**DOL Publishes Updated Voluntary Fiduciary Correction Program**

**And Prohibited Transaction Exemption**

On April 19, 2006, the Department of Labor published an update to the Voluntary Fiduciary Correction Program (VFC Program). 71 Fed. Reg. 20261 (Apr. 19, 2006). The VFC Program now covers nineteen specific transactions that could result in fiduciary breaches and prohibited transactions. The updated VCF Program is effective on May 19, 2006. In general, the VFC program provides a means to avoid a lawsuit initiated by the DOL in connection with certain fiduciary breaches and relief from the imposition of a 20% civil penalty on amounts recovered under any DOL lawsuit or settlement imposed under section 502(l) of ERISA.

A companion prohibited transaction class exemption (PTE 2002-51) to the VFC Program provides relief from excise taxes (under Internal Revenue Code section 4975) that would otherwise be imposed in connection with certain transactions corrected under the Program. In addition to updating the VFC Program, DOL also finalized amendments to PTE 2002-51. 71 Fed. Reg. 20135 (Apr. 19, 2006). Amendments to PTE 2002-51 are effective as of May 19, 2006.

Most of the changes to the VFC Program and to PTE 2002-51 were described by DOL in a revision to the program originally published in April, 2005. Major changes introduced in the 2005 revision included the adoption of a model application form, a reduction in the documentation required from filers, simplifying the calculations necessary to determine any lost earnings or profits to be restored to the plan, the introduction of an internet-based tool to calculate lost earnings or profits to be restored, and the addition of new transactions that may be corrected through the Program. These changes have been preserved in DOL's most recent update.

In addition, DOL's latest update includes the following notable changes to the VFC Program:

- The VFC Program now explicitly provides relief from civil penalties imposed under ERISA section 502(i). ERISA section 502(i) permits the DOL to assess a civil penalty on prohibited transactions in connection with welfare plans and nonqualified pension plans.

- Additional Transactions covered include:
    - The Sale of an illiquid asset from a plan to a party in interest;
    - Participant loans that violated level amortization requirements where correction is made under the IRS' forthcoming Employee Plans Compliance Resolution System ("EPCRS") program; and
    - Payment by the plan of certain expenses that should have been paid by the plan sponsor.

- The Program's on-line calculator has been revised to allow corrections involving multiple transactions with different time periods.

- The correction methods for a transaction that involves a plan's purchase of an asset from a party in interest has been expanded to allow a plan to retain the asset, and receive a settlement amount in cash for the correction of the transaction. Previously, the VFC Program had required the plan to sell the asset in all cases.

- Changes have been made to narrow the definition of "under investigation" for purposes of the exclusion from eligibility for those plans or applicants that are "under investigation" at the time of the application.

Final changes to PTE 2002-51 include the addition of two new transactions. PTE 2002-51 now covers six categories of VFC Program transactions, including the following new transactions:

- The plan's acquisition of an illiquid asset and subsequent sale to a party in interest; and

- The use of plan assets to pay for settlor, as opposed to plan, expenses.

In addition, in response to a request to expand the scope of PTE 2002-51 to cover transactions involving IRAs, the preamble clarifies DOL's view that neither the VFC Program nor the exemption applies to IRAs not subject to ERISA. DOL explained that excise tax relief for transactions involving IRAs may only be obtained through DOL's individual administrative exemption process.

While all the changes to the VFC Program contained in this update are positive, the most important is likely the 502(i) penalty relief. An often-overlooked fact is that welfare plans are not subject to excise taxes under the Internal Revenue Code. Because of this, the excise tax relief afforded under the VFC Program is not helpful to welfare plan fiduciaries. Thus, the VFC Program is rarely used in connection with welfare plan transactions. Although the 502(i) penalty is infrequently imposed, relief from the penalty is at least a tangible benefit for welfare plan fiduciaries of correction through the VFC Program.