

SUMMARY OF SIGNIFICANT CHANGES MADE TO EPCRS
BY REVENUE PROCEDURE 2008-50, IRB 2008-35

NOTES:

1. **Revenue Procedure (“Rev. Proc.”) 2008-50** updates the comprehensive system of correction programs for sponsors of retirement plans that are intended to satisfy the requirements of § 401(a), 403(a), 403(b), 408(k), or 408(p) of the Internal Revenue Code (the "Code") but that have not met these requirements for a period of time. This system, the **Employee Plans Compliance Resolution System ("EPCRS")**, permits Plan Sponsors to correct these failures and thereby continue to provide their employees with retirement benefits on a tax-favored basis. The components of EPCRS are the Self-Correction Program ("SCP"), the Voluntary Correction Program ("VCP"), and the Audit Closing Agreement Program ("Audit CAP").
2. **Rev. Proc. 2008-50 supersedes Rev. Proc. 2006-27.** This document identifies the significant changes made to Rev. Proc. 2006-27 when drafting Rev. Proc. 2008-50.

Section **2.02** was revised significantly to request comments on future improvements to EPCRS regarding methods to correct the failure to implement automatic enrollment with respect to elective deferrals in a § 401(k) plan that has an automatic enrollment provision as well as special issues relating to designated Roth contributions. Section 2.02 also makes reference to section 1101 of the Pension Protection Act of 2006 (PPA '06), Public Law 109-280 (120 Stat. 780).

Section **4.05(2)** was revised to clarify when correction of an Operational Failure by plan amendment is permitted under SCP.

Section **4.06**, which sets forth the procedures for submitting a determination letter application under EPCRS, was revised significantly and incorporated into section **6.05**.

Section **4.11** was revised to clarify the rules relating to egregious failures.

Section **5.01(3)** was revised to expand the definition of Excess Amount, to define the term Excess Allocations, and to incorporate a revised definition of Overpayment (formerly located in section 5.01(6)).

Section **5.03** (formerly section 5.06) was revised slightly to expand the definition of Orphan Plan. (All references to section 5.06 have been revised accordingly.)

Section **6.02(2)** was revised to further clarify “reasonable and appropriate correction.”

Section **6.02(4)** was revised slightly to clarify a few points regarding corrective allocations and distributions. In addition, subparagraph (e) was added to address the time period to be used in calculating earnings adjustments for corrective allocations and distributions.

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Section **6.02(5)** was revised to expand on a few points regarding the special exceptions to full correction. In addition, provisions were added to address the appropriate use of the Department of Labor's Voluntary Fiduciary Correction Program Online Calculator ("VFCEP Online Calculator").

Section **6.03** was revised to include a new subparagraph (4) which addresses the tax treatment of rollovers made from the plan pursuant to a distributable event.

Section **6.05** was revised to contain the procedures for submitting determination letter applications under EPCRS.

Section **6.06** was revised to incorporate correction rules relating to Excess Allocations and Overpayments.

Section **6.07** was revised to include specific requirements regarding plan loan failures and requests for relief from reporting the loans as deemed distributions. In addition, subparagraph (d) was added to section 6.07(2) regarding whether plan documents are required to contain loan provisions.

Section **6.09** was revised to include specific requirements regarding certain Qualification Failures or corrections that result in excise taxes and to address requests for relief from such excise taxes under Code §§ 4972, 4973, 4974, and 4979.

Section **9.04** was revised to further clarify "substantial completion of correction" for self-corrected Operational Failures.

Section **10.05**, which relates to submitting a determination letter application for plan amendments related to a VCP submission, was revised to require individually designed plans to submit a restated plan for review.

Section **10.07(2)** was revised to clarify those instances in which the VCP compliance fee will be refunded.

Section **10.07(5)(a)** was revised to clarify those situations where the Service may reject the inclusion of additional failures in a pending VCP submission.

Section **10.07(9)** was revised to include a requirement regarding the timing of correction for certain nonamender failures.

Section **10.07(10)** was revised to include some additional requirements relating to the modification of a compliance statement.

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Section **10.08(1)** was revised to clarify the scope of a compliance statement issued with respect to the failure to amend a plan timely for interim amendments or optional law changes, as described in section 6.05(3) of Rev. Proc. 2008-50.

Section **10.11(3)(d)** was revised to clarify which plans would be included in a Group Submission if the Plan Sponsor was notified of an impending Employee Plans examination.

Section **11.01** was revised to introduce a new application format for all VCP filings (Appendix D) and to provide for Streamlined Application procedures for several failures (Appendix F).

Section **11.02** was revised to provide new Streamlined Application procedures (where the application also constitutes the compliance statement) for the failures specified below:

- Schedule 1: for failure to adopt timely interim amendments described in section 6.05(2) or amendments required to reflect the changed operation of the plan on account of the Plan Sponsor's decision to implement optional law changes described in section 6.05(3)(b).
- Schedule 2: for failure to timely adopt amendments to comply with required legislative or regulatory changes (other than those described in 6.05(3)(a)).
- Schedule 3: for a SEP or a SARSEP that experienced one or more of the failures shown below, where the Plan Sponsor proposes to correct such failure(s) by using the method(s) provided on Appendix F, Schedule 3:
 - Employer Eligibility Failure (SARSEPs only);
 - Failure to satisfy the deferral percentage test (SARSEPs only);
 - Failure to make required employer contributions to the plan;
 - Failure to provide eligible employee with the opportunity to make elective deferrals (SARSEPs only); or
 - Excess Amounts contributed to the plan.
- Schedule 4: for a SIMPLE IRA that experienced one or more of the failures shown below, where the Plan Sponsor proposes to correct such failure(s) by using the method(s) provided on Appendix F, Schedule 4:
 - Employer Eligibility Failure;
 - Failure to make required employer contributions to the plan;
 - Failure to provide eligible employee with the opportunity to make elective deferrals; or
 - Excess Amounts contributed to the plan.
- Schedule 5: for failure to administer plan loans in accordance with the provisions of Code § 72(p)(2), where the failure solely relates to employees who are neither key employees (as defined in Code § 416(i)(1)) nor self-employed individuals (as defined in Code § 401(c)(1)(B)).
- Schedule 6: for failure to satisfy the criteria for an employer to sponsor either a 403(b) Plan, or a § 401(k) plan.
- Schedule 7: for failure to distribute elective deferrals made in excess of the Code § 402(g) limit, where the Plan Sponsor proposes to correct such failure using the method described in Appendix A, section .04.

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- **Schedule 8:** for failure to make required minimum distributions pursuant to Code § 401(a)(9), where the Plan Sponsor proposes to correct such failure using the method described in Appendix A, section .06.
- **Schedule 9:** for one or more of the following failures:
 - Code § 401(a)(17) failure being corrected using the method described in Appendix B, section 2.07(1)(a);
 - Hardship distribution failure being corrected using the method described in Appendix B, section 2.07(2)(a);
 - Loans permitted in operation, but not permitted by Plan document, being corrected using the method described in Appendix B, section 2.07(2)(a); or
 - Early inclusion of otherwise eligible employee(s) being corrected using the method described in Appendix B, section 2.07(3)(a).

Sections **11.03 and 11.04** (formerly sections 11.02 and 11.03) were revised significantly to address Submission Requirements and Required Documents. **Note:** Plan Sponsors are no longer required to submit any pages from the plan's Form 5500 series return. Instead, Plan Sponsors need only include Plan Data relating to the number of plan participants and the total amount of plan assets as of the most recent 5500 filing.

Section **11.12** (formerly section 11.11) was revised to require the inclusion of a separate Appendix E Acknowledgement Form for each plan submitted under VCP.

Section **11.13** (formerly section 11.12) was revised to update the mailing address for all VCP submissions.

Section **12.02** was revised to include a set of criteria for determining the compliance fee for VCP submissions where the sole failure is a failure of participant loans to comply with the requirements of Code § 72(p)(2) and such failure does not affect more than 25% of the Plan Sponsor's participants in any of the year(s) in which the failure occurred.

Section **12.03** was revised to reflect the changes made to section 6.05 and their impact on nonamender failures.

Section **12.04** was revised to include two new requirements for determining the compliance fee for Group Submissions.

Section **12.06** was revised to provide that the compliance fee rules for egregious failures also apply to intentional failures.

Section **13.01** was revised to provide that the Audit CAP rules and principles also apply to participant loans that did not comply with § 72(p)(2) (if such loans were not corrected under SCP or VCP).

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Section **14.01** was revised to describe the Maximum Payment Amount for participant loans that did not comply with § 72(p)(2).

Section **14.02** was revised to include a new factor (i.e., “whether the failure is solely an Employer Eligibility Failure”) to be used in determining the sanction amount under Audit CAP. In addition, section 14.02 was revised to delete those factors that applied only to 403(b) plans and to limit the number of factors that applied only to Qualified Plans. Lastly, an additional factor was added for participant loans that did not comply with § 72(p)(2).

Section **16** defines the general effective date of Rev. Proc. 2008-50 as January 1, 2009; however, Plan Sponsors are permitted, at their option, to apply the provisions of Rev. Proc. 2008-50 on or after September 2, 2008.

Appendix A, section .04 was revised to clarify that the inclusion of an excess deferral and the distribution (for both the excess deferral and earnings) in gross income applies whether or not any portion of the excess deferral is attributable to designated Roth contributions.

Appendix A, section .05 was revised significantly. A clarifying statement was added to the end of Appendix A, section .05(2)(g) regarding the timing of correction for improperly excluded employees if another qualification failure exists. In addition, three new subparagraphs address the correction of improperly excluded employees with respect to designated Roth contributions and missed catch-up contributions as well as correction for the failure to implement an employee election.

Appendix A, section .06 was revised to clarify the time period to be used in calculating earnings adjustments for required minimum distributions.

Appendix A, section .07 was revised to clarify a few points in paragraph (2) regarding the alternative method of correction for failure to obtain spousal consent for a distribution.

Appendix A, section .08 was revised to reflect the issuance of the finalized regulations under § 415. In addition, Appendix A, section .08 was revised to clarify that forfeited matching contributions are to be placed into an unallocated account to be used as an employer contribution, other than elective deferrals, in succeeding periods.

Appendix A, section .09 was added to address correction methods for Abandoned Orphan Plans.

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Appendix B, section 1.01 was revised to provide that corrective allocations and distributions should reflect earnings and actuarial adjustments in accordance with section 6.02(4) of Rev. Proc. 2008-50. In addition, Appendix B, section 1.01 was revised to provide that the correction methods in Appendix B are acceptable to correct Qualification Failures under VCP and to correct Qualification Failures under SCP that occurred notwithstanding that the plan has established practices and procedures reasonably designed to promote and facilitate overall compliance with the Code, as provided in section 4.04 of Rev. Proc. 2008-50.

Appendix B, section 1.03 was added to address correction methods for designated Roth contributions.

Appendix B, section 2.01(1)(b)(iii) was revised to clarify the time period to be used in calculating earnings adjustments for Excess Contribution Amounts.

Appendix B, section 2.02(1)(a) was revised to make reference to the new correction methods for improperly excluded employees described in Appendix A, section .05.

Appendix B, section 2.02(2)(a)(i) was revised to delete the reference to §1.401(k)-1(g)(10).

Appendix B, section 2.04(2)(a) was revised to reflect the movement of the Overpayment correction principles to section 6.06(3) of Rev. Proc. 2008-50 and to refer to such correction principles (instead of incorporating them in this section).

Appendix B, sections 2.06(1) and 2.07(1)(a) were revised to reflect the movement of the Excess Allocations correction principles to section 6.06(2) of Rev. Proc. 2008-50 and to refer to such correction principles (instead of incorporating them in this section).

Appendix B, section 3.01(2)(a) was revised to refer to the new requirements regarding corrective allocations and distributions set forth in section 6.02(4)(e) of Rev. Proc. 2008-50.

Appendix C was revised to include the following explanatory note in the Instructions section: “NOTE: If you are submitting a Streamlined Application under VCP using Appendix F in accordance with section 11.02 of this revenue procedure, this Appendix C does not need to be completed. If you are submitting a VCP submission using Appendix D, Part I of this Appendix C does not need to be completed.”

Appendix D was revised significantly to apply to general VCP submissions, as described in section 11.03 of Rev. Proc. 2008-50.

Appendix F was revised significantly to apply to VCP submissions that fall under the Streamlined Application procedures of section 11.02 of Rev. Proc. 2008-50. Appendix F also includes several supporting schedules which deal with particular failures and particular plan types. See summary of changes to section 11.02 of Rev. Proc. 2008-50, as described above.