2021 Joint TE/GE Council Employee Plans Annual Meeting IRS Practitioner Panel 2/26/21—EPCRS Self-Correction Issue Bullet Points Submitted by Scott E. Galbreath

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The current EPCRS scheme relating to determining whether an operational failure that was not corrected within two years of its discovery is eligible for the self-correction program (SCP) is very difficult to apply. Under SCP insignificant failures can be self-corrected at any time. 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.

The problem with applying the 7 factors contained in EPCRS is that the IRS does not state in how to apply the 7 factors. It does say that no one factor is determinative. However, beyond that we don't know. Can 2 factors be determinative? Do you need a majority of the 7 factors in your favor to be considered insignificant? Do you need more? It's not clear.

EPCRS sets forth 5 examples that apply the factors. However, the examples don't set forth how to apply the factors but make conclusions based on only applying a couple of the factors. In fact, four of the five examples apply 2 or less factors and Example 5 doesn't apply any factors but merely concludes that the multiple failures in a single year are insignificant in the aggregate.

In Example 1, three of 50 participants and $4,550 in excess contributions compared to employer contributions of $3,500,000 is considered insignificant because the total number of participants affected (3) 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 ($3,500,000) were insignificant. Thus, applying only two factors it concludes the failure was insignificant without an explanation of the reasoning.

Example 3, changes the facts of Example 1 slightly, to 18 affected participants and excess contributions of $150,000. This causes the IRS to conclude the failure is significant. In this example, 18 of the possible 50 participants affected is 36% compared to 6% in Example 1. Likewise, the monetary amount involved is only 4.28% of the employer contribution but the percentage in the first example is only .13%.

Does it matter if in Example 3, the plan had $200,000,000 in assets or 10,000 participants? The percentage of plan assets involved and number of participants affected compared to the total number of participants are also among the 7 factors. This would mean that less than 1 percent of the plan assets were affected and only .18% of the total plan participants were affected.

It would be helpful if the next Revenue Procedure would have more detailed examples of how to apply the 7 factors.