EPCRS Changes:
Follow Up Q&A
Ilene H. Ferenczy, Esq., CPC, APA
S. Derrin Watson, Esq., APM
Stephen W. Forbes, J.D., LL.M. (Taxation)

Major EPCRS Changes:
Revenue Procedure 2019-19

• Co-hosts:
  - Chuck Gouge
  - Joanne Pecina

During the Webinar

• All attendees’ lines are muted
• We will try to answer questions as we go. Send questions to all panelists.
• Slides and recording of webinar are available from ERISApedia.com/webcasts.
• Certificates for CE credits will be sent in a few days. PLEASE check spam folders.
Your Presenters Today

Ilene H. Ferenczy, JD, CPC, APA

S. Derrin Watson, JD, APM

Stephen W. Forbes, JD, LL.M.

How We Got Here

• We did a web seminar May 15 discussing the major EPCRS changes in Rev. Proc. 2019-19
  – It’s available (free) at www.erisapedia.com/webcasts
• We got 72 questions in a 50 minute webinar!
• We will try to answer as many as we can here
  – That means we won’t be covering all the rule changes themselves

Plan Loan Failures
Excess Loan

- Participant paid off old loan and then requested new $50K loan
- Plan gave full $50K without adjusting for highest account balance ($30K)
- Self-correctable?

Excess Loan

- Participant paid off old loan and then requested new $50K loan
- Plan gave full $50K without adjusting for highest account balance ($30K)
- Self-correctable?
- No (Excess Loan)
- Must file under VCP
  - Can avoid 1099-R if repay excess
- Alternative:
  - Issue 1099-R in year of self-correction
  - Employer pays income tax withholding on $30K
    - Should have been withheld by plan originally

Spousal Consent

- Document requires spousal consent for loans
  - Not QJSA
- Plan issued loan without consent
- Self-correctable?
Spousal Consent

- Document requires spousal consent for loans
  - Not QJSA
- Plan issued loan without consent
- Self-correctable?

- Yes, for QJSA and non-QJSA
- Provide notice to participant and spouse and get consent
  - Dated currently
  - Effective retroactively
  - Similar to existing correction for QJSA consent failures
- Reconsider whether you want consent requirement

Self-Correcting Loan Defaults

- Owner-only 401(k) plan
- Owner takes loan
  - Makes no payments first year
- Self-correctable?
  - No 1099-R

- Yes! It works for owners
  ▲ Warning: You need practices and procedures to self-correct
- Correct by:
  - Make lump-sum payment to bring loan current
  - Reamortize over 4 years
    - Loan policy doesn't need to permit refinance
    - Combination
Retroactive Self-Correction

• Participant defaulted on loan
  – Deemed distribution, not offset
• 1099-R issued in 2018
• Can we reverse 1099-R with self-correction?

It is unlikely the IRS would allow the plan to "undo" the 1099-R for a prior year
But it should work for loans that haven’t yet been treated as deemed distributions
  – Even if default occurred in earlier year

Prompt Recordkeeper

• We don’t find out about defaulted loan until after recordkeeper has defaulted it and issued 1099-R
• What can we do?
Prompt Recordkeeper

- We don’t find out about defaulted loan until after recordkeeper has defaulted it and issued 1099-R
- What can we do?
  - Talk to the recordkeeper
  - It now doesn’t make sense to be “quick on the draw” to default loans
    - At least give the participant the opportunity to correct
  - 2019 1099-R forms can be “reversed”

No Payments Made

- Loan made in May 2013
  - No payments ever made
  - No 1099-R issued
- Self-correctable?

No Payments Made

- Loan made in May 2013
  - No payments ever made
  - No 1099-R issued
- Self-correctable?
- Not really
  - Deadline to self-correct is 5 years after loan date (except for loans to acquire principal home)
- Options
  - Issue 2013 1099-R
    - With interest to 2013
  - Issue 2019 1099-R
    - With interest to 2019

No Payments Made

- Loan made in May 2013
  - No payments ever made
  - No 1099-R issued
- Self-correctable?
New Rules: You May Self-Correct Many Plan Document Failures ... If You Don’t Dawdle

• Primary issue: Failure to timely adopt interim amendment; can work for restatements

• Self-correction limitations:
  – It is treated as a “significant” failure
    • Must self-correct by end of second plan year after adoption deadline
    • If IRS audits you first, it’s too late
  – You must have a “favorable letter”
  – Plan must have practices and procedures

Late PPA DC Restatement

• Employer didn’t restate calendar year 401(k) plan for PPA by 4/30/2016
• Can they self-correct?
Late PPA DC Restatement

- Employer didn’t restate calendar year 401(k) plan for PPA by 4/30/2016
- Can they self-correct?
  - No!
  - Self-correction period ended 12/31/2018
  - File under VCP

Late DB Restatement

- Calendar year DB plan doesn’t restate by 4/30/2020
- Can they self-correct? Deadline?
  - Yes
    - Based on IRS comments, we think so
    - If they have practices and procedures
- Deadline 12/31/2022
  - But before audit
  - Sign with current date but retro effective date
  - No need to mention SCP in board resolution
Law Change

• Suppose law change required interim amendment for all preapproved DC plans
• Plan provider promised to adopt amendment on behalf of employers but failed to do so timely
• Self-correctable?

25

Law Change

• Suppose law change required interim amendment for all preapproved DC plans
• Plan provider promised to adopt amendment on behalf of employers but failed to do so timely
• Self-correctable?

Yes
– Question about practices and procedures
– Amendment could be signed by provider or by employer

26

403(b) Plan Without Document

• 403(b) plan adopted years ago
  – Never had document
  – Not a church
• Self-correctable?
**403(b) Plan Without Document**

- 403(b) adopted years ago
  - Never had document
  - Not a church
- Self-correctable?
  - No
- Lack of document isn’t self-correctable for qualified plan or 403(b)
- Correct under VCP
  - Get benefit of remedial amendment period

**Favorable Letter**

- Plan on pre-approved document
  - Never had determination letter
- Can it self-correct late interim amendment or restatement

**Favorable Letter**

- Plan on pre-approved document
  - Never had determination letter
- Can it self-correct late interim amendment or restatement
- Yes
- If the pre-approved document has an IRS opinion or advisory letter, the plan has a “favorable letter”
  - Even if there are amendments to the plan
Wait! There’s More!

Expanded Correction of Operational Failures by Plan Amendment

New Self-Correction Retroactive Amendment to Conform to Plan Operations

• Conditions:
  – Normal self-correction requirements (not necessarily “significant”)
  – Satisfy three requirements:
    a) Plan amendment results in increase of a benefit, right, or feature, [BRF]
    b) The increase in the benefit, right, or feature is available to all eligible employees, [Universality] and
    c) Providing the increase in the benefit, right, or feature is permitted under the Code and satisfies the correction principles of EPCRS, including:
      – Reasonable and appropriate
      – Keep assets in the plan
      – Not violate another specific rule

What’s a BRF?

• Is this rule “limited to changes that are considered a ‘benefit right or feature?’
  Meaning, if the retro change doesn’t involve a benefit right or feature, is not part of this new SCP retroactive amendment rule?”
What’s a BRF?

• Is this rule “limited to changes that are considered a ‘benefit right or feature?’ Meaning, if the retro change doesn’t involve a benefit right or feature, is not part of this new SCP retroactive amendment rule?”
• That is a requirement of the rule
• What is a BRF?
  – Only available definition is Treas. Reg. §1.401(a)(4)-4
  – Maybe they meant more
    • No confirmation
    • Act at your own risk

59 ½ Distributions

• 401(k) plan document doesn’t allow in-service distributions
• Since 2015, plan has operationally allowed all participant to elect distributions after 59 ½
• Self-correctable?

59 ½ Distributions

• 401(k) plan document doesn’t allow in-service distributions
• Since 2015, plan has operationally allowed all participant to elect 59 ½ distributions
• Self-correctable?
• It depends on whether the failure is significant.
  – If insignificant, yes you can
  – If significant, it’s too late
• Note the new rule applies to operational failures beginning before, in, or after 2019
**#1 Question!**

- Employer A adopted plan
  - A in controlled group with B
  - Only A employees can participate
- Employees of Employer B were allowed to participate
  - B never signed participation agreement
- Self-correctable?

---

**#1 Question!**

- Employer A adopted plan
  - A in controlled group with B
  - Only A employees can participate
- Employees of Employer B were allowed to participate
  - B never signed participation agreement
- Self-correctable?

- We don’t think so
- Not really a BRF
- It doesn’t satisfy universality
- It’s like a new plan adoption
  - Not self-correctable
- We recommend filing under VCP

---

**Eligibility Service**

- EGTRRA document
  - 6 month eligibility
  - Elapsed time
- PPA document
  - Regular hours of service
- Operations
  - Still use elapsed time
- Self-correctable?
Eligibility Service

- EGTRRA document
  - 6 month eligibility
  - Elapsed time
- PPA document
  - Regular hours of service
- Operations
  - Still use elapsed time
- Self-correctable?

- No
  - Not document failure
  - Not BRF
  - Could adversely impact some employees
- Check to make sure amendment needed
  - If it is, file under VCP

Comp Definition

- Prior document based allocations on compensations while a participant
- Restated document accidentally bases on total plan year comp
- Self-correctable?

- No, if participants have satisfied allocation conditions
  - That would be a cutback
  - Good luck with VCP
After-Tax Contributions

- 401(k) plan adopted 2/1/17
  - Does not provide for after-tax contributions
- Operationally, plan has accepted after-tax
- Self-correctable?

Possibly, yes.
- The ability to make each rate of after-tax is a feature
- (Different from elective deferrals)

Deferral Election Cap

- Plan caps deferrals at 10% of comp
- In practice, plan has ignored that limit and several participants defer more than the limit
- Self-correctable? What if the limit only applied to HCEs?
Deferral Election Cap

• Plan caps deferrals at 10% of comp
• In practice, plan has ignored that limit and several participants defer more than the limit
• Self-correctable? What if the limit only applied to HCEs?

• Yes, this is a BRF that can be expanded through self-correction
  – No 2-year limit on correction if insignificant
• But, if only HCEs were limited, increase wouldn’t benefit all employees (universality)
  – Try VCP

Roth Feature

• Plan properly added Roth feature in 2012 for all participants
• PPA document removed it inadvertently
• Plan continued to accept Roth deferrals
• Self-correctable?

• Yes
  – Technically, it depends on whether it is significant
Allocation Method

• Plan document provides integrated formula
• Employer has been operating as cross-tested
  — Each participant in separate group
• Self-correctable?

No

Almost surely violates anti-cutback rule
• Benefits some, hurts others
• Likely not BRF

403(b) Match

• 403(b) plan provides fixed match
• Document doesn’t allow discretionary match
• ER made discretionary match in 2018
• Self-correctable?
403(b) Match

- 403(b) plan provides fixed match
- Document doesn’t allow discretionary match
- ER made discretionary match in 2018
- Self-correctable?

- Assuming plan is not ACP safe harbor:
  - You can fix it until October 15, 2019, with retroactive corrective amendment
  - After that date it is arguably self-correctable (but dicey)

HCE Exclusion

- Plan document excludes HCEs
- Plan allowed HCEs to enter starting in 2017
- Self-correctable?

- No
- It violates universality
- And it benefits only HCEs, so it violates early entry self-correction
Questions?

CE Credit

• ERPA/ASPPA/NIPA
  – Will receive certificate by email in several days
  – ERPA will take longer (please be patient)
  – Please check spam folder
• Any questions, email: support@erisapedia.com

Contact Information

Ilene H. Ferenczy  
Author of the  
Qualified Plan eSource  
(678) 399-6602  
ilene@ferenczylaw.com

S. Derrin Watson  
Author of Who’s The Employer?  
403(b) Plan eSource  
(805) 451-8713  
sderrin@gmail.com

Stephen W. Forbes  
(720) 799-7039  
stephen.forbes32@gmail.com

Timothy M. McCutcheon  
Publisher of ERISApedia.com  
(612) 605-2266  
tmm@erisapedia.com  
sales@erisapedia.com