

# DOL DISCO

## EBSA VOLUNTARY PROGRAMS & INVESTIGATIONS

Presented by Marty Heming and Crisanta Johnson

### **WESTERN PENSION BENEFITS CONFERENCE LOS ANGELES CHAPTER**

### **SPRING SUMMIT - 2008**

*Pickwick Gardens Conference Center  
1001 Riverside Dr., Burbank Ca 91506*

9:50 a.m. to 11:05 a.m.

Outline By  
Martin M. Heming, Esq.

Reish Luftman Reicher & Cohen  
11755 Wilshire Boulevard • 10th Floor  
Los Angeles, California 90025  
Tel: (310) 478-5656 • Fax: (310) 478-5831  
Website:  
[www.reish.com](http://www.reish.com) Email: [martyheming@reish.com](mailto:martyheming@reish.com)

## **I. INTRODUCTION**

### **A. The Department of Labor (“DOL”) Acting Through the Employee Benefits Security Administration (EBSA) Conducts Investigations of Both ERISA Welfare and Pension Plans.**

1. Fiduciary Investigations.
  - a. Procedure.
  - b. Substantive issues.
2. What is a 502(l) penalty?
  - a. Avoiding its imposition.
  - b. Procedure to follow once imposed.
3. Case studies.

### **B. Voluntary Fiduciary Compliance Program (“VFC”).**

1. What is it?
  - a. Who is eligible?
  - b. What violations may be corrected?
  - c. What are the correction principles?
2. Frequently Asked Questions re VFC?
3. Case studies Highlight when and how to use VFC.

### **C. Failure to File Forms 5500**

1. Imposition of penalties for failure to file the Form 5500.
  - a. Penalties.
  - b. Procedures.
2. Case studies.

### **D. Using the DFVC Program.**

- a. What is the cost?
- b. How to use and when.

## II. EBSA INVESTIGATION – PENSION PLANS

### A. Typically, EBSA Investigations of Fiduciaries are Initiated Based on Participant Complaints, however a significant number are based on selected criteria and investigative priorities set by the Department.

1. An internal evaluation is conducted by EBSA.
2. A decision is made as to whether or not to conduct an investigation.
3. If an investigation is started, a letter will be sent to the plan fiduciaries requesting access to documents concerning the plan.
4. The documents produced will be reviewed by an EBSA investigator.
5. EBSA investigators will interview potential witnesses, including plan fiduciaries.
6. The EBSA evaluates the results of the investigation and, if appropriate, will send a voluntary compliance notice letter ("VC Notice Letter") to the fiduciaries.

**NOTE:** According to the EBSA Enforcement Manual, a VC Notice Letter is normally sent to fiduciaries in all cases where the EBSA finds a breach (except where the EBSA has determined that a civil or criminal action should be pursued regardless of whether the fiduciary is prepared to make restitution).

### B. Most Investigations focus on civil violations of ERISA; however, EBSA also conducts investigations of criminal violations regarding employee benefit plans under title I of ERISA and title 18 of the U.S. Criminal Code. Prosecutions of these criminal violations are handled by U.S. Attorneys' offices.

1. *Theft or Embezzlement from Employee Benefit Plan* (18 U.S.C. 664).
2. *False Statements or Concealment of Facts in Relation to Documents Required by ERISA* (18 U.S.C. Section 1027).
3. *Offer, Acceptance, or Solicitation to Influence Operations of Employee Benefit Plan* (18 U.S.C. Section 1954).
4. *Prohibition Against Certain Persons Holding Certain Positions* (Section 501 of Title I ERISA) – Persons convicted of violations enumerated in section 411 are subject to a bar from holding plan positions or providing services to plans for up to 13 years.
5. *Willful Violation of Title I, Part 1* (Section 501 of Title I of ERISA).
6. *Coercive Interference with the exercise of any right of a participant or beneficiary* (Section 511 of Title I of ERISA).

**C. EBSA Investigations Cover Many Substantive Issues and Include Both Welfare and Pension Plans. The Most Common are Prohibited Transactions, Fiduciary Breaches of Duty and Failure to Meet Required Funding. More specifically, the EBSA is Focusing on the Following:**

1. Failing to operate the plan prudently and for the exclusive benefit of participants.
2. Using plan assets to benefit certain related parties to the plan, including the plan administrator, the plan sponsor, and parties related to these individuals.
3. Failing to value plan assets at their current fair market value, or to hold plan assets in trust.
4. Failing to follow the terms of the plan (unless inconsistent with ERISA).
5. Failing to properly select and monitor service providers.
6. Taking any adverse action against an individual for exercising his or her rights under the plan (*e.g.*, being fired, fined, or otherwise being discriminated against.)

**D. Investigative Priorities.**

1. Health Fraud/Multiple Employer Welfare Arrangements (MEWAs).
2. 401(k) plans – specifically failure to timely deposit elective contribution and participant loan repayments.
3. Employee Stock Ownership Plans.
4. Protecting the rights and benefits of plan participants when the plan sponsor faces severe financial hardship or bankruptcy and the assets of the employee benefit plan is in jeopardy.
5. Receipt of improper, undisclosed compensation by pension consultants and other investment advisers.

**E. Structuring a Response to the EBSA Investigator.**

1. Each EBSA investigation commences with a request to examine documents.

- a. In most cases the EBSA investigator will send the plan fiduciary and/or the plan sponsor a letter that contains a list of the documents he or she wants to be available for inspection.
  - b. Invariably the request states that the EBSA investigator wants to examine the documents at the place of business of the plan sponsor.
2. In certain cases, document request will not be sent but the investigation will be initiated by issuing a subpoena to produce documents and or to be interviewed by EBSA in a more formal setting with a court reporter present to transcribe the questions and answers.
  - a. When will this be used?
  - b. Will the investigator advise the subject of his or her rights as if they were a criminal suspect?
3. In many cases the employer sponsoring the plan will send a copy of the document request to its third party administrator (“TPA”) or other advisor, such as the CPA.
  - a. The employer requests that the TPA handle the investigation; or
  - b. The employer asks for the advice of the TPA or CPA as to who should be involved in responding to the EBSA investigation.
  - c. The TPA’s written contract with the employer should state the terms and conditions under which it will handle an EBSA investigation of the plan.
  - d. In some cases the TPA has no written contract with the employer and, therefore, must negotiate the extent of its involvement on an ad hoc basis.
  - e. Sometimes the Employer will respond to EBSA without consulting his advisor.
4. What course of action should be taken in response to the document request?
  - a. Determine into which category the EBSA investigation falls.
  - b. The TPA determines after its own investigation that the case is clean and there is little or no chance of the EBSA investigator finding any problems.

- c. The TPA determines that there may be one or more serious problems but it is a takeover case and the problems didn't occur on its watch.
  - d. The TPA determines that there may be one or more serious problems but they were caused by the client's failure to act appropriately.
  - e. The TPA determines that there may be one or more serious problems and it is clear that it was caused by an error made by the TPA or other advisor.
5. In a rare instance it may be appropriate for the employer and the TPA or other advisor to handle the investigation unaided by counsel?
- a. Because EBSA investigations are normally the result of a compliant, it is very unlikely that EBSA will close the case with no action.
  - b. However, if the TPA or other advisor is convinced that there are no problems, it can handle it with out counsel.
  - c. If the TPA decides to handle it without counsel and EBSA sends a VC Notice Letter, it is imperative to have ERISA counsel hired before any response is made to the VC Notice Letter for the reasons set forth below. See ERISA 502(1) penalty.
6. In almost every case, the TPA or other advisor should recommend to the client to use ERISA counsel. Why?
- a. The TPA's normal job is to administer plans in accordance with law, not to negotiate in an adversarial context with the EBSA agent.
  - b. In many cases, the TPA may have partially caused the problem or his client may have that belief.
  - c. ERISA counsel can help extradite the TPA from the potential problems caused by personal involvement.
  - d. Using ERISA counsel is a win-win situation. Better results and yet the TPA doesn't lose most fees because all of the calculations, documents, etc. needed for the investigation are still prepared by the TPA.
  - e. Only ERISA counsel can ensure that the ERISA 502(1) penalty isn't imposed by EBSA.

**F. Determining if the Investigator will Discover Problems.**

1. The employer's file should be carefully reviewed both by the person who has handled the administration of the plan and by his or her supervisor.
2. TPA should have an established system to identify if there are problems.
  - a. Internal procedures.
  - b. Contacting and getting data from sponsoring employer.
  - c. Don't assume that if there was a problem that you, as TPA, would necessarily know about it.
  - d. Develop a checklist of items likely to be beyond knowledge of TPA. Discuss with client.
  - e. Carefully review all documents received from client.
  - f. Conduct your own mini investigation of the case before you give anything to the EBSA investigator.
3. If there is anything either in the document, or in the way it was administered that could cause a fiduciary breach of ERISA 404 or a prohibited transaction, it is critical that it be identified immediately.
4. Why is it important to have early detection of potential problems?
  - a. Need to determine if ERISA counsel is to be involved.
  - b. Necessary so that early voluntary correction of problems can occur.
  - c. Need to prepare the fiduciary for interview with the EBSA investigator.

**G. Where Will the Investigation be Conducted?**

1. As TPA, if you have all the relevant records, Have the DOL Investigator come to your office, not the employer's place of business.
2. Alternatively, if the employer has the records, then ERISA counsel should be present at the time the investigator inspects the records.
3. Make copies of non-voluminous records, such as the plan document and determination letter and put them in a loose leaf binder with an index, then give it to the investigator to keep.
4. Make the EBSA investigator's job easier.

5. Force a final meticulous review of all relevant documents by TPA and/or ERISA counsel.

#### **H. Responding to the Investigator's Request for an Interview of the Fiduciary.**

1. In each investigation, the EBSA investigator is required to ask the fiduciary under investigation if they will consent to an interview.
2. In almost all cases, it is to the fiduciary's benefit to have the interview. Why?
  - a. Fiduciary has opportunity to explain actions.
  - b. Refusal to give interview is suspicious and may lead to an expansion of the investigation.
3. Caveat – Never give the interview without ERISA counsel present. Why?
  - a. Despite his apparent demeanor to the contrary, the EBSA investigator isn't your friend.
  - b. Counsel can prepare you for the questions and can positively affect the course of the interview.

#### **I. Responding to the EBSA VC Notice Letter.**

1. If the EBSA investigator ascertains that there are any fiduciary breaches, including prohibited transactions, he will normally send a VC Notice Letter.
2. If any of the allegations have merit, then the response should inform the investigator of the voluntary correction that has been made and yet avoid being a settlement with the EBSA.
3. *The VC Notice Letter Response should always be written by ERISA counsel.*

#### **J. What is the ERISA 502(l) Penalty?**

1. ERISA §502(l). OBRA '89 added this section to ERISA effective for breaches of fiduciary duty and other ERISA violations that occur on or after December 19, 1989.
2. ERISA §502(l) requires the Secretary of Labor to assess a civil penalty against a fiduciary who breaches its fiduciary responsibility under, or commits any other violation of part 4 of Title I of ERISA. This includes §§ 401 through 414 of ERISA.

**NOTE:** The penalty may also be assessed against any other person who knowingly participates in the breach or violation—such as a disqualified person.

- a. The penalty is 20% of the applicable recovery amount. It is payable to the DOL – not the plan.
  - b. Applicable recovery amount means the amount recovered with respect to a breach or violation either pursuant to a settlement agreement with the EBSA, or as a result of a monetary award payable from a judicial proceeding.
  - c. The Secretary of Labor is authorized in his sole discretion to waive the penalty under two very limited circumstances:
    - i. Because of financial hardship, paying the penalty would jeopardize the fiduciary's ability to restore the loss to the plan, or
    - ii. During the breach of fiduciary duty or violation, the fiduciary acted reasonably and in good faith.
3. The Department of Labor's Employee Benefits Security Administration ("EBSA") routinely imposes a penalty of 20% of the applicable recovery amount in each EBSA pension plan investigation which is resolved by settlement.
4. What is a Settlement Agreement?
- a. Preamble to the DOL Proposed Regulations.
  - b. Release by the Secretary of a claim of a breach of fiduciary duty or other violation in return for cash or other property being tendered to the plan.
  - c. 502(l) will apply to voluntary compliance agreements as well as formal court ordered settlements.
5. EBSA Enforcement Manual provides that if corrective action is taken by the fiduciary or other person liable for the 502(l) penalty in response to the voluntary compliance letter, a settlement agreement may be deemed to exist without a written settlement agreement. In such instances, there will be a confirming letter from the Secretary stating the details of the oral settlement agreement.
- a. EBSA takes the position that the voluntary compliance letter constitutes an offer to settle, and that unless affirmative action is taken to reject such offer, the payment of the correction amount constitutes an acceptance of the offer and hence, a settlement agreement.

- b. Once the EBSA takes the position that there is a settlement agreement, it will automatically assess the 502(l) penalty. It is their position that under the terms of the statute, there is no choice.

**NOTE:** The VFC Notice Letter explains that the EBSA will impose a 502(l) penalty if there is a settlement agreement or a court order enforcing correction. However, it does not explain the EBSA view that a civil action need not have been filed and no formal written settlement agreement is necessary for a settlement to have occurred.

**K. The DOL is Entitled to Levy the 502(l) Penalty on the Assets of the Recipient of the Penalty Assessment as soon as it Becomes a Final Agency Action.**

1. This means that if no petition is filed within 60 days after the notice of assessment, then the DOL will, without the need to apply to the court, levy directly on the assets of the recipient. This is similar to the power of the IRS to levy to collect delinquent taxes.
2. Applicant may seek to enjoin the DOL from levying on its assets under the Administrative Procedures Act, 5 U.S.C. § 704. However, the grounds for such action are extremely limited and the burden is on the applicant.

**III. VFC - HOW DOES IT WORK?**

A. **History of VFC.** Initially established in March 2000 following the Department Pension Payback Program. Effective April 29, 2002, EBSA made modifications to the interim Voluntary Fiduciary Correction Program (“VFC”). Prohibited Transaction 2002-51 was adopted to allow waiver of IRS excise tax for certain correctable prohibited transactions

1. The program permits plan sponsors, fiduciaries and parties in interest to voluntarily correct specific violations of the Employee Retirement Income Security Act of 1974 (“ERISA”), as amended.
2. EBSA will issue a no action letter with respect to the violation(s) corrected under VFC.
3. Excise tax under IRC section 4975 may be waived for certain prohibited transactions corrected under VFC if conditions are met.

**B. Revised and Simplified April 2005**

1. Reduced documentation requirements (VFC made documentation of the VFC less onerous)
2. Added correctable transactions (Some new failures were added to VFC as well as several new corrections).

- a. Illiquid Assets
    - b. Participant Loans (employees only)
  - 3. Eliminated requirement for actual rates of return
    - c. Added on-line calculator
  - 4. Created a Model Application Form
    - d. Penalty of Perjury Statement
    - e. Authorization of Representative
- C. **VFC 2006.** On April 19, 2006, EBSA adopted a final version of interim modifications proposed about a year earlier. *The amended exemption, PTE 2002-51, continues to provide excise tax relief for the four original transactions, and also provides relief for two additional transactions.* Simply put, these new changes are as follows:
- 1. Excise tax relief is now available for prohibited transaction violations involving the purchase of an asset by a plan when the asset has been determined to be illiquid, and/or the subsequent sale of the illiquid asset by the plan;
  - 2. Use of plan assets to pay expenses to a service provider for services that are characterized as “settlor expenses,” provided such payments were not expressly prohibited in the plan documents.
  - 3. Now requires participant loan failures that also exceed IRC section 72(p), be first corrected under EPCRS.
  - 4. Reduces documentation for DOL No Action letter.
  - 5. Some corrections under VFC are coordinated with IRS VCP program when such failures are simultaneously violations of the terms of the plan document and constituted prohibited transactions.
  - 6. As part of VFC, the Prohibited Transaction Exemption (“PTE”) 2002-51 was amended to allow the elimination of the notice requirement for certain minor failures to timely deposit elective deferrals if the amount of the excise tax is less than or equal to \$100 and certain requirements were met.

#### IV. BASIC RULES OF VFC

##### A. Eligibility for VFC.

- 1. Neither the applicant nor the plan may be under investigation by EBSA and there must be no evidence of criminal violations.

**NOTE:** In addition, the applicant must sign a statement under penalty of perjury that no Federal agency has informed the applicant of any intention to investigate or examine the plan with respect to the transaction described in the application. Therefore, although not specifically stated as a condition of eligibility, no plan under an IRS examination with respect to the same issues is eligible for VFC.

2. Only those violations of ERISA listed in the program may be the subject of the application.
3. Correction of the violations is limited to the exact methodology set forth in the VFC program.
4. There is no correction fee to use VFC
5. No fees can be charged to the Plan (participants) unless the correction involves expenses that would have been charged to the Plan (e.g., valuation of closely held employer stock).
6. Generally, the participants in the plan need not be notified in writing of the breach and its correction. See exception below regarding waiver of the PT excise tax.
7. Plans may have to make supplemental distributions to former employees, beneficiaries or alternative payees.

**B. The Following ERISA Violations May Be Corrected Under VFC:**

1. *Delinquent participant contributions.* This includes the failure to deposit elective deferrals to a 401(k) plan or other type of employee contribution to a pension or welfare benefit plan (such as a cafeteria plan) (and insured welfare plan) (non insured welfare plan trust) and the failure to deposit the contributions on a timely basis, even if they are ultimately put into the plan. The failure to deposit the contributions at all, then the late deposit of participant contributions results in either a prohibited loan or discrete prohibited transaction under ERISA §406(a)(1).

**NOTE:** ERISA Regs. §2510.102(b) provides that employee contributions must be deposited into the trust as of the earliest date on which such contributions can reasonably be segregated from the employer's general assets, but in no event, later than the 15th business day of the month following the month in which it was withheld or received by the employer.

2. *Loans.* There are four types of loan transactions which are covered in this category:
  - a. *Prohibited transaction loans* from the plan to a party in interest. This includes both those loans initially made at fair market interest and loans that are not, initially made at fair market interest.

**NOTE:** VFC doesn't specify if the loan can be an undocumented oral loan. However, we have been advised by EBSA that only written loans qualified for the VFC program. Oral loans are deemed to be "extensions of credit," not loans.

- b. Loans (which are not prohibited transactions) made to other parties at below fair market interest; and loans made to other parties at below fair market interest as a result of a failure to perfect a security interest which constitute a breach of the prudent expert rule of ERISA §404(a)(1)(B).

**NOTE:** Under ERISA §404, a fiduciary must act with the care, skill, prudence and diligence under the circumstances when prevailing that a prudent man acting in like capacity and familiar with such matters, would use in the conduct of an enterprise of a like character and with like aims. Hence, the prudent expert rule.

3. *Purchases, Sales and Exchanges.* There are several types of transactions under this category:
  - a. Purchase of an asset from a party in interest (both at fair market value and at other than fair market value) (which is a prohibited transaction);
  - b. Sale of an asset to a party in interest (both at fair market value and at other than fair market value) (which is a prohibited transaction);
  - c. Sale and leaseback of property with the plan sponsor (a prohibited transaction);
  - d. Purchase by a plan from a non-party in interest at more than fair market value which constitutes a breach of the prudent expert rule of ERISA §404(a)(1)(B);
  - e. Sale of an asset to a non-party in interest at less than fair market value which constitutes a breach of the prudent expert rule of ERISA §404(a)(1)(B).
4. *Benefits.* This includes payment of benefits without properly valuing plan assets such that the participants received too small a distribution or too large a distribution in violation of ERISA §404(a)(1)(D).
5. *Plan Expenses.* This includes the payment by a plan of duplicative, excessive or unnecessary fees to a service provider and payment of compensation to a fiduciary who is already receiving compensation from the employer (which is a prohibited transaction).

**NOTE:** ERISA §408(b)(2) and the ERISA Regs. thereunder, provide the rules under which services may be purchased by a plan. Generally, this means the amount paid for the service must be reasonable and necessary.

### C. **Waiver of Excise Tax.**

1. IRS Class Exemption PTE 2002-51(as amended April 16, 2006) provides for the elimination of the prohibited transaction excise tax for certain prohibited transactions corrected under VFC. EBSA and the IRS in a coordinated effort have eliminated the excise tax, the interest otherwise payable on late filing of the Form 5330 and the late filing penalty otherwise applicable.
2. This waiver applies only to the following six specified prohibited transactions that are corrected voluntarily under VFC:
  - a. The failure to timely transmit participant elective contributions, or loan repayments to a plan.

- b. A loan to a party in interest made at fair market value.
  - c. The purchase or sale of an asset (including real property) between a plan and a party in interest, if the purchase or sale is at fair market value.
  - d. The sale and leaseback of real property by a plan to an employer when the transaction is at fair market value
  - e. Purchase of an asset (including real property) by a plan where the asset has later been determined to be illiquid as described under the Program in a transaction which was a prohibited transaction, and/or the subsequent sale of such asset to a party in interest.
  - f. Use of plan assets to pay expenses, including commissions or fees, to a service provider (e.g., attorney, accountant, recordkeeper, actuary, financial advisor, or insurance agent) for services provided in connection with the establishment, design or termination of the plan (settlor expenses), provided that the payment of the settlor expense was not expressly prohibited by a plan provision relating to the payment of expenses by the plan.
3. To be eligible for the waiver of the excise tax, the applicant must comply with special rules in addition to the ordinary VFC rules as follows:
- a. If the prohibited transaction involves the late deposit of elective deferrals, then the employer must have deposited them to the plan no later than 180 days after the date of the withholding.
  - b. If the prohibited transaction involves any of the other three eligible transactions, then the amount of the assets involved in such transaction, must not exceed 10% of the value of all assets in the plan and fair market value must be determined by an independent appraiser.
  - c. In addition, the transaction must be at least as favorable to the plan as if it was an arms length transaction and must not be part of a broader scheme to benefit the parties in interest.
  - d. Except as provided below, all of the transactions eligible for the waiver of the excise tax must also meet these additional requirements; (i) even though the VFC program generally has been modified to eliminate the notice to participant's requirement, in order to obtain relief from the excise tax on prohibited transactions notice to participants is still required and (ii) relief from the excise tax may only be used by the same employer once in every 3 year period.
4. If the excise tax otherwise payable on late deposits is \$100.00 or less, then no notice to participants is required as long as the amount of what would otherwise be the excise tax is paid to the Plan. A "draft" version of the

IRS Form 5330 that would otherwise be filed with the IRS is submitted with the VFC application to EBSA.

- D. **Correction Procedure Under VFC.** In each of the categories of breach correctable under the VFC program, the applicant must restore to the plan the “principal amount” plus the greater of
1. lost earnings from the loss date to the recovery date, or
  2. profits resulting from the use of the principal amount for the same period.

E. **Lost Earnings and/or Profits are Defined as Follows:**

1. Lost earnings equal the greater of the actual loss or the amount calculated using the IRS interest rate under IRC §6621(a)(2). However, for correction of late deposit of elective contributions to a 401(k) plan, lost earnings equals the actual earnings that each participant earned on his investments. If calculation of this amount is too difficult, then the highest rate of return among all of the offered investments must be used.
2. Profits are calculated based on actual profits earned by the applicant. If this cannot be determined because the amount in question is not ascertainable, then the IRS interest rate under IRC §6621(a)(2) must be used.

VFC Provides Examples of Specific Correction That Can Be Used. Each of them follows the same general theme of undoing the breach and restoring to the plan the greater of lost earnings or profits. Most require an independent appraiser, lender and/or fiduciary.

F. **VFC Provides the Following Procedures for Submission of an Application:**

1. The application must be filed with the regional office of the EBSA in which the applicant has its principal place of business.
2. The VFC must be in writing and provide a narrative which includes the following:
  - a. A list of all persons involved in the breach as well as the correction;
  - b. An explanation of what acts constituted the breach as well as how and when it occurred;
  - c. A detailed statement of how the breach was corrected, including specific calculations concerning the amount of the principal as well as lost earnings and restoration of profits;
  - d. EIN and address of plan sponsor and administrator;
  - e. Date that the most recent Form 5500 was filed;
  - f. A statement under penalty of perjury signed by the applicant that all aspects of the application are true, that no agency of the federal

government has informed the applicant of an intent to investigate or examine the plan with respect to the same issues that are the subject of the application and that there were no criminal investigations pending or prior criminal convictions involving employee plans or financial misconduct within the last 13 years.

**NOTE:** The DOL has provided a Model Application Form for use in filing the VFC Program application. As part of this seminar you will learn how to complete such a form in a sample case.

## **V. VFC – WHEN SHOULD YOUR CLIENTS USE IT?**

### **A. Late Deposit of Elective Deferrals:**

1. The addition of the model application form and the on line calculator, make it feasible to file the VFC application with very little cost or difficulty.
2. The fact that there is no filing fee and no need for an independent appraiser or fiduciary is a very strong incentive to use the program. In fact most the VFCs are used for this purpose.
3. The waiver of the excise tax on the late deposit is an added incentive and the ability to avoid the notice to participants for some smaller corrections is a bonus.

**B. Non-Assessment of the ERISA §502(l) Penalty.** Under VFC the ERISA §502(l) Penalty Will Not be Imposed as long as Correction is Completed in Accordance Therewith. This is helpful in some cases but as a practical matter only when a written agreement from the DOL as to correction is needed.

### **C. Use of VFC as Part of a Corporate Sale or Merger.**

1. Many times the due diligence process undergone as part of a merger or sale transaction, will uncover fiduciary breaches or illiquid assets with respect to one or more of the company's ERISA plans.
2. The merger or sale agreement may specify that correction must be to the satisfaction of the other party to the contract.
3. Thus, if the defect is eligible for correction, the merger agreement may mandate the use of VFC and/or the IRS correction programs such as VCP or VCO.

### **D. Voluntary Restoration Payments by Employer.**

1. VFC Application Facilitates Restoration Payments.

In IRS Private Letter Rulings (“PLR”) 9506030, 9506048, 9507030, 9513030, 9528034, 9601038, 9628031, 9727026, 9746039, 98070028, 9830022, and 9913047, the IRS has taken the position that, in order for a payment to be treated as a restoration payment, there must be a genuine controversy over whether the loss resulted from a fiduciary breach.

- a. There must be evidence of a claim of a fiduciary breach.
  - b. Actual litigation.
  - c. Claims or threats of lawsuits by participants.
  - d. Claim of breach by EBSA.
2. Under the VFC program, if a fiduciary has breached his fiduciary duty, and reports it to the EBSA, there will be a no action letter issued by the EBSA. While this does not prove there was a breach, it is good evidence that was a genuine controversy concerning the fiduciary breach.
  3. This is important because a restoration payment is not subject to IRC §404 deduction rules or the IRC §415 limits. Rather, it is deductible under IRC §162 as an ordinary and necessary business expense.

**NOTE:** In order to be deductible by the Employer, either the Employer must have committed the breach, or the Employer must have indemnified the trustee or other fiduciary who committed the breach.

4. If the fiduciary who has breached his duty to the plan is an individual who is a participant in the plan, another way to correct the violation is for the breaching fiduciary to assign all, or a part of the loss, to his or her account and/or to restore the other participant accounts by reducing his accrued benefit. The EBSA may choose to accept this method if done voluntarily. However, if the sponsor seeks official approval of this or any other correction on an ad hoc basis, will be subject to the 502(l) penalty. However, it is not part of VFC program.

**E. What Are the Disincentives to VFC?**

1. Additional administrative cost of following VFC procedures for certain of the corrections, including additional cost of attorney and independent fiduciaries and independent valuations.
2. Limited methods for correction of a prohibited loan. Under IRC §4975(f)(5), in appropriate cases, a prohibited loan can be corrected by the affected participant taking a distribution of the prohibited loan in lieu of repayment of the loan.
3. Limited number of types of prohibited transactions and fiduciary breaches under the program.

- a For example, if a plan has entered into a contact with a custodian of the plan assets involving an excessive surrender charge.
- b Another example is the fiduciary who realizes too late that he has failed to monitor the investments causing a loss to the plan.
- c Undocumented loans are not eligible for VFC.

**F. Alternative to VFC – Informal Program**

Each Regional Director has authority to informally permit voluntary correction.

**VI. VFC and late deposits--Fact or Fiction?**

- A. Plan sponsors have 15 days following the close of the month to deposit contributions and loan payments.
- B. Determining when is the earliest date on which such contributions can reasonably be segregated from the employer’s general assets is a mystery, anything the employer says it is or anything that EBSA says it is or none of the above.
- C. I can always use the DOL web-site calculator to determine lost earnings.
- D. If we show a late deposit on Schedule H or I, the plan will most likely be audited by the DOL and/or IRS.
- E. If the plan sponsor files Form 5330 and pays the excise tax, they don't have to file a VFC.
- F. If the plan sponsor files a VFC, there is no reason to file a Form 5330 or pay any excise tax.
- G. A VFC application is so complicated and time-consuming; none of my clients will be willing to pay us to prepare it.
- H. As long as the employer tells the TPA that they have not made any late deposits, the TPA can safely ignore any information that it may have to the contrary.
- I. I'm afraid that if I have a question about a plan and call the local DOL representative, it means that my client's plan will be investigated.

**VII. FAILURE TO FILE OR IMPROPER FILING OF THE FORM 5500**

**A. ERISA § 502(c)(2) Authorizes the DOL to Assess a Civil Penalty of \$1,000 Per Day for Improper or Non-filing.**

**NOTE:** In the case of incomplete filing, ERISA § 104(a)(4) permits correction within 45 days without penalty.

- 1. The Administrator (usually the employer) is liable for the penalty.

2. Procedure for imposition of the penalty.
3. In the case of improper filing, rather than non-filing, the first step is the 45-day notice to correct.
4. For non-filing (or if correction is not provided in 45 days), DOL then provides the administrator with a written notice to assess penalty.
  - a. Penalty amount.
  - b. Period of penalty.
  - c. Reasons for penalty.
5. Notice of intent becomes the final order of DOL unless administrator files a statement of reasonable cause within 30 days from date of service of notice.
6. If the statement of reasonable cause does not cause the DOL to waive the penalty, it will issue a notice of penalty which will become final if the administrator does not file an answer with the DOL.

**NOTE:** An answer is an appeal which is heard by an administrative law judge.

7. The ruling of the administrative law judge may be reviewed by the Secretary of DOL or his delegate. It is on the record and there is no opportunity for oral argument. The secretary decision constitutes final agency action.
8. The DOL civil penalty under ERISA § 502(c) is effective for all years which commenced on or after January 1, 1988.

**B. Limit on Maximum Penalty. In DOL News Release Issued March 23, 1992, EBSA Limited the Penalties Which Actually Will Be Assessed As Follows:**

1. Failure to file or improper filing - \$300 per day up to a maximum of \$30,000 per year.
2. Penalty is pyramided so that each year a particular Form 5500 is not filed, it is \$30,000 for the continued failure to file the previously due return.

**C. IRS Imposes its Own Penalty for Failure to File the Form 5500.**

1. The IRS is authorized to assess a penalty under IRC Section 6652(e).
2. The penalty for late filing is \$25 per day up to a maximum of \$15,000 for each return.

3. This penalty applies to all qualified plans and 125 plans, even if they aren't ERISA plans.
4. IRS Notice 2002-23 provides that if a late filed Form 5500 is submitted under the DFVC program, (covered below) then the IRS will waive its otherwise applicable penalty.
5. For plans that are filing Form 5500-EZ, and thus are not applicable for the DOL's DFVC program, it is still possible to obtain waiver of the IRS penalty by submitting a statement of reasonable cause.
6. Although, not mentioned in Notice 2002-23, it would be prudent to advise the DOL in the cover letter transmitting the original delinquent forms that they are delinquent and a simultaneous filing has been made under the DFVC program.

**NOTE:** All Forms 5500, whether or not delinquent must be filed with the DOL in Lawrence, Kansas, not the IRS. This is true even if the form is a Form 5500-EZ for a plan not covered by ERISA.

**D. What Happens if the DOL or the IRS Discover a Form 5500 is Delinquent?**

1. Generally, qualified retirement plans, such as 401(k), defined benefit and profit sharing plans (regardless of the number of participants), as well as most welfare plans with more than 100 employees (such as medical, dental and disability plans), are required to file an annual information tax return, known as a Form 5500.
2. If this Form 5500 isn't filed in a timely manner and the failure is discovered by the DOL or the IRS, then both agencies can assess penalties.
  - a. The IRS maximum penalty (as discussed above) is \$15,000 annual fee for each return that is not filed.
  - b. The DOL maximum penalty (as discussed above ) is \$30,000 per year for each year a return is not filed.
  - c. When either agency discovers the "delinquent filing" of the Form 5500, they are both entitled to assess penalties.
3. This means, for example, if a company with more than 100 employees has a health insurance plan for its employees that it established in 1998 and the company failed to file a Form 5500 and such oversight was discovered by the DOL in April of 2002, the potential penalty is \$180,000 (90K for 1998, 60K for 1999 and 30K for 2000).
4. Moreover, if, in addition, the Company didn't file the Form 5500 for the Company's 401(k) plan established in 1998, in addition to the DOL

penalty of \$180,000, the IRS could impose a penalty of \$15,000 per year or \$45,000.

## VIII. WHAT IS DFVC AND WHEN TO USE IT?

- A. **In order to encourage voluntary disclosure of unfiled Forms 5500, the DOL decided to reduce the late filing penalties if the plan sponsor voluntarily files the delinquent returns *before the government notifies them in writing of the delinquency.***
1. Accordingly, the DOL has adopted DFVC, and the IRS has issued Notice 2002-23. The amount of the penalty under DFVC depends on whether the plan is deemed to be a large plan or a small plan.
    - a. Generally, plans with more than 100 employees, as of the first day of the plan year, are considered large plans; all others are small plans.
    - b. If the plan was a large plan for any of the delinquent years, then it is treated as a large plan for all years under the DFVC program.
  2. Under DFVC, the penalty for failure to file a single year's Form 5500 both for large and small plans is \$10 per day.
    - a. The daily penalty is limited to \$750 for a small plan.
    - b. If the failure to file involves more than one year, the maximum penalty for all years is limited to \$1,500, regardless of the number of returns, which weren't timely filed.
    - c. The large plan filing fee is limited to \$2,000 for a single year's late return.
    - d. If the failure to file involves more than one year, the maximum penalty for all years is limited to \$4,000, regardless of the number of returns, which weren't timely filed.
  3. In addition, a nonqualified plan for a select group of management or highly compensated employees ("top hat plan") may also use DFVC.
    - a. Generally, top hat plans must file a Form 5500 unless they have timely filed a one-time notice and statement described in the DOL regulations.

- b. If the one-time notice wasn't file timely for one or more top hat plans of the sponsor, then upon discovery, each plan would be subject to the penalties for failure to file the Form 5500.
- c. However, under DFVC, the one-time notice can be filed late, along with the most recent year's Form 5500 (only lines 1a-1b, 2a-2c and 3a-3c need be completed) and a fee of \$750 for each top hat plan sponsor regardless of the number of top hat plans maintained by the sponsor.

**B. Who is Eligible for DFVC and What Procedures Must be Used?**

1. In order for the plan administrator to use DFVC, they must not have been notified in writing by EBSA of a failure to file a timely return under ERISA.
  - a. It is important to note that Form 5500-EZ, and other filings for plans not subject to ERISA, are not eligible for DFVC.
  - b. Accordingly, failure to file the Form 5500-EZ can only be corrected by an application to the IRS to waive its late filing penalty based on reasonable cause.
2. The procedure for filing under the new DFVC is significantly different than the 1995 DFVC. First, all unfiled returns must be completed using one of two methods.
  - a. One method is to prepare the delinquent return using the form that was in effect for each delinquent year. If this method is used, and if it was a small plan with delinquent years prior to 1999, the Form 5500-C must be used for such years even if a Form 5500-R would have been used had the form had been timely filed.
  - b. Alternatively, all delinquent years can be filed using the most recent Form 5500 and putting the appropriate date on each return.
3. Neither the check, nor the first page of the return should be labeled "DFVC" in red ink as was previously required.
4. Moreover, the DFVC application must include a copy of the entire Form 5500 with signature page but not the schedules.
5. Filing the DFVC application.
  - a. The original signed delinquent Forms 5500 must be sent separately, like any other filing, to the DOL in Lawrence, Kansas.

- b. The DFVC application, including the check made payable to the DOL and copies of the delinquent forms, must be sent to the Atlanta, Georgia.

**C. The Do's and Don'ts of DFVC filing.**

1. Reasonable cause statement may not be simultaneously filed.
2. Fees under DFVC may not be paid from plan assets.
3. All delinquent Forms 5500 must be prepared and signed before the DFVC application can be filed.
4. Don't submit 5500-R for delinquent forms.
5. Don't forget to include the check made payable to the DOL with the application to Atlanta, Georgia.
6. Don't submit delinquent Forms 5500-EZ under DFVC. Submit a statement of reasonable cause.

Don't forget the calculation of the DFVC filing amount, if less than the maximum, the fee is calculated based on the number of days late from the day the return should have been filed without any extensions until the date it is filed.

**CASE STUDY #1**  
**A FAILED QERP –VERY EXPENSIVE**

**FACTS:**

A qualified plan that happened to be ESOP acting through a corporation the stock of which was 100% owned by the plan purchased a warehouse and office building complex in 1996. It then proceeded to rent the property owned by the plan to a wholly owned subsidiary of the Company A that was sponsoring the ESOP.

The property was rented using a 15 year lease with no cost of living escalator. When the plan bought the building it paid the unrelated seller \$960,000. The plan purchased the building with a \$100,000 down payment and a promissory note from a bank for about \$860,000. The note was not guaranteed by the employer or its subsidiary.

In 1997, the Plan renovated the building at a cost of about \$110,000. The note required annual payment of principal and interest at 8.5% per annum and the rent payable under the lease by the subsidiary of Company A was equal to the amount of the annual note payments. No independent appraisal of the fair rental was ever calculated.

In 2004, EBSA opened an investigation of the plan. Company A and the trustee who was an employee of Company A decided to handle the investigation without involving a third party administrator or an ERISA attorney. I was told later the reason for this approach was that they “knew it had done nothing wrong”. When EBSA sent the plan a voluntary compliance letter outlining its view of the breaches of ERISA which had occurred, the trustee and Company A were shocked.

The reason for the ESOP to purchase the real property was a desire by the plan fiduciaries to increase the investment returns for the ESOP. In short, the ESOP stock was increasing each year at a reasonable rate but the other investments in the ESOP were not making as much as the fiduciaries thought they were able to make using a lease of real property to the Company. The plan was a mature ESOP that owned as much stock as the non-ESOP owners wished to sell. The plan had been around for many years and had built up a substantial portion of its assets in investments other than employee stock. In order to get a better return on the plan’s other investments, the fiduciaries decided to invest about 10% of its assets in a corporation established to purchase and hold real property which could be leased back at a good rate of return.

The company’s tax advisors believed that this transaction met the statutory exception for prohibited transactions for qualified employer real property (“QERP”) found in ERISA. Accordingly, the plan fiduciary caused the transaction to occur.

About 2/3 of the way through the lease term, the DOL opened its investigation of the plan.

EBSA's position in the investigation can be summarized as follows:

- a. The lease wasn't issued pursuant to the QERP exception.
- b. The subsidiary of the employer failed to pay fair rental for the rent of the property.
- c. The lease constituted a breach of fiduciary duty and a prohibited transaction that must be corrected immediately.

ISSUES TO BE DISCUSSED:

1. What are the rules for a party in interest transaction to constitute a QERP?
2. Does it matter that the real property was owned not directly by the ESOP but by the corporation?
3. If this is a prohibited transaction and breach of ERISA fiduciary duty, what correction is required?
4. What are the alternative corrections?
5. In addition to correcting the Prohibited Transaction, what other steps must the sponsor take to satisfy EBSA?
6. How is the excise tax calculated?

**CASE STUDY #2**  
**Section 404 violations and the 502(l) Penalty**

**FACTS:**

Company X, a small privately owned manufacturing company in Los Angeles, had a profit sharing plan to which the employer had for many years contributed on the average 10% of employee compensation. The founder and sole owner of the company made the investment decisions for the assets in the Plan. He had become disenchanted with investments in the stock market and decided to invest a substantial portion, about 40% of the plan's assets in real estate in the form of limited partnership interests. He used an acquaintance who belonged to the same golf club and who was a registered investment advisor to help him select the investments.

During the years the Plan had these investments, they were not properly valued and were generally carried at either book value or the value assigned on the K-1 by the general partners. The partnership assets had been purchased more than 10 years prior to the date of that EBSA decided to investigate the Plan. The trustee and owner of Company X had fiduciary liability insurance in effect both at the time of the purchase and throughout the years the plan held the investments.

EBSA obtained the investment documents from the plan sponsor who handled the investigation without the help of either a TPA or ERISA Counsel. During the investigation, EBSA interviewed the investment advisor who had recommended the sale of the limited partnership investments and who had received a commission on the sale. EBSA requested an interview with the owner and trustee of the Plan. However, he refused to discuss the matter.

EBSA sent a VC Notice Letter that recited its findings and requested self correction.

a. The purchase of about 1 million in limited partnership interested in real property was a violation of the diversification rules, the prudence rules and had caused damage to the Plan of about 1 million dollars.

b. No action was initiated against the investment advisor.

**ISSUES TO BE DISCUSSED:**

1. Were all or any part of the alleged breaches of fiduciary duty barred by the statute of limitations?

2. Did the owner employee follow procedural prudence in purchasing the assets?

Did the owner act prudently in his monitoring of the assets?

When did the loss occur?

What are the consequences of failure to value the assets annually?

3. Did the fact that the assets were purchased on the recommendation an investment advisor limit or eliminate the fiduciary duties of the owner employee?

4. If the owner employee was potentially liable for all or a portion of the 1 million dollar loss, is it possible to avoid the assessment of the 20% penalty under 502(1)?

**CASE STUDY #3**  
**FAILURE TO DEPOSIT ELECTIVE DEFERRALS**

**FACTS:**

Company A had a multi-state restaurant franchise operation company. All divisions had a bi-monthly payroll and the plan provided for elective deferrals and repayment of participant loans by payroll deduction. Many of the divisions had their own payroll systems.

Most of the divisions routinely deposited elective deferrals and loan repayments within 5 days after the last payroll each month. However, to avoid administrative cost, the mid-month payroll elective deferrals and loan repayments were held until the end of the month and then deposited.

Some of the divisions didn't follow the same system and had deposits of elective deferrals and loan repayments that were sometimes deposited as soon as 3 days after payroll and some as much as three or four months.

At the time of the investigation, there were still some outstanding un-deposited 401(k) deferrals equal to many thousand dollars for two of the divisions.

EBSA investigated the Plan based on a complaint by a plan participant to the Department. The Company's third party administrator convinced Company A to hire our firm to help with the investigation.

The EBSA investigator and a representative of Company A had a meeting to provide the requested information and to interview the VP of human resources. Prior to the meeting,

After providing the requested documents and concluding the interview, EBSA sent the plan fiduciaries a Voluntary Compliance "VC" Notice Letter.

The letter took the following position with respect to the delinquent deposits of elective deferrals and participant loan repayments:

1. All withheld amounts that had not yet been deposited must be deposited forthwith including earnings thereon.
2. The Company owed interest on all amounts that had been deposited later than 5 days after the payroll date from the date they should have been deposited until the date they were deposited.
3. The unpaid interest that was not yet repaid must itself bear interest from the date of its origin until the date it is paid to the plan.

The VC Notice Letter followed the standard format set forth in the EBSA Enforcement Manual

and stated the following:

The Company had committed a discrete prohibited transaction by taking plan assets with respect to the amounts not yet repaid and that they had committed prohibited loans with respect to the late deposited amounts.

*The plan trustees had violated their fiduciary duties by permitting the prohibited transaction and thus were liable to repay the Plan all loss caused by their breach of fiduciary duty.*

*If the Company made correction, the EBSA would not bring a lawsuit.*

*The EBSA will impose the ERISA § 502(l) penalty unless it is waived.*

#### ISSUES TO BE DISCUSSED:

What options are available to the fiduciary in replying to the VC Notice Letter?

What are the options in making correction?

How should correction be handled?

What should be done to correct possible future failures?

Are both loan repayments and late elective deferrals treated the same for purposes of correction?

How do the new proposed Regulations concerning late deposit safe-harbor affect the Plan?

What if the late deposits had been self corrected under the VCP program?

## CASE STUDY #4

### NEGOTIATING A LESSER PENALTY FOR LATE FILING OF FORM 5500

#### FACTS:

Corporation C (“C”) inadvertently failed to file its Forms 5500 for the plan years ending December 31, 1998, 1999 and 2000. The third party administrator (“S”) had prepared the Forms 5500 for the prior 4 years and had filed them with the IRS.

Under the agreement between S and the C, S agreed to prepare and file the Form 5500 for the Plan. During each year from 1990 through 1997, the Form 5500 was filed in a timely manner. Based on their agreement with S, C believed that S would continue to act as third party administrator and continue to prepare and file the Form 5500. However, unbeknownst to the C, the 1998 Form 5500 was never prepared.

Under normal circumstances, this oversight would have been noted by the Corporation. However, during the 1997-98 years, financial disaster struck the Corporation. It lost almost a 1/4 of its gross revenue and half of its employees. As a result, the size of the assets was significantly reduced. In light of the corporate changes and the critical issues facing the corporation and its employees, administration of the 401(k) plan became a secondary function.

The person responsible for the oversight of the Plan’s operation at the Corporation didn’t pay attention to the fact that the third party administrator had not prepared or filed the Form 5500. In short, it slipped under the radar screen. A new administration firm succeeded to S. Its name was ISC. Again, unknown to the C, the successor third party administrator didn’t prepare the Form 5500 for 1999 or 2000, or notify the C that they must hire someone else to take over that responsibility.

In 2002, the DOL notified C that they had discovered the failure to file the Forms 5500 and imposed a penalty of \$190,000.

C hired our firm to do what ever was possible to reduce or minimize the penalty.

#### ISSUES TO BE DISCUSSED:

What should C do at this point?

What re the procedural steps needed and what is the timing for such steps?

Can the penalty be avoided? Reduced?

What are the consequences if improper action or no action is taken?

## CASE STUDY #5

### USING VFC TO CORRECT LATE DEPOSITS

EBSA has been sending pension and profit sharing plan sponsors “friendly invitations” to use the VFC program, where the Plan’s Form 5500 reports Plan’s sponsor failed to remit participant contributions to the plan within the time period described in 29 CFR 2510.3-102. Although unstated in the invitation, the implication is that if the sponsor fails to accept the invitation, then EBSA will open an investigation. When faced with such a letter, ERISA attorneys have generally advised their clients that they have several choices: file a VFCP application, self correct the violation using the original VFCP methodology (actual rate of return) show the DOL how the transaction was corrected or ignore the EBSA letter.

It seems obvious that in most cases it is not the most prudent course of action to ignore the invitation. However, it is far from clear whether it is more advantageous to self correct or to use the VFC program. The advantage of self correction is that it will, if properly done, avoid the ERISA 502(l) penalty and be simpler, quicker and less expensive than using the VFC program. Moreover, it avoids the necessity of providing a detailed notice to the employees of the violation of ERISA.

Alternatively, using VFC has several advantages. First, the DOL will not challenge your correction if you properly followed the VFC Program, eliminating any investigation of this issue and any 502(l) penalty. Second the excise tax, as well as the interest and penalty for late filing the Form 5330 are avoided as well as the possibility of an Audit of the IRS Form 5330. Finally, the new streamlined VFC is easier to use and covers more transactions than were formerly covered.

The most common use of VFC program is for delinquent deposits. If an elective contribution to a 401(k) plan isn’t deposited in the trust as soon as it can reasonably be segregated from the general assets of the employer after withholding, but in no event more than 15 business days after the end of the month in which the amount was withheld, it is a prohibited transaction, *i.e.*, a loan from the plan to the plan sponsor.

The following example is typical of many of our clients. In this case, the plan sponsor had a 401(k) plan with less than 100 participants. The plan sponsor received a friendly letter in 2006 and decided to hire counsel to help them respond.

The plan was established in 2001 and initially had not arranged to have the amounts withheld for elective deferral or repayment of participant loans electronically deposited to the 401(k) plan. Instead, the amounts were withheld and then the employer would write a check to the 401(k) plan. Sometimes this was done within a few days and sometimes it took as much as 60 days. Generally, the amounts withheld were reasonable small. In 2006, the employer had gone to a system of automatic deposit to the plan directly from payroll withholding and the number of days from withholding to deposit was reduced to three or less. Under the DOL new amendment to the Plan Asset Regulations plans with 100 or fewer employees may use the safe harbor of 7 business

days after each payroll period for making deposits. For larger plans there is no safe harbor. In those cases the employer must review the historical time from withholding to deposit and consider if the method during 2001 through 2005, we estimated that if EBSA were to investigate the plan, they would most likely determine that the feasible deposit time was seven days. There is no magic formula for making this determination. It is our experience that if EBSA were to investigate, they would review all of the elapsed time periods from payroll date to deposit date and determine the shortest period that wasn't an isolated occurrence.

Having determined the length of the permitted period to deposit the amount withheld into the trust, the next step was to use the EBSA online calculator. This is located on the internet. Simply type into Google the phrase, "EBSA online calculator." This calculator requires that you do each payroll separately. You must then print out each one and move to the next payroll. Before you do this, you must know the date that the unpaid interest will be deposited.

An initial estimate of the amount of the lost earnings based on the EBSA calculator was under \$600. This type of a small number is not unusual if the number of days the deposits were late is small. Don't forget, the Department seeks compounded interest, which is first charged only on the days late then compounded to the date of correction. Based on this, it was clear that the amount of the excise tax would be less than \$100. PTE 2002-51 was amended in 2006 to allow excise taxes of \$100 or less to be paid to a Plan, as long as the general requirements of PTE 2002-51 are met (180 day rule, prior applications). If the VFCP was used, the excise tax would not have to be paid to the IRS as long as it was deposited to the plan in addition to the lost earnings. Moreover, by paying the excise tax to the Plan the applicant need not notify employees of the violation. The client decided that it wanted to use the VFC program to make the correction so that the amount of the excise tax could be paid to the Plan and no notification would be required. Moreover, the client wanted the assurance of having a no action letter from the DOL.

An interesting twist to the correction in this case was that the plan document had mandated that the elective deferrals be made to the plan within the time required by the EBSA rules. As a result, the later deposit wasn't only a prohibited transaction but also subjected the plan to disqualification for failure to follow its terms in operation. Unfortunately, neither EPCRS or VFC provide for coordination of the correction, so that use of VFC would automatically correct the operational failure of the plan. Nevertheless, under EPCRS this appears to be an insignificant failure and therefore subject to self correction. The VFC correction should suffice as meeting the requirements for such self correction. One would hope that in the future, VFC correction would be specifically listed in EPCRS as constituting correction of the operational failure regarding late deposit.