AMERICAN RETIREMENT ASSOCIATION

4401 N. Fairfax Drive | Suite 600 | Arlington, VA 22203
P 703.516.9300 | F 703.516.9308 | info@usaretirement.org | usaretirement.org

Working for America's Retirement

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Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave., NW
Room N-5655
Washington, DC 20210
via Federal rulemaking Portal at www.regulations.gov

Re: Proposed Amended and Restated Voluntary Fiduciary Correction Program
RIN 1210-AB64

Dear Department of Labor,

The American Retirement Associatierrors and pleased to provide our comments on the Department of Labor's (Department's) Proposed Amended and Restated Voluntary Fiduciary Correction Program (Proposal).[1] ARA believes the Proposal will promote more efficient and less costly corrections of fiduciary breaches by encouraging voluntary compliance by plan sponsors, incentivize timely correction of errors, and improve economic efficiency by reducing complexity and burdens on plan sponsors. This letter is a resubmission of our January 20, 2023, letter on the Proposal[2] revised to address specific questions related to the SECURE 2.0 Act of 2022[3], which caused the Department to reopen the comment period (Reopening).[4] ARA thanks the Department for the opportunity to provide input on these important matters.

The ARA is the coordinating entity for its five underlying affiliate organizations which represent the full spectrum of America's private retirement system: the American Society of Pension Professionals and Actuaries (ASPPA), the National Association of Plan Advisors (NAPA), the National Tax-Deferred Savings Association (NTSA), the American Society of Enrolled Actuaries (ASEA), and the Plan Sponsor Council of America (PSCA). The ARA's members include organizations of all sizes and industries across the nation who sponsor and/or support retirement saving plans and are dedicated to expanding on the success of employer sponsored plans. In addition, ARA has nearly 36,000 individual members who provide consulting and administrative services to sponsors of retirement plans. ARA and its underlying affiliate organizations are diverse but united in their common dedication to the success of America's private retirement system.

Summary

The ARA shares the Department's objective of safeguarding the interests of participants and beneficiaries in retirement savings plans. The ARA and its underlying affiliate organizations support of the principle that informs the Proposal: when retirement plan sponsors and officials are

[1] 87 Fed. Reg. 71164 (Nov. 21, 2022).
[2] https://araadvocacy.org/wp-content/uploads/2023/02/23.01.20-ARA-Comment-Letter-to-DOL-Voluntary-Fiduciary-Correction-Program.pdf
[3] The *SECURE 2.0 Act of 2022* is Division T of the Consolidated Appropriations Act of 2023.
[4] 88 Fed. Reg. 9408 (Feb. 14, 2023).

afforded the chance to identify and correct certain transactions and retirement plans are brought back into compliance with ERISA, plans and participants are better off. This principle ultimately supports the goal of ensuring participants' retirement savings are secure and continue to accumulate on a tax-preferred basis. The ARA thanks the Department for its efforts to improve and expand the Voluntary Fiduciary Correction Program (VFCP). As discussed in more detail below, ***the ARA believes:***

1. **The addition to the VFCP of a self-correction component for certain errors would be a welcome improvement.**
2. **The $1,000 limit on lost earnings should be increased to make self-correction under the VFCP more feasible for more plans.**
3. **The time limit for correction of delinquent participant contributions or loan repayments should be extended from 180 days to the due date for filing the Form 5500 for the year in which the error occurred.**
4. **The retention record checklist should not be required to be submitted under penalty of perjury.**
5. **Additional requirements for using the VFCP should not be imposed on fiduciaries of small plans.**
6. **The VFCP could be better coordinated with the Internal Revenue Service's (IRS') Employee Plans Compliance Resolution System (EPCRS).**
7. **The Department should expand the online calculator under the VFCP to include excise tax amounts, coordinating with the Department of the Treasury/IRS as necessary.**
8. **The Department should amend VFCP to provide that participant loan failures self-corrected under EPCRS be considered to meet the requirements of VFCP.**

Discussion

Self-Correction of Delinquent Participant Contributions and Loan Repayments

The ARA applauds the proposed addition of a self-correction option for delinquent participant contributions and loan repayments. We commend the Department for proposing to allow plan sponsors to self-correct and notify the Department in lieu of filing a full VFCP application. The ARA believes that the ability to correct errors on a voluntary basis enhances compliance and supports employers' interest in sponsoring retirement programs for their employees. The ARA believes that encouraging the full correction of certain breaches of fiduciary responsibility and the restoration to participants' and beneficiaries' accounts of losses resulting from those breaches ultimately serves plan participants and beneficiaries.

Restriction of VFCP Self-Correction to Lost Earnings of $1,000 or Less

The self-correction component under the VFCP (SCC) will be available for correction of late contribution errors only when the "lost earnings" amount due to the plan is $1,000 or less, thus allowing quicker correction of smaller errors. The ARA recognizes that, for prudential reasons, a fiduciary self-correction program should generally be limited to relatively minor errors. However,

we are concerned that by restricting the availability of self-correction to situations when lost earnings are $1,000 or less, the Department may preclude larger plan sponsors from accessing the program. We believe that if the Department implements a self-correction program, both large and small plan sponsors should have the opportunity to use it.

As an example, an ARA member cites the recent experience of a larger client that inadvertently delayed funding of employee salary deferral contributions by one business day, due to an illness of the clerk that normally processes such contributions. Instead of contributing employee salary deferrals for a single January 2022 payroll period on the specified payroll date, the company funded the contributions on the next following business day. However, the total delayed 401(k) contribution was almost $16 million for the pay period, triggering an initial calculation of lost earnings of just over $1,300. And because the delayed funding spanned a weekend, the revised, complete lost earnings calculation totaled over $5,300.

In this situation, on advice of legal counsel, the client filed with the Department under the VFCP and later received a "no action" letter from the Department. However, the client's legal costs relating to the VFCP filing were significantly greater than the cost of funding the lost earnings. Further, the fact pattern triggering this VFCP filing was relatively routine—a minor one-business-day delay in funding regular 401(k) contributions, due to circumstances largely outside the employer's control. Had the Proposal's changes been in effect at the time of this VFCP filing, self-correction would appear to have been an appropriate and cost-effective approach to resolving the problem. However, had the proposed $1,000 cap on lost earnings applied, this client would not have been eligible for the SCC.

ARA respectfully suggests that the Department consider a material increase in this cap on lost earnings such that larger employers are not precluded from using the program simply because of the scale of their plans' regular transactions. Additionally, the ARA is concerned that a $1,000 cap may rapidly become too restrictive if it is not subject to cost-of-living adjustments. The ARA recommends the Department set a materially higher fixed dollar cap (of at least $2,500, indexed for inflation) and/or provide an alternative cap, scaled to a small percentage of total plan assets. The ARA believes this change would allow larger employers to use the SCC without compromising the objective of efficient correction of relatively minor fiduciary errors.

Extend Time Limit for Self-Correction

The ARA recommends that the Department of Labor extend the eligibility for the SCC to include delinquent participant contributions or loan repayments remitted to the plan from 180 days to the due date for filing the Form 5500 for the year in which the breach occurred. We believe that the proposed 180-calendar-day requirement is too restrictive, especially for small plans where the failure to timely contribute participant salary deferrals is most likely discovered after the end of the plan year, when contributions and deposits are reconciled by a plan service provider. Delinquent contributions in small plans are usually limited to smaller amounts and we believe that they should be correctable without active engagement by the Department. Allowing additional time to discover and correct these delinquent contributions will assist plan sponsors seeking to remedy defects at the time when they typically are discovered by encouraging a faster and cost-effective correction method.

Retention Record Checklist

Under the Proposal, in order to use the SCC, each fiduciary seeking relief would have to sign a statement under penalty of perjury that they have reviewed all the documentation required in the SCC retention record. The documents required under the checklist include a brief statement explaining why participant contributions and loan repayments were not submitted timely and describing practices put in place to prevent a reoccurrence. In the day-to-day operation of plans, there may be breakdowns in contribution remission processes which are caused by multiple factors that could involve the plan sponsor, payroll provider, third party administrator, record keeper, trustee, or others. While the ARA understands the Department's need to understand where a compliance problem occurred and the measures taken to prevent it from recurring, we recommend that Appendix F materials not be subject to a penalty of perjury statement in order to avoid a chilling effect that such a statement could have on utilization of the SCC, recognizing the litigiousness of current times. We are concerned that such a requirement would deter fiduciaries or others who might otherwise seek to take advantage of the SCC from doing so.

Criteria for Small Plans

The Proposal specifically seeks comments regarding whether the SCC should incorporate additional protections for pension plans that are classified as small based on their participant population, such as limiting the participation of small plans to only those whose plan sponsors comply with the safe harbor standard in 29 CFR 2510.3–102(a)(2) for the timely handling of participant contributions. The ARA strongly disagrees that any additional requirements should be imposed upon the fiduciaries of small plans. Such additional requirements may have a chilling effect on use of the SCC by small plan fiduciaries, which does not support the objectives of the Department or the industry.

Coordination of VFCP and EPCRS

We believe that the VFCP could be further improved by coordinating certain program elements with the IRS' EPCRS in the following ways:

- Remove requirement to report to EBSA under the SCC. Self-correction under the EPCRS does not require notice to IRS. The VFCP likewise should permit correction of eligible transactions without requiring reporting to the Department, particularly when the transactions are reported on the Form 5500.
- Adjust de minimis threshold for corrective distributions. Under the EPCRS, corrective distributions to a participant or beneficiary are not required if the amount of the distribution is $75 or less and reasonable direct costs of processing and delivering the corrective distribution would exceed the amount of the distribution. The Proposal similarly prescribes a de minimis amount of $35, where distribution is not required if the former employee or beneficiary no longer has an account balance in the plan and the cost of making the distribution exceeds the corrective amount. In addition, the Proposal requires that the applicant contribute to the plan the total amount not distributed to such individuals as

de minimis corrections. The ARA believes that the de minimis amount under the VFCP should be increased to mirror the limit under the EPCRS.

- Synchronize corrective options for overpayments with EPCRS. Department interpretive guidance addresses fiduciary duties in the context of recovery of erroneous payments.[5] Updated EPCRS guidance provides options for recoupment of overpayments. We recommend changes to integrate VFCP provisions with EPCRS relating to correcting overpayments from defined benefit pension plans such that corrective options for overpayments are the same under both EPCRS and VFCP. Further, SECURE 2.0 amended ERISA and the Code to provide relief for the recovery of inadvertent overpayments and to impose limitations on how plan fiduciaries may proceed with the recovery of inadvertent overpayments. To the extent the IRS amends EPCRS to incorporate these changes into EPCRS, we recommend that the DOL clarify that no reporting is required under VFCP for the fiduciary decision on actions with respect to overpayments because of the SECURE 2.0 changes and EPCRS provides adequate guidance on whether the overpayment was inadvertent and whether required procedures were in place.
- De minimis overpayment amounts. The IRS has established that plan administrators are not required to seek return of overpayments that are at or below a de minimis threshold of $250. This limit should also be incorporated into the VFCP.

Excise Tax Calculation

The Proposal limits use of the SCC to applicants who use the online calculator to determine lost earnings. The ARA supports this provision because the online calculator provides a straightforward method for making these determinations. We believe that the online calculator, already in use under the VFCP for lost earnings calculations, provides accuracy, ensures consistency, and provides efficiencies to both the Department and plan sponsors. The ARA believes that the VFCP process similarly would be improved by inclusion of an online excise tax calculator as part of the VFCP. We recognize that the Department of the Treasury retains the authority for calculations of excise tax[6] and we urge the Department to coordinate with the Treasury Department to develop such a calculator.

Amend for SECURE 2.0

The Reopening document specifically seeks comments regarding how the VFCP should be modified in the future to implement the new deeming provision in SECURE 2.0, Section 305(b)(2). ARA agrees with the example suggested by the Department that Section 7.3 of the Proposal be amended to include a specific paragraph treating items self-corrected under the EPCRS as meeting the requirements of the VFC Program. Specifically:

[5] Advisory Opinion 77-08 (April 4, 1977).
[6] In 2002, excise tax relief under the VFCP was determined by the Department to be appropriate for certain transactions (PTE 2002-61, 67 Fed. Reg. 15062 (Mar. 28, 2002)) and on the same day, the IRS announced a nonenforcement policy that it would not seek to impose the excise tax for transactions covered by the exemption where all conditions for exemptive relief were met. IRS Announcement 2002-31, 2002-15 IRB 747 (Mar. 28, 2002).

- ARA recommends restating Section 7.3(a)(iii)(2) and (b)(2) to remove the requirement to obtain IRS approval under the Voluntary Correction Program using language similar to the following "Plan Officials must make a voluntary correction of the loan under the IRS' Employee Plans Compliance Resolution System as amended in accordance with SECURE 2.0 section 305(b) (EPCRS) for a similar loan failure eligible under EPCRS".
- ARA recommends restating Section 7.3(a)(iii)(3) and (b)(3) to remove the requirement to provide proof of payment and an IRS compliance statement (and in accordance with our recommendation to coordinate the VFCP and EPCRS above) using language similar to "the applicant is not required to submit any supporting documentation unless otherwise requested by the EBSA."
- ARA further recommends amending Section 2 to provide that the EBSA will not initiate a civil investigation or assess civil penalties for these corrections by adding a new section (a)(3) using language similar to "*Effect of correction under EPCRS.* If the corrector satisfies the requirements of section 7.3 and corrects a Breach, as defined in section 3, EBSA will not initiate a civil investigation under Title I of ERISA regarding the corrector's responsibility for the Breach or assess civil penalties. Any relief afforded by correction under it is limited to the Breaches described in section 7.3 of the Program."

The Reopening document specifically seeks comments regarding whether the VFC Program imposes additional reporting or other procedural requirements for these specific corrections. The ARA does not believe that any additional reporting or procedural requirements should apply to these corrections. The IRS Self-Correction Program does not require reporting to the IRS and consistency between the programs will reduce complexity and burden on plan sponsors. Further, considering these failures relate only to loans to plan participants (who are parties in interest based solely on their status as employees of an employer sponsoring the plan), improving economic efficiency and reducing complexity of participant loan programs which are believed to encourage plan participation is consistent with the purposes of the Department and SECURE 2.0.

The Reopening document specifically seeks comments regarding whether changes are needed to PTE 2002-51 to implement SECURE 2.0 section 305(b)(2). The ARA does not believe any further amendments are required.

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The ARA very much appreciates the Department's commitment to safeguarding America's workers' interests in their workplace retirement savings plans. The ARA shares this goal and would welcome the opportunity to discuss our comments further with you. Please feel free to contact Allison Wielobob, General Counsel, at AWielobob@USARetirement.org or (703) 516-9300.

Thank you for your time and consideration.

Sincerely,

/s/

Brian H. Graff, Esq., APM
Executive Director/CEO
American Retirement Association

/s/

Allison Wielobob
General Counsel
American Retirement Association