

April 2005

DOL Improves Voluntary Fiduciary Correction Program

The U.S. Department of Labor's Voluntary Fiduciary Correction Program ("VFC Program") provides a voluntary correction program for persons potentially liable for civil actions and civil penalties for violating certain fiduciary requirements under ERISA. The VFC Program is intended to encourage voluntary correction by employers and plan fiduciaries and has been in effect since March 2002. If the VFC Program requirements are satisfied, the applicant receives relief from enforcement action and certain penalties from the U.S. Department of Labor ("DOL") for the specified fiduciary breach. The DOL has now expanded and simplified the VFC Program effective as of April 6, 2005, with comments due by June 6, 2005, followed by a final adoption of the changes. The DOL intends these design changes to further encourage the use of the VFC Program.

New Model Application Form

The DOL is making a model VFC Program application form available. The model form outlines the required information and documents. The model form also includes the mandatory checklist for VFC Program applications. Applicants are not required to use the model form. However, the DOL is encouraging its use to minimize the occurrence of common application errors and to enable a more expedient and consistent review. The model form is available on the DOL's web-site and can be accessed by clicking here.

Reduced Documentation

The DOL has reduced the documents previously required under the VFC Program application to streamline the application procedures. This reduction includes (1) the elimination of the requirement to provide certain information relating to a plan's fidelity bond, and (2) allowing the employer to provide summary documentation in connection with the correction of delinquent contributions that involve (a) amounts below \$50,000, or (b) amounts greater than \$50,000 that were remitted to the plan within 180 calendar days after receipt by the employer.

Simplification of Correction Amount

The definition of "Lost Earnings" and "Restoration of Profits" set forth in the VFC Program for certain corrections

has been simplified by incorporating the factors provided under IRS Rev. Proc. 95-17 and limiting the cases in which a Restoration of Profits must be calculated. Further, the DOL is providing a new on-line tool, the "Online Calculator", to automatically perform certain calculations under the VFC Program.¹ VFC Program applicants now have the option of using the Online Calculator or performing a manual calculation using the factors specified in Rev. Proc. 95-17.

New Covered Transactions

The VFC Program is only available for the correction of the fiduciary breaches that are specifically listed by the DOL. Currently, covered transactions include:

- ◆ delinquent participant contributions to qualified retirement plans,
- ◆ fair-market interest rate loans with parties-in-interest,
- ◆ below-market interest rate loans,
- ◆ purchase of assets by a qualified retirement plan from parties-in-interest,
- ◆ sale of assets by a plan to parties-in-interest,
- ◆ purchase of assets from non-parties-in-interest at below-market value,
- ◆ sale of assets to non-parties-in-interest at below-market value,
- ◆ benefit payments based on improper valuation of plan assets,
- ◆ payment by the plan of duplicate, excessive and unnecessary compensation, and
- ◆ payment of dual compensation to plan fiduciaries.

The DOL has added the following to this list:

Illiquid Assets - This transaction covers a situation in which a plan is holding illiquid assets (e.g., real estate) and the plan fiduciary has determined that continuing to hold the assets is not in the best interest of the plan or the plan's participants and beneficiaries, and following reasonable efforts to liquidate the assets, the only available purchaser is a "party-in-

¹The online calculator may be accessed at:

<http://askebsa.dol.gov/VFCPCalculator/WebCalculator.aspx>

interest” (e.g., the employer). If certain requirements are satisfied, the required correction permits the sale of the illiquid assets to the party-in-interest. In connection with this new covered transaction, the DOL is proposing to add the sale of illiquid assets to the existing VFC Program class exemption. However, this will not be effective until finalized.

Participant Loans - The new participant loan transaction describes situations in which a plan extends a loan (1) to a participant who is a party-in-interest with respect to the plan based solely on his or her status as an employee, and (2) either the amount or duration of the loan exceeds the limits under the plan provision which reflects the requirements under Section 72(p) of the Internal Revenue Code. These loans are prohibited transactions that do not qualify for the statutory exemption because they are contrary to specific plan loan provisions. The required correction permits the participant to pay back the excess amount to the plan or to reform the loan terms, as applicable. The DOL indicates that it has had informal talks with the IRS and confirmed their intent to modify the Employee Plans Compliance Resolutions System (“EPCRS”) to coordinate it with the DOL’s correction method (i.e., alleviating certain tax consequences).

Delinquent Participant Loans - The DOL has previously issued guidance regarding the correction of delinquent participant loans (e.g., Advisory Opinion 2002-02A). Consistent with this prior guidance, the VFC Program has been expanded to specifically include delinquent participant loan repayments as an eligible transaction.

Other Changes

In addition to the changes described above, the DOL has made the following changes to the VFC Program:

Definition of “Under Investigation” - A person is not eligible to take advantage of the VFC Program if he or she is “under examination”. Previously, “under investigation” was defined to mean an investigation under Section 504 of ERISA by the DOL or any criminal statute involving a transaction affecting the plan. “Under investigation” is now defined to include an investigation or examination by other Federal agencies whether of a criminal or civil nature (e.g., an IRS investigation). Further, the definition includes a notice of a Federal agency’s intent to conduct an investigation. However, a plan, the applicant or plan sponsor will only be considered “under investigation” if the investigation or examination is in connection with an act or transaction involving the plan.

Modification of Penalty of Perjury Statement - The required penalty of perjury statement has been simplified and modified to reflect the revised criteria under the VFC Program.

The VFC Program provides a valuable correction option for employers, plan sponsors and plan fiduciaries involved in the enumerated transactions. However, it is important to note that if an application is rejected because the DOL determines that a full correction has not been implemented or the submitted transaction does not qualify for the VFC Program, the DOL may take enforcement action - including the imposition of penalties. Further, full correction under the VFC Program does not preclude any other person or governmental agency (i.e., IRS), from exercising any enforcement rights. Accordingly, careful consideration should be given before uti-

If you have any questions concerning the DOL Voluntary Fiduciary Correction Program (VFC), please contact the Seyfarth Shaw Employee Benefits attorney with whom you work or any Employee Benefits attorney on the website at www.seyfarth.com.

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