

Voluntary Fiduciary Correction Program Class Exemption



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Employee Benefits Security Administration
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The class exemption provides relief from certain excise tax provisions of the Internal Revenue Code if the terms of the Program and exemption are met. No relief is provided from the prohibited transaction provisions of ERISA because such relief is provided under the VFCP.

Why did the Department amend the class exemption?

Based on growing public use of the VFCP and the related exemption, we expanded the VFCP to include new transactions and amended the class exemption to add two of these transactions, the illiquid asset and settlor fees transactions. In addition, the IRS recommended that we eliminate the notice requirement in some delinquent employee contribution situations if the amount of the excise tax is less than or equal to \$100 and certain requirements were met. We adopted this recommendation.

Which transactions are covered by the class exemption?

The class exemption only covers six of the prohibited transactions identified in the VFCP. The six transactions are:

- The failure to transmit participant contributions to a pension plan within the time frames described in the Department's regulations (29 C.F.R. section 2510.3-102) and/or the failure to transmit participant loan repayments to a pension plan within a reasonable time after withholding or receipt by the employer.
- The making of a loan by a plan at a fair market interest rate to a party in interest with respect to the plan.
- The purchase or sale of an asset (including real property) between a plan and a party in interest at fair market value.
- The sale of real property to a plan by the employer and the leaseback of such property to the employer, at fair market value and fair market rental value, respectively.
- Purchase of an asset (including real property) by a plan where the asset has later been determined to be illiquid as described under the Program in a transaction which was a prohibited transaction, and/or the subsequent sale of such asset to a party in interest.
- Use of plan assets to pay expenses, including commissions or fees, to a service provider (e.g., attorney, accountant, recordkeeper, actuary, financial advisor, or insurance agent) 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 expressly prohibited by a plan provision relating to the payment of expenses by the plan.

What must be in the notice provided to interested parties?

The class exemption published in the Federal Register provides a complete description of the notice requirements, but, generally, the notice must include:

- An objective, easily understood description of the transaction and the steps taken to correct it,
- A thirty day period (from the date of distribution) for recipients to provide comments to the EBSA Regional Office, and
- The address and phone number of the EBSA Regional Office.

This is not a complete list of the notice requirements, and you should review the [class exemption](#) to ensure full compliance.

The class exemption covers the failure to transmit participant contributions to a pension plan within the time frames required by the Department's regulations (29 CFR 2510.3-102). The class exemption also says you can only take advantage of the relief for a transaction once every three years. How do you define a "transaction" for purposes of the failure to transmit participant contributions? Does each pay period count as one transaction?

We have said informally that more than one pay period can be treated as one transaction if the pay periods are close together in time and the delinquencies are related to the same cause. So, for example, if the employee responsible for payroll leaves the company, and for the next few pay periods the employer is late in depositing contributions, that can be one transaction. On the other hand, if there is no real related cause and the employer misses the deadline in December, March and June, but is not delinquent the rest of the time, the missed deadlines cannot be treated as one transaction.

What is the exception to providing notice to interested parties?

You do not have to send a notice to interested parties if:

- the violation involves delinquent employee contributions (including loan repayments),
- you meet all the terms of the Program,
- the excise tax otherwise payable to the IRS is less than or equal to \$100,
- the excise tax otherwise payable to the IRS is paid to the plan, and allocated to participants and beneficiaries as earnings would be,
- you send us a copy of the IRS Form 5330 used to determine the amount, or the same information that would be entered on the IRS Form 5330, and
- you include proof of payment of the amount with your application.

For the sole purpose of determining the amount of the excise tax discussed above, you may use the Online Calculator to determine the "amount involved".

How do I apply for relief?

It is not necessary to apply to the Department for relief under the class exemption. However, you must meet all of the applicable conditions in the exemption in order to obtain excise tax relief. In part, those conditions require participation in the VFCP. You must meet all of the VFCP's applicable requirements, and must receive a no action letter from EBSA with respect to the prohibited transaction described in the VFCP application. Additionally, under the class exemption, you must provide notice to interested persons regarding the transaction and its correction, and provide a copy of the notice to the appropriate Regional Office of the Department, within 60 days after submission of an application under the VFCP. (You should indicate on the checklist submitted with your VFCP application that you will provide notice to interested persons and the

Department's Regional Office.) This notice to interested parties does not have to be sent if you meet the conditions of the exception previously described.

How can I find out more about the class exemption?

Questions may be referred to the Department of Labor's Office of Exemption Determinations at (202)693-8540.