DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Parts 2560 and 2570

RIN 1210–AB64

Voluntary Fiduciary Correction Program

AGENCY: Employee Benefits Security Administration, Department of Labor.

ACTION: Notification of adoption of Updated Voluntary Fiduciary Correction Program.

SUMMARY: This document contains an amended and restated Voluntary Fiduciary Correction Program (VFC Program or Program) under title I of the Employee Retirement Income Security Act of 1974, as amended (ERISA). The VFC Program is designed to encourage correction of fiduciary breaches and compliance with the law by permitting persons to avoid potential Department of Labor civil enforcement actions and civil penalties if they voluntarily correct eligible transactions in a manner that meets the requirements of the Program. The amendments to the Program simplify and expand the VFC Program to make the Program easier to use and more useful for employers and others who wish to avail themselves of the relief provided. Specifically, the Program amendments add a self-correction feature for delinquent transmittal of participant contributions and loan repayments to a pension plan under certain circumstances; clarify some existing transactions eligible for correction under the Program; expand the scope of other transactions currently eligible for correction; and simplify certain administrative or procedural requirements for participation in and correction of transactions under the VFC Program. In addition, the amendments implement section 305(b)(2) and (3) of the SECURE 2.0 Act of 2022 (SECURE 2.0 Act) by adding a self-correction feature for certain participant loan failures self-corrected under the Internal Revenue Service's Employee Plans Compliance Resolution System (as described in Rev. Proc. 2021–30, or any successor guidance) (IRS's EPCRS).

DATES: The amendments to the VFC Program contained in this document are effective on March 17, 2025.

FOR FURTHER INFORMATION CONTACT: Brian J. Buyniski or Yolanda Wartenberg, Office of Regulations and Interpretations, Employee Benefits Security Administration (EBSA), (202) 693–8500, for questions regarding the VFC Program amendments in this document. Emily Harris, Office of Exemption Determinations, EBSA, (202) 693–8540, for questions regarding the amended associated class exemption PTE 2002–51. James Butikofer, Office of Research and Analysis, EBSA, (202) 693–8410, for questions regarding the regulatory impact analysis. (These are not toll-free numbers.)

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

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

SUPPLEMENTARY INFORMATION:

A. Summary Overview

The Voluntary Fiduciary Correction Program (VFC Program or Program) gives plans and fiduciaries a ready means to correct violations of ERISA, without the transaction costs and burden associated with enforcement actions for violations of the fiduciary standards in title I of ERISA), 29 U.S.C. 1132(a)(2) and 1132(a)(5). As an enforcement policy, the Program simultaneously promotes compliance with the law, correction of violations, and the efficient use of scarce enforcement resources. The Department also has the authority under section 408(a) of ERISA (29 U.S.C. 1108) to issue exemptions from the prohibited transaction rules in sections 406 and 407 of ERISA (29 U.S.C. 1106 and 1107) and in section 4975 of the Internal Revenue Code (Code).[1] Accordingly, in tandem with this amendment to the Program and in this same issue of the **Federal Register**, the Department has also published associated amendments to Prohibited Transaction Exemption (PTE) 2002–51, which implements important components of the VFC Program.

The EBSA adopted the VFC Program in 2002, and later revised it in 2005 and 2006.[2] EBSA designed the VFC Program to encourage employers and plan fiduciaries to voluntarily comply with ERISA and allow those potentially liable for certain specified fiduciary breaches under ERISA to voluntarily apply for relief from civil enforcement actions and certain civil penalties, provided they meet the Program's criteria and follow the procedures outlined in the Program.

Although the Department is not required to seek public comments on changes to an enforcement policy, in November 2022, EBSA published proposed revisions to the VFC Program with a request for public comments. The Department also proposed amendments to PTE 2002–51 for coordination. Additionally, because the VFC Program includes information collections that are subject to the Paperwork Reduction Act, the Department sought public comment in the November 2022 proposal on the revisions to the information collections included in the amendments to the VFC Program. The proposal discussed the revisions and incorporated them into a restatement of the VFC Program in its entirety for ease of reference. Comments received on the 2022 VFC Program proposed revisions and the proposed amendments to the related class exemption are posted on EBSA's website.

After careful consideration of the issues raised in the comment letters, EBSA decided to adopt final changes to the Program as discussed herein. In tandem with this publication of the 2025 VFC Program, EBSA is publishing final amendments to PTE 2002–51 to conform with certain revisions in the 2025 VFC Program. For a discussion of the amendments to the class exemption and the public comments to those changes, see amended PTE 2002–51, which is also published elsewhere in this issue of the **Federal Register**.

With these amendments, EBSA intends to facilitate more efficient and less costly corrections of fiduciary breaches under the Program, encourage greater participation in the Program, and respond to requests from stakeholders for adjustments based on their experiences using the Program. In this regard, the amendments are designed to simplify the Program and make it easier to use by employers and others who wish to avail themselves of the relief provided. Notably, the new self-correction procedures will apply to the transaction most frequently corrected under the Program—the delinquent transmittal of participant contributions

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

[2] 67 FR 15062 (March 28, 2002), 70 FR 17516 (April 6, 2005), 71 FR 20262 (April 19, 2006).

and loan repayments to pension plans—as well as to certain participant loan failures self-corrected under IRS's EPCRS. The amendments also clarify language and simplify certain administrative and procedural requirements for participation in and correction of transactions under the Program. This includes revisions to eligibility criteria that allow the submission of applications covering multiple plans by a single service provider under certain circumstances (*i.e.,* bulk applicants), as well as additional flexibility in the corrections methods for several violations. The Department anticipates that many users of the Program, as amended, will find it improved and less resource intensive, without sacrificing protections of the affected plans.

The following section of this document is an overview of the 2025 VFC Program and the Department's response to issues raised in the public comments. This document includes a restatement of the Program in its entirety to facilitate reference to and future use of the Program as amended.

B. Overview of Changes in the 2025 VFC Program

The 2025 VFC Program retains the fundamentals of the 2006 VFC Program. The Program describes how to apply for relief, lists the specific transactions covered,[3] and sets forth acceptable methods for correcting fiduciary breaches under the Program. It also provides examples of potential breaches and related permissible corrective actions. The Program defines the term ''Breach'' to mean any transaction that is or may be a violation of the fiduciary responsibilities contained in part 4 of title I of ERISA. The Program also provides a model application form, a checklist, and an online calculator for determining correction amounts. The VFC Program will continue to be administered in EBSA Regional Offices. Eligible applicants that satisfy the terms and conditions of the VFC Program application process receive a ''no action'' letter from EBSA and are not subject to civil monetary penalties for the corrected transactions. Excise tax relief for six specific VFC Program transactions is conditionally available under the amended associated class exemption, PTE 2002–51.[4]

The most significant changes to the VFC Program involve the addition of two new self-correction features. The first is in section 7.1(b) for certain failures to timely transmit participant contributions (and participant loan repayments) to pension plans,[5] and the second is in section 7.3(c) for certain participant loan failures self-corrected under IRS's EPCRS. The other Program amendments in this document: (1) clarify existing transactions eligible for correction under the Program; (2) expand the scope of certain transactions currently eligible for correction; and (3) simplify certain administrative or procedural requirements for participation in the VFC Program and correction of transactions under the Program. A more detailed summary of the Program revisions is set forth below in this preamble.

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

The 2025 VFC Program includes a new self-correction component (SCC) for failures to timely transmit participant contributions (and participant loan repayments) to pension plans in specified circumstances. The new SCC adds a more streamlined correction mechanism than is currently available under section 7.1(a) for instances in which employers have retained participant contributions or loan repayments beyond the time contemplated by the Department's regulations at 29 CFR 2510.3–102.

This transaction, referred to as ''delinquent participant contributions,'' is the type of transaction most frequently corrected under the Program. The Department received input from stakeholders who said the time and expense required to file a VFC Program application with the Department is a disincentive to use the Program to correct delinquent participant contribution transactions, especially when they involve small dollar amounts. Many of the comment letters submitted on the 2022 VFC Program proposed revisions expressed support for the self-correction feature, pointing out that it will promote voluntary, timely, and efficient correction of errors; increase compliance; eliminate unnecessary administrative requirements and costs; free up EBSA resources; and help ensure participants' retirement savings are secure. One commenter expressed concern, however, that the elimination of notices or official approvals in the final Program could open the Program to abuse and create an impression that no one is monitoring the system.

After carefully considering the public comments, the Department agrees that a streamlined self-correction feature for delinquent participant contributions to pension plans with appropriately designed safeguards will encourage more voluntary corrections by employers and other persons who are in a position to correct a Breach (Plan Officials). It will also enable EBSA to better allocate resources currently dedicated to processing VFC Program applications for these transactions. Accordingly, the 2025 VFC Program adds the SCC as the correction method for the list of eligible transactions in section 7.1(b) entitled ''Delinquent Participant Contributions and Loan Repayments to Pension Plans under the Self-Correction Component.''[6]

Under the final amendments, relief under the SCC for delinquent participant contributions and delinquent plan loan repayments is available in connection with any pension plan regardless of the size of the plan's participant population or amount of plan assets, so long as the applicant is eligible to use the Program and meets the conditions discussed below. While self-correctors that satisfy the terms and conditions of the VFC Program do not receive a no-action letter from EBSA, the SCC provides that compliance with the Program's terms and conditions will avoid the imposition of civil monetary penalties or an EBSA civil enforcement action against the SCC participant. As with any application under the Program, however, and in accordance with section 2(b) ''Verification,'' EBSA reserves the right to conduct an investigation with respect to the transaction corrected through the SCC,

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

[4] Stakeholders interested in a discussion of the components of the VFC Program that are not being revised in this document should review the **Federal Register** notices announcing the original 2002 Program and the 2005 and 2006 updates, as well as the 2022 proposed revisions to the Program. *See* 67 FR 15062 (March 28, 2002), 70 FR 17516 (April 6, 2005), 71 FR 20262 (April 19, 2006), and 87 FR 71164 (Nov. 21, 2022). For PTE 2002–51, *see* 67 FR 70623 (2002); 71 FR 20135 (2006), and 87 FR 70753 (Nov. 21, 2022). 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).

[5] The term pension plans include both defined contribution plans and defined benefit plans. *See* ERISA section 3(34) and 3(35).

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

to determine the truthfulness and completeness of the factual statements set forth in the SCC notice and to confirm the corrective action was in fact taken.

(a) Self-Correction Component $1,000 Lost Earnings Amount Limit—Section 7(b)(1)(ii)(A)

Eligibility to use the SCC in section 7.1(b) is conditioned on the amount of Lost Earnings [7] on the delinquent participant contributions or loan repayments being $1,000 or less (excluding any excise tax amounts paid to the plan under the related class exemption PTE 2002–51).

Several commenters recommended eliminating, increasing, or changing the Lost Earnings $1,000 cap. Some of these commenters expressed the view that it would be desirable from a standpoint of cost and efficiency to allow broader availability, while other commenters asserted the cap would restrict large and mid-size plan sponsors from participating and could result in others bifurcating the correction to skirt the limit. Several commenters observed that using the cap on Lost Earnings as determined by the online calculator, which utilizes the Code section 6621(a)(2) underpayment rates, will result in fluctuations leading to inconsistency and confusion with respect to SCC eligibility.

A variety of options were recommended by commenters, including increasing the Lost Earnings to $2,500 or $10,000; addition of a cost-of-living adjustment; adopting a cap that varies based on the amount of plan assets or number of participants; and eliminating the cap altogether. Commenters further recommended the Program allow the use of plan's forfeiture accounts to pay for Lost Earnings, arguing that such use would be consistent with the IRS's EPCRS, which allows a plan sponsor to use plan forfeitures to fund corrective allocations in certain circumstances. Another commenter suggested that the Program include a *de minimis* provision under which Lost Earnings would not have to be calculated and included in corrective payments. Alternatively, the commenter suggested that the Department should allow *de minimis* Lost Earnings amounts to be paid from the plan's forfeiture account.

After consideration of the comments, the Department has determined to finalize the $1,000 Lost Earnings cap as proposed. The Department believes that a substantial majority of delinquencies will be eligible for correction under the SCC even with the $1,000 Lost Earnings cap.[8] However, as noted in the 2022 VFC Program proposed revisions, the $1,000 Lost Earnings cap along with the 180-day remittance deadline (discussed below) are intended to exclude delinquencies from the SCC when the amount or length of delinquency suggest a need for EBSA to actively evaluate the circumstances surrounding the breach and the timing of the correction under the VFC Program application process. The Department believes it is appropriate to retain these protective parameters as it proceeds with a new element of the VFC Program.

With respect to the suggestion that the Lost Earnings calculation be based on the amount of plan assets or number of participants, EBSA believes that the Lost Earnings cap should continue to be a fixed figure. The VFC Program, and especially the SCC, is designed to provide simplicity and uniformity with an approach that eliminates complicated requirements for computation. A variable cap based on the total amount of plan assets or the total number of participants, by contrast, would complicate eligibility determinations and the Department's oversight of those determinations, undermining the goal of simplicity.

Regarding the use of forfeitures to pay for Lost Earnings, from its inception in 2000, the Program has required that the cost of correction not be paid from plan assets. Lost Earnings is part of the correction amount which is described in section 5(b) as a combination of the Principal Amount involved in the transaction, Lost Earnings, and any interest on the Lost Earnings. It was further clarified in section 5(c) of the 2022 VFC Program proposed revisions that the cost of correction cannot be paid from plan assets, including charges against participant accounts or plan forfeitures accounts.[9] This is still the right approach. It would defeat ERISA's remedial purposes, and undermine enforcement of the law's protections, to permit employers and fiduciaries to shift the cost of the correction to the plan itself, thereby causing new injury to the plan. Thus, this requirement and the clarification regarding forfeitures will continue to be part of the VFC Program.

Several commenters seeking clarification of the timeframe to calculate the Lost Earnings cap asked whether each pay period is viewed as a separate transaction. Generally, the Department has considered each pay period as a separate transaction; however, the Department has permitted more than one pay period to be treated as one transaction under the VFC Program if the pay periods are close together in time and the delinquencies are related to the same cause.[10]

(b) Self-Correction Component 180-Day Contribution Remittance Deadline—Section 7(b)(1)(ii)(B)

To be eligible for the SCC in section 7.1(b), the delinquent participant contributions or loan repayments must have been remitted to the plan within 180 calendar days from the date of withholding from participants' paychecks or receipt by the employer.

Several commenters argued that a 180-calendar day contribution remittance deadline was too restrictive and suggested extending it to either 120 days following the end of the plan year or until the due date of the Annual Return/Report of Employee Benefit Plans (Form 5500 or Form 5500–SF, as applicable). As noted above, the preamble to the 2022 VFC Program proposed revisions states that the 180-day remittance deadline is designed to exclude delinquencies that suggest the need for EBSA to actively evaluate the circumstances surrounding the breach and the timing of the correction. The Department continues to believe that a failure to identify a delinquency and remit contributions or loan payments due to the plan within 180 days indicates a potentially serious problem with the plan's processes and procedures for handling participant contributions and loan payments. It would not be consistent with prudent fiduciary administration of a plan to wait until the end of the plan year, the completion of the annual audit of the plan for annual reporting purposes, or the due date of the Form 5500 or Form 5500–SF to check for timely transmission of participant contributions and loan repayments. The Department also does not believe it would be appropriate to structure the VFC Program in a way that suggests that it is consistent with ERISA's fiduciary

[7] Section 5(b)(6) defines ''Lost Earnings'' as an approximate amount that would have been earned by the plan on the Principal Amount, but for the Breach, and sets forth methodology for calculating Lost Earnings for purposes of the SCC.

[8] The 2022 VFC Program proposed revisions estimated that the SCC would streamline the process for 74% of small and large VFC Program applicants involving Lost Earnings less than or equal to $1,000.

[9] 87 FR 71164, 71181 (November 21, 2022).

[10] For a discussion on whether each pay period can be viewed as a separate transaction, refer to the associated class exemption, PTE 2002–51 and the Voluntary Fiduciary Correction Program Class Exemption FAQs which can be found in EBSA's website at *https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/faqs/vfcp-class-exemption-faqs.pdf.*

duties to wait until the end of the year, the annual audit, or the filing of the plan's annual report to check for delinquent transmittal of contributions and loan repayments. Accordingly, EBSA has decided to retain this requirement, which has also been part of the class exemption since its inception in 2002, and which is intended to provide protection to participants and beneficiaries especially in situations outside of the full VFC Program application process.

(c) Requirements for the Self-Correction Component—Sections 5(b)(3)(ii), 7.1(b)(2)(i)

As with the current VFC Program application-based procedure for delinquent participant contribution transactions in section 7.1(a), correction amounts under the SCC consist of the (1) Principal Amount and (2) Lost Earnings, with the Principal Amount being the amount of participant contributions or loan repayments that would have been contributed to the plan if the employer had not retained such amounts and the Lost Earnings being the amount of earnings that would have been earned on the Principal Amount but for the failure to timely remit such amounts to the plan.

The SCC requires that Lost Earnings be paid from the ''Date of Withholding or Receipt,'' and mandates the use of the online calculator to determine the amount of the loss payable to the plan. The term ''Date of Withholding or Receipt'' means the date the amount would otherwise have been payable to the participant in cash in the case of amounts withheld by an employer from a participant's wages, or the date on which the participant contribution or loan payment is received by the employer in the case of amounts that a participant or beneficiary pays to an employer. The calculation of Lost Earnings from the Date of Withholding or Receipt is a special rule for purposes of the SCC and differs from the calculation of Lost Earnings under the full VFC Program application process, which begins on the earliest date on which the participant contributions or loan repayments could reasonably have been segregated from the employer's general assets (*i.e.,* the date on which the contributions become plan assets under the Department's regulation at 29 CFR 2510.3–102). Use of the earlier date and the use of the online calculator are important elements of the SCC that are intended to help ensure full correction without the need for the protections afforded by the Program's otherwise applicable application and Department approval process. These elements also will provide self-correctors with certainty that the calculation of Lost Earnings will meet the requirements of the SCC.

(d) Self-Correction Component Notice Requirement—Section 7.1(b)(2)(iii)

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

Several commenters asserted that the SCC notice requirement would discourage plan sponsors from using the SCC, although one commenter acknowledged it would not appear to impose a significant burden. Commenters also stated that the SCC notice was unnecessary because delinquent contributions and delinquent loan repayments are already reported on the Form 5500. Another commenter observed that self-correction under the IRS's EPCRS does not require notice to the Internal Revenue Service (IRS), while another commenter proposed a minimum dollar threshold before there would be a requirement for the completion of the SCC notice. However, as discussed above, another commenter expressed concern that any elimination of notices or official approvals can leave open doors for abuse and create the impression that no one is monitoring the system.

As noted in the preamble to the 2022 VFC Program proposed revisions, EBSA has been reluctant to adopt overbroad self-correction features because of the danger that it would have insufficient information regarding the breach and correction for which it is providing no-action relief. The decision to adopt the SCC is premised, however, on a conclusion that a well-designed self-correction feature can result in the Department receiving sufficient timely information to meet oversight objectives and ensuring appropriate corrections while also encouraging more Plan Officials to utilize the Program. In the Department's view, a well-designed program requires parties to file the basic data that is necessary for the Department to ensure adequate corrections, and appropriate oversight and accountability for fiduciary violations. Further, although EBSA supports appropriate harmonization of VFC Program provisions with the IRS's EPCRS when dealing with corrections of the same transaction, the Department does not believe that the SCC needs to match the requirements under the Self-Correction Program (SCP) of the IRS's EPCRS in every respect.[11] In addition, EBSA does not believe reporting delinquencies and corrections on the Form 5500 or Form 5500–SF is an adequate alternative to the SCC notice. The SCC notice is intended to provide a relatively contemporaneous report of the delinquency being corrected. Reporting delinquencies and corrections on the Form 5500 or Form 5500–SF may not happen until many months after the delinquency has been corrected. For example, a delinquency that occurs in January of a calendar year plan would not be reported until the end of July or, with a generally available extension, until the middle of October of the following year. EBSA, accordingly, has decided to retain the SCC notice and electronic filing requirements as proposed.

(e) Self-Correction Component ''Retention Record Checklist''—Penalty of Perjury Statement—Sections 6.2(d), 6.2(e) and 7.1(b)

Self-correctors under the SCC in section 7.1(b) must prepare or collect the documents listed in the SCC Retention Record Checklist, printed below in appendix F, and provide the completed checklist and required documentation to the plan administrator as required under sections 6.2(d) and 7.1(b)(3). Also, to participate in the SCC, a plan fiduciary with knowledge of the transaction that is being self-corrected and each Plan Official seeking relief under the program must sign a penalty of perjury statement as follows: ''Under penalties of perjury I certify that I am not Under Investigation (as defined in section 3(b)(3) of the VFC Program) and that I have reviewed the SCC notice acknowledgment and summary, the checklist, and all the required documentation, and to the best of my knowledge and belief the contents are

[11] Unlike the IRS program, the SCC includes PTE 2002–51, which provides an exemption from the prohibited transaction excise tax for certain transactions identified in the VFC Program.

true, correct, and complete.'' The penalty of perjury statement also appears in Appendix F.[12]

One commenter opposed the penalty of perjury requirement on the basis that it may have a chilling effect on utilization of the SCC and may increase litigation risk against Plan Officials. However, since its inception in 2002, the VFC Program has required a penalty of perjury statement as a necessary safeguard.[13] As noted in the 2006 Program, EBSA believes that an important result under the Program is a level of certainty that those using the Program have complied with the terms of the Program and have revealed the details of the transaction and the correction.[14] The penalty of perjury statement is part of what provides that level of certainty. Accordingly, the final SCC in section 7.1(b) retains the penalty of perjury statement as a fundamental part of the Program.

(f) Self-Correction Component Protections and Frequency of Use

In the preamble to the 2022 VFC Program proposed revisions, the Department stated that it had considered but did not include a limit on the frequency with which a self-corrector may use the SCC.[15] The Department explained that it intended instead to monitor participation for frequent use of the SCC and that it may communicate with repeat users or open investigations to identify and correct systemic issues leading to repeated failures to transmit participant contributions in a timely fashion. The Department requested comments on whether the SCC should incorporate other protections for pension plans that are classified as small based on their participant population. For example, EBSA asked whether the SCC should limit small plan participation to only those small plans whose plan sponsors comply with the safe harbor standard in 29 CFR 2510.3–102(a)(2) for the timely handling of participant contributions. The Department noted that compliance could require, for example, either an existing practice or an agreement to put in place a customary practice of depositing participant contributions and loan payments with the plan not later than the 7th business day following the day on which such amount would otherwise have been payable to the participant in cash in the case of amounts withheld by an employer from a participant's wages, or the 7th business day following the day on which the participant contribution or loan payment is received by the employer in the case of amounts that a participant or beneficiary pays to an employer.

Commenters generally supported the decision not to impose a limit on the frequency of use of the SCC. One commenter believed that, given the Lost Earnings cap, repeat use of the SCC is unlikely to present a risk to participants. Another commenter argued that plan sponsors will be disincentivized from using the SCC if their frequency of use is monitored by EBSA and asked for guidance as to the level of usage that is likely to generate follow-up inquiries from EBSA. Commenters also asked that no additional requirements be imposed on self-corrections by small plans. They argued additional requirements were unnecessary because the Department retains the right to investigate a plan fiduciary if it fails to meet the SCC requirements and additional requirements could discourage participation in the SCC. One commenter argued that in its experience most small employers followed the 7-business day safe harbor, but a more restrictive standard in the SCC would fail to acknowledge that there are occasions when a particular deposit cannot be reasonably segregated from the employer's general assets within the 7-business day period. The Department has decided not to adopt additional requirements for small plans at this time. As discussed in the preamble to the 2022 VFC Program proposed revisions, EBSA will monitor the use of the SCC and evaluate the potential merit of added requirements based on that data.

With respect to the request for guidance on the level of repeat usage of the SCC that might trigger communications from the Department or initiation of an investigation, the Department does not believe a general standard would be appropriate for determining whether repeated use of the SCC will generate an inquiry or investigation. Rather, the Department's actions with respect to any particular repeat user will depend on the facts and circumstances of the individual corrections.

(g) Self-Correction Component: Miscellaneous

The VFC Program does not relieve plans from reporting delinquent participant contributions on the plan's Form 5500 or Form 5500–SF, as applicable. That remains the case under these amendments to the Program for violations, regardless of whether corrected under the SCC or the application-based component of the VFC Program.

A commenter urged the Department to provide guidance on whether and how plan administrators should report use of the SCC on the Form 5500 (Line 4a of the Schedule H or Schedule I for small plans; line 9(a) of the Schedule DCG) or Form 5500–SF (Line 10a). The instructions for the Form 5500 and the Form 5500–SF already specifically address reporting of delinquent contributions. EBSA directs filers to the instructions for the Form 5500 to determine their reporting obligation regarding delinquent participant contributions. The information submitted on the SCC notice enables the Department to cross-reference SCC correctors to the Form 5500/5500–SF data. The Department has a project on its regulatory agenda that involves an evaluation of general improvements to the annual reporting forms and instructions. The Department is open to input on that project from stakeholders related to whether the Department should propose adding questions to the Form 5500 and Form 5500–SF that specifically relate to use of the SCC.

In the 2006 VFC Program, the Department rejected a recommendation that EBSA implement a *de minimis* rule under the VFC Program under which applicants would not be required to correct a previously filed Form 5500 in circumstances where the breach involved a defined de minimis threshold amount of the plan's assets.[16] EBSA continues to believe that such an exception from the requirement to file a complete and accurate annual report is not appropriate. Rather, when a prohibited transaction is not reported or is reported incorrectly on the plan's Form 5500 or Form 5500–SF annual report, the Form 5500 or Form 5500–SF filing must be amended so the plan's annual report correctly reflects the fiduciary breach and prohibited transaction.

[12] As discussed below, the Department made a change in this 2025 VFC Program to permit an employer in a multiemployer plan or multiple employer plan who wishes to correct on its own behalf to sign the application or SCC penalty of perjury statement and, regardless of the employer's status as a plan fiduciary, the penalty of perjury statement need not be signed by another plan fiduciary. *See* sections 6.1 and 6.2.

[13] 67 FR 15062, 15068, (March 28, 2002).

[14] 71 FR 20262, 20265 (April 19, 2006).

[15] The proposal noted that the class exemption PTE 2002–51 is generally unavailable to VFC Program applicants that have, within the previous there years, taken advantage of the relief provided by the VFC Program and the exemption for a similar type of transaction. Comments were solicited on whether to eliminate the three-year use limitation in the exemption PTE 2002–51. A discussion of that issue and the Department's conclusion can be found in the final amendment to PTE 2002–51 which appears in this issue of the **Federal Register**.

[16] 71 FR 20262, 20266 (2006).

Another commenter recommended that the Department create an online excise tax calculator in coordination with the Department of the Treasury. A requirement for the use of the SCC under section 7.1(b)(2)(i) is that the Lost Earnings on the delinquent remittance of participant contributions and participant loan repayments be calculated using the online calculator. This requirement was supported by commenters as a straightforward method to determine the Lost Earnings amount. The Department will consider the recommended addition and consult with the Department of the Treasury, but believes that step is beyond the scope of the current amendments and is not prepared to adopt such an expansion of the online calculator concurrent with this release.

2. Self-Correction Component for Participant Loan Transactions Corrected Pursuant to IRS's EPCRS—Section 7.3

The current VFC Program covers certain participant loans that fail to qualify for ERISA's statutory exemption for plan loan programs in ERISA section 408(b)(1). Specifically, these covered loan transactions are loans in which the terms of the loan did not comply with plan provisions that incorporated requirements of section 72(p) of the Code concerning amount, duration, or level amortization, or which defaulted due to a failure to withhold loan repayments from the participant's wages. The correction under the 2006 VFC Program for these transactions requires that the Plan Official voluntarily correct the loan with IRS approval under the Voluntary Correction Program (VCP) of the IRS's EPCRS and provide to the Department information regarding the correction.

In July 2021, IRS updated EPCRS to permit use of SCP for correction of certain participant loan failures. In December 2022, the SECURE 2.0 Act was enacted. Section 305(b)(1) of the SECURE 2.0 Act provides that an ''eligible inadvertent failure'' related to a loan from a plan to a participant may be self-corrected according to the rules of section 6.07 of Revenue Procedure 2021–30 or any successor guidance.

Section 305(b)(2) of the SECURE 2.0 Act requires the Department to treat eligible inadvertent failures related to participant loans that are self-corrected under the IRS's EPCRS as described above as meeting the requirements of the VFC Program ''if, with respect to the violation of the fiduciary standards of the Employee Retirement Income Security Act of 1974, there is a similar loan error eligible for correction under the IRS's EPCRS and the loan error is corrected in such manner.'' Section 305(b)(3) of the SECURE 2.0 Act permits the Department to impose reporting or other procedural requirements with respect to parties that intend to rely on the VFC Program for correction of these eligible inadvertent failures.

The 2022 VFC Program proposed revisions were published for public comment in November 2022 before the SECURE 2.0 Act was enacted, with a comment period closing date of January 20, 2023. Some commenters addressed SECURE 2.0 Act section 305 during that comment period. However, because the amendments were published for public comment before the SECURE 2.0 Act was enacted, the Department reopened the comment period from February 14 to April 17, 2023, to specifically solicit comments on the SECURE 2.0 Act section 305 directive. In the notice reopening the comment period, the Department asked specific questions about section 305 of the SECURE 2.0 Act, including (i) whether VFC Program section 7.3 should be amended to include a paragraph treating participant loan transactions self-corrected under the IRS's EPCRS as meeting the requirements of the VFC Program, (ii) whether the VFC Program should impose additional reporting or other procedural requirements for these specific corrections, and (iii) whether changes were needed to PTE 2002–51.

Several commenters expressed general support for the implementation of the changes required by the SECURE 2.0 Act section 305, including support for adding a self-correction component to the VFC Program for participant loans self-corrected in accordance with the SCP of the IRS's EPCRS. The commenters urged the Department to remove requirements in section 7.3 of the VFC Program that correctors must use VCP (under the IRS's EPCRS) and that they must provide the Department with proof of payment and an IRS compliance statement. A commenter further recommended amending section 2 of the VFC Program to provide that EBSA will not initiate a civil investigation or assess civil penalties for participant loan transactions corrected under the SCP of the IRS's EPCRS.

Several commenters stated that the Department should not impose any requirements on parties who self-correct plan loans under the VFC Program beyond what is required by the SCP of the IRS's EPCRS. The commenters noted that the SCP of the IRS's EPCRS does not impose notice or reporting requirements for employers that self-correct. One commenter stated that consistency between the IRS's EPCRS and the Department's VFC Program would simplify corrections and reduce burden. A different commenter stated that reporting to EBSA or other procedural requirements are unnecessary because a plan loan that is self-corrected under the SCP of the IRS's EPCRS puts the affected participants in the position they would have been if no failure occurred. One commenter recommended that the Department also include other ''eligible inadvertent failures'' (*i.e.,* eligible inadvertent failures other than those relating to loans to participants) in a VFC Program self-correction component as soon as practicable after the IRS provides guidance on the meaning of ''eligible inadvertent failures'' and how such failures can be self-corrected under EPCRS.

After evaluating the comments, and pursuant to section 305 of the SECURE 2.0 Act, the Department is modifying section 7.3 of the VFC Program to accept EPCRS self-corrections of eligible inadvertent failures of participant loan transactions. Specifically, the 2025 VFC Program adds a new self-correction component in section 7.3(c) entitled ''Eligible Inadvertent Participant Loan Failures Corrected under the Self-Correction Component.''

The description of the transaction set forth in section 7.3(c)(1) states, ''A plan extended a loan to a plan participant who is a party in interest with respect to the plan based solely on their status as an employee of any employer whose employees are covered by the plan, as defined in section 3(14)(H) of ERISA. There is an Eligible Inadvertent Participant Loan Failure that involves a Breach as defined in section 3(b)(1) [of the VFC Program].'' Section 7.3(c) further provides that an Eligible Inadvertent Participant Loan Failure is a participant loan failure that occurs despite the existence of practices and procedures that satisfy the standards set forth in, and is eligible for correction under, the IRS's EPCRS, and does not include any participant loan failure that is egregious, relates to the diversion or misuse of plan assets, or is directly or indirectly related to an abusive tax avoidance transaction. In addition, in connection with the new provision in section 7.3(c), a new exception is added to section 4 titled ''Exception for Eligible Inadvertent Participant Loan Failures'' to clarify that a self-corrector is eligible to correct an Eligible Inadvertent Participant Loan Failure under section 7.3(c) even if the plan or the self-corrector is ''Under Investigation,'' within the meaning of the VFC Program so long as the self-corrector is eligible to correct the participant loan failure under the IRS's EPCRS.[17]

The new SCC for participant loan failures in section 7.3(c) accordingly allows self-correction of transactions currently described in section 7.3(a) and (b) of the VFC Program—*i.e.,* loans the terms of which did not comply with plan provisions that incorporated requirements of section 72(p) of the Code concerning amount, duration, or level amortization, or loans that defaulted due to a failure to withhold loan repayments from the participant's wages—if such transactions are eligible for, and have been self-corrected under, the IRS's EPCRS. The new SCC in section 7.3(c) also extends to the failure to obtain spousal consent for a plan loan and to allowing a loan when the loan exceeds the number permitted under the terms of the plan, also provided that the transactions are eligible for, and have been self-corrected under, the IRS's EPCRS.

IRS Notice 2023–43 (IRS Notice) provides interim guidance under section 305 of the SECURE 2.0 Act with respect to the expansion of EPCRS, including with respect to the expansion of self-correction for eligible inadvertent failures relating to loans from plans to participants under section 305(b)(1).[18] Among other things, the IRS Notice provides that plan sponsors may self-correct any eligible inadvertent failure relating to a loan from a plan to a participant that is corrected in accordance with section 6.07 of EPCRS, before EPCRS is formally updated pursuant to section 305(g) of the SECURE 2.0 Act, if certain conditions are satisfied.[19] The IRS Notice also provides that plan sponsors may rely on the notice beginning on the date it was issued, May 25, 2023, and ending on the date EPCRS is updated pursuant to section 305(g) of the SECURE 2.0 Act. Likewise, with respect to the new SCC in section 7.3(c), the Department will accept self-correction in accordance with section 6.07 of the IRS's EPCRS before EPCRS is formally updated. Once the IRS's EPCRS is formally updated, the Department will accept self-correction in accordance with the updated EPCRS. In this regard, with respect to a failure to obtain spousal consent for a plan loan, the Department's SCC will initially accept only a correction that involves obtaining spousal consent, unless and until additional correction methods are identified in an updated IRS's EPCRS.[20] The Department intends to monitor use of the SCC as well as any additional changes to the IRS's EPCRS to determine whether additional guidance appears necessary on the scope of the SCC in section 7.3(c) or on any correction methods.

The Department does not agree with the commenters who suggested that the Department should not impose any requirements in the VFC Program on parties who self-corrected participant loans beyond what is required by the IRS's EPCRS. Rather, similar to the Department's position described above with respect to self-correction of delinquent participant contributions and loan repayments, the Department believes self-correction of participant loan transactions is a new approach that merits a level of oversight to ensure that transactions are adequately corrected and that breaching fiduciaries have an appropriate level of accountability. Accordingly, under section 7.3(c), self-correctors are required to complete a SCC notice and submit the notice electronically to EBSA using the online VFC Program web tool located on EBSA's website. Self-correctors are also required to complete and retain the documents required under section 6.2 (including the Penalty of Perjury Statement). The SCC for participant loan transactions has been designed so that the burden of providing information to the Department is minimal and mirrors the IRS recordkeeping requirements[21] by requiring only contact information, a short description of type of participant loan failure, the loan amount or amounts in the case of multiple loans, the date the failure was identified, the date or dates of correction, the correction, and the number of participants affected by the correction. Unlike self-correctors under section 7.1(b), who must complete a SCC Record Retention Checklist, self-correctors under section 7.3(c) do not need to complete that checklist.

The existing correction method under sections 7.3(a) and (b) are retained to permit those that would prefer to correct under the EPCRS VCP to utilize the application-based process under the VFC Program.

The Department also does not agree with the suggestion that section 2 be amended to provide that EBSA will not initiate a civil investigation or assess civil penalties for a self-correction of a participant loan failure corrected under the IRS's EPCRS. Consistent with EBSA's historical practice under the VFC Program, the Department generally does not anticipate taking enforcement action in response to a compliant application or eligible self-correction except in the unusual situation where EBSA becomes aware of possible criminal behavior, material misrepresentations or omissions in the VFC Program application or SCC notice, or other abuse of the Program.[22]

3. Other Revisions to the VFC Program

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

Section 7.1(a) has been renamed ''Delinquent Participant Contributions and Loan Repayments to Pension Plans under VFC Program Applications'' to clarify that it applies only to corrections pursuant to Program applications in contrast to self-corrections under section 7.1(b). Additionally, section 7.1(a) has been revised to reflect the Department's amendment of its regulation defining plan assets in 2010 to include participant loan repayments within these regulatory principles.[23] Language has also been added to sections 7.1(a)(3)(ii)(A) and (iii)(A) to explain that the required narrative in the application must include a description of any steps taken to prevent future delinquencies.

Sections 7.1(b) ''Delinquent Participant Contributions to Insured Welfare Plans'' and (c) ''Delinquent Participant Contributions to Welfare Plan Trusts'' are re-designated as sections 7.1(c) and (d) respectively. A change also has been made to each of these sections to clarify that the participant contributions were remitted to the insurance provider in section 7.1(c)(3)(iii) and to the trust in section 7.1(d)(3)(ii) rather than the plan as previously stated to clarify the provision.

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[17] Under Q&A–4 of Notice 2023–43, once a plan or plan sponsor comes under examination (as defined in section 5.08 of Rev. Proc. 2021–30), an Eligible Inadvertent Participant Loan Failure is no longer eligible for self-correction under the IRS's EPCRS unless the plan sponsor has, before the plan or plan sponsor comes under examination, demonstrated a specific commitment to implement a self-correction. However, under Q&A–5 of Notice 2023–43, a plan sponsor may self-correct an Eligible Inadvertent Participant Loan Failure that is insignificant, determined in accordance with the factors set forth in section 8.02 of Rev. Proc. 2021–30, even if the plan or plan sponsor is under examination, and even if the failure is discovered on examination.

[18] Notice 2023–43, Guidance on Section 305 of the SECURE 2.0 Act of 2022 with Respect to Expansion of the Employee Plans Compliance Resolution System, available at *https://www.irs.gov/pub/irs-drop/n-23-43.pdf.*

[19] *Id.* at Q&A 1.

[20] See section 6.07(4) of Revenue Procedure 2021–30 (relating to correction of failure to obtain spousal consent for plan loan).

[21] Notice 2023–43, at Q&A–11.

[22] 67 FR 15062, 15063 (2002).

[23] *See* 29 CFR 2510.3–102(a)(1).

The Department also had proposed deleting language regarding Restoration of Profits as a correction method under sections 7.1(a)(2)(i) and (ii) and 7.1(d)(2)(i) and (ii). The proposal was based on the view that this correction method may be unnecessary in this context, as applicants had not reported generating a profit through use of the delinquent amounts, and therefore, deletion would simplify the Program. Although the Department did not receive comments opposing these changes, the Department determined to retain Restoration of Profits as a potential correction method in the 2025 VFC Program in order to leave the option available should it become relevant to an applicant in the future. Many commenters on the 2022 VFC Program proposed revisions generally supported expansive availability of the Program to promote timely correction of errors.

The 2022 VFC Program proposed revisions also clarified that the VFC Program does not include a correction for delinquent matching employer contributions. However, as explained in the notice, to the extent that a Program application provides that the employer will apply the same correction formula to the employer matching contributions that it is required to apply to delinquent participant contributions, EBSA does not expect to reject or refuse to process such applications merely because delinquent employer matching contributions are included even though the ''correction'' of the employer contribution is not a covered transaction under the VFC Program, is not entitled to any relief under the Program, and will not be covered by any no action letter.

(b) Revisions to Application Process Provisions for Loans—Sections 7.2(b), (c) and (d)

The 2022 VFC Program proposed revisions included several changes to section 7.2 related to the application process for correction of certain plan loans made at below-market interest rates. The Department received no comments on the proposed revisions, and as described below, is adopting the changes as proposed.

The original VFC Program included as an eligible transaction ''Loan at Below-Market Interest Rate to a Party in Interest with Respect to the Plan.'' The corrective action in section 7.2(b) for such transactions requires the payment of the loan in full, plus penalties, and the greater of the Lost Earnings or Restoration of Profits. In addition to the required section 6.1 documentation, the 2006 VFC Program required applicants to provide both a written copy of an independent commercial lender's fair market interest rate determination under section 7.2(b)(3)(ii) and a copy of an independent fiduciary's dated, written approval of the fair market interest rate determination under section 7.2(b)(3)(iii). To reduce applicants' costs, the 2025 VFC Program revises section 7.2(b)(3)(iii) to eliminate the requirement that an independent fiduciary validate in writing the process used to determine the fair market interest rate determination for loans in the amount of $10,000 or less. The 2025 VFC Program also clarifies the wording in section 7.2(b)(3)(i) to require a narrative describing the process used to determine the interest rate at the time the loan was made.

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

Section 7.2(d) ''Loan at Below-Market Interest Rate Solely Due to a Delay in Perfecting the Plan's Security Interest'' is another transaction dating back to the original VFC Program. It provides a correction for when a plan made a purportedly secured loan to a non-party in interest, but a delay occurred in recording or otherwise perfecting the plan's interest in the loan collateral, resulting in the loan being treated as an unsecured loan until the plan's security interest was perfected. Section 7.2(d)(2) is re-organized to clarify the correction. Section 7.2(d)(2)(ii) specifically requires that the plan's interest in the loan collateral be recorded or perfected. For situations where the delay in perfecting the loan's security caused a permanent change in the risk characteristics of the loan, section 7.2(d)(2)(iii) requires the payment of the present value of the remaining Principal Amounts from the date the loan is fully secured to the maturity date of the loan. The 2025 VFC Program clarifies that the present value payment method must be coupled with the borrower's continued payment of the outstanding loan balance under the original repayment schedule for the duration of the loan. Section 7.2(d)(2)(iii) is also being amended in the 2025 VFC Program to add an alternative that permits the borrower's payment of the amortized outstanding loan balance over the remaining payment schedule of the loan at the interest rate that would have been applicable for a loan with the changed risk characteristics. When this new alternative in the 2025 VFC Program is used, the applicant must submit a copy of the loan repayment schedule for the re-amortized loan repayments under section 7.2(d)(3)(iii). Any fair market interest rate must be determined by an independent commercial lender.

In a related modification applicable to these three types of loans, section 5(a) is revised to include a specific explanation in section 5(a)(5) for when a commercial lender will be ''independent'' using the same criteria as is used to determine the ''independence'' of an appraiser. As an ongoing protection for plans and their participants, EBSA staff, as part of the application review process, will continue to monitor a commercial lender's interest rate determination process and will object if it appears that a lender is not truly ''independent'' of the plan's fiduciaries and parties in interest, or the interest rate determination process is otherwise flawed.

(c) Revisions to Application Process Provisions for Purchases, Sales and Exchanges, Sales and Leasebacks—Section 7.4

The 2022 VFC Program proposed revisions included several changes to Section 7.4(a) ''Purchase of an Asset (Including Real Property) by a Plan from a Party in Interest,'' Section 7.4(b) ''Sale of an Asset (Including Real Property) by a Plan to a Party in Interest,'' and Section 7.4(c) ''Sale and Leaseback of Real Property to Employer.'' The Department did not receive any comments on the proposed revisions, and as described below, is adopting the changes as proposed.

Section 7.4(a) provides a method of correction for situations when the plan purchased an asset (including real property) from a party in interest in a transaction to which no prohibited transaction exemption applies. A plan's purchase from a party in interest can be corrected under the VFC Program by reversing the transaction provided the plan receives the higher of the fair market value at resale or the Principal Amount plus the greater of either Lost Earnings or Restoration of Profits.[24] As an alternative correction, a plan may retain the asset plus receive an amount resulting from application of a formulaic calculation, but only if an independent fiduciary determines that the plan will realize a greater benefit from this alternative correction than from the resale of the asset. Section 7.4(a)(2) of the 2025 VFC Program includes a new paragraph (iii) that provides a third method of correction in situations when the purchase cannot be reversed or the asset retained because the plan no longer owns the asset (*e.g.,* sales, maturity, destruction). Under this new correction, the plan can receive a ''cash settlement'' if the asset has been sold and a Plan Official provides a statement, as required by section 7.4(a)(3)(v), that the sale was upon the advice of an independent fiduciary and not in anticipation of applying for relief under the Program. The determination of the cash settlement amount is prescribed in section 7.4(a)(2)(iii) and considers, among other factors, whether the plan realized a profit on the resale of the asset, or a loss on the resale, maturity or destruction of the asset.

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

The 2025 VFC Program also includes an amendment to section 7.4(b) ''Sale of an Asset (Including Real Property) by a Plan to a Party in Interest.'' Section 7.4(b) provides a method of correction in situations when the plan sold an asset for cash to a party in interest in a transaction to which no prohibited transaction exemption applies. The amendment adds a condition to the section 7.4(b)(2)(ii) correction to permit the plan to receive the correction amount rather than to repurchase the asset by permitting a Plan Official to determine that the asset cannot be repurchased (*e.g.,* destruction, maturity). This new condition in section 7.4(b)(2)(ii) is an alternative to the section's existing condition requiring an independent fiduciary to determine that the plan will recognize a greater benefit from this correction than the correction in section 7.4(b)(2)(i). As part of the required documentation under section 7.4(b)(3)(iv), the Plan Official making this determination must provide a written explanation of why the asset cannot be repurchased.

Section 7.4(c) ''Sale and Leaseback of Real Property to Employer'' provides a method of correction for a plan sponsor that sells a parcel of real property to the plan, which is then leased back to the plan sponsor and is not otherwise exempt. To more accurately reflect the statutory exemption provided by ERISA section 408(e), which does not limit the transaction to the plan sponsor, section 7.4(c) is being revised to explicitly allow correction of leases to affiliates of the plan sponsor. The final associated class exemption, PTE 2002–51, has been revised for consistency with this amendment.

(d) Revisions to Application Process Provisions for Illiquid Assets—Section 7.4(f)

The VFC Program includes correction for a transaction that permits a plan to divest, rather than continue to hold in its investment portfolio, a previously purchased asset that is determined to be illiquid and that had been acquired under circumstances described in the Program. The 2022 VFC Program proposed revisions retained those circumstances, as well as the correction method, which permits the sale of the asset to a party in interest provided the plan receives the higher of (A) the fair market value of the asset at the time of resale, without a reduction for the costs of sale; or (B) the Principal Amount, plus Lost Earnings as described in section 5(b). This correction encompasses a sale of the illiquid asset to a party in interest by the plan even if the original purchase of the asset by the plan was not a prohibited transaction or otherwise imprudent. However, the amendments modified the definition of Principal Amount to take into account the possibility that the transaction being corrected was neither a prohibited transaction nor a fiduciary breach. Section 7.4(f)(2)(ii) now defines Principal Amount as either the amount that would have been available had the Breach not occurred, or the plan's original purchase price if the original purchase was not a prohibited transaction or imprudent. The amendments also clarify that in the case of an illiquid asset that is a parcel of real estate, no party in interest may own real estate that is contiguous to the plan's parcel of real estate on the Recovery Date. There were no comments addressing these proposed revisions, and the 2025 VFC Program includes these changes as proposed.

(e) Revisions to the VFC Program General Eligibility Criteria—Sections 3, 4, and 5

(i) Under Investigation Definition—Section 3(b)(3)

To be eligible to correct under the VFC Program, a plan, applicant, or self-corrector may not be ''Under Investigation'' as defined in section 3(b)(3). The 2022 VFC Program proposed revisions included a modification to section 3(b)(3)(i) to state that a review by an EBSA Benefits Advisor is considered an investigation by EBSA that automatically makes an applicant or self-corrector ineligible to participate in the Program. However, the proposed change to section 3(b)(3) makes clear that a plan will not be considered to be Under Investigation merely because EBSA staff has contacted the plan, the applicant, the self-corrector, or the plan sponsor in connection with a participant complaint unless the participant complaint concerns the transaction described in the application or identified in the SCC notice and the plan has not received the correction amount due under the Program as of the date EBSA staff contacted the plan, the applicant, the self-corrector, or the plan sponsor.

One commenter opposed including in the definition of Under Investigation contact from an EBSA staff member regarding a participant complaint arguing that the fiduciary may have not known the breach occurred until the fiduciary received the call from the EBSA staff member. The commenter further suggested that EBSA instead could put time parameters around when the fiduciary must act based on receiving information from the EBSA staff member.

The VFC Program has limited eligibility for participation in the Program to plans and applicants that are not Under Investigation since its inception. The requirement does not turn on the fiduciary's knowledge of the breach (or allegations of a breach), but rather on the absence of an investigation by the Department. An important premise of the VFC Program is that fiduciaries should not wait to see if the agency has spotted the potential breach or if a participant has complained to the agency before they take action to correct

[24] The terms Principal Amount, Lost Earnings, and Restoration of Profits are defined in VFC Program section 5.

violations. Instead, they should timely correct violations, and the VFC Program should be structured to avoid incentives for fiduciaries to adopt a ''wait and see'' approach focused on the likelihood of getting caught, instead of the need to correct violations promptly. Accordingly, the Department is not persuaded that the changes suggested by the commenter are consistent with the purpose of the provision and, accordingly, declines to adopt the suggestions. Rather, the 2025 VFC Program retains the definition of Under Investigation as proposed.

(ii) Eligibility Exceptions—Section 4

Section 4 of the Program provides that in order to be eligible for the VFC Program, the plan, applicant, or self-corrector may not be Under Investigation (discussed above) and the VFC Program application must contain no evidence of potential criminal violations. The 2025 VFC Program added two new limited exceptions to the existing eligibility requirements to promote increase usage of the Program.

The first exception involves the ''potential criminal violations'' provision in paragraph (b)(2) and allows participation in the VFC Program by an innocent plan administrator, plan sponsor, or applicant for cases involving delinquent participant contributions and loan repayments when (1) all funds have been repaid to the plan; (2) the appropriate law enforcement agency has been notified of the alleged criminal activity; and (3) the applicant submits a statement (covered by the Penalty of Perjury Statement) with the application providing contact information for the law enforcement agency, certifying that the applicant was not involved in the alleged criminal activity, and reporting whether a claim relating to the potential criminal violation has been made under an ERISA section 412 fidelity bond. To accommodate this change, section 4(b) is re-named and re-designated as section 4(b)(1), ''In general.'' EBSA always retains the right to reject any VFC Program application based on its review of the criminal activity involved.

The second exception being added in the 2025 VFC Program is in section 4(d), which provides that an applicant is eligible to submit a ''bulk application'' when certain conditions are met. As noted in the 2022 VFC Program proposed revisions, over the past several years, EBSA has received Program applications from service providers to correct Breaches involving multiple plans. Some of these applications have involved hundreds, or even thousands, of plans, some of which are Under Investigation by EBSA. As noted elsewhere in this document, a plan is automatically ineligible to participate in the Program if it is considered ''Under Investigation'' as defined in section 3(b)(3) of the Program. Consequently, such plans could not be included in any resulting no action letter. EBSA noted that it would like to be able to issue a no action letter to the service provider that covers all plans named in the application in certain circumstances. EBSA received one comment letter in support of the changes described in the 2022 VFC Program proposed revisions, and the Program's eligibility provision have been expanded as proposed. Specifically, to qualify: (1) the application must cover at least ten named plans and each plan must have participated in the transaction being corrected; (2) the applicant must be a service provider that is applying for relief only on its own behalf; (3) the applicant is currently or was providing services to each of the named plans at the time of the transaction being corrected; and (4) the service provider cannot be Under Investigation by EBSA and the corrective action cannot have been taken as a result of an EBSA investigation or review of any named plan. EBSA retains the right to determine whether the corrective action was taken as a result of any investigation, and to exclude any plan involved in the investigation from the no action letter. Also, section 6.1(d)(3) is being amended to permit a bulk applicant to provide for each named plan either the Annual Report Form 5500 filing information or the plan sponsor's nine-digit number (EIN). This procedural change will avoid undue delay while a service provider attempts to secure Annual Report Form 5500 filing information, which may not be directly related to the Breach. Section 6.1(g) is also being amended to permit a bulk applicant with knowledge of the transaction that is the subject of the application to sign and date the Penalty of Perjury Statement in which the applicant certifies that it is not Under Investigation by EBSA instead of requiring a signature from a plan fiduciary for each plan covered by the application.

(iii) Lost Earnings De Minimis Exception—Section 5(e)

The 2006 VFC Program provides a de minimis exception that applies to corrective distributions of less than $20 each to former employees, their beneficiaries, and alternate payees who neither have account balances with nor have a right to future benefits from the plan if the applicant demonstrates that the cost of making a distribution to the individual exceeds the amount of the corrective payment. In that case, the distribution does not have to be paid to the individuals but rather the total amount can be paid to the plan. The 2022 VFC Program proposed revisions included an increase in the de minimis amount to $35. Several commenters asked for a de minimis rule for Lost Earnings on delinquent remittance of participant contributions and participant loan repayments under which the correction would be limited to payment of the principal amount and there would not be an obligation to pay Lost Earnings to the participants or to the plan. The suggestion was not to be limited to former employees, their beneficiaries, and alternate payees who neither have account balances with nor have a right to future benefits from the plan. Some commenters argued that the costs of processing the corrective Lost Earnings payments should be avoided when the per participant amount is very small while other commenters proposed a total amount threshold of $50 or $75 on a per event basis before correction would have to include Lost Earnings. The Department is not persuaded that the de minimis amount should be increased above the $35 amount in the proposal or that it should be expanded to include individuals with account balances or a right to future benefits from the plan. Rather, in the Department's view, a de minimis level for the VFC Program should reinforce, not undercut, the overarching obligation that plan sponsors and other Plan Officials who fail to follow the legal requirements (such as for depositing participant contributions and loan repayments) should make full correction to the plan and its participants and beneficiaries. Accordingly, the 2025 VFC Program retains the requirements in section 5(e) with the increase from $20 to $35.

(f) Payment of Correction and Correction Costs by Plan Officials

Although section 7 of the VFC Program provides that any Plan Official may correct a breach in accordance with section 5 and the applicable correction method, section 7.1(a) through (d) provides that any penalties, late fees or other charges must be paid by the employer. Several commenters suggested that the VFC Program expressly allow service providers, as well as employers, to pay Lost Earnings on delinquent remittance of participant contributions and loan repayments. The commenters argued that in certain circumstances when the amount of the delinquent participant contributions and loan repayments are small, the cost incurred by service providers to collect Lost Earnings from a plan sponsor or employer can exceed the amount of Lost Earnings. EBSA has decided to adopt this suggestion by modifying section 7.1(a) through (d) to better conform with section 5(b) by stating that the cost of the correction must be paid by a Plan Official and not from the employee contributions and loan repayments. This change is consistent with existing section 5(c) of the VFC Program which provides that the responsible fiduciary, plan sponsor or other Plan Official must pay correction amounts and any costs of correction and also prohibits payment of any part of the correction amount or costs of correction from plan assets. Plan Official is defined in section 3(b)(2) as a plan fiduciary, plan sponsor, party in interest with respect to a plan, or other person who is in a position to correct a breach by filing an application or submitting a SCC notice. Although the service providers may pay Lost Earnings amounts resulting from another Plan Official's breach, a proper VFC Program application or SCC notice, which includes the penalty of perjury statement by a plan fiduciary, must be completed or EBSA will not issue a no action letter or self-correction acknowledgment.

In the 2022 VFC Program proposed revisions, the Department also stated that, with respect to a multiemployer plan or multiple employer plan, both the plan administrator and any contributing or adopting employer would be permitted to use the amended VFC Program and the SCC.[25] The Department explained that the plan administrator of such a plan could apply on behalf of the entire plan and any participating employer may apply on its own behalf. Although no comments were received on that aspect of the 2022 proposal, to provide additional clarity, the Department made a change in this 2025 VFC Program to permit an employer in a multiemployer plan or multiple employer plan who wishes to correct on its own behalf to sign the application or SCC penalty of perjury statement and, regardless of the employer's status as a plan fiduciary, the penalty of perjury statement need not be signed by another plan fiduciary. *See* sections 6.1 and 6.2.

(g) Miscellaneous Modifications—Sections 5 and 7

The 2025 VFC Program includes assorted other clarifying changes that were in the November 2022 notice designed to update the Program, assist Program users, and maintain consistency among provisions. For example, section 5(d) ''Distributions'' is revised to reflect the cessation of both the IRS and Social Security Administration letter forwarding services for missing participants, and to provide a reference to the Missing Participants—Best Practices for Pension Plans guidance issued by the Department.[26] Another example is sections 7.3(a)(3) and (b)(3). Those sections provide that only certain supporting documentation must be provided with the application. The words ''unless otherwise requested by EBSA'' have been added to confirm that EBSA may, in individual cases, request copies of other supporting documentation. Similarly, references to self-corrector, self-correction, and the SCC notice have been added to various provisions where appropriate. Additionally, in sections 7.4(d) and (e) dealing with transactions at greater and less than fair market value respectively, the documentation requirement for the qualified, independent appraiser's report has been revised to correctly specify value rather than fair market value at the time of the transaction. In section 7.5 (''Benefits'') concerning the distribution of overvalued plan assets in a defined contribution plan, the correction specifically requires the restoration to the plan of the amount that exceeded the paid distribution amount to which all affected participants were entitled under the terms of the plan, plus Lost Earnings as described in section 5(b) on the overpaid distributions.[27]

4. Decisions on Requests for Comment on Further Expansion of VFC Program

The preamble to the 2022 VFC Program proposed updates included a solicitation of public comments on potential further expansion or revision of the Program in four specific areas: (i) missing and nonresponsive participants and beneficiaries, (ii) integration of the VFC Program with corrections under the IRS's EPCRS, (iii) adoption of a pre-audit compliance program, and (iv) electronic VFC Program submissions. Commenters were generally supportive of further changes to the VFC Program in these areas.

With respect to revising the program to either permit or require that VFC Program applications be submitted electronically, the Department intends to continue to evaluate alternative approaches to e-submission, *e.g.,* email versus an internet or web-based portal, but has decided to continue the current process under which the EBSA Regional Offices that administer the VFC Program application process can make available email boxes that can be used for e-submission of VFC Program applications and supporting documents. Text was added to the VFC Program to encourage applicants to contact the relevant Regional Office about email submission options and format requirements, *e.g.,* penalty of perjury statements.

[25] *See* 87 FR 71165 (citing the preamble to the 2006 VFC Program, 71 FR 20262, 20264 (April 19, 2006)). An employer would be considered a Plan Official for purposes of the Program.

[26] Available at *www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/retirement/missing-participants-guidance.*

[27] The preamble to the 2022 VFC Program proposed updates noted that, although a copy of the fidelity bond was originally required to be included with an application, the 2002 Program was modified to instead permit applicants to include information concerning the plan's ERISA fidelity bond, and this informational requirement was eliminated in the 2006 Program. Although the informational requirement was not proposed to be added back to the Program, the preamble to the 2022 proposed revisions emphasized that the prior modifications focused merely on streamlining the application process and should not be misconstrued as eliminating or modifying the ERISA section 412 bonding requirements that protect plans against loss by reason of acts of fraud or dishonesty. For information on the ERISA section 412 bonding requirements, *see* FAB 2008–04, (Nov. 25, 2008); 29 CFR 2550.412–1 (1975) and Part 2580 (1985).

However, with respect to missing and nonresponsive participants and beneficiaries and the other two areas identified for potential expansion, the Department believes they all involve important fiduciary compliance issues and central aspects of the Program that require careful development of issues and options. For example, with respect to revising the Program to extend to Breaches in connection with missing and nonresponsive participants and beneficiaries, the Department may consider ways to incorporate, as corrective action, the provision of information to the Department for its Retirement Savings Lost and Found searchable database described in ERISA section 523. While the Department has not included these areas of expansion in the 2025 VFC Program, it will consider these issues further and may propose expansion of the Program in these areas in a separate project.

C. Regulatory Impact Analysis

The following is a discussion of the examination of the effects of this regulatory action as required by Executive Order 12866,[28] Executive Order 13563,[29] the Paperwork Reduction Act of 1995,[30] the Regulatory Flexibility Act,[31] section 202 of the Unfunded Mandates Reform Act of 1995,[32] Executive Order 13132,[33] and the Congressional Review Act.[34]

1. Executive Orders 12866 and 13563

Executive Orders 12866 (as amended by 14094) and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing and streamlining rules, and of promoting flexibility.

Under Executive Order 12866, ''significant'' regulatory actions are subject to the requirements of the executive order and review by the Office of Management and Budget (OMB). As amended by Executive Order 14094, section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as any regulatory action that is likely to result in a rule that may: (1) have an annual effect on the economy of $200 million or more (adjusted every three years by the Administrator of the Office of Information and Regulatory Affairs (OIRA) for changes in gross domestic product); or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, Territorial, or Tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise legal or policy issues for which centralized review would meaningfully further the President's priorities or the principles set forth in the Executive order, as specifically authorized in a timely manner by the Administrator of OIRA in each case.

For this purpose, a ''rule'' includes ''an agency statement of general applicability and future effect . . . that is designed to implement, interpret, or prescribe . . . policy or to describe the procedure or practice requirements of an agency.''

OMB has determined that this action is significant under section 3(f) Accordingly, OMB has reviewed this action, and the Department has assessed the costs and benefits of its amended enforcement policy and related PTE proposal.

The VFC Program is designed to provide an efficient, cost-effective method for Plan Officials to correct a variety of ERISA fiduciary breaches and prohibited transactions and receive Departmental recognition of the correction. Specifically, the amendments to the Program add a SCC for delinquent transmittal of participant contributions and loan repayments to a pension plan under certain circumstances; clarify some existing transactions eligible for correction under the Program; expand the scope of other transactions currently eligible for correction; and simplify certain administrative or procedural requirements for participation in and correction of transactions under the VFC Program. In addition, the amendments to the Program add a SCC for certain participant loan failures self-corrected under the IRS's EPCRS.

The Department expects that the amendments to the VFC Program will increase efficiency and accessibility for potential applicants and self-correctors. These changes, described further below, include in part, a new SCC for delinquent participant contributions and loan repayments involving Lost Earnings less than or equal to $1,000, acceptance of bulk applications with modified requirements, and increased flexibility in the procedures for a variety of other transactions. These changes also include elimination from the exemption of a three-year limitation for VFC Program applicants that take advantage of the relief provided by the VFC Program and the exemption for a similar type of transaction.

(a) Affected Entities

All pension and welfare plans can utilize the VFC Program if they have a fiduciary breach for which there is an eligible transaction. Parties that are covered by section 4975 of the Code can rely on the related class exemption for excise tax relief for transactions identified in the exemption that are corrected under the VFC Program. In 2021 there were 718,736 defined contribution plans and 46,388 defined benefit plans that would be impacted by these changes.[35] In 2022 there were an estimated 2,790,000 health plans [36] and 630,000 other welfare benefit plans that would also be impacted by these changes.[37]

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

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

[30] 44 U.S.C. 3506(c)(2)(A) (1995).

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

[32] 2 U.S.C. 1501 *et seq.* (1995).

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

[34] 5 U.S.C. 804(2) (1996).

[35] Employee Benefits Security Administration, *Private Pension Plan Bulletin: Abstract of 2021 Form 5500 Annual Reports,* (September 2023).

[36] U.S. Department of Labor, EBSA calculations using the 2022 Medical Expenditure Panel Survey, Insurance Component (MEPS–IC), and 2020 Census County Business Patterns.

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

An average of 1,226 applicants per year used the VFC Program from 2021 to 2023. The Department estimates that the 73 percent of VFC Program applicants will move to the SCC.[38] The Department also estimates a one percent increase in the number of self-corrections, or 909 self-corrections,[39] resulting from the removal of the three-year limitation provision for self-correctors.

The Department also projects that changes to the VFC Program will result in two new Program users filing bulk applications and 326 Program users filing non-bulk applications.[40] Please see Table 1 for the number of plans that will utilize the VFC Program and exemption.

TABLE 1—NUMBER OF PLANS THAT WILL UTILIZE THE VFC PROGRAM AND EXEMPTION

	Number of plans
Filing Bulk Applications	2
Filing Non-Bulk Applications	326
SCC	909
Total	1,237

(b) Benefits and Costs

The Department believes that the benefits of the amended VFC Program and related PTE justify its costs. Because participation is voluntary, the VFC Program imposes no costs unless Plan Officials choose to avail themselves of the opportunity to correct a potential fiduciary breach under the terms of the VFC Program. Plans are expected to only utilize the program if the benefits of using the program exceed the costs. The Department expects that the revised VFC Program will be easier and more useful for potential applicants. The greater efficiency and accessibility that will result from the availability of a SCC for delinquent participant contributions, and other expansions and clarifying modifications of the Program, are expected to make the Program easier to use, to lessen the cost of participation in many instances, and to increase efficiency for both applicants and reviewers.

The VFC Program provides incentives for fiduciaries to correct a potential fiduciary breach. Benefits for Plan Officials who are granted relief under the VFC Program include elimination of risks arising from an otherwise uncorrected fiduciary breach, as well as savings of resources that otherwise might have been needed to defend against a civil action by the Department based on the breach. The VFC Program has been very successful to date in encouraging and facilitating the correction of violations.

The changes to the VFC Program will allow Plan Officials to obtain the benefits of the program at a reduced cost. The Department hopes that this cost reduction may encourage other Plan Officials to correct previously undetected and unreported fiduciary breaches and reimburse plan losses, which would enhance the retirement income security of participants and beneficiaries; however, it has no data to reliably predict the extent of the increased usage. The Department will continue to actively monitor the use of the VFC Program and evaluate its benefits and costs. The Department is unable to predict with certainty either the reduction in application costs that will arise from the revisions to the Program, or the potential increase in participation that will be associated with these revisions. One commenter requested the Department collect additional data from the VFCP applications to assess the VFC Program and SCC. The commenter suggested collecting data on the characteristics of the corrections and plans utilizing the program, including the amount of correction, the types of transactions corrected, the size of retirement plans, the date of the prohibited transaction, and the date by which participant contributions or loan repayments were supposed to be remitted to the plan. The commenter also suggested to conduct follow-up surveys or interviews with plans that use the VFC program. While this data could be beneficial, the Department seeks to minimize administrative costs.

An additional and significant benefit of the VFC Program accrues to participants and beneficiaries through the correction of fiduciary breaches and the restoration to the plan of amounts representing losses or improperly generated profits arising from impermissible transactions, resulting in greater security of plan assets and future benefits. Encouraging greater participation in the VFC Program by lowering the costs of using it could help reduce the need for plan participants to pursue legal action.

These changes to the VFC Program will reduce associated costs by reducing the number of hours required to make corrections and file applications. Compared with the existing VFC Program, the Department expects the amended Program's per-user costs to be lower because the amendments could move 73 percent of the expected VFC Program applications to the SCC.[41] Moreover, implementing the SCC will reduce the recordkeeping and reporting cost for Plan Officials with small amounts of delinquent participant contributions and loan repayments, because they no longer will have to submit an application to the Department with extensive supporting documentation, but instead will merely submit a self-correction notice with minimal data to the Department and provide corroborating documentation to the plan administrator.

This SCC also provides additional flexibility and potentially increase use to Plan Officials by eliminating the three-year limitation in the PTE. Please see Table 2 for estimates and cost savings for VFC Program applicants. The estimates presented in Column A are obtained using similar assumptions and methods as in Column B. The estimates presented in Column B are based on the estimates presented in Table 7.

[38] The Department estimates that the SCC will streamline the process for the 73 percent of small and large VFC Program applicants involving Lost Earnings less than or equal to $1,000.

[39] 1,226 applicants × 73.4% × 1.01 = 909 self-corrections.

[40] 1,226 applicants × (100% minus 74.3%) = 326 non-bulk applicants.

[41] The Department estimates that the SCC will streamline the process for 73 percent of small and large VFC cases involving Lost Earnings less than or equal to $1,000.

TABLE 2—COST SAVINGS FOR VFC PROGRAM APPLICANTS FROM PROGRAM AND EXEMPTION CHANGES

	Cost before program and exemption changes (A)	Cost after program and exemption changes (B)	Cost savings (A − B)
Traditional VFC Program (annual)	$765,570	$215,876	$549,693
SCC (annual)		355,910	−355,910
VFCP Exemption (annual)	120,236	120,236	0
Total (annual)	885,806	692,023	193,784

Plans or their service providers will need to familiarize themselves with the changes to the VFC Program and amendments to the PTE. Service providers may help multiple plans in a year or across years, so while it could take a service provider multiple hours to review the amended requirements, the actual burden impact on an individual plan would be less. The Department assumes that it will take two hours per plan to review the changes and fill out the VFCP application. Please see Table 3 for calculations and burden totals.

TABLE 3—HOUR BURDEN FOR RULE FAMILIARIZATION

	Number of entities (A)	Number of hours per entity (B)	Total hour burden (A × B)	Hourly wage (C)	Dollar equivalent of hour burden (A × B × C)
Compensation and benefits managers familiarize with the changes to the VFC Program and Exemption (first year)	1,237	2	2,474	$124.75	$308,632
Total	1,237		2,474		308,632

Overall, the Department estimates that the costs of the VFC Program and the associated class exemption, in their amended forms, would total approximately $690,798 ($669,600 in annual equivalent costs reflecting the monetized cost of the work performed by in-house personnel and outside service providers and $21,198 in annual cost burden reflecting the cost of materials and postage). Over 10 years, the costs associated with the VFC Program and associated class exemption would total approximately $7.5 million, annualized to $1 million per year (using a 7 percent discount rate).[42]

2. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (PRA 95) (*44 U.S.C. 350(c))(2)(A)*), the Department solicited comments concerning the information collection request (ICR) included in the 2022 VFC Program proposed revisions. At the same time, the Department also submitted the ICR to OMB, in accordance with *44 U.S.C. 3507(d).*

The Department received a comment that specifically addressed the paperwork burden analysis of the information collection requirements contained in the 2022 VFC Program proposed revisions. The commenter attempted to adjust the labor wage rates; however, the Department has already accounted for inflation in the labor rates.

The changes made by these final rules affect the existing OMB control number, 1210–0118. A copy of the ICR for OMB Control Number 1210–0118 may be obtained by contacting the PRA addressee listed in the following sentence or at *www.RegInfo.gov.* For additional information contact, U.S. Department of Labor, Employee Benefits Security Administration, Office of Research and Analysis, Attention: PRA Officer, 200 Constitution Avenue NW, Room N–5718, Washington, DC 20210; or send to *ebsa.opr@dol.gov.*

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

An average of 1,226 applicants per year used the VFC Program from 2021 to 2023. The Department estimates that the 73 percent of VFC Program applicants will move to the SCC.[43] Please see Table 1 for the number of plans that will utilize the VFC Program and associated class exemption PTE 2002–51.

In addition to the VFC Program, the Department is publishing a final amendment to the associated class exemption PTE 2002–51, which applies only to qualifying applicants and self-correctors participating in the VFC Program. The exemption is currently unavailable to VFC Program applicants that have, within the previous three years, taken advantage of the relief

[42] Over 10 years, the costs associated with the VFCP Program and associated class exemption would total approximately $8.8 million, annualized to $1 million per year (using a 3 percent discount rate).

[43] The Department estimates that the Self-Correction Component will streamline the process for the 73 percent of small and large VFC Program applicants involving Lost Earnings less than or equal to $1,000.

provided by the VFC Program and the exemption for a similar type of transaction. The three-year provision was initially included in the exemption to prevent parties from becoming lax in complying with fiduciary and other ERISA duties because of the availability of the exemption. Based on the Department's experience with the VFC Program and the exemption, the Department concluded that the risk of such behavior is low and therefore is eliminating the three-year limitation.

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

VFC Program

For the VFC Program, the Department estimates that Plan Officials will devote 2.5 hours of clerical staff gathering paperwork, one hour of a compensation and benefits manager calculating Lost Earnings, and one hour of clerical staff engaging in recordkeeping activities for each non-bulk application or self-correction. The Department estimates that for each bulk application, Plan Officials will devote 25 hours of clerical staff gathering paperwork, 10 hours of a compensation and benefits manager calculating Lost Earnings, and 10 hours of clerical staff engaging in recordkeeping activities. Please see Table 4 for calculations and burden totals.

TABLE 4—HOUR BURDEN OF VFC PROGRAM

	Number of entities (A)	Number of hours per entity (B)	Total hour burden (A × B)	Wage rate (C)	Dollar equivalent of hour burden (A × B × C)
Traditional VFC Program					
Compensation and benefits managers calculate Lost Earnings (non-bulk)	326	1	326	$140.32	$45,744
Clerical staff gather information (non-bulk)	326	2.5	815	65.99	53,782
Clerical staff maintain recordkeeping (non-bulk)	326	1	326	65.99	21,513
Compensation and benefits managers calculate Lost Earnings (bulk)	2	10	20	140.32	2,806
Clerical staff gather information (bulk)	2	25	50	65.99	3,300
Clerical staff maintain recordkeeping (bulk)	2	10	20	65.99	1,320
SCC					
Compensation and benefits managers calculate Lost Earnings	909	1	909	140.32	127,551
Clerical staff gather information	909	2.5	2,273	65.99	149,962
Clerical staff maintain recordkeeping	909	1	909	65.99	59,985
Total	1,237	....	5,648	....	465,963

The Department estimates that external service providers will spend about 10 minutes completing and submitting the online SCC notice, 20 hours completing and submitting bulk applications, and two hours completing and submitting all other applications.[44] The mailing cost per application is approximately $10.[45] Please see Table 5 for calculations and burden totals.

TABLE 5—HOUR AND COST BURDEN OF SERVICE PROVIDERS FOR VFC PROGRAM

	Number of entities (A)	Number of hours per entity (B)	Total hour burden (A × B)	Wage rate (C)	Dollar equivalent of hour burden (A × B × C)	Mailing cost per entity (D)	Cost burden (A × D)
Service providers prepare information (non-bulk)	326	2	652	$121.53	$79,238	$10.10	$3,293
Service providers prepare information (bulk)	2	20	40	121.53	4,861	10.10	20
Service providers maintain recordkeeping for SCC	909	0.17	152	121.53	18,412	....	....
Total	1,237	....	844	....	102,511	....	3,313

VFCP Class Exemption (PTE 2002–51)

The Department estimates that all self-correctors and VFC Program applicants will use the amended class exemption. The Department has determined that service providers will prepare the documentation required by the exemption which will require approximately one hour for completion and delivery. VFC Program applicants are required to send notices to their participants and beneficiaries. The mailing cost per notice is $0.78.[46] Please see Table 6 for calculations and burden totals.

[44] It should be noted that the required checklist for applications filed with the Department under the Program appears twice within the Appendices to the Program. While it is required to be submitted only once, it is included as the separate Appendix B for applicants who do not choose to use the model application in Appendix E, and separately as the final item in the model application for ease of use for those who do choose to use the model application.

[45] United States Postal Service, Priority Mail, (2024), *https://www.usps.com/ship/priority-mail.htm.*

[46] The mailing cost is calculated in the following manner: (1 page × $0.73 for postage + $0.05 for material costs) = $0.78.

TABLE 6—HOUR AND COST BURDEN OF VFCP EXEMPTION

	Number of entities (A)	Number of hours per entity (B)	Total hour burden (A × B)	Wage rate (C)	Dollar equivalent of hour burden (A × B × C)	Mailing cost per entity (D)	Cost burden (A × D)
Service providers prepare information	389	1	389	$121.53	$47,235		
Participants receiving notices for exemption through mail, prepared by service providers	24,500	0.03	817	65.99	53,892	$0.78	$19,110
Total	24,889		1,205		101,126		19,110

Summary

Please see Table 7 for the total annual hour and cost burden for the information collection arising from the VFC Program and the exemption.

TABLE 7—TOTAL ANNUAL HOUR AND COST BURDEN

	Total hour burden (A)	Total dollar equivalent of hour burden (B)	Total cost burden (C)	Total cost (B + C)
VFC Program	6,491	$568,473	$3,313	$571,786
VFCP Exemption	1,205	101,126	19,110	120,236
Total	7,696	669,600	22,423	692,023

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

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

Agency: Department of Labor, Employee Benefits Security Administration.

Title: Voluntary Fiduciary Correction Program.

OMB Number: 1210–0118.

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

Respondents: 1,237.

Frequency of Response: On occasion.

Responses: 59,991.

Estimated Total Burden Hours: 7,696.

Total Annual Cost (Operating and Maintenance): $22,423.

3. Regulatory Flexibility Analysis

The Regulatory Flexibility Act (RFA) [47] imposes certain requirements with respect to Federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act, or any other law, and are likely to have a significant economic impact on a substantial number of small entities.[48] Unless the head of an agency certifies that a final rule will not have a significant economic impact on a substantial number of small entities, section 604 [49] of the RFA requires the agency to present a final regulatory flexibility analysis of these final rules.

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

As mentioned previously, all pension and welfare plans can utilize the VFC Program with the related PTE if they have a fiduciary breach for which there is an eligible transaction. In 2021 there were 630,423 small defined contribution plans and 39,673 small defined benefit plans and plan officials that would be impacted by these changes.[50] In 2022 there were 2,710,128 small health plans that would also be impacted by these changes.[51] Currently 1,226 plan fiduciaries make use of the VFC Program in a given year and the Department projects a small increase to 1,237 fiduciaries making use of the VFC Program in a given year.[52] Please see Table 1 for the number of plans that will utilize the VFC Program and exemption.

The Department is amending the related PTE so that excise tax relief will be available for transactions that are corrected under the SCC. The Department is also amending the PTE to eliminate the three-year limitation. Thus, all plans eligible to use the VFC Program would be eligible to use the PTE more than just once every three years. However, the Department

[47] 5 U.S.C. 601 *et seq.* (1980).

[48] 5 U.S.C. 551 *et seq.* (1946).

[49] 5 U.S.C. 604 (1980).

[50] Employee Benefits Security Administration, *Private Pension Plan Bulletin: Abstract of 2021 Form 5500 Annual Reports,* (September 2023).

[51] U.S. Department of Labor, EBSA calculations using the 2022 Medical Expenditure Panel Survey, Insurance Component (MEPS–IC), and 2020 Census County Business Patterns.

[52] As discussed earlier in this regulatory impact analysis, the Department estimates a one percent increase in the number of self-corrections, or 909 self-corrections, resulting from the removal of the three-year limitation provision for self-correctors. Additionally, the Department also projects that changes to the VFC Program will result in two new Program users filing bulk applications and 326 Program users filing non-bulk applications. Thus, the number of fiduciaries making use of the VFC Program in a given year is calculated in the following manner: 909 self-corrections + 326 non-bulk applications + 2 bulk applications = 1,237.

estimates that, of the total number of pension and welfare plans significantly less than one percent will use the PTE in a given year.[53]

The final amended PTE provides excise tax relief for self-correctors if they pay the amount of the excise tax owed to the plan. The SCC can only be used in situations where the size of Lost Earnings is $1,000 or less. Code section 4975(a) imposes an excise tax on each prohibited transaction equal to 15 percent of the amount involved with respect to the prohibited transaction for each year (or part thereof) in the taxable period. Therefore, the maximum excise tax owed for each year would generally not exceed $150.[54]

Plans or their service providers will need to familiarize themselves with the amendments to the PTE. Service providers can help multiple plans in a year or across years, so, although it could take a service provider multiple hours to review the amended requirements, the actual burden impact on an individual plan would be less. The Department estimates that all self-correctors will use the new provisions of the amended class exemption. The per-plan cost for rule familiarization would be $140.[55]

For plans with the maximum Lost Earnings of $1,000 and an excise tax of 15 percent the maximum excise tax in each year would generally not exceed $150. Including the cost of rule familiarization of $140, the total expense could be $290 in a year. Based on the foregoing, the Department hereby certifies that these final amendments will not have a significant economic impact on a substantial number of small entities. Therefore, the Department has not prepared a Final Regulatory Flexibility Analysis.

4. Unfunded Mandates Reform Act

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

5. Federalism Statement

Executive Order 13132 (August 4, 1999) outlines fundamental principles of federalism and requires the adherence to specific criteria by Federal agencies in the process of their formulation and implementation of policies that have ‘‘substantial direct effects’’ on the States, the relationship between the national government and States, or on the distribution of power and responsibilities among the various levels of government. Federal agencies promulgating regulations that have federalism implications must consult with State and local officials and describe the extent of their consultation and the nature of the concerns of State and local officials. This action does not have federalism implications because it has no substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Section 514 of ERISA provides, with certain exceptions specifically enumerated, that the provisions of titles I and IV of ERISA supersede any and all laws of the States as they relate to any employee benefit plan covered under ERISA. The amendments of the VFC Program in this document do not alter the fundamental provisions of the statute with respect to employee benefit plans, and as such would have no implications for the States or the relationship or distribution of power between the national government and the States.

6. 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. OIRA has determined that The Program does not meet the criteria set forth in 5 U.S.C. 803(2) under the Act. The Program is not a ‘‘major rule’’ as that term is defined in 5 U.S.C. 804.

Authority: Authority: Secretary of Labor’s Order 1–2011, 77 FR 1088 (January 9, 2012). 29 U.S.C. 1132(a)(2) and (a)(5), 1136(b).

Voluntary Fiduciary Correction Program

[53] In 2021, there were 765,124 pension plans. (*Source:* Employee Benefits Security Administration, *Private Pension Plan Bulletin: Abstract of 2021 Form 5500 Annual Reports,* (September 2023).) In 2022, there were 630,000 welfare benefit plans. (*Source:* U.S. Department of Labor, EBSA calculations using non-health welfare plan Form 5500 filings and projecting non-filers using estimates based on the non-filing health universe.) Thus, 0.08% of all pension and welfare plans will use the PTE in a given year. (909 plans/(765,124 plans + 630,000 welfare benefit plans) = 0.07 percent.)

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

[55] With an hourly rate for the in-house compensation and benefits manager of $140.32 per hour and one hour of burden allocated to a plan, the burden be plan would be $140 (rounded).

Section 1. Purpose and Overview of the VFC Program

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

Section 2. Effect of the VFC Program

(a)(1) *Effect of a no action letter.* EBSA generally will issue to the applicant a no action letter [56] with respect to a Breach identified in the Program application if the eligibility requirements of section 4 are satisfied and a Plan Official corrects a Breach, as defined in section 3, in accordance with the requirements of sections 5, 6 and 7. Pursuant to the no action letter it issues, EBSA will not initiate a civil investigation under Title I of ERISA regarding the applicant's responsibility for any transaction described in the no action letter, or assess civil penalties under either section 502(l) or 502(i) of ERISA on the correction amount paid to the plan or its participants.

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

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

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

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

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

(4) *Applicant fails to satisfy terms of the VFC Program.* If an application fails to satisfy the terms of the VFC Program, as determined by EBSA, EBSA reserves the right to investigate and take any other action with respect to the transaction and/or plan that is the subject of the application, including issuing a rejection letter.

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

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

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

(iii) EBSA from making the appropriate referrals of criminal violations as required by section 506(b) of ERISA.[57]

(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 as required by section 3003(c) of ERISA; [58] 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.[59] 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

[56] *See* appendix A.

[57] 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.

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

[59] References herein to the Form 5500 include the Form 5500–SF as applicable.

Breaches in accordance with the VFC Program.

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

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

(d) *Limits on the effect of self-correction under the Self-Correction Component. (1) In general.* Any relief afforded by a self-correction under the SCC is limited to the Breaches described in sections 7.1(b) and 7.3(c) of the Program and to the Plan Officials who complete the Penalty of Perjury Statement in accordance with section 6.2(e) and (f) respectively. If a transaction gives rise to Breaches not specifically described in sections 7.1(b) and 7.3(c) of the Program, the relief afforded by the SCC will not extend to such additional Breaches.

(2) *Self-corrector fails to satisfy the terms of the Self-Correction Component.* If a self-corrector fails to satisfy the terms of the SCC, as determined by EBSA, EBSA reserves the right to investigate and take any other action with respect to the transaction and/or plan that is the subject of the self-correction.

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

(i) EBSA or any other governmental agency from conducting a criminal investigation of the transactions identified in sections 7.1(b) and 7.3(c) of the Program;

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

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

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

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

(ii) Imposing civil penalties under section 502(c)(2) of ERISA based on the failure or refusal to file a timely, complete and accurate Annual Report Form 5500. Self-correctors should be aware that amended annual report filings may be required if action is taken to correct a Breach in accordance with submitting an SCC notice.

(5) *Not binding on others.* Compliance with the SCC does not affect the ability of any other government agency, or any other person, to enforce any rights or carry out any authority they may have regarding the Breach corrected under the SCC.

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

(e) *Correction.* The correction criteria listed in the VFC Program represent EBSA enforcement policy with respect to both applications under the Program and use of the SCC, and are provided for informational purposes to the public, but are not intended to confer enforceable rights on any person who purports to correct a Breach. Applicants and self-correctors are advised that the term ''correction'' as used in the VFC Program is not necessarily the same as ''correction'' pursuant to section 4975 of the Internal Revenue Code (Code).[61] Correction may not be achieved under the Program by engaging in a prohibited transaction that is not subject to a prohibited transaction administrative exemption.

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

(g) *Confidentiality.* EBSA will maintain the confidentiality of any documents submitted under the VFC Program, to the extent permitted by law. However, as noted in paragraphs (c)(5) and (6) and (d)(3) and (4) of this section, EBSA has an obligation to make referrals to the Internal Revenue Service (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 violation of the fiduciary responsibility provisions contained in Part 4 of Title I of ERISA.

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

[60] *See supra* note 54.

[61] *See* section 4975(f)(5) of the Code; section 141.4975–13 of the temporary Treasury Regulations and section 53.4941(e)–1(c) of the Treasury Regulations. The Federal tax treatment of a violation and correction under the VFC Program (including the Federal income and employment tax consequences to participants, beneficiaries, and plan sponsors) are determined under the Code. The IRS has indicated that, unless and until the Department of the Treasury and the IRS issue further guidance, except in those instances where the fiduciary breach or its correction involve a tax abuse, correction under the VFC Program for a breach that constitutes a prohibited transaction under section 4975 of the Code generally will be treated as correction for purposes of section 4975. Also, correction under the VFC Program for a breach for which there is a similar failure under the IRS's EPCRS would generally be taken into account as correction under EPCRS.

application or submitting a SCC notice in accordance with the VFC Program's requirements.

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

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

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

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

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

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

An applicant notifying EBSA of an investigation or examination under section 3(b)(3)(v) must submit the name of the examining agency and a contact person at such agency. Upon receipt of an application including such information, EBSA will promptly notify the investigating agency in writing of the VFC Program application. EBSA's notice will afford the examining agency an opportunity to provide EBSA with information relevant to the investigation or examination. In response to the information received from the investigating agency, EBSA, in its sole discretion, may decline to issue a no action letter to the applicant.

For purposes of section 4(a), a plan shall not be considered to be ''Under Investigation'' merely because EBSA staff has contacted the plan, the applicant, the self-corrector, or the plan sponsor in connection with a participant complaint, unless the participant complaint concerns the transaction described in the application or identified in the SCC notice and the plan has not received the correction amount due under the Program as of the date EBSA staff contacted the plan, the applicant, the self-corrector, or the plan sponsor. A plan also is not considered to be ''Under Investigation'' if the accountant of the plan is undergoing a work paper review based on such accountant's audit of the plan by EBSA's Office of the Chief Accountant under the authority of ERISA section 504(a).

Example 1. On March 1, the plan sponsor of a multiple employer welfare arrangement (MEWA) received written notification from an agent of the state insurance commissioner's office that the MEWA has been scheduled for examination. The applicant does not notify EBSA of the examination. As of March 1, the plan is ineligible for participation in the VFC Program because the plan sponsor has received a notice from the state insurance commissioner's office concerning its intent to examine the plan, and the applicant did not provide EBSA written notice of the examination with the application.

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

Section 4. VFC Program Eligibility

Eligibility for the VFC Program is conditioned on the following:

(a) Except as provided in paragraphs (d) or (e) of this section 4, the plan, the applicant, or the self-corrector is not Under Investigation.

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

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

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

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

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

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

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

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

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

(e) *Exception for Eligible Inadvertent Participant Loan Failures.* A self-corrector is eligible to correct an Eligible Inadvertent Participant Loan Failure under the VFC Program section 7.3(c) even if the plan or the self-corrector is Under Investigation provided the failure is eligible for self-correction under the IRS's EPCRS.

Section 5. General Rules for Acceptable Corrections

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

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

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

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

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

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

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

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

(iv) A fiduciary of the plan (except to the extent the appraiser becomes a fiduciary when retained to perform this appraisal for the plan);

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

(vi) The VFC Program applicant.

(5) A commercial lender is ''independent'' if it is not one of the following, does not own or control any of the following, and is not owned or controlled by, or affiliated with any of the following:

(i) A person or entity who was involved in securing or maintaining the loan, or in determining or modifying the terms of the loan at any time during the life of the loan;

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

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

(iv) The VFC Program applicant.

(b) *Correction Amount.* (1) *In general.* For purposes of the VFC Program, the correction amount is the amount that must be paid to the plan as a result of the Breach in order to make the plan whole. In most instances, the correction amount will be a combination of the Principal Amount involved in the transaction (*see* paragraph (b)(2) of this section), the Lost Earnings amount, which is earnings that would have been earned on the Principal Amount for the period of the transaction (*see* paragraph (b)(6) of this section, and *also see* paragraph (b)(3) of this section for a special rule for Loss Date under the SCC), and any interest on Lost Earnings. However, in circumstances when the Restoration of Profits amount (*see* paragraph (b)(7) of this section) exceeds the Lost Earnings amount and any interest on Lost Earnings, the correction amount will be a combination of the Principal Amount and the Restoration of Profits amount. The responsible fiduciary, plan sponsor or other Plan Official, must pay the correction amount and any costs of correction. No part of the correction amount or costs of correction can be paid from plan assets, including charges against participant accounts or plan forfeiture accounts.

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

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

(ii) Special rule for delinquent participant contributions and loan repayments under the SCC section 7.1(b). ''Loss Date'' is the Date of Withholding or Receipt.

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

Example 1. An employer pays its employees' wages on the 1st and the

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

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

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

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

(ii) *Initial Calculation.* Lost Earnings shall be calculated by: (A) determining the applicable corporate underpayment rate(s) established under section 6621(a)(2) of the Code [62] for each quarter (or portion thereof) for the period beginning with the Loss Date and ending with the Recovery Date; (B) determining, by reference to IRS Revenue Procedure 95–17,[63] the applicable factor(s) for such quarterly underpayment rate(s) for each quarter (or portion thereof) of the period beginning with the Loss Date and ending with the Recovery Date; and (C) multiplying the Principal Amount by the first applicable factor to determine the amount of earnings for the first quarter (or portion thereof). If the Loss Date and Recovery Date are within the same quarter, the initial calculation is complete. If the Recovery Date is not in the same quarter as the Loss Date, the applicable factor for each subsequent quarter (or portion thereof) must be applied to the sum of the Principal Amount and all earnings as of the end of the immediately preceding quarter (or portion thereof), until Lost Earnings have been calculated for the entire period, ending with the Recovery Date.

(iii) *Payment of Lost Earnings after Recovery Date.* If Lost Earnings are not paid to the plan on the Recovery Date along with the Principal Amount, payment of Lost Earnings shall include interest on the amount of Lost Earnings. Such interest shall be calculated in the same manner as Lost Earnings described in paragraph (b)(6)(ii) above, for the period beginning on the Recovery Date and ending on the date the Lost Earnings are paid to the plan.

(iv) *Special Rule for Transactions Causing Large Losses.* If the amount of Lost Earnings (determined in accordance with paragraph (b)(6)(ii) above) and any interest added to such Lost Earnings (determined in accordance with paragraph (b)(6)(iii) above), exceed $100,000, the amount of Lost Earnings and interest, if any, to be paid to the plan shall be determined in accordance with paragraphs (b)(6)(ii) and (iii) above, substituting the applicable underpayment rates under section 6621(c)(1) of the Code [64] in lieu of the rates under section 6621(a)(2).

(v) *Method of Calculation for VFC Program Applications.* For purposes of calculating Lost Earnings and interest, if any, a Plan Official may either (A) use the Online Calculator described in paragraph (b)(8) below, or (B) perform a manual calculation in accordance with subparagraphs (i) through (iv) of this paragraph (b)(6). A Plan Official using the Online Calculator or performing a manual calculation shall include as part of the VFC Program application sufficient information to verify the correctness of the amounts to be paid to the plan.

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

(7) *Restoration of Profits.* (i) *General.* If the Principal Amount was used for a specific purpose such that a profit on the use of the Principal Amount is determinable, the Plan Official must calculate the Restoration of Profits amount and compare it to the Lost Earnings amount to determine the correction amount (*see* paragraph (b)(1) of this section). If the Restoration of Profits amount exceeds Lost Earnings and interest, if any, the Restoration of Profits amount must be paid to the plan instead of Lost Earnings. ''Restoration of Profits'' is a combination of two amounts: (A) the amount of profit made on the use of the Principal Amount by the fiduciary or party in interest who engaged in the Breach, or by a person who knowingly participated in the Breach, and (B) if the profit is returned to the plan on a date later than the date on which the profit was realized (*i.e.,* received or determined), the amount of interest earned on such profit from the date the profit was realized to the date on which the profit is paid to the plan. The amount of such interest shall be determined in accordance with paragraph (b)(7)(ii) below.

(ii) *Calculation of Interest.* Interest shall be calculated by: (A) determining the applicable corporate underpayment rate(s) established under section 6621(a)(2) of the Code for each quarter (or portion thereof) for the period beginning with the date the profit was realized (*i.e.* received or determined) and ending with the date on which the profit is paid to the plan; (B) determining, by reference to IRS Revenue Procedure 95–17, the applicable factor(s) for such quarterly underpayment rate(s) for each quarter (or portion thereof) of the period beginning with the date the profit was realized and ending with the date on which the profit is paid to the plan; and (C) multiplying the first applicable factor by the profit on the Principal Amount, referred to in paragraph (b)(7)(i)(A) above, to determine the amount of interest for the first quarter (or portion thereof). If the date the profit was realized and the date the profit is paid to the plan are within the same quarter, the initial calculation is complete. If the date the profit was realized is not in the same quarter as the date the profit was paid to the plan, the applicable factor for each subsequent quarter (or portion thereof) must be applied to the sum of the profit on the Principal Amount, referred to in paragraph (b)(7)(i)(A) above, and all interest as of the end of the immediately preceding quarter (or portion thereof), until interest has been calculated for the entire period, ending with the date the profit is paid to the plan.

(iii) *Special Rule for Transactions Resulting in Large Restorations.* If the amount of Restoration of Profits (determined in accordance with paragraph (b)(7)(i) above) exceeds $100,000, the amount of any interest on the Restoration of Profits to be paid to the plan shall be determined in accordance with paragraph (b)(7)(ii) above, substituting the applicable underpayment rates under section

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

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

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

6621(c)(1) of the Code in lieu of the rates under section 6621(a)(2).

(iv) *Method of Calculation for VFC Program Applications.* For purposes of calculating the interest amount for Restoration of Profits, pursuant to paragraphs (b)(7)(ii) and (iii) above, a Plan Official may either (A) use the Online Calculator described in paragraph (b)(8) below, or (B) perform a manual calculation in accordance with subparagraphs (ii) and (iii) of this paragraph (b)(7). A Plan Official using the Online Calculator or performing a manual calculation shall include as part of the VFC Program application sufficient information to verify the correctness of the amounts to be paid to the plan.

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

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

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

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

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

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

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

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

(d) *Distributions.* Plans will have to make supplemental distributions to former employees, beneficiaries receiving benefits, or alternate payees, if the original distributions were too low because of the Breach. In these situations, the Plan Official or plan administrator must determine who received distributions from the plan during the time period affected by the Breach, recalculate the account balances, and determine the amount of the underpayment to each affected individual. The applicant must demonstrate proof of payment to participants and beneficiaries whose current location is known to the plan and/or applicant. For individuals whose location is unknown, applicants must demonstrate that they have segregated adequate funds to pay the missing individuals and that the applicant has commenced the process of locating the missing individuals using methods involving nominal expense such as certified mail and electronic search technologies as well as checking related plan records and with any designated plan beneficiary. If these methods are unsuccessful, the applicant should consider the use of commercial locator services, credit reporting agencies, information brokers and investigation databases as well as analogous computer services depending on the amount of underpayment in relation to the cost of the services. The costs of such efforts are part of the costs of correction. See Missing Participants—Best Practices for Pension Plans (available at *www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/retirement/missing-participants-guidance*) for more information on fiduciary best practices that based on EBSA's experience working with plans have proven effective at minimizing and mitigating the problem of missing or nonresponsive participants.

(e) *De Minimis Exception.* Where correction under the Program requires distributions in amounts less than $35 to former employees, their beneficiaries and alternate payees, who neither have account balances with, nor have a right to future benefits from the plan, and the applicant demonstrates in its submission that the cost of making the distribution to each such individual exceeds the amount of the payment to which such individual is entitled in connection with the correction of the transaction that is the subject of the application, the applicant need not make distributions to such individuals who would receive less than $35 each as part of the correction. However, the applicant must pay to the plan as a whole the total of such de minimis amounts not distributed to such individuals.

Example. Employer X sponsors Plan Y. Employer X submits an application under the VFC Program to correct a failure to timely forward participant contributions to Plan Y. Employer X had paid the delinquent contributions six months late but had not paid Lost Earnings on the delinquency. The correction under the VFC Program, therefore, required only payment of Lost Earnings for the six-month delinquency. During the six-month period 25 employees separated from service and rolled over their plan accounts to individual retirement accounts. The amount of Lost Earnings due to 20 of those former employees is less than $35, and Employer X demonstrates that the cost of making the distribution to those former employees is $42 per individual. Employer X need not make distributions to those 20 former employees. However, the total amount of distributions that would have been due to those former employees must be paid to Plan Y. The payment to Plan Y may be used for any purpose that payments or credits, which are not allocated directly to participant accounts, are used.[65] Employer X must make distributions to the five former employees who are entitled to receive distributions of more than $35.

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

6.1 VFC Program Application Procedures

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

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

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

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

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

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

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

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

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

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

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

(iii) An explanation of why payment of Lost Earnings or Restoration of Profits was chosen to correct the Breach.

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

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

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

(3) Documentation establishing the Lost Earnings amount;

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

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

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

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

(f) *Examples of supporting documentation.* (1) Examples of documentation supporting the description of the transaction and correction are leases, appraisals, notes and loan documents, service provider contracts, invoices, settlement documents, deeds, perfected security interests, and amended annual reports.

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

(g) *Penalty of Perjury Statement.* Each application must include the following statement: ''Under penalties of perjury I certify that I am not Under Investigation (as defined in section 3(b)(3) of the VFC Program) and that I have reviewed this application, including all supporting documentation, and to the best of my knowledge and belief the contents are true, correct, and complete.''

(1) *Applicants in general.* The Penalty of Perjury Statement must be signed and dated by a plan fiduciary with knowledge of the transaction that is the subject of the application and the authorized representative of the applicant, if any. In addition, each Plan Official applying under the VFC Program must sign and date the Penalty of Perjury Statement. The statement must accompany the application and any subsequent additions to the application. Use of the Penalty of Perjury Statement included with the Model Application Form in Appendix E will satisfy the requirements of paragraph (g) of this section.

(2) *Bulk Applicants.* The Penalty of Perjury Statement must be signed and dated by the bulk applicant with knowledge of the transaction that is the subject of the application and the authorized representative of the bulk applicant, if any. The statement must accompany the application and any subsequent additions to the application. Use of the Penalty of Perjury Statement included with the Model Application Form in Appendix E will satisfy the requirements of paragraph (g) of this section.

(3) *Contributing or Adopting Employers in Multiemployer Plans or Multiple Employer Plans.* In the case of an employer that contributes to or has adopted a multiemployer plan or multiple employer plan and wishes to correct a Breach, the Penalty of Perjury Statement may be signed and dated by

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

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

the employer and, regardless of the employer's status as a plan fiduciary, the Penalty of Perjury Statement need not be signed by another plan fiduciary.

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

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

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

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

6.2 VFC Program Self-Correction Component Procedures

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

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

(c) *Submission of SCC notice.* The self-corrector must notify EBSA of participation in the SCC by submitting the SCC notice through the online VFC Program web tool in accordance with paragraphs 7.1(b)(2)(iii) and 7.3(c)(2)(ii).[67] EBSA will acknowledge receipt of a properly completed and submitted SCC notice in an email addressed to the self-corrector.

(d) *SCC Retention Record Checklist—Applicable to Self-Corrections under section 7.1(b).* The self-corrector of delinquent participant contributions and loan repayments under section 7.1(b) must complete the SCC Retention Record Checklist in Appendix F, prepare or collect the documents listed in this Appendix, and provide copies of the completed checklist and required documentation to the plan administrator.

(e) *Penalty of Perjury Statement for Self-Corrections under Section 7.1(b).* The plan administrator must retain the following statement: ''Under penalties of perjury I certify that I am not Under Investigation (as defined in section 3(b)(3) of the VFC Program) and that I have reviewed the SCC notice acknowledgment and summary, the checklist and all the required documentation, and to the best of my knowledge and belief the contents are true, correct, and complete.'' The statement must be signed and dated by a plan fiduciary with knowledge of the transaction that is the subject of the self-correction and the authorized representative of the plan sponsor, if any. In addition, each Plan Official who is seeking the relief afforded under the Program must sign and date the Penalty of Perjury Statement. Use of the Penalty of Perjury Statement included in Appendix F will satisfy the requirements of paragraph (e) of this section.

(f) *Penalty of Perjury Statement for Self-Corrections under Section 7.3(c).* The plan administrator must retain the following statement: ''Under penalties of perjury I certify that I have reviewed the SCC notice acknowledgment and summary, and all the required documentation, and to the best of my knowledge and belief the contents are true, correct, and complete.'' The statement must be signed and dated by a plan fiduciary with knowledge of the transaction that is the subject of the self-correction and the authorized representative of the plan sponsor, if any. In addition, each Plan Official who is seeking the relief afforded under the Program must sign and date the Penalty of Perjury Statement.

(g) *Contributing or Adopting Employers in Multiemployer Plans or Multiple Employer Plans.* In the case of an employer that contributes to or has adopted a multiemployer plan or multiple employer plan and wishes to self-correct a Breach, the Penalty of Perjury Statement may be signed and dated by the employer and, regardless of the employer's status as a plan fiduciary, the Penalty of Perjury Statement need not be signed by another plan fiduciary.

(h) *Recordkeeping.*

(1) For self-corrections of delinquent participant contributions and loan repayments under section 7.1(b), the plan administrator must retain a copy of the SCC Retention Record Checklist in Appendix F along with copies of the required documentation, the authorization form, if any, and a signed Penalty of Perjury Statement, for the period required by section 107 of ERISA.

(2) For self-corrections of participant loan failures under section 7.3(c), the plan administrator must retain proof of payment of Principal Amount and Lost Earnings, or Restoration of Profits, as applicable; a copy of the SCC Notice Acknowledgment and Summary page; the authorization form, if any; and a signed Penalty of Perjury Statement, for the period required by section 107 of ERISA.

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

EBSA has identified certain Breaches and methods of correction that are suitable for the VFC Program. Any Plan Official may correct a Breach listed in this section in accordance with section 5 and the applicable correction method. The correction methods set forth are strictly construed and are the only acceptable correction methods under the VFC Program and the SCC for the identified transactions described in this section.

7.1 Delinquent Remittance of Participant Funds

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

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

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

repayments to the plan for investment in accordance with the provisions of the plan and by reference to the principles of the Department's regulation at 29 CFR 2510.3–102, the employer retains such amounts for a longer period of time.

(2) *Correction of Transaction.* (i) *Unpaid Participant Contributions or Loan Repayments.* Pay to the plan the Principal Amount plus 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 or repayments is the date on which each contribution reasonably could have been segregated from the employer's general assets. In no event shall the Loss Date for such contributions or repayments be later than the applicable maximum time period described in 29 CFR 2510.3–102.[68] Any penalties, late fees or other charges shall be paid by the employer or another Plan Official and not from such contributions or loan repayments.

(ii) *Late Participant Contributions or Loan Repayments.* If participant contributions or loan repayments were remitted to the plan outside of the time periods described above, the only correction required is to pay to the plan 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 or another Plan Official and not from participant contributions or loan repayments.

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

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

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

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

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

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

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

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

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

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

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

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

(1) *Description of Transaction.* (i) An employer receives directly from participants, or withholds from employees' paychecks, certain amounts for either participants' contribution to a pension plan or for repayment of participants' plan loans. Instead of forwarding such contributions or loan repayments to the plan for investment in accordance with the provisions of the plan and by reference to the principles of the Department's regulation at 29 CFR 2510.3–102, the employer retains such amounts for a longer period of time.[69]

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

(B) the delinquent participant contributions or loan repayments were remitted to the plan within 180 calendar days from the date such amounts were received by the employer, or the date such amounts otherwise would have been payable to the participants in cash (regarding amounts withheld by an employer from employees' paychecks).

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

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

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

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

(B) plan name;

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

(D) Principal Amount;

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

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

(G) number of participants affected by the correction.

(3) *Documentation.* The self-corrector must complete the SCC Retention Record Checklist in Appendix F, prepare or collect the documents listed

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

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

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

in this Appendix, and provide copies of the completed checklist and required documentation to the plan administrator.

(c) Delinquent Participant Contributions to Insured Welfare Plans

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

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

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

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

(i) A statement from a Plan Official: (A) identifying the earliest date on which the participant contributions reasonably could have been segregated from the employer's general assets, along with the supporting documentation on which the Plan Official relied in reaching this conclusion; (B) attesting that there are no instances in which claims have been denied under the plan for nonpayment, nor has there been any lapse in coverage; and (C) attesting that any penalties, late fees or other such charges have been paid by the Plan Official and not from participant contributions;

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

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

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

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

(iv) If restored participant contributions exceed $50,000 and were remitted to the insurance provider more than 180 calendar days after the date such amounts were received by the employer, or the date such amounts otherwise would have been payable to the participants in cash (regarding amounts withheld by an employer from employees' paychecks), submit:

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

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

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

(d) Delinquent Participant Contributions to Welfare Plan Trusts

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

(2) *Correction of Transaction.* (i) *Unpaid Contributions.* Pay to the trust (A) the Principal Amount, and, where applicable, any penalties, late fees, or other charges necessary to prevent a lapse in coverage due to the failure to make timely payments, and (B) 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 or a Plan Official 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 or a Plan Official and not from participant contributions.

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

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

(i) A statement from a Plan Official: (A) identifying the earliest date on which the participant contributions reasonably could have been segregated from the employer's general assets, along with the supporting documentation on which the Plan Official relied in reaching this conclusion, and (B) attesting that there are no instances in which claims have been denied under the plan for nonpayment, nor has there been any lapse in coverage;

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

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

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

(iii) If restored participant contributions (exclusive of Lost Earnings) exceed $50,000 and were remitted to the trust more than 180 calendar days after the date such amounts were received by the employer, or the date such amounts otherwise would have been payable to the participants in cash (regarding amounts withheld by an employer from employees' paychecks), submit:

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

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

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

7.2 Loans

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

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

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

(3) *Documentation.* In addition to the documentation required by section 6.1, submit a narrative describing the process used to determine the fair market interest rate at the time the loan was made, validated in writing by an independent commercial lender.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Example. The plan made a $150,000 mortgage loan, secured by a first Deed of Trust, at a fixed interest rate of 4% per annum. The loan was to be fully amortized over 30 years. The fair market interest rate for comparable loans, at the time this loan was made, was 7% per annum. The applicant or other person must pay the excess of what the plan would have received through the Recovery Date had the loan been made at 7% over what, in fact, the plan did receive from the commencement of the loan to the Recovery Date (the Principal Amounts from the loan's inception until the Recovery Date), plus Lost Earnings on that amount as described in section 5(b). The applicant must also pay on the Recovery Date the present value of the difference of what the plan would have received between the 7% and the 4% interest rate for the remaining payments on the loan for the duration of the time the plan is owed repayments on the loan (the Principal Amounts from the Recovery Date until the loan's maturity date). The borrower must continue to repay the outstanding loan balance based on the loan's repayment schedule.

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

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

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

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

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

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

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

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

(iii) In addition, if the delay in perfecting the loan's security caused a permanent change in the risk characteristics of the loan, the fair market interest rate for the remaining term of the loan must be determined by an independent commercial lender. In that case the correction amount includes an additional payment to the plan. The applicant must pay to the plan the present value of the Principal Amounts from the date the loan is fully secured to the maturity date of the loan, as determined by an independent commercial lender. The borrower must continue to pay to the plan the outstanding loan balance according to the repayment schedule for the duration of the loan. Alternatively, instead of the applicant paying the present value of the Principal Amounts, the borrower may pay to the plan the outstanding loan balance amortized over the remaining payment schedule for the duration of the loan at the interest rate that would have been applicable if the loan had been made at the fair market interest rate that would have been applicable for a loan with the changed risk characteristics.

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

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

Example 1. The plan made a mortgage loan, which was supposed to be secured by a Deed of Trust. The plan's Deed was not recorded for six months, but, when it was recorded, the Deed was in first position. The interest rate on the loan was the fair market interest rate for a mortgage loan secured by a first-position Deed of Trust. The loan is treated as an unsecured, below-market loan for the six months prior to the recording of the Deed of Trust.

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

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

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

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

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

7.3 Participant Loans

(a) Loans Failing To Comply With Plan Provisions for Amount, Duration, or Level Amortization Corrected Under VFC Program Applications

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

(i) the amount of the loan,

(ii) the duration of the loan, or

(iii) the level amortization of the loan repayment.

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

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

(b) Default Loans Corrected Under VFC Program Applications

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

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

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

(c) Eligible Inadvertent Participant Loan Failures Under the Self-Correction Component

(1) *Description of Transaction.* A plan extended a loan to a plan participant who is a party in interest with respect to the plan based solely on their status as an employee of any employer whose employees are covered by the plan, as defined in section 3(14)(H) of ERISA. There is an Eligible Inadvertent Participant Loan Failure that involves a Breach as defined in section 3(b)(1) of the Program. An Eligible Inadvertent Participant Loan Failure is a participant loan failure that occurs despite the existence of practices and procedures that satisfy the standards set forth in, and is eligible for self-correction under, the IRS's EPCRS. An Eligible Inadvertent Participant Loan Failure shall not include any participant loan failure that is egregious, relates to the diversion or misuse of plan assets, or is directly or indirectly related to an abusive tax avoidance transaction.

(2) *Correction of Transaction.* (i) Plan Officials must make a voluntary self-correction of the Eligible Inadvertent Participant Loan Failure under the Self-Correction Program (SCP) of the IRS's EPCRS.

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

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

(B) plan name;

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

(D) Type of participant loan failure;

(E) Loan amount;

(F) Date the failure is identified;

(G) Date of correction;

(H) Correction method; and

(I) Number of participants affected by the correction.

(3) *Documentation.* The self-corrector shall provide the plan administrator with copies of the documentation required under section 6.2. Completion of the SCC Retention Record Checklist in Appendix F and supporting documents is not required.

7.4 Purchases, Sales and Exchanges

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

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

(2) *Correction of Transaction.* (i) The plan may sell the asset back to the party in interest who originally sold the asset to the plan [71] or to a person who is not a party in interest. Whether the asset is sold to a person who is not a party in interest with respect to the plan or is sold back to the original seller, the plan must receive the higher of (A) the FMV of the asset at the time of resale, without a reduction for the costs of sale, plus restoration to the plan of the party in interest's investment return from the proceeds of the sale, to the extent they exceed the plan's net profits from owning the property; or (B) the Principal Amount, plus the greater of (*1*) Lost Earnings on the Principal Amount as described in section 5(b), or (*2*) the Restoration of Profits, if any, as described in section 5(b).

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

(iii) As a cash settlement alternative, when the plan no longer owns the asset and the transaction cannot be reversed or the asset cannot be retained as described respectively in paragraphs (a)(2)(i) and (ii) above, the plan may accept in cash the amounts specified in (A) plus (B) where (A) is—the greater of (*1*) Lost Earnings less any earnings received on the asset up to the Recovery Date or (*2*) the Restoration of Profits, if any, as described in section 5(b), on the Principal Amount, and (3) with the resulting amount from (1) or (2) reduced by any profit if the asset were resold or matured at a gain, or increased by any loss including Lost Earnings on such loss if either the asset was resold at a loss or the plan otherwise ceased to own the asset (*e.g.,* maturity; destruction); and (B) is—the amount by which the Principal Amount exceeded the FMV of the asset (at the time of the original purchase), plus the greater of (*1*) Lost Earnings or (*2*) Restoration of Profits, if any, as described in section 5(b), on such excess. If the plan sold the asset, the asset must have been sold upon the advice of an independent fiduciary and not in anticipation of applying under the VFC Program.

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

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

Example 1. A plan purchased a parcel of real property from the plan sponsor. The plan does not lease the property to any person. Instead, the plan uses the property as an office. The plan paid $120,000 for the property and $5,000 in transaction costs. As part of the correction, the Plan Official obtains two appraisals from a qualified, independent appraiser in order to determine the FMV of the property at the time of the purchase and at the time of the correction (the ''Recovery Date''). The FMV of the property at the time of purchase was $100,000 ($20,000 less than the plan paid for the property). As of the Recovery Date, the appraiser values the property at $110,000. To correct the transaction, the plan sponsor repurchases the property for $120,000 with no reduction for the costs of sale and reimburses the plan for the $5,000 in initial costs of sale. The plan sponsor also must pay the plan the greater of the plan's Lost Earnings or the sponsor's investment return on these amounts. The determination of an independent fiduciary is not required because the applicant is correcting the transaction by selling the asset back to the party in interest pursuant to paragraph (a)(2)(i) of this section.

Example 2. On February 1, 2002, a plan purchased from a party in interest a parcel of commercial real estate for $120,000 and incurred $5,000 in costs of sale. The plan initially uses the property as an office. At the same time, it is discovered that the original purchase was a prohibited transaction, the plan enters into a lucrative lease with an unrelated party for use of the property to begin January 1 of the following year. Due to commercial developments in adjacent properties, the Plan Official believes that the property will increase in value and that the plan would be able

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

to obtain substantially increasing rental payments for the use of the property. As part of the correction, the Plan Official obtains two appraisals from a qualified, independent appraiser in order to determine the FMV of the asset at the time of the purchase and at the time of the correction (the ''Recovery Date''). The FMV of the property at the time of purchase was $120,000 (the same as the original purchase price). As of the Recovery Date, the property is valued at $150,000. Lost Earnings are calculated through September 30, 2005, the anticipated Recovery Date. The Online Calculator determined that Lost Earnings is $26,098.23 on the Principal Amount of $125,000 (purchase price plus transaction costs). There were no determinable profits. The increase in the FMV, $30,000, is greater than Lost Earnings or Restoration of Profits. Because the property is rapidly appreciating in value, and because the Plan Official expects to realize significant rental income from the property, the Plan Official would like to correct by retaining the property pursuant to paragraph (a)(2)(ii) of this section rather than selling the asset back to the party in interest pursuant to paragraph (a)(2)(i) of this section. The Plan Official must obtain a determination by an independent fiduciary that the plan will realize a greater benefit by retaining the asset than by selling the asset back to the party in interest. Because the original purchase price was the same as the FMV, and the increase in the FMV is greater than any earnings or investment return on the original purchase price, the only cash payment to the plan involved in this correction is the $5,000 in costs of sale, plus Lost Earnings.

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

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

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

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

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

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

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

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

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

(2) *Correction of Transaction.* (i) The plan may repurchase the asset from the party in interest [72] at the lower of (A) the price for which it originally sold the property or (B) the FMV of the property as of the Recovery Date plus restoration to the plan of the party in interest's net profits from owning the property, to the extent they exceed the plan's investment return from the proceeds of the sale.

(ii) As an alternative to the correction described in paragraph (b)(2)(i) above, the plan may receive the Principal Amount plus the greater of (A) Lost Earnings as described in section 5(b) or (B) the Restoration of Profits, if any, as described in section 5(b), provided an independent fiduciary determines that the plan will realize a greater benefit from this correction than it would from the repurchase of the asset described in paragraph (b)(2)(i), or provided a Plan Official determines that the asset cannot be repurchased (*e.g.,* maturity, destruction).

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

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

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

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

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

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

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

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

and the relationship of the purchaser to the plan;

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

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

(c) Sale and Leaseback of Real Property to Employer

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

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

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

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

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

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

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

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

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

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

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

(iv) A copy of the lease;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(1) *Description of Transaction.* A plan is holding an asset previously purchased from (i) a party in interest with respect to the plan in an acquisition for which relief was available under a statutory or administrative prohibited transaction exemption, (ii) a party in interest with respect to the plan at no greater than FMV at that time in an acquisition to which no prohibited transaction exemption applied, (iii) a person who was not a party in interest with respect to the plan in an acquisition in which a plan fiduciary failed to appropriately discharge their fiduciary duties, or (iv) a person who was not a party in interest with respect to the plan in an acquisition in which a plan fiduciary appropriately discharged their fiduciary duties. Currently, a plan fiduciary determines that such asset is an illiquid asset because: (A) the asset failed to appreciate, failed to provide a reasonable rate of return, or caused a loss to the plan; (B) the sale of the asset is in the best interest of the plan; and (C) following reasonable efforts to sell the asset to a person who is not a party in interest with respect to the plan, the asset cannot immediately be sold for its original purchase price, or its current FMV, if greater. Examples of assets that may meet this definition include, but are not limited to, restricted and thinly traded stock, limited partnership interests, real estate and collectibles. In the case of an illiquid asset that is a parcel of real estate, no party in interest may own real estate that is contiguous to the plan's parcel of real estate on the Recovery Date.

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

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

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

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

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

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

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

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

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

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

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

7.5 Benefits

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7.6 Plan Expenses

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) Expenses Improperly Paid by a Plan

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

(i) services provided in connection with the administration and maintenance of the plan (''plan expenses'' [74]) in circumstances where a

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

plan provision requires that such plan expenses be paid by the plan sponsor, or

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

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

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

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

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

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

(c) Payment of Dual Compensation to a Plan Fiduciary

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

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

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

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

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

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

Appendix A—Sample VFC Program No Action Letter

Applicant (Plan Official)
Address
Dear Applicant (Plan Official):

Re: VFC Program Application No. xx–xxxxxx

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

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

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

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

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

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

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

Appendix B—VFC Program Application Checklist (Required)

Use this checklist to make sure you are submitting a complete application. Indicate ''Yes'', ''No'' or ''N/A'' next to each item. A ''No'' answer or the failure to include a completed checklist will delay review of the application until all required items are received. The applicant must sign and date the checklist and include it with the application. Check with the relevant Regional Office whether it accepts email submissions of VFC Program applications.

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

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

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

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

[75] *See id.*

(or for a bulk application as described in section 4(d), the nine-digit employer identification number for each plan sponsor of a named plan)?

____5. Have you enclosed a signed and dated certification under penalty of perjury for the plan fiduciary with knowledge of the transactions and for each applicant and the applicant's representative, if any? In the case of a bulk application, have you enclosed a signed and dated certification under penalty of perjury for the bulk applicant based on knowledge of the transactions and for the bulk applicant's representative, if any? In the case of a contributing or adopting employer in a multiemployer plan or multiple employer plan, the employer may sign the Penalty of Perjury statement and, without regard to the employer's status as a plan fiduciary, no other plan fiduciary need sign.

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

____7. If applicable, have you provided written notification to EBSA of any current investigation or examination of the plan, or of the applicant or plan sponsor in connection with an act or transaction directly related to the plan by the PBGC, any state attorney general, or any state insurance commissioner?

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

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

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

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

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

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

____11. Have you enclosed supporting documentation, including:

____a. A detailed narrative of the Breach, including the date it occurred;

____b. Documentation that supports the narrative description of the transaction;

____c. An explanation of how the Breach was corrected, by whom and when, with supporting documentation;

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

____e. Specific calculations demonstrating how Principal Amount and Lost Earnings or Restoration of Profits were computed, or, if the Online Calculator was used, a copy of the ''Print Viewable Results'' page(s) after completing use of the Online Calculator;

____f. Proof of payment of principal amount;

____g. Proof of payment of Lost Earnings or restoration of profits to the plan; and

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

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

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

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

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

____13. In calculating Lost Earnings, have you elected to use:

____a. The Online Calculator; or

____b. A manual calculation performed in accordance with section 5(b) of the VFC Program?

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

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

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

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

Signature of Applicant and Date Signed:

____

Name of Applicant:

____

Title/Relationship to the Plan:

____

Name of Plan, EIN and Plan Number:

____

____

Contact information: Phone; email:

____

Paperwork Reduction Act Notice

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

Appendix C—EBSA Regional Offices

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

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

Boston Regional Office, J.F.K. Federal Building, 15 New Sudbury Street, Room 575, Boston, MA 02203, telephone (617) 565–9600, fax: (617) 565–9666; jurisdiction: Connecticut, Maine, Massachusetts, New Hampshire, central and western New York, Rhode Island, Vermont.

Chicago Regional Office, John C. Kluczynski Federal Building, 230 South Dearborn Street, Suite 2160, Chicago, IL 60604, telephone (312) 353–0900, fax (312) 353–1023; jurisdiction: northern Illinois, northern Indiana, Wisconsin.

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

Dallas Regional Office, 525 South Griffin Street, Rm. 900, Dallas, TX 75202–5025, telephone (972) 850–4500, fax (214) 767–1055; jurisdiction: Arkansas, Louisiana, New Mexico, Oklahoma, Texas.

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

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

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

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

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

Appendix D—Lost Earnings Example (Manual Calculation)

Delinquent Participant Contributions

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

Based on the above facts:

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

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

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

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

$10,000 * 0.003705021 = $37.05

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

$10,037.05 * 0.002853065 = $28.64

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

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

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

Note that the last factor comes from the Revenue Procedure 95–17 tables for leap years. The plan is also owed $11.64. This is the amount of interest on $65.69 (Lost Earnings on the Principal Amount) accrued between April 13, 2001, the Recovery Date, when the Principal Amount $10,000 was paid to the plan, and January 30, 2004, the date chosen to repay Lost Earnings.

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

Appendix E—Model Application Form (Optional)

Voluntary Fiduciary Correction Program Application Form

This application form provides a recommended format for your VFC Program application. Please make sure you have attached all documents identified on the VFC Program Checklist (for example, proof of payment). If you choose to use a different format to submit the required information for your VFC Program Application, your application must still include a completed copy of the VFC Program Checklist. Submit your application to the appropriate EBSA Regional Office. Check with the relevant Regional Office whether it accepts email submissions of VFC Program applications. For full application procedures, consult *www.dol.gov/ebsa/.*

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

List separately:

____

____

____

List Transaction(s) Corrected

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

____Delinquent Participant Contributions and Loan Repayments to Pension Plans

____Delinquent Participant Contributions to Insured Welfare Plans

____Delinquent Participant Contributions to Welfare Plan Trusts

____Loan at Fair Market Interest Rate to a Party in Interest

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

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

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

____Loans Failing to Comply with Plan Provisions for Amount, Duration or Level Amortization

____Default Loans

____Purchase of an Asset by a Plan from a Party in Interest

____Sale of an Asset by a Plan to a Party in Interest

____Sale and Leaseback of Real Property to Employer

____Purchase of Asset by a Plan from a Non-Party in Interest at More Than Fair Market Value

____Sale of an Asset by a Plan to a Non-Party in Interest at Less Than Fair Market Value

____Holding of an Illiquid Asset Previously Purchased by a Plan

____Payment of Benefits Without Properly Valuing Plan Assets on Which Payment is Based

____Duplicative, Excessive, or Unnecessary Compensation Paid by a Plan

____Expenses Improperly Paid by a Plan

____Payment of Dual Compensation to a Plan Fiduciary

Correction Amount

Principal Amount: $ ____________

Date Paid __/__/__
Lost Earnings/Restoration of Profit: $ ____________
Date Paid __/__/__

Narrative and Calculations

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

______

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

______

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

______

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

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

______

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

______

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

______

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

____Online Calculator—''View Printable Results'' page attached.

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

Supplemental Information

(1) Plan Sponsor Name:
______
EIN: ______
Address: ______

(2)(a) Plan Name:
______
Plan Number: ______

(2)(b) For Bulk Applicants (attach additional sheets identifying this information for each Plan named in the application involved in the transaction):
Plan Name: ______
Plan Sponsor EIN or date the most recent Form 5500 was filed: ____________

(3) Plan Administrator Name:
______
EIN: ______
Address: ______

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

(5) Name of Contact Person:
______
Address: ______
Telephone: ______
Email: ______

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

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

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

____No.

(8) Proof of Payment:

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

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

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

____PBGC
____Any state attorney general
____State: ____________
____Any state insurance commissioner
____State: ____________
____Other federal governmental agency: ____________
____Contact person for the agency identified: ____________

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

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

Authorization of Representative

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

Name of Plan Official
______
Signature of Plan Official
______
Date ______

Penalty of Perjury Statement

The following statement must be signed and dated by a plan fiduciary, (or pursuant to special rules, a bulk applicant or an employer with respect to a multiemployer plan or multiple employer plan), with knowledge of the transaction that is the subject of the application and by the authorized representative, if any. Each Plan Official applying under the VFC Program must also sign and date the statement, which must accompany any subsequent additions to the application.

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

______
Name and Title
Signature ______
Date ______
Name and Title
Signature ______
Date ______

Paperwork Reduction Act Notice

The information identified on this form is required for a valid application for the Voluntary Fiduciary Correction Program of the U.S. Department of Labor's Employee Benefits Security Administration (EBSA). You are not required to use this form; however, you must supply the information identified in order to receive the relief offered under the Program with respect to a breach of fiduciary responsibility under Part 4 of Title I of ERISA. EBSA will use this information to determine whether you have satisfied the requirements of the Program. EBSA estimates that assembling and submitting this information will require an average of 7 hours. This collection of information is currently approved under OMB Control Number 1210–0118. You are not required to respond to a collection of information unless it displays a currently valid OMB Control Number.

VFC Program Application Checklist (Required)

Use this checklist to make sure you are submitting a complete application. Indicate ''Yes'', ''No'' or ''N/A'' next to each item. A ''No'' answer or the failure to include a completed checklist will delay review of the application until all required items are received. The applicant must sign and date the checklist and include it with the application. Check with the relevant Regional Office whether it accepts email submissions of VFC Program applications.

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

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

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

____4. Have you provided the date that the most recent Form 5500 was filed by the plan (or for a bulk application as described in section 4(d), the nine-digit employer identification number for each plan sponsor of a named plan)?

____5. Have you enclosed a signed and dated certification under penalty of perjury for the plan fiduciary with knowledge of the transactions and for each applicant and the applicant's representative, if any? In the case of a bulk application, have you enclosed a signed and dated certification under penalty of perjury for the bulk applicant based on knowledge of the transactions and for the bulk applicant's representative, if any? In the case of a contributing or adopting employer in a multiemployer plan or multiple employer plan, the employer may sign the Penalty of Perjury statement and, without regard to the employer's status as a plan fiduciary, no other plan fiduciary need sign.

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

____7. If applicable, have you provided written notification to EBSA of any current investigation or examination of the plan, or of the applicant or plan sponsor in connection with an act or transaction directly related to the plan by the PBGC, any state attorney general, or any state insurance commissioner?

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

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

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

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

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

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

____11. Have you enclosed supporting documentation, including:

____a. A detailed narrative of the Breach, including the date it occurred;

____b. Documentation that supports the narrative description of the transaction;

____c. An explanation of how the Breach was corrected, by whom and when, with supporting documentation;

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

____e. Specific calculations demonstrating how Principal Amount and Lost Earnings or Restoration of Profits were computed, or, if the Online Calculator was used, a copy of the ''Print Viewable Results'' page(s) after completing use of the Online Calculator;

____f. Proof of payment of principal amount;

____g. Proof of payment of Lost Earnings or restoration of profits to the plan; and

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

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

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

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

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

____13. In calculating Lost Earnings, have you elected to use:

____a. The Online Calculator; or

____b. A manual calculation performed in accordance with section 5(b) of the VFC Program?

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

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

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

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

Signature of Applicant and Date Signed:

____

Name of Applicant:

____

Title/Relationship to the Plan:

____

Name of Plan, EIN and Plan Number:

____

____

Contact information: Phone; email

____

Paperwork Reduction Act Notice

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

Appendix F—SCC Retention Record Checklist

Delinquent Participant Contributions or Loan Repayments

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

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

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

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

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

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

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

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

Penalty of Perjury Statement—The following statement must be signed and dated by a plan fiduciary with knowledge of the transaction that is the subject of the SCC notice and by the authorized representative, if any. Each plan official who is seeking the relief afforded under the SCC must also sign and date the statement, which must be retained by the plan administrator. (In the case of a contributing or adopting employer in a multiemployer plan or multiple employer plan, the employer may sign the Penalty of Perjury statement and, without regard to the employer's status as a plan fiduciary, no other plan fiduciary need sign.)

Under penalties of perjury I certify that I am not Under Investigation (as defined in VFC Program section 3(b)(3)) and that I have reviewed the SCC notice acknowledgement and summary, the checklist and all the required documentation, and to the best of my knowledge and belief the contents are true, correct, and complete.

Name and Title ____________________
Signature ____________________
Date ____________________
Name and Title ____________________
Signature ____________________
Date ____________________

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

Authorization of Plan Official

I have authorized ____________ to submit the VFCP SCC notice.

Name of Plan Official ____________________
Signature ____________________
Date ____________________

Paperwork Reduction Act Notice

The information identified on this form is required for a valid use of the Self-Correction Component for Delinquent Participant Contributions or Loan Repayments of the Voluntary Fiduciary Correction Program of the U.S. Department of Labor's Employee Benefits Security Administration (EBSA). You must complete this form and provide a copy of the completed checklist and the required documentation to the plan administrator to receive the relief under the Self-Correction Component of the Program with respect to the breach of fiduciary responsibility under Part 4 of Title I of ERISA associated with the delinquent participant contributions or loan repayments. EBSA may request a copy of this information to determine that you have satisfied the requirements of the Self-Correction Component of the Program. EBSA estimates assembling this information will require an average of 4 hours and completing this form will require an average of 2 to 4 minutes. This collection of information is currently approved under OMB Control Number 1210–0118. You are not required to respond to a collection of information unless it displays a currently valid OMB Control Number.

Signed at Washington, DC, this 3rd day of January 2025.

Lisa M. Gomez,

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

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