

MEMO# 34958

February 16, 2023

DOL Reopens Comment Period for Update to Voluntary Fiduciary Correction Program for Comments Related to SECURE 2.0

[34958]

February 15, 2023

TO: ICI Members

Pension Committee

Pension Operations Advisory Committee SUBJECTS: Pension RE: DOL Reopens Comment Period for Update to Voluntary Fiduciary Correction Program for Comments Related to SECURE 2.0

The Department of Labor (DOL) has reopened the comment period[\[1\]](#) for the proposed updates to its Voluntary Fiduciary Correction Program (VFCP),[\[2\]](#) 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 comment period will be open for an additional 60 days, until April 17, 2023, to allow commenters to address issues raised by section 305 of the SECURE 2.0 Act (expansion of EPCRS).

Section 305 of SECURE 2.0 Act

The SECURE 2.0 Act was signed into law on December 29, 2022, as part of the Consolidated Appropriations Act, 2023 (H.R. 2617).[\[3\]](#) Section 305 of the Act expands the IRS Employee Plans Compliance Resolution System (EPCRS) to allow plans to self-correct inadvertent plan violations,[\[4\]](#) except where the error is identified by IRS prior to the plan initiating self-correction or the self-correction is not completed within a reasonable period after such failure is identified. In the case of self-correction of inadvertent plan loan errors, the Act provides that DOL should treat the correction as meeting the requirements of its VFCP; however, DOL may impose reporting or procedural requirements.[\[5\]](#)

Comments Requested

DOL requests comments on what revisions, if any, should be made to the VFCP, and what aspects of section 305 DOL should take into account as it makes further revisions to the VFCP. In addition, DOL asks the following specific questions.

- How should the VFCEP be modified to implement the new deeming provision in section 305(b)(2) ("the Secretary of Labor shall treat any such failure which is so self-corrected under subsection (a) as meeting the requirements of the Voluntary Fiduciary Correction Program of the Department of Labor if")? For example, should Section 7.3 (Description of Eligible Transactions and Corrections Under the VFCEP—Participant Loans) be amended to include a specific paragraph treating items self-corrected under EPCRS as meeting the requirements of the VFCEP?
- Should the VFCEP impose additional reporting or other procedural requirements for these specific corrections, and why?
- Are changes needed to PTE 2002-51 to implement section 305(b)(2)?

Shannon Salinas
Associate General Counsel - Retirement Policy

Notes

[1] The announcement of the new comment period was published at 88 Fed. Reg. 9408 (February 14, 2023), available at <https://www.govinfo.gov/content/pkg/FR-2023-02-14/pdf/2023-02545.pdf>.

[2] The package includes proposed updates to the VFCEP and proposed amendments to the related prohibited transaction exemption (PTE 2002-51). For a summary of the proposal, see ICI Memorandum No. 34401, dated November 23, 2022, available at <https://www.ici.org/memo34401>. The comment period closed on January 20, 2023.

[3] For a summary of the SECURE 2.0 Act, see ICI Memorandum No. 34795, dated January 12, 2023, available at <https://www.ici.org/memo34795>.

[4] Section 305(e) defines the term "eligible inadvertent failure" as a failure that occurs despite the existence of practices and procedures that satisfy EPCRS standards and is not egregious, related to the diversion or misuse of plan assets, or related (directly or indirectly) to an abusive tax avoidance transaction.

[5] Note that in the preamble to the November 2022 proposed updates, DOL requested comments regarding how the VFCEP could be integrated with corrections under EPCRS and noted that the VFCEP does not have a corollary self-correction component for participant loan transactions. Instead, it requires that applicants correct participant loan transactions under the normal EPCRS procedures to be eligible for VFCEP correction under Title I of ERISA. See 87 Fed. Reg. 71164, at page 71170 (November 21, 2022).