

Publications

DOL Suggests Changes to Its Voluntary Fiduciary Correction Program and Related Exemption

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November 18, 2022, the Department of Labor (“DOL”) released a number of changes to its Voluntary Fiduciary Correction Program (“VFCP”) in both an update of [VFCP](#) and related guidance.

VFCP is a comprehensive 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 the 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 (“ERISA”). In addition, for a sub-set of VFCP-covered transactions, a related Prohibited Transaction Class Exemption (“PTE”) 2002-51 provides a rare opportunity to obtain retroactive excise tax relief.

The release contains a restated version of VFCP (87 Fed. Reg. 71164) and a proposed amendment to PTE 2002-51 with conforming changes (87 Fed. Reg. 70753). These changes represent the first modifications to the Program in over 15 years. DOL is soliciting comments on the changes to the VFCP program despite its position that the amendments to VFCP are a change in enforcement policy that in DOL’s view does not require the DOL undergo the notice and comment process. Interested persons may submit comments on the VFCP revisions and the proposed amendments to PTE 2002-51 by January 20, 2023.

Key Changes to VFCP

The key changes to VFCP are as follows:

- For late transmittal of employee contributions – for which the employer is treated as having used “plan assets” in its interest – the revised VFCP allows the employer to self-correct by notifying the DOL of a correction made using VFCP requirements in lieu of filing a full VFCP application. The DOL explains that filing a notice will allow an employer to obtain no-action relief under VFCP while avoiding the expense of preparing a VFCP application. This self-correction option is available for late contributions only where the “lost earnings” amount due to the plan is \$1,000 or less, thus favoring smaller errors and quicker corrections.
- For transactions involving a plan’s impermissible purchase of an asset from a “party in interest” (as defined in ERISA), the revised VFCP allows a VFCP applicant to take credit for the plan’s earnings from owning the asset purchased from the party in interest. Previously, the correction amount

due to the plan in this situation could not be reduced by the plan's earnings derived from owning the asset, which meant that a correction under VFCP was costly to the applicant and could have resulted in a plan keeping both the earnings and a payment for the full "correction" cost of the prohibited transaction, thus potentially providing a windfall to the plan.

- A plan service provider may obtain relief under revised VFCP for a "bulk" application where one or more affected plans may be under government investigation. This change is an exception from the requirement that service provider not be under investigation by government agencies.
- The circumstances under which a plan will be considered "under investigation" and therefore ineligible to participate in VFCP have been modified to clarify when an applicant under a DOL "review," including a review by an EBSA Benefits Advisor, would be treated as being "under investigation." The applicant will be considered "under investigation" if the applicant has received a written or oral notice of an "investigation, review, or examination."

Key Proposed Changes to PTE 2002-51

The key proposed changes to PTE 2002-51 are as follows:

- PTE 2002-51 would be amended to allow an employer to obtain excise tax relief for self-corrected late contributions meeting certain conditions where the applicant files a notice to the DOL of a correction undertaken using VFCP requirements. Without this amendment the excise tax relief would not be available because a formal no-action letter would not be issued following the applicant's filing of a VFCP application. In addition, the DOL is proposing to revise PTE 2002-51 so that no notice to interested persons would be required in connection with self-corrected late contributions meeting the conditions of VFCP.
- The requirement under PTE 2002-51 that makes excise tax relief unavailable to applicants who have utilized VFCP more than once in the previous three years for a similar transaction would be eliminated.

Observations

Regulatory correction programs are often changed in an incremental process. For example, in the IRS context, its Employee Plans Compliance Resolution System has gone through numerous stages of evolution and become more and more useful for many plans. Although VFCP has not had as many changes over the past 15 years, the DOL's revisiting of VFCP is a positive step forward.

Although plans are already required to disclose late contributions on their Form 5500s, the proposed notice process will provide earlier notice to DOL. From a plan sponsors' perspective, filing a notice under the VFCP should be significantly less onerous than filing a full VFCP application. However, it is not clear if these filings will be used to identify targets (whether based on plan types or specific plans) for DOL investigations. Thus, there is the potential that some plan sponsors with late contribution issues may choose to simply self-correct – using a correction method that is at least as favorable to the plan as the correction method required under VFCP – but forgo seeking no-action relief from the DOL by filing a notice.

The change to the allowed correction method for a plan's purchase of an asset from a party in interest is a very positive and significant change. Specifically, it aligns VFCP with the logic that a plan should not be put in a windfall position by retaining earnings on assets (such as bond coupon payments) and receiving a correction payment that is not reduced by such earnings.

The proposed changes to PTE 2002-51 are a positive improvement and hopefully further enhancements will be made in the future. For example, future enhancements could involve DOL expanding the covered transactions under the exemption to match the transactions covered under VFCP. For example, inadvertent mistakes often occur with respect to plan expenses or fees, and while such transactions may qualify for VFCP no-action relief, only the payment of settlor expenses by the plan qualify for excise tax relief under PTE 2002-51. Additionally, hopefully a future revision of PTE 2002-51 would lift the limit on late contributions that may qualify for excise tax relief to only those contributions that were repaid to the plan within 180 days from the date the amounts were received by the employer or would have been payable to the participant as wages.

We would be pleased to discuss the VFCP revisions and the proposed changes to PTE 2002-51, including issues on which the DOL may benefit from receiving comments.

[DOL-Suggests-Changes-to-Its-Voluntary-Fiduciary-Correction-Program-and-Related-Exemption](#)