

# Employee Benefit Plan Review

## Internal Revenue Service Issues Interim Guidance on SECURE 2.0 Self-Correction Expansion

BY JOSHUA WALDBESER AND YAEL KALMAN

The Internal Revenue Service (IRS) has issued Notice 2023-43 (Notice) to provide interim guidance on Section 305 of SECURE 2.0 Act of 2022 (SECURE 2.0), which significantly expanded self-correction under the Employee Plans Compliance Resolution System (EPCRS). The Treasury Department was directed under SECURE 2.0 Section 305 to issue an updated version of EPCRS (most recently set forth in Rev. Proc. 2021-30) by December 29, 2024. The Notice is intended to provide some answers to plan sponsors in advance of the update to Rev. Proc. 2021-30.

In general, Section 305 of SECURE 2.0 broadened the scope of self-correction by permitting any eligible inadvertent failures (EIFs) to be self-corrected within a reasonable period after the failure is identified. SECURE 2.0 defines the self-correction period as indefinite, with no last day, so long as the IRS does not identify the failure before the plan sponsor takes action demonstrating a specific commitment to implement a self-correction to the failure.

### CERTAIN CONDITIONS FOR SELF-CORRECTION

The Notice in Q&A-1 identifies certain additional conditions for self-correcting

EIFs before Rev. Proc. 2021-30 is updated, including:

- The failure must not be egregious (per Rev. Proc. 2021-30 Section 4.10), must not relate to an abusive tax avoidance transaction (per Rev. Proc. 2021-30 Section 4.12(2)), and must not relate to the diversion or misuse of plan assets.
- The self-correction satisfies the provisions applicable to self-correction under Rev. Proc. 2021-30, including the following:
  - Section 4.04: plan sponsors must have established practices and procedures reasonably designed to promote and facilitate overall compliance with applicable Code requirements.
  - Section 6: plan sponsors must apply the Section 6 correction principles and rules of general applicability.
  - Appendix A and B: plan sponsors may, but are not required to, self-correct using a correction method in Appendix A or B (such correction methods are deemed to be reasonable and appropriate methods of correcting a failure).
- The plan sponsor may not use a correction method that is prohibited under Rev. Proc. 2021-30.

### CERTAIN FAILURES MAY NOT BE SELF-CORRECTED

The Notice in Q&A-2 and Q&A-12 identifies certain EIFs that a plan sponsor may not self-correct before Rev. Proc. 2021-30 is updated, including:

- A failure to initially adopt a written plan under section 401(a), 403(a), 403(b) (including the failure to adopt a written section 403(b) plan timely to meet the requirements of the final 403(b) regulations), 408(k), or 408(p).
- A significant failure in a terminated plan.
- An operational failure corrected by plan amendment that conforms the terms of the plan to its prior operations in a manner less favorable for a participant or beneficiary than the original terms of the plan.
- A demographic failure corrected using a method other than a method set forth in Treas. Reg. §1.401(a)(4)-11(g).
- A failure in an orphan plan and certain types of failures for SEPs, SIMPLE IRAs, and ESOPs.
- IRA custodians may not correct an EIF under EPCRS before Rev. Proc. 2021-30 is updated (Q&A-12).

### CERTAIN REV. PROC. 2021-30 PROVISIONS DO NOT APPLY

The Notice in Q&A-3 identifies certain provisions of Rev. Proc. 2021-30 that are inapplicable with respect to self-correction of an EIF before Rev. Proc. 2021-30 is updated:

- The requirement that a qualified plan or section 403(b) plan be the subject of a favorable letter.
- The prohibition of self-correction of:
  - Demographic failures;
  - Employer eligibility failures;
  - Significant failures under SEPs and SIMPLE IRA plans; or

- Certain loan failures.
- The provisions relating to self-correction of significant failures that have been substantially completed before the plan or plan sponsor is under examination.
- The requirement that a significant failure must be completed or substantially completed by the end of a specified correction period (in general, the last day of the third plan year following the plan year for which the failure occurred).

### TERMS USED IN SECURE 2.0 SECTION 305 DEFINED AND EXPLAINED

The Notice in Q&A-4 through Q&A-7 defines certain terms or explains how they are applied before Rev. Proc. 2021-30 is updated:

- An EIF is treated as having been “identified” by the IRS and therefore no longer eligible for self-correction when the plan or plan sponsor comes under examination, as defined in Rev. Proc. 2021-30 Section 5.08.
  - Once the plan or plan sponsor comes under examination, the EIF is no longer eligible for self-correction unless, prior to coming under examination, the plan sponsor has demonstrated a specific commitment to implement a self-correction with respect to the EIF.
  - A plan sponsor may self-correct a failure that is insignificant, as determined under Rev. Proc. 2021-30 Section 8.02, even if the plan or plan sponsor is under examination.
- Whether a plan sponsor’s actions are determined to demonstrate a “*specific commitment*” to implement the self-correction of an identified EIF is based on all facts and circumstances.
  - In general, the actions must demonstrate that the plan sponsor is actively pursuing

correction of the specific identified failure.

- Mere completion of an annual compliance audit or a general statement of intent to correct failures when discovered are not sufficient.
- A “reasonable period” is determined by considering all relevant facts and circumstances.
  - In general, a failure that has been corrected by the last day of the 18th month following the date the failure is identified by the plan sponsor will be treated as having been completed within a reasonable period after being identified.
  - Employer eligibility failures, however, will be treated as having been corrected within a reasonable period only if (i) the plan sponsor ceases all contributions to the plan as soon as reasonably practicable after the failure is identified, and (ii) in no event later than the last day of the 6th month after the date the plan sponsor IDENTIFIES THE FAILURE.

### CONFIRMATION OF CERTAIN PROCEDURAL REQUIREMENTS

The Notice in Q&A-8 through Q&A-11 confirms that:

- Plan sponsors may self-correct EIFs on or after December 29, 2022 (the date SECURE 2.0 was enacted), even if the EIF occurred prior to December 29, 2022.
- Plan sponsors may still submit VCP applications under Rev. Proc. 2021-30 to correct an EIF (i.e., an EIF that would otherwise be eligible for self-correction).
- No new IRS recordkeeping requirements are imposed with respect to self-correction of EIFs under SECURE 2.0 Section 305; however, current IRS recordkeeping requirements still apply (i.e., a plan sponsor must be

able to provide documentation substantiating the self-correction, if requested upon examination).

- Self-correction of an EIF with respect to which an excise tax or additional tax applies does not automatically result in a waiver of the tax. However, the plan sponsor may request that the IRS not pursue certain excise taxes or additional taxes through a VCP submission or request for a closing agreement through the Voluntary Closing Agreement Procedure (for issues that cannot be corrected through EPCRS).

### RELIANCE ON THE NOTICE AND FURTHER COMMENTS AND GUIDANCE

Plan sponsors may rely on the Notice beginning on the date it was issued (May 25, 2023) until the date Rev. Proc. 2021-30 is updated. If a self-correction was completed on or after December 29, 2022 and before May 25, 2023, the plan sponsor may apply a good faith, reasonable interpretation of SECURE 2.0 Section 305 in completing the self-correction (and if the self-correction accords with the Notice, it will be treated as having applied a good faith, reasonable interpretation).

The Treasury Department and the IRS invited comments on the Notice and any other aspects of SECURE 2.0 Section 305 on or before August 23, 2023. The IRS must issue an update to Rev. Proc. 2021-30 by December 29, 2024.

In the meantime, plan sponsors should reach out to benefits counsel for further advice on any correction matters. 🌐

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