

## IRS Makes Significant Changes to Plan Correction Guidance

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The IRS recently updated its retirement plan correction guidance, commonly known as the Employee Plans Compliance Resolution System (EPCRS). Many of the changes to EPCRS are conforming changes that reflect the IRS's recent suspension of the determination letter application process for individually designed plans. In addition, penalties and sanctions imposed under EPCRS are being modified and may, in some cases, make correcting plan failures costlier.

Below is a brief summary of the most significant changes to EPCRS and the impact to you:

- *Favorable determination letter for SCP.* EPCRS no longer requires that an individually designed plan be subject to a current favorable determination letter in order to be eligible for self-correction of significant operational failures under the Self-Correction Program (SCP). Instead, such plans are eligible for SCP if the plan has, at some point, received a favorable determination letter. Pre-approved plans, such as prototype and volume submitter plans, are still required to be subject to current favorable opinion or advisory letters.
- *Determination letter applications not permitted under SCP or VCP.* EPCRS no longer permits plan sponsors to file a determination letter when correcting a plan failure by amendment either under SCP or the Voluntary Correction Program (VCP).
- *Scope of compliance statement.* EPCRS has been updated to clarify that any compliance statement issued by the IRS in connection with a VCP submission that includes a plan amendment does not constitute a determination as to whether the plan amendment satisfies the applicable qualification requirements in form.
- *VCP fees and sanctions.* VCP user fees will be set forth in an annual schedule published by the IRS. Additionally, in the case of an egregious failure, the IRS reserves the right to impose a sanction under VCP in excess of the applicable VCP user fee. A failure is considered to be egregious where the parties controlling the plan recognized that the action would constitute a failure and the failure involves a substantial number of participants and beneficiaries, or participants who are highly compensated employees.
- *Audit Cap sanctions.* If the IRS discovers a failure upon audit, the potential sanction will be based on relevant facts and circumstances, including, among other things, the steps that the plan sponsor has taken to prevent and

promptly identify failures, the type and number of affected employees, and the period over which the failure occurred. Generally, the sanction will not be less than the VCP user fee applicable to such plan.

- *Sanctions for failures discovered in the determination letter process.* If the IRS discovers a failure in the determination letter process, the plan sponsor will be subject to a percentage of the applicable VCP user fee, depending on the period to which the failure relates and whether the plan is individually designed or a pre-approved plan.
- *Clarification that Appendix A and Appendix B are “safe harbors”.* EPCRS has been clarified to provide that the correction procedures described in Appendix A and Appendix B, which generally relate to correction methods for operational errors and earnings adjustments, are safe harbors only.

Winston & Strawn has considerable experience in helping plan sponsors in correcting plan document and operational errors.

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