AMERICAN RETIREMENT ASSOCIATION

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Working for America's Retirement

October 14, 2021

Internal Revenue Service
Attn: CC:PA:LPD:PR (Rev. Proc. 2021-30)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

Submitted via Regulations.gov

Re: **Revenue Procedure 2021-30, Public Comments Invited on How to Improve EPCRS**

The American Retirement Association ("ARA") is writing in response to Internal Revenue Service ("IRS") Rev. Proc. 2021-30, regarding comments for future improvements of the Employee Plans Compliance Resolution System ("EPCRS"). These comments are in addition to the comments included in our October 4, 2021, letter regarding the correction of late restatements of pre-approved plans. ARA thanks the Internal Revenue Service ("IRS" or "Service") and the Department of the Treasury for the opportunity to provide input on these very important matters.

The ARA is the coordinating entity for its five underlying affiliate organizations representing the full spectrum of America's private retirement system, the American Society of Pension Professionals and Actuaries ("ASPPA"), the National Association of Plan Advisors ("NAPA"), the National Tax-Deferred Savings Association ("NTSA"), the American Society of Enrolled Actuaries ("ASEA"), and the Plan Sponsor Council of America ("PSCA"). ARA's members include organizations of all sizes and industries across the nation who sponsor and/or support retirement savings plans and are dedicated to expanding on the success of employer-sponsored plans. In addition, ARA has nearly 31,000 individual members who provide consulting and administrative services to sponsors of retirement plans. ARA's members are diverse but united in their common dedication to the success of America's private retirement system.

ARA thanks the Service for its continuous improvement and expansion of EPCRS. In particular, the ARA thanks the IRS for the most recent expansion of the self-correction program (SCP) under EPCRS found in Rev. Proc. 2021-30. The ability to correct errors on a voluntary basis enhances compliance and encourages employers to sponsor retirement programs for their employees.

Summary

ARA recommends that the Service adopt the following improvements to EPCRS:

- Revise the provisions regarding self-correction by retroactive amendment to:
  - Permit retroactive correction by plan amendment for the failure of a participating (related) employer to adopt the plan, and
  - Clarify what is meant by the requirement to increase a "benefit, right, or feature" with respect to permissible corrections of operational failures by retroactive amendment.
- Extend the safe harbor correction methods described in Appendix A .05(9) to (a) deferral failures involving after-tax contributions, (b) partial-year exclusion failures, (c) terminated

participants, and (d) participants who did not receive notice within 45 days of correct deferrals commencing.

- Provide additional examples of "significant" and "insignificant" operational failures.
- Add new earnings adjustment calculation methods to the existing safe harbor methods in EPCRS, Appendix B, Section 3.
- Clarify the missed deferral opportunity for an excluded NHCE in a non-safe harbor plan if no NHCE made a deferral to the plan during the applicable plan year.

Discussion

I. Correction by Retroactive Amendment under SCP

ARA thanks the Service for its continued evaluation of SCP and the most recent expansion of the ability to use retroactive amendments under SCP. The myriad rules applicable to retirement plans are difficult for any plan sponsor to navigate, and particularly difficult for small businesses that may not employ dedicated benefits personnel. The ability of plan sponsors to voluntarily correct plan errors at a reasonable cost is important in a sponsor's decision to adopt and maintain a retirement plan. ARA believes expansion of SCP will promote plan sponsor compliance.

a. Failure of a related participating employer to adopt the plan

Section 4.05(a)(i) of Rev. Proc. 2021-30 permits a plan to correct an operational failure by plan amendment in order to conform the terms of the plan to the plan's prior operations if the plan amendment would result in an increase of a benefit, right, or feature. A frequent error that our members see is participation by employees of a company related to a plan sponsor (*i.e.,* a member of a controlled group or an affiliated service group) but the failure of the related business to sign a participating employer agreement. This error commonly occurs when a business reorganizes its structure, transfers employees among related companies, or acquires another entity. In this instance, the related entity's employees are permitted to participate in the plan despite the fact the entity is not a participating employer under the terms of the plan. It is not clear whether the addition of a participating employer's employees is a "benefit, right, or feature" that may be corrected under SCP by retroactive amendment. ***ARA recommends*** that the Service revise Section 4.05 to specifically permit plan sponsors to adopt a retroactive amendment to correct an error involving the participation of a related employer's employees (who otherwise meet the plan's eligibility conditions) when that employer did not take the necessary steps to adopt the plan.

b. Meaning of a "benefit, right, or feature" when correcting operational failures

As noted above, Section 4.05(a)(i) of Rev. Proc. 2021-30 permits a plan to correct an Operational Failure by plan amendment if the plan amendment would result in an increase of a "benefit, right, or feature." The phrase "benefit, right, or feature" has a specific meaning in other contexts applicable to retirement plans, such as under Treasury Regulation § 1.401(a)(4)-4(e).[1] Under this regulatory

[1] For example, the nonelective contribution under the plan is not an optional form of benefit, ancillary benefit or any other right or feature as defined in the regulation. See our November 9, 2020 comment letter for additional information. https://araadvocacy.org/wp-content/uploads/2020/11/20.11.09-ARA-Comment-Letter-to-IRS-Employee-plan-compliance-resolution-system.pdf

definition, the amount of any benefit accruals (e.g., contributions or allocations) are not a "benefit, right or feature." Therefore, for example, it is not clear whether a plan sponsor can use SCP to adopt a corrective amendment if the plan provides for a 3% nonelective employer contribution but the employer erroneously made a 5% nonelective contribution. **ARA recommends** that the Service clarify that "benefit, right, or feature" for purposes of the rules under Section 4.05(2) of Rev. Proc. 2031-30 is meant to be interpreted broadly and is not limited to plan provisions that qualify as benefits, rights, or features under Treasury Regulation § 1.401(a)(4)-4(e).

II. Extend the safe harbor correction methods described in Appendix A .05(9)

The safe harbor correction methods described in Appendix A .05(9) of Rev. Proc. 2021-30 appropriately encourage plan sponsors to closely monitor plan operations to detect and correct any errors quickly. ARA requests this provision be expanded to include the following situations in order to provide the same correction incentives.

a. After-tax contributions

As described in our November 9, 2020 letter, ***ARA recommends*** that the IRS modify the safe harbor correction methods described in Appendix A, Section .05(9)(a) and (b) of Rev. Proc. 2021-30 to include failures relating to after-tax employee contributions. The rationale for allowing a reduced or no QNEC when correcting elective deferral failures applies equally to correcting after-tax contribution failures.

b. Partial-year exclusion failures

Appendix B, Section 2.02(1)(a) states that the Appendix A, Section .05 correction is available when an employee is improperly excluded from electing and making contributions or receiving matching contributions for a portion of a plan year. Appendix B, however, then continues by only referencing the correction methods in Appendix A, Section .05(2)-(5), which include the 50% and 40% QNEC corrections, but not the remaining paragraph of Appendix A Section .05, including Section .05(9). ***ARA recommends*** the IRS clarify that all of the corrections permitted in Appendix A, Section .05 apply to failures that occur for only a portion of a year.

c. Elective deferral failures for terminated participants.

The reduced QNEC corrections provided for in Appendix A, Section .05(9)(a) and (b) do not apply to terminated participants because they cannot have ongoing elective deferrals. ARA believes plan sponsors should be similarly incentivized to correct failures relating to terminated employees as quickly as current employees. Terminated employees would similarly benefit from rapid corrections and therefore ***ARA recommends*** that the reduced QNEC corrections be expanded to include terminated participants. Additional details on our recommendations for this expansion are included in our November 9, 2020 letter.[2]

[2] https://araadvocacy.org/wp-content/uploads/2020/11/20.11.09-ARA-Comment-Letter-to-IRS-Employee-plan-compliance-resolution-system.pdf

d. Extension of Timeline for Required Notice

Under the safe harbor correction methods described in Appendix A, Section .05(9)(a) and (b), a notice must be sent to participants within 45 days of when the correct deferrals begin. This provides a disincentive for plan sponsors to correct a deferral error as soon as the error is discovered. A sponsor who corrects such an error immediately and then seeks advice regarding corrections for the period during which correct deferrals were not made often finds itself beyond the 45-day required notice period. Thus, the plan sponsor's prompt action in correcting ongoing deferrals results in that sponsor paying a higher QNEC than the sponsor who discovers the same error and does not correct ongoing deferrals until seeking counsel.

ARA recommends extending the notice timeline to ensure that plan sponsors who correct deferral errors timely are not penalized for their promptness. Specifically ARA recommends that the deadline for providing the notice be within 45 days after the last day that correct deferrals could have begun under Appendix A, Section .05(9)(a) and (b). Alternatively, the 45-day deadline should be extended to the earlier of (a) 180 days after correct deferrals begin or (b) 45 days after the last day that correct deferrals could have begun under the applicable safe harbor correction method.

III. Provide additional examples of "significant" and "insignificant" operational failures

Under EPCRS, insignificant failures can be corrected at any time. Unfortunately, it is often unclear to practitioners and plan sponsors whether an error is significant or insignificant. This causes some plan sponsors to file under VCP in an abundance of caution. ARA believes clarification of what is significant coupled with safe harbor tests would reduce the need for defensive precautionary VCP submissions. To reduce the burden of additional VCP filings in this instance, ***ARA recommends*** that the Service provide additional information and examples under EPCRS Section 8.02 to help plan sponsors determine an error's significance. ARA specifically recommends the Service provide at least one example illustrating each factor and provide safe harbors where possible. ARA also recommends that EPCRS be amended to provide that if a plan sponsor determines in good faith that an error is insignificant and self-corrects such error, and on audit, the Service disagrees with such determination, then the Audit CAP sanction would be limited to the amount the sponsor would have paid as a VCP filing fee. Additional information on this recommendation is included in our April 4, 2018 comment letter[3] and December 11, 2018 comment letter.[4]

IV. Adding earnings adjustment calculation methods

As described in our April 4, 2018 comment letter,[5] the uncertainty regarding how to calculate earnings causes some plan sponsors to use VCP when the error could otherwise be corrected under SCP. The existing earnings calculation methods provided in Appendix B, Section 3 of EPCRS can be impractical in many situations such as where there are a significant number of investment choices (making the determination of the highest rate of return over multiple/variable time periods cumbersome), where the affected participant(s) changed investment options, or where the plan has changed service providers and the previous service provider is unwilling to calculate earnings. Additionally, plan earnings are many times available only for a full statement cycle and take time to

[3] https://www.asppa.org/sites/asppa.org/files/PDFs/4.4.18Final%20SCP%20comments.pdf
[4] https://araadvocacy.org/wp-content/uploads/2020/03/18.12.11-ARA-Comment-Letter-to-IRS-SCP-expansion.pdf
[5] https://www.asppa.org/sites/asppa.org/files/PDFs/4.4.18Final%20SCP%20comments.pdf

produce whereas performance of indexes like the S&P 500 or a single fund that is used as a qualified default investment alternative are readily available for any business day or time period. These more efficient methods would be helpful in situations where the plan sponsor wants to post earnings to finish a correction timely and/or avoid additional earnings on earnings calculations. ***ARA recommends*** that the Service include the following earnings calculations in Appendix B, Section 3, as safe harbor methods of calculating earnings:

- The average earnings rate of funds held in the plan;
- An index rate, such as the S&P 500 or a blended rate of indices weighted based on the plan's allocation to equity and fixed income; or
- The earnings on the plan's qualified default investment alternative (if the plan includes such as alternative).

V. Clarify missed deferral opportunity when no NHCE deferred

It is unclear what the missed deferral opportunity is in a non-safe harbor plan in which all NHCEs were improperly excluded from participation and there were no matching contributions. ***ARA recommends*** that Appendix A 0.5(2) be expanded to include an example of how a missed deferral percentage should be calculated in this scenario, and specifically recommends that the Service provide that the missed deferral opportunity is the greater of (a) 3% (as prescribed under the Treasury Regulations when using the prior year testing method in the plan's first year[6]) and (b) the rate needed to pass the Actual Deferral Percentage (ADP) test.

ARA believes each of these additions to EPCRS will promote sound tax administration by encouraging voluntary compliance by plan sponsors, incentivize rapid correction of errors, resolve a significant issue relevant to many retirement plan sponsors, and improve economic efficiency by reducing the complexity and burdens on the plan sponsor.

These comments are submitted on behalf of and were prepared by ASPPA's IRS Subcommittee, Michelle Ueding, Esq., CPC, QPA, Chair, on behalf of the ARA. If you have any questions regarding the matters discussed herein, please contact Kelsey N.H. Mayo, Director of Regulatory Policy, at (704) 342-5307. Thank you for your time and consideration.

Sincerely,

/s/
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[6] See Treasury Regulation Section 1.401(k)-2(c)(2)(i).

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