

January 31, 2018

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

Re: Revised EPCRS User Fee Structure Is Unfair to Small Businesses

Dear Acting Commissioner Kautter:

The American Retirement Association (“ARA”) is writing to bring its concerns to the attention of the Internal Revenue Service (“IRS”) regarding the IRS’ recent revision of the user fees for Voluntary Correction Program (“VCP”) submissions under its Employee Plans Compliance Resolution System (“EPCRS”), as announced by the IRS in Revenue Procedure 2018-4 on January 2, 2018, and made effective on that same date. ARA thanks the IRS for the opportunity to provide input on this matter, and requests that a meeting be scheduled as soon as possible to discuss our concerns.

The ARA is a national organization of more than 20,000 members who provide consulting and administrative services to American workers, savers and sponsors of retirement plans and IRAs. ARA members are a diverse group of retirement plan professionals of all disciplines including financial advisers, consultants, administrators, actuaries, accountants, and attorneys. The ARA is the coordinating entity for its five underlying affiliate organizations, the American Society of Pension Professionals and Actuaries (“ASPPA”), the National Association of Plan Advisors (“NAPA”), the National Tax-deferred Savings Association (“NTSA”), the ASPPA College of Pension Actuaries (“ACOPA”) and the Plan Sponsor Council of America (“PSCA”). ARA members are diverse but united in a common dedication to America’s private retirement system.

Summary

ARA recognizes that the IRS must balance numerous competing compliance and enforcement concerns. ARA further recognizes that the IRS faces resource limitations that, in some instances, do not allow for the luxury of extended research, analysis, and debate.

We believe, however, the new user fee structure and its immediate effective date is unfair to small employers, and will have an adverse impact on plan participants. It is also in direct conflict with Congress’ directive to the Treasury Department to “[take] into account special concerns and

circumstances that small employers face with respect to compliance and correction of compliance failures.”¹

The new fee structure is a complete departure from the previous VCP user fee approach that was based on participant counts with lower fees for smaller plans. Revenue Procedure 2018-4 announced this unexpected change in determining VCP user fees on January 2, 2018, with no advance warning, no discussion, and no grace period to allow plan sponsors the opportunity to make their VCP submissions prior to the new fees taking effect.

ARA recommends that the IRS immediately amend Revenue Procedure 2018-4 to:

1. Provide that the applicable general VCP user fee is the lesser of the general VCP user fee in effect on January 2, 2018, or the general VCP user fee in effect immediately prior to January 2, 2018, pursuant to Revenue Procedure 2017-4; and
2. Reinstate the special reduced VCP user fees in effect immediately prior to January 2, 2018, pursuant to Revenue Procedure 2017-4.

Background

Section 1101(b) of the Pension Protection Act of 2006 (“PPA 2006”) charges the Secretary of the Treasury (“Secretary”) with continuing to update and improve EPCRS, and requires the Secretary to give special attention to, among other requirements, “[the] special concerns and circumstances that small employers face with respect to compliance and correction of compliance failures.”²

Discussion

Ensuring the operational compliance of their retirement plans is particularly burdensome for small employers due to the complexities of today’s myriad statutory and regulatory requirements for plan administration. Given the frequent occurrence of operational failures, the new VCP user fees appear to do exactly the opposite of what Section 1101(b)(2) of PPA 2006 requires. Indeed, the true beneficiaries of the new VCP user fees are large plan sponsors with plans that cover more than 100, more than 1,000, and more than 10,000 participants. Given the discretion accorded by IRC section 7528(b)(1)(A) in determining categories and subcategories for user fees, the new structure ignores the concerns of “small employers” that the Treasury Department is obligated to take into account under PPA 2006.

General VCP User Fees Before and After Revenue Procedure 2018-4

¹ Section 1101(b)(2) of the Pension Protection Act of 2006 (P.L. 109-280).

² *Id.*

The following charts summarize the general VCP user fees before and after Revenue Procedure 2018-4:

General VCP Fees Prior to January 2, 2018	
Number of Plan Participants	VCP fee
20 or fewer	\$500
21-50	\$750
51-100	\$1,500
101-1,000	\$5,000
1,001-10,000	\$10,000
More than 10,000	\$15,000

General VCP Fees Effective January 2, 2018	
Plan Net Assets	VCP fee
\$0-\$500,000	\$1,500
\$500,001-\$10,000,000	\$3,000
More than \$10,000,000	\$3,500

Admittedly, the new maximum VCP user fee amount of \$3,500 (for plans with net assets greater than \$10 million) is significantly lower than the previous VCP user fees of \$5,000, \$10,000, and \$15,000 for plans with more than 100, more than 1,000, and more than 10,000 participants, respectively. ARA agrees this change is likely to encourage large plans (the common term for plans over 100 participants) to utilize VCP. As described below, however, this new fee schedule triples, quadruples, or even sextuples the VCP fee for small plans. This unfair impact on small plans runs contrary to both the PPA mandate and general public policy.

Worse, the new VCP user fee schedule eliminates entirely the special reduced VCP user fees that were previously available to all plan sponsors that wished to voluntarily correct such common compliance failures as missed required minimum distributions, participant loan failures, and certain late amendment or nonamendment failures. These special reduced fees were beneficial to all sponsors, but especially small employers which do not have the financial resources of larger employers. Further, the reduced fees for required minimum distribution and loan failures provided an incentive to employers to make corrections that were more favorable from a tax perspective) to participants than merely self-correcting the defect.

Tying VCP User Fees to Plan Net Asset Values is Inappropriate

Basing the VCP user fee on net plan assets would appear to be a very arbitrary method of classifying the average cost of processing a VCP submission. Under EPCRS, VCP is available to correct certain plan qualification failures, including plan document failures, operational failures, demographic failures, and employer eligibility failures, so that plan sponsors can continue to

provide their employees with retirement benefits on a tax-favored basis.³ As a general principle, these failures are not considered corrected unless full correction is made with respect to all participants and beneficiaries for all tax years, regardless of whether such tax years are closed.⁴

While plan assets are necessarily involved in these qualification failures, either directly or indirectly, the more meaningful relationship to the cost of processing the submission is the number of participants and beneficiaries affected by such failures. For example, an operational failure involving the failure to properly administer a plan's definition of compensation for contribution purposes is not dependent upon the amount of the plan's net assets, but upon the number of adversely affected participants who must be made whole in order to correct the operational failure. Thus, a VCP user fee based on the plan's participant count is more appropriate, particularly for small employers.

Special Reduced VCP User Fees Should be Retained

The following charts summarize certain special reduced VCP user fees in effect before and after Revenue Procedure 2018-4:

Special Reduced VCP Fees Prior to January 2, 2018 For Failure to Satisfy Requirements of Internal Revenue Code Section 401(a)(9)	
Number of Affected Plan Participants	VCP fee
1-150	\$500
151-300	\$1,500
More than 300	General

Special Reduced VCP Fees Prior to January 2, 2018 For Participant Loan Failures	
Number of Participants With Loan Failures	VCP fee
13 or fewer	\$300
14-50	\$600
51-100	\$1,000
101-250	\$2,000
Over 150	\$3,000

Special Reduced VCP Fees Prior to January 2, 2018 For Other Failures	
Failure to adopt timely good faith/interim amendment	\$375
Failure to adopt amendment pursuant to favorable determination letter within applicable period	\$500
Nonamender failures submitted within one-year period following expiration of remedial amendment period	50% of applicable General VCP user fee
All failures for SEPs and SIMPLE-IRAs	\$250

³ Sections 1.01 and 4.01(2) of Revenue Procedure 2016-51, 2016-42 IRB 465, 9/29/2016.

⁴ Section 6.02 of Revenue Procedure 2016-51, 2016-42 IRB 465, 9/29/2016.

Special Reduced VCP Fees Effective January 2, 2018
NONE – General VCP User Fee Applies

These special lower VCP fees were designed to permit all employers to efficiently correct the common errors that plague even the most aptly run plans – but even more likely for plans sponsored by small employers. Many of these errors, particularly the errors regarding loans and amendments, cannot be corrected under EPCRS’s self-correction program. In addition, the reduced fee for 401(a)(9) failures primarily benefited participants (rather than plan sponsors) who, by virtue of the VCP filing, are assured they will not be responsible for the exorbitant excise taxes on small failures related to required minimum distributions. These reduced user fees encouraged the voluntary correction of common compliance failures via VCP. The significant increase in fees for these errors will reduce likelihood of correction through VCP, particularly for small employers that do not have the resources to pay a VCP user fee that is now up to five times as much as it was prior to Revenue Procedure 2018-4.

Increased Costs are a Disincentive for Plan Participation, Voluntary Correction, and May Compound Failures

Basing the VCP user fee on the value of plan assets drastically increases the costs of VCP submissions for all small employers, particularly for those who have successfully encouraged plan participation among employees and therefore have amassed plans with net assets greater than \$500,000. For example, the \$1,500 VCP user fee for a small plan with 99 participants and \$500,001-\$10,000,000 in net assets has doubled to \$3,000, while the \$750 VCP user fee for a small plan with 50 participants and \$500,001-\$10,000,000 in net assets (achieved with merely \$10,000 in average account balances) has quadrupled. The new user fee schedule based solely on plan assets unduly impacts small employers and effectively punishes small employers for encouraging employees to actively participate in its plans. This violates PPA’s mandate to “[take] into account special concerns and circumstances that small employers face with respect to compliance and correction of compliance failures”⁵ and runs contrary to the public policy of encouraging widespread participation in retirement plans to ensure a dignified retirement for all Americans.

Moreover, the higher VCP user fees are bound to disincentivize small employers (and, in the case of errors previously eligible for special user fees, large plans as well) from utilizing VCP. As a result sponsors are likely to either (1) not attempt to correct the error or (2) attempt self-correction of qualification failures, even when self-correction is neither available nor appropriate. This will further compound plan qualification failures and runs contrary to the stated policy of encouraging the voluntary correction of plan failures.

Conclusion

The new fee structure for VCP submissions under Revenue Procedure 2018-4 contravenes the directive of Congress to update and improve EPCRS in a way that takes into account the special

⁵ Section 1101(b)(2) of the Pension Protection Act of 2006 (P.L. 109-280).

concerns and circumstances of small employers. It also is in conflict with the general principles upon which EPCRS is based – that voluntary compliance is promoted by establishing limited fees for voluntary corrections approved by the IRS because it reduces employers’ uncertainty regarding their potential tax liability and participants’ tax liability.⁶

ARA respectfully requests that the IRS immediately amend Revenue Procedure 2018-4 to reinstate the special reduced VCP fees previously in effect under Revenue Procedure 2017-4, as well as to provide that the applicable general VCP User fee is the lesser of the fee that would apply under Revenue Procedure 2018-4 or the fee that would apply under Revenue Procedure 2017-4. We look forward to meeting with you to discuss our concerns.

These comments and recommendations are submitted on behalf of and were prepared by ASPPA’s IRS Subcommittee, Kelsey Mayo, Chair. If you have any questions concerning the matters discussed herein, please contact Craig Hoffman, ARA General Counsel and Director of Regulatory Affairs at (703) 516-9300.

Thank you for your time and consideration.

Sincerely,

/s/

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⁶Section 1.02 of Revenue Procedure 2016-51.

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