THE ERISA INDUSTRY COMMITTEE
Shaping benefit policies before they shape you.

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Submitted Electronically

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Attention: Amendment and Restatement of Voluntary Fiduciary Correction Program
RIN 1210-AB64

To Whom It May Concern:

The ERISA Industry Committee (ERIC) is pleased to respond to the request of the Department of Labor (DOL) for comments on its amended and restated Voluntary Fiduciary Correction Program (VFCP or Program) as published in the Federal Register on November 21, 2022. ERIC is a national advocacy organization that exclusively represents large employers that provide health, retirement, paid leave, and other benefits to their nationwide workforces. Our member companies are leaders in every sector of the economy, with stores, warehouses, factories, and operations in every state. ERIC is the voice of large employer plan sponsors on public policies impacting their ability to sponsor benefit plans for active and retired workers, as well as their families. Our member companies tailor retirement, health, and compensation benefits to meet the unique needs of their workforces. We have a strong interest in policies that enhance the ability of large employers to provide effective and cost-efficient retirement and health care programs to millions of workers, retirees, and their families. As such, ERIC has a vested interest in the VFCP and is well-positioned to provide helpful information from the perspective of large plan sponsors most affected by the VFCP.

ERIC supports the DOL's latest updates to the VFCP. The amended and restated Program includes a number of constructive and significant enhancements to the correction guidance for pension and welfare benefit plans. These include the new "Self-Correction Component" (SCC) for delinquent participant contributions and loan repayments to pension plans, updates to the original covered transactions, and clarifications of the Program's eligibility criteria. We also support the DOL's proposed amendments to Prohibited Transaction Exemption 2002-51, including the removal of the three-year "frequency of use" limitation on the use of that exemption. ERIC appreciates the DOL's efforts to update the VFCP to provide plan sponsors and related fiduciaries with expanded opportunities to correct fiduciary breaches.

Comments on New Self-Correction Component

With respect to the new Self-Correction Component of the VFCP for delinquent participant contributions and loan repayments to pension plans, ERIC recommends:

- **Increase the cap on "Lost Earnings."** The amended and restated Program limits the availability of the SCC to situations where the amount of "Lost Earnings" (*i.e.*, the approximate amount that would have been earned by the plan on the principal amount of the breach, but for the breach) is $1,000 or less (excluding any applicable excise tax). This limitation appears unduly restrictive. While the preamble states that the SCC is available to any pension plan regardless of the size of that plan's participant population or amount of plan assets and that 74% of all current submissions would be eligible for SCC with this limit in place, we believe that this limit directly correlates to the size of the plan's population and amount of assets. Specifically, by virtue of their large numbers of plan participants and geographically dispersed operations and payroll centers, large employers could easily experience a fiduciary breach (e.g., a single payroll run) resulting in Lost Earnings in excess of $1,000 and should have the same opportunity to use the SCC as smaller employers. Furthermore, the application of this limit could result in otherwise eligible submissions being bifurcated simply to skirt this limit, which seems unduly restrictive and burdensome. We urge the DOL to increase the Lost Earnings limitation to $10,000.[1]

- **Extend the permissible correction period.** The amended and restated Program requires, as a condition to using the SCC, that the delinquent participant contributions or loan repayments be remitted to the plan no more than 180 calendar days from the date of withholding or receipt. Many employers (large and small) audit their participant contribution and loan repayment practices on an annual basis as part of the annual Form 5500 filing. To the extent such audits uncover previously undetected delinquent participant contributions or loan repayments, we believe the employers should have the ability to use the SCC to correct the breach. Extending the permissible correction period from 180 to 365 calendar days from the date of withholding or receipt would allow for such corrections.

- **Notice requirement.** The amended and restated Program requires a self-corrector to notify the DOL of participation in the SCC by submitting an SCC notice through the online VFCP web tool, after which the DOL will acknowledge receipt of a properly completed and submitted SCC notice in an email. We note that the Internal Revenue Service (IRS) does not impose a notice requirement on employers relying on the self-correction component of the Employee Plans Compliance Resolution System (EPCRS),

[1] Lost earnings on the principal amount may also vary over time in relation to changes in the underpayment rates in Section 6621(a)(2) of the Internal Revenue Code. For example, the underpayment rates have more than doubled in the past year alone, rising from 3% in the first quarter of 2022 to 7% in the first quarter of 2023. Table of Interest Rates, at https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/correction-programs/vfcp/table-of-underpayment-rates. This will result in inconsistency and confusion as the same principal amount may or may not be eligible for SCC at different points in time.

and we question why the SCC needs to include a notice requirement. Employers who self-correct under EPCRS understand they need to retain records sufficient to document the self-correction in the event of a future IRS audit. The SCC, as described in the amended and restated Program, requires substantial documentation that would be available in the event of a future DOL audit. While submitting a SCC notice electronically would not appear to be a significant burden, we are concerned that it could be a disincentive to using the SCC, particularly if such notices become the basis for follow-up investigations by the DOL (see our next comment below). Alternatively, should the DOL determine that a notice is essential, we urge the DOL to provide guidance on whether and how sponsors and their related fiduciaries should report their use of the SCC on Schedule H Line 4a of the Form 5500 (or Schedule I for small plans).

- **Frequency of use.** ERIC supports the DOL's decision <u>not</u> to impose a frequency limitation on the use of the SCC. As the DOL notes in its preamble, a frequency limit could unintentionally create disincentives to use the SCC and the VFCP generally. We note in this regard, however, that the DOL's statement in the preamble that "*the Department will be monitoring for frequent use of the SCC and may communicate with repeat users or open investigations to identify and correct systemic issues leading to repeated failures to transmit participant contributions in a timely fashion*" could have a similar disincentive effect. If the DOL retains the notice requirement for usage of the SCC, and monitors such usage, we encourage the DOL to provide further guidance as to the level of usage of the SCC that is likely to generate follow-up inquiries from the DOL.

- **Changes to Prohibited Transaction Exemption (PTE) 2002-51.** ERIC also supports the DOL's decision <u>to remove the current</u> restriction limiting reliance on the PTE to once every three years for similar types of transactions. However, the DOL should simplify the proposed conditions of the PTE for the SCC. To encourage greater use of the SCC, the PTE should not require payment to the plan of the amount of the excise tax that otherwise would be imposed by Section 4975 of the Internal Revenue Code in order for the exception to Sections IV.A and B to apply. Particularly if the DOL does not increase the cap on Lost Earnings, the excise tax is likely to be so small that the costs of allocating to individual participants could outweigh any benefit to participants.

<u>Comments Requested by the DOL</u>

In its preamble to the amended and restated Program, the DOL requested feedback on whether the Program should be expanded in certain respects.

- **Missing participants and beneficiaries.** The DOL requested comment on whether it should expand the VFCP to include a transaction for correction of failures to comply with obligations related to missing participants and beneficiaries. ERIC wholeheartedly endorses including such a transaction in the VFCP. The large employers who are members of ERIC focus on tracking their plan participants and beneficiaries and ensuring that benefit payments commence on a timely basis. While there are times when failures to timely commence benefits occur through no fault of the employer (*e.g.*, when participants or beneficiaries fail to complete and submit benefit election forms), when such failures occur as a result of an employer oversight, our members would appreciate the opportunity to correct such failures under the VFCP. Moreover, since the correction procedures for failures to commence benefit payments on a timely basis are well established and standardized, we believe the SCC could be expanded to allow for these to occur on a self-correction basis.

- **Coordination with EPCRS.** Under the current VFCP, plan loans that do not comply with plan provisions incorporating the requirements of Section 72(p) of the Internal Revenue Code can be corrected by voluntarily correcting the loan with IRS approval under the Voluntary Correction Program of EPCRS. The DOL has noted that EPCRS now allows plan loan transactions to be corrected under the Self-Correction Program component of EPCRS and has asked whether there should be a corollary self-correction component for plan loans under the VFCP. We recommend that the SCC be expanded to include self-corrections of plan loans in accordance with the Self-Correction Program component of EPCRS. In fact, this is now required as a result of the *SECURE 2.0 Act of 2022* (SECURE 2.0), discussed in more detail below.

  The DOL has further noted that EPCRS includes recently expanded corrections for benefit overpayments from defined benefit (DB) pension plans. We recommend that the VFCP be expanded to include a transaction for correcting overpayments from DB pension plans in accordance with the EPCRS guidelines for such corrections. However, as noted below, any such expansion should also consider the impact of the recently enacted SECURE 2.0.

  The enactment of SECURE 2.0 as part of the *Consolidated Appropriations Act of 2023* creates additional opportunities for expanding and improving both EPCRS and the VFCP:

  - ***Inadvertent benefit overpayments.*** Section 301 of SECURE 2.0 amends ERISA[2] to provide that a plan fiduciary will not be considered to have failed to comply with the requirements of Title I of ERISA merely because the fiduciary determines, in the exercise of its discretion, not to seek recovery of "inadvertent benefit overpayments" from any participant or beneficiary, any plan sponsor or contributing employer, or any other plan fiduciary under the circumstances set forth in that section. Section 301 also permits plan fiduciaries to recover inadvertent benefit overpayments by reducing future benefit payments to or seeking repayment from the affected participant or beneficiary (in each case subject to the restrictions set forth in that section) or by seeking recovery from the person or persons responsible for the overpayment.

[2] Section 301 adds a new subsection (h) to the end of Section 206 of ERISA.

Section 301 of SECURE 2.0 also amends the Internal Revenue Code[3] to provide relief from the plan qualification requirements for failures to recover inadvertent benefit overpayments and for plan amendments to increase past or decrease future benefit payments in order to adjust for prior inadvertent benefit overpayments. The Internal Revenue Code amendments, like the ERISA amendments, allow plan fiduciaries to recover inadvertent benefit overpayments by reducing future benefit payments to the affected participant or beneficiary or by seeking recovery from the person or persons responsible for the overpayment.

These new statutory provisions expand upon the DOL's prior guidance regarding benefit overpayments in Advisory Opinions 77-07, 77-32A, 77-33 and 77-34, and expand upon the IRS's current EPCRS correction procedures for DB pension plan overpayments. We encourage the DOL to allow the use of the VFCP, and in particular the SCC, to address inadvertent benefit overpayments in accordance with SECURE 2.0's amendment of ERISA. While we do not believe it should be necessary to report a fiduciary decision not to recover an inadvertent benefit overpayment from a participant or beneficiary (as such non-recovery is now specifically permitted under ERISA), we understand the DOL will expect actions taken to recoup inadvertent benefit overpayments to comply with SECURE 2.0's restrictions on such actions. To the extent the IRS amends EPCRS to incorporate SECURE 2.0's amendment to the Internal Revenue Code for inadvertent benefit overpayments, we encourage the DOL to coordinate its VFCP guidance (via the SCC) with such EPCRS changes.

- ***Expansion of EPCRS.*** Section 305 of SECURE 2.0 directs the IRS to amend EPCRS to permit self-correction of any "eligible inadvertent failure"[4] at any time, unless (1) the IRS identifies the failure before actions demonstrating a specific commitment to implement the self-correction are taken, or (2) the self-correction is not completed in a reasonable period after the failure is identified. With respect to plan loan failures that are "eligible inadvertent failures," Section 305 directs that the IRS permit self-correction under EPCRS, and directs the DOL to treat such self-corrections in accordance with EPCRS as meeting the requirements of the VFCP. Section 305 permits the DOL to impose reporting or other procedural requirements with respect to parties who wish to rely on the VFCP for such self-corrections.

  At a minimum, given the directive of Section 305 of SECURE 2.0, the DOL should expand the SCC to include self-correction of plan loan failures in accordance with EPCRS. DOL should also expand the SCC for other "eligible inadvertent failures" as

3 Section 301 adds a new subsection (aa) to the end of Section 414 of the Internal Revenue Code.

4 An "eligible inadvertent failure" is defined as a failure that occurs despite the existence of practices and procedures which—
(A) satisfy the standards set forth in section 4.04 of Revenue Procedure 2021–30 (or any successor guidance), or
(B) satisfy similar standards in the case of an individual retirement plan.
The term does not include any failure which is egregious, relates to the diversion or misuse of plan assets, or is directly or indirectly related to an abusive tax avoidance transaction.

soon as practicable after the IRS has had an opportunity to provide further guidance on the meaning of "eligible inadvertent failures" and how such failures can be self-corrected under EPCRS.

- **Electronic applications.** The DOL has asked whether it should permit or require VFCP applications to be submitted electronically. ERIC believes allowing plan sponsors flexibility in the method of submission would enhance the effectiveness of the Program.

- **Pre-audit compliance program.** The DOL has asked whether it should introduce a pre-audit program similar to the IRS's pre-audit compliance pilot program for retirement plans. Under that pilot program, the IRS will send a pre-audit letter to plan sponsors whose retirement plans have been selected for audit, giving the sponsor a 90-day period to review the plan's documents and operations to determine if they meet current tax law requirements. If that review reveals mistakes, the plan sponsor may be able to self-correct the mistakes or qualify for a closing agreement with reduced sanctions. ERIC recommends that the DOL introduce a similar pre-audit compliance program in connection with DOL audits of retirement plans. The purposes of the IRS pilot program—to give plan sponsors an opportunity to correct plan errors with no (or reduced) potential sanctions, and to reduce the amount of time and resources that the IRS needs to expend on audits—apply equally to DOL audits and are consistent with the purposes of the DOL's VFCP. The VFCP is an ideal vehicle for allowing corrections in connection with such a pre-audit compliance program.

Conclusion

ERIC applauds the DOL for its proposed enhancements to the Program and appreciates the opportunity to provide comments on the amended and restated Program. We believe additional flexibility and coordination with the IRS' EPCRS will ultimately enhance the ability of plan sponsors to effectively provide benefits for workers and beneficiaries. If you have any questions concerning our comments or if we can be of further assistance, please contact us.

Sincerely,

Andy Banducci