

EMPLOYEE PLANS COMPLIANCE RESOLUTION SYSTEM (EPCRS)

Prepared by:

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(Effective September 1, 2006, the applicable revenue procedure is Revenue Procedure 2006-27. For certain provisions, use of Acknowledgement Letter (section 11.11), assembly of submission package (section 11.14) and the fee schedule for non amenders discovered in determination letter applications, not related to VCP submissions (section 14.04), the effective date is May 30, 2006. For all other provisions, during the period beginning from May 30, 2006 and ending on September 1, 2006, a Plan sponsor can elect to rely on the provisions of either Revenue Procedure 2003-44 or Revenue Procedure 2006-27)

Note: This outline is prepared for discussion/presentation purposes only. It is not an official reference source. Please refer to the prevailing revenue procedure for guidance.

Note: Items newly added by Revenue Procedure 2006-27 are featured in *italics*.

I. Introduction.

EPCRS: Employee Plans Compliance Resolution System (currently addressed in Rev. Proc. 2006-27). It is a collection of programs, which allows “plan sponsors to correct qualification failures and thereby continue to provide their employees with retirement benefits on a tax-favored basis.” (See §1.01 of Rev. Proc. 2006-27.)

- A. Programs include:
 - 1. Self Correction Program (SCP): Employer discovers failures and fixes problems without involving the IRS.
 - 2. Voluntary Correction Program (VCP): Employer discovers failures and fixes them with IRS approval.
 - 3. Audit Closing Agreement Program (Audit CAP): This program is an option that is available for the purpose of resolving qualification failures that are identified during the course of an IRS audit. This program may also apply, if qualification failures are identified by the Service, during the course of an application for a favorable determination letter.

For a brief overview of the programs, see § 1.03 of Rev. Proc. 2006-27.

II. Types of Plans covered by EPCRS.

- A. Qualified Plans under Internal Revenue Code (“IRC”) § 401(a).
- B. 403(b) Plans.
- C. SEPs and SARSEPs under IRC § 408(k).
- D. SIMPLE IRAs under IRC § 408(p).
- E. § 457(b) eligible governmental plans (while not specifically covered under EPCRS) can have issues resolved pursuant to a closing agreement.

See §§ 1.01 and 4.10 of Rev. Proc. 2006-27 for information on types of plans covered by EPCRS.

III. What can EPCRS accomplish?

- A. For a Qualified Plan, if the eligibility requirements (both with respect to the failures and the manner in which the failures are corrected) for any of the applicable EPCRS programs are satisfied, the Service will treat the Qualified Plan as if it continuously complied with the provisions of IRC § 401(a). (See § 3 of Rev. Proc. 2006-27.)
- B. Similar provisions in the revenue procedure for SEPs, SIMPLE IRAs and 403(b) Plans. (See § 3 of Rev. Proc. 2006-27.)
- C. Excise taxes:
- (1) For VCP applications *and Audit CAP*, waiver of IRC § 4974 excise taxes for the failure to make the minimum distributions required under IRC § 401(a)(9). (See § 6.09(2) of Rev. Proc. 2006-27.)
- (2) *For VCP applications: relief from IRC § 4972 excise tax for nondeductible contributions made to correct failures identified in the submission.* (See § 6.09(3) of Rev. Proc. 2006-27)
- (3) *For VCP applications: relief from IRC § 4979 excise tax for failed ADP/ACP test.* (See § 6.09(4) of Rev. Proc. 2006-27)
- D. Income taxes:
- (1) For VCP applications, the income tax reporting option. As part of VCP, in the event of a failure relating to a loan to a participant made from a Qualified Plan or a 403(b) Plan that is treated as received as a distribution for purposes of § 72(p) (a deemed distribution), the distribution may be reported on Form 1099-R for the year of correction with respect to the affected participant. (see § 6.07(1) of Rev. Proc. 2006-27)
- (2) For VCP applications, relief from the income tax reporting option. *Certain loans that failed to comply with plan provisions and the requirements of IRC § 72(p) may be corrected under VCP and relieve the Applicant from the responsibility of reporting the loans as deemed distributions to the participant. (see § 6.07(2); 6.07(3) of Rev. Proc. 2006-27. Also see § 6.02(6) of Rev. Proc. 2006-27). Generally, in order for a plan loan to eligible for relief from income tax reporting, the participant's failure to pay back the loan should have been caused by employer action and correction should have been accomplished within the maximum allowable duration for the loan provided for under IRC 72(p)(2)(B) (generally 5 yrs.) measured from the date of the loan.*

IV. What is not covered.

- A. Unless specifically provided for (see section III above), excise taxes cannot be mitigated under EPCRS. Thus, taxes such as those identified below would still apply even if related qualification failures are being addressed under EPCRS. Examples include:
 - 1. IRC § 4971- Excise tax arising from the employer's failure to fund the Plan to satisfy its minimum funding requirement under IRC § 412.
 - 2. IRC § 4975- Excise tax arising from "prohibited transactions" between a Plan and a "disqualified person".
- B. Egregious failures cannot be addressed under SCP. They may be addressed under VCP for a higher fee. Audit CAP is also available to correct an egregious failure.(see §§ 4.11 and 12.06 of Rev. Proc. 2006-27). Examples of egregious failures include a plan: (i) that has consistently covered only highly compensated employees and excluded eligible non highly compensated employees; (ii) *that provides more favorable benefits for an owner of the employer based on a purported collectively bargained agreement where there has in fact been no good faith bargaining between bona fide employee representatives and the employer. (See Notice 2003-24); or (iii) where contributions on behalf of one or more highly compensated individuals are well in excess of the applicable 415(c) limitation;*
- C. Failures arising from the diversion or misuse of Plan assets cannot be addressed under EPCRS. (See § 4.12 of Rev. Proc. 2006-27.)
- D. *Abusive Tax Avoidance Transactions(ATATs): EPCRS is not available to correct failures that are related to ATATs . For unrelated failures, based on feedback from the Tax Shelter Coordinator, unrelated failures may be addressed. Referral to exam for ATAT issue, examination of plan for ATAT issue could still be done even if failures are being addressed in a VCP submission. Compliance statement cannot be relied on for the purpose of concluding whether the plan or the plan sponsor were parties to an ATAT (for additional details refer to section 4.13 of Rev. Proc. 2006-27)*

V. Qualification Failures- IRC § 401(a) Plans (Categorized).

- A. Plan Document Failure: A Plan provision (or the absence of a Plan provision) that on its face violates the requirements of IRC § 401(a).

Example: No provision for limiting compensation to the applicable IRC § 401(a)(17) limit OR Plan document provides for a compensation limit of \$400,000.

- B. Operational Failure: Plan document provisions comply with IRC § 401(a). The failure is caused by the failure to operate the Plan in accordance with its provisions, i.e., the provisions of the Plan document were not followed.

Example: Plan provides for applicable IRC § 401(a)(17) limit on a participant's compensation. However, the provision is ignored and the participant's allocation is determined on her entire compensation of \$400,000.

- C. Demographic Failure: Plan document terms were followed, but the Plan still failed to satisfy any of the following requirements:

1. Minimum participation requirements of IRC § 401(a)(26).
2. Coverage requirements of IRC § 410(b).
3. Non-discrimination requirements of IRC § 401(a)(4).

Note: ADP/ACP test failures are Operational Failures.

Example: Plan covers employees of Employer A and does not cover employees of any other employers in the controlled group. The Plan operates in accordance with these terms. However, upon running the applicable test it is found that the Plan fails to satisfy the coverage requirements of IRC § 410(b).

- D. Employer Eligibility Failure: Situation where the Employer, not eligible under the relevant provision of the IRC, adopted a Qualified Plan. e.g. State/Local Government adopting a 401(k) Plan.

(See § 5.01 of Rev. Proc. 2006-27.)

VI. Correction Principles.

- A. Full correction includes all taxable years, whether or not the taxable year is closed, e.g., exclusion of an eligible employee for 10 years. His or her account balance would have to be restored to reflect the contributions or allocations he or she should have received had the employee participated timely. (See § 6.02 of Rev. Proc. 2006-27.)
- B. The correction method should restore the Plan and its participants to the position it would have been in had the failure not occurred. (See § 6.02(1) of Rev. Proc. 2006-27.)
- C. The correction should be reasonable and appropriate for the failure. (See § 6.02(2) of Rev. Proc. 2006-27.)
 - 1. Methods specified in Appendices A and B of the Revenue Procedure are “deemed to be reasonable”.
 - 2. Other methods used would be evaluated for reasonableness based on the following criteria:
 - (a) Consistency with the IRC. To the extent possible, the correction method should resemble a method already provided for in the IRC, e.g., Income Tax Regulations (IT Reg.) § 1.415-6(b)(6) to correct annual additions made in excess of the applicable 415(c) limit; IT Reg. 1.402(g)-1(e), to correct deferrals made in excess of the applicable 402(g) limit.
 - (b) Correction method for failures relating to non-discrimination should provide benefits for non-highly compensated employees (NHCEs), e.g., ADP test failure, solely distributing the excess to HCEs, would not be a “typical” means of correcting such a failure.
 - (c) Correction method should keep assets in the Plan unless Code, Regs or other guidance requires that correction be made by distribution to participants or that money be returned to the Plan sponsor
 - (d) Correction method should not violate another applicable specific requirement of IRC § 401(a), e.g., § 401(a)(4), 411(d)(6)); or in the case of 403(b) Plans, the applicable correction should not violate a provisions of IRC § 403(b). In the case of SEPs/SARSEPs, the applicable correction should not violate a provision of IRC § 408(k); or in the case of SIMPLE IRAs, the applicable correction should not violate a provision of IRC § 408(p).

- D. Where more than one correction method is available to correct an Operational Failure for a plan year, the correction method should be applied consistently with respect to corrective contributions or allocations for a particular type of Operational Failure for a plan year. (See § 6.02(3) of Rev. Proc. 2006-27.)
- E. Exceptions to full correction (see § 6.02(5) of Rev. Proc. 2006-27):
 - 1. Reasonable estimates, instead of precise calculations, because the difference between the approximate and precise restoration of a participant's benefit is insignificant and the administrative cost of determining precise restoration would exceed the difference.
 - 2. Delivery of small benefits (\$50 or less).
 - 3. Recovery of small overpayments (\$100 or less).
 - 4. Participants cannot be located and reasonable efforts have been made, including mailings to the last known address and use of a locator service, e.g., the IRS letter forwarding program.
 - 5. *Small Excess Amounts (\$100 or less)*
 - 6. *At the discretion of the Service, full correction may not be required for terminating Orphan Plans.*

VII. Correction for Certain Specific Situations.

- A. Correction by Plan amendment:
 - 1. VCP: A Plan Sponsor may use VCP to correct an Operational Failure by a Plan amendment provided that the amendment complies with the requirements of IRC § 401(a), including the requirements of §§ 401(a)(4), 410(b) and 411(d)(6). (See § 4.05(1) of Rev. Proc. 2006-27.)
 - 2. SCP: Plan amendment is only available to correct Operational Failures set forth in Appendix B, § 2.07 (see § 4.05(2) of Rev. Proc. 2006-27). Additional discussion on Plan amendments for SCP can be found in Part VIII of this outline.

Generally, when correction is made by plan amendment, the plan sponsor is required to submit an application for a favorable determination letter with respect to that amendment. (see §4.06 of Revenue Procedure 2003-44). The new revenue procedure provides that a determination letter will not be issued except in the following circumstances: (1) to correct a "non-amender failure", (2) to correct a failure submitted in a VCP submission which is filed during the year of the plan's termination, or (3) the plan is submitted during the last 12 months of the plan's remedial amendment cycle as provided for in section 13 of Rev. Proc. 2005-66 ("on-cycle filings"). Similar approach taken for Audit CAP. For details see §4.06 of Revenue Procedure 2006-27.

- B. Correction of a failure to obtain spousal consent for distributions from Plans that are subject to the requirements of IRC § 401(a)(11) and 417. see § 6.04 of Rev. Proc. 2006-27.

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. In the event that spousal consent to the prior distribution cannot be obtained because the spouse refuses to consent, does not respond to the notice provided or because 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 his or her retirement. Such spousal benefit must be provided if a claim is made by the spouse

In addition, 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 above) or (ii) a single sum benefit 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.

- C. Failure to include an eligible employee in a 401(k) or (m) plan-
Rev. Proc. 2006-27 requires that the employer 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. For purposes of the new revenue procedure, the value of the “lost opportunity” to the employee will be equal to 50% of the pre-tax deferrals that would have been made if the employee had been timely included in the 401(k) plan. Generally, the deferral is determined by using the ADP for determining the employee’s missed deferral for traditional 401(k) plans. For safe harbor 401(k) plans, the deferral percentage is assumed to be 3% (or higher, if the plan provides for at least 100% match for higher level of deferral). For after-tax employee contributions, the value of the “lost opportunity” will be equal to 40% of the after-tax employee contributions that would have been made if the employee had been timely included in the plan. ACP is used for determining the employee’s after-tax employee contributions. For an employee excluded from a plan that provides for

matching contributions, the corrective contribution for the excluded employee is equal to the matching contribution that the employee would have received had the employee made a deferral equal to the missed deferral. (Note: similar analogy applies if the plan matches after-tax employee contributions). For details and examples on the correction for an excluded employee in a plan that provides benefits subject to §§ 401(k) or (m) please see: Section 6.02(7), App. A .05 and App. B 2.02 of Rev. Proc. 2006-27.

Note: The principle of determining corrective contributions based on “lost opportunity”, with respect to elective contributions solely applies to the excluded employee failure. It cannot be used to correct other qualification failures.

VIII. Self Correction Program (SCP).

This program is only available to correct Operational Failures. (See § 4.01(1) of Rev. Proc. 2006-27.) “The Plan Sponsor must have established practices and procedures (formal/informal) reasonably designed to promote and facilitate overall compliance with applicable Code requirements.” (See § 4.04 of Rev. Proc. 2006-27)

Note: Simply having a Plan provision is not enough, e.g., if the Plan is to be tested for compliance with the top heavy rules, it is not enough to have a Plan provision that requires top-heavy testing. Additional procedures, e.g., procedures incorporated into the Plan administrator’s operating manual, would be required.

A. SCP- Insignificant Operational Failures (see § 8 of Rev. Proc. 2006-27):

1. Insignificant Operational Failures can be corrected at any time. The program is available even if the Operational Failure is discovered by an agent on examination.
2. SCP for insignificant failures is available for Qualified Plans (401(a)), 403(b) Plans, SEPs and SIMPLE IRAs).

B. SCP- Significant Operational Failures:

1. Not available for SEPs or SIMPLE IRAs. Available for Qualified Plans and 403(b) Plans. (See § 7 of Rev. Proc. 2006-27)
2. Favorable determination letter required for Qualified Plans (401(a)). (See § 4.03 of Rev. Proc. 2006-27) Generally means either the Plan should have received a favorable determination letter for GUST. For details, see “Favorable Letter” definition in § 5.01(4) of Rev. Proc. 2006-27.
3. Not available if the failure is not corrected by the time the Plan comes “Under Examination”. (See § 5.03 of Rev. Proc. 2006-27.). “Under Examination” includes:

- (a) IRS audit of the Plan. *This includes a plan being investigated by the Criminal Investigation Division of the Internal Revenue Service.*
- (b) If the Plan sponsor is an exempt organization, IRS audit of the Plan sponsor.
- (c) Verbal/written notification from Employee Plans that the Plan will be examined or that the Plan will be referred for examination.
- (d) “Plan” includes all plans that are required to be aggregated for purposes of demonstrating compliance with coverage and non-discrimination rules. (See IRC §§ 410(b), 401(a)(4).)

Example: Plans A and B are aggregated for purposes of coverage and non-discrimination. If Plan A is the subject of an IRS audit, then Plan B is also “Under Examination.”

- (e) For Plans that are not aggregated to comply with coverage and non-discrimination rules, “Plan” includes all plans that are required to be aggregated for purposes of demonstrating compliance with the code section relating to the failure being corrected.

Example: Plans C and D are not aggregated for purposes of coverage and non-discrimination. However, they are aggregated for the purpose of demonstrating either Plan’s compliance with the requirements of IRC § 415. If the failure being addressed is an IRC § 415(c) failure and if Plan C is under IRS audit, then Plan D is also considered to be “Under Examination”.

Alternatively, if Plan D is addressing a problem that involves the failure to provide spousal consents for distributions made from the Plan, then Plan D is not “Under Examination”.

- (f) Notification by Employee Plans of potential qualification failures resulting from the review of any Form 5300 series determination letter application. *The plan remains “Under Examination” for the issues identified, even if the applicant withdraws the determination letter application.* (See § 5.03(3) of Rev. Proc. 2006-27.)

4. Time constraints for completion/substantial completion of correction:

- (a) Generally the last day of the second plan year following the plan year in which the failure occurred.

Example: Failure occurs in 2004. For a calendar year Plan, correction must be completed by 12/31/2006.

- (b) For 401(k) Plan ADP/ACP/multiple use failures, the last day of second plan year following the end of the correction period provided by statute and regs.

Example: Plan fails ADP test for 2004. IRC § 401(k)(8) allows for correction by 12/31/2005. Plan would be eligible for SCP if the failure is corrected by 12/31/2007.

- (c) For transferred assets, correction must be completed by the last day of the first plan year that begins after corporate merger, acquisition or other similar transaction.

See Example 2 in § 9 of Rev. Proc. 2006-27: Operational Failure occurs in 1998. Acquisition resulting in asset transfer occurs in 2003. With respect to the “transferred assets,” the failure should have been corrected by December 31, 2004.

- 5. Correction by retroactive Plan amendment. Under SCP, Plan amendments can only be used for situations and correction methods provided for in Appendix B § 2.07. They are:
 - (a) Failure to comply with IRC § 401(a)(17) limit. 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.
 - (b) Contrary to the terms of the Plan document, the Plan provides for hardship distributions. The Plan is amended retroactively to provide for the hardship distributions that were made available. This amendment is permissible if the amendment does not cause the Plan to violate another 401(a) provision, e.g., benefits, rights and features issues under IT Reg. 1.401(a)(4)-4).
 - (c) Contrary to the terms of the Plan document, the Plan provides for participant loans. The Plan is amended retroactively to provide for the loans that were made available. This amendment is permissible if the amendment (i) 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.
 - (d) Ineligible employees (age and service; entry dates). The Plan is amended retroactively to change the eligibility provisions to provide for the inclusion of the ineligible employee to reflect the

Plan's actual operations. This amendment is permissible if the amendment does not cause the Plan to violate another 401(a) provision.

Ineligible employees include employees who either (i) have not completed the Plan's minimum age or service requirements; or (ii) have completed the Plan's minimum age or service requirements but became participants earlier than the applicable entry date.

- C. Significant v. Insignificant Failures (see § 8.02 of Rev. Proc. 2006-27). Factors considered when making that determination (not all-inclusive):
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.
 7. The reason for the failure, e.g., data errors such as errors in the transcription of data, the transposition of numbers, or minor arithmetic errors.

Example 1:

Total # of participants = 250
of participants potentially affected by 415 (c) limit = 50
Contributions for 2003 = \$3,500,000
3 participants exceeded 415(c) limit
Excess annual additions = **\$4,550**

Example 2:

Total # of participants = 250
of participants potentially affected by 415 (c) limit = 50
Contributions for 2003 = \$3,500,000
18 participants exceeded 415(c) limit
Excess annual additions = **\$150,000**

Rev. Proc. 2006-27 concludes that Example 1 is an example of an insignificant Operational Failure and Example 2 is an example of a significant Operational Failure.

IX. Voluntary Correction Program (VCP): (Program generally described in § 10 of Rev. Proc. 2006-27; fee structure outlined in § 12 of Rev. Proc. 2006-27).

- A. Eligibility:
 - 1. Qualified Plans, 403(b) Plans, SEPs and SIMPLE IRA Plans are eligible for consideration under VCP. See § 4.01(2) Rev. Proc. 2006-27.
 - 2. If the Plan or Plan sponsor is Under Examination, VCP is not available. See § 4.02 Rev. Proc. 2006-27 and discussion of the term “Under Examination” in Part VIII of this outline.
- B. Key elements:
 - 1. Employer identifies qualification failures to the Service.
 - 2. Employer outlines methods used to correct the qualification failures to the Service.
 - 3. Employer outlines changes in administrative procedures to the Service that would ensure that failures do not reoccur.
 - 4. Employer and IRS agree to the methods of correction and the proposed revision of administrative procedures.
 - 5. Employer pays a compliance fee. (Generally fixed under RP 2006-27 and payable up front along with the submission).
 - 6. IRS agrees not to pursue the sanction of Plan disqualification with respect to the qualification failures provided that all corrective actions and changes to the administrative procedures are completed within 150 days of the execution of the “compliance statement”.

X. VCP Programs and Fees.

Programs available under Rev. Proc. 2006-27:

- 1. VCP:
 - (a) Program can be used to correct all qualification failures: operational, Plan document, demographic and employer eligibility.
 - (b) Program is available to Qualified Plans, 403(b) Plans, SEPs and SIMPLE IRAs.

- (c) Fee is generally fixed based on the number of participants.
2. Anonymous Submissions: Program is available to all plans identified above. (see section 10.10 of Rev. Proc. 2006-27 for details)
 3. Group Submissions: See section 10.11 of Revenue Procedure 2006-27 for details. *New changes/clarifications summarized: (a) In addition to Plan document failures- Operational failures and Employer Eligibility failures can be corrected under the Group Submission procedure;(b)If a sponsor 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 plan; (c) Volume Submitter practitioner is eligible to make a Group Submission; (d) List of participating plans can be submitted once the notice requirement to affected plan sponsors has been satisfied; and (e) Impact of examination- "If a plan sponsor that is eligible to be included in the Group Submission 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." (Result-Possible for plan sponsor to address failure in Group Submission, even if notification is received before the identity of the plan/plan sponsor was disclosed to the Service. Examination with respect to other issues can continue even while the Group Submission is in progress).*

C. Fees for certain programs under Revenue Procedure 2006-27:

VCP Fees for Qualified Plans and 403(b) Plans (see § 12.02 of Rev. Proc. 2003-44): Generally ,the fee is based on the following table:

Number of Participants/Employees	Fee
20 or fewer	\$ 750.00
21 to 50	\$ 1,000.00
51 to 100	\$ 2,500.00
101 to 500	\$ 5,000.00
501 to 1,000	\$ 8,000.00
1001 to 5,000	\$ 15,000.00
5,001 to 10,000	\$ 20,000.00
Over 10,000	\$ 25,000.00

of participants used for 401(a) Plans; # of employees used for 403(b) Plans

VCP fee for nonamenders. The compliance fee for plans that have not been amended for tax legislation changes within the plan's remedial amendment period (nonamenders (includes EGTRRA nonamenders)) is determined in accordance with the chart above. The applicable fee is reduced by 50% for nonamenders that submit under VCP within a one-year period following the

expiration of the plan's remedial amendment period for complying with tax law changes.

Reduced compliance fee for certain VCP submissions- In addition to the fee structure outlined above, the new revenue procedure may provide for a reduced compliance fee for the following situations:

(1) If the sole failure being addressed by the VCP submission involves the failure to amend the plan timely with respect to (a) good faith plan amendments for EGTRRA within the period described in Notice 2001-42 including those changes listed in Notice 2005-5, (b) plan amendments for the § 401(a)(9) final and temporary regulations within the period described in Rev. Proc. 2002-29, as modified by Rev. Proc. 2003-10, or (c) interim amendments as provided in section 5 of Rev. Proc. 2005-66, the fee is \$375. (see section 12.03 of Revenue Procedure 2006-27) Plan Sponsors are encouraged to use the streamlined submission procedure provided for in Appendix F. Compliance statement provides for continued availability of the remedial amendment period (which is conditioned on the timely adoption of interim and good faith amendments). It does not make a determination on the language contained in those amendments. (see section 10.08 of Rev. Proc. 2006-27).

(2) If the sole failure being addressed by the VCP submission involves the failure to satisfy the minimum distribution requirements of § 401(a)(9) for 50 or fewer participants and the failure (if not addressed under VCP) would result in the imposition of the excise tax under § 4974, it is anticipated that the compliance fee will be \$500. (see section 12.02(2) of Rev. Proc. 2006-27)

(3) Compliance fee for SEPs/ SIMPLE IRAs reduced from \$500 to \$250 in most cases. (see section 12.05 of Rev. Proc. 2006-27)

(3) At the discretion of the Service, the VCP fee may be waived in the case of a terminating Orphan Plan. In such cases, the revenue procedure will require that the submission include a request for a waiver of the VCP fee. (see section 12.02(3) of Rev. Proc. 2006-27)

XI. Audit Closing Agreement Program (see §§ 13 and 14 of Rev. Proc. 2006-27).

I. Non-amender failures discovered and corrected during the course of a determination letter submission (unrelated to VCP):

Flat fee structure (ref: section 14.04 of Rev. Proc. 2006-27) See table below:

Number of Participants	EGTRRA/ subsequent legislation	GUST/ 401(a)(9) Regs	UCA/ OBRA '93	TRA '86	T/D/R	ERISA
20 or less	\$ 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

II. Audit CAP in other cases:

- A. Closing agreements regarding sanction of qualification failures and applicable failure are negotiated as part of the examination process (or in some cases, part of the determination letter review process).
- B. Correction will be consistent with the principles outlined for EPCRS.
- C. The sanction is a negotiated percentage of the Maximum Payment Amount (which is meant to be an approximation of taxes that could be collected if the Plan is disqualified).
- D. 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.
- E. 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 the 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 non-highly compensated employees who would be adversely affected if the Plan were not treated as qualified or as satisfying the requirements of § 403(b) or § 408(k).
 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. The period over which the failure 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).
 8. The reason for the failure (for example, data errors such as errors in transcription of data, the transposition of numbers, or minor arithmetic errors).
- F. Factors relating only to Qualified Plans also include:
1. Whether the Plan is the subject of a Favorable Letter.
 2. Whether the Plan has both operational and other failures.
 3. The extent to which the Plan has accepted transferred assets and the extent to which failures relate to transferred assets and occurred before the transfer.
 4. *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.*

APPENDIX:
LIST OF IRS EMPLOYEE PLANS' VOLUNTARY COMPLIANCE COORDINATORS

Coordinator for VCP – Pacific Coast area (Alaska, Hawaii, Washington, Oregon, California, and Idaho) and Central Mountain area (Nevada, Montana, Wyoming, Utah, Arizona, Colorado, New Mexico, North Dakota, South Dakota, Nebraska, Kansas, Minnesota, Iowa, and Missouri):

Internal Revenue Service
Attn: Paul C. Hogan
915 Second Avenue
Seattle, WA 98174
Phone: (206)220-6085
Fax: (206)220-6071
E-mail: Paul.C.Hogan2@irs.gov

Coordinator for VCP – Gulf Coast area (Oklahoma, Texas, Arkansas, Louisiana, Tennessee, Mississippi, Alabama, Georgia, and Florida):

Internal Revenue Service
Attn: William Y. Kerr, MC 4923 DAL, VC 7553
1100 Commerce Street,
Dallas, TX 75242
Phone: (214) 413-5508
Fax: (214) 413-5507
E-mail: William.Y.Kerr@irs.gov

Coordinator for VCP – Great Lakes area (Wisconsin, Illinois, Michigan, Indiana, Kentucky, Ohio, West Virginia):

Internal Revenue Service
Attn: Al Dorevitch, TE/GE VC:7552, MC:4914 CHI
230 S. Dearborn Street, Room 1720
Chicago, IL 60604
Phone: (312) 566-3833
Fax: (312) 566-3941
E-mail: Alexander.Dorevitch@irs.gov

Coordinator for VCP – Mid-Atlantic area (Pennsylvania, New Jersey, Delaware, Maryland, Virginia, North Carolina, and South Carolina) and Northeast area (New York, Vermont, New Hampshire, Massachusetts, Connecticut, Rhode Island, and Maine):

Internal Revenue Service
Attn: Scott M. Feldman, VC 7551
10 Metrotech Center
625 Fulton Street
Brooklyn, NY 11201
Phone: (718)488-2255
Fax: (718)488-2405
E-mail: Scott.M.Feldman@irs.gov

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