

**MEMO# 36007**

February 5, 2025

# **DOL Updates and Expands Voluntary Fiduciary Correction Program and Associated PTE 2002-15**

[36007]February 05, 2025TO:ICI Members

Pension Committee

Pension Operations Advisory CommitteeSUBJECTS:Pension

TaxRE:DOL Updates and Expands Voluntary Fiduciary Correction Program and Associated PTE 2002-15

The US Department of Labor (DOL) on January 14, 2025, published an update to the Voluntary Fiduciary Correction Program (VFCP or "Amendment")[\[1\]](#) and a conforming final amended PTE 2002-51,[\[2\]](#) the related prohibited transaction class exemption. The Amendment and final PTE 2002-51 follow proposed updates that DOL released in November 2022.[\[3\]](#)

## **Overview**

Broadly speaking, the Amendment:

- Adds a self-correction feature for the delinquent transmittal of participant contributions and loan repayments to a pension plan under certain circumstances;
- Adds a self-correction feature for certain participant loan failures self-corrected under the IRS' Employee Plans Compliance Resolution System (EPCRS),[\[4\]](#) as required by the SECURE 2.0 Act section 305(b)(2) and (3);[\[5\]](#)
- Clarifies some existing transactions eligible for correction under VFCP;
- Expands the scope of other transactions currently eligible for correction; and
- Simplifies certain administrative or procedural requirements under VFCP.

VFCP will continue to be administered by DOL Employee Benefits Security Administration (EBSA) regional offices. Additionally, eligible applicants who satisfy the conditions of VFCP will continue to receive a "no-action" letter from DOL and will not be subject to civil penalties for corrected transactions.

## **Background**

Originally adopted in 2000 as an interim program,[\[6\]](#) VFCP is designed to encourage employers and plan officials to voluntarily correct violations of ERISA. As DOL notes, in providing a ready means for plans and plan fiduciaries to correct violations of ERISA without the transaction costs and burdens associated with DOL enforcement actions, VFCP helps employers and plan officials better understand and meet their legal responsibilities and

strengthens the security of workers' promised retirement and health benefits.<sup>[7]</sup> The Amendment also reflects the requirements of the SECURE 2.0 Act section 305(b)(2) and (3), which provide that inadvertent plan loan errors corrected pursuant to EPCRS be treated as meeting the requirements of VFCP with respect to the correction of any violations of the fiduciary standards of ERISA.

## **Amendments to VFCP**

The Amendment largely reflects the 2022 proposed amendment to VFCP.<sup>[8]</sup> The most significant change the Amendment makes to VFCP is the addition of two new self-correction options, referred to in VFCP as self-correction components (each a SCC). While self-correctors do not receive a no-action letter from DOL, provided they comply with VFCP's terms and conditions they may still avoid imposition of civil monetary penalties or an EBSA civil enforcement action.<sup>[9]</sup>

## **New self-correction for delinquent participant contributions and loan repayments**

The Amendment adds a new SCC for failures to timely transmit participant contributions and participant loan repayments to pension plans (referred to in the Amendment collectively as "delinquent participant contributions") in specified circumstances. VFCP previously required that a party file an application to use VFCP to correct delinquent participant contributions. DOL received comments indicating that the time and expense involved in filing for VFCP were a disincentive to utilizing VFCP, especially for small dollar amounts.<sup>[10]</sup>

In summary, this SCC requires that:

- Lost earnings not exceed \$1,000, calculated from the date of withholding or receipt;
- Participant contributions or loan repayments must be remitted to the plan no later than 180 calendar days from the date of withholding or receipt;
- Self-correctors use the online VFCP calculator to determine the principal amount and lost earnings due to the plan;
- Self-correctors file a SCC Notice with EBSA, complete a self-correction record retention checklist, and provide these materials to the plan administrator, along with a statement made under penalty of perjury signed by each Plan Official seeking relief under VFCP;<sup>[11]</sup> and
- The plan, employer, plan sponsor, and self-corrector must not be "under investigation," as such term is defined in VFCP.

This SCC is available for plans of any size, provided the applicant meets the requirements of VFCP. While there is no limit as to how often a party may use this SCC, DOL will monitor the frequency of its use and may communicate with repeat users or open investigations to identify and correct systemic issues leading to repeated failures to timely transmit participant contributions to a plan.<sup>[12]</sup>

As noted above, self-correction for delinquent participant contributions or loan repayments is only available where the calculated lost earnings are \$1,000 or less (excluding any excises taxes paid to the plan under PTE 2002-51), and where the amount is remitted to the plan within 180 calendar days of the date it was either withheld from participants' paychecks or was received by the employer.<sup>[13]</sup> DOL declined to raise this limit, as in its view larger amounts or longer remittance timeframes "suggest a need for EBSA to actively evaluate the circumstances surrounding the breach and the timing of the correction

...."[\[14\]](#)

The correction amount for this SCC is the sum of the principal amount and lost earnings. The principal amount is the amount that would have been remitted to the plan but for the employer's retention of the amounts. While lost earnings are determined utilizing the online VFCP calculator, this SCC uses a different method for calculating lost earnings than is used for other purposes under VFCP. Specifically, lost earnings are calculated from the date the amounts otherwise would have been payable in cash to the participant, or for loan repayments the date they were received by the employer.[\[15\]](#)

The SCC also requires that a SCC Notice be submitted electronically to EBSA. The SCC Notice must include the name and email address of the self-corrector, the name of the plan and its 2-digit number, the name of the plan sponsor and their EIN, the amount of lost earnings and the date paid to the plan, the loss date, and the number of impacted participants.[\[16\]](#) DOL explained that it views a well-designed self-correction program as one that requires parties to file basic data sufficient for DOL to ensure adequate corrections and provide appropriate oversight for fiduciary violations.[\[17\]](#) Notwithstanding the SCC Notice, a plan still must report delinquent participant contributions on Form 5500 or 5500-SF.[\[18\]](#) DOL continues to view as unwarranted a *de minimis* rule whereby a Form 5500 would not need to be corrected for small amounts that are corrected pursuant to VFCP.[\[19\]](#)

### **New self-correction for eligible inadvertent participant loan failures self-corrected under EPCRS**

As the SECURE 2.0 Act was passed after the publication of the proposed amendment to VFCP, the proposed amendment did not reflect SECURE 2.0 Act section 305(b). Section 305(b)(2) and (3) require that an inadvertent loan failure self-corrected under EPCRS be treated as meeting the requirements of VFCP, with other reporting and procedural requirements DOL may impose under VFCP[\[20\]](#)

Participant loan failures are eligible for this new SCC if the failure:

- Occurs despite the existence of practices and procedures that satisfy the standards set forth in, and is eligible for correction under, EPCRS; and
- Does not include any participant loan failure that is egregious, relates to the diversion or misuse of plan assets, or is directly or indirectly related to an abusive tax avoidance transaction.[\[21\]](#)

Additionally, unlike in the case of the SCC for delinquent participant contributions, the plan or the self-corrector here may be "under investigation" as such term is used in VFCP, provided the self-corrector is still eligible to correct under EPCRS.

The types of failures that may be corrected under this SCC include:

- Loans the terms of which did not comply with plan provisions that incorporated the requirements of section 72(p) of the Internal Revenue Code (Code) concerning amount, duration, or level amortization;
- Loans that defaulted due to a failure to withhold loan repayments from the participant's wages—if such transactions are eligible for, and have been self-corrected under, EPCRS; and
- The failure to obtain spousal consent for a plan loan, or allowing a loan when the loan exceeds the number permitted under the terms of the plan, provided in each case that the transaction is eligible for, and has been self-corrected under, EPCRS.[\[22\]](#)

As with the above SCC, this SCC also requires a self-corrector to provide a SCC Notice electronically to DOL. This SCC does not, however, require completion of the record retention checklist. We note that DOL declined to commit (in response to a commenter) to not initiate an investigation or assess civil penalties in connection with a participant loan failure corrected under EPCRS. Rather, DOL confirmed that "[c]onsistent with EBSA's historical practice under the VFC Program, the Department generally does not anticipate taking enforcement action in response to a compliant application or eligible self-correction except in the unusual situation where EBSA becomes aware of possible criminal behavior, material misrepresentations or omissions in the VFC Program application or SCC notice, or other abuse of the Program."[\[23\]](#)

## **Additional changes and updates to VFCP**

### *Correction process for loans made at below market interest rates*

The Amendment revises the requirement that applicants to VFCP for such loans to a party-in-interest include both a written copy of an independent commercial lenders' fair market interest rate determination and a written validation by an independent fiduciary of the process used to determine the fair market interest rate. An independent fiduciary's validation no longer is required for loans of \$10,000 or less.[\[24\]](#)

For such loans not to a party-in-interest and those at a below-market interest rate solely due to a delay in perfecting the plan's security interest, the Amendment allows new alternative methods for determining corrective payments.[\[25\]](#)

For all of the above loan types, the Amendment updates the criteria for determining when a commercial lender is "independent" to the same criteria used to determine appraiser independence.[\[26\]](#)

### *Purchase and sale of assets between a plan and a party-in-interest*

The Amendment modifies the correction processes for certain failures involving the purchase and sale of assets between a plan and a party-in-interest. For plan purchases of an asset where no prohibited transaction exemption (PTE) applies, the Amendment adds a new correction method for the plan to receive a "cash settlement" in situations where either the plan's purchase cannot be reversed or the plan no longer owns the asset.[\[27\]](#)

For plan sales of an asset where no PTE applies, the Amendment adds a new alternative correction method where the plan can receive the correction amount instead of repurchasing the asset.[\[28\]](#)

For sale-leaseback transactions between a plan and a party-in-interest, the Amendment clarifies (consistent with ERISA section 408(e)) that corrections of leases to affiliates of the plan sponsor are allowed.[\[29\]](#)

### *Illiquid assets*

VFCP previously permitted corrections involving plans divesting illiquid assets purchased under certain circumstances described in VFCP. The Amendment modifies this correction process to account for the fact that the original purchase of the illiquid assets may not have been a prohibited transaction or otherwise imprudent.[\[30\]](#) The Amendment also clarifies that where an illiquid asset is a parcel of real estate, on the recovery date no party in interest may own real estate that is contiguous to the plan's parcel of real estate.

### *Ineligibility for VFCP due to investigation or criminal conviction*

In order to utilize VFCP, a plan, applicant, or self-corrector must not be "under investigation," as this term is defined in VFCP. The proposed Amendment would have modified this term to provide that a review by an EBSA Benefits Advisor automatically makes an applicant or self-corrector ineligible for VFCP. The Amendment clarifies that a plan will *not* be considered under investigation merely because EBSA staff has contacted the plan, applicant, self-corrector, or plan sponsor in connection with a participant complaint; unless the complaint describes the transaction described in the VFCP application or SCC notice and the plan has not received the correction amount due under VFCP as of the date of the EBSA staff contact.[\[31\]](#)

A plan also is not eligible to participate in VFCP if there is evidence of "potential criminal violations," as determined by EBSA.

The Amendment adds two limited exceptions to these restrictions "to promote increased usage of [VFCP]."[\[32\]](#) First, where there are "potential criminal violations" an innocent plan administrator, plan sponsor, or applicant may utilize VFCP for cases involving delinquent participant contributions and loan repayment, provided that:

- 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 VFCP application providing contact information for the law enforcement agency, certifying 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.

Second, an applicant may submit a bulk VFCP application that includes plans which are under investigation.[\[33\]](#) Previously, these plans could not be included in a VFCP no-action letter. To address EBSA's desire to be able to issue a non-action letter that includes these plans to a service provider, the Amendment permits such applications provided that:

- 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 currently is providing services to each of the named plans, or was at the time of the transaction that is being corrected; and
- The service provider 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.[\[34\]](#)

In connection with this second exception, the Amendment permits a bulk applicant to provide with the application the Form 5500 filing information or the plan sponsor's EIN for each named plan in the application, rather than requiring it for all plans. Additionally, a bulk applicant with knowledge of the transaction that is the subject of the application can sign the statement under penalty of perjury where it certifies that it is not under investigation by EBSA, rather than requiring a separate statement from a plan fiduciary for each plan covered by the application.

### *De minimis increase*

The Amendment increases to \$35 (from \$20) the de minimis exception for corrective distributions to former employees and their beneficiaries, and to alternative payees, who have neither account balances with nor a right to future benefits from a plan; if the applicant demonstrates that the cost of making the distribution to such individual would exceed the de minimis amount. In such a case, payment can be made to the plan rather than to the individual.[\[35\]](#)

#### *Payment of correction costs*

DOL in the Amendment confirmed its view that remittance to a plan may not be made from plan assets, which includes charges against participant accounts or against a plan's forfeiture account. In response to requests from commenters, DOL relaxed the requirement that the employer or plan sponsor pay remittances to more broadly require that a correction be paid by a Plan Official, which includes a plan fiduciary, plan sponsor, party in interest with respect to a plan, or other person who is in a position to correct a breach by filing a VFCP application or submitting a SCC notice. This expansion permits service providers to pay lost earnings resulting from another Plan Official's breach.[\[36\]](#)

#### *Use of VFCP by multiemployer and multiple employer plans*

The Amendment makes it easier for employers who participate in a multiemployer or multiple employer plan to utilize VFCP. As amended, either the plan administrator of the entire plan or any contributing or adopting employer can use VFCP. In such instance the administrator could apply on behalf of the entire plan, or the employer may apply only on its behalf. If the employer applies or self-corrects on its own behalf, the employer can sign the VFCP application or the SCC penalty of perjury statement itself, irrespective of its status as a plan fiduciary.[\[37\]](#)

### **Future changes to VFCP**

The proposed Amendment solicited comments on four areas of potential expansion or revision of VFCP: missing and nonresponsive participants and beneficiaries; integration of VFCP with corrections under EPCRS; adoption of a preaudit compliance program; and electronic VFCP submissions. The Amendment notes that DOL plans to continue to evaluate alternative approaches to electronic submission beyond the current email option, such as an internet or web-based portal. DOL also indicated that it may consider ways to incorporate the new Lost & Found database as a corrective action in connection with missing and nonresponsive participants and beneficiaries. While DOL did not specifically address the other areas, the Amendment notes that DOL will consider them further and may propose them as part of a future, separate project to expand VFCP.

### **Amendments to PTE 2002-51**

PTE 2002-51 provides relief from excise taxes imposed by the Code for eligible transactions corrected pursuant to VFCP. The amendments to PTE 2002-51 (which generally track the proposed amendments) conform PTE 2002-51 with the Amendment, and also implement additional changes outlined below. The amendments to the PTE:

- Clarify that relief is available for transactions that are corrected under the new SCC for delinquent participant contributions and loan repayments, and that the current requirement that the applicant receive an EBSA no-action letter may, in the case of the SCC, be met by the e-mail acknowledgement of a properly completed and submitted SCC notice.



- Eliminate the current three-year limitation, under which the exemption was generally unavailable to applicants that had, within the previous three years, taken advantage of the relief provided by VFCP and the PTE for a similar type of transaction.
- Expand coverage for 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 to VFCP. The amendments also add new definitions of "affiliate" and "control."
- Delete the section of the PTE which had required that "the transaction was not part of an agreement, arrangement or understanding designed to benefit a disqualified person." DOL explained that it views this requirement as unnecessary in light of other conditions of the PTE, including the requirement that a transaction have been corrected under VFCP in order for the PTE to apply.
- Modify the provisions regarding the required notice to interested persons, including that delivery of the notice by posting alone will no longer suffice; and provide in an appendix to the PTE a model notice to interested persons, for optional use, to facilitate compliance. The amendments also provide that the SCC notice for delinquent participant contributions and loan repayments will 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 VFCP and the PTE; and
  - provide the plan administrator a copy of such documentation.
- Make other ministerial changes to improve readability.

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#### Notes

[1] Voluntary Fiduciary Correction Program, 90 Fed. Reg. 4192 (2025), available at <https://www.federalregister.gov/documents/2025/01/15/2025-00327/voluntary-fiduciary-correction-program>;

[2] Prohibited Transaction Exemption (PTE) 2002-51 To Permit Certain Transactions Identified in the Voluntary Fiduciary Correction Program, 90 Fed. Reg. 3667 (2025), available at <https://www.federalregister.gov/documents/2025/01/15/2025-00328/prohibited-transaction-exemption-pte-2002-51-to-permit-certain-transactions-identified-in-the>.

[3] See ICI Memorandum No. 34401, dated November 23, 2022, available at <https://www.ici.org/memo34401>.

[4] For a discussions of IRS' EPCRS, see ICI Memorandum No. 33711, dated August 2, 2021, available at <https://www.ici.org/memo33711>; ICI Memorandum No. 35377, dated July 18, 2023, available at <https://www.ici.org/memo35377>.

[5] For a summary of the SECURE 2.0 Act, see ICI Memorandum No. 34795, dated January

12, 2023, available at [www.ici.org/memo34795](https://www.ici.org/memo34795).

[6] See ICI Memorandum No. 11746, dated March 21, 2000, available at <https://www.ici.org/system/files/attachments/pdf/memo11746.pdf> (summarizing the interim VFCP); ICI Memorandum No. 14614, dated April 5, 2002, available at <https://www.ici.org/system/files/attachments/pdf/memo14614.pdf> (summarizing the 2002 VFCP); ICI Memorandum No. 15408, dated November 27, 2002, available at <https://www.ici.org/system/files/attachments/pdf/memo15408.pdf> (summarizing PTE 2002-51); ICI Memorandum No. 20012, dated May 5, 2006, available at <https://www.ici.org/system/files/attachments/pdf/memo20012.pdf> (summarizing the 2005 updates to VFCP and PTE 2002-512).

[7] 90 Fed. Reg. at 4192; Fact Sheet: Voluntary Fiduciary Correction Program (DOL updated January 2025), available at <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/vfcp>.

[8] See ICI Memorandum No. 34401, dated November 23, 2022, available at <https://www.ici.org/memo34401>.

[9] EBSA explicitly reserves the right to investigate self-corrected transactions "to determine the truthfulness and completeness of the factual statements set forth in the SCC notice and to confirm the corrective action was in fact taken." 90 Fed. Reg. at 4193-94.

[10] 90 Fed. Reg. at 4193-94.

[11] *Id.* at 4195. A signed statement made under penalty of perjury already was required under VFCP.

[12] *Id.* at 4196. DOL declined to provide further guidance on what level of usage of this SCC may be too frequent,

[13] DOL also confirmed its view that each pay period is generally viewed as a separate transaction, though multiple pay periods may be treated as one transaction if they are close in time and the delinquencies are related to the same cause. *Id.* at 4194.

[14] *Id.* at 4194. DOL declined a request by several commenters to extend the 180-day time frame to beyond the end of the plan year or to the due date of the plan's Form 5500/5500-SF for a given year. Among other things, this extension would have permitted use of the SCC for failures first identified during an annual audit. DOL opined that: "a failure to identify a delinquency and remit contributions or loan payments due to the plan within 180 days indicates a potentially serious problem with the plan's processes and procedures for handling participant contributions and loan payments. It would not be consistent with prudent fiduciary administration of a plan to wait until the end of the plan year, the completion of the annual audit of the plan for annual reporting purposes, or the due date of the Form 5500 or Form 5500-SF to check for timely transmission of participant contributions and loan repayments." *Id.*

[15] For other purposes under VFCP, lost earnings are calculated from the earliest date that the participant contributions or loan repayments could reasonably have been segregated from the employer's general assets. Note that this is the same date as of which participant contributions become plan assets under 29 C.F.R. section 510.3-102.



[16] 90 Fed. Reg. at 4195.

[17] *Id.*

[18] The Amendment notes that DOL welcomes comments on whether to add questions to Form 5500 and Form 5500-SF specifically relating to use of the SCC; such comments may be provided under the DOL project (listed on DOL's regulatory agenda) evaluating general improvements to the annual reporting forms and instructions. 90 Fed. Reg. at 4196.

[19] 90 Fed. Reg. at 4196.

[20] We note that parties may still opt to correct participant loan failures under EPCRS' VCP, in order to use the application-based process under VFCP.

[21] 90 Fed. Reg. at 4198.

[22] Until EPCRS is updated, any correction for failure to obtain spousal consent must include obtaining spousal consent.

[23] 90 Fed. Reg. at 4198.

[24] *Id.* at 4199.

[25] *Id.*

[26] Section 5(a)(5) of VFCP 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." *Id.* at 4212.

[27] *Id.* at 4200.

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.* at 4201.

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.* at 4201-02. A proper VFCP application or SCC Notice is still required, including a

written statement by a plan fiduciary made under penalty of perjury.

[37] *Id.* at 4202.

[38] *Id.* at 4202-03.

[39] DOL noted that it will monitor how frequently fiduciaries rely on VFCP, and may consider further amendments in the future. 90 Fed. Reg. at 3699.

[40] *Id.*

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