

Publications

IRS Expands Self-Correction Program Primarily to Facilitate Plan Loan Corrections

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The IRS recently provided some welcome relief by expanding the types of failures eligible for self-correction. Revenue Procedure 2019-19, which contains an updated Employee Plans Compliance Resolution System (“EPCRS”), provides that certain plan document and operational failures, including some plan loan failures, may now be corrected through self-correction, without the added burden and expense of making voluntary correction program (“VCP”) filings with IRS.

The EPCRS program for correcting operational and other errors common to tax-qualified and section 403(b) plans continues to evolve slowly. Each iteration favorably addresses a few more issues, though the Service is careful not to make things too easy. As discussed below, this update is no exception. The changes included in the Revenue Procedure are effective April 19, 2019, and while not explicitly stated, it is reasonable to follow this guidance for any corrections made on and after such date.

Self-Correction Program Expansion for Plan Loans

For many years, practitioners and plan sponsors have sought expansion of the self-correction program to include correction of plan loan failures. This iteration of EPCRS permits such self-correction for a number of these failures:

- **Missed Payments (Defaulted Loans):** Where a participant fails to repay a plan loan in accordance with plan terms – e.g., a loan that would otherwise be defaulted for late, incorrect or no payments – self-correction is now available for corrective repayments of the loan. Specifically, these loans may be corrected by a single-sum repayment, reamortization of the outstanding loan balance, or a combination of the two.
- **Reporting:** Where a participant loan is not fully corrected and Form 1099-R reporting is required to report a “deemed” distribution, a plan sponsor may report the deemed distribution in the year of correction, rather than the year of failure, without an accompanying VCP filing.

- **Spousal Consent:** Where spousal consent is otherwise required but not obtained for a loan (e.g., under a money purchase pension plan), self-correction is available with respect to the notification of the participant and spouse so that spousal consent to the loan may be obtained. If consent is still not obtained, any further correction must be made under VCP or Audit CAP.
- **Too Many Loans:** As with the long-standing availability of self-correction for loans granted under a plan that does not permit plan loans, self-correction is now available where a participant is permitted to take out a number of loans which exceeds the number available under the plan. The failure may be corrected by a retroactive plan amendment to provide for the number of loans that were made available if: (1) the amendment satisfies Code section 401(a); (2) the plan would have satisfied Code sections 72(p) and 401(a) had the amendment been a part of the plan when loans were first available; and (3) the loans, including those in excess of the number permitted under the plan, were available to all participants (or only to one or more participants who were nonhighly compensated employees).

Note that not all loan failures may be self corrected. In particular, if the loan violates the dollar limit, maximum loan period, or level amortization requirements under Code section 72(p)(2)(A), (B) or (C), VCP is still the proper correction vehicle.

We note also that Department of Labor's Voluntary Fiduciary Correction Program ("VFCP") allows certain default loans made to parties in interest under ERISA to be corrected under an IRS VCP filing. The VFCP has not been updated to permit such default loans to be corrected via a self-correction. Further, as a general matter, EPCRS does not provide relief from any prohibited transaction excise taxes.

Self-Correction Program Expansion for Certain Operational and Plan Document Failures

The Revenue Procedure added certain other operational and plan document failures to be fixed by self-correction, although the relief may be rather limited. First, self-correction is now available to correct operational failures through a retroactive plan amendment to conform plan terms to plan operations if: (1) the amendment would result in an increase of a benefit, right, or feature; (2) such increase is available to all eligible employees; and (3) providing the increase is permitted under the Code and satisfies the general correction principles of EPCRS (this includes nondiscrimination requirements).

Second, for the first time, plan document failures (e.g., failure to adopt required or interim amendments), other than the initial failure to adopt a qualified plan or the failure to timely adopt a written 403(b) plan document, may be corrected through self-correction if the plan is subject to a favorable IRS letter and the correction is made within the required time period for correcting significant failures through self-correction (generally two plan years). Notably, this type of plan document failure does not extend to discretionary plan amendments.

Additional Examples of Insignificant Operational Failures

The Revenue Procedure also includes a cross-reference to the "Correcting Plan Errors" webpage on the IRS website for pending additional examples of insignificant violations, which are intended to provide additional guidance in making the facts and circumstances determination whether you are eligible for self-correction.

Observations

The IRS expansion of self correction for the first time to certain loan failures is a key development that we have advocated for many years in order to reduce the burden on plan sponsors and participants as a result of rather minor violations. The Revenue Procedure also notes that the IRS and Treasury continue to consider comments submitted regarding the self-correction of plan overpayments. Further, while the IRS has expanded the failures eligible for self-correction, the parameters of self-correction still apply, including the time period for correcting significant failures.

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