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### IRS guidance on SECURE 2.0 expansion of self-correction under EPCRS

The SECURE 2.0 Act of 2022 significantly expanded the Self-Correction Program under the IRS Employee Plans Compliance Resolution System (EPCRS). While EPCRS must be updated by December 29, 2024, the IRS has issued interim guidance in Notice 2023-43 on how a plan can now self-correct under EPCRS.

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#### Background

Revenue Procedure 2021-30 sets forth EPCRS, the current system of correction programs for qualified retirement plans. There are three ways plan failures can be corrected under EPCRS: (1) the Self-Correction Program (SCP), under which certain failures that are deemed “insignificant”, or “significant” failures that are corrected within the specified time (generally within three years of the failure occurring), can be self-corrected without an IRS filing, provided certain requirements are met; (2) the Voluntary Correction Program (VCP), under which a plan sponsor can report failures by filing a VCP application at any time before an IRS audit is underway, pay a fee, and receive the IRS’s approval of the corrections; and (3) the Audit Closing Agreement Program (Audit CAP), under which failures identified by the IRS on audit are corrected and the plan sponsor pays sanctions, which can often be considerable.

Section 305 of SECURE 2.0 (Section 305) expands the Self-Correction Program to cover certain “eligible inadvertent failures,” thereby eliminating the need in most cases to categorize failures as being significant or insignificant. SECURE 2.0 also broadened the time period for correction and allows self-correction for more types of errors, including certain plan loan and document failures. An “eligible inadvertent failure” is defined as a failure that occurs despite the existence of established practices and procedures and which is not egregious, does not involve the diversion or misuse of plan assets, and is not related (directly or indirectly) to an abusive tax avoidance transaction. These failures can be self-corrected at any time, but the correction must be completed within a reasonable time after discovery of the failure (regardless of the significance of the failure). Additionally, if a failure is identified during an IRS audit, the plan sponsor must demonstrate that they had a specific

commitment to the implementation of the correction before the failure was identified by the IRS in order to be eligible for the SCP. These changes were effective immediately upon enactment of SECURE 2.0, and the IRS has been directed to update EPCRS by December 29, 2024. The updates will include correction methodologies for eligible inadvertent failures, along with general correction principles if a correction method is not specified.

## Guidance offered under IRS Notice 2023-43

IRS [Notice 2023-43](#) provides interim guidance on self-correction in qualified retirement plans including 403(b) plans. The Notice clarifies what eligible inadvertent failures may be self-corrected and addresses limitations on self-correction. The following are some of the key provisions in the Notice:

- Significant failures, certain plan loan failures, and required minimum distribution failures may be self-corrected.
- Although a failure where an excise or additional tax applies may be self-corrected (e.g., required minimum distributions), the tax is not waived. The plan sponsor may file a VCP to request that the tax be waived.
- An “insignificant” failure, as determined under Revenue Procedure 2021-30, can still be self-corrected after the plan comes under examination by the IRS.
- The IRS will make a “facts and circumstances” determination as to whether actions taken by a plan sponsor demonstrate a specific commitment to self-correct a failure in a plan that is under examination. Mere completion of an annual compliance audit or adoption of a general statement of intent to correct the failure is not enough to demonstrate a specific commitment.
- Whether an eligible inadvertent failure is corrected within a reasonable period will be determined by considering all relevant facts and circumstances. Most failures will be treated as having been corrected within a reasonable period if the correction is completed within 18 months of the date the failure was identified. Some failures are subject to a shorter timeline (e.g., contributions to a 401(k) or 403(b) plan adopted by an employer not eligible to adopt such plan must cease by no later than six months after identification of the failure).
- A favorable IRS determination letter is not needed to self-correct eligible inadvertent failures.
- Notice 2023-43 confirms that, while the SECURE 2.0 changes to the SCP did not impose any new recordkeeping requirements with respect to the self-correction of an eligible inadvertent failure, the current IRS recordkeeping requirements continue to apply. Accordingly, if requested during an IRS examination, a plan sponsor must be able to provide appropriate documentation substantiating the self-correction.

The Notice also contains some examples of failures that are not eligible for self-correction:

- Certain demographic failures
- Failure to adopt a written plan document, including the failure to adopt a provision of a 403(b) plan to satisfy the final regulations under Internal Revenue Code Section 403(b)
- A “significant failure” (as determined under Rev. Proc. 2021-30) in a terminated plan
- An operational failure corrected by plan amendment where a participant or beneficiary is treated less favorably than under the original terms of the plan

Finally, and perhaps most importantly, the Notice states that an eligible inadvertent failure may be self-corrected on or after December 29, 2022 (the date that SECURE 2.0 was enacted) even if the failure occurred before that date.

## In closing

The expansion of the SCP to allow certain eligible inadvertent failures to be self-corrected, as well as the fact that eligible inadvertent failures that occurred prior to the enactment of SECURE 2.0 can be self-corrected under this guidance, is great news for plan sponsors. These changes will allow plan sponsors to self-correct many significant errors that previously would have required a VCP application, thus potentially avoiding the costs of preparing a VCP submission and fees paid to the IRS.

Plan sponsors may rely on the guidance provided in Notice 2023-43 until Revenue Procedure 2021-30 is updated by the IRS. A plan sponsor that completes self-corrections prior to such update and in accordance with Notice 2023-43 will be treated as having applied a good faith, reasonable interpretation of Section 305.

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