



Via Electronic Delivery

January 19, 2023

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Ave, NW
Washington, DC 20210

RE: Proposed Program Amendments; Request for Comment, Employee Benefits Security Administration; Amendment and Restatement of the Voluntary Fiduciary Correction Program; 87 Fed. Reg. 71164 (November 21, 2022), RIN 1210-AB64.

To Whom It May Concern:

This is the U.S. Chamber of Commerce's (Chamber) response to the Employee Benefits Security Administration's (EBSA) proposed Amendment and Restatement of the Voluntary Fiduciary Correction Program (Proposed Amendments). We commend EBSA on the proposed changes that simplify the Voluntary Fiduciary Correction Program (VFC Program) and make it easier for plan fiduciaries to use. Our suggested comments are below.

Self-Correction Component

The Proposed Amendments include a new Self-Correction Component (SCC) that would allow a plan fiduciary to correct for delinquent participant contributions/loan payments. The Chamber supports such a program; however, we believe a few modifications would improve the SCC.

The SCC is limited to corrections where the amount of Lost Earnings is \$1,000 or less. Although we understand this to be one of the participant protections, it will limit who may choose to use the program. Specifically, having such a low threshold would all but exclude medium and large plan sponsors. Furthermore, because Lost Earnings are determined using the Internal Revenue Code Section 6621(a)(2) underpayment rates, which fluctuate over time and have recently risen to 7% for the first quarter of 2023 (up from 3% just one year ago),¹ a principal amount that would be eligible for SCC when these rates are lower may no longer qualify for SCC when rates are higher, leading to inconsistencies over time.

Instead of imposing a flat dollar amount, there are numerous limits that could broaden which plan sponsors may be able to use the SCC while still protecting participants. For

¹ See Table of Interest Rates, at <https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/correction-programs/vfc/table-of-underpayment-rates>

example, the threshold could be based on the number of plan participants, with a larger threshold amount for larger plans. Alternatively, the amount could vary based on the plan assets on the correction date, again, with a larger amount for plans with more assets. Another example would be a percentage, such as 1 percent, of the total contributions from the prior year (or prior quarter for newer plans).

There also is a question of what the applicable correction period is. For example, if a plan sponsors missed contributions for two consecutive payrolls, is each payroll period a separate period or is it one period? Would the results differ if the contribution were missed in nonconsecutive payrolls, for example the second payroll of the year and the sixth payroll of the year?

EBSA also requested whether it should include additional criteria for small plans to participate in the SCC, such as limiting it to only those who meet the safe harbor under 29 C.F.R. Section 2510-102(a)(2) (relating to timely contributions for small plans). Although we understand the concern, adding additional components for small plans could discourage their participation in the SCC, which would undermine the purpose of implementing the SCC program. The fact that EBSA retains the right to investigate a plan fiduciary if it fails to meet the SCC requirements should be enough protection to ensure compliance.

Under Investigation

A fiduciary may not use the VFC Program or the SCC if the plan or plan sponsor is under investigation. The Proposed Amendments include a new scenario for being considered under investigation. Specifically, a plan would be considered under investigation if an EBSA staff member has contacted the plan in connection with a participant complaint that is the subject of the transaction described in the application or part of the SCC (unless corrected before the call). We believe that this is exactly when VFC or SCC should apply. Specifically, the fiduciary may not have known the breach occurred until the fiduciary received the call from the EBSA staff member. At that time, the fiduciary would then be under an obligation to cure the breach, and the fiduciary should not be precluded from using either VFC or SCC. If EBSA is concerned about potential abuse, EBSA could put time parameters around when the fiduciary must act based on receiving information from the EBSA staff member.

Reporting

The proposed amendment requires the plan sponsor to self-report information about any delinquent contributions and loan payments as part of the process at the time of correction by notifying EBSA of the self-corrector's participation in the SCC by submitting the SCC notice through the online VFC Program web tool. The required reporting may discourage plan sponsors from using the SCC or they may correct the delinquent contributions and loan payments but not report it. The current version of the Form 5500 includes a question requiring the reporting of any delinquent contributions and loan payments in Schedule H, Part IV Compliance Questions) - 4a "Was there a failure to transmit to the plan any participant contributions within the time period described in 29 CFR 2510.3-102? Continue to answer "Yes" for any prior year failures until fully corrected. (See instructions and DOL's Voluntary

Fiduciary Correction Program.)" We believe reporting the correction on the Form 5500 is sufficient.

De Minimis Earnings

Currently, the VFC Program requires that any correction include earnings on any delinquent contributions, without an exception for de minimis amounts. There may be times that the de minimis earnings would cost more to implement than the actual earnings and impose burdens on recordkeeping systems. We would request that EBSA update the VFC Program to require the correction of the principal amount of the delinquent contributions and loan payments but not the lost earnings for the event if the total amount is less than a reasonable threshold on a per event basis, for example \$50 or \$75. If EBSA does not include a de minimis exception, they may want to consider a prohibited transaction exemption that would either allow the recordkeeper to pay the de minimis amount on behalf of the plan sponsor or allow de minimis earnings amounts to be paid from the forfeiture account.

Prohibited Transaction Exemption (PTE) 2002-51

DOL proposes to eliminate the provision of the PTE that limits its use for similar types of transactions to once every three years. The Chamber supports this change and the incorporation of the new SCC into the PTE.

Further Expansion

In the Proposed Amendments, EBSA asks whether the VFC Program should be expanded to include four additional areas. Our comments are below.

Missing or Unresponsive Participants. In the Proposed Amendments, EBSA explains the actions it has taken with respect to "missing participants", namely individuals the plan sponsor is unable to locate or who refuse to respond to plan sponsor communications regarding benefit payments. In the Proposed Amendments, EBSA asks whether the VFC Program should include a transaction for correction of "fiduciary breaches involved in such recordkeeping, communication, and benefit payment failure." Since EBSA began the Terminated Vested Participants Project, plan sponsors have requested that EBSA provide a safe harbor fiduciaries may use to satisfy the obligation to locate missing or unresponsive individuals. Although EBSA has issued "Missing Participants - Best Practices for Pension Plans", Compliance Assistance Release 2021-01, and Field Assistance Bulletin 2021-01, none of this guidance explicitly identifies what is an actual breach of fiduciary duty with respect to locating missing or unresponsive participants or provides a safe harbor. For example, must a fiduciary follow all of the best practices in locating missing or unresponsive participants or only one or two of them or are there other alternatives? Also, what actually is a breach and when would it occur? Given this, it is unclear how this could be included in the VFC Program. Before EBSA considers including this as part of the VFC Program, it should first release guidance via regulations through notice and comment that includes very specific detail on what actually is a breach with respect to missing or unresponsive participants, how such

breach may be cured and a safe harbor to follow to ensure such breaches do not occur in the future.

Integrating VFC with EPCRS. To the extent a self-correction under the Internal Revenue Service's (IRS) Employee Plans Compliance Resolution System (EPCRS) also may be a breach of fiduciary duty under the Title I of the Employee Retirement Income Security Act, we encourage EBSA to integrate self-corrections under the VFC Program with EPCRS. We support integrating both participant loan² and overpayment corrections in EPCRS with the VFC Program. Before doing so, EBSA should publish a proposed amendment to the VFC Program on the specifics of such integration.

Electronic Submission. We are very encouraged by EBSA's proposal to increase the usage of electronic submissions. However, we caution against making this mandatory because paper submission may be better for some plan sponsors. We believe plan sponsors should be allowed a choice in how to submit their applications.

Pre-Audit Compliance Pilot. We support a pre-audit compliance pilot similar to that instituted by the IRS, and we look forward to working with EBSA to develop such a program. We also believe that if an entity has corrected under the IRS program, it should not be considered "Under Audit" for purposes of the VFC Program.

Conclusion

We commend EBSA on its work in updating the VFC Program with the Proposed Amendments, and we look forward to working with EBSA on improving the VFC Program in the future.

Sincerely,

Chantel Sheaks

Chantel Sheaks
Vice President, Retirement Policy

² Section 305(b)(2) of SECURE 2.0 directs DOL to do this for self-correction of participant loan errors under EPCRS, which we support.