SPECIAL REPORT

SECURE 2.0 ACT AND THE FUTURE OF THE EMPLOYEE PLANS COMPLIANCE RESOLUTION SYSTEM

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INTRODUCTION

The Internal Revenue Service's (IRS) Employee Plans Compliance Resolution System (EPCRS)[1] allows employers to correct errors involving the maintenance and operation of tax-qualified retirement plans. Depending on the severity of the error and the length of time the error has persisted, some corrections might require a formal submission to the IRS, while others can be self-corrected by the plan sponsor without the need for IRS approval.

The correction programs and options that make up EPCRS have, until now, been established exclusively in a series of IRS notices and revenue procedures dating back more than 30 years.[2] However, as part of the SECURE 2.0 Act[3] (Act), Congress took it upon itself to radically expand EPCRS to allow employers to self-correct most inadvertent failures to comply with the tax-qualification rules under the Internal Revenue Code (Code). This represents a dramatic change in how the availability of corrections has been legislated in the past. However, at its core, the Act's EPCRS-related pronouncements reinforce the decades-long push to encourage plan sponsors to timely identify and promptly resolve plan errors.

This article discusses the history behind the creation of EPCRS, outlines some of its key features, and highlights how the growth and expansion of this program—including, most recently, under the Act—continues to improve IRS enforcement of tax-qualified plan rules by encouraging plan sponsors to establish practices and procedures designed to ensure compliance, thereby avoiding the harsh tax penalties of plan disqualification.

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[1] *See* Rev. Proc. 2021-30.

[2] *See* Rev. Proc. 98-22 (consolidating the various voluntary and audit compliance programs into a single correction program for the first time); *see also* Pension Protection Act of 2006, §1101, Pub. L. No. 109-280 (affirming the Secretary of Treasury's authority and power to establish and implement the EPCRS program, as well as any other employee plans correction program, including the power to waive income, excise and other taxes).

[3] H.R.2617 - 117th Congress (2021-2022): Consolidated Appropriations Act, 2023, H.R.2617, 117th Cong. (2022).

HISTORY BEHIND THE CREATION OF EPCRS

Saving for retirement is a good idea and one that Congress has been solidly behind for more than 100 years. To that end, the Code has long provided tax incentives to encourage employees to save for retirement and motivate employers to help them do it.[4] However, the cost of those tax incentives is substantial. In fact, for the period between 2019 and 2023, the Brookings Institution Tax Policy Center estimates that the forgone federal tax revenue associated with employer-sponsored retirement plans will exceed $1.5 trillion.[5] Not surprisingly, the rules governing tax expenditures of this magnitude are rarely simple, and the rules governing tax-qualified retirement plans are no exception.

The watershed event in the regulation of retirement plans, the Employee Retirement Income Security Act of 1974 (ERISA) formalized the tax rules governing such plans and, among other things, established standards for plan eligibility, participation, funding and fiduciary conduct. During the initial period following ERISA's enactment, retirement benefits were almost entirely employer funded. But in more recent decades, employees have tended to bear much (or at least some) of this burden, as defined contribution plans (such as the 401(k) plan) have replaced defined benefit plans as the retirement plan of choice for employers.

Defined contribution plans are generally easy to explain to participants—money goes in on a tax-advantaged basis, is invested and grows tax-free, and is taxed, if at all, at retirement. But this seemingly simple concept rests on a mind-numbingly complex set of tax rules, and that complexity increases exponentially where the plan in question is a defined benefit plan. Making matters worse, the adverse tax consequences that flowed from failing to strictly comply with the myriad of tax qualification rules under the Code[6]— "disqualification," in the parlance of those rules—were draconian. A modest error could cause a plan's trust to lose its tax-exempt status, resulting in retroactive loss of tax deductions for employers, retroactive income inclusion for employees and taxation of earnings on the assets of the plan held in trust.[7]

The perceived disparity between the severity of infractions and the attendant consequences led to a growing frustration on the part of plan sponsors and their advisors. It too often seemed that the proverbial punishment did not fit the proverbial crime, as minor foot faults could trigger major, adverse tax consequences for not only the plan sponsor but also for covered employees. The tax consequences of potential disqualification also ran contrary to the legislative goal of encouraging employers to maintain retirement plans for their workers. As a result, it became increasingly clear that there needed to be a way to encourage plan sponsors to come forward, disclose and correct previously unreported failures, without jeopardizing the future stability and existence of their plans.

[4] Revenue Act of 1921, § 206(b), 42 Stat. 227 (establishing the first federal tax deduction for contributions to a pension or retirement plan).

[5] Urban-Brookings Tax Policy Center, The Tax Policy Center Briefing Book, March 13, 2023, available at: https://www.taxpolicycenter.org/briefing-book/how-large-are-tax-expenditures-retirement-saving#:~:text=The%20tax%20expenditures%20for%20retirement%20savings%20are%20very,credits%2C%20and%20other%20provisions%20in%20the%20tax%20code.

[6] 26 U.S. Code §§401(a) *et. Seq*.

[7] *See, e.g.*, *Buzzetta Construction Company v. Commissioner*, 92 T.C. 641 (1989); *Martin Fireproofing v. Commissioner*, 92 T.C. 1173 (1989) (affirmed the IRS's discretion to retroactively disqualify plans notwithstanding inadvertence, relatively minor failures and otherwise competent plan administration).

EMERGENCE OF IRS CORRECTION PROGRAMS AND EVOLUTION OF EPCRS

The IRS first publicly recognized the need for such a program in 1990, with the adoption of a pilot program called the Closing Agreement Program (CAP), which could be used to avoid disqualifying a plan, but resulted in a sanction equal to a negotiated percentage of the taxes that would be owed if the plan were disqualified.[8] The program was made permanent and expanded in the following year through the Administrative Policy Regarding Sanctions (or APRS, as it was called at the time), which provided for the correction of minor defects in operation without the imposition of sanctions.[9] From there, the effort advanced in fits and starts, with each successive iteration of the program becoming more expansive in its scope and less draconian in its imposition of penalties and sanctions.[10]

The 1996 "Administrative Policy Regarding Self-Correction" (APRSC) permitted self-correction by plan amendment in certain, limited instances. Rev. Proc. 2001-17 renamed APRSC the Self-Correction Program (SCP) permitting correction by use of retroactive plan amendments for certain defined failures without Service approval. In each case, the manner of correction that the plan sponsor must use is prescribed in detail, as is the requirement that the amendment be non-discriminatory and result in no cutback of a participant's benefit. These changes represent an inflection point for future plan corrections, with the potential to significantly increase the utilization of the SCP and continue to encourage plan sponsors, perhaps more than ever, to work toward timely identifying and resolving plan errors.

By 1998, the effort blossomed into what is now known as EPCRS.[11] Since then, the program has only continued to grow and expand.[12] EPCRS subsequently evolved into a comprehensive program that provides plan sponsors an opportunity to correct various errors[13] in plan administration, operation and documentation. Today, EPCRS consists of three component programs that combine a graduated system of fees and penalties designed to encourage plan sponsors to promptly identify and correct plan errors. More specifically, depending on the nature, extent, severity and duration of a failure, the plan sponsor may self-correct the error without IRS involvement (i.e., SCP), voluntarily correct the error with IRS approval by paying a compliance fee (Voluntary Correction Program (VCP)) or correct the error at the IRS's direction in connection with an IRS-initiated plan audit, typically resulting in IRS-imposed penalties and sanctions (Audit CAP).

To the IRS's credit, historical changes to EPCRS have generally been positive, resulting in, among other things,

[8] IRS Memo dated December 21, 1990.

[9] APRS was established in a March 1991 memorandum from John E. Burke, assistant commissioner (Employee Plans and Exempt Organizations) to assistant regional commissioners (Examination) and district directors of Brooklyn, Chicago and Cincinnati,). The memo was the transmittal for inclusion in the Employee Plans Examination Guidelines Handbook in the Internal Revenue Manual, located at IRM 7(10) 54.660 (July 19, 1992), reprinted in CCH Pension Plan Guide, Extra Edition, No. 843 (Apr. 17, 1991).

[10] *See* Rev. Proc. 92-89 (announcing the Voluntary Compliance Resolution (VCR) program, allowing plans with a favorable determination letter to disclose defects and make a related correction for the payment of a fixed fee); *see also* Rev. Proc. 94-62 (making the Voluntary Compliance Resolution program permanent), Rev. Proc. 94-16 (announcing the Walk-In Closing Agreement Program, which did not require a favorable determination letter and provided relief for plan document and demographic failures), Rev. Proc. 98-22, §16 (for a chronology of the IRS's prior programs).

[11] *See* Rev. Proc. 98-22 (modifying and consolidating the Administrative Policy Regarding Self-Correction (APRSC), VCR, Walk-in CAP and Audit CAP into one comprehensive system of correction programs for sponsors of retirement plans, the EPCRS).

[12] *See* Rev. Proc. 2000-16 (extending the correction programs for plans covered under Section 403(b) of the Code through a separate program known as the Tax-Sheltered Annuity Voluntary Correction Program); *see also* Rev. Proc. 2001-17 (making significant revisions to the IRS's correction program and consolidating it into three separate programs which still exist today), Rev. Proc. 2002-47 (expanding the availability of anonymous "John Doe" submissions and adding group submissions), Rev. Proc. 2003-44 (simplifying voluntary submissions, reducing fees for voluntary submissions and revising Audit CAP) and Rev. Proc. 2006-27.

[13] EPCRS permits the correction of "qualification failures," of which there are four types: plan document failures (resulting from a plan provision that violates the tax-qualification rules, including failures to amend for required law changes), operational failures (resulting from a failure to follow the terms of the plan), demographic failures (resulting from a failure to satisfy the minimum coverage and participation requirements under the Code), and employer eligibility failures (resulting from a failure to meet employer eligibility requirements to establish certain types of plans).

increased availability of corrections, added time for self-correcting significant operational errors, increased *de minimis* failure relief for certain small errors, reduced filing fees and sanctions, and reduced correction costs for certain errors. The Act's EPCRS-related pronouncements follow that trend by expanding the SCP to the correction of any eligible inadvertent failures remedied within a reasonable time after the failure is identified, making temporary corrections for automatic enrollment failures permanent, and establishing new rules providing additional guidance, flexibility and relief for overpayment corrections.

RISE OF SELF-CORRECTION AND EXPANSION UNDER THE SECURE 2.0 ACT

Self-Correction Limited to Operational Errors Under EPCRS

Because the SCP does not require any filing with the IRS or the payment of a fee or sanction, it has emerged as a particularly attractive avenue for correcting plan failures. However, historically, it has only been available to correct certain operational errors, not other types of failures addressed under EPCRS. Specifically, the SCP may be used to correct insignificant operational failures at any time and significant operational failures by the last day of the third plan year following the plan year for which the failure occurred.[14] Whether an operational failure is significant is determined by applying a non-exclusive list of factors, none of which is itself determinative.[15] These include:

- Whether other failures occurred during the period being examined
- The percentage of plan assets and contributions involved in the failure
- The number of years the failure has occurred
- The number of participants who could have been affected because of the failure.
- The number of participants affected relative to the total participants in the plan.
- Whether correction was made within a reasonable time after discovery of the failure
- The reason for the failure.[16]

Self-Correction Expanded to Eligible Inadvertent Failures Under SECURE 2.0 Act

The Act significantly increases the availability of self-correction by permitting self-correction of any "eligible inadvertent failure" to comply with the requirements of the Code. The term "eligible inadvertent failure" generally means and includes a failure that occurs despite the existence of practices and procedures designed to ensure compliance with the tax-qualification rules under the Code. However, such failures do not include failures that are egregious, related to the diversion or misuse of plan assets, or related to an abusive tax avoidance transaction.[17]

The definition of eligible inadvertent failures is extremely broad and does not appear to be limited to operational failures, as is the case under pre-Act guidance. This means that certain other types of failures previously ineligible for self-correction, such as those involving certain plan loan issues, can now be self-

[14] Rev. Proc. 2021-30, § 9.02.

[15] *See* Self-Correction Program (SCP) FAQs (March 14, 2023), available at: https://www.irs.gov/retirement-plans/self-correction-program-scp-faqs (noting that the list of factors does not contain all possible factors; no single factor determines the significance of the failure; failures will not be considered significant just because they occur in more than one year; the factors will not be applied in a way that prevents small businesses from being eligible for the SCP just because of their size).

[16] Rev. Proc. 2021-30, § 8.02.

[17] Rev. Proc. 2021-30, § 4.12.

corrected. In addition, plan document failures resulting, for example, from the failure to timely adopt a legally required amendment, may now be eligible for self-correction. Even more serious failures, such as those involving demographic and employer eligibility errors, not previously eligible for self-correction, could now be covered by the program. While the final scope of this change remains unclear, even in its most modest form it should drastically increase the availability of the SCP and the ability to make corrections under it.

This is also true of the changes to the rules governing the deadline for corrections under the SCP. In a marked departure from the current rules that apply to the SCP, the timing of the correction of eligible inadvertent failures under the Act is tied to the discovery of the error rather than the occurrence of the failure. According to Section 305(a) of the Act, all that is required for correction to be available under the SCP is that the eligible inadvertent failure not be identified by the Secretary of the Treasury or the Secretary's delegate (Secretary) "prior to any actions which demonstrate a specific commitment to implement a self-correction with respect to such failure" and that self-correction be "completed within a reasonable period after such failure is identified." There is no requirement that the error be insignificant or even that it be corrected within a set number of years after it is discovered. As if to add an exclamation point, the provision goes on to say that:

> "[T]he correction period is indefinite and has no last day, other than with respect to failures identified by the Secretary prior to any actions which demonstrate a specific commitment to implement a self-correction with respect to such failure or with respect to a self-correction that is not completed within a reasonable period, as described in the preceding sentence."

Those changes alone would represent a significant expansion of the SCP. But the Act does not stop there. The Act also eliminates certain restrictions that previously prevented plan sponsors from correcting certain common plan loan failures under the SCP, *e.g.*, failures involving loan limits. With the quick flick of a legislative pen, the Act authorizes treating plan loans failures in the same manner as any other eligible inadvertent failure, but with two modifications:[18]

- The US Department of Labor must treat a loan failure self-corrected in accordance with requirements governing eligible inadvertent failures as meeting the requirements of its Voluntary Fiduciary Correction Program (VFCP).[19] The reference is to the Department's voluntary enforcement program that allows plan officials to identify and correct certain transactions, including fiduciary violations relating to loans. The ERISA rules governing loans are structured as an exception to the prohibited transaction rules. Violations of the applicable loan rules typically run afoul of the ERISA fiduciary standards. This relief is therefore particularly welcome.
- The Act provides relief from the current EPCRS requirement to report corrected deemed distributions on Form 1099-R.

One intriguing, unanswered question is whether and to what extent self-correction by plan amendment may be used to correct eligible inadvertent failures. The Act does not say, exactly, but there is nothing in the Act that might preclude it. In addition, the Act confers on the IRS a good deal of discretion in this regard, noting that

[18] Act § 301.

[19] In late 2022, the US Department of Labor proposed to amend and restate the VFCP to make the program easier to use. 87 Fed. Reg. p. 71,164 (Nov. 21, 2022). Subsequently, in response to the Act, the Department reopened the comment period to allow commenters to address the new correction rules. 88 Fed. Reg. p. 9,408 (Feb. 14, 2023). The proposed rule included a reporting requirement for self-corrected deposit failures, which could be expanded to include reporting of self-corrected loan failures.

"[e]xcept as otherwise provided in the [Code], regulations, or other guidance of general applicability prescribed by the Secretary of the Treasury or the Secretary's delegate, . . ." any eligible inadvertent failure to comply with the Code's tax-qualification rules may be self-corrected under EPCRS. That the IRS has seen fit to recently expand self-correction by plan amendment indicates that it views the current contours of the rule as not inviting abuse. How much further the IRS is willing to go remains to be seen.

CONTINUED EXPANSION OF AVAILABLE CORRECTION UNDER EPCRS AND THE SECURE 2.0 ACT

Temporary Automatic Enrollment Corrections Added Under EPCRS

EPCRS provides a temporary safe harbor for correcting failures to properly apply a plan's automatic contribution feature, including a failure to implement an employee's deferral election in connection with automatic enrollment or to apply the plan's automatic escalator, if the failure is corrected in a timely manner.

Specifically, a plan sponsor does not have to make a corrective contribution for missed employee contributions that otherwise would have been made if a proper enrollment election is implemented by the earlier of (i) 9½ months after the end of the plan year in which the failure begins or (ii) the first pay date in the month following the month the participant notifies the plan sponsor of the error. The plan sponsor must still make a corrective contribution for any missed matching or other employer contributions that would have been received had the failure not occurred, however, and must adjust that contribution for earnings. In addition, to take advantage of this correction, certain procedural requirements must be satisfied (*e.g.*, provision of timely notice of the error).[20]

This temporary safe harbor correction, first introduced in 2015 and temporarily extended in 2021, makes adopting automatic contribution features easier for plan sponsors by implicitly acknowledging that failures involving automatic contributions are common, may span longer periods of time than regular contribution errors and, therefore, could prove costly to correct.

Permanent Automatic Enrollment Corrections Cemented and Expanded by the SECURE 2.0 Act

Section 350 of the Act makes the temporary safe harbor for correction of automatic enrollment errors permanent. It also expands and clarifies the safe harbor by specifying that it can be used when the failure affects terminated employees, and that the correction is available even after such an error is identified by the IRS. By doing so, the Act further encourages the use of automatic enrollment and escalation features by providing additional protection to plans that utilize them.

EXPANSION AND CLARIFICATION OF RULES REGARDING OVERPAYMENTS UNDER EPCRS AND THE SECURE 2.0 ACT

Rules Regarding Recoupment of Certain Overpayments Under EPCRS

Neither ERISA nor the tax code contain specific rules regarding the recovery of overpayments. However, plan sponsors are generally expected to operate their retirement plans in accordance with the plan terms, which necessarily means not overpaying benefits to plan

[20] Act § 350.

participants. As a result, historically, EPCRS has provided a mechanism for plan sponsors to address the tax qualification issues associated with overpayments.

Initially, under EPCRS, plan sponsors were required to attempt to recoup virtually all overpayments (plus interest) from the recipients of those amounts, and when they could not do so, the plan sponsor was required to contribute (or cause another person to contribute) the difference. However, later iterations of EPCRS relaxed and expanded the rule, with the most recent version of EPCRS prescribing several key rules for addressing an overpayment:

- A plan sponsor is not required to seek repayment of a *de minimis* overpayment (*i.e.*, an overpayment of $250 or less) and is not required to notify the recipient of that amount that it is not rollover eligible. However, if the otherwise *de minimis* overpayment resulted from a violation of a statutory limit, the plan must advise the participant, in writing, that it is not eligible for favorable tax treatment, including rollover.[21]
- A plan sponsor may retroactively amend its plan to incorporate the overpaid amount as a permissible benefit, thereby conforming the plan terms to its operation with respect to the amount received, meaning the plan is treated as if no overpayment was made. The amendment must satisfy all applicable qualification requirements and it may not be discriminatory.[22]
- A plan sponsor may recoup overpayments by permitting recipients to make repayments in a lump sum, through installment payments or by a reduction of future payments.[23] Where such repayments are insufficient to make up the amount overpaid (plus interest), the plan sponsor (or another party) generally is required to make up the difference. However, there are exceptions for overpayments from defined benefit plans that meet certain minimum funding levels[24] and for overpayments from defined contribution plans that do not adversely affect any other participant (*e.g.*, when the overpayment was simply an amount to which the participant was otherwise entitled prior to a distributable event).[25]

Under these rules, EPCRS no longer requires plan sponsors to seek recovery of overpayments in all situations. However, it does still require plan sponsors to notify participants who received such overpayments (other than *de minimis* amounts) that they are not eligible for favorable tax treatment (*i.e.*, tax-free rollovers) and, in many instances, to make the plan whole for the overpayment if the participant fails to do so. In addition, it does not include any fiduciary relief in instances where plan sponsors choose not to seek repayment on behalf of their plans.

New Rules for Correcting Overpayments Clarified and Expanded by the SECURE 2.0 Act

The Act provides new overpayment rules that address continued compliance with the Code and, for the first time, fiduciary protection under ERISA. These new rules establish guidelines that apply in situations where fiduciaries seek to recoup overpayments, but also provide leeway in situations where fiduciaries choose not to seek recovery of inadvertent overpayments, *i.e.*, those that are not the fault of the participant and do not result from misrepresentations, misstatements or

[21] Rev. Proc. 2021-30, § 6.02(5)(c).
[22] Rev. Proc. 2021-30, § 6.06(3)(a), (4)(a).
[23] Rev. Proc. 2021-30, § 6.06(3)(c),(d); Appendix B, § 2.05.
[24] Rev. Proc. 2021-30, § 6.06(3)(d)(i); Appendix B, § 2.05(1), (3)).
[25] Rev. Proc. 2021-30, § 6.06(3)(b)(iii).

knowledge that an amount is greater than the amount due.[26]

Recovering Overpayments

Where a fiduciary seeks to recoup an overpayment from a participant or beneficiary, the Act provides that the fiduciary: [27]

- May not charge interest or other additional amounts (*e.g.*, collection costs or fees)
- May not, in cases involving reduction of future annuity payments, (i) recoup more than 10% of the overpayment in a calendar year, or (ii) reduce future benefit payments below 90% of the periodic amount otherwise payable under the terms of the plan
- May not use threats of litigation (unless the fiduciary believes the amounts it recovers are likely to exceed the cost of litigation) or use a collection agency or similar third party (unless the participant or beneficiary ignores or rejects efforts to recoup the overpayment following a final judgment or settlement) to attempt to recoup overpayments
- May not recoup past overpayments to a participant from the spouse or beneficiary of such participant
- May not attempt to recoup overpayment that occurred more than three years before the participant or beneficiary was first notified in writing of the error
- Must permit a participant or beneficiary to contest recoupment of an overpayment under the plan's claims procedures
- May consider the hardship that recoupment would impose on the participant or beneficiary in determining the amount of recoupment to seek.

Not Recovering Overpayments

The Act also gives retirement plan fiduciaries flexibility to choose not to seek recovery of inadvertent overpayments without being deemed to have breached their fiduciary duties under ERISA.[28] The new rules include relief in situations where plan sponsors choose not to seek repayment of an overpaid amount from the recipient and do not repay the plan themselves. However, the relief is only available under a defined contribution plan if the failure to repay the plan does not result in an impermissible forfeiture of benefits and is only available under a defined benefit plan if the failure to do so does not adversely affect the ability of the plan to pay benefits due to other participants and beneficiaries. In addition, in each case, the plan must have established, and must have followed, prudent procedures to prevent and minimize overpayment of benefits.

Similarly, the Act provides that plan sponsors will not fail to satisfy the requirements of the Code simply because they choose not to recoup an overpayment or amend their plans to increase benefits to address past overpayments. However, this does not relieve plan sponsors of their obligation to prevent impermissible forfeitures or reductions of benefits.

The provision also includes rules governing the rollover of overpayments. The provision amends the Code to permit the rollover of inadvertent overpayments provided that the payment would have been an eligible rollover distribution. Thus, participants and beneficiaries will not suffer adverse tax consequences by reason of

[26] *See* Act § 301.
[27] *See* Act § 301.
[28] *See* Act § 301.

rolling over overpayments. Similarly, the return of an overpayment to the plan from the rolled over amounts is treated as a permissible rollover.

EXPANSION OF EPCRS TO ENCOMPASS IRAS UNDER THE SECURE 2.0 ACT

Historically, EPCRS was not available to correct errors in the administration of individual retirement accounts (IRAs). The Act changes this. The rules described above governing the correction of inadvertent failures will now apply to IRAs. As is the case with sponsors of qualified plans, IRA providers must have practices and procedures in place that are designed to promote and facilitate overall compliance in form and operation with the applicable requirements of law, and they must be prepared to demonstrate their compliance with these practices and procedures. The Act provides for the waiver of the excise tax on failures to take a required minimum distribution and permits the non-spouse beneficiaries to return distributions to an inherited IRA. Future guidance will address corrections involving the failure to withhold taxes from IRA distributions and transfers and rollovers to incorrect customer accounts, among others.

CONCLUSION

EPCRS has been hugely successful. The Act's EPCRS-related provisions build on a solid regulatory foundation that has been evolving for decades. The IRS should be justifiably proud of its work here. Congress has expressly affirmed in the Act the value of voluntary plan corrections, and it has provided the IRS with a robust regulatory structure from which to further that goal.

The Act directs the IRS to update its EPCRS guidance within two years of the Act's enactment. Here are some of the things that it might do:

- Address whether the distinction between significant and insignificant failures continues to be necessary. Congress seems more concerned with inadvertence than severity. The direction to plan sponsors is clear: have and follow policies and procedures, and fix problems when you find them.
- Address the potential application of the SCP to demographic and plan document failures.
- Clarify that the treatment of terminated employees under the auto-enrollment safe harbor correction method apply equally to terminated employees impacted by other missed contribution errors.
- Expand missed deferral safe harbors, which provided for reduced corrective contributions when errors are identified after shorter periods of time, to after-tax contributions.
- Expand the ability to correct by plan amendment to other types of failures. Congress identified loans as one example, and there are others. The rules governing automatic enrollment, for example, may not go far enough, and additional relief may be warranted for eligibility-related failures that do not involve auto-enrollment.
- Expand EPCRS to allow correction by retroactive plan amendment in certain instances that result in a cut-back of a participant's benefit. These corrections are permitted, of course. They are processed under the VCP or rules governing closing agreements, albeit using EPCRS principles and procedures. Some of the most daunting qualification failures that plans encounter fall into this category, and it is certainly understandable for the IRS to want to ensure corrections with this type of impact are limited to appropriate situations. But it might be time for the IRS to revise EPCRS to accommodate this class of corrections to some extent.

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