



EPCRS Changes: Follow Up Q&A

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Major EPCRS Changes: Revenue Procedure 2019-19



- Co-hosts:

Chuck Gouge



Joanne Pecina





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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.

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Your Presenters Today



Ilene H. Ferenczy, JD, CPC, APA



S. Derrin Watson, JD, APM





Stephen W. Forbes, JD, LL.M.




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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

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Plan Loan Failures




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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?



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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

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Spousal Consent

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



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Spousal Consent

- Document requires spousal consent for loans
 - Not QJSA
- Plan issued loan without consent
- Self-correctable?
 - Dated currently
 - Effective retroactively
 - Similar to existing correction for QJSA consent failures
- Yes, for QJSA and non-QJSA
- Provide notice to participant and spouse and get consent
 - Reconsider whether you want consent requirement

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Self-Correcting Loan Defaults

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



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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

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Retroactive Self-Correction

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



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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

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Prompt Recordkeeper

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



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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"

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No Payments Made

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



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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

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Failure

Self-Correcting Plan Document Failures

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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

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Late PPA DC Restatement

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

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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

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Late DB Restatement

- Calendar year DB plan doesn't restate by 4/30/2020
- Can they self-correct? Deadline?



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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

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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?



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Law Change

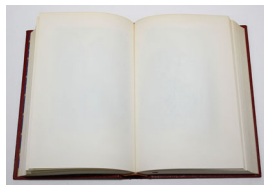
- Suppose law change required interim amendment for all preapproved DC plans
- Plan provider promised to adopt amendment on behalf of employers but failed to do so timely
- Self-correctable?
- Yes
 - Question about practices and procedures
- Amendment could be signed by provider or by employer

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403(b) Plan Without Document

- 403(b) plan adopted years ago
 - Never had document
 - Not a church
- Self-correctable?



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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

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Favorable Letter

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



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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

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Wait! There's More!

Expanded Correction of Operational Failures by Plan Amendment



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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


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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?"



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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

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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?



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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

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#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?



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#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

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Eligibility Service

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



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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

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Comp Definition

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



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Comp Definition

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

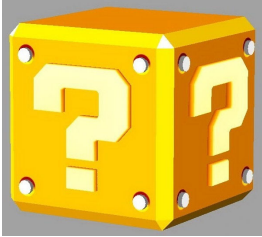
- No, if participants have satisfied allocation conditions
- That would be a cutback
- Good luck with VCP

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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?



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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)

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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?



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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

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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?



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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

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Allocation Method

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



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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

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403(b) Match

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



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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)

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HCE Exclusion

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



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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

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Questions?






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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




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Contact Information

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