

# **TOP TEN PLAN MISTAKES AND HOW TO CORRECT THEM**

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**MNCPA Audits of Employee Benefit  
Plans Conference**

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# AGENDA

1. Top Ten Plan Mistakes
  - How to Correct – Overview
  - Specific Errors
2. Determination Letter program

# **I. TOP TEN PLAN MISTAKES AND HOW TO CORRECT THEM**

# TOP TEN PLAN OPERATIONAL ERRORS

1. Eligibility
2. Enrollment
3. Delayed Transfer of Contributions to Trust
4. Wrong Definition of Compensation
5. Hardship Withdrawals
6. Loans
7. Other Distribution Issues
8. Forfeitures
9. Missing Participants
10. Delayed Retirement Benefits (after Age 65)

# HOW TO CORRECT, PART 1

- IRS Employee Plans Compliance Resolution System
  - Voluntary program
  - Income tax relief under 72(p) and 72(t)
  - Excise tax relief under 4972, 4974, 4979
  
- Basic Principles
  - Full correction of all tax years, whether open or not
    - Reasonable estimates and de minimis rules
  - Make participants whole
    - Earnings (and losses)
  - Correction should be reasonable and appropriate

# HOW TO CORRECT, PART 2

- Self-Correction Program (SCP)
  - Insignificant
- Voluntary Correction Program (VCP)
  - Significant
  - New IRS user fee schedule
- Audit Closing Agreement Program (Audit CAP)
  - New IRS penalty guidelines

# # 1 – PLAN ELIGIBILITY

- *Who* is eligible to participate
  - Payroll codes
  - Excluded groups: Interns, temps, seasonal workers
- How to correct missed deferrals
  - < 3 months
  - > 3 months

## #2 – PLAN ENROLLMENT

- *When* an eligible participant can enroll
- Automatic Enrollment
  - “change of heart” period
- How to correct missed deferrals
  - Special rules for auto-enrollment



# #3 – DELAYED TRANSFER OF CONTRIBUTIONS TO TRUST

- DOL and IRS Position
- Special cases
  - Terminated employees
  - Payroll disruptions
- How to correct late contributions
  - Prohibited Transaction

# #4 – WRONG DEFINITION OF COMPENSATION

- Plan may have multiple definitions of compensation
  - For testing purposes
  - For accrual purposes
- Trouble zones
  - Sales commissions, overtime, bonus payments
  - Changes in payroll coding
- How to correct

# #5 – HARDSHIP WITHDRAWALS

- Hardship withdrawals
  - Safe harbor standards
    - Immediate and heavy financial need
    - Inability to meet that need
  - New IRS substantiation guidelines
- How to correct improper withdrawal

# #6 – LOANS

- Loan issues
  - Improper at outset
  - Handling leave of absence
  - Failure to repay while working
  - Failure to repay upon termination
  - Layoffs
  
- How to correct loan failures
  - Deemed distribution and default

# #7 – OTHER DISTRIBUTION ERRORS

- Distributions prior to termination of employment
  - Controlled group issues (subs and JVs)
  - Systems issue
- Required minimum distributions
  - Age 70.5
- How to correct

# #8 – FORFEITURES

- Permissible Uses
  - Employer contributions
  - Plan expenses
  - Allocation to participants
  
- Impermissible Uses
  
- May indicate bigger problems
  - Failure to vest participants
  
- How to correct

# #9 – MISSING PARTICIPANTS

- “Reasonable efforts”
  - IRS and DOL expectations
- The ones you can’t find
  - Participants who drop off the face of the Earth
  - Nonresponsive participants
- How to handle
  - New PBGC options

# # 10 – DELAYED RETIREMENT BENEFITS (AFTER AGE 65)

- Example: Participant terminates employment with a vested benefit, but does not elect to commence retirement benefits at normal retirement age (e.g., age 65).
  - May be missing
  - May be nonresponsive
  - Plan unable to verify address, marital status
- IRS/DOL position
  - Benefit should be paid retroactively to age 65, with interest for late payments at “plan rate”



## **II. DETERMINATION LETTERS**

# END OF THE DL PROGRAM

- IRS largely abandons DL program
  - DLs available only for new plans or terminations
- Increased burden on employers...and auditors
  - Employers must adopt amendments in timely manner
  - IRS will no longer review plan document
  - Employer assumes risk of deficient amendments
  - No “free pass” to fix problems during extended remedial amendment period
  - Greater risk of sanctions on audit
- Other issues
  - M&A transactions
    - Counterparties will seek enhanced reps and warranties
  - Investment issues
    - Certain investment vehicles (e.g., group trusts) require DL

# ALTERNATIVES TO THE DL PROGRAM

- What auditors might expect
  - Legal opinion from counsel
  - Assurances from management
  - Better internal controls
  - Fewer discretionary amendments
  - Increased use of prototype plan documents
- Thoughts?



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