July 30, 2021

EPCRS Provides More Retirement Plan Self-Correction Opportunities

By: Tonie Bitseff and Jenni Krengel

On July 16, 2021 the IRS issued Revenue Procedure 2021-30, which modifies and supersedes Revenue Procedure 2019-19, expanding the Employee Plans Compliance Resolution System ("EPCRS"). EPCRS is a program for correcting documentation and operational failures for retirement plans that are intended to be qualified plans under Sections 401(a) and 403(b) of the Internal Revenue Code. The IRS created EPCRS in 1998, combining four prior correction programs for qualified plans into one.[1] The IRS regularly releases Revenue Procedures that update and summarize the procedures under EPCRS. The changes included in Revenue Procedure 2021-20 make it easier to correct operational and documentary qualification problems in retirement plans. They provide new methods for correcting certain benefit overpayments, which are discussed in Buchalter Client Alert, IRS Adds New Overpayment Correction Methods to EPCRS, July 19, 2021, and they significantly expand opportunities for self-correction.

This is a good time for retirement plan sponsors and plan administrators who are not familiar with EPCRS to acquaint themselves with the basic EPCRS opportunities, particularly the opportunity to self-correct many common retirement plan errors. Self-correction has been expanded many times since it was first introduced in 1992. With expansion, including the most recent guidance, self-correction is a convenient and cost effective way to preserve the qualified status of retirement plans and to mitigate risk associated with compliance problems.

EPCRS Structure

The current EPCRS is divided into three sub-programs – SCP, VCP and Audit CAP. Audit CAP requires sponsors to pay significant punitive fees and involves substantial IRS oversight to correct plans when the IRS uncovers qualification failures. SCP and VCP are initiated by the plan sponsor or fiduciary when the plan is not under IRS audit.

VCP. VCP requires correction and supporting documentation to be submitted to the IRS for review along with a user fee based on the total assets in the plan. This fee, which ranges from $1,500 for plans with $500,000 or less in assets to $3,400 for plans with over $10,000,000 in assets in 2021, is set forth in

[1] EPCRS combines the Audit Closing Agreement Program that was a pilot program introduced in 1991 focused on correcting errors once the IRS has already discovered them, APRS that was a an Administrative Policy Regarding Sanctions put into place in 1991 to avoid plan disqualification for specified operational issues and expanded in 1996 and renamed APRSC, VCP that was an experimental voluntary correction program established in 1992 and made permanent in 1994 for plans with a favorable determination letter that could be accessed by submitting corrections to the IRS and paying a fixed fee, and Walk-In CAP which was a closing agreement program for plans without a favorable determination letter. In 1999 The Tax-Sheltered Annuity Correction Program that was originally established in 1995 to provide correction procedures for 403(b) plans was added to EPCRS as well. The 2006 Revenue Procedure expanded the use of VCP and Audit CAP to ''orphan plans'' (or, as the Department of Labor (DOL) refers to them, ''abandoned plans''). References to any of these programs are references to corrections that are now administered under one program—EPCRS.

Appendix A of Revenue Procedure 2021-4 (and its annual successors). The VCP user fees are much less than Audit CAP fees. VCP is used to correct significant operational failures that are more than three years old, as well as plan document failures (usually caused by failure to update plan language), employer eligibility failures (usually caused by for-profit organization sponsorship of a plan intended to qualify under Internal Revenue Code Section 403(b)), and demographic failures when a plan fails certain annual nondiscrimination tests (such as the minimum coverage test) and does not correct within the timeframe permitted by IRS rules. Revenue Procedure 2021-30 eliminates a VCP anonymous submission procedure that required payment of fees and replaces it with an anonymous, no-fee, VCP pre-submission conference procedure effective January 1, 2022. The ability to participate in a pre-submission conference without incurring a fee will encourage corrections and will help plan sponsors decide how to present and structure submissions.

SCP: To utilize SCP, the IRS requires that the plan has in place administrative practices and procedures designed to ensure compliance with the Code's qualification rules, which means that the operational failure must have occurred as a result of an oversight or mistake in application, or because of the inadequacy of the procedures.

Operational failures can be corrected under SCP within three years following the occurrence. Insignificant failures have an unlimited correction window and can even be self-corrected under audit. Previously, the corrections for significant failures needed to be substantially completed by the end of the second year following the failure. Revenue Procedure 2021-30's extended deadline for significant failure self-correction also extends the safe harbor correction method for employee elective deferral failures lasting more than three months but not beyond the extended SCP correction period for significant failures. Revenue Procedure 2021-30 additionally delays the sunset of the safe harbor correction method to correct missed elective deferrals for eligible employees subject to an automatic contribution feature in 401(k) or 403(b) plans. A special rule continues to apply to mergers, acquisitions, and similar transactions that allows the correction and adoption of administrative practices to take effect after the merger for transferred plans, as long as the correction is made and the administrative practices take effect by the end of the first plan year that begins after the corporate merger, acquisition, or other similar transaction.

The IRS provides a list of factors to be considered when making a determination that a failure is insignificant, including the number of participants involved, the amount of contributions/plan assets involved, the number of years the failure occurred, and why it occurred. The sponsor is eligible for self-correction under the insignificant policy only if the operational failures in the aggregate are insignificant.

Until recently, operational failures that require retroactive plan amendments to conform the terms of the plan to its prior operations were permitted only with respect to the failures specifically identified in the Revenue Procedure, which included amending the plan to increase the allocations for employees below the §401(a)(17) limit so that the allocation becomes the same percentage of compensation as contributed for the employee having the §401(a)(17) failure; amending the plan to permit hardship distributions if the plan has been providing such distributions; amending the plan to permit plan loans if the plan had been providing such loans or to permit the participant to obtain a number of loans that exceeds the number of loans permitted under the terms of the plan; and amending the plan to reflect that the plan has admitted employees at an earlier entry date than specified in the plan document (provided the only employees affected by the amendment are predominately non-highly compensated employees). Now, retroactive amendment is also allowed for non-amender failures, failures to adopt good faith amendments, failures to

adopt interim amendments, and to increase a permitted benefit, right, or feature. Effective July 16, 2021, Revenue Procedure 2021-31 removes a previous requirement that the increase to a permitted benefit, right, or feature had to apply to all participants in the plan.

Correction Principles

EPCRS focuses on common defects in qualified plans with correction either through retroactive plan amendment or through a correction method that will restore the plan to its qualified status without compromising participants in the plan. Any self-correction should adhere to the IRS 's general correction principles.

- The correction method should be applied consistently in correcting failures of the same type in the same plan year and should restore the participants/ beneficiaries to the position they would have been in had the failure not occurred making full correction to all affected participants (former and active) and authorized beneficiaries for all tax years (not simply to those open under the statute of limitations).
- The correction method must keep assets in the plan unless the Code or official guidance permits correction through distribution of assets, must take into account the terms of the plan at the time of the failure, and must adjust for earnings (or losses) and forfeitures that would have applied. The interest rate used by the DOL's VFCP Online Calculator is deemed to be a reasonable interest rate.
- The correction method should be ''reasonable and appropriate'' for the failure using correction methods that are permitted by other governmental agencies for similar failures or corrections, using correction methods noted under the appendices of the revenue procedure that are automatically deemed to be reasonable and appropriate for correcting the related qualification failure, or using correction methods that resemble one otherwise provided under the Code, under the regulations, or under other authoritative guidance. Reasonable estimates may be used in making a correction if it is impossible to make precise calculations or if the administrative costs of exact calculations outweigh the difference between the proposed correction method and the precise corrective amount. Corrections of small distributions ($75 or less) do not have to be made if the administrative costs associated with the payment of the benefit would exceed the amount of the distribution. Corrections of small excess amounts and recovery of small overpayments ($250 or less/participant, which was increased from $100 by Revenue Procedure 2021-10) are not required.
- Discriminatory defects must be resolved in favor of the non-highly compensated employees, but correction may take into account a correction method recognized by the DOL. The correction must include a procedure to locate former participants/beneficiaries, but distributions to participant whose location remains unknown are not required.
- If the plan is subject to ERISA, correction under the DOL's VFCP will be deemed correction for a similar failure under the Code. For a failure that results from the employer either having ceased to exist or no longer maintaining the plan, or similar reason, the permitted correction will be to terminate the plan and distribute assets to participants/beneficiaries in accordance with the DOL standards and procedures. The IRS retains authority as to whether to require full correction for orphaned plans.

Main Take-aways

Most compliance problems with retirement plans can be corrected, but in order to rely on the correction, it must follow EPCRS. As soon as an error is discovered, the plan's administrator and sponsor should

consult with the current Revenue Procedure or the plan's advisors to identify the most cost effective correction method. Delay in correction will make the process more expensive and more difficult, so delay should be avoided. If correction is made as soon as possible, EPCRS provides cost effective compliance solutions. If there is a question about whether or how to file a correction under VCP for a significant failure that was not corrected within the three-year correction period, an attorney or representative can now engage in an anonymous pre-filing conference without incurring an IRS user fee.

If you have questions about retirement plan compliance or corrections, please contact Jenni Krengel, Tonie Bitseff, or any of Buchalter's Employee Benefits and Executive Compensation team.

Jenni Krengel
Shareholder
(415) 227-0900
jkrengel@buchalter.com

Tonie L. Bitseff
Special Counsel
(206) 319-7042
tbitseff@buchalter.com

Kalley R. Aman
Shareholder
(213) 891-5028
kaman@buchalter.com

Laurent Badoux
Shareholder
(480) 383-1867
lbadoux@buchalter.com

James Andrew Caprile
Shareholder
916-945-5244
jcaprile@buchalter.com

Lee C. Cheng
Shareholder
(949) 224-6471
lcheng@buchalter.com

Arthur Chinski
Shareholder
(213) 891-5060
achinski@buchalter.com

Joseph K. Fletcher, III
Shareholder
(213) 891-5079
jfletcher@buchalter.com

Martin P. Florman
Shareholder
(949) 224-6281
mflorman@buchalter.com

Michael W. Shackelford
Shareholder
(503) 226-8488
mshackelford@buchalter.com

Philip J. Wolman
Shareholder
(213) 891-5390
pwolman@buchalter.com

Nikole K. Zoumberakis
Senior Counsel
(213) 891-5123
nzoumberakis@buchalter.com

This communication is not intended to create or constitute, nor does it create or constitute, an attorney-client or any other legal relationship. No statement in this communication constitutes legal advice nor should any communication herein be construed, relied upon, or interpreted as legal advice. This communication is for general information purposes only regarding recent legal developments of interest, and is not a substitute for legal counsel on any subject matter. No reader should act or refrain from acting on the basis of any information included herein without seeking appropriate legal advice on the particular facts and circumstances affecting that reader. For more information, visit www.buchalter.com.