last job. The estimated amount that should have been deferred is $200k.
- What should you do? What outcome is most likely on these facts?

Case Study (continued)

- Same facts as the last slide except you investigate and determine that the problem is the result of an error in your plan document. When you changed recordkeepers at the end of 2009, Regina, the representative of the new recordkeeper, filled out your new adoption agreement for you. Although your plan had historically not permitted deferrals from bonuses, Regina's selections changed that. (You didn't bother having Smith Anderson review the new document because Regina really seemed to know what she was doing.) You think you may have an email somewhere where you told Regina that you didn't want to change from your prior practice.
- What should you do? What outcome is most likely on these facts?

Case Study (continued)

- Same facts as the slide where Peggy is the reason for the problem, except it isn't the auditor who discovers it. Instead, a new payroll hire, Nancy, puzzled by why Peggy keeps insisting deferrals shouldn't be made from bonuses, reads the plan document for herself and reports her findings to you.
- If only the company knows about the error, should what you do be any different?

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Key Takeaways

- Most plans will have a problem at some point
- Plan errors can be corrected
- You have more correction options and more control over the process the sooner you act
- All problems are not the same and the best correction method may depend on the facts
- Adopt a strategy and get sign-off (coordinate with auditor as necessary)
- Reach out and get help

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