

**MEMO# 15408**

November 27, 2002

# **DOL ISSUES PROHIBITED TRANSACTION CLASS EXEMPTION RELATING TO VOLUNTARY FIDUCIARY CORRECTION PROGRAM**

[15408] November 27, 2002 TO: PENSION MEMBERS No. 57-02 PENSION OPERATIONS ADVISORY COMMITTEE No. 78-02 RE: DOL ISSUES PROHIBITED TRANSACTION CLASS EXEMPTION RELATING TO VOLUNTARY FIDUCIARY CORRECTION PROGRAM The Department of Labor recently finalized a prohibited transaction class exemption for certain transactions eligible under its Voluntary Fiduciary Correction (VFC) program.<sup>1</sup> Under the VFC program, plan officials or other parties to the transaction at issue may voluntarily correct and seek relief for violations covered by the program.<sup>2</sup> Prohibited Transaction Exemption 2002-51 provides relief from the excise tax imposed under Internal Revenue Code section 4975 for a subset of the transactions eligible for correction under the VFC program, provided that the exemption's conditions are satisfied. Eligible Transactions. Four types of transactions are eligible for relief under the class exemption: (1) the failure to timely transmit participant contributions (or participant loan repayments, as discussed below) to a pension plan; (2) the making of a loan by a plan at a fair market interest rate to a party in interest with respect to a plan; (3) the purchase or sale of an asset (including real property) between a plan and a party in interest at fair market value; and (4) the sale of real property to a plan by the employer and the leaseback of such property to the employer, at fair market value and fair market rental value, respectively. Modifications in the Final Exemption. The preamble to the final exemption highlights three modifications to the conditions set forth in the proposed exemption. First, the final exemption clarifies the requirement under which notice of the transaction (for which the applicant is seeking relief) must be provided to interested persons within 60 calendar days following the submission of the VFC application.<sup>3</sup> Specifically, where a program 1 See Institute Memorandum to Pension Members No. 13-02 and Pension Operations Advisory Committee No. 21-02, dated April 5, 2002 (VFC Program Guidance and Proposed Exemption). 2 Specifically, applicants must correct any prohibited transactions, calculate and restore losses, and distribute any supplemental benefits owed to eligible participants and beneficiaries. If program requirements are met, the applicant would receive a "no action" letter indicating that there will be no further enforcement action by DOL on the corrected transaction. 3 A copy of the notice also must be provided to the appropriate regional office of the Department of Labor. 2 applicant is unaffiliated with and unrelated to the employer whose employees are covered by the plan, the final exemption provides that the notice requirement will be deemed to be satisfied if the applicant provides notice to an unrelated plan fiduciary, rather than each participant and beneficiary. Notably, the Department emphasized that under no

circumstances should plan assets be used to pay for the notice. Second, the final exemption creates an exception from the general rule that an applicant must not have taken advantage of the relief provided by the VFC program during the three years prior to the submission of the current application. This exception would apply where:

- The applicant was a registered broker-dealer, a bank supervised by federal or state authorities or subject to foreign government regulation, an insurance company qualified to do business in a state, or an affiliate thereof;
- The applicant was a party in interest (including a fiduciary) solely by reason of providing services to the plan or solely by reason of a relationship to such service provider;
- Neither the applicant nor any affiliate was a fiduciary with respect to the plan's assets involved in the transaction, and neither the applicant nor any affiliate used its discretion to cause the plan to engage in the transaction;
- The individuals acting on behalf of the applicant in connection with the transaction had no actual knowledge or reason to know that the transaction was not exempt from the prohibited transaction restrictions; and
- Prior to the transaction, the applicant established written policies and procedures that were reasonably designed to ensure compliance with the prohibited transaction rules, and the applicant engaged in periodic monitoring for compliance.

Third, pursuant to guidance issued earlier this year addressing the repayment of plan loans,<sup>4</sup> the final exemption includes the failure to timely remit participant loan repayments as a transaction eligible for relief. Other Exemption Conditions. In addition to the requirements noted above, the final exemption conditions relief from the prohibited transaction excise tax on a number of other requirements, including the following: (1) the transaction must not have been part of an agreement, arrangement or understanding designed to benefit a party in interest; (2) the applicant must have met all of the applicable requirements of the VFC program; (3) DOL must have issued a no action letter to the applicant pursuant to the VFC program; and (4) for transactions involving participant contributions or plan repayments, the contributions or repayments must have been transmitted to the pension plan not more than 180 calendar days.

<sup>4</sup> See Institute Memorandum to Pension Members No. 38-02 and Pension Operations Advisory Committee No. 56-02, dated August 9, 2002 (DOL Frequently Asked Questions on VFC Program); Institute Memorandum to Pension Members No. 27-02 and Pension Operations Advisory Committee No. 37-02, dated June 6, 2002 (DOL Advisory Opinion No. 2002-02A).

<sup>3</sup> From the date the amounts were received by the employer or the date the amounts otherwise would have been payable to the participant in cash.

<sup>5</sup> Effective Date. The final exemption is effective as of November 25, 2002. Thomas T. Kim Associate Counsel Note: Not all recipients receive the attachment. To obtain a copy of the attachment, please visit our members website (<http://members.ici.org>) and search for memo 15408, or call the ICI Library at (202) 326-8304 and request the attachment for memo 15408. Attachment (in .pdf format)

<sup>5</sup> The final exemption also sets forth certain conditions that apply to other specific types of transactions covered by the exemption.