U.S. Department of Labor
Employee Benefits Security Administration (EBSA)

An Overview of the

Voluntary Fiduciary Correction Program (VFCP)

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What is the VFC Program?

Allows "Plan Officials" to correct certain violations before DOL investigates and if done properly, receive a "No-Action" letter from the Department.

Plan Official

"You fixed it"

DOL

Voluntary Fiduciary Correction Program (VFCP)

- Eligible applicants
- Resources available: Model application form, application checklist, online calculator, fact sheet, and FAQs
- PTE 2002-51
  - Requires notification to participants
  - No §502(l) penalty
  - No §502(i) penalty
- IRS excise tax
- "No Action" letter
- Compliance with ERISA

VFC Program Class Exemption

- The class exemption applies to six transactions:

1. Delinquent participant contributions.
2. Loans by Plans to a related party at a fair market interest rate.
3. Purchases or sales of an asset (including real property) between a Plan and a related party.

VFC Program Class Exemption

4. Sales of real property to a Plan by the employer and leaseback to the employer at fair market value and fair rental value.
5. Purchase of an asset by a plan later determined to be illiquid and/or the subsequent sale of the asset.
6. Use of plan assets to pay for settlor expenses provided the expenses are not prohibited under the plan document.

For example *continued*

Documentation

contact name

narrative describing the violation(s) and

corrective action taken

supporting documents

relevant portions of the Plan

calculation of the lost earnings amount

proof of payment to the Plan

For example *continued*

Documentation *continued*

- penalty of perjury statement
- signed and dated checklist
- copy of accounting records or payroll documents-
  - showing the date and amount of each participant contribution received or withheld

For example *continued*

Documentation *continued*

- statements from a Plan Official
  - re: earliest date contributions could have reasonably been segregated
  - that there has been no denial of claims for payment or lapse in coverage
  - that any penalties, late fees etc. have been paid by the employer and not from participant contributions

Will I need help?

- The VFC Program is designed to be used by a Plan Official without assistance from an EBSA Regional Office.

(But we are here to assist!)

Processing VFCP Applications

- Handled by the respective Regional Office VFCP Coordinator
  - Answer questions from applicants
  - Clarify VFCP guidelines
  - Determine eligibility for program
  - Determine whether applications contain all required information and that the correction amount conforms to the guidelines
  - Issues the no action letter

- Mail applications to:

  VFCP Coordinator
  USDOL - EBSA
  525 S. Griffin St., Suite 900
  Dallas, TX 75202
  Fax : (214) 767-1055

Delinquent Participant Contribution Example

"I always send the participant contributions to the Plan 15 days from payday."

Plan Sponsor/Employer

For example --

"I always send the participant contributions to the Plan 15 days from payday."

Plan Sponsor/Employer

- Has there been a violation of ERISA? **<u>Yes</u>**.
- Is the violation covered under the VFC
- Program? **<u>Yes</u>**. Continue….

IRS Corrections

Qualification Failures

- Four types of qualification failures:
  - Plan document failures – Plan provision violates § 401(a) on its face
  - Operational failures – Failure to follow the terms of the plan
  - Employer eligibility failures – An employer that that fails to meet the employer eligibility requirements to establish a particular type of qualified plan
  - Demographic failures – Failure to satisfy the requirements of nondiscrimination, participation, or coverage that is not an Operational Failure or an Employer Eligibility Failure.

Correcting Qualification Failures

- Employee Plans Compliance Resolution System ("EPCRS") – An IRS program that permits plan sponsors to correct qualification failures and preserve the plan's tax-favored status
  - Self-Correction Program ("SCP")
  - Voluntary Correction Program ("VCP")
  - Audit Closing Agreement Program ("Audit CAP")

- Governed by "general principles"
  - Intended to encourage plan sponsors to maintain the qualified status of their plans by making voluntary and timely correction of any plan failures

Correction Principles

- Correction method should:
  - Restore affected participants to the position they would have been in had the failure not occurred
  - Be reasonable and appropriate for the failure

- May be more than one reasonable and appropriate correction for the failure
  - IRS has prescribed certain correction methodologies that are deemed reasonable and appropriate
  - Must be able to demonstrate that a non-prescribed correction methodology is reasonable and appropriate

Self Correction Program

- Correction of significant and insignificant operational failures
  - “Insignificant” operational failures at any time
  - “Significant” operational failures that occurred within current or prior two plan years
- Benefits of SCP
  - No user fees
  - Corrections are resolved more quickly
- Drawbacks of SCP
  - No compliance statement (IRS approval)
- Because there is no compliance statement, SCP is a good fit when using a prescribed correction method

Voluntary Correction Program (VCP)

- Use for:
  - Correction of significant or insignificant operational failures
  - Correction by retroactive amendment

- Requirements:
  - Payment of a fee based on total plan assets
  - Submission to the IRS
  - Cannot be under examination

- Benefits of VCP
  - Protection if the plan is audited

- Drawbacks of VCP
  - User fees
  - Can be a long review process

Updated VCP User Fee Schedule

Plan Assets	User Fee
$0 to $500,000	$1,500
Over $500,000 to $10,000,000	$3,000
Over $10,000,000	$3,500

Determining "Significance"

- Whether other failures occurred during the period being examined
- Percentage of plan assets and contributions involved in the failure
- Number of years the failure occurred
- Number of participants affected relative to the total number of participants in the plan
- Number of participants affected as a result of the failure relative to the number of participants who could have been affected by the failure
- Whether correction was made within a reasonable time after discovery of the failure
- The reason for the failure (for example, data errors such as errors in the transcription of data, the transposition of numbers, or minor arithmetic errors)

Audit CAP

- Available to correct significant or egregious failures identified while under examination
- Requires payment of sanction which should be more than the VCP user fees, but less than the cost of disqualification
- May be conditioned upon implementation of additional administrative procedures

Missed Deferrals

- Employer fails to implement an employee's deferral election or change to a deferral election on all or some of the employee's compensation

- General correction methodologies:
  - Standard approach: Corrective contribution = 50% missed deferral + missed matching contribution + allocable earnings
  - After-tax approach: Corrective contribution = 40% of missed deferral + missed matching contribution (if after-tax is matched) + allocable earnings
  - Alternate correction: Either 25% or no correction for missed deferrals + missed matching contribution + allocable earnings <u>and</u> satisfy other IRS requirements

Missed Deferrals

- Example:
  - Employer did not implement employee's deferral election
  - Employee elected 10% deferrals
  - Employee had $20,000 eligible compensation
  - Match formula = 100% on deferrals up to 3% of eligible compensation
  - Employer must make a corrective contribution equal to ½ of employee's missed deferral (the "missed deferral opportunity" or "MDO"), the missed matching contribution, and allocable earnings

- Calculation:
  - MDO = ½ of employee's missed deferral = ½ * (10% * 20,000) = $1,000
  - Missed employer match = 3% of eligible compensation = 3% * 20,000 = $600
  - Total corrective contribution = $1,600 + allocable earnings