

Client Alert

January 2023

The U.S. Department of Labor Announces Proposed Amendments to its Voluntary Fiduciary Correction Program

The U.S. Department of Labor (“DOL”) recently announced that its Employee Benefits Security Administration (“EBSA”) proposed amendments to its Voluntary Fiduciary Correction Program (“VFCP”). Most importantly, the DOL proposed to add for the first time a self-correction component for delinquent deposits of participant contributions and loan repayments.

The VFCP is a voluntary enforcement program that allows plan sponsors to self-identify and fully correct prohibited transactions and breaches of fiduciary duties that would violate the Employee Retirement Income Security Act of 1974, as amended (“ERISA”). Plan fiduciaries who may be liable for violations under ERISA may seek relief from DOL enforcement actions provided they comply with the criteria and procedures specified in the VFCP. Under the current VFCP, plan fiduciaries must prepare and submit a formal application to the DOL for review and wait to receive a no-action letter. Because of the costs of preparing the application, many plan fiduciaries choose not to apply for relief through the VFCP.

The EBSA’s proposed amendments add a self-correction component, enabling employers and plan fiduciaries to notify the EBSA electronically that certain delinquent participant deferrals and loan repayments have been self-corrected. The associated prohibited transaction class exemption, PTE 2002-51, would be amended accordingly.

Self-Correction Component

The new self-correction component would allow plan fiduciaries to obtain relief under the VFCP without the time and expense of preparing and submitting an application to the EBSA in order to receive a no-action letter. Instead, “self-correctors” would provide a notice to the EBSA through an online tool on its website and receive an email acknowledgement of a properly completed and submitted notice.

To use the self-correction tool the following conditions must be met:

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- Delinquent participant contributions or loan repayments must have been remitted no more than 180 calendar days from the date they were either received by the employer or otherwise would have been payable to the participant in cash.
- Self-correctors must calculate the applicable excise tax using the DOL online calculator.
- Lost earnings on the delinquent participant contributions must not exceed \$1,000.
- The plan or self-corrector must not be “under investigation” as defined in the VFCP. This means (1) an active investigation of the plan or plan sponsor by the EBSA, the Pension Benefit Guaranty Corporation, state attorneys general, or state insurance commission; (2) a criminal investigation of the plan or plan sponsor by a government agency; or (3) an IRS examination of the plan.
- Self-correctors must complete and retain the self-correction Retention Record Checklist in Appendix F of the VFCP for 6 years.
- Finally, the proposed amendment makes clear that even though self-correctors will not receive a no-action letter, compliance with the above will shield plan fiduciaries from penalties or civil enforcement actions.

Additional Changes

In addition to the self-correction component, the proposed amendment clarifies and expands the scope of some existing transactions that are eligible for correction, such as allowing a VFCP applicant to take credit for a plan’s earnings from owning an asset purchased from an impermissible party in interest, as defined in ERISA, and allowing a plan sponsor to obtain relief for a bulk application, even where one or more plans may be under investigation. The proposed change also amends the corresponding PTE 2002-51 and provides excise tax relief for transactions that are self-corrected.

In sum, these changes would provide a streamlined process for plan fiduciaries to avoid being the target of civil enforcement actions. While the self-correction component and other noted changes are not effective at this time, the DOL and EBSA is accepting public comments on the proposed changes until January 20, 2023.

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Olshan will be monitoring these proposed amendments as well as any changes that are adopted as part of the final rule. Please contact the Olshan attorney with whom you regularly work or the attorney below if you would like to discuss further or have questions.

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