



IMPACT OF MISSED RESTATEMENT DEADLINE FOR PRE-APPROVED PLANS

In the May 23rd edition of [Employee Plans News](#), the IRS addressed the impact of employers failing to restate their pre-approved defined benefit or 403(b) plans by the end of announced plan restatement deadlines. Although the IRS’ newsletter did not address all relevant issues, it clarifies its position on an employer’s ability to self-correct a missed plan restatement failure under the IRS’ Employee Plans Compliance Resolution System (“EPCRS”) program.

BACKGROUND

The ability to self-correct plan document failures has been an issue since the release of Revenue Procedure 2019-19, which set forth the conditions to utilize the EPCRS Self-Correction Program (SCP) for such failures. It became more of a concern when employers, in some cases due to pandemic closures, failed to restate their 403(b) plans by the June 30, 2020 restatement deadline or their pre-approved defined benefit plans by the July 31, 2020 restatement deadline. The IRS did not clarify the ability to self-correct a missed restatement failure in the most recent iteration of the EPCRS procedures (Revenue Procedure 2021-30).

The lack of clarity regarding the ability to self-correct a missed pre-approved plan restatement left employers and practitioners with a submission under EPCRS’ Voluntary Correction Program (VCP) as the only certain manner of correcting these plan document failures. The somewhat high VCP filing fees deter many employers, especially smaller employers, from submitting VCP applications.

ASC Insight: Many plan practitioners, including ASC, reached out to the IRS and asked for clarification on the ability of employers to self-correct a missed restatement failure, especially considering the unique pandemic circumstances in 2020 and the deterrent nature of VCP filing fees. Although some at the IRS gave favorable verbal assurance that self-correction under SCP was a viable option, others at the IRS were less certain given the specific conditions (in particular, the “favorable letter” requirement) for self-correction under the published EPCRS procedures.

Fortunately, the IRS listened to practitioner concerns and agreed to clarify its position on the impact of a missed restatement deadline for pre-approved plans. Of course, the best way to provide this clarification would have been a revision of the applicable rules for self-correction under the EPCRS Revenue Procedure. However, due to the lengthy bureaucratic process required for revising Revenue Procedures, the IRS believed that using “soft guidance” was the most efficient means to state its position on the issue.

EMPLOYEE PLANS NEWS

The May 23rd edition of the Employee Plans News included guidance entitled “Impact of Missed Deadline for Restatement of Pre-Approved Plans,” which provides the IRS’ position on correcting missed restatements. The newsletter, in addition to making certain general observations relating to pre-approved plans, separately discusses the missed restatement deadlines for 401(a) pre-approved defined benefit plans and for 403(b) plans.

As a general observation applicable to all pre-approved plans, the IRS states that failure to qualify as a pre-approved plan is not a qualification issue. Instead, the adoption of a pre-approved plan is just one method for meeting the applicable written plan document requirements. If an employer does not timely adopt a pre-approved plan, the plan becomes an individually designed plan. An employer may correct a plan document failure under the EPCRS program.

Missed deadline for 401(a) pre-approved defined benefit plans

With regard to 401(a) pre-approved defined benefit plans, the article generally provides that:

- A plan that was not restated by the July 31, 2020 deadline is no longer a pre-approved plan and became an individually designed plan.
- As an individually designed plan, the plan must be reviewed to determine if there are any “form” defects, including defects in any prior interim or discretionary amendments.
- If any interim or discretionary amendments are defective, the employer may correct the defect under the EPCRS program.
- The plan’s previous pre-approved plan approval letter (i.e., opinion or advisory letter) is equivalent to a “favorable letter” as required for self-correction under the EPCRS program. Therefore, an employer may use SCP to correct any defect that existed for less than three years.
- If the defect existed for more than three years, the employer must correct under VCP.

Missed deadline for 403(b) plans

With regard to 403(b) plans, the article generally provides that:

- A plan that was not restated by the June 30, 2020 deadline never became a pre-approved plan and is an individually designed plan.
- As an individually designed plan, the plan must be reviewed to determine if there are any form defects based on the requirements in Revenue Procedure 2019-39. (Revenue Procedure 2019-39

sets forth rules applicable to plan amendment requirements for individually designed and pre-approved 403(b) plans.)

- If the plan has any defective provision, the employer may correct the defect under the EPCRS program.
- If an employer had a written plan document in place in 2009 (or, if later, in the year the plan was first adopted), the plan meets the “favorable letter” requirement for self-correction under the EPCRS program. Therefore, an employer may use SCP to correct any defect that existed for less than three years.
- If the defect existed for more than three years, the employer must correct under VCP.

WHAT THIS MEANS

Generally, the Employee Plans News guidance provides a welcome solution for employers that missed the most recent restatement deadline for their pre-approved defined benefit or 403(b) plans. The best course of action for those employers is to assess the “qualified” status of their plan documents, correct any defects (including any issues with interim or discretionary amendments), and adopt a pre-approved plan as soon as possible. In most cases, an employer will be able to correct any defect under SCP. If not, the VCP program continues to be a viable option.

Although not referenced in this Employee Plans News, the same analysis the IRS uses for pre-approved defined benefit plans may be applied to pre-approved defined contribution plans that are not timely restated by the upcoming July 31, 2022 deadline.

ASC Insight: The Employee Plans News article leaves certain issues unclear. Among the issues are:

- What level of review is necessary to determine the acceptability of interim and discretionary amendments?
- May employers use a retroactive effective date when adopting a pre-approved plan to correct missed restatements?
- How do the end of the pre-approved defined contribution plan remedial amendment cycle (January 31, 2023 for Cycle 3), the pre-approved defined contribution plan restatement deadline (July 31, 2022) and ability to self-correct missed restatements interplay with one another?

ASC will continue to seek answers to these questions. Hopefully, the IRS will use future Employee Plans News to communicate its positions. In any case, we expect the IRS will clarify the ability to self-correct missed restatements in its next iteration of the EPCRS procedures.

Bottom line? ASC highly recommends that employers restate their pre-approved defined contribution plans by the July 31, 2022 deadline to avoid any possible issues.

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