

DEPARTMENT OF LABOR VOLUNTARY FIDUCIARY CORRECTION PROGRAM

The Voluntary Fiduciary Correction Program (VFCP) is designed to encourage employers and other plan officials to voluntarily comply with ERISA by self-correcting certain violations of the law. The VFCP covers eighteen specific transactions, and the program describes acceptable methods for correcting violations. In addition, the Employee Benefits Security Administration of the Department of Labor (EBSA) may provide immediate relief from the payment of excise taxes for transactions under PTE (Prohibited Transaction Exemption) 2002-51 (as amended).

Anyone who may be liable for fiduciary violations under ERISA, including employee benefit plan sponsors, plan officials, and parties-in-interest, may voluntarily apply for relief from enforcement actions provided they comply with the criteria and satisfy the procedures outlined in the program. The benefit of participating in the VFCP is that the EBSA will issue a no action letter with respect to the disclosed breach as long as you meet the eligibility requirements and fully correct the breach. This no action letter states that the Department of Labor will not initiate a civil investigation regarding the transaction or assess civil penalties under either Section 502(l) or 502(i) of ERISA on the correction amount paid to the plan or its participants. The Department of Labor reserves the right to conduct an investigation at any time to determine the truthfulness and completeness of the factual statements set forth in the application and that the corrected action was, in fact, taken.

A no action letter will not preclude:

1. Criminal investigations.

2. EBSA seeking removal from positions of responsibility with respect to a plan or other non-monetary injunctive relief against any person responsible for the transaction at issue.
3. EBSA referring information regarding the transaction to the Internal Revenue Service.
4. EBSA imposing civil penalties based on the failure or refusal to file a timely, complete and accurate annual report Form 5500. Amended annual reporting filings may be required if possible breaches of ERISA have been identified, or if action is taken to correct possible breaches in accordance with the Voluntary Fiduciary Compliance Program.

Additionally, this no action letter does not affect the ability of any other governmental agency, or any other person, to enforce any rights or carry out any authority they may have, with respect to matter described in the no action letter.

Eligibility for the VFCP is conditioned on the following:

1. Neither the plan nor the applicant is under investigation.
2. The application contains no evidence of potential criminal violations as determined by the Department of Labor.
3. The Department of Labor has not conducted an investigation which resulted in written notice to a plan fiduciary that the transaction for which the potential applicant could otherwise have sought relief under the program has been referred to the IRS.

Applicants do not need to consult or negotiate with the EBSA to use the program.

Applicants need only to follow the procedures outlined in the notice published in the April 6, 2005, Federal Register. This procedure is also found on the EBSA website.

Violations can be fully and correctly resolved as follows:

1. Identify any violations and determine whether they fall within the transactions covered by the program.
2. Follow the process outlined in the procedure for correcting specific violations.
3. Calculate and restore any losses and profits, if applicable, with interest, and distribute any supplemental benefits to participants.

4. File an application with the appropriate Employee Benefits Security Administration field office which includes documentation showing evidence of corrected transactions.

The VFCP provides relief for the following eighteen transactions:

1. Delinquent participant contributions and participant loan repayments to retirement plans.
2. Delinquent participant contributions to insured welfare plans.
3. Delinquent participant contributions to welfare plans and trusts.
4. Fair market interest rate loans with parties-in-interest.
5. Below-market interest rate loans with parties-in-interest.
6. Below-market interest rate loans with non-parties-in-interest.
7. Below-market interest rate loans due to delay in perfecting security interest.
8. Participant loan amount exceeds plan limitations.
9. Participant loan duration exceeds plan limitations.
10. Purchase of assets by plans from party-in-interest.
11. Sale of assets by plan to party-in-interest.
12. Sale and lease-back of real property to sponsoring employers.
13. Purchase of assets from non-parties-in-interest at other than fair market value.
14. Sale of assets to non-parties-in-interest at other than fair market value.
15. Holding of an illiquid asset previously purchased by plan.
16. Benefit payments based on improper valuation of plan assets.
17. Payment of duplicate, excessive or unnecessary compensation.
18. Payment of dual compensation to plan fiduciaries.

The VFCP provides rules for making acceptable corrections involving the transactions noted above and these rules must be followed in order to obtain relief. The application for the VFCP to the Department of Labor must contain basic plan and fiduciary information as well as a description of the breach, documentation of the correction, and the following additional information:

1. Documentation that supports the narrative description of the transaction.
2. Documentation that supports the correction.
3. Penalty of perjury statement signed by the fiduciary.
4. Signed VFCP checklist.

Persons using the program must fully and accurately correct violations. Incomplete or unacceptable applications may be rejected. If rejected, applicants may be subject to enforcement action, including assessment of civil monetary penalties under ERISA Section 502(l).

Applicants must restore the plan, participants, and beneficiaries to the condition they would have been in had the breach not occurred. The VFCP includes an online calculator on the EBSA's website to assist applicants by automatically calculating correction amounts that must be paid to the plan. Plans must then file, where necessary, amended Forms 5500 to reflect corrected transactions or valuations.

Applicants must also provide proof of payment to participants and beneficiaries, or properly segregate affected assets in cases where the plan is unable to identify the location of missing individuals. Payment of the correction amount may be made directly to the plan where distributions to separated participants would be less than \$20.00 and the cost of correction exceeds the distribution owed.

In order to encourage use of the program, the Department of Labor granted a class exemption providing limited relief from the excise taxes under the Internal Revenue Code imposed on certain transactions covered by the VFCP. Four specific transactions are now exempt from excise tax, provided applicants comply with the conditions contained in the exemption. The requirements to comply with this class exemption are as follows:

1. No more than 10% of the fair market value of the total plan assets can be involved.
2. Notice of the transaction and the correction must be provided to interested persons within 60 days of the filing, and a copy of the notice must be sent to the EBSA. The notice must describe the breach and correction and state that interested persons can provide comments to the EBSA for 30 days. Delivery of the notice can be by posting, regular mail, or electronic mail.
3. The breach cannot be part of an arrangement or understanding that benefits a related party.
4. The exemption does not apply to transactions for which an application for a similar transaction was submitted under the program within the past three years.

The exemption from excise tax currently covers the following transactions:

1. Failure to timely remit participant contributions or participant loan repayments to the plan.
2. Loans made at fair market interest rate by plans with party-in-interest.
3. Purchases or sale of assets between plans and parties-in-interest at fair market value.
4. Sales of real property to plans by employers and lease-back of the property at fair market value and fair market rental value, respectively.