Voluntary Fiduciary Correction Program

By Kandice K. Bridges

The Department of Labor ("DOL") has adopted the Voluntary Fiduciary Correction ("VFC") Program promulgated by the DOL's Pension and Welfare Benefits Administration. This program allows certain persons to avoid possible civil investigations and/or actions by the DOL and the imposition of civil penalties under section 502(l) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). ERISA section 502(l) provides that a 20% penalty is imposed on the amount recovered under any settlement agreement with the Secretary, or ordered by a court, in an action initiated by the Secretary with respect to any breach of fiduciary responsibility.

If a VFC applicant has complied with all of the terms and procedures of the program, the PWBA will issue a "no action letter." This means that the DOL will not, with respect to the breach described in the application: (i) take civil enforcement action against the applicant with respect to the described breach; (ii) recommend that the Solicitor of Labor initiate legal action against the applicant; or (iii) impose the 20% penalty. Full correction under the VFC program and receipt of the "no action letter" will not, however, preclude other governmental agencies (i.e., the Internal Revenue Service) from exercising any rights it may have with respect to the breach described in the application. See Baizer v. Commissioner (9th Cir., No. 98-70787, March 1, 2000). The Internal Revenue Service has noted, however, that correction under the VFC program will generally be an acceptable method of correction under the Internal Revenue Code.

Eligibility for the program is conditioned upon two criteria: (i) neither the plan nor the VFC applicant is under investigation; and (ii) as determined by the PWBA, the application contains no evidence of potential criminal violations. In addition, the VFC applicant or the plan administrator must provide written notice of the correction to all plan participants. The program applies only to the 13 transactions set forth in the program and only if correction is effected using the methods provided in the program.

Continue on page 3

The transactions that may be corrected under the VFC program are as follows:

Contributions:

(i) delinquent participant contributions to pension plans.

Loans:

(i) at fair market interest rate to a party in interest with respect to the plan;

(ii) at below-market interest rate to a party in interest with respect to the plan;

(iii) at below-market interest rate to a person who is not a party in interest with respect to the plan; and

(iv) at below-market interest rate solely due to a delay in perfecting the plan's security interest.

Purchases, Sales and Leases:

(i) plan purchased asset from a party in interest;

(ii) plan sold asset to a party in interest;

(iii) sale and leaseback of real property between plan and employer;

(iv) plan purchased property from non-party in interest and paid more than fair market value; and

(v) plan sold asset to non-party in interest for less than fair market value.

Benefit Payments:

(i) payment of benefits without properly valuing plan assets on which payment is based.

Benefit Payments:

(i) duplicative, excessive or unnecessary compensation paid by a plan; and

(ii) payment of dual compensation to a plan fiduciary.