STEPTOE & JOHNSON LLP

ATTORNEYS AT LAW

Melanie Franco Nussdorf
202.429.3009
mnussdor@steptoe.com

1330 Connecticut Avenue, NW
Washington, DC 20036-1795
Tel 202.429.3000
Fax 202.429.3902
steptoe.com

June 1, 2005

RECEIVED
OFFICE OF REGULATIONS
AND INTERPRETATIONS
2005 JUNE 2 AM 9:54

Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
Room N-5669
200 Constitution Avenue, NW
Washington, D.C. 20210

Attention: Voluntary Fiduciary Correction Program

Dear Mr. Doyle:

We are submitting these comments on the Voluntary Fiduciary Correction Program (the "Program") on behalf of financial institution clients who may be service providers and/or fiduciaries to plans covered by Part 4 of Subtitle B of Title I of the Employee Retirement Income Security Act of 1974, as amended ("ERISA") and section 4975 of the Internal Revenue Code ("Code"), as well as individual retirement accounts ("IRAs"), and other plans, accounts or arrangements subject only to section 4975 of the Code. We appreciate the expansion of the Program and the opportunity to submit comments on the changes.

1. **The change in the definition of "Under Investigation".** The current VFC Program defines "Under Investigation" to cover investigations by the Department of Labor Employee Benefits Security Administration (EBSA, formerly PWBA) pursuant to section 504 of ERISA or under any criminal statute involving a transaction affecting the plan. The proposed definition adds to these investigations any investigation or examination by any other Federal agency in connection with a transaction involving the plan. We think that this change is enormously, and perhaps unintentionally broad, and could, if read literally, eliminate a significant percentage of the banks and broker dealers who would otherwise use the Program.

As you know, many banks, broker dealers and other financial institutions such as insurance companies have been, and remain involved in ongoing investigations regarding such issues as fees, market timing and late trading with respect to their products and services, including mutual funds, insurance/annuity contracts, and various hybrid products. These are non-plan specific investigations. These investigations

have occurred simultaneously at both the federal and state levels. In addition, from time to time, the SEC initiates sweeps of large financial institutions which may relate to all clients, including plans. Most banks are examined at least annually, which examinations may extend for several months, by the Office of the Comptroller of the Currency or the Federal Reserve Board. Any of these investigations could involve a plan, since the transactions being investigated are common to lines of business or market practices, rather than client specific. Under penalty of perjury, however, it would be impossible for virtually all of these financial institutions to say that the transactions under investigation *could not* have involved a plan. Accordingly, given these facts and based on the proposed amendments to the Program, these institutions may not be able to use the Program, and hundreds of violations, perhaps covering thousands of plans, could go uncorrected, thwarting what we understood to be a primary purpose of the Program: self-identification and investigation and prompt correction. We think this cannot be what the Department intends. The Program has caused many service providers to thoroughly "scrub" their operations in order to include all possible violations in the filing, and has, in our view, done more for the process of self-correction and institutionalization of controls than any initiative since ERISA was enacted. It would be a shame to put an end to that process because of the breadth of the Department's proposed change in the eligibility rules for the Program, if those changes were intentional. While we can understand that the existence of other federal investigations should be a disclosure item to the Department (but not subject to general disclosure), we cannot understand the remedial purpose behind *closing* the Program to anyone under any kind of investigation by a federal agency where the investigated conduct *could* affect a plan, unless the investigation itself is plan specific. Finally, while we understand that state and local investigations will not be a bar to using the Program, we believe that it would be helpful to clarify that the New York Stock Exchange, the National Association of Security Dealers and other self-regulatory organizations are not included as Federal agencies.

2. **Credit for earnings actually received by the plan.** In the new definition of Lost Earnings and in the automatic calculator, there is no credit for what the purchased asset or the proceeds of the sold asset actually earned (interest, dividends, etc.). We assume that this is just an inadvertent omission, since the original VFC Program provided for such a credit, and the preamble to the proposed Program does not suggest that the Department has changed its view on this point. If, in fact, this omission was intentional, in our view, omitting this credit would be unfair where plans have actually enjoyed a financial benefit from the particular investment (and would significantly diminish usage of the Program) if there were no credit available. In addition, the absence of a credit for the amount actually earned by the plan is entirely inconsistent with both common law trust and Code section 4975 principles of correction, which, in accordance with ERISA's legislative history and interpretation, should be read consistently to the degree possible.

3. **Purchase transactions which are corrected over time.** In some cases, a plan will purchase a readily tradeable asset (such as publicly traded stocks and bonds) from a party in interest without an exemption, and will then sell all or a part of the securities prior to the date of filing under the Program. We believe it would be helpful to have an example that permits there to be more than one recovery date: for example, the first, on the date that one portion of the assets were sold and the second, on the date that the remainder were sold, with each portion corrected as required by the Program. We believe that the

cleanest way to handle such a situation would be to treat the purchase of each portion as a separate purchase (with its own Principal Amount) and run each of those transactions through the calculations for the Program separately for purposes of correction, calculation of Lost Earnings and determination of Recovery Date(s).

4. **Refiling Form 5500s.** In our experience, there are many times that the transaction, and the correction, are an insignificant portion of the plan's assets. Nonetheless, the Program seems to indicate that corrected Form 5500s must be filed in all cases. In our view, correction and refiling of the Form 5500 is burdensome and expensive, especially where both the plan and the government have been officially informed of the transaction and the correction. We believe it would be very helpful to have a de minimis rule, set forth in the Program which makes clear that unless the transaction constituted some reasonable threshold (e.g., 25% or more) of the plan's assets, no correction needs to be made to the previously filed Form 5500.

5. **Investigations.** The Program recites that the Department will generally not commence an investigation with respect to a filing unless there is prejudice to the Department caused by the expiration of the statute of limitations period, material misrepresentations, or significant harm to the plan or its participants that is not cured by the correction under the Program. See Section 2(e). We are concerned that this language would permit the Department to commence an investigation any time the filing relates to transactions that are close to the general ERISA statute of limitations (six years), even where they are being fully corrected. It is unclear whether, under the Program, if the Department does commence an investigation after the filing but before a no action letter is issued, the Program will be unavailable for all of the transactions covered by the filing, and whether the corresponding exemption will be unavailable as well. We think this course of action could be very unfair to applicants who are filing in good faith, and working with the regional offices to make sure all transactions are fully corrected. We believe the Department should be able to commence an investigation only where the applicant is refusing to correct properly and the statute of limitations is in danger of expiring.

6. **Repayment of Principal.** Where a plan purchases debt in a nonexempt transaction, principal may be paid back over time. It would be helpful if you could confirm that in a sale to a plan of an asset that is a debt security, the "Principal Amount" is treated as restored to the plan for all purposes on each date that principal is repaid to the plan through payments on the debt security. In particular, the Principal Amount should be treated as restored upon principal repayment (in whole upon maturity and repayment of the entire outstanding principal balance and in part upon repayment of any portion of the principal balance) for purposes of correction, calculation of Lost Earnings and determination of the Recovery Date.

7. **Corporate Actions.** The Program's online calculator does not deal with splits, tenders, mergers or other corporate transactions or reorganizations. While we understand that the calculator may not be able to process stock splits, tenders and mergers, it would be helpful to confirm that the transactions must be taken into account and must be taken into account manually.

8. **Cash settlement of recovery**. Where a publicly traded security is involved in a nonexempt transaction, the correction under the Program requires that the security be repurchased for the plan where the nonexempt transaction was a sale, or sold, where the transaction was a purchase. Because publicly traded securities are generally replaceable easily in the market, we believe that the correction of a transaction involving such a security should be permitted to be "cash settled"; if the plan chooses to purchase the security, it can, and if it chooses to sell the security, it can. We believe it serves no purpose for the plan to have to sell the security it had purchased, only to buy it back again, or to buy a security it had sold, only to sell it again. Those trades would be disadvantageous to the plan and to the market, leading only to unnecessary transaction costs all around. In addition, there are certain instruments which, if sold, cannot be replaced, like certificates of deposit bearing higher coupons than are currently available in the market.

9. **IRAs and other Plans subject only to Section 4975**. It has been our experience with financial institutions that when they determine that plans covered by ERISA have been involved in a prohibited transaction, the error that permitted that transaction to occur was repeated with IRA accounts and other Plans subject only to Section 4975. Because the Department has sole authority to issue exemptions, there is no way for these accounts to avoid excise taxes other than through an exemption application to the Department. The burden on the exemption staff of reviewing thousands of transactions in IRAs and other Section 4975 accounts makes it unlikely that these exemptions would be either quick, inexpensive or efficient, thereby potentially limiting the kind of "wholesale" corrections that IRS and the Department should want. We believe that with the cooperation of the IRS, the Department could amend the Program to permit IRAs and other Section 4975 plans to take advantage of the VFC Program, with the EBSA field offices issuing a no action letter so that the service providers can use the exemption process in the most efficient manner. We understand that the field offices have no jurisdiction over IRAs and these other accounts; it is our impression, however, that the most important questions in the filings are the kinds of transactions and whether they were properly corrected. Where the transactions are common to the ERISA plans and to the IRAs and other accounts and have been corrected the same way, we do not believe that adding the IRAs into the filing will create significant additional work.

We appreciate the opportunity to comment on the proposed amendments to the VFC Program, and would be happy to answer any additional questions you may have.

Best regards,

Melanie Franco Nussdorf