

Publications

DOL Reopens Comment Period for Voluntary Fiduciary Correction Program Changes

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The Department of Labor (“DOL”) recently announced ([88 Fed. Reg. 9408, Feb. 14, 2023](#)) that it will reopen the public comment period on proposed amendments to DOL’s Voluntary Fiduciary Correction Program (“VFCP”) and its related class exemption, [Prohibited Transaction Exemption 2002-51](#) (“PTE 2002-51”). The comment period now ends April 17, 2023.

VFCP is a DOL program designed to help plans, their fiduciaries, and service providers avoid civil enforcement and penalties under ERISA through proactive corrective steps. On November 21, 2022, DOL proposed long-awaited changes to the VFCP and its related class exemption, PTE 2002-51, which had not been updated since 2006. The proposed changes are intended to simplify and expand the original VFCP, which plan sponsors and fiduciaries have often found to be inefficient and expensive to use, particularly for small plans. (For detail on these proposed changes, please refer to our prior alert [here](#).) One of the key changes in the DOL’s proposed amendments would allow plan fiduciaries to self-correct late-deposited participant contributions or loan repayments by filing a notice of correction with the DOL, in lieu of filing a full VFCP application, when the “lost earnings” due to the plan are \$1,000 or less.

Following DOL’s proposed amendments, Congress passed the [Consolidated Appropriations Act of 2023](#), which includes several retirement reforms known as “SECURE 2.0.” Section 305 of SECURE 2.0 significantly expands the Internal Revenue Service’s (“IRS”) Employee Plans Compliance Resolution System (“EPCRS”) self-correction program to allow plan sponsors to correct any “eligible inadvertent failure,” including inadvertent failures related to a plan loan made to a participant. For plans to use the new self-correction process under Section 305 for a participant loan, the loan error in question must be an “eligible inadvertent” mistake, meaning it must have occurred despite the presence of appropriate policies and procedures, cannot be an “egregious” failure, and cannot relate to either the misuse of plan assets or “abusive tax avoidance.” Section 305(b) of SECURE 2.0 requires DOL to treat participant loan failures self-corrected under the EPCRS as satisfying the requirements under the VFCP, but authorizes DOL to require reporting or other procedural requirements. In reopening the comment period on the proposed amendments, the DOL explicitly asks whether and how the VFCP and PTE 2002-51

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should be revised to implement the new mandate that DOL deem those participant loans self-corrected under EPCRS rules as satisfying VFCP requirements.

If you are interested in submitting a proposed comment to the DOL by the new deadline of April 17, please contact us.