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Working for America's Retirement

November 9, 2020

Internal Revenue Service
Attn: CC:PA:LPD:PR (Rev. Proc. 2019-19) Room 5203
Box 7604
Ben Franklin Station
Washington, D.C. 20044
Submitted via email

RE: Revenue Procedure 2019-19, Public Comments Invited on How to Improve EPCRS

The American Retirement Association ("ARA") is writing in response to Internal Revenue Service ("IRS") Rev. Proc. 2019-19, regarding comments for future improvements of the Employee Plans Compliance Resolution System ("EPCRS"). 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 saving plans and are dedicated to expanding on the success of employer-sponsored plans. In addition, ARA has nearly 30,000 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. 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 recommends that the Service:

- Extend the safe harbor correction method for failures to implement automatic contribution features to failures that begin in years after 2020;
- Extend the safe harbor correction methods for employee elective deferral failures to after-tax contributions;

- Extend the safe harbor correction methods for employee elective deferral failures to terminated participants;

- Extend the safe harbor correction methods for employee elective deferral failures to employees who were corrected early but did not receive notice;

- Confirm that partial-year exclusion failures, like failures occurring for one or more plan years, may be corrected using the safe harbor correction methods for employee elective deferral failures;

- 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;

- Clarify what is meant by "the increase in the benefit, right, or feature is available to all employees eligible to participate in the plan" with respect to permissible corrections of operational failures by retroactive amendment;

- Clarify with respect to permissible corrections of plan document failures that the requirement to have a favorable letter does not prevent self-correction after the expiration of the six-year remedial amendment cycle by a preapproved plan;

- Provide safe harbor corrections related to overpayments and earnings adjustment calculations in defined benefit plans as described in our April 4, 2018, letter;

- Provide additional examples of "significant" and "insignificant" failures as described in our December 11, 2018, letter; and

- Provide reduced application fees for certain errors.

ARA believes that each of the suggestions:

- Will encourage voluntary correction of plan errors in a manner consistent with EPCRS principles and without unduly increasing the risk of improper corrections;

- Will reduce the burdens on both the Service and the plan sponsor related to the correction of common retirement plan errors;

- Will resolve significant issues relevant to many retirement plan sponsors and practitioners (not just a small group);

- Will promote sound tax administration by helping plan sponsors and practitioners to maintain retirement plans in compliance with tax code qualification rules; and

- Will be easily understood and applied by plan sponsors and practitioners.

Discussion

I. Extend the safe harbor correction method for failures to implement automatic contribution features to failures that begin in years after 2020.

We are thankful for the Service's response to the retirement plan industry's assessment that the cost associated with correcting failures to implement automatic contribution features discourages employers from adopting retirement plans with automatic contribution features. In Rev. Proc. 2015-28, the Service provided a safe harbor correction method, but this method applies only with respect to failures that begin on or before December 31, 2020.

ARA requests that the IRS extend the safe harbor correction method described in Appendix A, Section .05(8) of Rev. Proc. 2019-19. The special safe harbor correction method for failures related to automatic contribution features in a section 401(k) plan or 403(b) plan is scheduled to sunset on December 31, 2020. In first authorizing the safe correction method in Rev. Proc. 2015-28, the Service stated it would consider extending the safe harbor correction method. We understand that in deciding whether to extend the safe harbor correction method, the Service "will consider, among other relevant factors, the extent to which there is an increase in the number of plans implemented with automatic contribution features."

As of 2019, 40% of participants in workplace retirement plans participate in a plan with an automatic enrollment feature.[1] Vanguard reports that between 2015 and 2020 the percentage of its plans that had adopted automatic enrollment increased from 41% to 50%. Our affiliate, the PSCA, reports that plans among its membership increased from 52.4% to 60.2% during the same period.

II. Extend the safe harbor correction methods for employee elective deferral failures to after-tax contributions.

ARA requests that the IRS confirm that the safe harbor correction methods described in Appendix A, Section .05(9)(a) and (b) of Rev. Proc. 2019-19 are available for failures relating to after-tax employee contributions. Appendix A, Section .05(2)(e) provides for a correction of a 40% QNEC if an employee should have been eligible to elect and make after-tax employee contributions (other than designated Roth contributions) and Appendix A, Section .05(5)(b) provides a correction of a 40% QNEC if an employee filed an election to make after-tax employee contributions under the plan that the plan sponsor failed to implement on a timely basis. However, Appendix A, Section .05(9) provides a reduced QNEC correction for "Employee Elective Deferral" failures as defined in Appendix A, Section .05(10). Appendix A, Section .05(10) refers to elective deferrals made to sections 401(k) and 403(b) plans and not employee contributions. The rationale for allowing reduced or no QNEC for elective deferrals would apply equally to failures relating to employee after-tax contributions.

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[1] U.S. Bureau of Labor Statistics, National Compensation Survey Table 35. Savings and thrift plans: Availability of automatic enrollment and method of default contribution, private industry workers, 2019.

III. Extend the safe harbor correction methods for employee elective deferral failures to terminated participants.

ARA requests that the IRS confirm that the safe harbor correction methods for employee elective deferral failures described in Appendix A, Section .05(9)(a) and (b) of Rev. Proc. 2019-19 are available for failures relating to employees who terminated employment between the time the failure occurred, and the correction was completed. Appendix A, Section .05(9)(a) and (b) of Rev. Proc. 2019-19 requires that correct deferrals begin within the applicable time frame and the participant be provided a notice within 45 days of the commencement of the correct deferrals. If the impacted employee has terminated employment, the participant is no longer eligible to make contributions to the plan, and therefore correct deferrals cannot begin. As a result, plan sponsors find less advantage to correcting failures related to terminated employees on an expedited basis, and plan sponsors correcting a group of employees and former employees need to make larger corrective contributions to former employees. ARA recommends permitting plan sponsors to correct failures related to terminated employees using the correction methods provided in Appendix A, Section .05(9)(a) and (b) of Rev. Proc. 2019-19 as follows:

- If the failure impacts both employees and former employees, by providing notice and making the corrective contribution within the applicable time frames for the employees impacted by the failure; or

- If the failure impacts only former employees, by providing notice and making corrective contribution by the end of the month following the month in which the error is discovered.

IV. Extend the safe harbor correction methods for employee elective deferral failures to employees who were corrected early but did not receive notice.

ARA requests that the IRS extend the timeline for sending notice under the safe harbor correction methods described in Appendix A, Section .05(9)(a) and (b) of Rev. Proc. 2019-19.

Often plan sponsors fail to meet the requirements of the safe harbor correction methods because although they stop the failure from reoccurring, they delay finalizing and documenting plan corrections. For example, a plan sponsor might identify that deferrals were missed for a few pay periods and start corrective deferrals immediately (and may even contact the impacted employee) but not send the formal notice. Within three months, the plan sponsor consults an advisor about how to document the correction and pays a 50% QNEC to the participant's account. If a similar plan sponsor had restarted deferrals within three months and sent the notice within 45 days, it would qualify for a 0% QNEC. In this way, a plan sponsor who corrects quickly may be penalized. The ARA recommends extending the notice timeline and/or attaching it to the permissible correction period rather than the date corrective contributions begin—for instance, requiring the notice be sent within 15 days after the last day that correct deferrals could have begun under Appendix A, Section .05(9)(a) and (b), or the earlier of 180 days after correct deferrals begin or 30 days after the last day that correct deferrals could have begun under the applicable safe harbor.

V. Confirm that partial-year exclusion failures, like failures occurring for one or more plan years, may be corrected using the safe harbor correction methods for employee elective deferral failures.

ARA requests that the IRS confirm that the safe harbor correction methods described in Appendix A, Section .05(9)(a) and (b) of Rev. Proc. 2019-19 are available for elective deferral failures that occurred for less than the full plan year. Appendix B, Section 2.02(1)(a) states 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. However, Appendix B references the correction methods in Appendix A, Section .05(2)-(5), which include the 50% and 40% QNEC corrections, but not Section .05(9) of Appendix A. The ARA recommends clarifying that all corrections in Appendix A, Section .05 apply to failures that occurred for only a portion of a year.

VI. 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.

ARA requests that the IRS clarify that "benefit, right, or feature" for purposes of the new rules under Section 4.05(2) of Rev. Proc. 2019-19 for correcting operational failures by plan amendment under SCP is not limited to plan provisions that qualify as benefits, rights, or features under Treasury Regulation § 1.401(a)(4)-4(e). 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. ARA recommends that the IRS confirm that a retroactive amendment increasing the rate of the nonelective contribution and other amendments that add or increase plan provisions that do not qualify as "benefits, rights, or features" under Treasury Regulation § 1.401(a)(4)-4(b) but otherwise meets the requirements of Section 4.05(2) of Rev. Proc. 2019-19 may be accomplished through self-correction.

VII. Clarify what is meant by "the increase in the benefit, right, or feature is available to all employees eligible to participate in the plan" with respect to permissible corrections of operational failures by retroactive amendment.

ARA requests that the IRS clarify that an amendment can meet the requirement under Section 4.05(2) of Rev. Proc. 2019-19 of being available to all eligible employees without each eligible employee receiving a benefit. There are several common errors that would benefit a broad group of employees (but not every employee) if retroactive amendment is available.

One such group of errors occurs due to the failure to accurately apply the plan's eligibility requirements. Amending to allow all employees hired after a certain date to enter early would be a nondiscriminatory amendment but not impact all eligible employees. These types of errors are common for smaller employers due to the lower frequency of turnover and the eligibility rules related to retirement plans differing from the eligibility rules related to an employer's health plan and other benefits. In these cases, employees specializing in other facets of the business are employed in roles to administer the plan and they lack the expertise to appreciate some of the distinctions between retirement plans and other benefits. These errors are generally insignificant in nature because of the number of employees involved and thus would otherwise qualify for self-correction. Another common eligibility error relates to participating employers, where a related employer's employees participate in a plan even though the related employer did not sign a participation agreement. An example of this type of error in a context other than eligibility would be an amendment that offers a retroactive employer contribution to those employed on the last day of the year.

ARA recommends that the IRS specify that "being available to all eligible employees" is not meant to preclude amendments that benefit all similarly situated employees based on provisions and conditions otherwise permitted under the Code (including the requirements of Sections 401(a)(4), 403(b)(12), 410(b) and 411(d)(6), as applicable). We further request that the IRS remove from its website the example of a failure that is ineligible for correction by retroactive amendment.[2] The example suggests that a plan may only correct a failure to exclude compensation by retroactive amendment if every employee eligible for the plan has the particular component of compensation involved.

VIII. Clarify with respect to permissible corrections of plan document failures that the requirement to have a favorable letter does not prevent self-correction after the expiration of the six-year remedial amendment cycle by a preapproved plan.

Section 4.05(2)(c) of Rev. Proc. 2019-19 permits certain plan document failures to be corrected by plan amendment if the plan has a favorable letter. Under Section 5.01(4)(b) a "favorable letter" for a preapproved plan is defined as an opinion or advisory letter issued with respect to the most recently expired six-year remedial amendment cycle. An individual plan sponsor generally cannot rely on the latest opinion or advisory letter issued to the document sponsor until the sponsor has adopted the newly approved version of the preapproved plan. This adoption is not required until the last day of the adoption period that follows the IRS review period, both of which occur after the expiration of the six-year remedial amendment cycle.

ARA recommends that the IRS clarify that a plan sponsor using a preapproved plan may self-correct a plan document failure under this section after the expiration of the six-year remedial amendment cycle. Such plan sponsor would need to have a favorable letter for the prior cycle (or, for a 403(b) plan sponsor, have adopted an initial written 403(b) plan as required by Notice 2009-3 and Treasury Regulation Section 1.403(b)-3(b)(3)) and timely adopt a preapproved plan by the end of the applicable adoption period as described in Rev. Proc. 2016-37.

IX. Provide safe harbor corrections related to overpayments and earnings adjustment calculations in defined benefit plans.

ARA recommends that the IRS provide safe harbor corrections as described in our April 4, 2018, letter[3], and as more fully set forth in ASPPA's letter to the Service dated November 3, 2015,[4] as follows:

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[2] https://www.irs.gov/retirement-plans/fixing-common-plan-mistakes-using-a-plan-amendment-for-correction-in-the-self-correction-program
[3] https://www.asppa.org/sites/asppa.org/files/PDFs/4.4.18Final%20SCP%20comments.pdf
[4] https://www.asppa.org/acopa/comment-letters/2015

- Plan sponsors should be permitted (but in no way required) to use a correction method like the rules on the recoupment of overpayments issued by the PBGC in 29 C.F.R. § 4022.82, but such correction method should permit the recoupment of earnings and exclude the PBGC's limits on the amount that may be recouped;

- The Service should provide safe harbor rates that employers may use to calculate interest on overpayments; and

- The Service should clarify the following items involving overpayments:

    - Overpayments may be corrected by reducing future benefits from the plan if a participant does not repay an overpayment, and, in certain circumstances, the overpayment may continue to be treated as an eligible rollover distribution; and

    - The circumstances that may be considered in determining whether the plan has been made whole for the overpayments and the amount of the employer's corrective contribution to the plan.

X. Provide additional examples of "significant" and "insignificant" failures.

ARA recommends that the IRS provide examples illustrating each factor identified in Section 8.02 of Rev. Proc. 2019-9 and safe harbors as described in our April 4, 2018, letter[5] and incorporate the examples provided in our December 11, 2018, letter. [6]

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 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.

ARA recommends that, to reduce the burden of additional VCP filings in this instance, the Service provide additional information and examples under Section 8.02 of Rev. Proc. 2019-19 to help plan sponsors determine an error's significance. Specifically, we recommend that the Service provide at least one example illustrating each factor. ARA also recommends that the Service provide safe harbors where possible. For example, ARA believes it would be appropriate to create a safe harbor where an error involving an amount that is less than 10% of the plan's assets (and no more than $100,000) and impacting fewer than 25% of participants would be deemed an insignificant failure. Any error not within the safe harbor would be subject to the current facts and circumstances standard.

ARA also recommends that Rev. Proc. 2019-19 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.

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[5] https://www.asppa.org/sites/asppa.org/files/PDFs/4.4.18Final%20SCP%20comments.pdf
[6] https://www.asppa.org/sites/asppa.org/files/PDFs/GAC/Comment%20Letter/18.11.12FinalSCPImprovements.pdf

XI. Provide reduced application fees for certain errors.

ARA respectfully requests that the IRS reinstate the special reduced VCP fees previously in effect under Rev. Proc. 2017-4, as well as provide for a reduced general VCP User fee for plans with 100 or fewer participants for the reasons described in our letter dated January 31, 2018. [7]

If you have any questions regarding the matters discussed herein, please contact Martin Pippins, Director of Regulatory Affairs, at (703) 516-9300, ext. 146. Thank you for your time and consideration.

Sincerely,

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[7] https://www.asppa.org/sites/asppa.org/files/PDFs/1.31.18CommentsFinal.pdf