

LEGAL UPDATE

Department of Labor Updates Voluntary Fiduciary Correction Program

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In 2002, the Department of Labor (DOL) adopted the Voluntary Fiduciary Correction Program (VFCP). VFCP, modified in 2005 and 2006, is designed to encourage employers and plan fiduciaries to voluntarily comply with the Employee Retirement Income Security Act, as amended (ERISA). VFCP allows employers and plan fiduciaries who are potentially liable for breaches of

fiduciary duty under Title I of ERISA to apply for relief from enforcement actions and certain civil penalties. The relief is conditioned on the employers and plan fiduciaries following the criteria and procedures set forth under VFCP. Associated with VFCP is prohibited transaction class exemption 2002-51, which provides relief from excise tax for six listed prohibited transactions. The DOL recently

announced modifications to VFCP, which will be available beginning March 17, 2025.

The most significant change to VFCP is the addition of two new self-correction features. The first new feature is for the failure to timely remit participant contributions and loan repayments – the most frequently used correction under VFCP. Several notable limitations are associated with this correction:

- The DOL reserves the right to conduct an investigation into the reported transaction.
- The lost earnings must be \$1,000 or less.
- No “no-action” letter will be issued.
- The cost of correction may not be paid from plan assets, such as the plan’s forfeiture account.
- Lost earnings must be calculated using the DOL calculator.
- There is a 180-day deadline for delinquent contributions or loan repayments that must be remitted to the plan after withholding or receipt by the employer.
- An electronically filed notice must be sent to the DOL containing the self-corrector’s name and email address; the plan name and number; the plan sponsor and its EIN; the principal amount and the amount of lost earnings; the loss date; the date paid to the plan; and the number of participants affected. In response, the DOL will provide an automatic acknowledgment.

Among this list of requirements, the 180-day deadline will likely present an issue for plan sponsors who do not realize promptly during the plan year that this type of failure has occurred. This is often the case for small employers. Furthermore, the fact that a VFCP self-correction will not receive a no-action letter may cause plans to continue to use the existing VFCP procedures to gain the assurance provided by the no-action letter.

The self-corrector must also prepare and collect the documents listed in a record retention checklist and provide them to the plan administrator and a plan fiduciary with knowledge of the transaction, and any plan official seeking relief must execute a penalty of perjury statement. There is no limit on the frequency with which this self-correction can be used. However, the DOL will evaluate the possible merit of adding additional requirements with respect to this issue.

This new self-correction mechanism does not relieve a plan sponsor from reporting delinquent contributions on Form 5500, and filing amended returns may be necessary. Notably, no self-correction is available under VFCP for delinquent matching contributions. However, the DOL will not reject a late participant contribution self-correction if the delinquent matching contributions are corrected in the same manner as the late participant contributions. Finally, on the

plus side of the ledger, applicants can correct delinquent participant contributions and loan repayments even if the application contains evidence of a criminal violation. This requires that the applicant certify that they did not participate in the criminal activity, the appropriate law enforcement agencies have been notified, and certain other conditions have been satisfied.

The second new self-correction feature under VFCP involves certain eligible inadvertent failures related to participant loans available for self-correction under the Internal Revenue Service’s (IRS) Employee Plans Compliance Resolution System (EPCRS). (*The SECURE 2.0 Act of 2022 expanded the ability of plan sponsors to self-correct “eligible inadvertent failures,” including certain plan loan failures.*) A plan is eligible to use this self-correction component of VFCP, even if the plan is under investigation (as defined in VFCP), so long as the loan failure can be self-corrected under EPCRS. Four types of loan failures are covered under this self-correction component:

- Loans whose term exceeds the maximum permitted under Code Section 72(p);
- Loans that are defaulted due to a failure to withhold;
- Loans for which the required spousal consent was not obtained; and
- Loans that exceed the maximum number of loans available under the plan.

The procedures are similar to those involved in the correction of late participant contributions and loan repayments, but there is no record retention checklist requirement.

Other notable modifications made by the updated VFCP include additional correction options:

- For prohibited loan transactions and prohibited purchase and sale transactions involving plans;
- For sale and leaseback transactions to affiliates of the plan sponsor; and
- Permitting service providers to submit a bulk application to address violations involving multiple plans.

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