Proskauer

New “Self-Correction” Option for Voluntary Fiduciary Correction Starts March 17, 2025

Employee Benefits & Executive Compensation Blog on **March 14, 2025**

Starting March 17, 2025, the Employee Benefits Security Administration’s Voluntary Fiduciary Correction Program (“VFCP”) will have a “self-correction” option. Although the new option eliminates the need to wait for formal approval of a correction submission, participating fiduciaries will still need to satisfy a notice requirement and submit information to the Department of Labor. The applicable guidance is available here.

What is the VFCP?

The Department of Labor’s Employee Benefits Security Administration (“EBSA,” previously known as the Pension and Welfare Benefits Administration) established VFCP to encourage fiduciaries of employee benefit plans to self-report and correct specified breaches of fiduciary responsibility and prohibited transactions. EBSA encourages the use of the program to correct late contributions and loan repayments to a plan.

Under VFCP, EBSA waives civil penalties for specified transactions and, if certain conditions are satisfied, provides prohibited transaction relief.

What Transactions Qualify for Self-Correction?

Self-correction is available for two types of transactions that would otherwise be prohibited, each of which is described below:

1. Late Participant Contributions and Loan Repayments
2. Eligible Inadvertent Participant Loan Failures

Late Participant Contributions and Loan Repayments

Under EBSA guidance, participant contributions and loan repayments are considered plan assets as soon as they can reasonably be segregated from the employer's general assets. For example, if an employer's process for withholding amounts from participants' pay, reconciling files, and sending the money to the trust normally takes 5 days, EBSA treats the amounts withheld as plan assets after 5 days. Consequently, a hiccup that results in a delay relative to the normal 5 days would result in the employer holding plan assets, which EBSA treats as a prohibited extension of credit between the plan and the employer—triggering a self-reported excise tax and potential civil penalties.

By participating in VFCP, fiduciaries can avoid civil penalties and, if the applicable amounts are contributed to the plan's trust within 180 days after withholding (and all other requirements are satisfied), get relief from the excise tax. Starting March 17, 2025, the relief provided by VFCP is available through self-correction if the following requirements are satisfied:

- Neither the employer nor the plan may be "under investigation" (as defined by the VFCP);
- The applicable amounts must be remitted to the plan's trust, with lost earnings (as described below), within 180 calendar days after the date of withholding from the participant's paycheck (or, if applicable, receipt of the loan repayment) (the "Loss Date");
- Lost earnings are determined in the same manner as under VFCP, except that they must be measured from the Loss Date rather than the date the amount should have been contributed to the trust, and the amount of lost earnings must not exceed $1,000;
- The plan sponsor or another plan official must send a notice to EBSA through an electronic tool on EBSA's website;
- The employer (or another responsible party) must send to the plan's administrator records related to the correction, including a "Retention Record Checklist" that confirms the correction has been completed, documentation of the breach and its correction, and a signed statement, under penalties of perjury, confirming that the signer is not under investigation and the accuracy of the checklist; and
- The employer must pay all penalties, late fees, and other charges (if any) out of the employer's assets (and not, for example, out of plan assets).

Eligible Inadvertent Participant Loan Failures

A participant loan failure is a violation of the requirements under EBSA's prohibited transaction exemption (29 C.F.R. § 2550.408b-1) for a loan from a plan to a participant or beneficiary. The following violations are eligible for self-correction:

- Failing to comply with plan terms incorporating Internal Revenue Code requirements regarding the amount, duration, or amortization of plan loans;
- Defaulting a loan because an employer failed to withhold loan payments from a participant's wages;
- Failing to obtain spousal consent when required; and
- Exceeding the plan's permitted number of loans.

To complete the self-correction, plan officials must first correct the participant loan failure under the IRS's Employee Plans Compliance Resolution System and then submit a self-correction notice to EBSA via its web tool. The notice to EBSA must include, among other things, the type of loan failure, the loan amount, the number of people affected, the dates of the error and correction, and the correction method. Plan officials must also provide the plan administrator with documents related to the error and correction and a signed certification of accuracy that is subject to penalties of perjury.

Excise Tax Relief

Prohibited Transaction Exemption 2002-51 has been amended to provide excise tax relief for transactions corrected under the self-correction program. To be eligible for the excise tax relief, however, self-correctors must pay the amount of the excise tax directly to the plan. This leaves the plan sponsor with the following options for the excise tax:

- Complete a full VFCP application and seek relief from the excise tax, subject to satisfying additional requirements, including a notice to impacted individuals;
- Complete self-correction under VFCP and pay the full amount of the excise tax to the plan; or
- File Form 5330 with the IRS and pay the full amount of the excise tax to the IRS. If this option is followed, EBSA would retain the right to assess a civil penalty of up to 5% of the amount involved.

Other Notable Updates to the VFCP

In addition to introducing self-correction, EBSA has made other improvements to VFCP, including:

- Expanded correction options for prohibited loan transactions and prohibited purchase and sale transactions;
- Extending relief from transactions involving a prohibited sale and leaseback of real estate to covers eligible transactions with affiliates of the plan sponsor; and
- Allowing VFCP applications to address violations across more than one plan in a single submission.

Proskauer Perspective

The self-correction program should streamline the EBSA-approved process for correcting common errors. At the same time, however, the requirements for self-correction are not trivial, and EBSA reserves the right to scrutinize the submission and corrective action.

Plan sponsors and fiduciaries should discuss with counsel practical solutions for any violation.

View original.

Related Professionals

- **Seth J. Safra**
  Partner