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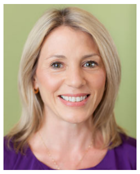
# New IRS Rules Allow Retirement Plan Sponsors to Self-Correct Broader Range of Plan Failures



*by Judith W. Boyette & Elizabeth J. Masson*

The IRS recently issued a new version of its Employee Plans Compliance Resolution System ("EPCRS") that gives sponsors of tax-qualified retirement plans additional options for self-correcting plan failures. The new EPCRS allows plan sponsors to use the Self-Correction Program ("SCP") in several circumstances, rather than requiring a Voluntary Compliance Program (VCP) filing with the IRS and payment of the applicable user fee.

Beginning April 19, 2019, plan sponsors that meet the conditions for using SCP can self-correct the following types of failures:

- Defaulted participant loans.
- Failure to obtain spousal consent for a participant loan.
- Allowing participant loans in excess of the number provided for under the terms of the plan.

In addition, if a plan has received a favorable determination letter from the IRS, certain plan document failures can be corrected by plan amendment through SCP.

**Background on EPCRS**

Under the EPCRS, many failures by tax-qualified retirement plans to comply with Internal Revenue Code ("Code") section 401(a) and 403(b) may be corrected through the SCP, VCP, or Audit CAP, depending on the type of failure and other factors.

For failures that are eligible for SCP, a plan sponsor that has obtained a favorable determination letter and established compliance practices and procedures can self-correct without submitting the correction to IRS for approval and without paying a user fee. In contrast, failures that must be corrected through VCP require approval by the IRS, meaning the plan sponsor must submit an explanation of the failure, describe the proposed correction, and pay a user fee. The Audit Cap component of EPCRS applies when an uncorrected failure that cannot be corrected through SCP is discovered during an IRS audit.

**New SCP Rules Issued to Ease Correction Burdens for Plan Sponsors**

The IRS explained that expansion of the SCP will facilitate compliance for plans while reducing costs and burdens of compliance by allowing plan sponsors to self-correct under certain circumstances where SCP was not previously available.

**Participant Loan Failures:** The following changes apply to correction of failures involving participant loans:

- If the maximum participant loan repayment period applicable to a loan has not expired, the failure to timely repay the loan can be self-corrected by: (1) collecting a lump sum repayment, including interest on the unpaid amount, to bring the loan up to date, (2) reamortizing the outstanding balance, including interest on the unpaid amount, over the remaining period of the loan, or (3) some combination of the two. (Previously, this correction method required a VCP filing.)
- Defaulted loans can be corrected by reporting the deemed distribution on a Form 1099-R in the year of the correction, rather than the year of the failure. (Previously, this relief was available only if the plan sponsor filed a VCP and requested the relief.)
- If required under the plan, a failure to obtain spousal consent to a participant loan may be corrected by notifying the spouse so that the spouse can provide consent. If spousal consent cannot be obtained, the failure must be corrected through VCP or Audit Cap.
- A failure to limit the number of participant loans in accordance with the plan document may be self-corrected, by adopting a retroactive conforming plan amendment, if (1) the amendment complies with Code sections 401(a) and 72(p), and (2) plan loans – including plan loans in excess of the number permitted under the terms of the plan – were available to either all participants, or solely to one or more participants who were non-highly compensated employees.

**Plan Document and Operational Failures:** The IRS also expanded the ability for plan sponsors to self-correct under SCP for plan document and operational failures in the following circumstances:

- Plan document failures, other than the initial failure to adopt a qualified plan, can be self-corrected if the plan has received a favorable determination letter and the correction is made within the maximum period for correcting significant failures (generally, by the end of the second plan year following the year of the failure). This includes a failure to adopt a plan amendment related to changes in the Code or applicable Treasury regulations.

- Operational failures to conform to the terms of a plan can be corrected by retroactive plan amendment if:
    - The plan amendment results in an increase of a benefit, right, or feature.
    - The increase in the benefit, right, or feature is available to all eligible employees.
    - Providing the increase in the benefit, right, or feature is permitted under the Code and satisfies the general correction principles of the EPCRS. (As was previously the case, if a retroactive amendment would reduce benefits, IRS approval must be obtained.)

The new EPCRS does not change the current rules that:

- Failures involving an employer that is not eligible to sponsor a 401(k) plan ("Employer Eligibility failures") or that violate certain rules about employee participation ("Demographic failures") are not available for correction under SCP.
- Plan loans that, when made, violate the dollar limit, or the amortization or repayment periods in Code section 72(p), and must be corrected through VCP or Audit Cap.

If you have questions or concerns about the new version of EPCRS, please contact the Hanson Bridgett

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