

## IRS Makes Helpful Changes to EPCRS and Modifies Anonymous Submission Process

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On July 16, 2021, IRS issued a new version of the Employee Plans Compliance Resolution System (“EPCRS”), set forth in [Revenue Procedure 2021-30](#). The new EPCRS provides qualified plan sponsors with the opportunity to correct specific errors that jeopardize the plan’s tax-qualified status. The program has evolved since originally implemented, and Revenue Procedure 2021-30 continues the trend of expanding the menu of self-correction options available to plan sponsors and service providers while also increasing the number of flexible, “common sense” correction methods available. Importantly, these updates can help plan sponsors and fiduciaries resolve some of the most vexing and recurrent plan failures without risking disqualification.

In its latest EPCRS update, the IRS has made some administrative revisions as well as important changes including: (1) an expanded Self Correction Program (“SCP”), including an extension of the general correction period, (2) updates to the rules for recovering overpayments, and (3) changes to the anonymous Voluntary Correction Program (“VCP”) submission process. These changes are generally effective July 16, 2021, except as otherwise provided below.

### 1. Expanded SCP

a. **Self-Correction Period:** Revenue Procedure 2021-30 expands the general correction period for significant operational and plan document failures under SCP from two to three years following the year for which the failure occurred. This extended correction period gives plan sponsors and service providers an additional year to identify and self-correct significant operational errors without risking disqualification or requiring a more involved (and expensive) VCP. This change also gives more time for fixing errors where the correction is tied to the SCP correction period for significant failures, such as the safe harbor correction method for elective

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deferral failures lasting more than three months but not beyond the SCP correction period (now three years).

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**GROOM INSIGHT:** There is now more time and more opportunities to use self-correction.

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b. Sunset for Certain Elective Deferral Failures: The safe harbor correction method for the failure to implement an automatic contribution arrangement (or an affirmative election for an employee subject to an automatic contribution arrangement), first introduced in Revenue Procedure 2015-28, was scheduled to sunset on December 31, 2020. Effective January 1, 2021, Revenue Procedure 2021-30 extends the sunset of this safe harbor correction method to December 31, 2023.

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**GROOM INSIGHT:** This extension of the 2015 relief provides a greater opportunity to identify and self-correct errors that occur in implementing automatic enrollment features. For plans that have delayed correction since the prior relief expiration date of December 31, 2020, there is now a clear path forward to use this beneficial relief.

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c. Self-Correction of Operational Failures through Plan Amendments: Under the new EPCRS, plan sponsors may now correct an operational failure via plan amendment that increases a benefit, right, or feature – even when that increase does not apply to all eligible participants. This change may be helpful in providing sponsors with flexibility to address limited eligibility errors – e.g., a sponsor could adopt an amendment to allow a group of otherwise excluded employees to keep their 401(k) contributions in the plan rather than returning the amounts to those participants.

*Takeaway:* This change makes self-correction by amendment a viable correction strategy for many more operational failure situations and is likely to be a first step in evaluating potential future corrections.

## 2. Overhaul of the Anonymous Review Process

Effective January 1, 2022, the IRS will no longer accept anonymous VCP submissions through EPCRS. Plan sponsors and practitioners have historically relied on anonymous VCP submissions to get IRS approval on uncertain, conflicting, or otherwise thorny issues for which there may be reasonable disagreement with the IRS about the best course of action without revealing the name of the plan sponsor. When the IRS and an anonymous submitter could not reconcile their view of the facts and/or law, the plan sponsor could withdraw the application while maintaining anonymity.

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Instead, anonymous VCP submissions are replaced with a VCP pre-submission conference option. Effective January 1, 2022, a plan sponsor may request an anonymous VCP pre-submission conference before submitting a VCP application. Similar to a VCP, pre-submission conference applications must describe the failure, proposed correction, related facts, and relevant plan provisions. The submission, conference, and IRS opinions are non-binding on the IRS.

A pre-submission conference will be available only (1) for errors for which a compliance statement may be issued under EPCRS, (2) with respect to correction methods not described as safe harbor correction methods in Appendix A or B to Revenue Procedure 2021-30, and (3) if the plan sponsor is eligible and intends to submit a VCP application. Whether a correction method is “described” as a safe harbor will be an interpretive question for the IRS, which has historically pushed plan sponsors towards safe harbor correction methods. Therefore, potential VCP filers should carefully craft their pre-submission conference requests to satisfy those requirements.

Despite the elimination of the anonymous VCP process, the pre-submission conference will serve a similar purpose by allowing the plan sponsor to engage with the IRS on a complicated issue without committing to a mandated course of action. The key differences are (1) the IRS has discretion on whether to hold a pre-submission conference and (2) there is no fee required for the submitter who decides not to file a VCP after the conference. Under the current process, if a plan sponsor files an anonymous VCP application that is subsequently withdrawn, the IRS retains the application fee.

Consistent with the EPCRS change, on July 20, 2021, the IRS updated its procedures for requesting voluntary closing agreements (“VCAP”) to eliminate anonymous requests and allow anonymous pre-submission conferences, at its discretion. See [Employee Plans Voluntary Closing Agreements | Internal Revenue Service \(irs.gov\)](#) for more information on the closing program updates.

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**GROOM INSIGHT:** Anonymous consultation and filing with the IRS has been a favored strategy used for uncertain and complex corrections as well as for EPCRS filers, such as standalone governmental plans and collectively bargained plans, who may not have an independent source of funds for unexpected correction costs. To the extent a plan sponsor or service provider wishes to use the anonymous filing approach, December 31, 2021 is now a hard deadline to keep in mind when planning for the rest of 2021.

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### 3. Modernization of the Rules for Recouping Overpayments

Revenue Procedure 2021-30 also modernizes the rules for recouping overpayments based on previous guidance and years of feedback from plan sponsors, service providers and other industry stakeholders. Historically, plans were required to obtain repayment of all overpayments from participants and beneficiaries or the sponsor was required to contribute the difference, plus earnings, to the plan.

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Recognizing the complications with seeking repayment in all situations, the IRS has expanded methods for repayment and added two ways to satisfy the plan's obligation for defined benefit plans.

a. **De minimis Overpayments/Excess Amounts:** The amount of a de minimis overpayment, for which a plan is not required to seek repayment and not required to notify the recipient that the overpayment is not rollover-eligible, is increased from \$100 to \$250. Similarly, the total amount of an excess amount (i.e., an allocation that has not been distributed) that need not be distributed or forfeited is increased from \$100 to \$250. However, there is no change to the rule that if the excess amount exceeds a statutory limit, the participant or beneficiary must be notified that the excess amount is not eligible for tax-free rollover. Note that the maximum amount for de minimis underpayments (\$75) remains unchanged.

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**GROOM INSIGHT:** The increase in the de minimis overpayment recovery threshold is a significant and very positive change that will hopefully reduce the complexity of overpayment corrections.

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b. **Installment Payments, Adjustments to Future Contributions, and Plan Amendments:** For both defined contribution and defined benefit plans, plans may now permit overpayment recipients to make repayments through a single sum, installment agreement, or an adjustment to future payments. The overpayment recipient must be notified that the overpayment is not eligible for tax-free rollover. Plan sponsors may also correct an overpayment error by amending their plan to reflect the overpayments, in which case no notification is required.

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**GROOM INSIGHT:** This repayment flexibility is a positive step that may help avoid excess burden on participants and beneficiaries who have received overpayments.

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c. **Funding Exception Correction Method:** A single-employer defined benefit plan with an AFTAP (adjusted funding target attainment percentage) at the time of correction of at least 100% may use the funding exception correction method. With this method, the plan must reduce future benefit payments to the overpayment recipient so that the correct benefit amount is paid prospectively, and the recipient must be notified that the overpayment is not eligible for tax-free rollover. Under this method, no further correction is required or permitted. This method means that the plan may not make any additional reductions to the participant's or beneficiary's payments to account for the prior overpayment.

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**GROOM INSIGHT:** For well funded single-employer defined benefit plans, historical overpayments can be left as is, dramatically reducing administrative burden.

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d. **Contribution Credit Correction Method:** This correction method allows overpayments to be reduced by (1) the cumulative increase in minimum funding requirements attributable to the overpayment, and (2) additional contributions in excess of the minimum funding requirements made after the overpayment. Like the other new correction method (Item (c) above), the plan must reduce future benefit payments so that the correct benefit amount is paid prospectively, and once the contribution credit correction method reduces an overpayment to zero, no further correction is required or permitted. However, if a net overpayment remains after the contribution credit is applied, the plan sponsor or another party must reimburse the plan for the remainder of the overpayment. The recipient must be notified that the overpayment is not eligible for tax-free rollover.

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**GROOM INSIGHT:** For single-employer defined benefit plans receiving annual contributions in excess of minimum funding requirements, this method provides a potentially useful method for reducing administrative burden.

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While not foundationally ground shaking, these changes do ease the burden on plans seeking to fulfill their obligations regarding overpayments. The Funding Exception and Contribution Credit correction methods should already be familiar to stakeholders acquainted with this area of the law. However, IRS formalization of these methods is a helpful development for plan sponsors who wish to do the right thing for plan participants and beneficiaries, especially those retirees with limited resources to repay large overpayments made over the course of many years. The IRS has also revamped the overpayment correction examples, which guide how these methods may look under different circumstances. We hope that the Department of Labor will weigh in on these new overpayment correction methods, blessing them as consistent with the plan administrator's fiduciary obligation to prudently attempt to recover overpayments. Further, additional overpayment relief may be on the horizon if SECURE 2.0 and related legislation on overpayments moves forward through Congress.

Administering retirement plans is complicated, and plan corrections are a practical reality. If you have questions on the new correction processes, or need assistance with your plan corrections, reach out to your Groom attorney.

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