DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Parts 2560 and 2570

RIN 1210–AB64

Voluntary Fiduciary Correction Program

AGENCY: Employee Benefits Security Administration, Department of Labor.

ACTION: Proposed program amendments; request for comment.

SUMMARY: This document contains an amended and restated Voluntary Fiduciary Correction Program (VFC Program or Program) under Title I of the Employee Retirement Income Security Act of 1974, as amended (ERISA) and a request for comment. The VFC Program is designed to encourage correction of fiduciary breaches by permitting persons to avoid potential Department of Labor (Department) civil enforcement actions and civil penalties if they voluntarily correct eligible transactions in a manner that meets the requirements of the Program. Based on its experience since the last revision of the Program in 2006, 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. Specifically, the Program amendments add a self-correction feature, clarify some existing transactions eligible for correction under the Program, expand the scope of other transactions currently eligible for correction, and simplify certain administrative or procedural requirements for participation in and correction of transactions under the VFC Program.

DATES: Written comments on the amended and restated VFC Program should be submitted on or before January 20, 2023. The Department will notify the public of the availability of the amended and restated VFC Program in a subsequent **Federal Register** document.

ADDRESSES: You may submit written comments, identified by RIN 1210–AB64, to one of the following addresses:

- *Federal eRulemaking Portal: www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Office of Regulations and Interpretations, Employee Benefits Security Administration, Room N–5655, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210, Attention: Amendment and Restatement of Voluntary Fiduciary Correction Program.

Instructions: Persons submitting comments electronically are encouraged not to submit paper copies. Comments will be available to the public, without charge online at *www.regulations.gov,* at *www.dol.gov/agencies/ebsa,* and at the Public Disclosure Room, EBSA, U.S. Department of Labor, Suite N–1513, 200 Constitution Avenue NW, Washington, DC 20210.

Warning: Do not include any personally identifiable or confidential business information that you do not want publicly disclosed. Comments are public records and can be retrieved by most internet search engines.

FOR FURTHER INFORMATION CONTACT: Yolanda R. Wartenberg, Office of Regulations and Interpretations, EBSA, (202) 693–8500, for questions regarding the VFC Program amendments in this document. Susan Wilker, Office of Exemption Determinations, EBSA, (202) 693–8540, for questions regarding the proposed amendments to the associated class exemption PTE 2002–51. James Butikofer, Office of Research and Analysis, EBSA, (202) 693–8410, for questions regarding the regulatory impact analysis. (These are not toll-free numbers.)

For general questions regarding the VFC Program: contact Dawn Miatech-Plaska, Office of Enforcement, EBSA, (202) 693–8691. For questions regarding specific applications and self-corrections under the VFC Program: contact the appropriate EBSA Regional Office listed in Appendix C. (These are not toll-free numbers.)

Customer Service Information: Individuals interested in obtaining information from the Department concerning ERISA and employee benefit plans may call the Employee Benefits Security Administration (EBSA) Toll-Free Hotline, at 1–866– 444–EBSA (3272) or visit the Department's website (*www.dol.gov/ebsa*).

SUPPLEMENTARY INFORMATION:

A. Summary Overview

The Department of Labor's (Department) authority to establish the Voluntary Fiduciary Correction Program (VFC Program or Program) derives from its authority to enforce the fiduciary standards in Title I of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1132(a)(2) and 1132(a)(5), and thereby to establish policies on how this authority will be implemented. The Department also has the authority under section 408(a) of ERISA (29 U.S.C. 1108) to issue exemptions from the prohibited transaction rules in sections 406 and 407 of ERISA (29 U.S.C. 1106 and 1107) and in section 4975 of the Internal Revenue Code (Code).[1]

The Employee Benefits Security Administration (EBSA) originally adopted the VFC Program in 2002, and later revised it in 2005 and 2006.[2] EBSA designed the VFC Program to encourage employers and plan fiduciaries to voluntarily comply with ERISA and allow those potentially liable for certain specified fiduciary breaches under ERISA to voluntarily apply for relief from civil enforcement actions and certain civil penalties, provided they meet the Program's criteria and follow the procedures outlined in the Program. The existing VFC Program describes how to apply for relief, lists the specific transactions covered, and sets forth acceptable methods for correcting fiduciary breaches under the Program.[3] It also provides examples of potential breaches and related permissible corrective actions. The Program defines the term ''Breach'' to mean any transaction that is or may be a violation of the fiduciary responsibilities contained in Part 4 of Title I of ERISA. The Program also provides a model application form, a checklist, and an Online Calculator for determining correction amounts. Eligible applicants that satisfy the terms and conditions of the existing VFC Program receive a no action letter from EBSA and are not subject to civil monetary penalties for the corrected transactions. Excise tax relief for six specific VFC Program transactions is conditionally available under an associated class exemption, PTE 2002–51.[4] The VFC Program has been, and will continue to be, administered in EBSA Regional Offices.

While the VFC Program continues to be successful in encouraging and facilitating the correction of violations

[1] Under Reorganization Plan No. 4 of 1978, 5 U.S.C. App. at 252 (2020), the authority of the Secretary of Treasury to issue exemptions pursuant to section 4975 of the Internal Revenue Code was transferred, with certain exceptions not relevant here, to the Secretary of Labor.

[2] 70 FR 17516 (2005), 71 FR 20262 (2006).

[3] 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 7.4(a) of the Program. EBSA encourages potential applicants to discuss eligibility and similar issues with the appropriate regional VFC Program coordinator.

[4] PTE 2002–51 at 67 FR 70623 (2002); amended at 71 FR 20135 (2006). The current exemptive relief for these six transactions remains available while the proposed amendments to the exemption are being finalized.

of ERISA's fiduciary responsibility and prohibited transaction rules, based on a review of the current VFC Program, which was last revised in 2006,[5] the Department concluded that certain revisions to the Program would facilitate more efficient and less costly corrections of fiduciary breaches under the Program, encourage greater participation in the Program, and respond to requests from stakeholders for adjustments based on their experiences using the Program.

The most significant change to the Program is the addition of a new self-correction feature contained in section 7.1(b) of the VFC Program for certain failures to timely transmit participant contributions (and participant loan repayments) to pension plans. Delinquent participant contributions is the type of transaction most frequently corrected under the Program. The Department has received input from stakeholders who said the time and expense required to file a VFC Program application with the Department is a disincentive to use the Program to correct these transactions, especially when they involve small dollar amounts. After carefully considering the issue, the Department agrees that a self-correction feature for delinquent participant contributions to pension plans that includes appropriately designed safeguards would encourage more voluntary corrections by offering plan officials and other responsible fiduciaries a streamlined correction process. It would also enable EBSA to better allocate resources currently dedicated to processing VFC Program applications for these transactions. The other Program amendments contained in this document (1) clarify existing transactions eligible for correction under the Program, (2) expand the scope of certain transactions currently eligible for correction, and (3) simplify certain administrative or procedural requirements for participation in the VFC Program and correction of transactions under the Program. A more detailed summary of the Program revisions is set forth below in the section of this preamble entitled ''VFC Program 2022 Amendments.'' [6]

In tandem with today's publication of amendments to the VFC Program, EBSA is publishing a proposed amendment to PTE 2002–51, the Program's associated class exemption, to make certain conforming amendments to the class exemption. For a more comprehensive discussion of the proposed changes to the class exemption and the request for public comments on those proposed changes, see the proposed amendment to PTE 2002–51 published elsewhere in today's issue of the **Federal Register**.

As discussed in greater detail below in the section entitled ''Statement on Availability and Request for Comment,'' this amended and restated VFC Program will become available to the public following approval by the Office of Management and Budget (OMB) of the revised information collections in the Program in accordance with the Paperwork Reduction Act of 1995 (PRA). The availability will be announced by the Department in a subsequent **Federal Register** Notice. Further, the expanded excise tax relief afforded by the proposed amendments to PTE 2002–51 is not available until such amendments are adopted in final form, which also will be communicated in the **Federal Register**. However, the existing VFC Program and PTE 2002–51 remain available during the Department's consideration of the changes.

B. VFC Program 2022 Amendments

The VFC Program 2022 Amendments set forth in this document would retain the fundamentals of the current VFC Program. To facilitate reference to the Program, this document includes a restatement of the Program in its entirety. Stakeholders interested in a discussion of the existing components of the VFC Program should review the **Federal Register** notices announcing the original 2002 program and the 2005 and 2006 revisions to the Program.[7] The following is an overview of the VFC Program amendments contained in this document.

(1) Self-Correction Feature for Delinquent Participant Contributions to Pension Plans—Section 7.1(b)

A major change, prompted by input from the regulated community, is the addition of a new Self-Correction Component (SC Component or SCC) to section 7, ''Description of Eligible Transactions and Corrections Under the VFC Program.'' Specifically, section 7.1(b) ''Delinquent Participant Contributions and Loan Repayments to Pension Plans under the Self-Correction Component'' provides a new self-correction process for pension plans.[8]

In the past, as noted in the preamble to the April 2006 VFC Program Notice, EBSA was of the view that a self-correction feature would not give the Department sufficient information and certainty of correction compared to that afforded by the Program's application and approval process. However, based on its experience with the Program and input from stakeholders, EBSA is persuaded that delinquent participant contribution/loan repayment transactions are suitable for a self-correction procedure. EBSA expects that a well-designed self-correction feature will mean more voluntary corrections and more participant accounts receiving more timely correction amounts.

Certain other conditions apply to relief under the SC Component. Relief under the SC Component for delinquent participant contributions and delinquent plan loan repayments is available to any pension plan regardless of the size of the plan's participant population or amount of plan assets, but is limited to corrections where the amount of Lost Earnings is $1,000.00 or less excluding any excise tax paid to the plan under the associated class exemption, PTE 2002–51.[9] The delinquent participant contributions or loan repayments also must have been remitted to the plan no more than 180 calendar days from the date of withholding or receipt. These conditions are designed to exclude from the SCC delinquencies involving lost earning amounts that suggest the need for more active evaluation by EBSA of the circumstances surrounding the Breach and timing of the correction.

The Department considered but did not include at this time a limit on the frequency with which a self-corrector may use the SC Component versus

[5] 71 FR 20262 (2006); 71 FR 20135 (2006).

[6] As is the case under the current VFC Program, multiemployer plans and multiple employer plans would be permitted to use the amended VFC Program (including the new SC Component) when it becomes available. The preamble to the 2006 revision of the VFC Program stated that the definition of ''Plan official'' in cases of multiemployer plans or multiple employer plans was not limited so that an application could be made only by the ''plan administrator'' rather than by any contributing or adopting employer. 71 FR 20262, 20264 (April 19, 2006). The Department explained that the plan administrator of such a plan could apply on behalf of the entire plan, but any participating employer may apply on its own behalf. The Department solicits comments on whether additional guidance on those points would be helpful, and if so, what the guidance should provide.

[7] *See* 67 FR 15062 (March 28, 2002), 70 FR 17516 (April 6, 2005), and 71 FR 20262 (April 19, 2006). 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)).

[8] To reflect the inclusion of the SCC into the Program, section 6 in the amended program has been renamed ''VFC Program Application and Self-Correction Component Procedures'' and the prior section 6 has been renamed and re-designated as section 6.1 ''VFC Program Application Procedures.''

[9] *See* proposed amendments to PTE 2002–51 elsewhere in today's **Federal Register**.

following the application process for correcting delinquent participant contributions. For example, the Department considered adopting a three-year provision modeled on the provisions in the current VFC prohibited transaction exemption (PTE) that precludes reliance on the PTE to avoid excise taxes for similar VFC Program covered transactions more frequently than once every three years.[10] The Department concluded, however, that the PTE provision was not comparable because it does not preclude reliance on the VFC Program; it just limits relief from applicable excise taxes and even that limitation was subject to several exceptions. The Department was also concerned about a frequency limit unintentionally creating disincentives to use the VFC Program and encouraging corrections outside the VFC Program. Moreover, as discussed in greater detail in the proposed PTE amendment, the Department is soliciting public comments on a proposal to remove the three-year limitation provision from the PTE. As noted above, no similar frequency limitation applies to the use of the VFC Program so parties are able to obtain a ''no action'' letter from the Department even in the case of repeated use of the VFC Program for similar types of transactions. The preamble to the proposed amendments to the PTE also notes that the three-year provision was initially included in the PTE to prevent parties from becoming lax in efforts to comply with their fiduciary duties in connection with covered transactions because of the availability of the exemption. However, the Department's experience with the VFC Program and exemption indicated that the risk of such behavior was low. Also, the application and reporting requirements under the VFC Program and the SC Component together with the ''under investigation'' ineligibility condition provide the Department with a system under which it receives notice of repeat usage and a means of protecting against any potentially inappropriate use of the exemption in connection with covered transactions. Accordingly, the Department decided that it would solicit comments on whether a frequency limitation should be included in the PTE, and if so, what it should be and should any exceptions apply. Nonetheless, the Department will be monitoring for frequent use of the SCC and may communicate with repeat users or open investigations to identify and correct systemic issues leading to repeated failures to transmit participant contributions in a timely fashion.

Relief under the SCC is further conditioned on a particular correction method being used. Correction amounts under the SC Component consist of the (1) Principal Amount and (2) Lost Earnings. Specifically, the Principal Amount is the amount of participant contributions or loan repayments that would have been available to the plan if the employer had not retained such amounts, while Lost Earnings is the amount of earnings that would have been earned on the Principal Amount but for the failure to timely remit such amounts to the plan. The SC Component requires that Lost Earnings be paid from the ''Date of Withholding or Receipt,'' and mandates the use of the Online Calculator to determine the amount of the loss payable to the plan. For this transaction, Date of Withholding or Receipt means the date the amount would otherwise have been payable to the participant in cash in the case of amounts withheld by an employer from a participant's wages, or the day on which the participant contribution or loan payment is received by the employer in the case of amounts that a participant or beneficiary pays to an employer. Use of the Online Calculator and the Date of Withholding or Receipt—which is a stricter standard than the date on which participant contributions or loan repayments could reasonably have been segregated from the employer's general assets—are critical elements of the SCC that, in the Department's view, will help ensure full correction without the need for the protections afforded by the Program's application and approval process. These elements also will provide self-correctors with assurance of the accuracy of their calculations.

Under the SC Component, section 7.1(b)(2)(iii) details an electronically filed notice requirement (SCC notice) which replaces the paper application requirements in section 7.1(a)(3) of the Program. The required data elements in the SCC notice include: the name and an email address for the self-corrector; the plan name; the plan sponsor's nine-digit number (EIN) and the plan's three-digit number (PN); the Principal Amount; the amount of Lost Earnings and the date paid to the plan; the Loss Date (Date(s) of Withholding or Receipt); and the number of participants affected by the correction. The SCC notice must be submitted electronically to EBSA using a new online VFC Program web tool to be located on EBSA's website. Self-correctors using the web tool will receive an automatic EBSA email acknowledging the SCC notice submission.

Prior to submitting the SCC notice, self-correctors must calculate the Lost Earnings amount using the VFC Program's Online Calculator. The Lost Earnings calculation is intended to be a reasonable approximation of the amount that would have been earned on the delinquent participant contributions or loan repayments but for the employer's delinquent transmission of the contributions or repayments. Lost Earnings is calculated by entering the Principal Amount which is the total amount of the delinquent participant contributions or loan repayments, the Loss Date (Date of Withholding or Receipt) which may require multiple entries based on delinquencies in multiple pay periods, and the date the Lost Earnings amount is paid to the plan. The Date of Withholding or Receipt is the date the amount would otherwise have been payable to the participant in cash in the case of amounts withheld by an employer from a participant's wages, or the day on which the participant contribution or loan payment is received by the employer in the case of amounts that a participant or beneficiary pays to an employer. Detailed instructions for the VFC Program Online Calculator are on EBSA's website. Definitions of capitalized terms are contained in sections 5 and 7.1(b).

Self-correctors also must complete the SCC Retention Record Checklist in Appendix F, prepare or collect the documents listed in the Appendix, and provide the completed checklist and required documentation to the plan administrator as required by sections 6.2(d) and 7.1(b)(3). This obligation applies even if the employer is the plan administrator. Such ''dual role'' situations do not relieve the employer as plan administrator from fiduciary recordkeeping and obligations under ERISA. The plan administrator then must maintain these documents as part of the plan's records as required by law. Although self-correctors that satisfy the terms and conditions of the VFC Program do not receive a no action letter from EBSA, similar to a no action letter, the SCC provides that compliance with the SCC terms and conditions results in not being subject to civil monetary penalties or an EBSA civil enforcement action. As with an application under the Program, however, and in accordance with section 2(b) ''Verification,'' EBSA reserves the right to investigate and take other actions with respect to the transaction corrected through the SCC, including taking steps to confirm the

[10] The exemption is currently unavailable to VFC Program applicants that have, within the previous three years, taken advantage of the relief provided by the VFC Program or the exemption for a similar type of transaction.

corrective action was in fact taken. The relief does not extend to criminal investigations or to persons other than the self-corrector. Also, if EBSA determines that the terms and conditions of the SCC were not satisfied, the ''self-corrector'' would, obviously, not be exempt from civil penalties or EBSA enforcement actions related to relevant participant contributions.

Other procedural requirements for self-correction are detailed in section 6.2 ''VFC Program Self-Correction Component Procedures,'' including a Penalty of Perjury Statement. For convenience, a compliant Penalty of Perjury Statement is included as part of the SCC Retention Record Checklist in Appendix F.

EBSA is seeking comments from interested persons on the revisions to the Program set forth in this document, including comments on the SCC criteria and conditions and whether other criteria or conditions would adequately protect plans and participants while being less burdensome or less costly. For example, the Department invites public comments on whether the SCC should incorporate additional protections for pension plans that are classified as small based on their participant population (generally those covering fewer than 100 participants).[11] A possible additional protection would be to limit the participation of small plans to only those whose plan sponsors comply with the safe harbor standard in 29 CFR 2510.3–102(a)(2) for the timely handling of participant contributions. Compliance could require, for example, either an existing practice or an agreement to put in place a customary practice of depositing participant contributions and loan payments with the plan not later than the 7th business day following the day on which such amount would otherwise have been payable to the participant in cash in the case of amounts withheld by an employer from a participant's wages, or the 7th business day following the day on which the participant contribution or loan payment is received by the employer in the case of amounts that a participant or beneficiary pays to an employer. The additional protection that would result from requiring compliance with the safe harbor as a condition of SCC relief is that small employers would either have or agree to implement clear procedures for the timely handling of participant contributions. In the Department's view, the use of the small plan safe harbor standard for large plans would be inappropriate. EBSA expects that large plans generally can and should be depositing participant contributions with the plan sooner than 7 business days after the contributions are withheld or received by the employer.

(2) Conforming Revisions to Current Application Process Provisions for Delinquent Participant Contributions (Sections 7.1(a), (c) and (d))

Section 7.1(a) has been renamed ''Delinquent Participant Contributions and Loan Repayments to Pension Plans under VFC Program Applications'' to clarify that it applies only to corrections pursuant to Program applications in contrast to self-corrections under section 7.1(b). Additionally, section 7.1(a) has been revised to reflect the Department's amendment of its regulation defining plan assets in 2010 to include participant loan repayments within these regulatory principles. (See 29 CFR 2510.3–102(a)(1)). Language has also been added to sections 7.1(a)(3)(ii)(A) and (iii)(A) to explain that the required narrative in the application must include a description of any steps taken to prevent future delinquencies. Language referring to Restoration of Profits has been deleted from sections 7.1(a)(2)(i) and (ii) to simplify the Program because in the Department's experience no applicant has reported generating a profit through use of the delinquent amounts.

Sections 7.1(b) ''Delinquent Participant Contributions to Insured Welfare Plans'' and (c) ''Delinquent Participant Contributions to Welfare Plan Trusts'' are being re-designated as sections 7.1(c) and (d) respectively. A change also has been made to each of these sections to clarify that the participant contributions were remitted to the insurance provider in section 7.1(c)(3)(iii) and to the trust in section 7.1(d)(3)(ii) rather than the plan as previously stated. A change was also made to delete language referring to Restoration of Profits in sections 7.1(d)(2)(i) and (ii) to simplify the Program because, as stated above, no applicant has reported generating a profit through use of the delinquent amounts.

The VFC Program does not include a correction for delinquent matching employer contributions. Although some applications filed under the current VFC Program for delinquent participant contributions have sought relief for matching employer contributions, EBSA historically concluded that the different characteristics of the plan asset and fiduciary obligations that apply in the case of employer contributions make it inappropriate to include matching employer contributions as a transaction in a VFC Program. The Agency's position on that subject has not changed. Nonetheless, to the extent that a Program application provides that the employer will apply the same correction formula to the employer matching contributions that it is required to apply to the delinquent participant contributions, EBSA anticipates that it will not reject or refuse to process such applications even though the ''correction'' of the employer contribution is not a covered transaction under the VFC Program, is not entitled to any relief under the Program, and will not be covered by any no action letter.

(3) Loans—Sections 7.2(b), (c) and (d)

The original VFC Program included as an eligible transaction ''Loan at Below-Market Interest Rate to a Party in Interest with Respect to the Plan.'' The corrective action in section 7.2(b) under both the current and this amended and restated Program requires the payment of the loan in full, plus penalties, and the greater of the Lost Earnings or Restoration of Profits. In addition to the required section 6.1 documentation, an applicant currently must provide both a written copy of an independent commercial lender's fair market interest rate determination under section 7.2(b)(3)(ii) and a copy of an independent fiduciary's dated, written approval of the fair market interest rate determination under section 7.2(b)(3)(iii). To reduce applicants' costs, the VFC Program 2022 Amendments would amend section 7.2(b)(3)(iii) to eliminate the requirement that an independent fiduciary validate in writing the process used to determine the fair market interest rate determination for loans in the amount of $10,000 or less. Thus, under these amendments to the Program, in the case of below-market interest rate loans in the amount of $10,000 or less, a copy of the independent commercial lender's written fair market interest rate

[11] In determining whether a plan qualifies as a ''small'' plan, self-correctors can rely on the end of year participant count reported on the latest Form 5500 or Form 5500–SF filed for the plan because that would be the annual report count closest in time to use of the SCC. If there is no Form 5500 or Form 5500–SF for the prior year, the self-corrector should use the participant count for the end of the year that would have been reported if a Form 5500 or Form 5500–SF were required or that will be reported when the prior year Form 5500 or Form 5500–SF is filed. Images of the Form 5500 and Form 5500–SF filings for plan years after 2008 can be accessed on EBSA's website at *efast.dol.gov/5500search/*. The Department notes that potential self-correctors who fail to meet the SCC conditions for participating in the SCC may still be eligible to correct the delinquency violation through the normal application process under the VFC Program.

determination will now suffice to validate the interest rate.

As a further clarifying change, the wording in section 7.2(b)(3)(i) is being revised to require a narrative describing the process used to determine the interest rate at the time the loan was made.

Section 7.2(c) ''Loan at Below-Market Interest Rate to a Person Who is Not a Party in Interest With Respect to the Plan'' is also a transaction that dates from the original VFC Program. Sections 7.2(c)(2)(i) and (ii) are being re-organized to clarify the required correction for this transaction. Section 7.2(c)(2)(ii) also adds an alternative to payment of the present value of the Principal Amounts from the Recovery Date to the loan's maturity date. The present value payment method must be coupled with the borrower's continued payment of the outstanding loan balance under the original repayment schedule for the duration of the loan. The new alternative permits the borrower's payment of the amortized outstanding loan balance over the remaining payment schedule of the loan at the interest rate that would have been applicable if the loan had originally been made at the fair market interest rate. When this new alternative is used, the applicant must submit a copy of the loan repayment schedule for the re-amortized loan repayments under section 7.2(c)(3)(iii). Any fair market interest rate must be determined by an independent commercial lender.

The wording in section 7.2(c)(3)(i) is being revised in a similar fashion to the wording in section 7.2(b)(3)(i) to require a narrative describing the process used to determine the interest rate at the time the loan was made.

Section 7.2(d) ''Loan at Below-Market Interest Rate Solely Due to a Delay in Perfecting the Plan's Security Interest'' is another transaction dating back to the original 2002 Program. It provides a correction for when a plan made a purportedly secured loan to a non-party in interest, but a delay occurred in recording or otherwise perfecting the plan's interest in the loan collateral, resulting in the loan being treated as an unsecured loan until the plan's security interest was perfected. Section 7.2(d)(2) is being re-organized to clarify the correction. Section 7.2(d)(2)(ii) specifically requires that the plan's interest in the loan collateral be recorded or perfected. For situations where the delay in perfecting the loan's security caused a permanent change in the risk characteristics of the loan, section 7.2(d)(2)(iii) is being amended to add an alternative to the payment of the present value of the remaining Principal Amounts from the date the loan is fully secured to the maturity date of the loan. The present value payment method must be coupled with the borrower's continued payment of the outstanding loan balance under the original repayment schedule for the duration of the loan. The new alternative permits the borrower's payment of the amortized outstanding loan balance over the remaining payment schedule of the loan at the interest rate that would have been applicable for a loan with the changed risk characteristics. When this new alternative is used, the applicant must submit a copy of the loan repayment schedule for the re-amortized loan repayments under section 7.2(d)(3)(iii). Any fair market interest rate must be determined by an independent commercial lender.

In a related modification applicable to these three types of loans, section 5(a) is being revised to include a specific explanation in section 5(a)(5) for when a commercial lender will be considered to be ''independent'' using the same criteria as is used to determine the ''independence'' of an appraiser.

As an ongoing protection for plans and their participants, EBSA staff, as part of the application review process, will continue to monitor a commercial lender's interest rate determination process and will object if it appears that a lender is not truly ''independent'' or the interest rate determination process is otherwise flawed.

(4) Purchases, Sales and Exchanges—Section 7.4

Section 7.4(a) ''Purchase of an Asset (Including Real Property) by a Plan from a Party in Interest'' provides a method of correction for situations when the plan purchased an asset (including real property) from a party in interest in a transaction to which no prohibited transaction exemption applies. A plan's purchase from a party in interest can be corrected by reversing the transaction provided the plan receives the higher of the fair market value at resale or the Principal Amount plus the greater of either Lost Earnings or Restoration of Profits. As an alternative correction, a plan may retain the asset plus receive an amount resulting from application of a formulaic calculation, but only if an independent fiduciary determines that the plan will realize a greater benefit from this alternative correction than from the resale of the asset. Section 7.4(a)(2) is being amended by adding a new paragraph (iii) that provides a third method of correction in situations when the purchase cannot be reversed or the asset retained because the plan no longer owns the asset (*e.g.,* sales, maturity, destruction). Under this new correction, the plan can receive a ''cash settlement'' if the asset has been sold and a Plan Official provides a statement, as required by section 7.4(a)(3)(v), that the sale was upon the advice of an independent fiduciary and not in anticipation of applying for relief under the Program. The determination of the cash settlement amount is prescribed in section 7.4(a)(2)(iii) and takes into account, among other factors, whether the plan realized a profit on the resale of the asset, or a loss on the resale, maturity or destruction of the asset.

As a further clarifying change, the wording in section 7.4(a)(2)(ii), is being modified to permit the subtraction of any earnings received on the asset up to the Recovery Date from Lost Earnings.

EBSA is also amending section 7.4(b) ''Sale of an Asset (Including Real Property) by a Plan to a Party in Interest.'' Section 7.4(b) provides a method of correction in situations when the plan sold an asset for cash to a party in interest in a transaction to which no prohibited transaction exemption applies. The amendment adds a condition to the section 7.4(b)(2)(ii) correction to permit the plan to receive the correction amount rather than to repurchase the asset by permitting a Plan Official to determine that the asset cannot be repurchased (*e.g.,* destruction, maturity). This new condition in section 7.4(b)(2)(ii) is an alternative to the section's existing condition requiring an independent fiduciary to determine that the plan will recognize a greater benefit from this correction than the correction in section 7.4(b)(2)(i). As part of the required documentation under section 7.4(b)(3)(iv), the Plan Official making this determination must provide a written explanation of why the asset cannot be repurchased.

(5) Sales/Leasebacks—Section 7.4(c)

Section 7.4(c) ''Sale and Leaseback of Real Property to Employer'' provides a method of correction for a plan sponsor that sells a parcel of real property to the plan, which is then leased back to the plan sponsor and is not otherwise exempt. To more accurately reflect the statutory exemption provided by ERISA section 408(e), which does not limit the transaction to the plan sponsor, the VFC Program 2022 Amendments would explicitly expand the transaction to allow correction of leases to affiliates of the plan sponsor. Changes, where appropriate, to the associated class exemption are being proposed for consistency with these amendments.

(6) Illiquid Assets—Section 7.4(f)

The April 2005 Program revision added a correction for a transaction that permits a plan to divest, rather than continue to hold in its portfolio, a previously purchased asset that is determined to be illiquid and that had been acquired under three possible circumstances described in the transaction. The transaction was further expanded in 2006 by adding a fourth scenario reflecting the acquisition of an asset from a party in interest to which a statutory or administrative exemption applied. This amendment of the VFC Program retains the four scenarios that compose the transaction, as well as the correction method, which permits the sale of the asset to a party in interest, provided the plan receives the higher of (A) the fair market value of the asset at the time of resale, without a reduction for the costs of sale; or (B) the Principal Amount, plus Lost Earnings as described in section 5(b). This correction encompasses a sale of the illiquid asset to a party in interest by the plan even if the original purchase of the asset by the plan was not a prohibited transaction or imprudent. In this regard, the definition of Principal Amount is being modified to take into account the possibility that the transaction being corrected was neither a prohibited transaction nor a fiduciary Breach. Section 7.4(f)(2)(ii) will now define Principal Amount as either the amount that would have been available had the Breach not occurred, or the plan's original purchase price if the original purchase was not a prohibited transaction or imprudent. The amendments also clarify that in the case of an illiquid asset that is a parcel of real estate, no party in interest may own real estate that is contiguous to the plan's parcel of real estate on the Recovery Date.

(7) Definitions—Section 3

The definition of ''Under Investigation'' in section 3(b)(3)(i) is being modified to state that an investigation of a plan resulting from an EBSA staff review, which could include a review by an EBSA Benefits Advisor, is considered an investigation by EBSA that automatically makes an applicant, self-corrector or plan sponsor ineligible to participate in the Program in connection with the plan provided that, as is currently required, written or oral notice of an investigation, review or examination has been received by the plan, a Plan Official, or an authorized plan representative. However, section 3(b)(3) makes clear that a plan will not be considered to be ''Under Investigation'' merely because EBSA staff has contacted the plan, the applicant, the self-corrector, or the plan sponsor in connection with a participant complaint, unless the participant complaint concerns the transaction described in the application or identified in the SCC notice and the plan has not received the correction amount due under the Program as of the date EBSA staff contacted the plan, the applicant, the self-corrector, or the plan sponsor.

There is a new limited exception to the definition of ''Under Investigation'' for bulk applicants that is discussed more fully below. Moreover, the existing exception from the definition of ''Under Investigation'' in section 3(b)(3) for a work paper review of the accountant of a plan by EBSA's Office of the Chief Accountant remains unchanged.

(8) Eligibility Criteria—Section 4

Section 4 ''VFC Program Eligibility'' is being amended to add two new limited exceptions to the existing eligibility requirements to promote increased usage of the Program. Currently, in order to be eligible to participate in the VFC Program there are two requirements involving possible criminal activity. First, if ''any governmental agency is conducting a criminal investigation of the plan, or of the potential applicant, self-corrector or plan sponsor in connection with an act or transaction directly related to the plan,'' such plan is considered ''Under Investigation'' in accordance with section 3(b)(3)(iii) and is not eligible for relief under the Program. This requirement remains. However, in addition to the first requirement, a second eligibility requirement in section 4(b) requires that there can be ''no evidence of potential criminal violations as determined by EBSA.'' EBSA has received applications involving clear evidence of potential criminal violations such as when a bookkeeper allegedly embezzled money from the plan sponsor, including participant contributions. In some situations, the plan sponsor repaid the money to the plan, including Lost Earnings, and referred the embezzlement to the local authorities who subsequently prosecuted the alleged embezzler. In situations like this, EBSA does not believe an innocent applicant who applies under the Program in such situations should be ineligible for relief under the Program. Accordingly, an exception is being added in paragraph (b)(2) to the section 4 requirements for eligibility to allow participation in the Program by an innocent plan administrator, plan sponsor or applicant for cases involving delinquent participant contributions and loan repayments when (1) all funds have been repaid to the plan; (2) the appropriate law enforcement agency has been notified of the alleged criminal activity; and (3) the applicant submits a statement (covered by the Penalty of Perjury Statement) with the application providing contact information for the law enforcement agency, asserting that the applicant was not involved in the alleged criminal activity, and reporting whether a claim relating to the potential criminal violation has been made under an ERISA section 412 fidelity bond. In light of that change, section 4(b) is re-named and re-designated as section 4(b)(1), ''In general.'' EBSA always retains the right to reject any VFC Program application based on its review of the criminal activity involved.

With regard to the ERISA fidelity bond, although a copy was originally required to be included with an application, the 2002 Program was modified to instead permit applicants to include information concerning the plan's ERISA fidelity bond. This informational requirement was eliminated in the 2006 Program. Although the informational requirement is not being added back to the Program under the VFC Program 2022 Amendments, EBSA emphasizes that these modifications focused merely on streamlining the application process and should not be misconstrued as eliminating or modifying the ERISA section 412 bonding requirements that protect plans against loss by reason of acts of fraud or dishonesty.[12]

As noted above, a plan is automatically ineligible to participate in the Program if it is considered ''Under Investigation'' by EBSA as defined in section 3(b)(3) of the Program. Over the past several years, EBSA has received Program applications from service providers to correct Breaches involving multiple plans. Some of these applications have involved hundreds, or even thousands, of plans, some of which are Under Investigation by EBSA. Consequently under the 2006 Program, such plans could not be included in any resulting no action letter. EBSA would like to be able to issue a no action letter to the service provider that covers all plans named in the application in certain circumstances. Accordingly, an exception is being added in section 4(d) to permit the submission of bulk applications by a single service provider when certain conditions are met. To qualify: (1) the application must cover at

[12] *See* FAB 2008–04, (Nov. 25, 2008); 29 CFR 2550.412–1 (1975) and Part 2580 (1985).

least ten named plans and each plan must have participated in the transaction being corrected; (2) the applicant must be a service provider that is applying for relief only on its own behalf; (3) the applicant is currently or was providing services to each of the named plans at the time of the transaction being corrected; and (4) the service provider cannot be Under Investigation by EBSA and the corrective action cannot have been taken as a result of an EBSA investigation or review of any named plan. EBSA, of course, retains the right to determine whether the corrective action was taken as a result of any investigation, and to exclude any plan involved in the investigation from the no action letter. Also, section 6.1(d)(3) is being amended to permit a bulk applicant to provide for each named plan either the Annual Report Form 5500 filing information or the plan sponsor's nine-digit number (EIN). This procedural change will avoid undue delay while a service provider attempts to secure Annual Report Form 5500 filing information, which may not be directly related to the Breach. Section 6.1(g) is also being amended to permit a bulk applicant with knowledge of the transaction that is the subject of the application to sign and date the Penalty of Perjury Statement in which the applicant certifies that it is not Under Investigation by EBSA instead of requiring a signature from a plan fiduciary for each plan covered by the application.

(9) Miscellaneous Modifications

This document contains assorted other clarifying changes to update the Program, assist Program users and maintain consistency among provisions. For example, section 5(d) ''Distributions'' reflects the cessation of both the Internal Revenue Service (IRS) and Social Security Administration letter forwarding services for missing participants and now provides revised guidance on locating individuals who are owed supplemental distributions. Another example is sections 7.3(a)(3) and (b)(3). Those sections provide that only certain supporting documentation must be provided with the application. The words ''unless otherwise requested by EBSA'' have been added to confirm that EBSA may in individual cases request copies of other supporting documentation. Similarly, references to self-corrector, self-correction and the SCC notice have been added to various provisions where appropriate. Additionally, in sections 7.4(d) and (e) dealing with transactions at greater and less than fair market value respectively, the documentation requirement for the qualified, independent appraiser's report has been revised to correctly specify value rather than fair market value at the time of the transaction. In section 7.5 ''Benefits,'' concerning the distribution of overvalued plan assets in a defined contribution plan, the correction specifically requires the restoration to the plan of the amount that exceeded the paid distribution amount to which all affected participants were entitled under the terms of the plan, plus Lost Earnings as described in section 5(b) on the overpaid distributions.

C. Statement on Availability 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 document, 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. Additionally, as the VFC Program includes information collections that are subject to the PRA, the Department seeks public comment below on the revisions to the information collections included in this amended and restated VFC Program. The Department will then seek approval of the revisions from OMB in accordance with procedures established by the PRA. A separate notice will be published in the **Federal Register** with a 30-day comment period when the Department submits the VFC Program to OMB seeking OMB's approval of the revised information collections. This amended and restated VFC Program, including the SC Component, will become available following OMB approval and the Department will announce the availability in a subsequent **Federal Register** Notice. Until such time, the existing VFC Program remains available.

The amendments to the associated class exemption, PTE 2002–51, are proposed so that its conditional relief also is not available until the amendments are published in final form; however, relief remains available under the conditions of the existing exemption. The Department expects that the availability of the amended and restated Program will encourage employers and fiduciaries, which otherwise might not do so, to correct Breaches and reimburse plan losses. Of course, implementation of this amended and restated Program does not foreclose resolution of fiduciary Breaches by other means, including entering into settlement agreements with the Department.

Comments may be submitted on any aspect of the VFC Program, including the amendments being announced in this document. The Department is particularly interested in comments on whether the Program should be further expanded in four respects.

First, EBSA has undertaken a nationwide compliance initiative to help retirement plans focus on practices to maintain complete and accurate census information, communicate with participants and beneficiaries about their eligibility for benefits, and implement effective policies and procedures to locate missing participants and beneficiaries. The Agency has a national enforcement project focused on these issues in defined benefit plans, has issued a compliance assistance release, and published a set of best practices that the fiduciaries of defined benefit and defined contribution plans, such as 401(k) plans, can follow to ensure that plan participants and beneficiaries receive promised benefits when they reach retirement age. The Department is interested in public comments on whether the VFC Program should include a transaction for correction of fiduciary breaches involved in such recordkeeping, communication, and benefit payment failures.

Second, the VFC Program contains a transaction for certain participant loans that fail to qualify for ERISA's statutory exemption for plan loan programs in ERISA section 408(b)(1). The covered transaction is for a loan the terms of which did not comply with plan provisions that incorporated requirements of section 72(p) of the Code. The VFC Program requires that the plan official voluntarily correct the loan with IRS approval under the Voluntary Correction Program of the IRS' Employee Plans Compliance Resolution System (EPCRS). The Department is interested in public comments on whether there are other circumstances in which the VFC Program could be integrated with corrections under EPCRS. For example, the IRS now allows participant loan transactions to be corrected under the Self-Correction Program component of EPCRS, but the VFC Program does not have a corollary self-correction component for participant loan transactions and requires that applicants correct participant loan transactions under the normal EPCRS procedures to be eligible for VFC Program correction under Title I of ERISA. Further, the latest updated version of EPCRS in Rev.

Proc. 2021–30 makes improvements to the program's rules for correcting benefit overpayments from defined benefit (DB) pension plans that give DB plan fiduciaries new options for correcting such overpayments and addressing inequities that may arise if the plan seeks to place a repayment burden on the participant. The Department has issued guidance that the hardship of a participant or beneficiary resulting from a recovery attempt, or the cost of collection efforts, may be such that it would be prudent for the plan not to seek recovery notwithstanding the fact that an overpayment of benefits to a participant or beneficiary may involve a fiduciary's failure to properly administer the plan in accordance with the terms of the plan's governing documents. See Advisory Opinions 77–07, 77–08, 77–32A, 77–33, 77–34. The Department is interested in comments on whether changes should be made to better integrate the VFC Program provisions on participant loan transactions with the IRS EPCRS and whether a transaction for correcting overpayments from DB pension plans should be added to the VFC Program that is integrated with correction of the overpayment under the IRS EPCRS.

Third, the Department is considering revising the program to either permit or require that VFC Program applications be submitted electronically. The Department is evaluating available alternative approaches to e-submission, *e.g.,* email versus an internet or web-based portal, but is particularly interested in comments on whether e-submission should be required and whether applicants or classes of applicants have issues or challenges with e-submission that the Department should consider ways to accommodate. The VFC Program application process is currently administered out of EBSA's Regional Offices. Some EBSA Regional Offices have email boxes that can be used for e-submission of VFC Program applications and supporting documents. As an interim step while EBSA considers a more uniform approach, text is being added to the VFC Program to encourage applicants to contact the relevant Regional Office about email submission options and format requirements, *e.g.,* penalty of perjury statements.

Fourth, on June 3, 2022, the IRS announced a pre-audit compliance pilot program for retirement plans. See Employee Plans News | Internal Revenue Service at *www.irs.gov/retirement-plans/employee-plans-news.* Under the program, the IRS will send a pre-audit letter to plan sponsors whose retirement plans have been selected for audit giving the plan sponsor a 90-day window to review the plan's documents and operations to determine if they meet current tax law requirements. If that review reveals mistakes, the plan sponsor may be able to self-correct or request a closing agreement, notify the IRS of correction actions taken and potentially avoid or limit the scope of the IRS examination. The goal is to reduce taxpayer burden and reduce the amount of time spent on retirement plan examinations. The IRS newsletter states that at the end of the pilot, the IRS intends to evaluate its effectiveness and determine if it should continue to be part of the IRS' overall compliance strategy. This is a change from the IRS' existing position that generally allows voluntary correction only until the IRS had identified the plan for audit. The VFC Program includes a similar principle under which persons are ineligible to use the VFC Program if they have received written or oral notice of an investigation, review, or examination by EBSA, IRS, and certain other governmental authorities. The Department is interested in comments on whether it should adopt a pre-audit program similar to the IRS pilot program, and if so, whether the ''under investigation'' provisions of the VFC Program should be revised to accommodate voluntary correction of covered transactions in connection with such a pre-audit program.

D. Regulatory Impact Analysis

The following is a discussion of the examination of the effects of this regulatory action as required by Executive Order 12866,[13] Executive Order 13563,[14] the Paperwork Reduction Act of 1995,[15] the Regulatory Flexibility Act,[16] section 202 of the Unfunded Mandates Reform Act of 1995,[17] Executive Order 13132,[18] and the Congressional Review Act.[19]

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing and streamlining rules, and of promoting flexibility.

Under Executive Order 12866, ''significant'' regulatory actions are subject to the requirements of the executive order and review by the Office of Management and Budget (OMB). Section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as 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. For this purpose, a ''rule'' includes ''an agency statement of general applicability and future effect . . . that is designed to implement, interpret, or prescribe . . . policy or to describe the procedure or practice requirements of an agency.''

OMB has determined that this action is significant under section 3(f)(4) because it raises novel legal or policy issues arising from the President's priorities. Accordingly, OMB has reviewed this action, and the Department has assessed the costs and benefits of its amended enforcement policy and related PTE proposal.

The VFC Program is designed to provide an efficient, cost-effective method for Plan Officials to correct a variety of ERISA fiduciary breaches and prohibited transactions and receive Departmental recognition of the correction. The Department expects that the amendments to the VFC Program will increase efficiency and accessibility for potential applicants and self-correctors. These changes, described further below, include in part, a new Self-Correction Component for delinquent participant contributions and loan repayments involving Lost Earnings less than or equal to $1,000, acceptance of bulk applications with modified requirements, and increased flexibility in the procedures for a variety of other transactions. These changes

[13] Regulatory Planning and Review, 58 FR 51735 (Oct. 4, 1993).

[14] Improving Regulation and Regulatory Review, 76 FR 3821 (Jan. 18, 2011).

[15] 44 U.S.C. 3506(c)(2)(A) (1995).

[16] 5 U.S.C. 601 *et seq.* (1980).

[17] 2 U.S.C. 1501 *et seq.* (1995).

[18] Federalism, 64 FR 153 (Aug. 4, 1999).

[19] 5 U.S.C. 804(2) (1996).

also include proposed elimination from the exemption of a three-year limitation for VFC Program applicants that take advantage of the relief provided by the VFC Program and the exemption for a similar type of transaction.

All pension and welfare plans can utilize the VFC Program if they have a fiduciary breach for which there is an eligible transaction. Parties that are covered by section 4975 of the Code can rely on the related class exemption for excise tax relief for transactions identified in the exemption that are corrected under the VFC Program. In 2019 there were 686,809 defined contribution plans and 46,870 defined benefit plans that would be impacted by these changes.[20] In 2021 there were 2,468,363 health plans [21] and 673,000 other welfare benefit plans that would also be impacted by these changes.[22]

An average of 1,429 applicants per year used the VFC Program from 2018 to 2020. Since the Department does not have data on the Self-Correction Component, as it is new, the Department assumes that 74 percent of VFC Program applicants will move to the Self-Correction Component.[23] The Department projects that the changes to the VFC Program will result in two new Program users filing bulk applications, 367 Program users filing non-bulk applications,[24] 1,072 plans using the new Self-Correction Component,[25] for a total of 1,441 users of the program and PTE.[26]

The Department believes that the benefits of the amended VFC Program and related PTE justify its costs. Because participation is voluntary, 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. 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 Self-Correction Component for delinquent participant contributions, and other expansions and clarifying modifications of the Program, 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 the revisions to the Program, or the potential increase in participation that will be associated with these revisions. However, these changes to the VFC Program will reduce associated costs by reducing the number of hours required to make corrections and file applications. Compared with the existing VFC Program, the Department expects the amended Program's per-user costs to be lower because the amendments could move 74 percent of VFC Program applications to the Self-Correction Component.[27] Moreover, implementing the Self-Correction Component will reduce the recordkeeping and reporting cost for Plan Officials with small amounts of delinquent participant contributions and loan repayments, because they no longer will have to submit an application to the Department with extensive supporting documentation, but merely submit a self-correction notice with minimal data to the Department and provide corroborating documentation to the plan administrator. This Self-Correction Component provides additional flexibility to Plan Officials. The Department is also providing additional flexibility by proposing to eliminate the three-year limitation in the PTE. The Department estimates that the total cost savings associated with the Self-Correction Component is $206,550.[28]

Plans or their service providers will need to familiarize themselves with the changes to the VFC Program and amendments to the PTE. Service providers can help multiple plans in a year or across years, so although it could take a service provider multiple hours to review the amended requirements the actual burden impact on an individual plan would be less. With an hourly rate for the in-house compensation and benefits manager of $124.75 per hour,[29] the Department estimates that the total cost burden for compensation and benefit managers to become familiar with the changes to the VFC Program and amended PTE will be $359,530.[30]

Overall, the Department estimates that the costs of the VFC Program and the associated class exemption, in their amended forms, would total approximately $1,359,006 ($1,289,305 in annual equivalent costs reflecting the monetized cost of the work performed by in-house personnel and outside service providers and $69,701 in annual cost burden reflecting the cost of materials and postage). These costs are quantified and discussed in more detail in the Paperwork Reduction Act section, below. This total represents a cost savings due to the new Self-Correction Component.

Benefits for Plan Officials who are granted relief under the VFC Program include elimination of risks arising from an otherwise uncorrected fiduciary breach, as well as savings of resources that otherwise might have been needed to defend against a civil action by the Department based on the breach. An additional and significant benefit of the VFC Program accrues to participants and beneficiaries through the correction of fiduciary breaches and the restoration to the plan of amounts representing losses or improperly generated profits arising from impermissible transactions, resulting in greater security of plan assets and future benefits. The changes to the VFC Program will allow Plan Officials to obtain the above benefits at a reduced cost. The Department hopes that this cost reduction may encourage other Plan Officials to correct previously undetected and unreported fiduciary breaches, which would enhance the retirement income security of participants and beneficiaries; however,

[20] Employee Benefits Security Administration. ''Private Pension Plan Bulletin: Abstract of 2019 Form 5500 Annual Reports.'' (September 2021).

[21] U.S. Department of Labor, EBSA calculations using the 2021 Medical Expenditure Panel Survey, Insurance Component (MEPS–IC), the Form 5500 and 2019 Census County Business Patterns.

[22] U.S. Department of Labor, EBSA calculations using non-health welfare plan Form 5500 filings and projecting non-filers using estimates based on the non-filing health universe.

[23] The Department estimates that the Self-Correction Component will streamline the process for the 74 percent of small and large VFC Program applicants involving lost earnings less than or equal to $1,000.

[24] 1,429 applicants × (100% minus 74.3%) = 367 non-bulk applicants.

[25] The estimate includes a one percent increase in the number of self-corrections, resulting from the removal of the three-year limitation provision for self-correctors. (1,429 applicants × 74.3% × 1.01 = 1,072.)

[26] 1,072 self-correctors + 2 bulk applicants + 367 non-bulk applicants = 1,441 Program Users.

[27] The Department estimates that the Self-Correction Component will streamline the process for 74 percent of small and large VFC cases involving lost earnings less than or equal to $1,000.

[28] The Department estimates that the quantified cost of the VFC Program before the addition of the Self-Correction Component would have been $794,724. The Department estimates that the quantified cost of the VFC Program with the Self-Correction Component is $588,174. Thus, the Department estimates that total cost savings associated with the Self-Correction Component is $206,550 ($794,724 − $588,174).

[29] Internal DOL calculation based on 2021 labor cost data. For a description of the Department's methodology for calculating labor rates, see: *https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/technical-appendices/labor-cost-inputs-used-in-ebsa-opr-ria-and-pra-burden-calculations-june-2019.pdf.*

[30] 1,441 users × 2 hours × $124.75 = $359,530.

it has no data to reliably predict the extent of the increased usage. The Department will continue to actively monitor the use of the VFC Program in order to better evaluate its benefits and costs.

Regulatory Flexibility Analysis

The Regulatory Flexibility Act (RFA) [31] imposes certain requirements with respect to federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act, or any other law, and are likely to have a significant economic impact on a substantial number of small entities.[32] Unless the head of an agency certifies that a proposed rule will not have a significant economic impact on a substantial number of small entities, section 603 of the RFA requires the agency to prepare and make available for public comment an initial regulatory flexibility analysis of the proposed rule.[33]

This document describes an enforcement policy of the Department that is not being issued as a general notice of proposed rulemaking. Therefore, the RFA does not apply. However, the Department is also issuing a proposed amendment to a class exemption (PTE 2002–51) to which the Regulatory Flexibility Act does apply. The Department certifies that the amendments to PTE 2002–51 will not have a significant economic impact on a substantial number of small entities. However, EBSA considered the potential costs and benefits of this action for small pension plans and the Plan Officials in developing the proposed amendment to the class exemption and believes that its greater simplicity and accessibility would make the Program more useful to small employers who wish to avail themselves of the relief offered under the exemption. Below is the factual basis for the certification.

As mentioned previously, all pension and welfare plans can utilize the VFC Program with the related PTE if they have a fiduciary breach for which there is an eligible transaction. In 2019 there were 600,165 small defined contribution plans and 39,586 small defined benefit plans and plan officials that would be impacted by these changes.[34] In 2021 there were 2,386,024 small health plans that would also be impacted by these changes.[35] Currently 1,429 plan fiduciaries make use of the VFC Program in a given year and the Department projects a small increase to 1,441 fiduciaries making use of the VFC Program in a given year. An estimated 1,072 plans will utilize the new Self-Correction Component in a given year.

The Department is proposing to amend the related PTE so that excise tax relief will be available for transactions that are corrected under the Self-Correction Component. The Department is also proposing to amend the PTE to eliminate the three-year limitation. Thus, all plans eligible to use the VFC Program would be eligible to use the PTE more than just once every three years. However, the Department estimates that, of the total number of pension and welfare plans significantly less than one percent will use the PTE in a given year.[36]

The proposed amended PTE would provide excise tax relief for self-correctors if they pay the amount of the excise tax owed to the plan. The Self-Correction Component can only be used in situations where the size of lost earnings is $1,000 or less. Section 4975(a) imposes an excise tax on each prohibited transaction equal to 15 percent of the amount involved with respect to the prohibited transaction for each year (or part thereof) in the taxable period. Therefore, the maximum excise tax owed for each year would generally not exceed $150.[37]

Plans or their service providers will need to familiarize themselves with the amendments to the PTE. Service providers can help multiple plans in a year or across years, so although it could take a service provider multiple hours to review the amended requirements the actual burden impact on an individual plan would be less. The Department estimates that all 1,072 self-correctors will use the new provisions of the amended class exemption.[38] The per-plan cost for rule familiarization would be $125.[39]

For plans with the maximum lost earnings of $1,000 and an excise tax of 15 percent the maximum excise tax in each year would generally not exceed $150. Including the cost of rule familiarization of $125, the total expense could be $275 in a year. Based on the foregoing, the Department hereby certifies that these proposed amendments will not have a significant economic impact on a substantial number of small entities. Therefore, the Department has not prepared an Initial Regulatory Flexibility Analysis.

Paperwork Reduction Act

As part of its continuing effort to reduce paperwork and respondent burden, the Department 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) (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.

The ICRs in the VFC Program and PTE 2002–51 are currently approved under OMB Control Number 1210–0118. A copy of the ICRs may be obtained by contacting the office listed in the Addresses section below.

The Department is seeking comment the revisions to the information collections in the enforcement policy and proposed amendments to PTE 2002–51. The Department is particularly interested in comments that:

- Evaluate whether the 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;

[31] 5 U.S.C. 601 *et seq.* (1980).

[32] 5 U.S.C. 551 *et seq.* (1946).

[33] 5 U.S.C. 604 (1980).

[34] Employee Benefits Security Administration. ''Private Pension Plan Bulletin: Abstract of 2019 Form 5500 Annual Reports.'' (September 2021).

[35] U.S. Department of Labor, EBSA calculations using the 2021 Medical Expenditure Panel Survey, Insurance Component (MEPS–IC), the Form 5500 and 2019 Census County Business Patterns.

[36] In 2019, there were 733,678 pension plans. (*Source:* Employee Benefits Security Administration. ''Private Pension Plan Bulletin: Abstract of 2019 Form 5500 Annual Reports.'' (September 2021).) In 2021, there were 673,000 welfare benefit plans. (*Source:* U.S. Department of Labor, EBSA calculations using non-health welfare plan Form 5500 filings and projecting non-filers using estimates based on the non-filing health universe.) Thus, 0.08% of all pension and welfare plans will use the PTE in a given year. (1,072 plans/(733,678 plans + 673,000 welfare benefit plans) = 0.08%.)

[37] Under Reorganization Plan No. 4 of 1978, supra n. 1, the Secretary of the Treasury retains interpretive authority over Code sections 4975(a) and (b).

[38] Internal DOL calculation based on 2021 labor cost data. For a description of the Department's methodology for calculating labor rates, see: *https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/technical-appendices/labor-cost-inputs-used-in-ebsa-opr-ria-and-pra-burden-calculations-june-2019.pdf.*

[39] With an hourly rate for the in-house compensation and benefits manager of $124.75 per hour and one hour of burden allocated to a plan the burden be plan would be $125 (rounded).

• 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.

Dates: Written comments must be submitted to the office shown in the Addresses section on or before January 20, 2023.

Addresses: Comments should be sent to James Butikofer, Office of Research and Analysis, U.S. Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue NW, Room N–5718, Washington, DC 20210 or email: *ebsa.opr@dol.gov.*

The amended VFC Program, described above, includes a Self-Correction Component for delinquent participant contributions and loan repayments to pension plans involving Lost Earnings less than or equal to $1,000, streamlined requirements for bulk applications, and it expands and modifies transactions that are currently eligible for the VFC Program. The Self-Correction Component permits applicants to self-correct, and then provide EBSA with a notice of the self-correction through the online VFC Program web tool. Service providers are able to submit bulk applications to the VFC Program, under the existing terms and requirements of the Program, with some easing of the eligibility and information requirements. Under the new bulk applicant provisions, the bulk applicant will receive a no action letter providing relief only to the service provider correcting transactions involving each of the plans named in the application.

An average of 1,429 applicants per year used the VFC Program from 2018 to 2020. Since the Department does not have data on the Self-Correction Component, as it is new, the Department assumes that 74 percent of VFC Program applicants will move to the Self-Correction Component.[40] The Department projects that the changes to the VFC Program will result in two new Program users filing bulk applications, 367 Program users filing non-bulk applications,[41] 1,072 plans using the new Self-Correction Component,[42] for a total of 1,441 users of the program and PTE.[43]

In addition to the VFC Program, the Department is publishing a proposed amendment to the associated class exemption PTE 2002–51, which applies only to qualifying applicants and self-correctors participating in the VFC Program. The exemption is currently unavailable to VFC Program applicants that have, within the previous three years, taken advantage of the relief provided by the VFC Program and the exemption for a similar type of transaction. The Department is proposing to eliminate the three-year limitation. The three-year provision was initially included in the exemption to prevent parties from becoming lax in complying with fiduciary and other ERISA duties because of the availability of the exemption. Based on the Department's experience with the VFC Program and the exemption, the Department concluded that the risk of such behavior is low.

The overall paperwork burden for the amended VFC Program and the amended PTE 2002–51 is provided below.

VFC Program

For the VFC Program, the Department estimates that Plan Officials will devote 2.5 hours of clerical staff gathering paperwork, one hour of a compensation and benefits manager calculating Lost Earnings, and one hour of clerical staff engaging in recordkeeping activities for each non-bulk application or self-correction. The Department estimates that for each bulk application, Plan Officials will devote 25 hours of clerical staff gathering paperwork, 10 hours of a compensation and benefits manager calculating Lost Earnings, and 10 hours of clerical staff engaging in recordkeeping activities. Therefore, total burden hours for Plan Officials will equal approximately 6,566 hours.[44] With an hourly rate for the in-house compensation and benefits manager of $124.75 per hour [45] and an hourly rate for in-house clerical staff of $58.66 per hour,[46] this results in an equivalent cost of approximately $481,558.[47]

The Department estimates that external service providers will spend about 10 minutes completing and submitting the online Self-Correction Component notice, 20 hours completing and submitting bulk applications, and two hours completing and submitting all other applications.[48] Therefore, total hour burden for external service providers will be 952 hours.[49] With a rate of $108.04 per hour for an accounting professional,[50] the hour burden is equivalent to approximately $102,926.[51]

Factoring in mailing costs of $10 per application for all applications except those under the Self-Correction Component, the total cost burden for applicants will be approximately $3,690.[52]

The total hour burden associated with the VFC Program will be 7,518 hours with an equivalent cost of $584,484. The total cost burden associated with the VFC Program will be $3,690.

VFCP Class Exemption (PTE 2002–51)

The Department estimates that all 1,072 self-correctors and 286 of the VFC Program applicants will use the amended class exemption. The Department has determined that service

[40] The Department estimates that the Self-Correction Component will streamline the process for the 74 percent of small and large VFC Program applicants involving lost earnings less than or equal to $1,000.

[41] 1,429 applicants × (100% minus 74.3%) = 367 non-bulk applicants.

[42] The estimate includes a one percent increase in the number of self-corrections, resulting from the removal of the three-year limitation provision for self-correctors. (1,429 applicants × 74.3% × 1.01 = 1,072.)

[43] 1,072 self-correctors + 2 bulk applicants + 367 non-bulk applicants = 1,441 Program Users.

[44] [((1,072 self-correctors) + 367 non-bulk applicants) × (2.5 hours of gathering paperwork + 1 hour of calculating Lost Earnings + 1 hour of recordkeeping)] + [2 bulk applicants × (25 hours of gathering paperwork + 10 hours of calculating Lost Earnings + 10 hours of recordkeeping)] = 6,566 hours.

[45] Internal DOL calculation based on 2021 labor cost data. For a description of the Department's methodology for calculating labor rates, see: *https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/technical-appendices/labor-cost-inputs-used-in-ebsa-opr-ria-and-pra-burden-calculations-june-2019.pdf.*

[46] *Ibid.*

[47] [((1,072 self-correctors) + 367 non-bulk applicants) × (2.5 hours of gathering paperwork × $58.66 + 1 hour of calculating Lost Earnings × $124.75 + 1 hour of recordkeeping × $58.66)] + [2 bulk applicants × (25 hours of gathering paperwork × $58.66 + 10 hours of calculating Lost Earnings × $124.75 + 10 hours of recordkeeping × $58.66)] = $481,558.

[48] It should be noted that the required checklist for applications filed with the Department under the Program 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 separately as the final item in the model application for ease of use for those who do choose to use the model application.

[49] (1,072 self-correctors 10 minutes) + (367 non-bulk application × 2 hours) + (2 bulk application × 20 hours) = 952 hours.

[50] Internal DOL calculation based on 2021 labor cost data. For a description of the Department's methodology for calculating labor rates, see: *https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/technical-appendices/labor-cost-inputs-used-in-ebsa-opr-ria-and-pra-burden-calculations-june-2019.pdf.*

[51] (1,072 self-correctors × 10 minutes × $108.04) + (367 non-bulk application × 2 hours × $108.04) + (2 bulk application × 20 hours × $108.04) = $102,926.

[52] (367 non-bulk applications + 2 bulk applications) × $10 materials and postage per application = $3690.

providers will prepare the documentation required by the exemption at a cost of $108.04 per hour, which will require approximately one hour for completion and delivery. The hour burden associated with the exemption therefore is 1,358 hours with an equivalent cost of $146,718.[53]

Of the 286 VFC Program applicants using the exemption, 167 VFC Program applicants are required to send notices to their participants and beneficiaries.[54] Mailing notices to these 167 VFC Program applicants' estimated 242,956 participants and beneficiaries will result in a cost burden of $66,011[55] and a hour burden of 3,385 hours[56] and an equivalent cost of $198,574.

The total hour burden associated with the VFCP exemption will be 4,743 hours with an equivalent cost of $345,292. The total cost burden associated with the VFCP exemption will be $66,011.

Summary

The total aggregate annual hour burden for the information collection arising from the VFC Program and the exemption is estimated at 12,261 hours with an equivalent cost of $929,776 (7,518 hours with an equivalent cost of $584,484 for the VFC Program, 4,743 hours with an equivalent cost of $345,292 for VFCP exemption).

The total aggregate annual cost burden for the information collection arising from the VFC Program and the exemption is estimated at $69,701 ($3,690 for the VFC Program and $66,011 for VFCP exemption).

In summary, the categories in the table below encompass the numbers for both the VFC Program and the amended class exemption:

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: 1,442.

Frequency of Response: On occasion.

Responses: 244,397.

Estimated Total Burden Hours: 12,261.

Total Annual Cost (Operating and Maintenance): $69,701.

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. The Department notes that persons are not required to respond to the revised information collection unless it displays a currently valid OMB control number.

Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), as well as Executive Order 12875, this action does not include any Federal mandate that may result in expenditures by State, local, or tribal governments in the aggregate of more than $100 million, adjusted for inflation, or increase expenditures by the private sector of more than $100 million, adjusted for inflation.

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 States, or on the distribution of power and responsibilities among the various levels of government. Federal agencies promulgating regulations that have federalism implications must consult with State and local officials and describe the extent of their consultation and the nature of the concerns of State and local officials. This action does 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 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 amendments of the VFC Program in this document 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 1–2011, 77 FR 1088 (January 9, 2012). 29 U.S.C. 1132(a)(2) and (a)(5), 1136(b).

Voluntary Fiduciary Correction Program

[53] 1 hour × 1,358 users = 1,358 hours; 1 hour × 1,358 users × $108.04 per hour × = $146,718.

[54] The 1,072 self-correctors that meet the requirements of section IV D. of the exemption and 167 VFC Program applicants for whom a small amount of excise taxes otherwise would be imposed and that meet the requirement of section IV C. of the exemption are not required to provide the notice.

[55] For materials and postage for paper notices. 242,956 notices × 41.8% paper notices × ($0.65 per paper notice)] = $66,011. Electronic notices will be distributed at de minimis cost.

[56] For labor costs for paper notices. 242,956 notices × 41.8% paper notices × 2 minutes = 3,385; 242,956 notices × 41.8% paper notices × 2 minutes × $58.66 = $198,574. Electronic notices will be distributed at de minimis cost.

Section 1. Purpose and Overview of the VFC Program

The purpose of the Voluntary Fiduciary Correction Program (VFC Program or Program), including its Self-Correction Component (SC Component or SCC), is to protect the financial security of workers by encouraging identification and correction of transactions that violate or may 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 breach of fiduciary responsibility by a co-fiduciary. 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)(1) *Effect of a no action letter.* EBSA generally will issue to the applicant a no action letter [57] with respect to a Breach identified in the Program 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 civil penalties under either section 502(l) or 502(i) of ERISA on the correction amount paid to the plan or its participants.

(2) *Effect of correction under the SCC.* EBSA will not issue a no action letter to a self-corrector under the Self-Correction Component of the Program. A self-corrector will receive an acknowledgment and summary of the SCC notice submission by email. If the self-corrector satisfies the eligibility requirements of section 4 and corrects a Breach, as defined in section 3, in accordance with the requirements of sections 5, 6 and 7, EBSA will not initiate a civil investigation under Title I of ERISA regarding the self-corrector's responsibility for the Breach identified in the SCC notice or assess civil penalties under section 502(l) or 502(i) 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 Program application or the SCC notice and (2) that the corrective action was, in fact, taken.

(c) *Limits on the effect of a no action letter under 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 Breaches not specifically described in the Program, the relief afforded by the Program would not extend to such additional Breaches.

(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 issuing a rejection 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 from making the appropriate referrals of criminal violations as required by section 506(b) of ERISA.[58]

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

[57] *See* Appendix A.

[58] 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.

(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 as required by section 3003(c) of ERISA; [59] 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) *Limits on the effect of self-correction under the SCC. (1) In general.* Any relief afforded by a self-correction under the SCC is limited to the Breaches described in section 7.1(b) of the Program and to the Plan Officials who complete the Penalty of Perjury Statement in accordance with section 6.2(e). If a transaction gives rise to Breaches not specifically described in section 7.1(b) of the Program, the relief afforded by the SCC will not extend to such additional Breaches.

(2) *Self-corrector fails to satisfy the terms of the SCC.* If a self-corrector fails to satisfy the terms of the SCC, 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 self-correction.

(3) *Criminal investigations not precluded.* Participation in the SCC will not preclude:

(i) EBSA or any other governmental agency from conducting a criminal investigation of the transactions identified in section 7.1(b) of the Program;

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

(iii) EBSA from making the appropriate referrals of criminal violations as required by section 506(b) of ERISA.[60]

(4) *Other actions not precluded.* Compliance with the terms of the SCC 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; or

(ii) 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. Self-correctors should be aware that amended annual report filings may be required if action is taken to correct a Breach in accordance with submitting an SCC notice.

(5) *Not binding on others.* Compliance with the SCC 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 regarding the Breach corrected under the SCC.

Example. The plan sponsor withheld monies from employees' paychecks, which were to be contributed, in part, to both a 401(k) plan and an insured health benefit plan. The plan sponsor did not remit the funds to either plan until four months after the Date of Withholding or Receipt. The plan sponsor corrects both Breaches and pays the appropriate Lost Earnings amount to each of the plans. The plan sponsor properly completes and submits an SCC notice to EBSA identifying the transaction involving the 401(k) plan. Assuming all conditions of the SCC have been met, relief under the Program is provided to the plan sponsor as the self-corrector for the delinquent participant contributions to the 401(k) plan, but not for the delinquent participant contributions to the insured health benefit plan. However, the plan sponsor may submit an application to correct the Breach involving the insured health benefit plan contributions under section 7.1(c) of the Program.

(e) *Correction.* The correction criteria listed in the VFC Program represent EBSA enforcement policy with respect to both applications under the Program and use of the SC Component, 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 Breach. Applicants and self-correctors 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).[61] Correction may not be achieved under the Program by engaging in a prohibited transaction that is not subject to a prohibited transaction administrative exemption.

(f) *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 or SCC notice 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 omissions, other abuses of the VFC Program, 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 SCC notice, 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.

(g) *Confidentiality.* EBSA will maintain the confidentiality of any documents submitted under the VFC Program, to the extent permitted by law. However, as noted in paragraphs (c)(5) and (6) and (d)(3) and (4) 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.

[59] 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, the Secretary shall transmit such information to the Secretary of the Treasury.

[60] *See supra* note 58.

[61] *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 federal tax treatment of a violation 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. The IRS has indicated that, unless and until the Department of the Treasury and the IRS issue further guidance, 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 be treated as correction for purposes of section 4975. Also, a correction under the VFC Program for a breach that also constitutes an operational plan qualification failure generally will be treated as correction for purposes of the IRS' EPCRS.

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. 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 violation of the fiduciary responsibility provisions 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 by filing an application or submitting a self-correction notice in accordance with the VFC Program's requirements.

(3) *Under Investigation.* For purposes of section 4(a), a plan, potential applicant or self-corrector shall be considered to be ''Under Investigation'' if any investigation, review or examination described in (i), (ii), (iii), (iv) or (v) of this section 3 exists, and the plan, a Plan Official, or any authorized plan representative has received a written or oral notice of the investigation, review or examination.

(i) EBSA is conducting an investigation or review of the plan;

(ii) EBSA is conducting an investigation of the potential applicant, self-corrector or plan sponsor in connection with an act or transaction directly related to the plan;

(iii) any governmental agency is conducting a criminal investigation of the plan, or of the potential applicant, self-corrector or plan sponsor in connection with an act or transaction directly related to the plan;

(iv) the IRS is conducting an Employee Plans examination of the plan; or

(v) Other than investigations identified in sections 3(b)(3)(i), (ii), (iii), or (iv), the Pension Benefit Guaranty Corporation (PBGC), any state attorney general, any federal governmental agency, or any state insurance commissioner is conducting an investigation or examination of the plan, or of the applicant, self-corrector or plan sponsor in connection with an act or transaction directly related to the plan, unless in the case of a VFC Program application, the applicant notifies EBSA, in writing, of such an investigation or examination at the time of the application.

An applicant notifying EBSA of an investigation or examination under section 3(b)(3)(v) must submit the name of the examining agency and a contact person at such agency. Upon receipt of an application including such information, EBSA will promptly notify the investigating agency in writing of the VFC Program application. EBSA's notice will afford the examining agency an opportunity to provide EBSA with information relevant to the investigation or examination. In response to the information received from the investigating agency, EBSA, in its sole discretion, may decline to issue a no action letter to the applicant. 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, the self-corrector or the plan sponsor in connection with a participant complaint, unless the participant complaint concerns the transaction described in the application or identified in the SCC notice and the plan has not received the correction amount due under the Program as of the date EBSA staff contacted the plan, the applicant, the self-corrector or the plan sponsor. A plan also is not considered to be ''Under Investigation'' if the accountant of the plan is undergoing a work paper review based on such accountant's audit of the plan 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 multiple employer welfare arrangement (MEWA) received written notification from an agent of the state insurance commissioner's office that the MEWA has been scheduled for examination. The applicant does not notify EBSA of the 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 state insurance commissioner's office concerning its intent to examine the plan, and the applicant did not provide EBSA written notice of the examination with the application.

Example 2. Assume the same facts as in Example 1, except that the applicant chooses to notify EBSA in writing of the examination. The plan's eligibility to apply under the VFC Program would not be affected because the applicant provides written notice of the examination to EBSA with the application. EBSA will promptly notify the state insurance commissioner of the pending VFC Program application so that the state insurance commissioner's office has an opportunity to provide information about its examination to EBSA. EBSA will include the information received from the state insurance commissioner's office in its review of the VFC Program application.

Section 4. VFC Program Eligibility

Eligibility for the VFC Program is conditioned on the following:

(a) The plan, the applicant, or the self-corrector is not Under Investigation.

(b)(1) *In general.* The Program application contains no evidence of potential criminal violations as determined by EBSA.

(2) *Exception for VFC Program applications correcting transactions described in Section 7.1(a).* Participation in the VFC Program to correct delinquent participant contributions and loan repayments is permitted in cases where there is evidence of potential criminal violation by parties other than the plan administrator, the plan sponsor or the applicant provided:

(i) all funds have been repaid to the plan;

(ii) the appropriate law enforcement agency has been notified of the potential criminal violation; and

(iii) the applicant submits to the appropriate EBSA office a statement (A) providing contact information for the law enforcement agency that has been notified of the alleged criminal activity; (B) asserting that the applicant was not involved in the potential criminal violation; and (C) stating whether a claim relating to the criminal activity has been made under an ERISA section 412 fidelity bond.

Example. The bookkeeper of the plan sponsor of a 401(k) plan allegedly embezzled funds from the plan sponsor, including amounts which had been withheld from employees' paychecks but not yet forwarded to the plan. As a result of the embezzlement, participant contributions were remitted to the plan two months later than the plan sponsor's usual practice. The owner of the company sponsoring the plan was not involved in the embezzlement and notified local law enforcement of the embezzlement. This owner is eligible to submit an application for relief under the VFC Program despite the potential criminal violation if the requirements under section 4(b)(2) are met. Note that the owner is not eligible for relief under the SCC because the exception under section 4(b)(2) is only available to applicants under the VFC Program and not the SC Component.

(c) EBSA has not conducted an investigation which resulted in written notice to a plan fiduciary that the transaction, for which the potential applicant or self-corrector could otherwise have sought relief under the Program, has been referred to the IRS. This condition applies only to those transactions specifically identified in

EBSA's written notice of referral to the IRS.

(d) *Exception for Bulk VFC Program Applicants.* An applicant is eligible to submit a bulk application under the VFC Program, even if one or more of the plans named in the application (''named plans'') is Under Investigation, and to receive a no action letter covering each of the named plans provided: (1) the applicant is a service provider that is seeking the relief afforded by the Program only on its own behalf; (2) the applicant was providing services to each of the named plans at the time of the transaction being corrected; (3) the application includes at least ten named plans; (4) all named plans participated in the transaction being corrected; and (5) the corrective action was not taken as a result of an investigation of any named plan. A determination by EBSA that the corrective action was taken as a result of an investigation of any named plan results in the no action letter specifically excluding such plan.

Example. A bank provides investment management services to pension plans. As part of these services, it bought bonds on behalf of its plan clients directly from a broker dealer's inventory. The bank independently discovered that the broker dealer is an affiliate of the bank and consequently, a party in interest to the plans (PII). No available class exemption permitted these purchases. The bank's review showed it had bought bonds for thirty-three (33) of its plan clients from the PII broker dealer. The bank, as a service provider to the plans, may submit a bulk application correcting the transaction in compliance with section 7.4(a) of the Program provided the application names all 33 plans that participated in the transaction and the bank is seeking relief only on its own behalf under the Program. Assuming the applicant has complied with the terms of the VFC Program, EBSA will issue a no action letter to the service provider, which includes the name of each of the participating plans.

Section 5. General Rules for Acceptable Corrections

(a) *Fair Market Determinations.* Many corrections require that the current or fair market value (FMV) 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 conditions in (1) through (4) below. Other corrections require that a fair market interest rate be determined as of a particular date, usually the date the loan was made. In order to be acceptable as part of a VFC Program correction, this determination must be made by an independent commercial lender, which meets the conditions in (5) below:

(1) If there is a generally recognized market for the property (*e.g.,* the New York Stock Exchange), the FMV 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 FMV 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 the appraiser 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 the appraiser 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 (except to the extent the appraiser becomes a fiduciary when retained to perform this appraisal for 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.

(5) a commercial lender is ''independent'' if it 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) a person or entity who was involved in securing or maintaining the loan, or in determining or modifying the terms of the loan at any time during the life of the loan;

(ii) a fiduciary of the plan (except to the extent the commercial lender becomes a fiduciary when retained to provide this service for the plan);

(iii) a party in interest with respect to the plan (except to the extent the commercial lender becomes a party in interest when retained to provide this service for the plan); or

(iv) 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* paragraph (b)(2) of this section), the Lost Earnings amount, which is earnings that would have been earned on the Principal Amount for the period of the transaction (*see* paragraph (b)(6) of this section, and *also see* paragraph (b)(3) of this section for a special rule for Loss Date under the SCC), and any interest on Lost Earnings. However, in circumstances when the Restoration of Profits amount (*see* paragraph (b)(7) of this section) 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. The responsible fiduciary, plan sponsor or other Plan Official, must pay the correction amount and any costs of correction. No part of the correction amount or costs of correction can be paid from plan assets, including charges against participant accounts or plan forfeiture accounts.

(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 include any transaction costs associated with entering into the transaction that constitutes the Breach, which were paid by the plan.

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

(ii) Special rule under the SCC. ''Loss Date'' is the Date of Withholding or Receipt.

(4) *Date of Withholding or Receipt.* ''Date of Withholding or Receipt'' is the date the amount would otherwise have been payable to the participant in cash in the case of amounts withheld by an employer from a participant's wages, or the day on which the participant contribution or loan payment is received by the employer in the case of amounts that a participant or beneficiary pays to an employer. Date of Withholding or Receipt is not the same date as the date on which contributions

or loan repayments could reasonably have been segregated from the employer general assets.

Example 1. An employer pays its employees' wages on the 1st and the 15th of each month. Participant contributions to a pension plan are withheld from employees' wages on these dates. The employer determined that it could reasonably take two business days to segregate these withholdings from its general assets for transmittal to the plan. The ''Date of Withholding or Receipt'' is the 1st and 15th of each month. For purposes of a Program application to correct delinquent participant contributions, without taking into account any non-business days, the ''Loss Date'' would be the 3rd and 17th of each month.

Example 2. Assuming the same facts as Example 1, except the delinquent participant contributions are being corrected using the SC Component. The ''Date of Withholding or Receipt'' is the 1st and 15th of each month. For purposes of using the SCC to correct delinquent participant contributions, the ''Loss Date'' would be the 1st and 15th of each month.

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

(6) *Lost Earnings.* (i) *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.

(ii) *Initial Calculation.* Lost Earnings shall be calculated by: (A) determining the applicable corporate underpayment rate(s) established under section 6621(a)(2) of the Code [62] for each quarter (or portion thereof) for the period beginning with the Loss Date and ending with the Recovery Date; (B) determining, by reference to IRS Revenue Procedure 95–17,[63] the applicable factor(s) 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; and (C) 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.

(iii) *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. Such interest shall be calculated in the same manner as Lost Earnings described in paragraph (b)(6)(ii) above, for the period beginning on the Recovery Date and ending on the date the Lost Earnings are paid to the plan.

(iv) *Special Rule for Transactions Causing Large Losses.* If the amount of Lost Earnings (determined in accordance with paragraph (b)(6)(ii) above) and any interest added to such Lost Earnings (determined in accordance with paragraph (b)(6)(iii) 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 paragraphs (b)(6)(ii) and (iii) above, substituting the applicable underpayment rates under section 6621(c)(1) of the Code [64] in lieu of the rates under section 6621(a)(2).

(v) *Method of Calculation for VFC Program Applications.* For purposes of calculating Lost Earnings and interest, if any, a Plan Official may either (A) use the Online Calculator described in paragraph (b)(8) below, or (B) perform a manual calculation in accordance with subparagraphs (i) through (iv) of this paragraph (b)(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.

(vi) *Method of Calculation under the SCC.* For purposes of calculating Lost Earnings and interest, if any, the self-corrector must use the Online Calculator described in paragraph (b)(8) below.

(7) *Restoration of Profits.* (i) *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) of this section). 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. ''Restoration of Profits'' is a combination of two amounts: (A) 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 (B) 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 paragraph (b)(7)(ii) below. There is no requirement to calculate a Restoration of Profits amount for corrections of delinquent participant contributions including loan repayments, if any, under section 7.1 of the Program.

(ii) *Calculation of Interest.* Interest shall be calculated by: (A) 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; (B) 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 (C) multiplying the first applicable factor by the profit on the Principal Amount, referred to in paragraph (b)(7)(i)(A) 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 (b)(7)(i)(A) 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.

[62] These underpayment rates are displayed on EBSA's website and will be updated when necessary.

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

[64] These underpayment rates are displayed on EBSA's website and will be updated when necessary.

(iii) *Special Rule for Transactions Resulting in Large Restorations.* If the amount of Restoration of Profits (determined in accordance with paragraph (b)(7)(i) 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 paragraph (b)(7)(ii), above, substituting the applicable underpayment rates under section 6621(c)(1) of the Code in lieu of the rates under section 6621(a)(2).

(iv) *Method of Calculation for VFC Program Applications.* For purposes of calculating the interest amount for Restoration of Profits, pursuant to paragraphs (b)(7)(ii) and (iii) above, a Plan Official may either (A) use the Online Calculator described in paragraph (b)(8) below, or (B) perform a manual calculation in accordance with subparagraphs (ii) and (iii) of this paragraph (b)(7). 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.

(8) *Online Calculator.* ''Online Calculator'' is an internet based compliance assistance tool provided on EBSA's website that permits applicants and self-correctors 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.

(i) *Lost Earnings and Interest.* To calculate Lost Earnings, applicants or self-correctors must input the (A) Principal Amount, (B) Loss Date, (C) Recovery Date, and, if the final payment will occur after the Recovery Date, (D) 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 and self-correctors with the amount of Lost Earnings and interest, if any, that must be paid to the plan.

(ii) *Interest Amount for Restoration of Profits.* To calculate the interest amount on the profit, applicants must input (A) the amount of profit, (B) the date the amount of profit was realized (*i.e.* received or determined), and (C) 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.

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

(c) *Costs of Correction.* (1) The fiduciary, plan sponsor or other Plan Official, must pay the costs of correction. The costs of correction cannot be paid from plan assets, including charges against participant accounts or plan forfeiture accounts.

(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) of this section is illustrated in the following example and in paragraph (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 methods involving nominal expense such as certified mail and electronic search technologies as well as checking related plan records and with any designated plan beneficiary. If these methods are unsuccessful, the applicant should consider the use of commercial locator services, credit reporting agencies, information brokers and investigation databases as well as analogous computer services depending on the amount of underpayment in relation to the cost of the services. The costs of such efforts are part of the costs of correction. See Missing Participants—Best Practices for Pension Plans for more information on fiduciary best practices that, based on EBSA's experience working with plans have proven effective at minimizing and mitigating the problem of missing or nonresponsive participants (available at *www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/retirement/missing-participants-guidance*).

(e) *De Minimis Exception.* Where correction under the Program requires distributions in amounts less than $35 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 $35 each as part of the correction. However, the applicant must pay to the plan as a whole the total of such de minimis 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 $35,

and Employer X demonstrates that the cost of making the distribution to those former employees is $42 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, which are not allocated directly to participant accounts, are used.[65] Employer X must make distributions to the five former employees who are entitled to receive distributions of more than $35.

Section 6. VFC Program Application and Self-Correction Component Procedures

6.1 VFC Program 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) *Applicant.* The application must be prepared by a Plan Official or an 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, including charges to participants accounts or plan forfeiture accounts.

(c) *Contact person.* Each application must include the name, address (street and email) 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:

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

(2) the plan sponsor's nine-digit number (EIN), plan number, and address of the plan sponsor and administrator;

(3) the date the plan's most recent Form 5500 was filed; or, in the case of a bulk VFC Program application, for each plan named in the application, either the date the most recent Form 5500 was filed or the plan sponsor's nine-digit number (EIN);

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

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

(6)(i) if the applicant performs a manual calculation in accordance with paragraphs (b)(6)(i) through (iv) of section 5 or paragraphs (b)(7)(i) through (iii), specific calculations demonstrating how Principal Amount and Lost Earnings or, if applicable, Restoration of Profits were computed;

(ii) if the applicant uses the Online Calculator in accordance with paragraph (b)(8) of section 5, the data elements required to be input into the Online Calculator under paragraphs (b)(8)(i) and/or (ii) of section 5, as applicable (to satisfy this requirement, applicants may submit a copy of the page(s) that results from the ''*View Printable Results*'' function used after inputting data elements and completing use of the Online Calculator); and

(iii) 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:

(1) copies of the relevant portions of the plan document and any other pertinent documents (such as the adoption agreement, trust agreement, or insurance contract);[66]

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

(3) documentation establishing the Lost Earnings amount;

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

(5) all documents described in section 7 with respect to the transaction involved; and

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

Applicants using the Online Calculator may satisfy the requirements of paragraph (e)(3) above, with respect to Lost Earnings, and paragraph (e)(4) above, as to the amount of interest, if any, payable with respect to the profit amount, by complying with the requirements of paragraph (d)(6)(ii) of this section. Except for proof of payment, as described in paragraph (e)(6) above, applicants correcting participant loan transactions in section 7.3 are not required to submit the other documentation described above unless requested by EBSA.

(f) *Examples of supporting documentation.* (1) 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.

(2) 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) of the VFC Program) 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.''

(1) Applicants in general. The Penalty of Perjury 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 paragraph (g) of this section.

(2) Bulk Applicants. The Penalty of Perjury Statement must be signed and dated by the bulk applicant with knowledge of the transaction that is the subject of the application and the authorized representative of the bulk applicant, if any. 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 paragraph (g) of this section.

(h) *Checklist.* The checklist in Appendix B must be completed, signed,

[65] For example, the Department has taken the position that where a plan document is silent as to the payment of reasonable administrative expenses, the plan may pay reasonable administrative expenses. Where a plan document provides that the employer will pay any such expenses, and if the employer has reserved the right to amend the plan document, ERISA would not prevent the employer from amending the plan to require, prospectively, that the relevant expenses be paid by the plan. The Department does not believe that ERISA would permit a fiduciary to implement a plan amendment that attempted to retroactively relieve the employer of an obligation to pay plan expenses.

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

dated and submitted with the application. Use of the checklist included with the Model Application Form in Appendix E also will satisfy the requirements of paragraph (h) of this section.

(i) *Where to apply.* The application shall be submitted to the appropriate EBSA Regional Office listed in Appendix C. Applicants should check with the relevant EBSA Regional Office whether the office accepts email submissions of applications and supporting documentation.

(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. If EBSA does not receive the requested documentation within a reasonable time after providing notice of the suspension, EBSA will issue a rejection letter.

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

6.2 VFC Program Self-Correction Component Procedures

(a) In general. Each self-corrector must adhere to the requirements set forth below. Failure to do so may render the self-correction invalid.

(b) Self-corrector. The SCC notice must be submitted by the self-corrector who is a Plan Official or an authorized representative (*e.g.,* attorney, accountant, or other service provider). If a representative of the Plan Official is submitting the SCC notice, the plan administrator must retain a statement signed by the Plan Official that the representative is authorized to represent the Plan Official. Use of the model authorization included in the SCC Retention Record Checklist in Appendix F will satisfy this requirement. Any fees paid to such representative for services relating to the correction under the SCC may not be paid from plan assets.

(c) Submission of SCC notice. The self-corrector must notify EBSA of participation in the SC Component by submitting the SCC notice through the online VFC Program web tool in accordance with paragraph 7.1(b)(2)(iii).[67] EBSA will acknowledge receipt of a properly completed and submitted SCC notice in an email addressed to the self-corrector.

(d) SCC Retention Record Checklist. The self-corrector must complete the SCC Retention Record Checklist in Appendix F, prepare or collect the documents listed in this Appendix, and provide copies of the completed checklist and required documentation to the plan administrator.

(e) Penalty of Perjury Statement. The plan administrator must retain the following statement: ''Under penalties of perjury I certify that I am not Under Investigation (as defined in section 3(b)(3) of the VFC Program) and that I have reviewed the SCC notice acknowledgment and summary, the checklist, and all the required 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 self-correction and the authorized representative of the plan sponsor, if any. In addition, each Plan Official who is seeking the relief afforded under the Program must sign and date the Penalty of Perjury Statement. Use of the Penalty of Perjury Statement included in Appendix F will satisfy the requirements of paragraph (e) of this section.

(f) Recordkeeping. The plan administrator must retain a copy of the SCC Retention Record Checklist in Appendix F along with copies of the required documentation, the authorization form, if any, and a signed Penalty of Perjury Statement, 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 and the SC Component for the identified transactions described in this section.

[67] The online VFC Program web tool will be located on EBSA's website.

7.1 Delinquent Remittance of Funds

(a) Delinquent Participant Contributions and Loan Repayments to Pension Plans under VFC Program Applications

(1) *Description of Transaction.* An employer receives directly from participants, or withholds from employees' paychecks, certain amounts for either participants' contribution to a pension plan or for repayment of participants' plan loans. Instead of forwarding such contributions or loan repayments to the plan 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 amounts for a longer period of time.

(2) *Correction of Transaction.* (i) *Unpaid Participant Contributions or Loan Repayments.* Pay to the plan the Principal Amount plus Lost Earnings on the Principal Amount as described in section 5(b). The Loss Date for such contributions or repayments 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 or repayments be later than the applicable maximum time period described in 29 CFR 2510.3–102.[68] Any penalties, late fees or other charges shall be paid by the employer and not from such contributions or loan repayments.

(ii) *Late Participant Contributions or 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 Lost Earnings as described in section 5(b). Any penalties, late fees or other charges shall be paid by the employer and not from participant contributions or loan repayments.

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

(iv) *Example.* The principles of paragraph (a)(2) of this section are illustrated by example in Appendix D.

(3) *Documentation.* In addition to the documentation required by section 6.1, submit the following documents:

(i) A statement from a Plan Official identifying the earliest date on which the participant contributions and/or repayments reasonably could have been

[68] The Department amended paragraph (a)(1) of 29 CFR 2510.3–102 to extend the application of the regulation to amounts paid by a participant or beneficiary or withheld by an employer from a participant's wages for purposes of repaying a participant's loan (regardless of plan size). 75 FR 2068 (2010).

segregated from the employer's general assets, along with the supporting documentation on which the Plan Official relied in reaching this conclusion;

(ii) If restored participant contributions and/or repayments (exclusive of Lost Earnings) either total $50,000 or less, or 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:

(A) 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 including any steps taken to prevent future delinquencies, and

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

(iii) If restored participant contributions and/or repayments (exclusive of Lost Earnings) exceed $50,000 and were remitted to the plan more than 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:

(A) 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 including any steps taken to prevent future delinquencies;

(B) 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

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

(b) Delinquent Participant Contributions and Loan Repayments to Pension Plans under the Self-Correction Component

(1) *Description of Transaction.* (i) An employer receives directly from participants, or withholds from employees' paychecks, certain amounts for either participants' contribution to a pension plan or for repayment of participants' plan loans. Instead of forwarding such contributions or loan repayments to the plan 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 amounts for a longer period of time. [69]

(ii) For this transaction: (A) the amount of Lost Earnings resulting from the correction of the delinquent participant contributions or loan repayments is less than or equal to $1,000, excluding any excise tax amounts paid to the plan under the related class exemption PTE 2002–51; and

(B) the delinquent participant contributions or loan repayments 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).

(2) *Correction of Transaction.* (i) *Unpaid Participant Contributions or Loan Repayments.* Pay to the plan the Principal Amount plus Lost Earnings on the Principal Amount as described in section (5)(b). The Loss Date for such contributions or repayments is the Date of Withholding or Receipt in accordance with section 5(b)(3)(ii). All calculations must be made using the Online Calculator in accordance with section 5(b)(6)(vi). Any penalties, late fees or other charges shall be paid by the employer and not from participant contributions or loan repayments.

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

(iii) *SCC Notice.* The self-corrector must input the required information in the fields provided in the SCC notice and submit the notice to EBSA through the online VFC Program web tool.[70] The required information includes certain data elements listed below:

(A) name and email address of the self-corrector;

(B) plan name;

(C) plan sponsor's nine-digit number (EIN) and the plan's three-digit number (PN);

(D) Principal Amount;

(E) amount of Lost Earnings and the date paid to the plan;

(F) Loss Date (Date(s) of Withholding or Receipt); and

(G) number of participants affected by the correction.

(3) *Documentation.* The self-corrector must complete the SCC Retention Record Checklist in Appendix F, prepare or collect the documents listed in this Appendix, and provide copies of the completed checklist and required documentation to the plan administrator.

(c) Delinquent Participant Contributions to Insured Welfare Plans

(1) *Description of Transaction.* Benefits are provided exclusively through insurance contracts issued by an insurance company or similar organization licensed 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.

(2) *Correction of Transaction.* (i) 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.

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

(3) *Documentation.* In addition to the documentation required by section 6.1, submit the following documents:

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

[69] *See* 29 CFR 2510.3–102(a)(2), 75 FR 2068 (2010).

[70] The online VFC Program web tool will be located on EBSA's website.

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

(iii) If restored participant contributions either total $50,000 or less, or exceed $50,000 and were remitted to the insurance provider 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:

(A) a narrative describing the applicant's contribution practices before and after the period of unpaid or late contributions, and

(B) summary documents demonstrating the amount of unpaid or late contributions; and

(iv) If restored participant contributions exceed $50,000 and were remitted to the insurance provider more than 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:

(A) a narrative describing the applicant's contribution remittance practices before and after the period of unpaid or late contributions including any steps taken to prevent future delinquencies,

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

(C) for participant contributions withheld from employees' paychecks, a copy of the payroll documents showing the date and amount of each withholding.

(d) Delinquent Participant Contributions to Welfare Plan Trusts

(1) *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.

(2) *Correction of Transaction.* (i) *Unpaid Contributions.* Pay to the trust (A) 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 (B) Lost Earnings on 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.

(ii) *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 Lost Earnings 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.

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

(3) *Documentation.* In addition to the documentation required by section 6.1, submit the following documents:

(i) A statement from a Plan Official: (A) 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 (B) 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;

(ii) If restored participant contributions (exclusive of Lost Earnings) either total $50,000 or less, or exceed $50,000 and were remitted to the trust 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:

(A) a narrative describing the applicant's contribution practices before and after the period of unpaid or late contributions including any steps taken to prevent future delinquencies, and

(B) summary documents demonstrating the amount of unpaid or late contributions; and

(iii) If restored participant contributions (exclusive of Lost Earnings) exceed $50,000 and were remitted to the trust more than 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:

(A) a narrative describing the applicant's contribution remittance practices before and after the period of unpaid or late contributions,

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

(C) for participant contributions withheld from employees' paychecks, a copy of the payroll documents showing the date and amount of each withholding.

7.2 Loans

(a) Loan at Fair Market Interest Rate to a Party in Interest With Respect to the Plan

(1) *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.

(2) *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.

(3) *Documentation.* In addition to the documentation required by section 6.1, 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.

(b) Loan at Below-Market Interest Rate to a Party in Interest With Respect to the Plan

(1) *Description of Transaction.* A plan made a loan to a party in interest with respect to the plan at an interest rate that, 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.

(2) *Correction of Transaction.* (i) Pay off the loan in full, including any prepayment penalties. Pay to the plan the Principal Amount, plus the greater of (A) the Lost Earnings as described in

section 5(b), or (B) the Restoration of Profits, if any, as described in section 5(b).

(ii) 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).

(3) *Documentation.* In addition to the documentation required by section 6.1, submit the following documents:

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

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

(iii) A copy of the independent fiduciary's dated, written approval of the fair market interest rate determination(s), except for below-market interest rate loans of $10,000 or less.

(c) Loan at Below-Market Interest Rate to a Person Who Is Not a Party in Interest With Respect to the Plan

(1) *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.

(2) *Correction of Transaction.* (i) Pay to the plan the Principal Amounts from the inception of the loan until the Recovery Date, plus Lost Earnings on the series of Principal Amounts through the Recovery Date, as described in section 5(b).

(ii) In addition, the applicant or other party must pay to the plan the present value of the Principal Amounts from the Recovery Date to the maturity date of the loan, as determined by an independent commercial lender. The borrower must continue to pay to the plan the outstanding loan balance according to the repayment schedule for the duration of the loan. Alternatively, instead of the applicant or other party paying the present value of the Principal Amounts, the borrower may pay to the plan the outstanding loan balance amortized over the remaining payment schedule for the duration of the loan at the interest rate that would have been applicable if the loan had been made at the fair market interest rate.

(iii) 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 inception 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.

(iv) The principles of paragraph (c)(2) of this section 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 applicant or other person 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 (the Principal Amounts from the loan's inception until the Recovery Date), plus Lost Earnings on that amount as described in section 5(b). The applicant must also pay on the Recovery Date the present value of the difference of what the plan would have received between the 7% and the 4% interest rate for the remaining payments on the loan for the duration of the time the plan is owed repayments on the loan (the Principal Amounts from the Recovery Date until the loan's maturity date). The borrower must continue to repay the outstanding loan balance based on the loan's repayment schedule.

(3) *Documentation.* In addition to the documentation required by section 6.1, submit the following documents:

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

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

(iii) If applicable, a copy of the loan repayment schedule for the re-amortized loan repayments.

(d) Loan at Below-Market Interest Rate Solely Due to a Delay in Perfecting the Plan's Security Interest

(1) *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 is perfected.

(2) *Correction of Transaction.* (i) Pay to the plan the Principal Amounts through the date the loan became fully secured, plus Lost Earnings on the series of Principal Amounts, as described in section 5(b).

(ii) Record or perfect the plan's interest in the loan collateral.

(iii) 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 applicant must pay to the plan the present value of the Principal Amounts from the date the loan is fully secured to the maturity date of the loan, as determined by an independent commercial lender. The borrower must continue to pay to the plan the outstanding loan balance according to the repayment schedule for the duration of the loan. Alternatively, instead of the applicant paying the present value of the Principal Amounts, the borrower may pay to the plan the outstanding loan balance amortized over the remaining payment schedule for the duration of the loan at the interest rate that would have been applicable if the loan had been made at the fair market interest rate that would have been applicable for a loan with the changed risk characteristics.

(iv) 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 inception 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.

(v) The principles of paragraph (d)(2) of this section 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.

(3) *Documentation.* In addition to the documentation required by section 6.1, submit the following documents:

(i) 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;

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

(iii) If applicable, a copy of the loan repayment schedule for the re-amortized loan repayments.

7.3 Participant Loans

(a) Loans Failing to Comply With Plan Provisions for Amount, Duration or Level Amortization

(1) *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 their status as an employee of any employer whose employees are covered by the plan, as defined in section 3(14)(H) of ERISA. The loan was a prohibited transaction that failed to qualify for ERISA's statutory exemption for plan loan programs because the loan terms did not comply with applicable plan provisions, which incorporated the requirements of section 72(p) of the Code concerning:

(i) the amount of the loan,

(ii) the duration of the loan, or

(iii) the level amortization of the loan repayment.

(2) *Correction of Transaction.* Plan Officials must make a voluntary correction of the loan with IRS approval under the Voluntary Correction Program of the IRS' Employee Plans Compliance Resolution System (EPCRS).

(3) *Documentation.* The applicant is not required to submit any of the supporting documentation listed in section 6.1(e) unless otherwise requested by EBSA, except that the applicant must provide (i) proof of payment, as described in paragraph (e)(6) of section 6.1, and (ii) a copy of the IRS compliance statement.

(b) Default Loans

(1) *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 their status as an employee of any employer whose employees are covered by the plan, as defined in section 3(14)(H) of ERISA. At origination, the loan qualified for ERISA's statutory exemption for plan loan programs because the loan complied with applicable plan provisions, which incorporated the requirements of section 72(p) of the Code. During the loan repayment period, the Plan Official responsible for loan administration failed to properly withhold a number of loan repayments from the participant's wages and included the amount of such repayments in the participant's wages based on administrative or systems processing errors. The failure to withhold is a Breach causing the loan to become non-compliant with applicable plan provisions, which incorporated the requirements of section 72(p) of the Code.

(2) *Correction of Transaction.* Plan Officials must make a voluntary correction of the loan with IRS approval under the Voluntary Correction Program of the IRS' EPCRS.

(3) *Documentation.* The applicant is not required to submit any of the supporting documentation listed in section 6.1(e) unless otherwise requested by EBSA, except that the applicant must provide (i) proof of payment, as described in paragraph (e)(6) of section 6.1, and (ii) a copy of the IRS compliance statement.

7.4 Purchases, Sales and Exchanges

(a) Purchase of an Asset (Including Real Property) by a Plan from a Party in Interest

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

(2) *Correction of Transaction.* (i) The plan may sell the asset back to the party in interest who originally sold the asset to the plan [71] 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 (A) the FMV of the asset at the time of resale, without a reduction for the costs of sale, plus restoration to the plan of the party in interest's investment return from the proceeds of the sale, to the extent they exceed the plan's net profits from owning the property; or (B) the Principal Amount, plus the greater of (*1*) Lost Earnings on the Principal Amount as described in section 5(b), or (*2*) the Restoration of Profits, if any, as described in section 5(b).

(ii) As an alternative to the correction described in paragraph (a)(2)(i) above, the plan may retain the asset and receive (A) the greater of (*1*) Lost Earnings less any earnings received on the asset up to the Recovery Date or (*2*) the Restoration of Profits, if any, as described in section 5(b), on the Principal Amount, but only to the extent that such Lost Earnings or Restoration of Profits exceeds the difference between the FMV of the asset as of the Recovery Date and the original purchase price; and (B) the amount by which the Principal Amount exceeded the FMV of the asset (at the time of the original purchase), plus the greater of (*1*) Lost Earnings or (*2*) Restoration of Profits, if any, as described in section 5(b), on such excess; provided an independent fiduciary determines that the plan will realize a greater benefit from this correction than it would from the resale of the asset described in paragraph (a)(2)(i) above.

(iii) As a cash settlement alternative, when the plan no longer owns the asset and the transaction cannot be reversed or the asset cannot be retained as described respectively in paragraphs (a)(2)(i) and (ii) above, the plan may accept in cash the amounts specified in (A) plus (B) where (A) is—the greater of (*1*) Lost Earnings less any earnings received on the asset up to the Recovery Date or (*2*) the Restoration of Profits, if any, as described in section 5(b), on the Principal Amount, and (3) with the resulting amount from (1) or (2) reduced by any profit if the asset were resold or matured at a gain, or increased by any

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

loss including Lost Earnings on such loss if either the asset was resold at a loss or the plan otherwise ceased to own the asset (*e.g.,* maturity; destruction); and (B) is—the amount by which the Principal Amount exceeded the FMV of the asset (at the time of the original purchase), plus the greater of (*1*) Lost Earnings or (*2*) Restoration of Profits, if any, as described in section 5(b), on such excess. If the plan sold the asset, the asset must have been sold upon the advice of an independent fiduciary and not in anticipation of applying under the VFC Program.

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

(v) The principles of paragraph (a)(2) of this section are illustrated in the following examples:

Example 1. A plan purchased a parcel of real property from the plan sponsor. The plan does not lease the property to any person. Instead, the plan uses the property as an office. The plan paid $120,000 for the property and $5,000 in transaction costs. As part of the correction, the Plan Official obtains two appraisals from a qualified, independent appraiser in order to determine the FMV of the property at the time of the purchase and at the time of the correction (the ''Recovery Date''). The FMV of the property at the time of purchase was $100,000 ($20,000 less than the plan paid for the property). As of the Recovery Date, the appraiser values the property 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 $5,000 in initial costs of sale. The plan sponsor also must pay the plan the greater of the plan's Lost Earnings or the sponsor's investment return on these amounts. The determination of an independent fiduciary is not required because the applicant is correcting the transaction by selling the asset back to the party in interest pursuant to paragraph (a)(2)(i) of this section.

Example 2. On February 1, 2002, a plan purchased from a party in interest a parcel of commercial real estate for $120,000 and incurred $5,000 in costs of sale. The plan initially uses the property as an office. At the same time, it is discovered that the original purchase was a prohibited transaction, the plan enters into a lucrative lease with an unrelated party for use of the property to begin January 1 of the following year. Due to commercial developments in adjacent properties, the Plan Official believes that the property will increase in value and that the plan would be able to obtain substantially increasing rental payments for the use of the property. As part of the correction, the Plan Official obtains two appraisals from a qualified, independent appraiser in order to determine the FMV of the asset at the time of the purchase and at the time of the correction (the ''Recovery Date''). The FMV of the property at the time of purchase was $120,000 (the same as the original purchase price). As of the Recovery Date, the property is valued at $150,000. Lost Earnings are calculated through September 30, 2005, the anticipated Recovery Date. The Online Calculator determined that Lost Earnings is $26,098.23 on the Principal Amount of $125,000 (purchase price plus transaction costs). There were no determinable profits. The increase in the FMV, $30,000, is greater than Lost Earnings or Restoration of Profits. Because the property is rapidly appreciating in value, and because the Plan Official expects to realize significant rental income from the property, the Plan Official would like to correct by retaining the property pursuant to paragraph (a)(2)(ii) of this section rather than selling the asset back to the party in interest pursuant to paragraph (a)(2)(i) of this section. The Plan Official must obtain a determination by an independent fiduciary that the plan will realize a greater benefit by retaining the asset than by selling the asset back to the party in interest. Because the original purchase price was the same as the FMV, and the increase in the FMV is greater than any earnings or investment return on the original purchase price, the only cash payment to the plan involved in this correction is the $5,000 in costs of sale, plus Lost Earnings.

Example 3: The plan purchased bonds from a party in interest on November 30, 2011 (the ''Loss Date'') at a face value of $100,000 with a yield of 2% interest annually. The purchase was at FMV and the bonds' maturity date was November 30, 2012. The plan received $102,000 on November 30, 2012 (the ''Recovery Date''). In January 2013, the plan trustee realized that the original purchase was a prohibited transaction because the seller is a party in interest. There were no determinable profits. Under these facts, because the plan no longer owns the asset, the transaction cannot be reversed under paragraph (a)(2)(i) above. Similarly, the plan cannot use the correction under paragraph (a)(2)(ii) above. A Plan Official may correct the transaction under paragraph (a)(2)(iii) by paying to the plan on January 7, 2013 (the ''Final Payment Date'') an amount of cash equal to the Lost Earnings as calculated using the Online Calculator less the interest paid on the bonds ($3,055.55 − $2,000).

(3) *Documentation.* In addition to the documentation required by section 6.1, submit the following documents:

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

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

(iii) 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;

(iv) If applicable, a report of the independent fiduciary's determination that the plan will realize a greater benefit by receiving the correction amount described in paragraph (a)(2)(ii) of this section than by reselling the asset pursuant to paragraph (a)(2)(i) of this section; and

(v) In a transaction involving a cash settlement correction under section 7.4(a)(2)(iii) where the plan sold the asset, a statement by a Plan Official that the asset was sold upon the advice of an independent fiduciary and not in anticipation of applying under the VFC Program.

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

(1) *Description of Transaction.* A plan sold an asset for cash to a party in interest with respect to the plan, in a transaction to which no prohibited transaction exemption applies.

(2) *Correction of Transaction.* (i) The plan may repurchase the asset from the party in interest [72] at the lower of (A) the price for which it originally sold the property or (B) 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.

(ii) As an alternative to the correction described in paragraph (b)(2)(i) above, the plan may receive the Principal Amount plus the greater of (A) Lost Earnings as described in section 5(b) or (B) the Restoration of Profits, if any, as described in section 5(b), provided an independent fiduciary determines that the plan will realize a greater benefit from this correction than it would from the repurchase of the asset described in paragraph (b)(2)(i), or provided a Plan

[72] 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 repurchase is not a new prohibited transaction and therefore does not require an individual prohibited transaction exemption.

Official determines that the asset cannot be repurchased (e. g., maturity, destruction).

(iii) 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 original sale price.

(iv) The principles of paragraph (b)(2) of this section are illustrated in the following examples:

Example 1. 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. As part of the correction, the Plan Official obtains an appraisal of the property reflecting the FMV of the property as of the date of sale from a qualified, independent appraiser. The appraiser values the property at $130,000, although the plan sold the property to the plan sponsor for $120,000. The plan did not incur any transaction costs during the original sale. As of the Recovery Date, the appraiser values the property at $140,000. The plan corrects the transaction by repurchasing the property at the original sale price of $120,000, with the party in interest assuming the costs of the reversal of the sale transaction. The determination of an independent fiduciary is not required because the applicant is correcting the transaction by repurchasing the property from the party in interest pursuant to paragraph (b)(2)(i) of this section.

Example 2. Assume the same facts as in Example 1, except that the appraiser values the property as of the Recovery Date at $100,000, and the plan fiduciaries believe that the property will continue to decrease in value based on environmental studies conducted in adjacent areas. Based on the determination of an independent fiduciary that the plan will realize a greater benefit by receiving the Principal Amount (FMV of the asset at the time of the original sale less the original sales price equals $10,000) plus the greater of Lost Earnings or Restoration of Profits, as described in section 5(b), the transaction is corrected by cash settlement pursuant to paragraph (b)(2)(ii) of this section, rather than by repurchasing the asset.

(3) *Documentation.* In addition to the documentation required by section 6.1, submit the following documents:

(i) 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;

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

(iii) 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

(iv) If applicable, a report of the independent fiduciary's determination that the plan will realize a greater benefit by receiving the correction amount described in paragraph (b)(2)(ii) of this section than by repurchasing the asset pursuant to paragraph (b)(2)(i) of this section, or if the asset cannot be repurchased, a written explanation of such circumstance from the Plan Official making this determination.

(c) Sale and Leaseback of Real Property to Employer

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

(2) *Correction of Transaction.* (i) The transaction must be corrected by the sale of the parcel of real property back to the plan sponsor or affiliate of the plan sponsor, or to a person who is not a party in interest with respect to the plan.[73] The plan must receive the higher of (A) FMV of the asset at the time of resale, without a reduction for the costs of sale; or (B) the Principal Amount, plus the greater of (*1*) Lost Earnings on the Principal Amount as described in section 5(b), or (*2*) the Restoration of Profits, if any, as described in section 5(b).

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

(iii) 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.

(iv) 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 or an affiliate of the plan sponsor must pay to the plan this additional Principal Amount, plus the greater of (A) Lost Earnings or (B) Restoration of Profits resulting from the plan sponsor's or affiliate's use of the Principal Amount, as described in section 5(b).

(v) The principles of paragraph (c)(2) of this section 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).

(3) *Documentation.* In addition to the documentation required by section 6.1, submit the following documents:

(i) 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;

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

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

(iv) A copy of the lease;

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

(vi) 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.

(d) 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 More Than Fair Market Value

(1) *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.

[73] If the plan purchased the property from the plan sponsor or an affiliate of the plan sponsor, the sale of the same property back to the plan sponsor or affiliate 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.

(2) *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).

(i) The principles of paragraph (d)(2) of this section 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).

(3) *Documentation.* In addition to the documentation required by section 6.1, submit the following documents:

(i) 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;

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

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

(e) 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

(1) *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.

(2) *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).

(i) The principles of paragraph (e)(2) of this section 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).

(3) *Documentation.* In addition to the documentation required by section 6.1, submit the following documents:

(i) 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;

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

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

(f) Holding of an Illiquid Asset Previously Purchased by a Plan

(1) *Description of Transaction.* A plan is holding an asset previously purchased from (i) a party in interest with respect to the plan in an acquisition for which relief was available under a statutory or administrative prohibited transaction exemption, (ii) a party in interest with respect to the plan at no greater than FMV at that time in an acquisition to which no prohibited transaction exemption applied, (iii) 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 their fiduciary duties, or (iv) a person who was not a party in interest with respect to the plan in an acquisition in which a plan fiduciary appropriately discharged their fiduciary duties. Currently, a plan fiduciary determines that such asset is an illiquid asset because: (A) the asset failed to appreciate, failed to provide a reasonable rate of return, or caused a loss to the plan; (B) the sale of the asset is in the best interest of the plan; and (C) 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. In the case of an illiquid asset that is a parcel of real estate, no party in interest may own real estate that is contiguous to the plan's parcel of real estate on the Recovery Date.

(2) *Correction of Transaction.* (i) The transaction may be corrected by the sale of the asset to a party in interest, provided the plan receives the higher of (A) the FMV of the asset at the time of resale, without a reduction for the costs of sale; or (B) 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; relief from the prohibited transaction excise tax also is provided if the Plan Official satisfies the applicable conditions of the VFC Program class exemption.

(ii) For this transaction, the Principal Amount is (A) the amount that would have been available had the Breach not occurred, or (B) the plan's original purchase price if the original purchase was not a prohibited transaction or imprudent.

(iii) The principles of paragraph (f)(2) of this section 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.

(3) *Documentation.* In addition to the documentation required by section 6.1, submit the following documents:

(i) 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;

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

(iii) 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;

(iv) A statement from a Plan Official attesting that: (A) the asset failed to appreciate, failed to provide a reasonable rate of return, or caused a loss to the plan; (B) the sale of the asset is in the best interest of the plan; (C) the asset is an illiquid asset; and (D) 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

(v) 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.

7.5 Benefits

(a) Payment of Benefits Without Properly Valuing Plan Assets on Which Payment is Based

(1) *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.

(2) *Correction of Transaction.* (i) 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. In the case of undervalued plan assets, 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. In the case of overvalued plan assets, restore to the plan the amount which exceeded the paid distribution amount to which all affected participants were entitled under the terms of the plan, plus Lost Earnings as described in section 5(b) on the overpaid distributions. File amended Annual Report Forms 5500, as detailed below.

(ii) 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.

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

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

(v) 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.

(vi) The principles of paragraph (a)(2) of this section 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 the participant's portion of the value of the property. The separated participant's account balance represented 2% of the plan's assets. As part of the 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 the participant the $2,000 Principal Amount plus Lost Earnings as described in section 5(b), as well as filing the amended Forms 5500.

(3) *Documentation.* In addition to the documentation required by section 6.1, submit the following documents:

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

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

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

(iv) If supplemental distributions are made, proof of payment to the individuals entitled to receive the supplemental distributions or to the plan if paid pursuant to the de minimis exception in section 5(e).

7.6 Plan Expenses

(a) Duplicative, Excessive, or Unnecessary Compensation Paid by a Plan

(1) *Description of Transaction.* A plan used plan assets to pay compensation, including commissions or fees, to a service provider (such as an attorney, accountant, recordkeeper, actuary, financial adviser, or insurance agent), and the compensation was:

(i) excessive in amount for the services provided to the plan;

(ii) duplicative, in that a plan paid two or more providers for the same service; or

(iii) unnecessary for the operation of the plan, in that the services were not helpful and appropriate in carrying out the purposes for which the plan is maintained.

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

(ii) (A) For the transactions described in paragraph (a)(1)(i) above, the Principal Amount is the difference between (*1*) the amount of compensation paid by the plan to the service provider and (*2*) the reasonable market value of such services.

(B) For the transactions described in paragraph (a)(1)(ii) above, the Principal Amount is the difference between (*1*) the total amount of compensation paid to the service providers and (*2*) the least amount of compensation paid to one of the service providers for the duplicative services.

(C) For the transactions described in paragraph (a)(1)(iii) above, the Principal Amount is the amount of compensation paid by the plan to the service provider for the unnecessary services.

(iii) The principles of paragraph (a)(2) of this section are illustrated in the following examples:

Example 1. Excessive compensation. A plan hired an investment adviser 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 adviser to limit the plan's investments to equities and bonds. In exchange for the services, the plan paid the investment adviser 3% of the value of the portfolio's assets. If the trustees had inquired, they would have learned that comparable investment advisers 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 the higher Lost Earnings or Restoration of Profits, as described in section 5(b).

Example 2. Unnecessary Compensation. A plan paid a travel agent to arrange a fishing trip for the plan's investment adviser as a way of rewarding the adviser because the plan's investment return for the year exceeded the plan's investment goals by 10%. An internal auditor discovered the charge on the plan's record books. To correct the transaction, the plan must be paid the Principal Amount, which is the total amount paid to the travel agent, plus the higher of Lost Earnings or Restoration of Profits as described in section 5(b).

(3) *Documentation.* In addition to the documentation required by section 6.1, submit the following documents:

(i) For the transactions described in paragraph (a)(1)(i) above, a written estimate of the reasonable market value of the services and the estimator's qualifications; and

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

(b) Expenses Improperly Paid by a Plan

(1) *Description of Transaction.* A plan used plan assets to pay expenses, including commissions or fees, which should have been paid by the plan sponsor, to a service provider (such as an attorney, accountant, recordkeeper, actuary, financial adviser, or insurance agent) for:

(i) services provided in connection with the administration and maintenance of the plan (''plan expenses'' [74]) in circumstances where a plan provision requires that such plan expenses be paid by the plan sponsor, or

(ii) services provided in connection with the establishment, design, or termination of the plan (''settlor expenses'' [75]), which relate to the activities of the plan sponsor in its capacity as settlor.

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

(ii) The Principal Amount is the entire amount improperly paid by the plan to the service provider for expenses that should have been paid by the plan sponsor.

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

Example. Employer X, the plan sponsor of Plan Y, is considering amending its defined contribution plan to add a 5% matching contribution. Employer X operates in a competitive industry, and a human resources consultant has recommended, among other improvements, that Employer X provide a competitive matching contribution to help attract and retain a highly qualified workforce. Employer X hired an actuary to estimate the cost of providing this matching contribution over the next ten years. In exchange for these services, the plan paid the actuary $10,000. Several months after the actuary's bill has been paid, a Plan Official realizes that one of Employer X's employees erroneously paid the bill from the defined contribution plan's assets. The bill should have been paid by Employer X because the bill related to settlor expenses incurred by Employer X in analyzing whether to add a matching contribution to the plan. To correct the transaction, the plan must be paid the Principal Amount ($10,000), plus Lost Earnings or Restoration of Profits, as described in section 5(b).

(3) *Documentation.* In addition to the documentation required by section 6.1, submit copies of the plan's accounting records which show the date and amount of expenses paid by the plan to the service provider.

(c) Payment of Dual Compensation to a Plan Fiduciary

(1) *Description of Transaction.* A plan used plan assets to pay compensation to 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 reimbursements of expenses properly and actually incurred by the fiduciary in the performance of their fiduciary duties.

(2) *Correction of Transaction.* (i) Restore to the plan the Principal Amount, plus the greater of (A) Lost Earnings or (B) Restoration of Profits resulting from the fiduciary's use of the Principal Amount, as described in section 5(b).

(ii) The Principal Amount is the amount of compensation paid to the fiduciary by the plan.

(iii) The principles of paragraph (c)(2) of this section 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 services as union president. The president is appointed as a trustee of the health plan while retaining the 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).

(3) *Documentation.* In addition to the documentation required by section 6.1, submit copies of the plan's accounting records which show the date and amount of compensation paid by the plan to the identified fiduciary.

Appendix A—Sample VFC Program No Action Letter

Applicant (Plan Official)
Address

Re: VFC Program Application No. xx–xxxxxx

The Department of Labor, Employee Benefits Security Administration (EBSA), administers and enforces Title I of the Employee Retirement Income Security Act of 1974 (ERISA). EBSA established a Voluntary Fiduciary Correction (VFC) Program to encourage the voluntary correction of breaches of fiduciary responsibility and the restoration of losses to the plan participants and beneficiaries.

You submitted a VFC Program application identifying the following transactions as breaches, or potential breaches, of the fiduciary duty provisions in Part 4 of Title I of ERISA. You also submitted documentation to EBSA under the VFC Program on the corrective action you have taken. Your application was assigned the application number indicated above.

[74] *See* Advisory Opinion 2001–01A (Jan. 18, 2001).

[75] *See id.*

[Briefly recap the transaction 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).]

Based on your representations and the corrective actions taken, in accordance with the terms and limitations set forth in the VFC Program, EBSA will not recommend that the Solicitor of Labor initiate legal action against you, and EBSA will not seek to impose civil penalties under section 502(l) or section 502(i) of ERISA with respect to the transactions described above.

EBSA's decision is conditioned on the representations in your VFC Program application being complete and accurate. The decision does not preclude EBSA from conducting an investigation of any potential violations of criminal law in connection with the transaction identified in the application or seeking appropriate relief from any other person. EBSA's decision is binding on EBSA only, and does not bar other governmental agencies, plan fiduciaries, participants or beneficiaries, and other interested persons from seeking separate or additional remedies.

[If the transaction is a prohibited transaction for which no exemptive relief is available, add the following language: The Secretary of Labor is required by section 3003(c) of ERISA, 29 U.S.C. 1203(c), 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.]

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

Appendix B—VFC Program Application Checklist (Required)

Use this checklist to make sure you are submitting a complete 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. The applicant must sign and date the checklist and include it with the application. Check with the relevant Regional Office whether it accepts email submissions of VFC Program applications.

____1. Have you reviewed the eligibility, definitions, transaction and correction, and documentation sections of the VFC Program?

____2. Have you included the name, address (street or email) and telephone number of a contact person familiar with the contents of the application?

____3. Have you provided the EIN, Plan Number, and address (street and email) of the plan sponsor and plan administrator?

____4. Have you provided the date that the most recent Form 5500 was filed by the plan (or for a bulk application as described in section 4(d), the nine-digit employer identification number for each plan sponsor of a named 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? In the case of a bulk application, have you enclosed a signed and dated certification under penalty of perjury for the bulk applicant based on knowledge of the transactions and for the bulk 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. If applicable, have you provided written notification to EBSA of any current investigation or examination of the plan, or of the applicant or plan sponsor in connection with an act or transaction directly related to the plan by the PBGC, any state attorney general, or any state insurance commissioner?

____8. If applicable (under section 4(b)(2) of the Program), have you included the following items?

____a. Contact information for the law enforcement agency notified of the criminal activity;

____b. A statement from the applicant asserting no involvement in the potential criminal activity; and

____c. A statement as to whether a claim relating to the criminal activity has been made under an ERISA section 412 fidelity bond.

____9. Where applicable, have you enclosed a copy of an appraiser's report?

____10. Where applicable, have you enclosed a copy of an independent fiduciary's approval?

____11. 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, or, if the Online Calculator was used, a copy of the ''Print Viewable Results'' page(s) after completing use of the Online Calculator;

____f. Proof of payment of principal amount;

____g. Proof of payment of lost earnings or restoration of profits to the plan; and

Caution: The correction amount and the costs of correction cannot be paid from plan assets, including by charges against participant accounts or plan forfeiture accounts.

____h. If application concerns delinquent participant 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?

____12. If you are an eligible applicant and wish to avail yourself of excise tax relief under the VFC Program Class Exemption:

____a. Have you made proper arrangements to provide within 60 calendar days after submission of this application a copy of the VFC Program Class Exemption notice to all interested persons and to the EBSA Regional Office to which the application is filed; or

____b. If you are relying on the exception to the notice requirement in section IV.C. of the VFC Program Class Exemption because the amount of the excise tax otherwise due would be less than or equal to $100.00, have you provided to the appropriate EBSA Regional Office a copy of a completed IRS Form 5330 or other written documentation containing the information required by IRS Form 5330 and proof of payment?

____13. 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) of the VFC Program?

____14. If the application involves payments to participants and beneficiaries:

____a. Have you enclosed a description demonstrating proof of payment to participants and beneficiaries whose current location is known to the plan and/or applicant in accordance with section 5(d) of the VFC Program?

____b. For individuals who need to be located, have you demonstrated how adequate funds have been segregated to pay missing individuals and included a description of the process that you commenced to locate missing individuals in accordance with section 5(d)?

____15. For purposes of the three transactions involving participant contributions covered under section 7.1, has the plan implemented measures to ensure that such transactions do not recur?

Signature of Applicant and Date Signed:

_____

Name of Applicant:

_____

Title/Relationship to the Plan:

_____

Name of Plan, EIN and Plan Number:

_____

Contact information: Phone; email

_____

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. Verify current telephone numbers and addresses on EBSA's website, *www.dol.gov/ebsa/* before you submit your application. Check with the relevant Regional Office whether it accepts email submissions of VFC Program applications.

Atlanta Regional Office, 61 Forsyth Street SW, Suite 7B54, Atlanta, GA 30303, telephone (404) 302–3900, fax (404) 302–3975; jurisdiction: Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, Tennessee, Puerto Rico.

Boston Regional Office, J.F.K. Federal Building, 15 New Sudbury Street, 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, John C. Kluczynski Federal Building, 230 South Dearborn Street, Suite 2160, Chicago, IL 60604, 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 South Griffin Street, Rm. 900, Dallas, TX 75202–5025, telephone (972) 850–4500, fax (214) 767–1055; jurisdiction: Arkansas, Louisiana, New Mexico, Oklahoma, Texas.

Kansas City Regional Office, 2300 Main Street, Suite 1100, Kansas City, MO 64108, telephone (816) 285–1800, fax (816) 285–1888; jurisdiction: Colorado, southern Illinois, Iowa, Kansas, Minnesota, Missouri, Montana, Nebraska, North Dakota, South Dakota, Wyoming.

Los Angeles Regional Office, 35 N. Lake Ave., Suite 300, Pasadena, CA 91101, telephone (626) 229–1000, fax (626) 229–1098; jurisdiction: 10 southern counties of California, Arizona, Hawaii, American Samoa, Guam, Wake Island.

New York Regional Office, 201 Varick Street, Room 746, New York, NY 10014, telephone (212) 607–8600, fax (212) 607–8611; jurisdiction: southeastern New York, northern New Jersey.

Philadelphia Regional Office, 1835 Market Street, 21st Floor, Mailstop EBSA/21, Philadelphia, PA 19103, telephone (215) 861–5300, fax (215) 861–5347; jurisdiction: Delaware, Maryland, southern New Jersey, Pennsylvania, Virginia, Washington, DC, West Virginia.

San Francisco Regional Office, 90 7th Street, Suite 11–300, San Francisco, CA 94103, telephone (415) 625–2481, fax (415) 625–2450; jurisdiction: Alaska, 48 northern counties of California, Idaho, Nevada, Oregon, Utah, Washington.

Appendix D —Lost Earnings Example (Manual Calculation)

Delinquent Participant Contributions

Company A pays its employees every other Friday. Each pay date, participant contributions total $10,000, which reasonably can be segregated from Company A's general assets by ten business days following each pay date. Company A should have remitted participant contributions for the pay date 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 decided to 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 (percent)	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. Please make sure you have attached all documents identified on the VFC Program Checklist (for example, proof of

payment). If you choose to use a different format to submit the required information for your VFC Program Application, your application must still include a completed copy of the VFC Program Checklist. Submit your application to the appropriate EBSA Regional Office. Check with the relevant Regional Office whether it accepts email submissions of VFC Program applications. For full application procedures, consult *www.dol.gov/ebsa/*.

Applicant Name(s) and Address(es) (street and email)

List separately: _____

_____

_____

List Transaction(s) Corrected

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

____Delinquent Participant Contributions and 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
____Loans Failing to Comply with Plan Provisions for Amount, Duration or Level Amortization
____Default Loans
____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 More Than Fair Market Value
Sale of an Asset by a Plan to a Non-Party in Interest at Less 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
____Expenses Improperly 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 a correction of Delinquent Participant Contributions or Loan Repayments, 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).

Number of days used to determine the date on which participant contributions/loan repayments withheld from employees' pay could reasonably have been segregated from the employer's general assets:

_____

_____

Description of how this date was determined, including the applicant's current contribution and/or repayment remittance practices:

_____

_____

_____

(5) For a correction of Delinquent Participant Contributions or Loan Repayments, provide a narrative describing any changes to the applicant's contribution and/or repayment remittance practices after the period of unpaid or late contributions and/or repayments, including any steps taken to prevent future delinquencies: (attach separate sheets if necessary)

_____

_____

_____

(6) Specific calculations demonstrating how Principal Amount and Lost Earnings or Restoration of Profits were calculated (attach separate sheets if necessary): If the Online Calculator was used, you only need to indicate this and attach a copy of the ''View Printable Results'' page.

____Online Calculator—''View Printable Results'' page attached.
____Manual calculation—see attached calculations, which must follow the method used in subparagraphs (i) through (iv) of section 5(b)(6). See Appendix D for a sample.

Supplemental Information

(1) Plan Sponsor Name:

_____

EIN: _____
Address: _____
(2)(a) Plan Name: _____

_____

Plan Number: _____

(2)(b) For Bulk Applicants (attach additional sheets identifying this information for each Plan named in the application involved in the transaction):

Plan Name: _____
Plan Sponsor EIN or date the most recent Form 5500 was filed: _____

(3) Plan Administrator Name:

_____

EIN: _____
Address: _____

(4) Name of Authorized Representative: (Submit written authorization signed by the Plan Official.)
Address: _____
Telephone: _____

(5) Name of Contact Person:

_____

Address: _____
Telephone: _____
Email: _____

(6) Date of Most Recent Annual Report Form 5500 Filing, if applicable: __/__/__ for Plan Year Ending: __/__/__

(7) Is Applicant Seeking Relief From Excise Tax Under PTE 2002–51?

____Yes—Either:
____Submit a copy of the notice to interested parties within 60 calendar days of this application and indicate date of the notice if not on the notice itself; or
____If you are relying on the exception to the notice requirement contained in section IV.C. of PTE 2002–51, provide a copy of a completed IRS Form 5330 or other written documentation and proof of payment.
____No.

(8) Proof of Payment:

____Canceled check
____Executed wire transfer
____Signed, dated receipt from the recipient of funds transferred to the plan (such as a financial institution)
____Bank statements for the plan's account
____Other: _____

Caution: The correction amount and the costs of correction cannot be paid from plan assets, including by charges against participant accounts or plan forfeiture accounts.

(9) Disclosure of a current investigation or examination of the plan by an agency, to comply with section 3(b)(3)(v):

____PBGC
____Any state attorney general
State: _____
____Any state insurance commissioner
State: _____
____Other federal governmental agency: ____
____Contact person for the agency identified:

(10) Be sure to include the required VFC Program Application Checklist and all other documentation identified as being enclosed. The checklist is available at *http://www.dol.gov/ebsa/calculator/2006vfcpchecklist.html*.

(11) In order to help us improve our service, please indicate how you learned about the VFC Program: _____

Authorization of Representative

I have authorized (insert name of authorized representative) to represent me concerning this VFC Program application.
Name of Plan Official

_____

Signature of Plan Official

Date

Penalty of Perjury Statement

The following statement must be signed and dated by a plan fiduciary, or bulk applicant, 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 section 3(b)(3) of the VFC Program) 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 7 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 Application Checklist (Required)

Use this checklist to make sure you are submitting a complete 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. The applicant must sign and date the checklist and include it with the application. Check with the relevant Regional Office whether it accepts email submissions of VFCP applications.

____1. Have you reviewed the eligibility, definitions, transaction and correction, and documentation sections of the VFC Program?
____2. Have you included the name, address (street or email) and telephone number of a contact person familiar with the contents of the application?
____3. Have you provided the EIN, Plan Number, and address (street and email) of the plan sponsor and plan administrator?
____4. Have you provided the date that the most recent Form 5500 was filed by the plan (or for a bulk application as described in section 4(d), the nine-digit employer identification number for each plan sponsor of a named 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? In the case of a bulk application, have you enclosed a signed and dated certification under penalty of perjury for the bulk applicant based on knowledge of the transactions and for the bulk 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. If applicable, have you provided written notification to EBSA of any current investigation or examination of the plan, or of the applicant or plan sponsor in connection with an act or transaction directly related to the plan by the PBGC, any state attorney general, or any state insurance commissioner?
____8. If applicable (under section 4(b)(2) of the Program), have you included the following items?
____a. Contact information for the law enforcement agency notified of the criminal activity;
____b. A statement from the applicant asserting no involvement in the potential criminal activity; and
____c. A statement as to whether a claim relating to the criminal activity has been made under an ERISA section 412 fidelity bond.
____9. Where applicable, have you enclosed a copy of an appraiser's report?
____10. Where applicable, have you enclosed a copy of an independent fiduciary's approval?
____11. 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, or, if the Online Calculator was used, a copy of the ''Print Viewable Results'' page(s) after completing use of the Online Calculator;
____f. Proof of payment of principal amount;
____g. Proof of payment of lost earnings or restoration of profits to the plan; and

____Caution: The correction amount and the costs of correction cannot be paid from plan assets, including by charges against participant accounts or plan forfeiture accounts.

____h. If application concerns delinquent participant 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?
____12. If you are an eligible applicant and wish to avail yourself of excise tax relief under the VFC Program Class Exemption:
____a. Have you made proper arrangements to provide within 60 calendar days after submission of this application a copy of the VFC Program Class Exemption notice to all interested persons and to the EBSA Regional Office to which the application is filed; or
____b. If you are relying on the exception to the notice requirement in section IV.C. of the VFC Program Class Exemption because the amount of the excise tax otherwise due would be less than or equal to $100.00, have you provided to the appropriate EBSA Regional Office a copy of a completed IRS Form 5330 or other written documentation containing the information required by IRS Form 5330 and proof of payment?
____13. 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) of the VFC Program?
____14. If the application involves payments to participants and beneficiaries:
____a. Have you enclosed a description demonstrating proof of payment to participants and beneficiaries whose current location is known to the plan and/or applicant in accordance with section 5(d) of the VFC Program?
____b. For individuals who need to be located, have you demonstrated how adequate funds have been segregated to pay missing individuals and included a description of the process that you commenced to locate missing individuals in accordance with section 5(d)?
____15. For purposes of the three transactions involving participant contributions covered under section 7.1, has the plan implemented measures to ensure that such transactions do not recur?

Signature of Applicant and Date Signed:

Name of Applicant:
Title/Relationship to the Plan:
Name of Plan, EIN and Plan Number:
Contact information: Phone; email

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 F: SCC Retention Record Checklist

Delinquent Participant Contributions or Loan Repayments

A self-corrector must complete this checklist, prepare or collect the listed documents and provide a copy of the completed checklist and the required documentation to the plan administrator (generally the plan sponsor/employer) to obtain relief under the SCC.

____Did you attach a brief statement explaining why the employer retained the participant contributions or loan repayments instead of timely forwarding such amounts to the plan (the Breach).

____Did you attach proof of payment, such as canceled checks, executed wire transfers, bank statements for the plan's account, or other documents showing the actual date the plan received the corrective payment(s)? If you paid the total amount of delinquent contributions and loan repayments (Principal Amount) separately from the total amount of earnings (Lost Earnings) that would have been earned on the Principal Amount but for the delinquency, make sure to attach proof of payment of both amounts. (Caution—Plan Assets, including charges to participant accounts or plan forfeiture accounts, cannot be used to pay the correction amount or the costs of correction);

____Did you attach other documents (if any) to support proof of payment, such as offsetting overpayments or annotations that provide a clear record of the correction?

____Did you attach a copy of the page(s) that results from the ''View Printable Results'' function of the Online Calculator? Self-correctors must use the Online Calculator to determine Lost Earnings and print a copy of the ''View Printable Results'' page.

____Did you attach a statement describing policies and procedures (if any) that the employer put into place to prevent future delinquencies of participant contributions or loan repayments?

____Did you attach a copy of the SCC Notice Acknowledgement and Summary page that you received from EBSA after submission of the SCC notice?

____Did a plan fiduciary and each plan official seeking relief complete the following Penalty of Perjury Statement and provide the signed statement to the plan administrator?

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 SCC notice and by the authorized representative, if any. Each plan official who is seeking the relief afforded under the SCC must also sign and date the statement, which must be retained by the plan administrator.

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 the SCC notice acknowledgement and summary, the checklist and all the required 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 _____

____Did a plan official complete the following authorization, if an authorized preparer was used to submit the SCC notice?

Authorization of Plan Official

I have authorized _____ to submit the VFCP SCC notice.

Name of Plan Official _____
Signature _____
Date _____

Paperwork Reduction Act Notice

The information identified on this form is required for a valid use of the Self-Correction Component for Delinquent Participant Contributions or Loan Repayments of the Voluntary Fiduciary Correction Program of the U.S. Department of Labor's Employee Benefits Security Administration (EBSA). You must complete this form and provide a copy of the completed checklist and the required documentation to the plan administrator to receive the relief under the Self-Correction Component of the Program with respect to the breach of fiduciary responsibility under Part 4 of Title I of ERISA associated with the delinquent participant contributions or loan repayments. EBSA may request a copy of this information to determine that you have satisfied the requirements of the Self-Correction Component of the Program. EBSA estimates assembling this information will require an average of 4 hours and completing 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.

Signed at Washington, DC, this 7th day of November, 2022.

Lisa M. Gomez

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

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