

**Office of Chief Counsel  
Internal Revenue Service  
memorandum**

CC:TEGE:EB:QP2

date: January 4, 2007

to: Joseph H. Grant, Director, Employee Plans SE:T:EP

from: Lisa Mojiri-Azad  
John Ricotta  
Office of Division Counsel/Associate Chief Counsel  
(Tax Exempt & Government Entities)  
CC:TEGE:EB:QP2

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subject: Availability of the Correction Programs Under Rev. Proc. 2003-44 for Plan Failures  
Relating to Certain Abusive Tax Avoidance Transactions

Our office has reviewed the materials relating to the availability of the correction programs under the Employee Plans Compliance Resolution System (EPCRS) for plans involved in either of the following categories of transactions: 1) reportable transactions described in Section 1.6011-4(b) of the Procedure and Administration regulations; and, 2) transactions that are not reportable but have been identified as abusive transactions by the "EP Abusive Tax Transactions" section of the Service web site. [REDACTED]

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Section 1.6011-4 provides rules relating to the requirement of a statement disclosing participation in certain transactions by taxpayers. Section 1.6011-4(b)(1) provides that a reportable transaction is a transaction described in paragraphs (b)(2) through (7) of 1.6011-4. There are five categories of reportable transactions: listed transactions, confidential transactions, transactions with contractual protection, loss transactions, transactions with a significant book-tax difference, and transactions involving a brief asset holding period.<sup>1</sup> Section 1.6011-4(b) defines a listed transaction as a transaction that is the same as or substantially similar to one of the types of transactions that the Service has determined to be a tax avoidance transaction and identified by notice, regulation, or other type of published guidance as a listed transaction.

The Service has also established Issue Management Teams (IMT) to ensure a coordinated approach across different Divisions of the Service in resolving examination

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<sup>1</sup> The significant book-tax difference transaction category is being removed, effective for transactions that otherwise would have to have been disclosed on or after January 6, 2006. Also, another category of reportable transactions is being proposed. See the notice of proposed rulemaking published in the Federal Register (71 FR 64488) on November 2, 2006,

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issues involving abusive transactions. IMTs have been created for many of the abusive transactions involving Employee Plans issues. These teams have established extensive coordination procedures with SB/SE and LMSB and are functioning across divisional lines to conduct coordinated exams of taxpayers involved in these abusive transactions. In this regard, the Service has published new IRMs to address the procedures, guidance on development and resolution of abusive transactions. These IRMs (published as IRM 4.32.1, 4.32.2 and 4.32.3) apply to all Service personnel involved in the investigation or resolution of abusive transactions.

We understand that your office has been receiving requests from plans and plan sponsors to correct failures relating to issues involving transactions of the types described above under EPCRS. EPCRS is a comprehensive system of correction programs for sponsors of retirement plans that have failed to satisfy certain requirements under sections 401(a), 403(a), 403(b), 408(k), or 408(p) of the Internal Revenue Code (Code), as applicable. EPCRS generally permits plan sponsors to correct these failures and maintain the tax-favored status of their plans.

EPCRS consists of three basic programs for correction: self-correction under SCP, voluntary correction with approval by the Service (VCP), and correction on examination (Audit CAP). SCP permits plan sponsors to correct eligible failures at any time (including when a plan or plan sponsor is under examination) or to correct significant operational failures within a specified correction period. VCP permits eligible plan sponsors to submit, at any time before an Employee Plans or Exempt Organizations examination a request to the Service identifying the plan's failures and requesting approval of the proposed correction methods. If agreement is reached regarding correction, the Service will issue a compliance statement specifying the corrective action required. Audit CAP permits a plan sponsor to correct an eligible failure when the Service discovers a "Qualification" or "403(b) failure" upon an Employee Plans or Exempt Organizations examination of the plan. If the plan sponsor corrects the failure (to the extent permitted by the Service), pays the sanction, and satisfies any additional requirements, the Service will enter into a closing agreement with the plan sponsor.

Section 2.02(3) of the 2003 rev. proc. gives the Service the discretion to exclude reportable transactions from the EPCRS program. Specifically, it provided that the Service was evaluating the availability of correction procedures under EPCRS for any failures related to a plan's participation in a reportable transaction as defined at section 1.6011-4(b). This section further provides that until this evaluation was completed, the Service reserved the right to treat any such failures as ineligible for EPCRS or to deal with any such failures outside EPCRS. [REDACTED]

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If you have any questions regarding this memorandum, please call us at 2-6060.

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