

October 4, 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

Re: Correction of Late Restatements of Pre-Approved Plans under EPCRS (Rev. Proc. 2021-30)

On May 27, 2021, the American Retirement Association (“ARA”) provided input on Internal Revenue Service Notice 2021-28 related to the 2021-2022 Priority Guidance Plan. In that letter, ARA stated it would provide comments relating to the self-correction of late restatements of pre-approved plan documents under the Employee Plans Compliance Resolution System (EPCRS).¹ The following letter provides specific suggestions on this matter.

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.

Summary

ARA thanks the Internal Revenue Service (IRS) for its commitment to, and continuous improvement of, EPCRS. In particular, 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. ARA is confident this most recent expansion will promote sound tax administration and encourage plan adoption and maintenance by reducing the burdens of sponsoring a plan.

ARA recommends that the IRS continue its efforts to promote plan sponsor compliance and reduce the burden of plan sponsorship by modifying EPCRS to permit a sponsor that misses a pre-approved plan restatement deadline to correct that failure using SCP.

¹ <https://araadvocacy.org/wp-content/uploads/2021/06/ARA-Advocacy-2021-Comment-Letter-2021-05-27-ARA-Recommend-Benefits-Items-for-2021-2022-IRS-Priority-Guidance-Plan.pdf>

Background

Section 4.03 of Revenue Procedure 2021-30 provides the following regarding the favorable letter requirement:

SCP eligibility requirements relating to plan documents. (1) Requirements for Qualified Plans and 403(b) Plans. The provisions of SCP relating to certain Plan Document Failures, as described in section 4.01(1)(b), and significant Operational Failures, as described in section 9, are available for a Qualified Plan that, as of the date of correction, is the subject of a Favorable Letter. See section 5.01(4) for the definition of Favorable letter for a Qualified Plan.

Section 5.01(4) of Revenue Procedure 2021-30 states:

(4) Favorable Letter. With respect to a Qualified Plan, the term “Favorable Letter” is defined in the following manner.

(a) Favorable Letter for individually designed Qualified Plans. In the case of an individually designed Qualified Plan, the term “Favorable Letter” means a determination letter issued with respect to the plan.

(b) Favorable Letter for Pre-approved Plans. In the case of a Pre-approved Plan, the term “Favorable Letter” means a favorable opinion or advisory letter issued with respect to the most recently expired six-year remedial amendment cycle under Rev. Proc. 2016-37, as modified. In the case of a terminated Pre-approved Plan, the plan is treated as having a favorable opinion letter or advisory letter if the plan is terminated prior to the expiration of the plan’s current remedial amendment cycle determined under the provisions of Rev. Proc. 2016-37, as modified, and the plan was amended to reflect the qualification requirements that applied as of the date of termination.

Analysis

The definition of “Favorable Letter” for qualified pre-approved plans causes a plan sponsor of a preapproved plan that misses the restatement deadline for a six-year cycle to be unable to correct the plan document failure or any significant errors under SCP after the end of the six-year cycle. For example, consider a defined benefit plan sponsor that maintains a pre-approved defined benefit plan, had reliance on an advisory letter issued prior to July 31, 2020, and failed to timely restate its plan by the July 31, 2020 restatement deadline (which happens to coincide with the end of the six-year cycle). Once the cycle ends and the sponsor has not adopted a preapproved plan, the plan no longer has a favorable advisory or opinion letter with respect to the most recently expired six-year cycle (i.e., the PPA cycle), and therefore the plan sponsor cannot use SCP to correct the plan document failure or any other significant error. A VCP filing would be necessary.

The loss of ability to use SCP creates a hardship for plan sponsors, particularly small plan sponsors.

Recommendation

ARA recommends that the IRS modify the requirements of EPCRS by adding the following sentence to the end of the definition of “Favorable Letter for Pre-approved Plans” in 5.01(4)(b):

In the case of a Pre-approved Plan, the plan is treated as having a favorable opinion letter or advisory letter during the correction period described in section 9.02 of the Revenue Procedure as long as the plan is amended no later than the end of such correction period to adopt a Pre-approved Plan with a favorable opinion or advisory letter issued with respect to the most recently expired six-year remedial amendment cycle. For this purpose, the

correction period would begin with the expiration of the most recently expired six-year remedial amendment cycle.

Treating pre-approved plans as having a favorable letter during the SCP correction period will address two concerns: (1) it will permit pre-approved plans to self-correct a missed plan restatement during the SCP correction period and (2) it will ensure those plans can self-correct other significant errors occurring before the missed plan restatement is adopted (as long as such restatement is also adopted by the end of the SCP correction period).

ARA believes this revision to EPCRS will promote sound tax administration by encouraging voluntary compliance by plan sponsors, encourage 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 and Plan Documents Subcommittee on behalf of ARA, primarily drafted by Michelle Ueding, Esq., CPC, QPA, Chair of ASPPA's IRS Subcommittee. If you have any questions regarding the matters discussed herein, please contact Kelsey N.H. Mayo, Director of Regulatory Policy, at (704) 342-5307 or kmayo@usaretirement.org. Thank you for your time and consideration.

Sincerely,

/s/
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/s/
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