PENSION RIGHTS CENTER

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Office of Exemption Determinations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave. NW
Washington, DC 20210
Submitted to: http://www.regulations.gov EBSA-2022-0024
Application # D-11799

Re: RIN 1210-ZA23
Proposed Amendment to Prohibited Transaction Exemption PTE 2002-51 for correction of delinquent participant contributions under the Voluntary Fiduciary Correction Program

The Pension Rights Center submits the following comments on the proposed amendment to the class exemption for certain prohibited transactions associated with the Labor Department's Voluntary Fiduciary Correction Program (VFCP). [1] The Pension Rights Center for over 45 years has been dedicated to the protection and promotion of retirement security for workers, retirees and their families.

The proposed Self Correction Component amendment to the VFC Program would alter the conditions required for fiduciary relief from enforcement actions and penalties resulting from failure to timely deposit participant contributions and participant loan repayments into a plan. The amendment would eliminate the application and approval procedure that currently applies, as well as the notice to interested parties that an employer has applied for a voluntary fiduciary correction. Relief under the proposed self-correction amendment for delinquent contributions would be limited to corrections where the amount of lost earnings is $1000 or less.

[1] https://www.govinfo.gov/content/pkg/FR-2022-11-21/pdf/2022-24702.pdf The letter also comments on the modification to the VCF program concerning failure to timely deposit participant contributions and loan repayments.

The requirement that delinquent participant contributions must be repaid to the plan no more than 180 calendar days from the date they were received by the employer or would have been payable to the participant in cash would remain under this amendment.

The prohibited transaction exemption was not available to plan fiduciaries who used the exemption within the last three years. This exemption, and this condition, applied to delinquent participant contributions and loans, as well as certain other correctible fiduciary violations.

The Department requested comments on the proposed elimination of this three-year requirement for fiduciaries who failed to timely deposit participant contributions and loans. The Department states that the purpose of the limitation is to "prevent parties from becoming lax in complying with fiduciary and other ERISA duties…" The Department maintains that "the risk of such behavior is low" in the case of failures to timely deposit contributions when the amount in question is relatively small (i.e., that earnings that the plan would have made if the contribution had been made in timely fashion are less than $1,000.)

<u>Discussion</u>

A voluntary correction program, particularly self-correction program, must be carefully crafted to ensure that corrections are timely made and are only for inadvertent errors on the part of plan sponsors and fiduciaries. This amendment to the VFC Program will simplify procedures by eliminating the notice to interested parties and substituting a form on the EBSA website for an application and approval system. This will make it easier for employers to use the VFC Program and should free EBSA resources for other projects. At the same time, the elimination of notices and official approvals can leave open doors for abuse and the impression that no one is monitoring the system.

The Pension Rights Center recommends that the three-year limitation period remain applicable for fiduciaries using the prohibited transaction exemption for delinquent contributions. However, we suggest that if the Department chooses to eliminate the three-year limitation period, that such a change only be made on a trial basis so that the Department can monitor how often employers are using the VFC Program without the three-year limitation, and that the Department also prohibit use of the exemption in the case of a third failure to timely deposit participant contributions or loan repayments.

In our view, a three-year limitation period would be easy to monitor electronically and should not impose a burden on EBSA resources. Additionally, although the three-year limitation is not routinely violated currently, removing it may encourage more employers to rely on the additional funds not timely deposited for business expenses.

Participants may not be aware of what is happening in their accounts, especially those participants who are automatically enrolled in a plan. They cannot be relied on in most cases to flag a problem. Since participant contributions to a retirement savings plan are monies withheld from their own wages, it is especially important that employers timely deposit that money into participant accounts.

The three-year limitation period seems to be an easy way to monitor the Self Correction Component of the VFC program without using unnecessary EBSA resources.

Respectfully submitted,

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