

# Voluntary Fiduciary Correction Program

**1. General.** The Voluntary Fiduciary Correction Program (VFCP) is a voluntary enforcement program that allows plan officials to identify and fully correct certain transactions such as prohibited purchases, sales and exchanges; improper loans; delinquent participant contributions; and improper plan expenses. The program includes 19 specific transactions and their acceptable means of correction, eligibility requirements, and application procedures. If an eligible party documents the acceptable correction of a specified transaction, EBSA will issue a no-action letter. (Figure 1)

**2. Eligibility to Participate in the VFCP.** Anyone who may be liable for fiduciary violations under ERISA, including employee benefit plan sponsors, officials, and parties in interest, may voluntarily apply for relief from enforcement actions provided they meet the criteria and follow the procedures outlined in the VFCP. The Department will consider an application if:

- a. Neither the plan nor the applicant is under investigation;
- b. The application contains no evidence of potential criminal violations as determined by EBSA; and
- c. EBSA has not conducted an investigation that resulted in written notice to a plan fiduciary that the transaction, for which the potential applicant could otherwise have sought relief under the VFCP, and is referred to the IRS.

A plan or potential applicant is "under investigation" if:

- a. EBSA has notified a plan official or a representative of an investigation of the plan or of the potential applicant or plan sponsor in connection with an act or transaction directly related to the plan;
- b. Any governmental agency is conducting a criminal investigation of the plan, or of the potential applicant or plan sponsor in connection with an act or transaction directly related to the plan;
- c. The IRS TE/GE is conducting an EP examination of the plan; or
- d. The PBGC, any state attorney general, or any state insurance commissioner is conducting an investigation or examination of the plan, or of the applicant or plan sponsor in connection with an act or transaction directly related to the plan, unless the applicant notifies EBSA, in writing, of such an investigation or examination at the time of the application.

A plan is not considered "under investigation" merely because EBSA staff has contacted a plan official with a complaint, unless the complaint concerns the transaction described in the application and the plan has not received the correction amount due under the VFCP by the time EBSA contacts the plan official.

**3. Application Procedures.** The applicant or his or her authorized representative must prepare each application. An application submitted by a representative must include a statement signed by the applicant that a representative has the authority to represent the applicant. The application must also include the name, address, and telephone number of a contact person who must be familiar with the contents of the application, and have authority to respond to EBSA inquiries.

**4. Application Contents.** The application must include:

- a. Detailed narrative of the breach and corrective action, including:
  1. A list of all people materially involved in the breach and its correction;
  2. The EIN and address of the plan sponsor and administrator;
  3. The date the plan's most recent Form 5500 was filed;
  4. An explanation of the breach;
  5. An explanation of how the breach was corrected, by whom and when;
  6. Calculations demonstrating how the principal amount and lost earnings or restoration of profits were computed; and
  7. An explanation of why payment of lost earnings or restoration of profits was chosen to correct the breach.
- b. Supporting documentation, including:
  1. A copy of the relevant portions of the plan document or any other pertinent documents;
  2. Documentation supporting the narrative description of the transaction and correction;
  3. Documentation establishing lost earnings and restoration of profits amounts;
  4. Documentation relating to the specific transaction;
  5. A completed application checklist (Figure 2); and,
  6. Proof of payment of the principal amount and lost earnings or restoration of profits.
- c. Penalty of Perjury statement signed and dated by a plan fiduciary with knowledge of the transaction. In addition, each applicant must sign and date the Penalty of Perjury statement. (Figure 3) The statement must also accompany any subsequent additions to the application.

**5. Eligible Transactions and Corrections under the VFCP.** Any plan official may correct any of the eligible transactions in accordance with the applicable correction method. In addition, an amendment to the Class Exemption to Permit Certain Transactions Identified in the Voluntary Fiduciary Correction Program grants relief from the excise tax on prohibited transactions imposed by section 4975(a) of the Internal Revenue Code. See Federal Register Volume 71, Number 75, pages 20135-20139, dated April 19, 2006 for a full description of the transactions eligible for this relief.

**6. Filing.** Applicants should send their applications to the appropriate RO.

**7. Tracking.** EBSA will track VFCP applications from date of receipt in the RO, through its current databases under Program 15. Within five working days of receipt, the RO sends a post card or letter to the applicant to acknowledge receipt of the application.

**8. Custody of Applications.** Each office must maintain physical custody of properly submitted applications, and forward to the appropriate RO any misdirected applications. Field office staff should treat applications as confidential and restrict access to the reviewer, his or her supervisor, and other EBSA staff assigned to such matters. Offices should maintain application files together in sequential order in a secure area.

**9. Review of Applications.** EBSA reviews each application to ensure that it is complete and eligible for the program. Then, EBSA reviews each application to ensure the applicant provided proper documentation.

**10. Inadequate Correction.** If the correction set forth in the application is incomplete or unacceptable under the VFCP, EBSA may reject the application and pursue enforcement action.

**11. Issuance of No-Action Letter.** If the application is complete and all breaches fully corrected, then EBSA issues a no-action letter to the applicant.

**12. Disposition.** The RO must maintain the disposition of the application in EBSA's current database, including a signed and dated copy of the no-action letter, signed by the RD or his/her designee.

**13. Coordination with IRS.** EBSA's voluntary correction program is separate from the IRS. Corrections made under the IRS' Employee Plans Compliance Resolution System do not grant corrective action under EBSA's VFCP. The applicant must file a separate application with EBSA for relief under the VFCP.<sup>1</sup>

## (Figure 1) No Action Letter

Applicant  
Address

RE: VFCP Application No. xx-xxxxxxx

Dear Applicant:

The Department of Labor, Employee Benefits Security Administration (EBSA), has responsibility for administration and enforcement of Title I of the Employee Retirement Income Security Act of 1974, as amended (ERISA). EBSA has established a Voluntary Fiduciary Correction Program (VFCP) to encourage the correction of breaches of fiduciary responsibility and the restoration of losses to the plan participants and beneficiaries.

In accordance with the requirements of the VFCP, you have identified the following transactions as breaches, or potential breaches, of part 4 of Title I of ERISA, and you have submitted documentation to EBSA that demonstrates that you have taken the corrective action indicated.

[Briefly recap the violation and correction. Example: Failure to deposit participant contributions to XYZ Corp. 401(k) plan within the time frames required by ERISA, from (date) to (date). All participant contributions were deposited by (date) and lost earnings on the delinquent contributions were deposited and allocated to participants' plan accounts on (date).]

Because you have taken the above-described corrective action that is consistent with the requirements of the VFCP, EBSA will take no civil enforcement action against you with respect to this breach. Specifically, EBSA will not recommend that the Solicitor of Labor initiate legal action against you, and EBSA will not impose the penalty in section 502(l) [or section 502(i)]<sup>(1)</sup> of ERISA on the amount you have repaid to the plan.

EBSA's decision to take no further action is conditioned on the completeness and accuracy of the representations made in your application. You should note that this decision will not preclude EBSA from conducting an investigation of any potential violations of criminal law in connection with the transaction identified in the application or investigating the transaction identified in the application with a view toward seeking appropriate relief from any other person.

[If the transaction is a prohibited transaction for which no exemptive relief is available, add the following language: Please also be advised that pursuant to section 3003(c) of ERISA, 29 U.S.C. Section 1203(c), the Secretary of Labor is required to transmit to the Secretary of Treasury information indicating that a prohibited transaction has occurred. Accordingly, this matter will be referred to the Internal Revenue Service.]

In addition, you are cautioned that EBSA's decision to take no further action is binding on EBSA only. Any other governmental agency, and participants and beneficiaries, remain free to take whatever action they deem necessary.

We are pleased you have taken the opportunity to correct the identified transactions, and encourage you to review all of your employee benefit plans to determine if there are any other violations you should correct. We have enclosed a list of all eligible transactions for your benefit.

If you have any questions about this letter, you may contact the Regional VFCP Coordinator at *applicable address and telephone number*.

Sincerely,  
Regional Director (or designated person)  
Enclosure

### **Covered Transactions in the Voluntary Fiduciary Correction Program**

- Delinquent Participant Contributions and Participant Loan Repayments to Pension Plans
- Delinquent Participant Contributions to Insured Welfare Plans
- Delinquent Participant Contributions to Welfare Plan Trusts
- Fair Market Interest Rate Loans With Parties in Interest
- Below Market Interest Rate Loans With Parties in Interest
- Below Market Interest Rate Loans With Non-Parties in Interest
- Below Market Interest Rate Loans Due to Delay in Perfecting Security Interest
- Participant Loans Failing to Comply with Plan Provisions for Amount, Duration, or Level

#### Amortization

- Defaulted Participant Loans
- Purchase of Assets by Plans from Parties in Interest
- Sale of Assets by Plans to Parties in Interest
- Sale and Leaseback of Property to Sponsoring Employers
- Purchase of Assets from Non-Parties in Interest at More Than Fair Market Value
- Sale of Assets to Non-Parties in Interest at Less Than Fair Market Value
- Holding of an Illiquid Asset Previously Purchased by Plan
- Benefit Payments Based on Improper Valuation of Plan Assets
- Payment of Duplicate, Excessive, or Unnecessary Compensation
- Improper Payment of Expenses by Plan
- Payment of Dual Compensation to Plan Fiduciaries

## (Figure 2) VFCP Checklist

Use this checklist to ensure that you are submitting a complete application. The applicant must sign and date the checklist and include it with the application. Indicate "Yes", "No" or "N/A" next to each item. A "No" answer or the failure to include a completed checklist will delay review of the application until all required items are received.

- \_\_\_\_\_ 1. Have you reviewed the eligibility, definitions, transaction and correction, and documentation sections of the VFCP?
- \_\_\_\_\_ 2. Have you included the name, address and telephone number of a contact person familiar with the contents of the application?
- \_\_\_\_\_ 3. Have you provided the EIN, Plan Number, and address of the plan sponsor and plan administrator?
- \_\_\_\_\_ 4. Have you provided the date that the most recent Form 5500 was filed by the plan?
- \_\_\_\_\_ 5. Have you enclosed a signed and dated certification under penalty of perjury for the plan fiduciary with knowledge of the transactions and for each applicant and the applicant's representative, if any?
- \_\_\_\_\_ 6. Have you enclosed relevant portions of the plan document and any other pertinent documents (such as the adoption agreement, trust agreement, or insurance contract) with the relevant sections identified?
- \_\_\_\_\_ 7. If applicable, have you provided written notification to EBSA of any current investigation or examination of the plan, or of the applicant or plan sponsor in connection with an act or transaction directly related to the plan by the PBGC, any state attorney general, or any state insurance commissioner?
- \_\_\_\_\_ 8. Where applicable, have you enclosed a copy of an appraiser's report?
- \_\_\_\_\_ 9. Have you enclosed supporting documentation, including:
  - \_\_\_\_\_ a. A detailed narrative of the Breach, including the date it occurred;
  - \_\_\_\_\_ b. Documentation that supports the narrative description of the transaction;
  - \_\_\_\_\_ c. An explanation of how the Breach was corrected, by whom and when, with supporting documentation;
  - \_\_\_\_\_ d. A list of all persons materially involved in the Breach and its correction (e.g., fiduciaries, service providers, borrowers, lenders);
  - \_\_\_\_\_ e. Specific calculations demonstrating how Principal Amount and Lost Earnings or Restoration of Profits were computed, or, if the Online Calculator was used, a copy of the "Print Viewable Results" page(s) after completing use of the Online Calculator;
  - \_\_\_\_\_ f. Proof of payment of Principal Amount and Lost Earnings or Restoration of Profits; and
  - \_\_\_\_\_ g. If application concerns delinquent employee contributions or loan repayments, a statement from a Plan Official identifying the earliest date on which participant contributions/loan repayments reasonably could have been segregated from the employer's general assets and supporting documentation on which the Plan Official relied?
- \_\_\_\_\_ 10. If you are an eligible applicant and wish to avail yourself of excise tax relief under the VFCP Class Exemption:
  - \_\_\_\_\_ a. Have you made proper arrangements to provide within 60 calendar days after submission of this application a copy of the Class Exemption notice to all interested persons and to the EBSA Regional Office to which the application is filed; or

\_\_\_\_\_ b. If you are relying on the exception to the notice requirement in section IV.C. of the Class Exemption because the amount of the excise tax otherwise due would be less than or equal to \$100.00, have you provided to the appropriate EBSA Regional Office a copy of a completed IRS Form 5330 or other written documentation containing the information required by IRS Form 5330 and proof of payment?

\_\_\_\_\_ 11. In calculating Lost Earnings, have you elected to use:

\_\_\_\_\_ a. The Online Calculator; or

\_\_\_\_\_ b. A manual calculation performed in accordance with Section 5(b)?

\_\_\_\_\_ 12. Where applicable, have you enclosed a description demonstrating proof of payment to participants and beneficiaries whose current location is known to the plan and/or applicant, and for individuals who need to be located, have you demonstrated how adequate funds have been segregated to pay missing individuals and commenced the process of locating the missing individuals using either the IRS and SSA locator services, or other comparable means?

\_\_\_\_\_ 13. For purposes of the three transactions covered under Section 7.1 has the plan implemented measures to ensure that such transactions do not recur?

Signature of Applicant and Date

Signed: \_\_\_\_\_

Name of Applicant:

\_\_\_\_\_  
Title/Relationship to the Plan:

\_\_\_\_\_  
Name of Plan, EIN and Plan Number:

\_\_\_\_\_

\_\_\_\_\_

(Figure 3)

**Penalty of Perjury Statement**

"Under penalties of perjury I certify that I am not Under Investigation (as defined in VFCP Section 3(b)(3)) and that I have reviewed this application, including all supporting documentation, and to the best of my knowledge and belief the contents are true, correct, and complete."

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\_\_\_\_\_  
Name and Title

Signature \_\_\_\_\_

Date \_\_\_\_\_

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\_\_\_\_\_  
Name and Title

Signature \_\_\_\_\_

Date \_\_\_\_\_

## Footnotes

1. Include reference to 502(i) in applications involving a welfare plan.