The COMMITTEE
of
ANNUITY
INSURERS

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August 23, 2023

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Internal Revenue Service
Attn: CC:PA:LPD:PR (Notice 2023-43), Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

Re: Comments on Notice 2023-43 and Section 305 of the SECURE 2.0 Act

Dear Sir or Madam:

We are writing on behalf of the Committee of Annuity Insurers (the "Committee")[1] in response to the request for public comment in Notice 2023-43, regarding guidance on the changes to the Employee Plans Compliance Resolution System ("EPCRS") required by section 305 of the SECURE 2.0 Act of 2022 ("SECURE 2.0").[2] The Committee also wrote to the Treasury Department and Internal Revenue Service ("IRS") on January 31, 2023, and July 21, 2023, to request guidance on numerous issues under SECURE 2.0, including EPCRS. This letter reiterates those prior guidance requests regarding EPCRS and expands upon them in certain respects.

BACKGROUND

Section 305 of SECURE 2.0 generally provides that any "eligible inadvertent failure" to comply with the applicable rules under Code section 401(a), 403(a), 403(b), 408(p), or 408(k) may be self-corrected under EPCRS without a submission to the IRS. It also directs the Secretary of the Treasury to expand EPCRS to allow IRA issuers to address "eligible inadvertent failures" with respect to IRAs, including (but not limited to): (1) waivers of the excise tax on required minimum distribution ("RMD") failures under Code section 4974, and (2) rules permitting a non-spouse beneficiary to return distributions to an inherited IRA described in Code section 408(d)(3)(C) when, due to an inadvertent error by a service provider, the beneficiary had reason to believe that the distribution could be rolled over tax-free. In Notice 2023-43,[3] the IRS provided interim guidance

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[1] The Committee is a coalition of life insurance companies formed in 1981 to participate in the development of federal policy with respect to annuities. The Committee's 32 member companies represent approximately 80% of the annuity business in the U.S. and are among the largest providers of annuities in the qualified plan and IRA markets. A list of the Committee's member companies is attached.

[2] SECURE 2.0 is Division T of the Consolidated Appropriations Act, 2023, Pub. L. No. 117-328.

[3] 2023-24 I.R.B. 919.

on certain aspects of section 305 of SECURE 2.0 until the IRS updates the EPCRS procedures. The Notice, in Q&A-12, states that "[a]n 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." Thus, it appears that EPCRS and self-correction remain temporarily unavailable to correct eligible inadvertent errors involving IRAs. However, Notice 2023-43 requests comments on "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."

GUIDANCE REQUEST

The Committee respectfully requests the following additional guidance under section 305 of SECURE 2.0 regarding the expansion of EPCRS:

(1) IRA self-correction in general

We request guidance providing that the expansion of EPCRS to permit self-correction without a submission to the IRS applies to eligible inadvertent failures affecting IRAs. We also request guidance clarifying that, for information reporting purposes, financial institutions will be permitted to reasonably rely on information regarding self-correction that individuals provide to them, particularly where the self-correction does not involve an error on the financial institution's part. Our more specific guidance requests below address some of the types of errors involving IRAs that should eligible for self-correction or correction with IRS approval.

(2) Self-correction of inadvertent distributions

We request clarification that inadvertent errors involving distributions from IRAs are eligible for self-correction under EPCRS. In that regard, we have the following specific comments:

(a) Mistaken IRA distribution instead of direct transfer

Self-correction should be available for situations where an IRA owner or beneficiary intends for an amount in their IRA to be directly transferred to another IRA, but, due to an inadvertent error by the individual, their financial adviser, or the IRA issuer, the amount is mistakenly distributed to the individual or their non-qualified account. This could include the following situations:

- The erroneous distribution was made to the IRA owner but the owner is precluded from rolling it over due to the limitation in Code section 408(d)(3)(B), prohibiting more than one tax-free rollover between IRAs within a one-year period, or because the owner inadvertently failed to roll over the distribution within 60 days.

- The distribution was made to a non-spouse beneficiary, who is not allowed to roll it over. SECURE 2.0 describes such a situation where, due to a service provider's inadvertent error, the non-spouse beneficiary "had reason to believe that the distribution could be rolled over."[4] Self-correction should not be limited to this situation, however, and should be available regardless of the beneficiary's belief regarding the ability to roll over the distribution, as long as the individual or a service provider inadvertently erred when requesting or making the distribution in the first place.

[4] SECURE 2.0 § 305(c)(2).

In these and similar situations, the owner or beneficiary should be permitted to repay the distributed amount to an IRA or inherited IRA and reverse any tax consequences associated with the inadvertent distribution. In cases where a distributed amount was erroneously deposited to a non-qualified account and thereafter investment gains or losses in that account caused the deposited amount to increase or decrease, it should be permissible to reflect those gains or losses when taking corrective action. For example, assume that a $50,000 distribution from an IRA was erroneously credited to the individual's non-qualified investment account in December 2023, rather than being directly transferred to their IRA. One year later, they discover the error and want to correct it by transferring amounts from the non-qualified account to their IRA. In such case:

- If the $50,000 credited to the non-qualified account in December 2023 incurred $5,000 in investment losses between that date and the date of the corrective transfer, the individual would need to transfer only $45,000 to their IRA to correct the error, *i.e.*, the transfer could be net of the investment losses and the $5,000 difference between the erroneous distribution and the corrective transfer would not be taxed as a distribution from the IRA.

- Similarly, if the $50,000 credited to the non-qualified account in December 2023 generated $5,000 in investment earnings between that date and the correction date, the individual should be allowed to transfer $55,000 to their IRA to correct the error. The extra $5,000 should be treated as a rollover and should not count towards the annual IRA contribution limit.

Allowing gains and losses to be reflected as described above would be consistent with the general principles of EPCRS that: (1) a "correction method should restore the plan to the position it would have been in had the failure not occurred, including restoration of current and former participants and beneficiaries to the benefits and rights they would have had if the failure had not occurred,"[5] and (2) "corrective allocations must include gains and may be adjusted for losses."[6]

(b) Overpayments

An inadvertent error by a plan or IRA issuer, including due to an erroneous directive by the individual's financial adviser, that results in a distribution of an amount greater than the individual requested, or an inadvertent distribution that the individual did not request, should be eligible for self-correction. For example:

- If an employee requests a distribution of $100 from a plan or IRA, but the plan or IRA issuer mistakenly distributes $1,000, the excess amount ($900) should be eligible for self-correction.

- If an individual requests a distribution from their non-qualified annuity but the issuer inadvertently makes the distribution from an individual retirement annuity that the individual also owns, the error should be eligible for self-correction.

In these and similar situations, the individual should be permitted to repay the erroneous distribution to the plan or IRA from which it was distributed, or transfer the amount to an IRA or, if applicable, an inherited IRA. This is particularly important if the individual is precluded from

[5] Rev. Proc. 2021-30 § 6.02(1).

[6] Rev. Proc. 2021-30 § 6.02(4)(a).

rolling over the erroneous distribution for reasons similar to those described above. Self-correction of these types of errors should have the effect of reversing their tax consequences, and if the correction is made before information returns (such as Forms 1099-R and 5498) are due for the year in which the error occurred, the error should be ignored for purposes of such reporting.

(c) Information reporting for self-correcting distribution errors

In some cases, it may be appropriate for financial institutions to file amended information returns to indicate that an erroneous distribution in a prior year should not have been taxed. For example, if a financial institution issued a Form 1099-R for a distribution that is later determined to have been made in error, and the distribution error is self-corrected in a subsequent year *via* repayment to an IRA, it may be appropriate to issue an amended Form 1099-R for the year of the erroneous distribution, in order to show that it should not have been taxed. However, filing such an amended Form 1099-R should be optional, considering that the original form was correct when filed. In addition, the statute of limitations may be relevant to whether an amended information return is appropriate. For example, a financial institution should not be expected to file an amended information return for a year that likely is closed by the statute of limitations.

With respect to corrective repayments of a prior year's erroneous distribution, we note that Form 1099-R currently contemplates the use of distribution code "E" in box 7 to report certain corrective distributions under EPCRS. Similarly, Form 5498 currently contemplates special entries in boxes 13 and 14 to report certain late rollover contributions and permitted repayments to IRAs. The instructions to these forms could be amended to provide that financial institutions also may use the existing codes or entries to report self-correction distributions and repayments. For example, if a distribution from an IRA was erroneously deposited into a non-qualified annuity rather than being transferred to another IRA, and in order to correct that error the issuer of the non-qualified annuity transfers amounts to the IRA, (1) the issuer of the non-qualified annuity could use code E in box 7 of the 1099-R when reporting the distribution from the non-qualified annuity, and (2) the issuer of the IRA could include an entry in box 13 or 14 of Form 5498 to report its receipt of the repayment. This would inform the IRS that a self-correction had occurred and would help support the individual's tax return filings, including any amended tax returns.

It is important to keep in mind that financial institutions will need time and resources to implement any changes to the relevant information reporting forms and requirements. Also, as we indicated above, for information reporting purposes financial institutions should be allowed to reasonably rely on information regarding self-correction that individuals provide to them, particularly where the self-correction does not involve an error on the financial institution's part.

(3) Invalid rollover distributions from employer plans

A distribution that a qualified plan inadvertently treated as an eligible rollover distribution ("ERD") when the distribution was not, in fact, an ERD, should be eligible for self-correction. This could arise, for example, where the participant receives a distribution prior to taking an RMD for the year, and the plan inadvertently treats it as an ERD.

(4) IRA contributions for prior years

Current law permits IRA contributions for a year to be made in the following year, provided they are made by the due date for the prior year's tax return (including extensions) and the contribution is "irrevocably specified in writing to the [IRA issuer] that the amounts contributed are for such taxable year."[7] In light of this rule, it is not uncommon for IRA owners to send two years' worth of contributions to an IRA issuer at once, intending half as a prior-year contribution and half as a current-year contribution. In some cases, however, the IRA owner may not specify this intent in writing. Similarly, an IRA owner may timely send money for a single contribution for the preceding year, but without specifying in writing their intent that the contribution apply for the preceding year. In these situations, the IRA issuer may report the entire amount as a current-year contribution on Form 5498, thus resulting in an excess contribution for the current year.

These situations should be eligible for self-correction. This may be as simple as clarifying that it would be appropriate for the IRA issuer to provide amended Forms 5498 to separate the contributions between the relevant tax years. Such self-correction should be permitted at least through the due date for the individual's tax return for the year in which they sent the contribution. For example, if an individual intended for a contribution they sent on March 15, 2023, to apply to the 2022 tax year, but they inadvertently failed to properly inform the IRA provider of that intent, the error should be self-correctable at least through April 15, 2024.

(5) <u>Self-correction of inadvertent RMD failures</u>

We request clarification, with examples, of circumstances in which inadvertent RMD failures can be self-corrected and the IRS will automatically waive the related excise tax under Code section 4974(d) (for instance, where reasonable steps are being taken to remedy an RMD failure that is due to an error on the part of an IRA trustee, custodian, or issuer).[8] We further request that such guidance address the following two issues:

- ***Separate accounts for multiple beneficiaries*** **–** Current regulations generally provide that in cases where a deceased employee has named multiple beneficiaries, the RMD rules apply separately to any such beneficiary for which a separate account was established no later than the end of the year following the year of the employee's death.[9] For a variety of reasons, a plan or IRA issuer may inadvertently fail to establish separate accounts by this deadline. Such errors should be eligible for prospective self-correction, but without requiring retroactive adjustments to RMDs that were determined and distributed before the separate accounts were established.

- ***Annuitizations*** **–** Current law generally permits individuals to obtain an IRS waiver of the excise tax on RMD failures if the error was reasonable and steps are taken to remedy the shortfall.[10] In the case of a non-annuitized account balance, remedying the shortfall is straight-forward; the individual simply takes an additional withdrawal from their account balance. In the case of an annuitized payout, however, the individual may not be able to take an additional withdrawal. Guidance should address how to remedy prior RMD shortfalls in such circumstances in a manner that facilitates a waiver of the excise tax.

[7] Prop. Treas. Reg. section 1.219-1(d)(2).

[8] *Compare*, *e.g.*, section 3.03 of Rev. Proc. 2003-16, 2003-1 C.B. 359, 360 (providing an automatic waiver of the 60-day rollover requirement under Code sections 402(c)(3)(B), 403(b)(8)(B), and 408(d)(3)(I) in certain circumstances where a rollover is not made timely due to an error on the part of a financial institution).

[9] Treas. Reg. section 1.401(a)(9)-8, Q&A-2(a)(2); Prop. Treas. Reg. section 1.401(a)(9)-8(a)(1).

[10] *See* section 4974(d)(1).

(6) Inadvertent failures to timely endorse a distributed annuity

We request clarification that EPCRS will be available where: (1) an annuity contract held in a qualified retirement plan or individual retirement account is transferred to the plan participant, IRA owner, or beneficiary, as applicable; (2) the transfer is intended to qualify as a tax-free rollover or transfer to an individual retirement annuity; (3) the annuity contract is treated by the transferee and issuer as an IRA from the time of the transfer; but (4) the issuer inadvertently fails to provide the transferee with an IRA endorsement for the contract and/or a disclosure statement in connection with the transfer.

(7) Self-correction of inadvertent errors involving IRA types

We request clarification that self-correction is available to address errors where the wrong type of IRA was established. For example:

- ***Newly established IRAs* –** If an individual properly completes paperwork to establish a traditional individual retirement annuity, but the issuer inadvertently issues the contract with a Roth IRA endorsement, the error should be eligible for self-correction by replacing the erroneous endorsement with the correct one. This type of situation is similar to inadvertent failures to satisfy the 60-day deadline for completing indirect rollovers, where IRS guidance automatically waives the error upon the taxpayer's self-certification that: (1) the error was committed by the financial institution receiving the contribution, (2) the distribution was deposited into and remained in an account that the taxpayer mistakenly thought was an eligible retirement plan, or (3) another specified circumstance caused the error.

- ***Conversion of incorrect amount* –** If an individual properly completes paperwork to convert a specified amount within a traditional IRA to a Roth IRA, but the IRA provider inadvertently converts more than the requested amount, the error should be eligible for self-correction by reversing the excess portion of the conversion. Although current law generally prohibits the recharacterization of Roth conversions that occur after 2017, correcting an erroneous conversion is distinguishable and should be permitted.

(8) Self-correction of inadvertent titling errors for inherited IRAs

We request clarification permitting the self-correction of inadvertent titling errors for inherited IRAs. IRS guidance generally provides that if an inherited IRA within the meaning of Code section 408(d)(3)(C)(ii) is issued to a non-spouse beneficiary in a direct rollover or direct transfer, the inherited IRA must be established and titled "in a manner that identifies it as an IRA with respect to a deceased individual and also identifies the deceased individual and the beneficiary."[11] In some cases, an IRA issuer may inadvertently fail to title an inherited IRA in this manner. Such errors should be eligible for self-correction, provided that the IRA issuer and

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[11] *See*, *e.g.*, Notice 2007-7, 2007-1 C.B. 395, Q&A-13 (addressing direct trustee-to-trustee transfers from qualified plans to inherited IRAs); PLR 202140011 (July 12, 2021) (suggesting that a similar titling convention applies in the case of a trustee-to-trustee transfer from an IRA to an inherited IRA); Publication 590-B, *Distributions from Individual Retirement Arrangements (IRAs)*, pg. 6 (April 4, 2023) (describing the rules for inherited IRAs and stating that a trustee-to-trustee transfer is permitted "as long as the IRA into which amounts are being moved is set up and maintained in the name of the deceased IRA owner for the benefit of [the] beneficiary.")

beneficiary treated the IRA as an inherited IRA at all times, *e.g.*, the beneficiary did not make any of their own contributions to the IRA.

(9) <u>EPCRS user fee for VCP submissions involving IRAs</u>

We request clarification that the user fee for a Voluntary Compliance Program submission under EPCRS that varies with the amount of assets of a "plan"[12] applies in a submission involving IRAs by treating each type of IRA (traditional or Roth) as a "plan," rather than treating each individual traditional IRA or Roth IRA account or annuity contract as a separate plan.

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The Committee appreciates your consideration of these comments. If you would find it helpful to discuss any of the issues described in this letter or any of the Committee's earlier comment letters on SECURE 2.0, we would be pleased to schedule a call with you and your colleagues. You can reach either of us at 202-347-2230 or the email addresses listed below.

Sincerely,

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Attachment (list of member companies)

[12] *See* section 1.01 of Rev. Proc. 2021-30, 2021-31 I.R.B. 172, 219 (referring to the user fees set forth in Appendix A of Rev. Proc. 2021-4 (and its annual successors)).

The COMMITTEE of ANNUITY INSURERS

Allianz Life Insurance Company, Minneapolis, MN
Ameriprise Financial, Minneapolis, MN
Athene USA, Des Moines, IA
Brighthouse Financial, Inc., Charlotte, NC
Corebridge Financial, Houston, TX
Equitable, New York, NY
Fidelity & Guaranty Life Insurance Company, Des Moines, Iowa
Fidelity Investments Life Insurance Company, Boston, MA
Fortitude Re, Jersey City, NJ
Genworth Financial, Richmond, VA
Global Atlantic Financial Group, Southborough, MA
Guardian Insurance & Annuity Co., Inc., New York, NY
Jackson National Life Insurance Company, Lansing, MI
John Hancock Life Insurance Company, Boston, MA
Lincoln Financial Group, Fort Wayne, IN
Massachusetts Mutual Life Insurance Company, Springfield, MA
Metropolitan Life Insurance Company, New York, NY
Nationwide Life Insurance Companies, Columbus, OH
New York Life Insurance Company, New York, NY
Northwestern Mutual Life Insurance Company, Milwaukee, WI
Ohio National Financial Services, Cincinnati, OH
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The Committee of Annuity Insurers was formed in 1981 to participate in the development of federal policies with respect to annuities. The member companies of the Committee represent approximately 80% of the annuity business in the United States.