Hi, My Name is Alison and I Fix Broken Plans

Questions and Answers

1. Can Alison please restate the "here is what/why/etc." for her example of documenting Self-Correction under EPCRS slide #18.

   A self-correction memo should follow the general structure of Form 14568. Sections in the SCP memo should cover:
   - What happened
   - Why it is eligible for self-correction (if using insignificant standard, cite the 7 criteria and why it may fit in)
   - How it has been corrected (include all applicable attachments)
   - What the plan sponsor has done to ensure the failure won't occur again (it can't just be that it hired a new TPA)

2. I have a simple 401(k) plan, 1 active participant. Found out my contact at the company was not making the participant's deposits to the plan for 2 1/2 years. She reported zero contributions to me each year. How do I fix this? Company has deposited deferrals and match, about 10,000 total for the 2 1/2 years. VCP, SCP?

   You actually have another program to consider here – VFCP. Because the plan sponsor was withholding the participant deferrals, but failed to deposit them timely, there is a fiduciary breach. Earnings should be calculated on the late deposits. If the plan sponsor decides not to fix through VFCP, then they should at least file a Form 5330 and pay excise taxes. I don't see this as a SCP candidate. Did the company take a deduction on its taxes for the contributions? If so, you have a tax issue in addition to the operational and fiduciary failures. Correcting through VCAP might enable you to address the tax issues. Otherwise, VCP is the best choice. A proper discussion for this scenario is bigger than this Q&A forum.

3. What is the most diplomatic way to resign as TPA from a Plan? (Also see - "Breaking Up Is Hard To Do" by Ilene Ferenczy – ERISApedia.com Webinar 4/25/2019)

   It depends on the reasons why you are considering resigning. If they are engaged in criminal conduct (e.g. stealing participant deferrals) or simply not responding to you – why are you worried about being diplomatic? This is business and not a social circle. Simply prepare a letter citing the termination provisions of your service agreement, state the effective date, and, of course, agree to cooperate with a successor vendor. Keeping it all business shouldn't be offensive. Your behavior in the transition is where you can show your best diplomacy.

4. Is a situation just as dire if a situation is only dealing with correction work solely dealing with Owners and/or HCEs and the NHCEs are not affected in any way? I know the Owners can still be majorly affected but would auditing agents of DOL/IRS still be just as concerned - if problems were caused by both Client and TPA?

It depends on the issue. If only owners were permitted to have self-directed brokerage accounts, that is a BRF issue that does impact NHCEs, albeit indirectly. Even if you have a situation where you failed to give HCEs a profit sharing contribution, unless the plan document allows for this, you have an operational failure. Correction is still required. If found on audit, however, I would use the argument that it only affects HCEs to negotiate a lower sanction, but there would still be the threat of disqualification.

5. Appendix B Section 3 - is this referring to Rev Proc 2019-19?

   Yes, Revenue Procedure 2019-19.

6. Earnings rate of return when depositing missing contributions - what about plan's average rate of return - ever a good idea?

   You can use the average rate of return when affected participants are predominantly NHCEs and were not allowed to make investment elections or if the plan is an employer-directed pool. Review Rev. Proc. 2019-19, Appendix B, Section 3.

7. I have always calculated the plan's rate of return for the period in question. If that is lower than the DOL calculator amount, I use the DOL#. Is this wrong?

   Being more generous to participants, especially NHCEs, is always a good thing. Although not required to do this, it's a good practice. Make sure you are documenting why you made this choice and have your proof points available.

8. Do you have a recommendation for presenting/handling when a client has issues in their plan for periods PRIOR to the time you are the engaged as the TPA but you find while working with them? Ex. part-time employees have been excluded for years 2016-2017 but should not have been omitted from census previously but are actually owed safe harbor contributions for prior years. Do you recommend documenting and providing to the client a summary of the issues to avoid a 'you didn't tell me about this' situation and CYA or NOT documenting and the client then able to plead ignorance to the issue should there be an audit later? I opt for the first option, putting it on the client to know and be responsible but I have received responses from others who say they may mention it but not document it.

   To begin with, a TPA's service agreement should have a clear provision with regard to the review of prior work and any errors spotted incidentally during ongoing administration. When a mistake is found, such as the part-time exclusion, the new TPA should outline the issue in writing, identify the consequences, and propose solutions to the situation. Keeping the client in the dark for plausible deniability is never the right answer. Don't make the prior TPA's mistake your own. If you don't tell the client, and its discovered by the IRS or DOL, not only will you have made yourself look bad to the client, but you've now set-up the client to be blind sighted at the worst possible time

9. What if the client decided to go VFCP for late deposits and they marked they did a 5330 and they didn't file it?

   VFCP is signed under penalty of perjury. So, failure to file Form 5330 is technically a felony. Correct this immediately and file the Form 5330.

10. I have clients that have their 8 year olds on payroll and give them a profit sharing contribution. Is that okay?

    Unless the 8-year old is a Disney child star, and the plan is for his/her benefit, no. We know there are aggressive CPAs out there that recommend putting family members on the payroll for beneficial tax purposes. This is tax fraud. If an individual doesn't perform legitimate services for a business, they should not be on the payroll. This may be a client you should terminate. Don't get dragged down by other's bad decisions.

11. If a client refuses to use VCP for something that's not eligible for SCP, and you can otherwise correct it to place the NHCEs in at least as good of a position that they otherwise would have been, would you retain the client (with a disclaimer)?

    Yes, even in our practice, we come across people that don't want to follow our recommendations. You can led a horse to water, but you can't make them drink. The first word of VCP is 'voluntary.' If the client chooses to just self-correct, I'd still retain them as a client. At least they are correcting. I would make sure you warn them in writing that if discovered on audit, there will be financial consequences.

12. How careful should one be with "other reasonable methods" for earnings calculations? For example: operational error re: matching calculation - so a contribution is due. However, an affected participant was enrolled and had made an affirmative investment election (non-auto-enroll) but has terminated employment and taken a distribution. Would it be "reasonable" to continue to use the return for the investment election(s) made by the participant through the end of the correction period?

    Yes, I think you're on track here using the fund with the highest rate of return through the period of correction, even if the affected participant has terminated and taken a prior distribution. This is consistent with Rev. Proc. 2019-19, Appendix B, Section 3.