Guidance on Section 305 of the SECURE 2.0 Act of 2022 with Respect to Expansion of EPCRS (Notice 2023-43)

Recently the Internal Revenue Service released Notice 2023-43 which provides guidance on section 305 of the SECURE 2.0 Act of 2022 with respect to the expansion of the Employee Plans Compliance Resolution System (EPCRS). Below are details from Notice 2023-43.

PURPOSE

Notice 2023-43 provides guidance in the form of questions and answers with respect to section 305 of Division T of the Consolidated Appropriations Act, 2023, Pub. L. 117-328, 136 Stat. 3559 (2022), known as the SECURE 2.0 Act of 2022 (SECURE 2.0 Act), enacted on December 29, 2022. Section 305 provides for the expansion of the Employee Plans Compliance Resolution System (EPCRS), currently set forth in Rev. Proc. 2021-30, 2021-31 IRB 172, and directs the Secretary of the Treasury or the Secretary's delegate (Secretary) to revise Rev. Proc. 2021-30, or any successor guidance, to take into account the provisions of section 305 not later than the date that is two years after the date of enactment of the SECURE 2.0 Act.

Notice 2023-43 is intended to assist taxpayers by providing interim guidance in advance of an update to Rev. Proc. 2021-30 and is not intended to provide comprehensive guidance with respect to section 305 of the SECURE 2.0 Act. Among other issues addressed, Notice 2023-43 (1) provides that a plan sponsor may self-correct an eligible inadvertent failure (as defined in section 305(e) of the SECURE 2.0 Act) before Rev. Proc. 2021-30 is updated if certain conditions are satisfied

and certain exceptions do not apply, (2) provides that a custodian of an individual retirement account described in section 408(a) of the Internal Revenue Code (Code) or an individual retirement annuity described in section 408(b) (IRA) may not correct an eligible inadvertent failure under EPCRS before Rev. Proc. 2021-30 is updated, and (3) provides interim interpretive guidance that applies with respect to corrections of eligible inadvertent failures. Notice 2023-43 does not address section 301 of the SECURE 2.0 Act, which relates to the recovery of plan overpayments, or section 350 of the SECURE 2.0 Act, which relates to correcting automatic contribution errors in a plan described in section 401(a), 403(b), 408, or 457(b) of the Code. Notice 2023-43 also does not address any elements of section 305 of the SECURE 2.0 Act over which the Department of Labor has authority. (See generally Amendment and Restatement of Voluntary Fiduciary Correction Program, 88 FR 9408 (Feb. 14, 2023).

The Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS) invite comments on the guidance in Notice 2023-43 and any other aspect of section 305 of the SECURE 2.0 Act.

BACKGROUND

Rev. Proc. 2021-30 sets forth EPCRS, a system of correction programs for sponsors of qualified plans, section 403(b) plans, SEPs, and SIMPLE IRA plans that have failed to satisfy the requirements of section 401(a), 403(a), 403(b), 408(k), or 408(p) of the Code, as applicable. The components of EPCRS are: (1) the Self-Correction Program (SCP), under which a plan sponsor that has established compliance practices and procedures may self-correct certain plan failures without payment of any fee or sanction, provided certain conditions are satisfied; (2) the Voluntary Correction Program (VCP), under which a plan sponsor, at any time before examination, may pay a limited fee and receive the IRS’s approval for correction of a plan failure; and (3) the Audit Closing

Agreement Program, under which a plan sponsor may correct certain plan failures identified on examination and pay a sanction. In addition to setting forth the requirements of the correction programs, Rev. Proc. 2021-30 sets forth correction principles, rules of general applicability, and certain acceptable correction methods under EPCRS.

Rev. Proc. 2021-30 provides that, under SCP, a plan sponsor of a qualified plan or a section 403(b) plan generally may self-correct certain significant operational failures and plan document failures by the last day of the third plan year following the plan year for which the failure occurred and may correct certain insignificant plan failures even if they are discovered on examination. A plan sponsor of a SEP or SIMPLE IRA plan may self-correct certain insignificant operational failures in the SEP or SIMPLE IRA plan, even if the failures are discovered on examination, but may not self-correct a significant plan failure in the SEP or SIMPLE IRA plan under SCP. To be eligible to self-correct a failure in a plan eligible for correction under EPCRS, section 4.04 of Rev. Proc. 2021-30 provides that a plan sponsor must have established practices and procedures designed to promote and facilitate overall compliance with applicable Code requirements. In addition, to be eligible for correction of significant plan failures under SCP, a qualified plan or a section 403(b) plan must, as of the date of correction, be the subject of a favorable letter, as defined in section 5.01(4) or 5.02(5) of Rev. Proc. 2021-30, as applicable, and, to be eligible for correction of insignificant operational failures in a SEP or SIMPLE IRA, the plan must meet the document requirements set forth in section 4.03(2) of Rev. Proc. 2021-30. Under SCP, a plan sponsor must self-correct a failure in accordance with the principles and rules of general applicability set forth in section 6 of Rev. Proc. 2021-30.

Under Rev. Proc. 2021-30, certain failures (for example, certain plan document failures, certain loan failures,

employer eligibility failures, and demographic failures) are not eligible for correction under SCP; to obtain reliance on the correction of those failures, a plan sponsor must seek approval from the IRS by filing an application under VCP. Section 6.07 of Rev. Proc. 2021-30 sets forth permitted correction methods for loan failures and identifies the loan failures that may not be corrected under SCP.

Section 305(a) of the SECURE 2.0 Act provides that, except as otherwise provided in the Code, regulations, or other guidance of general applicability prescribed by the Secretary of the Treasury or the Secretary's delegate (Secretary), any eligible inadvertent failure to comply with the rules applicable under section 401(a), 403(a), 403(b), 408(p), or 408(k) of the Code may be self-corrected under EPCRS, except to the extent that the failure was identified by the Secretary prior to any actions that demonstrate a specific commitment to implement a self-correction with respect to such failure, or the self-correction is not completed within a reasonable period after identification of the failure. Section 305(a) of the SECURE 2.0 Act also provides that, for purposes of self-correction of an eligible inadvertent failure, the correction period under section 9.02 of Rev. Proc. 2021-30 (or any successor guidance), except as otherwise provided in the Code, regulations, or other guidance of general applicability prescribed by the Secretary, is indefinite and has no last day, other than with respect to failures identified by the Secretary prior to any actions that demonstrate a specific commitment to implement a self-correction with respect to the failure or with respect to a self-correction that is not completed within a reasonable period, as described in the preceding sentence.

Section 305(b)(1) of the SECURE 2.0 Act provides that an eligible inadvertent failure relating to a loan from a plan to a participant may be self-corrected under section 305(a) according to the rules of section 6.07 of Rev. Proc. 2021-30,

or any successor guidance, including the provisions related to whether a deemed distribution must be reported on Form 1099-R.

Section 305(c) of the SECURE 2.0 Act provides that the Secretary shall expand EPCRS 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 described in section 408(d)(3)(C) 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.

Section 305(d) of the SECURE 2.0 Act provides that the Secretary shall issue guidance on correction methods required to be used to correct eligible inadvertent failures, including general principles of correction if a specific correction method is not specified by the Secretary.

Section 305(e) of the SECURE 2.0 Act defines an eligible inadvertent failure as a failure that occurs despite the existence of practices and procedures that satisfy (a) the standards set forth in section 4.04 of Rev. Proc. 2021-30 (or any successor guidance), or (b) similar standards in the case of an IRA. Under section 305(e), 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.

Section 305(f) of the SECURE 2.0 Act provides that section 305 of the SECURE 2.0 Act shall not apply to any failure unless the correction of the failure is made in conformity with the general principles that apply to corrections of such failures under the Code, including regulations or other guidance issued thereunder, and including principles and corrections set forth

in Rev. Proc. 2021–30 (or any successor guidance).

Section 305(g) of the SECURE 2.0 Act provides that the Secretary shall revise Rev. Proc. 2021-30, or any successor guidance, to take into account the provisions of section 305 not later than the date that is two years after the date of enactment of the SECURE 2.0 Act.

INTERIM GUIDANCE REGARDING SECTION 305(a) AND (b) OF THE SECURE 2.0 ACT – EXPANSION OF SELF CORRECTION

Q-1. May a plan sponsor self-correct an eligible inadvertent failure, as defined in section 305(e) (Eligible Inadvertent Failure), including an Eligible Inadvertent Failure relating to a loan from a plan to a participant that is corrected in accordance with section 6.07 of Rev. Proc. 2021-30, before Rev. Proc. 2021-30 is updated pursuant to section 305(g) of the SECURE 2.0 Act?

A-1. Except as provided in Q&A-2 of Notice 2023-43 and subject to additional guidance in Notice 2023-43, a plan sponsor may self-correct an Eligible Inadvertent Failure, including an Eligible Inadvertent Failure relating to a loan from a plan to a participant that is corrected in accordance with section 6.07 of Rev. Proc. 2021-30, before Rev. Proc. 2021-30 is updated pursuant to section 305(g) of the SECURE 2.0 Act, if the following conditions are satisfied:

(1) The failure was not identified by the Secretary prior to any actions demonstrating a specific commitment to implement a self-correction with respect to the failure.

(2) The self-correction is completed within a reasonable period after the failure was identified.

(3) The failure is not egregious, as described in section 4.10 of Rev. Proc. 2021-30, does not directly or indirectly relate to an abusive tax avoidance transaction, as described in section 4.12(2) of Rev. Proc. 2021-30, 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 Rev. Proc. 2021-30 (other than the provisions listed in Q&A-3 of Notice 2023-43), including that –

- A plan sponsor must have established practices and procedures reasonably designed to promote and facilitate overall compliance with applicable Code requirements, as described in section 4.04 of Rev. Proc. 2021-30;
- A plan sponsor must apply the correction principles and rules of general applicability set forth in section 6 of Rev. Proc. 2021-30;
- A plan sponsor may, but is not required to, self-correct using a correction method set forth in Appendix A or B of Rev. Proc. 2021-30 (and correction methods described in Appendices A and B are deemed to be reasonable and appropriate methods of correcting a failure); and
- A plan sponsor may not use a correction method that is prohibited under Rev. Proc. 2021-30.

Q-2. Before Rev. Proc. 2021-30 is updated pursuant to section 305(g) of the SECURE 2.0 Act, are there any Eligible Inadvertent Failures that a plan sponsor may not self-correct?

A-2. Yes. Before Rev. Proc. 2021-30 is updated pursuant to section 305(g) of the SECURE 2.0 Act, a plan sponsor may not self-correct the following Eligible Inadvertent Failures:

(1) A failure to initially adopt a written plan under section 401(a), 403(a), 403(b), 408(k), or 408(p) of the Code, including the failure to adopt a written section 403(b) plan timely to meet the requirements of the final regulations under section 403(b).

(2) A failure in an orphan plan (as defined in section 5.03(1) of Rev. Proc. 2021-30).

(3) 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 Rev. Proc. 2021-30) in a

terminated plan.

(4) A failure that involves excess contributions to a SEP or SIMPLE IRA plan and that is corrected by permitting the excess contributions to remain in an affected participant's IRA.

(5) A demographic failure that is corrected using a method other than a method set forth in Treas. Reg. § 1.401(a)(4)-11(g) (for example, a demographic failure under section 401(a)(4) may not be corrected by using a special testing provision set forth in §1.401(a)(4)-8 or §1.401(a)(4)-9, or by providing benefits primarily to short-service or low-paid employees).

(6) 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.

(7) A failure occurring in a SEP with a plan document that does not consist of either (a) a valid Model Form 5305-SEP or 5305A-SEP adopted by an employer in accordance with the instructions on the applicable form, or (b) a prototype SEP that has a current favorable opinion letter and that has been amended in accordance with the procedures set forth in Rev. Proc. 2002-10, 2002-1 CB 401.

(8) A failure occurring in a SIMPLE IRA plan with a plan document that does not consist of either (a) a Model Form 5305-SIMPLE or 5304-SIMPLE adopted by the plan sponsor in accordance with the instructions on the applicable form, or (b) a prototype SIMPLE IRA Plan that has a current favorable opinion letter and that has been amended in accordance with the procedures set forth in Rev. Proc. 2002-10.

(9) A failure in an ESOP that involves section 409 in which tax consequences other than plan disqualification are associated with the failure, for example, a failure under

section 409(p).

Q-3. Before Rev. Proc. 2021-30 is updated pursuant to section 305(g) of the SECURE 2.0 Act, are there any provisions of Rev. Proc. 2021-30 relating to self-correction that do not apply with respect to a self-correction of an Eligible Inadvertent Failure?

A-3. Yes. Before Rev. Proc. 2021-30 is updated pursuant to section 305(g) of the SECURE 2.0 Act, the following provisions of Rev. Proc. 2021-30 relating to self-correction do not apply with respect to a self-correction of an Eligible Inadvertent Failure:

(1) The requirement that a qualified plan or section 403(b) plan be the subject of a favorable letter, as defined in sections 5.01(4) and 5.02(5), respectively.

(2) The prohibition of self-correction of demographic failures and employer eligibility failures, as set forth in section 4.06.

(3) The prohibition of self-correction of significant failures under SEPs and SIMPLE IRA plans, as set forth in section 4.01(c).

(4) The prohibition of self-correction of certain loan failures, as set forth in section 6.07.

(5) The provisions relating to self-correction of significant failures that have been substantially completed before the plan or plan sponsor is under examination, as set forth in sections 4.02(2) and 9.02(3).

(6) The requirement set forth in section 9 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).

Q-4. Before Rev. Proc. 2021-30 is updated pursuant to section 305(g) of the SECURE 2.0 Act, when is an Eligible Inadvertent Failure under a plan treated as having been identified by the Secretary and therefore no longer eligible for self-correction?

A-4. Before Rev. Proc. 2021-30 is updated pursuant to section 305(g) of the SECURE 2.0 Act, an Eligible Inadvertent Failure is treated as having been identified by the Secretary when the plan or plan sponsor comes under examination, as defined in section 5.08 of Rev. Proc. 2021-30. Accordingly, before Rev. Proc. 2021-30 is updated pursuant to section 305(g) of the SECURE 2.0 Act, once the plan or plan sponsor comes under examination, the Eligible Inadvertent Failure is no longer eligible for self-correction unless the plan sponsor has, before the plan or plan sponsor comes under examination, demonstrated a specific commitment to implement a self-correction with respect to the Eligible Inadvertent Failure. However, see Q&A-5 of Notice 2023-43 relating to self-correction of an insignificant failure after a plan or plan sponsor comes under examination.

Q-5. Before Rev. Proc. 2021-30 is updated pursuant to section 305(g) of the SECURE 2.0 Act, may a plan sponsor self-correct a failure (including an Eligible Inadvertent Failure) that is insignificant, determined in accordance with the factors set forth in section 8.02 of Rev. Proc. 2021-30, even if the plan or plan sponsor is under examination, as defined in section 5.08 of Rev. Proc. 2021-30, and even if the failure is discovered on examination?

A-5. Yes.

Q-6. Before Rev. Proc. 2021-30 is updated pursuant to section 305(g) of the SECURE 2.0 Act, how will a determination be made as to whether actions taken by a plan sponsor demonstrate a specific commitment to implement the self-correction of an identified Eligible Inadvertent Failure?

A-6. Before Rev. Proc. 2021-30 is updated pursuant to section 305(g) of the SECURE 2.0 Act, a determination as to whether actions taken by a plan sponsor demonstrate a specific

commitment to implement the self-correction of an identified Eligible Inadvertent Failure will be made based on all the facts and circumstances. However, these actions must generally demonstrate that the plan sponsor is actively pursuing correction of the specific identified failure. The 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.

Q-7. Before Rev. Proc. 2021-30 is updated pursuant to section 305(g) of the SECURE 2.0 Act, how will a reasonable period be determined for purposes of ascertaining whether the self-correction of an Eligible Inadvertent Failure has been completed within a reasonable period after it is identified by the plan sponsor?

A-7. Before Rev. Proc. 2021-30 is updated pursuant to section 305(g) of the SECURE 2.0 Act, for purposes of ascertaining whether the self-correction of an Eligible Inadvertent Failure has been completed within a reasonable period after it is identified by the plan sponsor, a reasonable period is determined by considering all relevant facts and circumstances. Except with respect to an employer eligibility failure described in this Q&A-7, 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 it is identified. A self-correction of an Eligible Inadvertent Failure that is an employer eligibility failure (as defined, for qualified plans and 403(b) plans, in sections 5.01(2)(d) and 5.02(2)(d) of Rev. Proc. 2021-30, respectively, or, as determined for SEPs and SIMPLE IRA plans under similar principles) will be treated as having been corrected within a reasonable period after it is identified by the plan sponsor only if the plan sponsor ceases 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.

Q-8. Before Rev. Proc. 2021-30 is updated pursuant to section

305(g) of the SECURE 2.0 Act, is a plan sponsor prevented from self-correcting an Eligible Inadvertent Failure on or after December 29, 2022, merely because the Eligible Inadvertent Failure occurred prior to December 29, 2022?

A-8. No.

Q-9. Before Rev. Proc. 2021-30 is updated pursuant to section 305(g) of the SECURE 2.0 Act, does self-correction of an Eligible Inadvertent Failure with respect to which an excise tax or additional tax applies automatically result in a waiver of the tax?

A-9. No. Before Rev. Proc. 2021-30 is updated pursuant to section 305(g) of the SECURE 2.0 Act, self-correction of an Eligible Inadvertent Failure with respect to which an excise tax or additional tax applies does not automatically result in the waiver of the tax. However, a plan sponsor may request that the IRS not pursue certain excise taxes or additional taxes that apply with respect to the Eligible Inadvertent Failure through a VCP submission to the IRS, as provided in section 6.09 of Rev. Proc. 2021-30. For an income tax or excise tax issue that cannot be corrected under EPCRS, IRS Employee Plans will accept a request for a closing agreement through the Voluntary Closing Agreement Procedure. See section 4.04 of Rev. Proc. 2023-4, 2023-1 IRB 162 (updated annually).

Q-10. May a plan sponsor submit a VCP application under Rev. Proc. 2021-30 to correct an Eligible Inadvertent Failure (including an Eligible Inadvertent Failure that is a loan failure)?

A-10. Yes.

Q-11. Does section 305 of the SECURE 2.0 Act impose any new IRS recordkeeping requirements with respect to the self-correction of an Eligible Inadvertent Failure?

A-11. No. Section 305 of the SECURE 2.0 Act does not impose any new IRS recordkeeping requirements with respect to the self-correction of an Eligible Inadvertent Failure; however, current IRS recordkeeping requirements continue to apply. Accordingly, if requested upon an examination, a plan sponsor

must be able to provide documentation substantiating the self-correction, such as documentation that: (1) identifies the failure, including the years of occurrence, the number of employees affected, and the date the failure was identified; (2) explains how the failure occurred and demonstrates there were established practices and procedures (formal or informal) reasonably designed to promote and facilitate overall compliance that were in effect when the failure occurred; (3) identifies and substantiates the correction method and the date of the completion of the correction; and (4) identifies any changes made to those established practices and procedures to ensure that the same failure would not recur.

GUIDANCE REGARDING SECTION 305(c) OF THE SECURE 2.0 ACT – EPCRS FOR IRA CUSTODIANS

Q-12. May an IRA custodian correct an Eligible Inadvertent Failure under EPCRS before Rev. Proc. 2021-30 is updated pursuant to section 305(g)?

A-12. No. An IRA custodian may not correct an Eligible Inadvertent Failure under EPCRS before Rev. Proc. 2021-30 is updated pursuant to section 305(g) of the SECURE 2.0 Act.

RELIANCE AND FUTURE GUIDANCE

Plan sponsors may rely on Notice 2023-43 beginning on the date it is issued and ending on the date Rev. Proc. 2021-30 is updated pursuant to section 305(g) of the SECURE 2.0 Act. If a self-correction is completed by a plan sponsor on or after December 29, 2022, and before the date Notice 2023-43 is issued, the plan sponsor may apply a good faith, reasonable interpretation of section 305 of the SECURE 2.0 Act in completing the self-correction. A plan sponsor that completes a self-correction during this period in a manner that accords with Notice 2023-43 will be treated as having applied a good faith, reasonable interpretation of section 305 of the SECURE 2.0 Act.

REQUEST FOR COMMENTS

The Treasury Department and the IRS invite comments on the guidance in Notice 2023-43 and any other aspect of section 305 of the SECURE 2.0 Act. In particular, the Treasury Department and IRS seek comments relating to –

(1) Additional correction methods that are required to be used to correct Eligible Inadvertent Failures, including general principles of correction if a specific correction method is not specified by the Secretary; and

(2) A description of common IRA failures and suggested correction methods for those failures, and the possibility of expanding EPCRS to be available for both IRA custodians and IRA owners.

Comments should be submitted in writing on or before August 23, 2023, and should include a reference to Notice 2023-43. Comments may be submitted electronically via the Federal eRulemaking Portal at www.regulations.gov (type “IRS Notice 2023-43” in the search field on the Regulations.gov home page to find Notice 2023-43 and submit comments). Alternatively, comments may be submitted by mail to:

Internal Revenue Service

Attn: CC:PA:LPD:PR (Notice 2023-43), Room 5203

P.O. Box 7604

Ben Franklin Station

Washington, D.C. 20044.

The Treasury Department and the IRS will publish for public availability any comment submitted electronically or on paper to its public docket.

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