

January 20, 2023

Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, N.W., Room N-5655
Washington, D.C. 20210
(Submitted via the Federal eRulemaking Portal at www.regulations.gov)

**Re: Proposed Revisions to the Voluntary Fiduciary Correction Program
RIN 1210-AB64**

Nova 401(k) Associates (Nova) is submitting this letter in response to the request for comments on the proposed changes to the Voluntary Fiduciary Correction Program (VFCP or the VFC program). Nova is a third-party administrator serving over 6,500 employers. Our current practice involves all types of retirement plans. Nova's primary focus is on employers with fewer than 2,000 employees. Our affiliate, Administrative Fiduciary Services Inc. (AFS), serves as an independent administrative fiduciary and provides administrative fiduciary services and support. Neither Nova nor AFS offer investment products, investment advice or daily record-keeping as part of our services.

Nova is very appreciative of the Department of Labor's (DOL) efforts to update and expand the VFC program. Nova applauds the addition of the new Self-Correction Component (SC Component or SCC) for Delinquent Participant Contributions and Loan Repayments (collectively, Late Deposits). Our comments below are intended to provide recommendations as to how the proposal can be further improved to encourage more widespread use of VFCP and the SC component.

Self-Correction Component

- 1. Deposit Deadline for Self-Correction Should Be Extended** – Under the proposal, self-correction is only permitted if Late Deposits were remitted to the plan no more than 180 calendar days from the date such amounts were received or withheld by the employer. Nova recommends this deadline be extended until the due date of Form 5500 for the plan year in which the breach occurred. It has been Nova's experience that many times a late deposit is discovered in conjunction with the administrative work done after the plan year ends. Allowing for remittance to the plan by the due date of the plan's annual report would allow more employers to utilize self-correction. The cap on lost earnings precludes any significant risk to participants.
- 2. Cap on Lost Earnings Should be Increased to \$2,500 and Include a COLA** – Another requirement to utilize the Self-Correction Component of VFCP is that lost earnings restored as a result of the correction can be no more than \$1,000 (excluding any excise tax amounts paid to the plan under PTE 2002-51). Nova is concerned that this cap is too low and may quickly become problematic as it is not subject to an automatic cost-of-living adjustment. It is clear from news and reports from the DOL's own U.S. Bureau of Labor Statistics that the

U. S. economy is experiencing rates of inflation that have not been seen many years. It has been over 15 years since VFCP was last revised and Nova fears that in 15 years, the \$1,000 cap will be inadequate. Nova recommends that the cap be increased to \$2,500 and provide for automatic cost-of-living adjustments.

3. **Notice to the Department** – Under the proposal, a condition of self-correction under SCC is that a detailed notice be provided to the Department through an online portal on the Department’s website. Nova believes this requirement creates unnecessary burdens that will discourage the use of SCC. Information on delinquent contributions is already reported to the Department as a schedule to line 4a of Schedule H or Schedule I of Form 5500. Having to provide an additional notice at the time of correction is redundant and unnecessary. Nova recommends that participation in the SC component should not require additional notifications to the Department beyond the Schedule of Delinquent Contributions filed in connection with Form 5500.
4. **Nova Supports the Use of the Online Calculator for Self-Correction** – As a condition of participation in SCC, lost earnings need to be determined by using the online calculator. Nova is very supportive of this provision as the online calculator provides a straightforward method for making this determination.
5. **There Should Not Be a Limit on the Frequency of Use of SCC** – The Department chose not to impose a limit on how often a self-corrector could use SCC to self-correct Late Deposits. Nova is strongly supportive of this approach. Plan sponsors and other self-correctors who self-correct by going through the SCC procedures have demonstrated that they are compliance focused. Given the cap on Lost Earnings, allowing repeat use of SCC is unlikely to present a risk to participants. Nova also strongly supports removal of the 3-year provision from PTE 2002-51 for the same reasons.
6. **Small Employers Should Not Be Required to Follow the 7-Day Safe Harbor** – The Department asked for comment on SCC criteria and conditions and questioned whether small employers should be required to adhere to the 7-day safe harbor for depositing employee contributions as a condition of SCC. Nova does not support mandatory imposition of the 7-day safe harbor as a condition for self-correction by a small employer under SCC. It is Nova’s experience that most small employers do follow the 7-day safe harbor. But is unfair to subject them to a more restrictive standard that fails to acknowledge that there are occasions when a particular deposit cannot be reasonably segregated from the employer’s general assets within the 7-day period. As a matter of principle, Nova believes that small employers should not be disincentivized from using SCC by imposing more restrictive requirements than are applied to large employers.
7. **Integration of VFCP with EPCRS** – Comments were requested on whether changes should be made to VFCP to better integrate the program with the IRS Employee Plans Compliance Resolution System (EPCRS). Nova strongly recommends that the DOL consider Sections 305 of the SECURE 2.0 Act of 2022 in revising VFCP. Congress has specifically directed the Department to treat any loan failure that is self-corrected under EPCRS as meeting the requirements of VFCP. Nova recommends that the Department implement this Congressional

directive in the current update to VFCP. It is fortuitous that the Department's proposed update to VFCP comes as Congress acts to give direction. Nova recommends that VFCP be amended to provide that participant loan failures self-corrected in accordance with EPCRS are considered to meet the requirements of VFCP under the SCC component. In addition, Nova recommends that correction of a fiduciary breach associated with an overpayment be added as a transaction that may be corrected under VFCP. The Department should take consideration of ERISA Section 206(h), as added by SECURE 2.0, and IRS correction procedures under EPCRS should be sufficient to satisfy VFCP.

Conclusion

Nova appreciates the opportunity to provide input to the Department regarding the proposed revisions to VFCP. Should you have any questions, please feel free to contact Craig Hoffman, Attorney/Senior Consultant, at choffman@nova401k.com.

Sincerely,

/s/

Karen N. Smith
President