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WORKING FOR AMERICA'S RETIREMENT

# EPCRS Proposal
# Correction of Scriveners' Errors

## Introduction

As retirement plan documentation becomes more and more complicated, the potential for scriveners' errors – that is, document language that is not intended by the plan sponsor to be present in the plan or the omission of intended language – increases. This potential is also increased due to the popularity of preapproved documents. Furthermore, plan sponsors that are not schooled in ERISA matters are less and less able to identify such errors, as the plan documentation is not easily understood by lay people. As a result, the ability of the plan sponsor to be the final quality control entity is reduced.

Scrivener's errors occur often and many sponsors either do not correct the error (administering the plan contrary to its written terms but consistently with sponsor intent) or adopt retroactive corrective amendments without filing under VCP due to the time and expense involved. Furthermore, when sponsors do file under VCP, it appears that the ability to correct through a retroactive plan amendment is permitted inconsistently, creating more plan sponsor uncertainty as to how to proceed when such an error is found.

It is critical to plan compliance that there is consistency in the application of EPCRS with regard to scrivener's errors. Accordingly, ASPPA proposes that EPCRS be amended to permit the correction of document errors caused by scriveners' errors through the use of a retroactive plan amendment. ASPPA also is aware that the ability to correct scriveners' errors through retroactive amendment has been viewed by the IRS to contain a significant potential for abuse. As a result, the proposals discussed herein involve facts and circumstances under which the existence and nature of the error are either readily apparent or easily demonstrated to the IRS, so that there is no significant risk of abuse. Furthermore, these proposed corrections are "no harm, no foul" situations, in which no participant is harmed by permitting the correction (in fact, in many circumstances, the retroactive amendment permits participants to receive benefits that were intended but accidentally denied to them by documentation errors). These situations are akin to the currently existing SCP retroactive amendment corrections available for permitting participants to enter the plan sooner than provided under the plan's eligibility requirements, the provision of hardship distributions when the plan does not provide, and the use of compensation in excess of the Section 401(a)(17) limit.

## Proposed EPCRS Changes

To qualify for correction of a scrivener's error by retroactive amendment, the plan sponsor would need to make application under the Voluntary Correction with IRS Approval procedures of Rev. Proc. 2006-27 ("VCP"). The plan sponsor would need to meet all ordinary requirements for such program.

Furthermore, the following types of errors would be correctible under these modifications:

(1) There is a failure to provide for a certain type of contribution (such as a matching contribution in a 401(k) plan), notwithstanding the fact that such contributions have been deposited by the employer and allocated to participants' accounts (*see,* Example #1 below);

(2) A plan contains provisions that are internally inconsistent or omits provisions that are clearly required for the documented provisions to make sense (*see,* Example #2 below);

(3) The plan document contains terms that are inconsistent with a collective bargaining agreement or corporate transaction document (*see*, Examples #3 and #4 below);

(4) The plan has been administered inconsistently by a third party with a given plan provision since it was placed in the plan, and the administration is more favorable to nonhighly compensated employees than the documented provision (*see,* Example #5 below).

<u>Examples</u>:

<u>Example #1: Missing Matching Provision</u>. A 401(k) plan adoption agreement provision has not been elected to permit discretionary matching contributions. Nonetheless, the plan sponsor has made matching contributions on behalf of the participants and has allocated such matching contributions to the accounts of the participants.

<u>Example #2: Vesting Error</u>. A profit sharing plan is drafted to provide for a 2-year wait for eligibility purposes. However, the drafter inadvertently failed to provide for 100% vesting.

<u>Example #3: Violation of Collective Bargaining Agreement</u>. A retirement plan is drafted to exclude union employees. However, the collective bargaining agreement provides that the employer's plan is to cover the union employees, and such contributions have historically been deposited to the plan. A failure to provide contributions to the union employees will violate the collective bargaining agreement.

<u>Example #4: Inconsistency with Corporate Acquisition Documents.</u> Company A acquires the stock of Company B. Both companies have 401(k) plans with different eligibility requirements and employer matching contributions. The Acquisition Agreement for the corporate transaction provides that the Company B employees will continue to participate in the Company B plan through the transition period under Code Section 410(b)(6) and that Company B employees will not participate in the Company A plan until amendments are adopted for that purpose. However, the Company A plan provides that employees of a controlled group member are eligible to participate. Because Company B became a controlled group member with Company A on the date its stock was acquired, Company B employees are technically eligible to participate in both plans. Consistent with the merger agreement, Company B employees have not been permitted to participate in the Company A plan and have never been provided with information about the plan.

Example #5: Vesting Error. The plan sponsor intended that the plan provide for a vesting schedule that provides 25% vesting per year of service up to 4 years. The scrivener inadvertently documented the plan to provide for a 6-year graded vesting schedule. The plan has always been administered based on the 25% per year schedule. Forfeitures reduce employer contributions.