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Employee Benefits Security Administration

Voluntary Fiduciary Correction Program Under the Employee Retirement Income Security Act of 1974; Notice

DEPARTMENT OF LABOR

Employee Benefits Security Administration

RIN 1210–AB03

Voluntary Fiduciary Correction Program Under the Employee Retirement Income Security Act of 1974

AGENCY: Employee Benefits Security Administration, DOL.

ACTION: Adoption of amended and restated Voluntary Fiduciary Correction Program.

SUMMARY: This Notice contains an update, which amends and restates the Employee Benefits Security Administration's Voluntary Fiduciary Correction Program (the VFC Program or Program). The VFC Program permits certain persons to avoid potential civil actions and civil penalties under the Employee Retirement Income Security Act (ERISA) by voluntarily taking steps to correct violations that would ordinarily give rise to such actions and penalties. Based on its experience since adoption of the VFC Program in March 2002, the Employee Benefits Security Administration (EBSA) has identified certain changes that will both simplify and expand the original VFC Program, thereby making the Program easier for, and more useful to, employers and others who wish to avail themselves of the relief provided by the Program. EBSA is inviting comments from interested persons on the revisions to the VFC Program described in this document. At the same time, EBSA is making the simplified and expanded Program available immediately to those who wish to rely on the revisions in seeking VFC Program relief.

DATES: This Notice is effective April 6, 2005.

Written comments on the Notice should be received by EBSA on or before June 6, 2005.

ADDRESSES: Comments on the amendments to the VFC Program (preferably at least three copies) should be addressed to the Office of Regulations and Interpretations, Employee Benefits Security Administration, U.S. Department of Labor, Room N–5669, 200 Constitution Avenue NW., Washington, DC 20210, Attn: Voluntary Fiduciary Correction Program. Comments also may be submitted electronically to *e-ori@dol.gov* or to *http://www.regulations.gov.*

All comments received will be available for public inspection at the Public Disclosure Room, N–1513, Employee Benefits Security Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210.

FOR FURTHER INFORMATION CONTACT: For Questions Regarding the VFC Program Amendments: Contact Kristen L. Zarenko, Office of Regulations and Interpretations, Employee Benefits Security Administration, (202) 693–8510.

For General Questions Regarding the VFC Program: Contact Caroline Sullivan, Office of Enforcement, Employee Benefits Security Administration, (202) 693–8463. (These are not toll-free numbers.)

For Questions Regarding Specific Applications Under the VFC Program: Contact the appropriate EBSA Regional Office listed in Appendix C.

SUPPLEMENTARY INFORMATION:

A. Background

The Voluntary Fiduciary Correction Program was adopted by EBSA of the Department of Labor (Department) on a permanent basis in March 2002 (the original VFC Program).[1] The VFC Program is designed to encourage employers and plan fiduciaries to voluntarily comply with ERISA and allows those potentially liable for certain specified fiduciary violations under ERISA to voluntarily apply for relief from enforcement actions and certain penalties, provided they meet the VFC Program's criteria and follow the procedures outlined in the VFC Program. Many workers have also benefited from the VFC Program as a result of the restoration of plan assets and payment of promised benefits.

The VFC Program describes: how to apply for relief; the specific transactions covered;[2] acceptable methods for correcting violations; and examples of potential violations and corrective actions. Eligible applicants that satisfy the terms and conditions of the VFC Program receive a ''no-action letter'' from EBSA and are not subject to civil monetary penalties. In 2002, the original VFC Program was further expanded to include a class exemption (PTE 2002–51) providing excise tax relief for four specific VFC Program transactions.[3]

While the original VFC Program has been very successful in encouraging and facilitating the correction of violations of ERISA's fiduciary responsibility and prohibited transaction rules, EBSA believes, based on its own experience to date, as well as comments from employee benefit plan practitioners, that changes to the Program are needed to further encourage utilization of the Program. These changes will improve administration of the Program by EBSA's Regional Offices by which the revised VFC Program will continue to be administered. To this end, EBSA is publishing in this Notice an updated and revised VFC Program containing several changes (the revised VFC Program), discussed below, on which EBSA is inviting public comment. As also discussed below, EBSA is making the revised VFC Program effective on publication of this Notice in order to enable employers, plan fiduciaries and others to avail themselves of the simplified processes and new covered transactions during the interim period until the adoption of final changes to the Program.

EBSA also is proposing amendments to PTE 2002–51 to accommodate a new transaction contained in the revised VFC Program. These amendments also appear in the Notice section of today's **Federal Register**. It is important to note that the excise tax relief afforded by the amendments to PTE 2002–51 is not available until such amendments are adopted in final form and, therefore, the amendments cannot be relied upon for relief during the interim period of the revised Program.

B. Overview of VFC Program Changes

Except as discussed below, the revised VFC Program, as set forth herein, is unchanged from the Program adopted in 2002. The Program is set forth in its entirety in this Notice to facilitate both utilization and review by interested persons. The following is an overview of changes applicable to the revised VFC Program.

1. Model Application Form

To encourage use of the Program, EBSA is making available a model VFC Program application form. This model form is set forth in Appendix E of this Notice. EBSA also will be making the model form available to the public on its Web site.[4] While use of the model form

[1] 67 FR 15062 (March 28, 2002). Prior to adoption in March 2002, the VFC Program was made available on an interim basis during which the Department invited and considered public comments on the Program. (*See* 65 FR 14164, March 15, 2000).

[2] EBSA acknowledges, based on its experience, that certain transactions may fit within one or more of the listed categories of transactions, even if not specifically named in the category, for example certain transactions involving contributions in kind under Section 7.D.1. of the Program. EBSA encourages potential applicants to discuss eligibility and similar issues with the appropriate regional VFC Program coordinator.

[3] PTE 2002–51 published at 67 FR 70623 (Nov. 25, 2002).

[4] The model form will be accessible to applicants on EBSA's Web site at *http://www.dol.gov/ebsa.*

is wholly voluntary, EBSA encourages applicants to consider using the form in order to avoid common application errors that frequently result in processing delays or rejections. Moreover, EBSA believes that use of the model form will enable the Regional Offices to provide a more expedient and consistent review of VFC Program applications.

In brief, the model form provides an outline for applicants of the information and supplemental documentation that must be included with the application to help ensure that the applications are correct and complete. The model form includes the Program's mandatory checklist, which is also separately set forth in Appendix B of this Notice. Use of the model form, however, is not a substitute for an applicant's careful review of Program conditions and requirements. For example, all applications must include a completed penalty of perjury statement.

2. Reduced Documentation

As part of its effort to streamline and simplify the VFC Program, EBSA reviewed the supporting documents required to be filed as part of the application process. On the basis of this review, EBSA concluded that document requirements could be reduced in certain instances without compromising EBSA's review of applications. In particular, EBSA has made the following changes to the documentation requirements.

Section 6 of the Program has been revised to eliminate the requirement that applicants provide certain information relating to the plan's fidelity bond.

With regard to the correction of delinquent participant contributions or loan repayments under Section 7.A.1. of the Program, the Program is being revised to permit applicants correcting breaches that involve (i) amounts below $50,000, or (ii) amounts greater than $50,000 that were remitted within 180 calendar days after receipt by the employer to provide summary documentation. EBSA believes that introducing more simplified documentation requirements in certain cases rather than the detailed information and copies of accounting and payroll records required under the original VFC Program will streamline the application process, increase the efficiency of EBSA's reviewers, and be less burdensome for applicants making smaller corrections. Based on EBSA's experience to date, the majority of VFC Program applicants, under the revised Program, would be able to avail themselves of this reduced documentation requirement.

3. Simplification of Correction Amount

In the course of EBSA's administration of the VFC Program, a number of applicants expressed concern about the complexities attendant to calculating amounts required for transaction corrections under the Program. In an effort to address applicant concerns and facilitate corrections for purposes of the revised Program, EBSA is simplifying the definitions of both Lost Earnings and Restoration of Profits set forth in Section 5(b) of the Program.[5] Additionally, EBSA is also providing a new Internet tool on its Web site, the Online Calculator, to automatically perform Program calculations. Use of the Online Calculator is discussed in detail below.

The Program has always required that Plan Officials determine the correction amount to be restored to the plan based on either the losses to the plan resulting from a breach or the profits gained from improper use of plan assets, as required by section 409 of ERISA. The correction amount generally consists of two components: (1) Principal Amount and (2) Lost Earnings or Restoration of Profits. In broad terms, the Principal Amount is the amount of plan assets that would have been available to the plan if the breach had not occurred. Plan Officials must always restore the Principal Amount to the plan.

(a) Lost Earnings Component

Under the original VFC Program, Plan Officials generally calculated Lost Earnings by comparing two hypothetical amounts that a plan might have earned on the Principal Amount between the date of the breach (the Loss Date) and the date the Principal Amount is restored to the plan (the Recovery Date), as well as any interest on such earnings because of payment of Lost Earnings after the Recovery Date. The first earnings amount assumed that the Principal Amount had been appropriately invested under ERISA, while the second assumed that the Principal Amount had earned interest at a rate defined in section 6621 of the Internal Revenue Code (Code). Utilizing this approach, Plan Officials were then required to restore the higher of these two hypothetical amounts to the plan.

In an effort to simplify this component of the correction amount, EBSA is revising the method of calculating Lost Earnings and interest, if any, to use factors provided under IRS Revenue Procedure 95–17.[6] These factors, which are displayed on EBSA's Web site in a tabular format, incorporate daily compounding of an interest rate over a set period of time.

First, applicants must determine the applicable corporate underpayment rate(s) established under section 6621(a)(2) of the Code for each quarter (or portion thereof) for the period beginning with the Loss Date and ending with the Recovery Date. These rates are displayed on EBSA's Web site and will be updated when necessary. Second, applicants must select the applicable factor(s) under IRS Revenue Procedure 95–17 for such quarterly underpayment rate(s) for each quarter (or portion thereof) of the period beginning with the Loss Date and ending with the Recovery Date. Third, applicants multiply the Principal Amount by the first applicable factor to determine the amount of earnings for the first quarter (or portion thereof). If the Loss Date and Recovery Date are within the same quarter, this initial calculation is complete. However, if the Recovery Date is not in the same quarter as the Loss Date, the applicable factor for each subsequent quarter (or portion thereof) must be applied to the sum of the Principal Amount and all earnings as of the end of the immediately preceding quarter (or portion thereof), until Lost Earnings have been calculated for the entire period, ending with the Recovery Date.

In situations when the Lost Earnings amount is paid to the plan after the Recovery Date, applicants must calculate an amount of interest that the Lost Earnings would have earned during the time period between the Recovery Date and such payment date. This calculation also has been simplified to use the factors provided under IRS Revenue Procedure 95–17. Applicants must use the same method as in calculating Lost Earnings, but referencing the period beginning on the Recovery Date and ending with the payment date and applying the first applicable factor to Lost Earnings instead of the Principal Amount. Under the original Program, the Plan Official would have had to calculate and compare two assumed amounts of interest that would have been earned if the Lost Earnings amount had been restored to the plan on the Recovery

[5] The Department notes that the Program's correction criteria represent EBSA enforcement policy with respect to applications under the Program and are provided for informational purposes to the public, but are not intended to confer enforceable rights on any person correcting a violation.

[6] Rev. Proc. 95–17, 1995–1 C.B. 556 (Feb. 8, 1995).

Date and then pay the greater of these two amounts.

If the sum of Lost Earnings and any interest on Lost Earnings exceeds $100,000, applicants must then re-determine the amount of Lost Earnings and any interest on Lost Earnings using the same method discussed above, but substituting the applicable underpayment rates under section 6621(c)(1) of the Code for the rates previously used under section 6621(a)(2). These rates also are displayed on EBSA's Web site and will be updated when necessary.

Applicants either may use the Online Calculator to facilitate the calculation of these Lost Earnings amounts, as explained below, or perform the calculation manually. In either case, information sufficient to verify the correctness of the amounts to be paid to the plan must be included as part of the VFC Program application.

(b) Restoration of Profits Component

In a limited set of circumstances, Plan Officials are required to determine Restoration of Profits as a correction amount component. Under the original VFC Program, Plan Officials generally calculated Restoration of Profits when a breach involved the use of the Principal Amount by a fiduciary, plan sponsor or other Plan Official for a specific purpose resulting in an actual profit that could be determined. Plan Officials were required to compare this actual profit to a second amount that assumed that the Principal Amount had earned interest at a rate defined in section 6621 of the Code. The higher of these two amounts was defined as Restoration of Profits. Plan Officials were then required to compare this Restoration of Profits amount to the Lost Earnings amount and restore the higher amount to the plan.

In an effort to simplify this component of the correction amount, EBSA is revising the Program to require the calculation of a Restoration of Profits amount only when the Principal Amount was used by a fiduciary, plan sponsor or other Plan Official for a specific purpose such that a profit resulting from the breach is determinable. EBSA's experience suggests that more commonly, the Principal Amount is commingled with other funds of the plan sponsor or a fiduciary, so that a profit from the use of the Principal Amount cannot definitively be determined. As a consequence, EBSA anticipates that applicants under the revised Program will be using the simplified Lost Earnings calculation more frequently than Restoration of Profits.

Under the revised Program, Restoration of Profits is defined to incorporate two amounts: (i) The amount of profit made on the use of the Principal Amount, and (ii) if the profit is restored to the plan on a date later than the date on which the profit was realized (*i.e.*, received or determined), the amount of interest earned on such profit from the date the profit was realized to the date on which the profit is restored to the plan. Under the original Program, Plan Officials would have had to calculate and compare two assumed amounts of interest and then include the greater of these two amounts in Restoration of Profits.

EBSA is simplifying the determination of Restoration of Profits under the revised Program to use factors provided under IRS Revenue Procedure 95–17 in calculating the interest amount. First, applicants must determine the applicable corporate underpayment rate(s) established under section 6621(a)(2) of the Code for each quarter (or portion thereof) for the period beginning with the date the profit was realized (*i.e.* received or determined) and ending with the date on which the profit is paid to the plan. Second, applicants must select the applicable factor(s) under IRS Revenue Procedure 95–17 for such quarterly underpayment rate(s) for each quarter (or portion thereof) of the period beginning with the date the profit was realized and ending with the date on which the profit is paid to the plan. Third, applicants multiply the profit on the Principal Amount, referred to above, by the first applicable factor to determine the amount of interest for the first quarter (or portion thereof). If the date the profit was realized and the date the profit is paid to the plan are within the same quarter, the initial calculation is complete. However, if the date the profit was realized is not in the same quarter as the date the profit was paid to the plan, the applicable factor for each subsequent quarter (or portion thereof) must be applied to the sum of the profit on the Principal Amount, and all interest as of the end of the immediately preceding quarter (or portion thereof), until interest has been calculated for the entire period, ending with the date the profit amount is paid to the plan.

If the Restoration of Profits amount exceeds $100,000, applicants must then recalculate the interest amount for Restoration of Profits using the same method discussed above, but substituting the applicable underpayment rates under section 6621(c)(1) of the Code for the rates previously used under section 6621(a)(2).

To more easily perform these interest amount calculations, applicants may use the Online Calculator. Applicants also may perform these calculations manually. In either case, information sufficient to verify the correctness of the amounts to be paid to the plan must be included as part of the VFC Program application.

In situations when the Restoration of Profits amount can be determined, the revised VFC Program requires the Plan Official to restore Restoration of Profits to the plan as a component of the correction amount only if Restoration of Profits exceeds the Lost Earnings amount plus interest, if any.

4. Online Calculator

To facilitate use of the Program, EBSA is providing an Online Calculator on its Web site, which is an Internet based compliance assistance tool that may be used by applicants to automatically calculate Lost Earnings and interest, if any, and the interest amount for Restoration of Profits. Use of the Online Calculator will provide accuracy, ensure consistency and expedite review of applications by EBSA. While EBSA anticipates that most applicants will use the Online Calculator under the revised Program, applicants also may perform a manual calculation, as explained above, using the applicable factors under IRS Revenue Procedure 95–17.

In using the Online Calculator to determine Lost Earnings and interest, if any, applicants input four data elements: the (1) Principal Amount, (2) Loss Date, and (3) Recovery Date, and if the final payment will occur after the Recovery Date, (4) the date of such final payment. The Online Calculator selects the applicable factors under Revenue Procedure 95–17 after referencing the underpayment rates over the relevant time period. The Online Calculator then automatically applies the factors to provide applicants with the amount of Lost Earnings and interest, if any, that must be paid to the plan.

In using the Online Calculator to determine the interest amount for Restoration of Profits, applicants input three data elements: (1) The amount of profit, (2) the date the amount of profit was realized (*i.e.* received or determined), and (3) the date of payment of the Restoration of Profits amount. The Online Calculator selects the applicable factors under Revenue Procedure 95–17 after referencing the underpayment rates over the relevant time period. The Online Calculator then automatically applies the factors to provide applicants with the interest

amount on the profit that must be paid to the plan.

5. New Covered Transactions

(a) Illiquid Assets

On the basis of EBSA's review of the VFC Program, EBSA believes it is appropriate to revise the Program to include a correction of a transaction that permits the plan to divest, rather than continuing to hold in its portfolio, a previously purchased asset that is currently classified as illiquid. This new transaction is described in Section 7.D.6. of the revised Program.

Specifically, the new transaction covers circumstances where a plan is holding an illiquid asset and a plan fiduciary has determined that continued holding of such asset is not in the best interest of the plan or the plan's participants and beneficiaries, and following reasonable efforts to dispose of the asset, the only available purchaser is a party in interest. The revised Program describes three scenarios for the plan's acquisition of the illiquid asset, each of which results in the plan's holding of the illiquid asset, for which the correction is determined to be necessary. In the first scenario, the plan purchases an asset at a price not greater than fair market value at that time, but because the acquisition was from a related party, it was nonetheless a prohibited transaction. In the second scenario, the plan purchases an asset from an unrelated third party in an acquisition that was not a prohibited transaction under ERISA, but the plan fiduciary failed to appropriately discharge his or her fiduciary duties with respect to the purchase. For example, the fiduciary's purchase of a limited partnership interest from an unrelated third party was imprudent and inconsistent with the objectives contained in the plan's investment guidelines. In the third scenario, the plan purchases an asset from an unrelated third party in an acquisition that was not a prohibited transaction under ERISA, and the plan fiduciary appropriately discharged his or her fiduciary duties with respect to the purchase.

Subsequent to an acquisition pursuant to one of the foregoing scenarios, the plan fiduciary concludes that the continued holding of the asset is not in the interest of the plan. To correct the transaction, the revised VFC Program requires the fiduciary to classify the asset as illiquid by making the following determinations: (1) That the asset has failed to appreciate, failed to provide a reasonable rate of return or has caused a loss to the plan; (2) that the sale of the asset is in the best interest of the plan; and (3) following reasonable efforts to sell the asset to a non-party in interest, that the asset cannot immediately be sold for its original purchase price, or its current fair market value, if greater. Illiquid assets, among other things, could include restricted and thinly traded stock, limited partnership interests, real estate and collectibles.

The required correction permits the sale of the illiquid asset to a party in interest, provided the plan is returned to a financial position that is no worse than if the acquisition had never taken place. Accordingly, a plan must receive the higher of the fair market value of the asset on the date of the correction or its original purchase price, plus incidental costs. For purposes of the Class Exemption, corrective relief would, upon adoption of the amendments, extend to both the acquisition of the asset by the plan, if that acquisition would otherwise have been a prohibited transaction, and the disposition of the illiquid asset by sale to a party in interest, which would itself be a prohibited transaction but for the exemption.

(b) Participant Loans

Often plans incorporate in their terms with respect to participant loan programs a provision that a participant loan will not exceed the limitations set by section 72(p) of the Code.[7] The statutory exemption from the prohibited transaction provisions for participant loans provided by section 408(b)(1) of ERISA contains a requirement that a participant loan be made in accordance with plan terms regarding such loans. A violation of the prohibited transaction provisions of ERISA, therefore, would occur when the section 72(p) loan limitations are exceeded. According to practitioners, these loan violations commonly occur and lack an approved correction method for the fiduciary breach involved. EBSA recognizes that plan loans to participants can result in prohibited transactions through no fault of the borrowers. For example, a data processing system or record-keeping error could result in a loan that fails to comply with the plan's written loan provisions, and the borrower agrees to the loan terms unaware of the error. To facilitate correction of such transactions, EBSA is expanding the Program with the addition of two new categories of transactions involving plan loans to participants. These transactions are being added in Section 7.C.1. and 2. of the revised Program.

The new transactions describe situations when a plan extends a loan (i) to a participant who is a party in interest with respect to the plan based solely on his or her status as an employee, and (ii) either the amount or duration of the loan exceeds that permitted under the applicable plan provisions incorporating the limitations of section 72(p) of the Code. These loans are prohibited transactions that fail to qualify for the statutory exemption in section 408(b)(1) of ERISA because the loans were not made in accordance with the specific plan loan provisions.

To correct a loan that exceeded the amount limitation, the Program requires the participant to pay back to the plan the excess amount of the loan. For example, if on the date the loan was made, a participant should have received a loan no greater than $5,000, but the participant erroneously received a loan for $7,000, then the participant must pay $2,000 back to the plan on the date of correction. Then, Plan Officials must reform the loan to amortize the remaining principal balance as of the date of correction over the remaining duration of the original loan, making any required adjustments to the monthly repayment amount. Plan Officials otherwise must continue to enforce all other terms of the original loan agreement.

To correct a loan that exceeded the duration limitation, the Program requires that Plan Officials reform the duration of the loan to complete repayment within the maximum term permitted under the plan loan provisions. For example, if a loan should have been for a term of five years, but the participant erroneously received a loan with scheduled repayments over ten years, Plan Officials must reform the loan. The reformed loan must be paid back within five years from the date of loan origination, and Plan Officials must make any necessary changes to the monthly repayment amount. If more than five years has passed since the date of loan origination, then this correction is not available. Plan Officials otherwise must continue to enforce all other terms of the original loan agreement.

EBSA is aware that these plan loan transactions also have tax consequences; they require income tax reporting as a deemed distribution by the plan fiduciaries, which triggers income tax liabilities for participants. Informal discussion between EBSA and the staffs of the Internal Revenue Service (IRS) and Treasury Department have confirmed their intent to develop a coordinating Employee Plans

[7] *See* Code section 72(p)(2)(A) and (B).

Compliance Resolution System [8] (EPCRS) correction for these plan loan transactions under which certain tax consequences may be alleviated.

(c) Delinquent Participant Loan Repayments

Subsequent to the publication of the original VFC Program, EBSA issued Advisory Opinion 2002–02A (May 17, 2002) relating to the time frames for repayment of participants' loans to pension plans. The Department then issued guidance in a question and answer format under the VFC Program stating that applicants could correct the failure to forward participant loan repayments to a plan in a timely fashion under the Program in the manner set forth in this Advisory Opinion. In conjunction with this guidance, the Department included, in its final class exemption providing relief for certain transactions described in the Program,[9] explicit language to cover the failure to transmit participant loan repayments to a pension plan within a reasonable time after withholding or receipt by the employer. Consistent with the Department's prior guidance,[10] EBSA is expanding the Program to explicitly include delinquent participant loan repayments as an eligible transaction in Section 7.A.1. of the Program.

6. Other Changes

In addition to the revisions described above, EBSA is making the following changes in an effort to further refine the scope of the Program and facilitate its administration of the Program via the Regional Offices.

(a) Scope of the Term ''Under Investigation''

Eligibility to participate in the revised Program pursuant to Section 4 (VFC Program Eligibility), paragraph (a), is conditioned on neither the plan nor the applicant being ''Under Investigation.'' For purposes of the revised VFC Program, EBSA has changed the definition of ''Under Investigation'' in Section 3(b)(3). Upon review of the prior definition, EBSA concluded that in some respects the definition was too broad and in other respects too narrow. For example, the original VFC Program provided that a person would be considered ''Under Investigation'' only if he or she were subject to an investigation under either section 504 of ERISA by EBSA or any criminal statute involving a transaction affecting the plan. EBSA believes that if another Federal agency (*e.g.*, IRS, SEC) is conducting an investigation involving the plan, applicant or plan fiduciary in connection with an act or transaction involving the plan, the acts or transaction at issue should be subject to closer scrutiny than might otherwise be the case in connection with the VFC Program, which is designed to deal with routine correction issues. Accordingly, the definition of ''Under Investigation'' includes investigations or examinations by other Federal agencies whether of a criminal or civil nature.

EBSA further modified the ''Under Investigation'' definition to include notice of a Federal agency's intent to conduct an investigation, recognizing that the parties to the transaction may actually be on notice of an agency's intent to conduct an investigation well in advance of the beginning of the actual investigation. Again, EBSA believes that, while mere contact by an agency official generally is insufficient, communications notifying the parties of a Federal agency's intent to conduct an investigation or examination should, for purposes of eligibility for the VFC Program, be the same as if the investigation had started. It should be noted, however, that the plan, the applicant or plan sponsor will be considered ''Under Investigation'' only if the investigation or examination at issue is in connection with an act or transaction involving the plan. For example, if a plan sponsor is notified by a Federal agency of an investigation of the company regarding a Federal contract, such notification would not affect the plan's eligibility to participate in the VFC Program because the investigation does not involve the plan or an act or transaction involving the plan.

(b) Modification of Penalty of Perjury Statement

For purposes of the revised VFC Program, EBSA also has modified the Penalty of Perjury Statement required by Section 6(g) of the Program. This amendment significantly simplifies the statement and more closely conforms the required representations to the revised Program's eligibility criteria. Under the revised Program, the statement will continue to require a declaration that the application and all supporting documents, based on knowledge and belief, are true, correct, and complete.

(c) Requests for Additional Documentation

For purposes of the revised VFC Program, EBSA has added a provision to the Application Procedures set forth in Section 6(j) of the Program, Submission of Additional Documentation. This provision is intended to make clear that EBSA retains the right to make written requests for any supplemental documentation necessary for a complete examination and review of the application under the Program. If an applicant fails to respond with the requested documentation within the specified time period, EBSA may suspend further review of the application and consider what, if any, other action may be appropriate with respect to the identified violations. EBSA believes that this new provision will improve the efficiency of the Program and encourage timely communications among Program applicants and EBSA reviewers.

7. Miscellaneous Issues

(a) 502(l) Penalty If Application Is Rejected Or Closed As Incomplete

If a person files an application under the VFC Program, but the corrective action falls short of a complete and acceptable correction, EBSA may reject the application and consider appropriate action, including assessment of a section 502(l) penalty. However, no section 502(l) penalty would be imposed on the basis of any amounts restored to the plan prior to filing a Program application. The penalty would only apply to the additional recovery amount, if any, paid to the plan pursuant to a court order or a settlement agreement with the Department.

(b) Actions By Parties Other Than the Department

Full correction under the VFC Program does not preclude any other person or governmental agency, including the IRS, from exercising any rights it may have with respect to the transactions that are the subject of the application. The IRS has indicated to the Department that the federal tax treatment of a breach and correction under the VFC Program (including the federal income and employment tax consequences to participants, beneficiaries, and plan sponsors) are determined under the Code and that, based on its review of the revised Program, except in those instances where the fiduciary breach or its correction involve a tax abuse, a correction under the VFC Program for a breach that constitutes a prohibited transaction under section 4975 of the Code generally will constitute correction for purposes of section 4975 and a correction under the VFC Program

[8] Rev. Proc. 2003–44, 2003–1 C.B. 1051.

[9] *See* infra 1.

[10] *See also* Preamble to the final participant contribution regulation, 29 CFR 2510.3–102, published at 61 FR 41220, 41226 (Aug. 7, 1996).

for a breach that also constitutes an operational plan qualification failure generally will constitute correction for purposes of the IRS's EPCRS program.

C. Notice and Request for Comments

Although the Department is not required to seek public comments on an enforcement policy, the Department solicits comments from the public on the revisions to the VFC Program discussed in this Notice, including whether there are different ways in which the new transactions included in the Program could be corrected in accordance with the goals of the Program.

At the same time, the Department has determined that the relief afforded by the revised VFC Program should be made available upon publication of the revised Program in the **Federal Register** in order to ensure that interested parties may avail themselves of the Program changes on the earliest possible date. EBSA does not believe that a delay in the implementation of the changes discussed herein would serve any useful purpose and is unnecessary, depriving potential applicants of the ability to take advantage of the clarified procedures and additional transactions included in the revised Program. As with the original VFC Program, implementation of the revised Program does not foreclose resolution of fiduciary breaches by other means, including entering into settlement agreements with the Department. The Department expects that the availability of the revised Program will encourage fiduciaries, which otherwise might not do so, to correct violations and reimburse plan losses. Alternatively, VFC Program applicants may pursue relief under the original VFC Program until such time as final changes are adopted by the Department.

D. Impact of Program Amendments

Executive Order 12866 Statement

Under Executive Order 12866, the Department must determine whether a regulatory action is ''significant'' and therefore subject to the requirements of the Executive Order and subject to review by the Office of Management and Budget (OMB). Under section 3(f) of the Executive Order, a ''significant regulatory action'' is an action that is likely to result in a rule (1) having an annual effect on the economy of $100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as ''economically significant''); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. OMB has determined that this action is not a ''significant regulatory action'' under Executive Order 12866, section 3(f). Accordingly, an assessment of the potential costs and benefits under section 6(a)(3) of that order is not required. In order to better inform the public, however, the Department has included below a brief analysis of the costs and benefits attributable to the updated and revised Program.

The Department continues to believe that the benefits of the VFC Program substantially outweigh its costs, because participation is voluntary, the administrative cost of correcting a potential fiduciary breach through voluntary participation in the VFC Program is lower than the administrative cost of a correction in connection with a civil action and civil penalties, and the value and security of the assets of the plans participating in the VFC Program are preserved or increased. The VFC Program imposes no costs unless Plan Officials choose to avail themselves of the opportunity to correct a potential fiduciary breach under the terms of the VFC Program. Costs to Plan Officials in applying under the VFC Program include the expenses related to making a correction in accordance with Program conditions, and completing the application to be submitted to the Department. Benefits for Plan Officials include the reduction of risk and savings of penalties that would otherwise be payable on the amount of assets recovered following a civil action, in addition to the savings of resources that might have been devoted to such a civil action.

An additional benefit of the VFC Program accrues to participants and beneficiaries through the correction of violations and restoration of losses or profits that arise from the reversal of impermissible transactions, resulting in greater security of plan assets and future benefits.

The Department expects that the revised VFC Program will be easier and more useful for potential applicants. The greater efficiency and accessibility that will result from the availability of a model application form, the reduced documentation requirements, simplification of the correction amount calculation, including the introduction of the Online Calculator and the factors provided under IRS Revenue Procedure 95–17, addition of new transaction categories, and other clarifying modifications are expected to make the Program easier to use, to lessen the cost of participation in many instances, and to increase efficiency for both applicants and reviewers.

The VFC Program has been very successful to date in encouraging and facilitating the correction of violations. The Department anticipates that the revised VFC Program will encourage Plan Officials, who otherwise might not do so, to correct violations and reimburse plan losses.

The Department is unable to predict with certainty either the reduction in application costs that will arise from simplification of application and procedural requirements, or the potential increase in participation that will be associated with these revisions. However, based on the Department's experience to date, and comments from employee benefit plan practitioners, the availability of the model application form, streamlining of documentation requirements, and simplification of the correction amount calculation would make the Program substantially easier to use. The voluntary model form should offer an easily accessible outline for applicants to use in ensuring that their applications are complete, which will reduce or eliminate common application errors that result in processing delays and potential rejections.

The reduction in the extent of documentation required for corrections involving delinquent contributions, in particular, should decrease the cost of participation for many Plan Officials because the vast majority of applications based on the delinquent remittance of participant funds have entailed breaches that involve amounts below $50,000, or amounts greater than $50,000 that were repaid within 180 days. The delinquent remittance of participant contributions is also the most common type of violation corrected to date under the VFC Program. Where it applies, this reduction is substantial in that it permits the submission of summary information rather than the detailed accounting records previously required.

Similarly, the modification of the method of calculating Lost Earnings or Restoration of Profits will simplify the correction in two significant ways. First, the revision in most cases eliminates the need for multiple calculations and a comparison of the two hypothetical amounts representing losses based on

actual rates and losses based on Code section 6621 rates. Second, the calculation of correction amounts will be facilitated considerably by the availability of the Online Calculator and the factors provided under IRS Revenue Procedure 95–17. As explained in detail above, the Online Calculator and IRS factors will be simpler, easier to use, and lessen the opportunity for errors. As noted, the Online Calculator and IRS factors will also facilitate calculations in connection with differences in Code section 6621 rates over time applicable to Lost Earnings, interest on Lost Earnings and interest for the Restoration of Profits. Further, the Online Calculator and IRS factors will facilitate these calculations for transactions causing large losses or resulting in large restorations where the Code section 6621(c)(1) large corporate underpayment rate must be used.

Again, the Department anticipates that this simplification will have a sizeable aggregate effect. This is because the Online Calculator is expected to be particularly useful in the correction of violations involving the delinquent remittance of participant contributions. Not only is this the most common type of violation corrected to date, it is also a violation likely to involve multiple Loss Dates, further complicating the computation of correction amounts. The revised Program does retain flexibility for applicants by permitting manual calculations using the IRS factors.

The Department previously estimated the average administrative cost of participation at about $3,000, consisting of about 39 hours of purchased professional services and Plan Official time for the correction and application. The actual cost is expected to be highly variable. However, if the model form, streamlined documentation, and simplification of correction amount calculation together served to reduce the average application time by eight to ten hours, spread over purchased professional services and Plan Officials, the average cost per applicant would be reduced to between $2,500 and $2,300. For the 700 plans estimated to participate in the VFC Program annually, this would amount to an aggregate savings of about $400,000 to $500,000 per year. This cost contrasts with fiscal year 2004 corrections in 474 cases restoring over $260 million.

The Department is unable to estimate the increase in participation in the Program that may result from these revisions, largely because participation has continued to increase substantially. Participation roughly doubled between fiscal years 2003 and 2004. Many factors may contribute to this steady increase, such that it is not possible to observe a relationship between the administrative cost of participation in the Program and the decision to participate. Although the degree to which perceived complexities in the Program have discouraged participation is unknown, information provided by practitioners suggests that these changes will encourage greater participation.

The inclusion in the Program of new covered transactions, involving certain loans to participants, the delinquent remittance of participant loan repayments, and the purchases and sales, of illiquid assets as determined under the VFC Program, along with the proposed prohibited transaction class exemption also published today that relates to the purchase and sale of illiquid assets, is also expected to make the relief available under the Program accessible to more Plan Officials and further increase participation. This assumption is based on both feedback from potential applicants, and on the experience of the Department in administering the Program. The Department has not ascertained a basis for estimating the volume of increased participation that might result from these new covered transactions and related prohibited transaction class exemption.

The Department actively monitors the use of the Program, and will continue at this time to project annual Program utilization by about 700 plans until the rate of participation has become more consistent.

Beyond these administrative impacts, the Department has also considered the potential economic impacts of eliminating the requirement for the comparison of two hypothetical correction amounts for the calculation of correction amounts. Plan Officials were previously required to restore the higher of earnings as though the principal had been invested appropriately under ERISA, and earnings as though the principal had accrued interest at the rates specified in Code section 6621. The Department acknowledges that the correction amount under the revised Program may in some instances be lower than the higher of the former two hypothetical amounts.

In eliminating dual calculation methods and offering the Online Calculator and IRS factors, the Department has attempted to strike a reasonable balance between the advantages of simplicity, which may include lower administrative costs and a greater likelihood of a timely correction, and the potentially greater precision of applying multiple rates of return based on the investment alternatives involved. The Department welcomes comments on the possible economic consequences of the revised provisions relating to the correction amount.

Paperwork Reduction Act

The Information Collection Request (ICR) included in the 2002 Program and PTE 2002–51 is currently approved by the Office of Management and Budget under control number 1210–0118. This approval is scheduled to expire on December 31, 2006. The amendments to the original VFC Program described earlier in this preamble may be expected to modify burden to some degree. However, with the exception of the change in the documentation requirements for the delinquent remittance of participant funds, these amendments do not in the Department's view constitute a substantive or material modification of the existing ICR. Accordingly, the Department has not addressed changes other than those made to Section 7.A.1.c. in a submission for the approval of a revision to the ICR in connection with these amendments, or with the proposed amendments to PTE 2002–51, published separately in this issue of the **Federal Register.**

As noted, to facilitate applicants' use of the Program, the Department has developed an optional model application form (Appendix E). Potential applicants and practitioners have strongly encouraged EBSA to develop such a form to assist applicants to readily identify the Program requirements, and to verify that they have provided all of the information and supplementary documentation necessary for a valid application. Use of the form may help applicants avoid common errors that frequently result in processing delays or rejections.

Although the model form may reduce burden, it follows the requirements set forth in the Program, and would not collect information not already required to be provided by an applicant under the existing Program. As such, the model application form will provide ready access to Program requirements previously set out in the text of the Program, and increase certainty about compliance with the application requirements, without altering the existing ICR.

Completion and submission of the checklist (Appendix B) was required in the original program, and is revised in only its more user-friendly format. Elements of the checklist now appear on a separate Appendix. It should be noted that the required checklist appears twice within the Appendices to the Program.

While it is required to be submitted only once, it is included as the separate Appendix B for applicants who do not choose to use the model application in Appendix E, and as the final item in the model application for ease of use for those who do choose to use the model application.

The Department has also modified the VFC Program's application requirements by clarifying certain terms and representations to be made in the application, by describing the process by which the Department when necessary may request additional documentation, and eliminating previously required information related to the plan's fidelity bond. These modifications are also made with intention of making the Program easier and more efficient to use, but do not substantively or materially alter the existing ICR.

In the Department's view, the amendments to Section 7.A.1.c. do constitute a substantive and material change to the existing ICR because they will substantially reduce burden. The revision of the currently approved ICR pertains to documentation requirements for Delinquent Participant Contributions and Delinquent Participant Loan Repayments to Pension Plans. Revised provision 7.A.1.c. eliminates under specific circumstances the requirement for the applicant to provide accounting and payroll records to document the date and amount of each contribution at issue. The Plan Official is relieved from providing the more detailed documentation if restored participant contributions and/or repayments (exclusive of Lost Earnings) total $50,000 or less, or exceed $50,000 and were remitted to the plan within 180 days from the date such amounts were received by the employer or otherwise payable to the participant in cash. This program change is intended to reduce the burden of participation in the Program.

This revision is expected to impact the burden of the currently approved information collection because the vast majority of violations corrected under the Program involve delinquent participant contributions that totaled $50,000 or less, or were remitted within 180 days. Thus a burden reduction is expected for more than 90% of applicants.

The information collection burden of the VFC Program and related PTE 2002–51 is estimated as follows. The estimates include updated assumptions for compensation rates and mailing costs, and an increase in the number of respondents over the number currently in OMB inventory. For each of 700 plans, 8 hours of time of Plan Officials at $68 per hour, and 5 hours of service provider time at $83 per hour will be required to meet information collection requirements. These components account for 5,600 burden hours and $290,500 in burden cost. Total burden cost includes $2 in mailing costs, for a total of $291,900.

Assuming as many as one-half of applicants also make use of the class exemption when using the Program and that all work is performed by service providers, an additional cost burden of $29,000 arises from developing required notices to interested persons at $83 per hour, and mailing at first class rates for 10% of those notices and the notices to the Department, assuming an average of 136 participants per plan. It is assumed that the remaining notices are delivered electronically. Total cost burden for the information collection provisions of the exemption is $30,900. The total cost of the information collection provisions of the VFC Program and exemption before this revision is $322,800.

The revision in Section 7.A.1.c is estimated to reduce the hours and costs required to comply with the Program's information collection request by about one-half. The burden associated with the exemption is unchanged.

As part of its continuing effort to reduce paperwork and respondent burden, the Department of Labor conducts a preclearance consultation program to provide the general public and federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA 95) (44 U.S.C. 3506(c)(2)(A)). This helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed.

Currently, EBSA is soliciting comments concerning the revision of the currently approved information collection request (ICR) included in this Amended and Restated Voluntary Fiduciary Correction Program. A copy of the ICR may be obtained by contacting the PRA addressee shown below.

The Department has submitted a copy of the revised ICR to OMB in accordance with 44 U.S.C. 3507(d) for review of its information collections. The Department and OMB are particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Comments should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503; Attention: Desk Officer for the Employee Benefits Security Administration. Although comments may be submitted through June 6, 2005, OMB requests that comments be received within 30 days of publication of the Notice of Adoption of Amended and Restated Voluntary Fiduciary Correction Program.

PRA Addressee: Address requests for copies of the ICR to Gerald B. Lindrew, Office of Policy and Research, U.S. Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue, NW., Room N–5647, Washington, DC 20210. Telephone (202) 693–8410; Fax: (202) 219–5333. These are not toll-free numbers.

Type of Review: Revision of currently approved collection of information.

Agency: Department of Labor, Employee Benefits Security Administration.

Title: Voluntary Fiduciary Correction Program.

OMB Number: 1210–0118.

Affected Public: Individuals or households; Business or other for-profit; Not-for-profit institutions.

Respondents: 700.

Frequency of Response: On occasion.

Responses: 5,810.

Estimated Total Burden Hours: 1,200 for existing ICR; 3,500 for revised ICR.

Total Annual Cost (Operating and Maintenance): $66,000 for existing ICR; $177,600 for revised ICR.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of the information collection request; they will also become a matter of public record.

Regulatory Flexibility Act

This document describes an enforcement policy of the Department, and is not being issued as a general notice of proposed rulemaking. Therefore, the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) does not apply and the Department is not required to either certify that the rule will not have a significant economic impact on a substantial number of small entities, or conduct a regulatory flexibility analysis. However, EBSA considered the potential costs and benefits of this action for small plans and the Plan Officials in developing the revised Program, and believes that its greater simplicity and accessibility will make the Program more useful to small employers who wish to avail themselves of the relief offered.

Congressional Review Act

The VFC Program is subject to the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*) and will be transmitted to the Congress and the Comptroller General for review. The Program is not a ''major rule'' as that term is defined in 5 U.S.C 804 because it is not likely to result in (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, or federal, state, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Unfunded Mandates Reform Act

Pursuant to provisions of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), this regulatory action does not include any Federal mandate that may result in annual expenditures by State, local, or tribal governments, or the private sector, of $100 million or more.

E. Federalism Statement

Executive Order 13132 (August 4, 1999) outlines fundamental principles of federalism and requires the adherence to specific criteria by Federal agencies in the process of their formulation and implementation of policies that have substantial direct effects on the States, the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. This Program would not have federalism implications because it has no substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Section 514 of ERISA provides, with certain exceptions specifically enumerated that are not pertinent here, that the provisions of Titles I and IV of ERISA supersede any and all laws of the States as they relate to any employee benefit plan covered under ERISA. The requirements implemented in this Program do not alter the fundamental provisions of the statute with respect to employee benefit plans, and as such would have no implications for the States or the relationship or distribution of power between the national government and the States.

Authority: Secretary of Labor's Order 1–2003, 68 FR 5374 (Feb 3, 2003). ERISA Sec. 502(a)(2) and (a)(5) also issued under 29 U.S.C. 1132(a)(2) and (a)(5), ERISA Sec. 506(b) also issued under 29 U.S.C. 1136(b).

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Section 1. Purpose and Overview of the VFC Program

The purpose of the Voluntary Fiduciary Correction Program (VFC Program or Program) is to protect the financial security of workers by encouraging identification and correction of transactions that violate Part 4 of Title I of the Employee Retirement Income Security Act of 1974, as amended (ERISA). Part 4 of Title I of ERISA sets out the responsibilities of employee benefit plan fiduciaries. Section 409 of ERISA provides that a fiduciary who breaches any of these responsibilities shall be personally liable to make good to the plan any losses to the plan resulting from each breach and to restore to the plan any profits the fiduciary made through the use of the plan's assets. Section 405 of ERISA provides that a fiduciary may be liable, under certain circumstances, for a co-fiduciary's breach of his or her fiduciary responsibilities. In addition, under certain circumstances, there may be liability for knowing participation in a fiduciary breach. In order to assist all affected persons in understanding the requirements of ERISA and meeting their legal responsibilities, the Employee Benefits Security Administration (EBSA) is providing guidance on what constitutes adequate

correction under Title I of ERISA for the breaches described in this Program.

Section 2. Effect of the VFC Program

(a) *In general.* EBSA generally will issue to the applicant a no action letter [11] with respect to a breach identified in the application if the eligibility requirements of Section 4 are satisfied and a Plan Official corrects a breach, as defined in Section 3, in accordance with the requirements of Sections 5, 6 and 7. Pursuant to the no action letter it issues, EBSA will not initiate a civil investigation under Title I of ERISA regarding the applicant's responsibility for any transaction described in the no action letter, or assess a civil penalty under section 502(l) of ERISA on the correction amount paid to the plan or its participants.

(b) *Verification.* EBSA reserves the right to conduct an investigation at any time to determine (1) the truthfulness and completeness of the factual statements set forth in the application and (2) that the corrective action was, in fact, taken.

(c) *Limits on the effect of the VFC Program.* (1) *In general.* Any no action letter issued under the VFC Program is limited to the breach and applicants identified therein. Moreover, the method of calculating the correction amount described in this Program is only intended to correct the specific breach described in the application. Methods of calculating losses other than, or in addition to, those set forth in the Program may be more appropriate, depending on the facts and circumstances, if the transaction violates provisions of ERISA other than those that can be corrected under the Program. If a transaction gave rise to violations not specifically described in the Program, the relief afforded by the Program would not extend to such additional violations.

(2) *No implied approval of other matters.* A no action letter does not imply Departmental approval of matters not included therein, including steps that the fiduciaries take to prevent recurrence of the breach described in the application and to ensure the plan's future compliance with Title I of ERISA.

(3) *Material misrepresentation.* Any no action letter issued under the VFC Program is conditioned on the truthfulness, completeness and accuracy of the statements made in the application and of any subsequent oral and written statements or submissions. Any material misrepresentations or omissions will void the no action letter, retroactive to the date that the letter was issued by EBSA, with respect to the transaction that was materially misrepresented.

(4) *Applicant fails to satisfy terms of the VFC Program.* If an application fails to satisfy the terms of the VFC Program, as determined by EBSA, EBSA reserves the right to investigate and take any other action with respect to the transaction and/or plan that is the subject of the application, including refusing to issue a no action letter.

(5) *Criminal investigations not precluded.* Participation in the VFC Program will not preclude:

(i) EBSA or any other governmental agency from conducting a criminal investigation of the transaction identified in the application;

(ii) EBSA's assistance to such other agency; or

(iii) EBSA making the appropriate referrals of criminal violations as required by section 506(b) of ERISA.[12]

(6) *Other actions not precluded.* Compliance with the terms of the VFC Program will not preclude EBSA from taking any of the following actions:

(i) Seeking removal from positions of responsibility with respect to a plan or other non-monetary injunctive relief against any person responsible for the transaction at issue;

(ii) Referring information regarding the transaction to the Internal Revenue Service (IRS) as required by section 3003(c) of ERISA;[13] or

(iii) Imposing civil penalties under section 502(c)(2) of ERISA based on the failure or refusal to file a timely, complete and accurate annual report Form 5500. Applicants should be aware that amended annual report filings may be required if possible breaches of ERISA have been identified, or if action is taken to correct possible breaches in accordance with the VFC Program.

(7) *Not binding on others.* The issuance of a no action letter does not affect the ability of any other government agency, or any other person, to enforce any rights or carry out any authority they may have, with respect to matters described in the no action letter.

(8) *Example.* A plan fiduciary causes the plan to purchase real estate from the plan sponsor under circumstances to which no prohibited transaction exemption applies. In connection with this transaction, the purchase causes the plan assets to be no longer diversified, in violation of ERISA section 404(a)(1)(C). If the application reflects full compliance with the requirements of the Program, the Department's no action letter would apply to the violation of ERISA section 406(a)(1)(A), but would not apply to the violation of section 404(a)(1)(C).

(d) *Correction.* The correction criteria listed in the VFC Program represent EBSA enforcement policy with respect to applications under the Program and are provided for informational purposes to the public, but are not intended to confer enforceable rights on any person who purports to correct a violation. Applicants are advised that the term ''correction'' as used in the VFC Program is not necessarily the same as ''correction'' pursuant to section 4975 of the Internal Revenue Code (Code).[14] Correction may not be achieved under the Program by engaging in a prohibited transaction that is not subject to a prohibited transaction administrative exemption.

(e) *EBSA's authority to investigate.* EBSA reserves the right to conduct an investigation and take any other enforcement action relating to the transaction identified in a VFC Program application in certain circumstances, such as prejudice to the Department that may be caused by the expiration of the statute of limitations period, material misrepresentations, or significant harm to the plan or its participants that is not cured by the correction provided under the VFC Program. EBSA may also conduct a civil investigation and take any other enforcement action relating to matters not covered by the VFC Program application or relating to other plans sponsored by the same plan sponsor, while a VFC Program application involving the plan or the plan sponsor is pending.

[11] *See* Appendix A.

[12] Section 506(b) provides that the Secretary of Labor shall have the responsibility and authority to detect and investigate and refer, where appropriate, civil and criminal violations related to the provisions of Title I of ERISA and other related Federal laws, including the detection, investigation, and appropriate referrals of related violations of Title 18 of the United States Code.

[13] Section 3003(c) provides that, whenever the Secretary of Labor obtains information indicating that a party in interest or disqualified person is violating section 406 of ERISA, she shall transmit such information to the Secretary of the Treasury.

[14] *See* section 4975(f)(5) of the Code; section 141.4975–13 of the temporary Treasury Regulations and section 53.4941(e)–1(c) of the Treasury Regulations. The IRS has indicated that the federal tax treatment of a breach and correction under the VFC Program (including the federal income and employment tax consequences to participants, beneficiaries, and plan sponsors) are determined under the Code and that, based on its review of the Program, except in those instances where the fiduciary breach or its correction involve a tax abuse, a correction under the VFC Program for a breach that constitutes a prohibited transaction under section 4975 of the Code generally will constitute correction for purposes of section 4975 and a correction under the VFC Program for a breach that also constitutes an operational plan qualification failure generally will constitute correction for purposes of the IRS's Employee Plans Compliance Resolution Program (EPCRS).

(f) *Confidentiality.* EBSA will maintain the confidentiality of any documents submitted under the VFC Program, to the extent permitted by law. However, as noted in (c)(5) and (6) of this section, EBSA has an obligation to make referrals to the IRS and to refer to other agencies evidence of criminality and other information for law enforcement purposes.

Section 3. Definitions

(a) The terms used in this document have the same meaning as provided in section 3 of ERISA, 29 U.S.C. section 1002, unless separately defined herein.

(b) The following definitions apply for purposes of the VFC Program:

(1) *Breach.* The term ''Breach'' means any transaction that is or may be a breach of the fiduciary responsibilities contained in Part 4 of Title I of ERISA.

(2) *Plan Official.* The term ''Plan Official'' means a plan fiduciary, plan sponsor, party in interest with respect to a plan, or other person who is in a position to correct a Breach.

(3) *Under Investigation.* For purposes of section 4(a), a plan or an applicant shall be considered to be ''Under Investigation'' if EBSA or any other Federal agency is conducting an investigation or examination of the plan, the applicant, or the plan sponsor in connection with an act or transaction involving the plan, or if a written or oral notice of an intent to conduct such an investigation or examination has been received by the plan, a Plan Official, or other plan representative. For purposes of section 4(a), a plan shall not be considered to be ''Under Investigation'' merely because EBSA staff has contacted the plan, the applicant, or the plan sponsor in connection with a participant complaint, unless the participant complaint concerns the transaction described in the application. A plan also is not considered to be ''Under Investigation'' if the accountant of the plan is undergoing a work paper review by EBSA's Office of the Chief Accountant under the authority of ERISA section 504(a).

Example 1. On March 1 the plan sponsor of a profit sharing plan received written notification from an agent of the IRS that the plan has been scheduled for examination. As of March 1, the plan is ineligible for participation in the VFC Program because the plan sponsor has received a notice from the IRS concerning the IRS's intent to examine the plan.

Example 2. Assume the same facts as in Example 1, except that the plan sponsor received written notification from a Federal agency of an investigation of the company regarding an alleged workplace safety violation. The plan's eligibility to participate in the VFC Program would not be affected because the investigation does not involve the plan or an act or transaction involving the plan.

Section 4. VFC Program Eligibility

Eligibility for the VFC Program is conditioned on the following:

(a) Neither the plan nor the applicant is Under Investigation.

(b) The application contains no evidence of potential criminal violations as determined by EBSA.

Section 5. General Rules for Acceptable Corrections

(a) *Fair Market Value Determinations.* Many corrections require that the current or fair market value of an asset be determined as of a particular date, usually either the date the plan originally acquired the asset or the date of the correction, or both. In order to be acceptable as part of a VFC Program correction, the valuation must meet the following conditions:

(1) If there is a generally recognized market for the property (*e.g.*, the New York Stock Exchange), the fair market value of the asset is the average value of the asset on such market on the applicable date, unless the plan document specifies another objectively determined value (*e.g.*, the closing price).

(2) If there is no generally recognized market for the asset, the fair market value of that asset must be determined in accordance with generally accepted appraisal standards by a qualified, independent appraiser and reflected in a written appraisal report signed by the appraiser.

(3) An appraiser is ''qualified'' if he or she has met the education, experience, and licensing requirements that are generally recognized for appraisal of the type of asset being appraised.

(4) An appraiser is ''independent'' if he or she is not one of the following, does not own or control any of the following, and is not owned or controlled by, or affiliated with, any of the following:

(i) The prior owner of the asset, if the asset was purchased by the plan;

(ii) The purchaser of the asset, if the asset was, or is now being, sold by the plan;

(iii) Any other owner of the asset, if the plan is not the sole owner;

(iv) A fiduciary of the plan;

(v) A party in interest with respect to the plan (except to the extent the appraiser becomes a party in interest when retained to perform this appraisal for the plan); or

(vi) The VFC Program applicant.

(b) *Correction Amount.* (1) *In general.* For purposes of the VFC Program, the correction amount is the amount that must be paid to the plan as a result of the Breach in order to make the plan whole. In most instances, the correction amount will be a combination of the Principal Amount involved in the transaction (*see* subparagraph (2)), the Lost Earnings amount, which is earnings that would have been earned on the Principal Amount for the period of the transaction (*see* subparagraph (5)), and any interest on Lost Earnings. However, in circumstances when the Restoration of Profits amount (*see* subparagraph (6)) exceeds the Lost Earnings amount and any interest on Lost Earnings, the correction amount will be a combination of the Principal Amount and the Restoration of Profits amount.

(2) *Principal Amount.* ''Principal Amount'' is the amount that would have been available to the plan for investment or distribution on the date of the Breach, had the Breach not occurred. The Principal Amount, when applicable, must be determined for each transaction by reference to Section 7 of the VFC Program. Generally, the Principal Amount is the base amount on which Lost Earnings and, if applicable, Restoration of Profits is calculated. The Principal Amount shall also include, where appropriate, any transaction costs associated with entering into the transaction that constitutes the Breach.

(3) *Loss Date.* ''Loss Date'' is the date that the plan lost the use of the Principal Amount.

(4) *Recovery Date.* ''Recovery Date'' is the date that the Principal Amount is restored to the plan.

(5) *Lost Earnings.* (A) *General.* ''Lost Earnings'' is intended to approximate the amount that would have been earned by the plan on the Principal Amount, but for the Breach. For purposes of this Program, Lost Earnings shall be calculated in accordance with this paragraph.

(B) *Initial Calculation.* Lost earnings shall be calculated by: (i) Determining the applicable corporate underpayment rate(s) established under section 6621(a)(2) of the Code [15] for each quarter (or portion thereof) for the period beginning with the Loss Date and ending with the Recovery Date; (ii) determining, by reference to IRS Revenue Procedure 95–17,[16] the applicable factor(s) for such quarterly underpayment rate(s) for each quarter

[15] These underpayment rates are displayed on EBSA's Web site and will be updated when necessary.

[16] Rev. Proc. 95–17, 1995–1 C.B. 556 (Feb. 8, 1995). These factors, which are displayed on EBSA's Web site in a tabular format, incorporate daily compounding of an interest rate over a set period of time.

(or portion thereof) of the period beginning with the Loss Date and ending with the Recovery Date; and (iii) multiplying the Principal Amount by the first applicable factor to determine the amount of earnings for the first quarter (or portion thereof). If the Loss Date and Recovery Date are within the same quarter, the initial calculation is complete. If the Recovery Date is not in the same quarter as the Loss Date, the applicable factor for each subsequent quarter (or portion thereof) must be applied to the sum of the Principal Amount and all earnings as of the end of the immediately preceding quarter (or portion thereof), until Lost Earnings have been calculated for the entire period, ending with the Recovery Date.

(C) *Payment of Lost Earnings after Recovery Date.* If Lost Earnings are not paid to the plan on the Recovery Date along with the Principal Amount, payment of Lost Earnings shall include interest on the amount of Lost Earnings determined in accordance with subparagraph (5)(B), above. Such interest shall be calculated in the same manner as Lost Earnings described in subparagraph (5)(B) above, for the period beginning on the Recovery Date and ending on the date the Lost Earnings are paid to the plan.

(D) *Special Rule for Transactions Causing Large Losses.* If the amount of Lost Earnings (determined in accordance with subparagraph (5)(B)) and any interest added to such Lost Earnings (determined in accordance with subparagraph (5)(C)) above, exceed $100,000, the amount of Lost Earnings and interest, if any, to be paid to the plan shall be determined in accordance with subparagraphs (5)(B) and (C), above, substituting the applicable underpayment rates under section 6621(c)(1) of the Code [17] in lieu of the rates under section 6621(a)(2).

(E) *Method of Calculation.* For purposes of calculating Lost Earnings and interest, if any, a Plan Official may either (i) use the Online Calculator described in Section 5(b)(7), below, or (ii) perform a manual calculation in accordance with subparagraphs (B) through (D) of this paragraph (5). A Plan Official using the Online Calculator or performing a manual calculation shall include as part of the VFC Program application sufficient information to verify the correctness of the amounts to be paid to the plan.

(6) *Restoration of Profits.* (A) *General.* If the Principal Amount was used for a specific purpose such that a profit on the use of the Principal Amount is determinable, the Plan Official must calculate the Restoration of Profits amount and compare it to the Lost Earnings amount to determine the correction amount (*see* paragraph (b)(1)). ''Restoration of Profits'' is a combination of two amounts: (i) The amount of profit made on the use of the Principal Amount by the fiduciary or party in interest who engaged in the Breach, or by a person who knowingly participated in the Breach, and (ii) if the profit is returned to the plan on a date later than the date on which the profit was realized (*i.e.*, received or determined), the amount of interest earned on such profit from the date the profit was realized to the date on which the profit is paid to the plan. The amount of such interest shall be determined in accordance with subparagraph (B), below.

If the Restoration of Profits amount exceeds Lost Earnings and interest, if any, the Restoration of Profits amount must be paid to the plan instead of Lost Earnings.

(B) *Calculation of Interest.* Interest shall be calculated by: (i) Determining the applicable corporate underpayment rate(s) established under section 6621(a)(2) of the Code for each quarter (or portion thereof) for the period beginning with the date the profit was realized (*i.e.* received or determined) and ending with the date on which the profit is paid to the plan; (ii) determining, by reference to IRS Revenue Procedure 95–17, the applicable factor(s) for such quarterly underpayment rate(s) for each quarter (or portion thereof) of the period beginning with the date the profit was realized and ending with the date on which the profit is paid to the plan; and (iii) multiplying the first applicable factor by the profit on the Principal Amount, referred to in paragraph (A)(i), above, to determine the amount of interest for the first quarter (or portion thereof). If the date the profit was realized and the date the profit is paid to the plan are within the same quarter, the initial calculation is complete. If the date the profit was realized is not in the same quarter as the date the profit was paid to the plan, the applicable factor for each subsequent quarter (or portion thereof) must be applied to the sum of the profit on the Principal Amount, referred to in paragraph (A)(i), above, and all interest as of the end of the immediately preceding quarter (or portion thereof), until interest has been calculated for the entire period, ending with the date the profit is paid to the plan.

(C) *Special Rule for Transactions Resulting in Large Restorations.* If the amount of Restoration of Profits (determined in accordance with subparagraph (6)(A)) above exceeds $100,000, the amount of any interest on the Restoration of Profits to be paid to the plan shall be determined in accordance with subparagraph (6)(B), above, substituting the applicable underpayment rates under section 6621(c)(1) of the Code in lieu of the rates under section 6621(a)(2).

(D) *Method of Calculation.* For purposes of calculating the interest amount for Restoration of Profits, pursuant to subparagraphs (6)(B) and (C) above, a Plan Official may either (i) use the Online Calculator described in Section 5(b)(7), below, or (ii) perform a manual calculation in accordance with subparagraphs (B) and (C) of this paragraph (6). A Plan Official using the Online Calculator or performing a manual calculation shall include as part of the VFC Program application sufficient information to verify the correctness of the amounts to be paid to the plan.

(7) *Online Calculator.* ''Online Calculator'' is an Internet based compliance assistance tool provided on EBSA's Web site that permits applicants to calculate the amount of Lost Earnings, any interest on Lost Earnings, and the interest amount for Restoration of Profits, if applicable, for certain transactions. The Online Calculator will be updated as necessary.

(A) *Lost Earnings and Interest.* To calculate Lost Earnings, applicants must input the (1) Principal Amount, (2) Loss Date, and (3) Recovery Date, and if the final payment will occur after the Recovery Date, (4) the date of such final payment. The Online Calculator selects the applicable factors under Revenue Procedure 95–17 after referencing the underpayment rates over the relevant time period. The Online Calculator then automatically applies the factors to provide applicants with the amount of Lost Earnings and interest, if any, that must be paid to the plan.

(B) *Interest Amount for Restoration of Profits.* To calculate the interest amount on the profit, applicants must input (1) the amount of profit, (2) the date the amount of profit was realized (*i.e.* received or determined), and (3) the date of payment of the Restoration of Profits amount. The Online Calculator selects the applicable factors under Revenue Procedure 95–17 after referencing the underpayment rates over the relevant time period. The Online Calculator then automatically applies the factors to provide applicants with

[17] These underpayment rates are displayed on EBSA's Web site and will be updated when necessary.

the interest amount on the profit that must be paid to the plan.

(8) The principles of this paragraph (b) are illustrated by example in Appendix D.

(c) *Costs of Correction.* (1) The fiduciary, plan sponsor or other Plan Official, shall pay the costs of correction, which may not be paid from plan assets.

(2) The costs of correction include, where appropriate, such expenses as closing costs, prepayment penalties, or sale or purchase costs associated with correcting the transaction.

(3) The principle of paragraph (c)(1) is illustrated in the following example and in (d) below:

Example: The plan fiduciaries did not obtain a required independent appraisal in connection with a transaction described in Section 7. In connection with correcting the transaction, the plan fiduciaries now propose to have the appraisal performed as of the date of purchase. The plan document permits the plan to pay reasonable and necessary expenses; the fiduciaries have objectively determined that the cost of the proposed appraisal is reasonable and is not more expensive than the cost of an appraisal contemporaneous with the purchase. The plan may therefore pay for this appraisal. However, the plan may not pay any costs associated with recalculating participant account balances to take into account the new valuation. There would be no need for these additional calculations or any increased appraisal cost if the plan's assets had been valued properly at the time of the purchase. Therefore, the cost of recalculating the plan participants' account balances is not a reasonable plan expense, but is part of the costs of correction.

(d) *Distributions.* Plans will have to make supplemental distributions to former employees, beneficiaries receiving benefits, or alternate payees, if the original distributions were too low because of the Breach. In these situations, the Plan Official or plan administrator must determine who received distributions from the plan during the time period affected by the Breach, recalculate the account balances, and determine the amount of the underpayment to each affected individual. The applicant must demonstrate proof of payment to participants and beneficiaries whose current location is known to the plan and/or applicant. For individuals whose location is unknown, applicants must demonstrate that they have segregated adequate funds to pay the missing individuals and that the applicant has commenced the process of locating the missing individuals using either the IRS and Social Security Administration locator services, or other comparable means. The costs of such efforts are part of the costs of correction.

(e) *De Minimus Exception.* Where correction under the Program requires distributions in amounts less than $20 to former employees, their beneficiaries and alternate payees, who neither have account balances with, nor have a right to future benefits from the plan, and the applicant demonstrates in its submission that the cost of making the distribution to each such individual exceeds the amount of the payment to which such individual is entitled in connection with the correction of the transaction that is the subject of the application, the applicant need not make distributions to such individuals who would receive less than $20 each as part of the correction. However, the applicant must pay to the plan as a whole the total of such de minimus amounts not distributed to such individuals.

Example. Employer X sponsors Plan Y. Employer X submits an application under the VFC Program to correct a failure to timely forward participant contributions to Plan Y. Employer X had paid the delinquent contributions six months late, but had not paid lost earnings on the delinquency. The correction under the VFC Program, therefore, required only payment of Lost Earnings for the six-month delinquency. During the six-month period 25 employees separated from service and rolled over their plan accounts to individual retirement accounts. The amount of lost earnings due to 20 of those former employees is less than $20, and Employer X demonstrates that the cost of making the distribution to those former employees is $27 per individual. Employer X need not make distributions to those 20 former employees. However, the total amount of distributions that would have been due to those former employees must be paid to Plan Y. The payment to Plan Y may be used for any purpose that payments or credits to Plan Y that are not allocated directly to participant accounts are used. Employer X must make distributions to the five former employees who are entitled to receive distributions of more than $20.

Section 6. Application Procedures

(a) *In general.* Each application must adhere to the requirements set forth below. Failure to do so may render the application invalid.

(b) *Preparer.* The application must be prepared by a Plan Official or his or her authorized representative (*e.g.*, attorney, accountant, or other service provider). If a representative of the Plan Official is submitting the application, the application must include a statement signed by the Plan Official that the representative is authorized to represent the Plan Official. Any fees paid to such representative for services relating to the preparation and submission of the application may not be paid from plan assets.

(c) *Contact person.* Each application must include the name, address and telephone number of a contact person. The contact person must be familiar with the contents of the application, and have authority to respond to inquiries from EBSA.

(d) *Detailed narrative.* The applicant must provide to EBSA a detailed narrative describing the Breach and the corrective action. The narrative must include:

(i) a list of all persons materially involved in the Breach and its correction (*e.g.*, fiduciaries, service providers, borrowers);

(ii) the employer identification number (EIN), plan number, and address of the plan sponsor and administrator;

(iii) the date the plan's most recent Form 5500 was filed;

(iv) an explanation of the Breach, including the date it occurred;

(v) an explanation of how the Breach was corrected, by whom and when;

(vi) specific calculations demonstrating how Principal Amount and Lost Earnings or, if applicable, Restoration of Profits were computed and an explanation of why payment of Lost Earnings or Restoration of Profits was chosen to correct the Breach.

(e) *Supporting documentation.* The applicant must also include:

(i) copies of the relevant portions of the plan document and any other pertinent documents (such as the adoption agreement, trust agreement, or insurance contract); [18]

(ii) documentation that supports the narrative description of the transaction and its correction;

(iii) documentation establishing the Lost Earnings amount;

(iv) documentation establishing the amount of Restoration of Profits, if applicable;

(v) all documents described in Section 7 with respect to the transaction involved; and

(vi) proof of payment of Principal Amount and Lost Earnings or Restoration of Profits.

(f) *Examples of supporting documentation.* (i) Examples of documentation supporting the description of the transaction and correction are leases, appraisals, notes and loan documents, service provider contracts, invoices, settlement documents, deeds, perfected security interests, and amended annual reports.

[18] Applicants must supply complete copies of the plan documents and other pertinent documents if requested by EBSA during its review of the application.

(ii) Examples of acceptable proof of payment include copies of canceled checks, executed wire transfers, a signed, dated receipt from the recipient of funds transferred to the plan (such as a financial institution), and bank statements for the plan's account.

(g) *Penalty of Perjury Statement.* Each application must include the following statement: ''Under penalties of perjury I certify that I am not Under Investigation (as defined in Section 3(b)(3)) and that I have reviewed this application, including all supporting documentation, and to the best of my knowledge and belief the contents are true, correct, and complete.'' The statement must be signed and dated by a plan fiduciary with knowledge of the transaction that is the subject of the application and the authorized representative of the applicant, if any. In addition, each Plan Official applying under the VFC Program must sign and date the Penalty of Perjury statement. The statement must accompany the application and any subsequent additions to the application. Use of the Penalty of Perjury Statement included with the Model Application Form in Appendix E will satisfy the requirements of this Section 6(g).

(h) *Checklist.* The checklist in Appendix B must be completed, signed, and submitted with the application. Use of the checklist included with the Model Application Form in Appendix E also will satisfy the requirements of this Section 6(h).

(i) *Where to apply.* The application shall be mailed to the appropriate regional EBSA office listed in Appendix C.

(j) *Submission of Additional Documentation.* If EBSA determines that required information is missing from the application or that additional documentation is needed to complete EBSA's review, EBSA will request such documentation in writing from the applicant or authorized representative. If EBSA does not receive the requested documentation within a time period specified in writing by the EBSA reviewer, EBSA may suspend its review of the application and consider appropriate action. EBSA will notify the applicant or authorized representative in writing regarding such suspension.

(k) *Record keeping.* The applicant must maintain copies of the application and any subsequent correspondence with EBSA for the period required by section 107 of ERISA.

Section 7. Description of Eligible Transactions and Corrections Under the VFC Program

EBSA has identified certain Breaches and methods of correction that are suitable for the VFC Program. Any Plan Official may correct a Breach listed in this Section in accordance with Section 5 and the applicable correction method. The correction methods set forth are strictly construed and are the only acceptable correction methods under the VFC Program for the transactions described in this Section. EBSA will not accept applications concerning correction of breaches not described in this Section.

A. Delinquent Remittance of Participant Funds

1. Delinquent Participant Contributions and Participant Loan Repayments to Pension Plans

(a) *Description of Transaction.* An employer receives directly from participants, or withholds from employees' paychecks, certain amounts for either contribution to a pension plan or for repayment of participants' plan loans. Instead of forwarding participant contributions for investment in accordance with the provisions of the plan and by reference to the principles of the Department's regulation at 29 CFR 2510.3–102, the employer retains such contributions for a longer period of time. Similarly, in the case of participant loan repayments, instead of applying such repayments to outstanding loan balances within a reasonable period of time determined by reference to the guiding principles of 29 CFR 2510.3–102 and in accordance with the provisions of the plan, the employer retains such repayments for a longer period of time.

(b) *Correction of Transaction.* (1) *Unpaid Contributions or Participant Loan Repayments.* Pay to the plan the Principal Amount plus the greater of (i) Lost Earnings on the Principal Amount or (ii) Restoration of Profits resulting from the employer's use of the Principal Amount, as described in Section 5(b). The Loss Date for such contributions is the date on which each contribution reasonably could have been segregated from the employer's general assets. In no event shall the Loss Date for such contributions be later than the applicable maximum time period described in 29 CFR 2510.3–102. The Loss Date for such repayments is the date on which each repayment reasonably could have been segregated from the employer's general assets consistent with the guiding principles of 29 CFR 2510.3–102.[19] Any penalties, late fees or other charges shall be paid by the employer and not from participant loan repayments.

(2) *Late Contributions or Participant Loan Repayments.* If participant contributions or loan repayments were remitted to the plan outside of the time periods described above, the only correction required is to pay to the plan the greater of (i) Lost Earnings or (ii) Restoration of Profits resulting from the employer's use of the Principal Amount as described in Section 5(b). Any penalties, late fees or other charges shall be paid by the employer and not from participant loan repayments.

(3) For this transaction, the Principal Amount is the amount of delinquent participant contributions or loan repayments retained by the employer.

(4) *Example.* The principles of this paragraph (b) are illustrated by example in Appendix D.

(c) *Documentation.* In addition to the documentation required by Section 6, submit the following documents:

(1) A statement from a Plan Official identifying the earliest date on which the participant contributions and/or repayments reasonably could have been segregated from the employer's general assets, along with the supporting documentation on which the Plan Official relied in reaching this conclusion;

(2) If restored participant contributions and/or repayments (exclusive of Lost Earnings) (A) total $50,000 or less; or (B) exceed $50,000 and were remitted to the plan within 180 calendar days from the date such amounts were received by the employer, or the date such amounts otherwise would have been payable to the participants in cash (regarding amounts withheld by an employer from employees' paychecks), submit:

(i) A narrative describing the applicant's contribution and/or repayment remittance practices before and after the period of unpaid or late contributions and/or repayments; and

(ii) Summary documents demonstrating the amount of unpaid or late contributions and/or repayments; and

(3) If restored participant contributions and/or repayments (exclusive of Lost Earnings) exceed $50,000 and were remitted more than

[19] Although the maximum time periods described in 29 CFR 2510.3–102 are not directly applicable to participant loan repayments, retaining repayments beyond such periods raises a question as to whether the employer forwarded repayments to the plan as soon as they could reasonably be segregated from the employer's general assets. *See* Advisory Opinion 2002–02A (May 17, 2002).

180 calendar days after the date such amounts were received by the employer, or the date such amounts otherwise would have been payable to the participants in cash (regarding amounts withheld by an employer from employees' paychecks), submit:

(i) A narrative describing the applicant's contribution and/or repayment remittance practices before and after the period of unpaid or late contributions and/or repayments;

(ii) For participant contributions and/or repayments received from participants, a copy of the accounting records which identify the date and amount of each contribution received; and

(iii) For participant contributions and/or repayments withheld from employees' paychecks, a copy of the payroll documents showing the date and amount of each withholding.

2. Delinquent Participant Contributions to Insured Welfare Plans

(a) *Description of Transaction.* Benefits are provided exclusively through insurance contracts issued by an insurance company or similar organization qualified to do business in any state or through a health maintenance organization (HMO) defined in section 1310(c) of the Public Health Service Act, 42 U.S.C. 300e–9(c). An employer receives directly from participants or withholds from employees' paychecks certain amounts that the employer forwards to an insurance provider for the purpose of providing group health or other welfare benefits. The employer fails to forward such amounts in accordance with the terms of the plan (including the provisions of any insurance contract) or the requirements of the Department's regulation at 29 CFR 2510.3–102. There are no instances in which claims have been denied under the plan, nor has there been any lapse in coverage, due to the failure to transmit participant contributions on a timely basis.

(b) *Correction of Transaction.* (1) Pay to the insurance provider or HMO the Principal Amount, as well as any penalties, late fees or other charges necessary to prevent a lapse in coverage due to such failure. Any penalties, late fees or other such charges shall be paid by the employer and not from participant contributions.

(2) For this transaction, the Principal Amount is the amount of delinquent participant contributions retained by the employer.

(c) *Documentation.* In addition to the documentation required by Section 6, submit the following documents:

(1) For participant contributions received directly from participants, a copy of the accounting records which identify the date and amount of each contribution received;

(2) For participant contributions withheld from employees' paychecks, a copy of the payroll documents showing the date and amount of each withholding;

(3) A statement from a Plan Official identifying the earliest date on which the participant contributions reasonably could have been segregated from the employer's general assets, along with the supporting documentation on which the Plan Official relied in reaching this conclusion;

(4) Copies of the insurance contract or contracts for the group health or other welfare benefits for the plan;

(5) A statement from a Plan Official attesting that there are no instances in which claims have been denied under the plan for nonpayment, nor has there been any lapse in coverage; and

(6) A statement from a Plan Official attesting that any penalties, late fees or other such charges have been paid by the employer and not from participant contributions.

3. Delinquent Participant Contributions to Welfare Plan Trusts

(a) *Description of Transaction.* An employer receives directly from participants or withholds from employees' paychecks certain amounts that the employer forwards to a trust maintained to provide, through insurance or otherwise, group health or other welfare benefits. The employer fails to forward such amounts in accordance with the terms of the plan or the requirements of the Department's regulation at 29 CFR 2510.3–102. There are no instances in which claims have been denied under the plan, nor has there been any lapse in coverage, due to the failure to transmit participant contributions on a timely basis.

(b) *Correction of Transaction.* (1) *Unpaid Contributions.* Pay to the trust (1) the Principal Amount, and, where applicable, any penalties, late fees or other charges necessary to prevent a lapse in coverage due to the failure to make timely payments, and (2) the greater of (i) Lost Earnings on the Principal Amount or (ii) Restoration of Profits resulting from the employer's use of the Principal Amount as described in Section 5(b). The Loss Date for such contributions is the date on which each contribution would become plan assets under 29 CFR 2510.3–102. Any penalties, late fees or other charges shall be paid by the employer and not from participant contributions.

(2) *Late Contributions.* If participant contributions were remitted to the trust outside of the time period required by the regulation, the only correction required is to pay to the trust the greater of (i) Lost Earnings or (ii) Restoration of Profits resulting from the employer's use of the Principal Amount as described in Section 5(b). Any penalties, late fees or other such charges shall be paid by the employer and not from participant contributions.

(3) For this transaction, the Principal Amount is the amount of delinquent participant contributions retained by the employer.

(c) *Documentation.* In addition to the documentation required by Section 6, submit the following documents:

(1) For participant contributions received directly from participants, a copy of the accounting records which identify the date and amount of each contribution received;

(2) For participant contributions withheld from employees' paychecks, a copy of the payroll documents showing the date and amount of each withholding;

(3) A statement from a Plan Official identifying the earliest date on which the participant contributions reasonably could have been segregated from the employer's general assets, along with the supporting documentation on which the Plan Official relied in reaching this conclusion; and

(4) A statement from a Plan Official attesting that there are no instances in which claims have been denied under the plan for nonpayment, nor has there been any lapse in coverage.

B. Loans

1. Loan at Fair Market Interest Rate to a Party in Interest With Respect to the Plan

(a) *Description of Transaction.* A plan made a loan to a party in interest at an interest rate no less than that for loans with similar terms (for example, the amount of the loan, amount and type of security, repayment schedule, and duration of loan) to a borrower of similar creditworthiness. The loan was not exempt from the prohibited transaction provisions of Title I of ERISA.

(b) *Correction of Transaction.* Pay off the loan in full, including any prepayment penalties. An independent commercial lender must also confirm in writing that the loan was made at a fair market interest rate for a loan with similar terms to a borrower of similar creditworthiness.

(c) *Documentation.* In addition to the documentation required by Section 6,

submit a narrative describing the process used to determine the fair market interest rate at the time the loan was made, validated in writing by an independent commercial lender.

2. Loan at Below-Market Interest Rate to a Party in Interest With Respect to the Plan

(a) *Description of Transaction.* A plan made a loan to a party in interest with respect to the plan at an interest rate which, at the time the loan was made, was less than the fair market interest rate for loans with similar terms (for example, the amount of loan, amount and type of security, repayment schedule, and duration of the loan) to a borrower of similar creditworthiness. The loan was not exempt from the prohibited transaction provisions of Title I of ERISA.

(b) *Correction of Transaction.* Pay off the loan in full, including any prepayment penalties. (1) Pay to the plan the Principal Amount, plus the greater of (i) the Lost Earnings as described in Section 5(b), or (ii) the Restoration of Profits, if any, as described in Section 5(b).

(2) For purposes of this transaction, each loan payment has a Principal Amount equal to the excess of the loan payment that would have been received if the loan had been made at the fair market interest rate (from the beginning of the loan until the Recovery Date) over the loan payment actually received under the loan terms during such period. Under the VFC Program, the fair market interest rate must be determined by an independent commercial lender.

Example: The plan made to a party in interest a $150,000 mortgage loan, secured by a first Deed of Trust, at a fixed interest rate of 4% per annum. The loan was to be fully amortized over 30 years. The fair market interest rate for comparable loans, at the time this loan was made, was 7% per annum. The party in interest or Plan Official must repay the loan in full plus any applicable prepayment penalties. The party in interest or Plan Official also must pay the difference between what the plan would have received through the Recovery Date had the loan been made at 7% and what, in fact, the plan did receive from the commencement of the loan to the Recovery Date, plus Lost Earnings on that amount as described in Section 5(b).

(c) *Documentation.* In addition to the documentation required by Section 6, submit the following documents:

(1) A narrative describing the process used to determine the fair market interest rate at the time the loan was made;

(2) A copy of the independent commercial lender's fair market interest rate determination(s); and

(3) A copy of the independent fiduciary's dated, written approval of the fair market interest rate determination(s).

3. Loan at Below-Market Interest Rate to a Person Who Is Not a Party in Interest With Respect to the Plan

(a) *Description of Transaction.* A plan made a loan to a person who is not a party in interest with respect to the plan at an interest rate which, at the time the loan was made, was less than the fair market interest rate for loans with similar terms (for example, the amount of loan, amount and type of security, repayment schedule, and duration of the loan) to a borrower of similar creditworthiness.

(b) *Correction of Transaction.* (1) Pay to the plan the Principal Amount, plus Lost Earnings through the Recovery Date, as described in Section 5(b).

(2) For purposes of this transaction, each loan payment has a Principal Amount equal to the excess of the loan payment that would have been received if the loan had been made at the fair market interest rate (from the beginning of the loan until the Recovery Date) over the loan payment actually received under the loan terms during such period. Under the VFC Program, the fair market interest rate must be determined by an independent commercial lender.

(3) From the inception of the loan to the Recovery Date, the amount to be paid to the plan is the Lost Earnings on the series of Principal Amounts, calculated in accordance with Section 5(b).

(4) From the Recovery Date to the maturity date of the loan, the amount to be paid to the plan is the present value of the remaining Principal Amounts, as determined by an independent commercial lender. Instead of calculating the present value, it is acceptable for administrative convenience to pay the sum of the remaining Principal Amounts.

(5) The principles of this paragraph (b) are illustrated in the following example:

Example: The plan made a $150,000 mortgage loan, secured by a first Deed of Trust, at a fixed interest rate of 4% per annum. The loan was to be fully amortized over 30 years. The fair market interest rate for comparable loans, at the time this loan was made, was 7% per annum. The borrower or the Plan Official must pay the excess of what the plan would have received through the Recovery Date had the loan been made at 7% over what, in fact, the plan did receive from the commencement of the loan to the Recovery Date, plus Lost Earnings on that amount as described in Section 5(b). The Plan Official must also pay on the Recovery Date the difference in the value of the remaining payments on the loan between the 7% and the 4% for the duration of the time the plan is owed repayments on the loan.

(c) *Documentation.* In addition to the documentation required by Section 6, submit the following documents:

(1) A narrative describing the process used to determine the fair market interest rate at the time the loan was made; and

(2) A copy of the independent commercial lender's fair market interest rate determination(s).

4. Loan at Below-Market Interest Rate Solely Due to a Delay in Perfecting the Plan's Security Interest

(a) *Description of Transaction.* For purposes of the VFC Program, if a plan made a purportedly secured loan to a person who is not a party in interest with respect to the plan, but there was a delay in recording or otherwise perfecting the plan's interest in the loan collateral, the loan will be treated as an unsecured loan until the plan's security interest was perfected.

(b) *Correction of Transaction.* (1) Pay to the plan the Principal Amount, plus Lost Earnings as described in Section 5(b), through the date the loan became fully secured.

(2) For purposes of this transaction, each loan payment has a Principal Amount equal to the excess of the loan payment that would have been received if the loan had been made at the fair market interest rate for an unsecured loan (from the beginning of the loan until the Recovery Date) over the loan payment actually received under the loan terms during such period. Under the VFC Program, the fair market interest rate must be determined by an independent commercial lender.

(3) In addition, if the delay in perfecting the loan's security caused a permanent change in the risk characteristics of the loan, the fair market interest rate for the remaining term of the loan must be determined by an independent commercial lender. In that case, the correction amount includes an additional payment to the plan. The amount to be paid to the plan is the present value of the remaining Principal Amounts from the date the loan is fully secured to the maturity date of the loan. Instead of calculating the present value, it is acceptable for administrative convenience to pay the sum of the remaining Principal Amounts.

(4) The principles of this paragraph (b) are illustrated in the following examples:

Example 1: The plan made a mortgage loan, which was supposed to be secured by a Deed of Trust. The plan's Deed was not

recorded for six months, but, when it was recorded, the Deed was in first position. The interest rate on the loan was the fair market interest rate for a mortgage loan secured by a first-position Deed of Trust. The loan is treated as an unsecured, below-market loan for the six months prior to the recording of the Deed of Trust.

Example 2: Assume the same facts as in Example 1, except that, as a result of the delay in recording the Deed, the plan ended up in second position behind another lender. The risk to the plan is higher and the interest rate on the note is no longer commensurate with that risk. The loan is treated as a below-market loan (based on the lack of security) for the six months prior to the recording of the Deed of Trust and as a below-market loan (based on secondary status security) from the time the Deed is recorded until the end of the loan.

(c) *Documentation.* In addition to the documentation required by Section 6, submit the following documents:

(1) A narrative describing the process used to determine the fair market interest rate for the period that the loan was unsecured and, if applicable, for the remaining term of the loan; and

(2) A copy of the independent commercial lender's fair market interest rate determination(s).

C. Participant Loans

1. Loan Amount in Excess of Plan Limitations

(a) *Description of Transaction.* A plan extended a loan to a plan participant who is a party in interest with respect to the plan based solely on his or her status as an employee of any employer whose employees are covered by the plan, as defined in section 3(14)(H) of ERISA. The amount of the loan exceeded the amount permitted under applicable plan provisions incorporating the requirements of section 72(p) of the Code. The loan was a prohibited transaction that failed to qualify for ERISA's statutory exemption for plan loan programs because the loan amount exceeded the amount permitted under applicable plan provisions.

(b) *Correction of Transaction.* (1) The participant must pay the Principal Amount to the plan. Plan Officials must reform the outstanding loan amount that was not in excess of the applicable plan loan limit at origination (the date of Breach) into an ongoing plan loan. In reformulating the loan, Plan Officials must make the necessary adjustments to the monthly repayment amount so that the remaining outstanding principal balance is amortized over the remaining duration of the original loan and also enforce all other terms of the original loan agreement. The Principal Amount is the loan amount in excess of the applicable plan loan limit on the Loss Date. The Loss Date is the date of loan origination.

(2) The principles of this paragraph (b) are illustrated in the following example:

Example. On January 1, 2004, Participant A receives a $15,000 loan pursuant to the loan provisions of Plan X, which incorporate the requirements of section 72(p) of the Code. Participant A is an employee of Company Y, the plan sponsor. Participant A is not a party in interest with respect to Plan X for any reason other than his employment with Company Y. The terms of the loan include a five-year repayment in equal monthly installments of principal and interest at a then current market interest rate of 4.625%. Amortized monthly payments for Participant A are determined to be $280. However, in accordance with Plan X limitations on the amount of participant loans and Participant A's account balance as of January 1, 2004, Participant A should not have received a loan in excess of $10,000. The loan otherwise complies with Plan X's loan provisions.

In late 2004, a Plan Official discovers that the amount of Participant A's loan exceeded applicable plan limitations. On January 1, 2005, the Recovery Date, Participant A's outstanding loan balance is $12,270. Participant A repays $5,000 to Plan X, the amount by which his loan exceeded applicable plan limitations on January 1, 2004. Plan Officials reform Participant A's loan on January 1, 2005 based on the outstanding principal balance of $7,270, to be paid back in equal monthly installments of principal and interest at the original loan rate of 4.625%. Appropriate adjustments are made to the monthly repayment amount, which will be $166 over the 4-year period remaining on the loan's original 5-year term. The reformed loan otherwise will comply with the terms of the original loan.

(c) *Documentation.* In addition to the documentation required by Section 6, submit the following documents:

(1) For each plan loan originated in violation of applicable plan limits, the date, amount, duration, interest rate and repayment schedule applicable to each plan loan and the amount of each participant's nonforfeitable accrued benefit on such date;

(2) Date and amount of excess loan repaid by each participant prior to reformulation;

(3) Date, amount and repayment schedule of each reformulated plan loan being maintained as an ongoing plan loan;

(4) Date and amount of payments made by the participant with respect to the original plan loan;

(5) A copy of the plan's loan provisions; and

(6) An explanation of any administrative practices or procedures with respect to plan loans and any changes to such practices or procedures designed to prevent this type of Breach from recurring.

2. Loan Duration in Excess of Plan Limitations

(a) *Description of Transaction.* A plan extended a loan to a plan participant who is a party in interest with respect to the plan based solely on his or her status as an employee of any employer whose employees are covered by the plan, as defined in section 3(14)(H) of ERISA. The duration of the loan exceeded the maximum repayment term permitted under applicable plan provisions incorporating the requirements of section 72(p) of the Code. The loan was a prohibited transaction that failed to qualify for ERISA's statutory exemption for plan loan programs because the duration of the loan exceeded the maximum repayment term permitted under applicable plan provisions.

(b) *Correction of Transaction.* (1) Plan Officials must reform the duration of the loan term so that repayment of the outstanding loan will be completed by the date that complies with the maximum repayment term permitted under applicable plan provisions. The duration of the reformulated loan must be no longer than the maximum permissible term under applicable plan provisions, measured from the date of loan origination to the date of correction. In reformulating the loan, Plan Officials must make the necessary adjustments to the monthly repayment amount so that the remaining outstanding principal balance is amortized over such duration and also enforce all other terms of the original loan agreement. If the period of time elapsed between the date of loan origination and the date Plan Officials discover the error equals or exceeds the maximum permissible term permitted under applicable plan provisions, then this correction is unavailable.

(2) The principles of this paragraph (b) are illustrated in the following example:

Example. On January 1, 2004, Participant A receives a general purpose $10,000 loan pursuant to the loan provisions of Plan X, which incorporate the requirements of section 72(p) of the Code. Participant A is an employee of Company Y, the plan sponsor. Participant A is not a party in interest with respect to Plan X for any reason other than his employment with Company Y. The terms of the loan include a ten-year repayment in equal monthly installments of principal and interest at a then current market interest rate of 4.75%. Amortized monthly payments for Participant A are determined to be $105. However, in accordance with Plan X limitations on the repayment term for general purpose participant loans, Participant A should not have received a loan with a duration longer than five years. The loan

otherwise complies with Plan X's loan provisions.

In late 2004, a Plan Official discovers that the duration of Participant A's loan exceeded applicable plan limitations. Plan Officials reform Participant A's loan on January 1, 2005, the date of correction, based on the outstanding principal balance of $9,200, to be paid back in equal monthly installments of principal and interest at the original loan rate of 4.75%. Appropriate adjustments are made to the monthly repayment amount, which will be $211 over the remaining four-year repayment term that begins on the date of correction. The reformed loan otherwise will comply with the terms of the original loan.

(c) *Documentation.* In addition to the documentation required by Section 6, submit the following documents:

(1) For each plan loan originated with a duration exceeding applicable plan limits, the date, amount, duration, interest rate, and repayment schedule applicable to each plan loan;

(2) Date, amount, duration, interest rate, and repayment schedule of each reformulated plan loan being maintained as an ongoing plan loan from the date of correction;

(3) Date and amount of payments made by the participant with respect to the original plan loan;

(4) A copy of the plan's loan provisions; and

(5) An explanation of any administrative practices or procedures with respect to plan loans and any changes to such practices or procedures designed to prevent this type of Breach from recurring.

D. Purchases, Sales and Exchanges

1. Purchase of an Asset (Including Real Property) by a Plan From a Party in Interest

(a) *Description of Transaction.* A plan purchased an asset with cash from a party in interest with respect to the plan, and under the circumstances, no prohibited transaction exemption applies.

(b) *Correction of Transaction.* (1) The transaction must be corrected by the sale of the asset back to the party in interest who originally sold the asset to the plan or to a person who is not a party in interest. Whether the asset is sold to a person who is not a party in interest with respect to the plan or is sold back to the original seller, the plan must receive the higher of (i) the fair market value (FMV) of the asset at the time of resale, without a reduction for the costs of sale; or (ii) the Principal Amount, plus the greater of (A) Lost Earnings on the Principal Amount as described in Section 5(b), or (B) the Restoration of Profits, if any, as described in Section 5(b).

(2) For this transaction, the Principal Amount is the plan's original purchase price.

(3) The principles of this paragraph (b) are illustrated in the following example:

Example: A plan purchased from the plan sponsor a parcel of real property. The plan does not lease the property to any person. Instead, the plan uses the property as an office. The Plan Official obtains from a qualified, independent appraiser an appraisal of the property reflecting the FMV of the property at the time of purchase. The appraiser values the property at $100,000, although the plan paid the plan sponsor $120,000 for the property. As of the Recovery Date, the property is valued at $110,000. To correct the transaction, the plan sponsor repurchases the property for $120,000 with no reduction for the costs of sale and reimburses the plan for the initial costs of sale. The plan sponsor also must pay the plan the greater of the plan's Lost Earnings or the sponsor's profits on this amount. This example assumes that the plan sponsor did not make a profit on the $120,000 proceeds from the original sale of the property to the plan.

(c) *Documentation.* In addition to the documentation required by Section 6, submit the following documents:

(1) Documentation of the plan's purchase of the real property, including the date of the purchase, the plan's purchase price, and the identity of the seller;

(2) A narrative describing the relationship between the original seller of the asset and the plan; and

(3) The qualified, independent appraiser's report addressing the FMV of the asset purchased by the plan, both at the time of the original purchase and at the recovery date.

2. Sale of an Asset (Including Real Property) by a Plan to a Party in Interest

(a) *Description of Transaction.* A plan sold an asset for cash to a party in interest with respect to the plan, in a transaction that is not exempt from the prohibited transaction provisions of Title I of ERISA.

(b) *Correction of Transaction.* (1) The plan must receive the Principal Amount plus the greater of (i) Lost Earnings as described in Section 5(b), or (ii) the Restoration of Profits, if any, as described in Section 5(b). As an alternative to repayment of the Principal Amount, if it is determined that the plan will realize a greater benefit by repurchasing the asset, the plan may repurchase the asset from the party in interest [20] at the lower of the price for which it sold the property or the FMV of the property as of the Recovery Date plus restoration to the plan of the party in interest's net profits from owning the property, to the extent they exceed the plan's investment return from the proceeds of the sale. The determination as to which correction alternative the plan chooses must be made by an independent fiduciary.

(2) For this transaction, the Principal Amount is the amount by which the FMV of the asset (at the time of the original sale) exceeds the sale price.

(3) The principles of this paragraph (b) are illustrated in the following example:

Example: A plan sold a parcel of unimproved real property to the plan sponsor. The sponsor did not make any profit on the use of the property. The Plan Official obtains from a qualified, independent appraiser an appraisal of the property reflecting the FMV of the property as of the date of sale. The appraiser valued the property at $130,000, although the plan sold the property to the plan sponsor for $120,000. However, the plan fiduciaries have reason to believe that the property will substantially increase IN VALUE in the near future based on the anticipated building of a shopping mall adjacent to the property in question and, as of the Recovery Date, the appraiser values the property at $140,000. An independent fiduciary determines that the property is a prudent investment for the plan, and will not result in any liquidity or diversification problems. The plan corrects by repurchasing the property at the original sale price, with the party in interest assuming the costs of the reversal of the sale transaction.

(c) *Documentation.* In addition to the documentation required by Section 6, submit the following documents:

(1) Documentation of the plan's sale of the asset, including the date of the sale, the sales price, and the identity of the original purchaser;

(2) A narrative describing the relationship of the purchaser to the asset and the relationship of the purchaser to the plan;

(3) The qualified, independent appraiser's report addressing the FMV of the property at the time of the sale from the plan and as of the Recovery Date; and

(4) The independent fiduciary's report that the property is a prudent investment for the plan.

3. Sale and Leaseback of Real Property to Employer

(a) *Description of Transaction.* The plan sponsor sold a parcel of real property to the plan, which then was leased back to the sponsor, in a transaction that is not otherwise exempt.

[20] The repurchase of the same property from the party in interest to whom the asset was sold is a reversal of the original prohibited transaction. The sale is not a new prohibited transaction and therefore does not require an exemption.

(b) *Correction of Transaction.* (1) The transaction must be corrected by the sale of the parcel of real property back to the plan sponsor or to a person who is not a party in interest with respect to the plan.[21] The plan must receive the higher of (i) FMV of the asset at the time of resale, without a reduction for the costs of sale; or (ii) the Principal Amount, plus the greater of (A) Lost Earnings on the Principal Amount as described in Section 5(b), or (B) the Restoration of Profits, if any, as described in Section 5(b).

(2) For purposes of this transaction, the Principal Amount is the plan's original purchase price.

(3) If the plan has not been receiving rent at FMV, as determined by a qualified, independent appraisal, the sale price of the real property should not be based on the historic below-market rent that was paid to the plan.

(4) In addition to the correction amount in subparagraph (1), if the plan was not receiving rent at FMV, as determined by a qualified, independent appraiser, the Principal Amount also includes the difference between the rent actually paid and the rent that should have been paid at FMV. The plan sponsor must pay to the plan this additional Principal Amount, plus the greater of (i) Lost Earnings or (ii) Restoration of Profits resulting from the plan sponsor's use of the Principal Amount, as described in Section 5(b).

(5) The principles of this paragraph (b) are illustrated in the following example:

Example: The plan purchased at FMV from the plan sponsor an office building that served as the sponsor's primary business site. Simultaneously, the plan sponsor leased the building from the plan at below the market rental rate. The Plan Official obtains from a qualified, independent appraiser an appraisal of the property reflecting the FMV of the property and rent. To correct the transaction, the plan sponsor purchases the property from the plan at the higher of the appraised value at the time of the resale or the original sales price and also pays the Lost Earnings. Because the rent paid to the plan was below the market rate, the sponsor must also make up the difference between the rent paid under the terms of the lease and the amount that should have been paid, plus Lost Earnings on this amount, as described in Section 5(b).

(c) *Documentation.* In addition to the documentation required by Section 6, submit the following documents:

(1) Documentation of the plan's purchase of the real property, including the date of the purchase, the plan's purchase price, and the identity of the original seller;

(2) Documentation of the plan's sale of the asset, including the date of sale, the sales price, and the identity of the purchaser;

(3) A narrative describing the relationship of the original seller to the plan and the relationship of the purchaser to the plan;

(4) A copy of the lease;

(5) Documentation of the date and amount of each lease payment received by the plan; and

(6) The qualified, independent appraiser's report addressing both the FMV of the property at the time of the original sale and at the Recovery Date, and the FMV of the lease payments.

4. Purchase of an Asset (Including Real Property) by a Plan From a Person Who Is Not a Party in Interest With Respect to the Plan at a Price Other Than Fair Market Value

(a) *Description of Transaction.* A plan acquired an asset from a person who is not a party in interest with respect to the plan, without determining the asset's FMV. As a result, the plan paid more than it should have for the asset.

(b) *Correction of Transaction.* The Principal Amount is the difference between the actual purchase price and the asset's FMV at the time of purchase. The plan must receive the Principal Amount plus the Lost Earnings, as described in Section 5(b).

(1) The principles of this paragraph (b) are illustrated in the following example:

Example: A plan bought unimproved land without obtaining a qualified, independent appraisal. Upon discovering that the purchase price was $10,000 more than the appraised FMV, the Plan Official pays the plan the Principal Amount of $10,000, plus Lost Earnings as described in Section 5(b).

(c) *Documentation.* In addition to the documentation required by Section 6, submit the following documents:

(1) Documentation of the plan's original purchase of the asset, including the date of the purchase, the purchase price, and the identity of the seller;

(2) A narrative describing the relationship of the seller to the plan; and

(3) A copy of the qualified, independent appraiser's report addressing the FMV at the time of the plan's purchase.

5. Sale of an Asset (Including Real Property) by a Plan to a Person Who Is Not a Party in Interest With Respect to the Plan at a Price Less Than Fair Market Value

(a) *Description of Transaction.* A plan sold an asset to a person who is not a party in interest with respect to the plan, without determining the asset's FMV. As a result, the plan received less than it should have from the sale.

(b) *Correction of Transaction.* The Principal Amount is the amount by which the FMV of the asset as of the Recovery Date exceeds the price at which the plan sold the property. The plan must receive the Principal Amount plus Lost Earnings as described in Section 5(b).

(1) The principles of this paragraph (b) are illustrated in the following example:

Example: A plan sold unimproved land without taking steps to ensure that the plan received FMV. Upon discovering that the sale price was $10,000 less than the FMV, the Plan Official pays the plan the Principal Amount of $10,000 plus Lost Earnings as described in Section 5(b).

(c) *Documentation.* In addition to the documentation required by Section 6, submit the following documents:

(1) Documentation of the plan's original sale of the asset, including the date of the sale, the sale price, and the identity of the buyer;

(2) A narrative describing the relationship of the buyer to the plan; and

(3) A copy of the qualified, independent appraiser's report addressing the FMV at the time of the plan's sale.

6. Holding of an Illiquid Asset Previously Purchased by a Plan

(a) *Description of Transaction.* A plan is holding an asset previously purchased from (i) a party in interest with respect to the plan at no greater than fair market value at that time in an acquisition to which no prohibited transaction exemption applied, (ii) a person who was not a party in interest with respect to the plan in an acquisition in which a plan fiduciary failed to appropriately discharge his or her fiduciary duties, or (iii) a person who was not a party in interest with respect to the plan in an acquisition in which a plan fiduciary appropriately discharged his or her fiduciary duties. Currently, a plan fiduciary determines that such asset is an illiquid asset because: (1) the asset failed to appreciate, failed to provide a reasonable rate of return, or caused a loss to the plan; (2) the sale of the asset

[21] If the plan purchased the property from the plan sponsor, the sale of the same property back to the plan sponsor is a reversal of the prohibited transaction. The sale is not a new prohibited transaction and therefore does not require an individual prohibited transaction exemption, as long as the plan did not make improvements while it owned the property.

is in the best interest of the plan; and (3) following reasonable efforts to sell the asset to a person who is not a party in interest with respect to the plan, the asset cannot immediately be sold for its original purchase price, or its current FMV, if greater. Examples of assets that may meet this definition include, but are not limited to, restricted and thinly traded stock, limited partnership interests, real estate and collectibles.

(b) *Correction of Transaction.* (1) The transaction may be corrected by the sale of the asset to a party in interest, provided the plan receives the higher of (i) the fair market value (FMV) of the asset at the time of resale, without a reduction for the costs of sale; or (ii) the Principal Amount, plus Lost Earnings as described in Section 5(b). The Plan Official may cause the plan to sell the asset to a party in interest. This correction provides relief for both the original purchase of the asset, if required, and the sale of the illiquid asset by the plan to a party in interest, provided the Plan Official also satisfies the applicable conditions of the VFC Program class exemption.

(2) For this transaction, the Principal Amount is the plan's original purchase price.

(3) The principles of this paragraph (b) are illustrated in the following examples:

Example 1. A plan purchases undeveloped real property from a party in interest with respect to the plan for $60,000 in June 1999. In April 2004, Plan Officials determine that the property is an illiquid asset. A qualified independent, appraiser appraises the property at a current FMV of $20,000. The plan sponsor pays the plan the Principal Amount of $60,000 plus Lost Earnings as described in Section 5(b), and Plan Officials transfer the property from the plan to the plan sponsor. The Plan Officials also comply with the applicable terms of the related exemption.

Example 2. A plan purchases a limited partnership interest for $60,000 in June 1999 from an unrelated party after plan fiduciaries properly fulfill their fiduciary duties with respect to the purchase. In April 2004, Plan Officials determine that the interest is an illiquid asset because the interest has failed to generate a reasonable rate of return. A qualified, independent appraiser appraises the interest at a current FMV of $80,000. The plan sponsor pays the plan the FMV of $80,000 without a reduction for the costs of the sale, which is greater than the Principal Amount plus Lost Earnings, and Plan Officials transfer the interest from the plan to the plan sponsor. The Plan Officials also comply with the applicable terms of the related exemption.

(c) *Documentation.* In addition to the documentation required by Section 6, submit the following documents:

(1) Documentation of the plan's original purchase of the asset, including the date of the purchase, the plan's purchase price, the identity of the original seller, and a description of the relationship, if any, between the original seller and the plan;

(2) The qualified, independent appraiser's report addressing the FMV of the asset purchased by the plan at the recovery date;

(3) A narrative describing the plan's efforts to sell the asset to persons who are not parties in interest with respect to the plan and any documentation of such efforts to sell the asset;

(4) A statement from a Plan Official attesting that: (i) The asset failed to appreciate, failed to provide a reasonable rate of return, or caused a loss to the plan; (ii) the sale of the asset is in the best interest of the plan; (iii) the asset is an illiquid asset; and (iv) the plan made reasonable efforts to sell the asset to persons who are not parties in interest with respect to the plan without success; and

(5) In the case of an illiquid asset that is a parcel of real estate, a statement from a Plan Official attesting that no party in interest owns real estate that is contiguous to the plan's parcel of real estate on the Recovery Date.

E. Benefits

1. Payment of Benefits Without Properly Valuing Plan Assets on Which Payment Is Based

(a) *Description of Transaction.* A defined contribution pension plan pays benefits based on the value of the plan's assets. If one or more of the plan's assets are not valued at current value, the benefit payments are not correct. If the plan's assets are overvalued, the current benefit payments will be too high. If the plan's assets are undervalued, the current benefit payments will be too low.

(b) *Correction of Transaction.* (1) Establish the correct value of the improperly valued asset for each plan year, starting with the first plan year in which the asset was improperly valued. Restore to the plan for distribution to the affected plan participants, or restore directly to the plan participants, the amount by which all affected participants were underpaid distributions to which they were entitled under the terms of the plan, plus Lost Earnings as described in Section 5(b) on the underpaid distributions. File amended Annual Report Forms 5500, as detailed below.

(2) To correct the valuation defect, a Plan Official must determine the FMV of the improperly valued asset per Section 5(a) for each year in which the asset was valued improperly.

(3) Once the FMV has been determined, the participant account balances for each year must be adjusted accordingly.

(4) The Annual Report Forms 5500 must be amended and refiled for (i) the last three plan years or (ii) all plan years in which the value of the asset was reported improperly, whichever is less.

(5) The Plan Official or plan administrator must determine who received distributions from the plan during the time the asset was valued improperly. For distributions that were too low, the amount of the underpayment is treated as a Principal Amount for each individual who received a distribution. The Principal Amount and Lost Earnings must be paid to the affected individuals. For distributions that were too high, the total of the overpayments constitutes the Principal Amount for the plan. The Principal Amount plus the Lost Earnings, as described in Section 5(b), must be restored to the plan or to any participants who received distributions that were too low.

(6) The principles of this paragraph (b) are illustrated in the following examples:

Example 1. On December 31, 1995, a profit sharing plan purchased a 20-acre parcel of real property for $500,000, which represented a portion of the plan's assets. The plan has carried the property on its books at cost, rather than at FMV. One participant left the company on January 1, 1997, and received a distribution, which included her portion of the value of the property. The separated participant's account balance represented 2% of the plan's assets. As part of correction for the VFC Program, a qualified, independent appraiser has determined the FMV of the property for 1996, 1997, and 1998. The FMV as of December 31, 1996, was $400,000. Therefore, this participant was overpaid by $2,000 (($500,000–$400,000) multiplied by 2%). The Plan Officials corrected the transaction by paying to the plan the $2,000 Principal Amount plus Lost Earnings as described in Section 5(b).

The plan administrator also filed an amended Form 5500 for plan years 1996 and 1997, to reflect the proper values. The plan administrator will include the correct asset valuation in the 1998 Form 5500 when that form is filed.

Example 2. Assume the same facts as in Example 1, except that the property had appreciated in value to $600,000 as of December 31, 1996. The separated participant would have been underpaid by $2,000. The correction consists of locating the participant and distributing to her the $2,000 Principal Amount plus Lost Earnings as described in Section 5(b), as well as filing the amended Forms 5500.

(c) *Documentation.* In addition to the documentation required by Section 6, submit the following documents:

(1) A copy of the qualified, independent appraiser's report for each plan year in which the asset was revalued;

(2) A written statement confirming the date that amended Annual Report Forms 5500 with correct valuation data were filed;

(3) If losses are restored to the plan, proof of payment to the plan and copies of the adjusted participant account balances; and

(4) If supplemental distributions are made, proof of payment to the individuals entitled to receive the supplemental distributions.

F. Plan Expenses

1. Duplicative, Excessive, or Unnecessary Compensation Paid by a Plan

(a) *Description of Transaction.* A plan paid excessive compensation, including commissions or fees, to a service provider (such as an attorney, accountant, actuary, financial advisor, or insurance agent); a plan paid two or more persons to provide the same services to the plan; or a plan paid a service provider for services that were not necessary for the operation of the plan.

(b) *Correction of Transaction.* (1) Restore to the plan the Principal Amount, plus the greater of (i) Lost Earnings or (ii) Restoration of Profits resulting from the use of the Principal Amount, as described in Section 5(b).

(2) The Principal Amount is the difference between (a) the amount actually paid by the plan to the service provider during the six years prior to the discontinuation of the payment of the excessive, duplicative, or unnecessary compensation and (b) the reasonable market value of the non-duplicative services.

(3) The principles of this paragraph (b) are illustrated in the following example:

Example. Excessive compensation. A plan hired an investment advisor who advised the plan's trustees about how to invest the plan's entire portfolio. In accordance with the plan document, the trustees instructed the advisor to limit the plan's investments to equities and bonds. In exchange for his services, the plan paid the investment advisor 3% of the value of the portfolio's assets. If the trustees had inquired they would have learned that comparable investment advisors charged 1% of the value of the assets for the type of portfolio that the plan maintained. To correct the transaction, the plan must be paid the Principal Amount of 2% of the value of the plan's assets, plus Lost Earnings, as described in Section 5(b).

(c) *Documentation.* In addition to the documentation required by Section 6, submit the following documents:

(1) A written estimate of the reasonable market value of the services;

(2) The estimator's qualifications; and

(3) The cost of the services at issue during the period that such services were provided to the plan.

2. Payment of Dual Compensation to a Plan Fiduciary

(a) *Description of Transaction.* A plan pays a fiduciary for services rendered to the plan when the fiduciary already receives full-time pay from an employer or an association of employers, whose employees are participants in the plan, or from an employee organization whose members are participants in the plan. The plan's payments to the plan fiduciary are not mere reimbursements of expenses properly and actually incurred by the fiduciary.

(b) *Correction of Transaction.* (1) Restore to the plan the Principal Amount, plus the greater of (i) Lost Earnings or (ii) Restoration of Profits resulting from the fiduciary's use of the Principal Amount for the same period.

(2) The Principal Amount is the difference between (a) the amount actually paid by the plan during the six years prior to the discontinuation of the payments to the fiduciary and (b) the amount that represents reimbursements of expenses properly and actually incurred by the fiduciary.

(3) The principles of this paragraph (b) are illustrated in the following example:

Example. A union sponsored a health plan funded through contributions by employers. The union president receives $50,000 per year from the union in compensation for his services as union president. He is appointed as a trustee of the health plan while retaining his position as union president. In exchange for acting as plan trustee, the union president is paid a salary of $200 per week by the plan while still receiving the $50,000 salary from the union. Since $50,000 is full-time pay, the plan's weekly salary payments are improper. To correct the transaction, the plan must be paid the Principal Amount, which is the $200 weekly salary amount for each week that the salary was paid, plus the higher of Lost Earnings or Restoration of Profits, as described in Section 5(b).

(c) *Documentation.* In addition to the documentation required by Section 6, submit the following documents:

(1) Copies of the plan's accounting records which show the date and amount of compensation paid by the plan to the identified fiduciary; and

(2) If any of the amounts paid by the plan to the fiduciary represent reimbursements of expenses properly and actually incurred by the fiduciary, include copies of the plan records that indicate the date, amount, and character of these payments.

Signed at Washington, DC, this 30th day of March, 2005.

Ann L. Combs,

Assistant Secretary for Employee Benefits Security Administration, U.S. Department of Labor.

Appendix A – Sample VFC Program No Action Letter

Applicant (Plan Official)
Address

Dear Applicant (Plan Official):

Re: VFC Program Application No. xx–xxxxxx

The Department of Labor, Employee Benefits Security Administration (EBSA), has responsibility for administration and enforcement of Title I of the Employee Retirement Income Security Act of 1974, as amended (ERISA). EBSA has established a Voluntary Fiduciary Correction Program to encourage the correction of breaches of fiduciary responsibility and the restoration of losses to the plan participants and beneficiaries.

In accordance with the requirements of the VFC Program, you have identified the following transactions as breaches, or potential breaches, of Part 4 of Title I of ERISA, and you have submitted documentation to EBSA that demonstrates that you have taken the corrective action indicated.

[Briefly recap the violation and correction. *Example:* Failure to deposit participant contributions to the XYZ Corp. 401(k) plan within the time frames required by ERISA, from _____(date) to _____(date). All participant contributions were deposited by _____(date) and lost earnings on the delinquent contributions were deposited and allocated to participants' plan accounts on _____(date).]

Because you have taken the above-described corrective action that is consistent with the requirements of the VFC Program, EBSA will take no civil enforcement action against you with respect to this breach. Specifically, EBSA will not recommend that the Solicitor of Labor initiate legal action against you, and EBSA will not impose the penalty in section 502(l) of ERISA on the amount you have repaid to the plan.

EBSA's decision to take no further action is conditioned on the completeness and accuracy of the representations made in your application. You should note that this decision will not preclude EBSA from conducting an investigation of any potential violations of criminal law in connection with the transaction identified in the application or investigating the transaction identified in the application with a view toward seeking appropriate relief from any other person.

[If the transaction is a prohibited transaction for which no exemptive relief is available, add the following language: Please also be advised that pursuant to section 3003(c) of ERISA, 29 U.S.C. section 1203(c), the Secretary of Labor is required to transmit to the Secretary of the Treasury information indicating that a prohibited transaction has occurred. Accordingly, this matter will be referred to the Internal Revenue Service.]

In addition, you are cautioned that EBSA's decision to take no further action is binding on EBSA only. Any other governmental agency, and participants and beneficiaries, remain free to take whatever action they deem necessary.

If you have any questions about this letter, you may contact the Regional VFC Program Coordinator at *applicable address and telephone number*.

Appendix B – VFC Program Checklist (Required)

Use this checklist to ensure that you are submitting a complete application. The applicant must sign and date the checklist and include it with the application. Indicate "Yes", "No" or "N/A" next to each item. A "No" answer or the failure to include a completed checklist will delay review of the application until all required items are received.

_____ 1. Have you reviewed the eligibility, definitions, transaction and correction, and documentation sections of the VFC Program?
_____ 2. Have you included the name, address and telephone number of a contact person familiar with the contents of the application?
_____ 3. Have you provided the EIN, Plan Number, and address of the plan sponsor and plan administrator?
_____ 4. Have you provided the date that the most recent Form 5500 was filed by the plan?
_____ 5. Have you enclosed a signed and dated certification under penalty of perjury for the plan fiduciary with knowledge of the transactions and for each applicant and the applicant's representative, if any?
_____ 6. Have you enclosed relevant portions of the plan document and any other pertinent documents (such as the adoption agreement, trust agreement, or insurance contract) with the relevant sections identified?
_____ 7. Where applicable, have you enclosed a copy of an appraiser's report?
_____ 8. Have you enclosed supporting documentation, including:
_____ a. A detailed narrative of the Breach, including the date it occurred;
_____ b. Documentation that supports the narrative description of the transaction;
_____ c. An explanation of how the Breach was corrected, by whom and when, with supporting documentation;
_____ d. A list of all persons materially involved in the Breach and its correction (e.g., fiduciaries, service providers, borrowers, lenders);
_____ e. Specific calculations demonstrating how Principal Amount and Lost Earnings or Restoration of Profits were computed, and
_____ f. Proof of payment of Principal Amount and Lost Earnings or Restoration of Profits?
_____ g. If application concerns delinquent employee contributions or loan repayments, a statement from a Plan Official identifying the earliest date on which participant contributions/loan repayments reasonably could have been segregated from the employer's general assets and supporting documentation on which the Plan Official relied?
_____ 9. If you are an eligible applicant and wish to avail yourself of excise tax relief under the VFC Program Class Exemption, have you made proper arrangements to provide within 60 calendar days after submission of this application a copy of the Exemption notice to all interested persons and to the EBSA regional office to which the application is filed?
_____ 10. In calculating Lost Earnings, have you elected to use:
_____ a. The Online Calculator; or
_____ b. A manual calculation performed in accordance with Section 5(b)?
_____ 11. Where applicable, have you enclosed a description demonstrating proof of payment to participants and beneficiaries whose current location is known to the plan and/or applicant, and for participants who need to be located, have you demonstrated how adequate funds have been segregated to pay missing participants and commenced the process of locating the missing participants using either the IRS and SSA locator services, or other comparable means?
_____ 12. Has the plan implemented measures to ensure that the transactions specified in the application do not recur? (Do not include this with the application except for transactions under Section 7(c)(1) and (2)).

Signature of Applicant and Date Signed:

_____

Name of Applicant: _____

Title/Relationship to the Plan: _____

Name of Plan, EIN and Plan Number:

_____

Paperwork Reduction Act Notice

The information identified on this form is required for a valid application for the Voluntary Fiduciary Correction Program of the U.S. Department of Labor's Employee Benefits Security Administration (EBSA). You must complete this form and submit it as part of the application in order to receive the relief offered under the Program with respect to a breach of fiduciary responsibility under Part 4 of Title I of ERISA. EBSA will use this information to determine that you have satisfied the requirements of the Program. EBSA estimates that completing and submitting this form will require an average of 2 to 4 minutes. This collection of information is currently approved under **OMB Control Number 1210-0118**. You are not required to respond to a collection of information unless it displays a currently valid OMB Control Number.

Appendix C – EBSA Regional Offices

Submit your VFC Program application to the appropriate EBSA regional office:

Atlanta Regional Office, 61 Forsyth Street, SW, Suite 7B54, Atlanta, GA 30303, telephone (404) 562-2156, fax (404) 562-2168; jurisdiction: Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, Tennessee, Puerto Rico.
Boston Regional Office, J.F.K. Building, Room 575, Boston, MA 02203, telephone: (617) 565-9600, fax: (617) 565-9666; jurisdiction: Connecticut, Maine, Massachusetts, New Hampshire, central and western New York, Rhode Island, Vermont.
Chicago Regional Office, 200 West Adams Street, Suite 1600, Chicago, IL 60606, telephone (312) 353-0900, fax (312) 353-1023; jurisdiction: northern Illinois, northern Indiana, Wisconsin.
Cincinnati Regional Office, 1885 Dixie Highway, Suite 210, Ft. Wright, KY 41011-2664, telephone (859) 578-4680, fax (859) 578-4688; jurisdiction: southern Indiana, Kentucky, Michigan, Ohio.
Dallas Regional Office, 525 Griffin Street, Rm. 900, Dallas, TX 75202-5025, telephone (214) 767-6831, fax (214) 767-1055; jurisdiction: Arkansas, Louisiana, New Mexico, Oklahoma, Texas.
Kansas City Regional Office, 1100 Main Street, Suite 1200, Kansas City, MO 64105, telephone (816) 426-5131, fax (816) 426-5511; jurisdiction: Colorado, southern Illinois, Iowa, Kansas, Minnesota, Missouri, Montana, Nebraska, North Dakota, South Dakota, Wyoming.
Los Angeles Regional Office, 1055 E. Colorado Boulevard, Suite 200, Pasadena, CA 91106-2341, telephone (626) 229-1000, fax (626) 229-1097; jurisdiction: 10 southern counties of California, Arizona, Hawaii, American Samoa, Guam, Wake Island.
New York Regional Office, 33 Whitehall Street, Suite 1200, New York, NY 10004, telephone (212) 607-8600, fax (212) 607-8681; jurisdiction: southeastern New York, northern New Jersey.
Philadelphia Regional Office, The Curtis Center, 170 S. Independence Mall West, Suite 870 West, Philadelphia, PA 19106-3317, telephone (215) 861-5300, fax (215) 861-5347; jurisdiction: Delaware, Maryland, southern New Jersey, Pennsylvania, Virginia, Washington, D.C., West Virginia.
San Francisco Regional Office, 71 Stevenson St., Suite 915, San Francisco, CA 94105, telephone (415) 975-4600, fax (415) 975-4589; jurisdiction: Alaska, 48 northern counties of California, Idaho, Nevada, Oregon, Utah, Washington.

Please verify current telephone numbers and addresses on EBSA's website, www.dol.gov/ebsa/.

Appendix D –Lost Earnings Example (Manual Calculation)

Delinquent Participant Contributions

Company A's pay periods end every other Friday. Each pay period, participant contributions total $10,000, which reasonably can be segregated from Company A's general assets by ten business days following the end of each pay period. Company A should have remitted participant contributions for the pay period ending March 2, 2001 to the plan by March 16, 2001, the Loss Date, but actually remitted them on April 13, 2001, the Recovery Date. In early 2004, a Plan Official discovers that participant contributions for this pay period were not remitted on a timely basis. To comply with the Program, the Plan Official determined that she would repay all Lost Earnings on January 30, 2004.

Based on the above facts:

- **Principal Amount** is $10,000
- **Loss Date** is March 16, 2001
- **Recovery Date** is April 13, 2001
- **Number of Days Late** is 28 (Recovery Date less Loss Date)

The basic formula for computing earnings using the applicable factors under IRS Revenue Procedure 95-17 is: Dollar Amount * IRS factor

Step 1. The Plan Official must calculate Lost Earnings, based on the Principal Amount, that should have been paid on the Recovery Date.

The first period of time is from March 16, 2001 to March 31, 2001 (15 days). The Code underpayment rate is 9%. Using Revenue Procedure 95-17, the factor for 15 days at 9% is 0.003705021 from table 23.

$10,000 * 0.003705021 = $37.05

The plan is due $10,037.05 as of March 31, 2001. The second period of time is April 1, 2001 through April 13, 2001 (13 days). The Code underpayment rate is 8%. Using Revenue Procedure 95-17, the factor for 13 days at 8% is 0.002853065 from table 21.

$10,037.05 * 0.002853065 = $28.64

Therefore, Lost Earnings of $65.69 ($37.05 plus $28.64) must be paid to the plan.

Step 2. If Lost Earnings are paid to the plan after the Recovery Date, the Plan Official must calculate the amount of interest on the Lost Earnings (determined in Step 1) that must also be paid to the plan. This calculation is shown by the following chart: (The "Interest" column is the previous time period's "Amnt. Due" multiplied by the Factor. "Amnt. Due" is the previous "Amnt. Due" plus "Interest". The calculation in the first row is based on the $65.69 Lost Earnings.)

1st Day	To	Days	Underpmnt. Rate	Rev. Proc. Table	Factor	Interest	Amnt. Due
4/14/01	6/30/01	78	8%	21	.017240956	1.132558	66.82256
7/1/01	9/30/01	92	7%	19	.017798686	1.189354	68.01191
10/1/01	12/31/01	92	7%	19	.017798686	1.210523	69.22243
1/1/02	3/31/02	90	6%	17	.014903267	1.031640	70.25408
4/1/02	6/30/02	91	6%	17	.015070101	1.058736	71.31281
7/1/02	9/30/02	92	6%	17	.015236961	1.086591	72.39940
10/1/02	12/31/02	92	6%	17	.015236961	1.103147	73.50255
1/1/03	3/31/02	90	5%	15	.012404225	0.911742	74.41429
4/1/03	6/30/03	91	5%	15	.012542910	0.933372	75.34766
7/1/03	9/30/03	92	5%	15	.012681615	0.955530	76.30319
10/1/03	12/31/03	92	4%	13	.010132630	0.773152	77.07634
1/1/04	1/30/04	30	4%	61	.003283890	0.253110	***77.32945***
				Total	Interest:	11.64	

Note that the last factor comes from the Revenue Procedure 95-17 tables for leap years.

The plan is also owed $11.64. This is the amount of interest on $65.69 (Lost Earnings on the Principal Amount) accrued between April 13, 2001, the Recovery Date, when the Principal Amount $10,000 was paid to the plan, and January 30, 2004, the date chosen to repay Lost Earnings.

Therefore, the Plan Official must pay **$77.33** to the plan on January 30, 2004, as Lost Earnings ($65.69) plus interest on Lost Earnings ($11.64) for the pay period ending March 2, 2001, in addition to the Principal Amount ($10,000) that was paid on April 13, 2001. This total corresponds with the final Total Due in the above chart (emphasized).

Appendix E – Model Application Form (Optional)

Voluntary Fiduciary Correction Program
Application Form

This application form provides a recommended format for your VFC Program application. For full application procedures, consult www.dol.gov/ebsa/.

Applicant Name(s) and Address(es)

List separately:

_____

_____

_____

List Transaction(s) Corrected

Check which transaction(s) listed in the VFC Program you have corrected:

___ **Delinquent Participant Contributions and Participant Loan Repayments to Pension Plans**
___ **Delinquent Participant Contributions to Insured Welfare Plans**
___ **Delinquent Participant Contributions to Welfare Plan Trusts**
___ **Loan at Fair Market Interest Rate to a Party in Interest**
___ **Loan at Below-Market Interest Rate to a Party in Interest**
___ **Loan at Below-Market Interest Rate to a Non-Party in Interest**
___ **Loan at Below-Market Interest Rate Due to Delay in Perfecting Plan's Security Interest**
___ **Participant Loan Amount in Excess of Plan Limitations**
___ **Participant Loan Duration in Excess of Plan Limitations**
___ **Purchase of an Asset by a Plan from a Party in Interest**
___ **Sale of an Asset by a Plan to a Party in Interest**
___ **Sale and Leaseback of Real Property to Employer**
___ **Purchase of Asset by a Plan from a Non-Party in Interest at Other Than Fair Market Value**
___ **Sale of an Asset by a Plan to a Non-Party in Interest at Other Than Fair Market Value**
___ **Holding of an Illiquid Asset Previously Purchased by a Plan**
___ **Payment of Benefits Without Properly Valuing Plan Assets on Which Payment is Based**
___ **Duplicative, Excessive, or Unnecessary Compensation Paid by a Plan**
___ **Payment of Dual Compensation to a Plan Fiduciary**

Correction Amount

Principal Amount $ _____ *Date Paid* ___ / ___ / ___

Lost Earnings/Restoration of Profit $ _____ *Date Paid* ___ / ___ /

Narrative and Calculations

List (1) all persons materially involved in the Breach and its correction (e.g., fiduciaries, service providers):

_____

_____

_____

(2) An explanation of the Breach, including the date(s) it occurred (attach separate sheets if necessary):

_____

_____

_____

_____

(3) An explanation of how the Breach was corrected, by whom, and when (attach separate sheets if necessary):

_____

_____

_____

_____

_____

_____

_____

_____

(4) For correction of Delinquent Remittance of Participant Funds, provide a statement from a Plan Official identifying the earliest date on which participant contributions/loan repayments reasonably could have been segregated from the employer's general assets (attach supporting documentation on which Plan Official relied):

_____

_____

_____

_____

_____

(5) Specific calculations demonstrating how Principal Amount and Lost Earnings or Restoration of Profits was calculated (attach separate sheets if necessary):

_____

_____

_____

_____

_____

Supplemental Information

(1) Plan Sponsor Name:

_____

EIN: _____

Address:

_____

_____

_____

(2) Plan Name:

_____

Plan Number: _____

(3) Plan Administrator Name:

_____

EIN: _____

Address:

_____

_____

_____

_____

(4) Name of Authorized Representative:

_____

Address:

_____

_____

_____**Telephone:**

_____

(5) Name of Contact Person:

_____

Address:

_____

_____

_____

Telephone: _____

(6) Date of Most Recent Annual Report Form 5500 Filing: ___ /___ /____ **for Plan Year Ending:** ___ /___ /___

(7) Is Applicant Seeking Relief Under the VFC Program Class Exemption?

___ **Yes** ___ **No**

Attach supporting documentation here.

Authorization of Preparer

I have authorized (insert name of authorized representative)

_____ *to represent me concerning this VFC Program application.*

Name of Plan Official

_____

Signature of Plan Official

_____

Penalty of Perjury Statement

The following statement must be signed and dated by a plan fiduciary with knowledge of the transaction that is the subject of the application and by the authorized representative, if any. Each Plan Official applying under the VFC Program must also sign and date the statement, which must accompany any subsequent additions to the application.

"Under penalties of perjury I certify that I am not Under Investigation (as defined in VFC Program Section 3(b)(3)) and that I have reviewed this application, including all supporting documentation, and to the best of my knowledge and belief the contents are true, correct, and complete."

_____

Name and Title

Signature _____

Date _____

_____

Name and Title

Signature _____

Date _____

Paperwork Reduction Act Notice

The information identified on this form is required for a valid application for the Voluntary Fiduciary Correction Program of the U.S. Department of Labor's Employee Benefits Security Administration (EBSA). You are not required to use this form; however, you must supply the information identified in order to receive the relief offered under the Program with respect to a breach of fiduciary responsibility under Part 4 of Title I of ERISA. EBSA will use this information to determine whether you have satisfied the requirements of the Program. EBSA estimates that assembling and submitting this information will require an average of 6 to 8 hours. This collection of information is currently approved under **OMB Control Number 1210-0118.** You are not required to respond to a collection of information unless it displays a currently valid OMB Control Number.

VFC Program Checklist

Use this checklist to ensure that you are submitting a complete application. The applicant must sign and date the checklist and include it with the application. Indicate "Yes", "No" or "N/A" next to each item. A "No" answer or the failure to include a completed checklist will delay review of the application until all required items are received.

_____ 1. Have you reviewed the eligibility, definitions, transaction and correction, and documentation sections of the VFC Program?
_____ 2. Have you included the name, address and telephone number of a contact person familiar with the contents of the application?
_____ 3. Have you provided the EIN, Plan Number, and address of the plan sponsor and plan administrator?
_____ 4. Have you provided the date that the most recent Form 5500 was filed by the plan?
_____ 5. Have you enclosed a signed and dated certification under penalty of perjury for the plan fiduciary with knowledge of the transactions and for each applicant and the applicant's representative, if any?
_____ 6. Have you enclosed relevant portions of the plan document and any other pertinent documents (such as the adoption agreement, trust agreement, or insurance contract) with the relevant sections identified?
_____ 7. Where applicable, have you enclosed a copy of an appraiser's report?
_____ 8. Have you enclosed supporting documentation, including:
_____ a. A detailed narrative of the Breach, including the date it occurred;
_____ b. Documentation that supports the narrative description of the transaction;
_____ c. An explanation of how the Breach was corrected, by whom and when, with supporting documentation;
_____ d. A list of all persons materially involved in the Breach and its correction (e.g., fiduciaries, service providers, borrowers, lenders);
_____ e. Specific calculations demonstrating how Principal Amount and Lost Earnings or Restoration of Profits were computed, and
_____ f. Proof of payment of Principal Amount and Lost Earnings or Restoration of Profits?
_____ g. If application concerns delinquent employee contributions or loan repayments, a statement from a Plan Official identifying the earliest date on which participant contributions/loan repayments reasonably could have been segregated from the employer's general assets and supporting documentation on which the Plan Official relied?
_____ 9. If you are an eligible applicant and wish to avail yourself of excise tax relief under the VFC Program Class Exemption, have you made proper arrangements to provide within 60 calendar days after submission of this application a copy of the Exemption notice to all interested persons and to the EBSA regional office to which the application is filed?
_____ 10. In calculating Lost Earnings, have you elected to use:
_____ a. The Online Calculator; or
_____ b. A manual calculation performed in accordance with Section 5(b)?
_____ 11. Where applicable, have you enclosed a description demonstrating proof of payment to participants and beneficiaries whose current location is known to the plan and/or applicant, and for participants who need to be located, have you demonstrated how adequate funds have been segregated to pay missing participants and commenced the process of locating the missing participants using either the IRS and SSA locator services, or other comparable means?
_____ 12. Has the plan implemented measures to ensure that the transactions specified in the application do not recur? (Do not include this with the application except for transactions under Section 7(c)(1) and (2)).

Signature of Applicant and Date Signed:

_____

Name of Applicant: _____
Title/Relationship to the Plan: _____
Name of Plan, EIN and Plan Number:

_____

[FR Doc. 05–6627 Filed 4–5–05; 8:45 am]
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