

Questions – Stephen Forbes – February 21 Webcast

1. Any IRS movement to permit SCP of participant loan failures? If so, what can be resolved through SCP?

No. Organizations such as ASPPA have requested that IRS provide self-correction option for employers that fail to withhold loan repayments but, as of yet, the IRS has declined to provide a self-correction method other than simply declaring the loan a deemed distribution and paying the taxes and the premature distribution tax (if any).

2. A Participant signed a promissory note with the plan to have regular salary deduction payments made to payback a participant loan. Employer missed taking a couple salary deductions from the employee's pay. Is this considered missed contribution opportunity for which the employer is on the hook for under EPCRS? Or, since the participant is now separated from service, simply a loan offset at a date earlier than would be had the missing payments been made/deducted from the employee's pay?

First of all, under any correction method, the employee would be "on the hook" for the missed payments. You may resolve this error under the VCP correction method. Under the VCP correction method, the employer would be responsible for earnings on the missed payments (minimal cost). If the error occurred in a prior plan year, it probably would not be feasible to correct under VCP because the only benefit of filing under VCP in the above situation would be to move the taxation consequences to the current year.

If the missed payments occurred in the same year as the termination of employment, it would be reasonable to simply offset the entire loan. If the missed payments occurred in a prior year and were not corrected within the grace period, the error results in a deemed distribution. In such a case, the most practicable solution would be to issue a Form 1099-R for the amount of the outstanding loan.

3. After 4/1/19, if you file a VCP and it's accepted as complete, what do you do if you want to add something to the VCP?

You contact the IRS at the VCP Status Inquiry Line at (626) 927-2011 and arrange to supplement your submission.

4. Can a TPA/practitioner complete the online process without a 2848?

No. However, you could help the client complete the application online but the pay.gov account would need to be in its name and the submission would need to come from them.

5. What are the repercussions if you opt to correct a failure, such as loan payments not being withheld timely on your own instead of going through the VCP program?

Great question. I have not heard of a situation where the IRS has discovered on audit a situation where the employer self-corrected a loan failure (i.e., failure to withhold loan repayments) using the VCP loan correction method. Worst case scenario: since the error was corrected, I think the IRS might charge a sanction slightly higher than the VCP user fee. I know a practitioner for whom I have a lot of respect that recommends for its clients self-correct their loan failures using the VCP correction method. As far as I have heard, her clients have not had any problems. Of course, if you proceed with a self-correction approach, you need to explain the risks to your client.

6. My understanding is that EPCRS is not available for Tax Exempt 457 plan, is that still the case?

Yes. Rev. Proc. 2018-52 (EPCRS): "In the case of a § 457(b) plan that is an unfunded deferred compensation plan established for the benefit of top hat employees of a tax-exempt entity described in § 457(e)(1)(B), the IRS generally will not enter into an agreement to address problems associated with such a plan. However, the IRS may consider a submission for such a plan where, for example, the plan was erroneously established to benefit the entity's nonhighly compensated employees and the plan has been operated in a manner that is similar to a Qualified Plan."

7. If the plan sponsor is under a corporate IRS examination, does that also count as being "under examination"?

If an exempt organization is notified that it is under examination, it will be considered "under examination" purposes of EPCRS. However, if a "for profit" business is under examination, the plan is not considered "under examination." See EPCRS

8. Under VCP filing is it safe to do the entire correction based on EPCRS guidelines with lost earning calculations or hold off depositing lost earnings until IRS approves your correction? Thank you.

If you are using an IRS approved correction method, you may proceed with depositing the lost earnings prior to receiving the compliance correction method. If, however, you are proposing a new method of correction, you would be well advised to hold-off making the corrective contributions and earnings until you have IRS approval.

9. When you went through the electronic filing process, does the submission need to be completed in one sitting? Or is there a "save draft" feature?

No, you do not have to complete the submission is one sitting. You may save the submission and return to it later.

10. 401(k) - Late contributions occur yearly and auditors want plan sponsor to file VCP. Can they do one VPC submission or must they file VCP for each year they had late contributions?

The correction program to which you are referring is the Voluntary Fiduciary Correction Program (VFCP). That program is administered by the DOL. Under the VFCP, there is no user fees. Auditors who discover late deposits of deferrals or loan repayments often strongly encourage employers to file under the program. Although some practitioners file under the program, many simply follow the procedures of the program but do not file. If an employer does not want to file, it may explain to the auditor that it will follow the correction steps of the program but not file.

11. Do you recommend that attorneys or other authorized representatives file online on behalf of the plan sponsor and modify the 2848 accordingly? Will the authorized representative have to attest to the correctness of the application under penalty of perjury if he or she is signing the 8950 as part of the online submission process? There is a "check box" for the penalty of perjury statement on the 8950 - will it allow the authorized representative to file online without checking that box if you have the separate required statement from the sponsor?

In general, I believe an employer is in a better position if it hires an experienced practitioner to file the application on its behalf. The practitioner will need to check the box regarding the penalty of perjury statement and include such statement.

12. Is the Pay.gov account established by the practitioner or the applicant? And further can we have the applicant submit the payment rather than the practitioner?

The pay.gov account is established by whomever makes the submission. So, if a practitioner is filing on behalf of its client, he/she will establish the account. The practitioner also will need to complete the Form 2848. If the practitioner files the submission, it will need to make the payment with the submission. The client could make arrangements for the practitioner to use its credit card or ACH. However, it would seem easier either to bill the client for the fee or request up from reimbursement for the fee.

13. If you have more than one issue, can you file one VCP application with multiple model forms, or would you have to file an additional VCP application?

If you have multiple failures, you may file multiple model forms.

14. VCP Fees for multiple missed restatements for a Plan with less than 500K net plan assets would be \$1,500 total or \$1,500 for each missed restatement?

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15. When you set up an account you have to confirm that you will not share your password. To me this means that a TPA who submits VCPs for their clients must have different accounts for each one of their employees who submits VCPs. Or can the TPA set up an account and share their password with the specific staff members using this site?

Each employee of a TPA firm who is submitting a VCP application should establish an account. They should not share passwords. It is very easy to establish an account.

16. Can an individual on an 8821 form (not on a 2848 form) file online for a client?

No. Only someone who can sign a Form 2848 may submit a VCP application on behalf of a client.

17. If I have a client that did not timely restate for EGTRRA or PPA would that be one submission requiring one filing fee or two submissions requiring two filing fees?

If the submission identifies and corrects both failures, the employer need only make one submission and pay one filing fee.