Internal Revenue
bulletin

Bulletin No. 2008-35
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HIGHLIGHTS OF THIS ISSUE

These synopses are intended only as aids to the reader in identifying the subject matter covered. They may not be relied upon as authoritative interpretations.

INCOME TAX

REG–142680–06, page 565.

Proposed regulations under section 7508A of the Code clarify rules relating to the postponement of certain tax-related acts by reason of a Presidentially declared disaster or terroristic or military action. The regulations clarify the scope of relief under section 7508A and specify that interest may be suspended during the postponement period. These changes are necessary to reflect changes in the law made by the Victims of Terrorism Tax Relief Act and current IRS practice.

Notice 2008–71, page 462.

This notice requests comments with respect to possible expansion of regulations section 1.475(a)–4 (safe harbor valuation regulations) so that financial institutions headquartered outside the United States can qualify to make the election described in regulations section 1.475(a)–4(b).

Rev. Proc. 2008–51, page 562.

This procedure provides that the Service will not treat the debt instrument, issued by a corporation pursuant to a binding financial commitment obtained from an unrelated lender that satisfies certain conditions, as an applicable high yield discount obligation (AHYDO) for purposes of sections 163(e)(5) and 163(i) of the Code. As a result, no portion of the corporation's interest deductions attributable to the debt instrument will be disallowed under section 163(e)(5).

EMPLOYEE PLANS

Rev. Proc. 2008–50, page 464.

This procedure updates the comprehensive system of correction programs for sponsors of retirement plans that are intended to satisfy the requirements of sections 401(a), 403(a), 403(b), 408(k), or 408(p) of 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). Rev. Proc. 2006–27 modified and superseded. Rev. Proc. 2007–49, section 3, modified and superseded.

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Finding Lists begin on page ii.

Department of the Treasury
Internal Revenue Service

EXEMPT ORGANIZATIONS

Announcement 2008–79, page 568.
The IRS has revoked its determination that Ohio Taekwondo Association, Inc., of Cincinnati, OH; The Johnson Foundation of Sandy, UT; Chaim Ministries, Inc., of Los Alamitos, CA; Yes I Can of Burlington, NC; Surviving the System, Inc., of Peoria, AZ; Gravette Medical Center Hospital of Gravette, AR; D & L Carousel Pre-School of Los Angeles, CA; Christmas in April of Mobile, AL; Foundation for Life Enhancement of Dallas, TX; Colgate Residences, Inc., of Houston, TX; Help Ministries, Inc., of Mesa, AZ; CCC Centers of San Antonio, TX; Sunlight Ministries, Inc., of Brookhaven, MS; Consumer Credit Counseling Services of Huntsville, Inc., of Huntsville, AL; Universal Training Center Nonprofit Corporation of Highland, CA; and Deep South Community Development Corporation of Decatur, GA, qualify as organizations described in sections 501(c)(3) and 170(c)(2) of the Code.

ESTATE TAX

T.D. 9414, page 454.
Final regulations under sections 2036 and 2039 of the Code provide guidance on the portion of property transferred to a trust or otherwise that is properly includible in the grantor's gross estate if the grantor has retained the use of the property or the right to an annuity, unitrust, or other payment from the property for life, for any period not ascertainable without reference to the grantor's death, or for a period that does not in fact end before the grantor's death. Rev. Ruls. 76–273 and 82–105 obsoleted.

ADMINISTRATIVE

REG–142680–06, page 565.
Proposed regulations under section 7508A of the Code clarify rules relating to the postponement of certain tax-related acts by reason of a Presidentially declared disaster or terroristic or military action. The regulations clarify the scope of relief under section 7508A and specify that interest may be suspended during the postponement period. These changes are necessary to reflect changes in the law made by the Victims of Terrorism Tax Relief Act and current IRS practice.

The IRS Mission

Provide America's taxpayers top quality service by helping them understand and meet their tax responsibilities and by applying the tax law with integrity and fairness to all.

Introduction

The Internal Revenue Bulletin is the authoritative instrument of the Commissioner of Internal Revenue for announcing official rulings and procedures of the Internal Revenue Service and for publishing Treasury Decisions, Executive Orders, Tax Conventions, legislation, court decisions, and other items of general interest. It is published weekly and may be obtained from the Superintendent of Documents on a subscription basis. Bulletin contents are compiled semiannually into Cumulative Bulletins, which are sold on a single-copy basis.

It is the policy of the Service to publish in the Bulletin all substantive rulings necessary to promote a uniform application of the tax laws, including all rulings that supersede, revoke, modify, or amend any of those previously published in the Bulletin. All published rulings apply retroactively unless otherwise indicated. Procedures relating solely to matters of internal management are not published; however, statements of internal practices and procedures that affect the rights and duties of taxpayers are published.

Revenue rulings represent the conclusions of the Service on the application of the law to the pivotal facts stated in the revenue ruling. In those based on positions taken in rulings to taxpayers or technical advice to Service field offices, identifying details and information of a confidential nature are deleted to prevent unwarranted invasions of privacy and to comply with statutory requirements.

Rulings and procedures reported in the Bulletin do not have the force and effect of Treasury Department Regulations, but they may be used as precedents. Unpublished rulings will not be relied on, used, or cited as precedents by Service personnel in the disposition of other cases. In applying published rulings and procedures, the effect of subsequent legislation, regulations, court decisions, rulings, and procedures must be considered, and Service personnel and others concerned are cautioned against reaching the same conclusions in other cases unless the facts and circumstances are substantially the same.

The Bulletin is divided into four parts as follows:

Part I.—1986 Code.
This part includes rulings and decisions based on provisions of the Internal Revenue Code of 1986.

Part II.—Treaties and Tax Legislation.
This part is divided into two subparts as follows: Subpart A, Tax Conventions and Other Related Items, and Subpart B, Legislation and Related Committee Reports.

Part III.—Administrative, Procedural, and Miscellaneous.
To the extent practicable, pertinent cross references to these subjects are contained in the other Parts and Subparts. Also included in this part are Bank Secrecy Act Administrative Rulings. Bank Secrecy Act Administrative Rulings are issued by the Department of the Treasury's Office of the Assistant Secretary (Enforcement).

Part IV.—Items of General Interest.
This part includes notices of proposed rulemakings, disbarment and suspension lists, and announcements.

The last Bulletin for each month includes a cumulative index for the matters published during the preceding months. These monthly indexes are cumulated on a semiannual basis, and are published in the last Bulletin of each semiannual period.

For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

Part I. Rulings and Decisions Under the Internal Revenue Code of 1986

Section 163.—Interest

If a debt instrument issued by a corporation pursuant to a binding financing commitment obtained from an unrelated lender satisfies certain conditions, Rev. Proc. 2008–51 provides that the Service will not treat the debt instrument as an applicable high yield discount obligation (AHYDO) for purposes of §§ 163(e)(5) and 163(i) of the Internal Revenue Code. As a result, no portion of the corporation's interest deductions attributable to the debt instrument will be disallowed under § 163(e)(5). See Rev. Proc. 2008-51, page 562.

Section 2036.—Transfers With Retained Life Estate

26 CFR 20.2036–1: Transfers with retained life estate.

T.D. 9414

DEPARTMENT OF THE TREASURY
Internal Revenue Service
26 CFR Part 20

Grantor Retained Interest Trusts—Application of Sections 2036 and 2039

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations providing guidance on the portion of property transferred to a trust or otherwise, that is properly includible in a grantor's gross estate under Internal Revenue Code (Code) sections 2036 and 2039 if the grantor has retained the use of the property or the right to an annuity, unitrust, or other payment from such property for life, for any period not ascertainable without reference to the grantor's death, or for a period that does not in fact end before the grantor's death. The final regulations affect estates that are required to file Form 706, *United States Estate (and Generation-Skipping Transfer) Tax Return*.

DATES: *Effective Date:* These regulations are effective on July 14, 2008.

Applicability Date: For dates of applicability, see §20.2036–1(c)(3) and §20.2039–1(f).

FOR FURTHER INFORMATION CONTACT: Theresa M. Melchiorre at (202) 622–3090 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background and Explanation of Provisions

On June 7, 2007, proposed regulations (REG–119097–05, 2007–28 I.R.B. 74) were published in the **Federal Register** [72 FR 31487]. The proposed regulations contain proposed amendments to the Estate Tax Regulations [26 CFR part 20] providing guidance on the portion of a trust properly includible in a grantor's gross estate under sections 2036 and 2039 if the grantor retained the use of property in the trust or the right to an annuity, unitrust, or other payment from the trust for life, for any period not ascertainable without reference to the grantor's death, or for a period that does not in fact end before the grantor's death. The trusts that were the subject of the proposed regulations include without limitation certain charitable remainder trusts (collectively CRTs) such as charitable remainder annuity trusts (CRATs) within the meaning of section 664(d)(1), charitable remainder unitrusts (CRUTs) within the meaning of section 664(d)(2) or (d)(3), and charitable remainder trusts that do not qualify under section 664, as well as other trusts established by a grantor (collectively GRTs) such as grantor retained annuity trusts (GRATs), grantor retained unitrusts (GRUTs), and various forms of grantor retained income trusts (GRITs), such as qualified personal residence trusts (QPRTs) and personal residence trusts (PRTs). A CRT was within the scope of the proposed regulations whether or not the CRT met the qualifications of section 664(d)(1), (d)(2), or (d)(3) because either the CRT was created prior to 1969, there was a defect in the drafting of the CRT, there was no intention to qualify the CRT for the charitable deduction, or for any other reason. A GRT was within the scope of the proposed regulations whether or not the grantor's retained interest was a "qualified interest" as defined in section 2702(b).

The proposed regulations incorporate the guidance provided in Rev. Rul. 76–273, 1976–2 C.B. 268, and Rev. Rul. 82–105, 1982–1 C.B. 133, by proposing to amend §20.2036–1 to provide that the portion of the corpus of a CRT and GRT includible in the decedent's gross estate under section 2036 is that portion of the trust corpus necessary to generate a return sufficient to provide the decedent's retained annuity, unitrust, or other payment. See §601.601(d)(2)(ii)(*b*). The proposed regulations provide that, in cases where both section 2036 and section 2039 could apply to a retained annuity, unitrust, or other payment in a CRT or a GRT, section 2036 (and therefore, when applicable, section 2035), rather than section 2039, will be applied. Accordingly, the proposed regulations also amend §20.2039–1 by providing that section 2039 generally shall not be applied to an annuity, unitrust, or other payment retained by a deceased grantor in a CRT or GRT.

Written comments were received on the proposed regulations, and a public hearing was held on September 26, 2007. The proposed regulations, with certain changes made in response to the written and oral comments received, are adopted as final regulations. Although the final regulations provide guidance as to the Code section (specifically, section 2036 or 2039) to be applied in certain circumstances when each of those sections applies to the same trust, the final regulations are not to be construed to foreclose the possibility that any applicable section of the Code (sections 2035 through 2039, or any other section) properly may be applied in the future by the IRS in appropriate circumstances beyond those described in the final regulations.

Summary of Comments and Explanation of Provisions

References to the Terms GRAT and GRUT

A commentator recommended that the terms "GRAT" (grantor retained annuity trust) and "GRUT" (grantor retained

unitrust) in the proposed regulations be replaced with references to §25.2702–3(b) and (c) because the terms GRAT and GRUT are not statutory or regulatory terms in the Code. In response, the final regulations include both the Treasury Regulation citations and the terms GRAT and GRUT.

Application of section 2036 to a retained interest in a GRAT or a GRUT

A commentator suggested that section 2036 is not applicable to a retained annuity interest in a GRAT to the extent the retained annuity interest is not payable from trust income. The commentator takes the position that the retained annuity interest is payable from principal and/or income, in kind or in cash, and the size of the annuity payment is not defined in relation to trust income. Instead, the commentator suggests that the annuity is defined as a fraction or percentage of the value of the GRAT's original principal, and accordingly, pursuant to section 2033, only the present value of any unpaid annuity payments as of a particular date or event, valued using section 7520, should be includible in the deceased grantor's gross estate. The commentator opined that section 2036 includes a portion of the trust in the gross estate only to the extent that the trust's income must be used to pay the retained annuity.

Another commentator suggested that the method in the proposed regulations for calculating the portion of GRAT or GRUT corpus includible in the deceased grantor's gross estate under section 2036 results in an overstatement of the property required to produce the retained annuity because the method calculates the property necessary to produce the full dollar value of a fixed annuity over the actuarial life expectancy of the decedent as of the date of death, rather than for the actual term of years. Instead, the commentator stated that the method to be applied should value the retained annuity or unitrust interest, rather than the property in the trust required to produce the retained interest.

In addition, it has come to the attention of the IRS and Treasury Department that certain taxpayers have stated that section 2036 should not be applied to an annuity when the actuarial value of the present value of the remainder interest in the trust is zero, on the theory that the annuity was acquired for full and adequate consideration.

The IRS and Treasury Department have carefully considered these arguments and analyses. The IRS and Treasury Department believe, however, that these positions are not consistent with the language of section 2036(a)(1), its legislative history, and the case law interpreting this section, which require the inclusion in the gross estate of property over which a decedent has retained a "string" (the possession or enjoyment of, or the right to the income from the transferred property) for at least one of the required statutory periods (hereinafter referred to as a lifetime interest). This section was enacted in response to a concern that a donor might otherwise be able to remove property from the donor's gross estate by giving that property away before death while retaining the use or benefit of the property. Thus, section 2036 requires inclusion in the gross estate of the property subject to the "string", rather than the "string" or retained interest itself. For section 2036 purposes, if the grantor retains the possession or enjoyment of, or the right to the income from, the transferred property for life, for any period not ascertainable without reference to the grantor's death, or for a period which does not in fact end before the grantor's death, the value of the property over which the grantor retained the interest is includible in the grantor's gross estate. The interest retained by the grantor of a GRAT or GRUT who dies during the term of the GRAT or GRUT is a retained lifetime interest because the grantor is retaining the possession or enjoyment of, or the right to the income from, the transferred property for one of the statutorily required time periods. Section 2036(a)(1), accordingly, includes in the grantor's gross estate all or a portion of the corpus of the GRAT or GRUT. To conclude otherwise would be to ignore the unambiguous statutory language and the intent of section 2036.

This conclusion is supported by the legislative history and the U.S. Supreme Court's interpretation of section 2036 and its predecessors. See *Commissioner v. Church*, 335 U.S. 632, 637–638 (1949); 64 Cong. Rec. H10729 (July 10, 1916) (statements of Messrs. Elston and Kitchin); 71 Cong. Rec. S7078–7079 (March 3, 1931) (statement of Senator Smoot); and 71 Cong. Rec. H7198–7199 (March 3, 1931) (statement of Mr. Hawley).

In *Church*, the Court interpreted the possession and enjoyment clause in section 811(c) (the predecessor to section 2036) in keeping with its historic interpretation. *Church*, 335 U.S. at 645. The Court held that the term "possession and enjoyment" in section 811(c) includes in the transferor's gross estate property passing at the transferor's death in which the transferor has retained any type of lifetime interest (for example, income, a life estate, reverter, etc., contingent or otherwise, expressly stated in the transfer document or by operation of state law) that delayed the beneficiaries' actual use of the transferred property. The Court stated, "It thus sweeps into the gross estate all property the ultimate possession or enjoyment of which is held in suspense until the moment of the decedent's death or thereafter. . . . Testamentary dispositions of an *inter vivos* nature cannot escape the force of this section by hiding behind legal niceties contained in devices and forms created by conveyancers." *Church*, 335 U.S. at 646, quoting *Goldstone v. United States*, 325 U.S. 687 (1945) and citing *Helvering v. Hallock*, 309 U.S. 106 (1940). See, also, *Spiegel's Estate v. Commissioner*, 335 U.S. 701 (1949).

In the Act of Oct. 25, 1949, ch. 720, 63 Stat. 891 (1949) (codified at 26 USC 811(c)(1949)) (1949 Act), Congress amended section 811(c) to include interests retained for a term of years. H.R. Rep. No. 81–1412 at 9 (1949) (Conf. Report). The Conference Report states, in relevant part, that the "income interests described by section 811(c)(1)(B) [the predecessor to section 2036] and by similar language elsewhere in the conference amendments include reserved rights to the income from transferred property and rights to possess or enjoy non-income-producing property [*i.e.* corpus]." *Id.* at 11.

The IRS and Treasury Department believe, based upon the broad statutory language in section 2036, as well as its legislative history and relevant case law, that under section 2036, every type of lifetime interest in property (annuity, income, use or enjoyment of the transferred property, etc.) retained for the requisite time period constitutes the retained possession and enjoyment of the transferred property

or the income therefrom, causing inclusion of the transferred property in the transferor's gross estate. This is true regardless of the extent to which the retained interest is paid from the income or the corpus of the transferred property. This interpretation is consistent with the legislative intent specifically expressed by Congress in the 1949 Act's amendment to section 811(c) as well as with the Supreme Court's decision in *Northeastern Pennsylvania National Bank & Trust Company v. United States*, 387 U.S. 213 (1967). In that case, the Court held that a bequest to the decedent's spouse of a fixed monthly stipend, payable from trust income or corpus, satisfied the requirement of section 2056(b)(5) that the spouse receive all the income from a specific portion of trust corpus. The specific portion of corpus qualifying for the marital deduction was determined by computing the amount of corpus necessary to produce the guaranteed monthly payment, assuming a fixed rate of return.

In addition, this interpretation is consistent with the regulations under section 662. For trust accounting purposes, §1.662(a)–2(c) defines the phrase "the amount of income for the taxable year required to be distributed currently" to include any amount required to be paid out of income or corpus, limited by the amount of income received by the estate or trust for the taxable year and not paid, credited, or required to be distributed to other beneficiaries for the taxable year. Thus, an annuity required to be paid in all events (whether out of income or corpus) would qualify as income required to be distributed currently to the extent there is income (as defined in section 643(b)) not paid, credited, or required to be distributed to other beneficiaries for the taxable year. If an annuity or a portion of an annuity is deemed to be income required to be distributed currently, it is treated in all respects in the same manner as an amount of taxable income. The phrase "the amount of income for the taxable year required to be distributed currently" also includes any amount required to be paid during the taxable year in all events (whether out of income or corpus) pursuant to a court order or decree or under local law, by a decedent's estate as an allowance or award for the support of the decedent's widow or other dependent for a limited period during the administration of the estate to the extent there is income (as defined in section 643(b)) of the estate for the taxable year not paid, credited, or required to be distributed to other beneficiaries.

With regard to the commentator's suggestion that section 2036 applies only to the extent that the trust principal alone is insufficient to fully satisfy the annuity payment, the IRS and Treasury Department believe that this would condition the estate tax treatment on the nature and performance of the investments selected by the trustee. The application of section 2036 should not be dependent on either the trustee's exercise of his or her discretion to invest in income or nonincome producing assets, or the actual performance of the trust assets.

With regard to the position of certain taxpayers that the full and adequate consideration exception under section 2036 is satisfied when the present value of the remainder interest is zero, the IRS and Treasury Department believe that this exception to section 2036 does not apply. There is a significant difference between the *bona fide* sale of property to a third party in exchange for an annuity, and the retention of an annuity interest in property transferred to a third party. In the *bona fide* sale, there is a negotiation and agreement between two parties, each of whom is the owner of a property interest before the sale; each uses his or her own property to provide consideration to the other in exchange for the property interest to be received from the other in the sale. When the transferor retains an annuity or similar interest in the transferred property (as in the case of a GRAT or GRUT), the transferor is not selling the transferred property to a third party in exchange for an annuity because there is no other owner of property negotiating or engaging in a sale transaction with the transferor. The transferor, instead, is transferring the property subject to a retained possession and enjoyment of, or right to, the income from the property. If the grantor retains the interest for life, for any period not ascertainable without reference to the grantor's death, or for a period that does not in fact end before the grantor's death, the property is subject to inclusion in the grantor's gross estate under section 2036.

The portion of the GRAT or GRUT corpus includible in the deceased grantor's gross estate is that portion, valued as of the grantor's death (or the section 2032 alternate valuation date, if applicable), necessary to yield that annual annuity, unitrust, or other payment without reducing or invading principal. This portion is determined by using the section 7520 interest rate in effect on the decedent's date of death (or on the alternate valuation date, if applicable). The IRS has interpreted retained annuity interests under section 2036 in this manner since the enactment of this section in 1916. See Regulations 37 (revised, 1919), Article 24 at 22 (Revenue Act of 1918) or Treasury Department, Treasury Decisions under Internal Revenue Law of the United States, Vol. 21 (Jan.-Dec., 1919), T.D. 2910, Art. 24 at 771; Regulations 37 (revised, January, 1921), Article 24 at 20 (Revenue Act of 1918) or Treasury Department, Treasury Decisions under Internal Revenue Law of the United States, Vol. 23 (Jan.-Dec., 1921), T.D. 3145, Art. 24 at 299; Regulations 63 (1922 Edition), Article 20 at 21 (Revenue Act of 1921) or Treasury Department, Treasury Decisions under Internal Revenue Law of the United States, Vol. 24 (Jan.-Dec., 1922), T.D. 3384, Art. 20 at 1057; Regulations 68 (1924 Edition), Article 18 at 27 (Revenue Act of 1924) or Treasury Department, Treasury Decisions under Internal Revenue Law of the United States, Vol. 27 (Jan.-Dec., 1925), T.D. 3683, Art. 18 at 107; Regulations 70 (1926 Edition), Article 18 at 25 (Revenue Act of 1926) or Treasury Department, Treasury Decisions under Internal Revenue Law of the United States, Vol. 28 (Jan.-Dec., 1926), T.D. 3918, Art. 18 at 451; and Regulations 70 (1929 Edition), Article 18 at 27–28 (Revenue Act of 1926). The IRS confirmed this interpretation in Rev. Rul. 76–273 and Rev. Rul. 82–105. Although this guidance predates the advent of GRATs and GRUTs, the analysis and holdings of this guidance consistently has been applied to GRATs, GRUTs, and similar trust arrangements.

Pooled Income Funds

A commentator requested that the regulations be expanded to discuss their impact on both newer (under three years old) and more mature (over three years old) pooled income funds. The age of the fund determines the formula to be used to determine the fund's rate of return, and thus the value

of the charitable gift: funds that are at least three years old use the highest of the three last taxable years' rates of return; funds that are less than three years old generally use the highest of the three calendar-year annual averages of the section 7520 rates minus 1 percent. See §1.642(c)–6(e)(3) and (4). This distinction based on the duration of the fund, however, is not relevant for purposes of determining the amount included in the transferor's gross estate under section 2036 because the retained interest is the right to all of the income, thus mandating the inclusion of the entire share of the fund's corpus attributable to the transferor. A pooled income fund example has been added to the final regulations as *Example 5* in §20.2036–1(c)(2).

Remainder Interest in Personal Residences and Farms

A commentator requested that the regulations be expanded to discuss the estate tax implications for charitable gifts of remainder interests in personal residences and farms. The calculation of the charitable deduction is beyond the scope of these final regulations. *Example 2* of §20.2036–1(c)(1), however, has been added in the final regulations to confirm that, if the transferor transferred a personal residence to a third person while retaining the right to use the personal residence for life or for a term of years, and if the transferor died during that term, the fair market value of the residence on the date of death is includible in the transferor's gross estate under section 2036.

Alternate Valuation Date

A commentator questioned whether the proposed regulations imply that the portion of the trust includible in the grantor's gross estate when the estate has made a section 2032 election is to be determined with reference to the section 7520 rate in effect on the alternate valuation date. The commentator has requested an explanation of why the change in the section 7520 rate is not a change in value due only to the mere lapse of time under §20.2032–1(f).

When a section 2032 election is made, the section 7520 interest rate (but not the mortality factor) on the alternate valuation date is used to determine the portion of trust corpus includible in the grantor's gross estate under section 2036. The section 7520 interest rate reflects changes due to market conditions, which is permitted under section 2032. Mortality factors are not necessary to determine the portion of trust corpus includible in the grantor's gross estate under section 2036 because under section 2036 the dispositive factor is whether the interest was retained for the requisite statutory period, not the length of the period remaining at the transferor's death. See §20.2032–1(f) in cases where the mortality factor is applicable and the alternate valuation method under section 2032 is elected.

Alternate Valuation Date Example

A commentator requested an example that illustrates how the rules of §20.2032–1(d) affect the trust's value and how required annuity payments made after the date of death but before the alternate valuation date affect the estate inclusion computation. Any such example, which would properly belong in the regulations under section 2032, is beyond the scope of these final regulations.

Examples of CRAT and CRUT for a Term of Years

A commentator requested that the regulation be expanded to include examples or a discussion of the estate tax implications for a donor who creates a CRAT or a CRUT for a term of years. In response to this comment, *Examples 1* and *3* of §20.2036–1(c)(2) are amended in the final regulations to provide that, if the grantor instead had retained an interest in a CRAT or a CRUT for a term of years and had died during the term, the inclusion under section 2036 would be the same as when the grantor retained an interest for life in the CRAT or CRUT.

Graduated GRAT Example

A commentator requested that examples be provided that address a GRAT from which the grantor receives increasing annuity payments. The commentator suggested two alternative methods for valuing the annuity and requested that the IRS provide guidance on the appropriate method. The IRS and Treasury Department agree that such an example would be helpful and appropriate but believe the issue requires further consideration.

Example illustrating Proposed §20.2036–1(c)(1)

A commentator recommended that the example found in §20.2036–1(c)(1)(ii) illustrating the provisions of §20.2036–1(c)(1)(i) be changed by replacing the reference to D's spouse (E), with D's child (C), to avoid complications with section 2523. The commentator also explained that, even if D dies before E, D has a right at death to more than one-half of trust income because D has the right to the entire trust income in the event E dies before D. The IRS and Treasury Department agree that this example should be provided in the regulations under section 2036, but believe the issue requires further consideration.

Proposed Title for §20.2036–1(c)(2)

A commentator suggested that the title of proposed regulation §20.2036–1(c)(2) be changed to "Retained annuity, unitrust, and other income interests in trusts." This comment is adopted because this regulation addresses retained interests in trust income and corpus.

Examples 1 and 3 of Proposed §20.2036–1(c)(2)

A commentator recommended that *Examples 1* and *3* of proposed regulation §20.2036–1(c)(2) state that, if D's executor elects to use the alternate valuation date and also elects to use the interest rate component for either of the two months preceding the alternate valuation date, then under §1.664–2(c) of the Income Tax Regulations, the section 7520 rate and the mortality table for that month should be used for purposes of determining: (1) the portion of trust corpus includible in D's estate; (2) the value of C's continuing annuity interest; and (3) the charitable deduction available for the portion of the CRAT included in D's estate.

The choice as to the monthly interest rate to be used to determine the portion of trust corpus includible in D's estate and the value of C's continuing annuity interest present no issues under section 2036, and are addressed by section 7520.

Mortality factors, however, generally are not necessary to determine the portion of trust corpus includible in the grantor's gross estate under section 2036. In cases where a mortality factor is applicable and the alternate valuation method under section 2032 is elected, taxpayers are directed to §20.2032–1(f). The calculation of the charitable deduction is beyond the scope of these regulations. Accordingly, the issues raised in this comment will not be addressed in these final regulations.

Example 1 of Proposed §20.2036–1(c)(2)

A commentator had several comments with respect to this example. The commentator pointed out that the trust in the example fails the 10 percent remainder requirement set forth in section 664(d)(1)(D). In response, *Example 1* has been modified in the final regulations so that the trust meets this requirement.

Second, the commentator concluded that the charitable deduction of $30,024.80 arrived at in the example would be correct only if it is assumed that the annuity payments to C were paid entirely from the portion of the trust that is includible in D's gross estate. The commentator suggested that there is no basis for this assumption, and that C's annuity payments are made from the trust as a whole and should be allocated between the included and excluded portion of the trust in proportion to the relative values of each. This approach results in a charitable deduction of $86,683 ($200,000 reduced by two-thirds of the value of C's annuity). In response, it has been determined that it is beyond the scope of the final regulations to address the calculation of the charitable deduction. Accordingly, the charitable deduction calculations in *Example 1* and *Example 3* of §20.2036–1(c)(2) have been removed from the final regulations.

The commentator requested that the regulations include a statement that, if an *inter vivos* CRAT is properly formed and subsequently included in the grantor's gross estate, the requirements under section 664(d) for qualification as a CRAT do not need to be retested at the time of the grantor's death for purposes of determining whether the grantor's estate is entitled to a charitable deduction for the value of the remainder interest in the CRAT. This issue is governed by section 664 and is beyond the scope of the final regulations.

Finally, the commentator suggested that *Example 1* be expanded to include a right retained by D to revoke C's annuity interest or to change the identity of the charitable remainderman and to confirm the impact of these retained powers on the charitable deduction. *Example 1* in §20.2036–1(c)(2) is expanded in the final regulations to include the scenario that D may revoke C's annuity interest or change the identity of the charitable remainderman. The example cites to section 2038 for the inclusion of property in the gross estate on account of such retained powers.

Example 2 of Proposed §20.2036–1(c)(2)

A commentator suggested that the sentence, "No additional contributions were made to the Trust after D's transfer at the creation of the Trust" be removed or changed to reflect that no additional contributions may be made to a GRAT. In response, the final regulations adopt this comment.

A commentator suggested that the example address the amount includible in D's gross estate when the trust is payable to D's estate after D's death. In response, *Example 2* of §20.2036–1(c)(2) is modified in the final regulations to provide that the portion of trust corpus includible in D's estate under section 2036 is that portion necessary to support D's retained interest at the moment before D's death (calculated as directed in the example). Thus, it is not material whether annuity payments are made to D's estate after D's death.

Effect on Other Documents

The following documents are obsolete as of July 14, 2008.

Rev. Rul. 76–273, 1976–2 C.B. 268.

Rev. Rul. 82–105, 1982–1 C.B. 133.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations and, because these regulations do not impose on small entities a collection of information requirement, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding this regulation was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of these regulations is Theresa M. Melchiorre, Office of Chief Counsel, IRS.

* * * * *

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 20 is amended as follows:

PART 20—ESTATE TAX; ESTATES OF DECEDENTS DYING AFTER AUGUST 16, 1954

Paragraph 1. The authority citation for part 20 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 20.2036–1 is amended by:

1. Revising paragraph (a).

2. Designating the undesignated text following paragraph (a)(3)(ii) as paragraph (c)(1)(i) and adding new paragraph headings.

3. Adding paragraphs (c)(1)(ii), (c)(2), and (c)(3).

The revisions and additions read as follows:

§20.2036–1 Transfers with retained life estate.

(a) *In general*. A decedent's gross estate includes under section 2036 the value of any interest in property transferred by the decedent after March 3, 1931, whether in trust or otherwise, except to the extent that the transfer was for an adequate and full consideration in money or money's worth (see §20.2043–1), if the decedent retained or reserved—

(1) For his life;

(2) For any period not ascertainable without reference to his death (if the transfer was made after June 6, 1932); or

(3) For any period which does not in fact end before his death:

(i) The use, possession, right to income, or other enjoyment of the transferred property.

* * * * *

(c) *Retained or reserved interest*—(1) *Amount included in gross estate*—(i) *In general*. * * *

(ii) *Examples*. The application of paragraph (c)(1)(i) of this section is illustrated in the following examples:

Example 1. [Reserved].

Example 2. D transferred D's personal residence to D's child (C), but retained the right to use the residence for a term of years. D dies during the term. At D's death, the fair market value of the personal residence is includible in D's gross estate under section 2036(a)(1) because D retained the right to use the residence for a period that did not in fact end before D's death.

(2) *Retained annuity, unitrust, and other income interests in trusts*—(i) *In general*. This paragraph (c)(2) applies to a grantor's retained use of an asset held in trust or a retained annuity, unitrust, or other interest in any trust (other than a trust constituting an employee benefit) including without limitation the following (collectively referred to in this paragraph (c)(2) as "trusts"): certain charitable remainder trusts (collectively CRTs) such as a charitable remainder annuity trust (CRAT) within the meaning of section 664(d)(1), a charitable remainder unitrust (CRUT) within the meaning of section 664(d)(2) or (d)(3), and any charitable remainder trust that does not qualify under section 664(d), whether because the CRT was created prior to 1969, there was a defect in the drafting of the CRT, there was no intention to qualify the CRT for the charitable deduction, or otherwise; other trusts established by a grantor (collectively GRTs) such as a grantor retained annuity trust (GRAT) paying out a qualified annuity interest within the meaning of §25.2702–3(b) of this chapter, a grantor retained unitrust (GRUT) paying out a qualified unitrust interest within the meaning of §25.2702–3(c) of this chapter; and various other forms of grantor retained income trusts (GRITs) whether or not the grantor's retained interest is a qualified interest as defined in section 2702(b), including without limitation a qualified personal residence trust (QPRT) within the meaning of §25.2702–5(c) of this chapter and a personal residence trust (PRT) within the meaning of §25.2702–5(b) of this chapter. If a decedent transferred property into such a trust and retained or reserved the right to use such property, or the right to an annuity, unitrust, or other interest in such trust with respect to the property decedent so transferred for decedent's life, any period not ascertainable without reference to the decedent's death, or for a period that does not in fact end before the decedent's death, then the decedent's right to use the property or the retained annuity, unitrust, or other interest (whether payable from income and/or principal) constitutes the retention of the possession or enjoyment of, or the right to the income from, the property for purposes of section 2036. The portion of the trust's corpus includible in the decedent's gross estate for Federal estate tax purposes is that portion of the trust corpus necessary to provide the decedent's retained use or retained annuity, unitrust, or other payment (without reducing or invading principal) as determined in accordance with §20.2031–7 (or §20.2031–7A, if applicable). The portion of the trust's corpus includible in the decedent's gross estate under section 2036, however, shall not exceed the fair market value of the trust's corpus at the decedent's date of death.

(ii) *Graduated retained interests*. [Reserved].

(iii) *Examples*. The application of paragraphs (c)(2)(i) and (c)(2)(ii) of this section are illustrated in the following examples:

Example 1. (i) Decedent (D) transferred $100,000 to an *inter vivos* trust that qualifies as a CRAT under section 664(d)(1). The trust agreement provides for an annuity of $7,500 to be paid each year to D for D's life, then to D's child (C) for C's life, with the remainder to be distributed upon the survivor's death to N, a charitable organization described in sections 170(c), 2055(a), and 2522(a). The annuity is payable to D or C, as the case may be, annually on each December 31st. D dies in September 2006, survived by C who was then age 40. On D's death, the value of the trust assets was $300,000 and the section 7520 interest rate was 6 percent. D's executor does not elect to use the alternate valuation date.

(ii) The amount of corpus with respect to which D retained the right to the income, and thus the amount includible in D's gross estate under section 2036, is that amount of corpus necessary to yield the annual annuity payment to D (without reducing or invading principal). In this case, the formula for determining the amount of corpus necessary to yield the annual annuity payment to D is: annual annuity / section 7520 interest rate = amount includible under section 2036. The amount of corpus necessary to yield the annual annuity is $7,500 / .06 = $125,000. Therefore, $125,000 is includible in D's gross estate under section 2036(a)(1). (The result would be the same if D had retained an interest in the CRAT for a term of years and had died during the term. The result also would be the same if D had irrevocably relinquished D's annuity interest less than 3 years prior to D's death because of the application of section 2035.) If, instead, the trust agreement had provided that D could revoke C's annuity interest or change the identity of the charitable remainderman, see section 2038 with regard to the portion of the trust to be included in the gross estate on account of such a retained power to revoke. Under the facts presented, section 2039 does not apply to include any amount in D's gross estate by reason of this retained annuity. See §20.2039–1(e).

Example 2. (i) D transferred $100,000 to a GRAT in which D's annuity is a qualified interest described in section 2702(b). The trust agreement provides for an annuity of $12,000 per year to be paid to D for a term of ten years or until D's earlier death. The annuity amount is payable in twelve equal installments at the end of each month. At the expiration of the term of years or on D's earlier death, the remainder is to be distributed to D's child (C). D dies prior to the expiration of the ten-year term. On the date of D's death, the value of the trust assets is $300,000 and the section 7520 interest rate is 6 percent. D's executor does not elect to use the alternate valuation date.

(ii) The amount of corpus with respect to which D retained the right to the income, and thus the amount includible in D's gross estate under section 2036, is that amount of corpus necessary to yield the annual annuity payment to D (without reducing or invading principal). In this case, the formula for determining the amount of corpus necessary to yield the annual annuity payment to D is: annual annuity (adjusted for monthly payments) / section 7520 interest rate = amount includible under section 2036. The Table K adjustment factor for monthly annuity payments in this case is 1.0272. Thus, the amount of corpus necessary to yield the annual annuity is ($12,000 x 1.0272) / .06 = $205,440. Therefore, $205,440 is includible in D's gross estate under section 2036(a)(1). If, instead, the trust agreement had provided that the annuity was to be paid to D during D's life and to D's estate for the balance of the 10-year term if D died during that term, then the portion of trust corpus includible in D's gross estate would still be as calculated in this paragraph. It is not material whether payments are made to D's estate after D's death. Under the facts presented, section 2039 does not apply to include any amount in D's gross estate by reason of this retained annuity. See §20.2039–1(e).

Example 3. (i) In 2000, D created a CRUT within the meaning of section 664(d)(2). The trust instrument directs the trustee to hold, invest, and reinvest the corpus of the trust and to pay to D for D's life, and then to D's child (C) for C's life, in equal quarterly installments payable at the end of each calendar quarter, an amount equal to 6 percent of the fair market value of the trust as valued on December 15 of the prior taxable year of the trust. At the termination of the trust, the then-remaining corpus, together with any and all accrued income, is to be distributed to N, a charitable organization described in sections 170(c), 2055(a), and 2522(a). D dies in 2006, survived by C, who was then age 55. The value of the trust assets on D's death was $300,000. D's executor does not elect to use the alternate valuation date and, as a result, D's

executor does not choose to use the section 7520 interest rate for either of the two months prior to D's death.

(ii) The amount of the corpus with respect to which D retained the right to the income, and thus the amount includible in D's gross estate under section 2036(a)(1), is that amount of corpus necessary to yield the unitrust payments. In this case, such amount of corpus is determined by dividing the trust's equivalent income interest rate by the section 7520 rate (which was 6 percent at the time of D's death). The equivalent income interest rate is determined by dividing the trust's adjusted payout rate by the excess of 1 over the adjusted payout rate. Based on §1.664–4(e)(3) of this chapter, the appropriate adjusted payout rate for the trust at D's death is 5.786 percent (6 percent x .964365). Thus, the equivalent income interest rate is 6.141 percent (5.786 percent / (1 - 5.786 percent)). The ratio of the equivalent interest rate to the assumed interest rate under section 7520 is 102.35 percent (6.141 percent / 6 percent). Because this exceeds 100 percent, D's retained payout interest exceeds a full income interest in the trust, and D effectively retained the income from all the assets transferred to the trust. Accordingly, because D retained for life an interest at least equal to the right to all income from all the property transferred by D to the CRUT, the entire value of the corpus of the CRUT is includible in D's gross estate under section 2036(a)(1). (The result would be the same if D had retained, instead, an interest in the CRUT for a term of years and had died during the term.) Under the facts presented, section 2039 does not apply to include any amount in D's gross estate by reason of D's retained unitrust interest. See §20.2039–1(e).

(iii) If, instead, D had retained the right to a unitrust amount having an adjusted payout for which the corresponding equivalent interest rate would have been less than the 6 percent assumed interest rate of section 7520, then a correspondingly reduced proportion of the trust corpus would be includible in D's gross estate under section 2036(a)(1). Alternatively, if the interest retained by D was instead only one-half of the 6 percent unitrust interest, then the amount included in D's estate would be the amount needed to produce a 3 percent unitrust interest. All of the results in this *Example 3* would be the same if the trust had been a GRUT instead of a CRUT.

Example 4. During life, D established a 15-year GRIT for the benefit of individuals who are not members of D's family within the meaning of section 2704(c)(2). D retained the right to receive all of the net income from the GRIT, payable annually, during the GRIT's term. D dies during the GRIT's term. D's executor does not elect to use the alternate valuation date. In this case, the GRIT's corpus is includible in D's gross estate under section 2036(a)(1) because D retained the right to receive all of the income from the GRIT for a period that did not in fact end before D's death. If, instead, D had retained the right to receive 60 percent of the GRIT's net income, then 60 percent of the GRIT's corpus would have been includible in D's gross estate under section 2036. Under the facts presented, section 2039 does not apply to include any amount in D's gross estate by reason of D's retained interest. See §20.2039–1(e).

Example 5. In 2003, D transferred $10X to a pooled income fund that conforms to Rev. Proc. 88–53,1988–2 C.B. 712 (1988) in exchange for 1 unit in the fund. D is to receive all of the income from that 1 unit during D's life. Upon D's death, D's child (C), is to receive D's income interest for C's life. In 2008, D dies. D's executor does not elect to use the alternate valuation date. In this case, the fair market value of D's 1 unit in the pooled income fund is includible in D's gross estate under section 2036(a)(1) because D retained the right to receive all of the income from that unit for a period that did not in fact end before D's death. See §601.601(d)(2)(ii)(*b*) of this chapter.

Example 6. D transferred D's personal residence to a trust that met the requirements of a qualified personal residence trust (QPRT) as set forth in §25.2702–5(c) of this chapter. Pursuant to the terms of the QPRT, D retained the right to use the residence for 10 years or until D's prior death. D dies before the end of the term. D's executor does not elect to use the alternate valuation date. In this case, the fair market value of the QPRT's assets on the date of D's death are includible in D's gross estate under section 2036(a)(1) because D retained the right to use the residence for a period that did not in fact end before D's death.

(3) *Effective/applicability dates*. Paragraphs (a) and (c)(1)(i) of this section are applicable to the estates of decedents dying after August 16, 1954. Paragraphs (c)(1)(ii) and (c)(2) of this section apply to the estates of decedents dying on or after July 14, 2008.

Par. 3. Section 20.2039–1 is amended by:

1. Revising paragraph (a).

2. Adding new paragraphs (e) and (f).

The revision and addition reads as follows:

§20.2039–1 Annuities.

(a) *In general*. A decedent's gross estate includes under section 2039(a) and (b) the value of an annuity or other payment receivable by any beneficiary by reason of surviving the decedent under certain agreements or plans to the extent that the value of the annuity or other payment is attributable to contributions made by the decedent or his employer. Sections 2039(a) and (b), however, have no application to an amount which constitutes the proceeds of insurance under a policy on the decedent's life. Paragraph (b) of this section describes the agreements or plans to which section 2039(a) and (b) applies; paragraph (c) of this section provides rules for determining the amount includible in the decedent's gross estate; paragraph (d) of this section distinguishes proceeds of life insurance; and paragraph (e) of this section distinguishes annuity, unitrust, and other interests retained by a decedent in certain trusts. The fact that an annuity or other payment is not includible in a decedent's gross estate under section 2039(a) and (b) does not mean that it is not includible under some other section of part III of subchapter A of chapter 11. However, see section 2039(c) and (d) and §20.2039–2 for rules relating to the exclusion from a decedent's gross estate of annuities and other payments under certain "qualified plans." Further, the fact that an annuity or other payment may be includible under section 2039(a) will not preclude the application of another section of chapter 11 with regard to that interest. For annuity interests in trust, see paragraph (e)(1) of this section.

* * * * *

(e) *No application to certain trusts*. Section 2039 shall not be applied to include in a decedent's gross estate all or any portion of a trust (other than a trust constituting an employee benefit, but including those described in the following sentence) if the decedent retained a right to use property of the trust or retained an annuity, unitrust, or other interest in the trust, in either case as described in section 2036. Such trusts include without limitation the following (collectively referred to in this paragraph (e) as "trusts"): certain charitable remainder trusts (collectively CRTs) such as a charitable remainder annuity trust (CRAT) within the meaning of section 664(d)(1), a charitable remainder unitrust (CRUT) within the meaning of section 664(d)(2) or (d)(3), and any other charitable remainder trust that does not qualify under section 664(d), whether because the CRT was created prior to 1969, there was a defect in the drafting of the CRT, there was no intention to qualify the CRT for the charitable deduction, or otherwise; other trusts established by a grantor (collectively GRTs) such as a grantor retained annuity trust (GRAT) paying out a qualified annuity interest within the meaning of §25.2702–3(b) of this chapter, a grantor retained unitrust (GRUT) paying out a qualified unitrust interest within the meaning of §25.2702–3(c) of this chapter; and various forms of grantor retained income trusts (GRITs) whether or not the grantor's retained interest is a qualified interest as defined in section 2702(b), including without limitation a qualified personal residence trust (QPRT) within the

meaning of §25.2702–5(c) of this chapter and a personal residence trust (PRT) within the meaning of §25.2702–5(b) of this chapter. For purposes of determining the extent to which a retained interest causes all or a portion of a trust to be included in a decedent's gross estate, see §20.2036–1(c)(1), (2), and (3).

(f) *Effective/applicability dates*. The first, second, and fourth sentences in paragraph (a) of this section are applicable to the estates of decedents dying after August 16, 1954. The fifth sentence of paragraph (a) of this section is applicable to the estates of decedents dying on or after October 27, 1972, and to the estates of decedents for which the period for filing a claim for credit or refund of an estate tax overpayment ends on or after October 27, 1972. The third, sixth, and seventh sentences of paragraph (a) and all of paragraph (e) of this section are applicable to the estates of decedents dying on or after July 14, 2008.

Linda E. Stiff,
Deputy Commissioner for Services and Enforcement.

Approved July 4, 2008.

Eric Solomon,
Assistant Secretary of the Treasury (Tax Policy).

(Filed by the Office of the Federal Register on July 11, 2008, 8:45 a.m., and published in the issue of the Federal Register for July 14, 2008, 73 F.R. 40173)

Section 2039.—Annuities

26 CFR 20.2039–1: Annuities.

Final regulations provide guidance on the portion of property transferred to a trust or otherwise, that is properly includible in a grantor's gross estate under Internal Revenue Code (Code) sections 2036 and 2039 if the grantor has retained the use of the property or the right to an annuity, unitrust, or other payment from such property for life, for any period not ascertainable without reference to the grantor's death, or for a period that does not in fact end before the grantor's death. See T.D. 9414, page 454.

Part III. Administrative, Procedural, and Miscellaneous

Section 475 Valuation Safe Harbor

Notice 2008–71

SECTION 1. PURPOSE

This notice requests comments with respect to possible expansion of § 1.475(a)–4 of the Income Tax Regulations (safe harbor valuation regulations) so that financial institutions headquartered outside the United States can qualify to make the election described in Treas. Reg. § 1.475(a)–4(b).

SECTION 2. BACKGROUND

On June 12, 2007, the Treasury Department and the Internal Revenue Service (Service) published the safe harbor valuation regulations in the Federal Register (T.D. 9328, 2007–27 I.R.B. 1 [72 FR 32172]). For dealers in securities and for dealers in commodities that elect to mark to market under section 475(e), those regulations provide an elective safe harbor for valuations under section 475. Specifically, if an eligible taxpayer makes the safe harbor election, the values of certain positions that the taxpayer reports on an eligible financial statement in a manner consistent with the requirements of the safe harbor valuation regulations are treated as those positions' fair market values for purposes of section 475. *See* Treas. Reg. § 1.475(a)–4(b).

Any tax regulatory regime that permits use of values from a financial statement for tax purposes must ensure that the financial accounting regime's standards that are used by taxpayers are consistent with the requirements of applicable sections of the Internal Revenue Code (Code) (in this case section 475). The safe harbor valuation regulations are based on the conclusion that use of financial statement values for tax purposes is justified to the extent that the taxpayer satisfies certain basic criteria:

1. The financial accounting method used in the taxpayer's financial statement must be sufficiently consistent with what section 475 requires for tax purposes (and therefore is an "eligible method," *see* Treas. Reg. § 1.475(a)–4(d)).
2. The taxpayer's financial statement must have sufficient *indicia* of reliability to ensure that the taxpayer carefully and consistently follows the financial accounting method being used in the statement (and therefore is an "applicable financial statement," *see* Treas. Reg. § 1.475(a)–4(h)).
3. The taxpayer's record keeping and record production must enable the Service to verify that the values used for tax purposes were the same as the values reported on the financial statement; and, when the values to be reported on the tax return are required to incorporate adjustments to the raw values in the financial statement, the taxpayer's record keeping and record production must enable the Service to reconcile the two sets of values.

See generally the preamble to T.D. 9328 (discussing the broad policies underlying the particular requirements in the safe harbor valuation regulations).

Internationally Headquartered Financial Institutions

Some financial institutions that are chartered outside of the United States and are engaged in a trade or business within the United States (internationally headquartered financial institutions) have commented that certain of the requirements set forth in the safe harbor valuation regulations prevent them from using the safe harbor. The Treasury Department and the Service are considering expanding the regulatory safe harbor if the basic criteria above are satisfied and are requesting comments regarding that expansion.

Two definitions in the current regulations would need to be amended in order to expand the safe harbor valuation regime potentially to include internationally headquartered financial institutions.

Internationally headquartered financial institutions generally prepare financial statements in accordance with the International Financial Reporting Standards ("IFRS"). The definition of "eligible method" (see Treas. Reg. § 1.475(a)–4(d)) excludes non-U.S. GAAP accounting systems by including only accounting methods that determine value in accordance with U.S. GAAP. Therefore, in order for internationally headquartered financial institutions generally to be eligible to use the safe harbor, the definition of eligible method would have to be amended to include IFRS (or more specifically the version of IFRS the U.S. Securities and Exchange Commission (SEC) is considering for adoption).

Second, internationally headquartered financial institutions generally do not prepare financial statements that satisfy the current regulatory requirements for being an "applicable financial statement" (within the meaning of Treas. Reg. § 1.475(a)–4(h)). The definition of "applicable financial statement" requires preparation of the statement in accordance with U.S. GAAP and use of the statement in filings with the SEC or with any agency of the Federal government other than the Service. Internationally headquartered financial institutions generally file complete, non-U.S.-GAAP-based financial statements with a home country supervisor or market regulator, not with a Federal agency other than the Service as required by the safe harbor valuation regulations. Thus, the home country financial statement is not an "applicable financial statement." Therefore, in order for internationally headquartered financial institutions generally to be eligible to use the safe harbor, the definition of applicable financial statement would have to be amended to include non-U.S.-GAAP financial statements filed with the institution's home country regulator or some other financial statement that is filed by that taxpayer with other appropriate regulatory authorities.

Expansion of the Safe Harbor Valuation Regulations to Include IFRS

The decision whether to expand the definition of "eligible method" to include IFRS (or, more specifically, the version of IFRS ultimately adopted by the SEC) will be based on the criteria identified above that justify use of financial statement values for tax purposes. The current regulatory definition of "eligible method" attempts to ensure that a financial statement may serve as the basis of valuation for tax purposes only if the accounting method used in that state-

ment is sufficiently consistent with the accounting method that section 475 requires for tax purposes. The definition of "eligible method," which requires that an eligible method be a mark-to-market method, recognizes that the central difference between a mark-to-market and a realization accounting method is that, under the former but not under the latter, the taxpayer's income statement currently accounts for unrealized changes in value. Moreover, in crafting the current safe harbor the Treasury Department and the Service "concluded that the requirements and limitations of the safe harbor ensure sufficient consistency when applied to financial statements prepared according to U.S. GAAP. This conclusion is less clear when the requirements and limitations are applied to financial statements prepared under other accounting regimes." T.D. 9328, 2007–27 I.R.B. 1, 5 [72 FR 32172, 32176].

The Treasury Department and the Service continue to evaluate the issue of whether to expand the definition of "eligible method" to include IFRS and are therefore interested in comments on the differences between U.S. GAAP valuation standards and those in IFRS, especially differences between mark-to-market valuation under IFRS and under U.S. GAAP (including whether IFRS permits voluntary adoption of alternative valuation standards).

Understanding these differences is necessary in evaluating whether any IFRS standards are sufficiently consistent both with the three criteria described above that underlie the safe harbor and with the policies of other sections of the Code and the Regulations (*e.g.*, section 861 and Treas. Reg. § 1.882–5) that rely on asset values determined under section 475. For example, if a financial accounting method arrives at a value by including funding costs (including any management allocation of expenses) or permits those costs to be taken into account pursuant to a voluntary convention, allowing that method might significantly erode the policies of other sections of the Code and the Regulations.

Expansion of "Applicable Financial Statement"

The decision whether to expand the definition of "applicable financial statement" likewise will be based on the criteria identified above that justify the use of financial statement values for tax purposes. Many internationally headquartered financial institutions file a U.S. GAAP-based balance sheet (a "call report") with a United States bank regulator. Some commentators have urged that this financial statement be permitted to be an "applicable financial statement' to the extent that the other requirements of the regulations are satisfied. This partial financial statement does not satisfy the current regulatory requirements of the safe harbor. In particular, this partial financial statement does not contain an income statement and, as a result, changes in the values of the taxpayer's positions are not currently reflected in income. The partial financial statement, therefore, does not employ an "eligible method," and so the values reported on that partial statement are not eligible to be used in the safe harbor. It has been suggested, however, that when a taxpayer files a U.S. GAAP-based call report with a U.S. bank regulator and the values on the call report correspond to the values on the taxpayer's home country IFRS-based financial statements that include an income statement, these circumstances should nevertheless satisfy the definition of an "applicable financial statement" to the extent that the other requirements of the regulations are satisfied.

This suggestion raises the question whether the basic criteria described above would be satisfied by the combination of a call report filed with a U.S. regulator and the reporting party's home country income statement. In order for this to be the case, the mark-to-market method in the home country income statement would have to be an eligible method and the filing with a U.S. regulator would have to give the statement sufficient *indicia* of reliability that the financial accounting method is being carefully and consistently followed. In expressing uncertainty whether non-U.S.-GAAP financial statements satisfy the criteria underlying the regulations, the preamble to the final regulations asked a number of questions to solicit public comment. T.D. 9328, 2007–27 I.R.B. at 5 [72 FR at 32176]. The Treasury Department and the Service continue to welcome answers to those questions.

SECTION 3. REQUEST FOR COMMENTS

In particular, to aid in the consideration of whether to expand the safe harbor valuation regulations so that internationally headquartered financial institutions can make the safe harbor valuation election, the Treasury Department and the Service request answers to the following questions:

1. If the existing regulatory requirements discussed above were expanded to permit internationally headquartered financial institutions to make the election described in Treas. Reg. § 1.475(a)–4(b), are a significant number of these institutions likely to make the election?
2. If the safe harbor were expanded to include circumstances where the values reported in the U.S. call report of a foreign bank are the same values that are reported in a mark-to-market income statement filed in the bank's home country, how will the Service be able to match the values used for tax purposes with those on the home country income statement?
3. What is the relationship between the call report and the home-country income statement? Are there foreign currency translation considerations between the two? How might those be resolved so that the Service can effectively and efficiently audit the records?
4. If the definition of "applicable financial statement" is expanded, should the applicable financial statement be the one filed by the foreign bank with its home country bank regulator rather than with a home country market regulator (like the SEC)?
5. How, if at all, does mark-to-market valuation under IFRS take expenses into account, including funding costs or any similar amount (*e.g.*, cost of carry)?
   a. Does IFRS allow these amounts to be taken into account pursuant to a voluntary accounting convention under any circumstances?

b. What regulatory amendments, if any, should be considered if those costs are taken into account, keeping in mind the interaction of section 475 with other sections of the Code and Income Tax Regulations (*e.g.*, section 861 and Treas. Reg. § 1.882–5)?

6. In what circumstances is section 475 relevant for other purposes of the Code and in what circumstances do the policies of other sections of the Code and the Regulations that rely on asset values determined under section 475 (including those determined pursuant to an election under Treas. Reg. § 1.475(a)–4(b)) require special adjustment to the amount determined under section 475?

7. Should the definition of "eligible method" go beyond the accounting methods that the SEC has accepted? If so, what is an appropriate (and administrable) framework for evaluating whether such a method complies with the basic criteria outlined above?

SECTION 4. INSTRUCTIONS

Comments should be submitted on or before November 1, 2008, and should include a reference to Notice 2008–71. Send submissions to CC:PA:LPD:PR (Notice 2008–71), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, D.C. 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8:00 a.m. and 4:00 p.m. to CC:PA:LPD:PR (Notice 2008–71), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC 20224, or sent electronically via the following email address: *Notice.Comments@irscounsel.treas.gov*. Please include the notice number 2008–71 in the subject line of any electronic communication. All materials submitted will be available for public inspection and copying.

DRAFTING INFORMATION

The principal author of this notice is Sheila Ramaswamy of the Office of Associate Chief Counsel (International). For further information regarding this notice, contact Sheila Ramaswamy at (202) 622–3870 (not a toll-free call).

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26 CFR 601.202: Closing agreements.

Rev. Proc. 2008–50

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SECTION 1. PURPOSE AND OVERVIEW

.01 *Purpose*. This revenue procedure 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").

.02 *General principles underlying EPCRS*. EPCRS is based on the following general principles:

- Sponsors and other administrators of eligible plans should be encouraged to establish administrative practices and procedures that ensure that these plans are operated properly in accordance with the applicable requirements of the Code.
- Sponsors and other administrators of eligible plans should satisfy the applicable plan document requirements of the Code.
- Sponsors and other administrators should make voluntary and timely correction of any plan failures, whether involving discrimination in favor of highly compensated employees, plan operations, the terms of the plan document, or adoption of a plan by an ineligible employer. Timely and efficient correction protects participating employees by providing them with their expected retirement benefits, including favorable tax treatment.
- Voluntary compliance is promoted by providing for limited fees for voluntary corrections approved by the Service, thereby reducing employers' uncertainty regarding their potential tax liability and participants' potential tax liability.
- Fees and sanctions should be graduated in a series of steps so that there is always an incentive to correct promptly.
- Sanctions for plan failures identified on audit should be reasonable in light of the nature, extent, and severity of the violation.
- Administration of EPCRS should be consistent and uniform.
- Sponsors should be able to rely on the availability of EPCRS in taking corrective actions to maintain the tax-favored status of their plans.

.03 *Overview*. EPCRS includes the following basic elements:

- *Self-correction (SCP)*. A Plan Sponsor that has established compliance practices and procedures may, at any time without paying any fee or sanction, correct insignificant Operational Failures under a Qualified Plan, a 403(b) Plan, a SEP, or a SIMPLE IRA Plan, provided the SEP or SIMPLE IRA Plan is established and maintained on a document approved by the Service. In addition, in the case of a Qualified Plan that is the subject of a favorable determination letter from the Service or in the case of a 403(b) Plan, the Plan Sponsor generally may correct even significant Operational Failures without payment of any fee or sanction.
- *Voluntary correction with Service approval (VCP)*. A Plan Sponsor, at any time before audit, may pay a limited fee and receive the Service's approval for correction of a Qualified Plan, 403(b) Plan, SEP, or SIMPLE IRA Plan. Under VCP, there are special procedures for anonymous submissions and group submissions.
- *Correction on audit (Audit CAP)*. If a failure (other than a failure corrected through SCP or VCP) is identified on audit, the Plan Sponsor may correct the failure and pay a sanction. The sanction imposed will bear a reasonable relationship to the nature, extent, and severity of the failure, taking into account the extent to which correction occurred before audit.

SECTION 2. EFFECT OF THIS REVENUE PROCEDURE ON PROGRAMS

.01 *Effect on programs*. This revenue procedure modifies and supersedes Rev. Proc. 2006–27, 2006–1 C.B. 945 (as modified by Rev. Proc. 2007–49, 2007–30 I.R.B. 141), which was the prior consolidated statement of the correction programs under EPCRS. The modifications to Rev. Proc. 2006–27 that are reflected in this revenue procedure include:

- Expanding the definition of a plan loan failure to include violations of § 72(p)(2), regardless of whether the plan contains language relating to § 72(p). (sections 4.01 and 6.07)
- Clarifying that in particular cases the Service may decline to make available one or more correction programs under EPCRS in the interest of sound tax administration. (section 4.01(5))
- Expanding the scope of the SCP by: (i) liberalizing the requirements for determining whether there was substantial completion of correction as of the first date the plan or Plan Sponsor is considered to be Under Examination and (ii) expanding the failures for which sample correction methods are provided. (sections 4.05(2) and 9.04, Appendix A .05, and Appendix B 2.02)
- Expanding the correction method with respect to elective deferrals to include catch-up contributions under § 414(v) and plans that provide the opportunity for an employee to designate all or a portion of elective deferrals as designated Roth contributions. (Appendix A .05, and Appendix B 2.02)

- Expanding the correction method for a failure to include an eligible employee in a § 401(k) plan to include a situation in which elective deferral and after-tax employee contribution elections are not implemented by the employer or are implemented in a manner inconsistent with the plan's terms. (Appendix A .05 and Appendix B 2.02)
- Revising the requirements for submitting a determination letter application when correcting certain Qualification Failures by plan amendment. (sections 6.05, 10.08, and 11.01)
- Clarifying the scope of a compliance statement issued when correcting certain Qualification Failures by plan amendment. (sections 6.05 and 10.08)
- Updating the definition of Excess Amounts and providing corrections for Excess Amounts failures, including those resulting from the failure to satisfy the requirements of § 415. This update includes correction rules largely similar to the corrections that were at § 1.415–6(b)(6)(iii) of the Income Tax Regulations (as it appeared in the April 1, 2007 edition of 26 CFR part 1) prior to amendments made by the recently finalized regulations under § 415, but with the amount placed in an unallocated account to be reallocated in lieu of employer contributions other than elective deferrals. (sections 5.01(3) and 6.06, and Appendix A .08)
- Updating the definition of Favorable Letter. (section 5.01(4))
- Adding a factor to be considered in the determination of whether a correction method is reasonable and appropriate. The factor requires consideration of corrections of violations that are similar to the failure being addressed by other government agencies. In appropriate cases, for a failure that results from either the employer having ceased to exist, the employer no longer maintaining the plan, or similar reasons, the permitted correction would be to terminate the plan and distribute plan assets to participants and beneficiaries in accordance with standards and procedures substantially similar to those set forth in section 2578.1 of the Department of Labor Regulations (relating to abandoned plans). (section 6.02(2)(e)(ii) and Appendix A .09)
- Clarifying that the earnings adjustment for corrective contributions or distributions is calculated from the date when the qualification failure occurred without regard to any extensions provided under the Code. (section 6.02(4)(e))
- Clarifying that the earnings rate derived from the Department of Labor's VFCP Online calculator may be used to determine the earnings adjustment applied to corrective contributions, distributions, allocations, and reallocations if it is not feasible to make a reasonable estimate of what the actual investment results would have been. (section 6.02(5)(a))
- Providing that if the total corrective distribution due a participant or beneficiary is $75 or less, the Plan Sponsor is not required to make the corrective distribution if the reasonable direct costs of processing and delivering the distribution to the participant or beneficiary would exceed the amount of the distribution. (section 6.02(5)(b))
- Providing that if the Plan Sponsor attempts to use the IRS' Letter Forwarding Program to locate participants and the Service declines to implement the letter forwarding request, then the Plan Sponsor will use alternate means to locate missing participants. (section 6.02(5)(d))
- Clarifying that if a Plan Sponsor either (i) wants a participant's deemed distribution to be reported on Form 1099–R for the year of correction (instead of the year of the failure) or (ii) wants relief from reporting a participant's loan as a deemed distribution on Form 1099–R, then it must specifically request such relief. (sections 6.07(1) and 6.07(2)(a))
- Clarifying the treatment of amounts improperly distributed to participants and beneficiaries under the plan which are rolled over to IRAs, with respect to the excise tax under § 4973. (sections 6.03(4) and 6.09(5))
- Clarifying the circumstances under which a waiver of the excise tax under § 4974 would be considered under Audit CAP. (section 6.09(2))
- Expanding income and excise taxes that the Service may exercise discretion to not pursue. (sections 6.09(5) and 6.09(6))
- Clarifying the scope of a compliance statement issued with respect to certain nonamender failures. (sections 6.05 and 10.08)
- Providing for new and expanded streamlined application procedures for interim nonamenders and the failure to implement optional law changes timely and other nonamenders, certain SEP, SARSEP and SIMPLE IRA failures, certain plan loan failures, Employer Eligibility Failures, § 402(g) failures, § 401(a)(9) failures, and failures that involve plan amendment in accordance with Appendix B 2.07. (section 11.02, Appendix F)
- Reducing the compliance fee under certain circumstances for a plan where the sole failure is the failure of participant loans to comply with the requirements of § 72(p)(2). (section 12.02(3))
- Clarifying that, in the case of a Qualification Failure that is intentional, the compliance fee under VCP will be determined in accordance with section 12.06. (section 12.06)
- Providing that Audit CAP provisions apply if the Service identifies a participant loan that did not comply with the requirements of § 72(p)(2) (other than a loan failure that is corrected in accordance with SCP or VCP) upon an Employee Plans or Exempt Organizations examination of a Qualified Plan or 403(b) Plan. (sections 13.01 and 14.01)
- Providing a sample application form for VCP filings. (revised Appendix D)

.02 *Future enhancements*. *(1) Future updates*. It is expected that the EPCRS revenue procedure will continue to be updated from time to time, including, as noted above, further improvements to EPCRS based on comments previously received. Thus, the Service and Treasury continue to invite further comments on how to improve EPCRS. Comments should be sent to:

Internal Revenue Service
Attention: SE:T:EP:RA:VC
1111 Constitution Avenue, NW
Washington, D.C. 20224

(2) *Section 401(k) automatic enrollment*. Comments are requested for certain specific issues under EPCRS. First, comments are requested 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, including a § 401(k) plan that is designed to be a qualified automatic contribution arrangement within the meaning of § 401(k)(13), but no amounts were withheld from the compensation of an employee who has made no election. Second, comments are requested regarding methods to correct the failure to timely provide a safe harbor notice under a plan designed to satisfy the requirements of § 401(k)(12), 401(k)(13), or 414(w).

(3) *Designated Roth contributions*. Comments are also specifically requested on special issues relating to designated Roth contributions. For example, comments are requested on whether, if a plan failed to implement a participant's election to have a designated Roth contribution made on his or her behalf, but instead a pre-tax elective deferral was made for the participant with the participant's compensation reduced accordingly, would it be an appropriate correction of the failure for the employer to ask the participant whether correction should be made by a transfer of the contribution (with earnings) to a Roth account and inclusion of the amount so transferred in the participant's compensation in the year of the transfer (instead of either (i) a similar transfer with a corrected W–2 for the year of the failure and the participant having to complete an amended return for the year of the failure or (ii) a similar transfer and inclusion of the amount so transferred in the participant's compensation in the year of the transfer, but with the employer to make a grossup payment to the participant to make the participant whole for the resulting income tax). Comments are also requested regarding cases in which a plan fails to notify an employee of his or her right to elect designated Roth contributions, such as whether the correction for the failure described in the preceding sentence should also be applied in this case or whether some additional corrective contribution should be required to reflect the possibility that a participant's decision to make an elective deferral might be affected by the availability of designated Roth contributions. See also section .05(3) of Appendix A and Example 3 of Appendix B, section 2.02(1)(b), for an illustration of correction for exclusion of otherwise eligible employees from being able to make elective deferrals, which applies without regard to whether the plan only permits pre-tax elective deferrals or whether the plan also permits designated Roth elective deferrals.

(4) *Section 1101 of the Pension Protection Act of 2006*. (a) Section 1101 of the Pension Protection Act of 2006 (PPA '06), Public Law 109–280 (120 Stat. 780), grants the Secretary of the Treasury the full authority to establish and implement EPCRS and, among other things, instructs the Secretary to continue to update and improve EPCRS, giving special attention to the following: (1) increasing the awareness and knowledge of small employers concerning the availability and use of the program; (2) taking into account special concerns and circumstances that small employers face with respect to compliance and correction of compliance failures; (3) extending the duration of the self-correction period under SCP for significant compliance failures; (4) expanding the availability to correct insignificant compliance failures under SCP during audit; and (5) assuring that any tax, penalty, or sanction that is imposed by reason of a compliance failure is not excessive and bears a reasonable relationship to the nature, extent, and severity of the failure.

(b) EPCRS has historically been structured to achieve the general principles that are described in section 1.02 of this revenue procedure. This revenue procedure, like the many predecessor revenue procedures[1] that addressed correction of qualification failures, continues to include modifications that are designed to make the EPCRS programs more accessible, particularly with respect to small employers. For example, Appendix F has been substantially expanded to add additional failures that commonly occur in plans maintained by small employers, and significantly reduces the burden and cost to an employer of submitting under the VCP. Various other changes have been made that will provide assurance to small employers and other Plan Sponsors, including expansion of the standard corrections in Appendices A and B (such as correction for abandoned plans and orphan contracts and further expansion of standard correction for qualification failures involving the operational failure to extend elective deferrals to eligible employees). In addition, eligibility under SCP has been expanded with respect to employers who discover failures in their plans and have begun the correction process. See section 2.01 for a more thorough list of changes made in this revenue procedure.

PART II. PROGRAM EFFECT AND ELIGIBILITY

SECTION 3. EFFECT OF EPCRS; RELIANCE

.01 *Effect of EPCRS on retirement plans*. For a Qualified Plan, a 403(b) Plan, a SEP, or a SIMPLE IRA Plan, if the eligibility requirements of section 4 are satisfied and the Plan Sponsor corrects a failure in accordance with the applicable requirements of SCP in section 7, VCP in sections 10 and 11, or Audit CAP in section 13, the Service will not treat the plan as failing to meet § 401(a), § 403(b), § 408(k), or § 408(p), as applicable. Thus, for example, if the Plan Sponsor corrects a failure in accordance with the requirements of this revenue procedure, the plan will not thereby be treated as failing to satisfy § 401(a), § 403(b), § 408(k), or § 408(p), as applicable, for purposes of applying § 3121(a)(5) (FICA taxes) and § 3306(b)(5) (FUTA taxes).

.02 *Compliance statement*. If a Plan Sponsor or Eligible Organization receives a compliance statement under VCP, the compliance statement is binding upon the Service and the Plan Sponsor or Eligible Organization as provided in section 10.09.

.03 *Other taxes and penalties*. See section 6.09 for rules relating to other taxes and penalties.

.04 *Reliance*. Taxpayers may rely on this revenue procedure, including the relief described in section 3.01.

[1] See: Rev. Proc. 92–89, 1992–2 C.B. 498; Rev. Proc. 93–36, 1993–2 C.B. 474; Rev. Proc. 94–16, 1994–1 C.B. 576 ; Rev. Proc. 94–62, 1994–2 C.B. 778; Rev. Proc. 95–24, 1995–1 C.B. 694; Rev. Proc. 96–29, 1996–1 C.B. 693; Rev. Proc. 96–50, 1996–2 C.B. 370; Rev. Proc. 98–22, 1998–1 C.B. 723; Rev. Proc. 99–13, 1999–1 C.B. 409; Rev. Proc. 99–31, 1999–2 C.B. 280; Rev. Proc. 2000–16, 2000–1 C.B. 518; Rev. Proc. 2001–17, 2001–1 C.B. 589; Rev. Proc. 2002–47, 2002–2 C.B. 133; Rev. Proc. 2003–44, 2003–1 C.B. 1051; Rev. Proc. 2006–27, 2006–1 C.B. 945; Rev. Proc. 2007–49, 2007–30 I.R.B. 141.

SECTION 4. PROGRAM ELIGIBILITY

.01 *EPCRS Programs*. (1) *SCP*. SCP is available only for Operational Failures. Qualified Plans and 403(b) Plans are eligible for SCP with respect to significant and insignificant Operational Failures. SEPs and SIMPLE IRA Plans are eligible for SCP only with respect to insignificant Operational Failures.

(2) *VCP*. Qualified Plans, 403(b) Plans, SEPs, and SIMPLE IRA Plans are eligible for VCP. VCP provides general procedures for correction of all Qualification Failures: Operational, Plan Document, Demographic, and Employer Eligibility. VCP also provides general procedures for the correction of participant loans that did not comply with the requirements of § 72(p)(2).

(3) *Audit CAP*. Unless otherwise provided, Audit CAP is available for Qualified Plans, 403(b) Plans, SEPs, and SIMPLE IRA Plans for correction of all failures found on examination that have not been corrected in accordance with SCP or VCP. Audit CAP also provides general procedures for the correction of participant loans that did not comply with the requirements of § 72(p)(2).

(4) *Eligibility for other arrangements*. The Service may extend EPCRS to other arrangements.

(5) *Appropriate use of programs*. In a particular case, the Service may decline to make available one or more correction programs under EPCRS in the interest of sound tax administration.

.02 *Effect of examination*. If the plan or Plan Sponsor is Under Examination, VCP is not available and SCP is only available as follows: while the plan or Plan Sponsor is Under Examination, insignificant Operational Failures can be corrected under SCP; and, if correction of significant operational failures has been completed or substantially completed (as described in section 9.04) before the plan or Plan Sponsor is Under Examination, correction of those failures can be completed under SCP.

.03 *Favorable Letter requirement*. The provisions of SCP relating to significant Operational Failures (see section 9) are available for a Qualified Plan only if the plan is the subject of a Favorable Letter. The provisions of SCP relating to insignificant Operational Failures (see section 8) are available for a SEP but only if the plan document consists of either (i) a valid Model Form 5305–SEP or 5305A–SEP adopted by an employer in accordance with the instructions on the applicable form (see Rev. Proc. 2002–10, 2002–1 C.B. 401) or (ii) a prototype SEP that has a current favorable opinion letter which has been amended in accordance with the procedures set forth in Rev. Proc. 2002–10. The provisions of SCP relating to insignificant Operational Failures (see section 8) are available for a SIMPLE IRA Plan but only if the plan document consists of either (i) a valid Model Form 5305–SIMPLE or 5304–SIMPLE adopted by an employer in accordance with the instructions on the applicable form (see Rev. Proc. 2002–10) or (ii) a current favorable opinion letter for a Plan Sponsor that has adopted a prototype SIMPLE IRA Plan which has been amended in accordance with the procedures set forth in Rev. Proc. 2002–10.

.04 *Established practices and procedures*. In order to be eligible for SCP, the Plan Sponsor or administrator of a plan must have established practices and procedures (formal or informal) reasonably designed to promote and facilitate overall compliance with applicable Code requirements. For example, the plan administrator of a Qualified Plan that may be top-heavy under § 416 may include in its plan operating manual a specific annual step to determine whether the plan is top-heavy and, if so, to ensure that the minimum contribution requirements of the top-heavy rules are satisfied. A plan document alone does not constitute evidence of established procedures. In order for a Plan Sponsor or administrator to use SCP, these established procedures must have been in place and routinely followed, and an Operational Failure must have occurred through an oversight or mistake in applying them. In addition, SCP may also be used in situations where the Operational Failure occurred because the procedures that were in place, while reasonable, were not sufficient to prevent the occurrence of the failure. In the case of a failure that relates to Transferred Assets or to a plan assumed in connection with a corporate merger, acquisition, or other similar employer transaction between the Plan Sponsor and sponsor of the transferor plan or the prior Plan Sponsor of an assumed plan, the plan is considered to have established practices and procedures for the Transferred Assets if such practices and procedures are in effect for the Transferred Assets by the end of the first plan year that begins after the corporate merger, acquisition, or other similar transaction.

.05 *Correction by plan amendment*. (1) *Availability of correction by plan amendment in VCP and Audit CAP*. A Plan Sponsor may use VCP and Audit CAP for a Qualified Plan to correct Plan Document, Demographic, and Operational Failures by a plan amendment, including correcting an Operational Failure by plan amendment to conform the terms of the plan to the plan's prior operations, provided that the amendment complies with the requirements of § 401(a), including the requirements of §§ 401(a)(4), 410(b), and 411(d)(6). In addition, a Plan Sponsor may adopt a plan amendment to reflect the corrective action. For example, if the plan failed to satisfy the actual deferral percentage (ADP) test required under § 401(k)(3) and the Plan Sponsor must make qualified nonelective contributions not already provided for under the plan, the plan may be amended to provide for qualified nonelective contributions. Except as provided in section 6.05, the issuance of a compliance statement does not constitute a determination as to the effect of any plan amendment on the qualification of the plan.

(2) *Availability of correction by plan amendment in SCP*. A Plan Sponsor may use SCP for a Qualified Plan to correct an Operational Failure by a plan amendment in order to conform the terms of the plan to the plan's prior operations only to correct Operational Failures listed in section 2.07 of Appendix B. These failures must be corrected in accordance with the correction methods set forth in section 2.07 of Appendix B. Any plan amendment must comply with the requirements of § 401(a), including the requirements of §§ 401(a)(4), 410(b), and 411(d)(6). If a Plan Sponsor corrects an Operational Failure in accordance with the approved correction methods under Appendix A or Appendix B, it may amend the plan to reflect the corrective action. For example, if the plan failed to satisfy the actual deferral percentage (ADP) test required under § 401(k)(3) and the Plan Sponsor makes qualified nonelective contributions not already provided for under the plan, the plan may be amended to provide for qualified nonelective contri-

butions. SCP is not otherwise available for a Plan Sponsor to correct an Operational Failure by a plan amendment.

.06 *Availability of correction of Employer Eligibility Failure*. SCP is not available for a Plan Sponsor to correct an Employer Eligibility Failure.

.07 *Availability of correction of a terminated plan*. Correction of Qualification Failures in a terminated plan may be made under VCP and Audit CAP, whether or not the plan trust is still in existence.

.08 *Availability of correction of an Orphan Plan*. An Orphan Plan that is terminating may be corrected under VCP and Audit CAP, provided that the party acting on behalf of the plan is an Eligible Party, as defined in section 5.03(2). See section 6.02(2)(e)(ii).

.09 *Availability of correction of § 457 plans*. Submissions relating to § 457(b) eligible governmental plans will be accepted by the Service on a provisional basis outside of EPCRS through standards that are similar to EPCRS.

.10 *Submission for a determination letter*. In any case in which correction of a Qualification Failure includes correction of a Plan Document Failure, Demographic Failure, or Operational Failure by plan amendment, a determination letter application may be required. See section 6.05.

.11 *Egregious failures*. SCP is not available to correct Operational Failures that are egregious. Egregious failures include: (a) a plan that has consistently and improperly covered only highly compensated employees; (b) a plan that provides more favorable benefits for an owner of the employer based on a purported collective bargaining agreement where there has in fact been no good faith bargaining between *bona fide* employee representatives and the employer (see Notice 2003–24, 2003–1 C.B. 853, with respect to welfare benefit funds); or (c) a defined contribution plan where a contribution is made on behalf of a highly compensated employee that is several times greater than the dollar limit set forth in § 415(c). VCP is available to correct egregious failures. However, egregious failures are subject to the VCP fees described in section 12.06 and, for purposes of section 12.06, an egregious failure would include any case in which the IRS concludes that the parties controlling the plan recognized that the action taken would constitute a Qualification Failure and the failure either involves a substantial number of participants or beneficiaries or involves participants who are predominantly highly compensated employees. Audit CAP also is available to correct egregious failures.

.12 *Diversion or misuse of plan assets*. SCP, VCP, and Audit CAP are not available to correct failures relating to the diversion or misuse of plan assets.

.13 *Abusive tax avoidance transactions*. (1) *Effect on Programs*. (a) *SCP*. With respect to SCP, in the event that the plan or the Plan Sponsor has been a party to an abusive tax avoidance transaction (as defined in section 4.13(2)), SCP is not available to correct any Operational Failure that is directly or indirectly related to the abusive tax avoidance transaction.

(b) *VCP*. With respect to VCP, if the Service determines that a plan or Plan Sponsor was, or may have been, a party to an abusive tax avoidance transaction (as defined in section 4.13(2)), then the matter will be referred to the Internal Revenue Service's Employee Plans' Tax Shelter Coordinator. Upon receiving a response from the Tax Shelter Coordinator, the Service may determine that the plan or the Plan Sponsor has been a party to an abusive tax avoidance transaction, and that the failures addressed in the VCP submission are related to that transaction. In those situations, the Service will conclude the review of the submission without issuing a compliance statement and will refer the case for examination. However, if the Tax Shelter Coordinator determines that the plan failures are unrelated to the abusive tax avoidance transaction or that no abusive tax avoidance transaction occurred, then the Service will continue to address the failures identified in the VCP submission, and may issue a compliance statement with respect to those failures. In no event may a compliance statement be relied on for the purpose of concluding that the plan or Plan Sponsor was not a party to an abusive tax avoidance transaction. In addition, even if it is concluded that the failures can be addressed pursuant to a VCP submission, the Service reserves the right to make a referral of the abusive tax avoidance transaction matter for examination.

(c) *Audit CAP and SCP (for plans Under Examination)*. For plans Under Examination, if the Service determines that the plan or Plan Sponsor was, or may have been, a party to an abusive tax avoidance transaction, the matter may be referred to the Internal Revenue Service's Employee Plans' Tax Shelter Coordinator. With respect to plans Under Examination, an abusive tax avoidance transaction includes a transaction described in section 4.13(2) and any other transaction that the Service determines was designed to facilitate the impermissible avoidance of tax. Upon receiving a response from the Tax Shelter Coordinator, (i) if the Service determines that a failure is related to the abusive tax avoidance transaction, the Service reserves the right to conclude that neither Audit CAP nor SCP is available for that failure and (ii) if the Service determines that satisfactory corrective actions have not been taken with regard to the transaction, the Service reserves the right to conclude that neither Audit CAP nor SCP is available to the plan.

(2) *Abusive tax avoidance transaction defined*. For purposes of section 4.13(1) (except to the extent otherwise provided in section 4.13(1)(c)), an abusive tax avoidance transaction means any listed transaction under § 1.6011–4(b)(2) and any other transaction identified as an abusive transaction in the IRS web site entitled "EP Abusive Tax Transactions."

PART III. DEFINITIONS, CORRECTION PRINCIPLES, AND RULES OF GENERAL APPLICABILITY

SECTION 5. DEFINITIONS

The following definitions apply for purposes of this revenue procedure:

.01 *Definitions for Qualified Plans*. The definitions in this section 5.01 apply to Qualified Plans.

(1) *Qualified Plan*. The term "Qualified Plan" means a plan intended to satisfy the requirements of § 401(a) or § 403(a).

(2) *Qualification Failure*. The term "Qualification Failure" means any failure that adversely affects the qualification of a plan. There are four types of Qualification Failures: (a) Plan Document Failures; (b) Operational Failures; (c) Demographic Failures; and (d) Employer Eligibility Failures.

(a) *Plan Document Failure*. The term "Plan Document Failure" means a plan

provision (or the absence of a plan provision) that, on its face, violates the requirements of § 401(a) or § 403(a). Thus, for example, the failure of a plan to be amended to reflect a new qualification requirement within the plan's applicable remedial amendment period under § 401(b) is a Plan Document Failure. In addition, if a plan has not been timely or properly amended during an applicable remedial amendment period for adopting good faith or interim amendments with respect to disqualifying provisions, as described in §1.401(b)–1(b)(1) of the Income Tax Regulations, the plan has a Plan Document Failure. For purposes of this revenue procedure, a Plan Document Failure includes any Qualification Failure that is a violation of the requirements of § 401(a) or § 403(a) and that is not an Operational Failure, Demographic Failure, or Employer Eligibility Failure.

(b) *Operational Failure*. The term "Operational Failure" means a Qualification Failure (other than an Employer Eligibility Failure) that arises solely from the failure to follow plan provisions. A failure to follow the terms of the plan providing for the satisfaction of the requirements of § 401(k) and § 401(m) is considered to be an Operational Failure. A plan does not have an Operational Failure to the extent the plan is permitted to be amended retroactively to reflect the plan's operations (*e.g.*, pursuant to § 401(b)). In the situation where a Plan Sponsor timely adopted a good faith or interim amendment which is not a disqualifying provision as described in § 1.401(b)–1(b)(1), and the plan was not operated in accordance with the terms of such amendment, the plan is considered to have an Operational Failure.

(c) *Demographic Failure*. The term "Demographic Failure" means a failure to satisfy the requirements of § 401(a)(4), 401(a)(26), or 410(b) that is not an Operational Failure or an Employer Eligibility Failure. The correction of a Demographic Failure generally requires a corrective amendment to the plan adding more benefits or increasing existing benefits (cf. § 1.401(a)(4)–11(g)).

(d) *Employer Eligibility Failure*. The term "Employer Eligibility Failure" means the adoption of a plan intended to include a qualified cash or deferred arrangement under § 401(k) by an employer that fails to meet the employer eligibility requirements to establish a § 401(k) plan. An Employer Eligibility Failure is not a Plan Document, Operational, or Demographic Failure.

(3) *Excess Amount; Excess Allocations; Overpayment*. (a) *Excess Amount*. The term "Excess Amount" means a Qualification Failure due to a contribution, allocation, or similar credit that is made on behalf of a participant or beneficiary to a plan in excess of the maximum amount permitted to be contributed, allocated, or credited on behalf of the participant or beneficiary under the terms of the plan or that exceeds a limitation on contributions or allocations provided in the Code or regulations. Excess Amounts include: (i) an elective deferral or after-tax employee contribution that is in excess of the maximum contribution under the plan; (ii) an elective deferral or after-tax employee contribution made in excess of the limitation under § 415; (iii) an elective deferral in excess of the limitation of § 402(g); (iv) an excess contribution or excess aggregate contribution under § 401(k) or § 401(m); (v) an elective deferral or after-tax employee contribution that is made with respect to compensation in excess of the limitation of § 401(a)(17); and (vi) any other employer contribution that exceeds a limitation under § 401(a)(17), § 401(m) (but only with respect to the forfeiture of nonvested matching contributions that are excess aggregate contributions), § 411(a)(3)(G), or § 415. However, an Excess Amount does not include a contribution, allocation, or other credit that is made pursuant to a correction method provided under this revenue procedure for a different Qualification Failure. Excess Amounts are limited to contributions, allocations, or annual additions under a defined contribution plan, after-tax employee contributions to a defined benefit plan, and contributions or allocations that are to be made to a separate account (with actual earnings) under a defined benefit plan. See generally section 6.06 for the treatment and correction of certain Excess Amounts.

(b) *Excess Allocation*. The term "Excess Allocation" means an Excess Amount for which the Code or regulations do not provide any corrective mechanism. Excess Allocations include Excess Amounts as defined in section 5.01(3)(a) (i), (ii), (v), and (vi) (except with respect to § 401(m) or § 411(a)(3)(G) violations). Excess Allocations must be corrected in accordance with section 6.06(2).

(c) *Overpayment*. The term "Overpayment" means a Qualification Failure due to a payment being made to a participant or beneficiary that exceeds the amount payable to the participant or beneficiary under the terms of the plan or that exceeds a limitation provided in the Code or regulations. Overpayments include both payments from a defined benefit plan and payments from a defined contribution plan (either not made from the participant's or beneficiary's account under the plan or not permitted to be paid either under the terms of the plan or under the Code or regulations). However, an Overpayment does not include a payment that is made pursuant to a correction method provided under this revenue procedure for a different Qualification Failure. Overpayments must be corrected in accordance with section 6.06(3).

(4) *Favorable Letter*. The term "Favorable Letter" means, in the case of a Qualified Plan, a current favorable determination letter for an individually designed plan (including a volume submitter plan that is not identical to an approved volume submitter plan), a current favorable opinion letter for a Plan Sponsor that has adopted a master or prototype plan, (standardized or nonstandardized), or a current favorable advisory letter and certification that the Plan Sponsor has adopted a plan that is identical to an approved volume submitter plan. A plan has a current favorable determination letter, opinion letter, or advisory letter if (a), (b), (c), or (d) below is satisfied:

(a) The plan has a favorable determination letter, opinion letter, or advisory letter that considers the law changes incorporated in the Plan Sponsor's most recently expired remedial amendment cycle determined under the provisions of Rev. Proc. 2007–44.

(b) For plans with respect to whom the initial remedial amendment cycle under Rev. Proc. 2007–44 has not expired, the favorable determination letter, opin-

ion letter, or advisory letter that considers GUST.[2]

(c) The plan is initially adopted or effective after December 31, 2001, and the Plan Sponsor timely submits an application for a determination letter or adopts an approved master or prototype plan or volume submitter plan within the plan's remedial amendment period under § 401(b).

(d) The plan is terminated prior to the expiration of the plan's applicable remedial amendment cycle, determined under the provisions of Rev. Proc. 2007–44 and the plan was amended to reflect the provisions of any legislation that was in effect when the plan was terminated.

(5) *Maximum Payment Amount*. The term "Maximum Payment Amount" means a monetary amount that is approximately equal to the tax the Service could collect upon plan disqualification and is the sum for the open taxable years of the:

(a) tax on the trust (Form 1041) (and any interest or penalties applicable to the trust return),

(b) additional income tax resulting from the loss of employer deductions for plan contributions (and any interest or penalties applicable to the Plan Sponsor's return),

(c) additional income tax resulting from income inclusion for participants in the plan (Form 1040), including the tax on plan distributions that have been rolled over to other qualified trusts (as defined in § 402(c)(8)(A)) or eligible retirement plans (as defined in § 402(c)(8)(B)) and any interest or penalties applicable to the participants' returns, and

(d) any other tax that results from a Qualification Failure that would apply but for correction under this revenue procedure.

(6) *Plan Sponsor; Employer*. The terms "Plan Sponsor" and "Employer" mean the employer that establishes or maintains a Qualified Plan for its employees.

(7) *Transferred Assets*. The term "Transferred Assets" means plan assets that were received, in connection with a corporate merger, acquisition, or other similar employer transaction, by the plan in a transfer (including a merger or consolidation of plan assets) under § 414(l) from a plan sponsored by an employer that was not a member of the same controlled group as the Plan Sponsor immediately prior to the corporate merger, acquisition, or other similar employer transaction. If a transfer of plan assets related to the same employer transaction is accomplished through several transfers, then the date of the transfer is the date of the first transfer.

.02 *Definitions for 403(b) Plans*. The definitions in this section 5.02 apply to 403(b) Plans.

(1) *403(b) Plan*. The term "403(b) Plan" means a plan or program intended to satisfy the requirements of § 403(b).

(2) *403(b) Failure*. The term "403(b) Failure" means any Operational, Demographic, or Employer Eligibility Failure as defined below.

(a) *Operational Failure*. The term "Operational Failure" means any of the following:

(i) A failure to satisfy the requirements of § 403(b)(12)(A)(ii) (relating to the availability of salary reduction contributions);

(ii) A failure to satisfy the requirements of § 401(m) (as applied to 403(b) Plans pursuant to § 403(b)(12)(A)(i));

(iii) A failure to satisfy the requirements of § 401(a)(17) (as applied to 403(b) Plans pursuant to § 403(b)(12)(A)(i));

(iv) A failure to satisfy the distribution restrictions of § 403(b)(7) or § 403(b)(11);

(v) A failure to satisfy the incidental death benefit rules of § 403(b)(10);

(vi) A failure to pay minimum required distributions under § 403(b)(10);

(vii) A failure to give employees the right to elect a direct rollover under § 403(b)(10), including the failure to give meaningful notice of such right;

(viii) A failure of the annuity contract or custodial agreement to provide participants with a right to elect a direct rollover under §§ 403(b)(10) and 401(a)(31);

(ix) A failure to satisfy the limit on elective deferrals under § 403(b)(1)(E);

(x) A failure of the annuity contract or custodial agreement to provide the limit on elective deferrals under §§ 403(b)(1)(E) and 401(a)(30);

(xi) A failure involving contributions or allocations of Excess Amounts; or

(xii) Any other failure to satisfy applicable requirements under § 403(b) that (A) results in the loss of § 403(b) status for the plan or the loss of § 403(b) status for one or more custodial account(s) or annuity contract(s) under the plan and (B) is not a Demographic Failure, an Employer Eligibility Failure, or a failure related to contributions on behalf of individuals who are not employees of the employer.

(b) *Demographic Failure*. The term "Demographic Failure" means a failure to satisfy the requirements of § 401(a)(4), § 401(a)(26), or § 410(b) (as applied to 403(b) Plans pursuant to § 403(b)(12)(A)(i)).

(c) *Employer Eligibility Failure*. The term "Employer Eligibility Failure" means any of the following:

(i) The adoption of a plan intended to satisfy the requirements of § 403(b) by a Plan Sponsor that is not a tax-exempt organization described in § 501(c)(3) or a public educational organization described in § 170(b)(1)(A)(ii);

(ii) A failure to satisfy the nontransferability requirement of § 401(g);

(iii) A failure to initially establish or maintain a custodial account as required by § 403(b)(7); or

(iv) A failure to purchase (initially or subsequently) either an annuity contract from an insurance company (unless grandfathered under Rev. Rul. 82–102, 1982–1 C.B. 62) or a custodial account from a regulated investment company utilizing a bank or an approved non-bank trustee/custodian.

(3) *Excess Amount*. The term "Excess Amount" means any amount returned to ensure that the plan satisfies the requirements of §§ 401(a)(30), 415, or 403(b)(2) (for plan years prior to January 1, 2002). In addition, the term "Excess Amount" includes (for all plan years) any distributions required to ensure that the plan complies with the applicable requirements of § 403(b).

(4) *Maximum Payment Amount*. The term "Maximum Payment Amount" means a monetary amount that is approximately equal to the tax the Service could collect as a result of the 403(b) Failure and is the sum for the open taxable years of the:

(a) additional income tax resulting from income inclusion for employees or other participants (Form 1040), including the

[2] GUST is an acronym for the Uruguay Round Agreements Act (GATT), the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), the Small Business Job Protection Act of 1996 (SBJPA), the Taxpayer Relief Act of 1997 (TRA '97), the Internal Revenue Service Restructuring and Reform Act of 1998 (RRA '98), and the Community Renewal Tax Relief Act of 2000 (CRA).

tax on distributions that have been rolled over to other qualified trusts (as defined in § 402(c)(8)(A)) or eligible retirement plans (as defined in § 402(c)(8)(B)) and any interest or penalties applicable to the participants' returns, and

(b) any other tax that results from a 403(b) Failure that would apply but for correction under this revenue procedure.

(5) *Plan Sponsor; Employer*. The terms "Plan Sponsor" and "Employer" mean the employer that offers a 403(b) Plan to its employees.

.03 *Definitions for Orphan Plans*. (1) *Orphan Plan*. With respect to VCP and Audit CAP, the term "Orphan Plan" means any Qualified Plan or other plan with respect to which an "Eligible Party" (defined in section 5.03(2)) has determined that the Plan Sponsor (a) no longer exists, (b) cannot be located, or (c) is unable to maintain the plan. However, the term "Orphan Plan" does not include any plan which is subject to Title I of the Employee Retirement Income Security Act of 1974 ("ERISA") terminated pursuant to section 2578.1 of the Department of Labor regulations governing the termination of abandoned individual account plans.

(2) *Eligible Party*. The term "Eligible Party" means:

(a) A court appointed representative with authority to terminate the plan and dispose of the plan's assets;

(b) In the case of an Orphan Plan under investigation by the Department of Labor, a person or entity who the Department of Labor determined has accepted responsibility for terminating the plan and distributing the plan's assets; or

(c) In the case of a Qualified Plan to which Title I of ERISA has never applied, a surviving spouse who is the sole beneficiary of a plan that provided benefits to a participant who was (i) the sole owner of the business that sponsored the plan and (ii) the only participant in the plan.

.04 *References to Rev. Proc. 2007–44*. References in sections 5.01(4), 6.05, 10.05, and 10.08 of this revenue procedure to Rev. Proc. 2007–44, 2007–28 I.R.B. 54, include any successor revenue procedure (and references to any section thereof if such references refer to the successor section in any successor revenue procedure).

.05 *SEP*. The term "SEP" means a plan intended to satisfy the requirements of § 408(k). For purposes of this revenue procedure, the term SEP also includes a salary reduction SEP ("SARSEP") described in § 408(k)(6), if applicable.

.06 *SIMPLE IRA Plan*. The term "SIMPLE IRA Plan" means a plan intended to satisfy the requirements of § 408(p).

.07 *Under Examination*. (1) The term "Under Examination" means: (a) a plan that is under an Employee Plans examination (that is, an examination of a Form 5500 series or other Employee Plans examination); (b) a Plan Sponsor that is under an Exempt Organizations examination (that is, an examination of a Form 990 series or other Exempt Organizations examination); or (c) a plan that is under investigation by the Criminal Investigation Division of the Internal Revenue Service.

(2) A plan that is under an Employee Plans examination includes any plan for which the Plan Sponsor, or a representative, has received verbal or written notification from Employee Plans of an impending Employee Plans examination, or of an impending referral for an Employee Plans examination, and also includes any plan that has been under an Employee Plans examination and is now in Appeals or in litigation for issues raised in an Employee Plans examination. A plan is considered to be Under Examination if it is aggregated for purposes of satisfying the nondiscrimination requirements of § 401(a)(4), the minimum participation requirements of § 401(a)(26), the minimum coverage requirements of § 410(b), or the requirements of § 403(b)(12), with any plan that is Under Examination. In addition, a plan is considered to be Under Examination with respect to a failure of a qualification requirement (other than those described in the preceding sentence) if the plan is aggregated with another plan for purposes of satisfying that qualification requirement (for example, § 401(a)(30), § 415, or § 416) and that other plan is Under Examination. For example, assume Plan A has a § 415 failure, Plan A is aggregated with Plan B only for purposes of § 415, and Plan B is Under Examination. In this case, Plan A is considered to be Under Examination with respect to the § 415 failure. However, if Plan A has a failure relating to the spousal consent rules under § 417 or the vesting rules of § 411, Plan A is not considered to be Under Examination with respect to the § 417 or § 411 failure. For purposes of this revenue procedure, the term aggregation does not include consideration of benefits provided by various plans for purposes of the average benefits test set forth in § 410(b)(2).

(3) An Employee Plans examination also includes a case in which a Plan Sponsor has submitted any Form 5300, 5307 or 5310 and the Employee Plans agent notifies the Plan Sponsor, or a representative, of possible Qualification Failures, whether or not the Plan Sponsor is officially notified of an "examination." This would include a case where, for example, a Plan Sponsor has applied for a determination letter on plan termination, and an Employee Plans agent notifies the Plan Sponsor that there are partial termination concerns. In addition, if, during the review process, the agent requests additional information that indicates the existence of a Qualification Failure(s) not previously identified by the Plan Sponsor, the plan is considered to be under an Employee Plans examination. If, in such a case, the determination letter request under review is subsequently withdrawn, the plan is nevertheless considered to be under an Employee Plans examination for purposes of eligibility under SCP and VCP with respect to those issues raised by the agent reviewing the determination letter application. The fact that a Plan Sponsor voluntarily submits a determination letter application does not constitute a voluntary identification of Qualification Failures to the Service. In order to be eligible to perfect a determination letter application into a VCP submission, the Plan Sponsor (or the authorized representative) must identify each Qualification Failure, in writing, to the reviewing agent before the agent recognizes the existence of the Qualification Failure(s) or addresses the Qualification Failure(s) in communications with the Plan Sponsor (or the authorized representative).

(4) A Plan Sponsor that is under an Exempt Organizations examination includes any Plan Sponsor that has received (or whose representative has received) verbal or written notification from Exempt Organizations of an impending Exempt Organizations examination or of an impending referral for an Exempt Organizations examination and also includes any Plan Sponsor that has been under an Exempt Organiza-

tions examination and is now in Appeals or in litigation for issues raised in an Exempt Organizations examination.

SECTION 6. CORRECTION PRINCIPLES AND RULES OF GENERAL APPLICABILITY

.01 *Correction principles; rules of general applicability*. The general correction principles in section 6.02 and rules of general applicability in sections 6.03 through 6.11 apply for purposes of this revenue procedure.

.02 *Correction principles*. Generally, a failure is not corrected unless full correction is made with respect to all participants and beneficiaries, and for all taxable years (whether or not the taxable year is closed). Even if correction is made for a closed taxable year, the tax liability associated with that year will not be redetermined because of the correction. Correction is determined taking into account the terms of the plan at the time of the failure. Correction should be accomplished taking into account the following principles:

(1) *Restoration of benefits*. The correction method should restore the plan to the position it would have been in had the failure not occurred, including restoration of current and former participants and beneficiaries to the benefits and rights they would have had if the failure had not occurred.

(2) *Reasonable and appropriate correction*. The correction should be reasonable and appropriate for the failure. Depending on the nature of the failure, there may be more than one reasonable and appropriate correction for the failure. For Qualified Plans, any correction method permitted under Appendix A or Appendix B is deemed to be a reasonable and appropriate method of correcting the related Qualification Failure. Any correction method permitted under Appendix A or Appendix B applicable to a 403(b) Plan, a SEP, or a SIMPLE IRA Plan is similarly deemed to be a reasonable and appropriate method of correcting the related failure. If a plan has a different but analogous failure to one set forth in Appendix A or B (such as the failure to provide a matching contribution by a governmental plan that is not subject to § 401(m)), then the analogous correction method under Appendix A or B is generally available to correct any failure. Whether any other particular correction method is reasonable and appropriate is determined taking into account the applicable facts and circumstances and the following principles:

(a) The correction method should, to the extent possible, resemble one already provided for in the Code, regulations thereunder, or other guidance of general applicability. For example, for Qualified Plans and 403(b) Plans, the correction method set forth in § 1.402(g)–1(e)(2) would be the typical means of correcting a failure under § 402(g).

(b) The correction method should keep plan assets in the plan, except to the extent the Code, regulations, or other guidance of general applicability provide for correction by distribution to participants or beneficiaries or return of assets to the Employer. For example, if an excess allocation (not in excess of the § 415 limits) made under a Qualified Plan was made for a participant under a plan (other than a § 401(k) plan), the excess should be reallocated to other participants or, depending on the facts and circumstances, used to reduce future employer contributions.

(c) The correction method for failures relating to nondiscrimination should provide benefits for nonhighly compensated employees. For example, for Qualified Plans, the correction method set forth in § 1.401(a)(4)–11(g) (rather than methods making use of the special testing provisions set forth in § 1.401(a)(4)–8 or § 1.401(a)(4)–9), would be the typical means of correcting a failure to satisfy nondiscrimination requirements. Similarly, the correction of a failure to satisfy the requirements of § 401(k)(3), § 401(m)(2), or § 401(m)(9) (relating to nondiscrimination), solely by distributing excess amounts to highly compensated employees would not be the typical means of correcting such a failure.

(d) The correction method should not violate another applicable specific requirement of § 401(a) or § 403(b) (for example, § 401(a)(4), § 411(d)(6), or § 403(b)(12), as applicable), § 408(k) for SEPs, or § 408(p) for SIMPLE IRA Plans, or a parallel requirement in Part 2 of Subtitle B of Title I of ERISA (for plans that are subject to Part 2 of Subtitle B of Title I of ERISA). If an additional failure is nevertheless created as a result of the use of a correction method in this revenue procedure, then that failure also must be corrected in conjunction with the use of that correction method and in accordance with the requirements of this revenue procedure.

(e)(i) If a correction method is one which another government agency has authorized with respect to a violation of legal requirements within its interpretive authority and that correction relates to a violation for which there is a failure to which this revenue procedure applies, then the Service may take the correction method of the other governmental agency into account for purposes of this revenue procedure.

(ii) Thus, if the plan is subject to ERISA, for a failure that results from either the employer having ceased to exist, the employer no longer maintaining the plan, or similar reasons, the permitted correction is to terminate the plan and distribute plan assets to participants and beneficiaries in accordance with standards and procedures substantially similar to those set forth in section 2578.1 of the Department of Labor Regulations (relating to abandoned plans). This correction must satisfy four conditions. First, the correction must comply with standards and procedures substantially similar to those set forth in section 2578.1 of the Department of Labor Regulations (relating to abandoned plans). Second, the qualified termination administrator, based on plan records located and updated in accordance with the Department of Labor Regulations, must have reasonably determined whether, and to what extent, the survivor annuity requirements of §§ 401(a)(11) and 417 apply to any benefit payable under the plan and takes reasonable steps to comply with those requirements (if applicable). Third, each participant and beneficiary must have been provided a nonforfeitable right to his or her accrued benefits as of the date of deemed termination under the Department of Labor Regulations, subject to income, expenses, gains, and losses between that date and the date of distribution. Fourth, participants and beneficiaries must receive notification of their rights under § 402(f). In addition, notwithstanding correction under this revenue procedure, the Service reserves the right to pursue appropriate remedies under the Internal Revenue Code against any party who is responsible for the plan, such as the Plan Sponsor, plan

administrator, or owner of the business, even in its capacity as a participant or beneficiary under the plan. See, also, section .09(1) of Appendix A for parallel rules for plans that are not subject to ERISA.

(iii) Similarly, in the case of a violation of the fiduciary standards imposed by Part 4 of Subtitle B of Title I of ERISA, correction under the Voluntary Fiduciary Correction Program established by the Department of Labor (at 71 FR 20262) for a fiduciary violation for which there is a similar failure under this revenue procedure would generally be taken into account as correction under this revenue procedure. (See also section 7.3(b) of the Department of Labor's Voluntary Fiduciary Correction Program under which correction of a defaulted participant loan that provides for repayment in accordance with § 72(p)(2) requires only submission of the correction under VCP and inclusion of the VCP compliance statement (with proof of any required corrective payment).)

(3) *Consistency requirement*. Generally, where more than one correction method is available to correct a type of Operational Failure for a plan year (or where there are alternative ways to apply a correction method), the correction method (or one of the alternative ways to apply the correction method) should be applied consistently in correcting all Operational Failures of that type for that plan year. Similarly, earnings adjustment methods generally should be applied consistently with respect to corrective contributions or allocations for a particular type of Operational Failure for a plan year. In the case of a Group Submission, the consistency requirement applies on a plan by plan basis.

(4) *Principles regarding corrective allocations and corrective distributions*. The following principles apply where an appropriate correction method includes the use of corrective allocations or corrective distributions:

(a) Corrective allocations under a defined contribution plan should be based upon the terms of the plan and other applicable information at the time of the failure (including the compensation that would have been used under the plan for the period with respect to which a corrective allocation is being made) and should be adjusted for earnings (including losses) and forfeitures that would have been allocated to the participant's account if the failure had not occurred. However, a corrective allocation is not required to be adjusted for losses. See section 3 of Appendix B for additional information on calculation of earnings for corrective allocations.

(b) A corrective allocation to a participant's account because of a failure to make a required allocation in a prior limitation year is not considered an annual addition with respect to the participant for the limitation year in which the correction is made, but is considered an annual addition for the limitation year to which the corrective allocation relates. However, the normal rules of § 404, regarding deductions, apply.

(c) Corrective allocations should come only from employer nonelective contributions (including forfeitures if the plan permits their use to reduce employer contributions).

(d) In the case of a defined benefit plan, a corrective distribution for an individual should be increased to take into account the delayed payment, consistent with the plan's actuarial adjustments.

(e) In the case of a defined contribution plan, a corrective contribution or distribution should be adjusted for earnings (including losses) from the date of the failure (determined without regard to any Code provision which permits a corrective contribution or distribution to be made at a later date).

(5) *Special exceptions to full correction*. In general, a failure must be fully corrected. Although the mere fact that correction is inconvenient or burdensome is not enough to relieve a Plan Sponsor of the need to make full correction, full correction may not be required in certain situations because it is unreasonable or not feasible. Even in these situations, the correction method adopted must be one that does not have significant adverse effects on participants and beneficiaries or the plan, and that does not discriminate significantly in favor of highly compensated employees. The exceptions described below specify those situations in which full correction is not required.

(a) *Reasonable estimates*. If either (i) it is possible to make a precise calculation but the probable difference between the approximate and the precise restoration of a participant's benefits is insignificant and the administrative cost of determining precise restoration would significantly exceed the probable difference or (ii) it is not possible to make a precise calculation (for example, where it is impossible to provide plan data), reasonable estimates may be used in calculating appropriate correction. If it is not feasible to make a reasonable estimate of what the actual investment results would have been, a reasonable interest rate may be used. For this purpose, the interest rate used by the Department of Labor's Voluntary Fiduciary Correction Program Online Calculator ("VFCP Online Calculator") is deemed to be a reasonable interest rate. The VFCP Online Calculator can be found on the web at *http://www.dol.gov/ebsa/calculator*.

(b) *Delivery of small benefits*. If the total corrective distribution due a participant or beneficiary is $75 or less, the Plan Sponsor is not required to make the corrective distribution if the reasonable direct costs of processing and delivering the distribution to the participant or beneficiary would exceed the amount of the distribution. This section 6.02(5)(b) does not apply to corrective contributions.

(c) *Recovery of small Overpayments*. Generally, if the total amount of an Overpayment to a participant or beneficiary is $100 or less, the Plan Sponsor is not required to seek the return of the Overpayment from the participant or beneficiary. The Plan Sponsor is not required to notify the participant or beneficiary that the Overpayment is not eligible for favorable tax treatment accorded to distributions from Qualified Plans (and, specifically, is not eligible for tax-free rollover).

(d) *Locating lost participants*. Reasonable actions must be taken to find all current and former participants and beneficiaries to whom additional benefits are due, but who have not been located after a mailing to the last known address. In general, such actions include use of the Internal Revenue Service Letter Forwarding Program (see Rev. Proc. 94–22, 1994–1 C.B. 608) or the Social Security Administration Employer Reporting Service. A plan will not be considered to have failed to correct a failure due to the inability to locate an individual if either of these programs is used; provided that, if the individual is later located, the additional benefits are provided to the individual at that time. The Internal Revenue Service Letter Forwarding Program may not be used to locate participants

in order to collect amounts owed to the plan. On occasion, the Internal Revenue Service may decline to perform the letter forwarding request, even if additional benefits are due to participants. In such a situation, it is expected that the Plan Sponsor will take other reasonable actions to locate participants to whom additional benefits are due.

(e) *Small Excess Amounts*. Generally, if the total amount of an Excess Amount with respect to the benefit of a participant or beneficiary is $100 or less, the Plan Sponsor is not required to distribute or forfeit such Excess Amount. However, if the Excess Amount exceeds a statutory limit, the participant or beneficiary must be notified that the Excess Amount, including earnings, is not eligible for favorable tax treatment accorded to distributions from Qualified Plans (and, specifically, is not eligible for tax-free rollover). See section 6.06(1) for such notice requirements.

(f) *Orphan Plans*. The Service retains the discretion to determine under VCP and Audit CAP whether full correction will be required in a terminating Orphan Plan.

(6) *Correction principle for loan failures*. In the case of a loan failure corrected in accordance with section 6.07(2)(b) or (c) and section 6.07(3), the participant is generally responsible for paying the corrective payment. However, with respect to the failure listed in section 6.07(3), the employer should pay a portion of the correction payment on behalf of the participant equal to the interest that accumulates as a result of such failure — generally determined at a rate equal to the greater of the plan loan interest rate or the rate of return under the plan.

(7) *Correction for exclusion of employees for elective deferrals or after-tax employee contributions*. If a Qualified Plan has an Operational Failure that consists of excluding an employee that should have been eligible to make an elective deferral under a cash or deferred arrangement or an after-tax employee contribution, the employer should contribute to the plan on behalf of the excluded employee an amount that makes up for the value of the lost opportunity to the employee to have a portion of his or her compensation contributed to the plan accumulated with earnings tax free in the future. This correction principle applies solely to this limited circumstance. It does not, for example, extend to the correction of a failure to satisfy a nondiscrimination test, *e.g.*, the ADP test pursuant to § 401(k)(3) and the ACP test pursuant to § 401(m)(2). Specific methods and examples to correct this failure are provided in Appendix A .05 and Appendix B 2.02. Similarly, the methods and examples provided for correcting this failure do not extend to other failures. Thus, the correction methods and the examples in Appendix A .05 and Appendix B 2.02 cannot, for example, be used to correct ADP/ACP failures.

(8) *Reporting*. Any corrective distributions from the plan should be properly reported.

.03 *Correction of an Employer Eligibility Failure*. (1) The permitted correction of an Employer Eligibility Failure is the cessation of all contributions (including elective deferrals and after-tax employee contributions) beginning no later than the date the application under VCP is filed. Pursuant to VCP correction, the assets in such a plan are to remain in the trust, annuity contract, or custodial account and are to be distributed no earlier than the occurrence of one of the applicable distribution events, *e.g.*, for 403(b) Plans, an event described in § 403(b)(7) (to the extent the assets are held in custodial accounts) or § 403(b)(11) (for those assets invested in annuity contracts that would be subject to § 403(b)(11) restrictions if the employer were eligible).

(2) Cessation of contributions is not required if continuation of contributions would not be an Employer Eligibility Failure (for example, with respect to a tax-exempt employer that may maintain a § 401(k) plan after 1996).

(3) A plan that is corrected through VCP is treated as subject to all of the requirements and provisions of § 401(a) for a Qualified Plan, § 403(b) for a 403(b) Plan, § 408(k) for a SEP, and § 408(p) for a SIMPLE IRA Plan (including Code provisions relating to rollovers). Therefore, the Plan Sponsor must also correct all other failures in accordance with this revenue procedure.

(4) If correction is accomplished under VCP in accordance with the requirements of this section 6.03, then any rollovers made from the plan pursuant to a distributable event are deemed to have been made from a qualified trust for the purpose of determining whether the amounts qualify as an eligible rollover distribution under § 402(c) or an annuity contract that satisfies the requirements of § 403(b)(1) for the purpose of determining whether the amounts qualify as an eligible rollover amount under § 403(b)(8), including the determination of excess contributions that are subject to the § 4973 excise tax.

.04 *Correction of a failure to obtain spousal consent*. (1) Normally, the correction method under VCP for a failure to obtain spousal consent for a distribution that is subject to the spousal consent rules under §§ 401(a)(11) and 417 is similar to the correction method described in Appendix A .07. The Plan Sponsor must notify the affected participant and spouse (to whom the participant was married at the time of the distribution), so that the spouse can provide spousal consent to the distribution actually made or the participant may repay the distribution and receive a qualified joint and survivor annuity.

(2)(a) As alternatives to the correction method in section 6.04(1), correction for a failure to obtain spousal consent may be made under either section 6.04(2)(b) or section 6.04(2)(c).

(b) In the event that spousal consent to the prior distribution is not obtained (*e.g.*, because the spouse chooses not to consent, the spouse does not respond to the notice, or the spouse cannot be located), the spouse is entitled to a benefit under the plan equal to the portion of the qualified joint and survivor annuity that would have been payable to the spouse upon the death of the participant had a qualified joint and survivor annuity been provided to the participant under the plan at the annuity starting date for the prior distribution. Such spousal benefit must be provided if a claim is made by the spouse.

(c) In the event that spousal consent to the prior distribution is not obtained, the plan may offer the spouse the choice between (i) the survivor annuity benefit described in section 6.04(2)(b) or (ii) a single-sum payment equal to the actuarial present value of that survivor annuity benefit (calculated using the applicable interest rate and mortality table under § 417(e)(3)). Any such single-sum payment is treated in the same manner as a distribution under § 402(c)(9) for purposes of rolling over the payment to an IRA or other eligible retirement plan.

.05 *Submission of a determination letter application*. (1) *In general*. This sec-

tion 6.05 sets forth the situations in which a determination letter application is required to be submitted as part of the correction of a Qualification Failure if the correction includes a plan amendment. If a determination letter is required under this section 6.05, then, unless otherwise specified in this revenue procedure, the provisions of Rev. Proc. 2007–44 will apply. Thus, for example, in the case of an ongoing individually designed plan, a determination letter application will be reviewed with respect to all items of the Cumulative List (as defined in Rev. Proc. 2007–44) that would apply to the remedial amendment cycle during which the determination letter is filed. Notwithstanding any other part of this section 6.05, a determination letter is not required if the correction by plan amendment is achieved through the adoption of an amendment that is designated as a model amendment by the Service or the adoption of a prototype or volume submitter plan with an opinion or advisory letter as provided in Rev. Proc. 2008–6, 2008–1 I.R.B. 192, on which the Plan Sponsor has reliance.

(2) *Determination letter application required*. (a) *VCP and Audit CAP*. (i) A determination letter application is required for a determination of whether the plan document, including the corrective amendment, complies with the qualification requirements of § 401(a) if the Plan Sponsor submits the failure under VCP or corrects the failure under Audit CAP during an on-cycle year or in connection with a plan termination. An "on-cycle year" means the last 12 months of the plan's remedial amendment cycle set forth in Rev. Proc. 2007–44.

(ii) A determination letter application is required to correct a nonamender failure under VCP or Audit CAP, whether or not the plan is submitted under VCP or corrected under Audit CAP during an on-cycle year. For this purpose, the term "nonamender failure" means a failure to amend the plan to correct a disqualifying provision, described in §1.401(b)–1(b) within the applicable remedial amendment period. In general, a disqualifying provision includes a provision in the plan document that violates a qualification requirement of the Code or the absence of a provision that causes the plan to fail to satisfy a qualification requirement of the Code. A disqualifying provision also includes any provision designated by the Commissioner as a disqualifying provision under §1.401(b)–1(b)(3).

(b) *SCP*. In the case of any correction of an Operational Failure through plan amendment under SCP that is permitted under section 4.05(2) of this revenue procedure, a Plan Sponsor must submit a determination letter application for the plan, including the corrective plan amendment, by the end of the plan's next on-cycle year, or if earlier, in connection with the plan's termination. The determination letter application should be mailed to the address provided in the instructions of the applicable Form 5300, 5307 or 5310. As part of the determination letter submission, the cover letter must identify the amendment as a corrective amendment under SCP. In addition, the Plan Sponsor must include in the cover letter to the application: (1) a statement that neither the plan nor the Plan Sponsor has been a party to an abusive tax avoidance transaction (as defined in section 4.13(2) of this revenue procedure); or (2) a brief identification of any abusive tax avoidance transaction to which the plan or the Plan Sponsor has been a party.

(3) *Determination Letter application not required*. (a) *Failure to adopt timely interim amendments or amendments required to implement optional law changes*. If on any date during an off-cycle year that is prior to the plan's on-cycle year, a Plan Sponsor submits a failure under VCP or corrects a failure under Audit CAP to adopt timely interim amendments or timely amendments to the plan to implement optional law changes, then a determination letter application is not required and should not be submitted with the VCP submission or as part of the correction of the failure under Audit CAP. For purposes of this revenue procedure, interim amendments are interim amendments within the meaning of section 5.01 of Rev. Proc. 2007–44. For purposes of this revenue procedure, an optional law change refers to a law change implemented at the Plan Sponsor's discretion. An example of an optional law provision is § 414(v) of the Code, which sets forth the provisions relating to catch-up contributions. The issuance of a compliance statement or closing agreement results in the corrective amendments being treated as if they had been adopted timely for the purpose of determining the availability of the extended remedial amendment period described in Rev. Proc. 2007–44. However, the issuance of such a compliance statement or closing agreement does not constitute a determination as to whether the plan amendment complies with the change in qualification requirement. Thus, in order to ensure that the corrective amendment adopted for this failure complies with the change in qualification requirement, the Plan Sponsor should include the corrective amendment along with the compliance statement or closing agreement, with its application for a determination letter during the plan's on-cycle year or if earlier, in connection with the plan's termination. The provisions of this section 6.05(3)(a) are applicable only if the VCP application setting forth the interim or optional law change failure is submitted, or the Audit CAP correction is made, prior to the plan's first on-cycle year following the date by which the amendment for the interim or optional law change should have been adopted pursuant to section 5.05 of Rev. Proc. 2007–44.

(b) *Operational or Demographic Failures corrected through plan amendment under VCP and Audit CAP*. If, during an off-cycle year, a Plan Sponsor submits an Operational or Demographic Failure under VCP or corrects such a failure under Audit CAP, then a determination letter application is not required and should not be submitted with the VCP submission or as part of the correction of the failure under Audit CAP. If the plan amendment is accepted as a proper correction for either an Operational Failure or a Demographic Failure, the compliance statement under VCP or closing agreement issued under Audit CAP constitutes a determination on the effect of the plan amendment on the qualification of the plan; however, the compliance statement issued under VCP is subject to the condition that the amendment be submitted as part of a separate determination letter submission during the plan's next on-cycle year, or if earlier, in connection with the plan's termination, and that a favorable determination letter be issued with respect to the plan. The determination letter application should be mailed to the address listed in the instructions of the applicable Form 5300, 5307 or 5310 and should include a copy of the related compliance statement or closing agreement. A Plan Sponsor that corrects an Operational

Failure or Demographic Failure through a plan amendment under Audit CAP during an off-cycle year should also include a copy of the closing agreement when submitting a determination letter application during the plan's next on-cycle year, or if earlier, in connection with the plan's termination.

(4) *Determination letter applications optional under EPCRS*. A Plan Sponsor may submit a determination letter application with respect to the correction of failures through plan amendment prior to the plan's on-cycle year if the plan would be given the same priority as an on-cycle filing pursuant to sections 14.02 and 14.03 of Rev. Proc. 2007–44, relating to certain new plans, terminating plans, and off-cycle applications submitted in accordance with published guidance issued by the Service specifying such submission, and in the case of urgent business need. Determination letter requests submitted pursuant to this section 6.05(4) must contain a written justification as to the eligibility of the plan under section 14.02 or 14.03 of Rev. Proc. 2007–44 and this section 6.05(4). In the case of urgent business need, the Service will consider such requests based on the facts and circumstances.

(5) *Internal Revenue Service discretion*. Notwithstanding any other provision of section 6.05 of this revenue procedure, the Service reserves the right to require the submission of a determination letter application with respect to any amendment proposed or adopted to correct any Qualification Failure under VCP or Audit CAP.

.06 *Special rules relating to Excess Amounts*. (1) *Treatment of Excess Amounts*. Except as otherwise provided in section 6.02(5)(c), a distribution of an Excess Amount is not eligible for the favorable tax treatment accorded to distributions from Qualified Plans (such as eligibility for tax-free rollover). Thus, for example, if such a distribution was contributed to an individual retirement arrangement (IRA), the contribution is not a valid rollover contribution for purposes of determining the amount of excess contributions (within the meaning of § 4973) to the individual's IRA. A distribution of an Excess Amount is generally treated in the manner described in section 3 of Rev. Proc. 92–93, 1992–2 C.B. 505, relating to the corrective disbursement of elective deferrals. The distribution must be reported on Form 1099–R for the year of distribution with respect to each participant or beneficiary receiving such a distribution. Except as otherwise provided in section 6.02(5)(c), where an Excess Amount has been or is being distributed, the Plan Sponsor must notify the recipient that (a) an Excess Amount has been or will be distributed and (b) an Excess Amount is not eligible for favorable tax treatment accorded to distributions from Qualified Plans (and, specifically, is not eligible for rollover).

(2) *Correction of Excess Allocations*. In general, an Excess Allocation, as defined in section 5.01(3)(a) of this revenue procedure, is corrected in accordance with the Reduction of Account Balance Correction Method set forth in this paragraph. Under this method, the account balance of an employee who received an Excess Allocation is reduced by the Excess Allocation (adjusted for earnings). If the Excess Allocation would have been allocated to other employees in the year of the failure had the failure not occurred, then that amount (adjusted for earnings) is reallocated to those employees in accordance with the plan's allocation formula. If the improperly allocated amount would not have been allocated to other employees absent the failure, that amount (adjusted for earnings) is placed in a separate account that is not allocated on behalf of any participant or beneficiary (an unallocated account) established for the purpose of holding Excess Allocations, adjusted for earnings, to be used to reduce employer contributions (other than elective deferrals) in the current year or succeeding year(s). While such amounts remain in the unallocated account, the employer is not permitted to make contributions to the plan other than elective deferrals. Excess Allocations that are attributable to elective deferrals or after-tax employee contributions, (along with earnings attributable thereto) must be distributed to the participant. For qualification purposes, an Excess Allocation that is corrected pursuant to this paragraph is disregarded for purposes of § 402(g), § 415, the actual deferral percentage test of § 401(k)(3), and the actual contribution percentage test of § 401(m)(2). If an Excess Allocation resulting from a violation of § 415 consists of annual additions attributable to both employer contributions and elective deferrals or after-tax employee contributions, then the correction of the Excess Allocation is completed by first distributing the unmatched employee's after-tax contributions (adjusted for earnings) and then the unmatched employee's elective deferrals (adjusted for earnings). If any excess remains, and is attributable to either elective deferrals or after-tax employee contributions that are matched, the excess is apportioned first to after-tax employee contributions with the associated matching employer contributions and then to elective deferrals with the associated matching employer contributions. Any matching contribution or nonelective employer contribution (adjusted for earnings) which constitutes an Excess Allocation is then forfeited and placed in an unallocated account established for the purpose of holding Excess Allocations to be used to reduce employer contributions in the current year and succeeding year(s). Such unallocated account is adjusted for earnings. While such amounts remain in the unallocated account, the employer is not permitted to make contributions (other than elective deferrals) to the plan.

(3) *Correction of Overpayment failures*. An Overpayment from a defined benefit plan is corrected in accordance with the rules in section 2.04(1) of Appendix B. An Overpayment from a defined contribution plan is corrected in accordance with the Return of Overpayment method set forth in this paragraph. Under this method, the employer takes reasonable steps to have the Overpayment, plus appropriate interest from the date of the distribution to the date of the repayment, returned by the participant or beneficiary to the plan. To the extent the amount returned to a defined contribution plan is less than the Overpayment adjusted for earnings at the plan's earnings rate, then the employer or another person must contribute the difference to the plan. The Overpayment, adjusted for earnings at the plan's earnings rate to the date of the repayment, is to be placed in an unallocated account, as described in section 6.06(2), to be used to reduce employer contributions (other than elective deferrals) in the current year and succeeding year(s) (or if the amount would have been allocated to other eligible employees who were in the plan for the year of the failure if the failure had not occurred, then that amount is reallocated to the other eligible employ-

ees in accordance with the plan's allocation formula). In addition, the employer must notify the employee that the Overpayment was not eligible for favorable tax treatment accorded to distributions from Qualified Plans (and, specifically, was not eligible for tax-free rollover).

.07 *Rules relating to reporting plan loan failures*. (1) *General rule for loans*. Unless correction is made in accordance with this section 6.07(2) or (3), a deemed distribution under § 72(p)(1) in connection with a failure relating to a loan to a participant made from a plan must be reported on Form 1099–R with respect to the affected participant and any applicable income tax withholding amount that was required to be paid in connection with the failure (see § 1.72(p)–1, Q&A–15) must be paid by the employer. As part of VCP, the deemed distribution may be reported on Form 1099–R with respect to the affected participant for the year of correction (instead of the year of the failure. The relief of reporting the participant's loan as a deemed distribution on Form 1099–R in the year of correction, as described in the preceding sentence, applies only if the Plan Sponsor specifically requests such relief.

(2) *Special rules for loans*. (a) *In general*. The correction methods set forth in section 6.07(2)(b) and (c) and section 6.07(3) are available for plan loans that do not comply with one or more requirements of § 72(p)(2) and are corrected through VCP. The correction methods described in section 6.07(2)(b) and (c) and section 6.07(3) are not available if the maximum period for repayment of the loan pursuant to § 72(p)(2)(B) has expired. The Service reserves the right to limit the use of the correction methods listed in section 6.07(2)(b) and (c) and section 6.07(3) to situations that it considers appropriate; for example, where the loan failure is caused by employer action. A deemed distribution corrected under section 6.07(2)(b) or (c) or under section 6.07(3) is not required to be reported on Form 1099–R and repayments made by correction under sections 6.07(2) and 6.07(3) do not result in the affected participant having additional basis in the plan for purposes of determining the tax treatment of subsequent distributions from the plan to the affected participant. The relief from reporting the participant's loan as a deemed distribution on Form 1099–R, as described in the preceding sentence, applies only if the Plan Sponsor specifically requests such relief and provides an explanation supporting the request.

(b) *Loans in excess of § 72(p)(2)(A)*. A failure to comply with plan provisions requiring that loans comply with § 72(p)(2)(A) may be corrected by a corrective repayment to the plan based on the excess of the loan amount over the maximum loan amount under § 72(p)(2)(A). In the event that loan repayments were made in accordance with the amortization schedule for the loan before correction, such prior repayments may be applied (i) solely to reduce the portion of the loan that did not exceed the maximum loan amount under § 72(p)(2)(A) (so that the corrective repayment would equal the original loan excess plus interest thereon), (ii) to reduce the loan excess to the extent of the interest thereon, with the remainder of the repayments applied to reduce the portion of the loan that did not exceed the maximum loan amount under § 72(p)(2)(A) (so that the corrective repayment would equal the original loan excess), or (iii) *pro rata* against the loan excess and the maximum loan amount under § 72(p)(2)(A) (so that the corrective repayment would equal the outstanding balance remaining on the original loan excess on the date that corrective repayment is made). After the corrective payment is made, the loan may be reformed to amortize the remaining principal balance as of the date of repayment over the remaining period of the original loan. This is permissible as long as the recalculated payments over the remaining period would not cause the loan to violate the maximum duration permitted under § 72(p)(2)(B). The maximum duration is determined from the date the original loan was made. In addition, the amortization payments determined for the remaining period must comply with the level amortization requirements of § 72(p)(2)(C).

(c) *Loan terms that do not satisfy § 72(p)(2)(B) or (C)*. For a failure of loan repayment terms to provide for a repayment schedule that complies with § 72(p)(2)(B) or (C), the failure may be corrected by a reamortization of the loan balance in accordance with § 72(p)(2)(C) over the remaining period that is the maximum period that complies with § 72(p)(2)(B) measured from the original date of the loan.

(d) *No requirement for plan provisions*. This section 6.07 also applies even if the plan does not require loans to satisfy the requirements of § 72(p)(2). However, to correct the ERISA fiduciary violations associated with the failures described in section 6.07(2)(b), (c) and section 6.07(3) under the Department of Labor's Voluntary Fiduciary Correction Program, the plan must contain plan provisions requiring that loans comply with § 72(p)(2)(A), (B) and (C).

(3) *Defaulted loans*. A failure to repay the loan in accordance with the loan terms where the terms satisfy § 72(p)(2) may be corrected by (i) a lump sum repayment equal to the additional repayments that the affected participant would have made to the plan if there had been no failure to repay the plan, plus interest accrued on the missed repayments, (ii) reamortizing the outstanding balance of the loan, including accrued interest, over the remaining payment schedule of the original term of the loan or the period remaining had the loan been amortized over the maximum period that complies with § 72(p)(2)(B), measured from the original date of the loan, or (iii) any combination of (i) or (ii).

.08 *Correction under statute or regulations*. Generally, none of the correction programs are available to correct failures that can be corrected under the Code and related regulations. For example, as a general rule, a Plan Document Failure that is a disqualifying provision for which the remedial amendment period under § 401(b) has not expired can be corrected under provisions of the Code through retroactive remedial amendment.

.09 *Matters subject to excise taxes or other penalties*. (1) Except as provided in this revenue procedure, the correction programs are not available for events for which the Code provides tax consequences other than plan disqualification (such as the imposition of an excise tax or additional income tax). For example, funding deficiencies (failures to make the required contributions to a plan subject to § 412), prohibited transactions, and failures to file the Form 5500 series cannot be corrected under this revenue procedure.

(2) As part of VCP and Audit CAP, if a failure involves the failure to satisfy the minimum required distribution requirements of § 401(a)(9), in appropriate cases, the Service will waive the excise

tax under § 4974 applicable to plan participants. The waiver will be included in the compliance statement or in the closing agreement in the case of Audit CAP. Under VCP, the Plan Sponsor, as part of the submission, must request the waiver and, in cases where the participant subject to the excise tax is either an owner-employee as defined in § 401(c)(3) or a 10% owner of a corporation, the Plan Sponsor must also provide an explanation supporting the request. See section 12.02(2) relating to the applicable compliance fee for certain § 401(a)(9) failures. Under Audit CAP, the Plan Sponsor must make a specific request for waiver of the excise tax under § 4974. The Plan Sponsor should also provide an explanation supporting the request for a waiver. Upon reviewing the request, the reasons for the failure, and other facts or circumstances of the case under examination, the Service will determine whether it is appropriate to approve the waiver of the excise tax as part of the closing agreement negotiated under Audit CAP.

(3) As part of VCP, if the failure involves a correction that requires the Plan Sponsor to make a plan contribution that is not deductible, in appropriate cases, the Service will not pursue the excise tax under § 4972 on such nondeductible contributions. The Plan Sponsor, as part of the submission must request the relief and provide an explanation supporting the request.

(4) As part of VCP, if a failure results in excess contributions as defined in § 4979(c) or excess aggregate contributions as defined in § 4979(d) under a plan, the Service will not pursue the excise tax under § 4979 in appropriate cases, *e.g.*, where correction is made for any case in which the ADP test was timely performed but, due to reliance on inaccurate data, resulted in an insufficient amount of excess elective deferrals having been distributed to HCEs. The Plan Sponsor, as part of the submission, must request the relief and provide an explanation supporting the request.

(5) Subject to section 6.03(4), as part of VCP, in appropriate cases, the Service will not pursue the excise tax under § 4973 relating to excess contributions made to IRA (including either an individual retirement account (as defined in § 408(a)) or an individual retirement annuity (as defined in § 408(b)) under any of the following circumstances:

(a) As part of the proposed correction for Overpayments, the participant or beneficiary ("recipient") removes the Overpayment (plus earnings) from the recipient's IRA and returns that amount to the plan;

(b) As part of the proposed correction for Excess Amounts, the recipient removes the Excess Amount (plus earnings) from the recipient's IRA and reports that amount (reduced by any applicable after-tax employee contribution) as a taxable distribution for the year in which the Excess Amount (plus earnings) is removed from the recipient's IRA. The amount removed will generally be taxed in a manner that is similar to the manner in which the corrective disbursement of elective deferrals is taxed, as described in section 3 of Rev. Proc. 92–93; or

(c) In the case of an Overpayment that was not made pursuant to a distributable event, the Plan Sponsor, as part of the submission, must request relief from the § 4973 excise tax and provide an explanation supporting the request.

(6) As part of VCP, in appropriate cases, the Service will not pursue the 10% additional income tax under § 72(t) (or will pursue only a portion thereof) if, as part of the proposed correction for Overpayments that were not made pursuant to a distributable event, the participant or beneficiary ("recipient") removes the amount improperly distributed and rolled over (plus earnings) from the recipient's IRA and returns that amount to the plan. In appropriate cases, as a condition for not pursuing all or a portion of the additional tax, the Service may require the Plan Sponsor to pay an additional fee under VCP not in excess of the 10% additional income tax under § 72(t). The Plan Sponsor, as part of the submission, must request the relief and provide an explanation supporting the request.

.10 *Correction for SEPs and SIMPLE IRA Plans*. (1) *Correction for SEPs and SIMPLE IRA Plans generally*. Generally, the correction for a SEP or a SIMPLE IRA Plan is expected to be similar to the correction required for a Qualified Plan with a similar Qualification Failure (*i.e.*, Plan Document Failure, Operational Failure, Demographic Failure and Employer Eligibility Failure).

(2) *Special correction for SEPs and SIMPLE IRA Plans*. In any case in which correction under section 6.10(1) is not feasible for a SEP or SIMPLE IRA Plan or in any other case determined by the Service in its discretion (including failures relating to §§ 402(g), 415, and 401(a)(17), failures relating to deferral percentages, discontinuance of contributions to a SARSEP or SIMPLE IRA Plan, and retention of Excess Amounts for cases in which there has been no violation of a statutory limitation with respect to a SEP or SIMPLE IRA Plan), the Service may provide for a different correction. See section 12.05(2) for a special fee that may apply in such a case.

(3) *Correction of failure to satisfy deferral percentage test*. If the failure involves a violation of the deferral percentage test under § 408(k)(6)(A)(iii) applicable to a SARSEP, the failure may be corrected in either one of the following ways:

(a) The Plan Sponsor may make contributions that are 100% vested to all eligible nonhighly compensated employees (to the extent permitted by § 415) necessary to raise the deferral percentage needed to pass the test. This amount may be calculated as the same percentage of compensation (regardless of the terms of the SEP).

(b) The Plan Sponsor may effect distribution of excess contributions, adjusted for earnings through the date of correction, to highly compensated employees to correct the failure. The Plan Sponsor must also contribute to the SEP an amount equal to the total amount distributed. This amount must be allocated to (i) current employees who were nonhighly compensated employees in the year of the failure, (ii) current nonhighly compensated employees who were nonhighly compensated employees in the year of the failure, or (iii) employees (both current and former) who were nonhighly compensated employees in the year of the failure.

(4) *Treatment of undercontributions to a SEP or a SIMPLE IRA Plan*. (a) *Make-up contributions; earnings*. The Plan Sponsor should correct undercontributions to a SEP or a SIMPLE IRA Plan by contributing make-up amounts that are fully vested, adjusted for earnings from the date of the failure to the date of correction.

(b) *Earnings adjustment methods*. Insofar as SEP and SIMPLE IRA Plan assets are held in IRAs, there is no earnings rate under the SEP or SIMPLE IRA Plan as a whole. If it is not feasible to make a reasonable estimate of what the actual invest-

ment results would have been, a reasonable interest rate may be used.

(5) *Treatment of Excess Amounts under a SEP or a SIMPLE IRA Plan*. (a) *Distribution of Excess Amounts*. For purposes of section 6.10, an Excess Amount is an amount contributed on behalf of an employee that is in excess of an employee's benefit under the plan, or an elective deferral in excess of the limitations of §§ 402(g) or 408(k)(6)(A)(iii). If an Excess Amount is attributable to elective deferrals, the Plan Sponsor may effect distribution of the Excess Amount, adjusted for earnings through the date of correction, to the affected participant. The amount distributed to the affected participant is includible in gross income in the year of distribution. The distribution is reported on Form 1099–R for the year of distribution with respect to each participant receiving the distribution. In addition, the Plan Sponsor must inform affected participants that the distribution of an Excess Amount is not eligible for favorable tax treatment accorded to distributions from a SEP or a SIMPLE IRA Plan (and, specifically, is not eligible for tax-free rollover). If the Excess Amount is attributable to employer contributions, the Plan Sponsor may effect distribution of the employer Excess Amount, adjusted for earnings through the date of correction, to the Plan Sponsor. The amount distributed to the Plan Sponsor is not includible in the gross income of the affected participant. The Plan Sponsor is not entitled to a deduction for such employer Excess Amount. The distribution is reported on Form 1099–R issued to the participant indicating the taxable amount as zero.

(b) *Retention of Excess Amounts*. If an Excess Amount is retained in the SEP or SIMPLE IRA Plan under section 6.10(5), a special fee, in addition to the VCP submission fee, will apply. See section 12.05(2) for the special fee. The Plan Sponsor is not entitled to a deduction for an Excess Amount retained in the SEP or SIMPLE IRA Plan. In the case of an Excess Amount retained in a SEP that is attributable to a § 415 failure, the Excess Amount, adjusted for earnings through the date of correction, must reduce affected participants' applicable § 415 limit for the year following the year of correction (or for the year of correction if the Plan Sponsor so chooses), and subsequent years, until the excess is eliminated.

(c) *De minimis Excess Amounts*. If the total Excess Amount in a SEP or SIMPLE IRA Plan, whether attributable to elective deferrals or employer contributions, is $100 or less, the Plan Sponsor is not required to distribute the Excess Amount and the special fee described in section 12.05(2) does not apply.

.11 *Confidentiality and disclosure*. Because each correction program relates directly to the enforcement of the Code qualification requirements, the information received or generated by the Service under the program is subject to the confidentiality requirements of § 6103 and is not a written determination within the meaning of § 6110.

.12 *No effect on other law*. Correction under these programs has no effect on the rights of any party under any other law, including Title I of ERISA. The Department of Labor maintains a Voluntary Fiduciary Correction Program under which certain ERISA fiduciary violations may be corrected. The Department of Labor also maintains a Delinquent Filer Voluntary Compliance Program under which certain failures to comply with the annual reporting requirements (Form 5500 series) under ERISA may be corrected.

PART IV. SELF-CORRECTION (SCP)

SECTION 7. IN GENERAL

The requirements of this section 7 are satisfied with respect to an Operational Failure if the Plan Sponsor of a Qualified Plan, a 403(b) Plan, a SEP, or a SIMPLE IRA Plan satisfies the requirements of section 8 (relating to insignificant Operational Failures) or, in the case of a Qualified Plan or a 403(b) Plan, section 9 (relating to significant Operational Failures).

SECTION 8. SELF-CORRECTION OF INSIGNIFICANT OPERATIONAL FAILURES

.01 *Requirements*. The requirements of this section 8 are satisfied with respect to an Operational Failure if the Operational Failure is corrected and, given all the facts and circumstances, the Operational Failure is insignificant. This section 8 is available for correcting an insignificant Operational Failure even if the plan or Plan Sponsor is Under Examination and even if the Operational Failure is discovered on examination.

.02 *Factors*. The factors to be considered in determining whether or not an Operational Failure under a plan is insignificant include, but are not limited to: (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 by the failure); (2) the percentage of plan assets and contributions involved in the failure; (3) the number of years the failure occurred; (4) the number of participants affected relative to the total number of participants in the plan; (5) the number of participants affected as a result of the failure relative to the number of participants who could have been affected by the failure; (6) whether correction was made within a reasonable time after discovery of the failure; 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). No single factor is determinative. Additionally, factors (2), (4), and (5) should not be interpreted to exclude small businesses.

.03 *Multiple failures*. In the case of a plan with more than one Operational Failure in a single year, or Operational Failures that occur in more than one year, the Operational Failures are eligible for correction under this section 8 only if all of the Operational Failures are insignificant in the aggregate. Operational Failures that have been corrected under SCP in section 9 and VCP in sections 10 and 11 are not taken into account for purposes of determining if Operational Failures are insignificant in the aggregate.

.04 *Examples*. The following examples illustrate the application of this section 8. It is assumed, in each example, that the eligibility requirements of section 4 relating to SCP (for example, the requirements of section 4.04 relating to established practices and procedures) have been satisfied and that no Operational Failures occurred other than the Operational Failures identified below.

Example 1: In 1991, Employer X established Plan A, a profit-sharing plan that satisfies the requirements of § 401(a) in form. In 2005, the benefits of 50 of the 250 participants in Plan A were limited by § 415(c).

However, when the Service examined Plan A in 2008, it discovered that, during the 2005 limitation year, the annual additions allocated to the accounts of 3 of these employees exceeded the maximum limitations under § 415(c). Employer X contributed $3,500,000 to the plan for the plan year. The amount of the excesses totaled $4,550. Under these facts, because the number of participants affected by the failure relative to the total number of participants who could have been affected by the failure, and the monetary amount of the failure relative to the total employer contribution to the plan for the 2005 plan year, are insignificant, the § 415(c) failure in Plan A that occurred in 2005 would be eligible for correction under this section 8.

Example 2: The facts are the same as in *Example 1*, except that the failure to satisfy § 415 occurred during each of the 2005 and 2007 limitation years. In addition, the three participants affected by the § 415 failure were not identical each year. The fact that the § 415 failures occurred during more than one limitation year did not cause the failures to be significant; accordingly, the failures are still eligible for correction under this section 8.

Example 3: The facts are the same as in *Example 1*, except that the annual additions of 18 of the 50 employees whose benefits were limited by § 415(c) nevertheless exceeded the maximum limitations under § 415(c) during the 2005 limitation year, and the amount of the excesses ranged from $1,000 to $9,000, and totaled $150,000. Under these facts, taking into account the number of participants affected by the failure relative to the total number of participants who could have been affected by the failure for the 2005 limitation year (and the monetary amount of the failure relative to the total employer contribution), the failure is significant. Accordingly, the § 415(c) failure in Plan A that occurred in 2005 is ineligible for correction under this section 8 as an insignificant failure.

Example 4: Employer J maintains Plan C, a money purchase pension plan established in 1992. The plan document satisfies the requirements of § 401(a). The formula under the plan provides for an employer contribution equal to 10% of compensation, as defined in the plan. During its examination of the plan for the 2005 plan year, the Service discovered that the employee responsible for entering data into the employer's computer made minor arithmetic errors in transcribing the compensation data with respect to 6 of the plan's 40 participants, resulting in excess allocations to those 6 participants' accounts. Under these facts, the number of participants affected by the failure relative to the number of participants that could have been affected is insignificant, and the failure is due to minor data errors. Thus, the failure occurring in 2005 would be insignificant and therefore eligible for correction under this section 8.

Example 5: Public School maintains for its 200 employees a salary reduction 403(b) Plan (the "Plan") that satisfies the requirements of § 403(b). The business manager has primary responsibility for administering the Plan, in addition to other administrative functions within Public School. During the 2005 plan year, a former employee should have received an additional minimum required distribution of $278 under § 403(b)(10). Another participant received an impermissible hardship withdrawal of $2,500. Another participant made elective deferrals of which $1,000 was in excess of the § 402(g) limit. Under these facts, even though multiple failures occurred in a single plan year, the failures will be eligible for correction under this section 8 because in the aggregate the failures are insignificant.

SECTION 9. SELF-CORRECTION OF SIGNIFICANT OPERATIONAL FAILURES

.01 *Requirements*. The requirements of this section 9 are satisfied with respect to an Operational Failure (even if significant) if the Operational Failure is corrected and the correction is either completed or substantially completed (in accordance with section 9.04) by the last day of the correction period described in section 9.02.

.02 *Correction period*. (1) *End of correction period*. The last day of the correction period for an Operational Failure is the last day of the second plan year following the plan year for which the failure occurred. However, in the case of a failure to satisfy the requirements of §§ 401(k)(3), 401(m)(2), or 401(m)(9), the correction period does not end until the last day of the second plan year following the plan year that includes the last day of the additional period for correction permitted under §§ 401(k)(8) or 401(m)(6). If a 403(b) Plan does not have a designated plan year, the plan year is deemed to be the calendar year for purposes of this section 9.02.

(2) *Extension of correction period for Transferred Assets*. In the case of an Operational Failure that relates only to Transferred Assets, or to a plan assumed in connection with a corporate merger, acquisition or other similar employer transaction, the correction period does not end until the last day of the first plan year that begins after the corporate merger, acquisition, or other similar employer transaction between the Plan Sponsor and the sponsor of the transferor plan or the prior sponsor of an assumed plan.

(3) *Effect of examination*. The correction period for an Operational Failure that occurs for any plan year ends, in any event, on the first date the plan or Plan Sponsor is Under Examination for that plan year (determined without regard to the second sentence of section 9.02). (But see section 9.04 for special rules permitting completion of correction after the end of the correction period.)

.03 *Correction by plan amendment*. In order to complete correction by plan amendment (as permitted under section 4.05), the appropriate determination letter application must be submitted before the end of the plan's applicable remedial amendment period described in Rev. Proc. 2007–44.

.04 *Substantial completion of correction*. Correction of an Operational Failure is substantially completed by the last day of the correction period only if the requirements of either paragraph (1) or (2) are satisfied.

(1) The requirements of this paragraph (1) are satisfied if:

(a) during the correction period, 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 of the Operational Failure as expeditiously as practicable, and

(b) within 120 days after the last day of the correction period, the Plan Sponsor completes correction of the Operational Failure.

(2) The requirements of this paragraph (2) are satisfied if:

(a) during the correction period, correction is completed with respect to 65% of all participants affected by the Operational Failure, and

(b) thereafter, the Plan Sponsor completes correction of the Operational Failure with respect to the remaining affected participants in a diligent manner.

.05 *Examples*. The following examples illustrate the application of this section 9. It is assumed, in each example, that the eligibility requirements of section 4 relating to SCP have been met.

Example 1: Employer Z established a qualified defined contribution plan in 2003 and received a favorable determination letter. During 2007, while doing a self-audit of the operation of the plan for the 2006 plan year, the plan administrator discovered that, despite the practices and procedures established by Employer Z with respect to the plan, several employees eligible to participate in the plan were excluded from participation. The administrator also found that for 2006 Operational Failures occurred because the elective deferrals of additional employees exceeded the § 402(g) limit and Employer Z failed to make the required top-heavy minimum contribution. In addition, during the review of the administration for the 2006 year, it was found that the plan administrator intended to implement correction for the failure to satisfy the ADP test (as described in § 401(k)(3)) for the 2005 plan year. During the 2008 plan year, the Plan Sponsor made QNECs on behalf of the excluded employees, distributed the excess

deferrals to the affected participants, and made a top-heavy minimum contribution to all participants entitled to that contribution for the 2006 plan year. Each corrective contribution and distribution was credited with earnings at a rate appropriate for the plan from the date the corrective contribution or distribution should have been made to the date of correction. The failed ADP test for 2005 was corrected by making corrective contributions, adjusted for earnings, on behalf of nonhighly compensated employees using the method described in Appendix A .03 of this revenue procedure. Under these facts, the Plan Sponsor has corrected the ADP test failure for the 2005 plan year and the Operational Failures for the 2006 plan year within the correction period and thus satisfied the requirements of this section 9.

Example 2: Employer A established a qualified defined contribution plan, Plan A, in 1993 and has received a favorable determination letter for the applicable law changes. In April 2007, Employer A purchased all of the stock of Employer B, a wholly-owned subsidiary of Employer C. Employees of Employer B participated in Plan C, a qualified defined contribution plan sponsored by Employer C. Following Employer A's review of Plan C, Employer A and Employer C agreed that Plan A would accept a transfer of plan assets from Plan C attributable to the account balances of the employees of Employer B who had participated in Plan C. As part of this agreement, Employer C represented to Employer A that Plan C is tax qualified. Employers A and C also agreed that such transfer would be in accordance with § 414(l) and § 1.414(l)–1 and addressed issues related to costs associated with the transfer. Following the transaction, the employees of Employer B began participation in Plan A. Effective July 1, 2007, Plan A accepted the transfer of plan assets from Plan C. After the transfer, Employer A determined that all the participants in one division of Employer B had been incorrectly excluded from allocation of the profit sharing contributions for the 2002 and 2003 plan years. During 2008, Employer A made corrective contributions on behalf of the affected participants. The corrective contributions were credited with earnings at a rate appropriate for the plan from the date the corrective contribution should have been made to the date of correction and Employer A otherwise complied with the requirements of SCP. Under these facts, Employer A has, within the correction period, corrected the Operational Failures for the 2002 and 2003 plan years with respect to the assets transferred to Plan A, and thus satisfied the requirements of this section 9.

PART V. VOLUNTARY CORRECTION PROGRAM WITH SERVICE APPROVAL (VCP)

SECTION 10. VCP PROCEDURES

.01 *VCP requirements*. The requirements of this section 10 are satisfied with respect to failures submitted in accordance with the requirements of this section 10 if the Plan Sponsor pays the compliance fee required under section 12 and implements the corrective actions and satisfies any other conditions in the compliance statement described in section 10.08.

.02 *Identification of failures*. VCP is not based upon an examination of the plan by the Service. Only the failures raised by the Plan Sponsor or failures identified by the Service in processing the application are addressed under VCP, and only those failures are covered by a VCP compliance statement. The Service will not make any investigation or finding under VCP concerning whether there are failures.

.03 *Effect of VCP submission on examination*. Because VCP does not arise out of an examination, consideration under VCP does not preclude or impede (under § 7605(b) or any administrative provisions adopted by the Service) a subsequent examination of the Plan Sponsor or the plan by the Service with respect to the taxable year (or years) involved with respect to matters that are outside the compliance statement. However, a Plan Sponsor's statements describing failures are made only for purposes of VCP and will not be regarded by the Service as an admission of a failure for purposes of any subsequent examination. See section 5.07 for the definition of Under Examination.

.04 *No concurrent examination activity*. Except in unusual circumstances, a plan that has been properly submitted under VCP will not be examined while the submission is pending. Notwithstanding the above, a plan that is eligible for a Group Submission under section 10.11 may be examined while the Group Submission is pending with respect to issues not identified in the Group Submission at the time such plan comes Under Examination. In addition, if it is determined that either the plan or the Plan Sponsor was, or may have been a party to an abusive tax avoidance transaction (as defined under section 4.13(2)), the Service may authorize the examination of the plan, even if a submission pursuant to VCP is pending. This practice regarding concurrent examinations does not extend to other plans of the Plan Sponsor. Thus, any plan of the Plan Sponsor that is not pending under VCP could be subject to examination.

.05 *Determination letter application for plan amendments related to a VCP submission*. In any case in which a determination letter may be submitted pursuant to section 6.05, the Plan Sponsor must submit a copy of the amendment, the appropriate determination letter application form (*i.e.*, Form 5300, 5307 or 5310) , and the appropriate user fee concurrently and to the same address as the VCP submission. Pursuant to section 12.03 of Rev. Proc. 2007–44, in the case of individually designed plans, a restated plan generally will be required. The user fee for the determination letter application and the fee for the VCP submission must be submitted on separate checks made payable to the U.S. Treasury. See section 11.13 for the VCP mailing address.

.06 *Determination letter applications not related to a VCP submission*. (1) The Service may process a determination letter application submitted under the determination letter program (including an application requested on Form 5310) concurrently with a VCP submission for the same plan. However, issuance of the determination letter in response to an application made on a Form 5310 will be suspended pending the closure of the VCP submission.

(2) A submission of a plan under the determination letter program does not constitute a submission under VCP. If the Plan Sponsor discovers a Qualification Failure, the Qualification Failure may not be corrected as part of the determination letter process. The Plan Sponsor may use SCP and VCP instead, as applicable. If the Service in connection with a determination letter application discovers a Qualification Failure, the Service may issue a closing agreement with respect to the failures identified or, if appropriate, refer the case to Employee Plans Examinations. In either case, the fee structure in section 12 relating to VCP, will not apply. Except as provided in section 10.06(3), the sanction in section 14.01 relating to Audit CAP will apply. See section 5.07(3) for a description of when a plan submitted for a determination letter is considered to be Under Examination.

(3) If the Service in connection with a determination letter application discovers the plan has not been amended timely for tax legislation changes, the fee structure in section 14.04 will apply.

.07 *Processing of submission*. (1) *Screening of submission*. Upon receipt of a submission under VCP, the Service will review whether the eligibility requirements of section 4 and the submission requirements of section 11 are satisfied.

(2) *Eligibility of submission*. If, at any stage of the review process, the Service determines that a VCP submission is seriously deficient or that the application of VCP would be inappropriate or impracticable, the Service reserves the right to return the submission without contacting the Plan Sponsor. If no substantive processing of the case has occurred, the Service will refund the compliance fee submitted with the request.

(3) *Review of submission*. Once the Service determines that the submission is complete under VCP, the Service will contact the Plan Sponsor or the Plan Sponsor's representative to discuss the proposed corrections and the plan's administrative procedures.

(4) *Additional information required*. If additional information is required, a Service representative will generally contact the Plan Sponsor or the Plan Sponsor's representative and explain what is needed to complete the submission. The Plan Sponsor will have 21 calendar days from the date of this contact to provide the requested information. If the information is not received within 21 days, the matter will be closed, the compliance fee will not be returned, and the case may be referred to Employee Plans Examinations. Any request for an extension of the 21-day time period must be made in writing within the 21-day time period and must be approved by the Service (by the applicable group manager).

(5) *Additional failures discovered after initial submission*. (a) A Plan Sponsor that discovers additional unrelated Qualification or 403(b) Failures after its initial submission may request that such failures be added to its submission. However, the Service retains the discretion to reject the inclusion of such failures if the request is not timely (for example, if the Plan Sponsor makes its request when processing of the submission is substantially complete) or the application of VCP would be inappropriate or impracticable.

(b) If the Service discovers an unrelated Qualification or 403(b) Failure while the request is pending, the failure generally will be added to the failures under consideration. However, the Service retains the discretion to determine that a failure is outside the scope of the voluntary request for consideration because the Plan Sponsor did not voluntarily bring it forward. In this case, if the additional failure is significant, all aspects of the plan may be examined and the rules pertaining to Audit CAP will apply.

(6) *Conference right*. If the Service initially determines that it cannot issue a compliance statement because the parties cannot agree upon correction or a change in administrative procedures, the Plan Sponsor (generally through the Plan Sponsor's representative) will be contacted by the Service representative and offered a conference with the Service. The conference can be held either in person or by telephone and must be held within 21 calendar days of the date of contact. The Plan Sponsor will have 21 calendar days after the date of the conference to submit additional information in support of the submission. Any request for an extension of the 21-day time period must be made in writing within the 21-day time period and must be approved by the Service (by the applicable group manager). Additional conferences may be held at the discretion of the Service.

(7) *Failure to reach resolution*. If the Service and the Plan Sponsor cannot reach agreement with respect to the submission, the matter will be closed, the compliance fee will not be returned, and the case may be referred to Employee Plans Examinations. In the case of an Anonymous Submission that fails to reach resolution under this revenue procedure, the Service will refund 50% of the applicable VCP fee. See section 12 for the VCP fee.

(8) *Issuance of compliance statement*. If agreement is reached, the Service will send to the Plan Sponsor a compliance statement specifying the corrective action required. If the original submission is subsequently materially modified, then, unless the Plan Sponsor has submitted a penalty of perjury statement with respect to such subsequent modifications, the Plan Sponsor will be required to sign the compliance statement. In such case, the Service will send to the Plan Sponsor an unsigned compliance statement specifying the corrective action required. Within 30 calendar days of the date the compliance statement is sent, a Plan Sponsor must sign the compliance statement and return it and any compliance fee required to be paid at the time that the compliance statement is signed (see section 11.05). The Service will then issue a signed copy of the compliance statement to the Plan Sponsor. If the Plan Sponsor does not sign the compliance statement and send it to the Service (with a compliance fee, if applicable) within 30 calendar days, the plan may be referred to Employee Plans Examinations.

(9) *Timing of correction*. The Plan Sponsor must implement the specific corrections and administrative changes set forth in the compliance statement within 150 days of the date of the compliance statement. Any request for an extension of this time period must be made prior to the expiration of the correction period in writing and must be approved by the Service. Correction of the failure to adopt timely interim amendments or amendments relating to the implementation of optional law changes, as described in section 6.05(3)(a), must be made by the date of the submission. That is, the application should include the executed amendments that would correct this failure.

(10) *Modification of compliance statement*. Once the compliance statement has been issued (based on the information provided), the Plan Sponsor cannot request a modification of the compliance terms except by a new request for a compliance statement. However, if the requested modification is minor and is postmarked within the correction period provided for in the compliance statement, the compliance fee will be equal to the lesser of one-half of the original compliance fee or $1,500. The request should be sent to the VCP mailing address provided for in section 11.13. The request should include a letter explaining the modification, a copy of the original compliance statement, a copy of the original application and if applicable any other pertinent correspondence relating to the issuance of the original compliance statement, and a check for the compliance fee payable to the U.S. Treasury.

(11) *Verification*. Once the compliance statement has been issued, the Service may require verification that the correction methods have been complied with and that any plan administrative procedures required by the compliance statement have been implemented. This verification does not constitute an examination of the books and records of the employer or the plan (within the meaning of § 7605(b)). If the Service determines that the Plan Sponsor did not implement the corrections and procedures within the stated time period, the

plan may be referred to Employee Plans Examinations.

.08 *Compliance statement*. (1) *General description of compliance statement*. The compliance statement issued for a VCP submission addresses the failures identified, the terms of correction, including any revision of administrative procedures, and the time period within which proposed corrections must be implemented, including any changes in administrative procedures. The compliance statement also provides that the Service will not treat the plan as failing to satisfy the applicable requirements of the Code on account of the failures described in the compliance statement if the conditions of the compliance statement are satisfied. With respect to a failure to amend a plan timely for interim amendments, or optional law changes, as described in section 6.05(3) of this revenue procedure, the issuance of a compliance statement will result in the corrective amendments being treated as if they had been adopted timely for the purpose of determining the availability of the extended remedial amendment period currently described in Rev. Proc. 2007–44. However, the issuance of such a compliance statement does not constitute a determination as to whether the interim amendment or other corrective amendment to reflect the implementation of optional law changes, as drafted, complies with the change in qualification requirement. The compliance statement will not make any determination on whether the corrective amendment conforms the terms of the plan to the plan's prior operations, and whether the amendment complies with the requirements of § 401(a), including the requirements of §§ 401(a)(4), 410(b), and 411(d)(6). Where current procedures are inadequate for operating the plan in conformance with the applicable requirements of the Code, the compliance statement will be conditioned upon the implementation of stated administrative procedures. The Service may prescribe appropriate administrative procedures in the compliance statement.

(2) *Compliance statement conditioned upon timely correction*. The compliance statement is conditioned on (i) there being no misstatement or omission of material facts in connection with the submission and (ii) the implementation of the specific corrections and satisfaction of any other conditions in the compliance statement.

(3) *Authority delegated*. Compliance statements (including relief from any excise tax or other penalty as provided under section 6.09) are authorized to be signed by managers within Employee Plans Rulings and Agreements, under the Tax Exempt and Government Entities Operating Division of the Service.

.09 *Effect of compliance statement on examination*. The compliance statement is binding upon both the Service and the Plan Sponsor or Eligible Organization (as defined in section 10.11(2)) with respect to the specific tax matters identified therein for the periods specified, but does not preclude or impede an examination of the plan by the Service relating to matters outside the compliance statement, even with respect to the same taxable year or years to which the compliance statement relates.

.10 *Special rules relating to Anonymous (John Doe) Submissions*. (1) The Anonymous Submission procedure in this section 10.10 permits submission of Qualified Plans, 403(b) Plans, SEPs, and SIMPLE IRA Plans under VCP without initially identifying the applicable plan(s), the Plan Sponsor(s), or the Eligible Organization. The requirements of this revenue procedure relating to VCP, including sections 10, 11, and 12, apply to these submissions. However, information identifying the plan or the Plan Sponsor may be redacted (and the power of attorney statement and the penalty of perjury statement need not be included with the initial submission). In addition, if a determination letter application will be requested as part of the submission, the determination letter application should not be submitted until the time all identifying information is provided to the Service. For purposes of processing the submission, the state of the Plan Sponsor must be identified in the initial submission. All anonymous submissions must be numbered or labeled on the first page of the VCP submission by the Plan Sponsor or its representative to facilitate identification and tracking of the submission. The identification number should be unique to the submission and should not be used with respect to any other anonymous submission of the Plan Sponsor or representative. Once the Service and the plan representative reach agreement with respect to the submission, the Service will contact the plan representative in writing indicating the terms of the agreement. The Plan Sponsor will have 21 calendar days from the date of the letter of agreement to identify the plan and Plan Sponsor. If the Plan Sponsor does not submit the identifying material (including the power of attorney statement and the penalty of perjury statement) within 21 calendar days of the letter of agreement, the matter will be closed and the compliance fee will not be returned.

(2) Notwithstanding section 10.04, until the plan(s) and Plan Sponsor(s) are identified to the Service, a submission under this subsection does not preclude or impede an examination of the Plan Sponsor or its plan(s). Thus, a plan submitted under the Anonymous Submission procedure that comes Under Examination prior to the date the plan(s) and Plan Sponsor(s) identifying materials are received by the Service will no longer be eligible under VCP.

.11 *Special rules relating to Group Submissions*. (1) *General rules*. An Eligible Organization may submit a VCP request for a Qualified Plan, a 403(b) Plan, a SEP, or a SIMPLE IRA Plan under a Group Submission for Plan Document, Operational and Employer Eligibility Failures. If a sponsor of a master or prototype plan submits failures with respect to more than one master or prototype plan, each plan will be treated as a separate submission and a separate fee must be submitted for each prototype plan. Similarly, if a Volume Submitter practitioner submits failures with respect to more than one Volume Submitter plan, each plan will be treated as a separate submission and a separate fee must be submitted for each specimen plan.

(2) *Eligible Organizations*. For purposes of a Group Submission, the term "Eligible Organization" means either (a) a Sponsor (as that term is defined in section 4.07 of Rev. Proc. 2005–16, 2005–1 C.B. 674) of a master or prototype plan, (b) a Volume Submitter practitioner, as that term is defined in section 13.04 of Rev. Proc. 2005–16, (c) an insurance company or other entity that has issued annuity contracts or provides services with respect to assets for 403(b) Plans, or (d) an entity that provides its clients with administrative services with respect to Qualified Plans, 403(b) Plans, SEPs, or SIMPLE IRA Plans. An Eligible

Organization is not eligible to make a Group Submission unless the failures in their submission result from a systemic error involving the Eligible Organization that affects at least 20 plans and that result in at least 20 plans implementing correction. If, at any time before the Service issues the compliance statement, the number of plans falls below 20, the Eligible Organization must notify the Service that it is no longer eligible to make a Group Submission (and the compliance fee may be retained).

(3) *Special Group Submission procedures*. (a) In general, a Group Submission is subject to the same procedures as any VCP submission in accordance with sections 10 and 11, except that the Eligible Organization is responsible for performing the procedural obligations imposed on the Plan Sponsor under sections 10 and 11. See section 11.02(15) for a special submission requirement with respect to Group Submissions.

(b) The Eligible Organization must provide notice to all Plan Sponsors of the plans included in the Group Submission. The notice must be provided at least 90 days before the Eligible Organization provides the Service with the information required in section 10.11(3)(c). The purpose of the notice is to provide each Plan Sponsor with information relating to the Group Submission request. The notice should explain the reason for the Group Submission and inform the Plan Sponsor that the Plan Sponsor's plan will be included in the Group Submission unless the Plan Sponsor responds within the 90-day period to exclude the Plan Sponsor's plan from the Group Submission.

(c) When an Eligible Organization receives an unsigned compliance statement on the proposed correction and agrees to the terms of the compliance statement, the Eligible Organization must return to the Service within 120 calendar days not only the signed compliance statement and any additional compliance fee under section 12.05, but also a list containing (i) the employers' tax identification numbers for the Plan Sponsors of the plans to which the compliance statement may be applicable, (ii) the plans by name, plan number, type of plan, and number of plan participants, (iii) a certification that each Plan Sponsor received notice of the Group Submission, and (iv) a certification that each Plan Sponsor timely filed the Form 5500 series return for each plan. This list can be submitted at any stage of the submission process provided that the requirements of section 10.11(3)(b) have been satisfied. Applicants are encouraged to submit the list on a computer disk in Microsoft Word. Only those plans for which correction is actually made within 240 calendar days of the date of the signed compliance statement (or within such longer period as may be agreed to by the Service at the request of the Eligible Organization) will be covered by the compliance statement.

(d) Notwithstanding section 4.02, if a Plan Sponsor of a plan that is eligible to be included in the Group Submission and has not elected to be excluded from the Group Submission pursuant to section 10.11(3)(b) is notified of an impending Employee Plans examination after the Eligible Organization filed the Group Submission application, the Plan Sponsor's plan will be included in the Group Submission. However, with respect to such plan, the Group Submission will not preclude or impede an examination of the plan with respect to any failures not identified in the Group Submission application at the time the plan comes Under Examination.

.12 *Multiemployer and multiple employer plans*. (1) In the case of a multiemployer or multiple employer plan, the plan administrator (rather than any contributing or adopting employer) must request consideration of the plan under VCP. The request must be with respect to the plan, rather than a portion of the plan affecting any particular employer.

(2) If a VCP submission for a multiemployer or multiple employer plan has failures that apply to fewer than all of the employers under the plan, the plan administrator may choose to have the compliance fee (in section 12) or sanction (in section 14) calculated separately for each employer based on the assets attributable to that employer, rather than being attributable to the assets of the entire plan. Thus, the plan administrator may choose to apply the provisions of this paragraph where the failure is attributable in whole or in part to data, information, actions, or inactions that are within the control of the employers rather than the multiemployer or multiple employer plan (such as attribution in whole or in part to the failure of a employer to provide the plan administrator with full and complete information).

SECTION 11. APPLICATION PROCEDURES FOR VCP

.01 *General rules*. The requirements of this section 11 are satisfied if the request for a compliance statement from the Service under VCP satisfies the informational and other requirements of this section 11. In general, a request under VCP consists of a letter from the Plan Sponsor (which may be a letter from the Plan Sponsor's representative) or Eligible Organization (or representative) to the Service that contains a description of the failures, a description of the proposed methods of correction, and other procedural items set forth in this section 11. Appendix D and Appendix F of this revenue procedure are provided to assist the applicant in satisfying these requirements. Applicants are encouraged to use Appendix D or Appendix F, as applicable. If the Streamlined Application procedures described in section 11.02 are used, the applicant should use Appendix F and related schedules; otherwise, the application should be made in accordance with the provisions of section 11.03, using the format outlined in Appendix D.

The Appendix D and Appendix F formats for the application should not be modified. Also, since the application may form part of a document that is executed by the Service, the application itself (as distinguished from any cover letter or other supplemental letters that the applicant may provide) should not be submitted under the letterhead of the Plan Sponsor or the Plan Sponsor's authorized representative. The application also contains an Enforcement Resolution section (Part VII of Appendix D and Part IV of Appendix F). The applicant should complete only Parts I through VI, and Parts I through III, of Appendix D and Appendix F, respectively. The Enforcement Resolution (Part VII of Appendix D and Part IV of Appendix F) may only be completed by the Service. The application must include the Enforcement Resolution section. If the application is acceptable as submitted, the Service may execute the Enforcement Resolution page to indicate its approval of the submission. In such a situation, the executed Enforcement Resolution will be

made part of the compliance statement for the submission.

.02 *Streamlined Application procedures*. (1) If all of the Qualification Failures the Plan Sponsor proposes to correct through VCP are described in section 11.02(3) and the Plan Sponsor proposes to correct such failures using a correction method provided in the Appendix F schedules, then the submission should be made pursuant to those streamlined procedures. A Streamlined Application pursuant to this section consists of the Appendix F, the appropriate schedule(s) for the failure(s) (as described in section 11.02(3)), and all other documents required as indicated on the applicable schedule. The Service reserves the right to request additional information in connection with its processing of the Streamlined Application. The failure to provide the information required in the format provided in Appendix F may result in a delay in the processing of the submission. If only certain failures contained in the submission are described in section 11.02(3) (or one or more of the proposed corrections is not a method set forth in the Appendix F schedules), then the submission may be made pursuant to the Streamlined Application Procedures, to the extent applicable, and using the general rules of this section 11 to the extent the Streamlined Application procedures are not applicable.

(2) The Streamlined Application procedure in Appendix F should not be used if any of its provisions (including the failure, correction of the failure, or the Plan Sponsor's representation) do not apply to the Plan or Plan Sponsor. In such circumstance, a VCP submission should be made in accordance with the provisions of section 11.03 and Appendix D of this revenue procedure.

(3) The failures eligible for the Streamlined Application procedure and the applicable Appendix F schedules are described as follows:

(a) *Schedule 1*: If the Plan Sponsor failed to adopt timely (i) interim amendments described in section 6.05(2) or (ii) 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) of this revenue procedure, the Plan Sponsor should submit Appendix F, Schedule 1.

(b) *Schedule 2*: If the Plan Sponsor failed to timely adopt amendments to comply with required legislative or regulatory changes (other than those described in (3)(a)), the Plan Sponsor should submit Appendix F, Schedule 2.

(c) *Schedule 3*: If the Plan is a SEP or a SARSEP and experienced one or more of the failures shown on Appendix F, Schedule 3, and if the Plan Sponsor proposes to correct such failure(s) by using the method(s) provided on such schedule, the Plan Sponsor should submit Appendix F, Schedule 3.

(d) *Schedule 4*: If the Plan is a SIMPLE IRA and experienced one or more of the failures shown on Appendix F, Schedule 4, and if the Plan Sponsor proposes to correct such failure(s) by using the method(s) provided on such schedule, the Plan Sponsor should submit Appendix F, Schedule 4.

(e) *Schedule 5*: If the Plan Sponsor failed to administer the loans in accordance with the provisions of § 72(p)(2), the failure solely relates to employees who are neither key employees (as defined in § 416(i)(1)) nor self-employed individuals (as defined in § 401(c)(1)(B)), the Plan Sponsor should submit Appendix F, Schedule 5.

(f) *Schedule 6*: If the Plan Sponsor failed to satisfy the criteria for an employer to sponsor either a 403(b) Plan, or a § 401(k) plan, the Plan Sponsor should submit Appendix F, Schedule 6.

(g) *Schedule 7*: If the plan failed to distribute elective deferrals made in excess of the § 402(g) limit, and the Plan Sponsor proposes to correct such failure using the method described in Appendix A, section .04, the Plan Sponsor should submit Appendix F, Schedule 7.

(h) *Schedule 8*: If the plan failed to make required minimum distributions pursuant to § 401(a)(9), and proposes to correct such failure using the method described in Appendix A, section .06, then the Plan Sponsor should submit Appendix F, Schedule 8.

(i) *Schedule 9*: The Plan Sponsor should submit Appendix F, Schedule 9 if the Plan experienced one or more of the following failures:

1. § 401(a)(17) failure being corrected using the method described in Appendix B, section 2.07(1)(a);

2. Hardship distribution failure being corrected using the method described in Appendix B, section 2.07(2)(a);

3. 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

4. Early inclusion of otherwise eligible employee(s) being corrected using the method described in Appendix B, section 2.07(3)(a).

(4) An applicant may prepare a submission that includes one or more of the schedules in Appendix F. The inclusion of multiple schedules set forth in Appendix F does not affect the fee for the submission, as determined in accordance with section 12.02.

.03 *Submission requirements*. If the application includes failures and corrections that are not addressed in Appendix F, then the submission should be made in accordance with the format provided in Appendix D. The application should include the following:

(1) *Identifying information for the applicant*. This would include, the name and Employer Identification Number (EIN) of the applicant. (Note: Social Security Numbers are not acceptable. An applicant can obtain an EIN by calling (800) 829–4933. An application for an EIN can also be made online by accessing *www.irs.gov* and typing "How to Apply for an EIN" in its search engine.)

(2) *Identifying information for the Plan*. A statement identifying the type of plan submitted (*e.g.*, Qualified Plan, 403(b) Plan, SEP, or SIMPLE IRA Plan). In addition, if the submission involves a Qualified Plan, the statement should also identify the type of Qualified Plan being submitted (*e.g.*, Defined Benefit, Money Purchase, Profit Sharing, or Stock Bonus, and 401(k) or ESOP).

(3) *Plan Data*. Information relating to the number of plan participants determined in accordance with section 12.07 and the total amount of plan assets as of the most recent 5500 filing (or, if not filed, the most recent data available to the Plan Sponsor) prior to the filing of this VCP submission.

(4) *Type of Submission*. Where applicable, the application should identify whether the submission is a Group Submission, an Anonymous Submission, a nonamender submission, a multiemployer or multiple employer plan submission, or an Orphan Plan submission.

(5) *Identification of Failures*. A complete description of the failures, the years in which the failures occurred, including closed years (that is, years for which the statutory period has expired), and the number of employees affected by each failure.

(6) *Explanation*. An explanation of how and why the failures arose, including a description of the administrative procedures applicable to the failures in effect at the time the failures occurred.

(7) *Proposed Method of Correction*. A detailed description of the method for correcting the failures that the Plan Sponsor has implemented or proposes to implement. Each step of the correction method must be described in narrative form. The description must include the specific information needed to support the suggested correction method. This information includes, for example, the number of employees affected and the expected cost of correction (both of which may be approximated if the exact number cannot be determined at the time of the request), the years involved, and calculations or assumptions the Plan Sponsor used to determine the amounts needed for correction.

(8) *Earnings or actuarial adjustments*. A description of the methodology that will be used to calculate earnings or actuarial adjustments on any corrective contributions or distributions (indicating the computation periods and the basis for determining earnings or actuarial adjustments, in accordance with section 6.02(4)).

(9) *Computations*. Specific calculations for each affected employee or a representative sample of affected employees. The sample calculations must be sufficient to demonstrate each aspect of the correction method proposed. For example, if a Plan Sponsor requests a compliance statement with respect to a failure to satisfy the contribution limits of § 415(c) and proposes a correction method that involves elective deferrals (whether matched or unmatched) and matching contributions, the Plan Sponsor must submit calculations illustrating the correction method proposed with respect to each type of contribution. As another example, with respect to a failure to satisfy the ADP test in § 401(k)(3), the Plan Sponsor must submit the ADP test results both before the correction and after the correction.

(10) *Former employees or beneficiaries*. The method that will be used to locate and notify former employees and beneficiaries, or an affirmative statement that no former employees or beneficiaries were affected by the failures or will be affected by the correction.

(11) *Change in administrative procedures*. A description of the measures that have been or will be implemented to ensure that the same failures will not recur.

(12) *Request for excise relief (§§ 4972, 4973, 4974 or 4979) or income tax relief under §72(t).* If relief is sought, a specific request for relief should be included in the submission, along with explanations, where applicable, supporting such request.

(13) *Loan failures and income tax reporting relief.* A specific request for relief needs to be made if the applicant either wants relief from reporting a corrected participant loan as a deemed distribution or wants to report the loan as a deemed distribution in the year of correction instead of the year in which the deemed distribution occurred.

(14) *Under Examination statement*. A statement that, to the best of the Plan Sponsor's knowledge, neither the plan nor the Plan Sponsor is Under Examination.

(15) *Abusive tax avoidance transaction statement*. A statement that neither the plan nor the Plan Sponsor has been a party to an abusive tax avoidance transaction (as defined in section 4.13(2)) or a brief identification of any abusive tax avoidance transaction to which the plan or the Plan Sponsor has been a party.

(16) *Transferred Assets*. If a submission includes a failure that relates to Transferred Assets and the failure occurred prior to the transfer, a description of the transaction (including the dates of the employer change and the plan transfer).

(17) *Unrelated determination letter application requests*. A statement (if applicable) that the plan is currently being considered in a determination letter application that is not related to the VCP application. If the request for a determination letter is made while a request for consideration under VCP is pending, the Plan Sponsor must update the VCP request to add this information.

(18) *403(b) Plans only*. In the case of a 403(b) Plan submission, a statement that the Plan Sponsor has contacted all other entities involved with the plan and has been assured of cooperation in implementing the applicable correction, to the extent necessary. For example, if the plan's failure is the failure to satisfy the requirements of § 403(b)(1)(E) regarding elective deferrals, the Plan Sponsor must, prior to making the VCP application, contact the insurance company or custodian with control over the plan's assets to assure cooperation in effecting a distribution of the excess deferrals and the earnings thereon. An application under VCP must also contain a statement as to the type of employer (*e.g.*, a tax-exempt organization described in § 501(c)(3)) submitting the VCP application.

(19) *Group Submissions only*. A Group Submission must be signed by the Eligible Organization or the Eligible Organization's authorized representative and accompanied by a copy of the relevant portions of the plan document(s). In addition, a Group Submission must include a separate page for each affected Plan Sponsor that provides the Plan Sponsor's name, EIN, plan name, and failure(s).

(20) *Orphan Plans only*. If the plan is an Orphan Plan, whether relief from the VCP application fee or correction is being requested, and the supporting rationale for such relief.

.04 *Required documents*. A VCP submission must be accompanied by the following documents:

(1) *Plan document*. A copy of the entire plan document or the relevant portions of the plan document. For example, in a case involving an improper exclusion of eligible employees from a profit-sharing plan with a cash or deferred arrangement, relevant portions of the plan document include the eligibility, allocation, and cash or deferred arrangement provisions of the basic plan document (and the adoption agreement, if applicable), along with applicable definitions in the plan. If the plan is a 403(b) Plan and a plan document is not available, a written description of the plan should be submitted, with sample salary reduction agreements if relevant. In the case of a SEP and a SIMPLE IRA Plan, the entire plan document should be submitted.

(2) *Determination letter application*. In any case in which correction of a Qualification Failure is made by plan amendment, as permitted under section 4.05, other than the adoption of an amendment designated by the Service as a model amendment or the adoption of a prototype or volume submitter plan for which the Plan Sponsor has

reliance on the plan's opinion or advisory letter as provided in Rev. Proc. 2008–6, 2008–1 I.R.B. 192, and the Plan Sponsor is submitting a determination letter request as permitted under section 6.05, the Plan Sponsor must submit a copy of the plan document in restated form, the appropriate application form (*i.e.*, Form 5300, 5307 or 5310), the appropriate user fee concurrently and to the same address as the VCP submission, and the most recent version of the Form 8717, *User Fee for Employee Plan Determination, Opinion, and Advisory Letter Request*. Pursuant to section 12.04 of Rev. Proc. 2007–44, effective as of July 9, 2007, Form 6406, *Short Form Application for Determination for Minor Amendment of Employee Benefit Plan*, may not be used to apply for a determination letter. An application submitted with this form will no longer be accepted by the Service. The user fee for the determination letter application and the fee for the VCP submission must be submitted on separate checks made payable to the U.S. Treasury. See section 11.13 for the VCP mailing address.

.05 *Date fee due generally*. Except as provided in sections 11.06 and 12.02(4), the VCP fee under section 12 and, if applicable, the determination letter user fee must be included with the submission. The VCP fee and the determination letter user fee must be submitted on separate checks made payable to the U.S. Treasury. If the appropriate fees are not included in the submission, the submission will be returned.

.06 *Additional fee due for SEPs, SIMPLE IRA Plans, and Group Submissions*. In the case of a SEP, a SIMPLE IRA Plan, or a Group Submission, the initial fee described in section 12.02, 12.04, or 12.05 must be included in the submission and any additional fee is due at the time the compliance statement is signed by the Plan Sponsor and returned to the Service, or when agreement has been reached between the Service and the Plan Sponsor regarding correction of the failure(s).

.07 *Signed submission*. The submission must be signed by the Plan Sponsor or the Plan Sponsor's authorized representative.

.08 *Power of attorney requirements*. To sign the submission or to appear before the Service in connection with the submission, the Plan Sponsor's representative must comply with the requirements of section 9.02(11) and (12) of Rev. Proc. 2008–4, 2008–1 I.R.B. 121, and submit Form 2848, *Power of Attorney and Declaration of Representative*. A Form 2848 that designates a representative not qualified to sign Part II of the Form 2848, *e.g.*, an unenrolled return preparer, will not be accepted. A Plan Sponsor may authorize an individual, such as an unenrolled return preparer, to inspect or receive confidential information using Form 8821, *Tax Information Authorization*. (See Form 8821 and Instructions.) However, see section 10.10 for special rules relating to Anonymous Submissions.

.09 *Penalty of perjury statement*. The following declaration must accompany a request and any factual information or change in the submission at a later time: **"Under penalties of perjury, I declare that I have examined this submission, including accompanying documents, and, to the best of my knowledge and belief, the facts presented in support of this submission are true, correct, and complete."** The declaration must be signed by the Plan Sponsor, not the Plan Sponsor's representative.

.10 *Checklist*. The Service will be able to respond more quickly to a VCP request if the request is carefully prepared and complete. The checklist in Appendix C is designed to assist Plan Sponsors and their representatives in preparing a submission that contains the information and documents required under this revenue procedure. Except as otherwise provided in the checklist, the checklist in Appendix C must be completed, signed, and dated by the Plan Sponsor or the Plan Sponsor's representative. A photocopy of this checklist may be used.

.11 *Designation*. The letter to the Service should indicate in the upper right hand corner of the letter the type of plan submitted under VCP–a Qualified Plan, 403(b) Plan, SEP, or SIMPLE IRA Plan. In addition, if the submission is a Group Submission, an Anonymous Submission, a nonamender submission, a multiemployer or multiple employer plan submission, or an Orphan Plan submission, the letter should so indicate.

.12 *Acknowledgement letter*. The Service will acknowledge receipt of a VCP submission if the Plan Sponsor or the Plan Sponsor's representative completes the Acknowledgement Form in Appendix E and includes it in the submission. A separate Appendix E Acknowledgement Form should be included for each plan submitted. A photocopy of Appendix E may be used.

.13 *VCP mailing address*. All VCP submissions and accompanying determination applications, if applicable, should be mailed to:

Internal Revenue Service
Attention: SE:T:EP:RA:VC
P.O. Box 27063
Washington, D.C. 20038–7063

.14 *Maintenance of copies of submissions*. Plan Sponsors and their representatives should maintain copies of all correspondence submitted to the Service with respect to their VCP requests.

.15 *Assembling the submission*. The Service will be able to process a submission more quickly if the submission package contains all of the items required by the Appendix C checklist and is assembled in the following order:

1. If applicable, Form 8717, *User Fee for Employee Plan Determination, Opinion, and Advisory Letter Request*, and the check for the determination letter user fee made payable to the U.S. Treasury.

2. Determination letter application (*i.e.*, Form 5300, 5307, or 5310), if applicable.

3. Completed and signed Appendix C checklist.

4. A submission signed by the Plan Sponsor or Plan Sponsor's authorized representative, with a check for the VCP fee made payable to the U.S. Treasury attached to the front of the submission letter. The submission should include the following information (see section 11.15, paragraph 5, for instructions relating to applications submitted in the Appendix D or Appendix F format):

- Type of plan (or group of plans) being submitted.
- Description of the failures (if the failures relate to Transferred Assets, include a description of the related employer transaction).
- An explanation of how and why the failures arose.
- Description of the method for correcting failures, including earnings methodology (if applicable) and supporting computations (if applicable).

- Description of the method used to locate or notify former employees or beneficiaries affected by the failures or corrections. If no former employees or beneficiaries are affected by the failures or corrections, then the letter should affirmatively state that position when addressing this issue.
- Description of the administrative procedures that have been or will be implemented to ensure that the failures do not recur.
- Whether a request is being made in order for participant loans corrected under this revenue procedure to not be treated as deemed distributions under §72(p) and the supporting rationale for such request. Alternatively, whether a request is being made for participant loans corrected under this revenue procedure to be treated as deemed distributions under §72(p) in the year of correction.
- Whether relief is being requested from imposition of the excise taxes under §§ 4972, 4973, 4974, or 4979, or the 10% additional income tax under § 72(t), and the supporting rationale for such relief.
- If the plan is an Orphan Plan, whether relief from the VCP application fee is being requested, and the supporting rationale for such relief.
- A statement specifying whether the plan is being considered in an unrelated determination letter application (if applicable).
- A statement that the plan is not Under Examination.
- A statement that the Plan Sponsor is not under an Exempt Organizations examination.
- A statement that neither the plan nor the Plan Sponsor has been a party to an abusive tax avoidance transaction (as defined in section 4.13(2)) or a brief identification of any abusive tax avoidance transaction to which the plan or the Plan Sponsor has been a party.
- Penalty of perjury statement.

5. If the VCP application is submitted using either the Appendix F or the Appendix D format, the application should include a completed Appendix F or Appendix D, and any information/enclosures, including any related schedules. In addition, the application should include a separate Enforcement Resolution page.

6. Appendix E acknowledgement letter.

7. *Power of Attorney (Form 2848)* or *Tax Information Authorization* (Form 8821), if applicable.

8. Copy of opinion or determination letter (if applicable).

9. Relevant plan document language or plan document (if applicable).

10. Any other items that may be relevant to the submission.

SECTION 12. VCP FEES

.01 *VCP fees*. The compliance fees for all submissions under VCP are determined under this section 12. All fees must be submitted by check made payable to the U.S. Treasury and, except for the special fees described in sections 12.04 and 12.05(2), must be included with the initial submission.

.02 *VCP fee for Qualified Plans and 403(b) Plans*. (1) Except as otherwise provided in this section 12, the compliance fee for a submission under VCP for Qualified Plans and 403(b) Plans (including Anonymous Submissions) is determined in accordance with the following chart.

Number of Participants	Fee
20 or fewer	$ 750
21 to 50	$ 1,000
51 to 100	$ 2,500
101 to 500	$ 5,000
501 to 1,000	$ 8,000
1,001 to 5,000	$15,000
5,001 to 10,000	$20,000
Over 10,000	$25,000

(2) If (a) a VCP submission involves the failure to satisfy the minimum distribution requirements of § 401(a)(9) for 50 or fewer participants, (b) such failure is the only failure of the submission, and (c) the failure would result in the imposition of the excise tax under § 4974, the compliance fee is $500.

(3) If (a) a VCP submission involves the failure of participant loans to comply with the requirements of § 72(p)(2), (b) the failure does not affect more than 25% of the Plan Sponsor's participants in any of the year(s) in which the failure occurred, and (c) the failure is the only failure of the submission, the applicable fee for a VCP submission determined under the provisions of section 12.02(1) is reduced by 50%.

(4) At the discretion of the Service, the VCP fee may be waived in the case of a terminating Orphan Plan. In such cases, the submission must include a request for a waiver of the VCP fee.

.03 *VCP fee for nonamender failures*. In general, the compliance fee for plans with a nonamender failure, as described in section 6.05, is determined in accordance with the chart in section 12.02(1). The applicable fee for a VCP submission that contains only nonamender failures is reduced by 50% if it is submitted within a one-year period following the expiration of the plan's remedial amendment period for complying with such changes. Notwithstanding the above, the compliance fee for a submission that contains only a failure to adopt timely interim amendments or amendments required to

implement optional law changes, as described in section 6.05(3)(a), is $375.

.04 *VCP fee for Group Submission*. The compliance fee for a Group Submission is based on the number of plans affected by the failure as described in the compliance statement. With respect to pre-approved plans, the fee is determined based on the number of basic plan documents submitted, irrespective of the number of accompanying adoption agreements. The initial fee for the first 20 plans is $10,000. An additional fee is due equal to the product of the number of plans in excess of 20 multiplied by $250. The maximum compliance fee for a Group Submission is $50,000. If additional plans are added following the Group Submission, the additional fee is paid subject to the $50,000 maximum compliance fee. If more than one master or prototype plan is submitted as a Group Submission, each master or prototype plan is considered a separate Group Submission for purposes of the compliance fee.

.05 *VCP fee for SEPs and SIMPLE IRA Plans*. (1) In general, the compliance fee for a SEP or a SIMPLE IRA Plan submission (including an Anonymous Submission) is $250. Notwithstanding the preceding sentence, the Service reserves the right to impose the fee schedule under section 12.02 or section 12.06 in appropriate circumstances.

(2) In any case in which a SEP or SIMPLE IRA Plan correction is not similar to a correction for a similar Qualification Failure (as provided under section 6.10(1)), the Service may impose an additional fee. If the failure involves an Excess Amount to a SEP or a SIMPLE IRA Plan and the Plan Sponsor retains the Excess Amount in the SEP or SIMPLE IRA Plan, a fee equal to at least 10% of the Excess Amount excluding earnings will be imposed. This is in addition to the SEP or SIMPLE IRA Plan compliance fee set forth in section 12.05(1).

.06 *VCP fee for egregious or intentional failures*. Notwithstanding the preceding provisions of this section 12, in cases involving failures that are egregious (as described in section 4.11) or where the failure is not inadvertent (*i.e.*, is not a result of an oversight or mistake), the compliance fee for Qualified Plans, 403(b) Plans, SEPs and SIMPLE IRA Plans is the greater of (1) the fee that would be determined under the preceding provisions of this section 12, or (2) an amount equal to a negotiated percentage of the Maximum Payment Amount, with such percentage not to exceed 40%.

.07 *Establishing the number of plan participants*. Compliance fees under this section 12 are determined based on the total number of plan participants. For a description of participant, see the Instructions for Form 5500, lines 6 and 7. For new plans and ongoing plans, the number of plan participants is determined from the most recently filed Form 5500 series. Thus, with respect to the 2007 Form 5500, the Plan Sponsor would use the number shown in item 7f (or the equivalent item on the Form 5500 C/R or EZ) to establish the total number of plan participants. In the case of a terminated plan, the Form 5500 used to determine the number of plan participants must be the one filed for the plan year prior to the plan year for which the Final Form 5500 return was filed. If the submission involves a plan with Transferred Assets and no new incidents of the failure occurred after the end of the second plan year that begins after the corporate merger, acquisition, or other similar employer transaction, the Plan Sponsor may calculate the number of plan participants based on the Form 5500 information that would have been filed by the Plan Sponsor for the plan year that includes the employer transaction if the Transferred Assets were maintained as a separate plan.

PART VI. CORRECTION ON AUDIT (AUDIT CAP)

SECTION 13. DESCRIPTION OF AUDIT CAP

.01 *Audit CAP requirements*. If the Service identifies a Qualification or 403(b) Failure (other than a failure that has been corrected in accordance with SCP or VCP) upon an Employee Plans or Exempt Organizations examination of a Qualified Plan, 403(b) Plan, SEP, or SIMPLE IRA Plan, the requirements of this section 13 are satisfied with respect to the failure if the Plan Sponsor corrects the failure, pays a sanction in accordance with section 14, satisfies any additional requirements of section 13.03, and enters into a closing agreement with the Service. This section 13 also applies if the Service identifies a participant loan that did not comply with the requirements of § 72(p)(2) (other than a loan failure that is corrected in accordance with SCP or VCP) upon an Employee Plans or Exempt Organizations examination of a Qualified Plan or 403(b) Plan.

.02 *Payment of sanction*. Payment of the sanction under section 14 generally is required at the time the closing agreement is signed. All sanction amounts should be submitted by certified check or cashier's check made payable to the U.S. Treasury.

.03 *Additional requirements*. Depending on the nature of the failure, the Service will discuss the appropriateness of the plan's existing administrative procedures with the Plan Sponsor. If existing administrative procedures are inadequate for operating the plan in conformance with the applicable requirements of the Code, the closing agreement may be conditioned upon the implementation of stated procedures. In addition, for Qualified Plans, pursuant to section 6.05, the Plan Sponsor may be required to obtain a Favorable Letter before the closing agreement is signed. If a Favorable Letter is required, the Plan Sponsor is required to pay the applicable user fee for obtaining the letter.

.04 *Failure to reach resolution*. If the Service and the Plan Sponsor cannot reach an agreement with respect to the correction of the failure(s) or the amount of the sanction, the plan will be disqualified or, in the case of a 403(b) Plan, SEP, or SIMPLE IRA Plan will not have reliance on this revenue procedure.

.05 *Effect of closing agreement.* A closing agreement constitutes an agreement between the Service and the Plan Sponsor that is binding with respect to the tax matters identified therein for the periods specified.

.06 *Other procedural rules*. The procedural rules for Audit CAP are set forth in Internal Revenue Manual ("IRM") 7.2.2, EPCRS.

SECTION 14. AUDIT CAP SANCTION

.01 *Determination of sanction*. Except as otherwise provided in section 14.04, the sanction under Audit CAP is a negotiated percentage of the Maximum Payment Amount. Sanctions will not be excessive and will bear a reasonable relationship to the nature, extent, and severity

of the failures, based on the factors below. In the case of any participant loan that did not comply with the requirements of § 72(p)(2), the Maximum Payment Amount will include the tax the Service could collect as a result of the loan not being excluded from gross income under § 72(p)(2).

.02 *Factors considered*. Factors include: (1) the steps taken by the Plan Sponsor to ensure that the plan had no failures; (2) the steps taken to identify failures that may have occurred; (3) the extent to which correction had progressed before the examination was initiated, including full correction; (4) the number and type of employees affected by the failure; (5) the number of nonhighly compensated employees who would be adversely affected if the plan were not treated as qualified or as satisfying the requirements of § 403(b), § 408(k) or § 408(p); (6) whether the failure is a failure to satisfy the requirements of § 401(a)(4), § 401(a)(26), or § 410(b), either directly or through § 403(b)(12); (7) whether the failure is solely an Employer Eligibility Failure; (8) the period over which the failure(s) occurred (for example, the time that has elapsed since the end of the applicable remedial amendment period under § 401(b) for a Plan Document Failure); and (9) the reason for the failure(s) (for example, data errors such as errors in transcription of data, the transposition of numbers, or minor arithmetic errors). Factors relating only to Qualified Plans also include: (1) whether the plan is the subject of a Favorable Letter; and (2) whether the failure(s) were discovered during the determination letter process. If one of the failures discovered during an Employee Plans examination includes the failure to amend the plan timely for relevant legislation, it is expected that the sanction will be greater than the applicable fee described in section 14.04. An additional factor taken into account with respect to a participant loan that did not comply with the requirements of § 72(p)(2) is the extent to which the failure is a result solely of action (or inaction) of the employer or its agents (or to the extent to which the failure is a result of the employee's or beneficiary's actions or inaction).

.03 *Transferred Assets*. If the examination involves a plan with Transferred Assets and the Service determines that no new incidents of the failures that relate to the Transferred Assets occur after the end of the second plan year that begins after the corporate merger, acquisition, or other similar employer transaction, the sanction under Audit CAP will not exceed the sanction that would apply if the Transferred Assets were maintained as a separate plan.

.04 *Fee for nonamenders discovered during the determination letter application process not related to a VCP submission*. (1) The compliance fee for nonamenders (as defined in section 6.05(2)(a)(ii)) not voluntarily identified by the Plan Sponsor, but instead discovered by the Service in connection with the determination letter application process as described in section 5.03(3) is determined in accordance with the chart below. This fee schedule applies if the only failure in the submission is the nonamender failure.

(2) The acronyms listed in the chart refer to the following laws:

(a) Employee Retirement Income Security Act of 1974 (ERISA),

(b) Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA); Deficit Reduction Act of 1984 (DEFRA); and Retirement Equity Act of 1984 (REA) together (T/D/R),

(c) Tax Reform Act of 1986 (TRA '86),

(d) Unemployment Compensation Act of 1992 (UCA); Omnibus Budget and Reconciliation Act of 1993 (OBRA '93),

(e) The Uruguay Round Agreements Act; the Uniformed Services Employment and Reemployment Rights Act of 1994; the Small Business Job Protection Act of 1996; the Taxpayer Relief Act of 1997; the Internal Revenue Service Restructuring and Reform Act of 1998; and the Community Renewal Tax Relief Act of 2000 (collectively known as "GUST"),

(f) Final and temporary regulations under § 401(a)(9), 74 FR 18987, published on April 17, 2002 ("401(a)(9) Regs"),

(g) The Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA").

Number of Participants	EGTRRA/ subsequent legislation	GUST/ 401(a)(9) Regs	UCA/ OBRA '93	TRA '86	T/D/R	ERISA
20 or fewer	$ 2,500	$ 3,000	$ 3,500	$ 4,000	$ 4,500	$ 5,000
21–50	$ 5,000	$ 6,000	$ 7,000	$ 8,000	$ 9,000	$10,000
51–100	$ 7,500	$ 9,000	$10,500	$12,000	$13,500	$15,000
101–500	$12,500	$15,000	$17,500	$20,000	$22,500	$25,000
501–1,000	$17,500	$21,000	$24,500	$28,000	$31,500	$35,000
1,001–5,000	$25,000	$30,000	$35,000	$40,000	$45,000	$50,000
5,001 – 10,000	$32,500	$39,000	$45,500	$52,000	$58,500	$65,000
Over 10,000	$40,000	$48,000	$56,000	$64,000	$72,000	$80,000

PART VII. EFFECT ON OTHER DOCUMENTS; EFFECTIVE DATE; PAPERWORK REDUCTION ACT

SECTION 15. EFFECT ON OTHER DOCUMENTS

.01 *Rev. Proc. 2006–27 modified and superseded*. Rev. Proc. 2006–27 is modified and superseded by this revenue procedure.

.02 *Section 3 of Rev. Proc. 2007–49 modified and superseded*. Section 3 of Rev. Proc. 2007–49, 2007–30 I.R.B. 141, is modified and superseded by this revenue procedure.

SECTION 16. EFFECTIVE DATE

This revenue procedure is generally effective January 1, 2009. However, Plan Sponsors are permitted, at their option, to apply the provisions of this revenue procedure on or after September 2, 2008.

SECTION 17. PAPERWORK REDUCTION ACT

The collection of information contained in this revenue procedure has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1545–1673.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

The collection of information in this revenue procedure is in sections 4.05, 6.02(5)(d), 6.05, 6.09(5), 6.09(6), 10.01, 10.02, 10.05–10.07, 10.10–10.12, 11.02–11.05, 11.07–11.15, 13.01, section 2.01–2.07 of Appendix B, Appendix C, Appendix D, Appendix E, and Appendix F. This information is required to enable the Commissioner, Tax Exempt and Government Entities Division of the Internal Revenue Service to make determinations regarding the issuance of various types of closing agreements and compliance statements. This information will be used to issue closing agreements and compliance statements to allow individual plans to continue to maintain their tax qualified and tax-deferred status. As a result, favorable tax treatment of the benefits of the eligible employees is retained. The likely respondents are individuals, state or local governments, businesses or other for-profit institutions, nonprofit institutions, and small businesses or organizations.

The estimated total annual reporting or recordkeeping burden is 76,222 hours.

The estimated annual burden per respondent/recordkeeper varies from .5 to 45.5 hours, depending on individual circumstances, with an estimated average of 20.4 hours. The estimated number of respondents or recordkeepers is 3,745.

The estimated frequency of responses is occasional.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally tax returns and tax return information are confidential, as required by 26 U.S.C. § 6103.

DRAFTING INFORMATION

The principal authors of this revenue procedure are Avaneesh Bhagat and Maxine Terry of the Employee Plans, Tax Exempt and Government Entities Division. For further information regarding this revenue procedure, please contact the Employee Plans' taxpayer assistance telephone service at 877–829–5500 (a toll-free number) between the hours of 8:30 a.m. and 4:30 p.m. Eastern Time, Monday through Friday. Alternatively, you can direct your questions to either Mr. Bhagat or Ms. Terry by sending a question via electronic mail to *RetirementPlanQuestions@irs.gov*.

APPENDIX A

OPERATIONAL FAILURES AND CORRECTION METHODS

.01 *General rule*. This appendix sets forth Operational Failures and Correction Methods relating to Qualified Plans. In each case, the method described corrects the Operational Failure identified in the headings below. Corrective allocations and distributions should reflect earnings and actuarial adjustments in accordance with section 6.02(4) of this revenue procedure. The correction methods in this appendix 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 this revenue procedure. To the extent a failure listed in this appendix could occur under a 403(b) Plan, a SEP, or a SIMPLE IRA Plan, the correction method listed for such failure may similarly be used to correct the failure.

.02 *Failure to properly provide the minimum top-heavy benefit under § 416 to non-key employees*. In a defined contribution plan, the permitted correction method is to properly contribute and allocate the required top-heavy minimums to the plan in the manner provided for in the plan on behalf of the non-key employees (and any other employees required to receive top-heavy allocations under the plan). In a defined benefit plan, the minimum required benefit must be accrued in the manner provided in the plan.

.03 *Failure to satisfy the ADP test set forth in § 401(k)(3), the ACP test set forth in § 401(m)(2), or, for plan years beginning on or before December 31, 2001, the multiple use test of § 401(m)(9)*. The permitted correction method is to make qualified nonelective contributions (QNECs) (as defined in §1.401(k)–6) on behalf of the nonhighly compensated employees to the extent necessary to raise the actual deferral percentage or actual contribution percentage of the nonhighly compensated employees to the percentage needed to pass the test or tests. The contributions must be made on behalf of all eligible nonhighly compensated employees (to the extent permitted under § 415) and must be the same percentage of compensation. QNECs contributed to satisfy the ADP test need not be taken into account for determining additional contributions (*e.g.*, a matching contribution), if any. For purposes of this section .03, employees who would have received a matching contribution had they made elective deferrals must be counted as eligible employees for the ACP test, and the plan must satisfy the ACP test. Under this correction method, a plan may not be treated as two separate plans, one covering otherwise

excludable employees and the other covering all other employees (as permitted in § 1.410(b)–6(b)(3)), in order to reduce the number of employees eligible to receive QNECs. Likewise, under this correction method, the plan may not be restructured into component plans in order to reduce the number of employees eligible to receive QNECs.

.04 *Failure to distribute elective deferrals in excess of the § 402(g) limit (in contravention of § 401(a)(30))*. The permitted correction method is to distribute the excess deferral to the employee and to report the amount as taxable in the year of deferral and in the year distributed. The inclusion of the 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 a designated Roth contribution (see § 402A(d)(3)). In accordance with § 1.402(g)–1(e)(1)(ii), a distribution to a highly compensated employee is included in the ADP test; and a distribution to a nonhighly compensated employee is not included in the ADP test.

.05 *Exclusion of an eligible employee from all contributions or accruals under the plan for one or more plan years*. (1) *Improperly excluded employees: employer provided contributions or benefits*. For plans with employer provided contributions or benefits (which are neither elective deferrals under a qualified cash or deferred arrangement under § 401(k) nor matching or after-tax employee contributions that are subject to § 401(m)), the permitted correction method is to make a contribution to the plan on behalf of the employees excluded from a defined contribution plan or to provide benefit accruals for the employees excluded from a defined benefit plan.

(2) *Improperly excluded employees: contributions subject to § 401(k) or § 401(m)*. (a) For plans providing benefits subject to § 401(k) or § 401(m), the corrective contribution for an improperly excluded employee is described in the following paragraphs of this section .05(2). (See Examples 3 through 12 of Appendix B.)

(b) If the employee was not provided the opportunity to elect and make elective deferrals (other than designated Roth contributions) to a § 401(k) plan that does not satisfy § 401(k)(3) by applying the safe harbor contribution requirements of § 401(k)(12) or § 401(k)(13), the employer must make a QNEC to the plan on behalf of the employee that replaces the "missed deferral opportunity." The missed deferral opportunity is equal to 50% of the employee's "missed deferral." The missed deferral is determined by multiplying the actual deferral percentage for the year of exclusion (whether or not the plan is using current or prior year testing) for the employee's group in the plan (either highly compensated or nonhighly compensated) by the employee's compensation for that year. The employee's missed deferral amount is reduced further to the extent necessary to ensure that the missed deferral does not exceed applicable plan limits, including the annual deferral limit under § 402(g) for the calendar year in which the failure occurred. Under this correction method, a plan may not be treated as two separate plans, one covering otherwise excludable employees and the other covering all other employees (as permitted in § 1.410(b)–6(b)(3)) in order to reduce the applicable ADP, the corresponding missed deferral, and the required QNEC. Likewise, restructuring the plan into component plans is not permitted in order to reduce the applicable ADP, the corresponding missed deferral, and the required QNEC. The QNEC required for the employee for the missed deferral opportunity for the year of exclusion is adjusted for earnings to the date the corrective QNEC is made on behalf of the affected employee.

(c) If the employee should have been eligible for but did not receive an allocation of employer matching contributions under a non-safe harbor plan because he or she was not given the opportunity to make elective deferrals, the employer should make a QNEC on behalf of the affected employee. The QNEC is equal to the matching contribution the employee would have received had the employee made a deferral equal to the missed deferral determined under section .05(2)(b). The QNEC must be adjusted for earnings to the date the corrective QNEC is made on behalf of the affected employee.

(d) If the employee was not provided the opportunity to elect and make elective deferrals (other than designated Roth contributions) to a safe harbor § 401(k) plan that uses a rate of matching contributions to satisfy the safe harbor requirements of § 401(k)(12), then the missed deferral is deemed equal to the greater of 3% of compensation or the maximum deferral percentage for which the employer provides a matching contribution rate that is at least as favorable as 100% of the elective deferral made by the employee. This estimate of the missed deferral replaces the estimate based on the ADP test in a traditional § 401(k) plan. The required QNEC on behalf of the excluded employee is equal to (i) the missed deferral opportunity, which is an amount equal to 50% of the missed deferral, plus (ii) the matching contribution that would apply based on the missed deferral. If an employee was not provided the opportunity to elect and make elective deferrals to a safe harbor § 401(k) plan that uses nonelective contributions to satisfy the safe harbor requirements of § 401(k)(12), then the missed deferral is deemed equal to 3% of compensation. The required QNEC on behalf of the excluded employee is equal to (i) 50% of the missed deferral, plus (ii) the nonelective contribution required to be made on behalf of the employee. The QNEC required to replace the employee's missed deferral opportunity and the corresponding matching or nonelective contribution is adjusted for earnings to the date the corrective QNEC is made on behalf of the affected employee.

(e) If the employee should have been eligible to elect and make after-tax employee contributions (other than designated Roth contributions), the employer must make a QNEC to the plan on behalf of the employee that is equal to the "missed opportunity for making after-tax employee contributions." The missed opportunity for making after-tax employee contributions is equal to 40% of the employee's "missed after-tax contributions." The employee's missed after-tax contributions are equal to the actual contribution percentage (ACP) for the employee's group (either highly compensated or nonhighly compensated) times the employee's compensation, but with the resulting amount not to exceed applicable plan limits. If the ACP consists of both matching and after-tax employee contributions, then, in lieu of basing the employee's missed after-tax employee contributions on the ACP for the employee's group, the employer is permitted to determine separately the portion of the ACP that is attributable to after-tax employee con-

tributions for the employee's group (either highly compensated or nonhighly compensated), multiplied by the employee's compensation for the year of exclusion. The QNEC must be adjusted for earnings to the date the corrective QNEC is made on behalf of the affected employee.

(f) If the employee was improperly excluded from an allocation of employer matching contributions because he or she was not given the opportunity to make after-tax employee contributions (other than designated Roth contributions), the employer must make a QNEC on behalf of the affected employee. The QNEC is equal to the matching contribution the employee would have received had the employee made an after-tax employee contribution equal to the missed after-tax employee contribution determined under section .05(2)(e). The QNEC must be adjusted for earnings to the date the corrective QNEC is made on behalf of the affected employee.

(g) The methods for correcting the failures described in this section .05(2) do not apply until after the correction of other qualification failures. Thus, for example, if, in addition to the failure of excluding an eligible employee, the plan also failed the ADP or ACP test, the correction methods described in section .05(2)(b) through (f) cannot be used until after correction of the ADP or ACP test failures. For purposes of this section .05(2), in order to determine whether the plan passed the ADP or ACP test, the plan may rely on a test performed with respect to those eligible employees who were provided with the opportunity to make elective deferrals or after-tax employee contributions and receive an allocation of employer matching contributions, in accordance with the terms of the plan and may disregard the employees who were improperly excluded.

(3) *Improperly excluded employees: designated Roth contributions*. For employees who were improperly excluded from plans that (i) are subject to § 401(k) (as described in section .05(2)) and (ii) provide for the optional treatment of elective deferrals as designated Roth contributions, the correction is the same as described under section .05(2). Thus, for example, the corrective employer contribution required to replace the missed deferral opportunity is made in accordance with the method described in section .05(2)(b) in the case of a § 401(k) plan that is not a safe harbor § 401(k) plan or .05(2)(d) in the case of a safe harbor § 401(k) plan. However, none of the corrective contributions made by the employer may be treated as designated Roth contributions (and may not be included in an employee's gross income) and thus may not be contributed or allocated to a designated Roth account (as described in § 402A(b)(2)). The corrective contribution must be allocated to an account established for receiving a QNEC or any other employer contribution in which the employee is fully vested and subject to the withdrawal restrictions that apply to elective deferrals.

(4) *Improperly excluded employees: catch-up contributions only*. (a) *Correction for missed catch-up contributions*. If an eligible employee was not provided the opportunity to elect and make catch-up contributions to a § 401(k) plan, the employer must make a QNEC to the plan on behalf of the employee that replaces the "missed deferral opportunity" attributable to the failure to permit an eligible employee to make a catch-up contribution pursuant to § 414(v). The missed deferral opportunity for catch-up contributions is equal to 50% of the employee's missed deferral attributable to catch-up contributions. For this purpose, the missed deferral attributable to catch-up contributions is one half of the applicable catch-up contribution limit for the year in which the employee was improperly excluded. Thus, for example if an eligible employee was improperly precluded from electing and making catch-up contributions in 2006, the missed deferral attributable to catch-up contributions is $2,500, which is one half of $5,000, the 2006 catch-up contribution limit for a § 401(k) plan. The eligible employee's missed deferral opportunity is $1,250 (*i.e.*, 50% of the missed deferral attributable to catch-up contributions of $2,500). The QNEC required to replace the missed deferral opportunity for the year of exclusion is adjusted for earnings to the date the corrective QNEC is made on behalf of the affected employee. For purposes of this correction, an eligible employee, pursuant to § 414(v)(5), refers to any participant who (i) would have attained age 50 by the end of the plan's taxable year and (ii) in the absence of the plan's catch-up provision, could not make additional elective deferrals on account of the plan or statutory limitations described in § 414(v)(3) and § 1.414(v)–1(b)(1).

(b) *Correction for missed matching contributions*. If an employee was precluded from making catch-up contributions under this section .05(4), the Plan Sponsor should ascertain whether the affected employee would have been entitled to an additional matching contribution on account of the missed deferral. If the employee would have been entitled to an additional matching contribution, then the employer must make a QNEC for the matching contribution on behalf of the affected employee. The QNEC is equal to the additional matching contribution the employee would have received had the employee made a deferral equal to the missed deferral determined under paragraph (a) of this section .05(4). The QNEC must be adjusted for earnings to the date the corrective QNEC is made on behalf of the affected employee. If in addition to the failure to provide matching contributions under this section .05(4)(b) , the plan also failed the ACP test, the correction methods described in this section cannot be used until after correction of the ACP test failure. For purposes of this section, in order to determine whether the plan passed the ACP test the plan may rely on a test performed with respect to those eligible employees who were provided with the opportunity to make elective deferrals or after-tax employee contributions and receive an allocation of employer matching contributions, in accordance with the terms of the plan and may disregard any employer matching contribution that was not made on account of the plan's failure to provide an eligible employee with the opportunity to make a catch up contribution.

(5) *Failure to implement an employee election*. (a) *Missed opportunity for elective deferrals*. For eligible employees who filed elections to make elective deferrals under the Plan which the Plan Sponsor failed to implement on a timely basis, the Plan Sponsor must make a QNEC to the plan on behalf of the employee to replace the "missed deferral opportunity." The missed deferral opportunity is equal to 50% of the employee's "missed deferral." The missed deferral is determined by multiplying the employee's elected deferral percentage by the employee's compensation. If the employee elected

a dollar amount for an elective deferral, the missed deferral would be the specified dollar amount. The employee's missed deferral amount is reduced further to the extent necessary to ensure that the missed deferral does not exceed applicable plan limits, including the annual deferral limit under § 402(g) for the calendar year in which the failure occurred.

(b) *Missed opportunity for after-tax employee contributions.* For eligible employees who filed elections to make after-tax employee contributions under the Plan which the Plan Sponsor failed to implement on a timely basis, the Plan Sponsor must make a QNEC to the plan on behalf of the employee to replace the employee's missed opportunity for after-tax employee contributions. The missed opportunity for making after-tax employee contributions is equal to 40% of the employee's "missed after-tax contributions." The missed after-tax employee contribution is determined by multiplying the employee's elected after-tax employee contribution percentage by the employee's compensation.

(c) *Missed opportunity affecting matching contributions.* In the event of failure described in section (a) or (b) of this section .05(5), if the employee would have been entitled to an additional matching contribution had either the missed deferral or after-tax employee contribution been made, then the employer must make a QNEC for the matching contribution on behalf of the affected employee. The QNEC is equal to the matching contribution the employee would have received had the employee made a deferral equal to the missed deferral determined under this paragraph. The QNEC must be adjusted for earnings to the date the corrective QNEC is made on behalf of the affected employee.

(d) *Coordination with correction of other Qualification Failures.* The method for correcting the failures described in this section .05(5) does not apply until after the correction of other qualification failures. Thus, for example, if in addition to the failure to implement an employee's election, the plan also failed the ADP test or ACP test, the correction methods described in section .05(5)(a), (b) or (c) cannot be used until after correction of the ADP or ACP test failures. For purposes of this section .05(5), in order to determine whether the plan passed the ADP or ACP test the plan may rely on a test performed with respect to those eligible employees who were not impacted by the Plan Sponsor's failure to implement employee elections and received allocations of employer matching contributions, in accordance with the terms of the plan and may disregard employees whose elections were not properly implemented.

.06 *Failure to timely pay the minimum distribution required under § 401(a)(9).* In a defined contribution plan, the permitted correction method is to distribute the required minimum distributions (with earnings from the date of the failure to the date of the distribution). The amount required to be distributed for each year in which the initial failure occurred should be determined by dividing the adjusted account balance on the applicable valuation date by the applicable distribution period. For this purpose, adjusted account balance means the actual account balance, determined in accordance with § 1.401(a)(9)–5 Q&A–3, reduced by the amount of the total missed minimum distributions for prior years. In a defined benefit plan, the permitted correction method is to distribute the required minimum distributions, plus an interest payment representing the loss of use of such amounts.

.07 *Failure to obtain participant or spousal consent for a distribution subject to the participant and spousal consent rules under §§ 401(a)(11), 411(a)(11), and 417.* (1) The permitted correction method is to give each affected participant a choice between providing informed consent for the distribution actually made or receiving a qualified joint and survivor annuity. In the event that participant or spousal consent is required but cannot be obtained, the participant must receive a qualified joint and survivor annuity based on the monthly amount that would have been provided under the plan at his or her retirement date. This annuity may be actuarially reduced to take into account distributions already received by the participant. However, the portion of the qualified joint and survivor annuity payable to the spouse upon the death of the participant may not be actuarially reduced to take into account prior distributions to the participant. Thus, for example, if, in accordance with the automatic qualified joint and survivor annuity option under a plan, a married participant who retired would have received a qualified joint and survivor annuity of $600 per month payable for life with $300 per month payable to the spouse for the spouse's life beginning upon the participant's death, but instead received a single-sum distribution equal to the actuarial present value of the participant's accrued benefit under the plan, then the $600 monthly annuity payable during the participant's lifetime may be actuarially reduced to take the single-sum distribution into account. However, the spouse must be entitled to receive an annuity of $300 per month payable for life beginning at the participant's death.

(2) An alternative permitted correction method is to give each affected participant a choice between (i) providing informed consent for the distribution actually made, (ii) receiving a qualified joint and survivor annuity (both (i) and (ii) of this section .07(2) are described in section .07(1) of this Appendix A), or (iii) a single-sum payment to the participant's spouse equal to the actuarial present value of that survivor annuity benefit (calculated using the applicable interest rate and mortality table under § 417(e)(3)). For example, assuming the actuarial present value of a $300 per month annuity payable to the spouse for the spouse's life beginning upon the participant's death were $7,837 (calculated using the applicable interest rate and applicable mortality table under § 417(e)(3)), the single-sum payment to the spouse under clause (iii) of this section .07(2) is equal to $7,837. If the single-sum payment is made to the spouse, then the payment is treated in the same manner as a distribution under § 402(c)(9) for purposes of rolling over the payment to an IRA or other eligible retirement plan.

.08 *Failure to satisfy the § 415 limits in a defined contribution plan.* For limitation years beginning before January 1, 2009, the permitted correction for failure to limit annual additions (other than elective deferrals and after-tax employee contributions) allocated to participants in a defined contribution plan as required in § 415 (even if the excess did not result from the allocation of forfeitures or from a reasonable error in estimating compensation) is to place the excess annual additions into an unallocated account, similar to the suspense account described in § 1.415–6(b)(6)(iii) (as it appeared in the April 1, 2007 edition of

26 CFR part 1) prior to amendments made by the recently finalized regulations under § 415, to be used as an employer contribution, other than elective deferrals, in the succeeding year(s). While such amounts remain in the unallocated account, the employer is not permitted to make additional contributions to the plan. The permitted correction for failure to limit annual additions that are elective deferrals or after-tax employee contributions (even if the excess did not result from a reasonable error in determining compensation, the amount of elective deferrals or after-tax employee contributions that could be made with respect to an individual under the § 415 limits) is to distribute the elective deferrals or after-tax employee contributions using a method similar to that described under § 1.415–6(b)(6)(iv) (as it appeared in the April 1, 2007 edition of 26 CFR part 1) prior to amendments made by the recently finalized regulations under § 415. Elective deferrals and after-tax employee contributions that are matched may be returned to the employee, provided that the matching contributions relating to such contributions are forfeited (which will also reduce excess annual additions for the affected individuals). The 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. For limitation years beginning on or after January 1, 2009, the failure to limit annual additions allocated to participants in a defined contribution plan as required in § 415 is corrected in accordance with section 6.06(2) and (3).

.09 *Abandoned Orphan Plans; orphan contracts and other abandoned plan assets*. (1) *Abandoned plans*. If (a) a plan has one or more failures (whether a Qualification Failure or a 403(b) Failure) that result from either the employer having ceased to exist, the employer no longer maintaining the plan, or similar reasons and (b) the plan is an Orphan Plan, as defined in section 5.03 (*i.e.*, is not a plan to which ERISA applies), the permitted correction is to terminate the plan and distribute plan assets to participants and beneficiaries. This correction must satisfy four conditions. First, the correction must comply with conditions, standards, and procedures substantially similar to those set forth in section 2578.1 of the Department of Labor Regulations (relating to abandoned plans). Second, the qualified termination administrator, based on plan records located and updated in accordance with the Department of Labor Regulations, must have reasonably determined whether, and to what extent, the survivor annuity requirements of §§ 401(a)(11) and 417 apply to any benefit payable under the plan and takes reasonable steps to comply with those requirements (if applicable). Third, each participant and beneficiary must have been provided a nonforfeitable right to his or her accrued benefits as of the date of deemed termination under the Department of Labor Regulations, subject to income, expenses, gains, and losses between that date and the date of distribution. Fourth, participants and beneficiaries must receive notification of their rights under § 402(f). In addition, notwithstanding correction under this revenue procedure, the Service reserves the right to pursue appropriate remedies under the Internal Revenue Code against any party who is responsible for the plan, such as the Plan Sponsor, plan administrator, or owner of the business, even in its capacity as a participant or beneficiary under the plan. However, with respect to the first through third conditions above, notice need not be furnished to the Department of Labor, and notices furnished to the Plan Sponsor, participants, or beneficiaries need not indicate that the procedures followed or notices furnished actually comply with, or are required under, Department of Labor regulations.

(2) *Orphan contracts or other assets*. In any case in which a 403(b) Failure results from the employer having ceased involvement with respect to specific assets (including an insurance annuity contract) held under a defined contribution plan on behalf of a participant who is a former employee or on behalf of a beneficiary, a permitted correction is to distribute those plan assets to the participant or beneficiary. Compliance with the distribution rules of section 2578.1(d)(2)(vii) of the Department of Labor Regulations satisfies this paragraph .09(2).

APPENDIX B

CORRECTION METHODS AND EXAMPLES; EARNINGS ADJUSTMENT METHODS AND EXAMPLES

SECTION 1. PURPOSE, ASSUMPTIONS FOR EXAMPLES AND SECTION REFERENCES

.01 *Purpose*. (1) This appendix sets forth correction methods relating to Operational Failures under Qualified Plans. This appendix also sets forth earnings adjustment methods. In each case, the method described corrects the Operational Failure identified in the headings below. Corrective allocations and distributions should reflect earnings and actuarial adjustments in accordance with section 6.02(4) of this revenue procedure. The correction methods in this appendix 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 this revenue procedure.

(2) To the extent a failure listed in this appendix could occur under a 403(b) Plan, SEP, or a SIMPLE IRA Plan, the correction method listed for such failure may similarly be used to correct the failure.

.02 *Assumptions for Examples*. Unless otherwise specified, for ease of presentation, the examples assume that:

(1) the plan year and the § 415 limitation year are the calendar year;

(2) the employer maintains a single plan intended to satisfy § 401(a) and has never maintained any other plan;

(3) in a defined contribution plan, the plan provides that forfeitures are used to reduce future employer contributions;

(4) the Qualification Failures are Operational Failures and the eligibility and other requirements for SCP, VCP or Audit CAP, whichever applies, are satisfied; and

(5) there are no Qualification Failures other than the described Operational Failures, and if a corrective action would result in any additional Qualification Failure, appropriate corrective action is taken for that

additional Qualification Failure in accordance with EPCRS.

.03 *Designated Roth contributions*. The examples in this Appendix B generally do not identify whether the plan offers designated Roth contributions. The results in the examples, including corrective contributions, would be the same whether or not the plan offered designated Roth contributions.

.04 *Section references*. References to section 2 and section 3 are references to the section 2 and 3 in this appendix.

SECTION 2. CORRECTION METHODS AND EXAMPLES

.01 *ADP/ACP Failures*.

(1) *Correction Methods*. (a) *Appendix A Correction Method*. Appendix A, section .03 sets forth a correction method for a failure to satisfy the actual deferral percentage ("ADP"), actual contribution percentage ("ACP"), or, for plan years beginning on or before December 31, 2001, multiple use test set forth in §§ 401(k)(3), 401(m)(2), and 401(m)(9), respectively.

(b) *One-to-One Correction Method*. (i) *General*. In addition to the correction method in Appendix A, a failure to satisfy the ADP test, ACP test, or, for plan years beginning on or before December 31, 2001, the multiple use test may be corrected by using the one-to-one correction method set forth in this section 2.01(1)(b). Under the one-to-one correction method, an excess contribution amount is determined and assigned to highly compensated employees as provided in paragraph (1)(b)(ii) below. That excess contribution amount (adjusted for earnings) is either distributed to the highly compensated employees or forfeited from the highly compensated employees' accounts as provided in paragraph (1)(b)(iii) below. That same dollar amount (*i.e.*, the excess contribution amount, adjusted for earnings) is contributed to the plan and allocated to nonhighly compensated employees as provided in paragraph (1)(b)(iv) below. Under this correction method, a plan may not be treated as two separate plans, one covering otherwise excludable employees and the other covering all other employees (as permitted in § 1.410(b)–6(b)(3)). Likewise, restructuring the plan into component plans is not permitted.

(ii) *Determination of the Excess Contribution Amount*. The excess contribution amount for the year is equal to the excess of (A) the sum of the excess contributions (as defined in § 401(k)(8)(B)), the excess aggregate contributions (as defined in § 401(m)(6)(B)), and for plan years beginning on or before December 31, 2001 the amount treated as excess contributions or excess aggregate contributions under the multiple use test for the year, as assigned to each highly compensated employee in accordance with § 401(k)(8)(C) and § 401(m)(6)(C), over (B) previous corrections that complied with § 401(k)(8), § 401(m)(6), and, for plan years beginning on or before December 31, 2001, the multiple use test.

(iii) *Distributions and Forfeitures of the Excess Contribution Amount*. (A) The portion of the excess contribution amount assigned to a particular highly compensated employee under paragraph (1)(b)(ii) is adjusted for earnings from the end of the plan year of the year of the failure through the date of correction. The amount assigned to a particular highly compensated employee, as adjusted, is distributed or, to the extent the amount was forfeitable as of the close of the plan year of the failure, is forfeited. If the amount is forfeited, it is used in accordance with the plan provisions relating to forfeitures that were in effect for the year of the failure. If the amount so assigned to a particular highly compensated employee has been previously distributed, the amount is an Excess Amount within the meaning of section 5.01(3) of this revenue procedure. Thus, pursuant to section 6.06 of this revenue procedure, the employer must notify the employee that the Excess Amount is not eligible for favorable tax treatment accorded to distributions from qualified plans (and, specifically, is not eligible for tax-free rollover).

(B) If any matching contributions (adjusted for earnings) are forfeited in accordance with § 411(a)(3)(G), the forfeited amount is used in accordance with the plan provisions relating to forfeitures that were in effect for the year of the failure.

(C) If a payment was made to an employee and that payment is a forfeitable match described in either paragraph (1)(b)(iii)(A) or (B), then it is an Overpayment defined in section 5.01(6) of this revenue procedure that must be corrected (see sections 2.04 and 2.05 below).

(iv) *Contribution and Allocation of Equivalent Amount*. (A) The employer makes a contribution to the plan that is equal to the aggregate amounts distributed and forfeited under paragraph (1)(b)(iii)(A) (*i.e.*, the excess contribution amount adjusted for earnings, as provided in paragraph (1)(b)(iii)(A), which does not include any matching contributions forfeited in accordance with § 411(a)(3)(G) as provided in paragraph (1)(b)(iii)(B)). The contribution must satisfy the vesting requirements and distribution limitations of § 401(k)(2)(B) and (C).

(B)(*1*) This paragraph (1)(b)(iv)(B)(*1*) applies to a plan that uses the current year testing method described in §1.401(k)–2(a)(2), §1.401(m)–2(a)(2) and, for periods prior to the effective date of those regulations, Notice 98–1, 1998–1 C.B. 327. The contribution made under paragraph (1)(b)(iv)(A) is allocated to the account balances of those individuals who were either (I) the eligible employees for the year of the failure who were nonhighly compensated employees for that year or (II) the eligible employees for the year of the failure who were nonhighly compensated employees for that year and who also are nonhighly compensated employees for the year of correction. Alternatively, the contribution is allocated to account balances of eligible employees described in (I) or (II) of the preceding sentence, except that the allocation is made only to the account balances of those employees who are employees on a date during the year of the correction that is no later than the date of correction. Regardless of which of these four options (described in the two preceding sentences) the employer selects, eligible employees must receive a uniform allocation (as a percentage of compensation) of the contribution. (See Examples 1 and 2.) Under the one-to-one correction method, the amount allocated to the account balance of an employee (*i.e.*, the employee's share of the total amount contributed under paragraph (1)(b)(iv)(A)) is not further adjusted for earnings and is treated as an annual addition under § 415 for the year of the failure for the employee for whom it is allocated.

(*2*) This paragraph (1)(b)(iv)(B)(*2*) applies to a plan that uses the prior year testing method described in §1.401(k)–2(a)(2) and §1.401(m)–2(a)(2) and, for periods prior to the effective date of those

regulations, Notice 98–1. Paragraph (1)(b)(iv)(B)(*1*) is applied by substituting "the year prior to the year of the failure" for "the year of the failure".

(*3*) Examples.

Example 1:

Employer A maintains a profit-sharing plan with a cash or deferred arrangement that is intended to satisfy § 401(k) using the current year testing method. The plan does not provide for matching contributions or after-tax employee contributions. In 2007, it was discovered that the ADP test for 2005 was not performed correctly. When the ADP test was performed correctly, the test was not satisfied for 2005. For 2005, the ADP for highly compensated employees was 9% and the ADP for nonhighly compensated employees was 4%. Accordingly, the ADP for highly compensated employees exceeded the ADP for nonhighly compensated employees by more than two percentage points (in violation of § 401(k)(3)). There were two highly compensated employees eligible under the § 401(k) plan during 2005, Employee P and Employee Q. Employee P made elective deferrals of $10,000, which is equal to 10% of Employee P's compensation of $100,000 for 2005. Employee Q made elective deferrals of $9,500, which is equal to 8% of Employee Q's compensation of $118,750 for 2005.

Correction:

On June 30, 2007, Employer A uses the one-to-one correction method to correct the failure to satisfy the ADP test for 2005. Accordingly, Employer A calculates the dollar amount of the excess contributions for the two highly compensated employees in the manner described in § 401(k)(8)(B). The amount of the excess contribution for Employee P is $4,000 (4% of $100,000) and the amount of the excess contribution for Employee Q is $2,375 (2% of $118,750), or a total of $6,375. In accordance with § 401(k)(8)(C), $6,375, the excess contribution amount, is assigned $3,437.50 to Employee P and $2,937.50 to Employee Q. It is determined that the earnings on the assigned amounts through June 30, 2007 are $687 and $587 for Employees P and Q, respectively. The assigned amounts and the earnings are distributed to Employees P and Q. Therefore, Employee P receives $4,124.50 ($3,437.50 + $687) and Employee Q receives $3,524.50 ($2,937.50 + $587). In addition, on the same date, Employer A makes a corrective contribution to the § 401(k) plan equal to $7,649 (the sum of the $4,124.50 distributed to Employee P and the $3,524.50 distributed to Employee Q). The corrective contribution is allocated to the account balances of eligible nonhighly compensated employees for 2005, *pro rata* based on their compensation for 2005 (subject to § 415 for 2005).

Example 2:

The facts are the same as in *Example 1*, except that for 2005 the plan also provides for (1) after-tax employee contributions and (2) matching contributions equal to 50% of the sum of an employee's elective deferrals and after-tax employee contributions that do not exceed 10% of the employee's compensation. The plan provides that matching contributions are subject to the plan's 20% per year of service vesting schedule and that matching contributions are forfeited and used to reduce employer contributions if associated elective deferrals or after-tax employee contributions are distributed to correct an ADP or ACP test failure. For 2005, nonhighly compensated employees made after-tax employee contributions and no highly compensated employee made any after-tax employee contributions. Employee P received a matching contribution of $5,000 (50% of $10,000) and Employee Q received a matching contribution of $4,750 (50% of $9,500). Employees P and Q were 100% vested in 2005. It was determined that the plan satisfied the requirements of the ACP test for 2005.

Correction:

The same corrective actions are taken as in *Example 1*. In addition, in accordance with the plan's terms, corrective action is taken to forfeit Employee P's and Employee Q's matching contributions associated with their distributed excess contributions. Employee P's distributed excess contributions and associated matching contributions are $3,437.50 and $1,718.75, respectively. Employee Q's distributed excess contributions and associated matching contributions are $2,937.50 and $1,468.75, respectively. Thus, $1,718.75 is forfeited from Employee P's account and $1,468.75 is forfeited from Employee Q's account. In addition, the earnings on the forfeited amounts are also forfeited. It is determined that the respective earnings on the forfeited amount for Employee P is $250 and for Employee Q is $220. The total amount of the forfeitures of $3,657.50 (Employee P's $1,718.75 + $250 and Employee Q's $1,468.75 + $220) is used to reduce contributions for 2007 and subsequent years.

.02 *Exclusion of Otherwise Eligible Employees*.

(*1*) *Exclusion of Eligible Employees in a 401(k) or (m) Plan*. (a) *Correction Method*. (i) *Appendix A Correction Method for Full Year Exclusion*. Appendix A section .05(2) sets forth the correction method for the exclusion of an eligible employee from electing and making elective deferrals (other than designated Roth contributions) and after-tax employee contributions to a plan that provides benefits that are subject to the requirements of § 401(k) or § 401(m) for one or more full plan years. (See Example 3.) Appendix A section .05(2) also specifies the method for determining missed elective deferrals and the corrective contributions for employees who were improperly excluded from electing and making elective deferrals to a safe harbor § 401(k) plan for one or more full plan years. (See Examples 8, 9 and 10.) Appendix A section .05(3) sets forth the correction method for the exclusion of an eligible employee from electing and making elective deferrals in a plan that (i) is subject to § 401(k) and (ii) provides employees with the opportunity to make designated Roth contributions. Appendix A section .05(4) sets forth the correction method for the situation where an eligible employee was permitted to make an elective deferral, but was not provided with the opportunity to make catch-up contributions under the terms of the plan and § 414(v), and correction is being made by making a QNEC on behalf of the excluded employee. (See Example 11.) Appendix A section .05(5) sets forth the correction method for the failure by a plan to implement an employee's election with respect to elective deferrals (including designated Roth contributions) or after-tax employee contributions. (See Example 12.) In section 2.02(1)(a)(ii) below, the correction methods for (I) the exclusion of an eligible employee from all contributions (including designated Roth contributions) under a 401(k) or (m) plan for a full year, as described in Appendix A sections .05(2) and .05(3), (II) the exclusion of an eligible employee who was permitted to make elective deferrals, but was not permitted to make catch-up contributions for a full plan year as described in Appendix A section .05(4), and (III) the exclusion of an eligible employee on account of the failure to implement an employee's election to make elective deferrals or after-tax employee contributions to the plan as described in Appendix A section .05(5) are expanded to include correction for the exclusion from these contributions (including designated Roth contributions) under a 401(k) or (m) plan for a partial plan year. This correction for a partial year exclusion may be used in conjunction with the correction for a full year exclusion.

(ii) *Expansion of Correction Method to Partial Year Exclusion*. (A) *In General*. The correction method in Appendix A, section .05 is expanded to cover an employee who was improperly excluded from electing and making elective deferrals (including designated Roth contributions) or after-tax employee contributions for a portion of a plan year or from receiving matching contributions (on either elective deferrals or after-tax employee contributions) for a portion of a plan year. In such case, a permitted correction method for the failure is for the Employer to satisfy this section 2.02(1)(a)(ii). The Employer makes a QNEC on behalf of the excluded employee. The method and examples described to correct the failure to include

otherwise eligible employees do not apply until after correction of other qualification failures. Thus, for example, in the case of a § 401(k) plan that does not apply the safe harbor contribution requirements of § 401(k)(12) or § 401(k)(13) the correction for improperly excluding an employee from making elective deferrals, as described in the narrative and the examples in this section cannot be used until after correction of the ADP test failure. (See Appendix A section .05(2)(g).)

(B) *Elective Deferral Failures*. (*1*) The appropriate QNEC for the failure to allow an employee to elect and make elective deferrals (including designated Roth contributions) for a portion of the plan year is equal to the missed deferral opportunity which is an amount equal to 50% of the employee's missed deferral. The employee's missed deferral is determined by multiplying the ADP of the employee's group (either highly or nonhighly compensated), determined prior to correction under this section 2.02(1)(a)(ii), by the employee's plan compensation for the portion of the year during which the employee was improperly excluded. In a safe harbor § 401(k) plan, the employee's missed deferral is determined by multiplying 3% (or, if greater, whatever percentage of the participant's compensation which, if contributed as an elective deferral, would have been matched at a rate of 100% or more) by the employee's plan compensation for the portion of the year during which the employee was improperly excluded. The missed deferral for the portion of the plan year during which the employee was improperly excluded from being eligible to make elective deferrals is reduced to the extent that (i) the sum of the missed deferral (as determined in the preceding two sentences of this paragraph) and any elective deferrals actually made by the employee for that year would exceed (ii) the maximum elective deferrals permitted under the plan for the employee for that plan year (including the § 402(g) limit). The corrective contribution is adjusted for earnings. For purposes of correcting other failures under this revenue procedure (including determination of any required matching contribution) after correction has occurred under this section 2.02(1)(a)(ii)(B), the employee is treated as having made pre-tax elective deferrals equal to the employee's missed deferral for the portion of the year during which the employee was improperly excluded. (See Examples 4 and 5.)

(*2*) The appropriate corrective contribution for the plan's failure to implement an employee's election with respect to elective deferrals is equal to the missed deferral opportunity which is an amount equal to 50% of the employee's missed deferral. Corrective contributions are adjusted for earnings. The missed deferral is determined by multiplying the employee's deferral percentage by the employee's plan compensation for the portion of the year during which the employee was improperly excluded. If the employee elected a fixed dollar amount that can be attributed to the period of exclusion, then the flat dollar amount for the period of exclusion may be used for this purpose. If the employee elected a fixed dollar amount to be deferred for the entire plan year, then that dollar amount is multiplied by a fraction. The fraction is equal to the number of months, including partial months where applicable, during which the eligible employee was excluded from making catch-up contributions divided by 12. The missed deferral for the portion of the plan year during which the eligible employee was improperly excluded from making elective deferrals is reduced to the extent that (i) the sum of the missed deferral (as determined in the preceding three sentences) and any elective deferrals actually made by the employee for that year would exceed (ii) the maximum elective deferrals permitted under the plan for the employee for that plan year (including the § 402(g) limit). The corrective contribution is adjusted for earnings. The requirements relating to the passage of the ADP test before this correction method can be used, as described in Appendix A section .05(5)(d) still apply.

(C) *After-tax Employee Contribution Failures*. (*1*) The appropriate corrective contribution for the failure to allow employees to elect and make after-tax employee contributions for a portion of the plan year is equal to the missed after-tax employee contributions opportunity, which is an amount equal to 40% of the employee's missed after-tax employee contributions. The employee's missed after-tax employee contributions is determined by multiplying the ACP of the employee's group (either highly or nonhighly compensated), determined prior to correction under this section 2.02(1)(a)(ii)(C), by the employee's plan compensation for the portion of the year during which the employee was improperly excluded. If the ACP consists of both matching and after-tax employee contributions, then for purposes of the preceding sentence, in lieu of basing the missed after-tax employee contributions on the ACP for the employee's group (either highly compensated or nonhighly compensated), the Employer is permitted to determine separately the portions of the ACP that are attributable to matching contributions and after-tax employee contributions and base the missed after-tax employee contributions on the portion of the ACP that is attributable to after-tax employee contributions. The missed after-tax employee contribution is reduced to the extent that (i) the sum of that contribution and the actual total after-tax employee contributions made by the employee for the plan year would exceed (ii) the sum of the maximum after-tax employee contributions permitted under the plan for the employee for the plan year. The corrective contribution is adjusted for earnings. The requirements relating to the passage of the ACP test before this correction method can be used, as described in Appendix A section .05(2)(g) still apply.

(*2*) The appropriate corrective contribution for the plan's failure to implement an employee's election with respect to after-tax employee contributions for a portion of the plan year is equal to the missed after-tax employee contributions opportunity, which is an amount equal to 40% of the employee's missed after-tax employee contributions. Corrective contributions are adjusted for earnings. The missed after-tax employee contribution is determined by multiplying the employee's elected after-tax employee contribution percentage by the employee's plan compensation for the portion of the year during which the employee was improperly excluded. If the employee elected a flat dollar amount that can be attributed to the period of exclusion, then the flat dollar amount for the period of exclusion may be used for this purpose. If the employee elected a flat dollar amount to be contributed for the entire plan year, then that dollar amount is multiplied by a fraction. The fraction is equal to the number of months, including partial months

where applicable, during which the eligible employee was excluded from making after-tax employee contributions divided by 12. The missed after-tax employee contribution is reduced to the extent that (i) the sum of that contribution and the actual total after-tax employee contributions made by the employee for the plan year would exceed (ii) the sum of the maximum after-tax employee contributions permitted under the plan for the employee for the plan year. The requirements relating to the passage of the ACP test before this correction method can be used, as described in Appendix A section .05(5)(d) still apply.

(D) *Matching Contribution Failures*. (*1*) The appropriate corrective contribution for the failure to make matching contributions for an employee because the employee was precluded from making elective deferrals (including designated Roth contributions) or after-tax employee contributions for a portion of the plan year is equal to the matching contribution that would have been made for the employee if (1) the employee's elective deferrals for that portion of the plan year had equaled the employee's missed deferrals (determined under section 2.02(1)(a)(i)(B)) or (2) the employee's after-tax contribution for that portion of the plan year had equaled the employee's missed after-tax employee contribution (determined under section 2.02(1)(a)(ii)(C)). This matching contribution is reduced to the extent that (i) the sum of this contribution and other matching contributions actually made on behalf of the employee for the plan year would exceed (ii) the maximum matching contribution permitted if the employee had made the maximum matchable contributions permitted under the plan for the plan year. The corrective contribution is adjusted for earnings. The requirements relating to the passage of the ACP test before this correction method can be used, as described in Appendix A section .05(2)(g) still apply.

(*2*) The appropriate corrective contribution for the failure to make matching contributions for an employee because of the failure by the plan to implement an employee's election with respect to elective deferrals (including designated Roth contributions) or, where applicable, after-tax employee contributions for a portion of the plan year is equal to the matching contribution that would have been made for the employee if the employee made the elective deferral as determined under section 2.02(1)(a)(ii)(B)(*2*), or where applicable, the after-tax employee contribution determined under section 2.02(1)(a)(ii)(C)(*2*). This matching contribution is reduced to the extent that (i) the sum of this contribution and other matching contributions actually made on behalf of the employee for the plan year would exceed (ii) the maximum matching contribution permitted if the employee had made the maximum matchable contributions permitted under the plan for the plan year. The corrective contribution is adjusted for earnings. The requirements relating to the passage of the ACP test before this correction method can be used, as described in Appendix A section .05(5)(d), still apply.

(E) *Use of Prorated Compensation*. For purposes of this paragraph (1)(a)(ii), for administrative convenience, in lieu of using the employee's actual plan compensation for the portion of the year during which the employee was improperly excluded, a *pro rata* portion of the employee's plan compensation that would have been taken into account for the plan year, if the employee had not been improperly excluded, may be used.

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

(b) Examples.

Example 3:

Employer B maintains a § 401(k) plan. The plan provides for matching contributions for eligible employees equal to 100% of elective deferrals that do not exceed 3% of an employee's compensation. The plan allows employees to make after-tax employee contributions up to a maximum of the lesser of 2% of compensation or $1,000. The after-tax employee contributions are not matched. The plan provides that employees who complete one year of service are eligible to participate in the plan on the next designated entry date. The entry dates are January 1, and July 1. In 2007, it is discovered that Employee V, a NHCE with compensation of $30,000, was excluded from the plan for the 2006 plan year even though she satisfied the plan's eligibility requirements as of January 1, 2006.

For the 2006 plan year, the relevant employee and contribution information is as follows:

	Compensation	*Elective deferral*	*Match*	*After-Tax Employee Contribution*
Highly Compensated Employees (HCEs):				
R	$200,000	$ 6,000	$6,000	0
S	$150,000	$12,000	$4,500	$1,000
Nonhighly Compensated Employees (NHCEs):				
T	$80,000	$12,000	$2,400	$1,000
U	$50,000	$ 500	$ 500	0

HCEs:

ADP - 5.5%
ACP - 3.33%
ACP attributable to matching contributions - 3%
ACP attributable to after-tax employee contributions - 0.33%

NHCEs:

ADP - 8%
ACP - 2.63%
ACP attributable to matching contributions - 2%
ACP attributable to after-tax employee contributions - 0.63%

Correction:

Employer B uses the correction method for a full year exclusion, described in Appendix A section .05(2), to correct the failure to include Employee V in the plan for the full plan year beginning January 1, 2006. Employer B calculates the corrective QNEC to be made on behalf of Employee V as follows:

Elective deferrals: Employee V was eligible to, but was not provided with the opportunity to, elect and make elective deferrals in 2006. Thus, Employer B must make a QNEC to the plan on behalf of Employee V equal to the missed deferral opportunity for Employee V, which is 50% of Employee V's missed deferral. The QNEC is adjusted for earnings. The missed deferral for Employee V is determined by using the ADP for NHCEs for 2006 and multiplying that percentage by Employee V's compensation for 2006. Accordingly, the missed deferral for Employee V on account of the employee's improper exclusion from the plan is $2,400 (8% x $30,000). The missed deferral opportunity is $1,200 (*i.e.*, 50% x $2,400). Thus, the required corrective contribution for the failure to provide Employee V with the opportunity to make elective deferrals to the plan is $1,200 (plus earnings). The corrective contribution is made to a pre-tax QNEC account for Employee V (not to a designated Roth contributions account even if the plan offers designated Roth contributions, as provided in section .05(3) of Appendix A).

Matching contributions: Employee V should have been eligible for, but did not receive, an allocation of employer matching contributions because Employee V was not provided the opportunity to make elective deferrals in 2006. Thus, Employer B must make a QNEC to the plan on behalf of Employee V that is equal to the matching contribution Employee V would have received had the missed deferral been made. The QNEC is adjusted for earnings. Under the terms of the plan, if Employee V had made an elective deferral of $2,400 or 8% of compensation ($30,000), the employee would have been entitled to a matching contribution equal to 100% of first 3% of Employee V's compensation ($30,000) or $900. Accordingly, the contribution required to replace the missed employer matching contribution is $900 (plus earnings).

After-tax employee contributions: Employee V was eligible to, but was not provided with the opportunity to, elect and make after-tax employee contributions in 2006. Employer B must make a QNEC to the plan equal to the missed opportunity for making after-tax employee contributions for Employee V, which is 40% of Employee V's missed after-tax employee contribution. The QNEC is adjusted for earnings. The missed after-tax employee contribution for Employee V is estimated by using the ACP for NHCEs (to the extent that the ACP is attributable to after-tax employee contributions) for 2006 and multiplying that percentage by Employee V's compensation for 2006. Accordingly, the missed after-tax employee contribution for Employee V, on account of the employee's improper exclusion from the plan is $189 (0.63% x $30,000). The missed opportunity to make after-tax employee contributions to the plan is $76 (40% x $189). Thus, the required corrective contribution for the failure to provide Employee V with the opportunity to make the $189 after-tax employee contribution to the plan is $76 (plus earnings).

The total required corrective QNEC, before adjustments for earnings, on behalf of Employee V is $2,176 ($1,200 for the missed deferral opportunity plus $900 for the missed matching contribution plus $76 for the missed opportunity to make after-tax employee contributions). The required corrective QNEC is further adjusted for earnings.

Example 4:

Employer C maintains a § 401(k) plan. The plan provides for matching contributions for each payroll period that are equal to 100% of an employee's elective deferrals that do not exceed 2% of the eligible employee's plan compensation during the payroll period. The plan provides for after-tax employee contributions. The after-tax employee contribution cannot exceed $1,000 for the plan year. The plan provides that employees who complete one year of service are eligible to participate in the plan on the next January 1 or July 1 entry date. Employee X, a nonhighly compensated employee, who met the eligibility requirements and should have entered the plan on January 1, 2006, was not offered the opportunity to participate in the plan. In August of 2006, the error was discovered and Employer C offered Employee X the opportunity to make elective deferrals and after-tax employee contributions as of September 1, 2006. Employee X made elective deferrals equal to 4% of the employee's plan compensation for each payroll period from September 1, 2006 through December 31, 2006 (resulting in elective deferrals of $400). Employee X's plan compensation for 2006 was $36,000 ($26,000 for the first eight months and $10,000 for the last four months). Employer C made matching contributions equal to $200 on behalf of Employee X, which is 2% of Employee X's plan compensation for each payroll period from September 1, 2006 through December 31, 2006 ($10,000). After being allowed to participate in the plan, Employee X made $250 of after-tax employee contributions for the 2006 plan year. The ADP for nonhighly compensated employees for 2006 was 3% and the ACP for nonhighly compensated employees for 2006 was 2.3%. The ACP attributable to matching contributions for nonhighly compensated employees for 2003 was 1.8%. The ACP attributable to employee contributions for nonhighly compensated employees for 2006 was 0.5%.

Correction:

In accordance with section 2.02(1)(a)(ii), Employer C uses the correction method described in Appendix A section .05 to correct for the failure to provide Employee X the opportunity to elect and make elective deferrals and after-tax employee contributions, and, as a result, not receiving matching contributions for a portion of the plan year (January 1, 2006 through August 31, 2006). Thus, Employer C makes a corrective contribution on behalf of Employee X that satisfies the requirements of section 2.02(1)(a)(ii). Employer C elects to utilize the provisions of section 2.02(1)(a)(ii)(E) to determine Employee X's compensation for the portion of the year in which Employee X was not provided the opportunity to make elective deferrals and after-tax

employee contributions. Thus, for administrative convenience, in lieu of using actual plan compensation of $26,000 for the period Employee X was excluded, Employee X's annual plan compensation is prorated for the 8-month period that the employee was excluded from participating in the plan. The corrective contribution is determined as follows:

(1) Corrective contribution for missed deferral: Employee X was eligible to, but was not provided with the opportunity to, elect and make elective deferrals from January 1 through August 31 of 2006. Employer C must make a corrective contribution to the plan on behalf of Employee X equal to Employee X's missed deferral opportunity for that period, which is 50% of Employee X's missed deferral. From January 1 through August 31, 2006. The corrective contribution is adjusted for earnings. Employee X's missed deferral is determined by multiplying the 3% ADP for nonhighly compensated employees by $24,000 (8/12ths of the employee's 2006 compensation of $36,000). Accordingly, the missed deferral is $720. The missed deferral is not reduced because when this amount is added to the amount already deferred, no plan limit (including § 402(g)) was exceeded. Accordingly, the required corrective contribution is $360 (*i.e.*, 50% multiplied by the missed deferral amount of $720). The required corrective contribution is adjusted for earnings.

(2) Corrective contribution for missed matching contribution: Under the terms of the plan, if Employee X had made an elective deferral of $720 or 3% of compensation for the period of exclusion ($24,000), the employee would have been entitled to a matching contribution equal to 2% of $24,000 or $480. The missed matching contribution is not reduced because no plan limit is exceeded when this amount is added to the matching contribution already contributed for the 2006 plan year. Accordingly, the required corrective contribution is $480. The required corrective contribution is adjusted for earnings.

(3) Corrective contribution for missed after-tax employee contribution: Employee X was eligible to, but was not provided with the opportunity to elect and make after-tax employee contributions from January 1 through August 31 of 2006. Employer C must make a corrective contribution to the plan on behalf of Employee X equal to the missed opportunity to make after-tax employee contributions. The missed opportunity to make after-tax employee contributions is equal to 40% of Employee X's missed after-tax employee contributions. The corrective contribution is adjusted for earnings. The missed after-tax employee contribution amount is equal to the 0.5% ACP attributable to employee contributions for nonhighly compensated employees multiplied by $24,000 (8/12ths of the employee's 2006 plan compensation of $36,000). Accordingly, the missed after-tax employee contribution amount is $120. The missed after-tax employee contribution is not reduced because the sum of $120 and the previously made after-tax employee contribution of $250 is less than the overall plan limit of $1,000. Therefore, the required corrective contribution is $48 (*i.e.*, 40% multiplied by the missed after-tax employee contribution of $120). The corrective contribution is adjusted for earnings.

The total required QNEC on behalf of the employee is $888 ($360 for the missed deferral opportunity plus $480 for the missed matching contribution plus $48 for the missed opportunity to make after-tax employee contributions).

Example 5:

The facts (including the ADP and ACP results) are the same as in Example 4, except that it is now determined that Employee X, after being included in the plan in 2006, made after-tax employee contributions of $950.

Correction:

The correction is the same as in *Example 4*, except that the corrective contribution required to replace the missed after-tax employee contribution is re-calculated to take into account applicable plan limits in accordance with the provisions of section 2.02(1)(a)(ii)(C). The required corrective contribution is determined as follows:

Corrective contribution for missed after-tax employee contribution: The missed after-tax employee contribution amount is equal to the 0.5% ACP attributable to after-tax employee contributions for nonhighly compensated employees multiplied by $24,000 (8/12ths of the employee's 2006 plan compensation of $36,000). The missed after-tax employee contribution amount, based on this calculation, is $120. However, the sum of this amount ($120) and the previously made after-tax employee contribution ($950) is $1,070. Because the plan limit for after-tax employee contributions is $1,000, the missed after-tax employee contribution needs to be reduced by $70, to ensure that the total after-tax employee contributions comply with the plan limit. Accordingly, the missed after-tax employee contribution is $50 ($120 minus $70) and the required corrective contribution is $20 (*i.e.*, 40% multiplied by the missed after-tax employee contribution of $50). The corrective contribution is adjusted for earnings.

Example 6:

Employer D sponsors a § 401(k) plan. The plan has a one year of service eligibility requirement and provides for January 1 and July 1 entry dates. Employee Y, who should have been provided the opportunity to elect and make elective deferrals on January 1, 2006, was not provided the opportunity to elect and make elective deferrals until July 1, 2006. The employee made $5,000 in elective deferrals to the plan in 2006. The employee was a highly compensated employee with compensation for 2006 of $200,000. Employee Y's compensation from January 1 through June 30, 2006 was $130,000. The ADP for highly compensated employees for 2006 was 10%. The ADP for nonhighly compensated employees for 2006 was 8%. The § 402(g) limit for deferrals made in 2006 was $15,000.

Correction:

Corrective contribution for missed deferral: Employee W's missed deferral is equal to the 10% ADP for highly compensated employees multiplied by $130,000 (compensation earned for the portion of the year in which Employee W was erroneously excluded, *i.e.*, January 1 through June 30, 2006). The missed deferral amount, based on this calculation is $13,000. However, the sum of this amount ($13,000) and the previously made elective contribution ($5,000) is $18,000. The 2006 § 402(g) limit for elective deferrals is $15,000. In accordance with the provisions of section 2.02(1)(a)(ii)(B), the missed deferral needs to be reduced by $3,000, to ensure that the total elective contribution complies with the applicable § 402(g) limit. Accordingly, the missed deferral is $7,000 ($10,000 minus $3,000) and the required corrective contribution is $3,500 (*i.e.*, 50% multiplied by the missed deferral of $7,000). The corrective contribution is adjusted for earnings.

Example 7:

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

Correction:

Employer E uses the correction method for partial year exclusions, pursuant to section 2.02(1)(a)(ii), to correct the failure to include an eligible employee in the plan. Because Employee Z was given an opportunity to make elective deferrals and after-tax employee contributions to the plan for at least the last 9 months of the plan year (and the amount of the elective deferrals or after-tax employee contributions that the employee had the opportunity to make was not less than the maximum elective deferrals or after-tax employee contributions that the employee could have made if

the employee had been given the opportunity to make elective deferrals and after-tax employee contributions on January 1, 2006), under the special rule set forth in section 2.02(1)(a)(ii)(F), Employer E is not required to make a corrective contribution for the failure to provide the employee with the opportunity to make either elective deferrals or after-tax employee contributions. The employer only needs to make a corrective contribution for the failure to provide the employee with the opportunity to receive matching contributions on deferrals that could have been made during the first 3 months of the plan year. The calculation of the corrective contribution required to correct this failure is shown as follows:

The missed matching contribution is determined by calculating the matching contribution that the employee would have received had the employee been provided the opportunity to make elective deferrals during the period of exclusion, *i.e.*, January 1, 2006 through March 31, 2006. Assuming that the employee elected to defer an amount equal to 3% of compensation (which is the ADP for the nonhighly compensated employees for the plan year), then, under the terms of the plan, the employee would have been entitled to a matching contribution of 2% of compensation. Pursuant to the provisions of section 2.02(1)(a)(ii)(E), Employer E determines compensation by prorating Employee Z's annual compensation for the portion of the year that Employee Z was not given the opportunity to make elective deferrals or after-tax employee contributions. Accordingly, the required matching contribution for the period of exclusion is obtained by multiplying 2% by Employee Z's compensation of $10,000 (3/12ths of the employee's 2006 plan compensation of $40,000). Based on this calculation, the missed matching contribution is $200. However, when this amount is added to the matching contribution already received ($640), the total ($840) exceeds the $750 plan limit on matching contributions by $90. Accordingly, pursuant to section 2.02(1)(a)(ii)(D), the missed matching contribution figure is reduced to $110 ($200 minus $90). The required corrective contribution is $110. The corrective contribution is adjusted for earnings.

Example 8:

Employer G maintains a safe harbor § 401(k) plan that requires matching contributions that satisfy the requirements of §401(k)(12), which are equal to: 100% of elective deferrals that do not exceed 3% of an employee's compensation and 50% of elective deferrals that exceed 3% but do not exceed 5% of an employee's compensation. Employee M, a nonhighly compensated employee who met the eligibility requirements and should have entered the plan on January 1, 2006, was not offered the opportunity to defer under the plan and was erroneously excluded for all of 2006. Employee M's compensation for 2006 was $20,000.

Correction:

In accordance with the provisions of section 2.02(1)(a)(ii)(B), Employee M's missed deferral on account of exclusion from the safe harbor § 401(k) plan is 3% of compensation. Thus, the missed deferral is equal to 3% multiplied by $20,000, or $600. Accordingly, the required QNEC for Employee M's missed deferral opportunity in 2006 is $300, *i.e.*, 50% of $600. The required matching contribution, based on the missed deferral of $600, is $600. The required corrective contribution for Employee M's missed matching contribution is $600. The total required corrective contribution, before adjustments for earnings, on behalf of Employee M is $900 (*i.e.*, $300 for the missed deferral opportunity, plus $600 for the missed matching contribution). The corrective contribution is adjusted for earnings.

Example 9:

Same facts as *Example 8*, except that the plan provides for matching contributions equal to 100% of elective deferrals that do not exceed 4% of an employee's compensation.

Correction:

In accordance with the provisions of section 2.02(1)(a)(ii)(B), Employee M's missed deferral on account of exclusion from the safe harbor § 401(k) plan is 4% of compensation. The missed deferral is 4% of compensation because the plan provides for a 100% match for deferrals up to that level of compensation. (See Appendix A section .05(2)(d).) Therefore, in this case, Employee M's missed deferral is equal to 4% multiplied by $20,000, or $800. The required corrective contribution for Employee M's missed deferral opportunity in 2006 is $400, *i.e.*, 50% multiplied by $800. The required matching contribution, based on the missed deferral of $800, is $800. Thus, the required corrective contribution for Employee M's missed matching contribution is $800. The total required corrective contribution, before adjustments for earnings, on behalf of Employee M is $1,200 (*i.e.*, $400 for the missed deferral opportunity plus $800 for the missed matching contribution). The corrective contribution is adjusted for earnings.

Example 10:

Same facts as *Example 8*, except that the plan uses a rate of nonelective contributions to satisfy the requirements of §401(k)(12) and provides for a QNEC equal to 3% of compensation.

Correction:

In accordance with the provisions of section 2.02(1)(a)(ii)(B), Employee M's missed deferral on account of exclusion from the safe harbor § 401(k) plan is 3% of compensation. Thus, the missed deferral is equal to 3% multiplied by $20,000, or $600. Thus, the required corrective contribution for Employee M's missed deferral opportunity in 2006 is $300 (50% of $600). The required nonelective contribution, based on the plan's formula of 3% of compensation for nonelective contributions, is $600. The total required QNEC, before adjustments for earnings, on behalf of Employee M is $900 (*i.e.*, $300 for the missed deferral opportunity, plus $600 for the missed nonelective contribution). The corrective contribution is adjusted for earnings.

Example 11:

Employer H maintains a § 401(k) plan. The plan limit on deferrals is the lesser of the deferral limit under § 401(a)(30) or the limitation under § 415. The plan also provides that eligible participants (as defined in § 414(v)(5) may make contributions in excess of the plan's deferral limits, up to the limitations on catch-up contributions for the year. The plan also provides for a 60% matching contribution on elective deferrals. The deferral limit under § 401(a)(30) for 2006 is $15,000. The limitation on catch-up contributions under the terms of the plan and § 414(v)(2)(B)(i) is $5,000.

Employee R, age 55, was provided with the opportunity to make elective deferrals up to the plan limit, but was not provided the option to make catch-up contributions. Employee R is a nonhighly compensated employee who earned $60,000 in compensation and made elective deferrals totaling $15,000 in 2006.

Correction:

In accordance with the provisions of Appendix A section .05(4), Employee R's missed deferral on account of the plan's failure to offer the opportunity to make catch-up contributions is $2,500 (or one half of the limitation on catch-up contributions for 2006). The missed deferral opportunity is $1,250 (or 50% of $2,500). Thus, the required QNEC for Employee R's missed deferral opportunity relating to catch-up contributions in 2006 is $1,250 adjusted for earnings.

In addition, Employee R was entitled to an additional matching contribution, under the terms of the plan, equal to 60% of the missed deferral that is attributable to the catch-up contribution that the employee would have made had the failure not occurred. In this case, the missed deferral is $2,500 and the corresponding matching contribution is $1,500 (*i.e.*, 60% of $2,500). Thus, the required corrective contribution for the additional matching contribution that should have been made on behalf of Employee R is $1,500 adjusted for earnings.

Example 12:

Employer K maintains a § 401(k) plan. The plan provides for matching contributions for eligible employees equal to 100% of elective deferrals that do not exceed 5% of an employee's compensation. On January 1, 2006, Employee T made an election to contribute 10% of compensation for the 2006 plan year. However, Employee T's election was not processed, and the required amounts were not withheld from Employee T's salary in 2006. Employee T's salary was $30,000 in 2006.

Correction:

Employer K uses the correction method described in Appendix A section .05(5), to correct the failure to implement Employee T's election to make elective deferrals under the plan for the full plan year beginning January 1, 2006. Employer K calculates the corrective QNEC to be made on behalf of Employee T as follows:

(1) Elective deferrals:

Employee T's election to make elective deferrals, pursuant to an election, in 2006 was not implemented. Thus, pursuant to section .05(5)(a) of Appendix A, Employer K must make a QNEC to the plan on behalf of Employee T equal to the missed deferral opportunity for Employee T, which is 50% of Employee T's missed deferral. The QNEC is adjusted for earnings. The missed deferral for Employee T is determined by using T's elected deferral percentage (10%) for 2006 and multiplying that percentage by Employee T's compensation for 2006 ($30,000). Accordingly, the missed deferral for Employee V, on account of the employee's improper exclusion from the plan is $3,000 (10% x $30,000). The missed deferral oppor-

tunity is $1,500 (*i.e.*, 50% x $3,000). Thus, the required corrective contribution for the failure to provide Employee V with the opportunity to make elective deferrals to the plan is $1,500 (plus earnings).

(2) Matching contributions:

Employee T should have been eligible for but did not receive an allocation of employer matching contributions because no elective deferrals were made on behalf of Employee T in 2006. Thus, pursuant to section .05(5)(c) of Appendix A, Employer K must make a QNEC to the plan on behalf of Employee T that is equal to the matching contribution Employee T would have received had the missed deferral been made. The QNEC is adjusted for earnings. Under the terms of the plan, if Employee T had made an elective deferral of $3,000 or 10% of compensation ($30,000), the employee would have been entitled to a matching contribution equal to 100% of first 3% of Employee T's compensation ($30,000) or $900. Accordingly, the contribution required to replace the missed employer matching contribution is $900 (plus earnings).

The total required corrective QNEC, before adjustments for earnings, on behalf of Employee T is $2,400 ($1,500 for the missed deferral opportunity plus $900 for the missed matching contribution).

(2) *Exclusion of Eligible Employees In a Profit-Sharing Plan*.

(a) *Correction Methods*. (i) *Appendix A Correction Method*. Appendix A, section .05 sets forth the correction method for correcting the failure to make a contribution on behalf of the employees improperly excluded from a defined contribution plan or to provide benefit accruals for the employees improperly excluded from a defined benefit plan. In the case of a defined contribution plan, the correction method is to make a contribution on behalf of the excluded employee. Section 2.02(2)(a)(ii) of this Appendix B clarifies the correction method in the case of a profit-sharing or stock bonus plan that provides for nonelective contributions (within the meaning of §1.401(k)–6).

(ii) *Additional Requirements for Appendix A Correction Method as applied to Profit-Sharing Plans*. To correct for the exclusion of an eligible employee from nonelective contributions in a profit-sharing or stock bonus plan under the Appendix A correction method, an allocation amount is determined for each excluded employee on the same basis as the allocation amounts were determined for the other employees under the plan's allocation formula (*e.g.*, the same ratio of allocation to compensation), taking into account all of the employee's relevant factors (*e.g.*, compensation) under that formula for that year. The Employer makes a corrective contribution on behalf of the excluded employee that is equal to the allocation amount for the excluded employee. The corrective contribution is adjusted for earnings. If, as a result of excluding an employee, an amount was improperly allocated to the account balance of an eligible employee who shared in the original allocation of the nonelective contribution, no reduction is made to the account balance of the employee who shared in the original allocation on account of the improper allocation. (See Example 15.)

(iii) *Reallocation Correction Method*. (A) *In General*. Subject to the limitations set forth in section 2.02(2)(a)(iii)(F) below, in addition to the Appendix A correction method, the exclusion of an eligible employee for a plan year from a profit-sharing or stock bonus plan that provides for nonelective contributions may be corrected using the reallocation correction method set forth in this section 2.02(2)(a)(iii). Under the reallocation correction method, the account balance of the excluded employee is increased as provided in paragraph (2)(a)(iii)(B) below, the account balances of other employees are reduced as provided in paragraph (2)(a)(iii)(C) below, and the increases and reductions are reconciled, as necessary, as provided in paragraph (2)(a)(iii)(D) below. (See Examples 16 and 17.)

(B) *Increase in Account Balance of Excluded Employee*. The account balance of the excluded employee is increased by an amount that is equal to the allocation the employee would have received had the employee shared in the allocation of the nonelective contribution. The amount is adjusted for earnings.

(C) *Reduction in Account Balances of Other Employees*. (*1*) The account balance of each employee who was an eligible employee who shared in the original allocation of the nonelective contribution is reduced by the excess, if any, of (I) the employee's allocation of that contribution over (II) the amount that would have been allocated to that employee's account had the failure not occurred. This amount is adjusted for earnings taking into account the rules set forth in section 2.02(2)(a)(iii)(C)(*2*) and (*3*) below. The amount after adjustment for earnings is limited in accordance with section 2.02(2)(a)(iii)(C)(*4*) below.

(*2*) This paragraph (2)(a)(iii)(C)(*2*) applies if most of the employees with account balances that are being reduced are nonhighly compensated employees. If there has been an overall gain for the period from the date of the original allocation of the contribution through the date of correction, no adjustment for earnings is required to the amount determined under section 2.02(2)(a)(iii)(C)(*1*) for the employee. If the amount for the employee is being adjusted for earnings and the plan permits investment of account balances in more than one investment fund, for administrative convenience, the reduction to the employee's account balance may be adjusted by the lowest earnings rate of any fund for the period from the date of the original allocation of the contribution through the date of correction.

(*3*) If an employee's account balance is reduced and the original allocation was made to more than one investment fund or there was a subsequent distribution or transfer from the fund receiving the original allocation, then reasonable, consistent assumptions are used to determine the earnings adjustment.

(*4*) The amount determined in section 2.02(2)(a)(iii)(C)(*1*) for an employee after the application of section 2.02(2)(a)(iii)(C)(*2*) and (*3*) may not exceed the account balance of the employee on the date of correction, and the employee is permitted to retain any distribution made prior to the date of correction.

(D) *Reconciliation of Increases and Reductions*. If the aggregate amount of the increases under section 2.02(2)(a)(iii)(B) exceeds the aggregate amount of the reductions under section 2.02(2)(a)(iii)(C), the Employer makes a corrective contribution to the plan for the amount of the excess. If the aggregate amount of the reductions under section 2.02(2)(a)(iii)(C) exceeds the aggregate amount of the increases under section 2.02(2)(a)(iii)(B), then the amount by which each employee's account balance is reduced under section 2.02(2)(a)(iii)(C) is decreased on a *pro rata* basis.

(E) *Reductions Among Multiple Investment Funds*. If an employee's account balance is reduced and the employee's account balance is invested in more than one investment fund, then the reduction may be made from the investment funds selected in any reasonable manner.

(F) *Limitations on Use of Reallocation Correction Method*. If any employee would be permitted to retain

any distribution pursuant to section 2.02(2)(a)(iii)(C)(*4*), then the reallocation correction method may not be used unless most of the employees who would be permitted to retain a distribution are nonhighly compensated employees.

(b) Examples.

Example 13:

Employer D maintains a profit-sharing plan that provides for discretionary nonelective employer contributions. The plan provides that the employer's contributions are allocated to account balances in the ratio that each eligible employee's compensation for the plan year bears to the compensation of all eligible employees for the plan year and, therefore, the only relevant factor for determining an allocation is the employee's compensation. The plan provides for self-directed investments among four investment funds and daily valuations of account balances. For the 2006 plan year, Employer D made a contribution to the plan of a fixed dollar amount. However, five employees who met the eligibility requirements were inadvertently excluded from participating in the plan. The contribution resulted in an allocation on behalf of each of the eligible employees, other than the excluded employees, equal to 10% of compensation. Most of the employees who received allocations under the plan for the year of the failure were nonhighly compensated employees. No distributions have been made from the plan since 2006. If the five excluded employees had shared in the original allocation, the allocation made on behalf of each employee would have equaled 9% of compensation. The excluded employees began participating in the plan in the 2007 plan year.

Correction:

Employer D uses the Appendix A correction method to correct the failure to include the five eligible employees. Thus, Employer D makes a corrective contribution to the plan. The amount of the corrective contribution on behalf of the five excluded employees for the 2006 plan year is equal to 10% of compensation of each excluded employee, the same allocation that was made for other eligible employees, adjusted for earnings. The excluded employees receive an allocation equal to 10% of compensation (adjusted for earnings) even though, had the excluded employees originally shared in the allocation for the 2006 contribution, their account balances, as well as those of the other eligible employees, would have received an allocation equal to only 9% of compensation.

Example 14:

The facts are the same as in *Example 13*.

Correction:

Employer D uses the reallocation correction method to correct the failure to include the five eligible employees. Thus, the account balances are adjusted to reflect what would have resulted from the correct allocation of the employer contribution for the 2006 plan year among all eligible employees, including the five excluded employees. The inclusion of the excluded employees in the allocation of that contribution would have resulted in each eligible employee, including each excluded employee, receiving an allocation equal to 9% of compensation. Accordingly, the account balance of each excluded employee is increased by 9% of the employee's 2006 compensation, adjusted for earnings. The account balance of each of the eligible employees other than the excluded employees is reduced by 1% of the employee's 2006 compensation, adjusted for earnings. Employer D determines the adjustment for earnings using the earnings rate of each eligible employee's excess allocation (using reasonable, consistent assumptions). Accordingly, for an employee who shared in the original allocation and directed the investment of the allocation into more than one investment fund or who subsequently transferred a portion of a fund that had been credited with a portion of the 2006 allocation to another fund, reasonable, consistent assumptions are followed to determine the adjustment for earnings. It is determined that the total of the initially determined reductions in account balances exceeds the total of the required increases in account balances. Accordingly, these initially determined reductions are decreased *pro rata* so that the total of the actual reductions in account balances equals the total of the increases in the account balances, and Employer D does not make any corrective contribution. The reductions from the account balances are made on a *pro rata* basis among all of the funds in which each employee's account balance is invested.

Example 15:

The facts are the same as in *Example 13*.

Correction:

The correction is the same as in *Example 14*, except that, because most of the employees whose account balances are being reduced are nonhighly compensated employees, for administrative convenience, Employer D uses the earnings rate of the fund with the lowest earnings rate for the period of the failure to adjust the reduction to each account balance. It is determined that the aggregate amount (adjusted for earnings) by which the account balances of the excluded employees is increased exceeds the aggregate amount (adjusted for earnings) by which the other employees' account balances are reduced. Accordingly, Employer D makes a contribution to the plan in an amount equal to the excess. The reduction from account balances is made on a *pro rata* basis among all of the funds in which each employee's account balance is invested.

.03 *Vesting Failures*.

(1) *Correction Methods*. (a) *Contribution Correction Method*. A failure in a defined contribution plan to apply the proper vesting percentage to an employee's account balance that results in forfeiture of too large a portion of the employee's account balance may be corrected using the contribution correction method set forth in this paragraph. The Employer makes a corrective contribution on behalf of the employee whose account balance was improperly forfeited in an amount equal to the improper forfeiture. The corrective contribution is adjusted for earnings. If, as a result of the improper forfeiture, an amount was improperly allocated to the account balance of another employee, no reduction is made to the account balance of that employee. (See Example 16.)

(b) *Reallocation Correction Method*. In lieu of the contribution correction method, in a defined contribution plan under which forfeitures of account balances are reallocated among the account balances of the other eligible employees in the plan, a failure to apply the proper vesting percentage to an employee's account balance which results in forfeiture of too large a portion of the employee's account balance may be corrected under the reallocation correction method set forth in this paragraph. A corrective reallocation is made in accordance with the reallocation correction method set forth in section 2.02(2)(a)(iii), subject to the limitations set forth in section 2.02(2)(a)(iii)(F). In applying section 2.02(2)(a)(iii)(B), the account balance of the employee who incurred the improper forfeiture is increased by an amount equal to the amount of the improper forfeiture and the amount is adjusted for earnings. In applying section 2.02(2)(a)(iii)(C)(*1*), the account balance of each employee who shared in the allocation of the improper forfeiture is reduced by the amount of the improper forfeiture that was allocated to that employee's account. The earnings adjustments for the account balances that are being reduced are determined in accordance with sections 2.02(2)(a)(iii)(C)(*2*) and (*3*) and the reductions after adjustments for earnings are limited in accordance with section 2.02(2)(a)(iii)(C)(*4*). In accordance with section 2.02(2)(a)(iii)(D), if the aggregate amount of the increases exceeds the aggregate amount of the reductions, the Employer makes a corrective contribution to the plan for the amount of the excess. In accordance with section 2.02(2)(a)(iii)(D), if the aggregate amount of the reductions exceeds the aggregate amount of the increases, then the amount by which each employee's account balance is reduced is decreased on a *pro rata* basis. (See Example 17.)

(2) Examples.

Example 16:

Employer E maintains a profit-sharing plan that provides for nonelective contributions. The plan provides for self-directed investments among four investment funds and daily valuation of account bal-

ances. The plan provides that forfeitures of account balances are reallocated among the account balances of other eligible employees on the basis of compensation. During the 2006 plan year, Employee R terminated employment with Employer E and elected and received a single-sum distribution of the vested portion of his account balance. No other distributions have been made since 2006. However, an incorrect determination of Employee R's vested percentage was made resulting in Employee R receiving a distribution of less than the amount to which he was entitled under the plan. The remaining portion of Employee R's account balance was forfeited and reallocated (and these reallocations were not affected by the limitations of § 415). Most of the employees who received allocations of the improper forfeiture were nonhighly compensated employees.

Correction:

Employer E uses the contribution correction method to correct the improper forfeiture. Thus, Employer E makes a contribution on behalf of Employee R equal to the incorrectly forfeited amount (adjusted for earnings) and Employee R's account balance is increased accordingly. No reduction is made from the account balances of the employees who received an allocation of the improper forfeiture.

Example 17:

The facts are the same as in *Example 16*.

Correction:

Employer E uses the reallocation correction method to correct the improper forfeiture. Thus, Employee R's account balance is increased by the amount that was improperly forfeited (adjusted for earnings). The account of each employee who shared in the allocation of the improper forfeiture is reduced by the amount of the improper forfeiture that was allocated to that employee's account (adjusted for earnings). Because most of the employees whose account balances are being reduced are nonhighly compensated employees, for administrative convenience, Employer E uses the earnings rate of the fund with the lowest earnings rate for the period of the failure to adjust the reduction to each account balance. It is determined that the amount (adjusted for earnings) by which the account balance of Employee R is increased exceeds the aggregate amount (adjusted for earnings) by which the other employees' account balances are reduced. Accordingly, Employer E makes a contribution to the plan in an amount equal to the excess. The reduction from the account balances is made on a *pro rata* basis among all of the funds in which each employee's account balance is invested.

.04 *§ 415 Failures.*

(1) *Failures Relating to a § 415(b) Excess.*

(a) *Correction Methods.* (i) *Return of Overpayment Correction Method.* Overpayments as a result of amounts being paid in excess of the limits of § 415(b) may be corrected using the return of Overpayment correction method set forth in this paragraph (1)(a)(i). The Employer takes reasonable steps to have the Overpayment (with appropriate interest) returned by the recipient to the plan and reduces future benefit payments (if any) due to the employee to reflect § 415(b). To the extent the amount returned by the recipient is less than the Overpayment, adjusted for earnings at the plan's earnings rate, then the Employer or another person contributes the difference to the plan. In addition, in accordance with section 6.05 of this revenue procedure, the Employer must notify the recipient that the Overpayment was not eligible for favorable tax treatment accorded to distributions from qualified plans (and, specifically, was not eligible for tax-free rollover). (See Examples 20 and 21.)

(ii) *Adjustment of Future Payments Correction Method.* (A) *In General.* In addition to the return of overpayment correction method, in the case of plan benefits that are being distributed in the form of periodic payments, Overpayments as a result of amounts being paid in excess of the limits in § 415(b) may be corrected by using the adjustment of future payments correction method set forth in this paragraph (1)(a)(ii). Future payments to the recipient are reduced so that they do not exceed the § 415(b) maximum limit and an additional reduction is made to recoup the Overpayment (over a period not longer than the remaining payment period) so that the actuarial present value of the additional reduction is equal to the Overpayment plus interest at the interest rate used by the plan to determine actuarial equivalence. (See Examples 18 and 19.)

(B) *Joint and Survivor Annuity Payments.* If the employee is receiving payments in the form of a joint and survivor annuity, with the employee's spouse to receive a life annuity upon the employee's death equal to a percentage (*e.g.*, 75%) of the amount being paid to the employee, the reduction of future annuity payments to reflect § 415(b) reduces the amount of benefits payable during the lives of both the employee and spouse, but any reduction to recoup Overpayments made to the employee does not reduce the amount of the spouse's survivor benefit. Thus, the spouse's benefit will be based on the previous specified percentage (*e.g.*, 75%) of the maximum permitted under § 415(b), instead of the reduced annual periodic amount payable to the employee.

(C) *Overpayment Not Treated as an Excess Amount.* An Overpayment corrected under this adjustment of future payment correction method is not treated as an Excess Amount as defined in section 5.01(3) of this revenue procedure.

(b) Examples.

Example 18:

Employer F maintains a defined benefit plan funded solely through employer contributions. The plan provides that the benefits of employees are limited to the maximum amount permitted under § 415(b), disregarding cost-of-living adjustments under § 415(d) after benefit payments have commenced. At the beginning of the 2006 plan year, Employee S retired and started receiving an annual straight life annuity of $185,000 from the plan. Due to an administrative error, the annual amount received by Employee S for 1998 included an Overpayment of $10,000 (because the § 415(b)(1)(A) limit for 2006 was $175,000). This error was discovered at the beginning of 2007.

Correction:

Employer F uses the adjustment of future payments correction method to correct the failure to satisfy the limit in § 415(b). Future annuity benefit payments to Employee S are reduced so that they do not exceed the § 415(b) maximum limit, and, in addition, Employee S's future benefit payments from the plan are actuarially reduced to recoup the Overpayment. Accordingly, Employee S's future benefit payments from the plan are reduced to $175,000 and further reduced by $1,000 annually for life, beginning in 2007. The annual benefit amount is reduced by $1,000 annually for life because, for Employee S, the actuarial present value of a benefit of $1,000 annually for life commencing in 2007 is equal to the sum of $10,000 and interest at the rate used by the plan to determine actuarial equivalence beginning with the date of the first Overpayment and ending with the date the reduced annuity payment begins. Thus, Employee S's remaining benefit payments are reduced so that Employee S receives $174,000 for 2007, and for each year thereafter.

Example 19:

The facts are the same as in *Example 18*.

Correction:

Employer F uses the adjustments of future payments correction method to correct the § 415(b) failure, by recouping the entire excess payment made in 2006 from Employee S's remaining benefit payments for 2007. Thus, Employee S's annual annuity benefit for 2007 is reduced to $164,400 to reflect the excess benefit amounts (increased by interest) that were paid from the plan to Employee S during the 2006 plan year. Beginning in 2008, Employee S begins to receive annual benefit payments of $175,000.

Example 20:

The facts are the same as in *Example 18*, except that the benefit was paid to Employee S in the form of a single-sum distribution in 2006, which exceeded the maximum § 415(b) limits by $110,000.

Correction:

Employer F uses the return of overpayment correction method to correct the § 415(b) failure. Thus, Employer F notifies Employee S of the $110,000 Overpayment and that the Overpayment was not eligible for favorable tax treatment accorded to distributions from qualified plans (and, specifically, was not eligible for tax-free rollover). The notice also informs Employee S that the Overpayment (with interest at the rate used by the plan to calculate the single-sum payment) is owed to the plan. Employer F takes reasonable steps to have the Overpayment (with interest at the rate used by the plan to calculate the single-sum payment) paid to the plan. Employee S pays the $110,000 (plus the requested interest) to the plan. It is determined that the plan's earnings rate for the relevant period was 2 percentage points more than the rate used by the plan to calculate the single-sum payment. Accordingly, Employer F contributes the difference to the plan.

Example 21:

The facts are the same as in *Example 20*.

Correction:

Employer F uses the return of overpayment correction method to correct the § 415(b) failure. Thus, Employer F notifies Employee S of the $110,000 Overpayment and that the Overpayment was not eligible for favorable tax treatment accorded to distributions from qualified plans (and, specifically, was not eligible for tax-free rollover). The notice also informs Employee S that the Overpayment (with interest at the rate used by the plan to calculate the single-sum payment) is owed to the plan. Employer F takes reasonable steps to have the Overpayment (with interest at the rate used by the plan to calculate the single-sum payment) paid to the plan. As a result of Employer F's recovery efforts, some, but not all, of the Overpayment (with interest) is recovered from Employee S. It is determined that the amount returned by Employee S to the plan is less than the Overpayment adjusted for earnings at the plan's earnings rate. Accordingly, Employer F contributes the difference to the plan.

(2) *Failures Relating to a § 415(c) Excess*.

(a) *Correction Methods*. (i) *Appendix A Correction Method*. Appendix A, section .08 sets forth the correction method for correcting the failure to satisfy the § 415(c) limits on annual additions.

(ii) *Forfeiture Correction Method*. In addition to the Appendix A correction method, the failure to satisfy § 415(c) with respect to a nonhighly compensated employee (A) who in the limitation year of the failure had annual additions consisting of both (I) either elective deferrals or after-tax employee contributions or both and (II) either matching or nonelective contributions or both, (B) for whom the matching and nonelective contributions equal or exceed the portion of the employee's annual addition that exceeds the limits under § 415(c) ("§ 415(c) excess") for the limitation year, and (C) who has terminated with no vested interest in the matching and nonelective contributions (and has not been reemployed at the time of the correction), may be corrected by using the forfeiture correction method set forth in this paragraph. The § 415(c) excess is deemed to consist solely of the matching and nonelective contributions. If the employee's § 415(c) excess (adjusted for earnings) has previously been forfeited, the § 415(c) failure is deemed to be corrected. If the § 415(c) excess (adjusted for earnings) has not been forfeited, that amount is placed in an unallocated account, as described in section 6.06(2) of this revenue procedure, to be used to reduce employer nonelective contributions in succeeding year(s) (or if the amount would have been allocated to other employees who were in the plan for the year of the failure if the failure had not occurred, then that amount is reallocated to the other employees in accordance with the plan's allocation formula). Note that while this correction method will permit more favorable tax treatment of elective deferrals for the employee than the Appendix A correction method, this correction method could be less favorable to the employee in certain cases, for example, if the employee is subsequently reemployed and becomes vested. (See Examples 22 and 23.)

(iii) *Return of Overpayment Correction Method*. A failure to satisfy § 415(c) that includes a distribution of the § 415(c) excess attributable to nonelective contributions and matching contributions may be corrected using the return of Overpayment correction method set forth in section 6.06(3) of this revenue procedure.

(b) Examples.

Example 22:

Employer G maintains a § 401(k) plan. The plan provides for nonelective employer contributions, elective deferrals, and after-tax employee contributions. The plan provides that the nonelective contributions vest under a 5-year cliff vesting schedule. The plan provides that when an employee terminates employment, the employee's nonvested account balance is forfeited five years after a distribution of the employee's vested account balance and that forfeitures are used to reduce employer contributions. For the 1998 limitation year, the annual additions made on behalf of two nonhighly compensated employees in the plan, Employees T and U, exceeded the limit in § 415(c). For the 1998 limitation year, Employee T had § 415 compensation of $60,000, and, accordingly, a § 415(c)(1)(B) limit of $15,000. Employee T made elective deferrals and after-tax employee contributions. For the 1998 limitation year, Employee U had § 415 compensation of $40,000, and, accordingly, a § 415(c)(1)(B) limit of $10,000. Employee U made elective deferrals. Also, on January 1, 1999, Employee U, who had three years of service with Employer G, terminated his employment and received his entire vested account balance (which consisted of his elective deferrals). The annual additions for Employees T and U consisted of:

	T	U
Nonelective Contributions	$ 7,500	$ 4,500
Elective Deferrals	10,000	5,800
After-tax Contributions	500	0
Total Contributions	$18,000	$10,300
§ 415(c) Limit	$15,000	$10,000
§ 415(c) Excess	$ 3,000	$ 300

Correction:

Employer G uses the Appendix A correction method to correct the § 415(c) excess with respect to Employee T (*i.e.*, $3,000). Thus, a distribution of plan assets (and corresponding reduction of the account balance) consisting of $500 (adjusted for earnings) of after-tax employee contributions and $2,500 (adjusted for earnings) of elective deferrals is made to Employee T. Employer G uses the forfeiture correction method to correct the § 415(c) excess with respect to Employee U. Thus, the § 415(c) excess is deemed to consist solely of the nonelective contributions. Accordingly, Employee U's nonvested account balance is reduced by $300 (adjusted for earnings) which is placed in an unallocated account, as described in section 6.06(2) of this revenue procedure, to be used to reduce employer contributions in succeeding year(s). After correction, it is determined that the ADP and ACP tests for 1998 were satisfied.

Example 23:

Employer H maintains a § 401(k) plan. The plan provides for nonelective employer contributions, matching contributions and elective deferrals. The plan provides for matching contributions that are equal to 100% of an employee's elective deferrals that do not exceed 8% of the employee's plan compensation for the plan year. For the 1998 limitation year, Employee V had § 415 compensation of $50,000, and, accordingly, a § 415(c)(1)(B) limit of $12,500. During that limitation year, the annual additions for Employee V totaled $15,000, consisting of $5,000 in elective deferrals, a $4,000 matching contribution (8% of $50,000), and a $6,000 nonelective employer contribution. Thus, the annual additions for Employee V exceeded the § 415(c) limit by $2,500.

Correction:

Employer H uses the Appendix A correction method to correct the § 415(c) excess with respect to Employee V (*i.e.*, $2,500). Accordingly, $1,000 of the unmatched elective deferrals (adjusted for earnings) are distributed to Employee V. The remaining $1,500 excess is apportioned equally between the elective deferrals and the associated matching employer contributions, so Employee V's account balance is further reduced by distributing to Employee V $750 (adjusted for earnings) of the elective deferrals and forfeiting $750 (adjusted for earnings) of the associated employer matching contributions. The forfeited matching contributions are placed in an unallocated account, as described in section 6.06(2) of this revenue procedure, to be used to reduce employer contributions in succeeding year(s). After correction, it is determined that the ADP and ACP tests for 1998 were satisfied.

.05 *Correction of Other Overpayment Failures*.

An Overpayment, other than one described in section 2.04(1) (relating to a § 415(b) excess) or section 2.04(2) (relating to a § 415(c) excess), may be corrected in accordance with this section 2.05. An Overpayment from a defined benefit plan is corrected in accordance with the rules in section 2.04(1). An Overpayment from a defined contribution plan is corrected in accordance with the rules in section 2.04(2)(a)(iii).

.06 *§ 401(a)(17) Failures*.

(1) *Reduction of Account Balance Correction Method*. The allocation of contributions or forfeitures under a defined contribution plan for a plan year on the basis of compensation in excess of the limit under § 401(a)(17) for the plan year may be corrected using the reduction of account balance correction method set forth in section 6.06(2) of this revenue procedure.

(2) Example.

Example 24:

Employer J maintains a money purchase pension plan. Under the plan, an eligible employee is entitled to an employer contribution of 8% of the employee's compensation up to the § 401(a)(17) limit ($220,000 for 2006). During the 2006 plan year, an eligible employee, Employee W, inadvertently was credited with a contribution based on compensation above the § 401(a)(17) limit. Employee W's compensation for 2006 was $250,000. Employee W received a contribution of $20,000 for 2006 (8% of $250,000), rather than the contribution of $17,600 (8% of $220,000) provided by the plan for that year, resulting in an improper allocation of $2,400.

Correction:

The § 401(a)(17) failure is corrected using the reduction of account balance method by reducing Employee W's account balance by $2,400 (adjusted for earnings) and crediting that amount to an unallocated account, as described in section 6.06(2) of this revenue procedure, to be used to reduce employer contributions in succeeding year(s).

.07 *Correction by Amendment*.

(1) *§ 401(a)(17) Failures*. (a) *Contribution Correction Method*. In addition to the reduction of account balance correction method under section 6.06(2) of this revenue procedure, an employer may correct a § 401(a)(17) failure for a plan year under a defined contribution plan by using the contribution correction method set forth in this paragraph. The Employer contributes an additional amount on behalf of each of the other employees (excluding each employee for whom there was a § 401(a)(17) failure) who received an allocation for the year of the failure, amending the plan (as necessary) to provide for the additional allocation. The amount contributed for an employee is equal to the employee's plan compensation for the year of the failure multiplied by a fraction, the numerator of which is the improperly allocated amount made on behalf of the employee with the largest improperly allocated amount, and the denominator of which is the limit under § 401(a)(17) applicable to the year of the failure. The resulting additional amount for each of the other employees is adjusted for earnings. (See Example 25.)

(b) Example.

Example 25:

The facts are the same as in *Example 24*.

Correction:

Employer J corrects the failure under VCP using the contribution correction method by (1) amending the plan to increase the contribution percentage for all eligible employees (other than Employee W) for the 2003 plan year and (2) contributing an additional amount (adjusted for earnings) for those employees for that plan year. To determine the increase in the plan's contribution percentage (and the additional amount contributed on behalf of each eligible employee), the improperly allocated amount ($2,400) is divided by the § 401(a)(17) limit for 2006 ($220,000). Accordingly, the plan is amended to increase the contribution percentage by 1.09 percentage points ($2,400/$220,000) from 8% to 9.09%. In addition, each eligible employee for the 2006 plan year (other than Employee W) receives an additional contribution of 1.09% multiplied by that employee's plan compensation for 2006. This additional contribution is adjusted for earnings.

(2) *Hardship Distribution Failures and Plan Loan Failures*. (a) *Plan Amendment Correction Method*. The Operational Failure of making hardship distributions to employees under a plan that does not provide for hardship distributions may be corrected using the plan amendment correction method set forth in this paragraph. The plan is amended retroactively to provide for the hardship distributions that were made available. This paragraph does not apply unless (i) the amendment satisfies § 401(a), and (ii) the plan as amended would have satisfied the qualification requirements of § 401(a) (including the requirements applicable to hardship distributions under § 401(k), if applicable) had the amendment been adopted when hardship distributions were first made available. (See Example 26.) The Plan Amendment Correction Method is also available for the Operational Failure of permitting plan loans to employees under a plan that does not provide for plan loans. The plan is amended retroactively to provide for the plan loans that were made available. This paragraph does not apply unless (i) the amendment satisfies § 401(a), and (ii) the plan as amended would have satisfied the qualification requirements of § 401(a) (and the requirements applicable to plan loans under § 72(p)) had the amendment been adopted when plan loans were first made available.

(b) Example.

Example 26:

Employer K, a for-profit corporation, maintains a § 401(k) plan. Although plan provisions in 2005 did not provide for hardship distributions, beginning in 2005 hardship distributions of amounts allowed to be distributed under § 401(k) were made currently and effectively available to all employees (within the meaning of § l.401(a)(4)–4). The standard used to determine hardship satisfied the deemed hardship distribution standards in § 1.401(k)–1(d). Hardship distributions were made to a number of employees during

the 2005 and 2006 plan years, creating an Operational Failure. The failure was discovered in 2007.

Correction:

Employer K corrects the failure under VCP by adopting a plan amendment, effective January 1, 2005, to provide a hardship distribution option that satisfies the rules applicable to hardship distributions in § 1.401(k)–1(d). The amendment provides that the hardship distribution option is available to all employees. Thus, the amendment satisfies § 401(a), and the plan as amended in 2005 would have satisfied § 401(a) (including § 1.401(a)(4)–4 and the requirements applicable to hardship distributions under § 401(k)) if the amendment had been adopted in 2005.

(3) *Early Inclusion of Otherwise Eligible Employee Failure*. (a) *Plan Amendment Correction Method*. The Operational Failure of including an otherwise eligible employee in the plan who either (i) has not completed the plan's minimum age or service requirements, or (ii) has completed the plan's minimum age or service requirements but became a participant in the plan on a date earlier than the applicable plan entry date, may be corrected by using the plan amendment correction method set forth in this paragraph. The plan is amended retroactively to change the eligibility or entry date provisions to provide for the inclusion of the ineligible employee to reflect the plan's actual operations. The amendment may change the eligibility or entry date provisions with respect to only those ineligible employees that were wrongly included, and only to those ineligible employees, provided (i) the amendment satisfies § 401(a) at the time it is adopted, (ii) the amendment would have satisfied § 401(a) had the amendment been adopted at the earlier time when it is effective, and (iii) the employees affected by the amendment are predominantly nonhighly compensated employees.

(b) Example.

Example 27:

Employer L maintains a § 401(k) plan applicable to all of its employees who have at least six months of service. The plan is a calendar year plan. The plan provides that Employer L will make matching contributions based upon an employee's salary reduction contributions. In 2007, it is discovered that all four employees who were hired by Employer L in 2006 were permitted to make salary reduction contributions to the plan effective with the first weekly paycheck after they were employed. Three of the four employees are nonhighly compensated. Employer L matched these employees' salary reduction contributions in accordance with the plan's matching contribution formula. Employer L calculates the ADP and ACP tests for 2006 (taking into account the salary reduction and matching contributions that were made for these employees) and determines that the tests were satisfied.

Correction:

Employer L corrects the failure under SCP by adopting a plan amendment, effective for employees hired on or after January 1, 2006, to provide that there is no service eligibility requirement under the plan and submitting the amendment to the Service for a determination letter.

SECTION 3. EARNINGS ADJUSTMENT METHODS AND EXAMPLES

.01 *Earnings Adjustment Methods*. (1) *In general*. (a) Under section 6.02(4)(a) of this revenue procedure, whenever the appropriate correction method for an Operational Failure in a defined contribution plan includes a corrective contribution or allocation that increases one or more employees' account balances (now or in the future), the contribution or allocation is adjusted for earnings and forfeitures. This section 3 provides earnings adjustment methods (but not forfeiture adjustment methods) that may be used by an employer to adjust a corrective contribution or allocation for earnings in a defined contribution plan. Consequently, these earnings adjustment methods may be used to determine the earnings adjustments for corrective contributions or allocations made under the correction methods in section 2 and under the correction methods in Appendix A. If an earnings adjustment method in this section 3 is used to adjust a corrective contribution or allocation, that adjustment is treated as satisfying the earnings adjustment requirement of section 6.02(4)(a) of this revenue procedure. Other earnings adjustment methods, different from those illustrated in this section 3, may also be appropriate for adjusting corrective contributions or allocations to reflect earnings.

(b) Under the earnings adjustment methods of this section 3, a corrective contribution or allocation that increases an employee's account balance is adjusted to reflect an "earnings amount" that is based on the earnings rate(s) (determined under section 3.01(3)) for the period of the failure (determined under section 3.01(2)). The earnings amount is allocated in accordance with section 3.01(4).

(c) The rule in section 6.02(5)(a) of this revenue procedure permitting reasonable estimates in certain circumstances applies for purposes of this section 3. For this purpose, a determination of earnings made in accordance with the rules of administrative convenience set forth in this section 3 is treated as a precise determination of earnings. Thus, if the probable difference between an approximate determination of earnings and a determination of earnings under this section 3 is insignificant and the administrative cost of a precise determination would significantly exceed the probable difference, reasonable estimates may be used in calculating the appropriate earnings.

(d) This section 3 does not apply to corrective distributions or corrective reductions in account balances. Thus, for example, while this section 3 applies in increasing the account balance of an improperly excluded employee to correct the exclusion of the employee under the reallocation correction method described in section 2.02(2)(a)(iii)(B), this section 3 does not apply in reducing the account balances of other employees under the reallocation correction method. (See section 2.02(2)(a)(iii)(C) for rules that apply to the earnings adjustments for such reductions.) In addition, this section 3 does not apply in determining earnings adjustments under the one-to-one correction method described in section 2.01(1)(b)(iii).

(2) *Period of the Failure*. (a) *General Rule*. For purposes of this section 3, the "period of the failure" is the period from the date that the failure began through the date of correction. For example, in the case of an improper forfeiture of an employee's account balance, the beginning of the period of the failure is the date as of which the account balance was improperly reduced. See section 6.02(4)(e) of this revenue procedure.

(b) *Rules for Beginning Date for Exclusion of Eligible Employees from Plan*. (i) *General Rule*. In the case of an exclusion of an eligible employee from a plan contribution, the beginning of the period of the failure is the date on which contributions of the same type (*e.g.*, elective deferrals, matching contributions, or discretionary nonelective employer contributions) were made for other employees for the year of the failure. In the case of an exclusion of an eligible employee from an

allocation of a forfeiture, the beginning of the period of the failure is the date on which forfeitures were allocated to other employees for the year of the failure.

(ii) *Exclusion from a 401(k) or (m) Plan*. For administrative convenience, for purposes of calculating the earnings rate for corrective contributions for a plan year (or the portion of the plan year) during which an employee was improperly excluded from making periodic elective deferrals or after-tax employee contributions, or from receiving periodic matching contributions, the Employer may treat the date on which the contributions would have been made as the midpoint of the plan year (or the midpoint of the portion of the plan year) for which the failure occurred. Alternatively, in this case, the Employer may treat the date on which the contributions would have been made as the first date of the plan year (or the portion of the plan year) during which an employee was excluded, provided that the earnings rate used is one half of the earnings rate applicable under section 3.01(3) for the plan year (or the portion of the plan year) for which the failure occurred.

(3) *Earnings Rate*. (a) *General Rule*. For purposes of this section 3, the earnings rate generally is based on the investment results that would have applied to the corrective contribution or allocation if the failure had not occurred.

(b) *Multiple Investment Funds*. If a plan permits employees to direct the investment of account balances into more than one investment fund, the earnings rate is based on the rate applicable to the employee's investment choices for the period of the failure. For administrative convenience, if most of the employees for whom the corrective contribution or allocation is made are nonhighly compensated employees, the rate of return of the fund with the highest earnings rate under the plan for the period of the failure may be used to determine the earnings rate for all corrective contributions or allocations. If the employee had not made any applicable investment choices, the earnings rate may be based on the earnings rate under the plan as a whole (*i.e.*, the average of the rates earned by all of the funds in the valuation periods during the period of the failure weighted by the portion of the plan assets invested in the various funds during the period of the failure).

(c) *Other Simplifying Assumptions*. For administrative convenience, the earnings rate applicable to the corrective contribution or allocation for a valuation period with respect to any investment fund may be assumed to be the actual earnings rate for the plan's investments in that fund during that valuation period. For example, the earnings rate may be determined without regard to any special investment provisions that vary according to the size of the fund. Further, the earnings rate applicable to the corrective contribution or allocation for a portion of a valuation period may be a *pro rata* portion of the earnings rate for the entire valuation period, unless the application of this rule would result in either a significant understatement or overstatement of the actual earnings during that portion of the valuation period.

(4) *Allocation Methods*. (a) *In General*. For purposes of this section 3, the earnings amount generally may be allocated in accordance with any of the methods set forth in this paragraph (4). The methods under paragraph (4)(c), (d), and (e) are intended to be particularly helpful where corrective contributions are made at dates between the plan's valuation dates.

(b) *Plan Allocation Method*. Under the plan allocation method, the earnings amount is allocated to account balances under the plan in accordance with the plan's method for allocating earnings as if the failure had not occurred. (See, Example 28.)

(c) *Specific Employee Allocation Method*. Under the specific employee allocation method, the entire earnings amount is allocated solely to the account balance of the employee on whose behalf the corrective contribution or allocation is made (regardless of whether the plan's allocation method would have allocated the earnings solely to that employee). In determining the allocation of plan earnings for the valuation period during which the corrective contribution or allocation is made, the corrective contribution or allocation (including the earnings amount) is treated in the same manner as any other contribution under the plan on behalf of the employee during that valuation period. Alternatively, where the plan's allocation method does not allocate plan earnings for a valuation period to a contribution made during that valuation period, plan earnings for the valuation period during which the corrective contribution or allocation is made may be allocated as if that employee's account balance had been increased as of the last day of the prior valuation period by the corrective contribution or allocation, including only that portion of the earnings amount attributable to earnings through the last day of the prior valuation period. The employee's account balance is then further increased as of the last day of the valuation period during which the corrective contribution or allocation is made by that portion of the earnings amount attributable to earnings after the last day of the prior valuation period. (See Example 29.)

(d) *Bifurcated Allocation Method*. Under the bifurcated allocation method, the entire earnings amount for the valuation periods ending before the date the corrective contribution or allocation is made is allocated solely to the account balance of the employee on whose behalf the corrective contribution or allocation is made. The earnings amount for the valuation period during which the corrective contribution or allocation is made is allocated in accordance with the plan's method for allocating other earnings for that valuation period in accordance with section 3.01(4)(b). (See Example 30.)

(e) *Current Period Allocation Method*. Under the current period allocation method, the portion of the earnings amount attributable to the valuation period during which the period of the failure begins ("first partial valuation period") is allocated in the same manner as earnings for the valuation period during which the corrective contribution or allocation is made in accordance section 3.01(4)(b). The earnings for the subsequent full valuation periods ending before the beginning of the valuation period during which the corrective contribution or allocation is made are allocated solely to the employee for whom the required contribution should have been made. The earnings amount for the valuation period during which the corrective contribution or allocation is made ("second partial valuation period") is allocated in accordance with the plan's method for allocating other earnings for that valuation period in accordance with section 3.01(4)(b). (See Example 31.)

.02 *Examples*.

Example 28:

Employer L maintains a profit-sharing plan that provides only for nonelective contributions. The plan has a single investment fund. Under the plan, assets are valued annually (the last day of the plan year) and earnings for the year are allocated in proportion to account balances as of the last day of the prior year, after reduction for distributions during the current year but without regard to contributions received during the current year (the "prior year account balance"). Plan contributions for 1997 were made on March 31, 1998. On April 20, 2000 Employer L determines that an operational failure occurred for 1997 because Employee X was improperly excluded from the plan. Employer L decides to correct the failure by using the Appendix A correction method for the exclusion of an eligible employee from nonelective contributions in a profit-sharing plan. Under this method, Employer L determines that this failure is corrected by making a contribution on behalf of Employee X of $5,000 (adjusted for earnings). The earnings rate under the plan for 1998 was +20%. The earnings rate under the plan for 1999 was +10%. On May 15, 2000, when Employer L determines that a contribution to correct for the failure will be made on June 1, 2000, a reasonable estimate of the earnings rate under the plan from January 1, 2000 to June 1, 2000 is +12%.

Earnings Adjustment on the Corrective Contribution:

The $5,000 corrective contribution on behalf of Employee X is adjusted to reflect an earnings amount based on the earnings rates for the period of the failure (March 31, 1998 through June 1, 2000) and the earnings amount is allocated using the plan allocation method. Employer L determines that a *pro rata* simplifying assumption may be used to determine the earnings rate for the period from March 31, 1998 to December 31, 1998, because that rate does not significantly understate or overstate the actual earnings for that period. Accordingly, Employer L determines that the earnings rate for that period is 15% (9/12 of the plan's 20% earnings rate for the year). Thus, applicable earnings rates under the plan during the period of the failure are:

Time Periods	Earnings Rate
3/31/98 — 12/31/98 (First Partial Valuation Period)	+15%
1/1/99 — 12/31/99	+10%
1/1/00 — 6/1/00 (Second Partial Valuation Period)	+12%

If the $5,000 corrective contribution had been contributed for Employee X on March 31, 1998, (1) earnings for 1998 would have been increased by the amount of the earnings on the additional $5,000 contribution from March 31, 1998 through December 31, 1998 and would have been allocated as 1998 earnings in proportion to the prior year (December 31, 1997) account balances, (2) Employee X's account balance as of December 31, 1998 would have been increased by the additional $5,000 contribution, (3) earnings for 1999 would have been increased by the 1999 earnings on the additional $5,000 contribution (including 1998 earnings thereon) allocated in proportion to the prior year (December 31, 1998) account balances along with other 1999 earnings, and (4) earnings for 2000 would have been increased by the earnings on the additional $5,000 (including 1998 and 1999 earnings thereon) from January 1 to June 1, 2000 and would be allocated in proportion to the prior year (December 31, 1999) account balances along with other 2000 earnings. Accordingly, the $5,000 corrective contribution is adjusted to reflect an earnings amount of $2,084 ($5,000[(1.15)(1.10)(1.12)–1]) and the earnings amount is allocated to the account balances under the plan allocation method as follows:

(a) Each account balance that shared in the allocation of earnings for 1998 is increased, as of December 31, 1998, by its appropriate share of the earnings amount for 1998, $750 ($5,000(.15)).

(b) Employee X's account balance is increased, as of December 31, 1998, by $5,000.

(c) The resulting December 31, 1998 account balances will share in the 1999 earnings, including the $575 for 1999 earnings included in the corrective contribution ($5,750(.10)), to determine the account balances as of December 31, 1999. However, each account balance other than Employee X's account balance has already shared in the 1999 earnings, excluding the $575. Accordingly, Employee X's account balance as of December 31, 1999 will include $500 of the 1999 portion of the earnings amount based on the $5,000 corrective contribution allocated to Employee X's account balance as of December 31, 1998 ($5,000(.10)). Then each account balance that originally shared in the allocation of earnings for 1999 (*i.e.*, excluding the $5,500 additions to Employee X's account balance) is increased by its appropriate share of the remaining 1999 portion of the earnings amount, $75.

(d) The resulting December 31, 1999 account balances (including the $5,500 additions to Employee X's account balance) will share in the 2000 portion of the earnings amount based on the estimated January 1, 2000 to June 1, 2000 earnings included in the corrective contribution equal to $759 ($6,325(.12)). (See Table 1.)

TABLE 1 CALCULATION AND ALLOCATION OF THE CORRECTIVE AMOUNT ADJUSTED FOR EARNINGS			
	Earnings Rate	Amount	Allocated to:
Corrective Contribution		$5,000	Employee X
First Partial Valuation Period Earnings	15%	750[1]	All 12/31/1997 Account Balances[4]
1999 Earnings	10%	575[2]	Employee X ($500)/All 12/31/1998 Account Balances ($75)[4]
Second Partial Valuation Period Earnings	12%	759[3]	All 12/31/1999 Account Balances (including Employee X's $5,500)[4]
Total Amount Contributed		$7,084	

[1]$5,000 x 15%
[2]$5,750($5,000 +750) x 10%
[3]$6,325($5,000 +750 +575) x 12%
[4] After reduction for distributions during the year for which earning are being determined but without regard to contributions received during the year for which earnings are being determined.

Example 29:

The facts are the same as in *Example 28*.

Earnings Adjustment on the Corrective Contribution:

The earnings amount on the corrective contribution is the same as in Example 30, but the earnings amount is allocated using the specific employee allocation method. Thus, the entire earnings amount for all periods through June 1, 2000 (*i.e.*, $750 for March 31, 1998 to December 31, 1998, $575 for 1999, and $759 for January 1, 2000 to June 1, 2000) is allocated to Employee X. Accordingly, Employer L makes a contribution on June 1, 2000 to the plan of $7,084 ($5,000(1.15)(1.10)(1.12)). Employee X's account balance as of December 31, 2000 is increased by $7,084. Alternatively, Employee X's account balance as of December 31, 1999 is increased by $6,325 ($5,000(1.15)(1.10)), which shares in the allocation of earnings for 2000, and Employee X's account balance as of December 31, 2000 is increased by the remaining $759. (See Table 2.)

TABLE 2 CALCULATION AND ALLOCATION OF THE CORRECTIVE AMOUNT ADJUSTED FOR EARNINGS			
	Earnings Rate	Amount	Allocated to:
Corrective Contribution		$5,000	Employee X
First Partial Valuation Period Earnings	15%	750[1]	Employee X
1999 Earnings	10%	575[2]	Employee X
Second Partial Valuation Period Earnings	12%	759[3]	Employee X
Total Amount Contributed		$7,084	

[1]$5,000 x 15%
[2]$5,750($5,000 +750) x 10%
[3]$6,325($5,000 +750 +575) x 12%

Example 30:

The facts are the same as in *Example 28*.

Earnings Adjustment on the Corrective Contribution:

The earnings amount on the corrective contribution is the same as in Example 23, but the earnings amount is allocated using the bifurcated allocation method. Thus, the earnings for the first partial valuation period (March 31, 1998 to December 31, 1998) and the earnings for 1999 are allocated to Employee X. Accordingly, Employer L makes a contribution on June 1, 2000 to the plan of $7,084 ($5,000(1.15)(1.10)(1.12)). Employee X's account balance as of December 31, 1999 is increased by $6,325 ($5,000(1.15)(1.10)); and the December 31, 1999 account balances of employees (including Employee X's increased account balance) will share in estimated January 1, 2000 to June 1, 2000 earn-

ings on the corrective contribution equal to $759 ($6,325(.12)). (See Table 3.)

TABLE 3
CALCULATION AND ALLOCATION OF THE CORRECTIVE AMOUNT ADJUSTED FOR EARNINGS

	Earnings Rate	Amount	Allocated to:
Corrective Contribution		$5,000	Employee X
First Partial Valuation Period Earnings	15%	750[1]	Employee X
1999 Earnings	10%	575[2]	Employee X
Second Partial Valuation Period Earnings	12%	759[3]	12/31/99 Account Balances (including Employee X's $6,325)[4]
Total Amount Contributed		$7,084	

[1]$5,000 x 15%
[2]$5,750($5,000 +750) x 10%
[3]$6,325($5,000 +750 +575) x 12%
[4]After reduction for distributions during the 2000 year but without regard to contributions received during the 2000 year.

Example 31:

The facts are the same as in *Example 28*.

Earnings Adjustment on the Corrective Contribution:

The earnings amount on the corrective contribution is the same as in Example 23, but the earnings amount is allocated using the current period allocation method. Thus, the earnings for the first partial valuation period (March 31, 1998 to December 31, 1998) are allocated as 2000 earnings. Accordingly, Employer L makes a contribution on June 1, 2000 to the plan of $7,084 ($5,000 (1.15)(1.10)(1.12)). Employee X's account balance as of December 31, 1999 is increased by the sum of $5,500 ($5,000(1.10)) and the remaining 1999 earnings on the corrective contribution equal to $75 ($5,000(.15)(.10)). Further, both (1) the estimated March 31, 1998 to December 31, 1998 earnings on the corrective contribution equal to $750 ($5,000(.15)) and (2) the estimated January 1, 2000 to June 1, 2000 earnings on the corrective contribution equal to $759 ($6,325(.12)) are treated in the same manner as 2000 earnings by allocating these amounts to the December 31, 2000 account balances of employees in proportion to account balances as of December 31, 1999 (including Employee X's increased account balance). (See Table 4.) Thus, Employee X is allocated the earnings for the full valuation period during the period of the failure.

TABLE 4
CALCULATION AND ALLOCATION OF THE CORRECTIVE AMOUNT ADJUSTED FOR EARNINGS

	Earnings Rate	Amount	Allocated to:
Corrective Contribution		$5,000	Employee X
First Partial Valuation Period Earnings	15%	750[1]	12/31/99 Account Balances (including Employee X's $5,575)[4]
1999 Earnings	10%	575[2]	Employee X
Second Partial Valuation Period Earnings	12%	759[3]	12/31/99 Account Balances (including Employee X's $5,575)[4]
Total Amount Contributed		$7,084	

[1]$5,000 x 15%
[2]$5,750($5,000 +750) x 10%
[3]$6,325($5,000 +750 +575) x 12%
[4]After reduction for distributions during the year for which earnings are being determined but without regard to contributions received during the year for which earnings are being determined.

APPENDIX C
VCP CHECKLIST

Plan Name: _____ EIN: _____ Plan #: _____

INSTRUCTIONS

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, then Part I of this Appendix C does not need to be completed.

The Service will be able to respond more quickly to your VCP request if it is carefully prepared and complete. To ensure that your request is in order, use this checklist. *Sign and date the checklist (as plan sponsor or authorized representative) and include it in the submission as provided in section 11.10 of Rev. Proc. 2008–50.* (Hereafter, all section references are to Rev. Proc. 2008–50)

You must submit a completed copy of this checklist with your request. If a completed checklist is not submitted with your request, substantive consideration of your submission will be deferred until a completed checklist is received.

PART I – PLAN INFORMATION

1. APPLICANT'S NAME _____

2. APPLICANT'S ADDRESS

_____

_____

3. APPLICANT'S TELEPHONE NO. _____ (optional) 4. FAX NO. _____ (optional)

5. APPLICANT'S EIN _____ (do not use a Social Security Number) 6. PLAN NO. _____

7. PLAN NAME _____

8. TYPE OF SUBMISSION

☐	REGULAR SUBMISSION
☐	REGULAR SUBMISSION — ANONYMOUS
☐	REGULAR SUBMISSION — MULTI-EMPLOYER PLAN
☐	REGULAR SUBMISSION — MULTIPLE EMPLOYER PLAN
☐	GROUP SUBMISSION

9. TYPE OF PLAN (CHECK ONE ONLY):

☐	01	PROFIT SHARING	☐	09	CASH BALANCE
☐	02	401(k)	☐	10	GOVERNMENTAL PLAN (§ 414(d))
☐	03	MONEY PURCHASE	☐	11	SEP
☐	04	DEFINED BENEFIT	☐	12	SARSEP
☐	05	ESOP	☐	13	SIMPLE
☐	06	TARGET BENEFIT	☐	14	STOCK BONUS
☐	07	403(b)	☐	15	KSOP
☐	08	457	☐	16	OTHER (specify):

10. DATE (month and day) ON WHICH PLAN YEAR ENDS _____.

11. NUMBER OF PARTICIPANTS IN THE PLAN AS PROVIDED ON THE MOST RECENTLY FILED FORM 5500 SERIES (See Rev. Proc. 2008–50, section 12.07.): _____

12. ASSETS IN THE PLAN AS PROVIDED ON THE MOST RECENTLY FILED FORM 5500 SERIES (ROUND TO NEAREST DOLLAR): $ _____
See Rev. Proc. 2008–50, section 12.07.

If the Applicant is being represented by someone in connection with this matter or wishes to authorize someone to receive information from us in connection with this matter, submit a completed Form 2848 or Form 8821 and complete items 13 through 18.

13. NAME OF APPLICANT'S REPRESENTATIVE _____

14. NAME OF REPRESENTATIVE'S FIRM (if applicable)

_____

15. REPRESENTATIVE'S ADDRESS

_____

_____

16. REPRESENTATIVE'S PHONE NO. _____ 17. FAX NO. _____

18. REPRESENTATIVE'S E-MAIL ADDRESS _____
(optional)

PART II – SUBMISSION REQUIREMENTS
Answer each question by answering "Yes" or "N/A" as appropriate

Yes	N/A	Question	Reference (Rev. Proc. section)
		1. Have you included an explanation of how and why the failure(s) arose, including a description of the applicable administrative procedures for the plan in effect at the time the failure(s) occurred?	11.03(6)

Yes	N/A	Question	Reference (Rev. Proc. section)
		2. Have you included a detailed description of the method for correcting the failure(s) identified in your submission? This description must include, for example, the number of employees affected and the expected cost of correction (both of which may be approximated if the exact number cannot be determined at the time of the request), the years involved, and calculations or assumptions the Plan Sponsor used to determine the amounts needed for correction. Note that each step of the correction method must be described in narrative form.	11.03(7)
		3. If you are you requesting that participant loans being corrected under this revenue procedure not be treated as distributions pursuant to § 72(p), have you included the request and a detailed description of the failure? Alternatively, if you are requesting that participant loans being corrected under this revenue procedure be recognized as distributions in the year of correction instead of the year that the deemed distribution occurred under § 72(p), have you included the request and a detailed description of the failure?	11.03(13)
		4. Have you described the earnings or interest methodology (indicating computation period and basis for determining earnings or interest rates) that will be used to calculate earnings or interest on any corrective contributions or distributions? (As a general rule, the interest rate (or rates) earned by the plan during the applicable period(s) should be used in determining the earnings for corrective contributions or distributions.)	11.03(8)
		5. Have you submitted specific calculations for either all affected employees or a representative sample of affected employees? In lieu of providing correction calculations with respect to each employee affected by a failure, you may submit calculations with respect to a representative sample of affected employees. However, the representative sample calculations must be sufficient to demonstrate each aspect of the correction method proposed.	11.03(9)
		6. If you are requesting a waiver of the excise tax under § 4974 of the Code, have you included the request, and, if applicable, an explanation supporting the request for any affected owner-employee or 10 percent owner?	11.03(12)
		7. If you are requesting relief of the excise tax under §§ 4972, 4973, or 4979, have you included the request and a detailed description of the failure?	11.03(12)
		8. Have you described the method that will be used to locate and notify former employees or, if there are no former employees affected by the failure(s) or the correction(s), provided an affirmative statement to that effect?	11.03(10)
		9. Have you provided a description of the administrative measures that have been or will be implemented to ensure that the same failure(s) do not recur?	11.03(11)
		10. Have you included a statement that, to the best of the Plan Sponsor's knowledge, the plan is not currently under an Employee Plans examination?	11.03(14)
		11. Have you included a statement that, to the best of the Plan Sponsor's knowledge, the Plan Sponsor is not under an Exempt Organizations examination?	11.03(14)
		12. Have you included a statement that neither the plan nor the Plan Sponsor has been a party to an abusive tax avoidance transaction? Alternatively, have you provided a statement identifying the abusive tax avoidance transaction(s) to which the plan or the Plan Sponsor has been a party?	11.03(15)

Yes	N/A	Question	Reference (Rev. Proc. section)
		13. If the submission includes a failure related to Transferred Assets, have you included a description of the related employer transaction, including the date of the employer transaction and the date the assets were transferred to the plan?	11.03(16)
		14. Have you included a copy of the portions of the plan document (and adoption agreement, if applicable) relevant to the failure(s) and method(s) of correction?	11.04(1)
		15. Have you included the original signature of the sponsor or the sponsor's authorized representative?	11.07
		16. Have you included a *Power of Attorney* (Form 2848) or *Tax Information Authorization* (Form 8821)? Note: Authorization to represent a plan sponsor before the Service using Form 2848 is limited to attorneys, certified public accountants, enrolled agents, enrolled retirement plan agents, and enrolled actuaries.	11.08
		17. Have you included a Penalty of Perjury Statement signed (original signature only) and dated by the Plan Sponsor?	11.09
		18. Have you submitted the Appendix E acknowledgement letter?	11.12
		19. Where applicable, have you submitted an application for a determination letter and Form 8717 together with a check for the user fee made payable to the U.S. Treasury?	10.05 and 11.04(2)
		20. If the plan is currently being considered in an unrelated determination letter application, have you included a statement to that effect?	11.03(17)
		21. Have you included a check for the VCP compliance fee, and, if applicable, a separate check for the determination letter fee, each made payable to the U. S. Treasury?	11.04 and 11.05
		22. If your submission is for a terminating Orphan Plan, have you included a request for a waiver of the VCP fee?	11.03(22)
		23. Have you assembled your submission as described in section 11.15?	11.15

If you inserted "N/A" for any item, enter an explanation here:

_____

_____

_____

_____

_____

_____ _____

Signature Date

_____

Title or Authority

_____

Typed or printed name of person signing checklist

APPENDIX D
VCP SUBMISSION

Plan Name: _____ EIN: _____ Plan #: _____

(Please include the plan name, EIN, and plan number information on each page of the submission.)

PART I – PLAN INFORMATION

1. APPLICANT'S NAME _____

2. APPLICANT'S ADDRESS

_____

_____

3. APPLICANT'S TELEPHONE NO. _____ (optional) 4. FAX NO. _____ (optional)

5. APPLICANT'S EIN _____ (do not use a Social Security Number) 6. PLAN NO. _____

7. PLAN NAME _____

8. TYPE OF SUBMISSION

☐	REGULAR SUBMISSION
☐	REGULAR SUBMISSION — ANONYMOUS
☐	REGULAR SUBMISSION — MULTI-EMPLOYER PLAN
☐	REGULAR SUBMISSION — MULTIPLE EMPLOYER PLAN
☐	GROUP SUBMISSION

9. TYPE OF PLAN (CHECK ONE ONLY):

☐	01	PROFIT SHARING	☐	09	CASH BALANCE
☐	02	401(k)	☐	10	GOVERNMENTAL PLAN (§ 414(d))
☐	03	MONEY PURCHASE	☐	11	SEP
☐	04	DEFINED BENEFIT	☐	12	SARSEP
☐	05	ESOP	☐	13	SIMPLE
☐	06	TARGET BENEFIT	☐	14	STOCK BONUS
☐	07	403(b)	☐	15	KSOP
☐	08	457	☐	16	OTHER (specify):

10. DATE (month and day) ON WHICH PLAN YEAR ENDS _____.

11. NUMBER OF PARTICIPANTS IN THE PLAN AS PROVIDED ON THE MOST RECENTLY FILED FORM 5500 SERIES (See Rev. Proc. 2008–50, section 12.07.): _____

12. ASSETS IN THE PLAN AS PROVIDED ON THE MOST RECENTLY FILED FORM 5500 SERIES (ROUND TO NEAREST DOLLAR): $ _____
(See Rev. Proc. 2008–50, section 12.07)

If the Applicant is being represented by someone in connection with this matter or wishes to authorize someone to receive information from us in connection with this matter, submit a completed Form 2848 or Form 8821, and complete items 13 through 18.

13. NAME OF APPLICANT'S REPRESENTATIVE _____

14. NAME OF REPRESENTATIVE'S FIRM _____

15. REPRESENTATIVE'S ADDRESS:

_____

_____

16. REPRESENTATIVE'S PHONE NO. _____ 17. FAX NO. _____

18. REPRESENTATIVE'S E-MAIL ADDRESS _____
(optional)

PART II. APPLICANT'S DESCRIPTION OF FAILURES

Attach additional pages, as needed. Label attachment "PART II. APPLICAN'TS DESCRIPTION OF FAILURES." List and number each failure separately.

PART III. APPLICANT'S DESCRIPTION OF THE PROPOSED METHOD OF CORRECTION

Attach additional pages, as needed. Label attachment "PART III. APPLICAN'TS DESCRIPTION OF THE PROPOSED METHOD OF CORRECTION." Describe the correction method applicable to each failure listed in Part II.

PART IV. APPLICANT'S PROPOSED REVISION TO ADMINISTRATIVE PROCEDURES

Attach additional pages, as needed. Label attachment "PART IV. APPLICAN'TS PROPOSED REVISION TO ADMINISTRATIVE PROCEDURES." Please include an explanation of how and why the failures arose and a description of the measures that will be implemented to ensure that the same failures will not occur.

PART V. REQUESTS RELATED TO EXCISE TAXES, ADDITIONAL TAX, AND TAX REPORTING

☐ The Applicant requests that the Service not pursue the following taxes under the Internal Revenue Code (attach supporting rationale as required by Section 6.09), labeled "PART V. REQUESTS RELATED TO EXCISE TAX, ADDITIONAL TAX, AND TAX REPORTING.")

- ☐ Excise tax under § 4972 with respect to failure(s) #_____.
- ☐ Excise tax under § 4973 with respect to failure(s) #_____.
- ☐ Excise tax under § 4974 with respect to failure(s) #_____.
- ☐ Excise tax under § 4979 with respect to failure(s) #_____.
- ☐ Imposition of additional tax under § 72(t) with respect to failure(s) #_____.

☐ The Applicant requests that the Service grant the following with respect to plan loan failures as described in section 6.07 of Rev. Proc. 2008–50:

- ☐ With respect to failure(s) #_____, that a deemed distribution corrected pursuant to this VCP submission not be required to be reported on Form 1099–R and that repayments made by such correction not result in the affected participant having additional basis in the plan for purposes of determining the tax treatment of subsequent distributions from the plan.
- ☐ With respect to failure(s) #_____, that a deemed distribution be reported on Form 1099–R with respect to affected participant(s) for the year of correction instead of the year of the failure.

PART VI. APPLICANT'S REPRESENTATIONS

(Note: Since the representations include the penalty of perjury statement, the representations under Part VI of this Appendix D must be signed by the Plan Sponsor, not the plan representative.)

A. *Under Examination*

To the best of my knowledge:

1) The subject plan is not currently under examination of either an Employee Plans Form 5500 series return or other Employee Plans examination,

2) The Plan Sponsor is not under an Exempt Organizations examination (that is, an examination of a Form 990 series return or other Exempt Organizations examination),

3) Neither the Plan Sponsor nor any of its representatives has received verbal or written notification from the Tax Exempt and Government Entities Division of the Internal Revenue Service of an impending examination or of any impending referral for such examination, nor is the plan in Appeals or litigation for any issues raised in such an examination, and

4) The subject plan is not currently under investigation by the Criminal Investigation Division of the Internal Revenue Service.

B. *Abusive tax avoidance transaction* (check box that applies)

☐ Neither the plan nor the Plan Sponsor has been a party to an abusive tax avoidance transaction as defined in section 4.13(2) of Rev. Proc. 2008–50.

☐ The plan or the Plan Sponsor has been a party to an abusive tax avoidance transaction. Details of the transaction(s) are provided in a separate statement which has been included with the submission.

C. *Compliance Fee*

The Applicant will neither attempt to amortize, deduct, or recover from the Internal Revenue Service any compliance fee paid in connection with this compliance statement nor receive any Federal tax benefit on account of payment of such compliance fee.

D. *Penalties of Perjury*

Under penalties of perjury, I declare that I have examined this submission, including accompanying documents and representations. To the best of my knowledge and belief, the facts and information presented in support of this submission are true, correct, and complete.

Signed: _____ Date: _____

Name (printed): _____ Title: _____

PART VII. ENFORCEMENT RESOLUTION (to be completed by IRS only)

The Service will not pursue the sanction of revoking the tax-favored status of the plan under §§ 401(a), 403(b), 408(k) or 408(p) on account of the failure(s) described in this submission. This compliance statement considers only the acceptability of the correction method(s) and the revision(s) of administrative procedures described in the submission and does not express an opinion as to the accuracy or acceptability of any calculations or other material submitted with the application. In no event may this compliance statement be relied on for the purpose of concluding that the plan or Plan Sponsor (as defined in Rev. Proc. 2008–50) was not a party to an abusive tax avoidance transaction. The compliance statement should not be construed as affecting the rights of any party under any other law, including Title I of the Employee Retirement Income Security Act of 1974.

This compliance statement is conditioned on (1) there being no misstatement or omission of material facts in connection with the submission and (2) the completion of all corrections described within one hundred fifty (150) days of the date of the compliance statement.

☐ The Service will treat the failure to adopt interim amendments or amendments for optional law changes, as described in section 6.05(3)(a) of Rev. Proc. 2008–50 as if they had been adopted timely for the purpose of making available the extended remedial amendment period currently set forth in Revenue Procedure 2007–44, 2007–28 I.R.B. 54, or its successors. However, this compliance statement does not constitute a determination as to whether any such plan amendments, as drafted, comply with the applicable changes in qualification requirements.

☐ The Service will not pursue the following on account of the qualification failure(s) described in this submission:

☐ Excise tax under § 4972.

☐ Excise tax under § 4973.

☐ Excise tax under § 4974.

☐ Excise tax under § 4979.

☐ With respect to the loan failure(s) described in this submission:

☐ The Service will not require deemed distributions under § 72(p) to be reported on Forms 1099–R with respect to the participant(s) affected by the failure(s), and repayments made pursuant to the correction of such loan(s) will not result in an affected participant having additional basis in the plan for the purpose of determining the tax treatment of subsequent distributions from the plan to such participant(s).

☐ The Service will require deemed distributions under § 72(p) to be reported on Form 1099–R with respect to the participant(s) affected by the failure(s). However, the plan will be permitted to report deemed distributions on Form 1099–R in the year of correction, instead of the year of the failure.

☐ With respect to the Overpayment failures described in this submission that were corrected by removing improper distributions from the IRA(s) of the affected participant(s) and returning those distributions to the plan, the Service will not pursue _____ % of the 10% additional income tax under § 72(t).

Approved: _____

Joyce Kahn, Manager
Employee Plans Voluntary Compliance
Tax Exempt and Government Entities Division

Date: _____

APPENDIX E
ACKNOWLEDGEMENT LETTER

[ ]
[ ]
[ ]
[ ]

[INSERT NAME AND ADDRESS OF PLAN SPONSOR OR AUTHORIZED REPRESENTATIVE AT LEFT]

Applicant's Name: _____

Plan Name: _____
[insert plan name]

Plan No. _____
[insert plan number]

Control No.: _____
(to be completed by IRS)

Received Date: _____
(to be completed by IRS)

The Internal Revenue Service, Employee Plans Voluntary Compliance, has received your VCP submission for the above-captioned plan. Your request has been assigned the control number listed above. This number should be referred to in any communication to us concerning your submission.

You will be contacted when the case is assigned to an agent. If you need to inquire about the status of your case prior to that date, please call (626) 312–4921 (not a toll-free number). Please leave a message with the name of the plan, the Control Number, your name, and a phone number where you can be reached.

Thank you.

APPENDIX F
STREAMLINED VCP SUBMISSION

Plan Name: _____ EIN: _____ Plan #: _____

(Please include the plan name, EIN, and plan number information on each page of the submission.)

PART I – PLAN INFORMATION

1. APPLICANT'S NAME _____

2. APPLICANT'S ADDRESS _____

_____

3. APPLICANT'S TELEPHONE NO. _____ (optional) 4. FAX NO. _____ (optional)

5. APPLICANT'S EIN _____ (do not use a Social Security Number) 6. PLAN NO. _____

7. PLAN NAME _____

8. TYPE OF SUBMISSION

☐	REGULAR SUBMISSION
☐	REGULAR SUBMISSION — ANONYMOUS
☐	REGULAR SUBMISSION — MULTI-EMPLOYER PLAN
☐	REGULAR SUBMISSION — MULTIPLE EMPLOYER PLAN
☐	GROUP SUBMISSION

9. TYPE OF PLAN (CHECK ONE ONLY):

☐	01	PROFIT SHARING	☐	09	CASH BALANCE
☐	02	401(k)	☐	10	GOVERNMENTAL PLAN (§ 414(d))
☐	03	MONEY PURCHASE	☐	11	SEP
☐	04	DEFINED BENEFIT	☐	12	SARSEP
☐	05	ESOP	☐	13	SIMPLE
☐	06	TARGET BENEFIT	☐	14	STOCK BONUS
☐	07	403(b)	☐	15	KSOP
☐	08	457	☐	16	OTHER (specify):

10. DATE (month and day) ON WHICH PLAN YEAR ENDS _____.

11. NUMBER OF PARTICIPANTS IN THE PLAN AS PROVIDED ON THE MOST RECENTLY FILED FORM 5500 SERIES (See Rev. Proc. 2008–50, section 12.07.): _____

12. ASSETS IN THE PLAN AS PROVIDED ON THE MOST RECENTLY FILED FORM 5500 SERIES (ROUND TO NEAREST DOLLAR): $ _____
See Rev. Proc. 2008–50, section 12.07.

If the Applicant is being represented by someone in connection with this matter or wishes to authorize someone to receive information from us in connection with this matter, submit a completed Form 2848 or Form 8821, and complete items 13 through 18.

13. NAME OF APPLICANT'S REPRESENTATIVE _____

14. NAME OF REPRESENTATIVE'S FIRM _____

15. REPRESENTATIVE'S ADDRESS: _____

16. REPRESENTATIVE'S PHONE NO. _____ 17. FAX NO. _____

18. REPRESENTATIVE'S E-MAIL ADDRESS _____
(optional)

PART II. APPLICANT'S ENCLOSURES

The Applicant encloses the following documents with this submission:

☐ VCP fee of $_____ made payable to the U.S. Treasury (*required*). (If the fee is determined on the basis of treating Transferred Assets as a separate plan, pursuant to section 12.07 of Rev. Proc. 2008–50, please enclose a description of the related employer transaction, including the date of the employer transaction and the date the assets were transferred to the plan.)

☐ A written request if the application is made for a terminating Orphan Plan and the Applicant is applying for a waiver of the VCP fee.

☐ *Power of Attorney* (Form 2848) or *Tax Information Authorization* (Form 8821), if applicable.

☐ If the plan is being considered for an unrelated determination letter application, a statement to that effect.

☐ Appendix E (optional)

☐ Completed Appendix F schedule(s). (Check the schedules that apply)

- ☐ Schedule 1 — Interim and Certain Discretionary Nonamender Failures
- ☐ Schedule 2 — Nonamender Failures (other than those to which Schedule 1 applies)
- ☐ Schedule 3 — SEPs and SARSEPs
- ☐ Schedule 4 — SIMPLE IRAs
- ☐ Schedule 5 — Plan Loan Failures
- ☐ Schedule 6 — Employer Eligibility Failure
- ☐ Schedule 7 — Failure to Distribute Elective Deferrals in Excess of the § 402(g) Limit
- ☐ Schedule 8 — Failure to Pay Required Minimum Distributions Timely under § 401(a)(9)
- ☐ Schedule 9 — Correction by Plan Amendment (in accordance with Appendix B)

☐ Information required by each schedule, as set forth in each applicable Part entitled "Enclosures.".

PART III. APPLICANT'S REPRESENTATIONS

A. *Under Examination*

To the best of my knowledge:

1) The subject plan is not currently under examination of either an Employee Plans Form 5500 series return or other Employee Plans examination,

2) The Plan Sponsor is not under an Exempt Organizations examination (that is, an examination of a Form 990 series return or other Exempt Organizations examination),

3) Neither the Plan Sponsor nor any of its representatives has received verbal or written notification from the Tax Exempt and Government Entities Division of the Internal Revenue Service ("Service") of an impending examination or of any impending referral for such examination nor is the plan in Appeals or litigation for any issues raised in such an examination, and

4) The subject plan is not currently under investigation by the Criminal Investigation Division of the Internal Revenue Service.

B. *Abusive tax avoidance transaction (check box that applies)*

☐ Neither the plan nor the Plan Sponsor has been a party to an abusive tax avoidance transaction as defined in section 4.13(2) of Rev. Proc. 2008–50.

☐ The plan or the Plan Sponsor has been a party to an abusive tax avoidance transaction. Details of the transaction(s) are provided in a separate statement which has been included with the submission.

C. *Compliance Fee*

The Applicant will neither attempt to amortize, deduct, or recover from the Internal Revenue Service any compliance fee paid in connection with this compliance statement nor receive any Federal tax benefit on account of payment of such compliance fee.

D. *Penalties of Perjury*

Under penalties of perjury, I declare that I have examined this submission, including accompanying documents and representations. To the best of my knowledge and belief, the facts and information presented in support of this submission are true, correct, and complete.

Signed: _____ Date: _____

Name (printed): _____

Title: _____

PART IV: ENFORCEMENT RESOLUTION (to be completed by IRS only)

The Internal Revenue Service will not pursue the sanction of revoking the tax-favored status of the plan under §§ 401(a), 403(b), 408(k), or 408(p) of the Internal Revenue Code on account of the failure(s) described in the schedules submitted pursuant to this Appendix F. This compliance statement considers only the acceptability of the correction method(s) and the revision(s) of administrative procedures described in the schedules submitted pursuant to this Appendix F submission and does not express an opinion as to the accuracy or acceptability of any calculations or other material submitted with the application. In no event may this compliance statement be relied on for the purpose of concluding that the plan or Plan Sponsor (as defined in Rev. Proc. 2008–50) was not a party to an abusive tax avoidance transaction. The compliance statement should not be construed as affecting the rights of any party under any other law, including Title I of the Employee Retirement Income Security Act of 1974.

This compliance statement is conditioned on (1) there being no misstatement or omission of material facts in connection with the submission and (2) the completion of all corrections described in the applicable schedule(s) to this Appendix F submission within one hundred fifty (150) days of the date of the compliance statement.

In addition:
(paragraph applies only if checked by the Service)

☐ For failure(s) described in Schedule 1 of Appendix F, the Service will treat the amendments as if they had been adopted timely for the purpose of making available the extended remedial amendment period set forth in Revenue Procedure 2007–44, 2007–28 I.R.B. 54, or its successors. However, this compliance statement does not constitute a determination as to whether any such plan amendment, as drafted, complies with the applicable change in qualification requirements.

☐ For failure(s) described in Schedule 3 of Appendix F, the Service will not pursue the following:

☐ Excise tax under § 4972.

☐ Excise tax under § 4979.

☐ For failure(s) described in Schedule 4 of Appendix F, the Service will not pursue excise tax under § 4972.

☐ For loan failure(s) described in section _____ of Schedule 5 of Appendix F, the Service will not require the deemed distributions to be reported on Form 1099–R with respect to the participant(s) affected by the failure(s). The repayments made pursuant to the correction of such loan(s) will not result in an affected participant having additional basis in the plan for the purpose of determining the tax treatment of subsequent distributions from the plan to such participant(s).

☐ For loan failure(s) described in section _____ of Schedule 5 of Appendix F, the Service will require the deemed distributions to be reported on Form 1099–R with respect to the participant(s) affected by the failure(s). However, the plan will be permitted to report deemed distributions on Form 1099–R in the year of correction instead of the year of the failure.

☐ For minimum distribution failure(s) described in Schedule 8 of Appendix F, the Service will waive the excise tax under § 4974.

Approved: _____

Joyce Kahn, Manager
Employee Plans Voluntary Compliance
Tax Exempt and Government Entities Division

Date: _____

APPENDIX F, SCHEDULE 1
Interim and Certain Discretionary Nonamender Failures

Plan Name: _____ EIN: _____ Plan #: _____

(Please include the plan name, EIN, and plan number information on each page of the submission.)

PART I. IDENTIFICATION OF FAILURES

A. *Interim Amendments*

The plan identified above was not amended timely for (check all failures that apply)

☐ Good faith amendments under the Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA") required under Notice 2001–42 (for details see Notice 2001–57). If the Plan Sponsor failed to timely adopt one or more good faith amendments *required* for the plan to comply with EGTRRA, then check the box on the left and check the applicable amendments below:

- ☐ The increased limit on annual additions under § 415(c) (applies to defined contribution plans that do not incorporate § 415(c) by reference)
- ☐ Modification of top heavy rules under § 416 (applies to both defined benefit and defined contribution plans)
- ☐ Vesting requirements for employer matching contributions under § 411 (applies to plans that provided for employer matching contributions that do not vest as rapidly as any of the schedules provided for under § 411(a)(12))
- ☐ Modification of rules relating to eligible rollover distributions under §§ 401(a)(31)(A), 401(a)(31)(C), 402(c)(4), and 402(c)(8) (applies to both defined benefit and defined contribution plans)
- ☐ Repeal of the multiple use test under Treasury Regulations § 1.401 (m)–2 (applies to § 401(k) plans that were formerly subject to the multiple use test)
- ☐ Suspension period following hardship distribution (required for plans subject to the safe harbor requirements of § 401(k)(12) or § 401(m)(11))
- ☐ Plan provisions prohibiting loans to any owner-employee or shareholder-employee (required for plans that provide loans to participants but prohibit the making of loans to owner-employees or Subchapter S shareholder-employees)

☐ The automatic rollover provision under § 401(a)(31)(B), as described in Notice 2005–5 (applies to both defined benefit and defined contribution plans)

☐ The final and temporary regulations under § 401(a)(9) (interim amendment required for defined contribution plans; defined benefit plans have until the end of the extended EGTRRA remedial amendment period to amend. See Rev. Procs. 2002–29 and 2003–10.)

☐ Guidance relating to the prescribed mortality table under § 415(b)(2)(E)(v) or the applicable mortality table under § 417(e)(3)(A)(ii)(I), as described in Rev. Rul. 2001–62 (applies to defined benefit plans.)

☐ Interim amendments, as described in Rev. Proc. 2007–44 or its successors. If the plan failed to adopt one or more amendments *required* for the plan to comply with a law change, then check the box on the left and check the applicable amendments below:

- ☐ Final §§ 401(k) and 401(m) regulations (plans with 401(k) and 401(m) provisions must comply with the regulations for plan years beginning on or after January 1, 2006)
- ☐ Prohibited allocation of securities in an ESOP maintained by a S-Corp. pursuant to § 409(p)
- ☐ Retroactive annuity starting date provisions pursuant to Treasury Regulations § 1.417(e)–1 (required for plans that provide for retroactive annuity starting dates)
- ☐ Final regulations regarding low normal retirement age (§ 1.401(a)–1(b)(2))

☐ Amendments to § 1.411(d)–3 of the final regulations

☐ Final regulations under § 415

☐ Other (*i.e.*, any other interim amendment that complies with the requirements in Rev. Proc. 2007–44 or its successors). Please list:

B. *Implementation of Applicable Optional Law Changes* (defined in section 6.05(3) of Rev. Proc. 2008–50)

The plan identified above was not amended timely for (check all failures that apply)

☐ Optional good faith EGTRRA amendments under Notice 2001–42 (for details, see Notice 2001–57). If the Plan Sponsor implemented any of the optional law changes and failed to adopt good faith amendments timely to conform the plan to its operation, then check the box on the left and check the applicable amendments below:

- ☐ Increasing the limit on compensation (under § 401(a)(17)) that is taken into account for the purpose of determining allocations in a defined contribution plan or benefits in a defined benefit plan
- ☐ Disregarding amounts attributable to rollovers in determining the value of an employee's vested accrued benefit subject to involuntary distribution pursuant to § 411(a)(11)(D).
- ☐ Increasing the contribution limit for elective deferrals on account of the increased limitation under § 402(g) or, in the case of a SIMPLE 401(k) plan, § 408(p)(2)
- ☐ Adding types of rollovers accepted by the plan pursuant to EGTRRA §§ 641, 642, and 643 (available for rollovers accepted after December 31, 2001)
- ☐ Providing for catch-up contributions pursuant to § 414(v)
- ☐ Adding "severance from employment" as a distributable event pursuant to §§ 401(k)(2) and 401(k)(10)
- ☐ Increasing the limit on a participant's benefit pursuant to § 415(b)

☐ Final §§ 401(k) and 401(m) regulations (optional for plan years beginning before January 1, 2006, the earliest possible plan year in which regulations could be effective: plan year ending after December 29, 2004)

☐ Permitting participants to designate elective deferrals as Roth contributions pursuant to § 402A

☐ Permitting deemed individual retirement accounts pursuant to § 408(q)

☐ Final regulations under § 409(p) regarding ESOPs holding S-Corp stock

☐ Other amendments relating to implementation of optional law changes. Please list

PART II. DESCRIPTION OF METHOD OF CORRECTION

The Plan Sponsor has adopted amendments that satisfy the requirements of all of the items checked in Part I of this Appendix F, Schedule 1 retroactively to the effective dates of the specific provisions contained in the amendments. The executed amendments have been enclosed with this submission.

PART III. CHANGE IN ADMINISTRATIVE PROCEDURES

The Applicant has taken the following step(s) to ensure that the failure(s) will not recur:

PART IV. ENCLOSURES

In addition to the applicable enclosures listed on Appendix F, the Plan Sponsor encloses copies of the signed and dated amendments used to correct the failure(s) identified in Part I of this Appendix F, Schedule 1.

APPENDIX F, SCHEDULE 2
Nonamender Failures (other than those to which Schedule 1 applies)

Plan Name: _____ EIN: _____ Plan #: _____

(Please include the plan name, EIN, and plan number information on each page of the submission.)

PART I. IDENTIFICATION OF FAILURES

The plan identified above was not amended to comply with the applicable provisions of the following legislative and regulatory requirements by the applicable deadlines in accordance with § 401(b) and the regulations thereunder:

☐ The Employee Retirement Income Security Act of 1974 (ERISA)

☐ The Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA)

☐ The Deficit Reduction Act of 1984 (DEFRA)

☐ The Retirement Equity Act of 1984 (REA)

☐ The Tax Reform Act of 1986 (TRA '86)

☐ The Unemployment Compensation Amendments of 1992 (UCA)

☐ The Omnibus Budget Reconciliation Act of 1993 (OBRA)

☐ GUST (includes The Uruguay Round Agreements Act, the Uniformed Services Employment and Reemployment Rights Act of 1994, the Small Business Job Protection Act of 1996, the Taxpayer Relief Act of 1997, the Internal Revenue Service Restructuring and Reform Act of 1998, and the Community Renewal Tax Relief Act of 2000)

☐ The changes required by the 2005 Cumulative List (Notice 2005–101, 2005–2 C.B. 1219)

☐ The changes required by the 2006 Cumulative List (Notice 2007–3, 2007–1 C. B. 255)

☐ The changes required by the 2007 Cumulative List (Notice 2007–94, 2007–2 C.B. 1179)

☐ Other (specify the legal requirement and applicable Cumulative List):

_____

_____

PART II. DESCRIPTION OF PROPOSED METHOD OF CORRECTION

The Plan Sponsor has adopted (or will adopt) amendments that satisfy the requirements of all of the items checked in Part I of this Appendix F, Schedule 2 retroactively to the effective dates of the specific provisions contained in the amendments. The amendments and restated plan documents (where applicable) are enclosed with this submission.

PART III. CHANGE IN ADMINISTRATIVE PROCEDURES

The Plan Sponsor has taken the following step(s) to ensure that the failure(s) will not recur:

PART IV. ENCLOSURES

In addition to the applicable enclosures listed on Appendix F, the Plan Sponsor encloses the following with this submission:

- Copies of all amendments used to correct the failure(s), either as adopted or in proposed form,
- A copy of the plan document in effect prior to any of the amendments used to correct the failure(s),
- A copy of the most recent determination letter issued with respect to the plan (if applicable), and
- A determination letter application (Form 5300, 5307, or 5310 along with Form 8717 and the applicable user fee payment made payable to the U.S. Treasury).

APPENDIX F, SCHEDULE 3
SEPs and SARSEPs

Plan Name: _____ EIN: _____ Plan #: _____

(Please include the plan name, EIN, and plan number information on each page of the submission.)

Instructions: This Schedule 3 is available for Simplified Employee Pension plans (SEPs), including SEPs that include salary reduction arrangements (*i.e.*, Salary Reduction Simplified Employee Pension plans (SARSEPs).)

PART I. IDENTIFICATION OF FAILURE(S) AND PROPOSED METHOD(S) OF CORRECTION

The following failure(s) occurred with respect to the plan identified above. Check the failure(s) that apply. Within each failure, check applicable boxes, and provide the information requested:

☐ **A.** ***Employer Eligibility Failure*** (SARSEPs only)

☐ The Plan Sponsor was not eligible to sponsor a SARSEP because the plan was established on _____. (Plan Sponsors were not permitted to establish SARSEPs after December 31, 1996.)

☐ The plan was adopted by a Plan Sponsor who was (or subsequently became) ineligible to sponsor a SARSEP under the requirements of § 408(k)(6) because the Plan Sponsor (and, if applicable, its related controlled group or affiliated service group employers) had more than 25 employees (including leased employees, if applicable) during the following plan year(s): _____

The plan was adopted by a Plan Sponsor that became ineligible to sponsor a SARSEP under the requirements of § 408(k)(6) because, in one or more plan year(s), *fewer* than 50% of the employees eligible to participate in the plan elected to make salary reduction contributions. The failure occurred during the following plan year(s): _____

Description of Proposed Method of Correction

All contributions ceased as of _____ (insert date beginning no later than the date this application is filed under VCP). The Plan Sponsor will not permit any new salary reduction contributions to the plan.

☐ **B.** ***Failure to satisfy the deferral percentage test*** *(SARSEPs only)*

At least one highly compensated employee ("HCE") deferred an amount which, as a percentage of compensation, was more than 125% of the average deferral percentage ("ADP") for all nonhighly compensated employees ("NHCEs") eligible to participate in the plan (§ 408(k)(6)(A)(iii)).

The total excess deferrals for each affected plan year were as follows:

Year	Excess Deferrals

Description of the Proposed Method of Correction

The Plan Sponsor has made (or will make) nonforfeitable contributions on behalf of all eligible NHCEs. Each eligible NHCE will receive a contribution equal to a uniform percentage of compensation. The uniform percentage is equal to the difference between the (1) ADP that would have been required for a HCE's deferral percentage to have passed the nondiscrimination test and (2) the actual ADP for NHCEs. (Example: In a particular plan year, an HCE defers 10% of compensation. The ADP for NHCEs for the same plan year is 5% of compensation. However, in order for the plan to pass the nondiscrimination test, the ADP should have been 8% of compensation. The corrective contribution on behalf of each eligible NHCE will be equal to 3% of compensation.) The corrective contribution made on behalf of each NHCE will also be adjusted for earnings. Earnings will be calculated from the last day of the plan year for which the failure occurred through the date of the corrective contribution. The corrective contribution (adjusted for earnings) will be made to each affected NHCE's SARSEP IRA account. If an affected employee does not have a SARSEP IRA account, a SARSEP IRA account will be established for that employee. Earnings will be calculated for an affected NHCE's account on the basis of one of the following methods (check one):

☐ Actual investment results of the affected NHCE's SARSEP IRA account.

☐ The interest rate incorporated in the Department of Labor's Voluntary Fiduciary Correction Program Online Calculator ("VFCP Online Calculator") (*http://www.dol.gov/ebsa/calculator/main.html*), since the actual earnings of the affected NHCE's SARSEP IRA account cannot be ascertained

☐ Actual investment results for years in which data is available, or the rate incorporated in the VFCP Online Calculator for years in which the actual earnings of the affected NHCE's SARSEP IRA account cannot be ascertained. The VFCP Online Calculator was or will be used for the following years:

_____

The total corrective contribution (before adjusting for earnings) on behalf of the affected NHCEs for each plan year is as follows:

Year	Corrective contribution

Former employees affected by the failure (check one):

☐ There are no former employees affected by the failure.

☐ Affected former employees will be contacted, and corrective contributions will be made to their SARSEP IRA accounts. To the extent that an affected former employee cannot be located following a mailing to the employee's last known address, the Plan Sponsor will take reasonable actions to locate that employee. Such actions include the use of the Internal Revenue Service Letter Forwarding Program (see Rev. Proc. 94–22, 1994–1 C.B. 608) or the Social Security Administration Employer Reporting Service. After such actions are taken, if an affected employee is not found but is subsequently located on a later date, the Plan Sponsor will make corrective contributions to the affected employee's SARSEP IRA account at that time.

☐ **C.** ***Failure to Make Required Employer Contributions*** (SEPs or SARSEPs)

The Plan Sponsor failed to make employer contributions on behalf of eligible employees as required under the terms of the plan.

☐ The failure occurred on account of the erroneous exclusion of eligible employees.

☐ Other (describe): _____

The failure occurred for the following plan years: _____.

Description of the Proposed Method of Correction

The Plan Sponsor has contributed (or will contribute) additional amounts to the plan on behalf of each affected employee. For each affected employee, the corrective contribution will be determined by calculating the contribution the employee would have been entitled to under the terms of the plan and subtracting any contributions already made on behalf of the participant for the plan year. The required contribution made on behalf of an affected participant will be adjusted for earnings. Earnings will be calculated from the last day of the plan year for which the failure occurred through the date of the corrective contribution. The corrective contribution (adjusted for earnings) will be made to each affected employee's SEP (or SARSEP, if applicable) IRA account. If an affected employee does not have a SEP (or SARSEP, if applicable) IRA account, a SEP (or SARSEP, if applicable) account will be established for that employee.

The total corrective contribution (before adjusting for earnings) for each year is:

Year	Corrective Contribution

Earnings will be calculated for an affected employee on the basis of the following method(s) (check one):

☐ Actual investment results of the affected employee's SEP or SARSEP IRA account.

☐ The interest rate incorporated in the VFCP Online Calculator, since the actual earnings of the affected employee's IRA account cannot be ascertained.

☐ Actual investment results for years in which data is available, or the rate incorporated in the VFCP Online Calculator for years in which the actual earnings of the affected employee's IRA cannot be ascertained. The VFCP Online Calculator was or will be used for the following years: _____

Former employees affected by the failure (check one):

☐ There are no former employees affected by the failure.

☐ Affected former employees will be contacted, and corrective contributions will be made to their SEP or SARSEP IRA accounts. To the extent that an affected former employee cannot be located following a mailing to the employee's last known address, the Plan Sponsor will take reasonable actions to locate that employee. Such actions include the use of the Internal Revenue Service Letter Forwarding Program (see Rev. Proc. 94–22, 1994–1 C.B. 608) or the Social Security Administration Employer Reporting Service. After such actions are taken, if an affected employee is not found but is subsequently located on a later date, the Plan Sponsor will make corrective contributions to the affected employee's SEP or SARSEP IRA account at that time.

☐ **D.** ***Failure to provide eligible employees with the opportunity to make elective deferrals*** (SARSEPs only)

The plan did not provide employee(s) who satisfied the applicable eligibility requirements with the opportunity to make elective deferrals to the SARSEP. The failure occurred for the following plan years: _____

_____

Description of the Proposed Method of Correction

The Plan Sponsor has contributed (or will contribute) additional amounts to the plan on behalf of each affected employee. The corrective contribution will be made to compensate the affected employee(s) for the missed deferral opportunity. The corrective contribution on behalf of each affected employee is equal to 50% of what the employee's deferral might have been had he or she been provided with the opportunity to make elective deferrals to the plan. Since the employee's deferral decision is not known, the deferral amount is estimated by determining the average of the deferral percentages for the employee's group (highly compensated or nonhighly compensated). (Example: N, an NHCE, was erroneously excluded from the plan. During the year of exclusion, N made $10,000 in compensation. The average of the deferral percentages for other NHCEs who were provided with the opportunity to make elective deferrals was 5%. N's missed deferral is estimated to be: 5% times $10,000 or $500. The required corrective contribution on behalf of N, before adjusting for earnings, is 50% of $500 or $250.)

The total corrective contribution (before adjusting for earnings) on behalf of the affected NHCEs for each plan year is as follows:

Year	Corrective contribution

The corrective contribution made on behalf of each affected employee will also be adjusted for earnings. Earnings will be calculated from the date(s) that the contribution(s) should have been made through the date of the corrective contribution. The corrective contribution (adjusted for earnings) will be made to each affected employee's SARSEP IRA account. If an affected employee does not have a SARSEP IRA account, a SARSEP IRA account will be established for that employee. Earnings will be calculated on the basis of one of the following methods (check one):

☐ Actual investment results of the affected employee's SARSEP IRA account.

☐ The interest rate incorporated in the VFCP Online Calculator, since the actual earnings of the affected employee's IRA account cannot be ascertained.

☐ Actual investment results for years in which data is available, or the rate incorporated in the VFCP Online Calculator for years in which the actual earnings of the affected employee's IRA account cannot be ascertained. The VFCP Online Calculator was or will be used for the following years: _____

Former employees affected by the failure (check one):

☐ There are no former employees affected by the failure.

☐ Affected former employees will be contacted, and corrective contributions will be made to their SARSEP IRA accounts. To the extent that an affected former employee cannot be located following a mailing to the employee's last known address, the Plan Sponsor will take reasonable actions to locate that employee. Such actions include the use of the Internal Revenue Service Letter Forwarding Program (see Rev. Proc. 94–22, 1994–1 C.B. 608) or the Social Security Administration Employer Reporting Service. After such actions are taken, if an affected employee is not found but is subsequently located on a later date, the Plan Sponsor will make corrective contributions to the affected employee's SEP or SARSEP IRA account at that time.

☐ **E.** ***Excess Amounts Contributed***

☐ The Plan Sponsor contributed Excess Amounts to the Plan on behalf of participants as follows: (check boxes that apply)

☐ Amounts were contributed in excess of the benefit the participants were entitled to under the plan.

☐ SARSEP only: Elective deferrals were contributed to the SARSEP in excess of the limitation under the terms of the SARSEP (*e.g.*, the lesser of 25% of compensation or the applicable limit under § 402(g)).

The total of the Excess Amounts for each affected plan year was as follows:

Year	Excess Amounts	Number of Participants Affected

Description of the Proposed Method of Correction
(check all correction methods that apply)

☐ Distribution of Excess Elective Deferrals (SARSEPs only)

The Plan Sponsor has effected (or will effect) a corrective distribution of the Excess Amounts, adjusted for earnings through the date of correction, to the affected participant(s). The earnings adjustment will be based on the actual rates of return of the participant's SARSEP IRA account from the date(s) that the excess deferrals were made through the date of correction.

Affected participants were (or will be) informed that the corrective distribution of an Excess Amount is not eligible for favorable tax treatment accorded to distributions from a SARSEP and, specifically, is not eligible for tax-free rollover.

The total corrective distribution (before adjusting for earnings) for each affected year is as follows:

Year	Corrective Distribution	Number of Participants Affected

☐ Distribution of Excess Employer Contributions

The Plan Sponsor has effected (or will effect) the return of excess employer contributions, adjusted for earnings through the date of correction, to the Plan Sponsor. The earnings adjustment will be based on the actual rates of return of the SEP or SARSEP from the date(s) that the excess employer contributions were made through the date of correction. The amount returned to the Plan Sponsor is not includible in the gross income of the affected participant(s). The Plan Sponsor is not entitled to a deduction for such excess employer contributions. The amount returned is reported on Form 1099–R as a distribution issued to the affected participant(s), indicating the taxable amount as zero.

The amount to be returned to the Plan Sponsor (before adjusting for earnings) for each affected year is as follows:

Year	Return of Excess Employer Contributions	Number of Participants Affected

☐ Retention of Excess Amounts

Note: If this correction method is selected, an additional VCP fee is required. (See section 12.05(2) of Rev. Proc. 2008–50.)

☐ The Excess Amounts (including earnings) were retained in the SARSEP or SEP IRA accounts of the affected participants as follows:

Year	Excess Amounts Retained	Number of Participants Affected

The earnings adjustment will be based on the actual rates of return of the SEP or SARSEP from the date(s) that the excess employer contributions were made through the date of correction.

☐ Excess Amounts of $100 or less (See section 6.02(5)(e) of Rev. Proc. 2008–50.)

For one or more participants, the total Excess Amount (employer contributions and/or elective deferrals before adjusting for earnings) is $100 or less. The Excess Amount will not be distributed.

PART II. CHANGE IN ADMINISTRATIVE PROCEDURES

Please include an explanation of how and why the failures arose and a description of the measures that will be implemented to ensure that the same failures will not occur.

PART III. REQUEST(S) FOR EXCISE TAX RELIEF
(check applicable boxes)

☐ Excise tax pursuant to § 4979. The Applicant requests that the Service not pursue the excise tax under § 4979. (This applies only to failures to satisfy the nondiscrimination test for elective deferrals. See section 6.09(4) of Rev. Proc. 2008–50 for an example of a situation where a request for relief under § 4979 would be considered. Please enclose a written explanation in support of your request for relief from this excise tax.)

☐ Excise tax pursuant to § 4972. The Applicant requests that the Service not pursue the excise tax under § 4972. (This applies to situations where corrective contributions made in accordance with this submission would be nondeductible contributions for the year of correction and thus would be subject to the excise tax under § 4972. See section 6.09(3) of Rev. Proc. 2008–50. Please enclose a written explanation in support of your request for relief from this excise tax.)

PART IV. ENCLOSURES

In addition to the applicable enclosures listed on Appendix F, the Plan Sponsor encloses the following with this submission:

- The applicable plan document. (This could be an IRS form document, such as a Form 5305–SEP or 5305A–SEP, or a prototype plan document developed by a financial institution. If a prototype plan document is used, please send a copy of the most recent favorable opinion letter issued for such plan document).
- A written explanation of how and why the failure(s) described in this submission occurred, including a description of the administrative procedures applicable to the failure(s) in effect at the time the failure(s) occurred.
- For failures that involve corrective contributions or corrective distributions, a description of assumptions and supporting calculations used to determine the amounts needed for correction:
  1) For failures to satisfy the nondiscrimination test for elective deferrals, computations in support of the proposed correction, including:
     a) The determination of HCEs and NHCEs,
     b) The deferral percentages of individual employees and the applicable ADP calculations,
     c) The determination of corrective contributions on behalf of NHCEs to correct the ADP test, and,
     d) Calculations showing how the earnings adjustment and the ultimate corrective contribution on behalf of affected employees will be determined. (Please use estimates, including an estimated correction date, if corrective distributions have not been made yet.)
  2) For failures to make required employer contributions and for failures to provide eligible employees with the opportunity to make elective deferrals:
     a) Computations in support of the corrective contribution amounts attributable to each participant. In the case of a failure to provide eligible employees with the opportunity to make elective deferrals, please include computations showing how the average deferral percentage, missed deferral, and corrective contribution amount was determined.
     b) Calculations showing how the earnings adjustment and the ultimate corrective contribution on behalf of affected employees will be determined.
  3) For failures involving the contribution of Excess Amounts:
     a) Computations in support of the excess contribution amounts attributable to each participant;
     b) Calculations showing how the earnings adjustment and the ultimate corrective distribution amounts are determined. (Please use estimates, including an estimated correction date, if corrective distributions have not been made yet.)
- Explanations in support of requests for excise tax relief.
- Any other information that would be useful for the purpose of understanding the proposals made under the submission.

APPENDIX F, SCHEDULE 4
SIMPLE IRAs

Plan Name: _____ EIN: _____ Plan #: _____

(Please include the plan name, EIN, and plan number information on each page of the submission.)

PART I. IDENTIFICATION OF FAILURE(S) AND CORRECTION METHODS

The following failure(s) occurred with respect to the SIMPLE IRA Plan identified above:
(Check failure(s) that apply. Within each failure, check applicable boxes, and provide the information requested.)

☐ **A.** ***Employer Eligibility Failure***

☐ The plan was adopted by a Plan Sponsor who was (or subsequently became) ineligible to sponsor a SIMPLE IRA Plan under the requirements of § 408(p) because the Plan Sponsor (and, if applicable, its related controlled group or affiliated service group employers) had more than 100 employees (including leased employees, if applicable) who earned $5,000 or more in compensation during the following plan year(s):

_____

☐ The plan was adopted by a Plan Sponsor who was not eligible to sponsor a SIMPLE IRA Plan under the requirements of § 408(p) because the Plan Sponsor established or maintained a Qualified Plan with respect to which contributions were made (or under which benefits were accrued) during any plan year of the SIMPLE IRA Plan. The failure occurred during the following plan year(s):

_____

Description of the Proposed Method of Correction

All contributions to the plan ceased as of _____ (insert a date no later than the date this application is filed under VCP). The Plan Sponsor will not permit any new employer or salary reduction contributions to be made to the plan.

☐ **B. Failure to Make Required Employer Contributions**

The Plan Sponsor failed to make employer contributions on behalf of eligible employees as required under the terms of the plan.

☐ The failure occurred on account of the erroneous exclusion of eligible employees

☐ Other (describe): _____

The failure occurred for the following plan years: _____

For the applicable plan years, the provisions of the plan document required the Plan Sponsor to make employer contributions based on the following formula:

☐ 2% nonelective contribution on behalf of each eligible employee who earned at least $5,000 in compensation for the year.

☐ Matching contribution on behalf of each eligible employee equal to deferrals up to 3% of compensation.

☐ Grace period applied. The plan provided for a matching contribution on behalf of each eligible employee equal to deferrals up to ____% of compensation.

(Note: If the failure occurred for multiple plan years and different employer contribution criteria applied during those years, check the applicable box, and indicate the plan years for which the formula applied).

Description of the Proposed Method of Correction

The Plan Sponsor has contributed (or will contribute) additional amounts to the plan on behalf of each affected employee. For each affected employee, the corrective contribution will be determined by calculating the contribution the employee would have been entitled to receive under the terms of the plan and subtracting any contributions already made on behalf of the employee for the plan year. The corrective contribution made on behalf of an affected employee will be adjusted for earnings. Earnings will be calculated from the last day of the plan year for which the failure occurred through the date of the corrective contribution. The corrective contribution (adjusted for earnings) will be made to each affected employee's SIMPLE IRA account. If an affected employee does not have a SIMPLE IRA account, an account will be established for that employee.

If the plan did not provide eligible employees with the opportunity to make elective deferrals and the plan provides for matching contributions, the corrective matching contribution will be based on the assumption that the eligible employee would have made an elective deferral equal to 3% of compensation.

The total corrective contribution (before adjusting for earnings) for each plan year is:

Year	Corrective contribution

The earnings calculation for an affected employee will be based on one of the following method(s) (check one):

☐ Actual investment results of the affected employee's SIMPLE IRA account.

☐ The interest rate incorporated in the Department of Labor's Voluntary Fiduciary Correction Program Online Calculator ("VFCP Online Calculator") (*http://www.dol.gov/ebsa/calculator/main.html*), since the actual earnings of the affected employee's IRA account cannot be ascertained.

☐ Actual investment results for years in which data is available, or the rate incorporated in the VFCP Online Calculator for years in which the actual earnings of the affected employee's IRA account cannot be ascertained. The VFCP Online Calculator was or will be used for the following years:

_____

Former employees affected by the failure (check one):

☐ There are no former employees affected by the failure.

☐ Affected former employees will be contacted, and corrective contributions will be made to their SIMPLE IRA accounts. To the extent that an affected former employee cannot be located following a mailing to the employee's last known address, the Plan Sponsor will take reasonable actions to locate that employee. Such actions include the use of the Internal Revenue Service Letter Forwarding Program (see Rev. Proc. 94–22, 1994–1 C.B. 608) or the Social Security Administration Employer Reporting Service. After such actions are taken, if an affected employee is not found but is subsequently located on a later date, the Plan Sponsor will make corrective contributions to the affected employee's SIMPLE IRA account at that time.

☐ **C.** ***Failure to provide eligible employees with the opportunity to make elective deferrals***

The plan did not provide employee(s) who satisfied the applicable eligibility requirements with the opportunity to make elective deferrals to the SIMPLE IRA plan. The failure occurred for the following plan years:

_____

Description of the Proposed Method of Correction

The Plan Sponsor has contributed (or will contribute) additional amounts to the plan on behalf of each affected employee. The corrective contribution will be made to compensate the affected employee(s) for the missed deferral opportunity. The corrective contribution on behalf of each affected employee is equal to 50% of what the employee's deferral might have been had he or she been provided with the opportunity to make elective deferrals to the plan. Since the employee's deferral decision is not known, the deferral amount is estimated by assuming that the excluded employee would have made an elective deferral equal to 3% of his or her compensation. (Example: N, a nonhighly compensated employee was erroneously excluded from the plan. During the year of exclusion, N made $10,000 in compensation. N's missed deferral is estimated to be: 3% times $10,000 or $300. The required corrective contribution on behalf of N, before adjusting for earnings, is 50% of $300 or $150). Thus, the required corrective contribution for an employee who was erroneously excluded from making elective deferrals from a SIMPLE IRA Plan is equal to 1.5% of compensation (adjusted for earnings).

The total corrective contribution (before adjusting for earnings) on behalf of the affected employees for each plan year is as follows:

Year	Corrective contribution

The corrective contribution made on behalf of each affected employee will also be adjusted for earnings. Earnings will be calculated from the date(s) that the contribution(s) should have been made through the date of the corrective contribution. The corrective contribution (adjusted for earnings) will be made to each affected employee's SIMPLE IRA account. If an affected employee does not have a SIMPLE IRA account, a SIMPLE IRA account will be established for that employee. Earnings will be calculated on the basis of one of the following methods (check one):

☐ Actual investment results of the affected employee's SIMPLE IRA account.

☐ The interest rate incorporated in the VFCP Online Calculator, since the actual earnings of the affected employee's IRA account cannot be ascertained.

☐ Actual investment results for years in which data is available, or the rate incorporated in the VFCP Online Calculator for years in which the actual earnings of the affected employee's IRA account cannot be ascertained. The VFCP Online Calculator was or will be used for the following years:

_____

Former employees affected by the failure (check one):

☐ There are no former employees affected by the failure.

☐ Affected former employees will be contacted, and corrective contributions will be made to their SIMPLE IRA accounts. To the extent that an affected former employee cannot be located following a mailing to the employee's last known address, the Plan Sponsor will take reasonable actions to locate that employee. Such actions include the use of the Internal Revenue Service Letter Forwarding Program (see Rev. Proc. 94–22, 1994–1 C.B. 608) or the Social Security Administration Employer Reporting Service. After such actions are taken, if an affected employee is not found but is subsequently located on a later date, the Plan Sponsor will make a corrective contribution to the affected employee's SIMPLE IRA account at that time.

☐ **D.** ***Excess Amounts Contributed***

The Plan Sponsor contributed Excess Amounts to the plan on behalf of participants as follows:
(check boxes that apply)

☐ Amounts were contributed in excess of the benefit the participants were entitled to under the plan.

☐ Elective deferrals were made to the SIMPLE IRA in excess of the limitation under the terms of the SIMPLE IRA (*e.g.*, the applicable limit under § 408(p)(2)(E)).

The total of the Excess Amounts for each affected plan year was as follows:

Year	Excess Amounts	Number of Participants Affected

Description of the Proposed Method of Correction
(check all correction methods that apply)

☐ Distribution of Excess Elective Deferrals

The Plan Sponsor has effected (or will effect) a distribution of the Excess Amounts, adjusted for earnings through the date of correction, to the affected participant(s). The earnings adjustment will be based on the actual rates of return of the participant's SARSEP IRA account from the date(s) that the excess deferrals were made through the date of correction.

Affected participants were (or will be) informed that the distribution of an Excess Amount is not eligible for favorable tax treatment accorded to distributions from a SIMPLE IRA and, specifically, is not eligible for tax-free rollover.

The total corrective distribution (before adjusting for earnings) for each affected plan year is as follows:

Year	Corrective Distribution	Number of Participants Affected

☐ Distribution of Excess Employer Contributions

The Plan Sponsor has effected (or will effect) the return of excess employer contributions, adjusted for earnings through the date of correction, to the Plan Sponsor. The earnings adjustment will be based on the actual rates of return on the affected participants' SIMPLE IRA accounts from the date(s) that the excess employer contributions were made through the date of correction. The amount returned to the Plan Sponsor is not includible in the gross income of the affected participant(s). The Plan Sponsor is not entitled to a deduction for such excess employer contributions. The amount returned is reported on Form 1099–R as a distribution issued to the affected participant(s), indicating the taxable amount as zero.

The return of the excess employer contributions (before adjusting for earnings) for each affected plan year is as follows:

Year	Return of Excess Employer Contributions	Number of Participants Affected

☐ Retention of Excess Amounts

Note: If this correction method is selected, an additional VCP fee is required.
(See section 12.05(2) of Rev. Proc. 2008–50.)

☐ The Excess Amounts (including earnings) were retained in the SIMPLE IRA accounts of the affected participants as follows.

Year	Excess Amounts Retained	Number of Participants Affected

The earnings adjustment will be based on the actual rates of return of the SEP or SARSEP from the date(s) that the excess employer contributions were made through the date of correction.

☐ Excess Amounts of $100 or less (See section 6.02(5)(e) of Rev. Proc. 2008–50.)

For one or more participants, the total Excess Amount (employer contributions and/or elective deferrals before adjusting for earnings) is $100 or less. The Excess Amount will not be distributed.

Former employees affected by the Excess Amounts failure (check one):

☐ There are no former employees affected by the failure.

☐ Affected former employees will be contacted, and corrective contributions will be made to their SIMPLE IRA accounts. To the extent that an affected former employee cannot be located following a mailing to the employee's last known address, the Plan Sponsor will take reasonable actions to locate that employee. Such actions include the use of the Internal Revenue Service Letter Forwarding Program (see Rev. Proc. 94–22, 1994–1 C.B. 608) or the Social Security Administration Employer Reporting Service. After such actions are taken, if an affected employee is not found but is subsequently located on a later date, the Plan Sponsor will make corrective contributions to the affected employee's SIMPLE IRA account at that time.

PART II. CHANGE IN ADMINISTRATIVE PROCEDURES

Please include an explanation of how and why the failures arose and a description of the measures that will be implemented to ensure that the same failures will not occur.

PART III. REQUEST(S) FOR EXCISE TAX RELIEF
(check if applicable)

☐ Excise tax pursuant to § 4972. The Plan Sponsor requests that the Service not pursue the excise tax under § 4972. (This applies to situations where corrective contributions made in accordance with this submission would be nondeductible contributions for the year of correction and subject to the excise tax under § 4972. See section 6.09(3) of Rev. Proc. 2008–50. Please enclose a written explanation in support of your request for relief from this excise tax.)

PART IV. ENCLOSURES

In addition to the applicable enclosures listed on Appendix F, the Plan Sponsor encloses the following with this submission:

- The applicable plan document. (This could be an IRS form document, such as a 5305–SIMPLE or 5304–SIMPLE, or a prototype document developed by a financial institution. If a prototype plan document is used, please send a copy of the most recent opinion letter issued with respect to such plan document.)
- A written explanation of how and why the failure(s) described in this submission occurred, including a description of the administrative procedures applicable to the failure(s) in effect at the time the failure(s) occurred.
- For failures that involve corrective contributions or corrective distributions, a description of assumptions and supporting calculations used to determine the amount needed for correction:
  1) For failures to make required Employer Contributions and for failures to provide eligible employees with the opportunity to make elective deferrals:
     a) Computations in support of the corrective contribution amounts attributable to each participant. In the case of a failure to provide eligible employees with the opportunity to make elective deferrals, please include computations showing how the average deferral percentage, missed deferral, and corrective contribution amount was determined.
     b) Calculations showing how the earnings adjustment and the ultimate corrective contribution on behalf of affected employees will be determined. (Please use estimates, including an estimated correction date, if corrective contributions have not been made yet.)
  2) For failures involving the contribution of Excess Amounts:
     a) Computations in support of the excess contribution amounts attributable to each participant.
     b) Calculations showing how the earnings adjustment and the ultimate corrective distribution amounts are determined. (Please use estimates, including an estimated correction date, if corrective distributions have not been made yet.)
- Explanations in support of requests for excise tax relief.
- Any other information that would be useful for the purpose of understanding the proposals made under the submission.

APPENDIX F, SCHEDULE 5
Plan Loan Failures
(Qualified Plans and 403(b) Plans)

Plan Name: _____ EIN: _____ Plan #: _____

(Please include the plan name, EIN, and plan number information on each page of the submission.)

PART I. IDENTIFICATION OF FAILURE

The plan identified above did not comply with the requirements of § 72(p)(2) of the Internal Revenue Code. (Note: The conditions of § 72(p)(2) must be satisfied for a participant loan to be exempt from being treated as a distribution to the participant under § 72(p)(1).) The failure occurred for the following reason(s) (check applicable boxes and provide the information requested):

☐ A. The loan(s) exceeded the limit under § 72(p)(2)(A)

Plan Year	Number of participants affected	Total number of loans issued that violated § 72(p)(2)(A)

☐ B. Loan terms did not satisfy the limits on the duration of the loan under § 72(p)(2)(B)

Plan Year	Number of participants affected	Total number of loans issued that violated § 72(p)(2)(B)

☐ C. Loan terms did not satisfy § 72(p)(2)(C) relating to the frequency and amortization of payments

Plan Year	Number of participants affected	Total number of loans issued that violated § 72(p)(2)(C)

☐ D. Defaulted loan(s) (where the loan terms satisfied the requirements of § 72(p)(2), but default(s) occurred because loan payments were not made in accordance with the terms of the loan)

Plan Year of loan defaults	Number of participants affected	Total number of loans in default

PART II. ELIGIBILITY FOR USE OF APPENDIX F, SCHEDULE 5

	Yes	No	
A.	☐	☐	Is any affected participant either a key employee (as defined in § 416(i)(1)) or an owner-employee (as defined in § 401(c)(3))? If "Yes," *proceed to Part II B*. If "No," *skip Part II B and proceed to Part II C*.
B.	☐	☐	Is the purpose of this request limited to permitting the Plan Sponsor to report the loan as a deemed distribution in the year of correction instead of the year of the failure? If "Yes," *complete part III and then proceed directly to part IV D*. (Parts IV A, B, and C do not apply.) If "No," *STOP — do NOT use this schedule*. Any request for relief should be made by filing an application using the format described in Appendix D.
C.	☐	☐	Will correction be completed before the maximum period for repayment of the loan (pursuant to § 72(p)(2)(B)) has expired? (Note: The maximum period is determined from the original date of the loan. Generally, this period is five years from the original date of the loan, except for home loans as described in § 72(p)(2)(B)(ii).) If "Yes," and the Plan Sponsor wants relief from reporting the loan as a deemed distribution, *complete Part III and then answer applicable questions in Parts IV A through IV C*. If "No," *complete Part III and then proceed to Part IV D*.

PART III. EXPLANATION OF HOW AND WHY THE PLAN LOAN FAILURES OCCURRED

PART IV. DESCRIPTION OF PROPOSED METHOD OF CORRECTION

If the Plan Sponsor is requesting relief from reporting loans as deemed distributions, then complete Parts IV A, B, or C, as applicable.

If the Plan Sponsor is only requesting postponement of reporting loans as deemed distributions on Form 1099–R, then proceed directly to Part IV D.

A. ***Correction for Loans in Excess of § 72(p)(2)(A)***

Any participant affected by this failure will make a corrective repayment to the plan. After repaying the excess of the loan amount over the maximum loan amount under § 72(p)(2)(A) (the "excess loan amount"), the remaining balance of the loan will be paid over the remaining period of the original loan (not beyond the period permitted under § 72(p)(2)(B), determined from the original date of the loan) in a manner that complies with the frequency and level payment requirements of § 72(p)(2)(C). The excess loan amount that will be repaid by the participant is determined based on how previously made payments have been applied to the loan. The previous loan payments were applied as follows (check applicable box, and complete necessary information)

☐ Prior loan payments were made in accordance with an amortization schedule that complied with the requirements of § 72(p)(2)(B) relating to the terms of the loan and § 72(p)(2)(C) relating to frequency, and level loan payments. For the purpose of determining the excess loan amount and the remaining outstanding amount of the loan to be repaid over the remaining period of the loan, the previously made loan payments will be applied as follows (check box that applies)

☐ 1. Solely to reduce the portion of the loan that did not exceed the maximum loan amount under § 72(p)(2)(A) of the Code. Result: The corrective repayment would equal the excess loan amount plus interest thereon.

☐ 2. To reduce the excess loan amount to the extent of the interest thereon, with the remainder of the repayments applied to reduce the portion of the loan that did not exceed the maximum loan amount under § 72(p)(2)(A). Result: The corrective repayment would equal the excess loan amount.

☐ 3. *Pro rata* against the excess loan amount and the maximum loan amount under § 72(p)(2)(A). Result: The corrective repayment would equal the outstanding balance remaining on the excess loan amount on the date that corrective repayment is made.

☐ Prior loan payments were not made in accordance with an amortization schedule that complied with the requirements of §72(p)(2)(B) or (C):

Methodology for determining the excess loan amount that will be repaid and the remaining outstanding balance of the loan that will be amortized over the remaining period of the loan:

After the corrective repayment is made:
(Check one of the two options listed below)

☐ **Option 1:** The remaining loan balance will be repaid according to the original amortization schedule. (This option is available only if the original amortization schedule would result in the loan being paid within the maximum period permitted under §72(p)(2)(B) determined from the original date of the loan.)

☐ **Option 2:** The loan will be reformed to amortize the remaining principal balance as of the date of repayment over the remaining period of the original loan, provided that the recalculated payments over the remaining period comply with the requirements of § 72(p)(2)(B) determined from the original date of the loan.

B. ***Correction for loans with terms that: (i) provided for a repayment period that exceeded the period permitted under § 72(p)(2)(B) and/or (ii) provided for payments that did not provide for substantially level amortization with payments not less frequently than quarterly, as provided under § 72(p)(2)(C).***

☐ 1. The loan balance will be reamortized with payments made on a substantially level basis (per § 72(p)(2)(C)), made at least quarterly.

☐ 2. The reamortized loan balance will be paid over a remaining period that does not extend beyond five years from the date of the original loan (per § 72(p)(2)(B)).

C. ***Correction for defaulted loans with terms that complied with the requirements of § 72(p)(2)(A), (B), and (C): (check the box that applies)***

☐ 1. A lump sum repayment will be made to the plan in an amount equal to the additional repayments that the affected participant would have made to the plan if there had been no failure to repay the plan, plus interest accrued on the missed repayments.

☐ 2. The outstanding balance of the loan, including accrued interest, will be reamortized over a remaining period that does not extend beyond five years from the date of the original loan.

☐ 3. The Applicant will use a combination of the methods described in #1 and #2 above, as follows:

Determination of Interest Accrued on Missed Repayments: (check the box that applies)

☐ Plan loan rate [insert rate]

☐ Rate of return of investments under plan [insert rate]

Note: "Rate of return of investments" option may only be used if the rate of investment return under the plan equals or exceeds the plan loan rate.

Actual Interest Rate used [insert rate]

The interest rate for missed payments was determined as follows:

The additional unpaid interest (*will be* / *has been* (circle one)) paid by the: (check the box that applies)

☐ Plan Sponsor

☐ Affected participants

(*Note*: Irrespective of the Plan Sponsor's election to have the affected participants pay the unpaid interest, in accordance with section 6.02(6) of Rev. Proc. 2008–50, the Service may, based on the facts and circumstances, determine that the Plan Sponsor should pay all or a portion of the additional unpaid interest. If the Service makes this determination, the Plan Sponsor will be requested to revise this submission.)

D. ***Correction for Deemed Distributions*** (check if applicable)

☐ The Plan Sponsor is not eligible to or will not correct in accordance with Parts IV A through IV C of this Appendix F, Schedule 5. The Plan Sponsor proposes that the loans be reported as deemed distributions (using Form 1099 R) for the year of correction instead of the year of the failure. The Plan Sponsor shall pay any applicable income tax withholding amount that was required to be paid in connection with the failure. (See Income Tax Regulations § 1.72(p)–1, Q&A–15.)

PART V. DESCRIPTION OF STEPS TAKEN TO ENSURE THAT THE FAILURE DOES NOT RECUR

PART VI. REQUEST FOR RELIEF

Yes	No	
☐	☐	The Plan Sponsor requests relief from reporting participant loans as deemed distributions.
☐	☐	The Plan Sponsor requests that the plan be permitted to report the participant loans as deemed distributions in the year of correction instead of the year of the failure.

PART VII. ENCLOSURES

In addition to the applicable enclosures listed on Appendix F, the Plan Sponsor encloses the following with this submission:

- Loan amortization schedules for affected participants (A sample representation may be provided if there are multiple participants affected.)
- Specific calculations for each affected employee or a representative sample of affected employees (The sample calculations must be sufficient to demonstrate each aspect of the correction method proposed (*e.g.*, for a failure with respect to a loan that exceeds the maximum amount permitted by § 72(p)(2)(A), the calculations must include the amounts of the excess loan amounts that will be repaid to the plan, determination of the outstanding loan balance, and the proposed method of repayment of the outstanding loan balance; for the correction of a defaulted loan, the enclosure should set forth the periods of such loan defaults.))

APPENDIX F, SCHEDULE 6

Employer Eligibility Failure (401(k) and 403(b) Plans only)

Plan Name: _____ EIN: _____ Plan #: _____

(Please include the plan name, EIN, and plan number information on each page of the submission.)

PART I. IDENTIFICATION OF FAILURE

The following failure occurred with respect to the plan identified above (check failure that applies)

☐ **403(b) Plans**

The plan was intended to satisfy the requirements of § 403(b) but was adopted by a Plan Sponsor that was not a tax-exempt organization described in § 501(c)(3) or a public educational organization described in § 170(b)(1)(A)(ii). The type of organization sponsoring the Plan during the period of the failure was: _____.

The failure occurred during the following plan years: _____.

☐ **Section 401(k) Plans**

The plan intended to include a qualified cash or deferred arrangement and satisfy the requirements of §§ 401(a) and 401(k) but was adopted by an employer that failed to meet the eligibility requirements to establish a § 401(k) Plan.

Describe why the employer was ineligible to maintain the 401(k) plan:

PART II. DESCRIPTION OF PROPOSED METHOD OF CORRECTION

☐ **Section 403(b) Plans**

1. All contributions under the plan ceased as of_____. (Insert date beginning no later than the date the application under VCP was filed.)
2. No new employee or employer contributions will be permitted in the future.
3. The assets in the plan will remain in the trust, annuity contract, or custodial account and will be distributed no earlier than the occurrence of one of the permitted events under § 403(b)(7) or § 403(b)(11).

☐ **Section 401(k) Plans**

1. All contributions under the plan ceased as of_____. (Insert date beginning no later than the date the application under VCP was filed.)
2. No new employee or employer contributions will be permitted in the future.
3. The assets in the plan will remain in the trust, annuity contract, or custodial account and will be distributed no earlier than the occurrence of one of the permitted events under § 401(k).

PART III. CHANGE IN ADMINISTRATIVE PROCEDURES

Please include an explanation of how and why the failures arose and a description of the measures that will be implemented to ensure that the same failures will not occur.

APPENDIX F, SCHEDULE 7
Failure to Distribute Elective Deferrals in Excess of the § 402(g) Limit

Plan Name: _____ EIN: _____ Plan #: _____

(Please include the plan name, EIN, and plan number information on each page of the submission.)

PART I. IDENTIFICATION OF FAILURE

Calendar Years (Year of Deferral)	Number of Affected Participants	Amount of Excess Deferrals Distributed (excluding earnings)

PART II. DESCRIPTION OF THE PROPOSED METHOD OF CORRECTION

The plan will distribute the excess deferral to the employee(s) and report the amount as taxable in the year of deferral and in the year distributed. In accordance with Income Tax Regulations § 1.402(g)–1(e)(1)(ii), a distribution to a highly compensated employee is included in the Average Deferral Percentage (ADP) test; however, a distribution to a nonhighly compensated employee is not included in the ADP test.

For any distributions attributable to elective deferrals designated as Roth Contributions, all distributions will be reported as taxable in the year distributed. Designated Roth contributions will have already been included in income in the year of deferral.

The excess deferral to be distributed will also be adjusted for earnings. Earnings will be determined from the end of the year in which the failure occurred through the year of correction. Earnings will be included in the distribution amount that is to be reported as taxable in the year of distribution.

PART III. CHANGE IN ADMINISTRATIVE PROCEDURES

Please include an explanation of how and why the failures arose and a description of the measures that will be implemented to ensure that the same failures will not occur.

PART IV. ENCLOSURES

In addition to the applicable enclosures listed on Appendix F, the Plan Sponsor encloses the following with this submission:

- Specific calculations for each affected employee or a representative sample of affected employees (The sample calculations must be sufficient to demonstrate each aspect of the correction method proposed.)

APPENDIX F, SCHEDULE 8
Failure to Pay Required Minimum Distributions Timely under § 401(a)(9)

Plan Name: _____ EIN: _____ Plan #: _____

(Please include the plan name, EIN, and plan number information on each page of the submission.)

PART I. IDENTIFICATION OF FAILURE

Calendar Years	Number of Affected Participants	Total Amount of Missed Required Minimum Distributions

PART II. DESCRIPTION OF THE PROPOSED METHOD OF CORRECTION

☐ **Defined Contribution plan only —** The plan will distribute the required minimum distributions to affected participants. For each affected participant, the amount to be distributed for each year in which the failure occurred will be determined by dividing the adjusted account balance on the applicable valuation date by the applicable distribution period. For this purpose, adjusted account balance means the actual account balance, determined in accordance with § 1.401(a)(9)–5 Q&A–3 of the Income Tax Regulations, reduced by the amount of the total missed minimum distributions for prior years.

☐ **Defined Benefit plan only —** The plan will distribute the required minimum distributions plus an interest payment representing the loss of use of such amounts. The interest adjustment is determined as follows:

PART III. REQUEST FOR RELIEF

A. ☐ The Applicant requests relief with regard to excise taxes under § 4974

Yes No

☐ ☐ At least one affected participant is either an owner-employee (see § 401(c)(3)), or, if the Plan Sponsor is a corporation, a 10 percent owner of such corporation

If "Yes," the Applicant submits the following explanation for its request for relief from the § 4974 excise tax:

PART IV. CHANGE IN ADMINISTRATIVE PROCEDURES

Please include an explanation of how and why the failures arose and a description of the measures that will be implemented to ensure that the same failures will not occur.

PART V. ENCLOSURES

In addition to the applicable enclosures listed on Appendix F, the Plan Sponsor encloses the following with this submission:

- Specific calculations for each affected employee or a representative sample of affected employees (The sample calculations must be sufficient to demonstrate each aspect of the correction method proposed. For a defined benefit plan, these specific calculations must illustrate the interest rate used to represent the loss of the use of the missed required minimum distributions.)

APPENDIX F, SCHEDULE 9
Correction by Plan Amendment (in accordance with Appendix B)

Plan Name: _____ EIN: _____ Plan #: _____

(Please include the plan name, EIN, and plan number information on each page of the submission.)

PART I. IDENTIFICATION OF FAILURE(S) AND CORRECTION METHOD(S) AS SET FORTH IN REV. PROC. 2008–50, APPENDIX B, SECTION .07

The following failure(s) occurred with respect to the plan identified above (check failure(s) that apply)

☐ **A. § 401(a)(17) Failure in a Defined Contribution Plan**
(check as applicable)

☐ Contributions

☐ Forfeitures

were allocated on the basis of compensation in excess of the limit under § 401(a)(17) as provided below:

(Enter the plan years in which the failure occurred, the amount of the allocations in excess of § 401(a)(17) made for each plan year (including earnings), and the number of participants affected by the failure for each plan year:)

Plan Year	Amounts Allocated in Excess of § 401(a)(17)	Number of Participants Affected

Description of Proposed Method of Correction:

An additional amount has been (or will be) contributed to the plan on behalf of each of the employees who received an allocation for the year of the failure (excluding each employee for whom there was a § 401(a)(17) failure). The amount contributed for an employee is equal to the employee's plan compensation for the year of the failure multiplied by a fraction, the numerator of which is the improperly allocated amount made on behalf of the employee with the largest improperly allocated amount, and the denominator of which is the limit under § 401(a)(17) applicable to the year of the failure. In addition, the plan will be retroactively amended to reflect the increased contribution and allocation percentages for the plan's participants.

(Enter the plan years in which the failure occurred, the fraction used to determine the additional amount allocated to employees other than those for whom there was a § 401(a)(17) failure, and the total required contribution (before adjusting for earnings) for each plan year in which the failure occurred:)

Plan Year	Fraction Used to Determine the Additional Amount Allocated	Total Required Contribution (before adjusting for earnings)

The resulting additional amount will be adjusted for earnings from the end of the plan year in which the failure occurred through the date of the corrective contribution. The method for determining the earnings adjustment is as follows:

Former employees affected by the failure (check one)

☐ There are no former employees affected by the failure.

☐ Affected former employees will be contacted and contributions will be made to the plan on their behalf. To the extent that an affected former employee cannot be located following a mailing to the employee's last known address, the Plan Sponsor will take reasonable actions to locate that employee. Such actions include the use of the Internal Revenue Service Letter Forwarding Program (see Rev. Proc. 94–22, 1994–1 C.B. 608) or the Social Security Administration Employer Reporting Service. After such actions are taken, if an affected employee is not found but is subsequently located on a later date, the Plan Sponsor will make corrective contributions on behalf of the affected employee at that time.

☐ **B. Hardship Distribution Failure**

Hardship distributions were made to participants under the plan. All plan participants were entitled to request hardship distributions, and all requests were evaluated in accordance with uniform eligibility standards, as described below:

(Enter the plan years in which the failure occurred, the number of hardship distributions made for each plan year, and the number and amount of distributions made to highly compensated employees (HCEs) and nonhighly compensated employees (NHCEs) respectively, affected by the failure for each plan year.)

Plan Year	Number of Hardship Distributions Made During the Plan Year	Number of Hardship Distributions Made to NHCEs	Amount of Distributions	Number of Hardship Distributions Made to HCEs	Amount of Distribution

Description of the Proposed Method of Correction:

The failure was (or will be) corrected by retroactively amending the plan to provide for the hardship distributions that were made available. The effective date of the corrective amendment is: _____.

☐ **C. Plan Loan Failure**

Plan loans were made to participants under the plan. All plan participants were entitled to request plan loans under uniform standards of eligibility, and all plan loans made satisfied the requirements of § 72(p).

(Enter the plan years in which the failure occurred, the number of participant plan loans made for each plan year, and the number and amount of plan loans made to highly compensated employees (HCEs) and nonhighly compensated employees (NHCEs) respectively, affected by the failure for each plan year.)

Plan Year	Number of Plan Loans Made During the Plan Year	Number of Plan Loans Made to NHCEs	Amount of Plan Loans	Number of Plan Loans Made to HCEs	Amount of Plan Loans

Description of the Proposed Method of Correction:

The failure was (or will be) corrected by retroactively amending the plan to provide for the plan loans that were made available. The effective date of the corrective amendment is: _____.

☐ **D. Early Inclusion of Otherwise Eligible Employee Failure**

Employees:
(check the applicable box(es))

☐ Who had not satisfied the plan's minimum age or service requirements were treated as eligible participants on a date prior to their being eligible under the plan and were entitled to the same benefits under the plan to which they would have been entitled had they completed the minimum age or service requirements of the plan.

☐ Who had completed the plan's minimum age or service requirements were treated as eligible participants prior to the applicable plan entry date and were entitled to the same benefits under the plan to which they would have been entitled had they entered the plan timely.

The plan's minimum age or service requirements and plan entry date, as applicable, for the years of the failure were as follows:

(Enter the plan years in which the failure occurred and the number of participants affected by the failure, broken down by type of employee (highly compensated employee (HCE) or nonhighly compensated employees (NHCE) respectively, for each plan year.)

Plan Year	Number of NHCEs Affected by the Failure During the Plan Year	Number of HCEs Affected by the Failure During the Plan Year

Description of the Proposed Correction Method:

The failure was (or will be) corrected by retroactively amending the plan to provide for the inclusion of the ineligible employees. The effective date of the corrective amendment is: _____.

PART II. CHANGE IN ADMINISTRATIVE PROCEDURES

Please include an explanation of how and why the failures arose and a description of the measures that will be implemented to ensure that the same failures will not occur.

PART III. ENCLOSURES

In addition to the applicable enclosures listed on Appendix F, the Plan Sponsor encloses the following with this submission:

- Copies of all amendments used to correct the failure(s), either as adopted or in proposed form (*required*)
- A copy of the plan document in effect prior to any of the amendments used to correct the failure(s) (*required*)
- For a § 401(a)(17) failure in a defined contribution plan, specific calculations for each affected employee or a representative sample of affected employees. (The sample calculations must be sufficient to demonstrate each aspect of the correction method proposed. For example, the determination of the fraction used to determine the additional amount to be allocated to each employee (other than those for whom there was a § 401(a)(17) failure) must be demonstrated.)

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26 CFR 601.601: Rules and regulations.
(Also Part I, § 163.)

Rev. Proc. 2008–51

SECTION 1. PURPOSE

This revenue procedure describes circumstances in which the Internal Revenue Service ("Service") will not treat a debt instrument as an applicable high yield discount obligation ("AHYDO") for purposes of §§ 163(e)(5) and 163(i) of the Internal Revenue Code.

This revenue procedure provides certainty with respect to certain potential tax issues that may be implicated by the issuance of a debt instrument (including a deemed issuance of a debt instrument under § 1.1001–3 of the Income Tax Regulations) in the circumstances described below. No inference should be drawn about whether similar consequences would obtain if a debt instrument falls outside the limited scope of this revenue procedure. Furthermore, there should be no inference that, in the absence of this revenue procedure, a debt instrument within its scope would be an AHYDO.

SECTION 2. BACKGROUND

.01 Corporations frequently obtain financing commitments ("Financing Commitments") from potential lenders ("Lenders") in advance of borrowing money. These Financing Commitments ensure that the corporation will have sufficient debt financing at a future date, within certain parameters (for example, the total amount to be borrowed, an interest rate not to exceed a certain level, and the term of the loan).

.02 In some cases, the Financing Commitments are not ultimately called upon by the corporation, and the corporation obtains debt financing from other sources (or doesn't borrow at all).

.03 In other cases, the Financing Commitments are called upon by the corporation, and the Lender extends credit pursuant to terms negotiated earlier, as part of the Financing Commitment. In some of these situations, the corporation will borrow on terms that were generally established in the Financing Commitment, and which generally remain fixed (or "permanent") over the term of the resulting debt instrument. (The "permanent" nature of the terms frequently allows the debt to be quickly sold by the Lender to other holders.) Alternatively, the corporation will borrow on terms that are temporary (for example, in effect for a year or less) but that change to different, more "permanent" terms (that is, terms that will last for the remaining term of the financing arrangement) after this temporary period. (The corporation may attempt to refinance the loan during the temporary, or "bridge," period on terms that are more favorable than the "permanent" terms embedded in the loan extended pursuant to the Financing Commitment.)

.04 As recent events have demonstrated, market conditions can worsen, in an unanticipated fashion, between the time a binding Financing Commitment is obtained by the corporation and the time the corporation calls upon the Lender to perform pursuant to the Financing Commitment. This can have a number of collateral economic consequences, which can potentially result in situations in which the issue price of a debt instrument is significantly less than the amount of money actually received by the corporation, viewing the transactions as a whole. For example:

(1) In situations in which a corporation issues debt with "permanent" terms previously established in the Financing Commitment (that is, debt without temporary, or "bridge," terms), the Lender may be unable to sell the debt to third parties for a price equal to (or near) the amount of money provided to the corporation pursuant to the Financing Commitment. In these situations, the issue price of the debt may be significantly less than the amount of money advanced to the corporation. For example, this result could occur, in certain circumstances, if the Lender sells a substantial amount of the debt to third parties in its capacity as an underwriter within the meaning of § 1.1273–2(e).

(2) In situations in which a corporation issues debt with temporary, or "bridge," terms previously established in the Financing Commitment, the corporation may be unable to refinance the debt in the capital markets with new, alternative, "permanent" debt financing with terms that are more (or equally) favorable than the "permanent" terms embedded in the debt issued pursuant to the Financing Commitment. Thus, in order to allow the Lender to sell the debt to third parties (whether as part of a separately negotiated transaction or because the corporation is required to do so by contract), the parties may amend the terms of the debt to make it more marketable. Depending on the facts of a given case, such amendments may constitute a "significant modification" within the meaning of § 1.1001–3. In this situation, the issue price of the new debt, deemed to have been issued to retire the old debt, may be significantly less than the amount of money initially advanced to the corporation. For example, this result could occur, in certain circumstances, if the new debt is traded on an established market within the meaning of § 1.1273–2(f).

.05 The issuance of a debt instrument pursuant to a Financing Commitment (or pursuant to the significant modification of a debt instrument originally issued

pursuant to a Financing Commitment) potentially raises adverse income tax consequences in situations in which the issue price of the debt instrument is less than the cash actually received by the corporation for the debt instrument issued pursuant to the Financing Commitment. For example, interest deductions on the debt instrument may be disallowed under § 163(e)(5).

SECTION 3. APPLICABLE LAW

.01 Under § 163(e)(5), in the case of an AHYDO, a corporation is not allowed a deduction for the disqualified portion of the original issue discount ("OID") on the obligation, and the corporation's deduction for the remaining portion of the OID is deferred until the OID is paid in cash or in property (other than debt of the issuer or a related person within the meaning of § 453(f)(1)).

.02 Section 163(i) defines an AHYDO as any debt instrument if:

(1) The maturity date of the debt instrument is more than five years from the date of issue;

(2) The yield to maturity of the debt instrument equals or exceeds the sum of the applicable Federal rate in effect under § 1274(d) for the calendar month in which the instrument is issued plus five percentage points; and

(3) The debt instrument has significant OID.

.03 Under § 163(i)(2), a debt instrument has significant OID if:

(1) The aggregate amount that would be includible in gross income with respect to the debt instrument for periods before the close of any accrual period (as defined in § 1275(a)(5)) ending after the date five years after the date of issue, exceeds

(2) The sum of the aggregate amount of interest to be paid under the debt instrument before the close of the accrual period, and the product of the issue price of the debt instrument (as defined in §§ 1273(b) and 1274(a)) and its yield to maturity.

.04 For purposes of determining whether a debt instrument is an AHYDO, § 163(i)(3) provides that any payment under the debt instrument is assumed to be made on the last day permitted under the debt instrument, and any payment to be made in the form of another debt instrument of the issuer (or a related person within the meaning of § 453(f)(1)) is assumed to be made when such debt instrument is required to be paid in cash or in property other than such debt instrument.

.05 Section 1.1001–3 provides rules to determine whether a modification of the terms of a debt instrument results in an exchange of the original debt instrument for a modified instrument that differs materially either in kind or in extent. Section 1.1001–3 applies to any modification of a debt instrument, regardless of the form of the modification (including an exchange of a new debt instrument for an existing debt instrument).

SECTION 4. SCOPE

This revenue procedure applies to a debt instrument described in either section 4.01, section 4.02, or section 4.03 of this revenue procedure.

.01 *Debt Instrument Issued For Money Pursuant to a Financing Commitment*. The debt instrument is issued by a corporation and—

(1) The debt instrument is issued for money and the terms of the debt instrument are consistent with the general terms of a binding Financing Commitment obtained by the corporation from an unrelated party before January 1, 2009; and

(2) The debt instrument would not be an AHYDO within the meaning of § 163(i), if, solely for purposes of making a determination under this section 4.01(2), the issue price of the debt instrument were the net cash proceeds actually received by the corporation for the debt instrument (regardless of whether a different issue price is determined under § 1.1273–2).

.02 *Debt Instrument Exchanged for a Debt Instrument Issued Pursuant to a Financing Commitment*. The debt instrument is issued by a corporation and—

(1) The debt instrument is issued in exchange (including a deemed exchange under § 1.1001–3) for a debt instrument ("Old Debt Instrument A") issued by the corporation and described in section 4.01 of this revenue procedure;

(2) The debt instrument is issued within 15 months following the issuance of Old Debt Instrument A;

(3) The debt instrument would not be an AHYDO within the meaning of § 163(i), if, solely for purposes of making a determination under this section 4.02(3), the issue price of the debt instrument were the net cash proceeds actually received by the corporation for Old Debt Instrument A (regardless of whether a different issue price is determined under § 1.1273–2 or § 1.1274–2, whichever is applicable);

(4) The maturity date of the debt instrument is not more than one year later than the maturity date of Old Debt Instrument A; and

(5) The stated redemption price at maturity of the debt instrument is not greater than the stated redemption price at maturity of Old Debt Instrument A (see § 1.1273–1(b) to determine the stated redemption price at maturity of a debt instrument).

.03 *Debt Instrument Indirectly Exchanged for a Debt Instrument Issued Pursuant to a Financing Commitment*. The debt instrument is issued by a corporation and—

(1) The debt instrument is issued in exchange (including a deemed exchange under § 1.1001–3) for a debt instrument ("Old Debt Instrument B") issued by the corporation and described in section 4.02 of this revenue procedure;

(2) The debt instrument is issued within 15 months following the issuance of Old Debt Instrument A;

(3) The debt instrument would not be an AHYDO within the meaning of § 163(i), if, solely for purposes of making a determination under this section 4.03(3), the issue price of the debt instrument were the net cash proceeds actually received by the corporation for Old Debt Instrument A (regardless of whether a different issue price is determined under § 1.1273–2 or § 1.1274–2, whichever is applicable);

(4) The maturity date of the debt instrument is not more than one year later than the maturity date of Old Debt Instrument A; and

(5) The stated redemption price at maturity of the debt instrument is not greater than the stated redemption price at maturity of Old Debt Instrument A (see § 1.1273–1(b) to determine the stated redemption price at maturity of a debt instrument).

SECTION 5. APPLICATION

If this revenue procedure applies to a debt instrument, the Service will not treat the debt instrument as an AHYDO for purposes of §§ 163(e)(5) and 163(i).

SECTION 6. EFFECTIVE DATE

This revenue procedure is effective on August 8, 2008. Sections 4.02(4), 4.02(5), 4.03(4) and 4.03(5) of this revenue procedure do not apply to debt instruments issued before August 8, 2008.

SECTION 7. REQUEST FOR COMMENTS

The Service invites public comment related to this revenue procedure. Comments should be submitted no later than November 15, 2008, to the Internal Revenue Service, CC:PA:LPD:RU (Rev. Proc. 2008–51), room 5203, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Comments also may be hand delivered between the hours of 8 a.m. and 4 p.m. to the Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC 20224, Attn: CC:PA:LPD:RU (Rev. Proc. 2008–51), room 5203. Alternatively, comments may be submitted via the Internet *at Notice.Comments@irscounsel.treas.gov.* Include the revenue procedure number (Rev. Proc. 2008–51) in the subject line. All comments will be available for public inspection and copying in their entirety. Therefore, comments received by the IRS and Treasury should not include taxpayer-specific information or of a confidential nature. Comments should include the name and telephone number of a person to contact.

SECTION 8. DRAFTING INFORMATION

The principal author of this revenue procedure is William E. Blanchard of the Office of Associate Chief Counsel (Financial Institutions and Products). For further information, contact Mr. Blanchard at (202) 622–3950 (not a toll-free call).

Part IV. Items of General Interest

Notice of Proposed Rulemaking

Postponement of Certain Tax-Related Deadlines by Reason of Presidentially Declared Disaster or Terroristic or Military Actions

REG–142680–06

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains a proposed regulation that proposes to amend existing regulations issued under section 7508A of the Internal Revenue Code (Code). The purpose of the proposed regulation is to clarify rules relating to the postponement of certain tax-related acts by reason of a Presidentially declared disaster or terroristic or military action. The proposed regulation clarifies the scope of relief under section 7508A and specifies that interest may be suspended during the postponement period. These changes are necessary to reflect changes in the law made by the Victims of Terrorism Tax Relief Act and current IRS practice. The proposed regulation will affect taxpayers determined by the Secretary to be affected by a Presidentially declared disaster or terroristic or military action.

DATES: Written or electronically generated comments and requests for a public hearing must be received by October 14, 2008.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–142680–06), room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–142680–06), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC, or sent electronically, via the Federal eRulemaking Portal at *www.regulations.gov* (IRS REG–142680–06).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulation Mary Ellen Keys (202) 622–4570, concerning submission of comments Oluwafunmilayo Taylor, (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

This document contains proposed amendments to the Procedure and Administration Regulations (26 CFR part 301). Section 7508A of the Internal Revenue Code (Code) relates to the postponement of certain tax-related acts by reason of Presidentially declared disaster or terroristic or military action. Section 7508A was added by section 911(a) of the Taxpayer Relief Act of 1997, Public Law 105–34 (111 Stat. 788, 877–78 (1997)) (the 1997 Act), which was effective for any period for performing an act that had not expired before December 5, 1997.

Section 7508A authorizes the Secretary to postpone the deadlines for the performance of certain tax-related acts for taxpayers determined to be affected by a Presidentially declared disaster or a terroristic or military action. Section 301.7508A–1 provides guidance for taxpayers seeking relief under section 7508A.

Since the publication of §301.7508A–1 on December 14, 2000, section 7508A was amended by the Victims of Terrorism Tax Relief Act of 2001, Public Law 107–134 (115 Stat. 2427, 2433–35 (2002)) (the 2002 Act). The 2002 Act amended the statute by extending the time period during which the Secretary may postpone certain tax-related acts and allowing the Secretary to suspend the accrual of interest, penalties, additional amounts, or additions to the tax during the period of postponement. The proposed regulation incorporates amendments to section 7508A.

Explanation of Provisions

The proposed regulation reflects that the period of time the Secretary may postpone certain tax-related acts has been increased from 90 days to one year. Additionally, the proposed regulation reflects that the Secretary is authorized under section 7508A to suspend interest, penalties, additional amounts, and additions to tax which would normally accrue during the time the tax-related act is postponed. Before the 2002 Act, generally, a taxpayer was responsible for interest that accrued during the postponement period (with a limited exception under former section 6404(h) when the taxpayer received both an extension of time to file under section 6081 and an extension of time to pay under section 6161).

The proposed regulation sets forth how the IRS generally implements postponements of time under section 7508A. The proposed regulation provides, however, that the IRS may grant further relief to taxpayers under section 7508A by revenue ruling, revenue procedure, notice, announcement, news release or other guidance published in the Internal Revenue Bulletin, in addition to that relief provided by the proposed regulation.

The proposed regulation demonstrates that although specific tax-related acts may be due on different dates within the postponement period, the acts may be postponed under section 7508A until the last day of the period. Under the proposed regulation, when an affected taxpayer is required to perform a tax-related act by a due date that falls within the postponement period, the taxpayer is entitled to postponement of the act and is eligible for relief from interest, penalties, additional amounts, and additions to tax during the postponement period.

The proposed regulation provides that the postponement period under section 7508A runs concurrently with extensions of time to file or pay, if any, under other sections of the Code. Thus, when the original due date falls within the postponement period, an affected taxpayer has until the last day of the postponement period to file for an extension of time to file or pay, but any resulting extension runs from the original due date.

The proposed regulation also provides that, where the extended due date, but not the original due date, falls within the postponement period, relief under section 7508A is specific to the type of extension received. Thus, an affected taxpayer who received an extension of time to file, but not an extension of time to pay, is eligible

for a postponement of time to file and relief from penalties relating to the failure to file. The taxpayer is not eligible for penalty and interest relief relating to the failure to pay, as the payment due date was not extended.

The regulation also clarifies that a postponement of time under section 7508A to perform a tax-related act does not extend the due date to perform the act, but instead, merely allows the IRS to disregard a time period of up to one year for performance of the act.

Proposed Effective Date

The regulation, as proposed, applies to Presidentially declared disasters or terroristic or military actions occurring on or after the date of publication of a Treasury decision adopting these rules as final regulations in the **Federal Register**.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to this regulation. The regulation does not impose a collection of information requirement on small business entities, thus the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, this regulation has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Requests for a Public Hearing

Before this proposed regulation is adopted as a final regulation, consideration will be given to any written (a signed original and eight (8) copies) and electronic comments that are submitted timely to the IRS. All comments will be available for public inspection and copying. A public hearing will be scheduled if requested in writing by any person that timely submits comments. If a public hearing is scheduled, notice of the date, time, and place for the public hearing will be published in the **Federal Register**.

Drafting Information

The principal authors of this proposed regulation are Melissa Quale and Mary Ellen Keys of the Office of the Associate Chief Counsel (Procedure and Administration).

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Amendments to the Regulations

Accordingly, 26 CFR part 301 is proposed to be amended as follows:

PART 301—PROCEDURE AND ADMINISTRATION

Paragraph 1. The authority citation for part 301 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 301.7508A–1 is amended by

1. Revising paragraphs (b) and (e).
2. Adding paragraph (d)(3).
3. Removing paragraph (f) and redesignating paragraphs (g) and (h) as paragraphs (f) and (g) respectively and revising them.

The revisions and addition read as follows.

§301.7508A–1 Postponement of certain tax-related deadlines by reasons of a Presidentially declared disaster or terroristic or military action.

* * * * *

(b) *Postponed deadlines*—(1) *In general.* In the case of a taxpayer determined by the Secretary to be affected by a Presidentially declared disaster (as defined in section 1033(h)(3)) or a terroristic or military action (as defined in section 692(c)(2)), the Secretary may specify a postponement period (as defined in paragraph (d)(1) of this section) of up to one year that may be disregarded in determining under the internal revenue laws, in respect of any tax liability of the affected taxpayer (as defined in paragraph (d)(1) of this section)—

(i) Whether any or all of the acts described in paragraph (c) of this section were performed within the time prescribed;

(ii) The amount of interest, penalty, additional amount, or addition to the tax; and

(iii) The amount of credit or refund.

(2) *Effect of postponement period.* When an affected taxpayer is required to perform a tax-related act by a due date that falls within the postponement period, the affected taxpayer is eligible for postponement of time to perform the act until the last day of the period. The affected taxpayer is eligible for relief from interest, penalties, additional amounts, or additions to tax during the postponement period.

(3) *Interaction between postponement period and extensions of time to file or pay*—(i) *In general.* The postponement period under section 7508A runs concurrently with extensions of time to file and pay, if any, under other sections of the Internal Revenue Code.

(ii) *Original due date prior to, but extended due date within, the postponement period.* When the original due date precedes the first day of the postponement period and the extended due date falls within the postponement period, the following rules apply. If an affected taxpayer received an extension of time to file, filing will be timely on or before the last day of the postponement period, and the taxpayer is eligible for relief from penalties or additions to tax related to the failure to file during the postponement period. Similarly, if an affected taxpayer received an extension of time to pay, payment will be timely on or before the last day of the postponement period, and the taxpayer is eligible for relief from interest, penalties, additions to tax and additional amounts related to the failure to pay during the postponement period.

(4) *Due date not extended.* The postponement of the deadline of a tax-related act does not extend the due date for the act, but merely allows the IRS to disregard a time period of up to one year for performance of the act. To the extent that other statutes may rely on the date a return is due to be filed, the postponement period will not change the due date of the return.

(5) *Additional relief.* The rules of this paragraph (b) demonstrate how the IRS generally implements section 7508A. The IRS may determine, however, that additional relief to taxpayers is appropriate and may provide additional relief to the extent allowed under section 7508A. To the extent that the IRS grants additional relief, the IRS will provide specific guidance on the scope of relief in the manner provided in paragraph (e) of this section.

* * * * *

(d) * * *

(3) *Postponement period* means the period of time (up to one year) that the IRS postpones deadlines for performing tax-related acts under section 7508A.

(e) *Notice of postponement of certain acts*. If a tax-related deadline is postponed under section 7508A and this section, the IRS will publish a revenue ruling, revenue procedure, notice, announcement, news release, or other guidance in the Internal Revenue Bulletin (see §601.601(d)(2) of this chapter) describing the acts postponed, the postponement period, and the location of the covered disaster area. Guidance under this paragraph (e) will be published as soon as practicable after the occurrence of a terroristic or military action or declaration of a Presidentially declared disaster.

(f) *Examples*. The rules of this section are illustrated by the following examples:

Example 1. (i) Corporation X, a calendar year taxpayer, has its principal place of business in County M in State W. Pursuant to a timely filed request for extension of time to file, Corporation X's 2005 Form 1120, "*U.S. Corporation Income Tax Return*," is due on September 15, 2006. Also due on September 15, 2006, is Corporation X's third quarter estimated tax payment for 2006. Corporation X's 2006 third quarter Form 720, "*Quarterly Federal Excise Tax Return*," and third quarter Form 941, "*Employer's QUARTERLY Federal Tax Return*," are due on October 31, 2006. In addition, Corporation X has an employment tax deposit due on September 15, 2006.

(ii) On September 1, 2006, a hurricane strikes County M in State W. On September 6, 2006, the President declares a disaster within the meaning of section 1033(h)(3). Also on September 6, 2006, the IRS determines that County M in State W is a covered disaster area and publishes guidance announcing that the time period for affected taxpayers to file returns, pay taxes and perform other time-sensitive acts falling on or after September 1, 2006, and on or before November 30, 2006, has been postponed to November 30, 2006, pursuant to section 7508A.

(iii) Because Corporation X's principal place of business is in County M, Corporation X is an affected taxpayer. Accordingly, Corporation X's 2005 Form 1120 will be timely if filed on or before November 30, 2006. Corporation X's 2006 third quarter estimated tax payment will be timely if made on or before November 30, 2006. In addition, pursuant to paragraph (c) of this section, Corporation X's 2006 third quarter Form 720 and third quarter Form 941 will be timely if filed on or before November 30, 2006. However, because deposits of taxes are excluded from the scope of paragraph (c) of this section, Corporation X's employment tax deposit is due on September 15, 2006. In addition, Corporation X's deposits relating to the third quarter Form 720 are not postponed. Absent reasonable cause, Corporation X is subject to the failure to deposit penalty under section 6656 and accrual of interest.

Example 2. The facts are the same as in *Example 1*, except that because of the severity of the hurricane the IRS determines that postponement of government acts is necessary under these circumstances and publishes guidance accordingly. During 2006, Corporation X's 2002 Form 1120 is being examined by the IRS. Pursuant to a timely filed request for extension of time to file, Corporation X timely filed its 2002 Form 1120 on September 17, 2003 (because March 15, 2003, falls on a Saturday, Corporation X's 2002 Form 1120 was due to be filed on March 17, 2003). Without application of this section, the statute of limitation on assessment for the 2002 income tax year will expire on September 17, 2006. However, pursuant to paragraph (c) of this section, assessment of tax is one of the government acts for which up to one year may be disregarded. Because September 17, 2006, falls within the period in which government acts are postponed, the statute of limitation on assessment for Corporation X's 2002 income tax will expire on November 30, 2006. Because Corporation X did not timely file an extension to pay, payment of its 2002 income tax was due on March 17, 2003. As such, Corporation X will be subject to the failure to pay penalty and related interest beginning on March 18, 2003. The due date for payment of Corporation X's 2002 income tax preceded the postponement period. Therefore, Corporation X is not entitled to the suspension of interest or penalties during the disaster period with respect to its 2002 income tax liability.

Example 3. The facts are the same as in *Example 2*, except that the examination of the 2002 taxable year was completed earlier in 2006, and on July 28, 2006, the IRS mailed a statutory notice of deficiency to Corporation X. Without application of this section, Corporation X has 90 days (or until October 26, 2006) to file a petition with the Tax Court. However, pursuant to paragraph (c) of this section, filing a petition with the Tax Court is one of the taxpayer acts for which a period of up to one year may be disregarded. Because Corporation X is an affected taxpayer, Corporation X's petition to the Tax Court will be timely if filed on or before November 30, 2006, the last day of the postponement period.

Example 4. (i) H and W, individual calendar year taxpayers, intend to file a joint Form 1040, "U*.S. Individual Income Tax Return*," for the 2007 taxable year and are required to file a Schedule H, "*Household Employment Taxes*." The joint return is due on April 15, 2008. H's and W's principal residence is in County M in State Q.

(ii) On April 2, 2008, a severe ice storm strikes County M. On April 5, 2008, the President declares a disaster within the meaning of section 1033(h)(3). Also on April 5, 2008, the IRS determines that County M in State Q is a covered disaster area and publishes guidance announcing that the time period for affected taxpayers to file returns, pay taxes and perform other time-sensitive acts falling on or after April 2, 2008, and on or before June 2, 2008, has been postponed to June 2, 2008.

(iii) Because H's and W's principal residence is in County M, H and W are affected taxpayers. April 15, 2008, the due date for the filing of H's and W's 2007 Form 1040 and Schedule H, falls within the postponement period described in the IRS published guidance. Thus, H's and W's return will be timely if filed on or before June 2, 2008. If H and W request an extension of time to file under section 6081 on or before June 2, 2008, the extension is deemed to have been filed by April 15, 2008. Thus, H's and W's return will be timely if filed on or before October 15, 2008.

(iv) April 15, 2008, is also the due date for the payment due on the return. This date falls within the postponement period described in the IRS published guidance. Thus, the payment of tax due with the return will be timely if paid on or before June 2, 2008, the last day of the postponement period. If H and W fail to pay the tax due on the 2007 Form 1040 by June 2, 2008, and do not receive an extension of time to pay under section 6161, H and W will be subject to failure to pay penalties and accrual of interest beginning on June 3, 2008.

Example 5. (i) H and W, residents of County D in State G, intend to file an amended return to request a refund of 2007 taxes. H and W timely filed their 2007 income tax return on April 15, 2008. Under section 6511(a), H's and W's amended 2007 tax return must be filed on or before April 15, 2011.

(ii) On April 1, 2011, an earthquake strikes County D. On April 5, 2011, the President declares a disaster within the meaning of section 1033(h)(3). Also on April 5, 2011, the IRS determines that County D in State G is a covered disaster area and publishes guidance announcing that the time period for affected taxpayers to file returns, pay taxes and perform other time-sensitive acts falling on or after April 1, 2011, and on or before September 28, 2011, has been postponed to September 28, 2011.

(iii) Under paragraph (c) of this section, filing a claim for refund of tax is one of the taxpayer acts for which up to one year may be disregarded. The postponement period for this disaster begins on April 1, 2011, and ends on September 28, 2011. Accordingly, H's and W's claim for refund for 2007 taxes will be timely if filed on or before September 28, 2011. Moreover, in applying the lookback period in section 6511(b)(2)(A), which limits the amount of the allowable refund, the period from September 28, 2011, back to April 1, 2011, is disregarded under paragraph (b)(1)(C) of this section. Thus, if the claim is filed on or before September 28, 2011, amounts deemed paid on April 15, 2008, under section 6513(b), such as estimated tax and tax withheld from wages, will have been paid within the lookback period of section 6511(b)(2)(A).

Example 6. (i) A is an unmarried, calendar year taxpayer whose principal residence is located in County W in State Q. A intends to file a Form 1040 for the 2007 taxable year. The return is due on April 15, 2008. A timely files Form 4868, "*Application for Automatic Extension of Time To File U.S. Individual Income Tax Re*turn." Due to A's timely filing of Form 4868, the extended filing deadline for A's 2007 tax return is October 15, 2008. Because A timely requested an extension of time to file, A will not be subject to the failure to file penalty under section 6651(a)(1), if A files the 2007 Form 1040 on or before October 15, 2008. However, A failed to pay the tax due on the return by April 15, 2008, and did not receive an extension of time to pay under section 6161. Absent reasonable cause, A is subject to the failure to pay penalty under section 6651(a)(2) and accrual of interest.

(ii) On September 30, 2008, a blizzard strikes County W. On October 3, 2008, the President declares a disaster within the meaning of section 1033(h)(3). Also on October 3, 2008, the IRS determines that

County W in State Q is a covered disaster area and announces that the time period for affected taxpayers to file returns, pay taxes and perform other time-sensitive acts falling on or after September 30, 2008, and on or before December 2, 2008, has been postponed to December 2, 2008.

(iii) Because A's principal residence is in County W, A is an affected taxpayer. Because October 15, 2008, the extended due date to file A's 2007 Form 1040, falls within the postponement period described in the IRS's published guidance, A's return is timely if filed on or before December 2, 2008. However, the payment due date, April 15, 2008, preceded the postponement period. Thus, A will continue to be subject to failure to pay penalties and accrual of interest during the postponement period.

Example 7. (i) H and W, individual calendar year taxpayers, intend to file a joint Form 1040 for the 2007 taxable year. The joint return is due on April 15, 2008. After credits for taxes withheld on wages and estimated tax payments, H and W owe tax for the 2007 taxable year. H's and W's principal residence is in County J in State W.

(ii) On March 1, 2008, severe flooding strikes County J. On March 5, 2008, the President declares a disaster within the meaning of section 1033(h)(3). Also on March 5, 2008, the IRS determines that County J in State W is a covered disaster area and publishes guidance announcing that the time period for affected taxpayers to file returns, pay taxes and perform other time-sensitive acts falling on or after March 1, 2008, and on or before May 30, 2008, has been postponed to May 30, 2008.

(iii) Because H's and W's principal residence is in County J, H and W are affected taxpayers. Pursuant to the IRS's grant of relief under section 7508A, H and W received a postponement of the time to file the joint return and pay the tax due until May 30, 2008. Therefore, H's and W's joint return without extension is timely if filed on or before May 30, 2008. Similarly, H's and W's 2007 income taxes will be timely paid if paid on or before May 30, 2008.

(iv) On April 30, 2008, H and W timely file Form 4868, "*Application for Automatic Extension of Time To File U.S. Individual Income Tax Return*." H and W's extension will be deemed to have been filed on April 15, 2008. Thus, H's and W's 2007 income tax return is timely filed if filed on or before October 15, 2008.

(v) H and W did not request or receive an extension of time to pay. Therefore, pursuant to section 7508A, H's and W's 2007 income tax payment is due on May 30, 2008. H and W will be subject to the failure to pay penalty under section 6651(a)(2) and interest if H and W do not pay the tax due on the 2007 joint return on or before May 30, 2008. H and W will be subject to failure to pay penalties and accrual of interest beginning on May 31, 2008.

Example 8. The facts are the same as in *Example 7* except that H and W file the joint 2007 return and pay the tax due on June 15, 2008. Later, H and W discover additional deductions that would lower their taxable income for 2007. On June 15, 2011, H and W file a claim for refund under section 6511(a). The amount of H and W's overpayment exceeds the amount of taxes paid on June 15, 2008, the amount paid within three years of filing the claim. Section 6511(a) requires that a claim for refund be filed within three years from the time the return was filed or two years from the time the tax was paid, whichever period expires later. Section 6511(b)(2)(A) includes within the lookback period the period of an extension of time to file. Thus, payments that H and W made on or after May 30, 2008, would be eligible to be refunded. Since the period from April 15, 2008, to May 30, 2008, is disregarded, payments H and W made on April 15, 2008, (including withholding or estimated tax payments deemed to have been made on April 15, 2008) would also be included in the section 6511(b)(2)(A) lookback period. Thus, H and W are entitled to a full refund in the amount of their overpayment.

(g) *Proposed effective date.* The regulation, as proposed, applies to Presidentially declared disasters or terroristic or military actions occurring on or after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**.

Linda E. Stiff,
Deputy Commissioner for Services and Enforcement.

(Filed by the Office of the Federal Register on July 14, 2008, 8:45 a.m., and published in the issue of the Federal Register for July 15, 2008, 73 F.R. 40471)

Deletions From Cumulative List of Organizations Contributions to Which are Deductible Under Section 170 of the Code

Announcement 2008–79

The Internal Revenue Service has revoked its determination that the organizations listed below qualify as organizations described in sections 501(c)(3) and 170(c)(2) of the Internal Revenue Code of 1986.

Generally, the Service will not disallow deductions for contributions made to a listed organization on or before the date of announcement in the Internal Revenue Bulletin that an organization no longer qualifies. However, the Service is not precluded from disallowing a deduction for any contributions made after an organization ceases to qualify under section 170(c)(2) if the organization has not timely filed a suit for declaratory judgment under section 7428 and if the contributor (1) had knowledge of the revocation of the ruling or determination letter, (2) was aware that such revocation was imminent, or (3) was in part responsible for or was aware of the activities or omissions of the organization that brought about this revocation.

If on the other hand a suit for declaratory judgment has been timely filed, contributions from individuals and organizations described in section 170(c)(2) that are otherwise allowable will continue to be deductible. Protection under section 7428(c) would begin on September 2, 2008, and would end on the date the court first determines that the organization is not described in section 170(c)(2) as more particularly set forth in section 7428(c)(1). For individual contributors, the maximum deduction protected is $1,000, with a husband and wife treated as one contributor. This benefit is not extended to any individual, in whole or in part, for the acts or omissions of the organization that were the basis for revocation.

Ohio Taekwondo Association, Inc.
Cincinnati, OH
The Johnson Foundation
Sandy, UT
Chaim Ministries, Inc.
Los Alamitos, CA
Yes I Can
Burlington, NC
Surviving the System, Inc.
Peoria, AZ
Gravette Medical Center Hospital
Gravette, AR
D & L Carousel Pre-School
Los Angeles, CA
Christmas in April
Mobile, AL
Foundation for Life Enhancement
Dallas, TX
Colgate Residences, Inc.
Houston, TX
Help Ministries, Inc.
Mesa, AZ
CCC Centers
San Antonio, TX
Sunlight Ministries, Inc.
Brookhaven, MS
Consumer Credit Counseling Services of Huntsville, Inc.
Huntsville, AL
Universal Training Center Nonprofit Corporation
Highland, CA
Deep South Community Development Corporation
Decatur, GA

Definition of Terms

Revenue rulings and revenue procedures (hereinafter referred to as "rulings") that have an effect on previous rulings use the following defined terms to describe the effect:

Amplified describes a situation where no change is being made in a prior published position, but the prior position is being extended to apply to a variation of the fact situation set forth therein. Thus, if an earlier ruling held that a principle applied to A, and the new ruling holds that the same principle also applies to B, the earlier ruling is amplified. (Compare with *modified*, below).

Clarified is used in those instances where the language in a prior ruling is being made clear because the language has caused, or may cause, some confusion. It is not used where a position in a prior ruling is being changed.

Distinguished describes a situation where a ruling mentions a previously published ruling and points out an essential difference between them.

Modified is used where the substance of a previously published position is being changed. Thus, if a prior ruling held that a principle applied to A but not to B, and the new ruling holds that it applies to both A and B, the prior ruling is modified because it corrects a published position. (Compare with *amplified* and *clarified*, above).

Obsoleted describes a previously published ruling that is not considered determinative with respect to future transactions. This term is most commonly used in a ruling that lists previously published rulings that are obsoleted because of changes in laws or regulations. A ruling may also be obsoleted because the substance has been included in regulations subsequently adopted.

Revoked describes situations where the position in the previously published ruling is not correct and the correct position is being stated in a new ruling.

Superseded describes a situation where the new ruling does nothing more than restate the substance and situation of a previously published ruling (or rulings). Thus, the term is used to republish under the 1986 Code and regulations the same position published under the 1939 Code and regulations. The term is also used when it is desired to republish in a single ruling a series of situations, names, etc., that were previously published over a period of time in separate rulings. If the new ruling does more than restate the substance of a prior ruling, a combination of terms is used. For example, *modified* and *superseded* describes a situation where the substance of a previously published ruling is being changed in part and is continued without change in part and it is desired to restate the valid portion of the previously published ruling in a new ruling that is self contained. In this case, the previously published ruling is first modified and then, as modified, is superseded.

Supplemented is used in situations in which a list, such as a list of the names of countries, is published in a ruling and that list is expanded by adding further names in subsequent rulings. After the original ruling has been supplemented several times, a new ruling may be published that includes the list in the original ruling and the additions, and supersedes all prior rulings in the series.

Suspended is used in rare situations to show that the previous published rulings will not be applied pending some future action such as the issuance of new or amended regulations, the outcome of cases in litigation, or the outcome of a Service study.

Abbreviations

The following abbreviations in current use and formerly used will appear in material published in the Bulletin.

A—Individual.
Acq.—Acquiescence.
B—Individual.
BE—Beneficiary.
BK—Bank.
B.T.A.—Board of Tax Appeals.
C—Individual.
C.B.—Cumulative Bulletin.
CFR—Code of Federal Regulations.
CI—City.
COOP—Cooperative.
Ct.D.—Court Decision.
CY—County.
D—Decedent.
DC—Dummy Corporation.
DE—Donee.
Del. Order—Delegation Order.
DISC—Domestic International Sales Corporation.
DR—Donor.
E—Estate.
EE—Employee.
E.O.—Executive Order.
ER—Employer.
ERISA—Employee Retirement Income Security Act.
EX—Executor.
F—Fiduciary.
FC—Foreign Country.
FICA—Federal Insurance Contributions Act.
FISC—Foreign International Sales Company.
FPH—Foreign Personal Holding Company.
F.R.—Federal Register.
FUTA—Federal Unemployment Tax Act.
FX—Foreign corporation.
G.C.M.—Chief Counsel's Memorandum.
GE—Grantee.
GP—General Partner.
GR—Grantor.
IC—Insurance Company.
I.R.B.—Internal Revenue Bulletin.
LE—Lessee.
LP—Limited Partner.
LR—Lessor.
M—Minor.
Nonacq.—Nonacquiescence.
O—Organization.
P—Parent Corporation.
PHC—Personal Holding Company.
PO—Possession of the U.S.
PR—Partner.
PRS—Partnership.
PTE—Prohibited Transaction Exemption.
Pub. L.—Public Law.
REIT—Real Estate Investment Trust.
Rev. Proc.—Revenue Procedure.
Rev. Rul.—Revenue Ruling.
S—Subsidiary.
S.P.R.—Statement of Procedural Rules.
Stat.—Statutes at Large.
T—Target Corporation.
T.C.—Tax Court.
T.D. —Treasury Decision.
TFE—Transferee.
TFR—Transferor.
T.I.R.—Technical Information Release.
TP—Taxpayer.
TR—Trust.
TT—Trustee.
U.S.C.—United States Code.
X—Corporation.
Y—Corporation.
Z —Corporation.

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