January 20, 2023

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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 VFCP and PTE 2002-51**

Dear Sir or Madam:

On behalf of the SPARK Institute, Inc., we are writing in support of the Department of Labor's ("the Department's") proposed amendments to the Voluntary Fiduciary Correction Program ("VFCP") and the corresponding exemption for prohibited transactions that are corrected through VFCP ("PTE 2002-51"). The SPARK Institute supports the proposed amendments because we believe that they will promote the voluntary, timely, and efficient correction of errors.

The SPARK Institute also believes, however, that there are ways that the Department can improve its proposal by expanding the scope of the proposed self-correction component, expanding the approved methods for correcting errors, and eliminating unnecessary administrative requirements. These recommended improvements are discussed in greater detail below.

The SPARK Institute represents retirement plan recordkeepers, mutual fund companies, brokerage firms, insurance companies, banks, consultants, trade clearing firms, and investment managers. Collectively, our member firms administer the retirement plans for over 100 million American workers.

## I. SPARK SUPPORTS PROPOSED AMENDMENTS TO VFCP AND PTE 2002-51

The SPARK Institute appreciates and supports the Department's proposed amendments to VFCP and PTE 2002-51 because the proposed changes will promote the voluntary and timely correction of errors by making those corrections more efficient and less expensive. In this regard, we especially support the proposed changes that would:

- Create a new self-correction component ("SCC") for correcting errors involving delinquent participant contributions and loan repayments, and make corresponding changes to PTE 2002-51;
- Permit service providers to submit bulk VFCP applications on their own behalf, even if one or more impacted plans is under investigation;

- Expand VFCP eligibility so that an "innocent" plan administrator, plan sponsor, or applicant could submit a VFCP application, even when there is evidence of a potential criminal violation by a third-party;
- Eliminate the condition under PTE 2002-51 that currently prevents parties from relying on the exemption if they have, within the previous three years, relied on the exemption to correct a similar type of transaction; and
- Expand the correction options that are eligible for relief through VFCP.

## II. Recommendations for Additional Improvements

### A. Improvements to Proposed Self-Correction Component

***Remove Notice Requirement.*** Although the proposed SCC would eliminate the need to submit a full VFCP application to the Department when correcting delinquent participant contributions and loan repayments, under the proposal, relief would still be conditioned upon the plan notifying the Department and providing detailed information about delinquent participant contributions or loan repayments. The SPARK Institute recommends that the Department remove this specific notice requirement from the final procedures because it duplicates existing notification requirements and will unnecessarily discourage some employers from using the new self-correction option. The Form 5500 already requires employers to annually report the existence and amount of delinquent participant contributions and loan repayments to the Department.[1] We do not see any benefit to reporting this information twice – once when the correction occurs, and again as part of the Form 5500.

***Eliminate or Increase Earnings Limitation.*** According to the proposal, an employer would not be eligible to use the SCC for delinquent participant contributions and loan repayments if the amount of Lost Earnings for the "transaction" exceeds $1,000. The SPARK Institute recommends that the Department eliminate or significantly increase the proposed $1,000 threshold. We believe that, when employers fully and timely correct these types of errors, the SCC should be available, regardless of plan size or the dollar amount involved. Accordingly, we encourage the Department to eliminate or increase the Lost Earnings limitation in an effort to expand the availability of this new and efficient self-correction option.

If the Department retains the $1,000 threshold (or a similar threshold) in its final procedures, we request that the Department clarify the scope of the "transaction" to which the $1,000 limit applies. For example, it is possible that a payroll system error causing delinquent participant contributions could affect multiple payroll periods, each of which could be viewed as a separate transaction. We would be interested to know whether the Department would view each payroll period as a separate transaction.

***Extend Self-Correction Window.*** The proposed SCC would be limited to applicants who remit any delinquent participant contributions or loan repayments no later than 180 days from the date such amounts were received by the employer or the date such amounts otherwise would have been

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

payable to the participant in cash. The SPARK Institute recommends that the Department extend this self-correction deadline to the plan's Form 5500 filing deadline, including extensions. In small plans, it is common for delinquent contributions to be identified by the plan's recordkeeper when reviewing year-end data reported on the Form 5500. We believe that these employers should be permitted to use the new SCC, especially when any corrective contributions are accompanied by Lost Earnings.

B. Improvements to PTE 2002-51 – Remove Additional Contribution Requirement

According to the proposal, the relief provided through PTE 2002-51 would only be available to self-correctors if they pay the amount of the prohibited transaction excise tax to the plan. This contribution requirement would effectively replace the existing requirement under PTE 2002-51 to provide written notices to interested persons and copies to the Employee Benefits Security Administration's ("EBSA's") Regional Offices when using the proposed SCC, instead of correcting through the full VFCP application process. The SPARK Institute is concerned that this proposed contribution requirement will discourage some employers from using the new SCC procedures and make the proposed SCC procedures prohibitively expensive for others. Accordingly, in an effort to further promote timely, voluntary, and efficient corrections, we recommend that the Department eliminate this proposed contribution requirement and permit employers to rely on the relief granted through PTE 2002-51 by either: (a) providing notice to interested persons, without sending copies to EBSA; or (b) contributing the amount of the otherwise applicable excise tax to the plan. If the additional contribution requirement is retained, the exemption effectively will not provide employers relief from the prohibited transaction excise tax. Instead, it will merely change where employers direct these payments.

C. Improvements to VFCP

***Expressly Permit Corrective Contributions by Service Providers.*** In certain circumstances involving small amounts of delinquent participant contributions and loan repayments, we understand that the costs incurred by service providers to collect Lost Earnings from plan sponsors can actually exceed the amount of Lost Earnings. For cases involving these small dollar amounts, we recommend that the Department modify VFCP to expressly permit plan service providers, instead of employers, to pay the Lost Earnings that are attributable to delinquent participant contributions and loan repayments. In connection with such changes, we also request that the Department provide any prohibited transaction relief that is needed to make it possible for service providers to make these corrective contributions.

***De Minimis Errors.*** Under the existing and proposed versions of VFCP, there is a de minimis exception to full correction when a correction requires distribution of a de minimis amount to former employees, their beneficiaries, and alternate payees, and the cost of making the distribution to each individual exceeds the amount of the payment to which each individual is entitled. In that case, relief is available if the applicant pays the correction amount to the plan, instead of distributing such amount to each individual.

A similar issue arises for those plans and providers that are extremely diligent about making

corrections of delayed participant contributions. For example, if a plan or its provider is very conservative and concludes that a delay of only a few days triggers the need for a correction, the Lost Earnings involved can often be extremely small amounts, such as less than $5 for a participant. While we appreciate the need to provide for Lost Earnings, in some cases, the amount involved is so small that it actually discourages plans from making a correction using the Department's procedures, and the cost of calculating and remitting such amounts are not justified by the small dollar amounts involved. Thus, the SPARK Institute requests that the Department expand this de minimis exception so that in the case of Lost Earnings that are less than the de minimis amount for an individual – whether or not they are a current participant or beneficiary – an applicant can correct the error by paying the Principal Amount, without adjustment for Lost Earnings.

***Use of Forfeiture Account.*** We recommend that the Department further amend VFCP to allow the use of a plan's forfeiture account to pay for Lost Earnings. While we appreciate that the Department wants plan sponsors to fund any Lost Earnings, a forfeiture account generally can be used to offset employer contributions that an employer otherwise owes. It makes little sense for an employer to contribute Lost Earnings and then turn around and use the forfeiture account for other employer contributions anyway.

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The SPARK Institute appreciates the opportunity to provide these comments to the Department. If you have any questions or would like more information regarding this letter, please contact the SPARK Institute's outside counsel, Michael Hadley, Davis & Harman LLP (mlhadley@davis-harman.com).

Sincerely,

Tim Rouse
Executive Director