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Internal Revenue Service
Attn: CC:PA:LPD:PR (Notice 2023-43), Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Comments re. IRS Notice 2023-43

To Whom It May Concern:

The Investment Company Institute (ICI or the Institute)¹ is pleased to submit comments on IRS Notice 2023-43 and section 305 of the SECURE 2.0 Act (Act). Notice 2023-43 provides guidance with respect to the expansion of the Employee Plans Compliance Resolution System (EPCRS) as required under section 305 of the Act. Section 305 directs the IRS to modify EPCRS to allow plan sponsors greater use of self-correction for eligible inadvertent failures, and to extend EPCRS to allow IRA custodians to address certain inadvertent failures.

ICI strongly supports efforts to promote retirement security for US workers. As a trade association representing the asset management industry, ICI is especially attuned to the needs of retirement savers because the industry plays a significant role in US retirement saving by making available the investment products through which pension plans, defined contribution (DC) plans, and individual retirement accounts (IRAs) invest. Total US retirement assets were \$34.2 trillion as of December 31, 2022,² with our members managing a large portion of those assets through regulated funds, collective investment trusts, and separate accounts. To this end, the Institute supported the Act because it provides more tools for American families to save for and achieve a financially secure retirement.

¹ The [Investment Company Institute](http://www.ici.org) (ICI) is the leading association representing regulated investment funds. ICI's mission is to strengthen the foundation of the asset management industry for the ultimate benefit of the long-term individual investor. ICI's members include mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and UCITS and similar funds offered to investors in other jurisdictions. Its members manage \$31.2 trillion invested in funds registered under the US Investment Company Act of 1940, serving more than 100 million investors. Members manage an additional \$8.7 trillion in regulated fund assets managed outside the United States. ICI also represents its members in their capacity as investment advisers to certain collective investment trusts (CITs) and retail separately managed accounts (SMAs). ICI has offices in Washington DC, Brussels, London, and Hong Kong and carries out its international work through [ICI Global](http://www.ici.org).

² See Investment Company Institute, "Quarterly Retirement Market Data," available at <https://www.ici.org/research/stats/retirement>.

Specific to section 305, many of our members provide plan administration services to retirement plans and offer IRAs. As such, we strongly support the prospect of more efficient, less costly methods to correct plan failures – in particular with regard to IRAs. We appreciate that IRS provided interim guidance under section 305 in Notice 2023-43. In this letter, we comment on certain aspects of the Notice, including:

- Implications of the 18-month safe harbor for completing self-correction, as provided in Q&A 7;
- Common IRA failures for which EPCRS should be made available to IRA custodians; and
- The scope of the IRA correction program, specifically that custodians should be able to use the voluntary correction program in addition to self-correction.

I. Self-Correction Period Under EPCRS

Section 305(a) of the Act amends EPCRS to provide, as relevant here, that self-correction of “eligible inadvertent failures” is available only where the correction of such failure is “completed within a reasonable period after such failure is identified.” IRS Notice 2023-43, Q&A 7, states that, while a reasonable period for self-correction is determined by considering all relevant facts and circumstances, pending further guidance the IRS position is that “a failure that has been corrected by the last day of the 18th month following the date the failure is identified by the plan sponsor will be treated as having been completed within a reasonable period after it is identified.” Under EPCRS as it existed prior to the Act, however, failures that were identified as significant generally could be self-corrected by the end of the third plan year following the plan year in which the failure occurred.³

This interpretation raises a question as to which we would appreciate further guidance. Depending on when a failure is identified, the 18-month safe harbor may have the unintended consequence of effectively *reducing* the available time for self-correction in certain circumstances than was available under the pre-existing EPCRS. Section 305 was intended to expand the availability of self-correction methods. As such we request that the IRS clarify that, pending an update to Rev. Proc. 2021-30, in no event shall Notice 2023-43 be read to be more restrictive than Rev. Proc. 2021-30, including but not limited to the applicable time period to self-correct a failure. Moreover, when IRS and Treasury update EPCRS to expand access to IRA custodians, we request that the guidance confirm that any self-correction timeframe applicable to IRA custodians is not less restrictive than that applicable to plan sponsors to correct analogous failures.

II. Common IRA Failures for Which EPCRS Should Be Made Available to IRA Custodians

ICI strongly supports the expansion of EPCRS to allow IRA custodians to correct inadvertent failures in IRAs. We appreciate the Notice’s request for input on common IRA failures and suggested correction methods for the failures. As you know, section 305(c) specifically mentions

³ IRS Rev. Proc. 2021-30, § 9.02.

two types of IRA failures to be covered by the expansion (noting that the list was not intended to be exhaustive)—(1) waivers of the excise taxes otherwise due under Code section 4974 in connection with distributions of less than the required minimum distribution (RMD) for such year and (2) ineligible rollovers by non-spouse beneficiaries.⁴ Following are examples of common IRA failures where we believe it would be appropriate to permit custodians to initiate self-correction (or, at their option, utilize VCP) pursuant to EPCRS.

Failure to satisfy the 60-day rollover requirement

Code section 408(d)(3)(I) provides that the Secretary of Treasury may waive the requirement that an indirect rollover to an IRA be completed not later than the 60th day after the day an individual receives a payment or distribution. IRS Revenue Procedures 2020-46 and 2016-47 provide a process for a taxpayer to self-certify eligibility for a waiver of the 60-day rollover requirement. There are situations where a failure to satisfy the 60-day requirement is due to service provider error, and entirely out of the IRA owner's reasonable control. For example, due to an administrative error an IRA custodian may fail to timely deposit an indirect rollover check into a new IRA. We view this type of situation as ripe for self-correction under EPCRS by an IRA custodian (without the need for the taxpayer to self-certify), and recommend Treasury and IRS amend EPCRS to specifically permit such self-correction.⁵

Required minimum distribution failures

Errors in satisfying the RMD rules are one of the most common types of IRA failures. Our members support the expansion of EPCRS to permit self-correction by IRA custodians of RMD failures, with a waiver of any applicable excise taxes, as directed in section 305(c)(1) of the Act. While section 302 of the Act provides for a reduced penalty for RMD failures upon timely correction by the taxpayer, it is entirely appropriate to provide for penalty-free correction where the RMD failure is due to custodian error. For example, an administrative error on the part of a custodian could result in an intended distribution not being made or the distribution of an amount insufficient to satisfy the individual's required distribution amount. We believe that these scenarios exemplify the type of error for which self-correction by IRA custodians is intended, as it permits correction without requiring the IRA owner to take action to correct a failure they were not involved with.

Inadvertent or unauthorized distributions from IRAs.

Our members have indicated that another category of common IRA failures is inadvertent or unauthorized distributions that are due to a service provider error. For example, the service

⁴ Section 305(c)(2) calls for “rules permitting a nonspouse beneficiary to return distributions to an inherited [IRA] . . . where, due to an inadvertent error by a service provider, the beneficiary had reason to believe that the distribution could be rolled over without inclusion in income of any part of the distributed amount.”

⁵ While we recognize that there currently is a process under Rev. Proc. 2016-47 and Rev. Proc. 2020-46 for an IRA owner to self-certify eligibility for a waiver of the 60-day rollover requirement due to, among other things, “an error was committed by the financial institution receiving the contribution or making the distribution to which the contribution relates,” this process requires affirmative action by an IRA owner to correct an inadvertent error that was outside of their reasonable control. Self-correction by the IRA custodian would provide a more efficient and cost-effective correction process.

provider may process a distribution in an amount higher than was requested due to a processing error. In a similar vein, an IRA provider may inadvertently pay a RMD more than once. Alternatively, a service provider may process a distribution which the IRA owner did not request, for example by inadvertently debiting the wrong account or due to fraud. In each example, the error is not the fault of the IRA owner. As such, we suggest that these errors be self-correctable by the IRA custodian with no adverse impact to the IRA owner. This option for a custodian to return incorrect or unauthorized distributions should extend to inherited IRAs.

Setup of, or transfer to, wrong IRA account type

Our members have indicated that another common IRA service provider error is setting up the wrong account type—*e.g.*, a traditional IRA vs. a Roth IRA, or an inherited IRA vs. an IRA in the name of the taxpayer. While current law permits recharacterization by an IRA owner under certain circumstances, in this instance the mischaracterization is not due to a change of heart by the IRA owner but rather a situation outside of their control. As such, the existing rules for recharacterizing IRAs—which provide for allocation of income or loss across the recharacterized assets and any assets remaining in the first IRA—would not restore IRA owners to the situation they would have been in but for the service provider’s error. Where such an inadvertent error occurs due to no fault by the IRA owner, we request that the IRA custodian be able to self-correct this administrative failure by recharacterizing the contribution as originally directed by the IRA owner—including any income or losses attributable to that contribution.

Similarly, our members experience errors where an annual or rollover contribution is applied to the wrong IRA type (traditional vs. Roth). Here again the error is not due to an IRA owner failure or mistake. To address such an error, we recommend that the IRA custodian be able to self-correct the failure without the need for action by the otherwise uninvolved IRA owner.

Our members also see IRA errors where a service provider fails to properly process a Roth conversion. For example, a requested Roth IRA conversion may be inadvertently transferred to another traditional IRA or may not be processed at all. One potential correction method would be for the IRA custodian to correct the conversion error in the net amount without any income tax withholding, and then issue tax reporting for the year the conversion was requested by the IRA owner. As with the above failures, the IRA custodian could self-correct the error with no need for action by the IRA owner.

Failure to comply with the one-per-year limit on IRA rollovers

In a letter to IRS and Treasury recommending projects for inclusion in the 2023-2024 Priority Guidance Plan, we requested guidance permitting waivers of inadvertent violations of the one-per-year limit on IRA rollovers in circumstances where the inadvertent violations are beyond the control of the IRA owner.⁶ As we detailed in that letter, there are numerous circumstances under which there could be inadvertent violations. For example, an IRA could receive dividends post-distribution. If an IRA owner initiates a rollover after a dividend record date for an IRA investment but before the dividend payment date, the dividend payment likely would be issued to

⁶ Letter to Treasury and IRS from Elena Barone Chism and David Cohen, dated June 9, 2023, available at <https://www.ici.org/system/files/2023-06/23-cl-ici-priority-guidance-retirement.pdf>.

the IRA owner after the rollover is completed. If the IRA owner then sought to roll this dividend payment associated with the rolled over assets into the new IRA, they could violate this one-per-year limitation.

There are additional scenarios under which an IRA owner may receive a distribution due to circumstances beyond their reasonable control. If an investment product undergoes a structural change (such as a reorganization, merger, or closure), as a result of the structural change the IRA's investment in the investment product may be liquidated and payment issued directly to the IRA owner. When the IRA owner receives a payment during a 12-month period in which he or she has previously made an indirect rollover, this could preclude making another indirect rollover with the funds received as a result of the investment product's structural change. In yet a further example, a distribution to the IRA owner may be reported under the circumstances described in Revenue Ruling 2018-17,⁷ where assets in a traditional IRA are paid to a state unclaimed property fund. If the IRA owner later recovers these assets, the one-rollover-per-year limitation could prevent the individual from returning the funds to an IRA.

As a general matter, in light of the nature of the aforementioned failures, we believe it appropriate to provide a waiver process similar to the waiver process contained in Code section 408(d)(3)(I) for violations of the 60-day rule for indirect rollovers. All of the above failures are the result of "events beyond the reasonable control of the individual subject to such requirement," and therefore fall squarely within the criteria for waiver set forth therein.

More specific to the availability of EPCRS to IRA custodians, in some circumstances the IRA custodian could be an appropriate party to undertake the correction (*i.e.*, obtaining a waiver). For example, a technical violation of the one-rollover-per-year rule could occur when a custodian mistakenly codes a distribution and transfer of assets as a rollover instead of as a trustee transfer (which does not count against the one-rollover-per-year limitation). The custodian in this instance is at fault, and it would be appropriate for the custodian to initiate a correction of the error.

III. Optional Use of VCP for IRA Errors

Section 305(a) of the Act specifically references self-correction of eligible inadvertent failures for types of plans other than IRAs, stating in relevant part that "... any eligible inadvertent failure to comply with the rules applicable under section 401(a), 403(a), 403(b), 408(p), or 408(k) of such Code *may be self corrected* under the Employee Plans Compliance Resolution System (as described in Revenue Procedure 2021-30, or any successor guidance..." (emphasis added). Section 305(c) (the provision expanding EPCRS to IRAs), however, merely references IRA custodian correction of eligible inadvertent failures without limiting such correction to self-correction, stating: "[t]he Secretary shall expand the EPCRS to allow custodians of individual retirement plans (as defined in section 7701(a)(37) of the Internal Revenue Code of 1986) *to address eligible inadvertent failures* with respect to an individual retirement plan..." (emphasis

⁷ Revenue Ruling 2018-17 provides that, under the facts and circumstances described, an IRA trustee who pays amounts from a traditional IRA to a state unclaimed property fund must report the payment on Form 1099-R and withhold federal income tax (unless the taxpayer made a withholding election).

added). As such, section 305 by its terms does *not* limit correction of eligible inadvertent failures for IRAs to self-correction.

In light of the absence of a limitation in section 305 to use of self-correction for IRA errors, we urge the IRS and Treasury to confirm when updating EPCRS that in addition to self-correction, IRA custodians can opt instead to utilize the voluntary correction program (VCP). Using VCP would be of significant benefit to IRA custodians and IRA owners. One, VCP would enable the IRA owner to avoid any otherwise applicable excise taxes when the error is made by the custodian. Two, for failures where the appropriate correction method is not clear, a party may prefer to utilize VCP. Three, VCP may offer additional correction methods not available under self-correction. Moreover, in our view this extension of VCP to IRAs would further the intent of section 305⁸ to place IRAs on similar footing to other types of retirement plans with respect to the availability of EPCRS to correct plan failures.

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If we can provide you with any additional information regarding these requests, please do not hesitate to contact Elena Chism at 202/326-5821 (elena.chism@ici.org) or David Cohen at 202/326-5361 (david.cohen@ici.org).

Sincerely,

/s/ Elena Barone Chism

/s/ David A. Cohen

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cc: Carol Weiser, Benefits Tax Counsel, U.S. Department of the Treasury
Rachel Levy, Associate Chief Counsel, Internal Revenue Service
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⁸ The Senate Finance Committee's section by section summary of the SECURE 2.0 Act describes section 305 as follows. "Section 305 expands the Employee Plans Compliance Resolution System ("EPCRS") to (1) allow more types of errors to be corrected internally through self-correction, (2) **apply to inadvertent IRA errors**, and (3) exempt certain failures to make required minimum distributions from the otherwise applicable excise tax." Section by Section Summary of the SECURE 2.0 Act, Senate Finance Committee, available at <https://www.finance.senate.gov/imo/media/doc/Secure%202.0%20Section%20by%20Section%20Summary%2012-19-22%20FINAL.pdf> (emphasis added).