

BENEFITS & COMPENSATION UPDATE

DEPARTMENT OF LABOR UPDATES VOLUNTARY FIDUCIARY CORRECTION PROGRAM TO ADD A NEW SELF-CORRECTION OPTION

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The Department of Labor (“DOL”) has updated its Voluntary Fiduciary Correction Program (“VFCP”) to include a new Self-Correction Component (“SCC”). This allows plan sponsors and other plan fiduciaries to forgo a full VFCP application and self-correct certain prohibited transactions, including delinquent contributions and loan repayments and certain other participant loan failures, under limited circumstances, by submitting a notice and certain specified information to the DOL’s Employee Benefits Security Administration (“EBSA”). The DOL also amended the related Prohibited Transaction Exemption (PTE 2002-51) to expand the excise tax relief applicable to prohibited transactions corrected under the SCC. Both the SCC program and related expanded excise tax relief became effective on March 17, 2025.

Background

The VFCP is a voluntary compliance program that allows employers and plan sponsors to proactively correct certain retirement plan transactions which violate the Employee Retirement Income Security Act of 1974 (“ERISA”). While there are nineteen categories of transactions which may be corrected through the VFCP, the program is most frequently used by employers to correct delinquent participant contributions and loan repayments transmitted by the employers to retirement plans that they sponsor. A successfully submitted VFCP application, documenting appropriate corrections to prohibited transactions covered under the VFCP, will result in a

No-Action letter being issued by EBSA and avoid potential penalties for the plan. Importantly, a VFCP application cannot be submitted once the plan or applicant is under investigation by the DOL or under criminal investigation by any governmental agency.

A VFCP application must generally contain details on the fiduciary violations that occurred and the corrective actions taken, supporting documentation (including documentation determining the lost earnings and proof of payment of required amounts, if applicable), a signed checklist, and penalty of perjury statements signed by the plan fiduciary with knowledge of the violations and all applicants. An incomplete VFCP application may be rejected, and EBSA may request further information or seek enforcement action against the applicant as a result.

PTE 2002-51 provides that, with respect to certain prohibited transactions, VFCP applicants who have received a No-Action letter may also receive a waiver of excise taxes on the prohibited transactions, subject to certain requirements such as a notice to interested parties and the contribution of the otherwise applicable excise tax amounts to the plan (instead of the IRS). Prior to the 2025 amendments, the PTE 2002-51 exemption could only be used once in a three-year-period for similar prohibited transactions.

SELF-CORRECTION IS NOW AVAILABLE UNDER VFCP

VFCP now allows plan sponsors to use the SCC instead of a full VFCP application to correct two types of prohibited transactions: (1) delinquent participant contributions and participant loan repayments to retirement plans, and (2) inadvertent participant loan failures.

DELINQUENT PARTICIPANT CONTRIBUTIONS AND LOAN REPAYMENTS

In order for employers to use the SCC to correct delinquent payments made by them to retirement plans, the following conditions must be satisfied:

- A. The amount of lost earnings (determined starting from the date of withholding by the employer of the participant contributions and participant loan repayments from the participants' paychecks) must not exceed \$1,000. **Note:** The \$1,000 lost earnings limitation applies separately to each payroll period. As with a full VFCP application, plan sponsors must use the DOL's online calculator to calculate lost earnings.
- B. The delinquent participant contributions or loan repayments must have been remitted to the plan within 180 calendar days after the date of withholding by the employer from the participants' paychecks.
- C. The plan sponsor must retain records related to the delinquent payments. The records required to be retained are substantially similar to the records required to be submitted to the DOL as part of a full VFCP submission.
- D. The plan sponsor must send a notice of the correction to EBSA through a new online tool provided on EBSA's website. The notice must include information regarding the plan, the plan sponsor, the prohibited transactions at issue, and the number of participants affected by such transactions. EBSA will send the submitting plan sponsor an automatic email acknowledgment, without requiring further approval.
- E. The plan sponsor must complete and retain a retention record checklist and penalty of perjury statement certifying that it is not under investigation and that all supporting documentation is correct and complete.
- F. The plan sponsor must pay any penalties or late fees applicable to the delinquent payments (including the amount of lost earnings calculated using the DOL's online calculator) and must not be under investigation by the DOL (or under criminal investigation by any governmental agency). Additionally, the SCC does not relieve plans from reporting delinquent participant contributions on the plan's Form 5500.

INADVERTENT PARTICIPANT LOAN FAILURES

The updated VFCP provides for the use of the SCC to self-correct inadvertent participant loan failures and adds to the list of inadvertent participant loan failures that may be corrected under a full VFCP submission or an SCC submission the failure to obtain spousal consent for a loan when required and transactions where participants are granted loans in excess of the permitted number of loans under a plan's terms (the failure to comply with plan terms that include Internal Revenue Code requirements regarding the amount, duration, or amortization of a loan and the failure to withhold from a participant's wages that results in a loan default were already correctable under the VFCP prior to the introduction of the SCC as an additional method of correction).

Plan sponsors using a full VFCP submission or an SCC submission for inadvertent participant loan failures must first correct the inadvertent participant loan failures through the Internal Revenue Service's Employee Plans Compliance Resolution System ("EPCRS"); successful completion of the EPCRS process will be considered a valid correction under the SCC. Plan sponsors who complete the EPCRS process but do not complete a full VFCP submission or an SCC submission will not be eligible for the excise tax exemption under PTE 2002-51. As is the case with the self-correction of delinquent participant contributions and loan repayments, applicable records relating to the correction and the penalty of perjury statement must be retained by plan sponsors (completing the retention record checklist is not required).

Plan sponsors seeking to use the SCC to correct inadvertent participant loan failures must submit a notice to EBSA substantially similar to the notice described above with respect to delinquent payments to retirement plans. As with delinquent payments, EBSA will send the submitting plan sponsors an automatic email acknowledgment, without requiring further approval.

EXCISE TAX EXEMPTION

Amendments to the associated PTE 2002-51 apply the excise tax exemption provided under the VFCP to the two types of prohibited transactions corrected under the SCC. As such, plans that have received the SCC email acknowledgment from EBSA are eligible for a waiver of excise taxes on the prohibited transactions. The amendments to PTE 2002-51 also remove the once in three-year restriction, thereby allowing the excise tax exemption to be used irrespective of whether it has previously been used during the same three-year-period. Additionally, self-correctors using the SCC will not be required to provide a notice to interested parties regarding the prohibited transactions in order to receive excise tax relief. Instead, they must retain a completed Form 5330 (or other written documentation) to show the otherwise applicable excise tax amount related to the prohibited transactions and proof that this amount was remitted to the plan.

CONSIDERATIONS RELATED TO THE NEW DOL SCC PROGRAM

The new SCC program and the expanded relief from prohibited transaction excise taxes may be helpful for plan sponsors who wish to correct instances of delinquent participant contributions and loan failures without having to submit a formal VFCP application to the DOL. As discussed above, for plan sponsors seeking to correct delinquent payments to retirement plans, the new SCC program can only be used if lost earnings do not exceed \$1,000 per payroll period and the delinquent

payments have been remitted to the plan within 180 days. As such, large plans may not be able to benefit from using the SCC rather than a full VFCP application, as lost earnings amounts may exceed the threshold if a significant number of plan participants are affected. Late remittances may also be more difficult for large plans to timely identify, which may cause them to be ineligible for the SCC due to the 180-day remittance deadline required for participation in the SCC program.

Plan sponsors correcting failures under the SCC will receive an email acknowledgment upon their submission of the SCC notice to the DOL instead of a No-Action letter. Accordingly, plan sponsors who are contemplating the use of an SCC submission may determine that, since the SCC requires that they obtain most of the information required to submit a full VFCP application to the DOL, they should consider using the full VFCP process and obtain a No-Action Letter from the DOL regarding the corrections implemented with respect to delinquent contributions or loan failures. Additionally, the DOL has stated that it will monitor frequent use of the SCC by plan sponsors, and may communicate with frequent users or open investigations when there are indications of systemic plan failures being self-corrected through the SCC.

Plan sponsors must ensure their submission is complete and accurate, regardless of whether they complete an SCC application or a full VFCP application. Incomplete or inaccurate applications could result in requests for further information from EBSA and potential enforcement action against the applicants.

NEXT STEPS

Plan sponsors are now able to avail themselves of SCC under certain circumstances. Plan sponsors are urged to consult with their retirement and tax advisors if they believe there have been fiduciary violations involving plan assets and are seeking to correct such violations through the VFCP or SCC.

This update is not intended to provide legal advice with respect to any particular situation, and no legal or business decision should be based solely on its content.

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