

MEMO# 11746

March 21, 2000

DOL ESTABLISHES VOLUNTARY FIDUCIARY CORRECTION PROGRAM

[11746] March 21, 2000 TO: PENSION MEMBERS No. 18-00 PENSION OPERATIONS
ADVISORY COMMITTEE No. 19-00 RE: DOL ESTABLISHES VOLUNTARY FIDUCIARY
CORRECTION PROGRAM

The Department of Labor has established a "Voluntary Fiduciary Correction (VFC) Program." Under the VFC Program, persons who are potentially liable for a fiduciary breach can apply to the Department, informing them of the potential breach and measures taken to correct it. If Program conditions are satisfied, the applicant would avoid possible civil investigation or civil action by the Department with respect to the breach and any imposition of civil penalties under ERISA section 502(l). The VFC Program is designed to encourage the voluntary, timely correction of transactions and the restoration of losses to employee benefit plans resulting from fiduciary breaches. The Program's effective date is April 14, 2000. Nature of VFC Program relief. If a VFC Program applicant is in full compliance with the terms and procedures of the Program, the Department of Labor will issue a "no action letter." Pursuant to the "no action letter," the Department will not initiate a civil investigation under ERISA Title I regarding the applicant's responsibility for any transaction described, or assess a civil penalty under ERISA section 502(l) on the correction amount paid to the plan or participants. Relief under the Program is limited to the transactions identified in the application and the persons who are correcting those transactions. If a person filing an application under the VFC Program proposes corrective action falling short of an acceptable correction, the Department may reject the application and pursue enforcement. In such cases, however, no section 502(l) penalty would be imposed on the basis of any amounts restored to the plan prior to filing the VFC Program application; the penalty would apply only to the additional recovery amount, if any, paid to the plan pursuant to a court order or settlement agreement with the Department. In cases where the Department of Labor is aware of possible criminal behavior, any material misrepresentations or omissions in the VFC application, or other abuse of the Program, relief will not be available. In such cases, the Department may initiate an investigation, which may lead to enforcement action. Additionally, compliance with the terms of the VFC Program will not preclude the Department from taking action to seek removal of persons responsible for the transaction from positions of responsibility with respect to the plan, referring information to the IRS, or imposing civil penalties under ERISA 502(c)(2) for failure to file a timely Form 5500. Transactions for which relief may be granted. Transactions may be corrected without a determination that there is an actual breach; there need only be a possible breach. The Department has identified five types of transactions that may be corrected under the VFC Program, as follows: (1) Transactions relating to contributions, including delinquent participant contributions to a pension plan; (2) Loan transactions,

including a loan to a party in interest, a loan at a below-market rate to a person who is not a party in interest, and a loan at a below-market interest rate solely due to a delay in perfecting a security interest; (3) Purchase, sales and exchange transactions, including the purchase/sale of an asset by a plan from/to a party in interest, the sale and leaseback of real property to an employer, the purchase/sale of an asset by a plan from/to a person who is not a party in interest for other than fair market value; (4) Payments of benefits without properly valuing plan assets on which payment is based; and (5) Payments of duplicative, excessive or unnecessary compensation by the plan or payments of dual compensation to a plan fiduciary. These transactions are further described, along with eligible methods of corrections, in Section 7 of the release. Section 5 sets forth "general rules for acceptable corrections," including methods for making fair market value determinations, the manner in which correction amounts must be determined (including how to account for lost earnings and/or restoration of profits). Persons who may file for relief. Persons who may correct a fiduciary breach under the Program include the breaching fiduciary, plan sponsors, and parties in interest or other persons who are in a position to correct a breach. However, persons or plans that are the subject of pending investigations for violations of ERISA Title I, or that appear to have engaged in criminal violations, may not take advantage of the VFC Program. Cost of filing and correction. The cost of correction must be borne by the applicant and not the plan. Comments on the VFC Program. Written comments on the Program may be submitted to the Department of Labor by May 15, 2000. Russell G. Galer Senior Counsel Attachment Note: Not all recipients receive the attachment. To obtain a copy of the attachment referred to in this Memo, please call the ICI Library at (202) 326-8304, and ask for attachment number 11746. ICI Members may retrieve this Memo and its attachment from ICINet (<http://members.ici.org>).