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DOL Finalizes VFC Program Self-Correction Component for Late Deposits and Loan Failures

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On January 14, 2025, the US Department of Labor ("DOL") released a final regulation revising its Voluntary Fiduciary Correction ("VFC") Program and related prohibited transaction exemption ("PTE") 2002-51 to add a Self-Correction Component ("SCC"). Effective March 17, 2025, this rule modifies and finalizes changes that were originally proposed in 2022. The 2022 proposed regulation is discussed in our prior blog post. The final regulation also updates the VFC Program to offer a self-correction program for participant loan failures as required by the SECURE 2.0 Act.

Since 2006, the VFC Program has allowed for the correction of certain types of fiduciary breaches under specified correction approaches. Upon completion of the VFC Program, the DOL issues a "no action" letter confirming that it will not pursue penalties for the fiduciary breaches that have been corrected. In addition, certain corrections made through the VFC Program may qualify for excise tax relief if they meet the conditions of PTE 2002-51, which provides a prohibited transaction exemption. Unlike the Employee Plans Compliance Resolution System ("EPCRS"), the IRS's voluntary correction program for retirement plans, which applies a principles-based correction approach with some safe harbor correction methods, the VFC Program only allows for certain types of fiduciary breaches to be corrected, and these may only be corrected under specified correction procedures. Further, until this amendment, the VFC Program has not included a self-correction option like the Self-Correction Program under EPCRS, although many fiduciaries have elected to correct fiduciary breaches without DOL approval outside of the VFC Program.

The revised VFC Program includes two new opportunities to correct under the SCC. First, failures to timely transmit participant contributions and loan repayments to a retirement plan (after those amounts have been withheld from paychecks) may be eligible for self-correction, as provided under the 2022 proposed regulation. Second, in recognition of the SECURE 2.0 Act's mandate to expand self-correction programs, eligible inadvertent loan failures (loan failures that can be self-corrected under EPCRS) may now also be self-corrected under the VFC Program. The SCC of the VCP Program is limited to these failures and does not represent a general expansion of self-correction.

Further, unlike the IRS's Self-Correction Program under EPCRS, the SCC of the VFC Program still requires fiduciaries to file an electronic notice (called an "SCC notice") to be submitted to the DOL under the VFC Program website to inform the DOL of the notice. The DOL discussed that the SCC notice is intended to monitor usage of the SCC to assess whether any changes to the program are appropriate.

Further, while correcting under the VFC Program and submitting an SCC notice provides relief similar to a no-action letter, the DOL reserves the right to conduct an investigation as to whether facts set forth in the SCC were truthful and complete and whether the corrective action was actually taken. To this end, as part of a correction under SCC, the fiduciary 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).

Late deposits of participant contributions and loan repayments must be limited to failures that result in $1,000 or less in interest on the late deposits and must be corrected within 180 days of the due date, which is similar to the conditions that apply for excise tax relief under PTE 2002-51. Further, the DOL reiterated its position that because the VFC Program requires that fiduciaries pay all costs of correction, lost earnings (interest) on late deposits must be funded by the employer and cannot be paid out of forfeitures held in a plan.