

## Publications

# SECURE 2.0 Guidance Process Begins – Self Correction for Eligible Inadvertent Failures Is First Up

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The IRS has issued interim guidance to address the changes made by section 305 of [SECURE 2.0](#) to the self-correction program under the IRS Employee Plans Compliance Resolution System (commonly referred to as “EPCRS”). While the IRS will issue guidance completely restating the rules of EPCRS to reflect the new statutory changes within two years, [Notice 2023-43](#) (the “Notice”) provides initial guidance, in question and answer format, regarding what qualification failures can be self-corrected now. The guidance addresses qualified plans, 403(b) plans, SEPs, and SIMPLE IRAs, though we focus on qualified and 403(b) plans below.

## Background

Historically, the self-correction program under EPCRS has largely been limited to the correction of “insignificant” operational failures, or “significant” operational failures that were promptly corrected (generally within three years). However, some failures, such as certain plan document errors, certain loan failures, employer eligibility failures, or demographic failures generally were not eligible for self-correction.

To be eligible to correct under the self-correction program, the following requirements must have been met: a plan sponsor had established practices and procedures designed to “promote and facilitate” compliance with the Internal Revenue Code (the “Code”), qualified and 403(b) plans had a favorable letter (e.g., determination or opinion letter) for a significant failure, and the correction followed the general principles set forth in EPCRS.

SECURE 2.0 expanded the self-correction program such that any “eligible inadvertent failure” to comply with applicable Code requirements is eligible for correction, so long as (1) the failure is not first identified by the IRS (i.e., the plan is not under audit) prior to demonstration of a “specific commitment” to self-correct such failure, and (2) the self-correction is completed within a reasonable time of discovering the failure.

Eligible inadvertent failures are defined broadly in SECURE 2.0 as those that occur notwithstanding established practices and procedures supporting Code compliance,

but as in the past, do not include failures that are egregious or relate to the diversion or misuse of plan assets or an abusive tax avoidance transaction.

## Guidance

In the Notice, the IRS describes how a reasonable period for completing self-correction under SECURE 2.0 will be determined. Specifically, whether a correction has been completed within a reasonable period after it is identified will be determined based on all relevant facts and circumstances. If self-correction has been completed by the last day of the 18<sup>th</sup> month following identification of the failure, it will be treated as having been completed within a reasonable period. There is an exception to this 18-month outside limit for employer eligibility failures (primarily affecting 403(b) plans). For this type of error, the outside window to cease contributions to the plan is the last day of the 6<sup>th</sup> month following identification of the failure.

The Notice also explains how the IRS will determine whether a plan sponsor demonstrates a “specific commitment” to implement self-correction. While this determination will also be based on the facts and circumstances, the plan sponsor must demonstrate it was actively pursuing correction of the specific failure. In this regard, the mere completion of an annual compliance audit, or adoption of a general statement of intent to correct failures when discovered, is not sufficient.

The Notice clarifies that this expanded program may be used for eligible inadvertent failures prior to the issuance of an updated EPCRS if the self-correction requirements under existing EPCRS guidance are *generally* satisfied and the correction method is not prohibited by existing EPCRS guidance. The key takeaway from this guidance is that expanded self-correction is available for qualified and 403(b) plans even if some of the requirements under existing EPCRS guidance are not met. For example, the expanded program may be used even if the plan does not have a favorable determination or opinion letter; the failure is a demographic or employer eligibility failure, or a loan failure that was not previously eligible for self-correction; or the correction of a significant failure is not completed within the three-year period. Notably, failures that occurred prior to enactment of SECURE 2.0 may still be corrected in accordance with these new parameters.

The Notice also lists specific failures that may not be self-corrected before EPCRS is updated. These include the failure to initially adopt a 401(a) or 403(b) plan, or an operational failure corrected by retroactive amendment to conform plan terms to operations if such amendment would result in a cutback. Also, even when self-correction is available, the Notice confirms a plan sponsor may choose to submit a voluntary correction program application to the IRS. This course of action might be worth considering in certain cases, such as if an excise tax applies to the failure, as self-correction does not automatically waive that tax. Finally, the Notice confirms that prior to the issuance of an updated EPCRS, plan sponsors retain the ability to self-correct an insignificant failure (including an eligible inadvertent failure) while the plan is under audit, even if the failure is discovered on audit.

## Next Steps

The IRS requests comments on the Notice, particularly those related to: (1) additional correction methods required to be used to correct these failures and general principles of correction if no correction method is specified; and (2) common IRA failures, suggested correction methods, and the expansion of EPCRS to IRA custodians and owners. Comments are due by August 23, 2023.

While plan sponsors may rely on the guidance in the Notice immediately, such reliance will end upon the issuance of an updated EPCRS. Thus, plan sponsors should take this opportunity to address any “to do” list of possible corrections and remedy outstanding defects as soon as possible, keeping in mind the 18-month correction period.

If you have questions on the expansion of the self-correction program, including applicability to your SEP or SIMPLE IRA plan, please reach out to the authors or your regular Groom attorney.