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Expanded IRS Self-Correction Program Helps Avoid Increased User Fees for VCP, Still Has Risks

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OVERVIEW

This article discusses how recent changes in the calculation of user fees under the Employee Plans Compliance Resolution System (EPCRS) increased the cost of compliance for small employers and how the Internal Revenue Service (IRS) expanded the self-correction program in an effort to address the high cost of compliance. It will then also discuss the issues with self-correction and suggest possible improvements.

A qualified retirement plan has significant federal income tax advantages. In general, employer contributions to the plan for the benefit of employees are tax deductible in the year made, the employees do not pay income tax on the benefits until distributions are received, and the investment earnings of the plan are not taxed while in the plan. Under a §401(k) plan, employee pre-tax elective deferrals reduce the employee's taxable income, and after-tax Roth deferrals and the earnings thereon can escape tax on distribution. However, these advantages come at a cost. There are a myriad of rules these plans must meet to be qualified. The plan's written terms must comply with the rules and the plan must follow the written plan document in operation. There are limits on how much compensation may be considered, limits on how much can be contributed, minimum age and service eligibility requirements, and rules on when benefits become non-forfeitable or vested. In addition, certain plans can only be adopted by certain types of employers. For example, governmental employers cannot adopt a §401(k) plan. Likewise, only certain types of tax-exempt organizations—§501(c)(3) charitable organizations and public schools—can adopt §403(b) plans.[1]

Additionally, Congress continues to amend the qualification requirements under §401(a) and other sections of the Code to add more requirements for a plan to be qualified.[2] This requires existing plans to be amended. This highly technical aspect of tax qualification means that it is not that unusual for an employer's plan to fall out of either documentary compliance or operational compliance in some manner. Documentary compliance means the plan document includes the necessary terms under the law to be a qualified plan. Operational compliance means that the plan is being operated in accordance with the compliant plan document.

The effect of falling out of compliance is that the plan is no longer qualified for the tax advantages of a qualified plan—employer contributions are no longer deductible, the earnings of the plan trust are taxable at

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[1] Technically §403(b) plans are not "qualified" plans under §401(a), however they are included in the term "qualified plans" in this article because they are tax-advantaged plans that may be corrected under EPCRS.

[2] All section references are to the Internal Revenue Code of 1986, as amended (the Code) and the regulations thereunder unless otherwise specified.

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trust income tax rates, and employees are subject to income tax on the value of vested benefits.[3] Even when limited to only open years, due to the statute of limitations, these tax consequences are dramatic. The employee-participants are hurt the most as their retirement benefits are drastically reduced due to taxes and their benefits won't qualify for tax-free rollover treatment. Recognizing this, in the early 1990s, the IRS developed various correction programs to keep plans qualified for the benefit of participants. The Audit Closing Agreement Program (Audit-CAP) was the first program, beginning in 1990. In 1992, the Voluntary Compliance Resolution Program was established as an experimental program and was similar to the current Voluntary Correction Program allowing employers to voluntarily bring their plan operational failures to the IRS, correct them, and pay a fixed fee to keep the plan qualified. By 1998, all the programs were consolidated as EPCRS in Rev. Proc. 98-22. EPCRS has been modified and restated over the years with the latest version being contained in Rev. Proc. 2019-19.

EPCRS

EPCRS establishes three distinct programs for correcting operational and documentary failures of qualified plans, allowing a plan to be corrected and maintain qualified status under the Code despite an otherwise disqualifying error: the Self-Correction Program (SCP), the Voluntary Correction Program (VCP), and Audit-CAP.[4]

SCP

SCP allows employers to voluntarily self-correct certain failures without having to file with the IRS and obtain its consent. Under SCP, insignificant failures can be self-corrected at any time, even during an IRS audit of the plan. Significant failures may only be self-corrected if the correction is completed by the end of the second plan year after the plan year in which the failure first occurred.

EPCRS sets forth seven factors to be considered in determining whether an operational failure is significant or insignificant: whether other failures occurred during the plan year; the percentage of plan assets and contributions involved in the failure; the number of years the failure occurred; the number of participants affected relative to the total number of participants; the number of participants affected relative to the number of participants who could have been affected; whether the correction was made within a reasonable time after discovery of the failure; and, the reason for the failure (e.g., data transcription error, minor math error, etc.). No one factor is determinative.[5] Additionally, there is no mechanism for a taxpayer to learn whether the IRS agrees that an operational failure is insignificant when applying the factors. Rev. Proc. 2019-19 contains an example of an insignificant failure involving exceeding the §415(c) limit in a profit-sharing plan with 250 participants. In Example 1, three of the 50 participants whose annual additions during the plan year were limited by the §415 limit received annual additions in excess of the limit for a total of $4,550 in excess contributions. The employer contribution for the plan year was $3.5 million. The example concludes that this operational failure was insignificant because the total number of participants affected (three) relative to the number that could have been affected (50), and the monetary amount of the failure ($4,550) relative to the total employer contribution for the plan year ($3.5 million) were insignificant.[6]

In another example, changing the facts slightly to 18 affected participants and excess contributions of $150,000 causes the failure to be significant.[7] In this example, 18 of the possible 50 participants affected is 36% compared to 6% in the first example. Likewise, the monetary amount involved is only 4.28% of the employer contribution, but the percentage in the first example is only .13%. These two examples are pretty far apart in their facts, so what about a case that falls in between these two extremes. What if five participants of the possible 50 participants were affected and they had excess contributions totaling $35,000? That is 10% of the participants that could have been affected and 1% of the employer contribution. An employer with these facts, who didn't discover them before the end of the second plan year after the distributions were made, has to decide whether to self-correct and run the risk that, on audit, the IRS could maintain that the failure was significant and not eligible for SCP.

The IRS said it plans to provide additional examples illustrating whether an operational failure is

[3] Under §401(b)(4), if the only failure is the failure to meet the minimum participation and coverage rules, only highly compensated employees are subject to income tax to the extent vested.

[4] EPCRS also allows demographic and employer eligibility failures to be corrected. A demographic failure is a failure to meet the discrimination or minimum participation or coverage rules under §401(a)(4), §401(a)(26), and §410(b), respectively. An employer eligibility failure occurs when an employer adopts a plan intended to be a §401(k) plan when the employer is not eligible to adopt a §401(k) plan (such as a governmental entity). Because neither of these failures can be self-corrected, they are not addressed in this article.

[5] Rev. Proc. 2019-19, §8.02.

[6] Rev. Proc. 2019-19, §8.04(2), Ex. 1.

[7] Rev. Proc. 2019-19, §8.04(2), Ex. 3.

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insignificant on the IRS.gov website.[8] Hopefully, these examples will be more helpful.

VCP

The VCP allows employers whose plans are not under examination by the IRS to voluntarily bring errors in plan documentation or operation to the attention of the IRS, propose a correction method, and receive a compliance statement from the IRS stating that if the corrections are made within 150 days of the date of the statement, then the IRS will not disqualify the plan because of the error.[9]

Audit-CAP

The Audit-CAP program allows an employer whose plan has been audited by the IRS and found to include a disqualifying failure to pay a sanction amount, correct the failure, and keep the plan qualified for participant employees. The sanction amount is negotiated, but generally a percentage of the maximum payment amount that the Treasury Department would receive in tax from lost deductions, taxable plan earnings, and taxable vested benefits, for open years, if the IRS disqualified the plan.[10]

USER FEES INCREASED

Federal Office of Management and Budget policy requires that federal agencies assess user fees when the agency's program conveys special benefits to recipients beyond those accruing to the general public. The user fee is supposed to reflect the resources required to administer the program and be self-sustaining.[11] Originally, EPCRS charged a compliance fee based on the total number of participants under the plan and total assets under the plan. However, from 2001 through 2017, the user fee was based solely on the number of participants in the plan.[12] In 2017, the user fee was as low as $500 for a plan with 20 or fewer participants, with a high of $15,000 for a plan with over 10,000 participants. The user fees for 2017 are set forth in the chart below:[13]

Participants	*Fee*
20 or less	$500
21 to 50	$750
51 to 100	$1,500
101 to 1,000	$5,000
1,001 to 10,000	$10,000
More than 10,000	$15,000

Additionally, there were special lower user fees for failing to adopt interim amendments, errors involving participant loans, and required minimum distribution failures.[14]

On January 2, 2018, without advance notice or grace period, the IRS announced changes to how user fees would be calculated for VCP submissions in Rev. Proc. 2018-4. Under the new rules, VCP user fees were based on the net assets in the plan for submissions filed after 2017, under the following schedule:

Assets	*User Fee*
$0 to $500,000	$1,500
Over $500,000 to $10 million	$3,000
Over $10 million	$3,500

While the highest fee now paid is $3,500 rather than $15,000, which is a substantial reduction for larger plans, for most plans the user fees are likely to increase. A small plan with under 100 participants now has to pay $1,500 as a minimum. Under the old schedule, a plan would have to have over 50 participants to pay such a user fee. Put another way, a small plan, in terms of participants, that has significant assets due to any number of reasons (e.g., generous employer contributions, most employees deferring the maximum §401(k) plan deferral, good investment performance, significant rollover accounts) that has a failure that could be corrected under VCP will have to pay a significantly higher user fee. For example, a plan with $700,000 in assets but only 40 participants will have to pay a $3,000 user fee. In the past it would only pay $750. Plans with over $500,000 in assets and more than 100 participants will benefit the most under the new schedule as their user fee drops to $3,000 from $5,000, or more. And the user fee remains $3,000 until a plan has over $10 million in net assets, at which time it only increases $500.

Additionally, Rev. Proc. 2018-4 eliminated the special reduced VCP user fees for participant loan failures, required minimum distribution failures, and certain late amendments or non-amendment failures.

This increase in user fees for smaller plans could have a chilling effect on plans needing correction un-

[8] Rev. Proc. 2019-19, §8.04(1).

[9] Rev. Proc. 2019-19, §10.06(9), §10.07(1).

[10] Rev. Proc. 2019-19, §5.01(5).

[11] OMB Circular No. A-25.

[12] *See* Rev. Proc. 2001-17, Rev. Proc. 2002-47, Rev. Proc. 2003-44, Rev. Proc. 2006-27, Rev. Proc. 2008-50, Rev. Proc. 2013-12, Rev. Proc. 2016-51, and Rev. Proc. 2018-52.

[13] Rev. Proc. 2017-4, App. A at .08

[14] *Id.*

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der VCP. Smaller plans are most likely to experience an error that needs to be corrected under VCP. However, the increased cost might cause the plan sponsor to self-correct the plan, whether eligible for SCP or not, and ''bear the risk.'' If, on audit of the plan, the IRS doesn't agree that the failure was eligible for SCP or that the correction was proper, it will likely threaten to disqualify the plan and seek an employer sanction under Audit-CAP to keep the plan qualified.

The employee benefits community was surprised by this change in user fee calculation and many commentators criticized it. The American Retirement Association wrote a comment letter to the Acting Commissioner of the IRS on January 31, 2018, stating the new structure is unfair to small employers and will have an adverse impact on plan participants. The letter also pointed out that §1101(b) of the Pension Protection Act of 2006 charged the Secretary of the Treasury with continuing to update EPCRS and giving special attention to the special concerns and circumstances that small employers face with respect to compliance and correction of compliance failures. It stated the new user fees ''appear to do exactly the opposite of what §1101(b)(2) of PPA 2006 requires.''[15]

In a response to the American Retirement Association, the IRS Acting Director of Employee Plans, Cathy L. Jones stated that §7528 provides that the IRS shall establish a program for the payment of user fees and that Employee Plans reviews the user fees biennially. In its most recent analysis, it decided to increase the VCP user fees for small plans to ''more accurately reflect the average time spent on these cases and to reduce the fees for larger plans to reflect the average time it takes to do these cases.''[16]

The Commissioner of the IRS Tax Exempt/Government Enitities Division, Sunita Lough, testified at an April 17, 2018, House Small Business Subcommittee hearing on Small Business Retirement Plans and the IRS's Employee Plans Fee Change regarding the changes to the VCP user fees. Lough testified that the IRS was bound by OMB policy set forth in OMB Circular No. A-25 to assess user fees that reflect the resources required to administer the program. She further explained that the IRS did not study how the changes to the user fees would affect the willingness of small businesses to adopt or maintain retirement plans. She did, however, state that the IRS was willing to consider expanding SCP to help smaller employers correct plans without paying a user fee.[17]

[15] Letter to Honorable David J. Kautter from Brian H. Graff and Craig P. Hoffman, Jan. 31, 2018.

[16] Letter to Brian H. Graff from Cathy L. Jones, Mar. 6, 2018.

[17] Andrew Remo, *IRS Pressed on VCP Fee Changes at Hill Hearing*, ASPPA News (April 18, 2018).

IRS EXPANDS SCP

In April, 2019, the IRS expanded the failures that can be self-corrected under SCP in the latest version of EPCRS set forth in Rev. Proc. 2019-19. Whether this development was in reaction to concern about the effects on small employers or how user fees are now determined under VCP from a participant-based fee to an asset-based fee is difficult to say. The IRS has not stated as such. It simply stated that practitioners have requested expansion of the SCP to correct certain failures because it would increase compliance and reduce the costs and burdens associated with plan compliance.[18] Nonetheless, the expansion will help smaller employers with significant plan assets save money by permitting certain common failures to be corrected without filing under VCP and paying a user fee.

Failures that can now be self-corrected include: (1) certain plan document failures resulting from failing to amend the plan with respect to a qualification requirement, if caught and corrected by the end of the second plan year after the plan year in which the failure occurred; (2) retroactive plan amendments to correct an operational failure by conforming the plan document to its actual operation; and (3) certain participant loan failures.

Amendment Failures

If a plan would no longer be considered a qualified plan or §403(b) plan because it failed to timely adopt a good faith amendment or interim amendment required by law, this failure can be self-corrected if discovered early enough. The employer must adopt the necessary amendment by the end of the second plan year following the plan year in which the amendment was required to be adopted because such document failures are always treated as significant failures. The plan must already have a Favorable Letter indicating it is tax favored to be eligible for this self-correction.[19] For this purpose a Favorable Letter for a pre-approved plan means a favorable opinion or advisory letter issued with respect to the most recently expired six-year remedial amendment cycle under Rev. Proc. 2016-37. In the case of an individually designed qualified plan, the term Favorable Letter means a determination letter issued with respect to the plan.[20] A §403(b) plan will be treated as having a Favorable Letter if the employer is an eligible employer and, on or before December 31, 2009 (or the date a §403(b) plan is established, if later), (1) the employer has adopted a written §403(b) plan that is intended to satisfy

[18] Rev. Proc. 2019-19, §2.02(1).

[19] Rev. Proc. 2019-19, §2.02(2).

[20] Rev. Proc. 2019-19, §5.01(4).

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§403(b) effective as of January 1, 2009 (or the first day of the plan year in which a §403(b) plan is established, if later), or (2) the employer has failed to adopt a written §403(b) plan timely and corrects the failure in VCP or Audit-CAP.

A failure to originally adopt the qualified plan timely cannot be self-corrected. SEPs and SIMPLE IRAs can only correct insignificant operational failures under SCP.[21] Therefore, this expansion is not applicable to those plans.

Amendment to Conform to Operation

If a plan was operated with respect to benefits, rights, and features contrary to the provisions of its plan document, such an operational failure can be self-corrected by adopting a retroactive plan amendment to conform the document to the operation provided the amendment increases the benefit, right, or feature for all eligible employees and is otherwise permitted under the Code and satisfies EPCRS correction principles.[22] An example would be a plan that in operation has been permitting in-service distributions at age 59½ when the document does not provide for such. This could be self-corrected by a retroactive amendment permitting such distributions for all employees. Previously, the plan amendment correction method could only be used under SCP as provided in the examples listed in Appendix B, §2.07 of the effective EPCRS revenue procedure.[23] That section provided examples relating to a plan making hardship distributions when the plan document did not permit it and the early inclusion of an otherwise eligible employee because the employee entered the plan before the entry date whether or not meeting the plan's minimum age and service requirements. It has now been expanded to also include the situation where one or more participants has taken one or more participant loans that exceeds the number of loans permitted for a participant under the plan document as part of the expansion of self-correction for plan loans.[24] In that case, the plan can be retroactively amended to conform to the operation under SCP.[25] For example, if the plan did not provide for participant loans but the plan permitted a participant to borrow from his or her account balance and the loan otherwise met the rules for participant plan loans, the plan can be retroactively amended to permit participant loans for all eligible employees. However, SCP is only available if the plan loans were available to all participants or only to non-highly compensated employees.[26] This means that if the only participant that borrowed money from the plan is a highly compensated employee, SCP is likely not available, unless there is some evidence that non-highly compensated employees had been informed that they were eligible for participant loans under the plan, as well.

PARTICIPANT LOAN FAILURES

There are several rules under §72(p)(2) that plan participant loans must meet to prevent the loan from being a disqualification error as a premature distribution from the plan.[27] These rules include the requirement that the loan repayment term not exceed five years unless the loan is for the purchase of a primary residence;[28] the loan's repayment schedule must be calculated using level amortization with at least quarterly payments;[29] and the aggregate amount of all outstanding loans of a participant may not exceed the lesser of $50,000 or the greater of 50% of the present value of the participant's vested accrued benefit or $10,000.[30] In a defined contribution plan the present value of the participant's vested accrued benefit is the vested account balance.

Loan issues have historically been the number one cause for correction under EPCRS. In addition to correcting the failure of exceeding the maximum number of loans permitted for a participant under the plan document with a conforming amendment under SCP described above, certain other loan failures can also now be self-corrected under SCP.[31] However, the failures that can be self-corrected are in the nature of operational failures. These are spousal consent failures and defaulted loans. Statutory failures of not meeting the maximum repayment length, maximum loan amount, and level amortization requirements under §72(p), may only be corrected under VCP and Audit-CAP.[32] In addition, correction is not available for these failures under VCP or Audit-CAP, if the maximum period for loan repayment of the loan under §72(p)(2)(B) has expired.[33] If such failures are corrected under VCP or Audit-CAP, the participant will not be considered to have a taxable deemed distribu-

[21] Rev. Proc. 2019-19, §5.02(5) and §6.10(3).
[22] Rev. Proc. 2019-19, §4.05(2)(a).
[23] Rev. Proc. 2019-19, §2.02(3).
[24] Rev. Proc. 2019-19,§2.02(4)(e).
[25] Rev. Proc. 2019-19, App. B, §2.07(3).
[26] *Id.*
[27] §72(p).
[28] §72(p)(2)(B).
[29] §72(p)(2)(C).
[30] §72(p)(2)(A).
[31] Rev. Proc. 2019-19, §2.02(4).
[32] Rev. Proc. 2019-19, §6.07(3)(b),(c).
[33] Rev. Proc. 2019-19, §6.07(3)(a).

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tion and the plan will not have to file a Form 1099-R reporting the distribution.[34]

SPOUSAL CONSENT FAILURES

If a loan was made from a plan that required the consent of the participant's spouse for such a distribution, but such consent was not obtained, the failure can be self-corrected by notifying the participant and spouse and obtaining written consent of the spouse currently.[35] Rev. Proc. 2019-19 states that if spousal consent is not obtained, the failure must be corrected under VCP or Audit-CAP.[36] This appears to address when the spouse or former spouse refuses to give consent, has died, or cannot be found to give consent. However, it is unclear whether the spousal consent must be obtained by the end of the second plan year after the loan was made. That is, whether the failure to obtain spousal consent to a plan loan is a significant or insignificant operational failure. Rev. Proc. 2019-19 does not specifically address this issue. Therefore, it is unclear whether the failure can be corrected at any time under SCP as a safe harbor or whether the employer must apply the seven factors to determine whether it is a significant failure. Given that the significant/insignificant dichotomy is a fundamental premise of SCP it seems that it should apply to spousal consent failures.

DEFAULTED LOANS

When a participant defaults on making timely payments on a participant loan, the defaulted amount is considered a deemed distribution.[37] Such amount would have to be reported by the plan on Form 1099-R in the year it occurred. However, now such defaults can be self-corrected under SCP provided all the other rules for participant loans are met and there is still time remaining on the maximum repayment period.[38] The default can be caused for any reason, including the employer's failure to start payroll deduction timely. The default can be corrected by (1) the participant making a single-sum payment of the missed payments and accrued interest to ''catch up''; (2) re-amortizing the outstanding balance over the remaining term of the loan or the remaining maximum repayment period had the loan been amortized over the maximum repayment period; or, (3) a combination of the two.[39]

For example, if a participant took a $15,000 loan from his or her vested §401(k) plan account balance of $35,000 payable over five years with level amortization on June 1, 2019, but for some reason the employer failed to start the payroll deduction monthly repayment until January 15, 2020, this default could be self-corrected. The participant could simply make a lump-sum payment of the total of the missed payments, plus accrued interest, and then the payroll deductions beginning January 15, 2020, would continue. Alternatively, the outstanding loan balance and accrued interest could be re-amortized over the remaining 54-month repayment period, which would increase the monthly payments. It could also be self-corrected with a combination of the two methods with the participant making a repayment of less than the total missed payments and the remainder being re-amortized with the balance of the loan.

It is important to note that participant loans are allowed as an exception to the prohibited transaction rules. Therefore, if a loan fails to meet the requirements for the exception, a prohibited transaction has occurred. If a sponsoring employer and other plan fiduciaries correct defaulted loan failures through VCP and obtain a compliance statement, they can file under the Department of Labor's Voluntary Fiduciary Correction Program (VFCP) to obtain a no-action letter stating the DOL will not pursue penalties or legal action for fiduciary breaches. However, the DOL has advised the IRS that it will not issue a no-action letter under the program unless such failures are corrected under VCP and the compliance statement is included in the VFCP submission.[40] It remains to be seen whether this position of the DOL will change.

CONCLUSION

Expanding the availability of self-correction is welcome given how measuring user fees based on plan assets tends to increase the cost of correction for plans with a small amount of participants but significant assets. However, the issue with SCP that has always existed is the lack of clear guidance on whether a failure is significant or insignificant and applying the factors set forth in EPCRS. While Rev. Proc. 2019-19 adds new failures that can be self-corrected under SCP, it doesn't clearly state that the significant/insignificant dichotomy under SCP applies to these new failures. However, given that it is a fundamental concept of SCP it is safe to assume that it does. The problem is

[34] Rev. Proc. 2019-19, §6.07(2).

[35] Rev. Proc. 2019-19, §6.07(4)(a).

[36] Rev. Proc. 2019-19, §6.07(4)(b).

[37] §72(p)(1)(A).

[38] Rev. Proc. 2019-19, §6.07(3)(a).

[39] Rev. Proc. 2019-19, §6.07(d).

[40] Rev. Proc. 2019-19, §2.02(4).

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the employer sponsoring the plan is never completely certain that the failure is properly corrected and the IRS will agree that the matter was eligible for self-correction and properly self-corrected. It is possible that in a close case, an IRS agent may take the position, on audit, that the failure was significant and not corrected within the two-year correction period. The agent would then offer the employer the opportunity to enter Audit-CAP and pay a sanction to maintain the qualified status of the plan. This is quite different than VCP where the plan sponsor receives a compliance statement from the IRS agreeing not to disqualify the plan if the corrections are timely made pursuant to the VCP submission.

For example, assume a small 10-participant §401(k) plan with $600,000 in assets allows for loans pursuant to §72(p). Five of the participants take loans in 2017 in the aggregate amount of $200,000, all with the maximum five-year repayment period. Due to a change in the employer's payroll service provider, payroll deductions did not start until April of 2017. The error is discovered in early 2018 after VCP user fees increased. However, the employer didn't submit to VCP due to cost. In late 2019, the employer learns of the expansion of SCP and undertakes to self-correct all loans by re-amortizing them. The new payment schedules are finalized and new payroll deduction begins in June of 2020. Later that year, the IRS audits the plan and the agent maintains the loans did not qualify for SCP because they were significant operational failures and were not corrected by the end of 2019.

One might argue that the IRS shouldn't take such a position because the reason for expanding SCP was to reduce the cost of compliance. However, it must be remembered that the IRS seems to have ignored §1101(b) of the Pension Protection Act requiring it to consider special concerns and circumstances that small employers face with respect to compliance when changing the method of calculating user fees for VCP submissions.

Additional examples of what is insignificant are not likely to help if they continue to only provide two extremes of insignificant and significant. It seems that SCP could be modified to give more certainty to corrections. For example, it could provide that if failures are substantially corrected as described, the taxpayer will have a rebuttable presumption that the failure was corrected and the IRS would have the burden to prove that the failure was not eligible or properly corrected under SCP. Alternatively, it seems an electronic reporting of self-correction could be devised whereby employers could submit basic information on the correction demonstrating their good faith attempt to self-correct (and perhaps pay a minimal flat fee, e.g., $300) and reliance on SCP, to obtain an ''SCP Acknowledgment'' from the IRS that provides the IRS is aware that they have self-corrected a failure and they now qualify for the rebuttable presumption. Another possibility would be to amend Audit-CAP to provide for a reduced employer sanction if the employer demonstrates a good faith attempt to self-correct the failure.

Regardless of the issues with SCP, employers will be taking advantage of the expansion to correct failures without paying a user fee. Employers self-correcting any failure should prepare appropriate documentation regarding the correction so that they can defend it if the plan is audited. Employers should document actions relating to the self-correction including: resolutions or meeting minutes recording the issue, its eligibility for self-correction (including why it is significant/insignificant), the employer decision to self-correct, the number of participants affected, the dollars involved, and the employer action taken. These documents should be kept with the employer records of business actions in the corporate book as well as with the plan documents. Documents showing the actual correction should also be created and kept. For example, if an amendment was adopted, a signed copy of the amendment should be included. If a loan agreement's payment schedule is changed, this should be documented with an amendment to the loan agreement and both included. If payments were made and accounts adjusted, documents demonstrating this should be included. A memorandum summarizing the entire correction is also a good idea so when years have passed it can easily be determined how the issue was corrected. These steps can help mitigate the risk of self-correction.

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