

Publications

DOL Finalizes Update to Voluntary Fiduciary Correction Program

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On January 15, 2025, the Department of Labor (“DOL”) issued notice amending its Voluntary Fiduciary Correction Program (“VFCP”), along with related final amendments to Prohibited Transaction Exemption 2002-51 (“PTE 2002-51”), which provides exemptive relief for certain transactions identified in VFCP. Most notably, the final amendments allow plan fiduciaries to self-correct late-deposited participant contributions or loan repayments, as well as certain other participant loan errors by filing a notice of correction with DOL, in lieu of filing a full VFCP application. The final amendments take effect on March 17, 2025.

Background on the VFCP

VFCP is a fiduciary correction program designed to help plans, their fiduciaries, and service providers avoid civil enforcement and penalties through proactive corrective steps. VFCP provides an opportunity to obtain no-action relief from DOL as to specified types of transactions that may constitute a fiduciary breach or a prohibited transaction, under the Employee Retirement Income Security Act of 1974, as amended. In addition, for a subset of VFCP-covered transactions, PTE 2002-51 provides an opportunity to obtain retroactive excise tax relief.

Generally, in order to use VFCP, a fiduciary violation or prohibited transaction must fit within a list of violations identified in VFCP, and the applicant or plan at issue may not already be under investigation by DOL or certain other governmental agencies. If VFCP is available, the applicant must make a prescribed correction and apply for relief to the closest DOL regional office. Further, to obtain the excise tax relief provided for under PTE 2002-51, the VFCP applicant must provide a notice of the correction to interested persons, which may consist of participants and beneficiaries of the plan and allow them to submit comments to DOL.

New Self-Correction Procedure

The final amendments to VFCP permit an expedited self-correction component (“SCC”) procedure for certain violations:

- Late transmittal of employee contributions or participant loan repayments to a pension plan, provided that the interest or “lost earnings” amount due to the plan is \$1,000 or less, and the correction occurs within 180 days of when the amounts were withheld from the employee’s paycheck or, if applicable, when a loan payment is received by an employer. Due to the relatively small lost earnings amount, this self-correction option favors smaller errors and quicker corrections.
- Participant loan errors consisting of an “eligible inadvertent” mistake, meaning it must have occurred despite the presence of appropriate policies and procedures, cannot be an “egregious” failure, and cannot relate to either the misuse of plan assets or “abusive tax avoidance.” In the preamble to the final amendments, DOL identified participant loans that did not comply with plan provisions that track requirements of section 72(p) of the Internal Revenue Code concerning amount, duration, or level amortization, failure to obtain spousal consent, failure to withhold loan repayments from the participant’s wages, and when the loan exceeds the number of loans permitted under the plan’s terms as examples of errors that may fall under this category. For these errors, eligibility for and satisfaction of the requirements for self-correction (“SCP”) under the IRS [Employee Plans Compliance Resolution System](#) (“EPCRS”) is deemed correction under VFCP.

The self-correction must be reported to DOL along with information about the plan, plan sponsor, the violation, and number of affected participants, referred to as an “SCC notice.” To obtain prohibited transaction excise relief under PTE 2002-51, a notice to interested persons is not required, but the applicant must complete (but not file) a Form 5330 to calculate the excise tax otherwise payable in connection with the violation, and pay such excise tax amount to the plan. Additionally, a plan fiduciary and each plan official seeking relief must certify under penalty of perjury that it is not under investigation and that all submitted information is accurate and complete. There is an exception to the “not under investigation” requirement for eligible inadvertent loan failures if the plan sponsor is eligible for SCP under EPCRS (i.e., if the failure is “insignificant” or if the plan sponsor is under examination and has demonstrated a specific commitment to implement self-correction). In addition, plan sponsors correcting eligible loan failures are not required to submit a SCC Record Retention Checklist.

Unlike VFCP’s typical procedure, applicants who submit the required information will receive an automatic email response confirming the application without further need for DOL approval. Nonetheless, DOL noted that it will monitor self-correction filings for frequent users and may contact or open investigations into frequent users of the self-correction procedure to identify and correct potential systemic issues. Further, delinquent participant contributions and loan repayments would still need to be reported on an appropriate schedule to the plan’s Form 5500 notwithstanding usage of the self-correction procedure, although the delinquent contributions or loan repayments would not need to be reported as non-exempt prohibited transactions to the extent the excise tax relief provided under PTE 2002-51 is available.

Other Changes to VFCP

In addition to the creation of the self-correction procedures, DOL made certain other changes to VFCP, including:

- The final amendments permit plan service providers to submit “bulk applications” covering at least 10 plans notwithstanding the fact that one or more of the plans is under investigation. The service provider must not itself be under investigation to submit a bulk application. Further, the changes now permit any party in interest (including a service provider) to pay for the costs of correction.
- The final amendments expand the circumstances under which a plan, applicant, or self-corrector will be deemed to be under investigation to include a review of a plan initiated by a participant complaint. However, a plan will not be considered under investigation merely because DOL staff has contacted a plan, applicant, or self-corrector as a result of a participant complaint unless the participant complaint concerns the violation that is being corrected and the plan has not yet received the corrective payment due under VFCP as of the date of DOL staff contact.
- The final amendments provide new possible methods of correction for violations resulting from loans at below-market interest rates to a person who is not a party in interest, loans at below-market interest rate solely due to a delay in perfecting the plan’s security interest, a plan’s purchase of an asset from a party in interest, and for plan’s sales of an asset to a party in interest.
- PTE 2002-51 previously prevented applicants from obtaining excise tax relief for correction of violations through VFCP if the applicant had received excise tax relief for similar violations during the past three years. The final amendments remove this three-year limitation.

- PTE 2002-51 previously permitted the notice to interested persons to be provided through posting, regular mail, email, or a combination of these methods. The final amendments eliminate posting as a potential means of distribution.

Observations

The addition of a self-correction mechanism streamlines the process of obtaining VFCP relief for some of the most common errors that may occur in connection with the administration of a plan. However, the extent to which the self-correction procedure may be used to identify investigation targets is unknown, although DOL states that it generally does not anticipate taking enforcement action in response to a compliant VFC application or eligible self-correction except in unusual situations involving criminal behavior, material misrepresentation or omissions in the application or SCC notice, or other abuse. Moreover, the steps necessary to utilize the self-correction procedure are similar to those involved in a correction outside of VFCP. Some plan sponsors may therefore find there is a lack of sufficient incentive to use the self-correction procedure.