The SPARK Institute, Inc.
SHAPING AMERICA'S RETIREMENT

Submitted via electronic mail

February 19, 2018

Sunita B. Lough, Commissioner
Tax Exempt and Government Entities
Internal Revenue Service
1111 Constitution Ave., NW
Washington, D.C. 20224

Re: Request for Reinstatement of Alternative User Fees under the Voluntary Correction Program for Nonamender Failures, RMD Failures, or Corrected Plan Loan Failures, and Expansion of Self-Correction Program

Dear Commissioner Lough:

The SPARK Institute, Inc. is writing to request that the Internal Revenue Service ("Service") reconsider its recent decision to eliminate most alternative or reduced Voluntary Correction Program ("VCP") user fees. It is our understanding that such action was taken in connection with the Service's efforts to simplify the VCP user fee schedule. However, we are concerned that the elimination of the alternative fees for VCP submissions involving failures to timely adopt amendments ("nonamender failures"), to satisfy the required minimum distribution ("RMD") rules, or to correct plan loan failures could deter plan sponsors from submitting such issues for correction, resulting in more frequent adverse tax consequences for affected participants. We therefore ask that the Service reinstate the alternative VCP user fees for submissions regarding nonamender failures, RMD failures, and the correction of plan loan failures, and allow such issues to be fully resolved through the Self Correction Program ("SCP").

The SPARK Institute represents the interests of a broad-based cross section of retirement plan service providers and investment managers, including banks, mutual fund companies, insurance companies, third-party administrators, trade clearing firms, and benefits consultants. Collectively, our members serve approximately 85 million employer-sponsored plan participants.

Background on Simplification of VCP User Fees

1. Fees in Effect Prior to January 2, 2018

Under Revenue Procedure ("Rev. Proc.") 2017-4 (effective January 3, 2017), regular VCP submissions for qualified plans and section 403(b) plans were subject to a user fee based on the total number of plan participants. There were six levels of fees that ranged from $500 (20 or fewer participants) to $15,000 (over 10,000 participants). In addition, Rev. Proc. 2017-4 specified alternative (and generally reduced) fees for VCP submissions that only described one of the following errors:

1) failure to satisfy the RMD rules of Code section 401(a)(9), where such failure would result in the imposition of the excise tax under Code section 4974;
2) certain plan loan failures corrected in accordance with section 6.07 of Rev. Proc. 2016-51 (the Employee Plans Compliance Resolution System or "EPCRS"); or
3) certain nonamender failures.

Those alternative fees started at $300 for VCP submissions involving plan loan failures with respect to 13 or fewer participants, and $500 for VCP submissions involving RMD failures affecting fewer than 150 participants. Nonamender fees ranged from $375 to 50% of the otherwise applicable fee, depending on the particular failure. Finally, Rev. Proc. 2017-4 provided alternative fees for submissions concerning SEPs, SARSEPS, or SIMPLE IRA plans; group submissions; and certain submissions related to a request for a minor modification of a previously issued compliance statement.

2. Fees in Effect Beginning January 2, 2018

Effective January 2, 2018, the Service provided for a simplified VCP user fee structure in Rev. Proc. 2018-4 by introducing a three-tiered fee structure for regular submissions based on net plan assets. The new fees are $1,500 (net plan assets of $500,000 or less), $3,000 (net plan assets over $500,000 but under $10,000,001), and $3,500 (net plan assets over $10,000,000). Although the highest fee for regular submissions was substantially reduced from $15,000 to $3,500, the new VCP fee structure could result in either an increased or decreased fee depending on a particular plan's number of participants and net assets.

In connection with this simplified VCP user fee schedule, the Service indicated online that "[m]ost alternative or reduced fees that were part of previous revenue procedures [e.g., Rev. Proc. 2017-4] no longer apply."[1] Section 2.03 of Rev. Proc. 2018-4 further clarifies that, with the exception of group submissions and the special fee waiver for orphan plans (which is provided for separately in EPCRS), "[a]ll other reduced or alternative fees previously set forth in Appendix A, .09, no longer apply." As a result, it is our understanding that the alternative fees that had been available for VCP submissions involving nonamender failures, RMD failures, and the correction of plan loan failures are no longer available effective January 2, 2018.

Request to Reinstate Certain Alternative User Fees for VCP Submissions

As indicated above, the SPARK Institute respectfully requests that the Service reinstate, at a minimum, the alternative VCP user fees that applied under Rev. Proc. 2017-4 to submissions

[1] *See* https://www.irs.gov/retirement-plans/voluntary-correction-program-user-fees-changes (last visited February 5, 2018).

describing nonamender failures, RMD failures, or the correction of plan loan failures. Although we appreciate that, in many cases, the user fee for regular submissions has been substantially reduced, we are concerned that the elimination of those alternative fees will have a particularly significant and negative effect on affected plan participants.

The alternative fees that were previously available for VCP submissions involving nonamender failures, RMD failures, and corrected plan loan failures provided an effective incentive for plan sponsors to submit such failures through VCP. This is especially important for those errors, such as a participant's default on a loan repayment, where the primary (if not sole) beneficiary of the VCP process is the participant himself or herself. Our members are concerned that plan sponsors will be less willing to utilize VCP to assist participants in such cases if faced with a user fee of $3,000 or $3,500 instead of, for example, the $300 fee that previously applied if a handful of participants defaulted on their loan repayments.

Although all plan qualification failures could ultimately affect participants if not corrected, RMD and plan loan failures are some of the most common plan-related failures that occur. Moreover, they are failures that almost always present a direct and potentially substantial cost to plan participants, whether that be in the form of the excise tax under Code section 4974 for RMD failures or being taxed on a deemed distribution in connection with a plan loan failure. Regardless of whether such a failure occurred as a result of action (or inaction) by the plan or the participant, we believe that it would be in the best interest of plan participants for the Service to continue to provide for alternative VCP user fees to encourage plan sponsors to assist participants in resolving RMD and plan loan failures to the extent possible.

We understand from discussions with Service officials that part of the justification for the changes to the VCP fee structure was to comply with Code section 7528, which provides that the Service's user fees shall be determined "after taking into account the average time for (and difficulty of) complying with requests in each category (and subcategory)." We can appreciate why the overall structure was modified, but we submit that RMD, plan loan, and nonamender failures are, in fact, less "difficult" to review because they fit into predefined failures for which the correction is well established. Therefore, we strongly believe that Code section 7528 does not preclude the Service from reinstating a lower fee structure for these failures.

Allow RMD Failures and Corrected Plan Loan Failures to be More Fully Corrected Using the Self Correction Program

We also renew a longstanding request of the retirement plan community: the Service should expand SCP so that RMD and loan failures may be more fully addressed through SCP. Any such expanded relief available under SCP should include the relief that is available to plans and participants under VCP. We believe this change should be done whether or not the Service reinstates the special VCP user fees, but it certainly should be done if the Service does not reinstate those fees.

For example, plan loan failures cannot be corrected using SCP unless the plan treats (and reports) the loan as a taxable distribution in the year of failure, a very unfavorable result where a failure to satisfy the requirements of Code section 72(p) was inadvertent. In addition, although RMD failures may be addressed using either SCP or VCP, if the RMD failure is corrected under SCP, any affected participant must individually request a waiver of the excise tax under Code section 4974 using Form 5329. This is not an ideal solution, and could lead to inconsistent results if the Service grants some waiver requests and not others.

As noted above, RMD and plan loan failures are some of the more common plan-related errors that occur, and their resolution has become a rather standard process. We therefore believe that both types of failures would be very suitable candidates for full resolution and correction through SCP. Plan sponsors and service providers have sought self-correction of loans and RMD failures for many years, and there have been Congressional proposals to require the same.[2]

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The SPARK Institute appreciates the opportunity to provide these comments on the recent changes to VCP user fees to the Service. If the Service has any questions or would like more information regarding this letter, please contact me or the SPARK Institute's outside counsel, Michael Hadley, Davis & Harman LLP (mlhadley@davis-harman.com or 202-347-2230).

Sincerely,

Tim Rouse
Executive Director

cc: Robert Neis, Treasury
Kyle Brown, IRS

[2] *See* Retirement Plan Simplification and Enhancement Act of 2017 § 302 (H.R. 4524), introduced by Congressman Richard Neal, Ranking Member of the House Ways and Means Committee.