

# Voluntary Fiduciary Correction Program

A Practical Guidance® Practice Note by  
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This practice note describes the Voluntary Fiduciary Correction Program (VFCP) administered by the Employee Benefits Security Administration (EBSA), an agency within the U.S. Department of Labor (DOL). The VFCP offers employers and fiduciaries of employee benefit plans subject to the Employee Retirement Income Security Act (ERISA) the opportunity to self-correct certain delineated fiduciary violations. Applicants can voluntarily apply for EBSA approval of the corrections to avoid certain penalties, excise taxes, and governmental enforcement actions. This practice note sets forth the specific violations covered by the VFCP, methods for correcting violations, including calculation of plan restitution amounts, and describes the VFCP application process.

This practice note will cover the following topics:

- Introduction to the VFCP
- VFCP Eligible Transactions
- VFCP Correction Methods

- VFCP Application Procedures
- VFCP Effect and Limitations
- Related Prohibited Transaction Exemption for IRC Excise Tax Relief

For a checklist on VFCP compliance, see [Voluntary Fiduciary Correction Program Checklist](#). For an IRS discussion on applying the VFCP including examples and documentation requirements, see [IRS, Tax Exempt and Gov't Entities Training: Voluntary Fiduciary Correction of Prohibited Transactions](#). For practice notes on prohibited transactions and their related exemptions, see [Prohibited Transactions](#) and [Prohibited Transaction Exemptions](#). For a practice note and related video on EBSA investigations, see [Benefit Plan Investigations by the Department of Labor](#) and [Department of Labor Employee Benefit Plan Examinations Video](#). For a discussion of DOL correction programs, including the VFCP, see DOL website.

## Introduction to the VFCP

The DOL created the VFCP to encourage fiduciaries of ERISA-covered employee benefit plans to voluntarily self-correct a variety of fiduciary breaches (under ERISA § 404 (29 U.S.C. § 1104)) and prohibited transactions (under ERISA § 406 (29 U.S.C. § 1106)). While originally enacted in 2000 on an interim basis, the current VFCP identifies the application process, the categories of transactions covered, acceptable methods for correcting violations, and illustrates potential violations and the action required for correcting violations. See 71 Fed. Reg. 20262 (Apr. 19, 2006) (revising and restating the permanent program originally established in 67 Fed. Reg. 15062 (Mar. 28, 2002)).

Eligible applicants that satisfy the terms and conditions of the VFCP receive a no action letter from EBSA and are not subject to civil monetary penalties under ERISA § 502(l) or 502(i) for the corrected violations. ERISA §§ 502(l)502(i) (29 U.S.C. §§ 1132(l) 1132(i)). The VFCP includes a class exemption (PTE 2002 – 51) that provides excise tax relief for six specific VFCP transactions, as discussed in Related

Prohibited Transaction Exemption for IRC Excise Tax Relief below.

For a general overview of prohibited transactions under both ERISA and the Internal Revenue Code (IRC), including available prohibited transaction exemptions, see Employee Benefits Law § 12.08.

### VFCP as a Successful Enforcement Tool

Through its enforcement of ERISA, EBSA is responsible for ensuring the integrity of the private employee benefit plan system in the United States. EBSA's oversight authority extends to nearly 722,000 retirement plans, approximately 2.5 million health plans, and a similar number of other welfare benefit plans, such as those providing life or disability insurance. These plans cover about 154 million workers and their dependents and include assets over \$10.7 trillion.

In FY 2020, EBSA recovered over \$3.1 billion in direct payment to plans, participants and beneficiaries, with \$12 million collected through use of the VFCP, as indicated in the chart below.

Total Monetary Recoveries				
Total Recoveries	Recoveries from Enforcement Actions	Voluntary Fiduciary Correction Program	Abandoned Plan Program	Monetary Benefit Recoveries from Informal Complaint Resolution
\$3.124B	\$2.602B	\$12M	\$54M	\$456M

In FY 2020, EBSA received 1,309 VFCP applications.

[Dep't of Labor, Fact Sheet, updated 10/14/2020.](#)

## VFCP Program Eligibility

Anyone who may be liable for fiduciary violations under ERISA, including employee benefit plan sponsors, plan officials, and parties in interest (as defined in ERISA § 3(14) (29 U.S.C. § 1002(14))), may voluntarily apply for VFCP relief from possible EBSA enforcement actions, provided they comply with the following conditions:

- Neither the plan nor the applicant is under investigation.
- The application does not evidence potential criminal violations as determined by EBSA.
- No plan fiduciary has received an EBSA notice that the transaction for which relief is sought has been referred to the IRS.

71 Fed. Reg. 20270, Section 4(a)–(c).

For purposes of VFCP eligibility, the term “under investigation” means:

- **Active plan investigation.** EBSA is conducting an investigation of the plan.
- **Active applicant investigation.** EBSA is conducting an investigation of the potential applicant or plan sponsor in connection with an act or transaction directly related to the plan.

- **Active criminal investigation by governmental agency.** Any governmental agency is conducting a criminal investigation of the plan, or of the potential applicant or plan sponsor in connection with an act or transaction directly related to the plan.
- **Active IRS Examination.** The Tax Exempt and Government Entities Division of the IRS is conducting an employee plans examination of the plan.
- **Active Pension Benefit Guaranty Corporation (PBGC), state attorneys general, or state insurance commission investigation of the plan or the plan sponsor.** The PBGC, any state attorneys general, or any state insurance commissioner is conducting an investigation or examination of the plan, or of the applicant or plan sponsor in connection with an act or transaction directly related to the plan, unless (1) the applicant notifies EBSA, in writing, of such an investigation or examination at the time of the application, and (2) the plan, a plan official (defined below), or any authorized plan representative has received a written or oral notice of an investigation or examination described above. In such case the applicant must provide EBSA with information and EBSA will notify the examining agency of the VFCP application.

71 Fed. Reg. 20270, Section 3(b)(3)(i)–(v).

A plan official for purposes of the VFCP means a plan fiduciary, plan sponsor, party in interest with respect to a plan, or other person who is in a position to correct a breach. 71 Fed. Reg. 20270, Section 3(b)(2).

## VFCP Eligible Transactions

The VFCP identifies certain breaches or prohibited transactions and methods of correction that are eligible for VFCP self-correction. The list is finite and includes 19 categories of transactions identifying their methods of correction. Those correction methods are the exclusive correction methods for the transactions described.

The 19 categories of transactions are:

1. Delinquent participant contributions and participant loan repayments to pension plans
2. Delinquent participant contributions to insured welfare plans
3. Delinquent participant contributions to welfare plan trusts
4. Fair market interest rate loans to parties in interest
5. Below market interest rate loans to parties in interest
6. Below market interest rate loans to nonparties in interest
7. Below market interest rate loans due to delay in perfecting security interest
8. Participant loans failing to comply with plan provisions for amount, duration, or level amortization
9. Defaulted participant loans
10. Purchase of assets by plans from parties in interest
11. Sale of assets by plans to parties in interest
12. Sale and leaseback of property to sponsoring employers
13. Purchase of assets from nonparties in interest at more than fair market value
14. Sale of assets to nonparties in interest at less than fair market value
15. Holding of an illiquid asset previously purchased by plan
16. Benefit payments based on improper valuation of plan assets
17. Payment of duplicate, excessive, or unnecessary compensation

18. Improper payment of expenses by plan –and–

19. Payment of dual compensation to plan fiduciaries

71 Fed. Reg. 20274–20281, Sections 7.1–7.6.

## VFCP Correction Methods

The VFCP sets forth specific rules to be used when correcting any of the listed transactions. In general, VFCP applicants must restore the plan and its participants to the condition they would have been in had the prohibited transaction or fiduciary breach not occurred (i.e., make the plan and its participants whole). While the VFCP sets forth the specific rules for correcting each of the transactions listed above, the general correction principles are as follows:

- **FMV valuation required.** Where asset valuation was required, applicants must conduct fair market value (FMV) valuations of plan assets using generally recognized markets for the assets or obtain written appraisal reports from qualified professionals based on generally accepted appraisal standards. 71 Fed. Reg. 20270–20271, Section 5(a).
- **Correct to restore principal amounts plus lost earnings/profits.** Applicants must restore to the plan the principal amount involved in the prohibited transaction or breach to make the plan whole, and compute and contribute to the plan the greater of the amount needed to:
  - Restore lost earnings attributable to the breach or prohibited transaction having occurred, plus interest, starting on the date of the loss and extending to the recovery date (71 Fed. Reg. 20271, Section 5(b)(5)) –or–
  - Restore lost profits resulting from the use of the principal amount, starting on the date of the loss and extending to the date the profit is realized (71 Fed. Reg. 20271, Section 5(b)(6))
- **Pay associated expenses of corrective transaction.** The applicant must pay (but not from plan assets) the expenses associated with correcting the listed transaction, such as appraisal costs or fees associated with recalculating participant account balances. 71 Fed. Reg. 20271–20272, Section 5(c).
- **Complete supplemental (and corrective) participant distributions.** Where prior (incorrect) distributions were made or required the applicant must (1) make supplemental distributions to former employees, beneficiaries, or alternate payees, (if prior distributions to these individuals were too low) and (2) provide EBSA with proof of the payments, or properly segregate the

affected assets in cases where the plan is unable to identify the location of missing individuals. However, in the case of de minimis distributions (less than \$20), the applicant can pay the correction amount directly to the plan if the cost of correction exceeds the distributions owed. 71 Fed. Reg. 20272–20273, Sections 5(d), (e).

71 Fed. Reg. 20270–20273, Section 5.

Applicants using the VFCP must fully and accurately correct violations as EBSA may reject incomplete or unacceptable applications. If rejected, applicants may be subject to enforcement action, including assessment of civil monetary penalties under Sections 502(i) and 502(l) of ERISA. See ERISA § 502(i), 502(l) (29 U.S.C. § 1132(i), (l)). For a discussion of the penalties involved, see Employee Benefits Law § 12.08.

### **Corroboration of Corrections**

Plan administrators must file, where necessary, amended returns (such as amended Forms 1099-R and 5500) to reflect corrected transactions or valuations.

Applicants also must provide proof of payment to participants and beneficiaries, or properly segregate the affected assets in cases where the plan is unable to identify the location of missing individuals. As discussed above under “VFCP Correction Methods,” the last bullet thereof (i.e., Complete supplemental (and corrective) participant distributions), applicants must pay the corrected amount directly to the plan where distributions to separated participants would be less than \$20 and the cost of correction exceeds the distributions owed. 71 Fed. Reg. 20272, Section 5(e) and see [Dep’t of Labor Fact Sheet \(May 2006\)](#).

For guidance in locating missing participants, see [Missing Participants Best Practices Checklist](#). For a sample participant letter notifying participants of the plan sponsor’s failure to promptly deposit participant contributions or loan repayments, see [Delinquent Plan Contribution Notice \(401\(k\) Plan\)](#).

### **Use of Online Calculator or Making Manual Corrections in Calculating Lost Earnings and Interest on Restoration of Profits**

When calculating lost earnings as discussed above, either use the online calculator, or perform a manual calculation following VFCP guidance. See 71 Fed. Reg. 20271, Section 5(b)(5)(v) and [Dep’t of Labor: Voluntary Fiduciary Correction Program \(VFCP\) Online Calculator with Instructions, Examples and Online Calculations \(Online Calculator\)](#).

The online calculator computes lost earnings and interest which must be restored to the plan or the participant’s account. If the principal amount of the prohibited transaction or breach was used for a specific purpose such that a profit on the use of the principal amount can be determined resulting in an amount due to the plan that is greater than lost earnings, use the online calculator to calculate interest on the lost profit. Use the online calculator to compare lost earnings to lost profits. The greater amount must be restored to the plan. 71 Fed. Reg. 20271, Section 5(b)(6). Include as part of the VFCP application sufficient information (such as the online calculator calculation) to verify the correctness of the amounts to be paid to the plan, as indicated above in “Corroboration of Corrections.” 71 Fed. Reg. 20271, Section 5(b)(5)(v).

Recognize that using the online calculator solely to determine and repay lost earnings to the plan as restitution on its own (without applying to the VFCP) does not constitute a valid VFCP correction. Practitioners can reference the online calculator for an [Index of Eligible VFCP Transactions](#) for examples of calculations and estimated correction amounts.

### **Online Calculator Instructions**

Generally, the instructions for using the online calculator are:

- Enter the principal amount. (Note: Not all VFCP transaction corrections involve a principal amount, and in those cases lost earnings would not be calculated.)
- Enter the loss date.
- Enter the recovery date.
- Enter the final repayment date (i.e., date lost earnings and interest, if any, will be paid). If lost earnings are paid on the recovery date, leave the final payment date blank.
- The online calculator computes a total. This total reflects only lost earnings and interest, if any, but not any principal amount that also must be paid to the plan.
- Continue entering data as needed (e.g., for additional pay periods) until all information is entered.
- Select the calculate restoration of profits button only if a profit is determinable.
- Applicants must print and submit with the application calculations and data necessary for the department to verify the calculations. The online calculator allows applicants to view printable inputs and results. (Note: Calculations and data cannot be saved online. You may save your results by printing a copy or copying/pasting

a copy into a text document on your computer before terminating your session.)

The online calculator uses I.R.C. § 6621(a)(2) and (c)(1) corporate tax underpayment rates in effect during the VFCP corresponding time period and the corresponding factors from IRS Revenue Procedure 95-17 (IRS Factors). These rates reflect daily compounding. See Rev. Proc 95-17, 1995-1, C.B. 556. Under the VFCP's special rules for transactions involving large losses or large restorations, the online calculator automatically recomputes the amount of lost earnings and restoration of profits required by applying I.R.C. § 6621(c)(1) rates. 71 Fed. Reg. 20271, Section 5(b)(5)(ii).

## VFCP Application Procedures

Applicants applying for VFCP correction do so by remitting the application to the appropriate EBSA regional office based on the principal office of the plan sponsor. Failure to do so may render the application invalid. The applicant (either a plan official or his or her authorized representative (e.g., attorney, accountant, or other service provider)) must prepare and sign the application and include documentation that supports the VFCP correction taken. Plan assets cannot be used to satisfy any fees due to such representative for services relating to the VFCP preparation and submission. Applicants should provide EBSA with a detailed narrative describing the breach and the corrective action. For complete application procedures, see 71 Fed. Reg. 20273, Section 6.

For a listing of EBSA regional offices, see 71 Fed. Reg. 20282, Appendix C. Also, see [EBSA Regional Offices](#).

## VFCP Required Supporting Documentation

Providing documentation that identifies the breach or prohibited transaction within one of the 19 listed categories and supporting the correction taken is essential to preparing a complete VFCP filing. The required VFCP supporting documentation generally includes:

- Copies of relevant portions of plan and related documents
- Documents supporting transactions, such as leases and loan documents, and applicable corrections
- Documentation of lost earnings amounts
- Documentation of restored profits, if applicable
- Proof of payment of required amounts
- Specific documents required for relevant transactions, as outlined in Section 7 of the VFCP

- Signed [DOL VFCP Checklist](#) –and–
- A penalty of perjury statement

71 Fed. Reg. 20273, Section 6.

EBSA provides a [model VFCP application form](#), which includes the checklist, EBSA encourages the use of the model form to avoid common application errors. Those errors frequently result in processing delays or rejections. See [Dep't of Labor: Frequently Asked Questions \(FAQ\) \(Sept. 2013\)](#).

## VFCP Effect and Limitations

If a VFCP applicant satisfies the terms and conditions of the VFCP, EBSA will issue a no action letter for the breach that the applicant identifies in the application. If EBSA deems that the conditions for correcting the described breach are satisfied, the no action letter relieves the applicant from:

- Potential DOL civil investigation of that breach
- Potential civil action by the DOL –and–
- Potential civil penalties under ERISA that might otherwise apply without using the program

71 Fed. Reg. 20269, Section 2(a).

## Relief Is Limited to Identified Breach and Specific Applicants

The relief provided under a no action letter related to a VFCP application is limited to the breach described and applicants identified in the application. If a transaction gives rise to violations not specifically described in the VFCP, the relief will not extend to such additional violations. A no action letter does not imply approval of matters not included, including steps that the fiduciaries should take to prevent recurrence of the breach described in the application and to ensure the plan's future ERISA Title I compliance. 71 Fed. Reg. 20269, Section 2(c).

## Relief under No Action Letter

On receipt of a no action letter relating to a VFCP application, the applicant is assured that EBSA will not:

- Initiate a civil investigation under Title I of ERISA regarding the applicant's responsibility for any transaction described in the no action letter –or–
- Assess civil penalties under either ERISA §§ 502(i) or 502(l) on the correction amount paid to the plan or its participants

71 Fed. Reg. 20269, Section 2(a); ERISA §§ 502(i), 502(l) (29 U.S.C. § 1132(i), 1132(l)).

**Illustration of limited effect.** Suppose a funded ERISA employee benefit plan fiduciary causes the plan to purchase real estate from the plan sponsor under circumstances to which no prohibited transaction exemption under ERISA § 406 applies. See ERISA § 406 (29 U.S.C. § 1106). In connection with this transaction, the purchase causes the plan assets to be no longer diversified, in violation of ERISA § 404(a)(1)(C). See ERISA § 404(a)(1)(C) (29 U.S.C. § 1104(a)(1)(C)). If a VFCP application is made and reflects full compliance with the requirements of the VFCP, the no action letter would only apply to the violation of ERISA § 406(a)(1)(A) but would not apply to the violation of ERISA § 404(a)(1)(C). See 71 Fed. Reg. 20269, Section 2(c)(8).

### Material Misrepresentations or Other Abuses

Any material misrepresentations, omissions, or other abuses will void the no action letter, retroactive to the date that the letter was issued by EBSA, for the transaction that was materially misrepresented. See 71 Fed. Reg. 20269, Section 2(c)(3).

### EBSA Referrals of Criminal and IRS Matters

Participation in the VFCP does not preclude EBSA or any other governmental agency from conducting a criminal investigation of the identified transaction(s) or referring matters to the IRS. See 71 Fed. Reg. 20269, Section 2(c)(1)–(5).

### Confidentiality

EBSA will maintain the confidentiality of any documents submitted under the VFCP, to the extent permitted by law. However, EBSA is obligated to make referrals to the IRS and to refer to other agencies evidence of criminality and other information for law enforcement purposes. See 71 Fed. Reg. 20269–20270, Sections 2(c)(5)–(6) and 2(f).

## Related Prohibited Transaction Exemption for IRC Excise Tax Relief

The DOL promulgated Prohibited Transaction Class Exemption (PTCE) 2002-51 to work in tandem with the VFCP providing excise tax relief (under the I.R.C. § 4975(a) and (b)) to certain disqualified persons for a limited number of VFCP transactions. Certain conditions must be satisfied. See 67 Fed. Reg. 70623 (Nov. 25, 2002), as amended by 71 Fed. Reg. 20135 (Apr. 19, 2006). The transactions that PTCE 2002-51 identifies prohibit a disqualified person (as

defined under I.R.C. § 4975(e)(2)), from engaging, directly or indirectly, in any of the following activities:

- The sale or exchange, or leasing, of any property between a plan and a disqualified person
- The lending of money or other extension of credit between a plan and a disqualified person
- The furnishing of goods, services, or facilities between a plan and a disqualified person
- The transfer to, or use by or for the benefit of, a disqualified person of the income or assets of a plan – or–
- The act by a disqualified person who is a fiduciary whereby he or she deals with the income or assets of a plan in his or her own interest or for his or her own account

I.R.C. § 4975(c)(1)(A)–(E).

Ordinarily, taxpayers would be required to file [IRS Form 5330 “Return of Excise Taxes Related to Employee Benefit Plans”](#) to report and pay the excise taxes, in addition to correcting the transaction. PTCE 2002-51 relieves them of the filing and penalty payment.

The exemption covers transactions involving the following categories of prohibited transactions:

1. **Late deposit of participant contributions or loan repayments.** Failure to timely remit participant contributions or participant loan repayments to plans (under 29 C.F.R. § 2510.3-102). 71 Fed. Reg. 20274, Section 7.1(a).
2. **Interest rates on plan loans.** Loans made at fair market interest rate by plans with parties in interest. 71 Fed. Reg. 20275, Section 7.2(a).
3. **FMV purchases and sales.** Purchases or sales of assets between plans and parties in interest at fair market value. 71 Fed. Reg. 20277–20278, Section 7.4(a), (b).
4. **FMV sales of real property to ERISA plan.** Sales of real property to plans by employers and leaseback of the property at fair market value and fair market rental value, respectively. 71 Fed. Reg. 20278, Section 7.4(c).
5. **Plan purchase of illiquid asset.** Prohibited transaction violations under I.R.C. § 4975(c)(1) involving the purchase of an asset by a plan when the asset has been determined to be illiquid, and/or the subsequent sale of the illiquid asset by the plan. 71 Fed. Reg. 20279, Section 7.4(f).

6. **Paying settlor expenses with plan assets.** Use of plan assets to pay expenses to a service provider for services that are characterized as settlor expenses, provided such payments were not expressly prohibited in the plan documents. 71 Fed. Reg. 20281, Section 7.6(b).

71 Fed. Reg. 20138, Section I. For a discussion on Category 6 cases indicating when plan assets may be used to pay expenses associated with operation of an ERISA employee benefit plan, see [Paying ERISA Plan Expenses Considerations](#).

For a discussion on when plan contributions or loan repayments should be transmitted to the plan, see 29 C.F.R. § 2510.3-102 and [Dep't of Labor Advisory Opinion No. 2002-02A \(May 17, 2002\)](#). If the plan document provides a time by which contributions or loan repayments should be deposited, a failure to follow the plan document is an operational failure. This may require correction using not only the VFCP, applying PTCE 2002-51, but also using the IRS Employee Plans Compliance Resolution System (EPCRS) Rev. Proc. 2021-30. In such case, the VFCP submission must include the EPCRS voluntary correction program (VCP) filing documents. See [IRS: 401\(k\) Plan Fix-It Guide - You haven't timely deposited employee elective deferrals](#) and EPCRS Correction Rules and Procedures. EPCRS VCP filings also form the basis for obtaining VFCP relief for certain plan loan failures. 71 Fed. Reg. 20277, Sections 7.3(a)(2), 7.3(b)(2).

For an IRS discussion on applying PTCE 2002-51 and the VFCP, see [IRS Tax Exempt and Gov't Entities Training: Voluntary Fiduciary Correction of Prohibited Transactions](#).

For a letter notifying participants of the employer's late deposit of a participant contribution, see [Delinquent Plan Contribution Notice \(401\(k\) Plan\)](#).

### Conditions for PTCE 2002-51 Relief

Certain conditions apply to take advantage of the excise tax relief provided under PTCE 2002-51:

- **Not more than 180 calendar days' late.** For late deposits of participant contributions or loan repayments to pension plans, contributions or repayments to the plan must (ultimately) have been transmitted not later than:
  - o 180 calendar days from the date the amounts were received by the employer (in the case of amounts that a participant or beneficiary pays to an employer, like loan repayments) –or–
  - o The date the amounts otherwise would have been payable to the participant in cash (in the case of

amounts such as 401(k) deferrals withheld by an employer from a participant's wages)

- **Not more than 10% of plan assets.** For transactions described in Categories 2 through 5 above, the plan assets involved in the transaction, or series of related transactions, did not, in the aggregate, exceed 10% of the fair market value of plan assets at the time of the transaction.
- **FMV determinations.** For transactions described in Categories 2 through 5 above, the fair market value (FMV) of any plan asset involved was determined in accordance with VFCP Section 5 principles (regarding general rules for acceptable corrections).
- **Arm's length transactions.** The terms of any transaction described in Categories 2 through 6 above were at least as favorable to the plan as the terms generally available in arm's length transactions between unrelated parties.
- For any transaction described in Categories 1 through 6 above (except for certain broker-dealers or certain disqualified persons):
  - o The transaction was not part of an agreement, arrangement, or understanding designed to benefit a disqualified person.
  - o The applicant has not taken advantage of the relief provided by the VFCP and this exemption for a similar type of transaction(s) identified in the current application during the three-year period prior to submitting the current application.
- **No brokerage fees or commissions.** For a transaction involving a sale of an illiquid asset under Category 5 above, the plan did not pay brokerage fees or commissions in connection with the sale of the asset.
- **Plan assets involved.** For any Category 6 transaction, the amount of plan assets involved in the transaction or series of related transactions did not, in the aggregate, exceed the lesser of:
  - o \$ 10,000 –or–
  - o 5% of the FMV of all plan assets at the time of the transaction

71 Fed. Reg. 20138–20139, Section II.

### Applying for Relief under PTCE 2002-51

Compliance with the VFCP is a precondition for applying for PTCE 2002-51 relief. The applicant must:

- Demonstrate that they have met all VFCP applicable requirements –and–

- Have received a no action letter from EBSA for the transaction for which relief is being sought

See 71 Fed. Reg. 20139, Section III.

### ***Notice to Interested Persons (NIP)***

PTCE 2002-51 requires that interested persons receive written notice of the transaction(s) for which the applicant is seeking relief and the method of correcting the transaction. The notice to interested persons (NIP) must be provided within 60 calendar days following the date the VFCP application is submitted.

In addition, a copy of the notice must be provided to the appropriate [EBSA Regional Office](#) within the same 60-day period, with the date upon which notice was distributed to interested persons. Plan assets cannot be used to pay for the notice.

The notice must:

- Include an objective description of the transaction
- Include the steps taken to correct it
- Provide for a period of 30 calendar days, beginning on the date the notice was distributed, for interested persons to provide comments to the appropriate EBSA Regional Office, and include the address and telephone number of such regional office
- Be provided in a manner reasonably calculated to be understood by the average plan participant or beneficiary

71 Fed. Reg. 20139, Sections IV.A-IV.B.

For a form Notice to Interested Persons that can be used under PTCE 2002-51, see [Voluntary Fiduciary Correction Program Notice to Interested Persons for Excise Tax Relief](#).

### ***Exception to NIP Requirement for De Minimis Excise Tax Payments***

The DOL eliminates the NIP requirement for de minimis situations (excise tax of \$100 or less is due) involving delinquent participant contributions or the failure to timely transmit participant loan repayments. 71 Fed. Reg. 20139, Section IV.C. For the sole purpose of determining whether the excise tax due under I.R.C. § 4975 on the amount involved on these occasions is less than or equal to \$100, the applicant can calculate the excise tax due based upon the lost earnings amount computed using the online calculator. Id; and see “Use of Online Calculator or Making Manual Corrections in Calculating Lost Earnings and Interest on Restoration of Profits” in VFCP Correction Methods above.

However, to be eligible for this de minimis exception, an applicant must provide to the appropriate EBSA Regional Office with the application submission:

- A copy of a completed IRS Form 5330 or other written documentation containing the information required by IRS Form 5330 –and–
- Proof of payment to the plan (e.g., of late deposits)

71 Fed. Reg. 20139, Section IV.C.

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José M. Jara focuses his practice on ERISA and employment litigation and counseling, including representing clients under investigation by the Department of Labor (DOL) Employee Benefits Security Administration and defending them from lawsuits alleging violations of ERISA.

José defends plan fiduciaries and boards of directors against ERISA litigation alleging breach of fiduciary duty in connection with excessive fees, delinquent employee contributions and imprudent investments. He guides plan sponsors and fiduciaries on plan fees and expenses, meeting fiduciary responsibilities and prohibited transactions under ERISA.

He also works with clients to correct retirement plan errors under the IRS Employee Plans Compliance Resolution System, fiduciary violations under the DOL Voluntary Fiduciary Correction Program and annual reporting failures under the DOL Delinquent Filer Voluntary Compliance Program.

José advises clients on a broad range of labor and employment issues such as wrongful termination, sexual harassment and discrimination, restrictive covenants, retaliation and matters related to labor law such as grievances, arbitrations and collective bargaining. He also defends companies against DOL wage and hour investigations, conducts interactive harassment training, carries out internal investigations and drafts employment and severance agreements.

In addition, José assists clients with professional liability insurance matters, providing counsel on D&O, fiduciary, and EPL insurance issues; serves as monitoring counsel and coverage counsel; and provides advice to underwriters on a variety of provisions of the insurance policy.

José speaks frequently on ERISA and employment law topics, and has recently delivered presentations on the impact of the 2021 Consolidated Appropriations Act, DOL and IRS Health and Welfare Plan audits; disability claims and procedures; ESOP challenges and enforcement activity; and sexual harassment in the workplace, among other subjects.

**Sheldon S. Miles, Associate, Fox Rothschild LLP**

Sheldon S. Miles focuses his practice on employee benefits and executive compensation issues.

He assists companies, both private and public, with implementing and maintaining their employer-sponsored retirement and health plans, and nonqualified deferred compensation programs.

Sheldon routinely provides clients with practical and concise advice on matters relating to the Employee Retirement Income Security Act of 1974 ("ERISA") and the Internal Revenue Code of 1986 (the "Code").

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