Client Alert

September 2021

IRS Updates Correction Program for Company Sponsored Retirement Plans

The Internal Revenue Service ("IRS") recently issued Revenue Procedure 2021-30 ("RP") that made significant revisions to programs that permit retirement plan sponsors to correct certain plan failures. The system under which plan sponsors can correct certain operational and documentary failures is known as the Employee Plans Compliance Resolution System ("EPCRS"). Unless corrected in accordance with the EPCRS, such failures may result in the loss of a plan's favored tax status under the Internal Revenue Code of 1986, as amended ("Code"). This can cause the loss of a company's income tax deduction, the loss of participants' income tax deferral and a host of other adverse consequences to both the plan sponsor and plan participants.

This RP modifies and supersedes the most recent iteration of the EPCRS that was issued in 2019, including modifications to its three component programs:

- **Self-Correction Program ("SCP")** - allows the correction of certain plan failures without submitting the corrections to the IRS or paying a compliance fee. Under the SCP, plan sponsors must correct the failure by following the SCP prescribed rules and document its correction in great detail so that it can demonstrate its corrections in the event of a subsequent audit. Corrections under the SCP may include insignificant and certain significant failures. The period during which the corrections may be made has been extended to three years from two years after the occurrence of the failure.

- **Voluntary Correction Program ("VCP")** - allows corrections not otherwise eligible for SCP by submitting an application to the IRS and paying a compliance fee to obtain IRS approval of the proposed corrections. Corrections under the VCP include a broader range of failures and the plan sponsor will receive written approval of its corrections from the IRS. The RP requires that

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submissions under the VCP now be submitted electronically through an IRS portal.

- **Audit Closing Agreement Program ("Audit CAP")** - unlike the SCP or the VCP, this program can resolve plan failures discovered as a result of an IRS examination. Here, the plan sponsor will be required to pay a negotiated penalty and enter into a closing agreement with the IRS to resolve all discovered failures. The penalties under this program generally far exceed those payable under the VCP.

The significant changes, effective July 16, 2021 (except where noted differently), include:

- **Overpayment Correction Options**. Where a participant or beneficiary receives a payment from a plan that exceeds the plan's terms or applicable Code limitations, the revised EPCRS allows plan sponsors to seek repayments through a single sum payment, an installment agreement or an adjustment to future payments. In certain circumstances, there may not be a need to seek repayment or to require the sponsor to reimburse the plan for the amount of the overpayment remitted to the participant or beneficiary.

- **Extension of SCP Correction Period for Significant Operational Failures**. The RP extends the correction period by an additional year - from two to three years. This means that the correction must be made by the last day of the third year following the year in which the failure occurred. The extension of the correction period extends the safe harbor correction method for elective deferral failures lasting more than three months but not beyond the SCP correction period.

- **Expansion of SCP for Retroactive Plan Amendments**. The RP makes it easier for plan sponsors to use retroactive plan amendments to correct operational failures by eliminating the requirement that all plan participants must benefit from the retroactive amendment.

- **Anonymous VCP Submissions**. These are being eliminated effective January 1, 2022 and will be replaced by non-binding Anonymous Pre-Submission Conferences. This means that plan sponsors will be able to request a pre-submission conference to review a potential VCP submission to gauge the IRS position. Plan sponsors will not pay a fee to request the pre-submission conference. Following the pre-submission conference, should the plan sponsor submit its application, the submission will no longer be anonymous and the applicable compliance fee must be

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remitted. Keep in mind that pre-submission conferences are held at the IRS' discretion, time permitting.

- **Extension of Corrections for Automatic Enrollment Failures**. The RP extends the sunset of the safe harbor correction method for missed elective deferrals of eligible employees in 401(k) or 403(b) plans. The sunset was extended from December 31, 2020 to December 31, 2023.

- **Increased Threshold for De Minimis Correction Amounts**. The EPCRS does not require corrections for failures involving de minimis amounts. This threshold has been increased to $250 from $100.

The RP confirms that the IRS and the U.S. Treasury Department will continue to monitor and update EPCRS as they determine to be appropriate. We are available to help you navigate through any of your retirement plan operational, documentary, qualification or design questions.

Please contact the Olshan attorneys with whom you regularly work or the attorney below if you would like to discuss further or have any questions.

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