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IRS Expands Self-Correction Program

Posted on May 02, 2019

On April 19, 2019 the IRS issued Revenue Procedure 2019-19, which updates the comprehensive system of correction programs for sponsors of retirement plans.

The system is known as the Employee Plans Compliance Resolution System (**"EPCRS"**) and permits plan sponsors to correct failures via: the Self-Correction Program (**"SCP"**), the Voluntary Correction Program (**"VCP"**) and the Audit Closing Agreement Program (**"Audit Cap"**).

The IRS' policy principles behind EPCRS are to encourage sponsors and administrators to:

- establish administrative practices and procedures to ensure plans operate in compliance with applicable law;
- voluntarily and timely correct plan failures; and
- to promote the voluntary correction through consistent application of EPCRS and a system of graduated fees and sanctions to incentivize prompt correction.

In keeping with the policy, SCP allows sponsors and administrators to correct certain plan failures without contacting the IRS or paying a user fee. VCP addresses failures that are not eligible for self-correction and, where appropriate, allows a plan sponsor to obtain the IRS's written agreement that specified failures were properly corrected. The Audit CAP is used to resolve failures discovered during an IRS audit that cannot be self-corrected.

Rev. Proc. 2019-19 expands the Self-Correction Program to:

- allow self-correction of certain plan document failures;
- expanded options and relief from deemed distributions associated with loan failures; and
- include opportunities for correcting certain operational failures by retroactive plan amendment.

Correcting Certain Plan Document Failures Under SCP

This relief only applies to IRC 401(a) (including 401(k)) and IRC 403(b) retirement plans. The failures must be corrected by the end of the second plan year following the year of the failure. The plan must have a favorable determination letter [in the case of an individually designed plan, a favorable determination letter from the IRS and in the case of a pre-approved plan, a favorable IRS opinion or advisory letter].

SCP is not available to correct a failure to timely adopt an initial IRC 401(a) plan document, or a failure to adopt an initial written 403(b) plan. Corrective amendments to resolve demographic failures [coverage failures] that were not timely adopted are not eligible for SCP and must be resolved under VCP or Audit CAP.

Correcting Plan Loan Failures Under SCP

For a loan that does not meet the exceptions of IRC 72(p)(2) or is in default and not timely corrected, the Rev. Proc. allows the deemed distribution to be reported in the year of **correction** instead of the year of the failure.

If the plan fails to obtain spousal consent for a plan loan as required by plan terms, the correction requires notice to the participant and the participant's spouse (who was married to the participant at the time of the loan) and obtaining the spousal consent to the plan loan. If consent is not available, VCP relief may be available. If the number of plan loans to a participant exceeds the number of loans permitted by written plan terms, correction by retroactive plan amendment to conform the written plan document to the plan's operation is permitted if the other requirements of IRC 72(p)(2) are satisfied and the loans in excess of the number permitted by plan terms were available to all participants or solely to one or more non-highly compensated employees.

Retroactive Amendments Under SCP

Previously, retroactive amendments were available only through VCP. Now, an operational error may be corrected through SCP if the following conditions are satisfied:

- the corrective amendment results in an increase of a participant's benefit, right or feature;
- the increase in benefit, right or feature is provided to all employees eligible to participate in the plan; and
- the increase in benefit, right or feature is otherwise permitted under the nondiscrimination, minimum coverage and anti-cutback provisions of the Internal Revenue Code.

SCP is not available to retroactively amend the written plan to conform to the plan's operation if the operational failure did not provide for a uniform increase in benefits, rights or features to all employees eligible to participate in the plan. In these cases, correction may be available under VCP or, if the plan is under audit, Audit CAP.

EPCRS has been a very successful program for both the IRS and plan sponsors and administrators. Expansion of the SCP opportunities provides even greater encouragement for corrective compliance.

If you have questions as to eligibility for self-correction, the manner in which it should be undertaken, or other compliance issues, we are happy to discuss them with you.

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