



# Pension Analyst

Important information

Plan administration and operation

April 2009

## DOL Voluntary Fiduciary Correction (VFC) Program

### Who's affected

The Voluntary Fiduciary Correction (VFC) Program is available to plan sponsors, officers, trustees, plan administrators, parties-in-interest or other persons, who may be liable for certain fiduciary breaches under the Employee Retirement Income Security Act (ERISA).

The VFC Program is not available to plans that are not subject to ERISA, such as governmental and non-electing church plans, non-ERISA 403(b) plans, section 457(b) plans, and 409A nonqualified plans.

### Background and summary

In 2000, the Department of Labor (DOL) created the VFC Program. This program allowed plan sponsors and fiduciaries to voluntarily correct certain fiduciary violations and avoid civil and criminal penalties. In 2002, the DOL revised the Program to include a prohibited transaction class exemption to provide excise tax relief for four specific transactions. In April 2005, the DOL made additional changes to simplify the submission process and expand the availability of the Program.

In 2006, the DOL made additional changes to the VFC Program, including the addition of two more transactions to the prohibited transaction class exemption. This publication describes the Program as it stands today.

### Action and next steps

Plan fiduciaries and their legal counsel should decide whether to review plan transactions to determine if they meet all ERISA fiduciary standards. If violations have occurred, the individuals responsible should discuss the VFC Program with their legal counsel to determine if it is an appropriate option for their situation.

#### In this issue

- [Program eligibility](#)
- [Procedures for VFC Program correction](#)
- [Relief from excise taxes for certain transactions](#)
- [Next steps](#)

#### Related documents

- [Glossary of special VFC terms](#)
- [Eligible transactions and corrections under the VFC Program](#)
- [Model Application Form](#)
- [VFC Program Checklist](#)

ERISA establishes the responsibilities of employee benefit plan fiduciaries. A fiduciary who breaches any of these responsibilities is personally liable for any losses to the plan as a result of that transaction, and must restore to the plan

your Rock for Retirement®



**Prudential**

any profits he made through the use of those assets. A fiduciary may also be liable for a co-fiduciary's breach, or for knowing participation in a fiduciary breach.

If an individual satisfies all the requirements of the VFC Program, the DOL will not initiate a civil investigation or civil action with respect to the breach, and will not impose the standard 20% penalty.

## Program eligibility

The DOL will only consider a VFC Program application if neither the plan nor the applicant is under investigation. The 2006 changes narrowed the definition of "[under investigation](#)" to focus on situations when an investigation (either ongoing or for which notice has been given) involves the plan or an act or transaction under the plan.

Normally, a plan or potential applicant that is the subject of a non-criminal investigation or examination by the Pension Benefit Guaranty Corporation or certain state agencies is not eligible to use the VFC Program. However, the DOL does permit potential applicants to use the VFC Program if they disclose the existence of such an investigation.

The VFC Program cannot be used if there is any evidence of potential criminal violations.

## Procedures for VFC Program correction

A fiduciary must take the following steps to correct a fiduciary breach through the VFC Program.

### ***STEP 1: Determine if identified violations can be corrected under the VFC Program.***

Fiduciaries can correct the following retirement plan-related prohibited transactions under the VFC Program:

1. [Delinquent Participant Contributions and Loan Repayments.](#)
2. [Loan at Fair Market Interest Rate to a Party-in-Interest.](#)
3. [Loan at Below-Market Interest Rate to a Party-in-Interest.](#)
4. [Loan at Below-Market Interest Rate to a Person Who is Not a Party-in-Interest.](#)
5. [Loan at Below-Market Interest Rate Solely Due to a Delay in Perfecting the Plan's Security Interest.](#)
6. [Participant Loan Failing to Comply with Plan Provisions for Amount, Duration, or Level Amortization.](#)
7. [Defaulted Participant Loan.](#)
8. [Purchase of an Asset \(Including Real Property\) by a Plan from a Party-in-Interest.](#)
9. [Sale of an Asset \(Including Real Property\) by a Plan to a Party-in-Interest.](#)
10. [Sale and Leaseback of Real Property to Employer.](#)
11. [Purchase of an Asset \(Including Real Property\) by a Plan from a Person Who is Not a Party-in-Interest at a Price Other Than Fair Market Value.](#)
12. [Sale of an Asset \(Including Real Property\) By a Plan to a Person Who is Not a Party-in-Interest at a Price Other Than Fair Market Value.](#)
13. [Holding of an Illiquid Asset Previously Purchased by a Plan.](#)
14. [Payment of Benefits without Properly Valuing Plan Assets on Which Payment is Based.](#)
15. [Duplicative, Excessive, or Unnecessary Compensation Paid by a Plan.](#)
16. [Payment of Dual Compensation to a Plan Fiduciary.](#)
17. [Improper Payment of Expenses by Plan.](#)

### ***STEP 2: Use the VFC Program method of correction.***

The VFC Program provides specific correction methods for each of the covered transactions. The appropriate correction must be made *before* the VFC application is submitted. These correction methods, including the calculation methods for plan losses or earnings, are described in the document titled "Eligible transactions and corrections under the VFC Program."

Any corrections involving multiple transactions with different time periods must be corrected by performing the calculations in steps using different recovery dates. The [Online Calculator](#) may be used to perform such calculations. However, if the facts and circumstances surrounding the correction cannot be accommodated by the Online Calculator's functions, a manual calculation may be performed.

In addition, the DOL has indicated that, in order to ensure that results are correct, it is the responsibility of the applicant to take into account any adjustments necessary because of corporate transactions (e.g., stock splits, tenders, and mergers) before entering data into the Online Calculator. If the facts and circumstances surrounding the correction cannot be accommodated by the Online Calculator, an applicant may submit a manual calculation.

The DOL believes that the correction of participant loan issues under the VFC Program should be coordinated with the [IRS' Employee Plans Compliance Resolution System \(EPCRS\)](#). Specifically, correction of certain participant loan issues must first be submitted under [Voluntary Correction Program \(VCP\)](#). If the applicant meets all of the requirements of the VCP, the IRS will issue a Compliance Statement. The plan fiduciary may then apply for correction under the VFC Program. Applicants must provide the DOL with a copy of the IRS Compliance Statement and proof of payment of any required corrective contribution.

Currently, the VFC Program does not include a self-correction component. The DOL believes that an important result under the VFC Program is the certainty that applicants have complied with the terms of the program and have revealed the details of the transaction and the correction in their applications.

In addition, VFC requires plan sponsors to make any restorative payments to the plan. These restorative payments cannot be made from plan assets, such as forfeitures.

***STEP 3: File an application with the appropriate Employee Benefits Security Administration (EBSA) Regional Office.***

The DOL has provided a [model application form](#) that filers may use to make a submission. If an applicant uses the [Online Calculator](#), the applicant may submit a copy of the page(s) that result from the "View Printable Results" function. Filers must also submit a completed [VFC Program Checklist](#) with their applications.

The application must be sent to the appropriate [EBSA Regional Office](#).

***STEP 4: Receive a no-action letter***

DOL will issue a no-action letter if the applicant meets all VFC Program requirements. The issuance of a no-action letter means that DOL will not conduct a civil investigation or assess the 20% penalty regarding the transaction(s) corrected under the VFC Program. However, the no-action letter does not prevent the DOL from conducting a criminal investigation of the transaction identified in the application. It also does not affect the ability of any other government agency to investigate the transaction.

## Relief from excise taxes for certain transactions

The IRS imposes a 15% excise tax when a prohibited transaction occurs. However, the IRS will not impose this excise tax for six specific transactions if certain requirements are met. The six transactions that are eligible for the excise tax relief are:

- Failure to transmit participant contributions or participant loan repayments to a pension plan within a reasonable period of time after withholding or receipt by the employer.
- Loans made at fair market interest rate to parties-in-interest.
- Purchase or sale of an asset at fair market value between a plan and a party-in-interest.
- Sale and leaseback of real property to the employer.
- Purchase of an asset that was later determined to be illiquid or that was acquired from a third party.
- Use of plan assets to pay expenses for services provided in connection with the establishment, design or termination of the plan (settlor expenses), provided that the payment of the settlor expense was not prohibited by the plan.

Prohibited transactions that do not fall into one of these six categories are not exempt from the excise tax, even if corrected under the VFC Program.

For any of these six prohibited transactions to qualify for the excise tax exemption, all of the following requirements must be met:

- The transaction is corrected under the VFC Program, and the applicant received a no-action letter.
- With respect to the middle four transactions described above, the plan assets involved in the transaction did not exceed 10% of the fair market value (as defined in the "Glossary of special VFC terms") of all plan assets at the

time of the transaction. In addition, the transaction was at least as favorable to the plan as the terms available in arms-length transactions between unrelated parties.

- With respect to the improper use of plan assets to pay plan expenses, the amount of plan assets involved in the transaction or services of related transactions did not, in total, exceed the lesser of \$10,000 or 5% of the fair market value (as defined in the "Glossary of special terms") of all the assets of the plan at the time of the transaction.
- The transaction was not part of an agreement, arrangement or understanding designed to benefit a party-in-interest.
- The applicant has not used the VFC program and received excise tax relief for a similar type of transaction for the three-year period before the date of submission of the VFC application.
- Interested persons are given a notice within 60 calendar days after the date the VFC application is submitted.

However, the notice requirement does not apply to situations involving delinquent participant contributions and/or the failure to transmit participant loan repayments provided:

- The applicant has satisfied all of the VFC Program requirements;
- The amount of the excise tax imposed is equal to or less than \$100.00;
- The amount of the excise tax that otherwise would be imposed is paid to the plan and allocated to participants and beneficiaries in the same manner as provided under the plan with respect to plan earnings; and
- The applicant under the VFC program provides a copy of a completed IRS Form 5330 or written documentation containing the information required by the IRS Form 5330 and proof of payment with the application.

## Next steps

Plan fiduciaries and their legal counsel should decide whether to review plan transactions to ensure no ERISA requirements have been violated. If fiduciary breaches have occurred, those individuals responsible should discuss the VFC Program with their legal counsel to determine if it is appropriate for their situation.

your Rock for Retirement®



**Prudential**

### Pension Analyst by Prudential Retirement

The Pension Analyst is published by Prudential Retirement, a Prudential Financial business, to provide clients with information on current legislation and regulatory developments affecting qualified retirement plans. This publication is distributed with the understanding that Prudential Retirement is not rendering legal advice. Plan sponsors should consult their attorneys about the application of any law to their retirement plans.

Editor: Mitzi Romano (860) 534-2768