

# Voluntary Fiduciary Correction Program Checklist

A Practical Guidance® Checklist by  
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This checklist provides step-by-step guidance for private employers on the use of the Department of Labor's (DOL's) Voluntary Fiduciary Correction Program (VFCP) to correct and self-report fiduciary violations or prohibited transactions under the Employee Retirement Income Security Act (ERISA). See 71 Fed. Reg. 20,261 (Apr. 19, 2006). The VFCP also provides limited Internal Revenue Code (IRC) excise tax relief for certain prohibited transactions that can be corrected under the VFCP.

For more information on the VFCP, see [Voluntary Fiduciary Correction Program](#). For checklists that assist in determining whether a party is a party in interest or a

disqualified person, and that itemize prohibited transactions under ERISA and the IRC, see [Prohibited Transaction and Parties in Interest Checklist \(ERISA Rules\)](#) and [Prohibited Transaction and Disqualified Persons Checklist \(IRC Rules\)](#), respectively. For a DOL summary of the VFCP, see [DOL Correction Programs, Voluntary Fiduciary Correction Program](#).

## 1. Identify whether the Violation is Eligible for VFCP Correction

The VFCP identifies 19 categories of prohibited transactions and breaches of fiduciary duty and their methods of correction. Relief under the VFCP is limited to these transactions and the persons who correct them. In addition, prohibited transaction exemption (PTE) 2002-51 which was separately introduced to work in conjunction with the VFCP identifies six eligible VFCP-covered transactions that are exempt from I.R.C. § 4975 excise taxes on the particular prohibited transaction. 67 Fed. Reg. 70,623 (Nov. 25, 2002), as amended by 71 Fed. Reg. 20,135 (May 19, 2006). You can use the VFCP to correct multiple transactions (e.g., late deferral deposits over multiple pay periods), but you must make a separate VFCP application for each transaction where there are multiple types of violations (e.g., late deferral deposits and improper expenses).

	<b>VFCP Section</b>	<b>VFCP-covered violations</b>	<b>PTE 2002-51 Eligible Transaction?</b>
1	71 Fed. Reg. 20,274, Section 7.1(a)	Delinquent Participant Contributions and Participant Loan Repayments to Pension Plans	Yes
2	71 Fed. Reg. 20,274, Section 7.1(b)	Delinquent Participant Contributions to Insured Welfare Plans	No
3	71 Fed. Reg. 20,275, Section 7.1(c)	Delinquent Participant Contributions to Welfare Plan Trust	No
4	71 Fed. Reg. 20,275, Section 7.2(a)	Non-exempt Loans to Party in Interest at Fair Market Interest Rate	Yes
5	71 Fed. Reg. 20,275, Section 7.2(b)	Below Market Interest Rate Loans to Parties in Interest	No
6	71 Fed. Reg. 20,276, Section 7.2(c)	Below Market Interest Rate Loans to Non-Parties in Interest	No
7	71 Fed. Reg. 20,276, Section 7.2(d)	Below Market Interest Rate Loans Due to Delay in Perfecting Security Interest	No
8	71 Fed. Reg. 20,277, Section 7.3(a)	Participant Loans Failing to Comply with Plan Provisions for Amount, Duration, or Level Amortization	No
9	71 Fed. Reg. 20,277, Section 7.3(b)	Defaulted Participant Loans	No
10	71 Fed. Reg. 20,277, Section 7.4(a)	Purchase of Assets by Plans from Parties in Interest	Yes
11	71 Fed. Reg. 20,278, Section 7.4(b)	Sale of Assets by Plans to Parties in Interest	Yes
12	71 Fed. Reg. 20,278, Section 7.4(c)	Non-exempt Sale and Leaseback of Property to Sponsoring Employers	Yes
13	71 Fed. Reg. 20,279, Section 7.4(d)	Non-exempt Purchase of a Plan Asset from a Non-Party in Interest at More Than Fair Market Value	No
14	71 Fed. Reg. 20,279, Section 7.4(e)	Non-exempt Sale of a Plan Asset to a Non-Party in Interest at Less Than Fair Market Value	No
15	71 Fed. Reg. 20,279, Section 7.4(f)	Holding of an Illiquid Asset Previously Purchased by Plan	Yes
16	71 Fed. Reg. 20,280, Section 7.5	Benefit Payments Based on Improper Valuation of Plan Assets	No
17	71 Fed. Reg. 20,280, Section 7.6(a)	Payment of Duplicate, Excessive, or Unnecessary Compensation	No
18	71 Fed. Reg. 20,281, Section 7.6(b)	Improper Payment of Expenses by a Plan	Yes
19	71 Fed. Reg. 20,281, Section 7.6(c)	Payment of Dual Compensation to Plan Fiduciaries	No

## 2. Determine if the Plan is Eligible for a VFCP Application

DOL's Employee Benefits Security Administration (EBSA) is responsible for administering the VFCP. A plan (or plan sponsor) is eligible to use the VFCP if it satisfies the following conditions:

- **Not “under investigation.”** Neither the plan nor the applicant is “under investigation.” Being “under Investigation” means:
  - o EBSA is conducting an investigation of the plan

- o EBSA is conducting an investigation of the potential VFCP applicant or plan sponsor in connection with an act or transaction directly related to the plan
- o 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
- o The Tax Exempt and Government Entities Division of the IRS is conducting an Employee Plans examination of the plan –or–
- o 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 EBSA, in writing, of such an investigation or examination at the time of the application, and the plan, a plan official, or any authorized plan representative has received a written or oral notice of an investigation or examination.
- **No criminal violations.** The application does not contain evidence of potential criminal violations (of the plan, or of the potential applicant or plan sponsor) in connection with an act or transaction directly related to the plan, as determined by EBSA.
- **No referral to the IRS upon EBSA investigation.** EBSA has not conducted an investigation resulting in written notice to a plan fiduciary that the transaction, for which the potential applicant could otherwise have sought relief under the VFCP, has been referred to the IRS. This condition applies only to those transactions specifically identified in EBSA's written notice of referral to the IRS.

71 Fed. Reg. 20,270, Sections 3, 4.

### 3. Select the VFCP Applicant

Plan officials or their authorized representative (e.g., attorney, accountant, or other service provider) are required to sign the VFCP application (see [VFCP checklist](#), following item 13. Plan official means a plan fiduciary, plan sponsor, party in interest regarding the plan, or other person who is in a position to correct a “breach” which the VFCP identifies. 71 Fed. Reg. 20,270, Section 3(b).

### 4. Correct the Violations for Which the VFCP Application Will Be Made

The VFCP provides specific rules and correction methodologies for making acceptable corrections involving

the VFCP listed transactions. It also provides examples of corrections. In general, under the correction principles applicable to all of the transactions, applicants must:

- **Make fair market value determinations.** Conduct valuations of plan assets using generally recognized markets for the assets or obtain written appraisal reports from qualified professionals that are based on generally accepted appraisal standards.
- **Determine and contribute to the plan the corrected amount(s).** Determine the amount to restore to the plan, which is (1) the principal amount involved, plus (2) the greater of (i) lost earnings, starting on the date of the loss and extending to the recovery date, or (ii) profits resulting from the use of the principal amount, starting on the date of the loss and extending to the date the profit is realized.
- **The sponsor or other party must pay the cost of correction (but the plan can pay benefits and reasonable costs that should have been incurred).** Pay the expenses associated with correcting transactions, such as appraisal costs, fees associated with recalculating participant account balances, or sale or purchase costs associated with correction. For guidance when plan assets can be used to pay plan expenses, see [Paying ERISA Plan Expenses Considerations](#).
- **Allocate amounts to plan or plan accounts (for current employees) and distribute amounts to former employees.** Make supplemental distributions when appropriate to former employees, beneficiaries, or alternate payees, and provide proof of the payments. Current employee-participants may require plan allocations (in a defined contribution plan) or plan contributions (defined benefit plan). Payment of the correction amount may be made directly to the plan where distributions to former employees who no longer have a plan accrued benefit would be (1) less than \$20 (i.e. de minimis) and (2) the cost of correction exceeds the distributions owed.

71 Fed. Reg. 20,270, Section 5. These principles ensure that applicants restore the plan, participants, and beneficiaries to the condition they would have been in had the breach not occurred.

However, the corrections are specific to each of the 19 eligible transactions. Merely following the above guidelines in principle will not be sufficient. Only the precise corrections enumerated in the VFCP will be accepted. Please refer to the VFCP for the correction applicable to any one of the 19 transactions.

## 5. Calculate and Restore to the Plan any Losses or Profits with Interest, if Applicable, and Distribute any Supplemental Benefits to Participants.

**Use the EBSA online calculator.** The VFCP includes an [Online Calculator](#) to assist applicants by automatically calculating correction amounts that must be paid to the plan. Correction of most eligible VFCP transactions involves repayment of a Principal Amount. Select the transaction you are correcting from the [Index of Eligible VFCP Transactions](#) for examples of calculations. Consult these examples first to be certain you enter the correct Principal Amount in the Online Calculator for the type of transaction being corrected.

Generally, the instructions for using the Online Calculator are:

- Enter the [Principal Amount](#). (Note: Not all VFCP transaction corrections involve a Principal Amount, and in those cases [Lost Earnings](#) will not be calculated)
- Enter the [Loss Date](#).
- Enter the [Recovery Date](#).
- Enter the [Final Payment Date](#). (i.e., date Lost Earnings and interest, if any, will be paid.) If Lost Earnings are paid on the Recovery Date, leave the Final Payment Date blank.
- The Online Calculator computes a total. This total reflects only Lost Earnings and interest, if any, but not any Principal Amount that also must be paid to the plan.
- Continue entering data as needed (e.g. for additional pay periods) until all information is entered.
- Select the Calculate Restoration of Profits button only if a profit is determinable.
- Print and submit with the VFCP application the calculations and data necessary for EBSA to verify the calculations. The Online Calculator allows applicants to view printable inputs and results. Calculations and data cannot be saved online. You may save your results by printing a copy or copying/pasting a copy into a text document on your computer before terminating your session.

See 71 Fed. Reg. 20,283, Appendix D for a lost earnings example. For a recent case construing the proper application of the lost earnings calculator, see *Lees v. Imagemaster Printing LLC & Albert Rodriguez*, 2020 U.S. Dist. LEXIS 260528 (E.D. Mich. Dec. 15, 2020).

## 6. Pay Any Excise Tax Due under I.R.C. § 4975 on a Prohibited Transaction Corrected under the VFCP

Plan sponsors should pay applicable excise taxes on a prohibited transaction being corrected under the VFCP. The tax is 15%, rising to 100%, where the transaction has not been corrected within the taxable period (as defined in I.R.C. § 4975(f)(2)). I.R.C. § 4975(a), (b). However, PTE 2002-51, which applies in conjunction with the VFCP, may provide excise tax relief. See 71 Fed. Reg. 20,135.

**Determine if PTE 2002-51 excise tax relief applies to any transaction(s).** PTE 2002-51 provides relief from I.R.C. § 4975 excise taxes if the terms of the VFCP and PTE are met. See the chart in item 1, above, for eligible transactions. 71 Fed. Reg. 20,138. In addition, to be eligible for relief from excise taxes, the following requirements must be met:

- The applicant has satisfied each of the applicable requirements of the VFCP
- EBSA has issued a no action letter to the applicant under the VFCP regarding one of the transactions addressed in PTE 2002-51

For more information on PTE 2002-51, see [Voluntary Fiduciary Correction Program – Related Prohibited Transaction Exemption for IRC Excise Tax Relief](#).

**Use the PTE 2002-51 notice to interested parties, if applicable.** For applications under PTE 2002-51, provide interested persons (usually affected participants) within 60 days of the date of the VFCP application a notice informing such individuals of the violation and its correction. 71 Fed. Reg. 20,139, Section IV. For an example of such a notice, see [Voluntary Fiduciary Correction Program Notice to Interested Persons for Excise Tax Relief](#).

## 7. Prepare and Complete the VFCP Application with Documentation

EBSA has issued [VFCP FAQs](#) and a [VFCP Fact Sheet](#) that you can reference in completing a VFCP application. The VFCP also provides a fillable [model application form](#). See 71 Fed. Reg. 20,283, Appendix E. While use of this model application form is voluntary, EBSA encourages its use to avoid common application errors that can result in processing delays or rejections. See 71 Fed. Reg. 20,273, Section 6.

In addition to the above, complete the VFCP application by including the following documentation (as necessary to document corrective action):

- A completed and signed [EBSA VFCP checklist](#) (mandatory for VFCP filings, which will be rejected if the checklist is not completed and included with the VFCP application)
- Documents supporting transactions, such as leases and loan documents, and applicable corrections (e.g., a payroll report for the applicable deferral)
- Documentation of lost earnings amounts
- Documentation of restored profits, if applicable
- Copy of relevant portions of plan and related documents
- Amended returns (such as amended Forms 5500) to reflect corrected transactions or valuations
- Proof of payment to participants and beneficiaries, or proof that the plan has properly segregated the affected assets in cases where it is unable to identify the location of missing individuals (e.g., a plan asset report showing deposit of the principal amount into the participant's account prior to the recovery date and deposit of lost interest determined using the online calculator by the final payment date)
- Specific documents required for relevant transactions, as outlined in VFCP Section 7
- Penalty of perjury statement (included on page 4 of [model application form](#))

71 Fed. Reg. 20,282, Appendix B, VFCP Checklist.

File the VFCP application with the appropriate [EBSA Regional Office](#). See 71 Fed. Reg. 20,282, Appendix C. If the applicant also is seeking PTE 2002-51 relief (appearing at question 7, Supplemental Information section of the VFCP Model Application Form) you will need to:

- Supplement the VFCP filing within 60 days with a copy of the Notice to Interested Persons that is required when relying on the PTE 2002-51 exemption –or–
- If relying on a notice exception, provide a copy of a completed Form 5330 with proof of payment

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### **José M. Jara, Counsel, Fox Rothschild LLP**

José focuses his practice on ERISA and employment litigation and counseling, including representing clients under investigation by the Department of Labor (DOL) Employee Benefits Security Administration and defending them from lawsuits alleging violations of ERISA.

José defends plan fiduciaries and boards of directors against ERISA litigation alleging breach of fiduciary duty in connection with excessive fees, delinquent employee contributions and imprudent investments. He guides plan sponsors and fiduciaries on plan fees and expenses, meeting fiduciary responsibilities and prohibited transactions under ERISA.

He also works with clients to correct retirement plan errors under the IRS Employee Plans Compliance Resolution System, fiduciary violations under the DOL Voluntary Fiduciary Correction Program and annual reporting failures under the DOL Delinquent Filer Voluntary Compliance Program.

José advises clients on a broad range of labor and employment issues such as wrongful termination, sexual harassment and discrimination, restrictive covenants, retaliation and matters related to labor law such as grievances, arbitrations and collective bargaining. He also defends companies against DOL wage and hour investigations, conducts interactive harassment training, carries out internal investigations and drafts employment and severance agreements.

In addition, José assists clients with professional liability insurance matters, providing counsel on D&O, fiduciary, and EPL insurance issues; serves as monitoring counsel and coverage counsel; and provides advice to underwriters on a variety of provisions of the insurance policy.

José speaks frequently on ERISA and employment law topics, and has recently delivered presentations on the impact of the 2021 Consolidated Appropriations Act, DOL and IRS Health and Welfare Plan audits; disability claims and procedures; ESOP challenges and enforcement activity; and sexual harassment in the workplace, among other subjects.

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Sheldon focuses his practice on employee benefits and executive compensation issues.

He assists companies, both private and public, with implementing and maintaining their employer-sponsored retirement and health plans, and nonqualified deferred compensation programs.

Sheldon routinely provides clients with practical and concise advice on matters relating to the Employee Retirement Income Security Act of 1974 ("ERISA") and the Internal Revenue Code of 1986 (the "Code").

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