

Department of Labor Proposes New Self-Correction Option for Retirement Plan Prohibited Transactions

The U.S. Department of Labor (the DOL) has proposed an update to its voluntary fiduciary corrections program that, although very limited, will make it easier for fiduciaries to correct some compliance errors in retirement plans that are subject to the Employee Retirement Income Security Act of 1974, as amended (ERISA). The proposal is an amendment to the DOL's Voluntary Fiduciary Correction Program (the VFCP) for plan fiduciaries and plan sponsors to correct certain ERISA prohibited transactions and the associated prohibited class exemption, PTE 2002-51. Under the current iteration of the VFCP, prohibited transactions may only be corrected through a formal filing with the DOL. In a long-awaited move, the newly-proposed VFCP program includes a self-correction process.

The new self-correction process would apply to one of the most common compliance problems for 401(k) and 403(b) plans; the late deposit of contributions and loan repayments, which is a high priority for the DOL's enforcement efforts. The ERISA regulations provide that employee contributions and loan repayments to retirement plans must be deposited into the plan as soon as it is administratively feasible to do so, following the contributions being withheld from an employee's paycheck, but in no event later than the 15th business day of the month following the month in which the amounts are withheld from the participant's paycheck. A safe harbor is available for a plan with fewer than 100 participants – the plan is deemed to satisfy the regulations if they deposit employee contributions to the plan within seven business days following being withheld from pay.

Under the current rules, late contributions and loan repayments, regardless of the amount involved, can only be corrected with a formal filing with the DOL under the VFCP, which has been a sore spot for retirement plan sponsors and practitioners. Despite not being recognized by the DOL as a proper correction method, retirement plan sponsors and practitioners often choose to self-correct the issue without formally filing with the DOL, despite the DOL's requirements.

However, the proposal has several limitations, which, if adopted as part of the final rule, will make it unlikely for many retirement plan fiduciaries and sponsors to utilize the self-correction process. The proposal limits self-correction to the correction of late deposits that were deposited into the plan within 180 days of when they should have been deposited and to situations in which the lost earnings that must be repaid to the plan due to late deposits are less than \$1,000. In addition, the proposed self-correction process requires the plan official performing the corrective action to file a notice with the DOL informing them of the correction. This requirement stands in contrast to the Internal Revenue Service compliance mechanisms in place for retirement plan compliance issues, under which most errors can be self-corrected without a notice being provided to the government.

The DOL expects the proposed changes to become effective shortly after the U.S. Office of Management and Budget approves them.



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