

June 2023

IRS Notice 2023-43 Provides Interim Guidance for EPCRS Expansion Required by SECURE 2.0

On May 25, 2023, the Internal Revenue Service (IRS) released interim guidance with respect to Section 305 of the SECURE 2.0 Act of 2022 (SECURE 2.0) that requires changes to be made to the Employee Plans Compliance Resolution System (EPCRS). The interim guidance, which is in the form of a Q&A in advance of the IRS revising the EPCRS revenue procedure, provides that:

1. Plans that were previously eligible to self-correct certain failures using EPCRS may immediately implement the self-correction of eligible inadvertent failures to all corrections, including those that occurred prior to the December 29, 2022 enactment of SECURE 2.0, if certain conditions are met and exceptions do not apply, and
2. IRA custodians must wait until the IRS issues an updated EPCRS revenue procedure to correct any eligible inadvertent failures.

The full text of Notice 2023-43 is available at [N-2023-43 \(irs.gov\)](https://www.irs.gov/notice/2023-43)

Background on EPCRS

The most recent version of EPCRS, currently set forth in Revenue Procedure 2021-30 (available at <https://www.irs.gov/pub/irs-drop/rp-21-30.pdf>), which permits 401 plans, 403(b) plans, SEPs, and SIMPLE IRAs to correct certain plan and operational defects. EPCRS provides for three correction programs available for eligible plans to correct tax qualification failures:

1. **Self-Correction Program (SCP):** Self-correction for insignificant operational failures (generally, even if corrected during IRS examination of the plan) and significant operational failures (corrected within three years following the plan year in which the failure occurred). SCP does not require the plan sponsor to pay a penalty or to submit an application for IRS approval);
2. **Voluntary Correction Program (VCP):** Correction of significant failures identified prior to audit and that are not eligible for correction under SCP via submission of a proposed correction to the IRS for approval and payment of a fee; and
3. **Audit Closing Agreement Program (Audit CAP):** Correction of significant failures identified by the IRS during audit and payment of a financial sanction.

To utilize SCP under Revenue Procedure 2021-30, qualified plans and 403(b) plans must have a favorable letter issued by the IRS, sponsors must have established practices and procedures designed to ensure compliance with the Internal Revenue Code (the Code), and the failure must be corrected in accordance with the basic principles of EPCRS specified therein. Further, SEPs and SIMPLE IRAs are precluded from using SCP to correct any significant operational failures, and other certain failures are ineligible to be self-corrected by any plan, including employer eligibility and demographic failures.

Section 305 of SECURE 2.0

Section 305 of SECURE 2.0 expands the ability for qualified plans, 403(b) plans, SEPs and SIMPLE IRAs to self-correct any "Eligible Inadvertent Failure" under EPCRS without regard to when the failure occurred, as well as extends the ability for IRA custodians to use EPCRS to correct tax compliance failures within IRAs. While these changes are effective upon enactment, SECURE 2.0 directs the IRS to revise EPCRS (IRS Revenue Procedure 2021-30 and any successor guidance) two years from the December 29, 2022 date of enactment of SECURE 2.0:

1. Section 305(a) of SECURE 2.0 provides that any Eligible Inadvertent Failure may be self-corrected under EPCRS indefinitely, as long as it is corrected within a reasonable period after being identified and other conditions described by the Treasury are met. An Eligible Inadvertent Failure is defined in

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Section 305(e) of SECURE 2.0 as a failure that occurs despite the existence of practices and procedures that satisfy (a) the established practices and procedures reasonably designed to promote and facilitate overall compliance in form and operation with applicable Code requirements, or (b) similar standards in the case of an IRA.

An Eligible Inadvertent Failure does not include any failure that is egregious, relates to the diversion or misuse of plan assets, or is directly or indirectly related to an abusive tax avoidance transaction.

2. Section 305(c) of SECURE 2.0 provides EPCRS be expanded to allow custodians of IRAs to address eligible inadvertent failures with respect to an IRA, including, but not limited to: (a) waivers of the excise tax that would otherwise apply under section 4974 of the Code, and (b) rules permitting a non-spouse beneficiary to return distributions to an inherited IRA in a case where, due to an inadvertent error by a service provider, the beneficiary had reason to believe that the distribution could be rolled over without inclusion in income of any part of the distributed amount.

Interim Guidance under IRS Notice 2023-43

A plan sponsor of a qualified plan, 403(b) plan, SEP, or SIMPLE IRA may self-correct an Eligible Inadvertent Failure, including one relating to a plan loan from a 401 or 403(b) plan, before EPCRS is formally updated, if all of the following conditions are satisfied:

1. The failure was not identified by the IRS prior to any actions demonstrating a specific commitment to implement a self-correction with respect to the failure. The IRS cautions that mere completion of an annual compliance audit or adoption of a general statement of intent to correct failures when they are discovered are not actions demonstrating a specific commitment to implement the self-correction of an identified failure.
2. The self-correction is completed within a reasonable period after the failure was identified, determined by considering all relevant facts and circumstances. For these purposes, a reasonable period of time generally is correcting the failure by the last day of the 18th month following the date the failure is identified by the plan sponsor. If the correction involves an employer eligibility failure, a reasonable period of time occurs following the plan sponsor's cessation of all contributions to the plan as soon as reasonably practicable after the failure is identified and, in no event, later than the last day of the 6th month following the date the failure is identified.
3. The failure is not egregious, does not directly or indirectly relate to an abusive tax avoidance transaction, and does not relate to the diversion or misuse of plan assets.
4. The self-correction satisfies all of the provisions applicable to self-correction set forth in Revenue Procedure 2021-30, including that –
 - A plan sponsor must have established practices and procedures reasonably designed to promote and facilitate overall compliance with applicable Code requirements;
 - A plan sponsor must apply the correction principles and rules of general applicability set forth in section 6 of Revenue Procedure 2021-30;
 - A plan sponsor may, but is not required to, self-correct using a safe harbor correction method set forth in Appendix A or B of Revenue Procedure 2021-30; and
 - A plan sponsor may not use a correction method that is currently prohibited under Revenue Procedure 2021-30.

Notice 2023-43 provides clarification that certain Eligible Inadvertent Failures remain ineligible for self-correction under the interim guidance of Notice 2023-43, including but not limited to:

- A failure to initially adopt a written plan;
- A significant failure (that is, a failure that is not an insignificant failure, as determined in accordance with the factors set forth in section 8.02 of Revenue Procedure 2021-30) in a terminated plan; and
- An operational failure that is corrected by a plan amendment that conforms the terms of the plan to the plan's prior operations in a manner that is less favorable for a participant or beneficiary than the original terms of the plan.

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Further, the prohibition on self-correction under Revenue Procedure 2021-30 does not preclude certain Eligible Inadvertent Failures from using self-correction under the interim guidance of Notice 2023-43, including but not limited to:

- 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 and employer eligibility failures; and
- The requirement that a significant failure must be completed or substantially completed by the end of the last day of the third plan year following the plan year for which the failure occurred, or other prescribed correction period.

Finally, Notice 2023-43 was unequivocal that an IRA custodian may not correct an Eligible Inadvertent Failure under EPCRS before the IRS issues an updated revenue procedure in accordance with SECURE 2.0 requirements.

Reliance and Request for Comment

Plan sponsors may rely on this notice effective immediately until the IRS issues an updated revenue procedure pursuant to SECURE 2.0 by applying a good faith, reasonable interpretation of Section 305 of SECURE 2.0 Act and Notice 2023-43 in completing the self-correction. Comments on the guidance in Notice 2023-43 as well as Section 305 of SECURE 2.0 may be submitted in writing to the IRS on or before August 23, 2023, and should include a reference to Notice 2023-43.

IRS Circular 230 Disclosure

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