

# **Comments to Internal Revenue Service Revenue Procedure 2006-27 Employee Plans Compliance Resolution System**

**26 CFR 601.202**

**March 12, 2007**

The American Society of Pension Professionals & Actuaries (ASPPA) appreciates this opportunity to comment on the Internal Revenue Service's (IRS) update to its Employee Plans Compliance Resolution System (EPCRS). ASPPA proposes two modifications to the EPCRS program. First, pursuant to the Pension Protection Act of 2006 (PPA), ASPPA requests that IRS extend the EPCRS self-correction period. Second, consistent with our prior discussions, ASPPA is submitting a proposal to add an EPCRS notice filing procedure, along with a sample notice. Each proposal is described in further detail below.

ASPPA is a national organization of approximately 6,500 retirement plan professionals who provide consulting and administrative services for qualified retirement plans covering millions of American workers. ASPPA members are retirement professionals of all disciplines, including consultants, administrators, actuaries, accountants and attorneys. Our large and broad-based membership gives ASPPA unique insight into current practical applications of ERISA and qualified retirement plans, with a particular focus on the issues faced by small- to medium-sized employers. ASPPA's membership is diverse but united by a common dedication to the employer-sponsored retirement plan system.

## **Request to Enhance EPCRS**

PPA §1101(b) directs the Secretary to continue updating and improving EPCRS with special attention to extending the self-correction period for significant compliance failures, addressing the concerns of and circumstances faced by small employers, and assuring that the consequences of a compliance failure are not excessive and are reasonable given the nature, extent and severity of the failure. To serve all these purposes, ASPPA recommends extending the self-correction period to three years for significant operational failures.

## **EPCRS Notice Filing Proposal**

Consistent with our January 2, 2002, comments, ASPPA is submitting a request to add an EPCRS notice filing procedure (Notice Filing Program). This procedure is intended to increase the use of EPCRS by plan sponsors and practitioners without requiring any

significant increase in IRS resources. This procedure will further comply with the directions given to the Secretary under PPA §1101(b) to continue updating and improving EPCRS, and it will serve to address the concerns of and circumstances faced by small employers and assure that the consequences of a compliance failure are neither excessive nor unreasonable given the nature, extent and severity of the failure.

The details of the proposed Notice Filing Program are contained in the following model documents (enclosed):

1. EPCRS Notice Filing Program
2. EPCRS Notice Filing Program Instructions
3. IRS Acknowledgement letter

The main features of the procedure are summarized below.

- **Notice Filing Option**: For common errors and correction methods, a Notice Filing Program will be available. Specifically, the program will be available for the correction of operational failures [including operational failures that can be corrected under Self Correction Program (SCP)] and demographic or document failures, provided that the proposed correction method is one of the methods set forth in Rev. Proc. 2006-27, Appendix A, B, or F or Section 6.07 (as may be updated in future IRS guidance). For a reduced filing fee, plan sponsors will be able to complete a form that describes the error and the correction method. If acceptable to the IRS, the IRS will issue a notification to the employer acknowledging receipt of the filing. The IRS will not be required to review the substance of the filing and can refer the matter to EP Examinations at its discretion. Generally, if the matter becomes the subject of a substantive review in an EP examination or otherwise, potential sanctions will be limited (this is described in more detail below). The existing EPCRS correction programs will remain available to plan sponsors in lieu of the Notice Filing Option.
- **Reduced Fee for Routine Errors**: The Notice Filing Program would require the payment of a modest filing fee (\$250, or \$1,000 in the case of a group submission). The reduced filing fee is consistent with the limited nature of the eligible errors and corrections, and the fact that only a limited response is required of the IRS, and the fact that the filing provides only limited protection for the plan sponsor.
- **Increased Use of EPCRS**: The cost of utilizing the EPCRS procedure under which the plan sponsor voluntarily files with the IRS (i.e., the Voluntary Compliance Program, or VCP) can be very expensive, particularly for smaller plan sponsors. This expense includes legal and administrative fees generated by the relatively formal filing procedures of VCP. In fact, it is common for these fees to exceed the IRS VCP filing fees. As a result, many sponsors will elect to self-correct a disqualifying failure without filing under VCP, even when self-correction is not available under the EPCRS procedures.

The intent of the Notice Filing Program is to increase compliance of plan sponsors with EPCRS in relation to the common errors that plan sponsors face on a routine basis. The lower fees and the pre-approved form of a Notice Filing Program will encourage plan sponsors to file with the IRS and make corrections in accordance with the EPCRS requirements. We

expect employers who, under the existing EPCRS, may have self-corrected an issue but not made a formal EPCRS application (where one technically would have been required), will be more likely to file under the Notice Filing Program. As a result, we expect the IRS to be notified of many more corrections than is currently the case, and will be able to better monitor the use of EPCRS by plan sponsors, in general.

- **Risk of Examinations:** Unlike the prior Voluntary Correction of Operational Failures Standardized (VCS) program, the Notice Filing Program is merely a notification program; filers do not receive IRS approval on the correction. Moreover, the IRS will be permitted under this Program to refer the case to EP Examinations. In the event of such an examination, the IRS revenue agent will make one of the following determinations:
  - The taxpayer met the program's requirements. In that case, the failure addressed in the Notice Filing will be considered to be properly corrected under that procedure, and will be deemed not to be a disqualifying failure. As a result, no further action will be taken (or sanctions imposed) with respect to the issue;
  - The taxpayer acted in a reasonable, good faith manner, but otherwise failed to meet the program's requirements. In that case, provided the taxpayer complies with the agent's proposed correction measures, the revenue agent will enter into a closing agreement with the plan sponsor, under which the sanction imposed may not exceed the applicable VCP compliance fee. The failure addressed in the Notice Filing and the closing agreement will be deemed not to be a disqualifying failure; or
  - The taxpayer did not meet the requirements for the program and did not act in a reasonable, good faith manner in filing under the program. In that case, provided the taxpayer complies with the agent's proposed correction measures, the revenue agent will enter into a closing agreement with the plan sponsor, under which the sanction imposed may not exceed the applicable audit cap sanction. In any event (including egregious failures), filing under the Notice Program is a mitigating factor in determining the audit cap sanction. If the closing agreement is signed by all parties, the failure addressed in the Notice Filing and the closing agreement will be deemed not to be a disqualifying failure.

This approach, permitting referrals to EP Examinations, should limit the risk that taxpayers will file applications under the Notice Program that fall outside the limited scope of the program.

We have included a National Office/EPCRS Regional Coordinator review procedure (described in the attached model instructions) to ensure consistent application of EPCRS standards (and sanctions) by the revenue agents.



These comments were prepared by ASPPA's IRS Subcommittee of the Government Affairs Committee, James C. Paul, Esq., APM, Chair, and were primarily authored by Elizabeth T. Dold, Esq., APM. Please contact us if you have any comments or questions regarding the matters discussed above. Thank you for your consideration of these comments.

Sincerely,

/s/

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Executive Director/CEO

/s/

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Chief of Government Affairs

/s/

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## EPCRS Notice Filing Program

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1. Name and Address of Plan Sponsor/Sponsor of Pre-Approved Plan:

2. Name of Plan(s):

3. Plan Number:

4. EIN of Plan Sponsor:

5. Period Involved:

6. Identification of Failure(s) [include type of failure, number of participants affected (may be estimated), brief description of the administrative procedures in effect at the time of the failure(s), and explain how and why the failures occurred]:

7. Describe Method of Correction [including, check applicable error below, cite to App. A, B, F or Section 6.07 of Rev. Proc. 2006-27 (include reference to optional correction method used), notice to participants, reporting corrections, calculations or assumptions used to determine correction amounts (including earnings adjustments), location methods for former employees and date of actual correction]:

- §416 Failure
- §ADP/ACP Failure [  QNEC or  one-to-one correction]
- §402(g) Failure
- Exclusion of Eligible Employees
- §401(a)(9) Failure
- Participant or Spousal Consent Failure
- §415 Failure
- Vesting Failures
- Overpayment Failure
- §401(a)(17) Failure
- Hardship Distribution Failure
- Loan Failure
- Early Inclusion of Eligible Employee
- Non-amender Failure

8. Describe New Administrative Procedures to Prevent Reoccurrence:

9. Name, address and telephone number of contact person/authorized representative if more information is needed:

Under penalties of perjury, I declare that I have examined this submission, including supporting documents and, to the best of my knowledge and belief, (1) the facts and information presented in support of this submission are true, correct and complete, (2) the plan meets the program's requirements set forth in the attached instructions, and (3) the correction method fully complies with the method set forth in App. A, B, or F or Section 6.07 of Rev. Proc. 2006-27. I understand that this program is not binding on the Department of Labor or plan participants.

10. Signature, Name and Title of Plan Sponsor Officer (or Form 2848 Representative):

11. Date:

## EPCRS Notice Filing Program Instructions

**Who Can File:** Plan sponsors (or their authorized representative, pursuant to Form 2848) that meet the following eligibility provisions can file under the EPCRS Notice Filing Program:

Plan Type: 401(a) plan (either pre-approved or individually designed), 403(a) plan, 403(b) plan, 457(b), SEP or SIMPLE IRA;

Error: Operational failures that cannot be corrected under SCP, operational failures that can be corrected under SCP, document failures or demographic failures;

Correction: Correct under a correction method set forth in Appendix A, B, or F or Section 6.07 of Rev. Proc. 2006-27;

Examination: (1) the plan is not currently under examination (Employee Plans Form 5500 series return or other Employee Plans examination), (2) the plan sponsor is not under an Exempt Organizations examination (*i.e.*, an examination of a Form 990 series return or other Exempt Organizations examination), and (3) neither the employer nor any of its representatives have received verbal or written notification from the TEGE Division 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

Previous Filer: No party has previously filed under EPCRS for the described failure (unless the filing has been withdrawn).

**Note: This program is not binding on the Department of Labor or plan participants.**

**Group Submission:** A group submission can be filed by the sponsor of a pre-approved plan. However, (i) lines 2 and 3 should reference the pre-approved plan document; (ii) line 4 should indicate the group submitter's EIN; and (iii) line 6 should include the number of employer plans affected. Also, prior to filing, the sponsor must give notice explaining the error and correction to each adopting employer affected by the failure.

**Where to File:** Send submission (and the required documentation) to: Internal Revenue Service, Attention: T:EP:RA:VC:Notice, PO Box 27063, McPherson Station, Washington, DC, 20038.

**Filing Fee:** \$250 (group submission \$1,000) made payable to the US Treasury. This fee is non-deductible and non-refundable.

**Required Documentation:** Form \_\_\_\_ (i.e., the Notice we're proposing), a company or certified check for the filing fee, plus, if applicable, you must submit a Power of Attorney (Form 2848) and a copy of the corrective plan amendment. You must also retain the following supporting documents with a copy of your submission with your plan records: (1) plan document (including adoption agreement, if any); (2) first three pages of the most recently filed Form 5500 series; (3) corrective plan amendment, if applicable; (4)

sample explanatory letter to the participant, if any; (5) sample corrective Form 1099-R, if applicable; and (6) Power of Attorney (Form 2848), if applicable.

**Application Process:** Upon receipt of the filing and appropriate Filing Fee, we will issue an acknowledgement letter indicating that we have received the submission. To the extent that you met the requirements of the program (including correction in accordance with an approved method under Appendix A, B, F or Section 6.07 of Rev. Proc. 2006-27), except as stated below, no further action will be taken (or sanctions imposed) with respect to this issue and the failure will be deemed to be nondisqualifying. (If the submission is incomplete, we may issue a letter stating that your filing has been rejected and you may re-file your submission.)

In our discretion, we may refer your case to EP Examinations. In the event of an examination (either as a result of a referral from the Notice Filing Program group or a later examination for any reason), the IRS revenue agent will make one of the following determinations:

1. The filing met the requirements of the Notice Filing Program. In that case, no further action will be taken (or sanctions imposed) with respect to this issue. The failure that is the subject of the Notice Filing is deemed to be non-disqualifying;
2. The taxpayer acted in a reasonable, good faith manner, but otherwise failed to meet the Notice Filing Program requirements. In that case, provided the taxpayer complies with the agent's proposed correction measures, a closing agreement will be proposed, under which the revenue agent cannot impose sanctions in excess of the applicable VCP compliance fee. If the closing agreement is signed by all parties, the failure that is the subject of the Notice Filing is deemed to be non-disqualifying; or
3. The taxpayer did not meet the requirements for the Notice Filing Program and did not act in a reasonable, good faith manner in filing under the program. In that case, provided the taxpayer complies with the agent's proposed correction measures, a closing agreement will be proposed, under which the revenue agent cannot impose sanctions in excess of the applicable audit CAP sanction. In any event (including egregious failures), filing under the Notice Filing Program is a mitigating factor in determining the audit CAP sanction.

If you disagree with the Examinations revenue agent's determination, you can request a *de novo* review from the National Office/Regional EPCRS Coordinator of the decision and appropriateness of any sanctions.

[Proposed IRS Acknowledgement Letter]

Date: \_\_\_\_\_

Name of Filer

Plan Number:

Plan Name:

Employer Identification

Number:

Document Locator Number:

User Fee Paid: [\$250/\$1,000]

### **IMPORTANT RECORD – DO NOT DISCARD**

We have received your application for the EPCRS Notice Filing Program concerning the qualification of your plan and have assigned it the Document Locator Number listed above. You should refer to this number in any communications with us concerning your application.

To the extent that you met the requirements of the program (including correction in accordance with an approved method under Appendix A, B, or F or Section 6.07 of Rev. Proc. 2006-27), except as stated below, no further action will be taken (or sanctions imposed) with respect to this issue and the failure that is the subject of this Notice Filing shall be deemed to be nondisqualifying.

#### **What Happens Next?**

We will retain your application on file in the event of an IRS EP Examination of your plan. Also, in our discretion, we may refer this case to EP Examinations. In the event of an examination, the IRS revenue agent will make one of the following determinations:

1. This Filing met the requirements of the Notice Filing Program. In that case, no further action will be taken (or sanctions imposed) with respect to this issue and the failure that was the subject of the Notice Filing shall be deemed to be nondisqualifying;
2. You acted in a reasonable, good faith manner, but otherwise failed to meet the Notice Filing Program requirements. In that case, you will be given the opportunity to enter into a closing agreement with us, including proposed correction measures. If you enter into the closing agreement under those terms, the revenue agent cannot impose a sanction in excess of the VCP compliance fee that would have applied had you made a VCP filing initially, rather than a Notice Program Filing; or
3. You did not meet the requirements for the Notice Filing Program and did not act in a reasonable, good faith manner in filing under the program. In that case, you will be given the opportunity to enter into a closing agreement with us, including proposed correction measures. If you enter into the closing agreement under those terms, the revenue agent cannot impose a sanction in excess of the audit CAP sanction that would apply



had no Notice Filing been provided. In any event (including egregious failures), filing under the Notice Filing Program is a mitigating factor in determining the audit CAP sanction.

If you disagree with the revenue agent's determination in the EP Examination, you can request a *de novo* review from the National Office/Regional EPCRS Coordinator of the decision and appropriateness of any sanctions.