

# Frequently Asked Questions about the Voluntary Fiduciary Correction Program



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## **What is the Voluntary Fiduciary Correction Program (VFCP or Program)?**

The VFCP is a voluntary enforcement program that encourages the correction of possible violations of Title I of the Employee Retirement Income Security Act (ERISA). ERISA is the federal law that covers most employee benefit plans in the private sector. The U.S. Department of Labor (Department), Employee Benefits Security Administration (EBSA), enforces many parts of ERISA.

The Program 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 and satisfies the terms of the Program, we will issue a no action letter.

## **Why did the U.S. Department of Labor create the VFCP?**

In part, we developed the VFCP in response to requests from the employee benefits community for a formal Program that would permit self-correction of fiduciary violations and reduce the risk of enforcement action. Most of EBSA's investigations are resolved by fiduciaries taking corrective action after EBSA identifies violations. We recognized that as the private benefit system evolves, there is a need for innovation in voluntary compliance. The VFCP informs plan fiduciaries about their ability to make complete and fully acceptable corrections without discussion or negotiation with EBSA.

## **Why did the U.S. Department of Labor update the Program?**

The original and revised Programs were very successful in encouraging and making it easy for plan officials to correct certain violations of ERISA's fiduciary responsibility and prohibited transaction rules. Based on our experience, as well as comments from employee benefit plan practitioners, we believed that additional changes to the Program were needed to further encourage people to use the Program. These changes will also improve administration of the Program by EBSA's Regional Offices.

## **What changes are in the updated VFCP?**

Several major changes were made: four additional transactions are now eligible for correction under the Program; additional ways to correct were added to some transactions; the method of calculating the correction amount has been simplified; and the Department developed an online calculator to help you make accurate Program corrections. In addition, the Program has adopted a new model application form, reduced the number of supporting documents to be filed, modified the definition of "Under Investigation", and made other miscellaneous changes.

## **Who is eligible to participate in the Program?**

EBSA will consider an application if neither the plan nor the applicant is “Under Investigation” (as defined in the Program) and if the application contains no evidence of potential criminal violations as determined by EBSA. We have made the Program available to more applicants by revising the definition of who is “Under Investigation.”

## **Who is “Under Investigation” in the Program?**

A plan or potential applicant is “Under Investigation” if:

- EBSA is conducting an investigation of the plan;
- EBSA is conducting an investigation of the potential applicant or plan sponsor in connection with an act or transaction directly related to the plan;
- 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;
- the Tax Exempt and Government Entities Division of the IRS is conducting an Employee Plans examination of the plan; or
- the Pension Benefit Guaranty Corporation (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 us, in writing, of the investigation or examination at the time of the application

You must have received written or oral notice of the investigation or examination.

## **Is a SIMPLE IRA plan eligible to participate in the Program?**

If the SIMPLE IRA plan was established for your employees, it is generally covered by ERISA. Any plan covered by ERISA is eligible to participate.

## **How long will the U.S. Department of Labor continue the Program?**

We expect to continue the Program indefinitely. However, we may change it again.

## **What if the U.S. Department of Labor receives an application from a plan sponsor that has not adequately corrected a violation?**

We may need to negotiate with the sponsor for full correction. In that case, the Section 502(l) penalty may apply to amounts restored as a result of the negotiation. Depending on the facts, EBSA may also need to conduct a civil or criminal investigation or take other action, such as seeking removal of persons from positions of authority with a plan.

## **Are there any civil penalties involved in the Program?**

If the applicant meets the conditions of the Program, no Section 502(l) or 502(i) penalty would apply to correction amounts paid to the plan or to participants. We can still impose civil penalties under Section 502(c)(2) of ERISA if you fail to file a complete and accurate annual report Form 5500 on time. (See the Department’s DFVC Program to correct filing violations.) The Department must refer information about prohibited transactions to the IRS, as required by Section 3003(c) of ERISA. However, you may be eligible for relief from IRS excise taxes for certain VFCP transactions if you meet the conditions in the VFCP class exemption. This relief was expanded by a final amendment to the class exemption in April of 2006 to include the sale of certain illiquid assets to a party in interest and the payment of certain “settlor” fees.

## **Can applicants who comply with the Program conditions be certain that the U.S. Department of Labor will take no further action against them?**

Yes. If you satisfy the terms of the Program, we will send you a no-action letter. The no-action letter states that we will not initiate a civil investigation under Title I of ERISA regarding your responsibility for any transaction described in the no-action letter, nor assess a Section 502(l) penalty. However, even if we issue a no-action letter, other government agencies or any other persons may still enforce their rights.

## **How do I apply for relief?**

The Program includes application procedures, and an application form that we encourage you to use. Briefly, you must submit a written narrative and supporting documents describing the transaction and its correction, the checklist in the Program, proof of correction, and a signed penalty of perjury statement.

## **Do I have to use the Model Application Form?**

No, but we encourage you to use the form. It will help you submit a complete and accurate application.

## **Do I have to use the checklist?**

Yes. The checklist is required. For your convenience, the Model Application Form includes a copy of the checklist.

## **How do I prove I corrected the violation?**

If you paid money to the plan, you must send us proof that the plan received it. For example, you could send us a copy of the canceled check or the plan's bank statement showing the deposit. If you took other actions, such as selling a plan asset, you should include proof of the action in your application.

## **Do I have to use the Online Calculator?**

No. The Online Calculator was developed to make it easier for you to calculate the amount of money that needs to be paid back to the plan. If you decide to calculate this amount manually, you must submit your calculations. The Online Calculator instruction page also describes how to calculate this amount manually.

## **Where do I apply?**

Applications should be mailed to the appropriate EBSA regional office.

## **May I submit an application before I correct?**

No. The Program requires that you submit proof of corrective action with the application. If EBSA enters into negotiations with you because the violation hasn't been properly corrected prior to submission, the correction could lead to a settlement within the meaning of Section 502(l) and the assessment of the penalty.

## **What if I want to use a different method of correction than described in the Program?**

You must correct pursuant to the provisions in the Program in order to get a no action letter. If the applicant and EBSA negotiate the correction amount, the correction could lead to a settlement agreement within the meaning of Section 502(l) and the assessment of the penalty.

## **How can I find out more about the Program?**

Interested parties may contact the appropriate EBSA regional office. Regional coordinators assigned to the Program will assist you with your questions. Information about the VFCP can also be obtained by calling EBSA's Toll-Free Hotline number at [1-866-444-EBSA \(3272\)](tel:1-866-444-EBSA) and ask for the VFCP Coordinator.

## **How do I determine when participant contributions to pension plans are late?**

The general rule is that contributions (other than union dues) withheld from an employee's wages or paid to the employer by a participant must be sent to the plan on the earliest date these contributions can reasonably be separated from the employer's general assets. This means that if you know how much should be sent to the plan three days after the pay date and it takes you another day to prepare the check, you must submit employee contributions four days after the pay date. In no event may these contributions be forwarded later than the 15th business day following the month of withholding. We expect that most employers can forward employee contributions well before this maximum time period ends.

## **How do I show the earliest date contributions can be segregated for purposes of preparing a VFCP application?**

You must provide a description of the process you use to segregate employee contributions from the company's general assets. The description could include:

- how you determine the amount to be sent to the plan
- how the company is organized to perform this function
- any requirements of a third party administrator
- any other information affecting the earliest date contributions can be segregated

You must also submit any documents used to determine this date. This documentation might be your past withholding and remittance history, your payroll policies and procedures, and documents supporting a third party's requirements.

## **Participant contributions to the plan were delinquent, but the dollar amount needed to correct is very small. Do I have to participate in the VFCP?**

No one is required to file an application under the VFCP to correct a violation. Participation is voluntary. Of course, you must take appropriate actions to correct the violation even if you don't submit an application. However, if you don't file an application with us, you can't get the relief available under the Program. In addition, if we discover the violation during an investigation, and the correction was not complete, a civil penalty may be assessed on any additional amount required to fully correct the violation. Remember, too, that you aren't eligible for the IRS excise tax relief unless you receive a no action letter. See the FAQs on the class exemption for more information.

## **How do I determine what is the "Restoration of Profits" amount for purposes of determining earnings on delinquent contributions?**

"Restoration of Profits" is the amount earned by the fiduciary or party in interest on the use of the employee contributions not forwarded to the plan. If you can determine how this money was used and how much the money earned, the money earned is the amount of "Restoration of Profits." We have found that usually the profit from the use of the withheld employee contributions usually can't be determined.

**I want to correct participant loan problems. The VFCP states I have to correct the loans under the Voluntary Correction Program of the IRS' Employee Plans Compliance Resolution System (EPCRS) and receive their approval before I apply under the Program. How do I do this?**

You should contact the IRS Voluntary Correction Coordinator at the following locations.

- **Brooklyn, New York Tel: 718-834-5023**
- **Chicago, Illinois Tel: 312-292-4833**
- **Dallas, Texas Tel: 818-440-0221**