

MEMO# 34401

November 23, 2022

DOL Proposes Update to Voluntary Fiduciary Correction Program

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TO: ICI Members

Pension Committee

Pension Operations Advisory Committee SUBJECTS: Pension RE: DOL Proposes Update to Voluntary Fiduciary Correction Program

The Department of Labor (DOL) has released proposed updates to its Voluntary Fiduciary Correction Program (VFCP), which is designed to encourage the voluntary correction of fiduciary violations by allowing plan fiduciaries to avoid civil penalties and excise taxes by voluntarily disclosing and correcting certain violations of ERISA. The package includes proposed updates to the VFCP and proposed amendments to the related prohibited transaction exemption (PTE 2002-51).[\[1\]](#) Comments on both documents will be due on January 20, 2023.

This project has appeared on DOL's regulatory agenda for several years (since 2014), and DOL's stated goal, according to Assistant Secretary Lisa Gomez, is to "make it easier and more cost effective for plan officials to correct violations, and for the department to improve compliance."[\[2\]](#)

Changes to the Program

The proposed restatement of the VFCP would retain the fundamentals of the current VFCP. The amendments would make several improvements to the program, the most significant being the addition of a new self-correction feature.

New self-correction component

The amendments would add a new self-correction feature which could only be used for delinquent participant contributions[\[3\]](#) (the transaction most frequently corrected under the VFCP) and delinquent participant loan repayments to retirement plans. To use the self-correction feature, the proposal would require compliance with the following conditions:

- Lost earnings must not exceed \$1,000 calculated from date of withholding or receipt.
- Participant contributions or loan repayments must be remitted to the plan no more than 180 calendar days from the date of withholding or receipt.
- Self-correctors must use the program's online calculator to calculate the principal

amount and lost earnings and an online web tool to complete and file the self-correction component notice with EBSA.

- Self-correctors must also complete a self-correction retention record checklist, including signing a penalty of perjury statement, and provide it to the plan administrator.
- The plan or self-corrector must not be "Under Investigation" as defined in the program.

Ineligibility due to investigation or criminal violations

A plan is automatically ineligible to participate in the program if it is considered "Under Investigation." The definition of "Under Investigation" is proposed to be modified to provide that an investigation of a plan resulting from an EBSA staff review, which could include a review by an EBSA Benefits Advisor, is considered an investigation by EBSA (provided that written or oral notice of an investigation, review or examination has been received by the plan). However, a plan will not be considered to be "Under Investigation" merely because EBSA staff has contacted the plan in connection with a participant complaint, unless the participant complaint concerns the transaction described in the application and the plan has not received the correction amount due under the program as of the date EBSA staff contacted the plan.

The amendments would add a new limited exception to the definition of "Under Investigation" for bulk applicants (service providers who wish to correct breaches involving multiple plans, some of which are under investigation by EBSA). Under the proposed new exception, a single service provider may submit bulk applications when certain conditions are met. To qualify:

- the application must cover at least ten named plans and each plan must have participated in the transaction being corrected;
- the applicant must be a service provider that is applying for relief only on its own behalf;
- the applicant is currently or was providing services to each of the named plans at the time of the transaction being corrected; and
- the service provider itself cannot be Under Investigation by EBSA and the corrective action cannot have been taken as a result of an EBSA investigation or review of any named plan.

Currently a plan is not eligible to participate in the VFCP if there is evidence of potential criminal violations as determined by EBSA. The amendments would add a new exception to this provision. In a situation where there is a potential criminal violation (such as when a bookkeeper allegedly embezzled money from the plan sponsor), an innocent plan administrator/plan sponsor could use the VFCP, for cases involving delinquent participant contributions and loan repayments, when:

- all funds have been repaid to the plan;
- the appropriate law enforcement agency has been notified of the alleged criminal activity; and
- the applicant submits a statement (covered by the Penalty of Perjury Statement) with the application providing contact information for the law enforcement agency, asserting that the applicant was not involved in the alleged criminal activity, and reporting whether a claim relating to the potential criminal violation has been made under an ERISA section 412 fidelity bond.

Other changes to existing eligible transactions and corrections

Other proposed amendments would clarify existing transactions eligible for correction under the program and expand the scope of certain transactions currently eligible for correction. Below is a brief summary of the changes.

Loans

- For purposes of the eligible transaction "Loan at Below-Market Interest Rate to a Party in Interest with Respect to the Plan" (Section 7.2(b)), the requirement that an independent fiduciary validate in writing the process used to determine the fair market interest rate would be eliminated for loans in the amount of \$10,000 or less. In such cases, a copy of the independent commercial lender's written fair market interest rate determination would suffice to validate the interest rate.
- For purposes of the eligible transaction "Loan at Below-Market Interest Rate to a Person Who is Not a Party in Interest with Respect to the Plan" (Section 7.2(c)), the amendment would add an alternative payment for correction of the transaction. Under the proposed new alternative, the borrower could pay the amortized outstanding loan balance over the remaining payment schedule of the loan at the interest rate that would have been applicable if the loan had originally been made at the fair market interest rate (as an alternative to payment of the present value of the principal amounts from the recovery date to the loan's maturity date, coupled with the borrower's continued payment of the outstanding loan balance under the original repayment schedule for the duration of the loan).
- For purposes of the eligible transaction "Loan at Below-Market Interest Rate Solely Due to a Delay in Perfecting the Plan's Security Interest" (Section 7.2(d)), amendments would reorganize the section to clarify the correction methods. Also, the amendment would add a new correction alternative for situations where the delay in perfecting the loan's security caused a permanent change in the risk characteristics of the loan. The new alternative would permit the borrower to pay the amortized outstanding loan balance over the remaining payment schedule of the loan at the interest rate that would have been applicable for a loan with the changed risk characteristics.
- For purposes of determining fair market value for the loan types discussed above, the amendments would add specific conditions for when a commercial lender will be considered to be independent, using the same criteria used to determine the independence of an appraiser.[\[4\]](#)

Purchases, Sales and Exchanges

- For purposes of the eligible transaction "Purchase of an Asset (Including Real Property) by a Plan from a Party in Interest" (Section 7.4(a)), a new correction method is proposed to be added, for use in situations when the purchase cannot be reversed or the asset retained because the plan no longer owns the asset (e.g., sales, maturity, destruction). Under this new correction, the plan can receive a "cash settlement" that meets certain requirements.
- For purposes of the eligible transaction "Sale of an Asset (Including Real Property) by a Plan to a Party in Interest" (Section 7.4(b)), the amendment would allow one of the existing correction methods to be used if a plan official determines that the asset cannot be repurchased (e.g., maturity, destruction). This would be an alternative to the existing condition requiring an independent fiduciary to determine that the plan will recognize a greater benefit from this correction than the other available correction

method.

Sales/Leasebacks

- For purposes of the eligible transaction "Sale and Leaseback of Real Property to Employer" (Section 7.4(c)), the proposed amendments would explicitly expand the transaction to allow correction of leases to affiliates of the plan sponsor.

Illiquid Assets

- Regarding the eligible transaction, "Holding of an Illiquid Asset Previously Purchased by a Plan" (Section 7.4(f)), the definition of principal amount would be modified to take into account the possibility that the transaction being corrected was neither a prohibited transaction nor a fiduciary breach. The amendments also propose language to clarify that, in the case of an illiquid asset that is a parcel of real estate, no party in interest may own real estate that is contiguous to the plan's parcel of real estate on the recovery date.

Changes to PTE 2002-51

Some of the breaches that may be corrected under the VFCP are also prohibited transactions subject to excise tax under Internal Revenue Code (Code). DOL issued PTE 2002-51 to provide an exemption from the excise tax for eligible transactions corrected pursuant to the VFCP.

The proposed amendments to the PTE generally reflect the changes proposed to the VFCP (including the new self-correction component) and make other changes to simplify administration. The proposed amendments include the following changes:

- Clarify that relief is available for transactions that are corrected under the proposed self-correction component (and that the current requirement that the applicant receives an EBSA no-action letter may, in the case of the self-correction component, be met by the e-mail acknowledgement of a properly completed and submitted self-correction component notice).
- Eliminate the current three-year limitation, under which the exemption is generally unavailable to applicants that have, within the previous three years, taken advantage of the relief provided by the VFCP and the exemption for a similar type of transaction.
- Expand a covered transaction (the sale of real property to a plan by the sponsoring employer and the leaseback of such property to the same employer) to include affiliates of plan sponsors, reflecting a change proposed to the VFCP. The amendments add new definitions of "affiliate" and "control."
- Delete the current section of the PTE that requires that "the transaction was not part of an agreement, arrangement or understanding designed to benefit a disqualified person."
- Modify the provisions regarding the required notice to interested persons, including that delivery of the notice by posting alone will no longer suffice, and providing in an appendix to the PTE a model notice to interested persons, for optional use, to facilitate compliance. The amendments also provide that the self-correction component would not require notice to interested persons. However, the self-corrector must:
 - pay to the plan the amount of the excise tax that otherwise would be imposed by the Code and allocate such amount to the individual accounts of participants and beneficiaries in the same manner as provided under the plan with respect to plan earnings;

- retain a copy of a completed IRS Form 5330 or written documentation regarding the determination of the otherwise applicable excise tax and proof of payment of the amounts paid to the plan pursuant to the VFCP and this exemption; and
- provide to the plan administrator a copy of such documentation.^[5]
- Make other ministerial changes to improve readability.

Next Steps

DOL is accepting comments until January 20, 2022 on the proposed updates to both the VFCP and the PTE. Please let us know if you have questions or comments regarding the proposal, or if you would like ICI to submit comments to DOL.

Shannon Salinas
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Notes

^[1] The proposed updates to the VFCP were published at 87 Fed. Reg. 71164 (November 21, 2022), available at

<https://www.govinfo.gov/content/pkg/FR-2022-11-21/pdf/2022-24703.pdf>. The proposed amendments to the PTE were published at 87 Fed. Reg. 70753 (November 21, 2022), available at <https://www.govinfo.gov/content/pkg/FR-2022-11-21/pdf/2022-24702.pdf>. DOL also announced the proposal in a press release, available at <https://www.dol.gov/newsroom/releases/ebsa/ebsa20221118>. DOL last updated the VFCP in 2006. See ICI Memorandum No. 20012, dated May 5, 2006, available at <https://www.ici.org/system/files/attachments/pdf/memo20012.pdf>.

^[2] See DOL press release at <https://www.dol.gov/newsroom/releases/ebsa/ebsa20221118>.

^[3] Note that the VFCP does not include a correction for delinquent matching employer contributions. DOL notes that, while EBSA may not reject or refuse to process an application to correct delinquent matching contributions, such applicants are not entitled to any relief and will not be covered by a no action letter. 87 Fed. Reg. at 71167.

^[4] Section 5(a)(5) provides that "a commercial lender is 'independent' if it is not one of the following, does not own or control any of the following, and is not owned or controlled by, or affiliated with any of the following: (i) a person or entity who was involved in securing or maintaining the loan, or in determining or modifying the terms of the loan at any time during the life of the loan; (ii) a fiduciary of the plan (except to the extent the commercial lender becomes a fiduciary when retained to provide this service for the plan); (iii) a party in interest with respect to the plan (except to the extent the commercial lender becomes a party in interest when retained to provide this service for the plan); or (iv) the VFC Program applicant."

^[5] Under an existing exception to the notice requirement, the notice to interested parties is not required for delinquent participant contributions and/or loan repayments if the amount of the excise tax that would otherwise be paid under the Code is less than or equal to \$100. Similar requirements (paying an amount equal to the excise tax and providing written documentation regarding the determination of the amount) apply to this exemption.

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