

April 4, 2018

The Honorable David J. Kautter
Acting Commissioner
Internal Revenue Service
1111 Constitution Ave. NW
Washington, D.C. 20224

RE: Expansion of Self Correction Program under the Employee Plans Compliance Resolution System

Dear Acting Commissioner Kautter:

The American Retirement Association (“ARA”) is writing in response to Revenue Procedure 2018-4 and Revenue Procedure 2016-51 (the Employee Plans Compliance Resolution System (“EPCRS”)), to recommend modifications to EPCRS to expand the ability to use the EPCRS Self Correction Program (“SCP”) and thereby reduce the burden of the increased Voluntary Correction Program (“VCP”) fees on small business plans. ARA thanks the Internal Revenue Service (“IRS” or “Service”) for the opportunity to provide input on these matters.

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 ASPPA College of Pension Actuaries (“ACOPA”), 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 more than 20,000 individual members who provide consulting and administrative services to American workers, savers, and the 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 of rules applicable to retirement plans is difficult for any plan sponsor to navigate, and particularly difficult for small businesses (including small governmental entities and charities), which have limited resources and do not generally have the ability to 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. Unfortunately, the recent increase in VCP user fees has made this much more difficult, particularly for small businesses. Therefore, it is critically important that if the

increased user fees are to remain in effect that the Service offset their detrimental impact by expanding the opportunities for self-correction under EPCRS. We believe that each of the expansions proposed—

- 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.

ARA recommends the Service adopt the following modifications to EPCRS:

- Remove barriers to the use of SCP, including:
 - Extending the period for self-correction of significant errors and permitting self-correction of missed deferral opportunities, regardless of when the error occurred;
 - Adding new earnings adjustment calculation methods to the existing safe harbor methods in EPCRS;
 - Clarifying the definition of an insignificant operational failure;
 - Providing safe harbor corrections related to overpayments and earnings adjustment calculations in defined benefit plans;
- Expand the types of errors that may be corrected through SCP, including:
 - Correction by retroactive amendment to comply with the actual operation of the plan where the benefits provided were higher than the plan provided for and such operation would not violate other qualification rules (such as IRC §§415, 411, 401(a)(4), etc.);
 - Correction of non-amenders discovered within the SCP correction period for significant errors or during a merger/acquisition; and
 - Certain corrections to plan loans.

ARA has also included a number of optional safeguards and alternative programs for inclusion in EPCRS to the extent SCP is not expanded as recommended.

Discussion

The ability to voluntarily correct plan errors is an important factor in a business owner's decision to adopt and maintain a retirement plan. It has been widely reported that the U.S. population is facing a retirement crisis and individuals need to save more for retirement.¹ The importance of the employer-based retirement system in achieving that objective cannot be understated. Employees who have access to workplace retirement plans are significantly more likely to save for retirement.² Plan sponsors are much more likely

¹ U.S. Govt. Accountability Office, *GAO-18-111SP, The Nation's Retirement System: A Comprehensive Re-evaluation Is Needed to Better Promote Retirement Security* (October 18, 2017).

² "Workers who participate in, and contribute to, a retirement savings plan at work (44 percent) are considerably more likely to have saved at least \$50,000 than those who are offered a plan but choose not to participate (13 percent) or are not offered a plan (15 percent). Participating workers are much less likely than others to report having saved less than \$10,000 (18 percent vs. 58 percent who choose not to participate and 54 percent who are not offered a plan)." 2014 RCS Fact Sheet #6, EBRI.

to adopt and maintain a retirement plan if they have the ability to affordably make plan corrections. Congress recognized this fact in Section 1101 of the Pension Protection Act of 2006, when it directed the Service to expand self-correction for small employers. Therefore, to encourage business owners, particularly small business owners, to adopt and maintain retirement plans, ARA believes it is necessary to lessen the burdens associated with correcting plan errors.

I. Changes to Remove Barriers to the Use of SCP - ARA recommends the Service adopt each of the following modifications to remove barriers that may prevent a plan sponsor from utilizing SCP.

1. Extend the period for self-correcting significant errors in EPCRS Section 9.02.

ARA recommends that the Service fulfill the Congressional directive to extend the period for self-correction of errors. Section 1101(b)(3) of the Pension Protection Act of 2006 (“PPA”) states, “The Secretary of the Treasury shall continue to update and improve the Employee Plans Compliance Resolution System (or any successor program), giving special attention to . . . extending the duration of the self-correction period under the Self-Correction Program for significant compliance failures.” This self-correction period has not been extended since 2003, when the Service adopted the two-year self-correction period for significant failures.

One of the reasons plan sponsors are forced to make a VCP submission is due to the difficulty of determining whether a defect is truly significant. As discussed below, ARA recommends certain clarifications and safe harbor tests to facilitate the determination of when a defect is significant. An extension of the self-correction period would also address this concern because plan sponsors would be able to make the correction without having to worry about being second guessed on audit as to the significance of the defect. This change would finally fulfil the IRS’ obligations under PPA ’06 to extend the period for correcting significant defects. *ARA recommends* the Service extend the self-correction period for a significant error to the later of (a) the last day of the third plan year following the plan year for which the failure occurred, or (b) one year from the date of the plan sponsor’s discovery of the failure. *ARA also recommends* the self-correction period for significant errors involving only missed deferral opportunities be extended to the earlier of (a) the date the plan sponsor comes under examination by the Service or (b) one year from the date the plan sponsor discovers the error.

2. Add new earnings adjustment calculation methods to the existing safe harbor methods provided in EPCRS Appendix B, Section 3.

The uncertainty regarding how to calculate earnings causes some plan sponsors to use VCP when the error could otherwise be corrected under SCP. The existing earnings calculation methods provided in Appendix B, Section 3 of EPCRS can be impractical even for plans with small numbers of participants, particularly where there are a significant number of investment choices, where the affected participant(s) changed investment options, or where the plan has changed administrators. When the safe harbor methods are impractical, some plan sponsors utilize VCP to seek approval of a different method. ARA believes that SCP would be improved by including additional reasonable safe harbors that would be consistent with the principles of EPCRS.

ARA recommends the Service include these reasonable earnings calculations in Appendix B, Section 3, as safe harbor methods of calculating earnings:

- Use of the average plan earnings rate;
- Use of an index rate, such as S&P 500 or a blended rate of indices.
- Use of the plan's QDIA earnings rate.

ARA believes these recommended safe harbors are reasonable, straightforward substitutes for the actual rate of return and can be calculated in a straightforward, uncomplicated manner. They also avoid the unintended windfall that occurs when the rate of return for the investment fund with the highest rate of return is used.

3. Clarify the definition of an insignificant operational failure under EPCRS Section 8.02.

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, just to be safe. ARA believes clarification of what is significant coupled with safe harbor tests would reduce the need for defensive precautionary VCP submissions.

ARA recommends, to reduce the burden of additional VCP filings in this instance, the Service provide additional information and examples under EPCRS Section 8.02 to help plan sponsors determine an error's significance. *ARA specifically recommends* the Service provide at least one example illustrating each factor. *ARA recommends* 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 EPCRS 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.

4. Include guidance relating to overpayments and earnings calculations from defined benefit plans.

As more fully set forth in [ASPPA's letter to the Service dated November 3, 2015](#), (copy attached) *ARA recommends*:

- Plan sponsors should be permitted (but in no way required) to utilize a correction method similar to 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 PGBC'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 taken into account in determining whether the plan has been made whole for the overpayments and the amount of the employer's corrective contribution to the plan.

II. **Expand Errors that May be Corrected Through SCP** – ARA recommends the Service expand SCP to permit the correction of the following types of errors.

1. **Certain Retroactive Amendments**

Operational Errors Benefiting Participants. *ARA recommends* EPCRS be amended to permit a plan sponsor to self-correct errors through a retroactive plan amendment to conform the plan terms with the plan's actual operation whenever the benefits provided in practice were higher or more broadly available than what the plan document stipulated. This would, of course, require that the operation and the amendment pass nondiscrimination testing under Code Section 401(a)(4), not predominantly benefit HCEs, and not cause a violation of any other rules such as Code Sections 415 and 411.

- For example, a plan sponsor should be permitted to execute a related employer participation agreement, where employees were permitted to participate but the participation agreement was not completed. Similarly, SCP should be available to adopt an amendment to expand the plan's coverage to when the plan has permitted entry by otherwise ineligible NHCEs.
- Similarly, an employer that has, in operation, provided a matching contribution of 4% of compensation, rather than the plan-provided 3% of compensation, should be able to self-correct the operational error under SCP through a retroactive amendment.

Nonamenders. *ARA recommends* that SCP should be expanded to provide that if a plan sponsor discovers that its plan has not been updated for interim amendments or required restatement either within the SCP period for significant errors or for the one year period following discovery of the error during a review in anticipation of a merger or acquisition, the plan sponsor should be permitted to amend the plan under SCP to bring the plan back into compliance.

2. **Expansion of SCP with regard to plan loan failures**

As more fully set forth in [ASPPA's letter to the Service dated March 19, 2015](#), *ARA recommends*:

- The Service issue guidance expanding the operational failures related to participant loans to be corrected under the SCP component of EPCRS. ARA specifically recommends that SCP be expanded for loan failures that are otherwise eligible for correction under SCP to permit (i) correction of operational errors related to plan loans in a manner that will avoid reporting the loan as a deemed distribution, and (ii) reporting deemed distributions under IRC section 72(p) on a Form 1099-R for the year of correction.
- To the extent broad expansion of SCP eligibility for plan loan failures is not provided, at a minimum, SCP should be expanded to permit correction of the following operational loan errors, provided such error is otherwise eligible for SCP:

- Form 1099-R reporting relief;
- Loans with repayment errors;
- Loans that exceed the maximum repayment period;
- Loans that exceed the maximum loan amount;
- Loans that exceed the maximum permitted number of loans outstanding; and
- Loans made without spousal consent when required by the plan's terms.

3. Additions After Expansion

ARA recommends that, on a quarterly basis, the Service review closed VCP cases to see if any additional types of corrections that are repeatedly reviewed by the Service lend themselves to being available for self-correction because the correction methodology is well understood by the industry.

III. Alternative Suggestions for Safeguards – ARA recognizes the Service's interest in assuring that plan sponsors use SCP only for corrections the Service is confident can be corrected without supervision. ARA also recognizes the Service's desire to monitor the types of errors being corrected. Therefore, if any of the above expansions cannot be accomplished through an outright expansion of SCP, ARA alternatively recommends that the Service adopt one or more of the following expansions to EPCRS to reduce the burdens on both the Service and plan sponsors relating to plan corrections.

1. Require completion and retention of streamlined VCP Forms for SCP corrections

ARA recommends, to give the Service assurance sponsors are self-correcting errors in accordance with EPCRS principles, for any error currently available to be corrected on 14568 Form Series (a.k.a. the streamlined VCP forms), such error may be corrected through SCP, but the 14568 forms must be fully completed by the plan sponsor and maintained for inspection by the Service on audit. *ARA also recommends* that the waiver of the Code Section 4974 penalties should be automatic for errors corrected through SCP, unless the error impacts an owner employee or 10% owner of a corporation. All other requests for excise tax/penalty relief would still require a VCP filing.

2. Postcard Filing

To the extent the Service is unwilling to expand SCP to cover an error because the Service desires to track the prevalence of a certain correction, *ARA suggests* the Service permit the self-correction but require a postcard filing with very minimal information regarding the type of error. This will reduce the burden on the Service and plan sponsors regarding the correction of routine errors, but provide the Service with the desired data on the prevalence of certain failures.

3. Unreviewed Filing

To the extent the Service believes SCP should be categorically unavailable for a certain failure, *ARA recommends* the Service create a no-review VCP option for a reduced fee. Under this program, the plan sponsor would complete and file a VCP application with the Service, including the requisite information on the error, correction, administrative procedures, etc. However, the Service would not negotiate or sign off on the correction (thereby reducing its burden and supporting the reduced fee for the plan sponsor). The Service would be entitled to disagree with the correction in an examination. However, as long as the correction proposed was a good faith correction of the error using EPCRS principles and the correction is implemented as described, then, if the Service disagrees with the

correction, the plan sponsor will not be subject to Audit CAP for such error as long as the sponsor submits and re-corrects the error through VCP.

This approach would reduce the burdens on both the Service and plan sponsors of correcting plan errors—particularly for significant errors with clear correction methods (such as missed deferral opportunities).

4. Reinstate Discounted Fees

If such errors are not made available to correct through SCP, *ARA recommends* the Service reinstate the discounted fees for common errors as previously set forth in Revenue Procedure 2017-4, Appendix A, Section 9.

These special discounts promoted compliance and should be reinstated retroactively. These discounts encouraged plan sponsors to use VCP. The fees for corrections of participant loans and missed required minimum distribution that were based on the number of participant failures, significantly increased the likelihood of a VCP submission. The discounts for good faith or interim amendments (\$375), failure to adopt an amendment during the remedial amendment period (\$500), and the 50% discount for missed restatements made within one year of the deadline significantly reduced the burden of small errors (particularly on small business plans). The SEP, SARSEP, and SIMPLE IRA discount generally assists small employers, who are, by definition, the users of these plans, and who are less likely to be able to afford the new, higher VCP fees.

The retroactive reinstatement of these discounts will be of tremendous help in promoting the number of plan sponsors who will use VCP.

These comments are submitted on behalf of and were prepared by the IRS Subcommittee of the ASPPA Government Affairs Committee on behalf of ARA, Kelsey Mayo, Esq., Chair. We would appreciate the opportunity to discuss them more fully with you and your staff at your earliest convenience. If you have any questions regarding the matters discussed herein, please contact Craig Hoffman, ARA General Counsel and Director of Regulatory Affairs at (703) 516-9300. Thank you for your time and consideration.

Sincerely,

/s/

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/s/

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