Articles + Publications | June 22, 2023

IRS Issues Guidance on EPCRS Expansion of Under SECURE Act 2.0

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On May 25, the Internal Revenue Service (IRS) released Notice 2023-43 (Notice), which provides interim guidance on the expansion of the Employee Plans Compliance Resolution System (EPCRS) mandated by Section 305 of the SECURE 2.0 Act of 2022 (SECURE 2.0). EPCRS provides plan sponsors with several mechanisms for correcting operational failures of tax-qualified retirement plans that could otherwise result in a tax-qualification failure. Those mechanisms include different time periods in which the corrections must be identified and corrected, and in some cases, increased costs for the corrections. The least costly corrections fall under the Self Correction Program (SCP), while other corrections cannot be made under SCP and must instead be made under the more-costly Voluntary Correction Program (VCP). Section 305 of SECURE 2.0 (Section 305) is intended to expand the categories of errors — referred to as "eligible inadvertent failures" — that are correctable under SCP rather than VCP. The Notice provides clarification as to which errors will qualify as eligible inadvertent errors and the time period in which those errors may be corrected.

Background

Before SECURE 2.0, under the SCP, plan sponsors generally could self-correct certain significant operational failures and plan document failures by the last day of the third plan year following the plan year for which the failure occurred and could correct certain insignificant plan failures even if discovered on examination. However, certain failures (*e.g.*, specific plan document failures, particular loan failures, employer eligibility failures, and demographic failures) could only be corrected under the VCP.

SECURE 2.0 expanded the SCP to encourage plan sponsors to correct plan failures proactively. Section 305 provides that plan sponsors may self-correct any "eligible inadvertent failure" at any time, without regard to when the failure occurred or whether the failure is significant. Generally, an "eligible inadvertent failure" is any failure that:

- Is not identified by the IRS prior to any actions demonstrating a specific commitment to implement a self-correction with respect to the failure;
- For which the self-correction is completed within a reasonable period after the identification of the failure;
- Is not egregious;
- Does not involve the misuse or diversion of plan assets;

- Does not directly or indirectly relate to an abusive tax avoidance transaction; and
- 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.

To carry out the changes set forth in SECURE 2.0, Section 305 also instructs the IRS to revise Rev. Proc. 2021-30 by December 29, 2024 to incorporate the provisions of Section 305.

How Does Notice 2023-43 Impact Plan Sponsors?

The Notice intends to assist taxpayers by providing interim guidance related to the expansion of the EPCRS in advance of the IRS' update to Rev. Proc. 2021-30. However, it is not intended to be comprehensive. The Notice instead provides helpful guidance in a question-and-answer format concerning the issues outlined below.

Self-Correction of Eligible Inadvertent Failures

The Notice provides that a plan sponsor of a qualified retirement plan may self-correct an eligible inadvertent failure (including failures related to plan loans) before Rev. Proc. 2021-30 is updated, provided that certain conditions set forth in Rev. Proc. 2021-30 and Section 305 are satisfied. However, the Notice lists several eligible inadvertent failures that a plan sponsor may not self-correct before the date Rev. Proc. 2021-30 is updated. Such failures include:

- The failure to adopt a written plan;
- Significant failures in terminated plans;
- A demographic failure not otherwise corrected using a method found in the Treasury Regulations; and
- An operational failure corrected by a plan amendment that results in less favorable terms for a participant or beneficiary than the original plan terms.

Eligible Inadvertent Failures Discovered by the IRS

Under the Notice, an eligible inadvertent failure is considered discovered by the IRS when the plan or plan sponsor is subject to an IRS examination. Once a failure is identified by the IRS, the plan sponsor may not self-correct unless it can show there was a "specific commitment" to self-correct the failure. Insignificant failures, however, may be self-corrected regardless of whether the plan sponsor is under examination, or the failure is discovered during the examination.

The IRS analyzes the facts and circumstances of the plan sponsor's actions to determine whether the plan sponsor has demonstrated a specific commitment to self-correcting the failure. However, the Notice specifies that (1) the plan sponsor must show it is actively pursuing a correction of the failure, and (2) merely completing an

annual compliance audit or adopting a general statement of intent to correct failures is generally not enough to demonstrate a specific commitment to self-correcting the failure. As a result, the Notice, like EPCRS, incentivizes plan sponsors to vigilantly monitor the operation of their qualified plans and to proactively correct operational errors when discovered.

Reasonable Period for Correcting Eligible Inadvertent Failures

A determination of whether an eligible inadvertent failure is corrected within a reasonable period will be made based on all the facts and circumstances. However, the Notice provides that the failure will be treated as having been corrected within a reasonable period if it is corrected by the last day of the 18th month after the failure is identified by the plan sponsor. With respect to employer eligibility failures, a failure will be treated as being corrected within a reasonable period if the plan sponsor promptly stops making plan contributions after identifying the failure and corrects the failure by the last day of the sixth month after identifying the failure.

Methods of Correction

EPCRS establishes general principles for correction of operational errors and includes several specified, pre-authorized correction methods for certain common operational errors. The Notice does not add to these correction methods.

Reliance and Transition Period

Plan sponsors may rely on the Notice beginning on the date it is issued and ending on the date Rev. Proc. 2021-30 is updated. If the plan sponsor self-corrected an eligible inadvertent failure on or after the enactment of SECURE 2.0 (*i.e.*, December 29, 2022) and before the Notice (*i.e.*, May 25, 2023), the plan sponsor may apply a good faith, reasonable interpretation of Section 305 in completing the self-correction. A plan sponsor that completes a self-correction during this period in accordance with the Notice will be treated as having applied a good faith, reasonable interpretation of Section 305.

Comments Requested

The Treasury Department and IRS have requested comments on the guidance in the Notice and any other aspect of Section 305 by August 23, 2023.

What to Do Now?

Plan sponsors should continue to vigilantly monitor the operation of their qualified plans to ensure that they operate in accordance with their terms and all tax-qualification requirements. But, inadvertent errors do occur. For most large plans, such errors are nearly unavoidable given the complexity of payroll systems, data transfers, etc. Smaller plans can be susceptible to errors when administration depends heavily on nonautomated processes.

When operational errors are discovered, Section 305 and the Notice now provide a new step in the correction process — *i.e.*, determine whether the error qualifies as an eligible inadvertent failure under the Notice. If so, the plan sponsor may consider correcting the error under Section 305 as explained by the Notice and informed by

EPCRS. While the ultimate result may be similar to the analysis under EPCRS, there may be more corrections eligible for this treatment that may allow the plan sponsor to avoid the extra costs of VCP. The analysis will require a team effort, including legal advisors, plan recordkeepers, and the plan sponsor's human resources team.

If you have any questions or need assistance with corrections, please contact any member of the Troutman Pepper Employee Benefits + Executive Compensation Practice Group.

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