

# Retirement Spotlight

Illuminating current industry news and events

February 14, 2023

## EBSA Proposes Amendments to VFCP

The Department of Labor's Employee Benefits and Security Administration (EBSA) recently released a [proposed amendment](#) to the Voluntary Fiduciary Correction Program (VFCP) to include a Self-Correction Component (SCC) for transactions eligible for correction under the program. The EBSA also released a [proposed amendment](#) to Prohibited Transaction Exemption (PTE) 2002-51 to accommodate certain transactions subject to the self-correction component as proposed in the VFCP amendment.

### Background

The EBSA originally adopted the VFCP in 2002. The program was designed to encourage voluntary compliance with the Employee Retirement Income Security Act (ERISA) by allowing those potentially liable for certain fiduciary breaches to apply for relief from enforcement actions and certain penalties. The VFCP's primary goal is to ensure that a plan and its participants are "made whole" for any losses that occur because of a fiduciary breach. The VFCP is commonly used to correct delinquent participant contributions and loan repayments, which often involve relatively small dollar amounts. Considering this, the EBSA developed the proposed amendments to the VFCP to streamline the correction process and to reduce the time and expense required to voluntarily correct these errors.

### Proposed VFCP Self-Correction Component

The proposed amendment to the VFCP will establish the SCC for delinquent participant contributions and loan repayments. The proposed SCC will allow "self-correctors" to forgo submitting an application to the EBSA in order to receive a "No Action" letter, a document that provides relief from certain enforcement actions and penalties. Instead, self-correctors will be required to complete an electronic notice through an as-yet-to-be-developed online portal. The EBSA will review the online notice, determine whether the information is in good order, and e-mail an acknowledgement to the self-corrector. Relief under the proposed SCC will be available to the fiduciary or fiduciaries of any retirement plan regardless of the number of participants or amount of plan assets—as long as the plan is not currently under investigation (as defined in the VFCP).

- **Certain conditions must be met to qualify for relief under the SCC.** These conditions are designed to exclude from the SCC process any delinquencies that may require a more in-depth evaluation.
  - The amount of lost earnings must be \$1,000 or less (excluding any excise tax paid to the plan under the associated class exemption, PTE 2002-51).
  - The delinquent participant contributions/loan repayments must be remitted to the plan no more than 180 calendar days from the date that contributions are withheld from a participant's paycheck or that loan repayments are withheld or received.
- **Certain corrective methods must be used to qualify for relief under the SCC.**
  - Lost earnings must be calculated using the [VFCP Calculator](#).

- Lost earnings must be calculated beginning with the date the amount would otherwise have been payable to the participant or the day on which the participant contribution or loan repayment is received by the employer (“Date of Withholding or Receipt”)
- Self-correctors must complete the SCC Retention Record Checklist in Appendix F, prepare or collect the documents listed in the Appendix, and provide the completed checklist and required documentation to the plan administrator.
- Excise tax must be calculated and contributed to the plan as additional earnings.

The SCC imposes no limit on how often a self-corrector may use the SCC process. The EBSA considered mirroring the existing VFCEP limitation, which allows excise tax relief once every three years, but instead proposed amending PTE 2002-51 to eliminate the three-year limitation. The agency is no longer concerned that the exemption will be subject to abuse, especially considering the relatively small amounts involved under the SCC.

The VFCEP does not include a correction for delinquent matching contributions. Some applications filed under the VFCEP for delinquent participant contributions or loan repayments have sought relief for late employer matching contributions. But the agency has noted that the fiduciary obligations that apply to participant contributions and to employer contributions can be quite different. So the EBSA has decided not to permit VFCEP corrections for improperly deposited employer matching contributions.

As with its other VFCEP correction methods, the EBSA reserves the right to investigate and take other actions with respect to transactions corrected through the SCC, including taking steps to confirm that the corrective action was actually taken. Relief under the SCC does not extend to criminal investigations or to persons other than the self-corrector. Also, if the agency determines that the terms and conditions of the SCC were not satisfied, the self-corrector would not be exempt from enforcement actions or civil penalties related to delinquent participant contributions.

## Proposed Amendments to the VFCEP Application Process

The proposed amendments also add two exceptions to the existing eligibility requirements for the VFCEP application process. The EBSA has determined that these situations warrant an exception: cases submitted through the VFCEP application process that involve an “innocent plan administrator” or that involve a single service provider submitting applications for multiple clients.

- **An “Innocent Plan Administrator” may correct using VFCEP application if certain conditions are met.**  
The EBSA has received applications involving clear evidence of potential criminal violations such as when a bookkeeper allegedly embezzled money from the plan sponsor, including participant contributions. In some situations, the plan sponsor repaid the money to the plan, including lost earnings, and referred the embezzlement to the local authorities who subsequently prosecuted the alleged embezzler. In situations like this, the EBSA does not believe an “innocent plan administrator” who applies under the VFCEP application process should be ineligible for relief under the Program.
  - The EBSA included an exception to allow participation in the VFCEP application process by an “innocent plan administrator,” plan sponsor, or applicant when the case involves delinquent participant contributions/loan repayments *and*
    - all funds have been repaid to the plan,
    - appropriate law enforcement agencies have been notified of alleged criminal activity,
    - the applicant submits a statement with their application asserting that the applicant was not involved in the alleged criminal activity and detailing all information provided to law enforcement, and
    - the applicant reports whether a claim relating to the alleged criminal activity has been made under their fidelity bond.
- **Bulk submissions by a single service provider.** A second limited exception would permit single service providers who meet certain conditions to submit bulk VFCEP applications on behalf of multiple clients, even if one or more of the plans named in the application is under investigation. Presumably, this exception recognizes the possibility that service providers may not necessarily know about their clients being under investigation.

## Proposed PTE 2002-51 Amendments

Prohibited Transaction Exemption (PTE) 2002-51 provides an exemption from excise taxes imposed by the Internal Revenue Code for certain eligible transactions corrected under the VFCP. Therefore, the EBSA concurrently proposed amendments to PTE 2002-51, as they coincide with the proposed amendments to the VFCP.

- **Excise taxes paid to the plan as additional earnings.** This proposed amendment updates the references to the proposed SCC to state that the amount of the excise tax calculated on delinquent participant contributions or loan repayments under Code section 4975 will be paid to the plan as additional earnings and allocated to participants' and beneficiaries' individual accounts.
- **Self-correctors retain documentation.** Plans using the SCC method are required to retain a completed Form 5330, *Return of Excise Taxes Related to Employee Benefit Plans*, other written documentation detailing the determination of applicable excise taxes, and also proof of payment of the amounts deposited to the plan. Under the SCC, there is no requirement to submit Form 5330 and other documentation to the EBSA.

### Intent versus Affect

There is debate as to whether the proposed amendment to create the SCC will actually encourage more participation in VFCP. The proposed SCC will require applicants to provide similar information as under the VFCP application process; however without the reward of a no-action letter from the EBSA. The agency's approach to require the self-corrector to share specific data with the EBSA through a notice and sign a penalty of perjury statement as part of the documentation required under the proposed SCC is different than the Self-Correction Program (SCP) offered by the Internal Revenue Service (IRS) as part of the Employee Plan Compliance Resolution System. The IRS's SCP works anonymously, merely requiring the plan administrator to adhere to certain correction methods and to save all appropriate documentation. The EBSA's proposed SCC will provide an additional correction option to use than before, but it is not anonymous. This may cause hesitation for those interested in participating in the SCC.

### Next Steps

The EBSA originally requested written comments be received by January 20, 2023; however, the comment period has been re-opened to address any issues raised by specific references to the VFCP in connection with corrected loans to participants included in the SECURE 2.0 provisions of the Consolidated Appropriations Act. The EBSA will review written comments received by April 14, 2023, before issuing a final rule.