

DEPARTMENT OF LABOR

Pension and Welfare Benefits
Administration

29 CFR Parts 2560 and 2570

RIN 1210-AA86

Delinquent Filer Voluntary Compliance
Program**AGENCY:** Pension and Welfare Benefits
Administration, Department of Labor.**ACTION:** Notice, Delinquent Filer
Voluntary Compliance Program.

SUMMARY: This Notice modifies the Delinquent Filer Voluntary Compliance Program ("DFVC Program" or "Program") announced by the Department of Labor's Pension and Welfare Benefits Administration in 1995. The DFVC Program is intended to encourage, through the assessment of reduced civil penalties, delinquent plan administrators to comply with their annual reporting obligations under Title I of the Employee Retirement Income Security Act of 1974, as amended (ERISA). Following a review of the DFVC Program, as adopted in 1995, the Department has determined to update the Program and adjust the civil penalty structure under the Program in an effort to further encourage and facilitate voluntary compliance by plan administrators with ERISA's annual reporting requirements. Because the modifications to the DFVC Program include lower civil penalty assessments, the modifications are being put into effect upon publication of this notice in the **Federal Register**. Nonetheless, the Department is seeking comments from the public on the modified Program.

DATES: *Effective Date:* March 28, 2002. The modified Program adopted herein supercedes and replaces, as of its effective date, the DFVC Program as adopted on April 27, 1995 (60 FR 20874).

Comment Date: Written comments must be received by the Department no later than May 28, 2002.

ADDRESSES: Interested persons are invited to submit written comments on the DFVC Program to: DFVC Comments, Office of Regulations and Interpretations, Room N-5669, Pension and Welfare Benefits Administration, U.S. Department of Labor, 200 Constitution Ave., NW., Washington, DC 20210. All submissions will be open to public inspection at the Public Documents Room, Pension and Welfare Benefits Administration, Room N-1513, U.S. Department of Labor, 200 Constitution Ave., NW., Washington, DC 20210.

FOR FURTHER INFORMATION CONTACT:

Jennifer C. Warner or Scott C. Albert, Office of the Chief Accountant, Pension and Welfare Benefits Administration, telephone (202) 693-8360. This is not a toll-free number.

SUPPLEMENTARY INFORMATION:**A. Background**

The Secretary of Labor has the authority under section 502(c)(2) of ERISA to assess civil penalties of up to \$1,100¹ a day against plan administrators who fail or refuse to file complete and timely annual reports as required under section 101(b) of ERISA and the Secretary's regulations. Pursuant to 29 CFR 2560.502c-2 and 29 CFR 2570.60 *et seq.*, the Pension and Welfare Benefits Administration (PWBA) has maintained a program for the assessment of civil penalties for noncompliance with ERISA's annual reporting requirements. Under this program, plan administrators filing late annual reports may be assessed \$50 per day for each day an annual report is filed after the date on which the annual report was required to be filed, without regard to any extensions of time for filing. Plan administrators who fail to file an annual report may be assessed a penalty of \$300 per day, up to \$30,000 per year, until a complete annual report is filed. The Department may, in its discretion, waive all or part of a civil penalty assessed under section 502(c)(2) upon a showing by the administrator that there was reasonable cause for the failure to file a complete and timely annual report or that there was reasonable cause why the penalty, as calculated, should not be assessed.

In an effort to encourage delinquent filers to voluntarily comply with the annual reporting requirements under Title I of ERISA, the Department adopted, on April 27, 1995, the Delinquent Filer Voluntary Compliance (DFVC) Program (60 FR 20874). The Program, as adopted in 1995, permitted administrators otherwise subject to the assessment of higher civil penalties for failing to file a timely annual report to pay reduced civil penalties for voluntarily complying with the requirement to file an annual report under Title I of ERISA.

Under the 1995 DFVC Program, plan administrators filing the Form 5500-C (plans with fewer than 100 participants at the beginning of the plan year or

¹ In accordance with the requirements of the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended, the Department's regulation at 29 CFR 2575.502c-2 increased the maximum civil penalty from \$1,000 a day as stated in section 502(c)(2) of ERISA to \$1,100 a day for violations occurring after July 29, 1997.

plans filing the Form 5500-C pursuant to the "80-120" participant rule in § 2520.103-1(d) ("small plans")) were subject to a civil penalty assessment of \$50 per day up to \$1,000 when the annual report was twelve months or less late, and \$2,000 when the annual report was more than twelve months late.² Plan administrators filing the Form 5500 (plans with 100 or more participants at the beginning of the plan year other than a plan filing pursuant to the "80-120" participant rule ("large plans")) were subject to a civil penalty assessment of \$50 per day up to \$2,500 when the annual report was one year or less late, and \$5,000 when the annual report was more than one year late. A civil penalty assessment of \$2,500 applied to late filings by plan administrators for apprenticeship and training plans described in § 2520.104-22 and "top hat" plans described in § 2520.104-23(a). Under the terms of the DFVC Program, the Department reserved the right to modify or terminate the Program upon publication of a notice in the **Federal Register**.

B. Modifications to the DFVC Program

The Department is modifying the DFVC Program in order to further facilitate and encourage voluntary compliance with the annual reporting requirements. These modifications take the form of reducing civil penalty assessments, as well as simplifying and updating the process governing participation in the DFVC Program. A discussion of the changes follows.

1. Applicable Penalty Amount

Since the adoption of the DFVC Program in 1995, the Department has received input from plan administrators, as well as from accountants, third party administrators, and other members of the employee benefits community, indicating that the civil penalty assessments provided for under the 1995 Program, while less than the otherwise applicable penalties, nonetheless may be an impediment to many delinquent filers, especially administrators of small plans, because of the absence of a per plan, rather than a per annual report, based cap on the penalty amount. For example, under the 1995 Program, the administrator of a small pension plan with respect to which no annual reports were filed for plan years 1995-1999 would have to pay a civil penalty assessment of \$2,000 per report and, therefore, would be required to pay a civil penalty

² Plan administrators were not allowed to use the Form 5500-R when filing annual reports under the DFVC Program.

assessment of \$10,000 (\$2,000 × five plan years), a sizeable amount for many small employers. Public input in this area is consistent with the Department's finding that, although small employers constitute about 80 percent of the Title I of ERISA filers, the majority of plan administrators electing to comply under the DFVC Program are administrators of large plans.

Accordingly, the Department, in an effort to encourage voluntary compliance with ERISA's annual reporting requirements, is modifying the civil penalty structure under the DFVC Program. Specifically, the per day late filing penalty amount for plan administrators taking part in the DFVC Program has been reduced for large and small plans from \$50 per day to \$10 per day. In the case of a single late annual report filing for a plan, the cumulative daily penalty amount for a plan year is capped at \$750 for small plans and \$2,000 for large plans. The DFVC Program, as modified, also contains a new per plan cap on the penalty to address the concerns about the cumulative effect of the per annual report penalties when a plan has annual reporting delinquencies for multiple plan years. The per plan cap is \$1,500 for a small plan and \$4,000 for a large plan and applies on a submission-by-submission basis. Thus, in the case of the previous example where the plan administrator for a small plan did not file an annual report for a five-year period, the applicable penalty amount under the revised DFVC Program would be \$1,500 (rather than \$10,000 under the 1995 DFVC Program) provided the plan administrator included the annual reports for all five plan years in the same DFVC Program submission.³

The Department believes that this approach to applying the caps will encourage complete annual reporting compliance reviews with respect to specific plans, while facilitating Program administration. Although there is nothing in the DFVC Program that precludes a plan administrator from making separate or multiple submissions under the Program, the per plan cap on penalties starts over for each separate submission for a plan that is made under the DFVC Program.⁴

³ There is no "per administrator" or "per sponsor" cap. Thus, if the same person is the administrator of several plans required to file annual reports under Title I of ERISA, the administrator would need to calculate the applicable penalty amount for each plan.

⁴ For purposes of determining whether there is one or more submissions, the mere fact that a submission is transmitted in multiple envelopes or packages will not affect the submission's status as a single submission where there is evidence (e.g., an accompanying letter or note) indicating that

The Department also is revising the applicable penalty structure under the DFVC Program for apprenticeship and training plans and "top hat" plans, as well as adding another class of plans that are eligible to pay special reduced penalties under the Program. In lieu of the \$2,500 penalty amount for apprenticeship and training plans and "top-hat" plans, the applicable penalty amount under the modified DFVC Program for such plans is \$750. As was the case under the 1995 Program, the applicable penalty will be applied without regard to the number of apprenticeship and training or "top hat" plans maintained by the same plan sponsor and without regard to the number of plan participants covered under such plan or plans. In addition, the Department is establishing a maximum \$750 per plan penalty cap for administrators of small plans sponsored by Internal Revenue Code (Code) section 501(c)(3) organizations (including small Code section 403(b) plans). This special penalty amount, however, will not be available if, as of the date the plan files under the DFVC Program, there is a delinquent or late annual report due for a plan year during which the plan was a large plan. The Department is establishing this reduced penalty for administrators of such small plans in recognition of the special character of these organizations, and in light of the fact that the administrators/sponsors of such plans may receive most or all of their funding from government programs and other charitable, educational, or scientific grants, and, in the case of Code section 403(b) plans that are required to file annual reports under ERISA, because the information that is required to be filed annually is similar to the registration-type information required to be filed by apprenticeship and training plans and "top hat" plans under §§ 2520.104–22 and 2520.104–23.

2. Simplification of Process

As noted above, the Department is simplifying the procedures governing participation in the DFVC Program. These changes are intended to make the Program easier for plan administrators to use and to conform the Program to the recent streamlining of the annual report and the implementation of the computerized ERISA Filing Acceptance System (EFAS).

As with the 1995 DFVC Program, the Program adopted herein conditions relief on the filing of a complete annual

submission has been transmitted contemporaneously in multiple envelopes or packages.

report, including all required statements and schedules, for each plan year for which relief is sought under the Program. Under the Program, this requirement can be satisfied by the administrator filing an annual report for each plan year for which relief is sought using either: (1) The annual return/report form issued for the plan year(s) for which relief is sought; or (2) the most current annual return/report form available at the time the administrator elects to participate in the Program. By affording this option, administrators can choose to file the Form which is most efficient, and least burdensome, for their particular plan and circumstance.

Also, as with the 1995 Program, the modified Program provides that penalty amount payments must be accompanied by a paper copy of the filed annual return/report (excluding any required statements or schedules).⁵ Unlike the 1995 Program, however, the forms and penalty payment no longer have to be annotated in bold red print identifying the filing as a DFVC filing.

3. Scope of Program

As with the 1995 DFVC Program, the modified Program only applies to the correction of reporting violations under Title I of ERISA.⁶ Filings that are not required under Title I of ERISA, such as Form 5500-EZ filings, are not eligible for the DFVC Program. Annual reports filed under the DFVC Program may be subjected to the usual edit tests and plan administrators have an opportunity to correct identified deficiencies in accordance with the procedures described in § 2560.502c–2. The failure to correct deficiencies in accordance with these procedures may result in the assessment of further penalties, and the payment of DFVC Program penalties do not serve to reduce the additional civil penalties that may be assessed for the filing of a deficient annual report.

Request for Comments, Effective Date and Requests for Refunds

Although the Department is not required to seek public comments on an enforcement policy, the Department

⁵ While electronic filing of DFVC submissions and deposit of penalty amounts is not currently available, the Department will be evaluating this area for possible future improvements.

⁶ Although this Notice does not provide relief from late filing penalties under the Code or Title IV of ERISA, both the IRS and PBGC have agreed to provide certain penalty relief under the Code and Title IV of ERISA. Sections 5.02 and 5.03 of this Notice include information furnished to the Department by the Internal Revenue Service (IRS) and the Pension Benefit Guaranty Corporation (PBGC) regarding the penalty relief they are providing for delinquent Form 5500 Annual Returns/Reports filed for Title I plans when the condition of the DFVC Program have been satisfied.

solicits comments from the public on all aspects of this Program, including whether the reduced penalty amounts being adopted are set at appropriate levels and whether additional classes of filers should be provided special reduced penalty amounts. At the same time, the Department has determined that the relief afforded by this Program should be made available during and after the comment period. Delaying implementation of the revisions to the DFVC Program until after the end of the comment period would only deprive plan administrators of the ability to pay reduced penalties during the comment period. Accordingly, the DFVC Program adopted herein will be effective upon publication in the **Federal Register**.

In general, the Department will consider requests for refunds under the DFVC Program only when it is determined, upon review, that there was no reporting violation (e.g., the plan was not required to file an annual report or the report was filed timely) or the penalty assessment was otherwise improper. In this regard, the Department will not make refunds with respect to any DFVC filings merely because they were submitted prior to the effective date of the Program adopted herein. In the Department's view such filers received the relief with respect to which the paid penalty related. With regard to DFVC filings received on or after the effective date of the Program adopted herein and with respect to which the plan administrator incorrectly determined the penalty amount by referring to the superceded 1995 Program, the Department intends to return the DFVC Program submission (but not the annual report filing that is submitted to EFAST) to afford the filer the opportunity to make a DFVC submission in accordance with the modified program.

Summary of Economic Impact of the Amended DFVC Program

This amendment to the DFVC Program is intended to increase compliance with reporting requirements by increasing Program participation, especially among small plans. Under the existing Program, administrators of small plans, which are likely to represent a large majority of delinquent filers, have made up only a minority of Program participants. This amendment will reduce Program penalties for many participants, especially for administrators of small plans that have failed to file reports for many years, thereby encouraging more delinquent plan administrators to participate.

By increasing compliance with reporting requirements, the amended

Program will yield economic benefits. Greater compliance will improve the quality and availability of information on plans. Plans' annual reports are the principal source of information about the operation, funding and investments of employee benefit plans. Information derived from these reports is integral to PWBA's enforcement, research and policy development programs, and is widely used by other Federal agencies, Congress and the private sector in assessing employee benefit, tax, and economic trends and policies. Plans' reports also serve as the primary means by which participants, beneficiaries and the general public can monitor plan operations. For all of these reasons, better information will serve to improve the security of plan assets and benefits and to promote sound employee benefits policy. Plans that comply with reporting requirements also tend to stay in compliance with reporting requirements, redoubling the benefit of bringing plans into compliance at the earliest opportunity. Finally, participating plan administrators will benefit insofar as they will be relieved of the risk of incurring larger penalties outside the Program, and insofar as the penalties that many must pay in order to participate in the Program will be reduced.

The Department believes that the benefits of the amended Program will exceed its costs. Participating plan administrators will incur a cost in connection with the payment of penalties. Participation in the Program is voluntary, however, so it is reasonable to conclude that participating plans derive an economic benefit equal to or greater than this cost. The Department also notes that the payment of such penalties constitutes a transfer from plan administrators to the U.S. Treasury, thereby benefiting taxpayers at large. The only potentially meaningful economic cost of the Program is the potential for the loss of income to the U.S. Treasury from reduced penalties. This loss of income will be partly or fully offset by penalties paid by plan administrators that would not have participated at the existing Program's higher penalty levels. Moreover, any loss of Treasury revenue will be nominal and more than offset by the benefits of fuller reporting outlined above.

Because the amended program will substantially reduce Program penalties for many participating plan administrators, the Department expects that participation in the Program will grow. The Department lacks an empirical basis on which to estimate the amount by which it will grow, however.

In order to assess potential growth, the Department adopted conservative assumptions regarding responsiveness to decreases in Program penalties. On that basis, it is projected that participation by plan administrators in the amended Program will increase to about 2,500 plans per year, up from 1,400 plans under the current Program, an increase of about 75 percent. Participation by administrators of large plans will increase by more than 50 percent to reach about 1,300, while participation by administrators of small plans will grow by more than 100 percent to about 1,100. Total penalties paid under the Program are projected to fall by about one-half, however, from about \$9.3 million annually to about \$4.7 million. The Department believes that these estimates are highly conservative, and that participation might increase more, while penalties paid might decrease less or even increase. The derivation of these estimates and basis for the Department's conclusion that they are conservative is detailed below.

Executive Order 12866

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), the order defines a "significant regulatory action" as an action that is likely to result in a rule (1) having an annual effect on the economy of \$100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as "economically significant"); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. Pursuant to the terms of the Executive Order, it has been determined that this action is "significant" and subject to OMB review under section 3(f)(4) of the Executive Order because it offers a novel method for encouraging compliance while reducing regulatory burden.

As described earlier in this preamble, PWBA introduced the DFVC Program in

April of 1995 in an effort to encourage compliance with annual reporting requirements, which are met generally by filing the Form 5500 Annual Return/Report of Employee Benefit Plan. This amendment to the Program is intended to increase compliance with reporting requirements by increasing Program participation, especially among administrators of small plans. Under the existing Program, small plan administrators, which are likely to represent a large majority of delinquent filers, have made up only a minority of Program participants. (Among the approximately 1 million plans expected to file annual reports normally this year, about 750,000 are expected to be small plans.) This amendment will reduce Program penalties for many Program participants, especially for small plan administrators that have failed to file reports for many years (whose penalties will be capped at \$1,500 per plan), thereby encouraging more delinquent administrators to participate and come into compliance with reporting requirements.

To date under the existing Program, 17,545 separate filings have been made by 8,634 separate plans, involving total penalties to plan administrators in excess of \$50 million. This amounts to approximately 1,400 participating plans filing about 2,900 annual reports each year, and the administrators of those plans paying penalties of about \$9 million. Of the 17,545 filings, 10,082 were for large plans, and 6,781 were for small plans. In addition, there were 672 "top hat" filers and 10 apprenticeship and training plan filers.

About 70 percent of both large and small plan DFVC Program filings were made twelve or more months after they were otherwise due. About 63 percent of participating plan administrators filed for one plan year, about 16 percent filed for two plan years, and 21 percent filed for three or more plan years. The average was approximately two plan years. As a result, most DFVC Program participants paid the applicable maximum for each filing based on the size of the plan and the filing's original due date. Participating plan administrators filing two or more years' reports paid such maximum penalties separately for each report filed.

In developing the amended Program, the Department endeavored to select penalty levels that will maximize reporting compliance, especially among small plans. Maximizing compliance means maximizing Program participation, and with it the prompt submission of now delinquent filings, while at the same time maximizing on-time submission of future filings. The

amended Program's penalties are therefore calibrated to be at once low enough so that delinquent plan administrators will not be dissuaded from participating, and high enough to hold plan administrators appropriately accountable for filing on time.

This amendment to the DFVC Program generally will reduce the penalties owed by participating plan administrators. For example, the penalty owed by small and large plan administrators submitting single filings more than 12 months late will be reduced from \$2,000 and \$5,000, respectively, to \$750 and \$2,000. The penalty owed by administrators of small and large plans submitting five years' worth of filings all more than 12 months late will be reduced from \$10,000 and \$25,000 to \$1,500 and \$4,000.

To gauge the potential impact of the interaction of the new per plan caps for delinquencies involving multiple plan years, which are \$1,500 for small plans and \$4,000 for large plans, with the single plan year maximum penalties of \$750 and \$2,000, we computed the penalties that would have been paid by the past DFVC filers under the amended structure, assuming no changes in Program participant characteristics or increase in participation in response to the reduced penalties. This simple calculation of penalties under the prior and amended structures shows a reduction in total penalties paid of about \$39 million or 70 percent.

The amended Program will yield economic benefits. Fuller compliance will improve the quality and timeliness of information on the operation and assets of employee benefit plans, which will help to secure plan benefits and assets and promote sound public policy. Participating plan administrators will benefit from shedding the risk of incurring larger penalties outside the Program and from reductions in the penalties they must pay under the Program.

The amended Program's benefits are expected to exceed its costs. Because participation in the Program is voluntary, it is reasonable to conclude that participating plan administrators derive an economic benefit at least equal to the cost of the penalty. The payment of such penalties also enriches the U.S. Treasury to the benefit of taxpayers. Because the amended Program imposes smaller penalties, total penalties paid to the Treasury may fall. The economic cost associated with such a loss of Treasury revenue is expected to be small and more than offset by the benefits of fuller reporting.

The Department estimates that plan participation in the amended Program

will increase to about 2,500 filings per year, up from 1,400 under the current Program. Total penalties paid by plan administrators under the Program are projected to fall by about one-half, from about \$9.3 million annually to about \$4.7 million. These estimates are highly conservative; participation might increase more, while penalties paid might decrease less or even increase.

Basis for Estimate of Economic Impact

As noted above, under the existing DFVC Program, 17,545 separate filings have been made by 8,634 separate plans, involving total penalties to plan administrators in excess of \$50 million. This amounts to approximately 1,400 plans participating each year, paying penalties of about \$9 million. Based on the discounts available under the amended penalty structure, the Department expects the number of plan administrators participating annually to increase to about 2,500, resulting in annual penalties of about \$4.7 million.

Assuming a plan administrator is aware of a plan's reporting obligations, and of any failure to satisfy them, the decision whether or not to participate in the Program is essentially an economic one. The plan administrator must weigh the alternative of remaining out of compliance—and the attendant risk of becoming subject to larger penalties—against the cost of paying reduced penalties under the amended Program. The penalty under the Program can be thought of as a price the administrator can pay to achieve compliance and be relieved from the risk of larger penalties. The size and risk of unreduced penalties represents the value of such relief. Reduced penalties under the Program and potential full penalties will be different for different plans, reflecting their differing characteristics and circumstances. All else equal, the smaller the penalties under the Program relative to the potential unreduced penalties—that is, the lower the price of participation relative to its value—the larger the number of plan administrators that will participate.

Assuming that the risk and potential amount of full penalties are fixed, the increase in participation in the amended Program will depend on the number of delinquent plans, the amount by which penalties under the amended Program are discounted relative to those under the existing Program, and the responsiveness of plan administrators to this price reduction. Price responsiveness is commonly expressed in terms of "elasticity," or the percent increase in quantity demanded that will result from a one percent decrease in price. If administrators' elasticity of

demand for the Program is one, then a one percent decrease in the penalty will result in a one percent increase in the number of administrators participating.

The Department has no empirical basis on which to estimate the price elasticity of demand for the Program. Estimating elasticity generally requires observation of demand at different price levels. Casual observation reveals that the number of plan administrators participating in the existing Program generally is higher at lower penalty levels. In particular, relatively few participating plan administrators—and very few participating small plan administrators—submitted several years of delinquent filings and consequently owed relatively large penalties. This observation seems consistent with the premise that lower penalties encourage higher participation, but it falls short of providing formal supporting evidence. The Department lacks data on the number and circumstances of nonparticipating delinquent plan administrators. Therefore, it is not possible to determine whether variations in the number of plans participating at different penalty levels under the existing Program reflects responsiveness to those levels or the numbers and circumstances (and potential full penalties) of unobserved, nonparticipating delinquent plan administrators whose participation would trigger penalties at those levels. The Department also lacks any longitudinal basis for estimating the elasticity, because prior to this amendment the penalty levels under the Program had not been changed.

The Department nevertheless attempted to assess the potential magnitude of increased participation in the amended DFVC Program. To do this, the Department examined historical data on participation in the Program, relying on the general assumption that the potential users of the amended Program will resemble the past users of the existing Program. Then, by adopting assumptions regarding the elasticity of demand for the Program and comparing the penalties owed by past participants in the existing Program with the penalties they would owe under the amended Program, the Department projected participation in the amended Program.

Lacking a basis for estimating plan administrators' true elasticities, the Department adopted what it believes are conservative assumptions (that is, assumptions which are likely to be lower than the true elasticities). In the face of uncertainty, it is generally appropriate to adopt conservative assumptions, in order to avoid over

estimating the potential benefits of the Program.

The Department assumed that the price elasticity of demand for the Program among administrators of large plans (those with 100 or more participants) is one, and that among administrators of small plans is two. More precisely, it assumed that demand is linear and that large and small plans' price elasticities of demand at the starting positions on their demand curves (the equilibria under the current Program) are equal to one and two, respectively. A large decrease in price will result in movement down the demand curve into a region where elasticity is less than at the starting position. (As a result, total penalties collected under the amended Program are expected to be less than the assumed starting-point elasticities alone would imply.) The Department believes that these assumptions conservatively represent the likely price responsiveness of nonparticipating delinquent plan administrators.

First, the assumption of linear demand (and attendant decreasing elasticity) is inherently conservative in connection with large price decreases. A more plausible, nonlinear demand function with constant elasticity would suggest much larger increases in Program participation.

For administrators of many plans, the price decrease associated with movement from the existing to the amended Program will be large. This is especially true of administrators that are delinquent in connection with several plan years' filings, because the amended Program caps penalties for such plans, while the existing Program caps them only for each separate filing by such plans. For example, historical penalties owed under the existing Program equaled or exceeded \$25,000 for 74 participating large plans each year. These would include plan administrators that submitted five or more years' reports, all 12 months or more late, who would owe the maximum \$5,000 per filing. Historical penalties equaled or exceeded \$10,000 for 52 participating small plans annually, which similarly would include plan administrators owing the maximum \$2,000 penalty for each of five or more years' worth of filings. Under the amended Program, similar large plans' penalties will be capped at \$4,000 per plan, small at \$1,500, representing price reductions of at least 84 percent and 70 percent, respectively.

Microeconomic theory suggests that demand for most goods and services is likely to be better represented by a demand curve with constant elasticity

than by a linear one, especially in connection with large price changes. Consider the administrator of a large plans in this example. The Department, assuming linear demand and a starting elasticity of one, projects that an 84 percent fall in price results in an 84 percent increase in participation. However, this implies that the elasticity of demand at the new equilibrium would be just 0.09—that is, an additional one percent price decrease would increase participation by less than one-tenth of one percent. In the case of a small plan administrator, and assuming a starting elasticity of two, elasticity at the new equilibrium would be just 0.37. Under the potentially more plausible assumption of constant demand elasticities of one and two respectively for large and small plans, the 84 percent price decrease available to the large plan administrator would increase participation by 525 percent, while small plan administrators' price decrease would increase their participation by 1,011 percent. This suggests that the Department's assumptions are highly conservative and that the increase in participation, particularly among small plans that are many years delinquent, could be much larger than projected.

Second, the increase in the Program participation is unlikely to be constrained by market saturation anytime soon, and this is especially true for administrators of small plans. Thus, the premise that demand might exhibit a constant elasticity (and that therefore large price decreases could result in very large participation increases) is especially plausible for administrators of small plans.

Participation by both large and small plan administrators over the life of the Program is ultimately constrained to no more than the number of nonparticipating delinquent plans that exist. The Department has no way of knowing this number. As yet, however, there is no evidence that participation in the Program is nearing this constraint. Participation in the Program has been quite consistent since its inception, at about 2,900 filings per year, with small plans representing about 40 percent of each year's total. Small plans in particular are likely to represent a large majority of nonparticipating delinquent plans, just as they represent a large majority of plans that file annual reports on time. For example, among the approximately one million plans expected to file reports this year, about 250,000 will be large and about 750,000 will be small.

Consider again the above example of plans that submitted five or more years'

filings 12 or more months late under current Program. Is it plausible that demand could exhibit constant elasticity and that participation increases could therefore be very large? If participation by large plan administrators in similar circumstances increased by 525 percent, the number participating each year on average would grow from about 74 plans to about 463, which is equal to approximately 0.2 percent of large plan filers. A 1,011 percent increase in small plan administrator participation would mean that the number participating each year would grow from about 52 plans to about 578, which is equivalent to about 0.08 percent of small plan filers. Given these relative magnitudes, even these large increases in participation might be viewed as plausible. This would seem to confirm that the Department's assumptions of linear demand, with starting elasticities for large and small plans of one and two respectively, are conservative.

The Department requests comments on all aspects of this analysis, including the penalty levels as they apply to large and small plan administrators, assumptions concerning price responsiveness, and the characteristics of future filers as compared with the actual Program participants. The Department is particularly interested in information on existing rates and reasons for non-compliance with reporting requirements, and specific factors that may influence the decision whether or not to participate in the DFVC Program in light of the penalty reductions being implemented.

Paperwork Reduction Act

The Department, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA 95) (44 U.S.C. Chapter 35). This helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. OMB clearance of the information collection request (ICR) included in the existing DFVC Program was scheduled to expire prior to the implementation of this modified Program. In order to maintain OMB approval of the ICR, PWBA published a preclearance notice soliciting comments on the ICR (66 FR

44159, August 22, 2001). OMB received the submission for continued approval of the ICR on December 21, 2001. OMB approved the ICR on February 21, 2002. This approval will continue through February 28, 2005, unless the ICR is substantively or materially changed.

Although the Department has updated the Program and adjusted the penalty structure in an effort to further facilitate voluntary compliance, the information collection provisions of the Program are not substantively or materially changed. Under both the existing and amended DFVC Program, participating filers must supply a photocopy of the Form 5500 (without schedules or attachments) as filed along with their penalty check. The Department has, however, adjusted its burden estimates to reflect the expectation of additional participation in the Program due to the reduced penalty incentive and the addition of a penalty cap for small plans sponsored by Code section 501(c)(3) organizations. A summary of the effect of the adjustment has been provided to OMB.

Requests for copies of the ICR may be addressed to: Gerald B. Lindrew, Office of Policy and Research, U.S. Department of Labor, Pension and Welfare Benefits Administration, 200 Constitution Avenue, NW, Room N-5647, Washington, DC 20210. Telephone: (202) 693-8410; Fax: (202) 219-4745 (these are not toll-free numbers).

It is estimated that 2,500 filers will avail themselves of the opportunity to correct potential violations pursuant to the DFVC Program annually. The Department estimates that approximately 30 minutes will be required to read instructions, prepare a check, photocopy the Form 5500, and mail the package. It is further assumed that 90 percent of plan administrators sponsors will purchase services from a professional (e.g., accountant or attorney) to comply with the requirements of the Program, and that 10 percent will use in-house staff. The professional wage rate incorporated in the burden cost estimates is \$75 per hour. Material and mailing costs are estimated at \$0.70 per mailing.

The time and mailing cost assumptions have been increased from what was used in the past (21 minutes and \$0.37) due principally to the change in the penalty structure to incorporate a penalty cap for multiple plan year delinquencies. It is assumed that multiple plan year delinquencies will be filed together, requiring some additional time and mailing cost. The method for estimating the number of respondents has also changed due to the change in the penalty structure, with multiple plan year filings now considered one

response. As a result, the total number of respondents counted for PRA purposes is reduced, despite the fact that participation in the Program is assumed to increase.

Agency: Pension and Welfare Benefits Administration, Department of Labor.

Title: Delinquent Filer Voluntary Compliance Program.

OMB Number: 1210-0089.

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

Frequency of Response: On occasion.

Total Respondents: 2,500.

Total Responses: 2,500.

Estimated Burden Hours: 125.

Estimated Annual Costs (Operating and Maintenance): \$86,000.

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

Regulatory Flexibility Act

This document constitutes 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. However, PWBA has considered the potential costs and benefits of this action for administrators of small plans, that is, plans with fewer than 100 participants, in connection with this amendment to the DFVC Program. The basis of the definition of a small plan is found in section 104(a)(2) of ERISA, which permits the Secretary of Labor to prescribe simplified annual reports for pension plans that cover fewer than 100 participants. Under section 104(a)(3), the Secretary may also provide for simplified annual reporting and disclosure if the statutory requirements of part 1 of Title I of ERISA would otherwise be inappropriate for welfare benefit plans.

Small plans represent approximately 75 percent of all annual report filers, but have represented only about 35 percent of DFVC Program filings, despite lower scheduled maximum penalties for small plans. Small plan participants in the Program have represented an average of 0.4 percent of small Form 5500 filers, while large plans have represented about 2 percent of large filers. The reasons for these differentials cannot be known with certainty. The rate of participation in the Program by small plans has been relatively stable since its inception at about 1,000 filings on behalf of 520 plans per year. Historical DFVC Program data also show that more than 70 percent of both large and small DFVC Program filers are more than 12 months late when the filing is

completed, and small plan filers are about as likely as large plan filers to be required to make two or more filings at the same time to bring the plan into compliance with reporting requirements. This suggests that the penalty structure in effect prior to this amendment, though lower for small plan administrators on a per plan year filing basis, might have discouraged participation when multiple years were involved. Informal comments received by the Department have offered this view.

Under PWBA's program for the assessment of civil penalties for noncompliance with reporting requirements, plan administrators filing late annual reports may be assessed \$50 per day for each day an annual report is filed after the date on which the annual report was required to be filed, without regard to any extensions of time for filing. Plan administrators who fail to file an annual report may be assessed a penalty of \$300 per day, up to \$30,000 per year, until a complete annual report is filed. The distribution of actual DFVC filers based on the ratio of their voluntary penalty to the penalty that would have been imposed by the Department in penalty enforcement under this program shows that 80 percent of small plan DFVC filers, as compared with only 30 percent of large plan filers, have paid less than 10 percent of the enforcement program penalty. Forty percent of small plan filers paid less than 5 percent of the enforcement program penalty that would otherwise have been imposed. This also seems consistent with the conclusion that a large penalty serves as a significant disincentive for small plan administrators.

The reduction in the participating small plan administrators' maximum penalty for a single year's filing from \$2,000 to \$750 and the availability of the \$1,500 cap for multiple plan year delinquencies is expected to significantly reduce the penalties paid by small DFVC filers. A comparison of the penalties paid under the existing DFVC structure with those that would have been paid under the amended structure by small plans shows a reduction of about 72 percent, or approximately \$8 million, assuming no change in behavior or characteristics of the filers.

Based on the discounts available under the amended penalty structure, and assuming an elasticity of two, as described earlier, the number of small plans coming into compliance is expected to increase by 561 plans, to about 1,081 plans per year, with penalties totaling \$1.2 million. This

expected outcome is consistent with the stated purpose of the amendment.

The Department believes that the DFVC Program as modified offers a flexible and economically advantageous method for administrators of small plans to correct reporting delinquencies, which recognizes the special circumstances of small plans. The Department invites comments on this analysis and on alternatives that might further reduce potential burdens for small plans.

Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4), as well as Executive Order 12875, this regulatory action does not include any Federal mandate that may result in expenditures by State, local, or tribal governments, and will not impose an annual burden of \$100 million or more on the private sector.

Federalism Statement

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

Congressional Review Act

The DFVC Program is subject to the provisions of the Congressional Review Act (5 U.S.C. 801 *et seq.*) and will be transmitted to Congress and the Controller 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 the United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Section 1—Delinquent Filer Voluntary Compliance (DFVC) Program

The DFVC Program is intended to afford eligible plan administrators (described in Section 2 of this Notice) the opportunity to avoid the assessment of civil penalties otherwise applicable to administrators who fail to file timely annual reports for plan years beginning on or after January 1, 1988. Eligible administrators may avail themselves of the DFVC Program by complying with the filing requirements and paying the civil penalties specified in Section 3 or Section 4, as appropriate, of this Notice.

Section 2—Scope, Eligibility and Effective Date

.01 *Scope.* The DFVC Program described in this Notice provides relief from assessment of civil penalties otherwise applicable to plan administrators who fail or refuse to file timely annual reports. Relief under this Program does not extend to penalties that may be assessed for annual reports that are determined by the Department to be incomplete or otherwise deficient.

.02 *Eligibility.* The DFVC Program is available only to a plan administrator that complies with the requirements of Section 3 or Section 4, as appropriate, of this Notice prior to the date on which the administrator is notified in writing by the Department of a failure to file a timely annual report under Title I of ERISA.

.03 *Effective date.* The DFVC Program described herein shall be effective March 28, 2002. The Department intends that this DFVC Program to be of indefinite duration; however, the Program may be modified from time to time or terminated in the sole discretion of the Department upon publication of notice in the **Federal Register**.

Section 3—Plan Administrators Filing Annual Reports

.01 *General.* A plan administrator electing to file a late annual report (Form 5500 Series Annual Return/Report) under this DFVC Program must comply with the requirements of this Section 3.

.02 Filing a Complete Annual Report.

(a) The plan administrator must file a complete Form 5500 Series Annual Return/Report, including all required schedules and attachments, for each plan year for which the plan administrator is seeking relief under the Program. This filing shall be sent to PWBA at the appropriate EFAST address listed in the instructions for the most current Form 5500 Annual Return/Report, or electronically in accordance with the EFAST electronic filing requirements. See the EFAST Internet site at www.efast.dol.gov to view forms and instructions.

Note: Do not forward the applicable penalty amount described in Section 3.03 to the EFAST addresses listed above.

(b) For purposes of subparagraph (a), the plan administrator shall file either: (1) The Form 5500 Series Annual Return/Report form (but not a Form 5500-R) issued for each plan year for which the relief is sought, or (2) the most current Form 5500 Annual Return/Report form issued (and, if necessary, indicate in the appropriate space on the first page of the Form 5500 the plan year for which the annual return/report is being filed). Forms may be obtained from the IRS by calling 1-800-TAX-FORM (1-800-829-3676). Forms for certain pre-1999 plan years also are available through the Internet sites for PWBA and the Internal Revenue Service (IRS) (www.dol.gov/dol/pwba, www.irs.gov). For further information on EFAST filing requirements, see the EFAST Internet site (www.efast.dol.gov) and the instructions for the most current Form 5500.

.03 Payment of Applicable Penalty Amount.

(a) The plan administrator shall pay the applicable penalty amount by submitting to the DFVC Program the information described in subparagraph (b) along with a check made payable to the "U.S. Department of Labor" for the applicable penalty amount determined in accordance with subparagraph (c). This separate submission shall be made by mail to: DFVC Program, PWBA, P.O. Box 530292, Atlanta, GA 30353-0292. The annual returns/reports for multiple plans may not be included in a single DFVC Program submission. A separate submission to the DFVC Program (including a separate check for the applicable penalty amount) must be made for each plan.

Note: Personal or private delivery service cannot be made to this address.

(b)(1) The administrator shall submit to the DFVC Program, with the applicable penalty amount, a paper copy of the Form 5500 Annual Return/

Report filed as described in paragraph .02(a), without schedules and attachments. In the event that the plan administrator files as described in paragraph .02(a) using a 1998 or prior plan year form, a paper copy of only the first page of the Form 5500 or Form 5500-C, as applicable, should be submitted to the DFVC Program.

(2) In the case of a plan sponsored by a Code section 501(c)(3) organization described in paragraph .03(c)(4), the administrator shall clearly note "501(c)(3) Plan" in the upper-right hand corner of the first page of the Form 5500 Annual Return/Report submitted to the DFVC Program (in Atlanta, Georgia). This notation should not be included on the annual report filed with PWBA pursuant to paragraph .02 (in Lawrence, Kansas) because it may interfere with the proper processing of the required report.

(c) The applicable penalty amount shall be determined as follows:

(1) In the case of a plan with fewer than 100 participants at the beginning of the plan year (or a plan that would be treated as such a plan under the "80-120" participant rule described in 29 CFR 2520.103-1(d) for the subject plan year) (hereinafter "small plan"), the applicable penalty amount is \$10 per day for each day the annual report is filed after the date on which the annual report was due (without regard to any extensions), not to exceed the greater of: \$750 per annual report or, in the case of a DFVC submission relating to more than one delinquent annual report filing for the plan, \$1,500 per plan.

(2) In the case of a plan with 100 or more participants at the beginning of the plan year (other than a plan that is eligible to use and uses the "80-120" participant rule) (hereinafter "large plan"), the applicable penalty amount is \$10 per day for each day the annual report is filed after the date on which the annual report was due (without regard to any extensions), not to exceed the greater of: \$2,000 per annual report or, in the case of a DFVC submission relating to more than one delinquent annual report filing for the plan, \$4,000 per plan.

(3) In the case of a DFVC submission relating to more than one delinquent annual report filing for a plan, the applicable penalty amount shall be determined by reference to paragraph (c)(2) if for any plan year for which the submission is made the plan was a "large plan."

(4) In the case of a plan administrator filing an annual report for a "small plan" that is sponsored by a Code section 501(c)(3) organization (including a Code section 403(b) plan), the

applicable penalty amount is \$10 per day for each day the annual report is filed after the date on which the annual report was due (without regard to any extensions), not to exceed \$750 per DFVC submission, including DFVC submissions that relate to more than one delinquent annual report filing for the plan. This paragraph (c)(4) shall not apply if, as of the date the plan files pursuant to this DFVC Program, there is a delinquent or late annual report due for a plan year for which the plan was a "large plan." See paragraph .03(b)(2) for special instructions pertaining to small plans sponsored by Code section 501(c)(3) organizations.

.04 Liability for Applicability Amount.

The plan administrator is personally liable for the payment of civil penalties assessed under section 502(c)(2) of ERISA, therefore, civil penalties, including amounts paid under this DFVC Program, shall not be paid from the assets of an employee benefit plan.

Section 4—Plan Administrators Filing Notices for Apprenticeship and Training Plans and Statements for "Top Hat" Plans

.01 *General.* Administrators of apprenticeship and training plans, described in 29 CFR 2520.104-22, and administrators of pension plans for a select group of management or highly compensated employees, described in 29 CFR 2520.104-23(a) ("top hat plans"), who elect to file the applicable notice and statement described in sections 2520.104-22 and 2520.104-23, respectively, as a condition of relief from the annual reporting requirements may, in lieu of filing any past due annual report and paying otherwise applicable civil penalties, comply with the requirements of this Section 4. Administrators who have complied with the requirements of this Section 4 shall be considered as having elected compliance with the exemption(s) and/or alternative method of compliance prescribed in §§ 2520.104-22, or 2520.104-23, as appropriate, for all subsequent plan years.

.02 Filing Applicable Notice or Statement with the U.S. Department of Labor.

The plan administrator must prepare and file a notice or statement meeting the requirements of §§ 2520.104-22, or 2520.104-23, as appropriate.

The apprenticeship and training plan notice described in § 2520.104-22 shall be sent by mail or by private delivery service to: Apprenticeship and Training Plan Exemption, Pension and Welfare Benefits Administration, Room N-1513, U.S. Department of Labor, 200

Constitution Avenue NW., Washington, DC 20210.

The "top hat" plan statement described in § 2520.104-23 shall be sent by mail or by private delivery service to: Top Hat Plan Exemption, Pension and Welfare Benefits Administration, Room N-1513, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210.

Note: A plan sponsor maintaining more than one "top hat" plan is not required to file a separate statement for each such plan. See § 2520.104-23(b).

.03 Payment of Applicable Penalty Amount.

(a) The plan administrator shall pay the applicable penalty amount by submitting to the DFVC Program the information described in subparagraph (b) along with a check made payable to the "U.S. Department of Labor" for the applicable penalty amount determined in accordance with subparagraph (c). This submission shall be made by mail to: DFVC Program, PWBA, P.O. Box 530292, Atlanta, GA 30353-0292.

Note: Personal or private delivery service cannot be made to this address.

(b) The administrator shall submit to the DFVC Program with the applicable penalty amount the most current Form 5500 Annual Return/Report (without schedules and attachments). For purposes of this requirement, the plan administrators must complete Form 5500 line items 1a-1b, 2a-2c, 3a-3c, and use plan number 888 for all "top hat" plans and plan number 999 for all apprenticeship and training plans. In the case of plan sponsors maintaining more than one "top hat" plan and plan sponsors maintaining more than one apprenticeship and training plan described in § 2520.104-22, the plan administrator shall clearly identify each such plan on the Form 5500 filed with

the Department of Labor or on an attachment thereto. The plan administrator also must sign and date the Form 5500.

(c) The applicable penalty amount is \$750 for each DFVC submission, without regard to the number of plans maintained by the same plan sponsor for which notices and statements are filed pursuant to Section 4 and without regard to the number of plan participants covered under such plan or plans.

.04 Liability for Applicability Amount.

The plan administrator is personally liable for the payment of civil penalties assessed under section 502(c)(2) of ERISA, therefore, civil penalties, including amounts paid under this DFVC Program, shall not be paid from the assets of an employee benefit plan.

Section 5—Waiver of Right to Notice, Abatement of Assessment and Plan Status

.01 Payment of a penalty under the terms of this DFVC Program constitutes, with regard to the filings submitted under the Program, a waiver of an administrator's right both to receive notices of intent to assess a penalty under § 2560.502c-2 from the Department and to contest the Department's assessment of the penalty amount.

.02 Although this Notice does not provide relief from late filing penalties under the Code, the Internal Revenue Service (IRS) has provided the Department with the following information. The Code and the regulations thereunder require information to be filed on the Form 5500 Series Annual Return/Report and provide the IRS with authority to impose or assess penalties for failing to timely file. The IRS has agreed to provide certain penalty relief under the

Code for delinquent Form 5500 Annual Returns/Reports filed for Title I plans where the conditions of this DFVC Program have been satisfied. See IRS Notice 2002-23.

.03 Although this Notice does not provide relief from late filing penalties under Title IV of ERISA, the Pension Benefit Guaranty Corporation (PBGC) has provided the Department with the following information. Title IV of ERISA and the regulations thereunder require information to be filed on the Form 5500 Series Annual Return/Report and provide the PBGC with authority to assess penalties against a plan administrator under ERISA § 4071 for late filing of the Form 5500 Series Annual Return/Report. The PBGC has agreed that it will not assess a penalty against a plan administrator under ERISA § 4071 for late filing of a Form 5500 Series Annual Return/Report filed for a Title I plan where the conditions of this DFVC Program have been satisfied.

.04 Acceptance by the Department of a filing and penalty payment made pursuant to this DFVC Program does not represent a determination by the Department of Labor as to the status of the arrangement as a plan, the particular type of plan under Title I or ERISA, the status of the plan sponsor under the Code, or a determination by the Department of Labor that the provisions of §§ 2520.104-22 or 2520.104-23 have been satisfied.

Signed at Washington, DC, this 25th day of March, 2002.

Ann L. Combs,

Assistant Secretary, Pension and Welfare Benefits Administration, U.S. Department of Labor.

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