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Comments on the Department of Labor's Revisions to the Voluntary Fiduciary Compliance Program

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Department of Labor
Employee Benefits Security Administration

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The American Society of Pension Professionals & Actuaries (ASPPA) appreciates this opportunity to comment on the Department of Labor's (DOL) revised Voluntary Fiduciary Correction Program (VFC Program). These revisions were published in the Federal Register on April 6, 2005 (70 FR 17516, et seq.).

ASPPA is a national society of retirement plan professionals. ASPPA's mission is to educate pension professionals and to preserve and enhance the private pension system. Its membership consists of approximately 5,500 actuaries, plan administrators, attorneys, CPAs, and other retirement plan experts who design, implement and maintain qualified retirement plans, especially for small to mid-size employers.

ASPPA's members have considerable experience dealing with fiduciary issues and assisting employer clients in their attempt to rectify fiduciary violations. ASPPA applauds the DOL's efforts to simplify and expand the VFC Program. In particular, ASPPA welcomes the addition of the following three new "Eligible Transactions":

1. Illiquid plan assets sold to interested parties
2. Participant loans that violate certain plan loan restrictions
3. Delinquent participant loan repayments

In addition, ASPPA welcomes the streamlined approach to the VFC Program application process and the calculation of "lost earnings" through the (i) inclusion of an "Online Calculator" and (ii) the elimination of the requirement to take a plan's rate of return into account.

Summary of Recommendations

The following is a summary of ASPPA's recommendations. These are described in greater detail in the Discussion of Issues section.

- A. The DOL should clarify that the corrective actions under the VFC Program may also be used to correct similar transactions that are found as a result of an Employee Benefits Security Administration (EBSA) investigation.
- B. There should be coordination with the Treasury and IRS with regard to loan transactions that are covered by the VFC program, such as (1) the calculation of corrective amounts and (2) the tax consequences to participants.
- C. The VFC Program should be clarified to provide that Eligible Transactions with respect to participant loans include situations where the amount or duration of the loan exceeds plan limits but where such plan limits are more restrictive than the limits of Internal Revenue Code (IRC) §72(p).
- D. The eligible transactions under the VFC Program should be expanded to include situations where there is a failure to comply with loan repayment requirements due to the failure of an employer to set up necessary payroll withholding procedures.
- E. The DOL should provide further clarification of the term “Under Investigation.” Specifically, a plan should not be considered “Under Investigation” where there is an investigation that only has an indirect impact on a plan (*e.g.*, an employment tax audit resulting in misclassified employees or a DOL investigation relating to prevailing wage laws).
- F. When a plan official uses the Online Calculator to determine lost earnings, details regarding the calculation of such earnings should be limited to the data that was input into the Online Calculator.
- G. The DOL should permit the use of the updated VFC Program with respect to any pending VFC applications.
- H. The DOL should consider expanding the eligible transactions to include some transactions that violate ERISA §§404(a)(1) and 406(b) [*e.g.*, improper payment of plan expenses and holding real estate that violates ERISA §404(a)(1)(C)].

Discussion of Issues

A. Coordination of Corrections under VFC Program and EBSA Investigations

Typically, when a plan is undergoing an EBSA examination, EBSA will expect VFC Program correction methodology to be used in correcting violations found as a result of the investigation. The DOL should clarify whether the EBSA Regional Offices will now accept the revised VFC Program correction methodology for correction under an examination.

ASPPA recommends that the DOL clarify that the corrective actions under the VFC Program may also be used to correct similar transactions that are found as a result of an Employee Benefits Security Administration (EBSA) investigation.

B. Coordination of Corrections under VFC Program with Treasury and IRS

In many cases, violation of plan loan limitations will result in income tax consequences to participants pursuant to IRC §72(p). However, the VFC Program will not be utilized to its full potential if there is no confirmation that all applicable government agencies will accept correction under VFC Program as a final and complete closure of the issue at hand. This is particularly true with respect to the tax consequences and calculation of corrective amounts when there has been a loan transaction that violates both the prohibited transaction rules as well as IRC §72(p). In order to fully realize the potential benefits of the VFC Program, it must be clear to plan sponsors and other fiduciaries that all applicable government agencies will accept the correction methodology.

ASPPA recommends that the EBSA coordinate with the Treasury and IRS with regard to loan transactions that are covered by the VFC program, such as (1) the calculation of corrective amounts and (2) the tax consequences to participants.

C. Clarification of Loan Amount or Duration Exceeding Plan Limits

Sections 7.C.1 and 7.C.2. of the updated VFC Program apply to transactions where a participant loan exceeds the amount or duration limits permitted under “applicable plan provisions incorporating the requirements of section 72(p) of the Code.” In many situations, plans impose limits on the amount or duration of loans that are more stringent than those permitted under IRC §72(p). However, it is not clear whether loans exceeding these more stringent requirements are Eligible Transactions under the updated VFC Program.

ASPPA recommends that the VFC Program be clarified to include as Eligible Transactions participant loans that violate plan imposed limits on the amount or duration of loans, regardless of whether such limits are more restrictive than those permitted under IRC §72(p).

D. Loan Violations Due to Inadequate Payroll Processes

In some cases there is a failure to repay a participant loan as a result of an employer's failure to implement adequate payroll withholding procedures. The updated VFC Program does not include such a situation as an Eligible Transaction.

ASPPA recommends the list of Eligible Transactions be expanded to include situations where there is a failure to comply with loan repayment requirements due to the failure of an employer to set up necessary payroll withholding procedures. ASPPA further recommends that if such an Eligible Transaction occurs and a participant pays the amount that would have been withheld had the payroll deductions been made, then the loan will not be considered to have violated the plan's loan terms (including default provisions). In addition, ASPPA proposes that there be a short period (e.g., 180 calendar days or the last day of the calendar quarter in which the loan was originated) where the balance on the loan could simply be re-amortized over the remaining portion of the original term without any back payments made by the participant.

E. Clarification of “Under Investigation”

In order to be eligible to use the VFC Program, neither the plan nor the applicant may be

“Under Investigation.” A plan will be considered “Under Investigation” if the investigation or examination at issue is in connection with an “act or transaction involving the plan.” Under the updated VFC Program, the definition of the term was modified to include investigations or examinations by any Federal agency (*i.e.*, not just the DOL). ASPPA agrees with the underlying need to expand the definition of the term. However, further clarification is needed as to what constitutes “an act or transaction” for this purpose. For example, it is not clear whether a plan would be considered “Under Investigation” where the sponsor is the subject of an IRS employment tax audit resulting in a determination that the employment status of certain individuals was misclassified, thereby affecting their eligibility under a plan. It is also not clear whether a plan would be considered “Under Investigation” when there is a Federal agency investigation (or notice of an investigation) of a contract covered by the Davis-Bacon Act when the prevailing fringe benefit is partly being satisfied through plan contributions.

ASPPA recommends that the DOL provide further clarification on what constitutes “Under Investigation” for purposes of the VFC Program. Specifically, a plan should not be considered “Under Investigation” where there is an investigation that only has an indirect impact on a plan (*e.g.*, an employment tax audit resulting in misclassified employees or a DOL investigation relating to prevailing wage laws).

F. Clarification of Information Required With Use of Online Calculator

The addition of the Online Calculator is a significant enhancement that should result in increased efficiencies to all parties using the VFC Program. However, Section 6(d)(vi) requires that the application include “specific calculations” with respect to the computation of earnings. If the details of the calculation itself must be included in the application, then there would be benefit to using the Online Calculator.

ASPPA recommends that when a plan official uses the Online Calculator to determine lost earnings, details regarding the calculation of such earnings should be limited to the data that was input into the Online Calculator. A certification that the Online Calculator was utilized should then be sufficient with respect to demonstrating how the actual earnings were calculated.

G. Use of Updated VFC Program for Pending Applications

The updated VFC Program was effective as of the publication date (April 6, 2005). However, it is not clear whether the updated VFC Program will apply to applications that were pending with the DOL as of April 6, 2005.

ASPPA recommends that the DOL permit the use of the updated VFC Program with respect to any applications that were pending as of April 6, 2005.

H. Expansion of Eligible Transactions to Other ERISA Violations

ASPPA welcomes the expansion of the list of Eligible Transactions under the updated VFC Program. However, a further expansion of Eligible Transactions would make the program even more attractive to plan sponsors and fiduciaries. Since the inception of the VFC Program in early 2000, only relatively straightforward prohibited transactions described in

the regulations have been eligible for correction. Instead of the narrowly described eligible transactions, EBSA should consider categories of transactions that may violate specific sections of ERISA or applicable provisions of the Code, particularly ERISA §404(a)(1) and possibly ERISA §406(b). For example, categories of Eligible Transactions could include: (1) a plan holding real estate that violates or may violate ERISA §404(a)(1)(C); (2) the payment of expenses with plan assets, that violates ERISA §§404(a)(1) (A), (B), and/or (D); and (3) a plan acquiring or holding a plan asset that is contrary to plan documents or in breach of ERISA §404(a)(1)(D).

ASPPA recommends that the DOL expand the list of Eligible Transactions to include some of the more common transactions that violate ERISA §§404(a)(1) and 406(b) [*e.g.*, improper payment of plan expenses and holding real estate that violates ERISA §404(a)(1)(C)].

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These comments were prepared by ASPPA's DOL subcommittee of the Government Affairs Committee, Todd J. Berghuis, Esq., APM, Chair, and primarily authored by Robin S. Lazarow, Esq., APM and Todd J. Berghuis, Esq., APM. Please contact us if you have any comments or questions regarding the matters discussed above. Thank you for your consideration of these comments.

Sincerely,

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