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DOL to Allow Self-Correction of Late Deposits of 401(k) Plan Deferrals and Loan Repayments

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On November 18, 2022, the DOL released proposed text for a revised Voluntary Fiduciary Correction ("VFC") Program and related prohibited transaction exemption ("PTE") 2002-51. The most significant aspect of the revised VFC Program is that employers would be permitted to self-correct certain late deposits of participant deferrals or loan repayments under the VFC Program.

Late deposits are one of the most common compliance issues for 401(k) plan sponsors and have long been a key enforcement priority of the Department of Labor. While there is a safe harbor for small employers (100 or fewer 100 employees) to deposit contributions within 7 business days of the related payroll date, large employers are required to deposit contributions as soon as administratively feasible, which means that a compliance issue may result whenever contributions are deposited outside of the normal schedule.

Late deposits have been the most common failure corrected through the VFC Program, which did not include any self-correction component ("SCC") before these revisions. Late deposits may also be corrected outside of the VFC Program, but the VFC Program provides certainty that the corrections are properly completed. Further, late deposits outside of the VFC Program are still subject to excise taxes and must be reported on the Form 5500 filing for the plan. The excise taxes are nominal in many cases, but there is no specific minimum threshold for filing an excise tax return.

Under the revised VFC Program, companies will be permitted to use the new SCC for certain late deposit failures that meet the conditions described below and rely on the other VFC Program changes once the Office of Management and Budget approves the DOL's revised information collection (which will be announced in a subsequent DOL publication). Late deposits that are corrected through SCC will also qualify for excise tax relief under PTE 2002-51, which is being amended at the same time. However, corresponding changes to PTE 2002-51 cannot be relied upon until they are finalized in subsequent guidance.

The new SCC will be available to plans of all sizes with unlimited frequency, but only if the following requirements are met:

- Total lost earnings for the failure cannot exceed $1,000 or less per correction.
- Delinquent contributions or loan payments must have been remitted to the plan within 180 days after the date of withholding or receipt.
- The lost earnings correction amount must be computed using the DOL's VFCP calculator using the actual date of withholding or receipt (rather than the earliest date on which the amounts could feasibly have been remitted) as the loss date.

- The company must complete an “SCC Retention Record Checklist” (which includes signing a penalty of perjury statement), prepare or collect certain documents, and provide the checklist and required documentation to the plan administrator (which is required to treat the documents as plan records for purposes of complying with ERISA’s record-retention requirements).
- The company must file an electronic notice with the DOL containing certain limited information about the correction, which will generate an automated acknowledgement from the DOL.

Late deposits that do not meet these requirements can still be corrected through a filing made under the VFC Program as before.

Similar to a compliance statement under existing VFC Program corrections, compliance with the SCC program will result in protection from civil monetary penalties and civil enforcement actions from the DOL. However, the DOL reserves the right to investigate whether self-correction properly occurred.

The proposed VFC Program revisions also include a variety of clarifications, updates, and miscellaneous edits to the correction procedures for this and several other types of fiduciary failures.