



Employee Benefits In Focus

Pitta LLP
For Clients and Friends
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DOL PROPOSES IMPROVEMENTS TO ITS VOLUNTARY FIDUCIARY CORRECTION PROGRAM

On November 18, 2022, the U.S. Department of Labor (“DOL”) Employee Benefits Security Administration (“EBSA”) issued a News Release announcing proposed improvements to its Voluntary Fiduciary Correction Program (“VFCP”). The proposed improvements were published in the Federal Register on November 21, 2022 and can be accessed by clicking [here](#). To read the DOL’s News Release, please click [here](#). EBSA is seeking public comments on its proposed improvements to the VFCP by January 20, 2023.

Consistent with the DOL’s News Release, the proposed improvements include: “a self-correction component for employers who fail to send employee salary withholding contributions or participant loan repayments to retirement plans in a timely manner.” The changes are supposed to: 1) streamline the VFCP process, 2) make it easier and more cost effective for employers and plan officials to correct mistakes, and 3) allow the DOL to improve compliance. Further, the proposed changes will: 1) detail the types of transactions eligible for correction under the program, 2) “[e]xpand the scope of other transactions currently eligible for correction and simplify administrative or procedural requirements under the program,” and 3) “[a]mend the associated prohibited transaction class exemption, known as PTE 2002-51¹.”

According to the News Release, the most significant feature of the proposed improvements is the addition of the ability to self-correct. Such a feature allows employers and other plan officials to notify EBSA electronically “that they have self-corrected certain failures to send participant contributions and loan repayments to plans on time.” In order to use the VFCP, plan officials must submit an application to EBSA for review and approval. However, plan sponsors may only self-correct if certain conditions are met. Specifically, self-correction is permitted if: 1) participant contributions or loan repayments to the plan were “remitted no more than 180 calendar days from the date of withholding or receipt,” 2) lost earnings, calculated from date of withholding or receipt, are not greater than \$1,000, 3) the plan sponsor “must not be under investigation as defined in the program,” and 4) in order to calculate lost earnings, plan sponsors must use the program’s online calculator as well as an online tool to finish and file the self-correction component notice. In addition, plan sponsors are required to complete and retain the self-correction retention record checklist.

¹ PTE 2002-51 is a class exemption that provides relief from excise taxes imposed by the Internal Revenue Code of 1986.

PBGC APPROVES SFA APPLICATIONS FOR CENTRAL STATES PLAN & IRON WORKERS LOCAL 17 PENSION FUND

In a major boost to the troubled Central States, Southeast & Southwest Areas Pension Plan (“Central States Plan”) on December 8, 2022, the Pension Benefit Guaranty Corporation (“PBGC”) announced that it approved the Central States Plan’s special financial assistance (“SFA”) application. The following day, the PBGC separately announced that it approved the Iron Workers Local 17 Pension Fund’s (“Iron Workers Local 17 Fund’s”) supplemented application submitted to the SFA Program.

As a reminder, the PBGC’s SFA Program was enacted as part of the American Rescue Plan Act of 2021 (“ARPA”). ARPA is a \$90 billion-dollar financial assistance program that the government enacted with the Central States Plan in mind. We published articles on the SFA Program in our Employee Benefits In Focus issues in July and November 2022. Please click [here](#) to read our July 2022 article and [here](#) to read our November 2022 article. Of note is that under the PBGC’s SFA final rule, plans are permitted to re-submit supplemented applications for additional SFA even if they already submitted applications in compliance with the original interim final rule.

According to the News and Media Release published by the PBGC, the Central States Plan will receive around \$35.8 billion in SFA, “including interest to the expected date of SFA payment to the plan.” The Central States Plan covers 357,056 participants, is based in Chicago, Illinois, and encompasses a range of industries including construction, transportation, food processing, and more. Without the SFA, the Central States Plan was facing an \$18 billion-dollar funding shortfall. In fact, Central States applied under the interim final rule, then reapplied in August 2022 under the final rule and requested around one (\$1) billion more than the amount it requested in its original SFA application.

The Iron Workers Local 17 Fund, which is based in Cleveland, Ohio, and covers around 1,900 individuals in the construction industry, will receive around \$42.2 million in supplemented SFA, in addition to the \$48.9 million in SFA that the PBGC approved in May 2022 under its original interim final rule application.

According to the PBGC, as of December 9, 2022, the PBGC has approved nearly “\$45.4 billion to plans that cover over 550,000 workers, retirees, and beneficiaries.”

DOL ANNOUNCES FINAL RULE REGARDING CONSIDERATION OF ESG FACTORS

On November 22, 2022, the Department of Labor (“DOL”) issued a final rule that permits fiduciaries to take into account climate change and other environmental, social and governance (“ESG”) factors when they select retirement investments and exercise shareholder rights including proxy voting. The final rule follows a Notice of Proposed Rule Making (“NPRM”) that was published on October 14, 2021. Please see our October 29, 2021 In Focus article titled [“Department of Labor Proposal Amends](#)

[Investment Duties Regulation under ERISA](#)” for details on the NPRM. On the same date that the final rule was released, the Employee Benefits Security Administration (“EBSA”) issued a Fact Sheet explaining the final rule (“EBSA Fact Sheet”).

The final rule, titled “Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights” comes in response to Executive Orders (“EOs”) 13990 and 14030 which President Biden signed on January 20, 2021 and May 20, 2021 respectively. EO 13990, titled “Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis,” directed federal agencies to review regulations adopted between 2017 and 2021 that are or may be inconsistent with the policies set forth in the EO. Under EO 14030, titled “Executive Order on Climate-Related Financial Risk,” federal agencies were directed to ascertain and assess policies to safeguard the life savings and pensions of America’s workers and families from the threats of climate-related financial risk.

The final rule states that two rules issued in 2020 caused uncertainty and confusion and created a chilling effect with respect to weighing ESG factors. The 2020 rules, published on November 13, 2020 and December 16, 2020 were titled, respectively, “Financial Factors in Selecting Plan Investments” and “Fiduciary Duties Regarding Proxy Voting and Shareholder Rights.” According to the EBSA Fact Sheet, the final rule retains and reiterates two core principles: 1) the dual duties of prudence and loyalty which mandate that the Employee Retirement Income Security Act of 1974, as amended (“ERISA”) plan fiduciaries “focus on relevant risk-return factors and not subordinate the interests of participants and beneficiaries (such as by sacrificing investment returns or taking on additional investment risk) to objectives unrelated to the provision of benefits under the plan,” and 2) when a plan’s assets have shares of stock, the fiduciary duty to manage plan assets includes “the management of shareholder rights related to those shares, such as the right to vote proxies.”

The first significant change in the final rule clarifies the permissibility of consideration of ESG factors. The second significant change eliminates the special rules for qualified default investment alternatives (“QDIAs”) that were applicable under the 2020 rules. Under the final rule, the standards applied to QDIAs are the same as those applied to other investments. Another significant change to the 2020 rules is the final rule’s interpretation of the “tiebreaker” standard which allows fiduciaries to take into account collateral benefits as tiebreakers in certain instances. The 2020 rules mandated that before fiduciaries could consider collateral factors to break a tie, competing investments had to be economically indistinguishable. The EBSA Fact Sheet states that the final rule “replaces those provisions with a standard that instead requires the fiduciary to prudently conclude that competing investments or investment courses of action equally serve the financial interest of the plan over the appropriate time horizon.” In such cases, fiduciaries are permitted to select investments or investment courses of action based on collateral benefits other than investment returns. The final rule also deletes the special documentation requirement on the use of collateral factors provided for in the 2020 rules.

Further, as explained in the EBSA Fact Sheet, the final rule includes a new provision that makes clear that fiduciaries do not violate their duty of loyalty if they look to “participants’ non-financial preferences” when creating “a menu of prudent investment options for participant-directed individual account plans.”

In terms of the final rule’s provisions on shareholder rights, including proxy voting, the EBSA Fact Sheet provides that similar to the 2020 rules, the final rule provides for “a principles-based approach to governing the exercise of shareholder rights.” Further, the final rule includes three important changes to the 2020 rules: 1) the final rule gets rid of a provision in the 2020 rules that suggested “plan fiduciaries should be indifferent to the exercise of their rights as shareholders, even if the cost is minimal,” 2) the final rule gets rid of two safe harbor examples for proxy voting permitted under the 2020 rules, and 3) the final rule gets rid of “specific requirements in the 2020 rules on maintaining records on proxy voting activities . . . and monitoring obligations when using investment managers or proxy voting firms[.]”

The effective date of the final rule is 60 days after publication in the Federal Register. To read the EBSA’s Fact Sheet on the final rule, please click [here](#).

A FEW REMINDERS (Based on calendar-year plans)

These reminders are for informational purposes only and are not intended to replace your regular compliance calendar as they do not include all deadlines that may be applicable to your plan.

DECEMBER

HEALTH AND WELFARE PLANS

- **Prescription Drug Reporting**
 - December 27, 2022 is the deadline by which the plan administrator or other plan issuer must submit information on prescription drug and other health care spending for 2020 and 2021.

DEFINED BENEFIT PLANS

- **Actuary’s Certification of 2022 Adjusted Funding Target Attainment Percentage (“AFTAP”)**
 - December 31, 2022 is the deadline by which the actuary must certify the 2022 AFTAP to avoid a presumed AFTAP of less than 60%.
- **Election to Reduce January 1, 2022 Credit Balances**
 - December 31, 2022 is the deadline by which the plan sponsor must elect to reduce January 1, 2022 credit balances.

- **Revoke Election to Use Credit Balances in Excess of 2022 Minimum Required Contributions**
 - December 31, 2022 is the deadline by which the plan sponsor must revoke an election to use credit balances in excess of 2022 minimum required contributions excluding small plans that use year-end valuation dates.

DEFINED CONTRIBUTION PLANS

- **Ongoing Required Minimum Distributions**
 - December 31, 2022 is the deadline by which eligible participants must receive their ongoing required minimum distributions for 2022.

JANUARY

ALL PLANS

- **Form 1099-NEC (Nonemployee Compensation)**
 - January 31, 2023 is the deadline by which to furnish the Form 1099-NEC to recipients and file it with the Internal Revenue Service (“IRS”)
- **Form W-2 (Wage and Tax Statement if plan has employees)**
 - January 31, 2023 is the deadline by which to file the Form W-2 with the Social Security Administration (“SSA”).
- **Form W-3 (Transmittal of Wage and Tax Statements)**
 - January 31, 2023 is the deadline by which to file the Form W-3 with the SSA.

DEFINED BENEFIT PLANS

- **Form 1099-R**
 - January 31, 2023 is the deadline by which to furnish the Form 1099-R to recipients of 2022 distributions.
- **Form 945**
 - January 31, 2023 is the deadline by which to file the Form 945 with the IRS for 2022 nonpayroll withholding if taxes were not paid in full and deposited timely. If taxes were paid in full for the year and timely then the deadline for the Form 945 is extended by 10 days.

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HAPPY HOLIDAYS!

As we approach the end of the year, Pitta LLP wishes our clients, colleagues, and friends Happy Holidays, peace on Earth, good will toward all and a Happy and Joyous New Year!