

# Q3 Fiduciary Legal Briefing

## IRS Notice 2023-43: SECURE 2.0 Changes to Self Correction Programs

SECURE 2.0 expansion of IRS EPCRS

IRS Notice 2023-43 provides guidance regarding expansion

- Expansion effective immediately (May 25, 2023)
- Authorizes more lenient corrections for pre-SECURE 2.0 failures
- Defines “eligible inadvertent failure” (EIF) for self-correction
  - Cannot be egregious, relate to diversion/misuse of assets, or involve abusive tax avoidance
  - Opens myriad additional failures for self-correction
- EIF may be self-corrected before identified by IRS
  - May even do so post-identification if can demonstrate “specific commitment to implement a self-correction” – facts and circumstances
    - Specific identification of failure; and
    - Action toward correcting failure
  - Corrected within reasonable period after EIF identified (18<sup>th</sup> months following identification generally presumed reasonable)

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### IRS Notice 2023-43 (cont.)

- Remaining restrictions on self-correcting loan failures eliminated
  - Defaults
  - Defective loans from origination
- EIF self-correction requirements
  - Sponsor must *demonstrate* “practices and procedures reasonably designed to ensure compliance” to self correct - documentation
  - Must apply general correction principles of EPCRS ensuring restoration of plan that is reasonable and appropriate for failure
  - If EIF involves excise/additional taxes, then VCP required to obtain waiver or to correct tax issue
- Failures prohibited from self correction:
  - Failure to adopt initial written plan
  - Orphan plan failures
  - Significant failure in terminated plan
  - Demographic failures (coverage, nondiscrimination, participation testing)
  - Operation failures corrected by amendment resulting in less favorable benefit to participant
  - ESOP failure involving tax consequences other than plan disqualification
  - SEP or SIMPLE IRA failures with excess contributions remaining in IRA or for plans that do not use model/prototype document

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### IRS Notice 2023-43 (cont.)

- Recordkeeping/documentation requirements
  - Identification of failure, years in which occurred, number of impacted employees
  - Date failure identified
  - Explanation how failure occurred & demonstration of practices and procedures at the time designed for compliance
  - Identification & substantiation of correction (including date)
  - Changes to practices and procedures to avoid recurrence