

Professional Perspective

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Dorothy E. Lank, KLB Benefits Law Group

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Interim IRS Guidance on Self-Correction Expansion Under SECURE 2.0

Contributed by [Dorothy E. Lank](#), KLB Benefits Law Group

With the passage of the SECURE 2.0 Act of 2022 (the Act), [Public Law 117-328](#), Division T, Congress significantly expanded the self-correction program for tax qualified employer retirement plans and Individual Retirement Accounts (IRAs). Effective Dec. 29, 2022, Section 305 of the Act has added further impetus to the general trend that had already started at the Internal Revenue Service (IRS) to expand the availability of self-correction in various ways. For more background on this expansion, see [Changes to EPCRS Enacted in SECURE 2.0](#).

The Act provides plan administrators a powerful set of tools for maintaining compliance more cost effectively than ever. In addition to significantly increasing which failures may be self-corrected, the Act greatly expands the scope of time for self-correction, provided a plan is routinely operated with compliant practices and procedures.

Regulations to implement the Act must be issued within two years following the Dec. 29, 2022, effective date; specifically, the IRS is mandated to update its self-correction regulations, known as the Self Correction Program (SCP) of the Employee Plans Compliance Resolution System (EPCRS), which are currently set forth in [Revenue Procedure 2021-30](#) (the Revenue Procedure). This article lays out the particulars of IRS interim guidance on using SCP under SECURE 2.0, conditions that must be met to permit correction under SCP, which failures still are uncorrectable through SCP, and other topics addressed in the guidance.

Notice 2023-43: Interim Guidance on Self-Correction

To provide assistance while the Revenue Procedure is being updated, the IRS issued interim interpretative guidance on self-correction, in the form of [Notice 2023-43](#), dated June 12, 2023 (the Notice). Plan sponsors may rely on the Notice while the new EPCRS procedure is pending, and any plans that self-corrected before the Notice was issued may rely on a reasonable, good faith interpretation of Section 305.

Note that the Notice does not address Section 301 of the Act, which deals with the collection of benefit overpayments under EPCRS; nor does it address Section 350 of the Act, which deals with automatic contribution errors in a [§ 401\(a\)](#), [§ 403\(b\)](#), [§ 408](#) or [§ 457\(b\)](#) plan.

The Notice provides interim interpretive guidance in the following three areas, set forth as Q&As whose purpose can be summarized as follows:

- To provide the principles of correction under SCP during the interim period
- To delay the use of SCP by IRAs until the new Revenue Procedure is issued
- To provide practical tips, as well as certain clear instructions, regarding self-correction during the interim period

Updated General Principles of Correction Under SCP

Before the Act, the Revenue Procedure gave plans a three-year-plus period for self-correcting significant operational failures and plan document failures; that is, a significant operational failure had to be corrected by the last day of the third plan year following the year for which the failure occurred. Insignificant failures could be corrected at any time, even during a plan examination.

Now, with a few exceptions, provided certain conditions are satisfied as described in the Notice, a plan sponsor may self-correct any “Eligible Inadvertent Failure” (as defined in the Act) within any reasonable period of time. See the Notice at Q&A-1.

Conditions to Permit Correction

[Notice 2023-43](#) lists five conditions that must all be met to use SCP for eligible inadvertent failures:

- The failure is not identified by the IRS prior to any actions demonstrating a specific commitment to implement a self-correction
- The self-correction is made within a reasonable time after the failure is identified
- The failure is not egregious
- The correction is not prohibited by the current version of the Revenue Procedure

- The correction method is consistent with the general principles of plan correction found in Section 6 of the Revenue Procedure

Exceptions

Note that, according to the Notice (see Q&A-2), the following failures continue to be uncorrectable under SCP:

- Failures to initially adopt a written plan
- Significant failures in terminated plans
- Corrections of operational failures by a plan amendment that result in less favorable treatment for a participant than the original terms of the plan
- Anything that relates to the diversion or misuse of plan assets, or if it directly or indirectly relates to an abusive tax avoidance transaction

If a plan cannot meet the above conditions, or if a failure continues to be excepted from SCP, a proposed correction would require IRS approval, through the Voluntary Correction Program (VCP) or the Audit Closing Agreement Program (Audit CAP). Self correction is generally preferable to VCP or Audit CAP, which require payment of a user fee and which often involve significant delay while the IRS processes the applications.

Furthermore, in keeping with the Act's purpose to expand the availability of SCP, the Notice (at Q&A-3) suspended certain long-standing EPCRS requirements such as the requirement that a plan be the subject of a favorable determination letter.

Q&A Summary

The key to this broad new freedom to self-correct is the definition of an “Eligible Inadvertent Failure,” defined in Section 305(e) of the Act to be “a failure that occurs despite the existence of practices and procedures that satisfy (a) the standards set forth in Section 4.04 of the Revenue Procedure (or any successor guidance), or (b) similar standards in the case of an IRA.”

The Notice's Q&As set out the interim guidance as follows:

General Principles of Self-Correction

Q&A-1. This first Answer confirms the permissibility of using SCP for Eligible Inadvertent Failures as described in the Act, even before the Revenue Procedure is updated. It provides a safe harbor for the correction methods listed in Appendices A and B of the Revenue Procedure, and states that other methods not found in the appendices may also be used, provided they meet the above conditions and are not expressly prohibited by the Revenue Procedure.

Q&A-2. This Answer lists nine specific exceptions to eligibility for SCP, at least while the new Revenue Procedure is pending. The failures that may not be self-corrected are these:

- To adopt a written plan document establishing the plan
- In an orphan plan
- In a terminated plan that are not insignificant as defined in the Revenue Procedure
- Involving excess contributions to a SEP or SIMPLE IRA and that are corrected by allowing the contributions to remain in a participant's IRA
- That are demographic failures corrected by a method other than those set forth in [Treas. Reg. section 1.401\(a\)\(4\)-11\(g\)](#)
- That are operational failures corrected by a plan amendment resulting in less favorable treatment of the affected participant or beneficiary
- Occurring in a SEP without a pre-approved plan document
- Occurring in a SIMPLE without a pre-approved plan document

- Occurring in an ESOP involving [Section 409](#) in which tax consequences other than plan disqualification are associated with the failure

Q&A 3. This Answer lists the six conditions for SCP that used to apply under Revenue Procedure 2021-30, but which are now abrogated by Section 305 of the Act. These are:

- The requirement for a favorable determination letter
- The prohibition on using SCP for demographic or employer eligibility failures
- The ban on SCP for significant failures in SEPs and SIMPLE IRA plans
- SCP is forbidden for participant loan failures under Section 6.07 of the Revenue Procedure
- Provisions of Section 4.02(2) and 9.02(3) regarding corrections of significant failures that have been substantially completed before the commencement of an IRS audit and
- The deadline for completion of a correction within a particular period of time, at Section 9

Timing Topics

Q&A-4. This Answer describes the requirement to complete self-correction, or to have demonstrated a specific commitment to correct a particular failure (as described in Q&A-6 below), before an IRS audit is commenced; this applies to significant failures. For insignificant failures, see Q&A-5 below.

Q&A-5. This Answer confirms that insignificant failures may still be self-corrected even after the commencement of an IRS audit.

Q&A-6. This Answer defines the IRS' view of a "specific commitment" to correct an eligible inadvertent failure, in order for a failure to continue to be correctible even after an IRS audit has commenced. This determination depends on facts and circumstances that demonstrate the active pursuit of correction of a specific, identified failure.

Q&A-7. This Answer describes the IRS' view of what would be a reasonable time period to complete a self-correction. With the usual caveat that it must consider all facts and circumstances, the IRS provides a safe harbor of 18 months for correction starting from the date of identification of a failure, for all failures except for employer demographic failures (such as the ineligibility of the employer to sponsor a particular type of plan). Self-correction of employer demographic failures must involve cessation of all contributions to the plan as soon as reasonably practicable after identification of the failure and in no event later than 6 months following the date the plan sponsor identifies the failure.

Miscellaneous Topics

Q&A-8. This Answer helpfully confirms that an Eligible Inadvertent Failure may be corrected in accordance with the new rules even if the failure occurred prior to the effective date of the Act.

Q&A-9. This Answer confirms that self-correction does not result in the waiver of any additional tax or an excise tax that may result from an Eligible Inadvertent Failure. However, a sponsor may apply for such a waiver through VCP, Audit CAP, or the Voluntary Closing Agreement Program (VCAP).

Q&A-10. This Answer confirms that an Eligible Inadvertent Failure may also be corrected via VCP; there is no requirement to use SCP.

Q&A-11. This Answer confirms that the new rules do not impose any new recordkeeping requirements. The text helpfully reiterates the existing documentation requirements, which can be summarized as follows:

- Failure details—affected participants, date of occurrence, nature of the failure, etc.
- How the failure occurred in spite of compliance practices and procedures that were in place prior to the failure
- The method of correction
- Any changes to be made to the compliance practices to prevent future reoccurrence of the failure

Q&A-12. This Answer states that IRAs may not utilize SCP during the interim period before the Revenue Procedure is updated.

Conclusion

The Act's emphasis on existing strong compliance practices as a gateway to SCP is a sensible enforcement approach, as it provides a clear incentive for plan administrators and sponsors to beef up procedures proactively, which will tend to reduce the number and severity of inadvertent compliance failures that occur in the first place.

A systematic approach to compliance, well documented, is now more essential than ever as a key method for reducing administrative expenses associated with inadvertent failures. Plan sponsors should review their administrative routines regularly. In the event a tax qualification failure is identified, they should consult their compliance advisors regarding any potential self-correction to be made, particularly those not expressly permitted under the Notice or under the current version of the Revenue Procedure. Sponsors and their advisors should also work to institute the compliance best practices that will better enable their plans to proceed with self-corrections under the updated Revenue Procedure once it is issued.