



AMERICAN BENEFITS  
COUNCIL

June 2, 2005

FILED VIA E-MAIL

Office of Regulations and Interpretations  
Employee Benefits Security Administration  
U.S. Department of Labor  
Room N-5669  
200 Constitution Avenue NW  
Washington, DC 20210

Attention: Voluntary Fiduciary Correction Program

Dear Sir or Madam:

The American Benefits Council (Council) appreciates the opportunity to comment on the update contained in a Notice concerning the Voluntary Fiduciary Correction Program (VFCP) published by the Employee Benefits Security Administration (EBSA) in the Federal Register on April 6, 2005. The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council's members either sponsor directly or provide services to retirement and health plans that cover more than 100 million Americans.

The Council applauds EBSA for proposing simplified and expanded rules and identifying additional transactions covered by the VFCP. Both actions will encourage more use of the program. However, the Council recommends that EBSA make certain changes and additions to the program. We believe these modifications will facilitate use of voluntary correction and expedite the restoration of benefits to plan participants.

Specifically, the Council recommends that EBSA (1) expand the list of errors covered by the program, (2) seek more coordination with the Internal Revenue Service (IRS), (3) implement a self-correction method similar to the IRS's self-correction program, and (4) make limiting modifications for multiple employer plans.

### Expand List of Covered Errors

Council members are concerned that the VFCP is too limited by the narrow list of potential errors. In some cases, multiple plan errors may have been made and some would be covered by the VFCP while others would not. This discourages plan fiduciaries from availing themselves of the program because they worry EBSA will impose the 20 percent penalty under Section 502(l) of the Employee Retirement Income Security Act (ERISA) for ineligible errors brought to light under the program.

For example, if a plan has loan errors, some may be covered by the program (loan amounts that exceed amount or duration limitations) and others not (inappropriate interest rate used or failure to withhold payments for a significant period of time), and the plan's fiduciaries may hesitate to use the program. The Council recommends that EBSA meet with consultants and advisors in the employee benefits field, or seek additional written comments, to specifically identify additional errors that should be covered.

The Council notes that plan fiduciaries who correct errors in their plans using the program receive a "no action" letter from EBSA, not a settlement agreement. Thus, EBSA should not feel constrained by ERISA Section 502(l) (which requires a 20 percent penalty on the amount recovered pursuant to a settlement agreement) from expanding the program to cover additional errors.

### More Coordination with the IRS

The Council also commends EBSA for discussing correction issues with the IRS and encourages even further coordination. Many fiduciaries and their representatives believe they could meet all of the VFCP's requirements and still face potential liabilities and penalties from the IRS on top of the continued risk of participant lawsuits. For example, EBSA could work with the IRS to ensure its on-line calculator and method for determining plan restoration amounts coordinates with the IRS's Employee Plans Compliance Resolution System (EPCRS).

### Self-Correction Program

The Council strongly recommends that EBSA implement a self-correction program similar to that sponsored by the IRS. The Council understands that EBSA may be concerned about potential penalties under ERISA Section 502(l) in implementing a self-correction program. However, the Council recommends that EBSA incorporate ERISA Section 502(l)(3)(A) as an integral part of the plan. If a fiduciary breach is self-corrected, this would be disclosed to EBSA upon subsequent audit of the plan (the plan would be required to keep records of the

breach and correction as is required by the IRS program). If the error is appropriately rectified under the self-correction program, EBSA could determine, in writing, that the fiduciary acted reasonably and in good faith, meeting the requirements for waiver of the penalty under ERISA Section 502(l)(3)(A).

The IRS program differs depending on the “significance” of the mistake and EBSA could make a similar distinction and additional requirements for significant errors. For example, EBSA might deem errors where reduced documentation is now required under the program as “insignificant errors” and reduce the required documentation the plan must keep with its records in order to self-correct.

#### Multiple Employer Plans

Finally, the Council suggests that filings made for multiple employer plans be made by the plan administrator (rather than any contributing or adopting employer). This change, which would be consistent with the requirements of EPCRS (see Section 10.13 of IRS Rev. Proc. 2003-44), could be implemented by modifying the definition of “Plan Official” with respect to multiple employer plans.

Again, we appreciate the opportunity to comment on these proposed regulations. If additional information from us would be helpful, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Jan Jacobson", written in a cursive style.

Jan M. Jacobson  
Director, Retirement Policy  
American Benefits Council