

Publications

The IRS's Pre-Examination Pilot Program Enters Phase Two

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The IRS announced earlier this month that it is [extending its pilot program](#) under which retirement plan sponsors are given 90 days' notice that their plan has been selected for examination, with the opportunity to avoid a full audit by correcting certain errors and demonstrating compliance with the applicable Internal Revenue Code rules by the end of the 90-day pre-examination period. We covered phase one of the pilot program in detail [here](#).

The key features of the pre-examination pilot program remain the same. Under the pilot program, the IRS will notify plan sponsors by letter that their retirement plans have been selected for examination. This letter is sent 90 days before an IRS examination would otherwise begin, and triggers a 90-day period during which plan sponsors may review their plan document and operations to assess compliance with current tax law requirements. If the sponsor does not respond to the letter, the IRS will contact the sponsor to schedule an examination. If the sponsor does respond, the IRS will review any documentation submitted by the plan sponsor and determine if the IRS agrees with the sponsor's conclusions and that any errors have been appropriately corrected. If so, the IRS will issue a closing agreement to conclude the examination. If the IRS disagrees with the sponsor's conclusions, it may conduct either a limited or full scope examination.

A key advantage of the pre-examination pilot program is that any errors identified by the sponsor may be corrected using the principles set forth in the Employee Plans Compliance Resolution System ("EPCRS"), Revenue Procedure 2021-30. While not mentioned in the IRS notice, errors that are identified presumably may also be corrected in accordance with Notice 2023-43 (covered [here](#)), which provides initial guidance on the expansion of self-corrections under the SECURE 2.0 Act of 2022.

If errors are identified that are not eligible to be self-corrected, the plan sponsor can seek a closing agreement with the IRS. In negotiating the closing agreement, the IRS will apply the Voluntary Correction Program ("VCP") fee structure to determine the sanction amount, in lieu of the much higher Audit Closing Agreement Program ("Audit CAP") fees which ordinarily apply to errors identified by the IRS on examination.

Insights and Questions

The notice states that 100 letters were mailed to plan sponsors under phase one of the pilot program, and that the response rate was 72%. The notice does not state how long phase two of the pilot program will last, or how many letters will be sent under phase two of the program, but we understand from informal discussions with the IRS that the program is again limited to 100 letters that will be mailed on a staggered basis, and will focus on 402(g) limit compliance. The announcement indicates, as it did for phase one, that at the end of the pilot the IRS will evaluate the program's effectiveness and decide if the program should be part of the IRS's ongoing compliance strategy.

As we observed when phase one was announced, the pilot program offers a welcome opportunity to those plan sponsors selected by the IRS to correct plan failures at a reduced cost. However, 90 days is not a lot of time to conduct a compliance review and correct potential failures. Those plan sponsors selected by the IRS will need to act quickly and coordinate with legal counsel and other plan stakeholders in order to take full advantage of the pilot program.

If properly structured, a law firm-assisted response to the IRS under the pilot program may qualify for the attorney-client privilege. We also believe it is important for plan sponsors to take a proactive approach and conduct periodic self-audits, which are of even greater importance now that the IRS no longer routinely issues determination letters. Groom has developed a [Document Compliance Service \("DCS"\)](#) through which plan sponsors can request an opinion intended to confirm continued satisfaction of the IRS document requirements applicable to the sponsors plan(s).

If you have questions regarding document and operational compliance or the IRS pilot program, please reach out to the authors or your regular Groom attorney.