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Employee Benefits Security Administration

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

DEPARTMENT OF LABOR

Employee Benefits Security Administration

RIN 1210–AB03

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

AGENCY: Employee Benefits Security Administration, DOL.

ACTION: Adoption of Updated Voluntary Fiduciary Correction Program.

SUMMARY: This Notice includes an updated and streamlined version of the Voluntary Fiduciary Correction Program (VFC Program or the Program) under the Employee Retirement Income Security Act. The VFC Program is designed to encourage the voluntary correction of fiduciary violations by permitting persons to avoid potential civil actions and civil penalties if they take steps to correct identified violations in a manner consistent with the Program. The Program included in this Notice reflects changes made in response to public comments received on the VFC Program modifications implemented in April 2005. The final Program includes additional transactions, reduced documentation requirements, a simplified application form, a checklist, and availability of an online calculator for determining the amount to be restored to plans. These changes serve to both encourage and facilitate the use of the Program as a means by which to correct covered fiduciary violations.

DATES: The VFC Program contained in this Notice is effective May 19, 2006.

FOR FURTHER INFORMATION CONTACT:

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

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

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

SUPPLEMENTARY INFORMATION:

A. Background

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

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

In April 2005, EBSA published revisions to the VFC Program (the April 2005 VFC Program)[4] containing, among other amendments, several new covered transactions, on which EBSA invited public comment. EBSA believed that these revisions, designed to both simplify and expand the original Program, were needed to further encourage utilization of the Program. EBSA made the April 2005 VFC Program effective upon publication to permit use of the simplified processes and new covered transactions during the interim period prior to the adoption of final changes to the Program. Concurrently, EBSA proposed an amendment to the related class exemption, PTE 2002–51,[5] to accommodate a new transaction contained in the April 2005 VFC Program. However, the excise tax relief afforded by the amendments to PTE 2002–51 was not immediately available and could not be relied upon for relief during the interim period.

EBSA received six comment letters in response to the April 2005 VFC Program and related class exemption. Copies of these comments are posted on EBSA's Web site.[6]

After careful consideration of the issues raised by the comment letters and input from EBSA Regional Office personnel charged with administering the Program, EBSA is adopting final changes to the Program (the final VFC Program) in this Notice. EBSA believes these modifications will facilitate both the correction of violations of ERISA's fiduciary responsibility and prohibited transaction rules and the restoration of losses to participants resulting from the Breaches (as defined in the VFC Program). The final VFC Program will continue to be administered in EBSA Regional Offices. In tandem with today's publication of the final VFC Program, EBSA is publishing a final amendment to PTE 2002–51 in response to comments received and to conform with certain revisions in the final VFC Program. This amendment also appears in the Notice section of today's **Federal Register**.

B. Overview of Changes in the Final VFC Program

The final VFC Program retains the fundamentals of the original Program, adopted in 2002. The original Program was revised on April 6, 2005 (70 FR 17516), and public comment was solicited. The final VFC Program contained in this Notice includes additions to and modifications of the April 2005 Program. Set forth below is an overview of the changes to the April 2005 Program. To facilitate reference to the Program, this Notice includes a restatement of the Program in its entirety.

(1) Scope of Relief

Unlike the earlier versions of the Program, the final Program now affords relief from the imposition of potential civil penalties under section 502(i) of ERISA when correction is undertaken in accordance with the Program. This modification was made to provide more thorough and complete relief under the Program. In general, section 502(i) permits the Secretary to assess a civil penalty on prohibited transactions with respect to welfare plans and nonqualified pension plans.

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

[2] EBSA acknowledges, based on its experience, that certain transactions may fit within one or more of the listed categories of transactions, even if not specifically named in the category, for example certain transactions involving contributions in kind under section 7.4(a) of the Program. EBSA encourages potential applicants to discuss eligibility and similar issues with the appropriate regional VFC Program coordinator.

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

[4] 70 FR 17516 (April 6, 2005).

[5] 70 FR 17476 (April 6, 2005).

[6] *http://www.dol.gov/ebsa/regs/cmt_vfcp.html.*

(2) Covered Transactions

(i) Illiquid Assets—Section 7.4(f)

The April 2005 Program included 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, within the meaning of the Program. The Program described three scenarios for the plan's acquisition of the asset. Each acquisition eventually resulted in the plan holding an illiquid asset, for which the applicant must determine that the correction is determined to be necessary. One commenter suggested that the description of this transaction be expanded to include a fourth scenario reflecting the acquisition of an asset from a party in interest to which a statutory or administrative exemption applied. EBSA has decided to adopt this suggestion and, accordingly, has modified the description of the transaction in section 7.4(f) of the final Program. The related class exemption has been similarly amended.

(ii) Participant Loans—Section 7.3

The April 2005 VFC Program added two new categories of transactions involving plan loans to participants in section 7.C.1. These transactions provided an approved correction method for situations where participant loans exceeded the Internal Revenue Code (Code) section 72(p) limitations on amount or duration, which were incorporated into the plan. The statutory exemption from the prohibited transaction provisions for participant loans provided by section 408(b)(1) of ERISA requires that participant loans are made in accordance with plan terms regarding such loans. A violation would therefore occur when the section 72(p) loan limitations were exceeded.

Several comment letters on the April 2005 Program urged expansion of the categories of participant loan transactions. One commenter suggested including loans violating plan terms that imposed more stringent amount and duration limitations than Code section 72(p) restrictions. One comment letter requested including loans that were granted with inappropriate interest rates. Another commenter suggested including situations when loan repayments are not properly withheld from participants' wages (''default loans''), but instead are paid to the participant. This commenter observed that such withholding failures are administrative errors that frequently occur because of a change in service provider, for example, following a merger or acquisition. Several commenters asserted the necessity for coordination between EBSA and the IRS and also requested assurance that the Program's loan corrections would be compatible with resolution of the associated income tax issues under the Voluntary Correction Program of the IRS'' Employee Plans Compliance Resolution System (EPCRS) corrections.

EBSA believes that the transactions covered by the VFC Program should be as congruent as possible with the resolution of the related income tax issues. EBSA also believes that correction of participant loan issues under the VFC Program should be compatible with coordinating changes that EBSA understands will be made in a revision to the IRS'' EPCRS, based on informal discussions between EBSA and the staffs of the Internal Revenue Service and Treasury Department.

Accordingly, section 7.3(a) of the final Program has been modified to include a category of participant loan transactions for Breaches involving level amortization in addition to the transactions previously included for amount and duration Breaches. Section 7.3(b) also has been revised to include a category of transactions for default loans. The final Program's description of the loan transactions in section 7.3 is applicable only to plan participants who are parties in interest with respect to the plan based solely on their employee status with any employer whose employees are covered by the plan.

To simplify and expedite the correction process, the final VFC Program has been modified to require only that an applicant correct participant loan violations under the coordinating IRS'' EPCRS correction, when published, and then submit a copy of the resulting EPCRS compliance statement, along with proof of payment of any required amounts, to EBSA. Applicants are not required to submit any other documentation under the Program.

(iii) Settlor Expenses—Section 7.6

The preamble to the April 2005 Program specifically requested public input on viable additional transactions and reasonable methods of correction for such additional transactions. One commenter suggested the future development of transactions if and when additional fiduciary errors were identified. A second commenter recommended the addition of categories of transactions that might violate specific sections of ERISA under 404(a)(1) and 406(b). The recommended categories included the payment of expenses with plan assets in violation of ERISA section 404(a)(1)(A), (B) and (D), the holding of real estate in violation of ERISA section 404(a)(1)(C) and the acquisition of plan assets in violation of ERISA section 404(a)(1)(D).

In response to these comments, EBSA has revised the transactions in section 7.6 ''Plan Expenses'' to clarify that violations involving the use of plan assets to pay expenses that should have been paid by the plan sponsor may be corrected under the Program, as described more fully below. The related class exemption has also been revised to provide excise tax relief for certain plan expense violations corrected under the Program.

Beyond this expansion, however, EBSA believes that the addition of *general* categories of transactions, in contrast with the precisely described transactions currently included in the Program, would raise questions about the adequacy of the corrections. Program corrections depend on facts and circumstances and must be sufficiently uniform to obviate all need for negotiation and the consequent triggering of ERISA section 502(l) penalties.

The final Program includes a new section 7.6(b) ''Expenses Improperly Paid by a Plan.'' The description of this transaction posits that 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 for (A) services appropriately characterized as plan expenses, which involved the administration and maintenance of the plan, in circumstances where a plan provision requires that such plan expenses be paid by the plan sponsor, or (B) services appropriately characterized as settlor expenses, which relate to the activities of the plan sponsor in its capacity as settlor. The correction requires that the applicant restore the Principal Amount plus the greater of Lost Earnings or Restoration of Profits. For purposes of this transaction, the Principal Amount is defined as the entire amount improperly paid by the plan to the service provider for expenses that should have been paid by the plan sponsor.

Section 7.6(a) also has been revised and the definition of the Principal Amount for each of the described variations of the transaction has been clarified. A new example has also been added to illustrate a situation where the use of plan assets to pay compensation was a Breach because the compensation was for services that were simply unnecessary, in that they were not helpful or appropriate in carrying out the purposes for which the plan is maintained. Section 7.6(c) ''Payment of

Dual Compensation to a Plan Fiduciary'' has not been substantively altered in the final Program.

(3) Definitions

(i) Under Investigation

Several commenters suggested clarifying the changes made to the April 2005 Program's definition of ''Under Investigation.'' One commenter expressed concern that the current definition, which bars applicants if EBSA or any other federal agency is conducting an investigation in connection with a plan transaction, might prevent Program applications where an investigation has only an indirect impact on the plan, such as an employment tax audit resulting in misclassified employees. Another commenter suggested that the definition be modified to permit applications by financial institutions subject to ongoing investigations that are not plan specific, but might arguably ''involve'' the plan, such as annual examinations by the Federal Reserve.

EBSA has decided to amend the definition to more narrowly focus on situations when an investigation, either ongoing or for which notice has been given, involves the plan or an act or transaction involving the plan. For example, a plan would be ''Under Investigation'' if undergoing an Employee Plans examination by the Tax Exempt and Government Entities Division of the IRS. For non-criminal investigations and examinations of a plan, or of the applicant or plan sponsor in connection with an act or transaction directly related to the plan, by the Pension Benefit Guaranty Corporation (PBGC) or certain state agency officials, EBSA is instituting an optional disclosure provision. Potential applicants who choose to disclose such an investigation may apply under the final Program, while potential applicants who opt for nondisclosure cannot apply because they are considered ''Under Investigation.''

If an applicant discloses the existence of an investigation to EBSA in writing when submitting an application, EBSA will promptly notify the investigating agency of such application. EBSA's written notice is designed to afford the investigating agency an opportunity to provide EBSA with information relevant to the investigation or examination. EBSA will take suitable action in response to information received from the investigating agency and as a result, in appropriate circumstances, may decline to issue a no action letter to the applicant.

If EBSA has completed an investigation resulting in a referral of transactions to the IRS, eligibility to participate in the VFC Program to correct such transactions is limited. Section 4(c) has been revised to clarify that potential applicants continue to be eligible except with regard to the specific transactions identified by EBSA in a written notice to a plan fiduciary concerning the referral to the IRS.

(ii) Plan Official

One commenter suggested that the definition of ''Plan Official'' be revised to provide that in cases of multiemployer plans or multiple employer plans, an application could be made only by the ''plan administrator,'' rather than by any contributing or adopting employer. EBSA has decided to retain the existing definition of ''Plan Official,'' because the current definition provides maximum flexibility as to who may apply under the Program to correct violations involving multiemployer plans or multiple employer plans. The Program, of course, allows the plan administrator of such a plan to apply on behalf of the entire plan; any participating employer may apply on its own behalf.

(4) Correction Methodology

(i) Cash Settlement

One commenter requested that the correction for a plan's purchase of an asset from a party in interest under section 7.4(a) be amended to allow the plan to retain the asset and settle the correction amount in cash if doing so is determined to be in the best interest of participants and beneficiaries. The April 2005 Program required that a plan's purchase of an asset from a party in interest be corrected by selling the asset back to the party in interest, or to a non-party in interest. EBSA has decided to modify the correction under the final Program to permit the suggested alternative correction. A plan will be permitted to retain an asset purchased from a party in interest by settling the correction amount in cash, 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. An independent fiduciary is not required if the plan sells the asset back to the party in interest, because this correction is in essence a reversal of the original sale. EBSA believes that the determination to resell the asset to the party in interest may be properly determined by a plan fiduciary.

The correction for a plan's sale of an asset to a party in interest under section 7.4(b) is also being revised under the final Program. Although this correction already permitted both a cash settlement and the reversal of the transaction by the plan's repurchase of the asset from the party in interest, it is being modified to require a determination by an independent fiduciary only in the limited circumstances where the plan settles the transaction in cash. The related class exemption is being amended for consistency with these changes.

(ii) Credit for Voluntary Contributions

One commenter requested that the correction for delinquent participant contributions under section 7.1(a) be modified to permit an employer, which failed to timely remit withheld participant contributions to a contributory defined benefit plan, to credit any employer contribution in excess of amounts legally required by the minimum funding standard or bargaining agreements against the Program's required Lost Earnings or Restoration of Profits for that same plan year. EBSA has decided to retain the existing correction because it adequately addresses the Breach. EBSA believes that the proposed modification would create uncertainty and contravene sound funding policy.

(iii) Transaction Costs

In the interest of accurate applications and the desire to provide timely review by EBSA staff, EBSA wishes to emphasize that the general rule for determining the Principal Amount under section 5(b)(2) requires, where appropriate, the inclusion of any transaction costs associated with entering into the transaction that constitutes the Breach in the determination of the Principal Amount.

(5) Program Calculations

(i) Multiple Recovery Dates

One commenter asked for clarification regarding Program transactions that involve more than one correction period and result in separate calculations and multiple Recovery Dates. This commenter offered as examples: A plan's purchase of securities in a prohibited transaction where such securities are sold over time in more than one transaction, and the repayment of debt securities over time in installments of principal and interest. Corrections under the Program, which may involve multiple transactions with different time periods, may be corrected by performing the calculations in steps using different Recovery Dates. The Online Calculator is generally available to perform such calculations; however, if the factual circumstances surrounding the correction cannot be accommodated by the Online Calculator's functions, a manual calculation may be submitted.

(ii) Lost Earnings Formulation

One commenter observed that certain language in the original Program's formulation of Lost Earnings, which allowed applicants in appropriate circumstances to subtract ''actual net earnings or realized net appreciation'' or to add ''net loss to the plan as a result of the transaction,'' was not included in the April 2005 Program. EBSA deliberately eliminated such language from the April 2005 Program in an effort to provide more straightforward calculations. The April 2005 Program was designed to provide simplicity and uniformity in correction amount calculations; EBSA eliminated complicated requirements for the computation of actual plan earnings, as well as the associated additions and subtractions for net gains and losses. Instead, the April 2005 Program focused on the IRC section 6621 rate in its Lost Earnings calculation. The final Program retains this approach.

(iii) Corporate Transactions

One commenter asked whether the Online Calculator can accommodate corporate transactions such as stock splits, tenders, and mergers, or if such transactions had to be accounted for manually. EBSA believes that is the responsibility of applicants to take into account any adjustments necessary because of corporate transactions before entering data into the Online Calculator in order to ensure that the results are current and correct. In the event the factual circumstances surrounding the correction cannot be accommodated by the Online Calculator, applicants may submit a manual calculation.

(6) Documentation Requirements

(i) Summary Documentation

With regard to the correction of delinquent participant contributions or loan repayments to pension plans, the April 2005 Program under section 7.A.1. permitted applicants correcting Breaches that involved (A) amounts below $50,000 or (B) amounts greater than $50,000 that were remitted within 180 calendar days after receipt by the employer to provide summary documentation. EBSA has decided to expand the summary documentation requirements to two additional transactions involving the delinquent remittance of participant funds.

Specifically, with regard to the correction of delinquent participant contributions to insured welfare plans under section 7.1(b) and to welfare plan trusts under section 7.1(c), the final VFC Program permits the use of simplified documentation requirements for applicants correcting Breaches that involved (A) amounts below $50,000 or (B) amounts greater than $50,000 that were remitted within 180 calendar days after receipt by the employer. EBSA believes that extending the summary documentation requirements to these additional transactions not only minimizes the paperwork burden on applicants making smaller corrections, but provides consistency among all three transactions in section 7.1 of the final Program.

Applicants who fail to meet the $50,000 and 180 day standards may still be eligible to correct transactions involving the delinquent remittance of participant funds under the Program, but are simply precluded from submitting summary documentation to substantiate their applications. It should also be noted that the 180 day standard for summary documentation is separate and distinct from the 180 day standard for excise tax relief under the related class exemption for delinquent participant contributions or loan repayments to pension plans; for purposes of the exemption, the 180 day standard applies regardless of the amount involved.

(ii) Bonding

In the April 2005 VFC Program, section 6 was modified to eliminate the requirement that applicants provide certain information relating to the plan's fidelity bond. This modification was not changed in the final VFC Program, but this decision should not be misconstrued as eliminating the bonding requirement itself. This change focuses merely on streamlining the application process to eliminate documentation of the bond, and not on compliance with the substantive bonding requirements of ERISA.

(iii) Online Calculator

One commenter observed that the provisions requiring the submission of documents and information in support of calculations in circumstances where the Online Calculator is used to perform Program calculations were unclear. In response to this comment, EBSA has modified section 6(d), ''Detailed Narrative,'' which lists documents and information that must be submitted with an application. Subparagraph (ii) of section 6(d)(6) clarifies that applicants using the Online Calculator for Program calculations only need to submit a copy of the final page(s) that results from using the ''Print Viewable Results'' function. This function is used after inputting all data elements and completing all calculations using the Online Calculator.

(7) EBSA Procedures

(i) Investigations

One commenter inquired whether EBSA would commence investigations related to already filed Program applications if the statute of limitations for the transaction described in the application was close to expiring. As stated in the preamble to the original Program, EBSA generally does not anticipate taking enforcement action in response to an application, except where EBSA becomes aware of possible criminal behavior, material misrepresentations or omissions, or other abuses of the Program. In rare and appropriate circumstances, EBSA will consider entering into tolling agreements with applicants, but EBSA is not amending the VFC Program to require tolling agreements as a matter of course.

(ii) Timing

One commenter inquired whether relief under the Program remains available for transactions covered by a filed application if an investigation were to begin after the application is filed, but before a no action letter is issued. Relief under the Program is available for covered transactions if, *at the time the application is filed,* the plan or applicant is not considered to be ''Under Investigation'' as defined in section 3(b)(3) and meets the conditions under section 4 ''VFC Program Eligibility.''

(iii) Self Correction Component

One commenter requested that EBSA expand the VFC Program to include a voluntary self correction component within the Program. EBSA has decided not to include a formal self correction component. EBSA continues to believe that an important result under the Program is the certainty that applicants have complied with the terms of the Program and have revealed the details of the transaction and the correction under penalty of perjury in their applications.

(8) Miscellaneous

(i) Reporting

One commenter requested that EBSA implement a *de minimis* filing rule under the Program so that applicants would be required to correct previously filed Forms 5500 only in circumstances where the Breach involved a reasonable and defined threshold of the plan's assets. EBSA has declined to adopt this suggestion. EBSA believes that when a plan has engaged in a prohibited transaction or plan assets have been improperly valued, previously filed Forms 5500 must be amended to reflect these important reporting items. Applicants are directed to the instructions for the Form 5500 to determine their reporting obligations.

(ii) Application of Program to Other Plans

One commenter requested that EBSA provide relief under the Program and the related class exemption for breaches involving plans that currently are not eligible to participate in the Program.[7] The commenter suggested that it would be administratively convenient if a Program applicant, who had caused a number of plans, including plans subject only to provisions in the Code, to engage in a violation subject to correction under the Program, could correct and receive a no action letter with respect to all of the plans. The Department has determined that it cannot expand the Program as requested by the commenter, as it lacks jurisdiction to issue a no action letter under the Program with respect to violations of the Code.

C. De Minimis Excise Tax

The IRS requested a modification to the requirement in the related class exemption that employers notify interested persons in writing of transactions corrected under the VFC Program. Specifically, the IRS requested that the notice requirement not apply in those instances when the excise tax otherwise due under section 4975 of the Code would be less than or equal to $100.00. The IRS requested that the amount of the excise tax otherwise due be contributed to the plan, and that the contribution be allocated to the plan's participants and beneficiaries in a manner consistent with the plan's provisions for allocating earnings. The Department has adopted this request, which is discussed further in the preamble to the amendment to PTE 2002–51 published simultaneously with this Notice.

D. Effective Date

The Department has determined that the relief afforded to applicants under the final VFC Program will be available thirty days following publication of the final Program in the **Federal Register**. EBSA believes that any further delay for potential applicants in the availability of the provisions of the final Program would serve no useful purpose. During the thirty day period following publication of the final Program, applicants may continue to pursue relief by filing applications under either the original VFC Program or the April 2005 VFC Program. These applications will be processed under the provisions of the applicable Program. However, upon expiration of the 30 day period following publication of the final Program in the **Federal Register**, both the April 2005 VFC Program and original VFC Program will be superseded by the final VFC Program.

The Department notes that implementation of the final Program does not foreclose resolution of fiduciary breaches by other means, including entering into settlement agreements with the Department.

E. Impact of Program Amendments

Executive Order 12866 Statement

Under Executive Order 12866, the Department must determine whether a regulatory action is ''significant'' and therefore subject to the requirements of the Executive Order and subject to review by the Office of Management and Budget (OMB). Under section 3(f) of the Executive Order, a ''significant regulatory action'' is an action that is likely to result in a rule (1) having an annual effect on the economy of $100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as ''economically significant''); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. OMB has determined that this action is significant under section 3(f)(4) because it raises novel legal or policy issues arising from the President's priorities. Accordingly, the Department has assessed the costs and benefits of the regulation. OMB has reviewed this regulatory action.

As stated in its previous analysis in the preamble to the April 2005 Program published in April, 2005, the Department believes that the benefits of the VFC Program justify its costs. The Program is designed to provide an efficient, cost-effective method for correcting a variety of fiduciary Breaches and prohibited transactions and receiving Departmental recognition of the correction. The methods of correction set out in the Program provide the required conditions for correction, which are adequate and protective of the rights of participants and beneficiaries. Participation in the Program is voluntary. The Department believes that the costs to a plan and its fiduciaries of correcting a potential fiduciary Breach through voluntary participation in the VFC Program are lower than if correction were imposed in connection with a civil action; further, correction of potential fiduciary Breaches and prohibited transactions through the Program satisfactorily protects the assets of the participating plans.

The VFC Program imposes costs only when Plan Officials choose to use the Program to correct a potential fiduciary Breach. Such costs to Plan Officials generally include payment of the correction amount required by the Program and preparation and submission of the application to the Department. Benefits for Plan Officials who apply for relief under the 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 based on the Breach.

An additional and significant benefit of the VFC Program accrues to participants and beneficiaries through the correction of fiduciary violations 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 Department expects that the improvements to the final VFC Program published today will increase efficiency and accessibility for potential applicants. These improvements, described above, include: Extending to welfare plans the summary documentation requirements permitted for certain delinquent participant contributions to pension plans; clarifying the availability of a correction for the improper use of plan assets to pay expenses that should have been paid by a plan sponsor based on a plan provision or that are properly characterized as settlor expenses; expanding the correctable categories of

[7] Certain individual retirement accounts and other types of plans are regulated solely under the provisions of the Code. Compliance with and enforcement of those provisions are not within the jurisdiction of the Department of Labor.

defective participant plan loans and simplifying the loan documentation requirements; and permitting the use of a cash settlement as a correction methodology when a plan decides to retain an improperly purchased asset and an independent fiduciary approves such decision.

The Department has determined that the particular changes made to the final Program will reduce costs by reducing the number of hours required to make corrections and file applications. The Department has also estimated that participation in the Program will continue to rise in the future due to a combination of factors, including increases in the number and types of correctable transactions and increased public familiarity. Although the Department is unable to estimate accurately the extent to which the particular changes made in the final Program will contribute to this projected increase in participation in the Program, the Department is projecting that participation in the Program will increase from 985 in fiscal year 2005 to an annual application level of 1,250. See discussion below under *Paperwork Reduction Act.* The Department will continue to actively monitor the use of the Program in order to better evaluate its strengths and weaknesses.

Paperwork Reduction Act

The Information Collection Request (ICR) included in the 2002 edition of the Program and PTE 2002–51 was originally approved by the Office of Management and Budget (OMB) under control number 1210–0118. In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) (PRA 95), the Department submitted the revision to the existing ICR attributable to changes made to section 7.A.1(c) of the April 2005 Program to OMB for review and clearance at the time the April 2005 VFC Program was published in the **Federal Register** (April 6, 2005). At that time, the Department solicited public comment on the revision to the ICR. No comments were received on the information collection provisions contained in the revision to the ICR. OMB approved the revision on September 26, 2005, under the same control number, 1210–0118. A copy of the ICR, with applicable supporting documentation, may be obtained by contacting the Department of Labor, Departmental Clearance Office, Ira Mills, at (202) 693–4122. (This is not a toll-free number.) Certain of the additional changes being made in the final VFC Program as a result of public comment on the April 2005 Program, as described above, will cause adjustment of the prior ICR and the estimates of burden. These adjustments and their effect on the estimates of the overall paperwork burden imposed by the final Program are discussed below.

The final VFC Program extensively simplifies the documentation requirements for correction of certain participant loan and welfare plan contribution violations. In the final VFC Program, the Department requires voluntary correction of certain participant loans to employees under the IRS'' Employee Plans Compliance Resolution System (EPCRS) as a prerequisite to application for relief under the Program. Following correction under the EPCRS, applicants must only provide the Department with a copy of the compliance statement received from the IRS and proof of payment of any required correction amounts. No additional documentation is required. The Department also simplified the documentation requirements for applicants correcting delinquent participant contributions to insured welfare plans and welfare plan trusts. The April 2005 Program permitted summary documentation, rather than detailed payroll and accounting records, in support of applications for delinquent participant contributions or loan repayments to pension plans; the Department decided to extend these reduced requirements for Breaches involving delinquent participant contributions to welfare plans that are within certain amount and duration thresholds. Finally, the Department clarified that applicants using the Online Calculator to perform required calculations are not required to submit detailed documentation in support of the calculations; rather, they are simply asked to provide a copy of the final page(s) that results from using the ''Print Viewable Results'' feature of the Online Calculator.

The ''Fees and Expenses'' category of transactions in the final VFC Program has been restructured to clarify that applicants may correct Breaches involving the improper use of plan assets to pay plan expenses that should have been paid by the plan sponsor based on a plan provision or that are properly characterized as settlor expenses. Applicants must provide copies of the plan's accounting records showing the date and amount of the improperly paid expenses in addition to the supporting documentation generally required by the Program.

As a further change, the final VFC Program permits plans to utilize a cash settlement as a correction methodology when a plan decides to retain an improperly purchased asset, such as real estate. Plans that pursue this type of correction must hire an independent fiduciary to determine that the plan will realize a greater benefit from this correction than a reversal of the original transaction. If a plan chooses this method of correction, its application to the VFC Program must include a report of the independent fiduciary's determination explaining the basis for his or her conclusion that the plan will receive a greater benefit than if the plan had reversed the purchase by reselling the asset in accordance with Program requirements.

The overall paperwork burden of the final VFC Program and the amended PTE 2002–51 is estimated as follows. The Department projects an increase in the number of respondents from 985 in fiscal year 2005 to 1,250 annually. For the final VFC Program alone, Plan Officials will have to devote 3.5 hours to each application; they will spend an additional 1 hour on recordkeeping. Therefore, total burden hours for Plan Officials will equal 5,625 hours (4.5 hrs. × 1,250).

Service providers will need about 2 hours (at $34.50 per hour) for their work preparing plans' applications. The total burden cost for service providers equates to $86,250 ($34.50 × 2 hrs. × 1,250). Factoring in mailing costs of $8 per application ($10,000), the complete burden costs for applicants will be $96,250 ($86,250 + $10,000).

In addition to the Program, the Department is publishing an amendment to the class exemption PTE 2002–51, which applies only to qualifying applicants participating in the final VFC Program. A detailed discussion of the economic impact under Executive Order 12866 and the paperwork burdens under the Paperwork Reduction Act for the exemption, together with a table summarizing the relevant numbers, can be found in the preamble to the amendment to PTE 2002–51 published simultaneously with this Notice in today's **Federal Register**. In brief, the Department calculates that 250 of the applicants to the final VFC Program will be covered by the class exemption. The Department has determined that service providers will prepare the requisite documentation, which will require approximately one hour for completion and delivery. The paperwork burden cost of the exemption therefore equals $8,625 ($34.50 × 1 hr. × 250). Total mailing costs for the paperwork under the exemption will be $4,427. The Department assumes, however, that all applicants who send interested party notices will send the Department its copy of the notice by mail, using certified or overnight delivery services and that this copy will be included in the application package described above under costs for the VFC Program. The annual mailing costs for notices to interested persons and the Department is therefore estimated at $4,427. In total, the paperwork burden costs entailed by PTE 2002–51, as amended, is $13,052 ($8,625 + $4,427).

In summary, the categories in the table below encompass the numbers for both the final 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: 1,250.

Frequency of Response: On occasion.

Responses: 11,790.

Estimated Total Burden Hours: 5,625.

Total Annual Cost (Operating and Maintenance): $109,302.

Persons are not required to respond to the revised information collection unless it displays a currently valid OMB control number.

Regulatory Flexibility Act

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

Congressional Review Act

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

Unfunded Mandates Reform Act

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

F. Federalism Statement

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

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

Voluntary Fiduciary Correction Program

Appendix E. Model Application Form (Optional)

Section 1. Purpose and Overview of the VFC Program

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

Section 2. Effect of the VFC Program

(a) *In general.* EBSA generally will issue to the applicant a no action letter [8] with respect to a breach identified in the application if the eligibility requirements of section 4 are satisfied and a Plan Official corrects a breach, as defined in section 3, in accordance with the requirements of sections 5, 6 and 7. Pursuant to the no action letter it issues, EBSA will not initiate a civil investigation under Title I of ERISA regarding the applicant's responsibility for any transaction described in the no action letter, or assess civil penalties under either 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 application and (2) that the corrective action was, in fact, taken.

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

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

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

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

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

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

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

(iii) EBSA making the appropriate referrals of criminal violations as required by section 506(b) of ERISA.[9]

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

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

(ii) Referring information regarding the transaction to the Internal Revenue Service (IRS) as required by section 3003(c) of ERISA; [10] or

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

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

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

(d) *Correction.* The correction criteria listed in the VFC Program represent EBSA enforcement policy with respect to applications under the Program and are provided for informational purposes to the public, but are not intended to confer enforceable rights on any person who purports to correct a violation. Applicants are advised that the term ''correction'' as used in the VFC Program is not necessarily the same as ''correction'' pursuant to section 4975 of the Internal Revenue Code (Code).[11]

[8] See Appendix A.

[9] 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.

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

[11] *See* section 4975(f)(5) of the Code; section 141.4975–13 of the temporary Treasury Regulations and section 53.4941(e)–1(c) of the Treasury Regulations. The IRS has indicated that the federal tax treatment of a breach and correction under the VFC Program (including the Federal income and

Continued

Correction may not be achieved under the Program by engaging in a prohibited transaction that is not subject to a prohibited transaction administrative exemption.

(e) *EBSA's authority to investigate.* EBSA reserves the right to conduct an investigation and take any other enforcement action relating to the transaction identified in a VFC Program application in certain circumstances, such as prejudice to the Department that may be caused by the expiration of the statute of limitations period, material misrepresentations or 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 relating to other plans sponsored by the same plan sponsor, while a VFC Program application involving the plan or the plan sponsor is pending.

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

Section 3. Definitions

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

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

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

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

(3) *Under Investigation.* For purposes of section 4(a), a plan or potential applicant shall be considered to be ''Under Investigation'' if:

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

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

(iv) The Tax Exempt and Government Entities Division of the IRS is conducting an Employee Plans examination of the plan; or

(v) The Pension Benefit Guaranty Corporation (PBGC), any state attorney general, or any state insurance commissioner is conducting an 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, unless the applicant notifies EBSA, in writing, of such an investigation or examination at the time of the application;

and the plan, a Plan Official, or any authorized plan representative has received a written or oral notice of an investigation or examination described in (i), (ii), (iii), (iv), or (v).

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, or the plan sponsor in connection with a participant complaint, unless the participant complaint concerns the transaction described in the application and the plan has not received the correction amount due under the Program as of the date EBSA staff contacted the plan, the applicant, 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 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) Neither the plan nor the applicant is Under Investigation.

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

(c) EBSA has not conducted an investigation which resulted in written notice to a plan fiduciary that the transaction, for which the potential applicant 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.

Section 5. General Rules for Acceptable Corrections

(a) *Fair Market Value 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 following conditions:

(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

employment tax consequences to participants, beneficiaries, and plan sponsors) are determined under the Code and that, based on its review of the Program, except in those instances where the fiduciary breach or its correction involve a tax abuse, a correction under the VFC Program for a breach that constitutes a prohibited transaction under section 4975 of the Code generally will constitute correction for purposes of section 4975 and a correction under the VFC Program for a breach that also constitutes an operational plan qualification failure generally will constitute correction for purposes of the IRS' Employee Plans Compliance Resolution System (EPCRS).

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 he or she has met the education, experience, and licensing requirements that are generally recognized for appraisal of the type of asset being appraised.

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

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

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

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

(iv) A fiduciary of the plan;

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

(vi) The VFC Program applicant.

(b) *Correction Amount.* (1) *In general.* For purposes of the VFC Program, the correction amount is the amount that must be paid to the plan as a result of the Breach in order to make the plan whole. In most instances, the correction amount will be a combination of the Principal Amount involved in the transaction (*see* 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)(5) of this section), and any interest on Lost Earnings. However, in circumstances when the Restoration of Profits amount (*see* paragraph (b)(6) 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.

(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.

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

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

(5) *Lost Earnings.* (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 [12] 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,[13] 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 determined in accordance with paragraph (b)(5)(ii) above. Such interest shall be calculated in the same manner as Lost Earnings described in paragraph (b)(5)(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)(5)(ii) above) and any interest added to such Lost Earnings (determined in accordance with paragraph (b)(5)(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)(5)(ii) and (iii) above, substituting the applicable underpayment rates under section 6621(c)(1) of the Code [14] in lieu of the rates under section 6621(a)(2).

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

(6) *Restoration of Profits.* (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). ''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)(6)(ii) below.

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

(ii) *Calculation of Interest.* Interest shall be calculated by: (A) Determining the applicable corporate underpayment

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

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

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

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)(6)(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)(6)(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.

(iii) *Special Rule for Transactions Resulting in Large Restorations.* If the amount of Restoration of Profits (determined in accordance with paragraph (b)(6)(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)(6)(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 purposes of calculating the interest amount for Restoration of Profits, pursuant to paragraphs (b)(6)(ii) and (iii) above, a Plan Official may either (A) use the Online Calculator described in paragraph (b)(7) below, or (B) perform a manual calculation in accordance with subparagraphs (ii) and (iii) 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.

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

(i) *Lost Earnings and Interest.* To calculate Lost Earnings, applicants 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 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.

(8) 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, shall pay the costs of correction, which may not be paid from plan assets.

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

(3) The principle of paragraph (c)(1) 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 either the IRS and Social Security Administration locator services, or other comparable means. The costs of such efforts are part of the costs of correction.

(e) *De Minimis Exception.* Where correction under the Program requires distributions in amounts less than $20 to former employees, their beneficiaries and alternate payees, who neither have account balances with, nor have a right to future benefits from the plan, and the applicant demonstrates in its submission that the cost of making the distribution to each such individual exceeds the amount of the payment to which such individual is entitled in connection with the correction of the transaction that is the subject of the application, the applicant need not make distributions to such individuals who would receive less than $20 each as part of the correction. However, the applicant must pay to the plan as a whole the total of such de 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 $20, and Employer X demonstrates that the cost of making the distribution to those former employees is $27 per individual. Employer X need not make distributions to those 20 former employees. However, the total amount of distributions that would have been due to those former employees must be paid to Plan Y. The payment to Plan Y may be used for any purpose that payments or credits, which are not allocated directly to participant accounts, are used. Employer X must make distributions to the five former employees who are entitled to receive distributions of more than $20.

Section 6. Application Procedures

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

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

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

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

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

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

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

(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)(5)(i) through (iv) of section 5, 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 (b)(7) of section 5, the data elements required to be input into the Online Calculator under paragraphs (b)(7)(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); [15]

(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.

(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)) and that I have reviewed this application, including all supporting documentation, and to the best of my knowledge and belief the contents are true, correct, and complete.'' The statement must be signed and dated by a plan fiduciary with knowledge of the transaction that is the subject of the application and the authorized representative of the applicant, if any. In addition, each Plan Official applying under the VFC Program must sign and date the Penalty of Perjury statement. The statement must accompany the application and any subsequent additions to the application. Use of the Penalty of Perjury Statement included with the Model Application Form in Appendix E will satisfy the requirements of paragraph (g) of this section.

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

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

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

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

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

EBSA has identified certain Breaches and methods of correction that are suitable for the VFC Program. Any Plan Official may correct a Breach listed in this section in accordance with section

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

5 and the applicable correction method. The correction methods set forth are strictly construed and are the only acceptable correction methods under the VFC Program for the transactions described in this section. EBSA will only accept applications concerning correction of Breaches described in this section.

7.1 Delinquent Remittance of Participant Funds

(a) Delinquent Participant Contributions and Participant Loan Repayments to Pension Plans

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

(2) *Correction of Transaction.* (i) *Unpaid Contributions or Participant Loan Repayments.* Pay to the plan the Principal Amount plus the greater of (A) Lost Earnings on the Principal Amount or (B) Restoration of Profits resulting from the employer's use of the Principal Amount, as described in section 5(b). The Loss Date for such contributions is the date on which each contribution reasonably could have been segregated from the employer's general assets. In no event shall the Loss Date for such contributions be later than the applicable maximum time period described in 29 CFR 2510.3–102. The Loss Date for such repayments is the date on which each repayment reasonably could have been segregated from the employer's general assets consistent with the guiding principles of 29 CFR 2510.3–102.[16] Any penalties, late fees or other charges shall be paid by the employer and not from participant loan repayments.

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

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

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

(*2*) 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 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;

(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 to Insured Welfare Plans

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

(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, 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,

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

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;

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

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

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

(*2*) Summary documents demonstrating the amount of unpaid or late contributions; and

(iv) If restored participant contributions exceed $50,000 and were remitted 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.

(c) 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) the greater of (*1*) Lost Earnings on the Principal Amount or (*2*) Restoration of Profits resulting from the employer's use of the Principal Amount as described in section 5(b). The Loss Date for such contributions is the date on which each contribution would become plan assets under 29 CFR 2510.3–102. Any penalties, late fees or other charges shall be paid by the employer and not from participant contributions.

(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 greater of (A) Lost Earnings or (B) Restoration of Profits resulting from the employer's use of the Principal Amount as described in section 5(b). Any penalties, late fees or other such charges shall be paid by the employer and not from participant contributions.

(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, 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) (A) total $50,000 or less, or (B) exceed $50,000 and were remitted to the plan within 180 calendar days from the date such amounts were received by the employer, or the date such amounts otherwise would have been payable to the participants in cash (regarding amounts withheld by an employer from employees' paychecks), submit:

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

(*2*) 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 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, 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 which, at the time the loan was made, was less than the fair market interest

rate for loans with similar terms (for example, the amount of loan, amount and type of security, repayment schedule, and duration of the loan) to a borrower of similar creditworthiness. The loan was not exempt from the prohibited transaction provisions of Title I of ERISA.

(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, submit the following documents:

(i) A narrative describing the process used to determine the fair market 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).

(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 Amount, plus Lost Earnings through the Recovery Date, 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.

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

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

(v) 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 borrower or the Plan Official must pay the excess of what the plan would have received through the Recovery Date had the loan been made at 7% over what, in fact, the plan did receive from the commencement of the loan to the Recovery Date, plus Lost Earnings on that amount as described in section 5(b). The Plan Official must also pay on the Recovery Date the difference in the value of the remaining payments on the loan between the 7% and the 4% for the duration of the time the plan is owed repayments on the loan.

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

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

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

(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 Amount, plus Lost Earnings as described in section 5(b), through the date the loan became fully secured.

(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 for an unsecured loan (from the beginning of the loan until the Recovery Date) over the loan payment actually received under the loan terms during such period. Under the VFC Program, the fair market interest rate must be determined by an independent commercial lender.

(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 amount to be paid to the plan is the present value of the remaining Principal Amounts from the date the loan is fully secured to the maturity date of the loan. Instead of calculating the present value, it is acceptable for administrative convenience to pay the sum of the remaining Principal Amounts.

(iv) 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, 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; and

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

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 his or her status as an employee of any employer whose employees are covered by the plan, as defined in section 3(14)(H) of ERISA. The 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(e), except that the applicant must provide (i) proof of payment, as described in paragraph (e)(6) of section 6, 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 his or her status as an employee of any employer whose employees are covered by the plan, as defined in section 3(14)(H) of ERISA. 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(e), except that the applicant must provide (i) proof of payment, as described in paragraph (e)(6) of section 6, 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 [17] 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 fair market value (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 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) For this transaction, the Principal Amount is the plan's original purchase price.

(iv) 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

[17] 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.

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.

(3) *Documentation.* In addition to the documentation required by section 6, 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; 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 (a)(2)(ii) of this section than by reselling the asset pursuant to paragraph (a)(2)(i) of this section.

(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 [18] 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).

(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, 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.

(c) Sale and Leaseback of Real Property to Employer

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

(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 to a person who is not a party in interest with respect to the plan.[19] 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

[18] 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.

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

determined by a qualified, independent appraiser, the Principal Amount also includes the difference between the rent actually paid and the rent that should have been paid at FMV. The plan sponsor must pay to the plan this additional Principal Amount, plus the greater of (A) Lost Earnings or (B) Restoration of Profits resulting from the plan sponsor'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, 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.

(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, 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 FMV 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, 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 FMV 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 his or her 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 his or her 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.

(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 the plan's original purchase price.

(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, 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. Restore to the plan for distribution to the affected plan participants, or restore directly to the plan participants, the amount by which all affected participants were underpaid distributions to which they were entitled under the terms of the plan, plus Lost Earnings as described in section 5(b) on the underpaid distributions. File amended Annual Report Forms 5500, as detailed below.

(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 her 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 her 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, 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.

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 advisor, 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 advisor who advised the plan's trustees about how to invest the plan's entire portfolio. In accordance with the plan document, the trustees instructed the advisor to limit the plan's investments to equities and bonds. In exchange for his services, the plan paid the investment advisor 3% of the value of the portfolio's assets. If the trustees had inquired, they would have learned that comparable investment advisors charged 1% of the value of the assets for the type of portfolio that the plan maintained. To correct the transaction, the plan must be paid the Principal Amount of 2% of the value of the plan's assets, plus 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 advisor as a way of rewarding the advisor 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, 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 advisor, or insurance agent) for:

(i) Services provided in connection with the administration and maintenance of the plan (''plan expenses'' [20]) 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'' [21]), 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, 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 his or her 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 his services as union president. He is appointed as a trustee of the health plan while retaining his position as union president. In exchange for acting as plan trustee, the union president is paid a salary of $200 per week by the plan while still receiving the $50,000 salary from the union. Since $50,000 is full-time pay, the plan's weekly salary payments are improper. To correct the transaction, the plan must be paid the Principal Amount, which is the $200 weekly salary amount for each week that the salary was paid, plus the higher of Lost Earnings or Restoration of Profits, as described in section 5(b).

(3) *Documentation.* In addition to the documentation required by section 6, 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

Dear Applicant (Plan Official):

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

[21] *See id.*

Re: VFC Program Application No. xx–xxxxxx

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

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

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

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

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

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

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

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

Appendix B—VFC Program Checklist (Required)

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

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

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

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

____4. Have you provided the date that the most recent Form 5500 was filed by the plan?

____5. Have you enclosed a signed and dated certification under penalty of perjury for the plan fiduciary with knowledge of the transactions and for each applicant and the applicant's representative, if any?

____6. Have you enclosed relevant portions of the plan document and any other pertinent documents (such as the adoption agreement, trust agreement, or insurance contract) with the relevant sections identified?

____7. 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. Where applicable, have you enclosed a copy of an appraiser's report?

____9. 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 and Lost Earnings or Restoration of Profits; and

____g. If application concerns delinquent employee contributions or loan repayments, a statement from a Plan Official identifying the earliest date on which participant contributions/loan repayments reasonably could have been segregated from the employer's general assets and supporting documentation on which the Plan Official relied?

____10. 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 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 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?

____11. 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)?

____12. Where applicable, have you enclosed a description demonstrating proof of payment to participants and beneficiaries whose current location is known to the plan and/or applicant, and for individuals who need to be located, have you demonstrated how adequate funds have been segregated to pay missing individuals and commenced the process of locating the missing individuals using either the IRS and SSA locator services, or other comparable means?

____13. For purposes of the three transactions 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:

____

Paperwork Reduction Act Notice

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

Appendix C—EBSA Regional Offices

Submit your VFC Program application to the appropriate EBSA Regional Office:

Atlanta Regional Office, 61 Forsyth Street, SW, Suite 7B54, Atlanta, GA 30303, telephone (404) 562–2156, fax (404) 562–2168; jurisdiction: Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, Tennessee, Puerto Rico.

Boston Regional Office, J.F.K. Building, Room 575, Boston, MA 02203, telephone (617) 565–9600, fax: (617) 565–9666; jurisdiction: Connecticut, Maine, Massachusetts, New Hampshire, central and western New York, Rhode Island, Vermont.

Chicago Regional Office, 200 West Adams Street, Suite 1600, Chicago, IL 60606, telephone (312) 353–0900, fax (312) 353–1023; jurisdiction: northern Illinois, northern Indiana, Wisconsin.

Cincinnati Regional Office, 1885 Dixie Highway, Suite 210, Ft. Wright, KY 41011–2664, telephone (859) 578–4680, fax (859) 578–4688; jurisdiction: southern Indiana, Kentucky, Michigan, Ohio.

Dallas Regional Office, 525 Griffin Street, Rm. 900, Dallas, TX 75202–5025, telephone (214) 767–6831, fax (214) 767–1055; jurisdiction: Arkansas, Louisiana, New Mexico, Oklahoma, Texas.

Kansas City Regional Office, 1100 Main Street, Suite 1200, Kansas City, MO 64105, telephone (816) 426–5131, fax (816) 426–5511; jurisdiction: Colorado, southern Illinois, Iowa, Kansas, Minnesota, Missouri, Montana, Nebraska, North Dakota, South Dakota, Wyoming.

Los Angeles Regional Office, 1055 E. Colorado Boulevard, Suite 200, Pasadena, CA 91106–2341, telephone (626) 229–1000, fax (626) 229–1097; jurisdiction: 10 southern counties of California, Arizona, Hawaii, American Samoa, Guam, Wake Island.

New York Regional Office, 33 Whitehall Street, Suite 1200, New York, NY 10004, telephone (212) 607–8600, fax (212) 607–8681; jurisdiction: southeastern New York, northern New Jersey.

Philadelphia Regional Office, The Curtis Center, 170 S. Independence Mall West, Suite 870 West, Philadelphia, PA 19106–3317, telephone (215) 861–5300, fax (215) 861–5347; jurisdiction: Delaware, Maryland, southern New Jersey, Pennsylvania, Virginia, Washington, DC, West Virginia.

San Francisco Regional Office, 71 Stevenson St., Suite 915, San Francisco, CA 94105, telephone (415) 975–4600, fax (415) 975–4589; jurisdiction: Alaska, 48 northern counties of California, Idaho, Nevada, Oregon, Utah, Washington.

Please verify current telephone numbers and addresses on EBSA's Web site, *http://www.dol.gov/ebsa/.*

Appendix D—Lost Earnings Example (Manual Calculation)

Delinquent Participant Contributions

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

Based on the above facts:

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

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

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

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

$10,000 * 0.003705021 = $37.05

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

$10,037.05 * 0.002853065 = $28.64

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

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

1st day	To	Days	Underpmnt. rate (percent)	Rev. proc. table	Factor	Interest	Amnt. due
14/14/01	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). Submit your application to the appropriate EBSA field office. For full application procedures, consult www.dol.gov/ebsa/.

Applicant Name(s) and Address(es)

List separately: ______________________

____

List Transaction(s) Corrected

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

____Delinquent Participant Contributions and Participant Loan Repayments to Pension Plans

____Delinquent Participant Contributions to Insured Welfare Plans

____Delinquent Participant Contributions to Welfare Plan Trusts

____Loan at Fair Market Interest Rate to a Party in Interest

____Loan at Below-Market Interest Rate to a Party in Interest

____Loan at Below-Market Interest Rate to a Non-Party in Interest

____Loan at Below-Market Interest Rate Due to Delay in Perfecting Plan's Security Interest

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

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 was determined:

____

(5) For correction of Delinquent Remittance of Participant Funds, provide 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: (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 ''Printable Results'' page.

____ Online Calculator—''Printable Results'' page attached

____ Manual calculation—see attached calculations

Supplemental Information

(1) Plan Sponsor Name:

____

EIN: ______________________________

Address: ______________________________

(2) Plan Name:

____

Plan Number: ______________________________

(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: ______________________________

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

(7) Is Applicant Seeking Relief 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:

____

(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:

____

Contact person for the agency identified:

____

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

____

Authorization of Preparer

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

Name of Plan Official

____

Signature of Plan Official

____

Penalty of Perjury Statement

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

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

____

Name and Title

Signature

____

Date ______________________________

____

Name and Title ______________________________

Signature

____

Date ______________________________

Paperwork Reduction Act Notice

The information identified on this form is required for a valid application for the Voluntary Fiduciary Correction Program of the U.S. Department of Labor's Employee

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

VFC Program Checklist

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

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

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

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

____4. Have you provided the date that the most recent Form 5500 was filed by the plan?

____5. Have you enclosed a signed and dated certification under penalty of perjury for the plan fiduciary with knowledge of the transactions and for each applicant and the applicant's representative, if any?

____6. Have you enclosed relevant portions of the plan document and any other pertinent documents (such as the adoption agreement, trust agreement, or insurance contract) with the relevant sections identified?

____7. 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. Where applicable, have you enclosed a copy of an appraiser's report?

____9. 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 and Lost Earnings or Restoration of Profits; and

____g. If application concerns delinquent employee contributions or loan repayments, a statement from a Plan Official identifying the earliest date on which participant contributions/loan repayments reasonably could have been segregated from the employer's general assets and supporting documentation on which the Plan Official relied?

____10. 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 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 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?

____11. 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)?

____12. Where applicable, have you enclosed a description demonstrating proof of payment to participants and beneficiaries whose current location is known to the plan and/or applicant, and for individuals who need to be located, have you demonstrated how adequate funds have been segregated to pay missing individuals and commenced the process of locating the missing individuals using either the IRS and SSA locator services, or other comparable means?

____13. For purposes of the three transactions 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:

____

Signed at Washington, DC, this 12th day of April, 2006.

Ann L. Combs,

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

[FR Doc. 06–3674 Filed 4–18–06; 8:45 am]

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