

Self-Correction Under The Updated VFCP

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Agenda

- History of Voluntary Fiduciary Correction Program (VFCP)
- Relief Available Under VFCP
- 2025 Update to VFCP
 - Self-Correction Component
 - Delinquent Participant Contributions
 - Participant Loan Failures
- TH Benefits Report article:
<https://www.truckerhuss.com/newsletter/ebsa-adds-self-correction-component-to-voluntary-fiduciary-correction-program-update/>
- Blog article: <https://www.thebenefitofbenefits.com/2025/01/ebsa-beats-irs-in-updating-its-correction-program-for-self-correction/>

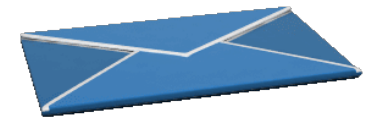
History of VFCP

- First adopted in 2002
- Last amended in 2006
- Proposed rules issued in 2022
- Final rules in 2025 effective 3/17/25



Purpose of VFCP

- Encourages voluntary correction of violations of ERISA
- In exchange for a “No-Action” letter from DOL/EBSA
 - Will not impose 20% penalty on amount involved
 - Will not pursue any civil enforcement action
- Related PTE Class Exemption 2002-51 for certain transactions
 - If use VFCP: exempt from excise tax under Code § 4975
 - Initial tax of 15% of amount involved
 - If not timely corrected increases to 100%



General Eligibility

- Neither the plan nor the applicant can be “under investigation”
- EBSA determines the application contains no evidence of potential criminal violations
 - New exceptions in 2025 update for:
 - Self-correction and bulk filings
- EBSA has not conducted an investigation resulting in written notice to a plan fiduciary that the transaction at issue has been referred to the IRS

Under Investigation

- A Plan Official or authorized representative has been notified of an investigation, review or examination by:
- EBSA that it is conducting an investigation or review of the plan, potential applicant, self-corrector or plan sponsor;
- Any governmental agency is conducting a criminal investigation of the plan, or of the potential applicant or plan sponsor;
- The IRS is conducting an EP examination of the plan; or
- The PBGC, any state attorney general, or any state insurance commissioner is conducting an investigation or examination of the plan, applicant or plan sponsor
 - Unless the applicant notifies EBSA, in writing, of such an investigation or examination at the time of the application.



Under Investigation:

Exceptions

- Delinquent Participant Contributions under Application Process
 - Criminal investigation of parties other than administrator, sponsor or applicant
 - All funds are repaid
 - Appropriate law enforcement agency is notified
 - Application includes statement re agency and that applicant was not involved
- Bulk Applications under Application Process for 10 or more plans by service provider
- New SCC for Participant Loans
 - Can be under examination by IRS



19 VFCP Transactions

- **Delinquent Participant Contributions and Participant Loan Repayments to Pension Plans**
- Delinquent Participant Contributions to Insured Welfare Plans
- Delinquent Participant Contributions to Welfare Plan Trusts
- Fair Market Interest Rate Loans With Parties in Interest
- Below Market Interest Rate Loans With Parties in Interest
- Below Market Interest Rate Loans With Non-Parties in Interest
- Below Market Interest Rate Loans Due to Delay in Perfecting Security Interest
- **Participant Loans Failing to Comply with Plan Provisions for Amount, Duration, or Level Amortization**
- **Defaulted Participant Loans**
- Purchase of Assets by Plans from Parties in Interest
- Sale of Assets by Plans to Parties in Interest
- Sale and Leaseback of Property to Sponsoring Employers
- Purchase of Assets from Non-Parties in Interest at More Than Fair Market Value
- Sale of Assets to Non-Parties in Interest at Less Than Fair Market Value
- Holding of an Illiquid Asset Previously Purchased by Plan
- Benefit Payments Based on Improper Valuation of Plan Assets
- Payment of Duplicate, Excessive, or Unnecessary Compensation
- Improper Payment of Expenses by Plan
- Payment of Dual Compensation to Plan Fiduciaries

Self-Correction Under Updated VFCP

What is Self-Correction?

- **DIY-Fix** the issue yourself
- **No governmental approval**
- **No filing fee**



Why VFCP Self-Correction?

- Stated reasons in updated program overview:
 - Make program easier to use and more useful
 - Facilitate more efficient and less costly corrections
 - Encourage greater participation in the program
 - SCC for most common failure—late contributions
 - SECURE 2.0 mandated for Participant loans
- Not stated: Lack of resources to enforce
 - Only 450 EBSA employees

Why Self-Correction?

<u>Year</u>	<u>VFCP Apps</u>	<u>DFVCP Apps</u>
2024	1,037	20,007
2023	1,192	18,995
2022	1,374	22,444
2021	1,201	22,553
2020	1,309	19,624

SCC For Delinquent Contributions



SCC-Delinquent Contributions Eligibility

- Delinquent Contributions must be remitted within 180 days
 - From date withheld from paycheck or
 - From date payment is received by Employer
- Lost Earnings must be under \$1,000 total
 - As calculated under DOL online calculator
 - From date:
 - Would have been paid to participant
 - Was repaid to employer
 - Not from when first could be segregated



Delinquent Contributions SCC Filing

- **Electronic Notice filed on EBSA Website**
 - Name and email address of the self-corrector;
 - Plan name;
 - Plan sponsor's EIN;
 - Plan's three-digit plan number;
 - Principal Amount and Lost Earnings
 - And date paid;
 - Date of withholding or receipt; and
 - Number of participants affected
- **Upon filing, self-corrector emailed an Acknowledgment and Summary**
 - Replaces No-Action Letter



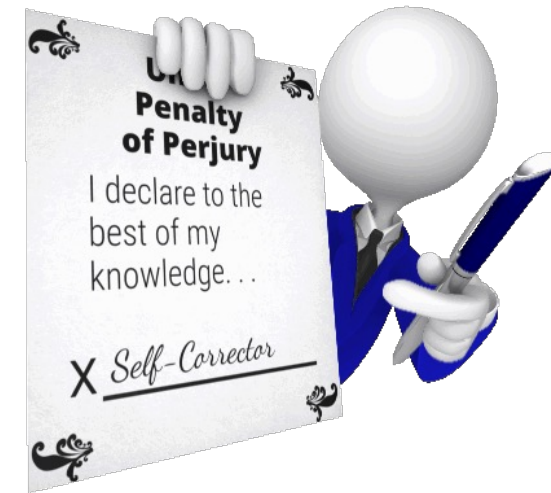
SCC Record Retention Checklist

- Provide SCC Checklist to Administrator with following attached with supporting documents:
 - Brief Statement of why contribution untimely
 - Proof of payment
 - Copies of the calculation from the online calculator
 - A statement describing employer policy changes, if any, to prevent reoccurrence
 - Copy of the SCC Notice and Acknowledgement & Summary from EBSA



Perjury Statement

- Each plan official (and rep) seeking relief must provide a signed perjury statement to Administrator certifying that:
 - Not under investigation
 - Have reviewed the SCC notice, Acknowledgment received from EBSA, checklist, and supporting documentation
 - To the best of his or her knowledge and belief the contents are true, correct, and complete



SCC For Participant Loans



Participant Loan Failures-History

- 2006-To use VFCP first had to obtain compliance statement under VCP of EPCRS
- 2019-Rev. Proc. 2019-19 permitted some Participant Loan failures to be self-corrected
 - Not failures of amount, term, or level amortization
- 11/22- proposed revisions to VFCP published for comment by January 20, 2023
- 12/2022- SECURE 2.0 permitted self-correction of eligible inadvertent failures (EIFs)
 - Required DOL to treat EIFs for Participant Loans corrected under EPCRS as eligible for VFCP
 - Directed IRS to issue new EPCRS w/in 2 years

Participant Loan Failures-History cont'd

- 2/14/23-DOL re-opens comment period until April 17, 2023, because of SECURE 2.0
- June 12, 2023- IRS Notice 2023-43 provides interim guidance until new EPCRS
 - Makes all Participant Loan failures eligible for self-correction as EIFs
- January 2025- VFCP updated to include SCC for Participant loans self-corrected under EPCRS

Participant Loans EPCRS Self-Correction

- **Self-Correction Program (SCP)**
 - Correction of certain plan failures (significant within 3 years, insignificant at any time)
 - No fee or sanction paid
 - No IRS contact
- **Voluntary Correction Program (VCP)**
 - Any time before IRS audit, plan sponsor can submit application describing failure and proposed correction
 - Pay limited user fee
 - Receive IRS compliance statement approving correction
- **Audit Closing Agreement Program (Audit CAP)**
 - While under audit
 - Plan sponsor corrects plan failure
 - Pays employer sanction to keep plan qualified

2019 Expanded Self-Correction

- Participant Loan Failures Eligible for Self-Correction
 - Spousal Consent
 - Number of loans outstanding
 - Defaulted loans
- Not Eligible for Self-Correction
 - Exceeding maximum loan amount (\$50K/50%)
 - Exceeding maximum repayment term (5 years/home)
 - Failing to provide level amortization



SECURE 2.0- Self Correction of EIFs

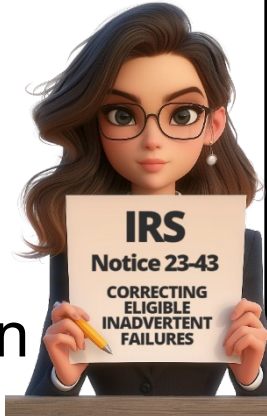
- Section 305(a) of the Secure 2.0 Act generally provides:
 - *Except as otherwise provided in the Internal Revenue Code of 1986, regulations, or other guidance of general applicability prescribed by the Secretary of the Treasury (emphasis added),*
 - *Any eligible inadvertent failure to comply with the rules applicable under section 401(a), 403(a), 403(b), 408(p), or 408(k) of such Code may be self-corrected under Revenue Procedure 2021–30, or any successor “EPCRS” guidance)(emphasis added).*
- Not 457 plans

Eligible Inadvertent Failure (EIF)

- A failure that occurs:
 - Despite the existence of practices and procedures that satisfy the standards of section 4.04 of Rev. Proc. 21-30
 - Or similar standards in the case of an IRA
 - Formal or informal reasonably designed to promote and facilitate overall compliance with applicable Code requirements
 - Plan document alone not sufficient
 - Must be in place and routinely followed
- Failure occurs due to oversight or mistake in applying them
- The failure is not egregious, does not directly or indirectly relate to an abusive tax avoidance transaction, and does not relate to the diversion or misuse of plan assets

IRS Guidance: Notice 2023-43

- An EIF may be self-corrected provided:
 - The failure was not identified by the IRS under an examination prior to any actions demonstrating a specific commitment to implement a self-correction with respect to the failure.
 - If the failure is insignificant (under the factors of Rev. Proc. 21-30) can self-correct when under exam
 - The self-correction is completed within a reasonable period after the failure was identified.
 - The failure is not egregious, does not directly or indirectly relate to an abusive tax avoidance transaction, and does not relate to the diversion or misuse of plan assets.
 - The self-correction satisfies the provisions applicable to self-correction set forth in Rev. Proc. 2021-30, including that Sponsor:
 - Has established practices and procedures;
 - Must apply the EPCRS correction principles and rules of general applicability;
 - May, but is not required to, self-correct using a correction method set forth EPCRS; and may not use a correction method that is prohibited under EPCRS



Until New EPCRS Rev. Proc.

- Certain provisions of Rev. Proc. 21-30 no longer apply:
 - The requirement that a qualified plan or section 403(b) plan be the subject of a favorable letter.
 - The prohibition of self-correction of demographic failures and employer eligibility failures, i.e., can self-correct them.
 - The prohibition of self-correction of significant failures under SEPs and SIMPLE IRA plans, i.e., can self-correct them.
 - The prohibition of self-correction participant loan failures dealing with amount, term, or amortization, i.e., can self-correct them.
 - The provisions relating to self-correction of significant failures that have been substantially completed before the plan or plan sponsor is under examination.
 - Now replaced with demonstrated specific commitment to implement correction before examination.
 - A significant failure must be completed or substantially completed by the end of last day of the third plan year following the plan year for which the failure occurred.
 - Now replaced with reasonable time from discovery

Participant Loan SCC Eligibility

- Participant loans that do not meet the requirements of Code section 72(p) concerning:
 - Amount
 - Duration
 - Level amortization
 - Number of outstanding loans
 - Defaulted for failure to withhold from wages
 - Failure to obtain spousal consent
- If self-corrected under EPCRS

Participant Loan SCC Eligibility

- Self-Corrected under EPCRS
 - Includes EIF under SECURE 2.0 and IRS Notice 23-43
 - Even if under exam by IRS
 - If demonstrated Specific Commitment before exam or
 - Failure is insignificant under EPCRS

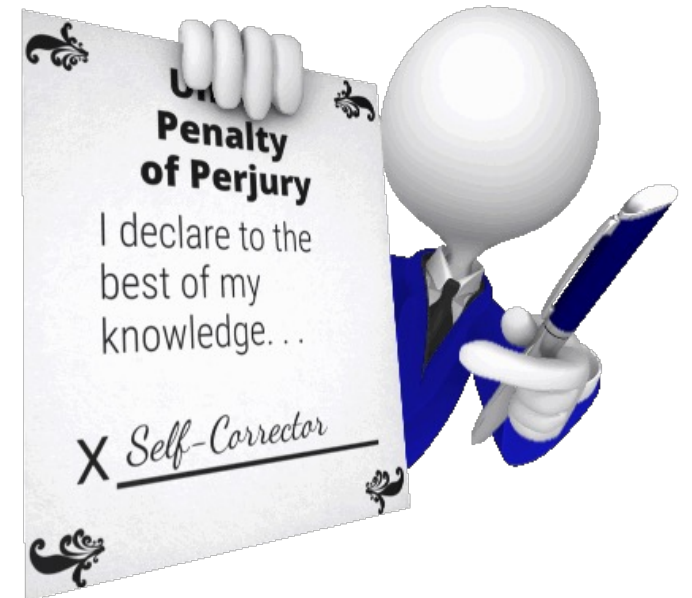
Participant Loan SCC Filing

- File SCC Notice with EBSA on website
 - Like Delinquent Contribution Notice
- Include information on:
 - Type of loan
 - Failure
 - Amount
 - Date identified
 - Date corrected under EPCRS
- No need to complete Checklist



Participant Loan SCC Documentation

- Provide to Administrator to Retain:
 - Contact information;
 - Short description of the type of Participant loan failure;
 - Loan amount(s);
 - Date the failure was identified;
 - Date of correction;
 - Correction method; and
 - Number of Participants affected
- Penalty of Perjury Statement



PTE Updated

- PTE 2002-51
 - Provides a class exemption from prohibited transaction excise taxes under Code section 4975 if corrected under VFCP
 - Initial 15% tax
 - Increases to 100%, if not corrected timely
 - Amended to provide benefits to SCC self-correctors of late payments
 - Eliminated requirement of notice to interested parties for SCC users
 - **Must** pay excise tax to Plan instead of IRS
 - Won't exceed \$150 per year (15% of lost earnings)
 - Lifted restriction that could not use PTE, if used with VFCP for a similar transaction within 3 years
 - Will continue to monitor and may amend
 - Get benefits of PTE only if:
 - Receive the EBSA Acknowledgment & Summary via email



Conclusion

- SCC streamlines VFPC for eligible transactions
- There are still significant document retention requirements
 - Best practice anyway
 - Documents are required in performing the correction
 - Documents should be retained to support participant loan EPCRS correction
- Fiduciaries can benefit from the SCC
- If SCC is successful for these transactions, maybe more will be added



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