



AMERICAN BENEFITS COUNCIL

March 1, 2021

Submitted via email

Internal Revenue Service
Attn: CC:PA:LPD:PR (Rev. Proc. 2019-19) Room 5203
PO Box 7604
Ben Franklin Station
Washington, D.C. 20044

**RE: Request for Permanent EPCRS Safe Harbor Correction Method for Failures
Related to Automatic Contribution Features in a Section 401(k) or 403(b) Plan**

Dear Sir or Madam:

On behalf of the American Benefits Council (“the Council”), we are submitting this letter in response to the Internal Revenue Service (IRS) Revenue Procedure 2019-19, which invites public comments and indicates that the U.S. Treasury Department and the IRS expect to continue to update the Employee Plans Compliance Resolution System (EPCRS) with improvements based on comments received.¹ The Council thanks Treasury and the IRS for the opportunity to submit comments.

EPCRS is a very successful voluntary compliance program, developed and expanded many times with input from plan sponsors. The Council and its members share the goal of the IRS and Treasury to maintain a program that encourages correction of operational and other errors, which all plans experience from time to time. One critical feature of EPCRS is that it seeks to avoid penalties that discourage a plan sponsor from correcting an error properly. If EPCRS is too burdensome to use, plan sponsors will simply not correct the error.

The Council is a Washington D.C.-based employee benefits public policy organization. The Council advocates for employers dedicated to the achievement of best-in-class solutions that protect and encourage the health and financial well-being of their workers, retirees and families. Council members include over 220 of the world's

¹ Rev. Proc. 2019-19, 2019-19 I.R.B. 1086, at Sections 2.04, 17.

largest corporations and collectively either directly sponsor or support sponsors of health and retirement benefits for virtually all Americans covered by employer-provided plans.

This letter relates to Appendix A, Section .05(8) of Rev. Proc. 2019-19, which provides a safe harbor correction method for failures related to automatic contribution features in a 401(k) plan or a 403(b) plan (“safe harbor” or “safe harbor correction method”) and which sunset on December 31, 2020.² The Council requests that the IRS and Treasury make this safe harbor correction method permanent and make the effective date retroactive to failures that begin in plan years after December 31, 2020. Alternatively, or until the IRS and Treasury have reached a resolution with regards to the current lack of this particular safe harbor for automatic contribution failures, the Council requests that the IRS and Treasury provide plan sponsors with flexibility by retroactively extending the safe harbor.

As detailed below, the Council believes that the safe harbor correction method is an invaluable tool for plan sponsors that reduces burdens on both plan sponsors and on tax administration as a whole. The recent sunset of the safe harbor leaves plan sponsors without an efficient and cost-effective manner in which to resolve automatic contribution deferral failures, with the ultimate effect being to discourage voluntary corrections and potentially the adoption of automatic contribution features altogether. The Council therefore urges the IRS and Treasury to take steps to make the safe harbor correction method permanent.

THE SAFE HARBOR CORRECTION METHOD IS THE APPROPRIATE CORRECTION

Under the non-sunset safe harbor correction method, where a plan fails to implement an automatic contribution feature for an affected eligible employee or fails to implement an affirmative election of an employee who is otherwise subject to an automatic contribution feature, but that error is caught and corrected very quickly, no qualified non-elective contribution (QNEC) for the missed elective deferrals is required where certain conditions are satisfied. The sunset of this safe harbor will result in a correction that could be considerably more expensive for the plan sponsor. In general, in the case of a failure related to participant deferrals, including an automatic contribution failure, the employer is required to make a corrective QNEC equal to 50% of the employee’s missed deferral opportunity.³ Where certain conditions are met, the 50% corrective QNEC may be reduced to 25% for an employee elective deferral failure

² Rev. Proc. 2019-19, at Appx. A, Section .05(8)(d).

³ Rev. Proc. 2019-19, at Appx. A, Section .05(2).

that extends beyond three months.⁴ Certain features of automatic enrollment make the former safe harbor correction method a more appropriate correction than the 50% or 25% corrective QNECs.

First, errors related to automatic enrollment are among the most common compliance errors in 401(k) and 403(b) plans.⁵ It is much more likely that inadvertent errors will occur where a participant is automatically enrolled in a plan than where a participant affirmatively elects to participate. It follows, therefore, that the correction for an incredibly common error should be relatively simple and not overly onerous.

Automatic enrollment features significantly increase employee participation rates among all demographic rates, including age, gender and income level.⁶ The types of employees who participate in automatic enrollment tend to be younger and newer.⁷ These newer and younger employees usually will have the opportunity to catch up and increase elective deferrals later on and therefore the safe harbor correction method is a more suitable correction than a 50% or 25% corrective QNEC.

It is important to keep in mind that the safe harbor correction method is limited to automatic contribution errors that are caught quickly. To take advantage of the safe harbor correction, the correct deferrals must begin no later than the earlier of the first payment of compensation made on or after the last day of the 9½-month period after the end of the plan year in which the failure first occurred and *even sooner* if the employee notices the error and informs the plan sponsor.

As the IRS and Treasury know well, the 50%/25% QNEC is a generous windfall for the employee who, after all, was paid the salary that should have been contributed to the plan. This windfall is unfair to the employee's peers because a fellow employee who actually made an affirmative election that was correctly implemented is not entitled to any windfall.

The theory behind the corrective QNECs is to compensate the employee for the lost tax-preferred earnings under the plan. But an employee affected by this error is only delayed in making a contribution for a brief period of time and can quickly catch up. Because automatic enrollment percentages tend to be fairly low, it would be extremely

⁴ Rev. Proc. 2019-19, at Appx. A, Section .05(9)(b). If the period of failure is less than three months, the 25% corrective QNEC is further reduced to zero. *Id.* at Section .05(9)(a). In our experience, however, it is very common that automatic enrollment failures are not caught this quickly, because by definition this error involves a participant who did not make an active choice as their deferral rate. These automatically enrolled participants are much less likely to notice that something is amiss and inform the plan sponsor.

⁵ Rev. Proc. 2015-28, 2015-16 I.R.B. 920, at Section 2.03.

⁶ *How America Saves*, VANGUARD (June 2020), at 34, Figure 30.

⁷ *How America Saves*, VANGUARD (June 2020), at 80.

rare for an affected employee to have reached the contribution limit under Code Section 402(g). (The safe harbor method does ensure, as it should, that the employee receives all matching contributions that would have been made if the error had not occurred.) Thus, for the specific group of employees affected by brief automatic contribution errors, the safe harbor correction method is fair and reasonable to the employee.

THE OTHER CORRECTION METHODS FOR FAILURES RELATED TO AUTOMATIC CONTRIBUTION CAN BE EXPENSIVE AND BURDENSOME

The safe harbor was first implemented by Rev. Proc. 2015-28 following public comments responding to the correction method for automatic contribution failures in Rev. Proc. 2013-12. As discussed above, in the case of an automatic contribution failure, the typical correction method requires a 50% corrective QNEC contribution, or a 25% corrective QNEC contribution where certain conditions are satisfied.

Rev. Proc. 2013-12 specifically requested comments regarding methods to correct failures to implement automatic contribution features.⁸ Those commenters were largely critical of the 50% corrective contribution method available under Rev. Proc. 2013-12. As the IRS acknowledged at the time, commenters stated that the “cost associated with correcting failures to implement automatic contribution features under the rules in EPCRS ... discourages employers from adopting plans with automatic contribution features because implementation errors are more common for plans with automatic contribution features (particularly automatic escalation features).”⁹ Commenters also expressed frustration that employees affected by an automatic contribution failure effectively received a “windfall” because they collected both their full salary *and* a 50% make-up corrective contribution. Therefore, the employees were overcompensated for failures that lasted only a short period of time because the participants usually had the opportunity to increase elective deferrals in later periods. In addition, commenters noted that such implementation errors are typically discovered in connection with the preparation of a plan’s Form 5500 series return for a plan year and therefore there was no need for such a harsh method of correction.

In light of these complaints, coupled with the specific requests for a special correction method for automatic contribution failures, the safe harbor correction method was implemented in Rev. Proc. 2015-28. The Council, among others in the retirement plan community, has found the safe harbor to be a cost-effective and efficient way of remedying such errors while also adequately protecting participants. However, with the sunset provision effective as of December 31, 2020, a plan sponsor correcting a failure related to an automatic contribution must generally return to the 50%/25%

⁸ Rev. Proc. 2013-12, 2013-4 I.R.B. 313, at Appx. A, Section 2.05(2).

⁹ Rev. Proc. 2015-28, at Section 2.03.

corrective QNEC. There is no reason to think that the same issues commenters pointed out in 2013 will not resurface again now that the safe harbor correction method is unavailable. A simple solution to this issue is to make the safe harbor correction method permanent.

THE POLICY REASONS BEHIND THE SAFE HARBOR CORRECTION METHOD CONTINUE

At the time that the safe harbor correction method was implemented, the IRS indicated its willingness to contemplate an extension in the future: “At a later date, the [IRS] will consider whether to extend the safe harbor correction method for failures that begin in later years. In deciding whether to extend the safe harbor correction method, the [IRS] will take into account, among other relevant factors, the extent to which there is *an increase in the number of plans* implemented with automatic contribution features.” (emphasis added).¹⁰

Recent data shows that there *has* been an increase in these types of plans. According to the Bureau of Labor Statistics, in 2019, 40% of employees in workplace retirement plans participated in a plan with an automatic enrollment feature.¹¹ That figure is a slight increase from 39% in 2017¹² and a marked increase from 19% in 2009.¹³ In addition, a recent Vanguard study found that the percentage of its defined contribution plans with automatic enrollment increased from 41% in 2015 to 50% in 2019.¹⁴

Part of the reason for the safe harbor correction was to remove one impediment to adoption of automatic contribution features and to discourage plan sponsors from dropping that feature because of an expensive correction after an inadvertent error.

¹⁰ *Id.*

¹¹ *National Compensation Survey Table 35, Savings and thrift plans: Availability of automatic enrollment and method of default contribution, private industry workers*, U.S. BUREAU OF LABOR STATISTICS (2019), <https://www.bls.gov/ncs/ebs/detailedprovisions/2019/ownership/private/table35a.pdf>.

¹² *Table 17, Savings and thrift plans: Availability of automatic enrollment and method of default contribution, private industry workers*, U.S. BUREAU OF LABOR STATISTICS (2017), <https://www.bls.gov/ncs/ebs/detailedprovisions/2017/ownership/private/table17a.htm>.

¹³ *Automatic enrollment in savings and thrift retirement plans, March 2009*, U.S. BUREAU OF LABOR STATISTICS (Sept. 15, 2010), https://www.bls.gov/opub/ted/2010/ted_20100915_data.htm.

¹⁴ *How America Saves*, VANGUARD (June 2020), at 9, Figure 1, <https://institutional.vanguard.com/ngiam/assets/pdf/has/how-america-saves-report-2020.pdf>. See also *Participants Putting More Money in Workplace Retirement Plans, Taking Out Less*, PLAN SPONSOR COUNCIL OF AM. (Jan. 11, 2016), <https://www.pasca.org/participants-putting-more-money-workplace-retirement-plans-taking-out-less> (finding that 60.2% of plans among PSCA’s membership included automatic enrollment features in 2018, up from 52.4% in 2015).

Automatic enrollment is not yet universal,¹⁵ so we need to continue to adopt policies that foster adoption and maintenance of this powerful design. At the same, it is important to keep in mind that the 50% or 25% corrective QNECs on their own, without the safe harbor correction method available in certain circumstances, would only serve to overburden an increasingly large number of plan sponsors who have built this feature into their plans.

Lastly, a major purpose of the EPCRS is to encourage voluntary corrections by plan sponsors and thereby allow plan sponsors to continue providing employees with retirement benefits.¹⁶ The safe harbor correction method promotes this purpose by ensuring that correcting failures related to automatic contributions is manageable and cost-effective for plan sponsors, particularly when compared to the 50% or 25% corrective QNECs. For the IRS and Treasury to decline to make the safe harbor permanent would be to undermine this fundamental purpose and discourage voluntary compliance.

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Thank you for your consideration of our request to make the safe harbor correction method permanent, or alternatively, to extend the safe harbor correction method.

Sincerely,



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cc: Eric Slack, Director, Employee Plans
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¹⁵ *More Jump on Auto Enrollment Bandwagon, But Not Everyone*, NAPANET (Jan. 21, 2015), <https://www.napa-net.org/news-info/daily-news/more-jump-auto-enrollment-bandwagon-not-everyone>.

¹⁶ Rev. Proc. 2013-12, at Section 1.01-02; Rev. Proc. 2019-19, at Section 1.02.