

# Washington Pulse

March 3, 2025

## DOL ISSUES FINAL AMENDMENTS TO THE VFCP

The Department of Labor (DOL) recently issued a [final amendment](#) to the Voluntary Fiduciary Correction Program (VFCP), incorporating a Self-Correction Component (SCC) for eligible transactions under the program. The DOL also released a [final amendment](#) to Prohibited Transaction Exemption (PTE) 2002-51 to include certain transactions under the SCC as outlined in the VFCP amendment.

### Background

In 2002, the DOL originally adopted the VFCP to encourage voluntary compliance with the Employee Retirement Income Security Act of 1974 (ERISA) by allowing those potentially liable for certain fiduciary breaches to apply for relief from enforcement actions and certain penalties. Not long after its adoption, the DOL revised the VFCP in 2005 and again in 2006. The VFCP is commonly used to correct delinquent participant contributions and loan repayments, referred to as “late deposit” failures, which often involve relatively small dollar amounts. In 2022, the DOL developed [proposed amendments](#) to the VFCP and PTE 2002-51 in order to streamline the correction process and to reduce the time and expense required to voluntarily correct these errors.

### Self-Correction Component under VFCP

The final amendment to the VFCP will establish the SCC to permit employers the ability to self-correct late deposit operational failures by electronically filing an SCC Notice to the Employee Benefits Security Administration (EBSA) using a new VFCP online tool. Instead of receiving a no-action letter, the employer will receive an automatic reply from EBSA acknowledging receipt of the SCC Notice submission. Relief under the final SCC will be available to the fiduciary or fiduciaries of any retirement plan regardless of the number of participants or amount of plan assets affected—as long as the plan is not currently under investigation (as defined in the VFCP). Similar to the proposed amendment, plan assets may not be used to pay lost earnings under the SCC. Under the final amendment, there is no limit to how many times an employer may use the SCC process, but EBSA retains the right to investigate and take other actions with respect to transactions corrected through the SCC.

- **Qualifying conditions 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.
- **Qualifying corrective methods under the SCC.**
  - Lost earnings must be calculated using the [VFCP Calculator](#).
  - Lost earnings must be calculated beginning with the “date of withholding or receipt”, which is the date that 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—not from the due date of the deposit of the participant contribution or loan repayment within the plan’s deposit standard.

This eliminates the undercalculation of lost earnings due to the plan using a longer deposit standard than what the DOL might determine. For example, an employer may identify its deposit standard as seven business days. The DOL may later determine (upon audit) that the employer has a deposit standard of only three days. The transition to using the date of withholding or receipt eliminates the need to recalculate lost earnings due to the difference in the number of days in the deposit standard.

- Employers must complete the SCC Retention Record Checklist in Appendix F of the final amendment, prepare or collect the documents listed in the Appendix (such as bank statements and page(s) from the Online Calculator results), complete and retain a penalty of perjury statement, and provide the completed checklist and required documentation to the plan administrator.
- **SCC Notice Requirements.** Employers must notify the DOL of the self-correction of a late deposit failure by submitting the SCC Notice with the following required information through the new VFCEP online tool. The SCC Notice must include the following information.
  - Self-corrector's name and email address
  - Plan name
  - Plan sponsor's nine-digit number (EIN) and the plan's three-digit number (PN)
  - Principal Amount
  - Amount of Lost Earnings and the date paid to the plan
  - Loss Date (date(s) of withholding or receipt)
  - Number of participants affected by the correction

## Eligible Inadvertent Participant Loan Failures Corrected Under SCC

Eligible inadvertent participant loan failures are violations involving loans from a plan to a participant that can be self-corrected under the Internal Revenue Service's (IRS') Employee Plans Compliance Resolution System (EPCRS). If employers make a correction through EPCRS, the SCC recognizes this correction method and will provide relief from EBSA enforcement action and civil penalties.

- **Qualifying Conditions for Relief Under the SCC.** The participant loan failures must involve
  - noncompliance with the terms of the plan's loan policy that reflect the Internal Revenue Code requirements regarding the amount, duration, or level amortization of the loan;
  - loans that defaulted due to a failure to withhold a loan payment from a participant's wages;
  - failure to obtain spousal consent for a loan distribution; or
  - a loan that exceeds the number of loans permitted by a plan's loan policy.
- **SCC Notice Requirements.** In addition, the employer must notify EBSA by submitting the SCC Notice through EBSA's online tool. The employer must also complete and retain a penalty of perjury statement. The SCC Retention Record Checklist is not required for correction of participant loan failures.

## Eligibility Exceptions to Apply Under the VFCEP

To apply for relief under VFCEP, the plan, applicant, or employer may not be under investigation and the application must not contain any evidence of a potential criminal violation. The final amendment retains two exceptions to the existing eligibility requirements for the VFCEP application process.

- **Innocent Plan Administrator.** EBSA has received applications under the VFCEP that include clear evidence of criminal behavior (e.g., bookkeepers allegedly stealing money from plan sponsors, including participant contributions). Sometimes, plan sponsors repay the money to the plan and report the theft to authorities, who then prosecute the alleged thieves. In these cases, EBSA believes that an "innocent plan administrator" may continue to participate in the VFCEP 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 (covered by the penalty of perjury statement) with the 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 a fidelity bond.
- **Bulk Submissions by a Single Service Provider.** EBSA has also received VFCEP applications from service providers to correct breaches that involve multiple plans, including plans that may be under investigation by

the agency. Plans under investigation generally would not be included in a no-action letter issued by EBSA. The final amendment allows EBSA to issue a no-action letter to a service provider that covers all plans named in a VFCP application if certain conditions are met.

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

## Other Changes to VFCP

- **Definition of “Under Investigation”.** The final amendment clarifies the definition of a plan that is “under investigation” to include a plan that has been reviewed by an EBSA Benefits Advisor. In these situations, the employer is considered ineligible to apply for relief under the VFCP. But a plan will not be considered to be “under investigation” merely because EBSA staff has contacted the plan, the applicant, the employer, or the plan sponsor in connection with a participant complaint, unless
  - the participant complaint concerns the transaction described in the VFCP application or is identified in the SCC Notice; and
  - the plan has not received the correction amount due under the VFCP Program as of the date EBSA staff contacted the plan, the applicant, the employer, or the plan sponsor.
- **Delinquent Matching Contributions.** The final amendment removed the clarification in the proposed amendment that referred to not including corrections for delinquent matching employer contributions. Although EBSA will not reject applications that include information on delinquent matching employer contributions, it will not provide relief under the VFCP and a no-action letter will not apply.
- **De Minimis Amount.** The final amendment increases the de minimis amount that applies to corrective contributions from \$20 to \$35. This is available to employers who can prove that the cost of making a distribution to former employees (or their beneficiaries or alternate payees) who do not have an account balance nor the right to a future benefit exceeds the corrective payment amount. The employer would instead make the corrective payment to the plan rather than individual.
- **Payment of Correction and Associated Costs.** The final amendment confirms that employee contributions, loan repayments, and plan assets may not be used to pay for the cost of a correction. It also clarifies that the cost of a correction may be paid by any plan official, including service providers. Regardless of who pays for the correction, a plan fiduciary must sign the penalty of perjury statement.

## Final PTE 2002-51 Amendments

PTE 2002-51 provides an exemption from excise taxes imposed by the Internal Revenue Code for certain eligible transactions corrected under the VFCP. Therefore, EBSA also issued final amendments to PTE 2002-51 to align with the final changes made to the VFCP, ensuring consistency and clarity in the application of these regulations.

- **Excise Taxes Paid to the Plan as Additional Earnings.** This final amendment updates the references to the SCC to state that the amount of the excise tax calculated on delinquent participant contributions or loan repayments under [Internal Revenue Code Section 4975](#) will be paid to the plan as additional earnings and allocated to participants’ and beneficiaries’ individual accounts.
- **Employers Retain Documentation.** Employers using the SCC method must 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 proof of payment of the amounts deposited to the plan. Under the SCC, there is no requirement to submit Form 5330 or other documentation to EBSA.
- **Model Notice to Interested Parties.** The DOL prepared a model notice for applicants that is available, but not required, to inform interested parties of the employer’s application under the VFCP and its intention to seek relief under PTE 2002-51. Delivery of the notice may not be completed solely by posting, meaning delivery must occur by regular mail, e-mail, or any combination of these methods.
- **Frequency of Use Limitation Removed.** Under PTE 2002-51, applicants were previously restricted from obtaining excise tax relief for correcting violations under VFCP if they had received relief for similar violations within the past three years. The final amendment eliminates this three-year restriction.

The final version of the SCC will require applicants to submit similar information but without the benefit of a no-action letter from EBSA. A key component in the SCC is the requirement for employers to provide specific data to EBSA through a notice and to sign a penalty of perjury statement as part of the documentation. This contrasts with the IRS’ Self-Correction Program (SCP) under EPCRS, which operates anonymously and only requires plan administrators to

follow certain correction methods and maintain appropriate documentation. While EBSA's final version of the SCC offers an additional correction option, its lack of anonymity may deter some potential participants.

## Next Steps

The final amendments to the VFCP and PTE 2002-51 are effective March 17, 2025, which is 60 days after publication in the *Federal Register*. Visit [ascensus.com](https://ascensus.com) for the latest developments.

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