

The IRS's New Pre-Examination Pilot Program – Key Features and Questions

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Earlier this month, the IRS announced a new pilot program under which retirement plan sponsors will be given 90-days notice that their plan has been selected for examination which they may be able to largely avoid by taking certain steps. We discuss the key features of this pilot program below, along with some questions and considerations.

90-Day Review and Correction Period

Under the new pilot program, 90 days before an IRS examination begins, the IRS will notify plan sponsors by letter that their retirement plan has been selected for examination. This notice letter from the IRS triggers a 90-day review period during which plan sponsors may review their plan document and operations to confirm compliance with current tax law requirements. We understand that the IRS notice letter will identify a particular issue or issues that IRS will focus on. For example, we have seen one such letter for a defined contribution plan which indicates that the IRS would be focusing on the Code section 415(c) limitation “plus any other issues that exist.” We suspect that other issues and types of plans will be part of the pilot program, but it is not yet clear if the program will be limited to only certain plans or issues.

Treatment of Errors Identified and Corrected During the 90-Day Review Period

Any identified errors may be self-corrected, if eligible, using the principles set forth in the Employee Plans Compliance Resolution System (“EPCRS”), Revenue Procedure 2021-30. If errors are identified that are not eligible to be self-corrected, the plan sponsor can seek a closing agreement with the IRS. The IRS will apply the Voluntary Correction Program (“VCP”) fee structure to determine the sanction amount in lieu of the much higher Audit

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Closing Agreement Program (“Audit CAP”) fees which would ordinarily apply to errors identified by the IRS on examination.

GROOM INSIGHT: This presents a potentially valuable opportunity to correct errors not normally eligible for self-correction during an audit at a reduced price, as Audit CAP fees can be significantly higher than the VCP fees (with VCP fees capped at \$3,500).

Plan sponsors must submit to IRS documentation of how compliance was determined and what corrections were made to address any errors. While the IRS announcement does not describe what sort of documentation should be submitted by plan sponsors, one letter we have seen states as follows:

- Send us the steps you took and documentation that demonstrates how you determined your compliance (or noncompliance). Additionally, if you self-corrected or are requesting a closing agreement to correct a mistake, provide the appropriate documentation.
- You may also want to provide the following to substantiate that your plan is qualified in form and to verify filings.
 - A signed copy of your plan document (including adoption agreement, if any), the trust document and all amendments that relate to the years under examination. For a pre-approved plan document, including a prototype or volume submitter plan, provide the IRS opinion letter or advisory letter issued on the plan.
 - Any other documents or explanations you believe will help in our review.

IRS Action

The notice states that the IRS will review documentation submitted by a plan sponsor, determine if the IRS agrees with the conclusions made and then issue a closing letter or conduct either a limited or full scope examination. Therefore, if the IRS agrees that the documentation provided on the issue under examination is sufficient, then it will close the audit and issue a closing letter that the plan retains its tax-qualified status. However, if the IRS disagrees with your assessment that there were no compliance issues (or disagrees with the sufficiency of the self-correction of disclosed errors or you otherwise request a closing agreement on failures that cannot be self-corrected or have other compliance issues), the IRS will conduct either a limited or a full scope exam, at their discretion.

Additionally, if the plan sponsor does not provide any response by the 90-day deadline, the IRS will contact the plan sponsor to schedule an examination.

Insights and Questions

We wonder if the new program is attempting to transform the previous issue-specific “IRS Compliance Questionnaire” into a tool to encourage broader voluntary compliance – and save IRS agents time and resources.

The IRS has not stated how long this pilot program will last. The announcement only indicates that the IRS will at some point evaluate the program’s effectiveness and decide if the program should be part of

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the IRS's ongoing compliance strategy. The stated goal of the program is to "reduce taxpayer burden and reduce the amount of time spent on retirement plan examinations," but the impetus for the program could also be the report issued by the Treasury Inspector General for Tax Administration ("TIGTA"), which found that overall quality scores for IRS examinations decreased by 23% from 2018 to 2020 and recommended changes to improve the quality of examinations, while also noting that additional actions could be taken to improve examination quality.

In the meantime, the pilot program appears to offer an opportunity to those plan sponsors selected by the IRS to correct plan failures at a reduced cost. However, 90-days is not a lot of time to review a plan for document and operational compliance – and then to identify and correct potential failures. Plan sponsors will need to act swiftly upon receipt of notice from the IRS of an upcoming examination and coordinate with legal counsel and other professionals to take full advantage of this pilot program.

If properly structured, a law firm-assisted response to the IRS under this pilot program may qualify for the attorney-client privilege. We also believe it is important for plan sponsors to take a proactive approach – periodic self-audits are of even greater importance now that the IRS no longer routinely issues determination letters. Such self-audits can serve as a key internal control for an organization's plans, and help avoid costly IRS corrections. And even upon receipt of this pending audit letter, a mini-audit of plan operations could be performed of the top issues of concern, and if the plan has not received a recent determination letter, an opinion letter on the plan document compliance is also worth considering. Groom has developed a [Document Compliance Service \("DCS"\)](#) through which plans sponsors can request an opinion intended to confirm continued satisfaction of the IRS document requirements applicable to the sponsors plan(s). If you have questions, please reach out to your Groom attorney.

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