



# AMERICAN BENEFITS COUNCIL

May 2, 2018

The Honorable David Kautter  
Acting Commissioner  
Internal Revenue Service  
1111 Constitution Avenue NW  
Washington, DC 20224

**Re: Updated VCP User Fee Schedule and Other EPCRS Changes**

Dear Acting Commissioner Kautter:

The American Benefits Council is writing to express its concerns with the recent changes to the user fee schedule that applies to submissions under the Voluntary Correction Program (“VCP”). We are particularly concerned that these changes create a disincentive for employers to correct common plan failures with approval from the Internal Revenue Service (“IRS”). Accordingly, the Council recommends that IRS reinstate the recently eliminated reduced VCP user fees and make other changes to the Employee Plans Compliance Resolution System, Revenue Procedure 2016-51 (“EPCRS”).

The American Benefits Council (the “Council”) is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council’s members either sponsor directly or provide services to retirement and health plans that cover more than 100 million Americans.

## **BACKGROUND**

Until recently, the user fee accompanying a VCP submission for most plan failures depended on the number of participants in the plan. That fee schedule generally ranged from \$500 for plans with 20 or fewer participants to \$15,000 for plans with more than 10,000 participants. Alternatively, and perhaps more importantly for purposes of this letter, if a VCP submission involved a failure to satisfy the required minimum

distribution (“RMD”) requirements of Code section 401(a)(9), a plan loan failure affecting no more than 25% of the plan’s participants, or a failure to adopt timely good faith or interim amendments, plan sponsors were generally eligible for a special reduced user fee. The special reduced user fees provided an important incentive for plan sponsors to correct, with the benefit of IRS approval, some of the most common errors associated with operating a qualified retirement plan.

Effective January 2, 2018, the IRS moved away from its VCP user fee schedule based on the number of plan participants in favor of a new VCP user fee schedule based on the net value of plan assets. According to this new schedule, the VCP user fee will be \$1,500 for plans with assets of \$500,000 or less; \$3,000 for plans with assets of over \$500,000 but no more than \$10,000,000; and \$3,500 for plans with assets over \$10,000,000. Most importantly for our members, the new user fee schedule eliminates the special reduced user fees for RMD, plan loan, and non-amender failures.

**I. Reinstate reduced user fees for plan loan, RMD, and non-amender failures.**

The Council urges the IRS to reinstate the reduced user fees for plan loan, RMD, and non-amender failures. We understand that the IRS changed the user fees in an effort to simplify the VCP fee schedule and to have that schedule more accurately reflect the average amount of time spent on reviewing each submission. We also appreciate and support that the highest user fee has been significantly reduced for many types of plan failures, which we believe will further encourage Council members to use VCP. Our members are very concerned, however, about how the elimination of the special reduced user fees will impact plan sponsors trying to remain compliant with the Internal Revenue Code’s strict qualification requirements. The reduced VCP user fees that have been eliminated provided a meaningful incentive to correct small but recurring failures with IRS approval. Without those reduced user fees, plan sponsors will be more reluctant to go through VCP to the extent it is optional. Unfortunately, for some of these failures, VCP is not optional. Council members will be faced with significant additional VCP fees where self-correction is not an option.

**II. Update and expand relief made available under the self-correction program.**

Regardless of whether the reduced user fees for RMD, plan loan, and non-amender failures are reinstated, the Council recommends that IRS update and expand the relief made available under its Self-Correction Program (“SCP”). We believe that the previously available reduced VCP user fees for RMD, plan loan, and non-amender failures reflected the fact that RMD, plan loan, and non-amender failures are common and relatively benign occurrences that should be corrected with minimal burdens for plan sponsors and participants. In this regard, we offer the following recommendations:

- ***Expand reporting relief for plan loan failures corrected through SCP.*** Under the current terms of EPCRS, plan loan failures that result in a “deemed” distribution must be reported on Form 1099-R in the year of the failure, unless the employer corrects the failure through VCP. If VCP is used to correct the failure, a plan sponsor can forego reporting the deemed distribution or report the deemed distribution on Form 1099-R in the year of the correction (instead of the year of the failure).

This relief is particularly important for participants because it can prevent participants from immediately including failed plan loans in income or having to file an amended return for a prior taxable year. *The Council recommends that IRS amend EPCRS to make similar reporting relief available for plans that correct loan failures through SCP. Additionally, IRS should coordinate with the Department of Labor (“DOL”) to update DOL’s Voluntary Fiduciary Correction Program (“VFCP”) to recognize SCP as a correction method eligible for relief under that program.*

- ***Expand excise tax relief for RMD failures corrected through SCP.*** Although RMD failures are eligible for correction under VCP or SCP, by default, individual participants who fail to receive an RMD must individually request a waiver of the 50% excise tax that generally applies to missed distributions. However, if a plan sponsor corrects an RMD failure through VCP and the plan sponsor makes a specific request for an excise tax waiver, the IRS can waive the individual excise tax on a group basis as part of the compliance statement issued under VCP.

This relief is particularly beneficial for plan participants that fail to receive a required distribution, which, in some cases, is due to no fault of their own. **The Council recommends that IRS amend EPCRS in a way that waives individual excise taxes when a plan sponsor corrects an RMD failure through SCP.** This correction could involve appropriate reporting on a Form 1099-R.

- ***Expand SCP to cover certain plan document failures.*** SCP is not currently available for “Plan Document Failures.” This means that plan sponsors cannot use SCP to correct a failure to adopt amendments within the applicable remedial amendment period – i.e., non-amender failures. *The Council recommends that IRS amend EPCRS to permit the use of SCP to correct certain non-amender failures, especially amendments adopted to expand participant rights. Examples of such amendments might include the addition of retroactive annuity starting dates, additional withdrawal options, and additional benefits, rights, and features.* The need for self-correction options in this context has become more important due to the elimination of the cyclical determination letter program for individually designed plans.

- *Expand SCP to cover certain demographic failures.* SCP is currently not available for “Demographic Failures.” This creates additional burdens for minimum participation, coverage, and nondiscrimination failures that are not or cannot be corrected by amendment before the deadline in Treas. Reg. § 1.401(a)(4)-11(g), especially in the context of closed defined benefit plans that experience a testing failure. *The Council recommends that IRS amend EPCRS to permit the use of SCP to correct appropriate Demographic Failures.*<sup>1</sup>

### III. Make IRS-approved corrections publicly available.

The correction methods described in EPCRS, especially in Appendix A and B, are a helpful roadmap for plan sponsors dealing with routine failures. However, if a failure does not fit into one of the correction methods described by EPCRS, plan sponsors lack clear guidance when attempting to fashion an appropriate correction method. *In an effort to reduce that uncertainty and to promote the consistent and uniform administration of EPCRS, the Council recommends that IRS make approved correction methods publicly available on a routine basis.*

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We thank you in advance for your consideration of each of the issues discussed in this letter. If you have any questions about our recommendations or any other related matters, please feel free to reach out to me by phone at 202-289-6700 or by email at [jjacobson@abcstaff.org](mailto:jjacobson@abcstaff.org).

Sincerely,



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Senior Counsel, Retirement Policy  
American Benefits Council

cc: David Horton  
Victoria Judson  
Stephen Tackney  
Robert Neis

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<sup>1</sup> This relief, however, is not a substitute for a more permanent and workable solution to the problem of closed defined benefit plans and closed benefit rights and features. See the Retirement Security Preservation Act of 2017, introduced by Senators Cardin and Portman ([S. 852](#)) and by Representatives Tiberi and Neal ([H.R. 1962](#)), as well as Section 205 of the Retirement Enhancement and Savings Act of 2018, introduced by Senators Hatch and Wyden ([S. 2526](#)) and by Representatives Kelly and Kind ([H.R. 5282](#)). See also [the Council’s letter of April 28, 2016](#), filed in conjunction with the proposed regulations.