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General Comment

See attached file(s)

Attachments

Comment on the Voluntary Fiduciary Correction Program

April 17, 2023

Via Electronic Submission

Office of Regulations and Interpretations
Employee Benefits Security Administration
200 Constitution Avenue NW
Washington, DC 20210

Re: Comments Pertaining to the Amended and Restated VFC Program

Dear Office of Regulations and Interpretations,

I respectfully submit these comments in response to the Employee Benefits Security Administration's ("EBSA") request for public comment on proposed amendments to the Voluntary Fiduciary Correction Program ("VFC Program").

Overview of Proposed Rule

The Employee Benefits Security Administration ("EBSA") within the Department of Labor ("DOL") is proposing amendments to the Voluntary Fiduciary Correction Program and to the Prohibited Transaction Exemption ("PTE") rule. Both rules were published on November 21, 2022, for comment. The comment period for both rules is being reopened as the Consolidated Appropriations Act, 2023 ("CAA") contained a provision to further modify the VFC Program.

The Employment Retirement Income Security Act of 1974 ("ERISA") sets the minimum standards for private retirement and health plans and provides protection to individuals in these plans. The law requires the disclosure of financial and other information to the plan beneficiaries, establishes standards of conduct for plan fiduciaries, and provides remedies and access to federal courts in the event of breaches. Title I of ERISA provides the DOL with authority to enforce fiduciary standards and enact policies on how this authority will be implemented.[1] The DOL used this authority to create the VFC Program. The DOL is authorized to issue exemptions to Prohibited Transaction rules from sections 408(a) and 407 of ERISA and section 4975 of the Internal Revenue Code.[2] Section 305 of the CAA requires the IRS' Employee Plans Compliance Resolution System ("EPCRS"), which also has a VFC Program, be expanded to cover "any eligible inadvertent failure," which is defined as "a failure that occurs despite the existence of practices and procedures that satisfy EPCRS standards and is not egregious, related to the diversion or misuse of plan assets, or related to an abusive tax avoidance transaction."[3]

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[1] *See* 29 U.S.C. 1132(a)(2) and 1132(a)(5).
[2] *See* 29 U.S.C. 1106–1107.
[3] *See* "Amendment and Restatement of Voluntary Fiduciary Correction Program," *Federal Register*, February 13, 2023, available at https://www.federalregister.gov/documents/2023/02/14/2023-02545/amendment-and-restatement-of-voluntary-fiduciary-correction-program.

The VFC Program was created in 2002 to encourage employers and plan fiduciaries to voluntarily comply with ERISA requirements. It allows employers and plan fiduciaries to voluntarily apply for relief from civil enforcement actions and penalties and provides guidance on how to correct breaches. The main amendment in the current proposal is the addition of a self-correction feature where plans could correct fiduciary breaches and report the correction to the EBSA without going through the VFC application process.

These proposed regulations will:

1. Add a Self-Correction Component ("SCC") for failures to transmit participant contributions or loan repayments to the pension plan in a timely manner;
2. Clarify existing transactions eligible for self-correction under the VFC Program;
3. Expand the scope of certain transactions that are currently eligible for self-correction;
4. Simplify certain administrative or procedural requirements for participation in the VFC Program and self-correction of transactions under the VFC Program.

When finalized, the rules will apply to all private welfare and pension plans in the United States. The VFC Program is available for all plans if fiduciaries choose to use it. According to EBSA, the goal of the proposed rules is to lower compliance costs and streamline and incentivize use of the VFC Program.

Regulatory Analysis

The Office of Management and Budget has determined that this proposal is significant under Executive Order 12866 because it raises novel legal or policy issues arising from the President's priorities. As required by Executive Order 12866 and Executive Order 12563, the DOL has assessed the benefits and costs associated with the proposed rules. The Regulatory Flexibility Act does not apply to enforcement policies, including the proposed rule on the VFC Program. However, it does apply to the PTE, so an RFA analysis is provided by the DOL. A Paperwork Reduction Act analysis is conducted in the benefit-cost analysis. The Unfunded Mandates Reform Act and Executive Order 13132 do not apply to these proposed rules.

Compelling Public Need
The DOL expects the amendments to increase efficiency and accessibility for potential self-correctors and applicants in the VFC Program. The VFC program is available to all pension and welfare plans. These changes would impact 686,909 defined contribution plans (as of 2019), 46,870 defined benefit plans (as of 2019), 2,468,363 health plans (as of 2021), and 673,000 other welfare benefit plans (as of 2021). All these plans would be eligible to use the SCC, which involves substantially less effort and paperwork than the traditional VFC Program application. The DOL believes the SCC will encourage greater participation in the VFC Program and yield benefits to plan participants. In line with Executive Order 12866 Section 1(b)(2), the proposed amendments will modify the VFC Program to make it more efficient.

Benefit-Cost Analysis
The DOL provides a brief benefit-cost analysis to support the proposed rules, as required by Executive Order 12866 and Executive Order 13563. The DOL does not estimate annual benefits and provides an estimate of some of the annual compliance costs. The analysis assumes that

74% of applicants to the VFC Program each year would use the SCC instead. Between 2018 and 2020, there were 1,429 applicants on average each year. The DOL forecasts that the SCC will increase the number of plans using the VFC Program, with two new plans filing bulk applications, 367 plans filing non-bulk applications, and 1,072 plans utilizing the new SCC. In total, 1,441 plans are expected to use the updated program on an annual basis.

The DOL expects that improved ease-of-use of the SCC and reduced costs from plans forgoing the traditional application process will result in a lower per-user cost of the VFC Program. The proposed rule also removes the three-year limitation in the PTE, improving flexibility for fiduciaries. The DOL estimates the total cost savings to be $207,000.

The RIA also lists several benefits that cannot be estimated or monetized at the moment. These include:

1. The elimination of risks to plans from uncorrected breaches;
2. Potential savings from plans not having to defend against civil action from the DOL over uncorrected breaches; and
3. The restoration of money to plans from corrections that can then earn profits for plan participants.

The DOL estimates that costs from the new SCC would total approximately $1.4 million each year. This includes $1.3 million in annual equivalent costs reflecting the monetized costs of work performed by both in-house personnel and outside service providers and $70,000 in materials and postage costs annually. There would also be a one-time cost of $360,00 for service providers and in-house staff to become familiar with the changes to the VFC Program and amended PTE. This assumes an hourly rate for these staff of $124.75.

Alternative Approaches

The DOL noted that it considered alternative options on some of the amendments in the proposed rules. However, it did not present any benefit-cost analyses for these different options. These are the issues on which the DOL is seeking comments for these proposed rules.

First, the DOL is considering adding additional protections for pensions plans that cover less than 100 participants. Second, the DOL is interested in whether the VFC Program should include self-correction for breaches involving recordkeeping, communication, or benefit payment failures. Third, the DOL is interested in whether the VFC Program should be better integrated with the IRS EPCRS. Fourth, the DOL is considering various approaches to e-submission. Fifth, the DOL is interested in whether the VFC Program should be modified to include a pre-audit program, like the IRS has done for retirement plans, or if the DOL should create a separate pre-audit program. Benefit-cost analyses on these approaches have not been presented with the proposed rules.

Proposed Effective Date

Public comments on these proposed rules are due by April 17, 2023. Since the VFC Program is an enforcement action, the DOL will publish the amended and restated VFC Program in a Federal Register document. It is not required to follow the traditional regulation process for enforcement actions. The finalized version of the PTE exemption, which is a regulatory action, will be published in the Federal Register. The DOL does not provide timelines on when these proposed rules must be finalized.

EBSA's Regulatory Impact Analysis

EBSA's regulatory impact analysis does not appear to include any sensitivity analyses for their benefit-cost analyses. It also does not include any estimation of avoided costs of potential enforcement actions from plans using the Self-Correction Component, or any estimation of how much money delinquent transmissions of participant contributions or loan repayments may cost plan participants. The proposed amendments do list these as benefits though it does not provide any examples or attempt to monetize these benefits. When data becomes available, EBSA should include these benefits in its regulatory impact analysis when assessing the program.

This section explores potential sensitivity analyses around how long it may take to fill out required forms for the Self-Correction Component and wages to involved employees to assess the potential range of costs for the new component. Next, it briefly discusses potential avoided penalties. Lastly, it discusses the potential distributional effects of the amendments.

Sensitivity Analyses
<u>Familiarization Costs</u>

EBSA estimates that it will cost plans about $359,530 to become familiar with the new Self-Correction Component and amended PTE. This estimation assumes that:

- 1% growth rate in applicants from 1,429 to 1,441 users of the VFC Program;
- Hourly wage for benefits and compensation managers of $124.75 based on 2021 labor cost data;
- Two hours of work to become familiar.

This results in an average cost per plan of $250 to become familiar with the new changes.

I have performed four sensitivity analyses that adjust the wage for wage growth and adjust the time required to become familiar with the amendments. According to EBSA's labor costs inputs, the wage of a compensation and benefits manager as of 2018 was $134.21.[4] Adjusting this value for wage growth in finance and business services from January 2019 to February 2023 results in an hourly wage of $160.[5] The Administration does not demonstrate how it calculated the $124.75 wage. Two scenarios below adjust the time for familiarization by 20%. The number of VFC Program users remains unchanged in all scenarios. The following table displays the results.

[4] "Labor Cost Inputs Used in the Employee Benefits Security Administration, Office of Policy and Research's Regulatory Impact Analyses and Paperwork Reduction Act Burden Calculations," *Employee Benefits Security Administration*, June 2019, p. 6, available at https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/technical-appendices/labor-cost-inputs-used-in-ebsa-opr-ria-and-pra-burden-calculations-june-2019.pdf.
[5] "Wage Growth Tracker" *Federal Reserve Bank of Atlanta*, March 16, 2023, available at https://www.atlantafed.org/chcs/wage-growth-tracker?panel=1.

		Base Scenario	Scenario 1	Scenario 2	Scenario 3	Scenario 4
Total Users	A	1,441	1,441	1,441	1,441	1,441
Time (Hours) For Familiarity	B	2.0	1.6	2.4	2.0	2.4
Hourly Wage	C	$125	$125	$125	$160	$160
Total Costs to all Users	D=A*B*C	$359,530	$287,624	$431,435	$461,191	$553,429
Cost Per Plan	E=D/A	$250	$200	$299	$320	$384

The first scenario reduces the time required to become familiar with the changes by 20% and leaves the wage unchanged. Familiarization time is reduced from two hours to 96 minutes. This change lowers the total cost of familiarization from $359,530 to $287,624 and the average cost per user to $200.

The second increases the time required for familiarity by 20% while leaving the wage unchanged. Familiarization time increases from two hours to 144 minutes. This increases the total cost of familiarization to $431,435 and the average cost per user to $299.

The third leaves time required for familiarity unchanged but uses the higher wage value. The wage is increased from $124.75 to $160. This increases the total cost of familiarization to $461,191 and the average cost per user to $320.

The fourth scenario assumes it takes 20% longer to become familiar with the program and a higher wage. Familiarization time increases from two hours to 144 minutes and the wage is increased from $124.75 to $160. These changes increase the total familiarization cost to $553,429, a 54% increase from the base estimation. The average cost per user increases from $250 to $384.

User Costs

EBSA estimates that the total cost of the new VFC Program with the Self-Correction Component will be about $588,174. This estimation can be broken down into four sub-estimations. The first is the cost to non-bulk users of the program. This assumes there will be 367 non-bulk and non-SCC users who spend 3.5 hours on applications, and 1,072 new users of the Self-Correction Component that each spend one hour on the application. With an hourly wage for compensation and benefits managers of $124.75, the cost to these 1,439 users is approximately $474,956 in time and labor. The 1,072 SCC users spend approximately $353,824 while the 367 non-SCC and non-bulk users spend approximately $121,132.

First Component		**All**	**SCC**	**Non-Bulk**
Clerical Staff Hours	A	3.5	3.5	3.5
Clerical Staff Wage	B	$58.66	$58.66	$58.66
Compensation & Benefits Manager Hours	C	1	1	1
Compensation & Benefits Manager Wage	D	$125	$125	$125
Total per User	E=(A*B)+(C*D)	$330	$330	$330
Users	F	1439	1072	367
Total Cost	G=E*F	$474,956	$353,824	$121,132

The second component is the cost to bulk users. EBSA estimates that there will be two bulk users who will not use the new SCC. For these two users to utilize the VFC Program, it will require 35 hours of clerical staff work with an hourly wage of $58.66 and 10 hours of work for compensation and benefits managers with an hourly wage of $124.75 for a cost of $3,300 for each bulk users. This results in a total cost to bulk users of $6,601.

Second Component		
Clerical Staff Hours	A	35
Clerical Staff Wage	B	$58.66
Compensation & Benefits Manager Hours	C	10
Compensation & Benefits Manager Wage	D	$125
Total per User	E=(A*B)+(C*D)	$3,301
Users	F	2
Total Cost	G=E*F	$6,601

The third component consists of the time and labor of accountants at external service providers. This estimation assumes that it will take these staff ten minutes for each SCC applicant, 20 hours for each bulk applicant, and two hours for each non-SCC and non-bulk applicant. With 1,072 SCC users, two bulk users, 367 other users, and an hourly wage of $108.04, the time and labor costs to external service providers is approximately $102,926. This consists of $19,303 for SCC users, $4,322 for bulk users, and $79,301 for non-bulk users.

Third Component		**All**	**SCC**	**Non-Bulk**	**Bulk**
SCC Time (Hours)	A	0.167	0.167	–	–
SCC Users	B	1,072	1,072	–	–
Bulk Time (Hours)	C	20	–	–	20
Bulk Users	D	2	–	–	2
Non-Bulk (Hours)	E	2	–	2	–
Non-Bulk Users	F	367	–	367	–
Total Time (Hours)	G=(A*B)+(C*D)+(E*F)	953	179	734	40
Accounting Wage	H	$108	$108	$108	$108
Total Users	I=B+D+F	1,441	1,072	367	2
Time Costs	**J=G*H**	$102,926	$19,303	$79,301	$4,322
Average Cost	**K=J/I**	$72	$18	$216	$2,161

The fourth component is for mailing costs. The SCC will be an online application, while bulk and other users will still need to mail in their applications and supporting documentation. With 369 non-SCC users and $10 in mailing cost per applicant, the mailing costs for applicants is $3,690.

The four components add up to the total cost to users of $588,174. Of this, SCC users spend $373,127, bulk users spend $10,943, and other users spend $204,123. On average, SCC users each spend $348, bulk users spend $5,471, and other users spend $556 per user of the VFC program. Assuming each SCC user would have to spend $556 per use under the current program, the introduction of the SCC would save each user $208 per use.

Total Costs	**All**	**SCC**	**Non-Bulk**	**Bulk**
First Component	$474,956	$353,824	$121,132	$0
Second Component	$6,601	$0	$0	$6,601
Third Component	$102,926.11	$19,303.15	$79,301.36	$4,321.60
Fourth Component	$3,690	$0	$3,690	$20
Total VFC Program Cost	**$588,174**	**$373,127**	**$204,123**	**$10,943**
Average Cost	**$408**	**$348**	**$556**	**$5,471**

As with the familiarization costs, I perform four sensitivity analyses that adjust the wages for wage growth and adjust the time required for the various tasks in the estimation for new users of the Self-Correction Component. The time required for clerical staff, compensation and benefits managers, and external accounting staff is adjusted by 20% in the relevant scenarios. As with the familiarization costs, wages are taken from EBSA's labor cost inputs and grown according to wage growth for finance and business services from January 2019 to February 2023 as provided by the Federal Reserve Bank of Atlanta. As EBSA's labor cost inputs do not include a category for clerical staff, the wage of a secretary is used. Clerical staff or secretary wages are increased from $55.14 to $66, compensation and benefits manager wages are increased from $134.21 to $160, and accounting wages are increased from $100.74 to $120. The starting wages are taken from EBSA's labor cost inputs.

In the first scenario, the time required for clerical staff, compensation and benefits managers, and external accounting staff to complete their respective tasks is decreased by 20%. This decreases the cost of the first component SCC users to $283,059 from $353,824. The second component, for bulk filers, does not apply for SCC users. The third component, related to time and labor costs for external service providers, decreases from $19,303 to $15,443. The fourth component, mailing costs, does not apply to the SCC program as applications are submitted online. Overall, costs for the SCC users decrease from $373,127 to $298,059. The average cost per use decreases from $348 to $278 for SCC users.

	Base Scenario	Scenario 1
Users	1,072	1,072
First Component		
Clerical Staff Hours	3.5	2.8
Clerical Staff Wage	$59	$59
Compensation & Benefits Manager Hours	1	0.8
Compensation & Benefits Manager Wage	$125	$125
Total per User	$330	$264
First Component Cost	$353,824	$283,059
Third Component		
Accounting Staff Hours	0.167	0.133
Accounting Staff Wage	$108	$108
Total Hours	179	143
Third Component Cost	$19,303	$15,443
Total	$373,127	$298,502
Average Cost Per User	$348	$278

In the second scenario, the time required for clerical staff, compensation and benefits managers, and external accounting staff to complete their respective tasks is increased by 20%. This increases the cost of the first component SCC users to $424,589 from $353,824. The third component, related to time and labor costs for external service providers, increases from $19,303 to $23,164. Overall, the cost for the SCC users increases from $373,127 to $447,753. The average cost per use increases from $348 to $418 for SCC users.

	Base Scenario	Scenario 2
Users	1,072	1,072
First Component		
Clerical Staff Hours	3.5	4.2
Clerical Staff Wage	$59	$59
Compensation & Benefits Manager Hours	1	1.2
Compensation & Benefits Manager Wage	$125	$125
Total per User	$330	$396
First Component Cost	$353,824	$424,589
Third Component		
Accounting Staff Hours	0.167	0.200
Accounting Staff Wage	$108	$108
Total Hours	179	214
Third Component Cost	$19,303	$23,164
Total	$373,127	$447,753
Average Cost Per User	$348	$418

In the third scenario, wages for clerical staff, compensation and benefits managers, and external accounting staff are adjusted for wage growth. This increases the cost of the first component SCC users to $418,225 from $353,824. The third component, related to time and labor costs for external service providers, increases from $19,303 to $21,461. Overall, the cost for the SCC users increases from $373,127 to $439,686. The average cost per use increases from $348 to $410 for SCC users. The result suggests that changing the time required for various parts of the

	Base Scenario	Scenario 3
Users	1,072	1,072
First Component		
Clerical Staff Hours	3.5	3.5
Clerical Staff Wage	$59	$66
Compensation & Benefits Manager Hours	1	1
Compensation & Benefits Manager Wage	$125	$160
Total per User	$330	$390
First Component Cost	$353,824	$418,225
Third Component		
Accounting Staff Hours	0.167	0.167
Accounting Staff Wage	$108	$120
Total Hours	179	179
Third Component Cost	$19,303	$21,461
Total	$373,127	$439,686
Average Cost Per User	$348	$410

VFC Program has a larger impact on costs than adjusting wages for growth from January 2019 to February 2023.

In the fourth scenario, wages for clerical staff, compensation and benefits managers, and external accounting staff are adjusted for wage growth and the time required for clerical staff, compensation and benefits managers, and external accounting staff to complete their respective tasks is increased by 20%. This increases the cost of the first component SCC users to $501,870 from $353,824. The third component, related to time and labor costs for external service providers, increases from $19,303 to $25,753. Overall, the cost for the SCC users increases from $373,127 to $527,623. The average cost per use increases from $348 to $492 for SCC users. This represents what is likely a reasonable upper bound on per user costs for the new Self-Correction Component.

	Base Scenario	Scenario 4
Users	1,072	1,072
First Component		
Clerical Staff Hours	3.5	4.2
Clerical Staff Wage	$59	$66
Compensation & Benefits Manager Hours	1	1.2
Compensation & Benefits Manager Wage	$125	$160
Total per User	$330	$468
First Component Cost	$353,824	$501,870
Third Component		
Accounting Staff Hours	0.167	0.200
Accounting Staff Wage	$108	$120
Total Hours	179	214
Third Component Cost	$19,303	$25,753
Total	$373,127	$527,623
Average Cost Per User	$348	$492

For comparison, applying the wage and time adjustments to the non-bulk and non-SCC process would lead to average costs for these users to increase from $556 to $766 per use. Even the most expensive of scenarios for the Self-Correction Component will save users $64 per use compared to the original process and parameters. If it costs approximately $250 for a plan to familiarize itself with the amended VFC Program, then it would only take two uses of the Self-Correction Component to more than cover the cost of familiarization in time and labor savings.

Avoided Costs of Potential Enforcement from EBSA or Litigation from Plan Participants

Using the VFC Program allows plan fiduciaries to avoid civil enforcement actions and civil penalties when they voluntarily correct transactions. Civil penalties can be up to 5% of the "amount involved" but can increase to 100% of the amount if not corrected within 90 days of a final agency order.[6] Since the Self-Correction Component can be used on principal and lost

[6] "Civil Penalties," *Employee Benefits Security Administration*, available at https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/enforcement/oe-manual/civil-penalties.

earnings up to $1,000, first tier avoided first tier penalties would be a maximum of $50 while second tier penalties would be a maximum of $1,000. Likewise, using the VFC Program offers excise tax relief for corrected transactions. First tier penalties are equal to 15% of the amount involved while second tier penalties are worth 100% of the amount involved. Transactions eligible for the SCC and excise tax relief could avoid maximum penalties of $150 and $1,000 for first and second tier penalties, respectively. Utilizing the SCC to avoid the maximum second tier penalty in either instance would save a plan $650 per use. Furthermore, the cost of defending against litigation from plan participants would far exceed the costs of using the Self-Correction Component.

Distributional Effects

EBSA's regulatory impact analysis does not discuss any potential distributional effects from introducing the Self-Correction Component. The $1,000 limit on principal and lost earnings and the savings and borrowing characteristics of lower-income households suggests that the Self-Correction Component could have a positive distributional effect on these households. To start, studies show that lower-income households and individuals are more likely to take out loans or cash out early from their retirement plan. Bryant, Holden, and Sabelhaus found that lower-income participants cash out a larger proportion of their retirement plan, either through withdrawals or failures to repay a loan.[7] Ghilarducci, Radpour, and Webb found that lower-income households are more likely to make withdrawals from their retirement plans when faced with economic shocks.[8] Utkus and Young found that "less educated, lower-income, younger, and, somewhat paradoxically, higher-income households are more likely to borrow" from a 401(k) plan, and that taking a loan is strongly correlated with low contributions and nonretirement wealth.[9] This suggests that these households and individuals are more often making repayments on those loans which go back into their accounts.

Furthermore, retirement contributions may represent a greater share of their income compared to middle- and high-income households. Lower-income households tend to have lower savings rates, meaning their retirement savings may represent a greater share of a family's savings. Therefore, delinquent contributions or loan repayments may have a greater impact on lower-income families. The self-correction component can help alleviate this impact. To use the component, principal and lost earnings amounts must be less than or equal to $1,000. Smaller loan repayments and contributions are the transactions for which the component is designed.

Additionally, lower-income households often do not have the resources to pursue litigation if their plan fiduciaries fail in their duties. A 2017 report from the Legal Services Corporation found that 71% of low-income households experienced at least one civil legal problem and that

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[7] Bryant, Victoria, Sarah Holden & John Sabelhaus, "Qualified Retirement Plans: Analysis of Distribution and Rollover Activity," *Wharton Pension Research Council*, January 1, 2011, available at https://repository.upenn.edu/cgi/viewcontent.cgi?article=1165&context=prc_papers.

[8] Ghilarducci, Teresa, Siavash Radpour & Anthony Webb, "New Evidence on the Effect of Economic Shocks on Retirement Plan Withdrawals," *The Journal of Retirement Spring*, 6(2), 2019, pp. 7–19, available at https://jor.pm-research.com/content/6/4/7.short.

[9] Utkus, Stephen & Jean Young, "Financial Literacy and 401(k) Loans," in *Financial Literacy: Implications for Retirement Security and the Financial Marketplace*, edited by Olivia S. Mitchell and Annamaria Lusardi, 59–75, New York: Oxford University Press, 2011.

86% of low-income households' civil legal issues either did not receive adequate legal assistance or did not receive any legal assistance at all.[10] Encouraging greater participation in the VFC Program by lowering the costs of using it could help reduce the need for plan participants to pursue legal action.

The effects on middle- and higher-income households may be distinct from those on lower-income households. Higher incomes are positively correlated with participation in a 401(k) plan and larger account balances.[11] This indicates that these households can take larger loans from their plans. Participants can borrow the lessor of 50% of the vested account balance or $50,000 if their account balance is greater than $10,000.[12] Larger loans may result in repayments exceeding the $1,000 limit for the Self-Correction Component. Thus, loans for these households may be less likely to benefit from the introduction of the SCC.

Policy Alternatives

EBSA requested comments related to various alternative options related to the VFC Program. Integrating the VFC Program with the IRS' EPCRS and creating a pre-audit program may lead to increased costs for retirement plans. First, a pre-audit program would impose additional costs on users. One of the major benefits of the VFC Program is that it only imposes costs on plans who choose to use it, and those costs will often be less than the benefits. A pre-audit program would likely be more expensive than either the traditional VFC Program application or the Self-Correction Component as it would likely require more time from plan staff, and it would not be optional. Some plans that get selected for a pre-audit would have used the VFC Program, but costs for plans that were not planning on using the VFC Program would increase.

Second, the IRS EPCRS includes three programs, including the Self-Correction Program and Voluntary Correction Program. The Self-Correction Program is available to any plan for insignificant operational errors and to 401(k) plans, 403(b) plans, and any profit-sharing or other qualified plans for significant operational errors.[13] This program does not require IRS approval. Integrating the VFC Program with the Self-Correction Program would likely not lead to increased costs for plans.

The Voluntary Correction Program allows plans to fix mistakes in plan document language or operations. It requires a written submission and a user fee between $1,500 to $3,000, which is then reviewed by the IRS.[14] The paperwork required for this application is 35 pages while the

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[10] "The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-income Americans," *Legal Services Corporation*, June 2017, available at https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf.
[11] O'Brien, Sarah, "Men participate less often in 401(k) plans than women, unless they are automatically enrolled," *CNBC*, December 3, 2022, available at https://www.cnbc.com/2022/12/03/men-participate-less-in-401k-plans-than-women-unless-auto-enrolled.html; Knueven, Liz & Paul Kim, "The average 401(k) balance by age, income level, gender, and industry," *Business Insider*, October 17, 2022, available at https://www.businessinsider.com/personal-finance/average-401k-balance.
[12] "Retirement Topics – Plan Loans," *Internal Revenue Service*, available at https://www.irs.gov/retirement-plans/plan-participant-employee/retirement-topics-loans,
[13] "Self-Correction of Retirement Plan Errors," *Internal Revenue Service*, August 4, 2022, available at https://www.irs.gov/retirement-plans/correcting-plan-errors-self-correction-program-scp-general-description.
[14] "Voluntary Correction Program (VCP) – General Description," *Internal Revenue Service*, September 6, 2022, available at https://www.irs.gov/retirement-plans/voluntary-correction-program-general-description.

VFC Program application is only five pages. The VFC Program is estimated to require between six and eight hours to complete and the proposed Self-Correction Component is estimated to require two hours. Meanwhile, the Voluntary Correction Program forms take an average of 12.4 hours to complete.[15] The cost in labor for the Voluntary Correction Program may range from $730 to $1,550 if all work is completed at a clerical wage of $58.66 or at compensation and benefit manager wage of $124.75. This is substantially more expensive that the standard estimate for the non-bulk VFC Program cost of $560 per use or the SCC cost per use of $350.

The cost differential is important to consider when contemplating integrating the two programs. If integration requires imposing higher time requirements on the VFC Program, then costs will increase for users significantly. However, if the VFC Program and Self-Correction Component are successful in reducing burdens for retirement plans then it could serve as a model to which the Voluntary Correction Program could be adjusted. EBSA should ensure any efforts to integrate the two programs leads to cost savings for users.

Ex Post Evaluation

To assess the impact of the VFC Program and Self-Correction Component, EBSA should establish a robust data collection and evaluation program. The first step should be to collect important information from each application that would allow EBSA to determine the characteristics of corrections and the plans using the program. This information should include, for example: the amount of the correction; the type of transaction corrected; the annual wage of the participant(s) if the correction is related to participant contributions or loans; the size of the retirement plan; date of the prohibited transaction; and date by which money was supposed to be remitted. The second step should be to conduct follow-up surveys or interviews with plans that use the VFC Program. These should focus on determining:

- Which program did they use and why?
- Approximately how long did it take to fill out the required forms for that program?
- What could have been made easier/simpler on the forms?
- Are they likely to use the program again in the future if needed?

Together, the data and survey/interview results would provide insights into how retirement plans are using the program and how to potentially improve it in the future. The results could also demonstrate which plans or transactions may be underserved by the VFC Program.

The data would also enable EBSA to perform various analyses to assess the performance of the VFC Program. For example, knowing the size of corrected transactions and the time elapsed between the date of the mistake and its correction would allow EBSA to estimate how much the plan may have been penalized in absence of the VFC Program. Avoided penalties are a benefit of the program and being able to monetize all costs and benefits is a critical component of a regulatory impact analysis. Having data on how long it takes to fill out the required forms of

[15] The IRS reported 15,375 responses with a total time burden of 190,941 hours. *See* "OMB Control No: 1545-1673," *Office of Information and Regulatory Affairs*, October 31, 2022, available at https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202208-1545-005.

both the SCC and traditional VFC Program application would enable EBSA to adjust its cost calculations.

Ideally, evaluation work should be performed in tandem between EBSA and the IRS to compare the VFC Program and Voluntary Correction Program as the two program serve very similar functions. Collaboration would allow both agencies to determine which plans are using which program and the size of self-corrections and potentially avoided penalties. It would also allow both agencies to learn from each other by seeing the successes and challenges of both programs. It would also enhance future rulemaking in this area as it would enable both agencies to get a better sense of the costs and benefits of alternative approaches to voluntary corrections by plan fiduciaries.

Other Impacts of the Self-Correction Component

The Self-Correction Component provides additional benefits to plans and EBSA. First, lowering the costs may incentivize more plans to report self-corrections. Plans already utilizing the VFC Program would see lower costs, and there would be a lower barrier for new plans to use the program. These lower costs could also be passed on to plan participants in the form of lower fees.

Second, the Self-Correction Component will conserve resources for EBSA. The reduced reporting requirement reduces the costs for evaluating each application. EBSA will not have to spend time and money pursuing penalties or enforcement actions against plans that report proper self-corrections. Increased use of the program will also enhance transparency between retirement plans and the agency as the agency receives a closer look into how plans are self-correcting and what they may be struggling with while plans get guidance on how to self-correct errors.

However, the Self-Correction Component and VFC Program could lead to abuse or perverse incentives. Without oversight and thorough review, plans may put misleading information on their self-correction applications and wrongfully avoid penalties. Additionally, some plans may be hesitant to use any self-correction programs for fear that reporting their errors will lead to their application being rejected and the agency pursuing issuing penalties or enforcement actions.

Conclusion

The introduction of the Self-Correction Component will lower costs for both users and EBSA by reducing paperwork burdens and protecting against civil penalties. This will encourage greater use of the VFC Program. The SCC will also particularly benefit lower-income households.

A robust evaluation program that includes data collection from applications and engagement with participating plans will allow EBSA to determine how plans are using the VFC Program and potential areas of improvement. It will also allow the agency to better compare the VFC Program with the IRS's Voluntary Correction Program and determine potential costs and benefits of integration with the IRS EPCRS. Since the IRS programs require significantly more time and labor than the VFC Program, any integration must aim to create cost savings for retirement plans.

In considering a final rule, EBSA should conduct a more thorough and robust benefit-cost analysis. Sensitivity analyses based on the time and labor costs of the programs are important to provide a potential range of costs. While benefits are difficult to quantify in this case, EBSA should provide examples of how much litigation and civil penalties over uncorrected breaches have cost plans. Highlighting these examples could also help convince more plans to use the VFC Program as it would allow them to point to specific cases where self-corrections could have saved a plan significant money. EBSA should also include examples of lost earnings calculations to demonstrate how much plan participants could receive from self-corrections. Analysis of previous VFC Program submissions could also offer useful insights into avoided costs. Overall, EBSA should proceed with the introduction of the Self-Correction Component, but more analysis and support should be included in the final ruling.