AMERICAN BENEFITS COUNCIL

January 20, 2023

Submitted electronically via www.regulations.gov

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

Re: Proposed Amendments to the Voluntary Fiduciary Correction Program and Prohibited Transaction Exemption 2002-51 (RIN 1210-AB64)

Dear Sir or Madam:

The American Benefits Council ("the Council") appreciates the opportunity to provide comments on the U.S. Department of Labor's (DOL) proposed changes to the Voluntary Fiduciary Correction Program (VFCP) and the corresponding Prohibited Transaction Exemption (PTE) 2002-51 providing excise tax relief for errors corrected through the VFCP.[1]

The Council is a Washington, D.C.-based employee benefits public policy organization. The Council advocates for employers dedicated to the achievement of best-in-class solutions that protect and encourage the health and financial well-being of their workers, retirees and their families. Council members include more than 220 of the world's largest corporations and collectively either directly sponsor or support sponsors of health and retirement benefits for virtually all Americans covered by employer-provided plans.

The Council has long advocated for legislative and regulatory solutions that simplify and streamline employee benefit plan correction procedures and allow more employers to self-correct more types of plan errors. We believe that efficient and flexible correction options encourage retirement plan formation by reducing costs and minimizing administrative burdens.

[1] 87 Fed. Reg. 71,164 (Nov. 21, 2022) and 87 Fed. Reg. 70,753 (Nov. 21, 2022).

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In light of these goals, the Council is writing in support of DOL's proposed amendments to the VFCP and PTE 2002-51. We believe that the proposed amendments will make DOL's correction procedures more efficient and encourage more employers to voluntarily correct plan errors. Additionally, by proposing changes that will eliminate administrative burdens and make corrections less expensive, we believe DOL's proposal will make it more likely for employers to offer retirement plans to their employees.

While the Council is encouraged by the newly proposed self-correction component and the other proposed changes that would expand DOL's existing correction procedures, we also believe DOL can make additional changes to further improve its correction program and the corresponding prohibited transaction relief. Our specific recommendations for improving the proposal are discussed in greater detail below.

THE COUNCIL SUPPORTS DOL'S PROPOSED AMENDMENTS

Support for Expanded Correction Options

The Council supports the proposed changes that would expand the correction options that are available to plan sponsors under the VFCP. In particular, we support the proposed creation of a new self-correction component (SCC) that would be available to correct errors involving delinquent participant contributions and loan repayments. Plan sponsors and their service providers routinely use self-correction procedures under other regulatory regimes, such as the Internal Revenue Service's (IRS) Employee Plans Compliance Resolution System (EPCRS), and we are pleased to see DOL is proposing to recognize self-correction as an option under the VFCP. Furthermore, beyond the proposed SCC, we support all of the other ways in which DOL has proposed to expand the correction options available for certain fiduciary errors not involving delinquent participant contributions and loan repayments.

Support for Amendments Impacting Eligibility

In addition to the new correction options being proposed, the Council supports the pair of exceptions DOL is proposing to add in order to expand the VFCP's existing eligibility requirements. The first proposed exception would create an exception to the existing rule that generally prevents VFCP eligibility when there is any "evidence of potential criminal violations." According to the proposal, in the case of delinquent participant contributions and loan repayments, evidence of a potential criminal violation would not preclude the use of VFCP if: (1) all funds have been repaid; (2) the appropriate law enforcement agency has been notified; and (3) the applicant attests it was not involved in the alleged criminal activity. The second proposed exception would provide a new exception to the existing VFCP eligibility rule that prohibits any plan or applicant from being under investigation. According to the proposal, this prohibition

generally would not prevent a plan service provider from applying for relief on its own behalf with respect to an error involving 10 or more plans, even if one of the plans named in the application is under investigation. In both of these circumstances, we agree that an applicant should not be prohibited from using the VFCP.

Support for Amendments to PTE 2002-51

The Council supports the proposed changes that would expand the availability of PTE 2002-51, including the change that would eliminate the existing condition prohibiting a party from relying on the exemption if it has taken advantage of the relief provided by the VFCP and PTE 2002-51 for a similar type of transaction within the past three years. We agree with DOL's assessment in the preamble to the proposal that this existing limitation is not necessary to promote compliance with ERISA, and we support its removal from PTE 2002-51.

RECOMMENDATIONS FOR ADDITIONAL IMPROVEMENTS

Eliminate or Increase the $1,000 Lost Earnings Limitation

Under the proposal, an applicant is eligible to use the SCC only if the amount of lost earnings (excluding any excise tax paid to the plan under PTE 2002-51) for the "transaction" is $1,000 or less. The Council recommends DOL eliminate – or alternatively, significantly increase – the proposed $1,000 threshold. Delinquent participant contributions are among the most common transactions corrected through the VFCP. If DOL eliminates or increases the $1,000 limitation, this would expand the number of employers that could use the SCC to correct those types of transactions.

If DOL decides to retain the $1,000 threshold (or a similar threshold) in the final procedures, the Council requests clarification on the scope of the "transaction" to which the $1,000 limit applies.

Eliminate the SCC Notice Requirement

As proposed, relief under the SCC would be conditioned on the applicant, after making the necessary correction, using an online web tool to submit a notice to DOL providing certain information about the correction. The information in the notice would include details such as the self-corrector's contact information; the plan name; the plan sponsor's EIN and the plan number; the number of participants affected by the correction; and other information pertaining to the amount of the delinquent participant contribution or loan repayment. The Council recommends DOL eliminate this notice requirement from the final VFCP procedures.

The Council believes this notice requirement is unnecessary because the Form 5500 already requires employers to annually report delinquent participant contributions and loan repayments.[2] Thus, regardless of whether an employer submits a notice through the VFCP web tool, DOL will obtain information about these errors. Additionally, we believe the notice requirement should be removed because it could discourage some employers from using the SCC, contrary to the VFCP's goal of promoting voluntary corrections.

Remove the Additional Contribution to Participants' Accounts Requirement

As currently proposed, an employer using the SCC would be granted relief under PTE 2002-51 only if the employer pays to the plan the amount of the prohibited transaction excise tax that would otherwise be imposed under Internal Revenue Code section 4975. As with the proposed requirement for employers using the SCC to provide notice to DOL (discussed above), the Council is concerned this contribution requirement will discourage some employers from using the SCC. The Council therefore recommends DOL replace the mandatory contribution requirement with an option that would allow employers using the SCC to rely on the relief in PTE 2002-51 by either: (1) providing notice to interested persons, without requiring employers to send copies to an Employee Benefits Security Administration regional office (as is required under existing PTE 2002-51 procedures); or (2) contributing the amount of the applicable excise tax to the plan. This would be very similar to the existing conditions for fiduciaries making corrections when the excise tax would be $100 or less.

Expand the *De Minimis* Exception

The VFCP currently contains a *de minimis* rule under which an employer does not need to make distributions to former employees, their beneficiaries or alternate payees if each would receive a *de minimis* amount as part of the correction and the cost of making the distribution to each individual exceeds the amount of the payment to which the individual is entitled. If this *de minimis* rule applies, then the employer must pay the amount of the correction to the plan as a whole, rather than to each individual. The proposed amendments to the VFCP retain this rule.

The Council recommends expanding the scope of the *de minimis* exception to allow an applicant to correct an error by paying the principal amount – without adjustment for lost earnings – in cases where lost earnings are less than a *de minimis* threshold for an individual (regardless of whether they are a current or former participant or beneficiary). In some cases, especially when corrections are made immediately, the very small amount of lost earnings does not justify the cost involved with calculating the exact amount and allocating it to participant accounts. Expanding the *de minimis*

[2] *See* Form 5500, at Schedule H, Line 4a; Form 5500-SF, at Line 10a.

exception as the Council recommends would address this issue and encourage greater use of the VFCP.

Allow Lost Earnings to be Paid out of a Plan's Forfeiture Account

The proposed VFCP rules provide that no part of a correction amount or costs of correction can be paid from plan assets, including charges against participant accounts or plan forfeiture accounts. The Council recommends DOL modify this restriction to allow the use of a plan's forfeiture account to pay for lost earnings. We believe this modification makes sense because forfeiture accounts generally can already be used to offset employer contributions an employer otherwise owes outside of the VFCP. Allowing lost earnings to be paid out of a plan's forfeiture account would be consistent with the IRS's EPCRS procedures, which allow a plan sponsor to use plan forfeitures to fund corrective allocations in certain circumstances.[3]

Allow Service Providers, Instead of Employers, to Make Corrective Contributions

The Council recommends DOL amend the VFCP to explicitly permit plan service providers – rather than employers – to pay the applicable lost earnings in connection with delinquent participant contributions and loan repayments in situations involving small dollar amounts. We believe this would improve the existing VFCP by addressing circumstances where, in cases involving small amounts of delinquent participant contributions and loan repayments, service providers spend more on efforts to collect lost earnings than the actual amount of the lost earnings. Allowing service providers to pay corrective contributions under these circumstances would help alleviate this issue. The Council also requests that, if DOL implements our recommendation, it also provide any necessary prohibited transaction relief to allow service providers to make such corrective contributions.

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Thank you for the opportunity to provide our views and suggestions. If you have any questions or if we can be of further assistance, please contact me at 202-289-6700 or ldudley@abcstaff.org.

Sincerely,

Lynn D. Dudley
Senior Vice President, Global Retirement and Compensation Policy

[3] *See, e.g.*, Rev. Proc. 2021-30, Section 6.02(4)(c).