

MEMO# 35377

July 18, 2023

IRS Provides Interim Guidance on EPCRS Consistent with SECURE 2.0 Act Section 305

[35377]

July 18, 2023

TO: ICI Members

Pension Committee

Pension Operations Advisory Committee SUBJECTS: Pension

Tax RE: IRS Provides Interim Guidance on EPCRS Consistent with SECURE 2.0 Act Section 305

The Internal Revenue Service (IRS) on Thursday, May 25, 2023, published Notice 2023-43 (Notice),^[1] which provides guidance with respect to the expansion of the Employee Plans Compliance Resolution System (EPCRS)^[2] as required under Section 305 of the SECURE 2.0 Act (Act).^[3] The Notice, which is structured as a series of Q&As, is intended as interim, non-comprehensive guidance in advance of an update to IRS Rev. Proc. 2021-30, the current iteration of EPCRS. Section 305 requires, among other things, that Treasury revise Rev. Proc. 2021-30 or its successor no later than two years following the December 29, 2022, enactment of the SECURE 2.0 Act.

Summary

The key takeaways from the Notice are as follows.

- Plan sponsors can use the expanded self-correction relief provided by section 305 of the SECURE 2.0 Act, notwithstanding concerns some had expressed that formal IRS guidance was needed first. IRA custodians, however, may not correct eligible inadvertent failures under EPCRS until the IRS updates Rev. Proc. 2021-30.
- Plan sponsors have significant flexibility to self-correct that goes beyond the limited self-correction rules under the current EPCRS program.
- The Notice confirms that EPCRS continues to not be available to correct scrivener's errors in a manner that is less favorable to participants than the original terms of the plan.
- The Notice places some guardrails on the scope of self-correction, such as using self-correction for certain testing and written plan document failures.
- The Notice requests comments on the guidance and any other aspect of section 305

of the SECURE 2.0 Act, including a description of common IRA failures and suggested correction methods for those failures, and the possibility of expanding EPCRS to be available for both IRA custodians and IRA owners. Comments are due August 23, 2023.

EPCRS

EPCRS permits retirement plan sponsors to correct certain failures to meet applicable tax qualification requirements and thereby continue to provide employees with retirement benefits on a tax-favored basis. EPCRS is comprised of three programs.

- **Self-Correction Program (SCP).** SCP is available to correct, without involving the IRS and without paying any fees or penalties, retirement plan operational and certain plan document failures. SCP has various conditions and limitations governing its use.
- **Voluntary Correction Program (VCP).** VCP can be used to correct a broader range of failures than SCP, including certain plan document problems not correctable under SCP, "significant" failures not corrected within SCP's required time period, and failures for which EPCRS does not provide a specific sample correction method. VCP requires filing an application (and paying a fee) to IRS for review and approval of the correction.
- **Audit Closing Agreement Program (Audit CAP).** Audit CAP is a correction process which applies to plans under IRS examination. Audit CAP is both more complicated and costlier than SCP or VCP, as it involves taking IRS-approved corrective actions, paying a negotiated penalty, and entering into a closing agreement with IRS.

SECURE 2.0 Act Section 305

Section 305 of the SECURE 2.0 Act, which was effective on December 29, 2022, expands EPCRS in numerous ways. Broadly speaking, section 305 allows plan sponsors to self-correct eligible plan failures that are identified too late for self-correction under EPCRS as in effect before the SECURE 2.0 Act. Section 305 also provides for the expansion EPCRS by making it available to IRAs, as detailed below.

Before the SECURE 2.0 Act, self-correction under EPCRS was limited mainly to either "insignificant" operational failures, or "significant" operational failures and plan document failures which had to be corrected within three years (technically, by the last day of the third plan year following the plan year for which the failure occurred). Certain plan failures, such as specific plan document failures, certain loan failures, employer eligibility failures, and demographic failures, could not be corrected under SCP—for these failures a plan sponsor had to file an application under VCP. Additionally, EPCRS imposed numerous requirements on self-correction.

Correction of "Eligible Inadvertent Failures"

Section 305 expands EPCRS to allow plan sponsors to self-correct an "eligible inadvertent failure" (as defined in section 305) at any time, without regard to when the failure occurred or whether the failure is significant.

An eligible inadvertent failure is any failure that:

- Is not identified by the IRS (i.e., the plan is not under audit) prior to any actions demonstrating a specific commitment to implement a self-correction with respect to

such failure;

- For which the self-correction is completed within a reasonable period after the identification of the failure;
- Occurs despite the existence of established and routinely followed practices and procedures reasonably designed to promote and facilitate compliance with the applicable requirements of the Internal Revenue Code (Code);[\[4\]](#) and
- Does not include a failure which:
 - is egregious;
 - involves the misuse or diversion of plan assets; or
 - is directly or indirectly related to an abusive tax avoidance transaction.

Correction of Plan Loan Errors

Section 305 provides that eligible inadvertent failures relating to plan loans to participants may be self-corrected under section 305, provided that the correction is made pursuant to the rules under section 7.07 of Rev. Proc. 2021-30 generally applicable to the correction of plan loan failures. Moreover, any such correction shall be treated as meeting the requirements of DOL's Voluntary Fiduciary Correction Program (VFCP)—provided that DOL may impose reporting or other procedural requirements in connection with the reliance on VFCP for such self-correction.

Requirements for Correction of Failures

Any correction of a failure pursuant to section 305 must be made in conformity with the general principles under the Code for correction of such failures, including but not limited to the principles and corrections set forth in Rev. Proc. 2021-30. If a correction is not made in conformity with the above, the failure is not eligible for correction under section 305.

Expansion of EPCRS to IRAs

Section 305 provides that IRS/Treasury shall expand EPCRS to allow IRA custodians to address IRA eligible inadvertent failures, including but not limited to: (i) waivers of the excise tax otherwise applicable under Code section 4974 (for required minimum distribution failures); and (ii) rules permitting a non-spouse beneficiary to return distributions to an inherited IRA where the beneficiary had reason to believe (due to an inadvertent error by a service provider) that the distribution could be rolled over without inclusion in income of any part of the distributed amount. For IRAs the applicable "established and routinely followed practices and procedures" are standards that are similar to those set forth in section 4.04 of Rev. Proc. 2021-30 (the established policies and procedures required for a plan sponsor or administrator to be eligible for SCP).

Section 305 does not specify whether the correction of eligible inadvertent failures by IRA custodians would be handled through SCP only or whether VCP also would be available.[\[5\]](#) We anticipate this will be clarified when Rev. Proc. 2021-30 is updated. IRA custodians should consider providing input on this point.

IRS Notice 2023-43

The Notice provides interim guidance to effect certain aspects of Section 305. As a threshold matter, the Notice affirms that parties are not limited to self-correction - eligible inadvertent failures still may be corrected through VCP.

Notably, the Notice also states that IRA custodians may not use EPCRS until Rev. Proc.

2021-30 is revised or otherwise updated.

Restrictions on Self-Correction

The Notice clarifies numerous failures for which self-correction is not available. These include:

- Significant failures in terminated plans;
- Coverage and certain nondiscrimination testing failures that are not corrected in a method prescribed by IRS regulations (this restriction does not apply to ADP/ACP testing for 401(k) plans, which may be self-corrected);
- Operational failures that are corrected by retroactively amending plan terms in a way that is unfavorable to participants or beneficiaries;[\[6\]](#)
- A failure to timely adopt an initial plan document; and
- Certain failures relating to employee stock ownership plans (ESOPs), SEPs, SIMPLE IRAs, and orphan plans.

Certain Self-Correction Restrictions No Longer Apply

Pending further guidance, the following rules under EPCRS do not apply to the self-correction of an eligible inadvertent failure.

- The requirement that a significant failure must be completed or substantially completed by the end of a specified correction period (in general, the last day of the third plan year following the plan year for which the failure occurred) to be eligible for self-correction.
- The requirement that self-correction of significant failures must be substantially completed before the plan or plan sponsor is under examination. Instead, as noted above there must be a "specific commitment" to self-correct prior to going under examination, as discussed below.
- The requirement that qualified plans and 403(b) plans have a favorable determination or opinion letter.
- Certain prohibitions on self-correction of certain loan failures, demographic and employer eligibility failures, and significant failures under SEPs and SIMPLE IRA plans.

Timing of Corrections

The Notice states that an eligible inadvertent failure can be corrected (subject to other requirements in the Notice and under the Code) irrespective of when it occurred, including if it occurred prior to enactment of the SECURE 2.0 Act. Eligible inadvertent failures that were self-corrected between December 29, 2022 (the date of enactment of the SECURE 2.0 Act) and May 23, 2023 (the date of the Notice) are considered corrected if the plan sponsor applied a good faith, reasonable interpretation of section 305 in completing the correction. A self-correction completed in accordance with the Notice is considered a good faith, reasonable interpretation of section 305.[\[7\]](#)

As for when an error must be self-corrected, as noted above section 305 provides that the correction must be made within a reasonable period after the identification of the failure. The Notice provides a safe harbor reasonable period for correcting an eligible inadvertent failure. The correction time period will be treated as reasonable if an eligible inadvertent failure is corrected by the last day of the 18th month following the date the failure is identified by the plan sponsor. There are, however, some exceptions. Self-correction of eligible inadvertent failures that are an employee eligibility failure[\[8\]](#) is treated as corrected

in a reasonable timeframe if the plan sponsor ceases all contributions to the plan as soon as reasonably practicable after the failure is identified, and in no event later than the last day of the 6th month following the date the failure is identified.

Once a plan is under audit, eligible inadvertent failures are treated as having been identified by the IRS. In such instance, eligible inadvertent failures may be self-corrected only if the plan or plan sponsor had earlier demonstrated a specific commitment to self-correct (discussed below). However, failures determined to be insignificant pursuant to section 8.02 of Rev. Proc. 2021-30 may still be self-corrected even after they are considered identified by IRS, including if the failure is in fact discovered in the course of an examination.

Specific Commitment to Correct

The Notice elaborates on actions by a plan sponsor that evidence a specific commitment to correct, stating that a determination of a specific commitment to correct is determined "by considering all relevant facts and circumstances." Such action "must generally indicate that the plan sponsor is actively pursuing correction of a specific identified failure." IRS views certain actions, such as completing an annual compliance audit or a generalized statement of an intent to correct failures when they are discovered, as not sufficient to evidence a specific commitment to correct.

Documentation Requirement

Section 305 does not add any recordkeeping requirement for parties utilizing EPCRS to correct eligible inadvertent failures. The Notice clarifies that any current IRS recordkeeping requirements do, however, continue to apply. The Notice specifically states that if requested on an examination, a plan sponsor must be able to provide documentation that:

- Identifies the failure, including the year(s) of occurrence, number of employees affected, and the date the failure was identified;
- Explains how the failure occurred and "demonstrates there were established practices and procedures (formal or informal) reasonably designed to promote and facilitate overall compliance that were in effect when the failure occurred";
- Both identifies and substantiates that method of correction and the date the correction was completed; and
- Identifies any changes to the above referenced established practices and procedures to ensure that the same failure will not reoccur.

Impact of Self Correction on Taxes

If an excise tax or additional tax is automatically applied to an eligible inadvertent failure, until such time as Rev. Proc. 2021-30 is updated these taxes are not waived on self-correction. A plan sponsor may, however, request through a VCP submission that taxes not be pursued. Moreover, if the tax is an income or excise tax issue that cannot be corrected under EPCRS the Notice states that IRS Employee Plans will accept requests for a closing agreement through the Voluntary Closing Agreement Procedure.

Comments Requested

IRS and Treasury have invited comments both on the Notice and on any other aspect of section 305 the SECURE 2.0 Act. Comments were specifically requested relating to two topics.

- Additional correction methods that are required to be used to correct eligible inadvertent failures, including general principles of correction if a specific correction method is not specified.
- A description of common IRA failures and suggested correction methods for such failures, and the possibility of expanding the availability of EPCRS to both IRA custodians and IRA owners.

Comments are due August 23, 2023.

David Cohen
Associate General Counsel, Retirement Policy

Notes

[1] IRS Notice 2023-43, May 25, 2023, available at <https://www.irs.gov/pub/irs-drop/n-23-43.pdf>.

[2] For a description of the current EPCRS program as reflected in Rev. Proc. 2012-30, see ICI Memorandum No. 33711, dated August 2, 2021, available at www.ici.org/memo33711.

[3] For a discussion of the SECURE 2.0 Act, see ICI Memorandum No. 34795, dated January 12, 2023, available at www.ici.org/memo34795.

[4] These policies and procedures are those that satisfy the standards of Section 4.04 of Rev. Proc. 2021-30 or any successor guidance.

[5] Section 305(a) specifically references self-correction of eligible inadvertent failures for other types of plans. Section 305(c) (the provision expanding EPCRS to IRAs), however, merely references IRA custodian correction of eligible inadvertent failures without limiting such correction to self-correction.

[6] This limitation means that EPCRS continues to not be available to correct many scrivener's errors.

[7] The Notice does not address whether interpretations not in accordance with the Notice are considered good faith, reasonable interpretations of section 305.

[8] An employee eligibility failure is one defined in section 5.01(2)(d) (for qualified plans) or section 5.02(2)(d) (for 403(b) plans) of Rev. Proc. 2021-30, or for SEPs or SIMPLE IRAs as determined under similar principles.