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NOW IS THE TIME TO REVIEW AND CORRECT RETIREMENT PLAN COMPLIANCE: IRS NOTICE 2023-43

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There has never been a better time for plan sponsors to prioritize reviewing and self-correcting eligible plan failures. SECURE 2.0, attached to the 2022 year-end Consolidated Appropriations Act, expands retirement savings opportunities for Americans and affords new opportunities for plan sponsors to make plan corrections without the traditional fees and processes of IRS intervention. In connection with such relief, the IRS issued Notice 2023-43 to provide guidance to plan sponsors engaging in self-corrections through the Employee Plans Compliance Resolution System (EPCRS). This post highlights the key provisions of that guidance.

BACKGROUND

Plan sponsors' ability to self-correct is more expansive than ever before. Under SECURE 2.0,

“any eligible inadvertent failure to comply with the rules applicable under section 401(a), 403(a), 403(b), 408(p), or 408(k)...may be self-corrected under the Employee Plans Compliance Resolution System...except to the extent that (1) such failure was identified by the Secretary prior to any actions which demonstrate a specific commitment to implement a self-correction with respect to such failure, or (2) the self-correction is not completed within a reasonable period after such failure is identified.”

The only other explicit exception to self-correction includes “any failure which is egregious, relates to the diversion or misuse of plan assets, or is directly or indirectly related to an abusive tax avoidance transaction.”

The Secretary of the Treasury has until the end of 2024 to revise current EPCRS guidance (found in [Rev. Proc. 2021-30](#)) to formulate standards for the expanded EPCRS. Until then, self-correction may be based on a good faith, reasonable interpretation of current the regulation.

GENERAL GUIDANCE

The interim guidance allows for self-correction as long as certain conditions are satisfied and certain exceptions do not apply. Such conditions are summarized below.

Comply with Applicable Portions of Rev. Proc. 2021-30

Plan sponsors should continue to comply with specific portions of the IRS' previous guidance to ensure proper self-correction of eligible inadvertent failures:

1. plan sponsors must have established practices and procedures that are reasonably designed to promote and facilitate overall compliance
2. plan sponsors must apply correction principles set forth in earlier guidance (including but not limited to restoring benefits for all participants, ensuring reasonable and appropriate corrections, and consistently applying correction methods); and
3. although not required, plan sponsors may self-correct using certain methods previously approved by the IRS.

Must Self-Correct within Reasonable Period

Plan sponsors should make self-corrections within a reasonable period after identifying the failure. A "reasonable period" will be determined based on all facts and circumstances, but any non-eligibility failures that are corrected by the last day of the 18th month after identifying the failure will be treated as a reasonable period. To correct eligibility failures within a reasonable period, plan sponsors should cease all contributions to the plan "as reasonably practicable" and no longer than the last day of the 6th month after identification of the failure.

Specific Commitment to Implement Self-Corrections

Plan sponsors are only permitted to self-correct before the Secretary examines the plan or plan sponsor, unless the plan sponsor had previously demonstrated a specific commitment to implement self-corrections, as determined based on all facts and circumstances. In that case, a plan sponsor's actions must demonstrate that they are actively pursuing correction of the failure, not merely completing annual audits or adopting general statements of intentions to self-correct.

Exempted from Self-Correction

Some eligible inadvertent failures may not be self-corrected until further guidance is provided:

1. failures to adopt a written plan
2. failures in orphan plans
3. significant failures in terminated plans
4. failures that involve excess contributions to SEPs or SIMPLE IRA plans in which the identified corrections permit excess contributions to remain in affected participants' IRAs

5. certain demographic failures
6. operational failures in which the identified corrections are by plan amendments that conform the terms of the plan to the plan's prior operations in a manner less favorable to participants or beneficiaries than original plan terms
7. failures occurring in SEPs with plan documents that do not consist of valid Model Forms or prototype SEPs with a current favorable opinion letter
8. failures occurring in SIMPLE IRAs with plan documents that do not consist of valid Model Forms or prototype SEPs with a current favorable opinion letter
9. certain failures in an ESOP that implicate tax consequences.

Until the IRS issues new guidance, plan sponsors may rely on a "good faith, reasonable interpretation" regarding self-correction, and thoroughly document the self-correction process in the event of future IRS examination. This pause in regulation presents an exceptional opportunity for plan sponsors to review their plans in detail and make all eligible corrections without engaging in a Voluntary Correction Program (VCP) or other IRS intervention.

*The author thanks Macin Graber, summer associate, for her work in preparing this summary.

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Lisa A. Van Fleet

St. Louis

lisa.vanfleet@bclplaw.com

[+1 314 259 2326](tel:+13142592326)

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