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IRS Issues SECURE 2.0 Guidance on Expanded Availability of Self-Correction

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The SECURE 2.0 Act of 2022 (“SECURE 2.0”) greatly expands the availability of self-correction of compliance failures involving employer retirement plans and IRAs. On May 25, 2023, the IRS issued [Notice 2023-43](#), which clarifies the scope of the expanded self-correction program before the IRS updates its correction program, the Employee Plans Compliance Resolution System (EPCRS), for the SECURE 2.0 changes.

The new notice does not address SECURE 2.0’s overpayment rules or special correction rules for automatic contribution arrangements. Please refer to our prior [legal alert](#) for a full description of the SECURE 2.0 correction rules.

Self-Correction Expansion is Effective Immediately. The IRS confirmed that failures that occurred prior to the effective date of SECURE 2.0 are eligible for self-correction, and that the expansion of self-correction is available immediately (subject to certain statutory restrictions described in our prior legal alert).

Availability of VCP. The IRS confirmed that while self-correction is now broadly available, plan sponsors remain free to seek IRS approval through the Voluntary Correction Program (“VCP”). The IRS also clarified that a VCP submission will continue to be necessary in order to obtain excise tax relief that was previously available only through VCP.

Restrictions on Self-Correction. The notice clarified that self-correction will not be available in a number of specific situations, including:

- Significant failures in terminated plans.
- Coverage and certain nondiscrimination testing failures that are not corrected in a method prescribed by IRS regulations. This restriction does not apply to ADP/ACP testing for 401(k) plans, which may be corrected by self-correction.
- Operational failures that are corrected by retroactively amending plan terms in a way that is unfavorable to participants or beneficiaries.
- A failure to timely adopt an initial plan document.
- Certain failures relating to employee stock ownership plans (ESOPs), SEPs, SIMPLE IRAs, and orphan plans.

Prior Restrictions No Longer Apply. The IRS confirmed that until further guidance is issued, the following rules do not apply with respect to self-correction of an Eligible Inadvertent Failure:

- The requirement that a significant failure must be completed or substantially completed by the end of a specified correction period (in general, the last day of the third plan year following the plan year for which the failure occurred) in order to be eligible for self-correction.
- The requirement that self-correction of significant failures must be substantially completed before the plan or plan sponsor is under examination. Instead, SECURE 2.0 requires a “specific commitment” to self-correct prior to going under examination, as described below.
- The requirement that qualified plans and section 403(b) plans have a favorable determination or opinion letter.
- Certain prohibitions on self-correction of certain loan failures demographic failures, employer eligibility failures, significant failures under SEPs and SIMPLE IRA plans.

When a Failure has been Identified by the IRS. The IRS notice states that until further guidance is issued, a failure will be treated as having been identified by the IRS (and thus ineligible for self-correction) when the plan comes “under examination” (*i.e.*, generally when the IRS initiates an audit with respect to the plan), even if the failure in question has not been specifically identified by the IRS as being at issue in the audit. Thus, in order to self-correct a significant failure, the sponsor must demonstrate a “specific commitment” to self-correction of the failure, based on actions preceding the audit. However, the guidance clarifies that insignificant failures will continue to be permitted to be self-corrected after an audit has been initiated, and even after the failures have been discovered by the IRS auditor.

Specific Commitment to Self-Correct. The IRS provided some clarifications regarding what is needed to demonstrate a specific commitment to self-correct. In general, the IRS will apply a facts and circumstances test. However, the IRS clarified that a general statement of intent to correct or the completion of annual compliance audits would not be sufficient. The actions must demonstrate that the plan sponsor is “actively pursuing correction of the specific identified failure”.

Timeframe for Self-Corrections. SECURE 2.0 requires that eligible inadvertent failures be corrected within a “reasonable period” after the failure is discovered. The IRS clarified that this will be determined on a facts and circumstances basis, but created a safe harbor that applies to any failure that is corrected by the end of the 18th month following the month in which the failure was identified. The safe harbor does not apply to employer eligibility failures (where an employer is erroneously sponsoring a plan that it is not eligible to sponsor), which must be corrected by ceasing all contributions as soon as possible and in no event later than the last day of the 6th month following the date the failure is identified.

Documentation of Self-Corrections. SECURE 2.0 does not impose any specific documentation requirements in connection with self-corrections of plan operational failures. However, the IRS stressed that such

requirements already exist under pre-SECURE 2.0 applicable law. In particular, the IRS noted that, if requested on audit, plan sponsors would be required to provide substantiating documentation of self-corrections, including:

documentation that: (1) identifies the failure, including the years of occurrence, the number of employees affected, and the date the failure was identified; (2) explains how the failure occurred and demonstrates there were established practices and procedures (formal or informal) reasonably designed to promote and facilitate overall compliance that were in effect when the failure occurred; (3) identifies and substantiates the correction method and the date of the completion of the correction; and (4) identifies any changes made to those established practices and procedures to ensure that the same failure would not recur.

Transition Rule. For corrections that have already been completed between the effective date of SECURE 2.0 and the date the new notice was issued (May 25, 2023), the correction will be respected if it reflected a good faith, reasonable interpretation of SECURE 2.0. Compliance with the terms of the new notice will be treated as meeting this standard.

IRA Custodians. The IRS confirmed that IRA custodians may *not* correct operational failures under SECURE 2.0 until additional IRS guidance has been released.

Comments Requested. The IRS will accept comments on the new correction rules through August 23, 2023.