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# IRS Expands Self-Correction of Retirement Plan Errors

In guidance issued on April 19, 2019, the IRS expands the situations in which retirement plan sponsors can self-correct compliance failures without first having to seek IRS approval or paying a fee. Employers should be aware there now are more situations where retirement plan compliance issues can be self-corrected without the need for an expensive filing with the IRS. Specifically, under IRS Revenue Procedure 2019-19, employers now can self-correct: (i) many plan document failures by retroactive plan amendment, (ii) certain operational failures through retroactive plan amendment and (iii) certain participant plan loan failures. The new guidance is effective immediately and applies to all failures not yet corrected.

### Background

The IRS sponsors various correction programs that provide plan sponsors with opportunities to correct retirement plans that fail to satisfy certain operational and/or plan document requirements under §401(a), §403(a), §403(b), §408(k), or §408(p) of the Internal Revenue Code of 1986, as amended (the “Code”). The programs collectively are referred to as the Employee Plans Compliance Resolution System (“EPCRS”).

By utilizing the EPCRS, plan sponsors may correct many operational and plan document compliance failures and have assurance of being assessed only limited fees and sanctions while being able to continue to provide employees with tax-favored retirement benefits. The EPCRS has three components:

- **Self-Correction Program (“SCP”).** The SCP allows plan sponsors to self-correct insignificant compliance failures at any time without an IRS filing or having to pay a fee or sanction. The SCP also allows sponsors to self-correct significant compliance failures without an IRS filing or having to pay a fee or sanction if the correction is made no later than the last day of the second plan year following the plan year in which the failure occurred.
- **Voluntary Correction Program (“VCP”).** The VCP allows plan sponsors to pay a limited fee to receive IRS approval to correct compliance failures that cannot be corrected under the SCP.
- **Audit Closing Agreement Program (“Audit CAP”).** The Audit CAP allows plan sponsors to correct compliance failures that have been identified on IRS audit and previously were not corrected under SCP or VCP. Here, the sponsor will be required to pay a sanction, but the sanction will bear a reasonable relationship to the nature, extent, and severity of the failure, taking into account the extent to which correction began before the IRS audit commenced.

Since 1991,<sup>1</sup> the IRS has offered, and periodically modified, programs to assist plan sponsors with correction of retirement plan operational failures. Now, the IRS makes the following modifications to the SCP through **IRS Revenue Procedure 2019-19**. The new guidance is effective immediately and applies to all failures not yet corrected.

### **Certain Plan Document Failures Now Can Be Self-Corrected By Retroactive Amendment**

Previously, the only ways to correct a failure to timely amend a plan to reflect changes in the law by the applicable statutory or regulatory deadline was to request IRS permission to retroactively amend the plan by making a VCP filing or through Audit CAP.<sup>2</sup>

Now, under **Rev. Proc. 2019-19**, a plan sponsor can self-correct certain “plan document failures” by retroactive amendment without first obtaining IRS approval or paying a fee or sanctions if the following two conditions are satisfied:<sup>3</sup>

1. The plan has a “Favorable Letter” in effect as of the date of the correction. If the plan is an individually designed plan, this means a letter of favorable determination from the IRS. If the plan utilizes a pre-approved plan (such as a master or prototype plan, or a volume submitter plan), this means that a favorable opinion or advisory letter has been issued with respect to the most recently expired six-year remedial amendment cycle.
2. The corrective, retroactive plan amendment is adopted no later than the earlier of (a) the last day of the second plan year following the plan year for which the failure occurred or (b) the date on which the IRS commences an examination of the plan.<sup>4</sup> For example, if a calendar year plan document failure occurs in 2019, the sponsor would need to adopt a retroactive amendment to correct the failure no later than Dec. 31, 2021.

Self-correction is unavailable for failures related to the timely initial adoption of a plan, which is intended to comply with Code §401(a) or §403(b), and for corrective amendments to resolve demographic failures that were not timely adopted—these must be corrected through VCP or Audit CAP. Also, the late adoption of discretionary amendments is not considered to be a plan document failure and cannot be retroactively corrected.

### **Certain Operational Errors Now Can Be Self-Corrected By Retroactive Plan Amendments**

Previously, when a plan sponsor wanted to correct an operational error through a retroactive plan amendment that conformed the plan’s terms to actual plan operations, the plan sponsor had to request IRS permission by making a VCP filing and paying a fee, or through Audit CAP.

Now, under **Rev. Proc. 2019-19**, a plan sponsor can correct an operational error by retroactively amending the plan’s terms to reflect plan operations if, in addition to satisfying the generally applicable correction principles,<sup>5</sup> the following three conditions are satisfied:<sup>6</sup>

1. The retroactive plan amendment results in an increase of a benefit, right or feature (“BRF”).

<sup>1</sup> See, page 11-6, “Historical perspective on EPCRS,” Chapter 11 of A Guide to Self Correction and Audit Closing Agreement Programs, found at <https://www.irs.gov/pub/irs-tege/epche1103.pdf>.

<sup>2</sup> The IRS annually publishes a list of required amendments. See, e.g., [Notice 2017-72: 2017 Required Amendments List for Qualified Retirement Plans](#) and [Notice 2018-91: 2018 Required Amendments List for Qualified Retirement Plans](#).

<sup>3</sup> Section 7.03 of Rev. Proc. 2019-19.

<sup>4</sup> In the case of transferred assets or a plan that has been assumed in connection with a corporate merger, acquisition or similar transaction, the correction period ends on the last day of the first plan year that begins after the transaction between the plan sponsor and the sponsor of the transferor plan or the prior sponsor of an assumed plan. Section 9.02 of Rev. Proc. 2019-19.

<sup>5</sup> See Section 6.02 of Rev. Proc. 2019-19.

<sup>6</sup> Section 4.05(2) of Rev. Proc. 2019-19.

2. The increase in the BRF is available to all employees eligible to participate in the plan.
3. The increase in the BRF is permitted under the Code (including nondiscrimination provisions of Code §401(a)(4), the minimum coverage provisions of Code §410(b), and the anti-cutback provisions of Code §411(d)(6)).

### Self-Correcting Participant Plan Loan Failures

Correcting noncompliant participant plan loans has always been particularly complicated and previously could not be done without IRS approval via VCP or Audit CAP. Now the IRS provides ways to self-correct some common loan failures.<sup>7</sup>

**Self-Correcting Failures to Timely Repay Loans.** A failure by a participant to make timely loan repayments can be corrected either through (i) the reamortization of the outstanding loan balance (including accrued interest) over the remaining term of the loan or over the maximum permitted loan term, measured from the original date of the loan, (ii) a lump sum repayment of the loan that includes all missed payments and accrued interest, or (iii) a combination of these two methods.

**Self-Correcting Other Loan Failures.** In addition, under Rev. Proc. 2019-19, the following loan failures can be self-corrected:

1. **Spousal Consent.** A failure to obtain spousal consent to a loan, when required by the plan, can be self-corrected by notifying the affected participant and the spouse and obtaining the spouse's consent. If the spouse does not consent, the failure must be corrected under VCP or Audit CAP.
2. **Too Many Loans.** The number of loans to a participant exceeds the number of loans permitted in the plan document can be self-corrected by adopting a retroactive plan amendment to conform the plan document to the plan's operation, if the conditions discussed above for correction by retroactive plan amendments are met. The sponsor should ensure that loans in excess of the number permitted by the plan document were available to all participants or solely to one or more non-highly compensated employees.

**Self-Correction Remains Unavailable for Some Loan Issues.** Unfortunately, some common loan issues cannot be self-corrected, but must attempt to be corrected through VCP or Audit CAP: (i) where the principle amount of the loan is more than allowed by law (generally, 50% of the participant's vested account balance), (ii) where the repayment period exceeds the maximum repayment period allowed by law (generally, five years except for the purchase of the participant's primary residence), and (iii) where the maximum period for loan repayment already has expired.

**Impact of IRS Self-Correction on DOL Approval of Correcting Fiduciary Violations for Noncompliant Loans.** Since participant plan loans are governed by both the IRS and the U.S. Department of Labor ("DOL"), self-correcting participant loan compliance issues in accordance with SCP does not also secure DOL approval regarding the correction. Instead, for now, a VCP filing still will be required to obtain DOL approval of a correction of a noncompliant loan because the DOL's Voluntary Fiduciary Correction Program still specifically requires correction through the VCP.

**Change in Reporting of Loans as Deemed Distributions.** Previously, a plan sponsor was required to report an uncorrected plan loan failure as a deemed distribution on Form 1099-R in the year of the failure, unless the sponsor asked for, and received, permission to report the loan as a deemed distribution in the year of correction via a VCP filing. Now, under Rev. Proc. 2019-19, a participant's loan can be reported as a deemed distribution on Form 1099-R in the year of correction and there no longer is a need for the plan sponsor to seek permission to do so via a VCP filing.

<sup>7</sup> Sections 2.02(4) and 6.07 of Rev. Proc. 2019-19.

**Recommendation: Seek Legal Advice Before Making a Corrective VCP Filing with the IRS**

We have seen many benefit advisors being, in our view, overly cautious by uniformly recommending correction of retirement plan compliance issues through a VCP filing, when self correction would be the perfectly acceptable and cost-effective alternative course of action. It seems to us that, particularly in light of the ongoing expansion of the self-correction program, the IRS is signaling it is acceptable, and perhaps even preferable, to self-correct without seeking IRS advance permission. Employers should gently challenge overly cautious plan advisors who automatically recommend VCP filings without exploring the appropriateness of self-correction. Certainly, there is a time and place for seeking IRS advance permission about corrections, but we think that a VCP filing should not be the automatic course of action. We would be happy to talk with you about your retirement plan's compliance issues and whether self-correction is a reasonable and rationale way to proceed.



If you have questions or would like assistance on issues affecting your benefit plans, please contact us:

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